SHOULD THE PLEA OF INSANITY AS A DEFENSE TO
AN INDICTMENT FOR CRIME BE ABOLISHED? *

By CARLOS F. MACDONALD, A. M., M. D., LL. D., NEW YORK.

The subject of this paper was suggested to the writer by a series of reports, three in all, somewhat recently promulgated by a committee of the New York Bar Association on "The Commitment and Discharge of the Criminal Insane." Taking for its text the Thaw Case, which it characterized as "a disgraceful farce," the committee recommends "for earnest consideration" the question: "Has not the time come in the development of our system of penology to relegate to the realm of the obsolete the assumption that an insane man cannot commit a crime? In other words, ought we not to abolish the defense of insanity and leave as the one issue to the petit jury: 'Did the accused do the forbidden deed?'"

The committee then goes on to say that if the accused did not commit the act charged, he is innocent; if he did, he is guilty, and that the jury should have nothing to do with the state of his mind at the time the act was committed; and that, however legally right under the present definition of insanity as laid down in the Code of Criminal Procedure,† it is wrong, sociologically, to find a man not guilty on the ground of insanity. The committee suggests that its views, if sound, could be put into effect by revising Section 20, of the New York Penal Code, with the following words:

Insanity or other mental deficiency shall no longer be a defense against a charge of crime; nor shall it prevent a trial of the accused unless his mental condition is such as to satisfy the court upon its own inquiry that he is unable, by reason thereof, to make proper preparations for his defense.

The committee, while refraining from recommending legislation to effectuate such a radical change in the criminal law, on the ground that public opinion may not yet be ripe for the same, declared that the question ought to be discussed and requested

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† New York.

an expression of opinion from the medical heads of institutions for the insane, and from other organizations interested in such questions, as well as from members of its own Association, as to whether insane persons should be made amenable to the criminal law. In view of this request it seemed to the writer that the subject is one which might properly be brought before this Association for discussion, and, if deemed expedient to do so, possibly the adoption of a formal resolution defining its position in the matter.

It need hardly be said that this suggestion of the committee of the Bar Association, the adoption of which it impliedly advocates, is by no means a new one, it having been advocated, in substance, from time to time, by both alienists and medico-legal jurists, in condemnation of a system which imposes upon a jury of laymen the determination of abstruse questions in medical science.

Without undertaking to revive and set forth all the reasons on which the conclusion that the legislative experiment of abolishing the defense of insanity in jury trials of indictments for crime is based by the advocates referred to, the matter may be briefly summed up in the statement that the determination of the mental condition of a person accused of crime naturally belongs, not to the tribunal, the jury which determines whether as a matter of fact a crime has been committed, but to the tribunal, or rather the successive tribunals who, after a verdict of guilty has been rendered, determine the nature and quantum of the punishment—sometimes whether any punishment at all shall be inflicted, and after punishment has been endured for a time, whether the same shall be continued. In other words, that the work of the jury in ascertaining the mental condition of the accused in order to determine the question of crime, should be transferred to the judge and to the pardoning power, in the performance of their work of ascertaining, first, in some cases, whether the convicted criminal should be punished at all; second, in what manner; third, to what extent; fourth, whether the allotted form of punishment shall be substituted by another form; and fifth, whether after a portion of the punishment has been endured, the subject of it may not be discharged from the remainder.

An eminent jurist ‡ of wide experience on the bench and also, previously, as a prosecutor and a defender, respectively, of criminals in the State of New Jersey, in a recent communication to the writer says:

There is, in my opinion, a fundamental fallacy which vitiates a great deal which has been said and written upon the subject of the defense of insanity. This fallacy consists in supposing that the jury administer justice and that the judge, in imposing sentence, and the governor in exercising his power to commute or pardon, are manifesting the divine attribute of mercy.

It would be, I think, more accurate to maintain that there is no such thing as mercy known to the administration of any system of human laws. A good many of the old and vague theories of the nature of criminal punishment have of late been entirely abandoned.

While it is now very generally conceded that the only justification for the maintenance of a system of criminal punishment is derived from the absolute necessities of society, and that we must continue to maintain our expensive and crude criminal system, notwithstanding the cruel injuries which in particular instances it inflicts upon individuals, solely upon the principle of the greatest good to the greatest number. The learned vice-chancellor says:

According to this view a man pays taxes, gives up his home for the construction of a railway, goes to war and gets shot, goes to jail for larceny, or is electrocuted for murder, for substantially the same reason. There is no room for mercy in the administration of our criminal law, and perhaps when we make the last analysis, the same proposition may safely be laid down with reference to justice. Certainly the notion that we actually succeed in administering Divine justice through our legal machinery for the administration of criminal law, is too preposterous for consideration; yet according to many old theorists, our whole criminal systems were maintained with this very object in view, namely, the administration of Divine justice. The real truth, it seems to me, is that our crude blundering and oftentimes cruel system of punishing criminals, is simply an institution of society maintained for the benefit of society—for the preservation of society. Abandoning all ideas of justice and mercy, to put the matter in the concrete, we may say that a man is punished for crime merely for the benefit of society, which, of course, incidentally may include his own reformation, and this punishment is continued, or ought to be continued, only as long as such continuance is in some way beneficial to society.

We may readily concede that the sole ground on which the state rests its right to punish wrong-doers is the protection of society, without admitting for a moment that the insane should be pun-

‡ Vice-Chancellor Eugene Stevenson.

ished in order to deter them by force of example from violating the laws, an old doctrine which the committee of the New York Bar Association, in its lack of knowledge of the clinical aspects of mental disease, have attempted to revise. In support of its contention, the committee cites the fact that experience at the hospitals for the insane shows that the insane are restrained by fear of punishment as well as the sane. The fact is, as every experienced alienist knows, very few insane persons realize or believe that they are insane, and while many of them, especially the paranoiacs, clearly perceive the abstract nature of crime, and have been known to declare, when speaking of the criminal acts of others, whom they knew to be insane that, being insane, they would not be punished, they cannot apply it to any particular act of their own. They regard themselves as outside the range of such application, consequently they are not induced to commit crime nor to relinquish control of their passions under the idea that they are irresponsible and consequently immune to punishment.

Ray says:

The fact that persons reputed to be insane had suffered the penalty for their crime, would have no more restraining influence than blows or threats in hushing the cries of a new-born infant. No human law can be more imperative than that higher law within him, which impels many an insane man to some act of violence, and no consideration of justice or pity can come in to lighten the stroke provoked by the trivial offense of a neighbor. Indeed, this idea of the insane being deterred from criminal conduct by penal laws, is utterly destitute of foundation, and we challenge its advocates to produce a single instance in point.

Objections to the change proposed by the committee of the Bar Association will naturally revolve around the proposition that there is no crime without criminal intent. Respecting the question of intent, about which much of a metaphysical character has been written, it must be conceded that in a large number of criminal cases, the jury must ascertain the intent of the accused in order to determine whether or not a crime has been committed. The question of intent in these cases, although intimately connected with the question of the mental condition of the accused, nevertheless is plainly distinguishable from that question. If Harry K. Thaw, when he shot Stanford White to death, supposed he was discharging a bullet into a post, then he had no intent to kill, and

could not be found guilty of murder, although he might be guilty of a minor degree of homicide. His real crime would be intentionally discharging a loaded pistol in a crowded apartment with intent to drive a bullet into a post, which act resulted in causing the death of a human being, such result being one which a reasonably prudent man must be presumed to be able to contemplate as highly probable. Now whether the question of sanity or insanity should be left with the jury in certain cases where they are obliged to pass upon the question of criminal intent, is a question which the writer would not undertake to determine. Thaw did not intend to discharge a bullet into a post; he discharged his bullet intentionally into White's body, knowing it was White, whom he intended to kill, and he did precisely what he intended to do. The defense was that Thaw's intention was an insane intention, and consequently he was not guilty of effecting the death of White.

What, let us ask, would be the practical result of abolishing insanity as a defense before the jury against the charge of crime and making it a defense before the judge and before the pardoning tribunal against the imposition of any punishment at all, against the imposition of some punishment and against the exacting of the entire quantum of the allotted punishment after a portion of that punishment had been endured? In answer to this question it might be said that this function naturally belongs to the court and to the governor, or other pardoning power, and is exactly in line with what these officials are doing almost daily in their frequent though often futile efforts to make the punishment fit the crime. After the jury found the defendant guilty, there is no instance, not even murder in the first degree, where the extent of the penalty is not determined by the court or the pardoning tribunal.

In the State of New York, when a man is convicted of murder in the first degree, it is the duty of the court to impose a sentence of death, and it is the duty of the governor to pass upon the question, whether or not the penalty of death, which the court was obliged to inflict, should not be changed to imprisonment for life, or for a term of years, or to a pardon outright. Moreover, in the vast majority of criminal convictions it is the duty of the court to determine whether sentence should be suspended or whether the criminal should be punished by a fine or by imprison-

ment. The amount of the fine and the terms of the imprisonment are largely within the discretion of the court. Hence it logically follows that no judge can discharge his function of measuring out the penalty without taking under consideration the mental condition of the convict and the effect which enticement or provocation might have upon a man whose mind was disordered. A striking instance of the wisdom of exercising this function by the court was shown in the trial in the City of New York a few years ago, of a young man who was convicted of murder in the first degree. The case attracted wide attention, owing to the atrocity of the crime, and after conviction, the learned judge,§ in pronouncing sentence of death, informed the prisoner that in view of the possible existence of some form of mental disorder which might absolve him from responsibility of the crime of which he was charged, the court, of its own motion, had taken the precaution to have him carefully observed by the prison physician, and also during the entire trial by an alienist who was in attendance at the judge's request, and that he was satisfied from the reports of these physicians that there was no question as to his entire responsibility for the crime.

It is safe to say that the trial of Thaw would have occupied but a few hours if the question of his mental condition could have been excluded from the consideration of the jury and left to the determination of the court, aided by a commission of competent alienists selected by the court. A few days at most would have sufficed for this last inquiry, and the result would have been precisely what was reached after two farcical trials, with all their disgusting details, which lasted for many weeks at an enormous expense to the family of Thaw and to the State of New York. Had this method of procedure been adopted, Thaw would have been placed precisely where he was placed, namely, in the Matteawan State Hospital for Insane Criminals.

It has been suggested that this proposed change in our criminal law practice would be less objectionable if juries were never permitted to render a verdict of guilty, if they were required simply to determine if the defendant did or did not commit the act charged in the indictment; and that the indictment itself might

§ Hon. Warren W. Foster.

omit all words which would brand the defendant as a criminal. The function of the jury in criminal cases would then be very like what it is in England to-day in civil cases, under the practice which has been developed largely during the last quarter of a century. The jury answers questions and finds propositions of fact oftentimes without having the slightest intimation from the court as to what the legal result will be from the different possible answers to these questions.

In conclusion, the writer would respectfully submit to the Association, for its consideration, and, if deemed expedient, for an expression of its opinion thereon, the following questions:

First.—The feasibility of substituting in place of the present form of verdict “not guilty by reason of insanity” the form of verdict which has obtained in England for more than three decades, “guilty but insane.”

Second.—Would it not be a more satisfactory way to deal with criminal cases, especially capital ones, in which insanity is pleaded as a defense, to keep the question of insanity entirely out of the case during the trial, and allow the jury to pass only upon the question of the guilt or innocence of the accused, irrespective of his mental condition. Then, if a conviction is had, let the court appoint a commission of competent alienists to determine the defendant’s mental condition, and if he is punishable by reason of mental disease or not. If the function of the jury were restricted to a finding on the facts, that is, if the defendant committed the act as charged, and, subsequently, the question of his mental condition were determined by competent alienists appointed by the court, the finding of such a commission would be accepted by the public, both lay and medical, and there would be no danger of a miscarriage of justice.

The writer does not pretend to say if either of these methods would be feasible, but he believes that either one would be preferable to the present method of determining the mental condition of a defendant which imposes upon a jury of laymen, who, presumably, are not familiar with the phenomena of mental disease, a responsibility which they should not be called upon to assume.

Moreover, the inducement by corrupting largess for favorable expert opinion would be obviated, and thus existing abuses incident to procuring expert testimony would disappear.

Finally, if either of these systems should be established, it would be easier to stop eloquent and tearful advocates from scaring juries by talking about consigning a defendant to state prison for life, to the gallows, or to the electric chair, while at the same time it would tend to mitigate much of the scandal which too often arises in connection with the plea of insanity as a defense to an indictment for crime.