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Criminal Responsibility and Mental Capacity Under the Uniform Code of Military Justice

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CRIMINAL RESPONSIBILITY AND MENTAL CAPACITY UNDER THE UNIFORM CODE OF MILITARY JUSTICE

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Congress, in May 1950, enacted a Uniform Code of Military Justice[1] applicable to all branches of the Armed Forces. Since that time, the rules and standards governing the defense of insanity have been uniformly interpreted in the military courts.[2] This is significant when considered in relation to the controversy in civilian jurisdictions since the case of *Durham v. United States*[3] in 1954. This uniformity of interpretation resulted because the Manual for Courts-Martial, which is the guide for practice and rules of evidence under the Uniform Code of Military Justice, established the test of insanity as a hybrid form of the M'Naghten Rule and the irresistible impulse test.

THE MENTAL RESPONSIBILITY TEST

The test for mental responsibility under the Manual is, simply stated, "whether the accused was at the time of the alleged offense so far free from mental defect, disease or derangement as to be able, concerning the particular acts charged, to distinguish right from wrong and to adhere to the right."[4]

The word "wrong" implies that the accused must know the community (the military, society in general) considers the act wrongful.[5] An accused's belief that an act is morally right, although he realizes its legal wrongfulness, does not constitute a defense.[6]

The Manual sets the tone for the military court's interpretation of lack of mental responsibility.

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1 64 STAT. 108 (1950), 10 U.S.C. §§ 801-940 (1958).

2 Formerly each branch of the service was the final authority over establishment and interpretation of its respective law. For the Army and Air Force, this was the Articles of War, for the Navy and Coast Guard, it was the Articles of Government of the Navy. As an example, prior to 1951, the Navy did not recognize "irresistible impulse" as a defense, while the Army, Air Force and Coast Guard did.

3 214 F.2d 862 (D.C. Cir. 1954). The Durham rule relieves the accused of criminal responsibility where his act was a product of mental deficiency or disease.

4 MANUAL FOR COURTS-MARTIAL UNITED STATES, 1951, para. 120b.

5 Department of the Army Technical Manual 8-240, para. 4; Department of the Air Force Manual 160-42, May 1953.

6 United States v. Smith, 10 C.M.R. 350 (1953), 5 U.S.C.M.A. 314, 17 C.M.R. 314 (1954).

> The phrase 'mental defect, disease, or derangement' comprehends those irrational states of mind which are the result of deterioration, destruction or malfunction of the mental as distinguished from the moral faculties. To constitute lack of mental responsibility the impairment must not only be the result of mental defect, disease, or derangement but must also completely deprive the accused of his ability to distinguish right from wrong or to adhere to the right as to the act charged. Thus a mere defect of character, will power, or behavior, as manifested by one or more offenses, ungovernable passion, or otherwise, does not necessarily indicate insanity, even though it may demonstrate a diminution or impairment in ability to adhere to the right in respect to the act charged.[7]

IRRESISTIBLE IMPULSE

It is evident the accused must not only be able to distinguish right from wrong, he must be able to adhere to the right. As pointed out in *United States v. Trede*,[8] while the test does not mention the word "irresistable," the Court of Military Appeals has construed paragraph 120b to mean practically the same as the irresistible impulse test in civil jurisdictions. As a matter of law, however, the phrase "irresistible impulse" should be omitted wholly from instructions to the court-martial.[9]

To be available as a defense, the irresistible impulse must stem from mental disease or derangement; moral deterioration or a mental condition is not enough. The defense of irresistible impulse therefore, is not in issue where the evidence goes no further than to establish that an accused's ability to adhere to the right was impaired.[10]

In the *Kunak* case[11] the court analyzed and accepted two similar tests as being applicable to measure irresistible impulse in military law. The first is referred to as the "policeman at the elbow" test; *i.e.*, the accused cannot be said to have acted under an irresistible impulse if he would not have committed the act had there been a policeman present. The other standard is that the accused would not have committed the act had the circumstances been such that immediate detection and apprehension were certain. The theory is that no impulse that can be resisted in the presence of a high risk of detection or apprehension is really irresistible.

Interestingly enough a case did arise where the policeman might be said to have been "at the elbow."[12] The accused was convicted of unpremeditated murder. There were air police in the area, but a psychiatrist

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[7] MANUAL FOR COURTS-MARTIAL UNITED STATES, 1951, para. 120b.

[8] 2 U.S.C.M.A. 581, 10 C.M.R. 79 (1953).

[9] United States v Smith, 10 C.M.R. 350 (1953), 5 U.S.C.M.A. 314, 17 C.M.R. 314 (1954).

[10] United States v. Sommerville, 19 C.M.R. 655 (1955).

[11] United States v. Kunak, 17 C.M.R. 346 (1954).

[12] United States v. Redmond, 15 C.M.R. 703 (1954).

testified that the accused would not have committed the offense if an air policeman had been more immediately present. The conviction was upheld. The reason the defense of insanity was not honored was primarily that the accused's record did not disclose any disease, defect or derangement. It showed only that he was drunk at the time, and policemen were in the vicinity.

Derangement or Disease

The *Dunn* case[13] is an excellent illustration of the requirement of derangement or disease. The accused was found guilty of indecent acts with male children under the age of sixteen years. The defense adduced testimony of a psychiatrist, duly qualified as an expert, that at the time of the commission of the offenses alleged the accused could not distinguish right from wrong, nor was he able to adhere to the right. However, questioning of the witness indicated that the accused did not suffer from any "acute psychotic episodes" at the time of the offenses nor did he ever depart from reality during that period. This witness also testified that in his opinion the accused would have been able to resist an impulse to commit the acts in question had the circumstances been different (*e.g.*, if the parents of any of the boys or an air policeman had been present). The witness further stated that the accused was suffering from a functional emotional illness which had no organic basis and that he was not emotionally capable of aiding in his defense.

On the other hand, other psychiatrists testified that the accused did understand the nature of the proceedings against him; that he could cooperate in his own defense; and that at the time of the commission of the offenses he was able to adhere to the right, even though his ability was impaired by a psychiatric condition, *i.e.*, sexual deviation manifested by homosexuality. Under these facts the finding of mental responsibility by the court was sustained on appeal.

The Durham Rule

The *Durham* rule has of course been presented by defense counsel in the military, but without success. The leading case of *United States v. Smith*,[14] clearly rejects the rule. The remarks in the opinion do not seem to limit themselves, however, to the issue of diseased mind and mental or moral responsibility. Here the court considered what the consequences would be if the rule were to become the accepted standard in the military.

The Court of Military Appeals found that the *Durham* rule was too uncertain. The opinion offered very excellent and detailed observations by Judge Brosman on the pitfalls of *Durham* in general. Then, with

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[13] United States v. Dunn, 9 C.M.R. 703 (1953).

[14] 10 C.M.R. 350 (1953), 5 U.S.C.M.A. 314, 17 C.M.R. 314 (1954).

reference to the military, he stated that under *Durham* the premium on malingering is enhanced. Since adequate psychiatric facilities for detecting the malingerer may not be readily available in the military, *Durham* would place the offender in a distinct and unfair advantage. The court also pointed out that the premium on a resort to the defense of insanity is higher in the military because no more than a reasonable doubt of sanity is required to acquit the accused, and because commitment does not automatically result in a finding of not guilty based on insanity. In addition, the court said that an acquittal would be a pleasant means of exit from the Armed Forces with a type of discharge carrying relatively little social stigma and at the same time preserving full veterans' privileges.

It is somewhat surprising that *Durham* has not succeeded in the military, since the District of Columbia is the background for many precedents for military law, and the Court of Military Appeals is generally assiduous in protecting rights of an accused.[15]

Raising the Issue

Ordinarily, the defense counsel will raise the question of the accused's responsibility, and when indicated, will ask for the necessary psychiatric examination. Military psychiatrists are available to the accused if he so desires. Moreover, the trial counsel and the members of the court-martial also have the duty to guard the accused's rights and will call for evidence in this regard whenever it appears indicated in the interest of justice.[16]

As a practical matter, the issue of sanity may be challenged by testimony of both lay and expert witnesses. However, the mere fact that a witness testified that an accused has a mental disease will not, in every case raise the issue of legal insanity. The issue is not merely whether the accused has a mental disease, defect or derangement, but rather whether on the whole record reasonable minds might conclude that because of some mental defect, disease or derangement, the accused was unable, concerning the particular acts charged, to distinguish right from wrong or adhere to the right. Where the evidence most favorable to the accused only indicates that his ability to adhere to the right was weakened or impaired, the issue of legal insanity is not raised.[17]

Capacity to Stand Trial

Insanity is also an issue as to the accused's capacity to stand trial. Technically, the matter is not a proper subject for a motion to dismiss.[18]

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[15] For a current list of jurisdictions which have rejected Durham, see Blocker v. United States, 288 F.2d 853, 866 n. 22 (D.C. Cir. 1961).

[16] Manual For Courts-Martial United States, 1951, para. 122a.

[17] United States v. Sommerville, 19 C.M.R. 655 (1955).

[18] Manual For Courts-Martial United States, 1951, para. 67, 68a.

The proper procedure is a motion for a stay of proceedings or continuance due to mental incapacity of the accused to stand trial.[19]

Upon this issue there is a different test for mental capacity than for mental responsibility. The mental capacity issue inquires into whether the accused has the mental ability to understand the nature of the proceedings against him and to intelligently conduct or cooperate in his own defense. This phrase is interpreted to mean that if the individual is capable of cooperating reasonably with counsel, he possess the requisite degree of mental capacity. There is no requirement that the lack of capacity be the result of a mental disease, defect or derangement.[20]

Mental capacity must relate to his capacity at the time of the trial or preparation for trial. The theory that it is unjust to prosecute one while he be incapable of cooperating in his own defense does not provide a permanent bar to prosecution where the real handicap in defending is merely that the accused cannot remember what happened.[21] The right to dismissal must grow out of a serious mental disturbance at the time of trial which, in good conscience, would require that legal proceedings be stayed and the action disposed of through administrative channels.

As spelled out by the Court of Military Appeals, the test of mental capacity is:

> Whether the prisoner at this time is possessed of sufficient mental power, and has such understanding of his situation, such coherency of ideas, control of his mental faculties, and the requisite power of memory, as will enable him to testify in his own behalf, if he so desires, and otherwise to properly and intelligently aid his counsel in making a rational defense.[22]

An example of a situation which failed to impress a court was the case of *United States v. Shipley*.[23] Prior to entering the accused's plea in that case, the defense counsel moved that an inquiry be had as to the mental capacity of the accused. The man was charged with the commission of indecent acts with boys who were under sixteen years. Upon questioning by the law officer, the defense counsel conceded that he had no evidence to present to the court in support of his motion, but he felt that anyone who would do the acts alleged in the specifications would be abnormal and that such abnormality might or might not be insanity. Thereafter, the law officer read to the court all pertinent portions of subparagraphs 112a and b, Manual for Courts-Martial, and, having determined that the defense counsel had had adequate time to prepare the defense of the accused, ruled, subject to objection by any member

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[19] United States v. Moore, 14 C.M.R. 658 (1953).

[20] United States v. Williams, 14 C.M.R. 242 (1953), 5 U.S.M.C.A. 197, 17 C.M.R. 197 (1954).

[21] United States v. Lopez-Malave, 4 U.S.C.M.A. 341, 15 C.M.R. 341 (1954).

[22] United States v. Williams, 14 C.M.R. 242 (1953), 5 U.S.C.M.A. 197, 17 C.M.R. 197, at 206 (1954).

[23] 14 C.M.R. 343 (1954).

of the court, that the motion was denied. No member of the court objected. The ruling was sustained by the Board of Review. Thus, although disease need not be shown, some disorder existing at the time of trial must be raised by the evidence to require an inquiry into insanity.

A finding of lack of mental capacity at the time of trial is not a finding on the merits. Upon this finding, the case is returned to the Convening Authority who will then determine whether to dismiss the charges if the incapacity is permanent, or suspend the proceedings until the accused regains capacity to stand trial. It may also, if dissatisfied with the findings of the court, require further examination of the accused, or even refer the matter back to the court for reconsideration of their findings. The point is, however, that the conclusion of lack of capacity to stand trial is not tantamount to an acquittal of the accused, nor is it treated as if he were found not guilty by reason of insanity. It merely postpones the time at which a court will be permitted to inquire into the guilt or innocence of the accused.

PARTIAL INSANITY

There is still another area in which an accused, although not so mentally unsound as to be entitled to an acquittal, may nevertheless receive consideration in the degree of his possible guilt. The military recognizes and accepts the doctrine of partial responsibility by which the accused's mental state or condition might be held to have affected his capacity to form a specific intent in a crime wherein a specific intent is an element of the offense.

Thus the court reasoned in *United States v. Story*[24] that an impaired mentality may affect one's mental capacity to premeditate, or to intend, or to have whatever other state of mind is required for the offense charged. This in turn may result in partial criminal responsibility. One lacking the mental capacity to intend may be fully responsible for a lesser crime that does not require such capacity, but only partially responsible for a greater offense which does. In this sense, there may be modified guilt or partial criminal responsibility.

Insanity which negatives criminal responsibility exists when an accused, because of a mental defect, disease or derangement, is unable, concerning the offense charged, to know right from wrong or adhere to the right. On the other hand, a lack of mental capacity to intend does not completely absolve an accused, but it may eliminate a particular element of the offense charged, such as premeditation, specific intent or knowledge. and thereby reduce the gravity of the crime. For as the *Smith* case pointed out, mental incapacity to intend may result from a disease

[24] 24 C.M.R. 596 (1957), 9 U.S.C.M.A. 162, 25 C.M.R. 424 (1958).

of the mind short of insanity, or, unlike insanity, it may be the product of a character or behavior disorder.

If an accused has a mental condition of the type and degree that casts doubt upon his capacity to have the state of mind required for the offense charged, *the cause of that condition is not of any particular significance*. A mental disease short of insanity, a character or behavior disorder and drunkenness, are among the conditions that may cause a lack of mental capacity to intend.[25]

Instructions on the effect of mental impairment short of legal insanity are required if there is evidence from which reasonable men could conclude that the accused was suffering from a condition which rendered him incapable of entertaining the state of mind required for the offense charged, regardless of how such condition was caused or by what name it is designated.[26]

However, it is complete incapability of premeditating, intending, knowing or having whatever other states of mind is essential, not merely impaired capacity, that leads to partial criminal responsibility. Accordingly, where there is affirmative evidence of mental capacity to intend, albeit impaired or diminished, and no evidence of incapacity, no instruction on partial criminal responsibility is necessary.[27]

The leading military case on the defense of partial insanity is *United States v. Kunak*.[28] Although earlier cases had upheld the application of the doctrine of partial insanity, this was the first case in which the failure of the law officer to instruct on the subject resulted in a reversal of a conviction. Kunak had been convicted of premeditated murder and sentenced to death. He had urged the defense of lack of mental responsibility. Notwithstanding expert testimony in favor of the accused, the trial court and the Board of Review both found that the evidence supported the findings of guilty and that the accused was mentally responsible at the time of the shooting. However, since the military allows a defense of mental disorder short of insanity in determining the accused's capacity to premeditate, and the court was not so instructed, the conviction could not be sustained.

The case went to the court with instructions that the court could not convict the accused if there was a reasonable doubt about his mental responsibility. The Court of Military Appeals acknowledged that this instruction was proper, but added,

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[25] United States v. Storey, 24 C.M.R. 596 (1957), 9 U.S.C.M.A. 162, 25 C.M.R. 424 (1958), citing United States v. Fleming, 7 U.S.C.M.A. 543, 23 C.M.R. 7 (1957), United States v. Dunnahoe, 6 U.S.C.M.A. 745, 21 C.M.R. 67 (1956), and United States v. Kunak, 5 U.S.C.M.A. 346, 17 C.M.R. 346 (1954).

[26] United States v. Galombos, 24 C.M.R. 621 (1957).

[27] United States v. Storey, 24 C.M.R. 596 (1957), 9 U.S.C.M.A. 162, 25 C.M.R. 424 (1958).

[28] 17 C.M.R. 346 (1954).

> Significantly missing in this case is an instruction to the effect that if in the light of all the evidence the court-martial had reasonable doubt that the accused was mentally capable of entertaining the premeditated design to kill involved in the offense of premeditated murder, it could find the accused not guilty of that degree of the crime.[29]

Shortly before *Kunak*, the Court of Military Appeals had commented on partial insanity in the *Edwards* case.[30] This case also involved a conviction of premeditated murder. Here, however, the Court of Military Appeals ruled that the facts presented did not warrant an instuction on partial insanity, and therefore the failure to so instruct was not error. The court, in stating that the issue of partial responsibility had not been raised, said:

> Medical evidence most favorable to him was that he possessed a personality which made it a little more difficult to adhere to the right. A mental capacity to adhere to the right may vary in individuals but so long as a person is able to do so he is not legally insane.[31]

In *United States v. Dunnahoe*[32] the accused had a disorder described as an "aggresive reaction." The Court of Military Appeals held that, considering the nature and severity of the defect, the findings of guilty of premeditated murder could not be affirmed in the absence of an instruction to the members of the court that they might consider the evidence of his mental condition in determining the accused's capacity to premeditate.[33]

Burden of Proof

For an issue of partial mental impairment to be reasonably raised, an accused does not have the burden of establishing beyond a reasonable doubt, or by greater weight of the evidence, that he was unable, by reason of mental impairment, to entertain a required specific intent. It is enough that there be evidence in the record, from whatever source, from which a reasonable man could conclude that the accused's mental condition was such that it would impair the capacity of the accused to entertain a specific intent. If there is substantial evidence of mental deficiency which might "interfere with," "diminish," "impair" or "lessen," an accused's capacity to premeditate, have knowledge, or entertain a specific intent, an issue is reasonably raised which must be governed by appropriate instructions.[34] In order to acquit, because of lack of mental

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[29] *Id.* at 362.
[30] United States v. Edwards, 4 U.S.C.M.A. 299, 15 C.M.R. 299 (1954).
[31] *Id.* at 303.
[32] 6 U.S.C.M.A. 745, 21 C.M.R. 67 (1956).
[33] Note, 5 Utah L. Rev. 276 (1956).
[34] United States v. Hemenway, 23 C.M.R. 810 (1956).

capacity to intend, there need be no more than a reasonable doubt of this capacity.

It may be observed, therefore, that insanity and incapacity to entertain specific intent are two different defenses.[35]

Perhaps the clearest illustration of the distinction is found in *United States v. Burns.*[36] There it was shown how mental impairment has two consequences as far as responsibility for crime is concerned. First, if it is of a sufficient degree to prevent the accused from knowing right from wrong or from adhering to the right, it will exonerate him completely from criminal responsibility for his conduct. Second, if it is of a lesser degree, it will not absolve him from all responsibility, but it may negative the existence of a particular element of a crime so as to reduce it to a lesser offense.

In *Burns,* the accused was convicted of assault with a dangerous weapon and robbery. On the way to his quarters he found an iron furnace shaker. As he passed the orderly room he saw the Charge of Quarters asleep on a cot and he entered and beat him into unconsciousness with the furnace handle. After he had knocked the victim unconscious, he noticed his wallet and took it before leaving the room. All of the psychiatrists who testified agreed that the accused knew right from wrong. The prosecution psychiatrists further felt the accused was capable of adhering to the right. However, the two defense doctors were of the opinion that the accused was suffering from an acute psychotic episode during the assault on the victim and that during the psychotic state the accused was acting from irresistible impulse. However, they agreed that the psychotic episode ended with the assault and did not encompass the theft of the wallet. As a result it was held that the accused's impairment reasonably raised an issue only with regard to the assault part of the robbery charge. An instruction as to the effect of the accused's mental condition was required only as a result of the assault. None was required as to the larceny.

In summary then, on a trial for an offense involving a specific intent, if there is sufficient evidence of mental impairment to raise an issue of the accused's ability to entertain the specific intent involved and no instructions are given on the effect of such mental impairment, only those lesser included offenses which do not involve a specific intent can be considered.[37]

Mental Disorders as Mitigating Factors

Although a mental condition may not be such that it would operate as a defense to an offense committed, it might well be a mitigating

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[35] United States v. Sommerville, 19 C.M.R. 655 (1955).
[36] 5 U.S.C.M.A. 707, 19 C.M.R. 2 (1955).
[37] United States v. Haas, 22 C.M.R. 868 (1956).

factor.[38] One's mental capacity and intelligence may be such that he should not be so severely punished as the cool, scheming offender. Thus such evidence concerning the accused's mental condition should be considered by the court and presented prior to the sentence being voted upon. This is so whether the matters were introduced as a defense to the crime, or merely reserved as evidence presented in mitigation and extenuation.

Two examples of the application are found in the cases of *United States v. MacReading*[39] and *United States v. Block*.[40]

In *MacReading*, upon conviction of two absences without leave for nine days and six days respectively, missing movements through neglect, and breaking restriction, the accused was sentenced to a Bad Conduct Discharge, confinement for four months, reduction in grade, and a forfeiture of pay and allowances. Defense Counsel submitted evidence showing that the accused had one year's service, and was only eighteen years old. Further mitigation evidence showed that the accused had a borderline mentality, emotional instability, and immature personality, plus an extended period of hospitalization for related physical symptoms. The members of the court-martial, in endorsing a petition for clemency, and the Convening Authority in approving its legal officer's recommendation with respect to clemency, made it plain there was no desire that the Bad Conduct Discharge be executed. The Board of Review set aside the portion calling for the Bad Conduct Discharge, obviously influenced by the evidence of the character disorder.

In *Block*, the accused was convicted of escape from confinement, wrongful appropriation of a motor vehicle, and three days absence without leave. He received a sentence which included a Bad Conduct Discharge. There was evidence that before his entry into the service he had run away from several private schools, that he had blackouts and behavior akin to fatigue, and that there was a history of epilepsy in his family. It was held that under the circumstances a Bad Conduct Discharge, which would separate the accused from the service in order to punish him for his acts, was not correct punishment. An administrative, rather than a punitive form of separation was deemed proper.

Similar results were reached in *United States v. Sears*,[41] and *United States v. Kelly*.[42] In the latter case, it was said that, although the accused was legally sane, the true degree of his criminality and the correctness of the sentence must be assessed in terms of his impaired ability to adhere to the right.

And even more recently, it was held that in determining the appro-

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[38] *Ibid.*
[39] 20 C.M.R. 560 (1955).
[40] 18 C.M.R. 458 (1955).
[41] 22 C.M.R. 744 (1956).
[42] 22 C.M.R. 723 (1956).

priateness of a Bad Conduct Discharge, a Board of Review may properly consider a post-trial neuropsychiatric report even though it was not part of the record and even though it raises no issue as to the accused's sanity.[43]

The privilege of raising the issue is well preserved and at the pre-sentencing stage the accused is allowed great leeway in apprising the court of matters which for trial purposes might not have been relevant, but for sentencing purposes will be. Recently a case was reversed because the law officer neglected to respect this right.[44]

Presumption of Sanity

As might be expected, the military will presume the sanity of the accused.[45] An accused is presumed to have been sane at the time of the offense charged and at the time of trial, until a reasonable doubt of his sanity at the time in question appears from the evidence.

Thus until the issue is challenged by the accused there is no reason whatever for the government to prove sanity in their presentation. If evidence tending to show insanity is introduced, and the members choose to disbelieve such evidence, they may still consider the presumption of sanity.[46]

In the military, the presumption of sanity is not evidence of sanity; it is merely a permissible inference.[47] As spelled out in the Manual:

> The weight to be given to a presumption of this kind will depend upon all the circumstances attending the proved facts which give rise to the inference to be drawn from such facts. . . . In making and weighing presumptions. . . members of course must apply their common sense and their knowledge of human nature and the ordinary affairs of life.[48]

A presumption in military law is normally to be construed as no more than a principle of circumstantial evidence, which disappears only upon the presentation of evidence that the trier of fact does not disbelieve.[49]

Additionally, an accused is also presumed to be capable of premeditation. Therefore, unless the record establishes some impairment of the ability to premeditate, an accused cannot complain because no instructions were given on partial responsibility.

When the issue of sanity has been raised, the burden of proving the sanity of the accused at the time of trial or the offense rests with the prosecution.[50] The presumption may perhaps outweigh the value of the

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[43] United States v. Gaskins, 26 C.M.R. 822 (1958).
[44] United States v. Cook, 11 U.S.C.M.A. 579, 29 C.M.R. 395 (1960).
[45] Manual For Courts-Martial United States, 1951, para. 122b.
[46] United States v. Johnson, 3 U.S.C.M.A. 725, 14 C.M.R. 143 (1954).
[47] United States v. Biesak, 3 U.S.C.M.A. 714, 14 C.M.R. 132 (1954).
[48] Manual For Courts-Martial United States, 1951, para. 138a.
[49] United States v. Biesak, 3 U.S.C.M.A. 714, 14 C.M.R. 143 (1954).
[50] Manual For Courts-Martial United States, 1951, para. 122a.

accused's evidence, but the burden is not on the accused to prove insanity; it is rather on the prosecution to prove sanity, and to prove it beyond a reasonable doubt. The only duty imposed on the accused is that he produces sufficient evidence of insanity to place it in issue. If he does this, then the government must prove sanity in the same manner and to the same degree as it does other issues.[51]

An instruction to the effect that an accused is presumed to be sane until a reasonable doubt of sanity appears from the evidence, does not improperly shift the burden of proof to the accused. There is no error where the instructions as a whole advise that evidence tending to prove insanity raises an issue of fact for determination by the court and places the burden of proving sanity beyond a reasonable doubt on the prosecution.[52]

"Substantial" evidence must be introduced to raise the issue.[53] Cases indicate, however, that the Court of Military Appeals will liberally construe that requirement, and hence a law officer is well advised to instruct on insanity whenever that issue has been fairly, though not substantially, raised by the evidence. In the *Biesak*[54] case, a witness for the defense, a hospital corpsman, testified that he did not consider the accused to be insane "in the meaning of the word 'insane' itself." But upon examination by a court member, the witness was asked if he thought the accused was free from mental defect as to be able, concerning the particular actions charged, to distinguish right from wrong and to adhere to the right. The witness replied, "I don't feel that he was, Sir, when I saw him at least." A prosecution witness, the psychiatrist who examined the accused the next day, offered the opinion that the accused was able to distinguish right and wrong with respect to the acts charged, and to adhere to the right. Clearly, the Court of Military Appeals could understand why a court might prefer to believe the psychiatrist more than the corpsman. Nevertheless, it seems obvious that the testimony of the corpsman raised the issue of insanity enough so as to require instructions by the law officer.

Shortly afterwards the court set aside another conviction wherein the charge on insanity was not given to the court.[55] At the trial the accused's mother testified as a witness and indicated that the accused's behavior prior to entering the Marine Corps during World War II had been normal in all respects. She further remarked that following his discharge in 1945 she had noticed a marked change in his personality.

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[51] United States v. Burns, 9 C.M.R. 707 (1952), 2 U.S.C.M.A. 400, 9 C.M.R. 30 (1953).

[52] United States v. Henderson, 11 U.S.C.M.A. 556, 29 C.M.R. 372 (1960).

[53] MANUAL FOR COURTS-MARTIAL UNITED STATES, 1951, para. 122b.

[54] United States v. Biesak, 3 U.S.C.M.A. 714, 14 C.M.R. 132 (1954).

[55] United States v. Loof, 4 U.S.C.M.A. 36, 15 C.M.R. 132 (1954).

He was "completely irresponsible," she told the court, as he would sometimes leave home on an errand and not return for several days. When he returned from such trips he claimed he had no idea of where he had been. His mother believed that he did not know right from wrong. Other defense evidence showed that after the accused received chemical burns and blast concussion wounds during World War II, his personality changed to the extent that he became meloncholy and developed a feeling of hatred toward others. Expert psychiatric evidence was to the effect that the accused was suffering from an "emotional disorder" but could distinguish right from wrong at the time of the alleged offense.

The Court of Military Appeals determined that although the psychiatric evidence (if believed over that of the mother) would result in a conclusion of sanity and that the evidence in his behalf may have come from a biased source, nevertheless these matters ought to have been weighed by the court in order to determine whether the degree of his mental disorder at the time of the offense did in fact constitute insanity. Regardless of how the court would probably have ruled, the evidence was held sufficient to raise the issue of insanity, and since it had not been instructed upon, the conviction was reversed.

In *United States v. Schatzinger*,[56] the confession of the accused contained the following statement: "I was sitting there a moment and I had the funniest feeling to kill someone and she happened to be next to me. I started choking her not realizing what I was doing. I had a haze in front of my eyes and after a few minutes it cleared away and I saw that I had choked a woman." There was no motion for a mental examination of the accused and the accused did not specifically raise the issue of mental responsibility. The law officer did not consider the issue raised and did not instruct on it. Nor did the trial board or defense counsel argue or consider insanity. The Court of Military Appeals ruled that the presumption of sanity remains until it is rebutted by substantial evidence tending to prove the accused is insane, and that the statement of the accused was not of such a nature that it raised an issue as to whether he was suffering from mental defect, disease or derangement. Accordingly, the prosecution was not required to prove sanity.

Conclusion: Test in Jeopardy

It is clearly not enough to merely recite that the military's test for insanity is M'Naghten and irresistible impulse, rather than *Durham*. For, as illustrated by the cases, many factual situations arise which, even though not constituting a complete defense to the crime charged, will nevertheless influence a court's determination as to the degree of guilt and the grade of sentencing. Essentially this is the present status of the law.

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[56] 9 C.M.R. 586 (1953).

Nevertheless, the solidarity of leading cases such as *Smith* and *Kunak* are presently in jeopardy. In *United States v. Currens*,[57] a case decided by the Third Circuit Court of Appeals on May 1, 1961, the court reversed a conviction under the National Motor Vehicle Theft Act, the so-called Dyer Act. The basis for reversal was the failure of the court below to adopt a test which conformed with today's knowledge of medical science, and, in particuar, to adopt the test that "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 which he is alleged to have violated." This test was drawn from Part I of the test proposed by the American Law Institute in its Model Penal Code.

Why then, if *Durham* has been rejected by the military, will this case be of any consequence? It is submitted that one line of reasoning is the theory that the offense is not a District of Columbia offense, but one under the United States Code. The Supreme Court treated *Durham* merely as if the highest court of a state had issued its pronouncement on substantive law. Here, however, the court is not sitting as a state court, but rather as a federal court on a federal offense.

The Supreme Court, therefore, must pass upon the *Currens* test as the rule in the federal courts. If they reject it, then all other federal courts should be bound thereby on federal offenses. If the *Currens* test is upheld, however, little imagination is required to see that some military lawyer will ask for a similar charge for an accused when the offense is federal in nature rather than state. Recalling that the military test is not in the Uniform Code of Military Justice, but rather in the Manual for Courts-Martial, it is not hard to see that the entire test is a federal interpretation of a federal law, the same as that in the *Currens* case.

The effect of the law which appeared fixed by the *Smith* case now becomes curiously doubtful. The *Currens* rule will no doubt be asserted, and the resulting interpretations by courts of military appeal could very easily improve the standards deemed acceptable to date as a defense in the military when insanity is raised as an issue.

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[57] 290 F.2d 751 (1961).