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ERNON LAW BOOK CO.
15 Grand Avenue
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Missouri's Mental Responsibility Law

A Symposium

Herbert Wechsler

FOREWORD

I am grateful for the opportunity to commend to the readers of the Journal this special issue devoted to the explanation and discussion of Missouri's comprehensive legislative treatment of the legal effect of mental disease or defect on the trial of persons charged with criminal offenses, their responsibility and punishment upon conviction, their commitment on acquittal and their ultimate discharge. To all who share the general concern for the improvement of our long neglected penal law, the enactment of this statute, dealing as it does with fundamental and divisive problems, is a heartening event. For those of us who labored for a decade on the Model Penal Code of The American Law Institute, there is encouragement in learning that Missouri's law makers were aided by our work.

The statute reflects conclusions similar to those reached by the Institute upon the following main points:

(1) the criterion governing fitness to stand trial should be sharply differentiated from that governing criminal responsibility and not covertly used, as it has sometimes been, to do the latter's work;

(2) the criterion of criminal responsibility derived from M'Naghten's case calls for alleviation to require more than surface intellection and to make allowance for destruction of capacity for self-control;

(3) mental disease or defect should be admissible whenever it is relevant to prove that the defendant did or did not have a state of mind which is an element of the offense;

(4) whenever sentence of death or of imprisonment is discretionary with the court or jury, mental disease or defect impairing cognitive or volitional capacity should be received in mitigation;

(5) when fitness to proceed or responsibility are drawn in issue, the defendant should be examined by a psychiatrist appointed by the court, precluding litigation of the issue solely on the basis of the testimony of physicians chosen by the parties;

(6) when a defendant is acquitted on the ground of irresponsibility, the court should order his commitment to the state department charged with the responsibility for mental health, to be placed in an appropriate institution for custody, care and treatment;

(7) the release or conditional release of a person so committed should be based on a finding that he may be so released without danger to himself or others; and the release should be subject to review by the committing court.

Missouri and the Institute are in accord, as I have said, in favoring retention and alleviation of the M'Naghten principle but the Institute goes further than Missouri in the scope of the alleviation it proposed. The contrast is revealed most simply by comparing the respective formulations:

Model Penal Code Sec. 4.01	*Mo. Senate Bill No. 143, Sec. 3*
A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality (alt: wrongfulness) of his conduct or to conform his conduct to the requirements of law.	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.

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The important difference in the standards turns, of course, on the extent of the impairment of capacity to appreciate or to conform that is demanded to negate responsibility. Taken on its face, the Missouri statute calls for finding an impairment that is total; the actor must not appreciate or be unable to conform. The Institute criterion is met if capacity is so impaired that it no longer is substantial; the reduction of capacity to marginal or trivial dimensions may thus suffice for exculpation.

The point is one of prime importance to the psychiatric witness seeking to assist in the administration of the law without loss of intellectual integrity; given a rational determination by the jury, it may frequently determine the result. For it is hardly open to dispute that even in the most extreme psychoses there is often some residual capacity to know or to appreciate or to control. The examiner who did not witness the event may be entirely satisfied that there was gross derangement and still be quite uncertain if the actor was berest of all awareness or was totally unable to conform.[1] It cannot be sound legal policy in cases such as this to force a finding of responsibility; the jury should be called upon at least to weigh the gravity of the impairment. The word "appreciate" as an antithesis to "know" may give some scope for dealing with degrees of cognitive capacity; but this puts more weight on a word than it will bear in many poignant situations. When the facts of life do not admit of any absolute appraisal, the law has elsewhere been content to recognize that it must make distinctions of degree. Is there not need for such a recognition here? The Institute concluded that there was; and we may hope Missouri courts will deem the issue one that can be dealt with in interpreting the statute.

The alleviation of M'Naghten to allow for the case where "mental disease or defect" has destroyed volitional capacity raises a special problem as to the meaning to be accorded to "disease" in one recurrent situation. The case involved is that of the individual who engages repeatedly in antisocial conduct, showing neither sensitivity to other people's interests nor responsiveness to social norms, without conflict, anxiety or fugue or other psychiatric indications. It is not unreasonable to regard behavior problems of this kind as a form of mental illness, in the view that reasonable capacity to adapt to the requirements of social life is a constituent of mental health for ordinary purposes. No one would argue, for example, that attempted treatment is beyond the proper province of psychiatry. It is another thing, however, to ground a diagnosis of disease for the specific purpose of determining responsibility upon no other basis than repeated conduct of the kind which, by hypothesis, must be attributed to such disease for irresponsibility to be established. Such a view involves a patent circularity of reasoning which, if accepted, would destroy the very basis of the concept of responsibility. Yet this view is involved in the categorization of "psychopathy" or "sociopathy" as a disease, as those categories are employed by some psychiatrists for purposes that, to be sure, may be quite unrelated to the problem here involved.

The Model Penal Code sought to surmount this difficulty by providing that the "terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct," a provision that Missouri has included in its statute. The formulation has been criticized as an intrusion on the province of psychiatry, a criticism here reflected in the comments of Judge Bazelon (*infra,* p. 669), Judge Biggs (*infra,* p. 670) and Dr. Guttmacher (*infra,* p. 661). I think, with deference, that the critique is inapposite. What is involved is not a legal lesson in psychiatry but rather declaration of a legal norm reflecting an important point of social policy. To treat the problem as an issue of psychiatry or one of fact for the determination of the jury is thus to miss

[1]*Cf. People v. Horton,* 308 N.Y. 1, 20-21 (1954) (dissenting opinion); *Commonwealth v. Clark,* 292 Mass. 409, 412 (1935).

the crucial point that is involved. No less beside the point is Dr. Winfred Overholser's objection that "the sociopath who comes into conflict with the law has numerous symptoms in addition to his anti-social behavior."[2] To the extent that such is deemed to be the case, a psychiatric diagnosis of disease based on those other symptoms *in addition to* the actor's conduct would not be excluded. The statute, in short, does not purport to define psychopathy or sociopathy or any other psychiatric category. It strikes at circularity of reasoning and nothing more.

I have dwelt at length on the new standard of responsibility embodied in the statute, since this is the most difficult and controversial of the changes made. That other changes are of large importance is, of course, entirely clear. Leveling the barrier to psychiatric testimony as to the absence of a state of mind which is an element of the crime charged will certainly promote the rationality and the equality of law administration. But that it will eliminate the issue of responsibility, as Professor Weihofen suggests it may (*infra,* p. 656), seems to me most unlikely, given the diffusion of the concept of a general intent as it is presently conceived.[3] Substantive law apart, the introduction of the court-appointed examiner and witness should go far to promote the practical administration of this aspect of the law of crime, which is dependent on the disciplined and conscientious aid of psychiatric testimony. While self-incrimination problems may be posed, despite the privilege provided by the statute, they will certainly be marginal in incidence. The problem in the average case is rather that of the impecunious defendant who does not deny the act and will regard the court appointment as a boon. The forensic problem may, moreover, be substantially reduced by the authority that here is granted to the state to accept a plea of irresponsibility, with the acquittal and commitment that a finding would imply. The Model Code moves even further toward this end by empowering the court to accept a finding of irresponsibility by the court-appointed expert, without the acquiescence of the prosecution.[4] That is a step that seems to me to be desirable wherever the state is not deemed constitutionally guaranteed a jury trial.

While the relaxation of the standard of responsibility should serve to give the psychiatric expert reasonable leeway in presenting his conclusions to the jury, a point on which trial practice has been most uneven through the country, the Model Code took pains to meet the problem by proposing this enactment:[5]

> "When a psychiatrist or other expert who has examined the defendant testifies concerning his mental condition, he shall be permitted to make a statement as to the nature of his examination, his diagnosis of the mental condition of the defendant at the time of the commission of the offense charged and his opinion as to the extent, if any, to which the capacity of the defendant to appreciate the criminality (alt. wrongfulness) of his conduct or to conform his conduct to the requirements of law or to have a particular state of mind which is an element of the offense charged was impaired as a result of mental disease or defect. He shall be permitted to make any explanation reasonably serving to clarify his diagnosis and opinion and may be cross-examined as to any matter bearing on his competency or credibility or the validity of his diagnosis or opinion."

If the omission of a provision on this point in the Missouri statute rests upon the view that practice now conforms to these requirements, the matter is, of

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[2]*Criminal Responsibility: A Psychiatrist's Viewpoint,* 48 A.B.A.J. 527, 529 (1962).
[3]See, for example, the proposed model charge on murder, *infra,* p. 658.
[4]Proposed Official Draft (1962) Sec. 4.07(1).
[5]*Ibid* Sec. 4.07(4).

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course, inconsequential. But if psychiatric testimony is presented through the medium of the hypothetical question, as is sometimes done in New York even when the witness has examined the defendant, the problem is of first importance in this field and would be solved by an enactment of this kind. Obtaining that enactment should present small problems to the men who built up the consensus that produced the statute as it stands.

I hope that I have said enough—and not too much—to introduce the articles and comments brought together in these pages. Their scholarship and insight are a fitting tribute to the high-minded, disinterested effort that achieved this notable advance toward what Max Radin aptly called "a juster justice, a more lawful law."

Herbert Wechsler*
Columbia University School of Law

*Harlan Fiske Stone Professor of Constitutional Law, Columbia University School of Law; Director, American Law Institute and Chief Reporter, Model Penal Code; member, New York Temporary Commission on Revision of the Penal Law and Code of Criminal Procedure; author, Principles, Politics and Fundamental Law (1961), The Federal Courts and The Federal System (with Henry M. Hart, Jr., 1953), Criminal Law and Its Administration (with Jerome Michael, 1940).

COMMENTS

Comments Of PROFESSORS OF LAW

GERHARD O. W. MUELLER

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Introduction

No topic of the criminal law is currently undergoing as much discussion, no provision as much experimentation, as that concerning mental responsibility for crime, frequently called (mental) capacity. Six different tests of mental responsibility are vying for adoption in America; hundreds of learned articles are urging reform; psychiatry and law are undergoing convulsions over the vociferously fought issues. It is with amazement, profound astonishment and admiration, therefore, that I take cognizance of Missouri's accomplishment in passing a mental responsibility bill which disproves all the slogans about the impossibility of getting sound legislation on such a topic out of an American legislature. Knowing nothing about the legislative history, about conceivable floor fights and debates, I can only say that this is the soundest American legislation on the topic in a century, for it caters to all the recognitions of solid modern psychiatry, while not departing from the sound wisdom of the ages, established by common law judges who were men of practical affairs and not at all unfamiliar with human emotions and the workings of the human psyche, however crudely or unscientifically this knowledge may have manifested itself in the past.

I. The Legislative Scheme:

One of the most appealing features of this bill is the comprehensiveness of the legislative scheme. The bill covers all substantive, procedural, administrative and dispositional aspects of the topic of mental responsibility insofar as applicable to criminal proceedings. Laudably the bill avoids any reference to the meaningless and threadbare expressions "insanity" and "lunacy proceedings" which ever since they were conceived, have been devoid of meaning in both law and psychiatry. The arrangement of the bill is sound, beginning (in Sec. 552.010) with a definition of mental disease or defect, treating next (in Sec. 552.020) of the problem of unfitness to proceed by reason of mental disease or defect, and its dispositional consequences, turning then (in Sec. 552.030) to incapacity to incur guilt for crime by reason of mental disease or defect and its procedural and evidentiary implications, moving on (in Sec. 552.040) to the problem of disposition in case of acquittal by reason of mental disease or defect, treating then of mental disease or defect developed during execution of a sentence of imprisonment (Sec. 552.050) or prior to execution of a capital sentence (Sec. 552.060). The remaining sections institutionalize the practice of inquiring into a convict's mental

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II. Mental Disease or Defect:

In modern medico-legal parlance the term mental disease or defect is understood to be a comprehensive one which—unlike M'Naghten's "defect of reason from disease of the mind," at least as frequently interpreted—includes all psychiatrically determinable, pathological deviations from mentally or emotionally normal states or conditions. Sec. 552.010 of the Act makes this clear by providing that the terms include "congenital and traumatic mental conditions as well as disease." However, like the draftsmen of the Model Penal Code (Sec. 4.01 (2)), the draftsmen of the Missouri Act were worried about the sociopath, whose classification in psychopathological terms is as yet a matter of some conjecture. Such persons manifest their psychopathology, if any, primarily through the repetition of antisocial or criminal conduct, they are virtually nondeterrable, virtually incapable of reform by the normal means at the command of society, and seemingly free from guilt feelings, social reactions or bonds of attachment or loyalty. That such incorrigible offenders are not "normal" in the typical sense of the word has long been felt by psychiatrists and lawyers alike. Neither profession has made significant progress in the rehabilitation or normalization of the sociopath. That a legislator, under these circumstances, is reluctant to include the sociopath within the sweep of an incapacity provision is clearly understandable. Nevertheless, the wholesale exclusion of sociopaths from coverage constitutes an inroad upon the diagnostic functions of the medical profession. However, in view of the fact that the Act excludes only those sociopaths whose "abnormality [is] manifested *only* by repeated criminal or otherwise antisocial conduct", and in view of the fact that many—especially those of the more severe—sociopathies have also other manifestations (e.g., some which are demonstrable by an electroencephalograph), the exclusion seems entirely defensible. Moreover, in view of the fact that the Act also includes provisions on partial and diminished responsibility—to be commented upon shortly—the legislature has solved the problem to the utmost satisfaction of current forensic psychiatry.

The psychiatric profession should note with particular satisfaction that the broad and nearly all-inclusive definition of the terms mental disease or defect will permit them full range on the witness stand or in written reports, making it possible to present any relevant information on the defendant-patient which may have any bearing on the issues at all, free from the often incongruous restrictions which had been placed on the freedom of testimony of expert witnesses under the older M'Naghten Test, as interpreted in most jurisdictions. I should think that, under the new Act, any medically competent evidence bearing on the defendant's capacity to engage in rational action (i.e., freedom from ego-impairment, etc.), or to form the requisite *mens rea,* will be admissible, and it need not be framed in legal terminology meaningless to the psychiatrist, though it must be within the purview of the language of the test which is phrased in neutral language commonly understood by nonpsychiatrists.

III. Fitness to Proceed:

(a) The Test

Missouri's test for fitness to proceed is entirely that which experience in all civilized nations has determined to be the only useful and proper one: does the defendant have the capacity to understand the proceedings against him or to assist in his own defense, or does he lack such capacity as a result of mental disease or defect? This, and nothing else, is at stake when the question of fitness to proceed is at issue. The test leaves unresolved the question whether recollection of the events involving the crime charged is a necessary ingredient of this capacity, and perhaps wisely so, for whether such recollection is or is not necessary may depend entirely on the circumstances of the particular charge or line of defense. The question, thus, has been relegated to one of fact.

(b) Procedure

The determination can be made only by physicians, more particularly by psychiatrists. The bill, unfortunately, satisfies itself with "physicians". As a practical matter, physicians entrusted with such an examination, possibly at "a hospital or other suitable facility", are likely to be specialists in mental diseases.

Due process is adequately guaranteed. An objection is occasionally made that an institutionalization of one charged with crime and found mentally unfit to be proceeded against violates standards of fairness because no judicial finding has preceded such determination to the effect that the defendant is indeed the perpetrator. The argument is frivolous. Since due process demands the stay of proceedings (other than *ex parte* proceedings, like the findings of an indictment by a grand jury, or a capacity inquest) against anybody charged with crime, it is logically impossible to make a determination to the effect that the defendant is the perpetrator whenever the question of his mental fitness is in doubt. Fitness proceedings, therefore, can be logically preceded only by the finding of an indictment or information establishing a *prima facie* case. Such proceedings are technically proper and safeguard due process if appropriate procedural mechanism, including recourse to *habeas corpus*, are provided. The bill is fully adequate in this respect. Moreover, the bill also provides for the conceivable dismissal of all proceedings against the defendant if "so much time has elapsed since the commitment of the accused that it would be unjust to resume the criminal proceeding". (Sec. 552.020(4)). This is in line with the most advanced American decisions.

In this connection it might also be worth mentioning that the bill has guarded against all conceivable incriminations which might result from a finding of fitness to proceed. (Sec. 552.020(6)).

In all these respects the bill is progressive, and miles ahead of the "lunacy proceedings" of most other jurisdictions.

IV. Incapacity by reason of mental disease or defect:

(a) The Test

Missouri's new incapacity test incorporates everything that is sound in M'Naghten's well-established standard, while catering to the advances in depth psychiatry which we are bound to accept. I should like to repeat what I said on this issue a few years ago:[1]

> The *M'Naghten* judges saw in "legal insanity" nothing but a negation of criminal liability, and since criminal liability flows from the commission of crime, they quite properly phrased their test in accordance with the constituents of crime, of which there are two—a prohibited act (the *actus reus*) and a criminal intent (the *mens rea*). Logically, and properly, the *M'Naghten* judges said that if the defendant could not engage in the requisite *act* (meaning that he could not act in a rational manner), or if he could not form a criminal intent, by reason of medical insanity—whatever that encompassed at the time—he obviously has not done what the statute requires

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These absolutely sound M'Naghten criteria have been adhered to in the Missouri test, which continues to insist on both halves of the crime concept, the *actus reus* (nature, quality . . . of the act), and the *mens rea* (wrongfulness of the act). But, beyond that, in line with modern psychiatric theory, the test makes it clear that more is required of a defendant than a mere psychic surface knowledge of what he was doing. Use of the word "appreciate" modernizes the old M'Naghten standard. In addition, reacting to the criticism that M'Naghten did not properly cater to the aspect of volition (as distinguished from cognition), the Missouri Act, utilizing some of the language of the otherwise rejected American Law Institute formula, specifically requires a capacity to conform the conduct to the requirements of law. Some may regard this reference as redundant, because a true depth appreciation of the nature, quality and wrongfulness necessarily implies and includes volitional capacity. But it might well be good utilitarianism to make this matter one of record by specific reference to the test itself. The reference is decidedly not one to the notion of irresistible impulse, another one of those medico-legal monstrosities without a basis in fact. It merely recognizes that, despite cognitional capacity, the volitional capacity may be substantially impaired.

The test does not refer to the degree of the requisite incapacity either to form the *actus reus* or the *mens rea*. Neither did M'Naghten. Most commentators, dating back to Sir James Fitzjames Stephen, have argued that a full impairment or complete disintegration of capacity is not required for exculpation under M'Naghten. But, at least in some jurisdictions, juries have sometimes been instructed—mostly impliciter—that M'Naghten requires an absolute or at least extreme incapacity. It is to be hoped that Missouri's new test will be interpreted in the historically and psychiatrically correct way, as satisfying itself with a substantial, but not a total, impairment of the faculties.

It is unlikely that Missouri judges will have any difficulty in supplying meaning to the term "wrongfulness". By the better considered opinions the meaning of the term is the axiological significance

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[1] M'Naghten Remains Irreplaceable: Recent Events in the Law of Incapacity, 50 Georgetown Law Journal 105, 106 (1961). Footnotes renumbered.

[2] *Id.* at 210, 8 Eng. Rep. at 722. Of course since the insanity test is a crime-negation test, they phrased it negatively in terms of incapacity, i.e., "as not to know the nature and quality of the act he was doing." *Ibid.*

[3] *Ibid.* The M'Naghten judges likewise stated "that he did not know he was doing what was wrong," i.e., "whether the accused at the time . . . knew the difference between right and wrong . . . put with reference to the party's knowledge of right and wrong in respect to the very act with which he is charged." *Id.* at 210, 8 Eng. Rep. at 722-23.

[4] Ryu and Silving correctly recognized this historical fact when they wrote:

> That belief in the essence of law violation being disobedience to known law still influenced legal thought in 1843 in England is evidenced by the ruling in *M'Naghten's Case*, which apparently held error, whether of law or of fact, to be the ground exempting insane persons from punishment. Such persons, the case suggests, do not deserve punishment because they are incapable of acquiring knowledge of the nature of the act or of its wrongfulness.

Ryu & Silving, Error Juris: A Comparative Study, 24 U. Chi. L. Rev. 421, 430 (1957).

of the defendant's conduct, either in terms of generally acceptable moral standards or, where a given law is devoid of such, the standards which organized society through its law has attached to such conduct.

No test in any American jurisdiction comes as close to my personal purely academical ideal of a logically, legally and psychiatrically sound test of incapacity as that adopted by Missouri. I can only hope that the legal and medical profession will employ as much enlightenment in administering the test as the legislature and governor employed in framing and accepting it.

(b) Procedure

The Act imposes the notice burden upon the defendant. A defendant must give adequate warning that he wishes to rely on the test, else he may be barred from relying on it. If no more were said than this, a highly controversial constitutional question would arise. Suppose that during the trial of a defendant who has not given the requisite notice, it is discovered that by reason of mental disease or defect he was incapable of forming the requisite *mens rea* for the crime charged, say arson. Could he be convicted of the crime despite the want of *mens rea*? If so, due process for such a conviction would be lacking. Fortunately, the rigor of the first provision is immediately modified by liberal provisions governing later notice and judicial discretion (Sec. 552.030 (2)), and by incorporation of partial responsibility, about which more later.

In line with the sound tradition by which all humanity governs its affairs, the Act continues the presumption of existing mental capacity, extending it even to defendants who at a previous time have been adjudicated incompetent. The latter provision is a novelty, but not a severe handicap, since, unquestionably, such a prior adjudication of incompetency is some evidence of the defendant's present mental condition. In line with the majority of states, the burden rests with the defendant to show by a preponderance or greater weight of the credible evidence that he was suffering from an incapacitating mental disease or defect. While this standard is inconsistent with the prosecution's burden of proving every element of the crime charged (thus, *mens rea* and *actus reus*) beyond a reasonable doubt, it is generally regarded as proper to create this evidentiary exception in the case of mental abnormality, due to the virtual impossibility to prove any human being's absolute mental and emotional normality beyond a reasonable doubt. (Sec. 552.030 (5)).

The requirement, in Sec. 552.030 (6) to the effect that a verdict and judgment of acquittal by reason of incapacitating mental disease or defect must be so designated, is an obviously sound one, for it immediately brings the disposition provisions, calling for the person's institutionalization, into play. Indeed, such is the sole justification for any mental incapacity test. If hospitalization were not the ultimate aim, criminal law could well do without a mental incapacity test, for an acquittal must always result when *actus reus* and *mens rea* cannot be proven, whether because of mental disease, error or ignorance, or any other cause.

In this connection, a brief reference to the excellent release provisions of Sec. 552.040 is appropriate. The release test, as indeed the entire Act, can well serve as a model for future legislation elsewhere:

> "No person shall be released from such commitment until it is determined through the procedures provided in this section that he does not have and in the reasonable future is not likely to have a mental disease or defect rendering him dangerous to the safety of himself or others or unable to conform his conduct to the requirements of law."

This test is particularly fortunate since expressly and impliedly, it refers to the very same causes which occasioned the defendant's commitment in the first place and is free from other legal or psychiatric criteria. Elaborate procedural provisions govern the release procedures are

evidence that he was suffering from an incapacitating mental disease or defect. While this standard is inconsistent with the prosecution's burden of proving every element of the crime charged (thus, *mens rea* and *actus reus*) beyond a reasonable doubt, it is generally regarded as proper to create this evidentiary exception in the case of mental abnormality, due to the virtual impossibility to prove any human being's absolute mental and emotional normality beyond a reasonable doubt (Sec. 552.030 (5)).

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This test is particularly fortunate since expressly and impliedly, it refers to the very same causes which occasioned the defendant's commitment in the first place and is free from other legal or psychiatric criteria. Elaborate procedural provisions govern the release procedures and safeguard the rights of a committed patient, as well as the interest of society.

V. Partial Incapacity:

The most remarkable aspect of Missouri's new mental incapacity Act is the incorporation of tests of partial and diminished responsibility. On the former issue the Act provides in Sec. 552.030 (3), *inter alias:*

"Evidence that the defendant did or did not suffer from a mental disease or defect shall be admissible (1) to prove that the defendant did or did not have a state of mind which is an element of the offense. . . ."

Psychiatry has long recognized the fact that, while ordinarily a mental disease or defect affects the entire personality, a person may suffer a particular psychic or emotional abnormality or disability without appreciable effect on his other functioning. The neurosis of an otherwise normally functioning individual may manifest itself in the incapacity to conduct his affairs in the normal and typically and predominantly conscious-subconscious fashion, when it comes to a given life-situation, ranging anywhere from bowel movements to behavior in front of or involving children, women redheads, rotarians or rabbis. Moreover, sociopaths and other abnormal persons may lack the power to fulfill normal mental tasks, like projection (or premeditation and deliberation). The law must recognize those incapacities. Several jurisdictions have done so recently by supreme court adjudication. Missouri caters to this psychiatric demand by legislation, in a scientifically sound and absolutely logical manner which is, above all, entirely consistent with the principles of criminal law and the bases on which the M'Naghten Test, old or modern, rests.

Likely, this new recognition of "partial incapacity" will find its most frequent application in homicide cases, where now reduction from a first degree charge to second degree charge becomes logically possible when the defendant lacked the psychic-emotional capacity to form the requisite "premeditation and deliberation". But "partial incapacity" may be equally applied in other cases, namely whenever criminal liability depends, in part, on an additional frame of mind.

VI. Diminished Responsibility:

In yet one other respect does the Missouri Act present a wholesome innovation. Likewise under Sec. 552.030 (3) namely in sub. (2), evidence of mental incapacity may be introduced in mitigation in capital cases. This is a so-called diminished responsibility provision. The concept presupposes that the defendant was not suffering from a mental disease or defect of such intensity as to entitle him to an acquittal under the general capacity test, and also that he was not suffering from such a disability as to cancel out the capacity to form any one of the requisite mental elements of the offense charged (partial incapacity), but recognizes that many offenders are not as "normal" as the law posits for the imposition of full responsibility. The beneficiaries are likely to be neurotics, sociopaths, behaviorally disordered persons, persons with slight schizoid reactions and others. It is only regrettable that Missouri's acceptance of diminished responsibility is restricted to capital cases. While it is true that in such cases the issue is particularly acute, it should also be recognized that the problem exists across the board, regardless of the offense charged.

The Missouri Act provides for the consideration of such diminished responsibility only after a finding of guilty. This creates a bit of an incongruity. On the one hand this amounts to a recognition that diminished responsibility does entitle the defendant to a mitigated punishment, while on the other, at the time of the verdict, it makes no allowance for the defendant's psychic or emotional shortcomings. But should diminished responsibility not recognize the fact that psycho-pathological shortcomings in a given person diminish his liability as much as—only consequently—his punishment? This later criticism is a purely academic one, since no one has yet been

able to invent a formula for a verdict of "guilty with diminished responsibiilty". In Missouri, this purely theoretical shortcoming is mitigated by the fact that the very same jury which rendered the verdict of guilty also determines the punishment (unless upon plea of guilty, in which case the judge fixes the punishment).

VII. Capital Punishment and Mental Responsibility:

The committee charged with the drafting of the new Mental Responsibility Act had no authority to squarely deal with the question of the psychological or psychiatric justification—or absence thereof—for the retention of capital punishment in Missouri. But the draftsmen gave evidence that they were keenly aware of the problem of the relation of mental responsibility and capital punishment and, indeed, made every effort to solve this problem as well as could be done within the framework of its authority. The just discussed provisions on partial incapacity and diminished responsibility are part of the draftsmen's scheme. Beyond that, in Sec. 552.070, the Act authorizes the governor to appoint a board of inquiry which is to assist him in the exercise of his constitutional clemency power in capital (as well as other) cases. This board must base its recommendation on all evidence obtainable, whether admissible under normal evidentiary rules or not. Short of abolishing the anachronism of capital punishment, this represents an enlightened attitude on the question. In view of the fact that perpetrators of capital offenses are so frequently disturbed, mentally or emotionally, but may not qualify for an exculpation even under Missouri's enlightened new standard, the provisions of Sec. 552.070 are of great practical significance. No statute, however, can guide either the Sec. 552.070 board of inquiry or the governor in the awesome decision of how to weigh various factors in deciding whether this man is to live and that man to die.

Conclusion

These random comments may suffice to introduce Missouri's remarkable new Mental Responsibility Act to the profession. With every one of its innovations the Act is progressive and represents the most advanced thinking in the field. At the same time, the draftsmen have guarded themselves against the exorbitant demands of way-out psychiatry and reactionary jurisprudence. The draftsmen have utilized the best of the legal wisdom of the ages, and the soundest of the demands of the psychiatric sages. It is a happy occasion for the academician to discover that practitioners do have such wisdom, and that practical politics do permit of progress in criminal justice.

HENRY WEIHOFEN

Professor of Law, University of New Mexico. Author, lecturer, member of many public and bar association committees. Among his major works are "Psychiatry and the Law" (1953, with Dr. M. S. Guttmacher), "Mental Disorder as a Criminal Defense (1954), "The Urge to Punish" (1956) and "Legal Writing Style" (1961). In 1955 he was the recipient of the Isaac Ray Award of the American Psychiatric Association, and in 1963 was elected an Honorary Fellow of that Association.

A number of the innovations found in Missouri's new Mental Responsibilty Law should prove eminently useful for the sound disposition of criminal insanity pleas. Among these are the provisions for psychiatric examination of persons who appear to be mentally unfit to stand trial or who plead mental irresponsibility.

Instead of using up space in lauding the good features of the act, however, I shall here limit myself to pointing out some difficulties that lawyers may en-

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END

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counter in the application of two provisions, both concerning the "tests" of irresponsibility.

I

Although the Missouri Supreme Court said in 1950 that the right-and-wrong test "has been consistently followed in Missouri" since 1855, *State v. McGee,* 361 Mo. 309, 234 S.W.2d 587, the wording of the test in instructions given by trial courts and approved by the Supreme Court has not always been consistent. In some cases knowledge of the nature and quality of the act was included as part of the test, and instructions including reference to such knowledge have been held not to be erroneous, *State v. Bryant,* 93 Mo. 273, 6 S.W. 102 (1887). The new legislatively prescribed test was apparently designed not only to broaden the old judicial test but also to fix the wording.

Broadening the tests was accomplished primarily by adding to the knowledge test the test of whether the defendant "was incapable of conforming his conduct to the requirements of law". This of course is the old irresistible impulse test, put into new and improved wording. The Missouri Supreme Court in a long series of cases extending back to 1881 had rejected this test. See cases cited in Weihofen, Mental Disorder as a Criminal Defense (1954), at 150. "It will be a sad day for this state", the court had said in 1887, "when uncontrollable impulse shall dictate 'a rule of action' to our courts". *State v. Pagels,* 92 Mo. 300, at 317, 4 S.W. 931. The day has arrived; whether it will be sad remains to be seen.

If I am correct in thinking that a second purpose behind the adoption of the legislative test was a desire for a fixed authoritative formulation, I fear that the effort will be unsuccessful. The new test is obviously taken from the American Law Institute's Model Penal Code, Section 4.01. But the Missouri legislature apparently couldn't bring itself to give up the old test completely. Instead, it tried to combine the old with the new. The result is that it fails to accomplish what the Code seeks to do. One of the most serious criticisms of the traditional right-and-wrong test has been that although superficially simple and clear, the wording is actually seriously ambiguous. Debate has raged for more than a century over the proper meaning of all the key words: "nature," "quality," "know," and "wrong." If a man kills his wife under a delusion that God had commanded him to do so for the salvation of mankind, he would presumably know the physical nature of his act, but would he know its quality? Does the word "quality" refer to a different aspect of perception from "nature," or do the two words mean the same thing? A reading of the cases, from Missouri as well as elsewhere, gives us no clear answer.

Does the word "know" require knowledge only on the verbal level, so that if asked whether it is wrong to kill, the person could give the proper answer? Or should "know" be interpreted to require some appreciation of the heinousness or consequences of the act? If the former merely, the word calls for only a very low level of comprehension indeed, for persons so disordered as not to have that much awareness are so rare as to be almost unknown. Only a hopelessly deteriorated, drooling psychotic or a congenital idiot would be unable to comprehend, for example, that he was endangering a human being when he aimed and fired, or that such an act was "wrong."

And what is meant by "wrong?" Does it mean legally or morally wrong? Take the man who knows that killing is prohibited by the temporal law but who believes his act was commanded by God; is he deemed by the law to know that it was wrong? Surpisingly few of the cases in which the right-and-wrong test has been applied during the past 120 years have even considered this question. The few that have disagreed in their interpretation.

The Model Penal Code undertook to eliminate these ambiguities by eliminating all these ambiguous terms. For "know" it substituted "appreciate"; for "nature and quality of the act or that it is wrong" it substituted "the criminality of his conduct." The Code test reads:

"(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law."

The new Missouri test adopts much of the language of the Model Penal Code—but also holds on to the key words of the old "right-and-wrong" formulation. Instead of substituting "appreciate" for "know", it uses both "know or appreciate". Instead of eliminating "nature and quality of the act" and knowledge that the act was "wrong", it keeps "nature, quality or wrongfulness of his conduct". Thus it fails to eliminate any of the ambiguous terms for which the old test has been criticised.

Indeed, it makes the test more ambiguous rather than less. By stringing the words together with "or", the draftsmen leave it unclear whether they are used in the conjunctive or in the disjunctive: (1) The statute says that a person is not responsible for criminal conduct if at the time "he did not know or appreciate . . . ." To come within this test is it enough that he knew but did not appreciate? (2) The person is not responsible if he did not know or appreciate "the nature, quality or wrongfulness of his conduct. . . ." Is it enough that he did not appreciate its quality, although he did know its nature? Suppose he knew and appreciated both the nature and quality of his conduct, but did not appreciate its wrongfulness?

I can foresee that, instead of clarifying the law, the new test will open up opportunities for an infinite number of appeals on questions of the proper wording of instructions given and instructions requested but refused.

II

The Missouri law actually sets forth a second test of criminal responsibility. Lawyers may possibly overlook this, because this second test is not put with the first, but is in a later subsection and is worded as a rule of evidence. This second test is found in the third subsection of section 552.030, and reads:

"3. Evidence that the defendant did not suffer from a mental disease or defect shall be admissible

(1) to prove that the defendant did or did not have a state of mind which is an element of the offense; . . ."

This rule is also taken from the Model Penal Code. It represents the law in a number of states, in most of which it was adopted by judicial decision rather than by statute. It may be said to state a broad principle that if the mental state requisite to a given crime is not present, that crime has not been committed; this is true whether the absence of the requisite mental state is due to mental disorder, drunkenness, unconsciousness or any other reason.

This broad principle, now enacted into Missouri law as applicable to mental illness, may, if much use is made of it, largely supplant the other formulation found in the first subsection of Section 552.030. To whatever extent used, this rule may give juries difficulty. It requires the jury to determine not only whether at the time of the act the defendant knew that it was wrongful, etc., but also whether, even if he did know that it was wrong, his mental illness prevented him from entertaining deliberation or premeditation, or malice, or the intent to steal or convert, etc.

But granting that making such distinctions would be a most difficult task for the jury, difficulty of application is a dubious ground for denying an otherwise legitimate defense. The new provisions for giving the jury the benefit of impartial psychiatric examination should make the task less difficult. And "precluding the consideration of mental deficiency only makes the jury's decision on deliberation and premeditation less intelligent and trustworthy." Mr. Justice Murphy dissenting in *Fisher v. United States*, 3[illegible] U.S. 463 (1946).

Another objection that might be made to allowing mental disorder to reduce the degree of a crime is that juries may misuse it to reach compromise verdicts in cases in which they are uncertain of the defendant's sanity or where they cannot agree on a clear-cut verdict of guilt or innocence. But juries already have wide powers to convict in a lower degree or for a lesser offense than that charged; in some states they also have the power to fix the punishment or to determine both the law and the facts. The possibility of compromise verdicts is therefore already so great that opening another door will make little difference, and the danger that juries may sometimes make improper use of the rule is hardly a good reason for refusing to permit them to apply it where it is logically proper. Refusal to allow the jury this power requires them to punish an accused who is mentally disordered, though not so seriously as to require full acquittal, either more severely than the circumstances justify, or not at all.

Most of the cases in which courts of other states have applied this intent rule have been first degree murder cases, in which it was applied with reference to the elements of deliberation and premeditation. But the Missouri statute (like the Model Penal Code) states the proposition in general terms. It is applicable to any offense in which a state of mind is an element—which means substantially all offenses. On a charge of murder, if the mental disorder negatived not only premeditation and deliberation but also the existence of malice aforethought, the defendant should not be convicted even of second degree murder. Mental disorder would also be admissible in evidence to negative the specific intent without which there can be no conviction for assault with intent to kill, arson, robbery, larceny, attempt to rape, burglary, and other crimes. It should also be available for crimes involving merely recklessness or negligence, or crimes requiring "wilfulness" or "knowledge".

Insofar as the rule operates to require acquittal of charges in the higher degree of a crime, for which specific intent is a requisite, and allows conviction only in a lower degree, it will result in mentally-disordered criminals receiving shorter prison terms and being turned loose on society sooner than the sane and perhaps less dangerous criminals. This objection could perhaps be met if juries in such cases were required to state that they are finding the defendant not guilty in the higher degree because of the lack of the requisite intent, due to mental illness. If an acquittal by reason of insanity must specifically be stated to be for that reason, why not a reduction in the degree of the crime? The statute does not provide that the judge should instruct the jury to give an explanatory verdict when they absolve a person of a charged crime because they are not convinced he was mentally able to entertain the requisite criminal intent. May the judge nevertheless so instruct? If the jury does return a verdict acquitting the accused of a higher degree of crime but convicting him in a lower degree, would the judge have power to order the defendant confined in prison for the length of time proper as punishment for the crime of which he has been found guilty, and then retained civilly for medical care until safe to be at large?

In raising these questions I do not mean to imply that this new test is undesirable. On the contrary, I consider it logical and just and destined to be accepted in more and more jurisdictions. But these questions will be raising their heads and lawyers will be compelled to deal with them.

III

Anyone who presumes to criticize the action of others, and especially action that is the product of as much study and judgment as this law represents, has an obligation to propose a better solution. My own preference, spelled out elsewhere, is for the Durham Rule.[1] But the fact that Missouri could not bring itself

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[1] Weihofen, The Urge to Punish (1956); In Favor of the Durham Rule, in "Crime and Insanity" (Nice, ed., 1958); The Flowering of New Hampshire, 22 U. Chi. L. Rev. 356 (1955).

to let go, completely, of the M'Naghten Rule makes it unrealistic to urge that it take the giant leap to Durham. The test adopted, however, was obviously intended to approach or even embrace the A.L.I. Model Penal Code formulation. If, as I think, it has failed to do so, the remedy is to delete the verbal echoes of M'Naghten and adopt the A.L.I. test verbatim.

PAUL W. TAPPAN

Meyers Visiting Research Professor, Harvard Law School. Author, lecturer and member of many commissions on organized crime. Associate Reporter of the Model Penal Code of the American Law Institute. He is the author of several books including "Crime, Justice and Correction" (1960) and numerous articles in professional journals.

Let me say merely that I am very pleased indeed to learn that your legislation relating to mental responsibility has been so vastly improved by this new legislation. I have no doubt personally that the rules relating to insanity in this law are far superior both to the M'Naghten tests and the standards set out in the Durham case. I hope that it may be feasible, in light of this very progressive step in the criminal legislation of Missouri, for the State to conduct an appropriate study and produce proposals for a more general revision of the sentencing legislation there.

You are well aware, of course, that the American Law Institute formulations on responsibility and the commentaries relating thereto were prepared largely by Professor Herbert Wechsler of the Columbia University Law School. I imagine you will have asked him for comments that might be included in the proposed publication of the Journal of the Missouri Bar. He would be in the best position to advise you of the consideration that has been given in New York, California, and elsewhere to legislative changes similar to those that have been adopted in Missouri.

Let me congratulate you on the work you have done. I believe this should be a prelude to other improvements in the Missouri statutes.

Comments Of PSYCHIATRISTS

MANFRED S. GUTTMACHER, M.D.

Chief Medical Officer of the Supreme Bench, Baltimore, Maryland, since 1930, Chief Psychiatric Consultant to the Second Army. Professor of Psychiatry at the Johns Hopkins University and the University of Maryland. Advisory Committee Member of American Law Institute on its Model Penal Code. Member of various psychiatric and mental hygiene societies. Lecturer and codirector of Legal Medicine, University of Maryland Law School. Author of numerous articles and books, including "Sex Offenses" (1950), "Psychiatry and the Law" (1953, with Professor Henry Weihofen), and "The Mind of the Murderer" (1960). Recipient of the Isaac Ray Award from the American Psychiatric Association in 1957.

Psychiatrists will, with few exceptions, consider the new Missouri Act, dealing with criminal responsibility, a great step forward. However, there are some, and among them I include myself who, doubtless, will feel that it might be further improved.

My discussion of the Act should be more intelligible if I begin by stating two postulates, which seem to me basic. First, psychiatry can best serve the courts when substantive and procedural provisions are so geared that the psychiatrist can present his data and his clinical opinion unhampered by many of the restrictions currently employed. The human personality is the material that the psychiatrist must analyze and assay, whether the subject be a normal or an abnormal individual. The variations in personality structure are myriad, no two persons are similar. As a consequence, truth is obscured when the analysis of the personality must be foreshortened and fitted into a tight legal formula, presented and interpreted by interrogating counsel.

From the point of view of psychiatry, perhaps the most important contribution of the new Model Penal Code of the American Law Institute, is the procedural provision which, in large measure, assures the expert psychiatrist an opportunity to present "the whole truth", while testifying.[1]

Secondly, responsibility is not a function of the individual, it is a social judgment based upon current mores, which is made by the community. It is not a clinical entity and its presence or absence should not be dependent almost exclusively upon medical opinion. The psychiatrist should not be made to assume the role of the dominant juror. Responsibility is a value judgment that should be made independently by the jury, or the judge sitting as a jury, after the fullest and clearest possible presentation, through expert testimony, of the patient's psychological condition.

Psychiatrists generally favor the broad and simple definition of criminal responsibility, originally propounded a century ago in New Hampshire and more recently presented as the Durham Rule. It says, in essence, that if the accused is suffering from a mental disorder and the alleged act is a symptom of this disorder, he shall be exculpated. Perhaps, next in favor is the Rule recently laid down by Judge Biggs in Currens; to be irresponsible "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".[2]

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[1] American Law Institute Model Penal Code, Tent. Draft No. 4, Sec. 4.07(4), 1955.

[2] *U. S. v. Currens*, 290 F.2d 771, 775 (3rd Cir. 1961).

The new Missouri Rule follows fairly closely the formulation in the New Penal Code of the American Law Institute. One of its features, which it has incorporated, is held in disfavor by most psychiatrists, the gratuitous pronouncement that criminal recidivism alone is not evidence of mental disease. No really competent psychiatrist can take such a position, so that there is general resentment over the fact that the Law has felt it necessary and prudent to circumscribe the definition of mental disease in this way.

In my opinion, the framers of the Missouri Act were unwise to borrow from the obsolete M'Naghten formula the phrase, knowledge of the "nature, quality and wrongfulness of his conduct." Professor Henry Weihofen, a leading American legal authority, states that American courts have held that there is no distinction between knowing an act was wrong and knowing its nature and quality.[3] So, that at best, it is redundant and superfluous. However, to the conscientious expert who assumes that every word in a legal definition is meaningful, this is confusing. The layman is not accustomed to the lawyer's frequent employment of catch all verbiage, which seem to have no specific significance.

The provisions of the new Missouri Act that provide for the employment of neutral experts, whenever the mental condition of the accused becomes an issue, are certainly meritorious. Along with this, the Bar Association should work toward the creation, in the future, of court psychiatric clinics in urban centers as integral court units. Legal psychiatry is an important and difficult subspecialty, in which men with special training and experience give the best service. Moreover, such clinics, on the basis of the experience of the ten large communities where they are now operative, provide a distinctive and valuable service to courts and probation departments. Massachusetts has recently established a statewide system of psychiatric court clinics, both as advisory and treatment agencies.

The provision that the reports of psychiatric examinations, when ordered by the Court, should be made available in every instance to the prosecution and defense, as well as to the Court, is both just and prudent. The exclusion of statements made by the accused during such examinations, as to guilt in a criminal proceeding, is also an important provision.

It seems to me highly desirable for the Court to have available when needed, skilled psychological and psychiatric personnel to examine and give recommendations as to the disposition of convicted offenders. A detailed analysis of the personality structure of the individual can, at times, be invaluable in leading to the best solution, both for the community and the offender, of a complex human problem.

The availability of psychiatric evidence to help determine whether the defendant had the state of mind, which is an element of the offense charged, and its availability in capital offenses is certainly commendable. Giving the hospital which has had the criminally insane individual under treatment, the opportunity to recommend to the Court certain conditions which should be made part of the release order, seems to me to be very salutary.

Section 552.050 fails to provide consultative psychiatric service to the head of the correctional institution to determine which sentenced prisoners need to be transferred to a psychiatric facility. I feel that such decisions should not be reached without expert advice. Certainly there is no longer need to support the assertion that no correctional institution should be without such skilled psychiatric help.

All in all, the new Missouri Act impresses me as an excellent one. Its architects and the legislators who made it a functioning reality are to be congratulated.

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[3] Weihofen, Mental Disorder as a Criminal Defense at 73.

WINFRED P. OVERHOLSER, M.D.

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I regret that the pressure of other work has caused delay in acknowledging your letter and telegram, and that I cannot prepare a formal article for the Bar Journal.

I am glad to note that steps are being taken in Senate Bill 143 to enact new legislation regarding mental disease as it relates to persons accused of crime. To judge by some of the sample charges to juries, it is likely that any change would be bound to be for the better!

I doubt whether Section 1 [552.010] clarifies very much, although it is certainly desirable to substitute the words "mental disease or defect" for the old vague term insanity. I question the attempt to legislate medical definitions such as psychopathy, sexual or otherwise. Lines 3 and 4 of Section 1 are evidently lifted from the ALI definition. I may say as a psychiatrist that I know of no mental disease "manifested only by repeated criminal conduct". The sociopath and the sexual psychopath have other symptoms, too.

I think Section 3.1 [552.030 (1)] (again borrowed from the ALI) is not any improvement over the M'Naghten and irresistible impulse "tests" of which it is a rewording. I am, of course, convinced that the Durham Rule as modified by the McDonald decision (214 F. 2d, 862 and 312 F. 2d 847) is much more realistic and in line with modern psychiatric thinking.

In Section 5 [552.050] I wonder whether the introduction of "substantial evidence" (line 78) is not unduly harsh. *Davis v. U. S.*, the governing decision in Federal courts, calls, I think, for "some" evidence.

I appreciate your sending me the material, and wish I could offer a full-fledged critique. No bill is perfect, and I hope you will accept my comments in the spirit in which they are sent. END

A CONSENSUS

This paper represents a consensus of opinion of some members of the Missouri Division of Mental Diseases and staff psychiatrists at the seven state hospitals for mentally ill in Missouri. It should not be taken to represent the views of all of those persons or even all of the views of any one such person. For that reason it is an unsigned "consensus".

Introduction

This law became effective on October 13, 1963. Some of its provisions have been drawn in whole or in part from statutes of Missouri, other states and the federal criminal code. Therefore, we may expect to gain some understanding of the key phrases of the law from interpretations given them elsewhere. On the other hand, there is much that is new in the Act, and the borrowed words, phrases or sentences may take on a different meaning when read in connection with the entire law. Therefore, one can only wait for the passage of time to tell whether the legal language used in the Act will be construed and applied to effectuate the

unquestionably admirable intentions of the legislature.

Taking only the law on the printed page, as distinguished from the law which will appear in action, it would appear that this new Act will facilitate communication and cooperation between members of the legal and medical profession who together must deal with the problem of the mentally disabled and the criminal law. Specifically: (1) the Act discards many old statutes and some of the unwritten common law which have created difficulties in the past; (2) it codifies and brings together in one place a comprehensive treatment of this area of the law; (3) it is written with reasonable simplicity and clarity; (4) it establishes definitions; (5) the rules of procedure and the several roles of participants in the legal process seem well defined or clearly implied, with sufficient alternatives to permit the flexibility which just treatment of the individual accused requires; and (6) by authorizing a written report, which may under some circumstances be used without requiring attendance of the psychiatrist in court, the law not only allows the expert witness to support his psychiatric conclusions by an explanation but also invites a clear, concise, logically developed and complete exposition of written expert testimony. On the other hand, if the judge or any attorney desires to have the psychiatrist present for interrogation or cross-examination he may demand that right.

Positive Features:

1. The definition of "mental disease or defect" specifically includes congenital and traumatic mental conditions. By long tradition and usage both functional and organic mental conditions are included, but the definition specifically excludes what may be termed "the old fashioned psychopath" now-a-days called a "sociopath" and found within the categories of character and behavior or personality disorder including impulse "neuroses". This exclusion is further firmed up and holds even though such conditions may be officially classified as mental illness, abnormality or disorder by the American Psychiatric Association or some other authority. The sexual psychopath as defined by law is also excluded.

2. Rather than leaving the definition of mental responsibility to common law, the legislature has made its will known. What we may think of the merits of the Durham decision is quite immaterial at this point. The Durham decision was made possible because the seeming outdatedness of the M'Naghten Rules left a vacuum into which the court believed it necessary to step. If the Missouri legislature desired any other solution than the Durham Rule it is well that the vacuum was filled with the present law. The definitions and the tests of fitness and responsibility seem reasonably clear, although only experience with the operation of the law will give us a final answer.

If, because of "mental disease or defect", the accused cannot defend himself at trial, the proceedings are suspended. This seems eminently fair to the accused but allows witnesses to the crime to disperse and their memories to dim. However, as required by our traditions, the rights of the accused are protected.

If, because of "mental disease or defect", the accused 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, responsibility for the particular conduct is excluded. On first reading, this seems to be a restatement of the old M'Naghten right-or-wrong rule, plus "ability to adhere to the right", but there are differences which may make the rule easier for the psychiatrist to understand and work with. The accused must not only "know" intellectually and "appreciate" emotionally, but also possess that inner control which makes it possible for him to conform his conduct to law. This last is a step in the direction of "irresistible impulse" but far short of it. It will be important to remember that the basis for the prescribed conduct must be "mental disease or defect" as defined by the law. The very positive advance here is that at long last the State of Missouri, for good or ill, has defined the rules of the game. At least we have a definite point from which all inquiries must begin. The second question in each case will be whether the individual involved has been so affected in his ability to think or to control his behavior as to make him fit to proceed, responsible for crime, dischargeable from commitment, or fit to execute if condemned to death.

Many psychiatrists had interpreted and applied the M'Naghten Rules to include impairments of volition and affect as well as disordered cognition, even though the legal test of "insanity" seemed confined to the latter. Therefore, Missouri's new law may have done nothing more than to eliminate the deviations by which some psychiatrists and juries avoided the stringencies and limited application of the old law.

3. It may also be noted that under Section 552.030(3) evidence concerning the presence or absence of a "mental disease or defect" is admissible "to prove that the defendant did or did not have a state of mind which is an element of the offense". Most crimes require *mens rea* or "a guilty mind", and some crimes require a particular kind of *mens rea*. But even more, the law recognizes that there may be *degrees* of responsibility in a few crimes, such as homicide, depending upon the mental state of the accused at the time of the crime. Thus, the sole difference between first and second degree murder in Missouri has been the presence of "deliberation" in the former.

However in the past Missouri and a number of other states have refused to permit the accused to show, as a defense, that he is anything except "insane" to the point of total mental incapacity. In short, proof of mental disease or defect short of "insanity" was not admissible for the purpose of reducing the *degree* of responsibility. This has been one of the main objections of many psychiatrists and jurists to the M'Naghten Rules. The trial was an all-or-nothing gamble, with the accused's life at stake where he was charged with a capital offense.

Missouri's new law will permit the psychiatrist to testify to the absence or presence of mental disease or defect affecting some *one* element of a crime, such as the ablity to "deliberate" where the charge is first degree murder, even though the accused is not so afflicted as to require his acquittal on the ground of complete irresponsibility. Most psychiatrists will welcome this change in Missouri law. If there are degrees of *responsibility* recognized in the law of homicide dependent upon degrees of *mental incapacity* the jury should surely have access to psychiatric testimony on that point. Moreover, the psychiatrist will no longer be forced or inclined to give a categorical opinion which may either send a mentally ill individual to the gas chamber or the mental hospital. *All* of his evidence will now be heard. It will then be for the *jury* to say whether the accused is fully responsible, partially responsible or completely irresponsible.

Section 552.030(3) also allows the jury to consider whether or not a mental disease or defect existed at the time of a capital offense in deciding whether a *guilty* defendant should be executed or given life imprisonment. A man may be "sane" enough to be guilty but sufficiently afflicted mentally as to make it unwise or inhumane to put him to death. The same evidence is made available under the Act to any judge who must make the same grim decision on a plea of guilty or on a conviction under the Habitual Criminal Law where the judge must fix the punishment.

4. The procedures established by the new law seem definite and sensible.

a. On motion of the prosecution, defense, or court, the matter of fitness to proceed may become an issue.

b. Operationally the possibility of "mental disease or defect" should receive automatic consideration from the very first. If the accused is then "insane" it is not likely that he will ever be tried, except in capital cases.

c. The law protects against a surprise plea of "mental disease or defect" excluding responsibility, although allow-

ing latitude for the court to exercise judgment where necessary.

d. Of great merit are the procedures requiring (1) that the court appoint as examining physicians (in practice, psychiatrists depending on availability) only those willing to examine, (2) that they be paid by the court, (3) that they may report in writing, although subject to cross-examination if either side so desires, and (4) that the report shall not be "open to the public". The really tremendous advance is that we have abandoned the adversary system in the presentation of psychiatric testimony, placed the witness in a position of neutrality, have removed any semblance of partisan profit motive for the expert, and in fact have allowed him in his own words, thoughtfully and deliberately to set down without hampering or heckling objection, his best and fullest report to the court regarding the truth of the matter of psychiatric concern. All this, without depriving either side of the necessary right of cross-examination, if thought necessary or desirable.

e. We all welcome the new law's provision that a written report shall be accepted if not contested on its merits. The notion that the expert should spend valuable time coming and going, identifying records, and testifying where not necessary is enough to deprive the courts of many qualified experts.

f. The fact that there is a penalty imposed if the report is poorly written, namely, cross-examination, should make for far better, more thorough, clear, and easily read and understood reports.

g. The right of the state or defendant to an examination by a physician of their own choosing is retained, and provision is made that all physicians in the case may be required to be interviewed.

h. Nothing is to be gained by appointing an expert witness who resents the appointment. The provision that no physician shall be appointed to examine unless he has consented to act should prove useful.

i. Sooner or later any psychiatric report will become public, but it should be kept out of the news media until final judicial decision is reached. Such a report often presupposes that the accused did the particular act charged. It little matters that we legal and medical professions entertain the notion that we can remain objective, despite the reporting and headlining of the news media, but we would dislike to trust the objectivity of jurymen if psychiatric reports were made public and published with or without embroidery, were we the accused. The initial psychiatric report should be suppressed from becoming public news until its potential for inadvertent harm to the accused has been dissipated by the passage of time. The public is entitled to the full news, but not necessarily immediately. Just as in time of war the public does not get the news hot off the griddle, the defendant who has his own personal war and security needs is entitled to the temporary suppression of assumptions that might be regarded as fact and interfere with the objectivity of the jury.

5. The superintendents of our state hospitals are happy to be relieved of the burden of deciding, with the concurrence of the Director of the Division of Mental Diseases, to be sure, when a patient committed because of "mental disease or defect" may resume his place in society. It seems very desirable that the court enter into this decision because the judgment is social as well as medical. Experience with judges leads to the belief that if objectivity is to be found anywhere, it is there. Further, it is believed prudent and wise that the court enter into the decision to release a person who at one time was regarded as a danger to the community. None of us are wholly rational about the insane offender. We psychiatrists do not at all times even seem aware of our own very favorable statistics concerning prognosis of schizophrenia. If, as the legally responsible psychiatrist, the superintendent of Missouri's maximum security mental hospital releases a certain patient, he will be regarded as a dreamy-eyed idealist by some and totally irresponsible by others. On the other hand, if the court is in on the decision, it becomes a businesslike, calculated risk, undertaken by a wise, experienced, humane person whose judgment the community respects and is willing to accept.

Negative Features:

It is assumed that the term "physicians" is used instead of "psychiatrists" because of the shortage of the latter. Unfortunately, few physicians, whether specializing in psychiatry or engaged in general practice, have developed much interest or competence in the forensic field. The use of a "physician" does not guarantee this competence. The wording of the law would be more meaningful if the concept of "physicians" were related to a "physician of special ability, experience, training or other source of competency in forensic psychiatry". At present, many who are competent feel they cannot afford the time to prepare and testify as an expert, leaving a vacuum to be filled by the less competent. The written report should help this situation, and it would be hoped that the Psychiatric Society could aid the courts in selecting a panel of competent and willing experts who could be called on in rotation, thus spreading the burden. If the Bar Association were to approach the Missouri Psychiatric Society with such a solution of this problem, it might be forthcoming.

It would be much more economical of time and talent if the court were to designate a psychiatric hospital or clinic to carry out the examination instead of naming individuals as examining physicians. Such institutions can provide expert examination and witnesses and produce one thoroughly famliar with the case on call, but specifying the name in advance creates logistic difficulties because the named psychiatrist may not be available when called, because away on leave, busy on an emergency, sick, or testifying in another court.

As expected, the law was unable to solve the circular dilemma that for purposes of the examination, the accused is assumed to have done the particular act charged, but the act cannot be proved or disproved until the accused is found capable of assisting in his own defense.

Legislative Intent:

The matter of what the legislature really intended when any particular bill has been enacted into law is intriguing. Apparently nobody knows, and surely nobody will tell. Committee chairmen quite properly deny that they speak for any but themselves. We desire to make it a matter of record that in Senate Bill No. 143 there was real legislative intent on two points of importance to psychiatrists.

1. As initially drafted, those parts of the bill which allow the court to define the conditions under which the psychiatric examination would be held, contained wording which could be construed to authorize that the attorney representing the accused and/or the prosecuting attorney be present during the psychiatric examination. Several who worked on and for the Senate Bill brought this to the attention of the Senate Judiciary Committee, recommending its omission, and it was deleted forthwith! From this, the conclusion is drawn that it was the intent of the legislature that neither the prosecution nor the defense attorneys nor anyone unauthorized by the examining physicians be present at the psychiatric examination. As the Senate Committee was informed, these examinations are difficult enough in themselves without having to wonder whether it is the accused and/or his attorney, and/or the prosecutor who is being examined. Each accused has the right to an objective psychiatric examination in privacy.

2. Similarly, the original wording of Senate Bill No. 143 would have required Fulton State Hospital to keep a prisoner "not fit to execute" by reason of insanity until he was "fit" for the purpose. After it was pointed out to the same committee that prisoners are transferred back and forth between the prison and Fulton State Hospital pursuant to Section 552.050 on the merits of the fluctuating requirements for treatment and care im-

posed by the mental disease, and not by an arbitrary provision of the law, the language was changed to place a condemned prisoner under Section 552.050. Therefore, it seems to be the intent of the legislature that, despite other requirements relating to those prisoners condemned to death, their actual location will be dictated by their individual psychiatric requirements. In other words, some condemned will not require further hospitalization, having recovered from their mental illness sufficiently to return to the custody of the penitentiary, but will still not be "fit to execute" because of mental disease or defect. The clear statement to the Committee of the above along with a description of the procedures then in being and comparable to Section 552.050 was followed by amendment of the original Senate Bill so that the condemned would be amenable to Section 552.050 as are all other prisoners.

Summary

The new law seems to offer useful rules and tests. It does not depart radically from concepts already widely held in Missouri. It protects the rights of the accused without any great widening of the definition of "mental disease or defect", offers the benefits of neutral expert testimony allowing the witness to present his complete formulation in writing, and constitutes a comprehensive code on the subject.

All in all, we all believe that considerable benefit will accrue to all concerned and to the administration of equal justice under equal law. Time alone will prove our expectation and hope that we know the difference between "right or wrong" law!

END

Comments Of JUDGES

DAVID L. BAZELON

Judge, United States Court of Appeals, District of Columbia. Lecturer on psychiatry and the law, University of Pennsylvania, 1957-1959; Sloan Visiting Professor at the Menninger Clinic, Topeka, Kansas, 1960-1961. Member, President's Panel on Mental Retardation, and Chairman, Task Force on Law, 1961-1962. Member various committees at universities engaged in research in the behavioral sciences and the law. Recipient of the Isaac Ray Award from the American Psychiatric Association, 1960-1961, and elected an Honorary Fellow of that Association in 1962. Author of the opinion in *U.S. v. Durham*, D.C.Cir., 214 F. 2d 862 (1954).

The President-Elect of your Bar Association, Mr. Orville W. Richardson, most graciously sent me a copy of Missouri's newly enacted Mental Responsibility Law, and asked for my comments. I am therefore taking advantage of your columns to express my warm commendation of the undertaking which resulted in the modernizing of Missouri law.

The comprehensive nature of the new legislation is its most striking, and in a way its most valuable, feature. It is easy to become so verbally overwrought in drafting a test of criminal responsibility that problems of punctuation assume greater significance than problems of obtaining the expert testimony so essential to a meaningful application of the test by the jury.

The legislation tackles the problem of obtaining expert witnesses to testify at trial by making provisions for their payment. Perhaps because of my unfamiliarity with Missouri practice, however, Section 552.080 raises a number of questions in my mind: to whom are these expenses to be taxed as costs; if to the defendant, what will happen where he is indigent or has insufficient funds. I also question the desirability of limiting the section to the medical profession. If a clinical psychologist is qualified as an expert witness, why should he not be reimbursed in the same manner as a physician?

The new statute realistically places the test of criminal responsiblity in its proper context by recognizing the relevance of the defendant's mental condition at each stage of the criminal process. Provision is made for the issue to be raised before trial, after conviction, and after time spent in a mental hospital following an acquittal on the ground of insanity.

As to the test of criminal responsibility itself, I have little to add. I have always felt that the actual wording of the test is of relatively small significance. The attempt to understand the accused's mental condition and the factors which propelled him into crime is far more crucial than the rubric under which this understanding is sought. However, I do wish to comment on the limitations placed on the otherwise broad definition of mental illness and mental defect in Section 552.010. Excluded from the legal meaning of these terms are abnormalities manifested only by: one, "repeated criminal or otherwise anti-social conduct"; and two, "criminal sexual psychopathy". The former of these exclusions is identical with that in the American Law Institute's test of criminal responsibility. I agree with the position taken by Drs. Freedman, Guttmacher and Overholser in the minority report of the psychiatric members to the American Law Institute Advisory Committee on the Model Penal Code: "The law must use not only the semantics but the substance of psychiatry. It cannot, for example, meaningfully adopt psychiatric words, and then appropriate to itself the right to establish psychiatric diagnostic criteria even by exclusion. It legally excludes forms of behavior which may themselves be symptomatic of pathology, for anti-social be-

havior may *be* the manifestation of illness."

I take it that the purpose and effect of both the exclusionary phrases is to ensure that psychopaths are always held criminally responsible. Some psychopaths may be very sick indeed; others only slightly so. In my view, the law should be able to reflect this variability. I do not say that defendants suffering from psychopathy, personality disorder or any other type of mental disease for that matter, should *never* be held responsible. I only say that this is properly a matter for the trier of fact to decide, on the basis of expert testimony, in each case as it arises.

Some argue that since psychiatry frequently appears to lack a "cure" for psychopathy, it is justifiable to regard psychopathy as a manifestation of wickedness rather than as a disease. Barbara Wootton, the distinguished British sociologist, has neatly demolished this position: "As a test of criminal responsibility, susceptibility to medical treatment is absurd. Susceptibility to medical treatment depends upon the state of medical knowledge. And to say that A must be judged guilty and punished because the doctors do not yet know what to do with him, while B must be held responsible for his actions because he can be reformed by medical attention, is really to dig the grave of the whole concept of responsibility: For A, poor soul, is being punished not for his offense but for the limitation of medical knowledge."

Placing restrictions on the legal definition of mental illness may, in years to come, render the new test of criminal responsibility subject to the same criticism that Justice Frankfurter aimed at M'Naghten when he said: "I do not see why the rules of law should be arrested at the state of psychological knowledge of the time when they were formulated."

Taking the statute as a whole, however, I am convinced that the Missouri Bar has a real opportunity to make the State a leader in humanizing the criminal law to take account of mental disorder. I hope that the bars of other states will be encouraged to follow its example.

END

JOHN BIGGS, JR.

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Missouri's new Mental Responsibility Law takes a long step forward and much credit is due those who are responsible for it. This type of law is not one for which there is popular demand, yet those who have had experience with cases involving so-called criminal insanity long have been aware of the urgent need for a revision of the old and unrealistic laws on the subject. One can only express amazement that with the progress in knowledge of mental disorders and its application in civil cases, there has been no earlier change in its application to criminal cases.

We move forward at a snail's pace when it comes to human relations. Our technical knowledge is light years apart from our knowledge of human behavior. As a nation we are willing to sanction the spending of billions of dollars for missiles, many out of date before they are completed, for the purpose of exterminating a possible foreign enemy, while our closer enemies, mental disorder and crime and other consequences of mental disorder are on our very doorstep. Our expenditures for research to study and develop human resources and strike at causes are minimal and grudgingly allocated. Public opinion needs to be directed to the danger in our apathy.

The new law will effect important procedural changes. I like particularly the provision permitting the court to dismiss the charge if it is determined that "so much time has elapsed since the commitment of the accused that it would be unjust to resume the criminal proceeding". This eliminates the somewhat incongruous proceeding of trying an offender for a crime committed many years earlier after he has spent the ensuing years in a mental institution and has been declared recovered. If rehabilitation has been effected, there is no point at that late date in punishing by incarceration a person who was too mentally ill to stand trial and who in all probability was mentally irresponsible when the crime was committed. It is also gratifying to see that *habeas corpus* has been made available to one confined in a mental institution. This is a fundamental right and should not be denied anyone. The new law appears to protect the rights of the accused in all respects.

Although the Model Penal Code of the American Law Institute has been closely followed on some points, there was one notable change. Where the Model Criminal Code specifies "psychiatrists", even using the modifying term "qualified" in most instances, the Missouri law specifies "physicians". Although a psychiatrist is also a physician, a physician is not necessarily a psychiatrist and may not be qualified to make judgment as to a mental disorder, unless of course it is the type that would be obvious to anyone. In the proposed official draft of the Model Criminal Code, the drafters have added "or other expert" in order "to take account of the possibility that others than psychiatrists may qualify as experts, such as psychologists in case of mental deficiency". It would appear that those who drafted the Code were careful to see that only specialists in the workings of the mind should qualify as witnesses. Without knowing anything of the legislative history of the Missouri law or the reason for this change, I hesitate to express an opinion, but it is to be hoped that in actual practice only qualified psychiatrists will be called, preferably those who have had experience in working with offenders. Although knowledge of the workings of the mind is probably still in its infancy, those who are devoting their time to this medical specialty ought to be better able to diagnose a mental disorder than the physician who deals only with physical symptoms.

The provision for the payment of physicians and the defendant's privilege of making a selection of his own choice is to be commended. Lack of funds for this purpose has often been a stumbling block in effecting justice.

Under the new law a jury still has the final decision as to the mental responsibility of an accused although, thankfully, it is no longer obliged to give a medical opinion as to "entire and permanent recovery", something even a psychiatrist would hesitate to do. Great care will be required to see that the lay jury is adequately prepared. Except in the most obvious cases, probably in the minority, laymen must make a judgment on matters that are completely foreign to their experiences and knowledge, and in case of divergence of opinion of the examining physicians, the decision will be difficult and the natural inclination is to make it in line with normal sympathies. There is great leeway for individual opinion when one is asked to decide whether an accused "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". The average person is largely controlled by subconscious emotions and may wish to see the offender punished if the crime has been a heinous one. Experience has shown that where a person has committed a crime of passion with which a juror may identify, he is more likely to be exonerated on the

product of some mental disease. Roche, Criminality and Mental Illness—Two Faces of the Same Coin, 22 U. Chi. L. Rev. 320, 322 (1955). The psychoanalytical school is particularly so inclined in belief. Other psychiatrists deny any such notion. Overholser, Criminal Responsibility: A Psychiatrist's Viewpoint, 48 A.B.-A.J. 527, 528 (1962). However, the jurist becomes even more uneasy where he finds psychiatrists unable to agree upon the number of people with mental disease either in the general population or in prisons.

Some Durham proponents show no alarm over a threatened collapse of the pillars of our penal system. They say that the structure is obsolete and should have been demolished long ago anyway. They advocate individualization of justice: courts to determine whether the accused committed proscribed conduct, a panel of psychiatrists, social workers and, perhaps, lawyers or judges to decide what to do with the "guilty" person. The answer is made that law and not panels of experts must decide whether a "punitive-correctional" disposition is more appropriate than "medical-custodial" care. More bluntly stated, law and not a "government by experts" must continue to decide the issue of "responsibility" which involves non-medical issues of morals and public policy, Hall, Psychiatry and Criminal Responsibility, 65 Yale L.J. 761, 770 (1956), although one psychiatrist predicts that law will be forced to change its notions in 10 years. Diamond. From M'Naghten to Currens and Beyond, 50 Calif. L. Rev. 189, 198 (1962). However, the good doctor does not tranquilize us when he says (197): "All we psychiatrists can tell the law is that if you think you have trouble with our inconsistencies now, wait and see what the future holds." Durham "and beyond" may be the ultimate solution, but as yet society is not ready for them and will probably not be in any mood to change its penal system until the day arrives when psychiatry has become a more reliable science with at least a majority of its practitioners in agreement.

It is quite true, of course, that the citadel of the criminal law has been shaken by programs which no longer treat juveniles, sexual or other sociopaths, alcoholics, drug addicts and some others as criminals when they break the law. Probation and parole, suspended sentences, out-patient mental clinics, and several other devices directed mainly toward rehabilitation are in high season and the voice of the social worker is heard throughout the land. However, a majority of the masses still feel that it is a good thing occasionally to stretch a few necks on the gallows. It is felt that at least some of the mentally sick are deterrables. Besides, we are told that punishing others helps purge our guilt and aggressions. . . .

3. Compromises between M'Naghten and Durham. For a long time many judges, lawyers and psychiatrists have joined in an effort to eliminate the basic fault of the M'Naghten Rules: their application of a narrow test of impaired cognition as the chief if not sole determinant of "legal insanity". "Recognizing volitional and emotional impairment in addition to intellectual disturbances has been the direction of nearly all proposed changes in the M'Naghten Rules." Note, Criminal Responsibility and the Proposed Revisions of the M'Naghten Rules, 32 St. Johns' L. Rev. 247 (1958). As early as 1834 in Ohio and continuing today the irresistible impulse test has been adopted as an alternative to the strict M'Naghten formulations. Under the pressure of a century of heavy bombing the proponents of M'Naghten have taken refuge in a contention that the Rules mean more than they say, that impaired cognition implies impaired volition and vice versa, and that in practice they work well because psychiatrists, judges and juries *behave* as though the Rules read much like the Model Penal Code does today.

Many jurists and medical men are unconvinced and, in any case, dislike to resort to what Mr. Justice Frankfurter described as "shams". The Royal Commission on Capital Punishment in its 1953 Report adopted a recommendation of the British Medical Association which proposed a test quite similar to that which the American Law Institute set out in its Tentative Draft No. 4 of the Model Penal Code in 1955. The Third Circuit's Currens' test is a modification of the Model Penal Code. *U.S. v. Currens*, 3 Cir. 290 F.2d 751. So is the test now incorporated into Missouri's new Act. All of these efforts are primarily reactions to M'Naghten's apparent failure to recognize that mental disease or defect may stem from disorders of volition and affect.

In the meanwhile, the Durham test, fashioned after the New Hampshire rule, marked an out-right revolt against M'Naghten. As in the case of any "revolution" it was inclined to go to extremes. It brushed past irresistible impulse as an unacceptable alternative and went practically the whole way, only stopping short of a complete abandonment of the concepts of "crime" and "punishment".

It must be obvious that the substantial number of courts and others who now follow either the irresistible impulse, Royal Commission, Model Penal Code, Currens or Missouri test are all thinking substantially alike. They are all content with a compromise, at least for the present, which leaves them still identified with M'Naghten and yet free enough of its faults to warrant stopping a long, safe way short of Durham.

(a) Irresistible impulse test. As of 1957, fifteen states, the federal jurisdiction and the military coupled this test with the M'Naghten Rules and "thus liberalized their gauge of criminal responsibility". Lindman and McIntyre, op. cit. supra, 332-333. No state relies upon it as the sole criterion. The rule is: if the accused was irresistibly driven to commit a criminal act by an overwhelming impulse resulting from mental disease he is not guilty, though meeting the M'Naghten tests. 70 A.L.R. 659; 173 A.L.R. 391. It has no application where the accused's volition resulted from a brooding, smoldering form of "insanity" or where his reason was "temporarily blinded by anger, jealousy or overriding passions not the result of a mental condition". Lindman and McIntyre, op. cit. supra, 333. The doctrine has never been accepted in Missouri in criminal cases, although it is recognized in civil cases where an "insane" suicide is regarded as an "accident" under insurance policies. *Edwards v. Business Men's Assur. Co.*, 350 Mo. 666, 168 S.W. 2d 82, 95.

The doctrine has been rejected in Missouri and a majority of the states for several reasons, some more "practical" than logical:

(1) There is no way that long after an event anyone, even the accused, can differentiate an irresistible impulse from one which was only unresisted. Being difficult to prove or disprove its application by juries will be erratic and, therefore, in some cases unjust either to the individual or society.

(2) Those who favor a *broader* test, though in accord with the attempt to give recognition to failures of control caused by mental disease, say that the test is too narrow and "may be impliedly restricted to sudden, spontaneous acts as distinguished from insane propulsions that are accompanied by brooding or reflection". Model Penal Code (ALI), Tentative Draft No. 4, comment at p. 157 (1955).

There are many psychiatrists who find a sound scientific basis for this doctrine. Lindman and McIntyre, op. cit. supra, 340; Keedy, Irresistible Impulse as a Defense in the Criminal Law, 100 U. Pa. L. Rev. 956 (1952) The formulation represents an early and persistent attempt to meet the basic fault of M'Naghten.

(b) The Model Penal Code (ALI) and allied tests. The Model Penal Code, approved in May 1962, by the American Law Institute is "the product of many heads and hands". Wechsler, Foreward to a Symposium on the Model Penal Code, 63 Colum. L. Rev. 589 (1963). Work on it began over 10 years ago with Professor Herbert Wechsler of Columbia University School of Law as the Chief Reporter. His special consultant on Section 4 dealing with Responsibility was Dr. Manfred S. Guttmacher, Chief Medical Officer of the Superior Court of Baltimore, Maryland. They made the initial formulations submitted in Tentative Draft No. 4 in 1955. "Cynical acid was applied to these submissions by three separate groups of critics: a strong Advisory Committee; the Council of the In-

stitute; and, finally, the membership in annual meeting." Ibid.

The only states which by statute have adopted any part of Section 4 of the Code dealing with Responsibility are Vermont and Illinois. Missouri's new Act is a modified form of Section 4 together with some rather significant additions. The Code submits two alternative formulations. The first, adopted in Vermont, Illinois and, for the most part, in Missouri is found in Section 4.01 (1) of the Model Penal Code. For convenient comparison with Missouri's new Act, Section 552.030 (1), we set out the Model Penal Code, Section 4.01 (1) showing Missouri's omissions therefrom in brackets and Missouri's additions in italics: "a person is not responsible for criminal conduct as a result of mental disease or defect if he [lacks substantial capacity either to appreciate the criminality of his conduct] *did not know or appreciate the nature, quality or wrongfulness of his conduct* [or to conform] *or was incapable of conforming* his conduct to the requirements of law".

Objections to the Model Penal Code's standard and answers thereto may be listed as follows:

(1) "It retains the irresistible impulse test." It does *not* do so. Allen, The Rule of the American Law Institute's Model Penal Code, 45 Marquette L. Rev. 494 (1962); Davis, Some Aspects of the Currens Decision, 35 Temple L. Q. 45 (1961). Insofar as the test recognizes the well supported medical views, rarely opposed, that such impulses can and do overcome reason and knowledge of wrong the criticism is really a merit of the Act. However, the Model Penal Code has several distinct advantages over the irresistible impulse test in its proposal that an accused is not responsible if by reason of mental disease or defect he is unable to conform his conduct to the requirements of law. In the case of irresistible impulse it would be sufficient to excuse the accused on the basis of one isolated impulse resulting in one act. The Model Penal Code (and the Missouri test) require more, viz. a showing that mental disease or defect has progressed so far as to render the accused generally, though not always, incapable of controlling his conduct within legal limits. (This broadened base and, in reality, heavier burden has been criticized by those who prefer the Curren's test, infra, which requires a finding that the inability to control one's conduct must be shown [only?] with reference to the act charged.) Furthermore, the Model Penal Code and Missouri tests are distinct improvements over the irresistible impulse test since they admit of evidence that the act resulted from "insane propulsions that are accompanied by brooding or reflection".

(2) "It retains the M'Naghten Rules", in the first alternative relating to the absence of substantial capacity to appreciate the criminality of conduct. The answer is that while the Model Penal Code and the Missouri Act both recognize that where mental disease or defect render the person incapable of knowing the nature, quality or wrongfulness of the conduct, they improve upon the M'Naghten Rules by substituting or adding as an alternative the requirement of *appreciation* as distinguished from "knowing". This is said to cure the ambiguity in the word "know" in the M'Naghten Rules. (Others think that the word "appreciate" beclouds the issue. It might be stated here that those who dislike the Model Penal Code are either ardent advocates of M'Naghten or equally avid proponents of the Durham test. What one will disfavor as "too liberal" the other may dislike as "too strict"!)

On the whole the Model Penal Code test has been widely acclaimed as a compromise between M'Naghten and Durham. It has been adopted by statute in Vermont and Illinois and now, in modified form, in Missouri. Cf. Vt. Stats. Anno., Title 13, section 4801 (1957); Illinois Criminal Code, 1961, effective January 1, 1962, found in Ill.Rev.Stats., 1961, chapter 38, section 6-2. It was passed by the Oregon legislature but vetoed by its governor. It has been studied and proposed by a New York committee but has been delayed pending a revision of New York's entire criminal code. Allen, The Rule of the American Law Institute's Model Penal Code, 45 Marquette L. Rev. 494, 499 (1962). It was favored by a majority of a House of Representatives Committee reporting on a Congressional bill which would replace the Durham rule in the District of Columbia. See H.R. 7052, 87th Cong. 1st Sess. (1961) and H.Rep.No. 563. The United States Court of Appeals for the Third Circuit has abandoned the M'Naghten irresistible impulse alternatives in favor of the second half of the Model Penal Code test. *U.S. v. Currens,* 3 Cir., 290 F.2d 751. No state or other federal court has followed the Third Circuit. The Currens' test, proposed by Judge Biggs, who for years has been a recognized authority in this field of law, has a few staunch supporters but as many, or more, critics. Its chief defect seems to be that whereas M'Naghten ignores volition and affect, Currens drops cognition. Those who defend M'Naghten on the basis that defects in cognition imply defects in volition (and vice versa) should logically support Currens if it is true that where one faculty of the mind is affected all are impaired.

The Model Penal Code-Currens-Missouri formulation relating to conforming one's conduct to the requirements of law does, of course, have *some* relation to the irresistible impulse test adopted as an alternative to the M'Naghten Rules in 15 states, the federal courts and the military. In a real sense this means that the Model Penal Code, the Currens test and the Missouri Act have "support" from a number of other states and the federal courts. See, for instance, the Manual for Courts-Martial United States, section 120b (1951) which phrases the military version of irresistible impulse as completely depriving the accused of "his ability. . . .to adhere to the right". The exact origin of the Model Penal Code phrase is not known, but appears to be a recommendation made by the British Medical Association to the Royal Commission on Capital Punishment. See its Report, op. cit. supra, 93, 110, 116. In *State v. White,* 58 N.Mex. 324, 270 P. 2d 727, 730 (1954) the court held that knowledge of the difference between right and wrong was not essential to acquittal "if, by reason of disease of the mind, defendant has been deprived of or lost the power of his will", and "was incapable of preventing himself" from committing the act. The New Mexico court cited with approval the Royal Commission on Capital Punishment, op. cit. supra, 116. The majority recommendation of the Royal Commission so closely follows the Model Penal Code and the Missouri Act that it is worth quoting (op. cit. supra, 111): "The jury must be satisfied that at the time of committing the act, the accused, as a result of disease of the mind or mental deficiency, (a) did not know the nature and quality of the act or (b) did not know that it was wrong or (c) was incapable of preventing himself from committing it."

The Model Penal Code (ALI) test has met with some rejection and disfavor, but most of the comments have been favorable. It has narrowly missed adoption by judicial decision in Wisconsin and Washington.

Since we have included objections to the Model Penal Code and Missouri rules it may be helpful to outline some of the things said in their favor. (1) They satisfy all of the basic postulates of crime and punishment adhered to by the majority of jurists today. (2) Though they present nothing revolutionary and follow the fundamental insights of the criminal law their spirit is progressive. They do not go as far as Durham but represent a marked improvement over the M'Naghten and irresistible impulse tests. (3) Coupled with a definition of mental disease or defect which excludes sociopaths whose only evidence of abnormality is repeated or anti-social conduct, they maintain legal control over rampant psychiatric testimony. (4) They give the expert ample latitude in his testimony and do not get involved in the causation problem which so upset courts and psychiatrists in handling the Durham rule. (5) They retain kinship with M'Naghten which is fundamentally based upon the two elements of crime, *actus reus* and *mens rea.* (6) They eliminate the ambiguities created by the word "know" by substituting or adding the word "appreciate". (7) The word "criminality" ("wrongfulness" in the Missouri Act)

disposes of the objection to the right-wrong test that it was related by some courts to legal wrong rather than moral wrong.

c. **Raising the Defense.**

1. Pleading or notice by the defendant. Prior to the present Act, Missouri and 32 other states allowed proof of insanity under a plea of "not guilty" even though it was an affirmative defense. Lindman and McIntyre, op.cit. supra, 347. In these states the defense could be raised during trial. Though the state might well have grounds to anticipate the defense in most cases, occasionally it could be taken completely by surprise. But even where the defense was suspected the state would be at a distinct disadvantage not only in gathering proofs but having them available, which is equally important. As a result of "grave abuses" of the insanity defense, Orfield, Criminal Procedure from Arrest to Appeal 303 (1947), at least 18 states require the plea to be entered at arraignment, either in the form of a written or oral special plea or notice of intention to defend on the ground of insanity. Four of these states allow the defense to be raised by notice given not later than 4 days before trial, while three other states permit the defense without notice in the discretion of the court. Lindman and McIntyre, supra; Weihofen, Mental Disorder as a Criminal Defense 357-359 (1954). "In many states the notice requirements are strictly enforced and are generally consistent with modern 'no surprise' pleading concepts." Lindman and McIntyre, supra, citing Orfield, op. cit. supra, 321; Millar, The Function of Criminal Pleadings, 12 J. Crim. L., C. & P.S. 500 (1922).

The first sentence of Section 552.030 (2) of the Missouri Act follows the language of Model Penal Code (ALI), Section 4.03 (2). The drafters of that Code call attention to similar provisions in the ALI Code of Criminal Procedure, Section 235.

A question has been raised as to whether evidence of mental disease or defect affecting a state of mind essential to some element of an offense or affecting the question of whether the defendant should be given death or life imprisonment in capital cases can be admitted under Section 552.030 (3) without prior pleading or notice required by Section 552.030 (2) for the introduction of evidence of mental disease or defect *"excluding responsibility"*. It was the intention of the drafters of the Act, three of whom are the authors of these annotations, to prevent the state from being taken by surprise and to permit it to have an examination of the defendant *in any case* where the defendant relies upon mental disease or defect as a complete or partial defense or by way of mitigation or reduction of the grade of the offense or the penalty.

It may well be that the language of Section 552.030 should be clarified by amendment. In the meantime, however, at least two of us, with the third *dubitante*, feel that the Act should be construed in keeping with the intention of the drafters. It is to be noted that the language of the Model Penal Code (ALI), Sections 4.02 and 4.03 are in many respects similar to Section 552.030 (2) and (3) of the Missouri Act. The failure to add a clarifying clause in the Missouri Act may have been due to oversight occasioned by the fact that the drafters followed the Model Penal Code (ALI) which in another section kept the burden of proof of the negation of an "affirmative defense" on the *state* unless indicated otherwise in the Code. See Model Penal Code (ALI), Tentative Draft No. 4, Section 1.13 (1955) and the troubled, involved comments thereunder at p.108 ff. Only the Tentative Draft (1955) was before the authors of Missouri's act in the fall of 1962. They did not have before them the Final Draft (1962) which added in brackets and with a question mark (?!) a phrase in Section 4.03 placing the burden of proving mental disease or defect *excluding responsibility*, as an "affirmative defense", upon the *defendant* by a preponderance of the evidence. Without the bracketed phrase in Section 4.03, the Model Penal Code, Section 1.13 left the burden of proof on the state so that it was not necessary in

Section 4 of the Code to spell out the *defendant's* duty to plead partial or diminished responsibility as a prerequisite to proof thereof.

Perhaps the above explanation will serve as adequate notice to the bench and bar of the intention of the framers of the new law. A defendant would be well-advised, out of an abundance of caution, to plead the "defenses" of partial and diminished responsibility if he intends to rely upon them. A good case can be made that even without clarifying amendment, and apart from legislative intent, the doctrines must be pleaded or noticed up by defendant if they are to be relied on.

It may be added that the English homicide Act, 1957 (5 & 6 Eliz. 2 c.11) Section 2, which established the rule of *diminished* responsibility in homicide cases, expressly places the burden of proof upon the defense. Official notes to the published Act require the defendant to prove the defense by a preponderance of the evidence, the rule in Scotland from which the doctrine was adopted. *R. v. Dunbar* [1957] 2 All E.R. 737, C.C.A.

2. The court's power to raise the defense. Until recently there was some question whether the court or prosecution could raise the defense if the defendant failed to do so. After the Durham rule was adopted, Congress in 1955 passed a statute requiring automatic confinement of a person acquitted on the ground of insanity. D.C. Code 1961, section 24-301 (d). It was soon found that some defendants who might successfully have raised the insanity defense preferred either to stand trial or plead guilty and thus take their chances on a fixed term in the penitentiary in lieu of an indefinite term in a mental institution where the "treatment" might not be worth the "cure." If, as Aristotle observed, "punishment is a sort of medicine", today "medicine can be a sort of punishment". DeGrazia, The Distinction of Being Mad, 22 U. Chi. L. Rev. 339, 355 (1955).

However, D.C. Code 1961, Section 24-301 (d) provided for automatic commitment after an acquittal on insanity without reference to how the defense was raised. The United States Court of Appeals for the District of Columbia held that the trial judge could reject a plea of guilty, then acquit on the ground of insanity and order the defendant committed. *Overholser v. Lynch*, D.C. Cir., 288 F.2d 388 (1961). The Supreme Court reversed on a construction of the Code, 369 U.S. 705, 82 S. Ct. 1063, 8 L.Ed. 2d 211, noting that doubts of the constitutionality of the Code might arise if interpreted otherwise. See also *Cameron v. Fisher*, D.C. Cir., 320 F.2d 731. For one thing, the right to plead is intimately associated with the right to counsel, and a forced plea by the court might seriously compromise that right. Krash, The Durham Rule and Judicial Administration of the Insanity Defense in the District of Columbia, 70 Yale L.J. 905, 938-939 (1961).

The drafters of the Model Penal Code decided to omit a provision permitting the judge to raise the defense of irresponsibility, since this might be "too great an interference with the conduct of the defense". Model Penal Code, Tentative Draft No. 4, comment at p. 194 (1955). For one thing there would be an "extraordinary inversion" of the usual roles of prosecution and defense if the former, with the burden of proving mental responsibility in some jurisdictions such as the District of Columbia, could prove insanity by merely failing to offer evidence thereon! This would force the accused to bear the burden of proof of sanity. And he might have no funds to do so. Krash, op. cit. supra, 939; Note, The Defense of Insanity—A Sword and a Shield, 10 Am. U. L. Rev. 201, 207 (1961).

A very nice question of legal ethics presents itself when one asks whether a defendant's lawyer, having knowledge of facts justifying the defense, is obliged to raise either it or mental fitness to plead. Cf. Krash, op. cit. supra, 940. The drafters of the Model Penal Code venture one solution: "A defendant's refusal to allow the issue to be raised where expert psychiatric opinion warrants it, however, might well be weighed as a factor in deciding whether he is mentally fit to proceed." Tentative Draft No. 4, comments