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## Partial Insanity As Affecting the Degree of Crime—A Commentary on *Fisher v. United States*

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... no man shall be deprived of life, liberty,  
or property except by due process of law . . . .

"IF A DOCTOR were to bleed his patients with leeches today, or if a psychiatrist were to attribute insanity to the moon, the hue and cry would be tremendous. And yet instance after instance may be pointed out wherein the law has remained, sometimes for hundreds of years, curiously rigid, despite the changes in scientific opinion upon which that law was based. Many rules in the criminal law are still affected by early views concerning psychology, which views are now outmoded or repudiated by newer discoveries through experimentation. A large number fail utterly to take cognizance of advances in education and educational methods."<sup>1</sup> Such an indictment may, in my opinion, be properly levelled against the recent decision of the United States Supreme Court in the case of *Fisher v. United States*,<sup>2</sup> in which the obsolete, if at all applicable, "right and wrong" test of

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<sup>1</sup> Woodbridge, *Some Unusual Aspects of Mental Irresponsibility in the Criminal Law* (1938-39) 29 J. CRIM. LAW & CRIMINOLOGY 822.

<sup>2</sup> (June 10, 1946) ..... U. S. ...., 66 Sup. Ct. 1318. This was a five-to-three decision, Jackson, J., not participating, with Frankfurter, Murphy and Rutledge, JJ., writing individual dissenting opinions.

insanity of the century-old *McNaghten* case,<sup>3</sup> came in for its share of legal ancestry worship.

The salient facts of the *Fisher* case, as reported, were these:<sup>4</sup> "The homicide took place in the library building on the grounds of the Cathedral of Saint Peter and Saint Paul, Washington, D.C., between eight and nine o'clock, a.m., on March 1, 1944. The victim was the librarian. She had complained to the verger a few days before about petitioner's care of the premises. The petitioner was the janitor. The verger had told him of the complaint. Miss Reardon [the librarian] and Fisher were alone in the library at the time of the homicide. The petitioner testified that Miss Reardon was killed by him immediately following insulting words<sup>5</sup> from her over his care of the premises. After slapping her impulsively, petitioner ran up a flight of steps to reach an exit on a higher level but turned back down, after seizing a convenient stick of firewood, to stop her screaming. He struck her with the stick and when it broke choked her to silence. He then dragged her to a lavatory and left her body to clean up some spots of blood on the floor outside. While Fisher was doing this cleaning up, the victim 'started hollering again.' Fisher then took out his knife and stuck her in the throat. She was silent. After that he dragged her body down into an adjoining pump pit, where it was found the next morning." Fisher was tried before the District Court for the District of Columbia, convicted of first-degree murder and sentenced to be executed. On appeal to the United States Court of Appeals for the District of Columbia, the judgment and sentence of the district court were affirmed.<sup>6</sup>

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<sup>3</sup> (1843) 10 Cl. & Fin. 200, 8 Eng. Rep. 718. This test of sanity grew out of questions propounded to the House of Lords as to what constituted insanity for the purpose of absolving one of responsibility for crime. The test, as stated in full, was "... the jurors ought to be told in all cases . . . that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused 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." (Italics added.) The "know the nature and quality of his act" test, as an alternative of the "right and wrong" test, if it was so meant to be, appears not to have been as widely adopted as the "right and wrong" test. For a discussion of this point, see WEIHOFFEN, *INSANITY AS A DEFENSE IN CRIMINAL LAW* (1933) 36 *et seq.*

<sup>4</sup> This statement of facts is taken directly from the opinion. 66 Sup. Ct. at 1319.

<sup>5</sup> According to one of the dissenting opinions, the insult referred to by the Court was the librarian's reference to Fisher as a "black nigger". 66 Sup. Ct. at 1326, 1329.

<sup>6</sup> (App. D. C. 1945) 149 F. (2d) 28. It is interesting to note that the court of appeals disposed of the case in a decision covering a little over a page and devoted little discussion to the principal argument in the case. See *infra* note 49.

It was not disputed that Fisher committed the homicide with which he was charged, nor does it appear from the evidence adduced, among which was a confession by Fisher, that any question of his having committed the deed could have been raised. The principal contention of the defense, based upon expert testimony, was that the defendant, because of mental disorder, short, however, of insanity in the commonly accepted legal sense, was incapable of exercising the "deliberation" and "premeditation" required for the crime of first-degree murder. No opinion is offered herein as to whether or not the testimony introduced—as to the condition of the defendant's mind at the time of the commission of the homicide—was sufficient to prove, or could have proved, that the defendant's mind was affected as contended; this discussion radiates from and around the rigid legal proposition laid down by the Court to the effect that only insanity in the legal sense, *i.e.*, inability to distinguish between right and wrong, can be submitted to and considered by the jury for the purpose of determining the responsibility or lack of responsibility of the defendant for the crime charged, irrespective of the nature of the crime. With this in mind, I shall undertake to discuss and evaluate some of the lines of argument pursued by the Court.

First of all, the Supreme Court, without hesitation and without questioning its applicability to factual situations of the kind before it, employed, as one of the principal grounds of its decision, what is known as the "right and wrong" test of insanity, which grew out of the ancient English case of *Regina v. McNaghten*. The Court, early in its opinion, said, rather abruptly: "He [the defendant] knew right from wrong",<sup>7</sup> citing the *McNaghten* case, and from there on out such was the test of Fisher's responsibility for the crime charged. Before proceeding further, it might be said, however, that the Supreme Court is not alone in its stereotyped application of the "right and wrong" test; many other of the American jurisdictions have also religiously invoked it.<sup>8</sup> The discussions and criticisms herein are, therefore, directed as well against these jurisdictions.

The application of the *McNaghten* case, without discrimination, has been forcefully criticized by members of both the legal and medical professions ever since its enunciation,<sup>9</sup> and especially in recent

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<sup>7</sup> 66 Sup. Ct. at 1320.

<sup>8</sup> 66 Sup. Ct. at 1324, n. 12.

<sup>9</sup> 2 STEPHEN, HISTORY OF CRIMINAL LAW (1883) 124-186; MAYNE, IND. CRIM. LAW (1896) 368.

years.<sup>10</sup> As a matter of law, the case had no binding force, for the rules laid down therein regarding the effect of insanity on criminal responsibility were merely the opinions of certain of the judges of the English House of Lords. The *McNaghten* case proper had already been decided when these rules were announced. McNaghten, who was a paranoiac and not insane at all when measured by the present legal test, had been already acquitted on the ground of insanity, which took the form of insane delusions and an irresistible impulse. The majority of the American jurisdictions, by virtue of allegiance to the "right and wrong" test, will not recognize insanity of this form as a defense.<sup>11</sup> If the rules attributable to the *McNaghten* case had been applied to the facts of that case, McNaghten could not himself have been acquitted, but the fact is, he was. It is thus questionable whether the judges in the *McNaghten* case intended the rules set forth therein to be indiscriminately applied to all defenses based on mental disorder, or whether they intended them to be applied only to the condition of mind denominated "insanity". In this connection, one English writer said: "... the McNaghten Rules were not intended by the judges to be the last word on the law of insanity. True, they contain a great deal of new matter, for much of which there is no authority in earlier cases, or in any textbook, or statute: but no one recognized better than the judges themselves the limitations of their medical knowledge, the infinite variety of possible facts of cases, and the danger of impeding justice and handicapping judges by fixed rules: perhaps that is why the Answers [establishing the rules] were made as vague as they are."<sup>12</sup>

Although the rules promulgated in *McNaghten's* case were actually dicta, over the course of time they have attained authority. However, the rules as interpreted, adopted and perpetuated are narrower in scope than the opinions in the case warranted or intended. There is evidence in the *McNaghten* case itself that some individualization in the application of the rules laid down was contemplated. In answering the third question propounded, the judges said: "... the usual course therefore has been to leave the question to the jury, whether the party accused had a sufficient degree of reason to know

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<sup>10</sup> Barnes, *A Century of the McNaghten Rules* (1944) 8 *CAMP. L. J.* 300; Aschaffenburg, *Psychiatry and Criminal Law* (1941-42) 32 *J. CRIM. LAW & CRIMINOLOGY* 3, 6-7; Streit, *Psychiatry and the Law* (1933) 8 *NOTRE DAME LAW.* 146.

<sup>11</sup> GLUECK, *MENTAL DISORDER AND THE CRIMINAL LAW* (1925) 264-273; WEIHOFEN, *op. cit.* *supra* note 3, at 44 *et seq.*

<sup>12</sup> Barnes, *op. cit.* *supra* note 10, at 319.

that he was doing an act that was wrong; and this course we think is correct, *accompanied with such observations and explanations as the circumstances of each particular case may require.*"<sup>13</sup>

One of the reasons for the continual misapplication of the *McNaghten* rules by many American jurisdictions is, in my opinion, their adamant refusal to accept the presently established and proved scientific fact that "insanity" is only one of the many forms of mental disorder which may condition human behavior.<sup>14</sup> When, on occasions, the term "insanity" is used by psychiatrists, it is used generically to include all of the diseases which affect the mind, and not, as does the law, to refer only to that condition of the mind which prevents one from distinguishing between right and wrong.<sup>15</sup> Properly looked at, however, "insanity" is a species of mental disorder. If thus considered, it is apparent that the "right and wrong" test of the *McNaghten* case, while possibly appropriate for the determination of responsibility when the defense is insanity, does not necessarily preclude consideration of other forms of mental disorder for the effect they may have on criminal responsibility.

The view of the American jurisdictions which follow the "right and wrong" test is that for the purpose of determining responsibility for crime individuals are to be divided into two classes only, *viz.*, the wholly sane and the wholly insane, a classification with which the medical profession bitterly disagrees. One critic of the law put it thusly: "The old common law authorities took the ground that sanity and insanity are states as clearly and absolutely distinguishable as are coverture and noncoverture; and that men are either wholly sane, so as to be responsible, or wholly insane, so as to be wholly irresponsible. This principle, however, is now abandoned as based on a psychological untruth. There are many degrees both of sanity and insanity, and the two states approach each other in imperceptible gradation, melting into each other, . . . as day melts into night."<sup>16</sup> Thus

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<sup>13</sup> *Regina v. McNaghten*, *supra* note 3, at 723 (italics added).

<sup>14</sup> "The perennial conflict between members of the legal and medical professions on the question of the relation of mental abnormality to criminal responsibility is a matter of common knowledge." Streit, *loc. cit. supra* note 10. See also, Aschaffenburg, *loc. cit. supra* note 10.

<sup>15</sup> See Woodbridge, *op. cit. supra* note 1, at 824.

<sup>16</sup> 1 WHARTON, CRIMINAL LAW (1912) 85. To the same effect, see WHITE, INSANITY AND THE CRIMINAL LAW (1923) 89: "To conceive that an individual is either absolutely responsible or absolutely irresponsible is to fly in the face of perfectly patent facts that are in everybody's individual experience and is only comparable to such beliefs of the Middle Ages that a person is possessed of a devil or is not possessed of a devil, and there-

viewed, it would seem that the degree of responsibility might well fluctuate with the degree of insanity and, correspondingly, that the test of responsibility would fluctuate. The ability to distinguish between right and wrong might thus be relegated, as a test, to a state of mind which we might call "complete" insanity, resulting in complete absolution from criminal responsibility, and making it possible to employ other tests of responsibility which the mental condition of the defendant would show were appropriate under the circumstances.<sup>17</sup>

A reason the courts which follow the "right and wrong" test refuse to adopt the theory of "partial insanity" advanced by the medical profession—a term they use, because of the lack of a better one, to indicate something less than complete insanity—lies possibly in the confusion of the concept of partial insanity as used in the *McNaghten* case with its connotation when used by psychiatrists. The judges in the *McNaghten* case, in answering the first question propounded to them regarding "insane delusions as to particular persons or things only", spoke in terms of "monomania", one of the two early-conceived forms of "partial insanity".<sup>18</sup> One afflicted with "monomania" is allegedly sound in all other respects, but has strong, irresistible inclinations in certain other directions,<sup>19</sup> e.g., kleptomania, the impulse to

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fore is or is not a free moral agent." See also the dissenting opinion of Mr. Justice Murphy, 66 Sup. Ct. at 1332.

<sup>17</sup> The principle advocated here should not be confused with the pleas that have been urged by some writers for "partial" or "limited" responsibility. (See WEIHOFEN, *op. cit. supra* note 3, at 98-108, 411-415; ASCHAFFENBURG, *op. cit. supra* note 10, at 8.) The theory of "partial", "limited", or "semi-" responsibility admits, in my opinion, that the defendant is guilty of the crime charged, but for some reason or other—here, usually partial insanity—his responsibility should not be of the same degree as that placed upon a normal individual. My theory is, rather, "full" responsibility, but only for the crime *actually* committed. To take the *Fisher* case, for example, I do not claim for Fisher "limited" or "partial" responsibility for the crime of first-degree murder; rather, I say that he should be fully responsible for that crime if, after consideration of all relevant evidence, it is found that his mental condition was compatible with that crime. If, however, it is found that it was not, then he should have no responsibility whatever for first-degree murder, but full responsibility for whatever crime he did commit, assuming that it could be found that his mental condition was compatible with some one of the types of unlawful homicides. In this connection, see GLUECK, *op. cit. supra* note 11, at 310, n. 1; Keedy, *Insanity and Criminal Responsibility* (1917) 30 HARV. L. REV. 535, 551-552; Weihofen, *Partial Insanity and Criminal Intent* (1930) 24 ILL. L. REV. 505, 514.

<sup>18</sup> Lord Hale stated that "partial" insanity was of two kinds: partial as to subjects or things and partial as to degree. 1 HALE, PLEAS OF THE CROWN 30.

<sup>19</sup> HALE, *loc. cit. supra* note 18: "Some persons, that have a competent use of reason in respect of some subjects are yet under a particular *dementia* in respect of some particular discourses, subjects, or applications."

steal, or pyromania, the impulse to set fire to objects. This concept of "partial insanity", which was rejected by the courts as a defense to criminal prosecution, has as well been entirely rejected as unsound by medical science, but not for the same reason. According to psychiatrists, a theory of "monomania", whereby one is insane in one respect and sane in all others, presupposes an organization of the mind that does not exist; it assumes that a mind is divided into independent compartments, it being possible for one of the compartments to be disordered while the others function perfectly. This, they say, is not so; the mind functions as an integrated whole. If any weaknesses exist in the mind at all, they attach to and are a product of the mind as a whole.<sup>20</sup> "Monomania" and other forms of mental disorder amounting to less than complete insanity, are what the psychiatrists mean by "partial insanity". The mind, in such cases, is affected as a whole, but the individual so afflicted may still be able to act sanely in some respects and know the difference between right and wrong. Unlike the law, medical science says that "monomania" is a weakness of the mind as a whole, taking the form of irresistible impulses in certain directions and, like other forms of mental disorder short of complete insanity, should be considered in the determination of criminal responsibility and the amount of punishment to be inflicted upon one charged with crime. The courts which have adopted the theory of the *McNaghten* case, possibly originally through confusion of concepts, and now through apparent stubborn reluctance to accept the findings of medical science, arbitrarily refuse to permit "irresistible impulse" or any other form of mental disorder short of "legal insanity" to be interposed as a defense for the purpose of affecting responsibility or the degree of responsibility for crime.

The evidence introduced by Fisher tended to show that he was mentally somewhat below the average,<sup>21</sup> that is, he was afflicted, apparently, with one or another of the degrees of feeble-mindedness. It is generally known that a person of weak mind may be more susceptible to impetuosity and lack of judgment, *i.e.*, in inability to weigh facts, than is one of normal mind. "Especially when accompanied by psychoses, feeble-mindedness may lead to the more serious crimes of violence. There is often in these cases very poor judgment

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<sup>20</sup> "There is not, and there never has been, a person who labours under partial delusion only, and is not in other respects insane." MERCIER, CRIMINAL RESPONSIBILITY (1926) 198. See also Weihofen, *op. cit. supra* note 17, at 509; Barnes, *op. cit. supra* note 10, at 305.

<sup>21</sup> 66 Sup. Ct. at 1320.

and inability to foresee the consequences of an act; and the control and guidance of instinctive behavior is defective. Further, feeble-minded persons are unusually suggestible and imitative."<sup>22</sup>

It seems unreasonably arbitrary and unjust in the light of present-day medical knowledge for the law to consider only "complete" insanity in determining responsibility or the lack of responsibility, giving no effect whatever to other forms of mental disorder. The aim of the law as an institution or system is the administration of justice. Although it is realized that it is not possible to achieve that aim in each individual case, condemnation of the law is justified when no attempt is made to wade through facts upon which justice must necessarily be based because of mere difficulty of administration. Facility of administration of a particular law is a poor excuse for its existence, especially where its application results in obvious injustice.<sup>23</sup> No quarrel could be had if in factual situations like that in the *Fisher* case a jury were to find no merit in a plea of irresponsibility, or limited responsibility,<sup>24</sup> by reason of mental disorder existing at the time of the commission of the crime. On the other hand, a rule of law which precludes submission of facts to a jury which are clearly material to the issue of the defendant's responsibility, or the degree of his responsibility, is justly open to censure and reproof.

True, as the Supreme Court stated, the trial court in the *Fisher* case submitted to the jury the issues of insanity, irresistible impulse, malice, deliberation and premeditation,<sup>25</sup> but, as the dissent rightly stated, those instructions "consisted of threadbare generalities, a jumble of empty abstractions."<sup>26</sup> In answer to this contention on the

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<sup>22</sup> GLUECK, *op. cit. supra* note 11, at 334.

<sup>23</sup> As illustrative of the attitude of the courts in this connection, consider the following statement by the court of appeals: "In the determination of guilt age old conceptions of individual moral responsibility cannot be abandoned without creating a laxity of enforcement that undermines the whole administration of criminal law." *Fisher v. United States*, *supra* note 6, at 29. On the objections raised against recognition of partial insanity, including the one referred to by the court of appeals, and an attempt at resolution of these objections, see Weihofen, *op. cit. supra* note 17, at 521-527.

<sup>24</sup> See *supra* note 17.

<sup>25</sup> The trial court's charge with respect to these matters is set forth in a footnote to the opinion. 66 Sup. Ct. 1320, n. 3.

<sup>26</sup> Of this portion of the charge, Mr. Justice Frankfurter, in his dissenting opinion, said: "As I have already indicated, I do not believe that the facts warrant a finding of premeditation. But, in any event, the justification for finding first-degree murder premeditation was so tenuous that the jury ought not to have been left to founder and flounder within the dark emptiness of legal jargon. The instructions to the jury on the vital issue of premeditation consisted of threadbare generalities, a jumble of empty ab-



part of the dissent, the Court said: "We think the contention advanced is that the district judge should have specifically referred to the words of insult or have elaborated upon the details of the evidence in his charge with respect to premeditation."<sup>27</sup> The dissent did not, however, mean that at all; rather, they meant that instead of simply defining "insanity", "irresistible impulse", "malice", "premeditation", and "deliberation", the court should have clearly indicated to the jury just what effect the mental condition alleged could have upon the defendant's responsibility for the crime charged, instead of leaving it to the jury to unravel from the instructions given, the part, if any, such a plea would play in the case.<sup>28</sup> It is certainly possible, and quite probable, that the jury reached the verdict it did despite the fact that it found that the defendant was suffering from some form of mental disorder which contributed to the commission of the crime with which he was charged, but not having been so instructed, failed utterly to take such fact into consideration in deciding the defendant's degree of responsibility.<sup>29</sup>

Although Fisher's mental condition may not have been of such a nature as to absolve him completely from responsibility for the act he committed, it might, in my opinion, be considered as having been sufficient to absolve him completely of the charge of first-degree murder. Laying aside for the moment the "mitigation" or "reduction in degree" aspect, what of the Court's theory that the defendant was either wholly sane and responsible or wholly insane and irresponsible?

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stractions equally suitable for any other charge of murder with none of the elements that are distinctive about this case, mingled with talk about mental disease. What the jury got was devoid of clear guidance and illumination." 66 Sup. Ct. at 1330.

<sup>27</sup> *Ibid.* at 1321.

<sup>28</sup> As Mr. Justice Frankfurter put it: "Inadequate direction to a jury may be as fatal as misdirection. The observations made by this Court in a civil case are especially pertinent to the duty of a federal judge in a trial for murder; ' \* \* \* it is the right and duty of the court to aid [the jury] \* \* \* by directing their attention to the most important facts, \* \* \* by resolving the evidence, however complicated, into its simplest elements, and by showing the bearing of its several parts and their combined effect, stripped of every consideration which might otherwise mislead or confuse them. \* \* \* Constituted as juries are, it is frequently impossible for them to discharge their function wisely and well without this aid. In such cases, chance, mistake, or caprice, may determine the result.' " 66 Sup. Ct. at 1330.

<sup>29</sup> See *Sabens v. United States* (1913) 40 App. D. C. 440, 444: "While it is unlikely that the jury would return a verdict of murder in the first degree unless satisfied that the defendant, at the time he committed the offense, was capable of entertaining the malicious intent, we cannot, in a case of this kind, speculate as to what consideration entered into this verdict." To the same effect, see *Kwaku Mensah v. The King* [1946] A. C. 83. See also *supra* note 28.

The crimes of first- and second-degree murder are as much separate and distinct as are the crimes of receiving stolen goods and arson. First-degree murder, like receiving stolen goods, requires the presence of certain elements before such a crime can come into existence. As receiving goods that are stolen, knowing the same to be stolen, with felonious intent, are necessary elements of the crime of receiving stolen goods, so are premeditation and deliberation the *sine qua non* of the crime of first-degree murder. It is undisputed that if one receives goods, with a felonious intent, but which goods were not in fact stolen, as a matter of law there can be no conviction for the crime of receiving stolen goods—one of the elements essential to criminality is lacking. So should the situation be with regard to all crimes which are composed of several elements. Thus, in the crime of first-degree murder, if the essential elements of premeditation and deliberation are absent, that crime has not in fact been committed, just as burglary would not exist where there was no "breaking and entering". It is immaterial, in my opinion, to what the absence of premeditation and deliberation is attributable, so long as they are in fact absent. In this connection, it seems quite illogical to say that the presence of premeditation and deliberation may be negatived by intoxication and not by similar, but otherwise inspired, mental states. The Court itself, as well as others following the "right and wrong" test of responsibility, while not recognizing voluntary intoxication as a defense to first-degree murder, does recognize it for its possible effect upon the ability of one so situated to engage in the deliberation and premeditation required for such a crime. Recognition of this fact on the part of the Supreme Court is evidenced by *Hopt v. People*.<sup>30</sup> As the defense contended, and as it has been construed,<sup>31</sup> the language in the *Hopt* case was broad enough to permit a ruling that the presence of premeditation and deliberation at the time a homicide is committed may be negatived by states of mind other than intoxication. In the *Hopt* case, the Court said: "When a statute establishing different degrees of murder requires deliberate premeditation in order to constitute murder in the first degree, the question whether the accused is in such a condition of mind, by reason of drunkenness or otherwise, as to be

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<sup>30</sup> (1881) 104 U.S. 631.

<sup>31</sup> In *Hempton v. State* (1901) 111 Wis. 127, 135, 86 N. W. 596, 598, the Wisconsin supreme court, citing the language of the *Hopt* case referred to, stated: "The same rule that permits proof of intoxication as bearing on the question of malice, permits evidence of a disordered mental condition, however produced." See also *Weihofen, op. cit. supra* note 17, at 518-519.

incapable of deliberate premeditation, necessarily becomes a material subject of consideration by the jury."<sup>32</sup> True, the case involved the defense of intoxication, but the language used, contrary to the contention of the Court in the *Fisher* case, does not indicate an intention to restrict negation of premeditation and deliberation solely to instances of minds stupefied by alcohol. In commenting on the "or otherwise" in the above quotation, the Court said: "Since drunkenness alone is specifically mentioned, the 'or otherwise' may refer to various stages of intoxication."<sup>33</sup> This construction of the phrase "or otherwise" is, in my opinion, groundless and untenable. To interpret it to mean "various stages of intoxication" is to say that something less than "intoxication" would suffice to negative the presence of deliberation and premeditation, a thing which the Court did not mean to say. Unless the Court intended to be redundant, the "or otherwise" was meant to cover states of mind analogous to intoxication, as regards the question of premeditation and deliberation, but which arose from other causes.

Whenever the plea of insanity is raised and established, its effect on responsibility is not judged by reference to its cause. Insanity is a good defense whether resulting from disease, intoxication, or otherwise. Analogously, the admissibility of a defense of the lack of the essential element of deliberate premeditation, in the crime of first-degree murder, should not depend upon the cause of the absence of these elements; it should be immaterial whether this absence resulted from intoxication or some other form of mental lesion.<sup>34</sup> The essential question is, is the element of deliberate premeditation present?<sup>35</sup>

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<sup>32</sup> *Hopt v. People*, *supra* note 30, at 634 (italics added).

<sup>33</sup> 66 Sup. Ct. at 1324, n. 13.

<sup>34</sup> See *supra* note 31.

<sup>35</sup> "Now it is easily recognized, of course, that there are many conditions due to mental disease, where it would be the general or common sense verdict, that the individual in question, who committed the unlawful act, by reason of mental disease did not have such attributes of mind as would correspond to that definition, or did not have a sufficient mental capacity so that we would say, under such a view that he should be held responsible. . . . For instance, if we adopt the legal theory of responsibility as formulated by the committee of the Institute some years ago, which is in substance that the test to be applied is whether the individual had sufficient mentality so that at the time of the commission of the act he had the mental qualities or attributes which were essential constituents of that act, the inquiry would be, in regard to murder in the first degree, for example, as sometimes defined at least—was he capable mentally of forming the intent to kill? . . . Did he have mentality sufficient to deliberate upon the act?" Lindsey, *Criminal Responsibility of the Feeble-minded* (1922) 13 J. CRIM. LAW & CRIMINOLOGY 300.

Thus viewed, the result would be that as a matter of law Fisher's mental condition was material to the issue of the presence or absence of the elements of deliberation and premeditation, without which the crime of first-degree murder would not exist, and thus it was error to fail to submit this issue to the jury.<sup>36</sup>

The contention advanced in the immediately preceeding paragraphs is that if Fisher had been found to have been afflicted as contended and his act was attributable to that affliction, he would have been entitled to complete exoneration of the charge of first-degree murder, as the presence of essential elements of the crime would have been negated by the existence of such a condition. Thus, if, as the Court put it, the question is one of complete responsibility or complete irresponsibility, "partial insanity", in the sense used herein, may be a complete defense to some crimes—those which, like first-degree murder, require specific states of minds which are incompatible with the sort of mental disorder from which the defendant may be suffering. Of course, it is realized that "partial insanity" alone does not necessarily preclude the presence of the type of intent which may be necessary for criminality; the argument is that if a causal relationship can be established between the act committed and the defendant's disordered state of mind,<sup>37</sup> no criminal responsibility should follow. In any event, a defendant should be permitted to submit to the jury all such issues, as being materially involved in the issue of his responsibility.

If, looking at the situation from another point of view, "partial insanity" is not to be considered a complete defense to charges of the nature of first-degree murder, it might, in any event, warrant a reduction to a crime of a lesser degree than that charged, *e.g.*, in the case of a charge of first-degree murder, reduction to second-degree

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<sup>36</sup> See Davidson, *Mental Deficiency and Criminal Responsibility* (1935) 1 N. J. L. REV. 123, 130: "The law presumes that every murder is in the second degree, and it imposes on the state the burden of proving the wilfulness and premeditation necessary to the more serious charge. One may ask whether feeble-mindedness or insanity might be insufficient to exculpate the defendant, but sufficient to prevent the State from proving the premeditation and deliberateness."

<sup>37</sup> Throughout this discussion there is the tacit assumption that the mental disorder and the illegal act are always related in a chain of cause and effect. As observed, however, by Glueck (*op. cit. supra* note 11, at 459), it cannot be said as a matter of certainty that the criminal act was the outgrowth of the defendant's disordered mental condition. "All that any expert can say in many of the cases is that there is a *reasonable probability* that an offense of the type involved would not have been committed but for the mental disorder; and the jury must decide whether the case under consideration falls within this probability."

murder.<sup>38</sup> Thus, if, in the *Fisher* case, the allegation of mental defect, to which the act committed could be attributed, could have been sustained, it should have warranted a reduction of the crime from first- to second-degree murder at least.<sup>39</sup> But neither could this result be achieved unless the Court permitted evidence of Fisher's mental condition to be considered by the jury as a material issue in the case. But, as shown, the Court refused to let this evidence go to the jury for any purpose.

In addition to allowing the interposition of the defense of intoxication to reduce first-degree murder to second, the courts uniformly allow heat of blood to reduce from murder to manslaughter. Now if heat of blood, which apparently is looked upon as a form of tem-

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<sup>38</sup> As intimated before, however, I do not subscribe to the theory of "reduction to a crime of lesser degree" as used. In my opinion, what actually happens, or should happen, considering the theory of responsibility advanced herein (*supra* note 17), is that the defendant is acquitted of the crime charged, because of the presence of some element which shows that for some reason or other it cannot be said that he committed that crime, and is convicted of the one he is found to have committed.

<sup>39</sup> Of course, the same argument advanced for acquittal of the charge of first-degree murder, *viz.*, the absence of an element essential to criminality by virtue of mental disorder, would apply as well to a charge of second-degree murder if the criminal intent necessary for that crime was found to be incompatible with the mental condition existing in the defendant at the time of the homicide. This suggests the possibility of finding persons who commit homicides under the conditions alleged to have existed in the *Fisher* case guilty of no greater a crime than manslaughter. Such a suggestion would probably, however, considering what is usually the temperament of the public when acts such as that done by *Fisher* are committed, be considered by the courts themselves—which frequently respond too readily to the not too well-considered judgment of the public on such occasions—to be no less than legal heresy. Generally, when atrocious and heinous crimes are committed, crimes which allegedly "shock" the public's sensibilities, the public is little inclined to consider the person who committed the crime; the greater part, if not all, of the emphasis is placed upon the deed committed. However, the atrocity of a crime does not alone determine criminality, nor does it determine the degree thereof. The matter of insanity is an illustration of this point. When a defendant is found to have been "legally" insane at the time the act was committed, the wickedness or baseness of his crime is considered immaterial to the question of responsibility. This is so because of the conclusive legal presumption against criminality which attaches to insanity. The situation should be no less so with regard to partial insanity. True, the law is expected to react to the temperament of the society of its day, but that does not mean reacting to a temperament that flares up in mob-like, blind desire-for-revenge fashion; this means a temperament that is properly displayed, through legislative or similar action. Public reaction to certain types of crimes are, for the most part, *ex post facto* in nature, and to allow it to enter into the determination of responsibility, or the degree of responsibility, would be no less objectionable than *ex post facto* laws.

In the light of the description of second-degree murder in the District of Columbia Code [see D. C. CODE (1940) § 22-2403] it may have been possible to find *Fisher* guilty of that crime, although his mental condition would have been incompatible with first-degree murder.

porary mental lesion, is receivable in mitigation of punishment, because of the law's "consideration for human weakness and frailty",<sup>40</sup> no logical reason exists for refusal to recognize other forms of mental states which may as well cause a similar kind of behavior, especially considering the fact that intoxication and heat of blood are, for the most part, voluntary acts, while mental disorders are generally afflictions of nature, for which the one so afflicted frequently is in noway responsible. It is no justification for the distinction existing in the law, as to the effect allowed intoxication and heat of blood and that allowed other forms of mental lesion, to say that intoxication and heat of blood are temporary conditions, determinable by objective standards, and other mental disorders are not. The question in each instance is, did some form of mental disorder, irrespective of its source, contribute to the act, and not did some form of mental lesion which is easily gauged do so.

While heat of blood may be more or less measured by objective standards, it is difficult to conceive how intoxication could be so measured any more than sanity or partial insanity. The determination of whether or not a particular defendant was in such a state of intoxication as would have the effect of reducing the crime charged to one of a lesser degree cannot, in my opinion, be made by reference to the mental control possessed by some "abstract" or "average" intoxicated man; this must be decided with reference to the condition of that particular defendant. No more than this is required when the defense is insanity or partial insanity. Just as medical science can gauge the degree of intoxication, so has it reached the stage where by means of widely accepted standards, it can determine the presence or absence of mental disorders short of complete insanity, chart their symptoms and predict their behavior; "... the fact that some difference of psychiatric opinion exists—a situation always found on the frontier of a young science—is no reason why the law should not avail itself of the scientific facts upon which all are agreed and which are susceptible of experimental proof."<sup>41</sup> Insanity is an accepted defense against criminal prosecution; yet, what constitutes insanity is in each instance a matter of medical proof, and this is so despite the fact that

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<sup>40</sup> *Mahe v. People* (1862) 10 Mich. 212, 219, 81 Am. Dec. 781: "the law, out of indulgence to the frailty of human nature, or rather, in recognition of the laws upon which human nature is constituted, very properly regards the offense [homicide committed in the heat of passion] as of a less heinous character than murder, and gives it the designation of manslaughter."

<sup>41</sup> *Streit, op. cit. supra* note 10, at 192.

a difference of opinion may exist among experts as to the mental condition of a defendant in a given case. The argument is, therefore, just as strong for the recognition of partial insanity as a defense, for whatever effect the evidence in a given case shows it should have.

Statutory enactments dividing murder into degrees were a recognition of the fact that different states of mind, requiring different degrees of censure and punishment, frequently accompanied the crime of murder. This trend constituted an attempt to make it possible to mete out justice more closely in individual cases than was true under the common-law classification of unlawful homicides.<sup>42</sup> In the District of Columbia, where Fisher committed the homicide for which he was prosecuted, murder was divided, in 1901, into degrees, *viz.*, first- and second-degree. The elements necessary for criminality were stipulated in each instance.<sup>43</sup> While the Supreme Court recognized that the "reason for the change, doubtless, lay in the wide range of atrocity with which the crime of murder might be committed so that Congress deemed it desirable to establish grades of punishment",<sup>44</sup> it is difficult to follow its conclusion that the "separation of the crime of murder into the present two degrees by the code of law for the District of Columbia, . . . is not significant in analyzing the necessity for the proposed submission of the evidence concerning petitioner's mental and emotional characteristics to the jury by specific instructions."<sup>45</sup> It appears to me that any factor which has a bearing on the amount or degree of punishment which should be meted out in a given case is of such significance as necessarily to require its submission to the jury. The contention of the defense was that by virtue of mental disorder, Fisher was incapable of committing the crime of first-degree murder, or, put more strongly, by virtue of not having the mental element or state required, he did not in fact commit the crime of first-degree murder. If such a contention was not "significant" in a prose-

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<sup>42</sup> "At the time of Coke, Hale, and other early writers on the criminal law, upon whom the courts like to rely today, murder and manslaughter only were recognized in the homicide cases. In the common law that situation still prevails. In many of our jurisdictions today there are, however, by statute, several degrees of homicide. It would seem that the very purpose of providing for degrees of homicide would be to mitigate, in certain cases, the former rigours of the common law." Woodbridge, *op. cit. supra* note 1, at 833. See also Wechsler and Michael, *A Rationale of the Law of Homicide: I* (1937) 37 COL. L. REV. 701, 703-704.

<sup>43</sup> See applicable sections of the District of Columbia statute. D. C. CODE (1940) §§ 22-2401, 22-2403, 22-2404.

<sup>44</sup> *Fisher v. United States*, *supra* note 2, at 1323.

<sup>45</sup> *Ibid.*

cution for first-degree murder, it is difficult to conceive of what would be.

The Court leaned heavily upon the fact that, in its opinion, the law contended for by the defendant was not, and never had been, the law of the District of Columbia, and cited *United States v. Lee*<sup>46</sup> as authority for its position. But, as the defense contended, the *Lee* case was decided at a time when murder was not divided into degrees, so that it cannot be said that the *Lee* case is necessarily authority for the proposition that mental conditions short of legal insanity are irrelevant in prosecutions in situations where murder is divided into degrees. The conclusion reached in the *Lee* case, considering the classification of unlawful homicides at the time it was decided, is quite understandable: the defendant must either have been found guilty of murder or of manslaughter, as there were no degrees of the crime of murder, and, as intimated before, the courts are frequently loath to find only manslaughter in such cases, especially where the crime is of a shocking or revolting nature.<sup>47</sup>

It is not altogether clear what the Court's reference to the division of common-law homicides into degrees, *viz.*, murder and manslaughter, was calculated to show. Apparently, it was intended to rebut the defendant's contention that the *Lee* case was no authority for the case at hand, it having been decided, as was stated above, at a time when murder was not divided into degrees. If this was its purpose, it was, in my opinion, ineffective, for it is an altogether different thing, from the point of view of practical administration of the criminal law, to say that "homicides" are divided into degrees and to say that "murder" is divided into degrees, just as there is a difference in the statement "the sexes are divided into male and female" and the statement "the male sex is divided into tall men and short men."

After concluding that the law contended for by the petitioner was not the law of the District of Columbia, the Court said: "For this Court to force the District of Columbia to adopt such a requirement for criminal trials would involve a fundamental change in the common law theory of responsibility. . . . Such a radical departure from the common law concepts is more properly a subject for the exercise of the legislative power or at least for the discretion of the courts of the District. The administration of criminal law in matters not affected by constitutional limitations or a general federal law is a matter

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<sup>46</sup> (1886) 4 Mackey (D. C.) 489, 54 Am. Rep. 293.

<sup>47</sup> See *supra* note 39.



peculiarly of local concern. . . . This Court has in a less important matter undertaken to adjust by decision an outmoded rule of the common law to modern conditions. But when that step was taken, it was declared that 'experience has clearly demonstrated the fallacy or unwisdom of the old rule.'"<sup>48</sup> It is submitted that "medical experience" has clearly demonstrated the fallacy and unwisdom of the old legal test of sanity and responsibility; and where to enforce or observe this old rule would result in a denial of due process of law, as in the *Fisher* case, the Supreme Court should unhesitatingly say "off with the old and on with the new", without regard to the fact that the matter may be one "peculiarly of local concern".

As to the Court's contention that the change, if any, should emanate from the legislature,<sup>49</sup> it is believed that legislative action is not necessary to obtain the desired change. First of all, the narrowness of the law of sanity and responsibility for crime is a result in the first instance of judicial misinterpretation and misapplication of the principles enunciated in the *McNaghten* case, and having thus been judicially imposed, the law is properly the subject of judicial amendment. Next, in dividing murder into degrees and specifying what constitutes first- and second-degree murder, the legislature has already clearly and effectively acted. The determination of whether or not the elements necessary to criminality exist in a given case is a matter for the court. As regards first-degree murder, the determination of whether or not the mental elements necessary for that crime exist in a particular case, and consideration of any and all facts necessary to such a determination, are no less judicial functions than the determination of a court in a prosecution for burglary of the presence or absence of the elements of "breaking and entering". It was for the court to say whether or not *Fisher* had committed the particular homicide with the deliberate premeditation necessary for criminality and, in reaching its conclusion, to say to what extent, if at all, his mental condition affected his ability to deliberate and premeditate, just as it passes upon the question of intoxication and its effect upon

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<sup>48</sup> 66 Sup. Ct. at 1324.

<sup>49</sup> The court of appeals approached the problem differently. It said: "Modern psychiatry has given us much scientific information which disturbs the former certainty of our judgments of individual responsibility and moral guilt. It has revolutionized the methods of treatment and rehabilitation of prisoners. But the principal place for the application of such a therapeutic point of view where the court exercises discretion in the amount of the sentence and in the treatment of criminals is in our penal institutions." *Fisher v. United States*, *supra* note 6, at 29.

the ability to perform those mental acts. It is the duty of the court to pass upon all matters which are of the essence of the crime charged; this obligation should not be shifted to the legislature upon the theory that this matter of substance, whose role has only recently been discovered, is "too extreme a departure" from an old rule, especially where to disregard such a matter would result in substantial injustice.

Although the Court stated that "no contention is or could be made of the denial of due process",<sup>50</sup> it is submitted that the denial to a defendant of the right and opportunity to show that he could not be guilty of the crime of first-degree murder because, by reason of mental defect or disorder, he did not or could not have the state of mind essential to criminality, is as much a denial of due process of law as it would be to deny a defendant in a prosecution for bigamy the opportunity to show in defense that his first spouse was in fact dead at the time of his second marriage, or to a defendant in a prosecution for rape that an alleged confession was extorted from him.<sup>51</sup> The Supreme Court, as the final protector and conservator of constitutional rights, has imposed upon it the obligation and duty to see that lower judicial bodies, both state and federal, operate in accordance with the rules which are designed to foster that brand of justice which underlies our constitutional concept of due process, and choices by local judicial bodies "between conflicting legal conclusions" which seem "nicely balanced" should not be left undisturbed, where modern experience proves that such choices proceed upon false premises and result in palpable injustice, especially where human life is involved.<sup>52</sup>

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<sup>50</sup> 66 Sup. Ct. at 1320.

<sup>51</sup> It has been held that a statute taking away the defense of "insanity" is unconstitutional, as violative of due process. See *Sinclair v. State* (1931) 161 Miss. 142, 132 So. 581; *State v. Strasburg* (1910) 60 Wash. 106, 110 Pac. 1020. Under accepted theories of constitutional law, the same result would attend an attempt by the judiciary to achieve such an end. Likewise, it would seem that a denial, by either the legislature or the judiciary, of the right to have the jury consider evidence of partial insanity, which tended to show that by reason thereof one did not, or could not, commit the crime with which he was charged, would be equally condemnable as violative of due process.

<sup>52</sup> "Men ought not to go to their doom because this Court thinks conflicting legal conclusions of an abstract nature seem to have been 'nicely balanced' by the Court of Appeals for the District of Columbia. The deference which this Court pays to that Court's adjudications in ordinary cases involving issues essentially of minor or merely local importance seems out of place when the action of this Court, no matter how phrased, sustains a death sentence at the seat of our Government as a result of a trial over which this Court, by direction of Congress, has the final reviewing power. This Court cannot escape the responsibility for the death sentence if it affirms the judgment. One can only hope that even more serious consequences will not follow, which would be the case if the Court's decision were to give encouragement to doctrines of criminal law that have

If admittedly "this Court has in a less important matter undertaken to adjust by decision an outmoded rule of common law to modern conditions", this attitude, which, in my opinion, is a proper one to possess in the administration of the law, is hardly reconcilable with the decision reached in the *Fisher* case.

It is unfortunate that the Supreme Court failed to avail itself of the opportunity presented by the *Fisher* case to set at rest a troublesome and uncertain area in the administration of the law of homicide, not only from the point of view of the federal judiciary, but also because of the influence such a decision would have commanded in the other American courts which are still ministering to the ancient "right and wrong" test of the *McNaghten* case.

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only obscurantist precedents of the past to recommend them." Frankfurter, J., dissenting in the *Fisher* case, 66 Sup. Ct. at 1331.