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TWO YEARS' EXPERIENCE WITH THE BRIGGS LAW (1928-30) OF MASSACHUSETTS†

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It is probably unnecessary, in view of the fact that ten years have elapsed since its passage, to enter into a full discussion of the nature of the Briggs Law or of the reasons for its existence. It is recognized generally by writers on legal psychiatric matters as a singularly advanced piece of legislation in that portion of the field of criminal law which deals with the questions of responsibility, triability and disposition. In practice, likewise, it has steadily and progressively demonstrated itself to be a valued aid in the administration of criminal justice.

Previously, several detailed studies of the operation and results of the law have been published.¹ It is the intention of the present contribution to bring more nearly up to date these existing reports on the functioning of the law, to detail certain pertinent judicial decisions, and to indicate such change in the law as has been enacted during the period considered, namely from October 15, 1928 to October 15, 1930.

The Briggs Law is that portion of the General Laws of the

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¹For other articles on this subject see: D. A. Thom, "Medico-Legal Provision in the State of Massachusetts Relative to the Mental Condition of Certain Persons Held for Trial," *Amer. Jour. Psychiatry*, III, 219-224. S. S. Glueck: "State Legislation Providing for the Mental Examination of Persons Accused of Crime," *Bulletin Mass. Dept. of Mental Diseases*, VII, 16-26. "Psychiatric Examination of Persons Accused of Crime," *36 Yale Law Journal*, pp. 632-648, March, 1927. Reprinted in *Mental Hygiene*, XI, 287-305. *Mental Disorder and the Criminal Law*, Boston, 1925—55-56, 58-72, 474-476. L. V. Briggs: "Conditions and Events Leading to the Passage of the Massachusetts Law commonly called the 'Briggs Law,'" *Bulletin Mass. Department of Mental Diseases XII*, Nos. 1 and 2, pp. 2-5. W. Overholser. "Psychiatric Examination of Prisoners in Massachusetts," *Boston Medical and Surgical Journal*, Vol. 195, 1065-1067. "Psychiatry and the Courts in Massachusetts." *Journ. American Institute Criminal Law and Criminology*, XIX, 76-83. "Practical Operation of the Mass. Law Requiring the Psychiatric Examination of Certain Persons Accused of Crime," *Mass. Law Quarterly XIII*, 35-49. (Reprinted from *Bulletin Mass. Dept. Mental Diseases*, XII, Nos. 1 and 2, October, 1928) "Psychiatry and the Massachusetts Courts as Now Related," *Social Forces*, VIII, No. 1, pp. 77-87, Sept., 1929.

Commonwealth known as Section 100A, Chapter 123, as amended,² which provides for the automatic examination by the Department of Mental Diseases of certain persons accused of crime, namely those indicted for a capital offense and those indicted or bound over for a felony who have been previously convicted of a felony or indicted more than once for any offense. The less formal appellation is usually applied by reason of the fact that the law was conceived by Dr. L. Vernon Briggs, distinguished former President of this Society, and was enacted largely through his untiring efforts. The principle of this law, combining as it does the automatic feature with impartial examinations made under the auspices of a department in the administrative, rather than the judicial branch of government, is novel, and even after ten years is still unique. Although several other States have considered such legislation, none has yet adopted it.

One of the tangible indices of the development of the law is the steadily increasing number of examinations made under its provisions. Prior to 1927 the duty of reporting to the Department the names of prisoners examinable under the law was imposed upon the clerk of the court.³ Although the capital cases were regularly reported, many of the other felony cases were not, since the clerk is not required to know of the previous record of a defendant. On July 1, 1927 an amendment became effective, by the terms of which the probation officer, whose duty it is to know of such previous records, is obliged to notify the clerk of any prior convictions of felony or of previous indictments, the clerk, in turn being given the duty of acting upon this information by reporting to the Department. The response to this amendment was immediate. For the years 1921-26 the annual average number of cases reported had been eighty-four; for the years ending October 15 the number increased thus: 1927, one hundred thirty-eight; 1928, two hundred thirty-nine; 1929, three hundred seventy; 1930, six hundred fifty-four—a jump in four years of 678½%. Another indication of the increasing efficiency of reporting is found in the fact that whereas up to October 1926 only 53% of the cases reported were of persons held for other than a capital offense, that percentage had risen in the ending October 15, 1930 to 96.2! These figures seem to warrant the inference that the cases reported recently represent more nearly than before a cross-section of the serious offenders who come before our courts.

²Chapter 415, Acts of 1921.

Chapter 331, Acts of 1923.

Chapter 169, Acts of 1925.

³Section 1, Chapter 59, Acts of 1927.

During the two year period under consideration, ten hundred twenty-four persons were reported to the Department of Mental Diseases for examination, of whom eight hundred four were examined. For one reason or another, then, two hundred twenty or 21.4% of these persons were not examined. It may be noted, in passing, that this proportion has remained almost constant, the figure for the entire period from 1921 to 1930 being 22.8%. It may be wondered why only four-fifths of those reported are actually examined. A detailed study of the reasons for the 1929 failures showed the following results:

Out on bail.....	38
Disposed of before examination.....	19
Not examined under law.....	18
Not located	5
Discharged or not proessed.....	3
Prisoner or parents refused.....	2
In House of Correction on another charge.....	1
Attorney refused	1
	87

The predominant reason, then, is that the prisoner is at liberty on bail. An attempt is made uniformly to contact these persons, and with moderate success, but a considerable number do not see fit to travel to the examiner to undergo a test of which they are suspicious and of which they fail to see the purpose. It seems to be the travel rather than the examination which is the controlling factor, however, as the refusal of a defendant in jail to submit to examination is almost unknown (3 in 1929, 1 in 1930). He may, to be sure, decline until he receives his attorney's approval, but this is nearly always forthcoming.

The group of those disposed of before examination, is one which is steadily decreasing. The Attorney General, in his report for 1929, commented as follows upon this statute: "If eight years of psychiatric examination have shown that penal restraints could not effect the reform or conviction of one fifth of capital and second offenders, future dispositions should be aided by a positive requirement that such examinations should be made and report thereon be available to the court at the earliest possible moment".⁴ Although no such positive requirements has been enacted, it is a fact that the judges are increasingly following the practice of insisting upon having the report available before they dispose of the defendant's case.

A considerable group of prisoners are referred who technically

⁴Report of Attorney General (Public Document No. 12) 1929, p. 27.

are not examinable—that is, they have not been indicted more than once or have not been previously convicted of a felony. The clerk on one district court, for example, makes it a practice to report all defendants bound over for a felony, whether or not they are known to have a previous record, saying that at least he will not err by failing to report any whose names should be sent in! The inclusion of these names in the total, although increasing the number of prisoners not examined, does not indicate a weakness of the law.

To sum up, we may say that a certain discrepancy between the numbers reported and those examined must be expected. Some decrease is to be expected by reason of the developing insistence of the judges upon having the report at hand. Probably, however, many of those on bail will continue to be missed, as the degree of compulsion which may be exercised in securing the examination is doubtful.

The type of offense alleged to have been committed by the defendants examined is of some interest. Against the eight hundred four persons studied there stood at least eleven hundred seventy-seven indictments (the number is not always given in the clerk's report, so this figure is an understatement). Of this number, forty-five were for a capital offense, two for murder in the second degree, and eighteen for manslaughter. Against the remainder were placed the following charges: larceny, three hundred fifty-two; breaking and entering (including what in most states is termed burglary), three hundred sixteen; robbery, eighty-four; sex offenses (mostly rape and carnal abuse) eighty-four; assault with intent to rob or kill, seventy-three; other offenses, two hundred three. Incidentally, it may be observed that the number of indictments for robbery in this group increased from twenty-three in 1929 to sixty-one in 1930, and those for felonious assault of one kind or another from twenty-four to forty-nine. Whether this indicates a true increase in these types of crime or merely greater activity on the part of grand juries in finding separate indictments is a question that cannot be answered positively on these limited data.

Our interest as psychiatrists naturally centers on the results of the examinations—what were the psychiatric findings, and what was done by the courts after receiving the reports of the examinations? Of the eight hundred four defendants, one hundred thirty-eight, or 17.1%, were stated to be clearly or suggestively abnormal mentally, the reports being as follows: "insane", seven; should be observed in a mental hospital, thirty-nine; mentally defective, seventy-one; "inferior intelligence", six; dull or borderline intelligence, ten; psycho-

pathic personality, two; epilepsy, two; brain injury with limited responsibility, one. Two features stand out—first, the infrequency of the diagnosis of psychopathic personality, suggesting the examiners' native antipathy to this dubious classification, or else lack of adequate social data concerning the defendant; second, the interesting fact that although in 1928 the general average of all cases up to these reported to be abnormal was 21.5%, it is only 17.1% for the 1928-30 period! For the entire period from 1921 to 1930, thirteen hundred sixty-five defendants have been examined, of whom two hundred fifty-nine, or 18.9%, have been reported to be other than having "no mental disease or defect".

What became of this group of one hundred thirty-eight defendants who were found to be distinctly deviates from mental normality or at least in such condition that observation in a mental hospital appeared called for? At least one would suppose that if a prisoner were reported to be frankly "insane" the court, with all the facilities readily available to it, would commit him to a state hospital under the safeguards which the law amply provides. As a matter of fact, this was done in four instances out of a possible seven (in one other instance the case was filed because the defendant was, already in the Bridgewater State Hospital). Of the two insane defendants not committed, one was sent to State Prison and one to the Lyman School. The latter defendant, a young boy who was clearly psychotic, was immediately recognized as such at the Lyman School, and was committed within a few days to a state hospital! In this case there had been much notoriety, and the court was apparently fearful that "mollycoddling" would be charged if the youth were sent to a hospital.

If the courts did fairly well in this group, what of the men recommended for observation? There were thirty-nine of these, as we have seen; of these eighteen, or slightly less than one half, were committed to a hospital as advised by the Department's examiners. Of the rest, one was committed to the Department for Defective Delinquents; four were sent to the State Prison, three to the Reformatory, and seven to the House of Correction; two were placed on probation, and four of the cases were filed. Some of these results sound almost fantastic, and are difficult to explain. Either, it may be, the judge considered himself a better critic of the defendant's mentality than the psychiatrists, or he labored under the outworn notion that a penal institution was the proper place to sort out those in need of penal treatment from those whose condition calls for

hospital care. The only other explanation, which may in some cases be the true one, is that disposition was effected in ignorance of the report; if this be the case, it may be expected that the analysis of later results will be more encouraging in this regard.

For the disposition of those diagnosed as mentally defective there are other explanations. During most of the period covered by this report the Department for Defective Delinquents at Bridgewater was so crowded that the Commissioner of Correction found it necessary to request the courts to discontinue making commitments to that institution;⁵ for practical purposes, therefore, the defective delinquent law, an extremely progressive piece of legislation in which Massachusetts was the pioneer has for the present almost ceased to function, and will not resume its function until legislative relief is forthcoming. Of the seventy-one mentally defective defendants only sixteen were committed to the Department for Defective Delinquents in the two years. Nearly every sort of disposition is found in the rest of the group, including probation for eight! The practical results of some of these dispositions will be cited later on.

As for the other diagnoses, little need be said here. One psychopath was placed on probation, and the other obtained a *nolle prosequi*; one epileptic was sent to the State Prison, and the other was found not guilty.

Before proceeding to a further discussion of the practical operation of the law, a few words should be devoted to the amendment passed in 1929 and to two judicial decisions of interest. The amendment referred to is found as Chapter 105 of the Acts of 1929, and provides that the report of the examiners shall be accessible to the probation officer of the court in addition to the parties named in the original law, viz. the court, the district attorney and the attorney for the accused. The purpose of the change was to make clear the probation officer's right to the information contained in the report; inasmuch as the court is expected to obtain a report from the probation officer before imposing sentence, it is only proper that the latter should be in a position to inform the court fully as to the defendant's mental state as well as his record and social history. To a moderate degree at least this change has worked well, and many of the officers carefully inspect the mental report in advance. Unfortunately in some courts a system has not yet been worked out (perhaps in part on account of the high pressure at which the officers must work)

⁵For the laws relating to defective delinquents, see General Laws, Chapter 123, Secs. 113-124, as amended.

which provides for the securing of this information in ample season. It is safe to expect, however, that this defect will be remedied as experience with the value of the reports accumulates. In 1930 an amendment was proposed, making examinable all persons indicted for an offense punishable by life imprisonment; this failed of passage.⁶

One question sometimes raised has been whether the making of a report as directed by the statute is necessary to constitute a fair trial, or whether failure to make the examination deprived the defendant of a right. This question was settled finally by the decision of the Supreme Judicial Court in the case of *Commonwealth v. Vallarelli et al.*, handed down November 26, 1930.⁷ Briefly, Vallarelli was one of four defendants convicted (of robbery) on March 8, 1929. Four days later the probation officer reported to the clerk that the defendants had previously been convicted of a felony, whereupon the Department was asked to examine and report. Reports were filed the following day, indicating that three of the four were not remarkable mentally, but that the fourth, one Polcarri, appeared to be hallucinated in the visual and auditory spheres, and that "he shows sufficient evidence of mental disease to require further observation under Section 100 at Bridgewater". All four were sentenced to the State Prison, and counsel then filed motions for a new trial on the grounds that they had been deprived of a fair trial, the three by being tried with a co-defendant whom they alleged to be of unsound mind, and Polcarri by reason of the Department's findings. The trial judge denied the motions, and the matter went up to the full bench for decision. The denial of the motions was upheld on the ground that the petitioners presumably (!) knew of their previous records, and therefore might have raised the issue at the trial. As to Polcarri, the court said: "The report of the Department of Mental Diseases concerning Polcarri's falls far short of indicating that he was of unsound mind when the crime was alleged to have been committed, or when the trial took place, or even at any time thereafter. It simply indicates that several days after the termination of the trial he showed, in the opinion of two physicians, sufficient evidence of mental disease to require further observation—no presumption can be indulged in favor of irresponsibility for Polcarri for criminal conduct or of his insanity at the trial." (The reader should observe here that the report is literally construed). The most significant statement as to the purpose and scope of the law follows: "—it is plain that noncompliance

⁶House Bill 38 (1930).

⁷*Commonwealth v. Vallarelli et al.*, 273 Mass. 240.

with the provisions of said Section 100A as amended does not invalidate the trial as a matter of law. The terms of that section contain no such intimation. It is an important statutory provision, but its design is to forward the administration of public justice, not to put into the hands of those charged with crime a new weapon of defence. There is express finding by the judge to the effect that the probation officer and clerk were ignorant until after the verdict of facts which rendered said Section 100A applicable to any of the defendants". That this point of view is wise will probably be generally admitted. To interpret the examination as a sine qua non of due trial would place an unfair burden on the Department and would add one to the many still-existing means of reversal and delay. For practical purposes, the insistence by the judges that the report be at hand makes it an essential without the disadvantage which would arise from a statutory mandate.

The other case of interest is found as *Commonwealth V. Soaries*.⁸ On May 22, 1930 Soaris was convicted of murder in the first degree. The first exception submitted to the Supreme Court was based upon the contention that compliance with Section 100A is a condition precedent to placing the defendant on trial. It was further claimed that the report as filed failed to "determine his mental condition". As a matter of fact, Soaris had developed a depression following the killing, and the report stated that he was unfit to stand trial, adding that he should be sent to a hospital until his recovery. He was committed to Bridgewater State Hospital, recovered, and was tried. The court held that the reports of the Department's examiners and of the medical director of the Bridgewater State Hospital constituted a compliance with the statute, but did not expressly decide whether such compliance was a condition precedent. The decision, however, referred to the case of *Commonwealth v. Vallarelli*, thus by implication deciding the latter question in the negative.

These decisions illustrate the well nigh conclusive character attributed by the courts to the reports of the Department, and should serve to warn the examiners to make their reports accurate and based upon careful examination of the defendant.

In order to make the reports clearer and more enlightening a change was made (April 1930) in the form used, adding a section entitled "Psychiatric Findings". The Department in calling the examiners' attention to this change, commented as follows: "This has appeared desirable in view of the fact that the statute calls for a

⁸*Commonwealth v. Soaris*, Mass. Adv. Sh. (1931) 973.

report upon 'the mental condition of the accused,' as well as upon the 'existence of any mental disease or defect which would affect his criminal responsibility'. The bare statement that there is 'no mental disease or defect which would affect his criminal responsibility' is hardly better than no report unless corroboration is furnished in the form of the results of the examination. The court in such an instance is no better off in obtaining guidance for its disposition than if it relied upon the legal presumption of sanity alone". By using this section adequately, the examiners have an opportunity to demonstrate to the courts and attorneys of the Commonwealth the true significance of a psychiatric examination, and to show the basis upon which their final conclusion on the case rests.

As has been the case in earlier years, instances still occur (though less frequently than before) in which the examiners show themselves ready to strain a point in making the defendant out as fully competent. For example:

"In our opinion, the prisoner is definitely feeble-minded, but he has not sufficient defect to affect his criminal responsibility. We find no evidence of mental disease."

This man, with a long record, diagnosed as feeble-minded without a psychometric, was said to be "responsible." As a result he was sentenced to two months in the House of Correction for breaking and entering, when a firm stand by the examiners might have brought about the more desirable solution of commitment as a defective delinquent. He had, as a matter of fact, been examined while serving a previous sentence. He had then been found to have a mental age of 10 yrs., and his commitment as a defective had been urged. The criminal record of this man (down to November 1931) is of interest as showing how a feeble-minded person may continue almost indefinitely to impose upon society despite the facilities available for his indeterminate segregation.

7/10/19	Larceny. Continued.
5/22/20	Larceny. \$20 fine.
1/28/21	Larceny. Dismissed.
9/19/21	Breaking and Entering Probation.
10/20/21	Larceny. Filed—returned to Superior Court.
10/20/21	Surrendered from probation. 2 mos. House of Correction.
10/16/22	Assault and Battery Probation.
10/25/22	Drunkenness Filed.
2/28/23	Surrendered. Probation.
11/27/23	Non support. 3 mos. House of Correction—suspended sentence.
3/20/24	Violation of probation. 3 mos. H. of C.

8/28/24	Non support. Discharged.
8/28/24	Assault and Battery on wife. Dismissed.
3/14/25	Larceny. 9 mos. H. of C. Appealed.
4/22/25	Same charge (Superior Court). 5 mos. H. of C.
5/19/26	Larceny. 6 mos. H. of C.
2/ 6/27	Drunkenness. Released by Probation Officer.
3/ 8/27	Drunkenness. Released by Probation Officer.
4/ 6/27	Breaking and Entering. 1 year. H. of C.
7/ 2/28	Breaking and Entering. 10 mos. H. of C.
8/ 6/29	Breaking and Entering. 2 mos. H. of C.
5/16/30	Exposing and keeping liquor. 1 month. H. of C.
7/ 2/30	Assault and Battery. 6 mos. H. of C.
11/13/31	Exposing and keeping liquor. 1 month. H. of C. and \$200 fine.

It seems fair to say that the two psychiatric examinations made upon this defendant might well have indicated to the court, quite aside from his lengthy record, the fact that society would be much better off by his permanent segregation.

Further examples follow:

"As a result of our examination, we do not find any evidence of mental disease. He is feeble-minded, of the moron type, but in our opinion this does not affect his criminal responsibility."

Again no psychometric was needed to satisfy the examiners that this man was a moron, yet they practically assured the court that this degree of mental defect need not be considered. Fortunately the court came to a different conclusion, based on its own psychiatric knowledge, and committed the accused to the Department for Defective Delinquents.

"He is not suffering from any mental disease, which would affect his criminal responsibility, despite the fact that he is mentally defective. C.A.—22M.A. Stanford 9.9 I. Q. 14 yr. basis—70 M.A. Perf. 10."

This is by far the most serious case, since the defendant is charged with murder and might conceivably be convicted in the first degree. Yet we are told that a mental age of 99/12 years, or on the 16 year basis, an I. Q. of 61 is no factor to be considered in such a case! In several similar cases recently mental defect of no greater extent has been successfully urged by examiners upon courts and prosecutors as diminishing "responsibility." It seems hardly sound psychiatrically to take the position that mental defect of such degree cannot be considered a mitigating factor.

A case in which a recommendation went astray may be cited here. A boy seventeen years of age was examined in May 1929 while

held on a charge of breaking and entering, and was reported to be distinctly feeble-minded, with a mental age of ten years. He was given probation, and in September 1929 was examined again at the request of the court. His commitment as a defective delinquent was strongly recommended then. On September 17, 1929 he was accordingly committed to the Department for Defective Delinquents, but on September 25 the court ordered the finding of defective delinquency vacated, and the prisoner returned to probation! Since that time he has been convicted again of larceny, has received probation again, and when surrendered on August 4, 1931 by the probation officer he was again placed on probation! The confidence of the court in this mentally defective delinquent seems greater than that of the psychiatrists or of the probation officer who has to deal with him! This case, is, of course, unusual, as are the preceding ones. They may serve, however, as illustrations of the care required in making reports, and of the further fact that sometimes even the best of reports may be disregarded. Despite these aberrations, however, it is nevertheless a fact that in general the reports are made as carefully as the exigencies of the case permit, and that the courts pay attention to them, even though on occasion they choose to follow their "judicial sense" instead of psychiatric advice.

The confidence shown by the members of the bar in the fairness and ability of the examiners is well illustrated by this quotation from a letter sent to the Department by a psychiatrist:

"I was asked to see this man for the defense, but I called attention to the fact that this is probably a case for the Department of Mental Diseases to examine. The attorney said, to his knowledge that he had not been examined, but that he would be willing to abide by the report of such an examination if made. I was very glad, therefore, to be able to tell him this morning that such an examination had been made and the doctor said he would see to it that the report got to Court."

Attorneys realize that the examinations are not only competent but impartial, a fact of which judicial notice was taken by our Supreme Court in the case of *Commonwealth v. Devereaux*.⁹ As a result, "battles of experts" continue to be virtually unknown in criminal cases.

With the increased efficiency of the superior courts in reporting, the number of cases in which a report is requested on very short notice has not decreased. This is primarily due to the fact that the

⁹*Commonwealth v. Devereaux*, 257 Mass. 391.

district courts have not exhibited a corresponding increase of efficiency in notifying the Department of defendants who are examinable under the law. The statute clearly indicates by its wording an expectation that the court of first instance will report those defendants with previous convictions of a felony who are bound over for the Grand Jury. The probation officer is called upon to know of the defendant's record, even though jurisdiction is declined, so there is no reason why the lower court should not do its part in carrying out the law. In 1929 only 73, or 19.6% of the cases reported, came to the notice of the Department from the District Courts. The Administrative Committee has called this to the attention of the District Courts, as have several of the District Attorneys, and an improvement is being noted. If only the District Courts will do their part, ample time for proper examination will be available before indictment is brought, since the great majority of cases originate in a finding of probable cause in the District Court rather than by indictment by the Grand Jury. The Administrative Committee has been most cooperative in attempting to bring about a more effective reporting of these cases, and there is every reason to believe that this difficulty will be minimized as time goes on. That hasty examinations, made in the detention room while the judge is waiting to impose sentence, are unsatisfactory and unfair goes without saying. On the other hand, there are times when delay in making such report may seriously inconvenience the court, and might even (in counties other than Suffolk or Middlesex) result in a delay of several months in disposition.

No law is self-administering, and no law functions perfectly; to this rule the Briggs Law is no exception. Nevertheless, in spite of certain difficulties which have been pointed out, we may still insist that the Briggs Law is operating with steadily increasing efficiency; that the courts, prosecutors and attorneys for the defense are exhibiting a keener consciousness of the value of the service rendered by the Department of Mental Diseases under the statute; and that as a means of eliminating partisan expert testimony in criminal trials, of securing a truer justice for the mentally abnormal defendant, and of giving to society a greater assurance of safety, this unusually advanced piece of legislation merits a wider application to our system of criminal justice.