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Mental Illness: A Legal Fiction

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ARTICLES

MENTAL ILLNESS: A LEGAL FICTION

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INTRODUCTION

The law has long kept "mental illness" in its back wards. An examination of the term "mental illness" and its synonyms is overdue. The treatment of choice may be to discharge the concept of "mental illness" from further retention by the law.

Previous publications have discussed the problems of defining the term "mental illness" (or the virtually synonymous "mental disease") when it appears in legal tests.[1] But this article furnishes the first exploration of the consequences resulting from such legal incorporation of the phrase "mental disease." Unlike earlier proposals that we jettison one or more of the legal standards in which "mental disease" appears,[2]

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1. *See, e.g.*, H. FINGARETTE, THE MEANING OF CRIMINAL INSANITY 19-52 (1972); Hardisty, *Insanity as a Divorce Defense*, 12 J. FAM. L. 1, 5-11 (1972); Swartz, *"Mental Disease": The Groundwork for Legal Analysis and Legislative Action*, 111 U. PA. L. REV. 389 (1963); Weihofen, *The Definition of Mental Illness*, 21 OHIO ST. L.J. 1 (1960).

2. *See, e.g.*, T. SZASZ, IDEOLOGY AND INSANITY 109, 113 (1970); Burt & Morris, *A Proposal for the Abolition of the Incompetency Plea*, 40 U. CHI. L. REV. 66 (1972); Goldstein & Katz, *Abolish the "Insanity Defense"—Why Not?*, 72 YALE L.J. 853 (1963); Hardisty, *Insanity as a Divorce Defense*, 12 J. FAM. L. 1 (1972). Similarly, the new proposal of the Nixon administration abolishes the "insanity defense" as that phrase traditionally has been used (*id.* at 16-17) and substitutes therefor a provision exculpating defendants who "as a result of mental disease or defect, lacked the state of mind required as an element of the offense charged." S. 1400, 93d. Cong., 1st Sess. § 502 (1973).

this is the first article to suggest that we retain the legal standards but drop from them the words "mental disease."[3] Such semantic alterations would not necessarily involve substantial changes in the types of persons found incompetent, criminally irresponsible or committable. Nor would they necessarily modify which individuals are sent to which institutions. However, they would help to rationalize psychiatric-legal proceedings and to reduce the confusion in communications and roles among psychiatrists, lawyers, judges, juries and clients.

The article will first examine the nebulousness of "mental disease" as a psychiatric, social and legal term. Then it will discuss a few of the "mental disease" legal rules. Finally it will analyze and evaluate the functions that "mental disease" performs as a legal term.

This article does not consider what additional changes, if any, should be made in various legal standards if the term "mental disease" were deleted from them. Such discussion is beyond the scope of this article, as it would require a separate, detailed analysis of each such incapacity standard and its purposes.

I. BORROWING "MENTAL DISEASE"

Many judges and commentators believe that in using the term "mental disease," the law embraces a medical concept.[4] If true, this would furnish an example of the law's inertia in the face of change because the law would be embracing an obsolete nineteenth century concept. In the nineteenth century, physicians employed the term "insanity" to refer to a physical disease of the *brain*.[5] They believed the strange hallucinations and emotions of the "insane" were caused or accompanied by anatomical or physiological changes in the "insane" brain.

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3. *But cf.* United States v. Brawner, 471 F.2d 969, 995 (D.C. Cir. 1972), *infra* note 60.

4. *See, e.g.*, State v. Crose, 88 Ariz. 389, 357 P.2d 136, 138 (1960); Weihofen, *The Definition of Mental Illness*, 21 OHIO ST. L.J. 1 (1960).

The discussion in this article of the meaning of "mental disease" in nonlegal contexts will be summary since the subject has been adequately covered elsewhere. *See, e.g.*, Redlich, *The Concept of Normality*, 6 AM. J. PSYCHOTHERAPY 551 (1952); T. SZASZ, THE MYTH OF MENTAL ILLNESS (1961); Parsons, *Definitions of Health and Illness in the Light of American Values and Social Structure*, PATIENTS, PHYSICIANS AND ILLNESS 165 (E. Jaco ed. 1958). For a more extensive discussion of the medical usage of "mental disease" by the present author, see Hardisty, *Insanity as a Divorce Defense*, 12 J. FAM. L. 1, 2-5 (1972).

5. N. DAIN, CONCEPTS OF INSANITY IN THE UNITED STATES 1789-1865 16, 26, 64, 70 (1964); I. RAY, A TREATISE ON THE MEDICAL JURISPRUDENCE OF INSANITY (1838).

When the courts and legislators of that era employed such words as "insanity" or "mental disease," they adopted the medical usage.[6] For example, the 1890 Washington State civil commitment statutes employed "insanity" to refer to a medical disease.[7] Similarly, New Hampshire treated the existence of criminal insanity as a question of medical fact.[8] This medical definition of criminal insanity was at least understandable when physicians still believed medical "insanity" had a physical referent.

But the "medical fact" approach to insanity makes no sense in modern legal usage since psychiatrists have abandoned it. Physicians no longer speak of "insanity."[9] In its place they use "psychosis" or potentially broader terms such as "mental disease," "mental illness," "emotional illness," "mental derangement" or "mental disorder." Although these terms seem to assume an identifiable underlying abnormality, physicians do not now believe they have any definite referrents. In fact, psychiatrists generally have concluded that such phrases as "mental illness" are relatively useless as medical terms.[10] Psychiatrists still employ the words "mental illness" but do so not to describe a medical condition but rather to achieve social purposes.[11]

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6. *See, e.g.*, Guetig v. State, 66 Ind. 94, 105-106 (1879), Denny v. Tyler, 85 Mass. (3 Allen) 225, 227-28 (1861); *In re* Crosswell's Petition, 28 R.I. 137, 66 A. 55, 58 (1907).

7. "[Two reputable] physicians shall . . . certify to the . . . premonitory symptoms apparent cause and class of insanity, duration of the disease and present condition." (The statute then provides for commitment if the "insanity" is of a recent, curable or dangerous nature.) Act of March 13, 1890, § 16, [1889-1890] Wash. Sess. Laws 486 repealed 1959).

8. *See* State v. Jones, 50 N.H. 399 (1871); State v. Pike, 49 N.H. 399 (1869); I. RAY, A TREATISE ON THE MEDICAL JURISPRUDENCE OF INSANITY 39 (5th ed. 1871); Reik, *The Doe-Ray Correspondence: A Pioneer Collaboration in the Jurisprudence of Mental Disease*, 63 YALE L.J. 183 (1953).

9. "Insanity" is a "vague, legal term for the psychotic state, now obsolete in psychiatric usage." AMERICAN PSYCHIATRIC ASSOCIATION, A PSYCHIATRIC GLOSSARY 39 (2d ed. 1964).

10. *See, e.g.*, Redlich, *The Concept of Normality*, 6 AM. J. PSYCHOTHERAPY 551-56 (1952). See also the following quotation from a concurring opinion by now Chief Justice Burger:

> So distinguished an authority as Dr. Philip Q. Roche, . . . said as recently as 1958:
>
> "I will say there is neither such a thing as "insanity" nor such a thing as "mental disease". . . . To the psychiatrist the mental illness can have a meaning *only in the sense of what in the future will be done to or with the patient to relieve him and those around him.*"

Blocker v. United States, 288 F.2d 853, 859 (D.C. Cir. 1961).

11. *E.g.*, T. SZASZ, THE MYTH OF MENTAL ILLNESS 21-36 (1961).

Many psychologists and sociologists, in particular, see the phrase "mental disease" as part of a misleading medical model based on an inappropiate analogy to physical disease. They believe the medical model aids medically trained professionals such as psychiatrists in maintaining their dominance over part of the field of behavioral deviancy. *See, e.g.*, T. SCHEFF, BEING MENTALLY ILL: A SOCIOLOGICAL THEORY 14, 25-26 (1966);

Thus "mental illness," even though it no longer has an accepted medical meaning, is not in linguistic limbo. People employ "mental illness" for its rhetorical power. They use it in achieving social objectives such as suggesting dangerousness[12] and placing the labelled person in the same social role as the *physically* ill. When psychiatrists or laymen say that either alcoholism or homosexuality is a "disease," they consciously or unconsciously attempt to influence society's reactions to alcoholics or homosexuals. They are using the label "disease" to make social, political and moral judgments that society should relegate alcoholics and homosexuals to the sick role.[13] The sociologist Talcott Parsons sees the mentally sick role as characterized by a disturbance in a person's *capacity* to perform other social roles: (1) society presumes the incapacity, called a sickness, cannot be overcome by will power and is thus beyond the individual's responsibility; (2) society exempts the sick individual from his normal role obligations; (3) society accepts sickness as a legitimate status if the sick person recognizes it as undesirable and tries to get well; and (4) society assumes the sick person and his family have an obligation to seek medical help.[14]

All of these vague social meanings of mental illness may be more connotations than denotations. But perhaps "mental illness" can now best be thought of as a phrase without a denotation. The functions of the phrase may now lie entirely outside its validity as a descriptive term. In any event, these connotations have helped shape the meaning of "mental illness" as adopted by the law and account for much of the confusion in its legal usage.

Although "insanity" and "mental disease" have died as medical concepts, their legal ghosts still haunt us. For example, the term "mental disease" is present in legal insanity defense standards. Similarly, the term is sometimes a part of the various incompetency tests. The legal concept, which originally was pinned to the historical medical concept, is left with no valid definition in medical terms. Never-

Albee, *The Relation of Conceptual Models to Man-power Needs,* EMERGENT APPROACHES TO MENTAL HEALTH PROBLEMS 63, 68-72 (E. Cowen, E. Gardner, M. Zaz eds., 1967). The term "medical model" itself often seems to be employed as a counter-rhetorical device which serves to replace rather than to aid analysis. The phrase will be avoided in the remainder of this article.

12. F. MILLER, R. DAWSON, G. DIX, R. PARNAS, CASES AND MATERIALS ON CRIMINAL JUSTICE ADMINISTRATION AND RELATED PROCESSES 1541 (1971); T. SCHEFF, BEING MENTALLY ILL: A SOCIOLOGICAL THEORY 71-74 (1966).

13. Parsons, *Definitions of Health and Illness in the Light of American Values and Social Structure,* in PATIENTS, PHYSICIANS AND ILLNESS 165, 166, 176 (E. Jaco ed. 1958).

14. *Id.* at 176-177.

theless, courts and legislatures have generally not furnished any legal definitions of the term[15] except for a few circular ones.[16] Trial judges in effect instruct juries to determine whether the defendant has a "mental disease," but leave the term undefined.[17]

Many judges and legislators fail to realize that "mental disease" no longer has an accepted psychiatric meaning.[18] Thus courts inadvertently let each testifying psychiatrist listen to his own drummer in defining what the law means by "mental disease."[19] In turn, psychiatric witnesses often assume that "mental disease" is a legal term since they know it has no accepted medical meaning. Since the court does not define it, each such witness assigns his own particular legal meaning to the term.[20] Other psychiatric witnesses attempt to translate "mental disease" into psychiatric jargon, variously assuming that under the law "mental disease" means anything from psychosis to a personality disorder such as antisocial personality.[21] The lack of consensus follows from the absence of accepted psychiatric guidelines. The result is a random determination of who is legally "mentally ill."

II. LEGAL STANDARDS CONTAINING "MENTAL DISEASE"

Despite the lack of agreed-on medical or legal meaning of mental disease, various legal standards incorporate the term. This section outlines the extent to which the phrase "mental disease" and its synonyms are a part of the legal tests for incompetency and the insanity defense. By way of background, the explicit inclusion of the term "mental illness" in such legal tests has certain formal procedural consequences. Such inclusion technically requires that the trier of fact, whether judge or jury, find that the allegedly incompetent or irresponsible person

15. A fortiori, the courts have not considered whether the phrase "mental illness" has different meanings when used in different legal rules.

16. D.C. CODE ANN. § 21-501 (1967) furnishes a typical example of a circular definition: " 'mental illness' means a psychosis or other disease which substantially impairs the mental health of a person."

17. *See, e.g.*, Terry v. Commonwealth, 371 S.W.2d 862, 865 (Ky. 1963).

18. *See, e.g.*, State v. Crose, 88 Ariz. 389, 357 P.2d 136, 138 (1960).

19. *See, e.g.*, Crosby v. Crosby, 186 Kan. 420, 350 P.2d 796, 799-800 (1960); Hampton v. Hampton, 241 Ore. 277, 405 P.2d 549, 550 (1965); R. ALLEN, E. FERSTER & H. WEIHOFEN, MENTAL IMPAIRMENT AND LEGAL INCOMPETENCY 43 (1968).

20. *Id.*

21. *Id.*; Williams v. United States, 312 F.2d 862, 865 n.15 (D.C. Cir. 1962), *cert. denied*, 374 U.S. 841 (1963); Sherrill v. State, 14 Md. App. 146, 286 A.2d 528 (1972); Dodd v. Hughes, 81 Nev. 43, 398 P.2d 540, 541 (1965).

was "mentally ill." Theoretically the fact finder must also ascertain that this "mental illness" "caused" the incompetency or irresponsibility in question. Before these issues reach the jury in a jury case, the trial judge must determine that there is enough evidence to support jury findings on these issues of the existence and causal effects of "mental illness."[22] On the other hand, all these findings are avoided if the legal test includes no phrase such as "mental disease," for then the trier of fact need not find any cause of the incapacity or irresponsibility. Of course, even if no causal finding is required, a psychiatrist may still testify about an underlying "mental disease" such as "schizophrenia," since such testimony would constitute relevant evidence on the issue of incompetency or irresponsibility.

Whether "mental disease" is a causal requirement in a legal test is sometimes unclear. Some of the tests are stated in statutes. Examination of those statutes indicates if the standards explicitly include a "mental illness" causal requirement. However, many tests are not codified. In construing these, the parties and the courts rarely focus on whether the phrase "mental disease" is a part of the legal standard. For example, the courts rarely discuss whether the jury instruction on competency or irresponsibility should contain a causal requirement such as "mental disease." However, a trial court in instructing juries often copies the formulation of a legal test employed by its appellate courts. If a particular legal test of competency as stated by an appellate court happens to contain the phrase "mental disease," even if the court was focusing on some issue other than the causal requirement of mental disease, then trial courts in that jurisdiction will tend to employ the same "mental disease" phrase in instructing a jury on the competency test.

A. Competency Tests

"Competency" covers a wide variety of legal problems and standards. In each legal area in which a person needs jural capacity, there is a separate test of his ability to perform the relevant legal act. For example, there are separate tests for competency to contract, to make a will, to manage one's person and affairs (guardianship), to sue and

22. *See, e.g.*, Ruffin v. State, 123 A.2d 461, 464 (Del. 1956). In some courts, competent evidence of "mental illness" may be sufficient by itself to take the issue of competency or irresponsibility to the jury. *See* note 76 *infra*. *But cf.* H. WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE 227 n.6 (1954).

be sued, to drive, to vote, to be a juror, to be a doctor, to raise children and to stand criminal trial.[23] A person may thus at the same time be competent for some legal purposes and incompetent for others.[24]

In general, these competency tests do not contain the phrase "mental disease" or its synonyms. This can be illustrated by two typical competency tests—competency to contract and competency to stand criminal trial.

The traditional common law standard for competency to contract provides:[25]

> To have the mental capacity to contract it is necessary that a person have the *ability* to comprehend the nature of the transaction in which he is engaged and to understand its quality and consequences.

One court has stated explicitly that there need not be a finding of the cause of the inability to understand the contract.[26] However, most courts reach the same result implicitly by merely omitting reference to mental illness or any other "cause" in formulating the test for incapacity to contract.[27] I have found no cases clearly mandating that a trial court find that "mental disease" or some other "entity" was the cause of the inability to comprehend the contract, although a few cases ambiguously suggest such a requirement.[28] In the few states which

23. R. ALLEN, E. FERSTER, H. WEIHOFEN, MENTAL IMPAIRMENT AND LEGAL INCOMPETENCY 260-369 (1968), discusses these tests of competency as well as others.

24. *Id.* at 291.

25. Kruse v. Coos Head Timber Co., 248 Ore. 294, 432 P.2d 1009, 1015 (1967) (emphasis added); 2 S. WILLISTON, CONTRACTS § 256 (3d ed. 1959).

26. "We are not concerned with what impairs capacity." Star Realty, Inc. v. Bower, 17 Mich. App. 248, 169 N.W.2d 194, 199 (1969). The court affirmed the trial court's denial of specific performance of a real estate contract because the defendant was incompetent. There was testimony that the defendant suffered from a "nervous condition" but none about "mental illness."

27. *See, e.g.*, Board of Regents of Univ. of Texas v. Yarbrough, 470 S.W.2d 86 (Tex. Civ. App. 1971); Harris v. Rivard, 64 Wn. 2d 173, 390 P.2d 1004, 1005-06 (1964). As an example of another cause, courts in general do not require a finding that voluntary intoxication was the cause of the inability to understand the transaction. *See, e.g.*, Olsen v. Hawkins, 90 Idaho 28, 408 P.2d 462 (1965). Courts generally treat incapacity to contract caused by intoxication the same as any other incapacity. *See, e.g., id.*; Peterson v. Eritsland, 69 Wn. 2d 588, 419 P.2d 332, 336 (1966); 2 S. WILLISTON, CONTRACTS, §§ 249-263 (3d ed. 1959).

28. *See, e.g.*, Sjulin v. Clifton Furniture Co., 241 Iowa 761, 41 N.W.2d 721, 723 (1950):

> To avoid the contract it must appear not only that Sterling was of unsound mind when it was made but that this unsoundness was such that he had no reasonable perception of the nature and terms of the contract.

Mahin v. Soshnik, 148 N.E.2d 852 (Ind. App. 1958); Sosik v. Conlon, 91 R.I. 439, 164 A.2d 696 (1960). *But cf.* Ortelere v. Teachers' Retirement Bd., 25 N.Y.2d 196, 206, 303

have enacted statutes pertaining to competency to contract, the courts have simply read the common law test into the general language of the statutes.[29] Surprisingly, the proposed Restatement (Second) of Contracts departs from the common law rule by including the causal requirement of *"mental illness or defect"* in its test of contractual capacity.[30] Yet the Restatement Comments give no reason for diverging from the common law. Nor is there any indication that the drafters recognized that they were abrogating the majority common law rule. This may illustrate the point made earlier that legalists have a confused conception of "mental illness," believing it accurately describes a cause for the incapacity, when actually it is more nearly a vague and value-loaded synonym for incapacity.

Interestingly, the American Law Institute made the same kind of an unacknowledged change in its test for competency to stand criminal trial. The traditional common law test is whether the defendant has the ability to understand the charges against him and to assist his attorney.[31] The standard contains no mention of "mental disease" or

N.Y.S.2d 362, 370, 250 N.E.2d 460, 466 (1969); Fingerhut v. Kralyn Enterprises, Inc., 71 Misc. 2d 846, 337 N.Y.S.2d 394, 400, 405 (Sup. Ct. 1971). In *Ortelere* the court ordered that on remand the trial court not limit itself to competency to contract under the traditional "cognitive" test of competency "to comprehend and understand the nature of the transaction." Ortelere v. Teachers' Retirement Bd., 25 N.Y.2d 196, 303 N.Y.S.2d 362, 366, 250 N.E.2d 460, 464 (1969). The trial court must also consider competency pursuant to a new test, apparently whether the contract was made "solely as a result of serious mental illness, namely, psychosis." *Id.* at 206, 303 N.Y.S.2d at 370, 250 N.E.2d at 466. The court limited the new test as follows: "Of course, nothing less serious than medically classified psychosis should suffice or else few contracts would be invulnerable to some kind of psychological attack." *Id.*

29. *See, e.g.,* Matthews v. Acacia Mut. Life Ins. Co., 392 P.2d 369, 373 (Okla. 1964) apparently construing OKLA. STAT. ANN. tit. 15, §§ 16, 22, 23 (1966).

30. (1) A person incurs only voidable contractual duties by entering into a transaction if *by reason of mental illness or defect*
   (a) he is unable to understand in a reasonable manner the nature and consequences of the transaction, or
   (b) he is unable to act in a reasonable manner in relation to the transaction and the other party has reason to know of his condition.
   (2) Where the contract is made on fair terms and the other party is without knowledge of the mental illness or defect, the power of avoidance under subsection (1) terminates to the extent that the contract has been so performed in whole or in part or the circumstances have so changed that avoidance would be inequitable. In such a case a court may grant relief on such equitable terms as the situation requires.

RESTATEMENT (SECOND) OF CONTRACTS § 18C (Tent. Draft No. 1, 1964) (emphasis added).

31. *See* Rex v. Dyson, 7 C. & P. 305 (1831) (deaf-mute held incompetent to stand criminal trial); State v. Mahaffey, 3 Wn. App. 988, 478 P.2d 787 (1970). At least one commentator has concluded that "mental illness" is part of the common law standard for competency to stand trial, basing this conclusion on cases holding that persons suffering from amnesia must stand criminal trial. The author makes the questionable assumption that amnesia is not mental illness. Note, *Amnesia: A Case Study in the Limits*

any other cause of the incapacity. When statutes provide that "insane" persons shall not stand trial, the courts construe "insane" to be a legal term which merely codifies the previous common law incapacity test. They do not require a finding of "mental illness" or other cause of the incapacity.[32] However, the Model Penal Code reverses this approach and requires the trier of fact to find not only that the defendant "lacks capacity to understand the proceedings against him or to assist in his own defense," but also that such incapacity is "a result of mental disease or defect."[33] The Model Penal Code Comments indicate neither awareness of this divergence from the traditional criteria nor explanation for it.[34] In fact, under recent United States Supreme Court decisions, the common law test omitting a causal requirement for the incapacity may be mandated by the due process clause of the fourteenth amendment.[35] Under these cases, a state is arguably prohibited from forcing trial on a criminal defendant who is without capacity to assist

of Particular Justice, 71 YALE L.J. 109, 115-118 (1961). A better view of the amnesia cases is that they turn on the ability to assist counsel. These cases suggest that the law analogizes the person suffering from amnesia to the person who was so drunk at the time of the criminal act that he did not know what was going on and to the person whose key alibi witness is dead. In each of these cases the defendant is in some sense deprived of evidence he might have had, but at the time of trial he is fully able to understand the charges against him and to communicate with his counsel about how to conduct his defense.

32. *See, e.g.*, People v. Perry, 14 Cal. 2d 387, 94 P.2d 559, 564-565 (1939), construing CAL. PENAL CODE §§ 1367-68 (West 1970). Other states have repeated the common law test in their codes:

> If the court shall find that the defendant has not comprehension sufficient to understand the proceedings and make his defense, the trial shall be delayed or continued on the ground of the insanity of the defendant.

IND. CODE § 35-5-3-2 (1971).

33. MODEL PENAL CODE § 4.04 (Proposed Official Draft 1962). For examples of statutes substantially adopting the Model Penal Code formulation including the "mental disease or defect" language, see ALASKA STAT. § 12.45.100 (1972); ARIZ. REV. STAT. ANN. § 13-1621(A) (Supp. 1972).

34. MODEL PENAL CODE § 4.04, Comment (Tent. Draft No. 4, 1955).

35. In Dusky v. United States, 362 U.S. 402 (1960) (per curiam), the Supreme Court reversed a federal conviction on the issue of competency to stand trial and stated that on remand:

> [T]he "test must be whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him."

Id. Although the *Dusky* opinion did not indicate whether this test is grounded on a statute or on the constitution, the Eighth Circuit construed it to establish a federal constitutional standard. Noble v. Sigler, 351 F.2d 673, 677 (8th Cir. 1965), *cert. denied*, 385 U.S. 853 (1966). At any rate the *Dusky* standard may have been raised to a constitutional status by Pate v. Robinson, 383 U.S. 375 (1966). *Pate* held that a state conviction violated the due process clause because the state had failed to hold a hearing on the defendant's competency to stand criminal trial although the evidence before the trial judge had suggested doubts about the defendant's competency.

counsel or understand the trial. The added Model Penal Code requirement of "mental illness or defect" is either unconstitutional or redundant.

In the light of the above illustrations from contractual and criminal law, we can begin to evaluate the traditional position of excluding "mental illness" from competency tests: if a person does not have the *ability* to understand what he is doing, it does not serve any obvious legal purpose to make his legal position turn on whether "mental illness" caused the incapacity.[36]

For example, if a person lacks the capacity to understand the nature of the contract he is signing, requiring the trier of fact to identify "mental disease" as the causative factor accomplishes no surface objective of contract law. To be sure, one incidental purpose of making "mental disease" a part of the contractual capacity test may be to exclude incapacities caused by the voluntary intoxication of the incapacitated party.[37] However, the exclusion of voluntary intoxication can be achieved more precisely by explicitly excluding incapacities caused by voluntary intoxication from the general standard than by incorporating "mental illness" into that standard.

Similarly, there appears to be no obvious reason for making incompetency to stand trial turn on a finding of "mental disease or defect."[38] The surface implication of such a requirement is that there are defendants who must stand trial if for reasons other than "mental illness or defect" they are unable to assist their attorneys or understand the proceedings.[39] But to force such defendants to trial would defeat the

36. Under the few competency tests focusing on capacity to control rather than capacity to comprehend, a required causative finding of "mental illness" indicates that the lack of control must derive from internal causes. The term "mental illness" excludes an external cause such as duress which is governed by other legal rules. *See* RESTATEMENT OF CONTRACTS §§ 492-99 (1932). Both Ortelere v. Teachers' Retirement Bd., 25 N.Y.2d 196, 303 N.Y.S.2d 362, 250 N.E.2d 460 (1969), *supra* note 28, and RESTATEMENT (SECOND) OF CONTRACTS § 18C (Tent. Draft No. 1, 1964), *supra*, note 30, added a "mental illness" causal requirement when they joined a control test to the traditional cognitive test of competency to contract. Duress would typically affect ability to control but not ability to understand.

37. The proposed RESTATEMENT (SECOND) OF CONTRACTS § 18D (Tent. Draft No. 1, 1964) establishes a separate test for the incompetency of intoxicated persons. If a party "is unable to understand in a reasonable manner the nature and consequences of the transaction" "by reason of intoxication," then the contract is voidable "if the other party has reason to know" of the disability. *Id.* This knowledge requirement does not limit the voidability if such inability was "by reason of mental illness or defect." *Id.* § 18C.

38. MODEL PENAL CODE § 4.04 (Proposed Official Draft 1962) requires such a finding.

39. If there are no such defendants, then the requirement of "mental disease or de-

purposes of the competency to stand trial requirement. For instance, the defendant's competency increases the accuracy of the guilt determining process. At least it is unclear what legal purpose is achieved by theoretically dividing all defendants who are unable to understand the proceedings or assist their counsel into two groups, the mentally ill and the mentally healthy, with trial postponed for one but not the other. More likely the tail will wag the dog: the term "mental illness" will not limit the category of persons found incompetent to stand trial, but rather whoever is found incompetent to stand trial for any reason will be deemed "mentally ill" by definition. Given the questionable nature of the "mental illness" concept, use of such a standard by legal forums raises the question of possible "hidden" functions performed by a "mental illness" requirement in competency proceedings.[40]

B. Insanity Defense Tests

In contrast to the competency area, "mental disease" has traditionally been a part of insanity standards governing criminal responsibility. The leading nineteenth century *M'Naghten's Case*[41] established a responsibility standard incorporating "disease of the mind" which is still widely followed:[42]

> [I]t must be clearly proved that, at the time of the committing of 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, if he did know it, that he did not know he was doing what was wrong.

Those courts adding the "irresistible impulse" test to the *M'Naghten* standard have required the defendant's inability to control himself to

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fect" is at least superficially unnecessary. I have found no cases involving incompetency to stand trial based on intoxication. Even if the defendant's incapacity were due to his own voluntary intoxication, waiting for the defendant to sober up would serve legal purposes such as maximizing the accuracy of the legal process. If such a case arose in a state which had adopted the Model Penal Code, the defendant could presumably be found incompetent under a residual common law incompetency to stand trial test that had not been entirely superseded by the Model Penal Code. The following cases involving intoxicated or otherwise drugged criminal defendants raise related legal arguments: People v. Martin, 203 Misc. 876, 119 N.Y.S.2d 214 (Monroe County Ct. 1953); State v. Rand, 20 Ohio Misc. 98 (C.P. Franklin County 1969); State v. Murphy, 56 Wn. 2d 761, 355 P.2d 323 (1960); State v. Maryott, 6 Wn. App. 96, 492 P.2d 239 (1971).

40. *See* Section III, *Functions of Mental Illness as a Legal Fiction, infra.*

41. 10 Cl. & F. 200, 8 Eng. Rep. 718 (H.L. 1943).

42. *Id.* at 208, 8 Eng. Rep. at 722.

"be the result of a disease"[43] or even "to have been the product of [a "mental disease"] *solely*."[44] Statutes codifying the *M'Naghten* and irresistible impulse standards have tended to retain the "mental disease" requirement.[45] The Model Penal Code irresponsibility defense, a variation of *M'Naghten* plus irresistible impulse, continues the "mental disease" prerequisite:[46]

> 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."
>
> . . . .
>
> Section 2.08. Intoxication.
>
> . . . .
>
> (3) Intoxication does not, in itself, constitute *mental disease* within the meaning of Section 4.01.

In the irresponsibility defense area, as elsewhere, the courts have not defined "mental disease." Nevertheless, judges have assigned a few functions to it. The social connotations of the term "mental disease" suggest incapacity.[47] But unlike the competency standards, the *M'Naghten* criteria for criminal responsibility do not mention the "capacity," "ability," or "power" of the defendant. Thus, the "disease of the mind" phrase apparently performs the same function in the *M'Naghten* rules that these other terms would perform if they were ac-

43. People v. Durfee, 62 Mich. 487, 29 N.W. 109, 112 (1886).
44. Parsons v. State, 81 Ala. 577, 2 So. 854, 866-67 (1886).
45. Ch. 44, § 1, [1972] Colo. Laws. 288; MINN. STAT. ANN. § 611.026 (Supp. 1972). The responsibility defense codified in Georgia retains a requirement of "mental disease, injury or congenital deficiency" as the cause for "a delusional compulsion as to such act which overmastered [defendant's] will to resist. . .," but omits any such prerequisite as the cause for lack of "mental capacity to distinguish between right and wrong." GA. CODE ANN. §§ 26-702 to 26-704 (1972).
46. MODEL PENAL CODE §§ 2.08, 4.01 (Proposed Official Draft 1962) (emphasis added).
47. *See* note 12 and accompanying text *supra*. The phrase "defect of reason" in *M'Naghten* may also suggest incapacity or inability. *See* H. FINGARETTE, THE MEANING OF CRIMINAL INSANITY 198 (1972).

tually expressed: in addition to not knowing that his acts were wrong, a defendant must be *incapable* of knowing they were wrong.[48] In the analogous situation of competency to contract, a person who neglects to read a contract before signing it may not know its nature and consequences, but he is not incompetent to contract since he had the *ability* to know. Since the contractual tests are expressly framed in terms of ability or capacity to know, there is no need for them to refer to "mental disease." Similarly under a responsibility test like the Model Penal Code which contains the word "capacity," the requirement of "mental disease or defect" becomes redundant insofar as its function is to indicate a lack of capacity.

But the "mental disease" phrase does more than merely suggest that the defendant must be incapacitated, not merely indisposed. The term "mental disease" (as in the competency standards) excludes incapacities caused by the defendant's voluntary acts, at least when the acts are not too remote in time.[49] For example, courts deciding cases under *M'Naghten* have held that states of mind caused by voluntary intoxication were as a matter of law not caused by a disease of the mind.[50] However, the same courts have blurred this "rule" that voluntary intoxication is not a "mental disease" by creating a second "rule" that "mental disease" caused by intoxication can support the insanity defense.[51] It is not clear how these two "rules" mesh. Possibly some courts mean that a state of mind caused by intoxication will be deemed a mental disease if it results in part from a voluntary act from the remote past but not if it results only from a voluntary act from the

48. "Disease of the mind" seems to be performing some function because, theoretically, if "disease of the mind" were deleted from the *M'Naghten* test every defendant who made an unreasonable mistake of fact causing him to believe his act was justified might claim he lacked criminal responsibility because he did not know his act was wrong. The "defect of reason" language could pose problems for such a claim unless the phrase were read to mean mistake in reasoning.

49. Incapacities caused by the defendant's voluntary acts could be explicitly excluded from the criminal responsibility defense thus avoiding the semantic and conceptual confusion inherent in the phrase "mental illness."

50. *See, e.g.*, Salter v. State, 159 Tex. Crim. 482, 264 S.W.2d 719 (1953).

The Model Penal Code basically codifies the common law in this respect. It states that "intoxication" rather than "voluntary intoxication" is not a "mental disease or defect," but it provides that "involuntary intoxication" will exculpate to the same extent that a "mental disease or defect" will. MODEL PENAL CODE §§ 2.08, 4.01 (Proposed Official Draft 1962) *supra* note 46 and accompanying text.

51. *See, e.g.*, State v. Clokey, 83 Idaho 393, 364 P.2d 159, 164 (1961); Griffin v. State, 96 So. 2d 424, 425 (Fla. Dist. Ct. App. 1957).

immediate past.[52] Alternatively, the rules may merely reflect the confused concept of "mental disease" held by many judges.

In addition to excluding voluntary intoxication from insanity defense, the courts have also excluded "frenzies" from the defense: "Frenzy arising solely from the passions of anger or jealousy, no matter how furious, is not insanity."[53] Any meaningful distinction between a "furious frenzy" and "insanity" (or mental disease) may be illusory. Insofar as "mental disease" has any accepted psycho-dynamic connotations, it describes a disorganization of the ego in the face of uncontrollable unconscious forces.[54] A "furious frenzy" would seem to describe such a disorganization. However, the courts may believe that sometimes a defendant who is incapable of knowing his act was wrong could have voluntarily prevented himself from getting worked up into that incapacity. The courts may label a frenzy resulting from such a voluntary omission of the defendant a mere "furious frenzy" and a frenzy which the defendant could not prevent a "mental disease," especially in view of the general connotations of "mental disease" as something beyond the defendant's responsibility. Alternatively, the "furious frenzy" limitation may mean that the phrase "mental illness" requires that the defendant's mental disturbance be major rather than minor and prolonged rather than ephemeral.[55]

The phrase "mental disease" more broadly suggests that the causes of a defendant's inability to control himself must be internal rather than external. It purports to require that the defendant's own personality be the source of his control difficulties. The "mental illness" requirement thus precludes use of the irresponsibility defense by a defendant whose inability to comply with the law stems solely from an attack or threat by another person. Such claims must instead be tested under separate standards such as self-defense or duress. Since such external

52. *See* Salter v. State, 159 Tex. Crim. 482, 264 S.W.2d 719, 721 (1953); State v. Rio, 38 Wn. 2d 446, 230 P.2d 308, *cert. denied*, 342 U.S. 867 (1951). A court could possibly analogize a case of heroin addiction to either of these "rules." In State v. White, 27 N.J. 158, 142 A.2d 65 (1958), the court held that heroin withdrawal is not a "mental disease" for insanity defense purposes. It is not clear from the case whether this was true as a matter of law or only because no doctor testified that heroin withdrawal is a "mental disease."

53. Gruetig v. State, 66 Ind. 94, 105-106 (1879) (the quotation is a jury instruction that was upheld over defendant's exception); *accord*, Ruffin v. State, 123 A.2d 461, 464 (Del. 1956).

54. *See, e.g.*, Kubie, *The Fundamental Nature of the Distinction Between Normality and Neurosis*, 23 PSYCHOANALYTIC Q. 167 (1954).

55. *See* Barbour v. State, 262 Ala. 193, 78 So. 2d 328, 330 (1954).

causes do not eliminate a defendant's capacity to understand but only his capacity to control, cognitive tests such as *M'Naghten* in effect exclude such causes apart from the term "mental disease."

The phrase "mental illness" does not serve any obvious purpose of the criminal law in determining which defendants should be held criminally responsible for their acts. In the language of the Model Penal Code, if a defendant involuntarily "lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law,"[56] he is not a proper subject for criminal punishment whether or not he meets the Code's added requirement of "mental disease or defect." He is not deterrable if he meets such criteria: a threat of punishment cannot deter a person from violating a rule if the person lacks the ability either to understand that he is violating the rule or to comply with the rule. Similarly, retribution is inappropriate for a person who meets such criteria: it is unfair and unjust to threaten punishment for rule-breaking if a person cannot comply with the rules. The state may be justified in incapacitating or "rehabilitating" the defendant, but this could be accomplished by "civil" intervention which eschews the intentional infliction of penalties whether or not he is labelled "mentally ill."

Only one court, the United States Court of Appeals for the District of Columbia, has attempted to give a legal definition of "mental disease." In *Durham v. United States*[57] the court placed an unsupportable weight on the ambiguous "mental disease" concept when it adopted as its criminal responsibility test whether or not the "unlawful act was the product of a mental disease or defect." The court came to recognize that "mental disease or defect" had no accepted psychiatric meaning and thereupon established a legal definition in *McDonald v. United States*:[58]

> [T]he jury should be told that a mental disease or defect includes any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls.

One problem with the *McDonald* definition is that it merely substitutes one undefined causal mental condition for another. Both "mental

56. MODEL PENAL CODE § 4.01 (Proposed Official Draft 1962), *quoted in* text accompanying note 46 *supra*.
57. 214 F.2d 862, 874-75 (D.C. Cir. 1954).
58. 312 F.2d 847, 851 (D.C. Cir. 1962).

disease or defect" and "abnormal condition of the mind" leave open the normative problem of what criteria determine what is normal and abnormal. Also, the definition suggests that the court could find no advantage in the "mental disease" concept beyond the often considered factors of "knowledge" (both cognitive and emotional) and "control." Many other jurisdictions, as well as the Model Penal Code,[59] have set forth the "knowledge" and "control" requirements as additions to the causal requirement of "mental disease," implying that the "mental disease" requirement has some independent significance. In contrast, the District of Columbia merely detoured the "knowledge" and "control" factors through the definition of "mental disease." In *United States v. Brawner*,[60] the District of Columbia recently replaced the *Durham* test with the Model Penal Code test but retained the *McDonald* definition of "mental disease or defect" and left "abnormal condition of the mind" undefined. This established largely[61] redundant tests for the "knowledge" and "control" aspects of criminal responsibility.

What does the phrase "mental illness" contribute to the irresponsibility defense? The question remains unanswered. Attempting to give any legal definition to "mental disease" unnecessarily confuses juries and psychiatric witnesses, not to mention lawyers, because any legal definition is overwhelmed by the medical connotations of the term. Thus courts and legislatures[62] have sometimes indicated what is not a

59. MODEL PENAL CODE § 4.01 (Proposed Official Draft 1962), *quoted in* text accompanying note 46 *supra*. For an example of a statute patterned on the Model Penal Code formulation, see ILL. ANN. STAT. ch. 38, § 6-2 (Smith-Hurd 1972).

60. 471 F.2d 969 (D.C. Cir. 1972). *Brawner* is the one decision which has explicitly considered dropping a "mental disease" causal requirement from the criminal responsibility test:

> Finally, we have not accepted suggestions to adopt a rule that disentangles the insanity defense from a medical model, and announces a standard exculpating anyone whose capacity for control is insubstantial, for whatever cause or reason. There may be logic in these submissions, but we are not sufficiently certain of the nature, range and implications of the conduct involved to attempt an all-embracing unified field theory. The applicable rule can be discerned as the cases arise in regard to other conditions—somnambulism or other automatisms; blackouts due, e.g. to overdose of insulin; drug addiction. Whether these somatic conditions should be governed by a rule comparable to that herein set forth for mental disease would require, at a minimum, a judicial determination, which takes medical opinion into account, finding convincing evidence of an ascertainable condition characterized by "a broad consensus that free will does not exist."

Id. at 995.

61. The *McDonald* test focuses on whether the defendant has mental or control problems generally whereas the Model Penal Code test focuses more particularly on the defendant's knowledge and control capacities with respect to the alleged criminal act.

62. *See, e.g.*, ME. REV. STAT. ANN. tit. 15, § 102 (1964) ("The terms 'mental disease' or 'mental defect' do not include an abnormality manifested only by repeated criminal conduct or excessive use of drugs or alcohol.")

mental disease. However, they have generally not given a positive definition of the concept. Perhaps they have not because the phrase serves no evident legal purpose.

C. *Other Tests of Mental Capacity*

The same issues created by the phrase "mental illness" in competency and irresponsibility tests also exist in other legal tests of mental capacity. Does the particular test incorporate a causal requirement of "mental illness"? If it does, is "mental illness" defined by reference to legal or psychiatric guidelines? What are the guidelines? These questions inhere in mental capacity tests in areas such as the following: partial responsibility for crime, commitment and release of criminal defendants who are incompetent to stand trial, commitment and release of criminal defendants found not guilty by reason of insanity, general civil commitment and release, commitment and release of sexual psychopaths, insanity as grounds for divorce, insanity as a divorce defense, insanity as a tort defense, insanity justifying a special standard for contributory negligence, mental illness caused by torts justifying increased damage claims, mental illness as a basis for health insurance claims, and insanity as a basis for sterilization.[63] It is beyond the scope of this article to develop the "mental illness" issues peculiar to each of these other tests of mental capacity. However, the following discussion of the surreptitious impact of "mental illness" is relevant to any legal test containing this apparitional phrase.

III. FUNCTIONS OF MENTAL ILLNESS AS A LEGAL FICTION

A legal fiction was created when psychiatrists abandoned the notion that all defendants could be classified as either mentally ill or mentally healthy on the basis of brain physiology. From that time on the "mentally ill man," like the notorious "reasonable man," has been a fictional model of man whose retention can be justified only by the worth of the legal purposes it serves. Yet "mental illness" neither has an accepted meaning nor furthers any apparent legal purposes, aside

63. For a general introduction to the variety of mental incapacity tests, see THE MENTALLY DISABLED AND THE LAW (S. Brakel & R. Rock eds., rev. ed. 1971).

from its rather awkward exclusions of a party's voluntary incapacities. But below the surface there are substantial, if only barely visible and perhaps unintended, consequences of the law's continued reliance on "mental illness." Let us shift our focus toward the subsurface impact of the phrase "mental illness" on the trial process.

At the trial stage, the inclusion of the term "mental illness" as part of the substantive standard affects both the nature of expert testimony and the interaction between expert witnesses, the judge and the jury. It tends to legitimize physicians as the best qualified witnesses on the issue of who meets a particular standard. A lay witness may seem competent to give opinion testimony as to whether the ordinary defendant had the ability to understand the nature and consequences of a transaction.[64] But the medical connotations of "mental illness" suggest the preeminince of testifying physicians on the questions of whether the defendant had a "mental illness" and whether he was unable to understand the transaction as a result of this "illness."[65]

The fictional concept "mental illness" tends to disparage the testimony of psychologists as well as lay witnesses. A Ph.D. clinical psychologist may be an expert on the mind and he may have much more academic knowledge and clinical training in human behavior than the typical nonpsychiatric physician. But unlike the physician, the psychologist does not have expertise in "diagnosing" "illnesses." Perhaps for this reason some courts have stated that psychologists, unlike psychiatrists, are not allowed to testify on the ultimate question of whether the defendant was mentally responsible for his criminal conduct.[66]

The presence of "mental illness" in the substantive standard influences the nature of the testimony as well as who testifies. From the

64. *See, e.g.,* Both v. Nelson, 31 Ill. 2d 511, 202 N.E.2d 494 (1964). In *Both,* a testamentary capacity case, the court reversed the trial court for refusing to give the following instruction requested by defendant:

> [W]hile physicians are better qualified to testify to a diseased condition than are laymen, their testimony upon the subject of the mental capacity of an individual whom they have been privileged to observe is not entitled to any greater weight than that of laymen.

Id. at 496.

65. *See, e.g., id.;* Frisone v. United States, 270 F.2d 401, 403 (9th Cir. 1959):

> But testimony as to existence or treatment of a mental illness serious enough to cause permanent memory impairment falls clearly outside the area of common knowledge and within the area where expert testimony is required.

66. *See, e.g.,* Sherrill v. State, 286 A.2d 528, 534 (Md. Ct. Spec. App. 1972). *See generally* Annot., 78 A.L.R.2d 919 (1961).

lawyer's standpoint, the best possible evidence that a defendant does or does not have a "mental disease" is *expert conclusory opinion testimony*. Since "mental disease" is a legal fiction which has no accepted meaning, its meaning cannot be readily inferred by the judge or jury from expert or lay testimony about underlying psychic phenomena or observed behavior. Thus the "mental disease" requirement increases the tendency of lawyers to ask questions of psychiatrists that call for answers in the conclusory language of the substantive test. This magnifies the tendency of psychiatric witnesses to apply conclusory labels such as "mental disease" or "schizophrenia" and to neglect data on the defendant's background and personality structure.

The testifying psychiatrist is presented with a dilemma when a lawyer asks him if a person has a "mental disease." He probably realizes that there is neither any accepted psychiatric definition of "mental disease" nor even any agreed-on psychiatric guidelines for determining what is a "mental disease." He may therefore assume that "mental disease" is legal jargon which serves legal purposes. When asked for an opinion, he may define the phrase by attempting to ascertain the purposes of the law in the light of his own personal values. In other words, his answer is subjective and result oriented. For example, in a civil commitment hearing a psychiatrist's definition of "mental illness" will depend on how he balances the *values* of liberty, the safety of the community, and involuntary psychiatric treatment. Similarly, in insanity defense proceedings, a psychiatrist believing law violators should be punished may limit "mental illness" to "psychoses" while one believing punishment is unproductive in achieving compliance with the law may expand it to include "personality disorders." Thus, testifying psychiatrists attempt to define "mental illness" by reference to legal and social rather than medical guidelines.[67] Yet at the same time, the medical connotations of "disease" cause lawyers to assume falsely that in legal tests the term "mental disease" has a medically accepted meaning. This terminological confusion exacerbates the general tendency of psychiatric witnesses and lawyers to misunderstand each other.[68]

67. *See* notes 19-21 and accompanying text *supra*.

68. *See, e.g.*, A. WATSON, PSYCHIATRY FOR LAWYERS 310 (1968); Roberts, *Some Observations on the Problems of the Forensic Psychiatrist*, 1965 WIS. L. REV. 240, 246; Vann & Morganroth, *Psychiatrists and the Competence to Stand Trial*, 42 U. DETROIT L. REV. 75, 84-85 (1964).

The confusion created by "mental illness" also extends to the trier of fact. The mere vagueness of the term "mental illness" has some impact on the fact finder.[69] A requirement that the jury find a defendant "mentally ill" increases the jury's discretion. The law grants such discretionary powers whenever it mandates that a jury or judge find "facts" such as negligence, proximate cause or best interests of the child which, like "mental illness," are invariably policy judgments rather than resolutions of what happened or existed. In the area of legal incapacities such increased discretion seems minimal because the whole incapacity standard is already indefinite.[70] For example, the test of whether a person "is unable to understand in a reasonable manner the nature and consequences" of a transaction is already so imprecise that the fact finder has almost unlimited discretion even before adding "mental illness or defect" to it.[71] Similarly, "mental disease or defect" can hardly increase the haziness of the Model Penal Code's irresponsibility defense requirements of "substantial capacity . . . to appreciate" and "substantial capacity . . . to conform."[72]

But the many connotations of "mental illness" have an impact on judges and juries far beyond mere vagueness. The medical connotations tend to increase the deference paid by judges and juries to medical witnesses and to their conclusory opinions. They naturally assume that a physician is a better judge than they about what is "illness," who is "ill," and what kinds of incompetency and irresponsibility are "caused" by "mental illness." This deference to an assumed medical meaning is reinforced by the failure of the law to define "mental disease." Yet, as indicated above, the testifying psychiatrists, in defining "mental illness," have necessarily resorted to legal and social criteria. Thus in irresponsibility defense cases, for example, commentators may state that the purpose of the vague criteria is to give great discretion to the jury to determine who is morally culpable.[73] However, the

69. The vagueness of "mental disease" adds to the potential constitutional problems of void for vagueness and improper delegation of powers created by the vagueness of other commitment criteria. Such constitutional problems are beyond the scope of this article.

70. For a discussion of various incapacity standards, *see* Section II, *Legal Standards Containing "Mental Disease," supra.*

71. The quoted language is from RESTATEMENT (SECOND) OF CONTRACTS § 18C (Tent. Draft No. 1, 1964), *supra* note 30.

72. MODEL PENAL CODE § 4.01 (Proposed Official Draft 1962), *quoted in* text accompanying note 46 *supra*.

73. *See, e.g.*, MODEL PENAL CODE § 4.01, Comment 159 (Tent. Draft No. 4, 1955).

medical aura of the term "mental illness" increases the tendency of the jury to pass the actual determination of community morals on to the psychiatrists.

Yet the delegation of moral and legal determinations to testifying physicians is achieved surreptitiously. The scientific aura of "mental illness" suggests that physicians are making a scientific rather than a social judgment. The term "mental illness" tends to mask not only the discretion delegated to judges and juries but also the discretion they in turn delegate de facto to medical witnesses. If juries need only find that the defendant did not have the capacity to conform his conduct to the law, they may realize the inherent tenuousness of any expert opinion. If they must also find from the expert testimony that "mental illness" caused the incapacity to conform, the connotations of "illness" falsely suggest that now the physician's opinion is more precisely scientific.

This delegation of moral and legal decisions to psychiatrists might not survive if it were not hidden. In the District of Columbia the delegation to doctors was exposed when a psychiatrist testified that originally psychopathy had not been a "mental disease" for insanity defense purposes but became one when the St. Elizabeth's Hospital Staff decided that future staff testimony should treat it as such.[74] The Court of Appeals for the District of Columbia eventually responded by attempting to adopt a legal definition for "mental disease or defect" and thus remove the physician's ability to make such a policy judgment for the court.[75]

The connotations of "mental disease" may also make it easier for the trier of fact to find that the rest of the standard has been met in incapacity hearings. A jury may find it very difficult to decide if a defendant had the capacity to conform his conduct to the law. But if they first find, on the basis of "scientific" testimony, that the defendant had a "mental illness," then they may assume that the defendant could not control his behavior because of the common supposition that the "mentally ill" cannot control their conduct.[76] Similarly, in civil com-

74. Blocker v. United States, 288 F.2d 853, 860 (D.C. Cir. 1961) (Burger, J., concurring).

75. McDonald v. United States, 312 F.2d 847, 850-851 (D.C. Cir. 1962).

76. Compare the practice of District of Columbia under the *Durham* rule: "The introduction of competent evidence of mental disorder raises the issue of causality sufficient for jury consideration." McDonald v. United States, 312 F.2d 847, 850 (1962).

mitment cases, the pluralistic presumption that the mentally ill are dangerous may mean that a judge upon finding "mental illness" will assume dangerousness. Thus a finding of "mental disease" may make it psychologically easier for the judge or jury to assume incapacity or irresponsibility. It may divert their attention from a lack of independent facts supporting required consequential findings such as dangerousness.

So far we have seen that as a theoretical matter, "mental illness" does not help the law determine whom to deem incompetent or irresponsible, but as a practical matter it has several consequences on the trial processes by which such determinations are made. But the presence of "mental illness" in such standards is much more far reaching. It influences not just trial processes but also pre-trial and post-trial procedures.

At the pre-trial stage, the term "mental illness" in pertinent capacity standards supports the employment of medical personnel and procedures. The designation "mental illness" also facilitates the assumption that traditional legal protections such as the privilege against self-incrimination and the right to bail are inapplicable to mental examinations prior to judicial hearings on a defendant's irresponsibility or competency to stand criminal trial.

Ordinarily the prosecution must prove the state of the defendant's mind at the time of the crime without forcing the defendant to tell what was in his mind.[77] However, many courts have held that a defendant must answer questions during a psychiatric examination to determine whether he meets the insanity defense.[78] One basis employed by courts for reconciling such psychiatric questioning with the privilege against self-incrimination is to classify a defendant's statements in a psychiatric examination as "real evidence" as opposed to "testimonial evidence."[79] The Supreme Court has held that the privilege against self-incrimination allows the state to force the defendant to produce "real" or nontestimonial evidence, such as blood[80] and handwriting exemplars,[81] and only prohibits the compelled production

77. *See, e.g.*, Malloy v. Hogan, 378 U.S. 1 (1964).
78. *See, e.g.*, United States v. Baird, 414 F.2d 700 (2d Cir. 1969); Note, *Requiring a Criminal Defendant to Submit to a Government Psychiatric Examination: An Invasion of the Privilege Against Self-Incrimination*, 83 HARV. L. REV. 648, 649-50 (1970).
79. *See, e.g.*, Parkin v. State, 238 So. 2d 817, 820-21 (Fla. 1970); 8 J. WIGMORE, EVIDENCE 399 (J. McNaughton rev. 1961).
80. Schmerber v. California, 384 U.S. 757 (1966).
81. United States v. Mara, 93 S. Ct. 774 (1973).

of "testimonial" evidence. This tendency of courts to classify statements by the allegedly insane as "real" evidence finds support in the entity theory of "mental illness." If "insanity" is seen as a disease of the brain, or if "mental illness" is seen as a thing which inhabits the defendant, then it is easier for courts to perceive a psychiatric examination as a search for mere verbal symptoms rather than as normal communication. Although such an "infestation"[82] theory of "mental illness" has been abandoned outside the law, the law perpetuates this image of "mental illness" as an underlying malady when it postulates "mental illness" as "cause" of a defendant's inability to know right from wrong. Thus the reification of "mental illness" in the irresponsibility test is a fiction serving to avoid the privilege against self-incrimination.

Ordinarily the criminal defendant has a right to be free on bail pending trial.[83] However, in many jurisdictions defendants raising the issues of competency to stand trial and irresponsibility have been automatically subjected to lengthy inpatient medical observation prior to judicial decision of those issues.[84] The connotations of "mental illness" facilitate the assumption that the examinations should be inpatient and thus that freedom on bail pending trial would be inappropriate. The connotation of dangerousness associated with "mental illness" suggests the need for confining an alleged mentally ill person pending trial. The notion that "illness" can best be cured in a hospital setting implies that a "mentally ill" defendant will be helped by such inpatient treatment in a mental hospital during the period of observation. The presence of "mental illness" in the capacity tests thus fosters denial of the right to freedom on bail without ever explicitly focusing on why that right should be abrogated.

For the same reasons the inclusion of "mental illness" in a capacity

82. This infestation or "devil-possession" theory, this ontological conception of mental disease as a *thing* present or not present in the individual, is an erroneous, medieval and pre-medieval concept which persists in the minds of many laymen, not a few lawyers, and even a few physicians in spite of all sorts of effort to eliminate it.

Menninger, *Community Attitudes Vis-a-Vis the Offender,* in ABA SECTIONS OF CRIMINAL LAW, PROCEEDINGS 83, 85 (1958).

83. S. KADISH & M. PAULSEN, CRIMINAL LAW AND ITS PROCESSES 1005 (2d ed. 1969).

84. *See, e.g.,* JUDICIAL CONFERENCE OF THE DISTRICT OF COLUMBIA CIRCUIT, REPORT OF THE COMMITTEE ON PROBLEMS CONNECTED WITH MENTAL EXAMINATIONS OF THE ACCUSED IN CRIMINAL CASES, BEFORE TRIAL, 31-33, 55, 104-107 (1966); *cf.* MODEL PENAL CODE § 4.05 (Proposed Official Draft 1962).

standard also helps to justify hospitalization after the judicial hearing if the defendant is found incapacitated. Of course, a finding of "mental illness" is not a prerequisite to hospitalization. In fact, one traditional practice has been for states automatically to hospitalize criminal defendants found incompetent to stand trial even though a causal requirement of mental illness was not incorporated into the competency to stand trial test.[85] Nevertheless, a finding of "mental illness" with its associated connotations of dangerousness and need for medical treatment makes hospital commitment appear to be a more appropriate and inevitable disposition.

The connotations of "mental illness" augment the inclination of lawyers and judges not to interfere with a hospital's custody of a defendant.[86] These connotations suggest that the defendant is being helped by hospital confinement and that the experts in "mental illness" can best prescribe the appropriate "therapeutic" conditions. They also suggest that psychiatrists are best able to determine when the "mental illness" is "cured" and the defendant is ready for release. The implication that an underlying "mental illness" entity is continuing and may be incurable serves to justify indefinite confinement of the "mentally ill" without periodic judicial review of whether their mental condition continues to meet the pertinent legal standard.[87] A similar judicial predilection not to intervene might exist without the term "mental illness," but the phrase magnifies the tendency.

85. *See, e.g.*, Jackson v. Indiana, 406 U.S. 715, 733-34 (1972). In *Jackson*, the Court held that the equal protection and due process clauses were violated when Indiana hospitalized the petitioner for three and one-half years as incompetent to stand criminal trial when it appeared he would never become competent to stand trial.

The statute under which Jackson was confined established the following single standard governing both incompetency to stand trial and commitment as incompetent to stand trial:

> [Whether] the defendant has comprehension sufficient to understand the nature of the criminal action against him and the proceedings thereon and to make his defense . . . .

Id. at 717-18 n.1. The statute uses the term "insanity" as a label for this test. *Id.* Because "insanity" carries connotations of dangerousness and need for hospital treatment, its usage functions implicitly to justify automatic hospitalization of persons found incompetent to stand trial.

86. On the general tendency of legal personnel to perceive hospitalized mental patients as de facto beyond the pale of the judicial system, *see, e.g.*, R. ROCK, HOSPITALIZATION AND DISCHARGE OF THE MENTALLY ILL 238-39 (1968); J. KATZ, J. GOLDSTEIN & A. DERSHOWITZ, PSYCHOANALYSIS, PSYCHIATRY AND LAW 633-50, 713-24 (1948).

87. For examples of states with systems of indefinite civil commitment with no periodic review, see THE MENTALLY DISABLED AND THE LAW 184-85 (S. Brakel & R. Rock eds., rev. ed. 1971).

Another post-trial consequence of including "mental illness" in a legal standard is that it stigmatizes the person to whom it is attached. A party is found "mentally ill" as well as incapacitated. He will henceforth carry the label "mentally ill" affixed by a court of law.[88]

In summary, the phrase "mental illness" lends a scientific aura to vague and mythical legal processes. The term increases the tendency of lawyers and laymen to defer to doctors—to escape problems by leaving the "mentally ill" exclusively within the medical jurisdiction. This deference has turned many judicial civil commitment hearings into mere rubber stamps for psychiatric decisions.[89] Such rubber stamp legal proceedings add formalities which legitimize psychiatric decisions by furnishing an illusion of due process.[90] The practice of allowing doctors to confine the "mentally ill" without any judicial participation is a more formal expression of the deferential tendency.[91]

But the term "mental illness" has subsurface effects not only on legal procedures, but also on substantive legal doctrine. The very mythical nature of the phrase "mental illness" tends to mystify any substantive legal rule containing it. It also mystifies the relationship of that rule to analogous rules. For example, the term "mental illness" blurs the relationship between the standards governing insanity as a divorce defense and other divorce standards, as this author demonstrated in an earlier article.[92]

Similarly, in criminal law a haze surrounds the insanity defense and the way it fits into general criminal law doctrine.[93] In particular the

88. The term "mental illness" contributes not only to the social stigma but also to the legal "stigma" flowing from a judicial finding of incapacity. For example, according to the "presumption of insanity" doctrine, a judicial finding that a person is incapacitated under one legal test generally creates a presumption that the person is (and will continue to be) presumed incapacitated under other legal tests. *See, e.g.*, A. GOLDSTEIN. THE INSANITY DEFENSE 115-20 (1967). The existence of "mental illness" in many capacity tests helps courts justify both presuming one incapacity from another and assuming the continuing existence of an underlying "disease" relevant to all incapacity tests.

89. *See, e.g.*, T. SCHEFF, BEING MENTALLY ILL: A SOCIOLOGICAL THEORY 130-55 (1966); Cohen, *The Function of the Attorney and the Commitment of the Mentally Ill*, 44 TEX. L. REV. 424, 427-31 (1966).

90. *See, e.g., id.*; Kutner, *The Illusion of Due Process in Commitment Proceedings*, 57 NW. U.L. REV. 383 (1962).

91. For discussions of hospitalization by medical certification, see THE MENTALLY DISABLED AND THE LAW 45-49, 57-59 (S. Brakel & R. Rock, eds., rev. ed. 1971); R. Rock, HOSPITALIZATION AND DISCHARGE OF THE MENTALLY ILL 46-47, 199-213 (1968). Judicial review is theoretically available but rarely sought.

92. *See* Hardisty, *Insanity as a Divorce Defense*, 12 J. FAM. L. 1, 12-23 (1972).

93. Even the relationship of the insanity defense to the basic criminal law concepts of *actus reus* (guilty act) and *mens rea* (guilty mind) is obscure. Professor Williams believes that the insanity defense only negatives *mens rea*. *See* G. WILLIAMS, CRIMINAL

term "mental illness" helps both to distinguish the insanity defense from other criminal law defenses and to avoid questions about justifications for differences between such defenses. For example, the Model Penal Code specifies that to be exculpated for duress the defendant must have been "coerced" to commit the criminal act "by the use of, or a threat to use, unlawful force against his person or the person of another, which a person of reasonable firmness in his situation would have been unable to resist."[94] In contrast, the control aspect of the Model Penal Code irresponsibility defense eschews such limitations and merely requires that the defendant "lacks substantial capacity . . . to conform his conduct to the requirements of law."[95] Why should the standards for incapacity to conform to the law be so much looser in the irresponsibility defense than in the duress defense? The fictional concept of a causal "mental illness" helps keep that question from being asked. Even the Model Penal Code Comments merely attempt to justify the difference by indicating that the irresponsibility defense is based on a "mental disease or defect" which constitutes "a disability that is both gross and verifiable."[96] Whatever else may be said about the alleged referents of "mental illness," they are neither necessarily "gross"[97] nor necessarily "verifiable."[98] A better explanation is that only the insanity defense triggers automatic commitment.[99]

Similarly, the phrase "mental illness" serves to cloud the relationship between the insanity defense and the involuntary act defense.[100] It fosters the illusion that the line between the two defenses is sharp

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LAW 482 (2d ed. 1961). In contrast, Professor Mueller states that it may negative the *actus reus* as well. Mueller, *M'Naghten Remains Irreplaceable: Recent Events in the Law of Incapacity*, 50 GEO. L.J. 105 (1961); *cf.* State v. Strasberg, 60 Wash. 106, 110 P. 1020 (1910).

94. MODEL PENAL CODE § 2.09(1) (Proposed Official Draft 1962).

95. MODEL PENAL CODE § 4.01(1) (Proposed Official Draft 1962), *quoted in* text accompanying note 46 *supra*.

96. MODEL PENAL CODE § 2.09, Comment 6 (Tent. Draft No. 10, 1960).

97. *See, e.g.*, L. SROLE, T. LANGNER, S. MICHAEL, M. OPLER & T. RENNIE, MENTAL HEALTH IN THE METROPOLIS 135, 138 (1962). This study found that 81.5% of the persons in a sample of Manhattan Island residents had consequential "symptoms of mental pathology." *Id.*

98. *See, e.g.*, Rosenhan, *On Being Sane in Insane Places*, 179 SCIENCE 250 (1973).

99. *See* MODEL PENAL CODE § 4.08 (Proposed Official Draft 1962).

100. Unlike a successful insanity defense, a successful involuntary act defense does not automatically set off commitment procedures. A. GOLDSTEIN, THE INSANITY DEFENSE 203-04 (1967). Moreover, the defendant may have more favorable burden of proof rules under the involuntary act defense than under the insanity defense. *Compare* People v. Hardy, 33 Cal. 2d 52, 198 P.2d 865, 871-73 (1948) *with* People v. Busby, 40 Cal. App. 2d 193, 104 P.2d 531, 536-37 (1940).

whereas in fact it is shadowy.[101] Some courts have said that a criminal act committed during an epileptic attack raises the involuntary act defense.[102] Others have stated that epilepsy is a "disease of the mind" and therefore does not raise the involuntary act defense but only the insanity defense.[103] All these courts merely apply the term "mental illness" as a label serving to announce a result. The label also shields against an examination of the relationship between the two defenses.

The term "mental illness" similarly obfuscates civil commitment standards. Why should we preventively detain certain dangerous persons but not others? The term "mental illness" helps avoid this question. Only the dangerous "mentally ill" are confined.[104] The connotations of the phrase "mental illness" help justify institutionalization of the "mentally ill" without further articulation of who is to be confined or why.

CONCLUSION

The many legal difficulties created by the phrase "mental illness" make its continued legal usage questionable. It has no accepted medical meaning, and there are not even medical guidelines for establishing such a meaning. Any legal definition of the term is inherently unsatisfactory since it retains its overlay of medical connotations in the minds of all participants in the legal process. Legal usage of this phantom concept exacerbates many problems surrounding psychiatric-legal proceedings. It aggravates interprofessional confusion since lawyers assume "mental illness" is a medical phrase while testifying doctors define it by reference to legal objectives. It increases the tendency of psychiatric witnesses to present conclusory rhetoric instead of underlying factual data. It contributes to psychiatric usurpation of such legal tasks as judging the moral culpability of defendants under the irresponsibility defense. It also legalizes the "devil-possession" myth by postulating "mental illness" as a thing inhabiting a mentally ill person and causing his behavior. "Mental illness" is a judicial label creating stigmatization.

101. *Cf.* A. GOLDSTEIN, THE INSANITY DEFENSE 204 (1967).
102. *See, e.g.*, Smith v. Commonwealth, 268 S.W.2d 937 (Ky. Ct. App. 1954).
103. *See, e.g.*, Bratty v. Attorney-General for Northern Ireland, [1961] 3 W.L.R. 965 (H.L.).
104. *See, e.g.*, D.C. CODE ANN. § 21-544(b) (1967).

In summary, we have determined what kind of an animal the law has caught. The law has hooked a fish. The "mental illness" fish is related to the red herring because it distracts legal participants from the pertinent legal issues. It is also akin to the cuttlefish because it makes connected concepts opaque. Should not the law throw this fish back in the sea?