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## THE PROBLEM OF MENTAL DISORDER IN CRIME: A SURVEY\*

One of the consequences of the law's acceptance of the lay notion that most people are free rational agents is the tacit assumption that except in clearly recognizable cases of marked dementia, all people are the same and should be treated alike. No middle zone is recognized.<sup>1</sup> This approach to the problem of anti-social behavior is, of course, completely opposed to the present trend of thought. To the criminologist mental abnormality is an extremely broad concept; and is merely one of the factors to be considered in determining in individual cases why an offender offended and what method of treatment would be most effective in protecting society against a repetition of such behavior. But the law could not adopt such a view and still continue to exist as it is classically envisaged. Law is general; rules are framed in advance and are applied to all equally. An inquiry into the causes of behavior for the purpose of determining a legal result would make each case unique. There could be no law.<sup>2</sup>

A concession, however, has been made in the case of marked dementia, for the early punitive philosophy of criminal law did not demand the punishment of people who had not the ability to control their behavior or comprehend its consequences. The desire for vengeance was not thwarted if offenders commonly regarded as demented were left untouched. But the very basis of the exception was the idea that people were of one type or the other, either sane or insane. At a time when mental abnormality was explained in terms of the effects of lunar rays, and even later (in the first part of the nineteenth century) when phrenology was respectable and in high vogue, it was inevitable that this simple categorization should have evolved. Psychology and psychiatry were not yet born when the law's present attitude toward the

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<sup>1</sup> See B. GLUECK, *PSYCHIATRIC AIMS IN THE FIELD OF CRIMINOLOGY* (Nat. Com. for Mental Hygiene, 1922).

<sup>2</sup> See S. Glueck, *New Trends in Criminology*, in (1924) CONFERENCE OF SOCIAL WORK.

problem of mental abnormality crystallized. Ordinary rules of law and procedure were regarded as being as well adapted for determining the existence of the particular condition of the mind termed insanity as for determining the existence of the operative facts in assault and battery. The matter was one capable of being handled competently by laymen.

If the law were malleable and easily changed to fit newly acquired knowledge, and if, in the past, those engaged in different professions were accustomed to exchange views to their mutual profit, the notorious condition now existing in this branch of the law would probably have been avoided. But the law is rigid, precedent is a stiffening element, and the professions have not been in the habit of exchanging views. Hence the law still clings to its early naïve notion in regard to the mental springs of human conduct, heedless of the fact that medical science has demonstrated that the lay tests devised by the law are hopelessly inadequate for the purpose of detecting mental abnormality. To the psychiatrist there is an almost endless variety of types of mental disorder. "Sanity" and "insanity" have been practically ejected from the medical vocabulary.<sup>3</sup>

There is thus a conflict between the sweeping general approach of the law and the highly individualized approach of sociologists and psychiatrists,<sup>4</sup> and it is toward the resolution of this conflict that effort should be directed. What means can be devised which will enable the law to utilize the knowledge of these branches of the sciences?

One preliminary point should be noted here. If the sole criterion of the desirability of rules of law was the degree to which these rules reflected the opinions and desires of the community, the vast difference subsisting between the legal and medical attitudes toward mental abnormality would not be conclusive proof that a radical change in the law was necessary. It is probable that the layman still conceives of offenders as being sane or insane and still demands that the sane be and the insane be not, held criminally responsible. The law to that extent reflects the psychological and ethical notions of the man on the street. But despite this consideration, there is still left the much more important problem of whether the rules and procedure adopted by the law are cal-

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<sup>3</sup> "Impulses, delusions, knowledge of right and wrong are no longer conceived as concrete entities that either are or are not. Man is not a mosaic which may have some portion of the pattern dropped out indifferently as it were. The language of the law, while it might have been all right a hundred or two years ago is no longer usable by the present-day psychiatrist who finds himself quite unequal to thinking in such terms and much less able to use them exclusively as he is required to on the witness stand, for the expression of his thoughts." WHITE, *INSANITY AND THE CRIMINAL LAW* (1923) 104. The fact is not overlooked that the various schools of thought in psychiatry and psychology differ to some extent *inter se*.

<sup>4</sup> S. GLUECK, *MENTAL DISORDER AND THE CRIMINAL LAW* (1925) 188 *et seq.*

culated to protect society from the harmful acts of people suffering from mental disorder, whether such disorder amounts to "insanity" or not. In the ensuing criticism, this latter consideration is premised as the chief gauge of desirability.<sup>5</sup>

#### HISTORY OF THE INSANITY DEFENSE<sup>6</sup>

Until the late thirteenth century criminal responsibility was determined quite objectively. Lunacy was no defense. In the reign of Edward I it became a ground for royal pardon; physical punishment was thus avoided but the goods of the accused were nevertheless forfeited. Not until the first quarter of the fourteenth century was lunacy established as a defense.<sup>7</sup> The law then adopted tests for the purpose of ascertaining the existence of this condition. The historical evolution of these tests is as random as the law itself. Stray phrases dropped in books and opinions were successively adopted as tests by commentators and courts. Thus Bracton, writing in the thirteenth century before lunacy was established as a defense in the courts, said that a madman (*furiosus*) is one who does not know what he is doing, who lacks in mind and reason, and who is not far removed from brutes.<sup>8</sup> Coke subsumed the requirement of sanity for criminal responsibility under the general requirement of "guilty intent."<sup>9</sup> Hale introduced the notion of partial insanity that was to cause so much trouble later, and also laid down the "child of fourteen" test as determining criminal irresponsibility in cases of total insanity.<sup>10</sup> Hawkins, writing late in the eighteenth century, introduced the "good and evil" concept, the precursor of the famous "right and wrong" test.<sup>11</sup> The courts, greatly influenced by these commentators, adopted now one, now another, and sometimes odd combinations of these tests.<sup>12</sup> In 1800, Lord Erskine, defending one Hadfield in a prosecution for shooting at the king, introduced a new element into the already highly disordered state of the law. Hadfield, according to modern psychiatrists, was a typical paranoiac suffering

<sup>5</sup> See Sayre, Book Review (1926) 39 HARV. L. REV. 520, 522.

<sup>6</sup> For an exhaustive historical treatment, see WHARTON AND STILLÉ, *MEDICAL JURISPRUDENCE* (1873) 510 *et seq.* S. GLUECK, *op. cit. supra* note 4, at 123 *et seq.* See also, Sayre, *Mens Rea* (1932) 45 HARV. L. REV. 974, 1005.

<sup>7</sup> 3 HOLDSWORTH, *HISTORY OF ENGLISH LAW* (3d ed. 1923) 312-316, 371-375. Holdsworth points out that this result was probably hastened by the fact that royal grace in such cases became a routine matter and that jurors returned verdicts of not guilty when they realized that application for a pardon had become a mere formality.

<sup>8</sup> BRACTON, *DE LEGIBUS ANGLIAE*, f. 150.

<sup>9</sup> CO. LITT. \*247b.

<sup>10</sup> 1 HALE, *PLEAS OF THE CROWN* (1778) 30.

<sup>11</sup> 1 HAWKINS, *PLEAS OF THE CROWN* (8th ed. 1824) 2.

<sup>12</sup> The cases are collected and analyzed in S. GLUECK, *op. cit. supra* note 4, at 139 *et seq.*; Mikell, *M'Naghten's Case and Beyond* (1902) 50 AM. L. REG. 264, 270.

from systematized delusions. Erskine eloquently pleaded that extreme cases where "the human mind is stormed in its citadel, and laid prostrate under the stroke of frenzy" are very rare, and that the true character of insanity is delusion. But he asserted that one should not be excused from criminal responsibility unless the delusion was "connected with the act."<sup>13</sup> His argument prevailed and became a landmark in the law of insanity.

In 1843 the law was in a state of hopeless confusion. In that year, one M'Naghten, suffering from a mental disease which manifested itself in what are now regarded as typical delusions of persecution, and believing himself to be hounded by Sir Robert Peel, shot and killed Peel's secretary, having mistaken him for Peel. He was tried, and acquitted on the ground of insanity.<sup>14</sup> The case created great public furore and was the subject of debate in the House of Lords. It was finally determined to secure the opinion of the judges of the House of Lords on the law governing such cases. Accordingly four questions were asked which were answered by the Lords. It is interesting to note that though the answers to these questions were merely opinions of the judges and not decisive of any case before them, the particular type of mental abnormality that must have been in the minds of the judges was paranoia,—M'Naghten's trouble.

Questions one and four and their respective answers, and questions two and three and their respective answers will be considered together for convenience.

*"Question One:* What is the law respecting alleged crimes committed by persons afflicted with insane delusion, in respect of one or more particular subjects or persons; as, for instance, where at the time of the commission of the alleged crime, the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some supposed public benefit?

*"Answer:* Assuming that your Lordships' inquiries are confined to those persons who labour under such partial delusions only, and are not in other respects insane, we are of opinion that, notwithstanding the party accused did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable according to the nature of the crime committed, if he knew at the time of committing such crime that he was acting contrary to law; by which expression we understand your Lordships to mean the law of the land.

*"Question Four:* If a person under an insane delusion as to existing facts, commits an offense in consequence thereof, is he thereby excused?

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<sup>13</sup> See *Hadfield's Case*, 27 How. St. Tr. 1281, 1314 (1800). Extracts from this speech are reprinted in MEREDITH, *INSANITY AS A CRIMINAL DEFENSE* (1931) 118.

<sup>14</sup> *M'Naghten's Case*, 10 Clark & F. 200 (1843).

"Answer: The answer must of course depend on the nature of the delusion; but, making the same assumption as we did before, namely, that he labours under such partial delusion only, and is not in other respects insane, we think he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if under the influence of his delusion he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes in self-defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment."<sup>15</sup>

The answers to these questions have been subjected to considerable discussion and criticism. Commentators, notably Sheldon Glueck, have pointed out that the answers proceed on the following erroneous assumptions:

(1) That delusion is a disease instead of a symptom of some broad mental disease affecting the individual as a unit, and that a person suffering from a delusion may be able to reason in a perfectly normal manner. Although this assumption is opposed to the knowledge of mental disorder that has been accumulated in recent years, it was probably in accord with the medical opinion of its time.<sup>16</sup>

(2) That a delusion is either visibly connected with the act in question or that it has no relation whatever to it, and that a layman is capable of discerning the connection.<sup>17</sup> Psychiatrists tell us that acts which, even to the most imaginative of laymen, have no "connection" with the delusion in question, may be the inevitable outcome of the delusion.<sup>18</sup>

(3) That the cognitive faculties are the sole criteria of mental health and therefore of criminal responsibility. The answers of the judges to these questions "do not take account of the fact that the cognitive mode of mental life can hardly be said to be disturbed without this

<sup>15</sup> 10 Clark & F. at 209.

<sup>16</sup> "Dr. Robert Darling Willis testified before a committee of the House of Commons in 1810 as follows: 'In insanity the mind is occupied upon some fixed assumed idea to the truth of which it will pertinaciously adhere in opposition to the plainest evidence of its falsity; and the individual is always acting under that false impression.' Writing in 1823, Dr. Francis Willis said: 'An unsound mind is marked by delusion.' An English barrister, writing in 1838, quotes Dr. Haslam as saying, 'False belief is the essential of insanity.' In M'Naghten's case, Dr. E. T. Mauro was asked, 'Is it consistent with the pathology of insanity that a partial delusion may exist, depriving the person of all self-control, whilst the other faculties are sound?' (Answer) 'Certainly, monomania may exist with general sanity.'" See Keedy, *Criminal Responsibility* (1921) 12 J. CRIM. L. 14, 23, 25.

<sup>17</sup> Note the effect of Erskine's plea in Hadfield's Case, *supra* note 13.

<sup>18</sup> See the many authorities collected in S. GLUECK, *op. cit. supra* note 4, at 302 *et seq.* See also 1 STEPHEN, HISTORY OF THE CRIMINAL LAW (1883) 161.

also being an indication of the disturbed condition of the inseparable emotional-volitional life of the accused."<sup>19</sup>

(4) That the two tests laid down are capable of being used practically and of producing consistent results. In answering the first question, the judges stated that whether or not the delusion was a defense depended on the ability of the accused to know that what he did was contrary to the law. In answer to the fourth question, the delusion was stated to be an excuse if the facts erroneously imagined would have constituted an excuse had they really existed. Both answers really applied to but one question, and that was, what should the law be in regard to the commission of crimes by people suffering from insane delusion. Yet the answers gave tests that were calculated to produce different results in certain situations. Thus a man stated to be suffering from an insane delusion might very well, as far as the judgment of laymen is concerned, be unable to know that what he was doing was contrary to the law of the land, and hence under answer one, be excused. And yet he would be held responsible under answer four if the facts that the insane delusion caused him to believe were such as would not constitute a defense if they had been real. How a court should instruct a jury and what the jury should do under such circumstances is not indicated. Furthermore, even conceding that the two tests do not clash, they are couched in terms which are well calculated to make the results in many cases a matter of chance.

Finally it may be said that these tests bear no relation to the needs that led to their creation. If it is assumed that the law of insanity should reflect the notions of society as to when mental abnormality should excuse one from criminal responsibility, certainly the answer to question four falls short of achieving that purpose. If the average layman believes that an individual is suffering from delusions of persecution it is extremely doubtful that he would hold him responsible although the facts, if real, constitute no defense.<sup>20</sup> If it is the chief purpose of the rules concerning criminal responsibility to insure the protection of society, the tests laid down in these answers have no relation to that purpose. There is no sound connection between the exoneration of persons who commit destructive acts while imagining facts which, if real, would constitute a defense, and the neces-

<sup>19</sup> S. GLUECK, *op. cit. supra* note 4, at 172.

<sup>20</sup> "It is probable no ingenuous student of the law ever read it for the first time without being shocked by its exquisite inhumanity. . . . If he [the defendant] dare fail to reason, on the supposed facts embodied in the delusion, as perfectly as a sane man could do on a like state of realities, he receives no mercy at the hands of the law. . . . It is not only opposed to the known facts of modern medical science, but it is a hard and unjust rule to be applied to the unfortunate and providential victims of disease." See *State v. Jones*, 50 N. H. 369, 387 (1891).

sity so to dispose of persons suffering from mental disorder as to insure that they will not again injure society. Nor can it be said that the manner of treatment should be determined by the ability of the offender to know whether his act constituted an offense. Similarly, if tests of responsibility should insure that offenders of a degree of mental abnormality falling short of the *M'Naghten* requirement but yet incapable of being deterred by punishment, will not be punished in the ordinary manner, it cannot be said that the tests laid down tend to accomplish that objective.

Questions two and three and their answers are as follows :

*“Question Two:* What are the proper questions to be submitted to the jury, when a person alleged to be afflicted with insane delusion respecting one or more particular subjects or persons, is charged with the commission of a crime (murder, for example), and insanity is set up as a defence?

*“Question Three:* In what terms ought the question to be left to the jury, as to the prisoner's state of mind at the time when the act was committed?

*“Answers:* As these two questions appear to us to be more conveniently answered together, we have to submit our opinion to be that the jury ought to be told in all cases that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that, to establish a defence on the ground of insanity, it must be clearly proved that, at the time of committing the act, the party accused was labouring 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. The mode of putting the latter part of the question to the jury on these occasions has generally been, whether the accused at the time of doing the act knew the difference between right and wrong; which mode, though rarely, if ever, leading to any mistake with the jury, is not, as we conceive, so accurate when put generally and in the abstract, as when put with reference to the party's knowledge of right and wrong in respect to the very act with which he is charged. If the question were to be put as to the knowledge of the accused solely and exclusively with reference to the law of the land, it might tend to confound the jury by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to a conviction; whereas the law is administered on the principle that every one must be taken conclusively to know it, without proof that he does know it. If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable, and the usual course therefore has been to leave the question to the jury whether the accused had a sufficient degree of reason to know he was doing an act that was wrong; and this course we think is correct, accompanied with such observations and explanations as the circumstances of each case may require.”<sup>21</sup>

This answer firmly established the “right and wrong” test. Even though the mental disorder is conclusively proved to have compelled

<sup>21</sup> *M'Naghten's Case*, *supra* note 14, at 209.

the defendant to do what he did, he will nevertheless be convicted if twelve laymen are of the opinion that the defendant knew that what he did was wrong. No indication is given in the last answer as to the sense in which the words "right" and "wrong" were used, whether moral or legal. Though of slight practical importance, the obscurity of the opinion of the judges on this matter<sup>22</sup> has occasionally caused difficulties.<sup>23</sup>

The criticisms of the answers to questions one and four suggested above apply with equal force here. None of the implied or expressed purposes which the rules of criminal responsibility should be designed to further seem to be served by the "nature and quality of the act" and "right and wrong" tests. If simplicity and objectivity of rules are desiderata in the law, it cannot be said that they are attained by the tests laid down in this answer.

Despite the fact that the opinion of the judges has been widely criticized by commentators, it is the foundation upon which rests the present law dealing with the mentally disordered.<sup>24</sup> It is a remarkable example of the inertia of legislatures and the rigidity of precedent.

#### THE LAW IN THIS COUNTRY

(1) *The "right and wrong" test.* The "right and wrong" test is adopted in the great majority of jurisdictions, and in some states as the sole test.<sup>25</sup> But as Sheldon Glueck points out, ". . . cases could be cited which would tend to prove that whatever may be the formal statement of existing tests of irresponsibility in the different states,

<sup>22</sup> In the answers to questions one and four, the judges made it clear that by "right and wrong" they were referring to the law of the land. In the answer to questions two and three, the judges refused to commit themselves as to whether juries were to be instructed to consider the law of the land.

<sup>23</sup> Cf. *People v. Schmidt*, 216 N. Y. 324, 110 N. E. 945 (1915); *White*, *op. cit. supra* note 3, at 63; *S. Glueck*, *op. cit. supra* note 4, at 221.

<sup>24</sup> Some recent English cases are: *Rex v. Kopsch*, 19 Cr. App. R. 50 (1925); *Rex v. Flavell*, 19 Cr. App. R. 141 (1926); *Rex v. True*, discussed *infra*, note 48; see (1930) 169 L. T. 138.

<sup>25</sup> There is an exhaustive collection of the authorities in *S. Glueck*, *op. cit. supra* note 4, at 227 *et seq.*; (1926) 44 A. L. R. 584. A survey of the more recent cases indicates no change in the inflexible rule. Cf., e.g., *People v. Marquis*, 344 Ill. 261, 176 N. E. 314 (1931); *Wilson v. State*, 120 Neb. 468, 233 N. W. 461 (1930); *State v. George*, 158 Atl. 509 (N. J. 1932); *People v. Lizarraga*, 108 Cal. App. 152, 291 Pac. 434 (1930); *Oehler v. State*, 202 Wis. 530, 232 N. W. 866 (1930); see *Commonwealth v. Szachewicz*, 303 Pa. 410, 416, 154 Atl. 483, 484 (1931); (1931) 22 J. CRIM. L. 437.

It should be noted that the discussion throughout this paper centers around legal tests for determining insanity at the time of the offense. However, an "insane" defendant cannot be tried or convicted, N. Y. PENAL LAW (1909) § 1120; N. Y. CODE CRIM. PRO. (1881) § 481. The defendant is deemed capable of standing trial if he is able to comprehend the nature of the proceedings against him, and to aid counsel in the preparation of his defense. Cf. cases cited *infra*, note 80.

there is no guaranty that such tests are exclusively adhered to in practice; so that, though the knowledge test alone may nominally exist in most jurisdictions, instances are not infrequent when other tests, officially taboo, are actually given the jury. . . . The habit of mixing numerous tests and scraps of tests in a judge's charge . . . is by no means uncommon."<sup>26</sup>

Again, in regard to the "nature and quality" rule, there is a great deal of discussion as to whether "nature" and "quality" are synonymous, and, if not, what each means.<sup>27</sup> Similarly a great deal has been written about the meaning of the term "know" in this connection, and, in some instances, judges have attempted to define the term to juries.<sup>28</sup> It is difficult to imagine how this could do more than add to their confusion.<sup>29</sup>

(2) *Delusion rule.* The delusion concept does not itself generally constitute a separate rule, but is used in connection with the "right and wrong" test and the irresistible impulse test. The law in regard to delusion is in just as muddled a state as any of the other rules on the subject.<sup>30</sup> The light of modern knowledge has not diffused the almost mystical but yet convenient and homely notion of the departmental mind.

(3) *Irresistible impulse rule.* No mention was made in M'Naghten's case of irresistible impulse. In some jurisdictions it has been held proper to instruct juries that the defendant should be acquitted if he committed the act in question because of an irresistible impulse.<sup>31</sup> In some states, though it is not recognized as a defense, juries are instructed that if the irresistible impulse is the result of mental disease sufficient to "obliterate the sense of right and wrong," the defendant should be excused from responsibility.<sup>32</sup> It seems doubtful if this test, followed literally, is any broader than the simple "right and wrong"

<sup>26</sup> S. GLUECK, *op. cit. supra* note 4, at 218. Compare, *e.g.*, State v. Miller, 225 S. W. 913 (Mo. 1920) with State v. Weagley, 228 S. W. 817 (Mo. 1921).

<sup>27</sup> Compare the discussion of OPPENHEIMER, CRIMINAL RESPONSIBILITY OF LUNATICS (1909) 142, with that of S. GLUECK, *op. cit. supra* note 4, at 215, 219.

<sup>28</sup> 1 STEPHEN, *op. cit. supra* note 18, at 125; Prince, *The Criminal Responsibility of Insane Persons* (1907) 49 J. AM. MED. ASS'N 1643.

<sup>29</sup> It is of course clear that the criticisms already made of the rule in M'Naghten's Case apply equally to the various American versions of the tests there laid down. To be emphasized is the blanket criticism stressed by commentators—the tests are uncertain and impracticable.

<sup>30</sup> S. GLUECK, *op. cit. supra* note 4, at 245 *et seq.*

<sup>31</sup> Smith v. United States, 36 F.(2d) 548 (App. D. C. 1929); State v. Green, 6 P.(2d) 177 (Utah 1931); Miller v. Commonwealth, 236 Ky. 448, 33 S. W. (2d) 590 (1930); see (1931) 70 A. L. R. 659; S. GLUECK, *op. cit. supra* note 4, at 267 *et seq.*

<sup>32</sup> See Sartin v. State, 51 Tex. Cr. 571, 574, 103 S. W. 875, 877 (1907); State v. Harrison, 36 W. Va. 729, 753, 15 S. E. 982, 990 (1892).

test.<sup>33</sup> It may also be noted that the seemingly hybrid quality of the test is not calculated to simplify the task of the jury.

But acceptance of the general irresistible impulse test is significant; it indicates that a great gap between medical and legal opinion has been narrowed. Recognition that the volitional mode of activity should be considered just as important a causal factor in human conduct as the cognitive, tends to pave the way toward legal acceptance of the conception of a unified personality, and of the validity of scientific protest against the abstract compartmentalizing of the mind. All this is true. But our procedural and administrative devices are not calculated to make the results, when the test is applied, certain and consistent. It is to be doubted whether any remedy for the situation can be effected through changes in the substantive law, if the machinery remains unchanged.<sup>34</sup>

(4) *No rule.* In New Hampshire the rules in *M'Naghten's* case and all other tests of irresponsibility have been entirely repudiated. The courts in that state have concluded that the tests so far devised are calculated only to confuse the jury.<sup>35</sup> In their view the question of whether the defendant should be held irresponsible because of "insanity" is a pure question of fact to be left entirely in the hands of the jury. They are told that if they find that the act was the product of a mental disease, the defendant is to be excused on the ground of insanity. In other words, juries in New Hampshire are frankly told to decide both the questions of mental disease and criminal irresponsibility, and there is a consequent merger of these two issues, which are sedulously kept apart in classical theory.

This view has been severely criticized on the ground that it is a complete surrender to the jury.<sup>36</sup> That it is a surrender cannot be denied. But again the question must be asked whether any of the tests really help juries in arriving at their conclusions. The classical theory applicable to this problem splits the issue into two component parts. On the one hand there is the supposed medical question of fact to be decided by the jury on the evidence: whether or not the defendant was "insane." If the jury find that the defendant was insane, they are then to apply the

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<sup>33</sup> What the jury are expressly told to consider is whether or not the sense of right and wrong was obliterated. Whether the mental disease caused an irresistible impulse seems quite unimportant, for even if it did not, the defendant would still theoretically be excused from responsibility if he could not distinguish between right and wrong.

<sup>34</sup> For a collection of additional criticisms of the irresistible impulse test, see S. GLUECK, *op. cit. supra* note 4, at 233 *et seq.*

<sup>35</sup> *Cf.* *State v. Pike*, 49 N. H. 399 (1870); *State v. Jones*, *supra* note 20.

<sup>36</sup> OPPENHEIMER, *supra* note 27, at 56; 1 WHARTON AND STILLÉ, *op. cit. supra* note 6, at 95. S. GLUECK, *op. cit. supra* note 4, at 263.

legal tests of irresponsibility given to them by the court. The New Hampshire rule denies the utility of such a separation of issues. This view quite frankly faces the realities of the problem. Few juries make this fine distinction; the courts do not as a general rule make the distinction clear. Medical experts are not only asked their opinion as to the mental condition of the defendant, but are also asked to state whether he was "responsible" or could "distinguish right from wrong,"<sup>37</sup> thus making it virtually impossible for juries to make the theoretical distinction between insanity and irresponsibility. While the New Hampshire rule is to be commended for its frankness, it still retains the outworn notion that "insanity" is a definite state of mental disorder. In addition, the caution sounded before as to the utility of any changes in substantive rules without radical changes along procedural and administrative lines, is repeated.

#### MECHANICAL ASPECTS OF PROBLEM

(1) *Raising the question of irresponsibility.* Under the common law practice, which is followed in the majority of states in this country, the question of irresponsibility is put in issue by a general plea of not guilty; in a few jurisdictions it must be specially pleaded.<sup>38</sup> The details of the methods by which the issue is raised are not nearly as important as the underlying premise upon which the details are based. The raising of the issue is left entirely in the hands of laymen. There lies beneath this procedure the assumption noted at the beginning of this paper, that "insanity" is a definite state of mental disorder, which is capable of discernment by laymen. But medical science has demonstrated that not all mental disorder is manifest and dramatic.<sup>39</sup> Relegating to laymen the task of raising the issue of mental disturbance must go far toward causing the trial of many suffering from what might be regarded by psychiatrists as acute and dangerous mental disorder.<sup>40</sup>

(2) *Method of presenting medical testimony.* (a) Qualification of experts. In presenting medical testimony to the jury, the same methods are employed as in presenting any other kind of expert testimony. Each side retains its experts. There are no specific qualifying tests. Determination of who is an expert is not made until trial. Questions

<sup>37</sup> See *infra*, p. 944 *et seq.*

<sup>38</sup> Note (1929) 38 YALE L. J. 650; (1929) 42 HARV. L. REV. 830. The minority view, although unnecessarily harsh, has been recommended by the MISSOURI CRIME SURVEY (1926) 399.

<sup>39</sup> See Singer, *Deranged or Defective Delinquent* (1929) in ILLINOIS CRIME SURVEY 741.

<sup>40</sup> See *infra*, p. 958 *et seq.*, in connection with the Briggs Law.

are first asked the proposed witness for the purpose of qualifying him as an expert, and generally the court then allows the witness to testify. A recent study tends to indicate that the average caliber of testifying experts is not as high as might be hoped.<sup>41</sup> It should be noticed that the problem of devising means for eliminating unqualified experts is of peculiar importance because of the lay belief that if one is a doctor he is necessarily acquainted with problems of mental disorder.

(b) Opposing expert testimony. The fact that experts testify not impartially but on behalf of one side or the other injects into the proceedings a spirit of seeming partisanship which psychiatrists are as anxious to avoid as anyone. The false light in which the competitive system of conducting a trial places them has been bitterly denounced.<sup>42</sup> No doubt some of the conflict of expert testimony is due to the fact that there are doctors who are willing to testify as asked but it is probably safe to say that a large part of the contumely heaped upon medical experts is caused not by corruption but by the appearance of partisanship which under the present system is unavoidable. It is unnecessary here to elaborate in any greater detail on the confusion that opposing expert testimony must cause, and the effect that it must have on the jury.

(c) Questions put to experts. A psychiatrist is by training equipped to state more adequately than a layman whether the defendant is suffering from mental disease, and if so, to describe its nature,<sup>43</sup> specify its cause, and prescribe its treatment. In addition he is also peculiarly qualified to state what may be expected of the particular disordered defendant in the future under varying conditions such as imprisonment, complete release, commitment to specialized institutions, *etc.* But he speaks in a tongue not his own when he is forced to state whether the defendant knew the difference between right and wrong, or knew the nature and quality of his act.<sup>44</sup> These are terms of law or ethics but they are not terms of modern medicine, and medical ex-

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<sup>41</sup> See Singer, *supra* note 39, at 754 *et seq.* The conclusions are not very significant because of the small number of cases examined. A list was compiled of 39 physicians who had testified as experts in Cook County. Six were from outside the state and were regarded as fully qualified. Of the 33 local physicians, 15 were members of the Chicago Neurological Society and had special experience in psychiatry. A group of 9 physicians, though not members of the Neurological Society, were, or had been, members of the staff of state hospitals for mental diseases. A group of 9 had no special training or experience.

<sup>42</sup> WHITE, *op. cit. supra* note 3, at 7.

<sup>43</sup> The tendency of psychiatrists to attach to mental disorders labels that are incapable of being understood by laymen has been severely criticized. See Adler, *Organization of Psychopathic Work in the Criminal Courts* (1917) 8 J. CRIM. L. 362.

<sup>44</sup> See Campbell, *Crime and Punishment: From the Point of View of the Psychopathologist* (1928) 19 J. CRIM. L. 244; WHITE, *op. cit. supra* note 3, at 102; S. GLUECK, *op. cit. supra* note 4, at 489.

perts should not be required to answer them. Yet they are typical of some of the questions asked expert witnesses.

(d) The hypothetical question. Where the medical expert has not examined the defendant (and sometimes where he has!<sup>45</sup>) he is allowed to state his opinion only in answer to an hypothetical question. The question, framed by counsel for defense or prosecution, is supposed to include all the relevant circumstances which each claims have been proved, and to inquire what the expert's opinion would be on the basis of these facts. As White points out, the permission granted counsel to frame an hypothetical question on the basis of testimony which he regards as having been proved, may very well create an impression in the minds of the jury that the data contained in the question have in fact been proved.<sup>46</sup> In addition, it is likely that after listening to a long hypothetical question the jury are in a position to judge less intelligently than they would be if the expert were allowed to give his opinion directly by specific reference to the defendant. And when counsel adopt the habit, as they frequently do, of adding to or subtracting from symptoms, the situation is aggravated. Lind brings this out clearly:

"Now, suppose we leave that out, would that affect your opinion?" The unwary witness may thus see 4 or 5 of his symptoms dropped and then become uneasy at their dwindling, say when it is suggested that the next symptom be elided, that he would then change his opinion. This gives the cross-examiner his opportunity. He says, 'In other words, you wouldn't call him insane without this symptom . . . but you would with it?' This focuses an undue attention on this particular symptom and it is attacked intensively, with the result that if the witness is obliged to admit that it is not in itself indicative of insanity it seems to the jury as if he had abandoned the one thing he emphasized."<sup>47</sup>

#### SOME SUGGESTED CHANGES

The foregoing presents a brief picture of the operation of the present law. Suggested changes, some sweeping, others aimed at specific difficulties, will now be considered.

##### A. Changes in the Tests

A recent English case<sup>48</sup> gave rise to public agitation similar to that which resulted from the acquittal of M'Naghten. After the decision,

<sup>45</sup> See, e.g., *People v. Raizen*, 211 App. Div. 446, 466, 208 N. Y. Supp. 185, 204 (2d Dept. 1925); 1 WIGMORE, EVIDENCE (1923) § 675.

<sup>46</sup> WHITE, *op. cit. supra* note 3, at 84. On the subject of hypothetical questions generally see WIGMORE, *op. cit. supra* note 45, §§ 672, 686.

<sup>47</sup> See Lind, *The Cross Examination of the Alienist* (1922) 13 J. CRIM. L. 228, 234.

<sup>48</sup> Appeal of Ronald True, 16 Cr. App. R. 164 (1922), discussed in CARSWELL, TRIAL OF RONALD TRUE (1925); MEREDITH, *op. cit. supra* note 13, at 40 *et seq.*

the whole subject was referred to a special committee for study. The committee recommended that irresistible impulse be recognized as a defense in cases of mental disorder.<sup>49</sup> The report has not yet been acted upon by Parliament<sup>50</sup> but as previously indicated, the proposed change is but a toddling step in the right direction. The suggestion was made despite the recommendation of the Medico-Psychological Association of Great Britain and Ireland that the tests of *M'Naghten's* case be wholly abrogated and that the jury be asked three questions:

- "a. Did the prisoner commit the act alleged?
- b. If he did, was he at the time insane?
- c. If he was insane, has it nevertheless been proved to the satisfaction of the jury that his crime was unrelated to his mental disorder?"<sup>51</sup>

This, it will be noted, frankly leaves the question in the hands of the jury. For its frankness it is to be commended. But it touches only one phase of the problem and is therefore inadequate.

In 1915, a committee appointed by the American Institute of Criminal Law and Criminology recommended that the substantive law be changed as follows:

"No person shall hereafter be convicted of any criminal charge when at the time of the act or omission alleged against him he was suffering from mental disease and by reason of such mental disease he did not have the particular state of mind that must accompany such act or omission in order to constitute the crime charged."<sup>52</sup>

Although approved by the Conference on Medical Legislation of the American Medical Association, this suggestion has since in effect been repudiated by the Institute,<sup>53</sup> and has been the target of justifiable criticism by commentators. "Criminal intent is a technical doctrine in the criminal law difficult to apply. It is bad enough to ask a jury to pass on the question whether the defendant knew the difference be-

<sup>49</sup> See REPORT OF THE COMMITTEE APPOINTED TO CONSIDER WHAT CHANGES, IF ANY, ARE DESIRABLE IN THE LAW IN WHICH THE PLEA OF INSANITY AS A DEFENSE IS RAISED (His Majesty's Stationery Office, London, 1923).

<sup>50</sup> In 1924 the committee's recommendation was referred to twelve High Court Judges for their opinion. Ten of the twelve judges advised against admitting the irresistible impulse defense. See MEREDITH, *op. cit. supra* note 13, at 70.

<sup>51</sup> The Report is reprinted in CARSWELL, *op. cit. supra* note 48, at 276 *et seq.*

<sup>52</sup> See Report of Committee "B" of the Institute, *Insanity and Criminal Responsibility* (1911) 9 J. CRIM. L. 521, 533 for a preliminary discussion, and Keedy, *Insanity and Criminal Responsibility* (1917) 30 HARV. L. REV. 535, 536, 724 for a discussion of the draft quoted. It will be noted that this test is substantially that suggested by Coke. See note 9, *supra*.

<sup>53</sup> Report of Committee "A" of the Institute, *Insanity and Criminal Responsibility* (1919) 10 J. CRIM. L. 184, 186, where the suggestion discussed *infra*, note 62, is set out.

tween right and wrong in relation to the act he committed. It is much worse to have to ask whether he knew the difference between right and wrong in relation to the particular intent which the particular crime requires."<sup>54</sup>

A more elaborate proposal has been advanced by Sheldon Glueck. He states that, regardless of the procedure adopted to weed out the mentally unsound prior to trial, there will still be left cases in which the issue must be decided at trial. He then suggests a program for improving the law in this particular.<sup>55</sup> In this program, these fundamentals of medical science would be judicially noticed by the courts: The unity of mental process and the consequent presumption that disorder in one phase of behavior is indicative of a disorder of the mind as a unity; the "tripartite, although only abstractly separable, nature of mental activity, *i.e.*, the cognitive, conative, affective modes of mental life"; certain fundamentals of psychopathology: the concept of disintegration or lack of synthesis of the personality, and the fact that hallucinations, delusions, obsessions, *etc.*, are evidences of a generally diseased mind, and do not themselves constitute the disease.

He then suggests a model charge to the jury which because of its length will not be set out here in its entirety. The first part, however, is of such importance that it will be quoted:

"Every illegal act in order to make its perpetrator criminally responsible for it, required that it shall have been committed with a 'guilty' (or 'criminal') intent. For a mind to be able in contemplation of the law, to have this necessary 'guilty intent,' it must be sound, in the sense that the minds of most men are sound. The mental soundness of most men presupposes a normally healthy functioning of the mind's activities of knowing and reasoning, and willing and restraining one's impulses to act, and feeling. But you are instructed that, because of the recognized interdependence of mental processes, a serious disorder of any of these principal mental activities, raises a strong presumption that the mind as a whole is disordered."

The jury are then told that all the evidence they have heard should be regarded as throwing light on the question of mental soundness. Three steps are then to be taken by the jury:

1. They must first inquire whether the prosecution has proved beyond a reasonable doubt that the defendant did the act charged. If this has not been proved, a verdict of "non-offender" should be returned.

<sup>54</sup> See Kidd and Ball, *Law and Mental Diseases* (1920) 9 CALIF. L. REV. 1, 4. See also Ballantine, *Criminal Responsibility of the Insane and Feeble Minded* (1919) 9 J. CRIM. L. 485; Note (1916) 30 HARV. L. REV. 179.

<sup>55</sup> S. GLUECK, *op. cit. supra* note 4, at 476 *et seq.*

2. If this burden has been sustained by the prosecution, the jury must then determine whether "the defendant has established his insanity (as to knowing and reasoning, *or* willing and controlling his impulses to act, *or* feeling), by 'a fair preponderance of the evidence.'" (Italics Glueck's.)

3. (a) If the defendant has not established his insanity, the jury must further inquire whether the defendant's mental condition "though not proved to be unsound in the sense above described" was such that he did not have the special mental condition (mentioning the condition) necessary for the particular grade of the offense. If defendant is found not to have the requisite mental condition, the verdict should be "sane offender, but guilty of murder in the second degree (or insert appropriate grade or degree and type of offense)." Otherwise the verdict should be "sane offender." (b) If insanity has been established by a fair preponderance of the evidence, the next step is to determine whether the defendant is irresponsible. For the determination of that question these tests are to be used: (1) "Did *this insane defendant*, when he committed the act, know the physical nature of the act?" (Italics Glueck's.) (2) Did he know it was wrong in the sense that it was condemned by morals, religion "and laws of modern civilized society"? (3) If he knew both of the above, was he nevertheless unable, by reason of mental disorder, to control his impulses "*with respect to the act*"? (Italics Glueck's.)

If the answer to any or all of these questions is "yes," the verdict should be "partially insane and semi-responsible offender."

The charge then reminds the jury that before applying these tests, they must have found the defendant insane "as evidenced by typical symptoms of the disorder of the knowing and reasoning, feeling (or emotional), or willing and inhibiting functions of the mind; and that evidence of disorder in one type of mental operation strongly implies disorder of the others."

The jury is then told what the consequences of the different verdicts will be. A "sane offender" suffers the penalty provided by law, depending on the degree of the offense found. If a person is found to be an "insane and irresponsible offender," he will be confined, for the safety of society and himself, in an asylum, to remain there until an officer of the asylum notifies the court that he has recovered his mental health and may safely be released, "or until he is otherwise lawfully discharged." If a defendant is found to be a "partially insane and semi-responsible offender" he will (if charged with murder in the first degree) be incarcerated in a hospital or prison for life, depending on the severity of the mental disorder. On a finding by the state department

of mental diseases that he may safely be returned to society, he may be pardoned by the governor. In other words, in the case of the "partially insane and semi-responsible" offender, discharge is a matter of grace.

This proposal is open to the following criticism:

(1) In the first paragraph quoted above, the term "mental soundness" is used. No definition is attempted except that this "presupposes a normally healthy functioning of the mind's activities of knowing and reasoning, willing and restraining one's impulses to act, and feeling." Later the word "insanity" is used, and the only intimation of a definition is found in the statement that the jury is to find "whether or not the defendant has established his insanity (as to knowing and reasoning, *or* willing and controlling his impulses to act, *or* feeling)." If a distinction is sought to be made between "mental soundness" and sanity, it is difficult to see what it is, or why a distinction is necessary. If no distinction was intended to be made, the unnecessary use of different terms is confusing.

(2) The jury are reminded that there are two separate questions for them to determine, insanity and irresponsibility, and that the latter is not to be considered until they have first decided that the defendant is insane. It would seem that the jury are left practically unguided in their determination of whether the defendant is sane. No definition is expressly given and the terms used can hardly be said to have objective descriptive properties. It is extremely questionable whether the medically disowned concept "insanity" can ever be defined in such a way as to prevent the jury from attaching to it whatever meaning they please.

(3) The tests for determining irresponsibility are practically the same as those for determining insanity. For practical purposes, it may be said that the latter tests include merely the additional concept of "feeling." What that means is not explained. In view then of this practical identity of the two tests, and the repeated reminder that "insanity" and "irresponsibility" are two separate questions, it may reasonably be expected that confusion will result. If there is any distinction, it is so fine as to be practically worthless for purposes of use by the jury.

(4) The provision of the charge allowing a verdict of guilty of a lesser offense if the defendant's condition at the time of the commission of the act, "though not proved to be unsound in the sense above described, was yet such that he could not, in all reasonable probability, have had the capacity for the deliberation, premeditation or malice (inserting special type of mental condition necessary to reduce the grade of the offense)," is so vague and indefinite, that in practice it would be

tantamount to granting the jury permission to do just as they pleased, so far as reducing the grade of the offense is concerned. It requires an extremely deft hand to balance "mental condition" against such highly variable concepts as premeditation, deliberation, *etc.*

(5) In the tests for determining "irresponsibility," the phrase "wrong in the sense that it was condemned by the morals, religion and laws of modern civilized society" cannot be said to be much of an improvement over the simple "wrong" used in *M'Naghten's* case.

(6) The tests for determining "responsibility" encounter the criticisms previously expressed in this paper.

(7) The concept "partially insane and semi-responsible" is very likely to confuse the ordinary jury and its usefulness is therefore highly questionable. But whether or not this is true, the concept "partially insane" seems to fly in the face of what is continually pointed out as a fundamental of psychology—the unity of the mind. It seems rather strange to ask in one breath that the courts take judicial notice of "the unity of the mental process" and in the next to ask them to instruct in terms of "partial insanity." In another part of his book, Glueck says: "Intention, motive, volition we said are separable only for the purpose of analysis, since *actual mental experience at any time can not be broken up, as the law assumes, into its cognitive, conative, and affective constituents; mental experience can be so analyzed only by a process of artificial abstraction. The criminal intention includes the conative-affective, as well as the cognitive, capacity.*"<sup>56</sup> (Italics Glueck's.)

The creation of the category "partial insanity" was probably induced by the desire to afford juries, in cases of mental disorder which they would not regard as constituting "insanity," some alternative other than guilty or innocent. One wonders, however, whether today juries are not, at least in homicide cases, creating for themselves this middle zone, and whether the possible gain to be derived from the perpetuation of this frequently disowned category is worth the sacrifice of an emphasized fundamental of psychology.

(8) No mention is made of the methods of treatment or release of those found guilty of lesser offenses because of a mental condition which, "in all reasonable probability, deprived them of the capacity to have the specific" type of mental condition required for the higher degree, other than that they "will suffer the penalty provided by the law." A defendant is charged with robbery in the first degree. The medical testimony is to the effect that he is a psychopathic personality with a low intelligence. The jury are given the charge outlined above, which

<sup>56</sup> *Id.*, at 427.

contains the permission to find the defendant guilty of a lesser degree of robbery if they conclude that, though not mentally unsound, his mental faculties were impaired to such a degree as to render him incapable of having the particular state of mind necessary for robbery in the first degree.<sup>57</sup> If the charge had been murder in the first degree, a verdict of guilty of a lesser degree of homicide would mean imprisonment for life. But the program contains no indication of what the result should be in cases other than homicide. If the language of the charge is followed literally such a person would receive "the penalty provided by the law," which in the case of the example given here, might be a short prison sentence, resulting in the release of a person described as a psychopathic personality. Such a result does not appear to be calculated to protect society.

(9) In the example given, the jury may find that the defendant, though insane, knew the physical nature of the act, or knew that it was wrong, or could have controlled his impulses. The verdict in such a case would be "partially insane and semi-responsible." The line between a finding of "insanity" (which we are told is merely a convenient abstraction) and a finding of mental condition such as to render one incapable of possessing the particular state of mind required (another abstraction) is at best extremely faint.

(10) No indication is given as to the period and place of detention of those found "partially insane and semi-responsible," but not charged with murder in the first degree. The criticism set forth in (8) applies here with equal force.

(11) The last and most comprehensive criticism is one anticipated by Glueck himself. The charge is long and confusing, and whether the jury will do what it ought to do remains, just as now, largely a matter of chance. Glueck answers the criticism by saying that in comparison with the charges now being given, it is the "very soul of wit."<sup>58</sup> That is true. But it has been shown above that the charge demands enlargement in some of its particulars. Besides, one doubts that it will continue to be brief when put to practical use by the ordinary run of trial court judges. Glueck states further that the danger of confusion will be minimized if copies of the charge are given to the jurymen. He also says, "Though intricate, its fundamental principles of law and psy-

<sup>57</sup> Whether the defendant's mental condition was such as to render him incapable of having the particular state of mind required, seems essentially a metaphysical question. This is tantamount to giving the jury a *carte blanche* to do as it likes. Juries today are in the same position, except that they have three possible choices—guilty, innocent, and guilty of a lesser offense. The procedure suggested affords the additional choice of "partially insane and semi-responsible." That would seem, however, to be the only difference.

<sup>58</sup> S. GLUECK, *op. cit. supra* note 4, at 481.

chology are, we believe, at least consistent."<sup>59</sup> But as stated before, it is quite probable that courts will have a difficult time reconciling the request that they judicially notice the psychological concept of unity of the mind, with a charge containing the phrase "partial insanity." And even if conceptual reconciliation is possible, the criticism of intricacy is not met.

### B. *Elimination of the Jury*

Various remedies, sometimes taking the form of statutory enactment, have been advanced for the obvious inadequacies of the jury system. Thus it has been suggested that the testimony of impartial experts appointed by the court be conclusive on the issue of insanity,<sup>60</sup> or that the jury be composed solely of medical experts.<sup>61</sup> More common has been the proposal that the jury be called upon to determine only whether the offense has been committed by the defendant. The determination of irresponsibility, due to "insanity" at the time of the offense or at the trial, is left entirely in the hands of the trial judge, who, it is contemplated, will seek impartial medical advice.<sup>62</sup>

Wherever enacted into law such proposals have been uniformly held unconstitutional as violative of the guaranty of jury trial.<sup>63</sup> The theory is that extirpation of the insanity defense deprives the jury of an inalienable function, the ascertainment of the criminal intent necessary to convict. The argument that the legislature may change the elements of old crimes or create new ones, in which case the defendant gets a jury trial of all the elements in the statutory definition<sup>64</sup> is met by vague objections, such as "cruel and unusual punishment,"<sup>65</sup> "due process"<sup>66</sup> and "the law of nature."<sup>67</sup>

<sup>59</sup> *Id.*

<sup>60</sup> NEW YORK CRIME COMMISSION, SPECIAL REPORT OF PSYCHIATRIC AND EXPERT TESTIMONY IN CRIMINAL CASES, (1928) (conclusive only if unanimous); La. Laws Extra Session 1928, No. 17 (conclusive if majority).

<sup>61</sup> Eugene Smith, *Criminal Law in the United States*, in CORRECTION AND PREVENTION (Russell Sage Foundation, 1910) 112.

<sup>62</sup> 33 REP. N. Y. BAR ASS'N 391, 401; Report of Committee "A" of the Institute, *supra* note 53; ILLINOIS CRIME SURVEY (1929) 809; see White, *Competency of Jurors to Pass on Insanity Question* (1913) 4 J. CRIM. L. 106; Miss. Code Ann. (1930) §§ 1327, 1328 (insanity no defense in homicide—to go in mitigation only); Wash. Laws 1909, c. 249, § 7 (insanity no defense to crime).

<sup>63</sup> State v. Strasburg, 60 Wash. 106, 110 Pac. 1020 (1910); State v. Lange, 168 La. 958, 123 So. 639 (1929); Sinclair v. State, 132 So. 581 (Miss. 1931), discussed in (1932) 22 J. CRIM. L. 899.

<sup>64</sup> See Smith, *C.J.*, *dissenting*, in Sinclair v. State, *supra* note 63, at 591.

<sup>65</sup> See Sinclair v. State, *supra* note 63, at 585. It should be noted that this problem is really not involved at all. The statutes merely work a change in the method of trial of the issue of insanity. In either case, the defendant, if found insane, goes to an asylum. See Rudkin, *C.J.*, *concurring* in State v. Strasburg, *supra* note 63, at 126, 110 Pac. at 1026. In addition, it is difficult to reconcile this view with the rejection by these states of irresistible impulse as a defense. See Smith, *C.J.*, *dissenting*, in Sinclair v. State, *supra* note 63, 132 So. at 591.

<sup>66</sup> See State v. Strasburg, *supra* note 63, at 116, 126, 110 Pac. at 1023, 1026.

<sup>67</sup> See Sinclair v. State, *supra* note 63, at 589.

Some arguments against the elimination of the jury have proceeded on other than constitutional grounds. Sheldon Glueck believes that the jury represent the "group mind"; the purpose of the jury system is to "furnish an approximate safeguard of personal freedom and reputation." Therefore, while every effort should be made to raise the caliber of jurors, and while the jury "should be given every opportunity to understand the fundamentals of psychology and psychopathology involved in insanity cases, and to hear the well founded reports of unbiased experts, the jury, as a *responsibility determining* device, should not be eliminated."<sup>68</sup> Glueck's argument for retaining the jury can hardly be said to be conclusive. It is based on assumptions not empirically proved. But the matter can only be settled by experimentation, and this will probably involve constitutional amendment. Until experimentation has yielded its answer the question must be regarded as open.

### C. *Separate Trial of the Issue of Insanity*

Some states have sought to improve the situation by requiring a separate trial of the issue of insanity. Generally these states require that the issue of insanity be tried first, although a recent California statute provides for a prior trial on the merits.<sup>69</sup> Such changes are quite superficial. The old tests are used in the old way.<sup>70</sup> Whether greater

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<sup>68</sup> S. GLUECK, *op. cit. supra* note 4, at 465. In this connection it is interesting to compare the point of view taken by Glueck in respect to the jury in other parts of his book. Thus he says: "The author has sometimes wondered at the naïveté of some writers on the criminal law, who seem to assume that in the vast majority of cases, after listening for days to a mass of conflicting, intricate and confusing testimony, to a series of hypothetical questions, and a long, frequently confusing, if not contradictory, trial-judge's charge, a jury of untrained laymen can retire to the cloistral calm of a stuffy jury room and contemplate on the judge's words of legal wisdom, deciding the case in strict accordance with the formal tests of criminal irresponsibility applicable to insanity cases!" *Op. cit.* at 108, n. 1.

"In the realm of the borderline cases of mental unsoundness, then, it is especially true that the jury represents prevailing public opinion and sentiment,—a sort of miniature group mind, disposing of cases not so much on the basis of the charges of trial judges as to the law of the tests of irresponsibility, as upon its own conception of rough-and-ready justice. Especially true is this in those jurisdictions where, as in Illinois, the jury judges the law as well as the facts, and where, as in California and a few other states, the jury has the power of fixing the penalty." *Op. cit.* at 207.

<sup>69</sup> Shepherd, *Plea of Insanity under the 1927 Amendment to the California Code* (1929) 3 So. CALIF. L. REV. 1; Note (1929) 38 YALE L. J. 650; Note (1931) 19 CALIF. L. REV. 174. REPORT OF THE CALIFORNIA CRIME COMMISSION (1931) 32 *et seq.* Such statutes are constitutional. They do not put defendant twice in jeopardy for the same offense, *People v. Leong Fook*, 206 Cal. 64, 273 Pac. 779 (1928); nor do they deprive him of life or liberty without a jury trial, or due process of law. *State v. Toon*, 172 La. 631, 135 So. 7 (1931); *People v. Troche*, 206 Cal. 35, 273 Pac. 767 (1929), *cert. den.*, 280 U. S. 524, 50 Sup. Ct. 87 (1929); *Bennett v. State*, 57 Wis. 69, 14 N. W. 912 (1883); (1929) 77 U. OF PA. L. REV. 923.

<sup>70</sup> *Cf., e.g., People v. Lizarraga, supra* note 25.

clarity is secured by separating the issues is questionable. It is probable that this type of legislation is enacted in the hope that the facts of the particular case will not prejudice the jury in their deliberations on the issue of insanity. But the question of insanity cannot be considered *in vacuo*; the facts of the particular case are necessarily involved in determining that issue. Further, the California statute permits the court, in its discretion, to retain the same jury for the "prompt trial of the issue of insanity," a procedure which has been uniformly followed by the courts of that state.<sup>71</sup> This amounts to no change at all. Finally, the inhumanity of subjecting possibly seriously disordered defendants to the strain of a trial is apparent.<sup>72</sup>

#### D. *Improvement in the Character of Expert Testimony*

In view of the constitutional infirmities to which the more radical of the preceding proposals are subject, it seems necessary, for the present at least, to concentrate on the improvement of existing devices, especially that of expert testimony. In 1915, a committee of the Institute of Criminal Law and Criminology composed of lawyers and psychiatrists recommended a bill which has been the basis of much of the subsequent thinking and legislation on the subject. It provides as follows:

"Sec. 1. *Summoning of Witnesses by Court.* Whenever in the trial of a criminal case the issue of insanity on the part of the defendant is raised, the judge of the trial court may call one or more disinterested qualified experts, not exceeding three, to testify at the trial, and if the judge does so, he shall notify counsel of the witnesses so called, giving their names and addresses. Upon the trial of the case, the witnesses called by the court may be examined regarding their qualifications and their testimony by counsel for the prosecution and defense. Such calling of witnesses by the court shall not preclude the prosecution or defense from calling other expert witnesses at the trial. The witnesses called by the judge shall be allowed such fees as in the discretion of the judge seem just and reasonable, having regard to the services performed by the witnesses. The fees so allowed shall be paid by the county where the indictment was found.

"Sec. 2. *Written Report by Witnesses.* When the issue of insanity has been raised in a criminal case, each expert witness, who has examined or observed the defendant, may prepare a written report regarding the mental condition of the defendant based upon such examination or observation, and such report may be read by the witness at the trial after being duly sworn. The written report prepared by the witness shall be submitted by him to counsel for either party before being read to the jury, if request for this is made to the

<sup>71</sup> Cf. *People v. Troche*, *supra* note 70; *People v. Strong*, 114 Cal. App. 522, 300 Pac. 84 (1931); see Preston, J., *dissenting* in *People v. Troche*, *supra* note 69, at 51, 273 Pac. at 775.

<sup>72</sup> See Overholser, *Psychiatry and the Courts of Massachusetts* (1928) 19 J. CRIM. L. 75.

court by counsel. If the witness presenting the report was called by the prosecution or defense, he may be cross-examined regarding his report by counsel for the other party. If the witness was called by the court, he may be examined regarding his report by counsel for the prosecution and defense.

"Sec. 3. *Commitment to Hospital for Observation.* Whenever in the trial of a criminal case the existence of mental disease on the part of the accused, either at the time of the trial or at the time of the commission of the alleged wrongful act, becomes an issue in the case, the judge of the court before whom the accused is to be tried or is being tried shall commit the accused to the State Hospital for the Insane, to be detained there for purposes of observation until further order of court. The court shall direct the superintendent of the hospital to permit all the expert witnesses summoned in the case to have free access to the accused for purposes of observation. The court may also direct the chief physician of the hospital to prepare a report regarding the mental condition of the accused. This report may be introduced in evidence at the trial under the oath of said chief physician, who may be cross-examined regarding the report by counsel for both sides."<sup>73</sup>

It will be noted that the chief purpose of the proposed law was to provide for the selection of impartial experts whose testimony would probably be given great weight by the jury. Similar legislation has been enacted in several states,<sup>74</sup> and recent cases have held it constitutional.<sup>75</sup> Unquestionably the proposal represents a great improvement. Certain defects are however manifest.

<sup>73</sup> The bill is quoted and discussed in Keedy, *supra* note 52; WHITE, *op. cit. supra* note 3, at 143 *et seq.* See also, *Report of American Psychiatric Association*, (1928) 19 J. CRIM. L. 373; MINUTES OF SECOND JUDICIAL CONFERENCE OF PENNSYLVANIA (1929); Brand, *The Insanity Defense* (1930) 9 ORE. L. REV. 309. The provisions in § 1 as to reasonable fees were inserted at the recommendation of the National Crime Commission, which adopted the legislation in its amended form. The bill is incorporated in the model code of Criminal Procedure of the American Law Institute. See OFFICIAL DRAFT (1930) § 308, and COMMENTARY at 921.

A somewhat similar suggestion was made in 1924 by the Medico-Psychological Association of Great Britain and Ireland, and the British Medical Society. No statement was made as to the method of selecting the experts. The recommendations were rejected by the Committee on Insanity and Crime on the ground that the panel would have to range over the entire country and that in some parts of the country there would be difficulty in finding suitable members. To insure that persons without means would have suitable medical testimony, the Committee recommended that the accused or his lawyer or the prosecution or the committing magistrate should be free to apply to the Home Office for a mental examination, the government to bear the expense unless the accused could reasonably bear it. See REPORT OF THE COMMITTEE, *op. cit. supra* note 49.

<sup>74</sup> Mich. Laws 1905, no. 175, § 3; IND. ANN. STAT. (Burns, Supp. 1929) § 2291; OHIO GEN. CODE (Page, 1931) §§ 13441-4; WIS. STAT. (1929) § 357.12; Colo. Laws 1927, c. 90, § 2; CAL. CIV. CODE (Deering, 1923) § 1871; CAL. PEN. CODE (Deering, 1923) § 1027.

<sup>75</sup> *People v. Strong*, *supra* note 72; *Jessner v. State*, 202 Wis. 184, 231 N. W. 634 (1930); 1 WIGMORE, EVIDENCE (1923) § 563; Taft, *Opinion Evidence of Expert Witnesses* (1927) 14 VA. L. REV. 81, 88. *Contra*: *People v. Dickerson*, 164 Mich. 148, 129 N. W. 199 (1910). Professor Wigmore argues (§ 2484) that even in the absence of statute, the trial court has inherent power to summon witnesses. See *State v. Horne*, 171 N. C. 787, 788, 88 S. E. 433, 433 (1916); *Tugman v. Riverside Cotton Mills*, 144 Va. 473, 495, 132 S. E. 179, 185 (1926). But see *People v. Scott*, 326 Ill. 327, 345, 157 N. E. 247, 256 (1927).

(1) It is couched in discretionary and not mandatory terms. Overholser shows that many trial courts are not prone to avail themselves of psychiatric advice.<sup>76</sup> Probably the constitutional issue would remain unaltered if the statute were couched in mandatory terms.<sup>77</sup>

(2) Determination of when an inquiry into the mental state of the defendant should be made is still left to laymen. Further, it is doubtful whether the machinery can be set in motion unless the defendant himself raises the question.

(3) The proposed bill says merely that the court may call upon "disinterested qualified experts." No attempt is made to state who shall be regarded as a qualified expert. This is peculiarly a job for the medical profession. The bill should contain a section describing the qualifications necessary, or providing that standards be set up by a neuro-psychiatric society, or state department of mental diseases, or some similar agency.<sup>78</sup>

The New York Crime Commission has had legislation in respect of expert testimony under consideration for some time. In its latest report it recommends two bills.<sup>79</sup> These provide for a board of psychiatric examiners composed of the state commissioners of mental hygiene, education, and health. Only psychiatrists certified by this board may testify as experts in a criminal action. The minimum prerequisites to certification are as follows:

<sup>76</sup> Oberholser, *Psychiatric Service in Criminal Courts* (1928) 12 MENTAL HYGIENE 818, 833. A supplemental study will be found in *Psychiatric Facilities in Criminal Courts in United States: A Supplementary Note* (1929) 13 MENTAL HYGIENE 800.

<sup>77</sup> *People v. Dickerson*, *supra* note 75 goes off not on the presence or absence of a mandatory provision but on the theory that there is a delegation of non-judicial power to the courts. *Id.*, at 153, 129 N. W. at 201. The additional argument is made in this case that the procedure violates due process in that the court gives implied certification of character and fitness to its own experts. "To give to the testimony of a witness or witnesses this extraordinary certificate of candor, ability, and truthfulness . . . is to subvert the very foundations of justice." *Id.*, at 155, 129 N. W. at 201. The usual legal attitude toward the insanity question is nowhere more clearly illustrated. See also CANTOR, CRIME, CRIMINALS AND CRIMINAL JUSTICE (1932) 209.

<sup>78</sup> Such a recommendation was made in the ILLINOIS CRIME SURVEY (1929) 765 Sheldon Glueck approves of the proposed bill of the Institute, but suggests an amendment to insure that only properly qualified experts will testify. This defines a qualified expert as "a physician who has been resident in the State for at least two years, who has been lawfully licensed to practice medicine in this state, and who has been in the actual practice of medicine for at least three years, at least two of which must have been spent in the diagnosis and treatment of mental and nervous diseases, either in legitimate private practice or in a hospital for mental patients, or both." See S. GLUECK, *op. cit. supra* note 4, at 489.

For a discussion of the institution of and the need for permanent psychiatric clinics, see REPORT OF THE JUDICIAL COUNCIL OF OHIO (1931) 27 *et seq.*

<sup>79</sup> See NEW YORK COMMISSION, SPECIAL REPORT ON PSYCHIATRIC AND EXPERT TESTIMONY IN CRIMINAL CASES (1930) 155 *et seq.*

"That he is a physician duly licensed to practice in the State of New York and has had at least five years experience in actual practice; and that either (a) he has had at least three years' experience since January first, 1915, in the care and treatment of persons suffering from mental diseases, in an institution providing for the care of such persons . . . ; or (b) that he has devoted the five years immediately prior to filing his application for certification to a private practice confined wholly or substantially to the care and treatment of persons suffering from nervous and mental diseases."

The second bill is in the form of an amendment to section 658 of the New York Code of Criminal Procedure. The proposed machinery is set in operation "in all cases where any person in confinement under indictment shall appear insane; or whenever a question arises in the mind of the court, the prosecuting attorney, or the attorney for the defendant, . . . or whenever the defendant pleads insanity. . . ." The defendant chooses one or two qualified experts, the prosecutor an equal number, and the court one. Each psychiatrist chosen examines the defendant in the presence of the others, and the group file a written report, dissenting opinions, if any, being also filed. Either side then has an opportunity to examine the psychiatrists before the court. If neither party objects to the report, and both agree that it be presented as the only evidence of the defendant's mental condition, the court shall so order, in which case no other expert testimony is admissible. If counsel fail to agree, the examining psychiatrists may be called as witnesses by either side or by the court. No other experts are then to be called except that the defendant may have two additional certified psychiatrists as witnesses. The latter are paid by the defendant, but at the fixed rate which the county pays the other experts.<sup>80</sup>

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<sup>80</sup> The Report also contains a provision for the compensation of experts at a uniform rate, amending the present § 662a of the Code of Criminal Procedure. The other relevant sections of the Code, §§ 659, 836, are reworded and made consistent with the radical revision of § 658 set out in the text.

These provisions present a great improvement over the present law:

(1) *Expert testimony.* Under the present § 658, when a defendant pleads insanity, "the court may appoint a commission of not more than three disinterested persons, to . . . report as to his sanity at the time of the commission of the crime." It will be noted that: (a) commissioners need not be specially qualified. It has apparently been the practice for such commissions to call medical experts as witnesses, the fees being fixed by the court. See *McGuire v. Prendergast*, 159 N. Y. Supp. 658, 664 (Sup. Ct. Spec. T. 1915). Since under § 662a the commissioners are themselves reimbursed by the county, this procedure results in unnecessary duplication of expense. (b) The appointment of a commission is discretionary. *People v. McElvaine*, 125 N. Y. 596, 26 N. E. 929 (1891); *People v. Tobin*, 176 N. Y. 278, 68 N. E. 359 (1903); *cf.* *People v. Rhinelander*, 2 N. Y. Cr. R. 335 (1884). The suggested provision is in terms mandatory. However, the result in the above cases was reached by liberally construing the provision "whenever it shall appear," *etc.*, in an older version of § 658 (discussed below). Since the same phrase persists in the proposed section, it is at least doubtful whether the mere change from *may* to *shall* will be efficacious.

It will be noted that with the single exception that inquiry into the defendant's mental state is still initiated by laymen, this legislative program meets all the objections levelled at the proposal of the Institute.

#### A MORE RADICAL SUGGESTION

The programs for improvement discussed above all retain the shell of the present system with its inherent weaknesses. If the problem of mental disorder and crime is essentially one of treatment, laymen are not equipped to handle it; their efforts seem today puny and anachronistic. The tendency of the times is directed towards divesting laymen of their control. The great problems are: What means can be devised to vest in the hands of the psychiatrists the task of ascertaining which offenders are mentally disordered? What means can be devised to give psychiatrists the power of determining what should be done with offenders, on the basis of a scientific ascertainment of the behavior that may be expected of offenders in the future? What institutional and non-institutional devices and structures are necessary to take care of the mentally disordered? The suggested and attempted remedies dis-

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(2) *Procedure.* The present § 659 provides that "if the commission find the defendant insane the trial or judgment must be suspended until he becomes sane. . . ." Section 836, in another part of the Code, provides *inter alia* that if a person, "in confinement under indictment or under a criminal charge . . . shall appear to be insane," the judge shall commit him . . . until the question of his sanity is determined.

Section 658 in terms applies to insanity at the time of the offense, but § 659 and § 661 (dealing with the proceedings when defendant becomes sane) apparently apply only to insanity at the time of the trial, and their reference back to the commission appointed under § 658 casts doubt on the interpretation of that section. S. Glueck believes that § 658 also covers insanity at the time of the investigation. *Op. cit. supra* note 4, at 588, n.1. This interpretation seems unsound for two reasons: (a) Section 658 applies in terms only where defendant *pleads* insanity. Insanity at the time of trial may be raised without special plea, *People v. Joyce*, 233 N. Y. 61, 134 N. E. 836 (1922), and apparently at any time in the proceeding. *Cf. People v. White*, 140 Misc. 701, 251 N. Y. Supp. 396 (Gen. Sess. 1931); *People v. McElvaine, supra*. (b) It completely disregards § 836. In *People v. White, supra*, defendant claimed insanity at time of trial and raised the question before sentence. The court, making no mention of § 836, ordered the appointment of a commission on the basis of § 481, discussed *supra* note 25. But *cf. People ex rel. Beldstein v. Thayer*, 121 Misc. 745, 202 N. Y. Supp. 633 (County Ct. 1923) (defendant under indictment sent to an asylum by an order under § 836).

An examination of the statutory history of these provisions reveals the genesis of the contradiction in §§ 658, 659, 661. Section 658 of the Code formerly contained an additional provision to the effect that, "if a defendant in confinement, under indictment, appears to be insane at any time before or after conviction, the court may appoint a like commission to examine the defendant as to his sanity at the time of the examination." The earlier counterpart of § 836—Laws 1874, c. 446, art. 2, § 26, as finally amended by Laws 1898, c. 417, § 1—was incorporated bodily into the Code by Laws 1909, c. 66. The duplication was immediately noted, and the very next year, when § 836 was amended in certain particulars by Laws 1910, c. 557, the second part of § 658 was deleted by § 2 of the same chapter. However, §§ 659, 661 were left untouched. Under the new provisions this confusion is avoided by appropriate amendments of all these sections.

cussed above are not aimed at the solution of these problems in their entirety. Their philosophy is Fabian. The suggestion to be treated now is a frontal attack.

In 1921 the now famous Briggs Law was passed in Massachusetts. It provided as follows:<sup>81</sup>

“Whenever a person is indicted by a grand jury for a capital offense or whenever a person, who is known to have been indicted for any other offense more than once or to have been previously convicted of a felony, is indicted by a grand jury or bound over for trial in the superior court, the clerk of the court in which the indictment is returned or the clerk of the district court or the trial justice, as the case may be, shall give notice to the department of mental diseases, and the department shall cause such person to be examined with a view to determine his mental condition and the existence of any mental disease or defect which would affect his criminal responsibility. The department shall file a report of its investigation with the clerk of the court in which the trial is to be held, and the report shall be accessible to the court, the district attorney and to the attorney for the accused, and shall be admissible as evidence of the mental condition of the accused.”

In 1925 the act was amended by striking out the clause providing for the admissibility of the report. This step was taken on the advice that otherwise the whole statute might be held unconstitutional.<sup>82</sup>

From the passage of the act in 1921 to October, 1928, of 561 examined, 231 were indicted for first degree murder, 6 for second degree murder, and 324 for various other offenses. Thirty-seven defendants were reported as suffering from definite psychoses. In the case of 14 others, a period of observation was recommended. Fifty-five were reported as mentally defective or as defective delinquents and 15 as psychopathic personalities. Of the total number examined, 21.5% were found to be “suggestively or clearly abnormal mentally.”<sup>83</sup>

Of the 37 defendants reported to have “definite psychoses” in only three cases was the report of the psychiatrists disregarded. In one case sentence was imposed and the defendant imprisoned. He very shortly had to be committed to an insane asylum. In most of the other cases falling in the same group, the defendants were committed without the formality of trial. In a few cases, after a brief formal proceeding the defendant was held “not guilty by reason of insanity.” This indicates a very high degree of cooperation between medical experts, counsel

<sup>81</sup> Mass. Laws 1921, c. 415; for the Act in its present form, see MASS. CUM. STAT. (Michie, 1929) c. 123, § 100 a.

<sup>82</sup> S. Glueck, *Psychiatric Examination of Persons Accused of Crime* (1927) 36 YALE L. J. 632, 635 n. 7.

<sup>83</sup> See the reports of Overholser and S. Glueck, *Psychiatry and the Massachusetts Courts as Now Related* (1929) 8 SOCIAL FORCES 77, for detailed studies of the operation of the law. It is regrettable that no more recent figures are available.

for defense, the prosecution, and the courts. Where, however, the reports of the examiners have been other than "definite psychosis," *e.g.*, "mentally defective," "defective delinquent," or "psychopathic personality," the courts have not generally accepted these classifications as requiring special consideration or treatment.<sup>84</sup> The literature fails to show definitely whether this is due to the state of the law or the failure on the part of the courts to cooperate. In the case of the psychopathic personalities, the literature implies that the failure to treat specially was due in the main to the lack of legislation providing for special housing or treatment.<sup>85</sup>

The results in the first group must be regarded as admirable when compared with the situation in other states where the issues of insanity and irresponsibility are fought out at trial. In regard to those cases reported as mentally disordered to a degree less than "definite psychosis," the lawyer can merely point out the difficulties and turn to others for help. It is at this point that causation, treatment and law merge. Whether it is useful broadly to classify persons as defectives or as psychopaths, whether it is sound to conceive of abnormalities of intelligence and personality as causative factors of crime instead of regarding each case as a unique entity, using statistical conclusions merely as indices of types of trouble to look for, *etc.*, are questions that concern primarily those interested in causation and treatment. It is the function of the law to create the machinery by means of which the recommendations of others can be carried to successful execution, and to insure cooperation between hitherto disparate fields of knowledge.

The theory of the Massachusetts statute seems fundamentally sound. To the extent specified in the statute, it makes an examination of mental condition a matter of routine rather than chance. Recognizing the evils inherent in allowing laymen to pass on the question of men-

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<sup>84</sup> Up to October 15, 1928, 34 of those examined were reported by the Department as "mentally defective" or as "defective delinquents." Eight of these were committed by the courts for indeterminate periods to a special institution for this type of offender. In the other 26 cases no special disposition was made. In the next year, 21 were reported (about two-thirds as many as in the previous 6 years). Of these only 3 were committed to a special institution. The remaining 13 cases were disposed of as follows: state prison, 7; reformatory, 2; house of correction, 4; filed, not prosseced, not guilty, and probation, one each.

Similar results have been reached under another Massachusetts statute providing for the commitment of certain mental defectives convicted of crime to the Department of Mental Delinquents. Mass. Laws 1921, c. 270, as amended, Mass. Laws 1928, c. 333.

Still another Massachusetts statute provides at the request of the trial judge for the examination by the Department of Mental Diseases of the mental condition of persons coming before the courts. MASS. GEN. LAWS (1921) c. 123, § 99, discussed in Overholser, *Note on the Massachusetts Statute* (1931) 15 BULL. MASS. DEPT. OF MENTAL DISEASES, Nos. 3 and 4, at 15.

<sup>85</sup> See Overholser and S. Glueck, *supra* note 83.

tal disorder, it provides for psychiatric examinations in advance and the submission of reports to the court and both counsel, in the hope that the advice of impartial experts will be followed. It makes possible a minimization of the ordinary evils of expert testimony at trial by providing for impartial expert testimony in those cases in which pre-trial advice is not followed.

Though the Briggs Law, in theory and practice, is far ahead of any other device dealing with the problem of mental disorder and the criminal law, there are certain adverse criticisms which may be made.

(1) Routine psychiatric examination applies only to persons indicted of capital offenses and persons indicted for any offense who have been previously convicted of a felony or previously indicted more than once. This method of selection seems purely capricious. The classification "felony" is utterly without relevance to the possible existence of mental disorder in the offender. Of course it would be impossible and unwise to examine all offenders. Some mean must be struck. But it is not to be found in a classification historical and outworn. If the assumption was (at least in part) that society's conception of the seriousness of the offense, as indicated by the severity of the penalty, is a fair criterion of the probability that mental disorder exists in the offender, this is likewise untenable.

(2) An analysis of the act in operation shows an amazingly large number of cases in which examinations were not made because defendants had already been sentenced by the courts or were out on bail.<sup>86</sup> This defect may be remedied by requiring as a condition to the imposition of sentence or the granting of bail, a report on the mental condition of the accused.

(3) Only 744 cases were reported in seven years. This seems a remarkably small number for the entire state. It is true that in the early years of the statute the clerks of court were not too assiduous in ascertaining the previous record of persons indicted, and that under subsequent legislation directed to this defect a higher percentage of non-capital cases reported has been noted.<sup>87</sup> But laxness of officials cannot be the entire cause. Unless a centralized system of criminal statistics is

<sup>86</sup> *Id.*

<sup>87</sup> Mass. Laws 1925, c. 169 imposed a fine on delinquent clerks. Probation officers were required by Laws 1926, c. 320, § 2 [MASS. CUM. SUPP. (Michie, 1929) c. 276, § 85] to investigate the records of all persons accused of offenses punishable by imprisonment for more than one year, &c. A 1927 amendment to the Briggs Law (Acts 1927, c. 59) imposed on probation officers the duty of notifying the clerks of previous convictions or indictments, and on clerks the duty of acting on such information by reporting it to the Department for Mental Diseases. See Overholser, *Practical Operation of the Briggs Law* (1928) 13 MASS. L. Q. No. 6, 35.

established, at least within the state, the success of the law will remain a matter of chance.

(4) It is apparent from the previous discussion of the Briggs Law, that its success demands cooperation on the part of psychiatrists, social workers, probation officers, counsel for defense, the prosecution, courts, clerks of court, the police, *etc.* Such cooperation depends on the degree of centralization subsisting in the administration of criminal justice. Until a coordinated system is devised and adopted,<sup>88</sup> cooperation will remain fortuitous.

(5) Similarly, the recommendations of psychiatrists will fail of execution unless the facilities for treatment along institutional and non-institutional lines are kept abreast of psychiatric views. As we have seen, the failure of the Massachusetts courts to treat persons reported as psychopathic personalities in any but the traditional manner seems to be explained by the absence of special institutions.

(6) The Briggs Law provides that the experts shall determine the accused's mental condition "and the existence of any mental disease or defect which would affect his criminal responsibility." It has been stated by those familiar with the practical operation of the law that the reports of the experts leave much to be desired. In most cases the psychiatrists have satisfied themselves with a statement that the prisoner is or is not "responsible," without making any further description of, or comment upon, his mental condition.<sup>89</sup> Further, the provision in the statute asking (in the conjunctive) for a determination of the existence of any mental defect "which would affect" the criminal responsibility of the accused, seems to require the determination of a question which is foreign to psychiatry. It is not surprising, consequently, if the psychiatrist's report is less than clear. Of course, a technical description of the mental condition of a person is, at best, hardly understandable to a layman. But the successful operation of the statute requires that psychiatrists couch their reports in terms as simple as possible, including wherever possible a statement as to what may be expected of the defendant in the future and what form of treatment would be most desirable. A statute now authorizes Massachusetts courts to commit persons certified as defective delinquents to a special institution for an indeterminate period.<sup>90</sup> The courts should also be empowered by statute

<sup>88</sup> See Cardozo, *A Ministry of Justice* (1921) 35 HARV. L. REV. 113.

<sup>89</sup> "The psychiatrists of Massachusetts have an unequalled opportunity, by means of clearly and simply written reports, giving not only their opinion but some of the facts upon which it is grounded, of educating the courts to an appreciation of the value of psychiatry as a practical aid in the administration of criminal justice." Overholser, *supra* note 83.

<sup>90</sup> See note 84, *supra*.

to follow the prognostic advice of psychiatrists *in any case*. This suggestion indicates how vital is the need for further study and research in the field of predictability.

In conclusion, it may be pointed out that there is no reason for selecting mental disorder as the sole prerequisite of special treatment. The Briggs Law foreshadows a thorough reorganization of our criminal system by which the function of determining the treatment to be accorded all offenders would be conferred on a specially qualified tribunal. Such a plan would necessitate a splitting of the task now being performed mainly by the judicial system into the guilt-finding function on the one hand and the treatment function on the other.<sup>91</sup> Complete individualization of treatment and punishment<sup>92</sup> abides the emergence of a practicable scheme along these lines.

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<sup>91</sup> "The trial ought to be divided into two parts: In the first the examination and decision as to . . . guilt should take place; in the second one the punishment should be discussed and fixed. From this part the public and the injured party should be excluded." 81 ANN. REP. N. Y. PRISON ASS'N (1926) 74.

<sup>92</sup> This suggestion has frequently been made. See, e.g., S. Glueck, *Principles of a Rational Penal Code* (1928) 41 HARV. L. REV. 453; *Recommendations of the Inst. of Crim. Law and Crim.* (1919) 10 J. CRIM. L. 184; ILLINOIS CRIME SURVEY (1929) 804; S. GLUECK, *op. cit. supra* note 4, at 485; *Report of American Psychiatric Ass'n* (1928) 19 J. CRIM. L. 367, 373.