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THE MASSACHUSETTS PROCEDURE RELATIVE TO THE SANITY OF DEFENDANTS IN CRIMINAL CASES
(The Briggs Law)

By Winfred Overholser*

From time to time a case arises in which the accused, generally believed by the public to be guilty of some heinous and well-publicized offense, enters a plea of insanity. Whether or not the plea is sustained, psychiatric expert testimony is introduced by the prosecution and defense which at least appears to be conflicting. Thereupon editorials are written demanding “reform,” perhaps even urging abolition of the defense of insanity, and in any event castigating severely the “venal” and “unprofessional” “experts.” Is is useless to tell the average man that the psychiatrists, thanks to the hypothetical question and the rules of evidence, probably seemed to disagree much more violently than they did in actuality; that there are many kinds of experts, and that some of them (such as real-estate experts) exhibit far greater discrepancies in their testimony; or that the defendant has a constitutional right to summon witnesses in his own behalf; or that insanity existing at the time of the act is a defense to crime recognized throughout England and the United States for many years. In short, there is a widespread popular distrust of the “plea of insanity” and of psychiatric expert witnesses.

Several states, taking cognizance of this distrust, have made attempts to improve matters. In California, for example, if the plea of insanity is introduced, two trials are had, the first on the facts and the second on the question of sanity, an arrangement which complicates matters unduly and very likely does not conduce substantially to a clearer ascertainment of the truth. Colorado provides that in the event the plea of insanity is introduced, the court must commit the defendant to a state hospital for observation; this procedure appears to work well as far as it goes. Missis-

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1California, Penal Code, sec. 1016.


3Colorado, Acts 1927, ch. 90.
sippi⁴ tried the abolition of the defense of insanity, but the statute was declared unconstitutional.⁵ Louisiana⁶ attempted to make a commissioner’s findings conclusive, but this act likewise was nullified by the supreme court of the state. The various procedures adopted as a supposed means of reform have, in general, overlooked a fundamental, namely, that the initiation of the plea of insanity is left to some non-psychiatric person,—the defense attorney, the jail officials, or the judge. Accordingly, there is no assurance that mental disease, if present in the defendant, will be recognized. There is no doubt that numerous defendants have been put on trial and even convicted and sentenced who were at the time mentally unsound; the inherent injustice of trying and convicting an insane man is well recognized in the law from Blackstone down. One other fundamental objection may be made to most of the prevailing systems, namely, that once insanity is “recognized,” machinery for an impartial determination of the question is lacking, and partisans must be introduced. Immediately the possibility of bias is injected and this bias thoroughly discounted, so that indeed before the proceedings are over the evidence of the experts for both sides is thrown out and the jury left to substitute that rather nebulous thing, “common sense,” for expert knowledge.

These preliminary remarks are intended to emphasize the significance of a Massachusetts procedure which obviates most of the objections mentioned above, which has operated well, and which received wide recognition as an extremely advanced step. In 1921, Dr. L. Vernon Briggs of Boston, a psychiatrist of note, secured the enactment of legislation conceived by him providing for the mental examination by the State Department of Mental Diseases in advance of trial of (1) all persons indicted for a capital offense; (2) all persons bound over or indicted who have been (a) previously convicted of a felony or (b) indicted more than once for any offense. These were the elements of the original act; four minor amendments, having to do with details of the machinery, have since been enacted, the last in 1929. The present law⁷ follows:

“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

⁴Mississippi, Acts 1928, ch. 75, secs. 1 and 2.
⁵Sinclair v. State, (1931) 161 Miss. 142, 132 So. 581.
⁷Massachusetts, General Laws, Tercentenary Ed., ch. 123, sec. 100A.
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. Whenever the probation officer of such court has in his possession or whenever the inquiry which he is required to make by section eighty-five of chapter two hundred and seventy-six discloses facts which if known to the clerk would require notice as aforesaid, such probation officer shall forthwith communicate the same to the clerk who shall thereupon give such notice unless already given. 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 probation officer thereof, the district attorney and to the attorney for the accused. In the event of failure by the clerk of a district court or the trial justice to give notice to the department as aforesaid, the same shall be given by the clerk of the superior court after entry of the case in said court. Upon giving the notice required by this section the clerk of a court of the trial justice shall so certify on the papers. . . . Any clerk or trial justice who wilfully neglects to perform any duty imposed upon him by this section shall be punished by a fine of not more than fifty dollars.”

For obvious reasons, the statute is usually referred to as the “Briggs Law,” and is so indexed.

In the first place, then, the law applies to all defendants falling within certain legal categories. It is doubtful whether even the well developed psychiatric machinery of Massachusetts could examine all defendants in the criminal courts, so a limit had to be set. This was done by describing in legal terms the groups which presumably include the more serious offenders. Parenthetically, it may here be observed that under another statute any court of the commonwealth may request a mental examination by a member of the staff of a state hospital of “any person coming before the court,” so that any defendant not affected by the Briggs Law may be examined by the department if the court so desires. Also the court may employ experts or commit the defendant to a state hospital if doubt arises as to his sanity either before trial or at any time before final disposition. The examination under the Briggs Law is made without reference to any “plea of insanity,” contem-

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9See article on this topic by Overholser in 16 Mass. L. Quart. (May, 1931) 26-34.
10Massachusetts, General Laws, Tercentenary Ed., ch. 123, sec. 100.
plated or actual; indeed, in one case of a murderer who was definitely insane the man's own attorney was doubtful of the report, and almost certainly would not have entered a defense of insanity unless the examination had been made.

In the second place, the examination is impartial. The two psychiatrists who make it are assigned by the Department of Mental Diseases, a professional department within the administrative branch of government. They are in no sense court attachés, and are employed neither by the district attorney nor by defense counsel. They are paid a fee of four dollars plus mileage of twenty cents a mile one way, certainly not a sum large enough to raise any suspicion of venality! Being appointed by psychiatrists, it is reasonable to suppose (as indeed is the fact) that they are competent, an assurance which cannot always be given in the case of psychiatrists who are selected by a judge who cannot be expected to be posted on the relative merits of medical men. The examiners being neutral and competent, there is every reason why their report should carry weight with court and jury. In the event that in spite of a report to the effect that the defendant is sane the defense insists upon introducing expert evidence to the contrary, the jury is naturally likely to lean toward the view expressed by experts who are not open to the suspicion of partisanship. That the members of the bar recognize that the examination is fairly made is evident from the fact that almost never does an attorney refuse to permit his client to submit to it. The report, although accessible to the court, district attorney, defense counsel and probation officer, is advisory only, and is not admissible as evidence. The examiners, however, may be summoned by either the commonwealth or the defense and asked their opinion and the grounds therefor. The right of the defense to introduce further expert testimony is, of course, not impaired, and in certain capital cases the expense of such testimony has been paid by the county upon authorization of the court, the defendant being impecunious.11 Cases in which such further testimony has been introduced have been extremely rare, and it may properly be claimed for the Briggs Law that it has almost entirely eradicated those "battles of experts" which have done much to provoke criticism of the courts and of psychiatrists, and which are still all too common in most jurisdictions.

11This procedure is discretionary with the trial justice. See Commonwealth v. Belenski, (1931) 276 Mass. 35, 176 N. E. 501: "Having been examined by impartial experts the defendant was not entitled as of right to a further examination at the public expense."
The following synoptic table indicates some of the essential data regarding the operation of the law:

<table>
<thead>
<tr>
<th>Year Ending October 15</th>
<th>Cases Reported</th>
<th>Cases Examined</th>
<th>Percent Not Examined</th>
<th>Insane</th>
<th>Observation Advised</th>
<th>Mentally Defective</th>
<th>Other Mental Abnormalities</th>
<th>Percentage Reported Abnormal</th>
</tr>
</thead>
<tbody>
<tr>
<td>1921-1926</td>
<td>367 (av. 73.2 yearly)</td>
<td>295 (av. 59 yearly)</td>
<td>19.6</td>
<td>26</td>
<td>7</td>
<td>25</td>
<td>11</td>
<td>23.4</td>
</tr>
<tr>
<td>1927</td>
<td>138</td>
<td>87</td>
<td>37.5</td>
<td>5</td>
<td>1</td>
<td>9</td>
<td>1</td>
<td>18.3</td>
</tr>
<tr>
<td>1928</td>
<td>239</td>
<td>179</td>
<td>25.1</td>
<td>6</td>
<td>6</td>
<td>21</td>
<td>13</td>
<td>25.7</td>
</tr>
<tr>
<td>1929</td>
<td>370</td>
<td>283</td>
<td>23.5</td>
<td>3</td>
<td>16</td>
<td>27</td>
<td>11</td>
<td>20.1</td>
</tr>
<tr>
<td>1930</td>
<td>654</td>
<td>521</td>
<td>20.3</td>
<td>4</td>
<td>23</td>
<td>44</td>
<td>10</td>
<td>15.7</td>
</tr>
<tr>
<td>1931</td>
<td>766</td>
<td>703</td>
<td>8.2</td>
<td>8</td>
<td>21</td>
<td>87</td>
<td>10</td>
<td>17.9</td>
</tr>
<tr>
<td>1932</td>
<td>909</td>
<td>817</td>
<td>10.1</td>
<td>6</td>
<td>26</td>
<td>68</td>
<td>19</td>
<td>14.5</td>
</tr>
<tr>
<td>1933</td>
<td>818</td>
<td>725</td>
<td>11.3</td>
<td>3</td>
<td>23</td>
<td>55</td>
<td>15</td>
<td>13.2</td>
</tr>
<tr>
<td>Totals</td>
<td>4261</td>
<td>3610</td>
<td>61</td>
<td>123</td>
<td>336</td>
<td>90</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Not examined: Total all classes 651 or 15.2% of all cases reported.

A few facts may be pointed out. First of all, of course, the proportion of those defendants found to be clearly or suggestively abnormal mentally is a sufficient refutation of the charge sometimes loosely made that the psychiatrists, if given a free hand, would find all or most accused criminals insane. Although 16.9% were found to exhibit deviations from normal, those reported to have mental disease ("insanity") or to show symptoms suggestive of it were only 5% of all examined. Some of the mental defectives would be legally "insane," but many would meet the tests of responsibility, and in the group of "other mental abnormalities" would be found such diagnoses as neurosis, alcoholism, epilepsy, and drug addiction, some of which might or might not be considered as constituting criminal irresponsibility. The marked increase of cases reported beginning in 1927 was due to the passage of an amendment in that year placing upon the probation officer the duty of reporting to the clerk the previous record of the defendant if it rendered the latter examinable under the law. The steadily decreas-

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ing proportion of defendants reported but not examined is evidence of the cooperation of the courts.

Of some interest may be found a tabulation of the offenses charged against the defendants examined (in numerous cases, of course, more than one indictment was found against the defendant).

<table>
<thead>
<tr>
<th></th>
<th>Defendants Examined</th>
<th>Murder—1st Degree</th>
<th>Manslaughter and 2nd Degree Murder</th>
<th>Larceny</th>
<th>Breaking and Entering (Burglary)</th>
<th>Robbery</th>
<th>Felonious Assault</th>
<th>Sex Offenses</th>
<th>Others</th>
</tr>
</thead>
<tbody>
<tr>
<td>1921-1928</td>
<td>561</td>
<td>231</td>
<td>6</td>
<td>128</td>
<td>148</td>
<td>47</td>
<td>29</td>
<td>39</td>
<td>54</td>
</tr>
<tr>
<td>(7 years)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1929-1930</td>
<td>804</td>
<td>45</td>
<td>20</td>
<td>352</td>
<td>316</td>
<td>84</td>
<td>73</td>
<td>84</td>
<td>203</td>
</tr>
<tr>
<td>(2 years)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1931</td>
<td>703</td>
<td>32</td>
<td>5</td>
<td>179</td>
<td>258</td>
<td>119</td>
<td>34</td>
<td>32</td>
<td>104</td>
</tr>
<tr>
<td>1932</td>
<td>817</td>
<td>34</td>
<td>5</td>
<td>151</td>
<td>359</td>
<td>112</td>
<td>51</td>
<td>26</td>
<td>109</td>
</tr>
<tr>
<td>1933</td>
<td>725</td>
<td>40</td>
<td>2</td>
<td>167</td>
<td>330</td>
<td>104</td>
<td>54</td>
<td>30</td>
<td>144</td>
</tr>
</tbody>
</table>

It need only be mentioned in connection with this table that the marked increase in offenses other than homicide illustrates the progressive improvement in reporting which has taken place since 1927.

Having seen the nature of the reports, we may turn to the matter of disposition. In those cases in which the defendant is reported to be "insane," the district attorney usually arranges to have him committed to a mental hospital,\textsuperscript{13} where he is held until it is determined that he is sane, being then returned to court. More rarely, in some homicide cases, the district attorney moves for a verdict of "not guilty by reason of insanity"; such a verdict is merely a formal one, following upon the minimum of uncontroverted testimony and consuming at the most an hour. The savings effected by such celerity and economy of procedure, as compared with the traditional method of taking up several days with expensive and perhaps conflicting testimony, have repaid every year and many fold the trifling cost of the administration of the law, and at the same time the treatment of the defendant has been much fairer. In the event of acquittal of homicide "by reason of insanity,"\textsuperscript{14} the prisoner must be committed to a mental hospital "during his natu-

\textsuperscript{13}Massachusetts, General Laws, Tercentenary Ed., ch. 123, sec. 100.

\textsuperscript{14}Massachusetts, General Laws, Tercentenary Ed., ch. 123, sec. 101.
eral life," and may be released by the governor with the advice and consent of the council if he is satisfied after an investigation by the department (of Mental Diseases) that such discharge will not cause danger to others. If commitment for observation is advised by the examiners, the district attorney usually arranges to have the court commit him for a period of thirty-five days. If not "insane," he is returned to court; if suffering from mental disease, the court may authorize his detention until restored to sanity. These procedures, except for the acquittal by reason of insanity, do not require a jury, nor even sworn medical testimony. This relative informality makes for the prompt and humane disposition of the mentally ill defendant. During the three-year period ending October 15, 1933, all seventeen of the defendants reported to be "insane" were committed to a mental hospital. This is as it should be, and indicates that the court not only waited for the report before disposition, but acted upon it. The number of defendants committed for observation under that procedure was as follows: 1931, 13 out of 21; 1932, 16 out of 26; 1933, 16 out of 23. In some of these cases, at least, the defendant was disposed of by a "no bill," a "nol. pros." filing of the case, or a verdict of "not guilty"; in a few others he was sentenced to a penal institution or placed on probation.

The disposition of the defendants reported as mentally defective was not so satisfactory from a psychiatric point of view. During the three-year period just referred to, 210 defendants were so reported, of whom 24, or 11.4%, were committed as defective delinquents; 119, or 56.6%, were committed to the conventional correctional or penal institutions; and 27, or 12.8%, were placed on probation. One reason for the hesitation of some judges to commit to the Department of Defective Delinquents is the fact that that department is much overcrowded. A more potent reason, however, is probably the feeling that commitment for an indeterminate period is an unduly severe disposition for what may be looked upon as a "less serious" offense—a relic of the "classical" theory of penology. Seemingly the day is not yet at hand when the dangerousness of the offender and the rights of society are gen-

16Massachusetts was the first (1911) to enact a defective delinquent law, providing for the indefinite segregation in a separate department of certain classes of mentally defective offenders. Massachusetts, General Laws, Tercentenary Ed., ch. 123, sec. 113-124.
erally considered as superior in importance to the name and supposed "seriousness" of the crime alleged.

The purpose of the statute has been well stated in the decision of the supreme judicial court of Massachusetts in the case of the *Commonwealth v. Devereaux*\(^1\) in 1926:

"The examination is required in order that no person so indicted may be put upon his trial unless his mental condition is thereby determined to be such as to render him responsible to trial and punishment for the crime charged against him, and that he has no mental disease or defect which interferes with such criminal responsibility. It is the duty imposed by the statute upon these doctors and others similarly assigned by the Department of Mental Diseases to say what is the mental condition of an accused and whether he has any mental disease or defect affecting his criminal responsibility. . . . It is a necessary deduction from all the circumstances that the defendant was put upon trial on the indictment because the report of the Department of Mental Diseases upheld his criminal responsibility. He would not have been brought to trial without evidence of his mental condition if that report had not been to the effect that he was of sufficient mental power to be criminally liable for his act and was not insane. . . . Doubtless the judge knew of this report at the trial. . . . He was justified in considering it in connection with the motion for a new trial in the circumstances here disclosed. . . . The judge had a right to examine the cause suggested in the motion for a new trial in the light of the contents of this report, in order to aid him in ascertaining whether justice required that there be a new trial."

In another part of the same decision the impartial nature of the report was emphasized as follows:

"It is a matter of general knowledge that there are in the service of the commonwealth under this department persons eminent for special scientific knowledge as to mental diseases. The examination under the statute, therefore, may fairly be assumed to have been made by competent persons, free from any disposition or bias and under every inducement to be impartial and to seek and ascertain the truth."

Judicial notice, then, is taken of the competence and impartiality of the examiners, and it is clearly indicated that the district attorney is not expected to bring to trial a defendant who is not pronounced to be sane and responsible. The figures already cited indicate that the district attorneys have of late, at least, followed the general lines laid down above. It is further stated that the trial judge was guided by the report.

\(^{17}\) (1926) 257 Mass. 391, 396, 397, 153 N. E. 881.
In this connection a recent case of interest may be outlined. In May, 1934, one S——, with another, was indicted for breaking and entering and possessing burglarious implements. His case was referred to the department, and the examiners reported him to be probably insane, strongly advising that he be committed to a state hospital for observation. When the case was called, the judge, in spite of knowing of this report, ordered the case to trial. The defendants were convicted, and thereupon S—— was committed to a state hospital. He was reported to be insane, and is still (October, 1934) in a state hospital for mental diseases. The attorney then filed a motion for a new trial, citing the Devereaux decision and arguing that his client should not have been put on trial. The motion was allowed. Just what was gained by trying an insane man it is hard to see; certainly it was not consistent with the principles of criminal procedure, and was distinctly unfair to the defendant as well as being a waste of the court's time and the public's money. The allowing of the new trial is a vindication of the Briggs Law, and will undoubtedly serve to recall to the minds of other judges the principles laid down in the Devereaux Case.18

The constitutionality of the Briggs Law has never been directly decided, but there would appear to be no ground for questioning it. A considerable number of writers on legal topics, notably Sheldon Glueck,19 L. A. Tulin,20 and Henry Weihofen,21 have expressed interest in the Briggs Law, and approved of its principles. Weihofen, for example, states:

"The Massachusetts' 'Briggs Law' is almost the only practicable recommendation looking to the sensible objective of sorting out the insane and irresponsible offenders before going through the time and money wasting process of a criminal trial." Glueck speaks of it as "the most farsighted piece of legislation yet passed on this subject."22

To summarize, the Briggs Law, by providing in advance of

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20 Tulin, (1932) 32 Col. L. Rev. 933-963.
21Weihofen, Insanity as a Defense in Criminal Law 401-407.
22 A comprehensive study of the Briggs Law by the present author, with full bibliography, has been accepted for early publication in the Journal of Criminal Law and Criminology. The reader who may be interested in features touched upon in the present article but not elaborated is respectfully referred thereto.
trial an impartial and competent mental examination of certain legal classes of persons accused of crime, has avoided the expense of numerous costly trials; it has almost entirely eliminated the "battles of experts" which have in the past brought discredit upon psychiatric expert testimony; it has protected the rights of the psychotic or otherwise mentally incompetent accused who might otherwise have gone unrecognized; it has served in numerous cases to indicate a disposition more in accord with the protection of society and justice to the defendant than the usual mechanically-determined one based upon "classical" penological theories; finally, it has aided in the process of educating judges, prosecutors, and the bar to a realization of the service which psychiatry can render to the individualization of justice. It is no exaggeration to say that the Briggs Law represents the most significant step yet taken toward a harmonious union of psychiatry with the criminal law.