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## PARTIAL RESPONSIBILITY—A MITIGATING FACTOR

One of the more perplexing and unsettled defenses in the field of criminal law is that of insanity. The doctrine of partial or diminished responsibility is one aspect of this defense,<sup>1</sup> and the insistence with which it has been urged upon the courts has increased in recent years.<sup>2</sup> The dominant proposition of the doctrine of partial responsibility is this: the mental condition of the accused, though not amounting to legal insanity,<sup>3</sup> is relevant in determining whether he had the particular state of mind which common law or statutory definitions require as an essential element of the crime.<sup>4</sup> The primary application of the test has been in cases of first degree murder.<sup>5</sup> Also, it has been applied in cases of felony murder so as to negative the mental state required for the underlying felony.<sup>6</sup> When applied to larceny the doctrine would negative the *animus furandi*, the intent to steal.<sup>7</sup> Similarly, this intent would be eliminated in robbery.<sup>8</sup> In cases of burglary the intent to commit a felony would be precluded.<sup>9</sup> The accused is not absolved of all criminal responsibility, for when the required mental state has been negated, he may be found guilty of an offense of a lesser degree. For example, if the accused were charged with first degree murder, the jury would be allowed to apply the test

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<sup>1</sup>Insanity is a "generic term, comprehending all kinds and conditions of mental unsoundness and derangement. . . ." Ex parte McKenzie, 116 Tex. Crim. 144, 28 S.W.2d 133, 134 (Crim. App. 1930).

<sup>2</sup>See notes 11, 16, 24 *infra*.

<sup>3</sup>"[I]n law a man is insane when he is not capable of understanding (1) that a design is unlawful, or that an act is morally wrong; or, (2) understanding this, when he is unable to control his conduct in the light of such knowledge." Walters v. Connecticut Mut. Life Ins. Co., 2 Fed. 892, 894 (C.C.D. N.J. 1880).

<sup>4</sup>State v. Padilla, 66 N.M. 289, 347 P.2d 312 (1959).

<sup>5</sup>People v. Moran, 249 N.Y. 179, 163 N.E. 553 (1928); State v. Green, 78 Utah 580, 6 P.2d 177 (1931); Oborn v. State, 143 Wis. 249, 126 N.W. 737 (1910).

<sup>6</sup>People v. Rizzi, 297 N.Y. 874, 79 N.E.2d 274 (1948); People v. Levan, 295 N.Y. 26, 64 N.E.2d 341 (1945).

<sup>7</sup>"Larceny is the wrongful taking and carrying away of the personal property of another with the felonious intent to convert it to the taker's own use, and make it his own property, without the consent of the owner." State v. Kavanaugh, 4 Penne. 131, 53 Atl. 335 (Del. Ct. Gen. Sess. 1902). "This specific, felonious intent to steal is the gravamen of the offense. . . ." *Id.* at 336.

<sup>8</sup>Robbery is generally defined as the taking of personal property of another from his person or in his presence, against his will, by violence or intimidation with intent to steal. Butts v. Commonwealth, 145 Va. 800, 133 S.E. 764, 767 (1926).

<sup>9</sup>"[B]urglary . . . is . . . the breaking and entering of a dwelling house of another in the nighttime, with intent to commit a felony therein, whether the felony be actually committed or not." Fidelity & Cas. Co. v. Wathen, 205 Ky. 511, 266 S.W. 4, 5 (1924).

to negative deliberation and premeditation. If the defendant were found incapable of deliberation and premeditation, a verdict of murder in the second degree might, nevertheless, be proper. A majority of the courts that have accepted the doctrine have been reluctant to extend the reduction beyond murder in the second degree.<sup>10</sup>

Two recent cases have reached opposite conclusions as to the acceptance of this doctrine. The United States Court of Appeals for the District of Columbia in *Stewart v. United States*<sup>11</sup> held, on third appeal, that there was no error on the part of the District Court in refusing to give an instruction which would allow the jury to consider the diminished intellect of the defendant as a factor which could reduce the degree of the offense. In this case the accused was charged with first degree murder and robbery. At the trial, it was revealed that prior to the offense Stewart had been engaged in a card game at his home. During the evening he excused himself from the game and proceeded to a nearby grocery where he made a few small purchases. Upon being informed by the proprietor that it was closing time, Stewart drew a gun and demanded the money in the cash register. He shot the proprietor, killing him instantly, scooped up about \$400 and fled. He returned to the card game and continued playing until two o'clock the following morning. At the trial, a psychiatrist who testified for the defendant stated that, in his opinion, Stewart was suffering from a severe mental illness<sup>12</sup> when he committed the crime; that the results of intelligence tests placed him in the moron category;<sup>13</sup> and that he was not malingering during the tests. Expert witnesses for the prosecution stated that the results of their investigations revealed that the accused was mentally retarded but not mentally defective.<sup>14</sup> The case was reversed on appeal twice,<sup>15</sup> but at the third trial the Court of Appeals rejected the partial responsibility test and held Stewart guilty of first degree murder.

Conversely, the Supreme Court of New Mexico, in *State v. Padilla*,<sup>16</sup> found error in the failure of the court below to give an instruc-

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<sup>10</sup>See note 25 infra. But see *State v. Green*, 78 Utah 580, 6 P.2d 177, 186 (1931).

<sup>11</sup>275 F.2d 617 (D.C. Cir. 1960).

<sup>12</sup>"[M]anic depressive psychosis." 275 F.2d at 620 (1960). See 2 Gray, *Attorneys' Textbook of Medicine* ¶ 103 (3d ed. 1949).

<sup>13</sup>Perkins, *Criminal Law* 741 (1957). Under the Binet classification, a moron is a person whose I.Q. falls in the range of 50-59 (low grade) and 60-69 (high grade).

<sup>14</sup>The term mentally retarded is distinguished from mentally defective in this case in that it defines one with low intellect as opposed to one who has either a congenital or post natal mental illness, i.e., neurosis or psychosis. 275 F.2d at 620.

<sup>15</sup>214 F.2d 879 (D.C. Cir. 1954); 247 F.2d 42 (D.C. Cir. 1957).

<sup>16</sup>66 N.M. 289, 347 P.2d 312 (1959).

tion which would allow the jury to consider the defendant's mental condition as relating to his ability to premeditate. Padilla was charged with first degree murder, having carnal knowledge of a child and kidnapping. Prior to the crimes, Padilla drank beer for some twelve hours and during that time smoked marijuana cigarettes. Afterwards, he drove to the home of the child and abducted her. He raped the child and stabbed her to death with a screwdriver. In holding the partial responsibility rule applicable, the court noted the use of alcohol and narcotics, but stated that the rule could be applied due to the defendant's diminished intellect.<sup>17</sup>

The District of Columbia Circuit has resisted the adoption of the theory of partial responsibility since it was first proposed in *Guiteau's Case*<sup>18</sup> in 1882. This was the celebrated case of the assassin of President Garfield. Before the murder, Guiteau had concluded that "the President's removal was a political necessity," because he had destroyed the Republican Party by creating two divided factions; and by this "removal" the party would be united and the government would be saved from falling into the hands of ex-rebels and their northern sympathizers. For this act Guiteau expected to receive the accolade of the American people. Speaking of these strange motives and expectations, the court said that a consideration of partial insanity was too difficult for a jury and that the administration of justice would be on surer ground by adhering to the "right and wrong" test<sup>19</sup> as the primary test of insanity. The court reaffirmed its position in 1885<sup>20</sup> saying that the law did not recognize degrees of insanity; therefore the principal test was that of the *M'Naghten Case*,<sup>21</sup> i.e., the "right and wrong" test. However, there was a shift in the court's view in *Durham v. United States*.<sup>22</sup> In that case the court adopted a rule similar to the one in effect in New Hampshire since 1871 under which an accused must be acquitted if his crime is a product of mental disease or mental defect.<sup>23</sup> Fourteen days after pronouncing the "prod-

<sup>17</sup>347 P.2d at 315.

<sup>18</sup>10 Fed. 161 (D.C. Cir. 1882).

<sup>19</sup>This is the rule propounded as a result of the famous *M'Naghten Case*, 10 Clark & Fennelly 200, 8 Eng. Rep. 718, 721 (1843), which stated that one was insane when he "was labouring 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."

<sup>20</sup>*United States v. Lee*, 4 Mackey 489, 54 Am. Rep. 293 (D.C. Cir. 1885).

<sup>21</sup>54 Am. Rep. at 294.

<sup>22</sup>214 F.2d 862 (D.C. Cir. 1954). See generally, Annot., 45 A.L.R.2d 1447 (1956); Kalven, *Insanity and the Criminal Law—a Critique of Durham v. United States*, 22 U. Chi. L. Rev. 317 (1955); 53 Mich L. Rev. 963 (1955); 40 Va. L. Rev. 799 (1954).

<sup>23</sup>*State v. Jones*, 50 N.H. 369 (1871).

uct rule" in the *Durham* case, the Court again refused to accept the doctrine of partial responsibility in the second appeal of the *Stewart* case. The court said:

"[W]e have concluded that reconsideration of [the rejection of partial responsibility]<sup>24</sup> . . . should wait until we can appraise the results of the broadened test of criminal responsibility which we recently announced in *Durham*. Only upon such an appraisal will it be possible to determine whether need for the rule remains."<sup>25</sup>

In other words, the court intimated that it found merit in the partial responsibility doctrine, but thought that the necessity for the rule might have been eliminated by the adoption of the "product rule." However, partial responsibility differs from the "product rule" in that the former is not a total defense. It only reduces the degree of the offense. Therefore, it is not entirely sound for the court to seek to apply a test which would render the accused not criminally responsible in a situation where the chief aim is the reduction of the degree of guilt. In *Stewart* the court finally rejected the doctrine, stating that the problem of applying the results of modern psychiatry was "beyond the competence of the judiciary."<sup>26</sup>

Before *Padilla*, the courts in six states had accepted the doctrine of partial responsibility.<sup>27</sup> The language in the *Padilla* case points out quite clearly the scope of the doctrine:

"[Partial responsibility] means the allowing of proof of mental derangement short of insanity as evidence of lack of deliberate or premeditated design. In other words, it contemplates full responsibility, not partial, but only for the crime actually committed."<sup>28</sup>

In applying the doctrine the court recognized that while the defendant may not have been insane to an extent that would absolve

<sup>24</sup>This court had rejected the doctrine of partial responsibility previously in 1945 in *Fisher v. United States*, 149 F.2d 28 (D.C. Cir. 1945). On appeal, the Supreme Court stated that an explicit instruction on partial responsibility was unnecessary because the instructions given had properly covered the questions of deliberation and premeditation, irresistible impulse, malice and insanity. Justice Frankfurter, in a vigorous dissent, attacked these instructions as "threadbare generalities" and "empty abstractions . . . mingled with talk about mental disease." *Fisher v. United States*, 328 U.S. 463, 487 (1946).

<sup>25</sup>214 F.2d at 883.

<sup>26</sup>275 F.2d at 624.

<sup>27</sup>*Hopkins v. State*, 180 Ind. 293, 102 N.E. 851 (1913); *People v. Moran*, 249 N.Y. 179, 163 N.E. 553 (1928); *Pigman v. State*, 14 Ohio 555 (1846); *State v. Green*, 78 Utah 580, 6 P.2d 177 (1931); *Dejarnette v. Commonwealth*, 75 Va. 867 (1881); *Oborn v. State*, 143 Wis. 249, 126 N.W. 737 (1910).

<sup>28</sup>347 P.2d at 314.

him from all punishment, yet he may have been incapable of the premeditation and deliberation necessary to constitute first degree murder. In a similar situation, he may have been incapable of forming the requisite intent of the underlying felony in a felony murder.<sup>29</sup>

The doctrine has been rejected in nine states<sup>30</sup> and in the federal courts.<sup>31</sup> Generally, the states which have rejected the doctrine have declared that the *M'Naghten* rule is the primary test of insanity.<sup>32</sup> When the District of Columbia Circuit adopted the "product rule," the *M'Naghten* test was apparently discarded. Nevertheless, recent decisions by that Court indicate that the "product rule" merely supplements the *M'Naghten* test.<sup>33</sup>

A result similar to that sought to be achieved by the rule of partial responsibility is found elsewhere in the law.<sup>34</sup> In the majority of states, voluntary intoxication may be regarded as material in reducing the degree of a crime in that the intoxication renders the accused incapable of forming the particular mental state required to establish guilt.<sup>35</sup> Some jurisdictions also recognize that the effects of drugs,<sup>36</sup> worry,<sup>37</sup> disease,<sup>38</sup> and lack of sleep<sup>39</sup> will preclude the requisite mental state and thereby reduce the degree of the offense. Under any of the foregoing theories the result is the same—the reduction of the degree of the crime due to the inability of the defendant to entertain the requisite mental state, *i.e.*, deliberation and premeditation or specific

<sup>29</sup>See note 6 *supra*.

<sup>30</sup>*Hall v. State*, 248 Ala. 33, 26 So. 2d 566 (1946); *Daniels v. State*, 186 Ark. 255, 53 S.W.2d 231 (1932); *Everett v. State*, 97 So. 2d 241 (Fla. 1957); *Reece v. State*, 212 Ga. 626, 94 S.E.2d 723 (1956); *Stewart v. State*, 203 Miss. 295, 33 So. 2d 787 (1948); *State ex rel. Standefer v. England*, 328 S.W.2d 732 (Mo. Ct. App. 1959); *State v. Schlaps*, 78 Mont. 560, 254 Pac. 858 (1927); *State v. Byrd*, 229 S.C. 593, 93 S.E.2d 900 (1956); *Martinez v. State*, 333 S.W.2d 370 (Tex. Crim. App. 1960).

<sup>31</sup>275 F.2d at 623.

<sup>32</sup>See cases cited at note 30 *supra*.

<sup>33</sup>*Douglas v. United States*, 239 F.2d 52, 58 (D.C. Cir. 1956); *United States v. Fielding*, 148 F. Supp. 46 (D.D.C. 1957).

<sup>34</sup>The fact that the accused is a person of low intelligence or that by virtue of a mental or neurological condition his ability to adhere to the right is diminished may be a mitigating factor. *Manual for Courts-Martial, United States* ch. 24, ¶ 123 (1951).

<sup>35</sup>22 C.J.S. Criminal Law § 68 (1940).

<sup>36</sup>*State v. Close*, 106 N.J.L. 321, 148 Atl. 764 (Ct. Err. & App. 1930); *People v. Samenige*, 118 Cal. App. 165, 4 P.2d 809 (Dist. Ct. App. 1931); *Johnson v. State*, 32 Ala. App. 217, 24 So. 2d 228 (1946); *State v. White*, 27 N.J. 158, 142 A.2d 65 (1958); *Milburn v. Commonwealth*, 223 Ky. 188, 3 S.W.2d 204 (1928). See generally, 22 C.J.S. Criminal Law § 72 (1940).

<sup>37</sup>*Johnson v. State*, 32 Ala. App. 217, 24 So. 2d 228, 230 (1945); *State v. Close*, 106 N.J.L. 321, 148 Atl. 764 (Ct. Err. & App. 1930); *State v. Thompson*, 110 Utah 113, 170 P.2d 153, 158 (1946).

<sup>38</sup>*Ibid.*

<sup>39</sup>*Ibid.*

intent. It seems incongruous that some states accept the doctrine of voluntary intoxication while rejecting that of partial responsibility.<sup>40</sup>

The final application of the doctrine rests with the jury and is useful only insofar as it enables them to arrive at a verdict which is as appropriate as humanly possible. The proper application of this test is difficult, but no more so than the application of a great many principles to be found in the law.<sup>41</sup> The goal of our system of jurisprudence is equal justice, and the difficulty of arriving at this end cannot be allowed to constitute a bar. The reluctance of a court to adopt the doctrine may be seen in the practical argument that its acceptance would allow mentally affected criminals to be released and returned to society sooner than a criminal who is not similarly affected.<sup>42</sup> However, once a court takes this position it has admitted the verity of the doctrine. The solution lies not in rejecting the doctrine but in providing facilities for the rehabilitation of such persons. Modern psychiatry recognizes that many varying degrees of mental aberration exist.<sup>43</sup> There is not, as the language of the courts in the earlier cases would indicate, a distinct line between the sane and the insane.<sup>44</sup> Our society demands that the weight of criminal responsibility placed on the mentally afflicted be lessened with the increase in the degree of the affliction. The rule of partial responsibility is not a panacea, yet it is a worthy supplement and must be urged on our courts as another logical step in the orderly progress of criminal justice.

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<sup>40</sup>See note 30 supra. *Dyer v. State*, 214 Ala. 679, 4 So. 2d 311, 314 (1941); *Hankins v. State*, 206 Ark. 881, 178 S.W.2d 56 (1944); *Garner v. State*, 28 Fla. 113, 9 So. 835, 845 (1891); *Edwards v. State*, 178 Miss. 696, 174 So. 57, 58 (1937); *State v. Reagin*, 64 Mont. 481, 210 Pac. 86, 88 (1922); *State v. McCants*, 1 Speer 384 (S.C. 1843). But see *State v. Shipman*, 354 Mo. 265, 189 S.W.2d 273, 274 (1945); *Dubois v. State*, 164 Tex. Crim. App. 557, 301 S.W.2d 97, 101 (Crim. App. 1957).

<sup>41</sup>A jurv faces the same problem in applying the test of partial responsibility as it does in applying the "right and wrong" test, "irresistible impulse," and the "product rule," that is, reaching a verdict on the basis of expert testimony.

In the law of damages: "Translating pain and anguish into dollars can, at best, be only an arbitrary allowance, and not a process of measurement, and consequently the judge can, in his instructions, give the jury no standard to go by; he can only tell them to allow such amount as in their discretion they may consider reasonable." *McCormick, Damages* 318 (1935).

In the law of torts: "It is difficult to escape the conviction that the refinements which have been developed in instructing the jury (on the reasonable man test), in the effort to avoid any personal standard, are artificial and unreal, and beyond the comprehension of the average man in the box." *Prosser, Torts* 125 (2d ed. 1955).

<sup>42</sup>*Commonwealth v. Szachewicz*, 303 Pa. 410, 154 Atl. 483, 484-85 (1931).

<sup>43</sup>*Symposium on Criminal Responsibility*, 4 Kan. L. Rev. 349 (1956).

<sup>44</sup>*Holloway v. United States*, 148 F.2d 665 (D.C. Cir. 1945); *Guiteau's Case*, 10 Fed. 161 (D.C. Cir. 1882); *United State v. Lee*, 4 Mackey 489, 54 Am. Rep. 293 (D.C. Cir. 1885).