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# STATE LEGISLATION PROVIDING FOR THE MENTAL EXAMINATION OF PERSONS ACCUSED OF CRIME<sup>1</sup>

S. SHELDON GLUECK<sup>2</sup>

The perennial conflict between members of the legal and medical professions on the question of the relation of mental abnormality to criminal responsibility is a matter of common knowledge. Every sensational trial brings it again to the forefront, and in almost every book of an exclusively legal or medical character, we find spirited attacks against the views held by the opposing camp. But in spite of this continuous disagreement on questions of theory, we also find increasing evidence that the differences between the two professions are more and more giving way to a spirit of whole-hearted co-operation.

This conscious attempt at co-operation is especially manifest in recent Massachusetts legislation providing for the routine mental examination of certain classes of persons accused of crime. Before considering the Massachusetts act, however, we will briefly review the legislative provisions in other states, so that we may have some basis of comparison.

The medico-legal problem of insanity and criminal responsibility may be divided into two great classes of questions: First, the subject of legal "tests" of criminal responsibility, and how far these are in harmony with modern psychiatric science—a question involving insanity at the time of the alleged criminal act; and, secondly, insanity *after* the offense was committed, that is, either before or during trial. The former question has so often been discussed at meetings such as this that most of you are no doubt familiar with its important features. But the second problem is one not so generally discussed. It is, moreover, daily becoming the more important one of the two, for judges and district attorneys are coming to agree with psychiatrists that it is more efficient, economical and humane to sort out, *before trial*, those accused persons who are mentally abnormal than to sub-

<sup>1</sup>Address delivered before the Massachusetts Hospital Trustees Association, semi-annual meeting, Oct. 25, 1923, Taunton State Hospital; reprinted from the Bulletin of the Hospital Trustees Association for 1923.

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ject such persons to the ordeal of a trial only to be compelled to transfer them early during their prison service to some hospital for the mentally ill. The second question has also been the subject of much more specific legislative provision in America than has the first. For these reasons we will confine ourselves at this time to a survey of the legislation on the second problem, namely, insanity of a defendant after the time when he was supposed to have committed the alleged offense, more particularly, insanity *before trial*.

In early English law, it was provided, in the language of Blackstone, that—

“ . . . if a man in his sound memory commits a capital offense and before arraignment for it he becomes mad, he ought not to be arraigned for it, because he is not able to plead to it with that advice and caution that he ought. And if, after he had pleaded, the prisoner becomes mad, he shall not be tried—for how can he make his defense?”<sup>3</sup>

The law in American states today is not essentially different from the old English law, except in one or two respects. In most states, for example, some definite procedural machinery is set in motion in case of the alleged insanity of a defendant before or during trial; and in some jurisdictions the showing of probable insanity which is required to be made on the defendant's behalf before the trial court will set such investigatory machinery in motion is also definitely prescribed by statute. At common law the question of insanity at trial was usually settled by a jury, but occasionally personal inspection by the judge of a defendant whose counsel claimed such defendant to be insane at or before the trial took the place of a special jury trial of that question. Again, at common law an individual found to be totally insane by one of these methods was kept in prison until he could be tried; today, he is usually, though not in all jurisdictions, confined in a hospital for mental diseases.

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

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<sup>3</sup>Commentaries, IV, p. 24.

In some six or eight states, of which New York<sup>4</sup> is an example, the law provides for appropriate investigatory procedure if "it shall appear" that accused awaiting trial is insane; but such legislation does not usually specify to whom and in what manner the accused shall appear to be insane, before an examination of his mental condition can be inaugurated. Rhode Island is more specific, providing for appropriate investigation on petition of the agent of the state charities and corrections or an officer having custody of the defendant.<sup>5</sup> In Connecticut the fact of defendant's insanity must be brought to the attention of the court by the sheriff of the county jail.<sup>6</sup> In Pennsylvania the jail physician or some executive officer of the institution where accused is confined awaiting trial may initiate proceedings for the mental examination of the defendant by filing with the court an application for commitment, prescribed by the Department of Public Welfare.<sup>7</sup>

In three states, of which Vermont<sup>8</sup> is an example, proceedings for the observation of the defendant in the state hospital are initiated only if a technical plea of insanity is made or if the court believes it will be made. Indiana broadly provides for the proper procedure if the judge, either of his own knowledge or upon the suggestion of *any person*, has "reasonable grounds for believing" accused insane.<sup>9</sup> In Wisconsin, if the court is informed "in any manner" that accused awaiting trial "probably is" insane or feeble-minded, the court must grant an inquisition to examine him.<sup>10</sup>

All these provisions are open to the objection that *initiation of proceedings* is left to persons untrained in psychiatry;<sup>11</sup> in other words, it is largely a matter of chance whether or not the defendant is given a mental examination before (or even during) trial, unless his symptoms are strikingly suggestive of the "raving maniac," or the "driveling idiot."

The Commonwealth of Massachusetts has a unique measure that constitutes the most radical step yet taken to provide for the mental examination of accused persons awaiting trial. It is the first piece of legislation making the mental examination of those indicted for cer-

<sup>4</sup>Gilbert's Criminal Code (1921), sec. 836.

<sup>5</sup>Public Laws (1909-1910), Chap. 642, sec. 35.

<sup>6</sup>General Stats. (Rev. of 1918), sec. 6584.

<sup>7</sup>Act of the General Assembly No. 414 (1923), Art. III, sec. 308.

<sup>8</sup>General Laws (1917), sec. 2602.

<sup>9</sup>Burn's Ann. Stats. (1914), Vol. 1, sec. 2071-d.

<sup>10</sup>Wis. Stats. (1921), Vol. II, sec. 4700.

<sup>11</sup>It is doubtful whether even the average jail physician, without experience in psychiatry, is qualified to pass on this question.

tain classes of crimes a *routine matter*, not dependent upon the alertness, desires or caprice of those in charge of the accused. Theoretically, at least, *all persons* falling within one of the three categories mentioned by the law *must* be mentally examined before trial, regardless of whether or not they exhibit symptoms of mental abnormality recognizable by the non-expert in mental diseases, whether such non-expert be a police officer, jail warden, counsel for the defense, the prosecuting attorney or the judge. We will return to a consideration of this act a little later.

Surveying the state legislation from the second point of view, namely, by considering the types of machinery set in motion when once the mental status of the accused before the trial is brought to the attention of the court, we again find several distinct classes. Some states have no definite procedure, and there it is left to the discretion of the court as to how it will answer the question of supposed mental abnormality. In a small group of states, such as New Jersey<sup>12</sup> and Rhode Island,<sup>13</sup> it is provided that the judge, taking such evidence as he may desire, shall conduct an inquiry into the mental condition of the accused, who, if found insane, is committed for an indefinite period to a state hospital.

In a number of states, of which New York<sup>14</sup> and Alabama<sup>15</sup> are typical, it is within the discretion of the judge as to whether or not he shall call a jury to try the issue.

A group of states, of which Ohio<sup>16</sup> is an example, provides specifically for a jury trial to pass upon the alleged insanity of an accused person who is in confinement under indictment, the hearing being in the nature of an elaborate, technical trial, exactly as if the main issue, the guilt or innocence of the defendant, were being tried.

In Kansas<sup>17</sup> the inquiry may be by the court, a commission, or special jury; and in Maine,<sup>18</sup> New Hampshire,<sup>19</sup> and Vermont,<sup>20</sup> if the court believes in a plea of insanity will be filed, it may send accused to the state hospital for observation. Pennsylvania provides for an inquiry either by two "qualified physicians," or a commission composed of two physicians and a lawyer.

<sup>12</sup>Laws of N. J. (1918), Chap. 147, sec. 437. The New Jersey law applies also to those appearing to be "*epileptic, imbecile or feeble-minded.*"

<sup>13</sup>Public Laws (1909-1910), Chap. 642, sec. 36.

<sup>14</sup>Gilbert's Crim. Code (1921), sec. 836.

<sup>15</sup>Crim. Code (1907), sec. 7180.

<sup>16</sup>Ohio Gen. Code (Throckmorton) (1921), secs. 13614 and 13577.

<sup>17</sup>Gen. Stats. (1915), sec. 10043.

<sup>18</sup>Rev. Stats. (1916), Chap. 139, sec. 1.

<sup>19</sup>Laws of 1911, Chap. 13, sec. 1.

<sup>20</sup>Gen. Laws (1917), sec. 2602.

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

Returning now to the Massachusetts law, we see that it is easily the most far-sighted piece of legislation on this subject yet passed. Much credit is due to Dr. L. Vernon Briggs, whose tireless efforts were largely instrumental in having the law enacted, and who, in addition, is keeping an eye on its practical operation; for many reformers are responsible for much legislation on the statute books, who, once the laws have been enacted, sit back complaisantly and expect the laws to enforce themselves. The original Massachusetts law went into effect in September, 1921.<sup>21</sup> Since then the law has been slightly amended. The original act provided that—

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

Notice, in the first place, that this act eliminates the bad features present in all other state legislation on the subject; that is, as was pointed out, it makes a *routine procedure* of the examination of the classes of offenders mentioned. Further, the examinations are made by a *neutral, unbiased agency* and by experts trained and experienced

<sup>21</sup>General Laws, Chap. 123, sec. 100A.

in mental medicine; and the examinations are made before trial and before it is decided whether or not to resort to the defense of insanity. Moreover, the examination is not a technicality-ridden procedure, before a judge and in the presence of the district attorney, or before a judge and jury, which, in other jurisdictions, really amounts to a special trial preceding the trial on the issue of guilt.

That the provision for such routine mental examination ought to result in the accumulation of valuable scientific data on the subject of the mental make-up of the recidivist is apparent. But more immediate good results are to be expected from such a law. In the first place, the mentally unsound can be spared the ordeal of a trial; secondly, the state and its officers will be spared a vast expenditure of time, effort and money spent in the prosecution of those who ought not to be tried, in those cases where the findings of the unbiased experts, appointed by a neutral agency before trial, are accepted by the defendant's counsel, the district attorney and the court as a working basis for the disposition of the case without trial. Further, the reports of the experts, impressing upon district attorneys and judges that in cases such as mental defectiveness, constitutional psychopathic inferiority, etc., defendants are at the most only partially responsible for their conduct, regardless of their legal responsibility, will serve to educate these public officials; and we may hope, as a result, for a more humane and sensible disposition of the vexing "border-line" cases of the "semi-responsible"<sup>22</sup> than is now characteristics of most jurisdictions. Indeed, the opportunity of the examiners to educate judges and district attorneys to the psychiatric point of view by means of complete, clearly and forcibly presented reports cannot be overemphasized. Unfortunately, an examination of the reports already filed indicates that not all examiners have been making such detailed and well-rounded reports as they might, or as would impress a court; but one can hardly criticize an expert on such score who has been devoting much of his time, without compensation, in the public-spirited duty of examining persons accused of crime. One of the provisions in the amendment to the law, recently passed, is for the payment of the nominal sum of four dollars per expert per examination; this is hardly better than no payment at all, as when no compensation was forthcoming the experts appointed by the state voluntarily performed what they considered to be their public duty, and now it is difficult to blame them if some of

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<sup>22</sup>See "The Semi-Insane and the Semi-Responsible," Joseph Grasset, transl. by S. E. Jelliffe, Funk & Wagnalls Co., N. Y. and Lond., 1907.

them are more insulted than enriched by the four-dollar fee for an examination that means so much in the way of responsibility and that might require three or four visits and interviews of several hours at a time. It is clear that the efficiency of the law, as far as requiring better reports is concerned, would be enhanced if the experts were compensated to a degree commensurate with their skill and the importance of their work. This then is the Massachusetts law as it appears in the books; let us briefly glance at the "law in action."<sup>24</sup>

In a paper read by him at the Detroit meeting of the American Psychiatric Association, Dr. Douglas A. Thom (who, by the way, has devoted more thought and time to the efficient enforcement of the law than perhaps any other individual with the possible exception of Doctor Briggs, the father of the law) discussed the operation of the Massachusetts law in eighty-eight cases which had been examined when he prepared his paper. Since then, through the co-operation of the officials of the Department of Mental Diseases and of the Massachusetts courts, I have made a study of the cases examined to date, with the following results:

The number of cases reported for examination to date and not still pending is 142. Of these twenty-nine were *not examined* for the following reasons: Thirteen were out on bail and could not be found when the examiners called. One case had been nolle prossed before examination, in one the indictment had been quashed, and in three the court had imposed sentence before examination by the experts. Eleven were reported for mental examination, but, as they did not come within the provisions of the law, they could not be examined. Of these eleven, four did not fall under the law because they were indicted for *manslaughter* and were therefore not in the class of "capital offenders," and seven, because their previous records, so far as could be ascertained, involved only misdemeanors. Of the classes of cases to which these eleven belong, more will be said later. On examining the history of one of those, not mentally examined because they were out on bail and could not be found (which I selected at random), the following criminal record was disclosed:

Offense	Date	Sentence
1. Attempted larceny and assault and battery.....	1905	Case filed
2. Breaking and entering.....	1911	Probation granted
3. Larceny .....	July, 1911	Five years—Released after thirteen months
4. Burglary .....	Dec., 1913	Six months to fifteen years—Released after seventeen months

<sup>24</sup>Acts and Resolves (1923), Chap. 331, 25.

Offense	Date	Sentence
5. Robbery .....	June, 1916	Four years—Released after sixteen months
6. Grand larceny .....	Apr., 1920	Six months—Given three months for attempt to escape
7. Grand larceny .....	Mar., 1922	Not mentally examined because out on bail

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

Of the 113 *examined* by the experts, 71 had been indicted for a capital offense, and five for second degree murder or manslaughter, these five having been examined before it became established that the law did not strictly apply to them. Eight of those examined were indicted for sex offenses, twenty-seven for offenses against property (such as robbery, larceny, burglary, etc.), and two for dangerous assault with intent to rob or kill.

Surveying now the reports on mental examination of these 113 accused persons, we find that there was reported insanity, psychopathic personality, mental deficiency or defective delinquency in 38 of these, leaving 75 in whom no noticeable evidences of mental deviation from the "normal" were found. Eight of the 38 were considered insane on the first examination, and upon such finding were immediately committed by the courts either to the Bridgewater State Hospital for the Criminal Insane or some other state hospital. Two cases, reported as not insane, tried, convicted, and sentenced to life imprisonment, developed symptoms of mental disease soon thereafter in prison, and were transferred to the hospital for the criminal insane. These cases strikingly illustrate the opinion of Professor Bishop in his "Criminal Law"<sup>25</sup> to the effect that the memorials of our criminal law are written over with many cases of insane and irresponsible persons who have been unjustly executed; for in these cases, if life imprisonment had not been imposed instead of the death penalty, they would have been

<sup>25</sup>One of the most important of the notable contributions to Jurisprudence and to the work of the socialization of the law made by Dean Pound of Harvard Law School is his emphasis on the need of studying the practical working of laws. This view has resulted in such fruitful preliminary work in law reform as the Cleveland Survey of Criminal Justice. See Dean Pound's oft-quoted "Law in Books and Law in Action," 44 Amer. Law Rev., 13.

unjustly executed. Even mental examination before trial and by unbiased, experienced experts failed to disclose in these cases the presence of mental disease; how much more truth must there be then in Professor Bishop's remark when considered in the light of the fact that in many cases in other jurisdictions, which do not provide for *routine* examination of serious offenders, the question of mental abnormality may not even be brought up! As it is these individuals were unnecessarily subjected to the ordeal of a trial, and the state unnecessarily underwent the expense of time and money. That expert examination failed to disclose mental disease is indicative of the need of a longer period of observation and more intensive examination of some cases. It should be said here that an inspection of the reports of examinations made discloses the fact that in the large majority of cases the accused were subjected to a remarkably thorough examination, two or three visits not being at all uncommon in cases where there was any doubt. When it is remembered that most of the cases were examined free of charge and that many examinations were made by busy psychiatrists, such a statement is particularly significant. Inspection of the records also discloses the fact that the Department of Mental Diseases has, wherever any doubt as to the significance of a report has arisen, either written to the experts for more explicit information or asked them to call at the offices for an interview about the case. Of course, it would require a much larger staff than now at the disposal of the department minutely to verify every report filed; nor is such procedure necessary in the large majority of cases.

One of the 113 cases examined was reported not insane, but developed symptoms at the *trial*, necessitating a re-examination and his commitment to a state hospital. The diagnosis in the eleven cases thus pronounced insane has in each instance been verified by subsequent observation in the hospitals to which they were committed.

In three cases, after a thorough examination, the experts appointed by the department remained in doubt, and recommended a period of observation in a hospital; these reports were not as yet available.

Seventeen cases were diagnosed by the experts as *mentally deficient* or *defective delinquent*. The latter designation is, however, more a legal than a medical one, the defective delinquent law<sup>26</sup> providing for the commitment for an indeterminate period to the department for defective delinquents of offenders with mental defect who provide too troublesome a problem to handle in the ordinary penal institution, school for feeble-minded or hospital for the insane. An offender is

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<sup>26</sup>Acts and Resolves (1921), Chap. 270, sec. 1.

thus not really a defective-delinquent under the law until committed as such to the special department. Three of those believed mentally defective were wisely committed by the courts as defective delinquents. In several other cases, however, where the experts declared such persons to be, in their opinion, defective delinquents, the court did not commit them for indeterminate periods under the defective delinquent law, but treated them in the ordinary way; thus one of these received but six months in the house of correction. One of the mentally deficient cases, in which the indictment was for a capital offense, received a life sentence, while another, who committed homicide, received a sentence of but one year in the house of correction under a voluntary plea of guilty to manslaughter. Obviously it would have been better for all concerned if the latter could have been incarcerated, under the law, for a wholly indeterminate period. The case of one mentally defective offender, indicted for murder, was nolle prossed because of insufficient evidence to convict. Another received fifteen to twenty-one years in prison for robbery and assault, although the experts had recommended a wholly indeterminate incarceration as a defective delinquent. This prisoner, at the age of 21, had a long and checkered criminal career behind him, beginning at six years of age, when he stole \$10, through the age of nine, when he used revolvers in committing holdups, and down to the time of his examination.

I cite the case of one of these mental defectives in some detail, as it is eloquent of the need of closer co-operation of courts with psychiatrists, social workers, probation officers and others concerned, under the law we are considering and similar laws, in the socio-legal treatment of such cases.

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

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

However, in transmitting this report to the court, the Department of Mental Diseases correctly pointed out that she could not be committed to a school for feeble-minded under the Massachusetts laws, and recommended her committed to a hospital for the insane for further observation. She was so committed by order of the superior court, and on her discharge therefrom at the order of the court, the following is a part of the report made by the hospital:

“ . . . Admits having been promiscuous sexually since the age of 14 and having used alcohol since the age of 19. She further admits five court sentences, two for adultery, and three for drunkenness. . . . Our formal diagnosis . . . is mental deficiency—low grade moron. From the medical standpoint we would recommend an indefinite sentence to Sherborn Reformatory, as we feel that this individual is quite unable to keep out of trouble if allowed to go at large.”

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

It is easy to criticize the court's action in such cases, but the fault often does not lie with the court. There exists at present in Massachusetts no place to which *female* defective delinquents of the type of this case can be committed.<sup>27</sup> It is true that this woman could have been committed to Sherborn as recommended; but the sentence there would have to be for some definite, and hopelessly inadequate, period, and no special facilities for the treatment of such cases exist in prisons for women; besides, this woman has a child, which complicated the problem. As a matter of fact, with so low a mental basis to build upon, but little good can be done by the ordinary penal and reformatory methods in such cases. Obviously, however, probation is even a less satisfactory device for dealing with them.

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

The diagnosis in seven cases was “*psychopathic personality*” or “*constitutional psychopathic inferiority*.” It is noteworthy that this condition was found in only seven out of 113 cases examined; this is an interesting contradiction of those who insist that if psychiatrists

<sup>27</sup>Although the original defective delinquent law provided for the treatment of female defective delinquents at one of the institutions for female prisoners, it was found that a special plant and equipment would be necessary to cope with this problem; no separate institution for female defective delinquents is in existence in Massachusetts at this time.

had more to do with the criminal law they would find almost all criminals irresponsible and would throw them into "constitutional psychopathic inferiority" where no definite psychosis could be established. In one of these, a capital case, the experts called the attention of the court and district attorney to the defendant's condition of "border-line" mental disease, and these officials agreed that while not absolutely irresponsible for his criminal acts, such an individual should be considered as only partially responsible; and he was given a life sentence. This case illustrates the kind of legitimate influence that can be exerted by unbiased experts to educate judges and prosecutors and to lessen the rigor of the law in cases such as this, wherein an inflamed public opinion demanded the death penalty—a fact which members of the jury conveyed to the district attorney in the case, after their discharge, when he had agreed to accept a plea of second degree murder on the recommendation of the experts. Here a wise social disposition was made of a type of case that has been the source of much medico-legal discussion, the problem of the semi-responsible. The prisoner has been placed for the rest of his life where he can do no further harm, and at the same time his mental condition and limited responsibility were considered and balanced against the legal demand of the extreme penalty.

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

"Age 29; divorced; . . . . Father deserted when (patient) three years of age. Became a state ward; attended school to the eighth grade.

"At 11 years sent to Lyman School as a stubborn child, remaining for three years; then transferred to Concord Reformatory for larceny, where he stayed 14 months; later committed to State Prison for burglary and larceny, where he served 4 years; from 1908 to 1911 was in the U. S. Army, was arrested as a deserter and served a sentence in Leavenworth. Has also served a year and one-half at Blackwell's Island, a sentence at Sing Sing and three months at Holmesburg, Pa.

"Has always been of nervous make-up, troubled with insomnia, an occasional user of morphine. Eleven days prior to arrest was paroled from State Prison.

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

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

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

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

In all such cases and in most of the cases of defective offenders the best of laws can do but little, until society, through its machinery for legal regulation of the social order, decides to take the radical step of incarcerating such unstable offenders for a wholly indeterminate period, its actual length to depend not upon the wishes of the trial judge, who has had little opportunity, if any, to study the offender and his development under penal and correctional treatment, but on the judgment of highly-trained prison officials who can study the behavior of the offender over a long period of time, and who are logically the

ones to say when such offenders can reasonably be expected to "make good" in society. Our boards of parole are attempting to do this now, but, unfortunately, some members of such boards are wholly untrained and unskilled in the problems with which they have to cope; adequate compensation, to attract highly skilled and thoroughly trained officers for this important branch of social engineering, is necessary. In the meantime, the education of judges and legislators in the social and psychological aspects of their professions is necessary.

To summarize the foregoing, out of 142 cases reported for examination, only 113 were examined, of which 71 had been indicted for a capital offense, the remainder coming under the other two categories of the law. Of the 113 examined, mental abnormality was found in 38, of which 11 were insane, three were recommended for further observation, 17 were found mentally deficient (of which three were committed as defective delinquents), and seven were diagnosed as psychopathic personality or constitutional psychopathic inferiority. All the insane were committed to insane hospitals, several of the mentally defective and psychopathic were wisely handled in conformity with the recommendations of the experts, and some not so satisfactorily. It is gratifying to note, however, the comparatively large number of instances in which public-spirited judges and prosecutors co-operated with psychiatric experts in a wise social disposition of problems of mutual interest to the law and medicine. With the progress of the work, wiser and more intimate co-operation may confidently be looked forward to.

Let us now briefly criticize the law by way of concluding our remarks: First, it applies, under the first category, only to *capital* offenders, thus making no provision for second degree murderers or those indicted for manslaughter. In the second category, that is, persons *known* to have been *indicted* for any other offense *more than once*, those previously indicted but once cannot be examined. In the third category, those previously convicted of a *felony*, criminals with long records of *misdemeanors* are not included. It is well known that the most promising material for the study of recidivism is among those who for various causes have had a long career as petty offenders. The line between misdemeanor and felony is, after all, artificial, when the distinction is considered from the psychiatric point of view; and the relationship of the mental condition to the illegal act is equally important in misdemeanor and felony.<sup>28</sup>

<sup>28</sup>Of the 9,219 occupants of our county jails (Massachusetts) in 1922, 59 per cent had served on an average of six previous sentences. (Statement of

Secondly, the reporting of the cases depends upon the clerks of the courts, who are not compelled to make such reports, if they do not, in the language of the statute, *know* of the previous records of offenders. Obviously, out of the vast number of cases which have come up since the law went into effect, more should have been reported than 142. But even if the clerks all willingly co-operated, the only reliable source of information as to prior criminal offenses is in the office of the Deputy Commissioner of Probation, the records of which, though excellent, cover but twenty-one courts of the state and about sixty per cent of the criminal business. Manifestly, before the law can operate successfully, thorough records of criminal offenses will have to be established covering the whole state; and even then, there is no centralized federal bureau of criminal records covering and co-ordinating criminal information in the various states, so that offenses in other jurisdictions are often unknown.

Thirdly, it will take some time before trial judges *co-ordinate* their *disposition* of cases with the experts' reports on such cases; the problem, in other words, is the fundamental one of co-ordination and effective inter-relation of all the agencies that deal with the criminal from the moment of his arrest to the time of his ultimate return to society. This, in my opinion, is the most fundamental problem to be solved in the field of crime as well as in other fields of social endeavor. It would be interesting to discover, for example, how many social and public agencies have been involved in the treatment of various cases arising in the field of social work, how much duplication and working at cross-purposes there has been, etc. Whether the work of co-ordination of effort among the various agencies that deal with the criminal should be done by a Ministry of Justice, as some have proposed, is a problem well worth pondering over.

In spite of these patent defects of the Massachusetts law, however, it is reiterated that this provision for the mental examination of persons accused of crime, even as it stands today, is far in advance of any similar legislation in any state of the Union. Its efficient principle is to reduce to a minimum the trial of persons who, because of mental abnormality, can more wisely be disposed of without a formal trial. It is the first step in the direction of placing the question of the socio-

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Massachusetts Civic League, in the Monthly Bulletin, Nov., 1923, of the Massachusetts Society for Mental Hygiene.) These petty offenders must commit one of the felonies provided for by the Massachusetts law for mental examinations, before they can be examined. The Civic League is now circulating an initiative petition for the mental as well as physical examination of the inmates of the county jails—a work that must commend itself to all forward-looking citizens.

legal treatment of the criminal insane where it belongs. It eliminates the objectionable feature common to all other state legislation on the subject, namely, leaving the mental examination of offenders to chance or caprice instead of, as in Massachusetts, making it a *routine, scientific* procedure. Finally, it makes for a much better understanding between the legal and medical professions on the vexing question of the criminal responsibility of the insane, than has characterized the past relation between the two professions.

It will take some time for such a piece of social machinery to become well oiled and to be properly co-ordinated with the other legal machinery. And there is nothing in the law to compel either the prosecution or defense or the court to follow, or even consider, the recommendations of the experts appointed by the Department of Mental Diseases; but this feature can constantly be improved through the influence of intelligent, well-informed, well-guided public opinion. It is here that the efforts of representative, thoughtful citizens may materially add to the efficiency of this and other social legislation. Such men and women as you, whose active participation as trustees in such state ventures as hospitals for the mentally abnormal has demonstrated your public-spiritedness, can help to furnish and formulate what Dean Pound and other legal scholars<sup>29</sup> have fittingly called the "social-psychological sanction" of law, without which many laws on the statute books not only remain dead letters, but inspire dissatisfied citizens to positive deeds of lawlessness.

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<sup>29</sup>See, for example, Jellinek: "Allgemeine Staatslehre, 2d ed., 89, 324.