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MENTAL DISORDER AND THE CRIMINAL LAW

MENTAL DISORDER AND THE CRIMINAL LAW

A STUDY IN

MEDICO-SOCIOLOGICAL JURISPRUDENCE

WITH AN APPENDIX OF STATE LEGISLATION AND INTERPRETIVE DECISIONS

BY

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TO

E. T. G. AND A. J. G.

AND

IN FOND MEMORY OF

MY PARENTS

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"While the lawyer as a rule still believes that the principles of law are absolute, eternal, and of universal validity, and that law is found, not made, the people believe no less firmly that it may be made and that they have the power to make it. While to the lawyer the state enforces law because it is law, to the people law is law because the state, reflecting their desires, has so willed. While to the lawyer law is above and beyond all will, to the people it is but the formulation of the general will. Hence it often happens that when the lawyer thinks he is enforcing the law, the people think he is overturning the law. . . . This conflict between the lawyer's theory and the political theory weakens the force of law. The lawyer's theory leads him to pay scant attention to legislation or to mold it and warp it to the exigencies of what he regards as the real law. . . . On the other hand, the people's theory that law is wholly a conscious product of the human will tends to produce arbitrary and ill-considered legislation impossible of satisfactory application to actual controversies. Each of these absolute theories must be given up. . . .

The chiefest of social interests is the moral and social life of the individual; and thus individual interests become largely identical with a social interest . . . Although we think socially, we must still think of individual interests, and of that greatest of all claims which a human being may make, the claim to assert his individuality, to exercise freely the will and the reason which God has given him. We must emphasize the social interest in the moral and social life of the individual. But we must remember that it is the life of a free-willing being." — Pound, "The Spirit of the Common Law", pp. 99–100, and 110–111.

"It seems to us that undue stress is placed in some of the cases upon the fact that. in prosecutions for murder the defence of insanity is frequently resorted to and is sustained by the evidence of ingenious experts whose theories are difficult to be met and overcome. Thus, it is said, crimes of the most atrocious character often go unpunished, and the public safety is thereby endangered. But the possibility of such results must always attend any system devised to ascertain and punish crime, and ought not to induce the courts to depart from principles fundamental in criminal law, and the recognition and enforcement of which are demanded by every consideration of humanity and justice. No man should be deprived of his life under the forms of law unless the jurors who try him are able, upon their consciences, to say that the evidence before them, by whomsoever adduced, is sufficient to show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged." — Mr. Justice Harlan, in Davis *v.* U. S., 160 U. S., 469, 492 (1895).

PREFACE

THE problem of the criminal insane is but a sub-division of the larger question of crime and criminals, and of the actual value of the legal means employed by organized society to cope with these social phenomena. Criminality is to-day a branch of social pathology which presses for intelligent consideration. In a recent report of the Law Enforcement Committee of the American Bar Association,[1] Chief Justice Taft made the statement that "the administration of criminal law in the United States is a disgrace to civilization." The report summarized existing conditions in these terms:

While the general population of the United States for the years 1910 until 1922 increased 14.9 per cent., the criminal population increased 16.6 per cent.

The criminal situation in the United States so far as crimes of violence are concerned is worse than in any other civilized country.

There were seventeen murders in London last year and not one of these crimes was unsolved.

During the same period New York had two hundred sixty murders and obtained three convictions.

It is estimated 7850 murders were committed in the United States last year. During 1921 there were one hundred thirty-seven murders [2] in Chicago. In the same year, throughout all England and Wales, there were sixty-three murders.

Leading newspapers and periodicals have of late been "featuring" articles on the prevalence of crime, on the causes of so-called "crime-waves", and on the means suggested by public officials and "reformers" for coping with the problems involved. Thus the *New York Times* devoted a column to an article by a prominent statistician who calculated that 1910 murders were committed

[1] *Journal of the American Bar Ass'n*, October, 1923.

[2] In 1922, there were 331 reported homicides in Chicago, 337 in New York, and 2315 in the entire population. — Dr. F. L. Hoffman, "Annual Record of Homicide and Suicide", *Spectator*, New York.

in twenty-eight American cities in 1921. The article quoted this authority in the following language:

> The murder record of 1921 is the most appalling in the history of the twenty-eight cities for which the data at the present time are available. The record makes a glaring contrast to the predictions of those who, in pre-prohibition times, assured the country of the salutary effects of the suppression of the liquor traffic upon the rate of homicidal frequency. Likewise, the infliction of the death penalty seems at best to have but a slight effect as a deterrent to the homicidal mania, which remains as the greatest blot upon the civilization of the United States.
>
> The reckless killing of human beings goes on at a pace in excess of our population increase, while at the same time there are abundant reasons for believing that the punishment for capital crimes, or of those guilty of all offenses against the person, is now more lax than at any time in our history.[1]

Numerous schemes for coping with the problem have been proposed from various quarters. Among the methods for improving the administration of the criminal law which were suggested by the Bar Association is "the awakening of the public to a clear sense of their responsibility for it. Improvement in our laws can accomplish little unless accompanied by a determination on the part of our citizens to have those laws enforced." The Bar Association also recommended the appointment of a commission of the Association "to formulate a standard code of criminal procedure for the States of the Union", the committee not to include "mere theorists and faddists."

Other critics place the blame largely upon the technicalities of the law, whereby "even the criminal caught red-handed" must, under the "presumption of innocence", be allowed in many cases to be released on bail. "His cash security — the proceeds it may be of his last theft — secures the bond. Out on bail, except for special surveillance by the police, he can ply his knavery as freely as before indictment. They utilize the technicalities of the law inherited from by-gone days, and, fruitful in plausible excuses for adjournments, they put off the trial." After a long time, when the case "has grown stale", and most witnesses have disappeared or died, "the defendant faces the jury not with the

[1] *New York Times*, Thursday, Dec. 7, 1922. Similar statistics have appeared for prior and subsequent years.

serenity of innocence, but with the affrontery of criminality. . . . He leaves the court unpunished to gloat with pals over thwarted justice, while every such happening lessens respect for law and undermines society." [1]

The author of these words, a judge of long experience in criminal work, believes that the element in criminal procedure he has criticized is "one that can and should be lessened . . . it is one that cannot be cured." He points out that "uniformity of decision and adherence to precedent" (that is, of course, *absence of individualization* in the treatment of the criminal) "is furthered by a judiciary limited in number"; and recommends the drafting of experienced lawyers, to serve as judges for a short period each year, as part of their duty as citizens.

Many more criticisms of the existing criminal law and procedure, and evidences of the acute status of the problem of crime have been adduced in recent times. Municipalities, suffering under the burden and dread of criminal activity, have resorted to all sorts of measures for relief. Thus, in Chicago, a Crime Commission of prominent citizens was organized in 1920, and has been doing important work in all fields that comprise the problem of crime. Much valuable information as to the causes and incidence of crime, the operation of the police department, prosecutors' offices, and courts has been gathered by this commission, which has enlisted the membership and coöperation of leaders in many fields of civic life, including criminologists and penologists.[2]

In Cleveland, the results of the monumental survey of criminal justice, conducted by Dean Pound and Professor Frankfurter of Harvard Law School, and a staff of nationally-known experts in the various fields of criminology and penology, have been published and widely read and discussed. Much immediate improvement, especially in the machinery of criminal law administration, has been made; and the Cleveland civic spirit, already expressed so notably in its many excellent municipal surveys, received a further stimulus in the proper direction. In New York "leaves of absence" of police officers are from time to time, according to the ebb and flow of the "crime wave", entirely eliminated, in an effort to cope with series of daring hold-ups and assaults; and in Philadelphia conditions were so serious that the municipal

[1] *New York Times*, Oct. 7, 1923, p. 5.
[2] *See* the Annual Reports of the Chicago Crime Commission.

authorities appealed to the Federal Government to lend the services of a prominent Army officer as chief of police. These evidences of the acute status of the problem of crime indicate that the subject is very much alive to-day, and that many minds have recently been occupied with it.

Now, one has only to examine the official reports of appealed cases in States like New York, Illinois, and California to realize that a large volume of the criminal cases appealed to the higher courts after a verdict of "guilty", deal with the question of mental unsoundness and its relation to criminal responsibility. But the cases appealed after trial and conviction do not constitute all the instances where the problem of mental disorder in its relation to criminal conduct is involved. Many persons accused of crime are *never tried*, a number of States having provisions for their commitment to appropriate institutions, if such accused persons are found to be suffering from mental disease or defect before or during the trial.

Nor have we included all mentally unsound offenders when we have considered those accused persons found insane [1] during the trial and those proved to have been insane (and irresponsible) at the time of the *offense;* for, as recent authoritative surveys of prison populations have shown, large percentages of the prisoners in our penal and correctional institutions are classifiable in terms of pronounced deviation from the average, normal mental health of the community.[2] It will thus be seen that the mentally unsound constitute a much larger proportion of those accused or convicted of crime than is popularly supposed, and that much more criminal conduct than is commonly believed is due to some form of unsound mentality and all it implies. This is only one of the contemporary pieces of evidence of existing conditions that open up the question, whether a thoroughgoing, radical reëxamination of the entire problem of crime — its extent in this and

[1] *See* note 11, p. 9, for a discussion of the term "insanity", and associated concepts; see also Schema at end of Chapter 1.

[2] *See*, for example, "A Study of 608 Admissions to Sing Sing Prison", by Bernard Glueck, *Mental Hygiene*, Vol. II, No. 1, January, 1918. Out of six hundred eight consecutive admissions to Sing Sing Prison studied by psychiatric and psychological technique together with elaborate investigations by social investigators, it was found that 18.9 per cent. were constitutionally inferior or psychopathic to so pronounced a degree as to have rendered extremely difficult, if not impossible, adaptation to the ordinary requirements of life in modern society; and 12 per cent. were found to be suffering from distinct mental diseases or deterioration, in a considerable number of which

other countries, its causation, prevention, and therapy — and of the entire philosophy, structure, and function of our criminal law and procedure, is not a task that requires immediate, earnest, and persistent effort on the part of sociologists, psychiatrists, and legal scholars.

In Illinois and throughout America, the much-journalized and discussed Leopold-Loeb hearing is even now bearing fruit in the shape of numerous articles, on different angles of the problem of mental disorder and the criminal law, published in scientific periodicals and professional journals. In England, the notoriety given to the Ronald True Case resulted in important Parliamentary debates, and in the appointment of a distinguished committee to reconsider the English law of insanity. This committee has but recently made its report,[1] after consultation with expert committees appointed for the purpose by the Medico-Psychological Association of Great Britain and Ireland, the British Medical Association, and with eminent legal scholars. It is unfortunate, and indicative of a weakness in our entire process of social engineering, that it requires the notoriety of a McNaghten's Case, a Guiteau's Case, a Ronald True Case, a Leopold-Loeb Hearing in Mitigation, before the thinkers of the particular day and age involved are pricked into preoccupation with the great social problem of crime; and the same may be said of other social evils. The writer considers it distinctly in its favor that this book was written, practically in its present form, before the advent of the modern era of the *cause célèbre*. Not while passions are inflamed, problems distorted, points of view beclouded, should

the mental disease was directly or indirectly responsible for the anti-social activities. Similar findings were made with respect to feebleminded inmates. These findings have been confirmed, in general, by Dr. Paul A. Bowers (*Journal of Delinquency*, Vol. 4, No. 1, January, 1919), in a study of 2500 prisoners in the Indiana State Prison, and by other workers in the field. (See Summary of such studies, by V. V. Anderson, in "Selected Readings in Social Problems and Social Policy", James Ford, p. 826.) The latest study to confirm the Sing Sing findings is that made in the Recorder's Court of Detroit, indicating that much the same conditions exist among petty offenders as were found to characterize the prison population of Sing Sing. — See "Socio-Psychiatric Delinquency Studies from the Psychopathic Clinic of the Recorder's Court, Detroit", by Theophile Raphael, Arnold L. Jacoby, Ward W. Harriman, Mary N. Raphael, *Mental Hygiene*, Vol. VIII, No. 2, April, 1924, pp. 453, *et seq.*

[1] "Report of the committee appointed to consider what changes, if any, are desirable in the existing law, practice, and procedure relating to criminal trials in which the plea of insanity as a defense is raised, and whether any, and if so, what changes should be made in the existing law and practice in respect of cases falling within the provisions of section 2 (4) of the Criminal Lunatics Act", 1884 (1923), His Majesty's Stationery Office, London.

the work of examination and suggested reform of our institutions (especially the law) take place; but in those intervals of calm between the emotional storms of public opinion, when at least some semblance of unbiased consideration and reflection is possible.

(One or two notes have, however, been added since the Leopold-Loeb Hearing was held in the American press; for that Hearing has raised some very important questions hitherto treated but lightly.)

The importance of the subject, then, and its timeliness, are sufficient justifications for undertaking another study in this field.

The writer believes, moreover, after a careful survey of the principal works in this province, that there is a distinct need for a study based upon a conscious attempt to interpret the law of insanity to psychiatrists and social workers, and the psychology and symptomatology of mental disorder, to lawyers and judges. Only by carefully pointing out the historical origins of the modern law of insanity, and the constitutional and other limitations upon proposed reforms of the law, on the one hand, and the psychology and symptomatology of mental disorder as we know it to-day, on the other, can we hope for a sensible *rapprochement* between lawyers, judges, legislators, psychiatrists, and social workers, with respect to a serious socio-legal problem that concerns them all.

In conformity with this belief, the writer has studied the statutory enactments in the various States, as well as foreign legislation, and the case material (including reports of trials and of cases appealed to higher courts); such material as was available in the records of well-known psychiatrists, probation officers, and others active in this field; and, finally, the records of several State boards of mental disease, such as the State Hospital Commission in New York, and the Department of Mental Diseases of Massachusetts. He has also availed himself of unusual opportunities to discuss some of the questions which have arisen, with teachers, lawyers, and psychiatrists. An attempt has been made to study not only the theoretical phases of the subject, but some of the evidences of the "law in action";[1] for only by studying the laws functionally as well as theoretically or ideally can one hope to arrive at some adequate conception of actual conditions and needs.

[1] *See* "Law in Books and Law in Action", by Roscoe Pound, 44 *American Law Review*, 12. Perhaps the most notable single contribution of recent years in American jurisprudence (among numerous admirable contributions

Details of the plan of this study and of the methods of procedure are given in the introductory chapter; a word on the subject at this point, however, is not amiss. In discussing the needs of the present situation with respect to the legal treatment of the criminal insane, I have attempted to consider the desirable improvements upon the present system — a task involving recourse to some of the ethical, psychological, and psychiatric phases of the problem; and the limiting factors necessitating modification of that which *theoretically* appeared desirable.

In this connection one must, of course, take a definite stand as to some very fundamental matters, about which, no doubt, some readers — legal as well as medical and lay — will disagree. Thus I have attempted to show the practical significance, not the ideal or dogmatic or analytical meanings, of "criminal intent" and the "tests" of irresponsibility; I have attempted to show the inadequacy of an exclusive psychological Behaviorism in the domain of the criminal law, while not, I hope, underrating its great promise as one branch of Psychology; I have attempted to justify the conception of "psychogenesis", at least in the case of some types of mental disorders; I have insisted upon the unity of mind and interdependence of the conative, affective, and intellective modes of mental life, as fundamental psychological data.

My assumption of a definite position upon such controversial questions will no doubt precipitate differences of opinion; but these are probably unavoidable. All one can do is to try to present opposing views and then, wherever necessary, to take one position or another in the light of fair analysis. This is preferable to the fruitless attitude of indefinitely suspended judgment.

After indicating existing conditions and the needs they suggest, it was next necessary to consider some of the agencies, forces, and devices appropriate at least to amelioration of conditions if not to the more fundamental solution of the multifold problems involved. This necessitated ascertainment of some of the more important suggestions which have been made for improving the medico-legal machinery concerned with the problem of the criminal insane, and a critique of these suggestions. Finally, this last step involved a weaving together, into a consistent and I believe workable program, of those features of the different State laws and

he has made) is the insistence of Dean Pound upon a technique in the study of legal problems, which embraces both the law in books and the law in action.

those improvements suggested at various times by students in the field, which commended themselves to me as the study proceeded.

The reforms suggested in the concluding chapter may not strike some readers, especially psychiatrists, as radical enough. But I have deemed it wiser to emphasize such improvements as in my opinion can be effectuated immediately, within present constitutional limitations and on the basis of more or less settled contemporary public opinion, than to suggest utopian reforms which are not justified as yet, either by law or psychiatry. In referring to constitutional limitations, however, I hope and believe that my treatment of the subject will not lay me open to the criticism of fetishistic worship of constitutions; my intention merely is to indicate some of the obstacles, valid and invalid, which any attempt at improvement of the law of insanity has to cope with.

The use of long notes was necessary in order, as much as possible, to free the text of too great technicality and detail; it is hoped, however, that these notes will prove valuable as a source of reference. Important and recent, rather than numerous citations to cases are given: the cases have been analyzed not only as a basis for the text, but as reference notes at the end of Chapters 7 and 8. An appendix of State legislation, with some interpretative decisions, covering the problems treated in this study, has also been compiled in the hope that lawyers, alienists, and social workers will find the cases and the appendix handy sources of reference.

Throughout the following pages my indebtedness to the teaching of Dean Roscoe Pound and Professors William McDougall, C. Macfie Campbell, and James Ford of Harvard University is apparent. To the inspiration of these scholars I owe much; the privilege of their counsel and instruction will be a long-remembered pleasure. I am indebted also to Professor Felix Frankfurter, Dr. Richard C. Cabot, Dr. William Healy, and Dr. Augusta Bronner, who have kindly perused the manuscript, at different stages, and have submitted many constructive suggestions for its improvement. My thanks are also due to Dr. Horatio M. Pollock of the New York State Hospital Commission, Dr. George M. Kline, Massachusetts Commissioner of Mental Diseases, and Dr. L. Vernon Briggs, former Member of the Massachusetts Board of Insanity, for making available much valuable material. I am also

under obligation to Miss Myrtle Brooks of the Harvard Stenographic Service Bureau for much helpful work in the preparation of the manuscript. A further debt is due my brother, Dr. Bernard Glueck, for his advice and helpful criticism; it was he who first turned my attention to the absorbing study of Criminology. My deepest gratitude, however, is to my wife, whose constant encouragement and suggestive criticism, in the final analysis, made this study possible. To the many other workers in the social sciences, who have given me of their time and thought in connection with the preparation of this work, I am deeply indebted. Needless to add, I am alone responsible for the views herein expressed.

The twentieth century Sociological School of Jurisprudence expresses the movement to unify the social sciences of which law is but one. Law is no longer regarded as a self-sufficient, cabalistic discipline, isolated from the other social sciences. We are realizing more and more that knowledge and methods from outside the formal law itself must be imported into the legal order. We can no longer be content with the use of exclusively legal material in the critique of the law itself. However imperfectly, I have attempted to employ the aims and the technique of the new school of Sociological Jurisprudence in developing this study.[1]

S. S. GLUECK

BOSTON,
February, 1925.

[1] In his "Outline of Lectures on Jurisprudence" (Third Edition, 1920, p. 37), Dean Roscoe Pound outlines the program of the Sociological School in the following language: "The Sociological jurists insist upon six points: (1) Study of the actual social effects of legal institutions and legal doctrines . . . (2) Sociological study in preparation for law-making . . . (3) Study of the means of making legal rules effective . . . (4) A sociological legal history . . . (5) The importance of reasonable and just solutions of individual cases . . . (6) That the end of juristic study, toward which the foregoing are but some of the means, is to make effort more effective in achieving the purposes of law." When the author was privileged to attend Dean Pound's truly inspiring lectures and Seminar in Jurisprudence in 1922–1923, Dean Pound added the following important items to the agenda of the Sociological School: (7) The study of judicial method. (8) A ministry of justice.

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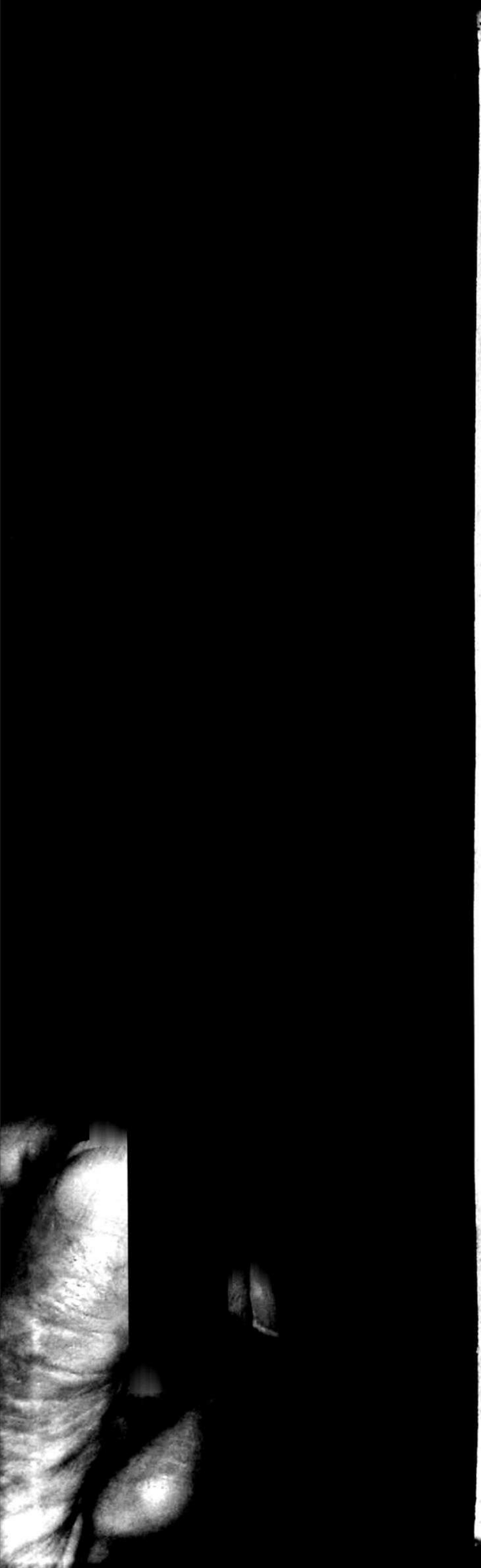

CHAPTER 1

INTRODUCTION

"Sir, these subjects may be dull, and want the light and shade of more exciting topics, but the expense which is incurred, the numbers that suffer, and the nature of their sufferings, will perhaps justify the present demand upon your time and patience." — Lord Ashley, "Speech in Parliament on a Lunacy Bill", July 23, 1844.

Section 1 — Cases Illustrating Some of the Questions Considered in this Study

Under the criminal law of the States of the Union, the defense of insanity may be interposed on behalf of a person accused of crime who suffers from mental disease or defect. It may be pleaded on his behalf, either that he was of unsound mind at the time when the alleged criminal act was committed, or that he is mentally ill at the time of the proposed trial; and appropriate proceedings are provided for by law in both cases.

Case I. — On different occasions in the past, several persons accused of crimes in Massachusetts were arrested, tried, convicted, and sentenced to imprisonment. Upon their arrival at the penal institution, the prison physicians,[1] in making physical examination of the prisoners, discovered that their underwear bore the labels of a hospital for the mentally ill and it developed that they were *escaped patients!*

Query: Since, in the case of mentally diseased persons accused of crime, our laws provide for consideration of the question of mental unsoundness both as a defense and as reason for the postponement of the trial, why is it that although these persons passed through the hands of the police, the prosecutor, the judge and jury, no one questioned their mental soundness, and no one took the steps provided by law in such cases?

Case II. — In most States of the Union it is provided by law that if a person accused of crime is "so insane" as not to be able to

[1] Personal statement to writer by prison physicians.

consult with his attorneys and aid in his defense, the trial must be postponed until he becomes mentally fit to be tried.

Two persons were arrested, charged with a homicide. Affidavits were produced before the trial court establishing that at the time of the homicide defendants were confined in the State hospital for the mentally ill, being treated for mental disease and not cured; that one defendant had been sent to the hospital upon the certificates of two surgeons of the United States Navy; the other had been committed to the hospital from the penitentiary, upon certification of the warden, resident physician, surgeon, and captain of the yard that he was "insane." Both were committed only a few weeks before the homicide occurred. Counsel for the defendants, in addition to producing these affidavits in support of their request for postponement of the trial and for a collateral examination into the mental condition of the defendants, informed the trial court that they "each made efforts to secure from the said defendants some statement concerning the crime charged in the information; that said defendants refuse to say anything about the facts or circumstances of the offense and act as though suffering from delusions of some character; that affiant therefore alleges that it is his opinion that both of these defendants are mentally insane; and that neither of them is mentally competent to make a just and rational defense to the charge made against them."[1]

In spite of this showing, the trial court refused to postpone the trial of the issue of guilt or innocence, and to determine the *preliminary question* of the defendants' mental capacity to proceed with their trial. The California District Court of Appeal reversed the judgment of the lower court only after a *rehearing*.

Query 1: If machinery is provided for the determination of the mental condition of accused persons *before trial*, and for the prevention of the trial of obviously mentally diseased persons, why are such individuals, as the defendants in this case, tried, the State subjected to unnecessary expense, and the accused suffered to undergo the needless ordeal of a trial only at the end to be returned to a hospital for the "criminal insane", where they came from originally?

Query 2: What machinery exists in the various States for determining which defendants are "sane enough" to be tried? What are the relative merits and demerits of the various types of procedure?

[1] People *v.* West, 143 Pac., (Cal.), 793 (1914).

Case III. — A youth of seventeen and a half years of age, who had never before committed a serious offense, was persuaded by another to commit a burglary. As they entered the house, one of the occupants raised a revolver; in the excitement the youthful burglar drew his own weapon and, shooting blindly, killed the head of the household. On his trial testimony was introduced to the effect that he was between seventeen and eighteen years of age, and a physician declared him to be an " imbecile ", though " not insane in the ordinary contemplation of the term." The defendant was found guilty. Upon his conviction, a motion for a new trial on the ground of " newly discovered evidence " was made by his counsel, which motion was denied by the trial judge. From this denial, an appeal was taken. Accompanying the motion for a new trial were affidavits as follows: The psychiatrist in the Superior Court, Juvenile Division, of Los Angeles, who had examined the youth by means of one of the well known standard intelligence tests, averred that the defendant had a mental age of less than ten years. The head of the Department of Psychology and Education of the California State Normal School made affidavit that the defendant " is feebleminded and not morally accountable for his acts to any greater degree than a child of corresponding ' mental age ' may be." Two psychologists of long experience made affidavits to the effect that the defendant was a low-grade moron of the mental age of eight, and one of these further alleged that the defendant was no more responsible morally than a child of eight. Another physician made affidavit that he found the defendant " one year above the imbecile age."

On appeal, however, the judgment of the trial court and the order denying a new trial were confirmed by the Supreme Court of California, upon the grounds that " no satisfactory reason was shown by any of the affidavits presented on the motion, for the failure to ascertain prior to the trial . . . the matters stated in the affidavits." Further, the court was " satisfied that we cannot hold, in the light of all the evidence on the trial, that the showing made by the affidavits was such as to make it manifest that a different result would or should be reached on the question of defendant's mental capacity in view of the alleged newly discovered evidence."

The court also pointed out that, though some of the expert witnesses for appellant testified at the time that in their opinion he was

of unsound mind, " their reasons given were not such as to show the degree of insanity or want of mental capacity necessary under the law to exempt a person from responsibility, and some stated that, in saying they regarded him as of unsound mind, they meant that they did not consider him bright or mentally efficient. Some of the witnesses for appellant on this question freely admitted that they considered him capable of distinguishing between right and wrong with relation to such an act as that here involved." [1]

The court also reviewed certain acts of the defendant as evidence that he knew " right from wrong " and was not feebleminded, — such as his persistence in the burglary when discovered, his escape and concealment, his attempt at first to explain a wound in his leg as one received elsewhere than at the house of the deceased, his clear and explicit recollection of what took place on the night of the homicide, etc.; and concluded that " it would be difficult indeed to reconcile the situation thus presented with any theory of mental incapacity on his part sufficient in degree to exempt him from responsibility under the law." [2]

Another important point was urged on appeal, besides that raised by the affidavits and the psychologists and psychiatrists. Under the Juvenile Court Act of California, the defendant, who was under eighteen years of age, should have been given the benefit of the equitable procedure provided in the case of juvenile offenders. But the court held that the fact that the case was not submitted to the Juvenile Court, pursuant to the provisions of the Juvenile Court Act,[3] did not deprive the Superior Court, in which the defendant was convicted, of jurisdiction to try the defendant for murder, though it developed during the trial that he was under

[1] People *v.* Oxnam, 149 Pac., (Cal.), 165 (1915). [2] *Id.*

[3] "No dependent or delinquent person under eighteen years of age shall be prosecuted for crime until the matter has first been submitted to the juvenile court by petition as herein provided, or by certificate of the lower court as provided in section sixteen (eighteen) hereof." (St. 1913, sec. 19, p. 1285.) The court said, in part: "Consideration of the provisions of the juvenile court law satisfies us that the provision relied on is not to be taken as affecting the jurisdiction of the superior court in any criminal prosecution. The design of the various provisions relative to investigation by the juvenile court of the cases of delinquent persons under the age of eighteen years is, of course, to afford an opportunity for investigation of the case of any delinquent person by a judge of the superior court specially charged with such work, with a view to ascertain whether the delinquent person is a fit and proper subject to be dealt with under the reformatory provisions of the act, rather than under the laws generally applicable to offenses." If this is "of course" the design of juvenile court legislation, it is difficult to see what outrage to justice would have resulted from granting a new trial.

eighteen years of age when the crime was committed; nor did this fact require that the Superior Court, *on its own motion*, without any suggestion being made pursuant to the Juvenile Court Act, should cause an investigation to be made of the defendant under that act. In other words, an objection that no opportunity had been afforded for investigation by the Juvenile Court under the Juvenile Court Act could not be considered by the Supreme Court on appeal, when the question of examination into the age of the defendant was not suggested to the court below.

In the light of these technicalities, the judgment of the trial court was affirmed. "Notwithstanding the petitions for clemency to the Governor from many important organizations and prominent private citizens, and the testimony of Dr. Henry Goddard, who happened to be in California at this time, this boy, after several reprieves, was finally hanged, as was his almost equally defective associate." [1]

Query 1: In view of the many affidavits from recognized experts, did the courts do wrong in refusing a new trial?

Query 2: Would the desirable balance between the public interest in the general security and the public interest in the security of the individual life have been greatly disturbed if the courts had found a way to grant a new trial under the Juvenile Court Act?

Query 3: What is the status of the well recognized psychological tests in the courts? And what is the status of psychological and psychiatric experts?

Query 4: Did the facts as to the defendant's attempt to escape, etc., necessarily prove that he was not feebleminded, or that he knew "right from wrong", to the extent that he could have been morally regarded a free agent?

Query 5: Is the knowledge of right and wrong a safe and fair criterion of criminal responsibility in all cases?

Query 6: If, through accident or mistake of the defendant's counsel, or the trial court, the question of the defendant's age placing him within the purview of the Juvenile Court Act was not raised in the technically-required way, is it within the *spirit* and *purpose* of juvenile court legislation for the Supreme Court to have refused a new trial? [2]

This last query answers itself. We cannot see how the structure of the law would have been shaken to its foundation, nor how a

[1] "Crime, Abnormal Minds and the Law", by Ernest Bryant Hoag, Edward Huntington Williams, and others, p. 67.

[2] "Apparently no suggestion of the age of appellant as a basis for arresting the prosecution was ever made in the superior court, the evidence on that subject being elicited in the ordinary course of the trial, etc."

"dangerous precedent" would have been set up if the appellate court had granted a new trial in this case.

Case IV. — A feebleminded colored boy was taken into the army and placed on sentry duty on a post in a wooded suburb. He came upon a couple, shot and killed the man and made indecent proposals to the woman. As she ran away, he shot her also. "After confessing and denying the crime several times, he evolved a stereotyped denial and persisted in it. . . . Every reviewing officer up to and through the Adjutant General approved the findings of the court martial, which were guilty of murder in the first degree. The President disapproved the findings solely on the ground of his mental condition," and the boy was sent to a Government hospital for the insane. "After about two years he was discharged by *habeas corpus* and went free into the community." [1]

This patient under ruling of the War Risk Bureau was granted compensation at the rate of $80 a month, which accumulated to his credit. After two years in the hospital he began to get impatient to be discharged and got a lawyer to look into his case. This lawyer was duly informed as to the circumstances of the case, being told that the patient was an imbecile who under the influence of sexual excitation had committed one crime already of whose seriousness he had but a vague appreciation. He was told that although his behavior in an institution [2] had been good there was no guarantee that he would not again commit some sort of a sexual crime if given his freedom. In spite of this a petition for a writ of *habeas corpus* was issued and the case came into court. Ordinarily the Judge would have ordered him discharged directly in view of the fact that he had not been adjudicated insane in the District of Columbia, but in this particular case a guardian had been appointed for his funds about a year after his admission which had necessitated the returning of a formal verdict of unsound mind. The case therefore went to a jury and the patient was put on the stand. His lawyer represented him as an ignorant country negro who had been subjected to the 'third degree' and had thus been brow-

[1] Cited by W. A. White, "Insanity and the Criminal Law", p. 112.

[2] One of the favorite arguments of those who, on the one hand, would hold most, if not all, insane persons criminally responsible for their conduct, and those who, on the other, would have acquitted insane persons, who have been committed to an institution, released as soon as possible, is that the insane are frequently deterred by the fear of punishment. They point to the fact that no discipline would be possible in our hospitals for the insane, if it were not for the fact that the mentally unsound understand that punishment will follow a forbidden act. Such persons forget that it is one thing for mentally ill patients to be able to comply with the simple demands of an artificial, sheltered environment designed for the insane, and quite another to be able to get along on the outside.

beaten into confessing a crime he had never committed. The patient, of course, wore his army uniform on the stand and was found of sound mind by the jury. He was then turned loose in a Southern community with about $1500 and the intelligence approximately of an eight-year-old child. Further comment is unnecessary.[1]

Query 1: What are the provisions in the different States of the Union for the incarceration in a hospital for mental diseases of defendants *acquitted* on the ground of insanity?

Query 2: What are the provisions in the different States of the Union for the subsequent *release* of persons so acquitted and thereupon incarcerated in a hospital?

Query 3: Is it wise to leave questions such as those raised in this case to procedure by *habeas corpus* and the determination of a lay jury?

Section 2 — Analysis of the Problem

Cases such as these, and the questions and problems they present, will be discussed in this study. These cases have been taken at random from among many similar ones in which the law reports and the records of superintendents of institutions for the criminal insane abound. Each presents a series of more or less distinct questions, which arise in connection with the whole complex problem of the socio-legal treatment of the mentally diseased offender. The types of questions raised by cases such as these can best be understood by a brief analysis of the entire problem of the criminal insane as it arises in our criminal courts.

In criminal cases, the problem of "insanity"[2] comes before the courts medico-legally in connection with the following questions, representative of the various stages of the criminal proceedings:

(1) What provisions are there for *selecting* the mentally unsound persons accused of crime from among those persons arrested for criminal offenses? Are these measures effective in attaining the ends sought by society through its legal machinery? Such questions are suggested by the first case cited.

(2) Assuming that the machinery for the recognition and segregation for special legal treatment of the mental cases from among those arrested for crime is effective, what legal provisions exist for determining whether the prisoner is "sane enough", in the language of the law, to *plead* to the criminal charge against him, and, in general, to conduct his defense? It will be noticed that

[1] White, *op. cit.*, pp. 116, 117.
[2] *See* Note and Schema at end of Chapter.

these two phases of the problem deal with the mental condition of a defendant at the time of the proposed *trial;* the law attempting a sharp distinction between mental condition at the time of the alleged *offense* and that at the time of trial. The feature of our problem mentioned in this paragraph is represented by the facts in the second case we have cited.

(3) Assuming that, in the eyes of the law, the prisoner is sane enough to plead and to conduct his defense, what are the "tests" of the *criminal irresponsibility* of defendants who plead that they were of unsound mind at the time of the alleged criminal offense? In other words, what are the *types* and the *degrees* of the abnormal condition of mind at the time of the alleged offense, which will satisfy one of the more or less artificial *tests* of criminal irresponsibility, which have gradually been evolved in the law? This question brings out the legal distinction between the mental unsoundness that is recognizable as such by psychiatrists and psychologists, and the mental condition that, *in contemplation of the law,* will relieve an accused person from criminal responsibility for his acts. The question, in brief, is: What are the *law's* tests of criminal *irresponsibility,* when *medically recognized mental disorder* is raised in a defense to a criminal charge? This phase of our general problem is suggested by the facts of the third typical case cited above.

(4) What becomes of the defendant if, upon his plea of irresponsibility on the basis of "insanity", he is acquitted of the offense? Is he immediately turned back to the community, or is he incarcerated in an institution for the criminal insane? If incarcerated, does he remain there? And if not, by what means is he legally discharged? The last case cited above suggests some of the problems which arise under this head.

Fields of Legal Inquiry. — As has been suggested, the different phases of the question of the mentally diseased offender naturally fall into two main fields of legal inquiry: First, that having to do with the problems presented by the mental condition of the defendant at the time when the criminal offense was alleged to have been committed; secondly, that dealing with the problems arising when the mental condition of a defendant at any time immediately before trial, during trial, or after trial, is questioned.

Ethics, Psychology, and Psychopathology. — In order to treat of the various phases of the complex question of the mentally diseased

offender in a more comprehensive way than it is dealt with by the law, however, it will be necessary to examine some of the socio-ethical, psychological, and psychopathological implications of the problem. For, in the last analysis, the issue is not exclusively a *legal* one. Indeed, most of the objections raised against the legal provisions for coping with this problem have been inspired by the attitude of many judges and lawyers suggestive of an opinion that the law has little concern for the other social sciences. To be sure, the existing laws and procedure are the result of many years of grappling with this question on the part of the law and its ministers; but it is a mistake to assume that the program of the law's treatment of the problems presented by the mentally disordered offender sprang, full-panoplied, out of the minds of lawyers and commentators; that it was unaffected by those social sciences, the very existence of which is implied in the law. And it is a more serious error to confine a study in *living law* exclusively to the *legal* considerations involved. If we are to evaluate the criminal law in this field, as a *social instrument*, we must regard the law as a means to an end. We must, from time to time, reformulate the socially desirable end which the criminal law is attempting to achieve. We must also examine the means, the instruments, with which it is working. We must think of law in terms of social usefulness, and in the light of more or less practical ideals. But to do this, it is necessary to examine the *actual products* of the application of the means at hand to the socially desirable end, — that we may evaluate both the means and the end, and see to what extent the fruits of the criminal law's labors are in consonance with its aims.

As nearly as possible, laws should have theoretical soundness as well as practical effectiveness. It is peculiarly desirable in the realm of legal activity, — with its technique of "leading case" material, precedent, etc., and the demands of predictability, stability, and "even-handed justice", — that laws should fit into the accepted legal traditions, professional technique, and the whole legal body, in a symmetrical and logically sound manner. To the extent, however, that strict adherence to theoretical and logical demands results in too great a social or individual sacrifice, it cannot be denied that we are justified in asking for a remodeling of certain features of the law and procedure in cases of mental unsoundness.

Outline of Steps to be Taken. — From what has gone before the

method of approach adopted in this study ought to be clear. Starting with our first important problem — mental disorder of a defendant at time of trial — we will discuss the procedural machinery existing in the different States for coping with the questions this raises. The reader's attention is particularly invited, in this connection, to the analysis of the practical operation of the Massachusetts law for the routine mental examination of certain classes of persons accused of crime.[1] After this discussion of the purely procedural features of our general problem, we will deal with mental unsoundness as constituting *irresponsibility*, *i.e.*, as a defense to a criminal charge. Here we must first examine some of the ethical and psychological foundations of the criminal law; then we will consider the historical development of the tests of the criminal irresponsibility of the mentally diseased offender. With the data thus obtained as a background, we will next discuss the tests of irresponsibility themselves, largely from a legal point of view, but with incidental references to abnormal psychology. After this will follow a chapter on the concept of mental disease, generally, and the psychology of mental unsoundness; then a chapter in which the data of modern psychopathology, as expounded by some of the leading authorities in this branch of medicine, will be inventoried and considered in connection with the various legal tests of criminal irresponsibility, with the view of arriving at some estimate of the reliability and inclusiveness of these criteria of legal guilt. The next chapter will deal with procedural problems arising upon the acquittal of defendants because of irresponsibility, their incarceration, and final discharge. In the last chapter, the variegated threads of the discussion will be woven together, conclusions summarized, and recommendations made.

Bearing in mind this sketch of the steps taken in this study, let us first consider some of the fundamentals of criminal procedure, as a setting for the " tests " of irresponsibility.

NOTE

LEGAL AND PSYCHIATRIC TERMINOLOGY

There is considerable fruitless and confused discussion in the books as to the meaning of the term " insanity "; one side vehemently maintaining that the term is a medical one, the other that it is a legal contribution, both as a name and a concept. The writer has carefully

[1] *Post*, Chapter 3, pp. 55 *et seq.*

examined the history of this subject (see Chapters 5 and 6) and comes to the following conclusions:

The specific term, " insanity ", seems first to have been introduced into the law by medical experts, finally superseding, on the whole, such legal terms as " madness ", " lunacy ", etc., which, in their turn, were also probably borrowed from the very imperfect psychiatric knowledge of the day (perhaps coupled with popular usage of those terms). Nevertheless, the root of the word " insanity " seems to have been quite generally used by commentators on the law in early times, the books speaking of " non-sane memorie ", and similar descriptions. It is probable that all such terms were popularly used until they were taken over by the first systematic writers, both in law and in psychiatry, and specialized.

Owing to careless use of language by judges, " insanity " became synonymous with *criminal irresponsibility* by reason of a certain type and degree of mental disorder — a type and degree which were provided for in advance by means of artificial " tests " of criminal irresponsibility. In the *law in action*, there is far from agreement between those cases in different jurisdictions (or even in the same jurisdiction) which have been used by various juries as the *occasion* for exempting different offenders from liability to punishment for their acts, on the ground of " irresponsibility by reason of insanity." Even slight acquaintance with the psychology of juries must convince one that in the application of the supposedly rigid " tests " of irresponsibility by different juries in different cases, there could not have been that uniformity of outcome, that " even-handed justice ", which one might expect from merely reading the " tests " of irresponsibility in cold print.

Of recent years, seeing that the law had preëmpted the term " insanity " and specialized it, and that judges were employing it not infrequently in the sense of *irresponsibility*, psychiatrists have sought other terms, such as " mental disorder ", " mental unsoundness ", " psychopathy ", " mental deterioration ", etc., to distinguish the mentally ill without reference to their criminal responsibility or irresponsibility. This practice has resulted in judges attempting to distinguish between " legal insanity " and " medical insanity."

In these pages we shall attempt to employ such terms as " mental disorder ", " mental unsoundness ", etc., in discussing our subject from the psychiatric point of view ; and " criminal irresponsibility ", " irresponsibility by reason of insanity ", " legal insanity " or plain " insanity ", as the case may be, when treating the problem from the legal point of view, to designate those forms and degrees of mental disorder that, theoretically at least, either exempt from guilt under the law, or prevent or postpone trial or execution.

The grade and type of mental unsoundness which will be sufficient in the various jurisdictions to postpone the trial of an accused mentally ill person, or the execution of a convict, are matters subject to other, more or less rigid, artificial " tests ", which in practice come down to the opinion of judge or jury, as the case may be, in the individual instance. Perhaps it will be well to specialize the term " criminal irresponsibility by reason of insanity ", to cover that form and degree of mental disorder that theoretically exempts from criminal liability under the law, and " insanity ", to embrace that degree and type of mental disorder that theoretically is sufficient to postpone the trial of

an acccused person, or his execution, if convicted, together with that type and degree of mental disorder that, though not constituting " irresponsibility ", nevertheless indicates that there is sufficient reliable testimony (expert and lay) in the case to justify the court in charging the jury as to the " tests " of irresponsibility. " Legal insanity " might then be used to cover these three concepts.

It should be pointed out that where evidence of mental disorder is admitted, after a plea of " guilty ", but before sentence, in a hearing on mitigation of punishment (as was the case in the Leopold-Loeb Hearing in Chicago, in 1924), such testimony has nothing at all to do with the question of guilt or innocence or with capacity to be executed; it is distinctly medical testimony addressed to the mind and conscience of the court, where the law permits him a choice of alternative penalties upon a plea of guilty.

The above discussion will perhaps become more clear in the light of the following proposed schema, differentiating legal and medical terminology and conceptology:

PROPOSED SCHEMA OF TERMINOLOGY TO PREVENT CONFUSION IN LEGAL DECISION AND COMMENTARY

I. Psychiatric Terms

Mental Abnormality

(Deviations from psychiatric and psychological norms of mental health and capacity.)

- *Mental Disorder* [1] (Subnormality in mental health sufficient to constitute unsoundness of mind.)
  - *Mental Disease*
    - *Definite Major Psychoses* [2]
    - *Psychopathies and Neuropathies* (Constitutional and acquired psychic disorder, not constituting a major psychosis; "borderline" conditions.[3])
  - *Mental Defect* (Feeblemindedness.) [2]
    - *Idiocy*
    - *Imbecility*
    - *Moronity* [4]
- *Mental Supernormality* (In health and capacity.)

[1] I employ the term "mental disorder" to embrace, on the one hand, the quite specific types of loss, impairment, or irregular development of mental faculty (conative, affective and intellective), and, on the other, lack, or early-arrested development, of mental function (largely, though not exclusively, intellective). Some might perhaps prefer the term "mental disability", "mental unsoundness", or "mental inadequacy."

[2] As defined and graded by authorities in this field, standard "intelligence tests", scientific bodies.

[3] As defined and classified by authorities and such societies as the American Psychiatric Association and the National Committee for Mental Hygiene.

[4] It is often difficult to classify the feebleminded (especially morons) on the basis of standard *intelligence* tests alone, since the emotional-impulsive life plays so important a rôle in the estimation of a feebleminded person's capacities to cope with his environment in a socially-acceptable manner.

II. Legal Terms

Legal Insanity

(Or "legal madness", or "lunacy", or "idiocy," etc.)[1]

Insanity (and "Idiocy.")

Constituting mental unfitness to be tried or executed, as determined by various legal criteria, established legislatively or by judicial decision.

Insanity (and "Idiocy.")

Covering mental disorder from the legal point of view, as established by competent testimony (lay and expert), constituting sufficient ground for the court to charge the jury as to the "tests" of irresponsibility, but not necessarily constituting irresponsibility (absence of guilt).[2]

Irresponsibility

(Or, as it is frequently designated, "criminal irresponsibility by reason of insanity.")

Constituting both insanity, as above (*i.e.*, insanity *per se*), and satisfaction of the legal "tests" of the irresponsibility of the insane.

Testimony in Mitigation

(Psychiatric and psychological evidence in a hearing in mitigation of punishment, upon a plea of guilty or after conviction, in those jurisdictions where the court is afforded a choice of alternative penalties for the same offense.)

[1] "Insanity, under which the law includes all forms of mental disturbance, whether lunacy, idiocy, dementia, monomania, or however otherwise its special phenomena may be denominated, is another ground upon which persons are held incapable of committing a crime. Insanity is mental unsoundness. It exists in different forms and degrees. A higher degree of insanity is requisite to protect a person from the consequences of a criminal violation of law, than to relieve him from the obligation of a contract." — "The Law of Crimes", John Wilder May, Second Edition, Edited by Joseph Henry Beale, 1893, pp. 29 *et seq.* The treatises and reports employ these terms indiscriminately and in a highly confusing manner.

[2] See pp. 255, 256.

CHAPTER 2

CRIMINAL PROCEDURE AND EVIDENCE

"America lags far behind other countries in the essential matter of putting the whole emphasis in our courts upon the substance of right and justice. . . . The actual miscarriages of justice, because of nothing more than a mere slip in a phrase or a mere error in an immaterial form, are nothing less than shocking. Their number is incalculable, but much more incalculable than their number is the damage they do to the reputation of the profession and to the majesty and integrity of the law." — Woodrow Wilson, cited in 6 *American Bar Association Journal*, 520, July, 1920.

Section 1 — Modes of Originating Criminal Proceedings

Introduction. — For the benefit of the lay reader, it is well to give at this point an account of criminal procedure in American courts with special reference to the plea of insanity. Although some of the steps of criminal procedure vary in the different States, and, to some extent, even in different courts in the same State, the variations are on the whole relatively insignificant for our present purpose.

Complaint Before Magistrate. — Several modes of originating criminal proceedings are usually provided for in the State criminal courts. The simplest method is by a *complaint* made before an *examining* (or committing) magistrate, justice of the peace, municipal, police, district, or other minor judge. Thereupon, such judge may issue a warrant authorizing the arrest of the person complained against or suspected of the commission of a crime. This person is then arrested and brought before the examining magistrate, who hears the complainant and other witnesses. If it is a minor offense, of which the court has summary jurisdiction, and the judge finds the person guilty, he may sentence him forthwith. If, however, the judge finds " probable cause " that a person charged with a *serious* crime has committed it, he may release him on bail,[1] or order his imprisonment until such time as the case is tried before a higher tribunal.

[1] The abuse of the bail privilege has already been mentioned in the preface. One of the most important steps, in the writer's opinion, toward making the criminal law more effective, would be to refuse bail entirely to persons found on the preliminary examination to be "habitual criminals", *i.e.*, to have been previously sentenced on one or two occasions for serious offenses, without the

Description of Complaint. — The complaint, which usually initiates proceedings, is a formal statement under oath, signed by a person competent to make it, setting forth the name of the person charged with a crime, the place where, and time when the offense is said to have been committed, and containing a plain and full account of the offense, with a "reasonable" degree of certainty.

Information Given to Prosecutor. — Another method of originating criminal proceedings against one suspected of having committed a crime is by the accuser giving the prosecutor the information upon which he prepares a form of indictment and files it with a grand jury. The grand jury then passes upon this, hears witnesses, and decides whether there is "probable cause" that a crime has been committed and that the person charged has committed it. If it so decides, the grand jury returns a *true bill*, and, thereupon, a process is issued commanding the arrest of the indicted person. Such person may then be released on bail, or "bound over" and held in prison, to answer to the charge contained in the indictment at a sitting of a higher criminal court.

Proceedings by Presentment. — Criminal prosecutions are sometimes also instituted by *presentment*, which is an indictment found by the grand jury, not at the instance of some private citizen, or of the prosecutor, but by the grand jury itself in the first instance, and for some offense about which it has first-hand knowledge.[1]

Proceedings by Information. — Another frequent method of initiating criminal proceedings is by *information*,[2] which is a charge preferred not by the grand jury or by a private individual, but by the prosecuting officer direct.

The Preliminary Examination. — After the person charged in a complaint has been arrested, the officer brings him before the

penal régime having done any appreciable good as a preventive of further criminal acts. But such a provision would undoubtedly meet constitutional objections in all except capital (or at the most, second degree murder) cases. Although release on bail is legally restricted in murder cases, "as a matter of fact, of 135 persons charged with murder in Chicago on April 1, 1920, 104 were at liberty on bail." — E. H. Sutherland, "Criminology", p. 212 (1924).

[1] Bishop, "Criminal Procedure" (3d Ed.), Section 136.

[2] *Id.*, Sec. 141. Bishop states that the rule at common law seems to be that this is a "concurrent remedy with the indictment for all *misdemeanors*, except misprision of treason, which is a misdemeanor, but not permissible in any felony."

magistrate who issued the warrant (or some other judge directed in the warrant), together with the warrant and a certificate showing that summons has been made upon the witnesses. When brought before the magistrate, the accused is informed of the charge against him, and, if he is not yet supplied with counsel, he is permitted a reasonable time to obtain legal assistance. When counsel is present, the magistrate reads the complaint (or information) to the accused, and he has the right to make a statement answering the allegations. Witnesses against him may be produced at this stage, and he may also produce his own witnesses. The examination for less serious offenses often amounts practically to a trial of the issue of guilt; but usually, where the charge is a grave one, the defendant waives a full examination, and gives a *recognizance* [1] for his later appearance before the trial court.

Usually the examination is disposed of summarily, although the magistrate may be allowed a reasonable time (a few days) before making a final disposition of the case so far as his court is concerned; and, if he does postpone the examination, he commits the accused to the custody of the proper officer during this period, by a *mittimus*. During the adjournment of an examination, if the defense is one for which bail may be accepted, the magistrate may allow the accused to be at large upon a recognizance.

If the offense is one within the jurisdiction of the examining magistrate, and upon the preliminary examination he finds the accused guilty, he pronounces sentence of a fine or imprisonment. An appeal can, of course, be taken in such case from the judgment of the examining magistrate. If the offense is one not cognizable by the magistrate, and he has probable cause to believe a crime was committed and that the accused is guilty, the accused is held to answer in the higher court, and the magistrate may either accept a recognizance for his appearance before the trial court, or he may order the accused committed to jail to await the proceedings of

[1] An oral agreement, of which the magistrate makes a written record, by which the accused, either alone or with sureties, promises to pay a certain sum of money as a penalty to be levied upon the "goods and chattels" of the "recognizors", and, in default of money, upon "their bodies", if the principal does not appear at the place and time designated. If the magistrate deems that the testimony of some of the witnesses will be important at the trial he may also require them to enter into a recognizance to appear before the court later.

such court. Where the accused is held for the higher court (or where he appeals from the lower court in a minor case), all the papers in the case are certified up to the higher court. Generally, no preliminary examination is necessary where an indictment has already been found against the accused by the grand jury.[1]

"Legal Insanity" at Time of Preliminary Examination. — The preliminary examination is the first stage,[2] in most jurisdictions, where the accused can plead not guilty by reason of insanity, or, where he may claim to be unfit for trial because of mental unsoundness at the time of the proposed examination.[3] It is customary, however, for the magistrate to leave the determination of the question of insanity, especially in grave cases, to the trial court, to which he certifies all the papers in the case, if he decides to hold the defendant to answer at a higher court. But in some States provision is made for settling such questions in the magistrate's court.

Initiation of Proceedings before Grand Jury by Prosecutor. — Frequently, as was said, action is initiated by the prosecutor, who presents the facts to the grand jury upon complaint or information that a crime has been committed by a certain person. In both general ways mentioned, *i.e.*, by certification up from the magistrate's court, or by direct action of the prosecutor, the grand jury hears the evidence *ex parte*, and if reasonably satisfied that the accused is guilty, it makes its finding known to the court which is to try the case, by the instrumentality of the indictment.

Proceedings before Grand Jury. — When the prosecutor initiates action, he appears before the grand jury, calls his witnesses and examines them, and explains to the grand jury the nature of the offense, the legal elements of the crime, etc. After the hearing,

[1] People *v.* Goldenson, 76 Cal., 328, 345 (1888); State *v.* Mates, 133 La., 714, 715 (1913); Blaney *v.* St., 74 Md., 153, 155 (1891); People *v.* McCarthy, 168 N. Y., 549, 554 (1901), *affd.*, 59 App. Div., 231, 233 (1901).

[2] This is the strategic point at which the services of a psychologic-psychiatric clinic would be of inestimable value. The findings of such a clinic would not only be useful in the vast class of minor offenders who are periodically sent through the police-court mill, jail, society, back to the police court, jail, etc., etc., *ad infinitum*, to the expense of society; but the clinic would do remarkable things with juvenile offenders, such as Healy (*see* his "Individual Delinquent") and other pioneers in this field have done; and, most important for our purpose, it would present the higher court about to try serious offenders with reliable psychological and social data upon which to proceed more intelligently than they do to-day.

[3] The degree and manifestations of mental disorder necessary to exempt one from a *trial* upon a charge are not the same as the insanity which will relieve one of *responsibility*. *See post*, pp. 47, *et seq.*

the jury votes, in the absence of the prosecutor. If twelve [1] vote that the accused is guilty, the indictment, which has been drawn up by the prosecutor, is signed by the foreman, who certifies it to be a true bill. The true bill is then handed to the clerk of the court where the case will be tried, by whom it is entered as a part of that court's records.

Arraignment in Trial Court. — When the accused is brought before the trial court, he is *arraigned, i.e.*, the indictment is read to him, and he pleads "guilty" or "not guilty." This is the stage in most States where he can plead "not guilty by reason of insanity", or where he may claim to be too unsound, mentally, to be tried. If he pleads not guilty or not guilty by reason of insanity, the "general issue" has been framed; that is, the defendant "puts himself upon the country" for trial by a jury of his peers.

In a few States, as we shall see,[2] the grand jury may refuse to indict an accused person if they believe him insane (mentally disordered) at the time of their investigation, or if they believe he was insane and irresponsible when he committed the alleged crime. When such fact is certified to the court, proper disposition is made of the defendant, *i.e.*, he may be committed to an asylum as a non-criminal insane person.

Procedure by "Information" Alone. — The method of instituting criminal proceedings by means of the technical information [3]

[1] The number of the grand jury at common law was from twelve to twenty-three; it is now regulated by statute.

[2] *Post*, p. 49.

[3] The Constitution of the United States (5th amendment) requires presentment or indictment by a grand jury before one can be held to answer for a "capital or otherwise infamous" crime. The modern rule for determining what constitutes an infamous crime is not based upon the nature of the *crime*, but upon the nature of the punishment; an infamous offense being one in which the statute authorizes infamous punishment regardless of whether or not the *offense* is one which might not be considered infamous by many people. — Ex parte Wilson, 114 U. S., 417 (1884). In Mackin *v.* U. S., 117 U. S., 348, 351 (1885), it was held that "what punishment shall be considered infamous may be affected by the changes of public opinion from one age to another." In the recent, interesting case of United States *v.* Moreland, 258 U. S., 433 (1922), in a five to three decision (Justices Taft, Brandeis, and Holmes dissenting), punishment at hard labor for six months, in the District of Columbia workhouse, for failure to support minor children was held to make the offense "infamous", requiring action by a grand jury before defendant could be proceeded against in the Juvenile court for non-support. The minority opinion written by Mr. Justice Brandeis (p. 445) went into the history of penology, and pointed out that "hard labor", which, in inflicting punishment for serious crimes, had first been introduced as a medium of disgrace, became the means of restoring and giving self-respect, when "reform and rehabilitation of those

does not involve the grand jury at all. The information, as was said, is substantially like an indictment, but made by the prosecutor upon his own responsibility, instead of first having the grand jury pass upon the facts. Informations, though used in some States, are usually confined to minor offenses.

The prosecuting attorney may, of course, refuse to institute proceedings either by complaint or information, where he has good reason to doubt the sanity of the accused, either at the time of his investigation of the facts, or at the time when the accused was supposed to have committed the offense. Sometimes he calls in experts to examine the defendant in jail, while the latter is awaiting trial. In most States, however, he reserves the question of mental unsoundness until the trial.

Section 2 — The Technical Plea of "Insanity" (Irresponsibility)

"Plea of Insanity" at Common Law, and in most American States. — The technical plea of insanity, which is filed by a defendant before trial, covers the defense which the accused sets up, alleging that when he committed the act (if he committed it), he was criminally irresponsible by reason of insanity (this term here broadly includes mental *disease* and mental *defect*). He may, as has been said, claim that he is insane at the time of *trial;* but the questions this raises will be considered later.[1] The question whether the defendant was insane, and criminally irresponsible, at the time of the commission of an illegal act was considered at common law[2] under the general plea of not guilty, no special,

convicted of crime became a chief aim of the penal system" (449); and that the dominant purpose of the workhouse in question (which is really an industrial farm) "is not punishment, but rehabilitation. Compulsory labor is, in a larger sense, compulsory education. In the case of those who are committed for non-support, it serves also the purpose of compelling the performance of a parental duty imposed by the common law." See J. H. Wigmore, "Obstructing the Efficiency of the Juvenile Court", *Jour. Crim. Law and Criminology*, Vol. 13, pp. 165–167, Aug., 1922, and R. Oppenheimer, "Infamous Crimes and the Moreland Case", *Harvard Law Rev.*, Vol. 36, pp. 299–320, Jan., 1923.

[1] *Post*, Chapter 3.

[2] "That system of law or form of the science of jurisprudence which has prevailed in England and in the United States of America, in contradistinction to other great systems, such as the Roman or civil law. As distinguished from statute law, those principles, usages, and rules of action applicable to the government and security of persons and of property, which do not rest for their authority upon any express and positive declaration of the will of the legislature." — Kent, "Commentaries", I, 492. As used in the United States, it includes both the unwritten law of England and the statutes passed before the settlement of the United States. — Patterson *v.* Winn, 5 Pet. (30 U. S.), 233, 241 (1831).

technical plea of not guilty by reason of insanity being required.[1] This is the rule to-day in some forty States.[2]

Special, Separate Plea in Some States. — By statutory provision in a few States, however, the defendant setting up the defense of insanity must plead it separately, and in a special, technical plea, which raises a separate issue to be tried either before, or contemporaneously with, the general plea of not guilty. It is not unconstitutional to provide that the finding of the jury[3] on the issue of insanity (which must be disposed of before that of guilt or innocence) is final and conclusive on that question, so as to preclude its being raised again when the jury passes upon the general question of guilt or innocence.[4] Some of the States requiring special, technical pleas of insanity may now be considered, by way of illustration.

Insanity not Put in Issue by Plea of Not Guilty. — In Alabama the statute provides that the " defense of insanity " must be raised by a special plea at the time of arraignment, and that the usual plea of not guilty does not put in issue, nor does it form the basis of trying, the question of irresponsibility because of insanity.[5] Of course, such special plea does not preclude the general plea of not guilty. As an evidence of the insistence of some courts upon trying the *theory of pleading*, instead of the substance of a case, the following decision of the Supreme Court of Alabama is interesting. In interpreting the statute providing for the special plea of insanity, that Court was considering the case of a defendant who had pleaded " not guilty " at the time of her arraignment but whose request, *on the very next day*, to change her plea to " not guilty by reason of insanity " was denied by the trial court. The Supreme Court, in reviewing the case, refused to interfere with the discretion exercised by the trial court, and held that:

> Defendant's absolute right to defend on the ground of insanity was lost by her failure to plead to that end when she was arraigned, and her right to thereafter interpose that defense was subject to the trial court's discretion. If it be conceded that the court's action in that regard can properly be reviewed, the revision cannot extend

[1] Kerr's Wharton's "Criminal Law", Vol. I, p. 103.
[2] If interested in any particular jurisdiction, as to this point, the reader is invited to consult the Appendix.
[3] Either the same jury that is to try the question whether or not the defendant actually committed the act with which he is charged, or another.
[4] *See*, for example, Bennett *v.* St., 57 Wis., 69, 78, 79 (1883).
[5] Appendix, p. 506.

beyond the ascertainment of whether there was an abuse of discretion, and that there was such abuse in the present case does not appear.[1]

To the layman it must appear surprising that the court here is apparently more concerned with the vindication of some abstract provision of the theory of technical pleading, than with the practical task of determining whether or not the defendant was insane (*i.e.*, " irresponsible " in the legal sense) when the act was committed, regardless of when that question was raised.[2]

Special Plea in Writing. — In Indiana it is required that the defense of insanity at the time of the alleged criminal act must be set up specially, in writing.[3] It has sometimes been said that the reason for requiring such a technical rule is that the State could not otherwise be prepared at the trial to meet the issue of insanity. This objection will be discussed later.[4]

Simultaneous Trial of Special and General Issues. — Wisconsin provides that no " plea of insanity " (or feeblemindedness) at the time of the alleged offense shall be received " unless interposed at the time of arraignment and entry of plea of not guilty ", except if the court permits it to be later entered, " for good cause shown." The " special issue " must be " tried with the general issue of not guilty." [5] Apparently the older practice of having the jury dispose of the special issue first, which is less misleading to a jury, has been replaced by letting the jury pass upon the two issues simultaneously.

Special Pleas in Washington and New York. — In Washington the special plea must be set out in detail, covering (1) defendant's " insanity or mental irresponsibility " at the time of the commission of the alleged criminal act; (2) whether such " insanity or mental irresponsibility " still exists, or (3) whether defendant has become " sane or mentally responsible " between the time of the commission of the crime and the time of the trial. This special plea may be interposed either at arraignment *or at any time before the submission of the case to the jury*, provided it can be proved that the existence of such irresponsibility was not known before.[6] In

[1] Morrell *v.* St., 136 Ala., 44, 45, 34 So., 208 (1902).

[2] In the absence of the special, technical plea, evidence as to sanity is not admissible. Ward's Case, 96 Ala., 100, 102 (1891); neither is argument in such case, based upon insanity, permitted. Walker's Case, 91 Ala., 76, 81 (1890).

[3] Appendix, pp. 537, 538. [4] *Post*, p. 26. [5] Appendix, pp. 637, 638. [6] *Id.* p. 631.

New York the plea of insanity may be offered as a specification under the general plea of not guilty.[1]

A recent New York case [2] interestingly illustrates the inefficiency and injustice that may result from too great adherence to the technical theory of pleading. In that case, the facts, as reviewed by the appellate court, strongly indicated that a confession of murder in the first degree had been obtained from the defendant under circumstances that, to say the least, were suspicious. At the trial, counsel for the defendant opened his remarks to the jury with the statement: "I will show that this man has the mind of a youth of nine or ten years"; whereupon the district attorney exclaimed: "I object; it is not a matter of defense in this case as to the condition of defendant's mind; if that was made an issue we would be prepared to meet it." (There was, however, some testimony to the effect that a doctor representing the prosecution had visited the defendant at the jail, while he was awaiting trial.) The trial judge said: "He has not claimed to be insane"; and after some colloquy, defendant's counsel continued: "We will prove by competent evidence that the mind that this defendant has, is a mind that if you or any other man had a stronger mind, insisted, talked well, pleaded, threatened, . . . his mind would succumb." Having thus indicated to the jury that any statements attributable to the defendant were the result of his extreme suggestibility "and lack of comprehension on his part of what he was stating, or the result of an illusion that he was a hero" (in the language of the judge considering this case on appeal), defendant's counsel was nevertheless denied the privilege of making any proof of the defendant's mentality. As the whole case hinged upon the confession of guilt that the defendant was supposed to have made to the police, proof of his state of mind when he made the confession and at the trial, would determine the difference between guilt of murder in the first degree (with the death penalty), and acquittal.

Defendant's counsel then called a specialist in mental and nervous diseases who had examined the defendant, but an objection to the admission of his testimony on the ground, as the trial judge said, that "there is no defense of insanity interposed", was sustained. The jury being then temporarily excused, defendant's counsel attempted to explain to the court "that he intended to prove by the doctor that defendant's mind was such that, from the

[1] Appendix, p. 589. [2] People *v.* Joyce, 233 N. Y., 61, 69–71 (1922).

test he made, he had the mind of a boy between the age of ten and twelve years and that being so, his mind is easily influenced by people who have stronger minds, and from beating, and from talking to him by the officers, they would be able to get his mind in such a condition that he would not know what he was saying, or if he did say something, it would not be true." Counsel further said: "I would like to have it put upon the record that this doctor examined this defendant in the presence of two other doctors, one assigned by the district attorney." But the trial court sustained the district attorney's objection, on the ground that the defendant claimed he never made the statements attributed to him, the judge saying that the testimony as to his mentality would only be relevant if the defendant claimed he was either "tweedled" into making the statement to the police, "tracked or tricked." Upon this flimsy technicality, the confession of the defendant (made, as was said at the outset, under such circumstances as to have suggested grave irregularity, which the Appellate Court alluded to at great length), was admitted, and the defendant, who had on a previous trial obtained a divided jury, was this time found guilty of murder in the first degree; and this in spite of the fact that there was not a shred of evidence against him except his own alleged confession!

The Appellate Court of course held that serious error was committed by the trial judge. Justice Hogan, of the Court of Appeals, after reviewing the testimony, quoted several authorities (judicial and medical) to the effect "that there have been instances of false confessions for which it was impossible to assign any reasonable motive whatever."[1] He held that the "justice was in error in suggesting that defendant was required to file a special plea of insanity or lack of mentality as a pre-requisite to the introduction of evidence of insanity or lack of mentality. . . . If defendant was what is known in medical jurisprudence as a moron, *i.e.*, one whose intellectual development proceeds normally up to about the eighth year of age, then arrested, never exceeds that of a normal child of about twelve years, evidence of such fact was material for consideration by the jury."

[1] *See* Healy, "Pathological Lying, Accusation and Swindling"; pp. 35–37, and Chapter 4. Although this work deals primarily with accusation rather than confession, it is of allied interest. Case 20, pp. 203–213, is an excellent illustration of *self*-accusation. *See also* "Criminal Investigation", by Hans Gross (edition by Adam), p. 117.

But in the meantime the State had gone through the expense of two trials, and the accused was probably subjected to this dual ordeal unnecessarily!

Criticism of Provisions for Special Pleas. — The objection to requiring a special, technical plea of insanity to be filed only at the time of arraignment has already been alluded to in discussing the Alabama provision. Obviously, the proper procedure, from a socially desirable standpoint, is to permit the issue to be raised under the general plea of not guilty (*i.e.*, of course, where for some reason it was not made in a separate plea); as the determination of the questions of mental condition and legal responsibility, and not of the technical theory of pleading involved, is the important task at hand. However, a provision along the lines of the Washington law would be helpful to the court and prosecution. There does not seem to be any valid objection, even from the legal point of view, to permitting the questions of the mental unsoundness of the defendant and his irresponsibility to be raised *at any stage of the proceedings*. The objection that the prosecutor would not be in a position to answer the plea if it were raised under the general issue of not guilty, or if raised at any stage of the trial after arraignment of the defendant, can hardly be sustained; as in some forty States no special plea is required, and there does not appear to be any difficulty on this score. Further, the cases where prosecutors are not, in practice, prepared to meet such an issue, no matter when it is raised, are negligible; and the court would undoubtedly permit an extension of time in such cases, allowing the prosecutor to prepare to meet the issue. If the question of the defendant's mental condition at the time of the offense is to be honestly answered, technical considerations of the theory of pleading or of the proper time to file the pleading should give way to the practical problem before the court and jury, whenever that problem is raised.

Section 3 — Evidence of Mental Disorder ("Insanity") and Irresponsibility

Introduction. — When the plea of irresponsibility because of insanity is filed, and the case goes to trial, probably the most vexing question which arises is that of medical expert testimony. The procedure for receiving evidence as to the mental incapacity of the defendant has been severely criticized, especially by the

medical profession.[1] A committee of eminent lawyers and alienists,[2] appointed by the Institute of Criminal Law and Criminology, has devoted long and earnest study to the problem of expert testimony; and the fruits of their labors have been embodied in an "Expert Testimony Bill",[3] which, it is hoped, will be generally adopted. The bill goes as far in the simplification and modernization of the vexing problem of medical expert testimony as the restrictions of the law permit; and its general terms will be discussed in the concluding chapter.[4] Some pertinent rules of evidence, and objections to the present procedure, must, however, be considered at this point, so that the general reader may understand some of the difficulties involved.

"Substantive" and "Adjective" Law.—With the progress of the substantive law, namely, the law dealing with the rights and obligations of individuals in civilized society under a legal régime, another type of law, prescribing the orderly legal procedure for the enforcement of those rights and obligations, had to be developed. This so called adjective law not only prescribes the nature, constitution, and powers of legally organized tribunals, but the methods of procedure in such courts. Part of this adjective law as it affects ordinary criminal trials has been discussed in the preceding two sections, which have dealt with the questions of the procurement of the defendant's appearance before the tribunal ("process") and the ascertainment of the point at issue ("pleading"). Here several of the important rules of evidence, also embraced within the adjective law, and dealing with the third step in the proceedings, namely, the trial, will be mentioned. The rules of evidence are not concerned so much with the machinery of criminal jurisprudence, as with "sorting out and selecting materials which are supplied to it", thus taking account of the imperfections of the machinery. Evidence, according to one of

[1] The criticisms are numerous. Among them may be mentioned "Insanity and the Criminal Law" (1923), by Dr. William A. White, a psychiatrist and alienist of many years' experience as an expert in insanity cases (*see* especially, Chapters VII and XVI); "The Cross-Examination of the Alienist", J. E. Lind., *Journal of Criminal Law and Criminology*, 1922, Vol. XIII, 228; "The Medical Witness in Lunacy Cases", P. C. Hurst, 53 Oh. L. B., 458, 41 *Chi. Leg. N.*, 110 (1909), "Expert Testimony and the Alienist," W. A. White, *N. Y. Med. J*, July 25, 1908; "Expert Testimony," Kelly, *N. Y. Med. J.*, Nov. 27, 1919, etc., etc.

[2] The committee was appointed by Dean John H. Wigmore, in 1910. "Insanity and Criminal Responsibility", Edwin R. Keedy, *Harvard Law Review*, Vol. XXX, No. 6, April, 1917.

[3] Keedy, *op. cit.*, pp. 537, 538.

[4] *Post*, pp. 487, *et seq.*

the early systematic writers on the subject,[1] is "Any matter of fact, the effect, tendency, or design of which, when presented to the mind, is to produce a persuasion concerning the existence of some other matter of fact; a persuasion either affirmative or disaffirmative of its existence." One of the general rules of evidence is that the *opinions* of a witness, upon the question of the existence or nonexistence of any fact in issue at a trial, are not admissible.[2] The obvious reason for the rule is that, since the witness is not presenting to the jury that of which he has direct knowledge through his senses, — a matter, at least to some extent, of objective fact, — his mind might interpret the data differently from the jury's interpretation when it comes to give its own opinion upon the same facts. The duty of the modern jury, in other words, is solely to draw its conclusions from the facts presented by the presumably unbiased objective testimony of witnesses.

Medical Expert Opinion Admissible. — The history of the jury system makes clear why, in spite of the general rule against the admission of opinion evidence, medical opinions are nevertheless admissible. Originally, the jury consisted of a body of witnesses who were presumably familiar with the facts in issue, from their own, first-hand knowledge; indeed, they were drawn as *jurors* for the same reason that persons are to-day summoned as *witnesses*. Gradually, these qualifications became the very reasons for not permitting men to serve on a jury; and the jury became an inference-drawing body, with power to determine the ultimate facts in issue. Since lay persons, without any special knowledge, could not be expected to draw intelligent conclusions from technical facts requiring expert training and long experience, opinion evidence had to be admitted in these particular cases; though under the new function of the jury, *i.e.*, to settle questions of disputed fact, it was strictly barred as a general rule.

But though opinion evidence is received in aid of the jury on technical matters, such as mental condition,[3] the final decision in

[1] Jeremy Bentham, "Rationale of Judicial Evidence" (1827), Vol. I, p. 17.
[2] Conn. Mut. Life Ins. Co. *v.* Lathrop, 111 U. S., 612, 618 (1883).
[3] It should be pointed out that while the legal decisions attempt to distinguish between "medical insanity" and "legal insanity" (see note at end of Chapter 1) when concerned with the problem of responsibility, much confusion exists in the decisions as to the question of what types of *evidence* are admissible under these two categories (insanity and irresponsibility). Strictly speaking, the question involved in irresponsibility is whether the defendant's insanity (proved mental unsoundness) at the time of the offense actually pre-

these cases still remains with the jury. The jury's opinions may not be the same as those of the experts, and the jury avails itself of the experts' views solely as an aid in arriving at its own conclusion. Further, the jury is concerned primarily, not with mental condition *per se*, but as related to the tests of irresponsibility. When it is decided in any case that expert testimony would aid the jury in reaching a verdict, it is within the discretion of the court to say whether or not a person offered as an expert witness has or has not qualified as an expert; and whether, therefore, his opinion can go before the jury. Expert opinion in insanity cases can usually be met only by contrary opinions of other experts; and it is this fact, together with the use of the hypothetical question, that has led to those deplorable and sometimes disgraceful situations in insanity trials, which have elicited the just condemnation of many thinkers as well as of the general public. As representing the concensus of medical opinion upon the shortcomings of the law of insanity in these respects, the views of several eminent psychiatrists may be considered.

Criticism of Hypothetical Question and Expert Testimony. — Hypothetical Question Founded upon Erroneous Psychology. — The hypothetical question has been criticized on the ground that it is founded upon an erroneous conception of psychology; the belief, namely, that in the ordinary process of passing judgment upon a mass of conflicting testimony it is possible, and is the usual practice, both for the experts and the jury, to pigeon-hole various facts in logic-tight compartments of the mind, without letting them affect each other, or without permitting some of them to enter into the judging process and final opinion. There is no valid reason for not permitting the expert to express his opinion directly, since everyone in the courtroom knows that the "hypothetical monstrosity,[1] whose mental condition the expert is asked to pass upon, is the defendant; and it is impossible, psychologically, for the jury or the expert, answering the hypothetical question about the assumed person, not to be influenced by this knowledge."

Hypothetical Question Inefficient in Practice. — Another closely-related objection raised by White [2] and others to the hypothetical question is, not only that it is based upon an erroneous theory of

vented him from knowing right from wrong (or in some jurisdictions from resisting an impulse to do wrong); while the psychiatrist is concerned solely with the problem of the defendant's general mental condition.

[1] White, "Insanity and the Criminal Law", pp. 81, *et seq.* [2] *Id.*, p. 83.

the judging process, but that it is wholly ineffective in practice. To permit the prosecution and the defense to frame their own hypothetical questions upon the basis of testimony which each assumes has been proven, militates against the very purpose of expert opinion evidence; for it only confuses the jury and makes them believe that the data contained in the conflicting hypothetical questions have actually been proven.[1] Since, moreover, the data of the hypothetical question are all given equal weight, the truth cannot be arrived at, for "there are statements of fact in the hypothetical question which the expert knows, because he has heard the testimony and seen the person who gave it, to be absolutely worthless, and yet such a statement is given the same value in the question as any other."[2] The procedure becomes ridiculous, as White points out, when, as is often the case, individual, hypothetical symptoms and items are added to, or deducted from, the long hypothetical question, and the expert is asked whether his opinion would change with these additions or deductions. "Imagine the depths of absurdity to which such a method may lead. The expert is asked to tell what would happen if an assumed symptom was added to or subtracted from a group of other assumed symptoms which in turn are assumed to be exhibited by a hypothetical individual."[3]

Modern Procedure Leads to Bias. — Perhaps the most serious indictment of the modern practice as to expert testimony in insanity trials is the fact that, to place the experts in a partisan

[1] The hypothetical questions are subject, of course, to the court's general approval; but much latitude is ordinarily allowed in framing the questions.

[2] White, *op. cit.*, p. 86.

[3] *Id.*, p. 84. John E. Lind, "Cross-examination of the Alienist", *Journal of Criminal Law and Criminology*, Vol. XIII, p. 232, speaking as an expert of long experience, says: "The most common attack in cross-examination is by attacking individually each symptom quoted by the doctor in giving his reason for thinking the accused of unsound mind. This is quite effective and exasperating, its effectiveness lying in the fact that mental disorder is, speaking broadly, not demonstrable in any examination of the patient at one time, nor in any single act committed by him, but in a broad view of his conduct over a certain period of time or in the circumstances and setting, say, of his criminal act." He points out further the important fact that the doctrine of *probability*, which the expert relies upon in interpreting the symptoms, is not available when the symptoms are taken up singly. "Thus the prosecuting attorney may take a single act, quoted by the alienist, out of its setting and force the physician to admit that of itself it is not necessarily an insane act or a symptom of insanity. Then he may say: 'In other words, doctor, you have admitted that this is not a symptom of insanity; in other words, that it means nothing. Now, one thousand times nothing is still nothing, isn't it?' Which is perfectly true, mathematically speaking, but in medicine the whole is sometimes greater than the sum of all its parts."

position reduces the whole procedure to a battle of wits supported by fees, frequently resulting in distinct bias and prejudice on the part of opposing experts.[1] The procedure is entirely opposed to the original purpose of expert testimony, — namely, to aid the jury upon a technical subject. It takes on the guise of a bitter conflict between experts, which the jury not infrequently enjoys. This discredits the entire proceedings in the eyes of the jury and the public. Moreover, the existing practice permits the abuse, long ago protested against by Chief Justice Chapman of the Massachusetts Supreme Court, when he gave it as his opinion that " experts can be found to testify to any theory, however absurd." [2] All this leads to the popular conception of such cases, which Lind [3] humorously, yet accurately, describes:

" The picture which the general public usually forms of insanity as a defense in a murder trial is a series of bewhiskered experts solemnly testifying that the accused is insane, followed by a series of equally hirsute and learned men testifying that he is sane. The natural reaction of the layman is to discount the whole business and no doubt this is what practically happens in the case of many juries. They say among themselves, ' Well, three doctors have testified on one side and three on the other. We don't know which to believe. Let's throw this whole insanity business out. The man doesn't look very crazy to us, anyhow.' The result is, of course — a man being presumed sane by the law — that the accused loses all the benefit of a doubt as to his mental condition."

Just so long as the experts are hired by opposing sides they will stand " in the delicate relation of employed to employer "; and the procedure will to some extent be biased.

Expert Testimony Procedure should be Altered. — We have seen that, according to the legal theory, the jury's province is to pass its own opinion upon the evidence introduced in a case. In

[1] *See* note 2, p. 34, which indicates that some of the leaders in psychiatry in America are not only fully cognizant of this evil, but ready to aid in its elimination.

[2] *Cited* by Oppenheimer, "Criminal Responsibility of Lunatics", p. 263. This abuse has to some extent been remedied today by the legislation in some States setting forth the qualifications of psychiatric and psychological experts. *See* L. S. Hollingworth, "Existing Laws which Authorize Psychologists to Perform Professional Services", *Journal of Criminal Law and Criminology*, Vol. XIII, 70–73. But in most jurisdictions the merest medical tyro can "qualify as an expert." *See* Wigmore, "Evidence", Second Edition, Vol. 1, pp. 978, 979, and cases cited.

[3] *Op. cit.*, p. 229.

the matter of opinion evidence, the expert, *theoretically*, has nothing to do with the *evidentiary facts* upon which he is asked to express his opinion, "except to assume them as they are stated to him hypothetically." It is said that the advantage of the hypothetical question "is that it gets before the jury exactly the facts upon which the opinion is founded." This is probably true in simple cases and where mathematically-exact, technical knowledge can be given.[1] It is further explained by legal writers, that "Where an expert witness has heard the evidence, it might be thought that it would be simpler to ask his opinion upon the facts as proved, but this would be objectionable, for the reason that the jury alone

[1] Dean Wigmore, in his characteristically clear manner, gives a good example of the issue involved in this point of evidence, which at the same time illustrates the writer's contention that, while this technical rule of evidence is valid and useful in simple cases, it will not work in such intricate cases as insanity. He supposes that the issue is as to a mode of death. "A physician is asked, 'Have you considered the matter of a congestion of the windpipe with reference to the cause of death?' Answer, 'I have.' Then, 'What mode of death, if any, does it here indicate as probable?' Answer, 'Death by strangulation.' Now in order that this latter answer may be further considered by the tribunal for the case in hand, it is obvious that the circumstance on which it rests, namely, the congestion of the windpipe, must be supplied, *as a fact in the case*, by testimony. This may be done in one of two ways, — either (1) by the testimony of the physician himself, based on a personal examination of the body, that the windpipe was congested, or (2) by the testimony of some one else who has made such a personal examination. But if the latter method is chosen — and this is the important circumstance — the fact to be considered by the physician *must be placed before him as a hypothesis only*. . . . If this were not done, and if the single question were asked, 'What in your opinion was the mode of this man's death?', it would be impossible for the tribunal to tell whether to accept the witness' conclusion or not; since, if the tribunal were to find that there had been no congestion of the windpipe, it would be unable to know whether the physician's conclusion had been based on a consideration of that circumstance alone or on a consideration of some other circumstance alone or of both." ("Evidence", Second Edition, Vol. I, p. 1078.) All this is perfectly clear and psychologically possible, *where the conclusion rests upon one, or a few, simple facts*, as in this illustration. But what happens to this theory when the intricate question of insanity is to be decided — a question that can only be answered by considering myriads of facts and conditions running back to early childhood; data, which in their presentation hypothetically, are partially unproven and even contradictory? And what happens to it, further, when it is remembered that the expert in insanity cases has observed and probably heard, if not himself examined, the defendant? Can he then, by a feat of psychological legerdemain, keep the minute hypothetical data clearly apart in his mind from the impressions gained by him at first hand and from his whole training and experience? Do not all these factors enter into his final "Yes" or "No" answer to the hypothetical question? But see People *v.* McElvaine, 121 N. Y., 250 (1890), where it is said that "when specific facts, either proved or assumed to have been proved, are embraced in the question the jury are enabled to determine whether the answer to such question is based upon facts which have been proved in the case or not." Logically, and where one or two simple questions are to be answered, yes; psychologically, where the intricate problem of the condition of a human mind is concerned, no; at least in most borderline cases.

are to determine what facts are proved." [1] This would be a valid reason in simpler cases; it does not hold water when the intricate question of the state of a human mind is involved. The legal objection that it is the jury's and not the expert's function to decide whether the defendant is legally insane is not of much force when applied to insanity cases. In those cases, particularly, the jury knows it is the defendant about whom the expert is testifying, and it is impossible for the expert to consider the data of the hypothetical question apart from his knowledge of their relationship to the defendant on trial. Moreover, this technical legal difficulty could be partially remedied. It has frequently been pointed out by legal authorities [2] that the jury really has two questions to decide: (1) Was the defendant mentally sound (sane) or mentally disordered (insane) when he committed the illegal act? (2) If mentally disordered, was his affection of a kind and degree to constitute irresponsibility; that is, of a kind and degree, that, in the *jury's opinion*, came within the exemptions from responsibility as measured by one or the other of the legal "tests"? It is quite true that most frequently the jury does not consciously take these two distinct steps; that would be attributing to the jury a calm, deliberative, judging capacity which it notoriously has not. But such is the theory of the law, at any rate. Now, if the expert were permitted merely to state his opinion as to the defendant's *mental* condition, giving the grounds for his opinion (regardless of whether it was the result of personal examination and observation of the defendant, or based upon facts in evidence, or both — so long as he made these grounds clear to the jury); and if he were *not* required to answer, in addition, the categorical questions involved in the tests of irresponsibility, the medical witness would give the jury aid in a matter regarding which he really has expert knowledge. He would thus be fulfilling the mission that experts were originally intended to fulfill. Where,

[1] Dean Wigmore, "Evidence", Second Edition, Vol. I, p. 1081, acutely points out that it is not a matter of usurping the functions of the jury (because the jury may entirely reject the expert's testimony) but a need of separating "premises from conclusions", *i.e.*, since there are two distinct subjects of testimony, premises and conclusions, and the latter necessarily involve a consideration of the former, "the tribunal must be furnished with the means of rejecting the latter if upon consultation they determine to reject the former, *i.e.*, of distinguishing conclusions properly founded from conclusions improperly founded."

[2] *Cf.* Heinrich Oppenheimer, "The Criminal Responsibility of Lunatics", pp. 10 and 251.

however, he is asked if the hypothetical person described in the question knew right from wrong, or " the nature and quality " of the act he committed, or if his impulse to commit it was irresistible, the alienist cannot be expected to answer such questions, since they involve more than purely medical considerations. Where he does answer them, he is encroaching upon the jury's province. He is not merely giving the jury his medical opinion as to the defendant's *mental* condition (which is partly based upon his knowledge of the mental condition, generally, of patients of the defendant's class), but is going further, and telling them, in effect, whether they should acquit or convict.[1] Such a separation of the relative functions of the jury and experts would aid in maintaining in practice (so far as this is psychologically possible) that distinction between mental unsoundness (insanity *per se*) and *irresponsibility* which, under the present procedure, it is a psychological difficulty, if not impossibility, for the jury to comprehend and maintain. As long as the expert tells the jury his opinion as to whether or not the defendant could have satisfied the requirements of the tests of irresponsibility, the jury may just as well be eliminated entirely. When, however, he lays before them the results of his study of the defendant's heredity, his developmental history, and his record of reactions to environmental stimuli, and the results of psychiatric-psychological examination, he is aiding them in deciding if the defendant was mentally abnormal to a degree that psychiatry deems pathological. This information they can then use, in their own, distinct task of deciding whether, *upon all the evidence before them*, — expert and nonexpert, — the defendant was or was not *responsible.*

The element of bias, the partisan nature of expert medical testimony, must at all events be eliminated, before we may hope for substantial justice both to the individual and to society, and for a far-sighted, rational disposition of the unsound offender.[2] The

[1] That is, when it is remembered that the expert and jury, in practice, know that the defendant and the person described in the hypothetical question are one and the same.

[2] In a recent case in Chicago, which aroused worldwide interest (People *v.* Loeb and Leopold), the expert testimony of several leading psychiatrists and psychologists, in an elaborate hearing in mitigation of punishment upon a plea of guilty to murder in the first degree, was subjected to countrywide criticism by the press. What the newspapers failed to emphasize, however, was the fact that the first request made by the experts for the defense, after they had carefully examined the two minors who had pleaded guilty, was that the defense experts be permitted to meet informally with the prosecution's experts

experts in criminal trials, where insanity is pleaded, must be appointed and paid by a *neutral* body;[1] their testimony should not be influenced consciously or subconsciously by the source and amount of their fee. The hypothetical question must also be eliminated and a more efficacious instrument for aiding the jury in its decision must be substituted; at the same time it must not be forgotten — a fact so frequently ignored by medical men — that, after all, the task of determination of guilt or innocence is a *legal* one; and that certain wise, traditional rules of the game in the trial of insanity cases must be adhered to.[2] The privilege of

for the purpose of discussing the psychological and psychiatric findings in the case, very much in the manner of a consultation between experts at a bedside. It was hoped that by means of such informal, dispassionate procedure some agreement could be arrived at, both as to the findings and their interpretation. What the press did not emphasize was the fact that some of the eminent experts for the *prosecution* were not only willing to accede to this novel suggestion for raising the standard of medical expert testimony by eliminating, as much as possible, the atmosphere of suspicion and bias, but went to considerable trouble in an attempt to make such procedure possible. This unique effort at dispassionate and scientific discussion of the subject failed, however, with the result that, as usual, the public obtained an entirely erroneous and distorted impression of the testimony as well as the attitude of the leading psychiatrists involved in this important case. Numerous and sarcastic were the editorials as to the "highly paid experts for the defense" (in spite of the fact that men of equal professional standing in the law, for example, command much higher fees than were agreed to by the medical experts in this case); but not one paper seems to have mentioned the fact that both the defense and prosecution experts have devoted, and are still devoting, much of their time, thought, and energy, without any compensation whatsoever, in the earnest attempt to aid in the diminution of mental disorder and unhappiness, to increase the body of scientific knowledge in the field, and to raise the standards of the profession. These experts are too well known in their profession and in such associated fields as prison reform, probation, and other fields of social work, to require even the remotest semblance of an apologia on the part of any one. In a study of this kind, however, and because of the worldwide publicity given to the Leopold-Loeb hearing, one cannot permit to pass unchallenged the utterly unfounded and frequently absurd drivel indulged in by certain editors who did not know the first principles of the subject they were attempting to discuss, and who, as molders of public opinion, owed it to their readers to have taken the trouble to inform themselves of the facts.

The Leopold-Loeb hearing made it evident that not psychiatrists, but the weaknesses of the law and the bloodthirstiness of a yellow-journalized public, stand in the way of a fair, scientific study of the facts in the case of the individual delinquent.

[1] It would be better still, as Oppenheimer points out (*op. cit.*, p. 266), if we would follow the Continental practice, and have the duly qualified experts form a permanent professional body attached to the courts, such as the "*Gerichtsaerzte*" in Germany and the "*experts médecins près les tribunaux*" in France.

[2] *See* Vol. I, pp. 144, *et seq.* of Dean Wigmore's scholarly treatise on the Law of Evidence, for an excellent comparison between the Anglo-Saxon "contentious" system of trial, and the Continental "inquisitorial" system, where "the examining judge and the trial judge . . . seek before trial, and adduce at

cross-examination of experts and of putting their qualifications before the jury, for example, should not be denied, and must be taken into consideration in proposed reforms.[1] In brief, those rules of evidence evolved for the government of expert testimony *generally* should be modified in the light of the nature of expert testimony in insanity cases; yet the modifications, as nearly as possible, should fit into the existing structure of the criminal law and procedure. To achieve this desirable end, the device proposed by the Committee of the Institute of Criminal Law and Criminology, and which, in the opinion of progressive lawyers and doctors, constitutes a desirable reform, is recommended in this study.

Nonexpert Testimony. — The opinions of nonexperts are also admissible in most jurisdictions to prove a person's condition of mind; but such nonexperts must have been in a peculiarly favorable position to observe the conduct of the defendant. In connection with such opinions we have a further demonstration and admission of the unsatisfactory nature of the hypothetical question which is given to experts. The opinions of nonexperts are admissible on the ground that those who have associated intimately with the defendant are peculiarly in a position to recount numerous details upon which they base their judgment as to defendant's condition. The fact of the admissibility of such evidence, together with the fact that in many jurisdictions the opinions of nonexperts are accepted in evidence without first requiring, on their part, a recital of the facts upon which they are based (except that it must appear that the witness was qualified by association, acquaintance, and observation to make it probable that his opinion will be of value), indicate that there is a growing disposition in the law to get at the facts of mental condition in the wisest and most practicable manner, regardless of the technical rules of evidence; and that the reasons for requiring the hypothetical question, in the case of expert testimony, are not very weighty. In some

the trial, the bulk of the evidence; and the parties' counsel . . . act mainly as vigilant guardians." Dean Wigmore points out that under our system, trial judges too frequently forget that they have the power "to select and summon and place on the stand a witness not called by the parties."

[1] The cross-examination is frequently of greatest value in showing that one of two divergent opinions has been advanced on the basis of either insufficient experience or inadequate grounds. Dr. John F. W. Meagher ("Why Alienists Differ in Criminal Trials", *New York State Journal of Medicine*, March 14, 1924) gives a brief, clear analysis of the usual reasons for divergence of opinions among alienists.

jurisdictions evidence by nonexperts is admitted only after the facts upon which it is based are set out, and provided the facts are such as, in the opinion of the court, reasonably justify the conclusion drawn from them. Only in a few States [1] is such lay-opinion evidence inadmissible altogether.

Nature of Evidence of "Insanity." — Human qualities, such as mental capacity, may be "evidenced circumstantially by three classes of facts: (1) the person's outward conduct, manifesting the inward and causing condition; (2) preëxisting external circumstances, tending to produce a special mental condition; and (3) the prior or subsequent existence of the condition, from which its existence at the time in question may be inferred." [2] Since the mind is a unit and the environmental stimuli are numerous, the condition of the mind, its mode of operation, "cannot be ascertained to be normal or abnormal except by watching the effects through a multifold series of causes. On the one hand, no single act can be of itself decisive; while, on the other, any act whatever may be significant to some extent." [3] Hence any and all *conduct* is admissible in evidence; "for if a specific act does not indicate insanity it may indicate sanity. It will certainly throw light one way or the other upon the issue." [4]

When external circumstances are considered capable, to some extent at least, of inducing, intensifying, or precipitating mental disorder, they may "always be admitted to evidence the probability of such affection"; but some additional foundation for probability must be laid by "other evidence that there was a diseased mental condition." [5] In this connection it is interesting to note that psychic trauma have been placed on a parity in some of these cases with purely organic [6] inducing or precipitating factors, provided some evidentiary foundation is first laid of the existence of a sufficiently weak mind to make it probable that the psychic shock induced a definite psychosis. In People *v.* Wood [7] Justice Peckham was considering the admissibility of evidence that a defendant, charged with killing his father-in-law, and de-

[1] Massachusetts, Maine, etc.
[2] Wigmore, *op. cit.*, Vol. I, 2d ed., p. 294, and cases cited. [3] *Id.*
[4] *Id.* This doctrine was well set forth in State *v.* Hays, 22 La. An., 39, 40 (1890).
[5] Wigmore, *op. cit.*, p. 483, and cases cited.
[6] *See* Chapter 9, where the problem of psychogenesis of mental disorder is considered.
[7] 126 N. Y., 249, 259 (1891), cited by Wigmore, Vol. I, 2d ed., pp. 483, *et seq.*

fending on the ground of insanity, had been told by his wife, a week prior to the killing, of an incestuous rape upon her by the father. The purpose of the evidence was to show "an adequate cause for the state of mind existing subsequent to the communication, and . . . that in truth such communication acting upon a diseased and weakened brain produced insanity at the time of the commission of the crime." The court said:

It is not disputed that a fall on the head, a physical injury to the brain, or other physical and sufficient cause for insanity can be proved. . . . Any material fact which might account for or naturally lead to insanity at that moment may be proved. Why should not the defendant have the right to prove a moral cause which might act upon a brain already diseased and might result in insanity as naturally as blows upon the head? This in connection with evidence tending to show insanity at the time the act is done, is proper. . . . In fine, the evidence is admitted on the ground that it is corroborative, more or less strongly, of the mental condition which the other and separate evidence in the case tends to prove.[1]

Another external circumstance admissible as bearing upon the defendant's probable mental condition is evidence of hereditary mental disorder. Evidence of ancestral collateral insanity is admissible, subject to numerous technical limitations on the ground of the irregularity of the effect of hereditary insanity, "its frequent dependency on external provoking circumstances as a condition of bringing it into activity, and the possibilities of too much weight being given to its probative value."[2] On the whole,

[1] Upon this principle, evidence is of course admissible to show that defendant's mind was *not* susceptible to such influences; for example, to disprove, in the trial of a father for murder, that his mind had been deranged by the belief that deceased was trying to ruin his daughter, evidence was admitted of the incest of defendant with his daughter. — People *v.* Lane, 101 Cal., 513, 517 (1894). However, this technical rule shows the inadequacy of such rules in "insanity cases"; the incestuous relations are probably themselves indicative of a deep-seated mental disorder.

[2] *See* the voluminous citations in Wigmore, Vol. I, pp. 485, 486, who gives some of the important cases in each jurisdiction. About the most outstanding principle running through these decisions is that evidence of insanity in *too remote relatives* is not admissible. For example, insanity in a second cousin was held inadmissible. — Snell *v.* U. S., 16 D. C. App. 500, 511 (1900). Another principle is that there must be sufficient *other* facts tending to show insanity before evidence of hereditary or familial insanity will be admitted. — People *v.* Smith, 131 Cal., 466 (1866). In Green *v.* St., 64 Ark., 523 (1898), admissible only after evidence of insane conduct; in James *v.* St., 193 Ala., 55 (1915), insanity of defendant's mother and maternal aunt excluded on the facts, etc. See *post*, pp. 284, *et seq.*, where the question of heredity of mental disease is discussed. Until we have more definite and conclusive data than are at

the law on this point is still in a state of flux; and with the abolition of the hypothetical question and the employment of neutral experts, it may well be simplified. Such experts will be open to cross-examination as to the basis of their opinions; and if these are founded upon evidence of too remote ancestral or collateral mental disorder, that fact will be brought out to the jury.

Since mental unsoundness is, on the whole, a continuous, progressive condition, evidence of both prior and subsequent mental conditions is usually admissible; but the courts seem to overlook the point that a strict adherence to rules of evidence would require different practice in the various psychoses; for prior and subsequent conditions are of relatively different importance in the different mental disorders.

To realize the truth of this, one has but to think of the so-called circular insanities [1] (manic-depressive psychoses), or the various stages of the epileptic psychoses, or the practically permanent nature of the mental unsoundness in the feebleminded, for example. In all such cases, the best reliance is upon the opinion of unbiased experts. Of course, these prior and subsequent conditions are merely evidential towards arriving at a conclusion as to the defendant's mental condition during what Oppenheimer calls, "the critical moment",[2] that is, the exact time when the act was committed. As to the penumbra of time prior and subsequent to the exact moment of the act, within which evidence as to mental unsoundness is admissible, the cases are not in agreement;[3] each case must be decided upon its own merits and with regard being had to the nature of the psychosis involved. Under the Freudian theory of the psychic influence of early infantile mental conflicts and experiences,[4] the door might logically be thrown open entirely. Such matters are, in the final analysis, within the discretion of the trial judge; and are therefore fruitful of numerous technical appeals.

Evidence of an inquisition or adjudication of prior insanity is

present available, the law, like popular belief, can well maintain its present attitude. The exact influence of heredity in mental disorder is still far from settled. Doctor Abraham Myerson of Boston has recently brought out a work which promises to discuss this problem thoroughly; but at the present writing this contribution is not available.

[1] *Post*, Chapter 10.

[2] "The Criminal Responsibility of Lunatics", *op. cit.*, pp. 235, 236. He discusses this in connection with the defendant having the intent to do the act while in one condition of mind, and doing it while in another.

[3] Wigmore, *op. cit.*, Vol. I, 2d ed., p. 491.

[4] *Post*, Chapter 9.

admissible to prove the condition of the person's mind at that time;[1] but it is not conclusive upon a defense of insanity, to a crime later committed.[2]

Legal Presumptions in Insanity Cases. — In addition to the law as to hypothetical questions, expert testimony, and nature of evidence admissible, there are several other legal principles, such as certain presumptions and inferences with reference to "insanity" that the law reports abound in. There are also some technical rules as to burden of proof that must be touched upon. "A 'presumption' is a rule which the law makes upon a given state of facts", and is distinguished from an "inference", or "conclusion which, by means of data founded upon common experience natural reason draws from facts which are proven."[3]

Presumptions are *prima facie* (rebuttable) or absolute (conclusive). Thus, evidence that a child accused of crime is under seven years of age, creates the conclusive presumption that it was incapable of committing, and therefore not guilty of, the offense; while proof that the child is between seven and fourteen is sufficient to establish, *prima facie*, that he was incapable of committing the offense. In the former case, the child is acquitted as soon as his age of under seven is proved; in the latter, the result is merely to throw the burden upon the prosecution of introducing evidence that, in the particular case under consideration, the child *was* capable of committing the offense. If the prosecution has clearly proved the commission of the offense by the person accused, the latter need only prove he is under fourteen, "to throw the burden of proceeding back on to the prosecution." In other words, capacity to commit a crime, like sanity, is assumed by the law at the outset, and need not be specially proved by the prosecution, which relies, in the first instance, upon this assumption; but proof on the defendant's part that he is under fourteen, changes the assumption from capacity to incapacity and compels the prosecution to prove capacity as an element of the crime.

[1] In Earl Ferrer's Trial, 19 How. St. Tr., 885, 937 (1760), evidence that one of defendant's relations had been confined under a commission of lunacy was admitted to prove his insanity.

[2] In Barton *v.* St., 230 S. W. (Tex.), 989 (1921), defendant, a patient in an insane hospital, had been released on parole on condition that he should report in person or by mail every thirty days; and he committed the offense two and a half years after such release. *See also* Hazelwood *v.* St., 79 Tex. Cr. App., 483 (1916); Kellum *v.* St., 238 S. W. (Tex.), 940 (1922).

[3] Ensel *v.* Lumber Ins. Co. of N. Y., 102 N. E., 955, 88 Oh. St., 269.

Burden of Proof. — The presumption of sanity[1] is merely the general assumption that, ordinarily, human beings are of sound mind. "Sanity and insanity are terms applicable to the mode of operation of the mind as judged by some accepted standard of normality."[2] But as soon as the fact of sanity is put in issue (*i.e.*, where some evidence of mental disorder is introduced), the prevailing rule in most jurisdictions is that sanity, like any other fact, must be proved as part of the prosecution's case[3] beyond a reasonable doubt.[4] Therefore, when all the evidence is in, if there remains a reasonable doubt as to the accused's responsibility, on the ground of insanity and the tests of irresponsibility, there is a

[1] Some authorities call this a "spurious presumption." In State *v.* Pike, 49 N. H., 399, 443 (1870), the presumption of sanity was thus described: "There are certain natural or usual causes, effects, conditions, and customs, generally within the reach of the experience or the observation or the reason of men, which a jury are justified in finding by an inference or presumption of fact when there is no testimony showing an exceptional instance in the case on trial. . . . The presumption of sanity is not an artificial or legal presumption, but a natural inference of fact to be made by a jury from the absence of evidence to show that a party did not enjoy that soundness which experience proves to be the general condition of the human mind."

[2] Wigmore, *op. cit.*, Vol. I, 2d ed., p. 473.

[3] *See* Davis *v.* U. S., 160 U. S., 469 (1895). The doctrine prevailing in most jurisdictions is well stated in People *v.* Garbutt, 17 Mich., 9, 23 (1868), as follows: The prosecution "are at liberty to rest upon the presumption of sanity until proof of the contrary condition is given by the defense. But when any evidence is given which tends to overthrow that presumption, the jury are to examine, weigh and pass upon it with the understanding that although the initiative in presenting the evidence is taken by the defense, the burden of proof upon this part of the case, as well as upon the other, is upon the prosecution to establish the conditions of guilt." In the notorious Thaw Case, Mr. Justice Fitzgerald charged the jury according to the other prevailing rule: "The legal presumption is that the defendant was sane when he committed the act, and it is not necessary for the prosecution to show that he was sane. Sanity being the normal and usual condition of the community, the law presumes sanity, hence a prosecutor may work on the presumption of sanity. Whoever denies it must prove insanity. The burden of overthrowing the presumption of sanity, and of showing insanity, is upon the person who makes the allegation."

[4] This term in the criminal reports illustrates "what a futile grist of profuse jargon is permitted by some Courts to be ground out annually in the name of truth and justice." — Wigmore, *op. cit.*, Vol. V, 2d ed., footnote, p. 465. The most frequently approved definition of "reasonable doubt" is that of Chief Justice Shaw in Com. *v.* Webster, 5 Cush. (Mass.), 295, 320 (1850). "Reasonable doubt is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge . . . a certainty that convinces and directs the understanding, and satisfies the reason and judgment." Wigmore (*op. cit.*, Vol. V, 2d ed., pp. 465, 466) decries the attempts of judges to enter into lengthy statements on this subject: "When anything more than a simple caution and a brief definition is given, the matter tends to become one of mere words, and the actual effect upon the jury, instead of being enlightenment, is rather confusion."

reasonable doubt upon the whole issue of his guilt, and he should accordingly be acquitted.[1]

Two other views as to the burden of proof in insanity cases prevail: (1) A variation of the first view (held by a few courts), which requires only a *preponderance* of proof on the part of the prosecution, as to the mental element of the crime;[2] and (2), a view being increasingly adopted, that the *accused* has the burden of proving[3] insanity, that is, *he* must persuade the jury beyond a reasonable doubt, or at least by a *preponderance* of the evidence, that he was irresponsibly mentally unsound when he committed the offense.[4]

[1] Davis *v.* U. S., 160 U. S., 469 (1895); State *v.* Jones, 50 N. H., 369 (1870); Plummer *v.* St., 135 Ind., 308, 320 (1893).

[2] Wigmore, *op. cit.*, Vol. I, 2d ed. p. 484.

[3] There are really two kinds of burden of proof. The first relates to the "risk of nonpersuasion", that is, the risk remaining throughout the trial upon the side which must establish its contentions beyond a reasonable doubt (or at least by a preponderance of the evidence). The second, sometimes called "the burden of proceeding" refers to the judge's duty of deciding who must, at various stages of the presentation of the testimony, take the initiative in the presentation of further evidence. — Wigmore, *op. cit.*, Vol. I, 2d ed., pp. 442, 443. The burden of proof never shifts but remains to the end of the case with the prosecution; the burden of proceeding with the evidence shifts from one party to another. *See* People *v.* Garbutt, 17 Mich., 9, 21–23 (1868); Fife *v.* Com., 29 Pa., 249 (1858); State *v.* Crawford, 11 Kan., 32, 45 (1873); People *v.* Downs, 123 N. Y., 558 (1890).

[4] This was substantially the rule in the Opinion of the House of Lords, following upon McNaghten's Case (10 Cl. & Fin., 200 (1843), see p. 212). This opinion laid down the rule that the jury should be instructed that "every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his crime until the contrary be proved *to their satisfaction;* and that to establish a defense on the ground of insanity, it must be *clearly proved* that at the time of committing the act the party was laboring 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 as not to know that what he was doing was wrong." It is acutely pointed out, in State *v.* Quigley, 26 R. I., 263 (1904), that "the English rule implies that the question of guilt and the question of insanity raise two distinct issues, and that while both may be involved in the final verdict, the burden of proof upon each issue lies upon different parties. . . . The American rule, so called, holds that in a criminal case there is but one issue and that the burden throughout is upon the prosecution to prove, not only the criminal act, but the capacity of the accused to commit it beyond a reasonable doubt. . . . Sanity is not an ingredient of crime. It is a condition precedent of all intelligent action, as well benevolent as nefarious. It is a quality of the actor, not an element of the act. . . . Sanity . . . is a preëxisting fact which may be taken for granted as implied by law and general experience. . . . In murder, the prosecution must establish the act, and either by inference or additional evidence, malice, and premeditation. If these ingredients of the crime cannot exist without sanity, sanity is presumed. All ingredients of the crime must be proved, and as to these we agree the burden never shifts; but as to sanity, it never attaches to the prosecutor. The plea of not guilty by itself does not put the sanity of the accused in issue. He must raise the question otherwise . . . if not by special plea at least by introducing evidence, and this is confession and avoidance." *See also* cases cited in this case.

Practical Importance of Burden-of-Proof Rules. — As to the *practical* importance of the intricate rules as to burden of proof, two more or less divergent views prevail: Oppenheimer seems to consider them more important than the substantive law on the " tests " of irresponsibility:

> The practical value of those maxims and the question whether substantial justice is done, depends . . . not merely on the terms of the abstract propositions in which the test is laid down, but to a very large extent upon the spirit in which it is to be applied in practice, and first and foremost upon those principles of adjective law which determine the amount of evidence necessary to establish the plea of insanity.[1]

Following the English law, he draws a sharp line between *insanity* and *irresponsibility*,[2] and says, in accordance with Stephen's views:[3]

> (1) Everybody is presumed to be sane.
> (2) Everybody, even one proved to be insane, is presumed to be responsible; in other words, even the raving lunatic is presumed to come up to the law's standard of responsibility, *i.e.*, to be able to distinguish right from wrong. . . . A prisoner who sets up the plea of insanity, has to prove:
> (1) That he is of unsound mind. Having satisfactorily established this, he must show further
> (2) That he fulfills that condition under which alone the law excuses a madman who has done an act otherwise criminal.[4]

Under this interpretation, evidence as to irresistible impulse or homicidal impulse, kleptomania, etc., is, strictly speaking, admissible even in those jurisdictions where only the right and wrong[5] test of irresponsibility prevails. For, as Oppenheimer correctly points out, it is admissible *not* to establish *irresponsibility*, to which purpose it is irrelevant, but " in guiding the jury to arrive at a solution of the primary question whether the prisoner is suffering from mental disease,"[6] of which it is symptomatic. At the same time, it should again be pointed out that in most American cases, the distinction between insanity (*i.e.*, mental unsoundness)

[1] "Criminal Responsibility of Lunatics", *op. cit.*, p. 247.
[2] *See* note 4, p. 42 for cases following this view.
[3] Sir James FitzJames Stephen, "Digest of the Criminal Law", Art. 29.
[4] "The Criminal Responsibility of Lunatics", p. 251.
[5] The various tests of irresponsibility are discussed in Chapters 7, 8.
[6] "The Criminal Responsibility of Lunatics", p. 253.

and irresponsibility is, to say the least, vague and confused; and, further, it must again be mentioned, that the actual psychological processes of the jury are rarely of that calm judicial nature that can clearly keep questions of insanity (mental unsoundness, in the psychiatric sense) distinctly apart from questions of *responsibility*. In most of the appealed cases, the discussions as to burden of proof use the term " insanity ", or they employ " irresponsibility " and " insanity " interchangeably.

On the basis of Oppenheimer's clean-cut distinction, he insists rightly that " whilst the most definite proof should be required of the *existence* of mental disease, when once it has been established that the prisoner is a lunatic, the present presumption of the law should be reversed; and it ought to be laid down as a rule of evidence that those proved to be of unsound mind should be assumed, till the contrary be shown, *not* to know the nature and quality of their acts and that that which they were doing was wrong." [1]

The other view as to the practical effect of the technical rules of the burden of proof, and the one which a study of American cases and a knowledge of psychology bears out, is that,

> In practice, the specific rules for burden of proof make upon us the impression of vain logical verbalities, — on the whole. They are, inherently, artificial methods of controlling the mind's operations. And when applied by a judge in the form of words which the jury is supposed to put to use in the privacy of its chamber, they are unlikely to have the supposed effect, — or indeed any effect, when they are more than the simplest rules of thumb. Comparing the amount of judicial thought expended upon them, they are probably the least worth-while part of the rules of Evidence.
>
> And yet they have a necessary place, and they are intrinsically sound enough. What to do with them, is a hard question. But it would be interesting to test them empirically, *i.e.*, by asking one hundred trial judges whether they have ever observed that these rules had their designed effect upon the jurymen's decisions.[2]

In view of the fact that juries find it difficult, psychologically, to keep questions of insanity distinct from those of irresponsibility, and of the further fact that, as Dean Wigmore suggests, it is difficult for them to be guided by instructions as to burden of proof in simple cases, — especially in cases which involve two distinct lines of evidence and burdens of proof (*i.e.*, mental un-

[1] *Op. cit.*, p. 253.

[2] Wigmore, *op. cit.*, Vol. I, 2d ed., p. 146.

soundness and irresponsibility) — one might despair of introducing a practicable reform into this branch of the law. It is desirable under our present criminal law, and from the point of view of the safety of society, that the jury be aided in maintaining the distinction between mental disorder generally and irresponsibility, if this is possible; for not all mentally disordered persons should be regarded as completely irresponsible for their acts.[1] Since, moreover, in the following pages we recommend the adoption of further tests of irresponsibility than the mere right-and-wrong rule (because this rule does not cover all mental disorders which frequently result in misconduct) some safeguard is necessary to prevent the jury from going to the other undesirable extreme, and acquitting all persons shown to have but slight psychotic taint. The confining of the expert's province to testimony as to mental condition generally and leaving the question of irresponsibility exclusively to the jury, already mentioned,[2] should help the jury to maintain this distinction. With this aid as a basis, a further safeguard would be to require that the existence of a pathological mental condition must be established by the defense, by a fair preponderance of the evidence, but that once mental disease or defect is proved, the presumption shall be that the defendant is not only insane, but legally *irresponsible*. The prosecution would in such cases be forced to establish responsibility on the part of such insane (mentally unsound) defendant, beyond a reasonable doubt. Trial judges can do much in aiding the jury to take these two distinct steps. If it is found, however, that the jury can still not maintain this distinction in practice, that fact should be frankly recognized; and it is believed that, in that likely event, the desirable balance,[3] between the social interest in the individual life and the social interest in the protection of society, could best be achieved by having, on the one hand, rules of irresponsibility liberal enough to cover all the recognized mental

[1] Of course many believe that the mere doing of a criminal act is itself conclusive proof of an irresponsible, disordered state of mind. The penological implications of such a view are revolutionary; and until it can be demonstrated conclusively, and society is given greater power over the individual life, all we can hope for is partial improvement of the law along the lines that, in our day and age, seem to be justified.

[2] Pp. 32, 33, *ante*.

[3] As to the general theory of "the balancing of interests", *see* Joseph Charmont, "The Conflict of Interests Legally Protected in French Civil Law", 13 *Illinois Law Rev.* (1919), p. 461; Korkunov, "General Theory of Law", Hastings' transl., Sec. 25; Kantorowicz, "Rechtswissenschaft und Soziologie", pp. 17, *et seq.*

disorders, but requiring, on the other, that mental unsoundness (which will now be practically synonymous with irresponsibility) must be proved by the defendant beyond a reasonable doubt.

Summary. — From this survey of the principal steps and rules involved in a criminal prosecution, it will be seen that the question of the mental disorder of an accused person may arise at several stages during the criminal proceedings: It may arise immediately after the arrest of the accused, while he is in jail awaiting his preliminary examination by a magistrate; it may be raised during such examination by the magistrate or after the examination and while the defendant is in jail awaiting trial. (The question, however, rarely arises in these early stages.) It may also be raised before or during trial, — either by way of *defense* to the criminal charge, or as constituting legal incapacity to be tried, sentenced, or executed because of mental unsoundness. When mental disorder is raised as a *defense*, the *ultimate* issue to be decided at the trial, in addition to the question of whether or not the defendant actually committed the offense, is whether he was insane, in a legally acceptable sense (*i.e.*, irresponsible) *at the time he committed the act.* When raised as constituting legal incapacity to be *tried, sentenced, or executed*, the matter to be determined is the mental condition of the defendant immediately before, during, or after the *trial.*

The modern procedure with regard to the introduction of expert testimony, and the use of the hypothetical question, were shown to be based upon an erroneous psychology, to be inefficient in practice, to lead to bias and possible miscarriage of justice. Appointment and payment of experts by a neutral body, and the elimination of the hypothetical question were recommended. This should greatly simplify the technical rules of evidence. An alternative between aiding the jury to distinguish insanity from irresponsibility, and frankly abolishing the distinction but requiring proof of mental disorder beyond a reasonable doubt, was recommended.

In the following pages we must retrace our steps to discuss, in detail, the problem of mental disorder when it arises before and during trial, and the procedural machinery in force in the various States for detecting and properly disposing of those accused persons whose mental condition makes it unjust that they should be subjected to trial and that the State should undergo the needless expense involved in such trial.

CHAPTER 3

MENTAL DISORDER OF ACCUSED BEFORE TRIAL

"Shall the law of the provinces be always at variance with the law in the capital? Shall a man be right in Brittany, and wrong in Languedoc? Nay, there are as many laws as there are towns; and even in the same parliament, the maxims of one chamber are not the maxims of another. . . . In short, to what side soever we turn our eyes, we are presented with a confused scene of contradictions, uncertainties, hardships, and arbitrary power. . . . In the present age, we seem universally aiming at perfection; let us not therefore neglect to perfect the laws, on which our lives and fortunes depend." — Attributed to Voltaire, in the preface of the first (1767) English translation of Beccaria's "Essays on Crimes and Punishments."

Section 1 — Insanity before Indictment

Introduction. — Most legal treatises on the subject of insanity and the criminal law neglect the problems of procedure which arise when it is found or alleged that an accused person is mentally unsound (before or after indictment) while awaiting trial, or at the time of the trial itself. Yet these questions, when considered from the point of view of the social problem of the mentally unsound offender in its entirety, are of great significance. Moreover, there are signs that they are gradually becoming more important than the tests of criminal irresponsibility themselves; for judges and district attorneys are beginning to agree with psychiatrists that it is more efficient, economical, and humane to sort out, *before trial,* those accused persons who are mentally abnormal, than to subject such persons to the ordeal of a trial only to be compelled to transfer them, early in their prison service, to some hospital for the mentally ill.

The legal problem of insanity before or during trial does not involve the issue of guilt or innocence, responsibility or irresponsibility; it is concerned with mental capacity to be arraigned, tried, or sentenced, which capacity, according to the numerous hazy cases on the subject,[1] is of a different type or degree from that constituting irresponsibility.

[1] *See* cases collected in note in 3 *American Law Reports,* 94, *et seq.* Some of the so-called "tests of *present* insanity" found in the cases are: Whether accused is mentally capable of rendering his attorneys such assistance as a proper defense to the indictment preferred against him demands; or, whether he has "mind and

The Problem at Common Law. — In early English law, it was provided, in the language of Blackstone, that "if a man in his sound memory commits a capital offense, and before arraignment for it he becomes mad, he ought not to be arraigned for it, because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried; for how can he make his defense?"[1] This was merely a recognition of the principle enunciated in some of the early English cases.[2]

Law To-day. — The law in American States to-day is not essentially different from the old English law, except in two or three respects. In most States, for example, some definite procedural machinery is set in motion in case of the alleged mental unsoundness of a defendant before indictment, or before or during trial; and in some jurisdictions the demonstration of *probable mental disorder* that must be made on the defendant's behalf before the trial court will set such investigatory machinery in motion for the purpose of establishing insanity is also definitely prescribed by statute. At common law the question of insanity (mental incapacity to be tried, as such incapacity is prescribed and interpreted legally) at trial was usually settled by a separate jury,[3] but occasionally personal inspection, by the judge, of a defendant whose counsel claimed such defendant to be insane at or before the trial, took the place of a special jury trial of that question. Again, at common law an individual found to be totally insane

discretion" which would enable him to appreciate the charge against him and the proceedings thereon. Jordan *v.* St., 124 Tenn., 81 (1911); whether he is sane enough to recall the events of his life, and to represent to counsel the facts which ought to be stated to the jury upon a trial on the indictment. State *v.* O'Grady, 3 O. N. P. Rep., 279 (1896); whether accused is able to comprehend his position. State *v.* Peacock, 50 N. J. L., 34 (1887). A person, though not entirely sane, may be put upon trial in a criminal case if he rightly comprehends his own condition with reference to the proceedings and has such possession and control of his mental powers, including the faculty of memory, as will enable him to testify intelligently and give his counsel all the material facts bearing upon the criminal charge against him, and material to repel criminating evidence. — United States *v.* Chisolm, 149 Fed., 284 (1906). *See also* Com. *v.* Braley, 1 Mass., 102 (1804), one of the earliest American cases in which this question arose; and Com. *v.* Hathaway, 13 Mass., 299 (1816). The whole matter rests within the discretion of the trial judge.

[1] "Commentaries", IV, 24. Blackstone, writing in 1765, summarized the views of Coke and Hale (seventeenth century) on this subject. For notes as to these writers, *see* Chapter 5, p. 124.

[2] Bateman's Case, 11 How. St. Tr., 467 (1685); Kinloch's Case, 18 How. St. Tr., 395, 411 (1746); Frith's Case, 22 How. St. Tr., 311 (1790).

[3] Hawkins, "Pleas of the Crown", p. 3.

by one of these methods was kept in prison until he could be tried; to-day he is usually, though not in all jurisdictions, confined in a hospital for mental diseases.

Failure to Indict Because of Insanity. — Taking up first the problem presented by the mental unsoundness of an accused person who is in jail awaiting indictment by the grand jury, or whom the jury has failed to indict because he is insane, we find that in many States there are no statutory provisions covering the subject. In such jurisdictions, where the grand jury has not acted, there is nothing to prevent the mentally disordered offender from continuing at large, unless it be the initiation of commitment proceedings as in the case of the noncriminal mentally unsound. Occasionally, the machinery provided for the determination of the insanity of a defendant *after* indictment might be availed of to cover insanity before indictment. However, there is nothing to compel such action to be taken.

Procedure in most States which have Specific Legislation on the Subject. — The procedure in most of the States which do have legislation on the subject is substantially that of Massachusetts: If the grand jury does not indict because of the mental unsoundness of the person held in custody on a criminal charge, they certify that fact to the court, which, " if satisfied that he is insane ", may have such a person committed to a State hospital, " under such limitations as it may order." [1] It will be noticed that in Massachusetts, as well as in those States which have similar proceedings, no distinct means, other than the report of the grand jury, are provided, whereby the judge can be satisfied that a person awaiting indictment is insane. However, it is the practice for the court to appoint experts to verify the opinion of the grand jury, and usually the court bases its disposition of the case on the findings of such experts. But in Massachusetts, definite machinery being provided whereby the Department of Mental Diseases may appoint experts to examine the defendant before trial,[2] the judge could possibly avail himself of this means to determine the mental condition of one not indicted because of alleged insanity.

[1] Appendix, p. 561. A further provision is made in Massachusetts for the distinction between such person as the court finds to have been a criminal before the present indictment or to be "of vicious tendency", and persons not in one of these categories: the former are sent, in the court's discretion, to the State Hospital for the Criminal Insane. — *Id.*

[2] *Post*, pp. 55, 56, and pp. 58, *et seq.*

States where Procedure Discretionary with Court; Place of Commitment. — In Louisiana [1] the court may commit a person not indicted because of insanity, if he deems such person dangerous. In Michigan,[2] if the discharge is deemed "manifestly dangerous to the peace and safety of the community", the court may order him to be retained in *prison* until further order. Another law in Michigan [2] provides that when a person accused of murder, attempt at murder, rape, attempt at rape, incest, abduction, highway robbery or arson, escapes indictment upon the ground of insanity, the court, when notified by the grand jury of the fact, must "carefully inquire" whether his "insanity in any degree continues", and if so, must send him to the State asylum. No specific procedure for this careful inquiry is laid down. In New Hampshire [3] the judge may commit such persons, if he thinks it dangerous that they be at large, either to prison or to the asylum, and in Vermont [4] such person may be confined in the county jail or State hospital for the mentally diseased.

Chancery Proceedings and Jury Trials. — In Mississippi [5] the grand jury must state whether they believe such person dangerous and the court must thereupon report its finding to the *chancery court*, for the institution of *lunacy proceedings*. In Ohio,[6] when the grand jury finds accused insane, it reports the matter to the court, which must order a *jury trial;* and if the petit jury appointed for the purpose finds the accused insane, he is committed to a State hospital.[7] In Utah,[8] also, such person is accorded a jury trial in the court where the indictment would have been returnable if found by the grand jury.

Commission. — In Pennsylvania [9] if a person in jail awaiting indictment is, "in the opinion of the superintendent, jail physician, warden, or other chief executive officer of the institution or other responsible person," "insane", or "in such condition as to make it necessary that he be cared for in a hospital for mental diseases", one of these persons must "immediately make application", upon a form prescribed by the Department of Public Welfare, to the proper judge, for commitment of the prisoner to such hospital. The court must thereupon order an inquiry either "by *two qualified physicians*" or by a *commission* composed of two qualified physicians and a lawyer, for examination and written report as to

[1] *See* Appendix, p. 553. [2] *Id.*, p. 565. [3] *Id.*, p. 577. [4] *Id.*, p. 624.
[5] *Id.*, p. 567. [6] *Id.*, p. 596. [7] *Id.* [8] *Id.*, p. 622. [9] *Id.*, p. 606.

whether, in their opinion, the person examined is "insane"[1] and is of "criminal tendency."[2] The court may in addition summon other witnesses and consider other evidence, and if satisfied that the "person thought or alleged to be insane is in fact insane", he *must order the removal* of such person to a hospital for mental diseases, "there to remain until the fact of his recovery is certified to the court."

County Board of Commissioners of Insanity. — In Iowa,[3] if any citizen makes written application under oath that a person confined in prison charged with crime but not yet indicted is insane, the *county board of commissioners of insanity*, composed of the clerk of the district court or his deputy, "one physician in actual practice and of good professional standing in the community, and one lawyer in actual practice and of good standing in his profession and in the community", appointed by the judge of the district court for a two-year term, must cause the prisoner to be brought before them; and if they find he is insane, they must commit him to a State hospital until the superintendent finds him to be cured. Here the board commits directly, while in Pennsylvania the commission merely reports its findings to the court, which may or may not accept them.

Procedure upon Recovery of Mentally Unsound Person not Indicted because of Insanity. — When a person not indicted because of insanity and sent to a hospital or other institution has recovered, the procedure usually is for the superintendent to notify the judge and prosecuting attorney concerned, who may resume proceedings or discharge the prisoner, as they see fit.

Discussion of Procedure. — Because of the elaborate provision in most States for the treatment of the problem of alleged insanity of a defendant upon *arraignment* or *during trial*, the question of his insanity before indictment is of secondary importance. The ideal procedure would of course be to weed out, before indictment, those held for an alleged criminal offense who are mentally ill. This could be accomplished by an efficient psychiatric clinic attached to the lower courts. If a trained psychiatrist and social investigators were attached to the police department,[4] district

[1] This is a *legal report*, not a medical opinion; hence the term "insane."
[2] *See* Appendix, p. 611, for definition of "criminal tendency."
[3] Appendix, p. 541.
[4] Former Police Commissioner Woods of New York recognized the value of a psychopathic clinic in connection with the police department; unfortu-

attorney's office, or magistrate's court much time and money might be saved by the *routine commitment*, to proper institutions, of those arrested for crime who, upon examination, were shown to be of unsound mind.[1] However, it must be remembered that once such persons are committed, their relatives and friends will more readily seek to have them discharged at a subsequent hearing on *habeas corpus* than would be the case if they were sent to the proper institutions with a record of an indictment hanging over them. In other words, this problem, as well as all the related questions, is intimately interwoven with the problem of the type of machinery provided for the *ultimate discharge* of such persons. In practice, most prosecutors prefer to present the facts to the grand jury (unless the prisoner be grossly disordered mentally), have the jury find a true bill, and let the question of insanity be settled at some stage in the subsequent proceedings.

As to the use of a jury to determine such question after the grand jury has refused to indict because of insanity, the obvious objection to such procedure is that a lay jury is in no position to answer what, in this stage of the proceedings, really amounts to a medical question. The appointment of experts by the judge, to inform himself as to the mental condition of one not indicted because of insanity, ought to answer the purpose, provided the experts so appointed have been trained in the diagnosis and treatment of mental diseases. It must be remembered that the question at this stage is most frequently that of whether a person is in a condition to be *tried* (although the experts sometimes indiscriminately deal also with the accused's state of mind at the time he committed the *offense*). There is more reason for having the question of insanity at time of the *offense* tried by a jury than the question of a defendant's mental condition before *trial;* for in the former case the determination of the mental condition of the defendant at the time of the offense (often several months or even a year before trial) is largely a matter of inference based upon testimony as to past

nately, this remarkable experiment was short-lived. Chief of Police August Vollmer of Berkeley, Cal., one of the most far-sighted police officers in America, is using a psychiatric clinic in connection with the work of his department, with apparent success. *See* "Crime, Abnormal Minds and the Law", by Ernest Bryant Hoag, and others.

[1] At present psychiatric clinics attached to magistrates' courts deal almost exclusively with misdemeanants, over whom such courts have summary jurisdiction. In juvenile courts, clinics are of course of inestimable aid in wisely disposing of children accused of felonies, as well as of juvenile misdemeanants.

fact; and it deals with the subject of *responsibility*, — a question for the jury.

The ideal and most economical procedure, then, would be to subject arrested persons to a thorough psychiatric examination and social investigation as a matter of *routine*, immediately after the hearing before the committing magistrate; at least, this might be done in certain cases where the nature of the offenses raises the suspicion of the accused's mental unsoundness. If the report of the psychiatrist and social worker showed a person so examined to be in no mental condition to be tried, he could be committed as are the noncriminal mentally ill, thus saving the time of the prosecutor, grand, and petit juries. Should such person be sufficiently recovered to stand trial, the prosecutor would be notified; and, if he so desired, criminal proceedings could be resumed at this stage. Of course, such procedure is only practicable where funds are available for a well equipped psychiatric, psychological, and social laboratory with sufficient personnel to keep abreast of the arrests, at least of those with long and serious criminal records; it is feasible only in large cosmopolitan centers, where one laboratory could take care of the combined criminal business in all the magistrates' or district courts. Moreover, it would require the sanction and coöperation of prosecutors and judges, and the moral support of a well informed public opinion.

Section 2 — Insanity of Defendant After Indictment but Before Trial[1]

Introduction. — Taking up now the procedure that follows upon allegation of the accused's "insanity" at the time when he is under indictment and awaiting trial, we find that many States have no special legislation governing this point; in such States the common law rules are in force. In the States that do specifically provide for such cases, the laws can profitably be considered from two points of view: First, how and by whom the existence of the alleged mental disorder of a prisoner before trial is brought to the attention of the court; secondly, the procedure that is then followed. Before surveying this State legislation, it is neces-

[1] The substance of this section constituted the author's article on "State Legislation Providing for the Mental Examination of Persons Accused of Crime", *Mental Hygiene*, Vol. VIII (January, 1924), p. 1, reprinted *Journal of Criminal Law and Criminology*, Vol. XIV (1923–1924), pp. 573, *et seq.*

sary to point out that by far the majority of arrested persons are released on bail after arraignment; hence, if these persons are not examined as a matter of routine procedure immediately after arraignment, their examination may not take place at all.[1]

(1) **By Whom Existence of Mental Unsoundness is Brought to the Attention of the Judge.** — In some six or eight States, of which New York[2] may be taken as typical, the law provides for appropriate procedure if "it shall appear" that accused awaiting trial is insane; such legislation does not specify to whom the existence of such insanity on the part of accused must "appear", nor what constitutes such an appearance of insanity. In New Jersey[3] the procedure extends specifically to those accused who appear "insane, *epileptic*, imbecile or feeble-minded", thus widening the common law classification. In Maryland[4] procedure is provided if the defendant "shall appear to be or be alleged to be insane", to the justice. Such laws are passed on the assumption that the average trial judge is sufficiently versed in psychiatry to recognize an insane defendant, or at least to judge between the views of rival experts. In Virginia,[5] if the court *or attorney for the Commonwealth* has "reason to believe" the accused is in such mental condition that confinement in a hospital or colony for the feebleminded is necessary for care and observation, steps are taken for the purpose.

Action by Person having Defendant in Custody. — Rhode Island[6] provides for appropriate procedure, in case accused is "insane or idiotic", on petition of the agent of the Penal and Charitable Commission, or officer having custody of the accused. In Connecticut[7] the mental condition of accused is brought to the attention of the court by the sheriff. In Pennsylvania[8] the jail physician or executive officer of the institution where the accused is confined may initiate proceedings by filing with the court an application for commitment, prescribed by the Department of Public Welfare.

Special "Plea of Insanity", before Examination Allowed. — In a few States, of which Vermont[9] is an example, if a plea of insanity is made, or if the judge believes such plea will be made, he may commit the accused to the State hospital for observation. In such cases the difficulty is that counsel for the defendant often

[1] *See* pp. 60, 61. [2] Appendix, pp. 586, *et seq.* [3] *Id.*, p. 579. [4] *Id.*, p. 557. [5] *Id.*, p. 626. [6] *Id.*, p. 613. [7] *Id.*, p. 519. [8] *Id.*, p. 606. [9] *Id.*, p. 624.

are not themselves aware of his mental condition; and even if they are aware of the fact, *they may deem it for the best interests of their client (except in capital cases) to let him be tried and take the chance of acquittal, or if convicted, to have him rather serve a definite sentence, reducible by good behavior, than be mentally examined and committed to an institution for a wholly indefinite, perhaps life-long, period.* After all, in many jurisdictions, prison service is not much worse, except for the stigma attached to it, than service in a hospital for the criminal insane. This indicates that a scientific provision for routine mental examination of all offenders, far from weakening the deterrent influence of the penal law, ought, in the vast majority of cases, tend rather to strengthen it; since the prospective offender's term of incarceration will, under such provision, be wholly indeterminate.

Broad Provisions in Indiana, Wyoming, and Wisconsin. — Indiana[1] broadly provides for the proper procedure if the court, either of its own initiative or upon the suggestion of *any person*, has "reasonable grounds for believing" accused insane; and in Wyoming[2] any officer having accused in charge must, and *any citizen may*, make complaint to the court in such cases, and thus initiate proceedings. In Wisconsin,[3] if the court is informed *in any manner* that accused awaiting trial "probably . . . is insane or feebleminded," the court must make inquisition.

All these provisions are open to the objection that *initiation of proceedings* is left to persons untrained in psychiatry; in other words, it is largely a matter of chance whether or not the defendant is given a mental examination before, or during, trial unless his symptoms are strikingly suggestive of the raving maniac or the driveling idiot.

The Massachusetts Law. — The Commonwealth of Massachusetts has a unique measure[4] that constitutes the most radical step yet taken to provide for examination into the mental condition of accused persons awaiting trial. The statute, because of its importance, will be considered in detail below. Here it is sufficient to state that the Massachusetts act is the first piece of legislation making the mental examination of those indicted for a capital offense (or those known to have been indicted for any other offense more than once, or to have been previously convicted of a felony), a *routine procedure*, not dependent upon the alertness, knowledge,

[1] Appendix, p. 537. [2] *Id.*, p. 640. [3] *Id.*, p. 637. [4] *Id.*, p. 561.

opinion, or caprice of those in charge of the accused. Theoretically, at least, *all* persons falling within one of the three categories mentioned *must* be mentally examined before trial, independent of whether or not they exhibit symptoms of mental abnormality which are apparent to the nonexpert in mental diseases, — that is, the police officer, jail warden, counsel for the defense, the prosecuting attorney, or the judge. In this way this law avoids the objections that may be raised against any other State legislation on the subject.

(2) **Types of Investigatory Machinery.** — Surveying this legislation from the second point of view, — that is, considering the types of procedural machinery set in motion when once the mental condition of the accused before trial is brought to the attention of the court, — we again find several distinct differences between the various States. Some have no specific procedure, and in such cases it is left to the discretion of the court to decide how it will have the question of supposed mental unsoundness answered.

Investigation by Judge Without Jury. — In a small group of States, including New Jersey [1] and Rhode Island,[2] it is provided that the judge, without the aid of a jury, and taking such evidence as he may desire, shall conduct an inquiry into the mental condition of the accused, who, if found insane, is committed to a State hospital.

Expert Testimony After Examination: Commission. — In Indiana [3] the court may appoint " two competent, disinterested physicians " to examine the accused and testify at a hearing, at which other evidence may also be introduced. This procedure is to be distinguished from the case where a commission is appointed by the court to examine witnesses under oath and take testimony of its own accord, its report of findings and its recommendations being then filed with the court. In Pennsylvania,[4] upon application to the court on a form prescribed by the Department of Public Welfare, the court must order an inquiry either by two " qualified physicians ", or a commission composed of two qualified physicians and one lawyer. The two physicians must submit two certificates stating if they believe " said person is mentally ill [5] and is in need of treatment and care in a hospital for mental diseases " ; the commission must hear such evidences as is offered, as well as the state-

[1] Appendix, p. 579. [2] *Id.*, p. 613. [3] *Id.*, p. 536. [4] *Id.*, p. 606.
[5] In the use of such terminology as "mentally ill", Pennsylvania is apparently attempting to incorporate into its legislation the "psychiatric point of view."

ments of such person or his counsel, and render its report in writing to the court. If the court approves such report (or the certificates of the two physicians), the person is committed.

Discretionary with Judge Whether or Not to Have Jury Trial. — In a number of States it is within the discretion of the judge as to whether or not he shall call a jury to try the issue. Thus, in Michigan,[1] the judge of the circuit court must " carefully investigate " the question of insanity before trial, call " two or more reputable physicians and other credible witnesses " as well as the prosecuting attorney, to aid in the examination, and, " if it be deemed necessary ", he may call a jury for that purpose; and in New York [2] the court must " institute a careful investigation ", call two " legally qualified examiners in lunacy ", and other credible witnesses, invite the District Attorney to aid in the investigation, and, if he deem it necessary, call a jury. In Alabama,[3] the judge of a court of record investigates the alleged insanity of the accused, may call " respectable physicians ", and other witnesses, and may also call a jury. In Wisconsin,[4] the court may investigate by jury or otherwise; in Virginia, by jury, commission or hospital officials.[5]

Specific Provision for Jury Trial. — A small group of States, of which Ohio [6] is an example, provides specifically for a jury trial to pass upon the alleged insanity of accused who is in confinement under indictment. In such States, as indeed in the case of a formal hearing before a judge without a jury, the inquiry partakes of the nature of a more or less technical trial.

Other Provisions. — In Wyoming [7] the inquisition is similar to that in the case of the noncriminal insane, and before a jury of six. In Kansas [8] the inquiry may apparently be by the court, a commission, or special jury. In Maine,[9] New Hampshire,[10] Vermont,[11] and one or two other States, if a plea of insanity is filed or the court believes such plea will be filed, the court may send accused to a State hospital for observation under such limitations as it may direct.

[1] Appendix, p. 565.

[2] *Id.*, p. 586. If, in New York City, a person appears to be insane before trial, who is under indictment or charge for an offense in which the maximum fine does not exceed $500, or the maximum term one year, the judge or magistrate may commit such individual to a hospital for observation. If he is then found insane at the hospital, and no demand is made for a hearing on his behalf, the judge may commit such person to a State hospital; if a demand for a hearing is made, it is granted as in the case of the noncriminal insane. *See* Appendix, p. 586.

[3] *Id.*, p. 505. [4] *Id.*, p. 637. [5] *Id.*, p. 627. [6] *Id.*, p. 597. [7] *Id.*, p. 641.
[8] *Id.*, p. 547. [9] *Id.*, p. 556. [10] *Id.*, p. 577. [11] *Id.*, p. 624.

Criticism of Procedure. — Obviously, a jury is unfit to settle a medical question;[1] further, such procedure duplicates a jury trial, since if the defendant is found by the first jury to be sane at the time of such trial, he is tried again, either by the same jury or another, on the main issue of guilt or innocence. Where experts are appointed by the court, it is doubtful whether they have the proper psychiatric training and experience unless their qualifications are specifically defined by statute. Besides, all the methods of appointing experts and of conducting technical hearings before the court smack too much of a trial on the main issue of guilt or innocence; and the principal object — that of sorting out those defendants on whom the expense of a trial would be wasted, and whom it is inhumane to try — would thus seem largely to be defeated.

Description of Massachusetts Law. — Returning now to the Massachusetts law, we see that it is easily the most farsighted piece of legislation yet passed on this subject. The original Massachusetts law[2] went into effect in September, 1921.[3]

Whenever a person is indicted by a grand jury for a capital offense or whenever a person, who is known to have been indicted for any other offense more than once or to have been previously convicted of a felony, is indicted by a grand jury or bound over for trial in the superior court, the clerk of the court in which the indictment is returned, or the clerk of the district court or the trial justice, as the case may be, shall give notice to the department of mental diseases, and the department shall cause such person to be examined with a view to determine his mental condition and the existence of any mental disease or defect which would affect his criminal responsibility. The department shall file a report of its investigation with the clerk of the court in which the trial is to be held, and the report shall be accessible to the court, the district attorney, and to the attorney for the accused, and shall be admissible as evidence[4] of the mental condition of the accused.

It will be noted, in the first place, that this act eliminates the bad features present in all other State legislation on the subject;

[1] We must remember that the question here is one of fitness to be tried, not of irresponsibility.

[2] Acts and Resolves, 1921, Chap. 415.

[3] The passage of this unique and forward-looking piece of legislation is largely attributable to the persistent efforts of Dr. L. Vernon Briggs, of Boston.

[4] A recent amendment to this law (see appendix, pp. 561–562), which will become effective ninety days after its approval on March 25, 1925, strikes out the provision for the admissibility of the report "as evidence of the mental condition of the accused."

that is, as has already been pointed out, it makes a routine procedure of the examination of the classes of offenders mentioned. Further, the examinations are made by a neutral, unbiased agency and by experts trained and experienced in mental medicine; and the examinations are made *before trial and before it is decided whether or not to resort to the defense of insanity.* Moreover, the examination is not a technicality-ridden procedure before a judge and in the presence of the district attorney or before a judge and jury, such as, in other jurisdictions, really amounts to a special trial preceding the trial on the issue of guilt.

Good Features of Law. — That the provision for such routine mental examination ought to result in the accumulation of valuable scientific data on the subject of the relationship of mental disorder to recidivism is apparent. But more immediate good results are to be expected from such a law. In the first place, the mentally unsound can be spared the ordeal of a trial. In the second, the State and its officers will be saved the vast expenditure of time, effort, and money that would be involved in the prosecution of those who ought not to be tried in cases where the findings of the unbiased experts, *appointed by a neutral agency before trial,* are accepted by the defendant's counsel, the district attorney, and the court as a working basis for the disposition of the case without trial. Further, the reports of the experts, impressing upon district attorneys and judges that in cases of mental defectiveness, constitutional psychopathic inferiority, and the like, defendants should be regarded as only partially responsible for their conduct, will serve to educate these public officials; and we may hope, as a result, for a more humane and sensible disposition of the vexing borderline cases of the semi responsible [1] than is now characteristic of most jurisdictions. Indeed, the opportunity of the examiners to educate judges, district attorneys, and legislators in the psychiatric point of view, by means of complete, clearly, and forcefully presented reports, cannot be overemphasized. Unfortunately, our examination of the reports already filed indicates that not all examiners have been making such detailed and well rounded reports as they might, or as would impress a court; but one can hardly criticize on this score an expert who has been devoting much of his time without compensation to the public spirited duty of

[1] *See* "The Semi-insane and the Semi-responsible", by Joseph Grasset, translated by S. E. Jelliffe. *See post,* pp. 65 and 66 and Chapter 12.

examining persons accused of crime. One of the provisions in the amendment to the law, later passed,[1] is for the payment of the nominal sum of four dollars per examination. This is hardly better than no payment at all. When no compensation was forthcoming, the experts appointed by the State voluntarily performed what they considered to be their public duty; it is difficult to blame them now if some of them are more insulted than delighted with the four-dollar fee for an examination that means so much in the way of responsibility and that may require three or four visits and interviews several hours long. It is clear that the efficiency of the law, so far as requiring better reports is concerned, would be enhanced if the experts were compensated to a degree commensurate with their skill and the importance of their work.

But no legislation is perfect, and some features of the present law will probably be found, after sufficient experience, to require modification. Certain of such features appear on the bare reading of the law and will be discussed later. This, then, is the Massachusetts law as it appears in the books. Let us briefly glance at the law in action.[2]

The Massachusetts Law in Action.[3] — Through the coöperation of the officials of the department of mental diseases and of the Massachusetts courts, we have made a study of the cases examined to date,[4] with the following results:

The number of cases reported for examination up to January 1, 1924, and not still pending, was one hundred and forty-two. Of these, twenty-nine were not examined for the following reasons: thirteen were out on bail and could not be found when the examiners called; one case had been *nol-prossed* before examination; in one the indictment had been quashed; and in three the court had imposed sentence before examination by the experts. Eleven were reported for mental examination, but as they did not come

[1] Acts and Resolves (1923), Chap. 331, 25.

[2] One of the most noteworthy of the notable contributions to jurisprudence and to the work of the socialization of the law made by Dean Pound of the Harvard Law School, is his emphasis on the importance of studying the *practical working of laws*. This view has resulted in such fruitful preliminary work in law reform as the Cleveland Survey of Criminal Justice. See Dean Pound's oft-quoted "Law in Books and Law in Action", *American Law Review*, Vol. 44, pp. 12–36, January–February, 1910.

[3] In a paper read by him at the Detroit meeting of the American Psychiatric Association, Dr. Douglas A. Thom discussed the operation of the Massachusetts law in eighty-eight cases which had been examined.

[4] To end of 1923.

within the provisions of the law, they could not be examined. Of these eleven, four did not fall under the law because they were indicted for manslaughter and were therefore not in the class of capital offenders, and seven, because their previous records, so far as could be ascertained, involved only *misdemeanors*. Of the classes of cases to which these eleven belong more will be said later. On analyzing the history of one (taken at random) of those not mentally examined because they were out on bail and could not be found, the following criminal record was disclosed:

	Offense	Date	Sentence
1.	Attempted larceny and assault and battery	1905	Case filed
2.	Breaking and entering	1911	Probation granted
3.	Larceny	July, 1911	Five years. Released after thirteen months
4.	Burglary	December, 1913	Six months to fifteen years. Released after seventeen months
5.	Robbery	June, 1916	Four years. Released after sixteen months
6.	Grand Larceny	April, 1920	Six months. Given three months more for attempt to escape
7.	Grand Larceny	March, 1922	*Not mentally examined because out on bail*

This record is probably incomplete, as it represents only those offenses to be found in the Massachusetts files. It shows clearly the utter ineffectiveness of the usual penal treatment in such cases. Yet, as stated, this man could not be examined under the law because he had been released on bail and could not be found. It is to be hoped that when the Massachusetts law for the routine examination of such offenders has begun to function more effectively, judges will see to it that such offenders are examined.[1]

Of the one hundred and thirteen examined by the experts, seventy-one had been indicted for a capital offense and five for

[1] Such examination might be made a condition precedent to admission to bail. In the writer's opinion it would not be such an unreasonable modification of this constitutional right as to be held unconstitutional, as long as it applied uniformly to all accused persons of certain classes of offense.

second-degree murder or manslaughter, these five having been examined before it became established that the law did not strictly apply to them. Eight of those examined were indicted for sex offenses, twenty-seven for offenses against property (such as robbery, larceny, burglary, and the like), and two for dangerous assault with intent to rob or kill.

Surveying now the reports on mental examination of these one hundred and thirteen accused persons, we find that there was reported insanity[1] (mental disease), psychopathic personality, mental deficiency, or defective delinquency in thirty-eight of these cases, leaving seventy-five in whom no noticeable evidences of mental deviation from the normal were found. Eight of the thirty-eight were considered mentally diseased on the first examination, and upon such finding were immediately committed by the courts either to the State Hospital for the Criminal Insane or to some other State Hospital. Two cases, reported as not insane, tried, convicted, and sentenced to life imprisonment, developed symptoms of mental disease soon thereafter in prison, and were transferred to the hospital for the criminal insane. These cases strikingly illustrate the truth of the opinion expressed by Bishop in his "Criminal Law", to the effect that the memorials of our criminal law are full of cases of "insane and irresponsible" persons who have been unjustly executed. In the two cases that we have mentioned, if life imprisonment had not been imposed instead of the death penalty, the convicted would have been unjustly executed. Even mental examination before trial and by unbiased, experienced experts failed to disclose in these cases the presence of mental disease; how much more truth must there be, then, in Bishop's belief when one takes into consideration the fact that in many cases in other jurisdictions, which do not provide for the routine examination of serious offenders, the question of mental unsoundness may not even be brought up! As it is, these individuals were unnecessarily subjected to the ordeal of a trial, and the State was put to a needless expenditure of time and money. That expert examination failed to disclose mental disease is indicative of the need of a longer period of observation and more intensive examination of some cases.

[1] The experts used the term "insane" in accordance with the older medical practice; what is really meant by this term here is the presence of a well-defined major psychosis.

One of the one hundred and thirteen persons examined was reported not insane, but at the trial developed symptoms that necessitated a reëxamination and his commitment to a State hospital. The diagnosis in the eleven cases thus pronounced insane has in each instance been verified by subsequent observation in the hospitals to which they were committed.

In three cases, after a thorough examination, the experts appointed by the department were still in doubt and recommended a period of observation in a hospital. The reports were not available at the time this was written.

Seventeen cases were diagnosed by the experts as mental deficients or defective delinquents. The latter designation is rather a legal than a medical term, the defective delinquent law[1] providing for the commitment, for an *indeterminate period,* to the department for defective delinquents, of offenders with mental defect who prove too troublesome a problem to handle in the ordinary penal institution, school for feebleminded, or hospital for the insane.[2] An offender is thus not really a defective delinquent under the law until committed as such to the special departments.

Three of those believed mentally defective were wisely committed by the courts as defective delinquents. In several other cases, however, where the experts declared such persons to be, in their opinion, defective delinquents, the court did not commit them for indeterminate periods under the defective delinquent law, but treated them in the ordinary way. Thus one of them received but six months in the house of correction. One of them, indicted for a capital offense, received a life sentence, while another, who committed homicide, received a sentence of but one year in the house of correction under a voluntary plea of guilty to manslaughter. Obviously it would have been better for all concerned if the first and the last could have been incarcerated, under the law, for a wholly indeterminate period.[3] The case of one mentally defective offender, indicted for murder, was *nol-prossed* because of insufficient evidence to convict. Another received fifteen to twenty-one years in prison for robbery and assault, although the

[1] Acts and Resolves (1921), Chap. 270, Sec. 1.

[2] Similar commitments to specialized institutions are recommended for other types of mentally unsound offenders.

[3] *See* the writer's paper read before the National Conference of Social Work, July, 1924, in the Official Report, in which the indeterminate sentence legislation is discussed in connection with some "Modern Trends in Criminology", and some obstacles in the way of reform of the Criminal Law are analyzed.

experts had recommended indeterminate incarceration as a defective delinquent. This prisoner, at the age of twenty-one, had a long and checkered career behind him, beginning at six years of age, when he stole $10. At the age of nine he had used revolvers in committing holdups, and his delinquencies had continued down to the time of his examination.

Need of Closer Coöperation between Courts, Psychiatrists, and Social Workers. — We cite the case of one of these mental defectives in some detail, as it is eloquent of the need for closer coöperation between courts and psychiatrists, social workers, probation officers, and others concerned with the socio-legal treatment of such cases, under the law we are considering, and similar laws.

X., a woman accused of adultery, pleaded guilty, and was sentenced by a district court to six months in the house of correction. Her counsel appealed to the superior court. In the meantime she was examined, under the Massachusetts law, as to her mental condition, and part of the report of the experts is as follows:

"She speaks reluctantly of her past life, giving a history of only four arrests, while we have a record of seven from the court. She seemed absolutely without shame in talking of her past; seemed to lack any true sense of moral decency. . . . She could 'see no harm in a woman's leading an immoral life unless she bore children.' Thought 'there was no harm in a woman's supporting herself by that means.' According to Binet tests, she graded up to 7.8 years of age. It would seem from this history and from the Binet examination that this woman is a menace to any community in which she might be living. In our opinion, she is a suitable case to be committed to a school for feeble-minded."

However, in transmitting this report to the court, the department of mental diseases correctly pointed out that she could not be committed to a school for feebleminded under the Massachusetts law, and recommended her commitment to a hospital for the insane for further observation. She was so committed by order of the superior court, and on her discharge therefrom at the order of the court, the following is a part of the report made by the hospital:

"Admits having been promiscuous sexually since the age of fourteen and having used alcohol since the age of nineteen. She further admits five court sentences, two for adultery and three for drunkenness. . . . Our formal diagnosis . . . is mental deficiency — low-grade moron. From the medical standpoint, we would recommend an indefinite sentence to Sherborn Reformatory, as we feel that this individual is quite unable to keep out of trouble if allowed to go at large."

This woman's case was placed on file and she was released on probation! Since then, she has worked in a factory for six months, on a job provided by the probation officer, but has again been arrested, for the same offense, and probation has again been recommended.

Need of Special Institution for Female Defective Delinquents. — It is easy to criticize the court's action in such cases, but the fault often does not lie with the court. There exists at present in Massachusetts no place to which female defective delinquents of the type of this case can be committed.[1] It is true that this woman could have been committed to the women's reformatory as recommended; but the sentence there would have had to be for some definite and hopelessly inadequate period, and no special facilities for the treatment of such cases exist in prisons for women. As a matter of fact, with so low a mental basis to build upon, but little good can be done by the ordinary penal and reformatory methods in such cases. Obviously, however, indiscriminate probation is sometimes even a less satisfactory device for dealing with them.[2]

Another young offender, declared by the experts to be a defective delinquent, was found not guilty of assault with intent to rape, and was released; and the remaining defectives were given brief, definite sentences. From a social point of view, the problems they present are far from solution.

Psychopathic Personality. — The diagnosis of seven cases was "psychopathic personality"[3] or "constitutional psychopathic inferiority." It is noteworthy that this condition was found in only seven out of the one hundred and thirteen cases examined. This is an interesting contradiction of those who insist that if psychiatrists had more to do with the criminal law, they would find almost all criminals irresponsible, and would throw them into the category constitutional psychopathic inferiority, where no definite psychosis could be established. In one of these seven, a capital case, the experts called the attention of the court and the

[1] Although the original defective delinquent law provided for the treatment of female defective delinquents at one of the institutions for female prisoners, it was found that a special plant and equipment would be necessary to cope with this problem. No separate institution for female defective delinquents is in existence in Massachusetts at this time.

[2] I have frequently wondered whether the extensive use of the excellent device of probation in this country does not actually mean its *indiscriminate* use.

[3] *See* Chapter 10 for a description of this group of disorders.

district attorney to the defendant's condition of borderline mental disorder, and these officials agreed that, while not absolutely *irresponsible* for his criminal acts, such an individual should nevertheless be considered as only partially responsible. He was, therefore, given a life sentence. This case illustrates the kind of legitimate influence that can be exerted by unbiased experts to educate judges and prosecutors and to lessen the rigor of the law in cases such as this. In this case an inflamed public opinion demanded the death penalty — a fact that members of the jury conveyed to the district attorney in the case, after their discharge, when he had agreed to accept a plea of second degree murder, on the recommendation of the experts. Here a wise social disposition was made of a type of case that has been the source of much medico-legal discussion, the problem of the semi responsible.[1] The prisoner was placed for the rest of his life where he can do no further harm; at the same time his mental condition and limited responsibility were considered and balanced against the legal demand of the extreme penalty.

Some of the other cases of psychopathic personality were not disposed of quite so wisely from a social point of view. Thus one, with a long record of burglary and larceny, was given six months in the house of correction; undoubtedly, he will resume his career of depredation when he is discharged, conforming to the psychiatric prognosis in the case. Another received one year in the house of correction on the following report of the experts:

> Age twenty-nine; divorced. . . . Father deserted when (patient) three years of age. Became a State ward; attended school to the eighth grade. At eleven years sent to Lyman School as a stubborn child, remaining for three years; then transferred to Concord Reformatory, for larceny, where he stayed fourteen months; later committed to State prison, for burglary and larceny, where he served four years; from 1908 to 1911 was in the U. S. Army; was arrested as a deserter and served a sentence in Leavenworth. He also served a year and one half at Blackwell's Island, a sentence at Sing Sing, and three months at Holmesburg, Pennsylvania.
>
> Has always been of nervous make-up, troubled with insomnia, an occasional user of morphine. Eleven days prior to arrest was paroled from State prison.[2]

[1] *Post*, Chapter 7, pp. 223–243.

[2] Cases such as this throw an interesting sidelight on the important problem of the bases and machinery of parole.

Mental examination shows an average intelligence, no hallucinations or delusions or gross evidences of insanity. Patient shows marked emotional instability, threatening suicide in case he is convicted again.

From his history and from our examination, we are of the opinion that his emotional instability is pathological. While we believe this man to be neither insane nor feebleminded in a legal sense, we believe his career to be adequately explained by a disordered personality, ordinarily classified as constitutional psychopathic state.

This is the type of case with which our socio-legal engineering has as yet utterly failed to cope. Every judge who had anything to do with the sentencing of this person, and who read the results of previous brief sentences, must have felt how hopelessly inadequate are the legal means at our command to-day for making a wise social disposition of such cases. Under the law, in the face of this report — and realizing, no doubt, what a ridiculous palliative he was prescribing — the judge was forced to give this man a brief sentence. Judges cannot alone be blamed if such laws as the Massachusetts act for the routine mental examination of certain classes of offenders cannot fully achieve the ends for which they were designed. The fault lies in the legislative prescription, in advance, of definite brief sentences, under the easily pierced disguise of indeterminate sentences, which in practice really amount to short fixed sentences.[1]

Another psychopathic delinquent, with a record not to be scoffed at in the best criminal circles, was given probation, and his case was placed on file. He reported for a time, but soon escaped to another jurisdiction, completed a six-months sentence in Providence, and at this writing is being held for trial in the Federal courts for breaking into two post offices. We quote from the report of the experts in still another of these cases of psychopathic personality. After detailing a long history of arrests from early boyhood days to the time of arrest for the last offense, the experts say: "Although we believe that this man is neither insane nor feeble-minded, we do believe that it is very doubtful if he will profit by the routine correctional measures, and that he will probably become a chronic offender against the law." This offender received a sentence of from three to four years in prison.

In all such cases, and in most of the cases of defective offenders,

[1] *See* the writer's "New Trends in Criminology", an address delivered at the National Conference of Social Work, in the "Proceedings", 1924.

the best of laws can do but little, until society, through its machinery for legal regulation of the social order, decides to take the radical step of incarcerating such unstable offenders for a wholly indeterminate period, its actual length to depend not upon the wishes of the trial judge — who has had little opportunity, if any, to study the offender and his development under penal and correctional treatment — but on the judgment of highly trained prison officials who can study the behavior of the offender over a long period of time, and who are logically the ones to say when such offender can reasonably be expected to make good in society. Our boards of parole are attempting to do this now, but unfortunately some members of such boards are wholly untrained and unskilled in the problems with which they have to cope; adequate compensation, such as will attract highly skilled and thoroughly trained officers for this important branch of social engineering, is necessary. In the meantime, the education of judges and legislators in the social and psychological aspects of their professions is imperative.

Summary of Findings in Massachusetts, and Conclusions. — To summarize, out of one hundred and forty-two cases reported for examination, only one hundred and thirteen were examined, of which seventy-one had been indicted for a capital offense, the remainder coming under the other two categories of the law. Of the one hundred and thirteen examined, mental abnormality was found in thirty-eight, of whom eleven were mentally diseased, having a definite major psychosis; three were recommended for further observation; seventeen were found mentally deficient, three being committed as defective delinquents; and seven were diagnosed as cases of psychopathic personality or constitutional psychopathic inferiority. All the mentally diseased were committed to mental hospitals, and several of the mentally defective and psychopathic were wisely handled in conformity with the recommendations of the experts; others were not so satisfactorily disposed of. It is gratifying to note, however, the comparatively large number of instances in which public-spirited judges and prosecutors coöperated with psychiatric experts in a wise social disposition of problems of mutual interest to the law and medicine. With the progress of the work, wiser and more intimate coöperation may confidently be looked for.

A brief criticism of the law is not out of place: First, it applies, under the primary category, only to capital offenders, thus making

no provision for second degree murderers or for those indicted for manslaughter. Under the second category — consisting of persons known to have been indicted for any other offense more than once — those previously indicted *but once* cannot be examined.

There does not seem to be any valid reason, from a social and psychiatric point of view, why the perpetrators of one type of homicide should be subjected to mental examination, while those of other types escape such examination, unless it be the rather questionable legal distinction that premeditation and "malice aforethought" are required in the first case. It should be mentioned, however, that it is the practice of grand juries to find true bills for the crime of first-degree murder in most cases where a homicide has been committed, leaving the reduction of the gravity of the crime to the prosecuting attorney; so that few homicide cases ought to escape examination, unless it be manslaughter by persons driving automobiles.[1] In the third category — of persons previously convicted of a felony — criminals with long records of misdemeanors are not included. It is well known that the most promising material for the study of recidivism is among those who, for various causes, have had a long career as petty offenders. The line between misdemeanor and felony is after all artificial, when the distinction is considered from the psychiatric point of view; and the relationship of the mental condition to the illegal act is equally important in misdemeanor and felony.[2] The distinction between misdemeanors and felonies is in some instances so hazy that criminal codes have not gotten further in the definition of it than the old common law; the General Laws of Massachusetts, for example, still say that "A crime punishable by death or imprisonment in the state prison is a felony. All other crimes are misdemeanors."[3] When we apply such definition there is

[1] Out of the total number of cases reported to the State Commission for mental examination since the Act went into operation, the writer has been able to find four cases of manslaughter not examined because they did not come under the Act; several other manslaughter cases involved accidental deaths by automobile.

[2] Of the 9,219 occupants of our county jails (Massachusetts) in 1922, fifty-nine per cent. had served on an average of six previous sentences. (Statement of Massachusetts Civic League, in the Monthly Bulletin, November, 1923, of the Massachusetts Society for Mental Hygiene.) These petty offenders must commit one of the felonies provided for by the Massachusetts law for mental examinations before they can be examined. A law providing for the mental examination of inmates of the county jails has recently been passed, and this important work is now under way.

[3] 1921, Chap. 274, Sec. 1.

little distinction of value to the psychiatrist and social ethicist (though it is of use to the court) between, for example, the person who *attempts* to commit a felony and fails, and the person who succeeds; yet it is provided that a person who attempts but fails (either because apprehended or for other causes) to commit a felony punishable by imprisonment in the State's prison for less than five years, shall be considered as having committed a *misdemeanor* only and punished in jail for not more than one year or by a fine of not more than three hundred dollars.[1] Again, there is a number of crimes in which the final determination of whether the act is a misdemeanor or felony rests within the discretion of the court, which may either impose a fine or sentence to *jail*, in which event the hitherto undefined crime becomes a misdemeanor, or sentence to State *prison*, when it becomes a felony. This is the case, for example, in adultery which is punishable, in the discretion of the court, by imprisonment in the State prison for not more than three years, or in jail for not more than two years, or by a fine of not more than five hundred dollars.[2] It is well known, too, that that crime which in one State is defined as a felony may be considered a misdemeanor in another. From the foregoing, it is clear that the distinction between those *indicted* for a *felony* and those *complained of* for a *misdemeanor* is more or less artificial from the points of view of psychology and ethics, as well as law.

Secondly, the reporting of the cases depends upon the clerks of the courts, who are not compelled to make such reports if they do not, in the language of the statute, "know" of the previous records of offenders.[3] Obviously, out of the vast number of cases that have come up since the law went into effect, more than one hundred and forty-two should have been reported. But even if the clerks all willingly coöperated, the only reliable source of information as to prior criminal offenses is in the office of the deputy commissioner of probation, the records of which, though excellent, cover but twenty-one courts of the State and about sixty per cent. of the criminal business.[4] Manifestly, before the law can operate successfully, thorough records of criminal offenses will have to be established covering the whole State.[4] And even if they existed, since there is no centralized Federal bureau of criminal records

[1] Mass. General Laws (1921), Chap. 274, Sec. 6. [2] *Id.*, Chap. 274, Sec. 14.
[3] But see amendment, p. 562, imposing penalty for failure to report.
[4] Since this was written, an appropriation has been made to expand this service to cover the entire State.

covering and coördinating criminal information in the various States, offenses in other jurisdictions would often remain unknown.

Thirdly, it will be some time before trial judges coördinate their disposition of cases with the experts' reports on such cases. *The problem, in other words, is the fundamental one of coördination and effective interrelation of all the agencies that deal with the criminal from the moment of his arrest to the time of his ultimate return to society.* This, in our opinion, is the most fundamental problem to be solved in the field of crime as well as in other fields of social pathology. It would be interesting to discover, for example, how many social and public agencies have been involved in the treatment of various cases that arise in the field of social work, how much duplication and working at cross-purposes there have been. Whether the work of coördination of effort among the various agencies that deal with the criminal should be carried on by a ministry of justice, as some have proposed, is a question well worth consideration.

In spite of these patent defects of the Massachusetts law, however, we must reiterate that this provision for the mental examination of persons accused of crime, even as it stands to-day, is far in advance of any similar legislation in any State of the Union. Its efficient principle is to reduce to a minimum the trial of persons who, because of mental abnormality, can more wisely be disposed of without a formal trial. It eliminates the objectionable feature common to all other State legislation on the subject — namely, the leaving of the mental examination of offenders to chance or caprice instead of, as in Massachusetts, making it a routine, scientific procedure. Finally, it makes for a much better understanding than has hitherto existed between the legal and medical professions on the vexed question of the criminal responsibility of the mentally disordered.

It will take some time for such a piece of social mechanism to become well oiled and to be properly coördinated with the rest of the legal machinery. And there is nothing in the law to compel the prosecution or the defense or the court to follow, or even to consider, the recommendations of the experts appointed by the department of mental diseases.[1] But this feature can constantly be improved through the influence of intelligent, well guided, well

[1] It is a remarkable fact that only in a very few cases have counsel refused to permit their clients to be examined under this act; and in most of these instances they have agreed to it when the purposes of the act were explained and the nonpartisan nature of the experts' examination was pointed out.

informed public opinion. It is here that the efforts of representative, thoughtful citizens can materially add to the efficiency of this and other social legislation, by helping to furnish and formulate what Dean Pound and other legal scholars [1] have fittingly called the "social-psychological sanction" of law, without which many acts on the statute books not only remain dead letters, but inspire dissatisfied citizens to positive deeds of lawlessness. The Massachusetts experiment should be carefully followed by all students in the field.

[Section 3 — "Insanity" of Accused during Trial

Introduction. — A long period may intervene between the time of indictment and the time of the trial; and this has necessitated special legislation covering the mental unsoundness of accused persons at time of arraignment or during the trial proper. In those jurisdictions which provide no special procedure, the matter and manner of examination are left to the discretion of the trial judge; [2] but the court may use the machinery in existence covering the determination of mental unsoundness existing before trial.

Remanding to Probate Court of Cases of "Insanity" during Trial. — In Kansas,[3] "whenever it shall be made to appear to the court" that defendant is feebleminded, the court must remand the case to the Probate Court for examination, and, where no jury trial is there demanded, or it appears to the judge to be "unnecessary or inexpedient or improper", he is required to appoint a commission of "two qualified physicians or one qualified physician and one clinical psychologist", chosen on account of their "known competency and integrity", to make personal examination and file a written report on oath with the Probate Court, giving their conclusions and recommendations. The witnesses before such commission are examined by the physicians *in the presence of the court and under oath.* In this way, perhaps, any legal objection to a provision, such as in the Massachusetts law, permitting the reports of the experts to be admissible as evidence at the trial in

[1] *See*, for example, Jellinek's "Allgemeine Staatslehre", 2d Ed., pp. 89, 324. Roscoe Pound, "The Limits of Effective Legal Action", *Rep. Penn. Bar Assn.*, Vol. XXII, p. 221; *International Journal of Ethics*, Vol. XXVII, p. 150.

[2] No special legislation exists, for example, in Florida; and it was there held that if it appears to the court "upon observation or suggestion", that a question as to defendant's sanity exists, the issue may be determined as the court deems "best under the law." — Johnson *v.* St., 57 Fla., 18 (1909).

[3] Appendix, p. 547.

chief,[1] might be eliminated. It is difficult, however, to examine witnesses in a formal manner, under oath, in court, without losing much of the efficacy of a private conversation between expert and witness. An additional section [2] in the Kansas law provides specifically for the disposition of a defendant found by the court, or a commission, or a special jury to be "insane, an idiot or an imbecile" at the time of trial, and unable to comprehend his position and make his defense. It would thus appear that in Kansas there are really three types of machinery at the disposal of the court.

California Rule — Jury Trial. — By far the largest group of States follows the California provisions in the case of mental unsoundness at trial. The California statutes [3] provide for an elaborate jury trial, "if, at any time during the pendency of an action up to and including the time when defendant is brought up for judgment or conviction, a doubt arises" as to his sanity.

Showing of "Probable Insanity." — The courts have tried, with little success, to lay down criteria as to when and under what conditions or on what showing such a doubt may arise. It is an interesting example of the difficulty of applying a general rule to cases that in their very essence require the principle of individualization of treatment. As the question is at the very root of the matter in most States, we will discuss it in more detail. The subject was carefully considered in People *v.* Hettrick [4] where the court said: "The Code provides no procedure for creating a doubt in the mind of the judge, and yet it seems to be the purpose of the law that no person should be tried for a crime while he is insane. . . . Much, however, must be left to the judicial conscience of the trial judge in a matter of this kind." Such a direction to a trial court is hardly illuminating; it leaves the question exactly where it was before — a matter of judicial discretion. In the Hettrick case, the court had before it the testimony of several experts and others without having any doubt as to defendant's sanity. A similar question was also considered in a Colorado case [5] (Colorado has substantially the same law as California on

[1] This point has not been tested in the courts as yet, the good feature of the Massachusetts law in practice being that it eliminates the necessity of a trial.

[2] Appendix, p. 547. [3] *Id.*, pp. 512, 513.

[4] 126 Cal., 425, 427, 58 Pac., 918 (1899).

[5] Bulger *v.* Peo., 61 Col., 187, 193 (1916). *See also* Com. *v.* Webber, 119 Pa., 223, 239 (1888). The Colorado case dealt with alleged insanity *after conviction.*

this subject), in which a five-to-two opinion was rendered. There the majority opinion held that the "doubt" may be established by

> a personal inspection or examination of him (the defendant), either public or private, by inquiry from attending physicians, or from those around the prisoner who have means of knowledge; and if, after such investigation and inquiry, the judge has no doubt of the prisoner's sanity he is neither bound to, nor should he order, an examination. . . . The sole modification of the common law by the statute is to require the court in cases where it believes that defendant is insane, *or, perhaps* where it has doubt of his sanity, to impanel a jury and try the question.

The court then gave it as its opinion that neither at common law nor under the Colorado statutes were "collateral proceedings of this character" reviewable; on the ground, largely, that "a defendant is not permitted to prosecute successive writs of error to the same judgment." The court's fear that a defendant could "prosecute successive writs of error to the same judgment", was groundless; for there is but one question to be settled in such cases, namely, whether or not the trial court abused its discretion in refusing to grant a trial on the question of mental incapacity to be tried or sentenced, as the case may be, at the time of the trial in chief or subsequent thereto. Justice Scott in a vigorous dissenting opinion, after insisting that the Supreme Court of Colorado was by the Colorado Constitution given general supervision and control over all inferior courts, argued that such blanket power included power of review of inquisitions as to sanity. Incidentally, he strongly denounced the method sometimes employed by prosecutors, more zealous than just, of bringing into such inquisition on the question of defendant's "sanity" *after conviction*, the facts proven at the trial of the main issue; pointing out that the State's attorney, by introducing such facts at the inquisition, prejudiced the defendant "by details of his crime and by appeals for punishment."

The question was again considered, though this time upon the *defendant's* insistence that he was sane enough to be tried, in an important California case,[1] where it was held that the question of insanity at trial is not to be judged merely according to the medical view of mental unsoundness, but with reference to the statute, which must be construed as an affirmance of the common law prin-

[1] In re Buchanan, 129 Cal., 330, 50 LRA., 378, 61 Pac., 1120 (1900).

ciple that if a person arraigned for a crime "is capable of understanding the nature and object of the proceedings against him, and can conduct his defense in a rational manner", he is deemed sane for the purpose of being tried, though "on some subjects" his mind may be deranged or unsound. This decision followed upon a previous opinion [1] in a case which was an application to the Supreme Court of California by the superintendent of the State hospital for the mentally ill, where defendant had been confined prior to his trial on the main issue, for a writ of prohibition to the judge of the Superior Court, to prevent the hearing of the defendant's petition for release from the hospital to stand trial for his offense. In that decision it was denied by the court that the superintendent of the hospital was the sole judge, under the California law, to decide whether defendant had become sufficiently sane to be tried, since such matter, involving, as it did, the question of unlawful restraint of a person's liberty, must always be a judicial one. Further, it was said, a statute which left such question exclusively to a superintendent of an asylum to decide would be unconstitutional. It was insisted that while it is the duty of the superintendent to notify the court as soon as defendant has become sane, this does not deprive defendant of his constitutional right to have the question of sufficient sanity to undergo trial answered by the court on writ of *habeas corpus*. In consequence of the decision in this case, the superior judge proceeded with the hearing upon return of the writ of *habeas corpus* he had issued; and, having concluded that defendant was still insane, as was claimed by the superintendent, he ordered him remanded to the hospital. Thereupon, a new application for the writ was made by the defendant to the *Supreme Court*. Having given its opinion, as quoted above, the Supreme Court, one judge dissenting, further said: ". . . If there is a difference between the medical view of insanity and the view upon which the statute is founded, the question of sanity or insanity is to be determined with reference to the latter, as contradistinguished from the former view." Discussing the fact that the statute merely reënacted the common law as enunciated by Blackstone, the court pointed out that

> when the view became a part of the common law, modern views of insanity were unknown. . . . A congenital idiot, or a raving lunatic,

[1] Gardner *v.* Jones, 126 Cal., 614, 59 Pac., 126 (1899).

was understood to be insane, but in the absence of any sensible loss of memory or material impairment of the intellectual faculties, a man was counted sane. If he could remember events and could reason logically, he was not within the letter or the reason of the rule which suspended proceedings against a madman or a lunatic. And if he was not within the common-law rule, neither is he within the rule of the statute, which merely reënacts the common law and has no other purpose than to suspend proceedings against a defendant who is by reason of mental infirmity incapable of making his defense.

Unfortunately, this type of legal ancestor worship is still common in judicial tribunals. The fact that when Blackstone wrote, insanity meant raving madness or stark idiocy and that the California law reënacted the common law, does not of itself justify adherence to a philosophy of mental disease which is a few hundred years out of date. That judges continuously legislate by putting a contemporary content into an ancient form of law, is known to many students of the law, though not admitted by some; and it is reasonable to ask why a *modern content*, based upon modern scientific knowledge, should not be put into the ancient forms, "insanity" and "lunacy"; why, in other words, contemporary knowledge and practice should be shackled by views that were in vogue several centuries ago, and which, when in vogue, themselves expressed still older medical opinion.

The court in the Buchanan case analyzed the testimony before it in these words:

> The evidence all shows that he (defendant) is in possession of every faculty requisite to the defense of the accusation against him. His memory is unimpaired, and his reasoning faculties, although they may not be equal to the promise of his youth, are far above those of the average man. His insanity is of a character which does not manifest itself in any apparent weakness of intellect or failure of memory, but may be best described as a sort of chronic and latent disease of the brain, which under the excitement of intoxicating drink, to which he is predisposed, will lead him to the commission of criminal acts.
>
> At the age of twenty, defendant
>
> began to indulge in the excessive use of intoxicating drink, the consequence of which was a serious illness, which undoubtedly affected his brain. Upon his recovery, or partial recovery, after a protracted period of convalescence it was discovered that his character was greatly changed. He had lost all ambition to excel in his

chosen profession, he had become aimless and trifling, his moral character had deteriorated, he was alienated from his family and took up the life of a wanderer, going about from place to place, and supporting himself by menial employments. At frequent intervals his appetite for intoxicants became uncontrollable, and when drinking he was disposed to acts of violence, besides being subject to occasional temporary delusions. The medical testimony based upon these facts is that his brain or its integument was permanently injured by the sickness above mentioned, and that his condition has been such ever since, and will so remain as long as he lives; that if set at liberty he will inevitably take to drinking; and that under the influence of intoxicants he will be dangerous. There is a very strong preponderance of expert testimony to this effect, and we cannot doubt that the medical gentlemen who have so testified are competent to decide such matters. *But this is a species of insanity which the statute governing this case does not contemplate.*

If one asks, Why? the court's answer is, because "it is not such insanity as would disable him to make his defense." The court turned psychiatrist, further on in the decision, announcing that the prisoner "reasons as other men do. He has no delusions. He is more than ordinarily intelligent. His memory is unimpaired . . . he gave a connected and rational account of his whole life. He showed that he understood his position with respect to the criminal charge against him, and that so far as his conduct is defensible or mitigable, he is master of his defense, etc. etc." Of course, the fallacy of such reasoning lies, as we have elsewhere suggested, in the legal clinging to "faculty psychology", — in the consideration of individual symptoms and faculties to the exclusion of the general picture of the psychosis. To some extent, it is possible that in certain psychoses, isolated faculties (using that term in a popular sense) may apparently be intact; but from the point of view of mental medicine, there is little justification for singling out individual mental processes and assuming they are unaffected by the deterioration which the personality as a whole has undergone.[1]

In fairness to the court it must be added that its action seemed to be based on the fact that if the defendant were acquitted and it was then found he was dangerous, he could be reconfined; but that his indefinite confinement without a previous trial on the question of his guilt or innocence was unjustified. Nevertheless, there is grave public danger involved in taking a chance on re-

[1] *Post*, Chapters 9 and 10.

leasing such persons; and a verdict of "*not guilty* by reason of insanity" frequently results in early release on *habeas corpus*.

That all judges do not worship legal fetishes but attempt to keep abreast of the times and yet within reasonable legal bounds is shown in the same case by the dissenting opinion of Mr. Justice McFarland, as follows:

> . . . To say nothing of any consideration to be given to the conclusion of a jury, a superior court, and the superintendent of the asylum, the evidence introduced in the present proceeding, in my opinion, preponderates against his restoration to sanity. *The statutory provision in question says nothing about different kinds of insanity; and certainly a man not sane should not be put on his trial for murder.*

The Buchanan case was decided some twenty years ago; but the statutory provision it construes is still in force in California, and at the present writing the case has not been overruled. It is true that to-day, with the excellent psychiatric service in some of the superior courts, as in Los Angeles,[1] questions like those discussed above can largely be eliminated; for the trial court will undoubtedly be governed, in most cases, by the findings of the psychiatrist in such matters; but if the defendant insists upon being tried for an offense and applies for a writ of *habeas corpus* for that purpose, a case like the Buchanan case could very well arise again.

In a later case[2] the California District Court of Appeal, considering what preliminary showing of mental disorder must be made before it becomes the duty of the court to impanel a jury to try the question of insanity at time of the trial in chief, held that,

> . . . Ordinarily, at least, if there are statements under oath of a credible person or persons that the defendant is insane, a doubt is or should be raised as to the defendant's sanity, and the question must be submitted to a jury. . . . If information comes, through a proper source and through proper channels, that the defendant is insane, or if, through observation and personal inspection, the information is disclosed to the court, a jury must be impaneled to pass upon the mental condition of the accused.

[1] For a good conception of the value of psychiatrical service to a trial court, see "Crime, Abnormal Minds and the Law", by Ernest B. Hoag, Edward H. Williams, and others.

[2] People *v.* West, 143 Pac., (California) 793 (1914).

To this explanation, which does not explain very much, the court hastened to add, that it did not " mean to say that the weight of the evidence and the credibility of the witnesses are not within the peculiar province of the trial judge, but we think that the *circumstances here* were such that it should be held as a *matter of law* that a doubt was or should have been created."

This decision, coupled with the preceding one, gets us no further in the matter than to say that whether a separate investigation of the question of a defendant's mental fitness to be tried will or will not be granted, depends, in the last analysis, upon the wishes of the trial judge; but that the Court of Appeals reserves its right to grant such trial over the head of the trial judge, whenever the latter has too glaringly abused his discretion. That the appellate tribunals are loath to interfere with the trial courts' discretion in such matters, is clearly demonstrated by the case we are considering. In this case the appellate court reversed the judgment only after a *rehearing*, and this though the trial justice had refused to grant a trial of the question of defendant's mental condition in the face of the convincing facts of mental unsoundness outlined in the Introduction.[1] This attitude is also shown in Jones *v.* State,[2] in which the Appellate Court of Alabama, though admitting that injustice was probably being done the defendant, refused to interfere with the trial court's exercise of discretion, saying:

> *Although we are of opinion that the facts disclosed in the bill of exceptions, might well have warranted the preliminary inquiry as to the prisoner's mental condition*, yet this must be left to the sound discretion of the court. If, amid the mystery and veil which shrouds the phenomena of mental aberration, so difficult to penetrate, the judge should be mistaken, and try an insane man, (*as we incline to think has been done in the case before us*), it will present a case in which there may be a strong appeal to executive clemency. (Italics ours.)

It may well be asked why such matters should be left to be righted by the uncertain agency of executive clemency. Governors frequently are reluctant to interfere with cases which have had the run of the courts. Besides, the attitude expressed in this and similar opinions, is one that it is difficult to understand. If a mistake has been made in a court of law, or if the law, as was proven by

[1] *Ante*, p. 4.
[2] 13 Ala., 153 (1848). *But see* People *v.* McElvaine, 125 N. Y., 596 (1891).

such mistake, is itself inadequate, why should not the matter be corrected by the courts themselves, or by appropriate legislation?

This long digression from our presentation of the law on the subject of the alleged mental unfitness of a defendant during his trial, as it is in California and the many States which have similar statutes, was necessary to give the law a proper basis of evaluation. Of course, not all trial justices, even in California, will demand such extreme proof of the existence of mental unsoundness at time of trial as was adduced in the cases just analyzed. But these cases indicate the uncertain and unscientific nature of the treatment of the legal problem of insanity at time of trial.

Suppose the trial judge, on a reasonable statement of fact pointing to probable mental disorder at the time of trial, does grant a jury trial on the question, is such procedure socially desirable? To answer this we must return to the legislation on the subject.

Method of Proving Insanity at Trial, in California and Many Other States. — The procedure in California and similar States is elaborate and technical. Six definite steps are enumerated.[1] Counsel for defendant must open the case, offering their evidence, then counsel for "the people" must present their evidence, after which the parties respectively may offer rebutting testimony. When the evidence is in, unless the case is submitted by either side without argument, counsel for the people must begin, and defendant's counsel conclude, the argument to the jury. If the indictment be for a capital offense, there may be two counsels on either side; in other cases the argument may be restricted to one. After the trial, the court must charge the jury, and if the jury find defendant sane, the trial in chief must proceed (that is, the trial on the question of his guilt or innocence); if they find him insane, the trial in chief must be suspended and defendant committed to a State hospital until sufficiently recovered for trial.

Critique of Procedure. — The criticism that might be directed against such technical procedure has already been mentioned in passing. It is wrong in principle, for it makes a technical battle out of what should be an unbiased, scientific inquiry. It results in just as much wrangling about paid expert conflicting testimony and hypothetical questions, as is the case where the question of defendant's mental condition at time of the *offense* is involved. It is an avoidable drain upon the treasury of the State and upon

[1] *See* Appendix, p. 513.

the time of the court, prosecutor, and counsel for the defense. It is not just; for, as several unbiased experts have assured the writer from their experience in numerous jury trials of insanity, the members of the jury, when questioned immediately after the trial, have admitted that they were so confused, not to say disgusted, with the technical and conflicting expert testimony, that by common consent, they voted to disregard it entirely in arriving at their verdict. In such cases they substituted their common-sense conceptions of justice and "insanity" in the individual case. In brief, such procedure is uneconomical, unscientific, inefficient, and unjust. Yet some twenty States, in addition to California, employ it, or modifications of it. To one who has given the question some study, it is a mystery why some simple, scientific procedure cannot be substituted for a jury trial in such cases. Where the question is one of *responsibility, i.e.*, of guilt or innocence, a jury trial is, under our present system, perhaps unavoidable; but here the question is purely one of mental unsoundness, or the psychological problem of a person's mental condition to be tried. And in such cases, the technicality of the procedure is out of harmony with the real object of such examination, — the ascertainment if the defendant is mentally unsound to an extent which an enlightened public opinion regards as making it futile, inefficient, and brutal to try him at such time. In Washington it was held [1] that a technical plea of insanity at time of trial is necessary, and such plea is waived if not interposed before trial; and it cannot be urged in the Supreme Court as ground for suspending judgment. In other words, if the defendant develops pronounced symptoms of mental alienation during the trial, the trial must proceed to the bitter end, if his lawyer — a layman as far as medical matters are concerned — was not alert enough to have filed a plea of present insanity before the trial.[2] Attempting to rectify such logical conclusion, the court, in the case mentioned, added that there is nothing to prevent the superior court from looking into defendant's sanity after *conviction*. But why not investigate the question when it arises instead of undergoing the expense in time and money only to find, *after conviction*, that defendant is mentally diseased?

[1] State *v.* Wilson, 69 Wash., 235, 124 Pac., 1125 (1912).

[2] On the procedure which well informed lawyers can profitably adopt on behalf of clients, see the illuminating appendix, by Prof. A. M. Kidd and Dr. Jau Don Ball, to "Crime, Abnormal Minds and the Law", by Ernest B. Hoag, Edward H. Williams, and others (1923).

Initiation of Proceedings by Counsel. — In Ohio,[1] the concurrence of only three fourths of the jury is required; and if three fourths do not agree, a second jury must be impaneled. If defendant is found insane, the case is certified to the probate court for commitment. The procedure in Ohio is initiated upon suggestion of defendant's counsel, accompanied by the certificate of a respectable physician. While this is an improvement on the California procedure in that definite provision is made for the showing of mental disorder required to initiate proceedings, it, like the procedure in California and similar States, is open to the objection of leaving the final determination to a jury.

Monthly Examination of Inmates. — In New Mexico[2] it is specially provided that, if the trial judge from observation concludes that the defendant undergoing trial on the main issue (responsibility at time of *offense*) is insane during trial, he must submit both issues to the jury at the same time. New Mexico provides further for procedure that may well be copied by other States: A *monthly examination* of inmates of the hospital for the mentally ill is required to be made by the superintendent, and the judges interested in the different patients must be notified as to the condition of such inmates so that appropriate action may be taken by the court. This keeps the law and medical science constantly, and as a matter of routine, in touch with one another in the treatment of a problem of which they *are mutually interested.*

Massachusetts Procedure. — In Massachusetts,[3] in addition to the provision, already discussed in detail, for the *routine* examination of certain types of offenders *after indictment but before trial,* if, at any time prior to sentence, the defendant is "found by the court to be insane" or in such mental condition that his commitment to a hospital for the mentally ill is necessary "for the proper care and observation of such person pending the determination of his insanity", the court may commit defendant to a State hospital, under its limitations. The court may also, in its discretion, employ "one or more experts in insanity, or other physicians qualified", to make an examination. The term "qualified physician" is specifically defined, and a physician can become qualified by making oath that he is a graduate of a legally-chartered medical school, has been in the actual practice of medicine for three years since his graduation, and for three years last preceding the making

[1] Appendix, p. 597. [2] *Id.*, p. 582. [3] *Id.*, p. 561.

of the oath, and that he is legally registered as a physician; it is further required that his "standing, character and professional knowledge of insanity are satisfactory to the judge." [1] Such a provision might be improved by making either the State Department of Mental Diseases, or the recognized professional (psychiatric or medical) association of the State, the judge of the qualifications of experts. Other States also define qualifications for examiners, though not all provisions are as detailed as those of Massachusetts.

There does not seem to be any reason why, if a defendant has not been examined as a matter of course *before* trial, or even if he has been so examined, the court cannot request an examination, by the State Department of Mental Diseases, of defendant's mental condition during the trial, if that question is then raised. Of course, few cases found by the Department to be mentally diseased at the time of its examination will proceed to trial; this is probably the strongest feature of the Massachusetts law on this subject. But if some cases do come to trial even after the Department's experts have pronounced the defendant mentally ill, or if (as was the case in one or two instances, where accused examined by the Department's experts were pronounced sane) they developed mental symptoms during the trial, it would seem that the court can resort to either of the devices provided for; that is, examination by experts appointed by the Department of Mental Diseases, or by those appointed by the court.

It is to be noted, too, that the Massachusetts law does not require strict adherence to the common law principle in force in California, that defendant must be of such peculiar type of insanity as will not enable him to understand the proceedings against him or to conduct his defense, in order that his trial may be indefinitely postponed; the judge may commit such person without trial, if he deems it necessary for defendant's proper care and observation, and no ironclad types of insanity are required to be found by the experts before defendant will be relieved from trial.

Commission, in New York. — In New York,[2] if the court is satisfied that an alleged mentally deficient defendant who is over sixteen and charged with a *misdemeanor* is mentally defective, it may, on a verified petition accompanied by certificates of mental defect, executed by "two qualified examiners", commit defendant

[1] General Laws, C. 123, sec. 53.

[2] Appendix, p. 585.

to the proper institution, with or without a prior hearing. When, in other cases, the defendant "pleads insanity", the court, instead of proceeding with the trial, may appoint a commission "of not more than three disinterested persons" (usually one physician, a lawyer, and a layman), to examine him and report to the court as to his mental condition. Such commission must take a referee's oath, must be attended by a representative of the district attorney, may call and examine witnesses and compel their attendance, and hear counsel for the defendant. If their report of the facts and their opinion thereon find the defendant "insane" (apparently either at time of investigation, at the time of offense, or both) the trial must be suspended and the court, if it deem defendant's discharge dangerous to public peace or safety, must order him committed.[1] The objections to the New York procedure are threefold: First, the qualifications of the personnel of the commission are not clearly set forth; and this is an invitation to appoint unqualified persons, for the fee involved. Secondly, even if a well qualified commission were provided for, its report is "for temporary purposes merely and cannot be regarded as an adjudication even as to the prisoner's then present condition."[2] So it may result in unnecessary duplication of effort to find out the accused's mental condition. Thirdly, it is too expensive.[3] For the cost of a relatively small number of such commissions, a permanent well equipped and capably manned psychiatric clinic could be maintained, which would be of routine aid to the courts.

Critique of Various Types of Machinery for Determining "Insanity" during Trial. — The objections to having such a technical question as mental disease or defect determined by a jury have already been discussed. It is true that the mental abnormality required by the law is in many jurisdictions as strictly defined as it was at the early common law to mean inability to understand

[1] In People *v.* Rhinelander, 2 N. Y. Crim., 335 (1884), the district attorney moved the court to suspend the trial of the defendant on the ground that a commission appointed by the court to inquire into defendant's mental condition had found him insane (by a two-to-one opinion). Defendant, however, opposed the motion on the ground that the findings contained in the report did not sustain the opinion formed by the two concurring commissioners. The district attorney and counsel for defendant's relatives insisted that the findings of the commission after examination are conclusive; but the court held that the trial court can either adopt or reject the findings of the commissioners appointed by him.

[2] People ex rel. Thaw *v.* Lamb, 118 N. Y. Supp., 389 (1909).

[3] Upon first-hand authority the writer has been informed that the fees are so high as to constitute quite a political plum.

the nature of the proceedings and rationally to conduct a defense; and, of course, it may be argued that this technical requirement of a specific type of mental disorder which will exempt from trial, involves a pure question of fact which a jury is in a position to determine; a condition, moreover, which frequently is different from that of the medical view of mental disorder. But, in the first place, in many jurisdictions this inhumane and unscientific conception of a type of mental disorder which affects only certain faculties, and leaves those useful in one's trial absolutely intact, has given way to the more rational view that a person of pronounced mental disorder, whether it affects primarily his thought processes or his emotional and volitional life, ought not to be tried. And, secondly, even were there mental diseases which leave the faculties necessary for one's defense entirely intact while destroying the remainder of the personality, and granting that the type of mental disease which will exempt from trial is a purely legal question, it is contended that the well qualified, impartial psychiatrist is better able to inform the court as to the actual condition of defendant's mind than is a lay jury after hearing a battery of conflicting expert witnesses. As to those States which have no specific legislation on the subject, it were much better if such laws existed, providing for a method which all judges uniformly could employ, instead of leaving such an important question to the wishes of individual judges.

Where experts are used, but are required to examine their witnesses in court, under oath, the proceeding is advantageous in the event the report of the experts will later be used as testimony on the trial of the main issue of " insanity at time of the offense "; no argument as to the inadmissibility of such testimony could then arise, the witnesses having been under oath and subject to cross-examination. Further, the statements of witnesses under oath are presumably more reliable. However, such practice has the disadvantage of making a formal, stilted proceeding of what should be an intimate examination by experts.

Provided the procedure is a routine one and the qualifications of the experts are clearly defined, the appointment of a commission to examine defendants is a good device; but here too it may be said that the impression that the psychiatrist could gain from a private examination of the defendant and witnesses is not the same that a commission obtains from hearing witnesses under oath,

interspersed with statements of counsel. It ought to be possible to strip the psychiatric examination of accused persons of the straitjacket of technical rules of evidence. What we are primarily seeking is, after all, a scientific estimate of the accused's mental makeup and its relation to behavior capacity.

From the above it would appear that the use by the court of experts appointed on its request by the State commission of mental diseases (or similar body), who would then make a thorough, unbiased psychiatric and social examination of the defendant, is the procedure best calculated to obtain the desired result.

Summary of Chapter and Conclusions. — The Massachusetts law is unquestionably the most promising piece of legislation on the subject of this chapter. It should be strengthened by requiring routine examination of all persons accused of *homicides*, not only capital offenders; and by building up a scientific bureau of criminal statistics to function in coöperation with similar bureaus in other States, and with a centralized, National bureau. A psychiatric clinic attached to the magistrates' courts could aid in making examinations of such persons accused of crime whom the Massachusetts act does not cover. (This is now being done to some extent in the case of misdemeanants appearing before the Boston Municipal Court.) Since most persons who are mentally unsound would be sorted out before trial, if the Massachusetts law functioned to full capacity, the question of insanity before indictment (Section 1) or during trial (Section 3) would rarely arise; when it would be raised, temporary commitment to a psychopathic hospital for observation would seem to be the best procedure.

Most important, our investigation has shown that the chief *desideratum* in this entire field is a means of unifying and coördinating the activities of judges, experts, probation officers, and social workers. If courts and probation officers were under one administrative head, and effective liaison were established with the department of mental diseases as well as private social agencies, the *disposition* of the cases we are considering would be more in harmony with the recommendations of the experts; and the results of medical, correctional, and penal treatment could be effectively studied. Only so can we ever hope to put " the psychiatric point of view " in criminal cases to the " acid test."

CHAPTER 4

ETHICAL AND PSYCHOLOGICAL CONCEPTS IN THE CRIMINAL LAW[1]

"It is . . . a remarkable fact that psychology, the science which claims to formulate the body of ascertained truths about the constitution and working of the mind . . . has not been generally and practically recognized as the essential common foundation on which all the social sciences — ethics . . . sociology . . . and the more special social sciences, such as . . . law . . . must be built up. . . .

"The department of psychology that is of primary importance for the social sciences is that which deals with the springs of human action, the impulses and motives that sustain mental and bodily activity and regulate conduct. . . . It is the mental forces, the sources of energy, which set the ends and sustain the course of all human activity — of which forces the intellectual processes are but the servants, instruments, or means — that must be clearly defined." — William McDougall, "An Introduction to Social Psychology", 14th Ed., pp. 1, 3.

"It is obvious that the point of departure of any thorough analysis of the *mens rea* must be sought in psychology. On the other hand it would be idle to contend that modern psychologists can treat such problems without taking heed of the lawyers' requirements and limitations." — Sir Paul Vinogradoff, "Outlines of Historical Jurisprudence", Vol. I, pp. 33, 34.

Section 1 — Introduction. The Sentiment of Justice

Résume of Discussion to This Point. — Up to this point we have been concerned with the pragmatic questions of mental condition of defendants before or during trial. We have discussed means of segregating, from among persons arrested for criminal conduct, those who were in no mental condition to be tried. With the effective operation of such a segregating device as the Massachusetts law, and the intelligent coöperation of prosecutors, judges, and the public generally, a large percentage of the more serious criminal offenders can be committed to appropriate institutions without the State undergoing the expense of trial (with the possible chances of acquittal of dangerous offenders),[2] and without the

[1] The substance of this chapter is part of the writer's essay on "Ethics, Psychology and the Criminal Responsibility of the Insane", *Journal of Criminal Law and Criminology*, Vol. 14, pp. 208, *et seq.*, Aug., 1923. *American Law Review*, Vol. 58, pp. 641, *et seq.* (1924).

[2] The very important point is frequently overlooked, that in many serious offenses where the danger of possible capital punishment is not present, men-

mentally diseased being unnecessarily subjected to the ordeal of a trial. There will, however, be some cases remaining, in which the experts will find the accused to be of sound mind, but in which the defense of insanity will nevertheless be interposed; and it is conceivable, too, that the experts of the State hospital commission, or similar body, may make mistakes. These cases, which in most of the States constitute almost the entire number of accused persons who plead insanity, will claim our attention in the succeeding pages. It is these cases in which the question of guilt or innocence arises; and in connection with them we are therefore led to consider the ethical and psychological concepts met with in the substantive law of insanity.

The Sentiment of Justice. — Modern writers upon the substantive criminal law cannot afford to neglect the ethical and psychological bases of the subject. These are the foundations, for example, of such works as Saleilles' "The Individualization of Punishment",[1] which is one of the few to contribute anything original to the fields of Criminology and Penology since the daring hypotheses of Lombroso. It admirably defines criminal law as "the sociology of crime adapted to the sense of justice."[2] Saleilles speaks of the sense of justice in these words: "In so far as the germ of human evolution is to be found in the psychology of man, it may

tally ill offenders and their counsel frequently prefer not to resort to the defense of insanity. The Massachusetts procedure would provide for the recognition of all mentally diseased offenders regardless of the gravity of their offenses or of whether or not their counsel would resort to the defense of insanity.

[1] "Modern Criminal Science Series", No. 4, Transl. by Rachel Szold Jastrow.

[2] But what is "justice"? The opinion of a philosophical jurist is as follows:

"Justice itself, which we are wont to appeal to as a test as well as an ideal, may mean different things to different minds and at different times. Attempts to objectify its standards, or even to describe them, have never wholly succeeded. Aristotle distinguishes between corrective justice . . . , distributive justice . . . , and general justice. . . . Such a classification does not carry us far. What we are seeking is not merely the justice that one receives when his rights and duties are determined by the law as it is; what we are seeking is the justice to which law in its making should conform. . . . It remains to some extent, when all is said and done, the synonym of an aspiration, a mood of exaltation, a yearning for what is fine or high. 'Justice', says Stammler in a recent paper, 'is the directing of a particular legal volition according to the conception of a pure community.' Perhaps we shall even find at times that when talking about justice, the quality we have in mind is charity, and this though the one quality is often contrasted with the other. The ingredient which sours if left alone, is preserved by an infusion, sweetening the product without changing its identity." — Benjamin Cardozo, "The Growth of the Law", pp. 86, 87.

be held that the sense of justice is, of all the inherent human instincts, the deepest, the most tenacious, and the most distinctive ";[1] and it cannot be denied that the complex sentiment which we speak of as the sense of justice, is at the basis of the rough-and-ready morality of society. It is the sense of justice, for example, which dictates that the criminal law must be more than " an instrument of social protection ", since such a limitation takes account only of the social interest in the *general* security. The sense of justice demands that the criminal law must, in addition, take cognizance of the social interest in the *individual* life;[2] hence of the personality of the *offender*. In dealing with the criminal law, we are therefore led to consider the question of human psychology.

The Basis of Moral Judgment. — The numerous views as to the basis of moral judgment expressed by different ethicists may after all be reduced to the opinion of the man in the street. When we pass moral judgment upon one's conduct, we speak of his " moral responsibility " (or irresponsibility) for the act. Usually, if we analyze the basis of this moral responsibility, we are driven to conclude that our notion of responsibility arises from the general opinion, based upon life's experiences, that a person possessed of the ordinary human faculties to an apparently normal degree is capable of acting, and therefore, must, and is by us expected, to act according to an accepted, socially required standard of morality. Acts which do not attain this standard, when fathered by a person apparently of *normal mental constitution*, are immoral. Our morality is thus seen to be based upon a conception of the mental makeup of most people;[3] and we begin to excuse from responsibility when we see that the mental equipment of the actor was so different from that of the general run of men that he could not have approached the moral problem presented to him in the same way that most persons, under similar conditions, would have met it.

If we analyze the mental endowment of the so called average man, we usually speak of two concepts: First, we say that he has

[1] *Op. cit.*, pp. 2, 3.

[2] *See* Roscoe Pound, "Interpretation of Legal History" (1923), pp. 160, *et seq.* *See also* Dean Pound's "A Theory of Social Interests", *Proceedings of the American Sociological Society*, 1921.

[3] Although Saleilles, *op. cit.*, p. 80, and Oppenheimer, "The Criminal Responsibility of Lunatics", *op. cit.*, pp. 157, *et seq.*, claim that in the Neo-Classical penological philosophy the tests of irresponsibility are based upon, and require the expert and jury to pass upon, the metaphysical question of "freedom of will", it is believed that this refers to power of volition; that it is, in other words, a *psychological* question.

a free will,[1] that is, that in the ordinary affairs of life, he is able to choose the good and avoid the evil; and, as ethicists, we help him to evaluate and recognize the good. Secondly, we say that such a person is endowed with ordinary " common sense ", or ordinary intelligence. Often we stop at this point, although occasionally we speak of bad upbringing, poverty, poor heredity, etc., when discussing the responsibility of any individual for acts that we consider immoral or illegal. Theoretically, at least, and in most situations, the criminal law stops at the point of the accused's *mental* condition when he committed the act. But even in considering mental constitution, the law in the light of modern psychology seems to ignore the most fundamental psychic element of all, — the affectivity. In many mental disorders this is most important. " The motives for all indulgence or abstinence in behavior", as we shall see later, " are derived from emotional tones (pleasurable or unpleasurable imagery, attraction and repulsion, strivings and counter-strivings). Upon the strength of these feelings depends the intensity of the motive, and by the same token, the urge for the action. In the battle of motives, the decision rests with the side which possesses the preponderance of affectivity. . . . If a thorough consideration of emotional factors is absolutely essential for the understanding of behavior in general, this is especially true for the understanding of the behavior of the psychopath, whose main distinguishing characteristic of constitution is a *pathological affectivity*." [2]

We are Chiefly Concerned with Mental Unsoundness as Affecting Criminal Responsibility. — The psychological approach is therefore necessary, if we would understand the criminal law. Such approach, it is true, is insufficient, standing alone, to insure a just estimate of responsibility in the individual case. To measure the exact responsibility of an alleged malefactor according to any yardstick, be it mental condition at the time of the offense, or a belief in ethical freedom, or in the individual's purposive capacity, or in absolutes of good and evil is difficult if not impossible. What we must do as far as possible is to proceed from a correct view of the make-up of human personality, and at the same time take into account, in the individual case, not only differences

[1] Meaning "volition", in the popular sense, not "freedom" in the metaphysical.

[2] Bernard Glueck, review of "The Psychopathic Criminal", by Karl Birnbaum. Reprinted from *Mental Hygiene*, Vol. III, No. 1, January, 1919, p. 2.

of mental constitution, but the more or less immediate environmental influences which contributed to the criminal act. The health, economic and social status, heredity of the defendant, his mental and moral education, his experiences, the peculiar circumstances surrounding the particular criminal act he stands charged with, — all these and many other factors ought justly to be weighed in determining responsibility and the type of penal treatment necessary in the *individual* case.[1] But, unfortunately, the general principles of the criminal law, and especially those involved in the defense of insanity, are more or less broad; and they are framed rather with reference to the average man, or the general run of men, than with regard to the possibility of specialized treatment of the individual delinquent.

While Healy [2] and other authorities have shown the complexity of causation in the production of antisocial conduct, and that general causation theories are of little value, they have also pointed out that the study of causes of crime must proceed primarily from a study of the *mental* factors of the criminal act in each individual case. Thus Healy says: "Whatever influences the individual or his offense must influence first the mind of the individual. It is only because the bad companion puts dynamically significant pictures into the mind, or because the physical activity becomes a sensation with reproduction in psychic life, or the environmental conditions produce low mental perceptions of one's duty towards others, that there is any inclination at all towards delinquency." [3]

We may say then that *no two offenses are indicative of exactly similar moral responsibility on the part of the perpetrators,* although behavioristically considered they both may present the same outward aspect. Similarly, no two offenses before the criminal law indicate the same grade of *criminal* responsibility (*i.e.*, punishability based upon perversity); for the capacity of every individual to act in a socially acceptable manner depends upon a host of

[1] To some extent, although too haphazardly, this process of individualizing responsibility is actually being employed to-day. Investigations by probation officers and social workers prior to disposition of the case, investigations and study within penal institutions, and some attempt at individualization of treatment, — these improvements no doubt have as their aim, to some extent at least, the evaluation of the complex elements of responsibility. The greatest promise, however, lies in a well organized, capably manned, well equipped psychopathic-sociologic laboratory, attached to the criminal courts, and at the same time supervising penal treatment in a directive way.

[2] William Healy, "The Individual Delinquent"; M. Hamblin Smith, "Psychology of the Criminal", pp. 13, *et seq.*

[3] Healy, *op. cit.*, p. 28.

subtle and complexly interrelated influences. But the human capacity for conscious, purposive activity is the most important of these influences, even though it too is of different degrees in different people.[1] Recognizing, then, the importance of other than the mental factors in the causation of crime, we are nevertheless largely concerned in this study with the relationship of mental unsoundness to criminal responsibility.

Responsibility and Freedom of Will.[2] — While many important writers in the field of criminology rightly make short shrift of the troublesome metaphysical problem of freedom of will,[3] some moral-

[1] Though Healy, Bernard Glueck, and others insist upon the psychological-psychiatric point of departure, they recognize that, while basic, the mental factor is not the only one involved in cases of delinquency. If a psychological-psychiatric examination alone were to determine responsibility, and a method could be devised whereby individuals could be graded in responsibility for similar offenses on the basis of their respective mental ages and their individual personality make-up, the task of estimating responsibility, which has occupied morals and law for so many years, would be comparatively simple. Such a device is, of course, only hypothetical. As a matter of fact, however, we come nearer to an actual evaluation of responsibility in the psychological-sociological technique employed by experienced scientists than we have ever been able to achieve in the law or in purely speculative ethics. By this technique, we obtain some remarkable light on problems of individual responsibility. We learn, for example, that mental make-up is not always the chief source of character in difficulties. Thus Healy, in his path-blazing study of the individual delinquent, found that in 162 cases out of 823 in which the complex causative factors of delinquency based on thorough psychological and sociological investigation were penetratingly analyzed, defective home conditions were a primary causative factor; in 394 out of the 823 cases, defective home conditions were a secondary causative factor. In 556 out of 823 cases, therefore, defective home conditions were found to be largely responsible for delinquent conduct. "The Individual Delinquent", pp. 130, 131. As to the importance of the mental approach, *see also* his "Mental Conflicts and Misconduct", Boston, 1917; *see* Bernard Glueck's "Study of 608 Admissions to Sing Sing Prison", *Mental Hygiene*, January, 1918, and his "Types of Delinquent Careers", *Mental Hygiene*, April, 1917.

[2] There are numerous definitions of "freedom" and "determinism", depending largely upon varying opinion as to the degree of freedom. Few to-day would seriously insist either that human activity is entirely free in the sense that a "movement of the will" is a "bolt from the blue", or, the other extreme, that all human action is inevitably determined by mechanical laws. Professor Horne's "Free Will and Human Responsibility" gives a pithy summary of the definitions of the terms and the arguments pro and con. The view of freedom taken in these pages is human capacity for conscious, purposive activity.

[3] Numerous writers in this field have recognized the futility of the freedom of will discussion in connection with criminal responsibility. To cite only a few, Oppenheimer, in his "Criminal Responsibility of Lunatics" (1909), p. 5, says, after warning the reader that criminal responsibility does not mean responsibility in a psychological or metaphysical sense, that he has "shown the utter hopelessness of the psychological conception of the problem", and that he feels "lighter for having thrown overboard the metaphysical ballast." The writer would not agree with him as to the futility of the psychological basis of the criminal law. The whole subject of *mens rea* (*see* pp. 107, *et seq.*) is founded upon psychology.

ists regard it as of the essence of a study of the criminal responsibility of the insane. Thus, Mr. F. H. Bradley pertinently asks, in criticism of Doctor Maudsley's classical "Responsibility in Mental Disease", "How in the world is it possible to say what relieves a madman of responsibility unless you know what makes a sane man responsible? Unless a man is agreed with us as to our main beliefs as to a sane man's responsibility, how can we receive his evidence to any one's nonresponsibility?"[1] Now while, in a sense, the logic of Mr. Bradley's queries cannot be denied, we must be clear as to the meaning of our concepts and as to what the law is attempting to do. In the first place, as we indicated at the outset, our notion of *moral* responsibility is not necessarily dependent upon our views as to the metaphysical problem of human freedom.[2] Men condemn and forgive each other, hate and love each other, hold each other responsible individually and socially, not necessarily

Again, Healy, in his monumental "The Individual Delinquent" (1915), p. 20, says: "The criteria of responsibility involve so much that is intricate, uncertain, metaphysical, and are themselves . . . subject to variations by reason of environmental and disease conditions, by reason of innate defects and differences in social suggestibility, that, for the purposes of general discrimination and the development of a general standardization, they are thoroughly impracticable."

And a recent little study on the "Psychology of the Criminal", by M. Hamblin Smith (1923), pp. 8–10, says: "An immense amount of controversy has gathered around this word ("responsibility"). And all kinds of theories have been propounded on the subject. The old view, and it is still quite a usual conception, is based upon a metaphysical theory of the 'freedom of the will.' It is held, practically, that there is an entity called the 'will' which presides over the mind, and which is regarded as the ultimate director of conduct. And it is further held that a man must be required to exercise his will in accordance with certain defined ethical principles. And he is to be accounted as 'responsible for his actions', unless he is incapable (either from mental disease or from mental immaturity) of 'knowing right from wrong.' Now this metaphysical theory, in the author's opinion, has no place in any scientific scheme. We cannot, in such a scheme, recognize 'will', apart from individual volitions. . . . We are therefore obliged to discard this particular theory of responsibility. . . . But there is a sense in which we may properly use the word 'responsibility', and in which we may take part in scientific discussion on this subject. If we reject the idea that responsibility is something intrinsic to the individual, we may still use the word as expressing the idea of the reaction of society to a given act."

I have attempted an examination of various theories of punishment in the light of freedom of will and determinism, and have come to similar conclusions. *See* my "Ethics, Psychology and the Criminal Responsibility of the Insane", *Journal of Criminal Law and Criminology*, Vol. 14, pp. 208, *et seq.*, August, 1923; reprinted in the *American Law Review*, Vol. LVIII, pp. 641, *et seq.*, September, October, 1924.

[1] "Ethical Studies", p. 44, Note 1.

[2] No one has more ably punctured the balloon of the alleged indissoluble relation between freedom of will and moral responsibility than has the erudite French jurist and philosopher, Gabriel Tarde. *See* his "Penal Philosophy", pp. 13, *et seq.*, "The Modern Criminal Science Series", No. 5, translated from the French by Rapelje Howell.

because of any belief in human freedom. They do these things because, on the one hand, their innate, instinctive nature prompts them to it, and, on the other, their intelligence and experience teaches them that most human beings have some capacity for purposive, creative activity, albeit under the influence of innate, psycho-physical dispositions, or " instincts ", and their emotional accompaniments, or " motives." Men regard such human conduct as purposeful in spite of the obvious fact that it can only be carried on within certain necessary hereditary and environmental limitations. If, therefore, we would use the expression " freedom of will " at all, let us employ it — as some writers of the Mentalist School of Psychology do[1] — as describing man's capacity to act with consciousness of purpose, albeit on the basis of his instinctive nature.

Secondly, Mr. Bradley must be answered by pointing out that this concept of human freedom as capacity for purposive activity within certain bounds is also employed by the criminal law. Writers on the philosophy of the criminal law, such as Wharton [2] and Stephen,[3] do not use the term " freedom of will " in its metaphysical connotations, but as expressive of the law's presumption that most men, in most of the relations of life, can act purposefully and can inhibit antisocial, illegal tendencies. The law, following common sense and common morality, assumes a certain degree of purposive capacity possessed by the normal mind.[4] Thus the law proceeds upon the assumption that it is possible to leave the question of metaphysical freedom or necessity entirely open, basing responsibility upon our experience of the nature of man's mental

[1] *See*, for example, William McDougall, "Outline of Psychology" (1923), pp. 446, 447.

[2] "Philosophy of Criminal Law", pp. 51–53.

[3] "History of the Criminal Law of England", Vol. II, pp. 83, 84. Stephen, a remarkable psychologist and philosopher as well as jurist, argued that "there is nothing to show that if all conduct could be predicted praise and blame would cease to exist. If, notwithstanding the doctrine of philosophical necessity, love and hatred are as powerful as ever, and not less powerful in those who are most firmly convinced of that doctrine than in other persons, it follows that there is no real inconsistency between that doctrine and those passions. . . . If the doctrine in question should ever be so completely established as to account for the whole of human life (and no one will assert that this has as yet been done), it will account for love and hatred as well as for other things, and will no more disturb them than other things are disturbed by being accounted for."

[4] "No matter what may be our speculative views as to the existence of conscience, or of freedom of action, we are obliged, when we determine responsibility (in criminal law) to affirm both." — Wharton, "Philosophy of Criminal Law", pp. 51–53, 109.

endowment and upon scientific data as to the manner in which the mind and behavior are affected by mental disease.[1] The law recognizes the fact that mental unsoundness does have an influence upon one's capacity to act purposefully in adhering to its commands; and the disadvantage that the mentally unsound defendant suffers in this regard is, under certain legal conditions, sufficient to absolve him from criminal responsibility.

One's notion of responsibility (both in morals and in law) is therefore bound up not so much with a belief in human freedom or in philosophical determinism, as with an understanding of the nature of human psychology, and with the conviction, obtained empirically, that most persons can more or less choose between various possible lines of conduct; that most persons, in other words, can act purposefully in a more or less rational and socially acceptable manner, upon the basis of man's innate instinctive-intellectual nature. When men fail to achieve the socially or legally acceptable minimun of required conduct, it is either because they deliberately chose such a result, or because, through native mental defect, mental disease, or the overwhelming pressure of the external world, they were actually unable to exercise their purposive-volitional capacity.

Section 2 — Behaviorism versus Mentalism in Psychology and Law

The Issue a Problem of Divergent Schools of Psychology. — For the practical purposes of the criminal law, the issue then becomes the alternative between that school of psychology which regards man as a purposive, creative being, capable of some self-direction, and the modern "radicals" in psychology, who regard man as a machine, or at the most as a conscious automaton.[2] In this re-

[1] The writer is aware of the fact that the nineteenth century overemphasized "the Will" in its legal writings, and held a "wicked" or "depraved" will as the punishable entity; however, with the advent of the criminological studies of the later nineteenth century, with the development of the biological and social sciences and the tracing of abnormal conduct to psychological and social causes, the view of "Will" as an entity presiding over the mind and dictating its conduct has gradually given way to an interpretation of it as the organized integrated capacity for purposive activity, in spite of the fact that the polemical *terminology* has often remained unaltered.

[2] For a good though brief exposition of the various schools of "behaviorism", *see* "Behaviorism and Psychology", A. A. Roback (1923), in which the numerous shades and complexions of this physico-psychology are presented, especially in their application to such problems as medicine, education, law, etc.

spect conservative law has shown herself much more sensible than her more impetuous sisters, — the experimental sciences; for, admitting that the hypothesis of universality of mechanical causation is every day permitting "experimental determinism" to adduce brilliant examples of the apparently universal sway of mechanism, it, nevertheless, takes the common-sense view that this need not at all affect our practical belief in the human capacity for purposive conduct, within certain limitations.[1] It refuses to become entirely behavioristic; for by surrendering itself exclusively to such an hypothesis it may blind itself to certain data of mental life, and their relation to criminal conduct, which it could otherwise seek to explain. It attempts to plumb the mental factors behind the criminal act.

At this stage it is necessary to treat briefly of the difference of opinion between the Mentalist and Behaviorist schools of Psychology. The former, in brief, recognizes the reality of mind and of the creative activity of mind[2] as expressed in the strivings, hopes, and ideals of man and his power to conform his conduct to social and legal demands. It is difficult to see, on the other hand, how, under a purely behavioristic (mechanical-materialistic) conception of the human organism, there is any room for belief in even a shred of free, self-directive, purposive, and to that extent responsible, activity. One thing further should be said. If Behaviorism were merely a new *point of view* in psychology; if, in other words, it were merely considered as a useful technique (for the purposes of experimentation) together with the hypothesis of mind and purposive capacity, it would not be open to objection, would not, indeed, be separable from the Mentalist position, which has always recognized the importance of physiological experimentation.[3] But

[1] This view is similar to the moving principle of Lotze's "Mikrokosmus": "It is to show how absolutely universal is the extent, and yet how completely subordinate is the significance of the mission which mechanism has to fulfill in the structure of the world." — Fünfte Auflage, 1896, S. xv.

[2] Of course, the term "mind" and what it connotes is an hypothesis, but an indispensable one. — McDougall, "Outline of Psychology", pp. 35 and 39.

[3] "On the other hand, I have no sympathy with certain psychological purists who would banish all physiological facts and theories from psychology, on the ground that psychology and physiology are two distinct sciences whose facts and categories cannot be mingled without confusion. . . . Let the psychologist make the fullest possible use of all the help that physiology can give; let him regard it as one of his tasks to harmonize or coördinate the facts and descriptions of his own science with those of physiology. But let him not capitulate to the unjustified demand that his science shall abdicate its functions in favor of a mechanistic physiology. Ultimately we may learn how to harmon-

Behaviorism is more than a point of view; it assumes to explain *all* human activity in terms of mechanical responses to stimuli, and refuses to consider the conscious phenomena of introspection.

The Law's Concern with Psychology. — A brief preliminary statement of the elements of the criminal law will serve to show how the problems of psychology, upon which the Mentalistic and Behavioristic schools differ fundamentally, become important. "To responsibility" (imputability), says Wharton, "there are, we must remember, two constituents: (1) capacity of intellectual discrimination; and (2) freedom of will.[1] If there be either incapacity to distinguish between right and wrong as to the particular act [2] or delusion as to the act, or inability to do or refrain from doing the act, then there is no responsibility." [3] We will consider these elements more in detail later; for our present purpose it is sufficient to mention the two *mental* elements of criminal responsibility, — "capacity of intellectual discrimination" and a more or less normal capacity for free volition. Some foreign codes, such as some of the Cantonal Codes of Switzerland, for example, expressly recognize these elements. Lucerne provides that the punishableness of an act, in itself criminal, presupposes reason and freedom of will in the actor.[4] The reason and freedom of volition required by the criminal law as part of the necessary criminal intent [5] are ordinarily presumed from the commission of an illegal act; but this presumption is, of course, rebuttable in any particular case.

The doctrine expressed by Wharton above is sometimes put in these words: For the commission of a crime there must be an illegal act with criminal intent. In this criminal intent two elements must be present: (1) The existence in the offender of a state

ize the findings of the two sciences more satisfactorily than it is possible to do at the present day. Let us push explanation in terms of nervous structure and function as far as ever we can; but in doing so, let us not suppose that such explanations are ultimately and completely true." — McDougall, "Outline of Psychology", pp. 36, 37.

[1] Having discarded freedom in the metaphysical sense, Wharton is here referring to freedom in the sense of capacity for conscious, purposive activity.

[2] This refers to knowledge of the circumstances surrounding the act; it omits ignorance of the *law*. "If ignorance of a law were defense to a prosecution for breaking such law, there is no law of which a villain would not be scrupulously ignorant." — Wharton.

[3] "Philosophy of Criminal Law", pp. 51–53, 109.

[4] *See* Oppenheimer, "The Criminal Responsibility of Lunatics", for a good summary of foreign criminal codes on this subject.

[5] The legal significance of this term is discussed in footnote 1, on p. 109.

of mind which has been declared by the law to constitute criminality; (2) the *voluntary* commission of an illegal act, as a result of that state of mind. The law's concern with the psychological elements of a criminal act is further illustrated by its use of intent, *specifically*, as an element in the definition of certain crimes whose degree of gravity to the public security depends upon the *special* intention with which those acts — outwardly, *i.e.*, *behavioristically*, all alike — were actually committed. Thus, in such offenses as wounding with intent to do grievous bodily injury, forgery with intent to defraud, assault with intent to kill, etc., the complex mental state comprising the intention becomes specifically important and must be proved. But intention is a concomitant of all purposive, voluntary action; and as all criminal acts must have, as one of their legally required elements, a criminal intent,[1] all criminal conduct implies the exercise of the capacity for conscious, purposive, and therefore voluntary, action.

When the Question of "Free Volition" arises in Criminal Trials. — The mental elements mentioned by Wharton, *i.e.*, capacity of intellectual discrimination and capacity for purposive volition, become most important in practice, when, at a criminal trial, the question of the possible exemption from normal criminal responsibility of a mentally unsound defendant is in issue; and it is in the manner of testing deviations from normal criminal responsibility because of mental disorder of one form or another that we find divergencies of opinion among jurists and physicians. It is this testing of deviations from the mental capacity of the rational, free-choosing, purposive individual which has caused, and still causes, much trouble in the administration of the criminal law in such cases.

It is important to point out that if the law proceeded on the basis of strict behaviorism, as described below, it would look only to the *external act* and not concern itself with questions of deviations from normal mental power and their relation to criminal responsibility.

Bearing in mind the above statement of the more important mental elements with which the criminal law is concerned (and there are others which are not so important for our purpose),

[1] Minor statutory offenses, wherein no criminal intent is necessary to constitute guilt, are unimportant for our purpose, as they rarely involve the defense of insanity.

let us consider which of the two major schools of psychology [1] best accords with the doctrines of the *developed* criminal law.

Some Principles of Behaviorism. — Thoroughgoing Behaviorism, under the influence of biological research, insists that all human behavior can be explained exclusively, and ultimately will be *completely explained* in terms of the structure and automatic, mechanical functioning of the brain, nervous system, musculature, and glandular activity of the human machine; that is, in terms of chemical and physico-chemical reactions to stimuli. Even thought is conceived as a complex, minute functioning of the muscles involved in speech, in the same way as all external behavior is attributed to the mechanical response of motor "sets" or bodily attitudes to accidental stimuli.

Conation (striving), volition, desire, are either not dealt with at all, or explained as consisting of automatic responses to stimuli. All the higher mental integrations and functions are similarly conceived as complex systems of reflexes which respond automatically to stimuli. Such words as "purpose", "striving", "ends", "aims", "intention", and many others of ethico-psychological significance with which the law deals, and which common sense recognizes and common experience confirms, are not to be found in the dictionary of Behaviorism, strictly construed. Man is a machine. The penological consequence is, that if the machine is out of order and runs amuck in a socially unacceptable manner, there is but one thing to do, — to get it out of the way, and not to consider the personality of this mechanical offender in the evaluation of his guilt, and planning of his course of socio-penal treatment.

But let us permit the leading Behaviorist to express his views in his own way:

> The psychology which I should attempt to build up would take as a starting point, first, the observable fact that organisms, man and animal alike, do adjust themselves to their environment by means of hereditary and habit equipments. These adjustments may be very adequate or they may be so inadequate that the organism barely maintains its existence; secondly, that certain stimuli lead the organisms to make the responses. In a system of psychology completely

[1] The views of the chief exponents of the rival schools are briefly outlined in two articles to be found in *Psyche*, Vol. V, No. 1, July, 1924, as follows: "In Defence of Behaviourism", J. B. Watson; "The Fundamentals of Psychology — A Reply to Dr. Watson", W. McDougall.

worked out, given the response the stimuli can be predicted; given the stimuli the response can be predicted.[1]

And again:

Behavior on analysis is the separate systems of reactions that the individual makes to his environment. When we come to study the mechanics of such adjustments we find that they depend upon the integration of reflexes connecting the receptors with the muscles and glands.[2]

He says, in another place:

Since, according to my view, thought processes are really motor habits in the larynx, improvements, short cuts, changes, etc., in these habits are brought about in the same way that such changes are produced in other motor habits. This view carries with it the implication that there are no reflective processes (centrally initiated processes).[3]

Inadequacy of Behaviorism in Law and Ethics. — If there are no "reflective (centrally initiated) processes", it is difficult to see on what basis offenders can be held either morally or legally accountable for their antisocial acts. These acts, in such a view of human nature, are merely the *automatic* responses to *accidental* environmental stimuli. Why, then, should one be held responsible for his automatic response to an external stimulus which he had no share in bringing about, and no way of foreseeing or forestalling? As mental states and mental concepts with which we are all familiar — such as intention, motive, volition, and others important in the criminal law — are, in Professor Watson's summary of his mechanistic psychology, rigidly excluded, the requirement of the law that to constitute criminal responsibility there must be "capacity of intellectual discrimination" and freedom of volition cannot be satisfied by such a discipline. If all human action is reflex action, or automatic response to stimuli, and if, as McDougall puts the situation, it is the result "merely of the play of nervous currents, started in the sense organs by stimulations from the physical world and propagating themselves through the jungle of the nervous system, finding always the paths of least resistance according to purely physical

[1] Watson, "Psychology as the Behaviorist Views It", *Psychol. Rev.*, 1913, Vol. XX, p. 167. *See also* his "Behavior", New York (1914).
[2] Watson, "Psychology from the Standpoint of a Behaviorist" (1919), p. 13.
[3] "Psychology as the Behaviorist Views It", note, p. 174.

principles", then the conscious-volitional-inhibitory basis of both moral and legal responsibility must be abandoned; and either all men must be exempt from responsibility on the ground that they are automata with no control over their responses to accidental, environmental stimuli, no power of purposive planning and execution of their purposes, or, arbitrarily, human machines which interfere with the smooth running of the social machine must be placed out of danger or scrapped entirely without regard to the rights of the machine or the equities or mitigating circumstances of the individual case. Behaviorism, briefly, is unsatisfactory as a basis either for ethics or law; that is, when these are not purely speculative systems derived by "pure reason" and unrelated to actualities.

Inadequacy of Behaviorism in Psychiatry. — The inadequacy of the behavioristic point of view in the field of psychiatry, and in the domain of our special interest in this study, — namely, the determination of the mental condition of accused persons who plead insanity as a defense to crime, — is well indicated by Jelliffe:

> There can be no doubt that psychoneuroses have brought about "habit twists" which have become a faulty equipment in the patient's reactions to life. To acknowledge this is by no means to lose sight of the relation of these habit twists as only forms of expression of a self that is more than a complex and coördinated system of language habits and bodily habits. . . . The very fact that the patient cannot phrase in terms of words the habit twists which have become a part of his biological equipment would imply that there was something more than merely bodily habit twist.[1]

The data of psychopathology must convince one that "Speech is no more capable than any other motor mechanism of taking the place of affective functioning, but is one of the vehicles through which this is given discharge, an implement which the same affective impulses first formed and are still perfecting for their use."

Says another practical worker in this field:

> It is impossible to investigate everything in our mental life by objective methods, for this inner experience is far richer than its manifestations by actions or reactions that can be the objects of an external observer's experience.

[1] S. E. Jelliffe, "Dr. Watson and the Concept of Mental Disease", *Journal Philos. Psychol. & Sci. Meth.*, Vol. XIV, 1917, pp. 270–271.

Nor has Behaviorism been able to attain its goal and predict and control human behavior. A pure Behaviorist would have little place in a psychological clinic or the schoolroom or the Juvenile Court, etc. Whenever one wishes to understand any of the real problems of mental conflict, or penetrate into the real causes of the difficulties of life, one has to obtain introspections from the patient in trouble. His reactions alone will not give the insight into his personality that is necessary in order to give him the help he needs. Psychology should enable us to solve the difficulties of the human race as well as to investigate the curve of learning in white rats, dogs, cats or human organisms.[1]

It thus appears that from the points of view of both the criminal law and of mental medicine — the two disciplines with which we are mainly concerned in this study — Behaviorism is inadequate.

The Nature of Human Psychology. — Let us try, therefore, to obtain a clear conception of the nature of human psychology from the Mentalist point of view. It is believed that both for the purpose of the criminal law, and in the light of what we are learning of morbid psychology, Professor McDougall's exposition is the most helpful. Briefly, his views are expressed in the following extract from a recent book,[2] in which he summarizes the concepts he first advanced in his fundamental work:[3]

> Emotion was regarded as a mode of experience which accompanies the working within us of instinctive impulses. It was assumed that human nature (our inherited inborn constitution) comprises instincts; that the operation of each instinct, no matter how brought into play, is accompanied by its own peculiar quality of experience which may be called a primary emotion; and that, when two or more instincts are simultaneously at work in us, we experience a confused emotional excitement in which we can detect something of the qualities of the corresponding primary emotions. The human emotions were then regarded as clues to the instinctive impulses, or indicators of the *motives* at work in us. . . . A little dose of intelligence may modify the impulsive power of emotion or of instinct.

In thus considering human personality as a sort of " federation of organic impulses ", distinguished from the mental constitution of lower animals by the degree of intelligence which can be interposed to modify these instinctive tendencies and their asso-

[1] T. V. Moore, "Dynamic Psychology", 1924, p. 9.
[2] McDougall, "Outline of Psychology", 1923, pp. 127, 128.
[3] "An Introduction to Social Psychology", 14th Ed. (1921).

ciated emotions, we get nearer to what the *law* regards to be the make-up of human personality. These impulsive instincts, which urge for gratification, are shared by man with the lower animals. They are modified or kept in check originally by their own "inward antagonisms", — as is the case where two impulses arise simultaneously (such as the urge to fight and the impulse to run, at the sight of danger). But with the development of mind and of social life, other considerations than the mere gratification of the individual's primitive impulses prompt to, or inhibit, action; or, rather, more refined and complex combinations of these primitive impulses.

Behaviorism the Psychology of Primitive Law. — Primitive man, as the lower animals, simply destroyed any obstacles in the way of gratification of these instinctive urges. As social life progressed, however, the conflict between those instinctive trends which are essentially egoistic, and the federation of organic impulses comprising the essentially social instincts, became more acute. In law, it represents the stage where social rights or interests were beginning to be consciously balanced, by legislators and judges, against individual "rights" (reducible to opportunities for instinctive expression). At the same time, the more that was learned about human nature, the more were mitigating circumstances taken into consideration in the balancing of individual against social interests. The history of criminal law (as we shall see in the chapter on the history of the tests of criminal irresponsibility) consists of an ever-widening consideration of such factors as age and mental condition of persons accused of crime, in the evaluation of their criminal responsibility. The recognition of the nature of man, of the variety and complexity of his motives (*i.e.*, emotional accompaniments of primitive instincts), and of the important fact that "according to the measure of his intelligence he can weigh them, estimate possible consequences, and follow one and inhibit the other"; [1] man's further recognition, that though the primary instincts may cry for satisfaction, such satisfaction might "harm him in his property, liberty, in his life, for the injustice and injury he is doing to others", [1] these factors began to be considered and balanced by the law in its estimation of criminal responsibility for antisocial, illegal conduct. Hence we may say that Behaviorism is the psychology *par excellence* of primitive law, the law of

[1] Bernard Hollander, "The Psychology of Misconduct", pp. 178–180.

self-help, and the *lex talionis*, when men either took vengeance into their own hands, or were awarded "an eye for an eye"; for in primitive law only the *objective fact of a damaging act* was taken into consideration, and the crude beginnings of the law were not concerned with questions of relative moral or legal responsibility, such as age and mental condition. All anti-individual (or antisocial) acts were on the same footing, and all men who committed acts which were externally alike were equally culpable.

Intention and Volition from the Point of View of Psychology. — As intention and volition are the two concepts with which the law on the subject of criminal responsibility of the insane is mainly concerned, and as Behavioristic psychology makes no provision for these,[1] a brief description of them from the standpoint of Mentalist psychology is necessary. We have said that free volition in the sense of conscious, purposive capacity is assumed by the criminal law, as it is assumed by popular thought and popular morality. As Professor McDougall points out, "neither 'the Will' nor 'Conscience' is a faculty, an entity of any kind, distinct from the personality. 'The Will' is character in action; and 'Conscience' is moral character — character developed under moral guidance, character in which the moral sentiments are duly incorporated in the system of the sentiments, and, through the medium of the sentiment of self-regard, are given due weight in all moral issues; character consolidated by habitual and consistent decision and action, in accordance with the promptings of the moral sentiments and of an unyielding self-respect." [2] A little reflection must convince one that this is essentially what is meant by "the Will" and character in everyday thought and conversation. By "free volition", then, is meant the capacity to express, partially inhibit,

[1] To say, as the Behaviorist probably would, that "intention" consists of "implicit language habits" would not serve the purposes of the law; nor would it give any reason why, as Doctor Roback has indicated, "implicit" language habits should involve greater culpability than "explicit", external behavior. For it is well known in the law that a mere declaration of intention is not always or necessarily an indication of the actual mental condition of intention or "criminal intent", which the law requires as an ingredient of every crime. Intent is required, to take account of the need of the culprit's having foreseen the consequences of his act, or having known that his act would result in injury or might thus result; and, further, to take account of the defendant's capacity to restrain the illegal act even after he had envisaged it — in other words, of the accused's capacity for conscious, purposive activity (including his inhibitory capacity).

[2] "Outline of Psychology", p. 442.

and consciously guide the innate tendencies to purposive action; the power to convert, in some measure, the blind purposes of the instinctive nature into the conscious purposes of the integrated personality. When this power is weakened or destroyed by mental disease, the primitive purposes dominate the conscious self.

In order to understand intention, its differentiation from the concept of " motive " is instructive:

> Suppose that you are sitting in a concealed spot near a lonely road, and that you observe an acquaintance, X, walking alone along the road. Suppose, further, that you see a needy-looking man coming in the opposite direction; that, when the two meet they stop and exchange some words; and that X puts his hand in his pocket, hands some money to the other man, and passes on. How will you interpret that behavior of X? . . . You will be able to infer that the man begged alms of X, and that X gave them; further, you can infer that X, when he put his hand in his pocket, intended to find a coin and to give it to the beggar. About his intention, then, you are clear. But what about his motive? That remains problematic. Here we have a clear illustration of the obvious fact that motive and intention are entirely distinct facts. Yet many psychologists and some lawyers deliberately confuse them, or assert that a motive is merely an ulterior intention. There is no distinction of more importance for the understanding of behavior. . . . If X, when he put his hand in his pocket, had pulled out a pistol instead of a coin, and had put a bullet through the other man, the question of motive would have become a matter for the lawyers to discuss.[1] The intention to shoot at the other man might be confidently assumed, though the motive remained absolutely unknown.[2]

Proceeding further in his analysis, the author of these words says:

> On seeing the coin given, at least three possible motives might be guessed with equal plausibility. You might guess that X was a timid person and that he gave the coin because he was afraid of the other man, afraid of being assaulted by him if he refused to give. Secondly, you might guess that X was a pitiful or kindly man; and that he was moved to give by pity. Thirdly, if you were 'inclined to be cynical', you might guess that X is a man who likes to feel himself superior to others and who enjoys any situation that enhances his feeling of superiority to others and their sense of his power over them.

[1] Motive need not ordinarily be proved as an element of the crime; it becomes important indirectly only, as throwing light, in cases of circumstantial evidence, upon the criminal intent.

[2] McDougall, "Outline of Psychology", pp. 121–125.

. . . In each case you would be assigning an emotion as the motive of the action; and, in so far as your guess was a good guess, you would have explained the action as completely as the psychology of the common-sense tradition can pretend to explain it. Of course, your explanation might be less simple; you might guess that all these three emotions were at work together, that X was a little bit afraid, a little bit compassionate, and a little proud, all at once; and if he were a stranger to you, it would be safest to assume some such mixed motives or emotions. . . . *Common sense identifies emotions with motives.* Common sense, when it has named correctly the emotion dominant during any man's action, holds that it has explained the action, made it intelligible, in general terms. . . . If any further explanation is required, it must take the form of explaining why that man experiences and displays that emotion under the circumstances of that moment. This stage of the explanation involves the description of his 'character'; and an adequate understanding of his character can be attained only by considering both his hereditary constitution and the course of his development.[1]

The important fact to note in the foregoing is that motives are reducible to the emotional accompaniments of the primitive, instinctive, innate trends of the mind, or to the complex combinations of these; and intention is the design, plan, or conscious purpose to do an act. Motives need not necessarily be accompanied by any clearly defined consciousness of their objects; the conscious-

[1] McDougall, "Outline of Psychology," pp. 123–125. The utter inadequacy of the behavioristic treatment of motives is well illustrated by a recent writer:

"We can measure stimuli, we can correlate stimuli with sensations, and when we have done all this we have scarcely trodden upon the field of psychology at all. Psychological explanations are really on a very different basis from physiological. One might learn all about the energy transformations going on in the human body, measure the quantity of food taken and the amount of work done by a human being, and yet one would not understand the true motives of his behavior. If a man appeared to be paralyzed and one understood that the paralysis was not due to any actual injury to the nervous system but to a state of mind, for example, to a desire to get compensation from a railroad company because of the fact that he was in an accident in which he was not really hurt — if one knew all this about a man one would understand his behavior far better than through any insight given by profound chemical studies which might be madé of the balance between the energy taken in his food and the energy manifested in his work. Physiological explanations do not help us to understand purely mental facts. It is not likely that they ever will, nor will the principles of physiology enable us, as a general rule, to modify the behavior of criminals or of a psychoneurotic or of an unruly child, etc. This does not mean that physiology may be dispensed with in the study of human behavior. It merely points out that human behavior is not completely explained or understood by an appeal to principles which are strictly those of natural science." — T. V. Moore, "Dynamic Psychology" (1924), p. 11.

ness is largely of the *emotional accompaniments* of instinctive trends, but the experient need not be clearly conscious of the *goal* of those trends.[1] The trends have their own primitive goals. Intention, on the other hand, always involves some intellectual (*i.e., cognitive*) process. In the example given above, it is clear that the man intended (*i.e.*, consciously had the design or purpose) to give the coin; in order to find the *reason* for his so doing, *i.e.*, that which prompted him (consciously or unconsciously) to have such design or purpose, we must look to his motive, — the emotional accompaniment of the operation within him of one or more instinctive trends.

For the purpose of analysis, we have distinguished volition from intention; but of course the intending of the act and the willing it are not strictly separable. The state of mind includes the *consciously controlled, striving* tendency which we call volition; and intention and volition are not clearly separable in the mind of the actor. Together and inseparable, they constitute the mental experience of the blended intellectual and conative-affective modes of mental life. This brings us to a consideration of the legal concept of " criminal intent."

Section 3—Mental Concepts in Criminal Law—Criminal Intent

Only certain types, or *symptoms*, of mental disease or defect, as they affect criminal intent, ordinarily relieve from criminal culpability. Judging from the language of some judicial decisions and statutes, however, the lay reader is likely to get the impression that mental unsoundness *as such* (or as recognized by the psychiatrist) excuses from criminal responsibility; since judges themselves, and legislators, too, often use loose terminology in this connection.[2]

[1] Hence, the Freudian concept of "unconscious motives", or "blind motives." The use of the term "unconscious desires" is, strictly speaking, inaccurate; for desire is an impulse directed towards a remote object or goal which is *present in consciousness* (or "in idea", as some prefer), but not present to the senses. In other words, desire, by definition, requires the presence of the goal in imagination; hence, it requires that the person should be *conscious* thereof.

[2] *See*, for example, Sec. 4617 (1) of Wisconsin Stats., 1921, Vol. II; Sec. 2173, of Comp. Stats. of Washington, 1922; Sec. 2866, of Comp. Stats., Okla., 1921. Oppenheimer, in his "Criminal Responsibility of Lunatics", rightly points to this elementary distinction and the fact that it is apparently ignored by carelessly worded statutes and decisions; but we believe that his separation between that species of insanity which exempts from responsibility and that which does not is too strict and formal, when considered in the light of actual practice, in American courts.

Though the distinction between that mental unsoundness which will exempt from criminal responsibility and that which will not is made by the formal statements of some judges, legal commentators, and legislators, it is highly probable that not infrequently this distinction is one of formal legal theory only; for in the final analysis, regardless of the strict legal "tests" of irresponsibility which are applied in cases where mental unsoundness is sought to be pleaded as a defense to a criminal accusation, it is the *jury* that must decide whether or not the defendant's state of mind when he committed the illegal act was such as to absolve him from responsibility under the law. When it is remembered that no appeal can be taken in such cases by the *State*, from a verdict of *acquittal* on the ground of insanity and irresponsibility, and hence, that the jury's application of the strict legal tests of irresponsibility to the evidence of mental unsoundness in any particular case cannot, in such instances, be reviewed by appellate tribunals, it is readily seen that wide scope is allowed the jury in deciding whether or not the defendant's alleged mental abnormality is such as to meet the requirements of the law's prescription as laid down in the formal tests of irresponsibility.[1] Nevertheless, in spite of the fact that the jury in insanity cases is not infrequently a miniature group mind, expressive more of public opinion and sentiment than of the judge's charge as to the formal tests of criminal irresponsibility, the law does attempt a distinction between those species of mental unsoundness which will exempt from criminal liability, and those which will not; indeed, the whole controversy between the legal and medical professions in this field is essentially based upon this legal distinction, and upon the question where the line between criminal liability, and exemption, of the mentally unsound should be drawn.

Criminal Intent. — But what mental diseases, or symptoms of

[1] "It must be admitted, however," say the editors of Bouvier's "Law Dictionary", after reviewing the legal tests of irresponsibility, "that the verdict in such cases is often determined less by the instructions of the court than by the views and feelings of the jury and the testimony of experts." — Vol. 2, p. 1595. The author has sometimes wondered at the naïveté of some writers on the criminal law, who seem to assume that in the vast majority of cases, after listening for days to a mass of conflicting, intricate, and confusing testimony, to a series of hypothetical questions, and a long, frequently confusing, if not contradictory, trial-judge's charge, a jury of untrained laymen can retire to the cloistral calm of a stuffy jury room and contemplate on the judge's words of legal wisdom, deciding the case in strict accordance with the formal tests of criminal irresponsibility applicable to insanity cases!

mental unsoundness, are sufficient to relieve a defendant from criminal responsibility? In attempting to answer this question, we are confronted with the troublesome legal concept of criminal intent.[1] The defense of criminal irresponsibility by reason of insanity[2] is, in other words, but a specific instance of the more general legal proposition, that no person can be held criminally liable and punishable for an illegal act, unless he has, as it is sometimes put, "sufficient mental capacity" to "entertain a criminal intent",[3] or to have a *mens rea*, or "guilty mind." Such a propo-

[1] "It is . . . undoubtedly a principle of English criminal law, that ordinarily speaking a crime is not committed if the mind of the person doing an act in question be innocent. 'It is a principle of natural justice and of our law,' says Lord Kenyon, C. J., 'that *actus non facit reum, nisi mens sit rea.*' (An act does not make a person guilty unless his intention be guilty also.) The intent and act must both concur to constitute the crime. . . . The guilty intent is not necessarily that of intending the very act or thing done and prohibited by common or statute law, but it must at least be the intention to do something wrong. That intention may belong to one or other of two classes. It may be to do a thing wrong in itself and apart from positive law, or it may be to do a thing merely prohibited by statute or by common law, or both elements of intention may coexist with respect to the same deed. . . ." — Judge Wills, in Regina *v.* Tolson, 23 Q. B. Div., 168, 171 (1889).

"Though this phrase (*mens rea*) is in common use, I think it most unfortunate, and not only likely to mislead, but actually misleading, on the following grounds. It naturally suggests, that apart from all particular definitions of crimes, such a thing exists as a *mens rea*, or 'guilty mind', which is always expressly or by implication involved in every definition. This is obviously not the case, for the mental elements of different crimes differ widely. *Mens rea* means in the case of murder, malice aforethought; in the case of theft, an intention to steal; in the case of rape, an intention to have forcible connection with a woman without her consent; and in the case of receiving stolen goods, knowledge that the goods were stolen. In some cases it denotes mere inattention. For instance, in the case of manslaughter by negligence it may mean forgetting to notice a signal. It appears confusing to call so many dissimilar states of mind by one name. It seems contradictory indeed to describe a mere absence of mind as a *mens rea*, or 'guilty mind.' . . . The principle . . . appears to me, when fully considered, to amount to no more than this. The full definition of every crime contains expressly or by implication a proposition as to a state of mind. Therefore, if the mental element of any conduct alleged to be a crime is proved to have been absent in any given case, the crime so defined is not committed; or, again, if a crime is fully defined, nothing amounts to that crime which does not satisfy that definition. . . . The mental element of most crimes is marked by one of the words 'maliciously', 'fraudulently', 'negligently', or 'knowingly', but it is the general — I might, I think, say, the invariable — practice of the legislature to leave unexpressed some of the mental elements of crime. In all cases whatever, competent age, sanity, and some degree of freedom from some kinds of coercion are assumed to be essential to criminality, but I do not believe they are ever introduced into any statute by which any particular crime is defined." — Judge Stephen, in Regina *v.* Tolson, 23 Q. B. Div., pp. 185, *et seq.*

[2] To avoid this cumbersome phraseology, we shall hereafter refer to it as the "defense of insanity", although, strictly speaking, it is rather the defense of irresponsibility on the ground of insanity.

[3] As we have already said, the, for us, comparatively unimportant cases

sition, it must be confessed, is not very illuminating. It has led to much confusion in judicial opinions. The principle has, notwithstanding, been used in recent years as a vehicle for a suggested improvement of the existing tests of the irresponsibility of the mentally diseased.[1] Of this concept of criminal intent in the law,

of petty, statutory offenses, in which no intent need be proved, are disregarded herein.

[1] It is this principle on which was based the "Criminal Responsibility Bill" of the Committee of the American Institute of Criminal Law and Criminology, appointed to consider the problem of revision of tests of irresponsibility. After much study and investigation, this committee, of which Professor Edwin R. Keedy was chairman, and which was composed of leaders in law and medicine, proposed the following section: "No person shall hereafter be convicted of any criminal charge when at the time of the act or omission alleged against him he was suffering from mental disease and by reason of such mental disease he did not have the particular state of mind that must accompany such act or omission in order to constitute the crime charged." (Sec. 1, Criminal Responsibility Bill, presented by the Committee in 1916, and approved by the Institute of Criminal Law and Criminology and the Conference on Medical Legislation of the American Medical Association. *See* Vol. XXX, No. 6, *Harvard Law Review*, April, 1917, pp. 536, *et seq.*, and Vol. XXX, No. 7, pp. 724, *et seq.*)

This section was ably defended by Professor Keedy against the criticisms of the Editor of the *Harvard Law Review*, and Professor Henry W. Ballantine. (The criticism of the Editor of the *Harvard Law Review* appears in Vol. XXX, December, 1916, p. 179, and of Professor Ballantine, in the *Journal of Criminal Law and Criminology*, Vol. IX, p. 485. Professor Keedy's reply to Professor Ballantine is found in the *Journal of Criminal Law and Criminology*, Vol. XII, p. 14.) Of all the exceptions to the proposed rule, the strongest was that raised by the Editor of the *Harvard Law Review*, to the effect that the proposed legislation would not change "the existing legal situation." In other words, the proposition requiring "the particular state of mind that must accompany such act or omission in order to constitute the crime charged", simply comes down to the doctrine of *mens rea;* it is equivalent to saying that no one shall be held liable for a criminal act if he did not have the necessary criminal intent — a proposition which is not of much practical value when we are trying to tell a jury under what conditions mental disease or defect excuses.

Professor Keedy does, however, point to the crossroads in the development of the criminal law where legal commentators and judges strayed from the highway into a maze of conflicting footpaths, when he says: "The proposed section is based upon the fundamental principle of criminal jurisprudence, that a crime has not been committed when the necessary mental element is lacking. The direct relation of insanity to this mental element, which relation is logically apparent, was formerly well recognized in the law. The Roman law set forth clearly that the effect of insanity was to negative the wrongful state of mind. At an early period in the English law Staundforde stated the same proposition. This relation between insanity and the mental element of crimes was largely lost sight of when the courts commenced announcing and attempting to apply medical tests." — *Harvard Law Review*, Vol. XXX, No. 7, p. 735. The straying from the road of criminal intent was due to the same reason that prompts Professor Keedy and others to evolve other tests of irresponsibility; namely, it was due to the fact that the concept "criminal intent" is entirely too vague and confusing and that commentators, in attempting to make it more specific, began to give *examples* of what they considered was sufficient deviation from the necessary criminal intent to constitute lack of responsibility. Professor Keedy, however, would merely bring us back to the point

Dean Roscoe Pound says: "Our traditional criminal law thinks of the offender as a free moral agent who, having before him the choice whether to do right or wrong, intentionally chose to do wrong. . . . We know that the old analysis of act and intent can stand only as an artificial legal analysis and that the mental element in crime presents a series of difficult problems." [1] While this is a correct evaluation of existing conditions, it is nevertheless necessary for our purpose to have the law *as it is* before us, so that we may examine the mental concepts used by the law as a preliminary to a discussion of how it might be improved. If we are to know the mental elements which enter into the criminal irresponsibility of the mentally diseased offender, we must first digress from this main problem sufficiently to examine the mental elements which enter into the criminal responsibility of the presumably sane offender.

Excuses from Conviction for Crime, which are Dependent on Consideration of Some Definite Mental Element. — We have already briefly alluded to the mental elements at the basis of a criminal act; and before going more into detail on this subject, it is necessary to consider the broader subject of the relation of *mens rea* in general to exemptions from criminal responsibility. It has been said that the defense of insanity is but one of the specific instances of the wider rule that absence of criminal intent, theoretically at least, relieves from criminal responsibility for illegal acts. What are some of the other instances of excuse from responsibility, and what position does the defense of insanity occupy among them? An English writer [2] on the subject of *mens rea* analyzes excuses from conviction for crime into the following

where the commentators began to stray, leaving us where we were before any tests of irresponsibility were introduced. It is true that no reference is made in his test to the confusing "delusion", "irresistible impulse", or "inability to distinguish between right and wrong"; but is it not more difficult for the jury to pass upon the presence or absence of the "particular state of mind that must accompany such act or omission in order to constitute the crime charged", than to consider the more tangible and everyday concepts of delusion, the ability to distinguish between right and wrong, etc.? True, the aim was, and a laudable one, to make the language so broad and general as to provide room for the growing concepts of mental medicine; but if a jury is to pass upon such technical questions at all, is it not better to have some sort of measures (though, unfortunately, too crude and imperfect) than none at all? For, as Stephen has shown, "criminal intent" is one of those vague legal concepts that might mean anything.

[1] "Criminal Justice in Cleveland", p. 586. The Cleveland Foundation, 1922.

[2] D. A. Stroud, "Mens Rea", Chapter 1 (1914).

categories: (1) Absence of *intention*,[1] because, among other reasons, of (*a*) *ignorance of fact*, (*b*) legal *incapacity* by reason of infancy, *insanity*, or drunkenness, (*c*) insufficient degree of intention (as to acts or omissions); . . . (2) Absence of *volition*,[2] because of (*a*) natural compulsion (due to accident or chance, impossibility of compliance with the law), or *automatism*, or, (*b*) compulsion by human agency, involving among other forms of compulsion, hypnosis; (3) Coercion (actual or presumptive), and (4) Occasional excuse (as in self-defense or self-assistance), provocation — sudden or in combat — for the advancement of justice, etc., and by consent, etc.

In this study we are interested directly in the excuses arising from the absence of *intention*, as caused by mental unsoundness, absence of *volition*, and compulsion; we are also interested indirectly, as will appear in discussing delusions, in exemption from responsibility by reason of ignorance of fact. By far the greatest volume of cases arising under the causes for criminal irresponsibility which we will discuss, turns on the defense of insanity.

Having pointed out the mental concepts with which we are concerned in this study, let us see how these are discussed by some of the leading commentators in this field, and let us then criticize their views in the light of the Mentalist psychology.

[1] The words "intention" and "intent" are used interchangeably by most writers.

[2] Unlike Stroud, Stephen distinguishes between involuntary acts and acts done under compulsion, and does not include compulsive acts under involuntary acts. He points out that the opposite of a voluntary act is an involuntary act, not one under compulsion. "The very strongest forms of compulsion do not exclude voluntary action. A criminal walking to execution is under compulsion if any man can be said to be so, but his motions are just as much voluntary actions as if he was going to leave his place of confinement and regain his liberty. He walks to his death because he prefers it to being carried. This is choice, though it is a choice between extreme evils. . . . A man is under compulsion when he is reduced to a choice of evils, when he is so situated that in order to escape what he dislikes most he must do something which he dislikes less, though he may dislike extremely what he determines to do. . . . Whether a man is free or under compulsion, he is equally a voluntary agent, and choice and volition equally enter into and regulate all his voluntary actions. . . . In cases of voluntary action compulsion is a narrow exception and freedom the general rule. . . . The word 'free', which applies to the bulk of human conduct, has no positive meaning. It denotes nothing more than voluntary action not prompted by motives which can be described as compulsory. . . . The difference between men of good character and men of bad character is shown in that part of their conduct which is free. When men are put under compulsion, when they are subjected to motives at once terrible and exceedingly powerful, the great majority of them will act in the same way." — "History of the Criminal Law of England", Vol. II, pp. 102, 103.

Stephen's Views of the Mental Elements of a Crime. — We have elsewhere [1] given the views of Professor Wharton, as to the mental elements of a crime. The great English jurist, Sir James Stephen, writing in 1883, gives the clearest brief legal treatment of the psychological elements of a crime that is available. Assuming that the act is done by a person of competent age, Stephen lists the following necessary elements of every crime:

1. The act must be voluntary, and the person who does it must also be free from certain forms of compulsion.
2. The act must be intentional.
3. Knowledge in various degrees according to the nature of different offenses must accompany the act.
4. In many cases either malice, fraud, or negligence enters into the definition of particular offenses.

The important fact which Stephen makes clear and which is almost universally overlooked by other writers on the criminal law, is that *each* of the above mental factors, — volition, intention, knowledge and the presence of malice, fraud or negligence, *may be affected by the mental disease or defect of the offender.* It follows logically, that, since all the elements listed above are necessary to constitute an act a crime, mental unsoundness affecting any of these elements ought, *under the law as it is,* excuse from crime. That it does not so excuse will be seen when we consider the tests of irresponsibility.

Stephen defines an action as " a group of related motions of different parts of the body "; he holds that actions may be involuntary or voluntary, and that an involuntary action may be further subdivided according as it is or is not accompanied by consciousness. Involuntary actions are not only such acts as the beating of the heart and heaving of the chest, but such *conscious* acts as coughing, or the motion which a man makes to save himself from falling, or the struggles of a person in an epileptic seizure. " No involuntary action," says Stephen, " whatever effects it may produce, amounts to a crime by the law of England. I do not know indeed that it has ever been suggested that a person who in his sleep set fire to a house or caused the death of another would be guilty of arson or murder." [2]

A voluntary action, Stephen holds, is a group of motions pre-

[1] *Ante,* pp. 97, 98.
[2] "History of the Criminal Law of England", Vol. II, p. 100.

ceded by volition, and directed towards some object. If consciousness of purpose, of the goal toward which the actor is striving, is present during the voluntary act, the act is one of a type which we have elsewhere described as constituting " conscious, purposive activity." The following account of a voluntary action is given by Stephen:

> Every such action comprises the following elements — knowledge, motive, choice, volition, intention; and thoughts, feelings, and motions adapted to execute the intention. These elements occur in the order in which I have enumerated them. Suppose a person about to act. His knowledge of the world in which he lives and of his own powers assures him that he can if he likes do any one or more of a certain number of things, each of which will affect him in a certain definite way, desirable or undesirable. He can speak or be silent. He can sit or stand. . . . The reasons for and against these various courses are the motives. They are taken into consideration and compared together in the act of choice, which means no more than the comparison of motives. Choice leads to determination to take some particular course, and this determination issues in a volition, a kind of crisis of which every one is conscious, but which it is impossible to describe otherwise than by naming it. . . . The direction of conduct towards the object chosen is called the intention or aim (for the metaphor involved in the word is obviously taken from aiming with a bow and arrow). Finally there take place a series of bodily motions and trains of thought and feeling fitted to the execution of the intention.[1]

Criticism of Stephen's Account. — This is a substantially correct account from the point of view of psychology, except perhaps for two reasons: In the first place, it suggests that the striving, or conation, arises only in the act of volition; whereas, it is of the very essence of mental life, and continues constantly. The volition is merely a more strongly felt striving, as the result of judgment or choice between alternatives; in other words, the volition necessarily implies the entering of conscious intelligence into the compound mental experience. Another possible objection against Stephen's account is the fact that he seems either to misunderstand the meaning of motive, from the psychological point of view, or to place it in the wrong order. Motive, as we have seen,[2] is the emotional accompaniment of the innate, psychophysical tendencies to action; and the motives for any act may be, and often are, extremely obscure, the vague urge to action being some-

[1] *Op. cit.*, pp. 100, 101. [2] *Ante*, p. 105.

times the only mental datum experienced. Hence a *knowledge* of motives not infrequently *follows*, rather than precedes, the impulse to action; and this is the reason for the popular expression, "blind motives", and the Freudian concept of unconscious or subconscious motives. The motives, in brief, are such emotional experiences as fear, or anger, or their complexly blended emotional states. Stephen's account of the psychological elements of a criminal act is, however, substantially correct; and the exceptions noted are perhaps due more to the process of analysis of the mental experience and the necessary oversimplification which results therefrom, than to anything inherently inaccurate in the description.[1]

Stroud's Account of Intention. — As intention and volition are the two important mental concepts discussed by Stephen, and as these are at the basis of criminal responsibility, let us look at them again, this time through the spectacles of a more recent writer and one or two American judges. Stroud uses the term "intention" in a broader sense than Stephen; that is, he includes the element of *knowledge* in intention, and we think justifiably so. "If . . . general intention be analyzed," says Stroud, "it will be found in all cases to involve, first, a knowledge of the facts essential to the crime, secondly, an actual or presumed knowledge of the law, and thirdly, a subsuming, or ranging, of those facts under that law, or the possibility of that process given due attention."[2]

Criticism of Stroud's View of Intention. — While Stroud's account is correct from the point of view of psychology, the legal tests of irresponsibility do not always take account of the elements of intention in the manner analyzed above. In other words, the law, when it insists upon some of its tests of irresponsibility, forgets that there are at least two processes involved in the *intellec-*

[1] In a footnote on p. 124, Vol. II of his masterly exposition of the "History of the Criminal Law of England", Stephen lists the great authorities of his day (third quarter of the nineteenth century) on mental medicine and forensic psychiatry, including the important contributions of Griesinger, Bucknill and Tuke, Maudsley, and others of first rank. He informs the reader (and it is quite apparent in his own book) that he has made a thorough study of these great authorities. Stephen probably had a better grasp of the mental elements which enter into a criminal act than any legal commentator of his day. He was one of the first judges to recognize the influence of psychology on judicial opinion; and his merit lay in the fact that he was perfectly conscious of his indebtedness to the social sciences, while many of his contemporaries (and many judges to-day), believed they were laying down the law in its pristine, mechanical rigor, untainted by what they regarded as the turbulent influences of the social sciences.

[2] *Op. cit.*, p. 15.

tive mode of mental life alone (not to mention the conative-emotional mode); namely, knowledge and apperceptive activity, the latter being the capacity, possessed in varying degrees by most persons, of seeing things in their proper relationships, or recognizing similarities and differences. Stroud's account of intention is more correct than Stephen's because knowledge, in some degree, is a *sine qua non* of intention. Stephen must have had in mind, when he separated knowledge from intention, the legal distinction between the general criminal state of mind and the " special criminal intent." In some crimes, such as counterfeiting, forgery, receiving stolen goods, etc., in addition to the guilty knowledge which may be assumed from the commission of a criminal act, the law requires that a special guilty knowledge be proved. This is due to the peculiar nature of such acts. For example, if a man passes a counterfeit coin, in order to prove whether he had the requisite criminal intent, it is necessary to prove if he had the special guilty knowledge that distinguished his act from that of an innocent person passing a counterfeit coin; this requires proof of whether he had previously passed such coins, or whether he passed the coin under circumstances which suggest that he honestly had no doubt of its genuineness. But knowledge is, of course, always an element of intention.

Intention and Motive. — Elsewhere [1] we have discussed these concepts from the point of view of psychology. Although confusion as to these terms exists in the legal reports, some judges have indicated the distinction correctly, albeit not in the technical language of psychology. The following extract, from a leading and often cited case, is illustrative of this fact:

> In the popular mind intent and motive are not infrequently regarded as one and the same thing. In law there is a clear distinction between them. Motive is the moving power which impels to action for a definite result. Intent is the purpose to use a particular means to effect such result. When a crime is clearly proven to have been committed by a person charged therewith, the question of motive may be of little or no importance. But criminal intent is always essential to the commission of crime.[2]

It is clear that by describing motive as " the moving power which impels to action for a definite result ", the court, although it did not

[1] *Ante*, pp. 105, 106. [2] People *v.* Molineaux, 168 N. Y., 264, 297 (1901).

use the terms expressive of the idea, had in mind the emotional (instinctive) nature of motivating powers.

Volition. — In addition to the law's requirement of the cognitive element of criminal intent, — the concept, namely, that a criminal act cannot be imputed to one unless he had knowledge of the facts and the apperceptive capacity to subsume the facts under the law (which he is presumed to have known), — the legal writers, as we saw in the case of Stephen and Wharton (and as the earliest commentators also recognized), hold that an act (or omission) is not imputable to a person if it did not depend upon his choice;[1] or, conversely, if he could not have inhibited or avoided it.[2] This principle has been strangely neglected in certain branches of the criminal law, especially in connection with the difficult problem of irresistible impulse, which will be later considered.[3]

Intention Implies Capacity for Voluntary Activity. — We must again point out, in passing, that the analysis of the mental elements of a crime into intention and volition is an artificial one, only justifiable as a means of more minute study of mental experience. Intention implies capacity for voluntary action; and to do an act with a *criminal* intent means to act voluntarily with consciousness of intending a deed prohibited by the law under penalty.

The Elements of Culpability. — Criminal culpability depends, as we have seen from the quotation from Stephen, not only upon

[1] "Will is as necessary an element of intent as are reason and judgment." — C. J. Simmons, in Flanagan *v.* St., 103 Ga., 619, 626, 30 S. E., 550 (1898). *See also* Parsons *v.* St., 81 Ala., 577.

[2] Under lack of volition most courts, unlike Stephen, regard the principle of lack of power to inhibit an act as including external compulsion, as well as "duress of mental disease." For example, "A man may throw himself into a river under such circumstances as render it not a voluntary act; by reason of force, applied either to the body or the mind." — Erskine, J., in charge to jury, Reg. *v.* Pitts, 1 C. & M., 285 (1842).

[3] *Post*, pp. 232, *et seq.* The principal difficulty involved in these cases, in the view of judges and of commentators such as Oppenheimer (*see* his "Criminal Responsibility of Lunatics"), is the practical one of proof. How can it be proved, is the question asked by jurists and commentators, that there is such a condition as irresistible impulse, or that the impulse was really irresistible and not merely unresisted? The answer is, of course, that by keeping purely within the realm of law, it cannot be proved. The question is one for the psychiatric expert of many years' experience. It involves a thorough mental examination and a study of the defendant's history as far back in his career as possible. For only by getting some light on the question of his *past* reactions to situations similar to those presented by the crime and its setting can it be said with any probability that the criminal act being considered could have been resisted or not. It should be pointed out, too, that according to the *theory* of criminal law, an impulse shown to have been irresistible is just as destructive of the intention and volition necessary to constitute the mental element of a criminal act, as unconsciousness of the act, or mistake of fact.

the cognitive mode of mental life (which Stephen separated from the volitional, and called " criminal intention "), and upon freedom of volition, but on their resulting in an act prohibited by law. To " think evil " constitutes guilt in the realm of ethics. As some one said, to illustrate the difference between ethics and criminal law, when the great actor, David Garrick declared to Doctor Johnson that whenever he acted Richard III he felt like a murderer, Johnson, as a moral philosopher, was bound to retort, " Then you ought to be hanged whenever you act it." But the criminal law attaches only upon the commission of a criminal *act* with the necessary mental elements involved, and not upon internal ill feeling or wickedness or malice alone. Thus, if a man takes a coat from a stand, with the criminal intention of stealing it, and it turns out to be his own, he commits no crime.

Relation of Culpable Intention to the " mens rea " Doctrine. — From our analysis above, we conclude that the well-known *mens rea* or guilty mind doctrine of the criminal law,[1] as Stephen has said, " means no more than that the definition of all or nearly all crimes contains not only an outward and visible element, but a mental element, varying according to the different nature of different crimes ";[2] or, what Stroud and others call " some form of culpable intentionality." The legal rule as to the effect of absence of *mens rea* by reason of mental unsoundness is recognized, and is the same in all common law jurisdictions; but (a striking illustration of the fact that a name is not a description) its meaning in practice is not uniform in the different jurisdictions.[3]

Summary and Conclusions. — In the foregoing pages we discussed the mental concepts in the criminal law as a background for the discussion of the legal tests of the criminal irresponsibility of the insane, which is to follow. We saw that the law requires a *mens rea* (which includes intention and volition, since these are not, strictly speaking, separable concepts), before it will punish a person for violation of its commands. We then analyzed these terms from the psychological and legal points of view. As to the concept of in-

[1] *Ante*, note, p. 109.

[2] "History of the Criminal Law of England" (1883), Vol. 2, p. 94.

[3] One has only to attempt to get some order out of the chaos in the reported decisions, which enshrouds such concepts as "malice", "criminal intent", "malice aforethought", "a mind bent on mischief", etc., etc., to be struck with the truth of this statement. *See*, for example, the debate between Professors Keedy and Ballantine as to the mental factors in a criminal act, in the articles alluded to in footnote.

tention, this analysis involved the distinction in psychology and law between intention and motive; and as to volition, our analysis involved a passing mention of irresistible impulse, which will be later considered in detail.[1] This was followed by a summary statement of the elements of criminal culpability, which concept, as we saw, includes both the mental elements and the external act prohibited by law.

The foregoing account of the mental elements of a criminal act, from the points of view of psychology and law, is, of course, imperfect; but much of its imperfection (aside from that arising from confusion in the use of terminology by various writers) is due to the fact that the law has naturally been driven to an *oversimplification* of the data of mental life in its attempt to reduce the elements of a crime to rule and measure. But psychology itself is forced thus to dissect the mind for the purposes of minute examination and exposition. So long as we bear in mind that mental life consists primarily of a striving (conation) of certain innate tendencies (instincts), elaborated into sentiments [2] (and complexes), toward more or less consciously conceived goals; that the higher mental processes involved in intention cannot be divorced from the conative-emotional modes of mental life and the sentiments built about them; so long, in brief, as we bear in mind the *unity of mind*,[3] we will run little danger of becoming confused

[1] *Post*, pp. 232, *et seq.*

[2] "When the instinctive emotions are brought into touch with environmental conditions, they tend to become attached to and grouped round the objects, ideas, events, or persons of the environment. These combine to form *psychological constellations*. Psychological constellations are composed of two factors, one from the *environment* — an event, person, or idea — and one from *heredity*, namely, the instinctive emotion. . . .

"A sentiment is a psychological constellation acceptable to the individual and with which he consciously identifies himself (such as patriotism, philanthropy, religion, etc.). . . .

"*Complexes*, like the sentiments . . ., are psychological constellations formed by the attachment of the instinctive emotions to objects or experiences presented by the environment, but which, owing to their painful or repugnant character, are *unacceptable* to the 'self.'" — J. A. Hadfield, "Psychology and Morals", pp. 20, 24.

[3] *See* "Body and Mind", William McDougall, 5th Ed., Chapter XXI. In the phenomena of multiple personality, reported by Dr. Morton Prince and other investigators, although the personality holding the field at any particular stage is fragmentary, the *mental process* is nevertheless a blend of the conative-affective and cognitive modes of mental activity. The principle of division of personality is apparently along the line of groups of instincts. The phenomenon involved in such classic cases of multiple personality as "B. C. A" (*see* Morton Prince, "The Unconscious") is not expressive of a division of the conative-affective mode of mental life from the cognitive mode.

by the dissecting process which must go on in the psychological laboratory, and the legal forum.

What then is the difficulty? Why was such a long introductory exposition of the law's conceptions of the mental elements of a criminal act necessary? Because, in the realm of mental disease and defect, we find the courts making just the mistake we have warned against. The judges often forget that the law has divided and analyzed the mental basis of the criminal act only for the purpose of better understanding and exposition. And when they do so forget we have such opinions in the law reports as the following, for example: that the defendant is *sane* for purposes of the criminal law, if his *reasoning processes* seem to the judge to be intact, regardless of whether or not his emotional-volitional life has been affected by some mental disease;[1] or that a paranoiac with delusions is perfectly sane upon all subjects not logically and *externally* connected with his delusional beliefs.[2] And these are but two instances of the law's intrenchment in the outworn faculty psychology.

The important fact to note, however, is that in its *definition* of such concepts as intention, knowledge, motive, volition the law's psychology (except for the use of nonscientific, and therefore confusing, terminology) is, on the whole, surprisingly correct. It is only when it comes to apply these concepts to the field of mental disease and defect, that it ignores some of the very elements of mental activity which it has previously declared as indispensable for the purpose of constituting a legally prohibited act criminal. It should be pointed out, too, that while some of the more important legal commentators and judges understand the fundamentals of psychology, yet these are not always clearly expressed by *trial* judges in their charges to juries; nor are they clearly understood by juries. Even many appellate courts have confused the terms involved in a legal exposition of the subjects of insanity and criminal responsibility.[3] These facts will appear in our exposition of the tests of irresponsibility.

Before considering these tests, however, it will be necessary to

[1] This is what the familiar "knowledge of the nature and quality of an act" test of irresponsibility is reducible to.

[2] This is the "delusion" doctrine of McNaghten's Case. *See* pp. 169, *et seq.*

[3] *See*, for example, the discussions in the reported cases as to burden of proof. These speak of the burden of proving *insanity*, when what they frequently mean is the burden of proving *irresponsibility*.

present the history of the tests of irresponsibility as related to the concept of criminal intent or *mens rea*. This is not only a necessary preliminary to a discussion of the tests themselves, but it is hoped that our study of the history of the tests will sufficiently indicate that there is nothing inherently sacred (except the dust of the ages), or even completely authoritative, about them, — as seems to be the impression among many judges and writers on the criminal law. It is hoped, in other words, that we shall be able to establish that the tests of irresponsibility as related to mental unsoundness have been developed more as the result of historical accident than as the logical or necessary outcome of anything inherent in the criminal law itself; further, that *if more scientific tests can be devised*, they should be embodied in the law. The great obstacle in the way, from a legal and judicial point of view, is, of course, the doctrine of *stare decisis*,[1] and the mental attitude it inspires in judges. In most fields of the law, especially where long-standing property rights are involved, the doctrine is a wise one, making for the necessary element of economic stability, and aiding somewhat in establishing predictability in the law. It becomes vicious, however, when followed blindly. Some means must be evolved, in the realms of social and criminal law, particularly, whereby the crystallized, mature, scientific opinion of an epoch may be made known authoritatively to legislators and to the leaders of the bench and bar. The law should by no means be so quickly responsive to the appeals of the other social sciences as to accept, without criticism, opinions incompletely formed, held by but a few extremists, and, at the best, highly problematical. There ought to be a method, however, whereby the fundamental concepts of the various domains of law can be reviewed, at stated periods, in the light of authoritative contemporary data furnished by the other sciences.[2] This was done when merchants and bankers were freely consulted in the drafting of the Negotiable Instruments Act and other commercial codes. Why can it not be done in the field of the criminal responsibility of the mentally dis-

[1] "It is a general maxim that when a point of law has been settled by decision, it forms a precedent which is not afterwards to be departed from." — Bouvier's "Law Dictionary", Vol. 3, p. 3118. *See* Blackstone, "Commentaries", I, 69 (1765). This is the doctrine behind Lord Esher's attitude when he said: "I agree that it is the law, though I think it is hard law; but we have nothing to do with the question of hardship." — In re Perkins, etc., 24 Q. B. D., 613, 618 (1890).

[2] *Post*, p. 494, as to the Ministry of Justice.

ordered? Such questions and the problems they raise must be left for consideration to the concluding chapter of this study. In the following chapters we must first consider the historical development of the tests of criminal irresponsibility, the tests themselves, the data of modern psychopathology, and the relationship of the tests to the symptomatology of the principal clinical groups of mental disorder.

CHAPTER 5

HISTORY OF THE LEGAL TESTS OF THE CRIMINAL IRRESPONSIBILITY OF THE INSANE, TO 1843

"The law has grown, and even if historical mistakes have contributed to its growth, it has tended in the direction of rules consistent with human nature." — Mr. Justice Holmes, in Brown *v.* U. S., 256 U. S., 335, 343 (1920).

Section 1 — Early English Commentators [1]

Introduction. — "In working out the principles of liability," says Professor Holdsworth,[2] ". . . English lawyers were thrown back upon themselves, and were obliged to evolve, by their own efforts, the new principles demanded by an advancing civilization." As part of the general "advancing civilization" may be included a gradual ethical infusion into the law and the rise and development of mental medicine. These sponsored the legal tests of the irresponsibility of the insane.

We may omit the more or less speculative opinions relative to the nature of mental disease as treated in Hebraic law, or in the laws of the ancient Greeks. Morel [3] and others have sufficiently written the early history of the medico-legal treatment of mental disorder; besides, much of this early history is hardly authoritative. When the speculations of the Greek philosophers were combined with the practical legal treatises of the Roman lawyers, the medical opinions of the great Greek physicians no doubt also began to exert some influence upon the Roman law. Through the Roman law they affected the Civil law of Europe. Passing through the channels of the Twelve Tables, Justinian's "Institutes", and Bracton,[4] they probably also had their influence upon the early English law.

[1] In the preparation of this section I have been greatly aided by Wharton and Stillé's scholarly treatise on "Medical Jurisprudence." The reader is referred to that work for a more detailed historical treatment than is possible within the scope of our study.

[2] W. S. Holdsworth, "A History of English Law", Vol. III, p. 371 (1923).

[3] "Traité de la Médicine Légale des Alienés", Paris (1866). *See also* Bucknill and Tuke's "Insanity", Historical Chapter (1858), where the opinions of Hippocrates, Galen, and other ancients, on the causes and treatment of mental disease, are interestingly set forth.

[4] A "Civilian", rather than a "common law" writer, *i.e.*, a follower of the Roman law. He wrote about the middle of the thirteenth century, some of his contributions being published as "Bracton's Note Book", after the notes were discovered by Professor Vinogradoff and published by Professor Maitland.

At best, however, these are but interesting historical relics; for if mental disease (or insanity) relieved from responsibility for crime in those early days, it is doubtful if any attempt was made to reduce the vague generalities, "madness", or "insanity", to more concrete, medical, psychological, or legal concepts. As to the medieval era, it should be pointed out in passing that, in the field of the social treatment of the problems of mental disease, perhaps more than in any other domain of public endeavor, the name, "Dark Ages", is particularly appropriate to this period. For "demenomania", or "epidemic witchcraft", was in those dread days largely fed by the misinterpreted symptoms of the unfortunate hystericals; and whatever the Greeks and Romans had contributed to mental pathology gave way to ignorance and superstition.

Early Common Law. — The milestones on the road of the legal treatment of the subject of mental unsoundness are readily recognizable. They are the views of Bracton, Littleton,[1] Fitzherbert,[2] Coke,[3] Hale,[4] Erskine,[5] and the Judges of England, in their famous Opinion delivered to the House of Lords after McNaghten's Case.[6] There are some less important contributions which will also be considered; but those listed above constitute the foundation of English and American law on the subject of insanity. Largely because of the fact that mental medicine was practically unknown in their day, or strangely mixed with ridiculous superstitions,[7] these

[1] A famous judge and commentator (largely, however, in the field of Real Property), who wrote about the middle of the fifteenth century.

[2] A judge of "common pleas", writing early in the sixteenth century.

[3] An oft-quoted judge and commentator, writing in the latter part of the sixteenth and early in the seventeenth centuries.

[4] A famous judge and author of authoritative treatises on law, writing about the middle of the seventeenth century.

[5] An eloquent lawyer of the early nineteenth century, whose address in the famous Hadfield's Case (*see* pp. 144–148) is often referred to in treatises on medical jurisprudence.

[6] The "Opinion of the Judges of England", which followed McNaghten's acquittal on the ground of insanity (1843), is the most famous and fundamental statement of the English law of insanity as it exists to-day in England and in most of the States of the Union. (*See* Chapter 6.)

[7] For example, Sir Thomas Browne's reputation as a man of science has been clouded by his "expert testimony" in the trial of two women in 1665, on the charge of causing fits in children, by the exercise of witchcraft. "There was also Dr. Browne of Norwich, a person of great knowledge; who after this evidence given, and upon view of the three persons in Court, was desired to give his opinion, what he did conceive of them: and he was clearly of opinion, that the persons were bewitched; and said, That in Denmark there had been lately a great discovery of witches, who used the very same way of afflicting persons, by conveying pins into them, and crooked as these pins were, with

authorities practically repeated each other's words and concepts; and the process, after them, with a few notable exceptions which will be later considered, has been the same easy treading along the well-worn path of legal tradition.

By Edward I's reign (1272–1307), insanity was admitted as an excuse to crime.[1] While, in the reign of Edward II (1307–1321), insanity was beginning to be recognized as a defense to crime, the chattels of the offender were still forfeited.[2] By Edward III's reign (1326–1327), however, absolute "madness" was a complete defense to a criminal charge.[3] Throughout the early English law a person charged with crime and found to be a madman was not acquitted; but a special verdict was given that he was mad, and then the King pardoned him.[4]

Statute De Prerogativa Regis. — One of the earliest statutes referring specifically to the mentally disordered is the statute De Prerogativa Regis, passed in the reign of Edward II.[5] This statute established the King's jurisdiction over "idiots and lunatics", the distinction between the mentally *defective* and the mentally *diseased* being early recognized. The former were by a legal presumption (not without medical foundation) alleged to be born without reason and always to remain so; hence these were incapable of performing the feudal duties. This gave the feudal overlord the right to seize the lands of idiots in payment of the military service owed him by the mentally defective vassals. As

needles and nails. And his opinion was, That the devil in such cases did work upon the bodies of men and women, upon a natural foundation, (that is) to stir up, and excite such humours super-abounding in their bodies to a great excess, whereby he did in an extraordinary manner afflict them with such distempers as their bodies were most subject to, as particularly appeared in these children; for he conceived, that these swooning fits were natural, and nothing else but . . . only heightened to a great excess by the subtilty of the devil, coöperating with the malice of these which we term witches, at whose instance he doth these villanies." — A Trial of Witches, 6 How. St. Tr., 647, 697 (1665). The judges in this case were at a loss as to the significance of the testimony of various witnesses; but the opinion of this "person of great knowledge" and prestige resulted in conviction and execution of the alleged witches.

[1] Holdsworth, "A History of English Law", Vol. III, pp. 371, *et seq.*

[2] *Id.* [3] *Id.*

[4] People *v.* Schmidt, 216 N. Y., 324, 331 (1915), where Stephen, "History of Criminal Law of England", Vol. II, 151, and others are cited.

[5] Edw. II, Cap. 9. Collinson, "Treatise on the Law concerning Idiots, Lunatics, and other Persons non compos mentis" (1812), Vol. I, pp. 89, *et seq.*, informs the reader that according to Fleta, "certain persons called tutores, used to have the custody of the lands *idiotarum et stultorum*", and that because of their abuse of this trust a statute was passed in Edward I's reign, giving the King supervision over the persons and inheritances of idiots; but that statute is not in print.

it was recognized that the mentally diseased might recover their reason, and might thus be able to perform their feudal duties at some future time, their lands could not be seized. They, nevertheless, required a guardian; and the King, through the Court of Chancery, was, by the writ above mentioned, empowered to act as guardian, but to use the proceeds of the lands only for the support of such lunatics.[1]

Under this early statute, though "natural fools" were kept distinct in definition from "any that before time hath had his wit and memory", and who later became *non compos mentis*, "as there are many *per lucida intervalla*" (as the statute runs), it has been shown [2] that in one of the earliest forms of writ issued out of Chancery for the mental examination of a person, confusion between "a natural fool and idiot" and one *insane* had already crept in. This form of writ directed an examination of the person named therein, to see if he were a natural fool or idiot, and, if so, whether from his birth "or from some other time . . . and whether he enjoys lucid intervals." Obviously, the framers of this writ were speaking of a mentally diseased person and using the term "idiot" to cover both the mentally defective and mentally diseased. This is one of the earliest evidences of confusion of terms in the law; and these were multiplied as the law developed.

Bracton. — One of the earliest systematic legal writers to discuss insanity was, as has been said, Bracton. He was a priest and head of the highest English court (*Aula Regis*), in the middle of the thirteenth century. As he was a "Civilian", largely influenced by the writings of the early Roman law commentators and, partially, by Justinian's Codes, his contribution to the law of insanity may be said to have come from these sources. His definition of insanity sums up his contribution for our purpose: A "madman" (*furiosus*), he said, is one who does not know what he is doing, who lacks in mind and reason (*animo et ratione*), and who is not far removed from the brutes (*et non multum distat a brutis*).[3]

[1] *See* note 5 on preceding page. [2] Collinson, *op. cit.*, pp. 118–120.

[3] Quoted by Wharton and Stillé, "Medical Jurisprudence", p. 510, from "De Legibus et Consuetudinibus Angliae", edited by Sir Travers Twiss, London, 1878.

"The older Roman law distinguished roughly between *furiosi*, those fallen into manifest delirium, and *dementes*, insane of other sorts. This is unknown to the law of Justinian. According to that, the negative circumstance of lack of normal mental power alone is considered, not the form of insanity. . . . The insane are incapable of acting, whether under guardianship at the time or not. Their acts stand as a chance of the powers of nature, since they are

The elements of this early definition have supplied two of the concepts embraced in the tests of irresponsibility at various times in the history of the criminal law; namely, the *knowledge test* and the *wild beast* or *wild brute test.* One of these, — that an insane person, in contemplation of the law, is one who does not know what he is doing ("the nature and quality" of the act), — still has its marked influence in the courts of the United States. The second, — the wild beast test, — was the principle invoked in the early case of Rex *v.* Arnold,[1] and will be considered later.[2] It is highly probable that Bracton had in mind the *civil,* rather than the criminal, liability of the insane, when he wrote; since insanity as a defense to crime does not seem to have been admitted in English law, as we have seen,[3] until the first quarter of the fourteenth century.

Littleton's Doctrine of "Nonstultification." — Littleton, in discussing the question of "*Discents*", considered the case of one who is "of non sane memory, that is to say in Latine, *qui non est compos mentis*"; and he explained that such a person was not allowed to set up insanity as an excuse to *civil* liability, because "no man of full age shall bee received in any plea by the law to disable his owne person." Then, with amusing legal casuistry, he added: "But the heire may well disable the person of his ancestor for his owne advantage in such case",[4] the explanation for this distinction apparently being, as has been aptly said, that "the heir had 'no discretion' in the matter, but the lunatic himself should have had more discretion than to become crazy."[5]

not subject to the direction of a sound mental power. Therefore the insane can not acquire through legal transactions which they conclude themselves; they can not come into possession, even when they physically seize upon objects, because the intention of possessing is lacking. They are not liable for delicts either civilly or criminally, since they are not accountable for them — a rule of more refined legal speculation, which indeed, only gradually prevailed in Rome. The lunatic who has lucid intervals is capable of acting during these intervals, even though he is under guardianship and has a curator. Hence it may be concluded that the partially insane, who have reason except for fixed ideas, are capable of acting so far as their reason extends, even though they are under guardianship." — Dernburg, "Pandekten", I, sec. 56, transl. by Pound, "Readings in Roman Law", pp. 66, 67. The remarkable point to be noted in this quotation is the fact, that in Justinian's time "the negative circumstance of lack of normal power" was alone considered, instead of the law attempting fine-spun distinctions between kinds of insanity and tests of irresponsibility.

[1] 16 How. St. Tr., 695 (1724). [2] *Post*, p. 139. [3] *Ante*, p. 125.

[4] *Cited* by Wharton and Stillé, "Medical Jurisprudence", 5th Ed., Vol. I, p. 511.

[5] *Id.*, p. 512.

The reason for this rule of nonstultification seems to have been the suspicion with which the excuse of mental disorder (insanity) — whether to release from civil obligation or relieve from responsibility for crime — was held at a time when mental medicine was as yet unborn.[1] But this suspicion of the defense of insanity in criminal trials persisted even after the times of Pinel, Esquirol, and other great pioneers in mental medicine, when Psychiatry was in its swaddling clothes; and it exists even today, when, although it cannot categorically be stated that Psychiatry has reached mature development, it must be recognized that it has at least grown sufficiently to be entitled to the name of science.

Fitzherbert's Definition of Idiocy. — Fitzherbert, writing early in the sixteenth century, defined an idiot as "such a person who cannot account or number twenty pence, nor can tell who was his father or mother, nor how old he is, etc., so as it may appear he hath no understanding of reason what shall be for his profit, or what for his loss. But if he have such understanding that he know and understand his letters, and do read by teaching of another man, then it seems he is not a sot or natural fool." [2]

Only the first portion of Fitzherbert's views has usually been quoted in the books, so that the fragmentary statement has been regarded as a sort of "counting-twenty-pence test" of the responsibility of an idiot. From the second portion of his definition, however, it seems clear that Fitzherbert, like his predecessors and successors, did not intend his definition to be categorically exclusive of any other means of determining a defendant's idiocy. He suggested it merely as one of the convenient methods known to his day, of arriving at a judgment as to a person's feebleminded-ness; for, in the second portion of his definition, he modified the extreme example put by him in the first part. There is certainly a wide gap between the mental condition of the idiot who can not

[1] Wharton and Stillé, "Medical Jurisprudence", p. 513.

[2] Cited by Hawkins, "Pleas of the Crown", Vol. 1, p. 2, footnote.

Staundeforde, *Pr. Reg.*, 34, cites Fitzherbert's definition with approval, as follows: "And the manner of the tryall of hym to bee a foole naturall appears in the sayd Natura Brevium, fol. 233. That is to say; yf hee cannot tell to twenty pence or tell his age, or who was his father or mother, or such lyke thynges, thereby it may appear that hee hath no kynd of understanding, in that is eyther for his profite or dammage. But if hee bee learned or apt to learne then is he no ideot." He adds, however, "As Maister Fitzherbert there thinkes and Greene sayth in Saver de default that if hee bee able to beget eyther soone or daughter hee is no foole."

Post, pp. 213, 214, as to mental abilities and disabilities of the feeble-minded.

" number twenty pence ", or " tell who was his father or mother "; and of one who can not acquire the much more intricate accomplishment of understanding " his letters ", and reading.

Coke's Contribution to the Subject of Insanity. — The doctrine of nonstultification introduced by Littleton seems to have been adhered to by Coke, his distinguished and admiring commentator.[1] In Beverly's Case,[2] reported by Coke, he introduced, in addition, the concept that, as the King is " the head and safety of the state, and from the head good health is transmitted to all ", even a person *non compos mentis* is not excused from criminal responsibility for the crime of high treason; " let one die lest all perish." Lord Hale, commenting on this doctrine of Coke's, said: " This is a safe exception, and I shall not question it, because it tends so much to the safety of the King's person." [3] The doctrine that insanity is no defense to a felony against the sovereign is rooted in popular psychology. In America it had its psychological influence, no doubt, in the trial of Guiteau, where the subterranean expressions of the sentiments and prejudices of the group mind,[4] especially the strong patriotic sentiment prevailing in America, were not without some influence upon the outcome of the case against the assassin of the President of the United States.

Coke, writing in the seventeenth century, made a generic term of the expression *non compos mentis*, a concept which had been used loosely up to his time. Of this term he said: " *Non compos mentis* is of foure sorts: 1. *Idiota*, which from his nativitie, by a perpetuall infirmitie is *non compos mentis*. 2. Hee that by sicknesse, griefe, or other accident wholly loseth his memorie and understanding. 3. A lunatique, that hath sometimes his understanding and sometimes not *aliquando gaudet lucidis intervallis*. . . . 4. . . . he that is drunken." [5]

In commenting upon Littleton's contribution to the law of insanity, Coke said: " Here Littleton explaineth a man of no sound memorie to be *non compos mentis*. Many times (as here it

[1] Coke, "Littleton", Bk. III, Chap. 6, sec. 405, says, however: "But this holdeth only in civil causes; for in criminal causes, as felonie, etc., the act and wrong of a madman shall not bee imputed to him, for that in those causes, *actus non facit reum, nisi mens sit rea*, and he is *amens* (*id est*), *sine mente*, without his minde or discretion; and *furiosus solo furore punitur*, a madman is only punished by his madnesse."

[2] 2 Co., 568.

[3] "Pleas of the Crown", Vol. I, Chap. IV, p. 37.

[4] *See* William McDougall, "The Group Mind."

[5] "Pleas of the Crown", Vol. I, p. 6.

appeareth) the Latine word explaineth the true sense, and calleth him not *amens, demens, furiosus, lunaticus, fatuus, stultus*, or the like, for *non compos mentis* is most sure and legal." [1] Coke thus used the term *non compos mentis* in a generic way, after the manner of the Institutes of Justinian and of the early English Civilians. In this respect he showed greater wisdom than many subsequent writers and judges, who have utterly confused the branch of the criminal law we are considering by making nice distinctions and playing fast and loose with the terminology. By employing the broad, generic "unsoundness of mind", Coke also showed some scientific discrimination; for the term correctly comprises mental defect as well as mental disease. However, his use of the term "lunatics" and all it implies ("lucid intervals", for example) has led to infinite confusion and controversy among lawyers and physicians. "There is no such thing in actual insanity as the 'lunatic' of Coke, if by that term is meant a distinct clinical form, and if that clinical form is always characterized by 'lucid intervals.' . . . Therefore the separation of 'lunatics' from patients who become insane from 'sickness, grief, or other accident', is entirely arbitrary and unscientific." [2]

In the Third Part of the Institutes,[3] Coke says: "If a man lose his memory by the rage of sickness or infirmity, or otherwise, and kill himself while he is not *compos mentis*, he is not *felo de se;* for, as he cannot commit murder upon another, so in that case, he cannot commit murder upon himself." Again, in approving Littleton's doctrine of nonstultification, when Coke distinguishes between civil and criminal cases he says: ". . . It is a maxim of the common law, that the partie shall not disable himselfe. But this holdeth only in civil causes; for in criminall causes, as felonie, etc., the act and wrong of a madman shall not bee imputed to him, for that in those causes, *actus non facit reum, nisi mens sit rea*, and he is *amens . . . sine menti*, without his minde or discretion; and *furiosus solo furore punitur*, a madman is only punished by his madnesse." [4] Further, in Beverley's Case,[5] Coke is of the opinion that: ". . . The punishment of a man who is deprived of reason and understanding can not be an example to others. . . . No felony or murder can be committed without a felonious intent and purpose; . . . but *furiosus non intelligit quid agit, et animo et*

[1] Coke on Littleton, p. 246. [2] Wharton and Stillé, *op. cit.*, p. 517.
[3] Cap. III, p. 54. [4] Coke Lit., Vol. 2, 247b. [5] 2 Coke's Rep., 571, 572.

ratione caret, et non multum distat a brutis, as Bracton saith, and therefore he cannot have a felonious intent." After giving his classification of persons *non compos mentis*, as he did in his Institutes, he adds: " . . . Of a lunatic, all acts which he doth during his lunacy, are equivalent to acts done by an ideot, or he who is utterly *non compos mentis:* but acts done by him *inter lucida intervalla*, when he is of sound memory shall bind him." [1]

These quotations from Coke's writings suggest a state of affairs that has been the stumblingblock of many treatises on the law of insanity and of most decisions, namely, the difficulty of reconciling the requirement of a " guilty intent " as the basis of every crime and the fact that disease or defect of mind *negatives such intent*, with the arbitrary tests of irresponsibility, which are only concerned with *one element* or *one example* of the required total guilty intent. Coke wisely relied upon the general requirement of criminal intent and upon the rule that mental disease and defect negative such intent. Hale, however, as we shall see further started the endless controversy in this field by attempting to draw the line between that " total insanity " which for him negatived criminal intent, and " partial insanity " which he claimed does not. Just as it is impossible to mark off the thin partition between mental soundness and unsoundness, so Hale's distinction has not only proved obscure but misleading and provocative of hopeless confusion and endless debate in legal decision.

From the quotations cited, it would appear that Coke, unlike his successors, was not inconsistent; he recognized the necessity of a guilty mind as the basis of every crime, and agreed with Bracton that an insane person can have no criminal intent. He did not subscribe to any one test of irresponsibility, but let the law rest upon the general principle of the requirement of a guilty intent.

Lord Hale's Statement of the Law of Insanity. — Lord Hale, writing in the middle of the seventeenth century, discussed the law as it was settled in his time, by making the most logical *approach* to the subject that had hitherto been attempted, at least in English law. Recognizing at the outset, as did Coke, that the defense of insanity is intimately related with the whole topic of criminal intent (a fact which his predecessors and successors only vaguely were aware of and which many modern judges wholly ignore), he began his inquiry by asking what makes the *sane* man

[1] Coke's Rep., p. 125.

responsible for his crimes. His chapter, "concerning the several incapacities of persons, and their exemptions from penalties by reason thereof",[1] begins with the following psychological and ethical fundamentals of the criminal law, so often ignored by writers and judges:[2]

> Man is naturally endowed with these two faculties, understanding and liberty of will, and therefore is a subject properly capable of a law properly so called, and consequently obnoxious to guilt and punishment for the violation of that law, which in respect of these two great faculties he hath a capacity to obey: The consent of the will is that, which renders human actions either commendable or culpable; as where there is no law, there is no transgression, so regularly where there is no will to commit an offense, there can be no transgression, or just reason to incur the penalty or sanction of that law instituted for the punishment of crimes or offenses. And because the liberty or choice of the will presupposeth an act of the understanding to know the thing or action chosen by the will, it follows that, where there is a total defect of the understanding, there is no free act of the will in the choice of things or actions.

Whatever we may think of Hale's simplified psychology, it can not be denied that his was the first rational *approach* in English law to the whole subject of the responsibility of the insane. From this introduction Hale logically passed to the *reason* why some sort of tests must, in his opinion, be laid down, expressing a difficulty which is very acute in the criminal law to-day: "But general notions or rules," said Hale, "are too extravagant and undeterminate, and cannot be safely in their latitude applied to all civil actions; and therefore it hath been always the wisdom of states and lawgivers to prescribe limits and bounds to these general notions, and to define what persons and actions are exempt from the severity of the general punishments of penal laws in respect of their incapacity or defect of will."[3] This is a recognition of the very modern difficulty, in the administration of the criminal law, which Dean Pound has frequently pointed to: "To find a proper mean between a system of hard and fast rules and one of completely

[1] "Pleas of the Crown", Vol. I, pp. 13, 15.

[2] I have not found a single writer who recognized our indebtedness to Hale from this point of view. All writers on the defense of insanity begin their study of Hale's contribution with his definitions. *See*, for example, Wharton and Stillé's treatment of Hale.

[3] "Pleas of the Crown", Vol. 1, p. 15.

individualized justice is one of the inherent difficulties of all administration of justice according to law." [1]

Dementia Divided into Idiocy, Madness, and Lunacy. — After this preliminary treatment of the subject of criminal intent and his recognition that some sort of rules must be laid down, Hale divided the " incapacities " into natural, accidental, and civil, and placed dementia under those accidental defects which negative criminal intent:

> Now concerning another sort of defect or incapacity, namely, *ideocy, madness* and *lunacy* . . . and this defect comes under the general name of Dementia, which is thus distinguished . . . *Ideocy* . . . such a one is described by Fitzherbert, who knows not to tell 20*s.* nor knows who is his father or mother, nor knows his own age; but if he knows letters, or can read by the instruction of another, then he is no idiot. . . . These, though they may be evidences, yet they are too narrow, and conclude not always, for *ideocy* or *not* is a question of fact triable by jury, and sometimes by inspection.[2]

It is remarkable that most commentators and judges following Hale have apparently ignored the last sentence quoted above. Hale here clearly demonstrates that *no single test of mental defect is conclusive of a defendant's idiocy, and hence, of his criminal irresponsibility;* and he points to the fact, long ignored by judges, that the question of whether or not the mind is so affected as to exempt one from criminal responsibility is, after all, a question of *fact* not answerable exclusively or conclusively by the application of any judge-made yardstick. He recognizes the fact that these early tests, though they may be evidences, " are yet too narrow, and conclude not always "; for the question of idiocy is one of fact and the jury is more or less a fact-finding instrumentality. The question, in actual practice, is not one of the judicial application of a rule *fashioned in advance* for the particular considerations of some previous case; though this is the legal theory even to-day.

Dementia Divided into " Partial " and " Total." — The second group of dementia, according to Hale, comprises *Dementia accidentalis vel adventitia.* This is caused " sometimes from the distemper of the humours of the body, as deep melancholy or adust choler; sometimes from the violence of a disease, as a fever or

[1] "Introduction to the English Version of the Individualization of Punishment", by Raymond Saleilles, "Modern Criminal Science Series", No. 4 (1911), p. xv.

[2] Hale, *op. cit.*, I, p. 29.

palsy; sometimes from a concussion or hurt of the brain, or its membranes or organs; and as it comes from several causes, so it is of several kinds or degrees; which as to the purpose in hand may be thus distributed: 1. There is a partial insanity of mind; and 2. a total insanity." [1]

Partial Insanity. — As to partial insanity, the phrase which, since McNaghten's Case,[2] has caused so much confusion in the law, Hale says it is of two kinds, — partial as to subjects or things, and partial as to degree. "Some persons, that have a competent use of reason in respect of some subjects are yet under a particular *dementia* in respect of some particular discourses, subjects, or applications." The insanity which is partial as to degree "is the condition of very many, especially melancholy persons, who for the most part discover their defect in excessive fears and griefs, and yet are not wholly destitute of the use of reason."

Hale then expressed a view which some criminologists of recent years have been bitterly accused of championing: After saying that "partial insanity seems not to excuse persons in the committing of any offence for its matter capital",[3] he assigns as a reason the opinion that "doubtless most persons that are felons of themselves, and others are under a degree of partial insanity, when they commit these offenses."[4] He concludes his commentary on partial insanity with these words often quoted, in which the inherent difficulty of the use of any inflexible tests, rules, or measures in the evaluation of the criminal irresponsibility of the insane, is eloquently expressed: "It is very difficult to define the indivisible line that divides perfect and partial insanity; but it must rest upon circumstances duly to be weighed and considered, both by the judge and jury, lest on the one side there be a kind of

[1] Hale, *op. cit.*, p. 30. [2] *Post*, Chapter 6.

[3] Writers often overlook the changing perspective in this whole field, which must have gone hand in hand with the humanization of the criminal law. From these early days, when even petty theft was punishable by death, to to-day, when, in most jurisdictions, only extreme, deliberate, and malicious homicides are thus punishable, there has come a steady liberalization of views toward the defense of insanity, especially in its milder forms. The defense is still largely raised in capital offenses, but not infrequently it is interposed in lesser crimes. Judging from Hale's entire approach to the problem, his attitude of balancing the interests involved, and his emphasis of *capital* offenses, and judging further from the changed attitude towards the defense of insanity in cases that Hale designated as partial, it seems that considerable of the bone of contention in this field is connected with the question of capital punishment.

[4] *Op. cit.*, p. 30.

inhumanity towards the defects of human nature, or on the other side too great an indulgence given to great crimes."[1]

Fourteen-year-old Child Test for Total Insanity. — In attempting to obtain a nice balance between "a kind of inhumanity towards the defects of human nature", and "too great an indulgence . . . to great crimes", Hale makes the mistake that he warned others against, when considering the use of Fitzherbert's test of idiocy; namely, he himself is forced to suggest a test or "measure for total insanity", and he says: "the best measure that I can think of is this; such a person as labouring under melancholy distempers hath yet ordinarily as great understanding, as ordinarily a child of fourteen years hath, is such a person as may be guilty of treason, or felony."[2] It must be admitted, however, that this test of Hale's had greater merit from the points of view of common sense and common experience that those proposed prior to his time and many of those proposed thereafter; especially, in view of the fact that he indicated so clearly that this test was not by any means an exclusive one, — a fact entirely overlooked by his successors. Incidentally, his test may be regarded as one of the interesting forerunners of the theory upon which modern psychological intelligence tests are based.

Insanity — Permanent or Interpolated. — After expressing his views on "total alienation of mind, or perfect madness", which "excuseth from the guilt of felony and treason", Hale distinguished "accidental dementia", both total and partial,

into that which is permanent or fixed, and that which is interpolated, and by certain periods and vicissitudes; the former is *phrenesis* or madness; the latter is that which is usually called *lunacy*, for the moon hath a great influence in all diseases of the brain, especially in this kind of *dementia;* . . . the person that is absolutely mad for a day, killing a man in that distemper, is equally not guilty, as if he were mad without intermission. But such persons as have their lucid intervals (which ordinarily happens between the full and change of the moon) in such intervals have usually at least a competent use of reason, and crimes committed by them in these intervals are of the same nature, and subject to the same punishment, as if they had no such deficiency.[3]

[1] *Id.* This is a practical recognition of the fact that tests or no tests it is the jury's attitude that largely determines the outcome of insanity trials.

[2] *Id.*

[3] *Id.*

In this passage we have the first statement in unqualified terms of the meaning of "lucid interval", and of "lunacy" in the law at the time Hale wrote.[1] While the theory of the influence of the moon upon the mind has been abandoned by judges (by some, perhaps regretfully), "lucid intervals" are still with us, and have afforded much scope for the exercise of judicial ingenuity, as the many cases in the reports will testify.

Hale also attempted to classify the accidental dementia according to their *symptoms*, thus setting an unfortunate precedent for legal commentators and judges, who attempt to psychiatrize in their legal decisions. He divided the accidental dementia into

the more dangerous and pernicious, commonly called *furor*, *rabies*, *mania*, which commonly ariseth from adust choler, or the violent inflammation of the blood and spirits,[2] which doth not only take away the use of reason, but also superadds to the unhappy state of the patient, rage, fury, and tempestuous violence; or else it is such as only takes away the use and exercise of reason, leaving the person otherwise rarely noxious, such as is a deep *delirium*, *stupor*, memory quite lost, and phantasy quite broken, or extremely disordered.

Summary of Hale's Contributions. — Hale's contributions may be summarized as follows: He correctly made the mental-legal concept of criminal intention his point of departure for treating of the tests of criminal irresponsibility of the insane; and in so doing recognized the necessity of the volitional[3] as well as the

[1] This concept persisted for quite a time thereafter. Several witnesses in Hadfield's Case (discussed on pp. 147, 148) testified with great solemnity about the moon's influence upon Hadfield.

Discussing the contributions to criminology of the eighteenth and nineteenth century fathers of psychiatry (Pinel, Esquirol, Falret, Morel, Despine, Maudsley, etc.), De Quiros, "Modern Theories of Criminality", p. 6, says: "The ideal portrait of the insane created by law begins from that time on to disappear, and in its place there appears the outlines of the criminal. The long list of the manias and alterations of a single chord of the psychic keyboard, its forms less and less objective and more delicate and hidden to the mere eye and good sense, the only criteria employed in former times; the lack of crisis, spasms, and deliriums; its relative character in the double sense of manifesting itself in a single idea or sentiment, and in mingling at the same time with the conditions of health instead of successions as claimed by the old theory of lucid intervals . . . have all extended the boundaries of mental infirmity, reduced the field of delinquency, and prepared the explanation of the morbid nature of crime."

[2] It is probable that this refers to "animal spirits", the conception made much of by Vesalius in the sixteenth century, and later by Descartes. Descartes supposed that the heart has innate heat which distills the animal spirits from the food. The animal spirits in Descartes' view seemed to be a fluid or flame.

[3] Although, of course, in his time "the Will" was conceived as a sort of ex-

cognitive modes of mental life. In discussing Fitzherbert's test of idiocy, he acutely pointed out that no legal test can, in the very nature of the subject of mental disorder, be conclusive. Dementia he divided into " partial " and " total ", and partial dementia he used as a concept with dual meaning: partial as to degree and partial as to subject-matter; yet he emphasized the difficulty of practically drawing the line between them. He pointed out that circumstances in the individual case must be taken into consideration by judge and jury, thus again alluding to the practical impossibility of having any all-conclusive test. Yet he fell into the error he himself warned against, by using the intelligence of a fourteen-year-old child as a criterion. In spite of this defect, this practical solution of a difficulty he fully recognized was wiser than many that succeeded it. There is much justification in employing the understanding of a fourteen-year-old child as a standard of comparison; as the subsequent development of psychological intelligence tests has demonstrated. Dementia (total and partial) was distinguished into permanent and interpolated forms, the latter referring to the concepts of lunacy and lucid intervals, based upon contemporary belief (both medical and lay) of the moon's influence upon the mind; and this view caused much debate in subsequent decisions dealing with lucid intervals. Finally, he initiated a practice we have called " psychiatrizing ", that, when indulged in by judges in subsequent cases, has contributed to the confusion in the law of insanity.

Hawkins' Good-and-Evil Test. — The next systematic writer on the subject of insanity and its relation to criminal responsibility was Hawkins.[1] His monumental commentary commences with these words:

ternal entity, a sort of *deus ex machina*, presiding over the mind and forcing desired action.

[1] Blackstone, writing in the middle of the eighteenth century, did not contribute anything original to the law of insanity. He treats of insanity as constituting one of the deficiencies in will which arise where the "will does not join with the act": "The second case of a deficiency in will, which excuses from the guilt of crimes, arises, also, from a defective or vitiated understanding, viz., in an *idiot* or a *lunatic*. For the rule of law as to the latter, which may easily be adapted also to the former, is, that *furiosus furore solum punitur* (a madman is punished by his madness alone). In criminal cases, therefore, idiots and lunatics are not chargeable for their own acts, if committed when under these incapacities: no, not even for treason itself." — Cooley's "Blackstone", 4th Ed., Vol. II, Book IV, p. 24. This, it will be noticed, gives the general rule only, without attempting any tests; and is therefore at best but a half-truth as to the criminal liability of the insane and feebleminded; for

The guilt of offending against any law whatsoever, necessarily supposing a wilful disobedience, can never justly be imputed to those who are either incapable of understanding it, or of conforming themselves to it.

He then proceeds:

Those who are under a natural disability of distinguishing between good and evil, as infants under the age of discretion, ideots, and lunaticks, are not punishable by any criminal prosecution whatsoever.

Indeed it was anciently holden, in respect of that high regard which the law has for the safety of the King's person, that a madman might be punished as a traitor for killing or offering to kill the King; but this is contradicted by the later opinions.[1]

Hawkins wrote late in the eighteenth century, and his concept of " good and evil " is the forerunner of the much used and abused " right and wrong " test of criminal irresponsibility. Apparently, since he speaks with such conviction, the capacity for moral distinction between good and evil seems to have been previously established in several trials as a test of irresponsibility where insanity was pleaded. " From this time onwards the doctrine of knowledge of right and wrong assumes an importance in all courts which the students of medical jurisprudence cannot ignore. For jurists it becomes an ' open sesame ' to unlock the mysteries of the insane mind; but for medical experts it is only the *casus belli* of many a hard-fought field. With the *début* of this doctrine, we unfortunately enter into the broad domain of controversy." [2] It is also pointed out that from this point on the development of the concept of insanity as related to criminal responsibility is through the medium of case law, that is, of judge-made law. As " this is not in any concert, but individually, each judge stating his own concept of the law and his own definition of insanity, there has thus arisen confusion, even contradiction." [3] It behooves us, therefore, to investigate some of these early, poorly considered albeit precedent making cases.

not insanity or idiocy, *as such*, excuses, but, even in Blackstone's day, more specifically, only certain *degrees* and types thereof.

[1] "Pleas of the Crown", by William Hawkins, 8th Ed. (London), 1824, Bk. I, Chap. 1, pp. 1 and 2.

[2] Wharton and Stillé, "Medical Jurisprudence", Vol. 1, p. 523.

[3] *Id.*

Section 2 — Early Cases Involving Insanity and Irresponsibility

Arnold's Case — "Wild beast test." — In 1724 Arnold was tried for shooting at Lord Onslow,[1] and the testimony tended to prove the act was committed as the result of delusions. Judge Tracy, though pointing out that the issue was whether the defendant was "under the visitation of God", and could not distinguish between good and evil, inaugurated the confusion in judges' charges that has persisted since his time, by attempting to define this "good and evil" in these words:

> If the man be deprived of his reason, and consequently of his intention, he cannot be guilty. . . . It is not every kind of frantic humor or something unaccountable in a man's actions, that points him out to be such a madman as is to be exempted from punishment; it must be a man that is totally deprived of his understanding and memory, and doth not know what he is doing, no more than an infant, than a brute, or a wild beast, such a one is never the object of punishment.[2]

[1] Rex *v.* Arnold, 16 How. St. Tr., 695, 764 (1724).

[2] It should be pointed out that Judge Tracy apparently did not intend all his remarks to be taken literally. Although he gives what has subsequently been referred to as the "wild beast test", the remainder of his charge, entirely neglected by most judges in subsequent cases, was: "I must leave it to your consideration, whether the condition this man was in, as it is represented to you on one side, or the other, doth shew a man, who knew what he was doing, and was able to distinguish whether he was doing good or evil, and understood what he did. . . . If you believe he was sensible and had the use of his reason, and understood what he did, then he is not within the exemptions of the law, but is subject to punishment as any other person" (pp. 764, 765). These remarks, together with the preceding ones, would indicate that, if every word of Judge Tracy's charge is to be taken literally (as so many legal commentators believe), then Judge Tracy not only laid down the "wild brute" or "wild beast" test, but every other test that seems to have been proposed up to his time. Thus he spoke of lack of *criminal intention* excusing from guilt; then he spoke of total deprivation of *understanding and memory* as a test; further, such deprivation had to be similar, not only to that of a "brute, or a wild beast" but to that of "an infant", — a wholly different type of mind from that of a beast and not comparable therewith. Later he spoke of knowledge of "good and evil" — a test involving both intellectual capacity and moral discrimination; and last of all, he seems to have thrown overboard most of what he said before, by reducing the whole thing to capacity to use "reason" and to understand what the defendant was doing. This charge is an excellent illustration of the kind of hotch-potch handed out in judicial charges to juries, in this field. In the individual case it does not matter so much, for the jury decides the case on its merits and cannot possibly keep in mind, or discriminate between, the nice scraps of tests laid down in a judge's charge. Such statements cause great mischief, however, when *scraps* carelessly tossed about in judges' charges are later lifted out of their whole setting and raised to the dignity and importance of inflexible "tests" to govern all future cases. Judge Tracy used the infant, brute, or wild beast expression in an attempt to help the jury to decide the vexing question of where to draw the line in insanity cases between respon-

Criticism of Test. — In this charge are embedded the seeds of the writings of all the authorities who had been studied by Judge Tracy. The knowledge concept of the Roman law [1] is stated to include both the specific knowledge of "what he is doing" and the general knowledge of the moral distinction between good and evil in the abstract. Intention or design are said to be necessary, and the reason used suggests that assigned by Coke,[2] namely, that punishment of one not having a criminal intention "can have no example"; that is to say, the punishment of an insane person can not act as a deterrent to others who would be shocked rather than deterred by the inhumanity of the spectacle of punishing a mentally diseased person. But we see, in addition, an example of the judicial recognition of the practical difficulty involved in such cases, just as it was evident in Hale's contribution. "Where," it was beginning to be asked, "shall be drawn the line between insanity which should excuse from crime and that which should not?" Judge Tracy's solution, judging from the tenor of his whole charge, seems to have been the extreme one of demanding a total deprivation of the "understanding and memory", and a total lack of knowledge on the defendant's part of "what he is doing"; *i.e.*, a knowledge "no more than an infant, than a brute, or a wild beast." In using the terms infant, brute, and wild beast, Judge Tracy showed some influence of Hale's fourteen-year-old-child example,[3] and Bracton's wild beast illustration.[4] But just as those early writers did not intend these illustrations to constitute more than useful aids, examples (and not inflexible tests) in such difficult cases, so it might be said Judge Tracy did not intend every word of his exposition of the subject to be taken literally, as constituting the only possible condition which would take the mentally unsound offender out of the category of the criminally responsible and place him into that of the criminally irresponsible. If, however, he

sibility and irresponsibility; subsequent judges and writers stripped his charge of all but the reference to "brute or wild beast", and regarded an incidental reference, or at least but one reference out of many, as an unqualifiable, all-inclusive principle, that should govern all future trials of allegedly insane offenders. Since Tracy's test has been thus emasculated, we treat of it in the text largely as the "wild beast test", with the reservations and explanations noted herein.

In connection with the whole practice of charging juries, especially in cases of insanity, an interesting psychological study might be made of the effect of frequency of repetition, recency, and other devices of emphasis employed by judges, upon the jury's conduct.

[1] *Ante*, p. 126, note 3.

[2] *Ante*, p. 130. [3] *Ante*, p. 135. [4] *Ante*, p. 126.

did so intend, he fell into the error that was Coke's, and against which Hale warned but which he too committed; namely, he raised to the dignity of an inflexible test covering all cases of mental disorder, that which his learned predecessors had merely intended as *one* of the rough instruments whereby the jury might be aided in measuring the mental unsoundness of an offender for the purpose of *converting* it into terms of criminal responsibility. This process of seizing upon incidental, or at the most, partial, statements of predecessors and adhering to them with uncritical dogmatism has marked the legal history of the subject to this day.

Still another source of confusion for subsequent writers can be traced to Judge Tracy's recognition of the necessity of the presence of criminal intention before an act will be criminal, only to abandon this general principle of the criminal law by insisting upon but *one element* of the required intention, namely, *knowledge*. In this way Judge Tracy initiated the practice we have criticized throughout this historical survey, of recognizing all the mental elements that constitute *mens rea* and at the same time inconsistently holding that only *knowledge* (of right and wrong, or of the nature and quality or consequences of an act) constitutes *mens rea*.[1]

A further criticism of such tests of irresponsibility will be made later.[2] At present these very obvious facts remain to be mentioned: First, if literally only a total deprivation of "understanding and memory" excused from criminal responsibility, then only such very extreme cases of mental disease as "have not the capacity to intend or accomplish *anything* whatsoever", crime or noncrime, fall within Judge Tracy's definition. In other words, the persons comprised in the definition rarely reach the point of trial at all. The great majority of offenders, suffering from the well recognized types of psychoses and neuroses, could not be included in this definition. As to whether a mental test similar to those now employed in intelligence tests and originated in the criminal law, as was said, by Hale, is an adequate basis of measure-

[1] This fault has been avoided by legal writers of acumen. Bishop, notably, in his "Criminal Law", Vol. I, sec. 381, says that "in the criminal law insanity is any defect, weakness, or disease of the mind rendering it incapable of entertaining the *criminal intent*, which constitutes one of the elements in every crime", and that a legal test for insanity "has never been found, because it does not exist." A similar view has been expressed by Professor Keedy (*see* pp. 546, *et seq.*, of his "Insanity and Criminal Responsibility", Vol. XXX, *Harvard Law Review*, p. 535).

[2] *Post*, Chapters 7 and 8.

ment of criminal irresponsibility (a concept which is of course based upon a recognition of the more or less normal mental capacity with reference to distinguishing between right and wrong), the same criticism may be made against such an *exclusive* test as is leveled against intelligence tests to-day. In the first place, the mind of a mentally pathological *adult* is not the same as that of a fourteen-year-old *normal child*. Secondly, conduct is not dependent solely, or even chiefly, upon those mental factors which are *measurable* by psychological tests in their present stage of development. The personality as a whole, and the history of the subject's reactions to the stresses and strains of life must be studied, says modern mental medicine, if we would gain a workable conception of the offender's capacity to adhere to the commands of the criminal law and to be governed by its sanctions. And in the study of the personality, the *conative-affective life*, that which is not so readily measurable as yet, is of vital importance. Besides, special abilities and disabilities among mental defectives have an important bearing upon conduct.[1] Finally, as to the oft quoted phrase used in Arnold's Case, neither the mind of an infant nor that of a mentally unsound person is fairly comparable to that of a brute or a wild beast.

Earl Ferrer's Case.[2] — In this case, tried in 1760, the Solicitor-General for the Crown, after quoting Hale with approval, insisted upon the knowledge of "right-and-wrong" test; thus this test seems to have been firmly implanted in English criminal law by that time. The pertinent statements of his address to the jury of "peers"[3] is noteworthy. The Crown's counsel summarized, or rather *interpreted*, Hale's doctrines as follows:

> . . . The result of the whole reasoning of this wise judge and great lawyer (so far as it is immediately relative to the present purpose) stands thus. If there be a total permanent want of reason, it will acquit the prisoner. If there be a total temporary want of it, when the offence was committed, it will acquit the prisoner: but if there be only

[1] *See* pp. 213, 214, where this point is developed.

[2] 19 How. St. Tr., 886, 948. It is remarkable that Lord Ferrer was, by some common law rule, compelled to be his own counsel, and *himself* set up the defense of insanity and argued it with great acumen. The spectacle presented was of an apparently chronic alcoholic himself examining and cross examining witnesses on his own plea of insanity and as to his own mental condition! And the Crown's counsel used the defendant's manifestation of legal acumen during the trial against him as one of the strongest proofs of defendant's sanity!

[3] Literally, for, as an Earl, Lord Ferrer was tried before a jury of lords.

a partial degree of insanity, mixed with a partial degree of reason; not a full and complete use of reason, but (as Lord Hale carefully and emphatically expresses himself) a competent use of it, sufficient to have restrained those passions, which produced the crime; if there be thought and design; and faculty to distinguish the nature of actions; to discern the difference between moral good and evil; then, upon the fact of the offence proved, the judgment of the law must take place.

. . . The question therefore must be asked; is the noble prisoner at the bar to be acquitted from the guilt of murder, on account of insanity? . . . Was he under the power of it, at the time of the offence committed? Could he, did he, at the time, distinguish between good and evil?

The same evidence, which establishes the fact, proves, at the same time, the capacity and intention of the noble prisoner. Did he weigh the motives? Did he proceed with deliberation? Did he know the consequences?

The above quotation is interesting as a further proof of the fact that the distinction between the entire *mens rea* necessary to constitute a crime, and the *knowledge* of good and evil, was confused even in those early times. The fact that "capacity and intention" and weighing of motives are spoken of, shows that counsel for the Crown was vaguely aware that a knowledge of good and evil does not alone constitute *mens rea*. This case is also interesting as one of the earliest instances in which a physician was called to testify as an expert, and his views subjected to that scorn and contumely on the part of counsel for the Crown which have so markedly widened the gap between the legal and medical professions with regard to a subject which, in its very nature, is neither exclusively legal nor exclusively medical, but *medico-legal*.[1]

[1] "The last witness called, on behalf of the noble prisoner," said the Solicitor-General, "was Doctor Monro. He was brought here to describe what symptoms he considers as marks of lunacy or insanity. He said, that there were many; and on being asked particularly as to the several symptoms suggested in this cause, Doctor Monro was led to speak principally of three marks of lunacy. The first was common fury, not caused by liquor, but raised by it. Surely this circumstance will not infer insanity. The next was, jealousy and suspicion, with causeless quarrelling. Do not many, who are not lunatics, suspect or quarrel without cause, and become dangerous to their neighbors? The third was, carrying arms; which (he said) though less usual, might be a mark of lunacy. And it is equally true, that such behaviour may prove, in many cases, a bad heart and a vicious mind, as well as lunacy. My lords, the general observation, which occurs upon Doctor Monro's evidence, is this; that he did not describe any of these things, as absolute marks of lunacy, so as to denote every man a lunatic, who was subject to them. Indeed he could not have said it, consistently with common sense and experience." (953.) *Compare* statement of modern expert, Chapter 2, p. 31.

Permanent Establishment of Right-and-wrong Test. — The principle enunciated in Lord Ferrer's Case is the "right and wrong test", which is to-day the most universally recognized test of irresponsibility in courts of law. From this spring, a huge stream of criminal cases involving the defense of insanity has flowed down the ages. In these numerous cases, judges have conveniently and uncritically, on the whole, repeated the right-and-wrong ritual with cabalistic solemnity. Only occasionally, even to-day, do we find any marked protest against this test, which, as was shown, constitutes an unwarranted judicial emasculation of the cardinal criminal law doctrine of *mens rea*, as well as an erroneous psychological notion. Judges have sometimes paid lip service to the *mens rea* doctrine in the very same opinions in which they have seized upon the knowledge element of it as alone constituting the applicable principle of law in insanity cases;[1] and some have gone so far as to refuse to charge juries as to the relationship of mental unsoundness to criminal intent.[2] To determine whether or not the "guilty mind" required by the law did or did not exist, consideration of the knowledge element alone (if, indeed, such an unnatural division of mental life is psychologically tenable), is not sufficient; nor is it warranted by the psychopathologist's account of the nature of the mind's pathological manifestations.

Erskine's Views in Hadfield's Case. — But as early as 1800 one of the greatest criminal lawyers of all times attacked the validity of the exclusive use of the right-and-wrong test from the points of view both of the law and of medicine. In Hadfield's Case,[3] one of the landmarks of the legal doctrine of insanity, Lord Erskine de-

This is an early example of the practice of some counsel in such cases, of selecting individual symptoms of the particular case about which the expert has testified and attempting to raise these individual symptoms to generalizations applicable to all cases of mental disease. It is this method used in cross examination, — the adding to and subtracting from, the whole picture of the psychosis, of individual symptoms, insignificant in themselves but of vital importance in connection with the whole history of the case and of the disease picture, — that to-day casts such stigma upon expert testimony in these cases. Any one of the marks of lunacy referred to by counsel is in itself harmless and insignificant enough; but when they occur together in marked degree, with a past history of abnormal mental reactions and with the appearance and demeanor of the defendant before and during trial, they may be of great importance as probable indicia of mental disease.

[1] *See*, for example, State *v.* Alie, 96 S. E. (W. Va.), 1011, 1014 (1918).

[2] *See*, for example, Hinson *v.* St., 109 S. E. (Ga.), 661, regarding refusal to charge "is his memory sufficient to form the *intent* to commit a crime?" and insistence upon the exclusive use of the "right-and-wrong" rule.

[3] 27 How. St. Tr., 1282 (1800).

fended a mentally diseased offender, who was tried for shooting at George III in Drury Lane Theatre. Hadfield, a battle-scarred veteran of many wars, was it appears a pronounced paranoiac, and the victim of systematized delusions. Erskine, in his address, considered the same passages from Coke and Hale which have been discussed above, and which were expounded by the Crown's counsel in this case; and he attempted to breathe life into them. After pointing out that the general principle of the law of insanity as stated by Coke and Hale "is clear, but the application is most difficult", he proceeded as follows: "It is agreed by all jurists, and is established by the law of this and every other country, that it is the *reason of man* which makes him accountable for his actions; and that the deprivation of reason acquits him of crime." He then quoted Coke's classification, but insisted that "notwithstanding the precision with which this great author points out the different kinds of this unhappy malady", he did not furnish any "illustration which it can now be useful to consider." Then he passed to Hale, and pointed out that he too did not indicate how the rule of insanity should be applied. Erskine then proceeded in these words to dispose of the views and the authority of Coke and Hale with little further ceremony:

> The Attorney-General, standing undoubtedly upon the most revered authorities of the law, has laid it down, that to protect a man from *criminal responsibility*, there must be a *total deprivation of memory* and understanding. I admit that this is the very expression used both by Lord Coke and by Lord Hale; but the true interpretation of it deserves the utmost attention and consideration of the Court. If a *total deprivation of memory* was intended by these great lawyers to be taken in the *literal* sense of the words: — if it was meant, that, to protect a man from punishment, he must be in such a state of prostrated intellect, as not to know his name, nor his condition, nor his relation towards others — that if a husband, he should not know he was married; or, if a father, could not remember that he had children; nor know the road to his house, nor his property in it — then no such madness ever existed in the world. It is *idiocy* alone which places a man in this helpless condition. . . . But in all the cases which have filled Westminster hall with the most complicated considerations — the lunatics and other insane persons who have been the subjects of them, have not only had memory, *in my sense of the expression* — they have not only had the most perfect knowledge and recollection of all the relations they stood in towards others, and of the acts and cir-

cumstances of their lives, but have, in general, been remarkable for subtlety and acuteness. Defects in their reasonings have seldom been traceable — the disease consisting in the delusive sources of thought; all their deductions within the scope of the malady, being founded upon the *immoveable* assumption of matters as *realities*, either without any foundation whatsoever, or so distorted and disfigured by fancy as to be almost nearly the same thing as their creation.[1]

Admitting that occasionally there are extreme cases, where "the human mind is stormed in its citadel, and laid prostrate under the stroke of frenzy", Erskine then pointed out that such cases are very rare, and never can become the subjects of judicial difficulty:

There can be but one judgment concerning them. In other cases, reason is not driven from her seat, but distraction sits down upon it along with her, holds her, trembling, upon it, and frightens her from her propriety. — Such patients are victims to delusions of the most alarming description, which so overpower the faculties, and usurp so firmly the place of realities, as not to be dislodged and shaken by the organs of perception and sense: In such cases the images frequently vary, but in the same subject are generally of the same terrific character. Here, too, no judicial difficulties can present themselves. . . . Another class, branching out into almost infinite subdivisions, under which, indeed, the former, and every case of insanity, may be classed, is where the delusions are not of that frightful character, but infinitely various, and often extremely *circumscribed;* yet where imagination (*within the bounds of the malady*) still holds the most uncontrollable dominion over reality and fact; *and these are the cases which frequently mock the wisdom of the wisest in judicial trials;* because such persons often reason with a subtlety which puts in the shade the ordinary conceptions of mankind; their conclusions are just, and frequently profound; but the *premises from which they reason, when within the range of the malady*, are uniformly false; — not false from any defect of knowledge or judgment: but, because a delusive image, the inseparable companion of real insanity, is thrust upon the subjugated understanding, incapable of resistance, because unconscious of the attack.[2]

Erskine then summarized his views as follows:

Delusion, therefore, where there is no frenzy or raving madness, is the true character of insanity. . . . In *civil* cases . . . the law avoids every act of the lunatic during the period of the lunacy; although the delusion may be extremely circumscribed; although the mind

[1] 27 How. St. Tr., p. 1312.

[2] *Id.*, pp. 1313, 1314. In the class of "circumscribed" delusions, Erskine is describing the symptoms of paranoia.

may be quite sound in all that is not within the shades of the very partial eclipse; and although the act to be avoided can in no way be connected with the influence of the insanity: — but to deliver a lunatic from responsibility to *criminal* justice, above all, in a case of such atrocity as the present, the relation between the disease and the act should be apparent. Where the connexion is doubtful, the judgment should certainly be most indulgent, from the great difficulty of diving into the secret sources of a disordered mind; but still, I think, that, as a doctrine of law, the delusion and the act should be connected.[1]

In this case the court agreeing with Erskine's eloquent disquisition, practically ordered an acquittal although Erskine still had some twenty witnesses to introduce.[2]

Discussion of Erskine's Views in Hadfield's Case. — Erskine's speech has been quoted in such detail because it represents one of the really significant stages in the development of the law of insanity. In the first place, he did not hesitate to destroy the great authority of Coke and Hale on this subject; treating them with respect, he nevertheless showed that those great commentators had not spoken the final word for future generations. Secondly, he introduced a concept which has had a far reaching influence upon the law, — namely, delusion. He made the same error, however, that is attributable to his illustrious predecessors, when he attempted to establish the symptom of delusion as the inflexible test for all cases of mental disease "where there is no frenzy or raving madness"; and this error, like so much in the history of the tests of irresponsibility, was probably due to an accident — the accident that Erskine had happened to have seen in his experience only such mentally diseased patients as paranoiacs, for example, whose symptoms were largely and characteristically delusional. Moreover, his insistence that the delusion must be connected with the criminal act to constitute excuse from criminal liability, was an attempt to lawyerize a medical concept; and this legal view of delusion, taken up and given higher authority in McNaghten's Case,[3] has been spread broadcast in the minds of judges; so that we get the spectacle of a mentally unsound person being relieved from criminal responsibility if he was so fortunate

[1] 27 How. St. Tr., p. 1314.

[2] "Mr. Attorney-general, can you call any witnesses to contradict these facts? With regard to the law, as it has been laid down, there can be no doubt upon earth." — Lord Kenyon, p. 1353.

[3] *Post*, Chapter 6.

as to have delusions the connection of which with the subject-matter of the crime is *externally visible*, but not otherwise; although the mental disease in the latter case might in many instances be much more severe than in the former, and although modern psychology of mental disorder establishes that the *externally visible* connection of the delusion with the act may not be the actual subjective connection.[1]

A happier contribution was made by Erskine in pointing out that there was no such concept as the " total madness " spoken of by the earlier authorities, and that, properly interpreted, Coke's and Hale's ideas on the subject did not warrant the assumption that the defendant must be totally deprived of all mental faculty before he can be acquitted.

The consequences of Erskine's speech also indicate how some principles of law are actually made. Erskine's thesis as to delusion being the true test of irresponsibility on the ground of insanity was *without judicial authority* in its day. It was merely his own eloquent language interpretive (rather misinterpretive) of the writings of Coke and Hale; yet, because of the brilliancy of his advocacy and the fact that it resulted in Hadfield's acquittal, his doctrine was immediately taken up by judges and commentators and literally made into law.[2]

Hadfield's acquittal created a doubt as to what should be done with him, thus raising a problem which has been the cause of much State legislation in this country.[3] Lord Kenyon, who had approved Erskine's exposition of the law and practically directed that Hadfield be acquitted, was of the opinion, however, that " it is absolutely necessary for the safety of society, that he should be properly disposed of, all mercy and humanity being shown to this most unfortunate creature. But for the sake of the community, undoubtedly, he must somehow or other be taken care of, with all the attention and of the relief that can be afforded him." [4] As there were no statutes in existence at the time covering the procedure in such cases,[5] the court remanded the prisoner " to the

[1] *Post*, Chapter 9.

[2] It is customary for lists of citations in treatises on the criminal law to be headed by a reference to Erskine's speech in Hadfield's Case. *See*, for example, Chitty, III, "Criminal Law", p. 724.

[3] This subject is considered in Chapter 11.

[4] Hadfield's Case, pp. 1354, 1355.

[5] There was, however, some judicial authority for incarcerating persons acquitted of crime, especially in some early Scottish cases, with which the court seemed to be unfamiliar.

confinement he came from ", until other means could be devised to deal with him " in a manner much better adapted to his situation." This case gave rise to two statutes [1] covering the question of the disposition of acquitted insane persons, and Hadfield was thus continued in custody.

Collinson's Cases — The Case of Bellingham. — The next group of cases that have been recorded on the subject of the defense of insanity are contained in the meager reports of Collinson,[2] a writer of the early nineteenth century. These cases are frequently quoted by commentators and judges, but the citations which Collinson gives for them are not always clear, and in some instances he gives no citations. One of the frequently mentioned cases is that of Bellingham,[3] a defendant who had elaborate, systematized delusions of persecution. He was convinced that the Government owed him large sums of money, and appealed to cabinet ministers and to Parliament for relief; and there was evidence also that many of his friends had for years regarded him as insane, and his elaborate claims against the Government as a tissue of delusive beliefs. Having failed to receive satisfaction from a Treasury official, he shot and killed him. Erskine's exposition of the doctrine of delusion was modified, to the extent of practically destroying it, by the presiding judge in this case (Lord Chief Justice Mansfield), whose statement of the law of insanity, twelve years after Hadfield's Case, was as follows:

> If a man were deprived of all power of reasoning, so as not to be able to distinguish whether it was right or wrong to commit the most wicked transaction, he could not certainly do an act against the law. Such a man, so destitute of all power of judgment, could have no intention at all.[4]

Criticism of Bellingham's Case. — Here, although the crux of the law of insanity, *criminal intention*, was recognized, an extreme degree of mental unsoundness which would negative such intention was required, obviously because of the strong public sentiment existing against the prisoner and sympathy for his victim, — a fact that is evident enough from reading Lord Mansfield's entire charge.[5] Manifestly, according to the test here laid down, all

[1] 40 Geo. III, Chaps. 93 and 94.
[2] 1 Coll. on Lunacy, pp. 636, *et seq.* (1812). [3] *Id.*, p. 671. [4] *Id.*
[5] Although a period of fifteen days had to be allowed, according to Hadfield's Case, between the date of commission of the offense and the date of arraign-

power of entertaining any intention whatsoever must be lost before one can be excused from criminal responsibility on the basis of mental unsoundness.

The influence of delusion [1] as an excuse for crime was sarcastically referred to in the following terms:

> There was a . . . species of insanity, in which the patient fancied the existence of injury, and sought an opportunity of gratifying revenge by some hostile act. If such a person were capable, in other respects, of distinguishing right from wrong, there was no excuse for any act of atrocity which he might commit under this description of derangement. The witnesses who have been called to support this *extraordinary* defence, have given a *very singular*. account, in order to shew that, at the time of the commission of the crime, the Prisoner was insane. What might have been the state of mind some time ago, is perfectly immaterial. The single question was whether, when he committed the offence charged upon him, he had sufficient understanding to distinguish good from evil, right from wrong, and that murder was a crime not only against the law of God, but against the law of his Country.[2]

This distinction between the types of mental disorder which exempt from criminal responsibility when the question of delusion arises was obviously prejudicial and unwarranted, both legally and psychologically. It has been shown by the whole history of the defense of insanity that the object sought by the law is to determine

ment, Bellingham was arraigned after but four days, in spite of the fact that his counsel pleaded for postponement, one of them saying, "I never saw the prisoner before, and it has not been in our power to bring forth all the evidence to prove whether he be sane or insane." Another feature in the case illustrating the effect of group psychology on the individual, and indicating the importance of psychological study of judges' charges, is Lord Mansfield's great praise of the deceased and emphasis to the jury to what extent the people and the Empire would suffer by his untimely end, etc., followed hastily by an admonition to the jury, that, of course, they were by no means to take that into account in arriving at their verdict, nor to consider his own feelings in the matter (he, who had lost a great friend, etc.). Of course, such emphasis cannot fail to have its psychological effect upon the jury. It is very similar to Marc Anthony's funeral oration, with its constant reference to the great deeds of Cæsar, interspersed, at psychologically relevant periods, by references to Brutus being "an honorable man."

[1] Literally delusion, since from this early date down to to-day courts do not look upon delusional manifestations as symptoms of definite types of mental unsoundness, but as entities in themselves. In other words, it is not paranoia, for example, which is recognized as a mental disease excusing from criminal responsibility, but *delusion*, as a distinct entity, torn out of its significant setting in the whole disease picture; although a few courts are beginning to take the correct view.

[2] *Op. cit.*, pp. 672, 673.

the cases in which the *normal mental elements* accompanying an act prohibited by the law, have been so disturbed as to deprive that act of one of its legally required constituents, and thus to make it noncriminal. As a matter of fact, during the trial the defendant in this case himself vigorously resented any imputation that he was insane, asserting that he relied exclusively upon the justice of his cause, that his killing of the official was right in view of the fact that the Government had repeatedly rejected his claim, and that he was thus justified in taking the law into his own hands. These remarks alone would have convinced a court wholly uninfluenced by bias that, even according to the right-and-wrong rule, the defendant did not know right from wrong, and that there was something radically wrong with his mental make-up.

We also have a reference in this case to knowledge of *legal*, as well as moral wrong, — a distinction that is fraught with no slight difficulty in subsequent decisions.

The obvious criticism of the requirement of knowledge that " murder was a crime against the law of God ", and " against the law of his Country ", is that it is a rule based upon ignorance of the operations of the pathological mind. It has been justly said that there are actually few, if any, patients in the hospitals for the mentally ill who are ignorant " of such an elementary principle of ethics. It would be as fair to insist that he (a mental patient with delusional symptoms) must not know that two and two are four. Such tests do not touch the real question of his responsibility under the domination of an insane delusion." [1]

Criticism of Offord's Case and Comparison with Bellingham's Case. — The case of Bellingham may be usefully compared with Offord's Case,[2] decided in 1831, where the mental disease was very similar to that of Bellingham. Offord also had an elaborate system of delusional beliefs; he believed the inhabitants of his town were leagued together to kill him, and he went about with a paper containing some fifty names, entitled, " List of Hadleigh conspirators against my life." Under the influence of delusional beliefs, he shot and killed one of his alleged persecutors. The charge to the jury in that case was substantially that of Bellingham's Case. The jury, it was said, must be satisfied that the defendant " did not know, when he committed the act, what the effect of it, if fatal,

[1] Wharton and Stillé, "Medical Jurisprudence", p. 534.
[2] 5 Car. and P., 168.

would be, with regard to the crime of murder." Here we have knowledge of right and wrong with respect to the particular act and with emphasis upon the *legal* consequences of the act. But this was coupled with the following: "The question is, did he know that he was committing an offense against the laws of God and nature?" Thus the test in Bellingham's Case was substantially approved, the requirement of specific, legal knowledge being laid down side by side with that of a general, moral knowledge.

It should be pointed out that in Bellingham's and Offord's Cases the defendants had exactly the same mental disease, and the juries were charged in substantially identical language; yet in the former case the defendant was convicted, and in the latter acquitted.

Regina *v.* Oxford.[1] — In this case, decided in 1840, Oxford, whose grandfather had died in a hospital for the mentally diseased and whose father was also mentally unsound,[2] fired a pistol at Queen Victoria. After stating the rule that "if some controlling disease was, in truth, the acting power within him, which he could not resist," defendant will not be responsible, Lord Chief Justice Denman, like so many judges before and after him, attempted to refine and make more explicit this generalization. "The question," he said, "is, whether the prisoner was labouring under that species of insanity which satisfies you that he was quite unaware of the nature, character, and consequences of the act he was committing, or, in other words, whether he was under the influence of a diseased mind, and was really unconscious at the time he was committing the act, that it was a crime."[3] Here we have the general and special knowledge of Offord's Case, the general knowledge referring rather to the physical character of the act than to its moral nature. In another place he said that the question is "whether the evidence given proves a disease of the mind as of a person quite incapable of distinguishing right from wrong."[4] The remarkable point in this charge is that the learned justice was trying to reconcile the general rule that insanity (*i.e.*, absence of the required "criminal intent" because of mental disorder) excuses from criminal responsibility, with the more specific example of one of the possible symptoms of some forms of mental disorder (*i.e.*, lack of capacity to distinguish right and wrong). Several additional points were introduced for the first

[1] 9 Car. and P., 525, 546. [2] *Id.*, p. 537. [3] *Id.*, p. 547. [4] *Id.*

time in this charge, illustrating the difficulty which judges find in expressing the law on the subject, and the chance observations made during the course of a charge, which later are regarded not as mere dicta, but as conclusive tests. First, the phrase used elsewhere in the charge, — " the controlling disease . . . which he could not resist ", — suggests the later important test of irresistible impulse;[1] secondly, " the nature, character, and consequences of the act " is a concept which was used as a test in many subsequent cases, and, as in this case, it was set down side by side, or confused with, the knowledge-of-right-and-wrong test. The words " nature, character, and consequences " have been the cause of numerous cases involving the judicial construction of those terms. Further, as has been said, there is a vague recognition in this charge of the fact that lack of capacity to comprehend the distinction between right and wrong is only one of the possible symptoms of some forms of mental disease; for the Lord Chief Justice says, that the question is " whether the evidence given proves a disease of the mind, *as of* a person quite incapable of distinguishing right from wrong." In other words, the right-and-wrong rule was used merely as an *illustration*, just as most of the previous tests were mere examples; it was not intended to be stated as an all inclusive test.

In this case the jury found the prisoner not guilty, being evidently more impressed with the general statements of the Justice as to " controlling disease . . . which he could not resist ", than with his more specific remarks about the knowledge of right and wrong.

The fact that the law to be gleaned from these early cases was laid down by trial judges in charges to juries and not, after appeal, by the tribunals of last resort, makes their legal authoritativeness questionable.[2]

Section 3 — Some Early American Cases

Thus far we have been considering the development of the law of insanity in English commentary and decision; it may be beneficial to examine a few of the earlier American cases, although these were greatly influenced, as might be expected, by the trend of the

[1] *See* pp. 232, *et seq.*

[2] *Post*, pp. 166, *et seq.*, where Sir James Stephen's views as to the authoritativeness of these tests are given.

law in England. Two early American cases which have been frequently relied upon in subsequent American decisions are In re Clark,[1] decided in 1816, and In re Ball,[2] decided in 1817.

In re Clark. — This was a case in which the defendant was accused of petit larceny.[3] After the arguments of counsel were in, "His Honour the Mayor" charged the jury:

> that such was the humanity of the law, that no man could be held responsible for an act committed while deprived of his reason; and that a madman was generally considered, in law, incapable of committing a crime. But it is not every degree of madness or insanity, which abridges the responsibility attached to the commission of crime. — In that species of madness, where the prisoner has lucid intervals; if during those intervals, and when capable of distinguishing good from evil, he perpetrates an offence, he is responsible. The principal subject of inquiry, therefore, in this case, is, whether the prisoner, at the time he committed this offence, had sufficient capacity to discern good from evil. — Should the jury believe he had such capacity, it will be their duty to find him guilty.[4]

The prisoner was found guilty, but the court suspended sentence to permit him to be sent back to Ireland, where he came from.

In this statement of the law, reference is made to the good-and-evil or right-and-wrong principle and to the lucid interval concept with such definiteness as to suggest that by 1816 the law in these respects was well established in New York and in some, if not all, the States.[5]

Ball's Case. — A man of sixty was indicted for setting fire to an inhabited dwelling house, of which he was the owner and in which he had a room. Testimony was adduced to the effect that the

[1] 1 City Hall Recorder (N. Y.), 176. [2] 2 City Hall Recorder (N. Y.), 85.

[3] As an amusing example of the manner in which fact and fancy were mixed by the reporters in the early American cases, the opening words of the report of this case may be given: "The prisoner is apparently between thirty-five and forty years of age, well dressed, tho' in a singularly fantastic mode, 'not wholly French or Dutch'; and were we permitted to describe him according to the impressions made from his appearance and conduct, during the short time of his trial in this court, we should say that he is one of the many foreigners who come to this country with an exalted idea of their own consequence, and with a certain haughty demeanor, not adapted to the simplicity of our manners. Such an one, we admit, may *live* in this country, should he have the means to *buy*." Apparently the immigration problem was acute even in 1816, albeit the agitation was directed against the aristocracy of wealth rather than against the laborer.

[4] *Id.*

[5] Of course the American cases in which insanity was pleaded as a defense up to 1816 are very few.

defendant had for years abused his wife and children to such a degree that they found it impossible to live with him; accordingly, he had been sent to prison at the instance of his wife. After his discharge, defendant had quarreled with a friend of the family who had helped his wife to secure a separation, and he threatened revenge. He went to his room, set his house on fire, and attempted to commit suicide by cutting his throat: "On being drawn out, he attempted to tear open his bleeding wounds, and declared to the bystanders, that if it had been only a half an hour longer, he should have had his revenge." It was also proved that "defendant had, formerly, been a sober, industrious man . . . but that, for a number of years past, he had been in habits of brutal intoxication, and was of violent, vindictive passions. The day, however, when the fire took place, he was more sober than usual; and a number of witnesses, on behalf of the prosecution, concurred in showing, that the defendant was not subject to insanity; and the testimony exhibited on behalf of the defendant, to this point, was very equivocal." Defendant's counsel contended, among other things, that the "circumstances in the case, independent of any proof, were sufficient to convince the most incredulous that the defendant was, at the time, subject to insanity." The Mayor, however, charged the jury that,

> if they believed that the defendant, actuated by revenge . . . committed this act, it would be their duty to find him guilty. It did not necessarily follow, as had been contended on behalf of the defendant, that the act of which he had been charged was the result of insanity, because, from its nature, it was horrid and unnatural. The only question on this part of the case is, whether, at the time he committed the offence, he was capable of distinguishing good from evil?

This case seems to deal with a defendant suffering from an alcoholic psychosis. The court's statement as to the horridness of a crime not being any proof that it is the result of insanity has been frequently quoted by courts in subsequent cases where it was sometimes evidently the purpose that the prisoner, although apparently pathological, should not escape the consequences of his particularly atrocious act by reason of his mental disease;[1] especially is this true where the crime was of a peculiarly revolting character, such as a brutal sex offense.

[1] Insanity cannot be predicated from the atrocity of the crime. Turner *v.* St., 119 Tenn., 663, 108 S. W., 1139 (1907).

A few other American cases which arose during the first quarter of the nineteenth century might be cited;[1] but the principles of law in the several States were substantially those mentioned in connection with the Clark and Ball cases. American courts did not begin to strike out independently of English law until after the Opinion of the Judges of England, following upon McNaghten's Case.

Summary and Conclusions. — What are the results of our long survey of the origins of the legal tests of the irresponsibility of the insane, up to this point? Any historical survey, whether of law or of some other social institution, is of little practical value if it is carried on in an exclusively antiquarian spirit. We hoped to establish in this chapter the thesis that the "tests of irresponsibility" are not the result of anything inherently sacred in the law itself; nor are they the result of mature reflection on the part of any highly authoritative, appellate tribunal, or any lawmaking body. We have seen that they are not even the product of careful judicial use of precedent; that they are largely the outcome of the attempts of trial judges to reduce to rule and concept a subject which is not so simple as to be thus pigeon-holed. Much of the basis of these tests is the result of historical accident, such as the accident of a silver tongued Erskine pleading the cause of a delusion ridden Hadfield. Much more of the foundation of the tests is not authoritative to the degree and in the sense that many ancient principles of the common law are authoritative; for not only has fact as to what the law is been sprinkled with fancy, but the authority of Coke and Hale has been shaken in such instances as Hadfield's Case, principle has been confused with dictum, and the pronouncements were not made by courts of last resort.

Throughout the survey, too, we have seen evidences of the confusion that the inherent difficulty of our subject has led to; we have seen scraps of opinions of different judges, upon various occasions, loosely pinned together to form not altogether consistent judges' charges in subsequent cases. The main source of confusion has arisen from the practice of recognizing that a criminal intent is necessary in order to make an act illegal, and at the

[1] *Cf.* United States *v.* Clarke (1818), #14,811 Fed. Cas. (2 Cranch, C. C., 158), where "lack of consciousness of moral turpitude of act" was the test; Pienovi's Case (1818), 3 City H. Rec. (N. Y.), 123.

same time, requiring conviction, if *knowledge* — but one element of criminal intent — were proved to be apparently intact, though disorder of the emotions and volitional-inhibitory power were pronounced. In brief, we have seen that there is nothing inherently sacred in the origin of these tests, nothing absolutely authoritative in them, nothing very consistent in them, and no very good reasons why they should not be changed, if they can be improved upon, after careful study of the subject matter with which they deal, just as they were consciously and subconsciously changed by individual judges and writers at various stages of their development. A brief résumé of the data brought out in the foregoing pages will, it is believed, serve more firmly to establish that these conclusions are justified by the historical facts.

The earliest commentator, Bracton, writing in the middle of the thirteenth century, and influenced by the early Roman law, defined an insane person as one who does not know what he is doing, who is lacking in mind and reason, and who is not far removed from the brutes. In this way the knowledge test and the wild beast test were introduced into English law. The reference to "brutes" seems to have been Bracton's addition to the early Roman law, as we have seen that the Roman law merely recognized the *general proposition* that insanity deprives one of the necessary guilty intent.[1] If Bracton had intended any one of the parts of his definition to have expressed the law exclusive of the others, it is reasonable to suppose he would have used but one, or would have indicated such intention. It is therefore probable that Bracton intended the items he listed as *examples* (not tests) of different types of insanity; that his reference to brutes was more in the nature of a figure of speech than any technical rule or measure. Yet we have seen that by seizing, in one case, upon the knowledge element of his remarks, and, in another, upon the example of the brute, these scraps of the concept of mental disease implied by his whole definition have been individually elevated to the dignity of all inclusive, immemorial, authoritative tests of the irresponsibility of the insane.

Passing over Littleton, whose contribution dealt largely with the *civil* liability of the mentally ill, we come to Fitzherbert, who wrote early in the sixteenth century. He defined an *idiot* as "such a person who cannot account or number twenty pence, nor can tell

[1] *Ante*, p. 109, note 1.

who was his father or mother, nor how old he is, etc." We have seen, that as only this portion of his definition has usually been quoted by subsequent writers, the erroneous idea gained currency that Fitzherbert meant his words literally, as constituting an inflexible test of legally defined irresponsibility because of *idiocy*. Taken in connection with the remainder of his statement, " if he have such understanding that he know and understand his letters, and do read by teaching of another man, then it seems he is not a sot or natural fool ", it is clear that Fitzherbert's " counting twenty pence test " or " telling one's father or mother test " were not intended by him to constitute *exclusive* measures or tests of irresponsibility (idiocy) at all. Yet these remarks of Fitzherbert, like those of Bracton, have been quoted piecemeal as tests.

Coke's contribution was a logical classification of the various types of mental disease and defect as conceived in his time; and his lucid interval concept, a corollary to his conception of lunacy, initiated much confusion in the law. We have also seen that Coke, as Bracton, relied upon the *general requirement of criminal intent* and not upon any one test of irresponsibility.

Hale, however, influenced perhaps by an accidental reference of Coke's to total insanity, inaugurated endless confusion in the law by attempting to differentiate between total and partial insanity; in spite of the fact that he, more than any of his predecessors, logically began his treatment of the subject of insanity by recognizing that a *sane* man's criminal responsibility rests upon his " understanding and liberty of will ", and that " where there is a total defect of the understanding, there is no free act of the will." Here again a troublesome concept (the distinction between total and partial insanity — a distinction difficult to maintain in law and in psychiatry) was seized upon by subsequent judges and repeated unthinkingly, until challenged by Erskine in Hadfield's Case; yet Hale, himself, warned against the use of any single test. Moreover, his use of " partial insanity " as referring to a supposed mental disease where the patient is ill only in the logic tight compartment of his mind occupied with the delusion, and perfectly sound in the remainder of his mind, was a legal sanctioning of an erroneous conception of the human mind. Hale also gave his stamp of approval to Coke's concepts of lunacy and lucid intervals.

With Hawkins we obtained the first expression, in an authoritative commentary, of the good and evil test. Yet his discussion,

much like Hale's, began with a recognition that "the guilt of offending against any law whatsoever, necessarily supposing a willful disobedience, can never justly be imputed to those who are either incapable of understanding it, or of *conforming* themselves to it." This is a plain recognition of the requirement of a guilty intent, including volitional-inhibitory capacity, at the basis of every crime; yet side by side with it he set down the *exclusive* requirement of knowledge of good and evil, which is only one of the elements of guilty intent.

The wild beast test of Judge Tracy in Arnold's Case was a repetition of but one of the elements of Bracton's views; and the infant test was an echo of Hale's fourteen-year-old child example. In Earl Ferrer's Case, the speech of the Crown's counsel, while insisting upon the right and wrong test, a development from the good and evil test, also showed a recognition that knowledge of right and wrong does not alone comprise the necessary *mens rea;* so here we saw a further confusion of the general requirement of a criminal intent, with that of the specific element of knowledge of right and wrong.

In Hadfield's Case the authority of Coke and Hale was shaken by Lord Erskine; and an entirely new concept, — delusion connected with the criminal act, — was for the first time introduced. There was no warrant in law for this, yet it was approved by the presiding justice, resulted in Hadfield's acquittal, and was subsequently taken up as full authority in many cases, including the most important of all — the Opinion of the Judges of England following upon McNaghten's Case.[1]

In Bellingham's Case, Erskine's views were modified, the necessity for a general criminal intent was recognized, yet the rule of entire lack of knowledge of right and wrong, with reference to *all matters,* as a *sine qua non* to irresponsibility was insisted upon; that is, if, upon other subjects than the one connected with the delusion, the defendant was capable of distinguishing right from wrong, it was held that delusion is no excuse. The moral and legal concepts, — that the accused must know that "murder was a crime not only against the law of God, but against the law of his Country", — were thrown in for good measure. In subsequent cases, scraps of this judge's charge have been appropriated here and there.

[1] *Post,* Chapter 6, where this very important Opinion is analyzed.

In Offord's Case, requirement of a *specific legal* knowledge was laid down together with the required general ethical knowledge. It was further suggested that a delusion, to excuse, must be such as would have excused if the delusional belief had actually been true; and this item also has entered into the turbulent stream of confused, conflicting tests.

In Regina *v.* Oxford, the general and special knowledge tests were used, together with "the controlling disease . . . which he could not resist", suggesting the later irresistible impulse test.

In Ball's Case, decided in America, the judge's remark that the horridness of the crime should not necessarily be indicative of mental disease has also entered the stream of opinion and dictum.

This survey, then, indicates that the tests of irresponsibility are of questionable authority; that many scraps of these tests are the result of historical accident; that the law's general requirement of *mens rea* has been confused with specific tests or measures, and that the earliest, simplest, and most authoritative, if not the only authoritative, principle of the criminal law that deals with insanity is expressed in the general rule that *to constitute an illegal act criminal, the actor must have had that condition of mind possessed by the person of ordinary intelligence and ordinary mental health.* And this means *volitional-emotional* health as well as cognitive or intellectual capacity.[1] If tests can be devised, they must take into account not only the cognitive mode of mental activity, but the conative and affective elements.[2] One case which has left its impress upon all subsequent decisions still remains to be considered in the following chapter.

[1] It is true that *mens rea* does not necessarily imply a *healthy* guilty mind; but it does imply a mind capable of acting in a manner prohibited by law. In the early cases that capability meant merely the power to know the nature of an act and to know it to be wrong (either morally, or legally, or both, the cases being confused on this point); later the criminal capacity included the power to *choose* between acts, or the power to resist an impulse to commit an act known to be wrong. This change in the law was introduced on the basis of the progress of science and its evidence that there are acts which, for all practical purposes of conduct, are irresistible, even though a rudimentary knowledge of their nature and quality or their wrongfulness may exist and accompany them. Why cannot this concept of *mens rea* now be still further widened in the light of evidence from psychologists that there are differences of "knowing" and that in certain disorders the emotional life may so color "knowledge" as to render the cognitive process something quite different from the "knowing" of the man in the street? It seems to be a pure fiction to maintain, as some legal theorists like to do, that the *mens rea* of today is exactly the *mens rea* of two or three hundred years ago.

[2] *See* McDougall, "Social Psychology", for an authoritative discussion of the nature of mental life, taking account of these principal modes of mental life.

CHAPTER 6

MODERN STATUS OF THE LEGAL TESTS OF IRRESPONSIBILITY — McNAGHTEN'S CASE

"In view of these conflicting decisions, and of the new light thrown on the disease of insanity by the discoveries of modern psychological medicine, the courts of the country may well hesitate before blindly following in the unsteady footsteps found upon the old sandstones of our common law jurisprudence a century ago. . . . Though science has led the way, the courts of England have declined to follow, as shown by their adherence to the rulings in McNaghten's Case, emphasized by the strange declaration made by the Lord Chancellor of England, in the House of Lords, ... that 'the introduction of medical opinions and medical theories into this subject has proceeded upon *the vicious principle of considering insanity as a disease.*' . . .

The question then presented seems to be whether an old rule of legal responsibility shall be adhered to, based on theories of physicians promulgated a hundred years ago, which refuse to recognize any evidence of insanity, except the single test of mental capacity to distinguish right and wrong — or whether the courts will recognize as a possible fact, if capable of proof by clear and satisfactory testimony, the doctrine, now alleged by those of the medical profession who have made insanity a special subject of investigation, that the old test is wrong, and that there is no single test by which the existence of the disease, to that degree which exempts from punishment, can in every case be infallibly detected. The inquiry must not be unduly obstructed by the doctrine of *stare decisis*, for the life of the common law system and the hope of its permanency consist largely in its power of adaptation to new scientific discoveries, and the requirements of an ever advancing civilization." — Mr. Justice Somerville, in Parsons *v.* St., 81 Ala., 577, 582, 584 (1886).

Section 1 — Facts and Judge's Charge

Importance of the Case. — The modern status of the legal tests of the criminal irresponsibility of the mentally disordered has, to a large extent, been bodied forth by McNaghten's Case.[1] The thousands of English and American decisions in the reports emanate from the opinion of the Judges of England after McNaghten's acquittal on a plea of insanity.

The facts and law in that famous case are, therefore, so important as to warrant their minute and careful consideration. We have seen how the law of insanity was gradually crystallized out of chance scraps of more or less conflicting opinions of the classical

[1] 10 Clark and Fin., 200. An abridgment of this famous case and the Opinion of the Judges following it, is given in Beale's "Cases in Criminal Law."

commentators on the law of England, and of the early trial judges. These inherent inconsistencies in the law were bound sooner or later to lead to dissatisfaction on the part of lawyers as well as physicians and laymen. Sooner or later, some one was bound to demand a more consistent as well as more authoritative exposition of this troublesome branch of the criminal law, than had existed at the end of the eighteenth and during the early part of the nineteenth centuries. McNaghten's Case was the occasion for such demand.

The Facts in the Case. — McNaghten's mental disease, which to-day would be designated paranoia, expressed itself largely in an elaborate system of delusions of persecution. Believing that he was being hounded by his enemies, he shot and killed Drummond, Sir Robert Peel's private secretary, whom he supposedly mistook for Peel. "The medical evidence was in substance this: That persons of otherwise sound mind might be affected by morbid delusions; that the prisoner was in that condition; that a person so labouring under a morbid delusion, might have a moral perception of right and wrong, but that in the case of the prisoner it was a delusion which carried him away beyond the power of his own control,[1] and left him no such perception; and that he was not capable of exercising any control[1] over acts which had connexion with his delusion; that it was of the nature of the disease with which the prisoner was affected, to go on gradually until it had reached a climax, when it burst forth with irresistible intensity; that a man might go on for years quietly, though at the same time under its influence, but would all at once break out into the most extravagant and violent paroxysms."[2] This testimony was

[1] This introduces the concept of delusion overmastering the will, and suggests the relationship of this concept to that of irresistible impulse. The two are not alike, since some jurisdictions which refuse to recognize the irresistible impulse test, nevertheless admit the possibility of delusion overmastering the will. *See* Chapter 8, where these subjects are treated.

[2] *Op. cit.*, pp. 201, 202. Dr. E. R. Monro was the expert in the trial. The pertinent questions and answers in the case are: Q. "Is it consistent with the pathology of insanity that a partial delusion may exist, depriving the prisoner of all self-control, whilst the other faculties are sound?" A. "Certainly, monomania (*i.e.*, paranoia to-day) may exist with general sanity." (4 Rep. St. Tr. N. S., p. 1919.) This was the period preceding phrenology, when faculty psychology was the fashion. To cite but one writer on paranoia: "This form of insanity, often spoken of as monomania or chronic delusional insanity, is a chronic delusional psychosis characterized by systematized delusions of personal exaltation and *relatively* slight mental or intellectual impairment. . . . An analysis of these persecutions would show that they are based on very complex, but extremely faulty reasoning." (Italics ours.) — Reese's "Med.

given by some witnesses who had previously examined McNaghten, and some who had never seen him before his appearance in court and who formed their opinions on hearing the evidence given by the other witnesses.

The Charge. — The following statement was made by Lord Chief Justice Tindal, who practically withdrew the case from the jury, believing that it was not one for conviction:

> The question to be determined is, whether at the time the act in question was committed, the prisoner had or had not the use of his understanding, so as to know that he was doing a wrong or wicked act. If the jurors should be of opinion that the prisoner was not sensible, at the time he committed it, that he was violating the laws both of God and man, then he would be entitled to a verdict in his favour: but if, on the contrary, they were of opinion that when he committed the act he was in a sound state of mind, then their verdict must be against him.

The verdict was " Not guilty, on the ground of insanity."

An analysis of this charge indicates that it was practically the right and wrong or good and evil test, with this modification, — that more emphasis than had usually been the practice up to the time of this charge (with the possible exception of Offord's Case)[1] was placed upon *knowledge* as pure rational activity, as well as activity involving moral character; in other words, the knowledge involved a knowing of the legal as well as the moral nature of the act. At the same time, the characteristic attempt was made not to narrow the test so much as to rule out the defendant's definite mental disease as had been disclosed by the testimony; for Justice Tindal concluded his brief charge by saying, in very general terms, that if the jury were of opinion that when the defendant committed the act he was " in a *sound* state of mind ", then their verdict must be against him. Obviously, the testimony disclosed that the defendant was not in a sound state of mind, but it did not necessarily disclose whether or not he knew that he was violating " the laws both of God and man." Here, then, as so often before and after this case, we find the court torn between the *general rule* that mental disease negatives the required criminal intent, and

Jurispru." McCarthy (1911), p. 304. The Freudian and Jungian psychologies of mental disease have made much of the peculiar nature of delusions and hallucinations more comprehensible, although some psychiatrists still regard most of their concepts as very tentative hypotheses. *See* Chapter 9.

[1] Mentioned in Chapter 5, p. 151, *ante*.

the *specific test*, which too greatly narrows the legally indispensable mental element of a crime.

McNaghten's Case would probably have taken its place with the previous decisions mentioned in the former chapter, and have helped to crystallize the law in more general terms than had the previous cases, were it not for the prestige of the deceased and the acquittal of the defendant. But, "this verdict, and the question of the unsoundness of mind which would excuse the commission of a felony of this sort, having been made the subject of debate in the House of Lords, it was determined to take the opinion of the Judges on the law governing such cases."[1]

[1] 10 Clark and Fin., p. 202. The debates will be found in Hansard's "Debates," Vol. 67, 288, 714. McNaghten was tried in January, 1843; the debates occurred in March of the same year. The following extracts from the debates, though long, are given as an indication of the furore which was caused by McNaghten's acquittal, and because they constitute an important and often overlooked background of the famous Opinion of the Judges. The Lord Chancellor addressed the House of Lords in these words: "I have felt anxious, my Lords, at the earliest possible day to call your Lordships' attention to the subject of the notice, which I gave on a former occasion (*see* Vol. 67, Hansard's "Debates", 288), with reference to a late trial. The circumstances connected with that trial have created a deep sensation amongst your Lordships, and also in the public mind. I am not surprised at this. A gentleman in the prime of life, of a most amiable character, incapable of giving offence or of injuring any individual, was murdered in the streets of this metropolis in open day. The assassin was secure; he was committed for trial; that trial has taken place, and he has escaped with impunity. Your Lordships will not be surprised that these circumstances should have created a deep feeling in the public mind, and that many persons should, upon the first impression, be disposed to think that there is some great defect in the laws of the country with reference to this subject which calls for a revision of those laws, in order that a repetition of such outrage may be prevented. I have felt it my duty, my Lords, in consequence of such suggestions from your Lordships, to consider (in consultation with others) this interesting and important subject, with the view not only of ascertaining correctly what the law is, with reference to it, but for the purpose also of ascertaining (if the law should turn out to be defective) what particular remedy should be applied, and what the nature of that remedy should be. Your Lordships will be aware that this is a most difficult and delicate subject: because all persons who have directed their attention to these inquiries, all persons who are best informed upon it, concur in stating that the subject of insanity is but imperfectly understood. I am not speaking of general and complete mental alienation. I am speaking of that description of insanity which consists of a delusion directed to one or more subjects, or one or more persons; and those who are acquainted with this subject know how difficult it is to decide to what extent the moral sense and the moral feeling that guide men's actions is influenced by delusions of this description."

After giving some examples of the difficulty of proving mental unsoundness in the case of persons with delusions, the Lord Chancellor said: "Any attempt at a definition or description of the particular disease would be altogether futile, and . . . the only course we can pursue is to lay down some general and comprehensive rule, and to leave those who administer the law of the country to apply that rule to the different cases as they may arise" (716).

In reviewing the law on the subject of insanity in England (which he declared to be "*clear, distinct, defined*" !), the Lord Chancellor began with the

charge of Mr. Justice LeBlanc, who "never was exceeded by any person administering justice in the accuracy of the view he took of the law," in a case in which the defendant shot another. The defense in that case was insanity, and it was proved that the prisoner "had had an epileptic fit, which not unfrequently does produce infirmity of mind." It was proved that a month previously the prisoner had been examined under a commission of lunacy and the jury had declared him insane after "the keeper of a lunatic asylum, a man of great experience in these matters, stated, that in his own opinion the prisoner was insane." The judge charged the jury as follows: "It is for you to determine whether the prisoner, when he committed the offence with which he stands charged, was, or was not, incapable of distinguishing right from wrong, or whether he was under the influence of any delusion with respect to the prosecutor which rendered his mind at the moment insensible of the nature of the act he was about to commit, since, in that case, he would not be legally responsible for his conduct. On the other hand, provided you should be of opinion, that when he committed the offence he was capable of distinguishing right from wrong, and was not under the influence of such a delusion as disabled him from distinguishing that he was doing a wrong act, in that case, he is answerable to the justice of his country, and guilty in the eye of the law" (717, 718).

The same view of the relation of delusion to criminal responsibility was held by Chief Justice Mansfield in Bellingham's Case, said the Lord Chancellor, as he discovered by an examination of the stenographic notes in that case. After stating that the law was settled as was indicated by the cases he cited, the Lord Chancellor made this suggestion, which led to the famous Opinion of the Judges: "If your Lordships entertain any doubt as to the law, you have a course to pursue which is perfectly open to you; it is this — to summon the judges of the land before you, to hear their opinion upon the law; and as the subject is one of great importance to the country, to obtain from them a rule laid down by their united authority, by which to guide the future administration of justice in cases of this description. A rule laid down by the united authority of all the judges might possibly have more influence and more force than the opinion of a single judge conveyed in a charge to a jury" (720, 721).

Later he said: "If, with respect to the general law, your Lordships think it necessary to take the opinion of the judges, and to have their united authority on the subject, I will request the attendance of those learned persons. I think such a course will give great authority and great force to the proceedings, and may be attended with practical consequences of good, far better than by interfering by legislation. Let us know from the highest authority, from the voice of the judges, what the law is, let it be laid down by them in precise terms, together with what is to be in future the administration of the law according to their opinion" (726).

Lord Brougham, following the Lord Chancellor, agreed that the assistance of the judges "would be invaluable on no account more than this, that it would lead to more uniformity in the language they used on future occasions in charging and directing juries on this most delicate and important subject. They would then no longer use the words wicked, wrong, improper, blameable, proper, right, good, evil; they would no longer indulge in that variety of phrase which only served to perplex others, if it did not also tend to bewilder themselves, as he supposed it sometimes did; but they would use one constant phrase, which the public and all persons concerned would be able to understand" (732, 733).

That Lord Brougham hoped for too much was shown by the Opinion of the Judges and by the confusion that it led to in subsequent cases.

As an evidence of the hostility of the judges to medical views of insanity, the following is instructive. Lord Campbell also "did heartily desire that the law might be laid down in a more authoritative manner, and for that reason he perfectly agrees with the expediency of the suggestion made . . . . of calling the judges together. The public mind was in considerable alarm on this subject. The public had been inundated by medical books calculated very

Section 2 — The Questions and Answers of the Opinion of the Judges of England

In June 1843, therefore, certain questions were put to the judges regarding the existing law of insanity, with especial reference to the subject of delusions. "It has been the general practice ever since," says Sir James Stephen,[1] "for judges charging juries in cases in which the question of insanity arises to use the words of the answers given by the judges on that occasion."

Legal Authoritativeness of Opinion of the Judges. — We have spoken in the previous chapter of the authoritativeness of the various scraps of the law of insanity enunciated in the treatises and early cases. Stephen says of these: "In the great majority of cases . . . there was only one judge, and in every case the language employed was that which suggested itself to the speaker at the moment, in reference to the particular facts of the case."[2] After pointing out, further, that there was not a single instance in which the "Court for Crown Cases Reserved, or any other court sitting in banc, has delivered a considered written judgment on the relation of insanity to criminal responsibility", Stephen gives it as his opinion that "the reports of the directions given by single judges to juries are . . . untrustworthy. What the judge says is constantly misunderstood, and the facts in relation to which he speaks are constantly left out of the report. Moreover, any one

much to mislead juries in the case of future trials of a similar kind. Those books spoke of what they were pleased to call a homicidal propensity, and contended that no man, under the influence of such a homicidal propensity, should be held liable for his acts" (742).

From all this it is clear that in spite of the Lord Chancellor's opening remarks that the law on the subject of insanity was "clear, distinct, defined", he was himself not so very sure as to what the law really was; nor were the other learned lords certain. Needless to add that the same phenomenon is observable to-day; many writers (such as Oppenheimer) insist that the law is perfectly clear, distinct, and defined, and many judges make it a point to open their charges with those magical words, as if to bolster themselves up for the plunge into the turbulent sea of confusing decisions. Even the most casual examination must convince the reader that the law of insanity to-day, no less than yesterday, is far from being "clear, distinct, defined."

History has indeed repeated itself with reference to the law of insanity. Not only did the notorious Thaw case in America arouse the public and the Bar of the State of New York to demand an entire reëxamination and clarification of the law on this subject, but only recently, in England, McNaghten's Case and its consequences have been reënacted. *See* Appeal of Ronald True, 16 Cr. Ap. Rep., 164 (1922). An imposing Parliamentary Committee has studied the subject of the law of insanity, and submitted a report recommending the adoption of the irresistible impulse test. *See* Chapter 12.

[1] "History of the Criminal Law of England", Vol. II, pp. 153, 154.

[2] *Id.*, p. 152.

who reflects on the number of cases in which the best judges are held to have misdirected juries in trials at *nisi prius* must feel that the value of the direction of a single judge, given on an occasion in which it cannot be questioned by any process of appeal, is often exaggerated by the very act of making it the subject of a report, however correct." [1]

What then of the authoritativeness of the Opinion of the Judges following McNaghten's case? Of this Stephen says: "It is necessary to remark that every judgment delivered since the year 1843 has been founded upon an authority which deserves to be described as in many ways doubtful." [2] Elsewhere he says: "I cannot help feeling . . . and I know that some of the most distinguished judges on the Bench have been of the same opinion, that the authority of the answers is questionable." [3]

Stephen attacks the authority of the Opinion on the dual ground that the answers of the judges "do not form a judgment upon definite facts proved by evidence", and that "the questions are so general in their terms, and the answers follow the words of the questions so closely, that they leave untouched every state of facts which, though included under the general words of the questions, can nevertheless be distinguished from them by circumstances which the House of Lords did not take into account in framing the questions." [4]

As to the first objection, one of the fifteen learned judges, Justice Maule, in a separate set of answers, protested that the answers should not have been given except in the form of a judgment and upon the facts actually proven in a case, instead of upon a series of hypothetical questions as put by the House of Lords. With regard to the second objection, Stephen insists that the Court for Crown Cases Reserved, if an actual case should ever be appealed in any way *different* from the hypothetical case submitted to the judges, would not have to be bound by the Opinion of the judges. In other words, the questions asked the judges were circumscribed and were intended to cover only the psychoses in

[1] "History of the Criminal Law of England", Vol. II, p. 152.
[2] *Id.*, p. 153. [3] *Id.*, p. 154.
[4] *Id.*, p. 154. But Oppenheimer, "Criminal Responsibility of Lunatics", p. 26, holds that the answers must be taken as "a complete declaration of the whole law in 1843", and points out that judges sometimes have gone beyond the scope of the answers, in exceptional cases, "but by looking upon them as exceptional these judges have undoubtedly repudiated all intention of thereby establishing precedents."

which delusional manifestations are the most striking symptoms, especially paranoia; moreover, the judges knew quite well that the questions referred to the case of McNaghten, a paranoiac with an apparently more or less circumscribed delusional system. Hence the extension of the tests to cases of mental disorder which were not dreamed of in the judges' philosophy is unwarranted, even if the legal authoritativeness of the answers be granted.[1]

It would lead us too far afield to go further into the interesting legal question of the authoritativeness of McNaghten's Case and the Opinion of the Judges of England following upon that case. Stephen himself admits that "the interest of the question as to the authority of the answer is speculative rather than practical, as there can be no doubt that the answers do express the opinion of fourteen out of the fifteen judges, and they have in fact been accepted and acted upon ever since they were given."[2] Much water has passed under the judicial mill since the famous opinion; and in England and in America the tenets of the opinion have been woven firmly into the texture of the law of insanity.

The Questions and Answers in the Opinion of the Judges. — Let us therefore return to the questions and answers of the opinion itself, and see what justification it has, not so much from the point of view of judicial authority, but rather as a correct exposition of the general principles of the criminal law, and as a set of legal principles grounded upon an understanding of human psychology.

The first question was:

> What is the law respecting alleged crimes committed by persons afflicted with insane delusion, in respect of one or more particular subjects or persons: as, for instance, where at the time of the commission of the alleged crime, the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some supposed public benefit?

It will be observed that the example given was drawn from the facts in McNaghten's Case, and probably was also intended to cover Hadfield's Case. The answer of fourteen of the judges was:

[1] *See* Appeal of Ronald True, 16 Cr. Ap. Rep. (Eng.), 164, 169 (1922), where it was said that the "old rigour of the rule in McNaghten's Case" had not been relaxed; and that the old tests were still in force and did not include the irresistible impulse principle.

[2] *Id.*, p. 154; Oppenheimer, *op. cit.*, p. 223, regards them as authoritative.

Assuming that your Lordships' inquiries are confined to those persons who labour under such partial delusions only, and are not in other respects insane, we are of opinion that, notwithstanding the party accused did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable according to the nature of the crime committed, if he knew at the time of committing such crime that he was acting contrary to law; by which expression we understand your Lordships to mean the law of the land.

As the fourth question and answer are closely related to the first, they may be set out next:

Question IV. — If a person under an insane delusion as to existing facts, commits an offence in consequence thereof, is he thereby excused?

Answer IV. — The answer must of course depend on the nature of the delusion: but, making the same assumption as we did before, namely, that he labours under such partial delusion only, and is not in other respects insane, we think he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if under the influence of his delusion he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes in self-defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment.

The Origin of the First and Fourth Answers of the Judges. — The reader will no doubt discover that these answers have the familiar ring of well remembered voices. In the first place, "partial delusions" is a mixture of two concepts, one, "partial insanity", borrowed from Hale, the other, delusion, taken from Erskine and suggested by the question asked the expert at McNaghten's trial.[1] Secondly, the reference to "persons who labour under such partial delusions only, and are not in other respects insane", is reminiscent of Erskine's reference to the mental disease "where imagination (*within the bounds of the malady*)" (a reference to the supposed

[1] This phrase referred no doubt to so called monomania, which was just coming into medical vogue at the time.

logic-tight compartment in which the delusion holds sway leaving the balance of the mind intact) " still holds the most uncontrollable dominion over reality and fact."[1] This conception of delusion as affecting only one portion of the brain or mind was employed a second time by Erskine when he said: " The premises from which they (insane persons with delusions) reason, when within the range of the malady, are uniformly false." [2] It seems not at all improbable that the learned judges, following Erskine, had a sentimental weakness for *phrenology*. Erskine's speech in Hadfield's Case, it should be pointed out, was delivered in 1800, the year when Francis Gall enunciated his half scientific, half fantastic doctrine of phrenology.[3] Spurzheim, Gall's disciple, later spread this doctrine, and up to the middle or even the latter part of the nineteenth century, phrenology was in much vogue, especially its natural concomitant, faculty psychology; indeed, vestiges of these doctrines still exist here and there, and one still hears occasionally some popular " psychologist " referring to his " bump " of " amativeness " or " docility", or what not.

Criticism of Answer IV as to Delusion. — Another familiar fact is disclosed in the answers of the judges; namely, Erskine's opinion that " as a doctrine of law, the delusion and the act should be connected", [4] before the delusion can constitute an excuse for crime, even in the case of those mental diseases which are largely characterized by delusional systems. This is what we have before referred to as an attempt to lawyerize a medical concept. For while nothing is more logical, from the standpoint of systematic legal conceptualism, than to hold that the delusion should be connected with the act to constitute guilt (and that such connection is conveniently visible *externally* for the aid of juries), such a mechanistic view of the nature of delusion as a mental symptom

[1] *Ante*, Chapter 5, p. 146.

[2] *See* p. 363 for a discussion of the genesis and progress of this disease.

[3] Gall, the creator of phrenology, combined localization of function on the cranium according to " bumps " presumably developed by the exercise of the different faculties, with the functional psychology. He charted off some thirty-five localities on the cranium, each bump representing a definite psychological function. A brilliant mind and an engaging speaker, he combined fact and fancy in a way which soon gained him many adherents. Although he was a learned anatomist, and added to our knowledge of the brain by dissection, his reputation as a whole suffered when phrenology fell into the discard in scientific circles. His ideas, however, led to much controversy and experimentation, and, in this indirect manner, he has rendered an invaluable service both to brain anatomy and psychology.

[4] *Ante*, Chapter 5, p. 147.

is, in the opinion of most psychiatrists, unwarranted.[1] This requirement of connection of the delusion and the act should be taken together with the requirement, also familiar (since we met it first in Offord's Case)[2] that a person under a "partial delusion only, and . . . not in other respects insane . . . must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real." As was pointed out in discussing Hadfield's and Offord's cases, such reasoning is based upon an erroneous psychology. In the first place, the judges take it for granted that a person can "labour under a partial delusion only", and be "not in other respects insane", while it is well known that there can be no delusions in any mental disease without expressing a condition of the mind as a whole and not of any presumably disconnected portions thereof. Secondly, the judges assume that a mentally disordered person with delusions can reason, as to the nature of the act about to be committed, in a normal manner, when they insist that delusion will only excuse if it would have excused the illegal act committed had the delusive beliefs been real. Such views of the nature of delusion leave the outcome of such cases to chance; or else they proceed upon the assumption that the mentally unsound defendant himself chose the type of delusion that characterized his disease. They disregard the fact that the delusion is the outcome of diseased functioning of the mind over which the subject has no control and which he did not voluntarily choose. In other words, the legal minds which laid down the rules quoted above, assumed that the accused's disease, when expressed by the symptom (among the others) of delusion, consists entirely of an erroneous belief that a state of fact exists which does not in fact exist, in the same manner exactly as a mentally sound person may be ignorant or mistaken of a fact. If a normal individual commits a criminal act under ignorance or mistake of fact, he may or may not be exempt from criminal responsibility, depending upon the particular circumstances of the case. The legal definition of the crime of theft, for example, includes "an intention to deprive the owner of his property permanently, fraudulently, and without claim of right." Stephen[3]

[1] This opinion grows from the judicial habit of conceptualizing data and treating isolated symptoms of a mental disease in the strictly logical manner that they would rules of property, or the law of contract, for example.

[2] *Ante*, Chapter 5, p. 151.

[3] *Op. cit.*, p. 116.

gives an excellent illustration of the operation of this requirement of the law:

> For instance, a man in the dark takes a watch from a table believing it to be a gold watch belonging to A, whereas, in truth, it is a silver watch belonging to B. Here there is a double mistake, but if the taker's intention was to appropriate fraudulently and without claim of right the watch which he took, whatever it might be made of and whoever might be its owner, he is a thief, notwithstanding his mistakes. Suppose, however, that the taker believed in good faith that the watch he took was his own, his mistake would take the case out of the definition of theft, for such a taking could hardly be fraudulent, and it would in all probability be a taking with a claim of right.

It will thus be seen that a mistaken belief of a sound minded person accused of crime might or might not justify his conduct. It is clear, however, that to place a *delusive* belief on a parity with ignorance or mistake of fact is to misunderstand the nature of mental disease. A delusive belief is but a symptom of mental disorder, and is in itself suggestive of the fact that the patient's reasoning powers are in some measure disturbed, and, much more important, that his emotional-conative life is seriously disordered; so that even if he could reason about his delusive symptoms as a sane man could (and to say this of delusions is to resort to a contradiction in terms) these mental data would have an entirely different coloring and significance to him than they would have to a healthy individual who, for example, was subjecting him to an examination.[1] Even if a delusion could be placed upon the same footing as the mistaken belief of a mentally sound person, the rule enunciated by the judges does not take account of the fact that the cognitive mode of mental life can hardly be said to be disturbed without this also being an indication of the disturbed condition of the inseparable emotional-volitional life of the patient. If, for example, a case could arise where there was an actual mistake of fact on the part of a mentally diseased person (as was the case when Hadfield mistook Sir Robert Peel's secretary for Sir Robert himself), but the nature of his malady were such as to deprive the subject of the ordinary inhibitions, such a mentally

[1] "But the fact that these ideas become delusions and acquire a power which even the senses cannot destroy can only be explained by an inadequate functioning of judgment, dependent on impassioned emotional excitement, clouding of consciousness, and weakness of the reasoning power." — Kraepelin, "Clinical Psychiatry", p. 51. *See* our Chapter 9.

unsound individual could not be said to have been a free agent. Nor could his mental condition be said to have satisfied the fundamental requirement of the criminal law, — namely, *mens rea;* which means, not only a guilty mind, but a guilty, *healthy* mind, and which, in turn, comprises a sound volitional and inhibitory capacity as well as intellectual capacity.[1]

Stephen suggests that the reason why the answers deal only with what we have called the intellective or cognitive mode of mental life is because the judges interpreted the questions "in such manner as practically to confine them to that subject." Here, of course, Stephen is referring to their unwarranted assumption that a person with delusions can be, as they expressed it, "not in other respects insane", and that if such person "*knew* at the time of committing such crime that he was acting contrary to law", he could *necessarily have avoided so acting.* Paraphrasing a great contemporary physician, Doctor Griesinger, Stephen says:

> A delusion of the kind suggested never, or hardly ever, stands alone, but is in all cases the result of a disease of the brain, which interferes more or less with every function of the mind, which falsifies all the emotions, alters in an unaccountable way the natural weight of motives of conduct, weakens the will, and sometimes, without giving the patient false impressions of external facts, so enfeebles every part of his mind, that he sees, and feels, and acts with regard to real things as a sane man does with regard to what he supposes himself to see in a dream.[2]

As to whether this general description of mental disease would be acceptable to modern physicians we need not commit ourselves at this point. At any rate, few judges understand the nature of mental disease as did Stephen; and where, to-day, trial judges do comprehend its nature, they are loath to venture upon the uncharted seas not covered by the tests of irresponsibility prevailing in their jurisdictions. Moreover, when, occasionally, a few judges here and there do make such venture, it is not as the result of

[1] "Will is as necessary an element of intent as are reason and judgment." — Chief Justice Simmons, in Flanagan *v.* St., 103 Ga., 619, 626 (1898). "This distinct element in criminal intent consists not alone in the voluntary movement of the muscles (*i.e.*, in action), nor yet in a knowledge of the nature of an act, but in a combination of the two, — *the specific will to act, i.e.* the volition exercised with conscious reference to *whatever knowledge the actor has* on the subject of the act." — Wigmore, "Evidence", Vol. I, 2d ed., Sec. 242.

[2] *Op. cit.*, p. 157.

carefully considered, *uniform decision on the part of the bench as a whole*, and this only makes confusion worse confounded.

More will be said of these answers throughout the study; enough has been indicated at this point, however, to show that the principles enunciated by Erskine in Hadfield's Case and taken up and stamped with the seal of high judicial pronouncement in the Opinion of the Judges, opened the way to serious difficulties and to much confusion in, and dissatisfaction with, the law.

Stephen's Broad Interpretation of the Judges' Answers to Include the True Conception of Delusion. — But Stephen's important point is that delusion, correctly conceived, should, at any rate, be used as *evidence* of a generally diseased mind. He insists that even under the answers of the judges, since they can readily be proved to be incomplete, there is room for expounding the true nature of delusion as related to mental disease in general, and its effect upon criminal responsibility. He points out that a delusion may not only mislead a person *as to the matter to which it relates*, but "it may have an effect in both or either of two ways. (1) It may be evidence of disease affecting the mind otherwise than by merely causing a specific mistake. (2) It may be evidence of a state of mind which prevented the person affected by it from knowing that his act was wrong, if that expression is construed in one of the senses which may be given to it." [1]

As to the first case,[2] he says: "A delusion which, considered as a mere mistake, has no importance at all, may as a matter of evidence be of the highest importance, because though trifling in itself it may indicate profound disturbance of every faculty of the mind. A man commits what on the face of it is a cruel and treacherous murder. It is proved that he laboured under an insane delusion that his little finger was made of glass. In itself such a delusion has no sort of tendency to excuse such a crime, and has no apparent connection with it, but if physicians of experience were to say that a fixed delusion on such a subject could arise only from deep-seated disease affecting a man's whole view of the world in which he lived, falsifying his senses, rendering him inaccessible to reasoning of the simplest kind, and incapacitating him from performing the commonest and most conclusive experiments, I do not see why they should not be believed." [3]

[1] "History of the Criminal Law of England", Vol. II, p. 157.

[2] The second case, the effect of delusion on knowledge of right and wrong, will be later considered (*see* pp. 181, *et seq.*).

[3] *Op. cit.*, p. 161.

Delusion Merely One Symptom of Some Forms of Mental Disease. — Here Stephen shows the result of his wide and deep study of the subject of mental disease. He rightly regards delusion not as an entity to be considered by itself in its legal effect, and, therefore, not as a test of irresponsibility, as Erskine announced it to be, but merely as one of the symptoms of some forms of mental disease. He says justifiably that the answers of the judges " threw no light on the question of the weight which should be attached to it (delusion) as a symptom forming evidence of other and wider disease of the mind." In other words, he insists that delusion should be placed in its proper setting as *one of the indicia* of certain types of mental disorder, such as paranoia. " The facts that a man stammers and that the pupils of his eyes are of different sizes are in themselves no excuse for crime, but they may be the symptoms of general paralysis of the insane, which is one of the most fatal forms of the disease. Why should not the existence of a delusion be as significant as the existence of a stammer? " [1]

Presence of Delusion as a Possible Line between Total and Partial Insanity. — Stephen overlooks one point, however, which while not indicated in the opinion of the judges, may have actually had some influence upon their exposition of the law of delusion. It will be remembered that the difficulty throughout the law, up to the time of the opinion of the judges, was to draw some line between such mental disease as could safely be allowed to excuse from criminal responsibility, and such mild forms of mental unsoundness as it was regarded dangerous to include under exemptions from responsibility. This difficulty was sought to be overcome by Hale, as we have seen, through his more or less artificial distinction between total and partial insanity; and he, himself, recognized and expressed this inherent difficulty in the law of insanity. Under these circumstances, if it could be definitely established, for example, that delusions are symptoms of certain types of mental disease after they have advanced to *a certain stage of gravity*, then, since the law does not wish to excuse persons of mental unsoundness at *all* stages of the disease, the presence of delusions may have been suggested to the judges as a means of establishing the arbitrary legal line drawn between Hale's total and partial insanity. All such lines must, however, remain arbitrary; nor can it be asserted that, medically, the presence of delusion is

[1] " History of the Criminal Law of England ", Vol. II, p. 157.

always a symptom that the mental disease has progressed to such a serious stage as materially to interfere with the patient's ordinary mental capacities.[1] Further, in some mental diseases delusion may not be present. Moreover, even if delusion could be used as an indication of the progression of the disease to the point where the law arbitrarily says criminal responsibility ceases, there would still be no justification for the rules that the delusion must be connected with the act and must be such as would have excused if the facts of the delusive belief had been true. In other words, the delusion, if adopted as an indication of the progression of the mental disease beyond the line of responsibility which the law would arbitrarily draw, would still have to be regarded as a *symptom* of mental disease, and not as an indication of such mistake of fact as would excuse the illegal act of a mentally sound person.

Stephen's Account of Medical Significance of Delusion. — Stephen brings out the significance of delusion in the disordered mind in an admirable manner:

> It must also be remembered in estimating the importance of delusions and the probability of their being connected with acts which to a sane mind seem to stand in no relation at all to them, that the mental processes of an unsound mind are often distorted as much as the conclusions connected with them are vitiated. To a sane man the belief (however caused) that his finger was made of glass would supply no reason for taking any peculiar view about murder, but if a man is mad and such a belief is a symptom of his madness, there may be a connection between the delusion and the crime as insane as the delusion itself.
>
> The following is a well-known instance: A man had some insane delusion about windmills, and would pass hours in watching them. His friends kept him out of the way of windmills in order to cure him of his delusion. He mutilated and nearly killed a little girl. There is no apparent connection between the delusion and the act, but there was a connection in his mind. He thought that if he committed a crime he might as a punishment be confined in some place where he could pass all his time in watching windmills, and in fact he gained his object, for he was confined in such a place. Of course a man has no right to commit a crime in order that he may watch windmills, but that is not the point for which I refer to the case. It is to show that it

[1] Of course, to some extent there is a correlation between the length of time the mental disease has persisted (its gravity) and the elaborate nature of the delusional systems; there is also some correlation between the stage of the disorder and the so called "residual delusions." *See* Chapter 9.

is practically almost impossible to say what part of the conduct of a person affected with a fixed insane delusion is unaffected by it.[1] If a man, owing to disease of the brain or nervous system, had contracted such a passion for watching windmills that he both believed that he would get a chance of gratifying it in the manner stated, and was willing to commit murder upon that chance, it would, I think, be open to a jury to draw the conclusion that he was incapacitated from forming a calm estimate of the moral character of his act, in other words that he had not a capacity of knowing that it was wrong.[2]

Possible Interpretation of Delusions from Point of View of "New Psychology." — Such is the analysis of the nature of delusion and of the working of the diseased mind which this great jurist gives us; and it must be admitted that little fault can be found with it from the point of view of psychology or psychiatry. From the point of view of the "New Psychology", the analysis of the connection between the delusion and the act in this case might appear superficial. A mental analysis based upon the ingenious, and to a great extent experientially established, psychoanalytical concept of *symbolism*, which has been developed to a point of great usefulness in the treatment of mental diseases, would probably uncover a much deeper and more significant connection between windmills and sadistic murder than was discovered by Stephen's analysis.[3] Whatever mental analysis is employed, however, the truth of the fact that a delusion is but one of the symptoms of some types of mental unsoundness cannot be denied; nor can it be denied that the connections of delusions and *external behavior* are much more subtle than the ingenuous theory announced in the answers of the judges would have us believe.

Importance of Charging Jury as to True Nature of Delusion. — Under our present system of criminal law it is therefore of importance that the jury should be charged as to this fact, and that the law should not be categorically announced to them — as laid down in the Opinion of the Judges after McNaghten's Case — that the connection between a delusion and the physical act is

[1] This is a remarkable statement when it is considered that it was made long before any convincing psychology of mental disorder was established. *See* Chapter 9.

[2] *Op. cit.*, pp. 161, 162.

[3] *See* the "Interpretation of Dreams", by Sigmund Freud. Dr. William A. White, in his little book on "Insanity and the Criminal Law", gives an admirable analysis of the mental operations of Father Johannes Schmidt, which is so convincing as greatly to strengthen the significance of the Freudian concept of symbolism. *See especially*, pp. 63–75.

something necessarily or frequently externally obvious, or something easily conceivable by the untrained lay mind. It may take a long and searching mental analysis [1] to unearth the true connection between the delusion in any case and the criminal act as conceived of by the *defendant.*

Second and Third Questions and Answers — "Nature and Quality" of Act and "Knowledge of Right and Wrong" as Tests.— The second and third questions and answers may now be considered together, in order to understand the meaning of Stephen's second point, — the significance of delusion in the right-and-wrong test:

> Question II. — What are the proper questions to be submitted to the jury, when a person alleged to be afflicted with insane delusion respecting one or more particular subjects or persons, is charged with the commission of a crime (murder, for example), and insanity is set up as a defence?
>
> Question III. — In what terms ought the question to be left to the jury, as to the prisoner's state of mind at the time when the act was committed?
>
> Answers II and III. — As these two questions appear to us to be more conveniently answered together, we have to submit our opinion to be that the jury ought to be told in all cases that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be

[1] The reader is referred to a recent work, "The Psychology of the Criminal", by M. Hamblin Smith (1923), which discusses the importance of developing methods for the study of the offender's "Unconscious mind", in determining the causes of delinquency in any particular case and in planning the program of medico-penal treatment. *See especially* Chapter III, pp. 64, *et seq.* Whether one is ready to adopt the hypothesis of "the Unconscious" and all it implies, or not, the importance of getting at the mental operations which do not lie on the surface, so to speak, cannot be overlooked. *See,* for example, Healy's illuminating Chapter X of his "The Individual Delinquent." If responsibility, to the law, means merely *punishability,* the findings of modern psychologists and psychiatrists raise a serious question, namely: Where shall the line be drawn in determining the extent to which *mental factors* should be taken into account in the evaluation of responsibility (*i.e., punishability*) before the law? Will not all responsibility disappear when the psychic factors of conduct become more and more evident through the researches of psychologists? The answer is that the consequences of responsibility are broader than mere *punitive* treatment; responsibility means forced amenability to *socio*-penal treatment, looking to the *future as well* as the past. A socio-penal program of dealing with delinquents may very well include *punishment* as one of the *therapeutic* measures necessary in *individual cases,* in addition to its service as a possible source of *deterrence* of prospective offenders; but, certainly, if we are to rehabilitate delinquents and reduce the criminal ranks, much more than "punishment" in the old sense is necessary. See pp. 443, *et seq.*

proved to their satisfaction; and that, to establish a defence on the ground of insanity, it must be clearly proved that, at the time of committing 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 that he did not know he was doing what was wrong. The mode of putting the latter part of the question to the jury on these occasions has generally been, whether the accused at the time of doing the act knew the difference between right and wrong: which mode, though rarely, if ever, leading to any mistake with the jury, is not, as we conceive, so accurate when put generally and in the abstract, as when put with reference to the party's knowledge of right and wrong in respect to the very act with which he is charged. If the question were to be put as to the knowledge of the accused solely and exclusively with reference to the law of the land, it might tend to confound the jury by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to a conviction; whereas the law is administered on the principle that every one must be taken conclusively to know it, without proof that he does know it. If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable, and the usual course therefore has been to leave the question to the jury whether the accused had a sufficient degree of reason to know he was doing an act that was wrong: and this course we think is correct, accompanied with such observations and explanations as the circumstances of each case may require.

Criticism of these Answers from Point of View of Law. — As to questions II and III, Stephen points out that "they are put in a very general form, and the answers can hardly have been meant to be exhaustive. If they were so meant, they certainly imply that the effect of insanity (if any) upon the emotions and the will is not to be taken into account in deciding whether an act done by an insane man did or did not amount to an offense; but they do not explicitly assert this, and the proposition that the effect of disease upon the emotions and the will can never under any circumstances affect the criminality of the acts of persons so afflicted is so surprising, and would, if strictly enforced, have such monstrous consequences, that something more than an implied assertion of it seems necessary before it is admitted to be part of the law. . . ." [1]

[1] *Op. cit.*, p. 159.

That Stephen is right in his views on this subject is indicated by the last clause of the answers of the judges to questions II and III, a clause which has strangely been overlooked by practically all writers and judges. The judges left much scope for modification of the narrow rules laid down by them, by the words, "accompanied with such observations and *explanations* as the circumstances of each case may require." If the remainder of the opinion of the judges is authoritative law, then the words quoted must be taken as equally authoritative. These words indicate a feeling on the part of the judges themselves, that the law, as they had specifically laid it down, applied to the hypothetical facts of the questions submitted, and not to all future cases, and that it was too narrow to cover all possible conditions of "insanity." They practically constitute a throwing wide open of the door of the law on this subject.

But whether this be so or not, the answers have, on the whole, been strictly and narrowly construed. It is obvious that to restrict the symptoms, as was done in these answers, to the *knowledge* phase of mental activity is to overlook the fundamental requirements of *every* criminal act, — be it that of a sane man or an insane man. Disregarding the general nature of the concluding words of the opinion, not mentioning the fact that such a restriction is against the common knowledge of modern psychology, and not adverting to Stephen's "monstrous consequences", of such a restriction, the statements of the judges are erroneous from the point of view of the criminal law itself. We have seen that to constitute the necessary *mens rea* of every crime the *volitional* element of mental life is just as important as the knowledge element (even if these were capable of such sharp segregation as the legal terminology assumes). How then could the judges in these answers ignore this fundamental fact? The ignoring of this element, however, is a practice which most judges in their charges, and most commentators in their treatises, are guilty of. It is not at all uncommon, as we have said, to find the requirement of criminal intent mentioned at the outset of a judge's charge, only to be followed by the *knowledge* rule *alone*, exclusive of the volitional element.[1]

[1] Some courts, however, do not fall into this inconsistency. Thus, Judge Ladd, in the famous case of State *v.* Jones, 50 N. H., 369, 393, decided in 1871, said: "At the trial where insanity is set up as a defence, two questions are presented: — First: Had the prisoner a mental disease? Second: If he had,

Stephen points out that even in Hadfield's Case, where the whole conception of delusion and its legal status were introduced, "Hadfield clearly knew the nature of his act, namely, that he was firing a loaded horse pistol at George III. He also knew the quality of the act, namely, that it was what the law calls high treason. He also knew that it was wrong (in the sense of being forbidden by the law), for the very object for which he did it was that he might be put to death that so the world might be saved; and his reluctance to commit suicide shows that he had some moral sentiments."[1] Under the law as laid down by the judges, therefore, Hadfield should have been convicted; yet it is very apparent from the Opinion of the Judges that, as a whole, they approved Erskine's views as expressed in his defense of Hadfield.

Relation of Delusion to Right-and-Wrong Test.—Stephen, as we have seen,[2] not only alluded to the value of delusions as *symptoms* of a general, disturbed mental condition, but also referred to their possible use by the courts as partial evidence that the defendant did not know right from wrong. He said:

> The existence of an insane delusion, and even the existence of insane depression or excitement of spirits apart from specific delusions, may be evidence that the person affected was 'labouring under such a defect of reason from disease of the mind that he did not know that what he was doing was wrong', unless indeed these words are to be construed in a manner so literal that I can hardly think it was intended by those who used them.[3]

Discussing the meaning of these terms, he insisted that to confine the description, "such a defect of reason that he does not know that he is doing what is wrong", only to a person "in whom madness took the form of ignorance of the opinions of mankind in general as to the wickedness of particular crimes, murder, for instance", is unwarranted; "and such a state of mind would, I suppose, be so rare as to be practically unknown." Stephen concluded, therefore, that any one would fall within the description in

was the disease of such a character, or was it so far developed, or had it so far subjugated the powers of the mind, as to take away the *capacity to form or entertain a criminal intent?* Now the entertaining of a criminal intent includes the volitional capacity; if this is pathological, the criminal intent is incomplete. "*Furiosi . . . nulla voluntas est.* — Digest, 50, 17, 40." This principle, as we have seen in the chapter on the legal treatment of the mental elements of a crime, is clearly established by such authorities as Stephen, Wharton, and Stroud.

[1] *Op. cit.*, p. 163. [2] *Ante*, pp. 174, 175. [3] *Op. cit.*, p. 163.

question who was "deprived by disease affecting the mind of the power of passing a rational judgment on the moral character of the act which he meant to do."[1] This is obviously what the judges must have meant in describing the nature of the mental process involved in knowing right from wrong. We have seen[2] that the knowledge element of criminal intention includes both the cognitive process and the apperceptive process. Stephen emphasizes the dual nature of the general knowledge which is presumed in criminal cases by saying that "it appears to contain two elements, first, a capacity of knowing the nature and consequences of the act done, and next, a capacity of knowing the common notions of morality . . . on the subject of crime. I say a 'capacity of knowing', instead of knowledge, because if a man has the ordinary means of knowing certain obvious things, and does not choose to use them, or if he chooses to differ from mankind at large on the subject of the moral quality of particular acts, regarding as virtuous actions what they look upon as crimes, he must take the consequences."[3]

From the foregoing it is clear that the mental process of passing a rational judgment on the moral character of a proposed act includes mental capacity for the development of the ordinary moral sentiments of life in civilized communities, knowledge of the prevailing morality, knowledge of the physical nature of the act the person is about to perform, and, finally, the apperceptive capacity of comprehending the relationship between the actor's notions and desires and the prevailing notions of morality (and legality). Manifestly, therefore, if the mental disease interferes with a person's normal mental processes, then, no matter whether or not the data of the *delusions* were such as would have excused the crime if the facts were true, such an individual would probably have been unable to exercise his cognitive-apperceptive powers in a healthy, normal manner. If, to cite Stephen's examples, the delusions (which, if true, would not excuse a person's proposed criminal act) were "in themselves so wild and astonishing as to make it impossible for him to reason about them calmly, or to reason calmly on matters connected with them"; or, if "the succession of insane thoughts of one kind and another" were "so rapid as to confuse him"; or, if "his will" were "weakened by his disease" to an extent which made him "unequal to the effort of

[1] *Op. cit.*, p. 163. [2] *Ante*, pp. 115, 116. [3] *Op. cit.*, p. 115.

calm, sustained thought upon any subject, and especially upon subjects connected with the delusion"; or, finally, if his *emotional reactions were out of all proportion to the nature of the associated concepts* (as in manic-depressive psychoses, for example),[1] — then, obviously, such a person would not have the capacity of knowing that the act he is about to do is wrong; certainly not in a manner that would characterize a mentally sound person's knowledge. "If excusable anger is held to extenuate the offender's guilt, although it does not affect his knowledge either of the nature of the act or of right and wrong, it seems hard to say that a short madness occasioned by provocation is to have a greater effect than long madness occasioned by disease."[2]

It is clear, also, that there is much justification for the insistence that a delusion should be treated as evidence upon the defendant's general mental capacity to know the nature and quality of the act or to know right and wrong, and not as a detached, diseased entity affecting only one compartment of the mind, which leaves the remainder of the mind free to reason, as would a mentally normal man, about the nature of the delusive beliefs springing from its diseased portion. Indeed, as we have seen, to say that a mentally diseased person can reason about his delusive beliefs is a contradiction in terms; for a delusion means a false "belief in something that would be incredible to people of the same class, age, education, or race, as the person who expresses it; those beliefs being persisted in, in spite of proof to the contrary."[3] And, further, as Hart makes clear, "The most striking feature of a delusion is its fixity and imperviousness to all opposing argument. Persuasion and reason are altogether ineffectual against it, and the patient preserves his belief in spite of the most convincing demonstration of its falsity."[4]

Right-and-Wrong Rule Does Not in Practice Cover Many Acts of the Insane. — Although Doctor Maudsley observes that the right-and-wrong rule "will cover and excuse many acts of insane violence", because "of few insane persons who do violence can it be truly said that they have a full knowledge of the nature and quality of their acts at the time they are doing them";[5] nevertheless, the test does not mention *full* knowledge, and the practice of prose-

[1] *Post*, Chapter 10.
[2] Stephen, *op. cit.*, p. 165.
[3] Clouston, "Unsoundness of Mind", p. 685.
[4] Hart, "The Psychology of Insanity", p. 33. *See* our Chapter 9.
[5] *Cited* by Stephen, pp. 166, 167.

cutors has been to vitiate most of the medical testimony of experts in such cases by asking the blunt, destructive question, "Did such a person (*i.e.*, he of the hypothetical question whom everybody in the court-room knows very well to be the defendant) know right from wrong when he committed the act?" This often places the expert in a quandary. It is an impossible question and the answer to it is often impossible of the requested, categorical "Yes" or "No" answer. The hypothetical question assumes that *knowledge* is a permanent entity that can be recognized and labeled; moreover, that it is unaffected by the apperceptive capacity and, most important, by disorder of the conative-affective modes of mental life, of which the intellective mode is but the instrument. Probably all experts would agree that, in most cases of acts committed by mentally diseased persons, *some knowledge* was present; but knowledge is not a constant factor, nor is it unaffected by the whole condition of mental life. Many psychological processes enter into the end-product that is called so glibly "knowledge of right and wrong", especially in a mental disease involving delusions and their oft-associated hallucinations; but these must be left for consideration in the chapters on the concepts of psychiatry.[1]

Legal and Moral Wrong in Right-and-Wrong Test. — As to the ambiguity of the word "wrong", this will be considered in connection with an important American case.[2] At this point it is sufficient to say that since by far the vast majority of cases in which insanity is pleaded as a defense to criminal prosecutions involves acts which are universally regarded as morally wicked as well as illegal, the hair-splitting distinction between legal and moral wrong need not be given much attention. But that it does arise with important consequences, even to-day, will be shown when we analyze the case mentioned. As was said in the Opinion of the Judges following upon McNaghten's Case, the law proceeds upon the assumption that people know what acts are illegal. But in Hadfield's Case, as we have seen, the knowledge of the illegality of the act was the very reason why Hadfield resorted to it; since his ultimate aim was to be hanged for it, thus permitting him to assume the rôle of savior, in keeping with his delusions of grandeur. The makers of this distinction between legal and moral wrong overlook the fact that, before such distinction can be applied, some substantial evidence must have been introduced tending to

[1] *Post*, Chapters 9 and 10. [2] *Post*, pp. 221, *et seq.*

prove that the act was committed by a person of unsound mind. If such fact be proved, then the use of "knowledge", "right", "wrong", and other concepts employed in the tests of criminal irresponsibility, if justified at all, can only be justified when the mental disorder, *as a unit*, has been explained to the jury by trained psychologists and psychiatrists, familiar by long experience with the significance of these concepts to the diseased mind: And this, though it is urged in this study that the answering of the difficult question of the accused's *irresponsibility* is a task for the *jury;* and that medical experts can only be expected to aid the jury in answering the *preliminary* question of the defendant's mental unsoundness. Since the real significance of the mental symptoms *to the patient* can only be interpreted in the light of the psychology of mental disorder, the jury is not in a position to evaluate the defendant's knowledge and reasoning capacity until after the experts have given an unbiased picture of the defendant's psychosis *in its totality*.

Summary and Conclusions. — Stephen's conclusions after his thorough analysis of the Opinion of the Judges have often been attacked by lawyers. They are, however, perfectly justified by the law itself,[1] by psychology, and by psychopathology. He says:

> Even if the answers given by the judges in McNaghten's Case are regarded as a binding declaration of the law of England, that law, as it stands, is, that a man who by reason of mental disease is prevented from controlling his own conduct is not responsible for what he does. I also think that the existence of any insane delusion, impulse, or other state which is commonly produced by madness, is a fact relevant to the question whether or not he can control his conduct, and as such may be proved and ought to be left to the jury.[2]

While these views are sound, the fact remains that the answers of the judges following upon McNaghten's Case have been given a much narrower construction in England, and in the majority of American jurisdictions, than Stephen insists upon. Only within recent months, after a case which seems to have raised the same furore in England as did McNaghten's Case in its time, the whole subject of the law of insanity was referred to a special committee for study;[3] and the important question to be answered by this

[1] That is, when it is not forgotten that the first principle to be considered in treating of the mental elements of crime is the requirement of *mens rea* and all that it implies.

[2] *Op. cit.*, pp. 167, 168.

[3] This committee was appointed by the Lord Chancellor, in July, 1922, "to consider what changes, if any, are desirable in the existing law, practice and

committee was whether the law of England should be *extended* to include "irresistible impulse", — a notion which, as we have seen, Judge Stephen, back in 1883, had insisted was part and parcel of the law as expounded by the famous Opinion of the Judges of England. In this country, too, the Opinion has been cited with approval by the highest courts in most of the States down to to-day; and, in most jurisdictions, it has been as narrowly construed as in England, so as not to include the doctrines insisted upon by Stephen.[1] Worst of all, the famous Opinion left so much to conjecture and judicial construction that in America it has done more than any other one agency, in our belief, to confuse the law of insanity.[2] Judges in their thousands of decisions in the various States have seized upon various and sundry scraps of the whole Opinion. Further, they have variously interpreted the same words in the Opinion, depending upon their own views and upon commentaries such as those of Stephen and others, on the one hand, or upon the hastily formulated views of well meaning, but misinformed reformers, on the other. In short, they have made it difficult, if not impossible, to say with certainty what the law as to insanity is in some States; and have caused much dissatisfaction, within the legal as well as the medical professions, with the entire judicial treatment of the mentally unsound offender.

There have, however, been occasional significant and well considered departures from the famous Opinion of the Judges after McNaghten's Case, or, rather, from its usual interpretations. If we are to obtain a useful account of the development of the law of insanity in America since 1843, we must turn to the most important American decisions and see if it is at all possible to find some semblance of order in the chaos that is the American law of insanity.

procedure relating to criminal trials in which the defense of insanity is raised." The Committee reported in November, 1923, and recommended the adoption of the "irresistible impulse" test to be used together with the "right-and-wrong" rule. — *See* Chapter 12.

[1] *See* the following two chapters on the "Tests of Irresponsibility in America."

[2] And this, in spite of the fact that, as we saw (note 1, p. 164), Lord Brougham's reason for putting the questions to the judges was that the assistance of the judges "would be invaluable on no account more than this, that it would lead to more uniformity in the language they used on future occasions in charging and directing juries on this most delicate and important subject. They would then no longer use the words wicked, wrong, improper, blameable, proper, right, good, evil; they would no longer indulge in that variety of phrase which only served to perplex others if it did not also tend to bewilder themselves." — Hansard's "Debates", Vol. 67, pp. 714, 732, 733. But they have continued to do this very thing.

CHAPTER 7

THE "TESTS" IN AMERICAN DECISIONS

"The crucial question of responsibility has to be decided by a jury guided by the general directions of the presiding judge. In this way a small body of laymen representing public opinion in the country have to formulate verdicts as to innocence, guilt and responsibility. They have to make up their minds not only as to the evidence of witnesses and the value of circumstantial indications, but also as to the relative importance of statements by experts, such as doctors in cases of mental disease or morbid influence. From a technical point of view such a method is open to objections, and, though the creation of the Court of Criminal Appeal makes it possible to correct flagrant errors, the verdicts of juries do not always show a high standard of perspicacity." — Professor Paul Vinogradoff, "Outlines of Historical Jurisprudence", Vol. 1, p. 32 (1920).

"The memorials of our jurisprudence are written all over with cases in which those who are now understood to have been insane have been executed as criminals." — Bishop, "New Criminal Law", Vol. I, Sec. 390.

Section 1 — "Borderline" Cases

Preliminary Observations. — The words of Professor Bishop, quoted above, present probably but one side of the shield. For while instances can be cited of the execution of persons of unsound mind even to-day, no doubt numerous persons not definitely classifiable as mentally diseased or feebleminded (though, perhaps, on the borderline) have been acquitted on the plea of insanity; and it is generally known, too, that many persons of definite and often dangerous mentally unsound constitution have been permitted to return to the community after such acquittal, either directly or through the use of the writ of *habeas corpus*.[1] We must attempt, then, out of the maze of complicated and confused, frequently conflicting, testimony with which we are confronted at the very outset of our inquiry, to obtain a balanced picture of the American law of insanity.

Confusion in the Law. — If we were asked to name the outstanding characteristic of the law of insanity, as found in the cases in the various State reports, we would unhesitatingly answer, — confusion. Perhaps in no other branch of American law are there so much disagreement as to fundamentals and so many contradictory

[1] *See*, for example, "Insanity and the Criminal Law", by Dr. William A. White, Chapter X, pp. 107, *et seq.* (1923).

decisions in the same jurisdictions. Not a modern text or compilation begins the discussion of the subject of insanity and its relation to the criminal law without a doleful reference to the chaos in this field. Much of this confusion, as must by now be apparent, is to be laid at the door of the early commentators and trial courts; much more has been added by modern judges. But the judges can not be too severely blamed for a difficulty that is inherent in the very subject itself. One of the great weaknesses of all " justice according to law ", is that it deals with rules and that " rules must be made for cases in gross and men in the mass and must operate impersonally and more or less arbitrarily "; [1] and another inherent weakness is that " as law formulates settled ethical ideas, it can not, in periods of transition, accord with the more advanced conceptions of the present; there is always an element, greater or less, that does not wholly correspond to present needs or to present conceptions of justice." [2] In addition, there are inherent difficulties in the administration of the *criminal* law.[3]

Nor are these fundamental antagonisms confined to the sphere of the law alone. Who, as yet, has been able to say categorically where *moral* responsibility begins and ceases in any particular case? Up to a few years ago our books on Ethics have spoken either of the "average man" or of the *general* concepts of freedom and responsibility. Only recently have a few innovators in the field of Social Ethics begun to attack these vital problems *individualistically*, by the *living* case method, and in conference with practical workers in the various fields of human relations. But the difficulty we are discussing is especially apparent in the law. In the law there is always a tendency towards generalization, towards conceptualization, towards the laying down of hard and fast rules [4] based upon precedent and intrenched in the doctrine of *stare decisis*. The rigidity of law, its scientific, special logic, its instruments of rule and concept, its "system"—these characteristics "carry with them a tendency to make law an end rather than a means." [5] Some predictability, and consequently some rigidity, is of course essential

[1] Pound, "Outlines of Lectures on Jurisprudence", p. 74. [2] *Id.*

[3] *See* Pound, "Inherent and Acquired Difficulties in the Administration of Punitive Justice", *Proceedings of Amer. Pol. Sc. Assn.*, IV, p. 237 (1907). *See also* the author's address at the National Conference of Social Work, Toronto, July, 1924, in the *Proceedings*. In discussing some "Modern Trends in Criminology", I attempted to analyze the "conflict between rule and discretion" in its relation to some problems of Criminology.

[4] Pound, "Outlines of Lectures on Jurisprudence", p. 74. [5] *Id.*

in all law. The very term "law" suggests this. But this rigidity, this requirement for general principles applicable to all future cases, — one of the desirable elements in law in general, — is in the realm of mental disease and its relation to criminal (as indeed to moral) responsibility, a force operating against the very desideratum in this field, namely, *individualization*.[1] Its practical effects will appear in the following pages.

Time when Cases Decided Important in this Field. — A fact almost universally overlooked in the treatises on the criminal law is that, especially as regards the defense of insanity, the *dates when cases were decided* are important. While outward forms and phraseology of the law may remain the same through centuries, their content is greatly affected by the era when the cases are actually disposed of. It is therefore important to note whether certain doctrines are still law, or whether they have been "explained", or "distinguished", or overruled in subsequent decisions, and whether this process has been going on tacitly, or whether it was the result of an heroic overthrow of hoary doctrine.[2]

Borderline Cases. — It is convenient to begin with the views found in the legal treatises and reports, covering those difficult types of mental pathology which psychiatrists and psychologists designate as "borderline" cases; that is, where there is either mental defect or disease, but of such a relatively mild character that the patient is capable of playing at least a minor rôle in social life, so long as his corner of the stage is sheltered and he is not subjected to too great mental stress and strain. How does the law deal with such cases? There seems to be a general agreement in the decisions that what the courts refer to (not always dispassionately) as "*mere* mental weakness" does not excuse from criminal responsibility, so long as the defendant knew right from wrong.[3] "Mere mental

[1] The outstanding works in this field are R. Saleilles, "The Individualization of Punishment", transl. by Rachel Szold Jastrow, which emphasizes the need of individualization in the peno-correctional field, and Healy's "The Individual Delinquent", emphasizing not only the therapeutic, but diagnostic and prognostic possibilities of the method of individualization, as opposed to the mass-treatment method of the classical schools of criminology.

[2] This last was the case in Parsons *v.* St., 81 Ala., 577 (1885), and in State *v.* Pike, 49 N. H., 399 (1870).

[3] *See*, for example, Taylor *v.* Com., 109 Pa., 262, 271 (1885). "The general derangement may not in all cases be sufficient to fall within the cognizance of the law," says Bishop ("New Criminal Law", Vol. 1, Sec. 380, 1923); and he gives as the ingenious, if not convincing, reason for this, the legal maxim, "the law does not notice small things." Whether this maxim is applicable to criminal law or only to civil law, Bishop himself finds it necessary to consider at length

weakness" is, of course, a variation of one of Hale's classes of partial insanity. He, it will be remembered, referred to insanity as being partial in degree and partial as to subject matter.[1] Of course, mental unsoundness to the point of lack of knowledge of right and wrong must theoretically exist in most jurisdictions before the defendant will be acquitted on the ground of insanity; but questions of borderline cases arise largely when a defendant requests a charge to the jury on the tests of irresponsibility, and the court refuses on the ground that there is not sufficient evidence of insanity in the case to charge the jury as to the tests.[2] There are also cases where the courts refused to charge the jury as to the tests of irresponsibility, because of evidence (in addition to that of mental unsoundness) of *plans* for the crime having been laid by the defendant; the court assuming that this showed sanity on the defendant's part.[3] As if mentally unsound persons never make plans![4] It will be of interest to consider some of the cases

(*see* secs. 214, *et seq.*). At any rate, the field of the borderline psychoneurotic and psychotic offenders (and the marginal cases of mental defect) is just the place where the law *should* concern itself with so called small things.

[1] At this point we are concerned with insanity that is partial in degree. It is extremely doubtful, to say the least, whether Hale's concept of partial insanity as a condition wherein the patient is insane on one subject and perfectly sane on all others (however he may *appear* to be so), is at all tenable from the point of view of mental medicine.

[2] In Bast *v.* Com., 30 Ky. L. Rep., 967, 99 S. W., 978 (1907), for example, there was testimony that the defendant was subject to epilepsy, but because a majority of the witnesses testified he knew right from wrong, although all agreed "that he was of weak mind and easily influenced", and "physicians testified that epilepsy, when extending over a long period, has a tendency to weaken the mind, *as it doubtless did in this case*" (in the words of the appellate court), the court (of Appeals of Kentucky), nevertheless, in spite of this admission, upheld the trial court in its refusal to permit the issue of insanity to go to the jury.

[3] *See* cases cited in 10 L. R. A. (N. S.), 999, 1000.

[4] This fallacy is due to the psychology of "ideas" and of consciousness as a "compounding" of ideas. It puts the cart before the horse; for the fundamental forces of human nature are the conative-affective instincts, and these express themselves through the intellect. Desire to escape and laying of plans, for example, are due to instinctive-emotional forces of which the insane person, like others, is not deprived.

Only a thorough medical and psychological examination can establish whether the defendant is mentally unsound; by showing that the instinctive equipment is perverted or diseased, that the motives were abnormal (in nature or degree), that the deed was one that was not characteristic of the person's life prior to the disorder, or that it was one that could have been fairly predicted by a study of the history of the accused's social reactions throughout his life; or that it was contrary to the person's natural affections, etc. The laying of plans for the deed or for escape are far from conclusive proof of the sanity of the individual; on the contrary, some forms of low cunning are quite characteristic of mental disorder, as in paranoia or even in some grades of mental defect. *See* Healy, "The Individual Delinquent" on this point.

which were regarded as on the borderline, especially those of mental *defect.*

In Rogers *v.* State [1] the testimony disclosed that the defendant "was dull in intellect, and possessed of about the intelligence of average boys of thirteen or fourteen years of age, though he was a mature man." The Court of Criminal Appeals of Texas decided, however, that "this does not constitute imbecility" such as would in any way affect the criminal responsibility of the defendant. Unfortunately, the facts adduced at the trial, and the qualifications of the witnesses testifying, are not set forth in the opinion of the appellate court. In State *v.* Richards,[2] one of the landmarks in the law of mental defect in its relation to criminal responsibility, the defendant was tried for burning a barn, — the typical crime of the feebleminded in rural regions; and the trial judge charged the jury as follows:

> Your attention has been turned mainly to the question whether the act was done with the felonious intent charged, and this question depends mainly upon another, whether the accused has sufficient mental capacity to warrant us in imputing to him a felonious intent.[3] That he is considerably below par in intellect is apparent to us all. This is indicated by his countenance and general appearance. The same thing is indicated by his extraordinary conduct at the fire. As the flames were bursting out he was seen on all fours crawling back from under the burning barn, with no clothing upon him except his shirt and trousers. The day was excessively cold. He remained some half hour, thus scantily clothed, gazing stupidly at the blaze, until ordered into the house. All this took place in broad day-light, in plain view of Mr. Gallup's house.

Elsewhere the judge also pointed out that,

> the history of the prisoner's life is somewhat significant. From early childhood it has been spent in almshouses, subjected to constant constraint. In the most ordinary acts of his life he has been governed by the superior will of others to whose care he has been committed. He has, it appears, been seldom left to the free guidance of his own judgment.

[1] 28 S. W. (Tex.), 685 (1894). [2] 39 Conn., 591 (1873).

[3] It will be noticed that the judge in this case approached the problem of the criminal responsibility of persons of unsound mind, in a logical and legally sound manner. He did not begin with any test completely divorced from the general legal requirement of a criminal intent; but correctly pointed out the relationship of the defense of irresponsibility because of insanity to the requirement of a guilty intent.

Criticism of State *v.* Richards. — The reader will agree that this is about as complete a picture of feeblemindedness as one could have, without resorting to psychological tests. Yet this clear case gave the learned judge much difficulty. The judge's reasoning is laid bare in this case, and it illustrates beautifully the mental struggle which often takes place in the minds of trial judges, when they are torn between the desire to conceptualize, to enforce the law according to its very letter and according to *a priori* general principles, on the one hand, and the common-sense appeal, on the other. The judge, after enumerating the points adduced in the testimony, said:

> But it is undoubtedly true, as the attorney for the State contends, that *mere inferiority* of intellect is no answer to the prosecution.

He then sagely observed that the defendant "is not a mere idiot, nor does he appear to be a lunatic. He suffers from want of mind rather than from derangement or delusion, and the question is whether the want of mind is such as to entitle him to acquittal on the ground of what in law is termed *dementia.*" After adverting to the inherent difficulty in all such cases, the judge continued:

> Our principal embarrassment arises however from the want of a definite measure of mental capacity. Eminent judges and learned commentators have attempted to furnish rules and tests for the guidance of triers in cases of this kind, but upon examination these rules and tests turn out to be imperfect and unsatisfactory.

The judge thought that the "accused had some knowledge of the consequences of his act. He probably knew that by igniting a match and throwing it into a hay-mow a fire would be kindled and that the barn would thereby be consumed. He perhaps also had some appreciation of the loss and destruction of property that would ensue." But, realizing that such elementary knowledge could not be sufficient to make a person imputable in the light of common sense and common morality, however it might in the light of a strict construction of the knowledge rule, the judge added that he was not "willing to say that some knowledge of consequences, however faint and imperfect, is sufficient to warrant you in convicting the prisoner"; and he further floundered back and forth between the desire to apply the knowledge test and his manifest conviction that injustice would result from its application in this particular case, finally confessing, much more frankly and

wisely than many of his brethren on the bench, that "I can give you no precise rule." But as this left him exactly where he started from, he felt constrained to add that he thought it "clear that if the prisoner's perception of consequences and effects was only such as is common to children of tender years he ought to be acquitted." This reminded him of Hale's rule, that "inasmuch as children under fourteen years of age are *prima facie* incapable of crime, imbeciles ought not to be held responsible criminally unless of capacity equal to that of ordinary children of that age." [1] The upshot of our judge's reasoning was that he commended Lord Hale's test to the jury, and told them that if that test were adopted by them, the defendant would have to be acquitted, since the prosecution's witnesses had testified "that he is inferior in intellect to children of ten years of age, and several very intelligent witnesses for the defense testified that they are acquainted with many children of six years who are his superiors in mental capacity." The judge wisely called attention to the fact, however, that "there can be no accurate comparison in detail between the healthy and properly balanced, though immature, mind of a child, and the unhealthy, abnormal and shrivelled intellect of an imbecile." [2] The judge added that "the comparison therefore is only of the general result in their respective appreciation of right and wrong and of consequences and effects." The jury acquitted the prisoner, giving as their ground for acquittal that they found a "want of mental capacity."

In Wartena *v.* State [3] the Supreme Court of Indiana approved the following instruction asked for by the prosecutor, and to which the defendant's counsel had objected at the trial:

> Mere weakness of mind does not excuse the commission of crime. If one is of sound mind, he is responsible for his criminal act, even though his mental capacity be weak or his intellect of an inferior order.

The facts adduced at the trial, upon which such instruction was given, do not unfortunately appear in the Supreme Court's opinion, although that court said that the charge "was applicable to evidence in the case."

[1] Hale's rule, however, applied only in the case of mental *disease* (total *insanity*), not mental *defect*.

[2] This was one of the earliest criticisms directed against psychological tests (when used *exclusively*) as an estimate of the personality make-up.

[3] 105 Ind., 445, 450 (1885).

It appears that the court was trying to draw a distinction between the classes that to-day would be called morons and imbeciles, on the one hand, and idiots, on the other, — an attempt often made in these borderline cases of mental defect, — when it said:

> The law does not undertake to measure the intellectual capacities of men. Imbecility of mind may be of such a degree as to constitute insanity in the eye of the law, but mere mental weakness, the subject being of sound mind, is not insanity, and does not constitute a defense to crime. The law recognizes no standard of exemption from crime less than some degree of insanity or mental unsoundness. Immunity from crime cannot be predicated upon a merely weak or low order of intellect, coupled with a sound mind.

Criticism of Wartena *v.* State. — Throughout this quotation the court assumes that "mental weakness" and a "sound" mind are not inconsistent concepts. The boundary between mental weakness and normality is of course hard to define, although by the use of standard intelligence tests we have to-day drawn a more or less arbitrary line between morons and those feebleminded persons whose mental defect is much more pronounced. When we deal with the classes of low grade imbeciles and idiots, the distinction between such persons and those of ordinary intelligence is apparent enough, often without the use of intelligence tests.

The cases cited above were decided in the seventies and eighties of the last century. Modern intelligence tests were of course unknown. It was not until 1905 that Binet and Simon announced their "measuring scale" of intelligence; and it was not perfected until a few years later, by these great psychologists and by American educational psychologists, such as Professor Terman, who developed the so called "Stanford Revision" of the Binet-Simon Scale and tests. Since then, widespread use of various types of measuring scales of intelligence has been made in the Army, in industry, in the schools, and in psychopathic clinics attached to municipal and juvenile courts.[1] Let us, therefore, examine one or two important recent cases, where it was sought to make use of this technique in ascertaining the mental condition of persons accused of crime and, in this manner, to supply the courts with the more refined instrument for drawing the line between total

[1] The pioneer work in this field was done by Dr. William Healy, in Chicago; and he still remains the leader in the field. *See* his monumental "The Individual Delinquent."

and partial unsoundness of mind that Hale and the judge in the Richards Case wanted so badly.

State *v.* Schilling. — In the opening chapter of this study, we mentioned the case of People *v.* Oxnam,[1] wherein a youth who, according to the standard intelligence tests as applied by four or five experts, was found to be an imbecile, suffered the death penalty. There the question of the weight to be given to the findings of experts using standard intelligence tests, both *at the trial* and as ground for a new trial *on appeal*, was really not decided; for the Supreme Court of California, by the technicality that no explanation was given as to why such intelligence tests were not used at the *original* trial but only in connection with an attempt to obtain a new trial, in effect ignored the findings of the experts. In the more recent case of State *v.* Schilling [2] intelligence tests were again employed. Defendant, twenty-eight years of age, killed an officer in an attempt to escape from arrest. It was contended by the defense that the defendant was of a mental age of eleven and that he therefore could rely upon the common law rebuttable presumption that between the ages of seven and fourteen an infant is incapable of committing a crime.[3] The Supreme Court of New Jersey refused to grant a new trial, however, disposing of the case in these words:

> It appears that this man, twenty-eight years of age seeks to escape punishment for his crime upon the ground that his mentality is to a certain extent deficient and that, according to the testimony of some of the experts, it did not exceed that of a normal person of eleven years, and it is urged that there is a presumption that he would be incapable of committing a crime to the same extent as if of the age of eleven years. But that is not the precise question presented, which, after all, is whether at the age of twenty-eight he had sufficient mentality to distinguish between right and wrong, for at that age he would be presumed to be capable of committing the crime unless he was able to overcome that presumption by proof of a mental condition rendering him incapable of committing the crime, and whether he did so was a jury question, and they by their verdict have found that he had sufficient mentality to determine that it was wrong to kill this officer. . . . There is a vast difference between a child at the age of eleven years and that of a man of twenty-eight, and while perhaps there is a presumption that an infant of tender years is incapable of committing a crime, that presumption does not extend to one of advanced years,

[1] *Ante*, p. 5. [2] 112 Atl. (N. J.), 400 (1921). [3] *Ante*, p. 40.

requiring the state to rebut it. When a man reaches manhood the presumption is that he possesses the ordinary mental capacity normally pertaining to his age, and it is for him to overcome that presumption, and whether he has done so is for the jury to determine. The presumption of the lack of power of thought and capacity in favor of a child is due more to the number of years he has lived than to the character of the development of his mind, and it is a merciful rule established by the courts, due to his tender years, but that reason does not apply when he comes to manhood. Deficiency of intellect is a species of insanity, and when that is set up as a defense for crime the burden is on the accused to prove it, the presumption being that he is sane.[1]

In this case, then, the court distinguished between the common-law rule as to the rebuttable presumption of innocence in the case of infants between seven and fourteen, and the presumption of capacity of *adults* who plead insanity as a defense. But the court erred when it placed the historical reason for the "infant rule" largely on the foundation of regard for an infant's tender years; for the very opinion upon which it relied, and which it quoted approvingly,[2] proves that the rule, at least as to the ages between seven and fourteen, is based not upon the consideration of the tender age of an infant alone, but, and more so, upon his *mental and moral capacity*. Therefore, if, upon reasonable proof, based upon standard psychological examinations by experts, it were shown that an adult defendant is below the mental age of fourteen, it would seem more in consonance with the law to place the burden of proving mental capacity, at least by a preponderance of the evidence, upon the prosecution. Besides, the law, through its judiciary, here forgets that when the rules as to the responsibility of children were introduced it was universally, though tacitly, believed that the mental age and the physical age are identical. In the light of generally accepted knowledge to the contrary, it is difficult to

[1] *Op. cit.*, p. 402.

[2] The court approved the words of Chief Justice Kirkpatrick in State *v.* Aaron, 4 N. J. Law, 269, in which he enunciated the common-law rule as to infants as follows: "It is perfectly settled that an infant within the age of seven years cannot be punished for any capital offence. . . . It is perfectly settled, also, that between the age of seven and the age of fourteen years, the infant shall be presumed to be incapable of committing crime upon the same principle, the presumption being very strong at seven, and decreasing with the progress of his years; but then this presumption . . . may be encountered by proof; and, if it shall appear by strong and irresistible evidence that he had sufficient discernment to distinguish good from evil, to comprehend the nature and consequences of his acts, he may be convicted and have judgment of death" (p. 277).

see why judges do not take "judicial notice" of these facts of modern psychology, and apply the presumptions as to children to mental infants, regardless of their physical age. Surely this could with safety be done in the case of low-grade morons and imbeciles, as well as idiots.

Rule should be Applicable to Adults of Mental Age of Seven to Fourteen. — Of the two rules cited on the question of idiocy, — namely, (1) that where mental defect (of a rather pronounced degree) is proved it is for the prosecution affirmatively to establish knowledge of right and wrong on the part of the defendant, and (2) that the burden of proving incapacity to know right from wrong in such cases remains upon the defendant and that the rebuttable presumption of the incapacity of infants between seven and fourteen is not applicable to feebleminded *adults* of the *mental* age of seven to fourteen, — the former would seem to be better law as well as more humane.

Partial Insanity as Affecting only Part of Mind. — As we said at the outset of this chapter, there is another sense in which partial insanity is employed in the leading cases in the reports, namely: The sense in which it was used in McNaghten's Case, where it referred, not to a *general* unsoundness in all modes of mental life yet of insufficient degree to exempt from responsibility, but to so called *monomania, i.e.*, to a mental disturbance which, according to this theory, affects the patient as to but one subject, leaving him presumably mentally sound on other subjects. This type of partial insanity was referred to by Judge Cox in his charge to the jury in the famous Guiteau Case, in these words:

> There are cases in which a man's mental faculties generally seem to be in full vigor, but on some one subject he seems to be deranged. He is possessed, perhaps, with a belief which every one recognizes as absurd, which he has not reasoned himself into, and cannot be reasoned out of, which we call an *insane delusion*, or he has, in addition, some morbid propensity, seemingly in harsh discord with the rest of his intellectual and moral nature. These are cases of what, for want of a better term, is called partial insanity.[1]

The view that a person can be mentally diseased in one watertight compartment of his mind and perfectly normal in others has

[1] 10 Fed., 161, 166 (1881). *See also* People *v.* Lowhone, 292 Ill., 32, 45, 48 (1920), where the same view is expressed; and it is held that the irresistible impulse test is apparently applicable only in cases of paranoia.

already been sufficiently criticized. But we will meet it again, when discussing delusions and their relation to one or the other of the modern tests of irresponsibility.[1]

In a later case,[2] the trial court had charged:

> On the other hand, if you should find that, at the time the act was committed, the defendant was suffering from partial mental disease, so that he was capable of at least some sound, healthy mental action, then he would or would not be accountable, depending upon whether the act was the product of a sound mental action. . . . If . . . even though the defendant was suffering with partial mental disease, yet . . . he was capable of some sound mental action, and . . . the crime was the outgrowth . . . of such sound mental action, then he would be accountable therefor.[3]

And the Supreme Court of Washington held that this instruction was "calculated to draw the minds of the jury entirely away from a consideration of the relation of the mental condition of the appellant to the particular thing charged against him. It denies the benefit of the defense of monomania, which may be and usually is the defense set up when insanity is relied upon." The court continued further:

> A person may be partially insane on all subjects, and yet be criminally responsible if he had sufficient capacity to distinguish right from wrong with reference to the crime committed. On the other hand, he may be mentally sound upon almost all subjects, with power of rational thought and capacity to meet the ordinary affairs of life; and yet upon some one or a particular group of subjects manifest a mental excitement, either of desire or aversion, that makes him wholly irresponsible within the limit of his aberration. Confusion has resulted from the failure of some courts to distinguish between partial insanity in the sense of weakened or disordered intellect generally, and partial insanity in the sense of monomania.[4]

This case indicates the practical importance of the law's distinction between the two types of partial insanity. On the whole, we may say that partial insanity, in the sense of borderline psychotic cases and cases of mental defect, does not exempt from criminal responsibility; nor does it even constitute ground for reversal of the case by an appellate court and its remanding for retrial, when,

[1] *Post*, pp. 245, *et seq.*
[2] State *v.* Craig, 52 Wash., 66, 68 (1909).
[3] *Id.* [4] *Id.*, p. 69.

though there was evidence of borderline mental disease or defect, the trial court refused to charge the jury as to the tests of irresponsibility.[1]

Section 2 — Partial Responsibility[2] (in Sense of Reduced Grade of Offense)

Its Meaning. — Does mental disease, though not of sufficient degree to excuse entirely from criminal responsibility, ever operate to *reduce the degree* of the criminal offense? For example, a person is charged with murder:[3] Is it possible that, though he can not be acquitted entirely, yet, by reason of his mental abnormality he can not be said to have had the "malice aforethought", or "deliberation", or "premeditation", or any other condition of mind which must be proved to have been present in capital offenses? Can evidence of some degree of mental unsoundness reduce to murder in the second degree or manslaughter[4] a crime

[1] It is, of course, possible to bring evidence of a borderline mental condition to the attention of the court in a hearing on mitigation of punishment after a plea of guilty. *See* note at end of Chapter 1. It is a question whether the success of such procedure in the Leopold-Loeb Case in Chicago will not make it a favorite instrumentality of escape from the harsh and rigid tests of irresponsibility of the mentally disordered.

[2] I use this term in the absence of a more accurate one. The principle involved here is the reduction of the severity of the offense (hence of the punishment), not because of a halfway mental condition *per se*, but because of a mental condition of such kind as to make it a fact that a *lesser crime* (or lesser degree) was in fact committed, as indicated by the definition of such crime (or degree). *See* the text.

[3] "Murder . . . is the killing of any person in the peace of the Commonwealth, with *malice aforethought*, either express or implied by law. Malice, in this definition, is used in a technical sense, including not only anger, hatred, and revenge, but every other unlawful and unjustifiable motive. It is not confined to ill will towards one or more individual persons, but is intended to denote an action flowing from any wicked and corrupt motive, a thing done *malo animo*, where the fact has been attended with such circumstances as carry in them the plain indications of a heart regardless of social duty, and fatally bent on mischief." — Chief Justice Shaw, in Commonwealth *v.* Webster, 5 Cush. (Mass.), 295, 304 (1850).

[4] "Manslaughter is the unlawful killing of another without malice; and may be either voluntary, as when the act is committed with a real design and purpose to kill, but through the violence of sudden passion, occasioned by some great provocation, which in tenderness for the frailty of human nature the law considers sufficient to palliate the criminality of the offence; or involuntary, as when the death of another is caused by some unlawful act, not accompanied by any intention to take life. From these two definitions, it will be at once perceived, that the characteristic distinction between murder and manslaughter is malice, express or implied. . . . The implication of malice arises in every case of intentional homicide; and, the fact of killing being first proved, all the circumstances of accident, necessity, or infirmity, are to be satisfactorily established by the party charged. . . . If there are, in fact, circumstances of

which, had the defendant been perfectly sound mentally, would have been first-degree murder? Is there room in the law for the "semiresponsible" in this sense of the term? As a general rule, no.[1] Under the present practice of the criminal law, a defendant charged with first-degree murder, who defends on the ground of mental disorder constituting irresponsibility, must either be convicted or acquitted of murder in the first degree. The attempt has been made to arrive at the aim sought in such cases, roughly, through the device of statutory "degrees" of murder. The nineteenth century witnessed an attempt on the part of many State legislatures to achieve that nice balance between the degree of outrage to the public interest (or disturbance of the jural order) involved in any criminal act, and the precise amount of punishment for that act,[2] which was dictated by the eighteenth and nineteenth century schools of Criminology and Penology. Through this means and other devices, such as the so called indeterminate sentence,[3] the provision for time off for good behavior, probation, parole, etc., these schools hoped to provide for that necessary individualization which the criminal law in its old rigidity had failed to achieve.

justification, excuse, or palliation, such proof will naturally indicate them. But where the fact of killing is proved by satisfactory evidence, and there are no circumstances disclosed, tending to show justification or excuse, there is nothing to rebut the natural presumption of malice. This rule is founded on the plain and obvious principle, that a person must be presumed to intend to do that which he voluntarily and wilfully does in fact do, and that he must intend all the natural, probable, and usual consequences of his own acts. . . . It is a settled rule of law, that no provocation by words only, however opprobrious, will mitigate an intentional homicide, so as to reduce it to manslaughter. . . . It is not the less malice aforethought, within the meaning of the law, because the act is done suddenly after the intention to commit the homicide is formed; it is sufficient that the malicious intention precedes and accompanies the act of homicide. It is manifest, therefore, that the words 'malice aforethought', in the description of murder, do not imply deliberation, or the lapse of considerable time between the malicious intent to take life and the actual execution of that intent, but rather denote purpose and design, in contradistinction to accident and mischance." — *Id.*

[1] Sage *v.* St., 91 Ind., 141, 145 (1883); Kirby *v.* St., 68 Tex. Cr., Rep., 63, 74 (1912): "We have no degrees of insanity in the criminal law, and a person is entitled to be acquitted by reason of his insanity if he does not know the right or wrong of the act he is charged with; if he has sufficient mind to know and appreciate the fact that the act is wrong, he is held responsible for the act he commits, and the law is or should be measured out to each individual alike." The last clause is an interesting expression of a twentieth century survival of the nineteenth century anti-individualization philosophy of criminal law.

[2] The New York Code, for example, has two degrees of murder, two of manslaughter, three of robbery, and two of larceny. *See* Gilbert's "Criminal Code", 1923. Some States have even more degrees.

[3] Not "indeterminate" strictly speaking; because it fixes limits.

Intoxication and "Heat of Blood" as Mitigating Degree of Offense. — But even before this movement was well under way, the law, in *some cases*, took account of abnormality of mental condition as a reason for reducing the gravity of the offense. It was long used, for example, where the defense was intoxication; and is to be found both in statutory provisions [1] and in judicial opinion.[2] The reason for the rule, that evidence of intoxication may be considered by the jury as to its effect upon the defendant's criminal state of mind, was discussed by the Supreme Court of Connecticut, in the case of a prosecution for first-degree murder, as follows:

> Intoxication is admissible in such cases, not as an excuse for crime, not in mitigation of punishment, but as tending to show that the less and not the greater offense was in fact committed.[3]

Professor Keedy interestingly points out [4] that the United States Supreme Court, speaking through Mr. Justice Gray, stated the doctrine (as to the reduction of the grade of offenses) "broadly enough to cover insanity as well as intoxication:

> 'When a statute establishing different degrees of murder requires deliberate premeditation in order to constitute murder in the first degree, the question whether the accused is in such a condition of mind, by reason of drunkenness *or otherwise*, as to be capable of deliberate premeditation, necessarily becomes a material subject of consideration by the jury.'" [5]

[1] ". . . Whenever the actual existence of any particular purpose, motive or intent is a necessary element to constitute a particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive or intent with which he committed the act." Gilbert's "Criminal Code", N. Y. (1923), Sec. 1220.

[2] *See* State *v.* Sparegrove, 134 Iowa, 599 (1907); People *v.* Peterson, 166 Mich., 10 (1911). The well known right-and-wrong test has been imported into this domain of the law by the courts using capacity to distinguish right from wrong as a measure of whether the intoxication had proceeded to a stage that negatived the required criminal intent. *See*, for example, Ryan *v.* U. S., 26 App. Dec., (D.C.) 74 (1905).

[3] State *v.* Johnson, 40 Conn., 136, 143 (1873). *See also* Evers *v.* St., 31 Tex. Crim. Rep., 318 (1892).

[4] Edwin R. Keedy, "Insanity and Criminal Responsibility", *Harvard Law Review*, Vol. XXX, No. 6, April, 1917, p. 552.

[5] Hopt *v.* People, 104 U. S., 631, 634 (1881). This case was cited with approval in two subsequent Supreme Court decisions. In Tucker *v.* U. S., 151 U. S., 164, 166 (1893), the trial court had said of the defendant about whose intoxication some evidence had been introduced, that "although he may not be absolutely insane, so that his will power is gone, so that he has no control over it, so that he cannot restrain it, . . . there is an absence from the case of what

The words "or otherwise", Keedy contends with much reason, indicate the intention of the Supreme Court to apply the doctrine of reduction of the grade of the offense to insanity cases.

The doctrine of reduction of the grade of the offense because of conditions which interfere with the ordinary operation of the defendant's mind is also applied where one kills another "at a time when his mental processes have been temporarily affected by provocation of certain kinds. In such cases his state of mind, though not amounting to a complete defense, reduces the degree of the offense from murder to manslaughter." [1] Judge Christiancy, in Maher *v.* People,[2] discussed this rule of law as follows:

> If the act of killing, though intentional, be committed under the influence of passion or in heat of blood, produced by an adequate or reasonable provocation, and before a reasonable time has elapsed for the blood to cool and reason to resume its habitual control, and is the result of the temporary excitement, by which the control of the reason was disturbed, rather than of any wickedness of heart or cruelty or recklessness of disposition; then the law, out of indulgence to the frailty of human nature, or rather, in recognition of the laws upon which human nature is constituted, very properly regards the offense as of a less heinous character than murder, and gives it the designation of manslaughter.

In spite of the precedent of these two classes of cases in which the law, at present, does admit evidence of an abnormal state of

is denominated by law as malice aforethought, and his offence would be manslaughter." In Winston *v.* U. S., 172 U. S., 303, 311, the Hopt Case was again approved. In the case of Stenzel *v.* U. S., decided in 1919, 261 Fed., 161, 163, the defendant had been indicted under the Espionage Act of June 15, 1917, for willful "obstruction of the enlistment service", and the theory of the defense was that he was intoxicated to such extent "that he was incapable of entertaining the necessary criminal intent." The act required words and actions to have been "willful." *Held*, that as there was "distinct and positive evidence that Stenzel was so drunk . . . that he did not know what he was saying. He was entitled to have the jury pass upon the question of whether or not he was so drunk that he was incapable of entertaining the specific criminal intent required by the Espionage Act."

The Hopt Case doctrine, with especial reference to the significant words, *or otherwise*, was also enunciated by the Wisconsin Supreme Court, in Terrill *v.* St., 74 Wis., 278, 287 (1889), and, again, in Hempton *v.* St., 111 Wis., 127, 135 (1901): but these cases, as well as the Hopt Case, involved the problem of the effect of *intoxication* upon the state of mind, so as to reduce the grade of the crime.

[1] Keedy, *op. cit.*, p. 553.

[2] 10 Mich., 212, 219 (1862). *See also* Collins *v.* St., 102 Ark., 180 (1912); State *v.* Kennedy, 169 N. C., 288 (1915); Commonwealth *v.* Colandro, 281 Pa. St., 343 571 (1911).

mind as a factor which reduces the gravity of the offense, a technical, legal distinction would probably be drawn by the courts between the cases where intoxication and heat of blood (as factors operating upon the *normal* state of mind) are taken to reduce the degree of the offense, and cases where it is sought to have the presence of so called partial insanity reduce the degree of the crime. They would probably say that in the first two cases it is assumed that the defendant, ordinarily, was of that sound mind and discretion which the law presumes the average man to possess, his condition by which it is sought to reduce the degree of his offense being merely of an exceptional, transient, or accidental nature; whereas, in the case of borderline mental unsoundness, the condition is a *chronic* one, but not severe enough to interfere with capacity to know right from wrong. And they would, no doubt, advert to the difficulty of drawing the line in such cases, the difficulty of proof, — just as Hale did. Of course, from the point of view of psychology and psychiatry, such a technical distinction between the two classes of cases as affecting the individual's capacity to act in a legally acceptable manner, and, therefore, his responsibility, could not receive much support; and, in practice, it would (and indeed it sometimes *does*) result in persons who have voluntarily become intoxicated, and in that condition have committed a crime, receiving lighter sentences than, for example, the constitutional psychopathic inferiors, or the morons, who were not intoxicated when they committed an offense. Until we are ready to revise the law of insanity radically, — for example, to substitute an entire, expert, *administrative* device for the present judicial machinery for handling the problems raised by the mentally disordered offender, — the duty of seeing that grave injustice is not done in these borderline cases of mental unsoundness must devolve upon public spirited, well informed prosecutors.[1]

Partial Responsibility as Recognized by a Few Courts. — The courts of at least two States have had sufficient vision to cope with the problem presented by the semiresponsible, even under existing law. In State *v.* Anselmo,[2] a case that has been widely discussed, the Supreme Court of Utah practically adopted the doctrine of partial responsibility (in the sense of reduced grade of offense because of the absence of a required mental element), as applicable

[1] *See* Chapter 3, p. 66, for a good instance of this kind.
[2] 46 Utah, 137 (1915).

to those borderline cases of mental unsoundness where, though not ready to excuse such offenders entirely, the law might well admit such evidence as bearing upon the premeditation or other state of mind necessary to constitute first-degree murder. In that case a person shown to have been an epileptic, and to have been intoxicated at the time he shot and killed an officer about to arrest him, was found guilty of murder in the first degree, without the jury recommending life imprisonment instead of capital punishment, as was within its power. The trial court had charged the jury, according to the Utah statutes, as follows: "Every . . . willful, deliberate, malicious, and premeditated killing, . . . or (any killing) perpetrated by any act greatly dangerous to the lives of others and evidencing a depraved mind, regardless of human life — is murder in the first degree." [1] The Supreme Court of Utah quoted with approval Wharton's "Criminal Law" [2] to the effect that, "a fixed design to kill makes the homicide murder in the first degree; a design to kill formed on the spur of the moment makes the homicide murder in the second degree." The Court then built upon this foundation the doctrine that we are here interested in, namely, that

> The jury should also be informed . . . that in determining the question of such design and premeditation they should take into consideration all the facts and circumstances developed at the trial, *as well as the evidence relating to the mental condition*, including that of intoxication of the accused, where such evidence has been introduced. . . .[3]

And, further, the Court said:

> *A person's mental condition may not be such as to make him irresponsible for his acts, and yet it may be such as to relieve him from the extreme penalty imposed by law for the committed act.* This is the theory upon which our statute giving the jury the right of recommendation is based, and . . . one accused of and tried for murder in the first degree is always entitled to the uninfluenced judgment of a fair and impartial jury upon that question. If, therefore, a person who is both mentally and physically sound is entitled to the judgment of a jury whose minds are uninfluenced from any source, how much more important is it that one whose physical ailments and mental condition incident thereto are by competent evidence shown to be abnormal,

[1] 46 Utah, p. 153. [2] 11th Ed., Vol. I, Sec. 219. [3] *Op. cit.*, p. 156.

to say the least, should be tried by a jury upon such instructions as leave no reasonable room for doubt with regard to what the charge really means upon a subject so important as the one just discussed?[1] (Italics ours.)

One cannot help believing, in spite of the liberal doctrine announced in this case, that the new trial was granted because the Court felt that a grave injustice would result if the verdict of the jury, *in this particular case*, were allowed to stand. This belief is inspired by reading the practically uncontradicted medical and lay testimony introduced at the trial, pointing to the defendant's mental and physical unsoundness; by the fact that a change of venue on the ground of adverse public sentiment was denied, though the facts strongly suggested that the trial should have been held in another jurisdiction because of local, popular prejudice; and, finally, by the guarded language of the opinion of the Utah Supreme Court itself, which carefully pointed out that its decision referred only to the peculiar facts of the case before it, and was not necessarily intended to cover future situations.[2] In other words, the Anselmo Case seems to constitute a heroic, forced individualization of justice on the part of an appellate tribunal in a single case where the facts demanded it, and where the jury might have been influenced by prejudice.[3]

In a more recent case,[4] however, the doctrine of partial responsibility as affecting the grade of homicide of a feebleminded person was deliberately and clearly adopted by the New Jersey Supreme Court. The following charge to the jury was substantially approved: If "at the time of doing the act, the evidence shows you that this defendant was so feebleminded that his faculties were prostrated and rendered him incapable of forming the specific intent to kill with its willful, deliberate, and premeditated character, then, *although it is no defense or justification*, his offense would be murder in the *second* degree." (Italics ours.)

[1] *Op. cit.*, p. 157.

[2] "While, therefore, we are not prepared to say that we should, under all circumstances, reverse a judgment because the court has charged the jury with regard to premeditation, as was done in this case, yet we do hold that under the evidence in this case, etc. etc." And again, "Under the particular circumstances of this case, as disclosed by the evidence, therefore, we think the giving of that portion of the charge we have set forth herein constituted reversible error, etc." (Pp. 157, 158.)

[3] We have been unable to find any later Utah cases where this doctrine was followed.

[4] State *v.* Schilling, 112 Atl. (N. J.), 400, 402, 403 (1920). *See ante*, p. 195.

It must not be inferred that because in the vast majority of jurisdictions evidence as to a partial unsoundness of mind can not be technically considered in reducing the degree of the offense, it is not actually so considered by juries in occasional instances. The foregoing discussion refers to the formal condition of the law, and assumes that juries are strictly governed by the charges laid down by trial judges.

As a general rule we may say then, that the doctrine of partial responsibility, — *i.e.*, the taking into consideration of mental unsoundness, not as reason for absolute excuse from criminal responsibility but as cause for *reduction of the degree* of the offense, — is not operative in American courts.[1]

Summary of Law as to Borderline Cases and Partial Responsibility. — Our study of these two classes of cases would indicate that, as a matter of fact, the difference between *criminal responsibility* and insanity (*i.e.*, responsibility in the lay and medical sense)

[1] In Appeal of Holder, 7 Crim. App. R., 59 (1911), and Appeal of McQueen, 8 Crim. App. R., 89 (1912), the English Court of Criminal Appeal has held that mental unsoundness, though insufficient to relieve absolutely from responsibility, may yet be cause for reducing the penalty.

For examples of cases in which this doctrine is repudiated, and reasons therefor, *see* Commonwealth *v.* Cooper, 219 Mass., 1 (1914); Commonwealth *v.* Wireback, 190 Pa. St., 138, 42 Atl., 542 (1899); and Witty *v.* St., 75 Tex. Crim. R., 440, 171 S. W., 229 (1914). The Cooper Case is interesting as a typical example of cases where the question of limited responsibility becomes exceedingly important. In that case, "the concensus of opinion of the alienists, based upon his family history and their examinations, classified him as constitutionally defective, or possessed of weak and diminished will power and self-control, although they were not agreed that he lacked sufficient capacity to distinguish 'between right and wrong.'" (P. 4.) Upon this evidence, defendant asked for a ruling that, if "the jury find the defendant had the mental disorder called 'constitutional inferiority', and if the jury find that such disorder carries with it a limited, that is, a diminished degree of responsibility for the act, he cannot be found guilty of murder in the first degree." He also asked for instructions that "if the defendant was suffering from a mental disease called 'constitutional inferiority', and if the jury find that in consequence of said mental disease his will power was diminished, the jury should inquire as to whether he had sufficient power to deliberately premeditate the commission of this crime, so as to be liable for murder in the first degree", and "if the jury find that in consequence of suffering from 'constitutional inferiority' the defendant was overborne by some irresistible and uncontrollable impulse, springing from mental defectiveness or disease, to do the act which he knows to be wrong, he is not legally responsible and cannot be convicted of murder in the first degree." The Supreme Court of Massachusetts held that these instructions were properly refused on the ground that "the defendant, even if abnormally deficient in will power and of retarded mental development, could be found still to have been fully conscious of the criminal character and consequences of his act." (Pp. 4, 5, 6.) *Compare* with this the action of the District Attorney of Suffolk County, Massachusetts, in a recent case, as discussed in Chapter 3, p. 66.

is not, in practice, so sharp as Oppenheimer,[1] Stephen, and others would have us believe. Even judges are often perplexed in borderline cases as to whether or not there is sufficient evidence of mental unsoundness to warrant a charge to the jury on the tests of irresponsibility; and if there is, whether it satisfies the required legal tests. How much more then must the jury be perplexed in such cases! We can readily assume that the jury often does violence to the pristine sacredness of law-made notions of criminal responsibility; that legal responsibility is often forced to relax her stern countenance; and that responsibility, in the popular sense, based upon the facts and prejudices of the particular case, upon the sentiments of the "twelve good men and true", frequently is, in the last analysis, the deciding factor. This is individualization in a crude way, and is, of course, open to abuse; for, in the words of Professor Vinogradoff, quoted at the beginning of this chapter, "juries do not always show a high standard of perspicacity." [2]

But if the borderline cases of mental defect and disease do not, according to the leading cases, exempt from criminal responsibility nor reduce the degree of the offense, conversely, some judges point out that "it is not necessary that the defendant should have been *completely* deprived of his reason." [3] In those decisions, often cited, where it apparently is insisted that mental disorder, to exempt from criminal responsibility, must have been so intense and overwhelming as utterly to have deprived the party of his reason with respect to the act, a close examination will usually reveal the fact, so patent throughout the books on the subject of insanity, that *scraps* of opinion have been lifted out of their setting and quoted as constituting the whole law. As a matter of fact, the judges' charges and opinions, when taken as a whole, establish the truth that, just as it is impossible to say with exactitude where mental soundness leaves off and disease begins, so the courts, in the practical application of their apparently hard-and-fast rules of irresponsibility, have found it impossible to be consistent.[4]

[1] "Criminal Responsibility of Lunatics", pp. 2, 10, 251.

[2] P. 187. [3] State *v.* Richards, 39 Conn., 591 (1873).

[4] *See*, for example, State *v.* Cole, 18 Del., 344, 353, 45 Atl., 391, where the doctrine was laid down that insanity must be complete and absolute before it will excuse from responsibility. And this case has frequently been quoted with others in support of such doctrine. But such statement was made *preliminarily*, by the trial court in charging the jury; and inconsistently, the court followed it up with these words: "After all has been said that can be said in elucidation of the subject, we are compelled to return to the plain and simple question, whether the person, at the time he committed the act, had

And, as has been said, if this is true of judicial pronouncement on review of appealed cases, one can easily imagine how much more true it is in the case of an unscientific jury's disposition of these difficult cases at the trial.[1] In the realm of the borderline cases of mental unsoundness, then, it is especially true that the jury represents prevailing public opinion and sentiment, — a sort of miniature group mind,[2] disposing of cases not so much on the basis of the charges of trial judges as to the law of the tests of irresponsibility, as upon its own conception of rough-and-ready justice.[3] Especially true is this in those jurisdictions where, as in Illinois, the jury judges the *law* as well as the facts,[4] and where, as in California and a few other States, the jury has the power of fixing the penalty.

Section 3 — "Child-of-Fourteen" Test

Turning now to the tests of irresponsibility themselves, which have become crystallized in judicial opinion through years of almost totally uncritical repetition by judge after judge, it may be said at the outset that the State courts fall into certain groups with reference to the tests; and, in general, the following doctrines may

sufficient mental capacity to distinguish between right and wrong in respect to that act and the power to choose whether or not he would do the act." This and similar cases, cannot therefore be cited in support of the allegation that "insanity must be so intense and overwhelming as utterly to deprive the party of his reason in regard to the act", — a statement with which the charge in this case began. Because of the habit of lawbook compilers of quoting scraps of opinions in support of certain legal doctrines in this field, the standard treatises and compilations have been found by the writer to be misleading in most instances.

[1] *See* Pound's "Introduction" to the English version of Saleilles' "The Individualization of Punishment", pp. xvi, xvii, where Dean Pound gives some interesting examples of individualization by a jury in California, where, as in some other jurisdictions, the jury has the power to fix the penalty. "As one studies the cases he can see to a certain degree that broad lines were drawn by the juries, even if crudely. But one of these lines which is most apparent is between picturesque murder, however brutal, and brutal murder without the picturesque element. Then, too, the cases show that the choice of penalty depends very largely on the temper of particular juries. . . . Obviously the crude individualization achieved by our juries, and especially by leaving the assessment of penalties to trial juries, involves quite as much inequality and injustice as the mechanical application of the law by a magistrate."

[2] *See* "The Group Mind", by William McDougall.

[3] This is especially brought out by Dean Pound's study referred to above.

[4] In the Third Annual Report of the Chicago Crime Commission, the President of that Commission speaks of the abuse of the defense of insanity, and the escape of many malefactors through "insanity avenue." On my writing the Secretary of the Commission for specific data upon which this statement was based, he replied that it was largely attributable to the fact that the jury is the judge of the law as well as the facts, in Illinois.

be distinguished, although in one or two States it is difficult to say exactly which tests are in operation:

1. Child-of-Fourteen Test; 2. Right-and-Wrong Test (including Knowledge of "Nature and Quality", or "Consequences" of Act); 3. Irresistible Impulse Test; and 4. Delusion, — (not as a separate test, but as a concept associated with the right-and-wrong or irresistible impulse test or both). As to the child-of-fourteen test, we discussed its history in the chapter on the origins of the tests, and we met it in its American guise in the case of State *v.* Richards.[1] It deals, as we have seen, with mental *defect*[2] rather than mental disease. It is based upon the presumption of the criminal law that a child under seven is conclusively incapable of committing a criminal act, and one between seven and fourteen is probably incapable of committing such act, because of the undeveloped mentality and moral sentiments of persons at such tender years. In the cases of children between seven and fourteen the presumption is rebuttable, *i.e.*, it may be proved, in any particular instance, that a child under fourteen and over seven actually did possess that degree of mental capacity which made it responsible for its criminal acts.

We have discussed this test in connection with the concept of partial responsibility. By now it must be evident that the distinction between total and partial insanity which Hale and modern judges attempt to draw must always be more or less artificial. We have been unable to find any other jurisdiction, in addition to Connecticut, where Hale's child-of-fourteen concept (which, in the case of mental *defect* at least, comes nearest to any successful drawing of the line between total and partial mental disorder) has been followed.

Importance of Intelligence Tests in Evaluation of Criminal Responsibility. — With the development of modern psychological testing the question presented by this rule ought to become increasingly important in the law. However, there are signs that the courts look with disfavor upon applying a presumption of law, designed for children, to adults of the mental age of fourteen years or less. If the law must continue to abide by more or less arbitrary tests of irresponsibility, it seems reasonable that the rules governing children should be taken over and applied in the case of adults of

[1] Referred to on p. 192.
[2] Although Hale intended it to refer to cases of mental *disease*.

the mental age of fourteen or under.[1] A well known psychologist has this to say upon this point:

It is obvious that if we have in our population a considerable group of persons who are children in mentality although adults in years, in stature, and in physical activities, we have a group for which we must fix a different type of criminal responsibility than the law has fixed for the rest of mankind.[2]

It should be pointed out, however, that psychologists are more and more realizing that the intelligence alone, as measurable by standard intelligence tests, while helpful, is not by any means an exclusive criterion of the personality of the individual, or of his *capacity to live up to the requirements of the criminal law.* In other words, the emotional-volitional life of the delinquent must be studied in addition to his intellective capacity.[3]

[1] *See*, for example, State *v.* Schilling, 112 Atl., 400 (N. J.) (1921), discussed on pp. 195, *et seq.*

[2] An interesting problem is raised by the findings of modern large-scale intelligence testing; namely, whether our idea of the criminal responsibility of the mentally defective must not undergo radical revision. The rule of the rebuttable presumption of criminal incapacity of infants of the chronological ages of seven to fourteen was based upon the popular belief that with the exception of the lowest idiots and the starkest madmen, average persons are capable of so guiding their actions as to make them conform to the demands of the law; but children between seven and fourteen, although often incapable of such intelligent conduct, *might*, in individual cases, be proved to have been of sufficient intelligence to be accountable for their acts. Hale, as we have seen, applied this rule by analogy to the case of the partially insane. Most writers on psychology and brain pathology have assumed that the "brain and mind develop normally until about the age of twenty. Terman more recently came to the conclusion that the average mental age of adults is approximately sixteen, while mental examinations in the military camps and elsewhere during the great mobilization in the United States in 1917–1918 would seem to indicate that even this is much too high." Out of some 1,700,000 men (unselected except as to draft, chronological age, and minimum physical requirements), tested psychologically with group tests, and over 83,000 individually examined men, an average mental age of adults was obtained of only about thirteen years, rather than sixteen as suggested by Terman and others. The result would indicate "that the level of intelligence, on the average, reaches its peak by thirteen years of age, and is not thereafter exceeded. Experience and maturity (Doll) may add various factors to the mental powers, but the intelligence level remains fixed."—"Mental Deficiency", by William Burgess Cornell, "Nelson Encyclopedia of Medicine." If the findings of the Army intelligence tests are reliable, and the average mental age of persons is between thirteen and fourteen years, it would seem that Hale's child-of-fourteen test for mental defectives, and the seven-to-fourteen year rule of criminal responsibility of children upon which it is based, ought to be modified to make the *mental* age of persons accused of crime during which there is a rebuttable presumption of criminal incapacity, say, seven to twelve years.

[3] Dr. Henry H. Goddard, in his "Psychology of the Normal and Subnormal", gives a good account of the importance of the emotional life in the capacity of mental defectives. Basing his views upon the theories of Mosso and Cannon,

Not Low Mental Age, but Its Effect on Knowledge of Right and Wrong, Excuses. — There is another interesting point brought out by a subsequent decision in Connecticut, namely, that it is not the low mental age *as such* which is the criterion of irresponsibility of mental defectives before the law, but the effect of such low mental age upon such a delinquent's knowledge of right and wrong [1] (or upon his power to resist an impulse to do the act, in those jurisdictions where irresistible impulse is a test). In People *v.* Saxon [2] it was held that the trial court properly refused an instruction as follows:

> If you find that the mentality of the accused was very low, and not as high *in some departments* as a child six years old, then your verdict should be acquittal.
> (Italics ours.)

The Supreme Court of Errors of Connecticut was of opinion that " this was not a proper rule for measuring the responsibility of the accused for his act. It does not point out the departments [3] in which, if the defendant's mentality is inferior to that of a six-year-old, he is relieved from criminal responsibility. Some children are of higher mentality and intelligence than others. The moral traits of children differ the same as those of older persons do. Children's powers of thought, perception, attention, volition, and memory differ. A child, even if the average one be taken, furnishes, at best, a poor criterion by which to test the mentality of a person of full age. If it is a proper one in any case, it is in one

he concludes that "only higher intelligences have the highest emotions", *i.e.*, those listed by McDougall as "primary emotions" (*see* his "Social Psychology"). Doctor Goddard shows the importance of taking account of the emotional make-up of feebleminded persons in planning a program of work and play.

[1] It is for this reason that the "infant rule" is usually included under the "right-and-wrong" test; but it deals with a sufficiently distinct subject matter to be listed as a separate test.

[2] 87 Conn., 5, 16, 86 Atl., 590 (1913).

[3] This is, of course, a valid requirement; when it comes to conduct, the temperamental make-up of the feebleminded is often of more importance than the purely intellectual age. *See* the following important contributions by Dr. Guy G. Fernald, Massachusetts Reformatory, Concord, Mass., in which the fundamental significance of *character* (*i.e.*, the conative-affective springs of conduct and the sentiments and complexes built about them, which in their totality comprise character) is convincingly emphasized. "A Method of Personality Diagnosis and Evaluation", reprinted from *Studies in Mental Inefficiency*, London, Vol. II, No. 2, April, 1921; "Importance of Character Study in Criminology", Annual Congress of American Prison Association, Oct. 22, 1919; "Field of the Prison Physician," *Id.*, Oct. 7, 1922.

like that of State *v.* Richards,[1] . . . where the claim was that the accused was demented; and, as the jury were told in that case, comparison should be limited to 'their respective appreciation of right and wrong and of consequences and effects.'" [2]

Again, in the more recent case of State *v.* Kelsie,[3] the defendant

was, for a time, under the professional and expert observation of Dr. James C. O'Neil at the Vermont State Hospital at Waterbury, having been sent there for that purpose by order of the court (it does not appear whether this was done by the court about to try him for murder or in some other proceeding). The defendant called this doctor as a witness "who was allowed to give, and did give, during his examination and cross-examination a very clear, comprehensive, and intelligent account of the various tests that were applied to the accused to determine his physical condition and his mental development, together with his responses and reactions, and from it all gave his conclusion that the accused was mentally and morally an eight-year-old boy. The purpose of this evidence is apparent. At common law an infant under the age of seven years was conclusively presumed to be incapable of committing a crime. Between seven and fourteen, he was presumed to be incapable but the fact might be shown otherwise." So if common law rules were to be applied, the respondent had by this evidence, if believed, raised a presumption of his incapacity, and made a jury question of it.[4]

But the court held that "in the matter of criminal responsibility the law makes no distinction between imbecility and insanity", and that "the test of the law in all cases is: Did the accused, as applied to the act in question, have the mental capacity to understand the character, consequences, and quality of such act, and successfully to resist the impulse to do it?" Consequently there was no error in the proceedings and sentence was ordered executed. Here was a case of one group of public officers — the courts — arriving at a different conclusion from another, — the medical experts in charge of the State Hospital; for there was nothing to prevent the appellate court from ordering a new trial on the ground

[1] *Ante*, p. 191.
[2] 87 Conn., 5, 16, 86 Atl., 590 (1913).
[3] 93 Vt., 450, 451 (1919).
[4] *Id.* According to H. H. Goddard, "The Criminal Imbecile" (1915), the case of People *v.* Gianini, tried in New York in 1914, was the first in which the results of the application of standard intelligence tests were admitted as evidence and the mentality of the accused was thus determined. Gianini was acquitted on the ground that he was an imbecile, did not know the nature and quality of his act, nor its wrongfulness.

that the verdict appeared to be contrary to the evidence, as given by the State's own medical experts.

In connection with *knowledge* of right and wrong, much more than the rating on the basis of one of the standard intelligence tests must be considered both in evaluating the criminal responsibility of the feebleminded and in prescribing the appropriate socio-correctional treatment. On the basis of many years' experience, Healy [1] points out an important fact that most persons, in discussing the problem of feeblemindedness, are prone to overlook; namely, that "there can be no doubt that the safest and most practical definitions for feeblemindedness and its subclasses are to be made by combining the statement of *known social disabilities, or special capabilities*, with the findings by accredited age tests." (Italics ours.) In other words, there is much more to social capacity than the measurable intelligence; and the intelligence quotient, unless it is carefully analyzed, is liable to be misleading. Such factors sometimes making for social success, as good insight on the part of the defective into his own mental condition, exceptional language ability, outstanding motor ability, etc., may very well take the individual out of the theoretical classification of moronity as determined by the standard intelligence tests, and place him in the class of socially capable individuals. Again, mental deficiency may manifest itself in special directions only, while in others the alleged mental defective may not only be normal, but sometimes supernormal. For example, an individual may grade normal or above in all departments of mental activity except in the employment of arithmetical processes, or in language ability, or in the power or mental analysis and synthesis generally, or in the capacity for exercising good judgment, common sense, in the ordinary affairs of life. On the other hand, the intellectual processes may be apparently intact, or even exceptional in some respects, but there may exist side by side with this such a lack of self-control as to warrant the use of the concept "defective" in characterizing the individual's mental make-up. Healy [2] cites many cases illustrative of mental defectiveness existing together with "special abilities", some of which abilities are more significant socially than others, however. This fact of disproportionate development of various intellectual

[1] "The Individual Delinquent", pp. 450, *et seq.*
[2] *Id.*, Chapters XV, XVI, XVII.

abilities and disabilities and of the various components of mental activity in general (such as high intelligence existing with pathologically weak self-control, or extremely fluid emotional play) has not been sufficiently recognized by the courts and by present-day educational psychologists. Judging from existing decisions, this entire field of the psychology of special abilities and disabilities is practically a closed book to the law. The attention of lawyers and judges is invited particularly to the class to which Healy has given the descriptive title, "verbalists", — mental defectives whose recognition in the early stages of legal proceedings is especially difficult, because they possess extraordinary verbal gifts, which effectively mask their real mental condition. Because of this special ability, a verbalist defective may continue to engage in antisocial adventures for many years, his escapades being set down to "downright wickedness", "perverseness", "evil", before they are seen in their true light. It is this type of case, particularly, that indicates how little practical good can be obtained from treating crime in the mass, and attributing it to an "evil heart", a "black conscience", a "depraved will", without knowing exactly what these terms signify in the *individual delinquent's case*.

From the foregoing it is clear that something more than the test of apparent capacity of knowledge of right and wrong as evidenced, for example, by low cunning, preparation for escape after commission of the act, etc., is necessary if the law is to evaluate correctly the criminal responsibility of the mentally defective, and if it is to provide for intelligent socio-penal treatment for these cases. With some mental defectives little can be done; for others a more hopeful prognosis, as based upon the actual experience of workers in this field, is possible.

Section 4 — Right-and-Wrong Test

Extent and Variations of this Test. — The right-and-wrong test, *without modification*, and regardless of the type of mental disorder and the symptoms disclosed by the evidence, is to-day operative in most American jurisdictions, including the Federal courts.[1] But this statement requires amplification. All State courts, with the possible exception of those in New Hampshire, employ the knowledge-of-right-and-wrong rule of criminal irresponsibility, *as far as*

[1] *See* note at end of this chapter.

it goes. Some, however, have variously modified it by recognizing that mental disorder is not always represented primarily by a disturbance of the cognitive sphere of mental life alone. Such courts provide for recognition of the fact of disease of the volitional-emotional modes of mental life, by means of the irresistible impulse test, which is laid down side by side with the right-and-wrong rule. The irresistible impulse doctrine will be discussed later.

In the note at the end of this chapter will be found a list of leading and most recent cases in those jurisdictions in which the right-and-wrong rule exclusively is in operation. At this point, in order to obtain some explanation of the amazing and confusing array of shades and complexions of but one feature of the famous Opinion of the Judges after McNaghten's Case, — the right-and-wrong rule — it will be necessary to advert briefly to that famous case again.

Some Features of McNaghten's Case Reviewed. — From our survey of the history of the tests, we may say that before 1843, the date of the Opinion of the Judges of the King's Bench following upon McNaghten's acquittal, the right-and-wrong rule was stated in substantially the following terms: To be entitled to acquittal "on the ground of insanity", the accused must have been "so insane" at the time of the commission of the offense charged, that he did not know "right from wrong." This statement was modified, as we have seen, by the Opinion of the Judges, the version of the right-and-wrong test there laid down being as follows: "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*, that he did not know he was doing what was wrong." [1] (Italics ours.)

Here we have several elements brought out, which, individually or together with other concepts, have furnished the raw material for the various forms of the right-and-wrong test in America. First, the test refers to knowledge of the nature and quality of the act; this is a reference to the cognitive mode of mental life in its highest forms.[2] Whether the judges used "nature and quality"

[1] The full answer of the Judges, covering this test, was given in Chapter 6.

[2] Goddard, "The Criminal Imbecile", pp. 97, 98, says that to know the quality of an act requires knowledge of all that distinguishes it from other acts; "such knowledge implies mental capacity which is not possessed by a boy of twelve

as synonymous, or whether they intended each word to have its distinct meaning, and, therefore, that knowledge should embrace two different factors with regard to the act, is not clear.[1] These words have, however, given rise to many nice cases and much conflict of opinion. Secondly, the test refers to knowledge with reference to the particular act under consideration, and not in general, with respect to all acts. But we have seen that the cases before the Opinion was rendered referred largely to "wrong" in general; and this has led to some confusion in subsequent decisions.[2] Thirdly, the disjunctive " or " is used in the Opinion of the Judges, providing that in the event the accused did have the cognitive capacity intact, if, nevertheless, his moral nature was so weakened as to have made it impossible to know that the act he was doing was wrong, he would be excused.[3] This, of course, assumes that the moral sentiments are entities apart from the cognitive capacity of the mind, instead of the truth that sentiments are complexly associated ideas, with definite meanings, and their emotional coloring. This suggestion as to the moral nature of the act has given rise to much legal discussion as to the doctrine of "moral insanity", most jurisdictions refusing to recognize such an entity and confusing it with cases which other jurisdictions designate as examples of irresistible impulse. Still another polemical firebrand has been thrust into the law of insanity by the reference of the judges to *legal* wrong. We have seen that the judges treated the first question of the House of Lords with regard to the right-and-wrong test as referring to wrong in the sense of prohibited by " the laws of the land", but they attempted to explain and qualify this.[4] This has only led to more confusion.

years of age. It involves experience; it involves abstraction, which is notoriously lacking in such persons (*i.e.*, the feebleminded). If there is one characteristic more noticeable than another among the high grade imbeciles or morons, it is their failure to deal with abstract ideas; to draw generalizations from specific instances."

[1] Oppenheimer, "Criminal Responsibility of Lunatics", makes out a case for the Judges' having intended a distinct and separate meaning for these, pp. 142, *et seq.* If they did so intend, however, why did they use the word "it" as referring to both nature and quality, instead of "them", or a similar word implying the plural?

[2] According to the weight of modern authority, however, the test refers to the particular act.

[3] *See*, for example, note at end of this chapter, covering the Nebraska law.

[4] *See* p. 168. In answer to the second and third questions, however, the judges approved the *moral* wrong test. In attempting to clarify, they only confused; hence, the confused state of American law on the subject is at least partially attributable to the famous Opinion of the Judges.

Elements of McNaghten's Case in Modern Species of Right-and-Wrong Test. — If the reader will now consult the note at the end of this chapter giving the various species of the right-and-wrong test in operation not only in different jurisdictions but in the same State, he will be impressed with the fact that the same process of singling out one or more elements of a definition, that we have criticized throughout this study as characteristic of the history of the tests, has been going on in American courts with reference to the right-and-wrong test particularly. Some courts deal with right and wrong *in general*, some with right and wrong *as to the particular act involved*, and many of them use the concepts *interchangeably* and *indifferently*. Some States have adopted the right-and-wrong test from the point of view of *moral* wrong; some from the point of view of *legal* wrong, some include *both;* some cite the "nature and quality" test *disjunctively* with the right-and-wrong rule, some *conjunctively*. Many decisions jumble these all together, throwing in other scraps of opinion and dictum for good measure; and some trial judges, in States where, according to the decisions of the local supreme courts, the right-and-wrong test *only* is the rule, have cheerfully included "requested instructions" to juries to the effect that "irresistible impulse", "overmastery of the will", etc., etc., — *even where knowledge of right and wrong exists*, — excuses from responsibility. Moreover, appellate courts, in reviewing such cases, have sometimes either closed an eye to this inconsistency between the law as they solemnly announced it in the books, and the law as applied by trial judges in action; or they have noticed it, merely commenting that the instructions given at the trial were very favorable to the accused, etc.

The Right-and-Wrong Test in Action. — For example: In a North Carolina case[1] the trial court, at defendant's request, charged the jury that "if the jury is satisfied from the evidence that at the time defendant shot the deceased, defendant was so affected in his mind and memory that he was not able to distinguish right and wrong and had no knowledge and understanding of the character and consequences of the act, and *power and will to abstain from it*, then he was not a legally responsible being, and the jury should find (defendant) not guilty." This test is in direct opposition to the existing law in North Carolina, where only the right-and-wrong test and nature-and-quality

[1] State *v.* English, 164 N. C., 497, 503 (1913).

rule have been laid down as authoritative law. Yet the inclusion in the charge of the "*power* and *will* to abstain" from the act known to be wrong was not criticized by the Supreme Court.

Again, in a recent Missouri case,[1] although the test in that State is the right-and-wrong rule *alone*, the Supreme Court made no adverse comment about, indeed, it inferentially approved, a charge given to the jury at the trial to the effect that the defendant should be acquitted if the jury found "that he did not know the nature of the act he was about to commit . . . that he did not know the act was criminal and would subject him to punishment, that he had no capacity to distinguish right from wrong, as to the act with which he stands charged, *or* that he was *impelled by an insane impulse*, and his powers were so impaired by disease that he *could not restrain* from doing the act." Other cases could be cited [2] which would tend to prove that whatever may be the *formal* statement of existing tests of irresponsibility in the different States, there is no guaranty that such tests are exclusively adhered to in practice; so that though the knowledge test *alone* may nominally exist in most jurisdictions, instances are not infrequent where other tests, officially taboo, are actually given the jury.

This habit of mixing numerous tests and scraps of tests in a judge's charge on the intricate questions of insanity and irresponsibility is by no means uncommon. It proceeds partially from a desire on the part of trial judges to be safe in the event the case is appealed from; since, out of the various and sundry odds and ends of tests included in a jumbled charge to a confused jury, some statement of the law will be found sufficient, by the appellate court, to sustain the verdict. The "sundries" charge in some cases also proceeds from the humanitarian attitude of some trial judges, who are only too glad to include as many requested instructions, together with their own, as will give the defendant every advantage of a "square deal." At any rate, it illustrates the fact that the law in action, as to the tests of irresponsibility, is not always a matter of the calm application of the rigorous, authoritative tests, laid down

[1] State *v.* Miller, 225 S. W., 913, 915 (1920).

[2] *See*, for another good example, State *v.* Clancy, 38 Nev., 181, 182, 183 (1915), where the appellate court impliedly approved a charge that the jury must believe "that the defendant . . . was without sufficient reason to know what he was doing, *or* that, as the result of mental unsoundness, *he had not sufficient will power* to govern his action by reason of some *insane impulse which he could not resist or control*, etc."

in supreme court decisions, to the facts at the trial. If this be so, then one of the chief reasons for having strict tests in such cases at all disappears, or at any rate, it loses much of its force;[1] unless the tests that can be substituted will make for greater uniformity of outcome in these cases. In the concluding chapter we hope to suggest a means of giving the jury a more intelligent basis upon which it may found its action, and one which it is believed will guarantee greater uniformity of results and operate with more justice than the present system is inherently able to achieve.

Meaning of Knowledge Test. — As may readily be surmised, there is considerable confusion in case and commentary as to the fundamental knowledge test. Oppenheimer[2] discusses the question in connection with the difference between "nature" and "quality" in this test; and concludes that the knowledge of the nature, quality, and wrongfulness of the act embraces the following elements:

1. The defendant "must be aware of the identity of the actor, of the true nature of the material objects upon which he acts, of the operation of the physical agencies which he sets in motion, and of so much of the existing facts as are ingredients of the *corpus delicti*. . . .

"2. He must have such knowledge of the abstract principle of law as to appreciate that certain classes of acts are threatened with criminal sanctions. . . .

"3. He must be able to subsume a concrete act under its proper legal category. . . . He must have such intelligence left as enables him roughly to appreciate what sort of a crime he is committing and in a popular way to classify his act according to its gravity."

But one has only to study the cases in the reports to see that such an analysis is that of the cloistered scholar. Certainly we have never come across a judge's charge which made the knowledge test as clear to the jury. It is true that judges here and there have attempted to explain the required knowledge to juries; but such

[1] In People *v.* Coleman, 1 N. Y. Cr. Rep., 1, 2 (1881), the reason for having tests of irresponsibility in insanity cases was thus assigned to the jury: "It is important that juries on trials of alleged crime should clearly understand what insanity is, within the established rules of the criminal law. Without such rules, the administration of justice in such cases would be dependent upon the shifting caprices of courts, or the equally unsubstantial passions and prejudices of jurors." But if, in action, the rules are jumbled to an extent that confuses more than instructs the jury, the purpose of any rules or tests is defeated.

[2] *Op. cit.*, pp. 141, *et seq.*

explanations have been so long and, frequently, so confusing, if not contradictory, that the judges would have done much better to rest content with the bare statement of the knowledge test.

Stephen, too, attempted to elucidate the word "know" in the famous Opinion of the Judges:

> By "knowing either that an act is illegal or that it is morally wrong", I understand being able to judge calmly and reasonably of the moral or legal character of a proposed action; and . . . "by controlling his own conduct" I mean able to refer calmly and reasonably to those motives which would lead men in general to resist temptation to crime and to allow proper weight to them.[1]

But is it to be implied that juries will look for any meaning but the obvious one in the simple yet complex word "know"? All that may safely be implied is, that different juries interpret the term differently. Moreover, the jury may interpret the word one way, while the judge, witnesses, and experts interpret it another way; and if by "know" the expert understands the term in the broad sense that Stephen used it, while the jury takes the meaning of the term in the vernacular, confusion inheres in the whole proceedings. This seems to have been the condition of affairs in the Thaw Case.[2]

The Meaning of "Wrong." — Let us now consider in detail but one more of the numerous sources of confusion, — the concept "wrong." As a matter of fact, the distinction between legal and moral wrong is, on the whole, unimportant; for as to most serious antisocial acts, law and morals are indistinguishable. But it has caused not a little confusion in the formal enunciations of the right-and-wrong rule by courts of last resort.

[1] "History of the Criminal Law of England", Vol. I, p. 125.

[2] *Cited* by Morton Prince, "The Criminal Responsibility of Insane Persons", reprinted from *Journal of the American Medical Association*, Vol. XLIX, Nov. 16, 1907, pp. 1643–1650, p. 23. This expert of wide and broad experience says: "I do not find that the broad construction (*i.e.*, Stephen's) is always or even generally put on the law. Certainly it was not in the Thaw case, as I have already pointed out. There Judge Fitzgerald, in his charge to the jury, simply laid down the formula to the jury without attempt at interpretation or qualification. The jury were left, if they saw fit, to understand, as I should have understood if I had been one of the jurors, the word know as commonly used in common parlance and not in any technical sense. The jury was expressly charged, too, that the law did not recognize irresistible impulses. And yet in the same case one of the experts, as he has since told me, in giving his answer to the hypothetical question as to whether the defendant did or did not know the quality of his act, took the word in the broad sense, similar to that given to it by Justice Stephen. One thing is certain, that, unless a broad interpretation is given to the test formula, it must at times lead to monstrous consequences."

As late as 1915, People *v.* Schmidt,[1] an important decision which has been quoted in many jurisdictions, construing the meaning of the word "wrong" in the right-and-wrong rule, was required in New York. It is instructive to consider the able opinion of Judge Cardozo in this case, as it illustrates the significance of but one word in the Opinion of the Judges of England, and the futility of legal logic as applied to mental disease. The facts, as outlined in the Judge's opinion, follow:

In September, 1913, the dismembered body of Anna Aumuller was found in the Hudson River. Suspicion pointed to the defendant (Father Schmidt). He was arrested, and confessed that he had killed the woman by cutting her throat with a knife. He repeated this confession again and again. He attempted, however, to escape the penalty for murder by the plea that he was insane. He told the physicians who examined him that he had heard the voice of God calling upon him to kill the woman as a sacrifice and atonement. He confessed to a life of unspeakable excesses and hideous crimes, broken, he said, by spells of religious ecstasy and exaltation. In one of these moments, believing himself, he tells us, in the visible presence of God, he committed this fearful crime. Two physicians of experience, accepting as true his statement that he was overpowered by this delusion, expressed the opinion that he was insane.[2] Other physicians of experience held the view that his delusion was feigned, and his insanity a sham. The jury accepted this latter view, and by their verdict found him guilty of murder in the first degree.

Among the grounds for a new trial, urged on appeal, was the allegation that the trial court erred in the definition of the degree of insanity that relieves from responsibility for crime. Under the New York Penal Law (sec. 1120), "a person is not excused from criminal liability as an idiot, imbecile, lunatic or insane person, except upon proof that, at the time of committing the alleged

[1] 216 N. Y., 324, 110 N. E., 945 (1915).

[2] We are not here concerned with the *interpretation* of these same facts by the trained psychiatrist. The reader who is interested in comparing facts as they appear in judicial decisions with their *significance* to the psychiatrist is invited to read Dr. William A. White's illuminating "Insanity and the Criminal Law", especially pp. 63 to 75, where the facts (given above from the point of view of an appellate judge who is also a great scholar) are interpreted psychiatrically by one of the learned experts in the Schmidt Case. Such reader will, we are sure, be convinced, in spite of the fact that Schmidt himself, on appeal, insisted that his stories at the trial were fabrications, and that he was not mentally unsound, — a fact made much of in the Opinion of Judge Cardozo, — that Father Schmidt was not sane when he committed the atrocious crime charged against him.

criminal act, he was laboring under such defect of reason as: (1) not to know the nature and quality of the act he was doing; or (2) not to know that the act was wrong."

The trial judge told the jury that "wrong" means "contrary to the law of the State." Judge Cardozo held that the word "wrong" in the statutory definition must be interpreted in the light of its history. Beginning with the early English law, when a madman charged with murder was not acquitted, but "a special verdict was given that he was mad, and then the King pardoned him", Judge Cardozo skillfully sketched the history of the law through the period of the wild beast test, Bellingham's Case, and other cases cited by Collinson, in 1812, when the capacity to distinguish right from wrong was "put forward as another test." "As propounded in these cases," said the Judge, "it meant a capacity to distinguish right from wrong, not with reference to the particular act, but generally or in the abstract. Sometimes it was spoken of as a capacity to distinguish between 'good and evil.' . . . Wrong was conceived of as synonymous not with legal but rather with moral wrong. Lord Mansfield told the jury in Bellingham's Case: 'It must be proved beyond all doubt that at the time he committed the atrocious act, he did not consider that murder was a crime against the laws of God and nature.' That became for many years the classical definition." Judge Cardozo then passed on to the Opinion of the Judges after McNaghten's Case, saying that the answer to the second and third questions [1] is the definition "that has been carried forward into our statute. The judges expressly held that a defendant who knew nothing of the law would none the less be responsible if he knew that the act was wrong, by which, therefore, they must have meant, if he knew that it was morally wrong." "But," continued the Judge, "whether he would also be responsible if he knew that it was against the law, but did not know it to be morally wrong, is a question that was not considered. In most cases, of course, knowledge that an act is illegal will justify the inference of knowledge that it is wrong. But none the less it is the knowledge of wrong, as conceived of as moral wrong, that seems to have been established by that decision as the controlling test. That must certainly have been the test under the older law when the capacity to distinguish between right and wrong imported

[1] *Ante*, pp. 178, *et seq.*

a capacity to distinguish between good and evil as abstract qualities. There is nothing to justify the belief that the words right and wrong, when they became limited by McNaghten's Case to the right and wrong of the particular act, cast off their meaning as terms of morals, and became terms of pure legality." [1]

Judge Cardozo was then forced to consider the fact that, as ably argued by Judge Ladd,[2] Maudsley,[3] Stephen,[4] and others, the answer to the first question of the famous Opinion of the Judges is inconsistent, as to the meaning of the term "wrong", with their answer to the second and third questions. The answer to the third question discusses the case of those strange "persons who labour under such *partial delusions only*, and are not in other respects insane", and says of one of these that "nothwithstanding the accused did the act complained of with a view, under the influence of insane delusions, of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable, according to the nature of the crime committed, if he knew at the time of committing such crime that he was acting contrary to law, by which expression we understand your lordships to mean the law of the land." Here Judge Cardozo disposed of the manifest conflict in the answers of the Judges by pointing out, first, that not the answer to the first, but to the second and third questions, were incorporated into the law of the State of New York; secondly, that the "conflict is more apparent than real", because "the answer to the first question, though it seems to make the knowledge of the law a test, presupposes the offender's capacity to understand that violation of the law is wrong. It applies only to persons who 'are not in other respects insane.' . . . A delusion that some supposed grievance or injury will be redressed, or some public benefit attained, has no such effect in obscuring the moral distinctions as a delusion that God himself has issued a command. The one delusion is consistent with knowledge that the act is a moral wrong, the other is not." [5]

Criticism of the Decision in the Schmidt Case.—In this reasoning Judge Cardozo falls into an error similar to that which characterizes those decisions which place delusion on a parity with *mistake*

[1] *Op. cit.*, p. 333.
[2] State *v.* Jones, 50 N. H., 369 (1871).
[3] "Responsibility in Mental Disease", p. 105.
[4] "History of the Criminal Law of England", Vol. II, pp. 154, 159, 160, 163.
[5] *Op. cit.*, pp. 334–335.

of fact by a sane person. Such cases assume (as did the Judges after McNaghten's Case) that the reasoning powers of a mentally diseased person, regarding subjects not connected with the delusion, *remain wholly intact.* Upon this erroneous psychology they build the theory that "a delusion that some supposed grievance or injury will be redressed, or some public benefit attained, has no such effect in obscuring moral distinctions as a delusion that God himself has issued a command", and that "the one delusion is consistent with knowledge that the act is a moral wrong, the other is not." The fallacy lies, of course, in the assumption that a delusion is the expression of a logic-tight compartment of the mind and that the remainder of the mind can calmly reason about the deluded portion; it overlooks entirely the fact that *delusion is but one of the symptoms of certain mental diseases,* and cannot be considered as a superficial phenomenon about which the patient can reason. One mentally diseased person with a delusion may not necessarily be capable of governing his actions to conform to his knowledge of the *legal* wrongfulness of certain acts; and another mentally disordered individual, perhaps of a much milder psychosis than the former, whose delusional system happened to involve a supposed command from the Deity, would not necessarily reason that the laws of God are above those of man. The thought that the act is *legally* wrong may never have entered the mind of a mentally unsound person with a delusion that God commanded him to do it. The whole theory assumes that delusions *mean* to the *diseased* mind what they apparently signify to the *lay* observer upon a superficial examination.[1] It is founded upon an attempt to squeeze the elusive data of mental disease into the legal pigeonhole of a "test" of irresponsibility based upon but a single symptom of mental disorder, and that, without regard to the *latent* significance of that symptom.

The upshot of Judge Cardozo's elaborate opinion (and it is unquestionably one of the ablest in the reported decisions on this point, and has been often quoted with approval) is that "there are *times and circumstances* in which the word 'wrong', as used in the statutory test of responsibility ought not to be limited to legal wrong." But is not this an admission that the right-and-wrong test is not an ironclad, hard-and-fast rule, *similarly applicable* to all cases where insanity is pleaded as a defense? And if so,

[1] *See* Chapter 9.

does it not militate against the very reason for which tests or rules have been devised, — namely, uniformity of application, even-handed justice?[1] From the whole opinion it would appear that where the delusion involves a command of God it is error for the trial court narrowly to restrict the knowledge test to *legal* wrong; for Judge Cardozo says that " knowledge that an act is forbidden by law will in most cases permit the inference of knowledge that, according to the accepted standards of mankind, it is also condemned as an offense against good morals. Obedience to the law is itself a moral duty. If, however, there is an insane delusion that God has appeared to the defendant and ordained the commission of a crime, we think it cannot be said of the offender that he knows the act to be wrong." [2] Why not? May not a mentally diseased person have a delusion that God ordered him to commit an act and still be convinced that it is wrong from the point of view of law and morals? The significance of a delusional system can only be arrived at, however imperfectly, through some means of thorough mental analysis; it is not something to the elucidation of which legal logic is applicable.

In spite of this apparent distinction between cases where the delusion is concerned with a command from God and those in which it is not, it would seem that in most jurisdictions (including New York) a charge to a jury that the defendant is guilty if, though insane, he knew that the act was *legally* wrong, without any reference to moral wrongfulness whatsoever, would probably be reversed on appeal, even where the delusion was not of a command from God. For Judge Cardozo, elsewhere in the same opinion, after admitting that the " definition of insanity established by the statute as sufficient to relieve from criminal liability, has been often and harshly criticized ", wisely adds that " we must not . . . exaggerate the rigor of the rule by giving the word ' wrong ' a strained interpretation, at war with its broad and primary meaning, and least of all, if in so doing, we rob the rule of all relation to the mental health and true capacity of the criminal." [3]

Summary of Status of Right-and-Wrong Rule. — The important right-and-wrong rule, as we have seen, appears in numerous guises and disguises in the law of the various States. Many decisions are

[1] *See* p. 219, note 1. [2] *Op. cit.*, p. 949.
[3] *Id.* Wharton, "Criminal Law", Vol. I, p. 69, and other commentators also hold that the word "wrong" refers to wrong in the popular or moral sense.

concerned with the meaning of the words " right " and " wrong ",[1] many split on the rock presented by the words " it must be clearly proved ",[2] numerous are the cases of difference of opinion as to the words " nature " and " quality ",[3] of the act, and conflict of opinion exists, indeed, regarding almost every word of the famous Opinion of the Judges and its numerous and motley progeny. Though the words " disease of the *mind* " are used, for example, some judges indiscriminately employ the concepts " mind " and " brain ", — a situation which made it difficult for long to convince some skeptical judges that there could be some diseases of mind which did not involve any noticeable organic lesions. Again, though lack of knowledge of the " nature and quality of the act " and knowledge thereof coupled with lack of awareness of its wrongfulness are put *disjunctively* in the Opinion, these two conditions were in some subsequent decisions *both* required to be absent in order to excuse from criminal responsibility; and in many decisions " and " and " or " have been used indiscriminately.

From all this we must conclude that the chief criticism of the right-and-wrong rule arises from the point of view of practicability alone; namely, that it was conceived in confusion, cradled in confusion, and to-day, in its maturity, is almost as confused as the most disordered defendants that are to be tested under it. Its greatest defect is that it is not what it pretends to be; uncertainty of application is its characteristic, rather than the definiteness we would expect from a so-called test or rule. Other criticisms of this test from the point of view of psychology have already been made *en passant*, — especially when we discussed the famous Opinion after McNaghten's Case, — the main one being that this test abstracts, unscientifically, but one element of mental life and

[1] In Bolling *v.* St., 54 Ark., 588, 602 (1891), and in Bell *v.* St., 120 Ark., 530, 560 (1915), the Supreme Court of Arkansas said: "By this test (*i.e.*, knowledge of right and wrong in general or in the abstract) if the defendant knew or could distinguish right from wrong in the general affairs of life he would be guilty, although upon the one matter pertinent to the case his knowledge and power of distinguishing right from wrong were wholly deficient. It can make no difference that the other instruction correctly stated the rule, for the two are contradictory and irreconcilable and we have no means of determining which the jury accepted as its guide."

On the other hand, there are many cases claiming that knowledge of wrongfulness pertains to general knowledge, as will be seen in the footnote digesting the cases in the different States.

[2] This involves the difficult, technical questions of "burden of proof" and "weight of evidence."

[3] *See* Oppenheimer, "Criminal Responsibility of Lunatics", pp. 142, 143.

proceeds upon the following erroneous assumptions: (1) that lack of knowledge of right and wrong is the sole symptom of mental disease; (2) that, further, such knowledge is the sole instigator and guide of conduct, or the most important element therein, and consequently, the sole criterion of criminal responsibility; and (3) that capacity of knowing right from wrong can be intact and functioning perfectly even though a defendant is otherwise mentally unsound. But a criticism of the right-and-wrong test (as of the others) from the point of view of psychopathology must abide our discussion of the important categories of mental disease in a subsequent chapter. Such discussion, it is hoped, will help to indicate the shortcomings of the tests of irresponsibility, and the criticisms directed against them by the other disciplines. In the meantime, we have yet to discuss one or two further tests.

NOTE

JURISDICTIONS EMPLOYING RIGHT-AND-WRONG TEST OF CRIMINAL IRRESPONSIBILITY OF THE INSANE

The following jurisdictions, as far as the writer has been able to determine by a careful study of the cases cited (which was necessary because of the confusion existing, not only in the cases but in the citations to cases, as supporting points made in most commentaries on the law of insanity), employ the right-and-wrong rule only; *i.e.*, they do not provide for exemption from criminal responsibility in the cases of mental diseases which express themselves largely in disorder of the volitional-emotional mode of mental life, if the jury believes the defendant knew right from wrong:

Federal: Right and wrong *morally*, and as to *particular act.* — Guiteau's Case, 10 Fed., 161 (1881); right and wrong morally and *in general.* — Perkins *v.* U. S., 228 Fed., 408 (1915).

Arizona: Morally and as to particular act. — Lautario *v.* St., 23 Ariz., 15 (1921).

California: *Nature and quality* of particular act, and (or) moral wrongfulness. — People *v.* Ashland, 128 Pac., 798 (1912); People *v.* Williams, 194 Pac., 1019 (1912); wrong and *criminal* (*i.e.*, *legally* wrong). — People *v.* Willard, 150 Cal., 554 (1907); People *v.* Bundy, 168 Cal., 777, 145 Pac., 537 (1914); instruction that "insufficient will power" excuses insane person who knows right from wrong, properly refused. — People *v.* Methever, 132 Cal., 326 (1900); "doctrine that under some forms of insanity a person may know the nature of the act fully and at the same time cannot prevent it through paralysis of the will power, . . . uncontrollable or irresistible impulse, has no legal standing." — People *v.* Harris, 169 Cal., 53 (1914).

Florida: Right and wrong morally and as to particular act; irresistible impulse doctrine repudiated. — Hall *v.* St., 83 So., 513 (1920).

Idaho: Moral wrong of particular act. — State *v.* Witter, 11 Idaho, 433, 443 (1906).

Kansas: Nature and quality of particular act and knowledge of moral wrong. — State *v.* O'Neil, 51 Kan., 651, 33 Pac., 287 (1893). Refusal to charge that if defendant knew wrongfulness of act, but was " driven to it by an irresistible impulse arising from *an insane delusion* he would not be responsible ", not error. — State *v.* Mowry, 37 Kan., 369, 15 Pac., 282 (1887). This excludes irresistible impulse caused by " delusion overmastering will " — which most States not recognizing irresistible impulse *in general* (*i.e.*, in nondelusional mental diseases) do not necessarily exclude in diseases whose chief symptoms are delusions.

Maine: Nature and quality and moral right and wrong re particular act; uncontrollable impulse to commit crime known to be such does not modify criminal responsibility. — State *v.* Knight, 95 Me., 467, 50 Atl., 276 (1901).

Minnesota: Right and wrong morally and nature and consequences of act and " mental power sufficient to apply that knowledge to his own case." — State *v.* Shippey, 10 Minn., 223, 229 (1865), State *v.* Williams, 105 N. W., 265, 268 (1905). Test prescribed by statute (*see* Appendix, p. 566).

Mississippi: Right and wrong in abstract; uncontrollable impulse, *unless* caused by a *delusion*, or unless it exists " to so high a degree that for the time it *overwhelms reason, judgment, and conscience* ", repudiated. — (This really means, unless it destroys knowledge of right and wrong.) — Cunningham *v.* St., 56 Miss., 269, 276 (1879). Nature and quality of particular act and knowledge of moral right from wrong; uncontrollable impulse only if destroys knowledge of right and wrong. — Smith *v.* St., 95 Miss., 786 (1905).

Missouri: Moral right and wrong of particular act. — State *v.* Paulsgrove, 203 Mo., 193 (1907); right and wrong as to particular act; irresistible impulse doctrine does not obtain, even under proof of " kleptomania, . . . a form of disease manifesting itself in an irresistible propensity to steal." — State *v.* Riddle, 150 S. W. (Mo.) 1044, 1045 (1912); test not whether accused capable of exercising his will, but whether incapable of distinguishing between right and wrong (in abstract) at time of commission of offense. — State *v.* Weagley, 228 S. W. (Mo.), 817 (1921); but *see* State *v.* Miller, 225 S. W. (Mo.), 913, 915 (1920), where court inferentially approved charge that " he did not know the nature of the act he was about to commit . . . that he did not know that act was criminal and would subject him to punishment, that he had no capacity to distinguish right from wrong, as to act with which he stands charged, *or that he was impelled by an insane impulse*, and his powers were so impaired by disease that he could not restrain from doing the act."

Nebraska: Error to charge that defendant must have been " incapable of understanding the nature of such act, and incapable of distinguishing between right and wrong with respect to such act," since it tells the jury that they may acquit " only in case (1) he was at the time of the fire incapable of understanding the nature of his act, and (2) that he was at the same time incapable of distinguishing between right and wrong with respect to that act. . . . Ordinarily, insane persons comprehend the nature of their acts. When they take life or destroy property, they usually know what they are doing, and often choose means singularly fitted to accomplish the end in view. The jury . . .

may have believed that the defendant applied a lighted match to the property in question, understanding well that combustion would follow, and that the store building and its contents would be reduced to ashes; and they may have refused, for that reason, to acquit him, although reasonably doubting his capacity to distinguish between right and wrong with respect to the act." — Knights *v.* St., 58 Neb., 225, 78 N. W., 508, 509 (1899). But this valid distinction was soon obscured by later decisions, where the rule is capacity to understand nature of act, *and* ability to distinguish right and wrong with respect to it. — Schwartz *v.* Neb., 65 Neb., 196, 198 (1902); uncontrollable impulse not recognized. — *Id.* Incapable of comprehending the nature of the act and unable to distinguish between right and wrong with respect to it, " howsoever such insanity is manifested, whether by insane delusion or any other manner." — Kraus *v.* St., 187 N.W. (Neb.), 895, 897–99 (1922).

Nevada: Moral and legal wrong as to particular act. — State *v.* Hartley, 22 Nev., 342, 360, 40 Pac., 372 (1895). In State *v.* Clancy, 38 Nev., 181, 182, 183 (1915), the court apparently tacitly approves a charge that the jury must believe " that the defendant . . . was without sufficient reason to know what he was doing, *or*, that, as the result of mental unsoundness, he had not sufficient will power to govern his action by reason of some insane impulse which he could not resist or control ", coupled with the usual moral right-and-wrong rule; but no affirmative approval of the irresistible impulse test was made.

New Jersey: Nature and quality of particular act, *or*, if known, knowledge of moral wrongfulness of particular act. — Mackin *v.* St., 30 Vroom, 495; State *v.* Maioni, 78 N. J. L., 339, 341 (1909); " irresistible impulse doctrine has no place in the law." — State *v.* Carrigan, 111 Atl. (N. J.), 927 (1921), *affirming* 108 Atl., 315, 317 (1919). In this case counsel tried to introduce what we have referred to as partial responsibility, by insisting that an act done as the result of irresistible impulse, even though not constituting a *defense*, cannot be said to have been " willful, deliberate " murder within the meaning of the statute defining *first-degree murder* in those terms. But court held that even conceding that the law recognizes existence of an irresistible impulse, the question of whether it had an influence on the willfulness or deliberateness of the murder to reduce its degree, is one for jury, and not a point of law, as contended.

New York: Moral right and wrong of particular act; insanity in which capacity of distinguishing right from wrong exists without the power of choosing between them not recognized. — People *v.* Flanagan, 52 N. Y., 467, 469, 470 (1873). Irresistible impulse not recognized, since test prescribed by statute (*see* Appendix, p. 584). — People *v.* Silverman, 181 N. Y., 235, 240, 73 N. E., 980 (1905). Part of opinion after McNaghten's Case adopted in New York statute to effect that a person is not excused from criminal liability as an insane person except upon proof that at the time of committing the alleged criminal act he was laboring under a " defect of reason ", which, furthermore, must have been such as to render him *either* (1) ignorant of the nature and quality of the act he was doing, *or* (2) ignorant that the act was wrong, — " which is the only test of responsibility known to the law of the State of New York." " Defect of reason " means disease of the mind; and a person cannot be relieved from consequences of his act

where insanity is relied upon as the sole defense, " unless at the time of the commission of the act, he was suffering from some disease of the mind." — People *v.* Carlin, 87 N. E. (N. Y.), 805, 808 (1909). " Wrong " means moral wrong, and a charge under the statute that if defendant knew nature and quality of act and knew it was wrong, " in the sense of forbidden by law ", is too narrow. — People *v.* Schmidt, 216 N. Y., 324, 328 (1915).

North Carolina: Quality of particular act and capacity to distinguish between good and evil. — State *v.* English, 164 N. C., 497, 503, 80 S. E., 72 (1913); incapacity to form " criminal intent " by reason of insanity set down side by side with right-and-wrong rule, either generally or regarding particular act; irresistible impulse repudiated. — State *v.* Cooper, 87 S. E., 50, 52 (1916).

Oklahoma: Moral wrongfulness of particular act, which " also embraces capacity to understand the nature and consequences of the same." — Maas *v.* Ter., 10 Okla., 714, 718, 63 Pac., 960 (1900). Irresistible impulse repudiated. — Turner *v.* Ter., 15 Okla., 557, 563, 82 Pac., 650 (1905). Right and wrong *and* nature and *consequences* of particular act. — McNeill *v.* St., 192 Pac., 256, 258 (1920).

Oregon: Nature, quality, *or* consequences *and* knowledge of wrongfulness of particular act. — State *v.* Zorn, 22 Or., 591, 598 (1892). Sec. 2408, L. O. L., providing that a morbid propensity to commit prohibited acts, existing in the mind of a person not shown to have been incapable of knowledge of right and wrong is no defense, held to establish a *conclusive presumption* (!) that a person having " sufficient mental capacity " to know that an act was wrongful and unlawful is incapable of governing his conduct by that knowledge or of resisting any impulse to violate the law. Only case where irresistible impulse to kill recognized is in Sec. 1897, L. O. L., providing that killing without malice, upon a sudden heat of passion, caused by provocation apparently sufficient to make the passion " irresistible ", constitutes manslaughter. — (But this is an erroneous use of term " irresistible impulse "; this refers to a transitory mental state of an otherwise mentally sound person, while " irresistible impulse " refers to a symptom of certain mental diseases.) State *v.* Hassing, 60 Or., 81, 86, 118 Pac., 195 (1911).

South Carolina: Moral and legal wrong of particular act; uncontrollable impulse, with presence of knowledge, does not excuse. — State *v.* Alexander, 30 S. C., 74, 84 (1888); moral *or* legal wrongfulness *and* must " recognize the particular act charged " as morally *or* legally wrong. — State *v.* Jackson, 69 N. E. (S. C.), 883, 886 (1911); knowledge that a particular act was punishable under law of State. — State *v.* Bramlett, 103 S. E. (S. C.), 755, 757 (1920).

Tennessee: Moral and legal wrongfulness of particular act. — Bond *v.* St., 129 Tenn., 75, 165 S. W., 229 (1914).

Texas: Nature and quality of particular act *or* knowledge of its moral wrongfulness; irresistible impulse repudiated. — Thomas *v.* St., 55 Tex. Cr. Rep., 293, 297. " Uncontrollable passion or excitement rendering the mind incapable of cool reflection, may reduce a killing to manslaughter but does not inject insanity into the case." — Swann *v.* St., 92 Tex. Crim. Rep., 153, 155 (1922). Test confined to right-and-wrong rule as to particular act, and " does not go to the capacity and *will power* of the person affected with insanity to

restrain his actions." — Craven *v.* St., 93 Tex. Crim. Rep., 328, 332 (1923).

Utah: Wrongfulness (legal or moral?) of particular act. — State *v.* Brown, 36 Utah, 46, 57 (1909). Mental condition may be considered on questions of deliberation and premeditation even though mental incapacity is insufficient to relieve *entirely* from responsibility (this is one type of partial responsibility discussed in the text). — State *v.* Anselmo, 46 Utah, 137, 145 (1915). Counsel contended that although accused, who killed a person while committing a burglary, may have had ample capacity to realize that it was wrong to *kill*, yet, if he was afflicted with an irresistible impulse to *steal*, he ought to have been acquitted of both crimes! But test in case of general insanity is knowledge of wrongfulness of particular act. (However, judging from *dictum*, and from dissenting opinion of J. Straup, p. 180, it is probable that irresistible impulse, where there is evidence of a disease in which it exists, or at least kleptomania might be adopted by Utah in future cases.) — State *v.* Mewhinney, 43 Utah, 135, 149–150 (1913).

Washington: Wrongfulness (moral) of particular act. — State *v.* Craig, 52 Wash., 66, 70 (1909). (In this case Washington Supreme Court held that where a more inclusive charge than mere right-and-wrong rule was given, that is, where a charge as to irresistible impulse was included in a State which had right-and-wrong rule *only, it constituted reversible error* (!), on the ground that where the jury are asked to do more than answer the question as to knowledge of right and wrong, " they are invited to enter the realm of speculation where even the opinion of alienists is met by like opinion." (P. 71.)

West Virginia: " *Mere* irresistible impulse to do an act will not exempt." — State *v.* Harrison, 36 W. Va., 729, 751 (1892). Insufficient " mental capacity " to have " criminal intent and purpose, that is, to know what he is doing and that it is wrong", constitutes legal insanity. — State *v.* Alie, 82 W. Va., 601, 608, 96 S. E., 1011 (1918). (Although this charge starts out from the correct approach, namely, that of the required criminal intent, or *mens rea*, it deliberately interprets this as *not including* capacity for normal *volition*.)

Wisconsin: If mental disease destroys capacity rationally to apprehend the significance of his acts or his responsibility therefor, he is exempt. — Duthey *v.* St., 131 Wis., 178, 193, 111 S. W., 222 (1907). Law does not recognize a form of insanity in which there exists capacity to distinguish right from wrong without power to abstain from it. — Oborn *v.* St., 143 Wis., 249, 273, 274, 126 N. W., 737 (1910).

CHAPTER 8

TESTS OF IRRESPONSIBILITY, *continued* — IRRESISTIBLE IMPULSE AND OTHER CONCEPTS

Section 1 — Irresistible Impulse Test

Various Expressions of Irresistible Impulse Test. — While most courts, as we have seen, hold one or the other variety of the right-and-wrong test as the *only* rule applicable to cases of insanity, others couple with this the rule that irresponsibility may result from the existence of an insane, irresistible impulse, even though knowledge of the wrongfulness of the act may have existed at the time.[1]

Reference to the note at the end of this chapter will indicate that the doctrine of irresistible impulse has been variously expressed by different judges. But the decisions are all based upon the recognition that other modes of mental process than the purely cognitive characterize the functioning of the mind; and, further, that to constitute the criminal intent [2] which must accompany an act to make it punishable under the law, a more or less healthy functioning of the volitional and inhibitory phases of mental activity (and, though this is not so clear as yet, the accompanying emotional phase) is just as necessary as that of the cognitive (knowing, reasoning, apperceiving, etc.) mode of mental life. The decisions which recognize irresistible impulse as a defense, take into account, in brief, the fact that where the defendant's mental disease was such as *very strongly and probably* (for who can decide categorically the *absolute* irresistibility of a particular impulse in some cases?) to have impelled him to the commission of an act, *though he seemed to have known it was wrong*, his free agency was at the time of such act destroyed. With the progress of medical learning and the

[1] *See* note at end of this chapter.

[2] "This distinct element in criminal intent consists not alone in the voluntary movement of the muscles (*i.e.*, in action), nor yet in a knowledge of the nature of an act, but in a combination of the two, — *the specific will to act, i.e.*, the volition exercised with conscious reference to *whatever knowledge the actor has* on the subject of the act." — Wigmore, "Evidence", 2d ed. Vol. I, sec. 242.

"Acts . . . are exertions of the will manifested in the external world." — Pound, "Readings in the History and System of the Common Law", p. 453.

continued socialization of the criminal law, we may confidently expect the legal tests of irresponsibility to become modified and to be put more and more in harmony with the data of psychological and medical science. For example, the terms " free agency ", or " freedom of will ", or " the Will ", as a sort of external, detached entity moving the mind to action, — the concepts which were so overemphasized in nineteenth-century writings and decisions — are gradually coming to mean power of conscious purposive volition; they are gradually coming to have a meaning less metaphysical and more in harmony with the data of medical and psychological disciplines, in spite of the fact that the *terminology* of the nineteenth century is still often encountered in case and commentary.

Reasons Why Most Courts Refuse to Recognize Irresistible Impulse. — In view of the fact that many authorities have long recognized that, as Stephen put it, " in order that an act may by the law . . . be criminal . . . it must be voluntary ", there appears no justification for the refusal of many judges to consider the effect of certain mental diseases on the conative-emotional life of the actor, or upon his power of inhibiting acts that he apparently knows to be wrong and illegal. It will, therefore, be of interest to consider some of the reasons usually assigned by the courts for their legally inconsistent refusal to recognize, *in insanity cases*, one of the elements the presence of which is assumed to be necessary in *all* illegal acts before they can be said to have been the result of a normal intent, and can be called criminal.

Difficulty of Proof. — The first of these is the difficulty of proof, a fact that we have adverted to in discussing the mental concepts in the criminal law.[1] And we there said that the question is, in the final analysis, one for the unbiased psychiatrist of many years of experience. In most cases *it is no less difficult to prove lack*

[1] *See* p. 117, note 3. In 1881, when much less than we know to-day was known of mental disease, and when the procedure in insanity cases was much more than it is to-day, a battle of experts, there was perhaps some justification for the following opinion: "If this were not the law, every thief, to establish his irresponsibility, could assert an irresistible impulse to steal, which he had not mental or moral force sufficient to resist, though knowing the wrongful nature of the act; and in every homicide it would only be necessary, in order to escape punishment, to assert that anger or hatred or revenge or an overwhelming desire to redress an injury, or a belief that the killing is for some private or public good, has produced an irresistible impulse to do a known illegal and wrongful act. So that really there could never be a conviction if the guilty party should assert and maintain an irresistible impulse, produced by some pressure which he could not resist, as a reason for committing a crime. To

of knowledge. The possibility of obtaining unbiased experts will be discussed in the concluding chapter.[1] Of course, such psychiatrists would take not only the history of the offender into consideration, but the peculiar facts surrounding the individual case. In some cases of kleptomania, for example, the facts, even to the layman, seem inconsistent with any other rational hypothesis than that the accused was the victim of a mental abnormality to which his wrongdoing was largely, if not wholly, attributable.[2]

restrain such impulses is the legal and moral duty of all men, and the protection of society demands that he who yields to them must take the consequences of his acts." — J. Davis, in People *v.* Coleman, 1 N. Y. Crim. R., 1, 3.

In 1885, in State *v.* Bundy, 24 S. C., 439, 445, the Supreme Court of South Carolina said: "It seems to us, however, that in the view suggested the difficulty would be great, if not insuperable, of establishing by satisfactory proof whether an impulse was or was not 'uncontrollable.'"

"The argument" (as to irresistible impulse) "proceeds upon the theory that there is a form of insanity in which the faculties are so disordered and deranged that a man, though he perceives the moral quality of his acts, is unable to control them, and is urged by some mysterious pressure to the commission of acts, the consequences of which he anticipates but cannot avoid. Whatever medical or scientific authority there may be for this view, it has not been accepted by courts of law. The vagueness and uncertainty of the inquiry which would be opened, and the manifest danger of introducing the limitation claimed into the rule of responsibility, in cases of crime, may well cause courts to pause before assenting to it. Indulgence in evil passions weakens the restraining power of the will and conscience; and the rule suggested would be the cover for the commission of crime and its justification." — Flanagan *v.* Peo., 52 N. Y., 467, 470 (1873). This statement resumes most of the judicial reasons against the doctrine. The irresistible impulse doctrine's disavowal was subsequently incorporated into the New York Penal Code, and reaffirmed in People *v.* Carpenter, 102 N. Y., 238 (1886); People *v.* Taylor, 138 N. Y., 398 (1893), and subsequent decisions. *See also* State *v.* Hassing, 60 Or., 81, 89, 90 (1911), and Oppenheimer, "Criminal Responsibility of Lunatics", pp. 188, 193.

[1] *See* pp. 487, *et seq.*

[2] *See*, for example, State *v.* Riddle, 245 Mo., 451, 455–458 (1912). The following is a good example of such a case. (While the judgment of conviction in this case was reversed by the Texas Court of Appeals, still, later, the kleptomania doctrine was repudiated in Texas): Defendant was accused of stealing certain small articles from a store in a house wherein he rented a room. Upon being accused of the theft he at first denied it, and then "confessed to these facts, and after indulging in a few moments of apparent study, he said that the explanation of the matter was that from boyhood he had been afflicted with an ungovernable habit of appropriating articles of property belonging to others, many of them articles for which he could have no possible use, such as photographs of entire strangers, combs, brushes, books, and could not tell how, when or where he came in possession of them." Some witnesses also testified they did not believe the defendant capable of telling right from wrong. After considering the views of some writers on medical jurisprudence, the Court of Appeals reversed the case on the ground that the evidence showed the "peculiar symptoms" of "kleptomania", in the *particular case* before it. — Looney *v.* St., 10 Tex. Ap., 520 (1881); in Harris *v.* St., 18 Tex. App., 287, 293, 294 (1885), it was said: "That kleptomania is a species of insanity which, if clearly established, will render its subject morally irresponsible for the crime of theft is, it seems, now well settled."

In some States specific legislation exists prohibiting the use of this test; or else, by setting out *only* the right-and-wrong test, the statute, by implication, prohibits the use of other tests.[1]

But the difficulty of proof, — the fact that there is so much disagreement among experts in any particular case (although it seems to be forgotten that there is disagreement too among judges, as evidenced by not a few divided opinions), —has led to many nice distinctions on the part of judges, and to a hopeless confusion between those instances of ordinary outbreak of passion, malice, jealous rage, emotional insanity, moral insanity, and other judicially scorned concepts in which the cases abound, and impulsive or compulsive criminal acts, the result of definite psychoses or neuroses. The distinction between acts supposed to be mere outbursts of anger and those genuine symptoms of a diseased mind comprised under the legal term " irresistible impulse ", has largely been made by trial judges and juries themselves, without much faith in the opinions of conflicting experts; but most often it has been made by appellate courts, who have reviewed the evidence and have decided whether or not the individual case involved genuine irresistible impulse, or that judicially despised condition referred to as "*mere* outburst of frenzy." As the constant conflict between paid experts has contributed no little to this whole state of affairs, the question of the reform of expert testimony is one of the most important in this entire inquiry.

No Irresistible Impulse. — Another reason usually assigned by judges for refusing to recognize the irresistible impulse doctrine is that there is no such thing as the medical concept of irresistible impulse, in fact; that in other words, impulses of the mentally disordered are not irresistible, but unresisted.[2] That there are

[1] *See*, for example, State *v.* Scott, 41 Minn., 365, 369 (1899), thus construing the Minnesota Penal Code. The same is true in New York. — People *v.* Carpenter, 102 N. Y., 238 (1886).

[2] The following views of Baron Bramwell, in Reg. *v.* Haynes, 1 F. & F., 666, 667, are often quoted in this connection. But it must be remembered, in considering all these cases, that the *time when the views were enunciated* is of the essence in accounting for the views held by the judges. Bramwell's views, expressed in 1859, are classical among the judicial pronunciamentos against the irresistible impulse doctrine: "But if an influence be so powerful as to be termed irresistible, so much the more reason is there why we should not withdraw any of the safeguards tending to counteract it." (This is, of course, begging the question; if the impulse is irresistible, then safeguards in any particular case are of no avail; the argument assumes that the impulse of an insane person is *not* irresistible.) "There are three powerful restraints existing, all tending to the assistance of the person who is suffering under such an influence — the restraint of religion, the restraint of conscience, and the restraint of law.

such impulses is to-day established in psychiatry;[1] but this question must be reserved for further discussion in the chapters on the important concepts of psychopathology.

Historical Reason. — In the history of the tests of irresponsibility we have seen that individual views of great commentators and of at least one brilliant advocate, Erskine, suggested to trial judges the scraps of abnormal mental phenomena which were used as tests on various occasions. We have also seen that in the Opinion of the Judges of England, following upon the popular dissatisfaction with the outcome of McNaghten's trial, in 1843, these dissociated scraps of opinion and dictum were welded into some sort of program for the judicial treatment of the problem of the criminal insane. In the analysis of this famous opinion, we found no reference to the concept of irresistible impulse, *simply because the judges were not asked to pass upon that question*, their answers being confined solely to the case of a defendant committing a crime by reason of *delusion*.[2] The fact that the judges did not

But if the influence itself be held a legal excuse, rendering the crime dispunishable, you at once withdraw a most powerful restraint — that forbidding and punishing its perpetration." (But the whole argument assumes that these restraints could have prevented an irresistible impulse from asserting itself, in which event, of course, we are no longer discussing a medically recognized symptom of certain mental diseases but a "resistible impulse.")

Chief Justice Dillon, in State *v.* Felter, 25 Iowa, 67, 82 (1868), said: "If, from the observation and concurrent testimony of medical men who make the study of insanity a specialty, it shall be definitely established to be true, that there is an unsound condition of the mind, — that is, a diseased condition of the mind, in which, though a person abstractly knows that a given act is wrong, he is yet, by an insane impulse, that is, an impulse proceeding from a diseased intellect, irresistibly driven to commit it, — the law must modify its ancient doctrines and recognize the truth, and give to this condition, when it is satisfactorily shown to exist, its exculpatory effect." It was this openmindedness that permitted the court to say later (State *v.* Mewherter, 46 Iowa, 88, 1877) that inability to distinguish right from wrong and no understanding and knowledge of the character and circumstances of the act, *and lack of power of will to abstain from it*, constitute irresponsibility; and still later (State *v.* McCullough, 114 Iowa, 532, 535, 1901) to say that the fact that the impulse to steal is inspired by avarice or greed will not preclude the defense of insanity, if the *will power is weakened* to such an extent as to leave the afflicted one *powerless to control the impulse*.

[1] L. C. Bruce, in his "Studies in Clinical Psychiatry", p. 27, says, for example, "An impulse is an action committed consciously, but without motive or forethought, and sometimes directly opposed by the will power of the individual." It would be more accurate to say, in the light of the Freudian psychology, "without *conscious* motive", as the motive is of course always present (*i.e.*, motive in the sense of the emotional accompaniment of the conative force, as used in this study; *see* Chapter 4, p. 106).

[2] There was, however, introduced the concept of "*delusion* overmastering the will", which, as we shall see, has entered into the tests in some jurisdictions, as another one of the miscellaneous scraps of the Opinion of the Judges; but this confined the irresistible-impulse concept to those diseases only of which de-

therefore say the last word on the *entire* law of insanity (even as it was in their day) has strangely been overlooked by most commentators and judges since that time. A third reason why judges later refused to admit irresistible impulse as a defense, is thus seen to be historical. When the doctrine was introduced as a defense in the early cases, where it was obvious that certain defendants, though *apparently* reasoning logically, nevertheless had such marked disturbance of the affective-volitional (and inhibitory) modes of mental life as not to have been free agents when they committed the alleged criminal acts, the reply of the judges to any argument in favor of irresistible impulse was that the crystallized and authoritative tests of irresponsibility made no provision for such a doctrine.[1]

This fact should make us hopeful that perhaps in England and some of the conservative American States, where exclusive adherence to the right-and-wrong rule still obtains, the law of insanity may some day be improved; for it appears that reform of the law is largely dependent upon the historical accident of some notorious case arousing citizens sufficiently to demand a reëxamination of legal principles. This has only recently been the case in England, where a trial that aroused as much comment as McNaghten's Case did in its day, resulted in the appointment by the Lord Chancellor of a special committee to reëxamine the whole problem of the law's treatment of the criminal insane.[2] So also, in New York, a notorious case aroused the Bar Association sufficiently to appoint a committee, which has been functioning for several years, to study the questions of the verdict in insanity cases and

lusions are symptomatic. It might be argued, however, that if the judges were willing to recognize the fact that conative activity could be interfered with in delusional diseases, they would have admitted the test of irresistible impulse, which recognizes the same principle in other types of mental diseases, had such a case actually been presented to them by trustworthy leaders of the medical profession, or had McNaghten's Case resulted in the acquittal of one suffering from such a disease.

[1] "The medical man called for the defence defined homicidal mania to be a propensity to kill, and described moral insanity as a state of mind, under which a man, perfectly aware that it was wrong to do so, killed another under an uncontrolable impulse. This would appear to be a most dangerous doctrine, and fatal to the interests of society and security of life. The question is, whether such a theory is in accordance with law? The rule, as laid down by the Judges, is quite inconsistent with such a view; for it was that a man was responsible for his actions if he knew the difference between right and wrong." Reg. *v.* Burton, 3 F. & F., 772, 780 (1863).

[2] *See* pp. 457, *et seq.* Such results will probably also flow from the Leopold-Loeb Hearing held in Chicago during the summer of 1924.

the disposition to be made of persons acquitted on the ground of insanity.[1] It would seem a much wiser policy, however, if some permanent body, such as a Ministry of Justice,[2] for example, were to make it part of its business to study the law in action, — not immediately after some atrocious, indignation arousing instance of apparent miscarriage of justice, when, in the transient excitement, dangerous tinkering with the structure of the law is likely to take place, but constantly, as a *matter of routine*, side by side with the law's daily functioning, and with respect to the unheralded cases as well as the yellow journalized, sensational ones.[3]

Recognition of Irresistible Impulse as a Defense Socially Dangerous. — A fourth reason, often mingled with the rest, why appellate courts refuse to embody the irresistible impulse doctrine into the fabric of the law of insanity, is, as has already been partially suggested, that such a practice would be socially dangerous.[4] But no one has as yet demonstrated, as far as we have been able to ascertain, that there is a greater incidence of crimes of violence in those States which employ this principle than in those in which the right-and-wrong rule alone obtains. This fear is, of course, based upon the tacit assumption, already mentioned, that it is extremely doubtful if there is such a thing as an irresistible im-

[1] *See* pp. 457, *et seq.* [2] *See* p. 494.

[3] This was written before the Leopold-Loeb Hearing in mitigation aroused world-wide interest and much frenzied indignation.

[4] "If juries were to allow it as a general motive, operating in cases of this character, its recognition would destroy social order, as well as personal safety." J. Henderson, in Boswell *v.* St., 63 Ala., 307, 321 (1879). "It will be a sad day for this State, when uncontrollable impulse shall dictate 'a rule of action' to our courts." J. Sherwood, in State *v.* Pagels, 92 Mo., 300, 317, 4 S. W., 931 (1887). "Indeed, it would seem dangerous to society to say that man who knows what is right and wrong may nevertheless, for any reason, do what he knows to be wrong without any legal responsibility therefor." J. Valentine, in State *v.* Nixon, 32 Kan., 205, 212 (1884). "It seems to me to be very dangerous to life to tell juries that a party may know the nature of his murderous act, and know and be conscious that it is wrong and criminal, and yet be excusable if he did the act at the command of irresistible impulse; thus eliminating the knowledge of the wrong of the act as an unessential, unimportant element in the test. I do not regard it essential to the safety of the parties accused." — State *v.* Harrison, 36 W. Va., 729, 753 (1892).

Several points are noteworthy in these decisions: First, they are old, and were perhaps written at a time when the practice, on acquittal of persons in insanity cases was to let them go free, or, at least, to make their subsequent release from an asylum to which they were committed upon acquittal, easy. This point is of the very essence of much of the law, and is most often overlooked by writers in this field; it will be considered later (Chapter XII). Secondly, they all imply that there is no irresistible impulse in the strict sense; or that it is easy to deceive a judge and jury by claiming it in diseases where it never exists; this assumes, of course, that no intelligent, unbiased psychiatrists have studied the history of the case and examined the defendant.

pulse; further, that it would be impossible to distinguish it, if it did exist, from those impulses that were merely unresisted. Here again we can only say that *the danger lies not in the doctrine itself, but in the way the law of insanity is administered.* The effectiveness of all the principles of the law of insanity, in *practice*, depends largely upon such procedural machinery as will enable unbiased, unpartisan, experienced, and trustworthy experts in mental diseases to express their views at the trial.

Irresistible Impulse Obliterating Sense of Right and Wrong.—In some of the States where the irresistible impulse rule does not obtain, some courts make a rather questionable concession to the principle, by saying that if the irresistible impulse is the result of mental disease sufficient to override reason and judgment, and to obliterate the sense of right and wrong, it will excuse from criminal responsibility.[1] This doctrine seems to be the expression of a transition stage between the exclusive right-and-wrong rule rigidly applied, and the judicial recognition of the fact that there is more to mental activity than its cognitive mode, and that the law itself, when treating of *criminal intent*, considers volitional capacity as necessary as cognitive capacity.[2] In those instances where irresistible impulse (or, rather, the recognition that the conative-emotional activity may overwhelm the intellectual activity of mind) is thus smuggled in as it were, though not recognized openly where it appears that presumably [3] the defendant knew right from wrong, the courts regard the facts as falling within the right-and-wrong rule. Hence, irresistible impulse, *conceived of as causing a loss of the power of cognition* (*i.e.*, of knowledge of the nature and quality of an act or of its wrongfulness), is a valid defense even in those States which bar it in cases where knowledge of right and wrong is presumed to have remained totally unaffected

[1] People *v.* Hoin, 62 Cal., 120, 121 (1882); State *v.* Nixon, 32 Kan., 205, 211 (1884); Cunningham *v.* St., 56 Miss., 269, 278 (1879); Sarten *v.* St., 51 Tex. Cr., 571, 574 (1907); State *v.* Harrison, 36 W. Va., 729, 751 (1892); Reg. *v.* Oxford, 9 Car. & P., 525, 546 (1840).

[2] In at least one State, Iowa, this transition seems to have occurred. In Fouts *v.* St., 4 Greene, 500 (1854), the irresistible impulse doctrine was held to apply only where it destroys power of right and wrong; yet in State *v.* Mewherter, 46 Iowa, 88 (1877), "power of will to abstain" from the act was coupled with the right-and-wrong rule, and in State *v.* McCullough, 114 Iowa, 532 (1901), it was deliberately spoken of, not only as weakening of "will power", but as such condition causing lack of power "to control the impulse."

[3] "Presumably", because this theory unwarrantedly assumes that the knowledge of right and wrong of a pathological mind is the same as that of a sound mind.

by mental disease affecting the volitional-inhibitory capacity. But such cases are to be sharply distinguished, *legally*, from those of genuine irresistible impulse. In *practice*, however, it may readily be assumed that a charge to a jury, which makes the subtle distinction between irresistible impulse generally and irresistible impulse overpowering the reason, — especially where there is conflicting expert testimony on this very point, — is open to misconstruction; and that in cases where the jury is looking for a loophole by which to acquit a defendant who pleads insanity, this vague doctrine is a convenient one.

When Irresistible Impulse Charge Proper. — There is considerable confusion, in the reported decisions, as to whether the irresistible impulse test (or other rules, such as that as to delusion) should be given to the jury together with the right-and-wrong rule, *in all cases* of insanity, or whether it should be confined to those cases wherein the evidence indicates the existence of a specific type of mental disease to which such charges are particularly appropriate. Thus, Justice Somerville's opinion, in the famous Parsons Case,[1] taking as its point of departure the fact that freedom of will is just as necessary an element of criminal intent as knowledge of right and wrong, holds that the irresistible impulse principle should form an integral part of *all* charges to juries when insanity is pleaded as a defense. On the other hand, a Georgia case [2] holds that a definition of insanity as impairment of intellect rendering the defendant unable to know right from wrong, and not including reference to power of control, does not constitute reversible error, where no evidence as to " partial dementia or delusion ", or " monomania ", exists. Again, an Illinois case [3] holds that while the irresistible impulse rule is not to be generally charged, still " in cases of partial insanity of the type known as paranoia ", it is not sufficient to charge merely as to the ability to distinguish right from wrong, but in addition that the accused must be capable of exercising the power to choose between them. Still other cases go into greater

[1] *See* Alabama in note at end of this chapter.

[2] Carr *v.* St., 96 Ga., 284, 290 (1895). *See also* State *v.* Peel, 23 Mont., 358 (1899); Hurst *v.* St., 40 Tex. Ap., 379, 382 (1899), and Bishop's "Criminal Law", Sec. 386, Subd. 2), which take a similar view, namely, that "in all issues the charge to the jury should disclose the law applicable to whatever facts the evidence tends to establish, not to any which it does not."

[3] People *v.* Lowhone, 292 Ill., 32, 48 (1920). Such cases illustrate the importance of considering the *dates* when these cases were decided. The going into the medical refinements of *stages* of *particular diseases*, as paranoia, marks the effort of judges to keep abreast of contemporary medical learning.

refinement on this subject. Thus, in Woodall *v.* State [1] the court acutely held that the rule as to delusion announced in McNaghten's Case (namely, that " where one labors under a partial delusion only, and is in other respects sane, he must be considered as if the facts with respect to which the delusion exists were real "), is " *limited in its application* solely to those cases where the testimony proves, or tends to prove, that the disease, paranoia, is in its first or earliest stage of development." Further, that as " paranoia is a progressive disease,

> In its first and earliest stage the manifestations of delusion indicating a disease of the mind are yet so mild and unpronounced that its victim, notwithstanding his mental delusion, may still be able to exercise his will and control his actions with reference to these delusions. Where such is the case there is no room for the doctrine of irresistible impulse caused by a disease of the brain.[2] But where the disease has progressed or evoluted to its second or persecutory stage, or subsequent stages, when its form and hallucinations are such as to indicate that its victim, because of the disease, is no longer able to control his will and actions, then the doctrine of irresistible impulse . . . is applicable.[3]

From these cases it would appear that the question of whether *all* rules as to the influence of mental disease upon criminal responsibility, or only the *pertinent* tests, should be charged to a jury in any particular case, is also in a state of confusion, with evidences of attempts of a few courts to go to such extents of refinement as to limit the various tests not only to certain types, but also *stages*,

[1] 231 S. W. (Ark.), 186, 189 (1921).

[2] It should be carefully noted that *legally* the term irresistible impulse in those States which have it as a test, refers *not* to cases such as this, where the impulse is the result of delusions, but to all types of mental disorder where there is a marked disturbance of the volitional-inhibitory mode of mental activity. Therefore, in most cases in most jurisdictions, an attempt is made to distinguish the genuine irresistible impulse (regardless of what type of mental disease is involved) from the impulsive acts which are the result of delusions, or which, as the cases have it, "overmaster the will"; so that there are States in which irresistible impulse in the sense, for example, in which it was used in the Parsons Case in Alabama, is not recognized, but in which, nevertheless, the possible influence of a delusion in overmastering the will is taken account of. Whether this distinction is useful or justifiable psychiatrically is another question; but in accordance with the practice in most cases, we have herein maintained this legal distinction; and "overmastery of the will" by delusions will therefore be treated in the section dealing with delusions.

[3] This case illustrates how tests are actually evolved; namely, through the slow influence of medical opinion upon progressive judges. In these cases the court quoted at length from various texts on insanity, and modified its rules accordingly.

of mental disease. This is a practice which, when indulged in by individual courts, can only result in further confusion of the law. We have seen that even the answers of the judges in McNaghten's Case were not meant to be absolutely rigid, and that the judges clearly expressed the opinion that the tests might be modified to suit individual cases. In thus opening the door, the judges, who realized that few, if any, rigid tests could cover all cases, attempted to leave a certain flexibility in the tests. By that very attempt, however, they not only proved that the tests were not *measures* in the strict sense in which many subsequent courts applied them, but they invited confusion; for their statement resulted in lack of that very uniformity of application which the tests were designed to secure. Some judges have strictly applied them, forgetting the concluding statements of the English judges to the effect that the tests might be modified to suit the particular circumstances of different cases; while others have overemphasized this license to modify the tests. If the tests are such in the strictest sense, then those judges who have applied them as such may have been wrong in doing so, from a medical and humanitarian point of view, and doubtless their strict application of hard-and-fast tests has resulted in some injustice; at the same time, they cannot be accused of having been inconsistent. On the other hand, if the tests are modifiable by every generation of judges, to bring them up to contemporary medical and ethical views, then we believe that their sporadic modification by individual judges (while most judges continue in the old channels) will result in more injustice and confusion than if all judges applied the tests strictly, but uniformly. Some machinery must therefore be devised, as was said elsewhere, whereby the authoritative, scientific views of an epoch may be made known to the *whole judiciary* (or other authoritative law-making[1] agency), through trustworthy channels; so that all judges, after mature consideration and decision to modify the law in certain particulars, may consciously and uniformly apply the modified tenets until the next general revision of the law on this subject.

Summary and Conclusions as to Irresistible Impulse Test. — Stephen argued, as we have seen, that the right-and-wrong rule as

[1] No one who has studied case material at all carefully can continue to indulge the vain fiction that judges do not legislate but merely apply the law as they find it.

laid down by the judges after McNaghten's Case is broad enough to include the irresistible impulse doctrine. "The man who controls himself refers to distant motives and general principles of conduct and directs his conduct accordingly. The man who does not control himself is guided by the motives which immediately press upon his attention. If this is so, the power of self-control must mean a power to attend to distant motives and general principles of conduct, and to correct them rationally with the particular act under consideration; and a disease of the brain which so weakens the sufferer's powers as to prevent him from attending or referring to such considerations; or from connecting the general theory with the particular fact, deprives him of the power of self-control. Can it be said that a person so constituted knows that his act is wrong? I think not, for how does any one know that any act is wrong except by comparing it with general rules of conduct which forbid it, and if he is unable to appreciate such rules, or to apply them to the particular case, how is he to know that what he proposes to do is wrong? . . . If the words 'know' and 'wrong' are construed as I would construe them, I think this is a matter of no importance, as the absence of the power of self-control would involve an incapacity of knowing right from wrong. . . . All that I have said is reducible to this short form: — Knowledge and power are the constituent elements of all voluntary action, and if either is seriously impaired the other is disabled. It is as true that a man who cannot control himself does not know the nature of his acts as that a man who does not know the nature of his acts is incapable of self-control."[1]

This argument of Stephen's is based upon a true understanding of the workings of the mind, upon a recognition of the unity of consciousness and of mental activity generally. His interpretation of "knowledge of right and wrong" is founded upon the fact that the conative-affective modes of mental life are always present in every thought and act; that they are inseparable from the knowing and reasoning processes, and that when they are separated, it is

[1] "History of the Criminal Law of England", Vol. II, pp. 170, 171. Stephen tried to embody an irresistible impulse test in his Criminal Code Bill of 1878, Art. 22, the question provided for being, whether the impulse to commit the crime was so violent that the offender could not be prevented from doing the act by knowledge that the greatest punishment permitted by law for the offense would be instantly inflicted. — 55 *Law Journal* (English), 121. But this is a modified form of the test, analogous to those intermediate American decisions where irresistible impulse excuses if it overwhelms reason.

only by a process of abstraction, for the purpose of more minute psychological study.[1]

But the trouble is that most judges, formally, in judicial decisions on appealed cases, have not interpreted the words "know" and "wrong" as Stephen has. The very vagueness of these concepts has, as we have seen throughout, led to numerous conflicting and confusing formal decisions.[2] And their vagueness must have led to the occasional, if not frequent, application by juries of judges' charges at variance with the law in books as formally laid down in the tests appearing in appellate decisions.[3] At any rate, this vagueness and confusion has introduced a serious element of caprice into the verdicts of juries in insanity cases, instead of furnishing a sure measure or rule, which was the object of the framers of the tests.

Another trouble is, that in the case of some of the mental diseases, it is difficult to convince a jury that a person's intellectual faculties are disordered;[4] and unless this fact can first be established, disorder of the impulses is not considered in those jurisdictions in which only the right-and-wrong rule is operative.

We conclude from the foregoing consideration of the irresistible impulse test, that while it is much less confused than the right-and-wrong rule, it has led to some misunderstanding in practice, especially in the attempt of courts to distinguish between "mere outburst of passion", "merely unresisted" impulses, etc., and

[1] *See* Chapter 4, on Psychological Concepts in the Law. *See also* McDougall, "Body and Mind", 5th Ed., Chap. XXI, and Goddard, "Psychology of the Normal and Subnormal", pp. x, 121.

[2] Confusion in appellate judges' statements of the distinction between irresistible impulse and impulse from passion is illustrated by C. J. Dillon's statement in State *v.* Felter, 25 Iowa, 67, 84 (1868), when he attempted to distinguish between "whether passion or insanity was the ruling force and controlling agency which led to the homicide." He said that if the jury "believe that the homicide was the direct result or offspring of *insanity*, they should acquit; if of *passion*, unless it be an insane passion, they should convict." The use of the word passion in connection with sane and insane persons, in the same breath, tends only to confuse the jury.

[3] "It is claimed that the instructions as to this point (that the monomania which irresistibly impelled the defendant to commit a crime need not have been as to any particular subject) given by the court at the instance of the State's attorney were calculated to mislead the jury, and two members of this court (Supreme Court of Indiana) are of that opinion. It is clear that the instructions might have been put in better form . . . but if this case turned upon that question, I should hesitate to determine that a jury might not have been misled by *instructions about the meaning of which there is a difference of opinion among the members of this court.*" — Stevens *v.* St., 31 Ind., 485, 488 (1869). (Italics ours.)

[4] *See* Chapter 9.

medically recognized irresistible impulse as a symptom of mental disease; and in the attempts either to limit this test to certain types and degrees of mental disease, or to make it a necessary element of every charge to a jury in insanity cases. It has, moreover, led to confusion in the practice of some juries, of applying this test even in those jurisdictions where *formally* it is not law, only the right-and-wrong test being the declared law. Further, the objections urged by judges against it are, on the whole, untenable; these being reducible to ignorance or neglect on their part of the facts of the unity of mind and indivisibility of the mental process, and the relation of these facts to mental disease symptoms; to suspicion that psychiatrists are trying to " palm off " the irresistible impulse symptom for moral insanity, or mere outburst of passion, etc.; and, lastly, to need of a more scientific administration of the law, by means of the aid of experienced, unbiased, and trustworthy experts. Finally, the practice of sporadic, unscientific modifications of tests by individual judges (although springing from commendable motives, frequently) has only introduced confusion into the law; in addition, it will cause more injustice and dissatisfaction with the law in the end than if the tests were rigidly but uniformly adhered to by all judges in all jurisdictions. The revision of tests of irresponsibility should not go on haphazardly and sporadically, but uniformly, by means of some machinery providing for the constant study of the operation of the law of insanity, *in practice*, and for a periodical, scientific, and well considered revision of the law, to bring it into harmony with advancing science.

Section 2 — Delusion

Hadfield's Case. — Erskine's eloquence, in his defense of Hadfield, was, as we have seen, the occasion for the introduction into the law of the concept of delusion. Pointing out that most insane persons were not raving maniacs, he affirmed that " delusion, . . . where there is no frenzy or raving madness, is the true character of insanity "; and, he added, " that where it cannot be predicated of a man standing for life or death for a crime, he ought not, in my opinion, to be acquitted." [1] While the concept of delusion was thus introduced as a distinct test, and in this way broadened the legal conception of insanity, Erskine, as we saw, made the same mistake

[1] Hadfield's Case, 27 How. St. Tr., 1281, 1314 (1800).

that is attributable to all his predecessors; namely, he laid down the presence of delusion as the *only test* in those cases "where there is no frenzy or raving madness."

Opinion of the Judges after McNaghten's Case. — In the much-discussed opinion of the judges following upon McNaghten's acquittal, Erskine's general statement as to delusion was hedged about with qualifications, to the effect that the defendant with delusions is responsible "if he knew at the time of committing such crime that he was acting contrary to law", and that the defendant with delusions "must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real." The first qualification supposes that knowledge of legal wrong may be unaffected by the presence of delusions; the second is the familiar rule that "ignorance or mistake of fact" furnishes no excuse for crime.[1] Both assume that a mentally ill person with delusions is perfectly sane in all other respects and with reference to all other subjects than that of the delusion.

Modern Status of Delusion Concept. — To-day the delusion concept cannot strictly be said to constitute, in itself, a test of irresponsibility;[2] it is, rather, an element that is considered in connection with the two tests already discussed, — the knowledge rule and the irresistible impulse rule. Like all the other legal principles on the subject it is to-day in a confused state. There

[1] For examples of this type of ingenuous, legal casuistry *see* Boswell *v.* St., 63 Ala., 307, 35 Am. Rep., 20 (1879); Commonwealth *v.* Rogers, 7 Metc. (Mass.), 500, 41 Am. Dec., 458 (1867). An insane delusion of a convict that a fellow convict had divulged his plan of escape to the prison authorities is no defense to the killing of such convict, "for an insane delusion with reference to the conduct and attitude of another cannot excuse the taking of his life, unless it is of such a character, that, if it had been true, it would have rendered the homicide excusable or justifiable." People *v.* Taylor, 138 N. Y., 398 (1893). This is the law in at least eight States. Obviously, it is unscientific from the psychiatric point of view; for it neglects the main fact of the existence of a psychosis and goes off on the relatively unimportant tack (from a medical point of view) of inquiring whether the false beliefs constituting the delusion were of such nature as would have excused a *sane* person (had they been real) from responsibility; thus assuming that the mentally diseased person could have reasoned as well with the delusion as without, provided only that the delusion were conveniently with reference to a subject which would not have excused the taking of life on the part of a mentally sound person.

[2] At least in most instances. The different combinations into which the concept of delusion has entered in the development of the tests in various jurisdictions will be discussed in the following pages. At least one type of statement of the effect of delusion on responsibility might be regarded as a distinct "delusion test", namely, the statement that if the act is *solely* the result of the delusion, it relieves from responsibility.

are at least five combinations of the delusion concept with the tests already considered, to be found in the reported decisions: (1) When the delusion has destroyed the defendant's capacity to distinguish right (legal or moral) from wrong;[1] (2) when the facts of the delusion, if true, would have justified the act and excused from responsibility;[2] (these two varieties were the direct outgrowth of the Opinion of the English Judges in McNaghten's Case);

[1] In United States *v.* Guiteau, 10 Fed., 161 (1882), a case about which an immense medico-legal literature has clustered, Judge Cox, in charging the jury, referred to the mistake-of-fact rule of delusion as follows: "The answer of the English judges, that I have referred to, has not been deemed entirely satisfactory, and the courts have settled down upon the question of knowledge of right and wrong as to the particular act, or rather the capacity to know it, as the test of responsibility; and the question of insane delusion is only important as it throws light upon the question of knowledge of, or capacity to know, the right and wrong." (P. 182.) *See also:* People *v.* Willard, 150 Cal., 543, 554 (1907); State *v.* Arnold, 79 Kan., 533, 537 (1909); Smith *v.* Com., 1 Duv. (Ky.), 224, 230 (1864); Grissom *v.* St., 62 Miss., 167, 169 (1884); Ford *v.* St., 73 Miss., 734, 740 (1896); State *v.* Huting, 21 Mo., 464, 476 (1855); State *v.* Spencer, 21 N. J. L., 199, 204 (1848); People *v.* Pine, 2 Barb. (N. Y.), 566 (but this case also approves the mistake-of-fact rule). "We gather from the authorities that a delusion need not be confined, as was formerly held, to the delusive belief of a fact which, if true, would afford a justification. But if the delusion was of such a character as to impair the mind of the person possessed thereof, to such an extent that the person was not able to discern the right or wrong of the particular act he was doing, and was induced to commit the particular act by the delusion, he would not be a criminal." Merritt *v.* St., 39 Tex. Cr., 70, 78, 80 (1898), holds that where it was proved that defendant had a delusion that a mob was after him to kill him, it was error for the trial judge to exclude evidence that he regarded the person he killed as the leader of the mob.

[2] Smith *v.* St., 55 Ark., 259, 263 (1891); Bolling *v.* St., 54 Ark., 588, 601 (1891), where it was stated that a delusion that defendant was trying to marry accused's mother would not excuse under the ignorance or mistake-of-fact rule of delusion; People *v.* Hubert, 119 Cal., 216, 221 (1897); State *v.* Mewherter, 46 Iowa, 88, 100 (1877); Commonwealth *v.* Rogers, 7 Metc. (Mass.), 500, 503 (1844), which holds that delusion excuses *either* (1) if "the delusion is such that the person under its influence has a real and firm belief of some fact, not true in itself; but which, if it were true, would excuse his act", such as killing "in supposed self-defence"; *or* (2) where "a delusion indicates, to an experienced person, that the mind is in a diseased state (which is the point later made by Stephen); that the known tendency of that diseased state of the mind is to break out into sudden paroxysms of violence . . . ; so that although there were no previous indications of violence, yet the subsequent act, connecting itself with the previous symptoms and indications, will enable an experienced person to say that the outbreak was of such a character, that for the time being it must have overborne memory and reason." In the last passage C. J. Shaw showed a more openminded attitude towards the defense of insanity, even in March, 1844, a few months after the famous Opinion of the English Judges in McNaghten's Case, than many of his successors in various States have shown up to the present. Only (1) above is, however, usually quoted by judges and commentators as the law laid down in the Rogers Case. Other cases in point are: Thurman *v.* St., 32 Neb., 224, 227 (1891); State *v.* Lewis, 20 Nev., 333, 363 (1889); People *v.* Taylor, 138 N. Y., 398, 407 (1893), where the defendant had a delusion that a fellow convict, whom he killed, had been placed as a spy over him to prevent his escape.

(3) when irresistible impulse (overmastery of the will) is attributable to the delusion;[1] (4) when either irresistible impulse or inability to distinguish between right and wrong is attributable to the delusion;[2] and (5) (sometimes indistinguishable from one of the others) when the criminal act is the product of the delusion.[3]

The last three varieties of the delusion concept were, of course, suggested by the prevailing practice in particular States as to the adherence to the right-and-wrong rule exclusively, or in combination with the irresistible impulse test; but, occasionally, a State not recognizing the irresistible impulse rule *in general*, nevertheless inconsistently makes a concession to it in cases where the symptoms of the mental disease are delusions, and where it can be shown (or, in practice, *implied*) that the delusion overmastered the will. In addition to the above, it has been frequently said that the insane delusion must be connected with the act, this requirement usually entering into the second, third, and fifth varieties noted above.[4]

[1] Flanagan *v.* St., 103 Ga., 619 (1898); Taylor *v.* St., 105 Ga., 746, 779 (1898); Allams *v.* St., 123 Ga., 500 (1905). The Georgia cases regard this as an exception to the right-and-wrong rule, and they usually put the rule as follows: "In consequence of some delusion, his will is overmastered, and there is no criminal intent"; thus recognizing the volitional ingredient in criminal intent. These cases also give us what might be considered another variety of the delusion rule, namely, a combination of the mistake of fact, with the overmastery of the will, concepts. Other cases in point are: Fouts *v.* St., 4 Greene (Ia.), 500, 508 (1854); Stevens *v.* St., 31 Ind., 485, 488 (1869), which holds that "if the defendant was a monomaniac on any subject, it was wholly immaterial upon what subject, so that the insane impulse led to the commission of the act"; Commonwealth *v.* Mosler, 4 Barr (Pa.), 265, 266 (1846); Taylor *v.* Com., 109 Pa., 262, 270, 271 (1885), in which the court lists "certain rules of law", which it considers "well settled", as follows: (1) Using the term "moral insanity" to denote this condition (which use has contributed to the confusion in the cases), the court holds that it is not a defense unless the delusion "subjugates the intellect", or "controls the will"; (2) the mistake-of-fact rule. A further case in point is: Commonwealth *v.* Wireback, 190 Pa., 138, 151 (1899).

[2] "In such a case (of insane delusion) . . . there must exist either one of two conditions: (1) Such mental defect as to render the defendant unable to distinguish between right and wrong in relation to the particular case; or (2) the overmastering of defendant's will in consequence of the insane delusion under the influence of which he acts, produced by disease of the mind or brain." — J. Somerville, in Parsons *v.* St., 81 Ala., 577, 596 (1886). Other case: Wilcox *v.* St., 94 Tenn., 106, 115, 116 (1894).

Another variety of the delusion test might be mentioned, though this is not so clear; it is a combination of the irresistible impulse or overmastery of will concept, and ignorance or mistake of fact. *See* Taylor *v.* St., 105 Ga., 746, 778 (1898).

[3] State *v.* Jones, 50 N. H., 369 (1871).

[4] *See* People *v.* Griffith, 146 Cal., 339, 346 (1905); State *v.* Gut, 13 Minn., 341 (1868); Allams *v.* St., 123 Ga., 500 (1905); State *v.* Hackett, 70 Ia., 442, 447 (1886).

Criticism of the Delusion Concept. — We have already criticized the whole legal conception of delusions, in discussing the Opinion of the English Judges after McNaghten's Case; namely, the law treats delusion as an entity, separable from the entire disordered condition of mind of the accused; whereas delusional manifestations constitute but one type of symptom of certain forms and states of mental disease. More specifically, the delusion rules discussed above may be criticized as follows: The first statement of the delusion concept has but narrow application, since most persons with delusions *apparently*, and to some extent at least, know right from wrong, when spoken to, as was pointed out by Stephen in his discussion of Hadfield's Case.[1] Moreover, this test " involves the further difficulty of establishing a direct relation between the two symptoms." [2] The second type of the delusion test, which we have already criticized in discussing Hadfield's Case,[3] assumes that an insane person with delusions can reason and control his conduct in the same manner as a sane person; for it is based upon the premise, as was the case in the Opinion of the English Judges, that there are patients who " labour under such partial delusion only ", and are " not in other respects insane." We will consider this proposition later, in discussing the data of modern psychiatry.[4]

Legal Criticism of Mistake-of-Fact Variety of Delusion Test. — At this point, perhaps the best argument against the delusion tests has been furnished by some writers on the law themselves. We have already seen that Stephen,[5] who so thoroughly understood this whole subject, said that delusion should be accepted by the law in its medical signification, namely, as one symptom of certain forms and stages of mental disease, and not apart from its setting in the entire symptomatology. The legal consequences of such view would be to regard delusion, not in the same light as ignorance of fact which excuses the act of a sane person, but, first, as evidence of an entirely disturbed functioning of the mind (which

[1] *See* p. 181. We must, of course, remember that their knowledge of the nature and wrongfulness of their acts cannot, strictly speaking, be said to be the same as that of a mentally sound person; the statement that most persons with delusions apparently know right from wrong is made in accordance with the legal assumption that their knowledge, as externally manifested to the lay mind, is apparently unaffected by the disease.

[2] Keedy, "Insanity and Criminal Responsibility", *Harvard Law Review*, Vol. XXX, No. 6, April, 1917, p. 558.

[3] *See* p. 147.

[4] Chapter 9.

[5] "History of Criminal Law", Vol. II, pp. 160, 163.

means, of course, the view that the delusion has deeper significance than appears at the surface to the untrained layman); and, secondly, as affecting the power of knowing right from wrong. Discussing the mistake-of-fact variety of delusion test, Stroud says:

> As has been frequently pointed out by medical and other writers, this was an absurd solution of an impossible problem (*i.e.*, the solution of the Judges of England of the problem posed by the Lords in their questions); and the most that can be said for it is that, in some cases, it might chance to work no substantial injustice.[1]

He then quotes Lord Brougham, in a case decided only five years after the famous English opinion, as follows:

> Mind is one and indivisible. We cannot, therefore, in any correctness of language, speak of general and partial insanity (*i.e.*, in the sense of delusions constituting partial insanity). If the being or essence which we term the mind is unsound on one subject, provided that unsoundness is at all times existing upon that subject, it is quite erroneous to suppose such a mind really sound upon other subjects. It is only sound in appearance.[2]

Stroud then concludes that "the false corollary set up by the judges in 1843, to meet the supposed case of partial insanity, is supported by no real authority, and may be asserted with confidence to form no part of the law of England. It was merely a *faux pas* in psychological theorization, based on the misleading evidence in *McNaghten's Case.*" [3]

Oppenheimer points out that:

> The theory of Esquirol and of the English law . . . is that an isolated delusion lies imbedded, like a foreign body, in a brain which is and remains normal all around. As against this view, modern science endorses the simile of Jules Falret, who likens a delusion to a parasitic plant "which will not spring up and grow in an unsuitable soil, and the soil which is suited to it is insanity"; "let the soil be changed to one of sanity," rightly remarks Maudsley, "in other words, let the mind apart from the delusion be sound, and this will dwindle and die." Maine well echoes the modern doctrine if he says: "The delusion is the outward and visible sign of disease of the brain; but the disease must have preceded the delusion, and continues silently to vitiate the mind,

[1] "Mens Rea", p. 78.
[2] Waring *v.* Waring, 6 Moo. P. C., 341 (1848).
[3] "Mens Rea", p. 78.

sapping the reason, warping the intelligence, and perverting the emotions." . . . Indeed, one would have thought that a very simple argument ought to have sufficed to show that, however narrow the limits within which insanity may appear to move, the intelligence is nevertheless *in toto* obscured.[1]

He might have added that the mind as a whole is "obscured"; for the fundamental, and probably the most important, mode of mental life of all, as we have so often said, is the conative-affective mode, of which the intelligence, consciousness, knowing, etc., are but the instruments of expression.

Among the numerous American commentators on the subject, Bishop also warns against the strict construction of the variety of delusion test that we are considering, as follows:

This branch of the doctrine should be cautiously received; for delusion of any kind is strongly indicative of a generally diseased mind. And doubtless sometimes if not always it does in fact extend beyond the precise point we have supposed, whether perceptibly to the casual eye or not.[2]

But the erroneous nature of the doctrine was most clearly brought out by two great American judges in this field, Judge Somerville, in Parsons *v.* State,[3] and Judge Ladd, in State *v.* Jones,[4] two epoch-making cases in the history of the tests of irresponsibility in America. After reviewing the leading medical texts of his day, Judge Somerville said:

If the rule declared by the English judges be correct, it necessarily follows that the only possible instance of excusable homicide in cases of delusional insanity would be, where the delusion, if real, would have been such as to create, in the mind of a reasonable man, a just apprehension of imminent peril to life or limb. The personal fear, or timid cowardice of the insane man, although created by disease acting through a prostrated nervous organization, would not excuse undue precipitation of action on his part. Nothing would justify assailing his supposed adversary except an overt act, or demonstration on the part of the latter, such as, if the imaginary facts were real, would under like circumstances have justified a man perfectly sane in shooting or killing. If he dare fail to reason, on the supposed facts embodied in the delusion, as perfectly as a sane man could do on a like state of

[1] "Criminal Responsibility of Lunatics", pp. 215, 216.
[2] "New Criminal Law", Vol. I, sec. 393.
[3] 81 Ala., 577 (1886).
[4] 50 N. H., 369 (1871).

realities, he receives no mercy at the hands of the law. It exacts of him the last pound of flesh. It would follow also, under this rule, that the partially insane man, afflicted with delusions, would no more be excusable than a sane man would be, if, perchance, it was by his fault the difficulty was provoked, whether by word or deed; or, if, in fine, he may have been so negligent as not to have declined combat when he could do so safely, without increasing his peril of life or limb. If this has been the law heretofore, it is time it should be so no longer. It is not only opposed to the known facts of modern medical science, but it is a hard and unjust rule to be applied to the unfortunate and providential victims of disease. It seems to be little less than inhumane, and its strict enforcement would probably transfer a large percentage of the inmates of our Insane Hospital from that institution to hard labor in the mines, or the penitentiary. Its fallacy consists in the assumption that no other phase of delusion, proceeding from a diseased brain, can so destroy the volition of an insane person as to render him powerless to do what he knows to be right, or to avoid doing what he may know to be wrong.[1]

And Judge Ladd was of opinion that the whole question of the relation of mental disease to criminal responsibility is one of fact, for the jury to determine. In connection with the mistake of fact variety of delusion concept, and with tests in general, he said:

It would doubtless be convenient to adopt some such test. It would, to some extent, save the trouble of trying each case, as it arises, on its own special and peculiar facts; at any rate, it would narrow the range of investigation to a search for the facts constituting the test adopted. But in cases of this sort, the argument of convenience is not to be admitted. No formal rule can be applied in settling questions which have relation to liberty and life, merely because it will lessen the labor of the court or jury. . . . It will hardly be contended, I suppose, that delusion, or knowledge of right and wrong with reference to the act, or any other thing, can, with any degree of propriety, be called a *legal* test of the mental capacity to commit crime, unless that capacity is determined absolutely, in all cases, by the presence or absence of the fact which is assumed to constitute the test. If we speak of *delusion*, for instance; before that can be adopted as the test, . . . it must appear that it makes no difference whether the delusion has any reference to or connection with the act or not.[2]

[1] 81 Ala., at pp. 595, 596.

[2] 50 N. H., at p. 393. *See also* Ryan *v.* Peo., 60 Col., 425, 428 (1915), in which the court said: "A simple illustration discloses its vice. Suppose a man labors under a delusion that a countryman is involved in a traitorous scheme in the capacity of a foreign spy, such delusion so completely possessing

From these quotations, we must agree with Judge Ladd's conclusion as to the mistake-of-fact brand of the delusion test; namely, that "it is probable no ingenuous student of the law ever read it for the first time without being shocked by its exquisite inhumanity." [1]

As to the third delusion rule, — that delusion will only excuse when irresistible impulse (overmastery of the will) is attributable to it, — there is no reason why jurisdictions recognizing the possibility of a delusion overpowering the volition should refuse to recognize the same irresistible nature of certain impulsive or compulsive acts of the mentally ill.[2] Yet, inconsistently, not all courts which recognize the principle of delusion resulting in overpowering of the will also accept irresistible impulse as a defense.

The fourth delusion rule, — that delusion will excuse when either irresistible impulse or inability to distinguish between right and wrong is attributable to it, — is merely the logical application of the delusion principle to the right-and-wrong rule and the irresistible impulse test, where these exist.

The fifth delusion rule, — that delusion will only excuse when the illegal act is the product of the delusion, — is vague and confused; it requires that connection of the particular delusion with the criminal act that is suggested in the second, or mistake-of-fact brand, of the delusion rule. It is, however, somewhat more liberal, in that while the *connection* between the delusion and the act must be *objectively* apparent, the delusive belief need not necessarily have been such as would have excused if the facts had been real. But this variety of the delusion rule, as we said in discussing Hadfield's Case, puts a premium on certain types of delusion. Moreover, the psychology upon which it is based is erroneous; for such view assumes that the *objective connection* between the delusion and the act is necessarily the subjective connection; whereas, as we shall see more fully in discussing the psychology of mental disorder,[3] the objective connection may tell us little or nothing about what has actually gone on in the mind of the mentally ill person to prompt him to the commission of the illegal act. There is, in other words, a deep significance (frequently symbolical) of the delusion and its relation to the act, which can only be arrived at, however imperfectly, through some form of mental analysis.

his mind that it becomes a foremost and constant thought, and actually renders him insane, and under it he kills the other in his belief that it was an act of civic duty."

[1] P. 387. [2] *See* Chapter 9. [3] *See* Chapter 9.

Summary and Conclusions as to Delusion. — From our survey of the various types of the delusion concept, we conclude that they constitute just as confused a proposition in the law of insanity as either the right-and-wrong test or the irresistible impulse rule; especially, in view of the fact that, as was the case throughout the history of the tests of irresponsibility, the delusion concept, too, has been raised out of its setting as but one symptom of mental disease and considered exclusively, objectively and *in abstracto*. Delusion is not necessarily more important than the rest of the symptomatology of a case of mental disease; and its significance as a symptom is almost entirely destroyed when it is removed from its setting in the whole disease picture. As to that species of the delusion rule which puts the mentally ill person with delusions in the same position with the person of sound mind who mistakes certain facts and is thereby excused, it has no warrant in psychology or law.

Section 3 — New Hampshire Law — Insanity and Irresponsibility Questions of Fact

Statement of Rule. — We have already referred to the fact that the New Hampshire courts have held that the presence or absence of knowledge of right and wrong, or irresistible impulse, or delusion, or any other of the concepts and symptoms of mental disease, which elsewhere have individually or in various combinations been raised to the dignity of rigid tests, constitutes a question of fact, determinable by the jury. This view of the New Hampshire courts is not very well understood by most writers. The presence or absence of *insanity* is in all States a question of fact determinable by the jury; but the jury are required to apply certain tests or measures to the fact of insanity once they have found it to exist; and they are warned that insanity, *as such*, does not exempt from responsibility, but only that type and degree of insanity that satisfies one of the tests provided by the law. In the famous New Hampshire case of State *v.* Jones,[1] however, not only were the rules in McNaghten's Case entirely repudiated, but all other tests of irresponsibility were declared inapplicable to insanity cases, because, in the opinion of the court, *they do not exist*. In other words, the court held that not only is insanity a question of fact,

[1] 50 N. H., 369 (1871). *See also* State *v.* Pike, 49 N. H., 399 (1870), and Boardman *v.* Woodman, 47 N. H., 120, 139, 148 (1866).

but *irresponsibility* is equally such a question, and equally determinable by the jury. After an elaborate review of the authorities, both medical and legal, the court went back to fundamentals, and declared itself of the opinion that the defendant should be acquitted if the jury found that, when he committed the act, he was afflicted with a mental disease of the kind and extent that deprived him of the capacity to entertain a criminal intent; and that criminal intent could not be imputed to the defendant if the evidence, as a matter of fact, showed that the killing was the product of the disease.

It is important to note just what the court did. The tests of irresponsibility are legal rules or measures applicable to certain cases where *some* evidence has been introduced showing that the defendant's mind was unsound when he committed the act. They were designed upon the assumption (true, in many, but certainly not all, instances) that the *jury* would not acquit a defendant if, *though they believed him insane,* they also believed that he knew right from wrong or could resist an impulse to do wrong, when he committed the act. In other words, the tests were developed upon the theory that there are, and always will be, two distinct steps in the proceedings: First, the introduction of some evidence which might make the jury believe the defendant was insane; secondly, the considered application by the jury of the tests of irresponsibility, as charged by the trial judge, to the fact they have already found, — namely, that the defendant was mentally unsound (insane, in legal terminology) when he committed the act. As a matter of fact, few juries actually make this clean-cut separation in practice, for the simple reason that a jury does not approach its task in a *judicial* frame of mind, and the further reason that the experts are not only asked whether or not the defendant was insane, but whether or not he knew right from wrong. Because of the psychological difficulty of keeping testimony as to *insanity* (and the feelings and opinions it engenders in the minds of the jury) apart from testimony as to irresponsibility (with the mental reactions that it, in turn, arouses in the jury), it can readily be presumed that the jury mingles its findings as to *insanity* and its findings as to *irresponsibility* (*i.e.*, as to the defendant's state of mind having satisfied the requirements of the legal tests), indiscriminately. This fact is, in our opinion, what the courts in the New Hampshire cases must have had in mind. They realized that,

in the last analysis, the jury actually decides both the question of insanity and the question of irresponsibility, and once they have *acquitted* a defendant upon the ground of irresponsibility by reason of insanity, he stands acquitted; and this regardless of whether or not the judge and the prosecution have been convinced during the course of the trial that the defendant in a particular case, though suffering from psychotic symptoms, as a matter of fact *did* know right from wrong or *could* have resisted an alleged irresistible impulse.

Criticism of New Hampshire Rule. — But this point of view has not passed unchallenged. Among the polemics of many judges and commentators who have attacked it, Professor Wharton's contribution is the clearest and strongest: He says that at the outset of any inquiry into the field of the criminal law we are considering, "two preliminary questions meet us: (1) Whether the definition of 'insanity' is for the court or for the jury, and (2) which is coëval with the existence of this branch of the law, arises from the opposite extreme, namely, from the desire to force into an inflexible and positive judicial code, special opinions delivered by judges when particular facts requiring such opinions were under examination."[1]

As to the second difficulty, Wharton gives several instances where special opinions, appropriate under the peculiar facts of some particular case, were subsequently raised into alleged *principles* of law, to cover all subsequent cases of the defense of insanity, regardless of the varying facts in those cases. This is a difficulty we have often referred to, and is inherent in the subject we are considering. The question is whether judicial rules or tests shall be so *specific* as to compel the jury either to force the facts of the particular case into a mold that they will not go into, or, frankly, to bring in a verdict absolutely disregarding the prevailing test of irresponsibility. Illustrating the process of raising into universal principles special opinions appropriate to special occasions, Wharton cites the following examples:

> For instance, when a defendant, in whom there is no pretence of mania or homicidal insanity, claims to be exempt from punishment on the ground of incapacity to distinguish right from wrong, the court very properly tells the jury that the question for them to determine is,

[1] Wharton and Stillé, "Medical Jurisprudence", 3d Ed. (1873), Vol. I, pp. 95, 103.

whether or not he labors under such particular incapacity. The error has been to seize such an expression as this as an arbitrary elementary dogma, and to insist on its application to all other cases. Or, take the converse, and suppose the defence is merely homicidal insanity. In such a case it would be very proper to tell the jury that, unless they believe the homicidal impulse to have been uncontrollable, they must convict. And yet nothing would be more unjust than to make this proposition, true in itself, a general rule to bear on such cases in idiocy.[1]

Is Irresponsibility a Question for Jury? — Professor Wharton actually takes a halfway place between strict general rules laid down by judges, on the one hand, and absolute freedom on the part of the jury to acquit or convict, no matter what the type of mental unsoundness, on the other. Considering the question whether the definition of insanity (meaning, in this case, *irresponsibility*) is for the court or jury, he analyzes the New Hampshire cases of State *v.* Pike and State *v.* Jones. In the first case, the defense was *dipsomania*, and the trial court instructed the jury clearly and simply that whether there is such a disease as dipsomania, and whether the killing of the defendant was the product of such disease, were questions of fact, to be determined by the jury in the same manner that they pass upon other questions of fact. In the Jones Case, defendant was tried for murder in killing his wife, and the defense was that he was suffering at the time from an " insane delusion " that his wife had committed adultery. Here again the judge charged the jury that if the killing was the " offspring or product " of mental disease, they should find the defendant not guilty. It was in this case that the court told the jury that neither delusion, *as such*, nor knowledge of right and wrong, nor such evidential facts as design or cunning in planning and executing the criminal act, or in escaping and avoiding detection, nor the capacity to recognize acquaintances, or to transact business, etc., did, *as a matter of law*, constitute final tests of irresponsibility; but that all symptoms and all so called tests are facts like any other facts, and as such are matters to be determined by the jury. " Whether the defendant had a mental disease, and whether the killing of his wife was the product of such disease, are questions of fact for the jury." The court further charged the jury that " whether every insane impulse is always irresistible, is

[1] Wharton and Stillé, "Medical Jurisprudence", 3d Ed. (1873), Vol. I, p. 103.

a question of fact. Whether in this case the defendant had an insane impulse to kill his wife, and whether he could resist it, are questions of fact. Whether an act may be produced by partial insanity when no connection can be discovered between the act and the disease, is a question of fact. The defendant is to be acquitted on the ground of insanity, unless the jury are satisfied beyond a reasonable doubt that the killing was not produced by mental disease." (P. 373.)

Although these instructions indicate an almost total surrender to the jury (and to some judges, no doubt, a welcome one) of the judge's part in the task of determining responsibility, they were approved by the Supreme Court of New Hampshire. Wharton, discussing the advisability of leaving the entire question of responsibility in insanity cases exclusively to the jury with the instruction to acquit, if the act was the product of mental disease, points out that the difficulty lies in the question, What is " mental disease "? And he goes on to say that " there is no phase of *ennui* or of misanthropy, no tinge of jealousy or avarice however faint, no corrosion of remorse however just, that has not received this title." [1] After quoting at length from various gems of literature to show in what wide and loose sense the term insanity has been used by various writers, Professor Wharton incorporates the phrases used by different authors, in the following language:

> No one would maintain, for instance, that it would not be in violation of all the fundamental sanctions of criminal jurisprudence, to tell the jury that they must acquit the defendant if they believe the act was produced by a 'mind ill at ease', or by a 'morbid or unhealthy condition of the mind', or by the mind's 'ruling passion.' Yet the term 'mental disease' legitimately and primarily includes all these states, and may be properly used to describe every evil passion by which crime may be caused. In fact, if criminal desire be, as is argued by Dr. Maudsley and Mr. Bain, always a mental disease, then the instructions under controversy are equivalent to telling the jury that they must acquit in all cases where the crime was the product of criminal desire. Under such a system, only the *innocent* could be convicted of crime, for only the innocent could be pronounced free from this psychical peculiarity.[2]

Discussion of Wharton's Views. — While Wharton's argument is considerably distorted by the exaggerations he indulges in, there

[1] *Op. cit.*, p. 98. [2] *Id.*

is much food for thought in it. The question is: How shall we determine whether the criminal act is attributable exclusively or (at least) largely to mental unsoundness, and at the same time rule out those cases to which "insanity" could only be applied by an exaggerated or literary use of the term? If the jury are to decide this question of innocence or guilt, as they do in ordinary cases, should they be given *carte blanche* to decide not only the presence of symptoms of mental disease, but, in addition, whether they are so marked as probably to indicate that the act was, in the legal sense, the deed of an irresponsible person? If they are given this leeway, their conception of responsibility will be the conception of the man in the street; and other influences, such as public opinion, prejudice, etc., will be even more often mingled with the determination of the pure question of fact, than they are to-day, where the legal tests afford at least some guidance to juries, however imperfect this guidance may be.

But are the use of hard-and-fast tests of irresponsibility, on the one hand, and the uncontrolled desire of the jury, on the other, the only alternatives? Professor Wharton attacks the statement of Judge Doe, in the Pike Case, to the effect that the question involved in insanity cases is one to be determined by experts, who alone can scientifically define what insanity is, on these grounds:

> (1) That the question in criminal issues is not insanity but irresponsibility, which it is eminently important should be limited by positive definition by the highest judicial authority the State can constitute; and (2) that experts do not form such an authority, (*a*) because their sense, as a body, cannot be obtained by any process known to our courts, (*b*) because there is no independent court of experts, which, on notice to both sides, and after argument, if necessary, can, when the experts called in a particular case conflict, give a judicial opinion upon the issues; and (*c*) because, in many cases of criminal defence, only those eccentric and exceptional experts are consulted who believe in some wild theory which may help out the defendant's case.[1]

While we agree that the question involved is irresponsibility and not insanity, there are several points to be considered in this connection: In the first place, irresponsibility is not something holy, nor is it based upon vague concepts unrelated to a consideration of the state of mind of the offender. Responsibility is a legal

[1] *Op. cit.*, p. 100. This argument is made much of by Oppenheimer, "Criminal Responsibility of Lunatics", p. 56.

concept which, we believe, is based both upon the popular conception of what constitutes moral responsibility, and upon consideration of the teachings of medical science at various stages of its development. That is to say, the concept of responsibility is not unrelated to reality; it is not, as we have frequently said, something that sprang full-panoplied out of the mouth of some Delphic oracle, or some lawmaking body, which conceived it arbitrarily, as something that does or does not attach to persons. It is true there is in the criminal law some element of the fiat of a lawmaking body declaring certain acts illegal and certain persons as responsible for those acts, under certain conditions of age, mind, etc. But responsibility contains much more of the traditional element than of the legislative element. Oppenheimer states, with some reason, that if " Parliament enact tomorrow that lunacy be no longer recognized as a defence to a criminal charge: B, a hopeless madman, will escape punishment if tried to-day, but he will be held responsible " if tried thereafter.[1] But this is not how the legal tests of irresponsibility arose in the past, and legislative bodies nowadays are not in the habit of acting so arbitrarily, at least not in cases where life and liberty are involved, and not in a stage of civilization where the views of leaders in the social sciences exert some influence on popular thought and upon that of members of lawmaking bodies.

Views of Professors Ballantine and Keedy as to Origin of Tests. — What, then, is criminal responsibility? Two diametrically opposite views as to the origin of the tests of criminal irresponsibility (especially with reference to the insane) are championed by outstanding legal scholars. The first view is represented by Professor Ballantine, who criticizes Professor Keedy's opinion that the tests are of medical origin, as follows:

> Professor Keedy states 'that the tests of irresponsibility now employed consist simply of a statement of certain mental symptoms, viz., inability to distinguish between right and wrong, irresistible impulse, and delusion, the existence of one or more of which is treated by the law as a defence. 'These symptoms,' he says, 'represent but a small portion of the phenomena of mental disease, and they bear no necessary relation to the ordinary legal rules for determining responsibility. They are simply obsolete medical theories crystallized into rules of law.'

[1] "Criminal Responsibility of Lunatics", p. 5.

This appears to the writer to represent an absolute failure to understand the ethical basis of these rules of law, viz., that criminal responsibility rests upon moral accountability as in the case of children from seven to fourteen. As pointed out by Somerville, J., in his notable opinion in Parsons *v.* State (probably the best exposition of the subject in the books): 'There must be two constituent elements of legal responsibility in the commission of every crime, and no rule can be just and reasonable which fails to recognize either of them: (1) capacity of intellectual discrimination; and (2) freedom of will.' These are tests of responsibility in criminal cases because without such powers a man is not morally accountable. . . .

The right-and-wrong and irresistible impulse tests are, therefore, not based on obsolete medical theories or on arbitrary symptoms of insanity, but on the general conditions of legal responsibility. Insane persons, like intoxicated persons may have intent to kill, to set fire to houses, to steal, to rape, or to defraud; but the great question is whether the defendant is a responsible moral agent. Crime does not exist unless the actor can be regarded as morally responsible for his act. If not, he is not culpable and does not deserve punishment. As Stephen says, 'Legal punishment connotes as far as possible moral infamy.'[1]

In taking the opposite stand, namely, that the tests of irresponsibility are the results of outworn medical views crystallized as rules of law, Professor Keedy[2] makes out a convincing case, by quoting many legal and medical authorities who support his position. However, our study of the history of these tests convinces us that there is some truth in both of the views expressed above. The first force that leavened the rigor of the early English common law was the moral or ethical force, — the simple fact that men were gradually becoming more civilized.[3] The origin of such rules as

[1] "Criminal Responsibility of the Insane and Feeble-minded", Henry W. Ballantine, *Journal of the Institute of Criminal Law and Criminology*, Vol. 9, February, 1919, pp. 485, 492.

[2] *Id.*, Vol. 12, p. 16.

[3] Holdsworth, "A History of English Law", Vol. III, pp. 372, 373, after citing certain relaxations in the rigor of the law in Edward III's reign (*see* Chapter 5), such as the beginnings of the rules which excused a wife in case of the commission of a crime under coercion of her husband, madness existing at time of crime constituting a defense, etc., says: "These rules make it clear that the law was laying more emphasis upon the *ethical* element in wrongdoing. It was beginning to be felt that the essence of the more serious crimes lay in the intent with which the act was done; and we even find cases in which the judges took the will for the deed, and punished the intent only, though the act was not accomplished." (He cites a number of interesting cases of homicide and larceny.)

the rule as to the irresponsibility of infants can thus be traced to an awakening ethical outlook in the early days of the common law. However, both by contemporary observation and through the infusion of the principles of the Roman law into the common law, by the early commentators such as Bracton, the view gradually prevailed that disease of the mind was something which made the mentally unsound so different from the ordinary run of men, with reference to their capacity to control their conduct and make it conform to an ever-widening circle of legal demands, that it ought to be taken into account in deciding whether culprits should be punished or not. With this admission of the influence of condition of mind upon criminal responsibility (*i.e.*, punishability) the views of ethical and medical leaders gradually were absorbed by the courts in their attempt to make the general rule — that disease of mind should excuse from punishment — more specific. Thus it is that the views of Beccaria and the Classical School of Criminology, the doctrines of the Neo-Classical and Correctionist Schools, and the opinions of such physicians as Doctor Monro, who testified at McNaghten's trial, and of Erskine (who was influenced by the prevailing medical views), and latterly, the views of contemporary medical writers [1] were gradually blended with the general conception of the relation of mental condition to criminal responsibility; and little by little they modified the rigor of the law. We thus see that the general principle behind the tests, namely, the fact that *unsoundness* of mind should affect *punishability*, just as *immature* mind affects it, originated in an advancing infusion of morality into the early common law; but that, in the attempt to make this general policy more specific and more suited to its application by juries in concrete cases, the different medical and psychological views prevailing at various stages of the development of those sciences, were gradually absorbed into the body of the criminal law. This process of absorption of advancing scientific views into the texture of the law having, however, gone on much slower than the development of morality and the sciences, there has always existed an hiatus between the condition of the tests of irresponsibility at any stage of legal development, and contemporary views in the realms of ethics, psychology, and psychiatry.

[1] *See*, for example, the cases on p. 240 which clearly illustrate this process, and the fact that absorption of contemporary medical views into the law is still going on.

The whole difficulty with this evolution in the past has been that the process went on haphazardly — slowly here, too fast there — without any coördinated, unified, intelligent guidance. The need has been for some coördinating body, whose business it would be to study the effects of the law in actual operation, to give to authoritative leaders in the various sciences opportunities to be heard as to the advances in their fields of learning which ought to be considered by the lawmakers, and either *consciously* rejected for good cause, or *consciously and uniformly woven into the texture of contemporary law.* This would provide for Professor Wharton's first requirement in this field, namely, that, since the question is not insanity *per se* but irresponsibility, " it is eminently important " that this term " should be limited by positive definition by the highest judicial authority the State can constitute "; and, at the same time, it would eliminate the evils of the present law by requiring uniformity of application of the law on the part of all trial judges, and by providing a means of keeping the law in harmony with advancing ethical and scientific views. As to the second great difficulty pointed out by Professor Wharton, namely, that the opinion of experts in this field " as a body, cannot be obtained by any process known to our courts ", the machinery recommended would also eliminate this. The question of whether an independent court of experts in the field of psychiatry should be made part of the legal machinery need not be considered; because, after all, the determination of the question of which persons have violated society's laws, and are therefore to be handed over to society's socio-penal machinery for punishment and other treatment, *is one that belongs to the courts and should remain there.* Whether, however, the courts, inexperienced in the types of treatment, penal and other, to which the individual criminal ought to be subjected, should have the power of fixing the length and type of treatment, is another question; it involves the science of penology. As to the employment of eccentric and unscrupulous experts, this is an evil which can and ought to be remedied; and though the subject has been partially discussed at the outset, it will be further considered in the concluding chapter.

Summary of Criticism of New Hampshire Rule. — Recapitulating our criticism of the New Hampshire rule, we may say that if the question of the relationship of insanity to responsibility is to be left to a jury at all, it would seem far better to hedge about the

possible arbitrary action of a jury with tests than to leave them without any more definite guide than the vague generality that if the defendant was insane when he committed the act, he should be found not guilty. However, the more or less arbitrary and confusing tests of irresponsibility, on the one hand, and arbitrary popular justice by a lay jury, on the other, are not the only alternatives. There remains the process of constantly and intelligently bringing rules of guidance for juries into harmony with advancing scientific thought, and in this way evolving a more appropriate and effective procedure. But since such an instrumentality for bringing to bear the data of advancing psychology and psychiatry upon the general procedure in insanity trials *does not yet exist*, we shall attempt, in the concluding chapter, to sketch what we consider an improvement upon the present system.

Summary and Conclusions as to the Tests of Irresponsibility. — Let us, at this point, review the entire course of our study of the history and status of the tests of irresponsibility. Our history of the tests and our study of the modern status of the tests seem to indicate that the whole tendency of the law (probably fostered by the past tendency in psychology and medicine) has been to vivisect the human personality into what was believed to be its component elements. The tendency originated at a time when little was known of psychology or psychiatry; it was strengthened by the passing fashions in psychology, such as phrenology, and its handmaiden, faculty psychology. It is perfectly permissible, when one is studying the nature of mind and human conduct, to analyze the mind and to abstract individual elements, suggested by external behavior (ordinary and under controlled experimentation), and by introspection, for the purposes of minute examination. But this tendency has led to serious consequences in psychology, and in the social sciences generally which deal with human conduct.

In the field of psychology the process of abstraction of elements of psychic states, originally pursued with the aim of studying these states more minutely, has often given way to a method of speaking and thinking of the human mind and of mental process as a compound of smaller elements which can be divided, the one from the other, without affecting the integrity of the whole mind and mental activity. "Ideas", "reflexes", "responses to stimuli", "sensations", "compound of elements of consciousness", "the mosaic of consciousness", etc., have been conceived of as distinct entities

or isolated processes and as more or less independent of the unified whole which constitutes the striving, thinking, feeling personality.[1] In the field of abnormal psychology, and through it, in the criminal law of insanity, we get such concepts as "partial delusion only"; or monomania, a delusion as to one particular object without its presumably affecting the remaining personality; or the belief that a mentally unsound individual with delusions can reason, feel, and will in a perfectly normal manner upon topics other than those connected with the delusion; or that a person who knows right from wrong must necessarily be able to act in accordance with such knowledge; or that the knowledge of right and wrong claimed on behalf of a mentally ill person is similar to what his knowledge, *and his emotional experience suffusing and affecting such knowledge,* would be were he of sound mind.

If the above described methods of analysis and abstraction and points of view have led to confusion and disagreement in psychology, these consequences are even more obvious in the social sciences which build upon psychology, especially in the law, and more particularly in the branch with which we are here concerned. It is no wonder that we have tests, by means of which the law seizes upon one element of mental activity or one symptom of mental disease and makes its presence or absence the *exclusive earmark* of irresponsibility or responsibility in insanity cases. It is no wonder that courts speak so scoffingly [2] and knowingly about the possibility of an irresistible impulse being present, even though knowledge of right and wrong is, to the naked eye of the untrained layman, apparently intact. What is needed in the law (in addition to procedural reform) is a proper conception of the unified personality. Disease of the mind is disease of a unity, of the personality

[1] Professor William McDougall, in the preface and introduction to his recent "Outline of Psychology", severely criticizes this whole attitude in psychology. "Impulse, delusions, knowledge of right and wrong are no longer conceived as concrete entities that either are or are not. Man is not a mosaic which may have some portion of the pattern dropped out indifferently as it were." — White, "Insanity and the Criminal Law", p. 104.

[2] Baron Alderson anticipated the modernist doctrine when he remarked, "A man might say that he picked a pocket from an uncontrollable impulse, and in that case the law would have an uncontrollable impulse to punish him." Justice Byles, in reply to query by counsel for prisoner charged with kleptomania, "Of course, your lordship knows what that is?" is reported to have replied, "Oh yes, and I am here to cure it." (*Cited* in 55 *Law Journal* — English — p. 121.) Baron Bramwell's ironical question is another frequently cited illustration. He asked: "Would the prisoner have committed the act if there had been a policeman at his elbow?"

make-up. And so long as it interferes with a person's power to conform his conduct to the demands of the criminal law, it is immaterial whether it manifests itself *primarily*, and to the casual eye, in a crumbling of the cognitive processes of the mind, or in an abnormal functioning of the emotional processes, in impaired power of inhibition or lack of will, in all of these or in combinations of these; the diseased personality is the fact. If legal tests must needs be provided (and with the system of trial by jury the use of some tests is better than to leave the matter entirely open), they should be applied only after the general mental condition of the defendant, as manifested by his mental and environmental history, physical and mental examination, psychological-psychiatric study, — in brief, the whole series of past social reactions of the accused as well as his conduct in the particular case under consideration, — have first been placed before the jury in an intelligent, clear, unbiased report. This report as to *mental* condition (and the neutral experts making it may, of course, be subject to cross examination) should form the *basis* of the jury's deliberations upon the second problem, that of *responsibility*. In applying whatever tests of irresponsibility may be in force, the jury by this method will at least have before it a scientifically laid foundation upon which to build, namely, the "natural history" of the illegal act and of the actor.

This general statement is all that can be made at the present stage of our inquiry. Before elaborating the procedure which in our opinion will more effectively bring about the desirable balance between the social interest in the general security and the social interest in the individual life, we must consider the subject of mental disorder in general, as well as the various types of psychoses and their principal symptoms. Such an inquiry should establish more convincingly the chief theoretical and practical difficulties with the present tests of irresponsibility; namely, that the unity of mental process is not sufficiently taken into account, that *superficial* symptoms of mental disease may have little relation to underlying causes and meanings of those symptoms, and that the tests of irresponsibility are not sufficiently comprehensive (individually or in combination), nor sufficiently thorough, scientifically to embrace all those clinical types of mental disorder which may issue in criminal conduct. These considerations will engage our attention in the two following chapters.

NOTE

JURISDICTIONS EMPLOYING IRRESISTIBLE IMPULSE TEST OF CRIMINAL IRRESPONSIBILITY OF THE INSANE

In the following jurisdictions the effect upon conduct of disorder of the impulses is taken into consideration by means of the irresistible impulse test of the irresponsibility of the insane.

United States Supreme Court: In Davis *v.* U. S., 160 U. S., 469, 485 (1895), Mr. Justice Harlan, in holding that it is incumbent upon the prosecution to prove all the elements of the crime, including the defendant's sanity, "beyond a reasonable doubt", incidentally approved the language of C. J. Shaw, in Com. *v.* Rogers, 7 Metc. (Mass.), 500 (1844), as follows: "In order to constitute a crime, a person must have intelligence and capacity enough to have a criminal intent and purpose; and if his reason and mental powers are either so deficient that he has no *will*, no conscience, or *controlling* mental power, or if, through the *overwhelming* violence of mental disease, his intellectual power is for the time obliterated, he is not a responsible moral agent, and is not punishable for criminal acts." (Our italics.) The Rogers Case is one of the earliest American bases for the later doctrine of "irresistible impulse."

In Davis *v.* U. S., 165 U. S., 373, 378 (1897), a statement of the degree of insanity which will excuse from crime was approvingly quoted as follows: "The term 'insanity' as used in this defence means such a perverted and deranged condition of the mental and moral faculties as to render a person incapable of distinguishing between right and wrong, or unconscious at the time of the nature of the act he is committing, *or* where, though conscious of it and able to distinguish between right and wrong . . . yet his will, by which I mean the governing power of his mind, has been . . . so completely destroyed that his actions are not subject to it, but are beyond his control."

Alabama: The opinion of Justice Somerville, in Parsons *v.* St., 81 Ala., 577, 596 (1886), ranks among the most famous and learned judicial pronouncements on the subject of irresistible impulse. In this case, the Supreme Court of Alabama was asked to review its action in Boswell *v.* St., 63 Ala., 307 (1879), wherein it had added the irresistible impulse test to the right-and-wrong rule. After sketching the history of the defense of insanity, Justice Somerville went back to fundamentals, and pointed out that, according to the legal authorities "freedom of will" is just as important and necessary an element in criminal intent as knowledge of right and wrong; he then reviewed the leading medical authorities of his time to the effect that most insane persons do have some knowledge of right and wrong, but that the mental disease consists largely of lack of power of control. Upon this basis, he set down the following tests to be given the jury in all criminal trials where the defense is insanity: "1. Was the defendant, at the time of the commission of the alleged crime, as matter of fact, afflicted with a disease of the mind, so as to be either idiotic, or otherwise insane? 2. If such be the case, did he know right from wrong as applied to the particular act in question? If he did not have such knowledge, he is not legally responsible. 3. If he did have such knowledge, he may nevertheless not be legally responsible if the two fol-

lowing conditions concur: (1) If, by reason of the duress of such mental disease, he had so far lost the *power to choose* between the right and wrong, and to avoid doing the act in question, as that his free agency was at the time destroyed. (2) *And* if, at the same time, the alleged crime was so connected with such mental disease, in the relation of cause and effect, as to have been the product of it *solely*." *See also* Mizell *v.* St., 63 So. (Ala.), 1000 (1913); also Wade *v.* St., 92 So. (Ala.), 97, 99 (1921), where "irresistible impulse generated by wicked propensities", is distinguished.

Arkansas: In order for it (insanity) to excuse " . . . it must appear he was so affected by it as to be unable to distinguish between right and wrong in respect to the act with which he was charged, or if he was conscious of the act he was doing and knew its consequences, that he was, in consequence of his insanity, wrought up to a frenzy, which rendered him unable to control his actions or direct his movements." — Williams *v.* St., 50 Ark., 511, 518 (1888). (Although in this case an attempt was made to distinguish the " frenzy " of an insane person from an act done " under the impulse of passion or revenge ", the case is a good example of the way both juries and judges may confuse these concepts.)

(1) Defect of reason from disease of mind so as not to know nature and quality of act; *or*, (2), if he knew it, that he did not know that it was wrong; *or*, (3), if he knew nature and quality and knew it was wrong, he was " under such duress of mental disease as to be incapable of choosing between right and wrong as to the act done, and unable, because of the disease, to resist doing of the wrong act which was the result solely of his mental condition "; for attempt to distinguish this from " mere passion ", etc., *see* Bell *v.* St., 120 Ark., 530, 553 (1915); Woodall *v.* St., 231 S. W. (Ark.), 186, 187 (1921).

Colorado: Incapacity to distinguish right and wrong as to particular act, or, being able to so distinguish, such " impairment of mind by disease as to destroy the will power and render him incapable of choosing the right and refraining from doing the wrong, and this is true howsoever such insanity may be manifested, by insane delusions . . . irresistible impulse, or otherwise "; distinction made between this and " moral obliquity, mental depravity, or passion arising from anger, hatred, revenge ", etc. — Ryan *v.* Peo., 60 Col., 425, 433 (1915).

Connecticut: Charge of " reason enough to be able to judge of the character and consequences of the act committed ", and that " he must not be overcome by an irresistible impulse arising from disease ", approved. — State *v.* Johnson, 40 Conn., 136, 142 (1873); State *v.* Saxon, 87 Conn., 5, 12 (1913).

Delaware: Right and wrong of particular act *or* deprivation of " sufficient will power to choose whether he would do the act or refrain from it." — State *v.* Jack, 4 Pennewill (Del.), 470, 475, 58 Atl., 833 (1903).

District of Columbia: It is not clear whether the law in the District of Columbia includes the irresistible impulse test. In United States *v.* Guiteau, 15 D. C., 498, 550 (1882), the court pointed out that it was not called upon to decide precisely the question whether irresistible impulse was recognized. It held, however, that the trial court need not charge the irresistible impulse rule where evidence of disorder of the volitional mode of mental life was not introduced, suggesting that,

perhaps, where the evidence pointed to such disorder, the court would be compelled to charge both the right-and-wrong rule and irresistible impulse doctrine. In Taylor *v.* U. S., 7 App. D. C., 27, 43 (1895), the court distinguished between " emotional insanity " and " epileptic insanity ", and also seemed to imply that if the distinction is valid, the volitional-inhibitory rule is appropriate.

Georgia: *See* p. 240 of text.

Illinois: *See* p. 240 of text.

Indiana: " A person may have sufficient mental capacity to know right from wrong and to be able to comprehend the nature and consequences of the act, and yet be not criminally responsible for his action, for if the will power is so impaired that he cannot resist an impulse to commit a criminal act he is not of sound mind." — C. J. Willoughby, in Morgan *v.* St., 130 N. E. (Ind.), 528, 530 (1921).

Iowa: " If the defendant's act in taking the life of his wife . . . was caused by mental disease or unsoundness, which dethroned his reason and judgment with respect to that act, which destroyed his power rationally to comprehend the nature and consequences of that act, *and* which, overpowering his will, irresistibly forced him to its commission, then he is not amenable to legal punishment." — State *v.* Felter, 25 Ia., 67, 83 (1868). It is difficult to say whether C. J. Dillon in this case intended to approve the " irresistible-impulse " rule, *where knowledge of right and wrong is present*, or not. It seems, however, that, far ahead of his contemporaries, he recognized the fact that the volitional mode of mental activity could not be separated clearly from the cognitive, as the irresistible-impulse rule would imply; and that whatever knowledge of right and wrong there might be in such cases, any mental disease which affected primarily the conative-emotional life of the subject was not such that the intellectual life could be designated normal.

Instruction on the issue of kleptomania as a defense in a prosecution for larceny, that the practical question to be determined was whether avarice or greed, or insanity, was the controlling force which led to the commission of the offense, held improper; since it sets off avarice and greed against insanity, as if these qualities necessarily indicated a sound mental condition. " Kleptomania is . . . an irresistible desire to steal. It is . . . a weakening of the will power to such an extent as to leave the afflicted one powerless to control his impulse to appropriate the personal property of others, without regard to whether such impulse is inspired by avarice, greed, or idle fancy." — State *v.* McCullough, 114 Ia., 532, 535 (1901). Here again no clear separation between irresistible impulse which is present together with substantially normal knowledge of right and wrong, and irresistible impulse which overwhelms the reason, etc. (as is usual in such cases), was made; except that it may be inferred that in cases of kleptomania the subject usually knows it is wrong to steal.

In State *v.* McGruder, 125 Ia., 741, 749 (1904), a case of sodomy committed by an apparently feebleminded person, the Supreme Court approved an instruction to the effect that " if there was any evidence that the act was the result of an irresistible insane impulse, it was not necessary . . . for the jury to find, in addition thereto, that the accused was of such imbecility or weakness of mind as to be unable to comprehend the nature and consequences of the act."

Kentucky: In Hall *v.* Com., 155 Ky., 541, 544, 545 (1913), the court approved an instruction to the effect that " the true test of responsibility is, whether the accused had sufficient reason to know right from wrong, *and* whether or not he had sufficient power of control to govern his actions "; yet the appellate court was of opinion that this instruction together with another did not require the jury " to believe that there must be a *concurrence* of his ignorance of what he was doing, and of right from wrong, and of insufficient will power to govern his actions ", but that " they were authorized to acquit if he was lacking in either of these three mental conditions."

Louisiana: It is difficult to say whether State *v.* Lyons, 113 La., 959, 996–998 (1904), approves the irresistible impulse doctrine or not. While the court pointed out that a requested charge to the effect that " if the . . . accused acted under an insane, irresistible, homicidal impulse, even though he was able to distinguish between right and wrong, he is entitled to acquittal ", was given in substance, and therefore the charge actually given was not ground for reversible error, the court nevertheless said that " if . . . the learned counsel intended, by means of the requested charge, to propound the doctrine of moral insanity (which consists of irresistible impulse coexistent with mental sanity) as a defense for crime . . . such doctrine ' has no support in either psychology or law.' " This is a good example of the confusion of the irresistible impulse principle with so called moral insanity, and the difficulty of keeping the concepts separate in judicial opinion.

Massachusetts: Keedy (" Insanity and Criminal Responsibility ", *Harvard Law Review*, Vol. XXX, #7, 724, 729), after reviewing the leading cases of Commonwealth *v.* Rogers, 7 Metc. (Mass.), 500 (1844), Commonwealth *v.* Johnson, 188 Mass., 382, 388 (1905), and Commonwealth *v.* Cooper, 219 Mass., 1, 5 (1914), comes to the conclusion that notwithstanding the many inconsistencies " it is highly probable that irresistible impulse unaccompanied by inability to distinguish between right and wrong, or the converse situation, would be held in a concrete case to constitute a defense ", at least as to the " living law in this respect ", which " is more comprehensible than the formal law." I have been unable to find any later cases which contradict this conclusion; and the judge's charge in Commonwealth *v.* Gilbert, 165 Mass., 45, 51, 52, 53 (1895), fairly bristles with references to " overwhelming impulse " which " overcame and obliterated his volition, his will ", etc., " and thus led him to commit an act although he knew it to be wrong ", etc., etc.

Michigan: In People *v.* Finley, 38 Mich., 482, 483, 484 (1878), the court approved a charge that the defendant " would be blameless in law, (1) if by reason of insanity he was not capable of knowing he was doing wrong, or (2) if he had not power to resist the temptation to violate the law ", and that sanity must be enlarged so as to " include persons who have not only knowledge of wrong but also capacity to resist it." *Appd.* in People *v.* Durfee, 62 Mich., 487, 494 (1886), and in People *v.* Quimby, 134 Mich., 625, 636 (1903).

Montana: " Criminal responsibility is to be determined solely by the capacity of the defendant to conceive and entertain the intent to commit the particular crime. If there is no intent, there is no crime. In the formation of this intent there must concur knowledge or intellectual comprehension, *and* the *power of choice*. An absence of the

former necessarily implies the want of the latter, for the latter cannot, in reason, exist without it. On the other hand, the former, as a scientific fact, may exist, in some degree at least, without the latter. It therefore follows that one may have mental capacity and intelligence sufficient to distinguish between right and wrong with reference to the particular act, and to understand the consequences of its commission, and yet be so far deprived of volition and self-control by the overwhelming violence of mental disease that he is not capable of voluntary action, and therefore not able to choose the right and avoid the wrong." — C. J. Brantly, in State *v.* Peel, 23 Mont., 358, 369 (1899). This is essentially the argument that Stephen used, when he said that the Opinion of the Judges of England after McNaghten's Case, if properly interpreted, is wide enough to include the irresistible impulse doctrine. *See also* State *v.* Keerl, 29 Mont., 508, 517 (1904). In State *v.* Colbert, 58 Mont., 584, 593 (1920), C. J. Brantly reaffirmed his views as to the irresistible impulse doctrine, expressed in the Peel Case, twenty-one years earlier.

New Hampshire: In State *v.* Pike, 49 N. H., 399, 402 (1870), at the trial, Justice Doe instructed the jury that " the verdict should be ' not guilty by reason of insanity ' if the killing was the offspring or product of mental disease in the defendant; that neither delusion nor knowledge of right and wrong, nor design or cunning in planning and executing the killing and escaping or avoiding detection, nor ability to recognize acquaintances, or to labor or transact business or manage affairs, is, as a matter of law, a test of mental disease: but that all symptoms and all tests of mental disease are purely matters of fact to be determined by the jury." (It will be noticed that Judge Doe referred to the tests as tests of mental disease instead of tests of *criminal irresponsibility*.) This charge was held to be correct on appeal (p. 408). It was approved in State *v.* Jones, 50 N. H., 369, 399 (1871), where it was reasserted that there *is no test*, and that the whole question of the presence or absence of a guilty state of mind, and hence of the effect of mental disease on criminal responsibility, is one of *fact for the jury*. Judge Ladd, in a famous opinion, reviewed all the " symptoms, phases, or manifestations " of mental disease, " as legal tests of capacity to entertain a criminal intent ", and concluded that " they are all clearly matters of evidence, to be weighed by the jury upon the question whether the act was the offspring of insanity: if it was, a criminal intent did not produce it; if it was not, a criminal intent did produce it, and it was crime. The instructions as to insane impulse seem to be quite correct, and entirely within the same principle. If the defendant had an insane impulse to kill his wife, which he could not control, then mental disease produced the act. If he could have controlled it, then his will must have assented to the act, and it was not caused by disease, but by the concurrence of his will, and was therefore crime." (398, 399.)

New Mexico: Territory *v.* Kennedy, 15 N. M., 556, 562 (1910), seems to approve the irresistible impulse test, though this is not clear.

Ohio: " Was the accused a free agent in forming the purpose to kill? Was he at the time capable of judging whether that act was right or wrong? And did he know at the time that it was an offense against the laws of God and man? " — Blackburn *v.* St., 23 Oh., 146, 165 (1872). This may at first appear to be a statement of the right-and-

wrong test merely. But the court in that case, approving the instructions laid down in Clark's Case (12 Oh., 494, note, 1843), said that the instruction in the Blackburn Case embodied the true rule, namely, the one given in the Clark Case. An examination of the Clark Case indicates that the volitional element was recognized. The instruction in that case quoted a statute defining murder in the first degree as an act done " purposely and of deliberate and premeditated malice "; and Judge Birchard said that " purposely implies an act of the will . . . it presupposes the free agency of the actor. . . . The crime of murder in the first degree can, therefore, only be perpetrated by a free agent, capable of acting or abstaining from action — free to embrace the right and reject the wrong . . . a sound intellect . . . under the control of the will."

Right and wrong *or* having such ability to enable him to refrain from doing wrong. — State *v.* Kalb, 7 Ohio Nisi Prius, 547 (1894).

Pennsylvania: Insanity to excuse must be shown to have existed to an extent " as to blind him to the nature and consequences of his moral duty. . . . Entirely to destroy his perception of right and wrong . . . so great as to have controlled the will of its subject, and to have taken from him the freedom of moral action." " There may be an unseen ligament pressing on the mind, drawing it to consequences which it sees, but cannot avoid, and placing it under coercion, which, while its results are clearly perceived, is incapable of resistance. The doctrine which acknowledges this mania is dangerous in its relations, and can be recognized only in the clearest cases. It ought to be shown to have been habitual, or at least to have evinced itself in more than a single instance. . . . To establish it as a justification in any particular case it is necessary either to show, by clear proofs, its contemporaneous existence, evinced by present circumstances, or the existence of an habitual tendency developed in previous cases." — C. J. Gibson, in Commonwealth *v.*Mosler, 4 Pa., 264, 266, 267(1846). This language was approved in Commonwealth *v.* Hillman, 189 Pa., 548 (1898). " The power to distinguish between right and wrong is not always the only test of responsibility, since this power may exist without the power of self-control." — Commonwealth *v.* De Marzo, 223 Pa., 573, 575 (1909). But this test is only applicable to cases where the evidence shows some " lack of control because of mental disease ", or a mind " dominated by an irresistible impulse." — *Id.* This is different from the rule in Alabama and a few other jurisdictions, where the irresistible-impulse doctrine seems *always* to be included in a charge in insanity cases, regardless of whether the evidence tends to show a disease of which impulsive action is symptomatic, or not.

Vermont: Doherty *v.* St., 73 Vt., 380, 383 (1901), quotes approvingly Bishop's " New Criminal Law ", Sec. 396-a, as follows: " One is insane who, from whatever cause, is incompetent to have the criminal intent, or who is incapable of so controlling his volition as to avoid doing the forbidden thing "; the court also holds that " if one's mental and moral faculties are so disordered and deranged that he cannot distinguish between right and wrong, *or* is not conscious at the time of the nature of the act he is committing, or if conscious of it and able to distinguish between right and wrong, yet if his mind or will is, involuntarily, so completely destroyed that he cannot control his actions, he is in a legal sense insane and is not subject to punishment for

criminal acts committed when in such a state." In State *v.* Kelley, 74 Vt., 278, 285, 286 (1900), it was held that the charge above quoted, if given with the conjunctive " and " instead of the disjunctive " *or*" constitutes reversible error, since it requires the three conditions to exist, while under the theory of the charge, the existence of any one of them would entitle the defendant to acquittal. In State *v.* Kelsie, 93 Vt., 450, 452 (1919), the knowledge and irresistible impulse tests were held applicable to feebleminded persons as well as to the insane, the common-law rule as to presumption of innocence of children under seven and between fourteen being held not applicable to the case of feebleminded *adults* of this *mental* age.

Virginia: Knowledge of nature and character of act and its consequences, and mental power sufficient to apply that knowledge to his own case, and to know that if he does the act he will do wrong and receive punishment, *and* possession, withal, of a " will sufficient to restrain the impulse that may arise from a diseased mind." — State *v.* Dejarnette, 75 Va., 867, 878 (1881); Thurman *v.* Com., 107 Va., 912, 916, 917 (1908).

Wyoming: Flanders *v.* St., 24 Wyo., 82, 88 (1915), approves a charge in which power to *choose* the right and *refrain* from the wrong was held equally necessary with knowledge of right and wrong.

CHAPTER 9

MENTAL DISEASE AS RELATED TO THE TESTS OF IRRESPONSIBILITY

"Of late years . . . there has been a growing tendency to seek beyond the facts of mere description and this urge has inevitably led to a progressively more *dynamic* approach to the problems of mental disease which has laid more and more emphasis upon the *processes* involved in the psychoses over and above the mere description of their phenomena as symptoms." — William A. White, "Foundations of Psychiatry" (1921), p. 1.

"A theory, to be accepted as true, must be able to account for the onset of illness, as well as for its cure. This the organicists have rarely attempted to do. They have never been able to show why one person should suffer greatly because of a slight astigmatism of which another is wholly unconscious, why retroflexion should cause pain in one woman while it causes nothing in another, why one individual should eagerly accept every unfavourable opinion from any doctor, while another, more robust in mind, but often much less so in body, flouts all precautions, though he knows the wisdom of carrying them out. . . . Such things are easily accounted for by most of the modern psychogenic hypotheses.

"Secondly, a theory to be true must accord with other ascertained facts. It is not in accordance with any such that nasal spurs" (for example) "should be regarded as the causes of fear, insomnia, and fatigue." — T. A. Ross, "The Common Neuroses" (1923), p. 13.

"The immediate situation back of the criminal act of stealing may in one case be poverty; in another a kleptomaniacal obsession (neurosis); in another the disintegration of the personality wrought by alcohol (alcoholism) or syphilis (paresis); in another it may be the expression of a maniacal lack of restraint (mania-depressive psychosis); in another the failure of development of the social instincts (mental defectiveness); while in another it may be due to lack of education and the influence of dominating and evilly disposed associates; conditions which are as widely different as can easily be imagined but which all issue in an act capable of the same statutory description." — William A. White, "Insanity and the Criminal Law" (1923), p. 25.

Section 1 — The Concept of Mental Unsoundness

Introduction. — In the preceding chapters we discussed some of the apparent shortcomings of the tests of irresponsibility from the points of view of the general principles of the criminal law and of psychology.

In this and the following chapter, we will consider them from the point of view of psychopathology, and attempt to estimate the extent to which the legal tests fall short of covering the entire

field of the relationship of mental abnormality to antisocial and illegal conduct. Such a task is difficult: for so much in the way of estimating whether or not a mentally ill person could have acted in a legally required manner depends upon the degree to which the mental deterioration has progressed in any individual case; further, it cannot be said categorically that the *behavior-capacity* of all persons suffering from some definite mental disorder is affected in exactly the same manner or to the same extent. Nevertheless, in some measure, basing our data upon the more or less unanimous opinions of experts in the field of mental disorder, as expressed in authoritative treatises and personal interviews, we may make an attempt to consider which types of mental disorder the tests are applicable to, and which they do not take account of.

Insanity and Criminal Irresponsibility. — To forestall any criticism from the legal camp, we must at this point hasten to reiterate that it is perfectly clear that " insanity " and " criminal irresponsibility " are two different concepts; that an insane person is not necessarily exempt from criminal responsibility, but that his exemption depends entirely upon whether or not his insanity satisfies the legal tests or criteria of irresponsibility devised for such cases. However, it must be said again, that those criteria were not made *in vacuo*, out of whole cloth, and without reference to any particular cases of mental disorder which arose. They were originally made, as we have seen, as the result of the infusion of a dawning humanitarianism into the harsh criminal law of early England; but as specific instances of mental unsoundness as a defense to criminal accusations arose, it was found necessary to devise some rules or measures which would serve to set off those who, although to some extent mentally pathological, might nevertheless very well have acted in conformity with the law. Hence it is, that the first glimmerings of these rules of irresponsibility were couched in general language, referring merely to the fact that a person *non compos mentis* (*i.e.*, a lunatic or an idiot) was irresponsible; that somewhat later, this vague generality was transformed into the requirement that the accused, to be exempt from responsibility, must have known the nature of the act and its wrongfulness; that still later, the still more specific symptom of *delusion* was taken account of by the law in its tests of irresponsibility; that at a later stage, in some of the American jurisdictions (and in Germany and other countries), the reality of volitional disorder as well as intellectual

derangement began to be considered, under the principle of irresistible impulse, — constituting another infusion of contemporary medical and psychological views into the law; and, finally, that there is therefore no valid reason to suppose that this process of infusion of the data of ethics and the hypotheses of contemporary science into the law, has stopped short at this stage. All this seems to us to prove that while irresponsibility is not insanity, nevertheless it has been based, during the evolution of the law, as well as of morality and science, upon more or less contemporary views of the relationship of mental disorder to antisocial and illegal conduct. The question then arises whether morality,[1] psychology, and psychiatry have, as yet, reached such a stage of development as to require a further, conscious adjustment to be made in the legal rules of irresponsibility. This is the attitude in which we must approach this problem; and with this explanation we may attempt such a task.

Objectivity of the Tests of Irresponsibility. — Throughout our study we have remarked that the difficulty with the tests of irresponsibility, especially the rule requiring connection of the delusion with the criminal act, or the rule that the delusive beliefs must have been such as would have excused a sane person from responsibility for the criminal act if they were actually true, is that they take account only of the more striking, *superficial* manifestations or symptoms of the mental disease under consideration; moreover, that, whatever symptom happens to be used as the test, this external manifestation of mental unsoundness, as long as it constitutes a test or measure of irresponsibility, is, because of this fact, considered by the law *in abstracto*, apart from the entire disease-picture, symptomatology, and the patient's past history.[2]

[1] Of course, if psychology and medicine give proof to ethics that certain moral views arrived at by pure speculation in the past must be adjusted to the new findings of those sciences, progressive ethics will make the adjustment; morality is based not only upon philosophical flights, but upon the findings of science as to human limitations. An admirable treatise that constitutes a rewriting of Ethics in the light of Psychology is Professor William Ernest Hocking's "Human Nature and its Remaking." There is room, however, for a sane Ethic in the light of the Freudian and Jungian psychologies. *See*, for a very interesting attempt, Dr. J. A. Hadfield's "Psychology and Morals."

[2] It is probable that this consideration by the law of only the cognitive, external mode of mental life has been caused by the past practice in psychology, which only in recent years has begun to emphasize the fundamental importance of the conative-affective mode of mental life. The cognitive phase was first emphasized, both by psychology and law, probably because it lies more open to inspection as it were.

In our chapter on the general psychological foundations of the criminal law, we have seen that the concept of the mechanical operation of motor sets, or reaction patterns, or the mechanical theory of the human organism, is not sufficient, by itself, to account for the phenomena of normal or pathological mental activity, and their relation to socially adequate, or to criminal, conduct. Therefore, in this chapter we must attempt an exposition of those psychological processes (*i.e.*, *mental*,[1] rather than neurological, processes) which lie behind the outward symptoms of mental disease generally, and which are strongly suggestive of the operation of the kind of psychic energy which has already been alluded to as constituting the conative, or striving, or driving, force that informs the human instincts.[2] But before attempting this, the ground must be cleared of several difficult, preliminary problems.

Definition, Classification, and Etiology of Mental Disorder — The Three Difficulties Encountered. — In any discussion of mental disorders the student is confronted with at least three fundamental difficulties: First, the definition of the term insanity (mental disease), secondly, the classification of mental diseases, and, thirdly (and allied to these) the problem of the etiology of the various mental disease types. The term "insanity" is one of the most difficult of all concepts to elucidate, much less define in a brief,

[1] If students of psychology would bear in mind the following lucid distinction drawn by Dr. Bernard Hart, much argument at cross purposes would be avoided: "The physiological conception (of mental disease) admits that the phenomena of insanity are phenomena of consciousness, but it assumes that the mental processes are accompanied by corresponding changes in the brain, and to these brain changes it devotes all its attention. With the phenomena as facts of consciousness it has no immediate concern. The first aim of the physiological conception is to find the actual changes in the brain which occur in insanity and the brain changes correlated with each morbid mental process. Its ultimate aim is the discovery of convenient 'laws' which will describe these brain processes in the shortest and most comprehensive manner. These laws will, of course, contain nothing but physiological terms — terms of *consciousness* will find no place therein.

"The psychological conception, on the other hand, takes from the outset an altogether different route. It regards the conscious processes occurring in insanity as the actual phenomena with which it is called upon to deal. Its ultimate aim is the discovery of convenient 'laws' which will shortly and comprehensively describe these *conscious processes*. In this case the laws will contain nothing but psychological terms — terms of *brain* will find no place therein. . . . Nothing but hopeless confusion can result from the mixture of 'brain-cells' and 'ideas.'" — "Psychology of Insanity", pp. 17, 18.

[2] Of course such an exclusively psychological approach is less adequate in those mental diseases where there are definite brain lesions, or where toxic causation is clear. The problems of insanity should be attacked both physiologically and psychologically; but the two orders, as Hart says, should not be confused.

all embracing statement. No two writers define the term in exactly the same manner; and a few, wiser than their colleagues, refuse to define it altogether. The Report of the Committee on Criminal Responsibility of the Medico-Psychological Association of Great Britain and Ireland, to the committee recently appointed by the Lord Chancellor in England for the purpose of considering the reform of the law of insanity, contains, at the outset, the following significant confession: "Insanity is admittedly incapable of precise definition." [1] However, some attempt must be made to indicate the generally accepted meaning of this concept; and this can best be done by pointing out that an analysis of the various types of definition which have been proposed, indicates that they depend upon the particular writer's point of view as to three fundamental problems of insanity, in a medical sense,[2] namely, its genesis,[3] or its symptomatology,[4] or its effects upon conduct,[5] especially socially and legally inadequate conduct. We may say tentatively

[1] "Report of the Committee appointed to consider what changes, if any, are desirable in the existing law, practice and procedure relating to criminal trials in which the plea of insanity as a defense is raised, and whether any and, if so, what changes should be made in the existing law and practice in respect of cases falling within the provisions of section 2 (4) of the Criminal Lunatics Act, 1884." London (1923), p. 29. (Hereinafter referred to as "Report of British Committee on Insanity and Crime.")

[2] It is not true that, as frequently asserted, "insanity" was originally exclusively a legal term; to-day, however, most psychiatrists prefer not to use the term, leaving it to the law.

[3] "Insanity is a manifestation in language or conduct of *disease or defect* of the *brain*." — Church and Peterson, "Nervous and Mental Diseases" (1901), p. 630. This definition, as will be seen further in the text, debars all functional diseases, and, in addition, the theory that some mental diseases are purely psycho*genetic* as well as psychic in nature. In the 1923 edition of this standard work on medical jurisprudence, no attempt is made to adhere exclusively, either to the organic or psychological explanation of mental disorder. (*See* "Mental Disorders in Medicolegal Relations", by Albert M. Barrett, in "Legal Medicine and Toxicology", edited by Peterson, Haines and Webster, p. 518.

[4] "Insanity is a diseased condition in which there is a relatively persistent departure from the normal manner of thinking, feeling and acting." — F. X. Dercum, "A Clinical Manual of Mental Disease" (1914), p. 21. "Moral insanity" is a disease of which the most prominent symptom is an almost entire absence or "a perversion of those mental faculties which are usually called the active and moral powers — the feelings, affections, propensities, temper, habits, and conduct." — Maudsley, "Responsibility in Mental Disease" (1874), pp. 171–172.

[5] "Insanity . . . is disorder of the process of adjusting the self to the circumstances, and . . . it is primarily manifested in disorder, not of mind, but of conduct. . . . Conduct may be strange, bizarre and extraordinary, without being disordered. Disorder of mind, if we construe this expression in a wide sense, is always present in insanity; but, in the first place, it is not necessary that this disorder of mind should be intellectual disorder; and, in the second, there is much disorder of mind that is not insane." — C. Mercier, "Crime and Insanity" (1911), pp. 32, 33.

that insanity (in psychiatric terminology, mental disorder) is a general concept used to embrace a number of types of mental unsoundness which, though different, tend, however, to fall into more or less clearly circumscribed groups of typical psychological (as well as physical) symptoms; and which express themselves in certain modes of socially inadequate conduct. When this socially inadequate conduct is of such degree or nature as to have been prohibited by the criminal law, because destructive of those social interests which the law is designed to secure, then insane conduct, like the conduct of a mentally sound person under like conditions, becomes illegal; but only when such insane and illegal conduct is of the type or degree that (theoretically, at least) satisfies the tests of criminal irresponsibility developed by the law for such cases, is mentally unsound, socially inadequate, and illegal conduct, branded as *criminal.*

Bases of Classification of Mental Disorders. — Without attempting further to define the term insanity, then, let us pass to a consideration of the other chief difficulties which are closely allied to this. The difficulties presented by varieties of classification of mental diseases are, like those of definition, also founded upon differences of points of view. Usually, mental diseases are classified according to etiology, symptomatology, or pathological anatomy.[1] A useful classification for some purposes is also possible on the basis of the mode of mental life (cognitive, conative, or affective) which appears to be *primarily* affected; provided, it is always remembered that because of the unified nature of mental function, there is an almost conclusive presumption that whenever a disorder of one of these modes exists, the others are also affected, regardless of whether or not such condition is observable superficially.

As to the classification of mental diseases on the basis of pathological anatomy, at the present stage of scientific learning on the subject of mental disease, such a basis would be much too narrow for the wide superstructure of symptom-complexes that must be reared upon it; for many psychoses have as yet failed to indicate any pathological structural basis, either for their origin or their continuance. Moreover, such a basis of classification would unnecessarily restrict and obscure the vision of investigators in this field as well as classifiers; for those who maintain it assume that

[1] George W. Jacoby, "The Unsound Mind and the Law" (1918), p. 46.

all mental disorder is organic at basis, and will ultimately be shown always to involve certain structural disorders of the tissue of the nervous system. But there does not need to be any such *a priori* narrowing, either of the field of scientific investigation of mental disorder, or of the field of classification; for in many psychoses, the neuroses and psychoneuroses,[1] the psychological approach, both for analysis of the disorders and their therapy, is, at present, the only fruitful one; and the psychical symptoms in many disorders are at present the only important ones. Professor McDougall has demonstrated the ill effects in the past of an exclusively materialistic approach to the problems of psychopathology;[2] and recent progress in the understanding and therapy

[1] Although these terms are frequently used interchangeably to designate all the functional disorders, they may be distinguished as follows: The psychoses (manic-depressive psychosis, paranoia, dementia præcox, etc.) are mental disorders in which there is little, if any, morbid anatomy, and in which "the patients fail to recognize their infirmities" and therefore "to adapt themselves to their environment, perhaps except in an asylum." These are the so called true insanities.

The neuroses (neurasthenia and anxiety neuroses) are disorders which are largely psychogenetic, and the etiological conditions of which "belong to the present or comparatively recent life of the patient and not to infancy."

The psychoneuroses (hysteria and compulsion neuroses) "differ from the neuroses in that they owe their origin, not to existing conditions but to partially or completely forgotten incidents or phantasies of early childhood, whose persistence in symbolic form into adult life, or the reactions against them, or a compromise between the phantasies and the reactions or their symbols, appears in symptomatic form, which may even itself be symbolized. . . . At the inception of a psychoneurosis there is frequently some existing determinant which serves as a link with the forgotten past, and is hence commonly but erroneously regarded as the primary cause of the disorder; but attention should not be directed to this etiological factor so much as to the already existing mentation of the individual who has been affected by such a factor." — W. H. B. Stoddart, "Mind and Its Disorders" (1921), pp. 253, 212, 229.

The above are the Freudian psychogenetic theories. T. A. Ross, "The Common Neuroses" (1923), uses the terms "psychoneuroses" and "neuroses" interchangeably. He classifies the psychoneuroses in accordance with the kind of response which is being given by the patient. "The view of the neuroses which is being put forward is that they consist in a faulty response to the difficulties which life offers. . . . There are three bad ways of reacting to difficulties: (1) by over-reaction, (2) by under-reaction or by failure to react at all, (3) by pretending that the difficulty is not present. . . . Over-reaction gives rise to those symptoms which have in the past been labelled neurasthenic. Of late the tendency has been to call them anxiety neurosis or anxiety hysteria. . . . Meeting difficulties by under-reaction or by failure to react at all gives rise to those symptoms which were formerly called hysterical, and which now in the Freudian terminology are called conversion hysteria, because the causal anxiety was regarded as being converted into the physical symptom. . . . Meeting difficulties by attempting to ignore them gives rise to obsessions and compulsions; and the collection of symptoms so produced may be called the Compulsion Neuroses," pp. 25, 26.

[2] "Research was for a time turned almost wholly in the direction of attempts to discover the defects of brain structure which were assumed to underlie all

of the psychoneuroses demonstrates the fruitfulness of the psychogenetic hypothesis and mental approach to the problems of psychiatry.

The question of classification, like that of definition, brings us to the third difficulty in this field, namely, that presented by the etiology of mental disease. Here there is a struggle between two [1] major schools of psychiatry, as to whether or not the so called neuroses, psychoneuroses, and most of the psychoses are of purely functional and psychogenetic nature.[2]

mental disorder. An immense amount of energy and time was devoted to the minute examination of the brains of the mentally diseased, as well as to the study of the normal brain. And chemical theories of mental diseases became fashionable, and led to elaborate chemical studies of mental patients. . . . Whatever we may think of this theory of the primacy and all-importance of structural defect of the brain in mental diseases and of the practice founded on it, it must be admitted that, during the latter part of the nineteenth century, when this theory and practice held almost exclusive sway, and when other branches of science were making very rapid progress, advance of the theory and practice of psychiatry was disappointingly slow; relatively speaking, it was a period of stagnation." — McDougall, "The Nature of Functional Disease", reprinted from *American Journal of Psychiatry*, Vol. I, No. 3, January, 1922, p. 339.

[1] Professor McDougall finds that there is a third group, between the functionalists and structuralists, namely, those who "take up an uncertain and vacillating position"; and he is of opinion that close study will indicate that the greatest contemporary psychiatrist, Kraepelin, in his "Lehrbuch der Psychiatrie", belongs to this last type. At most, holds Professor McDougall, Professor Kraepelin grants only grudging adherence to the psychogenetic theory, Professor Kraepelin saying, "in general we must grant to the real causal significance of mental influences only a very restricted scope." — *Op. cit.*, p. 345.

[2] "Functional *and* psychogenetic", because, while it has become the habit to speak of these interchangeably, McDougall has shown that it is quite conceivable that there may be functional *organic*, as well as functional psychic, disorders. — *Op. cit.*, pp. 340, 342. The same view as held by Professor McDougall as to the possibility of functional disorder being applicable to the purely organic part of the personality, seems to be held in a recent book by T. A. Ross, on "The Common Neuroses" (1923), pp. 1, 2, who says: "There is physical change in the retina when we see any object. There are even fairly well proved theories as to what this change is. But no one would call it a pathological lesion. Similarly there must be simultaneous change in the visual centres corresponding to those in the retina, and indeed all nervous activity must imply change. But again no one would call these lesions. All that is meant therefore when it is claimed that the neuroses . . . occur without lesion of any kind, is that the changes which occur are of the same nature as those which take place under circumstances which are never thought of as pathological, that they are the ordinary metabolic changes which go on with all kinds of bodily activity." This type of neurosis, he describes as one "where it (a physical lesion) has not only never been found, but where it is believed that it does not exist"; and he says that this is also called psychoneurosis, "because it is believed that" its "causes are psychological, mental", that it is "due to an alteration of mental functioning." He makes no distinction between such neuroses and the functional disorders embraced in the term "psychoneuroses", as Stoddart and others do.

Psychogenesis a Valid Hypothesis in Some Psychoses, the Neuroses and Psychoneuroses. — In a discussion of mental disease from the legal point of view we are not primarily concerned with problems of etiology,[1] except perhaps for the reason that the dictum, "every mental disease is a disease of the brain", may severely prejudice a jury against the defendant in those psychoneurotic and psychotic cases in which the evidence fails to disclose a history of organic disease or trauma.[2]

It is sufficient to state that science has so far been unable to demonstrate that all of that heterogeneous group of disorders embraced under the term mental disorder can be definitely traced to pathological organic structure. Whether all of the psychical disturbances which to-day seem to be purely functional and psycho*genetic*, as well as psychical in their very *essence*,[3] will some day yield to the magic of glandular or serum, or similar treatment, must be left as an open question. It cannot, however, be denied that the most important and significant symptomata of mental

[1] "It is the state and condition of the mind itself, the law will notice, and not the causes that produced it." — Bliss *v.* Conn. etc. R. Co., 24 Vt., 424, 425 (1852). This is, however, a civil, not criminal, case.

[2] The debate between the organicists and functionalists has apparently entered into the law. Thus we find some interesting attempts at definition in some of the cases: "Insanity is a mental symptom or manifestation of physical disease which impairs the understanding, so that one or more faculties of the mind is perverted, weakened, or destroyed." — Buchanan *v.* Wilson, 97 Neb., 369, 378 (1915). Insanity "is a diseased or disordered condition or malefaction of the physical organs through which the mind receives impressions or manifests its operations, by which the will and judgment are impaired and the conduct rendered irrational." — Blackstone *v.* Standard L., etc. Ins. Co., 74 Mich., 592 (1889). "Whatever opinion . . . may be entertained of the nature of the mind, it is generally admitted, at least by all enlightened physiologists, that it must of necessity be put in connection with matter, and, that the brain is the part of the body by means of which this connection is affected." — Denson *v.* Beazley, 34 Tex., 191, 214 (1870), *citing* Ray's "Medical Jurisprudence." "It is now generally conceded that insanity is a disease of the brain, of that mass of matter through and by which that mysterious power, the mind, acts. There, the mind is supposed to be enthroned, acting through separate and distinct organs. These organs may become diseased, one or more or all, and in the degree, or to the extent of such disease, is insanity measured. A disease of all the organs, causes total insanity, while of one or more, partial insanity only." — Hopps *v.* Peo., 31 Ill., 385, 390 (1863). Here also Ray's "Medical Jurisprudence" was cited. This is an interesting illustration of the influence of the old faculty psychology and phrenology upon judicial opinion.

[3] Professor McDougall is of opinion that there are two probabilities, and an additional possibility as to the genesis and nature of functional disorders: "(1) Diseases which, though involving structural and chemical abnormalities, are of functional (*i.e.*, psychical) origin. (2) Diseases which are of functional origin and of functional essence, involving no strictly pathological tissue change, but only a disturbance of the quantitative balance of functions. (3) Mental diseases which are of mind only, and not at all of the body." — *Op. cit.*, "The Nature of Functional Disease", pp. 346, 348, and 353.

diseases are the *psychological*, and that it is through these psychological disturbances that conduct becomes seriously affected; hence, the criminal law will always be concerned with the psychological symptoms. The law is further interested in problems of etiology, as well as nature of mental disease in connection with the psychology of mental disorder, and, indeed, with the whole position taken in this study — that the tests of irresponsibility deal more with patent, isolated, objective, external phenomena of mental disease, than with the more fundamental, latent, psychological forces and mechanisms of the personality (*i.e.*, the purposive, conative-affective, innate psychic trends, and the nervous-muscular machinery which they employ in expression of their purposes). The purely organic and structural hypothesis seems to constitute an unwarranted dogmatism as to a problem so fundamental that its solution must of necessity rest in the lap of time; and until it can be demonstrated that there is an agency, more fundamental than the psychic, involved in the causation of the psychoneuroses and psychoses, we must accept as valid and useful working hypotheses the concepts of the psychological schools of psychiatry.[1]

[1] One need only refer to the remarkable work done by Janet, Morton Prince, Freud, and Jung in the realm of the psychoneuroses, to realize the fruitfulness, as well as the validity, of the analytic-psychological approach to some, if not all, of the mental disorders. Of course, many insist that it is still too early to pass judgment upon the "cures" effected through the technique of psychological medicine. But a large literature of authenticated proof arose as the result of treatment of the War neuroses, and more is being daily accumulated. *Cf.* Ross, "The Common Neuroses" (1923).

Professor Adolf Meyer, one of the most stimulating writers in the field of psychiatry, takes the following fair attitude with respect to this vexed question: "As we study anomalies of mental activity and conduct," says this scholar of long experience, "we find some plainly due to extra-psychological events, for instance, happenings in the brain, such as vascular occlusions with consequent softenings or inflammatory processes, or simple senile atrophy, or intoxications; that is, conditions which in their etiology, evolution and outcome, are clinched in terms of physiology and pathology of the nutrition and vascular apparatus of the brain. There are, however, other disorders in which the circulatory and nutritional facts are merely incidental, and which we find best expressed in terms of mental events or reactions and their consequences. As such I should mention the results of emotional shock or emotional fretting, or of continued uncorrected and unchecked false reasoning." — "The Problems of Mental Reaction Types, Mental Causes and Diseases", *The Psychological Bulletin*, 1908, V. 253. Dr. Meyer explains the genesis of the skeptical attitude of some physicians and psychologists clearly: "Since in these conditions certain infra-psychic biological relations are frequently found to be at fault as well, through incidental loss of sleep and malnutrition, etc., the physician is inclined to over-rate them in his psychophobia and, finally, to *assume* these sub-cerebral conditions as the noumenal or 'real' cause, even when he does not *find* them or has nothing whatever to work on." — *Id.* Agreeing with Dr. Meyer,

Some Sources of Confusion. — But before leaving this preliminary discussion, one or two common sources of confusion in this field might well be alluded to. The mere proof that organic changes go on during the progress of some of the psychoses does not establish the fact that these psychoses are of organic, and not psychic, *genesis*. Sir Frederick Mott believes, for example, that the diseases of the group of dementia præcox are of organic genesis, as well as nature, basing such belief on his findings that there are organic changes in the brain and other parts of the body (such as the sex organs), which can be detected on post-mortem examination.[1] But, as Professor McDougall points out, " the demonstration of organic changes in a case of mental disease of some standing does not by any means prove the disease to be of organic, rather than functional, origin. Only the demonstration that changes of one order precede in time all changes of the other order could suffice to establish the primacy of the functional, or of the structural, derangement." [2] The changes found by Mott may have been post-mortem changes.

Another source of confusion in this field is presented by discussions as to the part *heredity* plays in the etiology of mental disease. That it is of marked influence is almost universally agreed.[3] But

Dr. Thomas Verner Moore, in his recent stimulating "Dynamic Psychology", rightly points out that, in the spirit of scientific inquiry, here as in other domains, "An undogmatic attitude is necessary to the physician. It is easy to say all mental disorders mean some kind of brain disorder, whether I can find the lesion or not. 'To try to explain an hysterical fit, or a delusion system out of hypothetical cell alterations which we cannot reach or prove, is at the present stage of histophysiology, a gratuitous performance. To realize that such a reaction is a faulty response or substitution to an insufficient, or protective, or evasive, or mutilated attempt at adjustment, opens ways of inquiry in the direction of modifiable determining factors, and all of a sudden we find ourselves in a live field, in harmony with our instincts of action, of prevention, of modification and of understanding, doing justice to a desire for directness instead of neurologizing tautology.' " — *Op. cit.*, p. 289.

[1] "Studies in the Pathology of Dementia Præcox", *Proc. Roy. Soc. Med.* (Section of Psychiatry, Aug., 1920), *cited* by McDougall, pp. 346, 347.

[2] *Id.*

[3] White, "Outlines of Psychiatry" (1918), p. 20, says that an inherited *predisposition* is found in from thirty to ninety per cent. of cases, according to different authorities. No doubt the variability is partially due to difficulty in gathering such statistics, inaccuracy of those reporting ancestral mental disorders, and perhaps a difference in the various mental diseases, as to percentage of inheritability of a weakened constitution. Dr. Horatio Pollock, "Eugenics as a Factor in the Prevention of Mental Disease", reprinted from *The State Hospital Quarterly*, November, 1921, pp. 2–4, gives the results of an extensive and highly-skillful statistical study of the insane in the hospitals of the State of New York, involving large numbers. It was found that "slightly more than half of . . . ascertained cases have no discoverable hereditary basis. If more thorough inquiries were made the proportion of patients with unfavorable

the extent of its influence, and the nature of that which is inherited, — whether it is a Mendelian unit,[1] etc., — these problems are, on the whole, still open. Not all or even most mentally diseased persons have been shown to have any hereditary taint; [2] while, on the other hand, persons of unusual mental and physical stamina have been known to have psychoses.[3]

Of recent years the claims as to the heredity of mental disorders *per se*, as Mendelian units, or of constitutional bases for mental disorders of various kinds, have been seriously questioned. Thus, Myerson [4] believes that "mental diseases are not unitary and that each type of mental disease must be studied by itself in

family history might be increased, but the significance of the history in relation to the family stock is open to question in many cases." Doctor Pollock cautiously points out the difficulty in such studies, namely, the fact that there are many imperceptible gradations between the so called normal and neuropathic, especially in studying family histories, where the judgment of untrained observers must be taken.

[1] There is some evidence that it is transmitted from parent to offspring as a trait which is recessive to the normal condition, in the Mendelian sense. *See* A. J. Rosanoff and F. I. Orr, "A Study of Heredity in Insanity in the Light of the Mendelian Theory." *Bulletin #5*, Eugenics Record Office, Cold Spring Harbor, N. Y. H. H. Goddard, "Heredity of Feeblemindedness." *Bulletin #1*, Eugenics Record Office. C. B. Davenport and D. F. Weeks, "A First Study of Inheritance in Epilepsy." *Bulletin #4*, Eugenics Record Office. *But see* Myerson, "Mental Disease in Families", *Mental Hygiene*, April, 1919, p. 239.

[2] "The children of any individual who errs from the general standard of the race in any respect exhibit, in the great majority of cases, a return towards the standard . . . and very many children of the insane are as sound in mind as they are vigorous in body. Even when insanity is strongly prepotent in a race, and when four or five brothers or sisters are insane, there is usually at least one brother or sister who never shows a sign of insanity. The influence of inheritance in producing insanity is great, but it should not be exaggerated; and it would be a gross exaggeration to suppose that the children of an insane person must necessarily be insane." — Mercier, "A Textbook of Insanity" (1914), pp. xix, 7.

[3] Discussing the fact that the structuralists strongly insist that the occurrence in an individual of a nervous disorder always implies some hereditary or constitutional defect, that there is always something wrong in the germ plasm, or ordering of atoms, etc., in these cases, Professor McDougall points out that in the early stages of the War it was very noticeable that amongst the large number of so called shell-shock cases (neuroses), there was an excessive proportion of noncommissioned officers of the regular British army, a group of men comprising a highly selected and seasoned body of troops, especially the noncommissioned officers, many of whom won their position in the field. The disproportionately high incidence of mental disorder in men who, according to the structural theory, should have had a smaller incidence of mental disorder, is explained by the fact that the mental strain thrown upon them was excessive to their individual capacity of dealing with the demands that a certain responsibility for their troops' safety entailed. — Professor McDougall, Unpublished Lectures in Abnormal Psychology. Of course, fatigue, caused by long strain, sleeplessness, worry, fright, etc., may be a strong predisposing factor for the final psychic or physical shock which brings on the definite neurosis.

[4] Abraham Myerson, "Inheritance of Mental Disease," Second International Congress of Eugenics, 1921, Vol. 1, p. 224.

order to discover its hereditary relationships. Most of the mental diseases have no hereditary relationships; a few . . . do." Though he believes that "it is . . . likely . . . that we are dealing with a disease of the germ-plasm and injury inflicted upon it, which is thereupon transmitted for a long or short time through one or more generations according to the severity of the injury," he also insists that "the one phenomenon that stands out" is that "the insane have normal descendants; normal folks have insane descendants in a perfectly bewildering and inexplicable fashion." [1]

From the point of view of the experienced psychotherapist, Glueck also demonstrates the probability that the inherited factor in the neurotic constitution has been too greatly stressed. He says: "Experience with better facilities for dealing with these problems at the time of their occurrence fully justifies the belief that perhaps we have overstressed in the past the element of constitutionality. At any rate, the etiologic problem of the so called nervous child partakes of most of the characteristics of similar problems in psychopathology. Specific causation is the exception rather than the rule. Ordinarily all kinds of issues combine to bring about the result." [2]

Again, it is admitted that the toxins of fatigue may predispose to a mental disease. But from this it does not follow that the fatigue may not be the result of purely mental strains (such as prolonged fear in time of war); nor does it follow that the purely psychic trauma may not have been the immediate predisposing cause of the psychosis. Indeed, war experience greatly supports this view. So, taking it all in all, we may say that the presence of other predisposing factors does not rule out the validity of the psychogenetic or psychical-nature concepts of mental disorder.[3]

From what has gone before, we may conclude that the most promising classification of mental disease is one that proceeds upon

[1] *Op. cit.*, p. 224. *But see* Aaron J. Rosanoff, "Inheritance of Mental Disorders", Second International Congress of Eugenics, 1921, Vol. I, pp. 226, *et seq.*, giving the literature on the subject.

[2] Bernard Glueck, "The Nervous Child", *Survey*, Vol. 51, Nov. 15, 1923, pp. 188, 189.

[3] In addition to the relationship of heredity to the psychogenetic concept as a source of confusion, however, the problem is of interest in connection with the trial of the insane. For not only does the popular belief of the connection of heredity with insanity conform to the general scientific opinion (except that the question, "what is inherited?" is extremely vague in the popular mind), but this popular belief is, of course, represented on the jury in any actual trial; further, the problems of the admissibility and weight of evidence as to ancestral mental disorder may be of importance.

the basis of those causes of mental unsoundness that are observable *to-day*, be they psychological or other; however, that wherever a pathological organic (or toxic), or hereditary causative factor is shown to be more ultimate than the psychogenetic explanation, this should be added to, but not necessarily substituted for, the psychogenic factors. We must proceed, then, upon the assumption that there are genuine psychic disorders, as there are mental disorders of organic or toxic origin. By psychic disorder is meant such symptom-complexes as may be considered to be "the expression of subconscious purposes, or of the failure and disharmony of conflicting purposes which may be wholly or in part subconscious. This fact has been increasingly recognized by all who study the neuroses, especially hysteria. But however little the conscious subject may be aware of the purposes at work within him, they are essentially of the type of mental activities. It is, therefore, through mental influences that functional disorders are brought about. They are the consequence of disharmony, conflict, or failure of mental or purposive adjustments. That is to say, they are essentially *psychogenic*. This is now commonly admitted of those disorders which are officially classified as functional, the hysteric, neurasthenic, and psychasthenic disorders. But it is just for this reason, just because they are so clearly the result of mental activities, mental conflict, disharmonies, and failures of mental or purposive adjustments, as well as because they do not commonly involve any discoverable lesion or structural defect, that they have been in the past so commonly neglected and regarded as unreal or imaginary."[1] The psychology of such psychogenic disorders will be considered after some typical symptoms of mental disease in general have been discussed.

The discussion which preceded will, it is hoped, serve to explain to the reader why some of the etiological factors in the various mental diseases are hereinafter referred to by terminology comprising such varying causal forces as purely psychic trauma, toxins, and organic trauma or structural disease. It will also serve to explain, it is hoped, why many of the manifestations, as well as most promising hypotheses, of the mental diseases are couched in analytic-psychological terminology and conceptology.[2] Finally,

[1] McDougall, "The Nature of Functional Disease", pp. 343, 344.

[2] The writer knows of no clearer exposition of the nature of the psychological conception of mental disorder than that of Dr. Bernard Hart, in his "Psychology of Insanity"; and, as some readers are likely to misunderstand, or be

our preliminary discussion has shown that we must keep in mind, not any special definition of insanity (which term we have seen to be practically incapable of clear definition), but the general idea that mental disorder expresses itself in what are readily recognized as abnormal, psychological manifestations, of a nature and degree that must be regarded as pathological; and, as all capacity for the exercise of conscious, purposive, social, and legally adequate behavior is dependent upon a more or less normal functioning of the mind (a functioning indicated by what are generally agreed to be normal psychological manifestations), any marked disturbance of an accused person's principal modes of mental life, — the cognitive, or conative, or affective, — regardless of whether or not such marked disturbance may be shown to have an organic, toxic, hereditary, or purely psychic basis, must be presumed[1] to have contributed the dominant factor to such person's inability to conform his conduct to the law's requirements.

prejudiced by, his point of view, he reproduces at some length the words of Doctor Hart: "In modern psychology, conceptions are employed which cannot be demonstrated to have an actual phenomenal existence. 'Complexes' and 'repression', for example, are conceptions devised to explain the phenomena which are observed, just as in physical science the concepts of 'force' and 'energy' are devised to explain the phenomena of motion." The student of the psychology of insanity "will find, again, such conceptual abstractions as 'unconscious mental processes', involving the assumption that mental processes exist of which the individual himself is absolutely unconscious. It will perhaps appear at first sight that the assumption involves a psychological impossibility, and that if a mental process exists it must, *ipso facto*, be accompanied by consciousness. The reader must remember, however, that he is dealing with a conception which lays no claim to phenomenal reality, and that it belongs to the same generic type as the ether of the physicist. An unconscious mental process is a phenomenal impossibility just as the weightless frictionless ether is a phenomenal impossibility. In both cases the conception justifies its claim to rank as a scientific theory, because it serves to resume and explain in a comprehensive and convenient manner the facts of our experience, and because it satisfies the one great criterion of science, the test of utility", pp. 19, 20.

In using the term "analytic-psychological", the writer is purposely avoiding specific reference to any one school of analytic-psychological theory or therapy; the term is employed to embrace all those techniques, which, as Doctor Hart puts it, satisfy "the one great criterion of science, the test of utility", both as an instrument of psychological investigation and explanation, and as an agent of therapy.

[1] "Presumed", because the medical expert cannot be expected to say with mathematical certainty that any specific act (criminal or other) would not have been committed by a defendant if he did not possess a certain disease; except, perhaps, in such cases as general paresis or senile dementia, *often* associated with more or less typical criminal acts of an indecent character. He can only say, that it is highly probable, based upon what we know of the different mental disorders and pathological processes, as well as symptoms, that these very largely determined the particular illegal act under consideration.

Section 2 — General Symptomatology of Mental Disorder

Introduction. — The progress of psychiatry has been of the nature of a shift of emphasis from the study and classification of the mere external symptoms of mental disorder to an attempt at more fundamental explanation and control of the psychological processes involved in the psychoses and psychoneuroses.[1] With the investigations of Kraepelin, Freud, Jung, Prince, White, McDougall and other creative thinkers in the field of the psychology of mental unsoundness, this attack of the subtle forces behind the symptoms of insanity through the avenue of psychological analysis and explanation, received a new and lasting impetus. It is true, that in discussing the psychological processes of which the external symptoms of mental disease are but expressions, we must remember that much in this field still consists of more or less tentative hypothesis. But, though some of the psychological explanations which lend logic and reason to mental symptoms that are otherwise obscure are still to some extent purely hypothetical, the experience of many eminent psychiatrists in psychotherapy on the basis of such hypotheses is tending more and more to establish them.[2] Admitting, then, that the exact nature and delimitation of some of the hypotheses which have been developed to explain the peculiar character of psychotic symptoms will ultimately require alteration on the basis of an ever growing body of scientifically observed data (a fact which, by the way, is true of many scientific hypotheses), we may nevertheless proceed with the assurance that a respectable body of conspicuous leaders in the field of psychological medicine to-day regard them as scientifically unimpeachable.

General Picture of Mental Disorder. — Almost any reliable text on mental disease or morbid psychology will give the reader a good conception of the kinds of symptoms normally manifest in the more usual types of mental disorder. We prefer to cite the descriptions given by one or two psychologists and psychiatrists, whose views are expressed in sufficiently nontechnical language to form a fitting point of departure for the layman's consideration of

[1] White, "Foundations of Psychiatry" (1921), p. 1.

[2] *See*, for example, the Introduction to the Third Edition of Stoddart's "Mind and Its Disorders", in which that writer acknowledges a radical change in his views since the publication of the former editions, due to his personal confirmation, during many years of practice, of most of the Freudian hypotheses.

the principal types of mental disorder. "The effect of mental disease," says Professor Sully, "is in general to substitute for the complex balanced system of psychical forces which we have in health, a comparatively simple state of things in which certain tendencies grow abnormally strong and predominant through the suppression of others. More particularly, the higher and later acquired forms of psychosis, regulative processes of ideation, and self-control generally, tend to be dissolved, leaving the earlier and more instinctive tendencies uncontrolled. Thus through the weakening of the regulative volitional factor the patient is unable to control his ideas, and his intelligence is wrecked: or he becomes a prey to unregulated emotion, as where overweening conceit, timidity or animosity becomes predominant, and helps to maintain corresponding mental illusion." [1]

The two or three important features to note are that mental disease involves a serious disturbance of *control* of mental processes, that the higher processes, involving ideation, judgment, etc., tend to "dissolve", as it were; that when this process goes on the more primitive, instinctive urges (much more simple than the higher, complex mental processes) break forth in almost pristine vigor; and that control is transferred, as it seems, from the higher mental processes to these more or less discordant, uncoöperative, primitive springs of conduct.

Wundt describes these phenomena similarly: "If there is any single criterion of mental derangement, it is this — that logical thought and the voluntary activity of the constructive imagination give way to the incoherent play of multifarious associations." [2] While Wundt seems here to emphasize the ideational, or cognitive disturbance, his reference to the "voluntary activity of the constructive imagination" indicates that he recognized the fact that the "incoherent play of multifarious associations" was but the external manifestation and end-product of a more fundamental, conative-affective disturbance. From these two quotations, then, it will be seen that the outstanding feature of mental disease generally is a lessening of the power of integration and conscious control by the personality as a whole, over its primitive,

[1] "Outlines of Psychology", p. 468. *Cited* by Arnold, "Psychology Applied to Legal Evidence and Other Constructions of Law", 2d Ed. (1913), pp. 380, 381.

[2] "Human and Animal Psychology", *cited* by Arnold, "Psychology Applied to Legal Evidence etc.", p. 381.

instinctive, " elemental " forces; and the confusion in the intellective processes is a secondary manifestation.

Mental Symptoms from the Analytic-psychological Point of View. — Let us now attempt to translate the language of Sully and Wundt into the terminology and conceptology of modern analytical psychology. Both because the description of all the intricate symptoms of mental disorder is beyond the scope of this study, and because we are interested mainly in those symptomata which have been embodied in the legal tests of irresponsibility, we must confine ourselves to certain signs of mental unsoundness which can be seen, and recognized as such, by the layman when he visits an asylum for the mentally ill; and then we must attempt an explanation of these symptoms in terms of modern abnormal psychology. Doctor Bernard Hart [1] gives as clear an exposition of the subject as we have been able to find in any of the more voluminous treatises; and his account will therefore be used as a basis.

Quantitative and Qualitative Changes of Mind in Disease. — At the outset we will follow the practice of the law, and deal with the symptoms of mental disorder generally; in the next chapter will be considered the individual psychoses and neuroses. The changes that the mind undergoes in mental disorder may roughly be regarded as quantitative or qualitative. The quantitative changes are noticeable in the two general forms, — *feeblemindedness* [2] (comprising the grades of moron, imbecile, and idiot, blending into each other by imperceptible gradations) and *dementia*. Mental defectiveness (feeblemindedness) will be considered later.[3] In those mental diseases embraced under the term " dementia ", the more or less normal mental equipment which the patient formerly possessed undergoes a gradual decay or deterioration. Perhaps the most striking type of dement is the patient suffering from senile dementia. The dementias not so apparent to the layman comprise the various diseases in which the process of mental deterioration (generally going on hand in hand with organic deterioration), which may have begun at an early age, has gradually become sufficiently marked to manifest itself in external, psychological symptoms. These are the purely organic mental disorders.

[1] "Psychology of Insanity."

[2] Most of these cases are congenital, but occasionally mental defectiveness may be acquired in early childhood.

[3] *See* next chapter, pp. 332, *et seq.*

Qualitative Changes of Mind. — In most mental diseases that interest us in this study, however, the alteration is *qualitative* rather than quantitative. "It may be regarded as a change in the general attitude of the mind towards its experience, either transitory or more or less permanent";[1] and it appears to be both the result, and the accompaniment, of mental stresses and strains, of conflicts between the fundamental purposes of the organism, or of "psychic trauma." Under this heading of qualitative changes of the mind are included such general, qualitative conditions as excitement, depression, and apathy.

Excitement in the Mentally Ill. — The excitement of the mentally diseased person is but a form of ordinary excitement; it differs from it "mainly in the exaggeration of its manifestation, and in the apparent lack of an adequate cause, and in the fact that it is out of harmony with the patient's real condition and circumstances."[2] Although the excitement of the mentally unsound patient appears in different forms and degrees, its main characteristic, common to all forms of mental disease, is "the fundamental fact that the mind is exhibiting an abnormal output of energy." Some of the more important manifestations of morbid excitement in the different mental diseases will be discussed in the following chapter.

Depression and Apathy in the Mentally Ill. — In the psychology of mental disorder we deal with a concept of "psychic energy", which is strikingly manifest not only in the excited condition, but in its converse, *depression*. Similarly, a third concept dealing with psychic energy is *apathy*, a qualitative change characteristic of some stages of some of the mental diseases. In these three types of general qualitative (or conative-affective) change which are found in different stages of the various mental disorders, the important fact to note is that the *psychic energy*, the "affectivity", as some prefer to call it, is functioning abnormally and beyond the control of the unified, integrated personality. The intellective processes are affected only secondarily, and in such manner as to indicate, — a fact so often emphasized in this study, — that the intellective mental processes are but the instruments of the conative-affective forces, which are fundamental in the organism.

Some Symptoms of Mental Disorder. — The foregoing qualitative psychical changes of a general nature which are to be found

[1] Hart, *op. cit.*, p. 25. [2] *Id.*

in the mental diseases are accompanied by numerous striking, but *secondary*, individual symptoms of particular diseases; and, taking mental disorder as a general concept to cover all these mental diseases, we may list the principal individual symptoms as follows: *Somnambulism* (and multiple personality), *amnesia, hallucinations, illusions, delusions,* and *obsessions.* The legal discussions of the last four symptoms are in a state of confusion in the reported cases and law books; just as in popular speech the distinction between these symptoms is not always clear. We may describe the striking symptoms listed above, as follows:

Somnambulism and Amnesia. — These are symptoms that can be described together. The former is a condition occurring occasionally in the borderline neurotic cases, the psychoneuroses, such as hysteria, in which it is difficult to classify the patient as definitely having a psychosis, but in which, nevertheless, the patient's mental life may be of a distinctly abnormal order. The most famous study of this subject was made by Janet,[1] whose description and analysis of the case of " Irene " (and other similar cases involving somnambulism, " fugues ", multiple personalities, etc.) have become classical in abnormal psychology. Irene had nursed her mother through a long illness, and the circumstances of the mother's death produced a profound mental shock. The abnormal mental condition which developed from this psychic trauma on the basis of long mental and physical fatigue, manifested itself in peculiar symptoms similar to those exhibited by the sleepwalker. In the midst of some activity, Irene would suddenly relive the scene of her mother's death, with its accompanying vivid, emotional experiences. Throughout this dramatization of her former experiences, the patient remained unconscious of her actual surroundings, seeing and hearing nothing but the events connected with her mental shock. This somnambulistic state would end, as it began, without warning; and the patient would return to her former occupation exactly where she left off, as if nothing had intervened, with complete *amnesia* (forgetfulness) of the events of the psychic drama in which she had just played the leading rôle. In addition, when questioned during her normal states, she was

[1] "Major Symptoms of Hysteria." Other notable investigators in this field, such as Dr. Morton Prince (*see* his "Dissociation of Personality"), have studied and reported many interesting cases of dissociation resulting in multiple personality.

completely forgetful of all the events surrounding her mother's illness and death, and had lost all such emotional experience as one would expect a discussion of those sad events to have aroused. The psychological explanation of this remarkable phenomenon must be reserved until some of the other striking symptoms of mental disorder have been discussed.

Legal Significance of Somnambulism in Hysterical Psychoneurotics. — These cases do not often arise in the criminal courts, perhaps because defendants are not given psychiatric examinations, disclosing the existence of a neurosis (as neurasthenia, or anxiety neurosis, or hysteria or conversion neurosis, — the psychic symptoms being " converted " into physical symptoms); but they are significant from the point of view of the legal tests of irresponsibility in general in that they illustrate that outward symptoms may have a deep causal basis, the meaning and ramifications of which are not superficially apparent. Suppose, for example, a Dr. Jekyll-Mr. Hyde type of dual personality [1] and the commission of an atrocious crime by the Hyde personality, which would be entirely out of harmony with the Jekyll personality. We have seen that the legal requirement of criminal intent in every crime means, essentially, that the defendant should be capable of having an ordinary intention to act illegally; *i.e.*, *he* should be normally *conscious* of the nature and quality of the act and its wrongfulness, and, at the same time, have the capacity voluntarily to commit or to refrain from committing that act. If such a secondary personality would have been conscious of the nature of the act and

[1] There have been cases, such as that of the Reverend Ansel Bourne, reported by Professor William James, in which one personality held the field for long periods of time; or that of Sally Beauchamp, reported by Dr. Morton Prince, in which one of the personalities was extremely vicious, the other extremely docile, each being in possession of the field for considerable spans of time. The following brief account of the Bourne case is cited: "On January 17th, 1887, the Rev. Ansel Bourne, an itinerant preacher, drew a considerable sum of money from a bank in Providence, and then entered a tram car. This was the last incident which he remembered. 'He did not return home that day, and nothing was heard of him for two months . . . On the morning of March 14th, however, at Norristown, Pennsylvania, a man calling himself A. J. Brown, who had rented a small shop six weeks previously, stocked it with stationery, confectionary, fruit and small articles, and carried on his quiet trade without seeming to any one unnatural or eccentric, woke up in a fright and called in the people of the house to tell him where he was. He said that his name was Ansel Bourne, that he knew nothing of shopkeeping, and that the last thing he remembered — it seemed only yesterday — he was drawing the money from the bank in Providence.'" — Hart, p. 49. *See also* "Multiple Personality", by Boris Sidis and S. P. Goodhart (1905), and "Psycho-Pathological Researches in Mental Dissociation", Boris Sidis (1908).

that it was wrong, and would have voluntarily committed it, then the main personality, although the patient had no criminal intent, would be chargeable with consciousness of the act. Theoretically, at least, such a psychoneurotic would be punishable for an act committed by the secondary personality, especially in view of the fact that in such cases the secondary personality may be in possession of the mental field for years at a time, and may adapt itself to an entirely different environment; so that the court, without psychiatric aid, would, on the basis of the defendant's appearance and manner alone, have no way of telling the true mental condition of the defendant. Or, suppose that Irene had committed murder in her somnambulistic state, knowing the nature of the act and its wrongfulness; theoretically she would be guilty. Again, suppose that the Reverend Ansel Bourne (case cited, page 294, *note* 1) had committed murder during his secondary personality state, when, to all outward appearance, he was perfectly normal; he, too, would be guilty if, in his secondary personality state, he knew the nature of the act and its wrongfulness. Yet the whole process of dissociation and the entire secondary personality are the result of mental unsoundness. The cases of somnambulism and multiple personality are extreme examples of dissociation; but some disintegration of the mind goes on in all the neuroses. Therefore, unless it can be shown that it proceeded to such degree as to destroy knowledge of right and wrong, such mental disorders would not come within the exemptive rules of the law; and there is therefore certainly a gap in the tests of irresponsibility in the more severe episodic mental disturbances, such as somnambulism and multiple personality, that occur in the psychoneuroses.[1]

[1] Not many cases of somnambulism are to be found in the reported legal decisions; in those few cases where the question arose, it referred to sleepwalking and its accompanying state of unconsciousness. In Regina *v.* Tolson, 23 Q. B. D., 168, 187 (1889), Sir James Stephen considered somnambulism, hypothetically, and concluded that it would excuse a criminal act "simply because" a sleepwalker "would not know what he was doing", *i.e.*, would not be conscious. The facts in Fain *v.* Com., 78 Ky., 183 (1879), are interesting:

The prisoner, accused of murder, and his friend came into the public room of a small hotel, sat down at a table and soon fell asleep. His friend soon awoke and asked a porter for a room for both of them. He attempted to wake the defendant by violently shaking him, but failed, and told the porter to try to wake him. The porter shook the defendant for some time, and failing to wake him, said he believed he was dead: but defendant's friend said "no", and told the porter to wake him. After continuously harder shaking by the porter, defendant looked up and asked what he wanted, and the porter said he wanted him to go to bed. Defendant replied he would not, and told the porter to go away and let him alone. The porter "said it was getting late, and he wanted

Hallucinations. — An hallucination is a false sense impression. The patient hears a sound, or sees, feels, or smells an object that

to close the house, and still holding the prisoner by the coat, the latter either raised or was lifted up, and, as he arose, he threw his hand to his side as if to draw a weapon. A bystander said to him, 'don't shoot'; but without noticing or giving any sign that he heard what was said, he drew a pistol and fired. The deceased instantly grappled him to prevent him from shooting again, but a second shot was fired almost immediately, and a third soon followed. After the third shot was fired the prisoner was thrown down and held by the deceased. The prisoner, while being held on the floor halloed *hoo-wee* very loud two or three times, and called for Welch (his friend). He asked the deceased to let him up; but the deceased said, 'If I do, you will shoot me again.' The prisoner said he would not, and the deceased released his hold and allowed him to get up. Upon getting up the prisoner went out of the room with his pistol in his hand. His manner was that of a frightened man. He said to a witness, 'Take my pistol and defend me'; said he had shot some one, but did not know who it was, and upon being told who it was, expressed sorrow for what he had done." He was tried for murder (the facts as reported do not clearly indicate which shot proved fatal) and was found guilty of manslaughter, and appealed, because of the exclusion of pertinent testimony.

"It did not appear that the prisoner knew or had ever seen the deceased before. There was not the slightest evidence of a motive on his part to injure the deceased, nor does there appear to have been anything in what the deceased did or the manner of doing it which, the facts being understood, was calculated to excite anger, much less a desire to kill him. At that time the prisoner was about thirty-three years of age, and he introduced evidence to show that he had been a man of good character and of peaceable and orderly habits." (Page 185.)

The following was the testimony defendant offered to prove, but which was rejected by the trial court: "That he had been a sleepwalker from his infancy; that he had to be watched to prevent injury to himself; that he was put to sleep in a lower room, near that of his parents, and a servant-man was required to sleep in the room to watch him; that frequently, when aroused from his sleep, he seemed frightened, and attempted violence as if resisting an assault, and for some minutes seemed unconscious of what he did or what went on around him; that sometimes, when partly asleep, he resisted the servant who slept in the room with him, as if he supposed the servant was assaulting him.

"He also offered to prove by medical experts that persons asleep sometimes act as if awake; that they walk, talk, answer questions, and do many other things, and yet are unconscious of what they do; that with many persons there is a period between sleeping and waking in which they are unconscious, though they seem to be awake; that loss of sleep, and other causes which produce nervous depression or mental anxiety, may produce such a state of unconsciousness between sleep and waking; and that for some days previous his children had been afflicted with a dangerous disease, and he had, in consequence, lost much sleep." (Page 186.)

He also offered to prove that he had the pistol in his possession, because his life had been threatened on a previous day by a person living near where he had business on that day, and he therefore had borrowed the pistol.

The Supreme Court of Kentucky held all this evidence admissible to prove somnambulism, or "somnolentia" ("the lapping over of a profound sleep into the domain of apparent wakefulness"); and the case was remanded for a new trial.

It should be pointed out, however, that this case was not one involving the somnambulism of the psychoneurotic, but the much more generally known somnambulism of the period following sleep. We have been unable to find a case in the legal reports in which the multiple personality phenomenon of the psychoneuroses was in issue; although there are many cases in which the milder types of mental disintegration are involved.

has no objective existence. The most usual hallucinations among the mentally disordered are auditory.[1] The patient hears "voices" addressing him in deferential phrase, or insulting him, or commanding him to do certain acts. Auditory hallucinations occur in varying grades of complexity, from simple noises or isolated words, to elaborate addresses, or from simple flashes of light, to vivid visions, such as Joan of Arc saw. Mental analysis often discloses that these voices and visions refer to some of the patient's most intimate experiences, his fears, wishes, etc.; and only through such analysis can the real effect of such hallucinations upon the patient's thought and conduct be estimated. The fact that hallucinations have a deeper significance than is externally apparent, suggests that they must be due to some processes of which the subject is not ordinarily aware; but the discussion of the concept of the "subconscious" must be reserved until we have treated of some other usual symptoms.

Legal Significance of Hallucinations. — Hallucinations may result directly in illegal conduct; their vivid reality and compelling force may lead the patient to commit the most serious crimes, in carrying out a supposed command from the Deity, or in redressing supposed insults and threatened injuries. Since the data of hallucinations are false, they seriously affect the patient's understanding of his environment and distort his experiences. Strictly speaking, the hallucination, like the delusion, must be connected with the criminal act, before the defendant may be exempt from legal re-

[1] "In some psychoses the hallucinations are more or less specific in their type. In delirium tremens they commonly take the form of animals, insects, snakes, and terrifying creatures. In the subacute and chronic forms of alcoholic psychoses the hallucinations are largely in the auditory field. They occur as voices, conversations involving the patient, or as insulting remarks. In the delirium from the chronic use of cocaine, the hallucinations are chiefly visual, and what is seen is usually small in size, such as . . . minute insects or objects on their body. In dementia præcox hallucinations are pre-eminently in the auditory field, and occur as voices, commands, conversations or remarks which express their wishes or fears. Where tactile hallucinations occur they are described as electric shocks or magnetic forces upon their body. In epilepsy they are both auditory and visual and have a characteristic terrifying or ecstatic religious quality. In hysteria the hallucinations largely represent wishes or fears or ecstatic experiences. In the acute psychotic disturbance met with among prisoners confined in jails the hallucinations take their content from the trying situation they are experiencing. Voices express their wishes or fears, or they hear conversation in which they are exonerated from their alleged guilt." — Peterson, Haines, Webster, "Legal Medicine and Toxicology", Vol. 1, pp. 523, 524. Southard and Jarrett, "The Kingdom of Evils", pp. 250, 251, humorously cite a case of delirium tremens in which the characteristic hallucinations of "animals", or "zoopsia", are replaced by "devils", which "perhaps . . . will serve in their place."

sponsibility. Nevertheless, it is not unusual for experienced alienists to attempt to bring the delusion or hallucination test within the general right-and-wrong rule, and to take the view that, once they are convinced "hallucinations are present in association with other evidences of a psychotic disorder . . . the existence of disordered perception indicates a mental state that makes knowledge of right and wrong obviously different from that of the normal man."[1] But such an answer to the test question put to the alienist is not, strictly speaking, in conformity with the formal requirements of the law in those jurisdictions where the mistake-of-fact type of hallucination (or delusion) rule is in operation. There the law asks, not whether the defendant knew right from wrong in a manner "obviously different from that of the normal man", but, categorically, whether he knew right from wrong; and evidence, for example, of conversations of the accused immediately prior to the criminal act, which shows that, to the layman, his expressions indicated such knowledge of right and wrong (as where he told some one of his intention to kill another, without assigning a reason, or where he prepared a plan of escape beforehand, etc.), might destroy any such answer as that given by the alienist cited above. On the other hand, it might not; for the relative weight and importance of the evidence, including such qualified answers to the right-and-wrong question as above, are, in the last analysis, matters decided by the jury. Further, even in those jurisdictions where direct connection of an hallucination (or delusion)[2] with the act is required, such striking symptoms as hallucinations and delusions, whether they apparently are connected with the criminal act or not, if manifested by clear evidence or by the defendant in the court room, are strong factors in influencing a jury's verdict; they are the popular signs of "craziness." The unreliability of the hallucination (or delusion) rule in operation in the courts is illustrated by the fact that persons of relatively mild psychotic or tinge may have such symptoms,[3] and they may pass without much

[1] "Mental Disorders in Medicolegal Relations", by Albert M. Barrett, M.D., in Peterson, Haines, Webster, "Legal Medicine and Toxicology", Vol. 1, p. 524.

[2] The reported decisions frequently use the terms delusion and hallucination interchangeably, when discussing the delusion tests of irresponsibility.

[3] "Hallucinations of sight, of sound, and of the other special senses are sometimes looked on as pathognomonic of insanity. But they occur in perfectly normal persons, and therefore also in neurasthenic patients. The test is that already laid down. What does the patient think of them? If he recognizes that they are a symptom of his illness, then he is not, so far as they are con-

harm being done to the mental integrity of the subject. If, therefore, such persons who may be capable of controlling their conduct were to commit crimes, and could prove on trial that they had hallucinations or delusions before the act, these tangible, popular signs of insanity might result in acquittal, especially where the jury was seeking a loophole to acquit. So that the raising of hallucination or delusion into a test on an equal footing with the right-and-wrong or irresistible-impulse tests, whether or not there is requirement of connection of such symptoms with the criminal act, may work an injustice to society as well as to the individual. In addition, we may say that the test of hallucination (or delusion), where such test requires connection of this symptom with the criminal act in question, and where it requires that the subject matter of the delusion must have been such as would have excused if true, is not broad enough to take care of psychoses with such hallucinatory or delusional symptoms as do not *happen to fall* within those legal requirements; further, that even where connection of the hallucination or delusion with the criminal act is not required, the use of this symptom as a *test*, tends to raise it out of its true setting as but one of the symptoms of the mental disorder. In both classes of cases its use as a test, divorced from the whole symptom-complex, patient's history, etc., may result in danger to society, as well as injustice to the individual; at any rate, it has not that quality of even-handed justice, of a set rule for all hallucination or delusion cases, and of predictability of outcome in all cases, that one would expect a test or measure to secure, and that it was expected by Erskine, in Hadfield's Case,[1] and by the judges after him, to secure.

Illusions. — Illusions, like hallucinations, are evidences of disorders of sense perception; that is, they involve a disorder of that form of mental activity whereby the personality becomes conscious of the effects of stimuli upon the various sense organs which receive impressions. "A correct understanding of the world about us and of our own body is only possible if these perceptions correspond with realities."[2] Illusions differ from hallucinations in that, while the latter are sense impressions without

cerned, suffering from insanity. If he maintains that they have an origin outside his own organism, then his views are those of fantasy, and so far he is insane." — Ross, "The Common Neuroses" (1923), p. 43.

[1] *See ante*, pp. 144, *et seq.*

[2] Peterson, Haines, Webster, *op. cit.*, p. 521.

sponsibility. Nevertheless, it is not unusual for experienced alienists to attempt to bring the delusion or hallucination test within the general right-and-wrong rule, and to take the view that, once they are convinced "hallucinations are present in association with other evidences of a psychotic disorder . . . the existence of disordered perception indicates a mental state that makes knowledge of right and wrong obviously different from that of the normal man."[1] But such an answer to the test question put to the alienist is not, strictly speaking, in conformity with the formal requirements of the law in those jurisdictions where the mistake-of-fact type of hallucination (or delusion) rule is in operation. There the law asks, not whether the defendant knew right from wrong in a manner "obviously different from that of the normal man", but, categorically, whether he knew right from wrong; and evidence, for example, of conversations of the accused immediately prior to the criminal act, which shows that, to the layman, his expressions indicated such knowledge of right and wrong (as where he told some one of his intention to kill another, without assigning a reason, or where he prepared a plan of escape beforehand, etc.), might destroy any such answer as that given by the alienist cited above. On the other hand, it might not; for the relative weight and importance of the evidence, including such qualified answers to the right-and-wrong question as above, are, in the last analysis, matters decided by the jury. Further, even in those jurisdictions where direct connection of an hallucination (or delusion)[2] with the act is required, such striking symptoms as hallucinations and delusions, whether they apparently are connected with the criminal act or not, if manifested by clear evidence or by the defendant in the court room, are strong factors in influencing a jury's verdict; they are the popular signs of "craziness." The unreliability of the hallucination (or delusion) rule in operation in the courts is illustrated by the fact that persons of relatively mild psychotic or tinge may have such symptoms,[3] and they may pass without much

[1] "Mental Disorders in Medicolegal Relations", by Albert M. Barrett, M.D., in Peterson, Haines, Webster, "Legal Medicine and Toxicology", Vol. 1, p. 524.

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[2] Peterson, Haines, Webster, *op. cit.*, p. 521.

actual stimulus of the sense organ having taken place (such as hearing of voices without any one speaking), the former do involve an actual stimulus of the appropriate sense organ, but this impression is falsified. Thus the eyes of a patient with illusions may actually be stimulated by a red spot of paint, but he may perceive (interpret) it as a red rose. Of course, illusions, like hallucinations, may occur in more or less nonpathological states, as "twilight" stages of consciousness immediately before falling asleep or awakening, hypnosis, delirium, etc. Because of their occurrence in more or less normal states, illusions again illustrate the undesirability of making any one symptom into a test, as will be further demonstrated below.

Legal Significance of Illusions. — Here, as in the case of hallucinations and delusions, as long as illusions are considered by the law *in the abstract*, apart from the entire symptomatology, they will not excuse from responsibility under most of the legal tests. Considered as part of the *general disease picture*, they might excuse, depending upon whether or not they destroyed the defendant's knowledge of the nature and quality of his act, or of its wrongfulness, or whether or not they satisfied any of the other tests in operation in the different jurisdictions.

Delusions. — Delusions involve a false *belief* rather than a false sense impression and perception. They therefore constitute a disturbance of the higher activities of conscious mind, such as the weighing of evidence, formation of conclusions, passing of judgments. The most frequent forms of this symptom are delusions of grandeur and delusions of persecution. In these cases, as the terms imply, the patients believe themselves to be great personages or the victims of sinister plots against their lives or fortunes. In conformity with these exaggerated beliefs, the patients will often play their rôles in dramatic fashion, expressing their grandeur by their haughty demeanor, fantastic phraseology, etc. Frequently these two types are combined, since they are more or less complementary. The patient may believe he is the Emperor Napoleon, that the British are hiding outside of the hospital ready to take him to St. Helena, and that the reason he remains in the hospital in disguise is to throw them off the scent. Usually, hallucinations, especially accusatory voices, are associated with the delusions, and often the delusions are elaborated into an intricate, detailed system, every part built up to account for the others.

In this process of elaboration, the facts of daily experience are distorted by the patient to fit into the whole delusional system; just as the hallucinated patient is led to invent queer explanations for the voices, or visions, — that they are caused by X-ray machines, rays from the sun, wireless telephone from Mars, etc.

As has been often recognized by judges as well as alienists, "the most striking feature of a delusion is its fixity and imperviousness to all opposing argument.[1] Persuasion and reason are altogether ineffectual against it, and the patient preserves his belief in spite of the most convincing demonstration of its falsity."[2] This is due to the fact that the high emotional interest that the patient has in these beliefs prevents the usual arguments of logic from penetrating them.[3]

Legal Significance of Delusions. — In connection with false beliefs of persecution, delusions of "reference" are often found. Any occurrence, however trivial, is interpreted by the patient as referring especially to him, and as being intimately bound up with his fantastic beliefs; and he is often ready to explain the exact manner in which it is designed to injure him. This illustrates the

[1] Under such circumstances it is amusing to read the sage accounts of delusions in some legal treatises. For example: "It is necessary to understand what the law means by an insane delusion. The delusion must be mental, and not moral; that is, it must not arise from moral degradation or passion, as this is mere moral insanity." — Wm. Clark, Jr., "Hand-Book of Criminal Law", p. 64. This assumes that the deluded patient consciously selects his delusions, and should be careful to select the right brand, or he will be punished.

Further, we are warned that "another essential is that the delusion must not be the result of *negligence* (!). If the person has the opportunity, and has sufficient reason, to correct a delusion, and, instead of doing so, continues to nourish it, he is responsible." — *Id.* Of course, the distinction the writer was trying to make was between delusions, and beliefs due to ignorance or stupidity, but not to mental disorder. Otherwise, the passage is absurd; for it neglects the fundamental fact that it is just because of "negligence", or failure to correct a delusion, or continued "nourishing" of the belief in spite of all logical demonstration to the contrary that it is a delusion.

[2] Hart, *op. cit.*, p. 33.

[3] Discussing the causes of delusions from the analytic-psychological point of view, Stoddart, *op. cit.*, pp. 166, 167, says that they are of two kinds: predisposing and exciting. "The predisposing cause is the patient's mood, usually determined by the unconscious mind. . . . 'The wish is father to the thought.'" The most frequent exciting cause is hallucination. "This will be readily understood, for if a person is not to believe the evidence of his senses, what is he to believe? . . . If God appears to him in the heavens, it is not very unreasonable for him to conclude that he is 'the elect of God'; and if his food tastes bitter, it is fairly rational for him to believe that it has been drugged." The Freudian theory of the origin of delusions may best be expressed in Stoddart's words (p. 166): "Delusions are analogous to or, in a way, identical with dreams, the difference being that a deluded person lives his dreams. A dream is the fulfilment of an unconscious wish, usually in distorted form. So is a delusion."

futility of any test requiring, as a *sine qua non* of irresponsibility, a demonstrable connection of the delusion with the act, or requiring that the delusive beliefs must be such as would have justified or excused the act of a *sane* person if those beliefs were actually well grounded. An original delusive belief may undergo considerable elaboration and distortion; the criminal act in question may be directed against entire strangers, whom the patient has never before seen, but about whom, encountering them in conversation together, for example, he immediately has a delusion of reference which prompts him to the commission of the criminal act against them. Take, for example, the following case as arising in a jurisdiction which requires connection of the delusion with the criminal act, and, further, that the delusive beliefs must have been of such a nature as would have excused the act, were the delusive beliefs actual facts. A paranoiac had delusions that his mother, a widow, was about to marry a certain man. To prevent this he killed him. In the jurisdiction we have assumed, he would be guilty, since it would be difficult to prove that he did not know the nature and quality of the act nor its wrongfulness, and further, the proposed marriage of his victim with his mother would be no legal excuse for any man, sane or insane, to resort to homicide.[1] Suppose, now, this paranoiac's delusion were the same as before, but that in passing the house of the man whom he falsely believed to be planning to marry his mother, he saw this man in conversation with another, then saw him suddenly break off the conversation and approach him in what he interpreted to be a threatening manner, holding what he believed to be a weapon; and as he approached, the paranoiac killed him. Under such conditions he probably would be found not guilty; for the situation would have been one of self-defense. Yet the fundamental delusive belief, about which the strong conative-emotional quality clung, was the same in both cases; the fact of the two men talking together was purely accidental, and the paranoiac's delusion that his mother's supposed suitor was about to kill him, grew out of the more fundamental delusion (with its still more fundamental psychological causes)[2]

[1] *See* Bolling *v.* St., 54 Ark., 588, 16 S. W., 658 (1890), the actual prototype of this case. *See also* People *v.* Taylor, 138 N. Y., 398, 34 N. E., 275 (1893), where a mentally disordered convict, under the delusion that a fellow convict had divulged his plan of escape, killed him; People *v.* Hubert, 119 Cal., 216, 51 Pac., 329, 63 Am. St. R., 72 (1897), where defendant killed his wife because of a delusion that she had been putting poison in his food.

[2] This case would be readily explainable by means of the Freudian psychology.

that this man was her suitor, that he knew the defendant was opposed to the marriage, and that therefore they were enemies, who would kill each other at sight.

Another important question, from the point of view of the administration of the law, is suggested by the following fact referred to by Doctor Hart: "The extent to which conduct is affected by the presence of delusions, is . . . very variable. In some cases patients under the influence of persecutory ideas will commit serious assaults upon their imagined enemies, and become a source of great danger to the community. In a very large number of cases, on the other hand, the delusion seems to have no direct effect upon the patient's behaviour. Often, indeed, belief and conduct are completely divorced from one another, or even grotesquely inconsistent. Thus, the 'Queen of the World' will contentedly carry out her daily task of scrubbing the ward floor, and the omnipotent millionaire will beg plaintively for a small gift of tobacco." [1] The quotation from Hart indicates that the delusion test standing *in abstracto* may fail to express the true relation of the mental disorder to the patient's illegal conduct; and this may not only be unjust to the defendant, but also to society. If the mere presence or absence of delusion is to be the criterion of criminal responsibility, as Erskine proposed, then the mildly psychotic person whose delusion did not necessarily lead to his criminal conduct in the particular instance, would have to be acquitted; while a much more seriously unsound defendant, without delusions, who had some "knowledge of right and wrong" but no power of control of conduct, would in most States and in England to-day be held criminally responsible.

Stoddart says, of a patient's delusion, that: "This is bound to affect his *conduct* in many ways and it is a matter of experience that such a delusion tends to colour the patient's *memory* of incidents which occurred long before the delusion existed. . . . We cannot regard any 'part' of mind as being affected alone. Mind is not a 'thing' to be divided into 'parts.'" [2] Such quotations as those given, by leading authorities in this field, are sufficiently destructive of the legal test which requires either externally manifest connection of the delusion with the criminal act, or such a state of facts as would have excused or justified the act had the delusive belief been a real one; and they are also destructive of the validity

[1] *Op. cit.*, p. 33. [2] Stoddart, *op. cit.*, p. 174.

of using delusion, but one symptom of some stages of mental disorder, as an objective test of irresponsibility, in any event. Further, they point to the need of thorough psychiatric study of the individual case, even if delusion, as such, is to be used as a test of irresponsibility; for the true significance, *to the defendant*, of delusional beliefs in any particular case, can only be arrived at by psychological analysis and psychiatric study. The objective connection of the delusion with the act may have little or no real significance.[1]

Disorders of the Impulses. — In discussing the legal tests of irresponsibility, we saw that only in a few states is the irresistible impulse doctrine recognized by the law. In most jurisdictions, it is inconceivable that the conscious knowledge of right and wrong, or of the nature and quality of an act about to be committed, can be apparently undisturbed, and at the same time the act be irresistible. A study of the cases as they appear in the legal reports will indicate that this term is usually applied by the law to such mental disorders as "kleptomania" (an irresistible impulse to steal), "pyromania" (an irresistible impulse to set fires), "homicidal mania" (an irresistible impulse to kill), etc. Occasionally, too, it occurs in the reported cases in connection with a case of epileptic seizure. Disorders of the impulsive or volitional-inhibitory mode of mental activity may occur in three classes of cases: First, are the disturbances of volition, or rather of inhibition, that quite frequently occur in cases of "constitutional psychopathic inferiority",[2] and that sometimes express themselves in the desire to steal certain objects. Often the symbolic significance of these objects is associated with a deeper disorder of one of the conative-affective springs of conduct, as, for example, a disorder of the sexual instinct expressing itself in kleptomania of a distinctly fetishistic type. In such cases the patient may steal women's underwear, etc.; while in an ordinary instance of kleptomania he may steal trinkets, or objects of little intrinsic value, the psychopathic nature of such impulses being usually indicated by the fact that he steals many needless duplicates of an object, as, for example, a dozen umbrellas, or numerous violins, etc. "Pyromania" is a difficult term to expound, because, while in the law books its significance as well as its name is derived

[1] *See* Section 3, *post*, where the psychological "mechanisms" of delusion are discussed.

[2] *See post*, pp. 379, *et seq.*, for a description of these disorders.

from *external manifestation, i.e.*, the burning, the act may be due to feeblemindedness, to a disorder of the sexual instinct in psychopaths, to a psychoneurotic compulsion in which somehow the fire and its surrounding circumstances are conceived of by the patient (consciously or subconsciously), as a defense mechanism, or to various combinations of these, together, in the case of children and feebleminded, with *nostalgia*.[1]

Secondly, in the clouded states of some of the epilepsies, there may be literally a " running amuck " where the controlling higher consciousness is temporarily so far disturbed as to permit the innate, conative-affective forces, either specifically or in a generalized, undifferentiated manner, to break forth and result in illegal conduct.

Finally, in some of the neuroses, certain *Zwangshandlungen*, imperative or compulsive acts may occur. While this subject has in the past rarely been raised in actual trials, the experiences of the late War have indicated the reality of these symptoms; and cases have arisen, especially in England, where responsibility was sought to be avoided or lessened on this score.[2]

[1] Scholz, "Anomale Kinder", pp. 227, *et seq.*, interestingly points out how all these instances of apparent impulsive conduct, or disturbances of the conative " drives" or inhibitory mechanism, which *externally* have the same aspect, and which, by the law, are comprised under the one rubric of " irresistible impulse", may really be attributed to wholly varying causes in different instances. Thus, the stealing impulse may really be an expression of the child's or feebleminded person's passion for collecting (McDougall's "instinct of acquisitiveness" — *see* his "Social Psychology", 14th Ed., pp. 91, 329). The child seizes property in order to gratify his innate zeal. "Naturally that is not a morbid desire to steal, for here things are stolen only in order to steal, indifferent perhaps as to what is stolen, as for the true gamester not the loss or gain but the charm of the game is the chief desideratum. The same is true of the arson impulse. Perhaps it is true that playing with fire affords the child great pleasure, but from this to the passion for setting fire to furniture and curtains, haystacks and houses is a long step." (McDougall would not assign this very marked desire among most children — and many adults too — to any special instinct; it is probably due to a combination of the instinct of construction — literally the instinct to "build" fires — and the instinct of curiosity — with occasionally, perhaps, the sexual instinct — and their accompanying emotions, such as wonder.) "It is therefore always well to seek, in a given case, for a more transparent motive, such as nostalgia, anxiety, revengefulness. Alcohol here, as in all crimes of passion, bears a great part of the blame; it makes easier the carrying out of the deed, and hushes the admonishing conscience. Most interesting is the connection between the setting of fires and sexual excitation, and no expert must neglect to inquire, in the case of female, juvenile incendiaries, whether at the time of the deed menstruation was in process or was expected. The connection of the two phenomena may possibly be explained in this way: the severe emotional shock, which the view of the blazing flame and the general panic calls forth, in connection with the lustful feeling of being the cause, even the unrecognized cause, offers a sort of compensation for the debarred sexual gratification."

[2] In a letter to the *Justice of the Peace Journal*, Vol. 80 (1916), p. 485, an

Professor McDougall[1] describes the case of a soldier in the World War who, after his return to civilian life, was afraid to go out for a walk with one companion, for fear of being seized with an impulse to kill him; and other observers have cited similar cases of obsessional neurosis.[2]

Since the entire subject of the causation, nature and consequences in conduct of all these disturbances of the volitional-inhibitory powers is very intricate, — causation being so manifold, and nature and consequences, too, depending upon the various clinical types of which the irresistible impulse (outwardly the same in the eyes of the law) forms but *one symptom*, — further treatment of this subject had best be reserved for the following chapter, where the mental disorders are discussed according to their recognized clinical classification. We may, however, at this point, consider the legal significance of such disorders, in a general way.

English correspondent, with "long experience in the courts", calls attention to the fact that a number of cases are arising of soldiers, unbalanced by shell-shock, who have suddenly begun leading a life beyond their means, using bogus checks, or developing some sexual perversity which brings them to the dock with serious charges to meet. The correspondent is of opinion that ordinary penal methods are not applicable to these cases, and suggests that perhaps a careful use of the British Probation Act, with conditions in the recognizance requiring temporary submission to control, residence away from the scene of temptation and other conditions designed to prevent a repetition of the offence, as provided by the Criminal Justice Administration Act, is the best way to meet such cases. He goes on to give the following explanation of illegal conduct on the part of shell-shocked soldiers: "It seems likely that a lively imagination is the root-cause of these persons lapsing into criminality." Sometimes "the intense inner life . . . continues into adult life and takes any form from the harmless fictions with which people send themselves to sleep to morbid imaginings, so vivid as almost to body themselves forth as realities." He reminds the reader of Krafft-Ebing's instances of dangerous "daydreaming", of those who lead a strong inner sexual life. So long as a person has his normal self-control and is hedged about with decent daily life and habits, he is safe. "But suddenly withdraw these barriers, throw him into unusual and trying conditions, his nervous balance gets upset, self-control goes, and the dream-person within takes charge with disastrous consequences."

[1] Unpublished lectures in "Abnormal Psychology" attended by the writer. This and similar cases were under treatment by Dr. McDougall, who had charge of one of the British hospitals for the mentally unsound during the World War.

[2] Stoddart mentions that he has several patients who came to the hospital as "*voluntary boarders* to be cured of a constantly recurring impulse to kill their children. Some of these have told me that if, by some mischance, one of their children had suddenly appeared in close proximity when they had happened to have a hatchet or a knife in hand the child would certainly have been killed before the parent could have had time to realize the awfulness of his crime. Had such a thing actually happened, as it sometimes does, the man might, according to the existing state of the law, have been hanged." *Op. cit.*, pp. 550, 551.

Legal Significance of Disturbances of Volitional-inhibitory Capacity, or of Primitive Impulses. — Since the patient always recognizes both compulsive ideas (obsessions) and the possibility of their going over into action[1] as being entirely foreign to his usual nature, and since there seldom appears any disturbance of consciousness or emotion, the patient seeming to be quite healthy except for these peculiar manifestations, release from, or even diminution of, responsibility in such cases under existing tests of irresponsibility, should be extremely difficult. In such cases, the question might very well be asked a defendant, why, since he knew perfectly well of the existence of these abnormal compulsions, he did not submit himself to medical care; and if he can show that he did so, the chances are that such a showing would have a favorable effect on the jury in their interpretation of the right-and-wrong test in the particular case.

Irresistible impulses, of a kind where the consciousness is apparently unclouded, as in the compulsion neuroses, assume legal significance only in those jurisdictions where the irresistible-impulse rule is in force side by side with the right-and-wrong test. Where only this latter test prevails, however, persons who are charged with having committed an illegal act as the result of the pathological operation of impulses, whether they were abnormal in the objects towards which they were directed (as, for example, homosexuality), or in their pathologically strong expression (as in "dipsomania"), would be criminally responsible; unless, as in the clouded states of epilepsy, or in the deteriorated condition of senile dementia or general paresis, it could be proved that they were barely conscious, and hence did not know right from wrong. Even where the irresistible impulse test prevails in addition to the right-and-wrong test, a difficult question and one made much of by the courts, is whether or not the impulse was really irresistible or merely *unresisted.* Considerable study of the whole case is

[1] Oppenheimer, "Criminal Responsibility of Lunatics", p. 179 (1909), claims that the belief that obsessions may lead to compulsive actions (which, with diseases of the primitive, conative-emotional impulses, are indiscriminately discussed in the law books as irresistible impulses) is due to confusion of thought on the part of the German alienists who, having first drawn attention to the existence of *Zwangsvorstellungen* ("imperative" ideas), "by a false analogy . . . were led to invent '*Zwangshandlungen*' (imperative acts) as a fit consort to the former." The existence of compulsive actions is today established in psychology and psychiatry, although it must be pointed out that an obsessional idea does not necessarily terminate in a compulsive *act,* as cause and effect; there may be a gap between idea and conduct.

necessary before such a question, put to an alienist, can be categorically answered. Some physicians take the attitude that "the existence of a psychosis at the time of the act would justify the conclusion that the impulse was irresistible. The greater the degree of variations from normal mental constitution and functioning, the less is the capacity for resistance."[1] In the case of exhibitionism, especially, it has been shown[2] that there is a frequent association of this indecency with mental disorder; and a thorough psychiatric examination of all persons accused of this crime and associated indecencies ought to be made. The difficulty, of course, arises in those cases, such as "constitutional psychopathic inferiority" and some of the psychoneuroses, where there does not seem to be any deterioration of the controlling mental faculties, but where, nevertheless, truly irresistible impulses or compulsions are known to exist. "The question of whether sadistic or masochistic impulses are to be regarded as irresistible impulses must be answered as it relates to each individual case. When these exist experience shows that there are probably other abnormal traits which mark the individual as one of pathological constitution. They are frequently accompaniments of definite psychoses, such as epilepsy and paranoid forms of mental disorders."[3] In this connection it must be remembered that sexual crimes are usually of a terrible and revolting character, and it is largely in these cases that the existence of mental disease, however pronounced, cannot overcome the feelings of the jury, who naturally find it extremely difficult not to permit their prejudices to weigh the scale of justice against the defendant.[4]

In most cases, it is difficult for the expert to answer with any certainty that any particular act was or was not irresistible, since it cannot be definitely stated that all impulses of a certain type in certain mental disorders are always irresistible. *The problem remains an individual one;* and as such, the irresistible impulse test cannot be said to provide a uniform rule whereby the jury can measure off a defendant's responsibility. However, its use is less open to objection than the using of delusion (or hallucination)

[1] Peterson, Haines, Webster, *op. cit.*, p. 555.
[2] By Seiffer *cited* by Peterson, Haines, Webster, p. 556; this is now common knowledge.
[3] Peterson, Haines, Webster, *op. cit.*, p. 555.
[4] *See*, for example, White, "Insanity and the Criminal Law", wherein the case of Father Schmidt is considered from this point of view.

as a test; for delusion is a symptom that occurs in many mental disorders, whereas disorders of the impulses are usually associated with certain definite degrees of progression of certain types of disease. In Pennsylvania, in one case,[1] the court recognized the difficulty of applying the test of irresistible impulse in any particular instance, and declared a rule that there must be some evidence of previous irresistible impulses along similar lines, before the impulse in question can be presumed to have been irresistible. But here the court was encroaching upon the jury's province; for, while the *declaration* of the irresistible-impulse rule is a judicial function, its *application* to the facts is the jury's duty.[2] The Pennsylvania rule would, of course, tend to exclude many mentally disordered defendants as well as some malingerers. In many mental disorders, too, there probably was a stage when the impulsive actions were resistible, when the higher intellectual functions were relatively strong;[3] and it is difficult delicately to

[1] Commonwealth *v.* Mosler, 4 Pa., 264, 266, 267 (1846).

[2] The more the writer has studied this question, the more has he become convinced that the greatest difficulty with the formal law on the subject of insanity as a defense to criminal responsibility, is the constant confusion of the respective functions of judge, jury, and experts; and the confusion between what is a *test* and what is mere dictum, between what are facts in any *particular* case, and what is the legal test of irresponsibility applicable to *all*. The most fruitful source of error and confusion in this field of law is traceable to the requirement that the expert say categorically whether or not the hypothetical person (whom everybody knows to be the defendant on trial) did or did not know right from wrong. This question is purely within the province of the *jury*, who must answer it as they must any other matter of questionable fact; all the expert should be asked to do, and all his training qualifies him to do, is to pass judgment, not upon the ethicolegal question of right and wrong, but upon the *medical question* of whether or not the defendant was mentally unsound, a question that his peculiar training and experience, and his study of the individual offender's case, entitles him to answer. Once he has given the facts as he finds them, as to *mental unsoundness* (*i.e.*, his opinion as to sanity or insanity and the type and degree of the latter), the *second* question, that of *irresponsibility*, is one that the jury must decide, with the aid of such legal devices as tests applied to the fact of insanity.

[3] In the writer's opinion, the term "impulsive disorders" should, strictly speaking, be confined to but two types of disorders: First, disorder of the impulses which occurs when there is a lessening of conscious control, due either to a temporary clouding of consciousness, as in postepileptic seizure states, or where there is a gradual, *permanent* deterioration of the higher faculties, as in paresis, senile dementia, or long indulgence in alcohol; secondly, the term may be applied to pathological manifestations of the conative-affective impulses, as in sexual perversions. The *compulsive* conduct occurring in the compulsion neuroses, seems to be due largely to the breaking through of subconscious activity, — the patient knowing full well his condition and probably consciously detesting the conduct urged upon him by obsessional ideas, yet being powerless to hold them in check. In cases like chronic alcoholism or periodic irresistible impulse to drink, there often is a psychotic, constitutional basis, a sort of unbalanced condition of the psychic energies, or an abnormal "psychic

balance the responsibility of such a person who, though he did not sufficiently control his conduct in the past, has nevertheless become one whose impulses, — through long erosive effects upon the nervous system (as in the case of chronic alcoholics and dipsomaniacs, or drug addicts), and upon the character generally — were in all probability irresistible when the crime was committed. In the cases of psychopathic inferiority (whether associated with dipsomania, or whether constituting abnormal functioning of other impulses), and in some of the psychoneuroses, there is room for some form of *limited responsibility*.[1]

Again, the nature of impulsive conduct generally brings out the point that irresistible impulse cannot be regarded as an isolated phenomenon apart from the emotional and cognitive processes of mind; nor can it be regarded as springing from the same causes in all cases, however outwardly alike this symptom may appear. To deal adequately with the impulse in question, one must consider the mind as a whole, especially the higher, controlling-inhibitory processes, to see whether or not there exists such a defect or disin-

tension," which first causes the person to seek relief through alcohol or drugs. On the whole, it is difficult to maintain a clear-cut distinction between the various types of impulsive disorder; for these, by hypothesis of the unity of mental function, are not only due to abnormal functioning of the primitive, innate, conative-affective urges, but to weakened inhibitory capacity, or conscious control. Stoddart, "Mind and its Disorders", for example, includes "dipsomania" under the obsessional neuroses; whereas, Barrett, in Peterson, Haines, Webster, *op. cit.*, treats obsessional symptoms separately from disorders of the impulses. This distinction is valid in our opinion, if the distinction between the psychoses (in this case "psychopathic personality") and neuroses (in this case the "compulsion" or "obsessional" neuroses) is valid.

[1] *See post*, pp. 383, 479, where this concept is discussed. Owing to the confusion in the books as to the use of this term, we venture to point out that two types of partial responsibility may be distinguished: (1) The concept discussed on page 199 *ante*, which might better be designated by the cumbersome expression, "Full responsibility; but, owing to the absence, by reason of a proved abnormal mental condition, of one of the required mental elements of the crime charged in the indictment, *responsibility for a lesser grade of offense.*" (2) A condition of mental unsoundness not sufficient to satisfy existing tests of irresponsibility nor of a kind to have resulted in the absence of a necessary mental element of the crime charged in the indictment (such as premeditation, malice, deliberation, etc.). This last condition might, perhaps, be best dealt with under the doctrine of "mitigation of punishment" (*see* note, pp. 412, *et seq.*, *post*), or might be made the basis of a jury's choice between alternative penalties. The point in this last type of case is that *technically*, the mental condition of the defendant when he committed the offense was not such as either to relieve him entirely from responsibility (because it did not meet the requirements of the formal tests), or, as in the first class of cases, to result in his entire responsibility but for a lesser grade of offense than that charged in the indictment. Of course, in both classes of partial responsibility, the practical result will be that in murder cases, the penalty will be life incarceration (in prison or hospital) instead of the death penalty.

tegration of intelligence as to have prevented development, or to have caused the deterioration, of those inhibitions which are possessed by the average person of similar age and training. Although the alienist says that, in practice, " if either defect of intelligence or mental disease is shown to exist, then it may fairly be assumed that the impulse was irresistible "[1] nevertheless, a prosecutor would probably deny this. Besides, the difficulty is not in those cases where senile or paretic deterioration of the cognitive faculties is shown to exist; for there the jury can be easily made to see the connection between a deterioration of the controlling intelligence, and the setting loose of the primitive instincts. The difficulty arises rather in those jurisdictions which accept the irresistible-impulse rule without requiring any deterioration of the knowledge of right and wrong to be necessarily present, — a mental condition that occurs in the psychopathic personality, and psychoneurotic cases. In those cases, where consciousness seems to be intact, and where, as is frequently true, the patient has not only a high degree of intelligence, but has had educational advantages, the looking merely to defect or deterioration of the cognitive processes, would not bring out whether the impulse was resistible or not.[2] In all such cases, those States (about three fourths) who do not recognize the irresistible impulse test, except as it destroys knowledge of the nature and quality of the criminal act and of right and wrong with reference to it, would impose the full penalty of the law; hence we find a gap in the law as regards the psychoneuroses and psychopathic inferiorities.

The psychopathic personalities and the psychoneurotics, then, present a grouping for which the law's clean-cut distinction between the responsibly insane and the irresponsibly insane is inadequate, and for which the concept of partial responsibility,[3] with its accompanying medico-penal implications, is peculiarly appropriate; for while such persons may know full well that their conduct is both morally and legally wrong, their emotional life is pathological,

[1] Peterson, Haines, Webster, *op. cit.*, p. 558.

[2] After this was written, two youths of extraordinary intelligence, committed an atrocious murder in Chicago. To look only to their intellectual attainments and gifts, as brought out by elaborate use of standard intelligence tests, must have proved them strictly responsible under existing legal tests; but on a hearing in mitigation of sentence upon their plea of "guilty", counsel were rightly permitted to introduce testimony of medical experts as to the disordered emotional life of defendants.

[3] Especially in the second sense discussed in note, p. 310 *ante*.

and their power of inhibition is manifestly below that displayed by the ordinary person in the affairs of life. And such criminal laws should be framed and interpreted with reference to the average mental (*i.e.*, cognitive, affective, and conative) capacity of the vast majority of persons.

Section 3 — Psychology of Mental Disorder

Introduction. — Thus far we have described the most striking symptoms of mental unsoundness in a general way, and have also discussed their legal significance. We must now analyze the modern psychological explanations of these phenomena of mental disorder that we have just considered. Let us begin with the description of somnambulism. To account for Irene's reënacting of the experiences surrounding the death of her mother, and the amnesia for a more or less unified, and highly emotional past experience, as well as to account for most of the typical symptoms of insanity, we must resort to the concept of *dissociation.*

Dissociation of Consciousness. — Throughout this study we have emphasized the unity of consciousness, as well as of all mental activity. Slight introspection will convince the reader of the fact, that at any moment in which he stops to analyze his mental experience it has this more or less unified nature, which manifests itself in a "uniform stream of thought progressing towards some definite end." In other words, whatever task we are engaged in at any one moment seems, at that instant, to occupy all our capacity for mental activity; and all our instinctive strivings as well as our thoughts, except those related to the task at hand, are somewhere out of mind. It is true that the mind may jump from one subject to another very rapidly, but two distinct, *conscious* purposive trains of thought do not go on *simultaneously.* In the minds of the mentally unsound, however, there occur occasionally several distinct streams of thought, all pursuing their individual developments toward apparently distinct, and not infrequently inconsistent, goals. Sometimes each in its turn enters into the consciousness of the personality, sometimes two are simultaneously operative, one being clearly in consciousness, the other not at all, or at the most, extremely vaguely. "This division of the mind into independent fragments, which are not coördinated together to attain some common end, is termed 'Dissociation of Consciousness.'" [1]

[1] Hart, "The Psychology of Insanity", p. 42.

Dissociation of the stream of consciousness is of all gradations, from the state manifested by the mentally sound person who, perhaps, is able to typewrite and at the same time pursue an independent train of thought, to the symptomata we mentioned in the case of Irene and those phenomena of still graver dissociation known as "dissociated" or "multiple" personalities. An intermediate stage between these two extremes is illustrated by the phenomenon of automatic writing, where the subject writes without being conscious of what his hand is writing and without being able to control the content of the writing, and yet the written matter is often shown to relate to past experiences of the patient, reaching perhaps back to childhood. Of these experiences the subject may not have the slightest, conscious recollection; and it often occurs that the forgotten experiences cover events of great importance and strong emotional significance in the patient's life. "The patient's mind seems, in fact, to be split into two smaller minds, engaged in two different occupations, making use of two distinct sets of memories, and without any relation whatever one to the other." [1]

This type of dissociation involves the *simultaneous* operation of two apparently disconnected streams of thought. But, as was mentioned, there is another type which is operative in somnambulism; namely, instead of the streams of consciousness being divided to function simultaneously the stream of ideas of one moment (with its conative-affective core) is completely cut off, as it were, from that of the preceding moment, without the subject being conscious of the psychic gap (or bridge) between the two. In the case of Irene, the one train of thought with the conative-affective force behind it, was suddenly broken off and replaced by an entirely different one, while the patient was unconscious of this abrupt transition; further, the patient was unconscious of the preceding train of thought and its accompanying emotions, which ran its course while she was in the somnambulistic state, and of the somnambulistic conative-affective-ideational content when she recovered her normal state. Moreover, the patient was powerless in the matter; the new train of thought and its accompanying vivid emotional experience took possession of the mental field without any warning, and departed in exactly the same way. Why dissociation should take place, must be discussed later.

The hypothesis of dissociation serves to explain not only som-

[1] Hart, *op. cit.*, pp. 44, 45.

nambulism and multiple personality, but, as we have said, such typical symptoms of psychoses as hallucinations, illusions, delusions, and obsessions. Considering the chief features of dissociation, Hart points out that of the two characteristics of dissociated activity (such as automatic writing, somnambulism, dual personality, etc.), namely, the fact that the dissociated group of ideas is autonamous and *independent of the control* of the personality, and the fact that the patient is *unaware* of the dissociated system of ideas, the former is the more fundamental. For example, the patient having an obsession (a system of "overweighted ideas"), is helpless to stop the development of those ideas to their purposive (though to him unconscious) end; unlike the case in automatic writing, however, the subject is perfectly aware of the fact that this train of unwelcome ideas or of foolish, compulsive acts has possession of his mental life and that he is powerless to control it. Hart cites Freud's case of the woman who was in the habit of conscientiously studying each banknote that came into her possession. When asked why she did so, she replied, "I don't know why I do so, but I simply cannot help it. Whenever I see a banknote, something forces me to examine the number. Of course I am distressed at my foolish behaviour, but the impulse is absolutely uncontrollable." [1] The only difference, therefore, between the phenomena of automatic writing, somnambulism, and multiple personality, on the one hand, and the obsessions and compulsions of the compulsive neurotics, on the other, is that in the latter cases the patient is perfectly aware of the uncontrollable and independent psychic entity. Similarly, hallucinations constitute but a fragmentary portion of the patient's own psychic life. "Although the voices formed a part of the mind, yet it is obvious that they did not form a part of the personality. The system of ideas in question is dissociated from the personality, and . . . the hallucinatory 'voice' is the mode in which the dissociated system announces its existence to the personality." [2]

The hypothesis of dissociation is also useful in accounting for delusions. If the patient's mind is conceived of as in a state of dissociation, and as no longer presenting "a homogeneous stream progressing in a definite drive towards a single end, but . . . composed of more or less isolated mental processes, each pursuing its own independent development", this explains the striking con-

[1] *Op. cit.*, p. 53. [2] *Id.*, p. 55.

tradictions found in cases where, for example, " the patient believes that he is the king, and he is also aware of facts which totally contradict that belief." [1] For, although both these things exist together in his mind, " they are not allowed to come into contact, and each is impervious to the significance of the other." [2]

The explanation for these phenomena must, however, go further than the mere hypothesis of " splitting of consciousness "; it must include reasons for this. Here, the most suggestive hypotheses have undoubtedly been presented by the Freudian and Jungian schools of psychological analysis, and by McDougall's entire psychology of instinctive behavior, as utilized by Doctor Morton Prince in the explanation of the phenomena of his famous cases of dissociated personality.[3] It is not our purpose to enter into these theories at any length; but merely to describe, *en passant*, such important concepts as " complex ", " the unconscious ", " rationalization ", " conflict ", " repression ", " projection ", etc.

Significance of Psychological Hypotheses and Analysis — Unconscious Mental Process. — Whatever one may think of the whole technique of psychoanalysis, it serves at least to point out that the *patent* phenomena of mental disorder are not fundamental, as will appear from the following discussion. The term " unconscious mental processes " has been attacked frequently by asking, " How can there be such contradictory concepts as unconscious and mental in the same phrase? " But this argument is based on the fallacy of regarding consciousness and mind as synonymous. No one has done more to destroy this fallacy than have Freud and McDougall; the former from the generalized approach of the hypothesis that many psychic processes which determine conduct, to a large extent never come into consciousness, or come into it only in various distorted and symbolical forms, unrecognizable by the conscious self; the latter by the construction of a more specific detailed system of psychology, including, as an important contribution, the view that the springs of human conduct, the instincts, are accompanied in their workings by *various degrees of conscious mental process*, and that therefore *consciousness* is far from being coextensive with *psychical process*. In order to support such hypotheses, sufficient convincing proof must be adduced of the fact that conduct is determined to a great degree by psychic activity which

[1] *Op. cit.*, p. 56. [2] *Id.*
[3] *See* "The Unconscious" (1921), pp. 446, *et seq.*

the subject knows little or nothing about in his normal mental states; and sufficient proof has been adduced by Freud and a host of others. Slips of the tongue, the suggestions made to the hypnotized subject of which he is unconscious when he awakes but which he nevertheless carries out punctually at some future time suggested to him while under hypnosis, the common experience of being able to set one's mind to awaken at a definite time, almost to the minute — these and many other well-known phenomena of everyday life, as well as the data of morbid psychology, constitute part of the evidence of the reality and importance of unconscious mental process, or motivation.

Complexes. — The term "complex" is used to denote a group of associated ideas with an especially strong emotional tone, which determines that certain actions will always be produced under certain conditions. The well known hobby, which makes reasonable men do all sorts of unreasonable things, is closely related. The important feature about a complex, as about all systems of ideas with a strong emotional tone, is not so much the ideas themselves, as the powerful emotional quality and driving force behind them. The perennial example of the young man in love, illustrates clearly that the system of ideas associated with the object of the complex or (sentiment) is of such strong conative-emotional force as to color even wholly unrelated subjects and actions.

Some writers[1] on abnormal psychology place Pavlov's "conditioned reflex" almost on a parity of importance with the concept of the unconscious. In Pavlov's well-known experiment, he presented articles of food to dogs at the same time that a bell was struck. After some repetitions, saliva would flow from the dog's mouth at the mere ringing of the bell, without any food being present. By this mechanism we may account for the fact, often met with, that the affectivity of a certain system of ideas is detached from its original object and attached to some object that, *externally* considered, seems to be wholly unconnected therewith. In this manner a complex may express itself indirectly. Jung's case of the man who was extremely irritated while walking with a friend, at the sound of church bells, which he declared to be very inharmonious although every one else found them to have a beautiful tone, is a good illustration. The friend, in trying to account for this peculiar reaction, inquired further and soon found that in his

[1] *Cf.* Ross, "The Common Neuroses" (1923).

companion's opinion, "not only were the bells unpleasant but that the clergyman of the church wrote extremely bad poetry. The causal complex was then apparent, for the man whose ears had been offended by the bells also wrote poetry, and in a recent criticism his work had been compared very unfavourably with that of the clergyman. The rivalry complex thus engendered had expressed itself indirectly by an unjustifiable denunciation of the innocent church bells." [1]

Conflict. — In everyday experience, one is convinced of the reality of the concept of mental conflict. When a complex is for some reason out of harmony with the personality as a whole (the "better self"), — as, usually, when it deals with some subject that is socially taboo (such as sex), or with some experience that has tended to damage the person's self-respect (as, during the World War, especially, when a soldier believed he had been cowardly), — a serious state of mental conflict arises between the personality, comprised of the systematized and unified higher sentiments and ideals, on the one hand, and the inharmonious or psychically offending complex on the other. During such a conflict, a strong, unpleasant emotional tension occurs, often resulting in paralysis of action; "it is a biological necessity that some solution of the difficulty, some way out of the *impasse* should be found." [2] The conflict may be resolved in one of several ways: The subject may appreciate fully the condition of disharmony in his mental life, and, after mature reflection and consideration of the consequences of the respective lines of conduct, consciously decide to take a certain course; or, which is more common, a conflict may be resolved by avoiding the conflict, the mind being "saved from the stress and strain of battle, because the two antagonists are not allowed to meet"; [3] or a complex may be so *modified* as to result in a more or less satisfactory *modus vivendi* for the personality as a whole. The second solution is the most important for our purpose, consisting "in the simple expedient of preserving both the opposing groups of ideas in the mind, while at the same time all contact or interaction between them is sedulously avoided. Each is allowed to pursue its own course and development, untroubled by its incongruity with the other. . . . This is the common mechanism of the 'logic-tight compartment', . . . it provides the explanation of the well-known

[1] Hart, *op. cit.*, pp. 73, 74. [2] *Id.*, p. 79. [3] *Id.*, p. 79.

antithesis between precept and practice."[1] By means of this, for example, "the patient who believes herself to be a queen, but who nevertheless cheerfully and contentedly carries out her daily task of scrubbing the ward, is not perturbed by the incongruity between her beliefs and conduct";[2] she preserves the delusion in a "logic-tight compartment secure from the disturbing influence of hard facts."[3] But this does not mean that the delusion *affects* only a logic-tight compartment of the mind as the law assumes; for it is itself a symptom of the loss of that homogeneity of mind which is characteristic of the ordinary normal person. The mind in the insane is "composed of more or less isolated mental processes, each pursuing its own independent course unaffected by the presence of its fellows, simply because those mental processes were contradictory and incompatible, and the conflict between them has been avoided by dissociating one from the other."[4] Hence, dissociation may in some cases be regarded as the result of conflict between inconsistent purposes, and "it is one of the methods by which the mind gets rid of the unpleasant emotional tension and paralysis of action that conflict invariably produces."[5] Somnambulism, multiple personality, obsessions, hallucinations, illusions, and delusions may perhaps be due to the same mechanism in most cases.

Rationalization and Distortion. — The resolution of a conflict is ordinarily a much more complex process than dissociation by means of maintaining the two or more inharmonious trains in logic-tight compartments. Most frequently, "the opposing systems do come into contact, but only through a medium which so distorts the connecting processes that the real significance of the incompatible forces is concealed, and the mind fails to appreciate that any actual contradiction is present."[6] *Rationalization* accounts for the mechanism of *distortion;* the subject invents some reason which satisfies him that the facts, actually incompatible with his complex, are to his mind quite harmonious and consistent. "The separate compartment of the mind in which the complex pursues its development is 'logic-tight', but not 'idea-tight'; opposing ideas are allowed to enter, but only after their logical significance has been distorted by a process of rationalization."[7] The mentally unsound person neglects all those facts which

[1] Hart, *op. cit.*, p. 80. [2] *Id.*, p. 82. [3] *Id.*, p. 82.
[4] *Id.*, p. 83. [5] *Id.*, p. 83. [6] *Id.*, p. 85. [7] *Id.*, p. 86.

are incompatible with his delusive beliefs; but where he must consider them, he resorts to the mechanism of rationalization, so that their actual significance is concealed. "Thus, the lunatic who is firmly convinced that his wife is seeking to murder him, will distort the meaning of everything which happens until it is brought into harmony with his dominating delusion, and capable of being used as a pseudo-logical prop. If his wife is solicitous for his welfare her behaviour is regarded as a cloak to conceal her real design, if she treats him badly the evil intentions are clear, if she gives him food it is obvious that she proposes to poison him, if she does not it is equally obvious that she hopes to undermine his health by withholding the necessaries of life. If we argue with him and point out that his belief is inconsistent with the facts, he smiles contemptuously at our credulity, or is perhaps suspicious that we are the paid accomplices of his wife." [1]

The mechanism of rationalization also accounts for the so called secondary delusions, or false beliefs erected by the mind in order to bridge over the incongruity between the primary delusion and the actual facts of the patient's experience. "For example, the patient who believes that he is a millionaire will meet the obvious fact that he has not a penny in his pocket by developing the further belief that he is the victim of an organized plot to deprive him of his property. The patient cannot conceal from himself that his claims to exalted rank and position are not recognized by his environment, but he rationalises this failure of recognition by persuading himself that it is the work of a malignant and envious enemy. In this way the most complicated delusional systems may arise, the patient being convinced that more and more elaborate persecutions are being employed the more he meets with evidence contradicting the primary belief." [2]

Their Legal Significance. — We have several times alluded to the inadequacy of the various types of delusion test of irresponsibility, which treat the symptom of delusions *in abstracto* and require objective connection of the delusion with the criminal act, or that the facts of the delusive belief must have been such as would have excused a mentally sound person's illegal act, under similar circumstances. The discussion as to secondary delusions, and the elaboration and distortion that delusive beliefs may undergo through the mechanism of rationalization, is further proof of the

[1] Hart, *op. cit.*, pp. 86, 87. [2] *Id.*, 87, 88.

unscientific nature of the delusion test. Certainly it proves that the *outward* connection between the delusion and the criminal act, which is presumed by the legal test, is rarely found; and that the true significance of delusive beliefs and their effect upon conduct can be arrived at only when they are recognized as but one group of symptoms in a whole disease picture and when some instrument of analytical psychology is resorted to, in order to pierce the web of rationalization which the defendant has woven around his original false beliefs.

"**Repression.**" — The mechanism of avoidance of the disagreeable emotional tension produced by a state of mental conflict, known as dissociation, is not always possible to the subject. When, for example, the inharmonious complexes with their conflicting purposes are "of such intrinsic importance and strength that the conflict between them cannot be concealed from the mind by the simple process of allowing each to pursue its own independent course of development";[1] or when the mind is "of a relatively more sensitive type which detects at once the unsatisfactory nature" of the logic-tight mechanism, when, in short, the mind is so capable of self-criticism that "it is unable to delude itself by the easy mechanism of the logic-tight compartment, and cannot be satisfied by the very obvious rationalizations which that mechanism employs", — the mind must either "face the music" by rationally considering the discordant mental elements and arriving at a conscious decision in the matter, or it must resort to the mechanism of *repression.* In this manner, instead of one of the offending and discordant complexes being allowed to face the other in consciousness but across the bridge of rationalization, it is banished from consciousness entirely, or "repressed." Much daily forgetting is not due to the "passive process of decay", but is really the result of a deliberate exclusion from consciousness of unpleasant experiences that we wish to forget. But while the complex can no longer appear in consciousness, it is still active. "It persists in the deeper layers of the mind, as it were, and is prevented from rising to the surface by the constant resistance which the repressive process opposes to it. . . . Repression is a more drastic method of dealing with conflict than that offered by the 'logic-tight compartment', and . . . its disturbing effect upon the homogeneity and unity of the mind will be proportionally greater."[2]

[1] Hart, *op. cit.*, p. 90. [2] *Id.*, p. 92.

The " mechanism " of repression together with the concepts of dissociation and the unconscious will serve to explain the peculiar phenomena of somnambulism and multiple personality. To refer again to the case of Irene, the death of her mother, after a long illness in which all of Irene's thoughts and energies were centered upon the one purpose of nursing her back to health, " not only produced a great grief but it deprived all those ambitions and activities of their main object and end. . . . The ideas connected with the mother's illness and death formed a system or complex intensely painful and repugnant to the personality as a whole. A conflict, with all its accompanying emotional stress and tension, was thus produced between the personality and the complex in question. To get rid of this conflict the mechanism of repression was brought into play. The painful complex was dislocated from the remainder of the mind, and no longer allowed to introduce its constituent ideas and emotions into the field of consciousness. Hence we find that Irene, in the intervals between her somnambulisms, had forgotten the whole system of ideas connected with her mother's death. . . . She discussed her mother calmly, and as if nothing had happened to disturb the tenour of her own life." [1] But while the conflict and its emotions were thus avoided through the process of repressing the painful complex, it continued to exist subconsciously, and demonstrated its continued existence " by suddenly erupting, as it were, and occupying for a time the whole field of consciousness. This is the state of affairs present during the periods of somnambulism. The system of ideas associated with the mother's illness suddenly makes its appearance, and Irene lives once more through the whole tragic scene." [2]

The phenomena of dual personality represent but a greater degree of complexity and extent of the dissociated system of complexes; dissociation is of sufficient extent to permit each fragment of the personality to continue to perform most of the functions of life in a relatively successful manner, as was the case with Ansel Bourne.[3]

[1] Hart, *op. cit.*, pp. 93, 94. [2] *Id.*

[3] Dr. Morton Prince, "The Unconscious", uses such an explanation of the phenomena in cases of multiple personality which he has treated; he demonstrates the validity of McDougall's classification of the instincts and primary emotions, by showing graphically that when one personality was dominant, only certain, closely related instincts were especially operative, and when another was dominant, the other instincts were primarily operative. When a cure is effected, it is through a "synthesis" of the fragmentary personalities and basic instincts.

Projection. — Another concept which helps to explain some of the symptoms of mental disorder with which the law is concerned is *projection*, which Hart defines as " a peculiar reaction of the mind to the presence of a repressed complex, in which the complex or its effect is regarded by the personality as belonging no longer to itself, but as the production of some other real or imaginary individual." [1] He says further: " In general it may be said that whenever one encounters an intense prejudice one may with some probability suspect that the individual himself exhibits the fault in question or some closely similar fault. . . . The fault constitutes a complex which is repugnant to the personality as a whole, and its presence would therefore naturally lead to that particular form of conflict which is known as self-reproach. The personality avoids this conflict, however, by ' projecting ' the offending complex on to some other person, where it can be sufficiently rebuked without the painful emotion which inevitably accompanies the recognition of deficiencies in ourselves." [2] Many symptoms of the different types of mental disorder may be ascribed to this mechanism. In alcoholism, which Trotter [3] and Hart regard as " one of humanity's refuges from the stress of conflict ", the subject quite frequently complains bitterly of the wrongdoing of others, and usually of members of his family, while an examination of the facts usually proves that he himself has all the faults he attributes to others. Delusions of infidelity on the part of the patient's wife, or delusions of persecution, are thus attributable to the mechanism of projection. In this manner the patient is able to regard the objectionable complex as belonging to some one else, " and thereby to substitute an illusory self-complacency for the pangs of remorse." [4] But while " alcoholism has indeed achieved its aim, and freedom from conflict has been attained ", this has been done " only at the price of mental integrity and self-honesty, and the asylum has become the inevitable consequence." [5]

While delusions of persecution, explained by the mechanism of projection, often involve actually existing persons or objects, it frequently occurs that the complexes which were objectionable to the integrity of the personality and which were repressed after a conflict, " are projected into an individual who has no real exist-

[1] Hart, *op. cit.*, p. 118. [2] *Id.*, pp. 119, 120.
[3] W. Trotter, "Herd Instinct", *Sociol. Rev.*, 1909, *cited* by Hart, p. 109.
[4] Hart, *op. cit.*, p. 121. [5] *Id.*

ence. The patient's mind, in its struggle to obtain freedom from the internal conflict, invents not only the man's conduct, but the man himself." [1] Sometimes the patient invents supernatural agencies upon which to project his unwelcome repressed wishes.

When, not the complex itself, but the feeling of guilt or reproach which it engenders is projected, the patient avoids the stress of conflict by changing the self-reproach to reproach by others. This puts him into a state of constant suspiciousness, leading naturally to delusions of " reference ", the patient interpreting any sights or sounds, however innocent or unconnected with him, as being directly calculated to harm him. It is readily seen that such a condition is favorable to the development of hallucinations, especially of hearing. The element of the patient's mind " which the personality has cut off and declined to acknowledge makes its reappearance as a hallucinatory voice." [2] The psychic stress of conflict is avoided by the projection of the "still, small voice" of conscience, distorted in the process of repression. Since the systems of ideas expressed by the hallucinations are incompatible with, or unsatisfactory to, the personality, they have been dissociated in order to avoid the conflict and emotional stress which their normal appearance into consciousness would arouse.

Conclusions. — This incomplete account of the chief psychological concepts of mental disorder must suffice. It is enough to explain why the use of external symptoms as tests of irresponsibility can not be satisfactory; namely, that *the external symptoms are but indicative of a much deeper disturbance, the relation of which to the criminal act can only be arrived at by a process of mental analysis, and may be entirely different from that which a consideration by the jury of the superficial evidences of delusion, for example, would indicate.*

It must be admitted, however, that with our modern legal machinery, and with the vast number of accused persons who must pass through the judicial mill, it is highly impracticable to submit all offenders to such minute and thorough psychological and psychiatric examination as will bring out the unconscious factors involved in their criminal conduct. Nor is such procedure necessary in many cases, in which an experienced psychiatrist can make an examination in a relatively short time,[3] provided he is assisted

[1] Hart, *op. cit.*, p. 123. [2] *Id.*, p. 125.

[3] *Cf. ante*, Chapter 3, pp. 60, *et seq.*, where the Massachusetts experience is discussed.

by efficient social investigators, who have gathered all the pertinent family, developmental, and other data available, as to the offender's life history. What our investigation goes far to establish, however, is the unscientific and unjust nature of the various types of delusion-test of the criminal irresponsibility of the insane existing in the different jurisdictions. Whether the techniques of mental analysis could be used to advantage in prisons, as part of the curative-reformative program, is a question belonging to penology, and beyond the scope of this inquiry.

The concept of unconscious motivation, too, raises an extremely interesting and difficult ethical question as to the extent to which such motivation should be considered in the evaluation of moral, as well as legal, responsibility.[1] The intricacy of the subject, and the difficulty of drawing a line between unconscious and conscious motivation, would have to be considered in that connection. As we are interested only in the practical features of the problem presented by the criminal insane, we must content ourselves with a mere reference to the possibility that a new system of ethics may some day be written, based upon the psychology of the unconscious. In the following chapter, the various psychoses and neuroses will be considered separately, both from the psychopathological and legal points of view.

[1] The most interesting discussion of this point that I have been able to find is contained in T. V. Moore's "Dynamic Psychology." He asks, p. 27: "What happens to human responsibility if the mind is subject to unconscious drives?" And answers this riddle as follows: "It is not necessary for us to know why a course of action appeals to us in order to resist it. The sexual drive is strong, but not irresistible. The fact that it masks itself under the temptation to steal (*citing* a case from Healy's "Mental Conflicts and Misconduct", p. 183) does not make it overpowering. The unconscious by shuffling the cards makes peculiar and uncanny problems but not insoluble ones. We are all subject to pathological associations. No one can render an account of all his likes and dislikes. But it is not necessary in order to behave ourselves with decency and discretion. Something may appeal with a peculiar, indescribable and inexplicable charm. Analysis of the charm is not necessary in order to see whether or not the course of action it leads to is or is not in accord with the ideals of conduct. The ability to compare action with the standards of conduct is the root of freedom. If we would escape the drive of the unconscious we must regulate our conduct according to principle. If, however, we follow whims and fancies and thoughtlessly yield to desires the unconscious bears us along and we know not whither we are going." (Pp. 27, 28.) *See also* J. A. Hadfield's "Psychology and Morals."

CHAPTER 10

MENTAL DISEASE AS RELATED TO THE TESTS OF IRRESPONSIBILITY, *continued*

"It is quite generally felt by those interested in problems of mental disorders in their medical and sociologic relations that the rigid provisions that the law has for dealing with an individual in respect to his actions do not give adequate consideration to the complexity of the mechanisms that enter into conduct and behavior." — Albert M. Barrett, "Mental Disorders in Medicolegal Relations", in Peterson, Haines, Webster, "Legal Medicine and Toxicology" (1923), Vol. I, p. 519.

Section 1 — Statistics of Psychoses and Crimes

In the following table is presented the list of first admissions to a New York Hospital for the criminal insane, the classification being based on Southard's [1] division of the eleven major groups of mental disorder. In Southard's classification, the types of mental unsoundness are presented both from the point of view of progression from "organic" to "functional" etiology, and "on the basis of the reliability of diagnostic tests and criteria." [2] This table will indicate, to some extent, the importance of the various mental disorders as related to criminal conduct in general. The table has been prepared on the basis of the records of the New York State Hospital Commission. The various disease groups will be discussed after presentation of another table correlating types of psychoses with types of crime.

From the first table, it will be seen that among the mental disorders, the most frequent contributors to criminal conduct were the syphilopsychoses, especially general paralysis (paresis), which contributed 155, or 13.4 per cent.; psychoses with mental deficiency, which furnished 88, or 7.6 per cent.; pharmacopsychoses, especially those caused by alcohol, to which 203, or 17.5 per cent. of offenses were attributable; schizophrenoses, particularly dementia præcox, which contributed the largest number (388), or 33.4 per cent. of offenses; manic-depressive psychoses, which furnished 72, or 6.2 per cent., and psychopathic inferiority, which contributed 181, or 15.6 per cent.

[1] *See*, "The Kingdom of Evils", by Southard and Jarrett, pp. 202, 446–448.
[2] *Id.*, pp. 446, 447. The official classification of the American Psychiatric Association (*see* "Statistical Manual", National Committee for Mental Hygiene, 3d Ed., 1923) will be freely drawn on, in discussing subclassifications.

PSYCHOSES OF FIRST ADMISSIONS OF CRIMINAL INSANE TO MATTEAWAN HOSPITAL,[1] NEW YORK, FROM OCT. 1, 1912,[2] TO JULY 1, 1923

PSYCHOSES — SOUTHARD'S CLASSIFICATION	NUMBER			PER CENT.		
	Male	Female	Total	Male	Female	Total
Syphilopsychoses[3] (Neurosyphilis)	139	16	155	14.4	8.4	13.4
Hypophrenoses (Feeblemindedness) with psychoses	69	19	88	7.1	10.0	7.6
Epileptoses (Epilepsies)	23	5	28	2.4	2.6	2.4
Pharmacopsychoses (Mental disease caused by alcohol and drugs)[4]	164	39	203	17.0	20.5	17.5
Encephalopsychoses (Brain disease)[5]	8	2	10	0.8	1.0	0.9
Somatopsychoses (Bodily disease)	—	1	1	—	0.5	.1
Geriopsychoses (Old age)[6]	24	9	33	2.5	4.7	2.8
Schizophrenoses (Dementia præcox)[7]	344	44	388	35.4	23.2	33.4
Cyclothymoses (Manic-depressive psychoses)	49	23	72	5.0	12.1	6.2
Psychoneuroses	1	—	1	0.1	—	.1
Psychopathoses (Dubious and special psychopathies)[8]	149	32	181	15.3	17.0	15.6
Total	970	190	1160	100.0	100.0	100.0

[1] Under the provisions of the Insanity Law of the State of New York, this hospital is "to be used for the purpose of holding in custody and caring for such insane persons held under any other than a civil process as may be committed to the said institution by courts of criminal jurisdiction, or transferred thereto by the state hospital commission, and for such convicted persons as may be declared insane while undergoing sentence of one year or less or for a misdemeanor at any of the various penal institutions of the state, and for all female convicts becoming insane while undergoing sentence." It will thus be seen that this hospital's inmates comprise a mixed grouping, consisting, first, of offenders of both sexes and accused persons of all grades of seriousness of offense, who are committed other than upon a verdict by a jury (*i.e.*, committed before trial); secondly, convicted *misdemeanants* declared insane while serving sentence; thirdly, *female* convicts of all grades of offense. Male felons becoming insane while serving sentence are sent to Dannemora State Hospital.

[2] The date when this hospital began to turn in statistical cards to the State Hospital Commission.

[3] Only four male and two female of these were cases of cerebral syphilis; the remainder were general paralysis.

[4] Only eleven male and six female of these were psychoses due to drugs and other exogenous toxins; the remainder were various types of alcoholic psychoses, such as delirium tremens, Korsakow's psychosis, acute hallucinosis, etc.

[5] These include: Traumatic psychoses — four male, no female; psychoses with cerebral arteriosclerosis — two male, one female; other — two male, one female. Cases of arteriosclerosis are not always of syphilitic genesis. — *See* R. DeFursac and A. Rosanoff, "Manual of Psychiatry", 1916, pp. 9, 10.

[6] These include senile psychoses — twenty-four male, six female; involution melancholia — three female.

[7] Only twenty-one male and five female of these are classifiable as "paranoia"; the remainder are dementia præcox.

[8] Of these, thirty-four male and three female were undiagnosed, and ten male

Before discussing the principal clinical groups and their legal significance, it will be of interest to reproduce a table prepared by the New York State Hospital Commission,[1] indicating the relationship between type of psychosis and type of crime:[2]

PER CENT. DISTRIBUTION OF CRIMES AMONG CLINICAL GROUPS

CRIME	PER CENT. OF TOTAL CRIMES						
	Senile	General Paralysis	Alcoholic	Manic-depressive	Dementia præcox	With constitutional psychopathic inferiority	With mental deficiency
Homicide (all forms)	—	2.9	17.6	2.9	32.4	14.7	17.6
Assault (all forms)	—	3.8	24.1	7.6	25.3	17.7	6.3
Burglary	—	13.2	—	7.9	39.5	23.7	5.3
Larceny (all forms)	1.3	22.8	5.1	6.3	24.1	15.2	7.6
Public intoxication	2.9	2.9	70.6	—	5.9	5.9	—
Disorderly conduct	2.4	13.4	17.1	12.2	17.1	17.1	7.3
Vagrancy or prostitution	8.5	15.4	13.8	4.3	35.1	6.9	7.4
All crimes	3.6	11.5	16.9	7.3	25.5	14.7	7.4

While this table is based on a study of but six hundred and forty-six patients,[3] its findings as to the relationship of various psychoses with types of criminal conduct are, on the whole, confirmatory of the opinions usually found in texts on psychiatry.[4] Thus it will be seen that crimes of violence (such as homicides and assaults) were principally committed by alcoholic, dementia præcox, psychopathic, and mentally defective inmates, whereas senile dementia contributed none. On the other hand, the offenses of the senile[5] consisted almost entirely of disorderly conduct and

and one female were without psychoses; the remainder, one hundred and five male and twenty-eight female, a total of one hundred and thirty-three, were psychoses with psychopathic personality.

[1] "Some Characteristics of the Criminal Insane", by Wm. A. Nolan, Asst. Statistician, State Hospital Commission, Albany, N. Y., reprinted from *The State Hospital Quarterly*, May, 1920.

[2] This is based on a study of six hundred and forty-six patients admitted to Matteawan State Hospital during the period from Oct. 1, 1912, to July 1, 1918.

[3] No attempt was made, apparently, to work out the "probable errors" in the table of the State Hospital Commission.

[4] *Cf.* Emil Kraepelin, "Psychiatrie", 8th Edition, and Gustav Aschaffenburg, "Crime and Its Repression", "Modern Criminal Science Series", No. 6.

[5] These totaled only twenty-three, however.

vagrancy. Again, the paretics [1] contributed 13.4 per cent. of disorderly conduct and 15.4 per cent. of vagrancy and prostitution, but a small per cent. of crimes of violence, and about 13 per cent. of the burglaries, and about 23 per cent. of the larcenies. The alcoholics [2] naturally contributed most of the offenses of public intoxication (their share constituting 70 per cent.), about 18 per cent. of the homicides and 24 per cent. of the assaults (crimes of violence probably induced by intoxicants); interestingly, there was not one alcoholic who committed burglary (a crime requiring considerable steadiness), the alcoholics contributed but a small percentage of the larcenies, about 17 per cent. of disorderly conduct and 14 per cent. of the vagrancy and prostitution. The manic-depressives [3] contributed but a small percentage to most of the crimes; but there was no public intoxication among them, and a relatively high contribution (12.2 per cent.) was made by them to disorderly conduct. With the exception of public intoxication (5.9 per cent.) and disorderly conduct (17.1 per cent.) the dementia præcox group [4] are pretty evenly distributed as to relative percentage of contribution to types of offense; and they contributed the largest percentages of crimes of violence (especially homicide), burglary and larcency, and vagrancy. The psychopathic inferiors with psychoses [5] contributed about 15 per cent. of homicides, 18 per cent. of the assaults, 24 per cent. of the burglaries, 15 per cent. of larcency, and 17 per cent. of the disorderly conduct. The mentally defective group with psychoses [6] contributed a good share (17.6 per cent.) of the homicides.

Of course, a much larger number of offenders would be needed to arrive at any permanent conclusions, and more refined statistical technique would have to be resorted to; [7] nevertheless, the percent-

[1] There were seventy-four of these.
[2] There were one hundred and nine of these.
[3] There were forty-seven of these.
[4] There were one hundred and sixty-five of these.
[5] There were ninety-five of these.
[6] There were forty-eight of these.
[7] It must also be pointed out that the table above does not represent the exact correlation of mental disorder and type of crime, for the further reason that it includes merely those offenders in New York State who have been *arrested* for crime and either committed because mental disorder was recognized *before trial*, or *acquitted* upon a trial on the plea of irresponsibility because of insanity, and then committed; and those *serious*, *female*, and *petty* male and female offenders (*see* p. 326, note 1), whose mental disorders were recognized while they were serving sentences. Many persons who commit crime are, of course, never arrested; many more are never brought to trial (as the Cleveland Survey of Criminal Justice has abundantly proved), many are acquitted without

ages given above accord, on the whole, as has been said, with the views usually found in textbooks on mental diseases and works on criminology, as to the correlation of types of crime with types of psychosis.

Section 2 — Clinical Types of Psychoses and Their Legal Significance [1]

We may now consider the principal types of psychoses from the points of view of their causation, chief mental symptoms, and legal significance.

Syphilopsychoses. — The type of syphilopsychosis which contributes the largest number of crimes, and in which we are chiefly interested, is general paralysis (paresis).

The causative factor of general paralysis is, of course, largely syphilis, but psychological influences may also play a rôle during its progress.

In its earliest stages, the mental symptoms are very mild, attracting but little attention, or being attributed to a sudden turn of "queerness" on the part of the patient; hence it is highly probable that many cases of paresis are overlooked at the arraignment and trial of offenders, especially since paretics most often appear in the lower courts, and in connection with misdemeanors. It is the practice in such lower courts to dispose of cases summarily and in large numbers. A psychopathic clinic, attached to a municipal or magistrate's court, would easily sift out this group; and with proper laws compelling their restraint and medical treatment until fit to be at large,[2] accused persons with syphilitic infection dangerous to others as well as themselves, could be kept out of the community.

pleading insanity at all, and, finally, there are many actually unsound offenders who are tried and convicted and who either failed to plead insanity as a defense, or were unsuccessful in such plea, or developed prison psychoses. (*See* "Report of a Special Committee of the New York State Commission of Prisons", *Mental Hygiene*, Vol. III, No. 2 (1919), pp. 177–198, in which the studies of Bernard Glueck, A. W. Stearns, and others, of the inmates of Sing Sing and other prisons, are given, proving that large percentages of prison inmates are mentally diseased or defective.)

[1] In the preparation of this Section I have found the illuminating exposition by Dr. Albert M. Barrett ("Mental Disorders in Medicolegal Relations", in "Legal Medicine and Toxicology", edited by Frederick Peterson, Walter S. Haines and Ralph W. Webster) to be of great aid.

[2] In this connection, Southard has pointed out that "neurosyphilis, in its paretic form, is not necessarily completely intractable to treatment." — "The Kingdom of Evils", pp. 204, 456.

Often there is an absurdly euphoric mood in general paralysis; but this may be interspersed with moods of sadness; and there may be cases with depressions, paranoid ideas, alcoholic-like episodes, etc. In addition to these character changes, there are "judgment defects, difficulty about time relations and discrepancies in statements, forgetfulness and, later on, a diffuse memory impairment." [1] As the disorder progresses, with its gradual destruction of the nervous tissue, there is a deterioration of mental processes in the inverse order of their acquirement; that is, the earliest symptoms of the disease consist of the destruction of the higher sentiments and mental integrations which were acquired last, and when these, and the controlling power, are destroyed, the primitive, instinctive forces have practically free play. The instincts of acquisitiveness, hunger and sex, especially, are very active, the patients perhaps collecting all sorts of useless objects, as in childhood, or taking whatever they desire, eating ravenously, or committing indecent acts and sex offenses.

Legal Significance of Syphilopsychoses. — In general paralysis, there are usually episodes of unclear consciousness, a grave deterioration of the reasoning processes, and serious emotional disturbances; and such disorders can readily destroy the capacity for knowledge of the nature and quality of an act about to be committed, or its wrongfulness. At the same time, general paralysis may also satisfy the irresistible-impulse test; since inhibitory control is generally destroyed, leaving free play to the primitive impulses. The point may be raised at the trial, however, that even though general paralysis exists at the time of arraignment or trial, its symptoms of disturbed consciousness and incapacity of control of conduct (with occasional hallucinations and delusions) may not have been present at the time when the offense was committed; and the tests of irresponsibility are theoretically applicable strictly to the exact time when the defendant committed the offense charged against him. If, for example, the evidences of neurosyphilis are shown to have existed prior to the time of the offense, by means of serologic examinations,[2] this does not prove that those *mental* symptoms of general paralysis which would have

[1] "Statistical Manual", National Committee for Mental Hygiene, 1923, p. 21.

[2] Albert M. Barrett, "Mental Disorders in Medicolegal Relations", in Peterson, Haines, Webster, "Legal Medicine and Toxicology" (1923), Vol. 1, p. 583.

satisfied the requirements of the tests of irresponsibility existed at that time, or at the time of the offense. Hence, the whole previous history must be studied by a trained psychiatrist, to see if the early symptoms of the disease, such as increased irritability, fatigue, disturbed memory, untidiness, carelessness, etc., existed at a time prior to the offense. From this picture a presumption may be drawn, — based upon the known nature of this deteriorating, progressive disorder, — that these symptoms also existed at the time of the offense.

Another difficulty in these cases is presented by the fact that quite frequently there is a remission of the symptoms to such an extent that the patient can resume work and apparently conduct himself with propriety;[1] if he commits a crime during such a period of remission, it is difficult to say whether he knew right from wrong when he committed an offense, or could have controlled his conduct, or not. A psychological question is also presented by the jury's knowledge that general paralysis is due to the loathsome disease of syphilis, and the moral effect of such knowledge or testimony upon their attitude toward the defendant.

A further interesting point occurs in this connection. In the case of crimes committed under the influence of alcohol, while the defendant is not excused from responsibility (because of the fact that he voluntarily put himself into a state that brought on the crime), nevertheless intoxication is usually taken into account, as we have seen,[2] in considering the questions of deliberation, premeditation, malice, etc., that are necessary to constitute a more serious *degree* of crime than would otherwise exist. In the case of general paralysis, too, though the disease is most often attributable to the person's own default, it might be argued analogically that the disturbed state of the higher controlling mental functions ought to be taken into consideration in reducing the degree of the crime; since, with the control of the higher faculties destroyed, the primitive instincts have full scope, and premeditation or

[1] Barrett, p. 583, cites the following interesting case: Plaintiff sued a street railway company for damages for having caused his nervous disorder. It was shown, that following a slight jarring of plaintiff's body caused by the sudden starting of the car, he complained of various nervous symptoms that rapidly led to his commitment to a hospital where his case was diagnosed as general paresis. The company introduced evidence showing that his signature to various papers made before the accident, evidenced the characteristic changes which occur in general paresis, such as elisions of letters or syllables, repetitions, serious grammatical anomalies, etc.

[2] *Ante*, pp. 201, *et seq.*

deliberation may seldom intervene between the impulse and the illegal act.

On the whole, we may say that cases of general paralysis, especially in the early stages, are frequently overlooked, since they most often arise in connection with offenses under the jurisdiction of petty courts, and the early symptoms are difficult to recognize. Where serious offenses are committed by paretics, they present a type to which the concept of *partial responsibility in the sense of reduction of the grade of the offense*, is applicable, in those cases where the symptoms fail to satisfy the legal tests of irresponsibility, but where the presence of the disease prior to the offense was shown (by serologic and other evidences) to have existed together with such mental disturbances as indicate a degree of mental instability which creates a presumption that the offense would not have been committed if power of deliberation and control had not been previously injured.

Hypophrenoses (Feeblemindedness). — The contribution of feeblemindedness to criminal conduct (especially when associated with psychoses)[1] is too well established to require much comment. The figures in the first table above are not quite typical, as out of a total of 1160 offenders there would usually be found more than eighty-eight with feeblemindedness combined with some psychosis. The American studies of the " Jukes ", by Dugdale, the " Nams ", by Estabrook and Davenport, and the "Kallikak Family", by Goddard,[2] and many similar investigations indicate the heavy toll paid by society to mental defectiveness, on account of crime, dependency, and other social evils, and the transmission of defective strains. It has been variously found by reliable investigators that from 16 to 42.7 per cent. of the inmates of penitentiaries, workhouses, reformatories, and prisons (including such large prison populations as that of Sing Sing in New York) are mentally defective.[3] The distribution of crimes among the feebleminded, which

[1] "Acute, usually transient psychoses of various form occur in mentally deficient persons. . . . The most common mental disturbances are episodes of excitement or irritability, depressions, paranoid trends, hallucinatory attacks, etc. Mentally deficient persons may suffer from manic-depressive attacks or from dementia praecox." — "Statistical Manual, etc.", p. 34.

[2] *See also* his "Feeble-mindedness, Its Causes and Consequences."

[3] The various important studies which have been made in this field are conveniently summarized by Wm. B. Cornell, "Mental Deficiency", "Nelson Encyclopedia of Medicine", Chap. XXIX, pp. 545, 552. Bernard Glueck, for example, found that out of six hundred eight consecutive admissions to Sing Sing Prison, 21.8 per cent. were feebleminded. Almost exact figures (22 per

is shown in the second table, is more typical; it indicates a predominance of crimes of violence, disorderly conduct and vagrancy, with a relatively small amount of crimes requiring higher intelligence.

The term "feeblemindedness" was originally applied to subnormality of the cognitive or intelligence phase of mental life; in recent years, however, the psychological tests originally devised by Binet on the basis of his ten-year study of the school children of Paris, have been enlarged and refined to include as nearly as possible all those mental functions involved in the individual's reactions to his environment, especially the conative-affective life.

Classification of the feebleminded is based upon the results of the application of one of the recognized standard intelligence tests, which give certain intelligence ages or levels. The gradation adopted by the American Association for the Study of Feebleminded are: Idiocy, less than one to three years; imbecility, three to seven years inclusive, moronity, eight to twelve years inclusive.[1] These levels are based upon the assumption that mental

cent.) were obtained in a measurement of inmates of the Massachusetts State Prison, those of Indiana State Prison (23 per cent.) and many others. These high percentages have recently been challenged, however.

Thus Edwin H. Sutherland, "Criminology", pp. 106–109, carefully, though briefly, reviews the more important statistical studies that have been made of the mental defectiveness of inmates of jails and prisons. These studies include the work of Goring, "The English Convict", Adler, "Cleveland Survey of Criminal Justice", Part V, *Medical Science and Criminal Justice*, Murchison, "Criminals and College Students", *School and Society*, 12: 25, July 3, 1920, Miss Fernald, "A Study of Women Delinquents in New York State", 1920, Doll, New Jersey State Prison, Report 1920, pp. 110–111, Healy, "The Individual Delinquent." Sutherland believes that the conclusions that may be drawn from an analysis of these investigations are (1) That inmates of jails and prisons differ very slightly, if at all, from the rest of the population; and, (2) that the larger proportions of criminals which were judged feebleminded in earlier studies can be accounted for by inadequate development of mental tests or use of subjective judgments (Goring) instead of tests, by inefficiency in the application of tests where used, or by the fact that those tested were highly selected (as Healy's recidivists).

If Goring is right in his elaborate statistico-mathematical study of "The English Convict", in concluding that crime is only to a trifling, if any, extent the product of social inequality, adverse environmental conditions or other manifestations of what he calls "the force of circumstances", then this fact, taken together with the findings of comparatively little mental defectiveness among inmates of prisons must make one conclude that the mental pathology of convicts is to be looked for in the sphere of their conative-emotional life (largely unmeasurable by tests and mathematical constructions), rather than in their cognitive equipment.

[1] Cornell, *op. cit.*, p. 546. The definitions in the famous English Mental Deficiency Act (3 and 4 Geo. V, ch. 28 (1913)), of the various classes of defectives provided for thereunder, emphasize the capacity for individual and social behavior (that is, actual history, or "performance") more than the results

age develops progressively with the physical age, up to a certain point.[1] Formerly, this was thought to be about twenty, later, Terman assumed that the average mental age of adults is approximately sixteen years; finally, the measurement of soldiers during the World War would indicate that even this average adult mental age is too high. Out of 83,000 drafted soldiers given individual tests and 1,700,000 measured by group tests, a median mental age of approximately thirteen and one half years was obtained;[2] which would indicate that the early assumptions were much too high, and that the average mental age is nearer fourteen than sixteen or twenty. The bearing of these data upon the tests of irresponsibility, especially the child-of-fourteen test, has already been mentioned.[3]

Legal Significance of Mental Defectiveness. — Especially when accompanied by psychoses, feeblemindedness may lead to the more serious crimes of violence. There is often in these cases very poor judgment and inability to foresee the consequences of an act; and the control and guidance of instinctive behavior is defective. Further, feebleminded persons are unusually suggestible and

obtained by any of the intelligence tests, namely: "(*a*) Idiots: that is to say, persons so deeply defective in mind from birth or from an early age as to be unable to guard themselves against common physical dangers; (*b*) Imbeciles: that is to say, persons in whose case there exists from birth or from an early age mental defectiveness not amounting to idiocy, yet so pronounced that they are incapable of managing themselves or their affairs, or, in the case of children, of being taught to do so; (*c*) Feeble-minded persons (in America, morons): that is to say, persons in whose case there exists from birth or from an early age mental defectiveness not amounting to imbecility, yet so pronounced that they require care, supervision and control for their protection or for the protection of others, or, in the case of children, that they by reason of such defectiveness appear to be permanently incapable of receiving proper benefit from the instruction in ordinary schools." The Royal College of Physicians defines a moron as "one who is capable of earning his living under favorable circumstances, but is incapable from mental defect existing from birth or from an early age (*a*) of competing on equal terms with his normal fellows, or (*b*) of managing himself and his affairs with ordinary prudence." *Cited* by Cornell, p. 547. Sec. 2 (5), Art. I, Chap. 71, p. 1177, Vol. 11, Consolidated Laws of New York, Second Ed., Suppl., 1918–1920, defines mental defectiveness in terms similar to those of the English Act.

These definitions, as is apparent, are largely for the purpose of determining who are committable under the Mental Deficiency Act, without reference to whether or not they have already come into conflict with the law.

[1] It must always be remembered, however, that when a person of, say, twenty years of age grades eight years in intelligence by means of one of the standard intelligence tests, his mentality is not exactly comparable to that of the average normal child of eight. Other personality factors, especially the emotional life, may have much more to do with determining a person's capacity to adhere to the demands of a legally ordered society, than his "pure" intellectual age level, especially in the higher grades of feeblemindedness.

[2] Cornell, *op. cit.*, p. 548.

[3] *See ante*, pp. 195, *et seq.*

imitative. These qualities easily lead to dangerous criminal conduct — assaults, fires and other wanton destruction of property, etc. Though, " by means of skilful discipline they learn to associate punishment with forbidden acts . . . it is doubtful whether they ever learn to restrain themselves from a purely moral sense." [1]

The English Mental Deficiency Act includes among its classification of mental defectives, the so called moral imbeciles; that is to say, " persons who from an early age display some permanent mental defect coupled with strong vicious or criminal propensities on which punishment has had little or no deterrent effect." [2] Among those liable to be placed under guardianship or sent to institutions for the feebleminded under the Act are mentally defective persons " found guilty of any criminal offence " and defectives " undergoing imprisonment (except imprisonment under civil process) or penal servitude, or undergoing detention in a place of detention by order of a Court, or in a reformatory or Industrial School." [3] It would thus appear that the feebleminded should present no problem in England from the point of view of the relationship of mental unsoundness to criminal responsibility; for upon a decision that an offender is feebleminded,[4] within one of

[1] Fred. Peterson, and Smith Ely Jelliffe, in Peterson, Haines, Webster, "Legal Medicine and Toxicology", Vol. 1, p. 653.

[2] 3 and 4 Geo. V, c. 28 (1913). *See* John and Samuel Wormold, "A Guide to the Mental Deficiency Act, 1913", and Herbert Davey, "The Law Relating to the Mentally Defective." It should be pointed out that this is not the usual meaning of this term, for here *mental defectiveness* is present, while the concept ordinarily means perfect *soundness of mentality* together with incapacity for *moral* development.

[3] Sec. 2 (1) (b) of the Act.

[4] The English verdict is, "guilty, but insane" (or "but feebleminded"). The purpose of such an anomalous verdict is, of course, to place the entire future of such persons in the hands of the Home Secretary, which, if the verdict were "*not guilty* by reason of insanity" (or feeblemindedness) could not be done so readily, since a person found not guilty has, after all, some definite rights, such as *habeas corpus*, in the matter of his discharge from an institution to which he has been committed upon *acquittal*. The ridiculous results to which such an anomalous verdict may lead were alluded to by the Editor of *Law Notes* (London), June, 1915, who was discussing the effect of such a verdict in a case (In re Haughton) in which the person had killed his father and eldest brother, to succeed to the estate. He was found "guilty, but insane." When the question arose as to whether he could inherit, a real puzzle was presented. For "the law is that no person can obtain or enforce any rights resulting to him from his own crime"; and the question was whether Haughton came within the rule. In Appeal of Felstead, 11 Cr. App. Rep., 129 (1914), it had already been held that "Guilty, but Insane" really meant a verdict of *acquittal;* and therefore in the instant case, the verdict "Guilty, but Insane" actually being "*not* Guilty by Reason of Insanity", there was no reason why Haughton could not succeed to the property of the father and brother he had murdered. The editor expresses himself in this graphic language: "We have

the definitions of the Act quoted above, it would seem that he would thereupon be committed under the Act. Upon a verdict of "guilty, but mentally defective" the legal problem presented by a feebleminded offender is apparently ended.

The legal difficulty in such cases, as we have seen in the chapter on the tests of irresponsibility, is the ever present one of knowing where to draw the line between such mental defect as does not interfere with capacity to conform to legally required conduct, and such as does. It is the difficulty encountered by Hale many years ago, and after him by the judges we have cited. According to Fernald,[1] one in every two hundred and fifty of the population is a mental defective, that is, there are about half a million mental defectives in the United States.[2] But these are of varying degrees of feeblemindedness, and varying degrees of social capacity, including capacity to conform to the mandates of the criminal law. "Human behavior from its mental aspect presents so innumerable a series of gradations — from that of the insentient idiot, on the one hand, to the versatile genius on the other — that it becomes a highly difficult matter to separate particular trends and say just where and how one grades into another."[3]

Since there is some scope for the development of capacity and control, in the imbecile and higher classes of mental defect, there are no doubt instances of mental defectives who are to some degree morally chargeable, and who should be legally responsible for their conduct. In the moron and borderline cases there is room for the concept of *limited responsibility;* but as we have seen,[4] the courts are as yet loath to put much stock in the findings of intelligence tests. There is also room in these cases for some such concept as habitual criminality,[5] the equivalent of the English moral imbecil-

all heard of funny verdicts, but did ever twelve of the biggest fools that ever got into a jury box evolve a more perverse verdict than the wisdom of the sovereign legislature has contrived? It might come straight out of 'Alice in Wonderland.'" The recently reporting Committee on the Reform of the Law of Insanity has recommended the changing of this verdict to the following: "That the accused did the act (or made the omission) charged, but is not guilty on the ground that he was insane so as not to be responsible according to law at the time." "Report of the Committee on Insanity and Crime" (1923), p. 12.

[1] *Cited* by Peterson and Jelliffe, in Peterson, Haines, Webster, "Legal Medicine and Toxicology", Vol. 1, p. 639.

[2] *Id.*, pp. 640, 641. [3] *Id.*, p. 640. [4] *Ante*, pp. 195, *et seq.*

[5] In many jurisdictions "habitual criminal acts" are in existence; where a person is convicted either of successive offenses or of subsequent violations of the same statute, the court may inflict a penalty more severe than that provided for a first offense. The Massachusetts law is as follows: "Whoever has been

ity in the sense of that term as used in the English Mental Deficiency Act;[1] so that when an offense has been repeated once or twice by a moron or borderline (or psychopathic) delinquent, who pre-

twice convicted of crime and sentenced and committed to prison in this or another state, or once in this and once or more in another state, for terms of not less than three years each, and does not show that he has been pardoned for either crime on the ground that he was innocent, shall, upon conviction of a felony, be considered an habitual criminal and be punished by imprisonment in the state prison for the maximum term provided by law as a penalty for the felony for which he is then to be sentenced." — Sec. 25, Chap. 279, Mass. Gen. Laws, 1921. "Since the year 1804 a person convicted at one term of three distinct larcenies has been subjected to aggravated punishment as a common and notorious thief." — Com. *v.* Richardson, 175 Mass., 202, 205 (1899). *See also* Williams *v.* Peo., 196 Ill., 173, 177 (1902); State *v.* Collins, 266 Mo., 93 (1915); State *v.* Gustafson, 87 Wash., 613 (1915); Rex *v.* Smith, 1 K. B., 17 (1909). Such statutes have been generally held constitutional. State *v.* Briggs, 94 Kan., 92, 95 (1915). They are not unconstitutional as inflicting a double punishment. Carlesi *v.* Peo., 233 U. S., 51, 58 (1914); nor as inflicting "cruel or unusual punishment", McDonald *v.* Mass., 180 U. S., 311, 313 (1900); nor in that they constitute "double jeopardy", Moore *v.* Mo., 159 U. S., 673, 677 (1895); nor on the ground that they deny defendant "due process of law", People *v.* Sickles, 156 N. Y., 541, 548 (1898); nor as a denial of a "fair and impartial" trial. McDonald *v.* Com., 173 Mass., 322, 327 (1899), etc. The extent to which such legislation is actually enforced in practice, depends upon the acumen of the prosecuting attorneys and the existence of reliable statistics of recidivism. *See* the author's address before the Section on Delinquency, National Conference of Social Work, *Proceedings*, 1924.

[1] An ever-interesting socio-psychiatric question is whether or not there are true "moral imbeciles", that is, persons showing no psychotic symptoms or mental defectiveness, whatsoever, yet exhibiting such consistent depraved activities as to suggest a moral imbecility. This term was introduced by Pritchard as early as 1835 ("A Treatise on Insanity", London). It is doubtful whether any such type really exists; for the moral character is not based upon any "moral sense", an ethical entity or faculty, but, as McDougall has shown ("Social Psychology"), it is the sum of the hierarchy of sentiments or systems of ideas and their emotions, built up out of the mental raw material, the instincts. Hence, it is fallacious to separate the purely intellectual mode of mental life from the conative-affective, and claim that the latter alone, operating in the ethical sphere, are diseased, — a fallacy similar to that interpretation of the right-and-wrong test of legal irresponsibility which assumes that the intellectual processes are sharply separable from the conative-affective, and that either may alone be diseased, leaving the others perfectly sound. Nevertheless, several eminent alienists have told the writer that they have had experience with cases in which the antisocial conduct could only be explained in this way, since there were absolutely no psychotic, neurotic, or defective symptoms. But in these cases, we approach the borderline between mental disorder and those other evils of the *Regnum Malorum*, Southard's "*Errores*" (educational deficiencies and misinformation), and "*Vitia*" (vices and bad habits); and problems of responsibility are difficult of solution.

Healy in "The Individual Delinquent", p. 788, discusses this question elaborately; after examining critically the chief contributions in this field he concludes, on the basis of long and unusually trustworthy experience, as follows: "If the 'moral imbecile' exists who is free from all other forms of intellectual defect, he must indeed be a *rara avis*. . . . The fact is, that approximately, and perhaps entirely, all individuals who react to moral situations as imbeciles belong in very definite pathological categories. There is no reason for using terms, then, which lead to confusion of practical issues."

viously was regarded as being able to get along in a more or less simple environment, and it has been demonstrated that punishment has failed to deter such persons from repeating their offenses, this pragmatic test would justify the law in placing such offenders in an institution or colony for life, regardless of the type of offense committed. In this manner there would be substantial justice done both to society and to the individual, for, under a sheltered, supervised environment, such persons could work and play and on the whole live a useful and happy life; while propagation would be prevented. Moreover, such institutions might be made self-supporting, if the products of the labor of the inmates could be marketed.

Epileptoses. — "It is just as true," say the authors of "The Kingdom of Evils",[1] "that there are numerous forms of epilepsy as that there are various forms of mental disease." They list no less than ten distinct types of epilepsy.[2] In the first table above, there were twenty-eight out of eleven hundred and sixty cases of psychopathic offenders, in which epilepsy was related to criminal conduct. Healy[3] found, in a study of one thousand young recidivists, that at least 7.5 per cent. were epileptics.

Because of the varying types of epilepsy, the problem of etiology is complicated. It is usual to distinguish "symptomatic" epilepsy, — that is, those disorders involving some definite structural change in the nervous tissue, which is the result of such distinct factors as brain tumors, neurosyphilis, arteriosclerosis, senile psychosis, etc., and those largely attributable to toxins, such as alcohol, — from ideopathic epilepsy, which is "a disorder that is characterized by the more or less frequent occurrence of epileptiform attacks or transitory disturbance of consciousness that cannot in our present knowledge be placed in the group of symptomatic epilepsy."[4] It

[1] Southard and Jarrett, *op. cit.*, pp. 467, *et seq.*

[2] Syphilitic, alcoholic, traumatic, encephalopathic, Jacksonian, symptomatic, ideopathic, psychic, narcoleptic, borderland.

[3] "Epilepsy and Crime: The Cost", a report from the Juvenile Psychopathic Institute, Chicago, reprinted from *Illinois Medical Journal*, Nov., 1912, p. 1.

[4] Professor McDougall, "The Nature of Functional Disease", p. 351, Doctor Stoddart, "Mind and Its Disorders", p. 401, and others believe that "we are justified in looking for functional origin of . . . epileptic insanities" (McDougall). Stoddart says that "the study of the epileptic character demonstrates epilepsy to be essentially a mental disease — a fact which is liable to become minimized by or forgotten on account of the maze of important pathological findings, especially the changes in the composition of the blood." Not only does true epilepsy (ideopathic epilepsy) often gradually reduce the intellectual capacity as a whole, "even to extreme dementia in many cases", but the "patients suffer from poverty of ideation and sluggish mentality similar

is often difficult to distinguish between convulsive attacks due to epilepsy, and those of hysteria; indeed, these conditions are occasionally associated. From a legal point of view, we are interested in such factors as the general psychic stigmata of the chronic epilepsies, as well as the convulsive attack itself, with its preceding, accompanying, and succeeding episodic mental disturbances which may lead to criminal conduct.

Three stages of the convulsive attack are distinguished by some writers, namely, the preparoxysmal stage, which may continue for several days before the convulsion, the prodromal stage, characterized by the appearance of the so called auræ, or warning, and the stage of the convulsion proper (*grand mal*). During the preparoxysmal stage, for several days preceding the convulsive attack, the patient is restless, sleepless, and " his customary impulsiveness is exaggerated." Other symptoms may be extreme suspiciousness, with delusions of persecution or grandeur. In the prodromal stage (a brief interval before the convulsive attack), occur the typical aurae or warnings of the approaching attack, such as peculiar sensations of various parts of the body, vivid visions, etc. This stage blends into the convulsive attack proper; and this is characterized by " a fall with unconsciousness and spasm. The spasm is at first a steady tonic spasm, but there shortly appear interrupted or clonic spasms. Automatic movements follow these clonic spasms. The patient then either wakes up or passes into a deep sleep. On waking the victim feels lame and weak in the convulsed muscles, and his head may ache. . . . The muscles are apt to be affected, always in the same order, and the convulsion is then said to ' march ' in a characteristic way." [1] Where there are

to that of a child of four or five years." Indeed, this mental infantilism is the keynote of all the mental characteristics of the epileptic. Southard, *op. cit.*, p. 469, says similarly that "The epileptic mind seems, on the whole, a little childlike, even when there is little proof of feeble-mindedness."

Stoddart also makes out a case for psychogenesis of the epilepsies, along analytic-psychological lines. Experience convinces him that the typical, exaggerated religiosity of epileptics is not so much due to the expression of the infantile desire for dependence on "the father" (as some have claimed), as to masochistic desires. The sexual instinct plays an important rôle in this disease, not only in its perverted expressions, but in its exaggerated and uncontrolled functioning. Hence, epileptics are frequently arrested for violent sexual crimes. Not only is it easy to discern extreme autoeroticism and "narcissistic" tendencies, but " during an 'epileptic equivalent', when the patient's normal consciousness is in abeyance and his unconscious personality holds uncontrolled sway, he is especially liable to commit violent sexual aggressions", and other indecent offenses.

[1] Southard and Jarrett, *op. cit.*, p. 469. "Jacksonian march."

but brief attacks of unconsciousness, or but slight motor disturbances, the attacks constitute *petit mal.* "It is especially after these minor fits that the condition known as post-epileptic automatism is likely to occur. The patient has a minor attack and immediately proceeds to perform some apparently purposive action of an irrelevant nature. For example, he may proceed to undress in the public street; this is quite common." [1]

Sometimes more serious offenses are committed in this state, the patient later remembering nothing (as in the case of hysterical somnambulism), except, perhaps, the preseizure auræ; but occasionally the conduct during the postepileptic state is remembered. It is sometimes difficult to distinguish so called epileptic equivalents from the episodes occurring in hysterical psychoneuroses. *Epileptic equivalents* are states of automatism which occur independently of epileptic convulsion, being *substitutes* for the epileptic seizures themselves. They may be transient or protracted; the transient ones consisting of an isolated impulsive outburst of a strong nature.[2] These are the states which usually give rise to those epileptic attacks in which the legal defense for a criminal act committed as the result of such attacks is irresistible impulse. The epileptic "flight" is a form of such transient epileptic equivalent in which the patient runs for a long distance "as if impelled by an irresistible force and perhaps strikes anybody who happens to be in his way. More commonly, the impulse consists of a violent, occasionally murderous attack", or it may lead to indecent exposure, arson, theft, etc.

The *epileptic "insanities"* consist of *protracted* equivalents of epilepsy, comprising epileptic depression or ill humor, excitement, confusion, delirium, stupor (epileptic catatonia), automatism, multiple personality, — indeed, any of the major abnormal mental states usually associated with the psychoses. In *epileptic excitement,* the subject has a much more violent form of excitement than is usually found in the other psychoses; his movements are impulsive, violent, sometimes furious (epileptic furor). This state frequently leads to homicides and violent sexual assaults.[3] The dis-

[1] Stoddart, *op. cit.*, p. 469. [2] *Id.*, p. 407.

[3] The epileptic nature of such attack is frequently apparent from the manner in which it was committed. *Cf.* Southard and Jarrett, *op. cit.*, pp. 238, 239: "There could be hardly any doubt that Patrick's action (the killing of his mother by a traumatic epileptic) was epileptic. His mother's body was badly mutilated." This defendant was acquitted of murdering his mother. Usually, however, in cases where terrible sexual crimes are committed, it is difficult

order may last for several days. *Epileptic confusion*, in which the patient suffers from "disorientation accompanied by aimless wandering and purposeless movements of the arms and legs", rarely leads to criminal acts.

In *epileptic delirium*, the prominent symptom consists of terrifying hallucinations, or hallucinations of typically religious import. These may lead to violent crimes. *Epileptic automatism* is similar to the postepileptic automatism. Constant subjection to convulsive attacks may result in a gradual disintegration of the patient's mind, disturbances of perception and memory and failure to understand concepts, and this condition may gradually lapse into complete dementia.

Legal Significance of Epilepsy. — The increased irritability of the epileptic personality, together with its infantile reactions to the environmental demands, may easily result in illegal conduct. The mental deterioration which gradually develops with the continued attacks, — such as slowing up of conscious processes, narrowing of intellectual interests, loss of capacity for judgment of relative values, indifference to rights of others, together with disturbances of memory, emotional and conative processes, — especially when accompanied by alcoholic stimulus, to which epileptics react badly, — may readily result in criminal conduct.[1] The acute, transitory episodes of mental disorder, such as abnormal moods, or episodic states of unclear consciousness, episodes of great irritability, and loss of control over the conative impulses, often result in criminal acts. Similarly, epileptic equivalents, whether of short or long duration, may express themselves in violent crimes.

Criminal acts may be committed during the dream stages after an attack, in which the patient, to all outward appearances, is perfectly normal, but in which "his self-consciousness is not in normal relations with events and situations of which he is a part", the patient actually behaving as if in a somnambulistic or trance state. The common crimes of epileptics in the twilight states are larceny, arson, damage to property, indecent exposure, etc. More violent assaults and sexual crimes are committed in the maniacal states,

to counterbalance the natural prejudices of a jury. *Cf.* White, "Case of Johannis Schmidt", in his "Insanity and the Criminal Law", pp. 63, *et seq.*

[1] Since epileptics are known to be especially susceptible to the influence of alcohol, it may be questioned whether the condition which leads to criminal conduct on the part of an epileptic who voluntarily becomes intoxicated, is not self-induced, and whether, therefore, the epileptic is not responsible in such event. However, the drinking may itself be symptomatic.

or as epileptic equivalents having a sexual, normal or perverted (as homosexual or sadistic) basis.

While proof of the existence of epilepsy does not itself constitute excuse from criminal responsibility, there is a strong presumption that an epileptic shown to have had previous attacks, preceded or followed by, or accompanied with, serious disturbances of consciousness or of inhibitory power, did not have the capacity either to know the nature, quality, or wrongfulness of his act, or the power to refrain from committing it. It is, however, extremely difficult to convince judge and jury as to the existence of an epileptic equivalent in any particular case, especially when it expresses itself in violent and repulsive sexual attacks.[1] Where, because of long-subsisting convulsive attacks, a state of chronic deterioration can be proved to have set in prior to the offense, it puts the case in a class with all other psychoses in which there is mental deterioration accompanied by impulsive conduct.

The nature-and-quality and the right-and-wrong rules, together with the irresistible-impulse rule, provided they are properly interpreted to the jury so as to include evidence of the subconscious as well as conscious psychological influences at work in the causation of such mental disorders and their expression in antisocial conduct, ought to cover the situation of the epilepsies. Here, as in general paresis, that type of partial responsibility concept dealing with premeditation and deliberation, would be useful.[2]

Serious cases of epilepsy should be colonized by the State, and submitted to some sort of limited control. Preventive work is of the essence in these cases of potential criminality. Until the State undertakes such work, it is difficult to say, in any particular case, whether the responsibility for a criminal act is with the defendant, or is rather to be laid at the door of a shortsighted society.[3]

[1] Healy, "Epilepsy and Crime", *op. cit.*, p. 7, claims that "under the jury method in vogue there is little chance of an epileptic being considered insane. Of course, he may show not the slightest signs of insanity at the particular time he is under observation."

[2] *See* pp. 199, *et seq.*, 310, 336.

[3] "The non-segregation of epileptics . . . is utterly uneconomical, unsympathetic and in general significant of a partially civilized state of social consciousness. The tears of afflicted mothers, the heartbreaking discouragements of the epileptics themselves when they are not too far gone to care, and the vast costs and injuries actually endured by society on account of crimes and vices committed by epileptics, all cry out against such wanton neglect." — Healy, *op. cit.*, p. 7.

Pharmacopsychoses. — Of the mental disorders due to drugs, we are largely interested in this study in the alcoholic psychoses. Southard says that "alcoholism is obviously a social diagnosis. . . . *Assuredly alcoholism is not a psychiatric diagnosis.*" [1] Frequently "overindulgence in alcohol is found to be merely a symptom of another psychosis, or at any rate may be incidental to another psychosis, such as general paralysis, manic-depressive insanity, dementia præcox, epilepsy, etc." [2] On the whole, it would appear that the proper view to take as to alcoholism is that "the determining factors of alcoholic insanity are (1) The nature and quantity of the alcoholic beverage employed and (2) the character of the individual who drinks it. . . . The brain of a normal person possesses the power of resisting the effect of a certain amount of alcohol. . . . If a larger amount than this be taken the result is *physical inebriation.* In some individuals, however, the capacity of resistance to alcohol is very small indeed: with them the ingestion of very small quantities leads to *pathological inebriation.*" [3] Further, "the indulgence of alcohol may be congenital or acquired." [4] It is congenital with persons of a neuropathic or psychopathic taint, such as epileptics, and persons suffering from dementia præcox.

The inclination to drink may usually be ascribed to conviviality or attempts to drown sorrows; but as these "do not invariably lead to alcoholic excess or even mental abnormality of another kind, there must be some deeper-lying cause." [5] Stoddart claims that psychoanalytic investigation of confirmed alcoholics and drug addicts reveals that these have a pronounced homosexual complex. Homosexuality is an intolerable idea, conflicts with conscious trains of thought and is therefore repressed.[6] If it subsequently escapes the repression, "it is bound to give rise to intrapsychic conflict. This is too much for the individual to bear and he therefore seeks comfort in alcohol, morphia or some other drug. The manner in which these achieve their object varies from patient to patient, and it can only be revealed by psychoanalysis." [7] Of course not all cases of excessive alcoholism are attributable necessarily to such subconscious causation; but it can not be denied that excessive alcoholism is frequently a symptom of mental instability, if not of a definite psychosis.

[1] *Op. cit.*, p. 245. [2] Statistical Manual, etc., *op. cit.*, p. 24.
[3] Stoddart, *op. cit.*, pp. 355, 356. [4] *Id.* [5] *Id.*
[6] *See* previous chapter, where the concept of "repression" is discussed.
[7] Stoddart, *op. cit.*, p. 357.

The chief types of alcoholic conditions that we are interested in are discussed by Southard [1] under the headings of acute alcoholism,[2] delirium tremens, alcoholic hallucinosis, alcoholic psychosis. Alcoholic psychoses are not necessarily the result of chronic drinking.[3] Dipsomania (true periodic drinking) and pathological intoxication "may develop as the result of a single imbibition or a relatively short spree." [4]

Acute alcoholism is a term frequently employed to designate plain drunkenness, and covers those transitory states which, while abnormal, do not constitute mental disease. *Chronic alcoholism* signifies a more or less continuous condition of mental deterioration as the result of habitual drinking. A protracted drinking bout, with occasional intermissions, may result in *delirium tremens*, — an acute condition of mental disturbance characterized by the existence of delirium and tremors. Delirium tremens is distinguished from acute hallucinosis by the facts that hallucinations of sight are usually present in the former, while hallucinations of hearing characterize the latter; further, the former is usually of shorter duration, and the "victim of delirium tremens is, on the whole, a much sicker-looking man than the victim of alcoholic hallucinosis." However, "alcoholic hallucinosis is ordinarily the worse disorder, since the capricious, scolding voices readily lead to suspiciousness and delusions of persecution that may outlast the pronounced mental symptoms and reach into the convalescent life of the patient." [5]

Alcoholic psychoses [6] are differentiated from the former cases by the fact that they have "an insidious onset and a chronic course", and that the characteristic tendency to hallucinate is usually absent, although frequently there are delusions, especially of reference, and of a sexual nature. *Dipsomania* is a term applied to "those who are extremely abstemious, but who, at certain periods, are seized with the most uncontrollable cravings for

[1] *Op. cit.*, pp. 244 to 270, and 470, 472.

[2] This must be distinguished from alcoholic psychosis, since it can not definitely be said to be a symptom of mental disorder. According to Southard, "drunkenness and alcoholism, acute or chronic, are conditions . . . outside the field of mental disease." *Op. cit.*, p. 470.

[3] "Neither delirium tremens nor alcoholic hallucinosis depends for its severity upon the amount of alcohol consumed." — Southard, *op. cit.*, p. 471.

[4] Statistical Manual, etc., *op. cit.*, p. 24.

[5] Southard, *op. cit.*, p. 471.

[6] Such as the "jealousy psychosis" (quite typical), *cited* by Southard, pp. 255, 471.

alcohol. . . . The attack usually comes on suddenly, after a preliminary period of depression or of exhilaration, and lasts from a few days to a week or two. During this time the individual drinks immoderately. He is utterly oblivious to his surroundings and indifferent to the disgrace his conduct is likely to entail upon himself and his family. Refinement and morality are cast aside, and unbridled debauchery reigns instead." [1] It is this type of alcoholic disorder, in the etiology of which there are probably strong psychic, subconscious forces at work.[2] Dipsomania "is, more accurately speaking, a form of manic-depressive insanity, characterized, during the seizure, by an uncontrollable craving for alcohol. . . . Acute alcoholic delirium is not an infrequent sequel of dipsomania, and if it does occur, it differs in no respect from the delirium of the true inebriate." [3] The basis of *pathological intoxication*, a rare disorder, "is perfectly obscure, though the condition may suggest, in its suddenness and relation with perfectly insignificant intakes of alcohol, some peculiar condition of sensitization." [4] This type furnishes so few criminals, that it need not be further considered.

Most of the prominent symptoms of these types of alcoholic disorders have already been alluded to in passing. They may be briefly summarized as follows: In ordinary drunkenness the disturbances of consciousness and inhibitory power are transitory. In these cases the person "seems to have a conscious appreciation of his acts at the time he does them, and can often give his reasons for so doing, yet when he arrives at a state of sobriety he either has absolutely no recollection of anything that transpired during his period of inebriety or else his recollections are exceedingly vague and indistinct. . . . Consciousness is not abolished, but the memory of consciousness is." [5]

In delirium tremens (acute alcoholic mania) the chief characteristics are tremors, hallucinations of sight and when the maniacal condition subsides, there is rarely any clear recollection of what transpired during the seizure.[6] "Acts of violence, horrible in

[1] Graemme, M. Hammond, "Inebriety", in Peterson, Haines, Webster, *op. cit.*, Vol. 1, p. 474.

[2] "The victim of genuine dipsomania is, no doubt, as a rule, a psychopath on some broader and deeper basis than the mere alcoholic habit." Southard, *op. cit.*, p. 253.

[3] *Id.* [4] *Id.* [5] Hammond, *op. cit.*, p. 473.

[6] The symptoms of acute hallucinosis are distinguished from these in that the hallucinations are usually auditory, frequently leading to persecutory delusions; and the attack is of longer duration, the symptoms sometimes becoming chronic.

their ferocity and brutality, are apt to characterize this state. Murders are sometimes committed, usually accompanied by the most savage mutilations and often perpetrated without the slightest provocation, but are generally the result of frightful hallucinations from which the maniac suffers." [1] There is rarely any recollection of what transpired during the attack.

Chronic alcoholism leads to a gradual nervous degeneration, and blunting of the moral sense, great irritability between debauches, weakening of will power and increased suggestibility. Alcoholic insanities are but increased degrees of chronic inebriety, except, that in addition to mental deterioration, there are delusions, especially of a sexual nature. Delusions of infidelity, common in these psychoses, may lead to frightful murders; and in view of the fact that these delusions "are not necessarily or even usually continuous", and are frequently forgotten after they have passed, nice forensic questions may arise in cases where it is claimed that an offense was committed as the result of delusion.

In dipsomania the chief symptom is, of course, the periodicity and uncontrollable nature of the impulse to drink; and this condition is most often attributable, as has been said, to underlying psychic factors.

Legal Significance of the Alcoholic Disorders of Mind. — The person who commits a crime while under the influence of liquor is, on the whole, in the same position with respect to criminal responsibility, as any other person. Having placed himself voluntarily in a condition of intoxication, the law holds him absolutely responsible. We have seen,[2] however, that where the intention to commit a crime was not formed before the drinking, and the crime was committed during a state of intoxication, the confused mental condition is generally taken into account on such questions as premeditation, deliberation, or malice; or, where some specific intent (as breaking and entering a house with intent to commit a felony therein — burglary) is necessary as part of the definition of the crime or grade of the offense, such intoxication may indicate that a different offense than that charged, or a lesser degree of the same offense, was actually committed, according to the statutory definition.[3] Temporary insanity, produced by the recent use of alcohol,

[1] Hammond, *op. cit.*, p. 473.

[2] *Ante*, pp. 201, *et seq.*

[3] The rule used to be that drunkenness, instead of mitigating the offense, aggravated it. "As for a drunkard who is voluntarius daemon, he hath . . . no privilege thereby, but what hurt or ill soever he doth, his drunkennesse doth

may in some States be considered in mitigation of the degree of the offense or of punishment.[1] As a rule, however, mental excitement or frenzy produced by immoderate intoxication does not exempt from responsibility, where the intoxication which induced the offense was voluntary.[2] It is, however, difficult to distinguish cases in which drunkenness merely was present from those in which either delirium tremens or acute hallucinosis led to the criminal act.[3]

Long-subsisting habits of alcoholic indulgence, which have produced an alcoholic psychosis, place the case in the same position with respect to responsibility as other psychoses; that is to say, the nature-and-quality-of-the-act test, the right-and-wrong test, the irresistible-impulse test, and the various types of delusion test are all applicable, depending upon the particular jurisdiction under consideration. The rules have also been held to apply to delirium tremens, where that condition was proved to have existed to an extent depriving the person of knowledge of right and wrong, or bringing him within one of the other conditions of the tests.[4]

There is disagreement among legal authorities as to whether or

aggravate it." — Coke, Litt., p. 247 *a*. To like effect is United States *v.* Claypool, 14 Fed., 127 (1882).

[1] This is the rule in Texas by statutory provision. *See* Kelly *v.* St., 67 Tex. Cr., 72 (1912), and Cleland *v.* St., 65 S. W. (Tex.), 189 (1901).

[2] United States *v.* Drew, 25 Fed. Cas., No. 14,993 (1828); People *v.* Travers, 88 Cal., 233 (1891); Upstone *v.* Peo., 109 Ill., 169 (1883); Wagner *v.* St., 116 Ind., 181 (1888); Commonwealth *v.* Hawkins, 3 Gray (Mass.), 463 (1855); Roberts *v.* Peo., 19 Mich., 401 (1870); and Flanigan *v.* Peo., 86 N. Y., 558 (1881).

[3] Some attempt is made in the reported decisions to distinguish the state of frenzy or excitement which accompanies drunkenness, from the mania of delirium tremens. It is often difficult to tell from a study of the cases as reported in the books, just what the mental symptoms were and whether they were typical of delirium tremens, acute hallucinosis, or merely the particular reaction to alcoholic stimulus of the person involved. "Although delirium tremens is the product of intemperance, and therefore in some sense is voluntarily brought on, yet it is distinguishable, and by the law is distinguished, from that madness which sometimes accompanies drunkenness." — 16 Corpus Juris, p. 110. *See also* State *v.* Kraemer, 49 La. Ann., 766 (1897).

[4] United States *v.* McGlue, 26 Fed. Cas., No. 15,679 (1851); Parrish *v.* St., 139 Ala., 16 (1903); People *v.* Methever, 132 Cal., 326 (1901); People *v.* Robinson, 2 Park. Cr. (N. Y.), 235 (1855); Maconnehey *v.* St., 5 Oh. St., 77 (1855). Wharton, "Criminal Law", 11th Ed., Sec. 65, states the reasons for this rule as follows: "That delirium tremens is not the intended result of drink in the same way that drunkenness is; (2) that there is no possibility that delirium tremens will be voluntarily generated in order to afford a cloak for a particular crime; (3) that so far as original cause is concerned, delirium tremens is not peculiar in being the offspring of indiscretion or guilt, for such is the case with many other kinds of insanity. . . . It is the result, like many other manias, of prior vicious indulgence; but it differs from intoxication in being shunned rather than courted by the patient, and in being incapable of voluntary assumption for the purpose of covering guilt."

not dipsomania excuses from responsibility, or indeed as to whether or not there is such a condition at all. In those States where the irresistible-impulse rule is not in force, dipsomania is treated like any other alleged irresistible impulse; and does not excuse from criminal responsibility. If a person, as the result of such an uncontrollable impulse to periodical alcoholic indulgence, becomes intoxicated and commits a crime in that condition, he is in exactly the same position as any other person committing a crime while intoxicated.[1] In States where the existence of irresistible impulse is recognized, dipsomania would probably be admitted on a parity with other irresistible impulses, although it should be noted that here the impulse is to *drink*, not to commit a homicide (homicidal mania), or to steal (kleptomania), or burn (pyromania), etc., the crime being a secondary result. We have seen[2] that in New Hampshire the existence of dipsomania, like any other mental disorder, and its effect upon criminal responsibility, are matters wholly within the province of the jury, as questions of fact.

The law as to the effects of drug addiction on criminal responsibility is practically the same as that relating to alcohol. The effect of the deprivation of a drug after habitual use (" withdrawal symptoms ") may be shown in any case as bearing on the defendant's capacity to entertain the particular intent essential to constitute the crime, and as cause for the reduction of the degree of the offense, where such condition interfered with capacity for deliberation or premeditation.[3]

On the whole, it may be said that in those jurisdictions which have the right-and-wrong test only, there is a gap in the law as to dipsomania, and as to uncontrollable acts committed as the result of delusions, in cases of alcoholic insanity. The alcoholic may, in the eyes of a lay jury, have been aware of the nature and quality of the act about to be committed and yet, because of mental deterioration or deadening of the higher controlling faculties, his inhibitory capacity may have been so diminished that he could not have resisted the dominating impulse to commit a criminal act. Again, we have seen that killing in a state of alcoholic frenzy does not excuse. Yet in such cases the acts may be attributable more to a

[1] Choice *v.* St., 31 Ga., 424 (1860); State *v.* Haab, 105 La., 230 (1901); Flanigan *v.* Peo., 86 N. Y., 554 (1881); Flanagan *v.* Peo., 52 N. Y., 467 (1873); State *v.* Potts, 100 N. C., 457 (1888), etc.

[2] Pp. 254, *et seq.*

[3] Rogers *v.* St., 33 Ind., 543 (1870).

chronic pathological mental condition than to the transitory influences of alcoholic imbibition; they are largely of subconscious motivation. Although the crime may be accompanied by such words and acts as would indicate a *design* to kill (with or without premeditation or deliberation), the apparently purposive conduct may be perpetrated without conscious design whatsoever; and the individual may have little or no knowledge of the acts committed in this state, when conscious control returns. In spite of the defects in this branch of the law, however, it is far in advance of the law of insanity generally; for by the introduction of the doctrine of the effect of alcohol upon the power of premeditation and deliberation, etc., it takes account of cases of limited responsibility.

Encephalopsychoses. — These are of comparatively rare occurrence in connection with criminal conduct. For our purpose we may include under this head not only organic cerebral disorders with mental symptoms, but also mental disorders arising from head injuries. The causative factors as well as symptoms in these nervous disorders are, of course, largely organic. Brain tumors, cerebral abscesses, arteriosclerosis, hemorrhages and softening, Huntington's chorea (chronic, progressive chorea), and other organic lesions may cause various mental symptoms.

Brain tumors may produce mental dullness, somnolence, slowness in thinking, memory failure, irritability and depression, and emotional instability, generally. "Episodes of confusion with hallucinations are common; some cases express suspicions and paranoid ideas."[1] The influence of this disorder upon conduct is of course various, depending largely upon the size, rate of growth and localization of the tumor and their consequences in disturbed mentality. The clinical symptoms of arteriosclerosis vary with the severity and distribution of the vascular cerebral disease, and probably to some extent with the mental make-up of the individual.[2] Arteriosclerosis is not necessarily a disease of senility.[3] The most important mental symptoms are short "spells of losing oneself",[4] and "impairment of mental tension" generally; *i.e.*, "interference with the capacity to think quickly and accurately, to concentrate and to fix the attention; fatigability and lack of emotional control (alternate weeping and laughing); often a tendency to irritability is marked; the retention is impaired and

[1] "Statistical Manual", p. 23.
[2] *Id.*, p. 20.
[3] Southard and Jarrett, *op. cit.*, p. 271.
[4] *Id.*

with it there is more or less general defect of memory, especially in the advanced stages of the disease, or after some large destructive lesion occurs. Pronounced psychotic symptoms may appear in the form of depression (often of the anxious type), suspicions or paranoid ideas, or episodes of marked confusion."

In cerebral hemorrhages and brain softening, usually in connection with a stroke of apoplexy, there is a rather deep disturbance of consciousness, and " when consciousness is clearing the patient is confused and his actions lack normal control and direction. Occasionally there occur following the stroke transitory states of excitement with seriously disordered conduct that may have harmful results." [1]

Huntington's chorea is associated with a gradual general intellectual deterioration. It frequently has a familial occurrence; and is regarded as hereditary. Mental inertia, with an emotional change to apathy or silliness, " or a depressive irritable reaction with a tendency to passionate outbursts ", [2] are the chief mental symptoms; and orientation is well retained. The mental disorders following head injury are various, — such as posttraumatic delirium (acute or protracted), the symptoms of which can hardly be distinguished from those of other deliria, such as occur from toxic causes and in senile psychosis; posttraumatic constitution, indicated by a more or less permanent change of character, expressing itself in " explosive emotional reactions ",[3] excessive reactions to alcohol, " and in some cases development of paranoid, hysteroid, or epileptoid symptoms "; [4] posttraumatic mental enfeeblement of varying degrees, accompanied frequently by " various focal neurologic disturbances such as paralysis, aphasia, or epileptic disorders "; [5] and conditions wherein the trauma is merely a precipitating factor to the more common psychoses, such as manic-depressive disorder and dementia præcox.

Legal Significance. — It is difficult to make any specific statements as to the legal significance of this heterogeneous group. Where it can be proved that organic lesions exist, this evidence has, of course, a strong effect on a lay jury; however, it can rarely be said from this alone, that the mental symptoms were such at the

[1] "Statistical Manual", p. 22. [2] *Id.* [3] *Id.*, p. 18.
[4] *Id.* Southard and Jarrett, *op. cit.*, pp. 238, 239, present an interesting case of epileptic convulsions caused (or precipitated) by severe head injury, finally resulting in the patient's brutally murdering his mother.
[5] Barrett, *op. cit.*, p. 563. He cites Adolf Meyer's classification.

time of the offense as to have destroyed capacity to reason as to the nature and quality or wrongfulness of the act about to be committed, or to have weakened or destroyed capacity of choice and inhibition. The unconscious spells of arteriosclerosis rarely lead to criminal conduct, but such conduct may be attributable to the impaired memory, and general intellectual incapacity to reason as to the nature and consequences of an act. After apopleptic strokes, during the stage of somewhat unclear consciousness or occasional episodes of excitement, there may also be loss of the legally required capacity either to reason with regard to the act or to control it. Similarly, in Huntington's chorea the occasional passionate outbursts may be indicative of such lost capacity for conscious control as to warrant the employment of the concept of limited responsibility. Crimes committed as the result of head injuries usually occur in the posttraumatic constitution type, because of the extreme irritability and susceptibility to alcoholic influences. Here, again, even where it may be difficult to prove the lack of reasoning or controlling capacity, the pathological condition might be considered in reduction of the degree of the offense and in determining the type of medicopenal treatment necessary.

Somatopsychoses (Transitory Bodily Diseases with Accompanying Mental Symptoms). — These are associated with bodily diseases, especially the infectious, or those connected with disturbances of the normal metabolism of the body. They are caused either by the high temperature, by the rapid formation and spread of toxins, or by the unusual nervous exhaustion that accompany such diseases. The symptoms usually are disturbances of perception and thinking processes, various degrees of clouded consciousness, hallucinations, and excitement. The symptoms may occur as initial deliria, which develop during the prodromal or incubation period,[1] in fever delirium, infection delirium, collapse delirium, or during convalescence from infectious diseases in which there may be various types of mental confusion, depressed states or suspicious ideas. All these somatopsychoses have but insignificant legal importance, since they rarely culminate in criminal acts. When they do occur, it is much easier to convince a jury as to their genuineness than is often the case in the more definite psychoses;[2]

[1] "Statistical Manual", p. 26.

[2] Psychotic symptoms accompanying pellagra are perhaps of forensic importance in the Southern States; but inasmuch as there exists little, if any, provision for routine psychiatric, psychological, or medical examination *before*

as testimony of the existence of an exhausting, infectious disease immediately prior to the mental disturbances and the criminal act, would constitute a strong presumption of inability to meet the requirements covered by the legal tests of irresponsibility, when the act was committed.

Geriopsychoses. — The psychoses of old age are the presenile (involutional melancholia) and the senile. Senile dementia proper contributes by far the most cases of illegal conduct attributable to the geriopsychoses; and we will therefore dispose of involution melancholia in a few words. The symptoms are "the slowly developing depressions of *middle life and later years* which come on with worry, insomnia, uneasiness, anxiety and agitation."[1] Frequently these are regarded as symptoms of a depressed phase of manic-depressive psychosis.[2]

The typical changes which come with old age may occur as early as the fifth decade, but are usual in the seventh. Increased forgetfulness and decreased capacity for attention, concentration and thinking generally, together with disturbances of the conative-affective life and the higher sentiments, due to deterioration of mental control, are characteristic. The increased self-centeredness is productive of a disregard for the interests of others. Conduct is largely directed by egoistic motives. Frequently, these patients become careless of their personal appearance, churlish, and childish, usually engaging in infantile fabrications. With the deterioration of the higher mental processes the increased eroticism (as the result of uncontrolled sway of the primitive instincts) frequently leads to indecent conduct or attempted sexual assaults. Delusions of reference, suspicion, and persecution are quite common,[3] frequently of an absurd or fantastic nature; and visual and auditory hallucinations (usually more frequent at nighttime) are common. The apparently purposeful acts of these patients nevertheless indicate a marked disorientation and poor judgment.

trial, it is highly probable that such conditions frequently pass unnoticed and are not utilized by way of defense, but treated, perhaps, in the penal institutions after conviction.

[1] "Statistical Manual", p. 28.

[2] Although Kraepelin and others regard this as a separate disease of the involution period, characterized by "apprehensiveness and restlessness", Stoddart, *op. cit.*, p. 267, claims with much justification that it is but a depressed stage of manic-depressive psychosis. Similarly, in the Classification of the American Psychiatric Association, "Statistical Manual", p. 28, it is said that "these depressions are probably related to the manic-depressive group."

[3] Barrett, *op. cit.*, p. 592.

Several clinical types are usually distinguished, largely on the basis of differences of the intensity and prominence of the chief senile characteristics (memory impairment, emotional disturbances, crumbling of the higher sentiments, and disturbances of judgment), as follows:[1]

Simple Deterioration, which is characterized by reduction in intellecutal capacity generally and narrowing of interests, suspiciousness, irritability, and restlessness; *presbyophrenic type,* in which memory and retention defects are much more severe, and there is total disorientation, "but with preservation of mental alertness and attentiveness" and "ability to grasp immediate impressions and conversation quite well", forgetfulness, leading to absurd contradictions and repetitions, suggestibility, and child-like fabrication; *delirious and confused* types, occurring often in the early stages of the psychosis and in which the picture is one of deep confusion or of a delirious condition; *depressed and agitated types,* in which, in addition to the underlying deterioration, there is a pronounced depression and agitation; and *paranoid types,* characterized by well marked, chiefly persecutory delusional trends, or expansive ideas, which "often accompany the deterioration, and in the early stages may make the diagnosis difficult if the defect symptoms are mild." On the whole, it may be said that, with the exception of such typical symptoms of mental disorder as delusions and hallucinations, "senile dementia neither anatomically nor clinically shows any marked distinction from the normal senile period and is but a maximum degree of these changes",[2] due to cortical atrophy or deterioration that accompanies old age.

Legal Significance. — Because of the weakening of inhibitions, the primitive impulses (especially the sex instinct) have full sway. As this deterioration of mental process and control involves also the higher sentiments and the judging capacity, the most common offenses are sexual offenses with children,[3] vagrancy, and petty thefts. As would be expected from the symptoms, the forensic question in these cases more frequently involves the capacity to

[1] This subclassification is that of the American Psychiatric Association, "Statistical Manual", p. 19, and is in quite general use in America.

[2] Simchouwicz, *cited* by Barrett, p. 591.

[3] Barrett, *op. cit.*, p. 594. Aschaffenburg says that among all the cases of sexual offenders over sixty years of age that he studied, he found not one in which there was not some senile decay; and he insists that all sex offenders over sixty should be subjected to routine psychiatric examination. ("Crime and Its Repression", "Modern Criminal Science Series", 6, p. 154.)

inhibit impulses to illegal action (*i.e.*, the irresistible-impulse test), than knowledge of the nature, quality, or wrongfulness of certain acts. Since it frequently happens that seniles arrested for serious crimes have no previous criminal records,[1] their past unblemished character and the likelihood of their having been unable, at the time of the offense, to have the capacities embraced in the tests of irresponsibility is, in such cases, impressed on the jury. Most seniles, however, are arrested for the petty misdemeanors which may bring them again and again before magistrates' courts. A psychopathic clinic attached to these lower courts would be of inestimable value in segregating such dements and prescribing intelligent, appropriate, socio-penal treatment, in hospitals or homes for the aged, instead of jails and prisons.

Schizophrenoses. — Under this head, Southard [2] includes dementia præcox and paranoia. As these are both important contributors to criminal conduct, they will be considered separately.

Dementia Præcox (True Schizophrenia). — Dementia præcox exacts perhaps the heaviest toll from society, of any of the psychoses. Its cost to the State, whether in criminal conduct or otherwise, is appalling.[3] The disease occurs during the most fruitful years of adult life (about fifteen to forty-five, with most cases in the periods of twenty to thirty), and the recovery rate is extremely low. It may lead to almost any conceivable crime.

The following is a typical statement of the relationship of dementia præcox to criminality:

"The judges send only suspected cases to the laboratory.[4] Out of 779 cases in the Boys Court, there were 654 suffering from dementia præcox, or about 84 per cent. . . . In the Morals Court, out of 464 cases of females, 260 or 36 per cent. were dementia præcox, . . . Out of 359 cases of males in the Morals Court, 107 were dementia præcox. . . . Out of 657 cases of males in the Domestic Relations Court, 236 were dementia præcox, . . . In the outside criminal branches of 270 males, 107 were dementia præcox, . . . Out of 152 females, 84 were dementia præcox. . . . You will observe, therefore, that dementia

[1] Barrett, *op. cit.*, p. 595. [2] *Op. cit.*, p. 285.

[3] Horatio Pollock, "Dementia Præcox as a Social Problem", reprinted from the *State Hospital Quarterly*, Aug., 1918, estimates that the annual losses to the State of New York, caused by dementia præcox, aggregate directly and indirectly some $10,000,000.

[4] Psychopathic laboratory attached to the Municipal courts of Chicago.

præcox plays the highest rôle and is the criminal psychosis par excellence." [1]

Even making a liberal allowance for errors and exaggerations in diagnosis, the extent of the relationship of dementia præcox to criminal conduct would indicate that its victims seem to come nearer to constituting the "criminal type" than Lombroso's atavistic or epileptic " born criminal."

" Dementia præcox is a mental disorder that follows essentially a chronic course, but presents varying phases. The progress of the disorder may stop at any stage, but a complete recovery is not likely to occur. It is characterized by a specific type of alteration in the thought and emotional reactions and in the relation that the individual assumes toward realities. In every case there is a more or less well defined 'splitting' of the psychic functions and the thought processes are controlled by groups of ideas (complexes) that have a strong emotional interest for the personality (Bleuler)." [2] Although there is practically unanimous agreement as to the outward symptomatology of the disease, differences of opinion are common, both as to the psychological explanation of those symptoms and the ultimate causation of the disorder. Jung [3] has brought forward proof that the disease is purely psychogenetic. Southard goes only so far in the admission of psychic influences at work in this disorder as to say that " life experience and environmental conditions play an important rôle in the development of the psychosis." [4] Sir Frederick Mott,[5] having shown " that in many cases of dementia præcox there is evidence of maldevelopment of the sex glands, and that in some there are distinct departures from the normal in the appearance of the neurones of parts of the brain ", and endocrine glands, infers from these findings that " the disease is primarily and essentially an organic and structural disease." [6] But McDougall has shown [7] that in attributing the changes in the

[1] Harry Olson, "Crime and Heredity", presidential address, delivered at Chicago, June 16, 1922, at the 11th Annual Meeting of the Eugenics Research Association, giving the experience of the Municipal Court in Chicago. Healy and Bronner, however, in a large series of juvenile repeated offenders, found a much smaller percentage of psychoses, — a fact obtained from a careful study not published at the present writing.

[2] Barrett, *op. cit.*, p. 605. To Kraepelin belongs the credit of having done much serious pioneer work in the clarification of the nature and symptoms of this widespread mental disorder.

[3] *Cited* by McDougall, "The Nature of Functional Disorder", p. 346.

[4] *Op. cit.*, p. 474.

[5] *Cited* by McDougall, pp. 346, *et seq.*

[6] *Id.*

[7] *Id.*

neurones ("an excess of lipoid granules") to "hypofunction" or greatly diminished metabolism in the cells, Mott may be putting the cart before the horse, or at least side by side with the horse; and that the reduced metabolism, instead of being due to degenerative processes in the brain, may, in the first instance, be due to excessive, prolonged activity of the neurones, because of abnormally strong appeals to the instincts. In support of this view he cites the case of "Graves' disease" or exophthalmic goitre, in which the definite organic symptoms are clearly due to prolonged subjection to fear, as was proved by experience with such cases during the War.[1] He admits, however, that there may be a "constitutional predisposition."[2] Jung,[3] while admitting the evidence in favor of the auto-intoxication theory of dementia præcox, insists that the toxins may themselves be produced by mental conflicts.

Stoddart[4] places much faith in the atavistic hypothesis, somewhat like that used by Lombroso to account for his born criminal. He emphasizes that the history of dementia præcox patients frequently "discloses the fact that they come of an insane stock generally on the maternal side", and, frequently, that there is more than one case in the family; "that the children of general paralytics are specially predisposed to dementia præcox." He further points to the fact that physical stigmata, such as deformities of palate, hair, and hands, are quite common, and says that he himself has "observed a deformity in the patients' hands, such as assimilates them to those of the apes, especially of the chimpanzee, and to those of the lemurs." Associating these, and similar simean characters "with the facts that they are sometimes encountered in cases of idiocy, especially those of the Mongol type, that imbeciles

[1] In this disorder, "the functional disturbance seems, in many cases, if not in all, distinctly to precede the organic changes." Professor McDougall cites his experience in war hospitals, with hundreds of nervous cases, which presented in various degrees some or all of the combinations of symptoms characteristic of Graves' disease. "It was noteworthy that the frequency of these cases seemed to increase greatly in the later stages of the War, when many men had been subjected for long periods to the strain of active service", especially to long periods of fear-inspiring activities. "It was notable that as the patients recovered from their abnormal timidity and ceased to suffer from fearful dreams, the bodily symptoms subsided; and in the vast majority of cases, the symptoms passed away completely." *Op. cit.*, pp. 350, 351. As we have seen, Stoddart goes so far as definitely to class exophthalmic goitre under the anxiety neuroses. *Op. cit.*, p. 219. As to the use of psychoanalysis in the treatment of this disorder he says: "Psychoanalysis reduces the pulse rate practically to normal in a month or six weeks, and the other symptoms are gradually ameliorated in a few months." *Op. cit.*, p. 228.

[2] *Op. cit.*, p. 348. [3] *Cited* by Stoddart, p. 316. [4] *Op. cit.*, pp. 313, 314.

are liable to develop at puberty symptoms resembling those of dementia præcox, and that the above peculiarities of the hands are also to be observed in the chimpanzee", he concludes that "dementia præcox may be regarded as a failure in evolution, as an atavism or reversion to an ancestral type."[1] Nevertheless, he admits that atavism does not account for all the features of the disease, since the rapidity of the deterioration and occasional recovery would indicate "that some active morbid process is at work."

From these varying statements, it is clear that the problem of the etiology of this important mental disorder still requires investigation;[2] but it is equally clear that search for the causative factors must not be dogmatically confined to organic-toxic spheres, and that scientific inquiry may, with equal validity, be directed to the possibility of the psychogenesis of this disorder. Indeed, it has been said only recently, that "the weight of opinion at the present time is that the etiologic factors are to be found primarily in the mental life of the individual. The emotional interests of the individual during his development gain a pathologic degree of importance for his personality that makes it impossible to adjust these in an adequate way to the demands of his life."[3]

The mental symptoms of dementia præcox are many and varied, as are also the behavior disorders to which they may lead, depending upon the phase and severity of the disease. Nevertheless, there are certain definite earmarks of the psychosis. It begins in youth, about the period of puberty, and is essentially a disease of early manhood. Kraepelin claims that sixty per cent. of all cases of dementia præcox begin before the twenty-fifth year, "the paranoid form beginning around the end of the second decade and one half of the katatonic cases setting in around the twenty-fifth year."[4]

[1] *Op. cit.*, p. 314.

[2] "This group cannot be satisfactorily defined at the present time as there are still too many points at issue as to what constitute the essential clinical features of dementia præcox." "Statistical Manual", pp. 28, 29. Most authorities claim that the difference of opinion exists not with reference to the clinical features, but as to etiology.

[3] Barrett, *op. cit.*, p. 611.

[4] *Cited* by Geo. W. Jacoby, "The Unsound Mind and the Law", p. 197. In an excellent statistical study of 19,544 cases of dementia præcox, resident in the civil hospitals of the State of New York in July, 1917, Dr. Horatio Pollock, Statistician of the New York State Hospital Commission, arrives at some extremely interesting conclusions. He claims that his finding that 49 per cent. of the cases are thirty years of age or over at date of entrance, "shows that dementia præcox cannot be considered as *insanity of youth* as the term implies." "Dementia Præcox as a Social Problem", reprinted from *The State Hospital Quarterly*, August, 1918.

We have, throughout this study, insisted upon the unity of mental activity (*i.e.*, that the cognitive mode of mental life is separable from the conative-affective mode, only by an artificial process of abstraction); and we have pointed out that the legal knowledge-of-nature-and-quality test and the knowledge-of-right-and-wrong test are based upon the assumption (less, perhaps, in their practical application at trials than in their theoretical exposition in the appellate decisions) that the intellectual processes function apart from, and independently of, the conative-affective mode of mental process. We have further pointed out that it is difficult to convince judge and jury, that although a mentally unsound defendant *appears* to have his reasoning powers intact, they really are not so, or, at least, cannot be normally utilized, if his conative-affective life is disordered. It is the frequently occurring dementia præcox cases among offenders who plead insanity that have probably contributed no little to the law's attitude; for the important characteristic of dementia præcox is an apparent splitting (schizophrenia) of the unified conative-affective-cognitive mental process. "'Splitting' means that there is no longer a congruity between the three psychological elements that form the personality; namely, the intellect, the affective reactions, and the will. The result is emotional apathy, loss of interest in one's family, lack of normal activity, inability to carry out one's purpose."[1] The splitting process naturally leads to gradual mental deterioration generally. It is at this stage that complexes, with strong emotional tone, seem to rule the personality.

The following picture of a dementia præcox patient results from the processes we have mentioned: "A seclusive type of personality or one showing other evidences of abnormality in the development of the instincts and feelings";[2] loss of interest, or apathy, and a marked discrepancy between *intellectual* integrity (at least such as is noticeable by the ordinary person) on the one hand, and the *affective-behavior* reactions, on the other; a gradual blunting of the emotions, defects of judgment, complaints, suspiciousness, and ideas of reference; development of peculiar trends and fantastic ideas, with strange, impulsive, or negativistic[3] con-

[1] Southard and Jarrett, *op. cit.*, p. 473.
[2] "Statistical Manual", p. 29.
[3] The patient usually does the exact opposite of what is expected of him, resisting efforts to aid him. Any suggestion immediately and automatically arouses the exact countersuggestion. "Negativism may sometimes be beauti-

duct " not accounted for by any acute emotional disturbance or impairment of the sensorium." At the same time, there is, as has been suggested, retention of orientation, memory, reasoning powers on any particular subject, etc. There may also be feelings of being forced, interference of the mind by physical or supernatural influences, and so called autistic[1] thinking. In spite of the general emotional dullness to experience, there is frequently present extreme irritability and a tendency to impulsive outbursts of temper that may lead to violent crimes.

We have, then, the peculiar symptom-complex of an insidious, progressive mental disintegration, taking place vertically, more than crosswise, if we may use such expressions; *i.e.*, an apparent dividing off of the conative-affective mode of mental life from the cognitive, resulting, primarily, in disorder of the emotions and volitional-inhibitory power, which leads frequently to emotional-volitional apathy, in some cases to deep dementia; and which, although a relative retention of sensory receptivity remains, results secondarily in *ineffective employment* of the cognitive mode of mental life. But it must not be assumed, as the framers of the knowledge tests of irresponsibility assumed, that the cognitive faculty can function normally when it is thus pathologically split off, more or less, from the affective-conative. *The legal premise that the cognitive capacity is intact, is wrong, even in these cases; because such typical symptoms as derangement of the power of association of ideas clearly indicate that the conative-affective life cannot be disordered without the disintegrating process also affecting the cognitive mode.* The effects of such primary disorder are to break apart the normal association process so that " ideas and fragments of ideas, often quite unrelated, intermingle, and give a characteristic incoherency to the thought productions." Ambivalence, the presence of conflicting thoughts, such as the

fully demonstrated in cases of catatonia major by placing one's hand near that of the patient as if to touch it; his hand moves away. If now the observer's hand be transferred to the other side of the patient's, the latter moves back again in the opposite direction like a needle repelled by a magnet. In this way the hand may be made to swing to and fro, always moving away from the hand of the doctor. Similarly if the doctor pretends that he is endeavouring to avoid the patient's hand touching his own, the patient's hand follows his, the former being constantly attracted as if by a magnet." Stoddart, *op. cit.*, p. 321.

[1] "Autism" is a name given by Bleuler to the typical dementia præcox symptom of "escape from reality", by means of which the patient lives in an imaginative world, in order to avoid the unpleasant conflicts of the real world; reality and fantasy exist side by side, but he keeps them apart. *See* Barrett, *op. cit.*, p. 608.

opposition of good and evil in the mind, and a feeling of being mentally "mixed up" or bewildered, are also frequent in abrupt developments of this disorder.

The shut-in personality, inability to make friends, supersensitiveness, overconscientiousness, too great a tendency to metaphysical speculation without the capacity to keep one's feet on the ground, too much day-dreaming — these danger signals occurring in childhood, and indicating a strong possibility of the constitutional peculiarity referred to by Jung [1] as "introversion" (introjection), should claim the attention of educators, social workers, and psychologists in their dealings with early youth; [2] and testimony of early childhood characteristics is of great importance in convincing a jury that the disorder actually existed at the time of the offense.

According to the prominence of typical symptoms and their various combinations, four clinical types of dementia præcox are usually differentiated, but the classes, as in all disease, blend into each other: The *paranoid type* is characterized chiefly by the prominence of delusions and hallucinations in the symptom-complex, especially delusions of reference, persecution, or grandeur, frequently elaborated in a connected scheme. The conflicting forces and ideas arising in the mind (ambivalence) result in a blocking of the course of thought and action; and the patient explains this peculiar state of mental suspension as the result of external, often supernatural, control over his mind. But we have seen that the peculiarities are due to the disintegration his mind has undergone, and that the concepts of conflict, repression, and dissociation go far to explain the symptoms. His mind has ceased to act with that unity of purpose, and in that interest of the personality as a whole, that characterizes the healthy mind. We have also seen that the fears, wishes, and mental stresses of the period before the

[1] *Cited* by McDougall, "The Nature of Functional Disease", p. 348.

[2] *Cf.* Healy, "The Individual Delinquent" (1915), pp. 66, 67; Bernard Flexner and Roger N. Baldwin, "Juvenile Courts and Probation" (1914), pp. 41, 42; McCurdy, "Psychiatric Clinics in the Schools", *Amer. Journ. of Pub. Health*, Vol. VI, No. XII, pp. 1265–1270, who point out the vast amount of saving that could be effected, and suffering avoided, through the establishment of psychiatric-psychological clinics in juvenile courts and schools. Such clinics, attached to municipal courts, would be of great aid in segregating these cases for special socio-penal treatment. Colonies and farms or industrial shops for work by the chronically ill, such as those suffering from dementia præcox and other mentally deteriorating disorders, are excellent devices. *See* Southard and Jarrett, *op. cit.*, pp. 551, *et seq.*

definite outbreak of the psychotic symptoms frequently determine the type and course of the delusional and hallucinatory symptoms. The patient's delusions may permit him to accomplish in fantasy what he could not achieve in the stern reality of life; they are a haven of refuge to which he escapes from reality. With increased mental deterioration, the patient becomes less and less interested in his own delusions, and the delusions frequently become absurd, persisting eventually only in a confused and incoherent, deteriorated mass of fantastic ideas. "In the instances of marked improvement when the delusions cease to be expressed one rarely finds that the patient regards these as having been unreal experiences or corrects them in a normal way." [1] A characteristic type of dementia præcox *deterioration* develops at the end, with residuals of the former elaborate, and more or less logically related, delusional symptoms.

In the *catatonic type* of dementia præcox, the negativistic reactions are predominant, with peculiarities of attitudes and behavior, such as stiffness of the body [2] or extremities (catalepsy), stereotyped (set, or formal) actions, phases of excitement characterized by impulsive, mechanical outbursts, and, frequently, abnormal suggestibility. Kraepelin [3] found that about thirteen per cent. of catatonics make an almost complete recovery, so that the prognosis in this type is better than the rest. In the *hebephrenic type* of dementia præcox there are less of the catatonic symptoms and the delusions are less elaborate. These cases show a more or less characteristic tendency to silliness, laughter, grimacing, speech and conduct mannerisms, grotesque ideas, motor restlessness, and, frequently, auditory hallucinations; another variety is characterized by depression, shyness, seclusiveness, etc. Cases of suicide frequently occur in this type; but the depression is distinguishable from that of the melancholia of the manic-depressive, in that hebephrenics momentarily cheer up. Hebephrenia is more common among females than males.

Dementia Præcox Simplex begins insidiously and develops

[1] Barrett, *op. cit.*, p. 607.

[2] While Kraepelin, *cited* by Stoddart, pp. 317, 318, believes that the peripheral anæsthesia of catatonic stupor is a negativistic sign, the patient merely not taking any notice of a pin prick, for example, Stoddart, with good reason, claims that there is true anæsthesia, since the loss of sensation has a definite distribution, it being not present, for example, in a small area in the region of the groins.

[3] *Cited* by Barrett, p. 610.

slowly; and the symptoms are not striking. The patient gradually loses interest in his surroundings and becomes blunted to his responsibilities. He is unable to continue long on one job, is often charged with being lazy and shiftless, can not get along with his family, frequently becomes a tramp. This group furnish many recruits to the dependent and minor delinquent classes. Excellent, constructive social work can be done with them, and dependency and delinquency staved off, if not entirely avoided.

Legal Significance of Dementia Præcox. — The fundamental disturbances of the conative-affective life that occur in dementia præcox patients makes it difficult for them to adjust themselves to the demands of the environment, and to adhere to the commands of the criminal law. Serious offenses are less common than misdemeanors (disorderly conduct, vagrancy, prostitution, petty larceny, etc.), and quite frequently in the early stages, forgery,[1] fraud, embezzlement, etc. The thefts indicate the characteristic weakness of will and instability of purpose; transactions requiring elaborate planning and long preparation are rare, because soon abandoned. Impulsive outbursts leading to crimes of a serious nature may, however, occur in cases with pronounced delusions and hallucinations. In such cases, as was shown in the previous chapter, superficial consideration of the delusions as objective tests of irresponsibility is unwarranted and unscientific, since the delusions usually have deep and farspread significance to the patient, and are but a single group of symptoms of the general splitting, disintegrating process which his mind has undergone.

The matter that presents difficulties most frequently arises, as has already been said, in those jurisdictions which have the knowledge rules of irresponsibility only; especially true is this in cases of early dementia præcox or in those partially recovered cases where the mental abnormalities and residual defects "can only be demonstrated by examinations more extensive and carefully made than is usual in the ordinary procedures of the courts in dealing with criminals."[2] In these cases, defendants, to all outward appearances, demean themselves in the courtroom as if their cognitive processes were perfectly normal, especially where they themselves are not called upon to testify. Where the right-and-

[1] *See* Southard and Jarrett, *op. cit.*, pp. 310, *et seq.*, for typical case of forgery committed by dementia præcox army officer with a previous history of eccentric, irresponsible conduct.

[2] Barrett, *op. cit.*, p. 613.

wrong rule is rationally *administered, i.e.*, where court and jury are informed of the interrelationship *of mental activities*, — that it is impossible for the conative-affective life to be long disturbed without its also affecting the intellectual processes, and that while the defendant may *apparently* have known the nature, quality and wrongfulness of his act, such knowledge, by reason of the emotional disturbances involved, was greatly distorted, moral values were weighed differently from the process that goes on in the healthy mind, and action was irrational, though seeming to be normal, — much of the objection to the right-and-wrong rule can be eliminated. *It is not so much the criterion itself that is objectionable in such cases, as its application on the erroneous theory that the intellectual process is not at all affected by a disease of the conative-affective life.*

Where the irresistible-impulse rule is in effect, together with the right-and-wrong rule, more consideration may be taken of these cases. But here, too, there are differences among courts and jurors in their appreciation of the fundamental fact of unity and interrelationship of mental processes; and there may be an overemphasis of the legal tests and an underemphasis of the results of psychiatric-psychological examination, including the history of the defendant's entire social reactions throughout his life. On the whole, *we may tentatively conclude that the objections to the two chief tests of irresponsibility would be greatly lessened were they interpreted, not narrowly, and superficially, but in the light of fundamental psychological and psychiatric concepts of the nature of the mind and its disorders.*

Paranoia (Paranoid Conditions). — The name "paranoia" is applied to a group of psychoses "which show clinically fixed suspicions, persecutory delusions, dominant ideas or grandiose trends logically elaborated and with due regard for reality after once a false interpretation or premise has been accepted.[1] Further characteristics are formally correct conduct, adequate emotional reactions, clearness and coherence of the train of thought."[2] The adjective "paranoid" is to-day used to denote delusional forms of other psychoses, such as dementia præcox, alcoholic

[1] Although the patient may enjoy the most logical of thought-sequences, the *point of departure* of the trend of thought, the *contact with reality* is so abnormal or impossible (either inherently or in its relation to the patient's situation in life), as to indicate the unmistakable pathological nature of the mind engaged in such thought.

[2] "Statistical Manual", p. 30.

psychoses, so called paranoid states (disturbances in which delusions are prominent, but which, because of other types of symptoms, are difficult to classify), etc. Again, paranoid is used to designate a reaction of suspiciousness which may not amount to definite, false beliefs. Unlike dementia præcox, paranoia is usually a disorder of the forties or fifties, rather than of puberty to the late twenties. A history of familial mental disorder is present in more than half the cases.

Kraepelin [1] contributed nothing more tangible as to the cause of the disorder than to say that the paranoiac is one who has abnormalities of mental constitution,—so called "psychic malformation" —that prevent the personality from normally developing and integrating. Since these abnormalities are frequently traceable to early childhood, and the definite outbreaks of the symptoms to some single psychic experience,[2] and since, further, the concepts of the subconscious, repression, projection, etc., suggested by the Freudians, lend a logical interpretation to the phenomena observed in these cases, it is probable that the problem of etiology will nearest approach solution through the psychological attack, especially the technique of psychoanalysis.[3] In the previous chapter we spoke of the mechanism of projection; we saw that a person's knowledge of his faults, and the accompanying feeling of shame, are *repressed* into the unconscious mind, and that these are replaced in consciousness by his attributing his own faults to others. Projection is one of the main characteristics of paranoia, which may be

[1] *Cited* by Barrett, p. 626.

[2] Stoddart, *op. cit.*, p. 302, mentions a case where the disorder started with a dream, and others attributable to some definite incidents.

[3] "Although psychoanalysis has succeeded in elucidating the psychology of this disease, it fails as a method of treatment," since the patients have no insight, and therefore are unwilling to coöperate with the analyst. Stoddart, *op. cit.*, p. 309.

Freud long ago demonstrated that the famous paranoiac case of Doctor Schreber, who published his autobiography, was based upon repressed homosexuality, "and since that time it has gradually become established that this is the invariable foundation of the disorder." Stoddart, *op. cit.*, pp. 308, 309. The theory is, that the repression of the unwelcome belief that a person is especially attracted to persons of the same sex, is, in cases of paranoia, unsuccessful; and this repugnant complex tends to assert itself in delusional disguise as the chief symptom of paranoia. The mechanism involves the unconscious premise on the part of, say, a male: "I love the man"; this repugnant idea becomes "I do not love him"; and by the interposition of the mechanism of projection, it becomes "he hates me" (*i.e.*, he does not love me). Similarly, these mechanisms are used to explain not only persecutory delusions, but delusions of grandeur, religion, love, jealousy, etc. (*See* pp. 308, 309, of Stoddart, who gives the Freudian formulæ, which explain the typical delusions.)

regarded as " a psychosis characterized by systematized delusions which develop progressively as a result of the patient projecting certain of his repressed complexes upon other people ",[1] supernatural agents or inanimate objects.

The symptoms are largely elaborate, systematized[2] delusions. The emotional life is the source of the delusions; and usually there is practically complete preservation of power of perception, " clarity of thought and orderly direction of the will and actions." [3] In paranoia, even more than in dementia præcox, therefore, there seems to be some warrant for the law's opinion that the cognitive mental processes may be intact, while the conative-affective processes are diseased; for in this group of disorders, more than in any other psychoses, " the psychic personality stands under the ban of a plainly marked system of delusions while the formal apparatus of thought remains intact and primary emotional disturbances are absent." [4] Because of the frequent occurrence of paranoia in connection with homicide cases, the courts have obtained their chief acquaintance with mental disorder through their contact with this disease. This accident, in our opinion, has contributed much toward the shaping of the legal tests of irresponsibility, especially the various species of the delusion test.[5]

The reasons for the delusions of the paranoiac are his dissatisfaction with the realities of life and his difficulties in normal adaptation. Hence it is that the egocentric trends are allowed abnormal development, that the paranoiac temperament is typically one of pronounced egotism, pride, vanity, suspiciousness and fear, and that the delusions are typically those of persecution and grandeur, with frequent ideas of reference. The paranoiac becomes very seclusive, self-sufficient, and resentful, and in association with this he builds up his delusions that he is among the chosen few, that he was born to save the world, etc. As arguments are presented to him to contradict these ideas, he develops more and more logical props to his main delusion, and in this way a vast,

[1] Stoddart, *op. cit.*, p. 301.

[2] "The term 'system' implies a group of delusional beliefs built up around a central idea and all more or less logically interrelated."

[3] Barrett, *op. cit.*, p. 624.

[4] Jacoby, *op. cit.*, pp. 219, 220.

[5] *Cf.*, pp. 144, *et seq.*, where Lord Erskine's speech in Hadfield's Case is discussed. Hadfield would to-day be regarded as a paranoiac. This disorder is frequently referred to in the older medical books and even in recent law reports as "monomania", a term introduced by Esquirol.

logic-tight delusional system is built up. There is due regard for reality after once a false interpretation or premise (*i.e.*, a wished or desired interpretation or premise) has been accepted as a point of departure; but since the unconscious wishes rule the mind, there is a distinct disorder of judgment.

It can readily be seen that conduct must, in such cases, be seriously affected. Frequently erotic fancies become prominent in the delusional system, leading to indecent advances, or sex offenses; and the bitterness engendered by delusions of persecution often leads to serious assaults and homicides.[1] In addition, these people are constantly moving from place to place to escape supposed enemies, writing inflammatory articles to papers, petitioning governmental bodies to redress their grievances, and engaging in endless, groundless litigation,[2] false accusations, etc. When these devices fail, they frequently resort to the self-help of the primitive law. It is at this stage that these patients become a public menace. This is the explanation of Bellingham's action in shooting the First Lord of the British Treasury, after failure of his appeals to cabinet ministers and to Parliament to pay him the large sum of money which he delusively believed the government owed him.[3] Many paranoiacs, however, are only harmless cranks, especially the religious variety, who assume queer garb, language, attitudes, etc., and prophesy the "end of the world."

Legal Significance. — The difficulty in these cases is the apparent soundness of the reasoning processes, apart from the delusional system; in other words, there is absent that general picture of mental deterioration which characterizes, for example, the toxic, deteriorated states. This fact, together with the fact that sufficient time and skill are not devoted to the mental examination of these cases when they arise in the courts, is responsible in large measure for the attitude of many judges and juries toward the criminal accountability of paranoiacs, and of the mentally diseased generally. *It must be remembered that the presence of a delusional system is itself an indication of a generally disordered mind; and, when examination is sufficiently thorough, "it can be found in*

[1] The law reports are replete with cases of homicide and sex crimes committed by paranoiacs; paranoia is the disorder most frequently met with as a defense to criminal responsibility.

[2] This type is usually discussed separately, as "litigious paranoia." *See* Bernard Glueck, "The Forensic Phase of Litigious Paranoia", *Journal of Criminal Law and Criminology*, Vol. 5, pp. 371–386 (1914–1915).

[3] *Ante*, pp. 149, *et seq.*

most cases of paranoia that the mental functioning as a whole is not free from impairment." [1] The very fact that the absorption of the patient in his delusional beliefs takes up so much of his psychic energy, leads him to perverted and illogical ways of thinking, which, in turn, result in erroneous ethical and legal conclusions *upon matters even apart from those outwardly connected with the delusions.* The emotional absorption of these patients in one set or system of delusions not only destroys their capacity for judgment with respect to that delusional system, but warps the judgment upon matters *in general.* These patients have little or no insight into their condition;[2] consequently the ordinary social and legal appeals and sanctions do not enter their minds in the same guise and setting as those of mentally sound persons. In brief, as we have so often insisted in this study, it is a fundamental error on the part of the law to consider the delusional system *in abstracto,* apart from its setting as but one symptom (although an important one) of a generally diseased entity, the mind. "Even when the delusions exist in but limited intensity and extent, the psychic personality as such is diseased. The psyche is an indivisible entity, and nothing could be more false than to conclude from the fact that the disease manifests itself only in certain special directions that only a certain part of the psychic personality is diseased." [3] It is for this reason that the abolition of the various delusion tests of criminal irresponsibility, as exclusive criteria and as external tests, apart from the entire disease picture, is recommended in this study. Delusions are but symptoms which should be considered on a parity with other symptoms of mental disorder, as well as the patient's life history, for the purpose of making a diagnosis of the type and degree of his disorder; they should not be the exclusive deciding factor in turning the scales in favor of acquittal or conviction, as the case may be.

If the expert can prove that fixed, systematically elaborated delusions of an incorrigible nature exist, and that these center about a principal subject as a core, with elaborations into other fields for the purpose of propping up this central delusion, he has proved such general disturbance of the mind as makes it reasonably certain that the defendant did not know the true nature and quality of his act and its wrongfulness. However, if a narrow interpreta-

[1] Barrett, *op. cit.*, p. 626. [2] Stoddart, *op. cit.*, p. 303.
[3] Jacoby, *op. cit.*, p. 220.

tion of these tests is taken, then language or actions on the part of the defendant, prior to, during, or after the offense, which, to the layman, and considered apart from the whole medical and social history of the defendant, would indicate the existence of such knowledge, may be regarded as conclusive proof that normal knowledge actually existed at the time of the offense. If the precaution is taken to explain to the jury that the knowledge of the paranoiac is necessarily colored by the patient's entire warped judgment and his intellectual and emotional absorption in his delusional beliefs, it is less likely that miscarriages of justice will occur. It is the acceptance of a delusion as but one symptom of a generally diseased mind, and not the existence of a delusion *as such*, that rationally accounts for the legally sound action of the jury in acquitting Hadfield, although he apparently knew the nature and quality of his act when he shot at George III in Drury Lane Theatre.[1] His sole purpose was to shoot at the king, without necessarily killing him, so that he might thereafter be sacrificed to the law as a martyr; and he showed remarkable logic in that he well knew that he would be hanged for the *attempt*, even though the assassination was not consummated. This view of the meaning of the knowledge test also explains why, though McNaghten[2] was apparently able to transact business and go about his various affairs, he nevertheless was under the delusional belief that his enemies, including Sir Robert Peel (whose secretary he mistakenly killed under the impression that he was shooting at Sir Robert), were persecuting him; and why, though he may apparently have known the nature and quality of his act (namely, that he was using a pistol to kill a cabinet minister) and its wrongfulness, both morally and legally (namely, that mankind regards it morally wrong to kill people and that such killing is prohibited by the criminal law), he was nevertheless rightly acquitted. For all such knowledge was secondary to his generally disordered mind, which expressed itself primarily in the delusion that he had been grievously wronged by his enemies, and that ordinary modes of satisfaction had proved abortive, from which delusional premise he reasoned, pathologically, that he was justified in taking the law into his own hands.

There are two difficulties then with the tests of irresponsibility, that are especially suggested by paranoia; namely, that of delusion

[1] *Ante*, pp. 144, *et seq.* [2] *Ante*, pp. 161, *et seq.*

as a test, and that of the results of literal interpretation of the knowledge tests. *First*, if we are to take Erskine's delusion test as being the only true criterion of irresponsibility " where there is no frenzy or raving madness ",[1] we limit irresponsibility to the delusional psychoses and those in which there is a transitory episode of " frenzy or raving madness." This does not take account of such mental disorders as are chiefly characterized by excitement, depression, apathy, compulsions, etc., and in which delusional symptoms are exceptional; and these disorders may affect conduct quite as seriously as the delusional psychoses.[2] Further, the requirement of outward connection of the delusion with the act, before there will be exemption from responsibility even in the delusional disorders, ignores the psychology of delusions, as was shown in the previous chapter and in discussion of the character of delusional elaboration and distortion in such psychoses as paranoia. Again, that delusion test which requires that the mentally diseased patient must reason with respect to the relation of the delusion to his conduct (criminal act) obviously is founded upon a misconception of the psychology of mental disorder generally. *Secondly*, the interpretation of knowledge in the two knowledge tests (" nature and quality " and " right from wrong ") is frequently too

[1] It should be pointed out that Erskine spoke of this as a test of *insanity*, not of *irresponsibility;* to him the terms were interchangeable, for while he said delusion was "the true character of insanity", he added, that "where it cannot be predicated of a man standing for life or death, for a crime, he ought not to be acquitted", *i.e.*, he is *responsible.*

[2] Oppenheimer's contention (*see* his "Criminal Responsibility of Lunatics", p. 10) that irresponsibility and insanity are two entirely different concepts, does not affect the argument; since, as we have shown, the tests of irresponsibility were based upon contemporary beliefs as to the existing types of mental disorder and their effect upon capacity to be governed by the ordinary sanctions of the criminal law (as is shown, for instance, by the note above, in which Erskine's use of insanity and irresponsibility interchangeably is indicated). That this is so was proved, for example, when delusion, which prior to Erksine's famous speech in Hadfield's Case, was unknown as a legal test of irresponsibility, was admitted after he had eloquently contended that in the type of insanity he was discussing, the apparently outstanding symptom is delusion, and that delusion seriously affects conduct; so that the medical symptom of delusion was then and there legalized into a test of criminal irresponsibility. As has been said before, too much emphasis has been laid by legal scholars on the distinction in law between irresponsibility and insanity, and too little on the historical development of the tests. While it is perfectly true that not all degrees of mental disorder excuse or should excuse from responsibility, it is equally true that the very tests of irresponsibility themselves were made in recognition of the fact that certain types and degrees of mental disorder seriously affect the capacity to conform one's conduct to the dictates of the law. And when sufficient proof is forthcoming that other types or degrees seriously affect conduct, the writer is convinced that the law will make provision for them.

narrow; and it may result in injustice. Not only paranoiacs, but manic-depressives and other mentally disordered persons may do acts that they apparently knew were both morally and legally wrong, but which are nevertheless traceable to their mental condition. In some of these cases, such as manic-depressive psychoses (as will be seen below), there is but little if any intellectual deterioration during remissions.

Cyclothymoses (Manic-depressive Psychoses). — This term was applied by Kraepelin to those mental disorders including "on the one hand, the entire group of the so called periodic and circular insanities", and, on the other, the simple manic excitement and the larger part of those clinical mental conditions commonly classed as melancholia, as well as many cases of amentia. These disorders comprise those mental diseases indicating a constitutional tendency to usually benign, affective (emotional) disturbances, occurring and recurring in oscillations;[1] and those allied disorders in which either mania or melancholia is predominant and where the circular or recurring feature is more or less absent.[2] The manic and depressed episodes are but two phases of the same fundamental, emotional disturbance suggestive of a sort of exaggerated ebb and flow of the tides of emotional life, but the predominance of one or the other of these phases, or of a mixture of the characteristics of both, gives to the three principal types of this disorder the useful names "manic", "depressed", and "mixed."[3] Between the attacks occur characteristic remissions or periods of apparently perfect mental health. The attacks vary from a few days or weeks to a year or more in extent, while the remissions may last for years or even decades.[4] Similarly, the severity of the symptoms varies,

[1] Stoddart, *op. cit.*, pp. 254, 255, distinguishes "periodic" from "intermittent" insanity, the former being a rare form distinguished from the latter in that the intervals between attacks are of approximately the same duration. Thus he cites one of his cases wherein the attacks occurred exactly every eleven years.

[2] Frequently the distinction between manic-depressive psychosis and the disorders designated as "mania" and "melancholia" is ignored, as these latter may with some justification be regarded as constituting essentially phases of a more fundamental emotional disturbance included under the general term "manic-depressive psychosis." *Cf.* "Statistical Manual", p. 27.

[3] A fourth type frequently distinguished is the "stupor reaction", which may, however, be regarded as an extreme degree of depression. *Cf.* "Statistical Manual", pp. 27, 28.

[4] A case of manic-depressive psychosis that has become classical in American literature on the subject is that of Clifford W. Beers, whose "A Mind That Found Itself" led directly to the inauguration of the mental hygiene movement in America. Mr. Beers is now the very capable secretary of the National Committee for Mental Hygiene.

from mild emotional changes to the severest types of mania or depression.[1] The first attack usually occurs around the twenty-fifth year; and the intervals between attacks tend usually to get shorter with advancing age.[2]

About the etiology of the disorder but two facts are at present known: First, inherited, constitutional defect of some kind has much to do with it; because a history of various mental disorder in the antecedents is obtainable in about eighty per cent. of all cases,[3] and commonly the ancestral mental disorder is some form of manic-depressive psychosis.[4] Secondly, a good case can be made out, based both upon the study of etiology in various instances, and upon the therapeutical experience, for psychogenesis of many of these disorders.[5] Stoddart has the following to say upon the psychology of the disorder: "The unconscious complexes at the root of this psychosis are found on psychoanalysis to vary from patient to patient. Parental fixations, repressed homosexuality, ungratified, and therefore repressed, maternal instincts or unsatisfied sexual desire, are found in different patients to be responsible for the disorder; but no constant factor has yet been discerned. I think, however, that it can be definitely stated that autoeroticism is never responsible for the maniacal-depressive psychosis." [6]

[1] Southard and Jarrett, *op. cit.*, p. 477. [2] Stoddart, *op. cit.*, p. 254.

[3] Barrett, *op. cit.*, p. 622. Stoddart, *op. cit.*, pp. 255, 256, points out that *acquired* mental instability as the result of alcoholism, acute disease, etc., is also frequently found.

[4] Barrett, *op. cit.*, p. 622.

[5] *Cf.* McDougall, "The Nature of Functional Disease", p. 351.

[6] *Op. cit.*, p. 256. At another place (pp. 293, 294) Stoddart discusses the views of some investigators who claim that pathology in these cases must be looked for, not in the brain, but in other organs. Some claim that indigestion or constipation is the cause of the disease; Craig attributes it to alterations in blood pressure, most writers try to find an explanation in some toxic process, and Stoddart accepts this view, but modifies it in supposing the toxic process to reside in the neurons and not in the general circulation. He concludes that "in mania, an irritating product is formed within the cortical neurons. This view is further supported by the 'flight of ideas' in mania. (2) That, in melancholia, a paralysing product is formed within the cortical neurons. (3) That, in agitated melancholia, there is a combination of deleterious influences, *viz.*, a paralysing product within the cortical neurons, and also an irritating body in the plasma bathing the nerve cell. (4) And that, in a few cases of mania, there is, in addition to the irritating body within the nerve cell, an irritating body in the plasma bathing the nerve cell." He adds (pp. 298, 299) that "it must be admitted, however, that psychoanalysis has revealed a deeper psychological meaning of this psychosis in that it is the distorted expression of long-repressed sexual complexes", which, though they vary with different patients, all "have their origin in infantile fixations on or identifications with members of the patient's own family. Such fixations and identifications, being inharmonious

The mental symptoms of the different phases are as follows: In the manic phase, three symptoms are typical, namely, emotional exhilaration (an exaggerated feeling of wellbeing — "euphoria"), flight of ideas (due to distractibility of attention and lessened inhibition), and overactivity (decreased inhibition of the motor impulses). The patient presents a picture of emotional elation, extreme good humor, and exuberance. These symptoms are accompanied by irascibility (due to the instability of the emotions generally), which may lead to angry, sometimes brutal, outbursts when the patient meets with some environmental restraint. Occasionally, brief spells of crying or dejection may occur even in this excited phase.[1] Patients are extremely distractible, and unable to carry on a sustained conversation or train of action. The flight of ideas, and distraction of attention, due to generally lowered inhibition together with increased outpouring of psychic energy, are typical; the patient's conversation consisting of broken scraps of sentences and constant leaping from topic to topic. In the severe forms of mania, consciousness may be more or less clouded. Delusions and hallucinations are infrequent; but playful distortion of fact occurs. Because of the increased motor activity, the patient seems to be extremely busy, occupies himself with all sorts of schemes and activities, enters into various complicating business and social situations and responsibilities, loses his inhibitions in sexual relations, and, when his activities are opposed, commits serious criminal offenses in his abnormal excitement.

The main symptoms of the depressed phase are practically the opposite of those of the manic phase; namely, emotional depression instead of exhilaration, slowing down of the thought processes instead of unrestrained flight of ideas, and abnormal laxity of the motor impulses instead of abnormally unrestrained play of motor activity. The typical emotional attitude is one of despondency, hopelessness, resignation; although the moods may be of various grades of intensity, from mild unhappiness and vague anxiety to the most abject dejection. In most of these cases there are delusional manifestations, the contents being of a sad or tragic nature. Ideas of unworthiness and self-accusations form the core of the

with the content of adult consciousness, are repressed and forgotten; but they attempt to gain expression by reappearing in consciousness in an unrecognizable form — *viz.*, as the symptoms of this psychosis."

[1] Barrett, *op. cit.*, p. 614.

delusions, around which are woven all the trivial events of the patient's past and present, which now assume overwhelming proportions and significance. The slowing down of motor impulses gives the depressed patient a typical slowness of gait and movement; retardation may be so severe as to constitute stupor, characterized by slight activity, ideas of death, and even such severe motor symptoms and drooling as to suggest the catatonic state of dementia præcox.[1]

Legal Significance. — As a rule, the offenses of manics are not of a serious sort; most of them being classifiable under disorderly conduct, forgery, fraud, etc. Sexual assaults and minor physical injuries may occur. When a manic is under the influence of alcohol, many more serious offenses may be committed. Here the simple rules relating to the irresponsibility of intoxicated persons are not easy of application; since the alcoholism itself may be due to the mental disorder, such cases should be considered from the point of view of the mental disease rather than the intoxication. Ordinarily, capacity to reason as to the nature and consequences or wrongfulness of an act is impaired during the phase of manic excitement; for the characteristic flight of ideas and distractibility make it almost impossible for manics to sustain a train of thought. Since the dominant euphoric mood colors all thought and activity, there is actual incapacity to appreciate the nature, quality, and wrongfulness of conduct, even where the ideational activity is not typically disturbed. Similarly, capacity for inhibiting impulses is so impaired as to place manics in the class to which the irresistible-impulse rule (or, better, the lack-of-power-of-control rule) is peculiarly applicable.

The attempts at suicide[2] and self-mutilations that characterize

[1] "Statistical Manual", p. 27.

[2] "It must be accepted as a general proposition that every case of depression of this type is liable to commit suicide." Barrett, *op. cit.*, p. 618. *See also* Southard and Jarrett, *op. cit.*, p. 479: "It is for this reason that one is prone to advise hospitalization for the depressed case until recovery is quite complete."

The writer suggests that (if this has not already been done) an interesting study might be made correlating season of year with the two principal phases of the manic-depressive psychosis, on the basis of statistically significant numbers. It has been shown that, in temperate climates at least, the suicide curve rises gradually to its peak in midsummer (June) and falls off just as gradually, instead of being at the peak in the winter months, when cold, hunger, destitution and despair are common. (The same phenomenon has been observed in the case of sex offenses. *See* Aschaffenburg, "Crime and its Repression", pp. 16, *et seq.*) This phenomenon is not explainable solely on the basis of the effect of temperature upon the emotional life; for if this were so, the curve should continue upward in July, August, and early September (the hottest

the depressed phase are the result of the feeling of guilt and worthlessness that is typical of this mood, and of the strong desire (with or without hallucinatory command) to inflict what is conceived of by the patient as well deserved, self-punishment. Other people may be murdered in the attempts at self-destruction, especially in so called suicide pacts, or because of feelings of hopelessness and poverty, or as a result of hallucinatory commands or advice. A mother with depression or compulsive ideas may murder her children. In cases of manic-depressive psychotic persons accused of crime, it is particularly important that the hereditary and developmental history be obtained, as frequently similar familial cases will be found.[1]

A difficult forensic problem is presented when it cannot be proved that the criminal act was committed during one of the phases, or when the prosecution definitely proves that it was committed during a remission or during what the lawbooks still call a "lucid interval." It is known that, unlike the result of the attacks in psychoses with purely organic pathology, or in dementia præcox or epilepsy, there is no progressive mental deterioration in the manic-depressive psychoses. In the intervals between attacks, the patients are to all intents and purposes perfectly normal.[2] Within these intervallary periods it would seem that under existing law they should not be exempt from responsibility for acts committed during the remissions. But, inasmuch as the intervals, when considered in the light of the whole history of past manic or depressed phases, and of the general knowledge of the recurrent nature of this disease, suggest an essentially or potentially disordered mind, regardless of its outward normality during intervals, or, more correctly, *remissions*, these cases present a type to which the concept of limited responsibility, with its socio-penal implications, might well be applied.

months) and then drop quite abruptly. The fact that it does not do so, together with the almost symmetrical nature of both the sex-offense and suicide curves, suggests a definite periodicity or cycle in emotional life. And if the curve for the depressed phase in a large percentage of many cases of manic-depressive psychosis were shown to coincide with the suicide curve, as to season of year, we would have a more ultimate explanation of suicide than we have; most of these cases of suicide might then be attributable to the activity of a frequently unsuspected psychosis.

[1] Even in newspaper accounts of suicides, it is frequent to find mention of the fact that the deceased's parents, siblings, or other relatives were mentally unsound or had committed suicide.

[2] There are frequently a supersensitiveness and moodiness even during the remissions; but these are on the whole negligible.

Neuroses. — While the terms "psychoses", "psychoneuroses", and "neuroses" are frequently used interchangeably, as applicable to the functional or basically psychogenetic disorders, some differentiation of them is, as we have seen, possible. The psychotic is distinguished from the neurotic or psychoneurotic patient in that, unlike the latter, he fails to recognize his infirmity, and therefore to adapt himself to his environment, except perhaps in the artificial, sheltered and supervised environment of a hospital.[1] In other words, the psychoses are the so called "true insanities." The neuroses are distinguished from the psychoneuroses in that "the etiological conditions of the neuroses belong to the present or comparatively recent life of the patient and not to infancy, as the psychoneuroses do."[2] Neurasthenia and anxiety neurosis are the two neuroses. The etiological factor of the former is in the patient's "own life history",[3] although it has been suggested that, inasmuch as in many cases the patient's condition is traceable to his parents' excesses or nervous disorders, some cause of the patient's condition is due to the fact that his store of nervous energy has been "squandered by his ancestors."[4] According to the Freudians, "psychoanalysis reveals that neurasthenia is always due to partially or completely repressed autoeroticism."[5] The main features of neurasthenia are defect of volition,[6] distractibility, and abnormal fatigability.

Anxiety Neurosis (including exophthalmic goiter) "receives its name from the fact that the symptoms represent the physical

[1] Stoddart, *op. cit.*, p. 253.

[2] *Id.*, p. 212. The term "neurosis" also used to be applied to "certain disorders in which, while the symptoms are both mental and physical, the primary cause is thought to be essentially physical." "Statistical Manual", p. 31.

[3] Stoddart, *op. cit.*, p. 212.

[4] Stoddart, *citing* Van Gieson, p. 212. Stoddart believes, however, that the abnormal behavior of the parents during the infancy of the patient is more responsible for his "inability to engage in the battle of life in a normal way." It is these cases that illustrate the fact that even if it were possible to evaluate moral responsibility in the individual case sufficiently for the law to take account of the delicate differences of responsibility for an act in any particular case, responsibility would have to be traced at least as far back as the defendant's parents.

[5] Stoddart, *op. cit.*, pp. 212, 213. *See also* the typical case of Maurice Eastman, cited by Southard and Jarrett, pp. 328, 329. These cases frequently require the aid of a good psychiatric social worker. *See* the altogether sane and balanced discussion on this subject and on the applicability of the various techniques of psychotherapy generally, in Southard and Jarrett's "The Kingdom of Evils", pp. 330, 331.

[6] Stoddart, *op. cit.*, p. 214.

accompaniments of anxiety or fear." [1] According to the Freudians, the etiology of the anxiety neuroses is traceable directly to the repression of sexual desires, " which are not allowed to follow their natural course of leading to either physical gratification or even conscious desire for this ",[2] or which are not successfully " sublimated ", that is, turned into creative, useful and satisfying activity. The desire which is repressed is replaced in consciousness by its *generalized* opposite, that is, fear or apprehension (anxiety). " The reason why the repression of sexual desire is especially potent is merely that sexual desire is infinitely more liable to be repressed than any other." [3] If this be so, it would seem that the repression of any of the other fundamental instinctive desires would result in a similar anxiety neurosis; and the Freudians have found it difficult to account for the numerous war neuroses in which, while the predominant psychogenetic factor was protracted fear, this could frequently not be traced to any sexual basis.[4]

The symptoms are hypersensitiveness, especially auditory and visual, occasionally hallucinatory, the general emotional condition of fear, anxiety or apprehensiveness, with its accompanying physical manifestations (especially prominent in exophthalmic goiter), a constant tendency to look for and find the deepest, direst significance in every occurrence, etc. Frequently the patients themselves do not know the reasons for their anxieties or sense of impending disaster; and when, later, a defendant of this type tells this to a judge or jury, it is not surprising to find that they ordinarily misbelieve him.

[1] Stoddart, *op. cit.*, p. 219. [2] *Id.*

[3] *Id.* After mentioning various types of unsatisfied desire, Stoddart says, p. 220: "For the benefit of those readers who abjure psychoanalysis, it may be stated that the above observations (as to the sexual origin of the anxiety neuroses) are obtained from direct clinical observation, not by psychoanalysis, and they have been confirmed, not only by disciples of Freud, but also by many physicians who are directly opposed to psychoanalysis."

[4] It is difficult for the reader who has not had much practical experience, to understand the explanations offered in reply to the criticism that the war neuroses have shown that many of this group of disorders cannot definitely be ascribed to a sexual basis. The interested reader who desires to follow the debate between the Freudians and those who take the view that one of the other primary instincts may be the seed from which a neurosis may spring, is referred to "Psychoanalysis and the War Neuroses", by S. Ferenczi (Budapest), Karl Abraham (Berlin), Ernst Simmel (Berlin) and Ernest Jones (London), Introduction by Professor Sigmund Freud (Vienna), London: The International Psychoanalytical Press, 1921, and to a fairly clear book review by Milton Harrington, in *Mental Hygiene*, Oct., 1922, Vol. VI, No. 4, pp. 852–859.

Legal Significance. — As neurasthenic conditions occur in what may be called the borderline between mental health and definite mental disease, it is difficult to make any estimation of the criminal responsibility of such persons or of the psychoneurotics and neurotics generally. Since, however, such persons are frequently abnormally irritable, impulsive in conduct and unable to control their desires and emotions, the severer cases may be regarded as only partially responsible. In the final analysis, their fate rests more in the desires and prejudices of the jury than in any hard and fast legal test of irresponsibility objectively applied. If, for example, a neurasthenic accused of murder in the first degree could show a history of "shellshock" received in active war service, the average jury would probably find a way to reduce the grade of his offense from first degree murder, to murder in the second degree or manslaughter. Since there is a morbid excitability in these cases, the cooling-time rule [1] of the criminal law should be readily

[1] Voluntary manslaughter is a homicide without "malice aforethought" committed when the act causing death is done in the "heat of sudden passion", caused by such provocation as the law deems adequate to excite "uncontrollable passion" in the mind of a "reasonable man." It is in the determination of the degree to which the neurotic person is different from the reasonable man, and of what constitutes *adequate provocation* in his case, that the neurotic's abnormal irritability should be considered. "The law contemplates the case of a reasonable man, and requires that the provocation shall be such that such a man might naturally be induced, in the anger of the moment, to commit the act." — Keating, J., in Reg. *v.* Welsh, 11 Cox Cr. Cas., 336 (1869). Numerous and varying examples of what has been held to constitute inadequate provocation by different courts fill the law reports. Thus, rejection of a suitor was held insufficient provocation to induce him to slay the girl. — State *v.* Kotovsky, 74 Mo., 247 (1881); assault and battery of such nature as to inflict great bodily harm or insult is usually deemed provocation for the purpose of reducing the crime. — Schlecht *v.* St., 75 Wis., 486 (1890); a blow by a child or woman might be insufficient provocation for the man. — *Dictum* of Gibson, C. J., in Com. *v.* Mosler, 4 Pa., 268 (1846); the beating of a wife by a husband was held sufficient provocation for the father — Campbell *v.* Com., 88 Ky., 402 (1889), etc. It would seem that according to legal theory, which takes account of the mental condition of the defendant at all times, not only the *objective* nature of the provocation, but the *subjective, abnormal irritability* of certain types of defendants who, while not definitely insane, are found to be psychotic or neurotic, should be taken into account; so that the same objective irritation which leads to the criminal act might well be held insufficient to reduce the grade of the offense of one person, and sufficient in the case of another person. The particular state of group mind prevailing in the different jurisdictions would seem to have much to do with the actual application of the rule. In few, if any, of these cases has the existence of neurasthenia been raised, since it would hardly be noticeable to counsel, court or jury or the defendant himself. With gradually clearer concepts of the symptoms and causation of these borderline mental disorders, and with the establishment of psychopathic clinics attached to the courts and the routine examinations of all offenders, however, such mild mental disturbances can gradually be taken account of by the criminal law.

applied in their favor. The legal significance of the anxiety neuroses is difficult to state, beyond what has already been said in connection with neurasthenia. In practice, since the symptoms would appear extremely intangible to the layman, it is probable that an anxiety neurosis never will entirely exempt from responsibility, no matter how severe it may be and *no matter how strong a subconscious connection between this state of mind and the criminal act it led to may exist.* Whether it should lessen the degree of the offense is a question answered by the jury, usually on other grounds than the (to them) vague symptoms of the disorder.

Psychoneuroses. — Hysteria and compulsion (obsessional) neurosis are the usually classified types of psychoneuroses. The peculiar " conversion " symptoms of hysteria, that is, the bodily (motor) symptoms which represent a conversion of the mental symptoms, have already been sufficiently discussed in the previous chapter. During the War, the numerous shellshock cases illustrated the reality of this disorder and its symptoms. When the symptoms are purely mental, the condition is known as anxiety hysteria. Segmental anæsthesia (" stocking ", " glove ", etc.) is typical of these disorders, the limits of the anæsthetic areas not following the anatomical or neurological lines but a straight line encircling the limb. The hysterical fit is different from that of the epilepsies. The patient falls in a place and manner calculated not to injure him, and does not bite his lip and void the urine (which are characteristic of the epileptic seizures). Nevertheless, as has been frequently said, " an unobserved attack of minor epilepsy ushers in a hysteroid fit probably more often than is usually suspected." [1] The unconsciousness during the seizure, the more severe states of dissociation and multiple personality, and the possible forensic significance of these phenomena have already been discussed in the previous chapter.

The *obsessional neuroses* or compulsion neuroses (formerly psychæsthenia) are characterized by uncontrollable ideas, fears, and impulses. These compulsions have also been discussed in the previous chapter. According to Stoddart, a history of mental disease in the patient's family is obtainable in sixty per cent. of the cases. Janet's explanation of the disorder is that it is the result of a " lowering of the psychological tension ", that is to say, the psychic response of such patients to the environmental demands

[1] Stoddart, *op. cit.*, p. 235.

are less than the normal, and therefore the power of perception of reality is subnormal. Stoddart,[1] however, claims that this view is incorrect, in that the perceptive power of such persons is, on the contrary, extraordinarily keen. In the psychoanalytic view, the psychoneuroses are the result of repressed experiences of early infancy, which reappear by means of the "transference of the affect." Morbid fears, obsessions, doubts, impulsions, anxieties and feelings of inadequacy generally are the types of symptoms encountered.

The *legal significance* of these disorders arises in connection with proof that the compulsions were actually irresistible. Each case must be decided individually, and where the irresistible-impulse test is in effect, if the nature of these disorders and the types of compulsive conduct they usually lead to are made clear to a jury, this is as far as the law can legitimately go.

Psychopathoses (constitutional psychopathic inferiority; psychopathic personality). — These cases have been the occasion of much argument among psychopathologists, psychiatrists and medical social workers. Some say that every psychopathic personality is *sui generis*, having a highly individualized "make-up of soil and taint."[2] Others claim the existence of clinically established, typical sub-groups; and a recent symposium[3] shows an attempt to take inventory of the terminology and scientifically established data of these disorders, and to bring some order out of the chaotic waste-basket, which the term "constitutional psychopathic inferiority" has been in the past.

But while there are disagreements as to the symptomatology and classification of these disorders, some definite statements are nevertheless possible. In brief, "psychopathic personality" is a generic term (perhaps more social than medical in its connotation) applied to those persons who, while not having a definite, major psychosis, present a mental constitution and an habitual reaction to life's experiences that are, for one reason or another, not normal or average or effective. This abnormality of reaction is expressed chiefly "in the character and intensity of their emotional and volitional reactions" (conative-affective life). The basic disorders of the conative-affective life characteristic of the psychopathic

[1] Stoddart, *op. cit.*, pp. 246, 247.
[2] Southard and Jarrett, *op. cit.*, p. 347.
[3] *Mental Hygiene*, Jan., 1924, Vol. VIII, No. 1, pp. 174, *et seq.*

personality are of all degrees; and frequently they form the foundation of the more definite psychoses.

Kraepelin [1] and others [2] divide the psychopathic personalities into types based not only upon the grouping and prominence of what may be regarded as the purely psychotic manifestations, but upon the typical careers or behavior anomalies to which these lead. This results in a mixed classification of a psychiatric and sociological-criminological character. Since, however, all mental disorder has its behavior, as well as its psychological, symptoms, such a procedure is not without justification. The more important of Kraepelin's groups are as follows:

(*a*) *The excitable.* "These are individuals who from slight external causes develop more or less severe excitement that may be dangerous to themselves or others. After the passing off of the excitement, observation shows the existence of constitutional psychopathic traits and the psychopathic character of the excitement." [3] The supersensitiveness and irritability, unrestrained emotional life, and frequent changes of mood in this type may lead to antisocial and criminal conduct. Frequently, such patients describe their minds as having been confused, or as in a dream, during the acute, excited state. (*b*) *The inadequate personality* is characterized by instability and unreliability of character, and extreme weakness of volition and self-control. The inability of this group to carry through any protracted piece of work, and the constant changing of plans, make for economic inefficiency; and this group contributes heavily to the beggars, petty thieves, tramps, prostitutes, etc. (*c*) *The impulsive personality* is characterized by the typical symptom that decisions are made on the spur of the moment, on a purely transient, impulsive, rather than a deliberative, basis. These contribute heavily to the spendthrifts and tramps; and dipsomaniacs are frequent among them.[4] (*d*) *The eccentric individual* of psychopathic make-up is one with various oddities of thought and behavior, not definitely traceable to a psychosis; the individual of one-sided judgments, whose conduct

[1] Barrett, *op. cit.*, p. 630.

[2] *Cf.* Symposium, "The Psychopathic Individual", "Differential Diagnosis", by S. A. Silk, *Mental Hygiene*, Jan., 1924, p. 179.

[3] Kraepelin, quoted by Barrett, p. 630.

[4] Although dipsomania may be due to a deeper compulsion. The differential diagnosis between psychopathic personalities and psychoneurotics is frequently difficult. *Cf.* "The Psychopath and the Psychoneurotic in Childhood", Winifred Richmond, Symposium, *cited* above, p. 189.

is frequently unintelligible and without aim. Usually these are harmless cranks. (*e*) *Pathologic liars and swindlers* have been made the subject of illuminating study by Healy.[1] Extraordinary liveliness of the imagination and tendency to believe their fantasies are the chief symptoms. Usually the imaginary exploits are the setting for their own rôle as chief protagonist. An unsteadiness of purpose is also typical. "Pathological lying is falsification entirely disproportionate to any discernible end in view, engaged in by a person, who, at the time of observation, cannot definitely be declared insane, feeble-minded, or epileptic."[2] Further, "such lying rarely, if ever, centers about a single event; although exhibited in very occasional cases for a short time, it manifests itself most frequently, by far, over a period of years, or even a life time. It represents a trait rather than an episode."[3] (*f*) *The antisocial personality* is largely characterized by a pronounced emotional unresponsiveness to the feelings of others, or lack of social sympathy. Such persons show a history of cruelty, lack of pity, extreme selfishness, poor judgment, and opposition to their share of regular work. Hence, many of the true professional criminals, recidivists, belong in this group. Larceny, robbery, forgery, various criminal schemes to deceive others, and occasional assaults are the crimes attributable to this class. This is the type for which the usual penal and reformative methods are wholly inadequate.[4] Many of these psychopathies deteriorate into definite psychoses, their symptoms being later classifiable as those of paranoia, dementia præcox, etc. (*g*) *The quarrelsome personality* is one whose psychopathic traits express themselves in an almost chronic antagonism to the environment, usually as violent outbursts upon the slightest provocation. The constant suspicion of this class that justice is not being done them leads to frequent complaint and litigation; they are, however, dis-

[1] *Cf.* "The Individual Delinquent" (1914), pp. 729, *et seq.*, "Pathological Lying, Accusation, and Swindling" (1915), with Mary Tenney Healy, especially Case 25, pp. 233, *et seq.*, and "Honesty: A Study of the Causes and Treatment of Dishonesty among Children" (1915).

[2] "Pathological Lying, Accusation, and Swindling", p. 1; *see also* "The Individual Delinquent", p. 729. Almost always, *episodic*, pathological lying is but a manifestation of some cases of epilepsy, hysteria, and other mental abnormalities; and the lying in such cases has usually an apparent or transparent purpose. — Healy, "Pathological Lying, Accusation, and Swindling", p. 9.

[3] *Id.*

[4] Dr. Bernard Glueck's scheme proposed for the New York prisons includes a special institution for the psychopathic offender. *See* his "Types of Delinquent Careers", in *Mental Hygiene*, April, 1917, p. 1.

tinguished from the litigious paranoiacs in that "they never develop delusions, and their quarrelsome interests extend into all sorts of affairs." The angry, impulsive outbursts and continuous looking for evidences of injustice to themselves naturally result in much illegal conduct.

Legal Significance of the Psychopathoses. — It is around these types of constitutionally psychopathic offenders that the arguments between physicians and lawyers have largely centered. They constitute to a large extent the so called partially insane which the law does not exempt from responsibility. Naturally, few of these offenders can satisfy the requirements of the existing tests of irresponsibility. It is difficult to say, in most cases, that the offender did not have knowledge of the nature, quality and wrongfulness of his act; and in only a few, if any, cases can it be said that the act was absolutely uncontrollable. Psychopathic individuals may, however, commit acts during transitory episodes of disturbed consciousness and conative-affective disorder; further, the capacity to reason may be seriously disturbed, due to the general emotional instability, erroneous evaluation of the relative importance of things, pathologically poor judgment. Conflicts with the law frequently arise out of defective emotional-volitional control and chronically weak inhibitions, and are most often due to impulsive, thoughtless acts. It is therefore a difficult question to decide whether or not the abnormal traits of the psychopathic personality have interfered with his acquiring such stability of character as is possessed by the majority of individuals, or whether or not his emotional disturbances are of such degree as to take him definitely out of the class of normal men. Further, the usual absence of those symptoms which are popularly associated with the insane,—delusions, hallucinations, cognitive disturbances, etc., — make it difficult to convince a jury that actual mental disorder exists in any of these cases.

On the other hand, studies in recidivism have shown again and again that these offenders contribute heavily to the criminal and dependent classes, and that the apparently constitutional nature of their mental and behavior anomalies make the ordinary penal or reformatory measures largely abortive. Since the psychopathic personalities are not definitely classifiable among the recognized types of psychotics (frequently, even, by psychiatrists), it is easy to understand the law's attitude in refusing to exempt such per-

sons from responsibility. Most often the choice that hangs in the balance in these cases is between the death penalty and life imprisonment. (Indeed, Maudsley has said of all psychoses that with the abolition of capital punishment there would no longer be any serious differences of opinion between lawyers and doctors.) However, there are cases in which the death penalty seems unjust and inappropriate; and the wise disposition of one of this class was referred to in a previous chapter.[1] On the other hand, there are many psychopathic offenders *who should be incarcerated for life, regardless of the severity of the offense committed.* Healy mentions the case of a nineteen year old offender with a long record of crime, who was a pathological liar, and who was of the type which "may be lacking in normal social control and in ability to reason, impulsively inclined to antisocial deeds and therefore social menaces, but, notwithstanding this, may not be classified under the head of any of the ordinary textbook types of mental disease."[2] He says further: "It is clear that for the protection of society a different notion of what constitutes mental aberration or insanity should prevail, so that these unusually dangerous types might be permanently segregated."[3] In this case, the defendant accused of robbery and vagrancy was examined at the request of the court, and the examiners "stated that . . . he was an aberrational type and the practical point was that he should neither be allowed to go out in the community, nor be sent to a penitentiary, but rather to an institution for observation and perhaps for long detention. The jury found it necessary, as usual in such cases, to declare him insane."[4] Upon this finding, the prisoner was sent to a hospital for the mentally ill, but was soon released, the authorities of that institution reporting that, "inasmuch as we were unable to prove that he had any form of insanity he was discharged."[5]

This case illustrates the need of a sort of halfway institution or colony between the prison and hospital for the definitely psychotic, where such psychopathic and defective offenders would be able to work and lead as near a normal life as possible, under absolutely indeterminate or permanent segregation. There may thus be seen to be two types of the limited-responsibility offender: First, the

[1] *Ante*, pp. 65, *et seq.* Recently, in Massachusetts, another offender of this type was disposed of informally, without the expense and scandalous publicity of a protracted "insanity trial."

[2] "Pathological Lying, Accusation, and Swindling", pp. 233, *et seq.*

[3] *Op. cit.*, p. 240. [4] *Id.* [5] *Op. cit.*, p. 236.

person who should be sent to prison and subjected to a *life, penal* régime, this comprising the cases where absence of premeditation was proved; secondly, the person on the borderline between mental health and disease, whose case presents a mixture of penal and psychiatric problems, and who should be sent, for a wholly indeterminate period, to an appropriate colony or institution. This is the type of offender whose disorder, when he committed the offense, may have been too mild to satisfy existing tests, and to gain a verdict of not guilty for him, or may have been disregarded by the jury; but whose mental condition was nevertheless translated by the jury into a sentence implying limited responsibility.

Summary of Preceding and Present Chapters. — In the preceding chapter we discussed the general problem of the nature of mental disorder, its genesis and its psychology. We also described the more striking phenomena of mental disorder generally, such as delusions, hallucinations, etc., and commented in general terms about their legal significance. Using this background as a point of departure for this chapter, we discussed the various principal types of mental disorder, their etiology, chief symptoms, and legal significance. Resuming our remarks at various stages of the discussion, as to the applicability of the tests of irresponsibility, we may say that the relationship of the tests to various mental disorders, and our recommendations based thereon, are as follows:

(1) In the early stages of *general paralysis*, or during the remissions, in which conduct is impulsive because of increased irritability and deterioration of controlling power, but where the patient may have a vague knowledge of right from wrong, the knowledge rules are insufficient. In extreme cases, however, the general mental disorientation is sufficiently covered by the knowledge tests. Because this disorder is usually traceable to the defendant's own default, it was pointed out that he should be in the same legal position as the intoxicated person who commits a crime; namely, that while his confused mental state and impulsive nature should not totally exempt him from responsibility, they should at all times be taken into account in determining the existence of such necessary mental conditions of first degree murder as deliberation, premeditation, malice aforethought, etc. Since these cases frequently arise in municipal, and other lower courts, the value of a psychiatric clinic attached to such courts in segregating such

offenders and recommending appropriate, wholly indeterminate, medico-penal treatment was pointed out.

(2) *Feebleminded* persons of high grade imbecile or moron class are not protected when the right-and-wrong rule is interpreted too literally. More stress should be laid upon the results of psychological-psychiatric examinations than is usual to-day. There is room for the concepts of limited responsibility and habitual criminality in these cases; and a special institution or colony, for defective delinquents, is necessary, because of the special problems presented by this group. Habitual criminality in these cases would mean *absolutely indeterminate* incarceration, with type of work and other activity, parole, and release, if any, dependent primarily upon the report to the court of original commitment, of the experts in charge of the special institution.

(3) *Epilepsies.* Increased irritability and infantile reactions to the demands of the environment may result in criminal conduct, though knowledge of the nature, quality, and wrongfulness of a proposed act be present. Without thorough psychiatric examination a criminal act may be attributable to alcoholism, when in fact the epileptic basis is primary. Mental deterioration caused by progressive, convulsive attacks frequently expresses itself not necessarily in a lack of knowledge of the nature, quality, and wrongfulness of an act, but in loss of general judgment capacity, and severe disturbances of the conative-affective life. In criminal conduct committed during the dream stages after the convulsive attack, the patient appears perfectly normal; hence the testimony of persons who talked with such a defendant prior to the criminal act may be misinterpreted as indicating that the defendant knew right from wrong. In brutal attacks, committed during maniacal states and epileptic equivalents, patients may appear to know the nature, quality, and wrongfulness of their acts, yet be powerless to control them. The impulsive conduct caused in these conditions would not exempt from responsibility, where only the knowledge tests were in operation. With the irresistible-impulse and knowledge tests broadly interpreted to the jury, and provision for the concept of partial responsibility, the epilepsies would be sufficiently taken account of. Colonization of serious cases of epilepsy, both as a preventive measure and as appropriate medico-penal treatment, is recommended.

(4) *Alcoholic Psychoses.* The rules as to drunkenness take

account of the effect of intoxication upon deliberation, premeditation, and malice necessary to constitute first-degree murder. Dipsomania is not covered, where the right-and-wrong rule only is operative. The irresistible-impulse doctrine would prevent possible injustice in these cases. Impulsive acts due to the mental deterioration of chronic alcoholism are not taken account of where the knowledge tests only are in operation; such persons may know the nature, quality, and wrongfulness of acts, in a narrow sense, and yet be powerless to resist the impulsive operation of the primitive instincts. Limited responsibility, carrying with it life incarceration, would cover these cases. Delirium tremens, alcoholic hallucinosis, and alcoholic psychosis are sufficiently covered in jurisdictions where both the irresistible-impulse doctrine and right-and-wrong rule are given the jury. Delusion tests only confuse; delusions and hallucinations should be used as part of the symptom-picture, not as tests.

(5) *Encephalopsychoses* are relatively unimportant, legally. The knowledge tests and the irresistible-impulse rule, together with the doctrine of partial responsibility, as resulting from lack of deliberation and premeditation, would cover such cases.

(6) The transitory psychoses accompanying *bodily disorders* would be covered by the knowledge tests and the irresistible-impulse rule, provided the nature of the disorder and its connection with the capacities implied by these tests were made clear to the jury.

(7) Psychoses due to *old age* would be readily discovered if a psychopathic clinic were attached to the lower courts, where most of these offenders appear. The right-and-wrong rule is not sufficient to cover the more serious crimes, because of the unrestrained play of the primitive instincts when mental deterioration, in these cases, has destroyed the controlling power, but where some capacity for knowledge still exists. Such persons should be sent to hospitals and homes for the aged; not to jails.

(8) In *dementia præcox and paranoia* the chief problem is presented by the law's treatment of delusions; namely, the requirement of an *objective connection* of the delusion with the criminal act, and the requirement that the delusive matter must have been such as would have excused or justified a sane person in the commission of the offense, if the beliefs of the delusion were real. The psychology of delusions and hallucinations shows that delusions

do not themselves constitute the mental disease, but are the *results* of a generally disintegrated mind. *The delusion tests should be abolished,* and delusions should be considered merely as part of the symptom-complex of a disordered mind. The right-and-wrong rule alone does not cover cases of early dementia præcox and the partially recovered cases; since these persons, outwardly, appear to know right from wrong as to subjects apparently not connected with the delusive system. The knowledge tests and irresistible-impulse rule, broadly interpreted, so as to give the jury a true conception of the *unity of mental disorder and interrelationship of mental process,* and of the real significance of delusions, would sufficiently cover these cases. More time and skill should be devoted to the medical examination of both dementia præcox and paranoid cases before they are sent to trial; and the jury should be furnished with as complete a life history, hereditary, developmental and other data as an efficient sociological-psychiatric staff can obtain within a reasonable time.

(9) In the *manic-depressive* psychoses, an act committed during a manic phase is covered by the knowledge tests, if this disorder is properly explained; since here the " flight of ideas " and extreme distractibility make it impossible to reason consistently about anything; and as the dominant euphoric mood colors all thought and activity, there would be inability to appreciate the true nature, quality and wrongfulness of an act — provided those terms are broadly construed — even where the ideational disturbance was not marked. The irresistible-impulse rule together with the right-and-wrong rule would amply cover these cases. Offenses committed during *remissions* can be provided for by the doctrine of limited responsibility, which will mean life imprisonment, in the case of a capital offense, with transfer to mental disease wards or hospitals during periods of the symptoms.

(10) In the *neuroses,* the abnormal irritability and impulsiveness of conduct may be taken care of under the " cooling time " doctrine, where acts are done in anger on the spur of the moment, in considering what constitutes sufficient provocation. Where criminal acts are committed with premeditation, it would be socially dangerous to allow neurasthenics any favored position before the criminal law; as the condition is difficult to prove and trenches so close on normality. The subconscious motivation of the anxiety neuroses would be difficult to establish before a jury; and here,

too, there would be definite social danger in relaxation of the present general rules of the criminal law. The compulsive acts of the obsessional *psychoneuroses* can only be covered by the irresistible-impulse rule; as such persons thoroughly know right from wrong but are powerless against their morbid compulsions, because of the mind's state of dissociation. In the rarely occurring somnambulistic or multiple-personality states of hysteria, the mind can not be said to have known right from wrong, even though acts are apparently purposeful; here too, the doctrine of irresistible impulse is necessary.

(11) The *psychopathic personalities* are not taken account of by the ordinary tests; since frequently such persons may know the nature, quality and wrongfulness of acts and may also have some power of resisting impulses. Nevertheless, their conative and, especially, their affective life is so disordered as to remove them from the class of normal persons to whom the sanctions of the criminal law should apply. The acts of the excitable type may be genuinely irresistible; in which event, they would not be excused where only the right-and-wrong rule prevails. The inadequate type, the impulsive group, and the quarrelsome class are characterized by extreme lack of self-control; and these, too, are not taken account of where the irresistible impulse rule is not operative. The cooling time rule should be especially modified in their favor. The concept of partial responsibility, implying life imprisonment instead of the death penalty in capital cases, is peculiarly appropriate to these offenders. Since the psychopathic personalities (especially the antisocial group) contribute heavily to recidivism, and since the fixed term of imprisonment does not effect its purpose in their case, these offenders should be covered by habitual criminal acts and wholly indeterminate incarceration. Limited freedom of social contact, or colony-life, under intelligent, medico-penal supervision, would do much to reduce the constant repetitions of crimes by these classes.

From the foregoing, it will be seen that the principal modifications in the existing substantive law that are recommended herein are the adoption of the concepts of semi-responsibility and habitual criminality with their medico penal connotations; the abolition of the delusion tests of irresponsibility; and the interpretation of the knowledge tests and irresistible-impulse test in a broad manner, in consonance with the data of modern psycho-

pathology. The manner in which these changes may be effectuated, and their relationship to the entire program for the socio-penal treatment of the problem of the mentally disordered offender, will be discussed in the concluding chapter.[1]

[1] We have indicated various mental conditions which are apparently not provided for by the law as it exists to-day. The careful reader will, however, have observed the important point that *throughout this discussion there was the tacit assumption that the mental disorder and the illegal act are always related in a chain of cause and effect.* That they are not necessarily so related is too well known to require comment.

This is the type of fallacy into which Goddard falls when he says, relative to feeblemindedness, that, "Such a diagnosis is as a rule easily made and when made fully explains any delinquency of which the child has been guilty." "Juvenile Delinquency", p. 22. And similar attitudes are consciously or unconsciously taken by many psychiatrists, with reference to mental diseases and the need of reform of the law of insanity.

Bernard Glueck, however, points out that he does not attribute the criminality of mentally disordered convicts to their mental condition *in all* cases. After giving the percentages of the various mental disorders found in his group of 608 consecutive admissions to Sing Sing Prison, he says that not in all cases, but in "a considerable number" of those "suffering from distinct mental disease or deterioration . . . the mental disease was directly or indirectly responsible for the antisocial activities." "A Study of 608 Admissions to Sing Sing Prison", Bernard Glueck, *Mental Hygiene*, Vol. II, No. 1, Jan., 1918. This judgment was based upon careful field investigations, as well as psychiatric diagnosis.

Perhaps we may validly say that in most cases, except the *violently and dangerously psychotic* (*i.e.*, the definite, well developed psychoses), the conclusion made in a recent careful study of female delinquents is the fairest and least dogmatic, and may be applied to male offenders as well as female delinquents: "Whether or not they become delinquent will depend, not so much upon the appearance of a single decisive factor, as upon the massing of factors in such a way as to disturb a more or less unstable initial adjustment. That certain factors, notably poor economic conditions, variously operative, and inferior intelligence, are particularly likely so to disturb the balance is the main point which we should urge in emphasizing these conditions." Mabel R. Fernald, Mary H. S. Hayes, and Almena Dawley: "A Study of Women Delinquents in New York State", New York, 1920, p. 528.

It is for the reason that in all cases except the most pronounced psychoses, it is difficult to say that the criminal act is exclusively or principally traceable in a cause-and-effect sequence to the diseased state of mind, that one must hesitate to stretch the tests of irresponsibility to their breaking point. Consequently, we have recommended the use of the concept of semi-responsibility in the borderline cases, and even in cases of definite psychoses where it is difficult for the jury to say that the criminal act and the morbid state of mind were definitely related. It is for this reason, too, that in the classic judicial pronouncement in Parsons *v.* State, 81 Ala., 577, Judge Somerville sought to prevent a throwing open of the doors of legal restraint entirely by requiring proof of a *definite causal connection* between the diseased mentality and the illegal act. It may be objected that it is difficult, sometimes impossible, to establish this in even the well marked psychoses. This is true; and it is for this very reason that the restraints of the law must be rigidly maintained in the less marked morbid states of mind, the borderline cases, and that even in the well marked psychoses it is safer all around to require the rigid proof laid down in the Alabama case mentioned above. Accordingly, we have provided (p. 479) that where there is proof of *insanity* (mental disorder), but no proof of strict satisfaction of the tests of *irresponsibility*, the defendant be found, not

irresponsible nor responsible, but "partially insane" and "semi-responsible." The effect in such cases, as well as in the borderline cases, where such conditions are definitely proved to be present, will be, in capital charges, to substitute life incarceration (in hospital or prison, as the case may be) for the death penalty; while in noncapital charges the effect will be to commit such convicts for *indeterminate periods* to hospital or prison, as the case may be, provided, however, that the offender with a definite psychosis will be entitled to a writ of *habeas corpus* when sufficiently recovered, while the borderline offender will not be entitled to this as of right, but will only be released, if at all, when the parole officials, assisted by psychiatrists, will find it wise to release him on parole.

CHAPTER 11

DISPOSITION OF ACCUSED PERSONS NOT TRIED, OR DEFENDANTS ACQUITTED, BECAUSE OF INSANITY OR IRRESPONSIBILITY

Section 1 — Verdict upon Acquittal on Ground of Insanity and Irresponsibility

Introductory. — We have discussed the types of tests of irresponsibility in operation in the various jurisdictions, when the question is raised as to the insanity of a defendant at the time of the alleged offense; and have criticized them in the light of law, psychology, and psychopathology. Previously, we had considered the various types of segregating machinery for the selection of persons obviously disordered mentally, who ought not to be tried, but rather committed forthwith to an appropriate institution for the purposes of treatment and safekeeping. In this chapter we will analyze the problems raised if the accused is found insane and is committed before trial, or if the defendant who proceeds to trial is successful in his plea of irresponsibility by reason of insanity; in a note at the end of the chapter we will discuss the rare case of a plea of "guilty" followed by the introduction of psychiatric testimony during a hearing in mitigation. These topics have been strangely neglected in almost all the important treatises upon the criminal insane. Yet the procedure for the release of insane persons accused, or acquitted, of crime is unquestionably the weakest link in the entire chain of the legal treatment of the problem; and much of the opposition to the more scientific and enlightened administration of our entire subject would be dispelled if this link of the chain were better welded. Moreover, a discussion of "tests" alone is practically divorced from reality. It is not sufficient to treat of these technical rules of the substantive law; we must in addition consider the practical results, to the accused and to society, of the verdict of acquittal that follows the successful application of these tests of irresponsibility.

Disposition upon Commitment before Trial. — Where an accused person is obviously insane, and is committed before trial, he is still a presumptively innocent individual; and the indictment, unless

it has been *nol prossed* or quashed, is still hanging over him like the sword of Damocles. If and when he recovers, he may be subjected to trial. It must be remembered, however, that in the case of most of the progressive, deteriorating psychoses, and in the case of feeblemindedness, the hope of recovery is slight. In such cases, commitment to a hospital is practically equivalent to a dismissal of the criminal proceedings. Nor are such persons, in most cases, subsequently released. They may, of course, bring *habeas corpus* proceedings; but the record of a pending indictment undoubtedly operates as a deterrent on the part of their friends, relatives and counsel. Nevertheless, after a sufficient period has elapsed, it is difficult to prove that such persons actually committed the offense with which they are charged, for witnesses have disappeared or died in the interim; and *habeas corpus* proceedings may, after all, result in the release of such persons. In homicide cases it would therefore seem to be a wise practice, from the point of view of social safety, to place reasonable checks upon the use of the writ of *habeas corpus*. These considerations require our careful attention.

Problems Discussed. — The questions presented are: (1) The kind of verdict rendered in case of acquittal by reason of insanity and irresponsibility; (2) the disposal which is then made of the defendant; (3) the manner in which an accused person who has been committed to an institution for the mentally ill before trial, or a defendant acquitted because of insanity but thereupon committed, is discharged from such institution.

Historical. — During the transitional stage in early English law, from the consideration of only the external act to the full recognition of insanity as a defense to a criminal accusation, persons who were insane were not, as we have seen,[1] thereby exempt from responsibility; their condition was considered as entitling them to a recommendation for a pardon. In China, insanity is not a legal defense. Its status is even lower than it was in the transitional English law; for insane persons in China are not entitled to a complete pardon, but only to commutation of sentence.[2] Be-

[1] Chapter 5.

[2] Oppenheimer, "The Criminal Responsibility of Lunatics", p. 91. "On the other hand, there seems to be a very drastic system of preventive measures. The relatives of a lunatic are bound, under heavy penalties, to notify the case to the authorities, and lunatics are, in general, required to be manacled." *Id.*, p. 41.

fore 1800, in England,[1] and in most jurisdictions in this country, if an accused person was found to be irresponsible by reason of insanity he was forthwith acquitted, and no special order looking to his safety or that of society was made. But by the Criminal Lunatics Act of 1800, the jury, in acquitting such a defendant, accused of a felony, was required to find specially whether such a person was insane at the time of the commission of the act, and whether he was acquitted upon that ground. Upon such a finding, the defendant was committed and detained "during His Majesty's pleasure." In 1883, when Maclean was found not guilty on the ground of insanity, of the charge of shooting at Queen Victoria, the Trial of Lunatics Act was passed, which is still in force, and of which Section 2 provides as follows:

> Where in any indictment or information any act or omission is charged against a person as an offence and it is given in evidence on the trial of such person that he was insane so as not to be responsible according to law for his actions at the time when the act was done or omission made, then, if it appears to the jury that he did the act or made the omission charged, but was insane as aforesaid at the time, the jury shall return a special verdict that the accused was guilty of the act or omission charged, but was insane as aforesaid at the time when he did the act or made the omission.

In practice, this verdict is returned as "guilty, but insane", an anomalous and paradoxical phrase, which, as we have seen,[2] leads to confusion. The purpose of such a verdict is, of course, to provide a theoretical legal basis for placing the defendant in the absolute control of the Home Secretary; nevertheless, it has been held to be a verdict of *acquittal* from which no appeal can be taken to the court of Criminal Appeals.

Under the Criminal Appeal Act of 1907,[3]

> If on any appeal it appears to the court of Criminal Appeals that, although the appellant was guilty of the act or omission charged against him, he was insane at the time the act was done or omission made so as not to be responsible according to law for his actions, the Court may quash the sentence passed at the trial and order the appellant to be kept in custody as a criminal lunatic under the Trial of Lunatics Act, 1883, in the same manner as if a special verdict had been found by the jury under the Act.

[1] Report of Committee on Insanity and Crime, England, 1923, p. 11.
[2] *Ante*, p. 335. [3] 7 Edw. 7, C. 23, Sec. 5, Subsec. 4.

In several cases,[1] the Court of Appeal exercised its prerogative, quashed the sentence, and ordered the appellant "to be kept in custody as a criminal lunatic in the same way as if a special verdict had been found." In several instances[2] the Court of Appeal indicated its hearty coöperation with the medical experts of the Home Office. There does not appear to be any difficulty, with reference to abuse of the writ of *habeas corpus*, in England; the defendant, though held actually to be acquitted by the anomalous verdict of guilty but insane, is in practice simply confined in an asylum, until released by the Home Secretary.

States having Special Provisions as to Acquitted Defendant's Recovery from Insanity. — Turning now to the situation in American jurisdictions, we find much just cause for dissatisfaction with existing procedure. In order to understand the American procedure, we may well consider in some detail the statutory provisions on our present subject in the different groups of States. In some jurisdictions, the same jury that acquits a defendant because of insanity (and irresponsibility) must state, in one way or another, whether it regards the person as "still insane." Thus, in the State of Washington,[3] the jury in rendering its verdict is required to state, in detail, (1) whether the defendant committed the crime, and if so (2) whether they acquit him because of insanity and irresponsibility at the time of the commission of the act; (3) whether such insanity still exists at the time of the verdict; (4) whether, if it does not then exist, "there is such likelihood of a relapse or recurrence of the insane or mentally irresponsible condition that the defendant is not a safe person to be at large." In the District of Columbia[4] and Ohio[5] the jury must state whether they acquit the defendant on the "*sole* ground" that he was insane and irresponsible when he committed the act. In Massachusetts,[6] if a person charged with a crime "other than murder or manslaughter", is acquitted by the jury, they must state such fact to the court. In Illinois[7] and Missouri[8] the jury must not only state whether they acquit the defendant because of his insanity

[1] *Cf.* Appeal of Jefferson, 1 Cr. Ap. Rep., 95, 97 (1908), and Appeal of Gilbert, 11 Cr. Ap. Rep., 23, 25 (1914).

[2] *Cf.* Appeal of Codere, 12 Cr. Ap. Rep., 21, 29 (1916), wherein the Court refused to substitute a special verdict, but, because of questionable mental condition of accused, commended the case to the Home Secretary who "has opportunities of enquiring into matters which are not before us."

[3] Appendix, p. 632. [4] *Id.*, p. 525. [5] *Id.*, p. 598.
[6] *Id.*, p. 563. [7] *Id.*, p. 534. [8] *Id.*, p. 570.

(and irresponsibility) at the time of the offense, but, in addition, whether defendant has or has not "entirely and permanently recovered from such lunacy or insanity." In Maryland [1] the jury finds both whether the defendant was insane at the time of the act, and whether he still is "insane, lunatic, or otherwise."

Statement as to Acquitted Defendant's Dangerousness. — In other States, the same jury that acquits is required, instead of giving their opinion *in general*, as to whether the defendant is still insane, to say specifically whether they regard him as still *dangerous*. Thus, in Mississippi,[2] the jury must state whether they acquit the defendant on the ground of insanity (and irresponsibility) and also "whether the accused have since been restored to reason, and whether he be dangerous to the community." In Minnesota [3] the jury must state, in addition to whether they acquit because of insanity (and irresponsibility), whether, in their opinion, the defendant had "homicidal tendencies" at the time of the offense.

Insanity at Time of Acquittal Determined by Separate Procedure. — In several States the insanity of a defendant *at the time of the jury's verdict* of acquittal because of insanity (and irresponsibility) during the offense, is determined by separate machinery; the types of procedure will appear below in discussing the disposition made of defendants acquitted because of insanity and irresponsibility.

In order to avoid the abuse of the writ of *habeas corpus* it has been recommended from several sources that the British verdict of "guilty but insane" be adopted in the American courts. This recommendation will be discussed in the concluding chapter.

Section 2 — Disposal of Defendants Acquitted on a Plea of Insanity

Defendant Discharged Where Jury Finds Him Insane at Time of Offense and Sane at Time of Verdict. — In a few States, of which Washington [4] is typical, if the jury acquit because defendant was insane and irresponsible at the time of the offense, and also find that defendant is at the time of their verdict no longer insane, or dangerous, such defendant is allowed to go free. Such procedure divides among twelve persons the responsibility of permitting a person acquitted of a homicide, for example, to continue at large.

[1] Appendix, p. 559. [2] *Id.*, p. 568. [3] *Id.*, p. 566. [4] *Id.*, p. 632.

However, it is also provided in Washington [1] that the prosecuting attorney may cause such person who has been discharged on acquittal to be brought before the court for a special jury trial as to his mental condition, at which the evidence on the trial of the main issue may be introduced and the jurors at the main trial may be required to testify as to the ground of the acquittal of the defendant; and, if he is then found insane, he must be committed as a criminally insane person.

This is a safeguard against erratic action by a jury; but it would be still better if proceedings for the incarceration of such acquitted defendants could be instituted on complaint of the State department of mental diseases, or similar body, and the inquiry be held before a commission of qualified experts; since a second jury trial may result in a similar disposition of such cases as has the first jury trial.

Specific Procedure in Illinois for Special Types of Crime. — In Illinois, while it is provided that if the jury acquit and also find defendant has "entirely and permanently" recovered, he must be discharged, what appears to be a contradictory measure also provides that when a person is acquitted, because of insanity (and irresponsibility), of the crime of murder, attempt to murder, or rape, attempt at rape, highway robbery or arson, the judge must order such person sent to an "asylum" for "insane criminals", there to remain until discharged by the board of charities.[2]

Sanity of Defendant after Acquittal Determined by Another Jury. — In Utah,[3] when a defendant is acquitted by a jury because of insanity (and irresponsibility), complaint must be made setting forth such fact, and a *new jury trial* must then be had on the question of defendant's sanity at the time of such acquittal. In California,[4] Arizona,[5] Montana,[6] Idaho [7] and one or two other States, the court, when a defendant has been acquitted by reason of insanity (and irresponsibility), *may* order another jury trial to determine "whether the defendant continues to be insane." The court may order the same witnesses to testify that did so at the main trial, may direct the county attorney to conduct the proceedings, and counsel may appear for the defendant. Where the jury finds such person not insane at the time of their inquiry, he is permitted to go at large.

[1] Appendix, p. 632. [2] *Id.*, p. 534. [3] *Id.*, p. 623.
[4] *Id.*, p. 516. [5] *Id.*, p. 508. [6] *Id.*, p. 573. [7] *Id.*, p. 533.

Criticism. — The provisions described above, as is the case with those in vogue in many States to determine the sanity of a defendant at any stage *before* or *during* the trial, merely duplicate the expense and undesirable features of a jury trial, and divide responsibility for permitting a person acquitted because of insanity (and irresponsibility) to remain at large, although he may actually have dangerous tendencies. Whether such a person can safely be permitted at large is a question of medical and social science, not to be answered by the prejudices or ignorance of a lay jury.[1] As some legal machinery must be used in such cases, it is better that either the court itself, or a commission appointed as an arm of the court, should determine this important question.

Compulsory, Routine Commitment to State Hospital on Acquittal. — In some ten States, the statutes do not allow the trial court any discretion where a jury acquits a person because of insanity (and irresponsibility), and such person is, in those jurisdictions, automatically forthwith committed to an asylum. Such is the case, for example, in Wisconsin,[2] Kansas,[3] Nebraska [4] and other States. In Ohio [5] the proceedings at the trial of such acquitted person are automatically certified to the clerk of the probate court, and such person is there proceeded against on the " charge of lunacy ", the verdict at the main trial being regarded in the probate court as *prima facie* evidence of such person's insanity. In Nevada [6] it is provided, similarly, that the verdict of " not guilty by reason of insanity " . . . " shall have the same force and effect as if he were regularly adjuged insane ", and the judge must

[1] Dr. William A. White, in his illuminating little book, " Insanity and the Criminal Law ", p. 67, gives some striking examples of what a jury is capable of in such cases. While he cites the following case in connection with discussion of the writ of *habeas corpus*, it is pertinent here. A retired sergeant, who became paranoid, was sent to the Government Hospital for the Insane at Washington. After a time he was brought before a jury in the District of Columbia Supreme Court to have him declared legally of unsound mind so that a guardian might be appointed who would handle his funds and provide for his wife. Although "four physicians testified that they had examined him and found him of unsound mind and stated at length the nature of his disease and the course of his delusional ideas, the patient himself took the stand and was shrewd enough to deny all his delusions, saying that he had formerly thought these things, but did not do so now", and the jury found him of sound mind. After his release (because of legal advice that it would be unlawful further to restrain him) the patient, while passing along a crowded street, identified one of his imaginary enemies, shot him through the back, was indicted for assault with a deadly weapon, but, as it was then seen he was insane, was not tried but returned to the hospital from whence he came. Such cases can be multiplied by the experience in many States.

[2] Appendix, p. 638. [3] *Id.*, p. 548. [4] *Id.*, p. 574. [5] *Id.*, p. 598. [6] *Id.*, p. 577.

commit defendant to a hospital for the "insane." In Georgia, too, although no specific legislation on the subject is provided, acquittal of a defendant on the ground of insanity (and irresponsibility) is regarded as equivalent to the verdict of a lunacy commission,[1] and such person is automatically committed. These provisions have been generally regarded as not violative of constitutional guarantees.[2]

Massachusetts Rule. — In Massachusetts, if a person charged with any crime other than murder or manslaughter is acquitted by a jury by reason of insanity, the court may, "if satisfied that he is insane", commit such person to a State hospital.[3] In the case of a defendant acquitted of murder or manslaughter, however, the court *must* "order him to be committed to a hospital for the insane during his natural life." [4]

Disposition of Defendant Discretionary with Court. — In some twenty States it is provided that when a jury acquits a person by reason of insanity (and irresponsibility), the court *may*, if *it* deem his discharge dangerous, commit him to a State hospital.

In the District of Columbia [5] the court certifies the fact of such acquittal to the Secretary of the Interior, who may or may not order such person confined. In Michigan [6] such person may be committed to prison, and in Pennsylvania [7] and New Mexico [8] the court may order such person confined in such place as it may deem fit. In Vermont,[9] too, such person may be confined in prison, hospital, or other "suitable place", under such terms as the court may dictate, which terms may be altered from time to time. In Florida [10] such person may be given by the court "into the care of his friends", on their giving proper security; and in Connecticut [11] the court may order such person confined in a State hospital for the mentally ill "for such time as the court shall direct, unless some person shall undertake before said court, and give bond to the State conditioned, to confine such person in such manner as such court shall order." In South Dakota [12] such person may also be sent to a State hospital or put under the care of such individuals as the court may direct. In Rhode Island [13] the court certifies its opinion in such cases to the *governor*, who may cause a person ac-

[1] Letter to writer from the Attorney General of Georgia.
[2] *See* note in Appendix, p. 548, discussing case of In re Clark, 86 Kans., 539, and other cases.
[3] *Id.*, p. 563. [4] *Id.* [5] *Id.*, p. 525. [6] *Id.*, p. 565.
[7] *Id.*, p. 610. [8] *Id.*, p. 583. [9] *Id.*, p. 625. [10] *Id.*, p. 526.
[11] *Id.*, p. 520. [12] *Id.*, p. 617. [13] *Id.*, p. 614.

quitted by reason of insanity to be removed to prison, the State hospital, or some institution for the mentally ill.

In North Carolina [1] it is provided that after the acquittal of a person because of insanity (and irresponsibility), the court must make an inquisition as to the mental condition of such person at the time of acquittal, take testimony, etc., in order to have a basis for the exercise of its discretion; and in one or two States the court must " make careful inquiry ", in such cases, but the method and manner of such inquiry are not definitely prescribed.

Criticism. — In all these cases the court has a wide discretion, and the safety of the community, as well as the genuine wellbeing of the person so acquitted by reason of insanity (and irresponsibility), depends upon the ability and enlightenment of judges and the facilities at their disposal, such as psychopathic hospitals, clinics, etc. Here there is wide scope for bringing to the attention of such judges the contributions of psychology, psychiatry, applied social ethics, as well as other disciplines, to the problems of crime and criminals.[2]

Section 3 — Manner of Enlargement from Hospital for Mentally Ill or Similar Institution

Habeas Corpus. — The remedy generally applicable when a person acquitted of crime because of insanity (and irresponsibility), and thereupon committed to an institution, seeks his release, is the ancient " *Writ of Habeas Corpus.*" [3] The law respecting the use of the writ is to-day largely statutory, and statutory regulation

[1] Appendix, p. 592.

[2] Professor Edward S. Corwin, of Princeton, and other contemporary jurists, recommend the training of young men for the career of judge, as is now done in some European countries, and making the judiciary a separate profession. — Interview, *New York Times*, Nov. 4, 1923. In the meantime, there is scope for the training of men on the bench in the social sciences which the law must take account of, through the coöperation of members of the various professions by means of joint professional conferences, papers, lectures, etc.

[3] "A writ directed to the person detaining another and commanding him to produce the body of the prisoner at a certain time and place, with the day and cause of his caption and detention, to do, submit to, and receive whatsoever the court or judge awarding the writ shall consider in that behalf.

"This is the most famous writ in the law; and, having for many centuries been employed to remove illegal restraint upon personal liberty, no matter by what power imposed, it is often called the great writ of liberty." — Bouvier's "Law Dictionary", 3d Ed., Vol. 2, p. 1400.

" As the States are sovereign political communities in all respects except those expressly delegated in the Federal constitution, they are limited, in their judicial power, only by the Federal Constitution, and they may at will create, apportion, and limit the jurisdiction of their courts over the writ of *habeas*

covers both the method of obtaining the writ and the purposes for which it may be issued. Though such writ is considered a matter of right, it is issued in the exercise of judicial discretion. Further, the writ will not *usually* be granted, where some other appropriate legal remedy exists. Thus the existence of a statute providing that a person confined after acquittal on the ground of insanity (and irresponsibility) shall not be released until the superintendent of the asylum certifies to the court that the petitioner is wholly recovered and that no person would be in danger by his discharge, and until the court issues an order discharging him, has been held to be a bar to the use of the writ of *habeas corpus*, unless the petitioner has first resorted, without success, to the remedy provided.[1] However, it has been insisted in some instances that the existence of another procedure does not necessarily mean that it is exclusive; a court may still be resorted to for relief by means of *habeas corpus*, and in its discretion may authorize relief under the writ in spite of other procedure provided by statute.[2] The constitutionality of a statute providing for the summary commitment to a hospital of one acquitted on the ground of insanity (and irresponsibility) may always be inquired into by *habeas corpus*.[3]

corpus, subject only to constitutional restrictions." — Church, "Habeas Corpus", 67, *cited* by Bouvier, p. 1402.

"The true use of the writ is to cause a legal inquiry into the cause of imprisonment, and to procure the release of the prisoner where that is found to be illegal." — Bouvier, *op. cit.*, 1405.

The application for the writ may be made either by the prisoner or some person on his behalf, when for some reason he is unable to make it. The usual procedure is to make a petition, in writing, verified by affidavit, setting forth the prisoner's unlawful detention, and accompanied by copies of pertinent legal papers. The writ is directed to the person having the prisoner in custody, who must produce the prisoner immediately before the court and show the reason why he is detaining such person. The imprisoned person may deny the causes of his detention as set forth in the "return" to the writ, and produce other evidence. If the court finds the imprisonment illegal, the prisoner is forthwith discharged.

The Federal Constitution provides that "the Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." — Art. I, sec. 7, subd. 2.

[1] In re Ostatter, 103 Kans., 487, 489 (1918).

[2] In Gardner (medical superintendent) *v.* Jones (judge), 126 Cal., 614, 617 (1899), it was contended that the California statute covering the case gave the medical superintendent exclusive authority to determine when a patient of the criminal class is restored to sanity. But it was *held* that a "fair construction of all provisions of the statutes on the subject leads to the conclusion that, in a case like this, the superintendent of the State hospital may discharge the patient, and, if he fails or refuses to act the inmate may institute the inquiry into his sanity by the process of *habeas corpus*."

[3] People ex rel. Peabody *v.* Chanler, 133 App. Div. (N. Y.), 159, (1909), *affirmed* in 196 N. Y., 525, 89 N. E., 1109, 25 LRA., NS, 1946 (1909).

In general, then, it may be said that courts will not ordinarily grant the writ of *habeas corpus* where the petitioner has not first taken the other steps provided by law; but if he has done so, and has not succeeded, or if he can show that the superintendent or other official of the hospital is acting arbitrarily in refusing to discharge him, the courts will inquire into the matter under the writ of *habeas corpus*. There is usually no limit upon the number of times that such a writ may be applied for; although some States have attempted to regulate the matter. A reasonable regulation of the writ, as to the length of time which must intervene between successive applications, would probably not be held unconstitutional. We will return to a discussion of the abuse of this privilege, after considering other usual modes of procedure for the release of the mentally disordered offender.

Special Statutory Provisions in Addition to Habeas Corpus. — In about a fourth of the States no special legislation covering the discharge of persons confined on acquittal because of insanity (and irresponsibility) is provided; the general common law provisions regarding the use of the writ of *habeas corpus* being considered sufficient to cover such cases. In nine or ten States, the use of the writ in cases of illegal deprivation of the liberty of insane persons is specially provided for. In some of the latter group, specific provisions are made for the nature of the testimony at such proceedings. In New York,[1] Michigan [2] and other States, for example, it is specially provided that the medical history of the patient, as it appears in the records of the hospital, may be given in evidence; and that the superintendent must be sworn and must testify as to the mental condition of the patient. However, such testimony is probably also introduced, as a matter of course, in States in which it is not specially mentioned by statute.

Habeas Corpus with or without Jury. — The hearing upon the return of the writ of *habeas corpus* may be with or without a jury. In New Jersey [3] and West Virginia,[4] for example, the hearing on *habeas corpus* may be with or without a jury, in the *judge's* discretion; in Alabama,[5] on the other hand, if the *petitioner* demands a jury trial on the return of the writ of *habeas corpus*, it must be granted. In these cases, a hearing before a judge is more efficient; as a judge is better able to weigh the conflicting

[1] Appendix, p. 589. [2] *Id.*, p. 566. [3] *Id.*, p. 582.
[4] *Id.*, p. 636. [5] *Id.*, p. 506.

individual and social interests involved and to understand the medical testimony.

Discharge by Superintendent. — In several States, as was mentioned at the outset, the superintendent is given authority to discharge persons committed after acquittal, when he deems it safe to do so; but, as was held in California,[1] if the superintendent refuses to act, the prisoner can resort to *habeas corpus*. In Virginia [2] it is provided that, on the request of the superintendent of the institution where an acquitted person is confined, the attorney for the Commonwealth must appear in opposition to the discharge; and in a few States it is his duty to oppose the release of all such persons.

Discharge by Superintendent and Board. — In several States the discharge of one confined in an asylum after acquittal because of insanity (and irresponsibility) is effected by the superintendent with the consent and advice of some advisory or governing body. Thus in Ohio [3] discharge may be by the superintendent with the consent and advice of the trustees; and it is further provided that "no patient who in the judgment of the superintendent has homicidal or suicidal propensities shall be discharged." In Illinois [4] a person acquitted of one of the more serious crimes, who has been sent to a hospital, must remain there "until adjudged by the medical superintendent thereof, and the Board of Commissioners of Public Charities a fit subject to be discharged." It must be remembered, however, that patients can always resort to the writ of *habeas corpus* even in these jurisdictions. Hence the efficiency of such legislation from the point of view of safety to the public depends in the final analysis upon the calibre of judge and jury.

Discharge by County Commissioners of Insanity. — In Iowa [5] the discharge of persons detained in a hospital after acquittal on the ground of insanity (and irresponsibility) is in the power of the county commissioners of insanity. It is also provided [6] that a commission of inquiry, consisting of a physician and lawyer, can be appointed by a court on a statement verified by affidavit that such person is not insane and is unjustly deprived of his liberty. This commission visits the hospital, interviews the patient and reports to the court, which, if it finds such person not insane, may discharge him. Such commission can not be appointed oftener than once in six months.

[1] Appendix, p. 516. *See* note. [2] *Id.*, p. 630. [3] *Id.*, p. 599.
[4] *Id.*, p. 534. [5] *Id.*, p. 544. [6] *Id.*

Release by State Board of Corrections. — In Kansas [1] no person confined after acquittal because of insanity (and irresponsibility) can be released except upon an order of the State Board of Corrections after a full hearing and a finding by the board that such person " is wholly recovered " and that " no person will be endangered by his or her discharge."

Discharge by Three Trustees, Commission of Lunacy, or Justice of Supreme Court. — In New Hampshire [2] the discharge of such person is " by any three of the trustees " (of the asylum), " by the commission of lunacy or by a justice of the supreme court." The Superior Court may also parole such person committed to the New Hampshire State Hospital.

Discharge upon Report of a Commission. — In Rhode Island,[3] on the petition of a person confined in the hospital, or any one on his behalf, to a justice of the Supreme Court, alleging that such person is " not insane", and is unjustly deprived of his liberty, the justice appoints a commission and the commissioners are required to make a personal examination of such imprisoned person " without the presence of the superintendent or any other person connected with such court "; and, upon their report, the justice may either confirm or disallow it and take other appropriate action.

Denial of Habeas Corpus. — In Wisconsin [4] it is specifically provided that persons in the Central State Hospital (that is, those acquitted of crime and committed there) shall not be entitled to the writ of *habeas corpus*, other provisions for their discharge on petition being considered sufficient. Upon petition by the inmate or his relative or friend setting forth the fact of trial, acquittal on plea of insanity, and commitment, the court appoints two physicians of special qualifications to examine him. The petitioner and others may appear at such examination and give testimony; and if the physicians report him sane and the judge believes him sane, he is discharged. The person may, however, demand a jury trial. The State Board of Control, acting as a " lunacy commission ", may conduct such an examination, and its findings are accepted and have the same force and effect as if made by a judge.

Procedure in Washington. — In the State of Washington elaborate provision is made for the procedure to be followed when a person acquitted because of insanity (and irresponsibility) and

[1] Appendix, p. 548. [2] *Id.*, p. 578. [3] *Id.*, p. 614. [4] *Id.*, p. 640.

thereupon committed to a hospital, desires his release.[1] Such persons must apply to the physician in charge of the criminal insane for an examination of his "mental condition and fitness to be at large." If the physician certifies to the warden that there is "reasonable cause to believe that such person has become sane since his commitment and is a safe person to be at large", the warden permits the prisoner to petition the court that committed him, stating the fact of his trial, acquittal, commitment, and alleged cure, and praying for discharge. A copy of the petition is served on the prosecuting attorney whose duty it is to "resist the application." The burden of proving that "he has, since his commitment, become a safe person to be at large", is upon the prisoner. Either party may read into the evidence the testimony at the original trial which resulted in the defendant's acquittal on the ground of insanity (and irresponsibility). The jury must find "whether the petitioner has become sane since his commitment, is not liable to a recurrence of the mental unsoundness or relapse, and is a safe person to be at large." And if they so find he is discharged. Upon a "certificate of probable cause" by the physician, such prisoner, if found still insane at this trial, may, at a later time, again petition the court.

Besides this procedure it is also provided[2] that the prosecuting attorney of any county where a person acquitted because of insanity (and irresponsibility) is *not in custody*, may, on his own initiative, have such person brought before the court for a trial of the question of his sanity, "by filing a petition in the name of the State setting up the commission of a crime by such person, his acquittal thereof because of his insanity, and his insanity or mental irresponsibility at the present time." Here again the question is tried before a jury, the testimony on the trial in chief is admissible, and the jurors on that trial may testify as to the grounds of their acquittal of the defendant. Appeals to the Supreme Court are permitted. This last provision covers the case of one acquitted and found by the jury trying him to be *sane* at the time of such acquittal, where it is believed the jury was in error as to defendant's mental condition at the time of their verdict.

Still another section[3] of the Washington law provides that if a

[1] *See* In re Brown, 49 Wash. (1908), 177, for application of the Washington law.

[2] Appendix, p. 632.

[3] *Id.*, p. 633.

person discharged under the proceedings on petition, should at some later time become insane or be regarded an unsafe person to be at large, the prosecuting attorney may file a petition setting up such relapse; and the defendant must then be brought into court, and a jury trial given him as to his mental condition at that time, at which the evidence in the previous trials may be introduced.

Criticism of Washington Provision. — It would seem that these provisions constitute a wise piece of socio-legal engineering in such cases. Proceedings for the release of such persons are *initiated* by the prison physician who, presumably, is trained in mental medicine. It would be better, however, to have the hearing before a judge instead of a jury. Nevertheless, even with a jury, the provision whereby the prosecutor can take action in cases where a person manifestly dangerous to be at large has been acquitted by a jury and released from custody, affords a means of checking up on an ignorant, prejudiced, or recalcitrant jury, albeit by way of another jury. Further, the possible "relapse" of persons who have aleady committed one serious offense is specially taken notice of and provided for.

Monthly Report and Examination by Superintendent. — In New Mexico [1] the superintendent of the hospital for the mentally ill must examine all inmates monthly, to see what their mental condition is; and his findings are certified to the interested judges, who must order those persons discharged, who have been certified as sane. This places the responsibility for release of such persons where it most appropriately belongs — on the shoulders of a trained expert who has had the opportunity to study the inmate over a period of incarceration and treatment. The entering of an order for discharge by the judge is apparently mandatory upon the superintendent's report that a certain inmate has recovered. Moreover, the routine, periodic report to the different judges as to the mental status of patients, guarantees to these patients a regular, periodic consideration of their cases, with a view to discharge.

Release by Court only on Certification of Superintendent. — In Minnesota [2] no person in confinement after acquittal because of insanity (and irresponsibility) is released unless the superintendent of the hospital or asylum "shall certify in writing to such commit-

[1] Appendix, p. 583. [2] *Id.*, p. 567.

ting court that, in his opinion, such person is wholly recovered and that no person will be endangered by the discharge."

Petition Served on Person Against Whom Offense was Committed.—In Connecticut [1] an acquitted person in a hospital, or the officers of the hospital, may petition the Superior Court for his discharge, and the petition must be served on the selectmen of the town to which the prisoner belongs and, where possible, upon the *person upon whom the offense was committed*, as well as the appropriate State's attorney. *Habeas corpus* is also specifically provided for. In Indiana,[2] after six months from the time of commitment of one acquitted because of insanity (and irresponsibility) he may file an application in the court which committed him to be discharged, and, "upon satisfactory proof being made to such court of the restoration of the sanity of such person and that the recurrence of such an attack of insanity is improbable", the court must order his discharge; a second application can be made only after two years from the time of the previous application. *Habeas corpus* is also specifically provided for, but this, like the former remedy, is limited as to time, the law providing that writs of *habeas corpus* shall not issue oftener than once in three months.

Discharge by Act of the General Assembly or by Governor. — In North Carolina it is provided that "no person acquitted of a capital felony on the ground of insanity shall be discharged therefrom unless an act authorizing his discharge be passed by the General Assembly",[3] and those acquitted of a lesser offense and committed to a hospital can only be discharged by an order of the Governor. Similar provisions exist in Georgia. To leave such matters to the legislative branch of the government is obviously an inefficient solution. One has only to study some instances of "legislative justice" in other fields of law,[4] to surmise the kind of disposition of such cases to be expected where the discharge of persons acquitted of crime because of insanity (and irresponsibility)

[1] Appendix, pp. 520, 521. [2] *Id.*, p. 539.

[3] *Id.*, p. 593. Although the unconstitutionality of this provision was pointed out in eloquent language, in 1904, by the North Carolina Supreme Court (In re Boyett, 136 N. C., 415), on the ground, among others, that it vests judicial power in the legislative branch of the government, which is prohibited by the State's constitution, this section (6239) is still in the books. *See* note to section 6237 in the Appendix, p. 592.

[4] *See* Pound, "Outline of Lectures on Jurisprudence", 3d Ed., p. 75, and citations listed.

is left to a body with such divided responsibility, uncertain tenure of office, and ready susceptibility to lobbying, if not corruption, as a legislature.

Discharge by Governor and Council. — In Massachusetts, as we have seen,[1] a person acquitted of murder or manslaughter must be committed to a State hospital for the insane "during his natural life"; and such person can only be discharged by the Governor with the advice and consent of his Council, when "satisfied after an investigation by the Department (of Mental Diseases) that such discharge will not cause danger to others." As to defective delinquents [2] it is provided that any person, at any time, may apply to the justice of the District Court in whose jurisdiction a department for defective delinquents is located for the discharge of any inmate of such department; and if, after a hearing, the justice finds it "probable that the inmate can be allowed to be at large without serious injury to himself or injury or annoyance to others", he may order such person *paroled*, further action on the application for discharge being meanwhile suspended for a year from the date of parole. The justice may at any time recall such defective delinquent from parole. If an application for parole is denied, a new application can not be made within one year; and if the judge is satisfied with the person's record on a year's parole, he may order him discharged, subject, however, to his liability to be summarily recommitted by any court, if he has committed any offense after discharge. This last provision has the same end in view as the Washington law.

Discharge to Custody of Friends on Proper Security. — In a few States, of which Pennsylvania [3] and Maine [4] are examples, if the kindred or friends of a person acquitted because of insanity (and irresponsibility) give security satisfactory to the court, with the condition that such insane, acquitted person "shall be restrained from the commission of any offense by seclusion or otherwise" (Pennsylvania), the court may release such person. In Maine such person may be committed to the custody of a friend who will give sufficient surety to the probate judge "conditioned for the safekeeping of such insane person, and the payment of all damages which any person may sustain by his acts." There would seem to be grave danger in such disposition of these cases, as friends and relatives are only too ready to make promises for the safekeep-

[1] Page 398. [2] *See* Appendix, p. 564. [3] *Id.*, p. 610. [4] *Id.*, p. 557.

ing of these persons, and surety companies are in business to provide bonds whenever possible. The existence of this legislation invites friends and relatives, as well as judges, to make use of it, and the result is that individuals untrained in psychiatry and unaware of the dangers involved in the discharge of persons who have already committed one serious crime, only too readily assume the responsibility for their release.

Review and Criticism of Provisions. — From the foregoing survey we find in operation, besides the ancient writ of *habeas corpus* (with or without a jury), some six types of machinery for the discharge of persons found insane before trial, or acquitted of crime because of insanity (and irresponsibility), who have been committed to a hospital: (1) Discharge by superintendent of hospital for the mentally ill offender. This is a wise provision in so far as it places judgment of the question of the inmate's safety to be at large in a person most fit to exercise it; but it would seem better practice if such discharge were *officially* made by the proper court on recommendation of the superintendent. In this connection the New Mexico law providing for periodic report of the mental condition of inmates to the interested courts seems to be a wise arrangement. (2) Discharge by superintendent and some advisory or governing board, such as the trustees of the hospital, board of charities, board of corrections, State hospital commission, etc., or by such board alone, as in Kansas. Here, too, it were better to include the formality of discharge by a court. (3) Discharge by court on report of commission appointed by the court. This procedure ought to operate satisfactorily provided the commissioners are of high professional standing, and have had sufficient experience in the treatment of the mentally ill. (4) Discharge by Governor and Council after report of hospital commission or similar body. This is the Massachusetts rule as to homicide cases; and as the Governor bases his action on the report of a trained, responsible body, it provides for a wise disposal of the problem.[1] (5) Wash-

[1] The constitutionality of this provision, which in homicide cases actually operates as a special verdict of "not guilty but permanently and dangerously insane", has never been directly questioned. In the case of Gleason *v.* West Boylston, 136 Mass., 489, 490 (1884), this section was incidentally under construction in a suit to compel a city to reimburse the State for the support, in an asylum, of one acquitted on the ground of insanity. The court said that an insane person acquitted of a *homicide* is not held in the asylum "as other inmates are held; he cannot be discharged, as others can be, by the trustees, or by a court upon proof that he is not insane, . . . He is confined in the hospital as a place of detention, because his being at large would be dangerous

ington procedure. This procedure, whereby the recommendation of the physician of the hospital is necessary before a petition can be filed, seems to be the most promising, at least as far as persons who have not committed homicides are concerned. (6) Discharge by State legislature. This procedure provided for by the Georgia and North Carolina laws seems to be the least suited for the purpose. (7) Discharge of patient to the custody of relatives or friends, upon surety satisfactory to the court. The dangers of such procedure have already been alluded to.

It would appear that the question of the particular authority which discharges is of secondary importance (except in the case of discharge by the legislature), provided *a proper balancing between the social interest in the rights of the individual and the social interest in the safety of the public is maintained,* and provided, further, that the questions of mental disorder and behavior-capacity are considered by those who are in a position to pass upon them. The Washington arrangement, under the operation of efficient officials in State hospitals and prosecutors' offices, would seem, on its face, to be the most nearly calculated to effectuate these requirements.

Law of Habeas Corpus "In Action." — The real difficulty arises when the writ of *habeas corpus* is abused; usually, when the petitioner is granted a jury trial on such writ. As was seen, in spite of the existence of the various special laws governing the discharge of insane persons, there is apparently nothing, in most jurisdictions, to prevent the use and abuse of the writ of *habeas corpus* after the special remedy has been exhausted. Some instances of such abuse will now be considered by way of illustration.

In an address which stimulated much discussion and great activity on the part of the New York State Bar Association,[1] the Superintendent of the Matteawan Hospital for mentally disordered offenders, Doctor Robert B. Lamb, vividly presented the results of a follow-up study of the careers of some forty-three cases

to the peace and safety of the community." (*See* Appendix, p. 564, note.) It would seem that this sort of procedure, which is similar to that in England under the Trial of Lunatics Act, would not be held unconstitutional; or at least that, if the converting of a verdict of "not guilty by reason of insanity", into one carrying with it life incarceration (whether this be in an asylum or prison) could be successfully assailed, the State can, in the exercise of the police power, make sufficiently drastic regulations to prevent the abuse of the writ of *habeas corpus.*

[1] "The Commitment and Discharge of the Insane Criminal", *Report of the New York State Bar Association,* Vol. XXXII, 1909, pp. 59, *et seq.*

of mentally ill persons who had been produced in obedience to writs of *habeas corpus*. The record is so eloquent of the weakness of this link in the chain of the legal treatment of the mentally disordered offender, that it is quoted in some detail:

> In two cases the writ was withdrawn after counsel had interviewed client. Of the remaining forty-one cases hearing was had, and of this number only seven were remanded to the custody of the hospital; six being so ordered after the judge had heard the cases and investigated the matter of the alleged sanity of the relator, the seventh order being granted after medical examiners appointed by the court had reported the patient to be an incurable paranoiac. It is interesting to know that the "Incurable Paranoiac", so adjudged by two specialists of New York City, on appeal to a jury, gained his release, and when last heard from, was again in a fair way to secure a fresh commitment. In thirty-four cases the court ordered the relator discharged from the hospital. Our table shows that of these thirty-four declared sane by the courts fourteen found their way back to either prison or asylum. Eight, after their release, showed signs of mental disturbance, and were troublesome to their families. Three, unable to earn their own livelihood, were cared for by their relatives. Six disappeared from view. Two committed suicide, and a single one, when last heard of, was partially self-sustaining. Of the forty-three cases, twenty-seven had committed criminal acts directly against persons and sixteen against property. Of the twenty-seven committing crime against person, twelve were charged with the crime of murder in the first degree, the diagnosis in a majority of instances indicating a chronic and irrecoverable insanity.

It would have been interesting, if Doctor Lamb had set out the types of psychoses from which these inmates were suffering; so that some suggestion might have been forthcoming from an experienced medical superintendent of a hospital for the mentally ill offender, as to whether it is possible to evolve any rules of guidance to aid in determining which types of unsound offender it is absolutely unsafe to discharge at any time, and which might, with reasonable safety to themselves and society, be released. At present, the only suggestion made in various places is that those who have once committed a *homicide* should never be released. This, as we have seen, is the law in Massachusetts. But it might well be objected against this generality, that in the case of *manslaughter*, at least, committed during an acute, transitory psychosis (as, for example, during the manic phase of manic-depressive psychosis), grave injustice might in this way be done. Moreover, the only

reason why some mentally ill persons of serious potential danger did not commit homicides is because their violent assaults did not, by the merest chance, culminate in death; yet such potentially dangerous individuals would be released. The results of Doctor Lamb's investigations are sufficiently expressive of the serious shortcomings of our present procedural law. He pointed out, further, " that in all cases referred to which have been submitted to juries for verdict, the finding has been uniformly in favor of the lunatic, without regard to his previous history. It is equally noteworthy that when a judge has investigated the case his finding has been in favor of the hospital."

In a discussion of Doctor Lamb's paper, it was alleged that there is practically no limit to the number of times the friends and relatives of a person acquitted on the plea of insanity may apply for the writ; that, since, under the New York law, application for the writ may be made before " a justice of the Supreme Court in any part of the State ", there is a possibility of some ninety-seven [1] applications by, and investigations of, the same person. That this is not greatly exaggerated was shown by the ingenuity of counsel in the elaborate and protracted legal proceedings of the notorious Thaw case. In practice it means that if the friends and relatives of a person acquitted, or not tried, because of insanity can raise sufficient funds, there is no limit to the number of times that the question of regained sanity can be raised on *habeas corpus* proceedings; and that sometime, somewhere, the convenient, gullible jury will be found to return a dangerous person to the bosom of society. Incidentally, this procedure means, of course, that here, as elsewhere, the poor are at a disadvantage in the purchase of that commodity euphoniously referred to as " justice." [2]

We have seen [3] that Dr. William A. White has but recently [4] pointed out similar weaknesses in the procedure by *habeas corpus* in insanity cases. At the same time, we must remember that society is not only interested in the social security, but in the welfare of the individual; and that here, as throughout the law, we are concerned with a balancing of interests. Any proposed reform must take this fact into account. Doctor Lamb suggests

[1] The number of applications has, I understand, now been limited to some extent.

[2] *Cf.* Reginald Heber Smith, "Justice and the Poor."

[3] Chapter 1, Case IV, p. 8, and note 1, p. 397, of this chapter.

[4] "Insanity and the Criminal Law" (1923).

that "it would seem perfectly fair that the same proceeding necessary to make the lunatic were employed to restore him to competency. That is, the certificate of two competent medical examiners, and the approval of the judge of a court of record. This would ensure a fixed individual responsibility and care not possible where juries are employed." Whether such procedure is the best that can be devised, and whether, as was proposed during the discussion of Doctor Lamb's paper, "the time has come to consider doing away with the special privileges of the insane as to writs of *habeas corpus*",[1] are matters that may well be reserved for consideration in the concluding chapter. There we shall discuss some proposals which have been made not only for the reform of this vital point in the legal machinery for coping with the criminal insane, but for the strengthening of other vulnerable spots in the law of insanity.

NOTE

ON THE ADMISSIBILITY OF EVIDENCE OF MENTAL DISORDER IN A HEARING OF MITIGATION OF PUNISHMENT, AFTER A PLEA OF "GUILTY"

An interesting question arises in the case where defendants plead guilty, throw themselves upon the mercy of the court, and attempt to introduce evidence of mental deviation from the normal, by way of extenuating circumstances in mitigation of punishment, in those jurisdictions which confer upon the trial court a discretionary power with reference to the degree and type of punishment. It has been urged, in at least one case (cited below), that such evidence can not be introduced by way of mitigation, on the ground that evidence of mental unsoundness can be introduced only upon a plea of "not guilty by reason of insanity." The type of case we are discussing is to be distinguished, at the outset, from the cases where evidence of mental unsoundness, *which arose after conviction but before sentence*, is introduced, — this last type of testimony being admissible in a hearing held to determine the mental condition of a convict at the time of such hearing.

The decisions on the point we are discussing are meager. The cases are agreed that evidence may be introduced and argument heard in mitigation as well as aggravation of sentence. — Rex *v.* Bunts, 2 Term Report, 683 (1788); Kistler *v.* St., 54 Ind., 400 (1876); People *v.* Vermilyea *et al.*, 7 Cow. (N. Y.), 108 (1827); People *v.* Bork, 96 N. Y., 188 (1884); State *v.* Reeder, 79 S. C., 139, 140 (1907); Parker *v.* St., 67 Neb., 555 (1903); Tracey *v.* St., 46 Neb., 361, 367 (1895).

[1] This, as we have seen, has practically been done in some jurisdictions; so that the criticisms of Doctors Lamb and White are not strictly applicable to those states.

In fact, examination of witnesses in mitigation or aggravation upon a plea of guilty, where such procedure is provided by statute, is usually held to be *mandatory*, and the record must show compliance with such provisions. — Arrano *v.* Peo., 24 Col., 233 (1897); Smith *v.* Peo., 32 Col., 251, 256 (1904).

The difficulty arises, however, as to the point whether evidence of *mental unsoundness*, or deviation from the normal mental health, is admissible by way of mitigation; especially, where a plea of guilty has been entered and the defendant has not set up a defense of irresponsibility because of insanity.

The Tracey Case (above cited) holds (p. 367) that: " When the prisoner is inquired of by the court whether he has anything to say why judgment should not be pronounced against him, he may make such statements of his previous good behavior, of his previous good *character*, of his age, of his *condition* at the time he committed the offense, and *the influences which were brought to bear upon him and led to his commission of the crime* as may induce the court ' to temper justice with mercy ' and to give the prisoner the least punishment provided for by the statute; and we cannot say that such action on his part would be an abuse of his discretion." (Italics ours.) Certainly, the question of mental condition must be considered in connection with passing judgment upon the " character ", " condition at the time " of the offense, and " influences . . . brought to bear " upon the defendant. More specifically, the court (p. 367) says: " The obvious intent of the statute in fixing the punishment for the crime of robbery at imprisonment from three to fifteen years was to invest the trial court with discretion to grade the punishment — within the limits of the statute — according to the enormity of the offense; to take into consideration in fixing the punishment all the circumstances in evidence under which the crime was committed; perhaps to consider the age, the *mental condition* and the previous good character of the person convicted."

Evidence of mental condition is admissible by way of mitigation, because, without this, evidence of *character* might be misinterpreted by the court, or, at least, might put the prosecution in an unfair advantage. The prosecutor introduces all the details of some ghastly crime, he *interprets* those details as indicating a depraved character. Now if the defense is not permitted to introduce testimony of the mental condition of the accused, such evidence and such interpretation must remain unchallenged and uncontradicted; while, if the defense can introduce such testimony, it may be able to convince the court that the very facts which the prosecution interpreted as evidencing a depraved character, in fact, and in the light of the medical testimony, actually indicate a disordered condition of mind. What is " character " if not the manifestation of a working mind? To divorce the act from the mental condition is a wholly artificial proceeding, condemned not only by psychology and psychiatry but by leading jurists. Dean Roscoe Pound, of Harvard Law School, says, for example: " Our traditional criminal law thinks of the offender as a free moral agent, who, having before him the choice whether to do right or wrong, intentionally chose to do wrong. . . . We know that the old analysis of act and intent can stand only as an artificial legal analysis and that the mental element in crime presents a series of difficult problems." (" Criminal Justice in Cleveland ", p. 586, The Cleveland Foundation, 1922.)

In the Philippine Islands, the Penal Code (1900), Chapter IV, Sec. 11, Arts. 77, *et seq.*, provides specific rules for diminishing or increasing penalties on the basis of detailed mitigating and aggravating circumstances. In United States *v.* Ligon, 15 Phil., 645 (1910), the mental condition of " loss of reason and self-control " was admitted in mitigation, reducing the penalty from death to " life imprisonment with accessories and indemnity."

In Smith *v.* Peo., 32 Col., 251, 258 (1904), the court said: " The character of the defendant, his habits, his social standing, his intelligence, his motive for the commission of the offense, are all subjects pertinent to the inquiry required by the statute as to the aggravation or mitigation of the offense." The leading authority in Social Psychology, Professor William McDougall, says: " The department of psychology that is of primary importance for the social sciences is that which deals with the springs of human action, the impulses and motives that sustain mental and bodily activity and regulate conduct. . . . It is the mental forces, the sources of energy, which set the ends and sustain the course of all human activity — of which forces the intellectual processes are but the servants, instruments, or means — that must be clearly defined." " An Introduction to Social Psychology ", 14th Ed., pp. 1, 3.

Now, while it is a commonplace in the criminal law that the motive with which an act was done, as such, does not affect the responsibility of the offender in the eyes of the law, nevertheless, as the court pointed out in the Smith Case, motives *are* admissible in a hearing before the court on the question of mitigation or aggravation of punishment. They are peculiarly the domain of the Court's prerogative of *mercy*, since they are not considered in establishing legal responsibility, as a general rule.

There is one strong case, — a case in which the point involved is similar to the Leopold-Loeb Case, recently considered in Chicago — in opposition to the position herein taken, People *v.* Miller, 114 Cal., 10, 13 (1896). In that case, the defendant pleaded guilty to murder, and the trial court, having already granted one postponement of the sentence to permit the defendant to produce evidence in mitigation of the death penalty, denied a second postponement to that end, to permit the defendant " to procure evidence of the previous good character of the defendant, and of the fact that at the time of the murder he was intoxicated, so that he was unable, at the time, to thoroughly appreciate his position, or to thoroughly distinguish right from wrong, or to form an intent to commit the crime." The trial court, in denying this second motion, held, " that under the circumstances the evidence was valueless — as to intoxication, because the defendant's confession admitted in evidence, with the other testimony which was taken, showed that the crime was deliberate and premeditated, and was perpetrated in accomplishment of a preëxisting plot; that the defendant knew at the time and afterward confessed in detail the part he took in it; and finally, because, if incapable of forming a criminal design, defendant was innocent of any crime, which consideration was removed by his plea of guilty." (Page 13.)

As to this case, in the first place, neither the trial court nor the Supreme Court cited any authorities in support of their position. Secondly, the trial court gratuitously assumed that the confession proves

the absence of a state of mind that might result in mitigation of sentence, while this is the very point which can only be decided by experts competent to inform the court upon a technical question involving a state of mind. Because, by a plea of guilty, defendant admitted that in accordance with the strict law, he was guilty, it does not at all follow that there might not have been a mental condition sufficient to constitute mitigating circumstances if not exemption from strictly legal " guilt." If this were not so, then there would be no room for the doctrine of mitigating circumstances altogether; because in all such cases the defendant is legally " guilty ", — whether as the result of the verdict of a jury or upon a plea to that effect. Experts are called in, in such cases, to aid the court in performing its difficult duty with respect to a condition of affairs which essentially involves an appeal to the *mercy* of the court, not the strict justice of the law. The error in the California case was made by counsel for the defense in so couching his statement as to what he hoped to prove by the expert testimony, as to give the trial court the opportunity to point out that questions of legal " right and wrong " and " guilty intent ", in a technical sense, were automatically disposed of by a plea of guilty. If counsel believed the defendant incapable of knowing right from wrong at the time of the offense, it was, of course, his duty to put in a plea of " not guilty " by reason of irresponsibility (legal insanity).

This brings us to another reason, in addition to the need of considering mental condition as part and parcel of all conduct, for the admissibility of the evidence of psychiatric experts in a hearing on the question of mitigation. Mental disease and legal insanity (*i.e.*, irresponsibility as determined by the application of the legal tests to the proved fact of mental disease) are two different concepts. The defendant, if he goes to trial on the plea of irresponsibility, has two distinct steps to take, namely: (1) to prove that he is mentally unsound; (2) to prove that his mental unsoundness is of such *degree and type* as would bring him completely under the exemptions provided for by the knowledge tests and the irresistible-impulse doctrine. It is quite true that in many cases, in the United States, this distinction is blurred. But these cases flow largely from McNaghten's Case (10 Clark and Finnelly, 200, 212 (1843)), and there are, strictly speaking, two distinct steps involved in insanity trials, suggested by the discussion of burden of proof in that famous case. In accordance with the views of Sir James FitzJames Stephen, England's greatest criminal jurist (" Digest of the Criminal Law ", Art. 29), Oppenheimer, (" Criminal Responsibility of Lunatics "), pp. 10, 247, 251, correctly says as follows as to the theoretical point we are considering:

" (1) Everybody is presumed to be sane.

" (2) Everybody, even one proved to be insane, is presumed to be responsible; in other words, even the raving lunatic is presumed to come up to the law's standard of responsibility, *i.e.*, to be able to distinguish right from wrong. . . . A prisoner who sets up the plea of insanity, has to prove:

" (1) That he is of unsound mind. Having satisfactorily established this, he must show further

" (2) That he fulfils that condition under which alone the law excuses a madman who has done an act otherwise criminal."

Hence it is that even in those jurisdictions where only the right-and-

wrong rule of irresponsibility prevails, evidence as to irresistible impulse, homicidal impulse, kleptomania, etc., is, strictly speaking, admissible; for it is admissible *not* to establish *irresponsibility*, to which purpose it is, strictly speaking, irrelevent (*i.e.*, when one considers the manner in which the knowledge tests are interpreted by the courts), but " in guiding the jury to arrive at a solution of the primary question whether the prisoner is suffering from mental disease, of which they are symptoms." Oppenheimer, *op. cit.*, p. 253.

That the distinction between mental unsoundness and irresponsibility sometimes becomes of the utmost importance, is indicated when certain borderline cases are considered, wherein the trial court refused to allow evidence of mental unsoundness to go to the jury on the question of *irresponsibility*, on the ground that there was not a sufficient case of *insanity* established for the jury to pass to the second stage of applying the legal tests of irresponsibility to the evidence of defendant's disordered mental condition. In Bast *v.* Com., 30 Ky. L. Rep., 967, 978 (1907), for example, there was testimony that the defendant was subject to epilepsy, but because a majority of the witnesses testified he knew right from wrong, although all agreed " that he was of weak mind and easily influenced ", and " physicians testified that epilepsy when extending over a long period, has a tendency to weaken the mind, *as it doubtless did in this case* " (in the language of the appellate court), the Kentucky Court of Appeals, nevertheless, in spite of this admission, upheld the trial court in its refusal to permit the issue of irresponsibility to go to the jury. Here the court confused the two issues; and, mental unsoundness having been established, it should have permitted the question of irresponsibility to go to the jury.

If the law provided for *degrees* of responsibility, so that proof of mental unsoundness falling short of proof of total irresponsibility would result in a lessened degree of responsibility and consequently of punishment, then there would be less excuse for counsel pleading " guilty " in such cases, throwing the defendant upon the mercy of the court, and introducing psychiatric testimony by way of mitigation. But such is not the law; and where counsel knows that defendant is mentally unsound, as established by psychiatric examinations, but also knows that the disorder is of such type and degree as would not exempt him completely from responsibility under existing tests, there is no way for him to have the jury legally take into account such condition. For the jury is bound to convict a defendant, legally (although, of course, it is well known that what a jury will do is always uncertain), if his mental condition is not such as to have deprived him of capacity to know right from wrong or to resist an impulse to wrongdoing. There is therefore but one legitimate course open to counsel for the defendant, where the latter has committed the act, but is mentally unsound in a manner and degree falling short of the requirements of the formal tests of irresponsibility; and that is to plead guilty, and introduce testimony tending to establish his client's mental unsoundness as of such type and degree as not to fall under prevailing, technical tests of irresponsibility, but nevertheless, as constituting a legitimate cause for the interposition of the mercy of the court, by way of mitigation of the harsh rules of irresponsibility. If this were not so, the law would be placing the mentally unsound

offender, whose condition happened not to come within the tests, exactly in the same position as the normally minded, deliberate, malicious murderer; for such disorders as manic-depressive psychosis, to cite but one example, would frequently not be acceptable either to establish irresponsibility (since it would not meet the requirements of the existing tests), or as a condition deserving less severe punishment, than that provided for the sound offender.

That evidence of mental condition at time of the offense is rightly admissible by way of mitigation is clear from such decisions as the Smith Case already cited. In that case the court quoted approvingly the definition of " mitigating circumstances " found in Black's " Law Dictionary ", p. 257, as follows: " Mitigating circumstances are such as do not constitute a justification or excuse of the offense in question, but which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability." Since evidence of mental unsoundness not meeting the tests and not constituting complete irresponsibility, would avail the defendant little or nothing on a trial, and would not constitute " justification or excuse ", such evidence is justly admissible only on a hearing in mitigation of punishment.

To recapitulate, evidence as to mental condition is admissible in a hearing on the question of mitigation of sentence for the following reasons:

1. Since all conduct involves mental activity, evidence of mental condition is always admissible to throw light upon the *motives* which were actually at work in the causation of the crime; and since the worthy or wicked motive with which a criminal act is committed does not ordinarily affect defendant's *responsibility*, it can only be considered by way of *mitigation of punishment.*

2. Evidence of mental condition is admissible in mitigation in order to enable the defense properly to rebut the testimony of aggravating circumstances, or of the details of the offense, by attempting to prove by medical testimony that the facts which the prosecution interpreted as indicating a depraved defendant, actually point to a disordered mind, but one falling short of the requirements of the technical tests of irresponsibility.

3. The defense of insanity involves two steps: the proof of mental disorder, and the proof of a mentally disordered person meeting the requirements of one of the tests of irresponsibility. If evidence on mental unsoundness were not admissible in hearings on mitigation, therefore, the mentally diseased individual, whose condition did not happen to be such as to fall within one of the more or less arbitrary tests, would be exactly in the same position, with respect to punishment, as the absolutely sound offender. If the law provided for degrees of responsibility, and permitted the acceptance by the jury of evidence of mental disorder insufficient to constitute complete irresponsibility as measured by the tests, but sufficient to permit the jury to find a less degree of the offense than would be the case where no such evidence was introduced, then resort to the plea of " guilty " and introduction of psychiatric testimony before the court by way of mitigation of the sentence, would not be necessary.

Several important considerations present themselves in connection with this case, in addition to the pure question of law involved.

In the first place, to compel one judge to pass upon the question of

life and death in the case of a person convicted of a capital offense is unwarranted and unfair to all concerned. It is unfair, manifestly, to the sole judge, who must shoulder what is, in the final analysis, a social responsibility, and who must bear the brunt of popular clamor; it is unfair to the person convicted, for it compels him to stake his all upon the opinions, views, sympathies, or prejudices of a single human being; finally, it is unfair to the public, who have a right to delegate their power to more than one person in these delicate cases. On the other hand, to place this serious duty upon the shoulders of too many only results in too great division of responsibility and possible evasion of duty. It would seem, therefore, that in jurisdictions which provide for judicial discretion in fixing the penalty in capital cases, where defendant has pleaded guilty and has thrown himself upon the mercy of the court, the hearing in mitigation should be before three justices, and that the opinions of two of the three should prevail in the disposition of the case.

Secondly, the success of the legal tactics in the Leopold-Loeb Hearing, — a plea of guilty with an appeal to the mercy of the court by the introduction of evidence of mental disorder, youthfulness, etc., — will no doubt stimulate the use of this method of procedure in those cases where public opinion seems to be strongly against the accused, and in cases where the mental condition, though not sufficient to satisfy the requirements of the law's tests of irresponsibility, can not, nevertheless, be considered normal. As substituting *at least the opportunity* for a calm, rational and scientific consideration of the facts in the case as well as the defendant's entire natural history, for the usual forensic battle between alienists in the ordinary trial of these cases, this practice of pleading guilty and appealing to the mercy of the court has much in its favor. It affords an opportunity to introduce "the psychiatric approach" not ordinarily possible in *jury* trials in an enflamed community whose primitive bloodlust is artificially whipped up by none too scrupulous yellow journals. Since, however, the jury is intended to be more than a mere fact-finding instrumentality (as will be discussed on page 465 of the text), it would seem the better practice, at least in the present stage of the public mind with reference to these matters, to provide for a jury trial in capital cases, even upon a plea of guilty, only on condition, however, that the doctrines of partial responsibility and others to be mentioned later are also provided for.

CHAPTER 12

SUMMARY, CONCLUSIONS, AND RECOMMENDATIONS

"We have reached the point where the apparently firm foundations of criminal law appear to quake, where a new structure is to be erected, the stones of which have not yet been tried, a part of the material of which has still to be found. But this cannot now or ever be done in the study, nor by means of theoretical abstractions. Only dispassionate consideration that views impartially the phenomena which we call crimes, which observes first and then concludes, — in a word, only the natural scientific method, — can smooth the way that leads to a knowledge of crime and criminals. Not until then will a sure foundation be laid for the proud structure of legal security." — Gustav Aschaffenburg, "Crime and Its Repression", p. 322, "Modern Criminal Science Series", No. 6 (1913).

Section 1 — Summary of Findings

Sketch of Argument. — In order that we may analyze past and present proposals for the reform of the law of insanity, and as a basis for our own recommendations, it will be helpful to summarize our findings in the foregoing pages.

In the introductory chapter we considered certain cases illustrative of the problems before us. We found that our subject naturally falls into two sets of problems. The first comprises the modes of ascertainment of the mental condition of accused persons, before, during, and after *trial;* the second involves the question of the mental condition of defendants at the time of the alleged offense, *i.e.*, the issue of criminal irresponsibility. We said that the first group of problems largely involves a consideration of the types and operation of the procedural machinery for the selection and hospitalization or other appropriate disposition of those persons whom, because of their mental condition, it would be unwise, unjust, and unnecessarily expensive to try; the second class of problems involves the ethical, psychological, and psychopathological, as well as legal, features of the so called tests of irresponsibility.

In the second chapter, in order to provide the lay reader with the necessary background, we outlined the criminal procedure and the law of evidence applicable to our problem. We found that the question of insanity may be raised at the preliminary hearing before the magistrate, or while the accused is in jail awaiting trial, or upon arraignment in the trial court, or at any stage during the

trial; and it was pointed out that the magistrates' courts constitute the strategic point at which the services of psychological-psychiatric clinics would be of prime value. When the issue of insanity is raised immediately before, or during, trial, the question may be either: "Is the defendant sane enough to plead and to aid and advise his counsel in conducting his defense?"; or, "Was the accused, when he committed the act charged against him, so insane as to be criminally irresponsible?" We found that in many jurisdictions the second question is not put in issue by the usual plea of "not guilty", but that a special, technical plea is required; moreover, that where this plea is not filed, the issue of insanity can not be later raised. And we pointed out that this technicality was objectionable in that the fact to be determined at the trial is, after all, the defendant's mental condition, and not some technical theory of pleading; further, that the reasons for requiring the separate, technical plea were not well founded in theory or practice. The Washington plea and procedure were recommended for general adoption. This plea sets out (1) defendant's mental condition and criminal irresponsibility at the time of the act, (2) whether such condition still exists, or, (3) whether the defendant has become "sane or mentally responsible" between the time of the act and the time of trial; and the practice is to permit this plea to be interposed either at arraignment, or at any time before the submission of the case to the jury.

In the third section of this chapter on the adjective law, we discussed the evils of the present system of medical expert testimony, and some pertinent rules of evidence, including the hypothetical question. We showed that the hypothetical question and expert testimony procedure are founded upon erroneous psychology; that the hypothetical question is inefficient in practice, and that, due to the modern system of expert testimony and the use of hypothetical questions, the trial of the insane is reduced to a battle of wits supported by fees, and the jury becomes confused, rather than enlightened, by the conflicting testimony. With certain modifications, the expert testimony bill of the Committee of the Institute of Criminal Law and Criminology was recommended for adoption; the purpose being the appointment and payment of experts by an unbiased, neutral body. This bill will be analyzed below.[1] The unsatisfactory nature of the technical rules as to the

[1] *See* pp. 450, *et seq.*

admissibility of evidence of insanity was also indicated, and the technical rules as to burden of proof were discussed. It was pointed out that in practice, the English distinction between insanity and irresponsibility is frequently not maintained by the jury, although from the points of view of legal theory and of the safety of society it would be useful to maintain it. It was indicated that if the expert's province were confined to testimony as to *insanity*, and the problem of irresponsibility were left exclusively to the jury, the distinction could more easily be maintained; and that in such event *insanity* should be required to be proved by a fair preponderance of the evidence, but that once this is so proved, the presumption should be that the accused's mental condition also satisfies the requirements of the tests of irresponsibility, and that therefore the prosecution should, upon proof of insanity by a fair preponderance of the evidence, be compelled to establish the necessary mental element of the crime, as it is compelled to establish the other elements, — beyond a reasonable doubt.

In Chapter 3 we discussed the procedural machinery in operation in the different States, for the purpose of discovering, before trial, those accused persons whose mental condition is such as to make their trial inhumane and needlessly expensive. Various types of laws in operation in the different States were analyzed. As to insanity before indictment, it was pointed out that the ideal procedure would be the *routine* examination, by well equipped psychopathic clinics, of at least those persons accused of certain types of crimes, the nature of which suggest mental unsoundness. In connection with insanity of accused persons after indictment and immediately before trial, the Massachusetts law for routine mental examinations by neutral expert psychiatrists, and its operation in practice, were presented in detail. An analysis of this law "in action" demonstrated that it constitutes by far the wisest measure for its purpose that is in operation in any of the States. This law scientifically segregates the mentally ill accused before trial and before it is known whether they will plead insanity or not; it saves the State much time and money; it spares mentally unsound persons and their friends the stigma and humiliation of trial; it effectively and scientifically disposes of mentally ill offenders, sending them to appropriate institutions; it tends to bridge the gap between law, medicine, and the other social sciences, bringing to the attention of prosecutors and judges the data of modern

psychopathology. Its weakness lies in that it does not cover persons accused of second-degree murder and manslaughter, as well as that vast army of recidivistic misdemeanants who constantly go in and out of the judicio-penal hopper with no improvement, if not, frequently, with positive detriment to their mental, physical, and moral make-up. A clinic attached to the lower courts, and "habitual criminal" laws properly enforced, could aid the courts in more wisely disposing of these last mentioned, socially costly cases. Other weaknesses in the Massachusetts law are the facts that the staff for mental examinations is too small and can not therefore efficiently dispose of the volume of work before it; and there is no *coördinating* body to link up the recommendations of the experts with the judicial disposition of the cases and to study the effects of various types of socio-penal treatment; and that there is no well organized, all embracing recording and statistical center, both for the State and nation, to which clerks of court and probation officers can readily and quickly turn for the information as to prior offenses which the act presumes to be easily available, and upon which its efficient functioning is largely dependent. It was also found that the immediate release of some offenders on bail nullifies the effectiveness of the act; and it was recommended that mental examination might, in severe offenses at least, be made a condition precedent to release on bail.

As to insanity during trial, the various provisions for a technical jury trial of this issue were criticized on the ground that they duplicate the trial in chief, and that a lay jury is not fitted to answer the medical questions involved. Here, again, the Massachusetts procedure, — where the defendant may be committed to a hospital for observation, or examined by qualified experts appointed by the court, — is best suited to the purpose. If and when the latter device is employed, it was recommended that the experts should be appointed by the court from a list of qualified psychiatrists submitted by the State commission for mental diseases (or similar body), or the leading professional body of the State. But this practice, as well as that of New York and similar jurisdictions, — where a hearing is held before a commission of three, having on it usually but one physician (and he without any special qualifications), — was disapproved on the ground that the great expense of such devices makes it wiser that the State, for this as well as similar purposes, maintain clinics in the courts, or psychopathic

wards in hospitals. Finally, it was emphasized that the *desideratum* in this entire field is some effective *coördinating agency*, that will maintain intelligent and effective liaison between judges, experts, probation officers, social workers, and penal officers.

Passing from the purely procedural features to the substantive law dealing with the tests of irresponsibility, we first considered, in Chapter 4, some of the important ethical and psychological imputations of our problem. In discussing the ethical and psychological foundations of the law of insanity, we found that the sense of justice requires that the penal law, in determining the question of guilt and punishability, consider the personality of the individual delinquent, as well as the outrage to the security and feelings of society. We were therefore led to consider the nature of the mental constitution of the average, normal individual; and we found that society holds a man responsible so long as his volitional and cognitive capacities are sound, and that the criminal law recognizes these modes of mental activity as the basis of responsibility. The *mens rea* of the criminal law includes the volitional-inhibitory, as well as the cognitive, modes of mental life; and a disease of either of these (assuming that " intention " and " volition " are as strictly separable psychologically as the law implies) constitutes a lack of one of the legally recognized factors of the guilty mind that is the *sine qua non* to responsibility. Since, therefore, a certain state of mind is a necessary element in the definition of all crimes (except minor statutory offenses, where no guilty intention need be alleged or proved), it was pointed out that the issue for the purposes of the application of the criminal law is between the two major schools of psychology, — the Behavioristic and the Mentalist; and an examination of the fundamentals of these two schools convinced us that Behaviorism is the psychology *par excellence* of primitive law, which looked only to the external act or omission, and was not concerned with such mental concepts as intention, motive, volition, deliberation, premeditation, etc.; while the Mentalist or purposive psychology (especially as expounded by McDougall) adequately meets the requirements of the existing criminal law. For all conduct that is branded as criminal implies the existence of capacity for conscious, purposive activity, capacity for foreseeing of consequences, and for amenability to the sanctions of the criminal law. Motive, intention, and volition — the three important concepts in the

criminal law — were then discussed from the points of view of psychology and law as explained by the leading commentators and judges, as well as psychologists. Intention, motive, volition, we said are separable only for the purpose of analysis, since *actual mental experience at any time can not be broken up, as the law assumes, into its cognitive, conative, and affective constituents; mental experience can be so analyzed only by a process of artificial abstraction. The criminal intention includes the conative-affective, as well as the cognitive, capacity.*

In considering the various exemptions from conviction for crime, we said that legal incapacity because of *insanity* furnishes the greatest volume of cases of excuses from criminal responsibility; and that, as Stephen long ago pointed out, each of the artificially abstractable mental elements of a crime — intention (including knowledge, and malice, fraud or negligence), and volition — may be affected by mental disease. It follows, therefore, that disease affecting primarily any of the mental elements that enter into the definition of a crime, if properly interpreted, should, *even under the law as it is*, exempt from criminal responsibility. In conclusion we again emphasized the fact that the law's analysis (as well as that of psychology itself) is prone to overlook the essential fact of the unity and interdependence of mental processes. We also found that this analytical tendency in the law has not only led to various erroneous conclusions in the way of "tests" of irresponsibility, conclusions not founded upon a true understanding of the nature of mind and its disorders, but it has resulted in a fundamental paradox in the law of insanity, a paradox pregnant with mischief in the actual application of the law; namely, while it is recognized in judges' charges to juries that the requirement of a *mens rea* is fundamental, it is at the same time inconsistently laid down in the tests of the irresponsibility of the insane as applied in most American courts, that pronounced disorder of the *cognitive* processes of mental life *only* will excuse the insane from criminal liability; and that a disease expressing itself primarily in malfunctioning of the conative-affective mode of mental life will not relieve from criminal responsibility.

Turning next to the history of the tests of irresponsibility, we found the foregoing views sufficiently borne out; for it soon became apparent that the historical (and frequently accidental) growth of the substantive law of insanity was not along any well defined lines

of development with the primary principle of "guilty mind" or "criminal intent" as the point of departure. The further removed we were from the earliest commentators, such as Bracton, Coke, and Hale, the more we found an inconsistency between the fundamental requirement of *mens rea* and the tests actually laid down; until with Erskine's accidental contribution of delusion as a test, we had the human mind completely emasculated, and the concept of insanity narrowed down to *but one of the striking symptoms of mental disorder*. The general concept of mental disorder constituting lack of that *mens rea*, the presence of which is supposed to be an indispensable element in the definition of every crime, was narrowed more and more by successive commentators and judges in their attempt to develop more precise measuring-sticks of irresponsibility. We concluded that the tests are of doubtful legal authority, that they are inconsistent with the criminal law's general requirement of *mens rea*, and that the earliest, simplest, and most authoritative principle of the criminal law dealing with insanity is afforded by the general rule, — that, to constitute an unlawful act criminal, the offender's condition of mind at the basis of his illegal act must have been that of the person of ordinary intelligence and ordinary mental health; further, that this means volitional-inhibitory and emotional health as well as intellectual soundness. For not only does the required *mens rea* logically include these, but it must be remembered that soundness of mind is a changing concept, and that *mens rea* (meaning a sound mind possessing and executing a guilty intention) is accordingly a term whose context must be filled in by the accumulating and changing psychological and medical knowledge of successive generations. But it was nevertheless admitted that, lest *mens rea* be interpreted too loosely, some limiting device, test, or measure is necessary; and that if the existing tests are incomplete, and the most important ones (the knowledge tests) are inconsistent with the fundamental principle of *mens rea*, they should be so modified as to bring them into harmony with the body of the law, and at the same time to make them sufficiently responsive to the findings of modern psychology and psychopathology.

Passing from the early formative period of the criminal law, we next critically considered the most important case in the law of insanity, *i.e.*, the answers of the Judges of England to the questions put to them by the House of Lords, upon the acquittal of Mc-

Naghten in 1843. We criticized the Opinion of the Judges, and its consequences, on the following grounds: First, that the answers are based upon an erroneous conception of mental disease, which, in turn, was founded upon an erroneous psychology; for they proceed upon the assumption (an assumption, by the way, which was not made in the *questions* put to the learned judges, but which they gratuitously imported into their answers) that the mind can labor " under partial delusion only ", and that the balance of the mind may remain perfectly sound, whilst the delusive portion holds sway. Of course, this was suggested by the early stages of those diseases whose most characteristic symptoms are delusions, — such as paranoia and dementia præcox. But, we pointed out, in the answers of the Judges the delusions were treated of as *themselves* constituting the mental disease, and they were considered *in abstracto*, apart from the whole disease picture; while, in truth, delusions are but symptoms of a more fundamental conative-affective disturbance. It is this erroneous view of mental disorder that led the Judges into the wholly unscientific " mistake-of-fact " type of delusion test that we criticized in the succeeding chapters.

The second criticism, directed rather at the *consequences* of the answers of the Judges than at the answers themselves, was, that while the questions put to the Judges distinctly referred to but one type of mental disorder (the pronounced delusional psychoses) the *answers* were later, in practice, held to extend to *all* insanities. This is the reason why disorders primarily of the impulses and the emotions were not taken account of in subsequent English law, the gist of which was the right-and-wrong test; yet the English Judges must have known that there were some earlier English decisions where the loss of *power of control* was recognized as a test on an equal footing with the knowledge tests.

Our third criticism of the answers of the Judges was that the important words of the knowledge test were not clearly defined in the answers; so that, in practice, instead of the answers being definite and accurate and inflexible measures of irresponsibility, they constitute vague, confusing, and even conflicting criteria. We saw that the words " nature ", " quality ",[1] " knowledge ",

[1] As late as 1916, in the Appeal of Codere, 12 Cr. Ap. Rep., 21, 27, these words, as well as "wrong", had to be specially construed by the Lord Chief Justice; and the peculiar fact of the decision is that he held that the Judges, in 1843, "were only dealing with the physical character of the act" when they used the terms "nature and quality"; in other words, that one or the other of

" right ", " wrong ", — indeed every word of the tests has been subjected to various simple, or strained, if not even weird, interpretations; this practice militating against the value of this fundamental test in the English law of insanity. Whether it follows that the jury should be told in detail exactly what each word means, is doubtful; certain it is, that to indulge in the logical and metaphysical argumentation which would then become necessary would make confusion worse confounded for the all-suffering and not too perspicacious jury. The alternative we suggest will be discussed in the last section.

It was also pointed out that the concluding words of the opinion of the judges (as well as the language of prior authorities) indicated that they themselves had but halting faith in the efficacy, clearness and all-inclusiveness of their own tests; for they distinctly and deliberately left the door open for modification of these allegedly unmodifiable and definite measuring-sticks of irresponsibility, by saying that the tests may be " accompanied with such observations and explanations as the circumstances of each case may require."

In discussing the American decisions, in Chapters 8 and 9, we indicated to what degree they suffered under the yoke of the English law. We pointed out the confusion existing in the law, not only because of the burdensome inheritance of the vague terminology of the Opinion of the Judges of England, but also, and especially, with reference to the application of the law in the difficult borderline cases of mental disorder. It was demonstrated that there is little uniformity in the practice of judges as to what constitutes sufficient proof of mental unsoundness to allow the plea of irresponsibility because of insanity to go to the jury. We also found that, although there is precedent for it in the law, most

the terms is "mere surplusage." Yet Oppenheimer, "Criminal Responsibility of Lunatics", pp. 142, *et seq.*, devotes many pages to an attempted differentiation of these two terms; and other learned commentators and judges have indulged in no little speculation as to the distinction between "nature" and "quality."

Similar difficulties beset the all-important word "know"; and views vary from Stephen's strained interpretation to those of judges who construe the term as having a very narrow and restricted meaning. If these learned scholars disagree upon such fundamentals, of what value can such a "test" be to a lay jury? Either the test must be changed, or the jury must have each word specially and carefully interpreted to it, or, — what appears to us to be a third, and best, alternative, — *the jury must be given a sufficient background of the nature of mental process and pathology, upon which properly to project the tests;* they certainly are not afforded such a background to-day, with the practice of partisan, conflicting, "expert" testimony, and the confusing, and frequently absurd hypothetical question.

jurisdictions do not take into account the effect of mental disorder as bearing upon the capacity for premeditation and deliberation, and that defendants with transitory or mild cases of mental disorder must, under the prevailing system, be either convicted on the same basis as the mentally sound, or acquitted and returned to the community. The adoption of the principle of the effect of mental disorder upon capacity for premeditation and deliberation (reducing the grade of the offense) was urged. There is a real need for a verdict of "semi-responsibility", covering such instances and carrying with it life imprisonment instead of the death penalty in capital cases; and in other instances, recognizing limited punishability because of mental disorder which, though not constituting a severe psychosis, nevertheless removes the defendant from the class of normal offender, to that of psychopathic offender, even though some capacity for deliberation and premeditation remains.

Passing on to the tests themselves, we first considered the child-of-fourteen test as originated by Hale, and as modernized by recent attempts to introduce the findings of "intelligence tests." We then discussed the right-and-wrong test in its various guises in the different American jurisdictions, and pointed out its chief weaknesses as follows: First, it is too *vague and uncertain* a criterion, as was mentioned above in connection with the Opinion following McNaghten's Case, and in greater detail, in Chapter 7; secondly, it is too *narrow* a measure of irresponsibility, for it does not take account of disorders of the conative-affective life; thirdly, it is, in practice, frequently presented to juries in a confused and jumbled manner, actual judges' charges being made up of scraps of opinion and dictum. This last criticism is equally applicable to the other tests, and suggests that one of the greatest needs in this field is not only a means of laying the true nature of mental disorder before the jury, untrammeled by the hotchpotch of perverted hypothetical questions, but sufficiently uniform and fundamental concepts which will form at least the skeleton of all judges' charges in insanity cases, and bring whatever consistency is possible into a branch of law that deals with cases of which, essentially, no two are alike. In other words, the formal *basis* for a happy balance between rule and discretion is one of the desiderata in this field. Not only is the right-and-wrong test made up, in the judges' charges, of jumbled scraps of opinion and dicta, but, as was pointed

out, this test, in practice, is not strictly adhered to as the only criterion of irresponsibility even in some States wherein the formal law, as enunciated by the Supreme Court decisions, is supposedly limited to the right-and-wrong test; in other words, trial judges, in practice, not infrequently lay down the irresistible-impulse test in jurisdictions where it is not the law.

Fourthly, the right-and-wrong rule, unaccompanied by other criteria, is based on an artificial abstraction from the unity and interrelation of mental processes; it is founded upon the assumption (similar to that of the judges in the Opinion after McNaghten's Case) that disease of the cognitive processes is disorder of one *compartment* of the mind, which leaves the emotional-volitional life unaffected; moreover, that cognitive disturbances are fundamental in the psychoses and neuroses, whereas the psychological truth is that the intellectual processes are but the instruments of the primary, instinctive, conative-affective processes. This test, then, *when used exclusively*, proceeds upon the following erroneous, psychological, as well as legal, assumptions: (1) That lack of knowledge of right and wrong is the sole and most common symptom of mental unsoundness; (2) that such knowledge is the sole instigator and guide of conduct, whereas, as was indicated in the chapter on psychology, the "motives" (*i.e.*, the instinctive, affective experiences) are the prime movers and springs of conduct; (3) that capacity of knowing right from wrong (and *intellectual* capacity generally) can remain intact, and function perfectly, even though the defendant is otherwise mentally unsound. Finally, the right-and-wrong rule, unaccompanied by a test covering the conative-affective mode of mental life, is assailable on the ground of the criminal law itself; for volitional capacity is, as we have seen, just as fundamental in the required guilty intent as is intellectual soundness.

Considering next the irresistible-impulse test, which together with the right-and-wrong rule, is in operation in a few States only, we pointed out that this test is based upon judicial recognition of the fact that other modes of mental process (and more fundamental) than the purely cognitive, enter into the functioning of the mind, and that to constitute that criminal intent of the mentally sound individual which must accompany an illegal act to make it punishable under the law, a more or less healthy, normal functioning of the volitional-inhibitory powers of the mind is necessary.

Analyzing the reasons why most courts refuse to recognize the volition test, we concluded that their objections were on the whole not well founded. For they are reducible to ignorance or neglect, on the part of the critics of the volition test, of the fundamental fact of the unity of mind and interrelation of mental processes. And it was predicted that with the advent of a more scientific administration of the law, — especially with the placing of expert testimony upon a neutral, unbiased basis and in the hands of well qualified experts, — much of the opposition to judicial recognition of the effect of disorders of the conative-affective impulses should disappear. We also pointed out that confusion exists in the reported decisions as to the important question whether the irresistible-impulse test should be charged to the jury in *all* cases of insanity (which, because of the complex nature of the mental element in criminal intent, seems to be the better practice), or whether it should be confined exclusively to cases wherein the testimony tends to show disorder of the impulses.

In discussing the legal treatment of the symptom of delusion; we pointed out that there are at least five, possibly six, types of delusion test extant. We criticized the use of delusion as a "test" on the ground that it is but one symptom, albeit a striking one, of some forms and stages of mental disorder. The law, however, treats delusion (as it does lack of knowledge) as an entity which itself constitutes the mental disease; it assumes that the mind is separable into compartments and that the compartment with delusions is separable from the balance of the mind, which supposedly remains sound. These assumptions ignore the fact that the delusion is but the superficial indication of a more or less fundamental disorder of the mind. That type of delusion test which excuses when the delusion has destroyed the defendant's mental capacity to know right from wrong is difficult of proof, requiring evidence of a direct external connection of the delusion with the capacity to know right from wrong. And it is founded upon the naïve psychology that holds delusions to be simple entities; that conceives the patent meaning of delusions to be also their latent meaning. Such psychology wholly ignores the evidence of psychiatrists to the effect that delusions are symptoms expressive of exceedingly complex mental processes; that frequently they are distorted in a manner that makes it difficult to analyze them and to get at their real significance to the patient; and that often

their external garb is but a symbolization of their latent meaning to the patient. The mistake-of-fact variety of delusion test which is in operation in many States, including New York, is even more subject to criticism along the above lines; for it is founded upon the erroneous assumption that an insane individual can reason soundly with reference to that compartment of his mind which is diseased, because it posits the opinion that the remainder of the mind is perfectly sound. Another variety of delusion rule, — that delusion will only exempt from responsibility where it overmasters the will, — is inconsistently recognized by some courts which do not accept the irresistible-impulse doctrine. The rule that delusion will only excuse when the illegal act is the product of the delusion is vague, and is open to the same objection that was made to the second delusion test, namely, it requires proof of connection of the delusion with the act; but it is more liberal than the mistake-of-fact variety in that it is not required that the delusive belief must have been such as would have excused the acts of a sane person if they were real. We concluded that the delusion tests are unsatisfactory and should be abolished; for they raise the delusion, which is but one symptom of mental disorder, to a position of unwarranted importance; delusions are dealt with in the tests *in abstracto*, apart from the entire disease picture, and these tests are difficult of practical application.

From the point of view of the fundamental principle of the criminal law, — the requirement of a *mens rea* in a mentally sound offender as a *sine qua non* to guilt, — we found that the New Hampshire practice is the most consistent. For it proceeds upon the assumption that there are no tests of irresponsibility, but that the existence, and presence in the accused, of delusions, capacity to know the nature and quality of his act, capacity to inhibit his impulses to illegal behavior, — in a word, the existence of a *mens rea* in the accused at the time of the offense, — is a question of fact for the jury. We pointed out that the New Hampshire rule proceeds upon the recognition of the fact that, *in actual practice*, the jury is not governed as much by the formal tests as expounded by the trial judges in their charges, as the elaborate treatises and judicial opinions on the subject of the tests would imply. For it must always be remembered that the State can not appeal from a verdict of acquittal on the ground of insanity (and irresponsibility); hence, it is difficult to check up on the motives

which prompted the jury to acquit a defendant, in any particular case. Moreover, the strict separation between *insanity* and *irresponsibility*, or, in other words, between *some evidence of mental disorder*, and conclusive proof of lack of knowledge of right from wrong, is frequently not maintained in American courts; and the judicial decisions themselves frequently confuse insanity and irresponsibility. In connection with the New Hampshire rule, it was, however, pointed out that the practice of leaving the question of guilt in insanity cases entirely to the jury opens the door to the possible acquittal and discharge of many mildly psychotic and neurotic offenders who ought not to be exempt from restraint, or who should be considered partially responsible.

Our entire critique of the tests of irresponsibility made it evident that the chief weakness of the law, following that of some of the early psychologies, has been its practice of splitting up the human mind into "elements", abstracting these, and setting them up as entities which supposedly are capable of being individually diseased, while leaving the remainder of the mind intact and sound. This naturally led to "tests" of a kind which assumed such a psychology and psychopathology. We gave it as our opinion that what is primarily needed in the substantive law of insanity is a proper conception of the unified personality, — the psychiatric approach; and that tests (since, with the jury system, these must be used) should only be laid down after the jury has been informed of the unity of mental process, of the fact that while mental process manifests itself in a tripartite mode (cognitive, conative, affective), disorder of apparently the cognitive, conative, or affective mode of mental life *alone*, is, because of the interdependence of mental processes, *actually indicative of a disorder of the mind as a whole.*

Having disposed of the criticism of the tests of irresponsibility from the points of view of law and general psychology, we next considered them, in Chapters 9 and 10, from the psychopathological approach. This involved a discussion, in Chapter 9, of the general concept of mental unsoundness, and of the psychology of mental disorder, and, in Chapter 10, a consideration of the leading types of mental disease, with a view to estimating the scope and reliability of the tests as applied to different psychoses and neuroses. Our examination of the data of the psychology of

mental disorder further bore out our allegations that the tests of irresponsibility do not sufficiently take account of those mental processes of which knowledge, volition, delusion and other concepts employed in the tests are but the external manifestations. Our views of the inadequacy of behaviorism and of the dogma of purely organic origin and nature of all the psychoses were also strengthened by an examination of the arguments for and against psychogenesis of mental disorder. We were confirmed in our belief that the criminal law wisely proceeds from a mentalistic premise, but that it unwisely takes into account only the superficial manifestations of deep-seated mental disorder. The significance of delusions and hallucinations (which the law treats as if they themselves constituted the disease, leaving the remainder of the mind sound) was also brought out by our analysis of the psychology of mental disorder; and the unreliability of the delusion tests, especially those based on the mistake-of-fact rule and those requiring externally demonstrable connection of the delusion with the illegal act, was further indicated. The inadequacy of the employment of the knowledge tests exclusively was further emphasized by a discussion of disorders of the impulses; and it was pointed out that those disorders of the impulses wherein consciousness remains apparently unclouded (such as the compulsion neuroses, dipsomania, etc.) are, theoretically at least, not taken account of in the many jurisdictions in which only the knowledge tests are operative. Where the irresistible-impulse test is recognized, it was indicated that expert, unbiased study of the individual case will aid judge and jury to distinguish cases of pathological irresistible impulse from those in which the impulse was merely unresisted. In the case of irresistible impulse no less than that of delusion, the impulse can not be regarded, as the test implies, as an isolated phenomenon, apart from the affective and cognitive processes; a thorough psychiatric and psychological examination and study of the patient's life history are necessary. In considering the disorders of the impulses occurring in the case of psychopathic personalities and psychoneurotics, it was pointed out, that while these persons should not be entirely exempt from responsibility (in the sense of punishability), their mental condition ought to be taken into account by way of reduction of the grade of the offense; and that this is impossible to-day, without a verdict that recognizes a middle ground between complete irresponsibility and

complete responsibility.[1] Our outline of the psychology of mental disorder from the point of view of the analytical schools indicated the need of thorough mental examination of the individual case, and emphasized the artificial nature of the modern criteria of criminal irresponsibility; further, it demonstrated *the need of supplying the jury with a simple, scientific background of the nature of mental process and disorder generally, upon which they could project the testimony of trained psychiatrists, and in the light of which the tests would be much less artificial, arbitrary, and unjust in their application than they are today.*

In Chapter 10, the various groups of psychoses were discussed in detail, and their legal significance was indicated. The need of examining cases of general paralysis in clinics attached to lower courts was pointed out; and the extension to this class of that type of the concept of limited responsibility concerning the effect of mental disorder in negativing capacity for deliberation and premeditation, was urged. In the case of mental defectives, the use of stringent "habitual criminal" and "defective delinquent" laws, and the applicability of the concept of limited "socio-penal accountability"[2] (in the sense of irresponsibility, but social controllability nevertheless), were recommended; and the need of special institutions for such defective delinquents was indicated. In the case of the epileptic psychoses, observation, examination, and reports by neutral, qualified experts were especially indicated, as, upon their trial, such persons may appear perfectly sound to judge and jury. It was found that if the knowledge tests and irresistible-impulse test are both provided for, and if the unity of mental process is pointed out to the jury, and if neutral experts are permitted to present their unbiased testimony, the epilepsies are sufficiently taken account of. Colonization of serious cases of epilepsy, both as a preventive measure and as appropriate medico-penal treatment, was recommended. The discussion of the alcoholic psychoses indicated that in those jurisdictions where the knowledge tests only prevail, there is a gap in the law in the case of dipsomania and in the impulsive conduct that is symptomatic of the mental deterioration of chronic alcoholism; nevertheless, because of the recognition of the effects of inebriety upon capacity for premedita-

[1] It is probable, however, that evidence of the existence of such a disorder in any particular case is admissible in a hearing before the court on the question of mitigation of punishment, after a plea of guilty or after conviction.

[2] *See* pp. 443, *et seq.*

tion and deliberation, the law governing the alcoholic psychoses is far in advance of that covering the other mental disorders. The value of a psychopathic clinic attached to the lower courts was further demonstrated in the case of the senile psychoses. It was pointed out that the right-and-wrong rule alone would not be sufficient to cover these cases; since, with the deterioration of the higher mental processes, knowledge of right and wrong in a narrow sense may remain, but the impulses are at the same time pathologically operative beyond the control of the unified personality.

In discussing dementia præcox and paranoia, it was pointed out that the facts that these groups contribute heavily to the serious crimes, and that their leading symptoms are delusions and (in the case of paranoia especially), the apparently vertical splitting process which the mind undergoes, seemingly leaving intact the patient's capacity for acute thought in fields unrelated to the delusional system, have given rise to the erroneous psychological conceptions in the law. For, while psychiatrists recognize that the external symptoms are indicative of a deep-seated emotional disorder, the legal tests proceed upon the assumption that these patent phenomena themselves constitute the disease; and it is entirely overlooked that the delusions and other symptoms are but external evidences of a serious mental disintegration. It was concluded that the knowledge tests and the irresistible-impulse rule, interpreted to the jury upon a basis which supplies them with a true conception of the unity of mental process and pathology, would sufficiently cover these cases. It was also indicated that more time and skill than is usually given today should be devoted to the psychiatric examination of these cases before defendants are put on trial; and that the jury should be furnished with as complete a life history, hereditary and developmental data as an efficient sociological-psychiatric staff can furnish.

In the manic-depressive psychoses, it was pointed out that in extreme cases an act committed during the manic phase would come under the knowledge tests; for the characteristic flight of ideas would cover such cases. The right-and-wrong rule and irresistible-impulse test sufficiently cover the cases of manic-depressive psychosis; and for offenses committed during remissions, the doctrine of limited responsibility, with life imprisonment instead of the death penalty in capital cases, was recommended. In the case of the neuroses, relaxation of the "cooling-time" principle,

by recognizing the morbid instability of such persons, was recommended; this would mean a recognition that slighter provocation is required in these cases than is ordinarily necessary, to reduce the degree of the offense. The irresistible-impulse doctrine would cover the compulsive conduct of the psychoneuroses. But it was insisted, that until our psychiatric methods are more refined, it would be socially dangerous to grant any special immunity to neurasthenics and persons with anxiety neuroses; since these conditions are difficult to establish and prove, and the patients are too nearly normal to be relieved from responsibility.

Considering next the psychopathic personalities, it was pointed out that these are not taken account of by the ordinary tests, since, frequently, such persons may know the nature, quality and wrongfulness of their acts, and may have some power of resisting their impulses; but their emotional and volitional modes of mental life are so unstable as seriously to handicap them in coping with the problems of life, especially in guiding their conduct to conform to the demands of the criminal law. It was recommended that the cooling-time rule be modified in their favor, especially in the impulsive types. The concepts of partial responsibility, and habitual criminality, and special colonies or institutions for unmanageable psychopathic personalities, as well as defectives, are peculiarly appropriate to these types of offenders.

Having discussed the procedural machinery for the scientific selection and segregation before trial of the mentally unsound offender, the more important ethical and psychological implications of our problem, the substantive law of insanity (*i.e.*, the tests of irresponsibility), and the weaknesses in the law as brought out by an analysis of the psychology of mental disorder and the chief clinical forms of mental disease, we analyzed, in the eleventh chapter, the machinery in operation in the various States for the disposition of persons not tried because of insanity, or acquitted for that reason. The practice of allowing a jury to say whether they deem an acquitted insane person, *immediately after his acquittal*, still dangerous to be at large, was disapproved; because this leaves the determination of a technical, medical question in the hands of a lay jury, and divides responsibility for setting loose in society a potentially dangerous offender who has, on at least one occasion, demonstrated his incapacity to be governed by legal sanctions. Similarly, those States, as California, in which *another* jury than the one which has

acquitted the defendant on the ground of irresponsibility decides whether he is safe to be at large, are merely duplicating the expense and undesirable features of a jury trial, and dividing among twelve men the responsibility for such person's possibly dangerous future conduct. The Florida provision, whereby persons acquitted on the ground of insanity (and irresponsibility) may be given into the custody of friends on proper security, obviously overemphasizes the social interest in the individual life to the detriment of the social interest in the general safety; and, further, it is disadvantageous to defendants who are too poor to raise the required security. Besides, incarceration for at least some period after acquittal sufficient, at least, for the acquitted person to be subjected to thorough psychiatric observation and examination in a hospital for the mentally ill is, it seems to us, highly desirable. Therefore, in this respect, those States in which the defendant is, upon acquittal, forthwith sent to a hospital, have the soundest legislation. In the many jurisdictions where judges are given wide discretion in the matter of discharge of defendants acquitted on the gound of insanity (and irresponsibility), the need of acquainting the Bench with the contributions of psychology, psychiatry, sociology and other disciplines was emphasized; and we pointed out, further, that the efficiency of judges in these matters depends upon the facilities at their disposal, in the shape of psychopathic hospitals, clinics, etc.

As to the use of the writ of *habeas corpus*, experience has shown that it is wiser that the hearing on return of the writ be held before the judge, instead of before a jury; for judges are usually more qualified to understand the testimony of hospital superintendents, and to weigh the individual and social interests involved. But there are certain difficulties in the way of this, which will be discussed in the concluding Section.

The feature in the Washington law, whereby *initiation* of proceedings for discharge by the *superintendent* is provided for, was commended; together with a device similar to that of New Mexico, wherein the superintendent is required to make periodical reports to appropriate courts, which must order the discharge of persons declared sane. The last named provision guarantees to patients a routine, periodic consideration of their cases, with a view to discharge, when the superintendent, who is best qualified to know, deems it safe for them to be released.

Our principal conclusions in this chapter were, first, that some means must be found for remedying the abuse of the writ of *habeas corpus*, and the unnecessary and preventable expense and danger to society it entails; secondly, that such procedure must take into account the desirable *balance between the social interest in the safety and security of society, on the one hand, and the social interest in the individual life, on the other.*

Résumé of Weaknesses in Modern Law and Procedure in Insanity Cases. — We may briefly resume the weaknesses we have discovered in the entire law and procedure that is concerned with the criminal insane, as follows:

1. *Sorting Out the Mentally Unsound Offender:* The first stage at which the question of insanity may be raised is immediately after the arrest of the accused, either before or during his preliminary examination. This is the strategic point, therefore, where some sort of efficient examining agency should function. Our comparative study of State legislation indicated, however, that in most States this important task is left to the point where the defendant has been transferred from the jurisdiction of the examining or committing magistrate, to that of the higher court, which is to try him. The ideal machinery would be an efficient psychiatric (psychological-sociological) clinic, such as is now in operation in some of the municipal courts.[1] This would cover cases of recidivistic misdemeanants, and would also be of aid in informing the magistrate whether, in doubtful cases, accused persons may be released on bail forthwith, or whether they should first be examined by the experts of the State Commission of Mental Diseases. A law similar to that of the Massachusetts provision for the routine examination of certain classes of more serious offenders could function in coöperation with municipal clinics.

In the absence of a psychopathic laboratory, with powers to examine at least certain types of accused persons (especially those accused of offenses which suggest the presence of mental disorder), and in the absence of a law similar to the Massachusetts provision, we have seen that the customary procedure is either for a jury to pass specially upon the accused's mental condition, when a preliminary showing of probable insanity has been made to the satisfaction of the trial court, or for a commission (frequently having but one physician, and he not being required to have special

[1] As, for example, those in Boston, Chicago, and a few other cities.

qualifications in psychiatry), appointed by the court within its discretion, to pass upon the accused's mental condition. The most serious objections to this procedure are that the instrument of inquiry is not the best that can be devised for the purpose; that it is unnecessarily expensive; and, worst of all, that its functioning is not routine. The facts that our prisons are filled with feeble-minded and mentally diseased persons, and that many convicts shortly after arriving at the penal institutions, must be transferred to hospitals for the mentally ill,[1] sufficiently prove that any socio-legal machinery which does not operate as a matter of routine, and which does not cover all cases, or at least those in which a trained psychiatrist has a suspicion that mental disorder exists, permits many mentally unsound persons to slip through the net designed for the purpose.

2. *The Defense of Insanity and the Tests of Irresponsibility:* Psychopathic clinics, coupled with a law similar to that in Massachusetts, should scientifically and efficiently dispose of by far the greater number of persons whose crimes are largely attributable to their mental condition. Since even with such devices, some mentally unsound offenders will slip through; and since (as we have been informed upon excellent authority to be a quite common practice in New York), some lawyers will advise their clients to "take their medicine" and obtain a definite, relatively brief sentence in prison rather than a wholly indeter-

[1] Nolan, "Some Characteristics of the Criminal Insane", p. 13, reprinted from *The State Hospital Quarterly*, May, 1920, upon a study of 646 first admissions to Matteawan Asylum for the Criminal Insane, arrives at the following conclusions: "More than 60 per cent. of the first admissions that were sent to penal institutions before being committed to Matteawan remained in such institutions less than three months. Most of these were vagrants or petty offenders and were probably insane at the time of arrest. A mental examination of misdemeanants before sentence would prevent the inhuman incarceration of many insane persons." Again: "A large part of the patients sent to penal institutions were insane at the time and should not have been branded as criminals but should have been sent to psychopathic hospitals or directly to civil State hospitals.

"Speaking of this class of patients, Dr. R. F. C. Kieb, superintendent of the Matteawan State Hospital, in his annual report for the fiscal year ending June 30, 1919, said: 'The original offenses were simply a manifestation of mental disease and the most casual examination before arraignment would have obviated the necessity of sentence and subsequent transfer. It is regrettable that no provision has ever been made for the psychiatric examination of prisoners produced before our Magistrates' Courts in the metropolitan district and in the larger upstate cities.'

"In this connection it is noteworthy that 599, or 92.7 per cent. of these first admissions, were committed from cities and only 37, or 5.7 per cent. from rural districts." (Pp. 11, 12.)

minate (probably life) incarceration in an asylum, and since, moreover, in most States the old common law procedure is still strictly adhered to, the tests of irresponsibility have had to be considered. The main weaknesses of the tests, briefly, are that they do not cover all possible cases of mental disease which may prompt to antisocial, illegal behavior; that the right-and-wrong rule is too narrow and uncertain of definition as well as application. In those States where the irresistible-impulse rule is operative, there is more opportunity for recognition of certain types of mental unsoundness, such as the psychopathic personalities, compulsion neurotics, epileptics, etc.; but such persons are either found entirely irresponsible or entirely responsible. Where delusion is required to be connected with the act and is held to excuse only if the delusive belief were actually a fact,[1] there exists in the present law an artificial conception of delusion, as well as of mental disorder generally. *All these tests, without a sufficient background upon which they may be projected, are too artificial, requiring certain symptoms to be present before they will exempt from responsibility; they overlook the fact that the symptoms are but manifestations of a generally disordered mentality, ignore the fact of the essential unity of mental process, and disregard the fact that no disorder of mental activity can exist without affecting the efficient operation of the mind as a whole.* On the other hand, some proposed substitutes for the tests (which will be considered below), are too vague and general, and do not sufficiently aid the jury in defining and delimiting that boundary between amenability to socio-penal treatment, and absolute acquittal, which it is the function of the law to outline. As long as these questions are to be decided by a jury, rules clear enough, yet broad enough, are necessary; and their chief function should be to acquaint the jury with some fundamentals in the light of which they may apply the law's tests. Another criticism of the present procedure is, that the jury frequently is not informed as to what will probably be the consequences, proximate and ultimate, of the different verdicts, both to the individual and to society.

3. *Expert Testimony, and Hypothetical Questions:* The weaknesses of the modern procedure have been sufficiently discussed; some device for placing before the jury the well rounded, scientifically grounded reports of qualified, unbiased experts is necessary.

[1] A few States do not require this. *See* State *v.* Keerl, 29 Mont., 508 (1904).

4. *Disposition of Defendant upon Acquittal; and Subsequent Release from Hospital:* The weaknesses we encountered here have largely to do, not so much with the fact that a mentally disordered person acquitted of crime is immediately thereupon turned loose, but rather with the fact that his *discharge from the institution to which he is sent is not based upon any scientific principles, nor upon the report of those persons who are best qualified to say whether or not his discharge is dangerous to himself and society.* This is largely due to the abuse of the writ of *habeas corpus* and of special legislation providing for the release of such persons. We have mentioned some of the vicious results of allowing a lay jury to pass upon the soundness of mind of persons who were acquitted of serious offenses on the ground of insanity (and irresponsibility), especially when the friends of such a person can obtain as many and as frequent writs as possible. The usual alternative, appointment by the court of a special commission, is also unsatisfactory, both because of its unnecessary expense, and because the commissioners are not the best qualified to pass upon the question.

These being the chief weaknesses that characterize the present legal treatment of the mentally unsound who are accused of crime, let us now consider some necessary theoretical prolegomena to proposed remedies of the entire procedure, and to our own recommendations in the concluding section.

Section 2 — Aims and Purposes

Social Purpose in the Domain of Penology. — Throughout this study we have attempted to set forth the *existing conditions*, their strength and their weakness. In addition to outlining the existing conditions, we also made references to the *needs*.[1] In order to focus attention upon the needs in this branch of social control through legal machinery, it will be of advantage to formulate more specifically the standards or criteria which, in our opinion, should govern the socio-legal order, in establishing a program for coping with the problems raised by the mentally unsound offender.

Now the chief difficulty encountered in our domain of socio-legal control, is the vagueness, as well as the complexity, of the social purpose that is *actually operative.* Numerous are the treatises which have been written, for example, as to the ends, aims, and

[1] *Cf.* James Ford, "Social Problems and Social Policy", pp. 2, 3.

justification of punishment.[1] Yet, in the first place, there is no clear exposition, that we are acquainted with, of what to-day constitutes punishment; and, secondly, there is no recognition of the motives *actually operative* in the individual penal program or in dealing with the individual offender. As to the second objection, it is a striking truth that few, if any, of the learned treatises in this field take account of these very pertinent facts: (1) That the justification of punishment (the motives primarily operative), in the minds of *legislators*, who frame penal codes, which are presumed to embody well formulated social purpose, may be quite different from those of the judges who apply the penal code in the individual case, or of parole officers who have wide administrative discretion as to the length and type of penal treatment, or of the public, the "mutable many", or the newspaper reporters and editors, who, in the background, always exert some influence upon the type, length, and justification of punishment in the individual case,[2] or, finally, from that of the jury in any case; (2) that even in the case of the framers of penal codes, the motives are exceedingly complex; and many and varied, if not even conflicting, are the philosophies of punishment that enter into the debates when these codes are being considered, and into the codes themselves;[3] that, finally, various amendments of, and accretions to, existing codes may be and frequently are in conflict with the prevailing philosophy of punishment of the common law, or with that which prompted the original penal measures. We must conclude, then, that just as the causation of crime is complex, so the motivation and justification of punishment is complex. But from this fact, though it must be frankly faced, it does not follow that an *effective* social purpose in the case of the administration of the penal law, especially the law of insanity, is not operative or can not be framed; for, in spite of the complexity of motivation and justification of punishment, it is

[1] *Cf.* Oppenheimer, "Rationale of Punishment" (1913), and Willoughby, "Social Justice" (1900), Chapter X. *See also* the writer's "Ethics, Psychology, and the Criminal Responsibility of the Insane", *Journal of Criminal Law and Criminology*, Vol. XIV, pp. 208, *et seq.* *Reprinted* American Law Review, Vol. 58, pp. 641, *et seq.*, (1924).

[2] After this was written, the Chicago Loeb-Leopold murder case occupied the attention of many newspaper editors, pseudopsychologists and well-meaning but ignorant "law reformers." Judge Caverly received numerous threatening letters.

[3] The writer has in preparation an essay based upon an analysis of the provisions of several State penal codes, which, he believes, will indicate the complex, and even conflicting, philosophies of punishment crystallized in these codes.

a fact that a few fundamental reasons for punishment are to-day primarily operative, and of these, social self-protection is, of course, foremost. So much for the *motives* of punishment.

As to what constitutes punishment, writers upon the theory of punishment frequently overlook the fact that just as the philosophy of punishment changes with advancing civilization, so the connotation of the term "punishment", as well as its socio-penal implications changes. Any history of penal methods[1] will substantiate this. This fact not only has important practical bearings with reference to individual "rights" under the constitutions of State and nation, as was shown, for example, by a recent case,[2] but, with reference to the *insane* offender, especially, it has its significant implications.

Purposes, Desiderata, and Difficulties. — With these preliminary observations, we may now attempt to outline what we conceive to be the social purpose expressed in the criminal law (especially the law of insanity), the desiderata in this field, and the difficulties that stand in the way of their achievement.

Responsibility. — We cannot escape some further dealing with the metaphysical specter of responsibility. Elsewhere[3] we have already expressed the opinion that the question of freedom of will may be entirely disregarded, for the purposes of the criminal law; that the problem of moral responsibility or social accountability[4] is rather concerned with those practical matters, — such as, on the one hand, the safety of the group, and, on the other, the mental condition (as well as other factors contributory to delinquency) of the individual offender. The metaphysical argument that freedom of will is essential to moral agency, virtue, vice, reward, punishment, must in practice result in absurd conclusions. For example, even practical, keen minded, but sentimentally altruistic lawyers, such as Clarence Darrow, arrive at absurd conclusions by treading the *via dolorosa* of "necessity", or "determinism." This capable advocate and humanitarian, steeped in the dogma of mechanistic psychology, informs us at the outset of a recent work on "Crime, Its Causes and Treatment",[5] that his

[1] *Cf.* George Ives, "A History of Penal Methods" (1914), and Louis N. Robinson, "Penology in the United States" (1921).
[2] *See* note 3, pp. 20, 21. [3] Pp. 92, *et seq.*
[4] Saleilles, "The Individualization of Punishment", pp. 137–219, shows that we are dealing primarily with a social or cultural phenomenon in responsibility.
[5] Thos. Y. Crowell, N. Y. (1923).

" main effort is to show that the laws that control human behavior are as fixed and certain as those that control the physical world. In fact, that the manifestations of the mind and the actions of men are a part of the physical world."[1] With commendable consistency, but absurd results, he therefore concludes that " the criminal " is morally blameless. He tells us that " crime " and " criminal " are " associated with the idea of uncaused and voluntary actions. The whole field is part of human behavior and should not be separated from the other manifestations of life." Now the use of the expression "*the* criminal" together with this supermechanistic and materialistic psychology, indicates that this author proceeds upon the wrong premise elsewhere criticized, that, because there are many evidences of mechanistic causation in the physical world, it necessarily follows that the human mind has not even an iota of power of creative adaptation to environmental demands and that, consequently, all human conduct is accidental; further, his view implies that we can speak of "*the criminal,*" the *homo delinquente* of Lombroso, disregarding the very obvious evidence of the multiplicity and complexity of causation of criminal, as of noncriminal behavior, in the individual case. What does Mr. Darrow propose to do with all these *criminals?* If all has already been written in the book of fate, then all his penological and humanitarian preventive efforts are doomed to miscarriage. No criminals can be reformed, nor can potential criminality be prevented; and it is, moreover, immoral and unjustifiable to restrain any offenders, if we accept the view that they were just pushed upon life's stage and had no power to depart from the literal statement of their rôles, which were written millions of years ago. As Professor Conklin long ago pointed out, the fundamental flaw of this whole deterministic-mechanistic position is its extreme one-sidedness, its eager jumping at conclusions that biological science itself does not warrant.[2] The presence of mechanism does not mean that human

[1] *Op. cit.*, pp. vii and viii.

[2] "In both ontogeny and philogeny there has been development of freedom. The reactions of germ cells and of the lowest organisms are relatively fixed. In more complex organisms reactions become modifiable through conflicting stimuli, intelligence, inhibitions. *Freedom is the more or less limited capacity of the highest organisms to inhibit instinctive and non-rational acts by intellectual and rational stimuli and to regulate behavior in the light of past experience. Such freedom is not uncaused activity, but freedom from the mechanical responses to external or instinctive stimuli, through the intervention of internal stimuli due to experience and intelligence.*" "Heredity and Environment", pp. 330, 331.

beings have not some spark of capacity for consciously and creatively guiding their conduct in conformity with legal sanctions. Professor Conklin well says: "We need to think of the possibilities of development as well as of the limitations of heredity. Chance, heredity, environment have settled many things for us; we are hedged about by bounds we can not pass; but those bounds are not so narrow as we are sometimes taught, and within them we have a considerable degree of freedom and responsibility."[1] If the problem of freedom of will must be discussed as a basis for moral responsibility, then we know of no better disposition of it than that made by Professor Conklin. But, as we have repeatedly said, it is our belief that praise and blame, the urge to hurt in retaliation, the instinct to self-protection, — these are all concepts that have their tangible illustration and sanction in the psychology of human nature; and, similarly, society's right to self-protection is found in group psychology, in the primitive urge of the group to maintain itself against those inimical acts of individuals that threaten its very existence. This *psychological* basis of responsibility is primary; the rest is mere addition, refinement, sublimation, and rationalization.

Granting the right of society to take every reasonable measure for its self-protection, responsibility really means *educability; i.e.*, if the offender's life history and mental examination disclose that he was able to profit by experience to a more or less normal degree, then he is responsible both morally and to the group, for violating the laws of the group wherein he finds himself. The concept of educability has two chief implications and looks in two directions: First, that punishment here carries with it the *stigma of criminality* and the penal-sociological régime of a *prison*, and this looks back upon the past offense. Secondly, since it has been shown that the mental condition of such a prisoner is such as to make it likely that he has the capacity to profit by future experiences, his educability means that he will be sent to a *prison* (instead of a hospital for the mentally ill), where he will be given the opportunity of education and reform and other character-building experiences; and this looks into the future. It must again be pointed out that such ability to profit by experience (hence, to that extent, responsibility), carries with it the more

[1] Presidential Address, American Society of Naturalists, Cleveland. *Science*, Jan. 10, 1913.

severe régime, as well as the stigma of *prison* service; whilst irresponsibility because of mental unsoundness carries with it no stigma, results in incarceration in pleasant surroundings, and implies opportunity for release when recovered, the asylum being essentially a place for *detention* and possible medical (rather than primarily punitive and reformative) treatment. Most important, this theory has at its basis the insistence that before an individual or the group can justifiably indulge in the luxury of "moral indignation", he or it must first make every effort to get at the causes of antisocial conduct in the individual case. Only thus can the purely emotional response to an antisocial, fear inspiring, or hate eliciting act be transmuted into rational and hence *righteous* moral indignation.

We have, then, two important principles governing the taking by society, under its control, of persons (mentally sound and unsound) whose conduct has already shown them to be disturbing elements, and inimical to the social order: (1) *The primary right of society to social protection at any cost commensurate with the potential danger to social security;* (2) *the recognition of the personality of the offender.* In (1) above, no doubt numerous subtle factors (as the "sublimated vengeance motive", or even more primitive complicating factors) enter; such as public rage, the passion for revenge, the lust for blood, etc. Similarly, as to (2) above, it is not always easy to keep the social aims of physical punishment of the offender, his right to assistance in possible reformation, the deterrence of others, etc., uncomplicated by a host of other motives in the individual case.[1] As long as certain particularly atrocious acts stir the group mind, as they do the individual, with hatred, disgust, fear, and a deep sense of outrage generally, just so long must it be the practice to force Justice into a mésalliance with Vengeance. The passion of revenge is a more or less "necessary concession to the brutal instincts and tendencies of men. Any system founded on reason must omit it,

[1] It is quite common, when there is a crime wave and newspapers are busy with their perennial condemnation of the police, the courts, the maudlin sentimentalism of misguided reformers, etc., for a judge to "take it out" on the next culprit before him, and to proclaim to an applauding world that he is "making an example" of the prisoner. It might well be asked, as a question of ethics, whether such judges are not transgressing the bounds of "determent" as a ground of punishment, and whether the unlucky culprit should be made to bear the brunt of the overambitiousness and overactivity of his brothers in crime.

as far as possible"; but in impulsive and uncivilized communities, and in times of social hysteria, some toll must be paid to revengefulness and the desire for blood. This is one of the inherent weaknesses in all social institutions; and only the solvent of liberal education can aid in its reduction.

But even an "emotional code" of penal law must take account of the mental condition of the offender. Our anger soon cools when we learn that a certain offender really could not have avoided the act: and it is our duty to suspend judgment upon the actor until we have made an effort to examine into the "natural history" of his act.

The social purposes as brought out in this study, more particularly as indicated by the two principles mentioned above, are then: (1) *To prevent the commission of crime where possible, and, in the field we are concerned with, to prevent the commission of crimes by mentally unsound persons;* (2) *to prevent the punishment, in the sense of incarceration and labor in a prison, and the attending stigma, of persons who ought not, by reason of their mental condition, to be subjected to such strenuous treatment, for the reason that it is probable*[1] *they would not have committed the illegal act, but for the mental disorder;* (3), *better than* (2), *to prevent the trial of such mentally unsound persons, thus saving the State its time and money, and the accused and his family the strain and disgrace;* (4) *to provide for the wise disposition of mentally disordered offenders, who, for some reason, have been tried;* (5) *to provide for their detention and treatment until they can, with safety to themselves and society, be released;* (6) *to bear in mind, at all times, the potential danger to society of mentally unsound offenders who, by reason of one or more criminal acts, have already manifested such a condition of mind as is inimical to social security.* In the fulfillment of all these purposes, resort must be had to such modern scientific instrumentalities as the *social-psychiatric clinic,* to the concept of *balance between the more or less conflicting social interest in the general security, on the one hand, and the social interest in the welfare and opportunity for freedom of individual self-expression, on the other.*[2] For example, the

[1] We have repeatedly pointed out that in the case of the relation of mental disorder to criminal behavior, in the individual instance, it is practically always a question of probability.

[2] *See* Pound, "Criminal Justice in the American City", in James Ford's "Social Problems and Social Policy", pp. 891, 892. *See also,* Pound, "Outlines of Lectures on Jurisprudence", 3d Ed. (1920), p. 89.

danger to society of some individual who is in the toils of the law because of a minor offense may be greater than the future danger of some much more serious offender; again, the social potential of a prisoner charged with a grave offense may be much more promising than that of a minor offender. These facts, which thorough psychiatric examination would help to disclose in the individual case, suggest the necessity of *individualization* on the basis of potential danger to the community; but they none the less imply that individualization can not ignore the personality and the rights of the offender, that, in other words, as nearly as possible, the desirable balance between the dual interests of society, — its own security and the welfare of its component parts, — should be maintained.

If we take a broader view, however, we find that in an enlightened society the social interest in the general security and the individual's own best interests are practically identical. For a healthy society is just as much concerned with the happiness and right of self-assertion of its constituent members, as with the welfare of the social order; and it tries to keep these two groups of interests harmonized as much as possible.

In the fulfillment of the social purposes outlined above, a useful conception, beside that of balance of interests, has been suggested in the foregoing discussion; namely, the idea of *socio-legal accountability*. We have seen that there are two groups that the penal order must keep in mind, *i.e.*, the *sane* (educable) criminal and the insane (mentally irresponsible, and hence morally unblamable) criminal. However, it must not be forgotten (a fact frequently overlooked in this connection) that to-day the defense of insanity, in practice, results in the transfer of the accused from the category of the sane *offender*, to that of the insane *offender*. In both cases, the accused is *still an offender;* he has offended against, and may possibly further endanger, society's laws and security. The relationship of these two types of offenders (the one morally culpable because of educability, the other morally blameless, but a social offender and potentially dangerous, nevertheless), to the attitude and duty of a legally ordered society toward their offenses may conveniently be embraced under the term *socio-legal accountability*. This term is broad enough to include both *penal* and *hospital* treatment, and both responsibility (in the sense of moral blameworthiness and punishability), and accountability (in the

sense of amenability to social control because of potential danger, but, at the same time, and as far as our present instrumentalities will enable us to judge, moral blamelessness). Though only the mentally sound offender is responsible (*i.e.*, punishable) both are accountable, *viz.*, both *prima facie* have an account to settle with society. With this statement of what we conceive to be the philosophy of socio-legal accountability, and of the purposes of society in this domain of social control we may proceed to consider some of the agencies and devices that have been suggested at various times and in different places as appropriate to the attainment of the social purposes outlined above.

Section 3 — Proposals Made for Reform of Law of Insanity

Preliminary Procedure. — With the exception of the Massachusetts law for the routine examination of offenders of certain classes, and projects for the establishment of psychopathic clinics in the lower courts, no practicable and farsighted recommendations covering the important point of sorting out mentally ill offenders *before trial* seem to have been made. The Massachusetts law, modified as suggested below, and articulated with the procedure in courts, probation offices, social agencies, and penal and reformative institutions, seems to us to be the most promising device for the routine examination and proper disposal of mentally disordered offenders; especially is this true if it functions in coöperation with psychopathic clinics attached to the lower courts in the larger municipalities.

Expert Testimony. — Among the devices which have been recommended or adopted are the following: The creation of a special, official staff of experts attached to the courts, as in Germany and France;[1] the appointment of experts for any particular case by the court, the experts having no special qualifications, but being merely physicians; the appointment by the court of experts from among specially qualified "lunacy examiners", the provisions for the qualifications of such experts varying. The New York law provides that the judge, before whom a hearing on *habeas corpus* is pending, " may appoint not more than three disinterested, competent physicians to examine such person as to his soundness of mind at the time of the examination "; and that any such physician " may

[1] Oppenheimer, "The Criminal Responsibility of Lunatics", p. 266.

be sworn as a witness at the instance of any party to the proceeding."[1] These proposals of the New York law are all improvements upon the preëxisting condition; but the provisions are limited to proceedings on *habeas corpus* or *certiorari;* and there is nothing to prevent the continued use of paid, conflicting, biased experts at trials on the issue of irresponsibility. Moreover, there is no guaranty that the experts will be well qualified to perform their duties. The Pennsylvania law specifically defines a "qualified physician" (for all purposes except that in which expert testimony is notoriously abused, namely, the actual trial), as follows: "A physician who has been resident in this State for at least three years, has been licensed to practice medicine in this State, and has been in the actual practice of medicine for at least three years or has had at least one year's experience as physician in a hospital for mental patients."[2]

The Expert Testimony Bill prepared by the Committee of the Institute of Criminal Law and Criminology, is as follows:

Sec. 1. *Summoning of Witnesses by Court.* Whenever in the trial of a criminal case the issue of insanity on the part of the defendant is raised, the judge of the trial court may call one or more disinterested qualified experts, not exceeding three, to testify at the trial, and if the judge does so, he shall notify counsel of the witnesses so called, giving their names and addresses. Upon the trial of the case, the witnesses called by the court may be examined regarding their qualifications and their testimony by counsel for the prosecution and defense. Such calling of witnesses by the court shall not preclude the prosecution or defense from calling other expert witnesses at the trial. The witnesses called by the judge shall be allowed such fees as in the discretion of the judge seem just and reasonable, having regard to the services performed by the witnesses. The fees so allowed shall be paid by the county where the indictment was found.

Sec. 2. *Written Report by Witnesses.* When the issue of insanity has been raised in a criminal case, each expert witness, who has examined or observed the defendant, may prepare a written report regarding the mental condition of the defendant based upon such examination or observation, and such report may be read by the witness at the trial after being duly sworn. The written report prepared by the witness shall be submitted by him to counsel for either party before being read to the jury, if request for this is made to the court by counsel. If the witness presenting the report was called

[1] *See* Appendix, p. 590. [2] *Id.*, p. 611.

by the prosecution or defense, he may be cross-examined regarding his report by counsel for the other party. If the witness was called by the court, he may be examined regarding his report by counsel for the prosecution and defense.

Sec. 3. *Commitment to Hospital for Observation.* Whenever in the trial of a criminal case the existence of mental disease on the part of the accused, either at the time of the trial or at the time of the commission of the alleged wrongful act, becomes an issue in the case, the judge of the court before whom the accused is to be tried or is being tried shall commit the accused to the State Hospital for the Insane, to be detained there for purposes of observation until further order of court. The court shall direct the superintendent of the hospital to permit all the expert witnesses summoned in the case to have free access to the accused for purposes of observation. The court may also direct the chief physician of the hospital to prepare a report regarding the mental condition of the accused. This report may be introduced in evidence at the trial under the oath of said chief physician, who may be cross-examined regarding the report by counsel for both sides.[1]

The excellent features of this bill are so obvious that they need not be gone into in detail. The bill should obtain that highly desirable neutral and disinterested attitude, which is not characteristic of testimony by experts in insanity cases to-day; at the same time, the bill sufficiently protects the interests of the accused, permitting him an opportunity to cross-examine the neutral, unbiased experts appointed by the court. Further, the bill provides for that proper balance between the opinion of conflicting experts, which, to-day, does not exist; for, while both sides are permitted to have their own experts, thus protecting the rights of the prosecution and defense, the psychological effect upon the jury of the knowledge that the *court's* experts probably have no conscious or subconscious motives for bias, should not be ignored. Moreover, the opportunity for hospital observation wisely provides for those cases which under the Massachusetts law, for example, might be overlooked by the experts of the State Hospital Commission.[2]

The bill, however, lacks one important feature that would greatly improve it; namely, although it provides for cross examination as to experts' qualifications, it does not define the qualifications of the experts, thus continuing an evil to which we have alluded in

[1] Quoted from "Insanity and Criminal Responsibility", by Professor Edwin R. Keedy (Chairman of the Committee that drew up the bill), *Harvard Law Review*, Vol. XXX, No. 6, pp. 537, *et seq.*, April, 1917.

[2] *See*, for example, p. 62.

Chapter 2. To the jury, all "experts" and all "doctors" are pretty much alike; and to leave their qualifications to be brought out on cross-examination, is not the best plan, and may only result in the indulgence in those unpleasant personalities that constitutes a blot upon present procedure in these cases. A section defining the qualifications of experts, — at least those appointed by the *court* (and of which the jury would have knowledge), — would greatly improve the bill; and herein we therefore recommend the adoption of the bill above quoted, with the improvement to which we have alluded.

Tests of Irresponsibility. — A literature almost as huge as that which has clustered about the philosophical problem of "freedom and necessity" has grown up around this subject. Here we can only advert to what we consider to be the most important recommendations which have been made at various times and from various sources.

Sir James Stephen, that acute psychologist as well as legal commentator, proposed the adoption of three tests of irresponsibility, as follows:

> No act is a crime if the person who does it is at the time when it is done prevented [[1] either by defective mental power or] by any disease affecting his mind —
>
> (*a*) from knowing the nature and quality of his act; or,
>
> (*b*) from knowing that the act is wrong; [[1] or,
>
> (*c*) from controlling his own conduct, unless the absence of the power of control has been produced by his own default.]
>
> But an act may be a crime although the mind of a person who does it is affected by disease, if such disease does not in fact produce upon his mind one or other of the effects above mentioned in reference to that act.[2]

While these measures of irresponsibility would, perhaps, theoretically take account of all definite psychoses, they are subject to the criticisms of a psychological nature which we made of the existing tests, *i.e.*, unless the jury is given a proper conception of the unity and interrelation of mental processes, these proposed tests would be just as artificial as existing tests are.

[1] Stephen regarded the parts in brackets as doubtful, although it is not clear why there should be any doubt as to mental *defect*, as well as disease, being included.

[2] "Digest of the Criminal Law", 6th Ed., Art. 28.

In the French rule, the simple statement that " There is neither crime nor offence if the accused was in a state of mental alienation at the time of doing the act, or if he was constrained by a force which he could not resist ",[1] has, because of its simplicity, been recommended in some quarters for adoption in American jurisdictions. Oppenheimer[2] has subjected this test to acute critical analysis, and has indicated its weaknesses. He points out, that while mental disorder *per se* excuses from responsibility under the French rule, the term *démence*, of the French code, was actually and originally intended to mean only such extreme disorder as is closely akin to the condition of Mr. Justice Tracey's " man who cannot exercise any of the faculties of his brain and who has completely lost his understanding, his will, and his memory." And Oppenheimer rightly indicates, that this original interpretation of the simple French test erred on the side of harshness; *i.e.*, that under it only " the confirmed idiot, the raving maniac, and the victim of general dementia in its highest degree ",[3] would be exempt from responsibility. However, according to Oppenheimer, the French judges soon recognized that *démence* is a medical term; they began, accordingly, to employ the medical expert freely, and, because of the rapid enlargement of the circle of psychoses and neuroses recognized by the French psychiatrists, " the field of irresponsibility received new and considerable accretions, so that a larger and larger number of prisoners obtained the benefit of the expanding medical views."[4] This, according to Oppenheimer,[5] practically means that medical experts, and not judge and jury, decide the fate of accused persons; and, discussing the question of " whether it is desirable that every criminal whom medical science declares insane, should escape punishment ", he is led emphatically to denounce " that medical absolutism which claims exemption from punishment for all those whom medical science declares insane."[6] This conviction he arrives at by pointing out that " a short visit to an asylum " must convince one that " on the whole, a madman thinks, judges,

[1] Penal Code of 1810, Art. 64, *cited* by Oppenheimer, "Criminal Responsibility of Lunatics", p. 44. This section has served as a model for the tests in Belgium, Guatemala, Haiti, several of the Swiss Cantonal Codes, etc. *Id.*, p. 82. The French rule goes "the whole length of declaring the victims of mental alienation incapable of committing a crime in any circumstances. The test is here a purely medico-pathological one, and as soon as the question of disease of the mind is answered in the affirmative, an acquittal must follow as a matter of course." — *Id.*

[2] *Id.* [3] *Id.*, p. 100. [4] *Id.*, p. 101.

[5] *Id.* [6] *Id.*, p. 102.

talks and acts exactly like any other person. He is readily influenced by the ordinary hopes and fears which control the conduct of ordinary people. 'A person does not, when he becomes insane, take leave of his human passions, nor cease to be affected by ordinary motives; he may do an act out of jealousy, avarice, revenge.'"[1]

While we agree with Oppenheimer's conclusions as to the undesirability of leaving the question of irresponsibility entirely to experts, we do not accede to his premises. This and similar arguments have already been criticized.[2] It is true that a mentally unsound individual has the ordinary motives, — the psychological accompaniments of the operation of those instincts which are innate in mentally diseased as well as mentally sound persons; but it is usually forgotten that the "lunatic" of the "asylum" is in a sheltered environment, especially adapted to persons of his mental make-up, and he is under supervision and control. Moreover, it certainly is far from true that, as Oppenheimer would have us believe, "on the whole, a madman thinks, judges, talks and acts exactly like any other person"; for if this were so, how would Oppenheimer distinguish the mentally unsound from the sane? And further, if the mentally ill are so much like those of sound mind, of what good are the knowledge tests, the wisdom of which Oppenheimer lauds and the retention of which he recommends?

The objection to the French test must be sought on other grounds. In the first place, it constitutes a delegation to the medical profession of a function that, when all is said and done, belongs to society's judicio-penal machinery. It is not desirable that the medical profession should usurp this function; it is highly desirable that it be permitted to furnish to judge and jury the benefit of its wisdom and experience, unhampered by such technical legal rules and procedure as, to-day, practically nullify its usefulness. Secondly, it is not desirable that all mentally unsound persons, including the mildly psychotic, be *acquitted*, and, either forthwith, or soon after such acquittal, *released* from all social control; which, at least in some American jurisdictions, is the outcome of acquittal. In other words, there are needed some more or less definite criteria of *irresponsibility*, declared by the law,

[1] Oppenheimer, "Criminal Responsibility of Lunatics", p. 101.
[2] *Ante*, p. 8, note 2.

but so framed as to permit trained, unbiased experts to lend their unhampered medical assistance to the judge and jury, whose task it is to dispose of defendants under the law.

Similar to the French rule, and open to similar, and additional objections, is the test recommended by Professor Keedy's Committee, of the Institute of Criminal Law and Criminology, as follows:

Sec. 1. *When Mental Disease a Defense.* No person shall hereafter be convicted of any criminal charge when at the time of the act or omission alleged against him he was suffering from mental disease and by reason of such mental disease he did not have the particular state of mind that must accompany such act or omission in order to constitute the crime charged.[1]

[1] "Insanity and Criminal Responsibility", etc., *op. cit.*, p. 536.

This test was, however, later repudiated by the committee in a subsequent report, as follows: "As a defense for crime the irresponsibility of the criminal is, from the viewpoint of society, largely an academic question. The pragmatic feature of such a situation is that the offense has been committed and this remains a fact regardless of whether it is decided that the person committing it was irresponsible by reason of juvenility, feeble-mindedness, insanity or other inadequacy. Such considerations are of importance only for determining the particular treatment to be adopted for the reformation of the criminal and the protection of the community. Society needs as much protection from the criminal acts of irresponsible individuals and is as vitally interested in their reformation as in the case of the responsible.

"Upon the above considerations this committee recommends the adoption of a program for development directed towards the following ends:

"(1) That in all cases of felony or misdemeanor punishable by a prison sentence the question of responsibility be not submitted to the jury, which will thus be called upon to determine only that the offense was committed by the defendant.

"(2) That the disposition and treatment (including punishment) of all such misdemeanants and felons, *i.e.*, the sentence imposed, be based upon a study of the individual offender by properly qualified and impartial experts co-operating with the courts.

"(3) That provisions be made permitting the transfer of such misdemeanants and felons at any time after conviction from one institution to another affording a different kind of treatment upon the presentation of evidence of the needs for such action satisfactory to the court which passed sentence.

"(4) That no maximum term be set to any sentence.

"(5) That no parole or probation be granted without suitable psychiatric examination.

"(6) That in considering applications for pardons and commutation careful attention be given to reports of qualified experts showing the applicant's mental age and mental stability and that in drafting statutes determining or defining juvenile delinquency, mental age and mental stability, within reasonable limits, be regarded as of importance with the calendar age of the delinquent." — *Journal of Criminal Law and Criminology*, Vol. 10, pp. 186, *et seq.*

While the writer is in hearty accord with the philosophy and the provisions above outlined, he feels that they constitute too radical a departure from prevailing law and procedure, and that they would meet insuperable constitutional and other difficulties; some of them could, however, be adopted, *e.g.*, (2), (3), (5), and (6), above.

The good feature of this test is its simplicity. Further, it is based upon the recognition that a criminal intent, or *mens rea*, or "the will to commit an offense",[1] or the "vicious will",[2] or "criminal knowledge",[3] or a similar term expressive of a sound mind intent upon committing an act known to be illegal, is the fundamental element in every crime. Moreover, this simple formula or shell can be filled in with a content of the ethical and psychological views of successive generations. But does it supply the jury with any clear working principle? Is it not, after all, equivalent to saying, that to make a man responsible under the law he must have that state of mind which constitutes responsibility? Would not, moreover, the courts continue to employ existing tests, by merely filling in the shell of "the particular state of mind that must accompany such act or omission to constitute the crime charged" with existing scraps of opinion and *dicta* in which the cases, as we have seen, abound? These last questions must be answered in the affirmative; and all the benefits of this test, without some of its objectionable features, could just as well be derived by simply recognizing the futility of legal tests and leaving the whole question to the jury, as in New Hampshire.

Doctor Charles Mercier, in his scholarly "Criminal Responsibility", gives the following test: "The actor must will the act; intend the harm; desire primarily his own gratification. Furthermore, the act must be unprovoked, and the actor must know and appreciate the circumstances in which the act is done." An analysis of this test indicates that it is not much of an improvement upon the existing knowledge tests. A violently disordered person, whom no rational being would declare morally responsible for his conduct, may very easily "will the act, intend the harm, desire primarily his own gratification." As to the act being unprovoked, does this assume that mentally ill persons are not subject to provocation? On the contrary, as we have recommended in several places, the pathological irritability in some of the psychoses ought to be considered in relaxing the "cooling-time" rule in their favor. Finally, who is to say how the phrase, "know and appreciate the circumstances in which the act is done", should be interpreted? Have we not here the same difficulties with reference to the meaning

[1] Hale, "Pleas of the Crown", Chap. 2.
[2] "An unwarrantable act without a vicious will is no crime at all." — 4 Blackstone, "Commentaries", 21.
[3] 3 Austin, "Jurisprudence", 326.

of "know" and the meaning of "nature" and "quality" (now converted into "circumstances") that we had before in the knowledge tests? Here, again, it seems to us that the problem was approached from the wrong point of view; that instead of providing the jury a general background of customarily accepted principles of psychology and psychopathology upon which they would intelligently project the tests, an attempt has been made to tinker with the tests themselves, by substituting for the troublesome knowledge test, an even more incomprehensible test.

In a recent book on "The Psychology of the Criminal",[1] an English author suggests the following test: "No act done by a person in a state of insanity, or suffering from mental defect, to such a degree as to justify his being placed under care, treatment, and control, can be punished as an offence." Considering the objections that might be raised against this test, he says: "Firstly, it will be said that this places the verdict in the hands of the medical expert witnesses. But this is not so. The expert witnesses can only express their opinion, backed by such facts as they are able to allege. A non-criminal lunatic can only be detained in an asylum by a legal order. Truly this order is based upon medical certificates. But each such certificate must rest upon observed facts which are sufficient to justify the physician in signing it. It may or may not contain sufficient evidence of insanity to satisfy the legal authority with whom the detention of the alleged lunatic ultimately rests. . . . And so with a Court, under the author's proposed definition. Secondly, it may be objected that, with this criterion a man may have been regarded as sane until he commits an offence. True, but this difficulty occurs with our present tests. Many a murderer has gone about with insanity unsuspected, or not inquired into, until he has committed the fatal act. Or such a man may have been regarded as being harmless."[2]

The author of the above overlooks the distinction which the law is attempting to maintain between commitable insanity and that insanity which excuses from responsibility (in the sense of punishability). Besides, even if it were desirable to eliminate this distinction (and it would appear socially dangerous to do so), the jury, under his test, is still not furnished with any criterion as to what condition of mind constitutes *commitability*.

A learned committee on criminal responsibility, of the Medico-

[1] M. Hamblin Smith (1923), p. 12. [2] *Id.*, pp. 12, 13.

Psychological Association of Great Britain and Ireland, proposed the following criteria to the Committee on Insanity and Crime, recently appointed by the Lord High Chancellor of Great Britain:

(*i*) The legal criteria of responsibility expressed in the Rules in McNaghten's Case should be abrogated, and the responsibility of a prisoner should be left as a question of fact to be determined by the jury on the merits of the particular case.[1]

(*ii*) In every trial in which the prisoner's mental condition is in issue, the Judge should direct the jury to answer the following questions:

(*a*) Did the prisoner commit the act alleged?

(*b*) If he did, was he at the time insane?

(*c*) If he was insane, has it nevertheless been proved to the satisfaction of the jury that his crime was unrelated to his mental disorder?[2]

To these criteria, the Committee on Insanity and Crime objected on the grounds, first, that "the Association gave no clue as to what they regard as the test of criminal responsibility"; secondly, that "all the witnesses (representing the Medico-Psychological Association) were, in substance, agreed that the effect of (*ii*) (*c*) which threw upon the prosecution the onus of satisfying the jury that the act of the person found to be insane was 'unrelated' to his mental disorder, would be to cast a burden which could not be discharged; and that the question was otiose. The vagueness of the term 'unrelated' was pointed out: and the phrase eventually was altered to 'the mental disorder was not calculated to influence the commission of the act'; but the difficulty of proof is not altered by the turn of the phrase."[3] The Committee was of opinion, further, that "the difficulty of diagnosis of the state of mind and, when some unsoundness of mind was indicated, of establishing the nonrelation of the act to the unsound state of mind would introduce so much uncertainty into the administration of the criminal law as to create a public danger."[4] But it may well be questioned whether greater uncertainty than exists at present, under the rules of the Opinion following McNaghten's Case, would

[1] It will be observed that this is essentially the New Hampshire rule. In England, where the distinction between irresponsibility and insanity is much more strictly maintained than in American courts, such a provision is much more objectionable legally than with us.

[2] "Report of Committee on Insanity and Crime", etc. (1923), pp. 31, 32.

[3] *Id.*, pp. 4, 5.

[4] *Id.*, p. 6.

result. The suggestion as to the crime being "unrelated to the mental disorder", is similar to that found in some American cases (another instance of the hotchpotch of opinion and dictum in this field); namely, that it must be proved that the crime "was the product" of mental disease "solely." While this is admittedly difficult to prove, the same difficulty exists to-day with reference to the tests of irresponsibility, even in England; for, to exempt from responsibility, it must there, no less than here, be proved that the mental unsoundness was related to the criminal act, as witness the delusion rules. All that any expert can say in many of these cases is that there is a *reasonable probability* that an offense of the type involved would not have been committed but for the mental disorder; and the jury must decide whether the case under consideration falls within this probability. Rarely (and only in certain offenses more or less typical of certain psychoses, *e.g.*, indecent sex offenses in senile dementia) can the expert say categorically that the mental disorder involved was the *direct* and *sole* cause of the offense of which the defendant stands accused.

The British Medical Association also delegated a committee to coöperate with the Committee on Insanity and Crime appointed by Lord Birkenhead, and its committee made the following recommendations as to the tests of legal irresponsibility for crime:

An act may be a crime although the mind of the person who does it is affected by disease or defective power if such disease or defect does not in fact prevent him:

(*a*) from knowing and appreciating the nature and quality of his act or the circumstances in which it is done; or

(*b*) from knowing and appreciating that his act is wrong; or

(*c*) from controlling his own conduct unless the absence of the power of control is the direct and immediate consequence of his own default; but no act is a crime if the person who does it is at the time it is done prevented either by defective mental power or by any disease affecting the mind:

(*a*) From either knowing or appreciating the nature and quality of his act or the circumstances in which it is done; or

(*b*) From either knowing or appreciating that the act is wrong; or

(*c*) From controlling his own conduct, unless the absence of the power of control is the direct and immediate consequence of his own default.

N.B. — 'Wrong' may mean (*a*) morally wrong; (*b*) illegal.[1]

[1] "Report of Committee on Insanity and Crime", pp. 33, 34.

These tests may be criticized on the following grounds: First, they add to the difficulty of definition which we found in the McNaghten rules, by introducing the new concept of "appreciating", and by not explaining the distinction between "knowing" and "appreciating", that judging from the second portion (the negative statement) of the tests quoted above, they intend to make. For, according to this latter part of the quotation, *either* lack of knowledge *or* lack of appreciation of the nature and quality of an act will exempt from responsibility under these tests. Again, while an attempt is made to define "wrong", the Association did not indicate whether moral wrong and legal wrong are used conjunctively or disjunctively.

The British Committee on Insanity and Crime, after careful study of the whole question and consideration of the recommendations above discussed, and others, proposed that the rules of the Opinion of the Judges following McNaghten's Case should be retained. They were of opinion, moreover, that those rules "are, in substance, sound"; but suggested the addition of the rule, "that the law does recognise irresponsibility on the ground of insanity where the act was committed under an impulse which the prisoner was, by mental disease, in substance deprived of any power to resist."[1] The Committee carefully pointed out that "the witnesses called in support of this recommendation did not propose that a weakening of control by mental disease should be sufficient. They meant control so impaired by disease as in substance to amount to complete loss of control."[2] The Committee went on to say that they appreciated "the difficulty of distinguishing some of such cases from cases where there is no mental disease, such as criminal acts of violence or sexual offences where the impulse at the time is actually not merely uncontrolled, but uncontrollable. The suggested rule, however, postulates mental disease."[3] But this explanation overlooks the fact that the difficulty in these cases is just that of convincing a jury that mental disease actually exists; *e.g.*, in the case of the impulsive conduct of some types of psychopathic personality, or in the case of the obsessive and compulsive phenomena of the neuroses, in which types the patients outwardly, and to a jury, appear to be "sane." In other words here again the importance of supplying the jury a background of abnormal psychology, upon which to project these

[1] "Report of Committee on Insanity and Crime", etc., p. 8. [2] *Id.* [3] *Id.*

tests, was not taken into account. Moreover, the proposal of the British Committee still retains in the law the unsatisfactory delusion tests. The Committee modified the usual power-of-control test (such as that proposed by Mr. Justice Stephen in his "Digest of the Criminal Law", Article 28,[1] and that found in the Criminal Code of Queensland, 1899, Sec. 27)[2] by providing that "the question to be determined should be, not whether the accused could control his conduct generally, but could control it in reference to the particular act or acts charged."[3] But the Committee added that, "no doubt general lack of control would be relevant to the question whether the lack of control in the particular case was due to mental disorder or to a mere vicious propensity."[4] We conclude that while this tardy adoption of Stephen's recommendations as to capacity for control would be a distinct improvement upon the present English law, this law is still weak in that it retains the unscientific delusion tests and in the fact that without a background for the tests it provides for, they are subject to all the criticisms as regard psychology, law, and their vagueness of terminology, and uncertainty of application, that we have made throughout.

Modification of Jury's Function. — Having disposed of the most important recommendations for the improvement of the existing tests, or their substitution by others, we will now consider some more radical recommendations for improvement of the substantive law of insanity. Several eminent psychiatrists, as well as members of the legal profession, have recommended the abolition of the jury or modification of its functions, when the question of insanity is raised. Thus, Doctor William A. White, in an address in 1911, recommended that the jury's task be confined to deciding merely

[1] Quoted *ante*, p. 452.

[2] "A person is not responsible for an act or omission if at the time of doing the act or making the omission he is in such a state of mental disease or natural mental infirmity as to deprive him of capacity to understand what he is doing or of capacity to control his actions or of capacity to know that he ought not to do the act or make the omission. A person whose mind at the time of doing or omitting to do an act is affected by delusions on some specific matter or matters but who is not otherwise entitled to the foregoing provisions of this section is criminally responsible for the act or omission to the same extent as if the real state of things had been such as he was induced by his delusions to believe to exist." This last test is typical of the faculty psychology and the monomania psychiatry of the nineteenth century, as embodied in the McNaghten rules.

[3] "Report of Committee on Insanity and Crime", etc., p. 9.

[4] *Id.*

whether or not an offense was committed. "This fact being established should give the State authority over the person of the offender, and he should be taken into custody, dealt with in accordance with the sort of person he is, and not turned back into the community until this may be done with safety. . . . A pleading of insanity is a virtual confession of having committed the offense charged. The jury passes on that offense. It convicts the man. He is sent to the nearest state hospital for the insane. If his defense holds good, there is where he belongs, and not in jail. If he is not insane, there is the place to determine that fact. Those in charge of the institution are more competent to pass on this point than is the jury. If the accused is found to be sane, the defense fails, and he is remanded to the judge for sentence for his crime." [1]

Before discussing this recommendation, one or two similar ones may well be considered, the fundamental principle of which is the same. Eugene Smith, sometime President of the Prison Association of New York, and a careful student of criminology and penology, made the following recommendations with reference to the procedure in the trial of insanity cases:

The first step should be a trial of the issue thus raised, to be had before the court and a special jury, the latter to consist of educated alienists only, who should be selected by a method analogous to that used to obtain a "struck jury." It is not necessary nor practicable that this jury should have twelve members; a much smaller number, perhaps five or even three, would be quite sufficient. This deviation from the traditional number of jurors (recommended for convenience) could not be made in those States the constitution of which requires a Common Law jury of twelve, without constitutional amendment. The constitutions of some of the States now provide for juries of eight, and even of four, members. The provision for jury trials contained in the United States Constitution requires a jury of twelve as at

[1] Quoted in an editorial in the *Journal of the Institute of Criminal Law and Criminology*, Vol. 4, pp. 107, 108 (1913–1914). Doctor White, in his recent "Insanity and Criminal Law", for the sake of expediency, advocated the less radical measures of the Institute of Criminal Law and Criminology. "Most suggestions for improving conditions fail to take into account constitutional limitations or firmly grounded methods of procedure and so never get anywhere"; and he points out that the recommendations of the committee of the Institute of Criminal Law and Criminology, "aim to incorporate only such changes as are practical and the committee felt it was better to actually accomplish something, be it ever so little, than to put forth an ideal scheme that was of necessity doomed to failure." *Op. cit.*, p. 142. *See also ante*, p. 455, note 1.

Common Law, but it applies to the Federal courts only and places no restriction upon the power of a State to regulate the size of its own juries. The court and jury thus constituted, after examining the defendant and receiving such testimony bearing upon his sanity as might be offered by either party, should determine whether defendant was insane to a degree rendering him irresponsible for his acts at the time of committing the crime charged and also at the time of the trial before them. The judgment rendered should be final and conclusive, subject to an appeal upon errors of law if allowed by a judge of a court of general jurisdiction. The results arrived at by such a trial and the subsequent proceedings would classify themselves under four distinct headings.

1. If the defendant was insane when the crime was committed and is still insane, the judgment would forthwith commit him to an asylum. In case he should in the future become sane, he should not be released without a further trial, before a court similarly constituted, to determine whether his condition, mentally and morally, is such that his restoration to freedom would be consistent with "public peace and safety."

2. If the defendant was insane when the crime was committed but is now sane, the judgment would further determine whether his present condition is so entirely sane and normal that he can with safety to the public and himself be set at liberty; and if not, the judgment would forthwith commit him to a sanitarium or other suitable institution for treatment and observation until he could safely be discharged. In this as in the preceding case, the defendant would be forever exempt from a criminal prosecution for the crime in question.

3. If the defendant was sane when the crime was committed and is now sane, the judgment would direct that he be forthwith brought to trial before a criminal court and common jury, where the claim of insanity should be rigidly excluded.

4. If the defendant was sane when the crime was committed but is now insane, the judgment would forthwith commit him to an insane asylum where he should remain until he becomes sane; if he regains his sanity, he is then to be tried criminally with the same force and effect as if he had never been insane.[1]

This measure, which is admirably suited to the social purposes involved, is, as will be seen, similar to Doctor White's recommendation, but it reverses the order of the findings; *i.e.*, the defendant's mental condition is first obtained through the aid of a jury of

[1] "Criminal Law in the United States", by Eugene Smith, in "Correction and Prevention", prepared by the Russell Sage Foundation for the Eighth International Prison Congress, New York (1910), pp. 112, 113.

alienists; then, if they find him to be of sound mind, he is tried by a lay jury.

Both of these measures provide for intelligently bringing to bear upon our problem the learning and experience of unbiased medical men. But both encounter what we believe to be well nigh insuperable difficulties. In the first place, under the reasoning of Strasburg *v.* State,[1] they would unquestionably be declared violative of the rights of accused persons under State constitutions. In that important case it was held, that, since the question of mental condition is an integral part of the *mens rea*, and since this condition of guilty mind is in turn a required element of the definition of all crimes (except minor statutory offenses), any measure which prevents the jury from taking the mental condition of the accused into consideration in deciding upon his status before the law, is violative of the common law principle of criminal intent, and, hence, of the Washington State constitutional guaranty that "the right to trial by jury shall remain inviolate."[2] Both Doctor White's proposal, — providing, *first*, for the determination of the fact of the commission of the physical act, and next, for the determination of mental condition by experts (not however as a jury), — and Mr. Smith's proposal, — providing, *first*, for a *jury of experts* to pass upon the *mental condition only* of the accused and, secondly, for another, but *lay*, jury to pass upon whether he committed the *physical* act, — would meet the fate of the Washington law. Indeed, the subsequent procedure provided in the Washington law was similar to that recommended by Doctor White. In both of the above recommendations, the right of trial by a jury of peers would probably be considered as so seriously modified as to constitute a denial to the defendant of the right to have the mental element of his crime, as well as the physical, determined by the same jury of peers.[3] The *absolute abolition* of

[1] 60 Wash., 106, 110 Pac., 1020 (1910). [2] *Id.*, p. 117.

[3] Of course, Smith's recommendation is not as extreme as that in the Washington act, where the question really was "can the legislature, under our constitution, so circumscribe inquiry touching the question of the guilt of the accused as to exclude *all* consideration by the jury of his insanity at the time of committing the act?" (*Op. cit.*, p. 116.) In the Smith proposal, the new question is presented of dividing the duty of establishing the existence of the crime, between two separate juries (one determining the mental element, the other the physical). While the writer has found no decisions on this point, or any which suggest how it might, analogically, be decided, he is certain that this division of labor between two juries, the second of which is compelled to abide by the decision of the first as to the most important ingredient of the crime, and the compelling of the defendant to be tried by a specialized jury,

the jury in these cases, as has also been frequently advocated, would certainly be held unconstitutional; nor would it be an easy matter to amend State constitutions so radically.

But even supposing that constitutional objections would be overcome by amendment or judicial construction, there is room for doubting the wisdom of a procedure which entirely eliminates the jury. The medical proponents of abolition of the jury trial in insanity cases overlook several fundamental facts. The jury is actually not purely a *fact-finding* device. If this were the sole function of the jury, no doubt a better fitted fact-finding instrument could be devised.[1] A jury's function, in addition to that of drawing conclusions from more or less conflicting evidence presented by both sides, is to represent the prevailing public opinion and morality;[2] a jury, in other words, is a sort of miniature group mind that reflects the sentiments of the community. If the jury were purely a fact-finding instrument, then the system of having juries composed of experts, ought logically to be extended to every field; and we should have juries of engineers, of veterinarians, of acrobats, and what not. Further, "the purpose of the jury system is to furnish an approximate safeguard of personal freedom and reputation."[3] Taking it all in all, the jury of laymen from all decent walks and stations of life, provided, always, that honest and intelligent men do their share of jury service,[4] is as good

not of his own choice, would be held destructive of State constitutional provisions, guaranteeing the inviolability of the right of trial by jury; for it unquestionably would be considered a "substantive right", and not a mere procedural form. This procedure, in Smith's proposal, must not be confused with the practice in California and other States of having a separate jury determine the prior (collateral) question of a defendant's mental capacity *to stand trial;* for Smith's proposal is for a jury of experts to pass upon the mental condition of the accused at the *time of offense.*

[1] Such, for example, as employed by Benussi, Marston, Larson, and other investigators in the field of the psychology of testimony. *See* the following: W. M. Marston, "Reaction-time Symptoms of Deception", *Journal of Experimental Psychology*, Vol. 3, pp. 72, *et seq.*, February, 1920; J. A. Larson, "The Cardio-pneumo-psychogram", *Journal of Experimental Psychology*, Vol. 5, pp. 323, *et seq.*, October, 1922; J. A. Larson, "The Cardio-pneumo-psychogram in Deception", *Journal of Experimental Psychology*, Vol. 6, pp. 420, *et seq.*, December, 1923; C. S. Morgan, "A Study in the Psychology of Testimony", *Journal of Criminal Law and Criminology*, Vol. 8, pp. 222, *et seq.*, July, 1917, etc.

[2] *See* Bushel's Case, Common Pleas, 1670 (Vaughan, 135), as to the historical origin of this function.

[3] Saleilles, "The Individualization of Punishment", p. 233.

[4] In this connection, the writer deplores the practice of widespread exemptions from jury service. Those highminded citizens who inveigh most strongly against the jury system frequently exhibit extreme ingenuity in avoiding service; just as those who deplore the system of democratic government which "gives to every moron a vote", and puts corrupt and incompetent politicians

a device, in our opinion, as could be evolved, for the difficult task of arriving at conclusions on the basis of frequently conflicting testimony. A jury of experts is not pliable enough mentally for the quick and, on the whole, efficient group mind process, — the sifting of conflicting testimony, judging of the relative weight and credence to be given to the testimony of different witnesses, compromising, where absolutely necessary, and similar group mind activities — that must go on in these troublesome cases; for experts are liable to be dogmatic, too onesided, each clinging to those theories borne out by his own particular experience, and, because he is a specialist with skill derived by long experience, less tolerant of the views of the others. We must not forget, in this connection, that the function of the experts, in such a scheme as Mr. Smith's, would actually be to determine *irresponsibility*. If it were merely to find the existence or nonexistence of a psychosis, eminently a medical question, then a few experts could come to agreement, and they do form the best available device; and we have therefore recommended this device at all stages of the proceedings *except* the actual trial of the issue, — *not* of insanity or sanity, — but of *guilt* or innocence. The jury system, of course, has many weaknesses, but, " the remedy for acquittals through maudlin sentiment or in response to popular clamor must be sought by correcting false notions, and not by destroying the safeguards of private liberty."[1] We conclude, that while every effort should be made to get intelligent, honest citizens to serve as jurors, and to root out the evil of professional jurymen, and the use of hangers-on at the courts, and habitual denizens of city park benches, as jurors,[2] and while the jury should be given every opportunity to understand the fundamentals of psychology and psychopathology involved in insanity cases, and to hear the well founded reports of unbiased experts, the jury, *as a responsibility determining device*, should not be eliminated.

Elimination of the Defense of Insanity is another, closely related solution which has been proposed for this perplexing problem. At the 1910 meeting of the New York Bar Association, a special

into high places, frequently are too busy or lazy to go to the polls. The practice of having special "keep off" lists in prosecutors' offices in which the most influential citizens are enrolled for the purpose of not serving as jurors, is greatly to be deplored. *See* the Cleveland "Survey of Criminal Justice" on this point.

[1] Strasburg *v.* State, 60 Wash., 106, 131 (1910). [2] *See* the "Cleveland Survey."

committee, that had been appointed to study ways and means of reforming the law and procedure in insanity cases, presented for discussion the following proposed amendment to the New York insanity laws:

Insanity or other mental deficiency shall no longer be a defence against a charge of crime; nor shall it prevent a trial of the accused unless his mental condition is such as to satisfy the court upon its own inquiry that he is unable, by reason thereof, to make proper preparation for his defense.

A supplemental provision was recommended by the chairman of the committee, as follows:

If at the time the jury renders the verdict the court has reason to believe that at the time of the commission of the crime the prisoner was insane or afflicted with any mental deficiency, it may then defer sentence and cause an inquiry to be made, and if as the result of that inquiry the prisoner is found to have been sane, the court shall then sentence him to be electrocuted or imprisoned in a jail, as the case requires; and if insane, the court shall then sentence him to be confined in the proper State asylum during his life or for a term of years, as the case requires.[1]

An act similar to the foregoing, providing for the abolition of the defense of insanity, was declared unconstitutional in Strasburg *v.* State, the Washington case already alluded to. The following are the pertinent provisions of that act:

It shall be no defense to a person charged with the commission of a crime, that, at the time of its commission, he was unable by reason of his insanity, idiocy or imbecility to comprehend the nature and quality of the act committed, or to understand that it was wrong; or that he was afflicted with a morbid propensity to commit prohibited acts; nor shall any testimony or other proof thereof be admitted in evidence.[2]

In order to get at the reasons for this legislation it is necessary to consider the section that supplements the above, which is as follows:

"Whenever, *in the judgment of the court* trying the same, any person convicted of a crime shall have been at the time of its commission unable by reason of his insanity, idiocy or imbecility, to comprehend the nature and quality of his act, or to understand that it was wrong, or shall be at the time of his conviction or sentence insane or an idiot, or imbecile, such court may in its discretion direct that such person be

[1] "Report of the New York Bar Assn.", Vol. XXXIII, pp. 391, 401, *et seq.*
[2] 60 Wash., 106, 124.

confined for treatment in one of the state hospitals for the insane or in the insane ward of the state penitentiary, until such person shall have recovered his sanity. In determining whether any person convicted of a crime was at the time of the commission thereof unable by reason of his insanity, idiocy or imbecility to comprehend the nature and quality of his act, or to understand that it was wrong, or is at the time of his conviction or sentence insane or an idiot or imbecile, the court may take counsel with one or more experts in the diagnosis and treatment of insanity, idiocy and imbecility, and make such personal or other examination of the defendant as in his judgment may be necessary to aid in the determination."[1] (Italics ours.)

The objects, negative and affirmative, of both of the measures above quoted may be analyzed as follows: (1) It was not intended to *punish* a person for the commission of a crime, in spite of the fact that " by reason of his insanity idiocy or imbecility ", he was able to meet the usual tests of irresponsibility. (2) The object was rather " to minimize the well-known evil resulting from the all too frequent interposition of the defense of insanity in homicide cases, where no other defense is available, by changing the time and mode of trial of the issue of insanity "[2] (irresponsibility). In other words, insanity as ground for irresponsibility was to be determined at any stage of the trial of the question whether or not the defendant committed the act, and it was to be determined by the judge with the aid of experts. The Washington measure was therefore essentially similar to that proposed by Doctor White, except that the Washington provision left the determination of irresponsibility, the use of experts to aid in this determination, and the commitment to a hospital after such determination, all to the discretion of the court. (3) Another object, closely related to (2) above, and which also was analogous to that recommended by White, was to place the question of the type and length of penal and hospital treatment of offenders under the supervision of experienced alienists, by removing the determination of irresponsibility from the province of the jury and leaving it entirely within the discretion of the judge. While determination, by an expert body, of the kind and length of treatment best suited to the individual case is commendable from a penological standpoint, the procedure suggested for this purpose in these measures is objectionable, because, as has been said in considering provisions for the

[1] 60 Wash., pp. 124, 125. [2] *Id.*, p. 125.

elimination of the jury, it fails to take any account of popular sentiment and opinion, through the imperfect, but improvable, and, on the whole, desirable, instrumentality of trial by jury; further, it makes no moral distinction between sane offenders and insane offenders, indifferently subjecting them both to, or relieving them both from, the stigma of guilt.

The Washington law was, of course, declared unconstitutional on the following reasoning: (1) That while the State Constitution's "due process" clause may not necessarily, by itself, imply a right of trial by jury, this provision, together with the one guaranteeing that the "right of trial by jury shall remain inviolate", indicates that in the cases we are discussing "due process" means "trial by jury"; (2) That "trial by jury" means "that the accused has the right to have the jury pass upon every substantive fact going to the question of his guilt or innocence";[1] (3) that, irresponsibility because of insanity is such a substantive fact entering into the question of defendant's guilt both prior to and after the adoption of the State constitution, and upon which, under the State constitution, "he has a right of trial by jury, the same as upon any other fact inherent in that question; even as the fact that the muscular action of his physical body did or did not commit the physical act charged as a crime against him."[2]

But, as was said above, the most forcible objection to the total elimination of the defense of insanity, assuming its constitutionality, is that it proceeds upon the theory (or gives the impression that it does) that the insane person is both morally and legally responsible. "Such a theory would require changes in our definition of crime and phraseologies concerning intent."[3]

The New York Bar Association Committee on insanity, meeting after the Washington act had been declared unconstitutional, claimed that it "never had in mind as radical a change as proposed in Washington"; that it merely suggested for consideration a change of procedure which "while making the insane man amenable to the criminal law, would yet result in the confining of the criminal insane in an asylum under sentence either for life or a term of years, so as to prevent him from becoming for the second

[1] 60 Wash., p. 118.
[2] *Id.*, p. 111, Parker, J., Crow and Mount, J. J., *concurring*.
[3] Report of Special Committee on the Commitment and Discharge of the Criminal Insane. "Report of the New York State Bar Association", Vol. XXXIV, pp. 271, *et seq.* (1911).

time a menace to society by obtaining his liberty as a matter of right on proof of regained sanity after a verdict of acquittal and a short detention in an asylum." [1] This brings us to the consideration of still another attempted method of remedying the evils in the present procedure in insanity cases, namely, by attacking the problem through the medium of a special verdict.

Special Verdicts. — As early as 1873, a bill was introduced in the New York Legislature, which provided that,

> if the jury acquit in capital cases on the ground of insanity, they shall so state in their verdict, and that the person so acquitted 'shall be confined in one of the State Lunatic Asylums, . . . for a period of not less than fifteen nor more than thirty years, and until it shall be proved in the manner provided by law that the defendant has been restored to sanity. The said defendant shall be confined in such lunatic asylum accordingly, and shall not be discharged or set at liberty before the expiration of the period mentioned in said order, except as hereinafter provided.' [2]

It was further provided that "in order to prevent any injustice in individual cases", the Governor should have the power "to discharge any person confined in any lunatic asylum under this act, 'if, in his opinion, justice shall require it.'"

We have seen [3] that Massachusetts has long [4] had an even more stringent measure, providing for the automatic life incarceration in an asylum, of persons acquitted on a plea of insanity, in the case of homicides, including manslaughter. Their release can only be ordered by the Governor, with the advice and consent of the Council, after an investigation by the Department of Mental Diseases has satisfied him "that such discharge will not cause danger to others."

The constitutionality of this Act has never been directly questioned; [5] and it is difficult to say what the decision would be, under the State constitution, if it were questioned. In all probability, however, the State can provide for certain types of verdicts, and for certain procedure as a consequence of different verdicts.

[1] "Report of the New York State Bar Association", Vol. XXXIV, pp. 271, *et seq.*

[2] "Defence of Insanity in Criminal Cases", — Argument of Henry L. Clinton before the Judiciary Committee of the New York State Senate (1873), p. 5.

[3] *Ante*, p. 398; *post*, Appendix, p. 563.

[4] The original Act was passed in 1873, so that the Massachusetts Act and the proposed measure in New York probably influenced each other.

[5] But *see* Appendix, note, pp. 563, 564.

While, in Massachusetts, this Act has on the whole operated effectively, because of the provision for examination by the experts of the State Department of Mental Diseases, it appears to us too drastic a measure, and one that overweights too much society's interest in the general security, to the undue disregard of the social and individual interests in the individual liberty. The discharge is in the nature of a pardon, and it is difficult to see why a person who is *ex hypothesi* irresponsible and therefore morally and legally blameless for his acts, should be *sentenced* for life and be put in the position of a petitioner for executive clemency. It seems to us that the term of asylum incarceration should be wholly indefinite, depending upon the safety with which the person can be released; and that release should come through the judicial branch, upon recommendation of experienced psychiatrists, and not as a matter of executive grace.

In this connection, we must allude again to the English law and procedure, wherein the anomalous verdict of "guilty but insane" is provided. While the absurd consequences and theoretical inconsistency of this verdict have already been mentioned, in a way it is more consistent theoretically than the Massachusetts verdict of "not guilty by reason of insanity." The latter *acquits and finds irresponsible*, yet incarcerates, *i.e.*, punishes and thus stigmatizes, the defendant for life; the former attempts to provide a theoretical justification for the subsequent procedure in such cases (*i.e.*, the incarceration of the defendant in a hospital "during His Majesty's pleasure") by arbitrarily stating that, though found insane, such persons are nevertheless still regarded as *guilty*. Thus, by an inconsistency, it solves a difficult question. The recent Report of the British Committee on Insanity and Crime, to which we have alluded above, recognized, and attempted to remedy, this inconsistency, in this manner:

> This (verdict of "guilty but insane") seems to us illogical. The verdict is one of acquittal.[1] An accused cannot be 'guilty' of a physical act which is not in itself an offence. The word 'guilty' in criminal trials should connote only criminality, the commission of a crime — the very thing which on the finding as to accused's state of

[1] This has been borne out by the British Court of Criminal Appeal, which refuses to consider appeals from a verdict of "guilty but insane" based on the ground that the verdict should have been "not guilty", claiming that "guilty but insane" is *practically* a verdict of *acquittal*.

mind is negatived. . . . The special verdict should be 'That the accused did the act (or made the omission) charged, but is not guilty on the ground that he was insane so as not to be responsible according to law at the time.'[1]

This solution is not as happy as at first glance appears; for under a verdict of *irresponsibility*, the theoretical difficulty remains of lack of legal authority for incarceration; and it was just the attempt to avoid this difficulty that originally led to the anomalous verdict of "guilty but insane." We recommend the simple expediency of a verdict of "insane and irresponsible *offender*", in cases of acquittal on the ground of insanity; for there can be no doubt that the insane defendant is nevertheless a social offender and presumptively a continuing menace. Until it can be successfully rebutted, there is in these cases a strong presumption that one, who because of mental unsoundness has already committed one serious offense, is dangerous to be at large. Only observation and treatment in a hospital for the mentally ill can answer the question whether this presumption does not apply, or has been rebutted, in the individual case; hence incarceration upon acquittal, until safe to be at large, is justifiable.

Section 4 — Program Proposed Herein

Having discussed the social purposes involved in our problem, and the strength and weaknesses of the proposals which have been made for the reform of the law, we may now attempt to set forth a program of law and procedure which, in our opinion, is best adapted to the social purposes involved, is sound psychologically, consistent legally, and at the same time not too visionary or radical for easy absorption into the existing order.

I. Sorting out the Mentally Unsound Offender before Trial

A. Psychopathic Clinics Attached to Magistrates', District or Municipal Courts. — Police clinics such as that formerly in New York under Police Commissioner Arthur Woods are of great value, in "adequately dealing with an important social and medical problem at a stage in the proceedings which has hitherto been almost entirely neglected."[2] But it is doubtful whether any but extreme and dangerous cases should be examined at this stage.

[1] Report of Committee on Insanity and Crime, etc. (1923).
[2] Report of Committee, Psychopathic Laboratory, Police Department, City of New York, December, 1917, p. 6.

After all, it is the judicial machinery and prosecutor's office which must decide the fitness of a person for trial; and clinics should be an integral part of the judicial machinery. Of course, in the large metropolitan centers, a separate psychopathic laboratory might well be attached to the Police Department, and might coöperate with the central clinic under the control of the courts. The problems of such a police clinic are in a way separable from those of the magistrates' courts. "Such a laboratory could . . . assure the proper disposition of the steady stream of mentally abnormal persons, many of them dangerous characters, who visit Police Headquarters to make complaints, etc. To the laboratory should also be referred for examination the large number of poorly balanced or defective persons who make complaints to policemen on duty, or who go to the station house to tell their story and often to ask for advice and protection. If instead of being turned away with trivial explanations or simply having their ideas laughed at, such persons were directed to the laboratory, a valuable service could be rendered many mentally sick individuals, and in many instances a danger to the public removed."[1] In other words, a police clinic in a modern industrial metropolis, is a necessary instrument for the important *preventive* work of detection of the potentially dangerous person of unsound mind.

But the clinics for sorting out the mentally unsound offender, especially the socially expensive recidivistic misdemeanant, should be attached to the lower courts; and the experienced psychiatrists, psychologists and social workers in charge of this work should be regarded as court officers. Such clinics would also be invaluable for the purpose of aiding magistrates in the proper disposition of repeaters, and in deciding upon the wisdom of admission to bail of serious offenders, before more thorough mental examination by the State's experts. Further, such clinics could be utilized by juvenile courts, in cities too small to maintain separate clinics for juvenile offenders, and by domestic relations courts. Finally, the directors of these clinics could do important preventive and educational work by means of addresses to teachers, probation and parole

[1] Report of Committee, Psychopathic Laboratory, Police Department, City of New York, December, 1917, p. 15. The clinic could also be of practical aid to the police force itself. "Just as psychiatrists are appointed in the army to look after the mental health of the soldiers, so the Police Department, with a force nearly equal to an army corps, should have the same sort of medical supervision by a trained psychiatrist."

officers, lectures in colleges, etc. The remarkable impetus given to this entire program by such pioneers as Healy is too well known to require further comment.[1]

B. The Massachusetts Law for the Routine Examination of Certain Types of Accused Persons.[2] — The value of this law, both theoretically, and in action, has already been sufficiently discussed. In order to strengthen the law, the following improvements are suggested:

1. That it be made to include, not merely capital offenders, but all persons accused of homicides. In this connection, in order to spare a person who accidentally kills another (such as, in some cases, automobilists who accidentally run over and kill a pedestrian), it is recommended that the amended bill be drafted to give the committing magistrate (judge of district court or Municipal Court of Boston) discretion whether or not a mental examination will be made in any case of manslaughter; and in the exercise of this discretion he could be aided by the psychopathic clinic attached to the lower courts.

2. That provision be made for the mental examination to be a condition precedent to admission to bail, in the cases embraced under the act. This, we believe, is not an unreasonable regulation of the right of admission to bail.[3] In this indirect manner the provision for mental examination, which now is not mandatory, and depends upon the coöperation of all concerned, might be made much more effective.

3. That better facilities in the way of centralized, statistical and other records be provided, so that clerks of courts and probation officers may be in a position to report to the State Department of Mental Diseases (or similar body) the cases falling within the provisions of the law. This provision is now being met.

[1] Not only every social worker, psychologist, teacher, etc., should acquaint himself with Healy's quarry of information on this subject, "The Individual Delinquent", but it might profitably be read by all thoughtful citizens as part of their civic education.

[2] *See* pp. 58, *et seq.*

[3] In most States the right to bail is governed by constitutional provisions; but where the offense is a capital one, admission to bail is usually within judicial discretion. It should be noticed that not *elimination*, but *control*, of bail is recommended in the cases covered by the Massachusetts law. Where there are no constitutional objections, the legislature can modify or even substantially abridge the common law right to bail in offenses not capital. Frequently, as in the Massachusetts constitution, the only prohibition is against excessive bail.

Of course, other considerations, such as probable innocence, might be taken into account in the individual case.

4. That a large enough staff of experienced psychiatrists and psychiatric social workers be placed at the disposal of the Department of Mental Diseases (or similar body) to carry on the work effectively and speedily.

The work of the department charged with the routine examination of certain persons accused of crime should be carefully articulated with the work of the clinics attached to the lower courts,[1] the latter examining recidivistic misdemeanants who do not fall within the provisions of the State law, and those misdemeanants whose actions, appearance, or crimes are such as to suggest the probable existence of mental disorder.

It should be noted that the ultimate *disposition* of cases examined under the Massachusetts act remains discretionary, depending upon the coöperation of courts, prosecutors, and counsel for defendants. This is, we are convinced, as far as prevailing public opinion and constitutional limitations will permit us to go at this time. That it is a step forward in the right direction, and more effective than would at first sight appear, has been indicated in the foregoing pages.

It should also be pointed out that while, under the operation of a law like that of Massachusetts, some murderers will escape the death penalty, because of mental disorder, lesser mentally unsound delinquents, who, under the prevailing laws, pass through our judicio-penal machinery for brief terms again and again, would be placed under much more protracted and suitable restraint. Though the procedure means expensive and long institutional care, it also means a great saving in the expense of court procedure;[2] but most

[1] Perhaps it would be more efficient and less expensive if psychiatric-psychological services for all the courts doing criminal business were rendered by clinics and workers deputized by the State Department of Mental Diseases to perform this service for the judicial branch of the Government, the State being reimbursed by counties and large cities. In this way, the *purely advisory* nature of such clinics, their function as *aids* to, and not replacements of, the judicial machinery, might be emphasized. At the same time, the perfect neutrality and scientific disinterestedness of this modern aid to an ancient and honored branch of the government's machinery would be made manifest.

[2] Not to speak of the intangible expense in sorrow and stigma, or of the inestimable toll in wasted, destructive lives, "the cost of detention, indictment, trial or other disposition of the average felon is conservatively estimated at $1000. The 2279 felons received into the State (New York) prisons during the year 1917, cost the State approximately two million two hundred seventy-nine thousand dollars. Of these individuals 87 per cent. had served previous terms and by their release into the community and return to criminal habits the State spent approximately two million dollars to again dispose of them and continues to spend such each time it undertakes to convict this particular

important of all, it means more appropriate and humane treatment for the mentally ill delinquent, on the one hand, and greater social safety, on the other.

II. The Trial

In most instances, where the accused would be declared of unsound mind under the above procedure, the question of irresponsibility would be merged with that of mental unsoundness, *i.e.*, the public prosecutor, as well as counsel for the defense, would be satisfied with the finding of the condition of mental unsoundness, the case would be *nol prossed* or filed, and the accused committed to an institution during the continuance of his mental unsoundness, and until lawfully discharged therefrom. But there will, no doubt, be cases in which the experts of the Department disagree, or in which either the prosecutor or counsel for the accused will insist upon going to trial. Hence we must consider improvement of the law and procedure during trial.

A. The Plea of Insanity. — The Washington[1] plea should be adopted. This sets forth, carefully and accurately, exactly the issues involved.

B. The Charge to the Jury, Tests of Irresponsibility and Verdicts. — Our examination has convinced us that the New Hampshire rule is too broad and uncertain of application; that the delusion tests are confusing and unscientific; that the simple statement in the original test of the Committee of the Institute of Criminal Law and Criminology,[2] is too vague and uncertain; that the knowledge tests, as now applied are too vague, abstract, unscientific (psychologically), inconsistent with the fundamental legal principle of criminal intent in that they recognize only the knowledge element thereof, and not broad enough to embrace many mental disorders; that where they are used together with the irresistible-impulse or

group of repeaters. Nothing can be accomplished in the way of permanent good for all this expenditure, if the criminal has not been deterred from repeating his criminal acts — . . . . Massachusetts in a given year received into its institutions 25,820 prisoners, 57.4 per cent. of whom were repeaters; the total number of previous commitments being 92,443, averaging six sentences for each recidivist." *Id.*, p. 7. Report of a Special Committee of the State Commission of Prisons, New York, 1918, p. 7.

Of course, not all recidivism is due to mental disorder; but that mental unsoundness contributes largely to failure of ordinary penal methods and to recidivism, has been too well established by independent investigators in various prisons to be seriously questioned.

[1] *See* p. 420. [2] *See* p. 455.

lack-of-power-of-control test, the last objection to the knowledge tests is eliminated. We said that there remains the use of these two tests (since, after all, knowledge and power of control of conduct are the generally accepted social criteria of responsibility for one's conduct), but, that they must be given their proper psychological setting, in order that juries may correctly, intelligently and consistently make use of them. With a proper psychological background, in the light of which these tests can be intelligently interpreted by the jury, much of their artificial and confused nature, as, for example, the meaning of the different words in the knowledge tests, ought to be eliminated. But no test that human ingenuity can devise will operate perfectly and in all cases; and since tests must under our present legal and social order be maintained, all we can do is to provide the jury every facility for intelligently applying them, and to expect occasional (though less frequent than at present) miscarriages of justice.

Three fundamentals of psychology should in our opinion be judicially noticed, by the courts: Namely, (1) *The unity of mental process and the consequent presumption that a mental disease manifesting itself primarily in one mode of mental activity indicates a disorder of the mind as a unity, and not of the one compartment of the mind, which apparently seems alone to be involved;* (2) *the tripartite, although only abstractly separable, nature of mental activity,* i.e., *the cognitive, conative, affective modes of mental life;* (3) *certain well established fundamentals of psychopathology, such as:* (a) *the concept of disintegration or lack of synthesis of the personality;* (b) *the fact that hallucinations, delusions, obsessions, volitional-inhibitory disorders, abnormalities of the cognitive (knowing, apperceptive, reasoning) processes, disorder of the emotional life, — all abnormal phenomena of this nature, — are evidences of a generally disordered mind, and do not themselves constitute the disease.*

The judge, in all cases where insanity is pleaded as ground for irresponsibility, might therefore charge the jury as follows,[1] after first clearly and briefly defining the crime of which the defendant stands charged, and the various mental elements (such as "deliberation", "premeditation", "malice", the "specific intent", etc.) necessary to constitute various grades of the offense:

[1] As long as the principles contended for are included in the charge, the terminology used is secondary, and no doubt the above can be improved upon.

I. Every illegal act, in order to make its perpetrator criminally responsible for it, requires that it shall have been committed with a "guilty" (or "criminal") intent. For a mind to be able, in contemplation of the law, to have this necessary "guilty intent", it must be sound, in the sense that the minds of most men are sound. The mental soundness of most men presupposes a normally healthy functioning of the mind's activities of knowing and reasoning, willing and restraining one's impulses to act, and feeling. But you are instructed that, because of the recognized interdependence of mental processes, a serious disorder of any of these principal mental activities, raises a strong presumption that the mind as a whole is disordered.

II. All the evidence you have heard (excepting, of course, that to which objections have been sustained by the court during the course of the trial), whether of delusions, hallucinations, or other common signs of mental disorder, should be regarded by you as tending to throw light upon the principal question, whether the defendant's mind, if and when he committed the act, was unsound or sound in the sense above described.

III. You have three steps to take: (1) First, you must decide whether the prosecution has proved, "beyond a reasonable doubt", that the defendant committed the act with which he stands charged. If you find it has not so proved the act charged, you will bring in a verdict of *non-offender* (the old "not guilty"), without inquiring further as to the defendant's state of mind.

(2) If you find that the prosecution has proved that the defendant committed the act with which he stands charged, you will take your second step, and find whether or not the defendant has established his insanity (as to knowing and reasoning, *or* willing and controlling his impulses to act, *or* feeling), by "a fair preponderance of the evidence."

(3) (*a*) If you find that the defendant has *not so established his insanity* at the time of the commission of the act, you must, nevertheless, further inquire whether, in your opinion, the defendant's mental condition at the time of the act, though not proved to be unsound in the sense above described, was yet such that he could not, in all reasonable probability, have had the capacity for the deliberation, premeditation or malice (inserting special type of mental condition necessary to reduce the grade of the offense), which are necessary to constitute murder in the first degree (or the appropriate type and grade of offense); and if you find that by reason of mental disorder he did not have such deliberation, premeditation, or malice (or other requisite mental condition), then you will find him to be a *sane offender, but guilty of murder in the second degree* (or insert appropriate grade or degree and type of offense). But if you find that he *did*

have the necessary deliberation, premeditation or malice (or other requisite mental condition), you must find him a *sane offender* (the old "guilty").

(*b*) If you find that the defendant *has* established his insanity by a fair preponderance of the evidence, you will take the third step of applying certain "tests" which the law has evolved for your guidance, to determine whether the insane defendant, in the sense above described, is also *irresponsible.* These tests are:

1. Did *this insane defendant,* when he committed the act, know the physical nature of the act?

2. Did he, when he committed the act, know that it was wrong in the sense that it was condemned by the morals, religion and laws of modern civilized society?

3. If he knew both the physical nature of the act and its wrongfulness in the above sense, was he, nevertheless, unable, by reason of his mental disorder, to control his impulses *with respect to the act?* [1]

If your answer as to any or all of the three last questions is "yes", you will find the defendant a *partially-insane and semi-responsible offender.* If your answer as to any of the above questions is "no", you will find him an *insane and irresponsible offender* (the old "guilty but insane" or "not guilty because of insanity").

(The terms "know", "physical nature" and any others in these tests have the ordinary, accepted meanings of everyday life. For example, to "know" an act, means to be in possession of all the pertinent facts respecting that act and to understand the ordinary significance of the act as the "average man" understands it. To know the "physical nature" of an act means to know its essential ingredients as ordinary experience teaches them, *e.g.*, when a man is about to use a deadly weapon, to know that it is a weapon, that it may be loaded, that it probably will result in death or injury when discharged at a

[1] *Compare* the tests laid down by Somerville, J., in Parsons *v.* St., 81 Ala., 577:

"1. Was the defendant at the time of the commission of the alleged crime, as matter of fact, afflicted with a *disease of the mind,* so as to be either idiotic, or otherwise insane?

"2. If such be the case, did he know right from wrong as applied to the particular act in question? If he did not have such knowledge, he is not legally responsible.

"3. If he did have such knowledge, he may nevertheless not be legally responsible if the two following conditions concur:

"(1) If, by reason of the duress of such mental disease, he had so far lost the *power to choose* between the right and wrong, and to avoid doing the act in question, as that his free agency was at the time destroyed.

"(2) And if, at the same time, the alleged crime was so connected with such mental disease, in the relation of cause and effect, as to have been the product of it *solely.*"

person, or recklessly; or, when one is about to set fire to a house, to know what matches are used for, to know that by striking one a flame will result, to know that paper, rags and similar materials are easily inflammable and that by touching the lighted match to such material a blaze will result, etc.)

You should always bear in mind that before you may apply the above three tests of *irresponsibility*, you must already have found the defendant insane as evidenced by typical symptoms of the disorder of the knowing and reasoning, feeling (or emotional), or willing and inhibiting functions of the mind; and that evidence of disorder in one type of mental operation strongly implies disorder of the others..

IV. To aid you in arriving at your verdict, you are advised that if you find the defendant to be a *non-offender* (or "not guilty"), he will be immediately discharged from custody; if you find him to be a *sane offender* (the old "guilty"), he will suffer the penalty provided by the law for his act, depending upon the degree of the offense which you find; if you find him an *insane and irresponsible offender*, he will be confined, for the safety of society and for his own safety and medical treatment, in a State hospital for the mentally ill, and he will there remain until the superintendent or other authorized officer of the hospital, informs the court that he has recovered his mental health, and that it will be safe to society and to himself, family and friends for him to be discharged, or until he is otherwise lawfully discharged; if you find him to be a *partially-insane and semi-responsible offender*, he will (if charged with murder in the first degree), be incarcerated in a hospital or in the State's prison for life, depending upon the gravity of his mental disorder. If, and when, greatly improved or entirely recovered, such person will be transferred to prison, but will receive medical treatment for his condition, when required; and he may, upon a finding of the State Department of Mental Diseases (or insert similar State body) that he has recovered sufficiently to make his discharge no longer dangerous to the community or to himself, family and friends, be pardoned by the Governor. In other words, in the case of the *insane and irresponsible offender*, discharge, when cured and safe to be at large, as determined by appropriate legal procedure, is a matter of *right*, obtainable through the *courts;* but in the case of the *partially-insane and semi-responsible offender*, discharge, even though he be entirely cured and safe to be at large, is a matter of grace, not of right, and rests with the Governor.

The above charge should in all cases be written, and the jury should be furnished copies thereof to take with them to the jury room.

We may enumerate the features, good and bad, of the above judge's charge, tests and verdicts, as follows:

1. It is somewhat long. A comparison with many of the charges found in the reported cases will, however, indicate that compared to these it is the very " soul of wit " of brevity, especially when the numerous voluntary and " requested " instructions in such cases are considered.

2. It is somewhat too intricate for the jury's comprehension. Comparison with existing " charges " is again invited. Though intricate, its fundamental principles of law and psychology are, we believe, at least consistent; a fact far from characteristic of the modern charges in insanity cases. Moreover, if the charge is typewritten, and copies are submitted to the jurymen, both of the above objections can be minimized.

3. That it is founded upon correct legal principles is indicated by the fact that its point of departure is the fundamental datum of criminal intent; that this is rightly interpreted to mean the intention of a normally sound mind, and that this normally sound mind rightly is said to constitute a healthy functioning of the mind as a unity, as expressed in the three major modes of mental activity, — the conative, affective, and cognitive.

4. It takes account of the two forms of limited responsibility that may arise: (1) The cases in which, owing to absence of such usual mental requisites of first-degree offenses as premeditation, deliberation, malice, specific intent, etc., by reason of mental disorder, a less offense than that charged in the indictment has in fact been committed; this is to-day taken account of only in one or two jurisdictions. (2) Cases in which, though there is evidence of mental disorder it is not of such type or severity as totally to exempt from responsibility because falling within one of the prescribed tests. It should be pointed out that these provisions should go far to bring lawyers and psychiatrists *en rapport.* They should also eliminate the need of permitting introduction of evidence as to mental condition upon a hearing in mitigation of sentence. (See note at end of Chapter 11.)

5. It is so drawn that it can readily fit into existing legal structure and procedure; for the two major tests are retained. Yet these are given a setting in the fundamentals of psychology, thus making them less artificial than before.

6. It is our belief that this charge (with only minor modifica-

tions) should be given in all cases where insanity is involved.[1] It is true, as Bishop and others point out, that the rule and practice are for judges generally to charge juries only with respect to the exact points brought out by the evidence. But while this practice is commendable in ordinary cases, it is creative of that artificiality and confusion in the tests of irresponsibility, that we are trying to avoid. In order to impress upon the jury the fundamental fact of interrelationship of mental functions, on the one hand, and to fit the tests into the primary legal concept of *mens rea* and its constituents, on the other, this charge should be given in all cases where irresponsibility by reason of insanity is pleaded as a defense.

7. The difficult words in the tests are stated to be employed in their ordinary, "common sense" and not strained, connotations. It is believed that the background as to the interdependence of mental processes will take care of the facts that, as has been said, "the lunatic may know right from wrong, but 'he knows it with an insane, not a sane mind'; he may know that the act he does is wrong, but 'he rarely knows how wrong it is'; he may be fully aware, in theory, of the heinousness of a crime, 'but in the special circumstances of his own case he regards it merely as a technical illegality.'" Under the barren tests as given to the juries in McNaghten's and similar cases, the juries should not, theoretically, have found defendants irresponsible. With the background as above given, the theoretical, as well as practical, justification for these acquittals would have been present; for the juries would have applied these tests having in mind the unity of mental process and disorder, and would have known that "knowledge" in these cases was not the knowledge of the ordinary individual, but was distorted and colored by the emotional disturbances of the defendants. These acquittals in extreme cases of paranoia are due to the common sense of some juries; and the background given herein ought to furnish a surer and more consistent guide.

8. A discussion of the forms of verdict is necessary. We have provided for four possible verdicts:

1. *Sane and responsible offender* (the old "guilty"); this includes guilt of the offense charged, and guilt of a lesser degree of offense due to the absence of capacity for the mental ingredients (such as

[1] (3) (*a*) might of course be omitted in ordinary cases, where it is not contended or in evidence that the conditions of premeditation, malice, deliberation, etc., were absent.

premeditation, deliberation, malice, or the "specific intent") which must accompany the crime charged in the indictment;

2. *Insane and irresponsible offender* (the old "not guilty because of insanity");

3. *Partially-insane and semi-responsible offender;*

4. *Non-offender* (the old "not guilty").

A word of explanation about each of these. The old English distinction, as we have seen throughout this study, was between "guilty" and "not guilty", the defendant who was insane but who had committed the act being, on the ground of insanity, in no better position with respect to the finding of the jury and the pronouncing of judgment upon conviction, than the sound-minded offender. In the case of insane persons found guilty, the Royal prerogative of pardon was the only hope for the accused. Later, the verdict was officially changed to "guilty but insane", in those cases of persons who committed the offense, but who nevertheless were irresponsible when they committed it. In America, the verdict has always been "not guilty by reason (or because) of insanity." Now the important consideration in this whole matter is the question: What becomes of the offender in case he is acquitted by reason of insanity? We have discussed the various procedures found in the different States in such cases; and it must be remembered in this connection that up to about the first quarter of the last century, persons acquitted on the ground of insanity (and irresponsibility) were almost everywhere in this country allowed to be returned to the community. While most States have provided against the dangers of such a policy, this provision has largely been concerned with the disposition of insane, acquitted persons *immediately after the verdict* of acquittal on the ground of insanity (and irresponsibility). Upon such acquittal, the defendants were safely incarcerated; but what happened after that stage had been reached was, and is in many States to-day, quite a different story. Often, as we have seen, such acquitted, temporarily-incarcerated persons are released but a short time after their commitment, and turned back upon the community.

In many of such cases, however, the defendant while not insane so as to be definitely classifiable in one of the psychiatric categories, or to fall within the exemptions of the tests of irresponsibility, nevertheless belongs to one of those unstable, semi-effective types, roughly embraced within the term "psychopathic inferiors."

And even in the early stages of the definite psychoses, such as dementia præcox or paranoia, the defendant, though known to be at the beginning of a progressive mental disorder, can, in many ways and fields, act like, and give the impression of, a queer or nervous or cranky, but nevertheless sane person; certainly, his condition would never bring him within the provisions of one of the tests. It has been well said as to all of these borderline and unclassifiable cases, that " as there are degrees of insane oblivious-ness to right and wrong, degrees of self-control, degrees of insane impulse, the law ought to awake to the fact that the amount of guilt decreases in the same ratio as mental disease gains in intensity." [1] As long as mental disease, therefore, like all nature, *non facit saltum*, and as long as there are borderline conditions of mental unsoundness that are not definitely classifiable among the clinical groupings of the psychoses, but in which, nevertheless, the patients are at a distinct disadvantage, humanity dictates the view that in these cases there is really but partial responsibility, in the sense of *penal* accountability. Hence, the jury should have an opportunity to say so, by a verdict of "partially-insane and semi-responsible offender", and not be thrown between the two horns of the dilemma of absolute acquittal or absolute conviction. Now the effect of such a verdict might very well be, not necessarily to send the defendant to a hospital (for only those in this group found insane but unable to meet the requirements of the tests would be sent there), but to a prison, perhaps for life; at any rate, its principal effect in operation would be to take feebleminded, neurotic, and psychopathic individuals committing *homicides* out of the class of those subjected to the death penalty, by the proof either that they were insane but partially responsible, or guilty of a less degree of offense than that with which they were charged. In prison, such persons could be made to do work for which they are, or might shortly be, adapted, and their earnings turned over to their innocent families, and to the families of their victims.

As to the other two possible verdicts in the case of persons found to be offenders (*i.e.*, to have actually committed the act with which charged), namely, *sane and responsible offender*, and *insane and irresponsible offender*, the most important word, and one too often overlooked by writers in this field, is *offender*. In other words, *both the insane and the sane* person who commit an act

[1] Oppenheimer, *op. cit.*, p. 225. But *see* pp. 233, 234.

prohibited by law and one that is socially dangerous are, *prima facie*, enemies to the social order; and, being such, society, through its organ, the law, has the right to *deal with them*, to hold them to account. Now dealing with them may or may not include punishment, corporal or otherwise. In the case of mentally disordered offenders, part of the hospital program occasionally includes mild forms of punishment; *i.e.*, the ordinary human motives of such persons are operative to an extent that is recognized and utilized for the maintenance of discipline. In the case of sane offenders, part of the prison program may, if "indicated", include punishment (other than incarceration itself), in addition to the correctional (moral, industrial, medical, etc.) treatment included in the most enlightened penal administration.

The *distinction* between sane and insane offenders is in their *mental* condition and the implications it has for responsibility, for the place of their incarceration, and the stigma of the name "criminal"; also, of course, in capital cases, for the elimination of the death penalty. The *similarity* between sane and insane offenders is the fact that both have committed a dangerous antisocial act that is so threatening to the social security as to require society, through the law, to take extreme measures to prevent its recurrence.

We contend that the verdicts provided for herein will do much to clarify the situation, both as to the *legal implications* (*e.g.*, by doing away with the need for such an anomalous verdict as the English "guilty, but insane"), and as categories having certain meanings with respect to moral-legal accountability, and with respect to the program of medical and socio-penal treatment applicable to the various classes of offenders.

Alternative Recommendation — Socio-Penal Commission after Conviction. — Our recommendations for reform of the tests of irresponsibility and for changes in the administration of criminal justice in the case of the insane, are, of course, greatly influenced by the fact that the limitations of our subject confine us to the situation with respect to the *pathological offender* only. Were this problem treated from the broad point of view of *all* offenders, we would probably have seen a different, perhaps more promising, solution. If the socio-legal treatment of *all* criminals, regardless of pathological mental condition were being considered, it would seem that the simplest device would be to permit the law to convict or acquit as is done to-day, but to provide for *an administrative*

instrumentality (perhaps a commission composed of psychiatrists, psychologists, sociologists and others) to begin to function in the case of convicted persons, at the point where the law leaves off, to determine the appropriate socio-penal treatment adequate to the individual delinquent, as well as its duration. Such an administrative board could be legislatively provided for; it would probably survive attacks upon the ground of unconstitutionality. Against such machinery, the objection raised against the Washington provision, — that any law which deprives the jury of the right to pass upon the mental element of the definition of a crime, as well as the physical, — would not be valid. For the jury could still pass upon the mental element of the crime — the *mens rea;* — but the work of scientific determination of the *peno-correctional consequences of conviction* by a jury, would be lodged in a skilled, administrative board specially qualified for such a task.

This plan has the great merit of not disturbing the judicial *status quo,* but merely adding a scientific, highly specialized administrative device to function as an administrative extension of the judicial machinery. It is offered as an alternative recommendation to extension of the tests to include irresistible impulse and partial responsibility; for such an administrative board could readily discover, and specially treat, cases of mental disorder which did not, however, satisfy the tests of criminal irresponsibility. It has the advantage over change of the tests themselves, of providing a scientific instrumentality for the *considered* (instead of arbitrary or capricious or accidental) disposition of *all offenders,* not merely those who plead insanity; and, at the same time, it leaves the traditional function of the jury — the ascertainment of guilt or innocence — inviolate. Its defect lies in the fact that, as at present, some persons whose conduct is attributable largely to mental disorder, will unfairly be subjected to the stigma of conviction as "criminals", and to the finding of guilt.[1]

[1] Able jurists have pointed out that the finding of "guilty" is a *legal* finding, and as such has little, if anything, to do with guilt in the popular sense. While this is theoretically true, several points must not be overlooked in this connection. In the first place, the very fact that the tests of irresponsibility frequently include the requirement of a knowledge of the *moral* (sometimes even religious) wrongfulness, as well as the legal wrongfulness of an act, makes it perfectly logical for the public to condemn a person found guilty by the *law,* as also *morally* guilty; secondly, most acts in the defense of which legally acceptable mental irresponsibility is pleaded are also morally condemned (as murder, rape, etc.), and therefore the public does not discriminate between

It is to be noted that this provision refers to the incorporation into the judicio-penal structure, as a step in the proper individualized treatment of the offender, of an *independent*,[1] scientific agency of individualization. Perhaps it would be wiser and easier of incorporation into the existing procedure, to have this body act merely in an advisory capacity to the court, the convicted offender being tentatively sentenced to a special institution, while his case is being carefully investigated and he himself subjected to mental and physical examination. After a due period, the results of the study and report of the experts would be sent to the court with recommendations as to length and type of treatment, which the court would or would not (but presumably most often would) accept.

C. Testimony. — The expert testimony bill of the Committee of the Institute of Criminal Law and Criminology is recommended for adoption. This bill has been set forth above.[2]

Doctor William A. White, a member of the committee that drafted this bill, succinctly enumerates its excellent features in these words:

In the first place it offers a correction of the method of procedure in so far as it attempts to remove the element of partisanship real or implied, that now exists in that method. While both parties to the issue are left absolutely free, as at present, to summon experts of their own choosing, still it is felt that the opinion of the experts summoned

legally found guilt and moral guilt. The public does not, in general, distinguish between legally found guilt and proof of an actually "evil heart", except in the most innocuous of statutory offenses. We may conclude, then, that "guilty", for all practical purposes, implies a wicked and depraved, willful offender, regardless of the fact that, strictly speaking, the law, when it finds a person guilty, does not pass any moral judgment, only a legal one, upon his conduct.

[1] This scheme is different from the proposal of Saleilles ("The Individualization of Punishment", p. 233), in that here a *permanent*, technically qualified body, with a definite function to perform in all cases, would be added to the existing procedure. Saleilles proposes "to associate with the magistrates (somewhat as in the German municipal courts) a second jury of experts appointed to determine the punishment. Such would be composed chiefly of physicians, directors of reformatory institutions, professional educators, and others qualified by their calling to judge and deal with men. It would be not an ordinary but a technical jury, the members of which would be obtained by an eliminative process of successive selections. The ordinary jury, drawn by lot, as at present, would remain the judge of the facts; it would report upon the material circumstances and upon the question of intent and mental condition, but it would render this opinion without any technical fitness. Next a technical jury would determine the punishment and become a jury of individualization. Lastly, the court, as at present, would set the term of sentence."

[2] Pp. 450, *et seq.*

by the court or the hospital physicians will, other things being equal, prevail because of the tactical advantage of their position of disinterestedness, in relation to the issue being tried.

Secondly, it provides that the witnesses summoned by the court may be cross-examined by counsel for both parties in the case. This not only gives each side an equal opportunity but if the court should because of political influence, ignorance or for any other reason summon incompetent or disreputable witnesses these facts would be pretty apt to be brought out under cross-examination by counsel for one side or the other.

Thirdly, existing sources of information and authority within the control of the State, the State Hospitals, are brought into a service that they are especially able and equipped to perform.

Fourthly, there is special provision for the fullest possible information to be placed at the disposal of the expert.

Fifthly, when the defendant is found to be mentally ill he is at once committed to a State Hospital for the Insane for treatment and to be retained there and not discharged until he shall have so far recovered as to no longer be a menace to the public safety.

And finally the suggested statute provides that each expert witness may prepare a written report upon the mental condition of the defendant, and such report may be read by the witness at the trial. The advantage of this will be at once apparent if a given crime is thought of, not as an isolated act, but, in accord with the principles already laid down, as an act that can only receive its explanation by an investigation of its historical antecedents. This means that the personality make-up of the individual must be understood as well as the situation to which that make-up has had to adjust, and in particular the specific situation out of which the crime issued.[1]

While thus providing for a sensible solution of the intricate problems involved in modern expert testimony procedure, this act, as we said elsewhere in this chapter, still ignores one of the chief weaknesses of the prevailing practice; namely, it still permits inexperienced physicians, and even charlatans, to set themselves up as "experts." To eliminate this weakness, a section should be added providing for minimum qualifications of experts in insanity cases. We believe that such a bill could be framed which would not be held unconstitutional. When it is considered that the State, under its police power, has regulated every conceivable occupation by requiring examinations, licenses, etc., it is difficult to see how an act setting forth, with sufficient particularity, standards of educa-

[1] "Insanity and the Criminal Law", *op. cit.*, pp. 145–147.

tion and experience for experts in insanity cases could be held unconstitutional. Sufficient freedom would still be allowed the defense, prosecution, and the court in the choice of experts from a panel of qualified physicians issued periodically by the State Department of Mental Diseases (or similar body). The examinations and required qualifications could be drawn up jointly by the State Department of Mental Diseases and the State's examining board in medicine, upon the recommendation and with the assistance of committees from the State medical association, the State psychiatric association and similar, legitimate professional bodies. If we have expert plumbers who are required to fulfill certain qualifications, let us have genuinely expert alienists. The ordinary medical courses and the usual medical board examinations have little or nothing to do with this important branch of medicine and with the important public duty of acting as expert in cases that frequently involve life and liberty, as well as property.

Upon the foregoing considerations, the following section is recommended for addition to the bill of the Institute of Criminal Law and Criminology:

A "qualified expert", in a criminal action or proceeding, or in a special proceeding instituted by the writ of *habeas corpus* or *certiorari* to inquire into the cause of a person's detention, in which the soundness of mind of such person is in issue, shall mean a physician who has been resident in the State for at least two years, who has been lawfully licensed to practice medicine in this state, and who has been in the actual practice of medicine for at least three years, at least two of which must have been spent in the diagnosis and treatment of mental and nervous diseases, either in legitimate private practice or in a hospital for mental patients, or both; and no physician or other person shall be permitted to act as expert in any matter pertaining to the legal relations of the insane unless a certificate evidencing the fulfillment of these requirements, shall have been issued to him by the State Board (inserting appropriate body).[1]

Experts, testifying in that capacity, should not be required to answer questions relative to the defendant's ability to meet the requirements of the different tests of irresponsibility; this is a conclusion of fact to be drawn by the jury from the evidence of *insanity* and other evidence in the case. Experts are legitimately qualified to speak only of mental unsoundness ("insanity"), not

[1] This, of course, does not prevent persons testifying in their *nonexpert* capacity.

of irresponsibility.[1] By confining their task to the problem of mental unsoundness, — a purely medical problem, — much of the opposition of the medical profession to the present procedure and to their present tasks in these cases ought to disappear.

III. Methods of Discharge from Hospital

While discharge by *habeas corpus* should be readily available to persons in *civil* hospitals for the mentally ill who have committed no criminal acts, the strictest supervision of the writ in case of mentally unsound *offenders* is justifiable. At the same time, in accordance with the general concept of balancing of interests, the avenue to freedom of persons who can with safety to themselves and families be released from custody should not be made so difficult as to constitute a closed door. Our concepts and verdicts of *insane and irresponsible offender* and *partially-insane and semi-responsible offender* afford, we believe, a theoretical, legal foundation for our recommendations as to methods of release on the basis of this balancing of interests.

Although we disapproved as unfair the Massachusetts practice whereby a person acquitted on the ground of insanity (and irresponsibility) is practically sentenced for life, and can only be released upon gubernatorial grace, we recommend this procedure in the case of the *partially-insane and semi-responsible* offender, for the reason that it is difficult, in the mild stages of the psychoses and in the borderline psychopathies to say just where mental health, and, consequently, guilt, leaves off, and mental unsoundness, and, consequently, innocence, begins. This concept of partial-insanity and semi-responsibility is admittedly, at best, but a more or less forced legal solution of a difficult problem combining morals and medicine. The best one can do, therefore, is to provide for the recognition of the partially unsound and partially accountable status in determining the *proximate* disposition of these cases; but to take into account their condition of at least partial guilt in the question of their *ultimate* return to society.

As to the frankly insane and wholly irresponsible offender, the abuse of the writ of *habeas corpus* is the chief problem. As we have seen, also, in addition to the State writ of *habeas corpus*, special legislative provisions for the release of such persons are in

[1] *See* p. 309, note 2.

force in most States. While the State has the right, under the police power, to commit such persons to institutions upon acquittal, on the ground that their danger to the social order has been proved, and upon the presumption that the insanity which existed at the time of the offense continues, it is difficult to say just how far it can go in the regulation of the writ of *habeas corpus*, once such persons have been committed to a hospital. Wisconsin [1] frankly denies the writ to inmates of the State hospital to which persons acquitted on the ground of insanity (and irresponsibility) are committed. However, a reëxamination of the condition of such persons, in a special proceeding before a magistrate and jury, which takes the place of a hearing on return of the writ, is provided for.

The following provisions, indicating the restrictions on the free use of the writ of *habeas corpus*, and the type of special legislation required, seem to us reasonably to balance the interests involved, and to come within the legitimate domain of legal control of the potentially dangerous offender.

As to the writ of *habeas corpus*, we recommend that,

When anyone is in custody, in a State hospital for the criminal insane, after a verdict of "insane and irresponsible offender", an application may be made in his or her behalf for a writ of *habeas corpus*, to any court or judge authorized by law to grant the same. But the first application shall not be made until after the inmate of such hospital has resided therein for at least two years, and subsequent applications shall not be made oftener than once in every two years, unless the permission of the superintendent of said hospital for such first or subsequent applications shall first be obtained in writing. Such applications shall only be made upon a written, verified petition, accompanied by a certificate made under oath by two qualified medical examiners in insanity. The certificate shall indicate that the examiners have made a careful examination of the person in custody, and of the official records at the hospital covering such person's case, giving the time and place of such examination, and that in their opinion it is reasonably certain that the person in custody has not only recovered his mental health but may be released with safety to himself and others; and such certificate shall also state the facts upon which the opinion of the examiners is based. Provided, that as to the first application for the writ by any person in custody in the State hospital for the criminal insane, any court or judge authorized by law to grant such application may, if to his satisfaction probable cause has

[1] Stats., 1921, Chap. 147, Sec. 3407.

been made out therefor, grant the writ without requiring the certificates of experts as hereinbefore provided.

The superintendent of the State hospital for the criminal insane, or other delegated officer of such institution, may, in his discretion, present evidence in opposition to said application. After consideration of the evidence presented, the court or judge may, in its or his discretion, make an order, either denying the application or directing that the writ issue. Should the order direct that the writ issue, the subsequent proceedings in the case of the first application for such writ shall be with or without a jury in the court's or judge's discretion, and the subsequent proceedings in the case of the second or subsequent applications for such writ shall be with or without a jury in the relator's discretion.

In all cases of release of persons declared and found to be sane and safe to be at large, release shall be probationary for such time and under such conditions, including periodic report at a State clinic for mental disease, or to an approved psychiatrist, as the court or judge, in its or his discretion, may order; and no release shall be permanent until after the entry of an order by the court or judge to that effect.[1]

The following points are brought out by the above:

1. The first application can not be made until after two years of incarceration and observation; and subsequent applications are limited to one in every two years. These are reasonable limitations, looking to provision for the careful and thorough examination of such persons for a time long enough to make their mental condition no longer doubtful. In some States that have limiting provisions, the period of time is shorter; the exact length of time being, of course, a matter of local opinion. The object is to limit the frequency of applications by such inmates as, for example, litigious paranoiacs. At the same time, both the period within which the first application may be made, and the periods of time between subsequent applications, may be shortened, within the discretion of the hospital superintendent, who is best qualified to pass upon the question.[2]

2. The first writ may be obtained upon application, unaccompanied by the certificates of experts, provided "probable cause"

[1] In this, and any other suggested legislation, the author makes no pretense to perfection of legislative draftsmanship. He has merely attempted to set forth the ideas involved, briefly and clearly, and with some regard to the legal terminology usually found in such provisions.

[2] Unfortunately, however, the action of hospital superintendents must often be influenced by the lack of space in institutions.

has, in any other manner, been made out to the satisfaction of the court; but subsequent writs can be obtained only when the petition of the relator is accompanied by the sworn certificates of two experts qualified as above provided for. The making of the first petition rests upon less rigorous requirements than that of the subsequent ones; and this is, frankly, a compromise between too radical a curtailment of a "right" that can not easily be deprived a person under the constitutions, and the present, practically unregulated practice.

3. The hearing upon return of the first writ may be with or without a jury in the *court's* discretion. While the hearing upon the return of subsequent writs may be before the court alone or before judge and jury in the *relator's* discretion, it must be remembered that, with the provision for the qualifications of experts much of the evil of the present system should be eliminated, and further, that as to such subsequent applications, the petition of the relator must be accompanied by the certificates of qualified examiners.

4. Release is always probationary for such time as the court, aided by the experts, shall deem necessary; provision is made for the much needed social-psychiatric after-care in such cases; and permanent release can only be gotten through the entry of a court order. These, in our opinion, are wise provisions that balance the various social and individual interests involved. They can work no injustice in the case of a mentally sound person who is deemed by the court to be no longer dangerous; for in such cases probation and psychiatric after-care may be made brief and perfunctory. At the same time, these features of the proposed program provide the necessary hold upon such cases, as manic-depressive psychosis, for example, where there is danger of a recurrence of the malady.

In our opinion, the above act is sufficient to cover the situation; but if supplementary legislation is required, such as is in force in many States, we recommend the Washington provision [1] supplemented by the New Mexico practice;[2] in the latter State automatic, periodic report by the hospital superintendent to the interested judges, of the mental condition of all inmates, is provided for.

[1] *See* Appendix, pp. 633, 634.

[2] *Id.*, p. 583.

IV. Other Provisions

The above constitute, we believe, a minimum of requirements for the achievement of the proximate ideals involved in our problem. We have seen, throughout this study, evidences of the lack of intelligent coöperation between the legal, social, and medical sciences. A Ministry of Justice,[1] — the purpose of which, among others, it would be to coördinate efforts in this field, — while seemingly not yet an achievable reform, is greatly needed. Not only could it be of assistance in such activities as provided under the Massachusetts law for the routine examination of offenders, but, in the work in the field of criminology generally, it would aid materially in the effective operation of such instrumentalities and devices as habitual criminal acts, indeterminate sentence laws, probation and parole, by maintaining a centralized statistical and criminal records bureau. Such a ministry would also be of inestimable value in the planning and execution of individualized penal, corrective and psychiatric social work, and in providing that vehicle for periodic, considered, scientific revision of the principles and procedure of the law that we alluded to elsewhere.[2]

[1] *See* "A Ministry of Justice", Benjamin N. Cardozo, *Harvard Law Review*, Vol. XXXV, 1921–1922, pp. 113–126, and articles cited therein.

[2] Pp. 263, 264. We know of no more necessary piece of work in the field of law reform than a study of the actual operation of European Ministries of Justice to see to what extent their machinery is applicable to conditions in the United States.

The American Law Institute is embarked upon a task of the utmost importance in the whole field of Jurisprudence, — the scientific restatement of the law, — with a view of bringing some certainty and order out of the vast tangle of the law, "the wilderness of precedent." This project, together with the penetrating and constructive critiques of various branches of the law by scholars of the calibre of Deans Pound and Wigmore, Professors Frankfurter, Freund, Williston, Beale and Justices Holmes, Brandeis, Cardozo, and a score of others, gives promise of the rebuilding of the moss-covered foundations of our proud legal structure. Judge Cardozo ("The Growth of the Law", p. 1) rightly points out that in addition we need the "philosophy that will mediate between conflicting claims of stability and progress, and supply a principle of growth." The restatement project does not yet include the vexed and tangled field of criminal law and procedure, for the reason that those branches of the law that deal directly with the conduct and psychology of human beings are naturally the last to be developed; they wait for the contributions of the socio-psychological disciplines.

In these pages we have attempted nothing nearly as ambitious as the programs alluded to by Judge Cardozo; the suggestions herein are tentative. Nevertheless, some such measures as those proposed are needed as a basis of discussion and further research; they and many others constitute the next step, — however halting that step may be, — in the *conscious direction* of the evolution of the law of crime, particularly those portions thereof dealing with the pathologically minded offender. But the more deeply we have pursued this study the more firmly was it borne in upon us that there is need and room,

The road to the achievement of the more ultimate social purposes must, we believe, include the establishment of "habit clinics" in schools; the founding of psychological-psychiatric clinics in industry and in juvenile courts; the dissemination of information relative to mental hygiene; the more thorough study of problems of eugenics and race mixture, of character building, etc. The roots of the mentally unsound offender of to-day can, to some extent, at least, be traced to the deeds of his forebears "unto the third and fourth generation"; but he himself, and the conditions of his life, have contributed no little to the end product of mental disorder and delinquency.

Our problem then, in the final analysis, goes back to the ideals and the physical, psychological, and social conditions of modern life. The law is but a social instrument that constantly requires improvement and adjustment to meet the demands of an advancing civilization. To define that advancement and to guide it in accordance with the highest ideals, are the functions of the moral philosopher and practical sociologist. Only when these are able to give to the framers of laws the ideals and the needs of the day and age, are the latter able to improve those laws. But while progress is the watchword, progress should be founded upon carefully studied conditions, and only after the ascertainment of needs and limitations.[1] In the law, one of the legitimate, though frequently overemphasized, limitations is tradition; law should progress, but carefully and surely.

even to-day, with our imperfect psychologies and sociologies, for a well-planned, carefully executed reëxamination of the fundamentals of our criminal law and criminal and penal procedure in the light of a long, wide, and deep study of the causes of various types of criminal conduct and the effect of different types of peno-correctional (including psychological, psychiatric, and ethical) regimens. Such a reëxamination should furnish us with the basis for a more than tentative criminal law and procedure; it should at least vindicate, if that is possible, the present system.

Perhaps we can greatly improve the present machinery while waiting for the blue-prints of the criminal law and procedure of tomorrow. Perhaps one of the most promising avenues of approach to the reform of the law in general is through the Ministry of Justice already alluded to. Judge Cardozo ("The Growth of the Law", pp. 121, 122), Dean Pound, and others, see in this instrumentality that necessary "channel of communication between legislatures and courts . . . essential, first, that the needs of the courts may be known to the legislature, and, second, that the needs, when known, may be intelligently and promptly met. . . ." We need to know more of the *actual operation* of European ministries of justice before we can say whether such an instrumentality could be adapted to meet American conditions, even if it were desirable to build it into our legal-administrative structure.

[1] *Cf.* James Ford, "Social Problems and Social Policy", p. 3.

In the foregoing pages we have recommended changes in the existing law and procedure in insanity cases, which we believe can be effectuated without serious upheaval in the structure and philosophy of the criminal law itself. Nevertheless, some lawyers will no doubt regard even these changes as revolutionary, visionary, unconstitutional, etc. But even if we subscribe to the conviction of the Historical School of Jurisprudence that law is a natural growth and that *natura non facit saltum*, we can not be lulled into the lethargic state which such a view usually inspires. All about us, to those who will but investigate, are evidences of the contradiction of the dictum that law is something immutable, unchangeable, something "that is not and in the long run cannot be made consciously." Just as it is true that the human mind, in the superb epic of conscious evolution, has coöperated with, and partially controlled and molded the mechanical, physical forces of blind nature, so do we believe that the more or less natural growth of law has been in the past, and should be to-day, consciously directed to achieve a definitely desired social purpose. Law is one of the means of conscious social control; it should be deliberately and intelligently framed to conform to our modern conception of the psychology of offenders and to the ideals of our day and age.

APPENDIX

INSANITY AND CRIMINAL IRRESPONSIBILITY

STATUTORY PROVISIONS GOVERNING THE TRIAL, COMMITMENT AND DISCHARGE OF PERSONS ACCUSED OF CRIME, WHO ARE BELIEVED TO BE INSANE AT ANY STAGE PRIOR TO, DURING, OR AFTER *TRIAL*, OR WHO PLEAD INSANITY AND CRIMINAL IRRESPONSIBILITY AS A *DEFENSE*

"Also, if a man in his sound memory commits a capital offense, and before arraignment for it he becomes mad, he ought not to be arraigned for it; because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried: for how can he make his defense? If after he be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced; and if, after judgment, he becomes of nonsane memory, execution shall be stayed: for peradventure, says the humanity of English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution." — 4 Blackstone's "Commentaries", 24.

"This short quotation shows what all the books and treatises and decisions on the subject show, — that the true and only reason why an insane person should not be tried is 'that he is disabled by the act of God to make a just defense, if he have one.'" — Chief Justice Beatty, in re Buchanan, 129 Cal., 330, 333, 61 Pac., 1120, 1121, 50 LRA., 378, 379 (1900).

". . . The common sense and feeling of mankind, the voice of nature, reason, and revelation, all concur in this plain rule, that no man is to be condemned unheard; and consequently no trial ought to proceed to the condemnation of a man, who by the providence of God is rendered totally incapable of speaking for himself, or of instructing others to speak for him." — Kinloch's Case (1746). 18 Howells St. Tr. (Eng.), 395, 411.

". . . In case a man in a phrenzy happens by some oversight, or by means of the gaoler, to plead to his indictment, and is put upon his trial, and it appears to the court upon his trial, that he is mad, the judge in discretion may discharge the jury of him, and remit him to gaol to be tried after the recovery of his understanding. . . ." — 1 Hale, Pleas of the Crown, 35.

INTRODUCTION

The outline at the end of this introduction presents the scheme of classification of the statutory provisions of the various States, covering the law on the criminal irresponsibility of the insane, and

the procedural and administrative provisions relative to the question of insanity when raised at any stage of the criminal proceedings. It will be noticed that the States of the Union differ greatly in the extent to which these matters have been the subject of legislation. Few States, for example, have specific statutory provision covering the tests of irresponsibility, as is the case in New York; the subject of tests of irresponsibility is covered largely by judge-made, as opposed to legislative, law. As might be expected, too, some differences appear in the judicial interpretation of similar code sections in different jurisdictions. The *practice* as to the relative importance of the code sections and their interpretation so as to fulfill the "intent of the legislature" (which is often very vague indeed), differs in the various States, although courts are of course greatly influenced by decisions in sister States. Sometimes a court seems practically to disregard the statutory provisions by interpreting them in a way which suggests that it is proceeding along the line of former decisions in its particular jurisdiction instead of in accordance with new legislation; in such instances, the court will sometimes resort to the much abused and convenient fiction of holding such legislation to be merely "declaratory of the common law." However, in the large majority of instances, the courts are earnestly attempting to get at the spirit and purpose of legislative enactment governing the judicial treatment of the criminal insane.

Owing to the imperfect and incomplete legislation on this subject in some of the States, and to the fact that in some jurisdictions such sections are scattered through numerous session-law books and are not compiled for ready and accurate reference, and owing further to the poor indexing [1] of code sections in some jurisdictions, an occasional pertinent provision may have been overlooked. Such omissions, however, we believe to be few, as our search for the material has proceeded on the basis of the outline set forth below.

Of course, every effort was made to include only the latest sec-

[1] ". . . Owing to the slipshod manner in which the Session Laws are indexed, and to the absence of any proper method of cross-indexing, the passage and existence of this law is comparatively unknown to the Bench, the Bar and to physicians." — Statement of the Chairman of the Committee on Expert Testimony of the New York State Bar Association with reference to the Expert Testimony Bill passed on the insistence of the Bar Association, p. 131, Vol. XXXIX, Report of the New York State Bar Association for 1916.

tions found in the most recent compilation or revision of the statutes and the session laws published since the death of such compilation, code, or revision. On a few occasions it was found difficult to say with conclusiveness whether certain sections were merely modified or entirely repealed by later provisions, the latest enactment being sometimes silent on this point and the final word on the subject being left, of course, to judicial interpretation.

Owing to the varying practice in different States as to titles (some code and session law sections not having titles, others having accurately descriptive titles, and, occasionally, some having entirely misleading titles), no effort has been made to include titles or to rely upon their accuracy where given. Instead, a scheme of symbols has been employed, which, despite its disadvantages, will, it is believed, be more useful than titles. In applying these symbols to the various sections, different schemes were considered, and it was found difficult, if not impossible, to maintain more than a relative consistency in classification; for the practice is various in different States, as to the kind and number of topics included in one section. Some classificatory divisions and designations will, for these reasons, no doubt appear arbitrary; but this was hardly avoidable. It is believed, on the basis of long study of the numerous code provisions and the practice in different States as to the number and nature of topics included under any one heading, that the scheme herein presented will be found helpful.

Under symbol (II, 1), proceedings before indictment, after indictment and before trial, after trial and before judgment, and after judgment but before execution of sentence have been included, to differentiate these questions, as a class, from the distinct problem — the plea of insanity at the time of the *offense*, and the trial of that issue, which problem is classified under symbol (II, 2). Relatively few sections were included under symbols I and III, the former covering tests of irresponsibility, the latter comprising a heterogeneous group of topics related secondarily to the main problems; these two topics have not been the subject of such careful and detailed legislation as have the important problems included under symbol II. Sometimes, however, it was impossible to maintain this distinction, as the legislative enactment covered not only more than one subdivision under the same general topic, but more than one topic. Chapter 139, sec. 2, Revised Statutes of Maine, 1916, for example, includes proceedings both on failure to indict by

reason of insanity (that is, a problem falling logically under symbol II, 1) and proceedings on *acquittal* by reason of insanity (and irresponsibility) at the time of the offense (a problem falling under symbol II, 2). Such sections have been placed where deemed most appropriate.[1]

Attention is invited particularly to some unique measures in force in some jurisdictions. As was pointed out in the text, the Commonwealth of Massachusetts, for example, has the first measure ever passed making the mental examination of certain classes of offenders a matter of *routine*, to which, theoretically, all such offenders must be subjected. The importance of this piece of socio-legal engineering can not be overemphasized.[2] Again, the State of Washington's elaborate provisions[3] covering the release of those acquitted on the plea of insanity who have thereupon been committed to an institution for the mentally ill, is worthy of note. The Massachusetts law providing for the discharge of such persons (acquitted of homicides) by the Governor and Council, *only after examination and report by the State Department of Mental Diseases* is also a wise piece of social engineering.[4] As an interesting relic of an outgrown stage of "legislative justice", the reader's attention is invited to the North Carolina[5] and Georgia[6] laws covering the discharge of persons acquitted of capital offenses and committed to an institution for the insane; in those jurisdictions release of such persons is by act of the legislature. In North Carolina the provision still appears on the statute books, in spite of a decision[7] in 1904 by the Supreme Court of that State holding such act unconstitutional as being an assumption by the legislature of a function belonging to the judicial branch of the government. Many more noteworthy provisions must be left for discovery to the interest and diligence of the reader.

The problem of the criminal insane is being given more attention to-day than ever before. Now that we have scientific proof that large percentages of the penal population in the various States

[1] The laws covering insanity of persons *while serving sentence* have not been included in this compilation except incidentally, under symbol III.

[2] *Ante*, pp. 58, *et seq.* For a description and estimate of the value of this law in action, *see* text and author's article, "State Legislation Providing for the Mental Examination of Persons Accused of Crime", *Mental Hygiene*, Vol. VIII, No. 1, Jan., 1924, pp. 1–19; reprinted in *Journal of the Institute of Criminal Law and Criminology*, Vol. XIV, No. 4, 1924.

[3] *Post*, pp. 633, *et seq.* [4] *Post*, p. 563. [5] *Post*, p. 593. [6] *Post*, p. 527.

[7] In re Boyett, 136 N. C., 415, 48 S. E., 789, 67 LRA., 972, 103 ASR, 944.

are classifiable in terms of insanity or feeblemindedness,[1] public-spirited lawyers, physicians and other social workers, as well as the learned professional societies, are beginning to look upon this problem in a new light. Great improvement of the judicio-penal treatment of such offenders can not be expected overnight. In the meantime, it is hoped that by bringing together in a convenient form some of the more important legislation in this vast and important field of criminalistics, together with some illustrative judicial decisions, a step will be taken toward supplying physicians, psychologists, social workers, legislators, other public officials, and even lawyers (who are too busy to gather such material), with one of the instruments needed in the social work of law improvement. To decide upon what the law *ought to be*, we must first know what it is.

Among the cases included in this compilation, we have not attempted to cover the decisions dealing with the substantive law involving tests of irresponsibility; the cases deal with matters of procedure and largely with the question of insanity arising at any stage *after* the time of the alleged criminal act, that is, the allegation of insanity existing at any stage after arrest of the accused and before, during, or after his trial.

[1] Bernard Glueck, "A Study of 608 Admissions to Sing Sing Prison", *Mental Hygiene*, Vol. II, No. 1, Jan., 1918, and "Concerning Prisoners", *Mental Hygiene*, Vol. II, No. 2, April, 1918. The findings in these studies have been confirmed by several important, subsequent prison surveys.

SCHEME OF CLASSIFICATION OF STATUTORY PROVISIONS COVERING THE LEGAL TREATMENT OF THE "CRIMINAL INSANE"[1]

I. Substantive Provisions: Tests of Irresponsibility, etc. (where this has been made the subject of legislative enactment, as in New York).
   1. Kind of test and who is "responsible" (and who can be tried, sentenced, or punished).
   2. Burden and measure of proof of "insanity" (and irresponsibility), where this has been made the subject of legislative enactment.

II. Procedural and Administrative Provisions:
   1. "Insanity" *after the time* of the alleged offense, and before indictment (or information), after indictment and before trial, during trial, after trial and conviction but before sentence, after sentence and before execution of sentence.
      a. Method of determining this.
      b. Commitment procedure, stay of execution, and procedure upon alleged recovery.
   2. "Insanity" *at time* of alleged offense.
      a. Plea, order of trial, etc.
      b. Verdict of jury.
      c. Disposal of defendant upon acquittal (or failure to indict because of "legal insanity" at time of alleged offense[2]) upon a "plea of insanity" and criminal irresponsibility.
      d. Method of enlargement from hospital for mentally ill (parole and discharge) of persons acquitted by reason of "insanity" (and irresponsibility) and committed to some institution.

III. Other interesting provisions, more remotely connected with the general problem of the "criminal insane." (This includes proceedings when a convict has become "insane" during his term of imprisonment, several typical provisions as to the commitment of *noncriminal* "insane", definitions, etc. The provisions under this head do not cover all states, and are given merely by way of illustration or as matter of allied interest.)

[1] The symbols at the head of the different code sections of the various States refer to the above outline. Sometimes one section covers more than one symbol, and *vice versa*, which may have necessitated an occasional departure from logical sequence.

[2] Wherever the distinction is made between failure to indict because of "insanity" at the time of the investigation by the grand jury, and "insanity" at the time of the alleged criminal act.

ALABAMA

(I, 1 and 2)

Presumption in favor of sanity; burden and measure of proof of insanity. — Every person over fourteen years of age charged with crime is presumed to be responsible for his acts, and the burden of proving that he is irresponsible is cast upon the accused. The defense of insanity in all criminal prosecutions shall be clearly proved to the *reasonable* satisfaction of the jury. — Criminal Code of 1923, sec. 4572 (p. 500).

(II, 1 *a* and *b*)

Inquisition in certain cases of felony; proceedings. — If any person charged with any felony be held in confinement under indictment, and the trial court shall have reasonable ground to doubt his sanity, the trial of such person for such offense shall be suspended until the jury shall inquire into the fact of such sanity, such jury to be impaneled from the regular jurors in attendance for the week or from a special venire, as the court may direct. If the jury shall find the accused sane at the time of their verdict, they shall make no other inquiry, and the trial in chief shall proceed. If they find that he is insane at that time, the court shall make an order committing him to an insane hospital, where he must remain until he is restored to his right mind. When the superintendent of the hospital shall be of opinion that such person is so restored he shall forthwith, in writing, inform the judge and sheriff of such court of the fact, whereupon such person must be remanded to prison on an order of such judge, and the criminal proceedings resumed. In no event shall such person be set at large so long as such prosecution is pending, or so long as he continues to be insane. — Criminal Code of 1923, sec. 4575 (p. 502).

Inquisition upon alleged insane prisoner; further proceedings. — If any person in confinement, under indictment, or for want of bail for good behavior, or for keeping the peace, or appearing as a witness, or in consequence of any summary conviction, or by an order of any justice, appears to be insane, the judge of any court of record of the county where he is confined must institute a careful investigation, call a respectable physician and other credible witnesses, and, if he deems it necessary, may call a jury, and for that purpose he is empowered to compel attendance of witnesses and jurors; and if it be satisfactorily proved that the person is insane, the judge may discharge him from imprisonment and order his safe custody and removal to the hospital, where he must remain until restored to his right mind; and then, if the judge shall have so directed, the superintendent must inform the judge and sheriff, whereupon the person must be remanded to prison, and criminal proceedings be resumed, or he be otherwise discharged. — Criminal Code of 1923, sec. 4577 (p. 503).

(II, 2 *a*)

Insanity must be specially pleaded as a defense for crime. — When the defense of insanity is set up in any criminal prosecution it must be by special plea, *interposed at the time of arraignment* and entered of record upon the docket of the court, which in substance shall be, "not guilty by reason of insanity." Such plea shall not preclude the usual plea of the general issue, which shall not, however, put in issue the question of the irresponsibility of the accused by reason of this alleged insanity, this question being triable only under the special plea. — Criminal Code of 1923, sec. 4573 (p. 501).

(II, 2 *b*)

Verdict when special plea interposed. — If it shall appear from the evidence that the defendant did the act charged as constituting the offense, but at the time of committing the act he was insane, the jury shall render a special verdict to the effect that the defendant is not guilty by reason of insanity; if the jury do not believe from the evidence that the defendant committed the act, or if they believe from the evidence that he is not guilty upon any ground other than his alleged insanity, they must return a general verdict of not guilty; otherwise, they must return a verdict of conviction. — Criminal Code of 1923, sec. 4574 (p. 501).

(II, 2 *c*)

Court orders to hospital defendant acquitted on account of insanity. — When a person has escaped indictment, or been acquitted of a criminal charge on the ground of insanity, the court, being informed by the jury, or otherwise, of the fact, must carefully inquire and ascertain whether his insanity in any degree continues, and, if it does, shall order him in safe custody, and to be sent to the hospital. — Criminal Code of 1923, sec. 4578 (p. 503).

Powers of county courts and justices in misdemeanors. — Persons charged with misdemeanors, and acquitted on the ground of insanity, may be kept in custody and sent to the hospital in the same way as persons charged with crimes; and the county courts and justices of the peace shall have the same power in reference to persons charged before them with misdemeanors, as is bestowed upon the circuit courts in the two preceding sections. — Criminal Code of 1923, sec. 4579 (p. 503).

(II, 2 *d*)

Habeas corpus for the release of insane persons confined. — Any person confined as insane may prosecute a writ of *habeas corpus* as provided in this chapter; and if the judge, or the jury, when the petitioner demands the issues arising to be tried by a jury, shall decide at the hearing that the person is insane, such decision does not bar a second application alleging that such person has been restored to sanity. — Criminal Code of 1923, sec. 4307 (p. 373).

ALASKA

NOTE. — The Criminal Code of Alaska does not seem to have any special provisions covering the case of the insane. The only reference to mental condition is in the definition of murder in the first degree, which is as follows:

Whoever, being of sound memory and discretion, purposely, and either of deliberate and premeditated malice or by means of poison, or in perpetrating or in attempting to perpetrate, any rape, arson, robbery, or burglary, kills another, is guilty of murder in the first degree, and shall suffer death. — Compiled Laws (1913), Criminal Code, sec. 1883, Chap. 2, Title XIV.

(Section 831, Chapter thirty-nine, provides for the Commissioners, acting as *ex officio* probate judges, having power to impanel a jury of six to try the issue of insanity in commitment proceedings.)

ARIZONA

(I, 1)

All persons are capable of committing crimes except those belonging to the following classes:

. . . (2) Idiots. (3) Lunatics and insane persons. (4) Persons who committed the act or made the omission charged under an ignorance or mistake of fact, which disproves any criminal intent. (5) Persons who committed the act charged without being conscious thereof. . . . — Rev. Stats. (1913), Penal Code, sec. 24.

A person cannot be tried, convicted or punished for a public offense while he is insane. — Rev. Stats. (1913), Penal Code, sec. 1264.

(II, 1 *a* and *b*)

(For the procedure to determine whether accused is insane at any period after indictment and before judgment (during trial), see secs. 1368–1372 of the Penal Code of California, 1915, which are similar to sections 1265–1268 of the Penal Code of Arizona on this subject.)

He may show for cause against the judgment: That he is insane; and if, in the opinion of the court, there be reasonable ground for believing him to be insane, the question of his insanity shall be tried as provided in sections 1263 and 1270 inclusive of this code. If upon the trial of that question, the jury find that he is of sound mind, judgment shall be pronounced; and if they find him insane, he shall be committed to the state asylum for the insane until he become sane, and when notice is given of that fact, as provided in section 1269, he shall be brought before the court for judgment. — Rev. Stats. (1913), Penal Code, sec. 1124 (1).

(II, 1 *a*)

If, after the delivery to the superintendent for execution, there is good reason to believe that a defendant, under judgment of death, has become in-

sane, the superintendent must call such fact to the attention of the county attorney of the county in which the prison is situated, whose duty it is to immediately file in the superior court of such county a petition, stating the conviction and judgment and the fact that the defendant is believed to be insane, and asking that the question of his sanity be inquired into. Thereupon the court must at once cause to be summoned and empaneled from the regular jury list of the county, a jury of twelve persons to hear such inquiry. — Rev. Stats. (1913), Penal Code, sec. 1141.

The county attorney must attend the hearing and may produce witnesses before the jury, for which purpose he may issue process in the same manner as for witnesses to attend before the grand jury, and disobedience thereto may be punished in like manner as disobedience to process issued by the court. — Rev. Stats. (1913), Penal Code, sec. 1142.

(II, 1 *b*)

The verdict of the jury must be entered upon the minutes, and thereupon the court must make and cause to be entered an order reciting the fact of such inquiry and the result thereof, and when it is found that the defendant is insane the order must direct that he be taken to the state asylum for the insane, and there kept in safe confinement until his reason is restored. — Rev. Stats. (1913), Penal Code, sec. 1143.

If it be found that the defendant is sane, the superintendent must proceed to execute the judgment as specified in the warrant; if it is found that the defendant is insane, the superintendent must suspend the execution, and transmit a certified copy of the order mentioned in the last section to the governor, and deliver the defendant, together with a certified copy of such order, to the medical superintendent of the asylum named in such order. When the defendant recovers his reason, the superintendent of such asylum must certify that fact to the governor, who must thereupon issue to the superintendent his warrant, appointing a day for the execution of the judgment. — Rev. Stats. (1913), Penal Code, sec. 1144.

(II, 2 *b*)

. . . . When the defendant is acquitted on the ground that he was insane at the time of the commission of the act charged, the verdict must be "not guilty by reason of insanity." — Rev. Stats. (1913), Penal Code, sec. 1084.

(II, 2 *c*)

If the jury render a verdict of acquittal on the ground of insanity, the court may order a jury to be summoned from the jury list of the county to inquire whether defendant continues to be insane. The court may cause the same witnesses to be summoned who testified on the trial, and other witnesses, and direct the county attorney to conduct the proceedings, and counsel may appear for the defendant. The court may direct the sheriff to take the defendant and retain him in custody until the question of continuing insanity is determined. If the jury find the defendant insane, he shall be committed by the

sheriff to the state insane asylum. If the jury find the defendant sane, he must be discharged. — Rev. Stats. (1913), Penal Code, sec. 1100.

ARKANSAS

(I, 1)

An idiot shall not be found guilty or punished for any crime or misdemeanor. — Crawford and Moses, Digest of the Statutes (1921), sec. 2302.

Persons capable of committing crimes. — A lunatic or insane person, without lucid intervals, shall not be found guilty of any crime or misdemeanor with which he may be charged. — Crawford and Moses, Digest of the Statutes (1921), sec. 2298.

A person that becomes insane or lunatic after the commission of a crime or misdemeanor shall not be tried for the offense during the insanity or lunacy. — Crawford and Moses, Digest of the Statutes (1921), sec. 2299.

(II, 1 *a* and *b*)

Insanity of defendant — procedure. — If the court shall be of the opinion that there are reasonable grounds to believe that the defendant is insane, all proceedings in the trial shall be postponed until the jury be impaneled to inquire whether the defendant is of unsound mind, and if the jury shall find that he is of unsound mind the court shall direct that he be kept in prison, or conveyed by the sheriff to the lunatic asylum, and there kept in custody by the officers thereof until he is restored, when he shall be returned to the sheriff, on demand, to be reconveyed by him to the jail of the county. — Crawford and Moses, Digest of the Statutes (1921), sec. 3055.

Judgment — not pronounced against insane person. — He may also show that he is insane. If the court is of opinion that there is reasonable ground for believing he is insane, the question of his insanity shall be determined by a jury of twelve qualified jurors, to be summoned and impaneled as directed by the court. If the jury do not find him insane, judgment shall be pronounced. If they find him insane, he must be kept in confinement, either in the county jail or lunatic asylum, until, in the opinion of the court, he becomes sane, when judgment shall be pronounced. — Crawford and Moses, Digest of the Statutes (1921), sec. 3237.

(II, 1 *a*)

Execution — authority of sheriff to suspend. — When the sheriff is satisfied that there are reasonable grounds for believing that the defendant is insane . . . , he may summon a jury of twelve persons on the jury list drawn by the court, who shall be sworn by the sheriff well and truly to inquire into the insanity . . . of the defendant and a true inquisition return; and they shall examine the defendant and hear any evidence that may be presented, and by a written inquisition, signed by each of them, find as to insanity. . . . And, unless the inquisition find the defendant insane . . ., the sheriff shall not suspend the execution; but, if the inquisition find the defendant insane . . ., he shall suspend the execution and immediately transmit the inquisition to

the Governor. — Crawford and Moses, Digest of the Statutes (1921), sec. 3251.[1]

(II, I *b* and II, 2 *c*)

Duty to act on judge's certificate. — It shall be the duty of the Superintendent of the State Hospital for Nervous Diseases to admit into said Hospital, upon the certificate of the judge before whom the case is pending upon presentment or indictment, any person that has been, or that may hereafter be, acquitted upon a plea of insanity of the charge made in said presentment or indictment, or any person who has been, or who may hereafter be, adjudged insane, as provided by law where such person has been held upon presentment or indictment and can not be tried because of such insanity. — Crawford and Moses, Digest of the Statutes (1921), sec. 9413.

Certificate — contents. — The certificate of the judge mentioned in § 9413 shall be signed by such judge officially and shall state that the person mentioned therein has been acquitted upon a charge of (naming the charge) upon the plea of insanity; or that such person has been presented or indicted and by reason of present insanity he can not be tried. — Crawford and Moses, Digest of the Statutes (1921), sec. 9414.

(II, 1 *b*)

Disposition of restored patients. — When any person confined in said Hospital under the provisions of this act shall be ascertained to be restored to reason, it shall be the duty of the said superintendent to give notice thereof to the sheriff of the county in which the indictment or presentment against such person is pending, and said sheriff shall forthwith proceed to said Hospital and take such person into his custody, and convey him to the jail of said county, or hold him in custody until admitted to bail or otherwise discharged

[1] In State *v.* Helm, 69 Ark., 167, 61 S. W., 915, at 917, the Supreme Court of Arkansas considered the degree of insanity which would exempt one from punishment, after verdict and before judgment. The statute on the subject was held to be declaratory of the common law. The court said: "We therefore conclude and decide that, if a person convicted of a crime is, by reason of a disease of the mind, unable to understand the nature of the indictment upon which he was convicted, his plea thereto, and the verdict thereon, when explained to him by the court, and is unable to comprehend his own condition in reference to such proceeding, and by reason thereof might not make known to the court or the attorneys in charge of his defense the facts within his knowledge, if any, which would show that judgment should not be pronounced against him, he is, as to the pronouncing of such judgment, to be deemed insane, within the meaning of the statute." In connection with this, an instruction that if the jury find that defendant is so afflicted with mental disease that when informed by the court of the nature of the indictment, his plea, and the verdict of conviction thereon, and of the consequences thereof, he would not *intelligently comprehend* such matters, they would be authorized to find him insane, was held incorrect as calculated "to induce the jury to believe that he should be possessed of more intelligence and mental capacity at the time judgment is pronounced than is necessary."

The manner and extent of the inquiry are left to the sound discretion of the court.

according to law. — Crawford and Moses, Digest of the Statutes (1921), sec. 9416.

(II, 2 *b*)

Verdict of insanity. — If the defense be the insanity of the defendant, the jury must be instructed, if they acquit him on that ground, to state the fact in their verdict. — Crawford and Moses, Digest of the Statutes (1921), sec. 3215.

(II, 2 *d*)

Any person admitted to the said Hospital under the provisions of this act shall be there and then kept until restored to reason, which shall be ascertained as in case of other insane persons in said Hospital. — Crawford and Moses, Digest of the Statutes (1921), sec. 9415.

Discharge of incurable class. — Whenever application is made for the admission of any insane person, according to law, and there is at the time no unoccupied or available room in the Hospital, if it shall appear from the history of the case presented that it is " acute " and uncomplicated, the superintendent shall, as soon as practicable, make room for the admission of such patient by discharging some one inmate belonging to the " incurable " class, if such there be in the Hospital, or one belonging to the " probably incurable " class, if there be no one dischargeable from the fourth class, or one belonging to the " chronic " class if there be no one dischargeable from the third class; but in making such selection for discharge, the superintendent shall discriminate and discharge such an one as may have been longest in the asylum, if not violent or dangerous to the community, or whose discharge will effect the least public inconvenience or cost; and no appeal shall be had from the decision of the Superintendent of the Hospital in matters of admission and discharge of inmates, except to the Board of Control of the Hospital, who may direct the superintendent to admit or discharge any person under any circumstances not involving a violation of law. — Crawford and Moses, Digest of the Statutes (1921), sec. 9419.

A person shall be considered of sound mind who is neither an idiot or a lunatic, or affected with insanity, and hath arrived at the age of fourteen years, or before that age, if such person know the distinction between good and evil. — Crawford and Moses, Digest of the Statutes (1921), sec. 2300.

(II, 3)

Classification of insane persons. — All persons found to be insane, for whom application for admission to the State Hospital shall be made in compliance with the provisions of this chapter, shall be classified as " acute," " chronic," " probably incurable," or " incurable," such classifications to be determined by the duration of the disease and such complications as are known to render recovery doubtful or impossible. All cases of less than one year's duration from first recognized symptoms of insanity shall be classified as " acute "; all cases over one year's duration shall be classified as " chronic "; all cases complicated with epilepsy, original imbecility or feeble mindedness, deformities of skull from injuries, old age or general paralysis, shall be classified as

" probably incurable "; and all other cases shall be classified as " incurable "; provided, that no person of either classification, whether curable or not, and whether the imbecility or insanity be idiotic or congenital or not, shall be refused admission as long as there is unoccupied room for patients in the Hospital. — Crawford and Moses, Digest of the Statutes (1921), sec. 9418.

CALIFORNIA

(I, 1)

Who are capable of committing crimes. — All persons are capable of committing crimes except those belonging to the following classes:

One. Children under the age of fourteen, in the absence of clear proof that at the time of committing the act charged against them, they knew its wrongfulness.

Two. Idiots.

Three. Lunatics and insane persons.

. . . .

Five. Persons who committed the act charged without being conscious thereof. Penal Code (Deering) (1923), sec. 26.[1]

Insane persons can not be tried, sentenced or punished. — A person can not be tried, adjudged to punishment, or punished for a public offense, while he is insane. — Penal Code (Deering) (1923), sec. 1367.

(II, 1 *a*)

Doubt as to sanity of defendant. Examination of before jury. Stay of proceedings. — If at any time during the pendency of an action up to and including the time when defendant is brought up for judgment or conviction a doubt arises as to the sanity of the defendant, the court must order the question as to his sanity to be submitted to a jury; and the trial or the pronouncing of the judgment must be suspended until the question is determined by their verdict, and the trial jury may be discharged or retained, according to the discretion of the court, during the pendency of the issue of insanity. — Penal Code (Deering) (1923), sec. 1368.[2]

[1] In People *v.* Methever, 132 Cal., 326, 64 Pac., 481, subdivision 5 was construed in a case in which defendant alleged that he committed the offense while insane, "claiming that this insanity arose from several serious injuries received upon his head during the course of his past life, conjoined with an attack of *delirium tremens*, which he claims actually encompassed him at the time of the killing." The court held it was obvious "that subdivision 5 does not contemplate cases of unsound mind, — that is, cases of idiots, lunatics, and insane persons, — but, upon the contrary, contemplates only cases of persons of sound mind, — as, for example, somnambulists, or persons suffering with delirium from fever or drugs. . . . There is no reason why subdivision 5 should be given any broader construction, for as to persons afflicted with unsound minds, subdivisions 2 and 3 include them all."

[2] If there is a doubt a second time, "the same procedure must be followed, and so on to the end as often as occasion may require." — People *v.* Farrell, 31 Cal., 576.

The question whether defendant has become sufficiently sane to be tried

Order of the trial of the question of insanity, charge of the court. — The trial of the question of insanity must proceed in the following order:

1. The counsel for the defendant must open the case and offer evidence in support of the allegation of insanity;

2. The counsel for the people may then open their case and offer evidence in support thereof;

3. The parties may then respectively offer rebutting testimony only, unless the court, for good reason in furtherance of justice, permit them to offer evidence upon their original cause;

4. When the evidence is concluded, unless the case is submitted to the jury on either or both sides without argument, the counsel for the people must commence, and the defendant or his counsel may conclude the argument to the jury;

5. If the indictment be for an offense punishable with death, two counsel on each side may argue the cause to the jury, in which case they must do so alternately. In other cases the argument may be restricted to one counsel on each side;

"is not to be judged according merely to the medical view of sanity or insanity, but is to be determined with reference to the statute, which is to be construed as an affirmance of the common law principle that if a person arraigned for a crime is capable of understanding the nature and object of the proceedings against him, and can conduct his defense in a rational manner, he is deemed sane for the purpose of being tried, though on some other subjects his mind may be deranged or unsound." — In re Buchanan, 129 Cal., 330, 50 LRA 378, 61 Pac., 1120. *See also* 178 Cal., 726, 3 ALR 95 *note*.

"The Code provides no procedure for creating a doubt in the mind of the judge, and yet it seems to be the purpose of the law that no person should be tried for a crime while he is insane. . . . Much, however, must be left to the judicial conscience of the trial judge in a matter of this kind." — People *v.* Hettrick (1899), 126 Cal., 425, 427; 58 Pac., 918.

In the following case the court, approving the distinction between "insanity that excuses crime and the insanity that arrests the trial" as given in the Buchanan Case, proceeded to elucidate it further as follows: "Of course, a person may be sane enough to be responsible for crime, and yet incapable of making his defense; and, on the other hand, he may have mental capacity to be placed on trial, and yet be insane within the contemplation of the law as to responsibility for a criminal act."

As to the question under what conditions a "doubt" as to the sanity of the defendant at trial can arise, the court said:

". . . As to the showing required to make it the duty of the court to submit the question of sanity to a jury, there is no discretion left in the court when a doubt arises as to the sanity of the defendant. And ordinarily, at least, if there are statements under oath of a credible person or persons that the defendant is insane, a doubt is or should be raised as to the defendant's sanity, and the question must be submitted to a jury. The only contingency is, Does a doubt arise? If information comes, through a proper source and through proper channels, that the defendant is insane, or if, through observation and personal inspection, the information is disclosed to the court, a jury must be impaneled to pass upon the mental condition of the accused." — People *v.* West, *et al.*, 143 Pac. (Cal.), 793, 794.

6. The court must then charge the jury, stating to them all matters of law necessary for their information in giving their verdict. — Penal Code (Deering) (1923), sec. 1369.

(II, 1 *b*)

Verdict of the jury as to sanity, and proceedings thereon. — If the jury finds the defendant sane, the trial must proceed, or judgment be pronounced, as the case may be. If the jury finds the defendant insane, the trial or judgment must be suspended until he becomes sane, and the court must order that he be in the meantime committed by the sheriff to a state hospital for the care and treatment of the insane, and that upon his becoming sane he be redelivered to the sheriff. — Penal Code (Deering) (1923), sec. 1370.

If defendant is committed, it exonerates his bail, etc. — The commitment of the defendant, as mentioned in the last section, exonerates his bail, or entitles a person, authorized to receive the property of the defendant, to a return of any money he may have deposited instead of bail. — Penal Code (Deering) (1923), sec. 1371.

Defendant detained in asylum until he becomes sane. — If the defendant is received into the state hospital he must be detained there until he becomes sane. When he becomes sane, the superintendent must certify that fact to the sheriff and district attorney of the county. The sheriff must thereupon, without delay, bring the defendant from the state hospital, and place him in proper custody until he is brought to trial or judgment, as the case may be, or is legally discharged. — Penal Code (Deering) (1923), sec. 1372.

(II, 1 *a* and *b*)

What causes may be shown against judgment. — He may show, for cause against the judgment:

1. That he is insane; and if, in the opinion of the court, there is reasonable ground for believing him insane, the question of insanity must be tried as provided in . . . this code. If, upon the trial of that question, the jury finds that he is sane, judgment must be pronounced, but if they find him insane, he must be committed to the state hospital for the care and treatment of the insane, until he becomes sane; and when notice is given of that fact, as provided in section one thousand three hundred and seventy-two, he must be brought before the court for judgment. — Penal Code (Deering) (1923), sec. 1201.

(II, 1 *a*)

Time for pronouncing judgment. — . . . If in the opinion of the court there is a reasonable ground for believing a defendant insane, the court may extend the time of pronouncing sentence until the question of insanity has been heard and determined, as provided in . . . this code. — Penal Code (Deering) (1923), sec. 1191.[1]

[1] On a suggestion of the insanity of one convicted of murder and arraigned for judgment, the test to be applied in an inquiry as to his sanity, authorized

Insanity of defendant (awaiting execution), how determined. — If, after his delivery to the warden for execution, there is good reason to believe that a defendant, under judgment of death, has become insane, the warden must call such fact to the attention of the district attorney of the county in which the prison is situated, whose duty it is to immediately file in the superior court of such county a petition, stating the conviction and judgment, and the fact that the defendant is believed to be insane, and asking that the question of his sanity be inquired into. Thereupon the court must at once cause to be summoned and impaneled, from the regular jury list of the county, a jury of twelve persons to hear such inquiry.[1] — Penal Code (Deering) (1923), sec. 1221.

Duty of district attorney upon hearing. — The district attorney must attend the hearing, and may produce witnesses before the jury, for which purpose he may issue process in the same manner as for witnesses to attend before the grand jury, and disobedience thereto may be punished in like manner as disobedience to process issued by the court. — Penal Code (Deering) (1923), sec. 1222.

(II, 1 *b*)

Order of court committing insane person to hospital. — The verdict of the jury must be entered upon the minutes, and thereupon the court must make and cause to be entered an order reciting the fact of such inquiry and the result thereof, and when it is found that the defendant is insane, the order must direct that he be taken to one of the state hospitals for the insane, and there kept in safe confinement until his reason is restored. — Penal Code (Deering) (1923), sec. 1223.

Defendant found to be sane, duty of warden. — If it is found that the defendant is sane, the warden must proceed to execute the judgment as specified in the warrant; if it is found that the defendant is insane, the warden must suspend the execution, and transmit a certified copy of the order mentioned in the last section to the governor, and deliver the defendant, together with a certified copy of such order, to the medical superintendent of the hospital named in such order. When the defendant recovers his reason, the superintendent of such hospital must certify that fact to the governor, who must thereupon issue to the warden his warrant, appointing a day for the execution of the judgment. — Penal Code (Deering) (1923), sec. 1224.

by the Penal Code, is whether the mind of the accused is in such a condition that he does not rightly comprehend his own condition with reference to the proceedings against him, or that he has been convicted of a crime punishable by death, and is before the court for the purpose of judgment on that conviction, or that he is then unable to present in a rational manner any defense that he might have, either on motion for a new trial or to the pronouncing of judgment. — People *v.* Lawson, 174 Pac., 885 (1918).

[1] According to the Code Commissioner of California, "The amendment (Stats. 1905, p. 898) is designed to permit the warden to act without procuring the concurrence of the judge of the Superior Court, and requires the District Attorney to act upon the suggestion of the warden, by filing a petition and taking proceedings thereunder to ascertain whether the defendant is insane."

(II, 2 *b*)

Form of verdict on acquittal on ground of insanity. . . . — When the defendant is acquitted on the ground that he was insane at the time of the commission of the act charged, the verdict must be " not guilty by reason of insanity . . . ." — Penal Code (Deering) (1923), sec. 1151.

(II, 2 *c*)

Proceedings on acquittal on ground of insanity. — If the jury render a verdict of acquittal on the ground of insanity, the court may order a jury to be summoned from the jury-list of the county, to inquire whether the defendant continues to be insane. The court may cause the same witnesses to be summoned who testified on the trial, and other witnesses, and direct the district attorney to conduct the proceedings, and counsel may appear for the defendant. The court may direct the sheriff to take the defendant and retain him in custody until the question of continuing insanity is determined. If the jury find the defendant insane, he shall be committed by the sheriff to the state insane asylum. If the jury find the defendant sane, he shall be discharged. — Penal Code (Deering) (1923), sec. 1167.

(II, 2 *d*)

Habeas corpus. — Any one in custody as an insane or incompetent person is entitled to a writ of *habeas corpus*, upon a proper application made by the commission (state lunacy), by such person, a relative or friend in his behalf to the superior judge of the county in which the hospital is located. Upon the return of such writ, the fact of his insanity or incompetency must be inquired into and determined. The medical history of such person as it appears in the clinical records, must be given in evidence, and the superintendent in charge of the state hospital wherein such person is held in custody, and any other person, must be sworn touching the mental condition of such person. — Political Code (Deering) (1923), sec. 2188.[1]

[1] In Gardner (medical superintendent of State Hospital) *v.* Jones (Judge), 126 Cal., 614, 617, it was contended that Sec. 13, Art. III (Section 2188 herein) distinguishes between two classes of insane — the civil and the criminal — and that the latter class is taken out of the operation of the statute as to the right of *habeas corpus*. *Held*, that this section does apply to the case of persons acquitted of crime because of insanity and sent to an insane asylum. It was also contended that Sec. 14, Art. III (section 1372 herein) confers authority upon the medical superintendent to determine when a patient of the criminal class is restored to sanity, and, as this authority is not conferred upon any other person or tribunal, it is necessarily exclusive, and also proves, as mentioned above, that the law recognizes the distinction between the civil insane and criminal insane as to the right of the writ of *habeas corpus*. *Held*, while this section was intended to provide means by which patients not tried by reason of insanity and confined in an asylum, "whose reason has become restored, could be at once remanded to the sheriff of the proper county for trial, . . . it was not intended that the arbitrary power should rest with the medical superintendent to deprive the patient of the right to be so returned, nor was it intended that the medical superintendent should be the exclusive judge of the

(II, 3)

To constitute crime there must be unity of act and intent. — In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence. — Penal Code (Deering) (1923), sec. 20.

Intent, how manifested, and who considered of sound mind. — The intent or intention is manifested by the circumstances connected with the offense, and the sound mind and discretion of the accused.[1] All persons are of sound mind who are neither idiots nor lunatics, nor affected with insanity. — Penal Code (Deering) (1923), sec. 21.

Discharge of insane convict proceedings. — . . . Before discharging any convict who may be insane at the time of the expiration of his sentence, the warden shall first give notice, in writing, to a judge of the superior court of the county in which the state prison may be located, over which he has control, of the fact of such insanity; whereupon said court shall forthwith make an order, and deliver the same to the sheriff of said county, commanding him to remove such insane convict and take him before said court. Upon the receipt of such order, it shall be the duty of said sheriff, to whom it is directed, to execute, and return the same forthwith to the court by whom it was issued, and thereupon the said court shall cause proper examination to be made by medical experts, and if it shall satisfactorily appear that such convict is insane said court shall order him to be confined in one of the insane asylums. . . . If any judge, after having been notified by the warden, shall neglect to cause such order to be made, as herein provided, or any such sheriff shall neglect to remove such insane convict, as required by the provisions of this section, it shall be the duty of the warden to cause such insane convict to be removed before a superior court of a county in which the state prison is located, in charge of an officer of the prison, or other suitable person, for the purpose of examination, . . . — Penal Code (Deering) (1923), sec. 1587.

COLORADO

(I, 1)

Lunatics; not to be convicted for act when insane. — A lunatic or insane person without lucid intervals shall not be found guilty of any crime or misdemeanor with which he may be charged; Provided, The act so charged as criminal shall have been committed in the condition of insanity. — Compiled Laws (1921), sec. 6637.

Idiot not guilty. — An idiot shall not be found guilty or punished for any crime or misdemeanor with which he or she may be charged. — Compiled Laws (1921), sec. 1638.

patient's restoration. . . . A fair construction of all provisions of the statutes on the subject leads to the conclusion that, in a case like this, the superintendent of the State hospital may discharge the patient, and, if he fails or refuses to act the inmate may institute the inquiry into his sanity by the process of *habeas corpus.*"

[1] Notice that this takes account both of the external circumstances (behavior) and the subjective state of mind.

(II, 1 *a*)

Lunacy after crime committed; after judgment; inquest. — A person that becomes lunatic or insane after the commission of a crime or misdemeanor ought not to be tried for the offense during the continuance of the lunacy or insanity. If, after verdict of guilty and before judgment pronounced, such person becomes lunatic or insane, then no judgment shall be given while such lunacy or insanity shall continue, and if after judgment and before execution of the sentence, such person becomes lunatic or insane, then in case the punishment be capital, the execution thereof shall be stayed until the recovery of such person from the insanity or lunacy. In all these cases it shall be the duty of the court to impanel a jury to try the question whether the accused be at the time of impaneling insane or lunatic. — Compiled Laws (1921), sec. 6639.[1]

[1] When the insanity of a convicted person is suggested under this section, the statute not stating in what manner the fact of insanity shall be ascertained, "and the common law necessarily controlling, thereunder, the court may determine the condition of the prisoner's mind by a personal inspection or examination of him, either public or private; by inquiry from attending physicians, or from those around the prisoner who have means of knowledge; and if, after such investigation and inquiry, the judge has no doubt of the prisoner's sanity he is neither bound to nor should he order an inquisition." — Bulger *v.* People, 61 Col., 187, 193. . . . "It would, therefore, seem that the sole modification of the common law by the statute is to require the court in cases where it believes that defendant is insane, or, perhaps where it has doubt of his sanity, to impanel a jury and try the question. . . . At common law collateral proceedings of this character were, of course, not subject to review, and if reviewable at all the authority therefore must be found in our constitution or statutes. . . . We are unable to find any provision of our law which expressly or impliedly gives the defendant the right to have such proceedings reviewed on error. . . . A defendant is not permitted to prosecute successive writs of error to the same judgment, and the law has in no wise extended the right to review on error to matters arising incidentally to the enforcement of a judgment after its affirmance by the reviewing tribunal. In Martin *v.* State, 21 Tex. App. 1; 5 S. W. 522 the Court of Appeals of Texas held that the judgment of the trial court upon an inquiry, after conviction, as to the question of insanity was conclusive and no appeal lies therefrom. . . . Nor is authority for reviewing the findings of the jury to be found in the constitution or statutes of the state." *Id.*

This was a 5–2 opinion. In a strong dissenting opinion, Scott, J., after insisting that the general power of superintendence and control over all inferior courts given to the Supreme Court by the State Constitution, includes power of review of inquisitions of insanity after conviction, pointed out the distinction between an inquisition and a trial on the principal issue of guilt. Of the inquisition or trial of the question of insanity of a convict *after judgment and before execution*, he said: "A trial of such character should be as free from connection with the facts of the crime, the former trial and conviction, as may be possible. It is simply a trial of the question of defendant's sanity at the time of the insanity hearing, and he should not be prejudiced by details of his crime, and by appeals for punishment or vengeance. From the record before us it appears that the defendant was in effect, subjected to a second trial for his offense, with but little regard for his alleged present infirmity." *Id.*, pp. 211–12.

No inquest shall be had as to the lunacy of any person charged with a criminal offense, until such criminal offense shall have been tried or dismissed, unless the judge of the district court wherein such criminal offense is pending shall order such inquest. — Compiled Laws (1921), sec. 562.

(II, 2 *a*)

Discharge of person restored to sanity. — . . . If any person confined in the state insane asylum shall be restored to reason, the superintendent thereof shall discharge such person from said confinement and shall forthwith transmit to the judge of the county court, by which said patient was adjudged insane, a notice in writing setting forth that such lunatic or insane person has been restored to reason, and has been discharged and the said superintendent shall have the further power to issue a probationary discharge whenever he believes the same to be for the best interest of any patient under his control. . . . — Compiled Laws (1921), sec. 565.

(II, 3)

Who is deemed of sound mind. — A person shall be considered of sound mind who is neither an idiot, nor lunatic, nor affected with insanity, and who hath arrived at the age of fourteen years, or before that age, if such person know the distinction between good or evil. — Compiled Laws (1921), sec. 6635.

Ward for criminal insane. — There shall be established at the Colorado state insane asylum a ward for the separate confinement and care of the criminal insane. — Compiled Laws (1921), sec. 568.

Criminal insane classified. — The following classes of patients shall be designated as patients to be confined in said criminal ward:

First. Dangerous persons who have committed or shall attempt to commit murder, arson, rape, robbery or other high crimes or misdemeanors.

Second. Those charged with committing either of the crimes before mentioned who are believed to feign insanity or of whose insanity there may be so great a doubt as to require the investigation of examiners.

Third. Those acquitted of such crimes on the ground of insanity, who shall be adjudged by the court trying the offense as dangerous persons to be at large.

Fourth. Those charged with the commission of either of such crimes and becoming insane before trial or sentence. — Compiled Laws (1921), sec. 582.

CONNECTICUT

(II, 1 *a* and *b*)

Examination of accused who appear to be insane. — When any person committed for trial to the county jail on binding over process, bench warrant, or appeal, shall, at the time of such commitment, or thereafter and before trial, appear to be insane, the sheriff of the county in which said jail is located may make application to a judge of the superior court, and after hearing upon said application, notice of said hearing having been given to the state's attorney, said judge may, if it appear to him to be advisable, appoint three reputable

physicians to examine as to the mental condition of the person so committed; and upon the return to said judge of a certificate by said physicians, stating the insanity of said person, said sheriff shall, upon the order of said judge, transfer said person so committed to either of the state hospitals for the insane in this state, for confinement, support and treatment, until the time of his trial. The expense of such examination, confinement, support and treatment, shall be taxed as a part of the costs in the prosecution against said person, and paid as costs in criminal prosecutions in the superior court. — Gen. Stats. (Rev. of 1918), sec. 6584.

(II, 2 *c*)

Disposition of accused acquitted on the ground of insanity. — Any superior court, criminal court of common pleas, city or police court in this state, before which any person shall be tried on any criminal charge, and acquitted on the ground of insanity or dementia, may order such person to be confined in either of the state hospitals for the insane for such time as such court shall direct, unless some person shall undertake before said court, and give bond to the state conditioned, to confine such person in such manner as such court shall order; and said court shall appoint an overseer to such person, if he have any estate, with the same powers and duties as conservators appointed by courts of probate, such overseer giving suitable bond to the state, conditioned for the faithful performance of his trust; and if such person have no estate, and belongs to any town in this state, the expense of his confinement, support and treatment shall be paid by such town and the state, in the same manner as is by law provided in the case of pauper patients committed by courts of probate; and if such person have no estate and does not belong to any town in this state, such expense shall be paid by the state. — Gen. Stats. (Rev. of 1918), sec. 6585.

Any person charged with any offense punishable by fine or imprisonment, or both, who shall have been found not guilty because of insanity, shall be committed to any institution supported in whole or in part by the state for confinement or treatment, or when any person shall be committed to any reformatory institutions supported by the state . . . , the expense for the support and treatment of such person while so committed shall be paid out of the estate of such person; and if such person shall have no estate such expense shall be paid by the town to which he belongs in the manner provided for in section 1660 of the General Statutes, and if he belongs to no town in this state such expense shall be paid by the state; provided the state may be reimbursed in case of any such commitment in the manner provided in section 1667 of the General Statutes as amended. — Public Acts (1921), chap. 152, p. 3144.

(II, 2 *d*)

Release of person sentenced under preceding section. — Any person who has been tried on any criminal charge, and acquitted on the ground of insanity or dementia, and confined in either of the state hospitals for the insane, may petition, or the officers of said institution may petition, the superior court of the county in which he is confined, for his enlargement, and the petition shall be served like civil process on the selectmen of the town to which he belongs,

and upon the person if any upon whom the offense was charged to have been committed, and upon the state's attorney of the county in which the trial was had, and said court shall make such order as to his disposal as it shall deem proper, and said state's attorney shall appear and represent the state on such application; and if such person so confined shall be unable to defray the expenses of said petition, the court before which the same is heard may tax the same against the state as in criminal cases. — Gen. Stats. (Rev. of 1918), sec. 6586.

Disposition of insane person upon expiration of term. — When any person shall have been tried on any criminal charge and acquitted on the ground of insanity or dementia, and shall have been confined in a hospital for the insane for any specific term by the order of the court before which such trial was had, and shall, at the expiration of such term, still be suffering from insanity or dementia, the superintendent of said hospital shall certify such facts to the state's attorney for the county wherein such trial was had, and said state's attorney shall thereupon procure from said court, or if such court be not in session, from any judge thereof, and such court or any judge thereof if such court be not in session, is authorized and empowered to issue an order for the further confinement of such person in such hospital until he recovers from such insanity or dementia, which order, when issued by a judge, shall by him be certified to the clerk of such court, and the clerk of such court shall thereupon transmit to such superintendent a new warrant of commitment based upon such order; the expense of such further confinement, support and treatment shall be paid out of the estate of such insane person, or if he have no estate such expense shall be paid by the town to which such person belongs; and if he belongs to no town in this state such expense shall be paid by the state. — Gen. Stats. (Rev. of 1918), sec. 6587.

Insane persons entitled to writ of habeas corpus.[1] All insane persons confined in an asylum in this state shall be entitled to the benefit of the writ of *habeas corpus*, and the question of insanity shall be determined by the court or judge issuing such writ, and if the court or judge before whom such case is brought shall decide that the person is insane, such decision shall be no bar to the issuing of such writ a second time, if it shall be claimed that such person has been restored to reason. Said writ may be applied for by said insane person or on his behalf by any relative, friend or person interested in his welfare. — Gen. Stats. (Rev. of 1918), sec. 1683.

Persons charged with crime not affected. — The foregoing provisions of this title (sec. 1683) shall not extend to nor affect in any way the cases of persons convicted of or charged with crime. — Gen. Stats. (Rev. of 1918), sec. 1684.

[1] Notice that sec. 1684, prohibiting the use of the writ of *habeas corpus* in cases "of persons convicted of or charged with crime", does not, however, prohibit its use where a defendant has been *acquitted* of the charge, but incarcerated in an asylum.

DELAWARE

(II, 1 *a* and *b*)

Persons charged with capital crime, becoming insane after conviction and before sentence; how dealt with. — Whenever, in a capital case, it shall appear to the Court in any manner that the prisoner has become insane after conviction and before sentence, the said Court shall have power, with a view of informing its own mind upon the subject, to appoint a Commission to be composed of experienced and practical men, two at least of whom shall be practicing physicians, to inquire of the mental condition of such prisoner and make report of their finding to the said Court, within one month from the date of their appointment, by writing, under their hands and seals. They shall have power to examine witnesses on oath, and to order the taking of testimony out of the State by commission, to be issued in the usual form by the Clerk of the Court of Oyer and Terminer.

Should the report of the commission be that the prisoner is insane, he shall be remanded to the custody of the Sheriff until the further order of the Court. Should he recover his reason after such remand, he shall receive the sentence appointed for his crime. And to avoid any unnecessary delay or uncertainty, the Court trying the prisoner shall adjourn from term to term of the Court of General Sessions until sentence can properly be passed. Whether he have so recovered his reason may be established to the Court by any evidence it may choose to consider for that purpose, and need not be by commission.

The clerk of the Court, upon the appointment of a Commission, shall forthwith notify the members of it by a paper, to be delivered to each by the Sheriff, under the hand of the Clerk and the seal of the Court, and the commission shall be issued to them and be delivered by the Sheriff to one of them within one week after their appointment. They shall receive for their services a reasonable compensation, in the discretion of the Court, not to exceed sixty dollars, to be paid by the County Treasurer upon orders under the seal of the Court, countersigned by a judge of the Court.

The fees of witnesses, sheriff and clerk, and the expenses of a commission to take depositions, shall be the same as in cases of similar service, to be paid as other State costs are in capital cases. — Revised Code (1915), sec. 2607.

(II, 2 *b*, *c*, *d*)

How disposed of upon verdict of not guilty. — If upon the trial of any person upon any indictment in the Court of Oyer and Terminer, or in the Court of General Sessions of this State, the defense of insanity shall be made and established to the satisfaction of the Jury impaneled on said trial, and the fact charged shall be proved, it shall be the duty of the Jury to return a verdict of "not guilty by reason of insanity," and upon the rendition of such verdict, the Court, before which the issue shall have been tried may, upon motion of the Attorney-General, order that the person so acquitted shall forthwith be committed by the Sheriff to the Delaware State Hospital at Farnhurst. The expenses of the removal of such insane person, and of his admission into such Hospital, shall be borne by the Trustees of the Poor of the County where the

act charged was committed, or of the county of such insane person's residence; but if any such insane person shall have any real or personal estate, said Trustees of the Poor may have for the expenses and charges so incurred as aforesaid, the same remedy as is provided in section 27 of Chapter fifty-four in the case of insane persons supported in the County almshouse.

The Court of General Sessions of the County wherein such case shall have been tried may order that such insane person charged and acquitted as aforesaid, shall be set at large, whenever it shall be satisfied that the public safety will not be thereby endangered, or may order such person to be removed from any such asylum or institution to the almshouse of the County where he resided at the time of the commission of the act charged in the indictment, or of the County where the act charged was committed. — Revised Code (1915), sec. 2606.

(II, 3)

Trustees for insane persons; chancellor may appoint; inquisition; appointment without inquisition; when; rules. — The Court of Chancery shall have the care of insane persons above the age of twenty-one years, so far as to appoint trustees for such persons to take charge of them and manage their estates.

Before such appointment, the Chancellor shall issue a writ to inquire by a jury and determine whether the person named is insane.[1]

Where, however, the person named is at the time of making the application an inmate of the Delaware State Hospital at Farnhurst, the Chancellor may in his discretion appoint a trustee or trustees for such person without issuing a writ to so inquire by a jury and determine whether the person named is insane; provided, however, that in any case the person alleged to be insane, or any person related to such person within the third degree of consanguinity, may at any time, before the appointment of such trustee, require that a writ issue to inquire by a jury and determine whether the person named is insane. The Chancellor shall have authority to make rules for carrying into effect the provisions of this Section. — Revised Code (1915), sec. 2614.

Discharge of sane persons; application to chancellor; procedure; order for release. — Upon the commitment of any person to the said Hospital, the person so committed, or any one person related to the person so committed within the third degree of consanguinity, or any other three persons, may present a sworn petition to the Chancellor at any time, setting forth the time and manner of said commitment and that he or they verily believes or believe the person so committed to be a sane person, and praying that a writ issue to the Sheriff of the County to determine whether the person so committed be a sane or an insane person; and the Chancellor shall thereupon forthwith make an order directing the Register in Chancery to forthwith issue a writ *de lunatico inquirendo* to the Sheriff of said County, commanding him within five days

[1] Notice that for the commitment of other than the *criminal* insane, the inquisition is by jury, while in the case of the criminal insane (see sec. 2607) it is by a commission, two members of which are physicians.

after the service of the said writ to summon a Jury, and have determined by said Jury whether the person so committed be a sane or an insane person, and make return of the same to the Chancellor within two days after the finding thereof by the Jury. If the finding of said Jury be that the person so committed be a sane person, the Sheriff shall forthwith make an order upon the Superintendent of said Hospital, and, if he be absent, upon any official of said Hospital, commanding that said person therein committed be immediately released from said Hospital; and the commitment of any person to said Hospital shall not raise any presumption against the sanity of the person so therein committed. The provisions of this Section shall inure to the advantage of persons confined in said Hospital without regard to the date of commitment. — Revised Code (1915), sec. 2603.

Whenever in any case it shall appear to the Court of Oyer and Terminer or to the Court of General Sessions of this State, or to any Judge thereof in vacation, upon information received from the Board of Trustees of the New Castle County Workhouse that a prisoner confined in said New Castle County Workhouse, has become insane after conviction and sentence, the said Court or Judge shall have power to appoint two reputable practising physicians to inquire of the mental condition of said prisoner and make report of their finding to the said Court, if in session, or to any Judge of the said Courts during vacation, within two days from the date of their appointment, by writing under their hands and seals. Should the report of the said physicians be that the prisoner is insane, he shall at once be ordered by said Court or by said Judge, transferred from said New Castle County Workhouse to the Delaware State Hospital at Farnhurst.

Whenever said Court or Judge shall be satisfied that the public safety or the safety of the other inmates of the New Castle County Workhouse shall not be thereby endangered, may order that such insane person be returned to the said New Castle County Workhouse to serve the balance of the term for which he was sentenced, or if said term is expired, then to have the power to release said person. — Laws, Vol. 30 (1918–19), Chap. 183, 2607–A. sec. 15–A, pp. 495–496.

Insane persons; how admitted.[1] — No person shall be received as a patient in the Delaware State Hospital, at Farnhurst, unless a certificate shall have been previously filed with the superintendent of said Hospital; which certificate shall be made and signed by at least two physicians, residents of this State, who have been actively engaged in the practice of medicine for at least five years theretofore, and who shall be residents of the same State and County as the alleged insane persons, and one of whom shall be chosen by a member of the State Board of Trustees of the Delaware State Hospital at Farnhurst. Said certificate must state that the physicians have separately examined the person alleged to be insane, and that they have arrived at the conclusion of the insanity of such person from such personal examination and the history of the case; that the disease of the person is of such a character as requires, in

[1] The above and similar sections are occasionally included merely as a matter of information relative to general commitment proceedings; such sections apparently do not apply to the *criminal* insane.

their judgment, hospital care and treatment, and that said physicians, or either of them, are in no way related by blood to or connected by marriage with such person, nor in any way connected with said hospital nor with any County almshouse in this State.

This section shall not apply to or be construed to embrace commitments to said Hospital made by any Court of this State, as provided by law. — Laws, Vol. 29 (1917), Chap. 214, 2598 sec. 6, pp. 689–690.

DISTRICT OF COLUMBIA

(II, 1 *a* and *b*, and II, 2 *b* and *c*)

Insane criminals. — When any person tried upon an indictment or information for an offense is acquitted on the sole ground that he was insane at the time of its commission, that fact shall be set forth by the jury in their verdict; and whenever a person is indicted or is charged by an information for an offense and before trial or after a verdict of guilty *prima facie* evidence is submitted to the court that the accused is then insane, the court may cause a jury to be impaneled from the jurors then in attendance on the court or, if the regular jurors have been discharged, may cause a sufficient number of jurors to be drawn to inquire into the insanity of the accused, and said inquiry shall be conducted in the presence and under the direction of the court. If the jury shall find the accused to be then insane, or if an accused person shall be acquitted by the jury solely on the ground of insanity, the court may certify the fact to the Secretary of the Interior, who may order such person to be confined in the hospital for the insane, and said person and his estate shall be charged with the expense of his support in said hospital. The person whose sanity is in question shall be entitled to his bill of exceptions and an appeal, as in other cases. — Code (1919), sec. 927.[1]

(II, 1 *b*)

Restoration to sanity. — When any person confined in the hospital for the insane, charged with crime and subject to be tried therefor or undergoing sentence therefor, shall be restored to sanity the superintendent of the hospital shall give notice thereof to the justice holding the criminal court and deliver him to the court according to its proper precept. — Code (1919), sec. 929.

(II, 3)

Insane criminals. — Any person becoming insane while undergoing a sentence of any court of the District of Columbia for crime may, in like manner,

[1] The fact that this section does not provide for the course to be pursued in behalf of a person confined in the hospital for the insane, charged with crime, and subject to be tried or sentenced therefor, where the superintendent *fails* or refuses to certify to the restoration of that person's sanity, does not render this section invalid; since, under such circumstances, even if the lower court, on a proper showing on behalf of the prisoner, has not the power to cause him to be produced for the purpose of a judicial inquiry as to whether his sanity has been restored, the prisoner can have such inquiry made by *habeas corpus* proceedings. — Wagner *v.* White, 38 App. D. C., 554.

be committed to said hospital for the insane, by order of the Secretary of the Interior, to receive the same treatment as other patients during the continuance of his disorder. — Code (1919), sec. 928.

FLORIDA

(II, 2 *b* and *c*)

Acquitted for cause of insanity. — When a person tried for an offense shall be acquitted by the jury for the cause of insanity, the jury, in giving their verdict of not guilty, shall state that it was given for such cause, and thereupon, if the discharge or going at large of such insane person shall be considered by the court manifestly dangerous to the peace and safety of the people, the court shall order him to be committed to jail or otherwise to be cared for as an insane person, or may give him into the care of his friends, on their giving satisfactory security of the proper care and protection of such person; otherwise he shall be discharged. — Rev. General Statutes (1920), sec. 6094.[1]

GEORGIA

(I, 1)

Idiots. — An idiot shall not be found guilty or punished for any crime or misdemeanor with which he may be charged. — Code (1914), Vol. 6, sec. 36.

Lunatics. — A lunatic or person insane, without lucid intervals shall not be found guilty of any crime or misdemeanor with which he may be charged: Provided, the act so charged as criminal was committed in the condition of such lunacy or insanity; but if a lunatic has lucid intervals of understanding, he shall answer for what he does in those intervals as if he had no deficiency. — Code (1914), Vol. 6, sec. 35.

(II, 1 *a* and *b*)

. . . When application is filed in the court of Ordinary for the commitment of an alleged mentally defective person, the judge of that court shall appoint two physicians to examine such person and determine whether or not such person is mentally defective. Both of these physicians shall be selected as being the most capable physicians available because of knowledge of and training in mental medicine, and neither of them shall be related in any wise to the person sought to be committed, it being understood and provided that

[1] A formal plea that a defendant is insane *when placed upon trial* is not necessary. If "upon observation or suggestion, it appears to the court that a question as to the defendant's sanity exists, such issue may be determined by the court as may be deemed best under the law, and the trial awaits the determination of the issue. If the defendant is found to be insane, the trial will be postponed." — Johnson *v.* State, 57 Fla., 18, 49 So., 40.

Where the insanity of the defendant is "a real issue in a criminal prosecution, the court should charge the jury that if the defendant is acquitted on the ground of insanity, they should so state in the verdict in order that appropriate action may be taken by the court [under this section]." — Scott *v.* State, 64 Fla., 490, 60 So., 355.

any court of the State where a prisoner is on trial for a misdemeanor offense and the judge of such court shall have cause to believe that such prisoner is mentally defective, then he may appoint two physicians to examine said prisoner, to ascertain whether or not said prisoner is in reality mentally defective; and if said physicians shall pronounce said prisoner to be mentally defective, then the judge may commit said prisoner to the Georgia Training School for Mental Defectives. In either of the cases named above, the physicians making the examination shall be required to make such examination complete and thorough, both physically and mentally, and shall be required to make to the court appointing them, certification as to their findings in the matter. This certification shall be in the form prescribed by the State Board of Health, and shall be made in duplicate, one copy of the same being sent with the patient when committed to the Georgia Training School for Mental Defectives and the other copy being filed with the court of Ordinary in the county from which said person is committed; . . . Laws (1919), Act. No. 373, sec. 4.

(II, 1 *a* and *b*)

Plea of insanity, how tried. — Whenever the plea of insanity is filed, it shall be the duty of the court to cause the issue on that plea to be first tried by a special jury, and if found to be true, the court shall order the defendant to be delivered to the superintendent of the sanitarium, there to remain until discharged in the manner prescribed by law. — Code (1914), Vol. 6, sec. 976.

Insanity at trial. — No lunatic, or person afflicted with insanity, shall be tried, or put upon his trial, for any offense, during the time he is afflicted with such lunacy or insanity, which shall be tried in the manner hereinbefore pointed where the plea of insanity at the time of trial is filed, and on being found true, the prisoner shall be disposed of in like manner. — Code (1914), Vol. 6, sec. 978.

(II, 1 *b*)

Insane convicts, disposition of. — Upon satisfactory evidence being offered to the Governor of this State that the person convicted of a capital offense has become insane subsequent to his conviction, the Governor may, within his discretion, have said person examined by such expert physicians as the Governor may choose; and said physicians shall report to the Governor the result of their investigation; and the Governor may, if he shall determine that the person convicted has become insane, have the power of committing him to the State sanitarium until his sanity shall have been restored, as determined by laws now in force. The cost of the investigation shall be paid by the Governor out of the contingent fund. Neither this nor the preceding section applies to any case pending August 17th, 1903. — Code (1914), Vol. 6, sec. 1074.[1]

Insane convict committed to the sanitarium. — When any person shall, after conviction of a capital crime, become insane, and shall be so declared in accordance with the provisions of the preceding section, the convict shall be received into the Georgia State Sanitarium, there to be safely kept and treated

[1] Sec. 1073 seems to contradict this, but apparently is intended merely to point out that the inquisition is not matter of right but of grace, within Governor's discretion.

as other adjudged insane persons. All the provisions of the law relating to insane persons under sentence of imprisonment in the penitentiary shall apply to the class of cases herein provided for, so far as applicable. — Code (1914), Vol. 6, sec. 1075.

Resentence and warrant on recovery. — If the convict mentioned in the preceding section should recover, the fact shall be at once certified by the superintendent to the judge of the court in which the conviction occurred. Whenever it shall appear to the judge by said certificate, or by inquisition or otherwise, that the convict has recovered and is of sound mind, he shall have the convict removed to the jail of the county in which the conviction occurred, or to some other safe jail, and shall pass sentence, either in term time or vacation, upon the criminal, and he shall issue a new warrant, directing the sheriff to do execution of the sentence at such time and place as may be named in the warrant, which the sheriff shall be bound to do accordingly. The judge shall cause the new warrant, and other proceedings in the case, to be entered on the minutes of said superior court. — Code (1914), Vol. 6, sec. 1076.

No inquisition after capital conviction. — No person who has been convicted of a capital offense shall be entitled to any inquisition or trial to determine his sanity. — Code (1914), Vol. 6, sec. 1073.

There shall be admitted to the Georgia Training School for Mental Defectives the following type of persons: Any person with mental defectiveness from birth or from an early age, or those that become mentally defective from injury or disease so pronounced that he or she is unable to care for himself or herself and manage his affairs with ordinary prudence, and that he constitutes a menace to the happiness of himself or of others in the community, and therefore requires care, supervision and control, either for his own protection or for the protection of others, and yet who is not insane or of unsound mind. This type of persons shall be known and designated as "Mental Defectives." Should the institution at any time not be able to accommodate all who shall under the terms of Section 5 of this Act be admitted thereto, it is hereby provided that preference in admission shall be given to children and women of child-bearing age. — Laws (1919), Act No. 373, sec. 3, p. 379.

(II, 2 *c* and *d*)

Criminals acquitted, how dealt with. — When a person who has been acquitted of a capital crime, on the ground of insanity, is committed to the Sanitarium, he shall not be discharged thence, except by special act of the legislature. If the crime is not capital, he shall be discharged by warrant or order from the Governor. If sentence is suspended on the ground of insanity, upon restoration to sanity the superintendent shall certify the fact to the presiding judge of the court where he was convicted. — Code (1914), Vol. 6, sec. 977.[1]

[1] Notice the delegation of judicial power to legislative branch. *See also* sec. 6239, Consol. Stats. of N. C., Vol. 2.

"Acquittal of a person charged with crime on the ground of insanity at the time of the commission of the crime is regarded as equivalent to the verdict of a lunacy commission." — Letter from Attorney-General.

When, in the judgment of the Superintendent of the Georgia Training School for Mental Defectives, a patient or inmate of said institution, shall, under the treatment given therein, improve mentally and physically to such an extent as to no longer constitute a menace to himself or others as set forth in Section 3 of this Act, then the said Superintendent shall have the right and it shall be his duty to parole or discharge such patient or inmate, under such rules and regulations as may be scientifically promulgated by the State Board of Health. — Laws (1919), p. 382, Act. No. 373, sec. 6.[1]

(II, 3)

Persons who are considered of sound mind. — A person shall be considered of sound mind who is neither an idiot, a lunatic, nor afflicted by insanity, or who has arrived at the age of fourteen years, or before that age if such person know the distinction between good and evil. — Code (1914), Vol. 6, sec. 33.

. . . Lunatic, insane, or non compos mentis, each includes all persons of unsound mind. . . . — Code (1914), Vol. 6, sec. 2.

Intention, how manifested. — Intention will be manifested by the circumstances connected with the perpetration of the offense, and the sound mind and discretion of the person accused. — Code (1914), Vol. 6, sec. 32.

HAWAII

(I, 1)

Imbecile. — Any person who, by reason of his idiocy or mental imbecility, is not competent to discern the nature and criminality of an act done by him, shall not be held criminally responsible for such act. — Revised Laws (1915), Chap. 203, sec. 3669.

Insane person. — Any person acting under mental derangement, rendering him incompetent to discern the nature and criminality of an act done by him, shall not be subject to punishment therefor; *provided*, however, that if any such person, while capable of discerning the nature and criminality of any act, entertained the intent to do the same, and subsequently does it in pursuance and execution of such intent, he shall be held responsible therefor, though the same be done in such state of mental derangement[2]; and so also if any such person voluntarily or heedlessly induced the mental derangement by intoxication or otherwise. — Revised Laws (1915), Chap. 203, sec. 3670.

Insane person. — . . . No person at the time insane . . . shall suffer

[1] There does not seem to be anything under the laws of Georgia against this provision applying to the criminal insane, except, perhaps, the existence of the provisions of sec. 977, Vol. 6, Code of 1914.

[2] This is based upon erroneous psychology and law. The law does not punish a "guilty intent" alone; it must issue in an act. If, therefore, a person intends to commit an unlawful act (making such intention known to persons who later become witnesses against him) and then becomes mentally

capital punishment; neither shall any child suffer such punishment who has not evinced a knowledge of the distinction between right and wrong.[1] — Revised Laws (1915), Chap. 203, sec. 3841.

(II, 1 *a* and *b*)

Insane defendant. — If any person indicted for any offense shall be insane, and shall upon arraignment be found so to be by a jury lawfully impaneled for that purpose, so that such person can not be tried upon such indictment, or if upon the trial of any person so indicted such person shall appear to the jury charged with such indictment to be insane, it shall be lawful for the court before whom any such person shall be brought to be arraigned or tried as aforesaid, to direct such finding to be recorded, and thereupon to order such person to be kept in strict custody in such place and in such manner as to such court shall seem meet, subject to a prosecution for such offense or discharge upon the termination of such insanity; and if any person charged with any offense shall be brought before any court to be discharged for want of prosecution, and such person shall appear to be insane, it shall be lawful for such court to order a jury to be impaneled to try the sanity of such person; and if the jury so impaneled shall find such person to be insane, it shall be lawful for the court to order such person to be kept in strict custody in such place and in such manner as to such court shall seem fit, subject to prosecution for such offense or discharge upon the termination of such insanity. — Revised Laws (1915), Chap. 203, sec. 3817.

(II, 2 *c*)

Insanity of defendant. — In cases where it shall be given in evidence upon the trial of any person charged with any offense, that such person was insane at the time of the commission of such offense, and such person shall be acquitted, the jury shall be required to find specially whether such person was insane at the time of the commission of such offense, and to declare whether such person was acquitted by them on account of such insanity, and if they shall find that said person was insane at the time of the committing of such offense, the court before whom such trial shall be had shall order such person to be kept in strict custody in such place and in such manner as to the court shall seem fit, subject to discharge by a circuit court or judge upon proof of the termination of such insanity. — Revised Laws (1915), Chap. 203, sec. 3836.

Commitment person acquitted of crime. — Whenever any person indicted for any crime shall be acquitted by reason of insanity or mental derangement,

unsound and commits the act (carries out the intention) while in such condition, the act is that of a mentally diseased individual, and the intent is now that of a mentally diseased individual.

[1] This is the only jurisdiction in which the "right-and-wrong" principle is used as a test not only of irresponsibility but of mental condition to be executed.

the court before whom such trial has been had shall forthwith, without other or further proceedings, commit such person to the insane asylum, there to be confined as an insane person until discharged as in this chapter provided. — Revised Laws (1915), Chap. 82, sec. 1081.

(II, 2 *d*)

Discharge from asylum. — Any person committed to the insane asylum may upon application being made by a sheriff, deputy sheriff or by a relative of such person, and notice given to the superintendent of the insane asylum, or upon application by the superintendent, be examined by the commissioners as to his or her sanity, and if a majority of said commissioners shall be satisfied that such person is of sound mind or is not dangerous to the public safety, they shall so certify to the superintendent of the asylum, and such person shall be forthwith released from custody. — Revised Laws (1915), Chap. 82, sec. 1088.

(II, 3)

NOTE. — Sec. 1082 provides for the appointment by the governor, with the advice and consent of the Senate, of " three persons, two of whom shall be regularly licensed to practice medicine or surgery in the Territory . . . who shall be known as commissioners of insanity . . . and whose duties shall be to hear all cases brought before them on appeal by any person committed to the insane asylum for insanity, and to investigate and determine the sanity or insanity of those committed." Each commissioner receives $5 per examination. The commissioners are invested with the power of committing magistrates. — Sec. 1086.

IDAHO

(I, 1)

Persons capable of committing crimes. — All persons are capable of committing crimes, except those belonging to the following classes:

1. Children under the age of 14 years, in the absence of clear proof that at the time of committing the act charged against them, they knew its wrongfulness.
2. Idiots.
3. Lunatics and insane persons.
4. Persons who committed the act or made the omission charged, under an ignorance or mistake of fact which disproves any criminal intent.
5. Persons who committed the act charged without being conscious thereof.

— Compiled Stats. (1919), sec. 8090.

Insane person can not be tried or punished. — A person can not be tried, adjudged to punishment, or punished for a public offense while he is insane. — Compiled Stats. (1919), sec. 9166.

(II, 1 *a* and *b*)

NOTE. — For the procedure to determine whether accused is insane at any period during the trial after indictment and before judgment, *see* secs. 1368–1372 of the Penal Code of California, 1915, which are similar to secs. 9167–9171 of the Idaho Compiled Statutes, 1919.

Grounds for withholding judgment. — He may show, for cause against the judgment:

1. That he is insane, and if, in the opinion of the court, there is reasonable ground for believing him to be insane, the question of insanity must be tried as provided in chapter 326. If, upon the trial of that question, the jury find that he is sane, judgment must be pronounced, but if they find him insane he must be committed to the state insane asylum until he becomes sane; and when notice is given of that fact, as provided in said chapter, he must be brought before the court for judgment. — Compiled Stats. (1919), sec. 9033.

(II, 1 *a*)

Inquiry as to defendant's sanity. — If, after judgment of death, there is good reason to suppose that the defendant has become insane, the sheriff of the county, with the concurrence of the judge of the court by which the judgment was rendered, may summon from the list of jurors selected by the commissioners for the year a jury of 12 persons to inquire into the supposed insanity, and must give immediate notice thereof to the prosecuting attorney of the county. — Compiled Stats. (1919), sec. 9056.

Production of witnesses. — The prosecuting attorney must attend the inquisition, and may produce witnesses before the jury, for which purpose he may issue process in the same manner as for witnesses to attend before the grand jury, and disobedience thereto may be punished in like manner as disobedience to process issued by the court. — Compiled Stats. (1919), sec. 9057.

(II, 1 *b*)

Proceedings upon finding. — If it is found by the inquisition that the defendant is sane, the sheriff must execute the judgment; but if it is found that he is insane, the sheriff must suspend the execution of the judgment until he receives a warrant from the governor or from the judge of the court by which the judgment was rendered directing the execution of the judgment. If the inquisition finds that the defendant is insane, the sheriff must immediately transmit it to the governor, who may, when the defendant becomes sane, issue a warrant appointing a day for the execution of the judgment. — Compiled Stats. (1919), sec. 9059.

(II, 2 *b*)

Forms of general verdict. — . . . When the defendant is acquitted on the ground that he was insane at the time of the commission of the act charged, the verdict must be "not guilty by reason of insanity. . . ." — Compiled Stats. (1919), sec. 8990.

Acquittal for insanity — commitment to asylum. — If the jury render a verdict of acquittal on the ground of insanity, the court may order a jury to be summoned from the jury list of the county to inquire whether the defendant continues to be insane. The court may cause the same witnesses to be summoned who testified on the trial, and other witnesses, and direct the prosecuting attorney to conduct the proceedings, and counsel may appear for the defendant. The court may direct the sheriff to take the defendant and retain him in custody until the question of continuing insanity is determined. If the jury find the defendant insane, he shall be committed by the sheriff to the state insane asylum. If the jury find the defendant sane, he shall be discharged. — Compiled Stats. (1919), sec. 9005.

(II, 3)

Manifestation of intent. — The intent or intention is manifested by the circumstances connected with the offense, and the sound mind and discretion of the accused. All persons are of sound mind who are neither idiots or lunatics, nor affected with insanity. — Compiled Stats. (1919), sec. 8088.

ILLINOIS

(I, 2)

Idiot — not punishable. — An idiot shall not be found guilty or punished for any crime or misdemeanor with which he may be charged. — Cahill's Rev. Stats. (1921), Chap. 38, par. 623.

Insanity. — A lunatic or insane person, without lucid intervals, shall not be found guilty of any crime or misdemeanor with which he may be charged: Provided, the act so charged as criminal shall have been committed in the condition of insanity. . . . — Cahill's Revised Stats. (1921), Chap. 38, par. 621.

(II, 1 *a*)

Becoming insane after crime. — A person that becomes lunatic or insane after the commission of a crime or misdemeanor shall not be tried for the offense during the continuance of the lunacy or insanity. If, after the verdict of guilty, and before judgment pronounced, such person become lunatic or insane, then no judgment shall be given while such lunacy or insanity shall continue. And if, after judgment and before execution of the sentence, such person become lunatic or insane, then in case the punishment be capital, the execution thereof shall be stayed until the recovery of said person from the insanity or lunacy. In all of these cases, it shall be the duty of the court to impanel a jury to try the question whether the accused be, at the time of impaneling insane or lunatic. — Cahill's Revised Stats. (1921), Chap. 38, par. 622.

(II, 1 *a* and *b*)

Feeble-minded person convicted of crime — Suspension of sentence — Commitment to institution — Procedure. — On the conviction by a court of record of competent jurisdiction of any person of any crime, misdemeanor, or

any violation of any ordinance which is in whole, or in part, a violation of any statute of this State; or on a child brought before a juvenile court for any delinquency, being found liable to be sent to a reformatory school, a training school or an industrial school, the court if satisfied on the testimony of a physician or a psychologist or other evidence that the person or child is feeble-minded within the meaning of this Act, may suspend sentence or suspend entering an order sending the child to a reformatory training or industrial school and direct that a petition be filed under this Act. When the court directs a petition to be filed it may order that pending the preparation, filing and hearing of the petition, the person or child be detained in a place of safety, or be placed under the guardianship of any suitable person on that person entering into a recognizance for his appearance. If the person is found not to be feeble-minded the court shall impose sentence. — Cahill's Revised Stats. (1921), Chap. 23, par. 186.

(II, 2 *c*)

Verdict and commitment. — . . . If upon the trial of a person charged with crime, it shall appear from the evidence that the act was committed as charged, but that, at the time of committing the same, the person so charged was lunatic or insane, the jury shall so find by their verdict, and by their verdict shall further find whether such person has or has not entirely and permanently recovered from such lunacy or insanity; and in case the jury shall find such person has not entirely and permanently recovered from such lunacy or insanity, the court shall cause such person to be taken to a State hospital for the insane, and there kept in safety until he shall have fully and permanently recovered from such lunacy or insanity; but in case the jury shall find by their verdict that such person has entirely and permanently recovered from such lunacy or insanity, he shall be discharged from custody. — Cahill's Revised Stats. (1921), Chap. 38, par. 621.

(II, 2 *c* and *d*)

Disposition on acquittal on ground of insanity. — At any time after the said Illinois Asylum for Insane Criminals shall be opened for reception of patients when a person shall be acquitted on trial of the crime of murder, attempt at murder, rape, attempt at rape, highway robbery or arson, on the ground of insanity, the judge of the court in which such trial is had shall order his safe custody and removal to such asylum, where he shall remain until restored to his right mind and be adjudged by the medical superintendent thereof, and the Board of Commissioners of Public Charities, a fit subject to be discharged. — Cahill's Revised Stats. (1921), Chap. 23, par. 140.

(II, 2 *c* and II, 1 *b*)

Persons accused of crime and acquitted on pleas of insanity. — Notice to and from State's attorney. In all cases where any person is sent to a State hospital for the insane, being acquitted of crime on the plea of insanity, or being under indictment for crime, the State's attorney in charge of the case shall officially notify the superintendent of the hospital to which the accused is sent, of any indictment pending against such person, or of the fact that the

accused has been acquitted of his crime on the plea of insanity, and it shall be the duty of the superintendent so notified, in case such superintendent shall at any time discharge the accused, to officially notify the said State's attorney of the fact of such discharge and the reasons therefor. — Cahill's Revised Stats. (1921), Chap. 85, par. 38.

(II, 2 *d*)

Discharge — Parole — Exceptions. — Authority to discharge patients from either of the State institutions for the insane is vested in the trustees, but may be delegated, by a formal vote, to the superintendent, under such regulations, as they may see fit to adopt. Discharges may be made for either of the following causes, namely: Because the person adjudged to be insane is not insane, or because he has recovered from the attack of insanity, or because he has so far improved as to be capable of caring for himself, or because the friends of the patient request his discharge, and in the judgment of the superintendent no evil consequences is [are] likely to follow such discharge, or because there is no prospect of further improvement under treatment, and the room occupied by an incurable and harmless patient is needed for the admission of others who are unsafe to be kept at large or probably curable. Authority is also vested in the trustees to release the patients on parole for any term not exceeding three months; and, if not returned to the institution within that period, a new order of commitment from the county judge shall be necessary in order to the readmission of any such paroled patient to the institution: *Provided*, that the court may make such order upon the old verdict, if satisfied that the patient in question is still insane. But no patient who is violent, dangerous, or more than usually troublesome or filthy, shall be discharged from any State institution and sent back to any county farm, almhouse, or insane department thereof. And no patient who has not recovered his reason *or who is charged with crime* shall be declared discharged until at least ten days after notice shall have been given to the judge of the county court having jurisdiction in the case, in order to enable the said judge to make some proper order as to the disposition of the said patient, when so discharged, which order shall be entered of record, and a copy thereof furnished to the superintendent, and to the State Commissioners of Public Charities. — Cahill's Rev. Stats. (1921), Chap. 85, par. 22.

Habeas corpus. — Every person confined as insane shall be entitled to the benefit of the writ of habeas corpus, and the question of insanity shall be decided at the hearing, and if the judge shall decide that the person is insane such decision shall be no bar to the issuing of the writ a second time whenever it shall be alleged that such person has been restored to reason; and if said person shall be adjudged sane, on presentation of a certified copy of said judgment to the county court where the inquest was had, such court shall rescind and set aside the judgment of insanity. — Cahill's Revised Stats. (1921), Chap. 85, par. 24.

Not to apply to persons in custody on criminal charge. — Nothing in this act shall be construed to apply to insane persons, or persons supposed to be insane, who are in custody on a criminal charge. — Cahill's Revised Stats. (1921), Chap. 85, par. 30.

(II, 3)

"Insane" defined — Exceptions. — . . . The word insane in this Act shall be construed to mean any person who, by reason of unsoundness of mind, is incapable of managing and caring for his own estate, or is dangerous to himself or others, if permitted to go at large, or is in such condition of mind or body as to be a fit subject for care and treatment in a hospital or asylum for the insane: Provided, that no person, idiot from birth, or whose mental development was arrested by disease or physical injury occurring prior to the age of puberty, and no person who is afflicted with simple epilepsy shall be regarded as insane, unless the manifestations of abnormal excitability, violence or homicidal or suicidal impulses are such as to render his confinement in a hospital or asylum for the insane a proper precaution to prevent him from injuring himself or others. — Cahill's Revised Stats. (1921), Chap. 85, par. 1.

"Feeble-minded person" defined. — The words "feeble-minded person" in this Act shall be construed to mean any person afflicted with mental defectiveness from birth or from any early age, so pronounced that he is incapable of managing himself and his affairs, or of being taught to do so, and requires supervision, control and care for his own welfare, or for the welfare of others, or for the welfare of the community, who is not classifiable as an "insane person" within the meaning of "An Act to revise the law in relation to the commitment and detention of lunatics, and to provide for the appointment and removal of conservators, and to repeal certain Acts therein named," approved June 21, 1893, in force July 1, 1893. — Cahill's Revised Stats. (1921), Chap. 23, par. 166.

Sound mind. — A person shall be considered of sound mind who is neither an idiot nor lunatic, nor affected with insanity, and who hath arrived at the age of fourteen years, or before that age if such person know the distinction between good and evil. — Cahill's Revised Stats. (1921), Chap. 38, par. 619.

Intention. — Intention is manifested by the circumstances connected with the perpetration of the offense, and the sound mind and discretion of the person accused. — Cahill's Revised Stats. (1921), Chap. 38, par. 618.

Criminal offense. — A criminal offense consists in a violation of a public law, in the commission of which there shall be a union or joint operation of act and intention, or criminal negligence. — Cahill's Revised Stats. (1921), Chap. 38, par. 617.

INDIANA

(II, 1 *a* and *b*)

Commitment before trial, subsequent action. — That when at any time before the trial of any criminal cause or during the progress thereof and before the final submission of the cause to the court or jury trying the same, the court, either from his own knowledge or upon the suggestion of any person, has reasonable ground for believing the defendant to be insane, he shall immediately fix a time for a hearing to determine the question of the defendant's sanity and shall appoint two competent disinterested physicians who shall examine the defendant upon the question of his sanity and testify concerning the same at the hearing. At the hearing, other evidence may be introduced

to prove the defendant's sanity or insanity. If the court shall find that the defendant has comprehension sufficient to understand the nature of the criminal action against him and the proceedings thereon and to make his defense, the trial shall not be delayed or continued on the ground of the alleged insanity of the defendant. If the court shall find that the defendant has not comprehension sufficient to understand the proceedings and make his defense he shall commit the defendant to the Indiana colony for the criminal insane, or if a female, shall be committed to any hospital of the state where the female insane are confined. Whenever the defendant shall become sane the superintendent of the insane hospital shall certify the fact to the proper court, who shall enter an order on his record directing the sheriff to return the defendant, or the court may enter such order in the first instance whenever he shall be sufficiently advised of the defendant's restoration to sanity. Upon the release of any defendant so committed he or she shall then be placed upon trial for the criminal offense the same as if no delay or postponement had occurred by reason of defendant's insanity. — Burn's Ann. Stats. (1914), Vol. 1, sec. 2071–*d*.

Defendant insane, inquest, commitment. — That when the defendant in a criminal cause appears for judgment, and the court, either from his own knowledge or upon the suggestion of any person, has reasonable ground for believing the defendant to be insane, the question of his insanity shall be determined by a jury of twelve qualified jurors, to be summoned and impaneled as directed by the court. If the jury do not find him insane, judgment shall be pronounced. If the jury find him insane, the court shall enter an order on his record directing that the defendant be confined in a state insane hospital. — Burn's Ann. Stats. (1914), Vol. 1, sec. 2177.

(II, 1 *a*)

Witnesses — Examination — Fees. — In order that the defendant's sanity may fairly be determined, witnesses may be examined touching their knowledge concerning defendant's mental condition; the presence of such witnesses may be compelled by compulsory process, if necessary; the fees for such witnesses may be compelled by compulsory process, if necessary; the fees for such witnesses to be paid the same as in other criminal actions. — Burn's Ann. Stats. (1914), Vol. 1, sec. 2179.

(II, 1 *b*)

Sanity recovered — order of court. — Whenever the defendant shall become sane the superintendent of the insane hospital shall certify the fact to the proper court, who shall enter an order on his record, directing the sheriff to return the defendant, that judgment may be pronounced; or, the court may enter such order in the first instance, whenever he shall receive information of defendant's restoration to sanity. — Burn's Ann. Stats. (1914), Vol. 1, sec. 2178.

(II, 2 *a*)

Plea of insanity [at time of offense]. — That when the defendant in a criminal cause desires to plead that he was of unsound mind at the time the offense

charged was committed, he himself, or his counsel must set up such a defense specially in writing, and the prosecuting attorney may reply thereto by a general denial in writing. — Burn's Ann. Stats. (1914), Vol. 1, sec. 2070.[1]

Evidence on trial. — At the trial of such cause evidence may be introduced to prove the defendant's present sanity or insanity. — Burn's Ann. Stats. (1914), Vol. 1, sec. 2071.

[1] In Sage *v.* State, 91 Ind., 141, defendant had drowned her illegitimate child as a condition precedent to her marriage. The court refused to give the following instruction asked for by the defendant: . . . "You may consider the evidence as to the state of mind of the defendant, and her physical condition, and if, when all the evidence shall be adduced before you, you find that the defendant, at the time the killing was done, was not wholly insane, though partially so, you may find her guilty of a less degree of crime than that charged in the indictment, and find her guilty of murder in the second degree, or manslaughter." *Held* the term "insanity" under the statutes of the State of Indiana, "includes every species of organic mental derangement, whether of a mild or violent form, and excludes every other condition of mind. It follows that there is, in our State, no middle ground between 'sanity' and 'insanity', and that as regards their mental condition, in those respects, we have but two classes of people, the 'sane' and the 'insane.' Actual insanity, however partial it may be, is, consequently, with us a defence, and not a mitigating circumstance, in a prosecution for crime. . . . The doctrine announced by Wharton on Criminal Law, Vol. 1, section 57*a*, as regards partial insanity as a mitigating element in the degrees of crime, can not be recognized as of binding authority in this State."

The court added, however, that "independently of any question of insanity the defendant in a criminal cause has the right to have his general physical as well as his mental condition at the time of the commission of the supposed crime explained to the jury, so as to put them in possession of all the facts connected with the transaction, and the better to enable them to judge of its character; but when insanity is relied upon as a shield against punishment, it must be specially pleaded." In view of the fact that appellant in this case had pleaded insanity in addition to her general plea of not guilty, it is difficult to understand the court's attempt to distinguish between insanity as a defense and evidence as to the state of mind when insanity is not specially pleaded.

In Coppenhaver *v.* State, 160 Ind., 540, 550, the trial court had refused to give an instruction based on the exact wording of the opinion in the Sage Case as to there being no "middle ground" between sanity and insanity. The court on appeal explained that "it is not every statement of the law found in a law book that is proper to be given in an instruction. . . . The language in the Sage Case that was made the basis of the instruction refused was made use of in holding that partial insanity is not a defence to crime . . . and appellant was not entitled to an instruction which was calculated to mislead rather than instruct."

It is not error to refuse evidence tending to prove unsoundness of mind of the defendant, when such fact is not in issue. Unless insanity is specially pleaded under this section the State can not be prepared to meet such issue; but if under the general plea of not guilty the prosecution permits defendant to admit evidence of insanity and meets it with rebutting testimony, and the court on its own motion and the instance of both State and defendant instructs the jury on the issue of insanity, the appellate court will act on the theory voluntarily assumed at the trial.

(II, 2 *b*)

Verdict, finding as to insanity. — In all cases where a plea of insanity is interposed as a defense it shall be the duty of the jury or the court if tried by it if the defendant is found not guilty, to find, and the jury or court shall be required to find, whether the defendant committed the act charged in the indictment or affidavit, and if so, whether the defendant was sane or insane at the time of the commission of the act, and whether not guilty because he was insane at the time of the commission of the act. — Burn's Ann. Stats. (1914), Vol. 1, sec. 2071–*a*.

(II, 2 *c*)

Commitment to hospital for insane. — If the court or jury trying the cause find the defendant not guilty on the ground of insanity, the court shall find as to the defendant's sanity at the time of the trial, and if the court shall find that the defendant is insane at the time of the trial, he shall order the defendant if a male person, to be committed to the Indiana colony for the criminal insane, and if a female person, to be committed to any hospital of the state where the female insane are confined; or if he shall find that the defendant is sane at the time of trial, but the recurrence of such an attack of insanity is highly probable, he shall order the defendant to be committed as above provided. Such person shall be confined therein until released as hereinafter provided. — Burn's Ann. Stats. (1914), Vol. 1, sec. 2071–*b*.[1]

(II, 2 *d*)

Discharge on becoming sane. — At any time after six months from the date of said commitment any person so confined in a hospital for the insane may file his or her application to be discharged, in the court from which they were committed, and upon satisfactory proof being made to such court of the restoration of the sanity of such person and that the recurrence of such an attack of insanity is improbable, the court shall order his or her discharge from such institution, and enter a final judgment discharging him or her: Provided, however, That a second or subsequent application for discharge shall not be made within two years from the time of any previous application. — Burn's Ann. Stats. (1914), Vol. 1, sec. 2071–*c*.

Habeas corpus — who may have writ. — Every person restrained of his liberty under any pretense whatever, may prosecute a writ of habeas corpus, to inquire into the cause of the restraint, and shall be delivered therefrom when illegal. — Burn's Ann. Stats. (1914), Vol. 1, sec. 1163.

Habeas corpus. — Any person committed as insane may apply to the proper authorities for a writ of habeas corpus, and the question of insanity shall be decided at the hearing. An adverse decision shall not operate as a bar to the issuance of another writ: Provided, however, That writs of habeas corpus shall

[1] An order of the court for the commitment of a person to an insane hospital is essentially a judgment by which he is deprived of his liberty, and is appealable. — Morgan *v.* State, 101 N. E., 6, 9 (1913).

Such provision is not unconstitutional; an acquitted person may be temporarily detained until his sanity is inquired into under this section. — *Id.*

not issue oftener than once in every period of three months in such cases. — Burn's Ann. Stats. (1914), Vol. 2, sec. 3729.

Parents, etc. may have writ. — Writs of *habeas corpus* shall be granted in favor of parents, guardians, masters, and husbands, and to enforce the rights and for the protection of infants and insane persons, and the proceedings shall, in all such cases, conform to the provisions of this statute. — Burn's Ann. Stats. (1914), Vol. 1, sec. 1164.

(II, 3)

Who are of unsound mind. — The words, " person of unsound mind," as used in this act or any other statute of this state, shall be taken to mean any idiot, *non compos*, lunatic, monomaniac, or distracted person. — Burn's Ann. Stats. (1914), Vol. 2, sec. 3100.

IOWA

(II, 1 *a*)

Proceedings suspended. — If a defendant appears in any stage of the trial of a criminal prosecution, and a reasonable doubt arises as to his sanity, further proceedings must be suspended and a trial had upon that question. — Comp. Code (1919), sec. 9477.

Method of trial. — Such trial shall be conducted in all respects, so far as may be, as the prosecution itself would be, except the defendant shall hold the burden of proof, and first offer his evidence and have the opening and closing argument. — Comp. Code (1919), sec. 9478.

(II, 1 *b*)

Discharge or commitment. — If the accused shall be found insane, no further proceedings shall be taken under the indictment until his reason is restored, and, if his discharge will endanger the public peace or safety, the court must order him committed to the department for the criminal insane at Anamosa until he becomes sane; but if found sane, the trial upon the indictment shall proceed, and the question of the then insanity of the accused cannot be raised therein. — Comp. Code (1919), sec. 9479.

Return to custody. — If the accused is committed to the department for the criminal insane, as soon as he becomes mentally restored, the person in charge shall at once give notice to the sheriff and county attorney of the proper county of such fact, and the sheriff, without delay, must receive and hold him in custody until he is brought to trial or judgment, as the case may be, or is legally discharged, the expense for conveying and returning him or any other, to be paid in the first instance by the county from which he is sent, but such county may recover the same from his estate, or a relative, or another county or municipal body bound to provide for or maintain him elsewhere, and the sheriff shall be allowed for his services the same fees as are allowed for conveying convicts to the penitentiary. — Comp. Code (1919), sec. 9502.

(II, 1 *a* and *b*)

Proceedings in juvenile courts. — When a child is brought before a juvenile court as a dependent or a delinquent child, if it appears to the court, on the testimony of a physician or psychologist, or other evidence, that such person or child is feeble minded within the meaning of this chapter, the court may adjourn the proceedings and direct some suitable officer of the court or some other suitable reputable person to file a petition under this chapter; and the court may order that pending the preparation, filing and hearing of such petitions, the person or child be detained in a place of safety or be placed under the guardianship of some suitable person on that person entering into recognizance for his appearance. — Comp. Code (1919), sec. 1970.

Insane prisoners — inquiry — confinement. — On a written application made by any citizen, stating under oath that a person confined in any prison within the county, charged with a crime but not convicted thereof nor on trial therefor, is insane, the commissioners shall cause said prisoner to be brought before them, and if they find that he is insane they shall direct his removal to and detention in one of the hospitals for the insane, issuing their warrant therefor, and stating therein that he is under criminal charges, and the superintendent of the hospital designated in such warrant shall receive and keep such prisoner as a patient. The warrant shall be executed by the sheriff or his deputy by delivering the prisoner to the superintendent in person. After an investigation such as contemplated in this section, the commissioners shall not entertain a like application within six months on behalf of said person. — Comp. Code (1919), sec. 2071.[1]

[1] The question of conflicting jurisdiction between the commissioners and the district court under sections 2279 and 5540, respectively, of the Code of 1897 (secs. 2071 and 9477, Code of 1919) was carefully considered in Stone *v.* Conrad (District Judge) and the Board of Commissioners of Insanity, 74 N. W. (Iowa), 910, 911 (1898). That case was an application for a writ of *certiorari* commanding the defendants "to certify up" certain proceedings of which complaint was made. The writ was dismissed. Stone, on January 5, 1898, killed Kahler; on Jan. 10 his father, acting through attorney, handed the clerk of the District Court a written application, signed and verified, charging that Stone was insane and asking that the Commissioners of Insanity investigate and take action under section 2279 (2071 above). Before anything further was done, indictments were found against Stone on January 11, and warrants were issued and served on Stone. After this, though on the same day, the Board of Commissioners of Insanity met, and upon suggestion of want of jurisdiction on its part because Stone was held under warrants, nothing was done. On January 12 the Board again considered the case and rendered an order reciting that for want of jurisdiction no action could be taken by it. On the same day Stone was arraigned and counsel appointed to defend him; and, it appearing that a reasonable doubt existed as to his sanity, a trial was had on that issue and the jury rendered a verdict declaring him to be insane, whereupon the court ordered him confined in the Department for the Criminal Insane of the penitentiary and that further proceedings on the indictments pending against him should be suspended.

Counsel for petitioner contended that the right to try the question of Stone's

(II, 1 *b*)

Suspension of criminal proceedings. — On the conviction by a court of record of competent jurisdiction of any person of any crime, misdemeanor, or any violation of any ordinance which is in whole, or in part, a violation of

sanity and make any order as to his disposition rested exclusively with the Commissioners of Insanity under section 2071.

Held, that under the State constitution the district court has exclusive jurisdiction in criminal matters except where otherwise conferred; the Commissioners of Insanity have no criminal jurisdiction. When the jurisdiction of the district court has once attached, therefore, such criminal jurisdiction continues. The words "in any stage of the trial of a criminal prosecution", in sec. 9477 (*see* above) do not mean any stage of the trial on the indictment, because if so, then after jurisdiction of the trial court had attached but before the case actually began, the Commissioners of Insanity could "open the jail door, take out the criminal defendant, and dispose of him as they may think best." The jurisdiction of the district court attaches at the time of the service of a warrant issued upon an indictment. The purpose of section 2071 was "to vest authority in the commissioners to inquire into cases of persons charged with crime, and of whose mental condition there may be doubt."

One of the reasons for the decision was that while the Commissioners have authority to send such a person to a *hospital*, the district judge must send him to the penitentiary. "The general assembly must have had in mind such cases as that of the plaintiff, who needs not only treatment but secure confinement, such as it is scarcely likely the hospitals are fitted to afford." But since, under section 2071, the Commissioners are required to state in their warrant that prisoner is under criminal charges, the probabilities are that special precautions are taken in such cases in the hospitals.

These sections were again carefully considered in Quaintance *v.* Lamb, 185 Iowa, 237, which seems to indicate that under the Iowa code sections, the procedure after a crime has been committed by an alleged insane person consists of a race between the district court (through the prosecutor's office and the grand jury) and the Commissioners of Insanity, as to who shall first take jurisdiction of the prospective defendant.

Quaintance, sixteen years old, committed murder, and a preliminary information was filed June 20, 1918, with a justice of County A, who issued a warrant for his arrest. He was arrested, waived a preliminary hearing, and the justice ordered him held without bail to answer any indictment which might be returned by the grand jury against him. During this time Lamb, Sheriff, was ordered to detain him. Two days later, the sheriff removed Quaintance to County B (the reason or authority therefor not being clear), retained him there until August 24, then returned him to County A, where he was detained until ordered by the chief justice to be delivered to the superintendent of the hospital for the insane, pending hearing and determination of this action. On August 23, the father of accused had filed in the district court of County B, an information charging accused with being insane and that he was confined in jail charged with the crime of murder but neither convicted nor indicted (the requirements of section 2071). Thereupon the Commissioners of Insanity issued their warrant, ordered Quaintance to be brought before them for trial, adjudged him insane, and committed him for treatment to the asylum. Lamb, the sheriff in whose hands the order was placed, instead of obeying it, removed accused from County B to County A where he

any statute of this state; or on a child brought before the juvenile court for any delinquency, being found liable to be sent to a reformatory school, a training school or an industrial school, the court if satisfied on the testimony of a physician or a psychologist, or other evidence that the person or child is feeble minded within the meaning of this chapter may suspend any sentence or suspend entering an order sending the child to a reformatory training or industrial school and direct that a petition be filed under this chapter. When the court directs a petition to be filed it may order that pending the preparation, filing and hearing of the petition, the person or child be detained in a place of safety, or be placed under the guardianship of any suitable person on that person entering into a recognizance for his appearance. If upon the hearing of said petition or upon any subsequent hearing under this chapter the person is found not to be feeble minded the court shall impose sentence. — Comp. Code (1919), sec. 1971.

(II, 2 *b* and *c*)

Acquittal on ground of insanity; commitment. — If the defense is insanity of the defendant, the jury must be instructed, if it acquits him on that ground, to state that fact in its verdict. The court may thereupon, if the defendant is in custody, and his discharge is found to be dangerous to the public peace and safety, order him committed to the insane hospital, or retained in custody, until he becomes sane. — Comp. Code (1919), sec. 9502.

(II, 2 *d*)

Discharge from hospital. — On the application of the relations or immediate friends of any patient in the hospital who is not cured, and who cannot be safely allowed to go at liberty, the commissioners of the county where such patient belongs, on making provisions for the care of such patient within the county as in other cases, may authorize his discharge therefrom; but no patient who may be under criminal charge or conviction shall be discharged without the order of the district court or judge, and notice to the county attorney of the proper county. — Comp. Code (1919), sec. 2034.

continued to detain him. Whereupon accused filed a petition praying for an injunction, which was dismissed. On September 5 accused was indicted, on September 10, arraigned, and objected to the jurisdiction of the court on the ground that he was legally in the custody of the Superintendent of the Hospital for the Insane, which objection was overruled and defendant entered the plea of not guilty. The court set the case down for trial November 25, and in the meantime accused applied for a writ of *habeas corpus*.

Held, section 5542 indicates that the trial contemplated in section 5540 (section 9477 herein) was that under indictment, "and that could not well commence before the accused's arrest thereunder, or his custody upon the return thereof." Prior thereto, section 2279 (section 2071 herein) of the Code is applicable. As the Commissioners found him insane *before indictment*, he should have been confined in the Hospital for the Insane until the Superintendent of that institution found him to be cured; and only when he did so "and issued a warrant for his return to the jury of the county", could he be put on trial. This decision gives the Superintendent much power in such cases. If the Commissioners act quickly enough, the trial (indictment) can be indefinitely postponed.

Habeas corpus. — All persons confined as insane shall be entitled to the benefit of the writ of *habeas corpus*, and the question of insanity shall be decided at the hearing. If the judge shall decide that the person is insane, such decision shall be no bar to the issuing of the writ a second time, whenever it shall be alleged that such person has been restored to reason. — Comp. Code (1919), sec. 2076.

Discharge from custody. — Whenever it shall be shown to the satisfaction of the commissioners of insanity of any county that cause no longer exists for the care within the county of any person as an insane patient, they shall order his immediate discharge, and shall find if such person is sane or insane at the time of such discharge, which finding shall be entered of record by the clerk of the commission. — Comp. Code (1919), sec. 2070.

(II 2 *d*)

Commission of inquiry — appointment by court. — On a statement in writing, verified by affidavit, addressed to a judge of the district court of the county in which the hospital is situated, or of the county in which any person confined in a hospital has his legal settlement, alleging that such person is not insane and is unjustly deprived of his liberty, such judge shall appoint a commission of not more than three persons, in his discretion, to inquire into the merits of the case, one of whom shall be a physician, and if two or more are appointed, another shall be a lawyer. Without first summoning the party to meet them, they shall proceed to the hospital and have a personal interview with such person, so managed as to prevent him, if possible, from suspecting its object; and they shall make any inquiries and examinations they may deem necessary and proper of the officials and records of the hospital, touching the merits of the case. If they shall judge it prudent and advisable, they may disclose to the party the object of their visit, and, either in his presence or otherwise, make further investigation of the matter. They shall forthwith report to the judge making the appointment the result of their examination and inquiries, such report to be accompanied by a statement of the case, made and signed by the superintendent. If on such report and statement, and the hearing of testimony if any is offered, the judge shall find a person not insane, he shall order his discharge; if the contrary, he shall so state, and authorize his continued detention. The finding and order of the judge, with the report and other papers, shall be filed in the office of the clerk of the court over which such judge presides, who shall enter a memorandum thereof on his record, and forthwith notify the superintendent of the hospital of the finding and order of the judge, and the superintendent shall carry out the order. The commissioners appointed as provided in this section shall be entitled to their necessary expenses and a reasonable compensation, to be allowed by the judge, and paid by the state out of any funds not otherwise appropriated, but the applicant shall pay the same if the judge shall find that the application was made without probable ground, and shall so order. — Comp. Code (1919), sec. 2074.[1]

[1] There is nothing to indicate that the procedure in this and the succeeding section is not applicable to the *criminal* insane.

How often. — The commission above provided for shall not be repeated oftener than once in six months in regard to the same person; nor shall such commission be appointed in the case of any patient within six months of the time of his admission. — Comp. Code (1919), sec. 2075.

(II, 3)

County commissioners of insanity. — In each county there shall be a board of three commissioners of insanity, and in counties having two places where district court is held there shall be one such board of commissioners at each place, consisting of the clerk of the district court, or his deputy, who shall be clerk of the same, also one physician in actual practice and of good professional standing in the community, and one lawyer in actual practice and of good standing in his profession and in the community, residing as convenient as may be to the county seat, to be appointed by the judge of the district court. Such appointment may be made during a session of the court, or in vacation; if made in vacation, it shall be by written order, signed by the judge and recorded by the clerk. The appointment shall be for two years, and so that the term of one commissioner shall expire every year. The appointment of successors may be made at any time within three months prior to the expiration of the term of the incumbent. In the temporary absence or inability to act of two commissioners, the commissioner present may call to his aid temporarily a person possessed of the qualification required for a member, who, after qualifying as in other cases, may act in the same capacity. But if one of the absent members is a clerk, his deputy shall act. The record in such cases must show the facts. The members shall organize by choosing one of their number president, and hold their meetings at the office of the clerk, unless for good reasons they shall fix on some other place, and shall also meet on notice from the clerk or his deputy. — Comp. Code (1919), sec. 2054.[1]

Clerk. — The clerk of said board, or in his absence his deputy, shall sign and issue all notices, appointments, warrants, subpœnas or other process required to be given or issued by the board, affixing thereto his seal as clerk of the court; shall file and preserve in his office all papers connected with any inquest by the commissioners and properly belonging to his office, with all notices, reports and other communications; and shall keep separate books in which to minute the proceedings of the board, and his entries therein shall be sufficiently full to show, with the papers filed, a complete record of its findings, orders and transactions. The notices, reports and communications herein required to be given or made may be sent by mail, unless otherwise expressed, and the facts and date of such sending and their reception must be noted on the proper record. — Comp. Code (1919), sec. 2055.

Jurisdiction and power. — The commissioners shall have cognizance of all applications for admission to the hospital, or for the safe keeping otherwise of insane persons within their respective counties, except in cases otherwise spe-

[1] This and the following two sections are included in this appendix merely to indicate the kind of board of commissioners of insanity in some of the States.

cially provided for. For the purpose of discharging the duties required of them, they shall have power to issue subpœnas and compel obedience thereto, to administer oaths, and do any act of a court necessary and proper in the premises. — Comp. Code (1919), sec. 2056.

Commissioners of insanity. — The medical director, the assistant medical director and one other member of the medical staff of the state psychopathic hospital shall constitute a board of commissioners of insanity; and said board is hereby vested with all the rights, powers, duties and obligations of the commissioners of insanity as now constituted by law, except as herein provided, with full power to receive and act upon all applications filed hereunder, as fully as the commissioners of insanity are empowered and authorized by law to do. The procedure of the board hereby created shall be the same as now provided by law, except as herein modified. — Acts and Joint Resolutions.[1] — Supplement to the Revised Code — 1921 — Chap. 8, sec. 2365 — a 2.

County and private insane institutions — supervision. — All county and private institutions wherein insane persons are kept are hereby placed under the supervision of the board of control of state institutions. — Comp. Code (1919), sec. 2044.

Insanity after commitment to jail. — If, after conviction for a misdemeanor and judgment of imprisonment in jail, the defendant is suspected of being insane, the same proceedings shall be taken as if provided in chapters nine, ten, eleven and twelve of title nine, and, if found insane, he shall be committed to the department for the criminal insane at Anamosa, and all subsequent proceedings shall be as provided in the preceding section. — Comp. Code (1919), sec. 9481.

" Feeble-minded " defined. — The words " feeble-minded person " in this chapter shall be construed to mean any person afflicted with mental defectiveness from birth or from an early age, so pronounced that he is incapable of managing himself and his affairs, or of being taught to do so, and requires supervision, control and care for his own welfare, or for the welfare of others, or for the welfare of the community, who is not classifiable as an " insane person " within the meaning of the provisions of the chapters of this title relating to the insane. — Comp. Code (1919), sec. 1952.

Meaning of terms " insane " and " idiot." — The term " insane " as used in this chapter includes every species of insanity or mental derangement. The term " idiot " is restricted to persons foolish from birth, supposed to be naturally without mind. No idiot shall be admitted to a hospital. — Comp. Code (1919), sec. 2073.

Insane. — The words " insane person " include idiots, lunatics, distracted persons, and persons of unsound mind. — Comp. Code (1919), sec. 55.

[1] This section does not repeal sections 2054–2056; it merely creates a Board of Insanity.

KANSAS

(II, 1 *a*)

Prosecution of feeble-minded. — That whenever in a court of record, during the hearing of any person charged with a misdemeanor or crime, it shall be made to appear to the court that the person is feeble-minded the court shall summarily remand such person to the probate court of the county for examination under the provisions of this act. — Laws (1919), Chap. 299, sec. 2. Revised Stats. (1923), sec. 39–237.

That in all proceedings relating to feeble-minded persons under the provisions of Laws 1907, chapter 247 and of chapter 165 of the Session Laws for 1917, when no jury is demanded and the circumstances of the case are such that there appears to the probate judge to be no occasion for the impaneling of a jury, or that a trial by jury would for any reason be inexpedient or improper, the probate judge shall appoint a commission of two qualified physicians, or one qualified physician and one clinical [and] psychologist, to be chosen by himself on account of their known competency and integrity, who shall make a personal examination of the person whose condition is to be inquired into and shall determine whether or not such person be feeble-minded, and shall file with the probate court a report in writing verified by affidavit, of the results of their inquiries, together with their conclusions and recommendations. The probate judge shall administer all oaths to any witnesses used in the examination and such witnesses shall be examined in the presence of said judge. — Laws (1919), Chap. 299, sec. 1. Revised Stats. (1923), sec. 39–236.

(II, 1 *b*)

That when any person is found and adjudged to be feeble-minded in accordance with the provisions of this act, the court shall order such person committed to the State Home for Feeble-minded. — Laws (1919), Chap. 299, sec. 3. Revised Stats. (1923), sec. 39–238.

(II, 1 *a* and *b*)

Criminal insane or feeble-minded. — Whenever any person under indictment or information, and before or during the trial thereon, and before verdict is rendered, shall be found by the court in which such indictment or information is filed, or by a commission or another jury empaneled for the purpose of trying such question, to be insane, an idiot or an imbecile and unable to comprehend his position, and to make his defense, the court shall forthwith commit him to the state asylum for the dangerous insane for safe keeping and treatment; and such person shall be received and cared for at the said institution until he shall recover, when he shall be returned to the court from which he was received to be placed on trial upon said indictment or information. — Gen. Stats. (1915), sec. 10043 (4). Revised Stats. (1923), sec. 62–1531.[1]

[1] It is plain that section 4 (section 10043 herein) has direct reference to insanity at the time of trial, and none whatever to insanity at the time the offense was committed. — In re Beebe, 92 Kan., 1027, 1028.

State *v.* Ossweiler (111 Kansas, 358, 367), 1922, interpreting the effect of

(II, 2 *b* and *c*)

Person acquitted of offense on ground that he or she was insane, an idiot or imbecile, etc., at time of commission of offense; verdict; commitment of such person to state asylum for dangerous insane; liberation from such institution; hearing; finding and determination. — Whenever during the trial of any person on an indictment or information, evidence is introduced to prove that he or she was insane, an idiot, or imbecile, or person of unsound mind, at the time of the commission of the offense, and such person shall be found to have been at the time of the commission of the offense alleged in such indictment or information, insane, an idiot, an imbecile, or person of unsound mind, and he or she shall be acquitted on that ground, the jury shall so state in the verdict, and the court shall, thereupon forthwith commit such person to the state asylum for the dangerous insane for safe keeping and treatment, and such person shall be received and cared for at said institution. No such person shall be liberated from such institution except in pursuance to an order made by the state board of corrections after a full hearing and a finding and determination by said board that such person is wholly recovered and restored to his or her right mind and that no person will be endangered by his or her discharge, and upon such finding and determination such person shall be entitled to immediate discharge. — Gen. Stats. (1915), sec. 10044.[1] Revised Stats. (1923), sec. 62–1532.

sec. 4 of Chap. 299, Laws of 1911 as amended by sec. 2 of Chap. 299, Laws of 1919 (now consolidated in Rev. Stats. — (1923) sec. 62–1531) says (p. 367), (Burch, J.):

"When the showing was presented (of present insanity), it was the court's duty to find out if the defendant was in a fit mental condition to be tried, whether counsel for either side made application for the inquiry or not. In effect, the law made the application for the defendant and, however the attorneys might fence about the matter, the court was not authorized to proceed with a trial on the merits until it had ascertained, by one of the statutory methods, whether the defendant was capable of making a rational defense. Trial on the merits is, of course, no substitute for the preliminary investigation. The question of capacity to commit crime on August 1 bears no relation to the question of capacity on December 15 following to defend against a charge of crime."

[1] In the important case of In re Clark, 86 Kansas, 539, the constitutionality of the above section was considered, and it was held that the provision was not obnoxious to the Federal or State constitutions. Clark had been acquitted of homicide, the jury finding him not guilty because insane. Thereupon he was committed to the asylum for the dangerous insane "for safe-keeping and treatment" and brought before the court on writ of *habeas corpus*. Among other points involved, the contention was that the statute is unconstitutional in that it is a deprivation of liberty "without due process of law", because: (1) There is no provision for finding whether an accused person is insane at the time of his *trial* on the criminal charge; the statute deprived accused of the right to a trial by jury in the probate court of the question of his sanity at the time of *commitment*, and, if found insane, to the benefit of admission to a regular hospital for treatment. (2) Defendant has no power to *initiate* proceedings for release, when restored to reason.

As to the deprivation of a trial by jury the court *held* that "while an orderly

proceeding adapted to the nature of the case is essential; inquests called in cases of alleged insanity such as are ordinarily provided by the statutes of various States (that is, inquests in the case of the insane who have not committed any crime) . . . are sufficient. A jury trial is not necessary, although the tribunal provided for the purpose may be called a jury and the inquest designated a trial."

Considering several important decisions on the question of the existence of insanity at any time during or immediately after trial, the court based its opinion on the several principles enunciated in those decisions as follows:

In re Brown, 39 Washington, 160, 164, 81 Pac., 552, 1 L.R.A., N.S. 540. The evidence at the trial in chief (that is, the trial of his guilt or innocence and the effect of insanity thereon) can be considered by the judge in passing upon whether defendant is safe to be at large after acquittal. Defendant having been tried before a jury to whom he submitted the issue that he was insane when the crime was *committed*, and having introduced evidence on that subject, and the jury having been instructed on the question and the verdict on the "issue he tendered" having been returned in his favor, "he was therefore accorded due process of law and the right of trial by jury upon that subject." (Notice, however, that this confuses the "due process" as to the defense of insanity, which is a question of defendant's mind *at the time he committed the offense*, with "due process" in the inquiry as to a person's state of mind *after acquittal*. This, however, the court in the Brown case justified on the ground of the "presumption that general insanity once shown to exist still continues" and that the burden was upon the accused to show that he was sane at the time of the trial, "which he neither alleged nor proved, but demanded his discharge as a matter of right.") On a later application to the full court for a writ of *habeas corpus* in the Brown Case that court also held the act valid since, while it provided no procedure for trying the issue of insanity at the time of the commitment, the court had the "inherent right to cause an arraignment and to give a hearing" upon the question of an ordinary course of practice. But it is important to note that because that was not done by the court below, defendant's discharge was ordered. (Brown *v.* Urquhart, 139 Fed., 846.) This decision was, however, reversed in Urquhart *v.* Brown, 205 U. S., 179, on the ground that a Federal judge should not ordinarily interfere by *habeas corpus* with the regular course of procedure under the State authority, but will leave the applicant to exhaust the remedies afforded by the State for determining whether he is illegally restrained of his liberty.

That the legislature intended that the court should rest its conclusion as to insanity after acquittal upon the evidence given at the trial in chief and the appearance of the defendant thereat, was also held in People, ex rel. Peabody *v.* Chanler, 133 N. Y. Spr. Ct. App. Div., 159 (one of the numerous Thaw cases), since "there is no provision for enlightenment of the court in any other manner. . . . Although the inquiry at the trial would be directed to insanity at the time of the commission of the offense, yet the evidence might establish that such insanity had not ceased, but had continued, that it was chronic, that the defendant might then or thereafter, in the very nature of his disease, be subject to recurrences of a state of mind like unto that in him when he committed the alleged crime.". . . Moreover such evidence (on the question of insanity at the time of the *offense*) might well bear directly upon the condition of the defendant at the time of trial. . . . It can not then be said that a defendant, who makes the plea of insanity and seeks to establish it, did not have notice under this provision of a hearing that might reveal the condition of insanity at the time of his trial, and a hearing of which the result might be

such commitment upon acquittal for insanity, under the said provision of the code of criminal procedure as was made in this case." Further, said the court, anticipating its answer to the second objection (the question of initiating proceedings for release), "The right to apply at any time for discharge has been held to reconcile even the absence of hearing in the first instance with the constitutional requirement of due process, and if upon such proceeding the petitioner is found to be insane his detention may be continued."

Moreover, such a commitment is *not* for *punishment* but is made in the exercise of the *police power* of the State. "Such a commitment is not for the punishment of such a defendant, for there can be no punishment for him who has been acquitted, but it is for protection for the public, made in the exercise of the police power of the State, which permits the restraint of an insane person who at large would be a danger to the peace and safety of the people. . . ."

The opinion in the Clark Case thus summarizes the grounds suggested by the various decisions reviewed therein, upon which the statute (or similar ones) was held valid: "(1) That insanity of a nature dangerous to others, proved at the trial, was presumed to continue to the time of commitment; (2) that the commitment was based on evidence showing the continuance of such insane condition; and (3) that the commitment resulting from the express command of the statute, the trial and verdict upon the criminal charge was only an equivalent of proceedings provided to determine the question of insanity in cases not involving a charge of crime."

Passing to the second question, — whether the right to a remedy by due course of law is denied by the act in that it prevents the *subject*, or any one acting for him, from *instituting* proceedings for his release when restored to sanity, because a certificate from the superintendent is first required (Section 10044 now requires an order by the State Board of Corrections), the court considered the opinion in the interpretation of a similar statute, in People, etc. *v.* Chanler, as follows: "A patient, held upon an order of a court or judge having criminal jurisdiction, in an action or proceeding arising from a criminal offense, may be discharged upon the superintendent's certificate of recovery, approved by any such court or judge." The court in the Thaw case held that as the summary commitment procedure was constitutional in the case of a *civil* proceeding in lunacy, so a person acquitted by reason of insanity at time of the offense may be summarily deprived of his liberty for the protection of the public while his insanity and dangerous proclivities continue; that the remedy for discharge provided by the statute, involving the superintendent's certificate of recovery, was not exclusive, that Thaw was at all times entitled to the writ of *habeas corpus*, and that "upon establishing in such proceeding his then sanity, he was entitled to be discharged." *Held*, that the provision for the certificate of the superintendent (now the State Board of Corrections) is not a condition precedent to or a necessary accompaniment of the application, and that no particular procedure in such cases is prescribed, "but ordinary methods by which the action of a court is invoked and a judicial investigation carried on in other matters, adapted to the end sought, under the supervision of the court as to notice and hearing, are sufficient." Further, even if the superintendent (board) does not perform his duty faithfully, the applicant would not be without remedy, and the act is therefore constitutional.

In the case of In re Beebe, 92 Kan., 1027, after return of a verdict of "not guilty on the ground that he was insane at the time he shot deceased," petitioner filed a written application in the district court for an inquiry as to his mental condition at the time of his *acquittal*, which was refused. His application for a writ of *habeas corpus* on the ground that he was illegally restrained

of his liberty by the superintendent of the State asylum for the dangerous insane was also denied. Petitioner contended that after acquittal based upon the finding of insanity at the time of the shooting, the court and the superintendent were not justified in restraining him of his liberty without adjudication as to his mental condition at the time of the *trial*, since "insanity at the time of the shooting was temporary in its nature." To this contention the court replied that, if so, the verdict would have so stated.

Citing the Clark case, which upheld the constitutionality of this section, the court deemed it "apparent that the legislative thought and intent were that one recently so insane as to kill another should be deemed unsafe to be at large and a proper subject for care and treatment in the asylum in question until shown to have been restored to sanity or to be no longer dangerous. . . . No means are provided for any evidence or hearing as to present sanity, and surely — if such a hearing were intended — it could not be the purpose to commit the defendant if found to be sane." The court pointed out that the section distinctly says that after an acquittal the court "shall thereupon, forthwith commit such person."

Held the trial court's denial of an application for an inquiry as to petitioner's sanity after acquittal did not void the commitment or render his restraint illegal for want of power. "An application for liberation can be easily made by him, but the application at the trial was not for liberation from the asylum, but rather to prevent his being placed there — a thing which the statute does not mention, and certainly one whose refusal does not work the right to a discharge." The intention of the legislature was inferred by the court from the fact that the act provides for an asylum for "mentally infirm and dangerous persons, and for authority to transfer insane prisoners from the penitentiary and reformatory", and inmates of other State hospitals "who have homicidal tendencies or whose presence is dangerous to the other inmates."

Campbell *v.* Downer, 94 Kans., 674, was a proceeding in mandamus to compel the judge of the district court to consider and rule upon a motion for a new trial. Campbell was tried for murder. The defenses were "that the plaintiff did not do the shooting charged in the information, that Hall did not die from wounds inflicted by the plaintiff but from other causes, that the killing was justifiable, that it was excusable, and that the plaintiff was insane at the time the homicide was committed." Among other instructions, the court gave the appropriate "test" as to criminal responsibility. The jury returned the following verdict: "That . . . do find . . . the defendant not guilty, and we further find that the defendant was insane at the time the offence was committed." Thereupon the court committed Campbell to the hospital for the dangerous insane. On the next day Campbell filed a *motion for a new trial* on the usual grounds in criminal cases, and a motion to discharge him from custody. The last motion was overruled. The court refused to consider the motion for a new trial on the ground that the verdict was tantamount to absolute acquittal. Evidence (the nature and extent thereof does not appear) was introduced at the trial that defendant was insane at the time the offence charged in the information was alleged to have been committed; that the jury passed specially upon the question of Campbell's sanity, and that the plaintiff was acquitted of crime on the ground of insanity. "Under these circumstances it is clear that the law governing procedure in criminal cases ceased to have any application the moment the verdict was returned", and as the plaintiff was *acquitted* of crime, "a motion for a new trial on the information charging a crime has no office to perform and no possible ground for an appeal exists. The criminal case has terminated in the plaintiff's favor

KENTUCKY

(II, 1 *a* and *b*)

Insanity at time of trial. — If the court shall be of opinion that there are reasonable grounds to believe that the defendant is insane, all proceedings in the trial shall be postponed until a jury be impaneled to inquire whether the defendant is of unsound mind, and if the jury find that he is of unsound mind, the court shall direct that he be kept in prison or conveyed by the sheriff to the nearest lunatic asylum, and there kept in custody by the officers thereof until he be restored, when he shall be returned to the sheriff on demand, to be reconveyed by him to the jail of the county. — Carroll's Codes, 6th Ed. (1919), Code of Criminal Practice, sec. 156.

Causes defendant may show against — insanity. — He may show for cause against the judgment any sufficient ground for a new trial, or for arrest of judgment; he may also show that he is insane. If insane, the question of his insanity shall be determined by a jury of twelve qualified jurors, to be summoned and impaneled as directed by the court. If the jury do not find him insane judgment shall be pronounced. If they find him insane, he must be kept in confinement, either in the county jail or lunatic asylum, until, in the opinion of the court, he becomes sane, when judgment shall be pronounced. — Carroll's Codes, 6th Ed. (1919), Code of Criminal Practice, sec. 287.

as certainly and as absolutely as if the special finding of insanity were absent from the verdict. From the time evidence of insanity was introduced the prosecution bore a double aspect — a trial for crime and an inquest relating to sanity. The verdict having eliminated responsibility for crime and having so ended the criminal proceeding, the statute steps in, adopts the verdict the same as if it were the result of an inquisition, and directs what shall be done. . . . New trial and appeal are matters of legislative discretion and favor . . . having been withheld in the case of any person found to be insane when tried upon an indictment or information charging crime, and acquitted on that ground, they do not exist."

The court further said: "The statute is designed to meet the defence of insanity successfully interposed in the course of a prosecution for crime. This defence is in essence and effect one in the nature of confession and avoidance. . . . When on trial for a breach of social duty he may deny generally, excuse, justify, tacitly admit, and still deny. His plea of not guilty puts all the allegations of the indictment or information in issue to the end of the trial, but he may say, 'although I did the killing, I was mentally irresponsible.' The statute still contemplates the establishing of the act on which the charge of crime is based, as in this case, a killing. . . . If the verdict in this class of cases were 'guilty but insane' the right to resort to the usual procedure for a review of the proceedings establishing guilt might be considered. But there is no method known to the law for retrying a defendant on a charge of crime of which he has been acquitted by the verdict of a jury."

The statement as to the verdict of "guilty but insane" is of interest in connection with the proposed adoption of such a verdict recommended by a committee of the New York State Bar Association (*see* their Annual Reports).

(II, 1 *a*)

Insanity . . . of defendant — proceedings. — If the sheriff be satisfied that there are reasonable grounds for believing that the defendant is insane . . ., he may summon a jury of twelve persons on the jury list, drawn by the clerk, who shall be sworn by the sheriff well and truly to inquire into the insanity . . . of the defendant, and a true inquisition return; they shall examine the defendant and hear any evidence that may be presented; and by a written inquisition, signed by each of them, find as to the insanity. . . . Unless the inquisition find the defendant insane . . ., the sheriff shall not suspend the execution; but if the inquisition find the defendant insane . . ., he shall suspend the execution and immediately transmit the inquisition to the governor. — Carroll's Codes, 6th Ed. (1919) Code of Criminal Practice, sec. 296.

Disposition of condemned; if insane. — If the condemned under sentence of death be insane on the day designated for the execution, said execution shall be suspended until said condemned be restored to his or her right mind, and then said execution shall take place under the warrant of the governor and at the time herein designated by him unless stayed by due process of law. — Carroll's Stats. (6th Ed.), (1922), secs. 1137-(8).

(II, 2 *b* and *c*)

Verdict and proceedings on plea of insanity. — If the defense be the insanity of the defendant, the jury must be instructed, if they acquit him on that ground, to state the fact in their verdict, and thereupon if the court, after hearing any testimony offered by the Commonwealth or the defendant, be satisfied that he is insane at the time the verdict is rendered, it may order him to be taken to a lunatic asylum. — Carroll's Codes, 6th Ed. (1919), Code of Criminal Practice, sec. 268.

LOUISIANA [1]

(II, 1 *a*)

Not indicted by reason of insanity. — Whenever the grand jury, upon any inquiry which they may make as to the commission of any crime or misdemeanor, by any person, shall omit to find a bill (by reason of insanity of the accused) it shall be the duty of such jury to certify the same to the court. — Marr's Ann. Rev. Stats. (1915), Vol. 1, sec. 2322.

(II, 1 *a* and *b*)

If restored to sanity, to be sent back to court for trial. — If any person charged by affidavit, information or indictment, with the commission of any crime is found to be insane in the court in which he is so charged, before trial or after trial and conviction, the court shall order him to be committed to the

[1] In Professor Keedy's compilation of Code sections for Committee "B" of the Institute of Criminal Law and Criminology, Journal, Vol. III, No. 6, Vol. IV, No 1, sections of a proposed code of criminal procedure, 1910, were given; as far as I have been able to ascertain, this proposed code was not adopted.

Ward for the Criminal Insane in the Insane Hospital of the State of Louisiana, where he shall be kept in custody, treated and cared for until he has been completely restored to sanity. If any such person committed to the Ward for the Criminal Insane is in the opinion of the Superintendent, not insane, or when such person, if insane, has been completely restored to sanity, he shall, upon the certificate of the commission provided for in this Act to such effect, be sent back to the jail or custody from which he was removed, where he shall be held for trial, or that sentence may be executed upon him as the case may be, in accordance with law. The Superintendent of the said Hospital for the Insane, shall, from time to time, or as often as the court may require, furnish information of the status of said criminal insane during his confinement in said Hospital for the Insane. — Marr's Ann. Rev. Stats. (1915), Vol. 2, sec. 3471.

(II, 1 *a* and *b*)

Insanity after commission of crime. — Where a person committed to a State Hospital for the Insane, who became insane after his conviction for a crime punishable by imprisonment in the penitentiary or by death, he shall not be restored to liberty, but, upon regaining his sanity, he shall be delivered by the Superintendent of said Hospital for the Insane into the custody of the sheriff of the parish wherein he was convicted in order that the judgment and sentence of the court may be executed in due course of law. When any person charged with a felony necessarily punishable in the State Penitentiary, or by death, has been adjudged insane, before or after trial or conviction, and shall be committed to a State Hospital for the Insane, such person shall not be discharged from said Hospital for the Insane or delivered into the custody of the proper sheriff until the Superintendent of the East Louisiana Hospital for the Insane of the State of Louisiana, the Superintendent of the Louisiana Hospital for the Insane, and in case of their disagreement, a physician appointed by the Judge of the District Court from whence said criminal insane person was committed, which said gentlemen are hereby constituted as a commission, shall be satisfied after a thorough examination, that such person has been completely restored to sanity and may be discharged without danger to others; and if said commission shall determine that such person has been completely restored to sanity, they shall certify to this fact in writing, which certificate shall be made in duplicate, one to be filed in the office of the Hospital for the Insane, and the other delivered to the proper officer, or other official charged with the duty of executing the process of that particular court having jurisdiction in the case. — Marr's Ann. Rev. Stats. (1915), Vol. 2, sec. 3473.

Examination by asylum physician. — The physician of the asylum shall professionally examine the lunatic or insane person sent to the asylum by the authority of the district judge, and if, in his opinion, said person is only feigning insanity, being a person charged with a felonious crime, he shall report to the Board, who shall investigate the facts, and if, in the judgment of the majority, said person should not be admitted as an inmate of the asylum, the president of said Board shall cause such person feigning insanity, and who had been previously committed to prison for a crime, to be confined in the parish jail, and shall immediately inform the president of the police jury of the parish,

or the proper authority in the parish of Orleans, where the rejected person has his domicile, of the fact, and the reason of his rejection, and the provisions of this section shall also apply to such persons charged with a crime, who afterwards recover and become sane, in said asylum. — Marr's Ann. Rev. Stats. (1915), Vol. 2, sec. 3474.

Duty of sheriff as to inmate feigning insanity. — The sheriff of East Feliciana, or his deputy, shall, within reasonable delay, convey said person feigning insanity, to the parish of his domicile. — Marr's Ann. Rev. Stats. (1915), Vol. 2, sec. 3475.

(II, 2 *b*)

Verdict when accused insane. — Whenever the jury, upon general issue of not guilty, shall acquit any person for the cause aforesaid, it shall be their duty, in giving their verdict of not guilty, to state that it was for such crime. — Marr's Ann. Rev. Stats. (1915), Vol. 2, sec. 3478.

(II, 2 *c* and II, 1 *b*)

Acquitted by reason of insanity. — Whenever any person, arrested to answer for any crime or misdemeanor, before any court of this State, shall be acquitted thereof by the Jury, or shall not be indicted by the Grand Jury, by reason of the insanity or mental derangement of such person, and the discharge and going at large of such person shall be deemed by the Court to be dangerous to the safety of the citizens or to the peace of the State, the Court is authorized and empowered to commit such person to the State Insane Hospital, or any similar institution in any Parish within the jurisdiction of the Court, there to be detained until he be restored to his right mind, or otherwise delivered by due course of law. — Marr's Ann. Rev. Stats. (1915), Vol. 2, sec. 3476.

MAINE

(II, 1 *a* and *b*)

Commitment of inmates of jails and persons under indictment. — Inmates of county jails and persons under indictment becoming insane before final conviction may be committed to either insane hospital by any judge of the supreme judicial court, or judge of the superior court in the county where such person is to be tried, or the case is pending, for observation, under such limitations as such judge may direct. Rev. Stats. (1916), Chap. 139, sec. 10.

Commitment of persons insane when motion for sentence is made; proceedings if insane at expiration of term of commitment; support. — If a person convicted of any crime, in the supreme judicial court or either superior court, is found by the judge of such court to be insane when motion for sentence is made, the court may cause such person to be committed to the department for the criminal insane at the Augusta state hospital under such limitations as the court may direct; provided that the crime of which such person is convicted is punishable by imprisonment in the state prison; otherwise

such commitment shall be to one of the insane hospitals; if at the expiration of the period of commitment to the department for the criminal insane at the Augusta state hospital such person has not become of sound mind in the opinion of the superintendent of the Augusta state hospital, he shall be removed to one of the insane hospitals. Persons committed by a judge of the supreme judicial or a superior court before final conviction, or after conviction and before sentence whether originally committed or subsequently removed thereto, and insane convicts after the expiration of their sentences, shall be supported while in the insane hospital in the manner provided by law in the case of persons committed by municipal officers, and the provisions of sections twenty-eight to thirty inclusive, of chapter one hundred forty-five shall apply to such cases. — Rev. Stats. (1916), Chap. 139, sec. 14.

(II, 2 *a*)

Proceedings when a person committed to a jail on a criminal charge, pleads insanity. — When a person is indicted for an offense, or is committed to jail on a charge thereof by a trial justice, or judge of a police or municipal court, any justice of the court before which he is to be tried, if a plea of insanity is made in court, or he is notified that it will be made, may, in vacation or term time, order such person into the care of the superintendent of either insane hospital, to be detained and observed by him until further order of court, that the truth or falsity of the plea may be ascertained. The superintendent of the hospital to which such person is committed shall, within the first three days of the term next after such commitment, and within the first three days of each subsequent term so long as such person remains in his care, report to the judge of the court before which such person is to be tried, whether his longer detention is required for purposes of observation. Rev. Stats. (1916), Chap. 139, sec. 1.[1]

(II, 2 *b*, *c* and *d* and II, 1 *a* and *b*)

Proceedings when grand jury omit to indict, or traverse jury acquit, on account of insanity of the accused. — When the grand jury omit to find an indictment against any person arrested to answer for an offense, by reason of his insanity, they shall certify that fact to the court; and when a traverse jury, for the same reason acquit any person indicted, they shall state that fact to the court when they return their verdict; and the court, by a precept stating the fact of insanity, may commit him to the department for the criminal insane at the Augusta State Hospital or to either insane hospital; and any person so committed shall be discharged by the court having jurisdiction of the case only on satisfactory proof that his discharge will not endanger the peace and safety of the community; and when such person so discharged is on satisfactory proof again found insane and dangerous, any justice of the supreme judicial court may, by a precept stating the fact of his insanity, recommit him to the department for the criminal insane at the Augusta State hospital or to either insane hospital. Rev. Stats. (1916), Chap. 139, sec. 2.

[1] This section may refer also to insanity at time of *trial*.

(II, 2 *d*)

Discharge of person so committed to the hospital; recommitment. — Any person so committed to an insane hospital may be discharged by any justice of the supreme judicial court, in term time or vacation, on satisfactory proof that his discharge will not endanger the peace and safety of the community; or such justice may, on application, commit him to the custody of any friend who will give bond to the judge of probate for the county of Kennebec, if such commitment was to the Augusta state hospital, or to the judge of probate for the county of Penobscot, if such commitment was to the Bangor state hospital, with sufficient sureties, approved by said judge of probate, conditioned for the safe-keeping of such insane person, and the payment of all damages which any person may sustain by his acts. And when, on satisfactory proof, he is again found insane and dangerous, any justice of the supreme judicial court may, by a precept stating the fact of his insanity, recommit him to the insane hospital from which he was discharged. Rev. Stats. (1916), Chap. 139, sec. 3.

Inquiry into cases of alleged unreasonable detention. — A friend of any person adjudged insane and committed to the department for the criminal insane at the Augusta state hospital under the foregoing proceedings, thinking such person is unreasonably detained, may apply in writing to any justice of the supreme judicial court, who shall inquire into the case and summon before him such witnesses as in his judgment may be necessary and upon such application vacate such commitment, and if the original sentence has expired, discharge such person. He shall tax legal costs and shall decide whether they shall be borne by the petitioner or by the state. If such application is unsuccessful, it shall not be renewed until the expiration of one year. — Rev. Stats. (1916), Chap. 139, sec. 11.

(II, 3)

The words " insane person " may include an idiotic, non compos, lunatic, or distracted person; but in reference to idiotic or non compos persons this rule does not apply to sections three to fifty-two, both inclusive, of chapter one hundred and forty-five.[1] — Rev. Stats. (1916), Chap. 1 (VIII), sec. 6.

MARYLAND

(II, 1 *a* and *b*)

Whenever any person shall be arrested and brought before a judge of any court of this State or before any justice of the peace of this State, having criminal jurisdiction, charged with any offense, and such person shall appear to be or be alleged to be insane or lunatic, and shall be committed in default of bail to await further proceedings in such court or before such justice or elsewhere, the said judge or justice shall commit him to the jail of the county or city where the charge is pending, or to such institution for the care of the insane as may from time to time be designated by the State Lunacy Commission. The said

[1] Sections three to fifty-two mentioned do not deal with the *criminal* insane.

State Lunacy Commission shall be notified of such commitment, and shall thereupon examine such person, and as soon as said Commission shall determine whether such person is insane or lunatic, and in every case within two weeks after said Commission shall have been so notified as aforesaid, said Commission shall report its findings to the court or justice then having jurisdiction of the charge against such person. If said Commission shall find such person insane or lunatic, he shall remain in the institution to which he shall have been committed as aforesaid, or in some other institution to which he may be transferred on the recommendation of said Commission, until he shall be tried or until the court shall in its discretion give the direction provided for in Section 6 of this Article. If, however, such person shall be found by said Commission to be sane, the court or justice then having jurisdiction of the charge against such person shall order him transferred to the jail of the county or city in which such charge shall then be pending. In all cases not punishable by death or confinement in the Penitentiary, the examination provided for in this section and in Sections 4 and 6 of this Article may be made by the Superintendent of any institution for the care of the insane in which such person may be confined pending trial, instead of by the said State Lunacy Commission, and such Superintendent shall within three weeks of the time when such person shall have been admitted to such institution make his report in writing to the court or justice of the peace before whom such charge shall then be pending at the time of such report, and such further proceedings shall then be had as if such report had been made by the said State Lunacy Commission. — Laws (1920), sec. 7–A.

Nothing in this section shall apply to the duties of the Supervisors of City Charities of the City of Baltimore.

(II, 1 *a* and *b*)

Whenever any person charged with the commission of any crime, offense or misdemeanor shall appear to the court or be alleged to be a lunatic or insane, or if the court shall have any reason to suspect that such person may be a lunatic or insane the court may cause the lunacy commission [1] to inquire whether such person is at the time of such inquiry insane or lunatic, or of such mental incapacity as to prevent such person from properly conducting his or her defense or advising as to the conduct of his or her defense; and if the lunacy commission shall find that such person is at the time of such inquiry insane or lunatic or of such mental incapacity as to prevent such person from properly conducting his or her defense or advising as to the conduct of his or her defense, the court shall in its discretion direct such person to be confined in one of the institutions referred to in the preceding section, until he or she shall have recovered and shall stay the proceedings against such person until that time, and upon recovery the court shall proceed with the trial of the charge pending against such person. The inquisition by said lunacy commission shall be made in the same manner and under the same conditions as examination of convicts

[1] *See* secs. 4, 5, Chap. 29, Laws 1922, conferring the powers of the Lunacy Commission upon the Board of Mental Hygiene.

are now required to be made by the said lunacy commission when summoned to do so by the Board of Directors of the Penitentiary or House of Correction pursuant to the provisions of Chapter 715 of the Acts of 1910, codified as Section 44 of Article 59 of the Code of Public General Laws of Maryland of 1910. — Ann. Code (1918), Vol. 4, Art. LIX, sec. 6.

(II, 1 *a* and *b* and II, 2 *b* and *c*)

If during the recess of the circuit court for any county, or the criminal court of Baltimore, any person appearing or alleged to be insane or lunatic shall be arrested and charged with any crime or misdemeanor before the judge thereof, the said judge shall issue an order to the sheriff of the county or city where said offense has been committed, requiring him forthwith to summon a jury of twelve good and lawful men and to charge such jury to inquire whether such person was lunatic or insane at the time of the commission of the offense and still is so, the judge shall commit such person as directed in the preceding section. — Ann. Code (1911), Art. 59, sec. 7.

(II, 2 *b* and II, 1 *a*)

When any person indicted for a crime, offense or misdemeanor shall allege insanity or lunacy in his or her defense, the jury impaneled to try such person shall find by their verdict whether such person was at the time of the commission of the alleged offense or still is insane, lunatic or otherwise. The judge of the court in which such indictment is pending shall have full power and authority at any time before trial to order an examination of the mental condition of such person by the lunacy commission, which examination shall be made in the same manner and as criminals under the same conditions as examinations of convicts are now required to be made by the said lunacy commission when summoned to do so by the Board of Directors of the Penitentiary or House of Correction, pursuant to the provisions of Chapter 715 of the Acts of 1910, codified as Section 44 of Article 59 of the Code of Public General Laws of Maryland of 1910. — Ann. Code (1918), Vol. 4, Art. LIX, sec. 4.

(II, 2 *b*, *c* and *d*)

If the jury find by their verdict that such person was at the time of committing the offense and then is insane or lunatic, the court before which trial was had shall cause such person to be sent to the almshouse of the county or city in which such person resided at the time of the commission of such act, or to a hospital, or some other place better suited in the judgment of the court to the condition of such prisoner, there to be confined until he shall have recovered his reason and be discharged by due course of law. Any judge of the circuit court for any county where such person is detained or of the supreme bench of Baltimore city, as the case may be, may, upon *habeas corpus* proceedings, make any order, absolute or conditional, for the permanent or temporary discharge of the person upon satisfactory proof of permanent or temporary recovery. — Ann. Code (1911), Art. 59, sec. 5.

(II, 3)

There shall be a Board of Mental Hygiene, consisting of the Commissioner of Mental Hygiene, who shall serve as the Chairman of the Board, and six associate members. Three at least of said Board shall be appointed from the City of Baltimore, four at least of said Board shall be physicians and graduates of some legally authorized medical college, and must also have been in the actual practise of their profession at least five years consecutively just preceding their appointment; one of said physicians so chosen shall have had at least five years' experience in the treatment of the insane; and one at least of said Board shall be a woman. All of the associate members shall be appointed by the Governor with the advice and consent of the Senate, except that the associate members first appointed under this Act shall be appointed by the Governor alone and their terms of office shall begin on the taking effect of this Act. . . . The Commissioner of Mental Hygiene shall be a qualified physician who at the time of his appointment has had at least five years' actual experience in the treatment of mental diseases. He shall be appointed as follows: On the taking effect of this Act, the associate members of the Board, or a majority of them, shall designate and nominate to the Governor the man in their judgment best fitted for the position, and the Governor shall thereupon appoint such nominee Commissioner of Mental Hygiene. . . .—Laws (1922), Chap. 29, sec. 4.

On the taking effect of this Act, all the rights, powers, duties, obligations and functions conferred by any of the sections of Article 59 of the Annotated Code, title "Lunatics and Insane," or by any other provisions of law, upon the Lunacy Commission, shall be transferred to and thereafter be exercised and performed by the Board of Mental Hygiene, as the lawful successor to said Lunacy Commission, and all rights, powers, duties, obligations and functions conferred by any provisions of law upon the Secretary of the Lunacy Commission, shall, on the aforesaid date, be transferred to and thereafter be exercised and performed by the Commissioner of Mental Hygiene, as the lawful successor to the said Secretary, to the same extent and effect as if the Board of Mental Hygiene, in the former case, and the Commissioner of Mental Hygiene, in the later case, had been the body or the official upon whom the said rights, powers, duties, obligations and functions were conferred. Thereupon, the Lunacy Commission and the position of Secretary thereto shall each cease and be abolished. — Laws (1922), Chap. 29, sec. 5.

MASSACHUSETTS

(II, 1 *a* and *b*)

If the grand jury does not indict a person who is held in custody on a charge of crime by reason of his insanity, they shall so certify to the court, which, if satisfied that he is insane, may order him committed to a state hospital, except the Bridgewater state hospital, under such limitations as it may order; or, if the court finds that he has been a criminal or is of vicious tendency, it may order him committed to the Bridgewater state hospital, and if he is charged with felony his expenses in any such hospital or in any state charitable institu-

tion to which he may be transferred shall be paid by the commonwealth. — General Laws (1921), Vol. 2, Pt. 2, Chap. 277, sec. 16 (p. 2812).

Commitment to state hospitals of persons under indictment. — If a person under complaint or indictment for any crime is, at the time appointed for trial or sentence, or at any time prior thereto, found by the court to be insane or in such mental condition that his commitment to an institution for the insane is necessary for his proper care or observation pending the determination of his insanity, the court may commit him to a state hospital for the insane under such limitations as it may order. The court may in its discretion employ one or more experts in insanity, or other physicians qualified as provided in section fifty-three, to examine the defendant, and all reasonable expenses incurred shall be audited and paid as in the case of other court expenses. A copy of the complaint or indictment and of the medical certificates attested by the clerk shall be delivered with such person in accordance with section fifty-three. If reconveyed to jail or custody under section one hundred and five, he shall be held in accordance with the terms of the process by which he was originally committed or confined. — Gen. Laws (1921), Vol. 1, Pt. 2, Chap. 123, sec. 100[1] (p. 1235).

Whenever a person is indicted by a grand jury for a capital offense or whenever a person, who is known to have been indicted for any other offense more than once or to have been previously convicted of a felony, is indicted by a grand jury or bound over for trial in the superior court, the clerk of the court in which the indictment is returned, or the clerk of the district court or the trial justice, as the case may be, shall give notice to the department of mental diseases, and the department shall cause such person to be examined with a view to determine his mental condition and the existence of any mental disease or defect which would affect his criminal responsibility. The department shall file a report of its investigation with the clerk of the court in which the trial is to be held, and the report shall be accessible to the court, the district attorney and to the attorney for the accused. [In the event of failure by the clerk of a district court or the trial justice to give notice to the department as aforesaid, the same shall be given by the clerk of the superior court after entry of the case in said court. Upon giving the notice required by this section the

[1] In the old case of Commonwealth *v.* Braley, 1 Mass., 102 (1804), the prisoner was indicted for the murder of his wife; and upon being asked the usual questions as to whether he was guilty or not, he confusedly said that it appeared to him that his wife was still alive, whereupon the court gave him until the next day to plead. When he was again arraigned, he said he wanted to confess, "but no direct or positive answer could be obtained from him. From the appearance and conduct of the prisoner at the several times he was arraigned, the Court were inclined to believe that he was in a state of mental derangement; and it also appearing that soon after the supposed murder of his wife, he had cut his own throat in such a manner as to endanger his life, a jury was immediately empanelled and sworn 'well and truly to try between the Commonwealth and the prisoner at the bar, whether he neglected or refused to plead to the indictment against him for murder, of his free will and malice, or whether he did so neglect by the act of God.' The jury found that he did so neglect by the act of God. Whereupon the prisoner was remanded to jail."

clerk of a court or the trial justice shall so certify on the papers. The physician making such examination shall, upon certification by the department, receive the same fees and traveling expenses as provided in section seventy-three for the examination of persons committed to institutions and such fees and expenses shall be paid in the same manner as provided in section seventy-four for the payment of commitment expenses.] [Any clerk of court or trial justice who wilfully neglects to perform any duty imposed upon him by this section shall be punished by a fine of not more than fifty dollars.] — Acts and Resolves (1921), Chap. 415, as amended by Acts and Resolves (1923), Chap. 331, and Acts and Resolves (1925), Chap. 169 (effective 90 days after March 25, 1925).

(II, 1 *b*)

If a person convicted of a capital crime is, at the time when motion for sentence is made, found by the court to be insane, it may cause such person to be removed to one of the state hospitals for such term and under such limitations as it may order. . . . — Gen. Laws (1921), Vol. 2, Pt. 2, Chap. 279, sec. 47 (p. 2843).

(II, 1 *a* and *b*)

If it appears to the satisfaction of the governor and council that a convict under sentence of death has become insane, the governor, with the advice and consent of the council, may, from time to time for stated periods, respite the execution of said sentence, until it appears to their satisfaction that the convict is no longer insane. . . . — Gen. Laws (1921), Vol. 2, Pt. 2, Chap. 279, sec. 48 (p. 2843).

At any time prior to the final disposition of a case in which the court might commit an offender to the state prison, the reformatory for women, any jail or house of correction, the Massachusetts reformatory, the state farm, the industrial school for boys, the industrial school for girls, the Lyman school, any county training school, or to the custody of the department of public welfare, for any offence not punishable by death or imprisonment for life, a district attorney, probation officer or officer of the department of mental diseases may file in court an application for the commitment of the defendant in such a case to a department for defective delinquents established under section one hundred and seventeen and one hundred and twenty-four. On the filing of such application the court may continue the original case from time to time to await disposition thereof. If, on a hearing thereon, it appears that the defendant, within a period of three years, has been found guilty of an offence for which he might have been committed to any institution above named or to the custody of the department of public welfare, or that he has been adjudged a juvenile delinquent, and that he is mentally defective, and is not a proper subject for the schools for the feeble-minded or for commitment as an insane person, the court may commit him to such department for defective delinquents, according to his age and sex, as hereinafter provided. — Acts and Resolves (1921), Chap. 270, sec.1 (pp. 309–310).

No person shall be committed to a department for defective delinquents under either of the two preceding sections unless there has been filed with the judge a certificate of the mental defectiveness of such person by two phy-

sicians qualified as provided in section fifty-three. The fees of the certifying physicians shall be of the amount and paid in the manner provided for like service in sections three to one hundred and twelve, inclusive. — Gen. Laws (1921), Vol. 1, Pt. 2, Chap. 123, sec. 115 (p. 1238).

(II, 2 *b* and *c*)

If a person charged with crime other than murder or manslaughter is acquitted by the jury by reason of insanity, the jury shall state that fact to the court, which, if satisfied that he is insane, may, under such limitations as it deems proper, order him committed to a state hospital, except the Bridgewater state hospital; but such person, if a male, or any person coming within the provisions of section one hundred or one hundred and one of chapter one hundred and twenty-three, may be committed or removed to Bridgewater state hospital if, in the opinion of the court, he has been a criminal or is of vicious tendency; and if he has been held on a charge of felony, the expense of his support in any such hospital or in any state charitable institution to which he may be transferred shall be paid by the commonwealth. The court may at any time revise or revoke the order of commitment as it may deem proper. — Acts and Resolves (1921), Chap. 262, sec. 13 (p. 303).

(II, 2 *b*, *c* and *d*)

Commitment of persons acquitted of murder, etc., by reason of insanity. — If a person indicted for murder or manslaughter is acquitted by the jury by reason of insanity, the court shall order him to be committed to a state hospital during his natural life. The governor, with the advice and consent of the council, may discharge such a person therefrom when he is satisfied after an investigation by the department[1] that such discharge will not cause danger to others. — Gen. Laws (1921), Vol. 1, Pt. 2, Chap. 123, sec. 101[2] (p. 1235).

[1] Of Mental Diseases.

[2] In Gleason *v.* West Boylston, 136 Mass., 489, this section was incidentally considered in an action by the Treasurer of the Commonwealth to recover expenses paid by the Commonwealth for the support of one Spakeman in the "Taunton Lunatic Hospital." Spakeman had been indicted for murder and acquitted by reason of insanity and committed to the hospital for life. "At the time of his commitment," said the court, "he was not, and he has not at any time since been, an insane person or a lunatic." It was held that the act by which it was provided that the expense of maintaining persons committed to an insane hospital should be borne by the respective towns did not include persons acquitted of capital offenses because of insanity, and the State was liable for their support. Speaking of the act of 1873 (section 101 above) the court said: "This statute does not require, or permit, the court to inquire whether the defendant is insane at the time of the commitment to the hospital. The verdict of not guilty by reason of insanity imports in law a finding that the defendant committed the homicide, but was insane at the time he committed it; and the duty of the court thereupon is to order his commitment without inquiry as to his present mental condition. There are different provisions in cases of acquittal, by reason of insanity, of offences other than homicides. In

(II, 2 *d*)

The board of parole of the department of correction may parole inmates of the departments for defective delinquents on such conditions as it deems best, and may at any time during the parole period recall to the institution any inmate paroled. — Gen. Laws (1921), Vol. 1, Pt. 2, Chap. 123, sec. 118 (p. 1239).

Any person may apply at any time to the justice of the district court in whose jurisdiction a department for defective delinquents is located, for the discharge of any inmate of said department. A hearing shall thereupon be held, of which notice shall be given to the applicant and to the person in charge of the institution where the inmate is confined. If after the hearing the justice shall find that it is probable that the inmate can be allowed to be at large without serious injury to himself, or damage or injury or annoyance to others, he may order the person having custody of said inmate to parole him. Further action on the application for the inmate's discharge shall be suspended for one year from the date of his parole. If, at any time prior to the expiration of said year, the justice of the court where the application was filed shall be satisfied that the best interests of said inmate, or of the public, require the recall of the inmate from parole, he may authorize the person having custody of the inmate to so recall him. If an application is denied, a new application shall not be made within one year after the date of the order denying the previous application. If at the end of said year the justice shall find that said inmate can be allowed to be permanently at large without serious injury to himself, or damage or injury or annoyance to others, he may order the person having custody of said inmate to discharge him. If a person discharged under this section is found by any court to have committed, after his discharge, any offence against the laws of the commonwealth, said court may commit such person to a department for defective delinquents without the certificate of any physician. — Gen. Laws (1921), Vol. 1, Pt. 2, Chap. 123, sec. 119 (p. 1239).

(II, 3)

"Insane person" and "lunatic" shall include every idiot, non compos, lunatic and insane and distracted person. — General Laws (1921), Vol. 1, Pt. 1, Chap. 4, sec. 7 (15), p. 20.

such cases, the court cannot commit a person thus acquitted to a lunatic hospital, unless it is satisfied that he is insane at the time of the commitment. . . . The practical effect of the Statute of 1873 is to provide that, in case of an indictment for homicide, the insanity of the defendant is not a defence which entitles him to an unconditional acquittal, but that he shall be detained in confinement until it appears to the Governor and Council that he may be discharged and set at large without danger to others. He is not committed to the hospital for the purposes of treatment as a lunatic. He is not held there as other inmates are held; he cannot be discharged, as others can be, by the trustees, or by a court upon proof that he is not insane, or, if insane, can be sufficiently provided for by himself or his friends, or the town of his settlement. . . . He is confined in the hospital as a place of detention, because his being at large would be dangerous to the peace and safety of the community."

MICHIGAN

(II, 1 *b* and II, 2 *c*)

No indictment found by grand jury because of accused's insanity. — When any person held in prison on a charge of having committed an indictable offense, shall not be indicted by the grand jury by reason of insanity, such jury shall certify that fact to the court; and thereupon, if the discharge or going at large of such insane person shall be deemed manifestly dangerous to the peace and safety of the community, the court may order him to be retained in prison until the further order of the court, otherwise he shall be discharged. — Compiled Laws, Vol. 3 (1915), sec. 15722.

(II, 1 *a* and *b* and II, 2 *c*)

When court may order persons sent to state asylum. — When a person accused of the crime of murder, attempt at murder, rape, attempt at rape, incest, abduction, highway robbery or arson, or attempt to do great bodily harm, shall appear to be insane, or shall have escaped indictment upon the grounds of insanity or shall have been acquitted upon trial upon the grounds of insanity, the court, being certified by the jury or otherwise of the fact, shall carefully inquire and ascertain whether his insanity in any degree continues, and if it does, shall order such person into safe custody and to be sent to the state asylum. If any person in confinement under indictment for the crime of arson, or murder, or attempt at murder, rape, or attempt at rape, or incest, or abduction, or highway robbery, or assault to do great bodily harm, shall appear to be insane, the judge of the circuit court of the county where he is confined shall institute a careful investigation. He shall call two or more reputable physicians and other credible witnesses, and the prosecuting attorney, to aid in the examination, and if it be deemed necessary to call a jury for that purpose, is fully empowered to compel the attendance of witnesses and jurors. If it is satisfactorily proved that such person is insane, said judge may discharge such person from imprisonment and order his safe custody and removal to the state asylum, where such person shall remain until restored to his right mind, and then, if the said judge shall have so directed, the superintendent of said asylum shall inform the said judge and prosecuting attorney, so that the person so confined may within sixty days thereafter be remanded to prison and criminal proceedings be resumed, or he be otherwise discharged. . . . — Public Acts (1915), sec. 1424.

(II, 2 *b* and *c*)

When prisoner acquitted by reason of insanity. — When any prisoner indicted for an offense shall, on trial, be acquitted by the jury by reason of insanity, the jury in giving their verdict of not guilty, shall state that it was given for such cause; and thereupon, if the discharge or going at large of such insane person shall be considered manifestly dangerous to the peace and safety of the community, the court may order him to be committed to prison, there to be kept until the further order of the court; otherwise he shall be discharged. — Compiled Laws, Vol. 3 (1915), sec. 15826.

(II, 2 *d*)

Insane entitled to writ of habeas corpus. — Anyone in custody as an insane person in any asylum, home, or retreat, is entitled to a writ of *habeas corpus*, upon a proper petition to the circuit court of the county in which said asylum, home or retreat is situated, made by him or some friend in his behalf. Upon the return of such writ, the fact of his sanity shall be inquired into and determined. The medical history of the patient, as it appears in the books of the asylum, home or retreat, shall be given in evidence, and the superintendent or medical officer in charge of the institution wherein such person is held in custody, and any other proper person, shall be sworn touching the mental condition of such person. — Public Acts (1915), sec. 1344.

(II, 3)

. . . The words "insane person" shall be construed to include an idiot, a non compos, lunatic, and distracted person. . . . — Compiled Laws (1915), Vol. 1, sec. 64.

MINNESOTA

(I, 1)

Criminal responsibility of insane persons. — No person shall be tried, sentenced, or punished for any crime while in a state of idiocy, imbecility, lunacy or insanity, so as to be incapable of understanding the proceedings or making a defence; but he shall not be excused from criminal liability except upon proof that at the time of committing the alleged criminal act he was laboring under such a defect of reason, from one of said causes, as not to know the nature of his act, or that it was wrong. — Gen. Stats. (1913), sec. 8475.

(I, 1 and 2)

Presumption of responsibility. — Save as hereinafter specified, every person is presumed to be responsible for his acts, and the burden of rebutting such presumption is upon him. Children under the age of seven years, idiots, imbeciles, lunatics, or insane persons are incapable of committing crime. . . . — Gen. Stats. (1913), sec. 8473.

(II, 1 *b*)

Insanity, etc., of defendant. — Whenever any person under indictment or information, and before or during the trial thereon and before verdict is rendered, shall be found to be insane, an idiot, or an imbecile, the court in which such indictment or information is filed, shall forthwith commit him to the proper state hospital or asylum for safe keeping and treatment; and whenever at such time any such person shall, in addition, be found to have homicidal tendencies, such court shall forthwith commit him to the asylum for the dangerous insane for safe keeping and treatment; and in either case such person shall be received and cared for at the institution to which he is thus committed until he shall recover, when he shall be returned to the court from which he was

received to be placed on trial upon said indictment or information. Gen. Stats. (1913), sec. 9217.

(II, 2 *b*, *c* and *d*)

Acquitted on ground of insanity. — Whenever during the trial of any person on an indictment, or information, such person shall be found to have been, at the date of the offense alleged in said indictment, insane, an idiot, or an imbecile, and is acquitted on that ground, the jury or the court, as the case may be, shall so state in the verdict, or upon the minutes, and the court shall thereupon, forthwith, commit such person to the proper state hospital or asylum for safe keeping and treatment; and whenever in the opinion of such jury or court such person, at said date, had homicidal tendencies, the same shall also be stated in said verdict, or upon said minutes, and said court shall thereupon forthwith commit such person to the hospital for the dangerous insane for safe keeping and treatment; and in either case such person shall be received and cared for at said hospital or asylum to which he is thus committed. No such person so acquitted shall be liberated therefrom, except upon the order of the court committing him thereto, and until the superintendent of the hospital or asylum where such person is confined shall certify in writing to such committing court that, in his opinion, such person is wholly recovered and that no person will be endangered by his discharge. *Provided*, that nothing herein shall be construed as preventing the transfer of any person from one institution to another by the order of the board of control, as it may deem necessary. — Gen. Stats. (1913), sec. 9218.

(II, 2 *d*)

Habeas Corpus — Who may prosecute writ. — Every person imprisoned or otherwise restrained of his liberty, except persons committed or detained by virtue of the final judgment of any competent tribunal of civil or criminal jurisdiction, or by virtue of an execution issued upon such judgment, may prosecute a writ of *habeas corpus* to obtain relief from such imprisonment or restraint, if it proves to be unlawful; . . . — Gen. Stats. (1913), sec. 8283.

(II, 3)

Insane persons . . . — The words "insane person" shall include every idiot, non compos, lunatic, and distracted person. . . . — Gen. Stats. (1913), sec. 9412.

MISSISSIPPI

(II, 1 *a* and *b* and 2 *a* and *b*)

Insane persons charged with crime. — When a prisoner shall be brought before any conservator of the peace, charged with the commission of an offense, and, in the course of the investigation, it shall appear that the prisoner was insane when the offense was committed, and still is insane, he shall not be discharged, but the conservator of the peace shall remand the prisoner to custody, and forthwith report the case to the chancellor or clerk of the chancery court,

whose duty it shall be to proceed with the case according to the law relating to persons of unsound mind. — Code of 1917, Vol. 1, sec. 1300.

Writ de lunatico inquirendo. — The chancery courts have jurisdiction of writs of lunacy, to be exercised by the clerks at any time, subject to the approval of the court. Any relative of a lunatic or insane person may procure him to be so adjudged; but if the relations and friends of any lunatic or insane person shall neglect or refuse to place him in an insane hospital, and shall permit him to go at large, the clerk of the chancery court shall, on the application, in writing and under oath, of any citizen, direct the sheriff, by writ of lunacy, to summon the alleged lunatic or insane person to contest the application, and six freeholders to make inquiry thereof, on oath, and the result of the inquisition to return to the clerk. The jury shall be impaneled in the presence of the clerk, and shall be charged by him to make due inquest as to the particulars indicated in the two following sections. — Code of 1917, Vol. 2, sec. 5561.

When grand jury do not indict because of insanity, what shall be done. — When any person is held in prison or on bail charged with an offense, and the grand jury shall not find a true bill by reason of the insanity of the accused, the grand jury shall certify the fact to the circuit court, and state whether such insane person be in such condition as to endanger the security of persons or property and the peace and safety of the community. And if the grand jury report such unsoundness of mind and such danger, the court shall forthwith give notice of the case to the chancellor or clerk of the chancery court, whose duty it shall be to proceed with such person and his estate according to the law relating to persons of unsound mind. — Code of 1917, Vol. 1, sec. 1301.

Execution in capital cases — What to be done if convict be insane. — If the sheriff shall at any time be satisfied that any convict in his custody under the sentence of death, is insane, he shall, with the concurrence of the judge of the circuit court, or of the chancellor or the president of the board of supervisors in the absence of the circuit judge, summon six physicians if to be had, and, if not, other discreet and experienced freeholders and electors of said county, to make up an inquest to inquire into such insanity. The sheriff shall summon and swear all necessary witnesses, and the jury and sheriff, after full examination, shall certify, under their hands, what the truth may be in relation to the alleged insanity. And in case such convict shall be found insane the sheriff shall immediately transmit the verdict of the jury to the governor, and suspend the execution of the sentence until the governor shall be satisfied of the sanity of the convict, when he shall order, by his warrant to the sheriff, the execution of the convict, on a day to be therein appointed by the governor, according to the sentence and judgment of the court. — Code of 1917, Vol. 1, sec. 1285.

(II, 2 *b* and *c*)

When acquitted because of insanity. — When any person shall be indicted for an offense, and acquitted on the ground of insanity, the jury rendering the verdict shall state therein such ground, and whether the accused have since been restored to his reason, and whether he be dangerous to the community;

and if the jury certify that such person is still insane and dangerous, the judge shall order him to be conveyed to and confined in one of the state asylums for the insane. — Code of 1917, Vol. 1, sec. 1302.

(II, 2 *d*)

Persons not insane discharged. — If the superintendent discovers that any person who has been adjudged insane and confined in the hospital is in fact sane, he shall discharge such person, and give him a certificate of sanity, and send a duplicate thereof to the sheriff of his county. — Code of 1917, Vol. 2, sec. 5568.

Harmless incurables and the restored, removed. — Where any patient in an insane hospital shall be found to be incurable, but harmless, and such as can be properly cared for out of the hospital, or if a patient be restored to reason, the superintendent shall notify the sheriff of the county from which the patient came to remove him from the hospital. On receiving such notice the sheriff shall at once notify some near relation of the patient in his county, and, unless such relation immediately remove the patient from the hospital, the sheriff shall do so. If a patient be restored to reason, the superintendent may furnish transportation to such patient to his home, and make requisition on the board of supervisors of the county for the costs thereof, which shall be allowed and a warrant issued to the superintendent of the hospital; and the board of supervisors shall proceed as hereinbefore provided to recover the sum so paid, but this shall not apply to pay patients. — Code of 1917, Vol. 2, sec. 5572.

The writ of habeas corpus shall extend to all cases of illegal confinement or detention by which any person is deprived of his liberty, or by which the rightful custody of any person is withheld from the person entitled thereto, except in the cases expressly excepted. — Code of 1917, Vol. 1, sec. 2011.

(II, 3)

Who not admitted in the hospitals. — Mere idiots,[1] fools, and known incurables, who are not dangerous, shall not be admitted into the hospitals; but, if indigent, may be cared for as paupers. — Code of 1917, Vol. 2, sec. 5559.

MISSOURI

(II, 1 *a*)

Insane, jury to try subsequent to indictment. — If any person indicted for any crime in this state shall, after his indictment and before his trial on such charge, become insane, and the circuit or criminal court wherein such person stands charged shall have reason to believe that such person has so become insane, it shall be the duty of such court to suspend all further proceedings

[1] Notice that the "mere idiots" are still confined with the paupers, and not in a special institution; perhaps the facetious implication is that any one who is a pauper in our land of plenty is *ipso facto* a "mere idiot."

against such person under said charge, and to order a jury to be summoned to try and decide the question of the insanity of such person, and said judge shall notify the prosecuting attorney of the pendency of such inquiry. The alleged insane person shall be notified of such proceeding unless the court order such person to be brought before it. — Rev. Stats. (1919), sec. 4000.

(II, 1 *a* and *b*)

Jury to decide insanity — costs, how paid. — If upon such inquiry the said jury shall become satisfied that such person has so become insane, they shall so declare in their verdict, and the court shall, by proper warrant to the sheriff, marshal or jailer, order such person to be conveyed to the lunatic asylum and there kept until restored to reason. And such person shall be thereupon disposed of, and the costs and expenses of conveying him to said asylum and of his support and maintenance at said asylum shall be taxed, paid and collected as now provided by law in cases of the insane poor; *Provided*, if such person shall have property, the costs shall be paid out of his property by his guardian. — Rev. Stats. (1919), sec. 4001.

(II, *b*)

Restored to reason, prosecution continued. — When such person shall be restored to reason, he shall be returned to the county whence he came, and the proceedings against him shall be continued and be prosecuted, and his trial had as though no such inquiry and proceedings thereon, as herein provided, had been made, and if upon such inquiry it shall be determined that said person has not so become insane as aforesaid, the criminal proceedings against him shall be continued and prosecuted, and his trial had in the same manner as though no such inquiry had been made and had. — Rev. Stats. (1919), sec. 4002.

(II, 2 *b* and *c*)

Insane criminals, how disposed of. — When a person tried upon indictment for any crime or misdemeanor shall be acquitted on the sole ground that he was insane at the time of the commission of the offense charged, the fact shall be found by the jury in their verdict, and by their verdict the jury shall further find whether such person has or has not entirely and permanently recovered from such insanity; and in case the jury shall find in their verdict that such person has so recovered from such insanity, he shall be discharged from custody; but in case the jury shall find such person has not entirely and permanently recovered from such insanity the prisoner shall be dealt with as provided in the two preceding sections. — Rev. Stats. (1919), sec. 4003.

(II, 2 *c*)

Prisoner may be sent to hospital, when — costs to be paid from estate — to furnish superintendent copy of order. — If the prisoner is not a poor person, and the court is satisfied, from the nature of the offense or otherwise, that it would be unsafe to permit the prisoner to go at large, an order shall be entered

of record that he be sent to a state hospital, designating it, and further requiring the sheriff or other ministerial officer of the court, with such assistance as may be specified in the order, to convey such prisoner to the hospital, after first ascertaining from the superintendent that such prisoner will be received into the hospital, and until the receipt of such information, to keep such prisoner in the county jail, poorhouse or other safe custody; and further, that the cost which may accrue in carrying into effect this order, and all expenses for the support and maintenance of such person whilst in the care and custody of the officer and at the hospital, shall be paid out of the proceeds of the estate of such person. And the court shall have power, at each succeeding term, to tax up, so long as it may be necessary, such cost and expenses as may have accrued since the preceding term, and cause the same to be levied and collected by execution; and the officer collecting the same shall pay to the treasurer of the hospital, and to such other persons as may be entitled thereto, their respective amounts due. The clerk of the court shall furnish a copy of the order of the court, under his official seal, to be lodged with the superintendent, upon the admission of the prisoner into the hospital, and issue a warrant upon said order to the officer named in said order as near as may be of the form specified in section 12292. — Rev. Stats. (1919), sec. 12299.

(II, 2 *d*)

Governor may pardon, commute or suspend sentence; sentence of court to be executed, when. — If any person, after being convicted of any crime or misdemeanor, and before the execution, in whole or in part, of the sentence of the court, become insane, it shall be the duty of the governor of the state to inquire into the facts; and he may pardon such lunatic, or commute or suspend, for the time being, the execution in such manner and for such period as he may think proper, and may, by his warrant to the sheriff of the proper county or warden of the state penitentiary, order such lunatic to be conveyed to a state hospital and there kept until restored to reason. If the sentence of such lunatic is suspended by the governor, the sentence of the court shall be executed upon him after such period of suspension has expired, unless otherwise directed by the governor. — Rev. Stats. (1919), Vol. III, sec. 12302.

Who may be admitted — how discharged — when. — Persons afflicted with any form of insanity shall be admitted into the hospital for the care and treatment of the insane, and any patient may be discharged by the superintendent whenever, in his opinion, the reason of such person is fully restored: Provided that nothing herein shall be so construed to prevent any superintendent from paroling any patient whenever he deems it best for such person confined in the hospital; and provided further, that county courts are hereby prohibited from removing from the hospital any indigent insane persons, except as herein provided. — Rev. Stats. (1919), Vol. III, sec. 12272.

Patients (who committed homicide) not to be discharged without consent. — . . . No patient who has committed homicide shall be discharged without the consent of the superintendent and the written admission of a majority of the board of managers. — Rev. Stats. (1919), Vol. III, sec. 12304.

Who may prosecute the writ. — Every person committed, detained, confined or restrained of his liberty, within this state, for any criminal or supposed criminal matter, or under any pretense whatsoever, except when, according to the provisions of this article, such person can be neither discharged nor bailed, or otherwise relieved, may prosecute a writ of habeas corpus as hereinafter provided, to inquire into the cause of such confinement or restraint. — Rev. Stats. (1919), Vol. I, sec. 1876.

(II, 3)

Terms construed. — The words " insane " and " lunatic ", as used in this chapter, shall be construed as including every species of insanity or mental derangement. . . . — Rev. Stats. (1919), Vol. III, sec. 12307.

MONTANA

(I, 2)

Who are capable of committing crimes. — All persons are capable of committing crimes except those belonging to the following classes:

. . . Idiots, lunatics and insane persons, persons who committed the act or made the omission charged under an ignorance or mistake of fact which disproves any criminal intent, persons who committed the act charged without being conscious thereof. . . . — Revised Codes (1921), Vol. 4, sec. 10729.

Insane person cannot be tried or punished. — A person cannot be tried, adjudged to punishment, or punished for a public offense while he is insane. — Revised Codes (1921), Vol. 4, sec. 12213.

(II, 1 *a* and *b*)

NOTE. — (Sections 12214–12218, prescribing the procedure in case of alleged insanity at any time during the trial, and section 12065 prescribing the procedure in case of insanity as cause against the judgment are practically the same as sections 1368–1372 and section 1201 of the Penal Code of California (1915).

Insanity of defendant, how determined. — If, after judgment of death, there is good reason to suppose that the defendant has become insane, the sheriff of the county, with the concurrence of the judge of the court by which the judgment was rendered, may summon from the list of jurors selected for the year, a jury of twelve persons to inquire into the supposed insanity, and must give immediate notice thereof to the county attorney of the county. — Revised Codes (1921), sec. 12095.

Proceedings upon finding of jury. — If it is found by the inquisition that the defendant is sane, the sheriff must execute the judgment; but if it is found that he is insane, the sheriff must suspend the execution of the judgment until he receives a warrant from the governor or from the judge of the court by which the judgment was rendered directing the execution of the judgment. If the inquisition finds that the defendant is insane, the sheriff must immediately transmit it to the governor, who may, when the defendant becomes sane, issue a warrant appointing a day for the execution of the judgment. — Revised Codes (1921), sec. 12098.

(II, 2 *b*)

Verdict. — . . . When the defendant is acquitted on the ground that he was insane at the time of the commission of the act charged, the verdict must be " not guilty by reason of insanity." . . . — Revised Codes (1921), sec. 12020.

(II, 2 *c*)

Proceedings on acquittal on ground of insanity. — If the jury render a verdict of acquittal on the ground of insanity, the court may order a jury to be summoned from the jury list of the county, to inquire whether the defendant continues to be insane. The court may cause the same witnesses to be summoned who testified on the trial, and other witnesses, and direct the county attorney to conduct the proceedings, and counsel may appear for the defendant. The court may direct the sheriff to take the defendant and retain him in custody until the question of continuing insanity is determined. If the jury find the defendant insane, he shall be committed by the sheriff to the state insane asylum. If the jury find the defendant sane, he shall be discharged. — Rev. Codes (1921), sec. 12036.

NEBRASKA

(II, 1 *a*)

Proceedings when accused becomes insane. — A person that becomes lunatic or insane after the commission of a crime or misdemeanor ought not be tried for the offense during the continuance of the lunacy or insanity. If, after verdict of guilty, and before judgment pronounced, such person becomes lunatic or insane, then no judgment shall be given while such lunacy or insanity shall continue; and if, after judgment and before execution of the sentence such person shall become lunatic or insane, then in case the punishment be capital, the execution thereof shall be stayed until the recovery of said person from the insanity or lunacy. In all such cases it shall be the duty of the court to impanel a jury [1] to try the question whether the accused be, at the time of impaneling, insane or lunatic. — Compiled Stats. (1922), sec. 10123.

When convict appears to be insane. — If any convict under sentence of death shall appear to be insane, the warden or sheriff having him in custody shall forthwith give notice thereof to a judge of the district court of the judicial district in which said convict was tried and sentenced, and said judge shall at once make such investigation as shall satisfy him as to whether a commission ought to be named to examine said convict. If he shall determine that there is

[1] Notice the inconsistency in these two sections. Section 10123 provides for a jury's determination of the question of insanity "in all such cases", including those wherein the punishment is capital; yet Section 10219, more wisely, provides for an expert commission of superintendents of State asylums, the only apparent difference in the two classes of capital cases involved being that in the first section the convict is still before the court, while in the second he evidently has already served part of his sentence, or is in custody awaiting execution.

not sufficient reason for the appointment of a commission he shall so find and refuse to suspend the execution of said convict. If the judge shall determine that a commission ought to be appointed to examine such convict he shall make a finding to that effect and cause it to be entered upon the records of the district court in the county in which such convict was sentenced, and, if necessary, the judge shall suspend the execution and appoint the three superintendents of the insane asylums at Lincoln, Hastings and Norfolk as a commission to examine such convict, and the commission shall examine the convict with a view of determining whether he is sane or insane and shall report their findings in writing to said judge within ten days after their appointment. If for any reason any of said superintendents cannot serve in such capacity, said judge shall appoint in his place one of the assistant superintendents of said asylum. If two of said commission shall find said convict insane, said judge shall suspend his execution until further order. Any time thereafter, when it shall be made to appear to said judge that said convict has become sane, he shall appoint a commission in the manner aforesaid, who shall make another investigation as to the sanity of said convict, and in case said convict is again declared insane his execution shall be suspended by the judge until further order, and such proceedings may be had at such times as said judge shall order until it is either determined that said convict is sane or incurably insane. — Compiled Stats. (1922), sec. 10219.

Same — on finding of sanity. — In case said judge has suspended the execution of said convict pending an investigation as to his sanity, and said convict shall be found to be sane, said judge shall appoint a day for his execution, which shall be carried into effect in the same manner as provided in the original sentence, a certified copy of which shall be transmitted by mail to the executioner. — Compiled Stats. (1922), sec. 10220.

(II, 2 *a, b, c*)

Criminal insane, disposition of. — Any person prosecuted for an offense may plead that he is not guilty by reason of insanity or mental derangement; when the defense is insanity of the defendant, the jury must be instructed, if they acquit him on that ground, to state the fact in their verdict. The court must thereupon order the defendant to be committed to the state hospital for the insane, until he becomes sane and is discharged by due process of law. *Provided,* the defense of insanity may be raised under a general plea of not guilty. — Compiled Stats. (1922), sec. 10164.

(II, 2 *d*)

Insane entitled to benefit of habeas corpus. — All persons confined as insane, dipsomaniacs, inebriates or as persons addicted to the excessive use of morphine, cocaine or other narcotic drugs, shall be entitled to the benefit of a writ of *habeas corpus* and the question of insanity, dipsomania, inebriety or the excessive use of morphine, cocaine or other narcotic drugs, shall be decided at the hearing, and if the judge shall decide that the person is insane, or a dipsomaniac, an inebriate or an excessive user of morphine, cocaine or other narcotic drugs, such decision shall be no bar to the issuing of a writ a second time

whenever it shall be alleged that such person has been restored to reason or has been cured from dipsomania, inebriacy or of the excessive use of morphine, cocaine or other narcotic drugs, but no court shall have jurisdiction to hear such writ until the clerk of the district court of the county in which the board of commissioners on insanity had the matter of detaining such person under consideration has been given reasonable notice of the time and place of such hearing. Upon the hearing of the writ of *habeas corpus* herein provided for, if it shall appear that the board of commissioners on insanity had jurisdiction of the patient, such patient shall not be released from custody by any court in this state except for the reason that such person has been restored to reason or cured of being a dipsomaniac, or inebriate or of the use of morphine, cocaine or other narcotic drugs. *Provided,* however, if the proceedings of such board of commissioners are so irregular as not to justify the detention of such person, then such person shall be by order of court returned to the sheriff of the county from which committed, there to be proceeded with according to law before the board of commissioners on insanity of such county. — Compiled Stats. (1922), sec. 6921.

Discharge of patient as cured or harmless. — Any patient who is cured shall be immediately discharged by the superintendent. Upon such discharge the superintendent shall furnish the patient, unless otherwise supplied, with suitable clothing and a sum of money not exceeding twenty dollars, which shall be charged with the other expenses in the hospital of such patient. The relatives of any patient not susceptible of cure by medical treatment in the hospital, and not dangerous to be at large, shall have the right to take charge of and move such patient on the consent of the state board of public lands and buildings: *Provided,* in the interim of the meetings of the board, the consent of a majority of the members of the board of public lands and buildings shall be sufficient. — Compiled Stats. (1922), sec. 6923.

Same — surrender to friends. — On the application of the relatives or immediate friends of any patient in the hospital who is not cured, and who cannot be safely allowed to go at liberty, the commissioners of insanity of the county where such patient belongs, on making provisions for the care of such patient within the county as in other cases, may authorize his or her discharge therefrom: *Provided,* no patient who may be under charge or conviction of homicide shall be discharged without the order of the board of public lands and buildings. Compiled Stats. (1922), sec. 6924.

NEVADA

(I, 1)

An act done by a person in a state of insanity cannot be punished as a public offence, nor can a person be tried, adjudged to punishment, or punished, for a public offence, while he is insane. — Revised Laws (1912), sec. 7385.

All persons are liable to punishment except those belonging to the following classes:

. . .

. . .

3. Idiots;
4. Lunatics and insane persons;
. . .
6. Persons who committed the act without being conscious thereof. — Revised Laws (1912), sec. 6268.

(II, 1 *a* and *b*)

(Sections 7386–7389 of the Revised Laws of Nevada, 1919, Vol. 3 and sections 7390–7392 of the Revised Laws of Nevada, 1912, Vol. 2, prescribing the method of procedure to determine sanity during or immediately after trial are similar to sections 1368–1372 of the Penal Code of California, 1915.)

He may show for cause against the judgment:

1. That he is insane; and if, in the opinion of the court, there is reasonable ground for believing him to be insane, the question of insanity must be tried, as provided by law. If upon the trial of that question, the jury find that he is sane, judgment must be pronounced; but if they find him insane, he must be committed to the hospital for mental diseases until he becomes sane; and when notice shall have been given of that fact, as provided in section 542, he must be brought before the court for judgment. . . . — Revised Laws (1912), sec. 7252.

If, after judgment of death, there is good reason to suppose that the defendant has become insane, the warden of the state prison to whom he is delivered for execution, with the concurrence of the judge of the district court of the county in which such prison is situated, may summon from the list of jurors selected by the county commissioners for the year, a jury of twelve persons, to inquire into the supposed insanity, and must give immediate notice thereof to the attorney-general and the district attorney of said county. — Revised Laws (1912), sec. 7271.

The attorney general and the district attorney shall attend the inquisition and may produce witnesses before the jury, for which purpose they, or either of them, may issue process in the same manner as for witnesses to attend before the grand jury, and disobedience thereto may be punished in like manner as disobedience to process issued by that court. — Revised Laws (1912), sec. 7272.

If it is found by the inquisition that the defendant is sane, the warden must execute the judgment; but if it is found that he is insane, the warden must suspend the execution of the judgment until he receives a warrant from the government, or from the judge of the district court of the county in which such state prison is situated, directing the execution of the judgment. — Revised Laws (1912), sec. 7274.

If the inquisition finds that the defendant is insane, the warden must immediately transmit it to the governor, who may, when the defendant becomes sane, issue a warrant appointing a day for the execution of the judgment. — Revised Laws (1912), sec. 7275.

(II, 2 *b*)

. . . When the defendant is acquitted on the ground that he was insane at the time of the commission of the act charged, the verdict must be " not guilty by reason of insanity." . . . — Revised Laws (1912), sec. 7216.

(II, 2 *b* and *c*)

Acquitted by reason of insanity, confinement in the hospital for mental diseases. — Where on a trial a defense of insanity is interposed by the defendant and he is acquitted by reason of that defense the finding of the jury shall have the same force and effect as if he were regularly adjudged insane as now provided by law, and the judge thereupon shall forthwith order that the defendant be confined in the hospital for mental diseases until he be regularly discharged therefrom in accordance with law. — Revised Laws (1912), sec. 7217.

(II, 3)

A person shall be considered of sound mind who is neither an idiot or lunatic, or affected with insanity, and who has arrived at the age of fourteen years, or before that age, if such person know the distinction between good and evil. — Revised Laws (1912), sec. 6269.

NEW HAMPSHIRE

(II, 1 *a* and II, 2 *b*)

Whenever the grand jury shall omit to find an indictment against a person, for the reason of insanity or mental derangement, or a person prosecuted for an offence shall be acquitted by the petit jury for the same reason, such jury shall certify the same to the court. — Public Statutes and Session Laws (1901), Chap. 255, sec. 1.

(II, 1 *b* and II, 2 *c*)

In either of the cases aforesaid, the court, if they are of opinion that it will be dangerous that such person should go at large, may commit him to the prison or to the asylum for the insane, there to remain until he is discharged by due course of law. — Public Statutes and Session Laws (1901), Chap. 255, sec. 3.

(II, 1 *a* and *b*)

When a person is indicted for any offense, or is committed to jail on any criminal charge to await the action of the grand jury, any justice of the court before which he is to be tried, if a plea of insanity is made in court, or said justice is notified that such plea will be made, may, in term time or vacation, order such person into the care and custody of the superintendent of the state asylum for the insane, to be detained and observed by him until further order of the court, or until such person shall have been ordered discharged from said New Hampshire state hospital by its trustees upon a report to them by said superintendent that such person is not insane. Whenever such person is so ordered discharged by said trustees the superintendent shall immediately give notice to that effect to the county solicitor of the county from which such person was sent to the hospital, and it shall be the duty of the county solicitor to cause such person to be immediately removed from the hospital. The person so committed shall be there supported at his own expense, if he has sufficient means; otherwise, at the expense of the state. — Laws of 1911, Chap. 13, sec. 1.

(II, 2 *a*)

Any person prosecuted for an offence may plead that he is not guilty by reason of insanity or mental derangement, and such plea may be accepted by the state's counsel, or may be found true by the verdict of the jury. — Public Statutes and Session Laws (1901), Chap. 255, sec. 2.

(II, 2 *d*)

Any person committed to the asylum may be discharged by any three of the trustees, by the commission of lunacy, or by a justice of the supreme court, whenever a further detention at the asylum is, in their opinion, unnecessary; but any person so discharged who was under sentence of imprisonment at the time of his commitment, the period of which shall not have expired, shall be remanded to prison.[1]

The superior court or any justice thereof may, with or without notice, in term or vacation, on due cause shown, parole any person committed to the New Hampshire State Hospital upon such terms and conditions as justice may require; and said court or justice may at any time thereafter, on due cause shown, revoke said parole and order said person returned to said state hospital under the original commitment. — Laws of 1905, Chap. 101, sec. 1. Public Statutes and Session Laws, p. 15 (Supp. 1901–1913).

The governor and council or the supreme court may discharge any such person from prison, or may transfer any prisoner who is insane to the asylum for the insane, to be there kept at the expense of the state, whenever they are satisfied that such discharge or transfer will be conducive to the health and comfort of the person and the welfare of the public. — Public Statutes and Session Laws (1901), Chap. 255, sec. 4.

(II, 3)

No person shall be committed to the asylum for the insane, except by an order of the court or the judge of probate, without the certificate of two reputable physicians that such person is insane, given after a personal examination made within one week of the committal. Such certificate shall be accompanied by a certificate of a judge of the supreme court or court of probate, mayor, or one of the selectmen, certifying to the genuineness of the signatures and the respectability of the signers.

The physicians making such examination shall be legally registered to practice medicine in New Hampshire, and in the actual practice of their profession at the time of said examination and for at least three years prior thereto. They shall act jointly in making said examination and their certificate shall

[1] If the proposal of the New York State Bar Association (*see* their annual reports) were adopted, providing that persons found "guilty, but insane" should be *sentenced* to a hospital, even defendants who had successfully pleaded insanity, would serve a "term"; the prison being merely replaced by the hospital, which latter, pervaded by the spirit of such an anomalous sentence as "guilty, but insane", and the sentencing for a definite term, would in our opinion soon itself take on the atmosphere of a prison.

bear the date of said examination. Neither of said physicians shall be a relative of the person alleged to be insane, or an official of the institution to which it is proposed to commit such person. Any violation of the terms of this act may be punished by a fine not exceeding one hundred dollars. The certificate of insanity shall be in the form prescribed by the commission and shall contain the facts and circumstances upon which the judgment of the physicians is based. — Laws of 1909, Chap. 124, sec. 1. Public Statutes and Session Laws, Supp. 1901–1913, p. 15.

NEW JERSEY

(II, 1 *a* and *b*)

If any person in confinement under commitment, indictment or sentence, or under any process, shall appear to be insane, epileptic, imbecile or feebleminded, the justice of the Supreme Court presiding in the courts of the county in which such person is confined, or judge of the Court of Common Pleas of said county, may, upon presentation to him of the application and certificates hereinabove provided, institute an inquiry and take proofs as to the mental or physical condition and legal settlement of said person in the manner and form hereinbefore provided, pending which inquiry such person may be temporarily confined in an appropriate public institution in this State, upon an order of such justice or judge; and if said justice or judge shall determine that said person is insane, epileptic, imbecile or feebleminded, he shall order that said person be removed from imprisonment, and that he be confined in one of the institutions for the care and treatment of such persons owned by the State of New Jersey, or if said justice or judge shall deem it expedient, in an institution for the care and treatment of such person owned by one of the counties of this State, until said person is cured or removed or discharged according to law. Such order shall contain a determination of such person's condition. . . . Said justice or judge may, in his discretion, order the removal of said person so confined as aforesaid from the institution in which he is confined, and may order his confinement in another one of the institutions of this State. . . . *Provided*, however, that when such person is in a condition to be discharged from the institution to which he has been removed, as cured, upon that fact being certified by the chief executive officer to the justice or judge said person shall be remanded by order of the justice or judge to the place in which he was confined under commitment, indictment or sentence, or other process as aforesaid, there to be dealt with according to law, unless the maximum period of detention fixed by sentence or operation of law, shall meanwhile have expired, in which case such inmate shall be discharged from custody when cured. . . . — Laws (1918), Chapter 147, sec. 437.[1]

Whenever a person is sentenced to the punishment of death for crime and a warrant has been directed to the Principal Keeper of the State Prison stating the conviction and sentence and appointing a week within which such sentence must be executed, commanding the said Principal Keeper of the State Prison, or his deputy, to execute the sentence upon some day within the week so appointed, or whenever any such person is now awaiting, or shall hereafter be

[1] Notice that this includes epilepsy and feeblemindedness.

awaiting, such execution of his sentence for a time fixed, or, by reason of reprieve or otherwise, to be fixed, has been or shall be found to be insane, so as to be without sufficient degree of reason to be responsible for his crime until the contrary be proved, so as not to have been or be conscious of having committed the crime of which he has been, or may be, convicted, nor aware that he is amenable to punishment and is unappreciative of his situation as one condemned to death, and has been or shall be found and determined so to be by an inquisition held by the trial court by which he has been, or hereafter may be, convicted and sentenced to death, whereby the sentence of execution by death has been, or shall be, stayed and arrested, the trial justice or judge, or such justice or judge having jurisdiction shall in such case, on his own motion or upon application of the Principal Keeper of the State Prison, the Attorney General or the prosecutor of the pleas of the county in which the conviction was had, direct, by order, in writing, the transfer by the Principal or Head Keeper of the State Prison or place of execution, of such person condemned to death, whose execution has been stayed or arrested, to the New Jersey State Hospital at Trenton, to be confined in the house of detention for convict or criminal insane, or such other place provided by law for the detention of criminal insane persons, until such time as such condemned person shall be conscious of having committed such crime and shall be aware that he or she is amenable to punishment and is appreciative of his situation as one awaiting execution of the death penalty for such crime. — Laws (1922), Chap. 101, sec. 1.

The trial justice or judge, or the justice or judge having jurisdiction, upon his own motion, or upon information from the Attorney General, or the medical director of the New Jersey State Hospital at Trenton, or the Principal Keeper of the State Prison, or the prosecutor of the pleas of the county in which the conviction was had, that such condemned person, whose execution has been thus stayed and arrested, has been restored to sufficient reason, shall inquire into his or her mental condition, and if it shall be found that such person is able to understand that he or she committed the crime for which he or she was convicted, and is aware that he or she is amenable to punishment therefor, and is appreciative of his or her situation as one condemned to death, shall order, in writing, that such condemned person, by name, shall be returned to the State Prison, or the place then provided by law for the putting to death of persons so condemned, which person shall thereupon be forthwith, as therein directed, delivered by the medical director of the New Jersey State Hospital at Trenton, or his duly designated deputy, or by such person having such condemned person in his custody, to the Principal Keeper of the State Prison, or his duly designated deputy or deputies, either at the said place where such condemned person is confined, or to the State Prison, or other place then provided by law for the execution of persons condemned to death, and shall in such order designate the time and place, subject to continuance in open court, as such justice or judge may direct, when and where he will sign and deliver a warrant for the execution of such person, as otherwise provided by law, when execution has been otherwise stayed and arrested; and such justice or judge shall further direct in such order that a copy thereof shall be published in a newspaper of general circulation in the county in which such conviction was had, at the expense of such county, once in each calendar week for two weeks, commencing

not sooner than the calendar week following the making of such order. Following such publication at the time designated in such order, and after publication as aforesaid, the said justice or judge having jurisdiction as aforesaid, shall, unless good cause be shown to his satisfaction to the contrary, make out, sign and deliver a warrant for the execution of the death penalty first imposed upon such condemned person, as otherwise provided by law, which warrant, in the hands of the persons authorized by law for the purpose, shall be sufficient justification in all respects for the execution of the sentence imposed in the first instance. — Laws (1922), Chap. 101, sec. 2.

(II, 2 *b*, *c* and *d*)

When any person shall have escaped indictment or have been acquitted of the criminal charge upon trial upon the ground of insanity, upon the plea pleaded of insanity or otherwise, the court being certified by the jury or otherwise of the fact, shall carefully inquire and ascertain whether his insanity in any degree continues, and if it does, shall order him in safe custody, and direct such person to be sent to the New Jersey State Hospital at Trenton, to be confined as otherwise provided by law, and maintained as to expense as is otherwise provided for the maintenance of the criminal insane, until such time as he may be restored to reason; but such person shall not be released from confinement except upon the order of the trial justice or judge having jurisdiction to try such person who has escaped indictment or has been acquitted of such criminal charge as aforesaid. Nothing in this section shall be construed to prevent the use of the writ of habeas corpus. — Laws (1922), Chap. 101, sec. 3.

(II, 2 *d*)

Inquiry into sanity of person confined in hospital for insane; persons entitled to appear and be heard. — In all cases where any writ of habeas corpus shall be sued out by or on behalf of any person confined in any hospital for the insane or lunatic asylum in this state, the justice of the supreme court or other judicial officer who shall award such writ of habeas corpus shall assign a place and a short day for the return of such writ and shall require the person suing out such writ to give such notice as such justice or other judicial officer shall direct to the party or parties upon whose application such person so committed to said hospital or asylum of the issuance of such writ, and the time and place of its return, and upon the return thereof, the fact of the sanity or insanity of such person so detained shall be inquired into, and the party or parties who procured the commitment of such insane person to said hospital or asylum, as well as such insane person, and also the medical director or other head officer of said hospital or asylum wherein any such person is confined, shall be entitled to appear on the return of such writ. — Compiled Statutes (1910), Vol. 2, sec. 31 *a*, p. 2646.

Taking testimony as to insanity; determination by judge. — At the time and place to which such writ of habeas corpus shall be returnable, the parties aforesaid shall proceed to take testimony before the justice of the supreme court, or other judicial officer before whom any such writ of habeas corpus shall have been sued out, touching the insanity of the person so confined, and after the

proofs shall be submitted on both sides and counsel heard the justice of the supreme court or other judicial officer aforesaid shall find and determine whether such person in whose behalf said writ of habeas corpus was sued out, is sane or insane; and no person so confined shall be discharged by the said justice of the supreme court, or other judicial officer granting said writ, unless he shall find such person to be sane. — Compiled Statutes (1910), Vol. 2, sec. 31 *b* (p. 2646).

Jury may be summoned to inquire into lunacy of person. — In all cases in the first section of this act provided for, the justice of the supreme court or other judicial officer before whom any such writ of habeas corpus shall be sued out, may in his discretion award a venire to the sheriff of the county in which said writ shall be made returnable, requiring him to cause to come before said justice or other judicial officer on the return of such writ, twelve good and lawful men of his county, qualified as jurors in the circuit court of such county under the laws of this state, who shall then and there, upon their several oaths or affirmations, inquire into the lunacy of the person on whose behalf said writ of habeas corpus shall be sued out. — Compiled Statutes (1910), Vol. 2, sec. 31 *c* (p. 2646).

Trial of fact of sanity; verdict. At the time and place to which such writ of habeas corpus shall be returnable, the said jury of summond shall be sworn or affirmed, as the case may be, and the parties shall proceed to take testimony before said jury, and after proofs shall be submitted on both sides and counsel heard, and after the court shall have charged the jury, the jury shall retire in charge of the sheriff or under-sheriff, or one of the constables of the county, to deliberate upon their verdict, and the said jury shall return the fact whether they find such person to be sane or insane; and no person so confined shall be discharged by the justice of the supreme court, or other judicial officer granting said writ and awarding said venire, unless said jury shall find such person to be sane; and the verdict of such jury shall be required to be unanimous. — Compiled Statutes (1910), Vol. 2, sec. 31 *d* (p. 2646).

Any patient admitted to any institution in this state, whether upon final order of commitment or otherwise, may be paroled or discharged therefrom in accordance with the rules and regulations prescribed by the Board of Managers or the Board of chosen freeholders or the proper committee thereof, as the case may be; *provided, however*, that in all cases where the patient shall have been transferred to the institution from a correctional institution he shall not be paroled or discharged prior to the expiration of the minimum period of detention. — Laws (1918), Chap. 147, sec. 438.

NEW MEXICO

(II, 2 *b* and *c* and II, 1 *a* and *b*)

Whenever it shall appear, upon the trial of any person, charged with any crime of misdemeanor, that such person was insane at the time of the commission of the same, and such person shall be acquitted, the jury shall be required to find, specially, whether such person was insane at the time of the commission of such offence, and to declare whether he was acquitted by them on the

ground of such insanity, and if they shall so find and declare, the court, before whom the trial was had, shall have power to order such person to be kept in strict custody, in such place and in such manner as to the said court shall seem fit, at the expense of the county in which the trial was had, so long as such person shall continue to be of unsound mind. The same proceedings shall be had if any person indicted for an offence, shall upon arraignment, be found to be a lunatic or habitual drunkard,[1] by a jury lawfully impaneled for the purpose, or if upon the trial of any person so indicted, such person shall appear to the jury charged with such indictment to be a lunatic, in which case the court shall direct such finding to be recorded, and may proceed as aforesaid.[2] — Statutes (1915), sec. 4448.

(II, 2 *d*)

Monthly hereafter the superintendent of the Insane Asylum shall cause all persons in such asylum to be examined to determine their sanity and the names of all persons therein found to be sane, together with his finding as to whether such persons are minors, indigent or indigent sick, shall be certified to the district judge of the county from which said persons were sent to such asylum, and the said judge shall thereupon enter an order of discharge of such person and mail a copy thereof to said superintendent, whereupon said person shall be released from said asylum. . . . Provided, however, that convicts confined in said insane asylum who regain their sanity, or who are declared sane, shall be delivered to the proper authority to complete their sentences of confinement or death as the case may be. — Laws (1921), Chap. 192, sec. 6.[3]

Insane persons received into the asylum must, upon recovery, be discharged therefrom. Insane convicts must be received into the asylum and returned to the state penitentiary upon their recovery, unless their sentence has expired. . . . — Laws (1915), Chap. 17, sec. 3618.

(II, 3)

For the purpose of this act . . . "insane person" shall mean a person without sufficient reason to be able to distinguish right from wrong. . . . — Laws (1921), Chap. 192, sec. 1.[4]

[1] Notice that chronic alcoholics are included.

[2] If, in the progress of a trial or a criminal charge, the trial judge concludes from observation or otherwise that there is reason to doubt the sanity of the defendant at that time he should submit that question to the jury along with the principal issue, requiring a special verdict on that point. — Territory *v.* Kennedy, 15 N. M., 556, 110 Pac., 854.

[3] The actual power of discharge here is apparently with the superintendent, the judge's procedure being merely formal. In this way an expert who has had opportunity to study the defendant and who is more qualified than the judge, passes upon releases. The responsibility for discharges is thus rightfully upon the shoulders of the person best qualified to assume it.

[4] This recognizes a distinction which the codes of California and the states modeling their codes on the California code, do not clearly define, — namely, the distinction between "insanity" and that species of insanity which results in criminal irresponsibility. (*See* Oppenheimer, *The Criminal Responsibility of Lunatics*, p. 251; *see* p. 43 of text.)

NEW YORK

(I, 1)

Irresponsibility of idiot or lunatic. — An act done by a person who is an idiot, imbecile, lunatic or insane is not a crime. A person can not be tried, sentenced to any punishment or punished for a crime while he is in a state of idiocy, imbecility, lunacy or insanity so as to be incapable of understanding the proceeding or making his defense.

A person is not excused from criminal liability as an idiot, imbecile, lunatic, or insane person, except upon proof that, at the time of committing the alleged criminal act, he was laboring under such a defect of reason as:

1. Not to know the nature and quality of the act he was doing; or
2. Not to know that the act was wrong.[1] — Consolidated Laws (1918), Vol. 5, 2d Ed., Chap. XL, Art. II, sec. 1120, p. 5844.

(II, 1 *a* and *b*)

Procedure relative to diagnosis and commitment of mentally defective persons before or after trial. — Any person alleged to be mentally defective within the meaning of this chapter arraigned on a criminal charge may be committed before or after trial or conviction in a hospital or other suitable place selected by the state commission for mental defectives where such a detention hospital has not been provided, or a hospital designated to receive them by the county or local authorities of any municipality for a period not to exceed ten days, for examination as to his mental and physical condition, by any court or magistrate. The examination of the alleged mentally defective person must be made by two competent physicians, or a competent physician and psychologist, duly qualified as required by section twenty-five of this chapter. The costs of such an examination shall be determined in manner provided for by section thirty-four of this chapter. The physicians, or the physician and psychologist making the examination of the alleged mentally defective person shall certify and report in writing to the judge or justice who committed the alleged mentally defective person in the form prescribed by the commission for mental defectives and shall state the facts and circumstances upon which the judgment of the examiners is based as is required by section twenty-five of this chapter; and, if such examination discloses that the alleged mentally defective person is of such a nature as to require his supervision, control and care of his own welfare or for the welfare of the community, the judge or justice shall issue an order as set forth in section twenty-four of this chapter.[2] If the report of the examiners shows that the alleged mentally

[1] The word "wrong" is *not* limited to legal as opposed to moral wrong. — People *v.* Schmidt (1915), 216 N. Y., 324, 110 N. E., 945.

[2] Section 14 of Chapter 483, Laws of 1921, sets aside the Eastern New York Reformatory at Napanoch as a State institution for mental defectives, placing it under the control of the Commission for Mental Defectives, to be used "for the care, training and treatment of mental defectives over sixteen years of age charged with, arraigned for or convicted of criminal offenses." Consolidated Laws, Vol. 13, 2d Ed., Cumulative Supplement, 1921–1923, Vol. 2) (Laws of 1919, Chap. 633), sec. 22-*b*, pp. 1383–1384.

defective person is not mentally defective, the judge or justice shall dispose of the said person according to law. — Consolidated Laws, 1918–1920, Vol. 2, 2d Ed., Supplement, Chap. 71, Art. IV, sec. 24-*a*, pp. 1188–1189.

(II, 1 *a*)

Qualified examiners. — The certificate of mental defect must show that such person is mentally defective and may be made by two reputable physicians, graduates of an incorporated medical college, and duly licensed to practice medicine in the state of New York who have been in the actual practice of their profession at least three years, or by one such physician and one psychologist who shall have had two full years of post-graduate study in psychology at an incorporated university or college and three years of actual clinical experience. Such examiners shall file with the commission for mental defectives a certified copy of the certificate of a judge of a court of record showing such qualifications in accordance with forms prescribed by such commission. — Consolidated Laws, 1918–1920, Vol. 2, 2d Ed., Supplement, Chap. 71, Art. IV, sec. 25, p. 1189.

Certificate of mental defect. — Such physician or psychologist shall have examined the person alleged to be mentally defective within sixty days next before the granting of the order of commitment or shall make such examination upon order of the court. The date of the certificate of mental defect shall be the date of the last examination. Such certificate of mental defect shall be the form prescribed by the commission for mental defectives and shall contain the facts and circumstances upon which the judgment of the examiners is based and show that the alleged mental defect of the person examined is of such a nature as to require his supervision, control and care for his own welfare or for his own welfare and for the welfare of others or for the welfare of the community. Neither of the examiners shall be a relative of the person applying for the order, nor of the person alleged to be mentally defective, nor any person having any pecuniary interest, directly or indirectly, in the institution to which it is proposed to commit such alleged mental defective. But this shall not apply to members of the medical staff of a state institution for mental defectives. — Consolidated Laws, 1918–1920, Vol. 2, 2d Ed., Supplement, Chap. 71, Art. IV, sec. 26, p. 1189.

(II, 1 *b*)

. . . In the case of an alleged mentally defective person over sixteen years of age charged with a misdemeanor the judge or justice may, if satisfied that the alleged mental defective is mentally defective, order his commitment to one of the state institutions for mental defectives. Such order shall be made upon a verified petition therefor and the certificate of mental defect made by two qualified examiners, or upon such petition and certificate and after a hearing to determine such question as provided in this article. . . . — Consolidated Laws, 1918–1920, Vol. 2, 2d Ed., Supplement, Chap. 71, Art. IV, sec. 24, pp. 1187–1188.

Persons who may be committed to the institution at Napanoch. — A male mental defective over sixteen years of age charged with, arraigned for or convicted of a criminal offense may be committed to the state institution at

Napanoch, established pursuant to section twenty-two-*b*. . . . — Consolidated Laws, Vol. 13, 2d Ed. (Cumulative Supplement, 1921–1923, Vol. 2) (Laws, 1921, Chap. 483), sec. 24-*b*, p. 1385.

(II, 1 *a* and *b*)

Proceedings when person in confinement appears to be insane. — If any person in confinement under indictment, or under a criminal charge, or for want of bail for good behavior, or for keeping the peace, or for appearing as a witness, or by order of any justice, or under any other than civil process, shall appear to be insane, a judge of a court of record of the city or county or a justice of the supreme court of the judicial district in which the alleged insane person is confined, in all cases outside the city of New York, and in all cases within the city of New York in which the maximum fine for the offense exceeds five hundred dollars or the term of imprisonment for the offense exceeds one year, shall institute a careful investigation, call two legally qualified examiners in lunacy, neither of whom shall be a physician connected with the institution in which such person so to be examined is confined, and other credible witnesses, invite the district attorney to aid in the examination, and, if he deem it necessary, call a jury, and for that purpose is fully empowered to compel the attendance of witnesses and jurors, and if it be satisfactorily proved that he is insane, said judge shall discharge him from imprisonment and instead commit him to a state institution for the care, custody and treatment of the insane, where he shall remain until restored to his right mind. The superintendent of such institution shall then inform the said judge and district attorney so that the person so confined may be returned forthwith to the authority by which he was originally held in confinement; and the proceeding for which the person was in such confinement shall then be resumed. The fees of the medical examiners called as witnesses, and the other necessary expenses for such investigation, shall be audited and allowed at a reasonable sum by said judge, and upon the presentation of the order made by him, such fees and expenses shall be paid by the county treasurer of the county where such person is confined, as a county charge. In case any person within the city of New York, in confinement under indictment or under a criminal charge, or for want of bail for good behavior, or for keeping the peace, or for appearing as a witness, or by order of any justice, or under any other than civil process, in which the maximum fine for the offense does not exceed five hundred dollars or the maximum term of imprisonment for the offense does not exceed one year, or in which no fine or term of imprisonment is provided, shall appear to be insane, the judge or magistrate of the court having jurisdiction over the proceeding in which such person is confined shall commit such apparently insane person, in the boroughs of Manhattan and the Bronx to the care and custody of the board of trustees of Bellevue and allied hospitals who shall keep such person in a safe and comfortable place until the question of his sanity be determined, and in the boroughs of Brooklyn, Queens and Richmond, to the care and custody of the commissioner of public charities, who shall keep such person in a safe and comfortable place, until the question of his sanity be determined. Whenever in the city of New York a person is committed as apparently insane as above provided, it shall be the duty of the board of trustees of Bellevue and allied

hospitals or the commissioner of public charities, as the case may be, forthwith to take proper measures for the determination of the question of the insanity of such person. If the person shall be found to be sane by the authorities to whom he was committed, the judge committing such person shall be notified, and such person shall be returned forthwith to the authority by which he was originally held in confinement; and the proceeding for which the person was in such confinement shall then be resumed. If such person be found to be insane, and no demand is made for a hearing in behalf of the alleged insane person, a judge of a court of record of the city or county or a justice of the supreme court of the judicial district in which the alleged insane person is confined, shall discharge him from imprisonment and instead commit him to a state institution for the care, custody and treatment of the insane, where he shall remain until restored to his right mind. If a demand is made for a hearing in behalf of the alleged insane person such judge shall proceed in accordance with sections eighty-two and eighty-three of chapter twenty-seven of the consolidated laws. When an insane person, committed to a state institution in accordance with the provisions of this section, shall have been restored to his right mind, the superintendent of such institution shall inform the judge who committed the person of the fact of his recovery, and such person shall be forthwith returned to the authority by which he was originally held in confinement; and the proceeding for which the person was in such confinement shall then be resumed. — Gilbert's Criminal Code (1924), Code of Criminal Procedure, Part VI, Title IV–A, sec. 836, p. 580.

(II, 1 *a*)

Appointment of commission to determine whether accused was insane at time of the commission of the crime. — When a defendant pleads insanity, as prescribed in section three hundred and thirty-six, the court in which the indictment is pending, instead of proceeding with the trial of the indictment, may appoint a commission of not more than three disinterested persons, to examine him and report to the court as to his sanity at the time of the commission of the crime.[1]

The commission must summarily proceed to make their examination. Before commencing they must take the oath prescribed in the Code of Civil Procedure, to be taken by referees. They must be attended by the district attorney of the county, and may call and examine witnesses and compel their attendance. The counsel of the defendant may take part in the proceedings. When the commissioners have concluded their examination, they must forthwith report the facts to the court with their opinion thereon. — Gilbert's Criminal Code (1924), Code of Criminal Procedure, Part VI, Title XII, Chap. V, sec. 658, p. 488.

[1] The report of the commission is for *temporary purposes merely* and cannot be regarded as an adjudication even as to the prisoner's then present condition. People ex rel. Thaw *v.* Lamb, 118 N. Y. Supp., 389 (1909).

This section invests the trial court with a discretion to use such examination or not as it might, "from inspection, observation, and information," judge to be "necessary or expedient." — People *v.* McElvaine, 125 N. Y., 596, 609, 26 N. E., 929 (1891).

(II, 1 *b*)

If found insane, trial or judgment suspended. — If the commission find the defendant insane[1] the trial or judgment must be suspended until he becomes sane; and the court, if it deem his discharge dangerous to the public peace or safety, must order that he be, in the meantime, committed by the sheriff to a state lunatic asylum, and that upon his becoming sane, he be redelivered by the superintendent of the asylum to the sheriff. — Gilbert's Criminal Code (1924), Code of Criminal Procedure, Part IV, Title XII, Chap. V, sec. 659, p. 489.

Detention of defendant in asylum, and proceedings on his becoming sane. — If the defendant be received into the asylum, he must be detained there until he become sane. When he becomes sane, the superintendent must give a written notice of that fact to a judge of the supreme court of the district in which the asylum is situated. The judge must require the sheriff without delay to bring the defendant from the asylum and place him in the proper custody until he be brought to trial, judgment, or execution as the case may be, or be legally discharged. — Gilbert's Criminal Code (1924), Code of Criminal Procedure, Part IV, Title XII, Chap. V, sec. 661, p. 489.

(II, 1 *a*)

What cause may be shown against the judgment. — He may show for cause, against the judgment,

1. That he is insane; and if, in the opinion of the court, there be reasonable ground for believing him to be insane, the question of his insanity must be tried as provided by this Code. If, upon the trial of that question, it is found that he is sane, judgment must be pronounced; but if found insane, he must be committed to the state lunatic asylum until he becomes sane; and when notice is given of that fact, he must be brought before the court for judgment. . . . — Gilbert's Criminal Code (1924), Code of Criminal Procedure, Part IV, Title IX, Chap. I, sec. 481, p. 379.

(II, 1 *a* and *b*)

Proceedings when person under sentence of death is declared insane. — If a defendant in confinement under sentence of death appears to be insane, the governor may appoint a commission of not more than three disinterested persons to examine him, and report to the governor as to his sanity at the time of the examination. The commission must summarily proceed to make their examination. Before commencing they must take the oath prescribed in the code of civil procedure to be taken by referees. They must be attended by the

[1] It will be noticed that the first paragraph of this section pertains specifically to insanity at the "time of the commission of the crime", and this section properly belongs under (II, 2 *a*); but according to section 659, section 658 also covers insanity *at the time of investigation.* These two sections seem to provide a method of avoiding the expense and time of a jury trial, where the defendant is manifestly of such mental condition that a trial would only result in acquittal by reason of insanity. They provide for an examination *before trial* into the mental condition of the accused, *both* at the time of the offense and at the time of examination.

district attorney of the county in which the murder was committed, upon at least seven days' notice to him, and may call and examine witnesses and compel their attendance. The counsel for the defendant may take part in the proceedings. When the commissioners have concluded their examination, they must forthwith report the facts to the governor with their opinion thereon. Whenever any person under sentence of death shall be found insane by such commission, the governor may, in his discretion, order his removal to a state hospital for insane convicts, there to remain until restored to his right mind, and it shall be the duty of the medical superintendent of such hospital, whenever, in his opinion, said convict is cured of his insanity, to report the fact to the state commission in lunacy and a justice of the supreme court of the district in which said hospital is situated, which justice shall thereupon inquire into the truth of such fact, and if the same be proved to his satisfaction, he shall so certify it under his official hand to the clerk of the court in which such convict was sentenced, and cause him, the said convict, to be returned to the custody of the warden of the state prison whence he came, there to be dealt with according to law. — Gilbert's Criminal Code (1924), Code of Criminal Procedure, Part IV, Title X, Chap. I, sec. 495-A, pp. 392–393.

(II, 1 *b*)

Examination; suspension of execution. — If it be found by the examination that the defendant is insane, the warden must suspend execution of the warrant directing the defendant's death, until he receives a warrant from the governor directing that the defendant be executed. — Gilbert's Criminal Code (1924), Code of Criminal Procedure, Part IV, Title X, Chap. I, sec. 498, p. 393.

(II, 2 *a*)

Plea of insanity. — Whenever a person, in confinement under indictment, desires to offer the plea of insanity, he may present such plea at the time of his arraignment, as a specification under the plea of not guilty. — Gilbert's Criminal Code (1924), Code of Criminal Procedure, Part IV, Title V, Chap. I, sec. 336, p. 252.

(II, 2 *c*)

When defendant acquitted on the ground of insanity, the fact to be stated with the verdict; commitment of defendant to state asylum. — When the defense is insanity of the defendant the jury must be instructed, if they acquit him on that ground, to state the fact with their verdict. The court must, thereupon, if the defendant be in custody, and they deem his discharge dangerous to the public peace or safety, order him to be committed to the state lunatic asylum, until he becomes sane. — Gilbert's Criminal Code (1924), Code of Criminal Procedure, Part IV, Title VII, Chap. III, sec. 454, p. 353.

(II, 2 *d*)

Habeas corpus. — Any one in custody as a mentally defective person is entitled to a writ of habeas corpus upon a proper application as provided by the code of civil procedure or civil practice act. The history of the patient as it appears in the case records may be given in evidence, and the superin-

tendent or medical officer in charge of the institution wherein such person is held in custody, or any other proper person, shall be sworn touching the mental condition of such person. Where a second or subsequent application is made for the discharge from custody of the same person, any party to the proceeding may introduce in evidence any testimony in relation to the mental condition of such patient received upon any former hearing or trial, together with all the exhibits introduced in evidence upon such hearing or trial in connection with such testimony without calling the witnesses who gave such testimony; such evidence to have the same force and effect as if such witnesses had been called. — Consolidated Laws, Vol. 13, 2d Ed., (Cumulative Supplement, 1921–1923, Vol. 2), (Laws, 1921, Chap. 483), sec. 35, p. 1388.

Habeas corpus. — Any one in custody as an insane person is entitled to a writ of habeas corpus, upon a proper application made by him or some friend in his behalf. Upon the return of such writ, the fact of his insanity shall be inquired into and determined. The medical history of the patient, as it appears in the case book, shall be given in evidence, and the superintendent or medical officer in charge of the institution wherein such person is held in custody, and any proper person, shall be sworn touching the mental condition of such person. Where a second or subsequent application is made for the discharge from custody of the same patient, any party to the proceeding may introduce in evidence any testimony, in relation to the mental condition of such patient, received upon any former hearing or trial, together with all the exhibits introduced in evidence upon such hearing or trial in connection with such testimony without calling the witnesses who gave such testimony, such evidence to have the same force and effect as if witnesses had been called.

The petition in such second or subsequent application shall state what other writs have been granted and the determination made thereon, and shall have annexed to it a copy of the determination, or a proper reference thereto, and said order or determination shall be conclusive evidence of the facts stated therein unless such order shall otherwise specify. All writs of habeas corpus hereunder must be made returnable before a justice of the supreme court or a county judge of the county in which the incompetent person is held. If at the time there is no such official in the county capable of acting, the writ shall be made returnable before the nearest accessible supreme court justice or county judge in an adjoining county. — Consolidated Laws, Vol. 12, 2d Ed., (Cumulative Supplement, 1921–1923, Vol. 1), (Laws, 1921, Chap. 673), sec. 93, pp. 1109–1110.

Examining physicians. — In a criminal action or proceeding or in a special proceeding instituted by the state writ of habeas corpus or certiorari to inquire into the cause of detention, in which the soundness of mind of a person is the issue, the court in which or the judge or justice before whom the action or special proceeding is pending may appoint not more than three disinterested, competent physicians to examine such person as to his soundness of mind at the time of the examination. Any such examining physician may be sworn as a witness at the instance of any party to the proceeding. The compensation of such examining physician for making such examination and testifying, when certified by the presiding judge or justice of the court or judge or justice making

the appointment, shall be paid out of any funds available for the payment of and in the same manner as other court expenses. — Consolidated Laws, Vol. 4, 2d Edition, Chap. XXX, Art. II, sec. 31, pp. 4165–4166.

(II, 3)

. . . " Mental defective " means any person afflicted with mental defectiveness from birth or from an early age to such an extent that he is incapable of managing himself and his affairs, who for his own welfare or the welfare of others or of the community requires supervision, control or care, and who is not insane or of unsound mind to such an extent as to require his commitment to an institution for the insane as provided by the insanity law. . . ; — Vol. 11, Consolidated Laws, 1918–1920, Vol. 2, 2d Ed., Supplement Chap. 71, Art. I, sec. 2, (5), p. 1177.

Morbid criminal propensity no defense. — A morbid propensity to commit prohibited acts, existing in the mind of a person who is not shown to have been incapable of knowing the wrongfulness of such acts, forms no defense to a prosecution therefor. — Consolidated Laws, 1918, Vol. 5, 2d Ed. Chap. XL, Art. II, sec. 34, p. 5598.

NORTH CAROLINA

(II, 1 *b* and II, 2 *c*)

Insane persons charged with crime to be committed to hospital. — All persons who may hereafter commit crime while insane, and all persons who, being charged with crime, and are adjudged to be insane at the time of their arraignment, and for that reason cannot be put on trial for the crimes alleged against them, shall be sent by the court before whom they are or may be arraigned for trial, when it shall be ascertained by due course of law that such person is insane and cannot plead, to the hospital for the dangerous insane, and they shall be confined therein under the rules and regulations prescribed by the board of directors under the authority of this article, and they shall be treated, cared for, and maintained in said hospital like patients in other state hospitals. Their confinement in said hospital shall not be regarded as punishment for any offense: Provided, that no insane person who has been or may hereafter be committed to the state hospital at Morganton, Raleigh, or Goldsboro shall be transferred therefrom to the hospital for the dangerous insane. — Consolidated Stats. (1919), Vol. 2, sec. 6236.

Proceedings in case of recovery of patient charged with crime. — Whenever a person confined in any hospital for the insane, and against whom an indictment for crime is pending, has recovered or been restored to normal health and sanity, the superintendent of such hospital shall notify the clerk of the court of the county from which said person was sent, and the clerk will place the case against said person upon the docket of the superior or criminal court of his county for trial, and the person shall not be discharged without an order from said court. In all cases where such person confined in the hospital for the dangerous insane shall have recovered his mind, the clerk of the court of the county from which he was committed shall fix the amount of bail required for his appearance at the next term of the superior or criminal court of his county for trial, except in cases where the offense charged is a capital felony, and in this case only the judge of the superior court residing within or holding the

courts of said district shall have the power to fix bail. If the person confined in the hospital for the dangerous insane, and reported sane as aforesaid, shall give the bond fixed by the clerk or judge as above provided for, he shall be discharged by the superintendent, and if he does not give the bond, he shall be transferred to the jail of the county from which he was committed. The superintendent will notify the sheriff of said county, and the sheriff will remove the person to the jail of his county. The sheriff will pay the expenses of such removal, and the county of the person's settlement will repay the sheriff for his expenses and services. — Consolidated Stats. (1919), Vol. 2, sec. 6240.

(II, 2 *c* and II, 1 *b*)

Persons acquitted of certain crimes or incapable of being tried, on account of insanity, committed to hospital. — When a person accused of the crime of murder, attempt at murder, rape, assault with the intent to commit rape, highway robbery, train wrecking, arson, or other crime, shall have escaped indictment or shall have been acquitted upon trial upon the ground of insanity, or shall be found by the court to be without sufficient mental capacity to undertake his defense or to receive sentence after conviction, the court before which such proceedings are had shall detain such person in custody until an inquisition shall be had in regard to his mental condition. The judge shall, at the term of court, at which such person is acquitted, cause notice to be given in writing to such person and his attorney, and, if in his good judgment it be necessary, to his nearest relative, naming the day upon which he shall proceed to make an inquisition in regard to the mental condition of such person. The judge shall cause such witnesses to be summoned and examined as he may deem proper or as the person so acquitted or his counsel may desire. At such inquisition the judge shall cause the testimony to be taken in writing and be preserved, and a copy of which shall be sent to the superintendent of the hospital for the dangerous insane to which such person is or has been committed. If upon such inquisition the judge shall find that the mental condition or disease of such person is such as to render him dangerous either to himself or other persons, and that his confinement for care, treatment, and security demands it, he shall commit such person to the hospital for dangerous insane, to be kept in custody therein for treatment and care as herein provided. Such person shall be kept therein, unless transferred under the previous provisions of this chapter, until restored to his right mind, in which event it shall be the duty of the authorities having the care of such person to notify the sheriff of the county from which he came, who shall order that he appear before the judge of the superior court of the district, to be dealt with according to law. The expense incident to such commitment and removal shall be paid by the county authorities from which such patient was sent. — Consolidated Stats. (1919), Vol. 2, sec. 6237.[1]

[1] In re Boyett, 136 N. C., 415, 48 S. E., 789, 67 L. R. A., 972, 103 A. S. R., 944 (1904), was an appeal from an order denying a writ of *habeas corpus* and construing the section which preceded the above, and which was as follows: "When any person accused of the crime of murder . . . shall have escaped indictment, or shall have been acquitted upon the trial upon the ground of insanity . . . the court before which such proceedings are had shall in its

(II, 2 *d*)

Persons acquitted of crime on account of insanity; how discharged from hospital. — No person acquitted of a capital felony on the ground of insanity, and committed to the hospital for the dangerous insane, shall be discharged therefrom unless an act authorizing his discharge be passed by the general assembly. No person acquitted of a crime of a less degree than a capital felony and committed to said department shall be discharged therefrom except upon an order from the governor. No person convicted of a crime, and upon whom judgment was suspended by the judge on account of insanity, shall be discharged from the said hospital except upon the order of the judge of the district or of the judge holding the courts of the district in which he was tried: Provided, that nothing in this section shall be construed to prevent such person so confined in the hospitals for the dangerous insane from applying to any judge having jurisdiction for a writ of habeas corpus. No judge issuing a writ of habeas corpus upon the application of such person shall order his discharge until the superintendents of the several state hospitals shall certify that they have examined such person and find him to be sane, and that his detention is no longer necessary for his own safety or the safety of the public. — Consolidated Stats. (1919), Vol. 2, sec. 6239.

(II, 3)

Idiots not admitted. — No idiot shall be admitted to any hospital, and for the purpose of this chapter an idiot is defined to be a person born deficient in mind. — Consolidated Stats. (1919), Vol. 2, sec. 6185.

Ex-convicts with homicidal mania committed to hospital. — Whenever any person who has been confined in the state's prison under sentence for the felonious killing of another person, and who has been discharged therefrom at the expiration of his term of sentence, or as the result of executive clemency,

discretion commit such person to the hospital for the dangerous insane to be kept in custody therein for treatment and care as herein provided. . . . No person acquitted of a capital felony on the ground of insanity and committed to the hospital for the dangerous insane shall be discharged therefrom unless an act authorizing his discharge be passed by the General Assembly." *Held*, that the statute is unconstitutional in that the power to commit to the hospital for the dangerous insane is wholly discretionary with the court and the statute makes no provision for giving persons so acquitted notice or an opportunity to be heard, or to require the question of his insanity at the time of acquittal to be entered into; that it expressly deprives him of the constitutional right of the writ of *habeas corpus*, and that the judicial department of government can not be deprived of its power in favor of the legislative branch to inquire into the cause of a person's restraint. The last argument, based on the theory of a tripartite division of the functions of government, was held by the courts to be "absolutely essential to a constitutional government." It is noteworthy that Section 6239 still retains the provision for discharge only by act of the General Assembly.

The power to detain under this act applies only to serious offenses mentioned or those of like kind and grade and not to misdemeanors. State *v.* Craig, 176 N. C., 740, 745, 97 S. E., 400.

shall thereafter so act as to justify the belief that he is possessed of a homicidal mania, and shall be duly adjudged insane, in accordance with the provisions of article three of this chapter, the clerk of the superior court or other officer having jurisdiction of the proceedings in which such person shall be adjudged insane may, in his discretion, commit such person to the hospital for the dangerous insane, or to one of the other state hospitals for the insane, as authorized and provided in this chapter. — Consolidated Stats. (1919), Vol. 2, sec. 6241.[1]

NORTH DAKOTA

(I, 1)

Insane person cannot be tried or punished. — An act done by a person in a state of insanity cannot be punished as a public offense, nor can a person be tried, adjudged to punishment or punished for a public offense, while he is insane. — Compiled Laws (1913), Vol. II, sec. 11063.

Who capable of crime. Exception. — All persons are capable of committing crime, except those belonging to the following classes:

3. Idiots.

4. Lunatics, insane persons and all persons of unsound mind, including persons temporarily or partially deprived of reason, upon proof that at the time of committing the act charged against them they were incapable of knowing its wrongfulness.

6. Persons who commit an act or make an omission, otherwise criminal or punishable, without being conscious thereof. — Compiled Laws (1913), Vol. II, sec. 9207.

(II, 1 *a* and *b*)

NOTE. — Sections 11064–11070, Vol. II, Compiled Laws of North Dakota, 1913, describing the procedure for determining the question of insanity before, during or immediately after trial and before judgment, and the procedure upon recovery from insanity at such times, are similar to sections 1368–1372 of the Penal Code of California, 1915, sec. 1371.

[1] After these sections had been compiled the North Carolina Session Laws for 1923 appeared, and Chapter 165 thereof amends secs. 6236–6242 above, abolishing the State hospital for the dangerous insane, and providing for use of other State hospitals.

Article Three mentioned in Section 6241 outlines commitment proceedings. Under Section 6192, the clerk of the court or justice of the peace conducts the inquisition, calling to his assistance "the county physicians of the county, or some other licensed and reputable physician, resident of the state", or, according to Section 7068, the county health officer who, if there be one, performs the duties of county physician. The clerk is required to "take testimony of at least one licensed physician, resident of this state, and, if possible, a member of the family, or some friend or person acquainted with the alleged insane person, who has had opportunities to observe him after such insanity is said to have begun."

When convict appears insane. — If a convict sentenced to death appears to be insane the sheriff of the county wherein conviction was had, upon notice thereof from the warden of the penitentiary, or his deputy, shall forthwith give notice thereof to the judge of the district court wherein the convict was sentenced, and to the state's attorney, and shall summon a jury of six impartial men to inquire into such insanity at the time and place to be fixed by the judge. — Compiled laws (1913), Vol. II, sec. 10983.

Who shall attend inquiry. — The judge, clerk of court and state's attorney shall attend the inquiry; witnesses may be produced and examined before the jury; if it be found that the convict is sane, the sheriff must forthwith return the prisoner to the penitentiary together with a certified copy of the findings at the examination and the warden or his deputy must execute the judgment; if the convict is found insane, the judge shall suspend the execution until the sheriff receives a warrant from the governor directing the same; and the finding of the jury and order of the judge, certified by the judge, shall be entered on the journal of the court by the clerk. — Compiled Laws (1913), Vol. II, sec. 10984.

(II, 2 *b* and *c*)

When defense insanity, and jury acquits. — If the defense is the insanity of the defendant, the jury must be instructed, if they acquit him on that ground, to state the fact with their verdict. The court may thereupon, if the defendant is in custody, and it deems his discharge dangerous to the public peace or safety, order him to be committed to the care of the sheriff until he becomes sane. — Compiled Laws (1913), Vol. II, sec. 10901.

(II, 2 *c*)

Acquitted for insanity. Court may commit. — When a jury has returned a verdict acquitting a defendant upon the ground of insanity, the court may thereupon, if the defendant is in custody, and it deems his discharge dangerous to the public safety, order him to be committed to the state hospital for the insane, or to the care of such person or persons as the court may direct till he becomes sane. Compiled Laws (1913), Vol. II, sec. 9210.

(II, 2 *d*)

Insane persons entitled to habeas corpus. — All persons confined as insane shall be entitled to the benefit of the writ of habeas corpus, and the question of insanity shall be decided at the hearing, and if the judge or court shall decide that the person is insane, such decision shall be no bar to the issuing of the writ a second time, whenever it shall be alleged that such person shall have been restored to reason. — Compiled Laws (1913), Vol. I, sec. 2564.

(II, 3)

Appointment of commissioners of insanity. — In each organized county of this state there shall be a board of commissioners consisting of three persons, to be styled " commissioners of insanity ", two of whom shall constitute a

quorum. The county judge shall be a member of such board and its chairman. The other two members shall be appointed by the board of county commissioners, one of whom shall be a reputable practicing physician, and the other a reputable practicing attorney; and such appointment shall be made from persons residing as near as may be to the county seat. Such commissioners shall be appointed for the term of two years and until their successors are appointed and qualified. The appointment of successors can be made at any time within three months prior to the expiration of the term of the incumbents. In case of the temporary absence of such commissioners or their inability to act, the county judge shall call to his aid a reputable practicing physician or attorney, who, after qualifying as in other cases, may act in the same capacity. In case of the temporary absence from the county of the county judge or his inability to act, the state's attorney shall act in his place and stead, as chairman of said board, and shall have full authority to issue subpœnas and issue commitments, and do all necessary acts as said chairman. He shall take the same oath as that required of the commissioners in section 2548. The records in such cases must show the fact of all absences. — Compiled Laws (1913), Vol. I, sec. 2547.[1]

Duties and powers of commissioners. — Such commissioners shall have cognizance of all applications for admission to the hospital or for the safe keeping otherwise of insane persons within their county, except in cases otherwise specially provided for. They shall have power to issue subpœnas and compel obedience thereto, to administer oaths, and do any act necessary and proper in the premises. — Compiled Laws (1913), Vol. I, sec. 2550.

Terms "insane" and "idiot" defined. — The term "insane" as used in this article includes any species of insanity or mental derangement. The term "idiot" is restricted to persons supposed to be naturally without mind. No idiot shall be admitted into the hospital for the insane. — Compiled Laws (1913), Vol. I, sec. 2567.

OHIO

(II, 1 *a*)

Grand jury finding accused insane. — If a grand jury upon investigation of a person accused of crime finds such person to be insane, it shall report such finding to the court of common pleas. Such court shall order a jury to be impaneled to try whether or not the accused is sane at the time of such impaneling, and such court and jury shall proceed in a like manner as provided by law when the question of the sanity of a person indicted for an offense is raised at any time before sentence. If such person is then found to be insane, he shall be committed to the Lima state hospital until restored to reason. This section shall not be in force and effect until the Lima state hospital is ready for the reception of inmates as certified to the courts by the governor and secretary of state. — General Code (Throckmorton) (1921), sec. 13577.

[1] This and Section 2550 are included as an example of typical county boards of commissioners in existence in a number of States.

Person under indictment insane. — If a person under indictment appears to be insane, proceedings shall be had as provided for persons not indicted because of insanity. If such person is found to be insane he shall be committed to the Lima state hospital until restored to reason when the superintendent thereof shall notify the prosecuting attorney of the proper county who shall proceed, as provided by law, with the trial of such person under indictment. — General Code (Throckmorton) (1921), sec. 13614.

Whether accused is insane may be tried to a special jury. — When the attorney of a person indicted for an offense suggests to the court in which such indictment is pending, and before sentence, that such person is not then sane and a certificate of a reputable physician to that effect is presented to the court, such court shall order a jury to be impaneled to try whether or not the accused is sane at the time of such impaneling. Thereupon a time shall be fixed for a trial, a jury shall be drawn from the jurybox and a venire issued, unless the prosecuting attorney or the attorney of the accused demand a struck jury, in which case such jury shall be selected and summoned as required by law. The jury shall be sworn to try the question whether the accused is or is not sane, and a true verdict give according to the law and the evidence, and, on the trial, he accused shall hold the affirmative. — General Code (Throckmorton), (1921), sec. 13608.

Verdict by three fourths of jury. — If three fourths of the jurors provided for in the next preceding section, agree upon a verdict, their finding may be returned as the verdict of such jury, and a new trial may be granted on the application of the attorney of the accused, for the causes and in the manner provided in this title. — General Code (Throckmorton) (1921), sec. 13609.

(II, 1 *b*)

Proceedings on verdict of such jury. — If three fourths of the jurors do not agree, or the verdict is set aside, another jury shall be impaneled to try the question. If the jury find the accused to be sane and no trial has been had on the indictment, a trial shall be had thereon as if the question had not been tried. If the jury find him to be not sane, that fact shall be certified by the clerk to the probate court, and the accused, until restored to reason, shall be dealt with by such court as upon inquest had. If he is discharged, the bond given for his support and safe-keeping shall contain a condition that, when restored to reason, he shall answer to the offense charged in the indictment, or of which he has been convicted, at the next term of the court thereafter and abide the order of such court. — General Code (Throckmorton) (1921), sec. 13610.

May be prosecuted when restored to reason. — When restored to reason, the accused may be prosecuted for an offense committed by him previous to such insanity, or sentenced on a conviction had previous thereto. General Code (Throckmorton) (1921), sec. 13611.

(II, 1 *a*)

If convict appear insane, inquest to be had. — If a convict, sentenced to death, appears to be insane, the sheriff shall forthwith give notice thereof to a

judge of the court of common pleas of the judicial district, summon a jury of twelve impartial men to inquire into such insanity at a time and place to be fixed by such judge, and give immediate notice thereof to the prosecuting attorney. — General Code (Throckmorton) (1921), sec. 13735.

Proceedings on the inquest. — The judge, clerk of the court, and prosecuting attorney shall attend the inquiry. Witnesses may be produced and examined before the jury and their finding shall be in writing and signed by them. If it be found that the convict is insane, the judge shall suspend the execution until the sheriff receives a warrant from the governor directing such execution. The finding of such jury and order of such judge, certified by him, shall be entered on the journal of the court by the clerk. — General Code (Throckmorton) (1921), sec. 13736.

(II, 1 *b*)

When convict restored, governor to order execution. — The sheriff shall forthwith transmit a copy of such finding to the governor, who, when convinced that the convict is of sound mind, may issue a warrant appointing a time for his execution. — General Code (Throckmorton) (1921), sec. 13737.

(II, 2 *c*)

When accused was insane or an idiot at commission of offense. — If, before the indictment of a person confined in jail charged with an offense, notice in writing is given by a citizen to the sheriff or jailer that such person was insane or an idiot at the time the offense was committed, or has since become insane, such sheriff or jailer shall forthwith give the notices and an examining court shall be held as provided in the next preceding section. If such judge find that such person was an idiot when he committed the offense, or was then or still is insane, or afterward became and still is insane, he shall, at his discretion, proceed as required by law after inquest held. — General Code (Throckmorton) (1921), sec. 13531.

Proceedings when accused is acquitted on the sole ground of insanity. — When a person tried upon an indictment for an offense is acquitted on the sole ground that he was insane, such fact shall be found by the jury in the verdict, and certified by the clerk to the probate court. Such person shall not be discharged, but forthwith delivered to the probate court, to be proceeded against upon the charge of lunacy, and the verdict shall be prima facie evidence of his insanity. — General Code (Throckmorton) (1921), sec. 13612.

Acquittal because of insanity. — When a person tried upon an indictment for an offense is acquitted on the sole ground that he was insane, and proceedings are had thereafter as provided by law, he shall be committed to the Lima state hospital. This section shall not be in force and effect until the Lima state hospital is ready for the reception of inmates as certified to the courts by the governor and secretary of state. — General Code (Throckmorton) (1921), sec. 13679.

(II, 2 *d*)

Proceedings when accused is restored to reason. — When a lunatic confined in an asylum or an infirmary, under the provisions of the next preceding section

or under the provisions of law, providing that the probate court shall examine an alleged lunatic who is in jail awaiting examination before a magistrate, is restored to reason, the superintendent having him in charge shall notify the prosecuting attorney of the proper county of such fact, who, within a reasonable time, shall cause the the clerk of the court to issue a capias, upon which the accused may be arrested and committed to the jail of the county, to answer the offense charged against him. In default of such capias, such superintendent shall discharge him. — General Code (Throckmorton) (1921), sec. 13613.

When a patient may be discharged. — On consent and advice of the trustees, the superintendent may discharge any patient from a state hospital for the insane, when he deems such discharge proper and necessary. No patient who in the judgment of the superintendent has homicidal or suicidal propensities shall be discharged. If, in the opinion of the superintendent, the condition of the patient at the time of discharge justifies it, he may permit him to go to his home, or leave the institution unattended. — General Code (Throckmorton) (1921), sec. 1964.[1]

Benefit of habeas corpus. — All persons confined as insane shall be entitled to the benefit of the writ of habeas corpus, and the question of insanity must be decided at the hearing. If the judge decides that such person is insane, the decision shall be no bar to the issuing of the writ a second time, if it is alleged that such person has been restored to reason. — General Code (Throckmorton) (1921), sec. 1976.

(II, 3)

Definitions of terms. — The terms " insane " and " lunatic ", as used in this chapter, include every species of insanity or mental derangement; the term " idiot " is restricted to a person foolish from birth, or supposed to be naturally without a mind. . . . — General Code (Throckmorton) (1921), sec. 1983.

OKLAHOMA

(I, 1)

Insane person cannot be tried or punished. — An act done by a person in a state of insanity cannot be punished as a public offense, nor can a person be tried, adjudged to punishment, or punished for a public offense, while he is insane. — Comp. Stats. (1921), Vol. 1, sec. 2866.

Persons capable of committing crimes. — All persons are capable of committing crimes, except those belonging to the following classes:

Third. Idiots.

Fourth. Lunatics, insane persons, and all persons of unsound mind, including persons temporarily or partially deprived of reason, upon proof that

[1] This section eliminates to some extent the objections raised by Dr. Wm. A. White in his "Insanity and the Criminal Law", in that no person who, in the judgment of the superintendent of the insane asylum, has homicidal or suicidal insane propensities can be discharged.

at the time of committing the act charged against them, they were incapable of knowing its wrongfulness.

Sixth. Persons who committed the act charged without being conscious thereof. — Comp. Stats. (1921), Vol. 1, sec. 1511.

(II, 1 *a* and *b*)

NOTE. — Sections 2867–74, Vol. 1, Comp. Oklahoma Statutes, 1921, prescribing the procedure for determining the question of insanity before, during or immediately after trial and before judgment and the procedure upon recovery from insanity at such times are similar to sections 1368–72 of the Penal Code of California (1915).

Disposition of insane defendants. — When it is contended on behalf of the defendant in any criminal prosecution that he is at the time of the trial a lunatic, an insane person, or a person of unsound mind, the court shall submit to the jury a proper form of verdict, and if the jury finds the defendant not guilty on account of such lunacy, insanity or unsoundness of mind, they shall so state in their verdict, and the court shall thereupon order the defendant committed to the state hospital for the insane, or other state institution provided for the care and treatment of cases such as the one before the court, until the sanity and soundness of mind of the defendant be judicially determined, and he be discharged from said institution according to law. — Comp. Stats. (1921), Vol. 1, sec. 2749.[1]

Defendant may show cause against judgment. — He may show for cause against the judgment:

First. That he is insane; and if, in the opinion of the court, there is reasonable ground for believing him to be insane, the question of his insanity must be tried as hereinafter in this chapter provided for. If upon the trial of that question the jury find that he is sane, judgment must be pronounced, but if they find him insane he may be committed to one of the state lunatic asylums until he becomes sane, or be otherwise committed according to law; and when notice is given of that fact, as hereinafter provided, he must be brought before the court for judgment. — Comp. Stats. (1921), Vol. 1, sec. 2769.

Prisoner becoming insane; question for jury trial. — If, after his delivery to the warden for execution, there is good reason to believe that a defendant under judgment of death has become insane, the warden must call such fact to the attention of the county attorney of the county in which the prison is situated, whose duty is to immediately file in the district or superior court of such county a petition stating the conviction and judgment and the fact that the defendant is believed to be insane and asking that the question of his sanity be inquired into. Thereupon, the court must at once cause to be summoned and impaneled from the regular jury list a jury of twelve persons to hear such inquiry. — Comp. Stats. (1921), Vol. 1, sec. 2788.

[1] It is not clear whether this section applies exclusively to insanity at time of *trial* or at time of offense; the section speaks of insanity at time of trial, yet it provides for the jury finding defendant *not guilty* on account of "such lunacy." Apparently it refers to the case where defendant was insane at time of offense and continues so at time of trial.

Witnesses for inquisition. — The county attorney must attend the inquisition, and may produce witnesses before the jury, for which purpose he may issue process in the same manner as for witnesses to attend before the grand jury, and disobedience thereto may be punished in like manner as disobedience to process issued by the court. — Comp. Stats. (1921), Vol. 1, sec. 2789.

Same; verdict; order of court. — The verdict of the jury must be entered upon the minutes and thereupon the court must make and cause to be entered an order reciting the fact of such inquiry and the result thereof, and when it is found that the defendant is insane the order must direct that he be taken to one of the state hospitals for the insane and there kept for safe confinement until his reason is restored. — Comp. Stats. (1921), Vol. 1, sec. 2790.

Same; verdict of sanity; procedure; verdict of insanity; procedure. — If it is found that the defendant is sane the warden must proceed to execute the judgment as certified in the warrant; if it is found that the defendant is insane, the warden must suspend the execution and transmit a certified copy of the order mentioned in the last section to the Governor and deliver the defendant, together with a certified copy of such order to the medical superintendent of the hospital named in such order. When the defendant recovers his reason the superintendent of such hospital must certify that fact to the Governor, who must thereupon issue to the warden his warrant, appointing a day for the execution of the judgment. — Comp. Stats. (1921), Vol. 1, sec. 2791.

(II, 1 *b*)

When found insane. — If the inquisition find that the defendant is insane, the sheriff must immediately transmit to the governor, who may, when the defendant becomes sane, issue a warrant appointing a day for the execution of the judgment. — Comp. Stats. (1921), Vol. 1, sec. 2792.

(II, 2 *b*)

Form of verdict. — When the defendant is acquitted on the ground that he was insane at the time of the commission of the act charged, the verdict must be "not guilty by reason of insanity." — Comp. Stats. (1921), Vol. 1, sec. 2738.

(II, 2 *d*)

Habeas corpus writ. — Anyone in custody as an insane person in any hospital, home or retreat, is entitled to a writ of habeas corpus, upon a proper petition to the County Court of the county in which said hospital, home or retreat is situated, made by him or some friend in his behalf. Upon the return of such writ, the fact of his sanity shall be inquired into and determined. The medical history of the patient, as it appears in the books of the hospital, home or retreat, shall be given in evidence, and the superintendent or medical officer in charge of the institution wherein such person is held in custody, and any proper person, shall be sworn, touching the mental condition of such person. — Comp. Stats. (1921), Vol. 2, sec. 8310.

Insane persons entitled to habeas corpus. — All persons confined as insane shall be entitled to the benefit of the writ of habeas corpus, and the question of insanity shall be decided at the hearing, and if the judge or court shall decide that the person is insane, such decision shall be no bar to the issuing of the writ the second time whenever it shall be alleged that such person has been restored to reason. — Comp. Stats. (1921), Vol. 2, sec. 8276.

Who entitled to writ. — Writ of habeas corpus shall be granted in favor of parents, guardians, masters, husbands and wives; and to enforce the rights, and for the protection of, infants and insane persons; and the proceedings shall, in all such cases, conform to the provisions of this article. — Comp. Stats. (1921), Vol. 1, sec. 444.

Patients discharged. — The medical superintendent of the State Hospital for the Insane may discharge any patient in the following cases:

(1) A patient who, in his judgment is recovered.

(2) Any patient who has not recovered, but whose discharge is not injurious to the public or to the patient; provided, however, that before ordering such discharge, the superintendent of the State Hospital for the Insane shall send notice by mail to the friends of such patient or to the proper officer of the county whence he came, and if such patient is not removed within ten days thereafter, he shall be returned to his home and friends or proper officer. When the superintendent is unwilling to discharge an unrecovered patient upon request, and so certifies in writing, giving his reasons therefor, the County Court or the judge thereof of the county from which the patient was admitted into the hospital may, upon such certificate, and an opportunity for hearing thereon, being accorded the superintendent of the State Hospital for the Insane, and upon such other proofs as may be produced direct, by order, the discharge of such patient, upon such security to the people of the State, the court or the judge thereof may require, for the good behavior and maintenance of the patient. A certified copy of the order shall be delivered to the superintendent of the hospital from which the patient is discharged. The superintendent of the State Hospital for the Insane may grant a parole to a private patient, not exceeding thirty days at any one time, under general conditions prescribed by a joint board. Such parole shall not effect the validity of the bond given for the support of such patient.

A patient who has been discharged by the medical superintendent may, with the approval of the superintendent, be re-admitted to the hospital under the original order of commitment at any time within six months after the date of such discharge, but thereafter he shall only be re-admitted upon a new adjudication of insanity, and a new order for admission. If the patient has been discharged by order of any court or the judge thereof, or has been found restored to soundness of mind, as provided in Section twenty-nine (29), he shall not again be admitted to the hospital except upon a new adjudication of mental disability and order for admission. — Comp. Stats. (1921), Vol. 2, sec. 8307.

Persons insane; adjudged by court. — When any person shall have been adjudged insane and shall have been discharged from or shall not have been received into any hospital, home or retreat, petition may be presented to the court or the judge thereof, making such adjudication for a finding and order

declaring such person restored to soundness of mind. Upon the presentation of such petition to such court or the judge thereof, by the person so adjudged insane, or by the person making the application for such adjudication, the court or the judge thereof, shall fix a time for hearing thereon, and in case the application is made by the person adjudged insane, shall cause notice of such hearing to be given to the person who applied for such adjudication, if he be found in said county, and may cause such further notice to be given as to the court or the judge thereof, seems proper. If, upon the hearing of such petition the court or the judge thereof from the testimony given, shall find such person restored to soundness of mind, an order shall be entered declaring him sane, provided, however, that the testimony of at least two reputable physicians establishing the sanity of such person, shall be required before the finding of the court or the judge thereof and entering of such order.—Comp. Stats. (1921), Vol. 2, sec. 8309.

(II, 3)

Commissioners of insanity. — In each organized county in this State there shall be a board of commissioners, consisting of three persons, to be styled commissioners of insanity, two of whom shall constitute a quorum. The county judge shall be a member of said board and its chairman. The other two members shall be appointed by the board of county commissioners, one of whom shall be a respectable practicing physician, and the other a respectable practicing attorney; and appointments shall be made of persons residing as near as may be to the county seat. One of these commissioners shall be appointed for one year, the other for two years. The appointment of successors may be made at any time within three months prior to the expiration of the term of the incumbent, who shall hold his office until his successor shall be appointed and qualified. In case of the temporary absence or inability to act of two of the commissioners, the county judge shall call to his aid a respectable practicing physician or lawyer, who, after qualifying as in other cases, may act in the same capacity. The record in such cases must show the fact of such absence. — Comp. Stats. (1921), Vol. 2, sec. 8260.

Terms "insane" and "idiot" defined. — The term "insane" as used herein includes any species of insanity or mental derangement. The term "idiot" is restricted to persons supposed to be naturally without mind. No idiot will be admitted into the hospital for the insane. — Comp. Stats. (1921), Vol. 2, sec. 8279.

Morbid propensity no defense. — A morbid propensity to commit prohibited acts, existing in the mind of a person who is not shown to have been incapable of knowing the wrongfulness of such acts, forms no defense to a prosecution therefor. — Comp. Stats. (1921), Vol. 1, sec. 1513.

OREGON

(I, 2)

Insanity must be Proven. — When the commission of the act charged as a crime is proven, and the defense sought to be established is the insanity of the defendant, the same must be proven beyond a reasonable doubt; and no act

committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his having been in such condition; but whenever the actual existence of any particular motive, purpose, or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the defendant was intoxicated at the time, in determining the purpose, motive, or intent with which he committed the act. — Laws (1920), Vol. 1, sec. 1527.

(II, 1 *a* and *b*)

Judges Believing Person Convicted Feeble-minded to Commit to Feeble-minded Institution. — Any person convicted of delinquency or crime or who shall be adjudged a dependent by a court of competent jurisdiction, and where the judge of said court shall have cause to believe that said person is feeble-minded, such judge shall call in an examining board, as provided in section 2880, and if said board together with the judge certifies that said delinquent or dependent person is feeble-minded, then it shall be the duty of said judge to commit said feeble-minded person to the institution for the feeble-minded for an indeterminate period, but no such alleged feeble-minded person shall, during the pendency of the hearing of the petition, be detained in any place provided for the detention of persons charged with or convicted of any criminal or quasi-criminal offense. — Laws (1920), Vol. 2, sec. 2880.

(II, 2 *b* and *c*)

Proceedings, when Defendant Acquitted on Account of Insanity. — If the defense be the insanity of the defendant, the jury must be instructed, if they find him not guilty on that ground, to state that fact in their verdict, and the court must thereupon, if it deems his being at large dangerous to the public peace or safety, order him to be committed to any lunatic asylum authorized by the state to receive and keep such persons, until he become sane, or be otherwise discharged therefrom by authority of law. — Laws (1920), Vol. 1. sec. 1558.

(II, 2 *d*)

Writ of Habeas Corpus Defined; Who may Prosecute. — The writ of habeas corpus ad subjiciendum is the writ herein designated, and every other writ of habeas corpus is abolished. Every person imprisoned or otherwise restrained of his liberty, within this state, under any pretense whatsoever, except in the cases specified in the next section, may prosecute a writ of habeas corpus according to the provisions of this chapter, to inquire into the cause of such imprisonment or restraint, and if illegal, to be delivered therefrom. — Laws (1920), Vol. 1, sec. 627.

(II, 3)

Examination and Commitment of Feeble-minded and Criminally Inclined Persons Over Five Years; Expenses of Transportation. — The county judge of any county of this state shall, upon the application of any citizen in writing, setting forth that any person over five years of age, or being under five years

of age and dependent (over five years of age) is feeble-minded or who, by reason of feeble-mindedness, is criminally inclined, or is unsafe to be at large, or may procreate children, cause such person to be brought before him at such time and place as he may direct; and the said county judge shall also cause to appear, at the same time and place two or more competent physicians, or two or more competent physicians and psychologists. Said physician or physicians and psychologists, shall constitute an examining board hereafter referred to as the " board." Said board shall proceed to examine the person alleged to be feeble-minded, and if said board, on careful examination, shall certify that said person is feeble-minded, such judge, if in his opinion said person is feeble-minded, shall commit said person to the institution for the feeble-minded of the state of Oregon for indeterminate detention; provided, that whenever an order is made committing any person to the institution, a copy of such order, together with the personal and family history of such person, upon blanks to be furnished the judge of the county court by the superintendent of the state institution for feeble-minded, including a full copy of the report of the physicians, shall be mailed forthwith to the superintendent, who shall indorse thereon the date of receipt and file in his office. Patients shall be entitled to admission in the order in which the copies of the orders for commitment were received and filed, and whenever there shall be room at the institution to receive additional patients, the superintendent shall at once notify the county court which made the commitment earliest received and filed as aforesaid, the said court shall within thirty days thereafter cause said patients to be taken to said institution or shall enter an order that such person is no longer entitled to admission, and shall notify the superintendent thereof; and shall provide for the safe and suitable care of such person, and said person shall be conveyed to the institution for the feeble-minded of the state of Oregon by a member of the family of such feeble-minded person or by a trained attendant of such institution for the feeble-minded in the same manner as is provided for the conveyance of insane persons to the hospital for the insane in sections 4437 and 4438 of Lord's Oregon Laws as amended by chapter 342 of the General Laws of Oregon for the year 1913; the expense of such transportation for such feeble-minded person to the institution for the feeble-minded shall be paid by the county from which such feeble-minded person shall be committed. — Laws (1920), Vol. 2, sec. 2878.[1]

PENNSYLVANIA

(II, 1 *a*)

When defendant is found insane upon arraignment. — The same proceedings may be had, if any person indicted for an offense shall, upon arraignment, be found to be a lunatic, by a jury lawfully impaneled for the purpose, or if,

[1] This section is interesting as one of the few provisions in any State which is based on the homely truism that "prevention is better than cure"; it is an attempt to cope with the "criminally inclined" before they have come into conflict with the law. As the section does not require that a criminal act shall actually have been committed before it becomes operative, it is placed under (II3).

upon the trial of any person so indicted, such person shall appear to the jury, charged with such indictment, to be a lunatic, the court shall direct such finding to be recorded, and may proceed as aforesaid. — Stats. (1920), sec. 14446.[1]

When prisoner brought up for discharge appears insane. — In every case in which any person charged with any offense shall be brought before the court to be discharged for want of prosecution, and shall, by the oath or affirmation of one or more credible persons, appear to be insane, the court shall order the district attorney to send before the grand jury a written allegation of such insanity, in the nature of a bill of indictment, and thereupon the said grand jury shall make inquiry into the case as in cases of crimes, and make presentment of their finding to said court thereon; and thereupon the court shall order a jury to be impanelled to try the insanity of such person; but before a trial thereof be ordered, the court shall direct notice thereof to be given to the next of kin of such person, by publication or otherwise, as the case requires, and if the jury shall find such person to be insane, the like proceedings may be had as aforesaid. — Stats. (1920), sec. 14447.

(II, 1 *a* and *b*)

When any person detained in any prison, whether waiting trial or undergoing sentence, or detained for any other reason (*e.g.* as a witness), shall, in the opinion of the superintendent, jail physician, warden, or other chief executive officer of the institution or other responsible person, be insane, or in such condition as to make it necessary that he be cared for in a hospital for mental diseases, the said superintendent, jail physician, warden, or other chief responsible officer of the institution, or other person, shall immediately make application, upon a form prescribed by the department, to a law judge of the court having jurisdiction of the charge against such person, or under whose order he is detained, for commitment of said person to a proper hospital for mental diseases. The said judge shall forthwith order an inquiry by two qualified physicians, or by a commission as provided in section three hundred and four of this act, who shall immediately examine the said person and make written report of their findings to the said judge. If, in their opinion, the person so detained is insane, the physician shall so state in a certificate conforming to the requirements of section three hundred and two, or the commission in a report conforming to the requirements of section three hundred and four of this act. They shall also report whether, in their opinion, such person is of criminal tendency. The said judge may, in his discretion, summon other witnesses and secure further evidence. If he is then satisfied that the person thought or alleged to be insane is in fact insane, he shall order the removal of such person to a hospital for mental diseases. If the prisoner is a convict serving sentence, or if he is of criminal tendency, he shall be removed to a State hospital for insane criminals. In any other case, the judge shall commit him to some other hospital for mental diseases.

If the person found to be insane and removed to a hospital is awaiting indictment or trial, or has been arraigned or is being tried, proceedings against

[1] As in Sec. 14445.

him shall be stayed until his recovery. Upon his recovery, he shall be returned to the prison from which he was removed, for the disposition of the charges against him, upon proper order of the court. If he is a convict serving sentence, the time during which he is in the hospital shall be computed as part of the term for which he was sentenced.

The expense of examination, including the fees of physicians or commissioners, and all costs incident to such removal, and of maintenance in the hospital previous to the expiration of sentence, shall be paid by the county liable for the maintenance of the patient in the prison from which he was removed, without recourse against any proper district.

If the sentence of a person committed to a hospital for mental diseases, under the provisions of this section, shall expire before his recovery, he may be transferred, by the authority of the department, to any other hospital for care until his recovery, when he shall be discharged as in the case of any noncriminal patient. If the person found to be insane and removed to a hospital is a convict and recovers before the expiration of his sentence, or is found, after observation for a sufficient time, not to be insane, the superintendent or chief officer of the hospital to which said person has been committed shall properly certify such fact to the court which has committed him, and he shall be returned, upon order of the said court, to the prison, from which he was removed. The expense of removal shall be paid by the county liable for his maintenance in the prison from which he was removed, without recourse against any proper district.

When, on the production or appearance of any person charged with criminal offense, or on the production or appearance before the court of such a person under any other circumstances, it shall appear to the court that such person is insane, or in such condition as to make it necessary that he be observed or cared for in a hospital for mental diseases, proceedings for the commitment of such person to such a hospital shall be had, such as are provided for in section three hundred seven or section three hundred three of this act, upon application of some person to be designated by the court.

When any person charged with any crime or misdemeanor whatever shall be acquitted on the ground of insanity or having been insane at the time the offense was committed, the jury shall set out this fact in their verdict; and the court or judge before whom such person is tried may thereupon order such person to be committed to a hospital for mental diseases, in the manner provided in sections three hundred three, three hundred four, or three hundred seven of this act. — Act of the General Assembly (1923), No. 414, Art. III, sec. 308.

Whenever it shall appear that any person is mentally ill, or in such condition as to be benefited by or need such care as is required by persons mentally ill, the superintendent of any hospital for mental diseases may receive and detain such person, on the written application of any relative or friend, or the legal guardian of such person or any other responsible citizen, and on the certificate of two qualified physicians that said person is mentally ill and is in need of treatment and care in a hospital for mental diseases.

The application aforesaid, shall be, in form, prescribed by the department, and shall state the name, sex, and residence of the patient, the opinion that

said patient is mentally ill and that care in such a hospital is necessary for his benefit, and the facts on which the said opinions are based, and such other facts or information as may be required by the department. If the facts called for, or any of them, are unknown to the applicant or applicants, it shall be so stated in the application.

In the certificate, aforesaid, the physicians shall each state his residence, that he has resided in this State for at least three years; that he has been licensed to practice medicine in this State; that he has been in the actual practice of medicine for at least three years, or has had at least one year's experience as physician in a hospital for mental patients; that he is not related by blood or marriage to the patient, or to the applicant or any of the applicants; that he is not connected in any way as medical attendant, or otherwise, with the hospital to which application has been made for the admission of the patient; that he has examined the patient with care and diligence within one week; and that, in his opinion, the patient is mentally ill and in need of hospital care. He shall further state in said certificate the information, relative to the patient, given him by others, and the facts, as to the physical and mental condition and the behavior of the patient, which he has himself observed, on which he bases his opinion.

The aforesaid application and certificate shall be sworn to or affirmed before a judge or magistrate; and said judge or magistrate shall certify to the genuineness of the signatures, and to the standing and good repute of the signers of the certificate. The certificate shall not authorize the admission of the patient unless the patient shall be admitted within two weeks of the date thereof. — Act of the General Assembly (1923), No. 414, Art. III, sec. 302.

Any person who is mentally ill may be placed and detained in a hospital for mental diseases by order of the court of common pleas or other court of record of the county in which the said person resides or is, or of any law judge of said courts, upon a sworn or affirmed application by any responsible person addressed to said courts or judge, which application shall be accompanied by a sworn or affirmed certificate of two qualified physicians. Said application and certificate shall conform, in all respects, to the forms prescribed by the department, and be executed not more than two weeks before the same are presented to the court or judge. Such procedure may be held at any place in the discretion of the court or judge, who may or may not, in his discretion, require the presence before him of the said mental patient.

A certified copy of the order of the court or judge, and copies of the application and of the certificate, shall accompany the patient and be given to the superintendent in charge of the hospital in which the patient is ordered to be placed. The said application, certificate, and order shall be kept on file in a special docket in the court.

Such order shall not authorize the admission of the patient unless he shall be admitted to the hospital within two weeks from the date thereof. The superintendent of said hospital shall receive the said patient, and may detain him therein until said patient shall have recovered or shall be removed according to law. — Act of the General Assembly (1923), No. 414, Art. III, sec. 303.

Whenever an application shall be made to a court of common pleas, or judge thereof, for an order for the admission of any person thought to be mentally

ill to a hospital for mental diseases, the court, or judge thereof, may, in its or his discretion, immediately appoint a commission to inquire into and report upon the facts in the case. Such commission shall be composed of three persons, two of whom shall be qualified physicians, and the other a lawyer. They shall, in their inquisition, hear such evidence as may be offered, or as they may require, relating to the mental condition of the person whose admission to a hospital for mental disease is sought, as well as the statements of such person, or his counsel; and shall make a report, in writing, to the court, or judge thereof, setting forth whether or not they find that the person in question is in fact mentally ill and a proper subject for admission to a hospital for mental disease, and setting forth the facts on which their conclusion is based.

If such commission finds that the person in question is mentally ill and is a proper subject for admission to a hospital for mental diseases, and the court, or judge thereof, shall approve the report of the said commission, said court or judge shall thereupon order the person to be admitted to and detained in the hospital named in the application. The court or judge may or may not, in its or his discretion, require the presence in court of the person thought to be mentally ill, and the procedure may be held in any place in the discretion of the court or judge.

If the person thought to be mentally ill shall refuse to submit himself to an examination by the aforesaid commission, the court, or judge thereof, may issue a warrant for the bringing of said person before said commission for examination. — Act of the General Assembly (1923), No. 414, Art. III, sec. 304.

The guardian, committee, or any relative or friend of a person thought to be mentally ill, may make application to the court of common pleas or other court of record of the county wherein such person resides or is, or to any judge thereof, for an order for the commitment of such person to a hospital for mental diseases for observation, diagnosis, and treatment. Such application shall be accompanied by the sworn certificate of two qualified physicians, setting forth, upon a form prescribed by the department, that such person is in such condition as to require observation in a hospital for mental diseases, and giving the information called for by said form. Thereupon, or in his own discretion without such application the court or judge, if satisfied that the condition of such person is such, as to make his commitment desirable for his best interests, shall commit him, for such period and under such limitations as the court or judge may direct, to the institution indicated in the application or to such other like institution as the court or judge may designate.

The superintendent or other person in charge of the institution to which the said person is committed shall, before the expiration of the period of commitment of the patient, make written report of said patient's mental condition to the court or judge making the commitment. Thereupon the court or judge, if satisfied that the patient is not mentally ill, shall order his discharge and that the cost of his transportation, commitment, care, and treatment be paid by the person so committed, by the applicant for his commitment, or by the poor authorities of the county or poor district in which such person is resident, as the court or judge shall deem just and proper, otherwise the court or judge shall make such order for the further disposition of the patient as may to him seem proper. — Act of the General Assembly (1923), No. 414, Art. III, sec. 307.

(II, 2 *b* and *c*)

Proceedings after acquittal on the ground of insanity. — In every case in which it shall be given in evidence, upon the trial of any person charged with any crime or misdemeanor, that such person was insane at the time of the commission of such offense, and he shall be acquitted, the jury shall be required to find specially whether such person was insane at the time of the commission of such offense, and to declare whether he was acquitted by them on the ground of such insanity; and if they shall so find and declare, the court before whom the trial is had shall have power to order him to be kept in strict custody, in such place and in such manner as to the said court shall seem fit, at the expense of the county in which the trial is had, so long as such person shall continue to be of unsound mind. — Stats. (1920), sec. 14445.

(II, 2 *c*)

Courts may commit insane criminals. — The courts of this commonwealth shall have power to commit to said asylum (Pennsylvania state lunatic hospital), any person who, having been charged with an offense punishable by imprisonment or death, shall have been found to have been insane, in the manner now provided by law, at the time the offense was committed, and who still continues insane; and the expense of said persons, if in indigent circumstances, shall be paid by the county of which he or she may belong by residence. — Stats. (1920), sec. 14129.

(II, 2 *d*)

Release on parole after acquittal because of insanity. — When any person charged with any crime or misdemeanor has heretofore been, or shall hereafter be, acquitted by the jury, on the ground of insanity, such person may be released from custody on parole, by the court wherein such person shall have been so acquitted. — Stats. (1920), sec. 14456.

Investigation by court. — Before the court shall direct the release of any person, as provided for in section one of this act, it shall ascertain, in such manner as it may direct, whether it shall be advisable that such person be so released on parole. — Stats. (1920), sec. 14457.

Terms and conditions of release. — The court directing the release on parole of any person acquitted on the grounds of insanity may prescribe such terms and conditions of said release as to it may seem proper. — Stats. (1920), sec. 14458.

Disposition of insane person, when acquitted. — If the kindred or friends of any person who may have been acquitted as aforesaid, on the ground of insanity, or in the default of such, the guardians, overseers or supervisors of any county, township or place, shall give security in such amount as shall be satisfactory to the court, with condition that such lunatic shall be restrained from the commission of any offense by seclusion or otherwise, it shall be lawful for the court to make an order for the enlargement of such lunatic, and his delivery to his kindred or friends, or as the case may be, to such guardians, overseers or supervisors. — Stats. (1920), sec. 14448.

Habeas corpus to lie for such persons. — On a written statement, properly sworn to or affirmed being addressed by some respectable person to any law judge, that a certain person then confined in a hospital for the insane is not insane, and is thus unjustly deprived of his liberty, the judge shall issue a writ of habeas corpus, commanding that the said alleged lunatic be brought before him for a public hearing, where the question of his or her alleged lunacy may be determined, and where the onus of proving the said alleged lunatic to be insane shall rest upon such persons as are restraining him or her of his or her liberty. — Stats. (1920), sec. 14294.

Habeas corpus not to be taken away. — Nothing in this act shall be construed so as to deprive any alleged lunatic or habitual drunkard of the benefit of the writ of habeas corpus or trial by jury, or any other remedy guaranteed to alleged lunatics or habitual drunkards by any existing laws or statutes of the commonwealth of Pennsylvania. — Stats. (1920), sec. 14305.

(II, 3)

" Mental Illness ", " mental disease ", " mental disorder " shall mean an illness which so lessens the capacity of the person to use his customary self-control, judgment, and discretion in the conduct of his affairs and social relations as to make it necessary or advisable for him to be under treatment, care, supervision, guidance, or control. The terms shall be construed to include " lunacy ", " unsoundness of mind ", and " insanity."

" Mental defective ", shall mean a person who is not mentally ill but whose mental development is so retarded that he has not acquired enough self-control, judgment, and discretion to manage himself and his affairs, and for whose own welfare or that of others supervision, guidance, care, or control are necessary or advisable. The term shall be construed to include " feeble-minded ", " idiot ", " imbecile."

" Qualified physician " shall mean a physician who has been resident in this State for at least three years, has been licensed to practice medicine in this State, and has been in the actual practice of medicine for at least three years or has had at least one year's experience as physician in a hospital for mental patients.

" Insane criminal " shall mean any person mentally ill who has been convicted on a criminal charge and the period of whose sentence has not expired, or who has a criminal tendency.

" Criminal tendency " shall mean a tendency to repeat offenses against the law or to perpetrate new offenses as shown by repeated convictions for such offenses — a tendency to habitual delinquency. — Act of the General Assembly (1923), No. 414, Art. I, sec. 103.

PORTO RICO

(I, 1)

A person can not be tried, adjudged to punishment, or punished for a public offense, while he is insane. — Revised Statutes and Codes (1911), sec. (6485).

(II, 1 *a*)

When an action is called for trial, or at any time during the trial, or when the defendant is brought up for judgment or conviction, if a substantial doubt arises as to the sanity of the defendant, the court must order the question as to his sanity to be submitted (to) three experts designated by the court, and the trial or the pronouncing of the judgment must be suspended until the question is determined by their decision, and the trial jury may be discharged or retained, according to the discretion of the court, during the pendency of the issue of insanity. — Revised Statutes and Codes (1911), sec. (6486).

The trial of the question of insanity must proceed in the following order:

1. The counsel for the defendant must open the case, and offer evidence in support of the allegation of insanity;

2. The counsel for The People may then open their case, and offer evidence in support thereof;

3. The parties may then respectively offer rebutting testimony only, unless the court, for good reason, in furtherance of justice, permit them to offer evidence upon their original cause;

4. When the evidence is concluded, on either or both sides without argument, the counsel for The People must commence, and the defendant or his counsel may conclude the argument;

5. If the information be for an offense punishable with death, two counsel on each side may argue the case, in which case they must do so alternately. In other cases, the argument may be restricted to one counsel on each side;

6. The court must then charge the experts [1] stating to them all matters of law necessary for their information in giving their verdict. — Revised Statutes and Codes (1911), sec. (6487).

If the experts find the defendant sane, the trial must proceed, or judgment be pronounced, as the case may be. If the experts find the defendant insane, the trial or judgment must be suspended until he becomes sane, and the court must order that he be in the meantime committed to an insane asylum, and that upon his becoming sane he be delivered to the warden of the jail. — Revised Statutes and Codes (1911), sec. (6488).

(II, 1 *b*)

If the defendant is received into the asylum, he must be detained there until he becomes sane. When he becomes sane, the superintendent must give notice of that fact to the prosecuting attorney of the district. The warden must thereupon, without delay, bring the defendant from the asylum, and place him in proper custody until he is brought to trial or judgment, as the case may be, or is legally discharged. — Revised Statutes and Codes (1911), sec. (6490).

If, after judgment of death, there is good reason to suppose that the defend-

[1] Although this section is much like the California and similar provisions, it will be noticed that the proceeding is before *experts* appointed by the court, and not before a jury. In this manner, by the use of *neutral* experts, provided they are well qualified, this provision of the Porto Rico law is the nearest approach to the Massachusetts law for the routine examination, by unbiased experts, of all persons of certain classes, accused of crime.

ant has become insane, the warden of the penitentiary to whom he is delivered for execution, with the concurrence of the court of the district in which such conviction was had, may summon from the list of jurors selected by the commissioner for the year, a jury of twelve persons, to inqure into the supposed insanity, and must give immediate notice thereof to the prosecuting attorney of such district. — Revised Statutes and Codes (1911), sec. (6373).

The prosecuting attorney must attend the inquisition, and may produce witnesses before the jury for which purpose he may issue process in the same manner as for witnesses to attend a trial before the court, and disobedience thereto may be punished in like manner as disobedience to process, issued by the court. — Revised Statutes and Codes (1911), sec. (6374).

If it is found by the inquisition that the defendant is sane, the warden must execute the judgment, but if it is found that he is insane, the warden must suspend the execution of the judgment until he receives a warrant from the Governor, or from the judge of the district court where the judgment was rendered, directing the execution of the judgment. If the inquisition finds that the defendant is insane, the warden must immediately transmit it to the Governor, who may, when the defendant becomes sane, issue a warrant appointing a day for the execution of the judgment. — Revised Statutes and Codes (1911), sec. (6376).

(II, 2 *a*, *b* and *c*)

If the jury render a verdict of acquittal on the ground of insanity, the court may order a jury to be summoned from the jury list to inquire whether the defendant continues to be insane. The court may cause the same witnesses to be summoned who testified on the trial, and other witnesses, and direct the prosecuting attorney to conduct the proceedings, and counsel may appear for the defendant. The court may direct the warden to take the defendant and retain him in custody until the question of continuing insanity is determined. If the jury find the defendant insane, he shall be committed to an asylum. If the jury find the defendant sane, he shall be discharged. — Revised Statutes and Codes (1911), sec. (6327).

RHODE ISLAND

(II, 1 *a*)

On the petition of the agent of state charities and corrections, or of the officer having the custody of any person awaiting trial or imprisoned in any county of the state, setting forth that such person is insane, the presiding justice of the superior court, or in his absence any justice of the superior court, may make such an examination of said person as in his discretion he shall deem proper. — General Laws (1923), sec. 1670.

(II, 1 *b*)

If, upon such examination, said justice is satisfied that the person thus imprisoned is insane or idiotic, he may order the transfer of such prisoner from the jail aforesaid to the prison insane ward or the state hospital for mental diseases. — General Laws (1923), sec. 1618.

Any person transferred as aforesaid, upon restoration to reason, may, by order of the presiding justice of the superior court, in his discretion, be remanded to the place of his original confinement, to await his trial for the offense for which he stands committed. — General Laws (1923), sec. 1619.

(II, 2 *b* and *c*)

Person under indictment acquitted because insane. — Whenever, on the trial of any person upon an indictment, the accused shall set up in defense thereto his insanity, the jury, if they acquit such person upon such ground, shall state that they have so acquitted him; and if the going at large of the person so acquitted shall be deemed by the court dangerous to the public peace, the court shall certify its opinion to that effect to the governor, who, upon the receipt of such certificate, may make provision for the maintenance and support of the person so acquitted, and cause such person to be removed to the prison insane ward, the state hospital for mental diseases, or other institution for the insane during the continuance of such insanity. — General Laws (1923), sec. 1604.

(II, 2 *d*)

On petition of any person confined in such institution for the insane under the provisions of this chapter, or of any person on his behalf, to a justice of the supreme court, setting forth that he has reason to believe and does believe that such person confined therein is not insane and is unjustly deprived of his liberty, the said justice shall issue a like commission as herein before provided, for the purpose of inquiring into the condition of such person. — General Laws (1923), sec. 1597.

In such case notice shall be served upon the person confined as insane, and he shall have the right to confer with counsel, to produce evidence, and to be present at the inquisition. Said petitioner and any counsel he may employ and any witnesses he may desire to use, shall have the right to visit or examine said insane person, either with the permission of the superintendent of such institution, or according to its rules, or by special order of the justice issuing the commission. — General Laws (1923), sec. 1598.

The personal examination by the commissioners of such person detained as insane shall take place at the institution where such person is detained, and not elsewhere except by order of the justice issuing the commission; it shall take place without the presence of the superintendent or any other person connected with such institution; nor shall such person so detained as insane be taken from the institution upon any pretence or for any purpose whatsoever pending such examination, except by special order of the justice issuing such commission. — General Laws (1923), sec. 1599.

In other respects said commissioners shall, with like powers, proceed and report to the justice in like manner as before provided, who, upon the coming in of said report, may either confirm or disallow the same and order the recommitment or discharge of such person, or dismiss the petition altogether, as the facts shall seem to require. And in case of commitment, such person shall thereafter be detained by virtue of and in accordance with such commitment

until lawfully discharged from such hospital or asylum. — General Laws (1923), sec. 1600.

Nothing in this chapter shall be so construed as to impair or abridge the right of any person to the writ of habeas corpus; and upon any application for such writ, it shall be the duty of the court to inquire and determine as to the sanity or insanity or the necessity of restraint of the person confined, at the time such application was made. If it shall appear to the court necessary and proper, it may in its discretion direct an issue or issues touching the sanity or insanity or the necessity for the restraint of the person so confined, to be framed and submitted to a jury in the superior court. The jurors may be those in attendance on the court, if in session at the time of such hearing, or may be summoned for the special purpose on writ of venire facias issued upon the order of the court. If it appears upon the verdict of the jury, or if it is the opinion of the court, if the issue is not submitted to a jury, that the person so confined is not insane, or that he is not dangerous to himself or others and ought not longer to be so confined, he shall be discharged from such confinement. — General Laws (1923), sec. 1601.

(II 3)

The penal and charitable commission shall establish an insane ward within the limits of the state prison or of the Providence county jail to be known as the prison insane ward and shall provide for the proper treatment of all persons legally committed thereto. — General Laws (1923), sec. 1635.

SOUTH CAROLINA

(II, 2 *c* and II, 1 *b*)

Commitment of persons charged with crime. — Any Judge of the Circuit Court is authorized to commit to the State Hospital any person charged with the commission of any criminal offense who shall, upon the trial before him, be adjudged insane, or in whom there is a question as to the relation of mental disease to the alleged crime, whether such question is raised by the prosecution or defense, or it appears to the Judge from any evidence brought before him or upon his own recognition: *Provided*, That such commitment shall be for a period of thirty days, at the end of which the patient must be returned to the Court if found sane, or duly committed by such Judge if found insane. When the person committed is financially able to pay, he shall be required to pay for his support and maintenance. — Code of Laws (1922), Vol. III, sec. (5100).[1]

[1] In State *v.* Bethune, 88 S. C., 401, it was contended that the question of insanity after judgment was one to be referred to a commission in lunacy. Bethune had been convicted of murder and after conviction it was claimed he was *then* insane. The issue of his then insanity was submitted to a jury in the court of General Sessions which found he was sane, and a new day was set for the execution. Defendant's counsel had moved to have the question of his client's sanity referred to a board of examining physicians and contended that it was the court's duty to have referred the question to the probate judge for determination in accordance with the terms of an act to regulate the practice with reference to the appointment of a committee for persons *non compos*

(II, 2 *d*)

Discharge of lunatics. — Whenever any lunatic or epileptic shall have recovered, it shall be the duty of the Regents to discharge him or her from the State Hospital for the Insane. — Code of Laws (1922), Vol. III, sec. (5097).

Of the Writ of Habeas Corpus; Person entitled to benefit of this chapter. — If any person or persons shall be or stand committed or detained for any crime, unless for felony (the punishment of which is death), or treason, plainly expressed in the warrant of commitment, or unless charged as accessory before the fact to treason or felony (the punishment of which felony is death), or with suspicion thereof, or unless charged with suspicion of treason or felony (which felony is punishable with death), which shall be plainly expressed in the warrant of commitment, they shall be entitled to the writ of habeas corpus — Code of Laws (1922), Vol. I, sec. (134).

SOUTH DAKOTA

(I, 1)

Insane person cannot be tried. — An act done by a person in a state of insanity cannot be punished as a public offense, nor can a person be tried, adjudged to punishment or punished for a public offense, while he is insane. — Rev. Code (1919), Vol. 1, sec. 4793.

Who are capable of committing crimes. — All persons are capable of committing crimes, except those belonging to the following classes:

. . . Idiots, lunatics, insane persons, and all persons of unsound mind, including persons temporarily or partially deprived of reason, upon proof that at the time of committing the act charged against them they were incapable of knowing its wrongfulness, . . . persons who committed the act charged without being conscious thereof. . . . Rev. Code (1919), Vol. 1, sec. 3583.

(II, 1 *a* and *b*)

NOTE. — Secs. 4794–4801, prescribing the method of procedure in case of alleged insanity before, during or after trial and before judgment are practically the same as sections 1368–1372 of the Penal Code of California, 1915.

mentis; counsel further contended that there was no provision in the laws of the State to have the issue of insanity after conviction and judgment tried by an ordinary jury as was done in his client's case, and "that such manner is and cannot be calculated to ascertain the truth of sanity or insanity of a defendant", and that the method used deprived defendant of his life and liberty without due process of law. But it was held that "at common law a suggestion of insanity, made after verdict and sentence, did not give rise to an absolute right on the part of a convict, to have such issue tried before the court and a jury, but addressed itself to the discretion of the court"; that the act referred to by counsel applied only in the case of the appointment of a committee in lunacy and not in criminal cases, and that in the absence of a statutory enactment to the contrary, "to determine the issue raised by the plea of insanity, in a criminal case, there never has been any question as to the right to submit such issue to a jury."

Sec. 4957, prescribing the procedure when defendant shows as cause against judgment that he is insane, is similar to sec. 1201 of the California Penal Code.

(II, 2 *b*)

Form of general verdict. — . . . When the defendant is acquitted on the ground that he was insane at the time of the commission of the act charged, the verdict must be " not guilty by reason of insanity." . . . — Rev. Code (1919), Vol. 1, sec. 4918.[1]

(II, 2 *c*)

Defense of insanity and acquittal. — If the defense involves the sanity of the defendant when the alleged crime was committed, the jury must be instructed, if they acquit him on the ground of insanity at that time, to state the fact in their verdict. The court may thereupon, if the defendant is in custody and it deems his discharge dangerous to the public peace or safety, order him to be committed to a state hospital for the insane until he becomes sane. — Rev. Code (1919), Vol. 1, sec. 4935.[1]

(II, 2 *b* and *c*)

Insanity, court may commit. — When a jury have returned a verdict acquitting a defendant upon the ground of insanity, the court may thereupon, if the defendant be in custody and it deems his discharge dangerous to the public safety, order him to be committed to a hospital for the insane, or to the care of such person or persons as the court may direct, till he becomes sane.[2] — Rev. Code (1919), Vol. 1, sec. 3586.

(II, 2 *d*)

Habeas corpus. — All persons confined as insane shall be entitled to the benefit of the writ of habeas corpus, and the question of insanity shall be decided at the hearing, and if the judge or court shall decide that the person is insane, such decision shall be no bar to the issuing of the writ the second time, whenever it shall be alleged that such person has been restored to reason. — Rev. Code (1919), Vol. 2, sec. 10086.

(II, 3)

Intoxication as an element of crime. — No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of

[1] Though these sections are substantially like those of California, the discharge of the acquitted defendant is in this State left to the discretion of the judge, the method of ascertaining continuing insanity, not being prescribed; in California, the court may impanel a jury to determine this, and must discharge defendant if the jury finds him sane.

[2] Section 4935, however, does not provide for turning over the acquitted defendant to a "hospital for the insane, or to the care of such person or persons as the court may direct", but only to the State Hospital for the insane. Sections 3586 and 4935 overlap.

his having been in such condition. But whenever the actual existence of any particular purpose, motive or intent, is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive or intent with which he committed the act. — Rev. Code (1919), Vol. 1, sec. 3584.

The word " insane " defined. — The word " insane ", as used in this chapter, includes any species of insanity or mental derangement, but no feeble-minded person, as defined in article 10, chapter 1, part 5, title 6, of this code, shall be admitted into a hospital for the insane. — Rev. Code (1919), Vol. 2, sec. 10089.

Morbid propensity no defense. — A morbid propensity to commit prohibited acts, existing in the mind of a person who is not shown to have been incapable of knowing the wrongfulness of such acts, forms no defense to a prosecution therefor. — Rev. Code (1919), Vol. 1, sec. 3585.

TENNESSEE

(II, 1 *a* and *b*)

Person accused of crime found insane. — When, upon the arraignment of any person not previously known or believed to be insane, who may be charged with a criminal offense punishable by imprisonment in the penitentiary or death, the plea of present insanity is urged in his or her behalf, the court shall charge the jury that if, from the evidence, they believe the defendant to be insane, they shall so find; but the powers of courts to commitment to the hospital for the insane shall not extend to insane persons arraigned for felonious assaults or misdemeanors only, or those who, by reason of their insane condition, may be admissible to the hospitals for the insane under the general laws of commitment provided therefor. — Ann. Code (1917), Vol. 2, sec. 2631.[1]

Insane person. — If the court in which a person is indicted for a criminal offense is satisfied that he is non compos mentis, and he has been so for four successive terms, it may discharge him from custody upon the recognizance of good and sufficient sureties, acknowledged before the court, for his personal appearance at the next succeeding term, in such sum as the court may direct. And the court may renew the recognizance from term to term, in its discretion, so long as the defendant continues under the disability. — Ann. Code (1918), Vol. 5, sec. 7439.

Order for commitment to hospital. — Upon such finding,[2] the court shall direct an order to the superintendent of the . . . Hospital for the Insane, near . . . to receive and keep the defendant as others, which order, together with the defendant, the sheriff of the county shall deliver to said superintendent. — Ann. Code (1917), Vol. 2, sec. 2632.

[1] The plea of *present* insanity must be specially pleaded and tried as a preliminary question. Under the plea of "not guilty" only insanity at the time of the commission of the crime can be shown and not insanity at the time of inquiry. Dove *v.* St., 3 Heis., 374.

[2] As in section 2631.

On recovery, delivery to jailer of the county. — When, in the opinion of the Tennessee board of control and the superintendent, such patient has recovered from his insanity, they shall cause him to be delivered to the jailer of the county in which the hospital is situated for safekeeping, and immediately transmit to the clerk of the county in which the patient was arraigned notice of the fact. — Ann. Code (1917), Vol. 2, sec. 2634.

Jailer to send him, where. — If, at the next term of the court, the district attorney shall wish further to prosecute such person, the jailer of such county, on notice thereof, shall deliver the prisoner to the jailer of the county in which he was arraigned; but if the district attorney shall not wish further to prosecute the prisoner, then he shall be discharged. — Ann. Code (1917), Vol. 2, sec. 2635.

(II, 3)

. . . The terms "lunatic", "insane", "non compos mentis", include all persons of unsound mind. — Ann. Code (1917), Vol. 1, sec. 62.

TEXAS

(I, 1)

Insanity a defense. — No act done in a state of insanity can be punished as an offense. No person who becomes insane after he committed an offense shall be tried for the same while in such condition. No person who becomes insane after he is found guilty shall be punished for the offense while in such condition. — Complete Stats. (1920), Penal Code, Art. 39.

(I, 2)

Proof of insanity according to common law. — The rules of evidence known to the common law in respect to the proof of insanity shall be observed in all trials where that question is in issue. . . . — Complete Stats. (1920), Penal Code, Art. 40.

(II, 1 *a*)

Reasons which will prevent the sentence. — The only reasons which can be shown, on account of which sentence can not be pronounced, are:

2. That the defendant is insane; and, if sufficient proof be shown to satisfy the court that the allegation is well founded, no sentence shall be pronounced. And where there is sufficient time left, a jury may be impaneled to try the issue. Where sufficient time does not remain, the court shall order the defendant to be confined safely until the next term of the court, and shall then cause a jury to be impaneled to try such issue. . . . — Complete Stats. (1920), Penal Code of Procedure, Art. 861.

Insanity after conviction. — If it be made known to the court at any time after conviction, or if the court has good reason to believe that a defendant is insane, a jury shall be impaneled to try the issue. — Complete Stats. (1920), Code of Criminal Procedure, Art. 1017.

Information as to insanity of defendant. — Information to the court as to the insanity of a defendant may be given by the written affidavit of any respectable person, setting forth that there is good reason to believe that the defendant has become insane. — Complete Stats. (1920), Penal Code of Criminal Procedure, Art. 1018.

Court shall impanel jury. — For the purpose of trying the question of insanity, the court shall impanel a jury as in the case of a criminal action. — Complete Stats. (1920), Penal Code of Criminal Procedure, Art. 1019.

Defendant's counsel may open, etc. — The counsel for the defendant has the right to open and conclude the argument upon the trial of an issue as to insanity. — Complete Stats. (1920), Penal Code of Criminal Procedure, Art. 1020.

Court shall appoint counsel, when. — If the defendant has no counsel, the court shall appoint counsel to conduct the trial for him. — Complete Stats. (1920), Penal Code of Criminal Procedure, Art. 1021.

No special formality required on trial. — No special formality is necessary in conducting the proceedings authorized by this chapter. The court shall see that the inquiry is conducted in such a manner as to lead to a satisfactory conclusion. — Complete Stats. (1920), Penal Code of Criminal Procedure, Art. 1022.

When defendant is found insane. — When, upon the trial of an issue of insanity, the defendant is found to be insane, all further proceedings in the case against him shall be suspended until he becomes sane. — Complete Stats. (1920), Penal Code of Criminal Procedure, Art. 1023.

(II, 1 *b*)

Court shall commit insane defendant, etc. — When a defendant is found to be insane, the court shall make an order, and have the same entered upon the minutes, committing the defendant to the custody of the sheriff, to be kept subject to the further order of the county judge of the county. — Complete Stats. (1920), Penal Code of Criminal Procedure, Art. 1024.

Shall be confined in lunatic asylum until, etc. — When a defendant has been committed, as provided in the preceding article, the proceedings shall forthwith be certified to the county judge, who shall take the necessary steps, at once, to have the defendant confined in the lunatic asylum, as provided in the case of other lunatics, until he becomes sane. — Complete Stats. (1920), Penal Code of Criminal Procedure, Art. 1025.

When the defendant becomes sane. — Should the defendant become sane, he shall be brought before the court in which he was convicted; and a jury shall again be impaneled to try the issue of his sanity; and, should he be found to be sane, the conviction shall be enforced against him in the same manner as if the proceedings had never been suspended. — Complete Stats. (1920), Penal Code of Criminal Procedure, Art. 1026.

Affidavit of the sanity of the defendant. — The fact that the defendant has become sane may be made known to the court in which the conviction was had by the official certificate, in writing, of the superintendent of the lunatic asylum,

where he is confined, or, if not confined in a lunatic asylum, by the affidavit, in writing, of any credible person. — Complete Stats. (1920), Penal Code of Criminal Procedure, Art. 1027.

Proceedings upon affidavit. — When a certificate, or affidavit, such as is provided for in the preceding article, is presented to the judge or court, either in vacation or in term time, such judge or court shall issue a writ, directed to the officer having the custody of such defendant, commanding such officer to bring the defendant before the court immediately, if the court be then in session; and, if the court be not then in session, to bring the defendant before the court at its next regular term for the county in which the conviction was had; which writ shall be served and returned as in the case of the writ of habeas corpus, and under like penalties for disobedience. — Complete Stats. (1920), Penal Code of Criminal Procedure, Art. 1028.

When defendant is again insane. — Should the defendant again be found to be insane, he shall be remanded to the custody of the superintendent of the lunatic asylum, or other proper office. — Complete Stats. (1920), Penal Code of Criminal Procedure, Art. 1029.

Conviction shall be enforced, when. — When, upon the trial of an issue of insanity, it is found that the defendant is sane, the judgment of conviction shall be enforced, as if no such inquiry had been made. — Complete Stats. (1920), Penal Code of Criminal Procedure, Art. 1030.

Verdict on plea of guilty by person insane. — When a jury has been impaneled to assess the punishment upon a plea of " guilty " they shall say in their verdict what the punishment is which they assess; but where the jury are of opinion that a person pleading guilty is insane they shall so report to the court, and an issue as to that fact be tried before another jury; and if, upon such trial, it be found that the defendant is insane, such proceedings shall be had as are directed in title 12, chapter one, of this Code. — Complete Stats. (1920), Code of Criminal Procedure, Art. 781.

(II, 2 *b*)

Acquittal for insanity. — When the defendant is acquitted on the ground of insanity, the jury shall so state in their verdict. — Complete Stats. (1920), Code of Criminal Procedure, Art. 780.[1]

[1] It is to be noticed that in Texas there do not seem to be any special provisions for the commitment of a defendant acquitted because of irresponsibility by reason of insanity. Article 780, taken in conjunction with Article 777 ("In all cases of acquittal, the defendant shall be immediately discharged from all further liability upon the charge for which he has been tried, and judgment upon the verdict accordingly shall be at once rendered and entered") would seem to indicate that in Texas all defendants acquitted upon the defense of insanity are released from custody. (Article 781 above evidently pertains to insanity at time of *trial*.) In spite of this apparent lack of provision for the defendant acquitted because of insanity at time of offense, Article 780 above, providing that the jury shall state the fact in their verdict if they acquit because of insanity, would indicate that the actual procedure after acquittal because of insanity is much like that in other States.

UTAH

(I, 1)

No person to be tried or punished while insane. — No person while insane shall be tried, adjudged to punishment, or punished for a public offense. — Compiled Laws (1917), sec. 9327.

All persons capable of committing crime, except following. — All persons are capable of committing crimes except those belonging to the following classes: . . . Idiots, lunatics and insane persons, . . . persons who committed the act charged without being conscious thereof. . . . — Compiled Laws (1917), sec. 7915 (Nos. 3, 4, 6).

(II, 1 *a* and *b*, and II, 2 *b* and *c*)

Inquiry into sanity of accused or convicted person. Procedure. — Whenever a person charged with crime shall have escaped information or indictment therefor, or shall have been acquitted thereof on trial, upon the ground of insanity; or whenever a person during trial, or when brought up for sentence, or while confined as a criminal in the state prison or a county jail, shall become insane, complaint under oath must be made setting forth the facts in the case, and the district court of the county must proceed as hereinafter in this chapter set out. — Compiled Laws (1917), sec. 9328.

Sections 9329–9331 and 9333, Compiled Laws of Utah, 1917, prescribing the procedure for determining whether an accused person is insane at time of trial, are similar to sections 1368–1371, Penal Code of California, 1915.

Procedure on finding of insanity. — If the jury find the defendant insane, the judge shall order the sheriff to forthwith convey him, together with a copy of the complaint, the commitment, and the physicians' certificate, if any, to the state mental hospital; provided, the court deems his freedom a menace to public quietude. Proceedings against the defendant must be suspended until he becomes sane. — Compiled Laws (1917), sec. 9332.

Id. Detention until sanity restored. Subsequent proceedings. — A person received into the state mental hospital in pursuance of the foregoing provisions must be detained there until he becomes sane. If then the sentence of such person shall have expired, he must be restored to liberty. But if he is not legally discharged, the superintendent must give notice of his recovery to the sheriff of the county from which he shall have been sent. The sheriff shall thereupon, without delay, bring the defendant from the state mental hospital, and either place him in proper custody until he is brought to trial or judgment, or return him to prison to serve out the remainder of his term. The defendant shall be entitled to have the time of his confinement in the state mental hospital deducted from his term. — Compiled Laws (1917), sec. 9334.

(II, 1 *a* and *b*)

Defendant may set up insanity for cause against judgment. Other grounds. — He may show for cause against the judgment:

1. That he is insane; and if, in the opinion of the court, there is reasonable ground for believing him to be insane, the question of insanity must be tried, as provided in chap. 50 of this code (secs. 9327–9336). If, upon the trial of that question, the jury finds that he is sane, judgment must be pronounced; but if they find him insane, he must be committed to the state mental hospital until he becomes sane; and when notice shall have been given of that fact, as provided in sec. 9334, he must be brought before the court for judgment. . . . — Compiled Laws (1917), sec. 9050.

(II, 1 *a*)

Id. Insanity of defendant. Trial by jury. Notice. — If, after judgment of death, there is good reason to suppose that the defendant has become insane, the sheriff of the county, with the concurrence of the judge of the court by which the judgment shall have been rendered, may summon from the list of the jurors selected by the proper officers for the year a jury of twelve persons to inquire into the supposed insanity, and must give immediate notice thereof to the county attorney or other counsel for the state. — Compiled Laws (1917), sec. 9175.

Id. County attorney to attend. Witnesses. — The county attorney must attend the inquisition, and may produce witnesses before the jury, for which purpose he may issue process in the same manner as for witnesses to attend before the grand jury, and disobedience thereto may be punished in like manner as disobedience to process issued by the court. — Compiled Laws (1917), sec. 9176.

Id. Inquisition signed by jury and sheriff, and filed. — A certificate of the inquisition must be signed by the jurors and the sheriff, and filed with the clerk of the court in which the conviction shall have been had. — Compiled Laws (1917), sec. 9177.

(II, 1 *b*)

Id. Procedure when defendant found sane; when insane. — If it is found by the inquisition that the defendant is sane, the sheriff must execute the judgment; but if it is found that he is insane, the sheriff must suspend the execution of the judgment until he receives a warrant from the president of the board of pardons or from the judge of the court by which the judgment shall have been rendered, directing the execution of the judgment. If the inquisition finds that the defendant is insane, the sheriff must immediately transmit it to the board of pardons who may, when the defendant becomes sane, issue a warrant appointing a day for the execution of the judgment. — Compiled Laws (1917), sec. 9178.

(II, 3)

Union of act and intent to constitute crime. — In every crime or public offense, there must exist a union or joint operation of act and intent, or criminal negligence. — Compiled Laws (1917), sec. 7908.

Drunkenness no excuse for crime. Mitigation. — No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his

having been in such condition. But whenever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive, or intent with which he committed the act. — Compiled Laws (1917), sec. 7910.

Intent, how manifested. Who are of sound mind. — The intent or intention is manifested by the circumstances connected with the offense, and the sound mind and discretion of the accused.[1] All persons are of sound mind who are neither idiots, nor lunatics, nor affected with insanity. — Compiled Laws (1917), sec. 7909.

. . . The words " insane person " include idiots, lunatics, distracted persons, and persons of unsound mind. . . . — Compiled Laws (1917), sec. 5848 (No. 16).

VERMONT

(II, 1 *a* and II, 2 *c*)

When person is not indicted because insane. — When a person held in prison on a charge of having committed a criminal offense is not indicted by the grand jury by reason of insanity,[2] the grand jury shall so certify to the court, and thereupon, if the discharge or going at large of said insane person is considered dangerous to the community, the court may order him confined in the county jail, or in the Vermont state hospital for the insane, or some other suitable place, at his own expense, if he has estate sufficient for that purpose, and if not, at the expense of the state. — General Laws (1917), sec. 2603.

(II, 1 *a* and II, 2 *a*)

Commitment for observation. When a person is indicted or informed against for a criminal offense, or is committed to jail on a criminal charge by a justice's, municipal or city court, the presiding judge of the county court before whom said person is to be tried, may, in term time or vacation, if a plea of insanity is made in court or if he is satisfied that a plea of insanity will be made, order said person into the care of the superintendent of the Vermont state hospital for the insane, to be detained and observed by said superintendent until further order of said judge or of such county court, that the truth or falsity of such plea may be ascertained. — General Laws (1917), sec. 2602.

(II, 2 *b* and *c*)

On acquittal by reason of insanity. — When a person tried on a complaint, information or indictment for a criminal offense is acquitted by the jury by

[1] Notice that this takes account both of the external behavior and the subjective state of mind.

[2] This, and similar provisions in other States, apparently includes failure to indict either because of insanity at time of offense or at the time of the proceedings before the grand jury.

reason of insanity, the jury, in giving its verdict of not guilty, shall state that it is given for such case, and thereupon, if the discharge or going at large of said insane person is considered dangerous to the community, the court may, in its discretion, order him to be confined in the state prison, or in the Vermont state hospital for the insane, or in some other suitable place, on such terms as the court directs, and at his own expense, if he has sufficient estate for that purpose, and if not, at the expense of the state. A superior judge, upon hearing, after twelve days' notice to the state's attorney of the county in which the case was tried, may, for good cause shown, order a change of the place of confinement of a person confined under the provisions of this section. — General Laws (1917), sec. 2604.

(II, 2 *c*)

Change of terms of confinement; petition. — When a person acquitted of a criminal offense because of his insanity is confined by order of the court, such court may thereafter alter the terms on which said person is confined, upon petition therefor, returnable to a stated term of the court and served upon the state's attorney for the county in which the order was made, at least twelve days before the beginning of the term. — General Laws (1917), sec. 2611.

Treatment at state prison of person acquitted by reason of insanity. — When a person has been acquitted of crime by reason of insanity, and by the county court is sent to the state prison as provided by law, the superintendent shall receive and put him to such reasonable labor as he is capable of performing, and may subject him to such reasonable discipline as his condition and circumstances require, and the expense shall be paid by the state. — General Laws (1917), sec. 7220.

(II, 2 *d*)

Insane respondent may petition for discharge. — A person confined under an order of court, pursuant to the two preceding sections, shall be discharged from confinement only by order of the county court for the county in which the order for confinement was made, upon petition therefor, made returnable to a stated term of such court, and served upon the state's attorney for that county at least twelve days before the beginning of the term. This section shall not affect the right of a person so confined to sue out a writ of habeas corpus. — General Laws (1917), sec. 2605.

Same; by supervisors. — If said person has no estate, the petition may be brought in his behalf by the supervisors of the insane at the expense of the state; in which case, recognizance for costs shall not be required. — General Laws (1917), sec. 2606.

Witness for respondent at expense of state, when. — If it appears to the court that said person is from poverty unable to procure the attendance of witnesses in his behalf, it may order such witnesses subpœnaed at the expense of the state as it deems necessary to secure the petitioner an impartial hearing. Said witnesses shall be paid as in other state causes. — General Laws (1917), sec. 2607.

Court may order respondent produced. — Such court may issue an order, directed to any sheriff or constable in the state, commanding him to bring said person before the court for hearing; and the officer executing the order shall deliver an attested copy thereof to the custodian of said person, who shall thereupon surrender him to the officer. — General Laws (1917), sec. 2608.

Hearing; discharged or recommitted. — If, upon hearing, it appears that said person has become sane, and the court considers that his release or going at large is not dangerous to the community, it shall order his discharge from confinement; otherwise the petition shall be dismissed and said person, if before the court, shall be recommitted to the place of confinement from which he was brought. — General Laws (1917), sec. 2609.

(II, 3)

Expert evidence. — A superior judge or the attorney general may, to prevent a failure of justice, order an examination to be made by an expert or experts, either within or without the state, in the investigation of a crime supposed to have been committed within the state. Such order shall be made only on the petition of the state's attorney for the county in which the crime is supposed to have been committed, setting forth the facts because of which the order is applied for, and verified by affidavit, and shall name the expert or experts by whom the examination is to be made, and limit the expense of the examination, and such expense shall be paid in the manner provided for the payment of witness fees in state causes in the county court. — General Laws (1917), sec. 2620.

Insane person. — The words "insane person" shall include every idiot, non compos, lunatic and distracted person. — General Laws (1917), sec. 10.

VIRGINIA

(I, 1)

Accused while insane not to be tried. — No person shall, while he is insane, be tried for a criminal offense. — General Laws (1923), sec. 4908.

(II, 1 *a* and *b* and II, 2 *a* and *b*)

When sanity of accused to be tried; if sane, trial to proceed; if sane when offense committed, or at trial, what the court to do. — If, prior to the time for trial of any person charged with crime, either the court or attorney for the Commonwealth has reason to believe that such person is in such mental condition that his confinement in a hospital for the insane or a colony for the feebleminded is necessary for proper care and observation, the said court or the judge thereof may, after hearing evidence on the subject, commit such person to the department for the criminal insane at the proper hospital under such limitations as it may order, pending the determination of his mental condition, and in such case the court, in its discretion, may appoint one or more physicians skilled in

the diagnosis of insanity, or other qualified physicians, and when any person is alleged to be feeble-minded may likewise appoint persons skilled in the diagnosis of feeble-mindedness, not to exceed three, to examine the defendant before such commitment is ordered, and make such investigation of the case as they may deem necessary, and report to the court the condition of the defendant at the time of their examination. A copy of the complaint or indictment, attested by the clerk, together with the report of the examining commission, including, as far as possible, a personal history, according to the form prescribed by the General Board of Directors of the State hospitals, shall be delivered with such person to the superintendent of the hospital to which he shall have been committed under the provisions of this act.

If a court, in which a person is held for trial, see reasonable ground to doubt his sanity or mentality at the time at which, but for such a doubt, he would be tried, it shall suspend the trial and proceed as prescribed in the foregoing paragraph or until a jury inquires into the fact as to the sanity or mentality of such person. Such jury shall be impaneled at its bar. If any such person so removed to the department for the criminal insane at the proper hospital is, in the opinion of the superintendent, not insane or feeble-minded, or when such person, if insane, has been restored to sanity, the said superintendent shall give ten days' notice in writing to the clerk of the court from which such person was committed, and shall send such person back to the jail or custody from which he was removed, where he shall be held in accordance with the terms of the process by which he was originally committed or confined.

If the jury or commission find the accused to be sane at the time of their verdict, they shall make no other inquiry, and the trial in chief shall proceed. If the jury find that he is insane or feeble-minded at the time of their verdict, they shall further inquire whether or not he was insane or feeble-minded at the time of the alleged offense; if they find that he was also insane or feeble-minded at the time of the alleged offense the court may dismiss the prosecution and shall order him to be removed thence to the department of the criminal insane at the proper hospital, there to be detained until he is restored to sanity. If they find that he was not insane or feeble-minded at the time of the alleged offense, but is now insane or feeble-minded, the court shall order him to be confined in the department for criminal insane at the proper hospital until he is so restored that he can be put upon his trial.

The experts or physicians skilled in the diagnosis of insanity or feeble-mindedness, or the physicians appointed by the court to render the foregoing professional service shall be paid at the rate of fifteen dollars per diem, and mileage during attendance upon court in the trial of such cases. Itemized account of expense, duly sworn to, must be presented to the court, and when allowed shall be certified to the auditor of Public Accounts for payment out of the State treasury, and be by him charged against the appropriation made to pay criminal charges. Allowance for the per diem authorized shall also be made by order of the court duly certified to the Auditor of Public Accounts for payment out of the appropriation to pay criminal charges.

The superintendent shall from time to time, or as often as the court may require, inform the court of the condition of the said person while confined in the hospital. — General Laws (1923), sec. 4909.

(II, 1 *a* and *b*)

Duties of courts when person before it appears to be feeble-minded. — When a person is brought before any circuit or corporation court, juvenile court, justice of the peace, or other court of justice for any purpose other than an inquiry into his mental condition, if it appears to the court upon the testimony of one or more qualified physicians that such a person is feeble-minded within the meaning of the law, the judge or the justice shall direct some officer of the court, or other suitable person, to file a petition, under this chapter, and the court, pending the preparation, filing and hearing of such petition, may order the said person to be detained in a proper place of safety; or be placed under the guardianship of some suitable person; or committed to the department of the criminal insane at the appropriate institution, for observation, under such limitations as it may order, pending the determination of the mental condition of said person suspected of being feeble-minded. — Code (1919), Vol. 1, sec. 1085.

Disposition of persons who become insane after conviction; duties of sheriff or sergeant as provided for in this and the preceding section. — If, after conviction and before sentence of any person, the court see reasonable ground to doubt his sanity, it may impanel a jury to inquire into the fact as to his sanity, and sentence him, or commit him to jail or to a hospital for the insane, according as the jury may find him to be sane or insane. If any person after conviction of any crime, or while serving sentence in the State penitentiary, or in any other penal institution, or in any reformatory or elsewhere, is declared by a jury or commission of insanity to be insane, he shall be committed by the court to the department for the criminal insane at the proper hospital, and there kept until he is restored to sanity; and the time such person is confined in the department for the criminal insane at the proper hospital shall be deducted from the term for which he was sentenced to such penal institution, reformatory or elsewhere.

The sheriff or sergeant of the court by which any of the orders as provided for in this and the preceding section, shall have been made, or the proper officer of the penitentiary or reformatory, shall immediately proceed in the manner directed by section one thousand and twenty-two to ascertain whether a vacancy exists in the department for the criminal insane at the proper hospital, and until it is ascertained that there is a vacancy, such person shall be kept in the jail of such county or corporation, or in such custody as the court may order, or in the penitentiary, or in the reformatory in which he is confined, until there is room in the department for the criminal insane at the said hospital. Any person whose care and custody are herein provided for shall be taken to and from the hospital to which he was committed by an officer of the penal institution having custody of him, or by the sheriff or sergeant of the county or corporation whose court issued the order of commitment, and the expenses incurred in such removals shall be paid by such penal institutions, county or corporation. — General Laws (1923), sec. 4910.

(II, 1 *b*)

When accused to be taken from hospital and committed to jail. — When the superintendent of the State Hospital for the Insane shall give notice to the clerk of the court, in pursuance of section one thousand and forty-five, such clerk shall issue a precept to the officer of said court, requiring him to bring the said prisoner from the hospital and commit him to jail. — General Laws (1923), sec. 4911.

(II, 1 *b*)

Sentence or trial of prisoner, when restored to sanity. — When a prisoner is brought from the hospital and committed to jail, or when it is found by the verdict of another jury that a prisoner, whose trial or sentence was suspended by reason of his being found to be insane or feeble-minded, has been restored, if convicted, he shall be sentenced; and if not, the court shall proceed to try him as if no delay had occurred on account of his insanity or feeble-mindedness. — General Laws (1923), sec. 4912.

(II, 2 *b* and *c*)

Verdict of acquittal by reason of insanity to state the fact; court may commit the defendant to hospital for insane. — When the defense is insanity or feeble-mindedness of the defendant at the time the offense was committed, the jury shall be instructed, if they acquit him on that ground, to state the fact with their verdict. If the jury so find the court shall thereupon, if it deem his discharge dangerous to the public peace or safety, order him to be committed to one of the State hospitals for the insane and be confined there under special observation and custody until the superintendent of that hospital and the superintendent of any other State hospital or feeble-minded colony shall pronounce him sane and safe to be at large. — General Laws (1923), sec. 4913.

(II, 2 *c*)

Disposition of insane person convicted of crime when restored to sanity. — When any person, confined in the department for the criminal insane at the proper hospital and charged with crime subject to be tried therefor, or convicted for crime, shall be restored to sanity the superintendent shall give notice thereof to the clerk of the court by whose order he was confined, and deliver him in obedience to the proper precept; provided, no person who has been convicted for a crime punishable by death shall be so delivered until the said superintendent and the superintendent of one of the other State hospitals for the insane or colonies for feeble-minded, to be designated by the Commissioner of State Hospitals, concur in the opinion that the said person has been restored to sanity. [When any person charged with or indicted for any offense which may be punishable by death, has been adjudged insane, both at the time of the offense and at the time when, but for such insanity, he would have been tried, shall be ordered by the court to be committed to the department for the criminal insane at the proper hospital, such person shall not be discharged therefrom until the superintendent of that hospital and the superintendents of two of the other hospitals or colonies, designated by the Commissioner of State

Hospitals, shall be satisfied, after thorough examination, that such person has been restored to sanity and may be discharged without danger to others, and provided that such discharge is given upon the consent and advice of the Commissioner of State Hospitals and the special board of directors of the hospital in which such person is confined; provided, however, that no person shall, in any case enumerated in this act, be denied the right of a trial by jury as to his sanity or mentality, if he or she shall so elect.] — General Laws (1923), sec. 1045.

(The amendatory act of 1920 contained a repealing clause, to-wit, " All acts and parts of acts inconsistent or in conflict with this act are hereby repealed.")

(II, 2 *d*)

Adjudged insane, epileptic, feeble-minded or inebriate person may test the legality of his detention. — Any person held in custody as insane, epileptic, feeble-minded or inebriate, may by means of a writ of habeas corpus have the question of the legality of his detention and of his condition determined by a court of competent jurisdiction. If such person be held in custody and actually confined in any hospital or colony, or other institution, he may file his petition in the circuit court of the county or the circuit or corporation court of the city in which such hospital or colony, or other institution is located or in the circuit court of the county or the circuit or the corporation court of the city of the county or city adjoining the county and city in which such hospital or colony or institution is located, or before the judge thereof in vacation, and upon such petition after notice to the authorities of the hospital or colony, or institution in which he is confined after having been adjudged insane, epileptic, feeble-minded or inebriate, such court or judge thereof in vacation shall in some court-room of such county or city determine whether such person be sane or insane, epileptic, feeble-minded or inebriate.

In all other cases such person may file his petition in the circuit court of the county or the corporation court of the city in which he resides, or in which he was adjudged insane, epileptic, feeble-minded or inebriate, or before the judge thereof in vacation and upon such petition, after notice to the authorities of the hospital or colony or to the person claiming the right to the custody of such adjudged insane, epileptic, feeble-minded or inebriate person, such court or judge thereof in vacation shall determine whether such person be sane or insane, epileptic, feeble-minded or inebriate.

In any case to test the legality of the detention of a person adjudged insane, epileptic, feeble-minded or inebriate, whether by habeas corpus or otherwise, the attorney for the Commonwealth of the county or city in which the hearing is had shall on request of the superintendent of the hospital or colony having or claiming custody of such person represent the Commonwealth in opposition to any such petition, appeal or procedure for the discharge of such persons from custody, and shall be paid a fee of ten dollars for each such case in which he so appears, which amount the auditor of public accounts shall pay to such attorney for the Commonwealth, upon the presentation by him of certificate from such superintendent and judge that he has rendered such service, out of funds appropriated to pay the criminal expenses of the State.

2. An emergency existing in the need for the expedition of cases affected hereby this act shall be in force from its passage. Acts of Assembly (1920), Chap. 164, sec. 1029 (amending and re-enacting sec. 1029, Code of Va., 1919, Vol. 1).

(II, 3)

Feeble-minded person defined. — The words "feeble-minded person" in this chapter shall be construed to mean any person with mental defectiveness from birth or from an early age (but not a congenital idiot), so pronounced that he is incapable of caring for himself or managing his affairs, or of being taught to do so, and is unsafe and dangerous to himself and others, and to the community, and who consequently requires care, supervision and control for the protection and welfare of himself, others and the community, but who is not classible as an "insane person", as usually interpreted. — Code (1919), Vol. 1, sec. 1075.

"Insane person." — The words "insane person" shall be construed to include every one who is an idiot, lunatic, non compos, or deranged. — Code (1919), Vol. 1, sec. 5.

WASHINGTON

(II, 1 *a* and II, 2 *a*)

Insanity — How Pleaded. — When it is desired to interpose the defense of insanity or mental irresponsibility on behalf of one charged with a crime, the defendant, his counsel or other person authorized by law to appear and act for him, shall at the time of pleading to the information or indictment file a plea in writing in addition to the plea or pleas required or permitted by other laws than this, setting up (1) his insanity or mental irresponsibility at the time of the commission of the crime charged, and (2) whether the insanity or mental irresponsibility still exists, or (3) whether the defendant has become sane or mentally responsible between the time of the commission of the crime and the time of the trial. The plea may be interposed at any time thereafter, before the submission of the cause to the jury, if it be proven that the insanity or mental irresponsibility of the defendant at the time of the crime was not before known to any person authorized to interpose a plea. — Remington's Comp. Stats. (1922), Vol. 1, sec. 2174.[1]

(II, 2 *b* and II, 1 *a*)

Special Verdict on Acquittal, When Plea of Insanity Interposed. — If the plea of insanity or mental irresponsibility be interposed, and evidence upon that issue be given, the court shall instruct the jury when giving the charge, that in

[1] Under this section the plea of mental irresponsibility at the time of trial is waived if not interposed before the trial; hence it cannot be urged in the Supreme Court as ground for suspending judgment. Defendant's mental condition after trial and conviction can, however, be looked into by the Superior Court which has original jurisdiction in such cases. — State *v.* Wilson, 69 Wash., 235, 124 Pac., 1125.

case a verdict of acquittal of the crime charged be returned, they shall also return special verdicts finding (1) whether the defendant committed the crime and if so, (2) whether they acquit him because of his insanity or mental irresponsibility at the time of its commission, (3) whether the insanity or mental irresponsibility continues and exists at the time of the trial, and (4) whether, if such condition of insanity or mental irresponsibility does not exist at the time of the trial, there is such likelihood of a relapse or recurrence of the insane or mental irresponsible condition, that the defendant is not a safe person to be at large. Forms for the return of the special verdicts shall be submitted to the jury with the forms for the general verdicts. — Remington's Comp. Stats. (1922), Vol. 1, sec. 2175.

(II, 2 *c*)

Verdict — Findings — Discharge or Commitment. — If the jury find by their special verdicts that the defendant committed the crime charged, that he is acquitted because of his insanity or mental irresponsibility at the time of its commission, and that before the trial he has become a sane or mentally responsible person, and is not liable to a relapse or recurrence of the insane or mentally irresponsible condition, and is a safe person to be at large, he shall be discharged. If the jury find that the defendant committed the crime charged, that he is acquitted because of his insanity or mental irresponsibility at the time of its commission, and that the insanity or mental irresponsibility still exists, or, if it does not exist, that he is so liable to a relapse or recurrence of the insane or mentally irresponsible condition as to be an unsafe person to be at large, the court shall enter judgment in accordance therewith, and shall order the defendant committed as a criminally insane person until such time as he shall be discharged as hereinafter provided. — Remington's Comp. Stats. (1922), Vol. 1, sec. 2176.

Commitment of Persons After Acquittal — Procedure. — The prosecuting attorney of any county wherein a person may have been acquitted of a crime because of his insanity or mental irresponsibility may cause any such person who is not in custody to be brought before the superior court of that county for trial as to the question of his sanity or mental responsibility by filing a petition in the name of the state setting up the commission of a crime by such person, his acquittal thereof because of his insanity, and his insanity or mental irresponsibility at the present time. The cause shall be tried to a jury as hereinbefore provided. The evidence given upon the trial of the criminal charge, if preserved by statement of facts or bill of exceptions, may be read in evidence, or the witnesses testifying upon the former trial may themselves be called. The jurors trying the criminal charge may testify as to the ground of acquittal. If the jury shall find that the defendant committed a crime, that he was acquitted thereof because of insanity, and that he is now insane or mentally irresponsible and an unsafe person to be at large, such person shall be committed to the penitentiary as a criminally insane person and be confined under the provisions of this act; otherwise, he shall be discharged. Either party may appeal to the supreme court as in other cases. — Remington's Comp. Stats. (1922), Vol. 2, sec. 6974.

Procedure to Secure Discharge. — When any person committed hereunder shall claim to have become sane or mentally responsible and to be free from danger of any relapse or recurrence of mental unsoundness and a safe person to be at large, he shall apply to the physician in charge of the criminal insane for an examination of his mental condition and fitness to be at large. If the physician shall certify to the warden that there is a reasonable cause to believe that such person has become sane since his commitment and is a safe person to be at large, the warden shall permit him to present a petition to the court that committed him, setting up the facts leading to his commitment, and that he has since become sane and mentally responsible, and is in such condition that he is a safe person to be at large, and shall pray his discharge from custody. The petition shall be served upon the prosecuting attorney of the county, whose duty it shall be to resist the application. No other pleadings than the petition need be filed, and the court shall set the cause down for trial before a jury, and the trial shall proceed as in other cases. The sole issue to be tried in the case shall be whether the person petitioning for a discharge has, since his commitment, become a safe person to be at large, and the burden of proof shall be upon him. If the evidence given upon his trial upon the criminal charge shall have been preserved by statement of facts or bill of exceptions as hereinbefore provided, either party may read such parts of the record as may be desired as evidence upon the hearing. The jury shall be required to find whether the petitioner has become sane since his commitment, is not liable to a recurrence of the mental unsoundness or relapse, and is a safe person to be at large. If they so find, he shall be entitled to discharge. If not, his petition shall be dismissed, and he shall be remitted to custody. Either party may appeal to the supreme court from the judgment discharging the petitioner or remitting him to custody, in the same manner that appeals in other cases are taken. The judgment of remission shall be conclusive that the petitioner is an unsafe person to be at large at the time of its entry; but if he shall subsequently claim to have become sane and a safe person to be at large, he may upon a certificate of probable cause by the attending physician, which shall show a change in his mental condition since the last trial, his present sanity and fitness to be at large, again petition for discharge, and the proceedings thereon shall be as hereinabove provided. — Remington's Comp. Stats. (1922), Vol. 2, sec. 6970.

Recommitment After Discharge — Procedure. — Should any criminally insane person discharged hereunder again become insane or mentally irresponsible, or be found to be an unsafe person to be at large because of mental unsoundness, the prosecuting attorney of the county from which he was committed may file a petition in the name of the state, setting up the facts leading to his commitment and subsequent discharge, and the relapse which is the basis of the petition. A warrant shall be issued for the defendant as in criminal cases, the defendant taken into custody, and the case tried to a jury, as in other cases provided herein; but the burden of proof, showing reasons for commitment, shall be upon the state. Should the jury find the defendant sane, and a safe person to be at large, he shall be discharged. Should they find that

since his discharge he has suffered a relapse or recurrence of his mental unsoundness, and by reason thereof he is an unsafe person to be at large, the court shall issue an order remitting him to custody as criminally insane. The evidence given upon the former trial or trials, if preserved by statement of facts or bill of exceptions as hereinbefore prescribed, may be read upon such hearing, and either party may appeal to the supreme court as in other cases. — Remington's Comp. Stats. (1922), Vol. 2, sec. 6971.

Parents, etc., may have Writ. — Writs of habeas corpus shall be granted in favor of parents, guardians, masters, and husbands, and to enforce the rights and for the protection of infants and insane persons; and the proceedings shall in all cases conform to the provisions of this chapter. — Remington's Comp. Stats. (1922), Vol. 1, sec. 1064.

(II, 3)

"Criminally Insane," Defined — Mental Irresponsibility. — Any person who shall have committed a crime while insane, or in a condition of mental irresponsibility, and in whom such insanity or mental irresponsibility continues to exist, shall be deemed criminally insane within the meaning of this act. No condition of mind induced by the voluntary act of a person charged with a crime shall be deemed mental irresponsibility within the meaning of this act. — Remington's Comp. Stats. (1922), Vol. 1, sec. 2173.

Criminal Insane to be Transferred to Penitentiary. — All the criminal insane now confined in the state hospitals for the insane shall be forthwith sent by the authorities of those hospitals to the state penitentiary and placed in the control of the warden and confined by him in the ward or department for the criminal insane, herein provided for, and shall not thereafter be discharged from his custody save in the manner herein provided. Any criminally insane person now confined in the state penitentiary shall be transferred to the ward for the criminally insane, and shall not be discharged, save as herein provided. — Remington's Comp. Stats. (1922), Vol. 2, sec. 6973.

WEST VIRGINIA

(I, 1)

Trial of insane persons. — No person shall, while he is insane,[1] be tried for a criminal offence. — Barnes' Code (1923), Chap. 159, sec. 9.

(II, 1 *a* and *b* and II, 2 *a*, *b* and *c*)

Same — Determination as to insanity before trial. — If a court in which a person is indicted for a criminal offence, see reasonable ground to doubt his sanity at the time at which but for such doubt he would be tried, it shall suspend the trial until a jury inquire into the fact of such sanity. Such jury shall be impaneled at its bar. If the jury find the accused to be sane at the

[1] In all such cases, "insane" probably means unable to understand the nature of the charge against him, the proceedings, etc., and hence unable properly to conduct his defense.

time of their verdict, they shall make no further inquiry, and the trial in chief shall proceed. If they find that he is insane they shall inquire whether he was so at the time of the alleged offence. If they find that he was so at that time, the court may dismiss the prosecution, and either discharge him or to prevent his doing mischief, remand him to jail, and order him to be removed thence to the hospital for the insane. If they find he was not so at that time, the court shall commit him to jail, or order him to be confined in said hospital until he is so restored that he can be put upon his trial. — Barnes' Code (1923), Chap. 159, sec. 10.

(II, 1 *a*)

Same — Determination as to sanity after conviction. — If, after conviction and before sentence of any person, the court see reasonable ground to doubt his sanity, it may impanel a jury to inquire into the fact as to his sanity, and sentence him, or commit him to jail or to the hospital for the insane, according as the jury may find him to be sane or insane. — Barnes' Code (1923), Chap. 159, sec. 11.

(II, 1 *b*)

Same — Trial or conviction after return to hospital. — When a prisoner is so brought from the hospital and committed to jail, or when it is found by the verdict of another jury that a prisoner, whose trial or sentence was suspended by reason of his being found to be insane, has been restored, if convicted he shall be sentenced, and if not, the court shall proceed to try him, as if no delay had occurred on account of his insanity. — Barnes' Code (1923), Chap. 159, sec. 13.

If any person charged with or convicted of crime, be found in the court before which he is so charged or was convicted to be insane, and if such court shall order him to be confined in one of the state hospitals, he shall be received and confined in it if there be room therein for him. The sheriff or other officer of the court by which the order is made, shall immediately proceed in the manner directed by section seven of this chapter, to ascertain whether such vacancy exists in a state hospital; and until it is ascertained that there is a vacancy, such person shall be kept in the jail of such court. — Barnes' Code (1923), Chap. 58, sec. 15.

When any person confined in a state hospital charged with crime and subject to be tried therefor, or convicted of crime and subject to be punished therefor, shall be restored to sanity, the superintendent shall give notice thereof to the clerk of the court by whose order he was confined, and deliver him to the proper officer upon the order of the court. — Barnes' Code (1923), Chap. 58, sec. 14.

(II, 1 *a* and *b*)

Commitment of insane persons. — When a person in jail, on a charge of having committed an indictable offence, is not indicted by reason of his insanity at the time of committing the act, the grand jury shall certify that fact to the court; whereupon the court may order him to be sent to the hospital

for the insane of the State, or to be discharged.[1] — Barnes' Code (1923), Chap. 158, sec. 13.

(II, 2 *c*)

Same — Disposition of prisoner acquitted on ground of insanity. — When a prisoner tried for an offence is acquitted by the jury, by reason of his being insane, the verdict shall state the fact; and thereupon the court may, if it deem him dangerous, order him to be committed to jail until he can be sent to the hospital for the insane. — Barnes' Code (1923), Chap. 159, sec. 14.

(II, 2 *d*)

When any patient in any state hospital is restored to sanity the superintendent shall give him a certificate of restoration and discharge him from custody. Any patient out on parole, or on bond, or otherwise temporarily released from a hospital, who has been restored to sanity, may present himself to the superintendent. If after examination the superintendent shall find him sane, he shall give him a certificate of restoration and a discharge. Any person who has been found insane by a mental hygiene commission or any other board or tribunal other than a circuit court, and any person who is confined in any hospital or other place of confinement or otherwise restrained of his liberty in violation of law, or a patient who has been restored to sanity and to whom the superintendent of the hospital refuses to give a certificate of restoration and discharge, may present his petition, or any relative or friend may present a petition in his behalf, to the circuit court of the county in which the hospital is located in case of a patient denied the certificate of restoration, and in other cases to the circuit court of the county in which the person is confined or is in custody, stating the facts. The courts shall treat such petition as an application for a writ of *habeas corpus*, so far as applicable and necessary, and cause such process to issue as the court may deem proper, and fix a time for the hearing of the case, which may be heard by the court either with or without a jury, as the court may order; and if the person is found sane, or it is found that he is held in custody in violation of law, he shall be discharged. . . . Nothing in this section shall be construed as applying to patients charged with or convicted[2] of crime, as provided in section fifteen hereof. — Barnes' Code (1923), Chap. 58, sec. 13.

(II, 3)

There is hereby established in each county a mental hygiene commission, to be composed of the president of the county court, the prosecuting attorney and the clerk of the county court. . . . — Barnes Code (1923), Chap. 58, sec. 4.

The word " lunatic ", wherever it occurs in this chapter, shall be construed to include every insane person who is not an idiot. Barnes' Code (1923) (p. 1289).

[1] This is a good example of the almost royal power of judges in these matters in some jurisdictions.

[2] Apparently this exception does not cover persons *acquitted* of crime because of insanity, and confined in a hospital.

WISCONSIN

(I, 2)

(2) The presumption of such accused person's sanity and mental normality, at the time of the commission of such alleged offense, shall prevail and be sufficient proof thereof on the trial of such special issue, unless the evidence produced on such trial shall create in the minds of the jury a reasonable doubt of the sanity or mental responsibility of such accused person at the time of the commission of such alleged offense. — Stats. (1923), Vol. 1, sec. 4697 (p. 2327).

(II, 1 *a* and *b*)

Insanity at the time of trial or conviction. — (1) If the court shall be informed, in any manner, that any person indicted or informed against for any offense probably is, at the time of his trial, or after his conviction and before commitment, insane, or feeble-minded and thereby incapacitated to act for himself, the court shall, in a summary manner, make inquisition thereof by a jury or otherwise as it deems most proper.

(2) If it shall be determined by such inquisition that such accused person is insane or feeble-minded his trial, sentence, or commitment for such offense shall be postponed indefinitely, and the court shall thereupon order that he be confined in the central state hospital for the insane or in the home for feeble-minded.

(3) Upon the recovery of such person from his insanity or feeble-mindedness the said superintendent shall notify the court in which such indictment or information is pending of such recovery, and said court shall thereupon issue to the sheriff of the county a warrant requiring him to take such accused person into his custody and confine him in the county jail of said county pending trial, sentence, or commitment for such offense; but such person may be released on recognizance or bail as provided in chapter 195.

(4) If it shall be determined, pursuant to section 51.11, that the insanity or feeble-mindedness of such accused person is incurable he shall be treated and disposed of as persons incurably insane or feeble-minded are required by law to be treated; but no such person shall be removed or discharged from said hospital or home except upon the order of the court having jurisdiction of such person for trial, sentence or commitment. —Stats. (1923), Vol. 1, sec. 4700 (p. 2327).

(II, 2 *a* and *b*)

Insanity at the time of committing the offense. — (1) No plea that the person indicted or informed against was insane or feeble-minded at the time of the commission of the alleged offense, and for that reason not responsible for his acts, shall be received unless such plea is interposed at the time of arraignment and entry of plea of not guilty, unless the court for good cause shown shall otherwise order. When such plea is interposed the special issue thereby made shall be tried and determined by the jury with the plea of not guilty; and if such jury shall find upon such special issue that such accused person was so insane, or feeble-minded, or that there is reasonable doubt of his sanity or men-

tal responsibility at the time of the commission of such alleged offense, they shall return a verdict of not guilty because insane, or feeble-minded. — Stats. (1923), Vol. I, sec. 4697 (p. 2327).

(II, 2 *c*)

(3) If the defendant shall be found by the jury " not guilty because insane " or " not guilty because feeble-minded ", he shall forthwith be committed by the court to the central state hospital for the insane or to the home for the feeble-minded, there to be detained and treated until he shall be discharged according to law. — Stats. (1923), Vol. I, sec. 4697 (p. 2327).

(II, 2 *d*)

(4) A re-examination of his sanity or mental condition may be had as provided in section 51.11; but no such person so committed shall be discharged from detention unless the magistrate or the jury upon whom devolves the duty to pass upon his sanity and mental condition shall, in addition to finding him sane and mentally responsible, also find that he is not likely to have such a recurrence of insanity or mental irresponsibility as would result in acts which, but for insanity or mental irresponsibility, would constitute crimes. — Stats. (1923), Vol. I, sec. 4697 (p. 2327).

Re-examination of persons adjudged insane. — (1) Except as otherwise provided in sections 4697, 4700, and 51.22, any person adjudged insane by any court, tribunal, or officer having lawful authority so to adjudge, or restrained of his liberty because of his alleged insanity, may on his own verified petition or that of his guardian or some relative or friend have a retrial or re-examination of the question whether such person is sane or insane before the judge of any court of record of the county in which such person resides or in which he was adjudged insane.

(2) The petition shall state the facts necessary to show that the judge to whom it is addressed and presented has jurisdiction to retry or re-examine the question of the present mental condition as to sanity or insanity of the person in whose behalf such petition is presented. It shall also state whether such person has a general guardian and if so, the name and residence of such guardian, and whether such person is detained in any hospital or asylum for the insane, and if so, its name and location and the name of the superintendent thereof.

(3) The judge shall thereupon by order appoint two physicians, each having the qualifications prescribed by section 51.01, to examine and report to him whether in their opinion the person in whose behalf the petition is made is sane or insane; and shall fix the time and place of such examination and cause reasonable notice thereof to be given to the guardian of the person to be examined, if he has a general guardian, and to the superintendent of the hospital or asylum in which the person is detained, if he is so detained.

(4) The petitioner and parties notified and any relative or friend of the person to be examined, may appear at such examination, offer testimony, and be heard. Should the state board of control certify that such superintendent

cannot attend such examination without danger of injury to his institution, his deposition may be taken and received pursuant to law.

(5) If such physicians report such person sane and the judge is satisfied that he is sane and no demand for a jury trial is made, the judge shall forthwith cause judgment to be entered to that effect and order his immediate discharge; but if the judge shall direct, or the person examined or his guardian or any of his friends or relatives shall demand, a trial by jury, an order for such trial shall forthwith be entered, and thereupon the procedure shall be, as near as may be, as prescribed in section 51.03. If the judge or jury find that such person is insane, the judge shall order him returned to the hospital or asylum or other place of detention of which he is an inmate; but if at large on parole or leave of absence, he shall be allowed to remain at large, unless the judge is satisfied that it will be unsafe to do so, in which case the judge may order him to be so returned.

(6) All persons who render services in such proceedings shall receive the same compensation as is allowed by law to persons rendering similar services in a judicial inquiry as to the mental condition of a person alleged to be insane, and all expenses of such proceedings shall be allowed, paid and adjusted as provided in section 51.07.

(7) When a proceeding for such retrial or re-examination is not pending in a court of record, and a jury trial is not desired by the persons authorized to commence such proceeding, the state board of control acting as a commission in lunacy may, on application, by like procedure determine the sanity or insanity of any such person committed to any hospital or asylum for the insane, and its determination shall be recorded in the office of the county judge of the county in which such inmate resides or was adjudged insane, and shall have the same force and effect as though made by such judge. The board may also, on or without application, if it has reason to doubt the insanity of any such inmate, request the county judge of the county in which such inmate resides or was adjudged insane to determine his mental condition, pursuant to this section; and it shall be the duty of said judge to do so.—Stats. (1923) (Vol. 1), sec. 51.11.

Transfer and discharge of patients; insane soldiers; nonresidents; tubercular patients. . . .

(3) Whenever, by a fair trial, it shall have become reasonably certain that any patient in either state hospital is incurably insane, and such patient is retained to the exclusion of others whose cases are of a more hopeful character, the board [1] may transfer him to some county asylum authorized by law to receive such patients.

(4) If the relatives or friends of any patient in either state hospital shall ask the discharge of such patient, before such patient has recovered from insanity, the board may, in its discretion, discharge such patient, and may require such relatives or friends or either of them to give a bond to be executed to the state of Wisconsin, in such sum and with such sureties as it may deem proper, conditioned for the safe-keeping of such patient. . . .—Stats. (1923) (Vol. 1), sec. 51.12.

[1] State Board of Control.

Parole of inmates; leave of absence; presumption of sanity and discharge by lapse of time. — (1) Each superintendent of the state and northern hospitals for the insane and the Milwaukee county hospital for the insane may permit any inmate in his hospital to go at large on parole, if in his opinion it is safe and proper to do so. Whenever within two years after granting such parole it becomes unsafe or improper to allow such persons to remain longer at large, the superintendent shall require his return to the hospital, unless such person shall have been adjudged sane by competent authority.

(2) The superintendent of any county asylum may, upon the written recommendation of the visiting physician thereof, allow any of its inmates to go therefrom on leave of absence for such time and under such conditions as such physician may direct.

(3) Upon the expiration of two years from the time of granting such parole or such leave of absence the authority of the superintendent to require the return to the hospital or asylum of the person paroled or granted leave shall end, and the presumption of insanity against such person because of the original adjudication that he was insane shall cease, and until a new adjudication to the contrary, he shall be presumed sane the same as though his sanity had been established by a judicial determination. — Stats. (1923), sec. 51.13.

Inmates may have writ of habeas corpus. — (1) Every person imprisoned or otherwise restrained of his liberty, except in the cases specified in the next section, may prosecute a writ of *habeas corpus*, as prescribed in this chapter to obtain relief from such imprisonment or restraint if it shall prove to be unlawful.

(2) All persons confined in any hospital or asylum as insane patients, except persons so confined in the central state hospital for the insane [1] may prosecute such writ, and the question of insanity shall be determined by the court or judge issuing the same; and if such court or judge shall decide that the person is insane such decision shall be bar to the prosecution of such writ a second time if it shall be claimed that such person has been restored to reason. — Stats. (1923), sec. 3407.

WYOMING

(II, 1 *a*)

Complaint and trial. — If any person accused of or convicted of any crime, misdemeanor or offense against the laws of this state, or against the laws of the late territory of Wyoming, shall be confined in any penitentiary, county jail of any county, or other place of confinement, awaiting trial, or who is confined therein under and pursuant to the sentence or judgment of any court or justice of the peace in this state, and is of unsound mind, any officer or person having such person of unsound mind in his charge shall, and any citizen of this state may, make complaint thereof, and the question of the sanity of such

[1] This is the place where the criminal insane are incarcerated. According to this section, as only persons acquitted of crime by reason of insanity and criminal irresponsibility, are kept at this hospital, these are not entitled to the writ of *habeas corpus*.

person shall be inquired of, tried and determined under and according to the law of this state providing for and regulating trials, inquisitions and proceedings in cases of inquiry into the sanity of other persons of unsound mind. Comp. Stats. (1920), sec. 531.

Jury Trial. — The determination of insanity or incompetency of any person shall be by a jury. The judge or court, commissioner or clerk shall issue an order to call an open venire, to the sheriff, who shall summon six men to act as a jury, who shall possess the qualifications for jurors, and the proceedings thereafter shall be in all respects, as near as may be in civil actions. — Comp. Stats. (1920), sec. 515.

Verdict. — The jury in addition to finding upon the question of the sanity or insanity of the person, shall find the value of his estate, if any, or whether he is a pauper. If he has an estate the judge, commissioner or clerk presiding over the proceeding shall appoint a guardian of the person and estate of such person, and such guardian shall take charge of the estate of such insane person in the manner provided by law in relation to guardianship. Comp. Stats. (1920), sec. 516.

(II, 1 *b*)

Care of insane convict. — If any such person accused of or convicted of any crime, misdemeanor or offense shall be found of unsound mind or insane upon such inquiry, trial or proceeding, he or she shall be forthwith taken to such place or places for treatment as shall be provided for or prescribed by the state board of charities and reform either generally, or for that particular case, and it shall be the duty of any and all persons, boards, superintendents, officers and employees of the place so designated by such board, to receive the same person into custody, and to treat him or her according to the regulations and practice of such place or institution. — Comp. Stats. (1920), sec. 532.

Disposition of person upon recovery of reason. — If any such person or patient so confined in any hospital or asylum or place designated by the said board of charities and reform shall recover his or her reason, he or she shall be returned to the penitentiary, county jail or other place of confinement or imprisonment where such person was confined at the time of such inquiry, trial or proceeding to determine his or her sanity or insanity, there to be tried or serve out or undergo his or her term of imprisonment if any part thereof remains, as the nature of the case shall require. — Comp. Stats. (1920), sec. 533.

(II, 1 *a*)

Inquest to be had if convict appears insane. — If any convict sentenced to the punishment of death, shall appear to be insane, the sheriff shall forthwith give notice thereof to a judge of the district court of the judicial district, and shall summon a jury of twelve impartial men to inquire into such insanity, at a time and place to be fixed by the judge, and shall give immediate notice thereof to the prosecuting attorney. — Comp. Stats. (1920), sec. 7563.

(II, 1 *b*)

Proceedings on the inquest. — The judge, clerk of the court and prosecuting attorney shall attend the inquiry. Witnesses may be produced and examined before the jury. The finding shall be in writing, signed by the jury. If it be found that the convict is insane, the judge shall suspend the execution of the convict until the sheriff shall receive a warrant from the governor of the state directing such execution. The finding of the jury and the order of the judge, certified by the judge, shall be by the clerk entered on the journal of the court. — Comp. Stats. (1920), sec. 7564.

Governor to order execution when convict restored. — The sheriff shall transmit immediately, a certified copy of such finding to the governor, who may, as soon as he shall be convinced that the convict has become of sound mind, issue a warrant appointing a time for his execution. — Comp. Stats. (1920), sec. 7565.

(II, 2 *d*)

Proceedings in insanity cases. — If any person shall allege in writing, verified by oath or affirmation, that any person declared to be of unsound mind has been restored to his right mind, the court or judge by which the proceedings were had shall cause the facts to be inquired into by a jury; provided, that before such matter shall be submitted to a jury it shall be the duty of the court to ascertain and determine whether the proceeding mentioned in this section is instituted and prosecuted in the interest of the person so declared to be of unsound mind; and if found not to be so instituted and prosecuted, the court shall dismiss said proceeding at the cost of the person instituting the same; but if found to be in the interest of the person declared to be of unsound mind, the said matter shall be submitted to a jury, as in this chapter provided. In ascertaining and determining the interest as aforesaid, the court shall have power to examine under oath any and all persons, including the person declared to be of unsound mind. — Comp. Stats. (1920), sec. 540.

(II, 3)

Drunkenness as affecting intent. — Drunkenness shall not be an excuse for any crime or misdemeanor, unless such drunkenness be occasioned by the fraud, contrivance or force of some other person or persons, for the purpose of causing the perpetration of an offense, in which case the person or persons so causing said drunkenness for such malignant purpose, shall be considered principal or principals, and suffer the same punishment as would have been inflicted on the person or persons committing the offense, if he, or she, or they had been possessed of sound reason and discretion. Where a crime rests in intention, the inebriated condition of the defendant at the time of committing the offense may be proven to the jury, as bearing upon the question of intention. — Comp. Stats. (1920), sec. 7530.

Insane criminals. — The state board of charities and reform shall make provision for the care, custody and treatment of all persons of unsound mind

who are accused of, or convicted of any crime, misdemeanor or offense against the laws of this state, or the laws of the late territory of Wyoming, either in the state asylum, or hospital for the insane at Evanston, or at a proper institution elsewhere within or without this state, after any such person of unsound mind shall be declared insane after inquiry, trial and determination as provided by law in the case of other persons of unsound mind. — Comp. Stats. (1920), sec. 529.

Defining certain terms. — For the purposes of this chapter, whenever the words " person of unsound mind " or " insane person " occur therein, said words shall be construed to mean an idiot, or a lunatic, or a person of unsound mind and incapable of managing his own affairs, as the case may be, upon proof as aforesaid. — Comp. Stats. (1920), sec. 542.

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In the author's experience, it is difficult to maintain a consistent analysis and classification of the works in the general field covered by this study. The artificial nature of classifications in the criminological field is clearly indicative of the fact that Criminology and Penology (especially the subject of the criminal insane), draw liberally upon many and varied social and natural sciences. I have attempted to classify the following works according to their primary emphasis in exposition by the authors.

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