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MENTAL DISORDER IN ILLINOIS CRIMINAL LAW

CLIFFORD J. HYNNING

THERE has ever been a vast interest in the vagaries of the minds of men, especially of those accused of crime. At times this interest has been largely etiological: Did the mental condition of the defendant bear any causal relation to the commission of the offense with which he stands charged? At other times this interest has manifested itself as seeking some excuse, some extenuating circumstances: Should a defendant who could not know that it was wrong or who knew but could not govern himself according to his knowledge be held criminally responsible? Others have said that nothing much can be known about the minds of men because of their peculiarly subjective nature, and therefore any inquiry into the "state of mind" is simply raising a dust cloud behind which the defendant can conveniently escape "justice." Judges have occasionally spoken prejudicially about insanity as a defense to crime.

Newspapers have emphasized, perhaps unduly, the frequency of such defenses in sensational cases. But probably all these views assume that the purposes of criminal prosecution are punishment, and perhaps some justification exists for such an assumption.

Before proceeding any further, it may be instructive to note the extent of the insanity defense in criminal procedure. During the years 1924-27 in Cook County, Illinois, the finding of insanity verdicts was less than one-


2 See a reversal on this ground in O'Shea v. People, 218 Ill. 352, 75 N. E. 981 (1905).

half percent (0.47) in all criminal cases, and in murder cases about four per cent. Consequently it is readily seen that the emphasis that has been placed on the problem of mental disorder is unduly great. But this emphasis can be easily understood in view of the popular conception of criminals as necessarily abnormal persons.

It is not the objective of this paper to make any exhaustive inquiry into the development of the various tests used to determine “criminal responsibility,” which has been competently treated by many writers, especially by Professor Sheldon Glueck. For the scope of this study it is necessary only to indicate that most of the so-called tests used in present-day criminal courts are derived from the famous answers of the judges of England in McNaughten’s Case, laying the foundation for the knowledge and (old) delusion rules in the following terms:

To establish a defense on the ground of insanity, it must be clearly proved that, at the time of committing the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature or quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong. . . . Where he labors under a partial delusion only, and is not in other respects insane, he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real.

It is to be observed that this case was decided in 1843 when the opinions of the judges may accurately have

5 Contrast the view of modern criminologists. Professor Edwin H. Sutherland concludes, “There is very little in this survey that shows a distinct type of people who commit crime. So far as there is any evident type it is the young-adult man living in the city; perhaps the negro should be included in this type, but it is by no means certain that the greater criminality is a racial rather than a cultural or economic trait. There seems to be little difference between criminals and non-criminals with reference to mentality or nationality.” Criminology, p. 110.
7 10 Cl. & Fin. 200.
reflected the state of contemporary psychological knowledge.\textsuperscript{8}

But even that was before the science of psychiatry was born. It was a time when Francis Gall's fantastic theory of phrenology was at the height of its popularity. According to this doctrine, each function of the mind was localized in its own corner of the brain, and the phrenologist could measure a man's "ambition," "amativeness," "docility," or what not, by measuring the respective bumps on the skull. Thus, the theory conceived of the brain as a bundle of functions, each working independently. The opinion of the Judges reveals that they accepted a similar view, for they refer constantly to a person suffering from delusion, "and not in other respects insane." We know today that no such person exists. The mind is a whole, and delusions are a symptom of the existence of some more fundamental disturbance. There is no such thing as a man suffering from "partial delusions only, and not in other respects insane." Yet it is this discarded fanciful brain-child of an eccentric Viennese physician of a 130 years ago that underlies the cornerstone of our law governing the criminal responsibility of the mentally unsound.\textsuperscript{9}

While since then medicine and psychology have made considerable advances, and the quaint faculty psychology of this famous case has been relegated to the gypsy-tent, yet many courts have refused to be led astray by adopting what the Lord Chancellor of England termed "the vicious principle of considering insanity as a disease."\textsuperscript{10}

Although it is true the right-and-wrong test of McNaghten's Case has been accepted as a minimum requirement in all American jurisdictions except New Hampshire,\textsuperscript{11} there is very little authority that the special delusion test therein announced has been accorded general acceptance by American courts, in spite of the frequent assumption that such is the case. It has been stated to

\textsuperscript{8} Glueck, Mental Disorder and the Criminal Law, pp. 162 et seq.
\textsuperscript{9} Weihofen, Insanity as a Defense in Criminal Law, p. 4.
\textsuperscript{10} Quoted in Parsons v. State, 81 Ala. 577, 2 So. 574 (1886).
\textsuperscript{11} State v. Pike, 49 N. H. 399 (1869); State v. Jones, 50 N. H. 369 (1871).
be law in not more than nine states, has been expressly rejected in eight jurisdictions and by implication in at least nine others.\textsuperscript{12}

The doctrine thus promulgated as law has found its way into the textbooks, and has doubtless been largely received as the enunciation of a sound legal principle since that day. Yet it is probable that no ingenuous student of the law ever read it for the first time without being shocked by its exquisite inhumanity. It practically holds a man confessed to be insane, accountable for the exercise of the same reason, judgment, and controlling mental power, that is required of a man in perfect mental health. It is, in effect, saying to the jury, the prisoner was mad when he committed the act, but he did not use sufficient reason in his madness.\textsuperscript{13}

\textsuperscript{12} Following the rule: Arkansas—Woodall v. State, 149 Ark. 33, 231 S. W. 186 (1921); Florida—Blocker v. State, 92 Fla. 878, 110 So. 547 (1926); Indiana—McHargue v. State, 193 Ind. 204, 139 N. E. 316 (1923); Iowa—State v. Mewherter, 46 Iowa 88 (1877) which may be overruled by State v. Buck, 205 Iowa 1028, 219 N. W. 17 (1928); Massachusetts—Commonwealth v. Rogers, 7 Metc. 500 (1844); Nevada—State v. Lewis, 20 Nev. 333, 22 Pac. 241 (1889); Tennessee—Davis v. State, 161 Tenn. 23, 28 S. W. (2d) 993 (1930); Texas—Alexander v. State, 8 S. W. (2d) 176 (1928), ignoring Merritt v. State, 39 Tex. Crim. App. 70, 45 S. W. 21 (1898); Utah—State v. Green, 78 Utah 580, 6 Pac. (2d) 177 (1931).


Weihofen, Insanity as a Defense in Criminal Law, p. 75, concludes that the following jurisdictions have impliedly rejected the test in the cases cited: California—People v. Willard, 150 Cal. 543, 89 Pac. 124 (1907); Illinois—People v. Geary, 297 Ill. 608, 131 N. E. 97 (1921); Kansas—State v. Arnold, 79 Kan. 533, 100 Pac. 64 (1909); Kentucky—Banks v. Commonwealth, 145 Ky. 800, 141 S. W. 380 (1911); Minnesota—State v. Scott, 41 Minn. 365, 43 N. W. 62 (1889); Missouri—State v. Paulsgrove, 203 Mo. 193, 101 S. W. 27 (1907); New York—People v. Schmidt, 216 N. Y. 324, 110 N. E. 945 (1915); Pennsylvania—Commonwealth v. Calhoun, 238 Pa. 474, 86 Atl. 472 (1913); Vermont—Doherty v. People, 73 Vt. 380, 50 Atl. 1113 (1901).

As to the last group of cases, alleged impliedly to have rejected the delusion rule, it must be observed that there is wide opportunity for differences of opinion. The writer would hesitate to make such a generalization from the opinion in People v. Geary, \textit{supra}.\textsuperscript{13}

\textsuperscript{13} Judge Ladd in State v. Jones, 50 N. H. 369 (1871).
MENTAL DISORDER IN ILLINOIS CRIMINAL LAW

It is certainly not clear just in what relation the judges of England considered the special delusion rule to stand to the general right-and-wrong rule, probably only in supplement to it under some circumstances. Confusion has only been added to confusion in many American decisions where the delusion test is phraseologically tied up with "irresistible impulse," and in one jurisdiction with a metaphysical "overmastery of the will."

The explanation for the special references found in the opinions of many courts to delusion as a test or symptom, is, again, historical. In 1800, Lord Erskine, in his eloquent defense of Hadfield had stated that "delusion . . . where there is no frenzy or raving madness, is the true character of insanity." Hadfield was acquitted, but more because of Erskine's brilliant discourse than because the court agreed with his view of the law. Certainly the idea that delusion was to be taken as the test of insanity in all cases "where there is no frenzy or raving madness" was accepted in no subsequent English case. However, the fact that Erskine won his case, and that the judge said of his remarks that "there can be no doubt upon earth" but that they were the law, has caused many American judges to assume the case is law, and that Erskine's delusion test must be fitted somewhere into the legal test of insanity. Hence the long instructions on delusion by trial judges, and a discussion of the same topic by appellate courts, often without much reference to the general tests of responsibility adopted in the jurisdiction.

To the established right-and-wrong rule has been added another test by some eighteen jurisdictions to the effect that if the defendant, although knowing the act to be wrong, is incapable of controlling an impulse to commit it, or, as others have phrased it, is incapable of making a

14 Arkansas, Indiana, Massachusetts, and Utah in cases cited in footnote 12.
16 27 How. St. Tr. 1282.
17 Weihofen, Insanity as a Defense in Criminal Law, pp. 71-73. See also Hotema v. U. S., 186 U. S. 413 (1901), affirming conviction for killing a woman under the belief that she was a witch; and Guiteau's Case, 10 F. 161 (1882), where Judge Cox dogmatically instructed the jury that an "insane delusion is never the result of reasoning and reflection."
choice, he shall be acquitted. This is the so-called "irresistible impulse" test.\textsuperscript{18} To this test, which certainly is not clear, courts have constantly added qualifications and restrictions, making its application to concrete facts exceedingly difficult.

Having thus stated in very general terms the common-law tests of legal insanity, it is the purpose of the writer to examine in some detail the Illinois statutes and cases on mental disorder as excusing crime, postponing criminal prosecution or execution, and the procedural problems of proving mental disorder, before subjecting the law as thus ascertained to general psychological and sociological criticisms.


Probably following this test: Louisiana—State v. Tapie, 173 La. 780, 138 So. 665 (1931); Massachusetts—Commonwealth v. Rogers, 7 Metc. 500 (1844); Montana—State v. Colbert, 58 Mont. 584, 194 Pac. 145 (1920); New Mexico—Terr. v. Kennedy, 15 N. Mex. 556, 110 Pac. 854 (1910).

One of the leading cases is Parsons v. State, supra, where Judge Somerville suggested the following tests:

"1. Was the defendant at the time of the commission of the alleged crime, as a 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."

It should be noted that most jurisdictions do not impose the latter condition of sole causation.
MENTAL DISORDER IN ILLINOIS CRIMINAL LAW

THE LEGAL PROBLEM

In criminal law, mental disorder may be significant either as excuse for the crime or as ground for postponing prosecution or execution. Where mental disorder is pleaded as an excuse to crime, it must be proved to have existed at the time of committing the offense; in other words, it attacks the element of criminal intent, which must coincide with the overt act in order that the defendant can be said to be held criminally responsible. If it is shown to have occurred at any subsequent time, it cannot, under conventional legal theory, operate as excusing the crime (and its consequences, i.e., punishment), but merely as postponing either the prosecution of the charge or the execution of a capital sentence. Likewise significant are the procedural problems of how and when the mental disorder of the defendant can be brought to the attention of the court, or proving mental disorder in a jury court governed by common-law rules of evidence, largely concerning expert testimony and hypothetical questions, and of the burden of proof. Consequently, the ensuing sections are divided into (1) Mental Disorder at the Time of the Offense, (2) At the Time of the Trial, (3) After Trial, (4) Putting Mental Disorder in Issue, (5) Method of Proof, and (6) Burden of Proof.

I. MENTAL DISORDER AT THE TIME OF THE OFFENSE

It is elementary in law that a crime consists of the coincidence of an overt act contrary to public law and a criminal intent. But before a person accused of crime can be said to be capable of entertaining a criminal intent, he must possess, in the words of the statute, "sound mind and discretion." The Illinois Criminal Code, in section 592, purports to define, in a very confusing manner, the nature of insanity that will negative criminal responsibility:

A lunatic or insane person, without lucid intervals, shall not be

19 Illinois Criminal Code, sec. 588.
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.21

The first decided case of the Illinois Supreme Court bearing on the problem of mental disorder as related to the criminal law was that of Fisher v. People22 (1859), in which the jury raised some of the perplexing problems of this particular branch of the criminal law in a communication sent to the trial judge after retiring to the jury-room for deliberation. Their questions were:

1. Is it lawful for a juryman to go behind our statute law and search the Bible to see whether our statute laws are not void in consequence of their disagreement with the higher law?

2. Is it lawful for a juror to go behind the testimony and read medical books to see whether the doctors and others examined at the trial testified correctly or not?

3. Is it lawful for a juryman to go behind the trial and search law books to see whether the judge did not exclude some testimony that ought to have been admitted?

4. Is it lawful for a juror to go behind the instructions of the court and search law books for the purpose of finding some error in said instructions?

5. Is it lawful for a juror, after admitting the proof of every essential fact which constitutes a certain crime, to bring in a different verdict, because he, the said juror, does not approve of the penalty attached to the first? If so, how long must we remain in this worse than purgatory and be abused and villified by a fanatical madman?

21 "This statute lays down an amazing proposition—that only those lunatics and insane persons who have no 'lucid intervals' shall be exempt from punishment. The proviso of the statute is redundant and superfluous, for if the insane person had no lucid intervals any act done by him must necessarily have been done in a 'condition of insanity.' The statute prescribes no symptoms, but simply requires a state of lunacy or insanity without 'lucid intervals.'" Keedy, "Insanity and Criminal Responsibility," 30 Harvard L. Rev. 535, 724, at p. 732.

22 23 Ill. 218.
MENTAL DISORDER IN ILLINOIS CRIMINAL LAW

The court, deciding that it was error for the trial judge to answer these queries by the statement that the jury was bound by the law as given it by the court inasmuch as at that time the jury in Illinois was judge of the law as well as the facts of the case, suggested that "before such a plea (of insanity) be allowed to prevail, satisfactory evidence should be offered that the accused . . . was affected with insanity and, at the time he committed the act, was incapable of appreciating its enormity." This is simply the right-and-wrong rule interwoven with a difficult question of procedure (burden of proof), about which more shall be said in an ensuing section. The case cited no authorities within this jurisdiction on the question of mental disorder, referred only to a few of the English and early American cases, and is on the whole a very unsatisfactory treatment of the problem, which was, it must be conceded, not so directly before the court.

Only four years passed before the Supreme Court was given the opportunity again, in 1863, to discuss the problem of mental disorder, in the leading case of Hopps v. People. It is in this case that the Illinois Supreme Court first suggested a test which later became known as that of "irresistible impulse."

Whenever it shall appear from the evidence, that at the time of doing the act charged, the prisoner was not of sound mind, but affected with insanity, and such affection was the efficient cause of the act, and that he would not have done the act but for that affection, he ought to be acquitted . . . But this unsoundness of mind, or affection of insanity, must be of such a degree as to create an uncontrollable impulse to do the act charged, by overriding the reason and judgment, and obliterating the sense of right and wrong as to the particular act done, and depriving the accused of the power of choosing between them.

It must be noted that, although the court used the phrase "uncontrollable impulse," this decision does not

23 Contra, People v. Bruner, 343 Ill. 146, 175 N. E. 400 (1931).
24 31 Ill. 385.
state unqualifiedly the test of irresistible impulse, for it attached certain essential consequences to the impulse, as "obliterating the sense of right and wrong," which, practically, is little more than the conventional doctrine of right and wrong. The court, however, did include in its statement one of the theoretical cornerstones of the impulse test: the power of choice. And so it is not so difficult to understand why later judges of the Illinois Supreme Court were able to declare that the test of irresistible impulse was part of the law of Illinois, and cite this case as their authority.

While decided in 1863 and a leading case on mental disorder in Illinois, the language of the Hopps case indicates a liberal spirit, which is only infrequently noted in most cases, that the law should keep apace with the developments of modern science. It is quite true that the court's description of mental disorder is a quaint variety of the old faculty psychology, as indicated in the extended following quotation from that case, but that was unquestionably the predominant scientific view of the time.

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 one or more, partial insanity only. . . . It is but very lately that insanity has become a subject of careful scientific investigation, which has made, and is making, rapid progress. This investigation enables experts to detect simulated insanity with much more certainty than could formerly be done. Shall we ignore and denounce the results of human study and research on this subject, while we recognize and applaud the advancement of science in all other directions? Peoples and governments in all civilized countries recognize them by the erection of vast asylums for these unfortunates, where this science can be carefully studied by those who will devote their lives to the investigation of this
subject, where very many, by careful scientific treatment, are
restored and become useful members of society. To say that men
by careful study and investigation can acquire no skill on this
subject, while the same study and investigation will constantly
develop new truths on all other subjects, would be a daring
assumption upon which we cannot consent to hang a fellow man.

This case was followed in Dunn v. People, where the
court attempted to clarify the test laid down in the pre-
ceding case by eliding the confusing phrase of the "imp-
ulse obliterating the sense of right and wrong" and
bringing more to the fore the power of choice.
Where reason and judgment are not overcome, but the person
charged with crime at the time retains the power to choose be-
tween right and wrong as to the particular act done, he cannot
escape responsibility for his acts under a plea of insanity. . . .
So, if at the time a deadly assault is made, the person making the
assault knew that it was wrong to commit such an act, and had
the power of mind to choose either to do or not to do, and of
controlling his conduct in accordance with such choice, he will
be amenable to the law, although he was not entirely and per-
fectly sane.

But in 1892 the Supreme Court restated the confusing
phraseology of the Hopps case in its decision of Hornish
v. People, reinserting the phrase of "obliterating the
sense of right and wrong" as an essential effect of the
"uncontrollable impulse."

This unsoundness of mind or affection of insanity must be of
such a degree as to create an uncontrollable impulse to do the
act charged, by overriding the reason and judgment, and ob-
literating the sense of right and wrong as to the particular
act done, and depriving the accused of the power of choosing be-
tween them.

It was not until 1920, however, that the Illinois Su-
preme Court, in the leading case of People v. Lowhone,

25 109 Ill. 635 (1884).
26 142 Ill. 620, 32 N. E. 677.
27 Expressly followed in Lilly v. People, 148 Ill. 467, 36 N. E. 95 (1894),
and Meyer v. People, 156 Ill. 126, 40 N. E. 490 (1895).
authoritatively adopted the test of "irresistible impulse," without the confusing limitations appended by the Hopps and Hornish cases. Although the court specifically undertook to point out that great advances had been made in the field of psychiatry since the decision of the Hopps case in 1863, it clung tenaciously to the notion of "partial insanity," (thus implicitly recognizing and relying on the quaint but now thoroughly discredited faculty psychology), which the court naively imagined to be illustrated by paranoia, the test of which was said to be that

... the afflicted person, to be responsible for a crime, must not only be capable of distinguishing between right and wrong, but he must also be mentally capable of choosing either to do or not to do the act constituting the crime, and of governing his conduct in accordance with such choice. ... An insane impulse which may impel a man to commit an unlawful act without being guilty of a criminal intent must be the result not merely of an inflamed passion but of an insane delusion which is due to a diseased mind, and which, without any provocation, so overpowers his reason as to render him incapable of refraining from committing the act.29

The difficulty of proof of such a supposed state of mental disorder (which the court seems to consider susceptible of being distinctly recognized) is reflected in the fact that the defendant Lowhone's conviction and sentence to death upon the second trial was affirmed with little discussion of the tests of insanity.30 But the case does indicate that the Supreme Court realized the gap between that hypothetical state of mental disorder termed "legal insanity" and the modern socio-psychological conceptions of mental maladjustments, and that the court was attempting to bridge the gap, although predicking its solution upon a heavy emphasis on a very dubious free-

29 Other cases following this test: People v. Cochran, 313 Ill. 508, 145 N. E. 207 (1924); People v. Krauser, 315 Ill. 485, 146 N. E. 593 (1925); People v. Preston, 341 Ill. 407, 173 N. E. 383 (1930); and People v. Witte, 350 Ill. 558, 183 N. E. 622 (1932). Not all of these cases noted the limitation in the applicability of the test, stated in the Lowhone case, to cases of paranoia and similar types of disease.

30 296 Ill. 391, 129 N. E. 781 (1921).
dom of choice, which is so apt to resolve itself into an endless dispute over a metaphysical freedom of the will.

The older cases seemed to require that acquittal on ground of insanity can only be returned where the mental disorder is shown to be fixed. A mere temporary intoxicated frenzy or mental affliction was held insufficient in *Upstone v. People*,\(^3\) which was admittedly not the ordinary case of drunkenness, for the court treated it as actual insanity, but insufficient because of its temporary character. Compare with this case the recent decision in *People v. Cochran*,\(^2\) where the court, referring to the preceding case as a "reactionary decision," said that

> Long continued habits of intemperance which produce permanent mental diseases amounting to insanity, which so weaken and impair the mind that one committing an offense has not mind enough at the time to know right from wrong and has not sufficient mind and will power to refrain from doing the act, relieve a person from responsibility under the law, the same as insanity from any other cause.

The effect that drugs (cocaine) might have on the mind as relevant to the issue of criminal responsibility was presented in the case of *People v. Penman*,\(^3\) where the court recognized it as constituting a defense by holding it to be error to refuse the following instruction:

> If the jury believe from the evidence that the shooting alleged to have been done by the defendant was done at a time when the defendant was affected by and labored under an attack of a brief or temporary madness or insanity, the result of an involuntary taking by the defendant of some drug preceding the act, and that he was thereby rendered unconscious of what he was doing, that would constitute in law a complete and entire defense.

\(^1\) 109 Ill. 169 (1883).
\(^2\) 313 Ill. 508, 145 N. E. 207 (1924).
\(^3\) 271 Ill. 82, 110 N. E. 894 (1915).
Mere emotional instability, lack of self-control, general nervous maladjustment, subnormal mentality, and the fact that the defendant was "not entirely and perfectly sane" have been held insufficient to excuse crime where the effect was not such as to indicate lack of knowledge of the right and wrong or deprive one of the power of choice.

In concluding this examination of cases where the mental disorder of the defendant has been offered as a complete defense or excuse to crime, it may be well to summarize in a very general statement what legal insanity at the time of the offense would probably be held to include. A person will be acquitted on ground of insanity in Illinois, according to present legal theory, if, at the time of the commission of the offense, he did not have such a mental condition that he could appreciate whether the particular act in question was wrong, or, if he knew it to be wrong, that he could mentally choose to refrain from committing it.

II. AT THE TIME OF THE TRIAL

At common law it was well established that a person accused of crime could not be prosecuted therefor if he were incapacitated by reason of his mental condition to prepare an adequate defense. The Illinois Criminal Code, in section 593, adopts this rule of the common law in the following terms:

34 People v. Ortiz, 320 Ill. 205, 150 N. E. 708 (1926), where the court said, "The fact that one's jealousy is easily aroused does not necessarily show a deluded mind. It does not follow that a man is insane because he lacks self-control. Nor does the making of a confession by a person charged with crime denote insanity. There are sane persons who occasionally exhibit a loss of self-control and even an inclination to confess criminal acts;" and People v. Pokasa, 342 Ill. 404, 174 N. E. 544 (1931).

35 People v. Marquis, 344 Ill. 261, 176 N. E. 314 (1931), where the court said, "A mere subnormal mentality is not a defense to a charge of crime unless the accused is by reason thereof unable to distinguish between right and wrong with respect to the particular act in question."

36 People v. Witte, 350 Ill. 558, 183 N. E. 622 (1932).


38 See People v. Gavrilovich, 265 Ill. 11, 106 N. E. 521 (1914), where the court expressly held this provision merely declaratory of the common law.
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.

It is to be observed that the vague phrases used by the statute—lunacy or insanity—cannot logically be used in the same sense as insanity or lunacy at the time of the offense, to which the preceding section of this paper was devoted. The law here adopts as its standard of sanity a mental condition in which the defendant can appreciate the difficulty in which he has become involved, take intelligent means to prepare an adequate defense, as securing the aid of competent counsel and informing him of the relevant facts. If he can do this the law considers him sane as far as the trial of the criminal case is concerned.\(^{39}\)

It is obvious that the mental condition of the defendant should be determined before the trial. Either the court will act on its own motion, as is frequently done in the Cook County Criminal Court by referring the defendant to the Behavior Clinic for examination, or on petition of counsel.\(^{40}\)

III. AFTER TRIAL

The mental condition of the defendant may be a relevant question after trial in two situations. He may have become mentally disordered after verdict but before sentence (probably a very rare occurrence); or he may have become mentally disordered after sentence but before execution in a capital case. In both situations the statute provides that the criminal proceeding (i. e., sen-

\(^{39}\) See dictum in People v. Geary, 298 Ill. 236, 131 N. E. 652 (1921). In People v. Varecha, 353 Ill. 52, 186 N. E. 607 (1933), a sentence to death upon a plea of guilty was reversed, because the defendant was alleged to be mentally defective, and hence could not make such a plea, although at the time of making it he seemed to appreciate its consequences.

\(^{40}\) People v. Maynard, 347 Ill. 422, 179 N. E. 833 (1932).
tence or execution) shall be postponed until the defendant has regained his sanity.\textsuperscript{41}

The statutory provisions, quoted in the footnote, were rather fully construed in the leading case of \textit{People v. Geary},\textsuperscript{42} where the court held that the issue of insanity occurring after sentence must be tried by a jury as in an ordinary civil case, whose sole function should be to determine whether the defendant was insane or lunatic at the time of the impaneling of the jury.

When one about to be executed is to be considered as insane or lunatic is not so well established by the authorities, but we think it is clear that within the meaning of our statute the defendant is to be regarded as sane, and not insane or lunatic, when he has sufficient intelligence to understand the nature of the proceedings against him, what he was tried for originally, the purpose of his punishment, the impending fate which awaits him, and a sufficient mind to know any facts which might exist which would make his punishment unjust or unlawful and sufficient intelligence to convey such information to his attorney or to the court. When he has not such intelligence and mental ability, he is to be regarded as insane or lunatic by the verdict of the jury, if so found, and his execution stayed or prolonged.

The proper manner for a defendant to raise the issue of his subsequent mental disorder is by a petition alleging such mental disorder supported by affidavits. If the defendant is found by the jury to be insane, the court will order a stay in the execution till recovery and confinement meanwhile in a hospital under proper safe-keeping. The opinion in this case argued that inasmuch as the statute provided only for one trial to determine whether

\textsuperscript{41} "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 the 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." Sec. 593. See also Moore, Illinois Criminal Law and Procedure, sec. 1466.

\textsuperscript{42} 298 Ill. 236, 131 N. E. 652 (1921).
MENTAL DISORDER IN ILLINOIS CRIMINAL LAW

a defendant has become insane after his conviction and sentence, no review can be had from the finding of the insanity inquest, either by motion to set aside the verdict, appeal, or writ of error. But in the subsequent case of People v. Preston, the court, undertaking to explain this latter holding as dictum, definitely decided that the verdict of such an insanity inquest is always subject to the court's inherent power to set it aside and order another trial on the motion of either party and the showing of proper grounds.

After a defendant has been found to be insane by such a statutory inquest, there is a presumption that the mental disorder of the defendant continued. It is not, however, conclusive as to insanity at any other time. Upon a petition signed by the State's Attorney, supported by affidavits, the court can properly inquire whether the defendant has regained his sanity by a jury in a similar civil proceeding, in which the defendant will be duly represented by a guardian ad litem appointed by the court.

IV. PUTTING MENTAL DISORDER IN ISSUE

In a few states the defense of mental disorder must be specially pleaded, or it otherwise cannot be put in issue. But at common law and in most American states, including Illinois, the plea of not guilty puts directly in issue the defendant's mental condition as an essential ingredient of the crime. It is of course true that the prosecution have a right to rely, and do in fact rely, on the presumption of sanity, as will be indicated in an ensuing section, and usually no evidence of the mental condition is intro-

43 The court had somewhat similarly held in People v. Bechtel, 297 Ill. 312, 130 N. E. 728 (1921), where there had been a sanity inquest preliminary to trial.
44 345 Ill. 11, 177 N. E. 761 (1931).
45 People v. Scott, 326 Ill. 327, 157 N. E. 215 (1927). The defendant committed suicide before the new trial could be held.
46 Glueck, Mental Disorder and Criminal Law, p. 22. See further Shepherd, "The Plea of Insanity under the 1927 Amendment to the California Penal Code," 3 So. Cal. L. Rev. 1 (1928); and "Failure to Plead Insanity as a Defense," 6 U. of Cincinnati L. Rev. 313 (1932).
duced until the defendant puts it in. Usually this matter of putting the mental disorder of the defendant in issue presents no legal problem.

But in 1928 a very perplexing and interesting problem was presented to the Illinois Supreme Court in the case of *People v. Hart,* 47 where the defendant had been convicted of robbery. When the jury returned a verdict of guilty, but reported a further finding that the defendant was then insane, the trial judge committed the defendant to the Chester State Hospital for the Criminal Insane. An appeal from this order was taken to the Supreme Court on the very ingenious ground that, the statute having expressly provided that an accused who is insane at the time of the trial cannot be tried while in that mental condition, and the defendant having been insane at the time of the trial, he had been erroneously prosecuted. The purpose of the statute was obviously to protect persons accused of crime from prosecution when their mental condition was such that they could not make an intelligent defense. The Supreme Court reversed the order of the trial court committing the defendant to Chester, and remanded the case "with directions to the trial judge to enter a proper judgment and sentence on the finding of the jury that the defendant was guilty in manner and form as charged in the indictment," on the ground that the finding of the jury should be treated as superfluous inasmuch as the defendant had not properly put in issue his mental condition as of the time of the trial.

It is submitted that the decision of the judges of the Illinois Supreme Court that the defendant, found insane by the jury, must be considered as having waived the issue of insanity as of the trial by failing to put it in issue in a technical manner, is far from satisfactory. Such an argument is logically inconsistent with the underlying purpose of the common-law rule, enacted into statutory form in Illinois, that an insane person accused of crime

MENTAL DISORDER IN ILLINOIS CRIMINAL LAW

cannot be tried while in such a condition of mental disorder because he cannot then make an intelligent and proper defense. To hold that an insane person waived the issue by failing to put in a technical plea, and hence that the finding of the jury must be regarded as superfluous, is absurd.\(^{48}\)

V. METHOD OF PROOF

The courts treat mental disorder as involving a question of fact for the jury to determine, and consequently are very reluctant to disturb the verdict of a jury unless clearly against the weight of the evidence. It is hardly necessary to point out the utter futility of trying very complex problems of mental disease before a lay jury. Consider further the situation formerly in Illinois when the jury was considered judge of the law as well as of the facts of the case.\(^{49}\) Under such a theory of the jury function, several Supreme Court decisions approved of the practice of reading to the jury in argument lengthy extracts from opinions of decided cases.\(^{50}\) In view of the great confusion of language used by the Supreme Court from time to time this practice was not at all peculiarly conducive to an intelligent performance of the jury function. But in view of a recent case\(^{51}\) holding that the jury is no longer judge of the law but only of the facts of the case, it is open to very serious doubt that such a confusing practice can be sustained.

Evidence of mental disorder may take several forms—as facts of the abnormal conduct of the defendant, expressed beliefs and ideas, and opinion evidence. Opinion evidence consists either of those of neighbors and ac-

\(^{48}\) In People v. Varecha, 353 Ill. 52, 186 N. E. 607 (1933), the Supreme Court reversed a death sentence upon a plea of guilty where the defendant was allegedly mentally defective, although the mental disorder as of the time of the trial was not raised until after sentence. This is in effect an overruling of the Hart case, which was not mentioned by the Court in the Varecha case.

\(^{49}\) Fisher v. People, 23 Ill. 218 (1859).


\(^{51}\) People v. Bruner, 343 Ill. 146, 175 N. E. 400 (1931).
quaintances of the defendant that he is sane or insane, stating the facts upon which such an opinion is based, or of the opinions of expert psychiatrists, usually formulated on the basis of hypothetical questions, or, occasionally, on the basis of an actual examination of the defendant.  

The courts have usually held that the mere commission of an unnatural or atrocious crime is not evidence of mental disorder, nor abandoned habits. It is, however, logically relevant and should be considered along with the other evidence, as it frequently is. Courts are somewhat reluctant to consider the expressed beliefs and theories of the defendant as evidence of his mental disorder, probably because of their insistence on treating such delusions as a mental disease in and of themselves rather than symptoms of mental disorder, and hence not significant to the court, nor from the layman’s point of view, unless clearly related to the criminal act committed.

There has been a decided tendency, however, to liberalize the rules of evidence and procedure in admitting relevant evidence bearing on the mental state of the defendant, as is illustrated in the case of People v. Krauser, decided in 1925. In this case physicians were permitted to testify in regard to facts disclosed at a physical and mental examination of the defendant prior to the trial or during an adjournment, and the court held that testimony as to the defendant’s statements during such an examination did not violate his constitutional privilege to be a witness against himself, provided the testimony was limited to the sole question of the defend-

52 See Glueck, Mental Disorder and Criminal Law, pp. 26-40.
53 People v. Spencer, 264 Ill. 124, 106 N. E. 219 (1914); and People v. Lowhöme, 296 Ill. 391, 129 N. E. 781 (1921).
54 See People v. Geary, 297 Ill. 608, 131 N. E. 97 (1921).
55 See Glueck, Mental Disorder and Criminal Law, pp. 119 et seq.; and note Index, under Mind.
56 315 Ill. 485, 146 N. E. 593 (1925).
MENTAL DISORDER IN ILLINOIS CRIMINAL LAW

ant’s mental condition. The court also permitted the experts to state in their testimony the results of intelligence tests.

Compare with this case that of People v. Scott,57 decided in 1927, where the Supreme Court held that it was error to admit the reports made by the Department of Public Welfare physicians (including those of Doctors Adler and Schroeder, State Criminologists) because incompetent as hearsay. In holding that the trial court also erred in appointing expert witnesses to examine the defendant with a view toward qualifying as court witnesses in the case, the Illinois Supreme Court largely relied on a very doubtful decision of the ultra-conservative Michigan Supreme Court58 invalidating a statute authorizing trial courts to appoint qualified experts to examine the defendant and testify in court as to the conclusions drawn from such an examination. It is generally agreed that the court has the inherent power to bring any evidence that is otherwise competent before the jury for consideration on its own motion.59 It has been observed that this case was a statutory proceeding to determine the sanity of the defendant after conviction and pending execution, and the statute did not authorize the court to consider evidence on its own motion. The writer, however, fails to see the relevancy of this variation from cases where the courts admittedly have the inherent power to bring evidence before the tribunal on its

57 326 Ill. 327, 157 N. E. 215.

58 People v. Dickerson, 164 Mich. 148, 129 N. W. 199 (1910), critically noted in 24 Harvard L. Rev. 483, 51 Reports of Am. Bar Assn. 441 (1926). Dean Wigmore characteristically writes, “It is a pity that the court suffered such a severe attack of dikastophobia on the sight of this harmless statute. As the history and authorities of the present subject are ignored in the opinion and as its fantastic logic would hardly be followed elsewhere, no further notice of its contents is needed.” 5 Evidence 436. Yet this is the “authority” upon which the Illinois Supreme Court relied in the Scott case! By statute trial courts are expressly authorized to appoint such experts in New York, Rhode Island, Vermont, Colorado, Wisconsin, and Louisiana; and such appointment is mandatory in California and Indiana. See Weihofen, Insanity as a Defense in Criminal Law, p. 210.

own motion. The statutory authorization for the proceeding is exceedingly scant.\textsuperscript{60} Since this proceeding has been admittedly governed by the ordinary rules of evidence, there seems to be little reason for depriving the judge of the exercise of one function which he would ordinarily possess, and which is presumably in the interests of all parties concerned.\textsuperscript{61}

Answer to a hypothetical question is the generally approved manner in which the expert presents his testimony.\textsuperscript{62} There is, however, no valid reason for the existence of the hypothetical question other than the very vague one that the opinion evidence of the expert would otherwise be invading the peculiar province of the jury, but it does that anyway. Every one in the courtroom knows that the "hypothetical monstrosity, whose mental condition the expert is asked to pass on, 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."\textsuperscript{63} It may further be objected that the various component elements of the question appear to receive equal weight, while "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."\textsuperscript{64}

The question and the answer very frequently mislead the

\textsuperscript{60} See sec. 593, quoted in n. 41.

\textsuperscript{61} Independently of statute this practice has been sustained in People v. Linton, 102 Cal. App. 608, 283 Pac. 389 (1929), subsequently enacted into statutory form; State v. Paine, 49 La. Ann. 1092, 22 So. 316 (1897), State v. Genna, 163 La. 701, 112 So. 655 (1927), similarly enacted into statutory form after the decision; State v. Cockriel, 314 Mo. 699, 285 S. W. 440 (1926); State v. Petty, 32 Nev. 384, 108 Pac. 934 (1910); and State v. Horne, 171 N. C. 787, 88 S. E. 433 (1916).

Note that expert witnesses were historically regarded almost as amici curiae and were called by the court. Chamberlayne, Modern Law of Evidence, Vol. III, sec. 2376 (1912).

\textsuperscript{62} People v. Geary, 297 Ill. 608, 131 N. E. 97 (1921).

\textsuperscript{63} White, Insanity and the Criminal Law, pp. 81.

\textsuperscript{64} Ibid., p. 86.
jury into believing that the facts assumed in the question have in fact been proved.

Dr. John E. Lind, an alienist of many years' experience in the courts, has written a very engaging article on "The Cross-Examination of the Alienist,"\textsuperscript{65} which will bear somewhat extended quotation.

It is thought these [impressions] might serve to show how easily the psychiatrist testifying in a murder trial may be put in a false position, how difficult it is for him to present his conception of the case to the jury, how skilfully his statements may be emasculated by cross-examination; it may perhaps serve to explain why he goes on the stand feeling that he is testifying on behalf of an irresponsible unfortunate whose mental condition should be taken into account in dealing with him, and leaves the stand wondering whether he has not helped to tighten the noose about his neck. . . . 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 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. . . . 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. . . . The purpose of cross-examination is to discredit the witness and vitiate his testimony. . . . The most common attack in cross-examination is by attacking independently 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. In other words, the conclusion to which an alienist comes, especially when his opinion is based on a hypothetical question, is often all the result of a process of inductive reasoning, which automatically lays

\textsuperscript{65} 13 Jour. Crim. Law 228 (1922).
itself open to the attack that all the facts were not known. . . . They [hypothetical questions] are of course attacked by dropping each part of them in turn and saying, "Now, suppose we leave that out, would that affect your opinion?" The unwary witness may then see four or five of his symptoms dropped out and then become uneasy at their dwindling, say when it is suggested that the next symptom be elided, that he would then change his opinion. This gives the cross-examiner his opportunity. He says, "In other words, you wouldn't call him insane without this symptom (or act), but you would with it?" This forces an undue attention on this particular symptom and it is attacked intensively, with the result that the witness is obliged to admit that it is not in itself indicative of insanity, it seems to the jury as if he had abandoned the one thing he emphasized.

Under present conditions of a criminal trial the most effective testimony or evidence that an expert psychiatrist can give is his opinion based on an actual and complete examination of the accused, as will appear from the scope of a psychiatric examination indicated in the ensuing description adapted from Dr. Singer's report in the Illinois Crime Survey.66

A psychiatric examination is a study of the kind of behavior shown by the person under study. How has he reacted to circumstances throughout his life? This is discovered by a scrutiny of his life story as given both by himself and by others and includes the conditions he has had to meet, as well as the manner in which he has met them—his school, home, work and play life; his interests, ambitions, hopes, and fears and the way in which he has dealt with them; his manner of expressing emotion, his balance and poise; his habits and associations. His manner of behaving at the time of the examination is studied by investigating his memory and appreciation of the facts of the world around him, his emotional responses, thoughts and conclusions in response to situations placed before him by means of questions and requests for action.

The direct observations of the man himself are supplemented by the stories told by relatives, friends and others who have had

66 P. 748.
opportunity to observe him at various stages in his career and under various conditions. This serves not only to establish the facts but also to check the statements of the man himself as to their validity and significance.

The two features outlined are by far the most important part of the examination. In addition, it is desirable to study the function of the body organs, particularly of the nervous system; consideration is given also to the history of the family from which the man is descended with the object of discovering evidences of faults in the stock. These phases of the examination, however, can never establish the fact of insanity; they can offer only a possible explanation for its existence, if present, and some clews as to the nature of the disease.

The disagreement of experts in criminal trials is always emphasized by lawyers and judges in considering the problem of expert testimony, nor has this feature of the problem been lost sight of by others either. Besides, disagreement among psychiatrists is not peculiarly characteristic of their profession. "Judges have been known to disagree in the interpretations of the laws and in the same way physicians may be expected to disagree at times in the interpretations of symptoms."

VI. PRESUMPTIONS AND BURDEN OF PROOF

The law occasionally allows the parties interested in a legal controversy to rely on certain facts that are usually true and so are presumed true without proof. Such a presumption, it is said, is not evidence, but is merely called upon to satisfy the requisites of a prima facie case. One such presumption is that of sanity. Every

67 "Agreement between experts for the prosecution and defense occurs much more frequently than is generally known. . . . Yet the consequences of this disagreement is so sensational that these cases completely overshadow those in which an agreement is reached." Illinois Crime Survey, pp. 790, 759.


For a discussion of the Expert Testimony Bill prepared by a committee of the Institute of Criminal Law and Criminology, see 30 Harvard L. Rev. 537.
man is presumed sane in a criminal case as well as in a civil one. But what is the effect of such a presumption in a criminal case where insanity is pleaded as a defense? Does such a presumption put the burden of proving insanity on the defendant?

It was so suggested in the case of Fisher v. People, the first case in Illinois in which the problem of mental disorder as related to the criminal law was discussed. Every man will be presumed sane until the contrary appears. . . . Before such a plea [of insanity] be allowed to prevail, satisfactory evidence should be offered that the accused . . . was affected with insanity, and at the time he committed the act was incapable of appreciating its enormity.

The first sentence of this quotation, which seems to cast the burden on the defendant of proving his insanity, has been followed apparently with approval in a number of cases.

But it is submitted that Fisher v. People, was erroneously decided insofar as it placed the burden of proof of mental disorder on the defendant. And the Supreme Court in Hopps v. People expressly alluded to the unfortunate language of the Fisher case and qualified it. It was there held that

in sustaining such a defense [of insanity], it is not necessary that the insanity of the accused be established even by a preponderance of proof; but if, upon the whole evidence, the jury entertain a reasonable doubt of his sanity, they must acquit.

69 Fisher v. People, 23 Ill. 218 (1859); People v. Gilmore, 320 Ill. 233, 150 N. E. 631 (1920), and other cases too numerous to cite.
70 23 Ill. 218 (1859).
71 See People v. Geary, 297 Ill. 608, 131 N. E. 97 (1921), where the court said, "This presumption inheres at every stage of the trial until insanity is made to appear by the evidence"; People v. Ortiz, 320 Ill. 205, 150 N. E. 708 (1926), where the court said, "Every person is presumed sane and responsible until the contrary appears"; and Wharton on Criminal Law, (12th ed., 1932), in sec. 78, so states the Illinois rule, citing largely civil cases.
72 31 Ill. 385 (1863).
MENTAL DISORDER IN ILLINOIS CRIMINAL LAW.

It is submitted that this case states the correct rule in Illinois as to the burden of proof of insanity in criminal cases, and has been followed in a great number of cases.\

Where a state of mental disorder has once been shown to exist, however, there is generally a presumption that it has continued to exist.

As a general rule, when insanity is proven as existing at a particular period, it will be presumed to continue until disproved. This rule, however, is subject to several qualifications. One is that the insanity shown to have existed prior to the commission of the act must be of a permanent type or of a continuing nature, or possessed of the characteristics of an habitual or confirmed disorder of the mind, or its peculiarities must have been exhibited for a long series of years. It is not sufficient that there be proof of a temporary or spasmodic mania. Another is that too long a period of time must not be shown to have elapsed between the proved insanity and the act charged. The insanity which authorizes the removal of a convict from the penitentiary to an asylum for the insane is not necessarily an insanity of a permanent kind. It may be assumed, pretended, or merely temporary. The removal is not based upon insanity that is determined by an inquest or legal adjudication, but because the attending physician or warden advises it.

See Chase v. People, 40 Ill. 352 (1866); Dacey v. People, 116 Ill. 555, 6 N. E. 165 (1886); Montag v. People, 141 Ill. 75, 30 N. E. 337 (1892); Jamison v. People, 145 Ill. 357, 34 N. E. 486 (1893); People v. Casey, 231 Ill. 261, 83 N. E. 278 (1907); People v. Ahrling, 279 Ill. 70, 116 N. E. 764 (1907); People v. Haensel, 293 Ill. 33, 127 N. E. 181 (1920); People v. Bacon, 293 Ill. 210, 127 N. E. 386 (1920); People v. Cochran, 313 Ill. 508, 145 N. E. 207 (1924); People v. Krauser, 315 Ill. 485, 146 N. E. 593 (1925); People v. Saylor, 319 Ill. 205, 149 N. E. 767 (1925); People v. Christensen, 336 Ill. 251, 165 N. E. 292 (1929); and Wharton on Criminal Law, (12th ed., 1932), sec. 79, correctly stating the Illinois law.

In Hornish v. People, 142 Ill. 620, 32 N. E. 677 (1892), the Supreme Court held it not to be error to refuse an instruction to the effect that the jury should acquit if they entertained a reasonable doubt as to the sanity of the defendant, stating that the acquittal must be on the ground of a reasonable doubt as to his guilt, not merely as to his sanity. Compare People v. Penman, 272 Ill. 82, 111 N. E. 544 (1915), where substantially such a refusal was held error as ignoring the defense of insanity.

Langdon v. People, 133 Ill. 382, 24 N. E. 874 (1890).
But it is likewise held that proof of insanity at one particular time carries no presumption that it existed prior thereto.\textsuperscript{75}

\textbf{Criticism}\textsuperscript{76}

Much of the confusion of the court decisions and much of the disrespect into which expert testimony has fallen is largely due to the persistence in treating primarily psychological and sociological problems (i.e., maladjusted or disorganized personalities reflected in the behavior branded criminal) by conventional legal methods. The artificiality of the legal attitude toward mental disorder may be attributed largely to its strong predisposition to consider the mental processes as highly departmentalized, to ignore completely the essential mental unity, and to require that the causal connection between the alleged delusion and the criminal act be apparent to laymen. With an emphasis out of all proportion on the cognitive aspects of mental life, the legal tests have tended completely to ignore the conative-affectional aspects. Courts have repeatedly insisted that deviations in the latter aspects are insufficient and really insignificant, with a few scattered exceptions.

Besides these difficulties, there is the added one of terminology, the importance of which cannot be too greatly emphasized. The psychiatric expert is constantly asked questions on the stand purposely phrased in words vague in legal meaning—as "responsibility"—and utterly useless and misleading as far as the expert is concerned. The language of the law, while it might have been all right a hundred or two years ago, is not any longer usable by the present-day psychiatrist who finds himself unequal to thinking in such terms and much less able to use them exclusively, as he is required to do on the witness stand, for the expression of his thoughts.\textsuperscript{77}

\textsuperscript{75} People v. Shroyer, 336 Ill. 324, 168 N. E. 336 (1929).

\textsuperscript{76} The writer is deeply obligated to his guide in the study of social science, Professor Edwin H. Sutherland, of the Department of Sociology in the University of Chicago, for a point of view.

\textsuperscript{77} White, Insanity and the Criminal Law, p. 104.
The physician is only on safe grounds in presenting his report when he formulates the data in the language of medicine and keeps within the categories of biology. When he is forced to use such equivocal terms as "insanity" or such metaphysical terms as "responsibility" he is apt to get into trouble.\textsuperscript{78}

It has been argued by some writers of the law\textsuperscript{79} that the irresistible impulse test, which seems to have been accepted by the Illinois Supreme Court, would fairly adequately cover most of the cases not falling within the knowledge tests. While unquestionably the acceptance of such a test by the courts does indicate a change of emphasis from the knowledge criteria, yet the difficulties of proof in such cases, the essential psychological unsoundness in the emphasis upon the "power to choose," and the necessarily hybrid quality of the test are not "calculated to simplify the task of the jury."\textsuperscript{80}

In 1921 the Massachusetts General Court enacted a statute,\textsuperscript{81} designated the Briggs Act after its firm advocate, providing for the compulsory examination of any person accused of a capital offense, or of a felony if he has a prior criminal record, by physicians of the department of mental disease, who submit their reports to the clerk of the court of district in which the indictment was found, where it will be accessible to interested parties, as the judge, district attorney, and defense counsel. Since


\textsuperscript{79} Professor Sheldon Glueck, in the concluding chapter of his work previously referred to, offers as an immediate recommendation a tolerable exposition of the law in the form of a jury charge, including the test of irresistible impulse and giving some emphasis to mental unity. But it is unduly long, contains unnecessary (and hence confusing) variations of terms, is inconsistent in the use of "partially insane and semi-responsible" in the same breath with an emphasis upon mental unity and interdependence, and is certainly clear neither to a lawyer nor to a psychologist, to say nothing of the jury.

\textsuperscript{80} Tulin, "Problem of Mental Disorder in Crime," 32 Col. L. Rev. 942 (1932).

\textsuperscript{81} Massachusetts General Laws, Ch. 123, sec. 100A. For construction and application of the act, see Commonwealth v. Devereaux, 257 Mass. 391, 153 N. E. 881 (1926), and Commonwealth v. Vallarelli, 273 Mass. 240, 173 N. E. 582 (1929).
such examinations are prescribed as routine, they tend to be impartial and eliminate to a great extent the duels of psychiatrists.\footnote{82}

Under [this] procedure, protracted and expensive trials have been avoided, and the necessity of bringing a mentally ill defendant into court to undergo trial has been avoided. Society has been protected better than otherwise; not only has the psychotic or mentally defective offender been segregated in the institution where he belongs, but his commitment has been made with such provision that he is not likely to be released until his mental condition warrants. . . . He can be released only by pardon of the governor after the latter has been assured by the Department of Mental Diseases that the patient’s discharge will not cause danger to others.\footnote{83}

The greatest difficulties in the administration of this law have been the lack of adequately correlated systems of records so that many offenders escape the express provision of the statute or examinations are forced on very short notice, insufficient co-operation by the court officials, and scanty appropriations. Practical necessity dictated the restriction to capital offenders and repeaters. But unquestionably the law is a further step in the direc-

\footnote{82} "The courts have on the whole been inclined to follow the recommendations of the examiners. The defense counsel also have cooperated to an extent which even the most hopeful proponents of the law had not expected. Almost without exception, counsel have raised no objection to having clients examined by the department’s experts, although before the act was passed it was objected that defense lawyers would never allow such examination. Also, counsel have in almost every instance recognized the fairness of the examiner’s report, and have not attempted to contradict their finding by putting other experts on the witness stand. The department’s report is usually accepted by both sides, and no other expert testimony is introduced. The act has therefore eliminated the most depressing spectacle which the criminal law affords, ‘the battle of experts,’ in which real and pseudo-experts, without distinction, are subjected to lengthy hypothetical questions and heckling cross-examination.” Weihofen, Insanity as a Defense in Criminal Law, pp. 406-407.

tion of intelligent social legislation and should be seriously recommended to state legislatures as an immediate practical measure.

The *Illinois Crime Survey*, in the study conducted by Dr. Douglas Singer on "The Deranged and Defective Delinquent," came to the following conclusions:

1. Questions of responsibility (mental or otherwise) should play no part in the determination of guilt. The sole question to the jury should be: "Did he commit the offense charged?"

2. Conviction should automatically carry an indeterminate sentence, of which the maximum is life.

3. Every person convicted should be studied psychiatrically and medically to determine (a) what treatment is needed to rehabilitate if possible and (b) where this treatment can be administered with prime regard to the protection of society.

4. Release from custody should be determined only by a study of the convict and not on the basis of any rule of thumb based on the nature of the crime committed.\(^{84}\)

It must be submitted that these conclusions are sound. As far as the problem of mental disorder is concerned, the survey candidly proposes to eliminate the jury completely. Further, these conclusions contemplate an entirely different philosophy of punishment in which the meaning of the word *punishment* is in effect substituted for complete individualization of treatment of the offender with a view to rehabilitate him in a manner consistent with public safety.\(^{85}\)

Objections to such conclusions may be either constitutional or practical. Unquestionably any statute contemplating such recommended changes in penal administration would be held unconstitutional in Illinois in view of the express provisions in the Bill of Rights section of the Illinois Constitution of 1870, to the effect that "the right of trial by jury, as heretofore enjoyed, shall remain

\(^{84}\) P. 804. See also the address of Governor Alfred E. Smith, before the Crime Commission, Albany, N. Y., on Sept. 7, 1927. Also, note Ball and Kidd, "The Relation of Law and Medicine in Mental Disease," 9 Cal. L. Rev. 1 (1920).

\(^{85}\) Sutherland, Criminology, pp. 339-60.
inviolate," and "all penalties shall be proportioned to the nature of the offense." But it is very probable that such a statute would not violate the "due process" clause of the Amendment XIV of the United States Constitution, since it has been repeatedly held that trial by jury is not essential to "due process of law," and that any other method of procedure will generally be held valid, as far as the clause is concerned, if all the persons within the state are subject to similar proceedings. But the objection of unconstitutionality, if it should be admitted that the recommendations of the Illinois Crime Survey embody a sound scheme of penal treatment, is relevant only in so far as necessitating a change in the fundamental law of the state, which has been accomplished in the past for lesser grounds, and can presumably be so changed in the future.

Before passing on the merits of the second objection (practicability), it may be instructive to consider some of the pertinent facts of present-day criminal procedure. No one can seriously contend against the characterization of the jury system as notoriously inefficient, drawn-out, and expensive, with few, if any, compensating features.

Nor is the jury system so important practically in Illinois since the Supreme Court ruled in favor of the competency of the defendant to waive jury trial. A goodly propor-
tion of indictments in Cook County are disposed of by court trials and pleas of guilty.

In conclusion, it must be observed that such a changed system should not be independently or immediately made. Rather they would form only a relatively small part of a larger program of penal treatment whose objectives would be the rehabilitation of criminals wherever possible in a manner consistent with public safety, temporary or permanent (probably the latter) incarceration of those who cannot be reformed, and the prevention of crime. The social scientist must candidly confess his inability at the present time to supply the details of such a penal program, for the techniques must be worked out pragmatically, constantly modified and reconstructed. In the words of Professor Edwin H. Sutherland:

It is desirable to regard punishment as a thing which has been tending for some time to disappear and be replaced by those other methods, and as a thing which, from the point of view of ethics and philosophy, it is desirable to get rid of as quickly as the general public can be induced to take the other attitude toward the criminals. The proper procedure, doubtless, is the one that has actually been used—an extension of the attitude of control by knowledge of the situation to larger and larger groups of offenders rather than a complete change over-night.

For a critical survey of the present "science" of criminology and what it "knows," see Michael and Adler, Crime, Law, and Social Science (New York, Harcourt, Brace & Co., 1933). In the new Mexican Penal Code the word "punishment" is expressly abolished (probably only on paper). "It is inspired by the conception that society does not need to be angry and to be bitter against criminals in order to keep the welfare of the community. In drafting this new penal code we did not need go, however, so far as to establish that all of the criminals are sick people, as some of the observers of the Mexican criminology have asserted. It was enough to assume, that criminals are dangerous beings for the common interests of society, for dealing with the problem. Nevertheless, it seemed to us that society would have a better chance to combat the evil of crime if it could acquire something like the coldness and simplicity of physicians and surgeons when they cut and cure." Professor Salvador Mendoza, "The New Mexican System of Criminology," 21 Jour. Crim. Law 15 (1930).

"The measures of social defense shall not aim at punishment or retaliation; they shall be expedient; they shall not humiliate human dignity and aim at the infliction of useless and superfluous suffering." Art. 6, Draft of the General Part of the Penal Code of Soviet Russia.

Sutherland, Criminology, p. 360.

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