THE MENTALLY ILL OFFENDER IN FEDERAL CRIMINAL LAW AND ADMINISTRATION

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THE care and custody of the mentally ill has customarily been considered a state and local rather than a federal function. Certainly the major burden of performing this task of public assistance and police protection is carried by local government agencies, to the extent that it does not still rest on the shoulders of families and relatives. It is also customarily believed that the mentally ill or defective offender is infrequently encountered in federal law enforcement. For there have been fewer homicide trials in federal courts than in state courts, and it is in such cases that the defense of insanity is most often raised. Homicide apart, a conception of federal crime as typified by larger scale depredations and more complex schemes than the delinquencies popularly associated with mental cases has also been rather widespread and misleading.¹ Although these two notions regarding the incidence of mental cases in the federal penal process once had a factual basis, they are increasingly invalid, both because of the progressive expansion of federal criminal legislation and the fact that we have only recently begun to learn to recognize mental illness readily.

The purpose of this article is to reappraise the problem of the mentally ill offender against federal law, i.e., to examine the problem of the offender against accepted social interests, whose personality deviates, from a psychiatric viewpoint, from the norm or norms attributed to the group treated as "criminal". It is proposed also to evaluate the existing federal statutory provisions, together with current procedures and administrative arrangements for this class of offenders.²

The term "offender" is used advisedly to denote a larger category than "criminal". For when an offender's personality deviation is recognized as of a certain degree and quality, it is one of the tenets of our law that he may not, consonant with due process, be brought to trial or sentenced; if such was the state of his personality at the time of the offense, it is also

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1. This statement, appearing as recently as 1938 in HOUSEL AND WALSER, *DEFENDING AND PROSECUTING FEDERAL CRIMINAL CASES* (1938) § 397, is a fair sample: "A defense of insanity seldom appears in Federal criminal cases, due no doubt to the generally involved nature and preparation required for the commission of a federal offense, and consequently there is little discussion and authority on the subject of insanity as a defense or bar to prosecution."

2. For a discussion of the roles of the psychiatrist and the psychologist in connection with the trial, sentencing, and disposition of offenders generally, see Dession, *Psychiatry and the Conditioning of Criminal Justice* (1938) 47 YALE L. J. 319.

well established that he is not to be regarded or treated as a criminal. But in each instance the offender may still be regarded and treated as a police problem; in each situation, there is legal authorization for his removal from the community and commitment to a custodial institution. The distinction is thus one both of assumed moral status and of administrative jurisdiction.

Unfortunately, however, the present federal criminal procedure and administrative practice fail to screen out many offenders who, in light of contemporary psychiatric theory, belong in the category of the mentally ill or defective. As a result many persons are subjected to criminal proceedings in violation of the constitutional requirement of due process. To some of them the trial is an ordeal as devastating as it is unnecessary. To the government the result is an inappropriate and even socially harmful expenditure of prosecution resources. When such an individual is convicted and sentenced the result is even less excusable. The problem is one for treatment, but of a quite different kind from that which the Bureau of Prisons is equipped to give. And the conviction destroys, without justification, such reputation as the individual may have possessed.

Of course, some of the mentally ill are spotted before conviction. The criminal proceeding is then suspended if not dropped altogether; but the offender may still be a public menace. Here the existing provisions for an alternative federal disposition are inadequate. Or the illness may be detected after a prisoner enters upon the service of a sentence of imprisonment. It may then appear that the prisoner was probably mentally ill at the time of trial, and even at the time of the commission of the offense; or the illness may appear to have developed or reached an aggravated stage only after he began serving his sentence. In either of these situations the prisoner can be transferred by an administrative order to an institution for the care and custody of the mentally ill; the federal government maintains several institutions for this purpose. But in the first situation, the injustice involved in the conviction and commitment of the offender as a criminal stands uncorrected; in both the provision for federal care and custody is inadequate in that it does not extend beyond the maximum period of the criminal sentence, however mentally ill and dangerous the prisoner may then be.

MENTAL ILLNESS OR DEFECT AS A BAR TO PROSECUTION

The Standard and its Application. Under current practice, the issue of the offender's sanity may be raised in the first instance in order to ascertain whether he is presently triable. For, at Anglo-American common law, mental illness of the accused or the presence of a defect amounting to "insanity" bar further proceedings in a criminal case. Under our Constitution, this conditioning of the validity of a criminal proceeding upon the

sanity of the accused is considered a requirement of due process.³ Accordingly, the legislation dealing with the disposition of persons charged with offenses against the United States and found to be insane implicitly assumes that such persons are not to be prosecuted so long as they remain mentally ill.

The considerations of policy underlying this view are historically complex and in part forgotten, as is the case with so many of the institutions of this most ancient branch of law. Those which commend themselves today are expressed in the current formulation of the standard for ascertaining whether offenders are mentally capable of undergoing trial.

To date, Congress has left formulation of this standard to the courts. The terms "sanity" and "insanity" are now merely legal concepts. Though there was a time when they were also considered medical concepts, it is observable today that these legal criteria trouble the conscientious expert witness, since they do not correspond with modern psychiatric conceptions and classifications. Criteria such as those advanced in *McNaghten's* case⁴—the so-called "right and wrong" test—employ alleged psychological concepts, which actually fail to jibe with the expert's clinical experience, and have hence been of little help to him. These legal terms must, therefore, be regarded as no more than short-hand expressions of a policy with respect to the kinds of offenders who shall be dealt with by one set of governmental correctional processes, i.e., the "criminal", and the kinds who shall be dealt with by another and quite distinct set, i.e., the "insane".⁵

It follows that sanity for purposes of present triability need not necessarily mean the same thing as sanity in the sense of criminal responsibility for an act; in fact, the courts have recognized this distinction.⁶ The standard of present triability which appears to have met with approval in the federal courts is that formulated by Judge Jones in his instruction to the jury in the *Chisholm* case.⁷ The issue is whether the accused has "sufficient mental power, and has such understanding of his situation, such coherency of ideas, control of his mental faculties and the requisite power of memory, as will enable him to testify in his own behalf, if he so desires, and otherwise to properly and intelligently aid his counsel in making a rational defense."

Application of this standard requires court and administrative procedures that fulfill two functions. First, offenders exhibiting symptoms which

3. HOUSEL & WALSER, *op. cit. supra* note 1, § 397; *Youtsey v. United States*, 97 Fed. 937, 940 (C. C. A. 6th, 1899). See *Forthoffer v. Swope*, 103 F. (2d) 707 (C. C. A. 9th, 1939).

4. 10 Cl. & Fin. 200 (1843).

5. See Dession, *supra* note 2.

6. See *United States v. Boylen*, 41 F. Supp. 724, 725 (D. Ore. 1941); *United States v. Chisholm*, 149 Fed. 284, 285, 286 (S. D. Ala. 1906).

7. *United States v. Chisholm*, 149 Fed. 284, 285, 286 (S. D. Ala. 1906).

suggest any serious question as to triability should be screened out for subjection to the legal test. Second, sufficient technical and background information must be made available to the judge so that the issue of triability may be intelligently determined. Hence, the question arises as to the adequacy with which current federal procedures accomplish these objectives.

Under current practice, the question of the offender's triability may be raised at any stage in a criminal proceeding. Where it is raised before trial, the accused is entitled at least to a preliminary inquiry by the court, which may, however, be *ex parte*; mere inspection by the court may suffice. The court's duty at this stage is only to entertain the motion and determine whether the question is raised in good faith and upon plausible grounds; the record should show that such duty has been exercised.⁸

Since no specific procedures for determining finally the issue of triability are prescribed by statute, the courts have looked for guidance to the common law. Several methods are thought to be authorized: (1) commitment of the accused to an institution for observation and report; (2) appointment of a commission to examine and report; and (3) the holding of a formal judicial hearing.⁹ Whatever method is followed, there can be no valid final determination of the issue without notice and opportunity for the accused to present evidence and be heard.¹⁰ Whether this final determination shall be made before trial or reserved for trial rests in the discretion of the judge.¹¹

Where the method employed is that of a formal hearing, the accused's evidence is heard first, and he has the burden, according to the more recent decisions, of overcoming the ordinary presumption of sanity by creating a reasonable doubt.¹² The hearing may be held with or without the assistance of a special jury, in the discretion of the court, as in the proceeding on the common law writ *de lunatico inquirendo*.¹³ There appears to be no particularly settled practice throughout the United States, with respect to the use of a jury. Judge Caffey stated in his opinion in the *Harriman* case¹⁴ in 1933 that no one recalled an instance where a jury had been used for this purpose in the Southern District of New York. In other districts, there are reported instances of submission of the issue to a jury, and a form of verdict for such submission is contained in Judge Jones' charge

8. See Note (1943) 142 A. L. R. 961; *Youtsey v. United States*, 97 Fed. 937 (C. C. A. 6th, 1899); *United States v. Boylen*, 41 F. Supp. 724 (D. Ore. 1941); *United States v. Harriman*, 4 F. Supp. 186 (S. D. N. Y. 1933).

9. See the authorities cited *supra* note 8.

10. *Youtsey v. United States*, 97 Fed. 937 (C. C. A. 6th, 1899).

11. *Ibid.* See *Whitney v. Zerbst*, 62 F. (2d) 970, 972 (C. C. A. 10th, 1933).

12. Note (1900) 34 L. R. A. (n.s.) 1115; *United States v. Chisholm*, 149 Fed. 234 (S. D. Ala. 1906).

13. *United States v. Harriman*, 4 F. Supp. 186 (S. D. N. Y. 1933).

14. *Id.* at 187.

in the *Chisholm* case.¹⁵ Where so employed, the jury's function is, of course, as in common law lunacy proceedings, merely advisory.

Whatever the procedure followed, federal courts usually obtain psychiatric reports and advice. Depending on the facilities available in the area, they may resort for such assistance to the Bureau of Prisons, to the United States Public Health Service, or to physicians on the panel list prepared by the Public Health Service and circulated through the Administrative Office of the United States Courts. Alternatively, the courts may obtain assistance from local clinics or physicians in private practice.

Sometimes the inquiry is on motion of the accused; in any event it is common practice to obtain his consent.¹⁶ But presumably the court may inquire into this issue of its own motion and order a psychiatric examination or commit the accused for observation even though he has been admitted to bail.¹⁷ Some question has arisen as to the privilege against self-incrimination, with respect to statements which may be elicited from the accused in the course of such an examination.¹⁸ No federal adjudication on this point has been found; however, the New York Court of Appeals was confronted with this problem in the *Esposito* case¹⁹ in 1942. Pursuant to pleas of present insanity, the trial court had committed the accused for observation before trial. During the commitment, metrasol and sodium amytal (inhibition-relieving drugs or "truth serums") had been administered, in connection with the psychiatric interrogation to determine whether the accused were malingerers or were actually insane. Appealing from an adverse determination, the accused contended that this constituted a violation of their privileges against self-incrimination. However, the Court of Appeals ruled that in so far as the inquiry was into the issue of sanity, there had been no violation. It is believed that the federal courts should adopt a similar view.

It thus appears that where the issue of an offender's triability is raised before the trial, the federal courts have ample power to inquire into his sanity. There should be no great difficulty from a budgetary point of view, since funds have been appropriated from time to time from which the fees of psychiatrists appointed by the courts may be paid.

15. *United States v. Chisholm*, 149 Fed. 284, 285 (S. D. Ala. 1906).

16. See *United States v. Harriman*, 4 F. Supp. 186, 187 (S. D. N. Y. 1933).

17. *Id.* at 186-7, and the following general statement: "Courts have (at least in the absence of legislation to the contrary) inherent power to provide themselves with appropriate instruments for the performance of their duties. . . . This power includes authority to appoint persons unconnected with the court to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause." *Ex parte Peterson*, 253 U. S. 300, 312 (1920).

18. See *United States v. Boylen*, 41 F. Supp. 724, 725, 726 (D. Ore. 1941).

19. *People v. Esposito*, 287 N. Y. 389, 39 N. E. (2d) 925 (1942).

However, where the issue of mental illness or defect as of the time of trial is raised for the first time at a later stage, as for example after verdict or finding of guilt or even after sentence, the situation is less clear. In a proper case, relief should presumably be available on motion for a new trial or in arrest of judgment, subject, of course, to the standing time limits on these motions. However, there was some suggestion in the *Lee* case in the Fifth Circuit, that a motion in arrest of judgment on this ground is addressed merely to the discretion of the court.²⁰

Where resort to these motions is barred by limitations, there is common law precedent for relief through the writ of error *coram nobis*;²¹ it is not settled, however, whether the federal courts will exercise a similar jurisdiction.²² The remaining possibility is *habeas corpus*. On the theory that an accused whose mental capacities fall below the standard formulated in the *Chisholm* case is incompetent to plead, and to assist counsel or waive counsel, it is probable, in the light of recent decisions of the Supreme Court, that such relief is now available.²³ This was suggested in the recent *Forthoffer* case in the Ninth Circuit, but not decided, as the court felt that, in any event, the petitioner had failed to show that he was sub-standard mentally at the time of entering his plea, or that his waiver of counsel was not competent.²⁴

The chief deficiency of current processes for determining nontriability and for screening out offenders is that, in many districts, the administrative patterns are such that the initiative in raising the question of mental illness before trial is left pretty much to the defendant. For in most instances the mentally ill defendant does not consider himself incapacitated; moreover, like other federal defendants, he is frequently represented by assigned counsel, if any. The result is that the initiative is too infrequently exercised. During a six month period in 1943, for example, it was the experience of the Bureau of Prisons that over 100 seriously mentally ill or very feeble-minded persons were convicted and sentenced. The condition may well be on the increase, since the expansion of federal criminal law is bringing numerous new categories of offenders into federal custody.

How, then, is a greater awareness of the symptoms of mental illness and defect to be stimulated among those who come into official and professional contact with accused persons before trial? Of course, this is basically a

20. See *Lee v. United States*, 91 F. (2d) 326, 331 (C. C. A. 5th, 1937).

21. See *Lamb v. Florida*, 91 Fla. 396, 107 So. 535 (1926); *People v. Reid*, 195 Cal. 249, 232 Pac. 457 (1924); *Orfield, Application of Writ of Error Coram Nobis in Nebraska* (1932) 10 NEB. L. BULL. 314.

22. See *Robinson v. Johnston*, 118 F. (2d) 998 (C. C. A. 9th, 1941), 130 F. (2d) 202 (C. C. A. 9th, 1942), *remanded on other grounds*, 316 U. S. 649 (1942).

23. See *Waley v. Johnston*, 316 U. S. 101 (1942); *Walker v. Johnston*, 312 U. S. 275 (1941); *Johnson v. Zerbst*, 304 U. S. 458 (1938).

24. See *Forthoffer v. Swope*, 103 F. (2d) 707, 710 (C. C. A. 9th, 1939).

problem in the education of such persons—the commissioners, the marshalls, the prosecuting and defense attorneys, the probation officers, and the judges. Not that they need be or should be psychiatrists. What is required is sufficient training to enable them to know when and how to utilize the assistance of psychiatrists.

In addition to such long range education, one possible remedy might be to build on the provision for pre-sentence investigations and reports contained in the present Probation Act.²⁵ The Act does not now prescribe the time when the investigation shall be made; in some districts, indeed, it is felt that a probation officer should not interview the defendant until after the verdict or finding of guilt. The scope of the investigation is similarly not prescribed; nor is it required that the investigations be made unless the court so directs. Hence the practice varies from district to district. It has been estimated that investigations are now made in about half of all cases, but they generally do not include psychiatric examination.

Another method for insuring the early detection of mental illness would be devisal of an administrative arrangement for the routine medical examination of all federal prisoners held in county jails or other places of detention, pending indictment or trial. Local physicians would be available for this purpose, and, assuming the utilization only of those having some familiarity with psychiatry, even a cursory examination should serve to uncover a great many of the cases of mental illness.

The much discussed Briggs Law of Massachusetts²⁶ suggests a fourth method. Originally enacted in 1921, the law requires a psychiatric examination by or under the auspices of the Department of Mental Health of all accused persons falling within the following categories: (1) persons indicted by a grand jury for a capital offense; (2) persons indicted or bound over for trial in the Superior Court who have previously been convicted of a felony; and (3) persons indicted or bound over who have previously been indicted more than once for any other offense.

The Briggs Law has the virtue of discarding the widespread but mistaken notion that while physical diseases require professional diagnosis, mental disease can be detected by any sensible person upon simple observation. Examinations are conducted by neutral experts and at an

25. 43 STAT. 1259 (1925), 46 STAT. 503 (1930), 18 U. S. C. §727 (1940). Concerning the present practice see ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS (1941) tables 24 and 28; THE PRESENTENCE INVESTIGATION (Administrative Office of the United States Courts, Division of Probation, 1942); ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES, PROBATION (1939) 174.

26. 4 MASS. LAWS ANN. (Michie 1942), c. 123, § 100 A. See WEIHOFEN, *INSANITY AS A DEFENSE IN CRIMINAL LAW* (1933) 403-406; Overholser, *Some Possible Contributions of Psychiatry to a More Effective Administration of the Criminal Law* (1939) 17 CAN. B. REV. 638; *The Briggs Law of Massachusetts: A Review and an Appraisal* (1935) 25 J. CRIM. L. & CRIMINOLOGY 859.

appropriately early stage in the proceedings. The effects of this law have unquestionably been beneficial, despite the inadequacy of appropriations for payment of examining physicians' fees and the occasional necessity for conducting the examinations on very short notice—in a few instances in the prisoner's room at the courthouse, while the judge waited for the result.²⁷

The defect of the Briggs Law is its limitation to the categories of defendants previously described. Not that automatic provision for the examination of all defendants would be either necessary or desirable. In federal practice, for example, there would be no point in providing psychiatric examination for all corporation executives charged with violation of the Sherman Anti-Trust Act, or all violators of the Migratory Bird statute. The real objection to the classification adopted in the Briggs Law is that there is little evidence to suggest any high correlation between the categories of defendants singled out and the incidence of mental illness or defect. The same objection would probably hold as to any other classification in terms of the crime charged, or of its legal severity or the offender's recidivistic record. Yet the legislative medium would hardly lend itself to an attempt to classify offenders in terms of symptoms of mental disorders.

Disposition. Once it is determined that an offender can not be legally tried by reason of mental illness or defect the next question is how to dispose of him. At common law, such offenders were committed to custodial institutions until such time, if ever, as they recovered sufficiently to be triable.²⁸ In earlier days this meant commitment to jail; in general, under modern practice, it means commitment to an institution for the treatment of the mentally ill. Such commitment assumes, of course, a prior judicial determination as to the mental state of the accused.²⁹ This practice is adopted in existing federal legislation, which, however, is incomplete in coverage. The omissions appear to reflect both doubt as to the legal basis for federal jurisdiction over the mentally ill and defective, and doubt, assuming the technical jurisdiction, as to the policy of treating such persons as federal rather than state charges.

It is submitted nevertheless that the jurisdictional basis for commitment to an institution is clear. Existing statutes provide for the federal commitment of insane persons who fall into a number of categories. These in-

27. See GLUECK, *MENTAL DISORDER AND THE CRIMINAL LAW* (1925) 60; Kidd, *California Legislation In Regard to Crime for 1929*, 17 CALIF. L. REV. 537, 542; Overholser, *Psychiatry and the Massachusetts Courts As Now Related* (1929) 8 SOCIAL FORCES 77; Tulin, *Problem of Mental Disorder in Crime* (1932) 32 COL. L. REV. 933, 942.

28. See *Youtsey v. United States*, 97 Fed. 937, 940 (C. C. A. 6th, 1899).

29. *Simon v. Craft*, 182 U. S. 427 (1901); *Barry v. Hall*, 98 F. (2d) 222 (App. D. C. 1938); *Ex Parte Dries*, 3 App. D. C. 165 (1894); 30 OPS. ATT'Y GEN. (1916) 569; cf. *White v. Treibly*, 19 F. (2d) 712 (App. D. C., 1927).

clude insane persons in the Army, Navy, Marine Corps, and Coast Guard, including in various instances retired personnel; civilians who become insane while employed in the Quartermaster Corps of the Army; insane prisoners of war and interned persons; Foreign Service personnel adjudged insane in a foreign country; insane patients of the Public Health Service, including merchant seamen; American citizens adjudged insane in the Canal Zone, in Canada, and in the Virgin Islands; as well as insane persons charged with a federal offense.³⁰

In some of these instances, commitment may be justified on the theory that the insane person belongs to a group, in whose care and protection the federal government has a special interest. As the court said with reference to the commitment of a retired naval officer in the *Treibly* case:³¹ "His care and protection, while thus incapacitated and unable to act for himself, are the concern and duty of the government." Much the same line of reasoning was employed in the *Barry* case,³² involving a merchant seaman. The principle is akin to the *parens patriae* concept usually invoked as a basis for the state commitment of delinquent and neglected juveniles. But the guardianship or special obligation relationship is not the only recognized basis for the commitment of an individual in our law. In federal practice, an innocent material witness may also be committed to insure his presence at a criminal trial.³³ An accused person lawfully arrested may be committed in federal as in state criminal proceedings where it appears necessary to insure his presence at the trial assuming that he does not furnish bail or that the crime charged is one where release on bail is not required. Jurors may be ordered confined during all recesses for the duration of a criminal proceeding to insure their freedom from pressure and influence. In the *De Marcos* case³⁴ the court upheld federal commitment of an American citizen, who had been found insane in Canada but who on transfer to the United States was found to have no ascertainable legal residence in any state, territory, or in the District of Columbia. In all these instances, the legal principles invoked emphasize the welfare and protection of the public, rather than of the individual committed. The common denominator underlying these varied situations is that the federal government is employing commitment as an instrument for the protec-

30. 38 STAT. 801 (1915), 37 STAT. 591 (1912); 40 STAT. 373 (1917), 40 STAT. 644 (1918); 54 STAT. 1236 (1940); 54 STAT. 1236 (1939); 54 STAT. 766 (1940); 54 STAT. 1236 (1940); 24 U. S. C. §§ 191, 191(a), 192, 193, 196, 196(a) and (b), 211-12 (1940).

31. *White v. Treibly*, 19 F. (2d) 712, 713 (App. D. C. 1927).

32. *Barry v. Hall*, 98 F. (2d) 222, 224 (App. D. C. 1938).

33. 1 STAT. 91 (1789), 2 STAT. 167 (1802), 5 STAT. 517 (1842), 9 STAT. 73 (1846), 24 STAT. 635 (1887), 36 STAT. 1167 (1911), 28 U. S. C. §§ 657-60 (1940).

34. *DeMarcos v. Overholser*, 122 F. (2d) 16 (App. D. C. 1941); *cert. denied*, 314 U. S. 609 (1941), *rehearing denied*, 314 U. S. 714 (1941).

tion of federal interests or as a necessary adjunct to the exercise of federal powers.

In the case of the person who is taken into custody on a federal charge and is found before trial to be insane, both bases of federal jurisdiction appear to be present. Such a person is lawfully in federal custody by reason of his arrest and therefore entitled to reasonable care so long as that custody continues; he is likewise entitled to a fair and timely trial, which however is impossible so long as the insanity continues. It would therefore appear to be the government's duty to provide for his care and treatment so that he may be restored to sanity as soon as possible. There is, of course, the alternative of release, but this is barred because the government has established probable cause for his detention on the criminal charge. To release a putative offender may mean escape; it may also mean commission of further federal offenses, which will be no less dangerous because the offender is legally irresponsible. Assuming a showing that the accused is insane and not fit to be at large, there is therefore at least as substantial a basis for federal commitment as in the case of a mere material witness.

Apart from the jurisdictional question, other legal and administrative difficulties may cause trouble. Read by itself, Section 211 of Title 24 of the United States Code would seem to authorize commitment to Saint Elizabeths Hospital in the District of Columbia of all persons charged with offenses against the United States and found insane. The difficulty is that Section 161 of the same Title, enumerating the purposes for which Saint Elizabeths Hospital was established, provides only that: "... its object shall be the most humane care and enlightened curative treatment of the insane of the Army and Navy of the United States and of the District of Columbia." To be sure, Section 211 was enacted almost two years after Section 161; but an opinion of the Attorney General rendered in 1881 construed Section 211 as though the two enactments were contemporaneous.³⁵ The result has been to exclude from the operation of Section 211 persons charged with offenses against the United States and found insane, except those residing in the District of Columbia or in the armed forces. The Act of August 7, 1882,³⁶ somewhat alleviated this con-

35. 17 OPS. ATT'Y GEN. 211 (1881).

36. 22 STAT. 329, 330 (1882), 24 U. S. C. § 212 (1940). The Act amended the Act of June 23, 1874, 18 STAT. 251 (1874), which stated that the transfer of "all persons who have been or shall be convicted of any offense in any court of the United States, and imprisoned in any State prison or penitentiary of any State or Territory, and who, during the term of their imprisonment, have or shall become and be insane," was authorized on application of the Attorney General and order of the Secretary of the Interior. In such cases the Attorney General was also authorized in the alternative to contract with any state insane asylum within the state in which the convict was imprisoned for his care and custody for the term of the sentence, but no longer. Retransfer to the

dition by providing for the commitment of additional classes of accused persons found mentally ill. Its provision for the transfer to Saint Elizabeths Hospital of "all persons who, having been charged with offenses against the United States, are in the actual custody of its officers, . . . and who during the term of their imprisonment have or shall become and be insane" has apparently been administratively construed to cover all persons arrested on federal charges in any district, who are found to be insane and who are not out on bail.³⁷

The remaining legislative gap is with reference to persons charged with federal offenses who have either not been taken into custody or who have been released on bail. The policy basis for this gap is unclear. It may rest on the assumption that dangerously insane persons will usually be without funds and without friends with funds, and hence unlikely to make bail. Or it may be thought that as a practical matter, the United States Attorney can usually arrange matters by having bail set at a high figure, or otherwise, so that a really dangerous individual will be in actual custody and hence subject to the commitment provisions of the Act. Or it may simply be that there has been a desire to limit federal commitment of the insane, and that this limitation just happens to be the one hit upon. The known legislative history leaves the explanation a matter of conjecture.

What has been the practice? In many cases the federal charge has been dismissed when a prisoner has been found insane. In some of these cases, the prisoner has then been committed by a state court or voluntarily admitted to a state institution for the mentally ill. This result has sometimes been facilitated by appointment of the superintendent of the appropriate state institution as one of the examining physicians in the federal proceeding. In other cases, persons found insane have been committed to any one of a number of federal institutions, including (but not limited to) the Medical Center at Springfield, Missouri, and Saint Elizabeths Hospital. In some instances prisoners found insane have been committed to federal penal institutions in the locality. The chief difficulty in arranging for state commitment arises in cases of non-determinable residence; for most states condition entry to their state hospitals on actual voluntary residence,

prison or penitentiary in the event of a restoration of sanity was also authorized, provided the sentence had not expired.

The amended statute read: "That upon the application of the Attorney General the Secretary of the Interior be, and is hereby, authorized and directed to transfer to the Government Hospital for the Insane in the District of Columbia all persons who, having been charged with offenses against the United States, are in the actual custody of its officers, and all persons who have been or shall be convicted of any offense in a court of the United States and are imprisoned in any State prison or penitentiary of any State or Territory, and who during the term of their imprisonment have or shall become and be insane."

37. Holtzoff, *Looking At The Law* (1943) 7 FEDERAL PROBATION No. 2, 41.

for from one to four years. In summary, it appears that in every case where commitment seems necessary the appropriate officials work it out as best they can, not infrequently being handicapped by the obscurities and omissions in the enabling legislation.

MENTAL ILLNESS OR DEFECT AS A DEFENSE

The issue of the offender's sanity may also be raised at trial as a defense to the federal charge. Relatively few recorded federal criminal cases have gone to trial which involved an insanity defense and there is no legislation governing either the standard or procedure. Consequently, whenever the issue has arisen, the courts have looked to the common law. The insanity defense is, of course, recognized, and it may be raised either by special plea or under the general issue;³⁸ the burden is on the claimant defendant to overcome the presumption of sanity by evidence sufficient to create a reasonable doubt.³⁹

The Standard. Contemporary formulations of the standard of insanity as a defense vary in phraseology, taking as a point of departure the rule laid down a century ago in England in *McNaghten's* case.⁴⁰ The following representative formulation is from an opinion handed down in 1941 in the Southern District of California:

"To excuse an act because of insanity the degree of insanity must be shown to have been sufficiently great to have controlled the will power of the defendant at the time the act was committed. When reason ceases to have dominion over the mind, proven to be diseased and the person reaches a degree of insanity where criminal responsibility ceases, accountability to the law for the purpose of punishment no longer exists. The issue upon that point is, was the defendant's brain impaired to such an extent that he was incapable of forming a criminal intent, and that his mind was not under his control by reason of this infirmity, and his brain was compelled to it, that at the time his will power, judgment, reflection, and control of his mental faculties were impaired, so that at the time he could not distinguish between right and wrong, or that the act was done under pressure of an irresistible, and uncontrollable impulse at the time."⁴¹

38. *Hotema v. United States*, 186 U. S. 413 (1902); *United States v. Fore*, 38 F. Supp. 140 (S. D. Calif. 1941); HOUSEL AND WALSER, *op. cit. supra* note 1, § 397.

39. *Hotema v. United States*, 186 U. S. 413 (1902); *Davis v. United States*, 160 U. S. 469 (1895).

40. 10 Cl. & F. 200 (1843). See *Owens v. United States*, 85 F. (2d) 270 (App. D. C., 1926); *United States v. Faulkner*, 35 Fed. 730 (N. D. Tex. 1883); *United States v. Ridgeway*, 31 Fed. 144 (S. D. Ga. 1887); *Guiteau's Case*, 10 Fed. 161 (D. C. 1882); *United States v. Shults*, Fed. Cas. No. 16,286, 6 McLean 121 (D. Ohio 1854).

41. *United States v. Fore*, 38 F. Supp. 140, 141 (S. D. Calif. 1941).

A substantially similar charge was approved by the Supreme Court in 1902 in the *Hotema* case,⁴² involving a member of the Choctaw Indian tribe. Since an alleged belief on the part of the defendant that the victim of his homicide was a witch was an element in the case, the charge also dealt specifically with the subject of delusions. It was stated that in order to excuse the accused's conduct, a belief such as that attributed to the defendant must be "the product of a diseased brain" and his act "the result of such diseased brain."

Disposition. If the interposition of a defense of insanity in a federal court is followed by acquittal of the accused, there is no statutory provision for further detention or commitment. Sections 211 and 212 of Title 24 hardly seem applicable, as one who has been acquitted is no longer considered charged with an offense, nor is he supposed to be in custody. The statement in a contemporary treatise on federal criminal procedure that "If a defendant is acquitted on the ground of insanity, commitment to an institution generally follows, for observation and detention until cured" must therefore be taken to refer to action by cooperative state authorities.⁴³

Here, again, our legislation is inadequate. Where state commitment is both available and reliable, it may well be the most appropriate way of disposing of a troublesome mental case; but when one who has committed a federal offense is thus disposed of, the federal government loses control of the situation. An inmate who is a real hazard may be released in a relatively short time from some state institutions; for many of these mental hospitals are over-crowded, and some are unduly susceptible to local influences. There is, moreover, the problem, already noted, of the person without a determinable legal residence. Suppose the case of another Guiteau, with paranoid designs on the President of the United States. If such a person were acquitted as insane after one assassination attempt, should not the federal government be authorized to commit him to an appropriate federal institution, in the event that state commitment proved for one reason or another not feasible?

MENTAL ILLNESS DISCOVERED OR OCCURRING AFTER CONVICTION AND COMMITMENT

Prisoners are often found to be insane after entering upon the service of their sentences, at the outset and later. It may appear that the insanity probably antedated the conviction, or that it developed after receipt of the offender by the Bureau of Prisons. Moreover, in some cases sanity may be restored prior to the expiration of the sentence, and in others it may not be. These various situations raise a series of separate problems.

42. *Hotema v. United States*, 186 U. S. 413, 419 (1902).

43. HOUSEL AND WALSER, *op. cit. supra* note 1, § 573.

Disposition of Convicts Found Mentally Ill or Defective On Receipt By The Bureau of Prisons. It was said in the *Youtsey* case⁴⁴ that "It is fundamental that an insane person can neither plead to an arraignment, be subjected to a trial, or, after trial receive judgment, or, after judgment, undergo punishment." The reference in the last clause is, of course, to the common law rule that if one under sentence of death becomes insane after conviction, execution is to be deferred until sanity is restored.⁴⁵ (Perhaps, as the court which issued this *dictum* and some commentators have assumed, this common law rule could be successfully invoked in capital cases in the federal courts; no case has actually been found in which the situation has arisen.)

Convicts sentenced to terms of imprisonment and found, on receipt by the Bureau, to be mentally ill or defective are by no means uncommon. More often than not it will appear that such mental illness or defect probably existed at the time of arraignment or trial, and it may likewise appear that it probably existed at the time of the commission of the offense. What is to be done in this situation?

As already explained, the government or counsel for the prisoner could move for a new trial within the time allowed for such motions, or attempt to avail themselves of certain other possible remedies. But prisoners are usually without counsel at this stage, and there is no established administrative policy favoring the re-opening of such cases. Existing legislation providing for the transfer of prisoners who are or become insane from penal institutions to mental hospitals fails to distinguish between prisoners of the kind now under discussion and those who develop serious mental illness after entering upon the service of their sentences.

This failure to differentiate between these dissimilar categories of prisoners constitutes another defect in our federal scheme, for it obviously does violence to considerations of due process and elementary justice. Commitment of persons who are mentally ill or have serious defects in any case appears unwise. Our federal penal institutions are not primarily designed or equipped for the care and treatment of the mentally ill. To sentence one of these offenders when his illness or defect is determinable in advance is not only unfortunate for the individual, but also a positive nuisance to the prison authorities. An administrative practice designed to return such convicts to the courts for more appropriate disposition would make prosecuting attorneys and judges more alert to the problem and go far to convince them of the desirability of avoiding criminal jurisdiction in such cases.

Disposition of Convicts Found Mentally Ill or Defective While Serving Their Sentences. When a federal prisoner serving his sentence in a state

44. *Youtsey v. United States*, 97 Fed. 937 (C. C. A. 6th, 1899).

45. 1 WHARTON, CRIMINAL LAW (12th ed. 1932) § 77; 1 HAWKINS P. C. c. 1, § 3.

or territorial institution is found to have become insane, Section 212 of Title 24 of the United States Code authorizes his transfer to Saint Elizabeths Hospital, upon application by the Attorney General and order of the Federal Security Administrator. When such a prisoner is serving his sentence in a federal penal institution, Section 876 of Title 18 authorizes his transfer on order of the Attorney General to the United States Hospital for Defective Delinquents or any other institution authorized by law to receive such offenders. In neither case is a judicial hearing required.⁴⁶

Section 876 creates a Board of Examiners for each federal penal and correctional institution, consisting of a medical officer appointed by the warden or superintendent, a medical officer appointed by the Attorney General, and a psychiatrist designated by the Surgeon General of the United States Public Health Service. Each board examines inmates alleged to have become mentally ill or defective and reports its findings to the Attorney General, who may then initiate transfer proceedings. Provision is made in both Sections 212 and 876 for the retransfer of prisoners in the event that they are restored to sanity, while their sentences remain unexpired.

Disposition of Convicts Found Mentally Ill or Defective When Their Sentences Are About to Expire. Section 211(a) of Title 24 might be read as purporting to authorize the transfer of an insane convict to Saint Elizabeths Hospital and his detention there "during the continuance of his mental disorder," without regard to the expiration of his term of sentence; such, however, has not been the official interpretation. In 1927 the Attorney General rendered an opinion that a convict whose term of imprisonment had expired and who was then confined in St. Elizabeths Hospital should be returned as soon as practicable to his state of residence, for care and maintenance in a state institution.⁴⁷ This opinion rested in part on a construction of Section 212 of the same Title as intended to secure proper treatment for federal prisoners "during the term of their imprisonment" only, in part on the absence of any provision in the statute for notice and a judicial hearing on the issue of insanity, and in part on the policy apparent in other statutes in *pari materia* and in Department of the Interior appropriation acts. In this connection, it should also be noted that Section 213 of Title 24, providing for the transfer of insane federal prisoners to state hospitals on a contract basis, expressly provides that "no contract shall be made or compensation paid for the care of such insane persons beyond their respective terms of imprisonment."

Section 876 of Title 18 limits the period of custody of prisoners transferred under that Act to such time as "the maximum sentence, without de-

46. 8 OPS. ATT'Y GEN. 390 (1857). See *White v. Treibly*, 19 F. (2d) 712 (App. D. C. 1927); 35 OPS. ATT'Y GEN. 366 (1927); 30 OPS. ATT'Y GEN. 569 (1916).

47. 35 OPS. ATT'Y GEN. 366 (1927).

duction for good time or commutation of sentence, shall have been served." Section 878 provides for notice, to the proper authorities of the State, District, or Territory where the convict has his legal residence, of the date of expiration of the sentence of any insane convict, who, in the judgment of the superintendent of the federal hospital is still insane or a menace to the public. Where legal residence cannot be ascertained, the notice is given to the authorities of the place from which he was committed.

Here again it would seem that the possibility of federal commitment should be open, in cases where the stateless individual constitutes a real threat to federal interests. The basis for federal jurisdiction in such cases is the same as in the case of persons merely charged with offenses against the United States and found insane.

CONCLUSION

Existing arrangements for dealing with mentally disordered and defective federal offenders are inadequate, both on the legislative and the administrative levels. Despite the rudimentary development of the federal law, the problems involved are neither unusual nor esoteric; most of them have for some time been the subject of experiment and legislative revision in many states. The general policy with respect to electing to exercise federal as against state jurisdiction, moreover, has not been clear and poses another group of problems.

Certain changes in the existing statutes and practices have been recommended in the course of this article. These should be effectuated through comprehensive revision of the relevant provisions of Titles 18 and 24, rather than through rules of court or the process of judicial decision in particular cases; for the indicated changes involve alterations in penal administration as well as judicial procedure. Amendments of the existing statutes are necessary to establish jurisdiction in certain situations, to clarify policy, and to prescribe procedures. Furthermore, new or additional appropriations will be needed to effectuate certain of the suggested reforms.

The point, of course, is not that the federal government should compete with the states in the care and treatment of the mentally ill and defective. Nor should the federal government encourage the states to dump as federal charges individuals who should be cared for in local mental hospitals. The statutory authorizations for federal commitment should in all instances be permissive rather than mandatory; and administrative practice should be alert to discourage the pressing of federal criminal charges, where the impetus comes primarily from local officials desirous of ridding themselves of a local public assistance problem.