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Insanity and Criminal Responsibility

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INSANITY AND CRIMINAL RESPONSIBILITY

REPORT OF COMMITTEE "A" OF THE INSTITUTE

EDWIN R. KEEDY, Chairman.

This committee was created at the second meeting of the Institute, held in Washington, D. C., in 1910, under a resolution which provided for the appointment of a committee "to investigate the insane offender with a view, first, to ascertain how the existing legal rules of criminal responsibility can be adjusted to the conclusions of modern medical science and modern penal science, and secondly, to devise such amendments in the mode of legal proceedings as will best realize these principles and avoid current abuses." It will be noticed that the scope of the committee is limited to the case of the "insane" as distinguished from the "mentally defective" offender, and further that "the existing legal rules of criminal responsibility" are to be taken as the basis for all proposals There is a wide difference between mental defect and insanity or mental disease, and each must be considered separately in its relation to criminal responsibility. It is only within very recent years that a careful study and classification of mental defectives have been made, and the problem of determining the legal responsibility of such persons has not as yet been fairly faced.

Regarding the question of criminal responsibility it must always be borne in mind that this is a legal question. Criminal responsibility means accountability according to the requirements of the criminal law, which determines what acts shall constitute crimes and establishes the essential elements of these crimes. According to our law the test of responsibility in all offenses except a small group of mild wrongs, which may be described as public torts and prohibitions within the police power, is the existence of *mens rea* or criminal mind, often called criminal intent. The problem for this committee accordingly has been to frame a provision that is based upon this fundamental principle of the criminal law, and at the same time is consistent with the established theories of the medical profession regarding mental disease. The difficulty with the present law relating to insanity is that it prescribes tests of responsibility which are not in accord with general principles of law and has incorporated into itself obsolete medical views of mental disease.

In 1911 this committee tentatively proposed the draft of a bill providing:

First. A test of criminal responsibility when insanity is let up as a defense.

Second. The procedure for determining this, and

Third. The disposition to be made of one who has been found to be insane so as not to be unusually responsible.

This draft after much discussion was slightly amended the following year, and was again tentatively reported in the following form:

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 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 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 pre-

sents 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.

Since that time the proposal has been elaborately discussed and commented upon in legal periodicals and judicial opinion. It has also been compared with the proposals of other organizations and has been subjected to searching criticism by the advocates of these other proposals. So well has the proposal withstood criticism that the committee, already convinced of its logical soundness and practical workableness, now feels itself in a position to present the measure in final form. The last two sections of the original proposal relating to the writ of *habeas corpus* and appeal from commitment order are withdrawn as it is believed they are not closely enough connected with the main features of the plan to be included in the same bill. Several changes in phrasing, which are considered improvements, have been made. Your committee presents as its final report on this point the following draft, which the Institute is asked to approve:

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

Sec. 2. When 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 at the time when he did the act or made the omission charged, then if the jury before whom such person is tried concludes 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, then the jury shall return a special verdict that the accused did the act or made the omission charged against him but was not at the time legally responsible, by reason of his mental disease.

Sec. 3. When such special verdict is found, the court shall remand the prisoner to the custody of [the proper officer][1] and shall immediately order an inquisition by [the proper persons][1] to determine whether

[1] When this bill is introduced in the legislature of any state, the titles of the persons, whose duty it is, according to the law of the state, to conduct an inquisition, shall be inserted here, as it is not proposed to change the prevailing practice in this respect.

the prisoner is at that time suffering from a mental disease so as to be a menace to the public safety If the members of the inquisition find that such person is mentally diseased as aforesaid, then the judge shall order that such person be committed to the state hospital for the insane, to be confined there until he shall have so far recovered from such mental disease as to be no longer a menace to the public safety. If they find that the prisoner is not suffering from mental disease as aforesaid, then he shall be immediately discharged from custody.

The proposed measure establishes a direct relation between criminal responsibility and mental disease. As has already been stated, the standard of responsibility in practically all cases is the existence of the criminal mind, as defined by law, at the time of the doing of the wrongful act. Any fact which negatives this state of mind removes one of the requisites for conviction. Mistake of fact, for instance, is a good defense, when by reason of it the defendant did not have the guilty mind at the time of his act. Consequently the provision now under discussion is seen to be in strict accord with a fundamental principle of the criminal law.

The proposed provision is also consistent with the present views of the medical profession regarding mental disease, for it does not limit the defense to any particular form or symptoms of mental disease, and does not attempt to draw the line between sanity and insanity. Psychiatrists and psychologists no longer regard insanity as a definite, clearly defined state, with a sharp line of cleavage separating it from sanity, but simply as mental unsoundness which may be as varied in its forms, degrees, and symptoms as physical ill health. Under this proposal the expert witness would not be required to state categorically whether the defendant was sane or insane at the time of the alleged crime, but would be asked to state the symptoms of his disease. The judge would then describe to the jury the state of mind which is involved in the crime charged, and the jury would then determine whether the defendant, by reason of the mental symptoms enumerated by the witness, had the particular state of mind described by the judge. It would not be necessary for the expert witness or the judge to use technical terms in performing their respective functions and as a result the jury would have less difficulty than at present in reaching an intelligent and appropriate verdict.

According to the proposed plan, in case the jury find that the defendant did not have the necessary criminal mind by reason of his mental disease, they will return a verdict to this effect, and the court

will then order an inquisition to determine whether the defendant is then suffering from a mental disease so as to be a menace to the public health and safety. If the jury so find, then the judge will commit him to a hospital for the insane. The issue in this second inquiry into the defendant's mental condition is necessarily different from the first. Then the question was whether he was guilty of a crime committed in the past; now the question is whether he is a safe person to be at large.

Under our present law on the subject of insanity the question is whether the defendant by reason of his mental disease shall be held not responsible to the law for the injury he has done. There is another question which is almost equally important, and that is whether a mental disease, although not of sufficient degree to relieve entirely from responsibility, may not be held to lessen the degree of the crime. For instance, may not a person charged with murder escape conviction for that offense because by reason of his mental disease he did not have the malice aforethought, but be found to have enough *mens rea* to be guilty of manslaughter? This doctrine of partial responsibility has been adopted by some continental countries and has earnest advocates here. The Supreme Court of Utah in a decision rendered last year applied this doctrine. (State v. Anselmo, 148 Pac. 1071.) If the proposal of the committee be accepted, partial responsibility follows as a logical conclusion

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Although the subject of expert testimony was not included in the original scope of this committee, yet as it plays such an important part in the trial of cases where insanity is set up as a defense, and is so often regarded as productive of miscarriages of justice in such cases, it was decided that the solution of this problem should also be undertaken. Accordingly in 1914 the following draft was submitted to the Institute, and was unanimously approved:

Sec. 1. *Summoning of Witnesses by Court.* Where the existence of mental disease or derangement on the part of any person becomes an issue in the trial of a case, the judge of the trial court may summon one or more disinterested qualified experts, not exceeding three, to testify at the trial. In case the judge shall issue the summons before the trial is begun, he shall notify counsel for both parties of the witnesses so summoned. Upon the trial of the case, the witnesses summoned by the court may be cross-examined by counsel for both parties in the case. Such summoning of witnesses by the court shall

not preclude either party from using other expert witnesses at the trial.

Sec. 2. *Examination of Accused by State's Witnesses* In criminal cases, no testimony regarding the mental condition of the accused shall be received from witnesses summoned by the accused until the expert witnesses summoned by the prosecution have been given an opportunity to examine the accused.

Sec. 3. *Commitment to Hospital for Observation.* Whenever in the trial of a criminal case the existence of mental disease on the part of the accused, either at the time of the trial or at the time of the commission of the alleged wrongful act, becomes an issue in the case, the judge of the court before whom the accused is to be tried or is being tried shall commit the accused to the State Hospital for the Insane, to be detained there for purposes of observation until further order of court The court shall direct the superintendent of the hospital to permit all the expert witnesses summoned in the case to have free access to the accused for purposes of observation The court may also direct the chief physician of the hospital to prepare a report regarding the mental condition of the accused. This report may be introduced in evidence at the trial under the oath of said chief physician, who may be cross-examined regarding the report by counsel for both sides.

Sec. 4. *Written Report by Witness.* Each expert witness may prepare a written report upon the mental condition of the person in question, and such report may be read by the witness at the trial. If the witness presenting the report was called by one of the opposing parties, he may be cross-examined regarding his report by counsel for the other party. If the witness was summoned by the court, he may be cross-examined regarding his report by counsel for both parties.

Sec. 5. *Consultation of Witnesses.* Where expert witnesses have examined the person whose mental condition is an element in the case, they may consult with or without the direction of the court, and if possible, prepare a joint report to be introduced at the trial.

This bill was also approved by the Conference on Medical Legislation of the American Medical Association, and with the exception of the third section, by the Committee on Jurisprudence and Law Reform of the American Bar Association. The bill as approved by the Institute was introduced in several legislative bodies, and was freely discussed there. The committee is now of the opinion that the bill in its present form is too comprehensive, and includes several sections not closely enough connected with the main provisions of the bill.

Three sections apply both to criminal and civil cases. The section on commitment of an accused person to a hospital for observation, though important in itself is rather foreign to provisions relating exclusively to expert witnesses. In addition to this, section 2, which provides that the accused shall not be permitted to introduce expert testimony unless he submits to an examination by the prosecution's witnesses, is extremely doubtful from a constitutional point of view. Accordingly the committee has decided to limit the scope of sections one and four to criminal cases and to ask that these sections be approved independently of the others. Several verbal changes have been made in section 1 and section 4, which now becomes section 2. The bill is now presented in the following form, which the Institute is requested to approve:

Sec. 1. *Summoning of Witnesses by Court.* Whenever in the trial of a criminal case the issue of insanity on the part of the defendant is raised, the judge of the trial court may call one or more disinterested qualified experts, not exceeding three, to testify at the trial, and if the judge does so, he shall notify counsel of the witnesses so called, giving their names and addresses. Upon the trial of the case, the witnesses called by the court may be examined regarding their qualifications and their testimony by counsel for the prosecution and defense. Such calling of witnesses by the court shall not preclude the prosecution or defense from calling other expert witnesses at the trial. The witnesses called by the judge shall be allowed such fees as in the discretion of the judge seem just and reasonable, having regard to the services performed by the witnesses. The fees so allowed shall be paid by the county where the indictment was found.

Sec. 2. *Written Report by Witnesses.* When the issue of insanity has been raised in a criminal case each expert witness, who has examined or observed the defendant, may prepare a written report regarding the mental condition of the defendant based upon such examination or observation, and such report may be read by the witness at the trial after being duly sworn. The written report prepared by the witness shall be submitted by him to counsel for either party before being read to the jury, if request for this is made to the court by counsel. If the witness presenting the report was called by the prosecution or defense, he may be cross-examined regarding his report by counsel for the other party. If the witness was called by the court, he may be examined regarding his report by counsel for the prosecution and defense.

One member of the committee, Dr. Prince, is strongly of the

opinion that section 3 should be approved as an integral part of one of the two proposals submitted to the Institute.

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