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## PSYCHIATRIC ASPECTS OF NEW PROCEDURES IN THE STATE OF MICHIGAN

Ralph M. Patterson<sup>1</sup>

During the past several years there has been in Michigan considerable interest manifested in the control of criminal psychopaths. The attention of the public was focused on the sexual psychopaths in particular and an attempt was made to obtain more stringent control over these unfortunate and dangerous individuals. These efforts were crystallized in 1937 by the enactment of the "Goodrich Law."<sup>2</sup> However, since various features of this act met with the disapproval of the State Supreme Court, it was declared unconstitutional. In no way daunted by this frustration, the Michigan State Legislature exerted itself to construct a constitutionally secure law which would provide rigid control over what were called criminal sexual psychopathic persons. This zealous application culminated in 1939 with the enactment of "An act to define criminal sexual psychopathic persons and to provide for the commitment of such persons and the procedure therefor."<sup>3</sup> This same session also saw the passage of an act which provides for a psychiatric examination of all individuals charged with murder.<sup>4</sup> Since these two acts promote striking changes in procedure, it seems propitious to review at this

time the role of the psychiatrist in court and to develop, if possible, a certain uniformity of attitude and approach.

When the criminal court first recognized the concept of mental illness there was no need for psychiatric or expert testimony to determine the presence or absence of insanity. Any ordinary person was able to determine responsibility or irresponsibility according to the principles defined by Coke<sup>5</sup> in 1671: "He that is non compos mentis and totally deprived of all compassings and imaginations, cannot commit high treason \* \* but it must be absolute madness, and total deprivation of memory." It is apparent that this narrow definition was strictly adhered to during the next half-century, for one finds the following re-statement during the trial of Arnold<sup>6</sup>: "It must be a man that is totally deprived of his understanding and memory and does not know what he is doing, no more than an infant, than a brute, or a wild beast, such a one is never the object of punishment." There is evidence that the court was beginning at this time to entertain the philosophical concept of the "knowledge of right or wrong" for it was stated that a man was respon-

<sup>1</sup> Neuropsychiatric Institute, University Hospital, Ann Arbor, Michigan.

<sup>2</sup> No. 196, Public Acts of Mich., 1937.

<sup>3</sup> No. 165, Public Acts of Mich., 1939.

<sup>4</sup> No. 259, Public Acts of Mich., 1939.

<sup>5</sup> Coke, Edw.: *The Third Part of the Institutes of the Laws of England*, p. 6, 1671.

<sup>6</sup> Howell, T. B.: *State Trials. Trial of Arnold*, p. 766. 1724.

sible: "who knew what he was doing, and was able to distinguish whether he was doing good or evil, and understood what he did." Towards the end of the eighteenth century the court began to acknowledge the existence of what was called "partial insanity" but refused to recognize this as a defense on the grounds of insanity. To quote from Hale<sup>7</sup>: "They have a competent use of reason in respect to some subjects \* \* and yet are not wholly destitute of the use of reason: and this partial insanity seems not to excuse them in the committing of any offense \* \* \*. It is very difficult to define the indivisible line that divides perfect and partial insanity \* \* \* a total alienation of the mind, or perfect madness; this excuses from the guilt of felony and treason." As the court became more and more inclined to accept the defense of partial insanity it became necessary to call upon expert witnesses so that by the beginning of the nineteenth century the psychiatrist, if we may call him such, was invited to testify before the criminal court. The psychiatrist then, as now, was inclined to possess a somewhat different point of view than the court and one finds Benjamin Rush,<sup>8</sup> the father of American psychiatry, writing on "moral derangement" and of rescuing certain individuals afflicted with this disease from the arm of the law "to render them the subjects of the kind and lenient hand of medicine."

<sup>7</sup> Hale, Matthew: *The History of the Pleas of the Crown*, p. 30, 1778.

<sup>8</sup> Rush, Benjamin: *Medical Inquiries and Observations upon the Diseases of the Mind*, p. 264. Philadelphia, 1812.

<sup>9</sup> Stephen, James Fitzjames: *A History of the Criminal Law in England*. Vol. 2, p. 153 et seq. 1883.

The acquittal of McNaghton<sup>9</sup> in 1843 on the grounds of partial, or as it was then popularly known, "delusional insanity," aroused considerable public reaction. This prompted the House of Lords to put certain pertinent questions to the judges and this august body of fifteen men answered questions 2 and 3 in part as follows: "That to establish a defense on the grounds of insanity, it must be clearly proved that at the time of committing the act, the accused was laboring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing, or if he did know it that he did not know he was doing what was wrong." If the "opinions of the judges" had been rendered before the trial of McNaughton he would probably never have been acquitted. In consequence of this unprecedented questioning by the House of Lords, the criminal court entered an era of relative inflexibility which persists to date. The pleas of Prichard,<sup>10</sup> Ray,<sup>11</sup> and others,<sup>12</sup> all leading psychiatrists of their time, went quite unnoticed. Ray was probably far in advance of the period, for he remarked that the right versus wrong test: "furnishes no protection to that class of the insane who entertain no specific delusion, but act from momentary irresistible impulses, or diseased moral perceptions." This introduction of the unscientific concept: "irresistible impulse" in 1853

<sup>10</sup> Prichard, James Cowles: *A Treatise on Insanity and Other Disorders Affecting the Mind*. Philadelphia, 1837.

<sup>11</sup> Ray, I.: *Treatise on the Medical Jurisprudence of Insanity*, pp. 38, 46, 61, 66. Boston, 1853.

<sup>12</sup> Moral Insanity, *Am. J. Insanity*. 14:311, 1858.

anticipated acquittals on this defense by more than half a century. To quote further from this outstanding scientist of nearly a century ago: "It would be far better if we had a class of men \* \* \* peculiarly fitted for duty by a course of studies expressly directed to this end \* \* \* appointed by the government \* \* \* ready, at the call of the court, to examine the health of criminals, draw up reports touching the same, and deliver opinions." He further recommends that if the question of insanity should arise the defendant ought to be placed in a hospital for the insane for a period of study and observation. These words of wisdom fell on the ground made sterile by the famous McNaughton trial, for even now relatively few courts and very few states permit the carrying out of such procedures. Another voice in the wilderness, that of Falret<sup>13</sup> likewise went unheeded. His remarks, which are most interesting and might have been made to-day rather than in 1867, were as follows: "Instead of fixing our principal attention upon the act with which he is charged, and which is submitted to our investigation, let us abandon this narrow and exclusive point of view, to consider the individual as a whole, in his entire physical and moral constitution, in his past, his present and his future. Let us make, in a word, a medical examination as we would in the case of a patient laboring under any other form of disease. Let us, then cease to waste words in discussing the fluctuating and arbitrary limits which theoretically divide sin.

passion and natural mental errors, from morbid ideas and feelings of insanity. Let us study, clinically, the whole body of physical and moral phenomena which the history and present condition of our patient affords. Let us bring together all who have any knowledge of him, and trace back as far as possible into his past, even to his birth and ancestry. \* \* \* Again, let us compare the individual with himself in different periods of his life; with the mode of thinking, the conduct, ideas, feelings and acts common to men in the same condition of life as his own. Let us judge him by the criterion of common sense, and in the light of the prevailing ideas, the manners and social customs of his age, \* \* \* for, in this standard of common sense, with the numerous variations possible to it in individual cases, lies the primary point of comparison for us, by which, in the last analysis, we may decide between reason and insanity." Despite this and other masterful pleas for abandonment of the archaic punitive philosophy and procedure there was no observable change until the very last decade of the nineteenth century. Ransom,<sup>14</sup> a physician at the New York State Prison at Dannemora, had the temerity to bring up again at that time the question of moral insanity and of "irresistible impulse." He also called attention to the fact that there were what he termed "psychopathic criminals" who had to be approached and treated in a fashion different from that used for the ordinary criminal. He

<sup>13</sup> Falret, Jules: On Moral Insanity. *Am. J. Insanity.* 23:407. 1867. pp. 420-421.

<sup>14</sup> Ransom, Julius B.: The Physician and the Criminal. *J. A. M. A.* 27:788. 1896.

was further supported by McDonald<sup>15</sup> who insisted that responsibility, i.e., punishability, should rest on the existence or non-existence of mental disease. He emphasizes further that the defendant in order to be responsible must have sufficient mental capacity to rationally appreciate the nature and consequence of the act he is committing and have sufficient power of will to enable him to choose between doing it and not doing it. He elucidates further that if the defendant is to be considered irresponsible he must have lost the power of choosing, with reference to the particular act, due to mental disease. The State of Michigan does recognize the very questionable defense of "irresistible impulse" but the rules laid down by the judges following the trial of McNaughton tend to dominate the courts. Prior to 1939 the psychiatrist in a circuit court in Michigan was subjected to the same form of focal questioning and confusing hypothetical questions as of the preceding fifty or seventy-five years. No change could be expected so long as the criminal law remained punitive in purpose and the only call for psychiatric testimony was to aid in the determination of punishability.

Although defendants charged with murder or criminal sexual psychopathy will be treated differently, procedure otherwise will continue to be based on punitive English law. Whether outmoded or modern philosophies are followed, in either case certain questions

of psychiatric policy arise. Is it advisable or is it necessary for the psychiatrist to state whether the defendant knew "right from wrong" or the "nature and quality of the act" or that he was "responsible or irresponsible"? East<sup>16</sup> remarks that the weakness of medical evidence in the criminal trial is often due to the attempt of the psychiatrist to prove too much and confuse the difference between irresponsibility according to law and to medicine. In a medical sense this term refers to mental health whereas the legal connotation is that of punishability. East further emphasizes that the psychiatrist's report should be of such detail and clarity as to permit conclusions regarding the culpability of the defendant. In this light he urges the adoption of the term "culpable" and assiduous avoidance of the presentations of any conclusions in regard to the defendant's responsibility. He considers it quite unnecessary and, in fact, unscientific for the psychiatrist to permit himself to become involved in any discussion of the legal concept of "knowledge of the nature and quality of the act" or the question of "right versus wrong." Overholser<sup>17</sup> supports this viewpoint, insisting particularly that the expert avoid making any conclusions regarding the responsibility of the defendant. The legal profession and the public accuse the psychiatrist of extravagant claims, unreliability of diagnosis, fantastic testimony, disagreements among themselves, etc., but the

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<sup>15</sup> McDonald, Carlos F.: *Am. J. Insanity*, 56:21, 1899.

<sup>16</sup> East, W. S.: *The Modern Psychiatric Approach to Crime*. *J. Ment. Sc.* 85:649, 1939.

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<sup>17</sup> Overholser, Winifred: *The Place of Psychiatry in the Criminal Law*. *Boston Univ. Law Rev.* 16:322, 1936.

attorneys in making such accusations seem rather blind to the nature and quality of the questions asked. As correctly and wisely stated by Ray<sup>18</sup>: "Much of the unmerited distrust of experts' testimony springs from the manner in which it is elicited." He also offers a solution as follows: "This evil would be entirely avoided if the testimony of experts would be given in writing and read to the jury without any oral examination."

Although the psychiatrist may feel inclined to criticize the present procedure, the legal profession cannot be accused of apathy. On the contrary, lawyers interested in criminal law are making energetic efforts to eliminate the punitive approach and thus improve trial procedure; permitting at the same time introduction of treatment methods. Beccle,<sup>19</sup> for example, in a recent article on Modern Medico-legal Trends discusses the question of sex offenses and what to do with the offender. His inability to arrive at any satisfactory solution may perhaps be due to no fault of the legal profession but rather to the failure of the psychiatrist to provide the proper answer.

Cooperative effort has indeed produced tangible results in the State of Michigan. By the passage of the aforementioned act concerning sex offenders, our state has the unique distinction of being the first to recognize any relationship between culpability and psychopathic personality. Thus a medical term has been admitted to the bar, even though the term is of questionable

scientific merit. Undoubtedly, the act concerning sexual psychopaths was not intended as a recognition of scientific progress, but was, on the contrary, promulgated for the purpose of giving a sexual offender who might otherwise get three to five years, indefinite or lifelong incarceration. This is substantiated by the provisions for discharge, which latter cannot be accomplished until the accused has fully and permanently recovered. Whatever may be the purpose and intent of the law, it represents a definite social and scientific advancement. The act does possess certain regrettable features, the most important probably being the discretionary power given to the prosecuting attorney. He is not required to demand a psychiatric examination of a person accused of a sexual crime but may, if he wishes to consider the accused a possible criminal sexual psychopath, then request psychiatric examination. There are, of course, possible advantages to this freedom of action given to prosecutors but it permits considerable variance in procedure throughout the state and allows the subjective reactions of the prosecutor to influence his course of conduct.

For example, L. A. (Case No. 447604) recently studied at The Neuropsychiatric Institute had been known to have some homosexual leanings for many years. He indulged in mutual masturbation in adolescence and continued this practice in early adult life until married at the age of twenty-three. Following the loss of his wife when he was thirty-five, he continued to indulge in similar practices on infrequent occa-

<sup>18</sup> Ray, I.: Contributions to Mental Pathology. Boston. 1873. p. 428.

<sup>19</sup> Beccle, L. F.: Some Modern Medico-legal

Trends. Med.-Leg. and Criminol. Rev. 6:261. 1938.

sions. At the age of fifty-two he handled the genitalia of a youth of nineteen and was charged with soliciting an act of gross indecency. During the initial hearing the defense introduced the question of whether this was an act of gross indecency or simply indecency. Since this seemed to be a somewhat debatable point, the prosecution then decided to pursue the case as that of a criminal sexual psychopath. It was alleged locally that this change of procedure was in fact a political maneuver, the prosecution wishing to be as severe as circumstances permitted.

Another feature of the act which might be questioned is the commitment of the criminal sexual psychopath to the jurisdiction of the State Hospital Commission. Although this body has at the present time one psychiatrist amongst its personnel, the commission is essentially a lay body. This lay organization then determines the hospital or correctional institution to which the psychopath is to be sent and also decides when and under what circumstances he may be paroled and when he may be discharged as fully and permanently recovered. It is questionable whether such a group can consistently practice sound scientific criminology and psychiatry and whether such a group will be as receptive as they should of the recommendations presented to them by the superintendent of the hospital wherein the defendant is confined.

Approaching this subject from the strictly psychiatric viewpoint, leaving out for the moment public feeling, one wonders why only the sexual psychopath should be considered as mentally ill and thus less culpable or less responsible in a legal sense for his

criminal act. Why should not other psychopaths with criminal propensities, such as the emotionally unstable, liars and swindlers, etc., be given similar consideration? Legal attitudes have encompassed this concept for some time as demonstrated by the article of Jacobs<sup>20</sup> and other attorneys who have likened criminality to insanity.

T. D. (Case No. 455591) illustrates this point in question very clearly. As an adolescent this man had considerable difficulty in adjusting to the home situation and was considered in his early youth as stubborn, rebellious and irresponsible. Because of these difficulties, he left home at the age of nineteen. At twenty-two he was charged and eventually sentenced for assault with intent to rape. He left the reformatory after some three years and was for a brief time an itinerant worker and then joined the Army, hoping by means of a uniform and an honorable discharge to overcome his feeling of inadequacy. During his Army service he was in the "brig" a number of times for drunken and disorderly conduct and for being absent without leave. At the age of thirty, some time after discharge, he married and within a year after marriage demonstrated pathological emotional instability in the form of explosive angry outbursts. These outbursts, characterized by fighting, threatening with a dangerous weapon (shot-gun, revolver, knife, etc.) continued, being frequently aggravated by alcoholism. The number of arrests, fines, and jail sentences was substantially increased by such difficulties as transportation of liquor, larceny, and disorderly conduct. At the age of fifty-two he was charged with incest and was finally committed as a criminal sexual psychopath. In reviewing his adjustment over a period of years, it is at once obvious that he has been a dangerous individual, unquestionably psychopathic, and should have been under some form of protective detention long before.

<sup>20</sup> Jacobs, Charles M.: Why Crime and Insanity. *Med.-Leg. J.* 45:4. 1928.

The criminal code of Germany as revised in 1933<sup>21</sup> provides for such detention but only after the accused has served a sentence. This method of dealing with such individuals constitutes a double jeopardy and was one of the reasons for the condemning of the Goodrich Law of 1937 as unconstitutional. Nevertheless, it does have the advantage of providing a prolonged and indeterminate detention of all dangerous individuals and is not limited exclusively to sexual psychopaths as is the act under consideration. Irrespective of the handicaps mentioned, the present act is a definite forward step and offers an avenue for social reform of scientific character in the field of criminology.

A century ago Cooper<sup>22</sup> criticised the testimony of the medical profession, accusing the expert of wishing to ramble through the whole life of the defendant rather than limiting himself to the particular question at hand. We now have the opportunity of doing that very thing, though not, it is hoped, in a rambling fashion. The psychiatrist now has the liberty of presenting a complete case study, which may include a careful consideration of the defendant's ancestry, social background, personal history, personality development, even the psychodynamic factors concerned with the charge pending. The psychiatrist is not only permitted to present a full report of the defendant's personality as a whole but he may also

make recommendations and offer a prognosis. The presentation of the defendant's past, present and future as recommended by Falret in 1867 has finally become an actuality. If the reports are full and complete, couched in simple understandable language, presenting a practical and conservative viewpoint, they should go far towards enhancing the position of the psychiatrist in the criminal court. Although the number of cases studied in The Neuropsychiatric Institute has been as yet limited in number, the cooperation received from the courts has been very gratifying and in only one instance has it been necessary for a psychiatrist to appear in court to testify. Since the filing of a complete report eliminates the need of a personal appearance in most instances, the psychiatrist is not faced with either the hypothetical question or cross-questioning. Avoiding thus those factors which lead to the disfavor and discredit of the psychiatrist in the criminal court, it should not be difficult to correct most if not all of the accusations, both fair and unfair, leveled at expert testimony.

If practical, conservative, complete reports can convince the court of the value of psychiatric examination the liaison thus cultivated would promote more progressive criminology in the State of Michigan. The first step of progress would be the fulfillment of the recommendations of the American Bar Association<sup>23</sup> which are as follows:

<sup>21</sup> Mannheim, Hermann: *The German Prevention of Crime Act, 1933*. *J. Crim. Law and Criminol.* 26:517, 1935.

<sup>22</sup> Cooper, Thomas: *Tracts on Medical Jurisprudence*. Philadelphia, 1819.

<sup>23</sup> Report of the 52nd Annual Meeting of the Am. Bar. Assoc. 1929. p. 56.

"1. That there be available to every criminal and juvenile court a psychiatric service to assist the court in the disposition of offenders. 2. That no criminal be sentenced for any felony in any case in which the judge has any discretion as to sentence until there be filed as a part of the record a psychiatric report. 3. That there be a psychiatric service available to every penal and correctional institution. 4. That there be a psychiatric report on every prisoner convicted of a felony before he is released. 5. That there be established in each state a complete system of administrative transfer and parole and that there be no decision for or against any parole or any transfer from one institution to another without a psychiatric report."

The second step would be fulfillment of the recommendations of the National Crime Commission,<sup>24</sup> namely that each court have available not only psychiatric service but psychologists and social investigators, the work of this tribunal being furthered by the enactment of a law similar in principle to the Briggs Law of Massachusetts.

The momentum thus gained would permit eventually the achievement of a third, more radical advancement, specifically a "treatment commission" to whom the court would commit all defendants for observation, study, and planning of correctional measures. Such a program would require an extension of the elasticity of the present

indeterminate sentence, perhaps to the point of making the sentence wholly indeterminate. Michigan<sup>25</sup> was the first state to establish the indeterminate sentence in 1860, ten years before such procedure was recommended by the Prison Congress. It is hoped Michigan may again bear the torch of progress.

The concept of a treatment commission, treatment tribunal, or planning commission is far from new, though never placed in actual practice to the extent of taking the sentencing power away from the court. Bryce<sup>26</sup> recommended the appointment of such a commission of experts as early as 1888, suggesting that after examination and study they prescribe the treatment and determine the place for and duration of detention. Allison<sup>27</sup> voiced similar views a decade later and during recent years numerous references have been made to such a treatment board. The American Law Institute<sup>28</sup> has been active in developing an act which would sentence youths under twenty-one to such a commission, said youths being outside the jurisdiction of the juvenile court. According to this plan the commission would be composed of an educator, sociologist, psychiatrist, and criminologist, they in turn employing other assistants or experts to aid them when necessary. Although there is no theoretical reason for limiting such a plan to this age range, nevertheless, the focusing of such a program on the youthful offender would doubtless

<sup>24</sup> National Crime Commission Committee's Report on the Medical Aspects of Crime.

<sup>25</sup> Lindholm, A. C.: Status of Parole Proceedings Am. Prison Assoc. 1938, p. 381.

<sup>26</sup> Bryce, P.: Moral and Criminal Responsibil-

ity. *Alienist and Neurologist*. 9:428, 1888.

<sup>27</sup> Allison, H. E.: What Constitutes an Insane Criminal. *Albany Medical Annals*. 18:569, 1897.

<sup>28</sup> American Law Institute: Criminal Justice—Youth. Unpublished communication.

produce the quickest statistical and, it is hoped, the most convincing results.

Under such a regime there would be no need of separating more than a few of the criminal sexual psychopaths from other psychopaths and ordinary criminals. Instead of following the present trend of placing more criminals under psychiatric supervision in mental hospitals, the trend would be to place more psychiatrists in the field of criminology. Such a course would be more logical and more practical, though perhaps not more economical if properly carried out.

#### *Summary*

Prior to the termination of the eighteenth century the psychiatrist played little or no role in the criminal court. Since that time there has been an increasing demand for expert testimony in keeping with the broadening concept of irresponsibility. During the past fifty years attempts have been made to extend this concept to include borderline mental conditions and "irresistible impulses." As a consequence of this and the manner of questioning psychiatric testimony acquired a most unsavory reputation. The State of Michigan has made a definite advancement in the field of criminology by providing for psychiatric examination

of defendants charged with murder and of individuals alleged to be criminal sexual psychopaths. Although these laws do possess certain handicaps they offer the psychiatrist an opportunity to present to the court a written case study, i. e., a complete longitudinal section report of the accused's past, present and future. By presentation of adequate, practical and conservative case summaries the psychiatrist's reputation may be elevated and courts convinced of the advantages of individualized criminology. By forsaking the punitive approach the recommendations of the American Bar Association may be fulfilled. With further progress, one might look forward to the establishment of a "treatment commission" composed of a social investigator, psychologist, psychiatrist and others as indicated. All offenders would then be committed to this commission and corrective measures, preventive detention, hospitalization, parole or probation would be under its supervision. Confusing and contradictory expert testimony now so prevalent would be largely eliminated from the courts. The general trend would avoid placing more criminals in psychiatric hospitals but would place more psychiatrists in the field of criminology.