CRIMINAL LAW REVISION COMMISSION
311 Capitol Building
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ARTICLE 5. RESPONSIBILITY

Tentative Draft No. 1; November 1969

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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 antisocial conduct.

COMMENTARY - MENTAL DISEASE OR DEFECT EXCLUDING RESPONSIBILITY

A. Summary

Subsection (1) of this section, based 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." 8 Eng. Rep. 718 (1843).

M'Naghten is in effect in all but a half dozen or so of the states.

The "irresistible impulse", or control, test addendum to the M'Naghten rule, 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."

The draft 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 on section 4.01 (2) of the Model Penal Code, is the object of a divergence of opinion as to its efficacy and desirability. The main purpose of the provision is to bar psychopaths (more modernly called sociopaths) 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 principal 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 provision in subsection (2) 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. The Commission adopts this view.

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 seems appropriate.

The M'Naghten rule was not strictly a product of common law case-by-case analysis although there had been cases prior to M'Naghten announcing a similar rule. 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.

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 US 790 (1952); cf., United States v. Freeman, 357 F2d 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 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 F2d 862, 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 in use in New Hampshire since 1870. "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 tended to confuse medical "concepts" of mental illness 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" (the new term for psychopathic personality) 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 F2d 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 and the Virgin Islands have been the only jurisdictions to date to adopt the Durham rule. Me Rev Stat Ann, c 15, sec 102 (1963); V I Code Ann, Title 14, sec 14.

In 1953 the American Law Institute began 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 F2d 751 (3rd Cir 1961). The Currens case provides:

> "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 requires "substantial" impairment of one's capacity to control his conduct. Like the Model Penal Code section 4.01, the Currens test recognizes variations in degree and allows 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 cognitive test. The Model Penal Code incorporates both.

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 F2d 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 proposed in the draft section is that of the Model Penal Code section 4.01. Illinois has adopted section 4.01 of the Model Penal Code in its entirety. Michigan in its proposed draft chooses the Currens formulation. 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 subparagraph (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.

C. Relationship to Existing Law

This section will effect a substantial change in Oregon's present insanity test. Oregon's test came into being largely as the result of decisional law. 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, and, 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 (and Oregon) 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. 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.

An examination of the literature in the field indicates that what Governor Hatfield feared might happen if the Model Penal Code version was adopted -- a flood of successful insanity pleas -- has in fact not occurred in the jurisdictions which have adopted the rule.

TEXT OF REVISIONS OF OTHER STATES

TEXT OF MODEL PENAL CODE

Section 4.01. 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 [wrongfulness] 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.

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TEXT OF NEW YORK REVISED PENAL LAW

§ 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. L.1965, c. 1030, eff. Sept. 1, 1967.

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TEXT OF MICHIGAN REVISED CRIMINAL CODE

[Mental Disease or Defect]

Sec. 705. A person is not criminally responsible for his conduct if at the time he acts, as a result of mental disease or defect, he lacks capacity to conform his conduct to the requirements of law.

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Section 2. Partial responsibility due to impaired mental condition. Evidence that the actor suffered from a mental disease or defect is admissible whenever it is relevant to the issue of whether he did or did not have the intent which is an element of the crime.

COMMENTARY - PARTIAL RESPONSIBILITY

A. Explanation

A defendant may be charged with a crime which includes an element such as specific intent or premeditation. Examples of these would be burglary, where the breaking and entering of a dwelling must be accompanied with a specific intent to commit a felony before the crime is complete, and first degree murder, where premeditation is required as an element. The defendant may not be insane within the meaning of the M'Naghten rule, but he may be suffering from a mental disease or defect which directly affects his capacity to form a specific intent or purpose. In this situation a growing number of jurisdictions now permit such defendant to introduce evidence of his mental condition to negate the element of specific intent for the purpose of reducing the defendant's responsibility (and consequent punishment) to a lesser offense included within the crime charged. For example, a defendant charged with murder in the first degree may convince the jury he could not premeditate because of a mental condition. This would not enable the defendant to escape conviction entirely (as he would if he established his insanity under the M'Naghten rule). Instead the jury may find him guilty of the lesser included offense of second degree murder.

The trend to the subjective theory of culpability embodied in the partial responsibility doctrine is apparent. Professor Goldstein says that in 1925 only two states subscribed to the doctrine. By 1967 a dozen had adopted the rule. In England the doctrine is called diminished responsibility and recently has been extended by statute to reduce murder to manslaughter. Goldstein, The Insanity Defense 195 (1967).

The Model Penal Code also recognizes the concept and adopts it in section 4.02 (1). In the comments to the section it is said, "If states of mind such as deliberation or premeditation are accorded legal significance, psychiatric evidence should be admissible when relevant to prove or disprove their existence to the same extent as any other

relevant evidence." MPC Comment, sec. 4.02, Tent. Draft No. 4 at 193 (April 1955).

The comment to the proposed Michigan section adopting the doctrine of partial responsibility stresses the usefulness of the doctrine in that it gives the jury wide latitude in dealing with an offender:

> "The jury should not be placed totally in an 'either-or' position so far as the use of evidence relating to mental condition is concerned, and 'diminished responsibility' or 'impaired mental condition' should be something they can properly take into account."

The basic theory underlying the partial responsibility doctrine is that the verdict and sentence should be tied more accurately than in the past to the defendant's culpability.

B. Derivation

The section is based on the MPC formulation of the partial responsibility doctrine in section 4.02 (1). The language of the draft section is similar to the Michigan formulation contained in section 710 of that state's proposed criminal code.

C. Relationship to Existing Law

Whether the partial responsibility doctrine is in effect in Oregon seems to be in doubt. The Oregon Supreme Court occasionally has referred to the doctrine but has never ruled squarely on the issue. In State v. Jensen, 209 Or 239 (1957), the court held that the doctrine could not be applied to reduce first degree murder arising from the felony murder doctrine to second degree murder or manslaughter. But felony murder is more in the nature of a "strict liability" crime and not a crime of premeditation. The Jensen case, beginning at page 266 of the report, examines other Oregon cases where the doctrine has been incidentally involved.

Adoption of the doctrine of partial responsibility would not be without analogous precedent in Oregon. ORS 136.400 (in effect since 1864) provides in part that "whenever the actual existence of any particular motive, purpose or intent is a necessary element to constitute any particular species or degree of crime, the jury may take

into consideration the fact that the defendant was intoxicated at the time, in determining the purpose, motive or intent with which he committed the act." In fact the doctrine of partial responsibility has its origin in the early cases which admitted evidence of intoxication to negate the elements of murder in the first degree. Goldstein, The Insanity Defense 195 (1967).

The defense of partial responsibility is not too dissimilar to another defense familiar in Oregon and elsewhere -- the rule that a homicide will be reduced from murder to manslaughter if defendant killed in a "heat of passion" arising out of a "sufficient" provocation. See ORS 163.040. Adoption of the partial responsibility doctrine contained in the draft section seems, then, to be a natural extension of legal principles already well established in Oregon.

TEXT OF REVISIONS OF OTHER STATES

TEXT OF MODEL PENAL CODE

Section 4.02. Evidence of Mental Disease or Defect Admissible When Relevant to Element of the Offense; [Mental Disease or Defect Impairing Capacity as Ground for Mitigation of Punishment in Capital Cases].

(1) Evidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove that the defendant did or did not have a state of mind which is an element of the offense.

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TEXT OF MICHIGAN REVISED CRIMINAL CODE

[Impaired Mental Condition]

Sec. 710. Evidence that the actor suffered from a mental disease or defect is admissible whenever it is relevant to the issue of whether he did or did not have a specific intent or purpose which is an element of the offense.

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Section 3. Burden of proof in defense excluding responsibility. Mental disease or defect excluding responsibility under section 1 of this Article is a defense which the defendant must prove by a preponderance of the evidence.

COMMENTARY - THE BURDEN OF PROOF

The policy presently embodied in ORS 136.390 is retained. ORS 136.390 reads 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 draft section continues this policy in language believed to be more appropriately phrased. The Commission wishes to emphasize that this section in no way affects the well established principle that the state has a rebuttable presumption that the defendant is sane.

TEXT OF REVISIONS OF OTHER STATES

TEXT OF MODEL PENAL CODE

Section 4.03. Mental Disease or Defect Excluding Responsibility Is Affirmative Defense; Requirement of Notice; Form of Verdict and Judgment When Finding of Irresponsibility Is Made.

(1) Mental disease or defect excluding responsibility is an affirmative defense.

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TEXT OF NEW YORK REVISED PENAL LAW

§ 25.00 Defenses; burden of proof

1. When a "defense," other than an "affirmative defense," defined by statute is raised at a trial, the people have the burden of disproving such defense beyond a reasonable doubt.

2. When a defense declared by statute to be an "affirmative defense" is raised at a trial, the defendant has the burden of establishing such defense by a preponderance of the evidence. L.1965, c. 1030, eff. Sept. 1, 1967.

§ 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. L.1965, c. 1030, eff. Sept. 1, 1967.

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TEXT OF MICHIGAN REVISED CRIMINAL CODE

[Burden of Injecting Issues of Responsibility]

Sec. 720. 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.

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Section 4. Notice required in defense excluding responsibility. No evidence may be introduced by the defendant on the issue of criminal responsibility as defined in section 1 of this Article, unless he gives notice of his intent to do so in the manner provided in section 6 of this Article.

COMMENTARY - REQUIREMENT OF NOTICE

ORS 135.870 now provides that a defendant may raise the defense of insanity under a simple "not guilty" plea. However, the section requires that where the defendant wishes to raise insanity as a defense under this plea he must give written notice or otherwise obtain the permission of the court where he fails to file notice. The details of filing the notice are not set out here for the reason that section 5, the next section dealing with partial responsibility, also requires notice. In the interests of drafting economy, the details of the notice requirements are set out in section 6 so as to apply to both this section 4, and section 5.

TEXT OF REVISIONS OF OTHER STATES

TEXT OF MODEL PENAL CODE

Section 4.03. Mental Disease or Defect Excluding Responsibility Is Affirmative Defense; Requirement of Notice; Form of Verdict and Judgment When Finding of Irresponsibility Is Made.

(2) Evidence of mental disease or defect excluding responsibility is not admissible unless the defendant, at the time of entering his plea of not guilty or within ten days thereafter or at such later time as the Court may for good cause permit, files a written notice of his purpose to rely on such defense.

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Section 5. Notice required in defense of partial responsibility. The defendant may not introduce in his case in chief expert testimony regarding partial responsibility under section 2 of this Article unless he gives notice of his intent to do so in the manner provided in section 6 of this Article.

COMMENTARY - REQUIREMENT OF NOTICE

Under the provisions of this section, the defendant without giving notice can introduce any lay evidence in an effort to show that he suffered from a mental disease or defect which rendered it impossible for him to form intent where such is required as an element of the offense with which he is charged. But if the defendant wishes to introduce the testimony of psychiatrists, psychologists or other expert witnesses, he must comply with the notice requirements of section 6.

The underlying reason for the notice requirements for this section (and for section 4, also) is to avoid surprising the prosecution with a highly technical and complicated issue where experts are going to be used by the defense. The Commission concluded that it was sufficiently fair to the state that defendant put it on notice, in cases of partial responsibility as a defense, only when defendant intends to bring in experts in his case in chief.

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Section 6. Notice requirements. A defendant who is required under sections 4 or 5 of this Article to give notice shall file a written notice of his purpose at the time he pleads not guilty. The defendant may file such notice at any time after he pleads but before trial when just cause for failure to file the notice at the time of making his plea is made to appear to the satisfaction of the court. If the defendant fails to file any such notice, he shall not be entitled to introduce evidence for the establishment of a defense under section 1 or 2 of this Article unless the court, in its discretion, permits such evidence to be introduced where just cause for failure to file the notice is made to appear.

COMMENTARY - NOTICE REQUIREMENTS

This section sets out the notice requirements where defendant intends to base his defense on insanity or partial responsibility. The language closely parallels existing notice requirements set out in ORS 135.870.

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Section 7. Right of state to obtain mental examination of defendant; limitations. Upon filing of notice or the introduction of evidence by the defendant as provided in section 6 of this Article, the state shall have the right to have at least one psychiatrist of its selection examine the defendant. The state shall file notice with the court of its intention to have the defendant examined. Upon filing of the notice, the court, in its discretion, may order the defendant committed to a state institution or any other suitable facility for observation and examination as it may designate for a period not to exceed 30 days. If the defendant objects to the psychiatrist chosen by the state, the court for good cause shown may direct the state to select a different psychiatrist.

COMMENTARY - RIGHT OF STATE TO OBTAIN MENTAL EXAMINATION OF DEFENDANT; LIMITATIONS

In its original form in Preliminary Draft No. 4, section 7 was designed basically to do two things: first, in subsection (1) it codified the holding in State v. Phillips, 245 Or 466 (1967), which established the right of the state to have a psychiatrist examine the defendant who gives notice of relying on the insanity defense; second, in subsection (2) it codified in a very broad fashion the holding in Shepard v. Bowe, 86 Or Adv Sh 981 (1968), which established the rule that at the examination by the state's psychiatrist the defendant has the Fifth Amendment right not to answer questions the answers to which might be incriminating. Subsection (2) further expanded Shepard v. Bowe by giving the defendant the right to have his lawyer and a psychiatrist of his own choosing present.

Opposition to the section centered on the Fifth Amendment provisions embodied in subsection (2) and, as a result, subsection (2) was eliminated. The effect expected is that the decisional law in Shepard v. Bowe will continue

to extend Fifth Amendment rights to the defendant within the confines of that decision or of future decisions as they may develop.

The codification of State v. Phillips contained in subsection (1) of the original version of section 7 remains in the language of the draft now adopted. It is intended that the examination of the defendant by the state may include an examination by psychiatrists, psychologists, neurologists or other appropriate experts. The section also extends to the defendant the right to challenge the appointment of the psychiatrist the state proposes for its examination of the defendant. The language to achieve this is found in the last sentence of the section.

TEXT OF REVISIONS OF OTHER STATES

TEXT OF MODEL PENAL CODE

Section 4.05. Psychiatric Examination of Defendant with Respect to Mental Disease or Defect.

(1) Whenever the defendant has filed a notice of intention to rely on the defense of mental disease or defect excluding responsibility, or there is reason to doubt his fitness to proceed, or reason to believe that mental disease or defect of the defendant will otherwise become an issue in the cause, the Court shall appoint at least one qualified psychiatrist or shall request the Superintendent of the Hospital to designate at least one qualified psychiatrist, which designation may be or include himself, to examine and report upon the mental condition of the defendant. The Court may order the defendant to be committed to a hospital or other suitable facility for the purpose of the examination for a period of not exceeding sixty days or such longer period as the Court determines to be necessary for the purpose and may direct that a qualified psychiatrist retained by the defendant be permitted to witness and participate in the examination.

(2) In such examination any method may be employed which is accepted by the medical profession for the examination of those alleged to be suffering from mental disease or defect.

(3) The report of the examination shall include the following: (a) a description of the nature of the examination; (b) a diagnosis of the mental condition of the defendant; (c) if the defendant suffers from a mental disease or defect, an opinion as to his capacity to understand the proceedings against him and to assist in his own defense; (d) when a notice of intention to rely on the defense of irresponsibility has been filed, an opinion as to the extent, if any, to which the capacity of the defendant to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law was impaired at the time of the criminal conduct charged; and (e) when directed by the Court, an opinion as to the capacity of the defendant to have a particular state of mind which is an element of the offense charged.

If the examination can not be conducted by reason of the unwillingness of the defendant to participate therein, the report shall so state and shall include, if possible, an opinion as to whether such unwillingness of the defendant was the result of mental disease or defect.

The report of the examination shall be filed [in triplicate] with the clerk of the Court, who shall cause copies to be delivered to the district attorney and to counsel for the defendant.

TEXT OF MODEL PENAL CODE (Cont'd)

Section 4.09. Statements for Purposes of Examination or Treatment Inadmissible Except on Issue of Mental Condition.

A statement made by a person subjected to psychiatric examination or treatment pursuant to Sections 4.05, 4.06 or 4.08 for the purposes of such examination or treatment shall not be admissible in evidence against him in any criminal proceeding on any issue other than that of his mental condition but it shall be admissible upon that issue, whether or not it would otherwise be deemed a privileged communication [, unless such statement constitutes an admission of guilt of the crime charged].

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Section 8. Form of verdict following successful defense excluding responsibility. When the defendant is acquitted on grounds of mental disease or defect excluding responsibility as defined in section 1 of this Article, the verdict and judgment shall so state.

COMMENTARY - FORM OF VERDICT FOLLOWING SUCCESSFUL DEFENSE EXCLUDING RESPONSIBILITY

This section is based on the provisions on form of verdict found in MPC section 4.03 (3). The language in this section states more economically the same policy already in existence in Oregon under that portion of ORS 136.730 dealing with form of verdict. ORS 136.730 reads as follows:

> "If the defense is the insanity of the defendant, the jury shall be instructed to state, if it finds him not guilty on that ground, that fact in the verdict, and the court shall thereupon, if it deems his being at large dangerous to the public peace or safety, order him to be committed to any hospital or institution, authorized by the state to receive and keep such persons, until he becomes sane or is otherwise discharged therefrom by authority of law."

(The portion of ORS 136.730 relating to possible commitment of the defendant is dealt with in sections 9 through 14.)

The present form of the verdict entered pursuant to ORS 136.730 consists of the simple phrase, "not guilty by reason of insanity." This will no longer be appropriate or accurate under this Article. The new phrase should be stated by the court to avoid the word "insanity" which is no longer found in this Article. The appropriate part of the verdict form should read, "not guilty by reason of mental disease or defect excluding responsibility."

TEXT OF REVISIONS OF OTHER STATES

TEXT OF MODEL PENAL CODE

Section 4.03. Mental Disease or Defect Excluding Responsibility Is Affirmative Defense; Requirement of Notice; Form of Verdict and Judgment When Finding of Irresponsibility Is Made.

(3) When the defendant is acquitted on the ground of mental disease or defect excluding responsibility, the verdict and the judgment shall so state.

NOTE: [The Commentary for sections 9 through 14 appears immediately following section 14.]

Section 9. Acquittal by reason of mental disease or defect excluding responsibility; court orders. After entry of judgment of not guilty by reason of mental disease or defect excluding responsibility, the court shall, on the basis of the evidence given at the trial or at a separate hearing, if requested by either party, make an order as provided in sections 10, 11 or 12 of this Article, whichever is appropriate.

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Section 10. Order of discharge. If the court finds that the person is no longer affected by mental disease or defect, or, if so affected, that he no longer presents a substantial danger to himself or the person of others and is not in need of care, supervision or treatment, the court shall order him discharged from custody.

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Section 11. Release on supervision. (1) If the court finds that the person is affected by mental disease or defect and that he presents a substantial danger to himself or the person of others, but he can be controlled adequately and given proper care, supervision and treatment if he is released on supervision, the court shall order him released subject to such supervisory orders of the court as are appropriate in the interests of justice and the welfare of the defendant. Conditions of release in such orders may be modified from time to time and supervision may be terminated by order of the court as provided in section 10 or section 14 of this Article.

(2) At any time within five years of the original entry of the order of release on supervision made pursuant to this section 11 the court may, upon notice to the prosecution and such person, conduct a hearing to determine if the person is affected by mental disease or defect. If the court determines that the person continues to be affected by mental disease or defect and is a substantial danger to himself or the person of others but can be controlled adequately if released on supervision, the court may release him on further supervision, as provided in subsection (1) of this section. If the court determines that the person is affected by mental disease or defect and presents a substantial danger to himself or to the person of others and cannot adequately be controlled if release on supervision is continued, it may at that time make an order committing the person to the Superintendent of the Oregon State Hospital for custody, care and treatment. At such hearing the state shall bear the burden of proof by a preponderance of the evidence that the defendant is

suffering from a mental disease or defect and is a substantial danger to himself or the person of others so as to warrant his commitment or his continued supervised release.

(3) Any person subject to the provisions of this section 11 may apply to the circuit court of the county from which he is on release on supervision, for a hearing upon his petition for discharge from or modification of an order upon which he was released upon the supervision of the court on the ground that he has recovered from his mental disease or defect or, if affected by mental disease or defect, no longer presents a substantial danger to himself or the person of others and no longer requires supervision, care or treatment. The hearing on an application for such discharge or modification shall be held on notice to the district attorney of the county. The petitioner must prove by a preponderance of the evidence his fitness for discharge or modification of the original order for supervision.

(4) If the state wishes to continue any person on supervised release beyond five years from the entry of the original order, the state must prove by a preponderance of the evidence that the person on supervised release continues to be affected by a mental disease or defect and continues to be dangerous to himself or the person of others but can be controlled and given proper care, supervision and treatment if continued on release on supervision.

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Section 12. Order of commitment; procedure for discharge. (1) If the court finds that the person is affected by mental disease or defect and presents a substantial risk of danger to himself or the person of others and that he is not a proper subject for release on supervision, the court shall order him committed to the Superintendent of the Oregon State Hospital for custody, care and treatment.

(2) If, after at least 90 days from the commitment of any person to the custody of the Superintendent of the Oregon State Hospital, the Superintendent is of the opinion that the person is no longer affected by mental disease or defect, or, if so affected, that he no longer presents a substantial danger to himself or the person of others, the Superintendent may apply to the court which committed the person for an order of discharge. The application shall be accompanied by a report setting forth the facts supporting the opinion of the Superintendent. Copies of the application and the report shall be transmitted by the clerk of the court to the district attorney of the county. If the state opposes the recommendation of the Superintendent, the state has the burden of proof by a preponderance of the evidence that the person continues to be affected by a mental disease or defect and continues to be a substantial danger to himself or the person of others and should remain in the custody of the Oregon State Hospital.

(3) Any person who has been committed to the Oregon State Hospital for custody, care and treatment, after the expiration of 90 days from the date of the order of commitment, may apply to the circuit court of the county from which he was committed for an order of discharge upon the grounds:

(a) That he is no longer affected by mental disease or defect; or

(b) If so affected, that he no longer presents a substantial danger to himself or the person of others.

(4) Application made under subsection (3) of this section shall be accompanied by a report of the Superintendent which shall be prepared and transmitted as provided in subsection (2). The applicant must prove by a preponderance of the evidence his fitness for discharge under the standards of subsection (3). Application for an order of discharge shall not be filed oftener than once every six months.

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Section 13. Hearings on applications; orders of court. (1) The court shall conduct a hearing upon any application for discharge, release or supervision or modification filed pursuant to section 11 or 12 of this Article. If the court finds that the person is no longer suffering from mental disease or defect, or, if so affected, that he no longer presents a substantial danger to himself or the person of others, the court shall order him discharged from custody or from supervision. If the court finds that the person is still affected by a mental disease or defect and is a substantial danger to himself or to the person of others, but can be controlled adequately if he is released on supervision, the court shall order him released on supervision as provided in section 11 of this Article. If the court finds that the person has not recovered from his mental disease or defect and is a substantial danger to himself or the person of others and cannot adequately be controlled if he is released on supervision, the court shall order him remanded for continued care and treatment.

(2) In any hearing under this section 13 the court may appoint one or more psychiatrists to examine the person and to submit reports to the court. Reports filed with the court pursuant to such appointment shall include, but need not be limited to, an opinion as to the mental condition of the person and whether the person presents a substantial danger to himself or the person of others. To facilitate the psychiatrist's examination of the person, the court may order the person placed in the temporary custody of any state institution or other suitable facility.

(3) If neither the prosecuting attorney nor counsel for the defendant contests the finding of the report filed with the court, the court may make the determination on the basis of such report. If the report is contested, the court shall hold a hearing on the issue. If the report is received in evidence in such hearing, the party who contests the report shall have the right to summon and to cross examine the psychiatrist or psychiatrists who submitted the report and to offer evidence upon the issue. Other evidence regarding the defendant's mental condition may be introduced by either party.

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Section 14. Persons on released supervision or in confinement for five years; procedure for review. (1) Any person who, pursuant to section 11 or 12, has been in the custody of the Superintendent of the Oregon State Hospital or on release on supervision by the court, or both, for a total period of five years shall, in any event, be discharged at the end of the five year period if he is no longer affected by mental disease or defect. He shall also be discharged if he is affected by mental disease or defect but he does not present a substantial danger to himself or to the person of others.

(2) If the person is in confinement in the Oregon State Hospital at the time the total five year period expires, the Superintendent shall notify the committing court of the expiration of the five year period. Such notice shall be given at least 30 days prior to the expiration of the five year period. Upon receipt of notice the court shall order a hearing.

(3) The notice provided in subsection (2) of this section shall contain a recommendation by the Superintendent either:

(a) That the person is still affected by a mental disease or defect but is no longer a substantial danger to himself or the person of others and should be discharged; or

(b) That the person confined continues to be affected by a mental disease or defect and is a substantial danger to himself or to the person of others and should continue in confinement; or

(c) That the person confined is no longer affected by a mental disease or defect and should be discharged.

(4) If the recommendation of the Superintendent is that the person should continue in confinement, the person seeking discharge has the burden at the hearing of proving by a preponderance of the evidence that he:

(a) Is no longer affected by a mental disease or defect; or

(b) If so affected, is no longer a substantial danger to himself or to the person of others.

(5) If the state wishes to challenge the recommendation of the Superintendent for discharge, the state has the burden of proving by a preponderance of the evidence that the person seeking release continues to be affected by a mental disease or defect and is a substantial danger to himself or to the person of others.

(6) Any person who is confined or remains on supervised release after the hearing at the end of the five years may be discharged subsequently in the same manner as provided in subsections (2) and (3) of section 11 of this Article and subsections (2) and (3) of section 12 of this Article.

COMMENTARY (SECTIONS 9 THROUGH 14) - ACQUITTAL BY REASON OF MENTAL DISEASE OR DEFECT EXCLUDING RESPONSIBILITY; RELEASE, COMMITMENT PROCEDURES

ORS 136.730 presently gives the trial court discretion to discharge a defendant completely following a verdict of not guilty by reason of insanity. It also provides that the court may "if it deems his being at large dangerous to the public peace or safety, order him to be committed to any hospital or institution, authorized by the state to receive and keep such persons, until he becomes sane or is otherwise

discharged therefrom by authority of law." The draft sections generally continue this policy. However, ORS 136.730 lacks details covering matters of extreme importance to the individual defendant, concerned with his personal rights, and the community at large, concerned with its safety in the event of the defendant's release. The draft sections are designed to deal with the details essential to a complete commitment and release statute. As noted in the following comments, some Oregon law and procedure will be changed.

Section 9. Disposition of defendant. Following the verdict of not guilty due to mental disease or defect the court may conduct a special hearing (or rely instead on evidence presented at the trial if sufficient) to determine what to do with the defendant. Provision is also made for either party to obtain a hearing upon request. A separate hearing on this issue is sometimes not necessary because the defendant's present mental condition is often the subject of evidence given at the trial as is his mental condition at the time of the act charged.

Section 10. Release; defendant recovered or not dangerous. This section authorizes the release of a defendant when it appears that the person acquitted because of his mental condition is no longer mentally affected or in need of custodial treatment. An order for discharge may not be made if the defendant is not free from mental disease or defect unless the court is of the opinion that the defendant is not dangerous to himself or the person of others and is not in need of care, supervision or treatment. If the evidence indicates that the defendant requires and is a fit subject for community psychiatric services, the court has the authority to impose supervisory or custodial restraints as provided in the sections which follow.

Section 11, subsection (1). Release on supervision. ORS 136.730 presently offers the court two alternatives when a defendant has been found not guilty by reason of insanity: release, or commitment to a state hospital. In actual practice, commitment is often the procedure; for understandable reasons, summary release is rarely granted. The lack of any alternative disposition through the use of local institutions, facilities and resources for the care and treatment of the mentally ill is attributable to the fact that until recent years, local means for caring for the mentally ill persons were inadequate. Problems still exist, but this provision allows use of existing local facilities

where adequate. The section permits administration of the release program and the supervision of persons released pursuant to its provisions may be performed by any department or agency. Orders of release and the conditions of release remain within the continuing jurisdiction of the court for modification or termination.

Section 11, subsection (2). Termination of supervision and commitment to the Superintendent of the Oregon State Hospital. This subsection together with section 14 establishes a provisional maximum period of release subject to supervision of five years. It authorizes commitment of a person so released to the Superintendent of the Oregon State Hospital at any time during the five year period that the person's mental condition has regressed to the point where he is dangerous to himself or to the person of others.

Section 11, subsection (3). Supervisory release; petition for modification or discharge. Procedure is provided by this subsection through which the person released on supervision may initiate action for his release upon a showing that he has recovered and is a fit subject for discharge or modification of the conditions of his release.

The standard for release set up in this subsection affects a change in the present Oregon law. ORS 136.730 was recently construed in Newton v. Brooks, 246 Ore 484 (1967), where the court laid down the requirements that before a person in confinement following commitment after a not guilty by reason of insanity verdict is entitled to discharge, he must prove by a preponderance of evidence (1) that he has the mental capacity to understand the difference between right and wrong, and (2) that with reasonable probability he will control his behavior so that his liberty will not be a danger to the public.

This subsection (and section 12, also) changes the focus somewhat, although it achieves what is believed to be the goal of the holding in Newton v. Brooks. Thus, a person committed to the Oregon State Hospital following a successful defense of insanity under this subsection is entitled to release if he has "recovered" from his mental disease or defect (i.e., is sane within the definition of section 1) which is in accord with the first part of the rule in Newton v. Brooks. Under the subsection even if the person in custody cannot prove he is sane within the definition of section 1, if he can show he no longer presents a substantial danger to himself or the person of others, he is entitled to discharge. This is a variation from Newton which requires

the defendant to prove his sanity and that he is no longer a danger to the public. The subsection places the burden of proof of fitness for discharge or modification of order on the petitioner in accordance with the rule announced in Newton v. Brooks.

Section 12. Commitment to the Superintendent of the Oregon State Hospital. This section authorizes commitment to the Superintendent of the Oregon State Hospital of those persons acquitted by reason of mental disease or defect whose potential dangerousness indicates that release or release under supervision involves risk that the individual may be dangerous to himself or the person of others.

Section 12, subsection (2). Procedure for release. The Superintendent of the Oregon State Hospital, by the provisions of this subsection, may initiate proceedings for the release of a committed person, after the expiration of 90 days, if such release is consistent with the welfare of the individual and the public safety. The criteria for release changes present law as explained in the comment above. The section also changes important administrative procedures. First, the subsection requires that a person committed to the State Hospital must be held a minimum of 90 days before he can be discharged at the instance of the Superintendent. No such minimum is presently required. Second, the Superintendent may not, as under present practice, discharge a person without a court order. Under the section the Superintendent must now apply to the designated court for an order of discharge. This has the beneficial effect of relieving the Superintendent of the considerable pressures of final decision on discharge. Because of this, the Superintendent might feel less reluctant to recommend release in cases where he is fairly sure in his appraisal of the person's dangerousness but might not be sure enough to take the responsibility entirely on himself. Furthermore, the original order of commitment was the result of the legal process -- determination of the court based on all evidence, medical or otherwise. The same policy obtains here for a discharge; it is left to the court as a legal matter rather than to the Superintendent as a purely medical matter.

As to the burden of proof it seems just that if the Superintendent is willing to recommend the discharge but the state, for reasons of public policy perhaps, wishes to oppose the discharge, the state ought to bear the burden of proof that the person is still a danger to himself or to the person of others.

Section 12, subsections (3) and (4). Committed person; procedure for release; petition by the person. These provisions provide means for the initiation of release proceedings by the committed person and changes the criteria of release prescribed in ORS 136.730 as construed in Newton v. Brooks, explained above. The burden of proof is placed on the applicant in accord with Newton v. Brooks. To eliminate frivolous applications, the person seeking discharge may do so no more frequently than once in six months. This procedure is not intended to preempt or take the place of existing habeas corpus procedures.

Section 13. Hearing on petition for release. This is a general procedural section which describes the form of the proceedings to be followed in any action for the release or discharge of a person subject to an order of supervisory release or commitment. It restates the flexible powers of the court to make appropriate disposition of the persons subject to its orders and provides for the appointment of psychiatric experts should their assistance be needed.

Section 14. Release from custody or supervision; maximum period. This section establishes a maximum period of five years for supervised release or commitment to the Superintendent of the Oregon State Hospital and requires discharge at the end of that term unless the mentally disordered offender is found to be dangerous to himself and others. It is the purpose of the draft to limit indefinite commitments only to those cases where release will give rise to problems of public safety. The choices to be made here tend to be arbitrary but the problem does not lend itself easily to solutions that will command ready acceptance. The draft attempts to minimize whatever arbitrary factors it includes by keeping the door open to continuing judicial review.

The hearing provided for in this section is automatic. It becomes necessary, therefore, to reevaluate the question of burden of proof. The policy of the section is that the notice of expiration of the five year period required of the Superintendent must also contain his recommendation for either continued confinement or release. Recommendation of confinement leaves the burden with the person in confinement. Opposition by the state of a recommendation for release places the burden on the state.

TEXT OF REVISIONS OF OTHER STATES

TEXT OF MODEL PENAL CODE

Section 4.08. Legal Effect of Acquittal on the Ground of Mental Disease or Defect Excluding Responsibility; Commitment; Release or Discharge.

(1) When a defendant is acquitted on the ground of mental disease or defect excluding responsibility, the Court shall order him to be committed to the custody of the Commissioner of Mental Hygiene [Public Health] to be placed in an appropriate institution for custody, care and treatment.

(2) If the Commissioner of Mental Hygiene [Public Health] is of the view that a person committed to his custody, pursuant to paragraph (1) of this Section, may be discharged or released on condition without danger to himself or to others, he shall make application for the discharge or release of such person in a report to the Court by which such person was committed and shall transmit a copy of such application and report to the prosecuting attorney of the county [parish] from which the defendant was committed. The Court shall thereupon appoint at least two qualified psychiatrists to examine such person and to report within sixty days, or such longer period as the Court determines to be necessary for the purpose, their opinion as to his mental condition. To facilitate such examination and the proceedings thereon, the Court may cause such person to be confined in any institution located near the place where the Court sits, which may hereafter be designated by the Commissioner of Mental Hygiene [Public Health] as suitable for the temporary detention of irresponsible persons.

(3) If the Court is satisfied by the report filed pursuant to paragraph (2) of this Section and such testimony of the reporting psychiatrists as the Court deems necessary that the committed person may be discharged or released on condition without danger to himself or others, the Court shall order his discharge or his release on such conditions as the Court determines to be necessary. If the Court is not so satisfied, it shall promptly order a hearing to determine whether such person may safely be discharged or released. Any such hearing shall be deemed a civil proceeding and the burden shall be upon the committed person to prove that he may safely be discharged or released. According to the

TEXT OF MODEL PENAL CODE (Cont'd)

Section 4.08 (Cont'd).

determination of the Court upon the hearing, the committed person shall thereupon be discharged or released on such conditions as the Court determines to be necessary, or shall be recommitted to the custody of the Commissioner of Mental Hygiene [Public Health], subject to discharge or release only in accordance with the procedure prescribed above for a first hearing.

(4) If, within [five] years after the conditional release of a committed person, the Court shall determine, after hearing evidence, that the conditions of release have not been fulfilled and that for the safety of such person or for the safety of others his conditional release should be revoked, the Court shall forthwith order him to be recommitted to the Commissioner of Mental Hygiene [Public Health], subject to discharge or release only in accordance with the procedure prescribed above for a first hearing.

(5) A committed person may make application for his discharge or release to the Court by which he was committed, and the procedure to be followed upon such application shall be the same as that prescribed above in the case of an application by the Commissioner of Mental Hygiene [Public Health]. However, no such application by a committed person need be considered until he has been confined for a period of not less than [six months] from the date of the order of commitment, and if the determination of the Court be adverse to the application, such person shall not be permitted to file a further application until [one year] has elapsed from the date of any preceding hearing on an application for his release or discharge.

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Section 15. Mental disease or defect excluding fitness to proceed. (1) If before or during the trial in any criminal case the court has reason to doubt the defendant's fitness to proceed by reason of incompetence, the court may order an examination in the manner provided in section 16 of this Article.

(2) A defendant may be found incompetent if, as a result of mental disease or defect, he is unable:

(a) To understand the nature of the proceedings against him; or

(b) To assist and cooperate with his counsel; or

(c) To participate in his defense.

COMMENTARY - MENTAL DISEASE OR DEFECT EXCLUDING FITNESS TO PROCEED

The test for competency in this section is made applicable to all proceedings in order to embrace preliminary examinations and other pre-trial matters as well as the trial itself. The criteria for determining competency are more particularized than those set out presently in ORS 136.150 which reads as follows:

> "If before or during trial in any criminal case the court has reasonable ground to believe that the defendant . . . is insane or mentally defective to the extent that he is unable to understand the proceedings against him or to assist in his defense, the court shall immediately fix a time for a hearing to determine the defendant's mental condition."

The particularization in the draft section may be legally unnecessary, but it is believed that precision in definition here will be helpful in obtaining precision in expert testimony at the hearing on the issue.

TEXT OF REVISIONS OF OTHER STATES

TEXT OF MODEL PENAL CODE

Section 4.04. Mental Disease or Defect Excluding Fitness to Proceed.

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 such incapacity endures.

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Section 16. Procedure for determining issue of fitness to proceed. (1) Whenever the court has reason to doubt the defendant's fitness to proceed by reason of incompetence as defined in section 15 of this Article, the court may call to its assistance in reaching its decision any witness and may appoint a psychiatrist to examine the defendant and advise the court.

(2) If the court determines the assistance of a psychiatrist would be helpful, the court may order the defendant to be committed to a hospital or other suitable facility for the purpose of the examination for a period not exceeding 30 days or such longer period as the court determines to be necessary for the purpose. The report of the examination shall include, but is not necessarily limited to, the following:

(a) A description of the nature of the examination;

(b) A statement of the mental condition of the defendant;

(c) If the defendant suffers from a mental disease or defect, an opinion as to whether he is incompetent within the definition set out in section 11 of this Article.

(3) Except where the defendant and the court both request to the contrary, the report shall not contain any findings or conclusions as to whether the defendant as a result of mental disease or defect was responsible for the criminal act charged.

(4) If the examination by the psychiatrist cannot be conducted by reason of the unwillingness of the defendant to participate therein, the report shall so state and shall include, if possible, an

opinion as to whether such unwillingness of the defendant was the result of mental disease or defect affecting his competency to proceed.

(5) The report of the examination shall be filed in triplicate with the clerk of the court, who shall cause copies to be delivered to the district attorney and to counsel for defendant.

(6) The court, when it has ordered a psychiatric examination, shall order the county wherein the original proceeding was commenced to pay:

(a) A reasonable fee if the examination of the defendant is conducted by a psychiatrist in private practice; and

(b) All costs including transportation of the defendant if the examination is conducted by a psychiatrist in the employ of the Oregon State Hospital.

COMMENTARY - PSYCHIATRIC EXAMINATION OF DEFENDANT ON ISSUE OF FITNESS TO PROCEED

This section is based largely on Model Penal Code section 4.05. In general it reflects the presently existing policies embodied in ORS 136.150. There are important differences, however.

Subsection (1). When the court has reason to doubt the defendant's competency to stand trial (within the test set out in section 15) the court is authorized to call such witnesses as it deems advisable including a psychiatrist. This reflects the current policy in Oregon as provided in ORS 136.150.

Subsections (2) - (5). It is the typical practice in Oregon when an incompetency examination is ordered for the psychiatrist also to examine the defendant as to his mental condition at the time of the crime. The psychiatrist then gives his opinion not only on the defendant's competency to

stand trial but also his mental condition at the time of the crime. Copies of this report routinely are given to both the state and the defendant. As a practical matter this dual response of the psychiatrist is welcomed by both the state and the defendant in many cases. The defendant, apparently more often than the state, requests the competency examination knowing that he will get an opinion also on his responsibility. The indigent defendant to whom funds may not be available by this procedure gets free expert advice upon which to determine whether to pursue the insanity defense.

Prior to Shepard v. Bowe (for a discussion of the case see the commentary following section 7) this dual response by the psychiatrist conducting the incompetency examination posed no problem. Now, however, it seems inadvisable to allow this practice to continue unless the defendant, knowing he has the right not to incriminate himself at the examination by answering questions concerning the crime, requests that the psychiatrist also examine him and give an opinion as to his mental capacity at the time of the crime. As a safeguard, however, against the harmful effects of such a request from a defendant who is obviously not competent to understand the danger of the request on the issue of self-incrimination, the section also requires that the court join in the request for the opinion on insanity as well as competency. This permits the court to act in the best interests of a defendant where justified.

The provisions of subsection (2) dealing with the contents of the psychiatric report is considerably more explicit than existing statutory provisions which frequently give the examining expert little or no guidance as to what his report must contain, and which thus fail to assure the parties and the court that the report will be adequate for the purpose for which the examination and report were ordered.

Subsection (6). This subsection reflects the provisions on fees and costs for the examination found in subsection (3) of ORS 136.150.

TEXT OF OREGON REVISED STATUTES

136.150 Mental condition at time of trial. (1) If before or during the trial in any criminal case the court has reasonable ground to believe that the defendant, against whom an indictment has been found or an information filed, is insane or mentally defective to the extent that he is unable to understand the proceedings against him or to assist in his defense, the court shall immediately fix a time for a hearing to determine the defendant's mental condition. The court may appoint one or more disinterested qualified experts to examine the defendant with regard to his present mental condition and to testify at the hearing. Other evidence regarding the defendant's mental condition may be introduced at the hearing by either party.

(2) In the event the court determines that the services of qualified experts in private practice are not available to conduct the examinations referred to under subsection (1) of this section, the court may use the services of one of the outpatient clinics operated by institutions under the supervision of the Oregon State Board of Control. The defendant shall be transported to the proper facility at the expense of the county wherein the original proceeding was commenced. If the person in charge of the outpatient clinic determines that the present mental condition of a particular defendant can be better evaluated by the institution on an inpatient basis, he shall so notify the superintendent who shall notify the court. The defendant shall then be admitted to the institution, unless otherwise ordered by the court. In no case shall a defendant admitted to the institution for evaluation of his present mental condition be detained in excess of 30 days unless a commitment order has been executed by the court.

(3) The court shall allow and order the county wherein the original proceeding was commenced to pay:

(a) A reasonable fee for any examinations made pursuant to subsection (1) of this section; or

(b) All costs connected with the examination made pursuant to subsection (2) of this section.

[Amended by 1963 c.503 §1]

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Section 17. Determination of fitness to proceed; effect of finding of unfitness; proceedings if fitness is regained; pretrial legal objections by defense counsel. (1) When the defendant's fitness to proceed is drawn in question, the issue shall be determined by the court. If neither the prosecuting attorney nor counsel for the defendant contests the finding of the report filed by a psychiatrist pursuant to section 16 of this Article, the court may make the determination on the basis of such report. If the finding is contested, the court shall hold a hearing on the issue. If the report is received in evidence upon such hearing, the party who contests the finding thereof shall have the right to summon and to cross examine the psychiatrist or psychiatrists who submitted the report and to offer evidence upon the issue. Other evidence regarding the defendant's fitness to proceed may be introduced by either party.

(2) If the court determines that the defendant lacks fitness to proceed, the proceeding against him shall be suspended, except as provided in subsection (4) of this section, and the court shall commit him to the custody of the Superintendent of the Oregon State Hospital or shall release him on supervision as provided in subsection (3) of this section for so long as such unfitness shall endure. When the court, on its own motion or upon the application of the Superintendent of the Oregon State Hospital or either party, determines, after a hearing, if a hearing is requested, that the defendant has regained fitness to proceed, the proceeding shall be resumed. If, however, the court is of the view that so much time has elapsed since the

commitment of the defendant that it would be unjust to resume the criminal proceeding, the court on motion of either party may dismiss the charge and may order the defendant to be discharged or, subject to the law governing the civil commitment of persons suffering from mental illness, order the defendant to be committed to an appropriate mental institution. The trial court shall conduct such proceedings in the manner provided in ORS 426.070 through 426.170.

(3) If the court determines that care other than commitment for incompetency to stand trial would better serve the defendant and the community, the court may release the defendant on such conditions as the court deems appropriate including requirements that the defendant regularly report to a specified institution or other facility for examination to determine if the defendant has regained his competency to stand trial.

(4) The fact that the defendant is unfit to proceed does not preclude any objection through counsel and without the personal participation of the defendant on the grounds that the indictment is insufficient, that the statute of limitations has run, that double jeopardy principles apply or upon any other ground at the discretion of the court which the court deems susceptible of fair determination prior to trial.

COMMENTARY - DETERMINATION OF FITNESS OR UNFITNESS

Subsection (1). The subsection is based on Model Penal Code section 4.06 and in general it reflects the same policies that presently obtain in Oregon under ORS 136.160. The draft continues the policy that the court, rather than the jury, hears and determines the issue of fitness to proceed.

The last sentence of subsection (1) may be interpreted as creating or at least allowing for an exception to the hearsay rule in connection with receiving in evidence the report of the examining experts without requiring that they appear and testify, thus obviating the necessity for taking the testimony of these experts in every case where a report is contested. The defendant is assured, however, of the right to summon and cross examine such experts if he wishes. The defendant and the state also have the right to bring in other witnesses.

Subsection (2) continues substantially the present Oregon requirement that the court hold another hearing if the custodian of the person previously declared unfit indicates to the court he believes the person is fit for proceeding.

The provision in subsection (2) permitting the court on motion of either party to dismiss the prosecution if because of the lapse of time it would be unjust to continue it is new to Oregon and novel in American law but not in actual practice, except that the result is usually reached at the discretion of the district attorney through the entry of a nolle prosequi. The important provision here is that the defendant is given the right to move for a dismissal and the court may grant the motion if it sees fit. There is value in vesting such a power in the court, to be exercised either where because of the lapse of time a defendant is unable to produce certain witnesses or other evidence once available which is essential to his defense, or where because of the length of the intervening period which he has spent in a mental institution subsequent to the alleged wrongful conduct it seems unjust to subject him to trial and punishment.

Subsection (3) of this section permits the court to release the defendant on condition as an alternative to commitment when supervision will serve the purpose. This reflects the policy presently in effect pursuant to ORS 136.160 (3).

Subsection (4). The fact that the defendant is unfit to proceed should not preclude his counsel from making any legal objection to the prosecution which is susceptible of fair determination prior to trial and without the personal participation of the defendant. Subsection (4) so provides. This provision is aimed at motions readily determinable prior to trial without unfairness to the state, and which do not require participation by the defendant including the

following: that the indictment is insufficient; that the statute of limitations has run; that double jeopardy principles apply; such other motions as the court in its discretion deems fair.

Although there is much to be said for according the defendant who is unfit to proceed an opportunity to defeat an unfounded criminal charge through the determination of issues of fact ordinarily disposed of at the trial stage, it does not seem feasible or advisable to give the defendant the right to put the prosecution to its proof in a proceeding which, if it results adversely to the defendant, would not be binding on him.

TEXT OF OREGON REVISED STATUTES

133.169 Proceedings after determination of mental condition. (1) If, after the hearing, the court decides that the defendant is able to understand the proceedings and to assist in his defense, it shall proceed with the trial.

(2) If, however, the court decides that the defendant, through insanity or mental deficiency, is not able to understand the proceedings or to assist in his defense, it shall take steps to have the defendant committed to the proper institution. If, thereafter, the proper officer of such institution is of the opinion that the defendant is able to understand the proceedings and to assist in his defense, he shall report this fact to the court that conducted the hearing. If the officer so reports, the court shall fix a time for a hearing to determine whether the defendant is able to understand the proceedings and to assist in his defense. This hearing shall be conducted in all respects like the original hearing to determine defendant's mental condition. If, after this hearing, the court decides that the defendant is able to understand the proceedings against him and to assist in his defense, it shall proceed with the trial. If, however, it decides that the defendant is still not able to understand the proceedings against him or to assist in his defense, it shall recommit him to the proper institution.

(3) If the court determines that care other than that available through commitment of a mentally defective defendant would better serve the defendant and the community, the court at any time may suspend the order of commitment upon condition that the defendant comply with the directions of the court and receive such care as the court may determine and that the defendant report at specified times to the institution for an examination by the proper officer of the institution to determine if the defendant is able to understand the proceeding and to assist in his defense.
[Amended by 1965 c.551 §1]

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Section 18. Incapacity due to immaturity. (1) A person who is tried as an adult in a court of criminal jurisdiction is not criminally responsible for any conduct which occurred when the person was less than 14 years old.

(2) Incapacity due to immaturity, as defined in subsection (1) of this section, is a defense.

COMMENTARY - IMMATURITY BARRING CRIMINAL RESPONSIBILITY

The purpose of this section is to cover two groups of persons. Group one includes those who commit a criminal act before reaching age 18 but who, for one reason or another, are not apprehended until after reaching age 18 at which time the Oregon juvenile court loses all opportunity for acquiring jurisdiction. Group two includes those persons who commit a criminal act prior to reaching age 18 and who have come under the custody of the juvenile court but have been remanded to the criminal courts pursuant to ORS 419.533.

To illustrate the group one situation: the offender is 13 when he commits the criminal act but his part in the crime does not come to the attention of the authorities until the offender is 18 or over. Since he is not apprehended until he has reached age 18, he cannot be made a ward of the juvenile court. See ORS 419.476. Nor is there any sound policy reason for disposition of such person as a ward of the juvenile court. The philosophy of juvenile court treatment is to keep one of tender years away from the criminal process, because it is believed he may be rehabilitated more readily in such case. But since the offender has reached at least age 18 at the time of his apprehension, reasons for treating him as a juvenile lose force. Nevertheless the fact that the act was committed at a tender age dictates that the offender be dealt with in a manner substantially different from offenders who were of fairly mature age at the time of a criminal act. Under the draft section the offender in the illustration above would be entitled at trial in a criminal court to the conclusive presumption that he was not responsible because he was below the age of responsibility -- 14 -- when he committed the act.

The second group to be covered by the section is illustrated as follows: the youth commits the criminal act at age 13 but is not brought into custody of the juvenile court until he is 16 or 17 years old. If the juvenile court elects to remand the offender to the criminal courts, as it may under ORS 419.533, the offender when tried in the criminal court will have a conclusive presumption of incapacity in his favor. It will be readily seen from this illustrative case that it is unlikely as a practical matter that there will be a remand at all.

Subsection (2). Burden of proof. Under the common law the burden of proving capacity of young offenders to commit crimes was on the prosecution. The draft section continues this policy. The defendant must first present evidence to raise the defense. The prosecution then has the burden of proving capacity beyond a reasonable doubt.

TEXT OF REVISIONS OF OTHER STATES

TEXT OF MODEL PENAL CODE

Section 4.10. 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 jurisdiction*]; or

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

(i) the Juvenile Court has no jurisdiction over him, or,

(ii) 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.

* The bracketed words are unnecessary if the Juvenile Court Act so provides or is amended accordingly.

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TEXT OF NEW YORK REVISED PENAL LAW

§ 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. L.1965, c. 1030, eff. Sept. 1, 1967.

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TEXT OF MICHIGAN REVISED CRIMINAL CODE

[Immaturity]

Sec. 701. A person less than 15 years old is not criminally responsible for his conduct.

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