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USE OF PSYCHIATRY IN SOVIET CRIMINAL PROCEEDINGS PART I

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A fair comparison of the uses of any body of knowledge in diverse cultures and social organizations requires that its particular use in a given place and time be seen as a function of the structure and organization of each social area. The main purpose of this paper is not to make comparisons but to state what can fairly be said about psychiatry in Soviet criminal procedure. We have therefore kept in mind, and sometimes suggested, that the Soviet use of psychiatry has been affected by the Soviet conceptions of state, law and social organization as well as by concepts of self and society, security and change, freedom and order, and means and ends. To render these ideas and relations fully, more space would be necessary than we have at command but the necessity of this approach cannot be overlooked if useful comparisons are to be made.[1]

THE ITALIAN INFLUENCE

Current Soviet commentators to the contrary notwithstanding, the early Soviet code practice largely reflected the Italian *sociological school* of Ferri. Thereafter it made use of expiation and moral culpability in political trials; today it appears inextricably linked to a notion of guilt based on a Soviet version of *mens rea*.[2] Current Soviet interpreta-

1. For a discussion of forensic psychiatry and its use in another culture (Sweden), see OLOF KINBERG, *Forensic Psychiatry Without Metaphysics,* 40 J. CRIM. L. AND CRIMINOL. 40, 555, 1950.

2. The Soviets distinguish between *otvetstvenost*—the generic term for legal responsibility, and *vmenyaemost*—a form of "accountability" based on emotional and mental factors and an essential element of legal responsibility.

For the early post-revolutionary theory of the criminal sanction as a tool of repression against the enemies of the state, see: reports of the "Donbass Miners Trial," a representative example, PRAVDA, June 30, 1928. For a good short summary of early Soviet doctrine, see J. P. MAYER, POLITICAL THOUGHT: THE EUROPEAN TRADITION, N. Y., Viking, 1939, pp. 437-446; see also VYSHINSKY AND UNDREVICH, UCHEBNIK UGOLOVNOVO PROTSESSA, (1936), p. 236; see CHAO, H., THE LABOUR CORRECTION CODE OF THE R.S.F.S.R., London, Sweet and Maxwell, Ltd. (1936), p. 3; CASE NO. 2843, reproduced in J. N. HAZARD, CASES AND READINGS ON SOVIET LAW, 1950, p. 39; for early definition of "crime" see 1922 CODE, UGOLOVNY KODEKS, R.S.F.S.R. (Moscow, 1923), Art. 6. The lapse of a few years resulted in the definition of "socially dangerous acts" rather than "crimes" as a condition of "accountability" and a substitution of "measures of social defense" for that of "punishment." Here we find most of the earmarks of Ferri's thought as expressed in the FERRI

tions of *responsibility* are not then at utter variance with the Thomist conception of moral responsibility. Cultural factors are potent as determinants even where the rationalization is strictly pragmatic.

However, in the earlier Soviet experience, the Italian penology was explicitly recognized.[3] At present it stands repudiated.[4] The Ferri formulation was found useful in revolutionary experimentation as revolution could use "social dangerousness" as distinguished from "individual guilt." Emergencies strengthened the use. Nor were the Marxist and the Positivist forms of determinism as related to crime irreconcilable; both rejected "free will," each retained a working idea of individual responsibility.[5]

In the early Soviet experience, frequent use was made of moral indignation as a sanction-invoking response. At first this was not derogatory of the Ferri model but rather an occasional lapse. But it provided the wedge for the return to an ever broadening concept of moral culpability. Here no attempt appears to reject Ferri explicitly. A form of moral indignation was sanctioned by code[6]; improvisation carried the process further. The inhibitory potential of Soviet sanctions helped and indeed was maximized. In fact, it was consistently articulated in all extant reports of political trials by emotionally charged epithets directed to defendants such as "odious lackeys of capitalism"[7] in an early case and "parasitic merchants of human blood,"[8] "Trotskyite filth"[9] and "thrice cursed by the people"[10] in a relatively recent one, to take representative examples.

BACK TO "PUNISHMENT"

An early political trial was avowedly conceived as "a demonstration of the class struggle which the capitalist world is waging against the Proletarian government"[11] with a defendant represented as an indi-

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PROJECT OF 1921—See HARRY ELMER BARNES AND NEGLEY K. TEETERS, NEW HORIZONS IN CRIMINOLOGY, N. Y. (1943). Prentice-Hall, p. 393; see JOHN LEWIS GILLIN, CRIMINOLOGY AND PENOLOGY, N. Y. (1945), D. Appleton-Century Company, pp. 239-247; see UGOLOVNY KODEKS, R.S.F.S.R., 1926 Ed. (Moscow 1927), Arts. 6, 9, *passim*.

3. See reference to ISAEV, OBSHTSHAYA CHAST UGOLOVNOVO PRAVA, R.S.F.S.R. (1925), in MARYAKHIN, *Vina v Ugolovnom Kodeke,* R.S.F.S.R.— 10 SOVETSKAYA YUSTITSIA, 15, 18 (1939). See also, NEMIROVSKI, SOVETSKOE UGOLOVNOE PRAVO (1926), Odessa, p. 20.

4. See MARYAKHIN, *op. cit.,* note 3, and more significantly VYSHINSKI, TEORIA SUDEBNIKH DOKAZATELSTV, (1941) Moscow, pp. 128-132.

5. For the Italian position see, FERRI, PRINCIPII DI DIRITTO CRIMINALE (1928); for early Soviet view see, NEMIROVSKI, *op. cit., supra,* note 3. For incisive comments see, JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW, Indianapolis, Bobbs-Merrill (1947), pp. 550-551.

6. See 1922 CODE, UGOLOVNY KODEKS, R.S.F.S.R. (Moscow, 1923), Art. 32; *Cf.* 1926 CODE (Moscow, 1927), Art. 20.

7. See PRAVDA, May 19, 1926, referring to defendants tried for industrial sabotage.

8. See *id.,* Jan. 24, 1937—reference to defendants in RADEK-PYATAKOV trial.

9. *Id.,* Jan. 26, 1937.

10. *Id.,* Jan. 27, 1937.

11. See PRAVDA, June 30, 1928; also Jan. 24, 1937, RADEK-PYATAKOV trial.

vidual who was "sensed . . . as the class enemy . . . (by the workers) instinctively."[12] A later trial found it possible to pay outright homage to the principle of moral culpability in officially depicting the defendants as "vagabonds and brigands . . . morally corroded and morally depraved"[13] traitors who had won high favor and had called themselves, blasphemously, "Bolshevik-Leninists"[14] and who had to be "destroyed, destroyed like carrion which is polluting the pure, bracing air of the land of the Soviets."[15] Without doubt this symbolized Ferri's doom in Soviet law.

The rift between the Italian sociological school and Soviet jurisprudence had become pronounced long before this. Disappearance from the Soviet scene of the authors of early post-revolutionary experimentation[16] had been followed by Stalin's call for "stability of laws"[17] and finally the Constitution of 1936. Socialism was declared achieved. The doctrine of the "withering away of the state" was all but abandoned.[18] A measure of economic recovery gave impetus to the demand for stability above all of existing institutions.[19] Heresy in the form of doctrinal deviation reared its head to be crushed underfoot.[20] The psychological climate was one of orthodox profession of faith; legal experimentation drew to a close and the concepts "crime" and "punishment" were returned to favor.[21]

The rejection of Ferri's doctrine at this stage in Soviet Russia need therefore be no more surprising than the rejection of the *Ferri Project* of 1921 in clerical Italy. Soviet "religiosity" has been commented upon more than once. But it is significant that the rejection of Ferri in the Soviets should now proceed in the name of Marxism and that it should be based on the nominal invocation of Marxist determinism, for current

12. *Id.*, May 26, 1928.
13. Vyshinski's characterization of defendants in the RADEK-PYATAKOV trial. See the reproduction of the trial transcript in THE MOSCOW TRIAL, p. 181 (London, 1937).
14. *Id.*, p. 173.
15. *Id.*, p. 173.
16. LON L. FULLER, *Pashukanis and Vyshinsky: A Study in the Development of Marxian Legal Theory*, 47 MICH. LAW REV. 1157 (1949).
17. For a good discussion of this development see BERMAN, PRINCIPLES OF SOVIET CRIMINAL LAW, 56 YALE LAW JOURNAL, 803 (1947).
18. See VYSHINSKI, THE COURT AND THE PROCURACY IN SOVIET STATE LAW. An early hint of the recession of the doctrine was provided by Stalin himself in an address to the Communist Party Congress of 1930 in these words:
"We stand for the demise of the State. At the same time we are for strengthening the dictatorship of the proletariat, which is the strongest and most energetic power in all states that have existed hitherto. The maximum development of the power of the state for the purpose of preparing the conditions for the demise of the state—such is the Marxist formula."
As quoted in J. P. Mayer, p. 440, *op. cit.*, note 2, *supra.*
19. See note 17, *op. cit., supra.*
20. See such representative transcripts of political mass trials as THE MOSCOW TRIAL (1937), (issued by the Anglo-Russian Parliamentary Committee, London).
21. See GOLYAKOV, UGOLOVNOE PRAVO (1949), *passim.*

Soviet theory restates the classic Marxist rejection of "free will" and then proceeds to adopt the doctrine of human freedom with predetermined patterns,[22] leaving ample room for the concepts "guilt" and "responsibility."[23] To sustain this thesis, Soviet commentators delve into early Communist writings. Punishment for personal guilt rather than for the more impersonal "measures of social defense" for "socially dangerous acts" seems to have been sought by Lenin in statements such as the following,[24] relating to a slow-down in industrial production:

"Under all circumstances find those responsible so that we can make the scoundrels rot in jail. Ascertain the precise personal responsibility for the operation of the plant. . . ."

And Stalin is quoted as stating that material obstacles are responsible for no more than one-tenth of an individual's derelictions.[25]

Thus authoritatively the concept of individual guilt is reaffirmed and with it goes a bit of eighteenth century classical jurisprudence—"The punishment," we are informed, "should be proportioned to the quantum of guilt. This is indisputable."[26] Then, significantly, the following modification is supplied: "But this means that the punishment must fit the guilt not only in its objective projection in the form of the crime, but also in its subjective source, the criminal's psyche, his motives and behavior."[27]

The current Soviet commentator erects a dummy from the writings of an earlier Soviet admirer of Ferri and then proceeds to demolish it. Thus he quotes his opponent on the Code of 1922[28]:

"Like the Ferri Project, our code is based upon the dangerousness of the criminal. Although it is familiar with the concept of 'punishment,' the latter embraces the concept of measures of social defense in a broad sense. It is this phase of the concept of 'dangerousness' which more than anything brings our code and the Ferri Project together."

22. For an authoritative exposition of this view see MARYAKHIN, *op. cit.*, note 3 *supra.* Nothing even remotely revolutionary is thus presented. Somewhat more brilliantly than in the Soviet text, the idea of human freedom within limits set by a mechanistically determined universe, had been expounded by Spinoza—See BENEDICT SPINOZA, ETHIC, PART IV, OF HUMAN BONDAGE, 1899. For a gestalt analysis see J. F. BROWN, PSYCHOLOGY AND THE SOCIAL ORDER, N. Y., McGraw-Hill (1936), 333-337.

23. See MARYAKHIN, *op. cit.*, note 3, *supra:* "The individual from the point of view of Marxism, . . . endowed with conscious reason acting upon reflection or fear, setting himself definite objectives, must evaluate his acts and be held to account for them."

See also VYSHINSKI, TEORIA SUDEBNIKH DOKAZATELSTV (1941), Moscow, pp. 128, 192: "It would be utterly incorrect to attempt to base a theory of criminal law on the negation of the so-called freedom of human will. Such a negation . . . has nothing in common with Marxist dialectical materialism." *Cf.* THOMAS AQUINAS, SUMMA THEOLOGICA, passim.

See also TRAININ, HITLERITE RESPONSIBILITY UNDER CRIMINAL LAW (1944), p. 75: ". . . in the sphere of criminal justice the central problem is that of guilt: without guilt there is no criminal responsibility."—and UCHENIE O SOSTAVE PRESTUPLENIA (1946), Moscow, *passim.*

24. As quoted in MARYAKHIN, *op. cit.*, note 3, *supra.*

25. *Ibid.*

26. *Ibid.*, p. 17.

27. *Ibid.*

28. *Ibid.*, pp. 17, 18.

The answer delivered in the official *Journal of the People's Commissariat of Justice* is unequivocal[29]:

"Here every word is a political mistake, every phrase the . . . point of view of the sociological school."

But it is conceivable that present predispositions expressed in the punishment of "guilt," after a meticulous ascertainment of objective and subjective characteristics, may offer a wider scope to the psychiatric role than predispositions primarily restricted to the establishment of the presence or absence of "social dangerousness."

CULPABILITY AND THE LIMITS OF PERSONAL CAPACITY

With certain restrictions, the Soviet citizen's capacity of assuming the burden of culpability is unquestioned. What are the stated limits of his capacity? They are apparently being determined by the new "stability of laws" and so if Soviet practice appears to be conservative, yet it may by no means be stultifying.[30]

For the field of outright exoneration the Code of the RSFSR provides:

Measures of social defense of a judicial-correctional character may not be applied to persons committing crimes in a state of chronic psychic disease (*dushevnoi bolezni*) or of temporary disturbance of psychic functions (*dushevnoi deyatelnosti*), or in any other state of disease, if these persons were incapable of accounting to themselves for their actions or of directing them; and equally to those who may have acted in a state of psychic health, but who succumbed to psychic illness at the time of the imposition of sentence.

To these persons measures of social defense of a solely medical character can be applied.

Addendum: The effect of this article does not extend to those who have committed crimes while in a state of intoxication.[31]

Early Soviet writings have characterized the ensuing standard of "non-accountability" as a "biological" formula or criterion supplemented by a "psychological" criterion.[32] They explain that the "biological" phase of the examination of "non-accountability" is restricted to ascertainment of the presence of "chronic mental disease" "temporary disturbance of mental functions" or of "any state of illness," and that that has to be supplemented by the establishment of an incapacity of adequate insight, awareness or control as an outgrowth of the diseased state.[33] More recent writings have rechristened the criteria respectively "medical" and "juridical,"[34] a change which may be significant. The formulation high-

29. *Ibid.*, p. 18.
30. See BERMAN, *Principles of Soviet Criminal Law*, 56 YALE LAW JOURNAL 803 (1947).
31. UGOLOVNY KODEKS, R.S.F.S.R., Art. 11.
32. See, e.g., NEMIROVSKI, SOVETSKOE UGOLOVNOE PRAVO, Odessa (1926), p. 70; VNUKOV AND FEINBERG, SUDEBNAYA PSIKHIATRIA, Moscow (1936), p. 16.
33. See VNUKOV AND FEINBERG, note 32, *supra*.
34. See BUNEEV AND FEINBERG, SUDEBNAYA PSIKHIATRIA, Moscow (1947), p. 6.

lights the universal predicament of the adoption of essentially medical symptoms as tests of responsibility, if, of course, absence of insight, awareness or control, are recognized as medical symptoms. The difficulty was discussed by a nineteenth century English psychiatrist.[35]

> The falseness of the (present) legal position will appear at once if we suppose a case of poisoning instead of a case of mental derangement: what would be thought of a judge who, when medical evidence of poisoning was given, should instruct the jury as a matter of law that they must be governed in their verdict by the presence or absence of a particular symptom.

The plea for the elimination of all artificial criteria and for the determination of legal responsibility on a purely factual basis has been heard in this country[36] and has received partial if not overwhelming psychiatric support.[37]

Such views were sharply rebuffed early in the development of the Soviet philosophy of forensic psychiatry. The underlying Soviet psychiatric attitude suggested that "accountability" insofar as it involved the invocation of sanctions for social defense was a matter of juridico-political or ethical significance and that the psychiatric role, therefore, should be confined to the clarification of health or illness, the degree of which, for purposes of incrimination or exculpation should be largely a matter of political decision:

> A scientific interpretation of all human behavior is determinist: all . . . conduct is based on biological personality characteristics and the external factors of the social order. Human behavior is pre-determined by these factors and consequently is not subject to a different analysis upon a scientific level. If this is so, the question of accountability cannot be a question of science and in the province of psychiatry, relative to the mentally ill or the psychopaths. This . . . is not a psychiatric question. It is closer to ethics and closer still to practical-juridical considerations.[38]

The predicament appears to have been resolved by the Soviets in conformity with this view. Mental disease and absence of responsibility or "accountability" are not co-extensive under Soviet law.[39] While establishment of mental disease has been made subject only to medical discretion, establishment of "accountability" is subject to governmental

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35. HENRY MAUDSLEY, *Responsibility in Mental Disease,* N.Y., D. Appleton (1892), p. 107.

36. See, e.g., DOE, J., dissenting in part in State v. Pike, 49 N.H. 399, 441, 442 (1870); for instance, this comment, "If the tests of insanity are matters of law, the practice of allowing experts to testify what they are, should be discontinued; if they are matters of fact, the judge should no longer testify without being sworn as a witness and showing himself qualified to testify as an expert. . . . The whole difficulty is that courts have undertaken to declare that to be law which is a matter of fact."

See OLOF KINBERG, *Forensic Psychiatry Without Metaphysics,* 40 J. CRIM. L. AND CRIMINOL. 555 (1950); also SAMUEL A. LEVINSON (ed.), *Symposium on Medico Legal Problems* (Series two), Phila., Lippincott, 1949, pp. 162-176.

37. See STEVENSON, *Insanity as A Criminal Defense; The Psychiatric Viewpoint,* 25 CAN. BAR REV. 731 (1947); *Cf.* F. Wertham, *Show of Violence,* N. Y., Doubleday (1949).

38. KRASNUSHKIN, SUDEBNO—PSIKHIATRICHESKIYE OCHERKI, Moscow (1925), p. 111.

39. UGOLOVNY KODEKS, R.S.F.S.R., Art. 11.

choice of that degree of mental or emotional disturbance which offers the most convenient tool to a policy-oriented officialdom in the achievement of its policy objectives.[40] At first blush the test appears to incorporate both the "McNaghten Rules"[41] and the "Irresistible Impulse" test[42] as known in this country.

THE MCNAGHTEN RULES CRITICISED

It is interesting to note, therefore, that at least the McNaghten Rules have come under heavy Soviet attack as conservative and anachronistic.[43]

The gist of the criticism appears to be that the McNaghten Rules accord insufficient importance to expert testimony and that they embody a purely intellectual test which is not in accord with scientific knowledge. The same criticism has been applied to them by American psychiatrists some of whom, however, have made the reservation that no reason exists why courtroom infiltration of psychological knowledge should not result in expanding the concept of awareness or knowledge of the McNaghten Rules to embrace both that of the emotional as well as of the intellectual variety, without benefit of statutory change.[44] No materials are available to show whether the first part of the Soviet "juridical criterion" of accountability, dealing with a form of awareness, as distinct from the second part dealing with a form of control, can be said to include both emotional and intellectual considerations. No doubt, however, exists that emotional and intellectual factors alike are included in the "juridical criterion" in its entirety.[45] Whether or not this could have been readily accomplished by the Soviets with the first part, analogous to the Mc-

40. *Ibid: Cf.* VNUKOV AND FEINBERG, *op. cit.*, note 32, *supra.*

41. Under the McNaghten Rules, "to establish a defense on the ground of insanity, it 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." See MCNAGHTEN'S CASE (House of Lords, 1843), 8 Eng. Reprint 718, 4 St. Tr. (N.S.) 847 (1843).

42. Under the "irresistible impulse" test, "one who knows the right but because of mental disease his will is so deranged or disordered that it fails to function and cannot direct or control the acts of the person so afflicted is and should be recognized as being legally insane." See State v. Green, 78 Utah, 580, 599 (1931). See also KINBERG, *op. cit.*, note 36, *supra,* p. 556.

43. See VNUKOV AND FEINBERG, *op. cit., supra,* note 32, p. 361.

44. See, e.g., ZILBOORG, *Misconceptions of Legal Insanity,* 9 AM. J. ORTHOPSYCHIATRY 540, 552-553 (1939): ". . . The psychiatrist, instead of leaving his clinical armamentarium at the entrance door of the courtroom and borrowing whatever antiquated speculations are offered to him by battling lawyers, will feel on much more solid ground, and he will become much more effective, if he carries with him his strict clinical standard directly to the witness stand." For the positions of clinic and of court, and for general comments see GEORGE H. DESSION, *Psychiatry and the Conditioning of Criminal Justice,* 47 YALE L. J. 319, 321 as well as his, *The Mentally Ill Offender in Federal Criminal Law and Administration,* 53 YALE L. J. 684, 686.

45. See BUNEEV AND FEINBERG, *op. cit.*, note 34, *supra,* p. 10: "Deciding upon accountability leads to an evaluation of the degree of personality change . . . at the time of the offence. . . ."

Naghten Rules alone, cannot be determined with accuracy. It is significant, however, that it was tried in the first Code of the RSFSR.[46] And it may well be significant that it was abandoned. The present code features both the ability to realize the significance of action as well as to control it in terms of "accountability."[47] What meaning then does Soviet theory give to the test of ability to direct or control action as analogous to "irresistible impulse"[48] and as a supplement to the test of the ability to realize the significance of action, analogous to the McNaghten Rules?[49] A brief reference to legislative history may help clarify this situation.

SOVIET BACKGROUNDS FROM THE 1903 IMPERIAL CODE

The Imperial Russian Criminal Code enacted in 1903 defined absence of legal responsibility in terms of an inability to understand "the nature and significance" of actions or an "inability to control them" as a result of specified forms of disease,[50] which had even then received the designation of psychological criteria.[51] This product had been subjected to the cross-currents of contemporary psychiatric debate[52] and the majority of the St. Petersburg psychiatrists protested that the adoption of "psychological criteria" were unwieldy and incapable of accommodating the constantly expanding psychiatric insights.[53] A well-known Russian criminologist denounced them as "metaphysical"[54] but, in turn, they were defended as a pragmatic necessity.[55] A contemporary Swiss commentator interpreted the adoption of these criteria in the legislative draft as the recognition of the validity of "intellectual" factors concerning ability to understand the nature and significance of action[56] on the one hand, and the recognition of the equal validity of "volitional" factors in the statement concerning ability to control actions[57] on the other. The enactment reflected some contemporary psychiatric theories; for instance, Mauds-

46. See 1922 CRIMINAL CODE OF THE R.S.F.S.R., UGOLOVNY KODEKS, Art. 17: "Punishment shall not be imposed upon persons committing crimes in a state of chronic psychic disease or of temporary disturbance of psychic function, or in any other state in which they were incapable of accounting to themselves for their actions. . . ."
47. See note 31, *supra.*
48. See note 41, *supra.*
49. See note 41, *supra.*
50. See WACHSMANN, DES NEUE RUSSISCHE STRAFGESETZBUCH (1908), p. 43, sec. 39.
51. See GRETENER, DIE ZURECHNUNGSFAHIGKEIT ALS GESETZGEBUNGSFRAGE, Berlin (1908), p. 111.
52. *Id.,* pp. 110-211.
53. See *Id.,* pp. 195, 197.
54. (Kuoni), *id.,* p. 201. For reproductions of the statements of views of Russian psychiatrists and criminologists on the subject of the legislative draft, both *pro* and *contra,* see GRETENER, *op. cit.,* note 51, *supra,* pp. 195-212.
55. *Id.,* pp. 202-212.
56. *Id.,* p. 123.
57. *Id.,* pp. 129, 130.

ley's.[58] He propounded the theory of the irresistibility of an insane impulse in the absence of "delusion . . . and marked derangement of intelligence."[59] Krafft-Ebing[60] conceded the absence of any freedom of choice as a result of certain mental disease contributing to the inevitability of the criminal act.[61]

Despite the fact that modern psychiatry has begun to look askance at the concept "irresistible impulse"[62] and despite the obsolescence of differentiating between intellectual and volitional impairment[63] (found in some American case law),[64] no reason exists why the test based on "control" or "direction" should not lend itself to a psycho-analytically oriented view of crime at least as well as the more ancient McNaghten Rules.[65] It is striking that the present Soviet code formulation of the test of "accountability" offers no startling contrast to that of the Imperial Code of 1903.

Further background material for Soviet change is provided by the adoption of one form or another of the "irresistible impulse" test by several European states.[66]

It is interesting to note that at about the time of the readoption of the test by Soviet Russia, the movement toward the introduction of the test had been gathering momentum in the United Kingdom where it was urged by the 1924 Committee on Insanity and Crime of the Royal Medico-Psychological Association on the theory that there are many cases of a true lack of responsibility despite the existence of an awareness of the nature and quality of the act.[67]

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58. MAUDSLEY, see note 35.

59. *Id.*, p. 133; *Cf.* DALLEMAGNE, LA VOLONTE DANS SES RAPPORTS AVEC LA RESPONSABILITE PENALE (Paris).

60. KRAFFT-EBING, GRUNDZUGE DER KRIMINALPSYCHOLOGIE (1882).

61. *Id.*, p. 17, quoted in GRETENER, *op. cit., supra,* note 51; *Cf.* ALEXANDER AND STAUB, *The Criminal, The Judge and the Public* (New York, Macmillan) (1931), p. 68.

62. See materials cited in discussion of "Irresistible Impulse" in JEROME HALL, *Principles of Criminal Law,* Ind.; Bobbs-Merrill (1947), pp. 505-526; *cf.* F. WERTHAM, *Show of Violence,* New York, Doubleday (1949); see KINBERG, *op. cit., supra,* note 36.

63. See ZILBOORG, *op. cit.,* note 44: "Today not only psychiatry but general medicine, surgery and biology speak of the organism as a whole and of the personality as a whole . . . The whole man is ill when he suffers from pneumonia or schizophrenia and not just a lobe of one lung and not just the emotional field."

64. See, *e.g.,* State v. Green, note 42, *supra.*

65. Note also Krafft-Ebing's suggestion concerning the role of an awareness of wrongdoing as a spur contributing toward the inevitability of crime with such current psychoanalytical views as ALEXANDER AND STAUB, *op. cit., supra,* note 61; J. C. FLUGEL, *Man, Morals and Society,* London, Duckworth (1945), pp. 143-164.

66. See, *e.g.,* sec. 51 REICHS—STRAFGESETZBUCH (German Penal Code) formulated in terms of free volitional determination. *Cf.* sec. 85 of ITALIAN PENAL CODE, formulated in terms of capacity of volition (London ed., 1931). For an interesting example of the flexibility of "Irresistible Impulse" in achieving the psychiatric exoneration of the would-be assassin of Mussolini see FERRI, *A Character Study and Life History of Violet Gibson Who Attempted the Life of Benito Mussolini, on the 7th of April, 1926* (reproduced in translation) 19 J. CRIM. L.—No. 2—Part I—211 (1928).

67. For discussion of committee recommendation see Winfield's introduction to CRAIG, R. U. *Mental Abnormality and Crime,* New York, Macmillan (1944), pp. 58, 60; 65-70.

PREDISPOSITION TOWARD READOPTION OF IRRESISTIBLE IMPULSE TEST

A predisposition toward the readoption of the test, moreover appears in the development of Soviet psychological thought and present classification of the symptomatology of mental disease is peculiarly adapted to the dual test of present Soviet law. Thus it includes *inter alia,* under separate headings, "disturbances of the . . . intellect," "disturbances of the emotional life," "disturbances of volition," and "disturbances of consciousness."[68] The dichotomy, however vague, between intellect and volition in the appraisal of "accountability" is sharpened by the present juridical criterion (officially described) which encompasses "not only changes of intellect, but also changes of the volitional sphere."[69]

It would, however, be wrong to credit the Soviets with complete retention of the nineteenth century distinction which appears to have a largely functional significance and which is qualified by the next statement of the official text:

> The expert therefore must examine not only the disturbance of the various sides . . . of mental activity but he must appraise the changes in the entire psyche.[70]

This follows from an authoritative interpretation of the Code which equates absence of "accountability" with inability of insight into one's behavior, inability of direction of one's act, and inability of orientation within the external world.[71]

We infer that the duality of the "juridical criterion" has been used by the Soviet courts as a conduit for broader personality appraisal in the light of the developing Soviet psychological science and this is reinforced by available examples of Soviet forensic psychiatric practice.

CASES ILLUSTRATING MENTAL DISEASE, TEMPORARY DISTURBANCE AND "ANY STATE OF ILLNESS"

An official text lists three cases of absence of "accountability" illustrative of the three phases of the medical criterion, i.e., chronic mental disease, temporary disturbance of mental functions, and any state of illness, in the following order:[72]

1. CHRONIC MENTAL DISEASE:

The defendant, age 64, had spent the larger part of his life working

68. See BUNEEV AND FEINBERG, *op. cit., supra,* note 34, *supra,* pp. 71-80.
69. *Id.,* p. 10. A similar distinction is made upon the similar Code provision of Switzerland by a leading contemporary Swiss psychiatrist. The distinction made there is between an "intellectual" failing and an "affective" one. See BINSWANGER, ZUR FORENSISCHEN PSYCHIATRIE 'DER NICHT GEISTESKRANKEN PERSONEN (Bern 1941), pp. 123, 124.
70. See BUNEEV AND FEINBERG, *op. cit., supra,* note 34, p. 10.
71. See GOLYAKOV, UGOLOVNOE PRAVO (Moscow 1947), p. 75.
72. *Id.,* pp. 76, 77.

on useless "inventions" which he had presented so plausibly to the responsible Soviet bureaucrats as to receive a series of official financial subsidies. Obvious aberrational behavior became manifest when for purposes of "attracting attention" he smashed windows in a government office. Arrested on a vagrancy charge, he was held not "accountable."

2. TEMPORARY DISTURBANCE OF MENTAL FUNCTIONS:

The defendant, age 25, set fire to his barn, walked around it holding up a crucifix, appearing oblivious of his immediate environment; on interrogation he had no recollection of his act. Medical findings established the presence of mental disease, at the time of the offense, accompanied by a temporary change of consciousness, presumably of epileptic origin.[73] Accountability was held negatived.

3. "ANY STATE OF ILLNESS":

The defendant, while under the stress of a difficult pregnancy, shot her three children and attempted suicide. She had been galvanized into a momentary rage by the chance comments of her husband on the difficulty of his family life. Her history established her as an unstable personality with a record of continuous marital discord. The conclusion of the absence of accountability was based on the theory of the absence of insight.

If the above examples are accepted as representative forms of Soviet practice, it will be apparent that a finding of "non-accountability" is not geared to either the intellectual awareness or the control test as single criteria, but that the practice leading to exoneration appears to rest on a diagnosis from the two tests as a totality, enjoining a general personality appraisal. Nonetheless, Soviet writers have explicitly accepted the possibility of the irresistibility of impulses, without more, at least on a theoretical plane as of 1936.[74] They appear to have linked these impulses to admittedly isolated cases which they likened to temporary mental blackouts, represented by the following:[75]

The defendant had gone into a depression after the sudden death of his wife, which deepened as his employment was terminated and his economic situation became critical. Unable to furnish his children with food he killed them and unsuccessfully attempted suicide. Upon interrogation he evinced an adequate recollection of what had transpired but

73. See BUNEEV AND FEINBERG, *op. cit., supra,* note 34, p. 18.
74. See VNUKOV AND FEINBERG, *op. cit., supra,* note 32, pp. 91, 92.
75. *Id.,* p. 92.

could not explain his acts. This was regarded as the product of a state of lowered consciousness and an "impulsive" attempt to escape from an intolerable situation.

No reason exists why this situation should not be conducive to the establishment of absence of responsibility in an enlightened courtroom under the McNaghten Rules.[76] The Soviet diagnostic view itself comes close to qualifying the defendant for exoneration under that test. Regardless of the validity or invalidity of the scientific concept underlying the Soviet theory of "irresistibility," however, it appears that an exonerating diagnosis is materially helped by that test in this context.

By and large, however, as has been indicated above, Soviet practice invokes the two tests jointly, rather than singly. In this way a case for "non-accountability" is deemed to have been established where the crime is the product of such diseases as "progressive paralysis, schizophrenia, manic-depressive psychosis, senile dementia, paranoia,"[77] epilepsy,[78] or of the so-called "pathological affect."[79]

Partial Psychiatric Exoneration

The problem of partial psychiatric exoneration arises in connection with the treatment meted out by Soviet criminal justice to individuals evincing degrees of mental and emotional impairment which are short of the norm set by the Code. The problem of that type of offender in this country has been highlighted by the recent case of *Fisher v. United States,*[80] in which the defendant was characterized as "mentally somewhat below the average with minor stigmata of mental subnormalcy" and a "psychopathic personality of a predominantly aggressive type." The question whether deficiencies of this type, admittedly below the standard of exoneration for insanity, need be regarded as sufficient for the purpose of lowering the degree of responsibility and hence the degree of the crime was answered in the negative by the Supreme Court, and in a majority of state jurisdictions.[81] The majority view in the Fisher case represents the law of the Soviet Union today. While the RSFSR Code has always been devoid of the concept of reduced responsibility, early Soviet development shows a trend toward recognition of reduced or partial responsibility as an area requiring special measures,

76. See Craig, *op. cit., supra,* note 67, pp. 8-71.
77. See Krasnushkin, *op. cit., supra,* note 38, p. 111.
78. See note 73, *supra.*
79. See Krasnushkin, *op. cit., supra,* note 38, p. 112.
80. 328 U.S. 463 (1946).
81. See *id.,* 473, 474 for a collection of cases pro and contra. See also Weihofen and Overholser, *Mental Disorder Affecting the Degree of Crime,* 56 Yale L. J. 959 (1947).

manifested by statements of early Soviet theorists[82] on the one hand, and by the judicial practice of increased leniency toward cases believed to be covered by this concept, on the other. The prime beneficiaries of this trend were the so-called "psychopaths." Thus between 1921 and 1924 "psychopaths" were frequently adjudged "not accountable."[83] As late as 1925 official Soviet psychiatry tended to regard the "psychopaths" as "too well for the hospital and too sick for the prison"[84] and their adequate disposition was still thought of in terms of their accommodation in special institutions with a modicum of psychiatric supervision.[85] The earlier trend has been completely reversed for the last decade. Current theory rejects all thought of "pampering" and maintains that criminal "psychopaths" would be encouraged to persist in socially harmful activities by receiving a special status under the Code which would provide them with the excuse of an illness and the incentive of a degree of immunity from punishment.[86]

Both the Soviet concept of the "psychopath"[87] and the dominant Soviet philosophy of his treatment[88] conform to the most conservative pattern of Western thought. Nonetheless Soviet legal psychiatry accords the "psychopath" certain measures of consideration over and above that shown to "non-psychopaths."[89] This is accomplished through the use of "extenuating circumstances."

Illustrative of the operation of the doctrine of extenuating circumstances (a doctrine of broader scope in the Soviets than on the continent) in its potentials for psychiatric use is the following recent case entitled, "Matter of Demkina" (Supreme Court of the U.S.S.R.):[90] A housewife criminally prosecuted for assaulting another alleged that the assault had been precipitated by the insulting remarks of the complaining witness. The conviction below was reversed by the highest court of the land finding error in that the trial court failed to investigate the character and circumstances of the insults—whether they were capable of evoking the strong emotional excitement recognized by the code as a

82. Nemirovsky, for example, as a Soviet professor of criminal law writing in the twenties, suggested the expansion of the Code section dealing with "non-accountability" to include the concept of reduced accountability and the establishment of special curative or rehabilitative institutions, distinct from hospitals, for those found to have committed crimes in a state of reduced accountability. See MAURACH, SYSTEM DES RUSSISCHEN STRAFRECHTS (Berlin 1928), p. 88.

83. See BUNEEV AND FEINBERG, *op. cit., supra,* note 34, p. 158.

84. See KRASNUSHKIN, *op. cit., supra,* note 38, p. 114.

85. *Ibid.*

86. See BUNEEV AND FEINBERG, *op. cit., supra,* note 34, p. 158.

87. *Cf.* E. KAHN, PSYCHOPATHIC PERSONALITIES, New Haven, Yale University Press (1931).

88. See *op. cit., supra,* note 34.

89. See *e.g.,* UGOLOVNY KODEKS, R.S.F.S.R., Art. 48; see *op. cit. supra,* note 34, pp. 158, 159; see *e.g.,* DONNEDIEU DE VABRES, TRAITE DE DROIT CRIMINEL (1947), 446-457.

90. SUDEBNAYA PRAKTIKA VERKHOVNOVO SUDA S.S.S.R. (1946), VYPUSKI IV (XXVIII), case No. 16, p. 23.

ground of mitigation; the "mental state" had not had requisite examination.[91]

EXPERIMENTATION IN A CONSERVATIVE DESIGN

Soviet legal psychiatry operating in the framework of the Soviet criminal code thus embodies several contradictory trends. Essentially conservative in outlook, it effected an expression of the code criterion of responsibility to secure a broader personality appraisal of the defendant. Apparently hampered by inadequate facilities it excluded from its protection a series of chronic emotional disturbances of varying degree but included, at least partially, momentary emotional states which could be often unrelated even to neuroses. Forward looking experimentation is circumscribed by a conservative design and the dominant mood itself appears conservative.[92]

91. *Ibid,* p. 24.

92. This is highlighted by a comparative view of Soviet psychiatric practice in a criminal case of international significance in the records of the International Military Tribunal at Nuremberg in which Hess claimed that he was incapable of preparing his defense due to amnesia. The Soviet report was practicably indistinguishable from those of the British, French and Americans in rejecting "insanity" while conceding the presence of a degree of amnesia which might handicap his defense. But this belongs more in a description of procedure and cannot be continued at this place. See 1 NAZI CONSPIRACY AND AGGRESSION 97-113, Office of the U. S. Chief of Counsel for Prosecution of Axis Criminality.