PART III

Adjective Law

CHAPTER 19

Evidence

WALTER H. MC LAUGHLIN, JR., *and*
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A. COURT DECISIONS

§19.1. Impeachment by evidence of conviction of crime. In *Gilday v. Commonwealth*[1] the petitioner was tried on a charge of armed robbery, and was convicted. At the trial the petitioner took the stand and testified on his own behalf. The Commonwealth in the course of cross-examination introduced five records of convictions to impeach the petitioner's credibility. In three of these five prior convictions the defendant was not represented by counsel.[2] On direct appeal to the Supreme Judicial Court his conviction was affirmed.[3]

Subsequently, *Burgett v. Texas*[4] was decided by the Supreme Court of the United States. In *Burgett*, the Court ruled that the introduction of records of prior convictions obtained without counsel in recidivist proceedings were constitutionally infirm under *Gideon v. Wainwright*, inherently prejudicial and inadmissible.[5] Thereafter, a petition for writ of error was filed in the *Gilday* case, alleging as

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§19.1. [1] 1969 Mass. Adv. Sh. 718, 247 N.E.2d 396.

[2] These were a 1951 Ohio conviction for breaking and entering and larceny in the nighttime for which he was placed on probation; a 1953 Minnesota conviction for carrying concealed weapons for which he received a sentence of 30 days; and a 1954 Massachusetts conviction for assault and battery for which he was placed on probation.

[3] Commonwealth v. Bowlen, 351 Mass. 655, 223 N.E.2d 391, cert. denied sub nom. Gilday v. Mass., 389 U.S. 916, rehearing denied, 389 U.S. 1010 (1967).

[4] 389 U.S. 109 (1967).

[5] See People v. Coffey, 67 Cal. 2d 204, 430 P.2d 15, 60 Cal. Rptr. 457 (1967), wherein the Supreme Court of California reached the same conclusion.

error the admission of three records of convictions to impeach the petitioner's credibility as the convictions were obtained without his being represented by counsel. A hearing was conducted by a single justice who found that Gilday had no counsel and was impecunious at the time of each conviction. The Supreme Judicial Court was not in agreement as to the implications of the *Burgett* case with respect to the present issues but concluded in any event that the use of the not very serious records now attacked was "harmless beyond a reasonable doubt" because there were admitted, without objection, two serious Massachusetts felony records. The Court added, however, that in view of the *Burgett* case no record of prior conviction henceforth should be offered to impeach credibility unless the witness thus attacked can be shown to have had or waived counsel on the proceedings certified by the record.

It is clear that the *Burgett* case did not decide the precise point relied upon by the petitioner for reversal. In *Burgett*, the prior convictions were an essential part of the offense for which the defendant was tried. They were introduced both to support guilt and enhance punishment, whereas in *Gilday* the prior convictions were used only to affect credibility. It is submitted that the *Gilday* case is indicative of both the Supreme Judicial Court's continuing lack of sympathy with the Supreme Court's pronouncements concerning criminal procedural law and its further use of the rescript as a procedural device to circumvent an analysis and discussion of recent Supreme Court opinions in the procedural criminal law area.

In *Della Jacova v. Widett*,[6] an action for malicious prosecution, the defendant introduced a certified copy of a conviction of the plaintiff as evidence of both probable cause and as evidence of plaintiff's character on the issue of mitigation of damages. The Court reaffirmed the traditional rule[7] that proof of specific instances of bad conduct are not admissible for the purpose of showing character because the resulting delay and obfuscation of the central issues would far outweigh any benefits derived. The Court nevertheless admitted the prior conviction to impeach credibility.

At this point a general reevaluation of the policy of impeachment

[6] 1969 Mass. Adv. Sh. 185, 244 N.E.2d 580. The case is particularly interesting in that the plaintiff was convicted of larceny in the Municipal Court of the City of Boston. The plaintiff appealed to the superior court and was acquitted. As a general rule a conviction in the tribunal to which the complaint was made, even though reversed on appeal, is conclusive proof of probable cause. However, here the plaintiff alleged that the conviction was obtained solely by the false testimony of the defendant. The jury agreed and rendered a substantial verdict for the plaintiff. The Supreme Judicial Court affirmed irrespective of the fact that the testimony in the municipal court was not stenographically recorded or transcribed. The Court also stated that the superior court was obliged to analyze the lower court's record to try to ascertain the basis upon which the municipal court conviction rested. See Broussard v. Great Atl. & Pac. Tea Co., 324 Mass. 323, 86 N.E.2d 439 (1949).

[7] McIntire v. Levering, 148 Mass. 546, 548, 20 N.E. 191, 192 (1889).

by evidence of conviction of crime in Massachusetts is in order. In the Commonwealth, by statute, the conviction of a witness of a crime *may* be shown in a civil or criminal case to affect his credibility.[8] The conviction may be for any type of crime[9] and from any jurisdiction.[10] It thereby is assumed that the reasons for excluding specific instances of conduct as a means of impeachment do not justify their exclusion when the evidence takes the form of a conviction of crime. Dangers of unfair prejudice, confusion of issues, misleading the jury, waste of time and surprise are supposed to disappear or diminish.[11] The traditional safeguard against abuse is a limiting instruction to the jury that the defendant's criminal record may be considered only as it bears upon the weight given to his testimony. The value of such a procedure has been justly characterized as self-deceptive[12] and an unmitigated fiction[13] which has as its only function the simplification of judicial administration by reducing the number of mistrials, new trials and reversals for prejudice.[14] Moreover, there is an increasing realization that impeachment by evidence of conviction, particularly where the prior conviction does not involve *crimen falsi*, not only casts doubt upon credibility but may result in casting such an atmosphere of aspersion and disrepute about the defendant as to convince the jury that he is a habitual lawbreaker who should be punished and confined for the general good of the community.[15]

Numerous possible legislative solutions, a detailed examination of which is beyond the scope of this article, have received much comment[16] and merit serious consideration. Among them are: (1) Allow no impeachment by conviction when the witness is the accused; (2) Allow only *crimen falsi*; (3) Exclude impeachment by conviction if the crime is similar to that for which the defendant is presently being tried; (4) Allow conviction evidence only if the accused first intro-

8 G.L., c. 233, §21.

9 See Gertz v. Fitchburg R.R., 137 Mass. 77 (1884), in which the defendant was allowed to impeach credibility by introducing a conviction of the plaintiff for impersonating a revenue agent in an action of tort for personal injuries.

10 Attorney General v. Pelletier, 240 Mass. 264, 134 N.E. 407 (1922).

11 3 Wigmore, Evidence §979, 980 (3d ed. 1940); Advisory Committee's Notes, Preliminary Draft Report of Proposed Rules of Evidence for the United States District Courts and Magistrates Rule 6-09 (1969) (hereinafter cited as Proposed U.S. District Court Rules).

12 Griswold, The Long View, 51 A.B.A.J. 1017, 1021 (1965).

13 Krulewitch v. United States, 336 U.S. 440, 453 (1949). See also Bruton v. United States, 391 U.S. 123, 128 (1968); Delli Paoli v. United States, 352 U.S. 232, 246-247 (1957).

14 Comment, Other Crimes Evidence at Trial: Of Balancing and Other Matters, 70 Yale L.J. 763 (1961).

15 Richards v. United States, 192 F.2d 602, 605 (D.C. Cir. 1951). See also Schaefer, Police Interrogation and the Privilege Against Self-Incrimination, 61 Nw. U.L. Rev. 506, 512 (1966); Kalnen & Zeisel, The American Jury 124, 126-130, 144-146 (1966).

16 Proposed U.S. District Court Rules at 126, 127.

duced evidence of character for truthfulness;[17] (5) Leave the matter to the discretion of the trial judge.[18]

While all of the above alternatives are imperfect, it is suggested that the most practical alternative is to leave the matter to the discretion of the trial judge. Since the Massachusetts statute is not written in mandatory terms, the trial court clearly is not *required* to allow impeachment by prior conviction each time the defendant testifies on his own behalf. The experienced trial judge possesses an awareness and sensitivity which can be relied on to exclude such evidence where the prejudicial impact of impeachment outweighs the probative relevance of the conviction on the issue of credibility. The sound discretion of the trial judge lends the proper flexibility tempered by reason and experience to properly balance the vital interests of the defendant and the public.

Some judges of the superior court have already adopted the above approach in interpreting G.L., c. 233, §21. It is the opinion of the authors that the refusal of a trial judge to exercise his sound discretion concerning the impeachment by evidence of conviction should be a proper basis for an appeal and reversal.[19]

§19.2. Leonard v. Taylor criticized and limited. In *Commonwealth v. March*[1] the Supreme Judicial Court limited the effect of the long-standing rule reaffirmed in *Leonard v. Taylor*[2] with respect to criminal cases and also implied that the *Leonard v. Taylor* rationale may rest on an unstable foundation in the civil cases. *Taylor* restates the 109-year-old rule established in *Clark v. Fletcher*[3] that where a party at trial calls for a document from his opponent and receives and examines it, the document may be put in evidence by the opponent, even though it would have been incompetent if it had not been called for and examined. The primary rationale is that the holder of the document, after he complies with the demand for inspection, should be allowed to offer it into evidence to avoid any inference or evasion that a jury may draw from a failure to introduce the document.

In *Commonwealth v. Marsh*, on voir dire it was established that the police officer–witness had made notes. The defendant asked to see them. The judge ruled he might have them and inspect them but only under a formal demand. Such a demand, under the principle reaffirmed in *Taylor* would have made the notes admissible on the offer of the Commonwealth. The defendant noted his exception and

17 Uniform Rules of Evidence, Rule 21.

18 Luck v. United States, 348 F.2d 763 (D.C. Cir. 1965).

19 Cf. Jennings v. Rooney, 183 Mass. 577, 579, 67 N.E. 655, 666 (1903); Commonwealth v. Bellino, 320 Mass. 635, 645, 71 N.E.2d 411, 418 (1947).

§19.2. 1 1968 Mass. Adv. Sh. 1229, 242 N.E.2d 545.

2 315 Mass. 580, 581, 53 N.E.2d 705 (1944).

3 83 Mass. 53, 57 (1861).

argued on appeal that the *Taylor* rule should be confined to civil cases.

The Court stated that the arguments for the rule noted in *Taylor* appeared inapplicable in a criminal case especially where the demand is on voir dire. The fact that there is no significant criminal pretrial discovery thus strengthens the case for allowing inspection.[4]

The Court, however, held that there was no prejudicial error in denying the defendant the right to inspect the notes made by the witness after the Court examined the question and answers to which the notes may have been relevant. In future criminal cases, the Court noted, the judge should have discretion to permit inspection of notes without a formal demand.

Significantly, the Court accepted as valid the traditional criticism of the rule by finding that it is an artificial distinction to allow inspection of notes used on the stand to refresh recollection and to decline it where the witness inspects his notes just before being called to the stand.[5]

It is evident that the Court went far beyond the necessary rationale for the decision. Since there is no significant criminal pre-trial discovery in Massachusetts, the Court apparently feels that the penal nature of the present rule is an unfortunate remnant of an earlier era, the consequences of which should not be borne by a criminal defendant, particularly where his attorney is merely attempting to inform himself at trial, for the first time, of the nature of documentary evidence being used against his client. In civil cases, however, with modern statutory procedures for discovery available, the demanding party can, by skillfully utilizing his opportunities of discovery, completely circumvent the penal consequences of the rule.[6]

In this regard, the liberal philosophy of Rule 15 of the Supreme Judicial Court Rules militates for the abolition of the *Taylor* rule. The purposes of Rule 15, to develop issues and to eliminate unfair surprise and concealment as litigation tactics, are completely inimical to the quaint common law notions of penalizing a party who attempts to ascertain the tenor of evidence in his opponent's possession, epitomized in the *Taylor* case.

Therefore, having already established a substantial basis for the limitation of *Taylor* in the criminal law it is submitted that the Court, in further commenting on the substantial artificiality of the rule, is possibly inferring that a similar limitation of the rule in the civil law is being given serious consideration. By placing the operation of the rule in the discretion of the trial judge, the Court would reduce much of the sportive element of the trial and eliminate the possibility

[4] Citing People v. Riser, 47 Cal. 2d 566, 585 (1956).

[5] 7 Wigmore, Evidence §2125 (3d ed. 1940). Compare Hughes, Evidence, 29 Mass. Practice Series 205 (1961).

[6] See Rule 3:15, Supreme Judicial Court Rules.

of the admissibility of otherwise incompetent evidence, as well as providing the sufficient flexibility to prevent exhibitionism by an attorney seeking to improperly influence the jury. The *Marsh* rationale is persuasive. Its principle should be extended and applied in civil cases.

§19.3. Statements to physicians and the doctrine of fresh complaint. Though the Court rightly criticized the artificial distinctions forming the basis for *Leonard v. Taylor*, the Court can be rightly questioned concerning the scant veneer of *Commonwealth v. Howard*.[1] In *Howard*, the defendant was charged with unlawful carnal knowledge and abuse of his seven-year-old daughter and incest. The molestation allegedly occurred on the night of November 19, 1967, while the child's mother was at work. The child saw her mother the next morning at breakfast before going to school. Normal conversation took place and no complaint was made. The child returned home from school at 3 P.M. and since everything appeared normal, she went out to play.[2] Finally, at 7 P.M. on November 20, 1967, the child told her mother what had occurred.[3] The mother waited until the next day to call the police who in turn took the child to the hospital for examination. At the trial the examining doctor was permitted to testify as part of the medical history about the child's description to him of various acts of molestation by the defendant on unspecified dates and that the "probable cause of the widening in the private area of this little girl" was "a male organ penetration." Though he also testified that the opening was "slightly above normal in size and not abnormal," he could not determine whether there had been any recent abuse. Furthermore, based on his examination, he could not "say medically that intercourse took place at any time."

The judge admitted the child's statements on the authority of *Commonwealth v. Colangelo*[4] that the statements were admissible as a basis for the physician's opinion upon the condition of her body. In his charge the judge instructed the jury that the child's complaints to the doctor could not be considered as evidence of guilt but only for the purpose of corroborating the child's own testimony about the defendant's acts. He also charged that if the complaints were not made within a reasonable time, this would be considered as evidence tending to discredit her.

The admission of the doctor's testimony raised two issues: (1) whether the history given to him by the child was admissible and (2) whether his opinion concerning the physical widening could be based in part upon that history. The Court overruled the *Colangelo* case but held that the doctor's testimony concerning the child's statements to him about her father's conduct was admissible for the lim-

§19.3. 1 1969 Mass. Adv. Sh. 483, 246 N.E.2d 419.
2 Record at 35.
3 Record at 28-29, 31.
4 256 Mass. 165, 166-167, 152 N.E. 241, 242 (1926).

ited purpose of corroboration on the principle of "fresh complaint" by the child. The Court also stated that though the trial judge erred in not requiring the questions to the doctor to be in hypothetical form, such error was harmless because it was within the doctor's professional competence to form an opinion whether the widening could have been caused by male penetration. The doctor's opinion that male penetration was the probable cause was rendered nonprejudicial by his expression of inability to say that intercourse had actually taken place, and also by his statement that the physical condition was not abnormal.

Thus, the Court in overruling the *Colangelo* case[5] properly reconciled conflicting decisions and reaffirmed the rule of the *Roosa* case[6] that it is not competent for the physician to testify as to statements by the patient concerning the cause of the symptoms or injury unless the statements are admissible upon other ground, such as a dying declaration.[7] However, in justifying the doctor's testimony on the basis of the fresh complaint principle[8] the Court refused an opportunity to set down meaningful guidelines; rather, the Court merely stated that the complaints of the child were made as soon as could reasonably be expected in the case of a child of this age. Yet, the opinion is devoid of evidence of the child being induced to silence by threat. Also, the child was not under the direct physical control of the defendant and was not among strangers or people in whom she could not confide. The Court had the opportunity to rule that for the "fresh complaint" principle to apply the disclosure should be at the first suitable opportunity unless the delay can be justifiably excused. In refusing to limit "fresh complaint" the Court has continued to perpetuate an evanescent, dangerous principle wherein the corroborative effect of the testimony is far outweighed by the massive prejudicial impact upon the jury of the detailed statement of horrible abuse to the ravished related by the physician.[9]

§19.4. Escobedo exclusionary rule inapplicable in civil cases. Although a confession obtained in violation of the rules established by the Supreme Court of the United States in the cases of *Escobedo v. Illinois*[1] and *Miranda v. Arizona*[2] is inadmissible in criminal pro-

[5] In Colangelo, a physician's testimony that the victim stated that rape had taken place on a date six months earlier was held to be admissible as a basis for the physician's opinion, though not admissible as proof of the fact of intercourse.

[6] Roosa v. Boston Loan Co., 132 Mass. 439, 24 N.E. 208 (1882).

[7] Cf. Commonwealth v. Sinclair, 195 Mass. 100, 108, 80 N.E. 799, 801 (1907). Cf. Commonwealth v. Smith, 213 Mass. 563, 565-566, 100 N.E. 1010, 1011 (1913).

[8] See Commonwealth v. Cleary, 172 Mass. 175, 51 N.E. 746 (1898), where evidence of complaints by an outraged victim including all the details was admissible not as part of res gestae or as substantive evidence of the facts charged but merely for the purpose of confirming or corroborating the testimony of the victim.

[9] Hughes, Evidence, 19 Mass. Practice Series 565 n.37 (1961).

§19.4. [1] 378 U.S. 478 (1964).

[2] 384 U.S. 436 (1966).

ceedings, the Supreme Judicial Court in *Seelig v. Harvard Cooperative Society*[3] refused to extend the above exclusionary rules to civil proceedings between private litigants. In *Seelig*, an action for malicious prosecution and slander, the plaintiff had signed an incriminating statement prior to being charged. He was later acquitted of larceny in the district court. The defendant in the malicious prosecution action excepted to the trial court's ruling excluding the incriminating statement because it was obtained in violation of the plaintiff's constitutional rights established in the *Escobedo* case.

The Supreme Judicial Court held that even if the statement might not have been admissible against the plaintiff in a criminal proceeding due to possible violations of the *Escobedo* rationale, the Court would not extend these rules to civil proceeding. The *Seelig* result is sound. The purpose of the exclusionary rule is to encourage law enforcement officers to employ constitutionally valid procedures by preventing use of evidence at trial obtained in violation of a constitutional right of a criminal defendant. The evidence is not necessarily excluded because it lacks reliability, relevancy or probativeness. An extension of the exclusionary rule to civil actions would result in the examination of many witnesses and the determination of a multiplicity of sophisticated collateral issues on voir dire. The resulting delay, exclusion of probative evidence and confusion of the central issues appear to far outweigh any possible prejudicial impact of voluntary incriminating statements of the plaintiff.

B. Student Comment

§19.5. Insanity defense: Use of expert testimony: Commonwealth v. Francis.[1] The 21-year-old defendant, Francis, was tried before a jury for the murder of a female acquaintance whom he had been dating. On the evening of March 11, 1967, and the morning of March 12, 1967, after having spent the afternoon of the 11th together, Francis and the deceased quarreled about her reputation and also about one of her former boyfriends. Francis, having become measurably upset during the quarrel, shot the girl and fled to Canada where he subsequently surrendered to the authorities.

At the trial the defense pleaded not guilty by reason of insanity and called two qualified psychiatrists to testify on behalf of Francis. After establishing a substantial basis for their opinions, they stated that the defendant was suffering from a mental disease and, in terms of the test for criminal insanity in Massachusetts,[2] the defendant

[3] 1969 Mass. Adv. Sh. 489, 495, 246 N.E.2d 642, 647.

§19.5. [1] 1969 Mass. Adv. Sh. 1, 243 N.E.2d 169.

[2] "'A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.'" Commonwealth v. McHoul, 352 Mass. 544, 546-547,

was not criminally responsible. The prosecution called the assistant medical director of Bridgewater State Hospital, Dr. Barrows, as a rebuttal witness. In his testimony, he re-emphasized the existence of a mental disease but stated that, in his opinion, the defendant did have substantial capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of law.[3] On cross-examination, Dr. Barrows contradicted his direct testimony and stated that due to the nature of the mental disease there was no way of knowing what defendant's capacity was at the time of the murder.[4] In effect, the testimony of the three psychiatrists was unanimous in finding that the defendant was indeed mentally ill, though it was somewhat contradictory as to the extent of that illness' effect on the defendant at the time of the crime. The jury, notwithstanding the expert testimony, found Francis guilty of first degree murder but recommended that the death penalty not be imposed. Francis was sentenced to life imprisonment.

On appeal to the Supreme Judicial Court, the question presented was whether the verdict was consistent with the weight of the evidence. In affirming Francis' conviction, the Court indicated the factors to be weighed by the jury in its determination and HELD: It was for the jury to determine, on all the evidence, "whether what was done was itself evidence of insanity at the time of the act."[5] The Court also stated, taking note of other available evidence besides that of the experts, that this was "a good example of how the issue of insanity may now be properly tried."[6]

It is precisely this last statement that is to be questioned throughout this discussion. Was Francis, in fact, properly tried and was his case properly decided? At the outset, it is necessary to point out that it is not the purpose of this Comment to consider several related questions. It is accepted that in Massachusetts the determination of insanity is left to the jury.[7] Furthermore, the validity and appropriateness of the Model Penal Code formulation as the adopted test of insanity in Massachusetts will not be questioned.[8] Finally, it is not the purpose here to be concerned with the wisdom in choosing to plead the defense of insanity or the treatment a defendant might

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226 N.E.2d 556, 557-558 (1967), noted in 1967 Ann. Surv. Mass. Law §9.16. The psychiatrist, Dr. Mezer, testified in Francis that his diagnosis of the defendant was that he suffered from "Schizophrenia Reaction, Paranoid Type" and lacked substantial capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law. Brief for Defendant at 15.

3 Brief for Defendant at 18.

4 Dr. Barrows' testimony, in part, was that "the substantial capacity may vary in this particular illness and *it has varied* in the seven months since we have seen him. . . . If it varies that much, it would be *very difficult* to determine just what his capacity was. . . ." Brief for Defendant at 18.

5 Commonwealth v. Francis, 1969 Mass. Adv. Sh. at 4, 243 N.E.2d at 172.

6 Ibid.

7 Commonwealth v. DeSalvo, 353 Mass. 476, 232 N.E.2d 921 (1968).

8 Commonwealth v. McHoul, 352 Mass. at 555, 226 N.E.2d at 563.

receive in a penal institution versus a mental institution with regard to rehabilitation.

If these policies and decisions are assumed to be valid, then what is wrong with the *Francis* decision? It is the thesis of this Comment that if the *Francis* case was in fact "properly decided," then first, the jury, which always has the responsibility of determining the question of insanity, may disregard the testimony of expert witnesses and make the decision based solely on their own observations and experience. Second, these observations may include a tendency toward social obligation evoked by the facts of the case and result in a newly created prejudice against the insanity defense. Finally, the jury's decision tends to be irreversible when evidence in addition to expert testimony is available.

The value of expert testimony in this area can be discerned by considering the development of the Model Penal Code test and the reason for its adoption in Massachusetts. In a case where the defendant pleads insanity, a moral value judgment must be transformed into legalistic terms to reflect the function of the legal system. In order that the jury make this determination based upon specific knowledge, the court allows the use of expert witnesses. In the past, however, there developed a dependence upon these psychiatrists' conclusions. Recently the courts have attempted to encourage the use of experts only as a means for providing the basis for a judgment and not to allow the jury to rely on the conclusive opinion of the expert. However, the nature of the testimony elicited from an expert was in terms of the particular test of insanity in the jurisdiction. As a result, when the M'Naghten test,[9] for example, was applied, testimony was restricted so as to "prevent . . . the introduction of meaningful psychiatric testimony."[10] The expert was, in effect, excluded from explaining the relation between the defendant's actions and his mental processes and was asked to make a judgment on his guilt or innocence — a black or white decision. The Durham test,[11] prescribed in other jurisdictions, was restrictive on the jury also since now "application [of] the test became medical rather than legal. . . ."[12]

It was the purpose of the Model Penal Code formulation, adopted

[9] The M'Naghten test provides that: "[T]o establish a defence [sic] on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong." Daniel M'Naghten's Case, 8 Eng. Rep. 718, 722 (H.L. 1843).

[10] "The medical expert is limited to testimony as to the accused's knowledge as to the nature and quality of his act." Comment, The Insanity Defense Under the Michigan Revised Criminal Code, 14 Wayne L. Rev. 863, 868 (1968).

[11] "[A]n accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect." Durham v. United States, 214 F.2d 862, 874-875 (D.C. Cir. 1954).

[12] Comment, The Insanity Defense Under the Michigan Revised Criminal Code, note 10 *supra*, at 874.

as the test for insanity in Massachusetts by the *McHoul* case,[18] to overcome these weaknesses. First the test was designed to allow greater use of expert testimony, that is, to allow the psychiatrist to testify on a broad scope in order to give the jury an essential basis for making a knowledgeable decision.[14] Secondly, this test recognizes that mental illness is a matter of degree and that even the most severely affected may know the difference between right and wrong.

> . . . The entire effort in formulating the Code was to recognize that there are graduations of impairment of the capacity involved and to seek words that imply a greater depth in the mental capacity that is called for. . . .[15]

Thirdly, "[t]he standard of substantial impairment will make psychiatric testimony more meaningful since evidence can be offered on several causes of the defendant's acts and the relevance of each cause to the conduct in question can be stated. . . .[16] Finally, attempt is made to avoid having the expert conclude as to existence of criminal responsibility by allowing the jury to use its own experience and observations as a guide to making its determination.[17]

In short then, the purpose of the Model Penal Code formulation was to allow the jury more leeway in making a moral judgment. It need not rely solely on the conclusion of the experts, yet it was hoped that the jury would make use of the expert's broad explanations so that it could understand the mind of a mentally ill defendant. As a practical matter, the jury cannot be under the control of the court when it is allowed this leeway in its use of the expert testimony. In the *Francis* case, the jury may have completely discounted or even ignored the testimony of the three psychiatrists. It may have based its decision solely upon its observation of the defendant during the trial. Or, it may have looked at the act itself as the determining factor of defendant's sanity. If the jury's conclusion was in fact a result of these considerations, then what the jury created was a standard of the normal man's reasonable reaction and compared that to the reaction of defendant. If it felt that defendant reacted as a normal man would have responded under the same circumstances, then the defendant was sane.

This can be substantiated by the reaction of Judge Whittemore to the jury's handling of the decision. In dissenting to the *Francis* case, he stated that the jury misunderstood the significance of two facts when placed together: first, that the commission of the act was without provocation, and second, that the experts found Francis suffered from

18 352 Mass. at 555, 226 N.E.2d at 563.

14 1967 Ann. Surv. Mass. Law §9.16 at 166-167.

15 Id. at 162.

16 Comment, The Insanity Defense Under the Michigan Revised Criminal Code, note 10 *supra* at 871.

17 Comment, The Criminal Law Defense of Insanity in Massachusetts, 2 Portia L.J. 170, 176 (1966-1967).

a mental disease. To him these made the act of Francis "inexplicable if tested by normal conduct,"[18] and therefore the jury was wrong in its decision. To emphasize Judge Whittemore's belief that the jury looked at the act itself, or the defendant himself, without use of other testimony, compare *Commonwealth v. Ricard*,[19] in which Judge Whittemore, writing the majority opinion, affirms the jury's conviction of first degree murder under the same circumstances as the *Francis* case. In the *Ricard* case, the evidence established that the defendant, after being beaten in a barroom fight, returned to the scene with a gun and lay in wait for the victim whom he shot to death. The state psychiatrist was called by the defense and he conceded that defendant Ricard suffered from psychosis and paranoia, lacked substantial capacity to appreciate the criminality of his act, but stated that it was "possible" that at the time of the act, he was sane. The jury convicted Ricard in spite of that testimony.

Judge Whittemore believed the jury was correct in rejecting the testimony of the experts. The reason for this must have been that the act of defendant Ricard was the response of a man sufficiently provoked. In other words, according to Judge Whittemore, Ricard reacted as would a normal man, but to react as Francis did must have been the reaction of an insane man and thus the jury in *Francis*, misapplied the standards. While this result is understandable in terms of the relativeness of the provocation in the two cases, it does not explain the application by the jury of a "new test" for insanity. That test is whether the act of the defendant is explicable when tested by the standard of a normal man. Both Ricard and Francis had uncontested expert testimony that they were suffering from mental disease. But since the degree of insanity may vary, the jury looks at the act itself and how the defendant reacted to given stimulus. This seems to establish the fact that the jury applies a new test without making use of expert testimony.

Why does a jury react in that manner? Why did the jury not find both defendants insane, or at least Francis? The reason might be explained by the jury's concept of the defense of insanity as a kind of "gamesmanship." This conception creates a prejudice against expert testimony associated with the insanity plea which develops subconsciously in a juror during the course of the trial.

One aspect of this prejudice is the belief by the jurors that insanity is a "popular defense," especially when a serious crime is charged.[20] They believe that the defendant is trying to take the easy way out to avoid criminal responsibility. They often feel that society is excusing "socially and morally delinquent behavior by labeling persons who engaged in such behavior as 'sick' "[21] and, in doing so, is weakening

[18] Commonwealth v. Francis, 1969 Mass. Adv. Sh. at 5, 243 N.E.2d at 172.
[19] 1969 Mass. Adv. Sh. 465, 246 N.E.2d 433.
[20] R. Simon, The Jury and the Defense of Insanity 144 (1967).
[21] Ibid.

itself. The effect of this type of thinking is that the jury accepts it as "their responsibility to prevent any further extention of this social cancer"[22] by rejecting the insanity defense.

The second aspect of the "gamesmanship" problem is the awareness by the jury of existing partisanship by the expert. Juries are aware of the adversary system, of the desire to "win" by each attorney, and therefore the feeling arises that the expert, paid by a particular "side" and testifying for its benefit, is part of that side. The expert is often identified with the particular position he takes by way of his diagnosis. This identification "can lead to subtle distortions, unwitting biases and warping of judgment. . . . [W]ithin the adversary system there is no such thing as impartial testimony."[23] A further aspect of this partiality of the expert is often thought of as the "Battle of the Experts." As part of the adversary system, each side may have experts testify to support their position with the common result of contradictory expert testimony. The jury must then decide whom to believe. Experts are not always equally competent, they are not equally objective, and they are not equally responsible or sympathetic to the goals of justice. "The psychiatrist's manner of presentation, his personality, and his credentials may have as much influence upon the jury as his scientific data. In this sense having a good psychiatrist becomes quite similar to having a good defense attorney."[24] The resulting effect upon the jury is obvious; confusion and contradiction force the jury to either judge the competence and credibility of each expert or to reject it in toto and make its decision without the benefit of the experts' knowledge. This has a significant adverse effect on the defense because in almost all cases the defense is required to introduce the insanity plea.

Solutions to this "gamesmanship" problem have often been suggested. One would be to remove insanity from the question of guilt or innocence and have it pertain only to the disposition of the defendant after a finding of guilty. This would remove the element of *mens rea* from a part of the criminal law and would therefore cause much revision in the law. A second possibility is that the court employ a panel of psychiatrists rather than either counsel hiring its own experts. This would tend to remove the adversary system from such cases, and also would take the decision making function from the jury and place it with the psychiatrists. A third suggestion might be to place the burden of examination with regard to sanity of the defendant in a capital case on the prosecution. General Laws, c. 123, §100A, provides for the making of such an examination and the filing of a report with the clerk of the court. It also provides that these reports will be available to the prosecutor. In no way, however, does it require

22 Id. at 146.

23 Smith, The Ideal Use of Expert Testimony in Psychology, 6 Washburn L.J. 300, 301-302 (1966-1967).

24 Halleck, A Critique of Current Psychiatric Roles in the Legal Process, 1966 Wis. L. Rev. 379, 390 n.30.

the prosecutor to introduce the reports, nor must they be given any weight if introduced. As a result, cases like *Francis* and *Ricard* arise where examinations have been made by the state psychiatrists. The prosecutor leaves the introduction of psychiatric testimony to the defense which then provides the opportunity for the jury to react as described above.

Another disadvantage to the defense when it pleads insanity results when it introduces technical evidence supporting the distinction between mental illness and criminality. Stanley E. Willis II, a psychiatrist and author, comments upon the consequences to a defendant who tries to base his defense on such a separation:

> Neither term [mental illness or criminality] exists without qualification; neither denotes absolutes. Undoubtedly, both terms require a social value judgment and this is a function of the particular culture or subculture which is seeking to protect its institutions. A group of jurymen should not be asked to decide whether a given assault on a social convention shall be classified as a crime or as a mental illness. It can be both, i.e., a crime which is the product of a mental illness. When pressed to decide whether it is either one or the other, they are likely to reach a finding that the behavior in question is a crime — which seems most consistent with preserving the social institutions. This is one reason the insanity defense is such a dangerous "game." Once the "game" of proving the insanity defense begins, the odds are fairly certain that the collective subconscious of the jury will be prejudiced against a finding that may seem to threaten established norms of behavior.[25]

Willis illustrates this concept by comparing two situations which occurred simultaneously in the same state. One case was the Jack Ruby murder trial, and the second was the case of Vaschia Michael Bohan.[26] The Ruby trial demonstrates the complexities of trying to separate criminality from mental illness. The defense attempted to show that the Kennedy assassination caused a passionate sense of revenge compelling Ruby to strike down the assassin. The trial dragged on with a great array of psychiatrists of national reputation. In the end, the jury found that, according to the M'Naghten test, Ruby was sane and then sentenced him to death.

One and a half hours after Ruby shot Oswald, Bohan killed his stepfather who had verbally attacked the murdered Kennedy. Bohan pleaded guilty making no attempt to claim insanity. The judge, in passing sentence, commented that Bohan was apparently caught up in the passions following the national tragedy, fined him $1000 and

[25] Willis, Psychiatric Testimony, Trial Gamesmanship and the Defense of Insanity, 5 San Diego L. Rev. 32, 40 (1968).

[26] Both are unreported cases and author Willis, note 25 *supra*, relied to a great extent upon J. Kaplan and J. Wactz, The Trial of Jack Ruby (1965).

sentenced him to eight years in prison. He then suspended the sentence and released Bohan.

Both Ruby and Bohan reacted in the same way, yet in the two cases the results were inapposite. Willis explains this in the following manner:

> The differing results between the Ruby and Bohan trials turned on the effects of "adversarial gamesmanship." . . . But for certain automatic responses elicited when the consideration of mental illness and psychiatric testimony were introduced into the trial, a considerably different result would likely have ensued in the Ruby trial. It may have been that the jury feared they were being deceived. . . . They decided the issue according to the rules of the "game," thereby ignoring or obscuring all other determinants. . . .
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> . . . When introduced into the Ruby trial as issues and positively asserted as theses, they [theories of insanity] inevitably evoked negative propositions. It is axiomatic that any weakness in the validity of a proposition positively asserted moves the trier of facts in the direction of doubt. This doubt seems particularly likely to insert itself when the jurors are not sufficiently sophisticated to understand a complicated psychiatric or neurological phenomenon.[27]

Willis further explains that a jury tends to identify with a defendant in a criminal case. They identify with the anger or frustration evoked in the defendant. But this identification and sympathy disappear when the defense attorney raises the defense of insanity and tries to prove the complex mental processes which influenced and motivated the defendant. At this point the jury's attention is focused on the attorney and not the defendant. The jury may then tend to "feel suspicious and fear that they are being manipulated with a trial tactic, or they may simply be hostile to the person who propounds the explanation and therefore reject it."[28]

Another reason for the jury's negative response to the defense of insanity is the innate desire of each juror to protect society from the dangers these defendants present. Where the crime is of a violent or heinous nature, the jury wants to put the defendant where he will be kept longer and more securely. Yet jurors demonstrate a belief that a defendant needs medical treatment even though they want to confine him.

> They seemed to be searching for a compromise between the two verdict alternatives provided by the law — guilty or not guilty by reason of insanity. They were unwilling to find the

[27] Willis, Psychiatric Testimony, Trial Gamesmanship and The Defense of Insanity, 5 San Diego L. Rev. at 45.

[28] Id. at 46.

> defendant *not* guilty by reason of insanity because they were too impressed both with the heinousness of the crime and with the rational, calculated manner in which, to their minds, the defendant carried it out.[29]

A final reason for the rejection of expert testimony is that the jury has formulated its own ideas on the symptoms of an insane man. These symptoms are "violence, irresponsible behavior, and an inability to carry out ordinary day-to-day activities . . . .[30] Consequently, when the jurors find that the defendant's reactions are similar to those of a normal man, that is, he is rational, methodical and consistent in his activities, they cannot convince themselves that he could be insane. Only if his acts were pointless and the result of spontaneous emotional reaction could he be insane.[31] Often the jury will base its opinion on its own observations of the defendant at the trial. If the defendant is calm, detached, and respectful, then he is not so insane as to require a not guilty by reason of insanity verdict even where his crime has no basis in rationality.[32] The result, then, is to separate the defendant's mental processes and internal conflicts from his external acts.

In summary, the jurors tend to acquire a prejudice against the testimony of expert psychiatrists because they fear that the defense is trying to deceive them into letting the defendant off easy, and therefore they disbelieve an insanity defense. Since they do not comprehend the concepts of the psychiatrists they therefore give to their own observations more weight than they do to the knowledge of the defendant's mental processes as conveyed by the psychiatrists. They fear the danger this defendant presents to society and therefore demonstrate a desire to confine him.

These considerations can now be applied to the *Francis* case for determination of whether that case was properly decided. First, the evidence tended to show a lack of provocation, that Francis' reaction was emotional and spontaneous, and that he "had to be insane to try it." Yet, the jury apparently felt that Francis knew what he was doing at the time and treated the act as a reaction completely separate from any mental process of the defendant which may have compelled Francis to react as he did. In effect, the jury gave no weight to the possible impact of these mental processes. Had the jury looked only at the act and at the mental processes as presented by the psychiatrists, the case would have been exactly like *Commonwealth v. Cox*,[33] where

29 R. Simon, The Jury and the Defense of Insanity 172 (1967).
30 Id. at 148.
31 Id. at 150.
32 Id. at 152.
33 327 Mass. 609, 100 N.E.2d 14 (1951). In that case, the defendant crudely murdered his wife, yet he calmly called the police to report it. He explained the act and his reasons for it intelligently and then signed a full confession. The only defense was the uncontradicted testimony of two psychiatrists stating that defendant was suffering from a mental disease. Appellant's argument was that, as a matter of law, this uncontradicted testimony required a directed verdict of not guilty by

the Supreme Judicial Court reversed the jury's conviction as against the weight of the evidence which consisted only of uncontradicated expert testimony. The cases are distinguishable according to *Francis,* because in *Francis* "the jury had much before them on the activity of the defendant before and after the crime, as well as the opportunity to see and hear him on the stand."[34] This is precisely the point; the presence of evidence in addition to the expert's testimony provided the jury with sufficient leeway to base its decision on any factors or tests other than the defendant's mental state.

For example, Francis took the stand and testified at length. He appeared calm and detached with no patent evidence of insanity. From testimony of the arresting police officers there was no sign of abnormal behavior by defendant from the time of his arrest. Furthermore, there was evidence that his actions before and after the crime were rational, methodical and consistent. These factors enabled the jury to convince itself that insanity was merely a sham defense.

Secondly, the act itself was violent, and being spontaneous, indicates the dangerousness of Francis. Therefore the jury could have had the desire to protect society from him. The jurors could have felt it was best for all concerned, considering the lack of difference between a penal and mental institution with regard to degree of treatment, that Francis be put in prison while noting his need for psychiatric attention.

Similarly, in the *Ricard* case, the defendant was methodical, rational, coherent, revengeful and dangerous — all attributes which lend themselves to the consideration discussed above.

In the *Cox* case, the Court had evidence which clearly proved that the murder by Cox of his wife was committed deliberately and with premeditated malice aforethought. The only defense was two expert psychiatrists who had examined Cox in accordance with G.L., c. 123, §100A, and had testified that he was insane. In both *Francis* and *Cox* there was unanimous medical opinion that both defendants were insane and yet the juries convicted each. The distinction which *Francis* mentions is the fact that in *Francis* the defendant testified while in *Cox* there was no such observation available to the jury. The only evidence before the jury was the testimony concerning the act of the murder and the expert testimony. The result might have been different had Francis not taken the stand or if he had acted less calm and detached. If may even be said that Francis convicted himself when he appeared on the witness stand.

It is significant that even though it is recognized that the question of insanity is for the jury, the *Cox* decision was not affirmed, yet the

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reason of insanity. The Court disagreed but ordered a new trial because the verdict was against the weight of the evidence. The Court said that since the only issue was criminal responsibility, and since the only evidence for the prosecution was the presumption that all men are sane, this was not enough to overcome the defense evidence.

[34] 1969 Mass. Adv. Sh. at 4, 243 N.E.2d at 172.

Francis and *Ricard* decisions were. It is submitted that as a result of these two most recent decisions, when the insanity defense is raised, as long as there exists evidence other than expert testimony, the jury's conviction will be irreversible.

If these are accurate observations of the nature of the response the insanity defense evokes from the jurors, then what can or should an attorney do to protect his client? It is the duty of the defense attorney to convince the jury that their decision must depend on their understanding of the trial, their own sense of justice, and their own concept of moral responsibility. He must then convince the court that if the jury is to retain its objectivity in performing its function, the court must acknowledge the possibility of prejudice arising against the insanity defense. He must make the court aware of the jury's tendency to disregard significant testimony and to establish a test of insanity of its own. He must also convince the court that a jury often misconstrues a defense attorney's attempt to be convincing as an attempt to take advantage of a "gullible" jury. However, this is not an easy task. The manner in which the attorney addresses himself to this problem may be detrimental if the jury believes that this also is a part of the ploy.

Some suggestions, if adopted by the court, could relieve the defense of some degree of prejudice. One would be to require the prosecution to introduce in court the reports of the psychiatrists who examined the defendant in accordance with G.L., c. 123, §100A. A second would be to request that the trial judge instruct the jury to be aware of the subconscious creation of prejudice which often develops in an insanity defense case. And third, the defense attorney might request the court to re-emphasize the responsibility of a jury to make its determination, keeping the ends of justice clearly in mind.

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