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Partial Insanity

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PARTIAL INSANITY

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For obvious reasons the legal conception of criminal capacity cannot be limited to those of high intellectual endowments. Neither can it be restricted to those of average mental powers. A few may be recognized as so far from normal as to be entirely beyond the reach of the machinery of criminal justice; but that machinery must be potentially applicable to the "mine run" of the population, so to speak, and therefore must be capable of reaching most of those who are below the median line as well as all who are above it. Hence criminal incapacity is not established by a mere showing of weakness of intellect,[1] a low order of intellect,[2] mental deficiency,[3] or a sub-normal mentality.[4] Neither is it sufficient to show that defendant is more ignorant and more stupid than common men,[5] or is an illiterate, ignorant and passionate man,[6] or is suffering from "shell shock."[7] Furthermore one may have criminal capacity although of an irritable temper and excitable disposition[8] or in spite of being deaf and dumb.[9] On the other hand, mental deficiency may be of such an extreme nature as to leave the individual without the capacity to commit crime.

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[1]*People* v. *Hurley,* 8 Cal. 390 (1857); *Conway* v. *State,* 118 Ind. 482, 21 N. E. 285 (1888); *State* v. *Palmer,* 161 Mo. 152, 61 S. W. 651 (1900).

[2]*Powell* v. *State,* 37 Tex. 348 (1872).

[3]*Commonwealth* v. *Szachewicz,* 303 Pa. 410, 154 Atl. 483 (1931).

[4]"A sub-normal mentality is not a defense to a charge of crime unless the accused is by reason thereof unable to distinguish between right and wrong with respect to the particular act in question." *People* v. *Marquis,* 344 Ill. 261, 267, 176 N. E. 314, 74 A. L. R. 751 (1931).

[5]*United States* v. *Cornell,* Fed. Cas. No. 14,868, 2 Mason 91 (1820).

[6]*Fitzpatrick* v. *Commonwealth,* 81 Ky. 357 (1883).

[7]"Shell-shock" does not constitute such insanity as to bar criminal responsibility if there is sufficient reasoning capacity to distinguish between right and wrong as to the particular act, and knowledge and consciousness that it is wrong and criminal, and will subject to punishment. *People* v. *Gilberg,* 197 Cal. 306, 240 Pac. 1000 (1925).

[8]*Willis* v. *People,* 32 N. Y. 715 (1865).

[9]*Regina* v. *Whitfield,* 3 Car. & K. 121 (1850). In ancient times there was no known method of communicating ideas to one who was *born* deaf, blind, and dumb. Hence the early law presumed such a person to be an idiot, 1 Bl. Comm. 304. But since it is now known that such an unfortunate is not by reason of this fact alone "wanting all those senses which furnish the human mind with ideas" (Ibid.), this presumption no longer prevails. *State* v. *Howard,* 118 Mo. 127, 24 S. W. 41 (1893). Thus the test of the contractual capacity of such persons "is placed upon its proper ground—their mental capacity." *Barnett* v. *Barnett,* 54 N. C. (1 Jones Eq.) 221, 222 (1854).

Hale divides the subject of mental disorder into (1) partial insanity and (2) total insanity.[10] Total insanity he characterizes as "total alienation of the mind," "absolute madness, and total deprivation of memory," thus picturing the "totally deprived of understanding and memory" concept which was anciently read into the word "insanity" itself.[11] Partial insanity, he says, may be (1) "in respect to things," or (2) "in respect of degrees,"[12] saying with reference to the first: "some persons, that have a competent use of reason in respect of some subjects, are yet under a particular *dementia* in respect of some particular discourses, subjects or applications . . . ."[13] This suggests the "not otherwise insane" idea referred to by the judges in their answers to the House of Lords.[14]

If we think of a house divided into rooms, walled apart with sound-proof partitions, permitting one room to be in the wildest confusion while order prevails in the rest of the building, we have the basis for a very fair analogy to the primitive notion of what might take place in the human mind. From the standpoint of science, however, this is quite an obsolete theory. The mind is not composed of independent compartments. It is not a group of units, but is itself a unit, the parts of which are so interrelated and interdependent that unsoundness at any point disturbs the soundness of the whole.[15] Hence if we are to speak without contradiction, it is necessary to abandon the reference to the insanity of a mind which is "not otherwise in-

[10]1 Hale, P. C. 30.

[11]"Bracton's idea of an insane patient was evidently limited to a furious or raving maniac." Wharton and Stille, Medical Jurisprudence, Mental Unsoundness, 510.

"So if a man *non sanae memoriae* kills another . . . he has not broken the law, because he had no memory or understanding . . . and therefore . . . there is no fault in him . . . ." *Reniger* v. *Fogossa*, 1 Plowden 1, 19, 75 Eng. Rep. 1 (1548).

Sir Edward Coke adopted Bracton's suggestion that the insane man does not know what he is doing, is lacking in mind and memory and not far removed from the brutes: Beverley's Case, 4 Coke 123b, 124b, 76 Eng. Rep. 1118 (1603); and in his later writing emphasized the total loss of memory and understanding: 2 Co. Litt. 247a (1628).

[12]1 Hale P. C. 30.

[13]*Ibid.*

[14]M'Naghten's Case, 10 Clark & F. 200, 8 Eng. Rep. 718 (1843).

[15]"So long as we bear in mind that mental life consists primarily of a striving (conation) of certain innate tendencies (instincts), elaborated into sentiments (and complexes), toward more or less consciously conceived goals; that the higher mental processes involved in intention cannot be divorced from the conative-emotional modes of mental life and the sentiments built about them; so long, in brief, as we bear in mind the *unity of mind*, we will run little danger of becoming confused . . . ." Glueck, Mental Disorder and the Criminal Law 119; with a footnote reference to William McDougall, Body and Mind (5th ed.) c. xxi.

sane." Hale's subdivision of partial insanity "in respect to things" finds no support in the scientific teachings of today.

Partial insanity "in respect of degrees" remains. This is an outgrowth of the ancient notion that "insane" referred to "a man that is totally deprived of his understanding and memory."[16] Starting with this point of view, any recognition of mental disorders of a lesser kind suggested the idea of "partial insanity." If the matter were so simple as to permit a classification of minds as (1) sane, (2) partially insane, and (3) totally insane, representing well-defined groups to which legal consequences might be assigned without further inquiry, it would be highly desirable for this to be done. The actual complexities, however, are such that an over-simplification of this nature would tend to confusion rather than to clarity. It is highly unlikely that one "totally insane" in the original sense would offer any problem at the present time. His case will take care of itself.[17] If only one legal problem were involved, the phrase "partial insanity" might be assigned to such mental disorder as resulted in legal consequences other than the normal. But many quite different legal problems are possible, such as whether the person has criminal capacity, whether he is triable,[18] whether he may properly be sentenced, or executed,[19] whether he should be committed to a hospital, whether he has testamentary capacity, etc. The original notion that a sane person had a mind but that one who was insane had *no mind* permitted all of these problems to be answered at once. The present position "that a man may have some intelligence and still be insane"[20] requires the inquiry to be conducted in the light of the particular issue at stake, because the nature of his mental disorder may incapacitate for some purposes but not for others. Hence the search is not for a label such as "insanity" or "total insanity" or "partial

[16] *Rex* v. *Arnold*, 16 St. Tr. 695, 765 (1724).

[17] "But these cases are not only extremely rare, but can never become the object of judicial difficulty. There can be but one judgment concerning them." From Erskine's famous argument in Hadfield's Case, 27 St. Tr. 1281, 1313 (1800).

[18] "Also, if a man in his sound memory commits a capital offense, and before arraignment he becomes mad, he ought not to be arraigned for it, because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried; for how can he make his defense?" 4 Bl. Comm. 24. See also *Freeman* v. *People*, 4 Denio 9 (N. Y. 1847).

[19] "If, after he be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced, and if after judgment he becomes of non-sane memory, execution shall be stayed: for peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution." 4 Bl. Comm. 24-25.

[20] Wharton and Stille, Medical Jurisprudence, Mental Unsoundness 510.

insanity," but for a condition of "unsoundness of mind (insanity) of such a kind and degree" as to negative criminal capacity or testamentary capacity or whatever the particular problem may be. "Partial insanity in respect of degrees," therefore, does not involve the element of contradition which is inherent in the reference to "partial insanity in respect to things"; but it seems to make no contribution. One who is "partially insane" may or may not have criminal capacity, depending upon the nature and extent of his mental disorder.[21] This can be said as effectively without the use of the adverb. Furthermore, we are never upon a secure footing in this field until we recognize that, as the word is commonly used at the present time, it is possible for an insane man to be guilty of crime—that it is only insanity of a certain kind or degree which precludes criminal guilt.[22]

[21] *State* v. *Hackett*, 70 Iowa 442, 30 N. W. 742 (1886); *Commonwealth* v. *Rogers*, 48 Mass. (7 Metc.) 500 (1844); *State* v. *Keerl*, 29 Mont. 508, 75 Pac. 362, 101 Am. St. Rep. 579 (1904); *State* v. *Harrison*, 36 W. Va. 729, 15 S. E. 982, 18 L. R. A. 224 (1892).

". . . the law does not recognize every degree of feeble-mindedness as a defense to a criminal charge . . . ." *State* v. *Schilling*, 95 N. J. Law 145, 148, 112 Atl. 400 (1920).

[22] Judge Tracy refers to "such a madman as is to be exempted from punishment." *Rex* v. *Arnold*, 16 St. Tr. 695, 763 (1724).

"The kind and degree of insanity available as a defense to crime has many times been defined by the decisions of this court." *People* v. *Gilberg*, 197 Cal. 306, 313, 240 Pac. 1000 (1925).

"Before the jury can acquit the prisoner on the ground of insanity, they must believe . . . that his insanity was of such character . . . ." *Fisher* v. *People*, 23 Ill. 283 (1860).

"Whilst such a person could not be regarded as sane, yet he would be criminally responsible for his acts, unless . . . ." *State.* v. *Stickley*, 41 Iowa 232, 240 (1875).

"If he was insane at the time to the extent . . . ." *State* v. *Strasburg*, 60 Wash. 106, 119, 110 Pac. 1020 (1910).

"The question whether the defendant in any case was affected with insanity to such a degree as will excuse him from the commission of an act which would be criminal if done by a sane person is one of fact . . . ." *State* v. *Keerl*, 29 Mont. 508, 520, 75 Pac. 362, 101 Am. St. Rep. 579 (1903).

"It follows, therefore, that even if a score of brain specialists come to Court and swear a murderer is insane he can nevertheless be found guilty and sentenced if his insanity falls short of the legal requirements." Meredith, Insanity as a Criminal Defense, 33.

The word "insanity" is sometimes used loosely to mean that kind and degree of mental disorder which precludes criminal capacity. When the lawyer uses it in this sense he invites misunderstanding because he is not speaking the same language as the doctor. For example—

"To the medical man, insanity is a general term, merely a convenient and arbitrary expression to define certain kinds and degrees of mental derangement. . . . On the other hand, amongst the insanities are to be found derangements of slight degree and importance." Dr. Morton Prince (discussion of committee report) 2 Jour. of Crim. and Cr. 538, 540.

"Much of the criticism directed from the medical side is based upon a misapprehension. . . . When once it is appreciated that the question is a *legal* question, and that the law is that a person of unsound mind *may* be criminally responsible, the criticism based upon a supposed clash between the legal

Whether there is anything which may usefully be considered under the head of "partial responsibility" remains to be considered. Responsibility means "answerability" or "accountability." One is criminally responsible if he must answer to the criminal law for his act.[23] At a time when one who had taken the life of another was not entitled to an acquittal on the ground of misadventure, or self-defense or insanity,[24] these had nothing to do with *criminal responsibility.* The feeling that they *should* have something to do with it resulted in a change in the law, and now they *may* be such as to negative criminal responsibility. Thus a man who has committed homicide in his own defense under circumstances in which he was privileged by law to resort to such an extreme measure, is not criminally responsible for the killing, just as another may not be criminally responsible for an act committed while suffering from such unsoundness of mind that he was incapable of understanding the nature and quality of the act or of distinguishing between right and wrong with reference thereto (not to mention other forms of mental disorder as to the effect of which there is considerable disagreement).

As one may commit homicide unlawfully, but under a sudden passion arising from such provocation that the offense will be manslaughter rather than murder,[25] it is clear that partial responsibility is not unknown to the law—at least in a sense. But this, together with the references to misadventure and self-defense, points to our present inquiry as one looking for a lack, or partial lack, of criminal responsibility due to a lack, or partial lack, of criminal capacity. The real problem, therefore, seems to be whether the law takes notice

and medical conceptions of insanity disappears." Report of Lord Atkin's committee published in 1923. Quoted in Meredith, Insanity as a Criminal Defense, 112.

[23]"Criminal responsibility means accountability for one's actions to the criminal law."

"Insanity and Criminal Responsibility" (Report of Committee B of the Institute—Edwin R. Keedy, Chairman) 2 Jour. of Crim. and Cr. 521, 523.

". . . responsibility means forced amenability to *socio*-penal treatment . . . ." Glueck, Mental Disorder and the Criminal Law 178, note.

Hopeless confusion results if the conception of criminal responsibility—accountability for one's actions to the criminal law—is confused with the rationalization of some particular person or school as to why responsibility is or is not present in a certain situation. Such confusion has caused one writer to refer to "this ethico-legal and quasi-religious conception." Weihofen, Insanity as a Defense in Criminal Law, 428.

[24]"The man who commits homicide by misadventure or in self-defense deserves but needs a pardon." 2 Pollock & Maitland, History of English Law, 477. And see the form for pardon of one who killed as a result of madness, quoted from the patent rolls of Henry III, on page 478.

See also 2 Stephen, Hist. Cr. L. 151.

[25]*State* v. *Vance,* 17 Iowa 138 (1864).

of a partial criminal capacity. From one point of view, an affirmative answer is required. Without going farther than the "right and wrong" test, it may be seen that the inquiry is not whether there was inability to distinguish between right and wrong in general, but to make this distinction "in respect to the very act with which he is charged."[26] Thus, in legal theory at least, a man who has done two quite different prohibited acts at the same time, while laboring under mental disorder of a certain nature, might be found to have had criminal capacity with reference to the one and not as to the other.

This is not, however, the point at which such an inquiry is ordinarily directed. Whether the phrase is partial (criminal) responsibility, or as seems preferable, partial (criminal) capacity, the problem is usually whether or not unsoundness of mind (insanity) may be of such a nature as not to entitle the defendant to an acquittal, but on the other hand to call for a conviction of some lesser grade or degree than would result had his mind been sound. "Can evidence of some degree of mental unsoundness reduce to murder in the second degree or manslaughter a crime which, had the defendant been perfectly sound mentally, would have been first degree murder?"[27] If the trial is for first degree murder in New York, for example, may it be possible for such mental disorder to be shown as to support a conviction of some sort, but not of murder in the first degree, on the ground that defendant's mind at the time was incapable of a *deliberate* and *premeditated design* to effect the death of the person killed?[28]

The courts are not agreed as to how these questions should be answered. Some have rejected the notion that there may be mental disorder of such a nature as to diminish the degree of guilt without establishing innocence,[29] announcing flatly that insanity must be either

[26]M'Naghten's Case, 10 Clark & F. 200, 8 Eng. Rep. 718 (1843). See also *People* v. *Johnson*, 2 Pac. (2d) 216 (Cal. 1931); *Hornish* v. *People*, 142 Ill. 620, 32 N. E. 677, 18 L. R. A. 237 (1892); *Bovard* v. *State*, 30 Miss. 600 (1856); *State* v. *Murray*, 11 Ore. 413, 5 Pac. 55 (1884).

[27]Glueck, Mental Disorder and the Criminal Law, 199-200.

"To conceive that an individual is either absolutely responsible or absolutely irresponsible is to fly in the face of perfectly patent facts that are in everybody's individual experience and is only comparable to such beliefs of the Middle Ages that a person is possessed of a devil or is not possessed of a devil, and therefore is or is not a free moral agent." William A. White, Insanity and the Criminal Law, 89 (1923).

[28]The New York statute provides other grounds of first degree murder, but this may be the one relied upon in a particular case. See N. Y. Pen. Code sec. 1044.

[29]*Commonwealth* v. *Cooper*, 219 Mass. 1, 106 N. E. 545 (1914).

Weihofen, after an exhaustive study, lists seven jurisdictions as having definitely rejected the notion that one with sufficient reason to be guilty of

a complete defense or none at all.[30] They have mentioned specifically that there is no grade of insanity sufficient to acquit of murder but not of manslaughter.[31] Other courts have reached the opposite conclusion, recognizing the possibility of unsoundness of mind of such a character as to negative guilt of a certain grade or degree without establishing innocence. These tribunals find no legal inconsistency in the notion that mental disorder may be such as to disprove guilt of murder without requiring an acquittal of manslaughter,[32] or may be such as to negative the element of willfulness, deliberation and premeditation needed to establish a certain charge of murder in the first degree without disproving the malice aforethought which is sufficient to convict of murder in the second degree.[33]

Logic seems to favor the second view.[34] Just as intoxication, while not an excuse for crime, may disprove the presence of some particular state of mind and hence show "that the less and not the

murder, may not, because of mental disorder, have capacity to commit first degree murder. These states are Arkansas, California, District of Columbia, Massachusetts, Missouri, Pennsylvania and Washington. He also lists Illinois, Kentucky and Texas as doubtful. Weihofen, Insanity as a Defense in Criminal Law, 101.

[30]*Commonwealth* v. *Wireback,* 190 Pa. St. 138, 42 Atl. 542 (1899).

"We have no degrees of insanity in the criminal law, and a person is entitled to be acquitted by reason of his insanity if he does not know the right or wrong of the act he is charged with; if he has sufficient mind to know and appreciate the fact that the act is wrong, he is held responsible for the act he commits, and the law is or should be measured out to each individual alike." *Kirby* v. *State,* 68 Tex. Cr. R. 63, 74, 150 S. W. 455 (1912).

". . . we have but two classes of people, the 'sane' and the 'insane.' Actual insanity, however partial it may be, is, consequently, with us a defense, and not a mitigating circumstance, in a prosecution for a crime." *Sage* v. *State,* 91 Ind. 141, 145 (1883).

[31]*United States* v. *Lee,* 4 Mackey 489, 54 Am. Rep. 293 (1885); *Witty* v. *State,* 75 Tex. Cr. R. 440, 171 S. W. 229 (1914).

[32]With reference to a certain kind of mental disorder, the court said: "Though such a state of mind would not excuse the homicide, it should reduce it to manslaughter, for deliberation would be absent, and that is essential to constitute murder." *Fisher* v. *People,* 23 Ill. 283, 295 (1860).

[33]The court approved an instruction to the jury that feeble-mindedness not sufficient to require an acquittal, might show inability to form a specific intent to kill with the *wilful, deliberate, and premeditated* character required for first degree murder, leaving the offense murder in the second degree. *State.* v. *Schilling,* 95 N. J. Law 145, 148-9, 112 Atl. 400 (1920).

Unsoundness of mind may be considered on the question of deliberation and premeditation, even if not sufficient to constitute complete incapacity to commit crime. *State* v. *Anselmo,* 46 Utah 137, 148 Pac. 1071 (1915).

Weihofen finds support for this view in eight or nine states: Connecticut, Indiana, New Jersey, New York (dictum), Rhode Island, Tennessee, Utah, Virginia and Wisconsin. Weihofen, Insanity as a Defense in Criminal Law, 101.

[34]See Edwin R. Keedy, "Insanity and Criminal Responsibility," 30 Harv. L. Rev. 535, 552-4 (1917); Glueck, Mental Disorder and the Criminal Law 199 *et seq.*

greater offense was in fact committed,"[35] it would seem possible for mental disorder to be of such a nature as to produce the same result. The problem may be approached from another angle, once more limiting the attention to the "right and wrong test" of insanity.[36] Since the question is not ability to distinguish right from wrong in general "but in respect to the very act,"[37] there would be no legal inconsistency in the notion that a man suffering from mental disorder of a certain nature could make this distinction with reference to killing a man but not with reference to burning a building. If so, he would have criminal capacity to commit murder, but not to commit arson. It would seem to follow that if he were charged with first degree murder on the ground that he committed homicide while committing arson in the first degree,[38] the circumstances might be such as to establish murder in the second degree only, on the ground that his burning would not amount to arson.[39]

Notwithstanding the leaning of logic in this direction, greater promise of socially desirable results may lie in another. To whatever extent insanity is recognized as going to the question of guilt or innocence, it becomes a matter for the jury. Legislative attempts to take such issues out of the trial and have them disposed of by some other machinery have been held to violate the defendant's constitutional right to have every aspect of guilt or innocence passed upon by the jury.[40] On the other hand, the possibility of mental dis-

[35]"Intoxication is admissible in such cases, not as an excuse for crime, not in mitigation of punishment, but as tending to show that the less and not the greater offense was in fact committed." *State* v. *Johnson,* 40 Conn. 136, 143-4 (1873).

[36]If, by using the "right and wrong" test alone, mental disorder may be shown to be of such a nature as to diminish the degree of guilt without establishing innocence, the point would seem to be established, since the result would be more easily reached under a broader view of the effect of mental disorder on criminal capacity. The limitation is for this reason only.

[37]M'Naghten's Case, 10 Clark & F. 200, 8 Eng. Rep. 718 (1843).

[38]In New York, for example, murder "when perpetrated in committing the crime of arson in the first degree" is murder in the first degree. N. Y. Pen. Code, sec. 1044.

[39]If there was no evidence of malice other than the alleged arson, there would be no murder if there was no arson. But the facts might be sufficient to establish malice aforethought on some other ground, but with no other basis than the alleged arson to support the "first degree" part of the charge. If the owner of a building should attempt to interfere with one who was in the act of burning it down, and that one should kill the owner under circumstances which would amount to second degree murder on the part of an ordinary trespasser; whether this particular killing did or did not amount to first degree murder would seem to depend upon whether this burning did or did not amount to arson. Compare *People* v. *Roper,* 181 N. E. 88 (N. Y. 1932).

[40]Since the "criminal intent," as well as the prohibited act, is necessary to constitute guilt of crime, a statute providing that insanity is no defense to

order being sufficient for mitigation of punishment though insufficient to affect the issue of guilt itself, has been recognized.[41]

If a defendant has been convicted of an offense for which the court has power to exercise discretion in fixing the punishment, it may conduct a hearing in which matters either in mitigation or in aggravation may be brought to light.[42] "It seems clear that the fact that the defendant at the time of the act was to a certain degree mentally abnormal, though not so abnormal as to be held irresponsible, is one such circumstance which may be taken into consideration by the court in passing sentence, although it is true that the cases on the point are meager."[43] The outstanding example of this is the Loeb-Leopold case in Chicago, in 1924, in which a lawyer of wide experience in the defense of criminal cases[44] had his clients enter pleas of guilty and throw themselves upon the mercy of the court. After a hearing in which psychiatrists testified both for the state and the defense, the court did not impose the sentence of death, but made use of imprisonment.

Our present machinery is inadequate in this respect, but it could be improved by statute without encountering constitutional difficulties. It is within the power of the legislative body to make special provision for outstanding peculiarities of the offender in the socio-penal treatment to be imposed after conviction. Just as the Texas statute withholds the death penalty from those under the age of seventeen,[45] so a legislative enactment could make a similar provision for those suffering from certain kinds of mental disorders which are held to be insufficient to warrant an acquittal. "The Italian Penal Code, for example, provides (Art. 47) that if the defendant's mental infirmity was 'such as greatly to diminish responsibility, without, however, excluding it, the punishment prescribed for the crime committed is to be reduced.' "[46]

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crime is unconstitutional. *State* v. *Strasburg,* 60 Wash. 106, 110 Pac. 1020 (1910).

See also *State* v. *Lange,* 168 La. 958, 123 So. 639 (1929); *Sinclair* v. *State,* 161 Miss. 142, 132 So. 581 (1931).

[41]Mental disorder which is insufficient to establish innocence may be such as to call for a mitigation of punishment. Appeal of Holder, 7 Crim. App. R. 59 (1911); Appeal of McQueen, 8 Crim. App. R. 89 (1912).

[42]*State* v. *Reeder,* 79 S. C. 139, 60 S. E. 434 (1907).

[43]Weihofen, Insanity as a Defense in Criminal Law, 107.

[44]Mr. Clarence Darrow.

[45]"A person for an offense committed before he arrived at the age of seventeen years shall in no case be punished with death." Tex. Pen. Code art. 31.

[46]Weihofen, Insanity as a Defense in Criminal Law, 99, note 100. He adds that similar provisions are to be found in the codes of Denmark, Finland, Greece, Japan, Norway, Sweden, and the Swiss cantons.

If there were proper statutory authority therefor, an inquiry might be made, after conviction, to determine whether the defendant had committed the crime while suffering from mental disorder of such a nature as to entitle him to different treatment than that otherwise provided; and such an inquiry would not require the aid of a jury, since no question of guilt or innocence would be involved. It might be made by a "treatment tribunal" quite separate from the trial court itself. The most scientific modes available for determining the existence of such disorders could be used without raising constitutional problems. At this point an analogy may well be drawn from the field of probation in spite of the fact that this device is ordinarily not available in the type of cases in which the insanity defense is most commonly employed. Although probation has been abused at times, and has all too seldom been guided by hands sufficiently experienced to give a reasonable promise of success, it is rather commonly conceded to have a proper place in the general scheme of socio-penal treatment.[47] A young man, for example, may make a misstep which amounts to a crime, under circumstances which do not seem to call for the treatment usually provided for such an offense. But whether or not there are such circumstances in a particular case is not a matter which must be determined by the jury. In truth, the only hope for ultimate success in the field of probation lies in the fact that it is quite apart from the guilt-finding part of the machinery of justice.

It seems remarkable that so little attention has been given to the possibility of having all but the most extreme cases of mental disorder receive attention after guilt has been established. The complaint of not taking sufficient notice of "partial insanity" in the trial of a criminal case, is utterly inconsistent with the complaint that this difficult problem is left to twelve persons who have no training or experience in this field. Yet it is not uncommon to hear both uttered in almost the same breath. It is true that a literal and rigid application of the "right and wrong" test[48] would leave very little for the jury to do as far as insanity is concerned, because cases of such ex-

[47]See Glueck, Probation and Criminal Justice.

[48]As to the so-called "right and wrong" test in general see: M'Naghten's Case, 10 Clark & F. 200, 8 Eng. Rep. 718 (1843); *Regina* v. *Layton*, 4 Cox C. C. 149 (1849); *McAlister* v. *State*, 17 Ala. 434, 52 Am. Dec. 180 (1850); *People* v. *Johnson*, 115 Cal. App. 704, 2 Pac. (2d) 216 (1931); *Ryan* v. *People*, 60 Colo. 425, 153 Pac. 756, Ann. Cas. 1917 C. 605 (1915); *Bridges* v. *State*, 43 Ga. App. 214, 158 S. E. 358 (1931); *Hornish* v. *People*, 142 Ill. 620, 32 N. E. 677, 18 L. R. A. 237 (1892); *State* v. *Mowry*, 37 Kan. 369, 15 Pac. 282 (1887).

treme mental disorder are very seldom tried in the criminal courts. But is not this a "consummation devoutly to be wished?"

The effort of the Classical School to establish in advance an exact measure of punishment for each transgression, by the creation of new offenses, and the division of others into degrees, etc., has been found to be inadequate. The modern trend is toward individualization of treatment as evidenced by such techniques as indeterminate sentence, probation and parole. Unsoundness of mind of every kind and degree would seem to require consideration in a fully developed scheme of individualized socio-penal treatment; but it would seem wiser to leave most of this field to the part of the machinery which functions after conviction, than to inject an increasing amount of it into the jury trial itself. Probably the social interests in the general security and the social interests in the individual life would both be promoted by keeping within rather narrow limits the kind and degree of mental disorder which entitles the defendant to a verdict of not guilty, while at the same time readjusting the machinery after the point of conviction in such a manner as to keep abreast of every contribution of science in the field of disorders of the mind.[49]

[49]The following committees met in joint session in the Mayflower Hotel, Washington, D. C., May 11, 1834:

American Psychiatric Association—
Dr. William A. White, Washington, D. C.
Dr. V. C. Branham, Albany, New York.
Dr. Winfred Overholser, Boston, Massachusetts.
Dr. C. P. Oberndorf, New York City.

American Medical Association—
Dr. William C. Woodward, Chicago, Illinois.
Dr. Winfred Overholser, Boston, Massachusetts.

New York Academy of Medicine—
Dr. Israel Strauss, New York City.
Dr. Dudley D. Schoenfeld, New York City.

American Bar Association, Criminal Law Section—
Mr. Louis S. Cohane, Detroit, Michigan.
Mr. Rollin M. Perkins, Iowa City, Iowa.

At this meeting it was unanimously agreed that it is desirable to keep within rather narrow limits the kind and degree of mental disorder which will entitle the defendant in a criminal case to an acquittal and to readjust the machinery after the point of conviction to the end that mental disorder which is not sufficient for an acquittal may result in treatment other than that provided for persons who are not mentally disordered. After some debate, it was also agreed by all that for the present it will be better to formulate statements of principle along these lines rather than to attempt at this time to draft proposed legislation. Thereupon certain statements of principle were prepared, including the following which received the unanimous approval of those present:

1. Criminal incapacity by reason of mental disorder should be limited within very narrow bounds. The end to be achieved is to

have only the most extreme cases of mental disorder recognized as grounds for acquittal.

2. A defendant acquitted on the ground of insanity shall be committed as a matter of course to the appropriate state hospital for mental diseases; subject to release only on conditions applicable to the release of other committed inmates of the institution together with the approval of the trial court or other appropriate tribunal.

3. Provision should be made whereby mental disorder which is not sufficient for an acquittal may result in treatment other than that provided for convicted persons who are not mentally disordered.