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INSANITY AND CRIMINAL RESPONSIBILITY.

(REPORT OF COMMITTEE B OF THE INSTITUTE.¹)

EDWIN R. KEEDY, *Chairman.*

Introduction.—Great dissatisfaction regarding the trial of the issue of insanity in criminal cases and the results thereof is being expressed on all sides. The layman claims that sane men are escaping responsibility for their crimes on the plea of insanity by reason of the venality of experts, the strong and corrupt partisanship of counsel for the defense, and the incompetency of the judge and the prosecuting attorney. The medical profession claims that the inadequate and artificial tests of the law, the restricted and inefficient methods of taking testimony, the ignorance on the part of judge and counsel of the medical aspect of insanity, prevent a proper determination of the question of responsibility. The legal profession replies by saying that the medical experts are paid to testify on one side, that they cannot agree amongst themselves and that they have no appreciation of the fact that criminal responsibility is a legal and not a medical question.

Before remedies for this situation can properly be proposed, it is necessary to consider how such a situation arose. First, it must be noticed that the present views and theories regarding insanity, even among members of the medical profession, are very modern. Till a

¹A preliminary report presented at the Third Annual Meeting of the Institute, at Boston, September 1, 1911. The resolution allotting the scope of the Committee's work, and its members for 1910-11, are as follows:

"An investigation of the insane offender, with a view, first, to ascertain how the existing legal rules of criminal responsibility can be adjusted to the conclusions of modern medical science and modern penal science, and, secondly, to devise such amendments in the mode of legal proceedings as will best realize these principles and avoid current abuses."

COMMITTEE: Edwin R. Keedy, Chicago, (professor of law in Northwestern University), *Chairman.*

Adolf Meyer, Baltimore (professor of psychiatry in Johns Hopkins University).

Harold N. Moyer, Chicago (physician).

W. A. White, Washington (superintendent Government Hospital for the Insane).

William E. Mikell, Philadelphia (professor of law in University of Pennsylvania).

Albert H. Barnes, Chicago (former judge of the Superior Court).

Walter Wheeler Cook (professor of law in University of Chicago).

Archibald Church, Chicago (professor of nervous and mental diseases and medical jurisprudence in Northwestern University).

century ago insanity was generally regarded as of supernatural origin, either divine or diabolic.¹ Even the most learned physicians, says Dr. Maudsley,² put the devil but one step further back. The accepted method of medical treatment consisted of manacles and the lash; and the law had nothing but its harshest punishments for those who were considered perversely and diabolically wicked. It was not till the early part of the nineteenth century that there arose an appreciation of the fact that the abnormalities of the insane were due to disease. At this time the medical profession recognized two kinds of insanity—partial and total. This classification was based upon the then prevailing psychological theory that the functions of the brain were divided into distinct parts, each of which had a considerable independence of the others. According to this view, any function might be impaired without causing a disturbance of the others.³ Consequently, it was believed that a man might be insane on one or more subjects and perfectly sane as to others; for instance, that he might suffer from an insane delusion and be in all other respects sane. In the case of total insanity it was thought that the victim was completely deprived of the power of understanding.

These views of the physicians were presented in their testimony before the jury in criminal trials, and the judge, following the customary practice, commented on this evidence in summing up the case to the jury. The answers of the judge in M'Naghten's case in 1843 were simply a summary of the summings up of the trial judges in preceding cases. The "right and wrong test" and the "delusion test" laid down by the judges in M'Naghten's case were but a statement of the prevalent medical and psychological theories of insanity. These tests, with modifications in some jurisdictions, have been applied to the present day. In the meantime, however, the views of the medical profession have been continually changing, and the old theories have been discarded. The result is that today the legal test of insanity is in sharp conflict with the views of the medical profession.⁴ This fact causes much of the dissatisfaction between members of the two professions.

¹This supernatural view of insanity was suggested in a judicial opinion in this country as late as 1862. In *State v. Brandon*, 8 Jones (N. C.), 463, the Supreme Court of North Carolina said: "The law does not recognize any moral power compelling one to do what he knows is wrong. 'To know the right and still the wrong pursue' proceeds from a perverse will brought about by the seductions of the evil one. * * * If the prisoner knew that what he did was wrong, the law presumes that he had the power to resist it, against all supernatural agencies, and holds him amenable to punishment."

²Responsibility in Mental Disease, 9.

³Paton, *Psychiatry*, 119.

⁴See article by Dr. Morton Prince, in *Jour. Amer. Med. Assn.*, vol. 49, p. 1463, 1465.

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The inherent difficulties of the problem of determining the proper relation between insanity and criminal responsibility, coupled with the fact that some physicians are venal and some lawyers are corrupt, will explain many of the grounds of dissatisfaction stated at the beginning.

Definitions of Criminal Responsibility and Insanity.—It is necessary to consider at this point what criminal responsibility is and how this is affected by insanity. Criminal responsibility means accountability for one's actions to the criminal law. The tests of criminal responsibility are the rules of law which determine the guilt (upon which the punishment is based) of those who cause certain injuries, carefully defined by the law, to individuals or society in general. Criminal responsibility is then a purely legal question to be determined by the tests and machinery of the law.

As criminal responsibility is a purely legal question, so insanity is a medical one which must be answered by the physician. He should decide whether an individual is suffering from a mental disorder and if so determine its character and its symptoms, just as he is the only one who can properly diagnose a case of physical ill-health. This being so, the physician's idea of insanity should be accepted, and according to him the term "insanity" is vague and misleading. The popular idea is that insanity is a definite, clearly defined state with a sharp line of cleavage separating it from a state of sanity. To the physician, insanity means nothing but mental derangement, as general a term as physical unsoundness. Just as there is a gradual, almost imperceptible shading between physical health and sickness, so there is between mental health and mental derangement. The physician differentiates between many kinds of mental diseases, each with its more or less characteristic symptoms.

The problem is to connect the physician's diagnosis of the mental condition of a particular individual with the legal tests of criminal responsibility.

Relation of Insanity to Criminal Responsibility.—According to the English common law, a crime consists of a criminal act done with a criminal intent. This criminal intent is defined by the law and varies with the particular crime. In other words, a particular state of mind must accompany and give rise to a particular act in order to constitute a particular crime. It is true that there has developed a class of misdemeanors largely statutory, which require no criminal intent. These misdemeanors may be grouped as public torts and prohibitions under the police power and do not present any difficulty in the present prob-

lem, as no case has been found where insanity has been set up as a defense to such a misdemeanor and no such case is likely to arise. There are also a few decisions to the effect that there may be a conviction for bigamy in the absence of any criminal intent, but these decisions have been criticized and there are cases *contra*. For all purposes, so far as the question of insanity is concerned, it may be taken as a hypothesis that every crime requires a criminal intent and that any fact which negatives the necessary intent in a good defense. It follows that when the defendant's mental derangement is set up as a defense to a charge of crime the question is not whether the defendant is insane, but whether, by reason of the particular mental disease from which he was suffering, he lacked the intent necessary to the crime with which he is charged. It is not the fact of insanity, but the symptoms thereof that are important in determining the question of criminal responsibility. The problem is no different, when insanity is set up as a defense, from what it is when it is claimed that some other fact negatives the criminal intent. The question is the same when the defense is physical ill-health. It means nothing to say that a man who killed another was physically sick at the time. Nor does it help to say that he had typhoid fever. But, if it can be shown that he was delirious by reason of the fever and that the act committed was produced by this delirium, then there is a good defense.

Method of Trial.—The next question is: How shall the issue of criminal responsibility, when insanity is a defense, be tried, and what are the proper functions of the judge, the medical expert and the jury? Some help in answering this question may be gained by referring to the ordinary method of trial when the defendant relies upon some defense other than insanity. Take, for instance, a case where the defendant claims he acted under a mistake of fact. Here, after the evidence showing the commission of the criminal act, the defendant introduces evidence to show the mistake and its character. The judge then tells the jury what state of mind must accompany the act in order to constitute the crime charged. Finally the jury determines whether the mistake of the defendant negatives the existence of this necessary state of mind.

In the case already referred to, where the defendant claimed he was suffering from the delirium of typhoid fever at the time of the commission of the alleged criminal act, the procedure would be the same. The medical witnesses for the defendant would testify as to whether or not the defendant was delirious, would explain to the jury the nature of such delirium, and express their opinion regarding the

effect which such delirium would have upon the defendant's understanding, judgment and volition. The jury as before, under instructions from the judge, would determine the question of responsibility.

In the case of insanity, the procedure should be the same. *The medical expert, if he has examined the defendant, should state the results of his examination and describe the symptoms of the disease; and should then state his opinion regarding the effect of such symptoms upon the powers of understanding and volition. If the expert has made no examination, his testimony must be confined to a statement of opinion based upon the testimony of other witnesses. The judge should explain to the jury what state of mind the law requires in the particular case, giving concrete examples, and describing situations of fact, some of which indicate the presence, others, the absence of such state of mind.*⁵ *The jury should then determine whether the expert's description of the defendant's state of mind coincides with that defined and illustrated by the judge.*

Expert Testimony.—In attempting to determine a proper method of trying the question of criminal responsibility when insanity is set up as a defense, it is advisable at the outset to consider a certain phase of expert testimony. The law is dependent upon the physician to diagnose the condition of the defendant, to state the symptoms, and to express his opinion regarding the manner in which the defendant would react to certain extraneous *stimuli*. The existing methods of presenting expert testimony and the character thereof are much criticized. It is submitted that some, at least, of this criticism, is without foundation. Experts in a case are often condemned because they disagree. Such condemnation is based upon the false assumption that all mental diseases are capable of a clear-cut and unmistakable diagnosis and that the symptoms of particular mental diseases never vary. The very nature of the subject, illusory and intangible as it is, makes uniformity of opinion in all cases impossible. Another reason why there is often disagreement among experts has been set forth by a member of this committee: "The reason why experts can be found for either side of a given case is because practically every case that goes into court has two sides, and experts, like other people, are of many minds, and it is naturally no more difficult to get experts who will testify on a given side than it is to get lay witnesses to do so, and yet we never hear a wholesale denunciation of the lay witnesses because they are not all on one side

⁵The restoration of the common law power of the trial judge to charge the jury on expert evidence was advocated by William Schofield and E. R. Thayer in *Boston Med. and Surg.*, Vol. 161, pp. 957 and 967, respectively.

of a case. Each side hunts for an expert who will agree with their theory of the case and they hunt until they find one. It never appears in evidence how many experts may have refused to testify before the desired one is finally discovered."⁶

The unsatisfactory character of much expert testimony as to insanity is believed to be due to the following causes: (1) the fact that some medical experts are incompetent and venal; (2) that some trial lawyers are corruptly partisan, and that others have an insufficient knowledge of the subject and their examination of an expert witness is dependent upon questions furnished by the witness;⁷ (3) that there is often a failure on the part of judge, counsel and expert to understand and appreciate the relation which insanity bears to criminal responsibility. The hypothetical question as a method of examination would be added by many to this list.⁸ Your committee has nothing to report on this matter at present, but plans to consider this during the coming year.

It will be seen that much of the difficulty involved in the matter of expert testimony is due to the faults and incompetency of individual members of the legal and medical professions. The responsibility for this rests upon the two professions and this committee strongly urges upon them the necessity of establishing and maintaining higher ethical and professional standards.

An arbitrary method of preventing incompetent and unprincipled physicians from testifying as experts is suggested. *Statutory enactment may provide that witnesses who give opinion evidence must be chosen from a definite qualified group.* Such a statute, it is believed, would be constitutional.⁹ The constitutional provision giving one accused of

⁶Expert Testimony and the Alienist, by Dr. Wm. A. White, *N. Y. Med. Jour.*, July 25, 1908.

⁷In a paper read before the Conference on the Reform of the Criminal Law and Procedure at Columbia University on May 13, 1911, Dr. Carlos F. MacDonald presented, *inter alia*, the following resolution: "That it is the sense of the conference that it is subversive of the dignity of the medical profession for any of its members to occupy the position of medical advisory counsel in open court and at the same time to act as expert witness in a medico-legal case."

⁸The American Neurological Association at its annual meeting on May 13, 1911, adopted, *inter alia*, the following resolution: "That we consider the hypothetical question as ordinarily presented to be unscientific, misleading and dangerous."

⁹"The law of evidence is under the control of the legislature and the courts, though in criminal cases the Constitution gives the defendant the right to be confronted by the witnesses against him. Our code and statutes now restrict the rights of a litigant as to the production of his proof. They fix the qualifications and compensation and, in some cases, the number of ordinary witnesses and the form of direct examination and cross-examination. The legislature has even a clearer right to regulate the selection and compensation of experts who are to give their opinions or conclusions, though many lawyers believe that the consti-

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crime the right "to have compulsory process for obtaining witnesses in his favor" does not cover the qualifications of witnesses nor their number. It merely provides that qualified witnesses may be compelled to attend. Under the present practice, before a witness can give opinion evidence he must convince the trial judge of his qualifications. The trial court in its discretion may limit the number of expert witnesses and statutes have been passed fixing the number of such witnesses. Though in theory a trial judge might exclude witnesses to facts when their evidence is merely cumulative, yet this has never been done, and it is doubtful whether a statute providing for such limitation would be upheld. However, since it has been recognized for many years that the judge may limit the number of expert witnesses, a statute such as is suggested would not be open to attack under the "due process of law" clause of the constitution. In a recent case¹⁰ the Supreme Court of Michigan held unconstitutional as violating the "due process of law clause," a statute providing that in homicide cases where the issues involve expert knowledge, the court shall appoint suitable disinterested persons to investigate the issues and testify at the trial, and the fact that such witnesses have been appointed shall be made known to the jury, but either the prosecution or defendant may use their expert witnesses at the trial. The court reached its conclusion on the ground that "the reasons which impel the court to make the selection are not of record and can never be known;" the names of the witnesses would not be known to the prisoner in advance; and the official sanction of the court given to the testimony of certain witnesses would tend to nullify the effect of the testimony of other witnesses. Even conceding that this decision is correct, its doctrine would not include the statute here proposed.

The result of the suggested statute would be that any physician who had examined the defendant could give in evidence what he discovered in such examination, and his opinion based thereon, but would not be permitted to express any opinion based upon the testimony of other witnesses, nor to answer any hypothetical questions unless he belonged to the qualified group of experts.

It is recognized that the proposed statute requiring the selection of expert medical witnesses from a qualified group involves the questions as to what shall be the necessary qualifications and who shall determine them. It might be urged that the appointment of official experts to

tution has not allowed the legislature to take from a party the right to choose his own experts." Edward J. McDermott in *Jour. of Crim. Law and Criminol.*, vol. 1, p. 698, 700.

¹⁰*People v. Dickerson*, 129 N. W. R. 199 (1910).

be paid by the state would be subject to political influences, and thus the very end desired would be defeated. It would seem that some responsibility might be placed upon the various medical associations to recommend a group from which the appointments might be made. At least the statute could provide that no one could qualify as an expert unless he had a specific training and experience. Your committee at present has no recommendation to make regarding the manner of selecting the qualified experts. It, however, hopes to be able to suggest a plan at the next meeting. The general plan is believed to be worthy of approval.

A further restriction upon the right of medical experts to testify is believed to be desirable. Under the present practice a physician who has examined the defendant may state the results of such examination and may express an opinion based upon what he discovered by the examination. In addition to this he is allowed to answer hypothetical questions based upon the evidence of other witnesses. This leads to confusion because of the difficulty of distinguishing, throughout the examination, between the "real man" and the "hypothetical man." There is also the temptation on the part of the witness to make his second opinion agree with the first. A medical witness who has stated an opinion, based upon his examination of the defendant, should not be asked to give an opinion dependent upon the testimony of other witnesses. There should be a distinct line of cleavage between medical witnesses, who testify as to facts and state opinions based on them, and those who pass upon hypothetical statements of testimony. The present practice by which attorneys may ask hypothetical questions before the evidence upon which they are based is introduced, under the promise that they will later produce witnesses to testify along these lines, is thoroughly unsatisfactory, if not actually vicious.

Function of Jury.—It has often been urged that the jury is not qualified to pass upon the question of the defendant's sanity, and that the function of the jury should be limited to finding that the act was committed, and that a commission of experts should then determine the question of the defendant's responsibility.

The *first* objection to this proposal is that it assumes that the present function of the jury is to decide simply whether the defendant is sane or insane. This, as explained above, is not the question for the jury, the proper question for them being *whether the mental element required by law was present*. This the jury has to decide in every criminal case.

The *second* objection to the proposal is as to its constitutionality.

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The constitution guarantees the right of trial by jury. This guarantee means more than that twelve men shall sit together in the court room during a defendant's trial. It means that the defendant has a right to have the necessary elements of his guilt passed upon by the jury. According to the law, criminal intent is a necessary requisite of crime. Consequently the jury which decides whether the criminal act was committed must determine whether the criminal intent was present or absent. The proposal under discussion would also be invalid under the due-process-of-law clause of the constitution. In *Oborn v. State*,¹¹ the Supreme Court of Wisconsin held that the defendant has a constitutional right to have all the issues in his case, including any special issue of fact, particularly as to his sanity, tried before a common law jury. In *Strasburg v. State*,¹² the Supreme Court of Washington held that a statute abolishing insanity as a defense to a charge of crime was unconstitutional, because it took away from the jury the question of criminal intent, thereby violating the "due process of law" and the "trial by jury" clauses.

The *third* objection to the proposal is that it loses sight of the fact that criminal responsibility is a legal question. The commission of medical experts is competent to decide whether the defendant is sane or insane, but in what respect it is fitted to determine whether the defendant is guilty or not of murder or larceny, as the case may be?

The *fourth* objection arises from the legal requirement that criminal responsibility depends upon the defendant's state of mind at the time of the commission of the act, not at the time of the trial. If the commission would limit its inquiry to the present condition of the defendant, it would violate this requirement. If, on the other hand, it would decide as to the defendant's condition at the time of the commission of the act, it would be compelled to examine witnesses. As much of the evidence to prove the act is material in determining the intent, the commission would have to re-examine many of the witnesses who testified before the regular jury. In the trial before the regular jury the witnesses were governed by the legal rules of evidence; in the inquiry by the commission they would not be, nor would the proceedings be under the control of the judge. The examination of witnesses by the commission would be a complete usurpation of the functions of judge and jury.

Form of Verdict.—According to the practice at common law and in most of our states, the jury brings in a verdict of not guilty, when they find that the defendant by reason of his insanity did not have

¹¹143 Wis. 249 (1910).

¹²110 Pac. Rep. 1020 (1910).

the necessary criminal intent. Objection has been made to this general verdict because it fails to include any finding as to insanity which may be made the grounds for confinement in an asylum. By statute in England in 1883, it was provided that:

(1) "Where in any indictment or information any act or omission is charged against any person as an offense, and it is given in evidence on the trial of such person for that offense, 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 before whom such person is tried, that he did the act or made the omission charged, but was insane as aforesaid at the time when he did or made the same, the jury shall return a special verdict to the effect that the accused was guilty of the act or omission charged against him, but was insane as aforesaid at the time when he did the act or made the omission.

(2) "When such special verdict is found the court shall order the accused to be kept in custody as a criminal lunatic, in such place and in such manner as the Court shall direct till His Majesty's pleasure shall be known, and it shall be lawful for His Majesty thereupon and from time to time, to give such order for the safe custody of the said person during pleasure, in such place and in such manner as to His Majesty may seem fit."¹³

There is one fundamental objection to this statute, viz.: that it makes insanity at the time of the commission of the act the ground for

¹³Trial of Lunatics Act, 1883 (46 and 47 Vict. C. 38) (b), s. 2 (1).

Since January, 1909, the English statute has been in substance re-enacted in this country as follows:

"After the passage of this act, if upon the trial of any male person accused of a felony the defense of insanity is interposed, whether upon a special plea or a general plea of not guilty, the court or jury trying said cause shall make a finding both as to the sanity of said defendant at the time so claimed and as to whether he committed the act as charged. And if it shall be found in favor of said defendant on such plea of insanity but against him as to the commission of the act as charged, he shall upon order of the court be committed to and confined in the Indiana colony for the insane criminals in like manner and on such conditions and for such terms as is now provided for by law for the confinement of insane criminals in a state hospital for the insane." Laws of Indiana, 1909, c. 87, s. 16½, p. 207.

"That any person prosecuted for an offense may plead that he is not guilty by reason of insanity or mental derangement, and 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 that the defense of insanity may be raised under the general plea of not guilty." Laws of Nebraska, 1909, c. 74, s. 1, p. 333.

"If any person indicted for any crime shall be acquitted by reason of insanity or mental derangement and it shall appear to the satisfaction of the presiding judge at said trial that it is dangerous to the safety of the community for such person to be at large, he shall without further hearing commit such person to the insane asylum." Laws of Hawaii, 1909, Act 149, s. 13, p. 194.

"If a person who is 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 for the insane during his natural life, and he may be discharged there-

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confinement after the trial. Suppose that the defendant has recovered his sanity at the time of the verdict. On what ground can he be confined? Not because he has committed a crime, for the jury by their verdict have negatived this; not for the purpose of treatment, because by hypothesis he is not insane.

In January, 1911, a committee of the New York State Bar Association recommended for consideration the following:

"If, upon the trial of any person accused of any offense, it appears to the jury upon the evidence that such person did the act charged, but was at the time insane, so as not to be responsible for his actions, the jury shall return a special verdict, 'guilty, but insane,' and thereupon the court shall sentence such person to confinement in a state asylum for the criminal insane for such term as he would have had to serve in prison, but for the finding of insanity; and if upon the expiration of such term it shall appear to the court that such person is still insane, his confinement in such asylum shall continue during his insanity; and, further, when such a verdict of 'guilty, but insane,' is returned in a case where the penalty for the verdict of guilty against a sane person is death, such sentence for the insane person thus found guilty shall be for life; and in all such cases the governor shall have the power to pardon, after such inquiry as he may see fit to institute upon the question whether it will be safe for the public to allow such person to go at large."⁴

This proposal is much more objectionable than the English statute. In the *first* place, the form of the proposed verdict is contradictory and misleading. If the defendant was insane so as not to be responsible for his actions, then he cannot "be guilty" according to the legal meaning of that word. *Secondly*, the proposal has the same fault as the English statute, in that it makes insanity at the time of the act, re-

from by the governor, with the advice and consent of the council, when he is satisfied after an investigation by the state board of insanity that such person may be discharged without danger to others." Acts of Massachusetts, 1909, c. 504, s. 104, p. 711.

"Whenever, on the trial of any person upon an indictment, the accused shall set up, in defense thereof 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 the insane, or other institution for the insane during the continuance of such insanity." Acts of Rhode Island, 1910 (Aug. Sess.), c. 642, s. 1, p. 104.

"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 and custody of the hospital for insane, until he becomes sane." Laws of South Dakota, 1911, c. 171, s. 1, p. 211.

⁴New York State Bar Assn. Rep., vol. 34, p. 278 (1911).

regardless of what may be the condition of defendant at the time of the commission of the act, the ground for his confinement. *Thirdly*, the proposal provides that one found "guilty, but insane" shall be sentenced to a state asylum for a definite number of years. On what theory can such a sentence be supported? The term "sentence" indicates that the confinement is to be for the purpose of punishment, and this idea is strengthened by the fact that the confinement is to be for a definite term. The party, by the terms of the statute, is not criminally responsible, and is consequently not a fit subject for punishment. The statute merely substitutes an asylum for the penitentiary as a place of imprisonment. It may be urged that the confinement in the asylum involves no idea of punishment but is for the purpose of restraint and treatment merely. Suppose the insane person recovers his sanity after a short period of confinement, then there is no need to restrain and treat him, yet by the terms of the statute he is to be confined until his sentence has expired. The proposed statute provides that the Governor may pardon in such a case. How can he pardon one who is not criminally responsible and hence is not a criminal? Finally, it might be urged that imprisonment is not imposed for the purpose of punishment but merely for restraint and that the character of the place of confinement merely depends upon the kind of restraint and treatment demanded by the condition of the individual. Though this theory is advanced by many, yet it is not recognized by the law. Imprisonment for crime disenfranchises, disqualifies for public office, and is a ground for divorce in many states. As was said by the court in *State v. Strasburg*, "We can not shut our eyes to the fact that the element of punishment is still in our criminal laws."

Statutory Abolition of the Defense of Insanity.—In 1910 the Committee of the New York State Bar Association submitted for discussion a proposal to abolish the defense of insanity.¹⁵ This suggestion was withdrawn in 1911,¹⁶ and the proposed statute, discussed above, was substituted in its place. The legislature of the State of Washington, in 1909, passed a law providing that insanity shall be no

¹⁵"Insanity or other mental deficiency shall no longer be a defense against a charge of crime." New York State Bar Assn. Rep., vol. 33, p. 401 (1910).

¹⁶Referring to its proposal of 1910 the committee says in 1911: "Your committee had never in mind, to suggest even for discussion, such a change in our criminal law as to shut out completely all evidence of insanity and thereby in the event of a verdict of guilty, to put an insane man in the category of the convict condemned to death or jail." New York State Bar Assn. Rep., vol. 34, p. 274 (1911).

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defense to a charge of crime.¹⁷ The committee of the bar association was influenced by the abuse of the defense of insanity and the difficulty of trying the issue when insanity is involved and these grounds induced the legislature of Washington to abolish the defense. It is submitted that such action is a confession of weakness. Because some sane men escape punishment on a plea of insanity is no reason for punishing those who are insane. Because the machinery of the law is ineffective is no reason for repealing fundamental legal principles. The Washington statute was held unconstitutional by the Supreme Court of the State in *State v. Strasburg*, already cited. This decision has been criticized in some quarters on the ground that the Legislature has the right to do away with criminal intent as a requisite of criminality. Whether this legal criticism be endorsed or not, we believe that it will be generally agreed that the abolition of the defense of insanity is not the proper way to remedy its abuse.

Proposed Legislation.—At this point the following propositions will be taken as established: (1) *That one who, by reason of his insanity, did not have the necessary criminal intent at the time of the commission of a wrong within the province of the criminal law, should not be convicted or punished;* (2) *that one, who by reason of his insanity is a menace to the safety or health of the public, should be confined for purposes of restraint and treatment, such confinement to end whenever, if at all, he regains his normal mental condition, and not before.*

The problem is to accomplish the proper result in each case, and this problem is made more difficult by the fact that one who was insane at the time of the commission of the wrong, may be sane at the time of the trial. For the solution of this problem, your Committee recommends the enactment of the following statute:

(1) Where in any indictment or information any act or omission is charged against any person as an offense, and it is given in evidence on the trial of such person for that offense 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 before whom such person is tried, that he did the act or made the omission charged, but by reason of his insanity was not responsible according to law, the jury shall return a special verdict that the accused committed the act or made the omission charged against him, but was not responsible according to law, by reason of his insanity, at the time when he did the act or made the omission.

¹⁷"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." Laws of Washington, 1909, c. 249, s. 7.

(2) When such special verdict is found, the court shall remand the prisoner to the custody of the proper officer and shall immediately order an inquisition by the proper persons to determine whether the prisoner is now insane so as to be a menace to the public health or safety. If the persons who conduct the inquisition so find, then the judge shall order that such insane person be committed to the state hospital for the insane, to be confined there until in the opinion of the proper authorities he has recovered his sanity and may be safely dismissed from the said hospital. If the members of the inquisition find that the prisoner is not insane as aforesaid, then he shall be discharged from custody.

(3) That when an insane person shall have been committed to the state hospital for the insane in accordance with the provisions of the preceding section, no judge of competent jurisdiction shall issue a writ of habeas corpus for the release of such person on the grounds that he is no longer insane, unless the petitioner for such writ presents sufficient evidence to establish a *prima facie* case of sanity on the part of the person confined as aforesaid. Or,

(3) That when an insane person shall have been committed to the state hospital for the insane in accordance with the provisions of the preceding section and a writ of habeas corpus has issued for the release of such person, upon the hearing of which writ such person has not been released from confinement, then no judge of competent jurisdiction shall issue a writ of habeas corpus for the release of such person on the ground that he is no longer insane, unless the petitioner for such writ presents to the judge as aforesaid evidence sufficient to show that the mental condition of the person confined has improved since the hearing upon the first writ, so as to render it probable that he is sufficiently sane to justify his release from the asylum.

The *first* section of the proposed statute is based upon the English statute. The form of the special verdict has been changed, however, so as to avoid the use of the contradictory terms "guilty" and "insane." The special verdict here proposed indicates the correct relation which insanity bears to criminal responsibility.

The *second* section recognizes that one who by reason of insanity is not responsible according to law for the wrong he has done, should not be punished because he has committed such wrong. The section is designed to secure his commitment to a hospital in case his condition warrants confinement. The commitment of the party to custody pending the inquisition is not illegal or unconstitutional. This was squarely decided by a Circuit Court of the United States in *Brown v. Urquhart*.¹⁸

The *third* section is designed to prevent the improper release from confinement of one who has been committed to a public hospital under the provision of section 2. It is claimed that under the present practice a person may escape punishment for a wrong done on the ground that he was insane, and then by suing out an indefinite number of writs of

¹⁸139 Fed. Rep. 846.

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habeas corpus, finally find a tender-hearted judge, who will release him on the ground that he is sane.¹⁹ The provision of the third section will remedy this evil.²⁰ The question remains, however, as to whether the section is constitutional. At first sight it may appear that it amounts to a suspension of the writ of habeas corpus. A review of the cases will show that such conclusion is unwarranted. In *Hobhouse's case*²¹ it was held by the King's Bench Division that a judge may refuse to issue a writ of habeas corpus unless probable ground is shown that the party confined is entitled to be released. The court quotes with approval the statement made by Lord C. J. Wilmot, in 1758, in the House of Lords:

"He there states it to be his opinion that those writs ought not to issue of course; adding that a writ which issues on a probable cause, verified by affidavit, is as much a writ of right as a writ which issues of course."

In *Sim's case*,²² Shaw C. J., said:

"This is a petition for a writ of *habeas corpus*, to bring the petitioner before this court, with a view to his discharge from imprisonment, upon the grounds stated in the petition. We were strongly urged to issue the writ, without inquiry into its cause, and to hear an argument upon the petitioner's right to a discharge on the return of the writ. This we declined to do on grounds of principle and common and well-settled practice. Before a writ of *habeas corpus* is granted, sufficient probable cause must be shown. * * * It is not granted as a matter of course. * * * The same court must decide whether the imprisonment complained of is illegal; and whether the inquiry is had, in the first instance, on the application, or subsequently, on the return of the writ, or partly on the one and partly on the other, it must depend on the same facts and principles, and be governed by the same rule of law."

In *Ex parte Yarborough*,²³ upon a petition for a writ of habeas corpus, the Supreme Court of the United States, following the custom existing in early English cases, issued a rule to the marshal to show cause why the writ of habeas corpus should not issue. The return showing imprisonment under formal sentence, the court said it would

¹⁹In an address before the New York State Bar Association in 1909 Dr. Robert R. Lamb, medical superintendent of the Matteawan State Hospital, stated that during the year 1908 there were forty-one writs of *habeas corpus* issued for the release of patients from the Matteawan Hospital, on the hearing of which writs thirty-four of the petitioners were discharged, and that fourteen of these later found their way back either to hospital or prison.

²⁰In an article published in the *Journal of the American Medical Association* (Feb. 18, 1911, vol. XXI, p. 481) Frederick A. Fenning of the Washington (D. C.) bar urged that the petitioner for a writ of *habeas corpus* should establish a *prima facie* case of sanity. Mr. Fenning also advocated "a uniformity of practice which will result in *habeas corpus* cases being held before the nearest judge of competent jurisdiction without the questionable aid of a jury."

²¹3 B. and Ald. 120.

²²7Cush. 285, 291.

²³110 U. S. 651.

consider the right of the prisoner to be released on the writ to show cause. In *Simmons v. Georgia Iron & Coal Co.*,²⁴ the Supreme Court of Georgia, by Cobb, J., says:

"But while the writ of habeas corpus is a "writ of right" it did not, either under the common law or the Statute of Charles II., issue as a matter of course, but only on probable cause shown. It was, under the English practice, incumbent upon the party moving for the writ to make a *prima facie* showing under oath authorizing the discharge of the party restrained of his liberty."

Exactly what shall constitute reasonable ground for the release of a person confined under section 2, so as to justify the issuance of a writ under section 3, remains to be settled. It has been suggested that the judge should require the affidavits of two competent physicians that the person confined has recovered his sanity.²⁵ This requirement would be prohibitive for one who did not have the funds to employ such physicians. Perhaps it is sufficiently definite to require that a *prima facie* case of sanity must be shown before the writ will issue. At any rate, it is suggested that such requirement will suffice for a consideration of the general provisions of the section.

Summary of the Recommendations.—Your Committee makes the following recommendations:

(1) That the legal tests of insanity for determining criminal responsibility be abolished.

(2) That insanity should be held to be a good defense, whenever it negatives the necessary criminal intent.

(3) That the various medical associations shall establish and maintain a code of professional ethics to govern medical experts.

(4) That the various bar associations shall establish and maintain a code of professional ethics to govern counsel in criminal trials, where the defense of insanity is raised.

(5) That medical witnesses who give opinion evidence in criminal cases, where the defense is insanity, shall be chosen from a qualified group.

(6) That the respective functions of medical expert, judge and jury shall be as set forth in this report.

²⁴117 Ga. 305, 311 (1903).

²⁵Report of Committee on Commitment and Discharge of the Criminal Insane, New York Bar Assn. Rep., vol. 34, p. 391, 394.

"Where there exists difference of opinion between the lunatic and his friends and the hospital management, 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." From paper by Dr. Robert R. Lamb, in New York State Bar Assn. Rep., vol. 32, p. 60, 67 (1909).

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(7) That the statute proposed by the committee be enacted into law by the legislatures of the various states.

The foregoing recommendations are put forward as tentative only, and it is hoped that they will be freely discussed and criticized.

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B. DISCUSSION OF REPORT.

Dr. MORTON PRINCE, of Boston (professor of neurology in Tufts Medical College): As I see the matter, the general dissatisfaction that exists and has long existed with the trials, as ordinarily conducted, of those accused of crime when insanity has been set up as a defense, and with the verdict of the jury in many cases, has resulted in a large degree from two conditions:

First, the legal test of responsibility which, with modifications in some jurisdictions, is laid down to the jury, and in accordance with which medical experts are examined, is not one which, in many cases, can be practically applied without giving rise to just criticism.

Speaking as a medical man, I am heartily in accord with the conclusion of the committee that the legal tests of insanity be abolished or rather, as I would prefer to phrase it, the legal tests of responsibility. At least, I concur with the recommendation of the committee to this extent, that that legal test which pre-

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vails in most jurisdictions should be abolished. In this I think I voice the sentiment of the profession to which I belong.

The famous answers of the judges of England in 1843 to the questions of the House of Lords as to criminal responsibility in a certain class of insane persons have been applied, excepting in a few localities, to all accused insane persons as a test of responsibility, from that time to the present day, though to use the words of the report "with modifications in some jurisdictions." According to this test, as everybody knows, for an insane person not to be legally responsible, it must be shown that he "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 if he knew it, that he did not know that what he was doing was wrong."

I say "the questions of the House of Lords as to criminal responsibility in a *certain class* of insane persons" advisedly, for it is a curious and interesting fact that the questions did not refer to all types of insane persons but only to a special type, and the answers of the judges did not refer to all types of insanity but *only to this special type about which the questions were asked*, and yet the answer I have just quoted has been applied ever since as a test in all kinds of insanity. Objections to the test have been made on this ground. It has been objected that the test was a restricted answer to a restricted question and did not refer, and we must assume was not intended by the judges to refer, to all cases of insanity. The questions of the Lords and the answers of the judges referred only to persons laboring under partial delusion only (i. e., delusion in respect to one or more particular subjects or persons) who are otherwise sane. But the answers have been applied as a test to insane persons in general—to those without delusions as well as those with delusions, to persons with general delusions as well as partial delusions, to persons wholly insane as well as those who, according to the theories of that day, are otherwise not insane, i. e., aside from a particular delusion.

I take it, however, the lawyers will say that the answers of the judges were not new-made law but only a restatement or formulation of the law as it was to be found in previous decisions, and if the questions had been asked in reference to all kinds of insane people, the answers would have been the same and the same formula proposed. That was the law of the time.

The inadequacy of this formula or test will be seen when it is remarked that it is based upon a conception of insanity that is a myth—a condition of mind that never exists. The law assumes that a person may be laboring under a delusion and not be otherwise insane. The truth probably is as Dr. Mercier, a distinguished psychiatrist and psychologist, says: "There is *not, and never has been, a person who labors under partial delusion only and is not in other respects insane*. Here is where the judges fell into a trap of sophistry owing to the then incomplete knowledge of mental disease and the ways in which the various faculties of the mind are affected. I take it that all medical men will be unanimous in the view that delusions are the effect and expression of a general mental derangement and not the derangement itself, and, therefore, that the mind must be otherwise deranged than as shown by a particular delusion. If a person is not otherwise insane, he will not have a delusion. This makes the difference between an insane delusion and that kind of false opinion in sane people which under another use of the term is called a delusion. An insane

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delusion being a false belief, the falsity of which cannot be corrected by such an examination and comparison with the facts as would suffice in healthy people, if a person laboring under a delusion cannot correct it by examination and comparison, it is evidence that his reasoning processes, at least, are deranged."

The law, then, is based upon an erroneous conception of insanity, and of the capabilities of an insane person, whether he has delusions or not, to control his reasoning processes.

I pass over the point which has been often raised and which has been emphasized in the report of the committee as to the difference in the lay and medical conceptions of insanity. To the medical man, insanity is a general term, merely a convenient and arbitrary expression to define certain kinds and degrees of mental derangement. Scientifically speaking, there never has been, and there never can be, a definition of insanity. There are forms of mental derangement in which there is entire moral and legal irresponsibility but which arbitrarily in medical lore are not classified as insanity, and which, scientifically classified, are not insanity. The fact is, we have agreed, as a matter of convenience, to classify certain types of mental derangement as insanity, neglecting many others which exhibit an equally high degree of mental derangement. On the other hand, amongst the insanities are to be found derangements of slight degree and importance. A legal test of insanity is, therefore, impossible; there is not, and there cannot be, a legal test of insanity.

It is no wonder then that the test has failed in practice to convince juries and the public and has given rise to criticism of trials based upon it. As a matter of fact, if the jury in the very case which gave rise to the questions of the Lords—the McNaughton case—had been governed by it, a verdict of guilty would have been necessitated. It is now commonly accepted, I believe, by all writers that McNaughton was properly acquitted as irresponsible by reason of his acknowledged insanity. Certainly no medical man of the present day would hold, I am sure, that McNaughton, governed by a delusion as he was, ought to have been adjudged responsible. And yet he certainly must have known, when he shot and killed Mr. Drummond, the nature and quality of his act and that what he did was wrong. The test, therefore, does not touch the very case which gave rise to the formula. It does not touch, again, for example, the case of Hadfield, who thought he was our Lord and fired at George III hoping to be hung that the world might be saved. Hadfield was properly acquitted by action of the judge who stopped the trial, and yet, according to the test, he should have been found guilty. And so with numerous other cases that might be cited. The only way out of it is to make the test exhaustive by interpreting the words in a broad sense, so broad that, as Dr. Mercier points out, the King's English becomes so stretched and perverted that one wonders whether hitherto he has had a real acquaintance with his native tongue.

Undoubtedly in this spirit, the law has been at times so broadly interpreted, so wide and generous a meaning has been given to the word "know," that it has been made to cover nearly every possible condition of mental derangement and to prescribe a just limitation of responsibility. But this has not always been the case. Many judges, as in the Thaw case, have taken the test in its narrow and literal meaning, and then it has become shockingly inadequate. Thus another cause for dissatisfaction with the test is lack of uniformity in its interpretation. The fact, I believe, is that in many cases when this test is

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applied in its literal and true meaning the juries disregard it, for its effect would be such that the moral sense of the community would be shocked because of the monstrous consequences. But we must recognize the fact that so far as the test laid down by the English judges in 1843 *narrowly interpreted* is still law, it represents antiquated knowledge. It may have been based upon what once was scientific knowledge, but it is so no longer. Judicial opinion, i. e., judicial law, but has lagged behind the progress of medical sciences and I think it may be justly said that judicial law in this respect must almost necessarily be less influenced by scientific opinion than statute law, "for statute law is the expression of the point of view and wishes of the community. If it does not represent public opinion in the matter which it governs, it can be amended or repealed, a process which is constantly taking place to make laws conform to the progress of thought and the changes in public sentiment. This sentiment itself is very largely molded by the diffusion through the community of information on any given subject by those who have special knowledge of it. So that in the case of mental responsibility, for example, the special knowledge of those who are learned in the diseases of the mind can make itself felt in shaping legislation which shall determine responsibility before the law. It is quite different with common law, which is the formulation of the opinions of a very learned body of men, but learned in a special branch of human knowledge—the law, a large part of which is made up of those opinions. Public opinion and sentiment to a very slight extent and only indirectly can shape, amend or formulate such laws; they rest entirely on the attitude of mind, the wisdom and special knowledge of judicial minds; nor can the knowledge of those learned in other branches of research, excepting indirectly, guide in their evolution. Fundamentally, every opinion rests on knowledge, and when any given opinion, such as that of what ought to constitute mental responsibility, rests on knowledge of a special branch of human inquiry, mental disease, its wisdom is directly proportionate to the knowledge which he who expresses it has of that special branch of learning."

I believe, therefore, that if we are to have a test of responsibility, it must be one which is in uniformity with scientific knowledge and must be altered from time to time in conformity with the progress of scientific knowledge. I doubt myself whether any concise formula can be devised which will be intelligible to a jury and which is not capable of individual interpretation according to personal bias, whether of judge or jurymen.

The committee has recommended that the legal tests of insanity (or responsibility) be abolished. If by this is meant, as I assume to be the case, the so-called "right and wrong" test, I am heartily in accord with the recommendation, and I believe that in this I voice the opinion of the medical profession. I would point out, however, that the interpretation of the law as expounded by Chief Justice Shaw in 1844, and which I understand is still the law in Massachusetts, would seem to answer all the requirements of scientific knowledge and to be just to the accused and society. If this lengthy exposition could be universally used in the sense of a test, it would seem to answer all the requirements of the problem.

As to the second recommendation of the committee, "That insanity should be held to be a good defense whenever it negatives the necessary criminal intent," not being a lawyer I do not feel that I am qualified to express an opinion on so technical a matter. To do so would require that one should have a thorough

understanding of the meaning of "*criminal intent*" as known to the law. To me, as a layman, however, it would seem that this recommendation is substantially in agreement with the law as laid down by Chief Justice Shaw to which I have just referred. "In order," it is there stated, "to commit 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."

However, on this recommendation, I do not feel qualified to hold an opinion for reasons I have stated.

The second of the two reasons for dissatisfaction, to which I referred at the beginning of my remarks, is the existing procedure in this country under which expert testimony is given. The committee in its report has pointed out other reasons with which I fully concur, but I shall confine myself to these two alone.

Under the present system of employing experts, of examining into the mental condition of the accused, and of taking expert testimony, I do not believe that any witness, however qualified, can give satisfactory opinions. He certainly cannot form an opinion and testify thereto in a way satisfactory to himself. In its report, the committee recommends that experts "shall be chosen from a qualified group." This recommendation I heartily endorse. The criticism that I would make is that it does not go quite far enough. The general latitude in allowing in practice, whatever be the theory, a physician with slight experience with mental disease—indeed almost any physician with little knowledge and less experience in psychiatry—to testify as an expert is an absurdity. It may be said it is open to the jury to determine how much weight shall be given to an expert's opinion according to his experience and other qualifications. But it is an equal absurdity to expect a layman to be able to judge of the qualifications of experts. He is much more likely, as in the case of selecting general practitioners in every-day life, to be influenced by this assurance, mannerisms and I may say "bluff" of the witness. It is very desirable, therefore, that the expert should be chosen from a qualified group, as recommended by the committee.

But this, in my opinion, does not go far enough. Under the present system of employing experts, of making the examination of the accused, and of giving testimony, it is almost impossible for any expert, however qualified, judicially minded and unbiased he may be, to give satisfactory evidence. As it is now—and it would be the same under the proposed plan—he is employed on each side according to his known views on theoretical subjects. Indeed, some men are known as biased experts for the defense and some for the plaintiff. The examinations of the accused are then made by each group separately apart from the other. Each side keeps its knowledge and point of view secret to itself. No consultations or discussions between the experts of the two sides are allowed. Imagine the members of a court arriving at unanimity of opinion, or even sound judicial opinion, or the members of a jury arriving at a sound judgment under similar circumstances. Then the experts on each side are lined up in battle array, subjected to examination

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and cross-examination calculated to bring out only the points favorable to each side respectively, and often, as I know from personal experience, leaving untouched crucial points which one side is afraid of and the other "darsent" touch for fear of an unfavorable answer. Deftly worded questions by clever counsel elicit answers meant by the witness to cover one class of facts but by specious reasoning and connotation of language made by counsel skilled in dialectics to apply to another class of facts.

Under such methods the most qualified, the most unbiased and judicial-minded expert becomes a partisan for the side that employs him. Happy that expert who leaves the stand satisfied with himself and that he has presented the truth as he knows it.

The only complete remedy for this state of affairs I believe to be the German system; but this I am told would be unconstitutional in this country. If it were constitutional, experts should be appointed by the court, employed by the court, and paid by the court. They should be responsible only to the court. But as this systems seems to be impossible on constitutional grounds, certain principles of procedure pertaining to it might be adopted. In the first place, experts should be selected by both sides only from a qualified group as the committee recommends. Second, they should be paid by the court. Third, examinations by experts of each side should be made jointly so far as possible and opinions on questions at issue, after consultation and full discussion, should be made in writing to the court. Such opinions should state the points on which there is full agreement on each side, and those on which there is disagreement. When the hypothetical question is put, it should be in writing, and the answer given in writing after time for due consideration and weighing of the facts. This last I believe a very important procedure.

Further, I would say that when the defense of existing insanity is set up, the Maine system, which has been adopted in New Hampshire, Vermont and Massachusetts, should be resorted to. The accused person is committed to an asylum to remain in the control of the court until it is determined by continuous observation under unbiased and qualified experts, whether or not he is insane. I do not believe the layman appreciates the difficulty of determining the mental condition in doubtful cases unless opportunity for continuous observation, day and night, is permitted.

Finally, I will say that in my judgment so long as it is unconstitutional to have experts appointed by the court, I do not believe that we shall ever reach a perfectly satisfactory method of obtaining expert testimony. But much can be done to improve the present system, and the recommendations of the committee go a long way in this direction.

As to the other recommendations of the committee, Nos. 3, 4, 6, and 7, I forbear discussing them, as I have already taken more than my fair share of the time. I will only add that they seem to be highly commendable.

Dr. P. C. KNAPP, of Boston (instructor in diseases of the nervous system, Harvard Medical School): Mr. President: I fully agree with the report which has been presented by this committee, especially in the abolition of the so-called legal definition of insanity, which is more than mediæval, it is absolutely antediluvian. I cannot go quite so far as Dr. Prince has done. Since we have served on a committee together, I have had occasion to go over the decision of Chief Justice Shaw again, and it seems to me it must be modi-

fied considerably, and, in fact, has been modified in our courts, in order to fit the requirements of modern ideas of insanity. The expert question is an exceedingly difficult one. The recommendations recently made by the American Neurological Association might serve, that the expert should be connected with various societies and have had a certain number of years' experience. The danger of that is, if it should be recognized by the law, I fear medical societies would spring into existence which would have as much relation to true clinics as a Raines-Law sandwich does to a square meal. But the expert at present, under the present methods of legal procedure, never has a fair chance. He is sworn to tell the truth, the whole truth and nothing but the truth, and if he attempts it, the lawyers on both sides, and sometimes the judge, immediately shut him off. If an expert could hear all the testimony on both sides and then give his opinion, it might be worth while. I regret that the committee has taken the attitude which it has in regard to the appointment of commissions. They have certainly worked well here in Massachusetts. They may not be legal, but they have prevented a good many murder trials, and the accused has been adjudged insane and sent to an asylum and the commonwealth has been saved the expense of a trial. There have not been in Massachusetts, in my recollection, any of the scandals which have existed in New York. In the capital cases the expert testimony, in my experience, has been fairly presented on the two sides (even when the commission has not been appointed) and in many instances the appointment of a commission has solved the question of insanity.

Mr. KEEDY (chairman of the committee): Regarding what Dr. Knapp said as to the Massachusetts commission, when the defense of insanity is set up, the man is committed to an asylum by the court, for a certain time, during which his case is investigated by the physicians, and they determine whether he is sane or insane; if insane, there is no trial; if sane, he is referred back to the court. Now the difficulty with that is, that the commission is limited to determining the defendant's present mental condition and cannot inquire into his condition at the time of the doing of the act. Is that right?

Dr. KNAPP: No. I think every commission, so far as I am informed, has considered the question of a man's sanity at the time the act was committed.

ROSCOE POUND, of Cambridge (professor of law in Harvard University): Two things in the discussion struck me particularly. One thing I have seen in meetings of other associations—I mean a disclaimer of local short-comings. I remember, at one time I was a guest of a gentleman in the south, and we took a horseback ride through the mountains, and I had heard a great deal about moonshine and I asked some very indiscreet questions and the people always said to me, "Well there *used* to be some; but there hasn't been any around here for a number of years, but there is right smart of it in the adjoining county." Now, I notice that in people when they discuss legal procedure. And the medical gentlemen from Massachusetts, in their opinion on Judge Shaw's decision, seem to think that this state hasn't anything open to criticism, but "there is right smart of it in the state of New York." The truth of it is, in the Rogers case, that Judge Shaw did nothing except what was done in the M'Naghten case. He had an advantage that judges do not have in some states; he could give an oral charge and explain to the jury the way in which they might apply those rules. But, we want to remember that

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M'Naghten's case only represents one of the four views to be found in the decisions of this country. Some of the states, and notably New York, have adhered to the M'Naghten case in its original form. I think it was Judge Cooley in Michigan who went on entirely different view, that insanity had to do with the will element rather than the state of consciousness. Then, in two states at least, in New Hampshire and Alabama, we have very illuminating opinion by Chief Justice Doe and Justice Somerville. Judge Doe's is the one usually cited, so that Judge Doe and Judge Somerville have given us a proposition substantially, I take it, such as the committee contend for, that insanity is not a legal question; the legal question is responsibility; the question of insanity is a medical question.

I want to mention briefly another matter. Our medical friends complain a great deal about the way they are treated in court, and with some justification probably; but I think they labor under a slight misapprehension. Most of them with whom I have conferred seem to feel it is really their duty to decide whether this accused person is or is not to be convicted, and I take it the lawyer can never concede that point. I take it that the question whether this person is to be held liable is a question that belongs to the law. Having determined what the legal rule is, we can turn to our friends of the medical profession to tell us, as near as they can, what the facts are as to this person's condition, and then we must apply the legal rule. In that matter I should feel that the report of the committee is doing us a real service.

Mr. ARCHINS, of Tennessee: As a practitioner who has tried insanity cases from the state side, I wish to urge the necessity of an insanity plea. It puts the state at a great disadvantage to know the kind of insanity that is going to be plead. I think there ought to be a preliminary plea of insanity.

W. O. HART, of Louisiana: I am impressed with the remarks of the gentleman from Tennessee, because we have the same difficulty in my state. The defense of insanity may come in at the last moment, and we do not know what it is until it is presented, with the experts to back it up.

Mr. KEEDY: I would like to say, in answer to the question of the last two gentlemen, that the committee intends to report on the question of the plea of insanity. The work as outlined will cover about five years.