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Mary Goshorn Williams

Mabel A. Elliott

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# COURT PROCEDURE AND SUBSEQUENT TREATMENT IN CASE OF THE CRIMINAL INSANE

Mary Goshorn Williams and Mabel A. Elliott

Dr. Elliott is Associate Professor of Sociology and Criminology at the University of Kansas. Mrs. Williams is associated with her as a member of the staff. Together they sent out over 300 letters to wardens and attorney generals to secure the data that is analyzed in this article. Practice lags behind both what we believe and what we demonstrate.—(Editor)

It is common knowledge that the significant advance in understanding mental disorders has not been markedly evidenced in public provisions for the treatment of mental disease. In fact most treatment has lagged far behind accepted principles and techniques for handling persons who are victims of mental deterioration and emotional disorders. This is true in the case of civilian mental patients. For those mentally deranged persons who have committed serious offenses, normally designated as crimes, the problem of treatment is complicated, not merely by the generally retarded standards of public institutions, but by the whole legal philosophy as to what constitutes both crime and insanity. On the one hand the offender is *de facto* guilty of criminal behavior, of having committed an offense or a series of offenses which are specifically forbidden by law. As such, he is liable to conviction and sentence according to the law.

The law, on the other hand, has long since incorporated the principles of man's "responsibility" for his conduct, whether it be acceptable or condemned, in accordance with the classical and ecclesiastical philosophy out of which this theory grew. Such ecclesiastical theory has held on *a priori* grounds that man is a free, moral agent, one who makes a free choice in his decision to do right or wrong. On the other hand, men of unsound mind (*non compos mentis*) have long since been recognized as incompetent to make such decisions; hence, by strictest application of legal philosophy, the mentally deranged who have committed crimes have been adjudged "irresponsible because insane." On such grounds many cases of persons suffering from violent mental disturbances have been allowed to go scot-free after the commission of what would otherwise have been adjudged a serious offense. Earlier such persons were acquitted as "not guilty," with no adequate provision for the protection of society against the further damages of similar outbreaks of violence.

That persons may become so mentally or emotionally disturbed as to be incapable of normal reasoning is thus generally recognized. The criteria employed to establish the irresponsible character of an individual's behavior vary, however, from the most scientific techniques of those skilled in psychology and psychiatry

to the simple testimony of untutored laymen. Because of the comparative recency of the scientific development of psychiatry and psychology and the more or less esoteric jargon employed in these sciences, only that part of the public which has received some training in these subjects is capable of understanding psychiatric or psychological testimony offered in defense of the emotionally disturbed or mentally ill. In consequence, the legal profession has been prone to reject psychiatric testimony as illogical or unreasonable. Furthermore, law has its roots in age-old customs, *not* in the acceptance of modern theories as to the dynamic character of human behavior. Moreover, legal decisions have been built upon the complicated system of precedent. Prior verdicts are accepted as true and proper methods for disposing of contemporary problems. So it is that the legal profession today tends to define responsible conduct in terms of the McNaughten-Drummond Case of 1843, in which the basis for deciding upon a man's sanity was established by the famous "right and wrong test." According to the decision in this case a man was sane if he knew the difference between right and wrong, insane if he did not.

Previous to this case, the best judicial opinion had held that all criminals should be subject to the full penalty of the law unless they were not conscious of the nature of their act, or possessed no more reasoning capacity than "a wild beast or an infant." The McNaughten-Drummond Case, tried in the British Courts in 1843,<sup>1</sup> produced a modification of this practice. In this particular case, the defendant's guilt was clear but he was quite obviously insane, and was for this reason acquitted by the jury. The House of Lords so disapproved of the decision, however, that they requested a group of judges to define and clarify the right and wrong test. The judges in turn formulated a series of questions to be put to the defendant pleading insanity to determine whether he, in committing the crime, knew he was doing wrong.

In general outlines this so-called right and wrong test has persisted and forms an important part of the proceedings in the case of alleged insanity of the defendant in most criminal trials in the United States. In the course of time the test has been expanded to include a knowledge of consequences in certain jurisdictions, but just as often it stands as defined above. More recently judges have broadened their interpretation of this test and have held the accused is not responsible if his act is the "offspring or product of mental disease."<sup>2</sup>

The conclusions of modern psychiatry and psychology are so widely accepted by recently trained college graduates that the

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<sup>1</sup>Sheldon Glueck, *Mental Disorder and the Criminal Law*. Little, Brown and Company, Boston, 1925, pp. 161-186, and p. 398, for a discussion of this case.

<sup>2</sup>*Ibid.*, pp. 187-229.

validity of the right and wrong test for measuring normal mental functioning no longer can be held by educated men and women. Compulsive behavior is, perhaps, the best example of such inadequacy. For example we may find a man to be intellectually aware of the nature of his behavior, to know that his conduct is "wrong," so to speak; yet a compulsion impels him to behave in a particular manner. Thus, a man may know it is wrong to kill another man, but be unable to resist the impulse to kill. He may be convinced that, irrespective of the immoral nature of murder, he *must* kill. Or he may be so emotionally wrought up that he virtually explodes, despite any otherwise rational attitudes he may have on the sanctity of human life.

Both popular opinion and the law, on the other hand, attach far less stigma to being adjudged "irresponsible" because of insanity than they do to serving a sentence because of conviction for the offense. It is not surprising therefore that there has been a strong impetus to abuse the plea of "not guilty because of insanity." Such pleas have been particularly frequent in case of defendants indicted for murder. The extent to which such a plea has been abused cannot be accurately determined, but in any event, the public mind has come to regard the plea as a means of escaping the rightful consequences of criminal behavior, in other words, a legal subterfuge. Part of this public reaction is derived from the customary practice of having the defendant produce alienists to testify as to the nature of his mental condition. Since the defendant or someone interested in him must pay the fee of such a specialist, the practice tends to be discredited on the grounds that the alienist is paid to *help the defendant and not to give an honest opinion*. To a degree this opinion is substantiated by the disparity in opinion between the alienists who testify for the State and those testifying for the defendant.

In order to minimize any tendency to give false testimony for a fee it would seem to be a far better procedure for the state to create a psychiatric board consisting of at least three members. These men should receive a stipulated sum for their services so as to preclude any basis for assuming that their testimony might be colored by financial considerations.

Under existing practices there undoubtedly have been many cases in which the plea, insanity, was made in an effort to avert conviction. To offset this, outraged legislators have enacted new laws providing for the incarceration of such persons under the special classification of "criminally insane." Instead of adhering to the old policy of adjudging such persons not guilty because insane, legal provision for another verdict arose, viz.: *not guilty, but insane*. Practices in the various states have depended quite

naturally upon the legislation enacted in such instances, as well as upon the folkways of local prisons and courts, all these developing with little or no actual statutory provision. Those of us familiar with treatment of the criminal insane in our own communities ordinarily can express only chagrin for the local practices.

Since there have been no studies indicating exactly what procedures are employed in dealing with those defendants alleging insanity and those adjudged criminal insane in the United States, we have undertaken the problem of ascertaining procedures for dealing with these situations in the various states. Letters requesting such information were sent out to all the state prison wardens and to all state attorney generals. Approximately one-half answered the first request, one-fourth (one-half of the remaining group) the second request, and information was obtained from practically all through the third letter. All told, 47 attorney generals or states attorneys and 48 wardens<sup>3</sup> reported the practices in their particular states.<sup>4</sup>

The need for clarification of our criminal procedure in case of alleged insanity of persons under trial has long been obvious to the criminologist and psychiatrist. Our research makes this fact doubly patent, since the prevailing practices are obviously confusing, and inconsistent. Upon analysis the returns from the various states attorneys indicate that the basis for determining sanity of the defendant in criminal cases fall into five distinct classifications.<sup>5</sup> (1) In certain states an ordinary jury trial is held for determining the sanity of the defendant, according to the classical test of whether the defendant knows right from wrong. Further inquiry with reference to the practices in these states however discloses that the testimony of laymen and experts is given as a means of determining the defendant's mental condition. In effect the procedure in such states does not vary markedly from (2) those states which employ a jury trial and make the decision as to the sanity of the defendant on basis of general evidence of competent laymen, or "expert testimony" from practicing physicians. Expert testimony is permitted but not required in this group of states. (3) In the third group of states a jury decides as to the mental condition of the defendant upon the evidence presented by expert testimony alone. (4) A

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<sup>3</sup>Two letters received were scarcely literate, which in themselves were a commentary on penal administration and practices.

<sup>4</sup>These data have been classified to the best of our ability. In case of any apparent inconsistency of the states attorneys the information has been checked and rechecked. The authors have accepted the statements of the attorney generals except where there seemed to be important reasons for checking with bibliographical and other sources.

<sup>5</sup>We are accepting the data received from the states attorneys of the several states as authentic with reference to the practices of the particular states.

TABLE I. METHODS OF JUDGING SANITY OF ACCUSED PERSONS AS REPORTED BY ATTORNEYS GENERAL IN 47 STATES<sup>1</sup>

I Jury trial on basis of "Right and Wrong test"	II Jury trial testimony of qualified laymen not necessarily expert testimony	III Jury trial Expert testimony	IV No jury, Expert testimony only	IV <sub>a</sub> States where expert must be a specialist in mental disease
Arizona	Alabama†	California	Arkansas	Arkansas
Delaware	Idaho	Colorado*	Colorado*	California
Illinois	Kansas*	Florida	Connecticut	Massachusetts
Iowa	Kentucky	Indiana	Kansas*	New York
Maryland*	Montana	Maine	Louisiana	Rhode Island
Mississippi	Nebraska*	Michigan	Maryland*	South Carolina
Missouri	New Hampshire	Minnesota	Massachusetts	V
Nevada	New Oklahoma	Tennessee	New Jersey	States with no fixed rule
New Mexico	Pennsylvania	Utah	New York	Nebrasket
South Dakota		Virginia*	North Carolina	Oregon
Texas			North Dakota	
West Virginia			Rhode Island	
Wisconsin			South Carolina	
Wyoming			Vermont	
			Virginia*	
			Washington	

<sup>1</sup>Georgia did not report.

\*States in which two procedures are employed.

†In practice this state usually falls under group II.

‡"Right and wrong test" also used.

fourth group has abolished the jury trial, and the testimony of physicians alone determines whether or not the defendant is declared insane. (5) Certain states (including some which require a jury trial and others which do not) stipulate that the expert testimony must be given by a physician who is a specialist in mental disease. (6) In two states no general procedure is required.

If we examine each of these classifications in detail we find that in group I, the right and wrong test is the theoretical basis for the jury's decision in case of alleged insanity of the defendant in 14 states, *viz.*: Arizona, Delaware, Illinois, Iowa, Maryland, Mississippi, Missouri, Nevada, New Mexico, South Dakota, Texas, West Virginia, Wisconsin and Wyoming. This test is however offset by the general practice of requiring competent laymen and/or physicians to testify in these states. In no case, however, is the expert necessarily a specialist in mental disease although he may occasionally be such.

Texas and several other states require expert testimony, but it need not be that of psychiatrists. In Illinois the classical right and wrong test still prevails despite the recently enacted (1943) Mental Health Act. If so desired either the state or the defendant may introduce expert testimony, but generally speaking testimony is given by persons who knew the defendant on or about the day the crime was committed.<sup>6</sup>

In Iowa the trial for determining the sanity of a defendant proceeds on the same basis as for any other trial, but the burden of the proof is upon the defendant. If it is determined that the defendant is insane he can not be indicted "until his reason is restored," in which event he may be returned to the custody of the court for trial. In the event that a misdemeanor incarcerated in an Iowa jail becomes insane, he however may be tried before a commission of insanity rather than a regular jury. In this case the medical opinion of a reputable practising physician is required. The commission of insanity in each county is composed of three members, *viz.*, the clerk of the district court, a reputable physician, and a reputable attorney. It seems obvious that persons guilty of minor offenses in Iowa are thus more likely to receive intelligent disposition than in case of those indicted for felonious offenses.

However, the prevailing practice in all states in group I fails to recognize the incompetency of many general practitioners to testify with reference to mental disease. It stands true that most older medical men engaged in general practice have had very little if any training in abnormal psychology or mental disorders.

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<sup>6</sup>Jerome Finkle, Executive Secretary of the Legislative Reference Bureau, Springfield, Illinois. *Correspondence*, dated April 20, 1944.

In only a few of our medical schools is specialization in mental disease possible, hence medical schools must bear part of the blame for the general lack of suitable standards. We do not actually have enough psychiatrists to give competent testimony with reference to what constitutes insanity. In groups II and III the final decision as to the sanity of the defendant also depends upon a jury of laymen. Group II, which includes Alabama, Idaho, Kansas, Kentucky, Montana, Nebraska, New Hampshire, Oklahoma, and Pennsylvania includes roughly those states which allow either general evidence upon the part of laymen or expert testimony or both. Of this group Alabama also employs the right and wrong test. As a matter of fact, notions of right and wrong undoubtedly color the layman's conception of the nature of insanity. If in popular parlance a man is "out of his head" the public is willing to concede that his conduct is unaccountable. Of the states in this group Pennsylvania allows a most interesting procedure. Whenever in the course of the trial the judge believes a defendant is a mental case he may stay the trial and have the defendant examined.

The ten states which provide for jury trial and admit expert evidence only, constitute group IV. These are Indiana, Florida, Utah, Minnesota, California, Maine, Tennessee, Virginia, Michigan and Colorado. Two of these states, Virginia and Colorado, also authorize waiving of jury trial, unless demanded. Kansas which may have a jury trial with both general and expert evidence also permits a decision without a jury in case of expert evidence. So also does Maryland, which may also employ the right and wrong test with a jury trial. In addition to these four states which may employ the non-jury trial permissively, twelve other states—Arkansas, Connecticut, Louisiana, Massachusetts, New Jersey, New York, Rhode Island, North Carolina, North Dakota, South Carolina, Vermont, and Washington, authorize a non-jury trial with only expert evidence in all such cases. Patently this is an improvement over the jury decision, but not all physicians are competent to decide such questions, as we have said before.

In only six states, *viz.*, New York, South Carolina, California, Massachusetts, Arkansas and Rhode Island (group V) is the expert required to be a specialist in mental disease. In Oregon and Nebraska (group VI) there is apparently no fixed rule of procedure but in practice Nebraska tends to fall in group II, with a jury trial determining the sanity on the basis of evidence from laymen or from reputable physicians.

To recapitulate briefly, 33 states still continue to decide cases involving the plea of insanity on the basis of a jury trial, despite

the subtle and intricate professional knowledge necessary to diagnose many types of mental disorder. We should not consider such a jury competent to diagnose pneumonia, yet a jury would probably be a more reliable judge of physical disorder than for the vagaries of mental disease.

So much for court procedure in reference to insanity. The disposition of the convicted cases of criminal insane presents no pleasanter picture, for in the case of criminals who are convicted but adjudged insane, five different practices apply. Twenty-eight states (Alabama, Arizona, Arkansas, Connecticut, Delaware, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana, Maine, Maryland, Mississippi, Montana, Nebraska, New Hampshire, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, South Carolina, South Dakota, Utah, Vermont, Virginia, and Wyoming) commit such criminals to a state hospital for the insane. This would appear to be the most enlightened practice in vogue. This practice is, however, often opposed by laymen, and especially by the relatives of the non-criminal inmates, who attach great stigma to "the association of their relatives with murderers." Yet it is well recognized that many non-criminal mental cases have made threat of violence and some, although they have not been tried for a criminal offense, have actually committed dangerous acts. Prominent families thus sometimes succeed in committing their relatives to a mental hospital to avoid a criminal trial. The difference between criminal and non-criminal conduct of insane persons tends thus to be a matter of court decision rather than one of an actual difference in overt behavior.

Nevertheless the objection to housing criminal insane with the non-criminal insane has been loudly voiced in many states. Twelve states (California, Illinois, Massachusetts, Michigan, Minnesota, Missouri, New York, Ohio, Pennsylvania, Rhode Island, Tennessee, and West Virginia) have provided special hospitals for the criminal insane. In the majority of these states there is a relatively large insane population; hence, the mere number of the criminal insane may warrant the existence of such a separate institution.

Unfortunately, 4 states (Iowa, New Jersey, Washington, and Wisconsin) still retain the barbaric custom of incarcerating the criminal insane within the prison itself. In 2 states (Colorado and Nevada) certain cases are kept in prison and others are sent to the state hospital. In one state (Indiana) some prisoners are confined in the prison, others are in a special hospital.

While hospitalization of the criminal insane is obviously to be desired, there can be no assumption that all persons so hospitalized are receiving anything resembling adequate treatment. Any-

one familiar with the overcrowded, under-staffed public hospitals for mental cases knows how far we must go before we can meet suitable standards in the case of the non-criminal mental patients. In many mental hospitals deplorable conditions exist because the insufficient appropriations will not provide for adequate medical staff, for trained attendants or suitable equipment. Frequently, political considerations determine the appointments of the assistants.

Meanwhile the plight of the convict who becomes a mental case following his commitment is often more serious than that of a person convicted as guilty but insane. Since less public attention is focused on inmates than on persons on trial for felonious offenses, inmates tend to be lost in institutional oblivion. Psychiatrists, themselves, have given relatively little attention to mental disorders arising in prisons, although it is acknowledged that many cases of psychosis arise during the period of incarceration. The sense of stigma, the isolation from friends and loved ones, the tendency toward rationalization on the part of the prisoners are a few of the factors which promote mental disturbances.

What happens in many of these cases is a deplorable chapter in the horrors of modern prison life. Few prisons have psychiatrists who are full-time members of their staffs, and visits from outside or consulting psychiatrists are infrequent, if they occur at all. If the warden and the medical staff are intelligently aware of the serious nature of mental disturbance such cases may be transferred eventually to a suitable hospital. But in far too many instances the mentally ill prisoners live a vegetative existence with little or no attention given to their unhappy plight.

In light of all these facts the need for promoting a standard law prescribing suitable procedure for determining the mental condition of defendants alleging insanity seems apparent. Similarly there is grave need for improving the treatment of the criminal insane. The American Law Institute and other interested groups would do well to accept this challenge.