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## INSANITY AS A DEFENSE IN CRIMINAL PROSECUTIONS—II\*

This is the second and concluding note on the defense of insanity in criminal prosecutions. The first note<sup>1</sup> presented a survey of decisions governing judicial interpretation of insanity as a defense. This note will present suggestions relating to a procedure for diagnosing abnormality more in keeping with modern psychiatric research than that presently used. Wisconsin law, court decisions and statutory enactments, will be the primary concern of the criticism.

In 1843, *M'Naghten's Case*<sup>2</sup> was handed down, in which the House of Lords set forth the right and wrong test; the test that is now universally accepted<sup>3</sup> by the American States and England. When the test was propounded it was clearly an advance over previous rules<sup>4</sup> laid down by the courts in diagnosing the diseased mind. At its inception the sciences of psychiatry and psychology were practically non-existent. The physician of 1843 knew little more than the layman in the diagnosis and prognosis of the mentally ill, and consequently it was perfectly proper for the juror or the court to pass upon the question of mental aberration. The test, therefore, was in essence adopted as a tool for the non-expert. Its conception was from the judicial rather than the medical mind. Approbation for the rule stops at the period when psychiatry gained a foothold in the field of medicine. No longer are the mentally diseased treated as if they were infested with some metaphysical agent. The psychotic, neurotic or feeble-minded can now be diagnosed with reasonable certainty. The tests used in such diagnosis do not include the right and wrong test.<sup>5</sup> The question arises — what are the courts trying to determine, whether the accused can differentiate right from wrong, or whether he is insane? It is true in some cases the two may not be mutually exclusive; however, in a dangerously large number of cases they are. Courts repeatedly have denounced any criterion that recognizes a type of aberration where the accused is insane, but still can distinguish right from wrong.<sup>6</sup> *M'Naghten's Case* originated this test as a necessary condition precedent to legal recognition of abnormality, and courts insist that without it no man can be adjudged

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\*The writer recommends that the first article of this series be read before this one, unless the reader has a fundamental knowledge of psychiatric terminology and is familiar with judicial interpretation of insanity as used as a defense in criminal cases.

<sup>1</sup> Insanity as a Defense in Criminal Prosecutions—I, 29 Marquette Law Review 108 (1946).

<sup>2</sup> *M'Naghten's Case*, House of Lords, 10 Clark and Fin, 200 (1843).

<sup>3</sup> Weihofen, "Insanity as a Defense in Criminal Law," 15 (1933).

<sup>4</sup> *Arnold's Case*, 16 Howell's State Trials 764 (1724); *Hadfield's Case*, 37 Howell's State Trials 1288 (1800).

<sup>5</sup> "The Test of Legal Responsibility for Insane Persons," 72 Univ. of Penn. Law Review 167, at page 169 (1924).

<sup>6</sup> 16 Corpus Juris 99-100 (1918).

insane. The medical profession<sup>7</sup> soon after the test was set forth, denounced it as the sole criterion of insanity, but to little avail. However, courts have recognized that expert opinion in this field is necessary, and as a result the medical profession has been allowed to give the benefit of their knowledge on the subject. However, is expert opinion given both pro and con the ultimate answer to the problem? Weihofen,<sup>8</sup> in his analysis of expert testimony in this field, points out the following defects:

"Any reputable practicing physician is legally qualified to speak as an expert on insanity, even though he may never have had any instruction or experience in mental disease. As a result, it is usually possible to hunt up some quacks or eccentric "experts" whose fantastic theories will permit them to testify as counsel wishes, even though no reputable psychiatrist would agree with them. The jury is usually unable to distinguish the competent expert from the incompetent, and obviously has no means of knowing how many experts refused to testify as counsel wished, before acceptable experts were found. The law relies upon cross-examination to reveal the witness's incompetency or inaccuracy, but as a matter of fact it is often the witness whose judgment is unobscured by too much knowledge of the subject who will be most positive in his assertions and who will make the best impression on the jury. Furthermore, leaving the witness's qualifications to be brought out on cross-examination too often leads to the sort of badgering and bickering for which these cases have been notorious.

"The partisan nature of the expert's service makes it difficult to obtain reliable and unbiased evidence. Allowing experts in criminal trials to be called on behalf of the parties is peculiar to the common law. It lies at the root of one of the great evils of which such trials are productive — lack of that impartiality which should be characteristic of scientific inquiry.

"The opinion testified to is often not based upon sufficient scientific observation and examination. At best, an examination made while the subject is in prison is not very satisfactory, and often no really thorough physical, mental, and neurological examination or study of the case history is even attempted, the witness's opinion being based merely upon what the defendant chooses to tell about himself or what his family tells about. Worse yet, an expert who has not examined or even seen the defendant at all is competent to testify in answer to hypothetical questions. Such questions may include only facts, proved or hoped to be proved, as tend to support the questioner's side of the case. Moreover, the witness may not himself believe in the truth of the facts assumed. The unfairness and unsoundness of the use of hypothetical questions in these cases has been pointed out by alienists repeatedly."

<sup>7</sup> Ordonaux, *Judicial Aspects of Insanity*, 423 (1877).

<sup>8</sup> Weihofen, "An Alternative to the Battle of Experts: Hospital Examination of Criminal Defendants Before Trial," 2 *Law and Contemporary Problems* 419, at page 420-421 (1935).

Without further comment, the practice of employing experts by counsel and by the state may well lead to more confusion than if the jury were allowed to determine the issue by themselves. However, the latter is by no means a satisfactory solution to the problem. Laymen cannot, and should not, be allowed to try the issue of insanity by their own observation. What procedure, then, should be used? The jury cannot be cast aside, since the United States Constitution<sup>9</sup> provides for it, nor can expert testimony be disregarded since only through it can the diagnosis be made.

#### PSYCHIATRIC EXAMINATION "BEFORE" TRIAL

In 1929 The American Bar Association<sup>10</sup> resolved the following:

"That there be available to every criminal and juvenile court a psychiatric service to assist the court in the disposition of offenders.

"That no criminal be sentenced for any felony in any case in which the judge has any discretion as to the sentence until there be filed as a part of the record a psychiatric report.

"That there be a psychiatric service available to every penal and correctional institution.

"That there be a psychiatric report on every prisoner convicted of a felony before he is released.

"That there be established in each state a complete system of administrative transfer and parole, and that there be no decision for or against any parole or any transfer from one institution to another, without a psychiatric report."

The introduction of a compulsory psychiatric examination before trial is not a new or revolutionary addition in criminal procedure; it has been in existence in the state of Maine<sup>11</sup> for over one hundred years. The statute of Maine provides for a period of hospitalization before trial to determine whether or not the accused was so mentally disordered at the time of the act as to be criminally irresponsible. It thus refers only to the issue of insanity as a defense. Five other

<sup>9</sup> United States Constitution, Article I, Section 7.

<sup>10</sup> Reports of American Bar Association, Vol. 54, page 56 (1929).

<sup>11</sup> Revised Statutes of Maine (1930), Chapter 149, Section 1, which reads:

"When a person is indicted for an offense, or is committed to jail on a charge thereof by a trial justice, or judge of a police or municipal court, any justice of the court before which he is to be tried, if a plea of insanity is made in court, or he is notified that it will be made, may, in vacation or term time, order such person into the care of the superintendent of either insane hospital, to be detained and observed by him until further order of court, that the truth or falsity of the plea may be ascertained. The superintendent of the hospital to which such person is committed shall, within the first three days of the term next after such commitment, and within the first three days of each subsequent term so long as such person remains in his care, report to the judge of the court before which such person is to be tried, whether his longer detention is required for purposes of observation."

states, Maryland,<sup>12</sup> Massachusetts,<sup>13</sup> New Hampshire,<sup>14</sup> New York,<sup>15</sup> and Wisconsin<sup>16</sup> have statutes which provide for an examination to determine if the accused is rational enough to understand the nature of the proceedings and to intelligently aid in the defense of his case. Three other states, Colorado,<sup>17</sup> Ohio,<sup>18</sup> and Vermont,<sup>19</sup> have statutes

<sup>12</sup> Annotated Code of Maryland, Vol. 2, Article 59, Section 6, which reads in part:

"\* \* \* The judge of the court in which such indictment or information is pending shall have full power and authority at any time, *before trial* to order an examination of the mental condition of such person by the Board of Mental Hygiene \* \* \*." (approved 1941).

<sup>13</sup> Annotated Laws of Massachusetts, Vol. 4, para. 100A, (approved April 23, 1941). The statute was recently interpreted in: *Com. v. Gray*, 314 Mass. 96, 49 N.E. (2d) 603 at page 607 (1943), where the court held:

"The purpose of this statute requiring examination into an accused's mental condition is to prevent an accused being put on trial unless his mental condition is determined to be such as to render him responsible to trial and punishment and unless he has no mental disease or defect which interferes with his criminal responsibility."

<sup>14</sup> Revised Laws of New Hampshire (1941) Vol. 1, Chapter 17, Section 13, which reads:

"When a person is indicted for any offense, or is committed to jail on any criminal charge to await the action of the grand jury, any justice of the court before which he is to be tried, if a plea of insanity is made in court, or said justice is notified by either party that there is a question as to the sanity of the respondent, may in term time or vacation, order such person into the care and custody of the superintendent of the state hospital, to be detained and observed by him until further order of the court, or until such person shall have been ordered discharged from the hospital by its trustees upon a report by the superintendent that such person is not insane."

<sup>15</sup> New York Statutes, Criminal Code, Vol. 66, Part 2, para. 658 (eff. 1939), which reads:

"If at any time before final judgment it shall appear to the court having jurisdiction of the person of a defendant indicted for a felony or a misdemeanor that there is reasonable ground for believing that such defendant is in such state of idiocy, imbecility or insanity that he is incapable of understanding the charge, indictment or proceedings or of making his defense, or if the defendant makes a plea of insanity to the indictment, instead of proceeding with the trial, the court, upon its own motion, or that of the district attorney of the defendant, may in its discretion order such defendant to be examined to determine the question of his sanity."

This statute which provides for a judicial examination before trial is not unconstitutional as denying the defendant "due process of law." *People ex rel Klesitz v. Mills*, 179 Misc. 58 at page 63, 37 N.Y.S. (2d) 185 (1942).

<sup>16</sup> Wisconsin Statutes, Section 357.12 (1943).

<sup>17</sup> Colorado Statutes Annotated, Vol. 1, Rule 35 (1935), which reads:

"In an action in which the mental or physical condition of a party is in controversy, the court in which the action is pending may order him to submit to a physical or mental examination by a physician. The order may be made only on motion for good cause shown and upon notice to the party to be examined and to all other parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made."

<sup>18</sup> Throckmorton's Ohio Code Annotated, Section 13441-4 (1940), which reads in part:

"\* \* \* the court shall have power to commit the defendant to a local insane hospital, or the Lenia State Hospital, where the defendant shall remain under observation for such time as the court may direct

which provide that whenever the plea of insanity is raised the defendant is to be committed to a state hospital for observation. All of these statutes, with the possible exception of Massachusetts, are merely stepping stone in the direction of a complete determination of the problem. The Wisconsin statute<sup>20</sup> will be taken as illustrative. It provides in part:

"1. Whenever, in any criminal case, expert opinion evidence becomes necessary or desirable the judge of the trial court *may* after notice to the parties and a hearing, appoint one or more disinterested qualified experts, not exceeding three, to testify at the trial.\* \* \* The fact that such expert witnesses have been appointed by the court shall be made known to the jury, but they shall be subject to cross-examination by both parties, who may also summon other expert witnesses at the trial, but the court may impose reasonable limitations upon the number of witnesses who may give opinion evidence on the same subject.

"2. No testimony regarding the mental condition of the accused shall be received from witnesses summoned by the accused until the expert witnesses summoned by the prosecution have been given an opportunity to examine and observe the accused, if such opportunity shall have been reasonably demanded.

"3. Whenever the existence of mental disease on the part of the accused, at the time of the trial, is suggested or becomes the subject of inquiry, the presiding judge of the court before which the accused is to be tried or is being tried *may*, after reasonable notice and opportunity for hearing, commit the accused to a state or county hospital or asylum for the insane to be detained there for a reasonable time, to be fixed by the court, for the purpose of observation.\* \* \* In cases of commitment to a hospital 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 the purpose 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 the said chief physician who may be cross-examined on the report by counsel for both parties.

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not exceeding one month; and the court may in such cases appoint one or more disinterested qualified physicians, \* \* \* to investigate and examine into the mental condition of the defendant and testify as experts at his trial or other hearing."

<sup>19</sup> Public Laws of Vermont, Section 2429 (1933), which reads:

"When a person is indicted or informed against for a criminal offense, or is committed to jail on a criminal charge by a justice's or municipal court, the presiding judge of the county court before whom the person is to be tried, may, in term time or vacation, if a plea of insanity is made in court or if he is satisfied that a plea of insanity will be made, order the person into the care of the superintendent of the Vermont State hospital for the insane, to be detained and observed by the superintendent until further order of the judge or of such county court, that the truth or falsity of such plea may be ascertained."

<sup>20</sup> Fn. 16, *supra*, italics the author's.

"4. Each expert witness appointed by the court *may* be required by the court to prepare a written brief report under oath upon the mental condition of the person in question and such report shall be filed with clerk at such time as may be fixed by the court. Such report may with the permission of the court be read by the witness at the trial."

This statute is a step in the right direction. It shows an awareness of the need for impartial testimony by providing for state examination. However, a brief criticism of the law is necessary to show how incompletely it resolves the problem. First, it gives the judge the sole discretion in determining whether or not an examination is necessary. To use an extreme example, the accused could be a raving maniac, but if the judge thought he was sane there could be no recourse, under this statute, to a state examination. Secondly, the statute fails to do away with the battle of expert testimony, but actually puts another player in the field. Under the statute, there is not only the battle of the parties, but an additional battle between the parties and the impartial witnesses. Thirdly, the statute has no teeth. The important provisions are all qualified by the word *may*. The statute comes to life only if the court injects life into it. Finally, laymen are still the final determiners of the issue of insanity. The court and jury can completely disregard the testimony presented and decide the issue from their own reflection on the problem. The testimony is merely an aid; it is not binding in the least.

The Massachusetts statute,<sup>21</sup> while it is not a complete answer to the problem, is the first legislation that attempts to make mental examination a matter of routine. It provides in part:

"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, which 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.\*\*\*"

This statute provides many advantages. The principal ones are as follows: (1) Certain classes of offenders are examined as a matter of course; (2) examinations are made by neutral and unbiased experts; (3) examinations are made *before* trial; (4) the examination eliminates the special trial before judge and jury; (5) the examination eliminates the open court and the subjection of the accused to the

<sup>21</sup> Fn. 13, *supra*.

morbid public eye; (6) it eliminates time and money spent for expert testimony before peers that cannot judge; (7) it eliminates to some extent the possibility of offenders still suffering from a mental defect being released into society; (8) it provides for the early discovery of latent abnormality, and for partial prevention of many who would continue in a life of crime.

Glueck<sup>22</sup> states that the Massachusetts statute is "the most radical step yet taken to provide for the mental examination of accused persons awaiting trial," but points out, by way of criticism, that it applies only to capital offenders, and to persons indicted more than once, that the system of reporting the cases is upon the shoulders of clerks and is not obligatory unless they know of the offender's previous record; and that it does not provide for a complete coordination between trial judge and hospital. However, in spite of these patent defects, Glueck<sup>23</sup> states that the Massachusetts law, "even as it stands today, is far in advance of any similar legislation in any state of the Union," and as to its future application, writes:

"But perhaps the most important though least obvious role which is being played by the unique Massachusetts law is that of harbinger of a new criminal procedure toward which, it would seem, the advance of criminological knowledge will gradually force use: namely, the basing of the offender's treatment in *all* cases — both as to length and type — not on the mechanical dosages of punishment prescribed by legislatures in advance, but on the rational exercise of judicial discretion enlightened by scientific reports of psychiatric, psychological, and sociological experts who should form an indispensable adjunct of the criminal courts of tomorrow."

#### CONCLUSIONS

Even a brief examination of the field of psychiatry will illustrate that it is one of our most technical sciences, and one that is extremely dangerous when entered into by the untrained practitioner. The necessity for impartial and qualified experts here is more important than in many other fields because of the repercussions that may follow if mistakes are made. Therefore, should the responsibility of the uninformed to arrive at the correct prognosis be continued? Should the use of obsolete criterions in determining the problem be continued? The answer is clear; the road to its final implementation is almost equally clear. Statutes should be enacted which provide for *routine* examinations in *all* criminal cases. Psychiatrists should be free to use the tools of their trade in arriving at final determinations,

<sup>22</sup> Glueck, "Psychiatric Examination of Persons Accused of Crime," 36 Yale Law Review 632, at page 645 (1927).

<sup>23</sup> *Ibid.*, at page 647.

and should not be hampered by ancient measuring devices promulgated by courts over one hundred years ago. The sanctity of the jury raises a difficult constitutional question. However, the Massachusetts statute, which with certain exceptions, appears to meet the problem, has been held constitutional<sup>24</sup> against this objection. Finally it is suggested that the proposed legislation should establish the basis for accrediting, by some responsible and qualified organization such as The American Medical Association, to the courts for this work of competent and qualified experts. The ground work has been laid. The working success of the Massachusetts law will become increasingly more apparent, and may be the necessary impetus to uniform legislation on routine psychiatric examination in all criminal cases before trial.

NORRIS NORDAHL

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<sup>24</sup> *Com. v Gray*, 314 Mass. 96, 49 N.E. (2d) 603, at page 608 (1943).