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## PSYCHIATRY AND THE COURTS IN MASSACHUSETTS

WINFRED OVERHOLSER, M. D.<sup>1</sup>

In the daily press, as well as in the flood of magazine articles and books on the subject of crime written by some of the amateur criminologists, of whom there is a "bumper" crop at present, we hear much criticism of expert testimony, with particular reference to the psychiatrists, and of the defense of insanity. These would-be saviors of the country, who seem to lack any historical perspective, feel that they have discovered something entirely new and would assure us that if the abuse of expert testimony can only be stopped, the epidemic of crime, supposed to be now raging, will at once subside. That there is nothing particularly novel in this criticism of such testimony may be seen by reference to a case decided by the Court of Appeals, of New York in 1890. The court in this case made the following comments: "The frequent spectacle of scientific experts differing in their opinions upon a case according to the side upon which they are retained tends much to discredit such testimony or to impair its force and usefulness and inclines us to prefer the formation of an opinion upon the real facts when the case is not one beyond the penetration and grasp of an ordinary mind."<sup>2</sup>

Perhaps one of the reasons why so much attention is drawn to the question of mental alienation in criminal cases is that some of the most startling, unusual and brutal crimes have been committed by persons who were distinctly deranged mentally. As a result of the striking nature of the crimes much attention has been attracted to them and an intense desire for revenge on the part of the crowd has been aroused. In some instances, as in the Guiteau case, the fact of mental disease has been reasoned away by the jury in order that the sadistic desires of the mob might be satisfied. In most cases,

<sup>1</sup>Director, Division for the Examination of Prisoners, Department of Mental Diseases, Boston, Mass. This article was read before the American Orthopsychiatric Association at Cincinnati, Ohio, June 3, 1927.

<sup>2</sup>*People v. Kemmler*, 119 N. Y. 580, at 583. Compare also this extract from the judge's charge in *Guiteau's Case* (1881) 10 Fed. 161 (at 165): "The defense of insanity has been so abused as to be brought into great discredit. It has been the last resort in cases of questionable guilt and has been the excuse to juries for acquittal when their own and the public sympathy have been with the accused, and especially when the provocation to homicide has excused it according to public sentiment, but not according to law. For these reasons, it is viewed with suspicion and disfavor whenever public sentiment is hostile to the accused."

however, the fact that the defendant was insane and therefore irresponsible has prevented execution, as it should, and in this way the demand for blood has not been fulfilled. The fact that the popular attitude in this matter is emotionally conditioned is obvious to the psychiatrists, and it is particularly noticeable that those who are the most vociferous in demanding abolition of the "defense of insanity" are those who, at least apparently, are not familiar with the traditions of the law or the aims of psychiatry. As a calm, judicial statement of what is to be desired, let me quote from a recent book which purports to be a scientific study of the intelligence of criminals: "But the great and crowning glory in the practice of criminal law is the protection offered to the insane and the methods made available for facilitating proof of insanity. If a criminal is insane, that is all the more reason for extinguishing him from society. He can never be of any service to the state or himself." The author (presumably to emphasize his independence) then goes on to admit that "practically all the literature of the last fifty years in the fields of criminology and penology has fostered the development of this maternalistic fallacy." The classical writers on the English Common Law were not the type of men who would today be called "coddlers of criminals" or "sentimentalists." As a contrast, therefore, to this 20th-century effusion it is refreshing to read Blackstone's dictum: "If a man in his sound memory commits a capital offense, and before arraignment for it he becomes mad, he ought not to be arraigned for it, because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried; for how can he make his defense?"<sup>3</sup>

The English common law recognized intent as a necessary element in crime and likewise recognized the fact that absence of such intent, due to mental irresponsibility, meant that no punishable offense had been committed. The principle went farther than this and held that a man should not even be tried if he became insane after the crime was committed, since it was unfair to him to try him while his mental condition was such that he could not intelligently defend himself. The law, in short, at least intended to be fair to the defendant, although it must be admitted that some of the "tests" laid down were inadequate to cover all the cases which they should. As a recognition of inadequacy of the "tests," the following remarks of

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<sup>3</sup>Blackstone, *Commentaries on the Laws of England*, bk. IV, p. 24 (1765). Ed Cooley, Pub., Chicago, 1899.

the judge to the jury in the course of his charge on the case of Guiteau are peculiarly a propos: "But assuming that the infirmity of mind has had a direct influence on the production of the crime, the difficulty is to fix the degree and character of the disorder which in such case will create irresponsibility. The outgivings of the judicial mind on this subject have not always been entirely satisfactory or in harmony with the conclusions of medical science. Courts have in former times undertaken to lay down a law of insanity without reference to and in ignorance of the medical aspects of the subject when it could only be properly dealt with through a concurrent and harmonious treatment by the two sciences of law and medicine."<sup>4</sup>

The procedure in the matter has been limited by statutes in the various jurisdictions, but as a rule, it has been agreed that if a man were alleged to be insane, the issue of insanity should first be determined either by the court, by commission, or by jury, and that trial upon the issue of the commission of the act should not be held unless the defendant was found to be sane.

The State of California has apparently been suffering lately from a certain degree of panic over the crime situation, and has recently passed a law which reverses this usual procedure.<sup>5</sup> Under this law, if the defense of insanity is to be introduced, the defendant must so plead before the trial. Presumably, of course, the defendant will recognize the premonitory symptoms sufficiently in advance to notify authorities that he is about to undergo an attack of mental disease! One is moved to inquire how much notice should be expected from a defendant who is suffering from mental disease at the time of his offense and continues to suffer in this way. Be that as it may, presuming that the patient has recognized the symptoms and has communicated them to the proper authorities, he is next tried on the question as to whether or not he committed the act. Assuming now that the man is definitely psychotic, he is submitted to a trial before a jury on the issue of facts as to the offense, a principle directly contradictory to that of the common law. If he is found to have committed the act in question the issue of his sanity is then tried before the same jury or another (perhaps the less said about the desirability of jury trials on the issue of sanity the better) and presuming he is found to be insane, he will be committed to an appropriate institution. Furthermore, even release from the hospital after such commitment is made a matter of determination by the

<sup>4</sup>*Guiteau's Case*, 10 Fed. 161, at 166-7.

<sup>5</sup>Ch. 677, Acts of 1927. Effective July 29, 1927.

court. It is sincerely to be hoped that California will see the wisdom eventually of returning to her former practice, which was not only legally sounder, but also much fairer to the accused.

It must be admitted, however, that the appearances at least in certain cases have been such as to make the public distrust the honesty and sincerity of expert testimony. We are, of course, familiar with the fact that the cases in which there has been dispute have often been borderline cases in which there is room for an honest difference of opinion. Judges have been known to disagree on the interpretation of laws, and in the same way physicians may be expected to disagree at times on the interpretation of symptoms. For this reason, it has been possible to find experts who will testify for either side, but the public and even the court have not been always able to see that the diagnosis of a mental situation, especially with regard to responsibility is a much more complicated matter than the diagnosis for instance of a fractured humerus.

One reason for the apparent and in some instances actual abuse of the plea of insanity has been the fact that initiation of the plea has depended upon laymen. There are various groups of laymen who may initiate these proceedings, as for instance, the judge, the prison officials and, of course, the defense attorney. As a result of the non-medical status of the introduction of this plea, the cases in which proceedings have been begun are either the obvious ones, those in which there is but little doubt even in the minds of laymen, or those in which a plea of insanity appears to be advantageous strategy for the defense. That the plea has been made in some cases without justification in fact must be admitted. The upshot of this situation is that the whole matter becomes a partisan one. Some district attorneys, inclined to estimate their success by the number of convictions they obtain, are prone, instead of endeavoring to determine the truth where an issue of insanity is raised, to contest the plea regardless of the facts. Instead of permitting the psychiatrists retained by the two sides to consult with each other in an effort to agree on the facts, they assume that the other side is made up entirely of incapable or dishonest men and insist on "fighting the matter out" in court. There is little doubt too, that some defendants suffering from mental disease who have been inadequately represented by counsel or who have not been recognized as being mentally ill have been convicted and punished as though sane. The present disrepute of expert testimony is much more the fault of the machinery than it is of the individual psychiatrists or even of the lawyers. Courts

and even juries are willing to be advised if only they can know whom to trust, but the existing legal system is such that it is not strange that a certain amount of suspicion is directed against the experts. In view of such suspicion, it is not strange that courts have not availed themselves oftener of their common-law right to call in advisers as *amici curiae*.

Certain courts under the guidance of progressive and intelligent judges have established psychiatric clinics, the court psychiatrist being an officer of the court and his recommendations naturally having weight. Even in such cases, however, a certain amount of selection has usually been exercised as to the cases examined and in most cases the psychiatrist has functioned only after conviction. A special interest, therefore, attaches to the fact that Massachusetts in 1921 took a step along medico-legal lines which is little short of revolutionary. This law, the passage of which was due almost entirely to the personal efforts of Dr. L. Vernon Briggs of Boston, provides that certain classes of felons shall be examined before trial by psychiatrists appointed by the Department of Mental Diseases. The essential features of the law itself are included in the following quotation: "Whenever a person is indicted by a grand jury for a capital offense or whenever a person, who is known to have been indicted for any other offense more than once or to have been previously convicted of a felony, is indicted by a grand jury or bound over for trial in the superior court, the clerk of the court in which the indictment is returned, or the clerk of the district court or the trial justice, as the case may be, shall give notice to the department of mental diseases, and the department shall cause such person to be examined with a view to determine his mental condition and the existence of any mental disease or defect which would affect his criminal responsibility. The department shall file a report of its investigation with the clerk of the court in which the trial is to be held, and the report shall be accessible to the court, the district attorney, and to the attorney for the accused."<sup>6</sup> Upon the receipt of notice from the court the Department of Mental Diseases appoints two psychiatrists to make the examination required. At least one of the psychiatrists is usually connected with the department in some capacity, one of the purposes of this arrangement being that the services of the department's social workers and psychologists in obtaining history and making psychometric tests are thus available. The importance of such history and psychometric examination is emphasized by the department, an at-

<sup>6</sup>Ch. 169, Acts of 1925. Originally enacted as Ch. 415, Acts of 1921, effective Aug. 20, 1921. Amended by Ch. 331, Acts of 1923.

tempt being made to encourage thorough examination and report. The examiners are impartial, being retained by neither the district attorney, by the defense, nor by the court. The report is available to all parties to the case, and the examining psychiatrists may be summoned into court by either side to present the results of their examination if the findings are desired as evidence. The mere fact that these psychiatrists are impartial adds immeasurably to the strength of their position if their evidence is introduced in court. Fully as important as the impartiality of the report, however, is the fact that this examination is a routine one. It is applicable to certain groups regardless of whether or not they are suspected by any one of suffering from mental disease or whether their counsel intends to resort to the "defense of insanity." The examination is made without any presupposition or subconscious desires as to what the examiner shall find. In nearly every instance the defendant has cooperated fully in the examination, and for the benefit of those who may have some doubts about self-incrimination, it may be said that in practically every instance the attorney for the defense, where there was any hesitancy on the part of the prisoner, has instructed his client to cooperate.

One result of this law has been that the duels between experts on opposing sides have been almost entirely eliminated in criminal cases. In the last six years there have been almost no criminal cases where the spectacle has been presented of experts arrayed on either side and giving conflicting testimony. The courts and the district attorneys, recognizing the impartial character of the report, have shown a most encouraging willingness to accept the findings and to abide by them. By making comprehensive, clear, and non-technical reports, psychiatrists have had a splendid opportunity to present to the courts and district attorneys some of the principles of the psychiatric point of view.

In the case of prisoners found to be insane, the prisoner has been committed to a State Hospital, a trial usually being avoided completely. In a few cases, a formal verdict of "not guilty by reason of insanity" has been returned so that the case was definitely closed rather than being filed. Under either procedure, protracted and expensive trials have been avoided, and the necessity of bringing a mentally ill defendant into court to undergo trial has been obviated. Society has been protected better than otherwise; not only has the psychotic or mentally defective offender been segregated in the institution where he belongs, but his commitment has been made with

such provisions that he is not likely to be released until his mental condition warrants. In the case of an insane killer, for instance, acquitted by reason of insanity, the statute provides that he must be sentenced for life to a State Hospital. Release can be secured only by pardon from the Governor after the latter is assured by the Department of Mental Diseases that the patient is in such mental condition that "his discharge will not cause danger to others." Safeguards are also thrown about the release of the insane who have committed other offenses.<sup>7</sup> The advantage of such an arrangement over the system of automatic parole, expiration of definite terms of imprisonment, or politically motivated commutations and pardons is obvious.

From the passage of the law in 1921 until October 15, 1926, 367 cases had been reported to the department, of whom 72 were not examined. The most of those not examined were missed because bail had been given and the defendant could not be located. One hundred and seventy-three of those reported were indicted for first degree murder. As this is very nearly one-half of the entire number reported, it is quite obvious that many persons indicted for other felonies were not being reported. A study of the situation soon made it obvious that the reason for this was that the responsibility for reporting was laid upon the clerk of the court. His duty does not include knowledge of the previous record of the defendant, with the result that in many cases the clerk was honestly ignorant of the fact that the latter had been previously convicted or indicted as provided by the statute. Fortunately, in Massachusetts, the probation system has developed as an adjunct the function of informing the court concerning cases and in 1926 a law was passed compelling the probation officer in every case where the crime charged might be punished by a sentence of more than one year to investigate the previous record of the individual and present his findings to the court. This investigation of the previous record already being a duty of the probation officer, the 1927 General Court was quite willing to amend the law to provide that "whenever the probation officer of such court has in his possession or whenever the inquiry which he is required to make by Section 85 of Chapter 276 discloses facts which, if known to the clerk, would require notice, as aforesaid, such probation officer shall forthwith communicate the same to the clerk who shall thereupon give such notice unless already given."<sup>8</sup> This amendment will

<sup>7</sup>For provisions regarding commitment and release of these groups, see Gen. Laws, ch. 123, secs. 90, 99-105.

<sup>8</sup>Ch. 59, Acts of 1927.

become effective on July 1, 1927, and should result in a marked increase in the number of cases reported to the department, thereby augmenting materially the efficiency and scope of the present act.

In view of the loosely made claims of some who are not familiar with the facts that psychiatrists if given their own way would find all offenders psychotic or mentally defective or psychopathic, it is of interest to note that of the entire number examined (two hundred and ninety-five), only twenty-one per cent were diagnosed as either insane, mentally defective, or as psychopathic personalities.<sup>9</sup>

In addition to hospitals for the mentally ill, schools for the feeble-minded, and the various types of penal institutions well known in other states, Massachusetts is one of the few states which has an institution for defective delinquents, that is, feeble-minded persons who are also delinquent. Although there are certain restrictions on the definition of defective delinquents, this institution has proved its usefulness and many persons have been committed thereto by the court on the recommendation of the psychiatrists appointed by the department of mental diseases. The commitment here is a totally indeterminate one, as in the case of persons committed to state hospitals as insane.<sup>10</sup>

As has been pointed out above, the routine examination of prisoners applies only to certain groups of felons. Other facilities as well for the psychiatric examination of prisoners are available to the court. For instance, any person under complaint or indictment may at any time be committed to a state hospital as insane or for observation as to his mental condition.<sup>11</sup> Wide discretion is given to the court regarding the provisions of the commitment and, as is to be expected, the courts are disposed to act upon the recommendations made by the state hospitals in the cases of persons so committed. This law is employed freely by the courts. More recently, a law was passed providing that any court may call upon the Department of Mental Diseases to assign a member of a state hospital staff to examine any person coming before the court.<sup>12</sup> Thus even a complainant might conceivably be examined, and properly so. No fee is paid for this examination so that the court need not feel hampered in any way by the prospect of undue expense. The Bos-

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<sup>9</sup>For an exhaustive study of the working and possibilities of this law, see Sheldon Glueck, "*Psychiatric Examination of Persons Accused of Crime*," Yale Law Jour., vol. 36, no. 5, pp. 632-648, March, 1927.

<sup>10</sup>For the provisions of law relating to the commitment and discharge of defective delinquents, see Gen. Laws, ch. 123, secs. 113-124.

<sup>11</sup>Gen. Laws, ch. 123, sec. 100.

<sup>12</sup>Gen. Laws, ch. 123, sec. 99.

ton Municipal Court is the only court in the state having an official court psychiatrist. Several of the district courts, however, have availed themselves of the services of interested psychiatrists who have volunteered to serve without compensation.

In 1924 the routine examination of prisoners in the houses of correction (county penal institutions) was commenced by the Department of Mental Diseases.<sup>13</sup> In these cases a complete social history is obtained and a physical examination and psychometric test are made. The prisoner is then examined by a psychiatrist. Recommendations in each case are made and forwarded to the Department of Correction, which attends to the follow-up of suitable cases. Copies of the report are also sent to the Commission on Probation and are available to the courts of the state should the prisoner again be arraigned. These reports in addition to giving a psychiatric diagnosis contain much information which is of value from the social point of view and are of considerable help to the courts and probation officers in understanding the factors of the defendant's delinquency. They are being used in increasing numbers and their possibilities are being appreciated.

The day of the routine treatment of offenders, of a blind following by courts of the penological doctrines of Beccaria, is passing. Judges are growing in a realization of the fact that the defendants coming before them for disposition differ each from the other in background, and in mental makeup. Within the limitations imposed upon them by the constitution, by law, and by tradition, they are more and more and more showing a readiness to be enlightened and to learn how they may the better conform the treatment to the individual's needs, and thereby best protect society. The Massachusetts procedure already described will almost inevitably be adopted by other states and also extended in scope. By removing expert testimony from the sphere of partisanship it is but the forerunner of a period of more enlightened exercise of judicial discretion wherein the courts, society and the offender will profit by the services of trained social investigators and psychiatrists.

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<sup>13</sup>Ch. 309, Acts of 1924.

Pages 84-117 containing Judicial Decisions, Notes and Abstracts and Reviews and Criticisms are omitted from this reproduced number.