# SOME POSSIBLE CONTRIBUTIONS OF PSYCHIATRY TO A MORE EFFECTIVE ADMINISTRATION OF THE CRIMINAL LAW *

When I was honoured by an invitation to address the Montreal Psychiatric Society it seemed to me proper and timely to present some thoughts on a subject which has long attracted my attention and study, namely, the possible contribution of psychiatry to more efficient administration of criminal law. Such a title, particularly to a group which by invitation includes this evening members of the bench and bar, may seem impertinent, in implying that there is room for improvement in the administration of that branch of the law which deals with offenders against society. Although a psychiatrist may seem to be somewhat outside of his field in criticizing the criminal law, I am confident that legal students share the feeling of other thoughtful citizens that perhaps all is not being accomplished in our dealings with offenders which might reasonably be expected by society. The U.S. Census[1] reports, for example, that in 1936, of 60,925 persons committed to Federal and State prisons, 56.5% were *known* to have served previous sentences; the rate of recidivism among the 600,000 or more prisoners sent to jails and houses of correction is far higher. Figures of this magnitude certainly suggest that our penal system fails rather sadly in reforming; it likewise fails in adequately protecting the public. A second implication, namely, that psychiatry may possibly offer some suggestions for improvement, is one which a psychiatrist might reasonably be expected to propound. I trust that I can satisfy you that there are certain possibilities inherent in the psychiatric approach which may be of value in a more effective dealing with offenders against the criminal law.

The laws relating to the punishment of offenders have through the ages undergone certain rather gradual transformation, some of which is substantial and some more in the nature of rationalization. The Mosaic or talion law has, of course, long since become extinct, as has the right of the injured party's relatives to wreak private vengeance. The notion of public revenge, although ostensibly having no part in the law of today, is actually a strong motivating force, although it is usually concealed by other terms. The deterrence theory of the law is

* Presented by invitation before the Montreal Psychiatric Society, April 27, 1939.

[1] Prisoners in State and Federal Prisons and Reformatories: 1936. U.S. Census.

in all probability the strongest motivating one today, although not carried to its former logical conclusion of public hangings and whippings. There is, too, a strong retributive element, that is, an attempt to impress upon the offender that "crime does not pay." Some lip service is given to the doctrine of reformation, an aim which should be a cardinal one.

Under the influence of Beccaria at the time of the French Revolution the thesis was assumed that for every quantum of pleasure derived by the criminal in committing his criminal act, there is an equivalent quantum of punishment which should be inflicted to counteract the pleasure. It was presumed that crimes could be graded in severity and that penalties could be set up by the legislature. In this manner, the only thing necessary was to name the offence, find the offender guilty, and then ascertain from the law books what was the punishment. This might be termed a "cash register" system of justice, but it is one which is still largely prevalent. The work of Lombroso about a century later laid stress upon the individual differences in offenders, and although many of Lombroso's conclusions are not accepted today, it is not a fact that Goring demolished Lombroso's contentions completely, as many believe. Indeed, recent studies by Professor Hooton, of Harvard University, indicate that there are significant differences between criminals as a class and those more fortunate members of society who have not been convicted of criminal activity. Lombroso, with all his scientific faults, set in motion a train of individualizing procedure and it was largely as a development of his influence that the reformative element has been injected into the criminal procedure. The development of reformatories, of the indeterminate sentence, of probation, of juvenile courts, and to a very large extent, of parole, have all come about since Lombroso's time, and represent attempts to make the penal treatment fit the offender rather than the offence. Further provisions have been made for the judge's enlightenment as to the history and make-up of the offender, all with the idea of individualization in the background. With the further development of psychiatry, its extension beyond the walls of mental institutions, and with its increasing emphasis upon personality studies, it seems to many of us that psychiatry has offered much light on criminal behavior, and upon the possible prediction of future conduct, and that it might thereby become a valuable ally in determining the most effective means of dealing with the criminal.

Psychiatry in one form or another has had a long history in the criminal courts, although in the earlier days the issue was decidedly limited. As a matter of fact, in the trial of criminal cases today the issue is still very much limited. As early as the reign of Edward I, lunacy, as it was then known, was sufficient ground for a royal pardon in the event of conviction, although the goods of the convict were still forfeited. By the reign of Edward III, however, what we should now call mental disease (or insanity, in legal terms), existing at the time of the offence, was considered to be a good defense, the doctrine of the coexisting intent (*mens rea*) and act having become generally accepted even as early as that period as necessary to constitute a crime. The judges in those early days considered it necessary to set up certain criteria or definitions of lunacy, and it was to be expected that these definitions would accord to some extent with the rather primitive state of psychiatric knowledge. In general it may be said that the definitions were rather strict and that it was only the marked types of mental disorder which were considered to constitute irresponsibility. In the thirteenth century we find Bracton defining a madman as "one who does not know what he is doing, who lacks a mind and reason, and who is not far removed from the brutes." By the seventeenth century we find Hale saying that no exclusive test can be laid down but that the decision should rest upon "circumstances duly to be weighed by the judge and jury." It was Hale who first used the term "partial insanity," a term which has done much to befog clear thinking along these lines since then. In the late eighteenth century we find the ability to distinguish between good and evil, as laid down by Hawkins, and the delusion test which Lord Erskine pleaded in the *Hadfield Case* in 1800. The tendency seems to have been to a greater leniency and toward a broader definition of insanity or "lunacy." In 1843, however, we find in the answers of the judges in the *M'Naghten Case*,[2] answers which are unusual for a number of reasons. In the first place, they marked a decided step backward so far as the progress of the law of insanity was concerned, since the law had previously recognized an inability to distinguish between right and wrong in general. According to the judges it was necessary to prove, in order to sustain a defence of insanity, that the party accused was "laboring under such a defect of reason from disease of the mind as not to know the nature and

[2] 10 Cl. & F. 200.

quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong." Another point to be borne in mind is that this ruling was laid down not on an actual case which was argued before the judges, but in answer to a series of abstract questions in which the name of the defendant was not even mentioned. One of the judges objected to the method of replying, and a very prominent writer on the English law, Sir James Stephen, considered the authority of the M'Naghten answers as "in many ways doubtful." The Supreme Court of New Hampshire has remarked that if the answers "did not make the path to be pursued absolutely more uncertain and more dark, they at least shed but little light upon its windings, and furnish no plain or safe clue to the labyrinth."[3] In spite of these facts the courts in England, in Canada and in the United States have continued to fall back upon the *M'Naghten Case*, often quoting only in part, or even garbling or apparently misunderstanding the dicta, with the result that today the law of insanity in criminal cases is distinctly muddled and certainly far from having kept up with generally accepted psychiatric doctrines. It is evident that many judges who have relied on the M'Naghten rules have omitted to note that the judges added in their answers that "the instructions should be accompanied by such observations and explanations as the circumstances of each case require." The M'Naghten rules offer a fertile field for detailed discussion and criticism, but time hardly permits further consideration here. Some of the American courts for the last century have followed a course which theoretically, at least, is somewhat more logical, by considering the act as well as the volitional element, thus developing what is known now as the "irresistible impulse" doctrine. This doctrine is accepted as prevailing law in at least fifteen of the American States, with several more not entirely clear.[4] Most of the rest still hold substantially to the M'Naghten rules, and the same is true of the English and Canadian courts. The most progressive American State in this field has been New Hampshire, which in 1871 discarded the so-called "tests" and declared that the question whether or not an alleged criminal act was the "product of mental disease" (note the avoidance of the word "insanity"!) was one of fact rather than of law, and therefore to be decided by the jury.[3] The decision of the court showed a remarkable degree of psychia-

[3] *State* v. *Jones* (1871), 50 N.H. 369.

[4] See Weihofen, H. "Insanity as a Defense in Criminal Law." N.Y. 1933.

tric insight and is well worth reading. It concludes, "We have consented to receive those facts of science as developed and ascertained by the researches and observations of our own day instead of adhering blindly to dogmas which were accepted as facts of science and erroneously promulgated as principles of law fifty or one hundred years ago." In some jurisdictions feebleness of mind or will has been accepted as possibly reducing the grade of the offence, but in general it may be said that the courts have failed to recognize the unity of mental processes, and still hold to the old dichotomy which divides all offenders into the completely responsible and the completely irresponsible.[5] It is not strange, perhaps, that amidst such a welter of conflicting legal rulings the psychiatric expert witness has a rather hard time of it.

The courts have admitted for many centuries that there were matters upon which the judge was not fully able to decide, since they were largely within the ken only of specially trained individuals. Mental disorder was one of these topics, even though it is all too common experience that the man in the street is likely to look upon himself as an expert on at least two medical questions — how to cure a cold and how to estimate the sanity of a person! In the days when the judge was the primary figure in the trial and when he acted *with* the jury in determining the facts as well as ruling on the law, it was only natural that when in doubt he should call in to advise him persons whom he knew to be trained, experienced, honest and impartial. There was no problem of expert testimony in those days. Toward the middle of the eighteenth century, however, the jury came to have the exclusive function of determining the facts, the judge becoming more of an umpire and less of a co-trier. As the latter retreated somewhat into the background he was inclined to give up his judicial prerogative of calling court-appointed experts, and it thereupon became the practice for the parties to the case to present the evidence through trained men of greater or less ability and honesty, who they felt sure would testify in such a manner as to favor their respective sides. Immediately the expert began to labor under the onus of partiality, and the juries and judges discounted his testimony accordingly. Nearly one hundred years ago an English court remarked, "Hardly any weight is to be given to

[5] For example: "Wherever the line of criminal responsibility of persons of low mentality may be drawn, one is either responsible or irresponsible. No definite idea is conveyed by speaking of 'impaired' responsibility." *Comm.* v. *Clark* (Mass.) 198 N.E. 641 (1935).

the evidence of what are called scientific witnesses; they come with a bias on their minds to support the cause in which they are embarked."[6] All too often, although nowhere nearly so frequently as the public generally believe, we find cases in which each side presents one or more experts who are made at least to appear to favor the side for which they are employed, with the result that the jury discards all of the expert testimony and relies upon what it chooses, perhaps euphemistically, to call its common sense. The fact which often escapes public attention is that in modern times, and particularly with the development of scientific disciplines, experts of many types are used in litigation of one sort and another. Experts on such topics as ballistics, handwriting, and on the civil side, engineering and real estate values, to mention only a few, are used in court far more frequently than psychiatrists, yet when the word "expert" is mentioned to the average man he pictures immediately a psychiatrist testifying for the defence in a criminal trial, and is very likely to add some rather uncomplimentary remarks to the effect that "all experts are liars" or "psychiatrists wish to excuse all offenders," or something of the sort. The reason for this popular state of mind is perhaps not far to seek. The psychiatric expert is likely to be called in the defence in criminal trials either because the offender (who may well actually have been deranged mentally) has committed a crime of peculiar atrocity or else because all the facts concerning the offence itself being clear, the only defence which counsel can put up with any hope of success is that of insanity.

That there are specious pleas of insanity no one can deny, and in some instances psychiatrists have lent themselves to unworthy aims. Further, the lawyers may safely be depended upon to emphasize, through their questions and hypotheses, any apparent differences of opinion among the experts. In other cases, however, it is the atrocity of the offence which has stirred up the feelings of public revenge to such an extent that no defence of any sort will be listened to by the jury. A case which seems to have been of this sort occured recently in the State of Colorado. First of all, it may be said that in 1927 Colorado, hoping to avoid "battles of experts," provided by law (Ch. 90, Acts of 1927) that in any criminal case in which insanity is pleaded as a defence, the defendant must be committed to a mental hospital for observation. In this instance a 25-year-old imbecile, who had been for a number of years an

[6] Tracy Peerage Case, 10 Cl. & F. 154.

inmate of the State School for the Feebleminded, had in company with a somewhat older and probably brighter accomplice, raped and killed a girl. Upon entering the plea of insanity he was sent to the state hospital, where he was under observation for a month. Three physicians on the staff of the state hospital filed a wholly unequivocal report to the effect that the defendant was low-grade mentally (his conversation was limited to monosyllables) and that in their minds there was no doubt that he was "legally insane" and incapable of knowing the difference between right and wrong. On the other hand, the police officers who had made the arrest testified in substance that he had given them an account of the crime (just how leading the questions were was not stated), and that in their opinion he was of sound mind. The Supreme Court of the State[7] upheld the jury in accepting the testimony of the police officers, who were, of course, prosecution witnesses, and non-medical at that, as against the testimony of three competent and impartial psychiatrists who, although employes of the State, were not attached to the District Attorney's office, and who had had the defendant under observation for a month. The Court said, "After all, police officers under present day conditions have frequent contacts with these deranged mental cases in the actual workaday world," and then went on to say, "The ability to distinguish between right and wrong is not to be based upon some mental age test given by alienists under ideal clinical conditions." The doctrine that a mental test can be given better in a jail than in a mental hospital is indeed a bit unusual, at least, to psychiatrists. This unfortunate case (it may be added that the defendant was executed in spite of nation-wide publicity which was given to his low mentality) indicates the triumph of popular clamor over the impartial expert. Nevertheless, it can not be gainsaid that the impartial expert is certainly to be preferred to the partisan.

Various attempts have been made in the past to improve the conditions under which partisan experts are utilized, and to overcome the prejudice of juries and of the public to expert testimony. One of the early American attempts occurred in the State of Washington in 1909, by the passage of an Act which provided that in the event that insanity was pleaded, the jury was to pass only upon the guilt or innocence of the defendant, leaving the disposition and the determination of insanity to the judge. This progressive law was declared to be

[7] *Arridy* v. *People*, 82 Pac. (2nd) 757. (1938).

unconstitutional.[8] In 1928 the State of Mississippi passed a similar law, which met the same fate,[9] and in Louisiana in the same year an attempt was made to substitute a state-appointed commission for all private expert testimony in criminal cases. This, too, was ruled to contravene the constitutional provisions.[10] Most of the methods which have been suggested in the past have had one substantial defect, namely, that they relied upon the initiation of a plea of insanity. Such a plea is ordinarily entered by the counsel for the defence or is based upon the observations of the jailer or other non-medical person. In other words, there is no assurance that a person who is mentally ill may not escape detection and that consequently a serious injustice may not be done.

Mention should be made at this point of the one statutory provision in the United States which obviates this defect — I refer to the so-called "Briggs Law" of Massachusetts, which provides that persons indicted for a capital offence and other defendants bound over or indicted who have previously been convicted of a felony or indicted more than once, shall be referred to the State Department of Mental Health for mental examination. This examination is made in advance of the trial on a class of defendants who are specified by the statute, regardless of whether or not anyone has alleged the existence of mental disease. The examination is made by experts who are appointed by psychiatrists rather than retained by the district attorney, or even appointed by the judge. In practice a defendant who is reported to be in need of care in a mental hospital is sent there without a trial. Later on, if he recovers he is returned to the original custody and may then be tried if the district attorney sees fit. On the other hand, it is obvious that in case the report is to the effect that no mental disorder or defect is found, it is highly unlikely that the jury will accept a different opinion from a privately employed psychiatrist called in behalf of the defence. During its first 14 years of operation, 5,159 defendants had been examined; 69 were reported to be "insane"; 169 more were considered to require observation in a mental hospital; 432 were reported as mentally defective; 100 were diagnosed as presenting other mental abnormalities, such as borderline intelligence, epilepsy, drug addiction, or psychopathic personality. In other words, 770, or 14.9% were

[8] *State* v. *Strasburg*, 60 Wash. 106.
[9] *Sinclair* v. *State*, 161 Miss. 142.
[10] *State* v. *Lange*, 168 La. 958.

found to be frankly or suggestively abnormal mentally. One result of this law has been to prevent the trial of a very considerable number of persons who were unfit to undergo it by reason of mental disorder, and it has further prevented almost completely the "battles of experts" which have been the cause of very serious criticism on the part of the court and the public. Considerable saving and expense has been accomplished, and the courts have, at least to some extent, been educated by this law in the psychiatric points of view. Although in successful operation since 1921, this law has not so far been copied by any other state; the ultimate spread of such procedure seems inevitable.[11]

In a considerable number of states the courts have a statutory, and in all probability a common law right as well, to appoint experts as they see fit, but as a matter of fact this right is rather little exercised — certainly far less frequently than it could be with considerable profit. That even court-appointed experts are far from enjoying any aura of omniscience and purity, the experience with the so-called "Lunacy Commissions" appointed by some judges in New York City furnishes eloquent evidence. Some of the recent revelations concerning favoritism, lack of adequate professional qualifications, and a tendency on the part of the Commissions to "play the game" of the District Attorney have caused the introduction in the current Assembly of the State of New York of three different bills to abolish these commissions; indeed, a bill to abolish them passed both houses of the Assembly last year but was vetoed by the Governor on technical grounds.[11A]

In the Federal courts panels of examiners have been set up, all the members of these panels being diplomates of the American Board of Psychiatry and Neurology; there is thus assurance of professional competence. In most instances the members of these panels are used to advise the court after conviction rather than before. The courts, and lawyers too, in selecting experts might well follow this example; one of the factors leading to the present questionable reputation of psychiatric expert testimony has been that all too often wholly unqualified men have been permitted by courts to testify as experts. Certification by the American Board of Psychiatry and Neurology gives a greater assurance of competence than

[11] See Overholser, W.: "The Briggs Law of Mass.: A Review and an Appraisal", 25 Journ, Crim. Law and Criminology 859 (Mar. Apr. 1935). Michigan has just passed a similar Act (Public 259, of 1939).

[11A] One of these bills was enacted (Ch.. 641, Act of 1939).

any other method of selection, and the number of diplomates (over 600 to date) assures at least the larger centres of a reasonable choice of qualified psychiatrists. Mention, too, should be made of the Uniform Expert Testimony Act which has been recommended by the Commissioners on Uniform State Laws after very considerable study. Some of the points of this Act are that it provides for the appointment of experts by the court, for the consultation of the experts on both sides with the court-appointed expert, for the joint examination of the defendant, and for joint reports. The Committee on the Legal Aspects of Psychiatry of the American Psychiatric Association has recommended as a matter of proper conduct that a psychiatrist should not permit himself to be employed in a criminal case without a proviso that he be allowed to consult with the experts on the other side, and to make a joint examination with them. Too many psychiatrists, as courts have pointed out, have been prone to look upon themselves as advocates rather than advisers of the court. Some psychiatrists have even gone so far as to appear as experts in cases and then sit with counsel and furnish him with questions to be asked of the expert presented by the other side. By such conduct an expert serves notice upon the public that he does not consider himself even in the slightest impartial, but that he looks upon himself as an associate counsel rather than as a "friend of the court."

We have considered so far principally what goes on in the trial, that is, before conviction. Perhaps even more important is what is done with the defendant after he has been found guilty of the offence with which he is charged. As we have already seen, under the so-called "Classical School" doctrines propounded by Beccaria, the matter of disposition was very simple. Theoretically, whether the act was committed by a normal individual, by an insane man, by a child or even by an animal, the predetermined punishment was to be the same. This scheme was soon found not to work, since the humanity of the community insisted on the limited punishability of the child and of the person who is seriously deranged mentally. Trials of animals were held in the Middle Ages and some are recorded even in very recent times, but in general the sense of humor of the public has forced their cessation. The need for more elastic provisions, and perhaps even for different kinds of institutions, has been making itself felt generally throughout the public, together with an increasing interest in the possibility

of doing something constructive for the offender rather than merely giving vent to the feelings for revenge of an outraged society. Studies of the rates of recidivism after treatment by juvenile courts and reformatory institutions, studies such as have been made by Drs. Eleanor and Sheldon Glueck in Massachusetts, indicate that at best the problem of reforming the offender is a difficult one. It is equally safe to say that the attempts at reformation that have been undertaken have not been the most intelligently or the most effectively implemented in the past. Probation systems and parole boards have all too often been in the hands of untrained political appointees, and even in the prisons and reformatories which have had the benefit of psychiatric services, those services have often not been integrated with the administration of the institution. The juvenile field has appeared to many to offer the most promising sphere of activity, first because it is dealing with young persons who are in a formative period, and second, because under the philosophy of law by virtue of which it operates greater scope is given to the judge in the handling of the case. Nevertheless, the results brought out by the Gluecks in their study of the results of the Boston Juvenile Court have been far from encouraging, since 88% of the one thousand "graduates" of that court studied after a lapse of five years were found to have committed further offences.[12] There was an average of 3.6 arrests, and it was found that two-thirds had committed offences which might be termed serious. Further, defective intelligence was nine times more frequent than in the school population, and three-fifths of the delinquents were found to have marked emotional and personality defects. All of these one thousand delinquents had been studied by the Judge Baker Foundation under the direction of Dr. William Healy, a pioneer and leader in the field. It should be emphasized that Dr. Healy had merely given a report to the court in each case, and that he had had no hand in the subsequent disposition or treatment. There was available to the court, however, very competent psychiatric advice, often of a predictive nature and containing suggestions for treatment; yet the treatment failed in all too many of the cases. The moral to be drawn is presumably that results certainly could not have been worse if the psychiatrists had been given a freer hand! Certainly in predicting the sort of treatment which should be meted out to delinquents, the more that can be known not only of the objective facts of the

[12] Glueck, Eleanor and Sheldon: "One Thousand Juvenile Delinquents". Cambridge, 1934.

offence, but of the motives which led up to it and the character of the personality of the delinquent, the better. There can hardly be any argument against making such data available to the courts, in hopes that the court may have suitable means at its disposal to avail itself of the knowledge. In 1928 the National Crime Commission made a questionnaire survey of the criminal courts and the correctional institutions of the country, which indicated a very wide interest on the part of judges and of prison administrators in the contributions of psychiatry to their problems.[13] Of 584 judges, 81% expressed themselves as believers in the value of psychiatric reports as an aid in disposition, and 50% of the 129 administrators of correctional institutions recorded a similar favorable attitude toward such reports in problems of the classification and disposition of prisoners. In 1934 Dr. James L. McCartney, then psychiatrist of the Elmira, New York, Reformatory, made a survey which indicated 48 full time psychiatrists in 13.4% of the institutions, and 35 more on a part time basis in 13.9% of the institutions, that is, a total of 27.3% of the institutions as compared with 35.9% as found in 1927.[14] Since 1932 the Court of General Sessions in New York City has had a psychiatric clinic which was established at the urgent solicitation of the judges and which has furnished valuable information to them in determining the type of disposition they should make. Since 1931 the Federal Bureau of Prisons in conjunction with the United States Public Health Service has provided psychiatric services in the Federal prisons and reformatories. Furthermore, the place in which the convict is to serve his sentence is determined not by the judge, but by the Bureau of Prisons after a study of the case has been made. This makes for a considerable elasticity of treatment, and the data of the psychiatrists are further available for the consideration of the Federal Parole Board. It may be suggested that parole boards, Federal and State, might benefit by psychiatric advice even to the extent of having psychiatric members of the board. It is significant in this connection to note that the Gluecks in their study of the Concord (Mass.) Reformatory "graduates" after a lapse of ten years, found that the "most marked difference between the reformed and unreformed lies in the factor of mental or

[13] Overholser, W.: "Psychiatric Service in Penal and Reformatory Institutions and Criminal Courts in the U.S." Mental Hygiene, 12:801, No. 4, Oct. 1928. Also 13:800, No. 4, Oct., 1929.

[14] Personal communication.

emotional difficulties" as diagnosed in a psychiatric report made at the time of the prisoner's commitment to the Reformatory.[15]

Most States make some sort of provisions for those prisoners who develop definite psychoses; that is, who are legally denominated as "insane." In a few States provisions are made for offenders who are clearly mentally defective, and who, in addition, have personality disorders which tend to a continuance of anti-social habits — the so-called defective delinquent group. The psychiatric criteria for the judging of mental disease and mental deficiency are fairly well established. Unfortunately, the same cannot be said to be true of that rather ill-defined group known as psychopathic personalities. There is no doubt in the mind of anyone who has reflected upon his contacts with offenders that there is a group of emotionally maladjusted individuals. There are, however, numerous classifications, none entirely satisfactory. Bromberg and Thompson, after examining nearly 10,000 prisoners during a four-year period in the Court of General Sessions in New York City, report approximately 1.5% psychotic and 2.4% mentally defective. They have made a diagnosis of psychopathic personality in 6.9%. They divide psychopathic personalities into the schizoid, the paranoid, the cyclothymic, sexual, constitutional inferior, drug addiction, and explosive types.[16] One result of the fact that the criteria and diagnosis of psychopathic personality have not been well fixed, is that it is as yet almost too much to expect that the law will recognize this group as a sufficiently distinct entity to call for separate treatment, as is the case with the criminally insane, and the defective delinquent. That a group of perhaps uncertain size, which may be denominated as of psychopathic personality, exists, is beyond doubt, and it is likewise beyond doubt that this group calls for special treatment. Many indeed are likely to be persistent offenders and pretty much incapable of reformation. The tendency has been in recent years to narrow the group considerably; Bromberg and Thompson's figures of 6.9%, for example, may be compared with much larger figures reported by earlier investigators. The diagnosis of psychopathic personality should *never* be based solely upon a prolonged criminal history; the criminal activity is merely one expression of factors which underlie the offender's conduct and behavior. To violate

[15] Glueck, Eleanor and Sheldon: "Later Criminal Careers", p. 201, New York. 1937.

[16] Bromberg, W. and Thompson, C.B.: "Relation of Psychosis, Mental Deficiency and Personality Types to Crime," 28 Journ. Crim. Law & Criminology, 70 May–June 1937.

this rule of diagnosis is merely to talk in circles. It would seem a desirable thing from the point of view of society to permit the segregation, for an indeterminate period, of at least this psychopathic group and of such other habitual offenders as psychiatric study indicated to be incurable or incapable of correction. Even if separate institutions are not at the moment available, psychiatry has been able to offer certain assistance in the internal administration of correctional institutions. Matters not only of occupation and of classification, but of discipline and of parole, may well be aided to a very considerable extent by the services of a psychiatrist. Further, East and Hubert in England have indicated in a recent publication that psychotherapy has a distinct place in dealing with certain types of inmates of correctional institutions.[17] In all of the discussions of prisons and prisoners, almost exclusive attention is given to the inmates of penitentiaries and reformatories. It is a fact that nearly three-fourths of all of the prisoners in the United States are in institutions of this type. It is equally true, however, that nearly ninety per cent of all the commitments to correctional institutions are to the county jails. These institutions receive short-term prisoners for presumably minor offences, but the turnover of population is enormous and the rate of recidivism little short of shocking. Only one State in the country, namely, Massachusetts, has ever made a systematic study of county jail prisoners, although a number of surveys have been made in the past under the auspices of the National Committee for Mental Hygiene. The Massachusetts study, which included social investigations as well as psychiatric examinations, indicated among other groups: alcoholism without psychosis, 37.8%; low-normal or borderline intelligence, 9.1%; mental deficiency, 7.5%; psychosis, 3.2% psychopathic personality, 15.5%. Even omitting the alcoholics, 20.1% of the men, and 38.9% of the women inmates were found to be suffering from mental disease, epilepsy, mental deficiency or at least low-normal or borderline intelligence.[18] When we bear in mind that most of these prisoners will be released within six months or a year, and that even in the state prisons and reformatories 95% or more of the prisoners eventually are released, one may readily see that the task of turning the prisoner out a better man than he was when he entered is one which is certainly not

[17] East, W. N., and Hubert, H. W.: "Psychological Treatment of Crime," H. M. Stationery Office, 1939.

[18] Overholser, W.: "The Department of Mental Diseases and the Examination of Prisoners," Bulletin Mass. Dept. of Mental Diseases, 18:30, Nos. 1 and 2, April 1934.

being carried out with any great success. Whether or not psychiatry can influence the administration of prisons and of parole systems to accomplish any greater proportion of reform without fundamental change in the law, is perhaps a point to be argued. It would seem that a more fundamental change is necessary if the prison system is to be more than a strictly custodial one, and is to protect society as it should by either reforming or segregating the prisoner.

Since 1927 the Section on Criminal Law of the American Bar Association has been working with a committee of the American Psychiatric Association in seeking to bring about a closer relationship between the criminal law and psychiatry. In 1929[19] the American Bar Association approved the following recommendations of its committee :

1. That there be available to every criminal and juvenile court a psychiatric service to assist the court in the disposition of the offenders;
2. 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 part of the record a psychiatric report;
3. That there be a psychiatric service available to every penal and correctional institution;
4. That there be a psychiatric report on every prisoner convicted of a felony before he is released;
5. That there be established in every 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 fact that a group of lawyers would make such recommendations indicates the interest of the serious students of the problem, and the fact that a ready reception exists, in certain quarters at least, for an adoption and development of the psychiatric approach to the problem of crime.

It is, of course, hardly to be expected that any suggestions looking toward an improvement in the operation of the penal system should be adopted without protest. Just as Beccaria one hundred and fifty years ago developed certain theses as a protest against the vagaries of the royally controlled judges,

[19] 54 Reports Am. Bar Ass'n., 56 (1929).

so today we find certain legal writers who, true to legal tradition, cling to the past and protest that the doctrines of Beccaria shall not be modified. One of the most eloquent defenses of the *status quo* appeared in the Yale Law Journal in January, 1938 from the pen of Professor George H. Dession (Vol. 47, pp. 319 - 340), under the intriguing title "Psychiatry and the Conditioning of Criminal Justice." One reads the article in vain for a suggestion that the good of society is very seriously to be considered. We are told that the State has set up only inadequate machinery so far in the court and institutional fields and that whether or not such machinery is set up, or whether the additional machinery of psychiatric procedures is added, is a question of "social values and of politics"; in other words, the public knows best, regardless of professional advice! One may wonder, by analogy, what progress in the reduction of infant mortality would have been made had a similar trust been reposed in the maxim "Mother knows best"! Psychiatry is criticised very largely on the ground not only that it is something new, but that it is not infallible, and those who would extend the principle of indeterminate sentences and of treatment tribunals are likened by inference to the King's Ministers in the old days with their *"lettres de cachet."* The attitude of profound suspicion of anything which savors of individualization of penal treatment is summed up in the following quotation, "Is treatment really treatment, or does that, as well as the equally euphemistic social defence, really mean punishment, perhaps of a repressive sort, that harks back to the darkest chapters in human history?" The curious inconsistency of the attitude of such writers is that no one seriously questions in the case of a person suffering from mental disease the propriety of confining him so long as his mental disorder renders him unfit to be at large. The same is true of the mental defective, and no hesitation is expressed by the authorities in confining for a wholly indeterminate time a person suffering from leprosy, for example, even without the jury trial which some devotees of the Dark Ages still require for the commitment of the mentally ill to hospitals. Does it strain one's reason or does it conflict with one's democratic ideals that a convicted offender whose history and whose personality make-up, as determined by psychiatrists and psychologists, indicate that he is not fit to be at large, that his condition is such that further criminal behaviour can safely be expected of him if he is released, shall be confined so long as the safety

of the public requires it? It seems only reasonable that the State should have the right to protect itself against persons who are its enemies. If the offender has been found to have contravened the law, is not the State entitled to take whatever steps seem to be necessary to protect it, at least steps short of his extinction? There is in the minds of many leading students a distinct trend toward the "treatment tribunal", and in California a law has been in force since 1917 which requires judges to fix a wholly indeterminate sentence. This law has been upheld as constitutional, the court adding that such laws "seek to make the punishment fit the criminal rather than the crime."[20] In most states, however, so-called "indeterminate" sentences are restricted to short maxima, and certainly the parole boards have all too often become routinized in their administration. Judges who conscientiously try to view their own work with a critical eye realize that they, even with the probation officer's report, are in no position to predict what penal treatment the offender should have and what the effect of the treatment they prescribe will have upon the offender. The various methods of sentencing, the various methods of release by parole boards, are probably at best but guesses, and all too often they are not even good guesses. Is it reasonable to say that simply because no panacea can be offered, no infallible substitute, that no effort toward improvement may be made? Certainly in the present state of affairs a greater admixture of psychiatry, a study of the personality of the individual, with the administration of the criminal law could not produce worse results than are being produced by the present system! Further than that, the odds that the results would be better are very considerable, since psychiatry, though not by any means possessing the sum total of knowledge, at least has certain scientific approaches, certain tests and criteria which are capable of helpful application.

The importance of various activities designed to prevent mental disorder and delinquent behavior as well should be constantly emphasized. The growth of the child guidance movement offers much hope for the future along these lines, and the development of playgrounds, boys' clubs, community centers, and the various other anti-delinquent endeavors can produce only good. That eventually they will have their effect in a measurable degree cannot reasonably be doubted. Recent studies by Clifford Shaw in Chicago on the relationship of

[20] Penal Code, Section 1168. Upheld in *In re* Lee, 177 Cal. 690.

certain areas to delinquency rates coincide closely with the more recent findings of R. E. L. Faris and H. W. Dunham on the relationship of these same areas to the incidence of mental disorder. These studies taken by themselves are important; taken together, they offer an eloquent testimony to the relationship between mental disorder and delinquency.[21]

The criminal justice of the future will find the psychiatrist, the psychologist, and the sociologist working along with the legal profession in a spirit of mutual helpfulness with a view to the rehabilitation of the offender wherever possible, and to his indefinite segregation when reformation does not seem attainable. It may safely be expected that judges will tend to confine themselves to the determination of guilt, leaving the disposition of the offender, within very wide limits, to the efforts of a scientific group, the treatment tribunal, or whatever it may be called, which will have in mind not only the constitutional guarantees but also the welfare of society. We may continue in the hope that during the years to come, to use the eloquent words of the late Mr. Justice Cardozo, "The students of the life of the mind in health and disease [will] combine with students of the law in a scientific and deliberate effort to frame a definition and a system of administration that will combine efficiency with truth."[22]

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[21] Mental Disorders in Urban Areas. Chicago 1929.

[22] "Law in Literature," p. 108. N.Y., 1931.

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