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CRIMINAL LAW IN MISSOURI— THE NEED FOR REVISION

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Each year one issue of the Law Review is traditionally devoted to discussions of "Selected Recent Missouri Court Decisions." These discussions are arranged by subject and one of the subjects is criminal law. In the volumes of the South Western Reporter, Second Series, that would have provide the basis for that article this year,[1] there were 133 decisions by the Missouri appellate courts in the area of criminal law. The crimes involved ranged from traffic offenses through first degree murder,[2] and, as is true

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1. Volumes 357-370 inclusive, South Western Reporter, Second Series.

2. The period involved is more than a calendar year. For those who enjoy statistics which are offered to prove nothing in particular, the breakdown of the decisions by offense is as follows:

Burglary (including joint prosecution for burglary and stealing)	23
Attempted burglary	8
Robbery	20
Assault with intent to rob	4
Murder and manslaughter	18
Assault with intent to kill	2
Assault with intent to do great bodily harm	1
Assault with a deadly weapon	1
Other felonious assault	1
Carrying concealed weapon	1
Common assault	2
Rape	7
Assault with intent to rape	1
Carnal knowledge of female of previously chase character between ages of 16 and 18	1
Abortion	1
Molestation of minors	2
Solicitation for immoral purposes	1
Nonsupport of child	1
Stealing and related offenses (including check offenses)	15
Receiving stolen property	1
Traffic offenses (including driving while intoxicated)	5
Narcotics offenses	4
Subornation of perjury	1
Possession of gambling equipment	1
Failure to file state income tax return	1
Sunday Sales Law	2
Selling milk without a permit	1
Soliciting magazine subscriptions without a license	1

In addition there were two casses on habeas corpus, two motions to vacate

every year, the courts dealt with important and difficult questions.[3] However, the most notable development in the criminal law of Missouri was not contained in or the result of any court decision, but was the enactment by the legislature of the Mental Responsibility Law.[4]

This law, which has been praised as "the soundest American legislation on the topic in a century,"[5] is an effort to codify and improve where necessary the standards and procedures for all of the "situations in which mentally ill persons must be dealt with under the criminal law."[6] This involves not only the relation of mental illness to responsibility[7] but also to the capacity to stand trial,[8] the disposition of those acquitted by reason

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sentence, and two cases dealing with the issuance of search warrants. Ninety-one convictions were affirmed, thirty-one were reversed, and two were affirmed in part and reversed in part. In two cases the lower court's dismissal of charges was affirmed, and there were seven miscellaneous dispositions.

3. Probably the most publicized was Harvey v. Priest, 366 S.W.2d 324 (Mo. 1963), which held in a declaratory judgment action that the then Sunday Sales Law (§§ 563.720-.730, RSMo 1959) was unconstitutional because of vagueness. The legislature responded by enacting a new Sunday Sales Law, § 563.721, RSMo 1963 Supp. Of greater significance in criminal law theory is State v. Bridges, 360 S.W.2d 648 (Mo. 1962), where the court followed Robinson v. California, 370 U.S. 660 (1962), and held unconstitutional those portions of §§ 195.020 and 195.200, RSMo 1959 making it a crime to become addicted to any narcotic drug. For students of courtroom decorum the most interesting case was State v. Deyo, 358 S.W.2d 816, 827 (Mo. 1962), where at the opening of court in the presence of the jury a minister gave the following invocation: "We realize that there are those who commit sin and that they must be punished and ask that we be given the strength to punish them according to Thy will." The conviction of first degree murder was reversed on other grounds, but the court stated, "A word of caution to a minister in appropriate instances should be sufficient."

4. §§ 552.010-.080, RSMo 1963 Supp.

5. Professor Gerhard O. W. Mueller in 19 J. Mo. BAR 650 (1963). This issue (December) of the Journal of the Missouri Bar contains comments on the new law as well as a section by section discussion of the law.

6. Richardson, Reardon & Simeone, *An Analysis of the Law*, 19 J. Mo. BAR 677, 681 (1963).

7. § 552.010, RSMo 1963 Supp. defines "mental disease or defect" and § 552.030, RSMo 1963 Supp. provides that:

> A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he did not know or appreciate the nature, quality or wrongfulness of his conduct or was incapable of conforming his conduct to the requirements of law.

Further paragraphs of this section require that the defendant plead this defense, and provide for examination of the defendant by physicians appointed by the court. The section also provides that evidence of mental disease or defect is admissible to prove the absence of a state of mind required by the offense, and to determine whether a defendant if found guilty of a capital offense should be sentenced to death or life imprisonment.

8. § 552.020, RSMo 1963 Supp. In addition to the standard to be applied this section also contains the procedure to be followed, including provision for examination by court appointed physicians and for the disposition of the accused should it be found that he does not possess the capacity to stand trial.

of ntal illness,[9] and the punishment of those who are mentally ill in addition to being guilty.[10]

The prior law on the relation of mental illness and crime[11] was largely the result of court decision and not legislative action. In general, the standard for responsibility was based on *M'Naghten's* case and the "right and wrong test."[12] By 1900 the standard was firmly established in Missouri[13] and the courts steadfastly resisted all attempts at modification. These attempts consisted of repeated efforts to attach some form of "irresistible

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9. § 552.040, RSMo 1963 Supp. This section provides that a person who is acquitted on the ground of mental disease or defect excluding responsibility shall be committed to a state mental hospital, and also sets out the procedures that are to be followed before such a person can gain his release from the state mental hospital.

10. § 552.050, RSMo 1963 Supp. deals with the transferring of prisoners who need "care in a mental hospital" to a state mental hospital, and § 552.060 deals with the effect of mental disease or defect on the carrying out of a death sentence.

11. One of the attractive qualities of the new law is that it does not use the ambiguous term, "insanity."

12. 10 Cl. & F. 200, 210, 8 Eng. Rep. 718, 722 (1843). This remarkable opinion was not the decision of a case but rather the answer of the Law Lords to certain questions put to them regarding the defense of insanity. The "right and wrong" rule is found in the opinion of Lord Chief Justice Tindal:

> . . . the jurors ought to be told in all cases that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong. The mode of putting the latter part of the question to the jury on these occasions has generally been, whether the accused at the time of doing the act knew the difference between right and wrong. . . .

13. The first and one of the few cases to cite *M'Naghten's* case was State v. Huting, 21 Mo. 464 (1855). An earlier decision, Baldwin v. State, 12 Mo. 223, 231 (1848), approved an instruction which was similar to M'Naghten's rule but which, in addition would have excused a defendant if

> he must have been so irresistibly impelled to the commission of the act, by insane impulse, that he had not the ability to resist that impulse, to control his action and choose between the right and wrong.

In the remaining years of the 19th century the court dealt several times with the question of whether the standard of responsibility with regard to mental illness should include "irresistible impulse" or the impairment of the volitional capacity. The court consistently rejected such an idea, see State v. Erb, 74 Mo. 199 (1881); State v. Pagels, 92 Mo. 300, 4 S.W. 931 (1887); but not always with unanimity. See State v. Kotovsky, 74 Mo. 247, 249 (1881):

> [W]hile two members of this court . . . do not think that the only legal test of insanity is "the ability to know the right from the wrong of the particular act," but that one knowing the right from the wrong may, in consequence of organic mental derangement be incapable of exercising the will, and is therefore, not amenable criminally for the act, three of our associates are of different opinion . . . .

impulse" to M'Naghten's rules[14] and, in 1958, the effort was to abandon M'Naghten's rules and to adopt the Durham or "product" test.[15] The Missouri courts' reluctance to modify the standard of responsibility was not unusual, for most states have not made such modifications.[16] Some jurisdictions have added some form of "irresistible impulse" to M'Naghten's rules[17] and two federal courts have adopted complete revisions of the rules.[18]

An examination of the new standard of the Mental Responsibility Law discloses that while there is substantial rewording of the prior test, there is not a drastic alteration of the concept of criminal responsibility. M'Naghten's rules' basic consideration was whether the defendant knew the "nature and quality of his act" and if he knew that, whether he knew

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In some inexplicable fashion, the M'Naghten's test of not knowing the nature and quality of the act *or* being unable to distinguish between right and wrong, became in some cases a requirement that the defendant must show that he did not know the nature and quality of his act *and* that he could not tell right from wrong. See State v. Duestrow, 137 Mo. 44, 38 S.W. 554 (1897); State v. Crayton, 354 S.W.2d 836 (Mo. 1962). See also discussion of Richardson, Reardon & Simeone, *op. cit. supra* note 6 at 700.

14. See cases cited *supra* note 13. In State v. Miller, 225 S.W. 913 (Mo. 1920), there was some indication that "irresistible impulse" might be accepted when the court approved an instruction that allowed such an approach. Later cases indicated that no change was intended. See State v. Jackson, 346 Mo. 474, 142 S.W.2d 45 (1940), and cases cited therein, and State v. West, 346 Mo. 563, 570, 142 S.W.2d 468, 472 (1940), which specifically discounted State v. Miller.

15. In Durham v. United States, 214 F.2d 862, 874 (D.C. Cir. 1954), the Court of Appeals for the District of Columbia declared M'Naghten and irresistible impulse tests to be inadequate and, following a New Hampshire case, State v. Pike, 49 N.H. 399 (1870), adopted the "product" test:

> The rule we now hold must be applied . . . . is simply that an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect.

The Missouri court rejected this approach in State v. Goza, 317 S.W.2d 609 (Mo. 1958), nor has Durham found acceptance by courts elsewhere. For a summary of criticisms of Durham see, Richardson, Reardon & Simeone, *op. cit. supra* note 6 at 701. See also Blocker v. United States, 288 F.2d 853, 857 (D.C. Cir. 1961); McDonald v. United States, 312 F.2d 847 (D.C. Cir. 1962).

16. For recent decisions, see Chase v. State, 374 P.2d 997 (Alaska 1962); State v. White, 374 P.2d 942 (Wash. 1962); State v. Esser, 16 Wis.2d 567, 115 N.W.2d 505 (1962); and State v. Lucas, 30 N.J. 37, 152 A.2d 50 (1959).

17. For a listing, see Appendix A, A.L.I. MODEL PENAL CODE (Tent. Draft No. 4, 161, 1955). See also Annots. "Irresistible Impulse as an Excuse for Crime," 70 A.L.R. 659 (1931), 173 A.L.R. 391 (1948). For a criticism of irresistible impulse, see HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 486 (2d ed. 1960).

18. Durham v. United States, *supra* note 15; United States v. Currens, 290 F.2d 751, 774 (3d Cir. 1961). The Currens test is:

> The jury must be satisfied that at the time of committing the prohibited act the defendant, as a result of mental disease or defect, lacked substantial capacity to conform his conduct to the requirements of the law which he is alleged to have violated.

This test is part of that proposed by the Model Penal Code. *Cf.* A.L.I. MODEL PENAL CODE § 4.01, P.O.D. (1962).

that what he was doing was wrong. The new law uses the phrases "did not know or appreciate the nature, quality or wrongfulness of his conduct"[19] which is certainly the same basic idea. The new law goes on to add, however, "or was incapable of conforming his conduct to the requirements of law."[20] This, at first blush, seems to be adding some form of "irresistible impulse," and it is.[21]

It is not the purpose of this article to discuss the merits of this new law[22] but rather to point out that the Missouri courts could have by judicial decision adopted a modification of the M'Naghten's test, and adopted one quite similar to that of the new law if they had followed the suggestions of the Model Penal Code.[23] What they could not have done, or at least, not have done without abandoning nearly all judicial restraint, would be to declare a comprehensive code for all of the situations covered by this new law. Courts, by their traditional position, are limited to deciding the cases that come before them and are limited to the issues that those cases raise. If there is to be a comprehensive revision of Missouri's criminal law it must be a result of legislative action. The truly notable feature of the new Mental Responsibility Law is not only that it improves the law in this one area, but that it demonstrates that thorough revision of the criminal law by legislative action is possible.[24]

The question arises then, is there a need for substantial revision in Missouri's criminal law?

Certainly changes are going to be required in the area of criminal

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19. § 552.030, RSMo 1963 Supp. quoted *supra* note 7. *Cf.* quotation from M'Naghten's case, *supra* note 12.

20. § 552.030, RSMo 1963 Supp. *Cf.* MODEL PENAL CODE § 4.01, *supra* note 18.

21. The language is based on that of the Model Penal Code, *supra* note 18. The comments to MODEL PENAL CODE, Tent. Draft No. 4, 157, state:

> The Draft accepts the view that any effort to exclude the non-deterrables from strictly penal sanctions must take account of the impairment of volitional capacity no less than of impairment of cognition; and that this result should be achieved directly in the formulation of the test, rather than left to mitigation in the application of *M'Naghten*. It also accepts the criticism of the "irresistible impulse" formulation as inept in so far as it may be impliedly restricted to sudden, spontaneous acts as distinguished from insane propulsions that are accompanied by brooding or reflection.

See also, Richardson, Reardon & Simeone, *op. cit supra* note 6 at 704.

22. For such a discussion, see December, 1963 issue of the JOURNAL OF THE MISSOURI BAR.

23. A.L.I. MODEL PENAL CODE § 4.01, P.O.D. (1962).

24. In 1955 the Missouri legislature did revise the law of theft. See §§ 560.156, 560.161, RSMo 1959. The crimes of larceny, embezzlement and obtaining property by means of false pretenses were consolidated into one offense, stealing. The revision may have changed the law of theft as well as consolidating related crimes.

procedure. The recent United States Supreme Court decisions dealing with legal assistance for indigent defendants at trial[25] and on appeal[26] raise problems that must be dealt with, and which are being dealt with.[27]

When more and more lawyers begin handling criminal cases, and it seems certain the number will increase, those lawyers who are accustomed to the discovery devices available in civil cases[28] are quickly going to learn of (and it is hoped be shocked by) the inadequacy of discovery devices in criminal cases.[29] This is certainly an area that needs careful consideration and revision.

The area of police investigations, with the problems of defining the proper limitations upon the power of the police to interrogate suspects and the remedies to be used when these limitations are exceeded[30] is one of the most difficult, for here there is the possibility of a very real conflict between our hopes for the prevention of crime and the detection of crim-

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25. Gideon v. Wainwright, 372 U.S. 335 (1963).

26. Douglas v. California, 372 U.S. 353 (1963), commented on in 51 CALIF. L. REV. 970 (1963). *Cf.* State v. Bosler, 366 S.W.2d 369, 373 (Mo. 1963). The defendant's request for counsel to prepare and prosecute his appeal was not granted. The court ruled that this was not a denial of any constitutional right, and stated:

> Under the procedure in appeals in criminal cases, this court . . . reviews all questions preserved in a motion for a new trial in cases where no brief is filed by appellant . . . . Such procedure adequately protects defendant's rights.

There is also the problem of assistance to indigent defendants in addition to providing counsel. See, Draper v. Washington, 372 U.S. 487 (1963); Griffin v. Illinois, 351 U.S. 12 (1956). See also Comment, *Right to Aid in Addition to Counsel for Indigent Criminal Defendants*, 47 MINN. L. REV. 1054 (1963). *Cf.* State v. Chapman, 365 S.W.2d 551 (Mo. 1963), where defendant requested an eye examination at state expense.

27. On July 15, 1963, the Missouri Supreme Court appointed a committee "to study the problems involved in the legal representation of indigent defendants in criminal cases." 19 J. MO. BAR 466 (1963).

28. See, e.g., FED. R. CIVIL P. 26-37; MO. R. CIVIL P. 56-61.

29. See Comment, *Developments in the Law—Discovery*, 74 HARV. L. REV. 940, 1051 (1961). See also, Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L. J. 1149, 1180-1198 (1960). For a case allowing pretrial discovery by the state, see Jones v. Superior Court, 372 P.2d 919, 22 Cal. Rptr. 879 (1962), noted 76 HARV. L. REV. 838 (1963). Some recent Missouri cases discuss the problems of discovery during trial of prior statements given by the witnesses. See State v. Mobley, 369 S.W.2d 576 (Mo. 1963); State v. Miller, 368 S.W.2d 353 (Mo. 1963); State v. Cochran, 366 S.W.2d 360, 361 (Mo. 1963); State v. Redding, 357 S.W.2d 103, 109 (Mo. 1962).

30. See Mallory v. United States, 354 U.S. 449 (1957), holding inadmissible in a federal prosecution a statement obtained as a result of an illegal detention. The detention was illegal under FED. R. CRIM. P. 5(a) requiring that an arrested person be brought before a commissioner "without unnecessary delay." *Cf.* State v. Scott, 298 S.W.2d 435 (Mo. 1957), ruling that the fact a defendant has been held over 20 hours in violation of MO. R. CRIM. P. 21.14 does not make statements after that period "involuntary" as a matter of law.

nals and the rights of the individual.[31] There is the less dramatic, but still very important, problem of pleading in criminal cases; how the state is to inform the defendant of the charges[32] and what, if any, defenses the defendant must announce before trial.[33] There are the problems of trying more than one defendant at a time,[34] the problem of multiple offenses, whether it is proper to try a defendant for more than one offense at one trial,[35] and the always present problem of clarifying and standardizing instructions to the jury.[36]

There are doubtless other areas that one can think of that could usefully be considered and codified, and these problems are important ones. However, it is of little avail to have a procedural system that is "fair" and "practical" if the substantive law being enforced through the system is arbitrary, confused and inconsistent.

One such area which is confused, illogical, and contains the seed of

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31. See, *Police Interrogation Privileges and Limitations: An International Symposium*, 52 J. CRIM. L., C.&P.S. 1-73 (1961).

32. See, e.g., State v. Mace, 357 S.W.2d 923 (Mo. 1962), affirming the quashing of an information which, while it did charge an offense, failed to inform the defendant of the "necessary particulars." The charge was brought under the stealing statute § 560.156, RSMo 1959 (see note 24 *supra*), which supposedly did away with the distinctions between larceny and embezzlement. The court recognized this but decided that it was necessary in order to prepare his defense that the defendant be informed of the facts which would have made the charge "embezzlement" or larceny."

33. Under the new mental responsibility law, the defendant is required to plead "mental disease or defect excluding responsibility." § 552.030(2), RSMo 1963 Supp. The proposed amendments to the FED. R. CRIM. P. require in Rule 12A that the defense of "alibi" be pleaded.

34. MO. R. CRIM. P. 25.07 requires separate trials in felony cases at the defendant's request.

35. Except for charges of burglary and stealing, it is improper in Missouri to charge more than one offense in a single indictment or information. Mo. R. CRIM. P. 24.04. *But see* State v. Terry, 325 S.W.2d 1 (Mo. 1959), discussed in Hunvald, *Criminal Law in Missouri*, 25 Mo. L. REV. 369-375 (1960). A related problem arose in State v. Pennick, 364 S.W.2d 556 (Mo. 1963). The defendant was involved in an automobile accident in which two persons, A and B, were killed. The defendant was charged with manslaughter for killing A, and then later was indicted for manslaughter for killing B. The defendant moved to dismiss the first information on the ground that the later indictment was for the "same offense" and therefore, under Mo. R. CRIM. P. 25.14, suspended the first charge. The court ruled that no error had been committed in denying the motion to quash "because no evidence was offered in support thereof." This left undecided the question of whether or not there was only one offense.

36. "We are hopeful that within the foreseeable future the forms of criminal instructions may be simplified . . . ." State v. Redding, *supra* note 29 at 110. The forms of instructions in civil cases have been recently so improved. MISSOURI APPROVED INSTRUCTIONS (1964). However, it is doubtful if significant improvement can be made in improving instructions in criminal cases until the criminal law is improved.

arbitrariness is the present Missouri law with regard to the effect of intoxication on criminal responsibility.[37] This law, as was the law on mental illness and responsibility, is the creation of the courts.

The earliest case was *State v. Harlow*[38] in 1855. The defendant there was charged with murder and convicted of manslaughter.[39] He requested the trial court to instruct that while drunkenness was no "justification for the killing, yet the jury may take it into consideration in determining the intent with which the defendant did the act" and that if the jury should find that because of intoxication the defendant was not able "to act as a sane and rational man" and that if he did not have the intent to kill or harm before becoming intoxicated, the jury must acquit. Both requests were refused and the Supreme Court affirmed, stating:

> I dismiss these two instructions, by stating that human life, cheap as it is now, would hardly be considered any longer under legal protection, if such should be the law laid down by our courts. It is considered criminal for a man to make himself a drunkard; one crime never yet justified the commission of another.[40]

This opinion lumps together two different concepts and without distinguishing between them concludes apparently that intoxication cannot be a defense to a crime whether it is claimed that the intoxication was such as to prevent the defendant from having the necessary powers to reason, "to act as a sane and rational man," or was such as to prevent him from having a state of mind necessary for the crime, e.g., the intent to kill. The result has been that in crimes which require a "specific" intent,[41] such as assault with intent to kill[42] or assault with intent to

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37. The rules regarding intoxication are usually stated in terms of "voluntary" and "involuntary" intoxication. "The surprising thing about the factual situations in the relevant cases is that *involuntary intoxication is simply and completely non-existent.*" HALL, *op. cit. supra* note 17 at 539.

38. 21 Mo. 446 (1885).

39. He was convicted of manslaughter in the first degree. At that time manslaughter was divided into four degrees. See Ch. 50, RSMo 1855. It is interesting to note that the language used in defining crimes against persons in 1855 is almost identical to that found in RSMo 1959.

40. *Supra* note 38 at 458. *Cf.* HALL, *op. cit. supra* note 17 at 529:

> The penal liability of grossly intoxicated harm-doers raises difficult theoretical questions, involving the principles of *mens rea* and concurrence. The case-law also reflects traditional attitudes of marked hostility toward drunken offenders, which renders sound adjudication harder to achieve than in insanity cases.

41. PERKINS, CRIMINAL LAW 671 (1957):

> A specific intent, when an element of the mens rea of a particular offense,

...,[43] the jury is instructed on the one hand that they must find that ... defendant intended that result, and then told that they are not to consider the fact that the defendant was intoxicated in determining whether or not he had the necessary intent.

An attempted justification for this illogic was given in *State v. Jordan:*

> . . . the defense of voluntary drunkenness cannot be interposed to an offense committed as the immediate result of such drunkenness, and, although there may be no criminal intent, the law will by construction supply same; this under the well-recognized principle that one who voluntarily assumes an attitude likely to produce harm to others, despite any specific intention to injure, is responsible for the consequences of his act.[44]

This paragraph is considerably ambiguous. It assumes that intoxication will be claimed as a defense to a completed crime. Yet the question may be whether a crime has in fact occurred. If the crime requires a certain mental state, then it would seem that the crime has not occurred unless that mental state was in existence. The use of the phrase "criminal intent" is ambiguous (although the case dealt with the crime of assault with intent to kill); does it mean "specific" intent, or merely mens rea? The talk of a constructive intent is confusing. If a person knowingly creates an unreasonable risk of harm and the harm occurs, he falls within

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is some intent other than to do the actus reus thereof which is specifically required for guilt.

WILLIAMS, CRIMINAL LAW, THE GENERAL PART 49 (2d ed 1961):

> In short, whenever an intention to commit another crime is involved in the definition of a crime, it is generally referred to as intention and not motive. It is commonly called by lawyers a "specific intent" . . . . The adjective "specific" seems to be somewhat pointless, for the intent is no more specific than any other intent required in criminal law.

Cf. State v. Martin, 342 Mo. 1089, 119 S.W.2d 298 (1938); State v. Chevlin, 284 S.W.2d 563 (Mo. 1955); State v. Holmes, 364 S.W.2d 537, 540 (Mo. 1963):

> Since the crime charged is assault "with intent to do great bodily harm," the intent to do great bodily harm must be present at the time of the act of assault.

42. State v. Jordan, 285 Mo. 69, 225 S.W. 905 (1920); State v. Lloyd, 217 S.W. 26 (Mo. 1919).

43. State v. Comer, 296 Mo. 1, 10, 247 S.W. 179, 181-82 (1922), approves an instruction which states, in part, that in order to convict of assault with intent to rape, the jury has to find that the defendant, "did make an assault upon Ruth White with the intent to ravish and carnally know her forcibly and against her will . . ." and another instruction which states ". . . neither can you consider such intoxication, in determining whether or not such assault was made with intent to commit a rape, or whether or not it was made on purpose."

44. State v. Jordan, 285 Mo. 69, 71, 225 S.W. 905, 906 (1920).

the category known as "reckless" and thus can be guilty of those crimes for which recklessness is the mental state required. It does not add much to speak of such a state of mind as being a "constructive intent."

The phrase that drunkenness cannot be an excuse for crime makes excellent sense if it means that a person who is intoxicated is still subject to the same standards as a sober man. Most people who are intoxicated still retain the power to reason, and they still know what they are doing, even though their power to think may be somewhat impaired and their inhibitions somewhat overcome. They can reason and they have arrived at their state of intoxication by a choice. It would certainly not seem fair to say that a person whose judgment has been impaired by drink is entitled to special consideration while a person whose judgment is impaired because he is highly emotional (without the assistance of alcohol) and who had no choice in his emotional makeup is denied such consideration.

But this does not lead to the result that if a crime requires a certain mental state, a person can be convicted of that crime even though he does not have the required mental state. If one of the elements of a crime is that the defendant have as his purpose, the achievement of a certain result, or that he have knowledge of certain facts, then he should have a "defense" if he does not in fact have the necessary purpose or knowledge, no matter what the cause of his lack of purpose or knowledge may be, whether from mental disease,[45] ignorance, mistake, or intoxication.

This approach is not going to be of much assistance to drunks. Consider again, for example, the decision of *State v. Harlow*.[46] The defendant was charged with murder. There was no question (judging from the report) that the evidence was sufficient to convict. The defendant should not be entitled to an instruction that if because of intoxication the defendant was not able to act as a sane and rational man the jury should acquit, but he should be entitled to an instruction that the jury can consider his intoxication in deciding whether or not he had the necessary state of mind for the crime of murder. The jury might find that he did not intend to kill or to injure, and thus he could not commit any crimes requiring those states of mind. But murder can be committed without an

45. § 552.030(3), RSMo 1963 Supp. allows for the admission of evidence of mental illness to show that "the defendant did or did not have a state of mind which is an element of the offense."

46. *Supra* note 38.

n[illegible] to kill or to injure, for murder can sometimes be committed reckes[illegible] and if not murder, the recklessness would be sufficient for manlaughter. In addition, if a person's conduct indicates that he had a certain purpose or knowledge, the jury is not going to accept too readily his claim of lack of such a state of mind because of intoxication.

> The present policy of the law [but not in Missouri][47] which permits the disproof of knowledge or purpose by evidence of extreme intoxication is sound enough. If a crime (or a degree of crime) requires a showing of one of these elements, it is because the conduct involved presents a special danger, if done with purpose or knowledge or the actor presents a special cause for alarm. A burglar, one who breaks in with a purpose to to commit a felony, is more dangerous than the simple housebreaker. The aggravated assaults are punished more severely precisely because of the danger presented by the actor's state of mind. He who passes counterfeit money with knowledge is a greater threat than the actor who transfers it without understanding. If purpose or knowledge are not present, the cause for the lack is not important. The policy served by requiring these elements of culpability will obtain whether or not their absence is established by proof of extreme intoxication or any other evidence.[48]

Such an approach to the problem of intoxication requires a precise nalysis of the elements, especially the mental elements, in any offense. 'h[illegible]ilure of the courts to distinguish carefully the differing states of nind included in the concept of criminal "intent" has led to the present nsatisfactory state of the law. This failure was not due to incompetence f the court (courts in many jurisdictions have had similar difficulties) or the common law did not define mental states with precision, but sed such phrases as "intent" or "mens rea" to cover the entire gamut f mental attitudes that are relevant to criminal liability.[49] One of the

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47. State v. Shipman, 354 Mo. 265, 268-69, 189 S.W.2d 273, 274-75 (1945): We have held many times that voluntary drunkenness of an accused is no excuse for the commission of crime . . . . Our holdings on the precise question here involved (voluntary intoxication as precluding one from entertaining the specific intent constituting an essential element of the crime with which accused is charged) appears to represent a minority view . . . . In such cases we have said that voluntary drunkenness cannot be considered in determining whether the accused had the specific intent charged.

48. Paulsen, *Intoxication as a Defense to Crime*, 1961 U. ILL. L. F. 1, 11.

49. *Id.* at 8:

The common law failed to identify with clarity the mental attitudes operative in the criminal law. "Intent" and "*mens rea*" are terms which

major advantages of the Model Penal Code is division of these mental attitudes into purpose, knowledge, and recklessness, all of which require some awareness.[50]

If a court were to adopt the approach of the Model Penal Code to intoxication,[51] then it would be necessary to know exactly what mental states are required for a given crime. Unfortunately, for the most part our statutes do not supply that information with any degree of clarity, either where they have merely adopted the common law definition, or where there has been a new offense created.[52]

For example, suppose a defendant breaks and enters a building for the purpose of stealing. This, of course, is burglary, but burglary in Missouri is divided into degrees and first degree burglary requires that the building be "a dwelling house of another in which there is at the time some human being."[53] Must the defendant have knowledge of this element, that is, be aware that it is a dwelling and that there is present inside a human being? Or will it be sufficient that he is reckless regarding this element, that is, he is aware that it *might* be a dwelling and that some

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embrace knowledge (*i.e.*, that the actor knows the nature of his conduct, the existence of relevant circumstances, or the fact that certain forbidden results will necessarily follow from his act); purpose (*i.e.*, that the actor has the conscious objective of causing a certain result or engaging in certain conduct); or sometimes recklessness (*i.e.*, conscious and culpable disregard of a high risk of harm). When the term "intent" is divided by the distinctions set forth above (which are taken from the Model Penal Code), it is clear that *extreme* drunkenness can (as a matter of logic) negative purpose, or knowledge or consciousness of risk taking. Because of the fact that liquor does affect mental processes, a central issue with respect to the place of intoxication in the criminal law is whether evidence of intoxication may be employed to disprove the psychological states upon which criminal liability depends.

50. A.L.I. MODEL PENAL CODE § 2.02, P.O.D. (1962).

51. *Id.*, § 2.08. The MODEL PENAL CODE does not allow for intoxication to negative recklessness. For a discussion of this approach, see Paulsen, *op. cit. supra* note 48. *But see* HALL, *op. cit. supra* note 17, 529 *et seq.* and WILLIAMS, *op. cit. supra* note 41 at 566.

52. For example, see § 560.115, RSMo 1959 which makes it a crime to possess burglar's tools. In State v. Heflin, 338 Mo. 236, 89 S.W.2d 938 (1935), the court read in the unexpressed mental element.

53. § 560.040, RSMo 1959. The example is suggested by State v. Powell, 357 S.W.2d 914 (Mo. 1962). Defendant sought reversal of his conviction for first degree burglary on the ground that the evidence was insufficient to prove the intent to steal. The breaking and entry were exceptionally noisy and the defendant claimed that had he intended to steal he would never have made so much noise getting into a building in which there were people. The court dismissed this argument by stating that there was no evidence to show that he knew people were inside.

human being *might* be inside? Or will the crime be established by negligence as to this element, that is, a reasonable man would have realized the risk that the building was a dwelling containing a human being? Or does this portion of the statute impose absolute liability, that is, if this result occurs (the breaking and entering of a dwelling with a human being inside) then the crime is first degree burglary without regard to whether the defendant knew or could have known of the existence of these facts? The Model Penal Code's solution is to require either purpose, knowledge or recklessness where the statute is silent, thus excluding negligence and absolute liability.[54]

Consider the further complications if our defendant is not successful in breaking and entering, and is charged with attempt to commit burglary in the first degree. Attempt usually requires an "intent to commit the crime attempted" which means that it must be the purpose of the defendant to achieve every element of the crime or possibly that he know that every element of the crime is substantially certain to result from his conduct.[55] So for attempted first degree burglary must it be proved that the defendant knew the building was a dwelling and that there was a human being inside? The point is that the law is not clear on this problem, but thankfully, this problem does not arise very often.

There is a temptation, which has too often been succumbed to in dealing with problems such as those above, to ignore the mental state as to a particular element of the crime and to allow a conviction simply because the defendant's conduct and his state of mind is sufficient for another, often lesser offense. It is here that the various types of "constructive" intents come into the law. The most common example is the felony-murder and the misdemeanor-manslaughter rules where the mental state for the felony or misdemeanor supplies the "malice" for murder or the

54. A.L.I. MODEL PENAL CODE, P.O.D. (1962):
§ 2.02(3) When the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts purposely, knowingly or recklessly with respect thereto.
(4) When the law defining an offense prescribes the kind of culpability that is sufficient for the commission of an offense, without distinguishing among the material elements thereof, such provision shall apply to all the material elements of the offense, unless a contrary purpose plainly appears.

55. PERKINS, *op. cit. supra* note 41 at 496:
The word "attempt" means to try; it implies an effort to bring about a desired result. Hence an attempt to commit any crime requires a specific intent to commit that particular offense.

"mens rea" or "general intent" for manslaughter. It would seem that the time has come to recognize clearly that it is wrong to punish a person for consequences which he did not intend and which he did not foresee. Consider, for example, the classic Missouri case, *State v. Frazier*,[56] where the defendant struck one Daniel Gross a blow on the jaw with his fist. Unfortunately for both Frazier and Gross, the latter was a hemophiliac; the blow caused a slight laceration on the inside of his mouth, which produced a hemorrhage and ten days later his death. The defendant was convicted of manslaughter and on appeal the court affirmed the conviction stating that it made no difference that the blow would not have been fatal but for the preexisting condition; nor did it make any difference that the defendant did not know, nor have any reason to know that Gross was a hemophiliac. The court concluded:

> If one commits an unlawful assault and battery upon another without malice and death results, the assailant is guilty of manslaughter, although death was not intended and the assault was not of a character likely to result fatally:[57]

In other words Frazier is guilty of manslaughter even though he did not know he was creating any risk of death. It is true he is guilty of assault, for he purposely struck Gross on the jaw with his fist, and for this crime he deserves to be punished. The question is not whether he is guilty or innocent, but of what crime is he guilty, and of what degree is his guilt? If no death had occurred, he would have been guilty of a relatively minor crime, assault and battery. Now he is to be guilty of a rather serious felony.[58] Why should the fact that the result of his conduct was death make him liable to be punished for causing that death?[59] In tort it may be proper to make him pay for the harm he has "caused" whether it was intended or foreseeable, but the purpose of criminal liability is to punish, and the heinousness of Frazier (which should determine the seriousness of his conduct and thus the degree of the crime) is nothing other than a man who intends to strike another with his fist. To punish him for a more serious crime is to put him into the category of those who consciously

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56. 339 Mo. 966, 98 S.W.2d 707 (1936).
57. *Id.* at 976, 98 S.W.2d at 713.
58. However, his sentence was set at a fine of $400 and a jail sentence of six months. The maximum sentence for common assault would have been a fine of $100 and a jail sentence of six months.
59. For a critical discussion of "cause" in the *Frazier* case, see HALL, *op. cit. supra* note 17 at 259.

create substantial risks of death and who cause death. To put him there is make the moral blameworthiness which is what should determine the degree of punishment, and the degree of offense, depend on matters which are completely outside of Frazier's awareness, and which should have no effect on the amount of condemnation that the law heaps upon Frazier.[60] It would be considerably different had Frazier been aware of Gross' condition, for then he would have knowingly created a substantial risk of death, and for taking this chance without any justification would deserve to be guilty of more than the minor offense of assault and battery. But to make him guilty of manslaughter because he has the state of mind for assault and battery is to be arbitrary and unjust, and further undermines the rationality behind the grading of offenses according to seriousness.

One of the basic problems in drafting a criminal code is the classification of offenses into varying categories of seriousness and the choice of factors to be used in determining the seriousness of a particular offense. The seriousness of the consequences, or the harm, is certainly a very important factor. Killing a human being is serious, but not all homicides are murder, nor are even all homicides criminal. In a rational code of criminal law, the factors that differentiate the innocent killings from the criminal killings, and the degrees of criminal homicide should be clearly spelled out and not rest on fictions of "constructive intent" and non-existing states of mind.[61] Such rationality should of course also extend to other crimes as well as homicides.

The punishment that may be imposed upon a conviction usually indicates the seriousness of a given crime. The sentencing structure, that is, the minimum and maximum sentences that can be imposed for given offenses, should be based on carefully considered factors that make one crime, or the degree of a crime, more serious than another.

> No branch of penal legislation is, in my view, more unprincipled or more anarchical than that which deals with prison terms

60. Nor will it be a deterrent to the commission of assaults to punish Frazier for manslaughter, for a man will not be deterred from committing an assault by reason of the punishment for manslaughter unless he is aware he is running a risk of committing that offense, that is, unless he is aware he is creating a substantial risk of death.

61. For criticism of certain aspects of the present Missouri law on criminal homicide, see Hunvald, *Criminal Law in Missouri—Manslaughter, a Problem of Definition*, 27 Mo. L. Rev. 1 (1962).

> that may or sometimes must be imposed upon conviction of specific crimes. The legislature typically makes determinations of this order not on any systematic basis but rather by according its ad hoc attention to some discrete area of criminality in which there is a current hue and cry. Distinctions are thus drawn which do not have the slightest bearing on the relative harmfulness of conduct and the consequent importance of preventing it so far as possible, on the probable dangerousness of the individual whose conduct is involved, or even on a public demand for heavy sanctions which is so inexorable that it cannot safely be denied. What dictates legislation is the simple point of politics that reelection demands voting against sin, whenever ballots on the question must be cast.[62]

That the sentencing structure in Missouri needs correction is evident upon examination of the statutes. Probably the worst example is the penalty that is provided for the crime of rape.[63] The possible penalties are death or imprisonment for not less than two years.[64] Perhaps if we were not so accustomed to the lack of order in our penal laws we would wonder at the possible nature of a crime that in the judgment of the legislature is deserving of punishment ranging from two years imprisonment to death. The truly astounding fact is that, in addition, the statute covers both forcible and statutory rape[65] and the penalty prescribed is the same for both!

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62. Wechsler, *Sentencing, Correction, and the Model Penal Code*, 109 U. PA. L. REV. 465, 472 (1961).

63. § 559.260, RSMo 1959.

64. There are other crimes with a minimum but no maximum penalty. There are the related crimes of rape of a victim who has been drugged, NLT (not less than) five years, § 559.270, and forcing a woman to marry, NLT three years, § 559.280. In addition there are: perjury in a capital case, NLT seven years, with a premeditated design to effect death of the prisoner, death or NLT ten years, § 557.020; rescuing a prisoner convicted of a capital offense, NLT ten years, § 557.230; second degree murder, NLT ten years, § 559.030 (first degree murder is punishable by death or life imprisonment); poisoning with intent to kill or injure, NLT five years, § 559.150; felonious assault with malice, NLT two years, § 559.180; kidnapping for ransom, death or NLT five years, § 559.230; arson, NLT two years, § 560.010; first degree robbery, NLT five years (or death if "by means of a dangerous or deadly weapon"), § 560.135; treason, death or NLT ten years, § 562.010; the "abominable and detestable crime against nature," NLT two years, § 563.230; bombing, death or NLT two years, § 564.560.

65. *Supra* note 63. The crime is defined as:

> carnally and unlawfully knowing any female child under the age of sixteen years, or by forcibly ravishing any woman of the age of sixteen years or upward.

This covers widely differing types of conduct. Certainly one who "forcibly ravishes" a woman or girl should be guilty of a serious crime, and so should an adult who takes advantage of a child and defiles her. But to treat as being in the same category the seventeen year old boy who has sexual intercourse with his

What is needed is a complete reconsideration of our criminal law, th[illegible] attempt to define offenses so that the factors that distinguish nocent conduct from criminal conduct and that distinguish more serious m less serious crimes are clear, and the seriousness of the crime and penalty will be the result of the "law" and not the prejudices of a y, the emotion of a community, or, as is more likely the case, the in-lity of the court or the jury to know what penalty the legislature con-ered sufficient, the penalty the crime deserves.[66]

A thorough revision of the criminal law is not an easy task. It is ch easier to criticize than to correct, however, and this article has ched on only a few of the problems.[67] Missouri is fortunate in that

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en year old girl friend with her actual (but not legal) consent is as shocking t is indefensible. For a system of grading various sex offenses, see A.L.I. MODEL AL CODE §§ 213.0-.3; P.O.D. (1962).

66. For a possible example, see State v. Caffey, 365 S.W.2d 607 (Mo. 1963). defendant was convicted of having under his control a narcotic drug, § .020, RSMo 1959. The penalty provided by § 195.200, RSMo 1963 Supp. for a offense, and this was, is a minimum of six months in jail to a maximum of nty years imprisonment. After deliberating 30 to 35 minutes, the jury returned rdict of guilty and set the sentence at the maximum, twenty years. The court med the conviction and sentence, refusing to rule that the lower court had sed its discretion in not reducing the sentence. The court followed the tradi-al view that an appellate court will not interfere with the sentence imposed ng as it is within the statutory limits and there is no showing that it, or the re to reduce it, was the result of "passion and prejudice." State v. Laster, 365 [illegible] 293 S.W.2d 300 (1956).

A[illegible]ier problem under our present laws is the very long sentences that may nd are imposed. There are many instances in Missouri of sentences of twenty s or more. These are imposed usually only for very serious crimes, and in t instances, upon defendants who have records of prior conviction. Is there any d reason for sentences in excess of, say five or ten years, if it is intended that defendant is to be released to rejoin society at some future date? Is the possi-y of a twenty year or fifty year sentence a significantly more effective de-nt than a five or ten year sentence? See Note, *Statutory Structures for Sen-ing Felons to Prison*, 60 COLUM. L. REV. 1134 (1960). It would seem that e is a good possibility that shorter sentences coupled with a program of super-n after release might be a more effective means of rehabilitation (and a good cheaper than maintaining a large prison population), without significantly ting the deterrent qualities of the criminal law.

Perhaps our reliance upon imprisonment as the "basic" form of punishment is rect. The use of imprisonment began as a substitute for the harsher penalties ath or transportation, and this "accident of history" has led to the belief that sonment is somehow the "right" sanction for crime. Wechsler, *op. cit. supra* 62 at 471-2. Perhaps some system of probation should be our basic sanction institutional confinement should be the exception and should be imposed only there are sound reasons for not using probation. *Cf.* A.L.I. MODEL PENAL § 7.01, P.O.D. (1962).

67. For discussions of some of the current problems in criminal law, see the s of pamphlets put out by The Joint Committee on Continuing Legal Educa-of American Law Institute and the American Bar Association on "Problems in inal Law and its Administration." There are ten pamphlets in the series: 1.

much of the work that must be done in order to accomplish a sound revision has already been performed by others. The Model Penal Code with its comments provides an invaluable source of information and ideas. Other states have recently revised their criminal laws.[68] Their efforts are available for consideration. The task is difficult but not insurmountable. Any state that can revise its laws on mental illness and criminal law in the fashion that Missouri has done can revise the rest of its criminal law.

One thing should be remembered. No criminal code is going to be perfect, for the aims of criminal law are varied and sometimes conflicting. The few suggestions made in this article are not based on any drastic modification of our traditional concepts of criminal responsibility (for example, that man is responsible for the choices he makes). We want the criminal law to provide an effective and fair means of controlling human conduct. It is hoped that these suggestions may assist in developing the criminal law of Missouri so that it will do what we want it to do, and what, unfortunately, so many mistakenly believe it is doing now.

> Whatever views one holds about the penal law, no one will question its importance in society. This is the law on which men place their ultimate reliance for protection against all the deepest injuries that human conduct can inflict on individuals and institutions. By the same token, penal law governs the strongest force that we permit official agencies to bring to bear on individuals. Its promise as an instrument of safety is matched only by its power to destroy. If penal law is weak or ineffective, basic human interests are in jeopardy. If it is harsh or arbitrary in its impact, it works a gross injustice on those caught within its toils. The law that carries such responsibilities should surely be as rational and just as law can be. Nowhere in the entire legal field is more at stake for the community or for the individual.[69]

"The Problem of a Criminal Defense" (1961); 2. "The Problem of Police Interrogation" (1961); 3. "The Problem of Electronic Eavesdropping" (1961); 4. "The Problem of Assistance to the Indigent Accused" (1961); 5. "The Problem of Discovery in Criminal Cases" (1961); 6. "The Problem of Intoxication as a Defense to Crime" (1961); 7. "The Problem of Responsibility" (1962); 8. "The Problem of Punishing Homicide" (1962); 9. "The Problem of Drafting an Obscenity Statute" (1961); and 10. "The Problem of Sentencing" (1962).

68. E.g., Wisconsin, Illinois.

69. Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1098 (1952).