

1966

Criminal Law - Criminal Responsibility

Richard S. Dorfzaun

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Recommended Citation

Richard S. Dorfzaun, *Criminal Law - Criminal Responsibility*, 5 Duq. L. Rev. 98 (1966).

Available at: <https://dsc.duq.edu/dlr/vol5/iss1/10>

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CRIMINAL LAW—Criminal Responsibility—Court of Appeals for the Second Circuit has adopted the ALI test for insanity.

United States v. Freeman, 357 F.2d 606 (2d Cir. 1966).

Defendant Freeman was indicted and convicted on two counts of selling narcotics¹ in a federal district court in New York. Defendant's principal allegation at trial was that at the time of the sale of narcotics he did not have sufficient capacity and will to be held responsible for the criminality of his acts. The trial court, applying the *M'Naghten Rule*, rejected this contention. On appeal,² the Court of Appeals for the Second Circuit reversed and held that Section 4.01 of the Model Penal Code (hereinafter referred to as the ALI test) would now be the standard for determining criminal responsibility in that jurisdiction. This test provides:

- (1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.
- (2) As used in this Article, the terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.³

The alternative term "wrongfulness" rather than "criminality" was specifically adopted by the court.⁴

The adoption of the ALI test is an attempt to resolve the issue of criminal responsibility, an area where there is a split of authority. To date, the *M'Naghten Rule*⁵ is the test most jurisdictions have adopted.⁶ In these jurisdictions *M'Naghten* is used either as the sole criterion or supplemented by the *irresistible impulse* test.⁷ In the federal system,

1. 21 U.S.C. §§ 173, 174 (1964).

2. *United States v. Freeman*, 357 F.2d 606 (2d Cir. 1966).

3. MODEL PENAL CODE § 4.01 (Proposed Off. Draft, 1962).

4. *United States v. Freeman*, 357 F.2d 606, 622 (2d Cir. 1966).

5. . . . to establish a defense on the ground of insanity, it must clearly be 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.

M'Naghten's Case, 8 Eng. Rep. 718, 722 (1843).

6. See Moore, Jr., *M'Naghten is Dead—Or is It?*, 3 HOUSTON L. REV. 58, 74-76 (1965).

7. A frequently referred to statement of the *irresistible impulse* test is found in *Parsons v. State*, 81 Ala. 577, 597, 2 So. 854, 866-67 (1887):

If he did have such knowledge [*i.e.* under the *M'Naghten Rule*], he may nevertheless not be legally responsible if the two following conditions occur:

(1) If, by reason of the duress of such mental disease, he had so far lost the *power*

certain courts⁸ take the view that the Supreme Court has adopted the *M'Naghten Rule* by its decisions in *Davis v. United States*⁹ and, the *M'Naghten Rule* is followed.

However, other federal jurisdictions have not felt so restrained and have established other tests for criminal responsibility. The first major departure from the *M'Naghten Rule* is found in *Durham v. United States*.¹⁰ The test established in *Durham* was that "an accused is not criminally responsible if his unlawful act was the product of mental disease or defect. . . ."¹¹ The *M'Naghten Rule* is criticized because its *right-wrong* orientation limits expert psychiatric testimony.¹² The *Durham* test was considered to be particularly successful in solving this problem.¹³

The next test established was the *Currens* test, which provides that "[T]he jury must be satisfied that at the time of committing the prohibited act the defendant, as a result of mental disease or defect, lacked substantial capacity to conform his conduct to the requirements of the law. . . ."¹⁴ The *Currens* test is a variation of the ALI test which rejects the phrase "to appreciate the criminality of his conduct." The reason given for this change is that reference to the cognitive element of the personality would be only rarely significant.¹⁵

Then in *Wion v. United States*,¹⁶ the Court of Appeals for the Tenth Circuit stated that it was "content" to adhere to the test for responsibility found in its holding in *Coffman v. United States*¹⁷ "in the more simplified and understandable language of the ALI formula."¹⁸ It would seem that the ALI test had been expressly adopted. However, included in the *Wion* opinion was a proposed charge to the jury.¹⁹ This charge stated that before a verdict of guilty may be returned the jury must be satisfied that

to choose between the right and wrong, and to avoid doing the act in question, as that his free agency was at the time destroyed;

(2) and if, at the same time, the alleged crime was so connected with such mental disease, in the relation of cause and effect, as to have been the product of it solely.

8. See *Sauer v. United States*, 241 F.2d 640, 642 (9th Cir. 1957), cert. denied, 354 U.S. 940 (1957) and *Howard v. United States*, 232 F.2d 274, 275 (5th Cir. 1956).

9. 160 U.S. 469 (1895) and 165 U.S. 373 (1897).

10. 214 F.2d 862 (D.C. Cir. 1954).

11. *Durham v. United States*, 214 F.2d 862, 874 (D.C. Cir. 1954).

12. See De Grazia, *The Distinction of Being Mad*, 22 U. CHI. L. REV. 339, 341 (1955); Remarks, Judicial Conference (2d Cir.), *Insanity as a Defense*, 37 F.R.D. 365, 387 (1964).

13. Overholser, *Criminal Responsibility: A Psychiatrist's Viewpoint*, 48 A.B.A.J. 527, 529 (1962).

14. *United States v. Currens*, 290 F.2d 751, 774 (3d Cir. 1961).

15. *Id.* at 774 n.32.

16. 325 F.2d 420 (10th Cir. 1963).

17. 290 F.2d 212 (10th Cir. 1961).

18. *Wion v. United States*, 325 F.2d 420, 427 (10th Cir. 1963).

19. *Id.* at 430.

the defendant was mentally capable of *knowing* what he was doing. The use of the term *know* rather than the term *appreciate* which is used in the ALI test would clearly reduce the latitude of the test.²⁰

In light of these previous decisions, the Court of Appeals for the Second Circuit sought a workable solution. The *M'Naghten Rule* was rejected because it is too narrow in scope.²¹ That rule concentrates solely upon the cognitive aspect of the personality and ignores those who commit undesirable acts because of impairment of volitional capacity. Such a test is unrealistic in the light of the advance in psychiatry's knowledge of the human personality.²² Moreover, because the rule limits expert psychiatric testimony to an opinion upon whether the defendant knew right from wrong, the jury will be deprived of facts necessary to its judgment.²³

The *irresistible impulse* test which is used to supplement the *M'Naghten Rule* was rejected because the name itself carries the implication that a crime *impulsively* committed is the result of a sudden, purely spontaneous act.²⁴ *Durham* was found to be unsatisfactory because it is too vague and does not give the jury a standard by which to measure the competency of the accused.²⁵ *Currens* likewise was rejected because it concentrates only upon the volitional aspect of the personality²⁶ and is, therefore, only a partial test.²⁷

The court then looked at the ALI test and concluded that it is free of many of the defects of *Durham*²⁸ and an infinite improvement over *M'Naghten*.²⁹ The ALI test recognizes that the mind is a unified entity and that its functioning may be impaired in many ways by a mental disease or defect.³⁰ Moreover, it is sufficiently precise to provide the jury with an adequate standard with which to measure the competency of the accused, but at the same time, is not unduly restrictive upon ex-

20. See *United States v. Freeman*, 357 F.2d 606, 624 (2d Cir. 1966).

21. *Id.* at 618.

22. *Id.* at 619. See Model Penal Code, § 4.01 comment at 156-57 (Tent. Draft No. 4, 1956); Allen, *The Rule of the American Law Institute's Model Penal Code*, 45 MARQ. L. REV. 494, 498 (1962).

23. *United States v. Freeman*, 357 F.2d 606, 620 (2d Cir. 1966).

24. *Id.* at 621.

25. In illustration of this point the *Freeman* court takes particular note of the "week-end" change which occurred when St. Elizabeth's Hospital reversed its previous determination and reclassified "psychopathic personality" as a "mental disease." See *Blocker v. United States*, 288 F.2d 853, 860 (D.C. Cir. 1961) (Burger, J. concurring).

26. *United States v. Freeman*, 357 F.2d 606, 621 (2d Cir. 1966).

27. See Mueller, *M'Naghten Remains Irreplaceable: Recent Events in the Law of Incapacity*, 50 GEO. L.J. 105, 116 (1961).

28. *United States v. Freeman*, 357 F.2d 606, 623 (2d Cir. 1966).

29. *Id.* at 624.

30. *Id.* at 623.

pert psychiatric testimony.³¹ These were the considerations which led to the adoption of the ALI test.

In spite of these advantages, certain criticisms have been directed at the ALI test. One such criticism is that sociopathic personality is excluded from consideration as a criminally irresponsible condition.³² The view is expressed that there may be future scientific discoveries which would necessitate a change in the concept of treating the sociopath as criminally responsible. However, the court recognized that the ALI test is not perfect³³ and, if and when such an occurrence takes place, the test *should* be changed.³⁴ But, until such a time, the ALI test seems to offer the most satisfactory solution.

Doubt has also been expressed regarding the competency of psychiatrists to testify upon whether the accused has "adequate capacity" to appreciate the criminality of his act or to conform his conduct.³⁵ This approach suggests that there would remain restrictions upon expert psychiatric testimony and that the difficulty in testifying in the *right-wrong* context would merely be transposed to an "adequate capacity" context. Although the test is stated in terms of a *standard* there is no indication that the view has been taken that psychiatric testimony will be limited in such a manner.³⁶ Assuming that such a view has been taken, the problem has been specifically recognized by the American Law Institute. Therefore, lack of *substantial* capacity is called for rather than *complete* lack of capacity. Thus, the psychiatrist is not faced with the problem of having to testify in terms of an "ultimate extreme of total incapacity."³⁷ Such a test offers a great deal more latitude to psychiatric testimony than the *M'Naghten Rule*, while at the same time, giving a workable standard to the jury. By adopting the ALI test, the Court of Appeals for the Second Circuit has recognized that where the problem to be faced has two extremes, some middle ground must be sought.

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31. *Id.* at 623.

32. Moore, Jr., *supra* note 6, at 70.

33. United States v. Freeman, 357 F.2d 606, 623 (2d Cir. 1966).

34. This is not expressly stated in the opinion; however there is certain language to indicate that this would be the holding of the court in such instance:

The impossibility of guaranteeing that a new rule will always be infallible cannot justify continued adherence to an outmoded standard, sorely at variance with enlightened medical and legal scholarship.

United States v. Freeman, 357 F.2d 606, 624 (2d. Cir. 1966).

This passage refers to *M'Naghten* but, if the ALI test were to become obsolete, such argument would readily apply.

35. Overholser, *supra* note 13, at 530.

36. See United States v. Freeman, 357 F.2d 606, 623 (2d Cir. 1966).

37. MODEL PENAL CODE, § 4.01 comment at 158 (Tent. Draft No. 4, 1955).

