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Insanity and Criminal Responsibility

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INSANITY AND CRIMINAL RESPONSIBILITY.

(Report of Committee B of the Institute.[1])

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In the first report of this committee, which was presented to the Institute at the meeting in Boston on Sept. 1, 1911, there was a discussion of the following topics: (1) the general relation of mental disease to criminal responsibility; (2) the function of the judge, the medical witness and the jury at the trial; (3) the qualifications of medical witnesses; (4) the form of the jury's verdict where insanity is set up as a defense; (5) the English statute regarding the form of the verdict and the confinement of the person found to be a lunatic; and (6) the report of the special committee of the New York State Bar Association. After establishing the propositions: (1) *that one who, by reason of his insanity, did not have the necessary criminal intent at the time of the commission of a wrong within the province of the criminal law, should not be convicted or punished;* (2) *that one, who by reason of his insanity is a menace to the safety or health of the public, should be confined for purposes of restraint and treatment, such confinement to end whenever, if at all, he regains his normal mental condition, and not before*—the enactment of the following statute was recommended:

(1) Where in any indictment or information any act or omission is charged against any person as an offense, and it is given in evidence on the trial of such person for that offense that he was insane so as not to be responsible according to law for his actions, at the time when the act was done or omission made, then if it appears to the jury before whom such person is tried, that he did the act or made the omission charged, but by reason of his insanity was not responsible according to law, the jury shall return a special verdict that the accused committed the act or made the omission charged against him, but was not responsible according to law, by reason of his insanity, at the time when he did the act or made the omission.

(2) When such special verdict is found, the court shall remand the prisoner to the custody of the proper officer and shall immediately order an inquisition by the proper persons to determine whether the prisoner is now insane so as to

[1]Second report.

be a menace to the public health or safety. If the persons who conduct the inquisition so find, then the judge shall order that such insane person be committed to the state hospital for the insane, to be confined there until in the opinion of the proper authorities he has recovered his sanity and may be safely dismissed from the said hospital. If the members of the inquisition find that the prisoner is not insane as aforesaid, then he shall be discharged from custody.

(3) When an insane person shall have been committed to the state hospital for the insane in accordance with the provisions of the preceding section, no judge of competent jurisdiction shall issue a writ of habeas corpus for the release of such person on the grounds that he is no longer insane, unless the petitioner for such writ presents sufficient evidence to establish a *prima facie* case of sanity on the part of the person confined as aforesaid. Or,

(4) When an insane person shall have been committed to the state hospital for the insane in accordance with the provisions of the preceding section and a writ of habeas corpus has issued for the release of such person, upon the hearing of which writ such person has not been released from confinement, then no judge of competent jurisdiction shall issue a writ of habeas corpus for the release of such person on the ground that he is no longer insane, unless the petitioner for such writ presents to the judge as aforesaid evidence sufficient to show that the mental condition of the person confined has improved since the hearing upon the first writ, so as to render it probable that he is sufficiently sane to justify his release from the asylum.

The report was favorably discussed at the meeting of the Institute and in the public press. Certain suggestions for the improvement of the proposed statute have been made, and some of them have been adopted. As a result of criticism and further consideration the proposed statute has been amended as follows:

Sec. 1. No person, suffering from mental disease, shall hereafter be convicted of any criminal charge, when at the time of the act or omission alleged against him, he did not have, by reason of such mental disease or derangement, the particular state of mind which must accompany such act or omission in order to constitute the crime charged.

Sec. 2. Where in any indictment or information any act or omission is charged against any person as an offense, and it is given in evidence on the trial of such person for that offense that he was mentally diseased so as not to be responsible, according to the preceding section, for his acts or omissions, at the time when the act or omission charged was made, then if it appears to the jury before whom such person is tried, that he did the act or made the omission charged, but by reason of his mental disease was not responsible according to the preceding section, the jury shall return a special verdict that the accused did the act or made the omission charged against him but was not legally responsible, by reason of his mental disease, at the time he did the act or made the omission.

Sec. 3. When such special verdict is found, the court shall remand the prisoner to the custody of the proper officer and shall immediately order an inquisition by the proper persons[1½] to determine whether the prisoner is now suffering from such a mental disease as to be a

menace to the public health or safety. If the members of the inquisition[1½] find that such person is a public menace, then the judge shall order that such mentally diseased person be committed to the state hospital for the insane, to be confined there until he shall have fully recovered from such mental disease. If the jury find that the prisoner is not suffering from a mental disease as aforesaid, then he shall be immediately discharged from custody.

Sec. 4. When a person suffering from a mental disease shall have been committed to the state hospital for the insane in accordance with the provisions of the preceding section, no writ of habeas corpus shall be issued for the release of such person on the ground that he is no longer mentally diseased, unless the petitioner for such writ presents sufficient evidence to establish a *prima facie* case of mental soundness on the part of the person confined as aforesaid.

Sec. 5. An appeal from a final order, discharging a person committed to a state hospital for the insane in accordance with section three (3) of this act, may be taken in the name of the state by the attorney-general or the district attorney.

In those states where no statutory provision is made for the release by habeas corpus of persons confined in the state hospital for the insane on the ground that they are no longer mentally diseased, a method of release such as is provided in a Wisconsin statute would prove satisfactory in practice. Following is the Wisconsin statute:

"Upon the receipt by the judge of the circuit court or any judge of any other court of record of the county in which any insane person is confined, or the county from which he was committed, of a petition verified by the oaths of any resident of the county wherein such circuit judge holds court or in which such other judge resides, setting forth that the person in whose behalf the petition is filed has theretofore been adjudged insane and alleging that such person is now believed by petitioner to be sane and requesting a judicial examination as to that fact, and further stating whether or not such person has a general guardian, and if he has, the name and residence of such guardian, such judge shall by order appoint two disinterested physicians, of good repute *and residents of the county,* to examine and report to him whether in their opinion the person named in such petition is sane or insane. If such person has such a guardian the judge shall at the time he appoints such physicians, cause notice of the time and place of making such examination to be served upon him, and such general guardian or any relative or friend of the person to be examined may appear at such examination. If such physicians report such person sane and the judge is satisfied that he is sane and no demand for a jury trial is made, a judgment to that effect shall forthwith be entered; but if the judge shall direct, or the person examined, his guardian or any of such person's friends or relatives shall demand, a trial by jury, an order for such a trial shall forthwith be entered. After hearing the evidence and arguments the jury shall return a verdict of sane or insane as they agree; if they disagree they shall be discharged and another

[1½] The members of the committee are at present not in agreement regarding the personnel of the body which shall conduct this inquisition. Some favor a jury, others a commission composed of physicians. It is hoped that the question can be settled before the next report.

jury may be impaneled. Judgment shall be entered in accordance with the fact found by the jury; if they find that the person is insane the judge shall make a further order of commitment to some hospital or asylum, or not, as in his judgment the facts warrant."[2]

Section 1 is inserted for the purpose of securing the specific enactment of what is deemed the proper test for determining the criminal responsibility of a mentally diseased person, and also to insure the proper interpretation of section 2. The need for the latter was well stated by a critic of the section: "Having in mind the reluctance of courts in the application of statutes to depart from established law except where such departure is made mandatory by the express language of the statute, it is likely that most courts would interpret the proposed legislation in such a way as to give the phrase used in the statute not responsible according to law, the meaning *not responsible according to existing law,* and thus perpetuate the existing legal tests of insanity. The effect of this interpretation of section 1 would be merely to authorize the statutory forms of insanity as they exist in the jurisdiction adopting the statute. The history of all reform legislation is that courts are tenacious of established common law principles, and generally they interpret the legislation so as to disturb established principles as little as possible. The reform proposed by this report is far-reaching, and will only be secured in its entirety by legislation, the meaning of which is unmistakable."

In section 2 "insane" is changed to "mentally diseased." The term "insanity" is misleading and has been repudiated by the medical profession. One physician writes: "I am getting so that I no longer use the word 'insanity' at all. I have come to the conclusion that 'insanity' has no scientific applicability whatever, but is after all a legal term." It is most desirable that any new legislation on this most complex subject should be free from misleading and ambiguous terms. Section 2 was amended also so as to refer directly to section 1 for the test of responsibility.

Section 3 (section 2 of the original draft) is presented again for discussion in rather indefinite form, since the members of the committee are not in agreement regarding this provision. A minority view is that the question of the defendant's present mental condition should be determined in the same proceeding in which his mental condition at the time of the commission of the wrongful act is considered. Those members of the committee who favor a separate inquiry into his present mental condition disagree as to the persons who shall conduct this inquiry.

[2]Wis. Stat. 1898, sec. 587. This statute should be amended by striking out the phrase "residents of the county," as it is unwise to limit the choice of the judge to local physicians.

Some favor a jury, others a commission of physicians. It is necessary that this question be considered further.

Section 4 (the first alternative of section 3 of the original draft) is presented for further consideration. The provision is not in conflict with the present law in some states and, if properly administered, would tend to discourage improper or unfounded petitions for the writ. Several members of the committee, however, are of the opinion that a *prima facie* case of mental soundness should not be required to be made out before the writ is issued. One member writes: "It seems to me that what is wanted is enough evidence to satisfy the judge of the necessity of an inquiry." Another member of the committee writes the following: "I further suggest that great injustice will result from the adoption of this section. How can a person, confined in a state hospital for the insane, procure evidence to establish a *prima facie* case of sanity without getting the officials in charge of the state hospital for the insane to give such evidence? It seems to me that the effect of section 4 will be to detain for life a person confined in the state hospital for the insane, as provided in section 3, unless the physicians in charge of the state hospital for the insane are willing to furnish evidence that the person has ceased to be insane."

The second alternative of section 3 of the former draft is not recommended again. It made too much depend on the decision of the judge on the first writ of habeas corpus.

Section 5 is recommended for the first time. Statutes providing for appeal by the state in habeas corpus cases exist in some states, section 5 as proposed being modeled after section 2059 of the New York Code of Civil Procedure, which reads:

> "An appeal from a final order, discharging a prisoner committed upon a criminal accusation, or from the affirmance of such an order may be taken in the name of the people by the attorney-general or the district-attorney."

Sections 4 and 5 should so regulate release on habeas corpus so as to remove most of the objections to the present practice.

In January, 1911, a committee of the New York State Bar Association recommended for consideration the following:

> "If, upon the trial of any person accused of any offense, it appears to the jury upon the evidence that such person did the act charged, but was at the time insane, so as not to be responsible for his actions, the jury shall return a special verdict, 'guilty, but insane,' and thereupon the court shall sentence such person to confinement in a state asylum for the criminal insane for such term as he would have had to serve in prison, but for the finding of insanity; and if upon the expiration of such term it shall appear to the court that such person is still insane, his confinement in such asylum shall continue during his insanity; and, further, when such a verdict of 'guilty, but insane,' is returned in a case where

the penalty for the verdict of guilty against a sane person is death, such sentence for the insane person thus found guilty shall be for life; and in all such cases the governor shall have the power to pardon, after such inquiry as he may see fit to institute upon the question whether it will be safe for the public to allow such person to go at large."

This recommendation was adversely criticised in the first report of this committee on the grounds: (1) that "guilty" and "insane" in the verdict proposed are contradictory; (2) that it makes insanity at the time of the commission of the act, regardless of the mental condition of the prisoner at the time of the trial, the basis for confinement in the state asylum; and (3) that the proposal merely substitutes imprisonment in the asylum for imprisonment in the penitentiary.

In a report presented on January 19th, 1912, the New York committee replied to these criticisms. The gist of this reply may be found in the following paragraph from their report:

"A verdict of 'guilty, but insane' does not negative the idea that a crime was committed; on the contrary, it expressly finds that it was. The hypothesis is not that the defendant is not insane; on the contrary, it expressly finds that he was insane at the time of the commission of the act, and the presumption of a continuance of that insanity applies. True, the defendant may have regained his sanity—if he ever had it—but the theory on which such verdict is based is, that no man whose insanity has resulted in an act dangerous to the community, should be permitted to go free and thereby endanger the community anew, merely because he happens to be sane at the time of the trial. Society has the right to protect itself against proved homicidal impulses, which may again result in the taking of human life. He who has demonstrated that he is incapable of controlling such impulses has, it may be urged, by that act alone forfeited his right to freedom, and should thereafter enjoy freedom only as an act of mercy, and not as of right."[3]

Two very significant conclusions may be drawn from this paragraph. The first of these is that the New York committee is confining the application of their proposed statute to the case of a person who kills as the result of a homicidal impulse. The second conclusion is that the committee's purpose is to declare that killing as a result of a homicidal impulse is a crime, and that the punishment for such crime shall be confinement in an asylum.

That the first conclusion is correct may be shown further by the following additional quotations from the report:

"But if they find that he had the intent, let them convict, and if they also find that he was insane at the time, but that his insanity was not of a character to affect his intent, but only to impair his self-control, let them add, that he was insane."[4]

"If such a man had never displayed any homicidal tendencies, then of course it would be an injustice, for which no one would contend."[5]

"But if you can impute to them intent to do the act which they did do, and

[3]P. 5.
[4]P. 8.
[5]P. 12.

if that act is one which is dangerous to the community, and is of such a character that its repetition may be reasonably expected, whenever the temptation arises, wherein lies any injustice in keeping them where their homicidal tendencies cannot be given full sway?"[6]

The proposed statute by its terms is much broader than the restricted interpretation put upon it by the committee. It covers "any offense" and any person "insane, so as not to be responsible for his actions." The New York committee recognizes in their second report that a person who by reason of mental disease does not have the necessary criminal intent or guilty state of mind *(mens rea)* should be acquitted. "If a jury finds in a given case of homicide, that there was no deliberate intent to kill it may acquit or find a less degree."[7] "Now, if on all the evidence, a jury finds that the prisoner, whether sane or insane, had no such intent, let them acquit"[8] Such a case, however, would be covered by the statute proposed. Apart from the inconsistency between the statute proposed and the interpretation of the committee, the interpretation is unsatisfactory. A provision that such a person shall be acquitted does not solve the problem. If the person is still mentally diseased so as to be a menace to the public health or safety he should be confined.

To support the second conclusion regarding the interpretation to be put upon their statute by the New York committee a further quotation from their report follows:

"Perhaps he may not be criminally responsible under existing statutes, but our suggestion is that there shall be a statutory amendment, making him criminally responsible, and then providing that his incarceration shall be in an asylum, rather than in a jail, so that he shall have the proper medical treatment."[9]

Under the New York law as it now stands no statute is necessary to secure the conviction of a person who kills while suffering from a homicidal impulse. The only change that the proposed act, as interpreted by the committee, would have on the present law of New York would be to substitute confinement in an asylum for death or imprisonment in a penitentiary as a punishment for one who kills as a result of a homicidal impulse. In states where an irresistible impulse is a defense to a criminal charge, the proposed act, as interpreted, would create a new crime, viz: homicide by one suffering from an impulse to kill. Even if it be assumed that it is desirable to accomplish the result contended for in the report of the New York committee, it is submitted that this should

[6] P. 13.
[7] P. 6.
[8] P. 8.
[9] P. 9.

be done by a statute, which provides in specific terms for such a case, and not by a statute, as the one proposed, which by its terms covers every sort of crime and every form of mental disease.

The New York committee is confused in its discussion of insanity and the effect of this upon the criminal intent. On page 6 it is stated: "The trouble is that it has always been assumed that an insane man cannot have any intent, whereas experience has shown the reverse." It may well be questioned whether there has been such a general assumption. The cases in which mentally diseased persons have been convicted of crimes indicate that such persons were regarded as having the necessary criminal intent. Physicians have recognized for many years that the persons suffering from certain forms of mental disease may intend their acts in the same way that a person of sound mind does. Again on page 7 the committee says:

> "The difficulty is that we have been wrong, not in our definitions of crime, but in our judge-made definitions of insanity. When in England 'all the judges' laid down the rule of knowledge of right and wrong in the McNaughton [McNaghten] case, they did so not by reason of their learning in the law, but because of their ignorance of psychology. It has had such an advance of late years, that we have learned that the trouble with the men, whom we have come to call the criminal insane—a contradiction in terms, under present definitions—the trouble is, not absence of intent, but of control."

The concluding sentence of the above statement is too broad in that no distinction is made between the different symptoms of mental disease. An insane delusion, for instance, may indicate the absence of criminal intent (*mens rea*).

It is not the desire of this committee to engage in an academic debate with the New York committee, nor to indulge in captious and unimportant criticism. However, since the purpose of each committee is to reach a proper solution of the problem of dealing with persons suffering from mental disease who are charged with crime, a comparison of the two plans proposed and the contemplated results of each is deemed desirable. On many points the two committees are in agreement. Both committees favor overthrowing the legal insanity test of M'Naghten's case; both wish to secure the conviction and punishment of persons who are relying upon feigned insanity as a defense; and both urge confinement in a hospital for persons who by reason of their mental condition are a public menace. This committee deems it of great importance that any new legislation should provide for the proper disposition of all cases, no matter what the character of the offense nor the symptoms of mental derangement. This defense is by no means confined to prosecutions for homicide. Following are some of the crimes of which defendants have been convicted when mental disease was set up as a

defense; rape,[10] burglary,[11] forgery,[12] running illicit distillery,[13] larceny,[14] mailing obscene literature,[15] writing forged instruments,[16] abduction,[17] arson,[18] embezzlement,[19] robbery,[20] slander,[21] and incest.[22] The statute proposed by this committee would cover all these, no matter what the character of the mental disease, because the statute is based on the proper relation of mental disease to criminal responsibility. In addition to declaring a test for determining what treatment, whether penal or remedial, shall be accorded a person who commits a wrong while suffering from a mental disease, the proposed statute provides a method, which it is believed will be effective, for securing the proper release and preventing the improper release of persons who have been confined because of their unsound mental condition. The proposals are, however, presented tentatively, and further consideration and criticism of them are desired.

[10]*Bothwell v. State,* 71 Neb. 747 (1904); *State v. Miller,* 111 Mo. 542 (1892).
[11]*Hays v. Commonwealth,* 33 S. W. R. (Kan.), 1104 (1896).
[12]*Langdon v. People,* 133 Ill. 382 (1890).
[13]*U. S. v. Ridgeway,* 31 Fed. 144 (1887).
[14]*Gruber v. State,* 3 W. Va. 699 (1869); *People v. Cummins,* 47 Mich. 344 (1882).
[15]*U. S. v. Faulkner,* 35 Fed. S. 730 (1888).
[16]*Riley v. State,* 44 S. W. R. (Tex. C. A.) 498 (1898).
[17]*Walker v. People,* 26 Hun. 67 (1881).
[18]*Knights v. State,* 58 Neb. 225 (1899); *State v. Richards,* 39 Conn. 591 (1873).
[19]*U. S. v. Chisholm,* 153 Fed. R. 808 (1907); *State v. Berry,* 179 Mo. 377 (1904); *U. S. v. Young,* 25 Fed. R. 710 (1885).
[20]*People v. Sprague,* 2 Parker Cr. Rep. (N. Y.) 43 (1849); *People v. Ford,* 138 Cal. 140 (1902).
[21]*Kelley v. State,* 101 S. W. R. (Tex. C. A.) 230 (1907).
[22]*Schwartz v. State,* 65 Neb. 196 (1902).