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SUGGESTED CHANGES IN THE NEW YORK LAWS AND PROCEDURES RELATING TO THE CRIMINALLY INSANE AND MENTALLY DEFECTIVE OFFENDERS

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This and the following nine full articles and digests of articles were contributed to the program of the Association for the Psychiatric Treatment of Offenders (APTO) which was given on November 17, 1951, in New York City in recognition of Dr. Robert H. Gault's forty years as Editor of this Journal. The contribution by Dr. Benjamin Karpman on sex criminals in Number One of the present volume belongs in this group.

The author of the first article below is a New York City Magistrate, Executive Director of the American Bar Association's Committee on Organized Crime, Editor of Organized Crime and Law Enforcement, and author of SEX AND THE LAW. —EDITOR.

The following changes are recommended in our present laws and procedures dealing with mentally disordered and mentally deficient persons who are charged with the commission of crimes.

I.

A psychiatric examination should be *required* for the following categories of offenders:

a. All persons indicted for murder.

b. All persons indicted for a felony who have previously been indicted or convicted of felonies.

c. All persons indicted for forcible rape or forcible crimes against nature.

d. All persons against whom an information has been filed, or who have been indicted for impairing or endangering the morals of a minor, carnal abuse of a child, or indecent exposure, who have once before been charged with similar crimes.

It would be highly desirable if all persons under indictment were submitted to routine mental examinations after conviction. This is done at the present time as a matter of routine only in the Court of General Sessions through its Psychiatric Clinic. This practice makes it possible to detect the psychotic and mentally defective offenders who may be sent to mental institutions instead of to prisons or penitentiaries, where they will be a source of serious difficulties for correctional authorities. A finding of psychosis or mental deficiency after conviction, moreover, makes it possible to take immediate steps to set aside convictions. Under our statutes a man cannot be tried for crime if he is in such a state of imbecility, idiocy or insanity that he is incapable of understanding the charge or of making his defense thereto.

A routine mental examination after conviction, even where defendants are neither psychotic nor mentally defective, has the further advantage that it produces considerable data about the personality of a defendant, which is of great value to a judge in the determination of sentence.

However, at the present time, it is not feasible to require the routine mental examination of all convicted offenders. The psychiatric clinics and facilities for undertaking such a task are presently not available, nor does it seem likely that they will be available in the foreseeable future. If psychiatric examinations must be restricted, because of lack of facilities, then they should be required only for those categories of offenders, who are likely to be mentally abnormal or who, because of their behavior patterns, may be dangerous to the community. We believe that mental examinations should be required after conviction for certain categories of sex offenders and for offenders who are beginning to develop patterns of repetitive criminality. In addition, psychiatric examination before trial should be required in all cases where defendants have been indicted for murder.

At the present time the law provides that a Court or Magistrate may commit a defendant charged with crime for psychiatric examination to a public hospital when he is "in such a state of idiocy, imbecility or insanity that he is incapable of understanding the charge or of making his defense."[1] This gives a Judge discretion as to when to order a psychiatric examination. Generally such examinations are ordered sparingly, and only in cases where the defendant has shown clear signs of mental aberration. The result is that mental disorders and deficiencies of large numbers of offenders remain undiscovered by the Court. This may cause serious difficulties in the disposition of criminal cases. This is apparent from the case of *People v. Wolfe*.[2]

Louis Wolfe was indicted for the killing of his wife in 1943. At his trial in 1944 he refused to permit his counsel to interpose a defense of insanity. The defendant was found guilty of murder in the first degree, which made a death sentence mandatory. Before sentence could be pronounced, however, Wolfe showed signs of mental aberration and was committed for examination. He was suffering from schizophrenia of the paranoid type and was ordered committed to Matteawan State Hospital. In 1950, six years later, he was returned from Matteawan to the Kings County Court on a certificate that he was no longer insane. Although the psychiatrists from Matteawan

1. Sec. 870, 658 *et seq.*, Code of Criminal Procedure.
2. 1950, 102 N.Y. S, 2d., 12.

changed their opinions with respect to Wolfe's mental condition during the course of the hearings, the original report from Matteawan, that he was sane, was confirmed and Wolfe, therefore, had to be sentenced to death. After this judgment, a motion was made by his attorney asking for a new trial on the ground of newly discovered evidence. The newly discovered evidence was that all during his trial in 1944, Wolfe was in such a state of idiocy, imbecility or insanity as to be incapable of understanding the proceedings or of making his defense thereto. The motion for a new trial was granted, and the trial and the death sentence were therefore quashed.

It is most extraordinary that this motion for a new trial was not made immediately after the original commitment to Matteawan, in 1944. Nevertheless, it is apparent that if the law had required a mental examination in advance of trial in the case of all persons indicted for murder, as we have suggested, the tremendous expense to the State of Wolfe's trial and the subsequent proceedings might have been avoided. It would have been apparent from the beginning that Louis Wolfe was a psychotic in need of mental treatment and not a criminal who deliberately beat his wife to death with a shoe.

II

The McNaughten Rule should be abandoned in New York as a test of criminal responsibility. If a person is definitely psychotic, or a mental defective, the law should concern itself with his mental condition and his dangerousness to the community rather than the criminal behavior with which he is charged. The test of liability for crime in the case of persons allegedly insane or mentally deficient should be the presence or absence of a clinically recognizable mental disorder (psychosis) or mental deficiency (imbecility or idiocy) at the time the crime was committed. When a psychotic or mental defective commits a crime, he should be confined in a mental hospital or mental institution until he is cured and until he is no longer dangerous. The psychotic or mentally defective offender should be discharged from the hospital only after a hearing in the Court which had jurisdiction of the charge of crime.

Sec. 1120 of the Penal Law provides that a person is not excused from liability on the grounds of insanity, idiocy or imbecility, except upon proof that at the time of the commission of the criminal act he was laboring under such a defect of reason as (1) not to know the nature and quality of the act he was doing or (2) not to know that the act was wrong.

Sec. 34 of the Penal Law provides, moreover, that "A morbid propensity to commit prohibited acts, existing in the mind of a person who is not shown to have been incapable of knowing the wrongfulness of such acts, forms no defense to a prosecution therefor."

It is apparent from the aforementioned that New York has expressly adopted the rule of the McNaghten case.[3] New York has also expressly repudiated the notion that so-called irresistible impulses to commit crimes, may excuse from criminal liability.

We believe that the rules governing the criminal responsibility of the insane and the mentally defective in New York, should be modified along the lines that we have indicated. In support of our position we urge the following:

A. The Rule in McNaghten's case, and the rules against irresistible impulses as a defense to crime, run counter to fundamental notions of moral responsibility as a basis for punishment or penal treatment.

The Anglo-American criminal law has been based traditionally upon the concept that men are free moral beings who, with knowledge of right and wrong, choose to do wrong and therefore should be punished. There is an interchangeability of what might be called penal and moral responsibility. This was expressed long ago by Sir Matthew Hale who stated:

> Man is naturally endowed with these two great faculties, understanding and liberty of will and therefore is a subject properly capable of a law . . . . . and consequently obnoxious to guilt and punishment for violation of that law which in respect of these two great faculties he hath a capacity to obey! The consent of the will is that which renders human actions either commendable or culpable. . . . . .[4]

It is a little difficult to see how there can be moral responsibility for crime if the defendant is suffering from a mental disorder affecting his volition, such as pyromania or kleptomania, in which there is a strong compulsion to do the prohibited act of stealing or setting fires. Nor is it apparent how a mentally disordered person, suffering from a delusion or a hallucination, who may know the wrongfulness of his act, or an epileptic who, during a seizure, may have an inadequate knowledge of a criminal act, can be held morally responsible for this crime. Actually, in these situations, the law pays only lip service to the doctrines of moral responsibility. It acts under the belief that the general security requires that even mentally disordered and mentally deficient persons must be subjected to punishment for crime, where there

3. 1843, 10 Clark and F.N. 200.
4. History of the Pleas of the Crown I, 14-15, 1736.

is some knowledge, even though it may be defective, of the nature and quality of the criminal act and of its wrongfulness.

We do not believe that the punishment of insane and mentally deficient offenders is required by the general security. If such persons are dangerous, they require the attention of psychiatrists and doctors rather than of jailors and prison wardens.

B. The rules of Sec. 1120 and Sec. 34 of the Penal Law are largely ignored at the present time as a basis for determining the criminal liability of the mentally disordered and the mentally deficient.

We have seen that Sections 870 and 658 *et seq.* of the Code of Criminal Procedure prohibit the trial of persons who are incapable of understanding the charges against them or of making their defense thereto. Under these sections, the test is whether the mental disorder or the mental deficiency of the defendant has so impaired his understanding, that it is unfair to try him for the crime with which he is charged. This is quite a different test than the knowledge of right and wrong and of the nature and quality of the act required by the McNaghten rules. The tests of 870 and 658 of the Code of Criminal Procedure are usually interpreted by psychiatrists, who examine defendants before trial, to mean the presence or absence of a clinical psychosis or of mental deficiency of the grade of idiocy or imbecility. If these forms of mental aberration are present, then the defendant is certified as being incapable of understanding the charge or proceeding. He is then committed to a hospital for the insane or for the mentally deficient, which is either under the jurisdiction of the Department of Mental Hygiene or the Department of Correction.

In the case of minor offenses, this commitment is a final disposition and the charge is abated[5]. In the case of felonies, a defendant must technically be returned to the Court where the charge is pending, if he has sufficiently recovered his reason, so that he can intelligently participate in the trial.[6] Generally, however, except in murder cases, a commitment to a mental hospital is for all practical purposes a final disposition of the criminal charge. If the defendant has a psychosis, recovery may take considerable time. Mental deficiency, moreover, defies the best efforts of doctors. The passage of time never helps the case of the prosecution. The longer the interval between the commission of the crime and the date of the trial, the greater is the reluctance to prosecute. Under these circumstances the commitment of the

5. 873 Code of Criminal Procedure.
6. 662 b Code of Criminal Procedure.

psychotic or the mentally defective, normally ends the criminal proceeding in both misdemeanors and felonies.

If the psychotic offender has been tried, convicted and sentenced to a penal institution, he is usually transferred by the correctional authorities to a mental hospital. Here the major concern is not his crime, but his mental condition. Thus, if his sentence expires while he is in the mental hospital and he is still dangerous, he may be held in confinement under the provisions of the Mental Hygiene Law.

Even in murder cases, a defendant found psychotic or mentally defective by the psychiatrist who examines him, may not be tried even though he may understand the nature and quality of his act and its wrongfulness. Until the offender has recovered sufficiently from his psychosis, so that he can intelligently participate in his defense, the trial for murder may not proceed. If such an individual is in fact tried and convicted of murder, and then found to be psychotic, the law forbids his execution even though sentence of death may have been imposed. The Wolfe case is an example.

We believe, therefore, that the modifications that we have urged of our rules concerning criminal responsibility of mentally disordered and mentally deficient offenders, are not too radical a departure from present practices.

C. The concept that mental disease, as such, where it is a clinically recognizable psychosis, and mental deficiency of the grade of idiocy and imbecility, should excuse from criminal responsibility, has respectable authority behind it. The rule of the McNaghten case with respect to the knowledge of the wrongfulness and the nature and quality of the criminal act, were repudiated as tests of responsibility as early as 1871 in the New Hampshire case of *State v. Jones*.[7] That case held that a jury was properly instructed in its deliberations on a charge of murder when the Court charged the jury: "If the defendant killed his wife in a manner that would be criminal and unlawful if the defendant were sane, the verdict should be not guilty by reason of insanity, if the killing was the off-spring or product of mental disease in the defendant." The Court felt that any further instructions to the jury would invade its province.[8]

III

The law of murder should be amended so as to provide a penalty less than death for killings from so-called praiseworthy motives.

7. 50 N.H. 369.
8. See discussion in WEIHOFEN, INSANITY AS A DEFENSE IN CRIMINAL LAW, 81 *et seq.*

When a child kills a parent, or a parent kills a child, who is incurably ill, or a husband kills the paramour of his wife, there is great reluctance to apply the drastic penalties of murder to such homicides. In order to relieve the offender of criminal responsibility in such cases, the plea of temporary insanity is frequently entered. It is usually alleged that, at the time of the crime, the defendant acted under such great mental stress and mental tension, that he was unable to know the nature and quality of the act that he was doing, or that the act was wrong. Immediately after the homicide, the tension and mental stress is eliminated, and the defendant is able to function like any other human being.

There can be no question that pleas of insanity in the so-called unwritten law cases, and in cases of killing from so-called praiseworthy motives, are specious. They are entered merely to achieve a result, to save the offender from the death penalty for murder. If the punishment for murder were more flexible, and permitted a certain discretion to the Judge, there would not be the same pressure upon lawyers and defendants to enter pleas of temporary insanity in the aforementioned type of cases. Accordingly, we feel that, where a person is killed, and the killing occurs from what might be deemed praiseworthy motives (the concern of a parent for a child, or of a child for a parent, the concern of a man or woman to protect his honor and integrity, etc.), the jury should be instructed to make a determination with respect to the motives which induced the killing. A finding by the jury that the killing occurred from "praiseworthy motives" as defined by the Court, should necessarily eliminate the death penalty. The Judge should then, under the statutory scheme that we favor, be able to impose a prison sentence for any term up to life or, he should be able to suspend sentence and place the defendant on probation.