See: Minutes of Subcommittee No. 3
9/20/68, p. 1, Vol. XI
Tapes #19 and 20

CRIMINAL LAW REVISION COMMISSION
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ARTICLE 5. RESPONSIBILITY

Preliminary Draft No. 2, September 1968, including:

Section [1]. Partial responsibility due to impaired mental condition

Section [2]. Incapacity due to immaturity

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Subcommittee No. 3

ARTICLE 5. RESPONSIBILITY

Preliminary Draft No. 2; September 1968

Section [1]. Partial responsibility due to impaired mental condition. Evidence that the actor suffered from a mental disease or defect is admissible whenever it is relevant to the issue of whether he did or did not have a specific intent or purpose which is an element of the crime.

COMMENTARY - PARTIAL RESPONSIBILITY

A. Explanation

A defendant may be charged with a crime which includes an element such as specific intent or premeditation. Examples of these would be burglary, where the breaking and entering of a dwelling must be accompanied with a specific intent to commit a felony before the crime is complete, and first degree murder, where premeditation is required as an element. The defendant may not be insane within the meaning of the M'Naghten rule, but he may be suffering from a mental disease or defect which directly affects his capacity to form a specific intent or purpose. In this situation a growing number of jurisdictions now permit such defendant to introduce evidence of his mental condition to negate the element of specific intent or premeditation for the purpose of reducing the defendant's responsibility (and consequent punishment) to a lesser offense included with the crime charged. For example, a defendant charged with murder in the first degree may convince the jury he could not premeditate because of a mental condition. This would not enable the defendant to escape conviction entirely (as he would if he established his insanity under the M'Naghten rule). Instead the jury may find him guilty of the lesser included offense of either second degree murder or, perhaps, manslaughter.

The trend to the subjective theory of culpability embodied in the partial responsibility doctrine is apparent. Professor Goldstein says that in 1925 only two states subscribed to the doctrine. By 1967 a dozen had adopted the rule. In England the doctrine is called diminished responsibility and recently has been extended by statute to reduce murder to manslaughter. Goldstein, The Insanity Defense 195 (1967).

The Model Penal Code also recognizes the concept and adopts it in section 4.02 (1). In the comments to the

section it is said, "If states of mind such as deliberation or premeditation are accorded legal significance, psychiatric evidence should be admissible when relevant to prove or disprove their existence to the same extent as any other relevant evidence." MPC Comments, Sec. 4.02, T.D. No. 4 at 193 (April, 1955).

The comment to the proposed Michigan section adopting the doctrine of partial responsibility stresses the usefulness of the doctrine in that it gives the jury wide latitude in dealing with an offender. "The jury should not be placed totally in an 'either-or' position so far as the use of evidence relating to mental condition is concerned, and 'diminished responsibility' or 'impaired mental condition' should be something they can properly take into account."

The basic theory underlying the partial responsibility doctrine is that the verdict and sentence should be tied more accurately than in the past to the defendant's culpability. Few would quarrel with this commendable goal.

B. Derivation

The section is based on the MPC formulation of the partial responsibility doctrine in section 4.02 (1). The language of the draft section is the same as the Michigan formulation contained in section 710 of that state's proposed criminal code.

C. Relationship to Existing Law

Whether the partial responsibility doctrine is in effect in Oregon seems to be in doubt. The Oregon Supreme Court occasionally has referred to the doctrine but has never ruled squarely on the issue. In State v. Jensen, 209 Or 239 (1957), the court held that the doctrine could not be applied to reduce first degree murder arising from the felony murder doctrine to second degree murder or manslaughter. This case beginning at page 266 of the report examines other Oregon cases where the doctrine has been incidentally involved.

Adoption of the doctrine of partial responsibility would not be without analogous precedent in Oregon. ORS 136.400 (in effect since 1864) provides in part that "whenever the actual existence of any particular motive, purpose or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the defendant was intoxicated at the time, in determining the purpose, motive or intent with which he

committed the act." In fact the doctrine of partial responsibility has its origin in the early cases which admitted evidence of intoxication to negate the elements of murder in the first degree. Goldstein, The Insanity Defense 195 (1967).

The defense of partial responsibility is not too dissimilar to another defense familiar in Oregon and elsewhere -- the rule that a homicide will be reduced from murder to manslaughter if defendant killed in a "heat of passion" arising out of a "sufficient" provocation. See ORS 163.040. Adoption of the partial responsibility doctrine contained in the draft section seems, then, to be a natural extension of legal principles already well established in Oregon.

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TEXT OF REVISIONS OF OTHER STATES

Text of Model Penal Code

Section 4.02. Evidence of Mental Disease or Defect Admissible When Relevant to Element of the Offense

(1) Evidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove that the defendant did or did not have a state of mind which is an element of the offense.

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Text of Michigan Revised Criminal Code; Final Draft - September 1967

Section 710. Impaired Mental Condition. Evidence that the actor suffered from a mental disease or defect is admissible whenever it is relevant to the issue of whether he did or did not have a specific intent or purpose which is an element of the offense.

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Section [2]. Incapacity due to immaturity. (1) A person who is tried in a court of criminal jurisdiction:

(a) Is not criminally responsible for any conduct when the person was less than seven years old;

(b) Is presumed not criminally responsible for any conduct while the person was seven years of age or more but under the age of 14 years. The presumption in this subsection (b) is rebuttable by proving the person was competent to know the nature and consequences of his conduct and to appreciate that such conduct was wrong.

(2) A defense under this section is an affirmative defense.

COMMENTARY - IMMATURITY BARRING CRIMINAL RESPONSIBILITY

A. Explanation

The purpose of this section is to cover two groups of persons. Group one includes those who commit a criminal act before reaching age 18 but who, for one reason or another, are not apprehended until after reaching age 18 at which time the Oregon Juvenile Court loses all opportunity for acquiring jurisdiction. Group two includes those persons who commit a criminal act prior to reaching age 18 and who have come under the custody of the Juvenile Court but have been remanded to the criminal courts pursuant to ORS 419.533.

To illustrate the group one situation: the offender is 13 when he commits the criminal act but his part in the crime does not come to the attention of the authorities until the offender is 18 or over. Since he is not apprehended until he has reached age 18, he cannot be made a ward of the Juvenile Court. See ORS 419.476. Nor is there any sound policy reason for disposition as a ward of the Juvenile Court. The philosophy of Juvenile Court treatment is to keep one of tender years away from the criminal process, because it is believed he may be rehabilitated more readily in such case. But since the offender has reached at least age 18 at the time of his apprehension, reasons for treating him as a juvenile lose force. Nevertheless the fact that the act was committed at a tender age dictates that the offender be dealt with in a manner substantially different from offenders who were of mature age at the time of a

criminal act. Under the draft section the offender in the illustration above would be entitled at trial in a criminal court to the rebuttable presumption that he was not responsible. See subsection (1) (b), above.

The second group to be covered by the section is illustrated as follows: the youth commits the criminal act at age 13 but is not brought into custody of the Juvenile Court until he is 16 or 17 years old. If the Juvenile Court elects to remand the offender to the criminal courts, as it may under ORS 419.533, the offender when tried in the criminal court will have a rebuttable presumption of incapacity in his favor under subsection (1) (b) of the draft section.

The method employed in dealing with the offenders in the two groups discussed here is to establish for such offenders the Common Law rules of incapacity. The Common Law rules, formulated in the draft section, are explained in the following excerpt from Perkins:

> "While failing to develop techniques comparable to those found in modern juvenile court or youth-correction authority acts, the common law made a very reasonable approach to this problem by taking notice of two ages in order to give due recognition to individual differences. According to the common law a child under the age of seven has no criminal capacity; one who has reached the age of fourteen has the same criminal capacity as an adult, that is, he is fully accountable for his violations of law unless incapacity is established on some other basis such as insanity; while between the ages of seven and fourteen there is a rebuttable presumption of criminal incapacity and conviction of crime is permitted only upon clear proof of such precocity as to establish a real appreciation of the wrong done. This presumption is extremely strong at the age of seven and diminishes gradually until it disappears entirely at the age of fourteen, such references being to physical age and not to some so-called 'mental age.'" Perkins, The Criminal Law 729 (1957).

Subsection (2), Burden of proof. Under the Common Law the burden of proving capacity of young offenders to commit crimes was on the prosecution. The draft section continues this policy. The defendant must first present evidence to raise the defense. The prosecution then has the burden of proving capacity beyond a reasonable doubt. (See the definition of "affirmative defense" in section 1.12 of the MPC. The term used in this draft section is meant to have the same meaning.)

Adoption of the burden of proof policy recommended here, when compared to the policy adopted by this subcommittee with respect to the defense of insanity, makes it advisable to alert the subcommittee to what might seem to be an anomalous position, but which in fact is not. The subcommittee has approved for the insanity defense the policy of placing on the defendant the burden of proof of insanity by a preponderance of the evidence. This continues existing law. See ORS 136.390. The burden of proving incapacity by virtue of immaturity may also be seen by some as peculiarly within the duty of the defendant to prove by a preponderance. However, your reporter believes that the burden, as at the Common Law, should be on the state to prove beyond a reasonable doubt once defendant has raised the issue by presentation of evidence. At least one of the reasons which compelled the subcommittee to reach a contrary result regarding the insanity defense is not present here. That reason arose out of the recent Oregon Supreme Court opinion in Shepard v. Bowe, 86 Or. Adv. Sh. 981 (June 14, 1968), prohibiting the state's psychiatrist in a mental examination in a case where insanity is a defense, from asking the defendant questions the answers to which might incriminate the defendant. This restriction undoubtedly severely impairs the ability of the psychiatrist to determine if the accused was or was not sane at the time of the crime. The issue of age at the time of the criminal act and the possible attendant issue of presumption of incapacity (between 7 and 14) do not pose the same problem involved in the insanity defense. Therefore, the same rule as to burden of proof is not required.

B. Derivation

The language in this section, especially in subsection (b), closely parallels the formulation of the Common Law rule as contained in the Canadian Criminal Code, sections 12 and 13, set out in Perkins, The Criminal Law 732 (1957). Similar, though less complete, statements of the Common Law rule are to be found in a few state statutes in this country. A search of them reveals that the Canadian statement is superior.

Newer codes in other states have retained the Common Law idea of incapacity but have simplified the formula and have raised the minimum age below which a youth is conclusively presumed incapable of crime. Illinois provides that no person under 13 years of age at the time of the act can be convicted of a crime. Ill. Rev. Stat. sec. 6-1. New York has a similarly simple formulation. It excludes from criminal responsibility all persons under 16. N. Y. Penal Law sec. 30.00. Michigan in its proposed new code fixes the age at 15. Mich. Rev. Crim. Code Final Draft sec. 701.

As to choice of policy on the question of burden of proof, Illinois and New York require that if the defense of incapacity is raised by "some evidence" by the defendant the state must prove capacity beyond a reasonable doubt. Ill. Rev. Stat. sec. 3-2; N. Y. Penal Law sec. 25.00 and 30.00. In Michigan's proposed code the policy is the same as for New York and Illinois. Mich. Rev. Crim. Code Final Draft sec. 720. All three are in accord with the policy contained in the draft section.

C. Relationship to Existing Law

The present policies and provisions of the Oregon Juvenile Code are not affected by this section.

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TEXT OF REVISIONS OF OTHER STATES

Text of New York Revised Penal Law

Section 25.00. Defenses; burden of proof

1. When a "defense," other than an "affirmative defense," defined by statute is raised at a trial, the people have the burden of disproving such defense beyond a reasonable doubt.

2. When a defense declared by statute to be an "affirmative defense" is raised at a trial, the defendant has the burden of establishing such defense by a preponderance of the evidence.

Section 30.00. Infancy

1. A person less than sixteen years old is not criminally responsible for conduct.

2. In any prosecution for an offense, lack of criminal responsibility by reason of infancy, as defined in subdivision one of this section, is a defense.

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Text of Michigan Revised Criminal Code; Final Draft - September 1967

Section 701. Immaturity

A person less than 15 years old is not criminally responsible for his conduct.

Section 720. Burden of Injecting Issues of Responsibility

The burden of injecting the issue of responsibility under any section of this chapter is on the defendant, but this does not shift the burden of proof.

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Text of Illinois Criminal Code of 1961

Section 3-2. Affirmative Defense

(a) "Affirmative defense" means that unless the State's evidence raises the issue involving the alleged defense, the defendant, to raise the issue, must present some evidence thereon.

Text of Illinois Criminal Code of 1961 (Cont'd)

(b) If the issue involved in an affirmative defense is raised then the State must sustain the burden of proving the defendant guilty beyond a reasonable doubt as to that issue together with all the other elements of the offense.

Section 6-1. Infancy

No person shall be convicted of any offense unless he had attained his 13th birthday at the time the offense was committed.

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Text of Canadian Criminal Code

Section 12. No person shall be convicted of an offense in respect of an act or omission on his part while he was under the age of seven years.

Section 13. No person shall be convicted of an offense in respect of an act or omission on his part while he was seven years of age or more, but under the age of fourteen years, unless he was competent to know the nature and consequences of his conduct and to appreciate that it was wrong.

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