

# COMMENT

## MENTAL DISEASE OR DEFECT EXCLUDING RESPONSIBILITY

A Psychiatric View of the American Law Institute:  
Model Penal Code Proposal

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It is a truism that in any decision-making process the freer the flow of relevant information the greater the chances that the decision will be rational and just. Any impediment to pertinent communication increases the probability that irrational or—in the court of law—unjust decisions will be made. The clinical insights of psychiatry can accurately reflect the state of its knowledge and be efficiently utilized by courts only when the procedures for testifying do not suppress or distort the information. The fewer the restrictions imposed on the psychiatrist testifying in court, the greater the resources upon which the courts can draw.

The considerations which we are presenting arise from and are restricted to our area of training, competency and primary interest—mental disease and mental defect. Only insofar as the proposal attempts to incorporate psychiatric disease need the Committee grant our advice any more weight than that of other interested laymen. However, so far as it does, we think it reasonable to hold that the unanimous opinion of the three psychiatric members of the Advisory Committee ought to be weighed as representative of the thinking of many of our colleagues in psychiatry upon whom the success of any formula depends.

There is now a body of experience based on the history of the M'Naghten<sup>1</sup> formula which may guide us to avoid a repetition of difficulties arising from earlier efforts. For example, a serious impediment to meaningful communication between psychiatrists and lawyers in the M'Naghten formula is the psychiatrists' mistaken assumption that M'Naghten makes an attempt to define insanity which they consider in error. Lawyers see it as a statement of the

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

conditions under which an accused person might be exculpated from guilt and from being stigmatized as a criminal.

The traditional reluctance of psychiatrists to testify in courts under the M'Naghten formula arises in large part from the frustration of language which the law requires of them. Many lawyers have failed to realize that freedom of psychiatric testifying is not identical with extension of psychiatric concepts in the procedures and decisions of the courts. Courts can only benefit from having the greatest possible clarity of exposition of psychiatric testimony, no matter what standards it sets for responsibility.

Section Four of the Model Penal Code of the American Law Institute,<sup>2</sup> devoted to Responsibility, has a dual function: It sets up the criteria by which, according to law, mental disease or defect may exclude responsibility. Responsibility is not a qualitative or quantitative intrinsic attribute of a person; it is, in this context, a legal judgment. Since, however, "the deed does not make the criminal unless the mind is criminal,"<sup>3</sup> the state of mind must be ascertained and a pathological state of mind is a psychiatric problem. However, the gauge for determining legal exculpation is not suitable for the differential diagnosis of psychiatric disability.

So, Section Four also sets up standards. It guides and it limits the communications of the psychiatrist concerning mental disease and defect to the judge and the jury who are to make the legal decision. It is this second and to some extent competing function which concerns us. Confusion arises from this paradoxical effort to combine in one formula: (1) the criteria by which the courts will hold a man not legally responsible (i.e., punishable); and (2) the conditions for the exposition of the psychiatrist's knowledge.

The question clearly should be: How may the courts optimally elicit testimony from the psychiatrist concerning psychopathology so that its own legal question concerning responsibility may be answered with maximum information at its disposal?

The two major formulae, competing to supplant M'Naghten, are the proposed American Law Institute prescription and the Durham

2. Model Penal Code § 4 (Tent. Draft No. 5, 1956), stating in part:  
Section 4.01—

(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 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.

3. Ibid.

Decision.<sup>4</sup> In our view both are refreshing and encouraging advances over M'Naghten and reveal significant agreement. The similarities between them might be summarized as follows: (1) each is intended to free from responsibility a man who has committed an illegal act which is the result of, or the product of, mental disease or defect; (2) each includes mental pathology—illness, disease or defect; (3) each rejects exclusively cognitive or intellectual approach; (4) neither formula, presumably, is primarily concerned to define mental illness but rather to indicate what degree of severity of mental illness protects an individual against the punitive and stigmatizing impact of criminal law; (5) each incorporates the concept of causality, with the words "product of" and "as the result of." Both "product" and "result" refer to the cause. Cause is the circumstance, condition, event, which necessarily brings about or contributes to a result.

Within this framework we state our reservations concerning the American Law Institute formula. We hold that the subtlety, complexity and obscurity of its psychological entities and its actual intrusion into the field of psychiatric diagnosis unnecessarily limit the contributions of psychiatry, present and potential, and needlessly restrict the medical and psychological resources upon which the court may draw. The legal requirements concerning appreciation of criminality and conformance of conduct and the negative definition that repeated criminal or otherwise antisocial conduct is not mental disease effect a gratuitous entrance into medical and scientific arenas which is unnecessary and may be harmful to the law's purposes.

Specifically, "substantial" and "capacity" are psychologically vague, ambiguous, unclear and complex quantitative concepts. More important, "to appreciate the criminality" is an involved cognitive phrase at least as likely to lead to confusion as "knowledge of right and wrong." Further, since criminality is an illegal act *with an accompanying mental state*, is there not a logical inconsistency or tautology here? For if the offender cannot "appreciate the criminality," then his act is not criminal, and if it is criminal then he must have "appreciated" it.

"To conform his conduct to the requirements of law" is an inverse restatement of irresistible impulse which has proven to be an almost unusable defense. To lack "substantial capacity to conform his conduct to the requirements of law" is to have an irresistible impulse.

The terms "mental disease and defect" specifically exclude "an abnormality manifested only by repeated criminal or other antisocial

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4. *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954), "An accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect." *Id.* at 874-75.

conduct." To refer to mental disease and then to limit its meaning is to rob the court of the worth of the psychiatrist's expertness precisely to the degree that it limits his ability to transmit clinical information. It predisposes to failure in communication. The phrase "mental disease or defect" should serve as a focus for the communication and description of the combined behavior, feeling, ideas, of a person so as to inform judge or jury.

If the courts wish to determine whether mental disease or defect exists, then 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 behavior may *be* the manifestation of illness. Repeated illegal or antisocial conduct is a manifestation of a personality, and this personality may be a sick one. There is a quality of behavior referred to as alloplastic, most commonly found in the psychopathic personality in which the symptom of psychopathology consists in the *acting out*. The manifestation of a man's abnormality may consist precisely in his repeated or otherwise antisocial conduct. To exclude such conduct from "mental illness" is to make a psychiatric judgment eliminating behavioral or conduct disorders.

Apparently there is no insistence on legal formulae in diagnosing physical diseases, so why in this case? If the physician were similarly forbidden to use one outstanding symptom as criterion for physical illness, the absurdity of such an approach would become apparent, or if he were limited to two tests it would be considered unscientific.

If the intent is to exclude the so-called psychopathic personality from irresponsibility, it is hard to see how it can succeed in this way. If the Committee does not want to excuse as psychiatrically ill individuals the so-called psychopathic or sociopathic personality, this formula will not serve that purpose, for its implementation depends upon the testimony of psychiatrists; those who consider psychopathic or sociopathic personality a mental disease or defect will so testify and those who do not will not.

In summary, essentially the Model Penal Code formula has added to the cognitive criteria volitional criteria. It has eliminated behavioral criteria except when they are combined with other phenomena.

The Durham Decision permits free communication of psychiatric information and the American Law Institute creates road blocks to such transmission. The Durham formula puts no limitations on psychiatric testimony except those which are implicit in the present

state of the discipline. The American Law Institute formula requires psychiatric judgments as to substantial capacity, demands essentially cognitive criteria concerning capacity to control, and insists upon including legal criteria in the old tradition by attempting to eliminate the psychopathic personality.

Neither the Model Penal Code nor the Durham formula resolves the problems of psychiatry; no legal formula can. Psychiatry is an incomplete scientific and medical specialty. Indeed all medicine and science are developing and hence are incomplete. This is reason to encourage its contribution rather than to emphasize its limitations in the courts.

For these reasons, we recommend the adoption of the historic practice of the New Hampshire Court as recently reformulated in the case of *Monte Durham*.

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