Missouri Law Review

Volume 30
Issue 3 *Summer 1965*

Article 8

Summer 1965

Recent Legislation

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THE MENTALLY ILL IN MISSOURI CRIMINAL CASES

In October of 1963 the new Chapter 552 of the Revised Statutes became an effective part of Missouri law. This new chapter made substantial changes in the law dealing with the acquittal, commitment, and discharge of, and the procedure for dealing with, the mentally ill defendant in criminal actions. As well as superseding some well established judicial precedents, Chapter 552 repeals a large block of statutory law found scattered throughout the statutes.[1] The bulk of the subject matter dealing with the mentally ill criminal defendant can now be found in this one chapter.

It is not the purpose of this comment to digest or recapitulate the entire new chapter or to note all of the many changes made in the old law. Rather, the emphasis will be placed upon an examination of four basic areas in which a criminal defendant's mental condition is a determinitive factor. These four areas are: (1) Mental Condition Necessary for Trial; (2) Mental Condition Precluding Responsibility; (3) Mental Condition Removing the Mental Element of the Crime; and (4) Mental Condition Affecting Punishment.

I. Mental Condition Necessary for Trial

The United States Constitution seems to require that a person have a certain degree of mental competency before he can be tried for a criminal offense. "The courts have long recognized that the constitutional right to a fair trial includes the right to be physically present and to assist in his own defense, but also embraces his right to be present mentally as well."[2] Missouri law, now and prior to Chapter 552, recognizes this mandate. The problem arises not from the requirement that one must be competent before a court may legally proceed, but rather from the question what *degree* of competency a man must have. The old statute in Missouri simply provided that an "insane" person could not be brought to trial.[3] Nowhere did the statute define "insane" or attempt to clarify what degree of competency was needed. A few years ago a judicial test was promulgated providing what degree of competency the courts would deem necessary before they would proceed. The court said the question to be determined is if "the accused can appreciate the nature of the charges against him, or whether he is so mentally impaired as to render it probable that in so far as it may devolve upon

1. "Sections 202.080, 545.750, 545.760, 545.770, 546.510, 546.520, 546.530, 546.623, 546.625, 546.627, 546.760, 546.770, 546.780, 546.790, and 549.030, RSMo 1959, are repealed and ten new sections enacted in lieu thereof . . . ." Mo. Laws 193, at 75, § A.
2. United States v. Gundelfinger, 98 F. Supp. 630, 631 (W.D. Pa. 1951).
3. § 546.510, RSMo 1959 (repealed in 1963).

him, he cannot have a full, fair, and impartial trial."[4] This test had the faults of being overly verbose and difficult to apply. The test which says that one is incapable to proceed when his condition will keep him from having a fair trial would seem to give the fact finder very little aid in its determination of defendant's capacity.

The test espoused by the United States Supreme Court for federal cases, which is probably also the majority rule among the states, is more exact. It, also, is a two-pronged test, requiring that the defendant have a "rational and factual" understanding of the proceedings and have a "present ability to consult with his lawyer with a reasonable degree of rational understanding."[5] Missouri's old rule required an understanding of the charges, while the federal rule requires an understanding of the proceedings. Missouri law required that defendant's condition be such that if tried he could not have a fair trial, while the federal rule more exactly requires that the defendant have the ability to consult with his attorney.

Missouri's new test, adopted from the *Model Penal Code,* is much more similar to the federal test than to the old Missouri test. It provides, "no person who as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense shall be tried, convicted or sentenced for the commission of an offense so long as the incapacity endures."[6] Again the test is a two-pronged one. The first prong, as in the federal test, requires an understanding of the proceedings, and the second prong, similar to the federal test, requires capacity to assist in his own defense.

Missouri's new statute has an advantage over the old Missouri law in that the new statute completely eliminates the word "insane." Such a word, left undefined, can lead to considerable difficulty. Furthermore, the new test gives the fact finding body, as well as the expert witness, a more exact idea of the degree of competency the law deems necessary in order to continue the proceedings. And the new test does so in much fewer words.

Procedurally, the new statute makes some considerable changes. The method of determining the defendant's fitness to proceed has been entirely revamped. The old law provided that when the judge had reason to believe the defendant was "insane" he would impanel a jury of twelve persons to hear evidence and determine the sanity of the defendant.[7]

The new law is considerably more complex. When the judge has reason to believe that the accused is not mentally fit to proceed, rather than calling a jury, the judge appoints one or more physicians to examine fully the accused and submit a report. After receipt of this report the accused or the state or both may have a physician of their own choosing examine and report on the accused's condition. If the reports are uncontested, the court will then make a determina-

4. State *ex rel.* Standefer v. England, 328 S.W.2d 732, 736 (Spr. Mo. App. 1959).
5. Dusky v. United States, 362 U.S. 402 (1960).
6. § 552.020(1), RSMo 1963 Supp.
7. § 546.510, RSMo 1959 (repealed in 1963).

tion of the accused's fitness. However, either party may contest any report, call for a hearing before the court, and cross-examine the examining physician(s). After the hearing the court will then make its finding of fitness to proceed.[8]

The law has thus been changed from a completely adversary system of each party presenting evidence to a jury in every case, to a more administrative system of hearing and fact-finding, in which the judge is the fact finder aided by court-appointed, as well as partisan, experts.

II. Mental Condition Precluding Responsibility

The next area to be examined is the mental condition of the accused, not at the time of the trial, but at the time the particular anti-social act took place. The law has long recognized that a man's mental condition, at the time he committed an act, otherwise criminal, may be such that the law will not hold him criminally responsible.

The first problem is to determine what degree of competency should be established as necessary for one to be a fit subject of punishment for his anti-social acts. Upon establishing this abstract line between responsibility and non-responsibility, the second and perhaps greater problem arises as how best to convey these established notions of responsibility to the fact finding body. The search for the best test to determine what mental conditions will preclude responsibility contain both the consideration of establishing the law's notions of what does and does not constitute the area of responsibility, and the best way in which to convey this notion of responsibility to the fact finding body.

Missouri, in its new Chapter 552, has adopted a rule establishing this area of non-responsibility and providing for the fact finder what is hoped to be an adequate guide by which to measure the mental condition of the accused. Missouri's new test is:

> 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.[9]

With this new statutorily defined test, Missouri has not only made a considerable break with the past, but has also placed itself in the vanguard of jurisdictions which have adopted similarly worded measures of responsibility.

Until October, 1963, the effective date of the new law, Missouri stood squarely in line with the majority of the states, with a definition of legal insanity, or non-responsibility, which was first promulgated over one hundred and twenty years ago by the House of Lords in the well-known *M'Naghten's Case*.[10] The exact wording varying from case to case, repeated Missouri decisions indicated a long and strong commitment to the popular old rule. Courts on repeated

8. § 552.020(2), RSMo 1963 Supp.
9. § 552.030(1), RSMo 1963 Supp.
10. 10 Cl. & Fin. 200, 8 Eng. Rep. 718 (1843).

occasions refused to expand or modify the old relic.[11] The previous stand in Missouri is well illustrated by the language of the supreme court in *State v. Goza*:

> [I]f, at the time of the commission of the alleged offense, he had capacity and reason sufficient to enable him to distinguish between right and wrong, and understand the nature and consequences of his act as applied to himself, he is a responsible agent . . . .[12]

It is this language that the legislature has modified and enlarged by its enactment of this new statute.

By examining briefly the four tests generally used in the United States today, what Missouri's new test does and fails to do in relation to the various alternatives can be explored. The four basic tests in use today are the M'Naghten Right and Wrong Test; the Irresistable Impulse Test, which is used in conjunction with and in addition to the M'Naghten Test; the Durham or Product Test; and the test published by the American Law Institute in its *Model Penal Code*.

The oldest and by far the most generally used test in this country is the above mentioned test first promulgated in *M'Naghten's Case*, where it was said:

> to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.[13]

In other words, if the mentally ill accused knew what he was doing and knew that it was wrong to do it, he is criminally responsible under the M'Naghten Right and Wrong Test.

Despite M'Naghten's wide judicial acceptance, it is not difficult to find equally wide criticism of the rule. The general line of attack on this old citadel of criminal law seems to follow this basic pattern. The old Right and Wrong Test is "enforcing as a matter of law, outmoded and erroneous psychological theories which give controlling importance to the so-called intellectual or cognative faculty."[14] "[P]sychiatry now recognizes that a man is an integrated personality and that reason, which is only one element in that personality, is not the sole determinant of his conduct. The right-wrong test, which considers knowledge alone, is therefore an inadequate guide to mental responsibility for criminal behavior."[15] This attack is aimed at the very narrow breadth of the rule, arguing that other

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11. Two early cases refusing to modify M'Naghten are: State v. Thruston, 92 Mo. 325, 4 S.W. 930 (1887); State v. Pagels, 92 Mo. 300, 4 S.W. 931 (1887). See also State v. Bannister, 339 S.W.2d 281 (Mo. 1960); State v. Deyo, 358 S.W.2d 816 (Mo. 1962).

12. 317 S.W.2d 609, 615 (Mo. 1958), quoting Thomas v. State, 206 Md. 575, 582, 112 A.2d 913, 916 (1954).

13. *Supra* note 10, at 210, 8 Eng. Rep. at 722.

14. Annot., 45 A.L.R.2d 1447, 1456 (1954).

15. Durham v. United States, 214 F.2d 862, 871 (D.C. Cir. 1954). See also ROYAL COMMISSION ON CAPITAL PUNISHMENT, REPORT 113 (1953); CARDOZO, WHAT MEDICINE CAN DO FOR THE LAW (1932).

mental conditions should be considered. The argument continues by saying that such a strictly narrow rule places undue restraints upon expert testimony. The psychiatrist is forced to frame his diagnosis solely in terms of what is right and what is wrong in the mind of the defendant, all else under this test being irrelevant. He is forced to give testimony in terms that have very little meaning to him and have no meaning in the clinical study of the defendant's mental condition. Furthermore he is forced to make moral judgments as to what is right and what is wrong to be able to give an answer, thus usurping what may be considered the sole province of the jury.[16]

It has been repeatedly argued that even though one can readily distinguish between right and wrong, particular types of mental illness can make it absolutely impossible for the sufferer to refrain from doing a given forbidden act. It is pointed out that a person should not be responsible when his free agency is thus destroyed. When he has lost the power to choose between right and wrong, even though he may fully realize the difference, he is not a fit subject of punishment. A substantial number of jurisdictions, though still a minority, accept this argument and allow for this type of situation by adding the Irresistable Impulse Test to the M'Naghten Test. The exact wording of the test varies from jurisdiction to jurisdiction, but generally it can be defined as the condition that exists when, although the "accused can distinguish between right and wrong, still he is unable because of mental disease to resist the impulse to commit the criminal act."[17] This addition considerably broadens the area of mental illness which the law will consider to be in the area of non-responsibility by legally recognizing established psychological and psychiatric phenomena. A fortiori the expert witness is given considerable more breadth in his permissable testimony under this addition to the M'Naghten Test.

While only a few attack this broadening of the scope of non-responsibility, there are considerable attacks on the way this idea is expressed to the jury. The use of the words "impulse," "irresistable impulse" or "destruction of free agency" tend to confuse the jury. This idea of one's inability to refrain from some act is not best expressed in any of these terms. The use of them does not seem to allow for the mental illness in which urges or compulsions result from long periods of brooding, smoldering, or reflection. Not only do they seem to exclude the slowly developing, compulsive action, they seem to allow exclusively for a ruling of non-responsibility where reason was temporarily blinded by anger, jealousy, passion, or sudden impulse; even perhaps without the presence of a mental disease or defect causing this anger, passion or impulse.[18]

The third test is one that seems to be a favorite of defense counsel, but which has met with only very limited acceptance by the courts. This test was first popularized in *Durham v. United States*[19] from which its name was derived. The court there adopted a test similar to that existing for some time in New

16. Annot., 45 A.L.R.2d 1447 (1954).
17. State v. Goza, 317 S.W.2d 609, 613 (Mo. 1960).
18. LINDMAN & MCINTIRE, THE MENTALLY DISABLED AND THE LAW 332 (1961). See also Saur v. United States, 241 F.2d 640 (9th Cir. 1957).
19. *Supra* note 15.

Hampshire.[20] This Durham or Product Test has two elements for determining lack of responsibility: (1) a mental disease or defect, and (2) a critical relationship between the disease and the alleged act.[21] In other words, if the act in question was the "product" of the mental disorder, the accused is not responsible.[22] This test breaks completely with M'Naghten and would seem to widen considerably the area of non-responsibility at the same time that it devises an entirely different method of getting this broadened concept of responsibility before the fact finder. For psychological and humanitarian reasons this test may have a very sound basis, but the courts have almost unanimously refused to accept it.[23]

While finding substantial support among the psychiatrists, as representing a realistic approach to responsibility and allowing the expert the freedom needed to explain fully each defendant's unique mental condition,[24] the test has also come under some heavy criticism which seems to follow this pattern. First, the words used in the test are too vague. Such terms as "disease," "defect," and "product" are completely undefined. This leaves the jury with absolutely no guidelines to follow in appraising the defendant's mental condition and responsibility. The result is that the jury is at the mercy of the expert witness' testimony. The psychiatrist's attitude toward criminal behavior many times embodies as a basic assumption the feeling that such anti-social conduct is, in itself, prima facie evidence of the existence of a mental disease.[25] The mere fact that the acts were done is enough to cause some psychiatrists to conclude that anyone who did them was mentally ill. With the fact of defendant's mental illness proven by defendant's own anti-social acts, "it can be expected that few expert witnesses will hesitate to find the necessary causal connection between the crime and the disease once they have determined the disease to exist."[26] The result, it is argued, is obvious. Any defendant, once it is shown that he did the act in question, must be acquitted due to lack of responsibility.

This line of argument is strongly contested by many psychiatrists, and perhaps justifiedly so. Even if this argument against Durham is true perhaps a demurrer is in order. The cause of society might best be served when most criminal offenses are met by psychiatric care rather than punishment. Be that as it may, this day will likely be far in the future. The fact remains that the Durham

20. See, *e.g.*, State v. Pike, 49 N.H. 399 (1869).
21. Carter v. United States, 252 F.2d 608 (D.C. Cir. 1957).
22. Durham v. United States, *supra* note 15.
23. "The Durham Rule has thus far been rejected by all state courts upon whom it has been urged. Several United States Courts of Appeals have also rejected it, as has the United States Court of Military Appeals. . . . However, in the spring of 1961 the Maine legislature adopted a test of legal insanity modeled after the Durham Rule. Me. Rev. Stat. Chap. 149, § 38 A." PAULSON & KADISH, CRIMINAL LAW AND ITS PROCESSES 324 (1962).
24. For generally favorable comment see Guttmacher, *The Psychiatrist as an Expert Witness,* 22 U. CHI. L. REV. 325 (1955); Roche, *Criminalty and Mental Illness—Two Faces of the Same Coin,* 22 U. CHI. L. REV. 320 (1955); Zilboorg, *A Step Toward Enlightened Justice,* 22 U. CHI. L. REV. 331 (1955).
25. DeGroza, *The Distinction of Being Mad,* 22 U. CHI. L. REV. 339, 345 (1955).
26. *Ibid.*

Test is extremely vague, and being so does give great power and freedom of testimony to the expert witness. Whatever the underlying reason may be, the courts have not yet chosen to leave the legal decision of responsibility almost solely to the testimony of the psychiatrist.

The final basic test used in this country is the one proposed in the *Model Penal Code,* Section 4.01. The test reads:

> 1) A person is not responsible for criminal conduct if at the time of such conduct as a result of a 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.
>
> 2) . . . . The terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.

Three states have adopted the essential features of the Model Penal Code Test: Vermont,[27] Illinois,[28] and now with this new statute, Missouri. Illinois adopted the test verbatim. Vermont substituted the word "adequate" for the Model Code's word "substantial." Missouri, while adopting the essential idea of the Model Code test, has made various word changes that a comparison will quickly demonstrate. How much change in actual results will come from the word changes cannot be accurately ascertained, but the difference will probably only be slight. From a theoretical standpoint the Model Code's test is broader, while the Missouri adaption requires a more complete incapacity. To illustrate, the Model Code requires only a "lack of *substantial capacity* to appreciate the wrongfulness of his conduct" or *lack of substantial capacity* "to conform his conduct to the requirements of law." Missouri, however, in more absolute terms requires that the defendant "*not know* the nature, quality or wrongfulness of his act," or be "*incapable* of conforming his conduct." Thus it is entirely possible that one could lack "substantial capacity" and be considered not responsible under the more inclusive Model Code test, yet not be completely "incapable" as the narrower Missouri adaptation requires.

Even though Missouri's adaptation includes a slightly narrower range of mental condition in the area of non-responsibility, Missouri's more absolute terms have the advantage of easier communication to the jury. Missouri's use of the terms "not know" and "incapable" would seem to be easier for a jury to understand and apply to a given defendant's conduct than would the Model Code's words "substantial capacity." In short, it is easier to determine in one's own mind when someone is incapable of doing something, than to determine when he lacks the substantial capacity to do it. It would seem to be difficult to determine exactly what is and what is not "substantial capacity." Therefore, the possible slight narrowing of the included mental conditions in Missouri's test, is more than compensated for by its relative ease in application.

Missouri in adopting a variation of the *Model Penal Code's* test has done

27. VT. STAT. ANN. tit. 13, § 4801 (1959).
28. ILL. REV. STAT. ch. 38, § 6-2 (1962).

two things. First, it has codified the old M'Naghten Right and Wrong test with a little different and perhaps improved wording. Secondly, by excluding from responsibility one who is incapable of complying with the law's demands, the concept of volition or control, which is the central theme of the Irresistable Impulse test, is now part of Missouri law, without the confusing wording of that test. With the use of the words "incapable of conforming conduct" in the Missouri test, the criticism of the Irresistable Impulse test is met. Missouri's test clearly states that all actions must be caused by mental disease or defect, and actions motivated by brooding are more easily slipped into this new test without confusion.

Missouri's new test, unlike the Durham Test, is of such a nature that a basic framework is constructed for the fact finder by a reading of the test itself. As such, the definition of basic terms does not play such an essential role in the test. Missouri nonetheless has adopted from the *Model Penal Code*[29] an attempted partial definition of one essential term "mental disease or defect." "The terms 'mental disease or defect' include congenital and traumatic mental conditions as well as disease. They do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct. . . ."[30]

It is obvious that this definition does very little defining. Rather than stating what a mental disease is, it states what it is not. This is not necessarily harmful, however, for this negative definition does meet a prime fear of the Durham critics, fear that the criminal acts themselves will prove to the psychiatrist the existence of the mental disease. By failing to establish a specific definition the expert is allowed great freedom to fully explore and relate the entire range of defendant's mental condition. With this greater degree of freedom derived both from the breadth of the test itself and from this broad definition of mental disease, the expert is no longer bound within the rigid framework of "right and wrong."

Missouri's test will allow the nearly complete freedom of testimony found under the Durham Test. In Durham, however, causation is a key, and the psychiatrist has almost complete freedom to establish this causation between disease and the act. Causation, however, does not have any degree of determinitive importance under the Missouri test. Causation would probably be irrelevant and even if admitted would not require the jury to find non-responsibility.

Missouri's test then could be considered a well worded compromise between the extreme strictness of M'Naghten and the extreme flexibility of Durham. This is not to say that the test is perfect or without responsible criticism.[31] There seems, however, to be considerable approval of the general principles established in the *Model Penal Code* test.[32] Perhaps the most significant vote of confidence

29. MODEL PENAL CODE § 4.01(2).
30. § 552.010, RSMo 1963 Supp.
31. See, *e.g.*, Weihofen, Comment, 19 J. Mo. BAR 656 (1963); WEIHOFEN, THE URGE TO PUNISH, 63-101 (1956).
32. MASSACHUSETTS JUDICIAL COUNCIL, REPORT 56-59; Maryland Legislative Committee as quoted in United States v. Hopkins, 169 F. Supp. 187, 190 (D. Md. 1958); ROYAL COMMISSION ON CAPITAL PUNISHMENT, REPORT 111 (1953). Expressions of preference for the test can be found in Commonwealth v. Chester, 337

came recently from the birthplace of the modern Durham Test, the District of Columbia Court of Appeals. That court seemed to backtrack on its earlier stand in *Durham* and indicated a preference for a rule more in line with the *Model Penal Code*.[33]

A question may arise as to whether the exact words found in the statute should be used in the jury instructions. It is axiomatic that courts are bound by legislative dictate, and it is these exact words that the legislature has dictated for use in assessing the criminal responsibility of accused persons. Likewise, a definition of the terms of the statute supplied by the court would not seem to be permissible. The words used in the test are not technical and any definition, no matter how carefully worded, will of necessity result in a change of meaning in the minds of the jury.[34] It is not a shade, an interpretation, a redefinition, or a broadening or narrowing change that the legislature intended to be applied, but rather this very measuring stick, as inexact or imperfect or ambiguous an individual court may believe it to be. To this exact test the courts should be bound.

Procedurally, the defendant must at the time of entering his plea, or ten days thereafter by written notice, or at a later date if the court for good cause allows, plead not guilty by reason of lack of responsibility. Failure to so plead or give the required notice will make all evidence of mental condition precluding responsibility inadmissable.[35] After the plea or the giving of notice, the court will appoint one or more physicians to examine fully and report on the defendant's mental condition. After receipt of the court appointed physician's report, both parties upon request may have defendant examined by a physician of their own choice. The question of responsibility will still be determined by the jury at the trial upon a hearing of all the evidence.[36] There is nothing in this statute that prohibits other evidence of non-responsibility and nothing that restricts Missouri's broad rule allowing lay testimony of a defendant's mental condition.[37]

Presumptions and burdens of proof were not changed by the new statute.

Once acquitted upon the grounds of mental condition precluding responsibility, the old law provided that the jury should make the additional determination of whether or not the defendant was still "insane." If not he was released from custody. This is changed by the new law. Upon acquittal by reason of non-responsibility, the defendant is automatically committed to the division of mental diseases for custody.[38]

Mass. 702, 150 N.E.2d 914 (1958); People v. Johnson, 169 N.Y.S.2d 217 (Westchester County Ct. 1957). Judicial adoptions of the test include United States v. Currens, 290 F.2d 751 (3d Cir. 1961); United States v. Hopkins, 169 F. Supp. 187 (D. Md. 1958).

33. McDonald v. United States, 312 F.2d 847 (D.C. Cir. 1962).

34. See Richardson, Reardon & Simeone, *An Analysis of the Act*, 19 J. Mo. BAR 677 (1963), and the model instruction on p. 732. For an excellent discussion of the entire chapter see the entire December issue of 19 J. Mo. BAR.

35. § 552.030(2), RSMo 1963 Supp.

36. § 552.030(4), RSMo 1963 Supp.

37. For an example of Missouri's broad rule allowing lay testimony see State v. Jackson, 346 Mo. 474, 142 S.W.2d 45 (1940).

38. § 552.040(1), RSMo 1963 Supp. This section further reads: "No person shall be released from such commitment until it is determined through the pro-

III. Mental Condition as Removing an Element of the Crime

Perhaps the greatest change in the law brought about by this new chapter is not that a new standard and procedure for determination of fitness to proceed was announced, nor that a changed test to determine responsibility was enacted, but rather that one's mental condition may now be shown to remove a necessary mental element of the crime. The statute reads:

> Evidence that the defendant did or did not suffer from a mental disease or defect shall be admissible to prove that the defendant did or did not have a state of mind which is an element of the offense . . . .[39]

This doctrine is known by the confusing term "partial insanity." It is a misnomer because the defendant is completely "sane" under the test of responsibility. Even though the defendant appreciated the nature of his wrongful act and was capable of conforming his conduct to the law's demands, still his mental condition was such that it would be impossible for him to harbor the intent, or other mental element, necessary to commit the crime. His mental disease has precluded him from having the "mens rea."

At this time the vast majority of the American courts enforce a sane-insane dichotomy.[40] They take an all or nothing attitude by assuming that if the defendant is found responsible, then as a matter of course he must be capable of entertaining the necessary state of mind required for the commission of the crime. As a result, evidence showing that one's mental disease precludes him from having the required mental element is not generally admissible. Until the enactment of this statute, Missouri was in line with this majority that refused to adopt the doctrine of "partial insanity."[41]

In examining this section the first thing to note is that it applies only to mental disease or defect as defined earlier in the chapter. Thus one who has an "abnormality manifested only by repeated criminal or otherwise anti-social conduct" does not have a mental disease or defect as herein defined and would not be covered by this section. The section is used to allow evidence showing that persons of very low mentality, persons with severe neurosis, alcoholics, or persons with various other mental defects did not have, because of their mental condition, the state of mind necessary to commit the crime.

With this section allowing evidence of "partial insanity" the legislature has made a seemingly logical step forward. The mental element is a very real and important part of the criminal law. A very high precentage of crimes require some

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cedures 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." Thus a fourth type of test is provided for release from custody after acquittal.

39. § 552.030(3), RSMo 1963 Supp.

40. Richardson, *et al., supra* note 34, at 711.

41. State v. Deyo, 358 S.W.2d 816 (Mo. 1962); State v. Pinski, 163 S.W.2d 785 (Mo. 1942); State v. Paulsgrove, 203 Mo. 193, 101 S.W. 27 (1907); State v. Holloway, 156 Mo. 222, 56 S.W. 734 (1900).

particular state of mind as a necessary element of the offense. This state of mind is a necessary element for the state to prove in all of these cases and the defense, under the old law, was permitted to fully demonstrate the absence of this necessary element, with the one exception that defendant's mental condition could not be used to demonstrate that he did not have the mental element necessary. It would seem, as a logical matter, that the mental element, if it is going to be such a necessary part of the crime, is open to proof or disproof by all evidence including psychiatric. If the defendant, in fact, does not have the necessary mental element, whatever be the cause, he would not seem to fill the requirements demanded and would therefore not be a fit subject of punishment for that particular crime.

The most likely result of this section is not the mass acquittal of mentally ill defendants, but rather convictions based upon reduced offenses in which a different degree of the mental element is needed.

This doctrine of "partial insanity" can be attacked on the grounds that it will tend to confuse the jury. The average juror may not realize the fine distinctions in the law. It will be difficult for him to understand that he must first use the evidence of mental condition to determine defendant's responsibility, then if he decides the defendant is responsible for his act, he must use this same evidence to determine if the defendant has the necessary mental element that the law requires for the commission of this offense. The result may be that when considerable evidence of mental disease is introduced, the juror may use this section as an "escape hatch." Even though finding the defendant responsible, he may then "compromise" and find a reduced offense without seriously considering the difficult factor of whether or not the disease actually removed the necessary mental element. To a degree this fear may be justified, but there is little under the old law that would keep a jury from reaching a "compromise" verdict after the mental condition of defendant was introduced for another purpose. Carefully selected juries and meticulously drawn instructions should keep this danger, if it is such, to a minimum.

IV. Mental Condition Affecting Punishment

In all criminal cases under the new law, if before conviction or sentencing, the defendant, because of mental disease or defect, lacks capacity to understand the proceedings against him or to assist in his own defense, he shall not be convicted or sentenced so long as the incapacity endures.[42] This is the same general "fitness to proceed" section discussed earlier, and this inability will prevent infliction of punishment.

If after the person has been convicted and sentenced and while he is an inmate in a state correctional institution he becomes mentally ill, the statute outlines the following procedure. "If the person in charge of any correctional institution has reasonable cause to believe that any inmate needs care in a mental hospital" he shall see that the inmate is transferred to a state mental hospital.[43]

42. § 552.010, RSMo 1963 Supp.
43. § 552.050(1), RSMo 1963 Supp.

The time spent in the hospital shall be counted as part of the sentence imposed.[44]

In capital cases, the new statute introduces a concept known as "'diminished responsibility." Missouri is the first state in the nation to have such a provision, although it is quite a common doctrine in civil law nations.[45] The doctrine allows evidence to be admitted showing that

> defendant did or did not suffer from a mental disease or defect . . . for the purpose of determining whether or not the defendant, if found guilty of a capital offense, shall be sentenced to death or life imprisonment.[46]

This is a third area in which evidence of mental condition may be used at trial. The rationale behind this doctrine is that even though the defendant is fully responsible, his mental disease might indicate that he did not have quite the degree of culpability that a perfectly normal person would have. His mental disease would thus be a form of a plea for mercy. Though this is a wise step taken by the legislature, it would seem that the rationale should be applied to all criminal cases and not just to capital offenses. If one's mental condition is such that he is not as blameworthy as he would be if he was not afflicted by a mental disease, there would seem to be no reason why the jury should not use this information in assessing punishment. By hearing this evidence of disease, the jury would be in a position to assess the punishment best suited for this particular person for this particular criminal act. Very likely, however, the jury, perhaps unconsciously, when hearing evidence of mental illness introduced for other purposes, does this very thing when it assesses its punishment.

Finally, "no person condemned to death shall be executed if as a result of mental disease or defect he lacks capacity to understand the nature and purpose of the punishment about to be imposed upon him or matters in extenuation, arguments for executive clemency or reasons why the sentence should not be carried out."[47] In short, similar to the test in "fitness to proceed," the condemned person must not be able to understand the proceeding or assist in his pleas for mercy to be considered unfit for execution. If the warden of the correctional institution has reasonable cause to believe such a condition exists, the governor shall order a stay of execution, if necessary, and the Circuit Court of Cole County shall conduct an inquiry in which both parties may have an examination of the condemned by a physician of their choice. The court will, after hearing, determine the issue of the condemned person's fitness for execution.[48]

V. Conclusion

This new chapter will have a considerable effect on the practice of criminal law in the state. The substantive as well as procedural aspects of Missouri law have been revamped in the entire area dealing with the mentally ill criminal de-

44. § 552.050(2), RSMo 1963 Supp.
45. Richardson, *et al.*, *supra* note 34, at 713.
46. § 552.030(3), RSMo 1963 Supp.
47. § 552.060(1), RSMo 1963 Supp.
48. § 552.060(2), RSMo 1963 Supp.

fendant. With this new law, Missouri has moved from a solidly conservative position, standing with a substantial majority of her sister states, to the position of a vanguard minority. The move, however, should not be considered radical or drastic. It was a move preceded by sound consideration and supported by considerable medical and jurisprudential support. It is a step toward a more realistic and enlightened consideration of the problem of the mentally ill and the criminal law.

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