See: Minutes of Subcommittee No. 3
9/7/68, p. 1, Vol. XI, Tape #18
9/20/68, p. 10, Vol. XI, Tapes #19 & 20

CRIMINAL LAW REVISION COMMISSION
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# ARTICLE 5. RESPONSIBILITY

Preliminary Draft No. 1, July 1968, including:

Section 1. Mental disease or defect excluding responsibility

Section 2. Issue of insanity is affirmative defense

Section 3. Immaturity excluding criminal conviction; proceedings to juvenile court

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Subcommittee No. 3

# ARTICLE 5. RESPONSIBILITY

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Section 1. Mental disease or defect excluding responsibility. (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) As used in this Article, the terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.]

## COMMENTARY - MENTAL DISEASE OR DEFECT EXCLUDING RESPONSIBILITY

### A. Summary

Subsection (1) of this section, based entirely on section 4.01 (1) of the Model Penal Code, is a modernized rendition of the M'Naghten and the "control" (irresistible impulse) tests. The M'Naghten rule in its classical form reads as follows:

> "In all cases of this kind the jurors ought to be told that a man is presumed sane . . . until the contrary be proved to their satisfaction. It must be clearly proved that at the time of committing the act, the party accused was laboring 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 as not to know that what he was doing was wrong."

M'Naghten is in effect in about two-thirds of the states.

The "irresistible impulse," or control, test addendum, which is operative in about a third of the states, adds the following consideration to the rule:

> "If he did have such knowledge, he may nevertheless not be responsible if by reason of the duress of such mental disease, he had so far lost the power to choose between right and wrong, and to avoid doing the act in question, as that his free agency was at the time destroyed."

This section substitutes "appreciate" for M'Naghten's "know," thereby indicating a preference for the view that an offender must be emotionally as well as intellectually aware of the significance of his conduct. The section uses the word "conform" instead of the phrase "loss of power to choose between right and wrong" while studiously avoiding any reference to the misleading words "irresistible impulse."

In addition the section requires only "substantial" incapacity, thereby eliminating the occasional references in some of the older cases to "complete" or "total" destruction of the normal cognitive capacity of the defendant.

Subsection (2) of this section, based entirely on section 4.01 (2) of the Model Penal Code, is set out in brackets to stress a divergence of opinion as to its efficacy and desirability. The main purpose of the provision is to bar psychopaths from the insanity defense. The comment on this portion in the Model Penal Code reads as follows:

> "Paragraph (2) of section 4.01 is designed to exclude from the concept of 'mental disease or defect' the case of so-called 'psychopathic personality.' The reason for the exclusion is that, as the Royal Commission put it, psychopathy 'is a statistical abnormality; that is to say, the psychopath differs from a normal person only quantitatively or in degree, not qualitatively; and the diagnosis of psychopathic personality does not carry with it any explanation of the causes of the abnormality.' While it may not be feasible to formulate a definition of 'disease', there is much to be said for excluding a condition that is manifested only by the behavior phenomena that must, by hypothesis, be the result of disease for irresponsibility to be established. Although British psychiatrists have agreed, on the whole, that psychopathy should not be called 'disease', there is considerable difference of opinion on the point in the United States. Yet it does not seem useful to contemplate the litigation of what is essentially a matter of terminology; nor is it right to have the legal result rest upon the resolution of a dispute of this kind." Comment, Tent. Draft No. 4, 160 (April 25, 1955).

The principle criticism of the Model Penal Code formulation, apart from those who oppose the addition of the "control" test, centers on subsection (2) of the section. The critics of this portion suggest that it represents an

inadvisable effort to bar psychopaths from the insanity test. (A psychopath is commonly regarded as having either antisocial character or no character at all. Though his cognitive faculties are likely to be intact, he is unable to defer his gratifications. What he does seems unmotivated by conventional standards, and he feels neither anxiety nor guilt if he hurts others in the process. Because he will seem very much like the "normal" man in most respects, he will be less able to persuade a jury that he should be acquitted.)

Others in support of the section's provision feel that the effort to bar psychopaths from the insanity defense is advisable because it is essential to keep the defense from swallowing up the whole of criminal liability, as it might if all recidivists could qualify for the defense merely by being labeled psychopaths.

Your reporter concludes that the portion of the section embodied in subsection (2) might better be omitted from the section. In support and explanation of this view is the observation by one writer that psychopathy is never "manifested only by repeated criminal . . . conduct. Psychiatrists -- not just montebanks, but the most honest ones -- would invariably testify that any psychopath would show some other symptom of his psychopathy, even though his antisocial conduct might be its principal outcropping." Kuh, "A Prosecutor Considers the Model Penal Code," 63 Col. L. Rev. 608, 626 (1963).

The term "mental disease or defect" is not defined in the section. Indeed, it appears that over the years it has been aptly demonstrated that it is impossible and not even desirable to formulate a legal definition of the term. Rather than put any language of definition into the section, even in the negative fashion of subsection (2), it seems more advisable to leave the definition unrestricted. It may be at some future time that some types of psychopathic personality will be generally agreed to be within the concept of "mental disease or defect." On this point it seems best to keep this probably ineffective and potentially troublesome portion of the Model Penal Code out of the Oregon statute.

Before passing from the discussion of this section, a brief review of the M'Naghten rule and some of the more modern deviations from it.

The M'Naghten rule was not strictly a product of common law case-by-case analysis. Rather it was the response of fifteen common law judges to five hypothetical questions put to them by the House of Lords. The now famous rule was espoused in 1843 by Chief Justice Tindal in response to these questions.

Some states have adopted the "irresistible impulse" (more accurately described as the control test) addendum to the M'Naghten rule which recognizes as a defense a form of mental disease which deprives a person of his ability to control, his power to choose between (as distinguished from his ability to know) right and wrong.

Although the M'Naghten rule has remained in force in Oregon, other jurisdictions have attempted to find new tests both through the judicial and legislative processes. The following is a discussion of these alternatives.

The United States Supreme Court has left the states free to experiment and to adopt their own test for legal insanity.

> "At this stage of scientific knowledge it would be indefensible to impose upon the States through the due process of law . . . one test rather than another for determining criminal culpability, and thereby displace a State's own choice of such a test, no matter how backward it may be in light of the best scientific canons." Leland v. Oregon , 343 U.S. 790 (1952); cf., United States v. Freeman, 357 F. 2d 607 (2d Cir. 1966).

M'Naghten is by no means a perfect test for criminal insanity. Weighty arguments have been advanced in opposition to the rule. As early as 1930 Mr. Justice Cardozo said to the New York Academy of Medicine that "the present legal definition of insanity has little relation to the truths of mental life." B. Cardozo, Law and Literature and Other Essays and Addresses, 106 (Harcourt, Brace 1931). The Royal Commission on Capital Punishment had concluded that the "right-wrong test was based on an entirely obsolete and misleading conception of the nature of insanity." Royal Commission Report 73-129 (1949). The major difficulty found with the M'Naghten test was that it concentrated solely on one aspect of mental make-up, viz. the cognitive, to the exclusion of all other phases of mental life.

The most radical shift away from M'Naghten occurred in 1954 with the decision of the United States Court of Appeals for the District of Columbia in Durham v. United States, 214 F.2d 862 (Abe Fortas, U. S. Supreme Court Chief Justice-designate, was Durham's attorney) in which Judge Bazelon rejected the M'Naghten rule as well as the supplemental control test. The rule finally adopted in Durham was similar to the rule already in use in New Hampshire. "An accused is not criminally responsible if his unlawful act

was the product of mental disease or defect." The Durham rule supposedly would give much more freedom to the expert witness to explain fully the mental condition of the defendant. However, a major difficulty with Durham was that it equated medical insanity with legal insanity. Critics of the rule point out that this tends to outstrip community attitudes toward insanity and that expert testimony may usurp the function of the jury. The rule came further into disrepute when psychiatrists of St. Elizabeth's Hospital in Washington, D. C., decided at a weekend conference to change "sociopathy" from a non-disease to a disease category which had the immediate effect of freeing the defendant when the change was incorporated into the Durham rule in Blocker v. United States, 288 F.2d 853 ( D. C. Cir. 1961). These weekend changes in medical nomenclature affecting the Durham rule have been strongly criticized as demonstrating that the Durham rule really is not a useful legal standard.

Because of these and other difficulties with the Durham test, Maine has been the only state to date to adopt the Durham rule. Me. Rev. Stat. Ann. c. 15, sec. 102 (1963).

In 1953 the American Law Institute commenced its exhaustive study of criminal conduct. Nine years of research and debate culminated in section 4.01, formally adopted by the Institute in 1962. The section is a well considered compromise between M'Naghten and Durham. It was first followed in part in United States v. Currens, 290 F.2d 751 (3rd Cir. 1961). The Currens case provided: "The jury must be satisfied that at the time of committing the prohibited act, the defendant, as a result of mental disease or defect, lacked substantial capacity to conform his conduct to the requirements of the law . . ." Unlike the M'Naghten rule which was concerned with absolutes (right or wrong), the Currens rule only required "substantial" impairment of one's capacity to control his conduct. Like the Model Penal Code section 4.01, the Currens test recognized variations in degree and allowed wide scope for expert testimony without the troublesome causal questions raised by Durham.

Currens has been criticized, however, as being too narrow in that it relies on the control test to the exclusion of the right-wrong test. The Model Penal Code incorporates both so that if a defendant can come under the right-wrong portion, yet conceivably might not be able to bring himself under the control test, he can successfully raise the insanity defense.

Five years after Currens the United States Court of Appeals for the Second Circuit adopted a full-blown version

of section 4.01 of the Model Penal Code. United States v. Freeman, 357 F.2d 606 (1966). The trend in the federal courts is decidedly toward the Model Penal Code. At least five states have also adopted the Model Penal Code version in complete or substantially complete form including Illinois, Vermont, Massachusetts, Maryland and Wisconsin. Of the Model Penal Code insanity test one authority has said recently, "Its proposal solves most of the problems generally associated with the older rules while at the same time representing the same line of historical development. As a result, it is likely to become the formula for the immediate future in the United States." Goldstein, The Insanity Defense 95 (1967).

B. Derivation

The insanity test is that of the Model Penal Code section 4.01. Illinois had adopted section 4.01 of the Model Penal Code in its entirety. Michigan in its proposed draft chooses the Currens formulation based in part on the Model Penal Code but which eliminates reference to the right-wrong part of the Model Penal Code. New York has chosen to follow the more liberal language of the right-wrong portion of the Model Penal Code but has refused to incorporate the control test portion and sub-paragraph (2). The comments of the New York Commission on the New York version were that the prosecutors throughout the state felt the control test was too liberal and for this reason it was deleted. Thus the New York version falls somewhere between M'Naghten and the Model Penal Code version, being more liberal than the former but not as liberal as the latter.

C. Relationship to Existing Law

This section will effect a substantial change in Oregon's present insanity test. Oregon's test came into being as the result of case law and does not exist in the form of a statute. The most recent formulation of the Oregon rule appears in the following jury instruction approved in State v. Gilmore, 242 Or 463 (1966):

> "Insanity, to excuse a crime, must be such a disease of the mind as dethrones reason and renders the person incapable of understanding the nature and quality and consequences of his act or of distinguishing between right and wrong in relation to such act." Id. at 468.

It should be noted that this formulation is somewhat more liberal than the original M'Naghten rule. The Oregon test speaks of lack of capacity for "understanding" the

nature of the act. This would seem to allow a full examination of the mental condition of a defendant on not only the intellectual awareness of his act but also the emotional awareness. The word "know" in the psychiatric sense is understood to be not limited to intellectual awareness. Psychiatrists uniformly insist that it is possible for a person to "know" intellectually what he is doing but not to "know" it emotionally. If either of the two levels of "knowledge" is missing, a person qualifies as insane under the test. By using the word "understanding" in the Oregon formulation this subtle, yet highly significant distinction of levels of knowledge seems to be incorporated. This is in accord with the meaning generally given the "knowledge" test in most jurisdictions which have directly faced the issue and in a great number of jurisdictions which have not. In these latter jurisdictions the word "know" is given no narrow definition in the jury instruction -- it is simply presented to the jury which is then permitted to make its own "common sense" determination of the word's meaning. Psychiatrists testifying at the trial in these jurisdictions are, as a practical matter, able to testify as to both the intellectual and emotional awareness of the defendant. And the juries, in actual practice, then consider all such testimony.

The section proposed further modifies the Oregon rule by requiring that the defendant's capacity for understanding need only be "substantially" impaired. This again liberalizes the kind of expert evidence which is necessary for the jury to have a more complete understanding of the defendant's mental life before it makes its decision.

The section in its second major aspect would permit a defendant raising the defense to show that even if he had substantial capacity to appreciate the wrongfulness of his act, he may still bring himself under the defense if he can show he lacked substantial capacity to "conform his conduct to the requirements of law." This, of course, is the control test formulation. Presently Oregon by statute prohibits a defendant from raising the control test. ORS 136.410 provides: "A morbid propensity to commit a prohibited act, existing in the mind of a person who is not shown to have been capable of knowing the wrongfulness of the act, forms no defense to a prosecution for committing the act." This section would necessarily have to be repealed if the proposed section on the insanity test is adopted.

Lest the impression be given that the new section is too radical a departure from existing Oregon law to command acceptance by the Oregon legislature, it is important to

note that the entire language of section 4.01 of the Model Penal Code was actually enacted by the 1961 session of the Oregon Legislative Assembly in Senate Bill No. 96. Only a veto by Governor Hatfield prevented Oregon from having as law the section in the form now presented for consideration of this Commission. In his veto message, the Governor said:

> "Senate Bill No. 96 while a laudable and humanitarian approach to the problem of mental illness or defect in a criminal case, is in my judgment, premature. The bill lacks adequate safeguards and there are not sufficient institutional facilities and trained personnel to implement . . . wide sweeping changes in our concept of criminalty." Senate and House Journal, 1963 at 32.

# # #

Section 2. Issue of insanity is affirmative defense. Mental disease or defect excluding responsibility is an affirmative defense.

COMMENTARY - ISSUE OF INSANITY IS AFFIRMATIVE DEFENSE

A. Summary

This section must be viewed in light of section 1.12 (1) and (2) of the Model Penal Code which deals with the relationship between proof beyond a reasonable doubt by the prosecution and the burden of proof imposed on the defendant by denominating certain defenses, such as insanity, as an affirmative defense.

By making insanity an affirmative defense the result under this section, and section 1.12 of the Model Penal Code (on the assumption that the Commission will adopt section 1.12) is as follows: The prosecution has the presumption that the defendant is sane. If the defense adduces no evidence on insanity, the prosecution has no burden. But if "there is evidence" by the defense that the defendant is insane, then the burden of persuasion to the contrary is shifted to the prosecution and it must negative the defense's evidence beyond a reasonable doubt.

Affirmative defenses are unusual in the criminal law and the subject troubled the Reporters for the Model Penal Code. In the comments to the section it is said:

> "No single principle can be conscripted to explain when these shifts of burden to defendants are defensible, even if the burden goes no further than to call for the production of some evidence. Neither the logical point that the prosecution would be called upon to prove a negative, nor the grammatical point that the defense rests on an exception or proviso divorced from the definition of the crime is potently persuasive, although both points have been invoked. See e.g. Rossi v. United States, 289 U. S. 89 (1933); United States v. Fleischman, 339 U. S. 349, 360-363 (1950); State v. McLean, 157 Minn. 359 (1923). What is involved seems rather a more subtle balance which acknowledges that a defendant ought not be required to defend until some solid substance is presented to support the accusation but, beyond this, perceives a point where need for narrowing the issues, coupled with the relative accessibility of evidence to the defendant, warrants calling upon him to present his defensive claim." Comment, Tent. Draft No. 4, 110-11 (April 25, 1955).

It will be seen at once that the question of burden of proof has large connotations of procedure, and the present work of the Oregon Criminal Law Revision Commission has been directed specifically to deal with substantive issues first and procedural matters later. However, your reporter feels the matter warrants attention now since it is one of the factors which will weigh heavily with defense counsel on whether to raise the defense of insanity at all. As to the reasons and desirability of dealing with this matter here, though procedural in a large sense, the language of the Model Penal Code comment on section 1.12 is useful.

> "The problems dealt with are, of course, procedural in nature. But they involve such fundamental policy that, though there is some fragmentary treatment in state codes of criminal procedure, they are omitted from the most important modern formulations in that field: the A.L.I. Model Code of Criminal Procedure, the Federal Rules and the proposed Uniform Rules of the National Conference. Moreover, students of procedure often have admonished that the underlying legislative considerations relevant to the solution of these problems have as large a substantive as adjective dimension. It seems essential, therefore, that the problems should be faced, at least to the extent that they are necessarily involved in application and enforcement of the Code." Comment, sec. 1.12, Tent. Draft No. 4, 108 (April 25, 1955).

B. Derivation

This section is based on paragraph (1) of section 4.03 of the Model Penal Code. Other matters set out in section 4.03 as paragraphs (2) (requiring that defense give notice of intent to raise the insanity defense) and (3) (requiring that if the jury finds the defendant not guilty by reason of insanity, the verdict shall so state) find existing and concurring provisions in the Oregon statutes. See ORS 135.870 (notice of defense) and 136.730 (form of jury verdict). For the reason that existing Oregon statutes now adequately cover these aspects, the draft of this section omits them. It will undoubtedly be advisable to incorporate the existing Oregon statutes in this proposed section when procedural matters are dealt with later.

This section's policy on burden of proof is reflected in the New York Penal Code though the nomenclature is different. Insanity is called simply "a defense." N. Y. Penal Law, sec. 30.05, Consol. Laws Service. By definition

in N. Y. Penal Law sec. 25.00 this means that if the defense is raised, the prosecution must disprove it beyond a reasonable doubt.

Illinois likewise follows the Model Penal Code policy in Ill. Rev. Stat. sec. 6-4 which makes insanity an "affirmative" defense and which provides in Ill. Rev. Stat. sec. 3-2 that if the defendant in an affirmative defense presents "some evidence" on the issue, the prosecution must then prove the defendant sane beyond a reasonable doubt.

Michigan's proposed draft is also in accord with the Model Penal Code. The Michigan proposed code in section 720 provides: "The burden of injecting the issue of responsibility under any section of this chapter is on the defendant, but this does not shift the burden of proof." The language of the Michigan draft is decidedly different but, as explained in the Commission comments on the section, the result is the same -- after the defendant has introduced "any evidence" on the issue of insanity, the burden is on the state to prove his insanity beyond a reasonable doubt.

C. Relationship to Existing Law

ORS 136.390 now provides as follows:

> "When the commission of the act charged as a crime is proved and the defense sought to be established is the insanity of the defendant, the same must be proved by the preponderance of the evidence."

The proposed section would make a major change in the Oregon law under which the defendant bears the burden of proof by a preponderance and the state need not prove sanity beyond a reasonable doubt.

The constitutionality of ORS 136.390 was challenged before the U. S. Supreme Court in Leland v. Oregon, 343 U. S. 790 (1952). The U. S. Supreme Court held that the statute (which at the time of the case required the defendant to prove his insanity not by a preponderance but beyond a reasonable doubt) was not a violation of the Federal Constitution due process requirements. It was so held even though the rule in the federal court system placed on the prosecution the burden of proof of sanity beyond a reasonable doubt when the defendant had presented evidence of insanity.

The rule in the federal courts is followed by at least 21 of the states. The present Oregon rule also is followed by 20 other states thus showing a clear split of authority.

However, the Model Penal Code rule, embodied in the proposed section, is felt by your reporter to be the preferable one.

It is generally recognized now that many defendants who might qualify for the defense of insanity deliberately choose not to do so. One of the reasons, and probably the principle one, is that a successful defense on grounds of insanity may result, as a practical matter, in confinement in a mental institution for a period far longer than the maximum sentence which might be imposed if the defendant simply pleaded guilty or defended and lost on the merits. This is so because of commitment procedures in most states, including Oregon, pursuant to which the defendant may be sent to a state mental institution from whence he will not usually be discharged until deemed sane or, at least, not dangerous to society. In Oregon both are required before one so committed may be returned to society. See Newton v. Brooks, 84 Or. Adv. Sh. 639 (April 12, 1967). This section makes no change or has no impact with respect to this grave problem with the insanity defense. The section does, however, remove the substantial practical problem of the burden of persuasion from the defendant. To this extent, then, the proposed section is designed to facilitate the raising of the defense where it is warranted but which might not be raised because of problems with persuasion.

# # #

Section 3. Immaturity excluding criminal conviction; transfer of proceedings to juvenile court. (1) A person shall not be tried for or convicted of an offense if:

(a) At the time of the conduct charged to constitute the offense he was less than sixteen years of age, in which case the juvenile court shall have exclusive original jurisdiction; or

(b) At the time of the conduct charged to constitute the offense he was sixteen or seventeen years of age, unless:

(A) The juvenile court has no jurisdiction over him; or

(B) The juvenile court has entered an order waiving jurisdiction and consenting to the institution of criminal proceedings against him.

(2) No court shall have jurisdiction to try or convict a person of an offense if criminal proceedings against him are barred by subsection (1) of this section. When it appears that a person charged with the commission of an offense may be of such an age that criminal proceedings may be barred under subsection (1) of this section, the court shall hold a hearing thereon, and the burden shall be on the prosecution to establish to the satisfaction of the court that the criminal proceeding is not barred upon such grounds. If the court determines that the proceeding is barred, custody of the person charged shall be surrendered to the juvenile court, and the case, including all papers and processes relating thereto, shall be transferred.

## COMMENTARY - IMMATURITY

### A. Summary

This section, maturity, is related conceptually to the section on insanity. They both concern responsibility for the commission of a crime, and both relate to incapacity to commit a crime. This section excludes from criminal responsibility any juvenile below the age of sixteen. However, if the juvenile is sixteen or seventeen at the time he commits the offense, juvenile jurisdiction may be waived and the child may be remanded to the regular criminal courts. No attempt is made to define the standards which guide the juvenile court in waiving jurisdiction; such standards are appropriate considerations of the Juvenile Court Act (Chapter 419 of the Oregon Revised Statutes). See, ORS 419.533 (1) (c) which authorizes waiver and remand whenever "the juvenile court determines that retaining jurisdiction will not serve the best interest of the child or of the public." Nor does this proposed section concern itself with the rapid deterioration of the parens patriae doctrine of juvenile jurisprudence and the concomitant rise of constitutional rights for juveniles set forth in the recent Gault decision. In re Gault, 87 S. Ct. 1428 (1967).

Primarily this section is designed to define the age below which a child cannot be deemed a criminal. There is a "consensus that there [is] an age under which a child in any event should not be criminally responsible." Holman, Oregon's New Juvenile Code, 39 Or. L. Rev. 305 (1960). At common law the accountability of juveniles for crimes was defined in terms of capacity. A child below the age of seven was absolutely incapable of committing a crime. Ill. Ann. Stat. ch. 38 sec. 6-1 Committee Comment (1964). And "between the ages of seven and 14 he [the child] is subject to a rebuttable presumption of incapacity; and after 14 he is presumably capable." State v. Monahan, 15 N.J. 34, 104 A. 2d 21, 46 A.L.R. 2d 641 (1954). There was confusion under the common law "capacity" definition not only because it involved conclusive and rebuttable presumptions, but also because juvenile court acts were often superimposed upon the common law adding jurisdictional problems. Model Penal Code sec. 4.10, Comment (Tent. Draft No. 7, 1957). Hence, for purposes of clarity the present section, as recommended by the American Law Institute, is phrased in terms of jurisdiction.

In Oregon, prior to enactment of the revised juvenile code in 1959, there was no clear rule as to whether, and when, a child was capable of committing a crime. Under sec. 9 of Article VII of the Oregon Constitution, all jurisdiction not specifically vested in other courts was

reserved for the circuit court. "The circuit courts of this state have exclusive original jurisdiction of all felonies committed therein." Ex parte Stacey, 45 Or 85, 88, 75 P. 1060, 1061. Hence a juvenile of any age could be convicted as a criminal. The circuit courts had jurisdiction to convict any juvenile:

> " . . . [T]he circuit court has authority to hear the case regardless of the age of the accused, and in its discretion either sentence the young man as provided by law or certify the conviction of the minor to the juvenile court." In re Loundagin, 129 Or 652, 278 P. 950 (1929).

However, the legislature revised the Juvenile Court Act in 1959, effective January 1, 1960, and the current Oregon law is much clearer. ORS 419.476 (1) and ORS 419.533 (1) vest the juvenile court with exclusive original jurisdiction for all juveniles under 18 and provide for concurrent jurisdiction (by waiver) for juveniles between 16 and 18. In this respect the Oregon Juvenile Court Act is very similar to the Model Penal Code provision on juvenile responsibility for crime.

Under the proposed section in (1) (b) (B), exclusive jurisdiction for juveniles under 18 is vested (like ORS 419.476) in the juvenile court. The section further envisions (like ORS 419.533) a system of concurrent jurisdiction over juveniles between the ages of 16 and 18.

The relevant point in time for determining a juvenile's age for purposes of jurisdiction is "at the time of the conduct charged," and not at the time he is apprehended or when his remand is ordered. Hence if a juvenile commits a crime at age 15 and is taken into custody, the juvenile court cannot wait until he is 16 and then remand him to circuit court to be tried as a criminal. "The general policy of the law favoring a speedy trial argues that the law should be so drawn as to maintain pressure for prompt disposition." Model Penal Code sec. 4.10, Comment (Tent. Draft No. 7, 1957); but see, State v. Little, 241 Or 557, 407 P.2d 627 (1965). There may be a rare situation in which a juvenile commits a crime before he is 16 but is not apprehended until the jurisdiction of the juvenile court lapses after age 18. In such a case the juvenile might escape punishment since neither the juvenile nor the criminal courts would have jurisdiction. The proposed section in (1) (b) (A) provides that in such a case criminal conviction is not barred when "the juvenile court has no jurisdiction over him."

Finally, exclusive original jurisdiction is vested in the juvenile courts for children under 18 regardless of the

nature of their crime. In some states jurisdiction over juveniles depends upon the type of crime the child committed, but there is no reason for making such a distinction especially between types of felonies: " . . . [T]he former law appeared illogical in that a child of fifteen is not deemed sufficiently mature to be responsible for robbery, burglary or assault, [but] he can be deemed mature enough to be responsible for murder or kidnapping." New York Penal Law sec. 30.00, Commission Staff Notes (1967).

B. Derivation

The basic provision follows that of section 4.10 of the Model Penal Code. It differs, however, from the statutory provisions recently enacted in the criminal codes of New York and Illinois (although it is quite similar to the extant Oregon law.) In New York infancy is a defense to be raised like insanity and is not merely a jurisdictional defect. Under N. Y. Penal Law Title C. "Defenses," section 30.00 provides: "Infancy - 1. A person less than sixteen years old is not criminally responsible for conduct. 2. . . . [L]ack of criminal responsibility by reason of infancy . . . is a defense." As indicated above, the Model Penal Code defines juvenile responsibility in terms of jurisdiction and does not make non-age a defense. Illinois has adopted a lower age limit than New York. "No person shall be convicted of any offense unless he had attained his 13th birthday at the time the offense was committed." Ill. Ann. Stat. ch. 38 sec. 6-1 (1964). The Illinois statute, like New York and the Model Penal Code, but unlike Oregon, is strictly for purposes of criminal responsibility and is not a part of the Juvenile Court Act.

C. Relationship to Existing Law

The Model Penal Code section 4.10, the New York Penal Law section 30.00, and the Illinois Criminal Law chapter 38, section 6-1, all have provisions under the heading "responsibility" which exclude juveniles from criminal responsibility. All three, though they employ different language, impart some notion of incapacity -- that children are not capable of committing crimes. Just as it has no statute directly defining insanity in its criminal statutes, Oregon has no statute defining a child's incapacity for crime. Such rules that do exist are to be found in Oregon's Juvenile Court Act. Certainly the Juvenile Court Act reaches a similar result, but theory, substance, and clarity argue that a comprehensive criminal code should include a section on responsibility providing both for insanity and juvenile incapacity.

Oregon case law has adopted the parens patriae doctrine commonly found in juvenile jurisprudence. Parens patriae carries along an attendant idea that children are not criminals:

> "Every statute . . . designed to give protection, care, and training to children, as a needed substitute for parental authority . . . is but a recognition of the duty of the state, as the legitimate guardian and protector of children where guardianship fails." Hills v. Pierce, 113 Or 386, 231 P. 652 quoted in Ex parte Packer, 136 Or 159, 298 P. 234 (1931).

> "The provisions governing the juvenile court where children are brought before it, are clearly not intended to come within what is termed criminal procedure, nor are the acts therein alluded to, as applied to children, crimes." State v. Dunn, 53 Or 304, 99 P. 278 (1909).

Although prior case law, before the 1959 revision of the Juvenile Court Act, indicated that juveniles were not considered criminals, any juvenile could have been convicted as a criminal in the discretion of the circuit court. In re Loundagin, 129 Or 652, 278 P. 950 (1929). All juveniles were under the jurisdiction of the circuit court. Or. Const. Art. VII sec. 9 (1859). The 1959 Juvenile Court Act defined juvenile incapacity in terms of jurisdiction much like the proposed section and section 4.10 of the Model Penal Code. ORS 419.476 (1) provides that "the juvenile court has exclusive original jurisdiction in any case involving a person who is under 18 years of age and: (a) who has committed an act which is a violation . . . of a law . . . " Further, like the proposed section in (1) (b) (B), ORS 419.533 (1) establishes concurrent jurisdiction for juveniles between the ages of 16 and 18.

> "(1) A child may be remanded to a circuit, district, justice, or municipal court of competent jurisdiction for disposition as an adult if
>
> "(a) The child is at the time of the remand 16 years of age or older; and
>
> "(b) The child is alleged to have committed a criminal offense . . . and
>
> "(c) The juvenile court determines that retaining jurisdiction will not serve the best interest of the child and the public."

Note, however, that subsection (1) (a) of ORS 419.533 is significantly different from subsection (1) (a) of the proposed section. ORS 419.533 determines the relevant age for remand as the time of the remand while the proposed section determines the relevant age for remand at the time of the alleged crime. In a recent Oregon case a 15 year old boy raped and murdered a young girl. He was taken into custody while he was still 15 years old. The juvenile court retained jurisdiction until he reached his 16th birthday and then remanded him to circuit court. This procedure was held proper under Oregon law. State v. Little, 241 Or 557, 407 P.2d 627 (1965). This result cannot be reached under the proposed section since the relevant time for determining capacity is the date of the crime (age 15) and not the date of the remand (age 16). Thus, ORS 419.533 must be amended to make it consistent with the proposed section. However, if a juvenile commits a crime at age 15 but is not arrested until after juvenile jurisdiction passes, he does not escape punishment since the state may proceed under (1) (b) (A) of the proposed section when "the juvenile court has no jurisdiction over him."

Subsection (2) of the proposed section is primarily procedural. It is similar in language and effect to ORS 419.478 which provides for a hearing to determine a juvenile's age in a doubtful case and for a transfer of the proceeding if he is found to be below age 18.

The major reason for adopting the section is that it is properly a part of any comprehensive criminal code as indicated by the penal codes of New York and Illinois and the Model Penal Code. Nor will adoption of the section drastically affect Oregon's revised juvenile code. Save for the difficulty of determining age for waiver of juvenile jurisdiction raised in State v. Little, supra, the proposed section and Oregon's juvenile code are identical. Juvenile responsibility for crime is a theoretically and pragmatically important concept and should be set forth in the criminal code.

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## APPENDIX

Relevant Oregon Cases and Statutes

1. Statutes

ORS 419.476 (1)

ORS 419.478

ORS 419.533 (1)

2. Cases

Ex parte Stacey, 45 Or 85, 75 P. 1060 (1904)

State v. Dunn, 53 Or 304, 99 P. 278 (1909)

In re Loundagin, 129 Or 652, 278 P. 950 (1929)

Hills v. Pierce, 113 Or 386, 231 P. 652 (1924)

Ex parte Packer, 136 Or 159, 298 P. 234 (1931)

Brady v. Gladden, 232 Or 165, 374 P.2d 452 (1962)

State v. Little, 241 Or 557, 407 P.2d (1965); cert. denied 385 U.S. 902 (1966)

State v. Gullings, 244 Or 173, 416 P.2d 311 (1966)

Shannon v. Gladden, 243 Or 334, 413 P.2d 418 (1966)

State v. Phillips, 245 Or 466, 422 P.2d 670 (1967)

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## TEXT OF REVISIONS OF OTHER STATES

### Text of New York Revised Penal Law

ARTICLE 30 - DEFENSES INVOLVING LACK OF CRIMINAL RESPONSIBILITY

Section 30.00. Infancy

1. A person less than sixteen years old is not criminally responsible for conduct.

2. In any prosecution for an offense, lack of criminal responsibility by reason of infancy, as defined in subdivision one of this section, is a defense.

Section 30.05. Mental disease or defect

1. A person is not criminally responsible for conduct if at the time of such conduct, as a result of mental disease or defect, he lacks substantial capacity to know or appreciate either:

(a) The nature and consequence of such conduct; or

(b) That such conduct was wrong.

2. In any prosecution for an offense, lack of criminal responsibility by reason of mental disease or defect, as defined in subdivision one of this section, is a defense.

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### Text of Illinois Criminal Code of 1961

ARTICLE 6. RESPONSIBILITY

Section 6-1. Infancy

No person shall be convicted of any offense unless he had attained his 13th birthday at the time the offense was committed.

Section 6-2. Insanity

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

(b) The terms "mental disease or mental defect" do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.

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