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IN THE LAW'S DARKNESS: INSANITY AND THE MEDICAL-LEGAL CAREER OF ISAAC RAY, 1807-1881

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IN THE LAW'S DARKNESS: INSANITY AND THE MEDICAL-LEGAL CAREER OF ISAAC RAY, 1807-1881

by

JOHN STARRETT HUGHES

A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE DEGREE DOCTOR OF PHILOSOPHY

APPROVED, THESIS COMMITTEE:

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HOUSTON, TEXAS

MAY, 1982
DEDICATION

This work is for my parents whose patience has finally borne fruit. Their unquestioning faith and support through seemingly unending years of schooling provided the dependable foundation which was indispensable to a young scholar as he followed his dreams.
Abstract

IN THE LAW'S DARKNESS:
INSANITY AND THE MEDICAL-LEGAL CAREER OF
ISAAC RAY, 1807-1881
by John Starrett Hughes

This dissertation traces the medical-legal career of Isaac Ray, a prominent physician who specialized in the treatment of insanity and wrote extensively on medical jurisprudence. Ray's writings influenced every major development in the common law of insanity during his lifetime, including the famous trial of Daniel McNaughten in 1843, "irresistible impulse" tests, and the New Hampshire doctrine of criminal insanity.

Ray's brand of human psychology was both materialistic and deterministic. Until the early 1830s he championed phrenology which held that all of a person's mental attributes were the result of the functioning of discrete organs in the brain. Thereafter Ray was America's leading advocate of a controversial concept called moral insanity which held that victims of mental disease could not help but act in ways they knew to be wrong.

Ray's belief in moral insanity's uncontrollable impulses provided the foundation for his unyielding criticisms of the common law and dramatized his fundamental conflict with legal thinkers. Anglo-American common law implied that a person was responsible whenever he could distinguish right
from wrong. By stressing uncontrollable impulses, Ray's medical determinism challenged the law's assumption of man's free agency.

Ray also lobbied actively in favor of involuntary confinement of the insane. From the 1840s through the 1870s, he wrote and promoted a model law sanctioning the forced commitment of people whom physicians had judged to be insane. Ray bitterly opposed judicial interference in asylum confinement procedures because he believed that judges and juries were scientifically too unsophisticated to determine whether someone should be committed. Moreover, he opposed government oversight of the confinement of the insane because state regulation conflicted with his ideals of asylum management.

Both in his attacks on criminal law and in his defense of involuntary confinement Ray sought to give physicians quasi-judicial authority by weakening the actual authority of judges and juries. In criminal cases he stressed the value of expert testimony in determining responsibility and in confinement law he emphasized the control of the asylum manager.
ACKNOWLEDGEMENTS

Research for this project was made possible by generous grants from the Office of Advanced Studies and Research at Rice University in 1980. Support during the writing stage over the last year came from a Samuel I. Golieb Research Fellowship in Legal History at the New York University School of Law. I also am indebted to the Rice University History Department for three years of fellowship support during my tenure as a graduate student.

My greatest debt, of course, is to my thesis advisor and mentor, Professor Harold M. Hyman. I deeply appreciate his unflagging support and encouragement over the past four years. What traces of lucidity this dissertation embodies are due largely to his direction. Dr. Albert Van Helden, my advisor in the history of science, likewise gave freely of his time and ideas. It was he who first suggested that I examine medical and legal concepts of human responsibility. Numerous conversations with Dr. Thomas Haskell on the intellectual history of nineteenth-century America also served to clarify my ideas about Isaac Ray's importance as a medical-legal writer.

Finally, I am indebted to my colleagues and friends among the graduate students at Rice University and the members of the Legal History Colloquium at the New York University School of Law. Their scores of informal criticisms and suggestions have contributed far more to this project than
any list of footnotes or bibliographical citations can reckon.
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Preface

-1-

Isaac Ray often employed a vivid imagery in his writings on the law of insanity. He pictured the common law as a dark wasteland ruled by ancient authorities like English jurist Matthew Hale of the seventeenth century. In 1847 Ray claimed that men of the nineteenth century had "to grope" their way "by the light that has travelled down from these distant luminaries." In contrast to the law's bleakness he depicted his own medical science as dazzlingly bright. The nineteenth century was "illumined, blazing . . . with the torch of discovery."¹

In 1856 Ray hoped that "the light of science" would be "spread abroad, and become the common property of men." Only then, he believed, could science "illumine the dark corners of the law."² Nearly fifteen years later when Justice Charles Doe of New Hampshire announced a rule of criminal insanity which Ray liked, he described the judge's opinion as a "luminous exposition."³

Ray thus looked at the law as a biased outsider. Legal matters alone never attracted his interest. He studied the law only where it conflicted with his science, as in tests of criminal insanity and judicial procedures for involuntary commitment. Ray's training was exclusively medical and what knowledge of the law he acquired came largely through his reading and experience as an expert witness.
So the values which Ray brought to the law were the values of science. In particular he extolled progress. To him the nineteenth century as a period of extraordinary change, an era in which knowledge was growing faster than man's ability to grasp it. His own specialty of insanity had undergone a remarkable transformation since the eighteenth century. The insane, once chained and hidden from view, were unshackled and placed in special hospitals run by physicians dedicated to studying their disease. It seemed to Ray that the future could only bring improvement.

Defenders of the common law entertained a different world view however. They looked back, not forward, in their search for solutions to problems. Jurists celebrated precedent, not progress. At best Ray's science could only be an adjunct to the law's pursuit of truth. Ideally, judicial reason and logic played more important roles. As Judge Doe explained to Ray in 1868, lawyers believed that the common law was "the perfection of reason."

This legal concentration on man's reason posed problems for Ray. It led lawyers to define man as a rational creature who was free to choose good over evil. Ray's outlook included a more naturalistic view of man. To him man's mind was a part of his physical nature. Ray's study of insanity led him to believe that men could intellectually appreciate the difference between good and bad but nonetheless be com-
pelled against their better judgment to choose the bad. Where lawyers had a voluntaristic conception of man, Ray held a more deterministic view. He argued that even subtle disturbances of the brain could destroy man's free agency. Yet, despite Ray's criticisms, the law persisted in maintaining that only gross and nearly complete distortions of the intellect could remove a person's legal responsibility.\(^5\)

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Ray has been an important figure in the history of legal insanity. His 1838 Treatise on the Medical Jurisprudence of Insanity supplied the strategy of Alexander Cockburn in his successful defense of Daniel McNaghten for killing Edward Drummond in 1843. As a result of widespread public criticism of McNaghten's acquittal on the grounds of insanity, the Justice of the Queen's Bench presented an advisory opinion explaining the common law of criminal insanity. In their opinion the Justices repudiated Ray's authority and McNaghten's acquittal by saying that, unlike McNaghten, defendants must lack a knowledge of right and wrong in order to be excused for their crime.

In 1844 Ray served as an expert witness at the first American trial to receive the new rule. His testimony encouraged Massachusetts Chief Justice Shaw to announce the "irresistible impulse" test of insanity which later became a supplement to the right and wrong test in many jurisdictions.
In the late 1860s Ray also encouraged New Hampshire Justice Doe to develop another alternative rule to the McNaghten right and wrong test. In several cases Doe argued that the question of insanity and its bearing on a criminal act should be given to juries as a question of fact without judges announcing any legal definitions of the disease. More recently, in 1954, Judge David L. Bazelon cited Doe's New Hampshire doctrine as well as Ray's Treatise in his famous decision in Durham v. the United States. Bazelon's rule was that whenever an "unlawful act was the product of mental disease or defects" it was legally excused.  

In addition to this considerable influence on the criminal law Ray also wrote extensively in favor of involuntary confinement of the insane who had committed no crimes. Ray advocated private involuntary commitment without legal due process and was the most influential leader among early American psychiatrists who preferred to have friends and families commit their insane neighbors quietly. Ray bitterly resented any legal interference in informal confinement practices and was the profession's leading defender in involuntary commitment.

-3-

Until the 1930s Ray escaped historical treatment. But beginning then several scholars, many of whom were psychiatrists, examined his long career. Like Ray, these historians...
of psychiatry were undoubting believers in scientific progress and had little understanding of, or sympathy for lawyers. They agreed unhesitatingly with Ray's depiction of the law's darkness.

Albert Deutsch's 1937 The Mentally Ill in America: A History of Their Care and Treatment From Colonial Times was the first study to treat Ray as an important figure. Duetsch featured Ray prominently in his analysis of psychiatry's legal relations. He said that Ray's argument stressing the law's backwardness was "still applicable. . . . Bound by the shackles of archaic traditions, the law gives little heed to the advances made in the study of mental phenomena . . . ." Ray's message thus endured in Deutsch. Where law and medicine were at odds, Deutsch agreed that the law was at fault.

In addition to Deutsch, a number of psychiatrists have also chronicled Ray's career. Gregory Zilboorg, a leading forensic psychiatrist, wrote admiringly about Ray. In 1944 Zilboorg characterized Ray as a professional prophet. Ray's medical-legal writings were "not only ahead of his colleagues but ahead of his time . . . ." The Treatise "was a true forerunner and milepost on a highway of progress." Among American psychiatrists Ray was "the most scholarly blazer of new trails" through a dark forest of insanity law. In 1953 Zilboorg said that Ray "spoke the language of the future as early as 1838." Psychiatrists of Zilboorg's own time were "still using Isaac Ray as a guide in many of our modern strivings" For Zilboorg Ray was more than an object of histor-
ical inquiry; he was a professional culture hero of nearly mythological proportions.

Winfred Overholser, superintendent of St. Elizabeth's Hospital during the 1940s and 1950s, was another psychiatrist-historian of Ray. Like Zilboorg he was an expert in forensic psychiatry. Although he was less strident than Zilboorg in his admiration of Ray, Overholser venerated Ray whom he called "one of the bright stars of the psychiatric firmament."\textsuperscript{10} He too portrayed Ray as a man ahead of his times. Writing of psychiatrists in 1962, Overholser said, "We have not even yet fully caught up with the reforms he advocated."\textsuperscript{11}

More recently in the Zilboorg-Overholser tradition is Jacques M. Quen of Cornell Medical Center. Since the early 1960s Quen has carefully studied a wide range of sources on Ray and has published numerous valuable articles. Quen's research has been exhaustive and impressive, setting him apart from his predecessors as a more committed scholar. But like Zilboorg and Overholser before him he too has characterized Ray as ahead of his times.

Quen has attempted to demonstrate Ray's pioneer quality by presenting his ideas, often by direct quotation, next to a modern psychiatric principle. For example, like most early psychiatrists who were phrenologists (Quen plays down this influence), Ray argued in 1863 that strengthening the brain physically would improve the functioning of the mind. In 1977
Quen wrote that this idea "finds a 1974 confirmation in a review article in Science on research in environmental enrichment and its effect on brain chemistry and anatomy." Quen's comparison denied the radically different intellectual settings of 1863 and 1974. Patricia Wallace, author of the Science article, conceivably never heard of Ray; certainly her article ignored him. What Quen saw was purely coincidence, not "confirmation."

Few trained historians have studied Ray. But those who have written about him have avoided characterizing him as a professional prophet or a man ahead of his times. John D. Davies's excellent Phrenology: Fad and Science: A 19th-Century American Crusade (1955) correctly placed Ray in the nation's phrenological vanguard. Norman Dain's Concepts of Insanity in the United States, 1789-1865 (1964) integrated Ray's career into the general intellectual history of nineteenth-century American psychiatry. Dain also provided some valuable coverage of the tension between psychiatry and law.

David J. Rothman has also discussed Ray in his The Discovery of the Asylum: Social Order and Disorder in the New Republic (1971), a study of insane asylums, penitentiaries, almshouses, and orphans homes. Gerard Grob's Mental Institutions in America: Social Policy to 1875 (1973) was a recent well-written analysis which took account of Ray's importance among the early superintendents of asylums. Neither Rothman nor Grob however presented any detailed analysis of Ray's
medical-legal career.

None of these historians has focused exclusively on Ray or on psychiatry's early encounters with the law. Neither have legal historians written much of substance. John P. Reid's 1967 biography of Judge Doe treated Ray's important correspondence with Doe before the New Hampshire judge announced his challenge to the McNaghten right and wrong test in the late 1860s. Michael Moore's recent article, "Legal Concepts of Mental Disease" (1980), examined the history of insanity tests from their origins to recent developments. Moore stressed Ray's influence, especially on Doe and "those early courts in America that adopted the irresistible impulse test," but he too merely sampled Ray's writings.

-4-

This study supplies some of the deficiencies in existing scholarship on Ray. Part I examines Ray's education and early medical career. In particular it explores his scientific values, his belief in phrenology, and his scholarly interest in the jurisprudence of insanity. Part II looks at Ray's career after becoming the superintendent of an asylum. It analyzes his writings on the criminal law and his advocacy of moral insanity between 1838 and his death in 1881. It also explores Ray's influence on Doe's important New Hampshire doctrine. Part III examines the same chronological period as Part II but focuses on the most ignored aspect of Ray's legal writings, his active defense of involuntary commitment.
Notes


4Doe to Ray, July 22, 1868, Manuscript Collection, Isaac Ray Memorial Library, Butler Hospital, Providence, Rhode Island.


6214 F. 2d 874-875 (1954).


8"Legal Aspects of Psychiatry," in One Hundred Years of American Psychiatry (New York: Published for the American Psychiatric Association, 1944), pp. 547, 524.


Part I

DISCOVERING

INSANITY AND LAW
CHAPTER 1

"A Search for
'The Most Perfect Knowledge'"

"[T]o obtain the most perfect knowledge
of any branch of science, we must, to a
certain degree, become acquainted with
the nature and objects and general prin-
ciples of all the rest."

—Isaac Ray, 1832

Isaac Ray began his career during an age of scientific
transition in America. Eighteenth-century scientists—
Benjamin Franklin, for example—had been part-time amateurs,
often gifted ones, who engaged in undisciplined, eclectic
research. Their funding was out-of-pocket and few relied
on academic positions as a source of income. Beginning in
the nineteenth century, however, a shift toward greater pro-
fessionalism and institutional funding of scientific investi-
gation occurred. Scientists became full-time practitioners
committed to the study of a single subject. Ray's early years
revealed elements of both the fading eighteenth-century ama-
teurism and the emerging nineteenth-century professionalism.

Ray's career was a chronicle of the period's transition.
He began by earning his living practicing medicine but his
interests ranged far beyond its bounds. He explored botany,
natural history, geology, and physiology, to name but a few
of his scientific avocations. Only in 1841 when he became
the state-salaried director of the Maine Insane Hospital,
when he was freed from the medical marketplace, and when the
asylum provided him with the laboratory for his researches, did he become a full-time scientist dedicated to a single subject.

Ray's turn to science and a profession was not determined by his heritage. Born in Beverly, Massachusetts on January 16, 1807, he was the eldest child of a Yankee sea captain who died when Ray was only seven years old. Little else is known of his boyhood. His family (which traditionally spelled its name "Rea") first came to America in 1630, landing in Plymouth but settling in Salem the next year. Ultimately the family moved to Beverly where Ray was born. His ancestors, like his father, were mostly shipmasters and community leaders, men of position though not of great wealth. None, it seems, was highly educated or a professional man. In this important respect young Ray, who had changed the spelling of his father's name, charted a new course and sought a different life.

He received his first formal education at Phillips Academy, a preparatory school in nearby Andover, Massachusetts from which he graduated in 1822. While there the boy, barely in his teens, followed a rigorous curriculum common to such schools which stressed a detailed knowledge of the classics. In 1820, while Ray was a student there, Phillips instituted a course of study which required students to take twenty different subjects in order to graduate. Thirteen of these were either Greek or Latin. Grammar, Virgil, Cesarsar, and so forth
each were considered a single subject. Only two of the twenty courses related in any way to the English language. Another two were mathematics. Phillips's curriculum included no modern European languages.\textsuperscript{5}

Ray's headmaster, John Adams, was a deeply religious man and a difficult taskmaster. Adams had a reputation for requiring flawless performance in recitations and, as the curriculum suggested, he expected the boys to accomplish a prodigious amount. The strict regimen he employed no doubt helped to develop Ray's future demeanor which was formal and his later professional standards which were demanding. As might be expected, most students did not recall Adams warmly.

Josiah Quincy, Jr., who, like Ray, was a student under Adams's tutelage, remembered him as a forceful but narrow man:

He was an excellent man with no distinguishing traits. He was very religious, but had no literary tastes. His classical attainments enabled him to fit boys for college, but went no further. He was particular in the observance of all religious exercises, both in the family and in the school, and did all he could to promote the moral and spiritual interest of his pupils.\textsuperscript{6}

Oliver Wendall Holmes, Sr., a younger contemporary of Ray, recalled disapprovingly the stern Calvinist and evangelical character of Adams's regime. Punishment, he said, was corporal and often severe. Holmes believed, in fact, that he received the most savage beating ever dished out by an instructor at Phillips.\textsuperscript{7}

Another contemporary of Ray, James A. Burrill, outlined the typical student's daily routine in a letter home:
We study one hour and a half in the evening or morning just as you please and 8 hours in school besides; all the time we have is at night. When we go into school we have two prayers and sing; we have one prayer in the morning at 6 o'clock and another in the evening at 9. I commonly get up at 5, dress and wash myself and study till prayers, then eat breakfast and study till 7 o'clock, play till 8 and then go to school, come out at 12, eat dinner at ½ past twelve, go to school again at 2, come out again at 6, supper as soon as school is done. In the evening we go in to the water or take a walk.

When the fifteen-year-old Ray left Phillips in 1822 after four years of study he took with him this legacy of scholarly rigor and Calvinist discipline. Ray did not look back on his Phillips experience as a wholly positive one however. He recalled the Andover years in print only once and then critically. He said that the long hours of confinement and study were hazardous to the boys' health. In 1834 he applauded the Scottish phrenologist George Combe's attack on Phillips-like classical education. Combe had argued, as Ray paraphrased him, that undue emphasis on Greek and Latin, while once necessary because those languages contained "all the knowledge that was abroad in the world," was no longer appropriate because most information was available in modern languages. Students' time, Ray said, would be better spent on studying facts in chemistry, physiology, or natural history rather than the grammar and composition of ancient languages. "The greatest obstacle to a course of sound, rational instruction in our colleges and higher schools," he said, likely recalling his Phillips years, "is that twaddle about the 'pure foundations of classical literature,' and the repeti-
tion of various other equally sensible phrases, whenever we endeavor to convince people, that as ideas are of more consequence than words, they should receive a far greater proportion of the young student's attention."  

After Ray's graduation from Phillips Academy in October 1822 he immediately entered Bowdoin College in Brunswick, Maine. To supplement his income which evidently was meager he taught grammar school in the area while he attended classes at the college. Bowdoin was a school of considerable renown then and attracted many gifted students, including the future novelist Nathaniel Hawthorne, poet Henry Wordsworth Longfellow, future president Franklin Pierce, Maine's Civil War Senator William Pitt Fessenden, and Luther V. Bell who, like Ray, would become an early American psychiatrist. Ray was unable to continue long at Bowdoin, however, because of a persistent illness, probably a troublesome bronchial condition that plagued him throughout his life, and in 1824 withdrew from classes and returned to Beverly.  

Back in his home town Ray convalesced and, upon his recovery, took an apprenticeship to learn medical practice with a local physician named Samuel Hart. Soon he left Beverly for Boston where he studied with the distinguished practitioner George Cheyne Shattuck, then on the faculty of Harvard Medical School. Ray was never formally enrolled at Harvard however, though he might have sat in on some of Shattuck's lectures. His relationship was that of an appren-
tice who assisted the older physician in his practice. Such a relationship provided students with some theoretical understanding but its primary purpose was to give practical experience with patients. Medical schools lacked clinical facilities, making such apprenticeships crucial to future successful practice. Most physicians, especially in less populated areas, usually had no formal schooling at all. Ray was fortunate in that he studied with Shattuck, a leading doctor, and also was to get a formal education. For his medical schooling he returned to Bowdoin in 1826 where he entered the Medical School of Maine which was a part of the college.¹¹

Ray probably chose Bowdoin because he knew the place and its people. In particular he was close to Parker Cleaveland, a professor of chemistry and mineralogy, who also lectured for the medical school in materia medica. In 1829 Ray dedicated his first book to Cleaveland. Dr. Nathan Smith had been the principal lecturer there until 1825. Smith was a leader in medical education and had taught Shattuck when he was a student at Dartmouth early in the century. Shattuck had kept in close touch with Smith after he established his practice in Boston. Shattuck likely urged Ray to study at Bowdoin where his old teacher's influence was still strong. Another of Shattuck's Boston protégés, Benjamin Lincoln, also went to Bowdoin with Ray in 1826. Lincoln was Ray's closest friend during his early years and the two probably wanted to attend school together. When Lincoln died tragically
in 1835 Ray wrote a warm eulogy which testified to the depth and importance of this friendship.\textsuperscript{12}

In order to graduate, Bowdoin required Ray to attend its three-month course twice, in both 1826 and 1827. As was common for medical schools at that time, the curriculum was precisely the same every year and each student had to attend all lectures twice. Bowdoin's annual fee for the course was fifty dollars. Several professors lectured and the course probably contained seven subjects: physics, surgery, chemistry, materia medica, physiology, anatomy, and obstetrics.\textsuperscript{13} Classes ended in May when most students, and probably Ray, returned home for the nine months between courses and renewed their apprenticeships to gain practical experience.

-2-

Although representative of medical schools of its age in most respects, the Bowdoin Medical School differed from others in one important practice. It required that each candidate for a degree write and defend a dissertation. Ray's M. D. thesis, defended on May 17, 1827, reflected Shattuck's special interest in pathology. Later in the century Ray's Boston teacher demonstrated this interest when he established a chair in Pathological Anatomy at Harvard.\textsuperscript{14} Ray's dissertation, entitled "Remarks on Pathological Anatomy," was only eleven pages long, but it revealed much about his philosophy of medicine and his theory of science. It indicated a broad familiarity with European medical literature
and theory, especially French authorities. Jean Corvisart, Marie F. X. Bichat, Francois Broussais, and Claude Lallemand of the Paris Clinical School in particular received attention. These early nineteenth-century Paris physicians were among the first to study large numbers of patients by methodically cataloguing their symptoms. After death the Paris clinicians always conducted thorough autopsies in order to try to find the causes of disease.\textsuperscript{15}

In his "Remarks" Ray, only twenty years old, outlined a theory of disease which he would retain throughout his long career. In particular he rejected "vitalistic" theories of disease and accepted instead "mechanism," a more materialistic alternative. Vitalists argued that there was a separate, perhaps immaterial, element in all living organisms which set them apart from the nonliving. Men, for example, were like inert stones. They both were made of essentially similar matter. What set men and other living things apart was the presence of this mysterious and undefinable vital force. Disease and death, being part of the process of moving from living to nonliving, necessarily reflected some action of the vital force. But because this vitalism was itself a mystery, disease too must also remain partly unknowable. Ray and other mechanists rejected any notion that there was an undefinable element which set living and inert matter apart. They held that the difference was simply one of how the matter was organized, the manner of its arrangement. They
eschewed the mystery of vitalism because, for them, all diseases were knowable. Mechanists believed that man was subject to unchanging natural laws like the rest of nature.\textsuperscript{16}

As a mechanist Ray refused to accept the unknown as unknowable. There was no room for mystery in his science. He rejected the vitalists' "restless desire to seek for strange and unintelligible principles to explain the causes of diseased action." Man, he insisted, was subject to natural laws which scientists could discover through careful observation. He admitted he could give no "answer that will show distinctly the line where health ends and disease begins," but he was certain that all disease involved some change in the "easy and regular performance of the functions" of the body. These changes resulted from derangement of organic structure somewhere in the body. "This proposition we deem irrefutable," he said, "to consider the derangement in the functions as possible without any change in the organs themselves, seems to be a most palpable absurdity." As this language indicates, Ray was quite certain of himself even as a professional novice. His tone, referring to vitalistic theory as a "palpable absurdity," was confident. It reflected a young man who knew what he was about.\textsuperscript{17}

Like other mechanists Ray compared the human body to a "finely constructed machine." When, for example, a violin was out of tune and functioning badly, Ray noted that the musician did not invent an element wholly apart from it to
explain the problem. He knew that there had been some subtle change in the structure of his machine, likely in the strings, which completely accounted for the "disease." Ray viewed the human body as a musician viewed his instrument. Dysfunction always meant structural change. That change, he admitted, might be imperceptible to the observer's eye (as in the case of the violin strings) but it existed nonetheless. He was sure of this because he assumed that the unknown would always conform to the known. He never doubted that a single set of natural laws governed all matter and assured predictability. Nature played no tricks and would allow herself to be known.18

Ray's theory of disease thus led him to look beyond the symptoms of illness to seek out unknown causes. In order to find these causes he said that the physician must have patience; sometimes he must wait until the sufferer died. Only then could he extend his search for causes of disease beyond symptoms in a thorough autopsy as the Paris clinicians had suggested. Exploratory operations were not conducted. Anesthesia was not yet available and surgical searches for the causes of disease were too traumatic. Ray's primary advocacy in the dissertation was that post-mortem examinations would reveal the bodily changes, the "structural derangements," which caused the symptoms. He argued that physicians must observe the course of disease in the patient while alive and then, after death, proceed to a careful observation of the
internal organs. In this way one could match the sets of symptoms with any corresponding organic changes.¹⁹

Ray feared, however, that his colleagues had much to learn. He was outraged at the manner in which most physicians conducted autopsies. Community prejudice against human dissection was great and, as a result, legal post-mortems were still rare in 1827 except where in a legal proceeding there was doubt about the cause of death. This meant that most doctors got little or no practice at actual dissection. Further, they failed to treat the opportunity when it arose as a chance to study the body scientifically. Consequently, Ray charged that most physicians were inexcusably sloppy pathologists:

With an imperfect knowledge and little reflection upon the case with no notice with regard to what may or may not be found the examination is begun: the viscera after being tumbled over, cut up and mangled for the purpose of finding something that may be fairly considered the cause of death which if luckily hit upon puts an end to the proceedings, are put back into their places, the body is sewed up and buried, with all remembrance of the case.²⁰

This haphazard and unscientific approach incensed Ray. "Pathological Anatomy studied in this manner will never add one jot, or one tit[t]le to our knowledge." If Ray was right about the nature of disease—and he never doubted he was—then knowledge could expand only through the frequent use of autopsies. And when the opportunity to conduct post-mortems arose, physicians must exploit it as fully as possible in order to expand their own knowledge and familiarity with the
body. According to Ray, physicians could learn to distinguish the often subtle differences between morbid and healthy anatomy in no other way. Autopsies should be thorough and go beyond a singleminded search for the cause of death. They should also include a complete examination of all organs of the body. In short, Ray hoped to see the principles of the Paris Clinical School embodied in the practice of America's physicians.21

In this call for careful pathology Ray was asking a great deal of his fellow physicians. He was asking them to be scientists when most were no more than crudely trained general practitioners who were ill-equipped even to help the living patients who sought them out. Their concern for dead patients likely was not great. Few had the training that Ray had received. Even those fortunate enough to have gone to medical school got virtually no dissecting experience because the principles Ray urged were seldom embodied in the curricula. Most doctors were still only apprentice-trained and probably never seriously considered themselves to be scientists. Their concern was less with knowledge than with results, more with the living than the dead. Unlike Ray, they were quite satisfied to treat symptoms and leave the search for causes to others. Ray was different however. His dissertation revealed a sophisticated twenty-year-old who perceived himself in the scientific vanguard of his profession. Medicine for him would be more than a way to make a
living. It would be an opportunity to expand knowledge.

Ray's "Remarks" also showed that his broader view of science was typically American. During the first half of the nineteenth century American scientists were nearly all Baconians. In his *Novum Organum*, published in 1620, Francis Bacon (1561-1626) had outlined a philosophy of science which held that all the secrets of the universe were discoverable through careful observation and classification of data. Bacon believed that all nature was ultimately knowable. Through adherence to a correct methodology a time would come when all questions could be answered. But in Ray's time, when many questions still remained unanswered, appeals to Bacon were commonplace. References to the English philosopher of science had become signals of orthodoxy. Ray, for example, praised the Frenchman Lallemand's recent treatise on brain pathology by saying the book was "so accurately and strictly deduced from thorough and extensive observation before and after death, that we do not fear to instance it as one of the most successful applications of the Baconian method to Medical Science." By connecting Lallemand so approvingly with Bacon, Ray intended the highest praise possible.

Baconianism at this time included a broad range of ideas and many scientists who called themselves followers of Bacon likely differed on its exact definition. All agreed, however, that Baconian methodology, unlike the modern scientific method, eschewed speculation and hypotheses. Instead, unprejudiced
observation was the staple of scientific research. Once the scientist observed and recorded his data he would organize his findings into natural categories which were inherent in their character. For Baconians theory and generalization always followed but never preceded observation. It was the facts which imposed structure on theory, not the other way around. In the nineteenth-century lexicon of American Baconians "observation" was the mark of orthodoxy. "Speculation" and "theory" signaled faulty reasoning and suspect conclusions. "Metaphysicians" were those who reasoned not from facts but from speculation. 25

American Baconians owed much to Scottish common-sense philosophy which argued that observers could accept the testimony of their senses as true. Common-sense philosophers held that God gave each person innate ideas which assured man's ability to discover the perfect order of the universe. By coupling unbiased observation with innate ideas truth could be discovered. Falsehood in science could and did occur, but it resulted only from too little or too biased observation. By using the correct method it could be avoided and truth could be found. 26

Baconianism led Ray—and most others of his age—to an unquestioning faith in progress. Baconianism was, after all, a philosophy of progress. It posited a finite knowable world which scientists, using correct methods, one day would completely reveal. Pursuit of science was therefore pursuit
of progress and all that progress carried with it: improved health, professional reform, greater happiness, perhaps even civilization itself. Science illuminated the future and therefore was to be revered.

Ray's "Remarks on Pathological Anatomy" was a piece neatly cut from this philosophical fabric; Medicine, when practiced within Baconian methodology was completely knowable. All that was needed was observation through autopsies which allowed careful comparisons of the deranged functions of the living with the morbid anatomy of the dead. In time a true classification of disease would emerge. Within this Baconian framework Ray viewed all disease as physical; otherwise it would remain in the realm of mystery beyond his scientific reach. Later when he became interested in diseases of the mind he retained this approach. Insanity, like any other disease, always resulted from organic changes in the brain.

Although he laid much stress on internal physical disorder he did not overlook external influences which affected the body. Returning to his analogy of a musical instrument, Ray noted that, if the violin was left exposed to the atmosphere, physical changes naturally occurred which altered its performance. So it was with man: "Climate, food, habits, and in fact; the whole train of moral and physical evils are in increasing operation to disturb and destroy their functions." Ray believed that modern "artificial" society, especially
his own dynamic America threatened man's health as never before. Not only did physical evils threaten, moral ones menaced as well. In Ray's theory of disease one's whole cultural and physical environment thus imperiled his physical being.27

Ray developed his theory of disease very early and clung to it throughout his career. It was what has been aptly called an "endlessly flexible etiological model." His age lacked any usable germ theory or concept of immunology; both were developments of later physicians. Doctors of Ray's age viewed with suspicion man's physical and moral environment, and were always on guard for the dangers it posed. That they were unable to describe the mechanism by which these manifold influences changed the body was no insurmountable problem. Observation revealed that the evils existed and that people got sick. Assuming order and purpose to the universe, physicians believed that the evils and the illnesses were connected.28

Ray's "Remarks" abbreviated most of the scientific assumptions he carried with him throughout his life. The dissertation revealed his mechanistic concept of the human body, his belief that all disease resulted from organic changes, his Baconian methodology, his unquestioning faith in progress, and his sense that modern dynamic society offered unprecedented threats to man's health. It was, in short, a remarkably full exposition, one abreast of the leading theories of his
age. Scientifically and intellectually, Ray was both a self-confident and a sophisticated twenty-year-old physician.

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After leaving Bowdoin in May 1827 Ray moved to Portland, Maine and established his first private practice. As he recalled some years later, ". . . at the tender age of 20, being a member of the medical profession in regular standing, I offered my services as practitioner of medicine and surgery, to the people of Portland in 1827." The venture failed to meet his expectations however. Portland's residents, as Ray wryly noted, "manifested no vehement desire to avail themselves" of his services. 23 Only two years later he left Portland for the fishing town of Eastport on Maine's northern coast. Ray's tenure in Portland, though brief, was not wholly uneventful. While there he delivered a course of lectures on botany and natural history. One of his students, Abigail May Frothingham, the daughter of a local judge, was sufficiently impressed by the young doctor to marry him in 1831 after he had moved on to Eastport. 30

Perhaps because the people of Portland showed no "vehement desire" to employ his services Ray found time for other occupations. Besides his public lectures he also became a book reviewer. In 1828 he reviewed an American edition of William Lawrence's Lectures on Physiology, Zoology, and the Natural History of Man for the American Quarterly Review. Most of his essay was an unexceptional commentary on the
book's contents but one point deserved special attention. Lawrence had been criticized in England after the book's original printing in 1819 because he had treated the mind as essentially indistinguishable from the body. Ray deplored the "very illiberal and testy spirit in which he [Lawrence] was attacked," especially by clergymen who feared Lawrence's book threatened to pollute young and impressionable readers. While Ray differed with Lawrence's conclusions (despite his materialism, Ray accepted the orthodox Christian separation of mind and body), he applauded his method. Ray believed that the mind, whatever it was, depended on the body for its manifestation. Lawrence was therefore correct to study the body to learn of the mind. Lawrence had not invaded the sacred realm of metaphysics but had based his conclusions on observation. Metaphysicians, on the other hand, could hardly claim as much; they had based their views on speculation of "entities and quiddities."³¹

For the first time Ray had indicated his lifelong view that investigation of the mind was correctly a physiological question. Mind and body completely depended on one another. He insisted that mental activity could rightfully be studied only by the physician. He denied that study of the mind was the special province of the metaphysician. When considered in the context of his theory of disease outlined in the "Remarks," it would have followed that derangements in mental (or mind) functions necessarily implied organic disorder,
probably in the brain. In this way he could logically draw
the mind into the realm of Baconian science.

This support of Bacon's method was equally evident the
next year when Ray reviewed Robert Bakewell's Introduction to
Geology. Besides detailing the book's arguments Ray devoted
several paragraphs to a discussion of the role of theories
in science. Ray praised Bakewell for not falling into the
habits of earlier geologists who engaged in "fanciful theories
and idle speculation." For them "[i]magination readily
furnished the outlines of the picture, and no facts were too
irrelevant or scanty, no views too impartial, no reasoning
too shallow, to fill up the lights and shades, and give to
the whole, form, distinctness, and the appearance of reality."
Their flaw, Ray said, was that they began "at the wrong end
of their inquiries" for they had not first bothered to observe
the facts. 32

But Ray did not want to be misunderstood on this point.
Theories were valuable. Their misuse at the hands of "philos-
ophers" should not lead to "their entire exclusion from
science." Besides lending order and object to researches,
there was a certain "pride" connected with theories which
"stimulates the mind to higher exertions." So long as theor-
ies were based on observable facts and not on "warm fancies
and superficial habits of thinking," they were constructive.
For even if later disproved, they were based on facts which
were still true and available to other scientists. 33
Yale professor Benjamin Silliman had edited this American volume of Bakewell's work and took the opportunity to add an outline of his own course on geology. While Ray praised the bulk of Sillman's additions he was quick to upbraid him for his deviance from the Baconian way. Silliman had tried "to explain, upon physical principles" the great scriptural deluge. Ray considered the Biblical flood to be an intervention of God beyond man's understanding. To attempt to explain such a supernatural act by ordinary "physical principles" was futile, if not foolish. Yet that is what Silliman had done. Ray said:

This is a subject, we know, on which geologists in the absence of all dear and well-understood facts, seem to enjoy a prescriptive right to give up the reins to fancy, and indulge, ad libitum, in the wildest and vaguest speculation. But it is time for this child's-play to be done away with, and geologists to be reminded, that their field of inquiry is ever bounded by the clear horizon of true facts, and sound philosophy. 34

The tone of these remarks was significant. Ray, only twenty-two and barely out of school, did not hesitate to chastise Silliman who not only was his professional elder but was also editor of the American Journal of Science and Arts and one of the most respected men in America's scientific community. 35 Ray's willingness to criticize Silliman's "child's-play" marked his Baconian standards to be sure. But it also reasserted the bold self-confidence his dissertation had embodied.

Further evidence of this self-assurance was the publication, also in 1829, of Ray's first book, Conversations on the
Animal Economy: Designed for the Instruction of Youth and the Perusal of General Readers. Written as an elementary treatise on physiology, its form was that of a dialogue between an inquisitive student, Emily and her teacher, Dr. Benjamin. Ray hoped the book would be used in schools as a text but it passed through only a single edition and was never widely circulated. In 1854 he recalled Conversations to his old Bowdoin professor, Parker Cleaveland, the man to whom he had dedicated the book: "A few days ago I exhumed a copy from a mass of rubbish in the garrett, and on looking it over, after a lapse of twenty years, it really struck me as entitled to a better fate." Indeed, the book was charmingly and clearly written and bore the same stamp of scientific currency as had his dissertation two years earlier.

The content of Conversations demonstrated the directions of Ray's interests while in Portland. First, his central focus on physiology was closely allied to his medical school interest in pathological anatomy. Second, it revealed a growing interest in education. Ray had taught grammar school briefly while at Bowdoin and later, while in Eastport, he served on the school committee. Finally, the book included Ray's first public avowal of phrenology. After the move to Eastport later in 1829 Ray became increasingly active in advocating phrenology. This science held that all man's moral and intellectual attributes were related to discrete organs in the brain. The size and health of those brain
organs, phrenologists argued, controlled man's behavior.

Eastport, Maine in 1829 was a fishing community of about 2400 inhabitants. Mail arrived by packet several times a week, enabling Ray to keep in touch with friends to the south. Despite its small size and relatively isolated character, Eastport had an atheneum which kept newspapers and quarterlies, some of them foreign. Favor's bookstore offered another valuable access to reading material. Ray's medical practice in this village evidently prospered better than in larger Portland. He remained there twelve years and left only to assume the superintendence of the Maine Insane Hospital.

While in Portland Ray was a community leader. In particular, he devoted his energy to local education as a member of the school committee. In a letter to education reformer Horace Mann in 1838 Ray demonstrated a familiarity with local schools and a deep concern about public education. He deplored especially the trend in Eastport toward private rather than public schools. Contrary to popular misconception, he said, public education was no source of pride. The more prosperous the community became the less it spent on public education. It was private schools which benefitted from affluence. Praising Mann's efforts, Ray argued that good free schools were crucial to a healthy society: "The man who shall in instrumental in raising from their current degraded condition & making them what they should be, good
schools for all classes of children will be a great benefactor of the race.  "40

Speaking from experience, Ray also bemoaned the difficulty in finding good teachers. Because schools were only in session three months out of the year teachers could only count on part-time employment. None could really be viewed as professional educators. Instead they were only part-time teachers who supplemented other incomes. Ray hoped to devise a system in which several communities could jointly hire a teacher who rotated his services. Above all, he wanted educators of professional quality. 41

This desire to upgrade professional standards was also evident in his views on medicine. Early in 1831 the Massachusetts legislature legalized the study of anatomy and provided physicians with the corpses of dead criminals and paupers for dissection. As Ray's dissertation showed, frequent autopsies were crucial to his concept of medical science. He wrote his friend and mentor Cleaveland at Bowdoin to ask if any local physicians were lobbying for a similar law in Maine. If so, he said, "I should like the opportunity of giving them all my assistance ...." Maine citizens, he believed, would likely accept such a law because public emotions on the question of human dissection had not often been "outraged by flagrant instances of exhumation." He offered to lobby a Portland newspaper for its support while there in May for his wedding. Further, he said he was willing to
give a lecture to encourage support if Cleaveland thought it would help.42

Evidently Cleaveland agreed it was a good idea. On May 30, 1831 Ray lectured to the State Lyceum in Portland on the need for new legislation allowing more frequent human dissection. He stressed the "absolute necessity that a knowledge of anatomy should be familiar to every medical man to enable him to be useful in his profession . . . ." He denounced the "inconsistency of our laws and the injurious prejudices of society on this subject." On the one hand, people expected great knowledge and skill from their doctors. Yet, on the other, they withheld the very means of acquiring either. Society expected doctors to have "the most minute acquaintance with the intricate and beautiful mechanisms of the human structure, and yet if he attempts to examine one of these wonderful machines . . . he is prosecuted as a criminal and driven from society."43

Two years later Ray had much to add about the sorry consequences of poor autopsy skills. In July 1833 he reviewed for the Boston Medical Magazine the medical testimony given in a murder trial in Rhode Island. In this case four physicians examined the exhumed body of a young woman who died following a miscarriage. Evidently, there was some indication of an attempted abortion. Inside the uterus the examining physicians found "seven wounds, each about two and a half inches in length, made, apparently, by a round blunt-
pointed instrument." It was possible that the wounds had been made to effect an abortion. The defendants on trial supposedly had aided the woman in the attempt that resulted in her death. To Ray's disgust, however, no two of the doctors could agree if the wounds were self-inflicted or caused by the defendants. This inability to reach a consensus greatly troubled Ray. Aside from the mere presence of the wounds, he noted that "no farther agreement between them on any matter of consequence, is to be found, though all of them had eyes to see with, and fingers to feel with, and knew their testimony must affect the lives of some of their fellow-citizens." 44

Ray did not limit his disapproval to the four men who conducted the autopsy. He had "another leaf to turn over, in this chapter of professional blunder and ignorance." He castigated especially a fifth physician who gave an opinion on the evidence offered by the other four doctors. Ray inferred that this last doctor must have been "a man of repute in his neighborhood, and looked up to on uncommon occasions." But despite the witness's local acclaim, Ray held nothing back: "His testimony opens with a flourish of trumpets, the like of which for asinine tones, was never before heard, we will venture to say, since the world began." Evidently this physician stated that the wounds in the uterus likely did not cause death. Ray found this incredible. Of course, he said, the wounds could cause death and they likely did. More
learned physicians knew that such injuries often resulted in peritoneal infection which was frequently fatal.\textsuperscript{45}

What concerned Ray most about this episode was its poor reflection on the medical profession. He would not "stand by quietly, and see the dignity of the medical character degraded, and the lives of our fellow citizens [those on trial for murder] jeopardized by public exhibitions of the most gross and presumptuous ignorance that has ever disfigured the records of medical jurisprudence."\textsuperscript{46} He acknowledged that the quality of physicians in his time varied greatly. And this troubled him; for "by means of a good popular address, an unshaken confidence in himself, almost any blockhead may get a run of practice, and be the oracle of the neighborhood . . . ." Ray had little faith that ordinary men such as jurors could judge professional excellence. The "intelligent, high-minded physician is well aware, that physicians alone can judge his qualifications, and it is with them only, that a true solid reputation can be established."\textsuperscript{47}

Ray's attack on the hapless physicians who testified in this murder trial showed the importance he attached to expert testimony. He viewed it as a public ritual in which a medical practitioner proved his worth or paraded his ignorance. Because of its importance Ray believed that medical schools should stress medical jurisprudence in their curricula. "It is nominally taught indeed, in most of our medical colleges but its instruction" was usually entrusted to a professor
who specialized in something else and gave jurisprudence short shrift. This problem was heightened by the fact that students' examinations never covered the subject. Ray hoped that medical schools would correct the deficiency because forensic medicine gave physicians their "best chance in the world of distinguishing themselves either to their credit or their shame."^48

These remarks showed that, only six years out of medical school, Ray still perceived himself as special within his profession. He was the scientist first and the practitioner second. Scientific merit, he believed, could only be judged by the community of scientists; hence his need to chastise what he saw as egregious stupidity in other physicians. This was the age of "heroic" medicine in America when most therapies relied on bleeding or harsh purgatives and emetics. Few doctors, scientific or not, could really help their patients. Ray therefore attacked his less learned colleagues by stressing theory, not therapeutics. He did not, for example, criticize the Rhode Island medical witnesses as ineffectual therapists. The older doctor whom Ray classified as "a man of repute" probably was reasonably successful in his treatments. Otherwise, he would not have earned a good reputation. But in the courtroom it was theory that mattered and it was in theory that these men were woefully deficient. Ray believed it was possible for a professional hierarchy to emerge in the courts by way of physicians' testimony.
Because Ray believed that a "true solid reputation" depended less on therapeutics than on the support of other physicians, he said that doctors should "rejoice in the opportunity" to give their testimony in court. By doing so they appeared "directly before the public" and subjected themselves "to the rigid scrutiny" of other professionals capable of judging their performance. Expert testimony was thus a means of proving one's professional worth, though not so much to prospective patients as to one's colleagues. In this age of relatively impotent therapeutics, Ray perceived another route to professional status. He would seek the acclaim of other physicians rather than patients.49

Ray's later career as an institutional physician took him out of the medical marketplace. His patients were to be largely involuntary. They were people whose judgments about his therapy were often irrelevant. Ray reported not to them but to those who had placed them in his care. The hospital and not the individual patients paid his salary. In 1844 he helped to found a national professional organization, the Association of Medical Superintendents of American Institutions for the Insane. This organization finally provided Ray with that professional community support he found so necessary in 1833.

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This early phase of Ray's career shaped the man who would come later. While he remained largely an amateur of
deep and wide ranging interests, he was also profoundly concerned about his own profession. Despite his interests in botany, geology, natural history, and so forth, he remained a dedicated, sophisticated physician. Man's body was to him a marvelous machine and, as such, it was no more mysterious than any other machine. Natural laws governed its operation. Through faithful and thorough observation of the body's working he could learn its secrets. Progress necessarily followed from sound philosophy. Defense of professional standards had led him to see medical jurisprudence as an important aspect of his profession. His Eastport years would see the growth of this interest, especially as he entered the battles over phrenology fought during the 1830s on the pages of the nation's journals.
Notes


2-For a fuller discussion of the shift from "talented amateur" scientists to full-time professionals see George H. Daniels, American Science in the Age of Jackson (New York: Columbia University Press, 1968), esp. pp. 6-33.


7-Ibid., pp. 168-69.

8-Quoted in Allis, Youth from Every Quarter, p. 166. For some brief comments on his own schedule see Ray's Education in its Relation to the Physical Health of the Brain (Boston: Ticknor, Reed, and Fields, 1851). Ray said his routine was to spend eight hours per day in class and another two or three studying (p. 18).


11 Kirkbride, "Notice of the Late Isaac Ray," p. 160; Quen, "Isaac Ray and His 'Remarks,'" p. 114. Kirkbride said that Ray attended Harvard but Quen, who studied the college's records, found no evidence of it. Kirkbride's obituary was based on information Ray gave him shortly before his death. It is possible that Ray told Kirkbride he had attended some classes in conjunction with his apprenticeship and that Kirkbride misunderstood Ray to mean he was formally a student there.


13 Norwood, Medical Education, pp. 201-204.


17 Quoted in Quen, "Isaac Ray and His 'Remarks,'" quotations, in order, on pp. 123, 121, 121.

18 Quoted in ibid., p. 122.


21 Ibid.

23 For a more thorough discussion of the Baconian character of American science at this time see Daniels, American Science in the Age of Jackson, pp. 63-85 and passim.

24 Quoted in Quen, "Isaac Ray and His 'Remarks,'" p. 125.

25 Daniels, American Science, p. 65.

26 Ibid., pp. 75-77.

27 Quoted in Quen, "Isaac Ray and His 'Remarks,'" p. 123.


31 Review of Lawrence, Lectures in American Quarterly Review 3 (June 1828): 327.

32 Review of Bakewell, Geology in: ibid. 6 (Sept. 1829): 75.

33 Ibid., p. 76.

34 Ibid., p. 103.


36 Published locally in Portland by Shirley and Hyde in 1829.

37 Ray to Cleaveland, March 23, 1854.


40 Ray to Mann, Sept. 14, 1838, Horace Mann Collection, Massachusetts Historical Society, Boston, Massachusetts.

41 Ibid.
Ray to Cleaveland, May 1, 1831, Parker Cleaveland Collection, Bowdoin College.

Portland Daily Courier, May 31, 1831; all the quotations here are paraphrases of Ray by the newspaper's reporter. The phrases are very close to those found in Ray's other writings however.


Ibid., p. 23.

Ibid., p. 18.

Ibid., p. 26, italics added.

Ibid.

Ibid.
CHAPTER 2

"'A Revelation of New Truths:'
The Influence of Phrenology, 1829-1838"

"Phrenology was to me, in those days, a revelation of new truths and especially of a philosophy that shed a marvelous light on the whole field of mental science.

—Isaac Ray, 1879 \(^1\)

Ray's eclectic scientific interests ranged widely during the Eastport years before 1841. Besides his practice of medicine, the study of botany, natural history, and geology as well as his deep interest in public education occupied him. But, increasingly, his attention focused on phrenology, then a new science to American intellectuals. It had come to America from Europe in the 1820s as Ray was reaching his intellectual maturity. Nearly all his compositions of this period bore signs of phrenology's influence. Some of his essays indicated the considerable depth of his scientific and emotional devotion to the science. A few were outright defenses. From his first book, *Conversations on the Animal Economy*, written in 1829 while he was still in Portland, to his life's major work in 1838, *A Treatise on the Medical Jurisprudence of Insanity*, Ray's acceptance of phrenology was unmistakable. It was from this advocacy of phrenology that Ray first developed his interest in the law of insanity.

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Phrenology began late in the eighteenth century when a German physician named Franz Joseph Gall (1758-1828) suggested
that the brain was actually a collection of many separate organs, each with a specific function. Gall was one of the premier brain anatomists of his age and even those who differed with his theoretical arguments usually applauded his research. In 1800 Gall began a fruitful partnership with a former student of his, Johann Gaspar Spurzheim (1776-1832). Until 1813 when their collaboration ended the two men worked together and refined a phrenological theory which went far beyond their anatomical findings. Yet, phrenology as they conceived it was far more credible than the vulgarized form which later enthusiasts would practice. Reading bumps on heads was but a minor concern of these men, especially of Gall.³

Three main propositions supported the science as they described it. First, they held that all human behavior was a manifestation of brain activity. Mental operations could only be understood by examining the brain. Second, the brain was not unitary but a congeries of many separate organs. Not all phrenologists agreed on the number, but they were certain that the organs included those called Language, Destructiveness, Amativeness, Benevolence, and Time among many others. Most phrenologists postulated a total of thirty-seven separate organs. Finally, Gall and Spurzheim argued that the size of each organ reflected its degree of development; the larger the organ, the more predominant was its characteristic in that person's personality. Size could be discerned
without dissection, according to phrenology, because all organs radiated from the brain's center toward the skull in a cone-like form. Where the organ was large it caused a bump on the skull; where small it produced no bump or perhaps a depression. Phrenologists also argued that by deliberate use of an organ a person could enlarge its size. Exercise of the brain, like that of a muscle, resulted in improved strength.  

Phrenology had much to recommend it. Originated by a leading anatomist, it bore the stamp of scientific credibility. Moreover, its reductionism made it marvelously logical and understandable. Phrenology carried with it extraordinary explanatory power. Man's behavior, good or bad, could be reduced to anatomical structure which could be measured and studied. Not surprisingly, the early opposition to phrenology was not so much scientific as religious. To many opponents, the science seemed to reduce the mind to the brain, leaving little room for the soul. Early challenges therefore focused less on its scientific veracity than its troubling materialism.  

Most of the originality of phrenology was Gall's, but it was Spurzheim who acted as the science's propagandist, especially in America. After bringing news of the science to most of Europe, Spurzheim visited the United States in 1832. In September he lectured in New York and met with many of the republic's scientific vanguard. He visited Yale in New Haven
and met with Professor Benjamin Silliman who was a follower. He continued on to Hartford, visiting schools for the deaf and blind, asylums for the insane, and prisons for the nation's criminals on the way. Finally, he travelled to Boston where he lectured before Harvard University and the Boston Medical Society.

In Boston Spurzheim continued his hectic routine of visiting prisons and schools as well as attending to a full agenda of social functions. By early November his health failed and, despite the care of some of Boston's best doctors, he died on November 10. Following his untimely death Dr. John C. Warren of Harvard conducted a public autopsy in accordance with Spurzheim's will, taking special care to preserve the brain and skull. James G. Audubon attended and sketched the remains of phrenology's dead discipline. A funeral committee headed by Harvard President Josiah Quincy oversaw the solemn ceremonies. Included on Quincy's committee were some of Boston's leading citizens: Nathaniel Bowditch, Joseph Story, Harrison Gray Otis, and Joseph Tuckerman. The Boston Medical Society attended the funeral en masse and heard Harvard professor Charles Follen give a memorial oration.6

Spurzheim's visit demonstrated dramatically that phrenology was no vulgar pseudo-science during its early history in America. It had come to this country during the 1820s by way of European phrenological works and by reports from Americans who had studied abroad. Though phrenology was far
from universally hailed, it did receive much scientific acclaim. During the 1820s and 1830s, it remained a respectable science for the educated elite, not a popular ideology for the masses. In the 1840s and later it degenerated into popular gimmickry practiced in storefront salons and on the midways of county fairs. But when, as a young physician, Ray urged its benefits, phrenology still belonged to respectable classes.⁷

American intellectuals did not begin consistently to attack phrenology until the early 1830s.⁸ Its defenders therefore enjoyed a period of confidence until after Spurzheim's death when the attacks started. The criticism was largely religious and moral, focusing on phrenology's materialism and its supposed denial of Christian free will. By 1833 and 1834 following the early attacks phrenologists like Ray found themselves no longer on the offensive but increasingly part of a beleaguered minority. By the end of the decade their critics had quieted them. Many including Ray, submerged their phrenological advocacy into other causes. During the 1840s the scientists had lost control of the doctrine. Bump readers had democratized it and given it to the masses.

Ray's career as a phrenologist reflected this history. He had accepted the new science while it was being received in America and became a confident and assertive advocate early in the 1830s. But by the mid-1830s he ceased to assert
and began to defend. By 1838 when he published his famous *Treatise* Ray had completely sublimated his phrenological framework so that his attack on common law doctrines of insanity would not be polluted by associated guilt.

Ray's earliest espousal of phrenology appeared in his *Conversations on the Animal Economy* in 1829 when he was only twenty-two years old. His self-assured presentation of the phrenological theory reflected his faith that it would eventually be widely accepted. In the dialogue of the *Conversations* Emily asked her teacher how she could tell whether phrenology was a product of "sound philosophy" or simply "the dreams of visionaries," as some critics had charged. Dr. Benjamin answered that because phrenology "pretends to establish its principles only on numerous and well observed facts, [it] cannot, with the slightest justice, be associated with the fancies of dreamers or fanatics, but is worthy the examination of all sound and inquiring minds."9

Ray's Dr. Benjamin went on to describe the new science in some detail. He noted that the phrenological organs were divided into three tiers. Animal propensities, sometimes mistaken for instincts, occupied a part of the brain at the back of the head. Man's moral faculties were governed by the organs located in front of the animal passions. The front of the brain contained the intellectual faculties and gave man an ability to reason. It was possession of this intellect which made man differ so dramatically from the beasts. Dr.
Benjamin also defended the proposition that the size and not the delicacy of these organs chiefly reflected their degree of development, a proposition upon which he said virtually all "of the best observers" agreed. Francois Magendi, a French physiologist of the early nineteenth century, for example, had noted that the heads of nearly all great men were large. To the phrenologist this revealed well-developed brains. Even the ancient sculptors always fashioned gods and great men with large heads. No one, Dr. Benjamin suggested, could look at a bust of Bacon or Shakespeare and confuse them for idiots.10

Ray wrote Conversations for school children, not for a professional scientific audience. It was not a complete or sophisticated exposition; hence the rather superficial reasoning on head sizes. But it was still a revealing discussion. Confident and unembarrassed despite its simple style, Conversations demonstrated a full acceptance and detailed knowledge of phrenology. In particular the book showed that Ray's attraction to the science was partly the result of its founders' reputation as tireless Baconian observers.11

Conversations was also an honest presentation of phrenology. When Emily asked the doctor why he had not discussed the various phrenological organs in his earlier outline of the brain's anatomy, he answered, "They were not mentioned, because in truth they cannot be distinguished. All other propositions of phrenology," he said, "may be established
by fact, or sound reasoning, but as to form, size, or even existence of these organs, anatomy gives us no light whatever." Phrenology rested instead on physiological and pathological observations.\textsuperscript{12} Physicians knew, for example, that a blow to a certain region of the head often resulted in the victim's inability to speak. Though no organ of Speech could be isolated, Ray assumed it existed because of these other observations.

In 1832 Ray reviewed George Combe's \textit{The Constitution of Man Considered in Relation to External Objects} for the \textit{Christian Examiner}. In this essay he elaborated on the outline of phrenology presented in the \textit{Conversations}. Combe, a Scotsman, was to become perhaps the greatest propagandist of phrenology after Spurzheim's death. His frequent writings on the new science during the 1830s were a principal source of information for Americans like Ray. Combe personally added little to phrenology as a science. Rather, his talent was as a disciple who popularized and preached the doctrine's virtues. Ray's review, which devoted only about three of its twenty pages to Combe, stressed instead the merits of Gall and Spurzheim's works, the principal sources of Combe's views.\textsuperscript{13}

Ray retained the confident and assertive tone of his \textit{Conversations}. American phrenology still had not met the crushing criticisms which ultimately would drive it from respectability. In keeping with phrenology's current acceptability, Ray's essay was much more than a defense of the
new science. He asserted the doctrine's scientific superiority to traditional metaphysics as a key to studying the human mind. Unlike phrenologists who were careful observers of the brain, metaphysicians failed to study the mind with all the observational tools at their disposal. They did not look, for example, at the brain's structure, the nervous system, or at the obvious similarities between man and the lower animals.

For Ray all of science was a whole. Divisions of inquiry into disciplines, although necessary, were artificial. Knowledge learned in one field enlightened countless others. Metaphysicians had committed the radical error of setting themselves apart and refusing the light of other sciences. They had sentenced themselves to perpetual darkness, seeking truth with no more guidance than the logic of their own minds. For Ray it was as though they never set foot outside their libraries. His damnation of the metaphysicians was as caustic as it was complete:

No study has been pursued more in this insulated manner, and consequently been followed by fewer successful results, than that of metaphysics, or the philosophy of the mind. Starting, as it has, from the general position, that every individual has within himself all the materials of this study, and that careful observation of the action of his own mind, without calling in any foreign aid whatever, is all that is necessary to gain the object of his search, it would evince no extraordinary discernment to tell where and how its inquiries must end. This is the crying sin of metaphysics, the foundation of its thousand systems, all equally false,—of its jarrings, its confusions, its mysticism, its eternal disputes about truth.
In phrenology Ray found salvation from this "crying sin." The doctrine denied the philosophers' *a priori* separation of mind and body which Ray called "a vulgar distinction." It was impossible, Ray believed, "to point out exactly where the province of one ends, and the other begins." While he agreed in principle at least that the mind was distinct from matter, he noted that observation revealed that "the mind depends on the body for its manifestations." Without body, the mind could not act. This was, he thought, "a fact too obvious for even a child to overlook." Ray held that, despite its spiritual quality, the mind should be studied as a physical, rather than a metaphysical, phenomenon.\(^{15}\)

Using phrenology coupled with his Baconian assumptions, Ray was able to classify mental, supposedly nonphysical, phenomena as observable and measurable. Phrenology salvaged the mind, its intellect and morality, from metaphysics and all "its jarrings, its confusions, its mysticism, its eternal disputes about truth." Ray believed scientists could at last save the philosophers. Because the mind was so intimately connected with the body it followed that it too was subject to discoverable and unchanging natural laws.

Bacon's true scientific method applied to the mind as it did to the rest of the body. This was a key to understanding Ray's attraction to phrenology. Strictly speaking, it was Gall and Spurzheim's reputations as tireless observers rather than their theoretical conclusions which Ray found so com-
pelling. These men had not sequestered themselves in solitary
contemplation;" Rather, they "traversed continents to
pursue their researches in the wretched receptacles of pov-
erty and crime;" they "endured for years the toils of the
dissecting room, the wear and tear of which, to body and
mind, none but a practical anatomist can adequately conceive
of . . . ." 16 Phrenology's pioneers had been pathologists
of the type Ray so highly praised in his 1827 dissertation.
Gall and Spurzheim epitomized the best tradition of Baconian
experiential science. More than the metaphysicians they
offered the promise of real knowledge and "successful results."

Ray was sensible to the controversial nature of the phren-
ology. He urged his readers to view Gall and Spurzheim's
work dispassionately. Most of their assertions in no way
depended on phrenology. Ray admitted the theory itself
could not be proved by observation. He claimed that the
pioneers' greatest contribution was to treat man's mind as
subject "to the general laws of the universe," rather than
as an abstract and mysterious quality. What made them great
was not their theory per se but their methodology. Even if
phrenology were to fail to stand the test of time, Ray said
that these "intrepid inquirers" would remain worthy of
"admiration and gratitude." 17

-3-

It was only a year later that phrenology's test of time
was at hand. In July 1833 the North American Review, likely
the nation's most prestigious journal, published a scathing attack on Gall and Spurzheim's science. The anonymous author began condescendingly by saying that he doubted "the expediency of meddling with the subject" at all. But since phrenology had "occupied of late a good deal of the public attention" he decided to "offer a few remarks on the subject." He accused phrenologists of likening themselves to a beleaguered minority being persecuted by an older established authority. They refused to accept the fact that intelligent men might differ with them. He compared the defenders of the science to the "low-bred pettifogger [who] calls for the sympathy of the mob against a combination of the grandees of the bar, who are jealous of his superior acuteness."18

The reviewer argued that no man with the least familiarity with anatomy could seriously believe phrenology. No anatomical proof existed for it. In particular he stressed that the various organs of the brain could not be seen upon dissection. No anatomist, not even Gall, had claimed to know the exact boundaries of the phrenological organs. If they could not be observed, he argued in his own Baconian way, they could not exist. Without them it followed that phrenology itself could not exist.19

Phrenology's moral implications also deeply troubled the reviewer, especially with regard to criminal behavior. If all heinous crimes such as infanticide or incest could be reduced to an underdevelopment of a physical organ in the
brain, then what of the moral responsibility of the criminal? "The direct and necessary conclusion from Phrenology, in our view of it," he said, "is that great allowance should be made in cases of crime, which indeed [according to the phrenologists] we should rather incline to regard as evidence of insanity or organic derangement . . . ." The effect of this reasoning would be "to diminish the horror of guilt," to break down society's sanctions against deviance. "There seems to us to be a little too much of that excessive charity about it, which weeps over the sufferings of the atrocious malefactor, and is especially anxious, lest the strict execution of the laws should encroach a little on the rights of the scoundrel." It was, "in a word, ultra Epicureanism." 20

This attack enraged Ray who saw himself as both an anatomist and a moral man. Within the year following the North American Review's essay he published two articles which responded to the arguments made there. The first, published in the Boston Medical Magazine was an explicit response to the charges, but dealt only with the question of anatomy. 21 The second, which included no direct reference to the essay in the North American Review, defended the morality of phrenology. 22 Ray's tone in these essays was less aggressive than in earlier writings. He now found himself in the business of defending phrenology. Others now had set the terms of the debate. Though he probably did not yet realize it, the advantage had already shifted to the opposition.
Ray's Medical Magazine article followed the North American Review's attack by only four months and its tone was one of unbridled outrage. He said that the reviewer's argument was "stupid nonsense." Ray was "mortified that such deplorable trash should be sent to the public, through so respectable a channel as the North American Review." Ray resented "the practice of calling names in scientific discussions," which he said was a "common resort of narrow minds" grossly ignorant of the issues they were discussing. Ray doubted that a medical man could have written the review. At least, "for the credit of the profession," he hoped not. He preferred to think it was the work of "some youthful aspirant for trimonthly fame, who crammed his head with anatomical phrases, and was uneasy till he had let off his paper pallets at the phrenologists."23

Much of Ray's argument was less a defense of phrenology than a vindication of Gall and Spurzheim's claim to anatomical expertise. He established that even medical authorities who differed with their theories lauded the two men's discoveries about brain structure and the nervous system. According to Ray, the fact that no anatomist had ever distinguished the various phrenological organs by dissection offered no insuperable problem. He claimed that the organs were analogous to spinal nerves. No medical authority denied that there were two types of these nervous fibers: one set for sensation, another for motion. Yet no anatomist could distinguish them
by sight. This demonstrated that anatomy alone could never reveal a knowledge of an organ's existence. Physiology and pathology were equally important in determining organic function.  

While Ray granted that anatomy alone could not prove phrenology, he insisted that it "was never pretended to base phrenology on anatomical facts, for whether they support it or not, is a question entirely irrelevant to that of its truth. It has been merely shown that it is not contradicted by anatomy, but is in accordance with all its facts." Ray had said as much in his Conversations four years earlier when he conceded that "as to form, size, or even existence of these organs, anatomy gives us no light whatever."  

Tone was as important as substance in Ray's comments. It showed that the phrenology debate was far more than a doctrinal discussion. It struck to the core of Ray's perceptions about himself. The author of the North American Review essay had doubted that "Any individual, at all acquainted with physiology or mental philosophy, [could] seriously believe" in phrenology. Ray was well acquainted with both of these fields and did, in fact, take the new doctrine seriously. His scientific respectability—his very professionalism—was being questioned. Ray clearly prided himself on his standards; his writings revealed a meticulously thorough and logical manner. To be compared to a "low-bred pettifogger" was an insult too grave to take. He
responded bitingly. There was more, much more, involved here than phrenology. His professional legitimacy was at stake.

Ray's anger calmed by the spring of 1834. In a review of Combe's *System of Phrenology* for the *Christian Examiner* he expanded his defense less passionately to include the moral aspect of the attack. Though he never expressly mentioned the *North American Review*’s criticism, he clearly took up his argument where the *Medical Magazine* article ended. After dispensing with anatomical considerations in about three pages, he devoted fully twenty-four to a discussion of the moral questions. Ray's two articles, taken together, constituted a full defense of phrenology.

This was an important article in the widening polemical war over phrenology. The *Christian Examiner*, which had published Ray's review of another Combe work in 1832 without comment, deviated from its usual practice to add an editor's note to this 1834 essay. "To prevent misunderstandings," the editors stated, "we take this occasion to observe once and for all, that we must not be held responsible for the views and reasonings advanced in every article of this work."

They offered the review, they said, so that their readers could hear both sides of the debate and decide for themselves. This unusual note reflected the growing controversy over phrenology. Only two years earlier in Ray's equally laudatory review the editors saw no need to separate
themselves from his views.

Ray began his essay much as he did all his writings on phrenology. He praised the founders. In particular he cataloged the ways in which they, especially Gall, were vilified and condemned in Europe during the early nineteenth century:

The arm of power was stretched out by the decaying dynasties of the old world to crush it [phrenology] by shutting the mouths of its friends; the Vatican fulminating its edicts to awe it into silence; learned bodies registered their decisions against it; the great ones in literature and science turned away from it with a sneer of derision; the hacks of literature sputtered it with their venomous effusions, till its fate seemed, more than once, to be irrevocably sealed. 28

Yet phrenology survived. In fact, Ray insisted that it had grown faster and "to an extent unexampled in the history of science." He believed "nothing but truth could have successfully withstood" the pervasive character of the assault on phrenology. 29

Far from disparaging the morality of phrenology as the _North American Review_'s essay had, Ray praised it. Phrenology's doctrines held that not just a few but all men were capable of moral rectitude. As a phrenologist Ray's argument was that man was physically equipped for morality. Everyone's brain contained three groups of organs. Animal propensities, which man shared with lower beasts, were wholly selfish in their operation. They were designed to assure physical survival. If not controlled by the moral and intellectual organs, however, they would lead to unbridled self-indulgence. But all men had organs which
enabled them to make moral distinctions and place the concerns of others before themselves.30

In particular the organs of Conscientiousness, Veneration, and Benevolence assured man's innate virtue. Conscientiousness produced "the feeling of moral obligation, of right and wrong, of merit and demerit." Veneration encouraged men to respect and revere "whatever is good and great." Benevolence drove man to seek the happiness of others and to feel compassion. Locke, Ray said, was largely wrong. Man may indeed lack innate ideas per se, but he had "innate faculties" which assured that he had a capacity for morality. Observation of both civilized and primitive cultures proved, he argued, that all people drew moral distinctions. They may differ about the morality of a particular act, but all had moral standards.31

These moral faculties, however, operated from "a blind, instinctive impulse" in their urge to do good. The amount of good actually done depended upon the guidance of intellectual faculties. "Without some regulation of this kind, the best and purest intentions . . . may produce incalculable mischief." Through conscious control of good intentions man could maximize the social good and improve the harmony of his society.32

What made Ray hopeful about the phrenological doctrine was that it included an evolutionary component which seemed to assure progress. Man was in an ongoing process of master-
ing his intellectual abilities. He could direct his natural moral impulses and control his selfish animal propensities: "Phrenology teaches us, that man is now, and for anything we know, always will be, in a transition state, ever passing from under the bondage of the animal propensities and sentiments, and ever subjecting himself farther and farther, to the government of the moral powers and enlightened intellect."\textsuperscript{33} The visionary in Ray could see a day when selfishness was all but evolved out of existence.

So phrenology promised optimism. It held that the future would be better than the present. If only man would accept phrenology Ray argued that he could more quickly bring his naturally virtuous tendency under the control of his intellect. Each man could also improve himself on the individual level. Conscious exercise of the moral organs, like exercise of any organ, would strengthen them. Conscious denial of selfish animal propensities likewise would weaken them. All men were thus equal. To be sure, some were born with larger organs of moral sentiments than others. But by deliberate effort everyone could improve what he was born with.\textsuperscript{34} According to phrenology, man need not remain a victim of his inheritance.

Far from contradicting Christianity and its emphasis on personal responsibility, phrenology validated them. Ray noted that the object of Christ's teaching was the subordination "of the selfish interests to the interests of others."
Phrenology showed that by his very nature man was designed for such altruism. In this light, Ray believed the chief duty of the clergy was to educate. "The first lesson then to be taught," he said, "is the existence and function of these faculties, their connexion with and influence upon one another, and their tendency, when properly exercised, to promote man's best happiness here and hereafter." According to Ray, the clergy should preach science as the message of salvation.

In one important respect Ray failed to answer the North American Review's attack. The reviewer specifically criticized phrenology for its supposed unpleasant legal implications. Phrenologists would interpret criminal behavior, the critic had argued, as a form of insanity. They would pity rather than punish offenders. Ray offered no rebuttal to this important criticism. As yet his defense of phrenology remained general and decidedly nonlegal. His interest in jurisprudence and phrenology's impact on it had not shown itself and he had not publicly tried to articulate the difference between insanity and crime.

Ray continued instead to preach phrenology's optimistic doctrine of educability. Later in 1834 he wrote an essay on education for the Annals of Phrenology, the nation's first journal devoted exclusively to the science. Ray reviewed two works on education by leading phrenologists: one by Combe and another by Charles Caldwell, a medical professor
at Transylvania University in Kentucky who was perhaps America's leading phrenologist. Ray began his remarks by noting that whatever the detractors of phrenology might claim, the science undoubtedly had stimulated an unprecedented interest in education. With characteristic sarcasm he commended "this fact to the notice of the gentleman, who, with remarkable modesty and knowledge of the subject, has settled the claims and fixed the destiny of Phrenology, in the pages of the North American Review." 36

Ray saw phrenology as a godsend to the common man. It showed that man's ability to provide for physical subsistence was but a small part of his nature. So long as laboring people were treated as if "they had been created merely to toil, to eat, sleep, and transmit existence to others, a limited education is sufficient." But when considered as men with natural moral and intellectual capacities, it was remiss to deny them more enlightened learning. Mere altruism did not dictate the value of educating the masses. The health of society did. By letting the laboring classes merely to subsist, society allowed them to exercise their selfish animal propensities almost exclusively. Where then, were "the inducements to the practice of honesty, fidelity, or any other virtue, while the higher powers are suffered to lay waste and barren?" 37

Ray joined Combe in thinking that "the progress of mechanical invention" would make extensive education of all classes
possible. It would reduce the necessity of manual labor and create more leisure time which could be used in education. Man's natural social concern could emerge and he could continue to pass from under the domain of his own selfishness.\textsuperscript{38}

Ray's article in the \textit{Annals of Phrenology} signaled his close relationship to the Boston phrenologists who published it. In particular, Ray became a frequent correspondent of Nahum Capen, a publisher of numerous phrenological works as well as of the journal. The \textit{Annals} was short-lived, lasting through only two volumes and its production was only about three hundred copies. But it was an enterprise well suited to Ray's sophisticated brand of phrenology. It reprinted current articles from Scottish and French journals and provided a forum for leading American phrenologists.\textsuperscript{39} The \textit{Annals} championed an intellectual tradition for phrenology. It vigorously opposed a growing alternative tradition, that of the nonprofessional practical phrenologists who read head bumps for a fee. The editors of the \textit{Annals} claimed that the bump readers turned "a dignified science into a system of legerdemain. . . . The rule should be, examine no heads of living individuals of respectable standing." Only the heads of deviants such as criminals or the insane should be studied and only then to check if their head characteristics verified phrenological theory.\textsuperscript{40}

During the mid-1830s Ray lent his considerable energies
to Boston phrenological enterprises. He regularly contributed to the *Annals*, writing notices on the contents of the Edinburgh *Phrenological Journal*, probably the science's most prestigious organ, and reviewing recent published works.\textsuperscript{41}

In addition, during the summer of 1835, he anonymously translated part of Gall's six-volume *Functions of the Brain* for Capen's publishing house. He translated all of the fourth volume, part of the sixth, and told Capen he was willing to translate the fifth as well. Evidently Ray did all this work out of a desire to see the master's principal work made more readily available in English. A Boston physician named Winslow Lewis, Jr. rather than Ray received credit for the work.\textsuperscript{42}

During this period of heightened activity on behalf of phrenology Ray first developed his enduring interest in the legal problems caused by insanity.\textsuperscript{43} He became interested in a court case in Maine which raised the issue of mental condition. In August 1834 a nine-year-old boy named Major Mitchell stood trial in Durham on charges of aggravated assault and mayhem. He allegedly had beaten and castrated a younger playmate. Mitchell confessed to the crime and, whenever asked about it, repeated his story as though he had memorized it. The gruesome nature of the crime made the case into something of a *cause célèbre* in the area and attracted wide attention in other parts of the state. Hearing of the case, John Neal, a lawyer from nearby Portland,
came to the boy's defense. Like Ray who visited Mitchell in jail, Neal was an enthusiastic phrenologist.44

Before Neal took the case, however, several phrenologists had already examined Mitchell's head. A traveling lecturer on phrenology named Silas Jones examined the boy and pronounced him to be cruel, cowardly, and treacherous. But when Neal first met Mitchell he became convinced that the confession was bogus and that the boy was innocent, if not of the assault, at least of the castration. After his own examination Neal conceded that Mitchell's phrenological organ of Destructiveness was unnaturally large and that the boy was in fact capable of irrational violence. Yet he pitied the boy. Mitchell was defenseless. He was poor, illegitimate, and largely unschooled. No one, not even his mother, seemed to care what became of him. After hearing Mitchell repeat his story several times as if by rote, Neal decided that some other boys had committed the crime and forced Mitchell to take responsibility by repeating the fabricated story.45

Neal planned his defense strategy in two stages. First, he sought to prove that the more serious charge of mayhem had not occurred at the same time as the assault. Evidently, he agreed that Mitchell had beaten the other boy. But not even the physician who examined the victim on the day of the assault made any mention of a castration. The boy's parents added that charge later. If he failed to disprove the emasculation, Neal next wanted to show that, as a child, Mitchell
was not legally capable of crime. As a boy of only nine there was a prime facie presumption of legal incapacity to form criminal intent, placing the burden of proof on the prosecution. 46

Neal hoped to set precedent in this second stage. Even though he had no burden to prove Mitchell's incapacity, he attempted to do so anyway. He argued that, while an infant, Mitchell had suffered a fall which resulted in a wound to his head. This blow centered on the child's organ of Destructiveness and resulted in making it unnaturally large and therefore less controllable. For the court or jury to accept this defense would also be to accept phrenology. Neal intended to introduce several phrenological works, especially Spurzheim's Observation of Deranged Manifestations of the Mind, or Insanity. But in a recent case, Ware v. Ware, the Maine Supreme Court had ruled that even medical books of the highest authority were inadmissible as evidence. At the trial Neal tried to support his contention by calling some phrenologists to the stand to testify on the facts their science revealed. The judge refused to allow him to call witnesses as phrenologists. Since the men whom Neal sought were also physicians, the judge allowed them to be questioned as medical men. Once on the stand two doctors concurred that Neal's assertion that the childhood fall could have damaged the organ of Destructiveness. They also agreed this could have caused a violent disposition. In his charge to
the jury, however, the judge negated the value of this testimony. He said that it was a statement of theory and not fact. As such it was not proper evidence for the jury. 47

The jury heeded the judge's charge. After twenty minutes of deliberation, it accepted the boy's confession at face value and returned a verdict of guilty on both counts. The judge sentenced young Mitchell to a nine-year term in the state prison. Neal was disappointed by the outcome but believed that he had done all he could. "Phrenology had been seriously mentioned in a Court of Justice, without provoking laughter," he said. "Two most respectable physicians had acknowledged their belief in Phrenology, as a science upon oath . . . ." 48

Ray's familiarity with the Mitchell case was close. He accompanied Neal on one of his visits to Mitchell in the Durham jail and evidently made some off-hand phrenological observations of his own. In 1835 he reviewed the case and commented on it in the Annals of Phrenology. After discussing the various measurements taken by Jones and Neal, Ray outlined several differences with them. In his own measurements of several important phrenological organs, Ray's observations differed from theirs. Ray's conclusions were less generous than Neal's. He said: "it needs no uncommon experience in phrenology to infer the character of a cowardly, bloody-minded, able villain, distinguished by superior tact and shrewdness." 49
Ray praised Neal for "the skill and scientific knowledge that directed his defense, yet," he added, "we could have wished a better case for the introduction of the light of phrenology, into the dark passages of our Criminal Law." He observed that Neal's defense was bound to have failed. Neal would have had to show that Mitchell did in fact receive the blow to the head, that the blow altered his character, and that blows to that part of the head predictably had similar consequences. In short, Ray tacitly agreed with the judge that Neal's experts had offered up nothing but theories. Although Ray did not belittle Neal for his attempt, he wished that phrenology's first introduction in court had proved solid and successful, "an augury of its future stupendous influence." 50

At the same time Ray contemplated this "future stupendous influence" he was preparing a lecture for a group of lawyers in Maine. The lecture, entitled "Criminal Law of Insanity," later (October 1835) appeared in the American Jurist, a leading New England law journal. Ray wrote the essay at the same time he was active in furthering phrenology. Even though the basic assumptions of "Criminal Law of Insanity" were clearly phrenological, he never mentioned the science by name. 51

In "Criminal Law of Insanity" Ray severely criticized the common law of insanity. He argued for more receptivity to changes in medical theory and less reliance on precedent.
"Nearly all the common law of insanity . . . is founded on totally erroneous notions . . . of this disease, and consequently has led to frightfully numerous cases of judicial homicide," he insisted. The common law's emphasis on precedent virtually assured that obsolete medical theories would preclude any humane defense of insane defendants. In particular, Ray objected to the common law's failure to accept partial insanity as an excuse from responsibility. With few exceptions, the defendant had to establish either that he totally lacked his reason or that he did not understand the wrongfulness of his act.52

Ray argued that only a tiny portion of the insane were completely deranged. Most had diseases affecting only parts of the brain. He especially stressed the existence of "moral insanity," a form of the disease in which a person could be fully aware that his behavior was wrong yet be unable to control himself. Ray described it as a condition in which "the passions may be in a state of insanity, impelling a man, for instance to the commission of horrible crimes, in spite of all his efforts to resist." It was a precursor of later irresistible impulse doctrines. Though phrenologists did not originate the concept of moral insanity, they universally accepted it. For them it was easy to view the selfish animal propensities in an unnatural state of excitement driving man to commit acts which his relatively weakened moral sentiments could not control. To them moral insanity was simply a
derangement of certain organs of the brain. Knowledge of right and wrong (an attribute of intellectual organs alone) did not, according to Ray, preclude insanity.

To support his position he cited most of the contemporary leading authorities on insanity. He referred to the Paris clinician Phillippe Pinel (1745-1826), an alienist known for being the first to take the chains off the chronically insane, and Pinel's disciples, Jean Esquirol (1772-1840) and Etienne Georget (1795-1828); English experts James Cowles Prichard (1786-1848) and John Haslam (1764-1844); and phrenologists Gall and Spurzheim, all of whom championed moral insanity. To Ray it was an imposing list. He could not understand why the courts refused to follow such scientific authority, choosing instead the outdated views of insanity offered up by precedent. It violated his every notion of scientific progress.54

One anonymous reader of the American Jurist, however, found the common law sufficiently progressive without Ray's help. He responded, saying that he did not care to see the common law so libeled. The letter-writer doubted whether Ray's own medical colleagues would agree with him. He reminded Ray that insanity was "a mixed question of law and fact." The court must instruct the jury what insanity meant "in the contemplation of the law." According to Ray's critic, it was a question of morality, not strictly of medicine, whether a person was responsible. The definition
of insanity used in court need not satisfy Ray. Rather it must be "absolutely true to all our ideas of moral obligation and accountability."\textsuperscript{55}

Charles Sumner, an editor of the \textit{American Jurist}, defended Ray's views. In response to the letter-writer's criticisms, Sumner said what Ray had avoided, that "Dr. Ray . . . has evidently adopted the phrenological theory of insanity . . . as the basis of his remarks." Sumner said that phrenology had received so much support among "so many enlightened and scientific men" that it needed no defense. It provided the foundation of modern theories of insanity and, as such, Ray was correct to rely on it. Sumner was himself quite impressed by the science and readily perceived the phrenological framework even though Ray never once mentioned it. He pointed perceptively to a basic difference separating Ray from his critic. Whereas Ray defined insanity as a physical disease, his critic retained the traditional view that it was a nonphysical "alienation of mind."\textsuperscript{56}

Ray thanked Sumner privately for the defense but also expressed concern about it. True, he said, he had adopted "the phrenological theory of insanity." But he had intentionally refrained from mentioning it because he did not wish that the journal's readers "should get the impression that my views are necessarily based on phrenology, for they are not." He had to be careful about discussing phrenology because of the "odium" attached to it, "especially in its
relations to legal science." He feared that any "belief among your profession that the modern views of insanity are founded on phrenology would most essentially check their progress." 57

Ray then wrote a published response to the letter-writer's criticism. In it he neither mentioned phrenology nor alluded to Sumner's editorial note. Instead he responded only to his critic's points. As he had used sarcasm in his answer to the North American Review's attack on phrenology three years earlier, Ray employed a similarly sharp tone to dismiss the American Jurist correspondent's assault on his legal opinions. He said that the writer had not bothered to learn about insanity, that he had failed to acquaint himself "with the works of the best writers" on the subject, and that he had delivered his "opinions on the subject, ex cathedra." Characteristically, Ray resorted to derision:

We do not hesitate to say, that whoever comes to his task, ignorant of what others have done before him, and with a feeling of contempt for every result, that does not harmonize with his own preconceived notions, and more inclined to bow with reverence to the dicta of the past, than to receive with a grateful heart the facts presented to him by the diligent student of nature, will utterly fail of success. 58

This exchange over the American Jurist article was an important turning point for Ray. He showed that, despite a deep commitment to phrenology as seen in the Mitchell case, he nonetheless could suppress his advocacy when it might offend his audience. He had begun the process of surrender-
ing the battle over phrenology. Any overt discussion of
the science would be conspicuously absent from his future
writings. By the mid-1830s the control of phrenology's
future already had begun to slip from the scientific pro-
fessionals into the hands of popularizers and charlatans.
But if Ray was losing one advocacy he was finding another.
Hereafter, he would expose the inadequacy, indeed the in-
humanity, of the law's treatment of the insane.

Ray's relationship with Sumner proved fruitful. During
the five years following his first article in Sumner's
journal Ray was a frequent contributor to the American
Jurist, usually as a reviewer. More importantly, Sumner and
the journal provided Ray with the necessary support for his
enlarging legal interests. In May 1836 Ray wrote Sumner that
he had begun a manuscript on the legal relations of the
insane and sought Sumner's encouragement in the project.
Because of his relative isolation in northern Maine he needed
books and reports of trials unavailable to him. Sumner and
other Boston friends frequently helped Ray by sending him
research material. The result was Ray's most lasting work,
A Treatise on the Medical Jurisprudence of Insanity, pub-
lished in Boston in 1838.\(^59\)

The Treatise was a vastly expanded presentation of the
views Ray advanced in the American Jurist in 1835. Like
that article, phrenology provided a pervasive, if somewhat
inconspicuous, framework. Ray maintained "the phrenological
theory of insanity" which he had told Sumner was the basis of his views. He also continued to attack the common law for its failure to treat insanity as a physical disease. Moral insanity in particular remained a distinguishing component of his argument. Ray insisted that the brain's moral functions were physically separate from its intellectual operations. This was the basis of his attack on "right and wrong" tests, for example. To Ray it was possible for one part of the brain to appreciate wrongfulness but nonetheless be overruled by the diseased action of another part.

Luther S. Cushing, one of Sumner's co-editors of the American Jurist, effusively praised Ray's Treatise when he reviewed it for that journal in July 1838. He thought it was both "a contribution of the cause of humanity" and a worthy "attempt to embody the results of modern science." By modern science he meant, in large measure, phrenology. Whereas Ray had consciously avoided any overt reference to the science, Cushing singled it out for special commendation. He praised Ray for presenting his views "in conformity with the phrenological system." Ray's orientation was clear to Cushing who was already familiar with the science. He noted, for example, that Ray's treatment of insanity corresponded to phrenology's "divisions of the organs of the brain . . . into those of the affective powers, including the [animal] propensities and the [moral] sentiments, and those of the intellectual powers."60
Cushing's celebration of the Treatise caught the attention of George Combe, the Scottish phrenologist, when he visited the United States later in 1838. Combe was a lawyer by training though his work on behalf of phrenology took him away from active practice. After reading the American Jurist review, he read the Treatise itself and, like Cushing, found "it to contain much excellent matter." Combe recommended it because it treated "insanity on phrenological principles" and because it revealed the "contradictions, errors, and inhumanity" of common law doctrines of insanity. Combe especially lauded Ray's emphasis on moral insanity.61

Cushing and Combe both looked to a healthy future for phrenology. Ray did not. After five years of service in the polemical battles over its legitimacy he was resigned to its defeat by 1838. Never again would he publicly praise phrenology. As he told Sumner in 1836, it was better for progress that he be silent on the subject lest its very mention upset an already prejudiced audience. Earlier than most, Ray saw that phrenology was lost to the control of men like himself. He could no longer be responsible for phrenology. True, he would continue to share some of its assumptions. Insanity would always remain for him a physical disease, not an ephemeral loss of reason. He always retained some belief in localization of brain function. But he refrained from mixing phrenology's divisive element into his future advocacies.
In his introductory remarks to the *Treatise* he offered a bittersweet yet veiled eulogy for the science that had given him so much:

The only metaphysical system of modern times which professes to be founded on the observation of nature and which really does explain the phenomena of insanity with a clearness and verisimilitude that strongly corroborate its proofs was so far from being joyously welcomed, that it is still confined to a sect and is regarded by the world at large as one of those strange vagaries in which the human mind has sometimes loved to indulge. So true it is that in theory all mankind are agreed in encouraging and applauding the humblest attempt to enlarge the sphere of our ideas, while in practice it often seems as if they were no less agreed to crush them, by means of every weapon that wit, argument, and calumny can furnish.62
Notes


4. Davies, Phrenology, pp. 3-5; Fink, Causes of Crime, pp. 1-3.


7. Davies, Phrenology, pp. 30-45 describes the shift in American phrenology from a scientific enterprise to a mass popular ideology.

8. Ibid., pp. 64-67.


10. Ibid., pp. 145-46, quotation on p. 146.


15. Ibid., quotations, in order, on pp. 387, 388, 392.
16. Ibid., p. 401.

17. Ibid., quotations, in order, on pp. 400, 401.


20. Ibid., p. 74.


25. Ibid., p. 251; Conversations, p. 145.


27. Review of Combe's System, p. 221n. Perry Miller in his The Transcendentalists: An Anthology (Cambridge, Mass.: Harvard University Press, 1950), pp. 75-76 seriously misrepresented Ray's review. First, he said the Examiner presented the review "belatedly" (p. 75). Actually Ray reviewed an 1834 edition of Combe's book in this, the May 1834, number of the Examiner. Further, the Examiner did not decide "it could no longer afford to disregard the fad" (p. 75). It had reviewed another of Combe's books in July 1832. Ray was the reviewer then as well. Finally, Miller said the editors "had every reason to suppose Ray would exorcize the pseudo science, because he was a levelheaded scientist" (p. 75)! Precisely the contrary was true. Since Ray had already favorably reviewed phrenology for them, the editors certainly expected the result they got. As for Ray's levelheadedness, it would in no way have automatically disposed him against phrenology.


29. Ibid.

30. Ibid., pp. 228-29.
It is important not to view biological inheritance from a twentieth-century, post-Mendelian perspective. Early in the nineteenth century the concept of inheritance was different. Individuals were thought to be capable of changing their natures by the way they lived. For an excellent and concise discussion of this in its social context see Charles E. Rosenberg, "The Bitter Fruit: Heredity, Disease, and Social Thought" in Rosenberg, No Other Gods: On Science and American Social Thought (Baltimore: The Johns Hopkins University Press, 1976), pp. 25-53.


Ibid., p. 381.

Ibid.

Davies, Phrenology, pp. 56-57.

Quoted in Ibid, p. 41.

See Ray to Capen, Sept. 25, 1834; "Eastport 24.1834"; March 14, 1834, 1835; Capen Papers, Francis A. Countway Library, Harvard University, Boston, Massachusetts.

See Ray to Capen, June 10, 1835; Aug. 19, 1835, Capen Papers; Benjamin Pasamanick, "An Obscure Item in the Bibliography of Isaac Ray," American Journal of Psychiatry 111(Sept. 1954): 164-71. There is no record that Ray received payment for his translating work. In his August 19, 1835 letter to Capen Ray offered to translate the fifth volume but no evidence exists to suggest that he actually did.

[Thomas S. Kirkbride], "Isaac Ray," American Journal of Medical Science 82(July 1881): 285. In this obituary notice Kirkbride said "Dr. Ray became interested in insanity and the treatment of the insane, when circumstances that occurred in the trial of certain cases in courts of Maine . . ." led him to begin writing on the subject.

Ibid., Feb. 7, 1835.
Ibid.; Ware v. Ware 8 Me. 42 (1834).
Ibid.
Ibid., quotations, in order, on pp. 308, 309.
Ibid., passim., quotation on p. 261.
Ibid., passim.
Ibid., p. 92.
Ray to Sumner, May 5, 1836, Sumner Collection, Houghton Library, Harvard University, Cambridge, Massachusetts.


62 Treatise, p. 56.
CHAPTER 3

"Progress vs. Precedent:
Ray's Critique of the Common Law
of Insanity, 1835-1841"

"For our courts we hope better things,
than that blind submission to authority,
which prefers the dicta of fallible men
to the established truths of science."

—Isaac Ray, 1835

It was Ray's science that led him to a criticism of the law. Trained as a physician, he worked at the practice of medicine, but filled his leisure time in the pursuit of science. Pathology, physiology, anatomy, botany, natural history, geology—all these and more—were the objects of his interest. Their study, he was certain, could follow but a single methodology, that of Bacon. He believed that disinterested observation, natural classification and avoidance of speculation, would assure legitimacy in science. Further, they would guarantee progress, the hallmark of civilization.

The law, however, seemed to dispute these values. Unlike science which encouraged the sharing of knowledge across disciplinary lines, the law, like the "metaphysicians" whom Ray so fervently attacked during his phrenology debates, isolated itself. In its search for truth the law seemed to look only to itself. Worse, it looked only backward. Precedent excluded progress. Ray found that the results of modern science were seldom embraced by the law. Instead the decisions of dead judges, not even of dead scientists, gov-
erned the law's quest for truth. The law presented an odd world to Ray, one he would not easily accept.

He opened his attack on the common law in 1835 at a time when his defense of phrenology was ending. While he continued to rely on the same phrenological theory of insanity he had held since the 1820s, he carefully sublimated any discussion of it in his legal writing in order not to alienate his readers. During the late 1830s until 1841 when he became superintendent of the Maine Insane Hospital Ray focused almost exclusively on the law and insanity. The fullest expression of his views was his Treatise which consolidated all his earlier criticism of the law and provided the framework for a lifelong advocacy. Between its first publication in 1838 and the appearance of the fifth edition in 1871 the basic thrust of its argument never changed.  

The structure of his legal thought took its shape while Ray was still a small-town general practitioner in Maine. Ironically, Ray, who always preached Baconianism, developed his theory of insanity and his conception of the common law before he had gained any first-hand experience with either. Neither asylums nor courtrooms, but books, were the focus of his legal observations. Most of the ideas about the law and insanity expressed in his writings were not strictly his own but those of others whose experience with medicine and the law was greater. Ray noted in the preface of his Treatise that his work was "original strictly in plan and in many of
its general views, for the materials have been necessarily
drawn in a great degree from other sources than the author's
experience."³

The major sources of Ray's views were largely foreign
language publications little known in America. His principal
authorities were French writers he had used in his articles
for the American Jurist: Pinel, Esquirol, and Georget.
Georget in particular wrote extensively on forensic psychiatry
in the early nineteenth century and probably had the great-
est influence on Ray's medico-legal views. Ray also relied
to a lesser extent on the German jurist J. C. Hoffbauer
whose work (published in 1809) predated that of Georget.
Hoffbauer however was not a physician and Ray preferred the
more strictly scientific assessments of the Frenchmen. Among
Ray's English sources were John Haslam's Medical Jurisprudence
as it Relates to Insanity (1819) and John Conolly's Inquiry
Concerning the Indication of Insanity (1830). Ray also relied
on James Cowles Prichard's Treatise on Insanity (1835),
especially to substantiate his extensive remarks on moral
insanity. It was Prichard who coined the phrase "moral
insanity" and first introduced the concept in England in 1835
after it was first championed by Pinel and his followers in
France.⁴ In addition to these and other foreign sources,
Ray's staples were the phrenologists: Gall, Spurzheim, and
the Combe brothers.⁵

The tone of Ray's early legal writing was reminiscent
of the phrenology debates. Sarcasm linked with the certainty of his own correctness pervaded Ray's attacks on legal precedent as they had his assaults on the antiphrenological metaphysicians. This was so because the foundation of his views was unchanged. He attacked the common law as he had the antiphrenologists because it was unscientific and ill-disposed to greet new knowledge with openmindedness. Both the defenders of the law and the critics of phrenology relied too strongly on the claims of authority and were jealous of new ideas and reform.

In this regard there was a curious anomaly to Ray's writings. Even though he advocated Baconian science he had personally never made extensive first-hand observations of insanity or the law. He relied instead on the observations of others: Georget, Pinel, Esquirol, Prichard, and the phrenologists. Because he was convinced that they had conducted their researches according to correct methods he embraced their views and took them for his own. These men became his authorities and he defended them as earnestly as any lawyer might rally behind the common law.

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Ray hoped he would be able to prove "that nearly all the common law of insanity touching responsibility for crime was . . . founded on totally erroneous notions . . ., and consequently has led to frightfully numerous cases of judicial homicide."6 By adhering to outdated theories of in-
sanity, he argued, courts were responsible for murder. Law had refused the light of modern science and kept its vision trained on a dark past:

In their zeal to uphold the wisdom of the past from the fancied desecrations of reformers and theorists the ministers of the law seem to have forgotten that, in respect to this subject, the real dignity and respectability of their profession is better upheld by yielding to the improvements of the times and thankfully receiving the truth from whatever quarter it may come than by turning away with blind obstinacy from everything that conflicts with long established maxims and decisions."

This clearly was not a subject about which Ray would mince words; "blind obstinacy" had led to "judicial homicide."
To continue would be inexcusable. The light of modern science clearly showed that the law was in error.

Ray was so sure that the law was wrong because he was equally certain that his science was right. Theories of insanity had undergone dramatic changes during the nineteenth century. Ray long had held that insanity was a physical disease like any other and not a mysterious alienation of mind. "[T]hat insanity is caused by disease, or deranged function of this organ [the brain], is a fact now universally acknowledged by medical men . . . ."8 Since medical authorities had settled the scientific question, it troubled Ray that the legal question should not also have been settled.

Ray devoted a complete chapter in his Treatise to the pathology of insanity. In it he set forth the premises on which he built his theory. First, "Mania arises from a morbid affection of the brain." Second, "Insanity observes
the same pathological laws as other diseases.\textsuperscript{9} And like other diseases its causes were manifold:

Whether proceeding from hereditary predisposition of maternal influences during gestation; from the cerebral irritation produced by disease in other parts by external injuries; from excessive or deficient exercise of the mind; from great predominance or indulgence of some faculties with a small endowment or neglect of the rest; from improper or insufficient nourishment or air; from unbridled license of the passions; or the habitual use of intoxicating drinks; we see the influence of causes precisely analogous to those which give rise to other diseases.\textsuperscript{10}

Nineteenth-century physicians like Ray often offered explanations of disease which, like this one, were remarkably flexible.\textsuperscript{11} Deviant behavior in this model could, for example, be both cause and effect of insanity. Ray's description also showed his belief, earlier expressed in his M. D. dissertation in 1827, that man was potentially a victim both of his environment and his own bad habits. Indications of his phrenological framework were evident here. If one failed to restrain his natural animal passions, they might through their "excessive exercise" overpower one's moral restraint and lead to insanity. But despite the varied causes, insanity was always a physical disease, the product of changes in its victim's brain. Ray never defined it simply as irrational or deviant behavior.

Conceptually this was of great importance to Ray's attack on the common law. Because insanity was not merely abnormal behavior but disease which operated under general laws as
any other illness, it could be medically identified, described, and treated. There was no need for metaphysical speculation or archaic precedent when modern scientists, interested in nothing but truth, could distinguish the diseased from the depraved. The existence of insanity required no clever tests employed by courts to direct juries. Physicians, experts in disease, could and should provide the answers.

Clever tests and archaic precedents were what Ray found when he looked to the law. Searching over the legal record he found that many problems stemmed from Matthew Hale's (1609-1676) seventeenth-century pronouncements on insanity. Hale had argued in his *History of the Pleas of the Crown* that there were two degrees of insanity, partial and total. A victim of partial insanity, he reasoned, always retained "competent use of his reason" with respect to most subjects. According to Hale, all persons who committed crimes were partially insane. As a result, their disease could not excuse them from responsibility without acquitting all criminals. Only total insanity was grounds for such an excuse. According to Hale, a person must be "wholly destitute of the use of reason." To Ray this was a very constricting definition. When Hale pronounced it, however, the Englishman likely believed it was humane and progressive. The Hale formula allowed the defendant at least some excuse from responsibility
and therefore some escape from punishment. Hale acknowledged the difficulty in distinguishing partial from total insanity. Yet judges and juries must make the distinction "... lest on the one side there be a kind of inhumanity towards the defects of human nature;—or on the other side, too great indulgence given to great crimes."\^12

Ray agreed with Hale that partial insanity was a common form of the disease. He differed on the need to draw sharp distinctions between partial and total insanity. He found Hale's analysis scientifically outdated. Ray said that modern authorities believed partial insanity affected more than its victim's reasoning or intellectual powers. In particular, the phrenological concept of the brain as separated into distinct regions of passions, morals, and the intellect led Ray to believe that insanity could affect any one function without directly harming others. Ray also rejected the notion that all crime was a product of insanity. Some people who committed crimes had no physical illness at all but were simply depraved. He saw no scientific reason to assume, as Hale did, that nearly all criminals were partially insane.\^13

Ray doubted that even Hale would have continued to hold these views if he had the knowledge supplied by recent discoveries. "Could Lord Hale have contemplated the scenes presented by the lunatic asylums of our times," he suggested, "we should undoubtedly have received from him a very different
doctrine . . . ." In other words, it was not the fact that Hale was wrong that bothered Ray. He granted that in the seventeenth century insanity was much misunderstood. He even argued that in Hale's lifetime insanity was "much a less frequent disease than it is now." What troubled him was that, in an age of vastly expanded understanding and a higher incident of the disease, modern lawyers should continue to cite Hale's antiquated authority against the insanity defense. A strict reading of Hale's remarks, Ray argued, all too often meant that only the most raving of maniacs could qualify for the law's protection.  

Ray found a most appalling application of Hale's reasoning in the case of Edward Arnold. He was tried in 1723 for attempting to kill Lord Thomas Onslow. Justice Robert Tracey relied on Hale's authority when he charged the jury that "a man must be totally deprived of his understanding and memory, so as not to know what he is doing, no more than an infant, a brute or a wild beast . . . ." Tracey also told the jury that, if Arnold could distinguish right from wrong he must be held accountable. According to the testimony at his trial, Arnold's family and friends long had considered him mad. Even his reason for trying to kill Onslow suggested madness. He claimed that Onslow had sent devils and imps to invade his body, causing him unending discomfort. Yet, Arnold was not a "wild beast." He could read and write, plan the murder attempt, and act in accordance with his plan.
Despite his delusion, then, he retained some of his reason. So, in accordance with Tracey's charge, the jury convicted Arnold of attempted murder and the court sentenced him to death. Only Lord Onslow's personal appeal saved him from the gallows for a life in prison.

In Ray's first article on the common law in 1835 he could hardly restrain his indignation over this "wild beast" test. "This may be good law," he conceded, "but blessed be God, it has little foundation in nature." All modern scientific authorities—Pinel, Esquirol, Prichard, Gall, Spurzheim, and so on—agreed that partial insanity was real and that it should excuse its victims from criminal responsibility. Ray charged that the "wild beast" test was "inappplicable in practice, because it is the attribute of a class that are never subjected to persecution [sic; he did not write prosecution], and is nothing but a cruel mockery of justice." It was a test that cruelly diverted attention from those whom the law should take care not to punish. Ray found it

... an astonishing and heartsickening fact that men, with hearts and heads of men, can contemplate the miserable victim of insanity before them, behold the wildness of his eye and the disorder of his looks, and listen to the story of his mad hallucinations, and then coolly sentence him to the scaffold, because God, in his mercy, has not quite reduced him to the condition of a brute, not completely shrouded his heaven-born reason in the uncontrollable fury of delirium.

When Ray discussed Arnold's case in his Treatise three years later he amended his tone. He was equally clear in his opposition to Tracey's "wild beast" doctrine but decid-
edly more moderate in his tone. Gone were his "blessed be 
God" inflection and his depiction of lawyers' behavior as 
"astonishing and heartsickening." He likely had not changed 
his opinion because the substance of his critique remained 
unaltered. Rather he probably considered such an accusing 
tone inappropriate in a treatise. His earlier remarks were 
in an avowedly argumentative article. By 1838 when he wrote 
the Treatise he realized that his views on the jurisprudence 
of insanity were more influential than had been the case in 
the 1835 article. In the earlier year he was still new to 
the subject. He intended then to dramatize only the gulf 
between legal and medical science. In 1838 he avoided the 
condemnatory tone just as he avoided open references to 
phrenology, because he wished not to alienate his audience. 

In any event, Ray's object was not to condemn the entire 
development of the common law. He cited with favor, for 
example, the decision in James Hadfield's case tried in 
London in 1800. Hadfield had attempted to assassinate George 
III at the Theatre Royal in Drury Lane. During his trial 
the attorney-general, Sir John Mitford, argued that Hadfield 
should be held responsible despite his unquestioned delusion 
that he was a messiah and must be a martyr like Jesus Christ. 
Mitford relied on Hale and Tracey's authority and claimed 
that Hadfield, because he was still in command of some of his 
reason, should not be acquitted on the grounds of insanity. 
Thomas Erskine, Hadfield's counsel, responded by directly
attacking Hale and Tracey who, he said, were simply wrong. Wild beasts or persons totally deprived of their reason were never held accountable for their acts. That condition was extremely rare and too infrequent to worry about. In the place of the old test Erskine argued for one based on delusion. Whenever the criminal act was the offspring of an insane delusion, he argued, it should excuse the defendant from responsibility. This argument, coupled with Hadfield's unquestioned insanity (Mitford conceded the delusion), encouraged Chief Justice Lloyd Kenyon to stop the trial early and to charge the jury to find Hadfield unaccountable. The jury concurred by acquitting Hadfield whom the judge promptly incarcerated in a mental hospital. 20

To Ray this was a fresh breeze in the stagnant recesses of the common law. He feared that the delusion test alone might be too narrow (not all the insane had delusions) but praised the improvement over the "wild beast" doctrine. It was "the first time in an English court [that] anything like a thorough and enlightened discussion of insanity as connected with crime" had ever occurred. But he attributed the Hadfield verdict less to the influence of science than to the great rhetorical skills of Erskine. If all insane defendants could have had his counsel, then "old maxims" would always be challenged and forced to change. As it was, many defendants had no counsel at all and "the officers of the government have always been at liberty to put their own con-
struction on the law, and urge it on the jury as the only correct one, without fear of being contradicted or gainsay-ed."21

Erskine's challenge did not seriously alter the course of the common law however. In 1812 John Bellingham shot and killed Spencer Percival, First Lord of the Treasury and Chancellor of the Exchequer. Bellingham believed Percival and his agents had confounded his business dealings and therefore decided to kill him. When Chief Justice James Mansfield charged the jury he ignored Erskine's delusion test and stressed the rule found in Tracey's instructions in Arnold's case nearly a century earlier. He did not employ the "wild beast" doctrine which Ray had found so inappropriate but he pronounced the rule that knowledge of rightness or wrongness of the act determined a defendant's responsibility. Bellingham, who denied he was insane, clearly knew that murder was wrong and the jury convicted him as charged.22

Ray interpreted this right and wrong test as nearly a complete reversion to Tracey's faulty "wild beast" criterion of acquittal. For the right and wrong test treated insanity as a deprivation of reason or a derangement of intellect alone. Mansfield's pronouncement had denied what progress had managed to creep into the law. "This opinion was delivered," Ray noted, "scarcely a dozen years after the absurdity of its principles had been so happily exposed in a few
words by Mr. Erskine . . . . What a comment on the progress of improvement in the medical jurisprudence of insanity!"²³

Ray's view of insanity as a physical derangement of all or part of the brain made it impossible for him to accept the intellectualistic right and wrong test. Its "radical fault" lay "in the metaphysical error of always looking on right and wrong in the abstract—as things having a positive and independent existence, and not, as they really are, mere terms expressing the relations that exist between actions and certain [physical] faculties of our moral nature."²⁴ To Ray it was possible for moral faculties to be diseased while the intellectual faculties (which distinguished right from wrong) remained healthy.

Ray's reliance on the doctrine of moral insanity was at the heart of his objections to and challenge of the common law. Like nearly all of his contemporary writers he championed this form of the disease in which little or no perceptible impairment of the reasoning process existed. Insane people, they argued, could realize that their acts were wrong, could act according to minutely planned schemes, and could speak rationally when questioned. This concept emerged first in France at the turn of the century when Pinel, working in Paris asylums for the chronically insane, devised the category manie sans délire. His students, among them Esquirol and Georget, furthered the concept. Prichard who was sympa-
thetic to phrenology gave it the English description "moral insanity" in 1835. Phrenologists Gall and Spurzheim had a similar concept based on their belief that the brain was a group of separate organs each liable to derangement. Spurzheim's Observations on Deranged Manifestations of the Mind, or Insanity, published in 1817, was an argument favoring the concept of partial insanity, one form of which was impairment of the moral organs alone.25

All Ray's avenues of research, both pro- and nonphrenological, thus led to an affirmation of the concept of moral insanity. His phrenological orientation had prepared him to receive the views of leading psychiatrists like Pinel who were outside that tradition. Although he continued to cling to a more expressly physical description of the disease's etiology than other moral insanity advocates his conclusions about its legal implications were the same. If moral insanity was truly a disease, then the common law's right and wrong test was grossly inadequate.

Moral insanity was a new concept to the English-speaking world during the 1830s when Ray began writing on the common law. It is possible that his 1835 article for the American Jurist contained the first reference to the doctrine by an American.26 Prichard had coined the phrase earlier that very year, though the concept in France was several decades old.

Ray was not alone however in advocating it in America.
Moral insanity received some influential support in 1836 from Samuel B. Woodward who was superintendent of the Massachusetts State Lunatic Hospital at Worcester. Like Ray, Woodward was influenced by phrenology and was familiar with the European literature. In his annual report for 1836 Woodward classified a fourth of his patients as morally insane and thereby lent some clinical credence to the concept in America. Ray cited several of Woodward's examples in his Treatise which undoubtedly was the fullest exposition of moral insanity in America, before or since. Though not strictly original, Ray's work was, for Americans at least, seminal.  

Beginning with his first discussion of moral insanity in 1835 Ray usually linked it with a concept of irresistible impulse. Victims of the disease could see the error of their act but were powerless to stop themselves. Ray argued that "while the reason may be unimpaired, the passions may be in a state of insanity, impelling a man . . . to the commission of crimes, in spite of his efforts to resist." Although he did not use the phrase "irresistible impulse" in 1835 its meaning was clear. Two years later in an article for the American Jurist Ray discussed homicidal insanity which he classified as a special form of moral insanity. For the first time he precisely described the disease as one "characterized by an irresistible impulse to destroy."  

The connection between irresistible impulse and moral insanity was more evident in his Treatise the following year.
He said that homicidal insanity caused its victim to act "solely [as] the result of a blind, automatic impulse with which reason has as little to do as with the movements of a newborn infant." Ray described an "internal struggle that takes place between the affective and intellectual powers" in which "the former have the advantage of being raised to their maximum of energy by the excitement of disease which ... rather tends to diminish the activity of the latter."\textsuperscript{30}

In homicidal insanity the affective faculty of destruction would be so agitated that the intellectual knowledge of the evil of killing would be overridden. The moral maniac thus lost his free will by the action of his disease.

Homicidal insanity was but one of the "monomanias" or forms of moral insanity that deranged its victim only on a single subject. Ray also discussed the "irresistible propensity to steal, unaccompanied by any intellectual alienation;"\textsuperscript{31} the "inordinate propensity to lying;"\textsuperscript{32} "erotic mania" or the "[m]orbid activity of the sexual propensity;"\textsuperscript{33} and incendiaryism in which the mind "though otherwise sound, is borne on by an invisible power to the commission of this crime."\textsuperscript{34}

The common theme was that in all cases the acts were motiveless and those who committed the crimes were often appalled by their own actions. The morally insane always acted in spite of themselves.

For legal purposes, Ray thought, homicidal insanity was the most important monomania and to it he devoted much atten-
tion. All the major tests of insanity, for example, had been pronounced in trials that involved homicides or attempted homicides. The problem was to distinguish crime from disease so that the truly guilty would be punished while the insane were protected. What were the differences between criminals and monomaniacs? According to Ray, all homicidal maniacs possessed an "irresistible motiveless impulse to destroy." Criminals, on the other hand, always acted from a motive. In the biographies of nearly all morally insane murderers there was some other physical illness or a period of melancholy in which the insanity had incubated. Homicidal maniacs were often encouraged to their violence by some "trivial or even imaginary circumstance" such as the sight of a gun or an imagined insult. Most victims of the disease killed either strangers or people very dear to them such as spouses or children. Further, the morally insane often committed senselessly bloody acts while the criminal "sheds no more [blood] than is necessary for the attainment of his object." Criminals often worked with accomplices, whereas maniacs never did. Finally, the acts of morally insane persons always deviated from their "natural manifestations" while the criminal's acts were "in correspondence with the tenor of his past history or character."

Ray recognized that his was still a minority view. "The doctrine of moral insanity has been as yet unfavorably received by judicial authorities," he conceded. But this
was "not certainly for want of sufficient facts to support it;" rather it resulted from "that common tendency of the mind to resist innovations upon old and generally received views." The older authorities like Hale or Tracey could not be blamed for their ignorance of moral insanity because they lived before the current age of medical enlightenment. But other jurists of more recent vintage should not escape the opprobrium of their peers.

In particular Ray cited the Englishman Joseph Chitty whose Medical Jurisprudence had recently been published. Chitty discussed moral insanity but only to descredit its application to the law. In a recent Scottish case in which moral insanity was pled in defense for murder, the court disregarded it as a "groundless theory." Ray disagreed. Not only was moral insanity not "groundless," it was also much more than a "theory." According to Ray, countless observations by Pinel and others proved that the disease existed not only as an abstraction in physicians' minds but as a reality in physicians' wards. "Such opinions" as Chitty's and the Scottish court's, "from quarters where a modest teachableness would have been more becoming than an arrogant contempt for the results of other men's inquiries, involuntarily suggest to the mind a comparison of their authors with the saintly persecutors of Galileo . . . ." They wished to convince the world that "nature always operated and always should operate in accordance with their views of propriety.
Ray's survey of English common law led him to believe that there was then no single test of insanity uniformly applied. He believed that the right and wrong test was the most predominant but there had "been a great diversity of practice on this subject, according as it has been affected by the speculative opinions of the judge, the eloquence of counsel, the magnitude of the criminal act, and the ignorance or humanity of juries." It was the courts, not the physicians, who were guilty of "groundless theories." It was the common law definitions of insanity, not medical ones, which strayed away from the facts and into speculation.

Ray was unable to find many American cases to check for possible divergence from English precedents. But he believed from what little he had learned that matters were similar because, "in the absence of any provisions by statute, the practice in our courts is completely regulated by that of England." A few American cases had employed Erskine's delusion test since Hadfield's trial in 1800. On other occasions, however, American courts ignored the "little light" provided by the delusion test and "turned back to the old maxims and again rejoiced in the wisdom of their ancestors."

As for moral insanity, it had fared no better in America than in England. In a review of one Woodward's annual reports for the Massachusetts State Lunatic Hospital which
discussed moral insanity, Ray remarked approvingly of Woodward's "proper method and spirit of scientific inquiry." Yet Ray saw no evidence that the new scientific support was helping to develop respect for moral insanity in the courts. He noted that, in America as in England, it had been "scouted from the courts, as a presumptuous and dangerous speculation." The courts continued to prefer pat definitions of insanity which were seasoned by time. Such new knowledge as Woodward's, he feared, was not likely to gain ready acceptance.43

Ray hoped to see an end to all legal tests which sought to define insanity in any form. Because of these tests the courts mistrusted new concepts like moral insanity. According to Ray, there could be no single test which encompassed every possible case of insanity. To hope for one comprehensive definition was "chimerical, by the very nature of things." Insanity was a disease like any other and "no single diagnostic symptom" determined its presence. According to Ray, there was a "whole body of symptoms," no one of which was present in every case.44 He preferred a simple rule rather than a definitional test. In an 1840 review of a recent German book on medical jurisprudence Ray praised the 1824 Louisiana penal code based on France's civil law. It read simply, "No act done by a person in a state of insanity can be punished as an offense."45 The German author had cited it for its simplicity and flexibility. Ray agreed. Such a rule simply required that insanity be proven; it did not
require courts or medical experts to apply outdated definitions.

Ray was troubled by more than the various common law tests of insanity and the exclusion of moral insanity as an accepted defense. He disapproved also of the different ways in which courts treated insanity in civil and criminal cases. He cited, for example, the fact that Bellingham in 1812 had earlier been judged mentally unfit to conduct his civil affairs, yet was sane enough to be held responsible for his criminal acts. Ray argued that the logical course should have been to accept Bellingham's demonstrated inability to conduct his civil affairs as grounds for excusing him from criminal responsibility. "A plain man, unversed in the niceties of legal science," Ray wrote in 1835, "might well be puzzled to understand how a person can be incapable of conducting his own affairs, and still 'possess a mind capable of distinguishing right from wrong.'" Ray called the principle "vicious."46

In testamentary law, Ray noted that often slight irrationalities provided sufficient evidence of unsound mind to disregard a will. Sir John Nichol, for example, held that the presence of partial insanity, "even if there be but one word sounding to folly," was grounds for overruling a will. Why, Ray asked, should the civil law accept such meager evidence as establishing insanity "when an atrocious crime is
shown to be motiveless, unnatural, in opposition to the habits, feelings and principles of the whole past life, and unfollowed by any consciousness of guilt, should not . . . be considered as equally strong proof of unsoundness of mind?" Ray's point was that the character of the act, be it the drawing of a will or the commission of a murder, should be part of the grounds for establishing insanity. Was the act characteristic of the person's general character? That was the key question. As matters stood, Ray considered the common law illogical and nearly incomprehensible because of its "preposterous distinction between civil and criminal cases."

Inconsistency of judges' decisions was not the only problem. Ray doubted whether juries were fit to determine questions of insanity correctly. Jurymen were laymen. They could hardly decide what was often a complex scientific issue. How were juries to rate the credibility of expert testimony, he asked? "That a body of men, taken promiscuously from the common walks of life, should be required to decide whether or not certain opinions and facts in evidence provide derangement of mind, or, in other words, to decide a professional question of a most delicate nature . . .," he commented in his Treatise, "is an idea so preposterous that one finds it difficult at first sight to believe it ever was seriously entertained." But entertained it was, leading the system to great abuse. Juries had blindly to accept the profession-
al credentials of an expert; to decide which expert among several to believe, or "to slight them altogether and rely solely on their own judgment of the facts." None of these courses seemed right to Ray who blamed not so much the jurymen as the system which forced on them such unpleasant choices. 48

In order for the justice system to work well Ray believed that more attention needed to be paid to the qualifications of experts in insanity cases. He regretted that there was currently no means of regulating who could and could not serve as medical experts. Often, be believed, experts had no special knowledge of insanity at all. They relied completely on their "professional character" or reputation in the community to give their "opinion the authority they ought to possess." 49 Most experts were simply general practitioners who saw insane patients only rarely and were utterly ignorant of current literature. Ray noted thankfully that there seemed to be an opportunity for improvement. Recently there had been a proliferation of insane asylums in America which were managed by a class of physicians especially equipped to offer sound opinions on insanity. He suggested that legislatures in America intervene in the common law to establish minimum qualifications for experts in cases where insanity was pled.

Though he was unaware of it, Ray's advocacy of legislative solutions to problems of the common law fit well with recent American developments. In the 1820s and 1830s there
was a trend toward codification based on the same French codes which gave Ray his model rule for determining criminal responsibility. But Ray never indicated any understanding of the internal debate among lawyers over codification of the common law. Had he not been a physician, but a lawyer familiar with developments in that profession, he might have been able to marshal valuable nonmedical support for his position.50

Ideally, Ray hoped to see more than the qualifications of experts but the whole system legislatively reformed. He preferred the French system of experts. French experts, unlike their English or American counterparts, were appointed by the government. They did not offer their opinions for either side in the courtroom's adversary setting. Rather, they were the only experts called; the court chose them for their special knowledge. Ray believed that such a system had several virtues. It guaranteed that experts would be knowledgable and current in their understanding of insanity, and reduced the confusion of the jury since only one expert appeared whose credentials were beyond question. French courts also gave the expert ample time to examine the defendant before requesting his testimony. Ray feared that in America experts seldom studied the case at hand. Some gave opinions based only on facts presented by others and the defendant's courtroom appearance.51

In his Treatise Ray proposed that the government should
appoint "a special commission consisting of men who possess a well-earned reputation in the knowledge and management of mental derangement . . . ." Whenever a case came up requiring an expert opinion on insanity the court could call a member of the commission who would be bound to respond. Once in court, Ray's experts would be under no obligation to follow the traditional legal tests of insanity. This system would reflect the virtues of the French method of allowing experts to examine "the accused with the coolness and impartiality proper to scientific inquiries." Ray's way would bring science into the courtroom.

Perhaps because of his reverence for science, Ray assumed that courts would accept the expert's decisions since they were impartial and scholarly. In an 1839 article on the French system for the American Jurist he said that making the expert's opinion binding on the jury would relieve the court from having to present jurors "with refined speculations beyond their reach." It was enough merely to establish the defendant's insanity scientifically "without minutely calculating the extent of his knowledge of right or wrong, or laying down any other metaphysical test of criminal responsibility."

Ray continued to refine his criticism on expert testimony in the absence of any dramatic changes like those he had recommended. In 1841 he again reviewed the prevailing manner of eliciting expert opinions and pointed to its flaws. He
did not confine himself to experts on insanity but broadened his remarks to include all medical opinions. He was particularly concerned that physicians had acquired the reputation of "breaking down" on the witness stand. As a consequence, he said that lawyers often disregarded them as ignorant or incompetent. Ray wanted to remove this onus from his profession and place it where it belonged. "The medical profession has been greatly wronged by the imputation of ignorance and presumption . . .;" he charged that it was "time it were generally understood, that the blame in this matter is more justly chargeable to the laws and opinions of the community, than to any culpable deficiency in the profession itself."\(^{54}\)

Ray admitted that "the proverbial embarrassment of medical men on the witness-stand" was often "the result of culpable ignorance that deserves no indulgence whatever." Many physicians freely offered opinions even though they had ceased the study of medicine as soon as they began to practice it. They allowed their own rapidly changing field to pass them by. Often, especially in rural areas, these men were older leading practitioners in their communities and enjoyed the respect of laymen like those whose sat on juries. When these doctors were challenged by the "counter testimony of others of genuine attainments" they usually persisted "in striving to obtain a triumph by force of positive and clamorous assertions." Hence, feelings of professional animosity
overrode the "conscientious regard for truth, and the witness-
stand becomes the scene of professional collisions in which ignorance usually triumphs." 55

How, Ray asked, could the profession be blamed for this? It was the legal system, not physicians, which allowed "pro-
fessional ignorance and audacity [to] rear their unblushing front . . . ." Because states had set no minimum level of qualifications to be an expert, younger, more knowledgable physicians nearly always lost the courtroom battle for popular support to their older but more ignorant brethren. The common nature of juries virtually assured domination by the older doctors. Ray wished to disassociate himself from igno-
rant experts but also claimed "some indulgence for the intelligent physician, on account of the disadvantage under which his testimony is given." 56

Ray especially disliked the fact that medical testimony was not treated as the result of a scientific inquiry. He resented that American courts required doctors to testify either for the defense or the prosecution. By being placed in such an adversary setting experts' impartially could not help but be questioned. This arrangement also led to perhaps the single greatest obstacle to good expert opinions, according to Ray: cross-examination by lawyers less interested in truth than triumph. Physicians, he said, were unused to having their every word questioned, their every shade of meaning distorted. They were used to respect for
their utterances. So when "able and ingenious counsel" began their cross-examination even the most learned physicians, taken off guard, often found themselves making "some fatal admission which otherwise would never have escaped [them]."\(^{57}\)

To compound the problem, Ray said, courts often called experts to testify without giving them ample time to study either the defendant or the pertinent medical sources. So when asked for their opinions, experts often spoke tentatively and defended their positions poorly. Ray counselled potential medical witnesses "to testify merely to facts that have come under their own observation." Courts could not compel them to give opinions unrelated to their own observations. Ray suggested that, if experts felt uncertain about their opinions, they should "demand ample time and means for investigation. In no other way could they avoid jeopardizing their own reputation, and compromising the honor of their profession."\(^{58}\)

Ray conceded that these problems with medical evidence were partly the profession's fault. Returning to arguments he had made in his first comments on expert testimony in 1833, he claimed that medical education had woefully disregarded medical jurisprudence. It was "greatly neglected in all our schools; being omitted in some and confined to a few desultory lectures in others." Ray doubted that much could be done to improve the situation by the schools themselves. As soon as one school would make medical juris-
prudence a major part of its curriculum, thereby making its requirements more rigorous, its students would simply move to a less demanding competitor. "Nothing but the strong arm of the legislature," he said, "can regulate medical education, and raise the healing art to the rank and dignity of a liberal science."^59

Ray did not write of the law as a lawyer. His professional orientation was quite different. He was a scientist in the best sense of that term in the 1830s: his ideal embraced the careful observations required by Bacon; he always accepted new knowledge; he advocated an ethic of scientific progress which required a certain skepticism about authority. Because the common law seemed to lack all these qualities it had allied itself with opponents of progress. Reverence for authority superceded all else, causing progress in the law to creep at a glacial pace. Even worse, the common law seemed to be a haven for ignorance. Ray was willing to excuse Hale or Tracey for their lack of enlightenment about insanity, but he asked whether it was "reasonable for a science the law, which claims the high character of being the 'perfection of reason,' to tolerate it now, when our knowledge of this affection has been increased a hundred fold by the researches of able and indefatigable inquirers."^60

Conceptually, Ray always sought to fit the law into his
scientific model. His critique followed from his inability to make it fit. He wanted the courtroom to be a scientific truth-finding arena, not unlike his own pathologist's dissecting room. The same principles ought to apply, for matters of human life very often were at stake in both. Without a healthy questioning of authority, new knowledge and with it improvement would never come. As a Baconian, Ray looked always ahead to the possible golden age. He could not accept a situation in which the law looked backwards to the past in its search for truth.

Ray's views on expert testimony demonstrated this tendency to make law a science like any other. It upset him that opinions of experts in English and American courts were not received "as the result of an impartial and scientific investigation . . . as medical testimony in such cases ever should be." Instead it was "coolly regarded as part of the evidence 'for the defense,' to be offset by some of the opposite tenor, trumped up, as best can be, by the government counsel." This was no impartial search for the truth about a defendant's sanity; it was a "mockery of justice, a setting at nought of the common claims of humanity[.]." 61

The science that Ray wished to bring to the law was deterministic and naturalistic. To him human beings were intricate organisms subject to natural laws. Like other natural organisms, men were surrounded by threatening influences and liable to derangement. Since, according to Ray,
human behavior was a product of brain activity, any derangement of the brain could potentially alter behavior, rendering it unlawful and dangerous. Ray's vision was thus of a world populated by people delicately perched between health and rectitude on the one hand, and disease and criminality on the other.

Moreover, these people, when ill, were not responsible for their behavior, but victims of forces beyond their control. Try as they might, victims of insanity could not control their behavior. This view of men which Ray promoted was foreign to lawyers who viewed all men, except the wildly deranged, as perfectly free to choose or reject criminality. If Ray's science was right men were, by their nature, less responsible than the lawyers thought.

Throughout Ray's early writings he treated the issues of insanity and legal responsibility as synonymous, something a lawyer likely would not have done. To Ray the discovery of irresponsibility was a process of discovering disease. Ray reduced human responsibility to a question of bodily derangement, to a question that only physicians could answer. His argument took the determination of insanity out of the judicial arena and placed it in the province of medicine. "No act done by a person in a state of insanity can be punished as an offense." That was the rule Ray sought. By making insanity a blanket excuse from responsibility and by defining insanity as a physical disease, Ray's
scheme made the medical expert the key judicial officer.
For it was only he who could tell when disease existed.
Notes


3 Treatise, p. 8.

4 See esp. Ray's "Preface" to the Treatise (pp. 5-9) in which he reviewed the leading sources on the jurisprudence of insanity. Ray commented here and in a letter to Charles Sumner (May 5, 1836, Sumner Collection, Houghton Library, Harvard University, Cambridge, Mass.) that he first considered translating a foreign work, probably Hoffbauer or Georget, but decided a more synthetic work was needed. Most of these sources were mentioned in Ray's first article on the common law, "Criminal Law of Insanity," pp. 253-74.

5 Ray mentioned the phrenologists frequently, especially in "Criminal Law of Insanity" and the Treatise, but also to a lesser extent in other writings on the law between 1835-1841. For another discussion of the influence of phrenology on the Treatise see Overholser's "Editor's Introduction," to the Belknap Press edition of the Treatise, pp. x-xii and passim.


7 Treatise, p. 13.


Quoted in Ray's Treatise, p. 20.

Ibid., pp. 45-46.

Ibid., p. 21.


Ibid., p. 260.

Ibid., p. 265.

Treatise, pp. 21-22.

For Ray's discussion of Hadfield's case see ibid., pp. 23, 28-29.

Ibid., p. 29n25; see also "Criminal Law of Insanity," pp. 264-65.


Treatise, p. 31n29.

Ibid., p. 39; for an almost exactly identical wording see "Criminal Law of Insanity," p. 268; for a less exact earlier rendering of the same idea see Ray's review of George Combe, A System of Phrenology, in Christian Examiner 16 (May 1834): 234.


Reports and Other Documents Relating to the State Lunatic Hospital (Boston, 1837), p. 173; Treatise, p. 166n45.


Treatise, p. 191.

Ibid., p. 140.

Ibid., p. 143.

Ibid.

Ibid., p. 145.

Ibid., p. 169, italics in original.

Ibid.

Ibid., p. 171.

Ibid.; change in character was a key in Ray's estimation to differentiating crime from insanity. In 1840 he quoted Georget as saying "that an act committed without interest, without passion and opposed to the natural character of the individual, is evidently an act of madness." ("Influence of Insanity on Criminal Responsibility," American Jurist 22 [Jan. 1840]: 322.)

Treatise, p. 43.

Ibid., p. 44.

Ibid., p. 187.

Ibid., p. 47.


Treatise, p. 43.

"Influence of Insanity on Criminal Responsibility," p. 328. This was a review of J. C. Mittermaier, De principio imputationis alienationem mentis in jure criminali recte constituendo (Heidelberg, 1838).


Ibid., p. 49.
49 Ibid., p. 50.


51 Treatise, pp. 50-54; see also "Insanity:—Case of Pechot," American Jurist 22(Oct. 1839): 37-39.

52 Treatise, p. 54.

53 "Case of Pechot," p. 38.


55 Ibid., p. 295.

56 Ibid., p. 296.

57 Ibid., p. 301; see also "Case of Pechot," p. 38.

58 "Medical Evidence," p. 298.

59 Ibid., p. 303; see also Chapter 1 for a discussion of Ray's early ideas on expert testimony.


61 "Case of Pechot," p. 38.
Part II
ATTACKING
THE CRIMINAL LAW
CHAPTER 4

"Tests of Insanity and
Expert Testimony, 1841-1869"

"[H]abitual reference to the views of
distinguished jurists of bygone times,
implies the belief that with them all
inquiry had ceased, and it only remained
for us to grope our way by the light that
has travelled down from those distant
luminaries."

—Isaac Ray, 1847

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In 1841 Ray decided to change careers. He left his
private practice in Eastport to become a full-time specialist in the treatment of insanity. His Treatise was by then
the most comprehensive work on insanity jurisprudence in the
language. Shortly after the book was published in 1838 Ray
expressed a desire to become the superintendent of a mental
hospital. In September he asked Horace Mann for information
about a hospital for the pauper insane then under construction in Boston. "It will require a physician of course,"
Ray noted, "and what I wish to ascertain is by whom and in
what manner his appointment will be made." He hoped that Mann
could supply information that would help him in making a
formal application.2

While nothing came of the Boston job, Ray's inquiry
showed that his vision of the future was changing. Early in
the 1830s he was contented with his Eastport practice and
the ample free time for study. But by the end of the decade
his scholarly analysis of insanity had sparked his imagination.
He wanted to expand his bookish understanding with clinical experience.

Ray got his chance in 1841. By then his *Treatise* had won the approval of fellow physicians and some lawyers. As a result, the trustees of the Maine Insane Hospital at Augusta proudly called on their native son to superintend the recently opened asylum. Ray accepted their offer and took the first step toward acquiring the clinical understanding of insanity he lacked.

After changing careers Ray continued his interest in jurisprudence although it was briefly eclipsed by his new responsibilities at the hospital. But in his report to the Maine legislature in November 1843 he deviated from his discussion of hospital affairs to discuss relevant legal matters. Ray asserted that because of new asylums like the one in Augusta legal change would likely occur. He detected a "benigner spirit" in the common law, a growing willingness to send deranged criminals to hospitals rather than to prisons or the gallows.

This improvement in the law was however only slight. Ray said that lawyers had begun to employ the insanity plea more frequently than in the past. As a result, the public was growing increasingly aware of the defense and frequently denounced it "as subversive of the safety of society and the foundation of all moral distinctions." For some lawyers it was an act of courage to suggest the plea, Ray said. So
while it seemed that the courts tended less to hang lunatics, the public also appeared to be growing more convinced that criminals were escaping their just deserts.  

Of one thing Ray was decidedly pleased. He believed that many courts were beginning to disregard the traditional common law tests of insanity. Ray told the Maine legislature that, "It was once very commonly laid down as sound law, that if a person, however insane, still knew right from wrong, or evinced the power of laying plans, he was responsible for his actions." But Ray added happily that such tests were "seldom offered now, because their insufficiency has been satisfactorily established." Even in his earliest essays on insanity law Ray had berated the law's understanding of the disease. Now in 1843 he saw reason for optimism. He hoped the law might, after all, catch up with science.  

Ray's optimism was premature. In the months before he told the legislature of his belief that courts were dispensing with metaphysical tests, a drama was played out in England that belied his faith. In January 1843 a Scotsman named Daniel McNaughten shot and killed Edward Drummond, the personal secretary of Prime Minister Robert Peel. McNaughten suffered under a delusion that members of Peel's Tory party were following and persecuting him wherever he went. McNaughten became convinced that by killing Peel his troubles would end. On January 20, he followed the Prime Minister
and several of his associates to a London bank. As the group departed Drummond supposedly gave McNaghten a "scowling look." In angry response McNaghten drew his pistol, placed it at Drummond's back, and fired. The secretary died several days later. 8

McNaghten made no effort to escape and was calm when arrested. He acknowledged that killing Drummond was illegal, but ably transacted business, and had methodically followed Peel's movements. In other words, his intellect was not grossly distorted. He knew right from wrong and he was able to make detailed and seemingly rational plans. 9

McNaghten's counsel at his trial was Alexander Cockburn. When the case came before Lord Chief Justice Nicholas Tindal in March 1843 Cockburn realized that the ordinary right and wrong test could only harm his client. His strategy therefore was to discredit the test and to emphasize recent medical opinions about insanity. To accomplish this Cockburn based his defense on Ray's Treatise which was published in England in 1839. In his opening remarks to the jury Cockburn quoted at length from Ray. Picking up a copy of the Treatise, he said: "I hold in my hand perhaps the most scientific treatise that the age has produced upon the subject of insanity in relation to jurisprudence ...." He referred to Ray in rather exaggerated fashion as "a professor in one of the great national establishments" in America. 10
Cockburn used Ray's remarks largely to demonstrate how medicine had made obsolete the traditional legal tests of insanity. He quoted criticism of Matthew Hale at great length and examined Ray's treatment of leading English precedents: Arnold's case in 1724, Erskine's defense of Hadfield in 1800, and Bellingham's trial in 1812. In each instance Cockburn noted favorably Ray's criticisms. He focused especially on Bellingham's trial in which the right and wrong test had been used and resulted in the hanging of a man who, in Ray's opinion, was clearly insane.\textsuperscript{11}

Cockburn was matching authority with authority. To counter the weight of precedent he produced contrary medical expertise, namely Ray's \textit{Treatise}. After outlining this theoretical defense Cockburn called eight physicians to testify to McNaughten's state of mind. Each pronounced him to be unmistakably insane. The prosecutor, Solicitor General William Webb Follett, produced no medical witnesses to counter this testimony. The court had appointed two medical experts but, because both believed that McNaughten was deranged, Follett intended to call neither.\textsuperscript{12}

After hearing Cockburn's eight experts repeat that the prisoner was insane, Chief Justice Tindal stopped the trial and, while he did not expressly direct the jury to return a not guilty verdict, he made clear that was what he expected. He did tell the jury in traditional language that if McNaughten was unaware that he was violating the laws of man or of God
when he shot Drummond he was not guilty. But more important than his words was Tindal's timing. Having stopped the proceedings abruptly after the flood of expert testimony, he certainly created an impression that favored insanity. He did not have to direct the verdict in so many words. His actions were direction enough. After the jurors deliberated briefly, they returned the verdict of not guilty by reason of insanity. Tindal then ordered McNaghten to be committed to Bethlem Hospital as a man too dangerous to be at large.¹³

A torrent of public outrage followed. London newspapers roundly condemned the verdict. Queen Victoria herself wrote to Prime Minister Peel and expressed her disappointment. Many people believed that McNaghten had acted from political motives and that he was trying to assassinate the Prime Minister. Others were alarmed generally by the rise in violence in England in the 1840s, a period of radical reform protest and agitation, and believed that an example should be made of McNaghten. Moreover, three years earlier Edward Oxford had attempted to assassinate the queen. He had also been acquitted as insane. Now another act of dramatic violence had occurred and McNaghten too escaped punishment.¹⁴

In response to the public's outrage and to political pressure the House of Lords requested that Tindal and his fourteen colleagues of the Queen's Bench announce formally the common law criteria for determining legal insanity. In June 1843 the judges answered almost unanimously (with one
dissent) several questions which the Lords had put to them. Their response, in essence, repudiated the McNaghten verdict. They said that knowledge of right and wrong was the basic common law test of insanity.  

Tindal and his colleagues granted that delusion could also be a defense, but with one condition. A person suffering under a delusion must behave rightly and lawfully given the facts supplied by his delusion. If, for example, McNaghten had a delusion that Drummond had drawn a knife and was threatening to stab him, then McNaghten would have been justified in shooting him because self-defense was legal. But under the judges' pronouncements, known ever since as the McNaghten Rules, McNaghten's actual delusion would have provided no excuse. He simply believed that Peel and the Tories were persecuting him and because murder was an unlawful and immoral response to persecution it could not have been excused by his delusion. McNaghten would have been convicted had Tindal charged the jury with the rules that came to bear his name.

McNaghten's case and the judges' rules lessened the vagueness of the common law. This was no obscure precedent to be buried under countless others. McNaghten killed an important person in a case with political overtones. His trial and the events which followed galvanized popular attention on the insanity question in England and, to a lesser extent, in America. McNaghten's acquittal began a process in which
the public and the government openly debated legal and moral principles of responsibility. The remarkable result was that the judges of the Queen's Bench, Tindal at the fore, completely obliterated the McNaghten precedent and supplied in its place the McNaghten Rules.

McNaghten's case therefore was no ordinary prosecution. It was an historical event. Its impact was more immediate and popular than most criminal trials. English courts, and their American counterparts, benefitted from the judges' advisory opinion in a certain sense. They got a clear landmark decision of great authority which was issued after a prolonged public debate. From their birth the McNaghten Rules had a certain respectability in legal circles as a reasonable resolution to a difficult problem. They were a highly visible point of reference and promised to be reasonably permanent.

Ray had reason to be both pleased and distraught over events in England. Cockburn had frankly acknowledged him as the leading scientific authority on insanity jurisprudence and structured his whole defense on criticism of the law found in Ray's Treatise. This strategy, when coupled with the vitally important testimony of eight physicians, had been successful. McNaghten escaped the gallows. Had events stopped there Ray's remarks to the Maine legislature the same year might have proved true. Right and wrong tests would have been moving toward extinction.

But events did not stop at the trial's end. And all the
promise of progress in the verdict was lost in the public's outrage. The result was the resurrection in England of an orthodox common law test that Ray had criticized for nearly a decade. What briefly seemed to be a victory for Ray's ideals quickly became an emphatic rejection. Instead of moving forward to endorse medical enlightenment, the law retreated to the comfortable familiarity of traditional doctrine.

Ray's ideas, having played a prominent part in McNaghten's trial, likewise affected the first American case which received the McNaghten Rules. Along with senior medical colleagues Luther V. Bell of the McLean Asylum in Somerville, Massachusetts and Samuel B. Woodward of the State Lunatic Asylum in Worcester, Ray travelled to Boston in January 1844 to attend the trial of Abner Rogers. Roger's defense counsel had solicited their opinions as leading authorities.\

In 1843 Rogers, an inmate of the Massachusetts State Prison, had killed his warden in a fit of anger. The defense attorneys claimed that Rogers was insane and committed the act in a paroxysm of disease. They insisted that his knowledge of right and wrong was irrelevant because his disease impelled him to act against his better judgment. The prosecution, on the other hand, pointed to the opinion of the English Lords Justices during the summer before and insisted that even if Rogers was insane (which they doubted), he was
still responsible. Even if he had a delusion that the warden wished him ill, there was no evidence that his delusion suggested that self-defense was necessary. The prosecution clearly relied on the English judges' McNaghten ruling as the best statement of the law.\textsuperscript{19}

Bell, Woodward, and Ray all appeared as witnesses and each insisted that Rogers was insane and should not be held responsible. Bell was the defense's leading witness with Woodward and Ray there to endorse his assessment. Ray's testimony was more explicit than his colleagues' however. He testified that Rogers's case bore all the markings of documented examples in which "the insane man's reason is overborne by an irresistible impulse." Regardless of his knowledge about right and wrong, Rogers was powerless to control his actions.\textsuperscript{20}

Chief Justice Lemuel Shaw charged the jury without citing a single precedent. His wording indicated however that he was largely following the McNaghten Rules. He affirmed the right and wrong test in particular. His principal deviation was his charge that the prisoner should be found not guilty if he was unable to control his behavior. In essence, if Rogers was without will or \textit{mens rea}, he could not be held accountable. Shaw thus added Ray's "irresistible impulse" argument to the rest of the McNaghten Rules. The result was a welcome one for Ray. The jury found Rogers not guilty by reason of insanity and Shaw committed him to
Woodward's care at the asylum at Worcester. 21

A year later Ray looked back on Rogers's trial with mixed emotions. While still pleased with the result, he expressed doubts about Shaw's continued use of legal tests of insanity. Shaw, after all, had simply modified the recently announced McNaghten Rules to include the concept of "irresistible impulse." Ray was unsure whether "these conditions of irresponsibility would furnish protection for all who might require it—rigidly construed they certainly would not." 22

Ray described a class of hospital patients who knew perfectly well the difference between right and wrong and still chose to do wrong. They did so, according to Ray, not because of an uncontrollable urge but because they enjoyed it. Ray insisted that these people were nonetheless insane. Their moral affections were diseased and, as a result, their entire thought processes were distorted. Legal tests, even Shaw's relatively broad one, would not include these unfortunates. "When will the world recognize the truth, as well recognized as any in nature, that insanity not only impairs the intellectual or reasoning power, but perverts the moral faculties, vitiating the tastes and sentiments, and furnishing strange motives and impulses,—in a word," Ray said, "transforming the man into a fiend!?" Even with Shaw's ruling moral insanity escaped the attention of jurists. 23
These views marked a subtle change in Ray's thinking. Nearly a decade earlier when he wrote his Treatise he had closely linked moral insanity and irresistible impulse. Now, with the addition of a few year's clinical experience, he easily detected moral maniacs who acted from no uncontrol-lable impulses. Ray's appreciation of insanity had matured. As a result, the clear-cut delineations presented by legal tests seemed even less appropriate.

A year after Ray testified in Boston at Rogers's trial his career took another important turn. He decided to leave the asylum at Augusta. His health was poor and he had chafed under the control exercised by the legislature. In 1845 the Board of Trustees of the private Butler Hospital for the Insane in Providence, Rhode Island took Luther Bell's advice and asked Ray to become its superintendent. Butler was then still in the planning stages and Ray would oversee its construction. The creative opportunity appealed to him and he accepted, telling the trustees he likely would stay for only a few years because of his delicate health. Following the move he would be closer to other superinten-dents whose hospitals also were located near the northeast's major cities.

Only the year before Ray had joined with a dozen other asylum managers to establish the Association of Medical Superintendents of American Institutions for the Insane
(today the American Psychiatric Association). The group continued to meet annually to exchange views and to promote the interests of their specialty. At the same time that Ray moved from relatively isolated Augusta to the more accessible Providence he was simultaneously strengthening ties with his fellow experts in insanity.

The move also increased Ray's opportunities to serve as an expert witness. While a superintendent in Maine, trips like the one to Boston for Rogers's trial could happen only rarely and cases in Augusta requiring Ray's opinion were probably infrequent. But once in Providence he was nearer to the courts. Boston in particular was only a short train trip away. Ray's decision to relocate in 1845 thus widened his opportunities by placing him closer to legal affairs as well as to his neighboring superintendents.

Butler began admitting patients only in late 1847. While it was being completed Ray had travelled to Europe and supervised the construction of the hospital. These duties required much of his time, but the lack of a daily asylum routine allowed Ray to pursue his study of medical jurisprudence. What Ray saw when he analyzed recent trends in American criminal law troubled him. In particular, American courts were relying increasingly on the right and wrong test. Shaw's "irresistible impulse" abridgement had received acceptance practically nowhere. In short, American law seemed to have locked onto the McNaghten Rules as the true statement of the
common law.27

In an article for the Monthly Law Reporter in 1847 Ray presented his most comprehensive statement on criminal insanity since his Treatise in 1838. In its basic features his critique had changed only slightly. As he had done a decade earlier, he damned the law's backwardness. Since Rogers's case the incidence of insanity pleas had increased, he said. Yet, "In judicial decisions and popular discussions, we have witnessed a remarkable disregard of established scientific facts, and a disposition to be governed by names and prescriptive usages, rather than by the spirit of enlightened jurisprudence."28

Ray remained a philosophical Baconian. He eschewed speculation and conjecture. Observation alone, he insisted, could explain when insanity was or was not present. Metaphysical tests like the right and wrong criterion were vestiges of an older age. Since jurists had originated the legal tests scientists like Pinel and Esquirol had established through countless observations that many of the insane could easily distinguish right from wrong. Special hospitals for the insane had also been built and afforded unprecedented opportunities for observation. But it seemed to Ray that legal authorities utterly ignored these historic changes. "Are we still obliged to float on a sea of conjecture and speculation," he asked? "Is it possible that in the middle of the nineteenth century we can have no better guide than
the wisdom of the seventeenth century?"29

Ray's reference to the seventeenth century was an allu-
sion to Hale, the first jurist to announce that partial in-
sanity was no excuse from responsibility. All subsequent
tests, Ray believed, resulted from Hale's statement that
only certain kinds of insanity were an excuse at law. Hale's
legacy was that future jurists were bound to debate where to
draw the line between insanity that did excuse and insanity
that did not excuse its victim. Due to Hale's authority
later jurists failed even to consider the premise that
insanity in any form should remove legal responsibility.
And that was the proposition Ray wished to establish.

Despite his belief that Hale was the source of modern
troubles, Ray did not blame him. He sought instead to appro-
priate Hale's authority to his own ends. Hale, he said, had
kept abreast of the best medical knowledge of his day. He
was "not to be blamed for being no wiser than his own gener-
ation." Far from being damned, Hale should be applauded
despite his opinion because his method was correct. Unlike
his successors, Hale avoided metaphysical tests. Ray be-
lieved that Hale had labored hard to see that the law kept
abreast of medicine, pitiful as it was in his day. Had later
common law jurists emulated his method rather than merely
reciting his words, Ray argued that "we should have been
spared a host of decisions descreditable to jurisprudence,
to medical science, and humanity." Had jurists only amended
the common law to include current medical knowledge no controversy would exist.\textsuperscript{30}

Ray's strategy was ingenious though flawed. He sought to damage his opponents' effectiveness by enlisting their chief authority in his own cause. But clever as the manoeuvre was in its debating style, it indicated an insensitivity to the legal mind. Common lawyers celebrated the common law precisely because it was unchanging, and hence discoverable. Ray, on the other hand, operated from a wholly different mentality, a scientific one which equated change with progress. Each side employed a different definition of truth and each accorded a different value to the desirability of change.

Perhaps the worst test still employed by legal minds was the right and wrong criterion of the McNaghten Rules. Ray said that physicians, unlike backward-looking lawyers, estimated that a large proportion of asylum patients could distinguish right from wrong "with all their original acuteness." Ray estimated the proportion at about ninety percent. If he was correct, then the vast majority of those diagnosed as insane would have to be held accountable for criminal acts under the right and wrong test alone.\textsuperscript{31}

Ray found this to be a preposterous state of affairs. Knowledge of right and wrong was frankly irrelevant. Insane people usually considered "themselves as absolved from the obligations of the law." Ray admitted that even experts who
studied insanity closely were often unsure what motivated victims of the disease. "They move in a sphere beyond the reach of the ordinary motives of human conduct," Ray said, adding that the insane were often "a law unto themselves." It was folly to think that rigid tests of criminal responsibility would be a deterrence to crime. The insane would be deterred only if they were motivated as rational people. But victims of insanity defied ordinary logic. "The only logic used by the insane is, that the end justifies the means." 

Ray detected a tendency among legal authorities to treat human beings solely as rational creatures. To lawyers the ability to reason defined the person. Ray was particularly troubled by the McNaghten delusion rule in this regard. It required victims of a delusion to behave rationally given the circumstances of their unreality. Only if the delusion supplied justifiable grounds for a crime could its victims be excused. Ray called this a "most deplorable ignorance of the mental operations of the insane." Insane men simply refused to listen to reason. Ray described the delusion rule sarcastically: "In short," he said, "having become fairly enveloped in the clouds of mental disorder, the law expects you will move as discreetly and circumspectly as if the undimmed light of reason were shining up your path." Aside from jurists, Ray blamed the philosopher John Locke who had assumed that the insane were reasonable in their delusions. Like the jurists, Locke was not a physician who daily observed the
insane in asylum wards. He too was a metaphysician.\textsuperscript{34}

The irony of Tindal's announcement of the McNaghten delusion rule did not escape Ray. Ray observed that, while it was true that McNaghten had a delusion, he nonetheless acted illegally given its fact situation. In no way had Drummond threatened him. McNaghten admittedly was in no immediate danger when he shot the Prime Minister's secretary. Yet at no point in the trial did Tindal question Cockburn's insanity defense which emphasized McNaghten's delusion. Instead he tacitly acknowledged McNaghten's insanity by stopping the trial when he did. Nowhere did Tindal announce the peculiar delusion rule he later read before the House of Lords.\textsuperscript{35}

It was precisely this sort of judicial behavior that puzzled Ray most. "If any further proof were wanting," he said, "of the vague, contradictory, and erroneous notions relative to the psychological effects of insanity which have led to the various judicial tests of responsibility, we have a conclusive one here." The McNaghten delusion rule became for Ray a sort of monument to judicial muddle-headedness.

Of the McNaghten Rules generally he concluded:

This, then is the point at which we have arrived—that the law is now as far from being seemed as ever. Is there not, therefore, reason to believe that the notions respecting insanity that prevail in the courts, are wrong; that men have attempted to establish distinctions that have no foundation in nature: and have deduced general rules from a very partial view of the facts?\textsuperscript{36}

Ray's solution was to eschew all "abstract rules" and
determine a person's responsibility "by the circumstances of the particular act in question." He suggested that the criminal law should adopt the strategy used in civil cases. Whenever a will or contract was contested, for example, the courts looked to the document itself for evidence of insanity. Ray said that usually the slightest flaw would resolve the matter in favor of insanity. How different this was from the criminal law where only the surest evidence of insanity would suffice to excuse the defendant. And his act per se was seldom admitted as evidence of disease. Even with clear indications of insanity Ray said that courts often refused to acquit a defendant because he still retained a knowledge of right and wrong. 37

What Ray suggested was a "complete inversion" of competency tests in civil and criminal cases. In contracts and wills he believed that the courts too readily acknowledged suspected insanity. Ray said that many insane people were perfectly capable of drafting these documents because most were only partly insane. It was wrong to take this privilege from them except in cases where provisions of the contract or will were clearly a product of insanity. But in criminal cases, because life itself was often at stake, Ray would give defendants "the benefit of every reasonable doubt." 38

Ray's ideal criminal law rule would employ no test at all. It would be simply, "that insanity without stint or qualification should annul responsibility for criminal acts
"..." Judges should tell jurors that the question before them was not the defendant's knowledge of good and evil, "but whether he was insane when he committed the act." This was a rule which avoided all metaphysical distinctions. It also incorporated moral insanity as well as intellectual derangement. And chief among Ray's objects was to devise a rule by which moral insanity would be an acceptable defense. 39

This ideal rule already existed in limited operation. It was the principle of the French penal code which Ray had praised in his earliest writings on insanity jurisprudence during the 1830s. The Louisiana code, based largely on French civil law, also had the same rule. New York also had enacted the rule legislatively in 1841, though judges there usually ignored it and continued to charge juries that the common law was still in operation. 40

Ray was willing to amend his rule by allowing a condition on the insanity defense. Insanity should always remove responsibility, he said, "unless the criminal act can be proved to have no connection with the insanity . . . ." In this way Ray would shift the burden of proof from the defense, where it currently lay, to the prosecution. Once the prisoner's counsel had demonstrated by expert testimony that his client was insane, it was left to the prosecutor to prove the act was unrelated to the disease. 41

To make Ray's system work he granted that there would be need for improved expert testimony. At present the deci-
sion about which doctors should appear was "left entirely to counsel." Ray admitted that "medical men can generally be found—we regret to say—ready to testify for or against the insanity of the accused, who have had but little practical knowledge of the disease, and have made but a superficial examination of the case at hand." Chosen as they were by a particular "side" in the contest, experts could hardly avoid some measure of bias.42

"Indeed," Ray said, "with every disposition to arrive at truth, it is generally impossible under the present arrangements." Experts often had never even met the accused. Those who had visited the defendant got only a brief jailhouse interview which afforded only a pitiful opportunity for observation. To remedy this Ray suggested that prisoners pleading insanity should be removed to mental hospitals for prolonged observation by experts in the disease. Only then could expert opinions be truly scientific and free from bias.43

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At the annual meeting of the medical superintendents in May 1849 Ray was appointed to chair a committee on the medical jurisprudence of insanity.44 Although he received no instructions on how to proceed, Ray used the position to prepare a proposed model law for regulating the law of insanity. Despite the surface appearance of a committee project, Ray's proposals, presented to the Association in 1850,
were largely his own work. The plan, entitled "Project of a Law Regulating the Legal Relations of the Insane," covered all aspects of the law, civil and criminal. Most sections, in fact, dealt with commitment procedures which are discussed in later chapters. But Ray did address the subject of criminal responsibility.45

His "Project" embodied the rule of the French penal code. "Insane persons," it stated, "shall not be made responsible for criminal acts in a criminal suit, unless such acts shall be proved not to have been the result, directly or indirectly, of insanity." Defendants would receive the greatest possible benefit of all doubts. In order to win a conviction, prosecutors would have the burden of proving a defendant's insanity was unrelated to the crime.46

According to the "Project," there would be a need for the insanity plea only occasionally. It proposed that no person should be tried during the course of his disease. In order to determine the presence of insanity, Ray proposed that the judge appoint a temporary four-member commission to investigate a defendant's proposed plea of insanity. At least one member of the commission would be a physician. If the commissioners agreed that the defendant was insane, he would be sent to an asylum, "or some other place favorable for a scientific observation of his mental condition." The superintendent of the institution would have to report on the person's condition to the judge before the next session
of the court. If the judge was unhappy with the superintendent's report he could reappoint an insanity commission like the one that had originally judged the prisoner to be insane. 47

Conceivably a judge could commit a prisoner to an asylum where he could remain indefinitely without ever standing trial. Only if the original commission ruled that the prisoner was sane would there be a need to employ a conventional plea of insanity. In that event Ray would allow the court to follow ordinary procedures. If acquitted by reason of insanity, the "Project" required the defendant to be sent to a mental hospital. 48

The "Project" also would grant the judge discretionary power to impanel a commission even if the defendant did not intend to plead insanity. So long as the judge was "satisfied that there are reasonable grounds for suspecting the prisoner to be insane . . ." he could start the process which might end in the prisoner's indefinite confinement in an asylum by appointing an insanity commission. According to Ray's ideal proposal, then, criminal defendants, whether they considered themselves insane or not, could have their competency to stand trial investigated. If found unfit, they could be confined indefinitely. 49

Ray's proposals caught his colleagues in the Association of Medical Superintendents unprepared to consider them and the members candidly refused to take any action. Instead
they tabled Ray's call for reform and avoided further consideration on the "Project" until 1864.\textsuperscript{50} It was not that they disagreed with Ray. Rather most superintendents likely felt that such a general reform was too ambitious a program for a small and relatively new professional organization.

Fourteen years later, however, when the Association was two decades old, Ray again presented his proposals. He included minor changes in the wording of some of the criminal law sections but his provision calling for adoption of the French penal code's rule of responsibility remained unchanged. The temporary insanity commissions which Ray had proposed to investigate a prisoner's insanity would consist of either three or four members under the 1864 plan where in 1850 Ray placed the number simply at four. Ray's new plan would also continue to allow the judge in a case to request an insanity commission whenever he suspected the prisoner was deranged.\textsuperscript{51}

Following four years of consideration the superintendents finally endorsed Ray's "Project" at their 1868 meeting in Boston. They accepted the section on criminal responsibility without changes but dropped completely the one allowing a judge to form an insanity commission where the defendant or his counsel had not requested it. But when the prisoner did intend to plead insanity, the superintendents decided that the commission (now with three to five members) should be made up entirely of physicians with one member to be an expert in insanity. Ray personally opposed requiring all
commissioners to be doctors. He said that he had seen too many wretched examples of general practitioners giving bad opinions in court. He believed instead that laymen of intelligence and attainment could decide the issue as well with a single physician to guide them.52

Yet despite this last difference of opinion the criminal law provisions of the "Project" were largely what Ray wanted. Over the years since 1850 his perception of the problem and its remedies remained the same. He had finally succeeded in getting his profession to sanction the rule that all forms of insanity should excuse criminal acts which resulted from them. The medical superintendents had also approved the concept that no person should stand trial while insane. At last, eighteen years after Ray introduced the idea, the Association endorsed a concept of fitness to stand trial.

In all respects these provisions of the "Project" sought to remove determination of criminal responsibility from ordinary judicial offices. Ray's "Project" was basically an attempt to alleviate the trials of medical experts in the legal setting. Under its provisions medical men would give their opinions outside the courtroom before a commission of nonlawyers rather than before a jury of largely unlearned laymen.53 Problems of bias and cross-examination would be nearly avoided. If found insane the defendant would be under a superintendent's care and again a physician would be the determiner of insanity. Only if the commission failed to
find the prisoner unfit for trial would an ordinary courtroom
drama be played out. Only when all other processes failed
would medical men have to enter the uncomfortable environs
of the courtroom.

During the 1850s Ray devoted a great deal of energy to
studying the problem of expert testimony as well as promoting
his ideal remedy for outdated legal tests. Even when his
colleagues in the Association of Medical Superintendents re-
mained unwilling to endorse his comprehensive "Project"
reforms, they remained deeply interested in practical matters.
At the 1851 annual meeting Ray read a paper entitled "Hints
to the Medical Witness in Questions of Insanity" which was
warmly received. Unlike the "Project" which was an ideal-
istic model for reform, Ray's paper on "hints" to the expert
was an immensely practical plan for coping with current
problems.54

While many of his objections to current expert testimony
—ruthless cross-examination for example—were reminiscent
of his earlier writings, he said that he had based this essay
chiefly on "personal experience."55 It bore the mark of a
man who had experience as an expert witness. The chief
point Ray tried to impress on his listeners was the exist-
ence of a gulf between legal and medical styles of discourse.
What was expected of the medical witness was nothing like
what was expected of the general practitioner. Whereas
doctors usually gave their opinions without fear of petty quibbling, the expert should be prepared to have his every word and shade of meaning analyzed, distorted, and turned on its head.56

Ray warned his colleagues to avoid the problems inherent in the expert's participation in the adversary setting. Under the current system, medical witnesses had to testify in favor of a certain party, either for or against the defendant's sanity. Often the expert received his facts solely from the side that employed him. This frequently led to a distorted depiction of the facts. Lawyers representing the same side as the expert often considered him as too much of a friend. The lawyer's "intercourse is marked by a kind of cordially and fellow-feeling, somewhat adverse to that independence which the expert should never relinquish."57

Ray reminded the superintendents that, unlike medical men, lawyers were not particularly interested in the truth. They were interested in winning cases. Their questions were calculated always to lead the witness to conclusions favorable to their clients. The medical expert should therefore answer counsel's questions carefully. His own reputation, not to mention the defendant's life, might depend on his deportment.58

Of particular concern to Ray was the lawyer's fondness for hypothetical questions which were carefully devised "to bring out the wished for reply."59 Ray roundly condemned
this use of hypotheticals. He believed they were profoundly unscientific. "It is a well-settled principle," he said, "that in matters of science, opinions must not be formed on a partial statement of facts . . . ." Ray wondered at the utility of any opinion based on a presentation of facts that was "professedly fictitious." As a Baconian he avoided hypotheses. Valid opinions resulted only from careful observation of all facts at one's disposal. Truth could not be had from judging the merits of a supposed circumstance.

Another anti-Baconian lawyer's trick was to abstract one or two symptoms of a person's derangement and ask the expert if they alone were "proof of insanity." Ray reminded his colleagues that one man's insanity was not another's. It was not the abstract quality of a person's behavior that indicated disease; it was the particular quality "compared with that which he exhibited when admitted to be sane . . . ." Ray advised his colleagues that they should "firmly decline to form an opinion on one or two selected facts." Instead he advocated the change-of-character criterion for detecting the disease. According to Ray, no general definition existed to encompass all cases.

Ray urged medical witnesses to avoid giving abstract definitions of insanity. True science only required the expert's opinion on a particular rather than a generalized set of facts. To attempt to give a definition suitable to a lawyer would be to engage in a metaphysical contest in which the
physician "will be sure to be worsted, for his opponent is cool and prepared, while he is taken by surprise, and unable to see the point to which he is dexterously taken." Counsel often lured doctors into a debate over definitions and, according to Ray, always succeeded in damaging the witness's credibility.62

Prospective experts should also be aware of another lawyer's trick. That was to ask for an opinion on moral insanity. Because of the preference for tests recognizing only intellectual derangement, courts almost always refused to approve moral insanity defenses. Lawyers seeking to discredit an expert often tried to get him to endorse the concept, "for the purpose of attaching to him an unpopular doctrine, and thereby diminishing the weight of his evidence."63

Ray assumed that all members of the Association agreed on the existence of moral insanity, but advised them not to mention it in court. Nowhere had moral insanity "met with less favor than on the bench, as if it carried with it something peculiarly repulsive to the judicial conscience." Ray said it was "folly to contend with such prejudice" and regretted the concept had even been mentioned in American courts. If possible experts should avoid the term. "It is enough," he believed, "to say that the party is insane. The law does not oblige us to enter into nice distinctions respecting the form of insanity." Ray said that because an opinion on moral insanity was not directly a question on the
facts of the case, judges probably would not compel experts to express their views. 64

Another problem in giving medical opinions was the often contradictory character of the testimony of ordinary witnesses. Experts usually gave their opinions based on observations of the defendant and on the evidence presented during the trial. Ray reminded the superintendents that only the jury could rightly decide the truth of testimony. Experts should simply express their views as though all the evidence was true. If some of the important facts were contested then the expert should "candidly state his embarrassment, show how the testimony clashes, describe the bearing which its several portions may have on his opinion, and leave the farther disposal of the matter to the court." 65

Finally, Ray advised that the expert should remain "cool and quiet and never be provoked into a sharp reply or a cutting retort. Let him be careful how he descends from the high position which he holds in virtue of his functions . . . ." 66 Ray granted that it was often difficult to maintain composure. Testifying was an unpleasant and unnecessarily trying job. But the medical witness should steel himself for the ordeal:

He must make up his mind to have his sentiments travestied and sneered at, his motives impugned, and pitfalls dug in his path. With the same kind of indifference with which he would hear the malcontents of an excited patient. 67

The skills needed for dealing with lawyers were, it seemed,
but little different from those used in treating one's
patients.

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During the remainder of the 1850s the law continued to
change. But the direction of the change was away from rather
than toward Ray's ideals. While on circuit in 1851 Supreme
Court Justice Benjamin Curtis established an important pre-
cedent affecting the way courts would receive testimony in
insanity cases. In United States v. McGlue Curtis stressed
that it was "not the province of an expert to draw infer-
ences of fact from evidence . . . ." That was the jury's
responsibility. To avoid having experts judge the facts,
Curtis said counsel should put a hypothetical case before
the medical witness and get his opinion on that.\(^{68}\)

During the remainder of the decade more and more American
courts began relying on Curtis's opinion. Ray, who was a
frequent medical expert, noticed the change with considerable
dismay. His 1851 paper on "Hints to the Medical Witness"
had condemned hypothetical questions as particularly unsci-
entific. Growing reliance on the McGlue precedent led him
in 1859 to publish a new article condemning it.\(^{69}\)

Ray illustrated the change in the common law by contrast-
ing Curtis's method of eliciting expert opinions with that
employed by Shaw in the 1844 Rogers case. Shaw had allowed
the experts to hear all the testimony presented in evidence
and then give their opinions of Rogers's sanity. Ray said
that under Shaw's method the expert must assume that all the evidence was true, leaving it to the jury to decide the matter. If the jurors subsequently decided that some of the facts were in error they could modify the extent to which they accepted the expert's opinion. Ray insisted that under Shaw's approach jurors remained free to reject an expert's testimony.70

Ray greatly preferred the Rogers precedent to McGlue. Under the McGlue method, "the expert is told he must not utter a word respecting the case, the details of which he has been following day after day, perhaps for weeks together . . . ." He must give the jury his opinion on an imagined set of facts. Once called to the stand, the medical witness was obliged "to talk about anything rather than the case at hand—the only case regarding which the jury care to have his opinion at all."71

Often, Ray said, lawyers would include in their hypothetical cases precisely every fact presented in evidence, nothing less and nothing more. Yet this was supposed to be an improvement over allowing the witness to give an opinion on the facts in evidence. Ray called it the difference "between 'Come out here, Mr. McCarthy,' and 'Mr. McCarthy, come out here.'" It was a "paltry shuffling of words." The exercise was silly and useless.72

Some lawyers presented truly hypothetical cases however. They strayed from the actual evidence and framed a case more
to their liking. In these cases Ray believed that the "method is not only useless, it is positively mischievous." Clever lawyers were able to alter the facts so subtly that jurors might not detect the change. By using these hypotheticals counsel could thus manipulate both the jury and the witness. Conceivably lawyers could force experts to give an opinion on the hypothetical case which completely contradicted their true opinion on the actual case.\(^7\)

Ray said this manner of receiving expert opinions was a violation of "the settled rules of philosophy." Men of science should base their opinions only on facts, never on conjecture. "A hypothetical case must always be open to this objection," Ray believed, "that being the offspring of fancy it may be such a case as never did or never could exist in nature ..." Ray wondered to what extent a scientist's opinion on a fanciful speculation could be trusted.\(^7\)

In conclusion Ray sought to turn the tables on the lawyers. He asked if it was common practice for them to give a professional opinion on a wholly "suppositious case." He believed that lawyers might agree for the sake of debate to give an opinion on an imaginary case. But where their reputations were at stake they would demand a full knowledge of the particulars. Only then would any lawyer worthy of his profession venture an opinion. Why, Ray asked, should doctors have to expect less?\(^7\)

From 1838 when he wrote his *Treatise* into the 1860s Ray
continued to elaborate on the same script. The McNaghten Rules really changed nothing. They simply popularized and sanctified the traditional common law doctrines that knowledge of right and wrong was the correct legal test of insanity. What the new rules did was dissolve the ambiguity of pre-1843 precedents. In the same year as McNaghten's trial, Ray had thought the test was disappearing. But the fifteen judges' opinion, while it said little that was new, assured that what was old would continue.

With or without McNaghten the central problem was the same. Law and medicine, the courts and medical witnesses, viewed the determination of insanity differently. To Ray questions of criminal responsibility were issues for science to decide. Abstract rules and metaphysical tests, he believed, were inappropriate for discovering questions of fact. But law judges had no such qualms about abstract rules. To them the essence of law was its generalized rules of behavior which provided a standard for measuring deviance.

Criminal trials functioned on different levels. First, they were finders and triers of specific facts. Yet, in a larger sense, they were public rituals which transcended the particular case at hand and dramatized what society held to be good and bad. While Ray devised remedies for the particular case only, the jurists he criticized aimed their pronouncements as much at society as at prisoners before the bar.
Notes


2 Ray to Mann, Sept. 14, 1838, Mann Collection, Massachusetts Historical Society, Boston, Massachusetts.

3 See, for example, [Luther S. Cushing], "Ray's Medical Jurisprudence of Insanity," *American Jurist* 19(Dec. 1838): 363-92 for a positive lawyer's reaction. For a medical impression see Luther V. Bell to John Neal, Dec. 19, 1840, Manuscript Collection, Isaac Ray Memorial Library, Butler Hospital, Providence, Rhode Island. Bell, a leading American psychologist, said he regarded the Treatise "as of the highest authority; as . . . honorable to the author and honorable to his country. I know not when I have felt more strongly a pride of country, than in going into a bookstore in London, last May, the first volume on which I placed my hand was a British edition of this work!" Bell said that he thought the Treatise would help in removing the "mystical doctrines about insanity to which lawyers have been educated . . . ."


5 *Annual Report* 1843, Maine Insane Hospital, p. 28.


7 *Ibid.*, p. 31. Ray may have been referring to the recent English trial of Edward Oxford who had fired a shot at Queen Victoria. His defense was insanity and Lord Chief Justice Thomas Denham charged the jury without using the right and wrong test. Denham said if Oxford was without the power to resist his act he was not guilty (see *Regina v. Oxford*, 9 C. & P. 525 [1840]).


9 Quen, "An Historical View of the M'Naghten Trial," p. 43.

Ibid., 651-54; also see chapter 3 above for a discussion of Ray's criticisms of the pre-McNaghten precedents.

Diamond, "Isaac Ray and the Trial of Daniel M'Naghten," p. 655. Evidently Follett was convinced of McNaghten's insanity and recognized that Tindal was disposed to favor acquittal. His prosecution was routine and designed only to fulfill his obligation to the government.

Quen, "An Historical View of the M'Naghten Trial," pp. 480-49. Quen noted that most accounts of the trial alleged Tindal's charge called for a directed verdict. He correctly noted that it did not. Still, Tindal's behavior and Follett's acquiescence suggested that there was little doubt about how the jury would decide the matter.

Ibid., pp. 49-50; Queen Victoria to Peel in A. C. Benson, ed., The Letters of Queen Victoria: A Selection from Her Majesty's Correspondence Between the Years 1837 and 1861 (2 vols., New York: Longman's Green and Co., 1907), I:587.

15 The judge's answers are in 10 C. & F. 200-214 (1843).

Ibid., p. 211.


See [Ray], "Trial of Abner Rogers," Monthly Law Reporter 7(Feb. 1845): 449-60 and a report of the trial in "Medical Jurisprudence of Insanity" in AJI 1(Jan. 1845): 258-74. Both of these accounts are reviews and commentaries on George Tyler Bigelow and George Bemis, Report of the Trial of Abner Rogers, Jr., Indicted for the Murder of Charles Lincoln, Jr. . . . . (Boston: Little and Brown, 1844).

Both sides referred frequently to the McNaghten precedent. See, for example, Bigelow and Bemis, Trial of Abner Rogers, p. 21 where prosecutor Samuel D. Parker said that he would "contend that the law is rightly laid down by Lord Chief Justice Tindall's [sic] statement of the opinions of the English judges to the House of Lords . . . ." Also see other references to the precedent on pp. 59-60, 71-74, 100-102, 190.

Ibid, p. 165.

22 "Trial of Abner Rogers," p. 460.

23 Ibid.

24 See chapter 3 above. David Brion Davis has also noted that the "difference between irresistible impulse and moral insanity ... was [not] sufficiently clarified in the 1830s ... ." His evidence drew heavily on Ray among other advocates of moral insanity, including Pinel, Esquirol, Combe, Prichard, and George (see Homicide in American Fiction, 1798-1860: A Study in Social Values [Ithaca, N. Y.: Cornell University Press, 1957], pp. 74-75).


26 Kirkbride, "Notice of the Late Isaac Ray," p. 158.


28 Ibid., p. 1.

29 Ibid., p. 21

30 Ibid., p. 4.

31 Ibid.

32 Ibid., p. 8.

33 Ibid., p. 9.

34 Ibid., pp. 10-11, quotation on p. 10.

35 Ibid., p. 11.

36 Ibid., p. 12.

38 Ibid., p. 101.


40 Ibid., pp. 103-107, quotation on p. 103. Ray's belief that the New York judges were ignoring the statute and charging juries according to common law doctrines received recent corroboration in the trial of William Freeman in which the state's Supreme Court ruled the statute did not alter the common law. See "William Freeman, in Error v. the People," ibid. 10 (May 1847): 12-13 and The Trial of William Freeman for the Murder of John G. Van Nest . . . (Auburn, N. Y.: Derby, Miller & Co., 1848).


42 Ibid., p. 108.

43 Ibid.

44 "Proceedings of the Fourth Annual Meeting of the Association of Medical Superintendents . . .," AJI 6 (July 1849): 69-70.

45 The "Project" alone appeared in ibid. 7 (July 1850): 92-96 and an article with the same title explaining its provisions in 7 (Jan. 1851): 215-34.

46 See section 12 in ibid., (July 1850): 94.

47 Ibid., pp. 94-95.

48 Ibid.

49 Ibid., p. 95.

50 "Proceedings of the Fifth Annual Meeting," ibid. 7 (July 1850): 80.


52 "Contemporary Literature," Quarterly Journal of Psychological Medicine and Medical Jurisprudence 3 (July 1869): 495-505; Ray's comments on p. 504. The AJI failed to report the "Proceedings" for 1868. As a result the report is found abbreviated in another journal.

The paper appeared as an article in *ibid.* 8 (July 1851): 53-67.

Ibid., p. 54.

Ibid., p. 55.

Ibid., p. 57.

Ibid., p. 58.

Ibid.

Ibid., p. 60.


Ibid., p. 63.

Ibid., p. 64. Also see Ray's "The Hinchman Case," pp. 182-83 where he said almost exactly the same thing about moral insanity.

"Hints to the Medical Witness," pp. 64-65, quotation on p. 65.

Ibid., p. 66.

Ibid., p. 67.

"Law Cases Bearing Upon Insanity," *AJT* 13 (July 1856): 77.

"The Testimony of Medical Experts, and the Reading of Medical Books in Jury Trials," Monthly Law Reporter 22 (July 1859): 129-50. Part of Ray's article discussed a trend away from letting counsel read from medical books. Ray favored allowing the reading from these books in counsel's opening and closing remarks.
70 Ibid., pp. 134-35.
71 Ibid., pp. 136-37.
72 Ibid., p. 137.
73 Ibid.
74 Ibid., p. 138.
75 Ibid.
CHAPTER 5
"Years of Challenge"
The Moral Insanity Debate, 1855-1869"
"We know that the mention of moral insanity in a court of justice is enough
to excite a smile of derision, as if it were only an artful dodge got up for the
purpose of screening a criminal offender, or, in some way, of preventing the due
course of justice."
—Isaac Ray, 1869

In the 1850s when he was speaking out on the law's inadequacy Ray enjoyed a deserved position of prestige both
in his profession and outside it. His criticisms of common law tests of criminal responsibility had always been sharp
but legal writers had not yet fought back in any concerted way. More important, most other asylum superintendents still
supported his position. But beginning in the mid-1850s this period of relatively little challenge ended. First, the
prominent Philadelphia lawyer Francis Wharton wrote an influential legal treatise on insanity which criticized Ray's ideas, especially his defense of moral insanity. Second, a younger generation of American superintendents was beginning to assert itself. While these junior colleagues continued to look up to Ray as an honored leader, they also began to question his concepts of madness. Like their legal counterpart Wharton, they too dissented from Ray's advocacy of moral insanity.

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Wharton's Monograph on Mental Unsoundness appeared in
1855. Wharton championed the McNaghten Rules and likely contributed to their longevity in American courts. Similarly, Wharton's attack on moral insanity aided in checking its acceptance among lawyers and judges. In order to maintain his attack on moral insanity, Wharton had to criticize Ray who was the doctrine's leading American advocate. He disparaged Ray's use of sources, claiming that Ray overlooked most reported cases and drew only on those sources that supported his views.²

Ray was stung by the criticisms and wrote a disapproving review of Wharton's Monograph for the American Journal of Insanity. Actually, it was hardly a review at all but a defense of his own work. He did not defend moral insanity per se because he still enjoyed unchallenged support respecting it among the superintendents who read the Journal of Insanity. Instead, he turned the tables on his critic and suggested that Wharton had been indiscriminate in his use of sources. Wharton cited bad authorities on insanity as well as good ones. Ray's objection was that Wharton failed to explain whose views were the result of observation and whose were the product of speculation. Ray feared that Wharton's readers would wrongly accept the authority of the scientific dilletantes.³

What upset Ray most was Wharton's belief that law had changed to keep abreast of science. Wharton's argument took precisely the opposite position from the one Ray had advocated
for two decades. Ray attacked Wharton's defense of the right and wrong test, saying that from a medical standpoint, it was "as preposterous" as Hale's seventeenth-century rule that to be legally insane a person could exhibit no more intelligence than a child of fourteen.  

Ray granted that the insanity plea had become more successful in recent years, as Wharton had said, but denied that changes in the common law were the cause. Success of the plea, Ray argued, was due to juries who frequently ignored the legal tests outlined in the judge's charge. He said that if insanity was "pretty clearly manifested" jurors usually followed their own impressions rather than "the metaphysical tests pronounced by the judge." According to Ray, the key problem for medicine and law was the difficult case where insanity was "beneath the surface." In such an instance, the jurors' common sense impressions were of little value and the judges' formulas were of inestimable harm.  

Ray insisted that the common law ignored "the light of science." "History teaches plainly enough," Ray said, "that this must first be spread abroad and become the common property of men before it can illuminate the dark corners of the law." Ray charged that the law itself never accepted science. Law had to wait until the public endorsed medical concepts such as moral insanity before the courts gave them legal sanction.  

This was a valuable insight, but one Ray would never
develop. Law, he suggested, was of the people and science above them. Only when science became popular would the law embrace it. But Ray never directed his message of specialized knowledge to a broad audience in order to gain public support. His vision was that of an expert who did not try to bring his science to the people. He tried to elevate the law above them.

Ray's idea of the law lacked the democratic qualities of the Jacksonian era which produced him. Whereas those who were less elitist believed that common men were competent judges of any legal matter, Ray held that ordinary juries were incapable of deciding cases involving insanity. Ray believed that nineteenth-century America was growing too scientifically complicated for non-expert jurors. Defenders of juries, however, argued that non-expert jurors checked legal excesses and assured that the common law would reflect popular values. But what was the expert to do, Ray asked, when popular values were wrong? When common men grossly misunderstood insanity? In that event he was sure that humanity, and therefore justice, were better served by avoiding popular opinion and appealing to experts.

Wharton's book signalled an important change in attitudes about Ray. Late in the 1850s members of his own profession began questioning his advocacy of moral insanity. They argued that moral insanity should never be accepted in defense of
crimes. Whereas most of the founding generation of American superintendents endorsed the concept, by the middle of the century younger men were coming to doubt it. These younger colleagues of Ray often entered the profession as assistant physicians in the asylums established by the founders. Still, their ideas were shaped by a different experience. They received their training more through experience in hospital wards than through careful study of the great writers. The experience of Ray's generation had been nearly the opposite. Ray and his contemporaries learned most of their concepts from reading the authorities: Pinel, Esquirol, Prichard, Conolly, and the Combes, among many others, all of whom endorsed moral insanity. This earlier generation's belief in the doctrine was therefore less a product of clinical experience than a result of their respect for authority. Some of the younger superintendents followed the teachings of Ray's generation and accepted the teachings of the founders. But many did not.

A leader among the challengers was the superintendent of the New York Lunatic Asylum at Utica. John P. Gray assumed his duties there in 1855. Among the responsibilities that came with the Utica job was the editorial control of the American Journal of Insanity which had been published there since 1845 when the publication's founder Amariah Brigham was superintendent. As the principle organ of the Association of Medical Superintendents, the Journal and its editor
exerted tremendous influence throughout the profession. Gray was adamantly opposed to moral insanity as well as to Ray who was its chief American promoter. Beginning in the late 1850s and continuing into the 1860s, Gray launched an unrelenting attack on the doctrine and its champion. 7

The first significant opportunity to assail moral insanity came in 1856 when Charles B. Huntington stood trial in New York City on one of twenty-seven indictments for forgery. Huntington's counsel, James T. Brady and John A. Bryan, pleaded the defendant not guilty by reason of insanity. Brady and Bryan believed that Huntington suffered from monomania, a form of moral insanity in which the victim was perfectly sane with regard to most matters though profoundly deranged on a single subject. Huntington was allegedly insane on the subject of "making paper" (the forging of documents in order to extort money). Huntington's lawyers granted that he suffered no delusion and knew that forgery was illegal and immoral. Yet, they contended that their client could not control his actions. 8

In order to support this contention the defense called two prominent New York City physicians to offer expert testimony. The first was Willard Parker, a professor of surgery at the College of Physicians and Surgeons who supported the moral insanity defense. When asked whom he considered the highest authority on insanity jurisprudence, Parker cited Ray. He added that he had been a schoolmate of Ray's and
considered him a physician of great attainment.\textsuperscript{9} The other medical witness, Chandler R. Gilman, was a professor of medical jurisprudence and obstetrics, also at the College of Physicians and Surgeons. He too testified that Huntington was morally insane though he did not mention any specific authorities.\textsuperscript{10}

In his summation to the jury the prosecutor, William C. Noyes, tried to damage the credibility of Ray's authority on which much of the expert testimony rested. He referred to Ray as "an author who is a sort of visionary upon the subject of insanity." According to Ray's \textit{Treatise}, Noyes said, anyone "who is insensible to moral consequences, no matter what may be his intellectual shrewdness, is regarded . . . as insane and free from moral responsibility,—a doctrine which the law not only condemns, but abhors."\textsuperscript{11} The judge apparently was more convinced by Noyes's argument and the weight of precedent than by the defense's novel strategy. He explicitly charged the jury that the law recognized no such disease as moral insanity. If Huntington knew that his act was illegal and immoral, he was guilty.\textsuperscript{12}

During the course of trial in late December 1856 public outrage at the attempted defense was great. The \textit{New York Times} even accused Brady and Bryan of inventing a disease unknown to medicine. The \textit{Evening Post} feared that if Huntington won an acquittal it would mean that every criminal at the bar would have to be released because each
could claim his own special monomania. Brady complained of the negative publicity during the trial but the court was unsympathetic. As a result of the negative climate of opinion and the condemnation of moral insanity by the prosecutor and the judge, the jury returned a verdict of guilty. ¹³

Editor Gray was delighted over the Huntington episode. In an 1857 review of the trial in the *Journal of Insanity* he remarked that the verdict was a good sign. Moral insanity had been roundly rejected. Gray believed that the doctrine was so vague that it deserved no legal recognition at all. "There is," he said, "no indisputable case [of it], unanimously acknowledged by those of the profession who are particularly experienced in insanity." Gray predicted that experts in the disease would soon cease to consider moral insanity as a viable clinical category. ¹⁴ Later, in 1859, he blamed the unfortunate diagnosis by the witnesses in Huntington's trial on older authorities like Ray who continued to include moral insanity in their classifications of the disease. ¹⁵

Soon after his review of the forgery trial Gray furthered his criticism of moral insanity. In a paper presented to the medical superintendents (and later published in the *Journal Of Insanity*) Gray described fifty-two case histories of patients he had treated at the Utica asylum. Each had been sent there because he or she had committed a murder. Gray analyzed
these examples in detail in order to test the contention of moral insanity advocates that there was a monomania called impulsive homicidal mania. This was a form of insanity was described by Esquirol and widely recognized by early American writers, including Ray.\(^{16}\)

Gray doubted the existence of homicidal mania which allegedly impelled its victims to behave contrary to their knowledge of right and wrong. "That such a form of insanity has been enunciated by Esquirol, or by other acknowledged authorities in the profession," he said, "is not in itself evidence of its real existence." Conclusions of older scientists were not without error. Gray argued that later scientists should test the findings of these older authorities by comparing them to modern clinical experience. Only then could scientific truth be fixed "beyond any reasonable cavil.\(^{17}\)

Gray believed that refuting Esquirol's classification had an importance beyond medicine. This variety of moral insanity had a "tendency to embrace within his [Esquirol's] definition of it, and therefore to shield from punishment, a great mass of crimes of the most atrocious and appalling character . . . ." To Gray this provided all the more reason for scientific scepticism. He said that violence in America was "now so prevalent" that experts in insanity should be especially wary of granting any vague excuse for destructive behavior. He concluded that it was "not for society to claim
for any homicide, or other act of violence or wrong, the protection of such a defense." What concerned Gray most was the need for deterrence and the maintenance of a moral society.

What separated Ray and Gray in the moral insanity debate was their fundamentally different notions of human psychology. As Gray often suggested, they differed over the nature of man. Ray, who was schooled in the materialistic tradition of phrenology, accepted a view of human psychology that was deterministic. To Ray man seemed less a voluntary free agent than a delicate natural mechanism easily deranged by forces beyond his control. Gray, on the other hand, took a more classically religious view. He saw countless temptations all around each person. According to Gray, man's uniqueness was his innate ability to choose good over evil. And only when that ability was disturbed should man be excused from his moral responsibility. Gray believed that men who obeyed an irresistible impulse to do bad things were not sick, but simply immoral.

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During the following year the controversy over moral insanity, including homicidal mania, widened. In 1858 the American Medical Association published a massive volume of its Transactions designed to inform general practitioners on various specialties in medicine. One important article examined the medical jurisprudence of insanity. Its author
was C. B. Coventry, a widely respected New York physician. Coventry included moral insanity in his description of the various forms of the disease and listed many types of monomania, including homicidal mania. Among several European writers, Coventry cited Gall, Spurzheim, and Combe brothers and early American superintendents Brigham, Woodward and Ray as his authorities for moral insanity. Each of these men, all dead by 1858 except Ray, had been phrenologists. Coventry's object in emphasizing moral insanity so strongly was his desire to support his opposition to the McNaughten right and wrong test. He intended that his article should place in the hands of general practitioners a medical argument opposing the popular legal test.

Coventry's report on insanity jurisprudence was supposedly the work of an AMA committee, but not all of Coventry's colleagues accepted his characterization of insanity. One, David Meredith Reese, also of New York, managed to get a dissenting report included in the 1858 Transaction. Reese was both a physician and a lawyer who had written a book in 1838 called The Humbugs of New York which sharply ridiculed what he thought were evidences of quackery, including animal magnetism, homeopathy, and phrenology.

Reese sought to discredit the concept of moral insanity and all its subsidiary monomanias by arguing that they were necessarily based on phrenology. Among others, he cited Ray as a phrenological champion of the disease. This was an
argument designed largely for its dramatic propaganda effect. By the late 1850s, respectable physicians in the AMA agreed with Reese that phrenology was a form of quackery. But Reese's argument was actually dishonest. Many advocates of moral insanity, including Ray, came to accept the doctrine largely because of their philosophical acceptance rather than any practical applications of phrenology. Some defenders of the disease had no connection with phrenology at all. The founder and the leading advocate of moral insanity were the Frenchmen Pinel and Esquirol, neither of whom endorsed the theories of Gall and Spurzheim. While Reese's characterization of moral insanity's dependence might have had some merit in Ray's particular case, it was a grossly distorted depiction of the doctrine's origins.

Reese insisted that the logic of moral insanity was that the more depraved an act, the greater the indications of the disease. What the moral insanity advocates really sought was an abolition of the gallows and a conversion of the nation's prisons into hospitals.²³ He said that in many alleged cases of moral insanity the only evidence of disease was the atrocity of the act itself, and that what was being tried. Reese argued that such cases were not examples of insanity at all, but of depravity.²⁴

He sought to defend the McNaughten Rules which physicians had often maligned. Reese claimed that the medical critics were all too ready to find fault with legal definitions of
insanity but always refrained from giving one of their own. Ray, for example, always counselled against experts giving general definitions of insanity in court. While "it may be the fashion of the times to decry the decisions of the bench and bar," Reese said that physicians would do well to offer alternative definitions "before they so flippantly become the censors of the jurisprudence of insanity, of which they themselves know so little."²⁵

Much as Gray had argued in 1857 Reese also cleverly turned the Baconian argument against moral insanity. He said that if it was really a physical disease of the brain as its advocates claimed, then clinical observation would have proved it. But, he said, no such support existed. In the absence of clear proof he suggested that his readers among ordinary physicians should reject moral insanity until its defenders produced "unequivocal evidence" favoring it.²⁶ The doctrine's promoters were metaphysicians who preached the concept based solely on speculation. Doctors should leave the "phrenology, psychology, and metaphysics of insanity to the gentlemen of the long robe . . . ."²⁷

When Gray reviewed the articles by Coventry and Reese for the Journal of Insanity he predictably took Reese's side on moral insanity. Coventry's description of the pathology of insanity was phrenological. "That the moral insanity of the phrenologists can in no way be distinguished from wickedness and criminality is certain," Gray said.²⁸ He recalled
Huntington's forgery case and said that both the experts who testified to moral insanity were "of the materialistic and phrenological school of Spurzheim and others." Among these others, he surely meant Ray. The leading expert at the trial had, after all, cited Ray as the best authority on insanity jurisprudence.

In the same number of the *Journal of Insanity* in which he reviewed the AMA reports Gray included a longer essay attacking moral insanity. He dramatized the defects of moral insanity by referring to another case history, one with an authority no one would question. The first recorded case of homicide was Cain's murder of his brother, a case in which Cain was unprovoked and without motive. Were the case "tried now, in our criminal courts, the defense of moral insanity would doubtless be set up . . ." and might even persuade a jury to acquit the murderer. But fortunately, Gray believed, God and not man had adjudicated Cain's case. Far from excusing Cain, God held him strictly accountable. Unlike modern medical experts, God had refused to shield the "flagrancy of crime;" according to Gray, God was no believer in moral insanity.

Gray correctly noted that, "The question of moral insanity involves chiefly crimes, and is of very modern suggestion." Were it not for the legal considerations there would be no debate. Gray alleged that the concept of moral insanity was nothing more than an attempt to protect the
morally depraved from just punishment. He conceded that there were many men who clearly understood the difference between right and wrong but nonetheless lacked the necessary will to refrain from committing immoral deeds. But Gray said this was a fact from which "moral insanity can derive no aid. . . . It is the usual condition of those, who, in plain speaking times, were called bad men."\(^{32}\)

Gray feared the consequences of a general acceptance of moral insanity because it might lead to a loss of deterrence to crime. Moral insanity was "bad, in a religious view, because it tempts men to indulge their strongest passions, under the false impression that God has so constituted them that their passions or impulses are not generally governable . . . ." Moral insanity rendered men unresponsible and absolved them of moral guilt. It was, in a word, "fatalism."\(^{33}\) Gray would have nothing of the determinism of moral insanity. He clung instead to a voluntaristic conception of man.

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By the end of the 1850s the battle lines were drawn. Gray, on one side, would exploit his influence as editor of the \textit{Journal of Insanity} to discredit moral insanity. Its defenders, led by Ray, would either have to fight back or give up their ground. John Curwen, a leading member of the Association of Medical Superintendents and manager of the Pennsylvania State Lunatic Asylum, wrote to a colleague in July 1860 to complain of Gray's treatment of moral insanity,
especially the way he was attacking Ray. He was "seriously considering whether I shall continue my subscription [to the Journal] as a means of assisting them in their crooked foolery." 34

Like Curwen, Ray too had taken about as much as he could. In 1861 he wrote a long article entitled "An Examination of the Objections to the Doctrine of Moral Insanity" which Gray agreed to publish in the Journal of Insanity. "Of late years," Ray observed with a bit of understatement, "a dissentient voice has occasionally been heard from the bench, bar, the medical profession at large, and even those who claim some special knowledge of insanity and the insane." He could understand why non-experts like members of the legal profession or even general practitioners might question moral insanity but he was surprised that experts in mental phenomena should also have doubts. He wondered who could have read the works of older authorities like Pinel, Esquirol, Georget, Prichard, and so on, and still doubt moral insanity's existence. For Ray, unlike Gray, it was enough that the clinical experience of the old masters had validated the concept. 35

On one point Ray and Gray were agreed. "If this were matter of scientific curiosity merely," Ray said, "it might be very properly left to the ordinary progress of knowledge . . .; but its practical consequences to life, liberty and prosperity, require that it should be settled speedily." 36
Both recognized that the debate was one about the nature of criminal responsibility more than the correctness of a clinical description. And both agreed that the resolution of the controversy was important. Men's lives were in the balance.

Ray accused his opponents of contending against moral insanity "by metaphysical arguments, by objections of fidelity of the observations, by appeals to startling consequences, and, too often for the credit of their cause, by sneers and jibes." They had accused proponents of moral insanity like himself of being "visionary and crochety, and the prejudices of all those worthy people who cling to the past solely because it is old, are invoked against us for wishing to pull down all the time-honored barriers against crime and immorality."37

Ray granted that opponents like Reese were correct when they charged medical authorities with being unable to define insanity. But Ray defended this inability as scientifically justified. Moral insanity was not defined by any objective criteria, but by "changes of mind and character, which can be explained on no other hypothesis than that of disease." Victims of moral insanity should be measured against their ordinary past behavior, not against an abstract and "imaginary standard."38

Ray also tried to meet the criticism that moral insanity was nothing but moral depravity. He granted that drawing
the distinction was often difficult but said that science was "full of difficulties, and the pleasure and dignity of its pursuit consist mainly in triumphing over these difficulties." Ray thought it was an act of professional cowardice simply to note the difficulty and then resolve it prematurely on the side of depravity. He said "every principle of justice, every emotion of humanity, impels us to treat these cases with a sort of philosophic impartiality, and give them a careful and dispassionate examination." Ray was convinced that a dedicated expert could always tell insanity from depravity.39

Only difficult cases ever went to trial. Ray said that grand juries seldom indicted manifestly deranged criminals. Judges usually committed them as too dangerous to be at large. Only hard cases were therefore at issue. "True," Ray said, "a mistake may be made, and a criminal may escape unjustly the punishment of his crimes."40 But Ray asked if this was sufficient reason to do away with the insanity plea altogether. "If the difficulty of distinguishing between moral depravity and moral insanity is a sufficient reason for ignoring the latter altogether," he said, "the argument would be equally strong against admitting any kind of insanity in defence of crime."41

Ray also defended medical experts who testified that the criminal act itself was proof of moral insanity. He gave the example of a loving mother, "previously distinguished
by every virtue,[ who] takes the life of her darling child . . ." with no apparent motive. If the woman knew her act was wrong, the opponents of moral insanity would have her hanged. Ray, on the other hand, believed that her incredible behavior, standing as it did in contrast to her previous demeanor, was itself evidence of insanity. Ray also criticized his opponents who claimed that "the very thing in dispute . . . can not be fairly used in evidence for or against." He found this reasoning to be nothing more than a "paltry sophism;" it was the guilt or innocence of a human being, not a particular act, that was on trial.

The opponents' attempt to link moral insanity with phrenology also provoked Ray. He charged the doubters with outright distortion of fact. Esquirol, in particular, he rightly noted, began his career as an opponent of moral insanity and of homicidal mania in particular. Unlike his inferior successors, according to Ray, Esquirol had the "moral courage" to "acknowledged his mistake" when his clinical experience produced numerous examples. And far from being a phrenologist, Esquirol "always denied that it had any foundation in fact . . . ." As for himself, Ray refrained from discussing the impact of phrenology on his work and restricted his defense to the older authorities.

In his 1858 article attacking moral insanity Gray had recommended that medical witnesses stop uttering the phrase and simply testify to the existence of disease. This was
precisely the advice Ray had given experts in 1849 and 1851. But now, a decade later, he caustically ridiculed the recommendation. "The giver of this sage advice," he said, speaks, no doubt, in all the freshness of ingenuous innocence; but he was evidently never on the witness-stand. Had he ever experienced one of those inquisitorial performances to which any third-rate, country court lawyer is allowed to subject a medical witness, whose testimony has damaged the cause of his client, he would have discovered that it was not quite op- tional with him what he might declare and what he might withhold.  

Ray's about-face, exceptional as it was, was less revealing than his tone. He harshly implied that only a fool would offer the advice to avoid mentioning moral insanity when he had suggested exactly that in an article which he claimed was based on "personal experience."  

It was remarkably uncandid and as close as Ray ever came to dishonesty. Ray was aware that his tone was somewhat out of charac- ter and apologized if he had "occasionally manifested a little more freedom of expression than the needs of a strictly sci- entific discussion require . . . ." Nevertheless he defended himself. Ray said that the opponents of moral insanity had started the fight and he was only responding in kind. "Facts may be met with facts," he said, "arguments may be met by arguments, but sneers, jibes, sophisms, and conceit, must be encountered with a very different class of weapons."  

Gray allowed Ray's article to appear in the Journal of Insanity, but not without comment. In a thorough critique of Ray's remarks he continued the debate and matched Ray's
sharp tone, epithet for epithet. He accused Ray of being unscientific. Ray had failed to defend moral insanity by "affirmative arguments" and attacked only those "objections of his own shaping and selection." Gray said that Ray would have done better to present detailed case histories rather than repeat his reliance on the same authorities whose conclusions were in question. Gray found no proof in Ray's references to the older masters and resented Ray's implications that they were beyond reproach.50

"This leads us," Gray said, "to notice a feature of the method of Dr. Ray and his school, which appears to us objectionable in the last degree." That was the repeated "use of positive terms, and the assumption of scientific exactness" in matters of insanity. Gray contended that current knowledge of insanity warranted no such language because it had none of the exactness of the study of ordinary physical diseases. As a result, the advocates of moral insanity were unwarranted in their neat classifications of the disease, especially their references to all the various monomanias like kleptomania, pyromania, and homicidal mania. According to Gray, these categories created an impression of far greater scientific precision than really existed.51

Gray argued that Ray's references to "irresistible impulse" and "morbid action" of the brain were also misleading. He accused Ray of "arrogat[ing] proof under the shallow disguise of imposing but indefinite terms . . . ." Gray said
he had imagined such a method "was left to medical quacks and theological dogmatists." 52

Gray challenged Ray to draw on his own clinical experience to defend moral insanity. He observed that Ray had first embraced the doctrine a quarter-century earlier when he wrote his Treatise. Ray was then only an "amateur" psychologist. The book included "not one original case" and was "without any claim to originality in its doctrines." Yet, despite his own origins, Ray had berated other amateurs for entering the moral insanity debate. 53

In particular Ray argued that, because they were metaphysical, lawyers and philosophers were unfit to judge moral insanity's worth. According to Ray, the discussion was rightly confined to medical experts. Gray disagreed. He thought that "moralists and lawyers are, perhaps, as good judges of the workings of the vicious, as we of the diseased mind." As a result, these nonmedical figures also should have their say in the controversy over moral insanity's legal viability. 54

Finally, Gray continued to insist that moral insanity depended on phrenology. He granted that authorities like Esquirol had never been practicing phrenologists but suggested that they nonetheless adhered to the phrenological "school of philosophy" which conceived of the mind as divided into separate units. 55 As evidence Gray pointed to the belief of Esquirol and his generation in monomanias which had decided
phrenological overtones. Kleptomania, for example, could be considered a derangement of the organ of Acquisitiveness. "Can any one fail to see," Gray asked, "that a theory of monomania or of moral insanity based on these doctrines is worthless?" Gray was pushing the crude argument earlier advanced by Reese; moral insanity necessarily rested on phrenology.

Three years later Gray reviewed Ray's new book for laymen entitled Mental Hygiene. In his survey Gray repeated his charge that Ray was philosophically a phrenologist and said that traces of phrenology had tainted the book with "a great and fundamental error in its theory." Ray's presentation of mental disease lacked a sufficient grounding in religion and was far too materialistic for Gray's religious tastes. He feared that Ray's naturalistic psychology deprived man of his free will. Gray was thankful, however, that Ray was "so good as to humor our notion that there is a spiritual element" in man's make-up. But Gray still thought that Ray was teaching "a philosophy of fatalism."

By the early 1860s the controversy had been raging for five years and showed no signs of abating. At the 1863 annual meeting of the medical superintendents Andrew McFarland of Illinois read a paper calling for the Association to renounce the concept of moral insanity. The superintendents' discussion of McFarland's paper was reveal-
ing. It showed practically no substantive difference about what they observed in alleged cases of moral insanity. Their differences were over the meanings to assign those differences and moral insanity's viability as a legal defense. 60

McFarland and other opponents of moral insanity including Gray argued that in all cases of the disease, especially those reported by Esquirol, there was actually subtle intellectual derangement. They also agreed with the advocates of moral insanity that most victims of general insanity manifested moral disturbances first and then, in later stages, developed intellectual impairment. The opponents insisted that the intellect had always been affected. In short, they argued that, given time, cases of supposed moral insanity would reveal intellectual derangement. If no disturbance of the intellect appeared, the case was obviously one of depravity. 61

Ray listened quietly to his colleagues and finally said that he could not "discern any well defined and well understood issue between the believers in moral insanity and the unbelievers." He granted that in time moral insanity would often develop into intellectual derangement as well. He even conceded that the intellect may be disturbed from the outset, "but that does not alter the case." Ray could observe no intellectual impairment in the early stages. "I do see moral impairment, moral disease, moral aberration—I see nothing else, and that is all I know of it." By what
right, he asked, could a scientist assume the existence of a dysfunction he could not observe?\textsuperscript{62}

Ray's concern was that of a hurried medical witness. Often courts failed to allow the time needed for moral insanity to develop into later stages of general mania. What, he asked, was he to do in such cases of moral insanity? Was he to testify against his professional judgment that the prisoner was sane simply because, as a witness, he could not detect an intellectual disturbance? This seemed ridiculous to Ray. "You see no intellectual impairment," he insisted, "and for all practical purposes, that is enough."\textsuperscript{63}

Gray again challenged the defenders to produce cases to prove that the disease existed. As usual Ray responded by citing his litany of authorities: "Esquirol, Pinel, Marc, Georget, and Pritchard." Ray still was amazed that anyone with Gray's extensive experience with the insane could doubt that moral insanity existed. "I can only say," he concluded, "that my observation confirms the observation of the writers whom I have mentioned."\textsuperscript{64}

Joseph Workman, superintendent of the Provincial Lunatic Asylum in Toronto, Canada, agreed with Gray that Ray depended too heavily on old authorities. Workman said that he could either detect intellectual insanity in the older writers' descriptions or that their observations had simply failed to detect present intellectual impairment. As for his own experience, Workman claimed that he had never seen a case
of moral insanity. Gray added that he had never observed a case in the four or five thousand patients he had treated. W. S. Chipley of the Eastern Lunatic Asylum in Lexington, Kentucky agreed. In "fifteen to eighteen hundred cases of insanity" he found none to fit the definition of moral insanity. Like Workman he believed that authorities like Esquirol had unintentionally overlooked or suppressed evidence of intellectual disease.

Mcfarland, whose paper had started the debate, tried to steer the superintendents back to the question at hand: should the Association disavow moral insanity. Mcfarland thought that once the doctrine lost any suggestion of professional sanction it would cease to be a source of controversy. He outlined what he saw as the crux of the problem. In criminal cases lawyers regularly put insanity experts "through a certain sort of catechism." They would read "some garbled extracts" from Ray's Treatise which supported moral insanity and then ask for an opinion in hopes of getting the expert to endorse a legally disreputable doctrine. To Mcfarland this was an unnecessary horror show. He believed that if experts could simply answer that their profession had formally disavowed the concept they could escape this lawyer's ploy. Mcfarland said optimistically that he was "satisfied that whatever is the opinion of this body, will become the accepted position of the courts, and the accepted opinion of the higher minds of the country."
Ray was unmoved by the argument and asked McFarland if he believed that there were cases of insanity in which, during the early stages at least, no intellectual disturbance was visible. Reluctantly, McFarland agreed but said that he had no doubt intellectual derangement existed beyond his observation. According to McFarland, it was still too minute to be detected. With this response Ray had gotten McFarland to admit the same position he held. Yet McFarland insisted that the term moral insanity should still be renounced because of its unpopularity in the courts. Ray suggested that McFarland could disown the term if he wished, but he would simply have to find another; the objective reality of insanity without intellectual derangement remained. According to Ray, the debate amounted to nothing more than "a question of words." 70

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At their 1863 meeting the superintendents disbanded having settled nothing. Some, like McFarland and Gray, would continue to oppose moral insanity. Others, like Ray, would persist in their defense of the doctrine. Three years later at the annual meeting in 1866 the controversy came before the Association again. Chipley of Kentucky, who had sided with McFarland in 1863, read a paper reviewing a recent judge's decision in his state's Court of Appeals. 71 In Smith v. Commonwealth Judge George Robertson reversed a lower court's ruling that the right and wrong test was the correct legal
method of determining criminal insanity. Robertson stated that moral insanity was nearly as widely endorsed by experts on insanity as intellectual mania. He argued that the true test was first, whether the accused knew right from wrong, and second, "whether or not he had sufficient power of control to govern his actions."72

Chipley correctly observed that Robertson was simply wrong. Most authorities on insanity did not regard moral insanity as a viable defense in criminal cases. Chipley said that he knew of only "a few isolated instances" where courts had accepted the doctrine.73 In those few cases in which judges had allowed the defense of moral insanity, Chipley was convinced that Ray was responsible. He said that moral insanity's "recognition in a few of the higher courts of this country is due, mainly, to the ability of one of our most eminent confreres, whose work on the 'Medical Jurisprudence of Insanity,' stands today unrivalled in our language."74

In challenging Ray's authority Chipley recognized that he was opening himself to criticism. He said that sometimes people "strongly intimated that to question their authority is little less than sacrilege."75 But Chipley said that he would hazard such criticism because "progress of science of one age consists mainly in exposing the fallacies of the past . . . ." He hoped that those who disagreed with him would allow him to question the older writers "without laying
ourselves liable to the just charge of impertinence or presumption." 76

Chipley repeated the charge that Ray and other defenders of moral insanity always referred to "a series of old cases which, for the most part, are given with meagre detail." Many of these cases came from believers in phrenology, that "enthusiastic school of philosophers who undertook to map out on the skulls of living men separate and independent powers of the mind—that school of materialists and fatalists whose doctrine, if true, makes of man a machine, and not an accountable being." Advocates of moral insanity thus rested "their case on the opinions and cases of men who flourished an age since . . . ." The defenders relied on the authority of men no longer taken seriously. 77

Like earlier critics of moral insanity Chipley observed that crime was necessarily a symptom of the disease. Nearly all of the examples of the malady presented by the defenders included criminal acts. 78 "It is surprising," Chipley said, "how frequently insanity is inferred from the mere apparent absence of motive, and from the atrocity of the deed, and the readiness with which many accord immunity to the fancied victims of uncontrollable impulse." 79 Like Gray, Chipley feared that moral insanity was a deterministic doctrine which denied man's free will. Ray and the defenders had portrayed the morally insane as unconscious victims of forces of disease beyond their control. As a medical student, for example,
Ray compared the human body to a finely constructed musical instrument which could be deranged by the subtle forces of the climate. Chipley, Gray, and other opponents of moral insanity argued quite differently that the morally insane were the special creation of God with an inborn sense of right and wrong. The morally insane were people who freely chose to behave immorally.

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In the 1860s as Ray was being pressed to defend his position on moral insanity he increasingly came to argue that mental derangement was often the result of heredity. Earlier in his career he had emphasized environmental hazards to the human organism which could cause insanity: intemperance, poor diet, climate, lack of exercise, the excitement caused by business or political activity, and habitual indulgence in bad habits. But beginning in the mid-1860s his focus shifted from these external concerns to hereditary considerations. Ray argued that victims of insanity frequently inherited a disposition to the disease, though not the actual insanity itself. He observed that the ancestor who had transmitted the susceptibility need not be a parent but could be a grandparent as well. Ray believed that bad habits and indulgences of ancestors which had caused insanity could be transmitted to offspring where they would lie dormant until some exciting cause triggered their manifestation.

Ray thus began to nurture a view of human psychology
that held man to be even less in control of his destiny than before. Now Ray saw the potential of man carrying around with him predispositions to mental disease which were completely unknown to the victim. According to Ray, in many cases the only evidence of this hereditary disease was a seemingly irrational criminal act. "No part of the animal economy," he said, "suffers more severely from hereditary disease than that which consists of the appetites, affections, and emotions." It was thus a propensity to moral insanity that people most often inherited from their parents and grandparents.82

This increased emphasis on hereditary disease was important to the moral insanity controversy. Ray had first asserted it while he was under attack by his critics for being unscientific. By advancing the heredity argument he added another layer of complexity to the already difficult task of determining criminal responsibility. If Ray was right, experts would now have to examine the lives of a prisoner's ancestors at least two generations back in their search for disease. No longer would an examination of a host of current external influences constitute an exhaustive search. The new emphasis on heredity also rendered attention to the prisoner's conscious motives even less important than Ray considered them before.

As Gray and the other opponents attacked Ray for being un-Baconian and too materialistic, he responded by becoming even more speculative and deterministic. He personally had
made no detailed study of heredity, although he was a keen observer as a superintendent and always tried to investigate his patients' backgrounds. He grounded his new assertions on the writings of others, especially Frenchmen B. A. Morel and I. Moreau. The result of his change in emphasis respecting the causes of insanity was that he significantly sharpened his conception of man as a machine. Much as he had argued forty years earlier in the M. D. dissertation, Ray conceived of the human organism as vulnerable. It was buffeted about in a perilous world. Now, with the threats of heredity, man not only had to cope with the conditions of his own world, he had to face the dangers of his parents' world as well. If Ray was right, man was indeed less a responsible agent than his critics assumed.
Notes


2 A Monograph of Mental Unsoundness (Philadelphia, 1855); for another discussion of Wharton's book see Arthur E. Fink, Causes of Crime: Biological Theories in the United States 1800-1915 (Philadelphia: University of Pennsylvania Press, 1938), p. 23. Fink said "... Wharton's book may be regarded as being as able a work for the legal profession as Ray's, seventeen years earlier, was for the medical."


4 Ibid., p. 288.

5 Ibid., p. 289.

6 Ibid., p. 290.


8 Trial of Charles B. Huntington for Forgery, Principal Defense: Insanity (New York: John S. Voorhies, 1857). Gray claimed the defense was employed against the wishes of the Huntington family (see "Case of Huntington," AJI 14[July 1857]: 110).

9 Trial of Charles B. Huntington, pp. 241-63; references to Ray on pp. 244-45.

10 Ibid., pp. 263-71.

11 Ibid., quotations, in order, on pp. 418, 419.

12 Ibid., p. 450.

13 Ibid., pp. 116-21 describes Brady's protest of local press coverage; Times, Dec. 20, 1856; and Evening Post, Dec. 31, 1856.
"Case of Huntington," p. 111. This article was unsigned, but since it represented the Journal's policy I have attributed it to the editor, Gray.

Review of Transactions of the American Medical Association 11(1858) in ibid. 15(April 1899): 423. Like the "Case of Huntington" this Review was unsigned but represented Gray's editorial policy.


Ibid., p. 144.

Ibid.


Ibid., passim.; reference to McNaghten Rules is on p. 516.


Ibid., pp. 724-25. On p. 724 Reese attributed the concept of "irresistibility" of impulses to Spurzheim, the phrenologist.

Ibid., p. 729.

Ibid., p. 744.

Ibid., pp. 734-37, quotation on p. 734.

Ibid., p. 744.

Ibid., p. 745.


Ibid., pp. 414-15.

31 Ibid., p. 313.
32 Ibid., p. 320, emphasis in original.
33 Ibid., p. 321.
36 Ibid.
37 Ibid., p. 114.
38 Ibid., p. 119.
39 Ibid., quotations on p. 120; also see p. 132.
40 Ibid., p. 121.
41 Ibid., p. 120.
42 Ibid., p. 127.
43 Ibid., p. 128.
48 "Hints to the Medical Witness in Questions of Insanity," p. 54. Eight years later Ray returned to the position he attacked Gray for endorsing. He said that believers in moral insanity should "avoid the use of its name on all forensic occasions, lest it might jeopardize the interest which they meant to promote." See his review of Discussion of Moral Insanity in the [French] Medico-Psychological Society, p. 140. Also see Ray's comments on p. 152 where he advised the
"proper course" for the expert was simply to testify to insanity generally.


51 Ibid.

52 Ibid.

53 Ibid., p. 186.

54 Ibid., p. 185.

55 Ibid., p. 187.

56 Ibid., p. 186.

57 Ibid., p. 188.


59 Ibid., p. 344. Gray's review was not the only one which dissented from Ray's materialistic framework. The reviewer of a leading medical journal also believed Ray's book was phrenological (see American Journal of Medical Sciences n. s. 47 [Jan. 1864]: 151-63). The reviewer of a more popular magazine did not mention Ray's phrenological connection but was clearly troubled by his materialism (see Atlantic Monthly [13 March 1864]: 388-92.

60 "Proceedings of the Seventeenth Annual Meeting," AJI 20 (July 1863): 63-106. For an interesting comparison see Ray's review of Discussion of Moral Insanity in the [French] Medico-Psychological Society, pp. 139-54. The French psychologists similarly observed the phenomena and drew different conclusions. Judging from Ray's review, their discussion was much like that of the American superintendents in 1863.

61 "Proceedings of the Seventeenth Annual Meeting," see, for example, the remarks of Chipley on p. 84 and of Workman on p. 87.

62 Ibid., p. 79.

63 Ibid., p. 80, emphasis in original.

64 Ibid., p. 81.
Ibid., p. 87.
66 Ibid., p. 71
67 Ibid., p. 84.
68 Ibid., p. 89.
69 Ibid., p. 93.
70 Ibid., pp. 98-88.
71 "Intemperance and Insanity," AJT 23 (July 1866): 1-45.
72 Ibid., Robertson's remarks quoted on p. 6; for the original citation see Smith v. Commonwealth 62 Ky. 224 (1864), quotation on p. 231.
73 "Intemperance and Insanity," p. 18.
74 Ibid., p. 6. An often cited case where moral insanity was allowed was State v. Kleim in New York in 1845. At Kleim's trial Judge J. W. Edmonds charged the jury that moral derangement was a defense. Kleim however showed ample signs of intellectual insanity. Years later in 1861 Judge Edmonds said that he was attracted to moral insanity from his reading of Ray's Treatise. See Edmond's remarks in "Remarks Upon Dr. Parigot's Paper, 'On Moral Insanity in Relation to Criminal acts,'" AJT 18 (April 1862): 416. Also see Kleim's case in "Homicidal Insanity," ibid. 2 (Jan. 1846): 245-66.
75 "Intemperance and Insanity," pp. 26-27.
76 Ibid., p. 27.
77 Ibid., p. 28.
78 Ibid., pp. 28-29.
79 Ibid., pp. 42-43, emphasis in original.

CHAPTER 6

"The Doe-Ray Collaboration
and the Birth of the New Hampshire
Doctrine of Criminal Insanity"

"There is a natural repugnance among us
[lawyers] to the idea of making the law
variable—depending upon the advancing
& progressing of opinions of men of sci-
ence. Such an idea is at war with the
fundamental theory of the law."

—Judge Charles Doe, 1868

Ray's influence might have been injured by the moral
insanity debate, but it was not crippled. In 1866 he began
a fruitful correspondence with New Hampshire Supreme Court
Justice Charles Doe. Doe had purchased Ray's Treatise in
1854 when he began his law practice and was deeply impressed
by Ray's eloquent indictment of the law for having refused
to advance in step with science. The result was that, in
1869, the New Hampshire Supreme Court, under Doe's leader-
ship, announced the only major repudiation of the McNaughten
Rules in any American jurisdiction for nearly a century.

In 1865 Doe had dissented in the testamentary case Board-
man v. Woodman. He objected to the Court's treatment of
insanity as a question of law defined by judges rather than
as a question of fact left entirely to jurors. The majority
of the Court had announced that in will cases insanity was
defined by the presence of a delusion in the testator. Doe
believed that judges should refrain from telling jurors, in either civil or criminal cases, which kinds of insanity provided an excuse and which did not. In criminal cases, judges ordinarily charged juries that only a disturbance of a person's knowledge of right and wrong or the presence of a delusion were grounds for excuse. Doe saw legal definitions of insanity as an infringement on the province of the jury. He would prefer to instruct jurors that if the act was a result of mental disease, then it should be excused.

In February 1866 before Doe had written his dissent in the Boardman case he wrote to Ray's friend, John E. Tyler, superintendent of the McLean Asylum near Boston. Doe explained that he had decided to insert a dissenting opinion in the forthcoming volume of New Hampshire Reports. He wanted his opinion to avoid the very problem he was attacking, the law's backwardness in scientific matters. Doe told Tyler that he also wished an introduction to Ray because the Treatise had made a profound impression on him and he wanted to "send him a copy of this case & ask his views." Doe added that he would also like to acknowledge the "debt due to him [Ray] from my profession for his treatise which is doing much to liberalize the minds of law students on this subject.

Ray's book may have done much to liberalize Doe's mind but it accomplished less among other lawyers. And despite his comment about the Treatise's impact on law students, Doe
really understood that nowhere were courts following Ray's lead. In fact, this was the reason Doe sought Tyler and Ray's collaboration on his Boardman dissent. "I now offer to your profession," he told Tyler, "an opportunity to put your views (brief or lengthy as you choose) into a law book . . ." which would be read throughout New England and many other states. 6

As Doe requested, Tyler introduced the New Hampshire judge to Ray. Evidently, Ray responded by sending Doe his views on the Boardman case and offering suggestions for his dissent. In August 1866 Doe replied to Tyler to thank him for the introduction. Letters he had received from the two superintendents were "just what I wanted." He told Tyler that he would "try to put the substance" of Ray's and his views (which he considered identical) into his published dissent "as an expression of what I understand to be the received medical opinion of this age . . . ." 7

Nearly two years were to pass before Doe completed his dissenting opinion and the case was chronicled in the New Hampshire Reports. A great deal happened in those years. During that period, Doe polished his legal argument attacking the traditional tests of insanity. His letters before 1868 referred generally to the discontinuity between law and medicine. In 1868 and after he advanced the more sophisticated argument that all legal tests violated the jury's prerogatives.

The years 1866 to 1868 were also important for Ray. In
late 1866 he decided to resign his superintendency at Butler Hospital. He moved to Philadelphia the following year where the climate was slightly milder than in New England. Ray told Buler's Board of Trustees that his health had worsened in recent years and he could no longer maintain a daily routine at the asylum. The move south improved his health, however, and by 1868 Ray was again leading an active life. He wrote voluminously and appeared frequently as an expert witness in cases where insanity was an issue. After settling in Philadelphia, he began a long and regular correspondence with Doe which lasted into the 1870s.8

Doe wrote Ray in April 1868 to report that he had finally finished his Boardman dissent. In its completed form the opinion showed traces of Ray's influence. Doe said, for example, that the traditional tests of insanity revealed "nothing but the former state of medical science ...."9 Doe agreed with Ray that the law should be flexible enough to embody the medical science of every age. In each particular case the parties involved should be free to seek the best current medical knowledge physicians could offer. The jury could then receive expert opinions and either accept or reject them as it would. According to Doe, judges should not intercede to define what was, in essence, a medical question. The Boardman dissent thus sought to free the common law from all particular medical doctrines. Under this plan medical jurisprudence could progress as quickly as scientists made dis-
coveries and juries accepted them. The common law stood ready to accept medical improvements. The key was that juries rather than judges would decide which medical theories to accept and which to reject.

Ray liked the sound of the dissenting opinion and Doe's remarks on the common law. He asked if Doe's position was not the same as his traditional stance that insanity "without stint or qualification, should exempt from the ordinary legal consequences . . .". Doe answered that, yes, he thought that he had stated "merely your views . . . in a form my profession will best understand . . .". As a strategic matter Doe believed that his focus on the distinction between questions of fact and questions of law would be more successful than Ray's call for statutory reform.

Doe told Ray that the problem with all legal tests of insanity had begun with Hale. Doe believed that in Hale's time judges ordinarily charged juries on questions of both law and fact. When, for example, Hale told jurors that the test of insanity was knowledge no greater than that of a child under fourteen years, he was really charging them on a question of fact based on the best medical knowledge of his day. Lawyers, Doe believed, had subsequently misread Hale. They failed to recognize that judges in England in the seventeenth century, unlike those later, charged juries as to questions of fact. These later jurists wrongly assumed that Hale's charge included only questions of law.
Doe explained to Ray what he had never fully comprehended. "The theory of the common law," Doe told Ray, "is that it is unchangeable." He added that it was true that judges often made mistakes; generations of jurists had, after all, misread Hale's use of tests of insanity. But the common law itself was "the perfection of reason." It did "not consist of such mistakes, any more than astronomy consists of the idea that the earth is flat & that the Sun passes over it." Doe believed that his Boardman dissent pointed the way back to the true common law. Since the seventeenth century English and American jurists had been arguing, in essence, that the sun orbited the earth. Doe's object was simply to return the sun to its honored and unchanging place at the center of things.\footnote{13}

Now that he had isolated the error of modern legal tests of insanity, Doe told Ray that it was the duty of future jurists "to correct it by declaring that to be a question of fact which they have treated as a question of law." Doe was certain that once his argument was placed before his legal colleagues they would accept it because "it is an impregnable position among lawyers when understood by them . . . ." He stressed the depth of his conviction that his doctrine freed the law from medical science and thereby freed it from having to change as medicine improved. "There is a natural repugnance among us [lawyers] to the idea of making the law variable . . . .," he said. "Such an idea is at war with the
fundamental theory of the law.\textsuperscript{14}

Doe's \textit{Boardman} dissent appeared nearly four years after the Court decided the case. The volume of the New Hampshire \textit{Reports} that contained \textit{Boardman v. Woodman} was finally published in the spring of 1869. Doe immediately sent Ray a copy as a token of his appreciation for Ray's advice and encouragement. "I was led to examinations which produced that opinion," he told Ray, "solely by a copy of the 3rd edition of your 'Medical Jurisprudence of Insanity.'" He hoped that Ray would not be offended by the complete absence of any reference to him or to the \textit{Treatise} in the opinion. Doe would have liked to acknowledge his intellectual debt to Ray's medical theories but feared that doing so would have "retarded the reform itself by repelling that very numerous class of lawyers & judges who can be easily stamped by the cry of 'medical theory', or 'scientific innovations' & 'doctors' notions.'\textsuperscript{15}

Doe had however unknowingly made one crucial mistake regarding medical theories in his dissent. No doubt following Ray's advice, he reported that moral insanity was a fact "established by the unanimous medical authorities of our day . . . ."\textsuperscript{16} The statement was categorically wrong and showed that Doe was ignorant of the bitter division over moral insanity among contemporary medical authorities. Doe had relied too heavily on Ray's ability to represent his profession. Moreover, the reference to moral insanity was
unnecessary. Doe's principal object was to argue that common law doctrines should stand apart from particular medical theories. Still, the damage was done. Those readers of the opinion who were more aware of moral insanity's unillustrious legal standing might well have drawn the inference that Doe was seeking to alter the common law in order to allow moral insanity defenses. Perhaps Ray had not served Doe as well as the judge thought.

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The basic problem with Doe's Boardman opinion was that it was a dissent and no precedent. Late in 1868 that problem was corrected. In that year Josiah L. Pike killed a man while he was robbing him and stood trial for the crime in Portsmouth, New Hampshire. In all such capital cases two of the state's Supreme Court justices had to preside as nisi prius judges. At Pike's trial Doe assisted Chief Justice Ira Perley. Pike's counsel pleaded his client not guilty by reason of insanity, claiming that Pike suffered from dipso­mania, a form of moral insanity characterized by an irresistible impulse to drink alcoholic beverages. In his charge to the jury Perley followed the formula announced in Doe's Boardman dissent. He instructed the jury that, "whether there was such a mental disease as dispomania, and whether the killing . . . was the product of such disease, were questions of fact for the jury." Doe's doctrine had gotten
the full support of a precedent. 17

Doe wrote to Ray late in December 1868 to inform his friend of the good news. The seventy-year-old Perley, he said was "admitted to be by far the ablest lawyer in the state" and having his name linked to the new doctrine would be helpful in securing its acceptance. Doe had discussed the matter with the Chief Justice privately and convinced him that all the legal tests of insanity should properly be treated as questions of fact for the jury. He told Ray that he doubted if Perley who was about to retire "fully realized that his charge was in conflict with the recent decision in Boardman v. Woodman." Evidently, Doe had succeeded in persuading the older Perley to announce the new rule without explaining to him that he had already presented it in his Boardman dissent.

Regardless of Doe's behind-the-scenes machinations, Perley's charge did not help the dipsomaniac Pike. The jury accepted its responsibility as the trier of facts and convicted him as charged. His lawyer then appealed the decision though he did not make an exception to Perley's charge which rejected traditional tests. The defense objected only to Perley's wording that assigned to the jury the question of dipsomania's existence. Pike's counsel wanted the judge to instruct the jury that dipsomania was in fact a disease. Before the whole Court had reviewed Pike on appeal Doe told
Ray that, despite the jury's conviction of Pike, he was quite pleased with how matters had progressed. "The more I reflect on it, the more satisfied I am that that [Perley's charge] is the law, however unsatisfactory the application of it may be rendered by the jury's prejudice against many truths now established by science."¹⁹

Doe told Ray that he was fearful about how his fellow justices would decide Pike's appeal. "I feel quite sure," he said, "that some of the judges, & probably a majority" would rule that "knowledge of right and wrong" was the correct legal test of insanity in criminal cases. But, he added, Perley's charge would still be on record as "the most effective inroad yet made upon the uniform precedent of England & America."²⁰

In June 1869 when all six justices of the Supreme Court reviewed *State v. Pike* Doe's apprehensions proved to be unfounded. The judges unanimously upheld Perley's instructions and thereby secured the clear precedent for Doe's doctrine that the determination of insanity was a question of fact for the jury. According to Doe, most of the judges were completely unaware that the *Pike* ruling had validated the argument advanced in his earliér dissent. "I think that C. J. Perley & three of the other judges," he told Ray, "do not fully see their decision in State v. Pike, sustains my dissenting opinion in Boardman v. Woodman." Only Justice Jeremiah Smith, Jr. comprehended the doctrine's entire history and he
supported Doe completely.\textsuperscript{21}

One major problem with the Court's failure to grasp the connection with Boardman was that the judges perceived the new doctrine as applying only in criminal cases. Doe wanted his rule to apply equally in civil matters. To him it mattered not at all whether insanity bore on a man's killing of a neighbor or his drafting of a will. Either way, it was a question of determining as a fact how or to what extent disease had caused the act. Doe told Ray that the discrepancy between civil and criminal cases would likely continue but that he was satisfied with the limited progress that the Court had made. He intended to write an opinion for the state \textit{Reports} explaining the new doctrine.\textsuperscript{22}

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It was not until late 1870 that Doe finished the \textit{Pike} opinion. In the meantime Ray decided that he too should act to spread the news. In January 1869, even before the whole Court approved Perley's charge in \textit{Pike}, Ray told Doe that he intended to write an article for the \textit{American Law Review} publicizing Doe's challenge to traditional legal tests.\textsuperscript{23} Doe thought an article would be helpful but cautioned Ray how to write it. Ray must remember that the audience he had to persuade was a legal, not a medical one. Lawyers, Doe insisted, were "to be convinced only by the argument that our rule is the ancient, original theory of the common law—older than Hale or Coke." "State a legal proposition as new," he
advised Ray, "& you waste your time arguing in support of it." Law was different than medicine. Doe recognized how hard it was "for a man of science, acknowledging, & struggling for, progress, to understand that the only common law progress which a lawyer will admit, is the progress of reviving and restoring the primeval ideas & spirit & meaning of that law . . . ."\textsuperscript{24}

Doe was emphatic that Ray heed his warnings. " . . . I do verily believe that to claim that your & my rule is a new one, is to prevent its ever being adopted by the courts." Doe recommended that Ray's article should focus exclusively on the issues in Boardman v. Woodman. Again, he counselled Ray not to state that the New Hampshire judges had invented the rule; he and the others had only discovered it. "I dare say," Doe concluded, "this seems to you disingenuous & Jesuitical, but it does not seem so to me."\textsuperscript{25}

By April 1869 Ray had completed the portion of his article about Boardman and Pike and sent a copy to Doe for suggestions.\textsuperscript{26} Doe spent about a month studying the essay and returned it in May with extensive suggestions. After reading the article, Doe decided that it would be better if Ray focused on Chief Justice Perley's charge in Pike rather than on his own dissent in Boardman. He reminded Ray that Perley was unaware of the similarity between the instructions to the Pike jury and his Boardman opinion. Doe feared that
Perley might change his mind when he realized that the charge was unoriginal. Doe cryptically explained that there was a "secret history of Perley's charge," the details of which were "too voluminous to go into . . . ." Moreover, Perley was a "very eccentric man" and might take offense at the suggestion that the innovation was not of his doing.27

All of Doe's suggestions to Ray for revising his American Law Review article were strategic. He was primarily concerned with not offending Perley and thereby keeping the valuable support of his "venerable & weighty name which is greater in reality & in reputation than that of any other man now on the Bench in New England." Doe told Ray that the article offered a "great opportunity to impress your views upon the Bench & Bar of the U. S. & that by far the most effective measure is to represent Perley to be the great judge he is, & make him the magnus pars on your side." Again, several paragraphs later, Doe insistently repeated himself: "It is indispensable that Perley be lauded very highly,—that your argument be given in support of his charge . . . ." He told Ray to restrict reference to his own name to a single mention regarding the Boardman opinion.28

Doe also repeated what he had told Ray when he first learned of the idea of the article. He told him to keep his audience in mind. Arguments that appealed to Ray's fellow physicians were inappropriate for lawyers. Doe
stressed that Ray should avoid the intimation that the Boardman dissent or Perley's Pike charge embodied new ideas. Instead, Ray should stress that these opinions appealed to ancient and indisputable common law. "I know the feelings, & habits of thought, & veneration of precedent which prevail among lawyers & judges," he told Ray, "& be assured that, in arguing to that class of people, it is expedient not to disturb that veneration unless you undertake to show them that that veneration is an argument in your favor. 29

Ray answered Doe by saying that he would strengthen his emphasis on Perley, but only reluctantly. He said that he would "do it under a kind of mental protest for it looks very much like acting the play with the part of Hamlet left out, or, worse still, transferred to another character." Ray said that he would try to follow Doe's advice as closely as possible. 30

Ray's article, "The Law of Insanity," appeared anonymously in the American Law Review in January 1870. Perhaps without Doe's knowledge Ray discussed far more than developments in New Hampshire. He placed the new doctrine in a broader context. Ray began by referring to comments by New York Judge J. W. Edmonds in the 1845 case of People v. Kleim. Edmonds was one of the few judges who had acknowledged that moral insanity was a defense. Kleim, a murderer, knew that he had acted immorally and in violation of the law, yet Edmonds
charged the jury that if Kleim could not control his behavior he was not guilty by reason of insanity. Ray hailed the judge because he had departed from standard tests and tried to add moral insanity to the recognized excuses from responsibility.\footnote{31}

Next Ray praised a recent Philadelphia case, \textit{Commonwealth v. Haskell}, in which the judge charged the jury that the defendant had to have "the power to govern his mind, his body, and his estate" in order to be found guilty. If the jurors found that the prisoner lacked the power to control his behavior, the judge instructed them to find him not guilty by reason of insanity. Again Ray praised this example of progress because the judge's instructions would allow moral insanity as a defense.\footnote{32} Ray also referred to Shaw's 1844 charge to the jury in the \textit{Rogers} case in which the Massachusetts Chief Justice established the "irresistible impulse" test. Ray doubted that Shaw had meant to include all forms of moral insanity but praised him for broadening the standard right and wrong test.\footnote{33}

Only after illuminating the precedents supporting moral insanity did Ray take up the question of the New Hampshire doctrine. He said that Doe's dissent in the \textit{Boardman} will case was the most hopeful development in recent legal history. It offered a rule which could apply equally to civil and criminal cases. Ray quoted from the majority opinion in
Boardman that "mere moral insanity . . . will not, unless accompanied by insane delusion, be sufficient to invalidate a will . . . ." According to Ray's article, it was from this idea that Doe had dissented. Ray quoted an extensive passage from Doe's opinion which included the incorrect reference to moral insanity as a fact "established by the unanimous medical authorities of the day . . . ." Ray's two-page excerpt from Doe's opinion also included the argument that the definition of insanity rightfully belonged to the jury as a question of law.

To a certain extent Ray followed Doe's advice by mentioning the judge's name only twice (Doe suggested but a single mention). But Ray clearly implied, especially by his extended quotation from the Boardman dissent which he called a "luminous exposition," that Doe was the originator of the New Hampshire doctrine. Ray did, however, dutifully catalogue Perley's Pike charge and praise the Chief Justice's reputation. Perhaps out of deference to Doe's wishes Ray told his readers that he believed that Perley's "name will be associated with the final settlement of this important branch of law as long as our legal system shall endure."

Doe never discussed the published article with Ray and his reaction is unknown. Perhaps he wished he could have written the article himself. If he had it likely would have given Perley the credit for originating the doctrine.
Contrary to Doe's preference, the article that Ray did write clearly recognized Doe as the originator of the law-fact distinction which formed the basis of the New Hampshire doctrine. While Perley received ample kudos, Ray brought him into the story only after praising Doe's eloquent dissent. Despite Doe's insistence, Ray had given his friend rather than the Chief Justice the role of Hamlet.

Ray also constructed the American Law Review article to inform the moral insanity controversy. Judging from Doe's correspondence, he was utterly unaware of the bitter medical debate which had been triggered by the legal viability of moral insanity. Many of Ray's colleagues renounced the concept and Doe's fellow lawyer Francis Wharton had also denied its legal applicability since 1855. In effect, Ray had appropriated Doe's common law argument as a weapon to use against critics who were challenging his medical theories. Moreover, he had unnecessarily connected the New Hampshire doctrine with the notion of moral insanity in his essay, "The Law of Insanity," for the prestigious American Law Review.

If Doe was disturbed by Ray's article his letters never revealed it. He referred to the article only occasionally and then in passing. During the nine months after Ray's article appeared the two men exchanged no letters at all,
the first significant hiatus in the correspondence since 1868. In September 1870 when they resumed writing, their letters were cordial as ever, if shorter and less frequent.

On September 19, 1870 Doe wrote Ray a brief note to say that he would begin writing a draft of his opinion in the Pike case which he had first heard back in October 1868. He listed a few recent precedents which he believed had broken with "the old legal tests of insanity." One case, Stevens v. State in Indiana, seemed "nearly" to have followed the New Hampshire doctrine. Doe credited the development to Ray's article of January 1870 which had publicized New Hampshire's new rule. "The world does move," Doe told Ray optimistically and recent developments had shown him the importance of getting a thorough opinion on Pike into the report of the case. "Now that the revolution is starting," he said, "I want to fire one more shot in the N. H. Rep[rorts] to help it along."³⁷

Three months later Doe sent Ray a draft of his Pike opinion and asked for suggestions. Any help Ray could offer would be appreciated, he said, because he was "sorely pressed for time." Doe felt hurried by other judicial business and said that he found "great difficulty in stating what loose ideas I have in plain & simple language ... ."³⁸ Ray wrote back and suggested several changes. On the whole, however, he found the opinion quite good. Like Doe, Ray was optimistic that it would help to hasten the rejection
of traditional legal tests like those embodied in the McNaghten Rules.\textsuperscript{39}

Doe's opinion, which was the only one given by the judges who upheld Perley's charge unanimously, repeated much that he had already said to Ray privately. He argued that Hale's successors had misread his intent. Later jurists had assumed that Hale charged jurors only on questions of law, when he had actually instructed them on questions of fact as well. Doe said the common law notion was as it had always been; that judges should only include questions of law in their instructions to juries. Since he believed that insanity's existence and its bearings on a person's behavior were purely matters of fact, judges were wrong to include definitions of mental disease in their charges.\textsuperscript{40}

Doe developed another argument which Ray applauded. He said that the traditional presumption of sanity was a "substitute for evidence."\textsuperscript{41} This presumption had always served to place burden of proving insanity on the defendant. "In relation to the burden of proof on the question of insanity in criminal cases," Doe said, "the English and nearly all the American authorities have been manifestly wrong." Doe argued that the prosecution rather than the defense right-fully bore the burden of proof. The prosecution had to est-

lish guilt beyond a reasonable doubt and, according to
Doe, guilt depended on sanity. In order to prove a person's guilt, the prosecutor therefore had to prove the defendant's sanity beyond doubt.42

As in his Boardman dissent Doe refrained from citing Ray or any other physician as an authority for his views. He still wished to avoid censure from his legal colleagues by appealing to medical theories. Neither did he mention moral insanity per se. The whole thrust of his argument was that judges should leave science to the scientists and let juries decide whom to believe. Still, moral insanity was at issue in the Pike case. The defense, after all, had pleaded that Pike was excused by reason of dipsomania which was a form of moral insanity. True, the jury had repudiated the contention that the disease absolved Pike of his responsibility. But Doe's doctrine had raised no obstructions to the moral insanity defense. On the contrary, it had explicitly approved the defense.

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At the same time Doe was finishing his Pike opinion he presided at another murder trial. In October 1870 Hiram Jones was tried for murdering his wife. The defense argued that Jones was not legally responsible because he suffered under a delusion that his wife had been unfaithful. In his summation, Jones's counsel specifically asked Doe to charge the jury that delusion, irresistible impulse, and knowledge
of right and wrong were the tests of criminal responsibility. Doe offered no tests in his charge, however, using instead essentially the same instructions Perley had employed at Pike's trial. He left to the jury the decision whether Jones had a delusion and whether it was sufficient to destroy his responsibility. The jurors agreed that Jones was insane but decided that he was not sufficiently deranged to be excused for murder. They found him guilty as charged.\textsuperscript{43}

Jones's counsel appealed the decision claiming that Doe's instructions relating to criminal responsibility were incorrect. This meant that on appeal all the justices of the Supreme Court would have to rule squarely on the legality of the new doctrine. Doe wrote Ray in May 1871 to report that he and his colleagues would meet in June to decide \textit{State v. Jones}. Then, he said, "we shall know whether my charge in that case, is the law of this state in criminal cases."\textsuperscript{44} Fortunately for Doe and Ray, the judges accepted the charge and overruled the defense's exceptions. Justice William S. Ladd, who had been appointed to the Court during the same week as Jones's trial, wrote the opinion for the unanimous Court.\textsuperscript{45}

Ladd largely supported Doe's reasoning in the \textit{Pike} opinion but, unlike Doe added a measure of medical authority as well. In particular Ladd closed his opinion by saying that
it confirms me in my belief that we are right, or least have taken a step in the right direction, to know that the view embodied in this charge meets the approval of men who, from great experience in the treatment of the insane as well as care and long study of the phenomena of mental disease, are infinitely better qualified to judge in the matter than any court or lawyer can be.46

Ladd's reference was to the fifth edition of Ray's Treatise which had just come off the presses. In the new edition, Ray had included an expanded version of his remarks from the 1870 American Law Review article which praised Doe's Boardman dissent and Perley's Pike charge. He also referred favorably to Doe's charge in Jones's case which occurred just before the new edition went to press. Only a month before the Court decided the Jones appeal in June Ray had sent Doe a complementary copy of the book.48 Doe likely lent it to Ladd who then added the deferential remarks about Ray to his opinion.

Ladd also used Ray as an example of the best medical authority on insanity, reporting that Ray had observed countless asylum inmates who were clearly insane yet fit no legal description of the disease: they knew right from wrong, suffered under no delusions, and were motivated by no irresistible impulse. "If we are at liberty to weigh and consider evidence upon the question of insanity," he said, "it is clear that such testimony must outweigh all the convenient formulas and arbitrary dogmas laid down by lawyers and judges from the time of Lord Hale to the present, simply for the
reason that Dr. Ray is qualified by study and observation to give an opinion, while lawyers and judges are not."49
It is doubtful that Ladd comprehended how others might read his opinion. It implied that, because Ray believed in moral insanity, lawyers should stop opposing it. To many like Wharton and New York superintendent John Gray this was wholly unpalatable.

In one sense State v. Jones was important in securing Doe's New Hampshire doctrine. In Jones the very charge which embodied the doctrine was challenged and then affirmed. No sooner had the rule been born than it was tested. By 1871 the precedent was firm. Both Pike and Jones employed substantially the same instructions and both were unanimously endorsed by the whole Court. Until well into the twentieth century Doe's doctrine remained the most important alternative to the predominant McNaghten Rules which were used in virtually every American jurisdiction outside of New Hampshire.

At every turn in the doctrine's history Ray had played a part. First, it was his criticism of the law's backwardness that prompted Doe to devise the ingenious law-fact argument against traditional tests of insanity. It was Ray who nurtured Doe's interest through numerous supportive letters. Second, it was Ray who early championed the rule publicly in an important legal journal. Finally, Ray's
Treatise greatly informed Ladd's Jones ruling and received prominent mention in it as the major supporting medical authority.

Yet, despite Ray's support for the new rule, the New Hampshire doctrine was less than an ideal remedy. Its merit was that it repudiated the McNaghten Rules and dispensed with legal definitions of insanity. The doctrine's greatest shortcoming from Ray's point of view was its great faith in juries. Successful insanity defenses depended entirely on the good sense of the ordinary men who served as jurors. Moreover, the doctrine's brief history had not been encouraging. Juries had rejected medical expert opinions and convicted both Pike and Jones. Given Ray's antipathy toward juries, Judge Doe's new rule was at best a partial solution to the problems of criminal insanity.

Doe's belief of September 1870 that "the revolution is starting" was ill-founded. No other state picked up the New Hampshire doctrine which Doe at first thought was "an impregnable position among lawyers when understood by them . . . ." Years later in 1889 Doe tried to explain why the doctrine had been so ignored. Few critics had even attempted to refute the logic of his or Ladd's opinions. After nearly twenty years of reflection, he isolated two reasons why he believed that other judges had ignored his precedent.
First, many jurists had balked at his argument that the burden of proof rightfully lay with the prosecution. This point had "tended to rouse the hostility of all courts that put the burden on the defendant." Had he to do it over, Doe said, "I should certainly omit the paragraph on the burden of proof."50

A second, perhaps equally strong reason for the precedent's poor reception was that some judges feared that "the heresy of moral insanity lurks in the doctrine." Doe said that moral insanity was unessential to his argument and should not be used against it.51 Doe was right in a narrow technical sense. His doctrine depended on no particular medical theory. What he overlooked was the crucial early history of his rule and Ray's intimate connection with it. At almost every phase of the doctrine's development the rule bore the stamp of moral insanity. Doe's own Boardman dissent mentioned it explicitly. The defense in Pike based its case on dipsomania, a form of moral insanity. Ray championed the new rule in the American Law Review article which unmistakably associated it with the medical theory. Ray later extolled the doctrine's virtues in the fifth edition of his Treatise, the leading book in America defending moral insanity. Finally, Ladd's Jones opinion, while it avoided mentioning moral insanity, was clearly aware of the phenomena and urged Ray's authority to support it.
Had Doe been aware of the liabilities of an alliance with Ray he might have been better able to utilize the assets. Because of his ignorance of the moral insanity debate and Ray's leading role in it, he unconsciously allowed his doctrine to become alloyed with an element of controversy. Others who were more familiar with the moral insanity debate immediately became suspicious of Doe's doctrine when its mention was always in the company of the disputed medical theory. The third edition of Wharton's treatise on insanity was published in 1873 and the New Hampshire doctrine's link to moral insanity received mention. Wharton was especially disturbed that the New Hampshire Court had allowed a defense of dipsomania in *State v. Pike*. "In order . . . to sustain the conclusions of the court," he said, "we are obliged to make 'mental' include 'moral,' and thus expand the instructions to include moral disease, or morbid condition of the morals, as well as morbid condition of the mind."\(^5^2\)

Wharton was adamantly opposed to moral insanity and had a different view of the law than Doe. Wharton believed that the common law should instruct citizens rather than reflect their beliefs. In his discussion of moral insanity, Wharton said that "the idea of responsibility . . . must be implanted in each breast; and this can be done only by exacting responsibility among persons with reason, as a general and absolute rule."\(^5^3\) Moral insanity was pernicious because it gave li-
cense to people's passions regardless of the dictates of their reason.

Wharton also rejected the Pike precedent because it left matters entirely to jurors. He said that "the question of irresponsibility is one that cannot consistently, with public justice, be surrendered by the courts [i.e., judges]. Responsibility is a judicial question. It is of the highest grade." To Wharton the question of defining responsibility was better left to judges than to the ordinary men who sat on juries.

Doe's doctrine failed to change the law outside New Hampshire for a number of reasons, most of which had nothing to do with his own logic or presentation of the law. His burden of proof argument had bothered many jurists who studied the new rule. And there were others like Wharton who had less faith in juries. But a great many mistrusted the link with moral insanity and Ray. Not without reason, they detected a legalistic camouflage for an unacceptable medical theory.
Notes

1 Doe to Ray, July 22, 1868, Manuscript Collection, Isaac Ray Memorial Library, Butler Hospital, Providence, Rhode Island.

2 Doe to Ray, March 23, 1869, *ibid*.


4 47 N. H. 120 (1865)

5 Doe to Tyler, Feb. 10, 1866, Manuscript Collection.

6 *Ibid*.

7 Doe to Tyler, Sept. 5, 1866, *ibid*.


9 Doe to Ray, April 14, 1868, Manuscript Collection.

10 Ray to Doe, May 3, 1868, *ibid*.

11 Doe to Ray, May 18, 1868, *ibid*.

12 Doe to Ray, July 22, 1868; March 23, 1869.

13 Doe to Ray, July 22, 1868:

14 *Ibid*.

15 Doe to Ray, March 23, 1869.

in full at 47 N. H. 140-50.

17 49 N. H. 399 (1869). A nisi prius court is any court where a case is heard before both a judge and jury.

18 Doe to Ray, Dec. 21, 1868, Manuscript Collection.

19 Ibid.

20 Ibid.

21 Doe to Ray, June 24, 1869, ibid.

22 Ibid.

23 Ray to Doe, Jan. 12, 1869, ibid.

24 Doe to Ray, Jan. 18, 1869, ibid.

25 Ibid.

26 Ray to Doe, April 19, 1869, ibid.

27 Doe to Ray, May 17, 1869, ibid.

28 Ibid.

29 Ibid.

30 Ray to Doe, May 24, 1869. ibid.


33 Ibid., p. 242

34 Quoted in ibid., p. 243.


36 Ibid., pp. 245ff, quotation on p. 248.

37 Doe to Ray, Sept. 19, 1870, ibid.
38 Doe to Ray, Nov. 28, 1870, ibid.
39 Ray to Doe, Dec. 2, 1870, ibid.
40 49 N. H. 408-44 (1869).
41 Ibid., p. 408, quotation from the headnotes.
42 Ibid., pp. 435-44, quotation on p. 435.
44 Doe to Ray, May 19, 1871, Manuscript Collection.
46 Ibid., p. 400.
48 Doe thanked Ray for the book in the letter of May 19, 1871.
49 50 N. H. 395, emphasis in original.
50 Doe to Clark Bell, Jan. 10, 1889, in "The Right and Wrong Test in Cases of Homicides by the Insane," Medico-Legal Journal 16(1898): 266.
51 Ibid. In particular Doe was referring to Chief Justice Stone's dissent in the famous Alabama case, Parsons v. State, in 1866 where Stone argued that the New Hampshire doctrine encompassed moral insanity (see 81 Ala. 577).
52 A Treatise on Mental Unsoundness, Embracing a General View of Psychological Law (3d ed., Philadelphia: Key and Brother, 1873), p. 100. This is a later edition of Wharton's 1855 Monograph on Mental Unsoundness cited above.
53 Ibid., p. 170; see also Wharton's negative comments on dipsomania on pp. 619-623.
54 Ibid., p. 199
CHAPTER 7

"Whom to Believe:
Insanity Experts and Legal Procedure,
1870-1877"

The radical defect of the jury trial is
that it is without any competent authority
to decide between conflicting witnesses;
but is trial by commission any better in
this respect?"

—Isaac Ray, 1877

1

-1-

In Judge Doe's New Hampshire doctrine Ray believed he
had found a solution to the problem of legal insanity tests.
He was convinced that, in time, all American courts would
give the determination of insanity to juries as a question
of fact. The more immediate problem facing him in his re-
tirement during the 1870s was the difficulty of serving as
an expert witness in court. Freed from a daily hospital
routine after settling in Philadelphia, Ray frequently test-
ified as a medical witness.2 He had accumulated three decades
of experience by the 1870s and was no doubt a highly prized
witness both for his professional eminence and his familiarity
with courtroom procedure.

Ray had never enjoyed his excursions into the lawyer's
realm but considered expert testimony an important profes-
sional responsibility. And though he seldom mentioned it
before the 1870s, serving as a witness was also remunerative.
As an elder statesman among his fellow superintendents and
the author of a leading treatise on the medical jurisprudence of insanity, Ray could command handsome fees from clients who sought his services. When asked in 1870 what he would charge, he answered that it depended on who was paying. If it was the state he said his fee would be one hundred dollars. "If the service is chargeable to the patient's estate," he said, "perhaps $50 would be a fitting charge." But if his testimony was for the benefit of a hospital, he would provide the service gratuitously.³ Later in the decade in 1879 Ray received fifty dollars from a law firm in Lebanon, Kentucky for providing it with a written opinion in a will case.⁴

Despite the potential for financial reward Ray still wanted to get the expert out of the courtroom. Twenty years earlier in his "Hints to the Medical Witness in Questions of Insanity" he had painted a rather gruesome picture of lawyers badgering physicians in an effort to damage their credibility. Later he criticized the trend toward using hypothetical cases rather than the facts presented in evidence as the grounds of an expert's opinion. Ray's answer to these problems, embodied in his "Project of a Law" approved by the medical superintendents in 1868, was to remove medical men from the courtroom altogether. Ray preferred pre-trial temporary commissions which would investigate a prisoner's sanity. This would obviate the need for cross-examination, hypothetical cases, and the expert's appearance for one side or the
other in the adversary setting.

The problems as Ray defined them in the 1850s and 1860s remained virtually unchanged. But other factors led him increasingly in the 1870s to question the effectiveness of the temporary insanity commissions he had long extolled. First, the recent (and ongoing) controversy over moral insanity had demonstrated sharp divisions among superintendents, those physicians with the greatest expertise in insanity. The early illusion of consensus among the asylum founders had been shattered. Some experts, Ray learned, would never agree, regardless of their similar observations. Disagreement would be as real before commissions as before juries. Not all the fault, it seemed, fell at the feet of lawyers.

Another factor which weakened Ray's faith in pre-trial commissions was the changing character of American physicians generally. Most medical experts whether in court or on commissions, were not asylum superintendents; they were general practitioners. In the post Civil War period several sects of irregular physicians gained respectability. In particular homeopaths who employed very mild treatments and prescribed extremely small doses of drugs achieved success among the middle and upper classes. Eclectic physicians also won greater respectability in postwar America than they had earlier. Eclectic therapeutics stressed botanical remedies but included some mineral drugs as well. Before the Civil War
eclectics used large doses which often caused their patients to become quite ill. After the 1860s they increasingly used smaller, less demonstrative doses and gained wider acceptance.6

These irregular doctors, of whom Ray did not approve, frequently served as experts. Ray feared that they would populate the commissions he had earlier envisaged only for regular physicians like himself. In 1877 he expressed his anxiety over the medical profession's growing heterogeneity, explaining that he could no longer ignore the fact that "homeopaths, half-educated regulars, eclectics, female doctors, etc." would have as much right in most places to sit on insanity commissions as their regular counterparts. Licence laws were not so strict as to eliminate participation of irregulars on an equal footing with regulars.7

-2-

Disagreement among medical witnesses was pronounced enough in October 1870 that Ray wrote a major paper on the subject which he read before a meeting of the American Social Science Association.8 He observed that the most common objection to expert testimony was that it was often contradictory. Numerous medical experts were available to support the contentions of both the prosecution and the defense. Some critics charged that, as a result of inevitable disagreements among experts, their opinions were "unreliable for
judicial purposes." Ray said, "Lawyers especially are fond of declaring, as if the fact were a conclusive proof of this position, that experts equally numerous and skilful may always be obtained on both sides of a case."\(^9\)

To Ray disagreement seemed natural in 1870, perhaps even desirable. There was a great variance in the individual careers of scientific men, no less so in medicine than in geology, chemistry, or any other science. Even judges' opinions, Ray insisted, would differ given the same set of facts. "It does not follow . . .," Ray believed, "That every one . . . qualified must arrive at precisely the same conclusions, for the simple reason that all cannot have had precisely the same experience." Ray contended that a number of differing opinions might prove more enlightening than a single idiosyncratic one.\(^{10}\)

Ray claimed that the sharpest criticism of medical witnesses came from that part of society which he expected to be the most understanding. Prejudice against experts who disagreed was more prevalent among the thinking and cultivated classes than among others of a different description. Their idea is that the statements of the experts should be as unquestioned as Gospel truth; that when once uttered, nothing can be added to it or taken from it. To them discrepancy implies incompetence, or something worse, and draws out expressions of contempt and disgust . . . . They expect of an expert nothing less than omniscience and infallibility . . . .\(^{11}\)
Thirty or forty years earlier Ray might have been among those who saw unprofessionalism in disagreement. Now in 1870 after a decade of sharp interprofessional conflict among the superintendents Ray was convinced that one could be challenged and still retain his claim to expertise.

It was simply in the nature of things that various observers should disagree. All witnesses at a trial, expert or not, were equally liable to discrepant testimony. Many critics of medical witnesses contended that experts only confused jurors. Ray granted that jurors often became confused, but said that they were just as likely to be perplexed by the discrepancies in the statements of ordinary witnesses. Even worse were the addresses of counsel which, according to Ray, often had no other purpose than confusing the jury. Ray said that objections to medical experts as sowers of confusion came with "an ill grace from lawyers."\(^\text{13}\)

In any event, jury bewilderment was to be expected. According to Ray, jurors were simply unqualified to judge the merits of scientific testimony. Under the current system, learned and ignorant physicians received equal treatment in court. Both could offer their opinions as "experts." Often an unenlightened witness could win the support of the jury by his pleasing manner on the stand while a more worthy colleague seemed ill at ease and lacking in confidence. Ray called jurors' lack of discrimination "one of the crying
evils of our time." And without improvements in the quality of juries he feared that the evil was "beyond the reach of correction." 14

Aside from the undiscerning quality of jurors and the tendency of experts to disagree, many critics claimed that medical opinions were bought and paid for, and thereby biased. Ray said that he had noticed recently that lawyers had begun asking how much an expert was paid for his testimony in hopes of creating an impression of impartiality. Ray reacted sharply to this, saying, "It is only a scandal, not a matter of fact, that experts are employed like counsel, for hire, without regard to the merits of a case . . . . Because a man's opinions are worth money," he added, "it does not follow that they are corruptly bought." Giving expert testimony was a service, one which frequently took a great deal of time. As such the expert deserved "a fair compensation." 15

Ray explained how a reputable expert (admitting the infrequent scoundrel) offered his services. A lawyer for a particular party would contact him and supply the expert with all the facts at his disposal. After examining the record and perhaps the prisoner, the prospective expert witness would explain his opinion. If it was suitable to the party wishing his services, he would be retained. Often, Ray said, an expert would have to admit that his evidence would be harmful and would not get the job. Ray was unclear
if the expert ordinarily received compensation for this unfavorable and therefore unused opinion. But when the expert's assessment aided the party's case, payment was ethical. "The opinion sought for happens to be favorable, honestly and conscientiously so; it is uttered on the witness-stand, and compensation follows."\textsuperscript{16}

According to Ray, the most commonly advocated solution to the anxieties caused by disagreement among experts and potential bias was the formation of a permanent board of experts appointed in each state by the governor. Ray himself had advocated essentially this remedy in the 1830s. The object was to restrict which physicians could give opinions in court to only a few of merited reputation. Though Ray still agreed in 1870 that the plan had a pleasant ring to it, he doubted if it would succeed in practice. Those doctors best suited to sit on a permanent commission of experts would be too busy and likely would refuse to serve. Legislatures would also probably set compensation too low to attract more experienced experts. Perhaps Ray's greatest objection to a board of experts appointed by the executive was the governor's inability to judge professional questions. How could the governor know which doctors would be the best experts? Ray was sure he knew the answer; governors would choose experts on the basis of their political affiliations. He pointed to the scandalous record of President Ulysses
Grant's appointments and said that he doubted whether an impartial, politically selected board of experts "could be reasonably expected before a millenial period." 17

Another proposed solution to the difficulties attending medical opinions was also one of Ray's earlier remedies. Some opponents of the current system favored the method used in French and German courts where the judge appointed a single expert whose report was binding. Again, as in the case of a board of experts, Ray now doubted the solution of his youth. First, he feared that courts would not pay enough to attract the best experts. Second, he claimed that no matter how good the expert was, each side could properly feel slighted by the inability to select witnesses freely. In America each side appealed directly to the jury and was free to make its case using as much evidence as it wanted. There were, after all, legitimate differences in expert opinion and each side deserved the chance to get its position clearly before the jury. The French and German systems worked well, Ray said, only because Germany had little trial by jury and in France the expert's opinion was binding on the jury. 18

"When we shall have abolished the trial by jury, or made the jury the mere mouthpiece of the judge," Ray said, "we may be ready to have experts appointed by the court,—and probably not till then." 19 He concluded that it was "idle to expect our people to adopt any method which implies a change in the
essential features of a jury trial.\textsuperscript{20}

Ray's own proposed reforms in 1870 were less dramatic than those he criticized. Interestingly, he did not appeal specifically to the remedies outlined in his "Project" which the Association of Medical Superintendents had recently approved. There he had sought temporary pre-trial commissions to investigate the mental condition of prisoners who intended to plead insanity. His colleagues, however, had altered that portion of the "Project" against Ray's wishes. They turned Ray's proposed commissions of laymen with a single physician into a temporary board of doctors headed by an expert in insanity. Ray feared that this gave ordinary, perhaps irregular physicians too great a role in the process. In his American Social Science Association paper he recommended instead the Maine system. There any prisoner who intended to plead insanity was sent to the state asylum for observation. Often, Ray said, if the superintendent found the prisoner to be insane, the state dropped its prosecution and allowed the prisoner to remain incarcerated as an inmate of the hospital.\textsuperscript{21}

Another partial remedy which Ray endorsed was the establishment of a commission when the friends of a convicted felon applied to the governor for a pardon on the grounds of insanity. Such a commission would be needed only rarely and its purpose most often would be to save a person from the
gallows by getting a sentence of death commuted to life imprisonment. Ray saw it as a commission of last resort to be used only when the earlier attempts at the pre-trial and trial stages had failed to establish a prisoner's insanity. 22

Finally, Ray offered another new solution. He suggested that all expert opinions be given in writing, rather than in person. According to Ray, this remedy had the virtue of avoiding dreaded hypothetical questions and destructive cross-examinations. He noted that this method had occasionally been employed in some will cases and he believed that it would serve satisfactorily in any case bearing on insanity. Ray said that he saw no major obstacle posed by ordinary procedure to prevent it. 23

In concluding his paper, Ray emphasized that lasting remedies to the problems of expert testimony would not be legislative. It was an odd pronouncement for the man who had spent two decades securing his colleagues' approval of a plan for legislative reform. Evidently, the divisions of the 1850s and 1860s over moral insanity had taught him that disharmony and dispute were professional facts of life. No amount of legislation would create a professional consensus. "We must look for improvement," he said, "not so much to any devices of legislation, as to broader views and a firmer spirit on the part of those who administer the laws, to a
higher sense of professional honor, both in the lawyer and the physician, and to a healthier public sentiment."²⁴

Three years later in March 1873 Ray again highlighted his objection to legislated remedies. Earlier that year a member of the Pennsylvania legislature proposed a bill to improve expert testimony in the state's courts. According to the proposed law, a prisoner must declare his intention to plead insanity prior to his first court appearance. Once informed of the defendant's intent, the judge would appoint a three-member investigating commission comprised of two physicians and one lawyer. The commission would inquire into the defendant's sanity and draft a report which would be given under oath at his trial. According to the bill, the prisoner would be free to call other experts once the case came before the jury.²⁵

Ray was completely opposed to the proposed remedy even though he believed it was well motivated. Its problem was that it failed to eliminate the need of a jury trial and consequently settled very little. The commissioners would still be bound to give their evidence before the jury and be subjected to cross-examination. According to Ray, the commissioners, like any other experts, would "be badgered by counsel bent on making the worse appear the better reason, and forced to contradict themselves by an artful juggle
of hypothetical cases or some paltry shuffling of ordinary facts."\textsuperscript{26}

Ray believed that there was a great danger that the three commissioners would fail to agree in the first place. "One may find the prisoner quite crazy and devoid of responsibility," he said; "another may regard him as only partially insane, and more or less responsible; while the third may believe the apparent insanity is nothing more than a form of depravity." Given this potential for pronounced disagreement Ray was certain that lawyers at the trial would have little trouble in destroying the commission's credibility before the jury.\textsuperscript{27}

Courts also would tend to underestimate the value of an expert's time and knowledge. As a result, Ray was sure that courts would offer too meager a compensation to attract the most qualified men. The job would fall to those less experienced and perhaps even less scrupulous. Men of "inferior attainments" would populate Pennsylvania's insanity commissions.\textsuperscript{28}

As in 1870 Ray insisted that the problem lay with juries, not the scientific experts who, by their nature, would often disagree. It was the poor status of juries that polluted the current method of receiving expert opinions. Jurors were too undiscriminating to disregard the views of ill-prepared and unlearned medical witnesses. "When we shall have
ceased excusing from jury-duty almost every man tolerably competent to perform it," Ray asserted, "and putting into the jury-box men hardly knowing their right hand from their left, we shall have little occasion to complain of the delinquency of expert witnesses." Since scientific men would naturally disagree, what was needed were jurors of intelligence and discrimination who were capable of detecting poor logic and pomposity. 29

In April 1873 Ray reported that experienced and competent experts were often wasted on common jurors who were "men whose time is worth only two dollars a day [compensation for jury duty], or less, and who have only the feeblest sense of moral obligation . . . ." Even intelligent jurors unreasonably expected a consensus among experts. Ray said that occasionally he had advised lawyers with strong cases of insanity to go to trial without any expert at all. Jurors preferred to rely on common sense impressions of insanity by ordinary witnesses rather than scientific analyses of learned men. Sometimes, Ray said, experts actually damaged an insane defendant's chances of acquittal. 30

-4-

In 1874 New York passed a law which reformed its system of receiving expert testimony. The state legislature enacted a pre-trial commission remedy similar to the one proposed in the 1868 "Project." Whenever a defendant pleaded insanity
at his arraignments the court was authorized (though not compelled) to impanel a commission made up partly of physicians. The commissioners had the power to take testimony and subpoena witnesses. If the commissioners agreed that the prisoner was insane, the court sent him to the State Lunatic Asylum at Utica. In 1876 the Utica asylum's superintendent, John Gray, reported at the Association of Medical Superintendents annual meeting that the law was working well. Courts had impaneled several commissions and in each case Gray said that the court had accepted the commission's findings. As a result, no jury was ever needed in these cases. As Gray said, this remedy brought "the inquiry fully and clearly into the hands of the medical profession and the courts [i.e., judges]."  

Ray pressed Gray about the operation of the New York commissions. He wanted to know if the defendant was bound by the decision of the commission if it ruled he was sane and therefore responsible. Would such a defendant retain the right to plead insanity at his trial on the general issue of his crime? Would he then be free to seek whatever experts he wished? Gray answered that, of course, prisoners found sane by the commission retained all their ordinary rights to handle their defenses as they saw fit.  

Ray was largely satisfied by this response from his long-time antagonist. "I admit that commissions appointed to
ascertain the mental condition, before trial, of such persons may do a very proper service," he said, "... provided that such report would prevent the necessity of a trial."33 But if the commission reported a defendant sane, Ray wanted him to be able to raise the issue of insanity as always at his trial. Ray was not prepared to pin the prisoner's chances on the opinions of some unnamed experts with whom he might disagree. He was determined that insane defendants should have the freedom to pursue experts favorable to their cause.

John Ordronaux, a professor of medical jurisprudence at the Law School of Columbia College in New York and the State Commissioner of Lunacy, also approved the pre-trial commission remedy praised by Gray. Like Gray, he too had long opposed Ray on the subject of moral insanity. Ordronaux was both a lawyer and a physician. In 1875 he gave a paper before the Medico-Legal Society of New York in which he extolled the commission remedy as the best solution to problems of expert testimony. Like Ray, Ordronaux believed that jurors were poor judges of a medical witness's opinion.

Ray reviewed Ordronaux's paper for a leading medical journal and focused principally on Ordronaux's praise of commissions.34 Ray agreed that jurors, as they were currently selected, were incompetent to determine the worth of an expert's opinion; "but," he asked, "is trial by
commission any better in this respect?" Who, Ray asked, would decide the issue when commissioners disagreed? "Considering the heterogeneous crowd that now fill the ranks of medical practitioners," he said, "... we cannot shut out our grave apprehensions on this score."35

Ray, as before, would accept the commissions only if they did not jeopardize a defendant's chances to plead insanity at his trial in the event the commissioners believed him sane. And recourse to a full trial brought Ray back to the question of juries. Ultimately, commissions only mitigated the problem; they did not eliminate it. Any comprehensive remedy needed to include improving the quality of juries by placing on them "men of a higher grade of culture and character."36

There was a tinge of irony in Ray's criticisms of Ordronaux and Gray. The remedy they urged was essentially the one he had pioneered during the 1850s in his "Project." Now, late in the 1870s, he did not reject the idea. But his acceptance was clouded with reservation and doubt. Gray and Ordronaux both had been (and remained) his opponents in the moral insanity controversy. Perhaps their support of the pre-trial commissions gave Ray the impression that the commissioners might often be opponents of his pet theory, moral insanity.

This apprehension no doubt was heightened by the fact
that judges would appoint the physicians who would sit on the boards. Judges traditionally opposed moral insanity defenses and it is likely many of them would have avoided appointing doctors with reputations as defenders of moral insanity. Ray's emphasis on guaneeing the defendant recourse to plead insanity at his trial reflected his doubt that judges would use his choices of doctors. In essence, Ray feared that commissions might define responsibility too narrowly because the courts still controlled their composition. Defenders of moral insanity or any other minority position would probably have to give their opinions as witnesses in full court rather than as special commissioners.

The larger problem, extending far beyond professional psychologists, was the heterogeneity of general practitioners in the 1870s. These ordinary doctors, rather than asylum directors, provided the basic pool from which judges would select commissioners. This group might include eclectics, homeopaths, variously trained regulars, and whomever the nonscientific judges deemed fit for service. Since Ray could not control how judges would populate the commissions, he insisted on providing defendants with an adequate recourse when physicians of "inferior attainments" found their way onto the pre-trial boards. According to Ray, trial by jury might yet be needed.

By the late 1870s Ray saw himself as less representative
of his profession than at any time since he became a physician. He had seen the tide ebb against him in the moral insanity controversy while outside the limits of his specialty numerous kinds of irregular physicians vied for the public's support. Disagreement seemed inescapable. Professional conflict was more real to Ray in the 1870s that it was fifty years earlier when he became a doctor. Professional differences, of course, had always been there. But in the years before his death in 1881 Ray was less a shaper of professional directions than when he was younger.

In these last years before he died, Ray's views on expert testimony showed that he perceived himself as part of a minority. As a result, disagreement troubled him less than in his youth and he now criticized those who saw a lack of professionalism in disagreement. But his minority position assured that he would have no illusions about the makeup of commissions, microcosms of the profession. He knew that men like himself might well be a minority there too. He hoped that the commissions would eliminate the need for many jury trials. But when they did not, he knew that he had to be prepared to take the witness stand. Ray knew that, after all his exertions, he might still have to lay out his science before juries of men he did not respect.
Notes


3 Ray to Dr. William Pepper, March 8, 1870, enclosed in letter from Pepper to unknown, in Kirkbride Collection, Historical Library of the Institute of the Pennsylvania Hospital, Philadelphia. These are figures for a single case and I have generalized them. Ray implied that they were standard fees, saying that if the case was in Massachusetts or Rhode Island (where he had much previous experience) his fee for the state would be one hundred dollars. For Ray's earlier remarks on compensation see his review of Isaac F. Redfield, The Law of Wills . . ., in AJI 21 (April 1865):

4 Russell & Avritt, Attorneys at Law to Ray, Jan. 22, Feb. 5, May 6, and May 19, 1879, Manuscript Collection, Isaac Ray Memorial Library, Butler Hospital, Providence, Rhode Island.


6 Ibid., pp. 217-229.


9 "The Evidence of Medical Experts," p. 422.

10 Ibid., p. 412.

11 Ibid., p. 413.

12 See, for example, Ray's views in "Review of Medical


14 Ibid., p. 421

15 Ibid., p. 418

16 Ibid., pp. 419-20, quotation on p. 419.

17 Ibid., pp. 422-23, quotation on p. 422.

18 Ibid., pp. 424-26. Ray added that the French and German method was likely better for poor defendants. Under the American system defendants ordinarily got only the kind of expert they could afford, and the good ones were expensive. For another comment on the unworkability of the French and German systems in the U. S. see Ray's review of Richard von Krafft-Ebbing, *La Responsabilité Criminelle et la Capacité Civile dans les États de Trouble Intellectuel*, in *American Journal of Medical Sciences* n. s. 70(July 1875): 156-57.


20 Ibid., p. 426.

21 Ibid., p. 427. See also Ray's "Legislation for the Insane in Maine," *AJI* 4(Jan. 1848): 211-17


23 Ibid., pp. 429-30; references to hypothetical cases and cross-examination are on pp. 427-29.

24 Ibid., p. 432.


26 Ibid., p. 409.

27 Ibid.

28 Ibid.


31 "Proceedings of the Thirtieth Annual Meeting," *AJI* 33 (Oct. 1876): 246. Gray wanted the Association formally to endorse the New York commission remedy as the best answer to the problems of expert testimony. The members of the organization took no action however.


Part III

DEFENDING

IN VOLUNTARY COMMITMENT
CHAPTER 8

"'The Great Law of Humanity:'

Model Legislation for the
Confinement of the Insane, 1838-1852"

"The right to restrain an insane person of his liberty, is found in the great law of humanity, which makes it necessary to confine those whose going at large would be dangerous to themselves or others."

—Lemuel Shaw, 1845

In addition to his lifelong criticism of the criminal law, Ray also wrote extensively about commitment practices. He had always been fairly consistent in his comments on legal tests of insanity, arguing that the courts applied doctrines which were at odds with medical knowledge. His ideas about involuntary commitment however experienced a marked change. Between 1838 when he wrote the Treatise and the late 1840s after he had served several years as an asylum superintendent Ray's views changed almost completely. He began in the 1830s as a scholar of insanity jurisprudence by advocating numerous legal safeguards against unjust commitment. But after working in hospitals, he decided that physicians and families of the insane should be free to confine the deranged without legal procedures. Once he had gained personal experience confining the insane he became convinced that the liberty of patients was not threatened and that legal regulation of the commitment process was unnecessary. Throughout the remainder of his
career, Ray advocated allowing staffs of mental hospitals to police themselves.

-1-

In the first edition of his Treatise Ray posed key questions about involuntary commitment. The deprivation of an individual's liberty was a serious step and one which he argued should be regulated by legal safeguards. Most states had no laws regulating the confinement process. To date Ray believed that America had been lucky. No major scandals involving restraint of the insane had occurred as in other countries. 

"[P]ublic attention has scarcely been attracted to this subject, but," he added, "either human nature is very different here from what it is in other countries, or we shall . . . have to deplore the abuses which they are now anxiously seeking to remedy, unless . . . we prevent them by suitable and seasonable legislation."2

He cited three legitimate reasons why the insane should be confined: therapy, custodial care, and the security of society. Because Ray believed that insanity was treatable, especially in its early stages, he preferred a system that allowed ready commitment in cases where the affliction was recent. He believed that the law should reflect his medical faith in curability by authorizing seclusion soon after a physician diagnosed the disease. The law also should allow for quick commitment of dangerous insane persons, curable or
not, who posed a threat to society. According to Ray, the class of the insane which posed the most problems was the middle one: patients who were incurable though harmless. He feared that family members might commit these incurables simply to gain control of their estates. He had found no evidence that this was actually a problem in America, "but it would be unwise," he said, "to act as if this state of innocence were to continue always." He reported that England had encountered much difficulty with wrongful commitment and that Parliament had instituted "checks and precautions" to assure that the incurably insane were protected from "grasping and ill-natured relatives."³

Ray presented several "general features" of what he believed would be model legislation to "place the restraint of the insane as far as possible beyond the reach of abuse." He suggested that anyone confining the insane should be licensed by the state. State governments could then set minimum standards for these institutions in order to guarantee humane treatment. To assure compliance Ray recommended a state-appointed "board of commissioners, two or more of whom should be medical men of some practical knowledge of insanity, whose duty it should be to visit, from time to time, houses licensed for the reception of the insane, examine the accommodations, the moral and medical treatment made use of, . . . and submit their report to some branch of government."
Legislatures should also give this commission the right to discharge any patient "unjustly confined or capable of enjoying himself more at his home." In these ways, states could assure that asylums would not become agencies which did the bidding of greedy relatives.⁴

Ray asserted further that two or more physicians, one of whom was an expert on insanity, should sign certificates of insanity, attesting that confinement was necessary. The medical certificates, he argued, should also be "counter-signed by the selectmen of the town or mayor of the city in which the patient resides . . . ." Under his Treatise plan, both medical and legal authority would be necessary to sanction the taking of an insane person's freedom.⁵

Ray's characterization of the issues of confinement as well as his suggested remedies indicated much about his lack of practical asylum or courtroom experience when he wrote the Treatise. The discussion lacked the authentic tone of a participant. Instead it had the quality of a debater's argument, its sources gleaned from the best books. Ray relied heavily on English sources and repeatedly had to admit ignorance of actual American situations.⁶ He concluded from a consideration of abstract libertarian principles that abuses were likely in the absence of legal safeguards.

Ray's suggested ideal legislation in 1838 reflected the lack of any professional control over the medical super-
intendents who managed mental hospitals. His reliance on state-enforced safeguards like the permanent roving commission suggested that he had little faith in the ability of asylums or their staff physicians to police themselves. In the 1830s there was no national professional organization of doctors who specialized in insanity. Such a private agency might have had the ability to regulate asylums or to set standards of conduct for those who operated them. Only in the 1840s and later when the Association of Medical Superintendents was firmly established did Ray drop his call for a traveling lunacy commission which visited places of confinement. Once the Association was securely founded Ray was satisfied that the profession could regulate itself without state interference.

Ray's remarks in the Treatise also reflected the fact that American mental institutions were experiencing dramatic changes in the 1830s. Hospitals built earlier in the century were custodial institutions, little committed to medical treatment and seldom managed by physicians. By the 1830s American asylums were becoming institutions of "first resort" dedicated to the treatment, not simply the maintenance of the insane. Unlike earlier mental institutions, the new asylums were truly hospitals run by men with medical credentials. When mental institutions were simply recep-
tacles for the wretched, only the violent or manifestly un-
managable were sent there. But with the advent of the new
asylums which offered treatment, families had begun sending
less obviously insane persons, people who often could appreci-
ate their confinement in a more rational manner than the
totally disturbed patients who populated earlier institutions.
Public opinion had seldom been outraged by the confinement
of people who were clearly insane but the restraint of persons
who were only partially deranged posed new questions. The
new curative institutions threatened to arouse public hostil-
ity by involuntarily depriving only mildly insane people of
their freedom.

Ray's call in the Treatise for legal safeguards on the
commitment process suggested the importance of libertarian
principles. Adherents to these principles argued that no
one should lose his freedom without adequate cause and
due process. Ray noted repeatedly that he knew of no actual
violations of patients' rights in America. He suggested
only the possibility, if not the probability, of future
abuse. What led him to urge his reforms therefore was not an
outstanding problem but a felt need to reconcile legal
and medical procedure with a valued American ideal. This
compulsion, like much of his discussion, was scholarly. It
was born of the debater's need to balance accounts, the de-
tached reformer's desire to reconcile reality and ideals.

2

By the end of the 1840s, Ray had discarded nearly every reform he had proposed in 1838. The change resulted from his enlarged personal involvement in the confinement process. Since 1841 he had been a medical superintendent of two asylums. In 1845 he travelled to Europe and visited many of the better hospitals there and discussed questions of asylum management with leading experts on insanity. Moreover, with a dozen other superintendents, he had also helped to found the national organization of physicians who specialized in asylum management. By the end of the 1840s, he had developed great confidence in his own clinical reputation and in his profession's ability to regulate itself.9

In 1848 he reviewed legislation for the insane passed by the Maine legislature the year before and demonstrated a general lack of faith in the ability of legislators to improve matters. His earlier tone of confidence in legislative remedies which characterized the Treatise had vanished. Now he characterized the recent Maine politicians as unusual because they had actually produced some intelligent law. They had authorized the selectmen of towns to commit non-dangerous insane persons to the state mental hospital even if their families were unable to pay for their keep.
Ray knew because he had been superintendent of the Maine asylum for three years that before this new legislation the insane poor were dumped in the poor house where conditions were deplorable. ¹⁰

More important than his praise for the Maine assembly was his depressing depiction of American legislators generally. He said that politicians were always willing to promote material interests such as canals or railroads. But they usually ignored "the promotion of justice, charity and goodwill among men." According to Ray, humanitarian legislation for the insane was too spiritual an enterprise for most lawmakers' tastes. Ray sarcastically observed that enacting a law for the insane "presents to the Solons of the times, no other claims than those of suffering humanity, and hence is too often allowed to go its way until a more convenient season." ¹¹ Only ten years after the optimistic Treatise Ray had become pessimistic about the success of legislative reform. He was thankful, to be sure, for small gains. But he doubted that any great changes would result.

Ray's pessimism about legislative bodies was evident in 1849 regarding judicial proceedings when he reviewed for the Monthly Law Reporter a Pennsylvania conspiracy case in which a released mental patient sued the people who had committed him. He claimed that they had confined him in order
to gain control of his estate. The released patient, Morgan Hinchman, succeeded in convincing a jury in Philadelphia in March 1849 that seven of the fifteen defendants whom he named were guilty. The jury awarded him $10,000 damages. Ray was outraged by the case and examined it in great detail.12

Hinchman was a Quaker bankteller and farmer living near Philadelphia. Shortly after his marriage in 1839 he stopped being warm and affectionate with family members. He became moody, rude, frequently capricious, and engaged in poor business deals. Only one witness, however, reported violent behavior. Hinchman evidently whipped a child, a stranger, and later apologized. He also took some money from the bank where he worked and co-workers expressed the belief that he was insane when he did so. His Quaker neighbors refrained from reading him out of their meeting because they considered him insane.13

Because of Hinchman's change in character, especially with regard to family members, his wife and mother urged him to enter the Friends' Asylum in Frankford, Pennsylvania. But Hinchman refused, even after appeals from his family physician. When in January 1847 they failed to win his compliance, his wife and several friends took him forcibly to the asylum and admitted him. They did this on the authority
of a single certificate of insanity, signed by a physician other than the family doctor. Shortly after Hinchman was confined, a lunacy commission met and declared him insane. The asylum superintendent who treated Hinchman agreed that he was ill. Six months later the asylum released Hinchman and he immediately began planning his law suit.14

During his confinement, a court-appointed commission managed Hinchman's property and business affairs. Hinchman charged that his family removed him to the asylum so that his estate would fall under external control. He also claimed that his mother (whom he did not name as a defendant) wanted him confined as revenge for the way he had treated her. She alleged that he had threatened her. According to Ray, the commission returned Hinchman's property after his release and no one gained materially by his confinement.15

Ray's conclusion did not prove a conspiracy had never taken place. It showed only that the gains Hinchman's family had achieved were temporary. Still, Ray demonstrated convincingly that the case was rife with peculiarities. Judging from his presentation of the facts, based on newspaper accounts and a pamphlet containing speeches of counsel, the case was hardly proved. Yet the jury found for Hinchman and awarded the heavy damages. To Ray the verdict
resulted less from an objective evaluation of the case's merits than from sensational newspaper coverage which preceded the trial and prejudiced the jury. Ray accused the press of finding the defendants guilty before the case ever came before the judge.  

Ray's treatment of the Hinchman case revealed the extent to which he had changed his ideas about confinement. A decade earlier in his Treatise he had stressed the abuses to which involuntary commitment was liable. He had argued that all commitments should be approved by some civil authority: judges, selectmen, or mayors. But Hinchman's family and friends confined him on the order of no official and on the recommendation of only one physician. While this process was legal in Pennsylvania and common in most other states at this time, it was the kind of arrangement Ray had earlier criticized. In the Treatise he had advocated the necessity of two physicians' certificates, insisting that one should be signed by an expert on insanity. Hinchman's certificate was not even signed by the doctor who knew him best, the family physician. True, a lunacy commission had found Hinchman insane. But it had met only after the confinement was already accomplished and the likely presumption was that Hinchman was truly insane.

Nowhere did Ray complain of this mode of commitment in
1849. On the contrary, he labored to defend it. Several reasons accounted for his support of Hinchman's involuntary removal. Ray wanted to vindicate his professional colleagues, the doctor who signed the certificate and the asylum superintendent, both of whom believed Hinchman was insane. Had he questioned the tactics of the confinement, he might also have cast doubts on the physicians' behavior. Moreover, Ray was certain that they had acted correctly. His reading of the evidence had convinced him that Hinchman was "unequivocally insane." Yet Ray admitted that Hinchman was far from a raving maniac. Evidence of his insanity came less from the nature of his acts (sane people were often cruel and insensitive as well as irrational) than from the change in his "natural character," especially in domestic relations. Hinchman had "produced some sixty or seventy witnesses, who testified that they never saw or knew him to be otherwise than sane." But Ray dismissed this rather prodigious number of reports, claiming that none of Hinchman's witnesses were well acquainted with him. The fact that Hinchman's family and close friends had noticed a marked change in his personality was sufficient to convince Ray that Hinchman was insane.

Ray also doubted whether Hinchman had recovered from his disease as the superintendent of the Friend's Asylum.
claimed. Hinchman belonged to a "class of patients—not a small one by any means—who never recover so far as to be able to resume their customary pursuits and to conduct with tolerable correctness, but never obtain a healthy tone of thought or feeling on the subject of their infirmity."

Instead of expressing their gratitude for the people who had helped them, Ray said that released patients often accused their benefactors of causing their troubles. These unfounded feelings of animosity toward those who had confined them, he concluded, needed "only to be artfully stimulat-ed and managed by mischievous acquaintances, to find vent in law-suits and criminal prosecutions." Ray easily explai ned away Hinchman's contentions. They were simply the product of a partially diseased mind. ²⁰

While he was convinced of Hinchman's insanity before and after his confinement, Ray admitted that the disease was periodic and largely nonviolent. ²¹ Evidence of actual violence was limited to the single case of the child beating. Only Hinchman's mother among family members felt threatened. Ray clearly approved of the commitment even though he believed that Hinchman posed no imminent danger. He concurred in the confinement because Hinchman was partially insane and because the family's harmony had been disrupted. According to Ray in 1849, these were sufficient grounds for depriving
a man of his liberty with no legal safeguards or due pro-
cess.

Ray had misgivings about the possible consequences of
the verdict favoring Hinchman. He feared that it would dis-
suade families and friends from confining the insane because
incidentally they could benefit materially from the act.
Then, when the asylum released the patient, families might
face the prospect of litigation and heavy damages as had
Hinchman's family and friends. Acts of compassion might
in this way be thwarted from fear of a diseased person's
retribution.

-3-

Developments in the 1840s had proved to Ray that,
despite his anti-legislature bias, new confinement laws
were needed. Ray wished lawmakers would simply authorize
private involuntary confinement and thereby release fam-
ilies and physicians from legal accountability. Tradition-
al common law doctrines sanctioned informal commitment only
when a person was dangerous to himself or others. But as
Hinchman's case demonstrated, courts did not always take
the danger criterion to mean that a person must be imminently
violent. Ray wanted positive law clearly to approve in-
formal confinement even where the patient was harmless.
As matters stood, most states had no laws governing admis-
sions of patients to mental hospitals. Instead, practice varied widely and usually conformed to individual hospital policies or to judges' interpretations of the common law.22

The result was that those involved in the process—family, friends, private physicians, and asylum superintendents—were unsure of their responsibilities and liabilities. Ray feared that many victims of insanity who could be helped in an asylum would never receive treatment because families would not hazard the chance of future litigation.

Ray was probably correct. By 1849 he had accumulated eight years of experience as a hospital superintendent and had dealt with scores of families and knew their apprehensions well. He argued that a more uniform and private process was needed. He wanted new state laws to approve confinement by family and friends. "Justice, domestic peace, the common rights of humanity," he said, "all require that . . . the current clouded situation should be replaced by one more definite and more easy of application to the circumstances of modern times."23

Because radical and immediate changes in the common law were impossible, the reform must be statutory. That meant legislative action, something about which Ray had recently evinced little faith. In order to prompt the politicians to act Ray encouraged his colleagues in the Association of
Medical Superintendents to endorse a proposed model law. He hoped that their unified support for reform would convince lawmakers to act in a field where they had shown little interest.

At the May 1849 annual meeting of the superintendents Ray was appointed to chair a committee on medical jurisprudence. News of the Hinchman case had surfaced only recently and Ray was seething with what he believed were its injustices. Over the next year, he worked diligently (and alone, despite the fact that he headed a committee) and was ready to present his "Project of a Law Regulating the Legal Relations of the Insane" at the 1850 superintendents' meeting.

Ray's prodigious—and unsolicited—effort overwhelmed his fellow superintendents. After his presentation they declined flatly to discuss it until an indefinite future meeting when each member could have before him a printed copy to study. During the next year, the Journal of Insanity printed both the proposed law and an essay by Ray defending it. Ray also managed to have the "Project" articles published in the September 1850 Monthly Law Reporter, thereby getting the plan before a legal audience as well as his medical colleagues.

Ray's model law included nineteen sections governing
all legal problems of insanity, including guardianship, contracts, wills, criminal responsibility, and tort liability. But the most important sections were the first eleven which dealt with commitment and release of patients from mental hospitals. Twelve pages of his twenty-page essay explaining the "Project" focused on the commitment question. The last eight pages sufficed for all other issues. Clearly, Ray's paramount concern was to eliminate ambiguity in the confinement process.²⁸

The plan sought to increase the authority of physicians by limiting the roles played by regular judicial officers in the commitment process. Ray distrusted judges and juries as much in confinement law as in criminal law. Had Ray seen dangerousness alone as the grounds for committing deranged people, the more conventional legal avenues might have sufficed. But since disease, whether it produced a dangerous situation or not, was the basis of confinement, physicians became the key judicial officers. Only they could accurately determine when disease was present.

Ray's proposal would have made it legal for relatives or legal guardians of the insane to confine them in an asylum without getting a judicial order. Any determination of the necessary grounds for confinement would be made by those seeking the commitment and by one physician who would sign
a certificate of insanity. Justification for depriving a person of his liberty would rest wholly on domestic and medical considerations. No requirement of the person's posing a danger needed to be met. Treatment or custodial care would suffice if the physician and the person seeking confinement wished. Ray's plan gave no weight to the desires of the person being restrained.29

The proposal also stipulated that the doctor signing the certificate must be a "regular physician." In 1850 pluralism characterized the medical profession. In addition to early homeopaths and eclectics, there were also Thomsonians, followers of Samuel Thomson, who were simply trained laymen with no formal education. Most active in rural areas, they employed botanical remedies and rejected regular treatments like bleeding. Ray distrusted these various irregulars and gave them no authority in his model law.30

The "Project" also provided for insane persons who had no family or friends to commit them privately. Any "justice of a law-court" could appoint a temporary commission on the "written statement of any respectable person, that a certain person is insane and that the welfare of himself or others requires his restraint ... ." This reference to the welfare of the patient or others did not indicate that proof of danger was necessary. Some persons like Morgan Hinchman
were insane, but not manifestly violent. Still, according to Ray, their welfare and that of others would be served by their confinement. 31

The "Project's" temporary insanity commissions would include from four to six members one of whom would be a lawyer and another a doctor. The commissioners would have the responsibility of hearing all evidence regarding the person's alleged insanity and could, if the commissioners desired it, receive a statement from the person or his counsel. Ray's plan did not require that the person be present, only that he be given "reasonable notice of the proceedings." The proposed law also approved the person's confinement throughout the commission's deliberations. 32

The "Project" granted the judge no specific discretionary power to refuse the inquisition's findings. If the commissioners decided that the person in question was insane, the judge would be bound to issue a "warrant for such disposition of the insane person as will secure the objects of the measure." 33 Ray's plan completely removed the determination of sanity from ordinary judicial offices. The commission, sequestered if possible from public interference, would decide the case, leaving the judge to accept its conclusion.

Ray intended that commitment commissions would be used rarely and only as a last resort. In 1859 a fellow expert
on insanity, Edward Jarvis, a physician who took the insane into his own home, criticized Ray's proposed commissions because he believed that they would be slow to act, cumbersome and expensive. Jarvis favored instead a standing commission in each county which would be ready at a moment's notice to supply a rapid investigation.34

Ray responded by telling Jarvis that his criticisms would be appropriate only if commissions were expected to handle large numbers of commitments. But most confinements would need no judicial proceeding at all. Ray preferred that families and friends commit the insane privately and quietly, "provided only they have the certificate of a physician."

It was only in cases where the family shrank from taking the necessary steps or where "no one feels sufficient interest" in the person that a commission need be employed. "When a man's own family are afraid to interfere," he asked Jarvis, "who will? Somebody should, both for his & the family's sake . . . ." Only when families failed to provide for the insane, Ray believed that the state should intervene.35

A similar insanity commission should also be used whenever someone outside an asylum believed an inmate was unjustly deprived of his freedom. On a written statement by "any respectable person" claiming wrongful confinement a judge would appoint a commission exactly like the one for deciding questions of commitment. It would hear all pertinent evid-
ence and "without summoning the party to meet them, shall have a personal interview with him, so managed as to prevent him, if possible, from suspecting its objects." Ray argued that if the patient knew his freedom was being considered, the knowledge would disrupt his convalescence or spur a relapse. In cases of alleged wrongful restraint Ray advocated a presumption that the person was insane. His object was to shield the patient from unnecessary excitement. In order to avoid repeated attempts at release, a commission could form only once every six months.36

Ray believed that this procedure was a far better one than the common law's habeas corpus remedy. The commission approach was "not necessarily attended with a degree of formality and publicity calculated to excite injuriously the mind of an insane person, and also to produce a mischievous effect upon the minds of other patients in the same establishment."37 At a hearing on a writ of habeas corpus superintendents had to present their patients in court. This required removing them from the asylum and explaining the matter to them. Rumors inevitably started among other inmates which disrupted the tranquility of the hospital. Habeas corpus hearings would also allow judges who were unschooled in medicine to decide the issue of insanity in whatever fashion they chose. Judges at habeas corpus hearings were not required to seek medical opinions, though most did.
To correct the hazards of habeas corpus proceedings Ray proposed the "Project's" less public commission procedure. The plan was radical in many ways, but it was not so bold as to attack the time-honored writ of habeas corpus. Instead, the "Project" attempted only to reduce its necessity. In any event, the proposed law, if enacted, would not have outlawed the common law writ.

Nowhere in Ray's "Project" did he provide a way for a patient's complaint about wrongful confinement to be heard outside the hospital. Under the plan's release procedure Ray attempted to keep the inmate as ignorant as possible of any investigation. Only if the patient was fortunate enough to be in contact with a sympathetic person outside the asylum could he commence a release procedure himself. Under Ray's proposals it was possible for an inmate to be placed in a hospital without notice and then have no assured recourse for gaining release. It was a system that placed great weight on the integrity of those involved: family, friends, and especially physicians.

An important influence on Ray's construction of the "Project" was his reading of an 1845 opinion by Chief Justice Lemuel Shaw in a habeas corpus case. Josiah Oakes, an inmate of McLean Hospital for the Insane near Boston, had sued for his release, alleging that because he was not dangerous
he could be confined only by due process, including a jury trial. Shaw however ordered Oakes remanded to custody, saying that "the great law of humanity" allowed one's family to confine him without due process if he was insane. Ray interpreted the ruling to mean that informal confinement was legal and that Shaw intended that the "great law of humanity" should overrule the common law.³⁸

In his essay defending the "Project" Ray credited Shaw's Oakes opinion with establishing "the broad principle, that the friends of an insane person are authorized in confining him in a hospital . . . ." He contrasted this enlightened ruling with an 1850 English case, Nottidge v. Ripley, in which the court endorsed the traditional common law rule that only imminently dangerous insane persons could be confined against their will.³⁹ Ray's presentation of these two cases side by side gave the impression that Shaw categorically approved involuntary commitment for purposes of treating nonviolent patients. Shaw's opinion was actually anything but categorical and Ray's reading of it was at best wishful and at worst simply wrong. Shaw had taken care to present his reasons for remanding Oakes in traditional common law language. The judge said, "it would be dangerous for Mr. Oakes to be at large, and that the care which he would meet with at the hospital, would be more conducive to his cure
than any other course of treatment." Ray was right; Shaw had stressed treatment. What Ray failed to consider sufficiently was that Shaw also said that Oakes was dangerous. 40

A number of factors might have caused Ray to read more into Shaw's opinion than was justified. First, Shaw's emphasis on treatment misled Ray. Restraint of Oakes should continue, Shaw said, "as long as is necessary for the safety of himself and others, and until he experiences relief from the present disease of his mind." In his reading of these words, Ray did not stress the reference to "safety" but focused instead on Shaw's added phrase that confinement could last until the patient "experiences relief." 41

A second reason Ray praised the opinion was that Shaw endorsed Ray's medical theories about insanity. Shaw said that the best evidence of Oakes's insanity was the marked "change of character" he had undergone before his commitment. 42 This was precisely the criterion Ray usually employed in difficult cases. Moreover, Shaw endorsed the medical concept of monomania which Ray had championed since writing his Treatise. "Since the subject [of insanity] has been scientifically investigated," Shaw reported, "we know that a person [like Oakes] may show shrewdness and sagacity in business, but still be decidedly insane on some one subject." 43 Ray no doubt liked Shaw's deference to science and probably saw the ruling as a progressive opinion.
Ray read Shaw's Oakes opinion as a hopeful scientist, expecting progress in what seemed to him archaic common law. As a result, he read the decision incorrectly. Shaw had not said that family and friends could confine their neighbors involuntarily for treatment alone. On the contrary, he had labored to show that Oakes posed a danger if free. Shaw had followed the traditional common law formula.

Shaw's opinion was not the only source shaping the content of Ray's 1850 "Project." Even more important were medical imperatives and Ray's sense of humanitarianism. Since his days as a phrenologist, he had always described insanity as a physical disease. To explain the necessity of informal confinement he often stressed insanity's special status as an illness. "When a person is struck down by disease," he said, "and is no longer capable of caring for himself, he is completely dependent on those around him—his family, his relatives, his neighbors, and even the passing stranger." Ray believed that the purest of emotions and motives would prompt people to assume responsibility for the insane. "It does not appear, at first sight at least, that there is any difference in the relations of the parties when the disease is mental, instead of bodily." Insanity rendered a person "if not utterly helpless, . . . incapable of judging what is best for himself . . . ." Ray argued that others who were
capable of judging what was best for the insane should do so. And, as the "Project" suggested, the law ought to protect people who took this responsibility.

Science had shown that insanity was a complex disease which occurred in many forms. Drawing on his phrenology background and the theory of localization of brain functions, Ray reminded readers of his "Project" that insanity was frequently only partial in its effects. "We all know that insanity does not always derange every operation of the mind, and deprive the patient of every attribute of a rational being." Sometimes insanity was unrecognizable to strangers who encountered a victim. "[T]o those who regard . . . an insane person superficially, he appears to be governed by the ordinary feelings and motives of men." At worst, the partially insane appeared "only a little eccentric," or impulsive. But to those intimately familiar with the insane, disease was always discernable because a partially insane person would engage in behavior which was "foreign to his natural character and perhaps of recent origin."45

People so afflicted frequently disrupted family relations engaged in shameful behavior, or squandered their money. The partially insane were also often disruptive hospital patients because many of their mental operations were unclouded and they questioned the need for their incarcerat-
tion. These inmates often chafed under the controls imposed by asylum life.

Ray advocated an asylum therapy known as moral treatment which differed from medical treatment in that medicines were seldom used. Moral treatment ministered directly to the brain by regulating its manifestations, the patient's behavior. This therapy discouraged physical punishment, and its advocates embraced the use of mechanical restraints only in extraordinary cases. It required instead "an unyielding firmness tempered by a spirit of gentleness." Ray wrote in 1841 that

... very much of what is called moral treatment is the general influence exerted upon the insane mind by the order and regularity with which the service is conducted. To rise in the morning and retire at night, to take food and medicine at certain hours; to sit at meals in the company of others with propriety and decorum; to wash and dress himself; and to observe certain rules which are made for the benefit of the whole ... The goal was to create a wholesome, well-ordered environment in which excitement was reduced. In this setting the brain, which had been physically overtaxed when the victim was engaged in ordinary affairs, would find needed relief. In the absence of the frequent irritations of his usual home routine the patient's brain supposedly could heal. Soon the patient could be released.

From a legal standpoint moral treatment however posed problems. It encouraged the confinement of mildly ill per-
sons who resented the asylum's regimentation and the loss of their freedom. These partially insane inmates were those who frequently lobbied for writs of *habeas corpus* and began lawsuits when released. Ray argued that families and friends of the patients should be assured that their compassionate acts, based on medical necessity, would never be cause for legal action by a resentful ex-patient. If positive law clearly allowed for private involuntary commitment, he believed that disturbed patients might see that their clamorings for release would be unavailing.49

To complicate the situation and lend a note of urgency, Ray believed that the incidence of insanity was rising sharply. In his first essay on insanity jurisprudence in 1835 Ray described the problem. In America, unlike most other countries, "the brain receives a share of exercise altogether disproportioned to that of other organs." Reasons for this unrivaled stress were manifold. "The spirit of enterprise pushing into untried paths of activity, and the rapid and frequent fluctuations of business, give rise to anxiety and care, which, in the less happily organized, leads to a morbid excitement that terminates in cerebral disease." To these causes he added the "frequency and freedom of elections," which constantly kept Americans animated. Also there was "that scourge of the country, Intemperance."50

In 1850 Ray lectured before the Rhode Island Institute
of Instruction and warned of the many dangers posed by modern society. In particular he condemned popular books such as romance and adventure novels, "yellow-covered literature, as it is called." Everywhere he encountered these books. He said they appeared on the surface to be harmless enough, "yet the slightest examination discloses enough of their peculiar character to cause the deepest alarm for the safety of the rising generation."  

Ray saw a pressing need for legal reform. The world outside the asylum walls was perilous. If families, friends, and physicians were to retain the right to sequester the sick away from the irritating influences of modern America, then the law must respond by protecting them.

In 1850 Ray's colleagues in the Association of Medical Superintendents had tabled indefinitely any consideration of Ray's "Project." Evidently few shared Ray's concern over the ambiguity of confinement law. Most superintendents probably had adjusted to the peculiar way in which local judges applied the common law. But, regardless of the members' reasons, they never again referred to Ray's 1850 proposals. The "Project's" chances of soon becoming the whole profession's proposal were lost.

Ray would not let matters rest however. He worked to get the "Project's" confinement provisions enacted in his
home state of Rhode Island. In his 1851 report to the Butler Trustees he pointed to the need for new legislation and solicited their help. While no immediate crisis existed, he told them that the hospital could continue admitting patients informally only "by the sufferance of public opinion" rather than by "any sanction of law." As a result, "we constantly lie at the mercy of excited passion and prejudice" which could erupt at any time.53

Ray reported that his "actual practice" was to allow a close relative to confine an insane person on the presentation of one certificate of insanity. In most instances, he said, this procedure worked well because the person being committed was clearly insane. What concerned Ray were the "cases of a doubtful character," where he had allowed the confinement of people who were seemingly normal. A person of this class "not only regards the deprivation of his liberty as the grossest outrage upon his rights, but is in a position, sooner or later, to seek redress for his fancied injuries." The threat of litigation therefore suggested the need of a new law since no statute currently covered the matter. Ray said that it was difficult to guage how a judge might handle a future case under the vague common law.54

He told the Trustees that the common law allowed "no confinement of the insane, except on the score of their safe-
ty or that of society . . . ." He did not mention his opinions about Shaw's Oakes ruling, perhaps because he felt it might jeopardize his depiction of the necessity to override the common law by legislation. In any event, Ray said that, because Butler frequently held harmless people against their will, a new law was imperative to avert the possibility of costly damage suits. "There is no reason," he said, "why a charitable institution engaged in a work of benevolence, should be subjected to responsibility [for damages] of this kind."55

Ray then admitted a fact that he had never mentioned in his more widely circulated writings. He said that he confined "many patients" who showed no signs [of insanity] at all "at the moment of their admission." These people would "loudly protest the measure, and give plausible reasons for their conduct." He conceded that "weeks and even months may pass away, before . . . signs [of insanity] are apparent under the closest observation." As a result, "the fact of insanity must sometimes be taken on trust, and nothing could be more unjust than to make the officers of a hospital responsible for so doing."56

Although his report did not refer expressly to his "Project" Ray had supplied the Trustees with a copy to use as a model in their lobbying efforts with lawmakers. A committee
of the Butler Board of Trustees took the plan and successfully encouraged the General Assembly to act.\textsuperscript{57} In 1851 the legislature enacted "An Act in Relation to the Butler Hospital for the Insane" which, in many sections, was a verbatim transcription of Ray's "Project." The new Rhode Island law allowed Butler to confine persons presented by a relative, friend, or guardian so long as a certificate of insanity was produced. It also provided that insane persons could be committed by a commission procedure similar to that which Ray had proposed. A judge of the Supreme Court could appoint a commission of three members to investigate a person's sanity.\textsuperscript{58}

Rhode Island's new statute provided for the commission remedy to release asylum inmates. But it failed to include the restriction that such a commission could only be formed only every six months for any one asylum inmate. Also unlike Ray's plan, the act stated explicitly that the commission remedy did not replace the writ of \textit{habeas corpus}. Finally, the act excused from liability all Butler officers, including the superintendent and Trustees, for admitting anyone under the law's provisions.\textsuperscript{59}

Despite the fact that the law embraced many aspects of his "Project," it displeased Ray. In particular, he disliked the manner in which the Assembly altered the release provisions. It troubled Ray that commissions to investigate wrongful confinement could be established as often as the judge
wished. He had sought to restrict such commissions to one in any six-month period.\textsuperscript{60}

Yet, despite his dissatisfaction with the 1851 Rhode Island law, it represented success. For the first time Ray had succeeded in getting a state to approve private involuntary confinement. It symbolized how far he had moved since his days as a sequestered scholar of insanity. In the decade after writing the \textit{Treatise} he learned well the lessons of hospital management and of moral treatment. He had learned that, if his vision of the asylum was to survive, the law must protect it.
Notes


3 Ibid., p. 339

4 Ibid., p. 340


6 Ray cited only John Conolly's Inquiry into the Indications of Insanity (1830) and an Annual Report of the State Lunatic Hospital of Massachusetts by Samuel B. Woodward in his remarks on confinement.


10 "Legislation for the Insane in Maine," AJI 4 (Jan. 1848): 213 and passim. Ray might have felt some personal pride in the legislature's action. In his 1843 annual report to that body he had vigorously urged state-funded support for the indigent insane. (See Annual Report 1843, Maine Insane Hospital, pp. 22-26.)
"Legislation for the Insane in Maine," p. 211.


Ibid., pp. 171-75

Ibid.

Ibid., p. 171.

Ibid., p. 182.

Ibid., p. 172.

Ibid.

Ibid., p. 174.

Ibid., p. 179.

Ibid., p. 175


Ibid., p. 216

"Proceedings of the Fourth Annual Meeting of the Association of Medical Superintendents . . .," ibid., 6(July 1849): 69-70.

"Proceedings of the Fifth Annual Meeting," ibid. 7(July 1850): 80.

The "Project" alone appeared in ibid., pp. 92-96 and the article, cited above, in 7(Jan. 1851): 215-34.


"Project," (July 1850), sections 1 and 11, pp. 92-94.

"Project," (July 1850), sect. 3, pp. 92-93.

Ibid.

Ibid., p. 93.


Ray to Jarvis, Jan. 20, 1860, Jarvis Collection, Francis A. Countway Library of Medicine, Harvard University, Boston.

"Project," (July 1850), sect. 4, p. 93.

"Project," (Jan. 1851), p. 225; see also p. 217 for more discussion of the writ of habeas corpus.


Ibid., also see Ray's discussion of the Oakes case in Ray to Charles Doe, Jan. 12, 1869, Manuscript Collection, Isaac Ray Memorial Library, Butler Hospital, Providence, Rhode Island.


Ibid., pp. 125-26, quotation on p. 125; see chapter 3 above for Ray's views on monomania.


Ibid., p. 220.

Annual Report 1841, Maine Insane Hospital, p. 48.

Ibid., p. 33.


Education in Its Relation to the Physical Health of the Brain (Boston: Ticknor, Reed, and Fields, 1851), p. 45; Ray also devoted space to the issue of increasing insanity in his Butler Hospital Annual Report for 1853, pp. 19-31. His argument, in part, was that, as civilization advances, the incidence of insanity rises.

In none of the "Proceedings" of the Association of Medical Superintendents published in the 1850s or early 1860s was there any reference to Ray's "Project."


Ibid., p. 15.

Ibid.

Ibid., p. 16.

Annual Report 1852, Butler Hospital, p. 21.


Annual Report 1852, p. 38.

Ibid., pp. 21-22.
CHAPTER 9

"The Least Formality Necessary:"

The Success of Ray's 'Project of a Law'"

"[T]he only question which the public has a
right to ask, is whether the committed per-
son is or is not insane; and the least for-
mality necessary for this purpose is all that
the public can fairly require."

—Isaac Ray, 1864

Ray's attempt in the 1850s to win support for a model
law failed. His colleagues in the Association of Medical
Superintendents tabled his "Project of a Law" in 1850 and
never again considered it. Ray's considerable effort failed
to get the profession to take a public stand on ideal commit-
ment procedures. The superintendents' official silence de-
monstrated that no burning desire existed to change confine-
ment practices. Too few superintendents had yet experienced
unwanted external interference in admissions and their daily
management of asylums. In 1850 most superintendents still
had not had to cope with an outraged public which demanded
libertarian safeguards against involuntary commitment.

-1-

A critical climate of opinion regarding mental hospitals
matured during the 1850s, however, and became prominent dur-
ing the 1860s. Modern asylums of the sort Ray managed were
young in the 1850s. Their managers were champions of humanitarian treatment of the insane. Like Ray, they advocated moral treatment and believed that modern, well-regimented, and charitably managed hospitals offered unprecedented opportunities for curing patients. To deliver on their promises of a therapeutic revolution these early superintendents demanded an authoritarian physician-patient relationship. Founders of therapeutic asylums argued that they needed absolute control over their patients' environment, which they restricted to the asylum. It was a model of treatment which resented external interference. Calls for libertarian safeguards on the commitment process which placed decision-making in nonmedical judicial offices were especially unwelcome.

By the 1850s the authoritarianism of moral treatment had failed to deliver on the superintendents' promises. Improved statistical analysis and mounting experience soon drew into question the high cure rates which founders had anticipated. Ray himself, as early as 1849, was extremely critical of his fellow superintendents' methods of reckoning cures and classifying patients. Too often they simply assumed that released patients were cured. Occasionally a single patient who had visited an asylum several times and was released each time would account for several cures,
Other critics outside the profession also began to question the results of these early asylums.\textsuperscript{4}

Disappointment about cure rates was not the only factor which tarnished the asylum founders' standing. By the 1850s mental hospitals were still unable to accommodate even half of the insane. At best the new hospitals could take but a fraction of the total number. Moral treatment required relatively small physician-patient ratios and was a more expensive therapy than alternative asylum models which stressed custodial care rather than the treatment. In hospitals which sought only to maintain the insane, large professional staffs and frequent doctor-patient interaction were unnecessary.\textsuperscript{5}

Mental hospitals that stressed moral treatment, as did most run by physician-superintendents, came with a large pricetag. In most cases the new asylums relied on the state for support. Ray's first superintendency at the Maine Insane Hospital was in a publicly funded institution while Butler Hospital, his second asylum was private (though it admitted some patients whose expenses were paid by the state). Ray's experience at Butler was in many ways exceptional. Most superintendents received nearly all their funding from, and were directly accountable to the state government. More than Ray, they had to defend their practices against the
scrutiny of cost-conscious legislators, politicians who were aware of both the superintendents' promises and the asylums' costs. It was inevitable that state legislatures should begin to examine the new asylums to see if they warranted their cost.

Legislative investigations of mental hospitals became increasingly common in the 1850s and began to draw attention to asylum practices. Edward Jarvis, a leading American expert on insanity, in 1854 undertook a massive study of insanity (though not of asylums per se) in Massachusetts for the commonwealth's legislature. Similar though less ambitious studies took place in Rhode Island and New York. Other states investigated asylums and the status of their insane by special legislative committees. Yet, these studies were far from uniformly critical. Many like Jarvis's praised the newer hospitals and were widely respected by superintendents. But critical or not, these investigations focused public attention on issues of insanity and its treatment. A common conclusion was that too few institutions existed to meet the demands of all a state's citizens who could legitimately claim their services. Democratic ideology dictated that state funds should benefit all classes of unfortunates. By the 1850s and early 1860s pressures were mounting that forced superintendents to admit more patients than they could reasonably treat.6
By the Civil War superintendents of asylums were growing increasingly aware of the chasm between their optimistic promises of cure and legislative demands for economy and more admissions. The public's growing antipathy toward mental hospitals added to this unsettling factor. Ray's 1848 account of Morgan Hinchman's case suggested the depth of newspaper reporters' hostility toward asylums and their suspicion of commitment practices in particular. Neither was this an isolated case. In 1852 one of Ray's former Maine patient, Isaac H. Hunt, published a sensational pamphlet entitled *Three Years in a Madhouse by a Victim*. In it he accused Ray of cynical and calculated ill-treatment. The cover of Hunt's pamphlet bore a woodcut of Ray standing over him while he was held to the floor by three attendants. The caption read "Dr. Ray Giving Poisonous Medicines!!"8

Also in 1852, before public suspicions about mental hospitals hardened, Ray outlined his views on public opinion of asylums. He was pleased that many people had recognized the need for new asylums and new treatment techniques. Nearly every year, he noted, states built new hospitals. But beneath "this general current of public opinion" he detected a "strong under-current of a very different character." There was a large "amount of bad feeling, gross misconception, scandalous gossip, and even fierce hostility,
that quietly pervades the community . . ." and threatened to harm the effectiveness of hospitals for the insane.  

The principal source of this "under-current" of public distrust came from released patients, people like Hinchman and Hunt. The ex-patients, who were usually only partly recovered, told horror stories of asylum life with an air of "sincerity and plausibility." Most of the rumors [of] bad treatment began in this way. Sick persons who were resentful of having lost their freedom simply won the ear of sympathetic listeners. Ray said that these ex-patients' "plain, deliberate and touching statements are supposed, in spite of one's better judgment, to have some shadow of foundation of fact . . . ." As a result, many friends and relatives concluded that part, if not all, of the tales of abuse were true.  

Ex-patients' delusions found corroboration, Ray conceded, in the nature of the asylum. First, the "buildings must necessarily present some prison-like features . . . ." They were separate from the community and physically formidable. Ray disliked these concomittants of restraint but found them "a necessary evil."  

In addition to the dour physical impression which hospitals offered, confinement was actually a traumatic experience. Ray described a typical commitment:
Against his own will probably, and not without the use of some force, he is taken from his home, a home to which, notwithstanding his seeming disregard of all its claims and proprieties, he still retains some strong attachments,—and placed in an apartment of unusual size and form.

In this small room, the newly committed patient would find no furniture, bare walls, few windows and little light, no open fire, and "a crowd of persons, [who] by their strange looks and stranger conduct, appear to make a mock of his calamity." Then at night he would hear the cries of other patients as well as "other unaccountable noises [that] disturb his rest, and fill him with suspicion."\(^{12}\)

Ray granted that these circumstances were largely unavoidable. What troubled him was the effect on the friends and relatives of newly confined hospital inmates who heard tales of these experiences on their visits to the asylum. Often on these visits they found seeming validation of the patient's stories in the "screams of some excited patient, or the sight of one peculiarly repulsive and disagreeable." Ray feared that there was no way to eliminate completely this source of ill feeling because "the insane, as a class, are wonderfully faultfinding and difficult to please, in which qualities they are frequently excelled by their friends..."\(^{13}\)

Yet superintendents should do all within their power to
lessen the impact of these troubling impressions. Ray recommended keeping the bars on windows to a minimum and designing the hospital buildings to improve patient comfort wherever possible. Ill-tempered attendants should also be removed, although he granted the difficulty of finding good employees. He also argued vigorously against the "promiscuous admission of visitors to the galleries," because of the disruptive influence on patients as well as possible bad impressions on the onlookers.\(^{14}\)

Ray believed that the best insurance against the rising tide of ill-feeling was "the personal character of the superintendent." Ultimately, an asylum's good image rested on the professionalism of the man who managed it. He set the policies, directed the attendants, and defined the tone of each institution.\(^{15}\)

This call for quality in management, however, failed to halt the growth of public hostility. By the 1860s the climate of opinion shifted decidedly and the medical superintendents faced a crisis. One cause was the appearance of English novelist Charles Reade's sensational novel *Hard Cash*. Based on an actual incident, the story revolved around the struggle of a young hero whose business associates had him illegally confined in a mental hospital in order to gain control of his fortune. *Hard Cash* enjoyed tremendous pop-
ularity in the United States and presented the reading public with a vivid tale of wrongful confinement. 16

The vortex of the mounting controversy was an Illinois woman who claimed that she had been wrongly incarcerated at the Illinois State Hospital for the Insane at Jacksonville. In 1861 Elizabeth Ward Packard entered the asylum involuntarily and under coercion on the request of her husband. Packard's husband was a minister and believed that his wife was deranged because she had developed unorthodox religious views. Though the law did not require it, her husband produced two certificates of insanity to verify her unsoundness. Illinois law at the time approved the summary commitment of a wife or children by the husband. Packard remained an inmate of the hospital until 1864 when she was released on a writ of habeas corpus. 17

Soon after gaining her freedom Packard began a crusade against commitment laws in Illinois and elsewhere. Her melodramatic case excited a great deal of attention. She portrayed herself articulately as a woman who had been "kidnapped," separated from her children, and incarcerated because her husband no longer could accept her different views on religion. From the mid-1860s into the 1870s she lobbied before state legislatures from Massachusetts to Iowa and succeeded in getting several states to provide libertarian
safeguards on confinement procedures. Her most dramatic success was in Illinois where the state amended its laws in 1867 to require a jury trial in all sanity proceedings.\textsuperscript{18} Packard also wrote several widely read books which criticized asylum commitment practices and personnel.\textsuperscript{19} In particular she attacked the superintendent of the Illinois Hospital, Andrew McFarland, whom she accused of physical and psychological abuse as well as sexual advances.\textsuperscript{20}

Other superintendents suffered similar fates in the 1860s and 1870s.\textsuperscript{21} They found that the professionalism which Ray had advocated as a bulwark against popular disaffection was insufficient protection against public and patient hostility. Beginning early in the 1860s the Association of Medical Superintendents changed its hands-off approach to Ray's earlier calls for legal reform. The superintendents' inability to deliver on earlier promises, the mounting level of state intervention, and the realities of a public prepared to think the worst combined to make change more attractive in the 1860s than in 1850.

-2-

In 1863 the medical superintendents demonstrated their concern for legal matters by establishing a new Committee on Lunacy Laws. Ray, the leading authority on the law in their ranks, chaired the new committee. Unlike his experience
with the 1850 Committee on Medical Jurisprudence, this was a more collective enterprise, at least in its information-gathering stage. A superintendent from each loyal state was appointed to work with Ray. They were to send him copies of their state's insanity laws and to provide information on the practical workings of those laws. Evidently most members were lax about their responsibilities and in the Journal of Insanity in January 1864 Ray appealed to his committee colleagues to forward their information. He claimed that he had "received reports from only a few members . . . , and that some of those are entirely silent on some of the prescribed points." If the information failed to arrive soon he said that he might be unable to report at the next scheduled meeting in Washington, D. C. during May 1864.22

Regardless, Ray's report was ready in time. But it did not survey the current laws of the loyal states as expected. It reintroduced the "Project" of 1850. He offered several minor changes in the confinement sections but, on the whole, it was nearly a verbatim duplicate. Ray was unable to attend the meeting because his assistant physician at Butler was ill and could not replace him for the week or more that the convention would take. Ray therefore had his friend John E. Tyler of McLean Asylum present the new "Project"
as well as a long paper explaining the reasons behind each section.23

Like the 1850 "Project," the new proposal would have allowed easy commitment by friends and relatives so long as they applied for confinement in writing and submitted one certificate of insanity from a "regular physician." Ray changed slightly the membership requirements for the commission which could commit patients to asylums and release them if there was evidence of wrongful confinement. His 1850 plan called for four to six members and the 1864 proposal reduced the number to three or four. Ray retained the requirement that one be a doctor and another a lawyer.24

This reduction in size may have reflected a new interest in economy. According to the 1864 proposal, the costs of operating the commissions were to be defrayed by the estate of the allegedly insane person. If the person under investigation had no property, then whoever requested the commission was required to pay the costs. Earlier, in 1859, Jarvis had criticized Ray's 1850 plan because of its potential cost. Though Ray denied that his proposed commissions would be expensive, his changes in the 1864 plan suggested that he might have been trying to avoid criticisms of the kind Jarvis had made.25

Like the earlier "Project," Ray's primary focus in the
1864 proposal was on the question of confinement. He began his paper which explained the new plan by recognizing that involuntary commitment was a dramatic act not to be taken lightly. It caused a citizen to lose his liberty and the right to enjoy his property. But Ray said that when a person "loses his reason, it becomes necessary that the reason of others . . . shall supply its place . . . . Humanity demands this; the peace and safety of society demand it, and the ultimate good of all parties is promoted by it." 26

Ray showed that he was aware of the libertarian issues surrounding the confinement issue which had aroused public opinion. "Under what circumstances," he asked, is this interference with the rights of men, on the grounds of insanity, to be allowed? To whom is the privilege of interference entrusted? By what safeguards against abuse is this trust to be protected? By what solemnities is this deprivation of liberty and property to be accomplished and recorded? 27

Ray's first answer to this battery of questions was an appeal to medical necessity. As he had in 1850, he again urged that insanity should be treated as were more clearly physical diseases. Whenever bodily affliction disabled a person, Ray argued that his neighbors would naturally offer their help. There should be no difference in the response of family and friends when the disease was insanity. In fact, because insanity primarily affected its victim's
reasoning powers, Ray believed that the intercession of others was even more necessary. 28

Friends and relatives therefore had not only the right to intervene and confine the insane, they had a duty, according to Ray. Borrowing his favorite phrase from Chief Justice Shaw, he said that "the great law of humanity" placed those around an insane person "under a moral obligation" to act on his behalf, even against his wishes if necessary. Ray said that this duty fell to them "precisely as if the disease were one of the lungs, or liver, instead of the brain." 29

Ray thus established what he considered the overriding justification for involuntary confinement. Medical necessity and simple humanity demanded it. Moreover, he held these considerations to be paramount to the protection of personal liberty. The libertarian questions which he himself had posed should not dictate the way in which legislators drafted confinement laws. He said that, if lawmakers were "[g]overned by abstract principles of the sacredness attached to personal liberty," they would create commitment procedures which were "limited and hedged around by a multitude of restrictions." And complicated legal proceedings were precisely what Ray sought to avoid. 30

"Abstract principles are a poor foundation for repres-
sive law," he said. But by "repressive law" he meant statutes that made confinement more difficult for the family and friends. He did not mean laws that ignored the basic rights of the patient. Both the hospitals for the insane and those who humanely committed their fellow men had patients' interests at heart. Informal practices would suffice if they received legal sanction in order to avoid damage suits by released patients. Ray believed that "The prudent legislator will wait for some actual evil requiring redress, before he places a new law in the statute book." He concluded "that a law which reaches no existing evil is needless and that one which undertakes to regulate what may as well be left to the unrestricted actions of men, is worse than needless." 31

Ray justified the legality of involuntary confinement without due process by defining it as a domestic act. "Nobody questions the right of the husband to confine his wife in his own house" when she was "bent on self-destruction or disposed to wander about . . . ." Likewise, according to Ray, a wife had a right to restrict her husband, and the parents an insane child. No one could "doubt the propriety of such a measure." Most people would regard such confinement in the home as an unfortunate but necessary act. To place such a person in the hospital was only an extension of
this domestic right and duty. Moreover, asylums afforded professional care and the hope of cure. Victims of insanity received better treatment in the hospital than at home because asylums were designed expressly for that purpose. To Ray, the right to confine involuntarily at home naturally encompassed the right to commit to an asylum.\textsuperscript{32}

Ray conceded that there were difficult cases in which insanity was only barely detectable. These exceptional cases were the source of negative publicity over confinement laws. They involved "patients in whom the manifestations [of insanity] are not very demonstrative, or are such as may pass for eccentricity or strong peculiarity." When these people were placed in an asylum "there will always be many to cry out against it as an unnecessary and heartless measure." But Ray insisted that "the only question which the public has a right to ask, is whether the person is or is not insane; and the least formality necessary for that purpose is all the public can fairly require."\textsuperscript{33}

The only formality required by Ray's model law was a certificate of insanity signed by one or more regular physicians of a written application by a respectable family member or neighbor. His assumption was that all insanity warranted confinement if family or friends believed that the insane person was disrupting domestic relations. So long as an
expert verified the presence of disease the public or its legislatures, which Ray believed were unable to comprehend the complexities of insanity, had no right to interfere by enacting "repressive laws."\textsuperscript{34}

In August, only three months after Ray presented his new "Project," his friend and popular campaigner for humane treatment for the insane, Dorothea Dix, wrote to ask him about a case in which a woman named Mary Flemming claimed to have been wrongly confined. Flemming evidently seemed rational in the presentation of her story and Dix wanted Ray's opinion on the case. He answered by saying that the story was typical of a sort told by many insane people. He referred to the letter in which Flemming had presented her case and said that he "could turn out of my archives a score of them, and I suppose every Superintendent could say the same."\textsuperscript{35}

According to Ray, it was common for the insane to misrepresent the reasons for their confinement and their experiences in asylums. The nature of insanity often rendered patients' memories unreliable. He told Dix that frequently the "more demonstrative signs of disease" disappeared quickly. But doctors could see what patients could not, that vestiges of the disease remained.
Flemming admitted that she was insane briefly but insisted that she had recovered long before her doctors released her. Ray defended his fellow physicians, claiming that they could probably discern that Flemming "was only better not cured, and very properly discouraged her discharge while any trace of disease remained."\(^{36}\)

Ray concluded that there was no "proof" of Flemming's charges of wrongful confinement and ill treatment. He said that her word stood against that of the asylum superintendent. Ray told Dix that he would have to rely on the physician's character in the absence of any better proof than an ex-patient's accusations.\(^{37}\)

He also explained to Dix what he had told his colleagues earlier, that these difficult cases were often the basis of community mistrust. "That many people believe such statements about hospitals for the insane, is true, and pity 'tis, 'tis true," because many friends and relatives shrank from sending loved ones to asylums precisely because of stories like Flemming's. "But so it is," he told her, "a plausible story plausibly told, will always find believers, even among the cautious & intelligent."\(^{38}\)

In his paper for his fellow superintendents, Ray argued that, despite public suspicions, ideal confinements laws should allow families and friends to commit the insane
without any judicial procedures. A private process was best for those who accepted the responsibility as well as for the victims of insanity. Because some ill-informed observers could imagine possible abuses or because the tales of released patients seemed plausible were insufficient grounds to create a cumbersome process hedged by libertarian safeguards.

"To argue against the use of a thing from its possible abuse," Ray said, "has always been regarded as poor philosophizing . . . ." The only debatable question in the confinement process was whether insanity really existed and diagnosing disease, Ray said, should be left with physicians. When a doctor signed a certificate of insanity he "performs a professional service in which he is amenable to his own sense of right and wrong, and . . . to the laws of his country. Under what better obligations and sanctions can any one act," Ray asked? Professionalism, not judicial procedure would guarantee protection against abuse.39

Some of Ray's contemporaries outside the profession in 1864 advocated, as he had in 1838, the establishment of a state-appointed permanent commission empowered to visit all hospitals for the insane and to listen to complaints of wrongful confinement and ill treatment. Under such a plan, superintendents would be obliged to open their records, and
allow the commissioners to visit inmates of their asylums. Ray vigorously opposed this plan in 1864. He admitted that the idea of a permanent roving commission sounded good but predicted that it would have disastrous results.

Roving commissions would be well-intentioned, Ray was sure. But their objects would be to oversee only moral and political questions. Ray feared that commissioners would be incompetent to appreciate the medical subtleties posed by insanity. Like the public at large, they might be swayed by the plausible stories of resentful patients. Their disposition to do what is right is but a poor preparation for a scientific inquiry,—it may be even a dangerous one. What cares a man for the scientific bearings of a question, who looks only at its moral aspects, and is sure that he cannot be misled by his own sentiments [?]

In addition to being deceived by the protests of patients commissioners might also interfere with the superintendant's control. Moral treatment was, after all, an authoritarian therapy. To be successful the physician needed complete command of the situation. He alone set the policies and established the regimen in which the insane might recover. A primary tenet of moral treatment was isolation from external excitements. Commissioners, well-intentioned or not, would disrupt routines and generate rumors when
they visited the hospital. The result would be unnecessary and damaging excitement which threatened to exacerbate the physical condition of patients.

As Ray had said with regard to public opinion, the existence of disease was the only necessary justification for confinement. Commissioners were incompetent to diagnose insanity; only physicians could do that. And none were better for the task than the experts on insanity, the superintendents themselves. Ray argued that boards of trustees supplied all the regulation that was needed. Trustees had no interest in unnecessarily confining healthy people. In fact, according to Ray, trustees usually lobbied to get their superintendents to release patients before they were sufficiently recovered. 41

Ray's emphasis on the need to protect moral treatment was evident in the "Project's" proposals for guardianship proceedings for asylum patients. The plan proposed that notice of the guardianship hearing need not be presented to the patient. A decision whether or not to inform the inmate would be left to the superintendent. If he believed that official notice of the proceeding and the ordinary appearance before a judge would harm the patient's health, the law would allow him to withhold the information. Rhode Island's legislature had passed such a law in 1863
and Ray said that he was pleased with its operation. 42

The Association of Medical Superintendents was as unprepared for Ray's proposals in 1864 as in 1850. All that the members expected was a report on existing laws relating to the insane in the various states. What they got was a comprehensive plan for reform and an articulate exposition of the reasons why it was needed. But unlike their response in 1850, the superintendents agreed that new laws were needed and decided to discuss the report. They did not, however, intend to reach any final decision about the "Project" at the 1864 meeting. They simply wished to discuss it and offer opinions. Ray then would take their ideas and present another report the next year. By then all members would have had the time needed to study the proposals rigorously. 43

After some debate the superintendents decided to discuss each of the proposed twenty-one sections. But they covered only the first two, both of which involved commitment. Differences of opinion were large and most members were simply unprepared for a thoughtful analysis. Most who participated in the discussion agreed with Ray that involuntary commitment by relatives or friends was the best approach. That was, after all, already the ordinary prac-
tice. Some doubted that any law was necessary. But others agreed with Ray that making these procedures legal by statute would reduce the chances of damage suits.\textsuperscript{44}

Partway through consideration of the second section, discussion broke off. John Gray commented that "the discussion thus far had revealed the fact that we are hardly prepared to agree upon a law at this time." He suggested that the discussion cease and moved that the Association should adopt Ray's report and proceed to other business.\textsuperscript{45} This seemingly harmless suggestion elicited much debate. Other superintendents were unwilling to accept Ray's report because they did not want to seem to support his "Project." After debating precisely what they were willing to countenance they accepted a motion by Tyler who had presented the report in Ray's absence. They decided to "concur in, and endorse, the views expressed by Dr. Ray, preliminary to the projected law . . . ." In other words, they accepted his paper explaining the "Project" though not the model law itself. For a decision on that the Association would wait until a future meeting.\textsuperscript{46} The superintendents disbanded in 1864 undecided, but committed to future action. Ray's bold presentation had broached a vital issue and the debate on commitment procedures would continue among America's superintendents.
In October 1864, only five months after the annual meeting, the *Journal of Insanity* published a major essay which responded to Ray's proposals and criticized them sharply. Dr. J. Parigot of New York, a native of Belgium and professionally less prestigious than Ray, differed with the "Project's" recommended law governing commitment procedures and proposed more libertarian alternatives.47

Parigot wrote that though the proposals were ostensibly the work of a committee, he realized that they embodied Ray's ideas. "[I]t may evince great temerity," he said, "to criticize and attack a so-called work of eminent psychopathists, headed by a man of high and deserved reputation . . . . Nevertheless, in daring to do so we obey the dictates of our conscience."48

In Europe Parigot had found himself similarly in the minority of superintendents. There he had advocated the "free air system" of treating the insane which had developed in the Belgian town of Gheel. For hundreds of years this community enjoyed a reputation as a religious shrine to which the insane went for care. In Gheel the insane lived in family cottages and, in most cases, were free to move about. By the 1860s the village had a bureaucratic administration and many of the less controllable patients were institutionalized. Most however continued to live in cot-
tages and enjoyed a high degree of freedom. In Gheel, unlike the practice in American asylums which practiced moral treatment, the insane were not sequestered, isolated, and regimented. 49

Parigot championed this approach to managing the insane before he came to America. Most Europeans as well as American superintendents considered Gheel to be an exceptional example and preferred the authoritarian model of therapy represented by moral treatment. Parigot, as a defender of the "free air" therapeutic model, argued against Ray's "Project" from a more libertarian treatment perspective, one not widely endorsed in America or on the continent.

According to Parigot, all people, even the insane, had "a primitive liberty and a desire for it, inherent to our nature." As a result, involuntary deprivations of freedom such as hospital confinement should have some legal sanction. 50 "There can be no doubt about the necessity of the interference of the law and its officers in such important proceedings," he said. "No secondary considerations as family grief and the necessity of secrecy, can prevent its application when our liberty is at stake." 51 Private and informal commitments like those Ray proposed lacked magisterial sanction and were wholly unacceptable to
Parigot. "[N]one of us, however virtuous, have a right to reject, or declare it unnecessary that legal precautions should be taken against possible errors or crimes."52

Ray's assertion that "abstract principles" calling for the protection of liberty were "a poor foundation for repressive laws" shocked Parigot. He saw "no abstraction in civil liberty. It is of priceless value to everyone . . . ."53 Parigot granted that society had the right to confine the insane, but insisted that more effective checks on the manner in which society exercised its rights were needed. Ray's contention that actual abuses were rare did not diminish the need for due process. Occasionally, people were wrongfully confined and the law should address the issue. Infrequency of abuse was no argument against protecting "the sacredness of liberty."54

In place of Ray's informal confinement process Parigot proposed a more cumbersome one. He argued that the procedure should include affidavits (he disliked mere certificated) by two physicians sworn before a local judge or magistrate. Parigot saw no need for a public ceremony to accomplish this. He suggested that it be done in the judge's chambers as it ordinarily was in Europe. Parigot insisted further that the medical affidavits should be meaningful. Certificates of insanity commonly used at the
time only required the physician to state that a person was deranged. It was not necessary to supply any reasons for recommending commitments. Parigot wished to correct this deficiency with affidavits that stated the disease's symptoms, the reasons for advising confinement, and the probable future course of the disease. Parigot suggested that affidavits, along with the judge's order, should be placed on file in the hospital where the patient was confined. 55

He also argued that all asylums and even homes where the insane were confined should be registered with the state and open for inspection by special officials at any time. Parigot differed with Ray about the effectiveness of roving insanity commissions that oversaw hospital practices. He believed them to be an integral part of the system. Commissions were needed as a final safeguard against wrongful confinement. Parigot denied Ray's contention that hospitals should be shielded from outside influence. "It is remarkable," he said, "that routine leads us to consider asylums as if they were something like the in p ace of Catholic convents, where people are absolutely out of sight and hearing."56

Parigot also disagreed with Ray that the commission's overseer function could be carried out by each asylum's board of trustees. He conceded that in some cases the
trustees might actually provide supervision. But more often superintendents dominated the board members who usually took the physician's advice on difficult cases. In any event, "Trustees, like other mortals, are liable to errors and weaknesses of a social and domestic nature." They often became close friends with their superintendents and created a situation in which the detachment necessary for correct oversight was impossible. 57

Parigot demonstrated the weakness of Ray's insistence that insanity was a physical disease as a justification for coercing patients. He presented the analogy of the general practitioner and the institutional physician. Regular doctors could prescribe treatment, but were unable to force their patients to accept it. "Ordinary patients do not always submit to the prescriptions of medical science," Parigot said, "and there are no compulsory means to make them do so." Why, then, if insanity was no different from physical diseases, was there no summary right to force treatment on ordinary patients? To Parigot only a specific judicial order should allow superintendents to administer treatment against patients' wishes. Precisely because insanity was like other diseases there was a need for safeguards. 58

According to Parigot, good legislation that provided
protection from abuse would not harm virtuous superintendents. Honest men would faithfully obey the laws. The less virtuous however would behave correctly out of fear of punishment. Rights of the insane could thus be protected and good superintendents would not be hindered at all.\textsuperscript{59}

It seemed to Parigot that Ray's "Project" required superintendents to be at the same time, legal officers, explaining and applying the laws of lunacy; medical officers, having the supreme moral direction of their institution; and . . . supervisors and controllers of their own doings." Everything depended on their sense of propriety. Parigot said that this was too much responsibility for any one class of men. The importance of freedom, he argued, required that no group should have so much control over the lives and fortunes of others.\textsuperscript{60}

Parigot had practical as well as idealistic objections to informal commitment. He pointed to the poor public opinion regarding mental hospitals and asked what caused it. Why were there so many rumors of intrigue? On what did the public found its suspicions? "On the very absence of good laws regulating the admission and liberation of patients from asylums" he answered; "on the absurd affidavits [certificates of insanity], on the circumlocution of government offices, and so on." To Parigot it seemed a small
price for public confidence to recognize the necessity of protecting personal liberty. 61

What Parigot's criticism failed adequately to consider were the significant differences between himself and most superintendents regarding therapy. Parigot's ideal treatment allowed most patients relative freedom. But Ray and most other superintendents preferred the more authoritarian moral treatment. Ray's "Project" implicitly recognized that moral treatment could not long survive if the superintendent's control was threatened. In part, Ray's plan defended therapeutics as much as it advocated reform.

Since the 1850s Ray's generation of superintendents had felt the frustration of reconciling therapeutic ideals with social and political realities. They had failed to deliver on promised cure rates; several states had begun to investigate their operations; and legislatures began requiring superintendents of public hospitals to accept more patients than they could treat. As a result, custodial care rather than treatment for cure threatened to become the object of asylums. Ray's plan harkened back to the earlier ideal by stressing private rather than public commitment and denying the necessity of an oversight commission. Under the "Project" patients could sue for release only once every six months. Superintendents also decided whether patients
should be informed of a guardianship hearing. The "Project" protected a concept of the asylum in which moral treatment was possible.

Ray's colleagues in the Association tabled the "Project" until 1868. Since 1864 Ray had been absent from the meetings and the members refrained from discussion until he, the principal architect of the plan, could be present. At last, Ray was present for the meeting in Boston in May 1868. When the plan came up for discussion there was great diversity of opinion, as there had been four years earlier.62

Discussion centered on the "Project's" first section which authorized families and friends to commit the non-violent insane without due process of law. The "difference of opinion . . . was at first so great that, after several sessions had been occupied solely in the discussion of the first section, it was seriously proposed to drop the subject entirely." On one side superintendents sympathetic to Ray argued in favor of the informal procedure which avoided judicial processes. They said that public judicial procedures would cast the "odor of criminality on the patient." The supporters of the informal approach agreed with Ray that commitment was a question "purely med-
ical in its bearing." 63

Others refused to approve Ray's proposal. They argued, as had Parigot, "that no man should under any circumstances be deprived of his personal liberty, without due process of law . . . ." The opponents claimed that the public demanded some safeguards and looked to the Association for leadership. They said that self-interest also required a judicial process. Opponents doubted that any informal process could protect superintendents from law suits. The challengers pointed to several states, such as New York, which required judges to order all commitments and said that the process worked well. 64

A third group of superintendents, the smallest, also entered the debate. They held that ordinary physicians and judicial officers were simply incompetent to decide who should or should not be confined. This group favored the establishment of permanent "commissions of lunacy, composed of men who have made the subject an especial study, and that all cases of supposed lunacy should be referred to these commissioners for disposal." The majority of superintendents argued against the commissions, saying that they would be slow to act and expensive. A major problem, according to opponents of the permanent commission alternative, was that too few insanity experts were available to serve. 65
To avert stalemate the Association compromised. Family and friends would still be allowed to confine the insane, but the physician's certificates of insanity would have "to be duly acknowledged before some magistrate, or judicial officer who shall certify to the genuineness of the signature, and to the respectability of the signer."  In this way the superintendents preserved the informal procedure by requiring that a judge merely vouch for the certificate's authenticity. This approach did not disturb the private character of commitments and kept the role of judicial officers to a minimum. Considering the depth of the differences of opinion, Ray's plan survived with relatively minor revisions.

Other sections of the accepted "Project" generated discussion and the superintendents modified most in minor ways. The final "Project" retained temporary commissions for confining persons whose family or neighbors chose not to. Ray's sections regarding commissions impaneled to investigate wrongful confinement survived essentially intact. In particular the provision that limited the impaneling of more than one commission per patient during a six-month period survived the debate. On the whole Ray's structure remained. With the exception of the revision to the first section, confinement would remain a private
matter between a family with its physician and the hospital.

In order to present a united front the Association endorsed the modified "Project" unanimously. The preamble which the members added to Ray's draft said that the superintendents urged its adoption "by every State whose existing laws do not, already, satisfactorily provide for these ends" of justice and "enlightened humanity."67

It had taken nearly two decades but Ray succeeded. At last his colleagues accepted his "Project." Since 1850 the basic tenets of the plan remained unchanged. Acceptance, in fact, had never depended upon the particular structure of Ray's proposals. It depended instead on the changing realities of the asylum in America. In 1850 the promise of moral treatment and the virtue of the sequestered asylum remained unchallenged. Partly by failings of the superintendents to deliver on promises, partly by increasing pressure of state bureaucracies, and partly by growing public antagonism, the dreams of the 1840s needed defending in the 1860s. Ray simply detected the coming troubles earlier than most. In effect, the 1868 "Project of a Law" aimed to protect professional ideals and values of an earlier time.
Notes


5Grob, Mental Institutions in America, pp. 257-303, passim.

6Ibid., pp. 259-62; also see Grob, Edward Jarvis and the Medical World of Nineteenth-Century America (Knoxville: University of Tennessee Press, 1978) and Rothman, Discovery of the Asylum, pp. 270-84.


8Hunt, Astonishing Disclosures! Three Years in a Madhouse, By a Victim, Written by Himself. A True Account of the Barbarous, Inhuman and Cruel Treatment of Isaac H. Hunt, in the Maine Insane Hospital, in the Years 1844, '45, '46, '47 . . . (n. p.: published by the author, 1852).


10Ibid., p. 39.

11Ibid., pp. 40-41.

12Ibid., p. 41.

13Ibid., p. 42.


Grob, Mental Institutions in America, p. 265; Pitts, "The Association of Medical Superintendents," pp. 81-82.


Grob, Mental Institutions in America, pp. 265; Pitts, "The Association of Medical Superintendents," p. 82.

In 1866 Dr. William H. Stokes stood trial in Baltimore for encouraging persons to confine wrongly their relatives to the Mount Hope Institution near Baltimore, the hospital that he superintended. He was exonerated of all wrongdoing. (See Grob, Mental Institutions in America, p. 269, and Stokes own defense in AJI 23 (Oct. 1866): 311-29.) Stokes's
case was also discussed at the annual meeting. (See AJI 23 [July 1866]: 78-91.) Charles Nichols, Superintendent of the Government Hospital for the Insane in Washington, D. C. also was charged with unlawfully holding patients in 1873 and 1876. (Pitts, "The Association of Medical Superintendents," pp. 85-86)


27 Ibid., p. 22.

28 Ibid., pp. 22-23.

29 Ibid., p. 23.

30 Ibid.

31 Ibid.

32 Ibid., p. 25.

33 Ibid., p. 27.

34 Ibid., pp. 27-29.

35 Ray to Dix, Aug. 31, 1864, Dix Collection, Houghton Library, Harvard University, Cambridge, Mass.

36 Ibid.

37 Ibid.

38 Ibid.

39 "American Legislation on Insanity," p. 30. It is


41 Ibid., p. 34; also see similar comments by John Gray which were condemnatory of permanent commissions in "Proceedings of the Eighteenth Annual Meeting," pp. 146-47.


44 Ibid., pp. 132ff.


46 Ibid., p. 149.


48 "Legislation on Lunacy," p. 201; also see Parigot's "The Gheel Question" From an American Point of View," AJI 19 (January 1863), pp. 332-54.


51 Ibid., p. 205.

52 Ibid., p. 203.

53 Ibid., p. 207.

54 Ibid., p. 211.
Actually Ray was present in 1867 but the proceedings of the meeting were not published in the AJI in the usual manner. The meeting had been closed to the public against the wishes of editor Gray. In the past, members had been allowed to revise their remarks before they were published. Gray disliked this procedure. As a result, the report for the 1867 meeting is incomplete and faulty. In any event, there is no evidence that the superintendents considered the "Project" in any detail. (See "Proceedings," AJI 24 Jan. 1868: 288-336.)

"Contemporary Literature," Quarterly Journal of Psychological Medicine and Medical Jurisprudence 3[July 1869]: 499. Again in 1868 the "Proceedings" of the annual meeting were not reported. The remarks discussed here and below therefore come from another journal which reviewed a pamphlet contained minutes of the 1868 meeting and gave a transcription of the adopted "Project."

Ibid., pp. 499-500, quotation on p. 499.

Ibid., p. 501.

Ibid., p. 495. For other indications of the sentiments of the Association see "Admission to Hospitals for the Insane," AJI 25(July 1868): 66-79. This article was unsigned but was attributed to the "Association" in the index to the volume. It recapitulated many of the arguments made regarding confinement since 1864 and may have been intended as a kind of policy statement.

"Contemporary Literature," p. 495.
CHAPTER 10

"Resignation and Frustration:
The Confinement Controversy,
1868-1881"

"Can anyone tell us by what fatality it
is that amateur philanthropists and the
chosen legislators of the State, when un-
dertaking to promote the interests of the
insane, frequently seem to have as completely
lost their wits as the poor creatures who
have awakened their sympathies?"

—Isaac Ray, 1874

By 1868 when the Association of Medical Superintendents
finally endorsed Ray's "Project" his views on involuntary
confinement had ceased to be inventive. He had long devoted
his energies to defending the informal commitment approach
he first championed in 1850. Yet it was not Ray's proselyt-
izing that convinced his colleagues to support a call for
reform. It was the rising animosity of the public. But
official endorsement of Ray's plan failed to quiet the pop-
ular clamor over asylum confinement. In 1868, for example,
Elizabeth Packard's crusade was just beginning. Public
discussion of the practices of mental hospitals continued
and increased in intensity.

Consequently, Ray's active defense of private commit-
ment likewise continued into the 1870s when he presented
refined and polished versions of arguments he had employed earlier. From his vantage point, the situation was no different in the 1870s than in the 1840s: sick people still needed confinement to get well; families would only commit them if the process was private and informal; and physicians required absolute control, free from outside influences, if they were to succeed.

Judged only by its substance, Ray's position on confinement after 1868 seemed hackneyed. What was new and different was its tone. Until the late 1860s Ray's strategy had always been to win his profession's support. After 1868 the task was to convince legislatures, if not the public at large. By the time of his death in 1881 Ray's writings on commitment revealed his frustration at lawmakers' refusal to accept his position. Where earlier in his career he had been assertive, he now became defensive. His writings, which always had been biting, became increasingly acerbic. By the end of the 1870s Ray was an anachronism seeking to implement reforms suited to an earlier age. Where once he had been forceful and hopeful, he grew resigned and doubtful.

After Ray retired from his office at Butler and moved to Philadelphia his improved health allowed him to lead an active life. Besides his frequent service as an expert wit-
ness, he also continued to write prolifically, especially for certain journals edited in Philadelphia. In 1869 he became a charter member of the Philadelphia Social Science Association. Between 1870 and 1873 he was an active member of the Board of Guardians of the Poor of Philadelphia and devoted much energy to the Insane Department of that agency. Each spring from 1870 to 1872 he lectured on insanity for students at Jefferson Medical College.

As these varied activities suggest, Ray did not use his retirement from an active superintendency as an excuse to withdraw. If anything, greater free time enabled him to increase his devotion to promoting legal reform. Eighteen sixty-eight, his first full year of retirement, was an eventful one in Philadelphia. Confinement controversies hovered over the local scene while Packard continued her agitation for legal change in the West. In 1867 she succeeded in securing the Illinois jury trial bill for all commitments. In 1868 the Illinois legislature started an investigation of the state asylum at Jacksonville which ended in the resignation of Ray's fellow superintendent, Andrew McFarland.

Closer to Philadelphia, Ray's friend Thomas S. Kirkbride, superintendent of the Pennsylvania Hospital for the Insane, also came under scrutiny. Unlike McFarland, Kirkbride weathered the controversy without losing his good reputation.
Courts frequently investigated Kirkbride's confinement of patients by issuing writs of habeas corpus. This troubled Ray who was certain that Kirkbride's administration was flawless. He wrote Judge Doe in New Hampshire and complained of the local judges. He said that they issued "writs of habeas corp. and have the patients of the insane hospitals brought before them examining them personally and thus deciding whether they ought to be remanded to the hospital or discharged." Ray found this judicial behavior to be an extraordinary interference in asylum management. Judges were actually releasing patients on their own judgment of the person's sanity. Often they did not even solicit medical opinions.

As threatening as this practice seemed to Ray it paled in comparison to an attack on Pennsylvania confinement practices that appeared in the Atlantic Monthly in May 1868. L. Clarke Davis, another Philadelphian, wrote an article entitled "A Modern Lettre De Cachet" which compared physicians' certificates of insanity to the ancient French writ that enabled the king summarily to imprison anyone he pleased. "There is not a man among us," Davis said, "however pure, wise, or influential, who may not be, upon the certificate of a single physician, committed to the cell of a lunatic asylum, the walls of which are as high and strong, the
keepers as vigilant and morose, the code of laws so absolute, the windows and door as difficult to escape from as those of any prison in the land."7

"Of all our sacred rights and privileges," Davis said, "that of personal liberty is the dearest, the most sacred." It was the "often-repeated boast" of the American people that even the vilest criminal "cannot be committed to prison without a sufficient warrant, issued in due form by a properly authorized magistrate . . . ." Yet, with absolutely no judicial process, respectable persons who were guilty of nothing could be held in places no less secure than prisons.8

Current practice thus allowed physicians to control the destiny of free persons. "No matter how unknown, how criminal, how ignorant or besotted, how old or how young, the physician may be," Davis said that he could hold a person "at his mercy" so long as he could produce "that mighty weapon," a medical diploma. Davis was aware of the pluralistic character of the medical profession. Not only regular physicians but a host of irregulars, including eclectics and homeopaths, also had diplomas from colleges of one sort or another. Neither the law nor custom regulated who among physicians was fit to exercise this remarkable power of signing lunacy certificates. Davis claimed that even well-
intentioned and competent physicians could be fooled by covetous relatives and tricked into sentencing a sane man to a life in an asylum.9

Davis claimed also that the writ of habeas corpus, which Ray feared was being overused, could not penetrate the asylum's veil. "Prisoners in these prison-like Bastiles [sic]," Davis said, were not allowed to send a letter "until it has had the supervision of the superintendent . . . ."10 Similarly, the asylum physician might restrict visitors to the patient. How then, asked Davis, could a wrongly confined inmate get help? How could he get word to his counsel to seek a writ of habeas corpus? Yet, even supposing a patient succeeded in getting word to a sympathetic outsider, his chances were slim of ever convincing a judge that he was sane. The presumption would always be that the inmate was deranged; a patient's incarceration would be "almost prima facie against him." Even the victims' exasperation at his unjust confinement would appear to some observers as evidence of insanity.11 Davis also feared that placing sane people among the disordered could result in creating insanity where none had existed before.12

Davis was careful not to condemn all physicians or asylums. He singled out Kirkbride and his administration of the Pennsylvania Hospital as good examples. But even the
best-intentioned managers like Kirkbride required and held too much power. Davis quoted Kirkbride as saying that superintendents needed the "sole direction of the moral, medical, and dietic treatment" of their patients. To Davis this was too much authority. Perhaps men of Kirkbride's character could refrain from abuse. But hospitals run by less conscientious men, in particular managers of "those private mad-houses whose name is legion," were likely to cater to greedy relatives seeking to deprive a sane family member of his freedom.¹³

Davis admitted that most asylums were well designed, at least in theory. What troubled him was that the only safeguard against violations of personal liberty was the unflagging virtue of the men who ran them. "Rules," he said, "however well considered, cannot execute themselves. There must be excellence as much in execution as in conception." Davis thus struck at the vitals or moral treatment. He was correct; superintendents did need tremendous authority. While he admitted the logic of the well-run asylum, Davis retained grave doubts about the potential for abuse that it embodied.

In any event, the superintendents were but a part of the problem. More immediately threatening were the assorted general practitioners who signed certificates of insanity.
How were these men to be relied upon? "Even where the signee of the certificate is entirely honest and honorable . . .," which Davis feared often was not the case, "how are his opinions to be relied upon in cases of alleged insanity?" How often did any two doctors agree about the diagnosis of any disease, let alone one so complex as insanity? Even medical and legal experts were unable to define insanity. Yet ordinary doctors, of no special ability and perhaps of questionable training, enjoyed the privilege of diagnosing insanity and banishing fellow citizens with the mere signing of their names.15

Protests that most physicians were conscientious did not persuade Davis. "That the wise, honorable, and virtuous physician will not abuse the power this monstrous law gives him is no reason why he should ever have it . . . ." His less ethical colleagues, "the ignorant, dishonest, and wicked quack," also got the power because he too could produce the diploma of a medical school, whatever its reputation.16

Finally, Davis said that physicians often failed to appreciate the difference between insanity on the one hand, and vice or folly on the other. Davis feared that signers of certificates often proclaimed people to be insane who were merely wicked or foolhardy. "A man may, through
ignorance or viciousness, do many grossly foolish things," Davis said; "but he is permitted a liberty of choice and freedom of action in them . . . ." When folly finally led someone "to infringe the law" then he became accountable and, if necessary, confined.17

Ray responded immediately and predictably to Davis's depiction of Pennsylvania confinement practices. He was usually reluctant to debate in the popular press, preferring to restrict discussion to professional journals. This case was different. Davis had attacked Ray's profession, its confinement policies, and its very honor. Moreover, intelligent people frequently read the Atlantic Monthly and could easily get the wrong impression.18

The pattern of Ray's response was reminiscent of his youth. In 1832 when he was a defender of phrenology Ray had responded to a critic by claiming that the challenger was ignorant of the facts. He also employed biting sarcasm. In 1835 when a reader of the American Jurist doubted Ray's early views on insanity, he answered sharply that the critic knew nothing about medical theories of insanity and should therefore have remained silent.19 So when Davis criticized the exact process of confinement that Ray had long championed, he answered by saying that Davis was ignorant of the facts and evidently "governed by private pique."20
Ray devoted most of his own *Atlantic Monthly* essay to exposing factual errors in Davis's article. He demonstrated successfully that Davis had exaggerated actual abuses and that he had cast events in a sensational manner. But with few exceptions, Ray refrained from discussing the general libertarian considerations which had motivated Davis. Instead, he announced predictably that no abuse existed and avoided the opportunity to address the fundamental issues Davis had raised.

Ray repeated his often asserted premise that insanity, being like any other disease, required a deranged person's confinement. Ray said that "the usages of society and the common feelings of men indicate no difference between insanity and other diseases, as to the manner in which the patient should be treated by his family and friends."\(^2\) Ray showed no sign that Parigot's criticism that superintendents had no right to force treatment on their patients had any effect.

Ray conceded that "the medical profession has its share of unworthy members . . . ." Infrequently, some doctors might even agree to sign certificates of insanity when they knew that no insanity existed. But Ray denied "that this or any other possible form of delinquency should be met by in-
discriminating legislation. No accumulation of safeguards," he insisted, "can change completely the course of human nature. To some extent, certainly, we are obliged to trust to the honesty of men."²²

Ray was convinced that Davis labored "under a mistaken notion that rare, exceptional abuse of a thing can be remedied only by the total abolition of the thing itself." Ray preferred to trust to the integrity of doctors, which, "ninety-nine cases out of a hundred" provided ample safeguard. That lone exceptional case had remedies already, particularly in the writ of habeas corpus.²³

Physicians were not so cavalier in signing certificates of insanity as Davis suggested. It was a professional duty and one that doctors exercised with caution. "A physician gives a certificate of insanity precisely as he performs any other professional duty," Ray said, "... with the same deference to the laws of the land and the good opinion of his fellow-men. What better safeguards can we have?"²⁴

Ray also defended the operations of modern asylums, including policies of moral treatment. In most hospitals, he said, patients were free to write uncensored letters, especially to family members. But he defended the superintendent's right to seize the mail. Deranged patients often wrote things harmful to themselves or others. When they
recovered, knowledge of the hurtful statements caused regret. For example, "[n]ot unfrequently a refined and cultivated woman writes letters, while in the height of disease, the thought of which, when restored, overwhelms her with shame and confusion." Ray claimed that to allow such letters to leave the hospital would be a "breach of trust," a violation of a professional obligation.

Efficiency dictated that superintendents completely control their asylums. Ray said that their unquestioned authority was as necessary as that of a manager of "mills, ships, railways, and many other industrial establishments." Originally medical men seldom managed insane asylums. Instead they came in only occasionally to prescribe medicines and treat the patients. Moral treatment had changed this. It relied less on medicines than on a tight control of the moral environment. Thus, according to Ray, efficiency as well as medical necessity dictated current practices of asylum management. Legal safeguards such as those Davis hinted at threatened this system.25

Ray admitted that insane asylums were not perfect. There was, after all, that one case in a hundred; there also were unscrupulous physicians. But these infrequent problems would better be left to experts on insanity than to "the ill-natured flings of amateur reformers who never spent a
couple of hours in [an asylum] in all their lives . . . " Ray looked to mental hospitals, and like Davis, saw some inadequacies. But where Davis, saw some constitutional and moral deficiencies, Ray saw only medical ones. Remedies, according to Ray, should therefore be scientific rather than political. Hospitals for the insane were necessary and valuable; "It is too late in the day," he said, "to decry these institutions." 26

Among Davis's more glaring factual errors was his depiction of the commitment process as one sanctioned by positive law. Ray pointed out that only common law suffered the one-certificate routine to exist. Pennsylvania statute law was silent on the subject. But as a result of the attention given the confinement question in 1868, the state legislature addressed the matter in 1869 and took Ray's "Project" as its model. Both Ray and Kirkbride, leading Pennsylvania authorities on the insane, testified before a state Senate investigating committee and urged acceptance of the plan which the Association of Medical Superintendents had recently endorsed. 27

In April both houses of the state legislature agreed on a bill to approve confinement by friends or relatives with the certificates of "two or more respectable physicians."
Perhaps in response to Davis's criticism of certificates, the law required that they "be duly acknowledged and sworn to, or affirmed, before some magistrate or judicial officer." In this way there would be a check on "the genuineness of the signature and ... the respectability of the signer."²⁸

In June, at the annual meeting of the medical superintendents, Kirkbride, who was the organization's president, discussed the new law favorably. Most superintendents doubted that the requirement of swearing to the certificate was of any value. Kirkbride agreed and said that, never in nearly forty years of experience had he known a doctor to certify wrongly that a person was insane: "I therefore believe no amount of swearing will give the public greater security than it already has had from the members of the medical profession." Kirkbride still approved the new law because it was largely based on the "Project."²⁹

According to Ray, the final bill had another flaw. At the last moment, the lawmakers altered a section authorizing a commission to investigate the wrongful confinement of a hospital patient. Ray had inserted that section in the "Project" specifically to eliminate frequent resorts to writs of habeas corpus, a major external interference with asylum management. In place of this section which established commissions, the legislators adopted a paragraph
that required judges to issue writs of habeas corpus whenever a "respectable person" attested in writing that an asylum inmate was wrongly deprived of his liberty. After this law had been in operation for several years it proved worse by Ray's standards than no law at all. Before 1869 a judge could refuse to issue the writ. After passage of the new law, he was bound to issue one whenever a respectable person requested it.

The 1868-69 winter had been one of controversy. Ray's friend Kirkbride was called into court several times on writs of habeas corpus. Davis had attacked routine confinement practices. And Ray had testified before the Pennsylvania Senate, urging adoption of his "Project." That same winter Ray wrote his last major article on commitment practices. In January 1869 the American Law Review published his essay "Confinement of the Insane." Ray evidently considered it to be his best contribution on the subject. It was the only article on commitment he included in an 1873 anthology of his essays, entitled Contribution to Mental Pathology.

In this new article Ray neither offered new suggestions nor retreated from the position he pioneered twenty years
earlier. But he did marshal new arguments to defend his position. And his analysis of the common law of confinement, though controversial, was clearer and more perceptive than ever before. Much credit for this fresh quality was due to Judge Doe who corresponded with Ray frequently and discussed at length the legality of involuntary commitment. Doe's letters provided Ray with something he long had lacked: genial, firm, and private criticism from an inventive legal thinker.

Beginning in August 1868 Doe and Ray discussed involuntary confinement. Ray asked Doe about an 1842 New Hampshire precedent, Colby v. Jackson,\textsuperscript{34} which he thought held that insanity per se was insufficient "justification of confinement without some due process." The case troubled Ray because he could find no New Hampshire statute forbidding private commitment. What then, he asked, was the court's reason for ruling against involuntary confinement by relatives or friends? In light of the Colby decision, what would be the "proper legal measures" private persons should take to confine the insane?\textsuperscript{35}

Doe answered by saying that Ray's letter presented only the easiest questions." Ray's inability to find a statute to support the 1842 ruling was not surprising. Colby was "a mere recital of common law principles so elementary &
so general, that no lawyer well-read in the common law, can doubt its correctness." Doe compared these principles with fundamental laws in medicine that became second nature and which doctors applied unconsciously. All "sound lawyers" agreed that, according to the common law, no person over twenty-one years old could be deprived of his liberty without due process. Whenever a person sought to confine an insane adult, he could "justify [it] only on the plea of necessity" and only so long as it took "to obtain the interdiction of regular authority by the appointment of a guardian."

Doe insisted that the informal commitment procedure that Ray preferred could never be approved under the common law, but added that "friends of an insane person can easily protect themselves against liability to suits, by procuring the appointment of a guardian in a reasonable time ...." He advised that asylum superintendents should make it a policy to require a guardianship application as a condition to admitting patients. Doe said that this would provide legal protection and would have the added advantage of quieting negative public opinion.

Doe revealed his ignorance of current statute law when he predicted that states would never allow private commit-
ments without first requiring "guardianship or some equivalent." Ray's previous home state of Rhode Island in 1850 had passed just such a law and even Doe's New Hampshire had a statute which authorized friends privately to confine the insane. But despite this error, Doe's reasoning behind the prediction was important. He said that legal procedures were necessary because "the public mind is so sensitive on this point of personal liberty." He called it a "universal idea . . . the national boast—the object of the settlement of N. England—the foundation of our institutions—the watchword of political parties—the text of 4th of July orations—the mouthing of all schoolboys & members of Congress—it is in fact, the great American Eagle himself . . . ." So long as this libertarian ideology continued Doe feared that "confinement of the insane will often be accompanied by some inconveniences . . . ." 38

Ray ignored Doe's eloquent depiction of the importance of liberty. His years of experience had taught him that "the right of friends to place a patient in confinement, without legal process should be legalized" because it promoted "the welfare of all parties." Ray still argued that statutes should remove the impediments of the common law. As for requiring guardianship proceedings, Ray objected because it "would be detrimental to the patient's interests."
According to Ray, guardians often dismantled the patient's estate.\textsuperscript{39}

Ray also rejected the judge's assertion that legal safeguards on the confinement process would quiet public opinion. "No kind of legislation short of abolishing all hospitals," he claimed, "will prevent or even abate the popular clamor." Ray blamed the rise in the public's hostility on the presence of newspapers which had "multiplied 40 fold" over the past fifty years. Newspapers had created a "large class of persons" who were "careless and unscrupulous" and made their livings selling the papers stories of the "'Hard Cash' character."\textsuperscript{40}

Ray asked Doe to clarify what most lawyers believed that the common law of confinement provided. Once armed with this knowledge he believed that he would be prepared to approach legislators, most of whom Ray thought were lawyers, and argue persuasively that a new statute was needed. If he was poorly versed on legal points, Ray feared that lawmakers would claim that the common law was sufficient protection and dismiss his request for reform. In particular Ray wanted to know the limits of the criterion for danger and its implication in insanity cases.\textsuperscript{41}

Doe answered: "The 'imminent danger,' to which the common law authorizes the confinement of the insane, is not the
danger of increasing the disease, but the danger of injurious acts produced by disease." Only the threat of harm to others, not merely of a deteriorating physical condition, warranted the restraint of liberty. Doe said that "the law makes no distinction between insanity & other diseases: it does not authorize confinement for the purpose of treating disease—scrofula, or yellow fever, or insanity."42

Though Doe did not know it, his argument struck at a primary premise of Ray's reasoning in favor of private commitment. Ray argued that confinement was necessary because it was like other diseases; Doe denied the right to confine on precisely the same grounds.

Ray never acknowledged this crucial criticism of his pro-confinement argument. Instead he noted the "very different styles of mental training to which lawyers and doctors have been accustomed . . . ." Ray had decided that this difference prevented him and Doe from "arriving at the same conclusions, instead of remaining wide as the poles apart." But the difference between Ray and Doe was far more than a divergence of "styles;" it was also a difference over values.43

Although the two men viewed confinement differently, their relationship remained genial. Both enjoyed the dis-
cussion and neither belabored a point disputed by the other. Ray especially benefitted from the discussion. He wrote his American Law Review article while he and Doe were exchanging opinions on confinement. Doe's letters served to sharpen his definition of the legal problems, helping him to shore up his defenses and to advance his position.

Ray began his new article by marshaling a historical argument. He hoped to set the context of the common law's danger criterion. Originally, he said, asylums held only the violently insane, those who were manifestly deranged to all who saw them. But early in the nineteenth century asylum populations began to change. Insane hospitals became predominantly treatment facilities for the nonviolent in which friends and family placed the insane. At that time the public considered such a confinement a "duty." "Fifty years ago," Ray said, "it struck the people of that generation that to legalize such a duty was like re-enacting a law of nature."44

This congenial climate unfortunately changed. According to Ray, "with little or no foundation," public opinion about confinement had soured: "admission to hospitals for the insane has come to be regarded, to some extent, as exceedingly liable to be perverted by bad men from its former purpose."
As a result, some states had already succeeded in taking from relatives and neighbors the right to commit patients quietly and privately. In so doing, "a service of love and humanity has been replaced by an unfeeling process of law." 45

Despite Doe's contrary remarks, Ray repeated his assertion that informal confinement by friends rested on insanity's status as a physical illness. "No one should be in doubt," he insisted, "how far his duties to the victim of disease are modified by the single fact that the disorder is seated in the brain, rather than in the stomach or lungs; nor should anyone run the risk of finding an office of kindness and humanity made the occasion of a troublesome suit at law." 46 Despite criticisms by Doe, and earlier by Parigot, Ray persisted in emphasizing the analogy to other more clearly physical diseases.

Ray's article reviewed major court decisions that bore on the right to confine. In his survey of precedents Ray found only one clear ruling that he believed supported his position on private involuntary commitment. That was his often mentioned 1845 opinion by Shaw in the Oakes case. Ray claimed that Shaw had based his favorable ruling on the "law of humanity," "a law higher than the common law, which supplements its defects, and provides for duties of a nobler order than any which it enjoys." Shaw's opinion "takes care,
by repeated iterations, to have it understood, that the recovery of the patient is a sufficient warrant for his confinement in an asylum."47

Ray also interpreted how he believed Shaw had reached his decision in this exceptional case. Shaw had noted that the common law clearly authorized confinement on the grounds of a person's danger to himself or others. If, as Ray said, the common law could be "suspended to meet one emergency, so it may to meet another." Ray argued that in Oakes Shaw, in effect, approved a "suspension" of the common law to allow for the operation of a higher command, the "great law of humanity."48

Doe's repeated warnings about lawyer's views of the common law helped to hold Ray in check. They kept him from overemphasizing the importance of the Oakes case and engaging in even more novel wanderings. A less lawyer-like reading of Shaw's opinion was hardly possible. Thanks to Doe, Ray realized that, whatever the exceptional qualities of the opinion, the balance of common law precedents all rested on the traditional danger criterion. That was "the element which is to legalize that which, without it, would be manifestly illegal." As a result, Ray now buttressed his old argument for private commitment with a new element
one that boldly addressed the danger criterion. Evidently, he was not satisfied to wait until new legislation clearly approved the private approach. Already, too many nonviolent patients were confined without due process. Ray hoped to convince lawyers that the common law might yet evolve to accommodate the families and neighbors of these inmates.49

For the first time Ray defined insanity as a disease which was necessarily dangerous. Since he could not shape the law to fit the disease, he would shape the disease to fit the law. "A proclivity to mischief," he said,

is one of the most common features of insanity. Yielding to passions unchecked by moral or prudential restraints, controlled by delusions that are mistaken for the most vivid of realities, moved by impulses that are completely irresistible, delighted by what would otherwise have caused unutterable pain and disgust, they the[insane] are necessarily, by the very conditions of the case, dangerous. Not that the danger is always imminent, or always extreme.50

He conceded that a "long, close observation" might prove a person was "harmless; but it would be the height of foolhardiness to say this of any patient on the strength of one or two interviews." It was common, Ray added, for those patients who at first seemed harmless to commit "the most fearful acts of violence."51

Ray lamented the danger criterion's entrenched position in the common law. Its historical roots lay in an era when
asylums housed only violent lunatics. Now that hospitals offered cures to more subtly deranged patients this ancient criterion was unrealistic. The danger criterion only propagated the false notion that hospitals for the insane were merely receptacles for the wretched.\textsuperscript{52}

Ray pointed to a large class of asylum patients who were neither obviously violent nor curable. Many inmates were custodial patients who posed no immediate danger but whose comfort was better served in an asylum than at home. Ray believed that he had found legal sanctions for holding both curables and the dangerous; but he doubted the authority by which hospitals confined custodial patients.\textsuperscript{53}

Everywhere Ray looked in the common law he saw ambiguity. Only legislation could completely erase the doubts. He presented three objects of an ideal commitment law. It "should put no hindrance in the way to prompt use of those instrumentalities which are regarded as most effectual in promoting the comfort and restoration of the patient." Medical experts agreed that quick confinement was essential to effecting a cure.\textsuperscript{54} The process of restraint should also "spare all exposure of private grief, and all unnecessary conflict with popular prejudices." Finally, commitment laws "should protect individuals from wrongful imprisonment," by
some remedy like the temporary commission proposed in the "Project." 55

An example of bad legislation was the 1867 Illinois law requiring jury trials which Packard's crusade had succeeded in securing. According to Ray, the jury trial procedure violated the first two objects of an ideal law. It was slow and public; "the proceedings may be printed in the newspapers, and the griefs of a stricken family become food for heartless gossip." 56

Juries also were "totally unsuitable as a means of obtaining correct results in regard to questions purely scientific." Ray believed that jurors would ignore the opinions of experts and decide the case according to their own crude notions of insanity. If, on the other hand, they were "sensible men" they would simply validate the opinions of the experts. In the first instance their decision would be a travesty, in the second a formality. In either case Ray said that the jury was unnecessary. 57

Doe wrote to Ray immediately after reading the article to offer praise and criticisms. In particular two things bothered Doe: Ray's characterization of Shaw's opinion in the Oakes case and his continued use of the physical disease argument. Doe began deferentially by saying that his
remarks were only "points of captious criticism, in which some technical lawyers might indulge" but that they might help Ray to prevent future misunderstandings "in any republication of your article." But his critique was more than captious. It epitomized the common lawyer's reaction.\(^5\)

Doe sought first to correct Ray's argument that the "law of humanity" was separate from, and above the common law. No lawyer could endorse this argument. He said that "when Shaw spoke of the 'great law of humanity' he did not mean a law higher than or distinguished from the common law but only a part of the law of reason upon which the common law is based . . . ." Neither did Shaw establish a treatment criterion for involuntary confinement as Ray suggested. Shaw's reason for approving Oakes's commitment was that he was dangerous, "the right to defend against dangerous persons being an old, familiar & well established rule of the common law."\(^5\)

Ray's contention that private commitment should be approved because insanity was a physical disease also troubled Doe. Only three months earlier he had warned Ray, telling him that the common law authorized involuntary confinement for no medical reasons. Doe told his friend that " . . . on this point the argument proves too much for lawyers—
it proves the right to deprive our friends of their liberty in order to give them the best treatment for other diseases, when they are perfectly sane, & that no lawyer will admit." Only the necessity of guarding against danger warranted such an extreme step. Treatment alone gave friends no right to restrain their neighbors. 60

When Ray republished his American Law Review article in his 1873 anthology of essays he kept the physical disease argument but revised his remarks on the Shaw decision slightly to conform more to Doe's reading of the case. But he continued to argue that Shaw intended to approve private confinement without due process. To support his view he told Doe that since 1845 Massachusetts courts had ordinarily ruled that confinement was proper for treatment alone. 61

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Soon after writing the American Law Review article and during his correspondence with Doe, Ray began to prepare lectures to give at Jefferson Medical College in Philadelphia starting in 1870. 62 One lecture, entitled "Isolation & Interdiction of the Insane," discussed the confinement question but was never published. Ray did not intend it for a public audience. Instead the lecture was his candid and unguarded advice to students of his profession. 63
Ray's lecture imparted largely practical information. He intended it as a guide to help future physicians who might have to sign certificates of insanity. Ray emphasized in particular the problems of public opinion. He advised his students to resign themselves to being criticized for helping to commit the insane. When released, many asylum patients would be bitter and perhaps even initiate law suits. Family and friends who had opposed the confinement invariably would help them in these designs. Ray told the future doctors that families nearly always divided over the necessity of confinement. If, for example, a wife confined her husband, his family predictably would blame the physician. In short, Ray warned the students to expect hostility. 64

In addition to private retribution from ex-patients and their friends, Ray said that the public at large posed problems. It was "jealous . . . of every show of oppression, sympathizing with the weaker side, right or wrong, and always supposing that people are actuated by the worst motives where no motives of any kind are visible to the whole world." 65

To illustrate his point on the irrationality of the public Ray reiterated at length the case Elizabeth Packard though he never mentioned her by name. Ray believed that
she was unquestionably insane because her husband had reported a marked change in her character. "But the difficulty was to obtain satisfactory proof of insanity. The husband needed no other proof than the utter change of character she had experienced. Stronger proof could not be had by anybody, but it was fully known only to him, and of course, not available as a proof for the purpose [of having her committed]." Still, Ray said, Packard's husband eventually confined her to a hospital. Ray said that in time she "became so troublesome" that the trustees released her.

Since her release "she has been roaming over the country, east and west, doing nothing but abusing her husband and preaching up a crusade against the hospital in which she was kept and all other hospitals in general." Ray admitted that she appeared normal and articulate, especially to newspapermen, "the knights of the quill, [who,] whether grubbing for pennies in the social sewers of the city, or enthroned in the editorial sanctum of a marble palace, [find] her plausible discourse and pleasing manners" to be proof of her allegations of wrongful confinement.

The purpose of Ray's digression into the Packard case was to demonstrate the necessity of being certain of a patient's insanity before signing a certificate of lunacy.
Only complete confidence in professional decisions could protect doctors from the groundless accusations of ex-patients and the press. Ray admitted to this private audience that he had "been often surprised by the facility with which such certificates are signed,—sometimes, even by physicians who have not seen the patient for months, perhaps not at all, relying solely on the statements of others." Never had Ray so questioned the professionalism of his colleagues. As in his angry response to Davis in 1868, he always had publicly extolled his colleagues' professionalism as a safeguard against wrongful commitment.\textsuperscript{69}

Ray outlined for his students the criteria which warranted signing a certificate. He created six categories of symptoms which he believed justified commitment. The first two and most obvious were "a disposition to injure others" and the imminent possibility of suicide. Even if no violence or suicide attempt had occurred, the reasonable suspicion of them should also lead a physician to certify a patient insane.\textsuperscript{70}

A third justification for confinement was "a propensity to petty mischief." In this category Ray included "[t]he patient who breaks furniture, destroys clothing and in spite of all domestic vigilance succeeds in accomplishing an amount
of damage which his estate can ill afford." 71 Similarly, a fourth condition warranting restraint was a patient's "feelings of distrust and animosity towards their friends which are frequently entertained by the insane." 72 Another reason for commitment was "the influence which the constant presence of an insane person is apt to exert on the minds of those around him." 73 The final condition was a "propensity to wander about at unseasonable times, and in improper places, whereby they alarm their friends with fears for their safety, and frighten women and children by their extraordinary manners." 74

In the absence of danger to self or others, Ray thus stressed disturbances of domestic harmony and socially deviant behavior as principle justifications for confinement. He not only approved of restraint when it benefitted the patient, but also when it relieved the apprehensions of those around him. Despite Ray's repeated insistence that insanity was a physical disease, all the symptoms he listed which warranted involuntary commitment were behavioral, not medical.

-4-

In 1870 and the early months of 1871 a single lawyer in Philadelphia requested that judges issue writs of habeas corpus for five different patients of Kirkbride's hospital.
In all cases, according to Ray, the lawyer did not know the persons. Neither had the patients' families of friends requested his intercession. Yet under the 1869 Pennsylvania law "any respectable person" could make the written request and the judge would be bound to issue the writ.75

Ray severely criticized this use of the writ. He said that the idea that asylums confined sane people was a "vulgar notion." It was "nothing better than a bugaboo story for frightening children that have got their growth." Such stories "originated solely in the distempered fancies of the insane themselves, who are unconscious of the infirmity, and can see no motive for their confinement save a bad one."

If judges continued to issue writs of habeas corpus "on the most frivolous pretexts," as the law allowed, the number of patients being admitted for needed care would decline radically. Unless the threat of these public hearings was reduced, many families simply would refuse to commit the insane and keep them at home instead.76

Evidently matters improved little during the next several years. In March 1876 Ray wrote to his successor at Butler, John Sawyer, and complained that local courts had been busy processing writs. "The scrub lawyers in this village," Ray said sarcastically, "seem to think they have found a bonanza
in Kirkbride's place, for they have kept up a running fire of habeas corpses all winter." He also predicted "a grand fight over an action for damages for false imprisonment against the hospital." Ray said that the man suing the institution was an irregular "roots and herbs doctor" who was asking for $20,000 in damages. Ray told Sawyer, however, that he "would not give him one dime for all he will get." This tone of resignation suggested that legal challenges had become familiar.

Events during his years as a Guardian of the Poor in Philadelphia afforded Ray more reasons to feel resigned. Between 1870 and 1873 he worked diligently to improve the Guardians' Insane Department which oversaw mental health facilities for the city's insane paupers. The deplorable conditions of the department shocked Ray who had high standards of asylum management. Inmates slept in crowded rooms no larger or better kept than a prison cell. Food and clothing likewise were grossly inadequate. Attendants frequently mistreated the patients. In a report submitted in February 1871 Ray recommended increasing the number of suitable attendants and improving the food and furniture. These were only piecemeal measures, he admitted, but they would cost nearly $19,000. The remainder of the Board accepted the Report
but never acted on it.

In 1872 and 1873 Ray introduced a number of motions designed to improve management of the hospitals for the insane by introducing moral treatment techniques. He urged the Board to restrict visiting privileges to Sundays and to keep the number of patients to nine hundred or less (the crowded facilities were designed for five hundred). Finally, he moved that the Board should build a new asylum outside the city for the insane poor. There the managers could create a more wholesome environment than the one in the city.\textsuperscript{79} In short, moral treatment required a large-scale and extremely expensive welfare system for the city's insane paupers.

Ray's requests for radical and costly change evidently annoyed his colleagues on the Board. According to one commentator, in 1873 "Dr. Ray was ejected from office for political reasons."\textsuperscript{80} Ray had always couched his requests for reform in terms of moral imperatives. Christian communities had no choice, he said, but to enact needed reforms for the insane. Though the reasons for his dismissal are unknown, Ray's colleagues on the Board likely found his grandiose proposals unrealistic and his moral indictments disquieting. The Board never enacted Ray's reforms during his lifetime and the conditions of confinement for the city's insane paupers
remained bad. The experience contributed to his growing sense of frustration over the prospects for significant legislative reform.

More disconcerting even than the Guardian experience was the success of Packard's crusade in the early 1870s. She succeeded in securing regulatory legislation that weakened moral treatment practices. In particular she convinced the Iowa legislature to investigate the state asylum in Mount Pleasant and to pass a new law in 1872. The act required superintendents and their staffs to allow patients complete freedom in sending and receiving mail. Special mailboxes were to be placed in all wards where patients could drop their letters. This was a major infringement of the superintendent's authority and damaged the chances for successful moral treatment. 81

Following her success in Iowa, Packard journeyed east and began lobbying before legislatures closer to Ray's home. This prompted him to predict in 1874 that

a few years hence, it will become one of the curiosities of human credulity that, in the seventh decade of the nineteenth century, a poor crazy woman, relying only on her nimble tongue, visited the legislatures of the several States, and persuaded them to pass an act, framed by herself, for the government and surveillance of their hospitals for the insane . . . 82

Not only did Packard want mailboxes in all asylums, she also
advocated a roving commission with power to visit all mental hospitals and examine the complaints of patients.

Pennsylvania, Ray's home, recently had passed a modified mailbox bill which made it illegal for superintendents to tamper with letters between patients and their lawyers. Ray said it was a bad sign. "Revolutions it is said, never go backwards," he feared,

so in the fulness of time we [in Pennsylvania] may have here letter-boxes in the halls, whereby men of proverbial wisdom and prudence will proclaim their follies to a jeering world, and women, delicate, refined, and modest,—wives, mother, sisters, daughters,—moved, as they often are in insanity, by the coarser feelings of their nature, will reveal their inmost thoughts in a manner the consciousness of which, on recovery, will overwhelm them with mortification and dismay.83

In 1875 a mailbox bill was pending in Rhode Island and Ray wrote to his friend Sawyer at Butler. He characterized the bill as "anomalous & indefensible," and urged Sawyer to challenge its backers to present even a single case of abuse which might prove the necessity of such a gross interference in asylum management. "It is not the custom," he said, "to legislate in this high handed manner against evils not shown to exist." Mailboxes in the hospital wards "would be a standing proclamation to the patients that the officers are unworthy of their confidence . . . ."84

Exasperation typified many of Ray's writings about con-
finement during the last years of his life. In October 1879, only a year and a half before he died, he presented what was to be his last paper on the subject before the Philadelphia Social Science Association. Ray told his audience nothing new, nothing he had not already said in many ways before many audiences: private involuntary commitment was essential to all parties; it served the health of the patient, and protected the sensibilities of those who assumed responsibility for the commitment; any judicial procedure would subject friends and family to humiliation, and juries and roving committees so warmly advocated by the public only interfered in medical concerns.  

One last time Ray insisted that no abuse existed. In his quarter century as a superintendent he had had charge of three thousand patients. Not one of them, he said, was wrongly confined. Each was clinically insane. Yet popular mistrust of asylums persisted. "It is notorious," he said, "that any body can obtain the ear of the public, who can tell a tale of false imprisonment, however improbable; and, on evidence that would not be listened to in a court of justice, the newspaper press is swift to pour out the vials of its wrath on the supposed offender." Popular hostility had gotten so bad in Philadelphia, Ray said, that "leading
physicians in this community, to avoid the peril of a suit at law, have concluded to sign no more certificates of insanity."

5

Times changed but Ray did not. In 1850 he had presented to his fellow superintendents a model law for involuntary confinement. Fourteen years later, after years of silence, he presented the plan again virtually unchanged. At last, in 1868 he shepherded the "Project" through difficult debates and won a unanimous endorsement. From then until his death in 1881 he carried the reforms to state legislatures and urged their necessity in the nation's journals. He never retreated.

In spite of an increasingly hostile public, Ray persisted in his advocacy of the authoritarian confinement model. It was not that he lacked alternatives; he intentionally selected a course that accorded patients no due process. He did this for several reasons. He claimed that there was no abuse of freedom and, in the absence of an evil, restrictive legislation was dangerous. Public suspicions of wrongful confinement offered poor reasons to enact safeguards. Any retreat from his stated ideal would have lent credence to charges of unprofessional behavior among physicians. Ray proposals had always stressed the honesty of doctors, those who signed
the certificates and those who ran asylums. Any agreement on
the need of libertarian safeguards might have cast doubts on
the integrity of his profession.

Most important, Ray relied on the private commitment ap-
proach because his ideals of treatment required it. Moral
treatment stressed the absolute control of the physician.
To heal insanity, superintendents minutely regulated the
lives of their patients in order to create a wholesome en-
vironment devoid of irritating influences. The last things
moral therapists wanted were judicial proceedings, patient
interviews with lawyers, or the frequent visits of insanity
commissioners. At best these interferences could do no
more than guard against evils that did not exist. At worst
they wrecked chances of recovery.

Ray and his libertarian opponents viewed involuntary com-
mitment from different perspectives. The public and even
Ray's colleague Parigot viewed confinement from the perspec-
tive of people who somehow found themselves wrongly confined.
What would they do? What protection did the law afford? Ray,
on the other hand, simply dismissed any notion of unjust
commitment and viewed matters from the superintendent's posi-
tion, from the perspective of an authority figure, scientist,
and humanitarian. Never did he imagine himself as a free man
restrained. Never did he question his own sanity.
Notes


6 Ray to Doe, July 10, 1868, Manuscript Collection, Isaac Ray Memorial Library, Butler Hospital, Providence, Rhode Island.


8 Ibid., p. 589.

9 Ibid.

10 Ibid., p. 597.

11 Ibid., p. 598.

12 Ibid., p. 599.

13 Ibid., p. 591.

14 Ibid., p. 592.

15 Ibid., p. 601.

16 Ibid., pp. 601-602.

17 Ibid., p. 602.


21. Ibid.

22. Ibid.

23. Ibid., p. 229.

24. Ibid.

25. Ibid., p. 238.

26. Ibid., p. 238


32. 3 (Jan. 1869): 193-217.


34. 12 N.H. 60 (1842).

35. Ray to Doe, Aug. 7, 1868, Manuscript Collection.
36 Doe to Ray, Aug. 18, 1868, ibid.
37 Ibid.
38 Ibid.
39 Ray to Doe, Aug. 23, 1868, ibid.
40 Ibid.
41 Doe to Ray, Oct. 4, 1868; Ray to Doe, Nov. 8, 1868, ibid.
42 Doe to Ray, Oct. 5, 1868.
43 Ray to Doe, Nov. 8, 1868.
45 Ibid., p. 194; Ray discussed the Illinois law on pp. 211-12.
46 Ibid., p. 194.
47 Ibid., p. 199.
48 Ibid.
49 Ibid., p. 200
50 Ibid.
51 Ibid., p. 201.
52 Ibid., p. 201-201.
53 Ibid.
54 Ibid., pp. 208-210; quotation on p. 208.
55 Ibid., p. 216.
56 Ibid., p. 212; Ray also rejected the commission idea on these grounds (pp. 213-214).
57 Ibid., p. 212.
58 Doe to Ray, Jan. 4, 1869, Manuscript Collection.
59 Ibid.
60 Ibid.
61 Ray to Doe, Jan. 12, 1869, ibid.; for Ray's revised article see "Confinement of the Insane" in Contributions to Mental Pathology, pp. 168-202.
63 "Handwritten Lectures," Manuscript Collection.
64 Ibid., pp. 2-3.
65 Ibid., p. 7.
66 Ibid., p. 10.
67 Ibid., p. 12.
69 Ibid., pp. 13-14.
70 Ibid., pp. 31-32.
71 Ibid., p. 34.
72 Ibid.
73 Ibid., p. 36.
74 Ibid., pp. 35-36
76 Ibid., p. 260.
77 Ray to Sawyer, March 3, 1876, Manuscript Collection.
79 Ibid., pp. 151-56.


83 Ibid., p. 379.

84 Ray to Sawyer, Feb. 21, 1875, Manuscript Collection.


87 Ibid., pp. 6-7.
CONCLUSION

"A Portrait of Sisyphus"

"We can add but little, if any thing, to what, in one place or another, we have already said on . . . medical jurisprudence, and if we are forced to the Sisyphaean task of reiterating facts, with no other result than to see them utterly disregarded, or condemned as dangerous and visionary, it certainly is not our fault."

—Isaac Ray, 1847

"I have been writing on this subject 35 years, but I doubt if I have said any thing new the last 20 years. At my time of life, one finds that it does not necessarily follow that an error once fairly killed will stay killed. The process must be repeated over and over as if an error had more lives than a cat."

—Isaac Ray, 1869

Some historians of Ray, especially the psychiatrists, have characterized him as nearly mythological. Ray himself may have shared a similar self-perception. In 1847, when criticizing the criminal law, he referred to the "Sisyphaean task of reiterating facts" which he had already discussed many times in many places. Later, in 1869, he told Doe that he had spent much of his career killing and rekilling the same persistent errors in the law.

Ray likened himself to the Sisyphus of Greek mythology who was condemned to push a huge stone up a hill in Hades, only to have it roll back upon him as he neared the summit.
Ray had good reasons for drawing this comparison with Sisyphus. In 1843 his critique of the law received a valuable endorsement in McNaghten's acquittal. But whatever progress the trial signified was immediately repudiated when the Justices of the Queen's Bench announced their McNaghten Rules. Later, in the 1860s and 1870s Ray believed that he had found in Doe's New Hampshire doctrine an acceptable solution to the problems of legal insanity tests. But in the following years, he lived to see the rule completely ignored. In confinement law Ray labored hard to persuade his fellow medical superintendents to endorse his model law for involuntary commitment. When he finally succeeded in winning their approval after nearly twenty years of effort in 1868, the public largely ignored it and demanded instead judicial safeguards to protect patients' liberty.

A major problem was that Ray never fully understood the differences between medical and legal discourse. In 1871 a legal reviewer of the fifth edition of the Treatise noted this deficiency. He said that Ray had looked "at all questions of insanity from a medical and not from a legal point of view . . . . Insanity may be the same thing from whichever point it is viewed," he said; "but the question of its treatment is different." The reviewer said that medicine
focused on the individual while the law aimed at protecting the whole of society. Punishment of a criminal defendant was not only for the prisoner's benefit. It also served as a deterrent to the rest of the community. The reviewer even wondered if there might not be a merit in punishing the insane. Punishment would keep deranged criminals from repeating their acts and it would furnish an example for the rest of society.  

From the reviewer's vantagepoint, the law provided a necessary social ritual which benefitted its observers. It was a public affirmation of right and wrong. To him it would not have been surprising that nineteenth-century legal tests of responsibility stressed knowledge of right and wrong. Since morality was so important to the peace and safety of society, the law required that individuals be treated as responsible free agents.

But Ray's medical science was a wholly different enterprise. It was not, consciously at least, a ritual for the community's benefit. Ray's idea of individual responsibility was different than his legal critics. To Ray men were less free agents than marvelous machines. Environment, disease, and heredity threatened man's freedom of choice. Ray considered the law's blanket assumption that man could choose
good over evil to be ill-founded. Often man had no choice but to obey physiological laws. Man's laws with their emphasis on deterrence were futile enterprises where the insane were concerned; nature's laws were ascendent.

Ray's answer to legal problems was to remove legal decision-making from judicial offices and give the authority to physicians. His ideal tests of criminal responsibility, whether the rules of the French penal code or Doe's New Hampshire doctrine, denied judges the opportunity to define insanity. If possible he wanted commissions of respectable laymen to decide the issue completely outside the public courtroom setting. Finally, Ray wanted insane defendants removed to asylums without trial where superintendents would decide their future. In the commitment process, Ray likewise would give greater authority to physicians who signed certificates of insanity than to judicial officers. Wherever possible he would strengthen the quasi-judicial character of physicians and reduce the real authority of judges and juries.

In the twentieth century courts have instituted many reforms like those which Ray championed. Psychiatrists today examine many criminal defendants prior to their trials to determine their fitness to stand trial. Those prisoners whom psychiatrists find unfit usually enter treatment facilities
where other mental health professionals decide their futures. Moreover, for those prisoners who actually go to trial and plead insanity courts seldom use right and wrong tests of criminal insanity any longer. Today courts employ a number of tests, most of which recognize that mentally ill defendants often commit acts they knew were wrong.

These modern legal reforms are not however the direct product of Ray's efforts. Surely his long career and frequent criticisms of the law helped to define the direction later reforms would take. But widespread acceptance of his position has depended more on subtle shifts in intellectual history. In the nineteenth century Ray's deterministic view of man was a minority position. Not only did lawyers reject it but many in his own profession like John Gray also opposed it. But in the twentieth century Ray's willingness to assign responsibility to abstract forces rather than to actual people seems more agreeable. Now there is a greater consensus than in Ray's lifetime that environmental forces like disease, poverty, and racial oppression can alter people's moral and legal accountability. Only with this shift toward intellectual determinism could Ray's criminal law reforms have succeeded.

In the final analysis Ray was a great psychiatrist as
many scholars have suggested. But his importance was due less to his ideas than to his persistence. Ray was not a brilliant man, only an important one. His ideas were the ideas of others. Phrenology and later moral insanity were the hallmarks of his psychology. Yet neither were concepts of his own creation. Ray was only an average scientist who early adopted the ideas of others and pursued a career in their behalf. He got his ideas from scholarship, not from personal observation and insight. And despite his panegyrics to Bacon, Ray was Baconian only philosophically. He always used the observations and theories of others. What made Ray important was his unflagging energy, his sincere devotion to profession, and his unquestioning faith in progress.

Like Sisyphus who never quite got the stone to the top of the hill, Ray never succeeded in convincing lawyers or the public to approve his reforms. But the effort left its traces. More than any other psychiatrist of his lifetime he shaped the nineteenth-century debate over medical-legal relations. Later psychiatrists, whether they were aware of it or not, were in his debt. Future Sisyphuses, pushing their stones, had a route well marked. The difficult turns and treacherous paths had, at least in part, been marked.
Notes


Ray to Doe, May 24, 1869, Manuscript Collection, Isaac Ray Memorial Library, Butler Hospital, Providence, Rhode Island.

BIBLIOGRAPHY

I. Primary Sources

A. Manuscripts

Butler Hospital Papers, John Carter Brown Library, Brown University, Providence, Rhode Island.

Parker Cleaveland Collection, Bowdoin College, Brunswick, Me.

Dorothea L. Dix Collection, Houghton Library, Harvard University, Cambridge, Mass.

Edward Jarvis Collection, Francis A. Countway Library of Medicine, Harvard University, Boston, Mass.

Thomas S. Kirkbride Collection, Historical Library of the Institute of the Pennsylvania Hospital, Philadelphia, Penn.

Letter Collection, Alumni Office, Bowdoin College, Brunswick, Me.

Horace Mann Papers, Massachusetts Historical Society, Boston, Mass.

Manuscript Collection, Isaac Ray Memorial Library, Butler Hospital, Providence, Rhode Island.

Charles Sumner Collection, Houghton Library, Harvard University, Cambridge, Mass.

B. Works Written by Ray

Address Delivered on the Occasion of Laying the Course Stone of the State Hospital for the Insane, At Danville, Pa... August 26th, 1869. Harrisburg: Theo. F. Schaffer, 1869.


"Delusion Considered as a Test of Insanity." American Journal of Medical Sciences 56 (July 1868): 73-87.

Education in its Relation to the Physical Health of the Brain. Boston: Ticknor; Reed, and Fields, 1851.


"Hospital Plans." American Journal of Medical Sciences n. s. 71 (April 1876): 485-96.

"Ideal Characters of the Officers of a Hospital for the Insane." American Journal of Insanity 39 (July 1874): 64-83.


"Insane Convicts." (Philadelphia) Medical Times 3 (March 22, 1873): 393-94.


"The Insanity of King George III." American Journal of Insanity 12 (July 1855): 1-29.
"The Insanity of Women Produced by Desertion or Seduction."  

"The Labor Question, and Hospitals for Incurables."  

[_____]  

[_____]  


[_____ ]  

"Life and Trial of Dr. Abner Baker, Jr."  American Journal of Insanity 3 (July 1846): 26-35.

[_____]  

[_____]  
"Madness; Or Maniac's Hall: A Poem in Seven Cantos. By the Author of 'the Diary of a Solitaire.'"  

[_____ ]  


[_____ ]  

[_____]  

[_____ ]  

"On the Isolation of Persons in Hospitals for the Insane."  
Penn Monthly 11 (Jan. 1880): 22-34.

"Pathological Psychology." American Journal of Medical Sciences n. s. 61 (Jan. 1871): 244-45.


"Prognosis in Mental Disease." American Journal of Medical Sciences n. s. 60 (Oct. 1870): 390-400.


"Recoveries in Mental Disease." Alienist and Neurologist 1 (April 1880): 131-42.


Review of G. Fielding Blanford, Insanity and its Treatment; Lectures on the Treatment, Medical and Legal, of Insane Patients, in American Journal of Medical Sciences n. s. 61 (April 1871): 531-39.


Review of On the Government of the Retreat for
the Insane, at Hartford, Connecticut, in American Journal
of Medical Sciences n. s. 68 (July 1874): 211-25.

Review of John Ordronaux, The Jurisprudence of
Medicine . . ., in American Journal of Medical Sciences
n. s. 59 (Jan. 1870): 214-17.

Review of John Ordronaux, "The Proper Status of
the Insane and Feeble Minded," in American Journal of
Medical Sciences n. s. 73 (Jan. 1877): 208-211.

Review of Isaac F. Redfield, The Law of Wills,

Review of Report on Insanity and Idiocy in Mass-
achusets, by the Commission on Lunacy, under Resolve
of the Legislature of 1854, in North American Review
82 (Jan. 1856): 78-100.

Review of J. Russell Reynolds, On the Scientific
Value of Legal Tests of Insanity, in American Journal of
Medical Sciences n. s. 65 (April 1873): 460-66.

Review of D. H. Tuke, Essay on Changes in the
Moral Treatment of the Insane, in American Journal of
Insanity 1(April 1845).

Review of D. H. Tuke, Illustrations of the In-
fluence of Mind upon the Body in Health and Disease . . ., in American Journal of Medical Sciences n. s. 65 (April 1873): 447-54.

Review of Francis Wharton, A Monograph on Mental
Unsoundness, in American Journal of Insanity 12 (Jan.

"Shakespeare's Delineations of Insanity." American Journal
of Insanity 3 (April 1847): 289-332.

"Singular Malformation of the Heart." Boston Medical

"The Statistics of Insane Hospitals." American Journal of
Insanity 6 (July 1849): 23-52.

"Synopsis of the Laws of the Several States of the Union


"Ventilation in Hospitals." American Journal of Medical Sciences n. s. 70 (Oct. 1875): 461-69.


C. Other Books and Articles


General Catalogue of Bowdoin College and the Medical School of Maine. Brunswick, Me.: Published by the College, 1894.


Hunt, Isaac H. Astonishing Disclosures! Three Years in a Madhouse, By a Victim, Written by Himself. A True Account of the Barbarous, Inhuman and Cruel Treatment of Isaac H. Hunt, in the Maine Insane Hospital, in the Years 1844, '45, '46, '47 ... n. p.: Published by the Author, 1852.


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The Trial of William Freeman, for the Murder of John G. Van Nest, Including the Evidence and the Arguments of Counsel, with the Decision of the Supreme Court Granting a New Trial. Auburn, N. Y.: Derby, Miller & Co., 1848.


D. Periodicals

Alienist and Neurologist

American Journal of Insanity

American Journal of Medical Sciences

American Jurist

American Law Review

American Quarterly Review

Annals of Phrenology

Atlantic Monthly

Boston Medical and Surgical Journal

Boston Medical Magazine

Christian Examiner

(Portland, Me.) Daily Courier

(New York) Evening Post

(Philadelphia) Medical Times

Medico-Legal Journal

Monthly Law Reporter

New England Galaxy
New England Magazine

New York Times

North American Review

Penn Monthly

Quarterly Journal of Psychological Medicine and Medical Jurisprudence

Transactions of the American Medical Association

E. Hospital Records


Maine Insane Hospital, Annual Reports, 1841-43. Augusta: Contract Printers, 1841-1843.

F. Association Proceedings


II. Secondary Sources

A. Books and Articles


Benson, A. C., ed. The Letters of Queen Victoria: A Selection from Her Majesty's Correspondence Between the Years 1837 and 1861. New York: Longman Green's and Co., 1907.


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B. Unpublished Material

Pitts, John Albert. "The Association of Medical Superintendents of American Institutions for the Insane,