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# Criminal Law--Insanity--Test for Criminal Responsibility

Joe Bill Campbell
*University of Kentucky*

# Recent Cases

CRIMINAL LAW—INSANITY—TEST FOR CRIMINAL RESPONSIBILITY.—Charles Freeman, a confirmed alcoholic and narcotics addict, was convicted on two counts of selling narcotics in violation of a federal statute.[1] Through an informant, two federal narcotics agents arranged to purchase heroin from Freeman. Unaware of the agents' identities, the defendant on two separate occasions received money in exchange for a substance which chemical analysis indicated to be heroin. In denying responsibility for the substantive offense, Freeman alleged that at the time of the transaction he possessed insufficient capacity and will to be held responsible for the criminality of his acts. Pursuant to these allegations and in light of precedent, the district court instructed the jury to employ the M'Naghten rule[2] as the appropriate test of insanity. The conviction resulted in Freeman's being sentenced to concurrent terms of five years on each count. *Held*: Reversed. The new test for determining criminal responsibility shall be whether at the time of committing the act the defendant, as a result of mental disease or defect, lacked substantial capacity either to appreciate the wrongfulness of his act or to conform his conduct to requirements of law.[3] *United States v. Freeman*, 357 F.2d 606 (2d Cir. 1966).

Absent the issue of criminal responsibility, the facts of the *Freeman* case were but routine. The importance of this decision rests on the fundamental notion of criminal justice: the criminal law should truly reflect the moral sense of the community.[4]

Since the United States Supreme Court has refused[5] to establish a

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[1] 21 U.S.C. §§ 173-74 (1909).

[2] M'Naghten's rule states that:

> a defense of insanity can be established only when the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he committed, or if he did know it, he did not know he was doing wrong.

*M'Naghten's Case*, 10 Clark and Fin. 200 (1843).

[3] Section 4.10 of the Model Penal Code [hereinafter cited as "ALI rule"] as formulated by the American Law Institute reads as follows:

> 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 wrongfulness of his conduct or to conform his conduct to requirements of law.

[4] 357 F.2d at 607-08.

[5] Although there are arguments that the Supreme Court has indicated its approval of *M'Naghten* in Davis v. United States, 160 U.S. 469 (1895), and in Davis v. United States, 165 U.S. 373 (1897), the court in *Freeman* attempted to distinguish the reasoning of these two cases.

uniform standard of criminal responsibility in federal proceedings,[6] the courts of appeal in the various circuits have wide discretion in ascertaining the principle which they believe best satisfies the dictates of justice in criminal insanity trials. Taking note of this issue, the Second Circuit in *Freeman*, in an effort to support its transition, cited recent cases in two other federal circuits where the courts abandoned the M'Naghten rule in favor of a position similar to that adopted by the Second Circuit.[7] While it is true that M'Naghten remains the test in the majority of state and federal jurisdictions,[8] the court in this case acknowledged the need for a change. The constant distinctions and refinements continually being made in the field of criminal law require that questions previously answered be re-asked, and new answers must be brought forth if the concept of ordered liberty so pertinent to our system of justice is to be maintained.[9]

The majority opinion made an articulate analysis in disposing of M'Naghten and implementing the new rule. Operating on the assumption that the three purposes of the criminal law—rehabilitation, deterrence, and retribution—are best served when the truly irresponsible are given psychiatric treatment rather than imprisonment, the court expressed doubt as to its ability to attain justice under M'Naghten.[10]

Ultimately, the court's arguments against M'Naghten are derived from one basic premise—its focus upon only the cognitive aspect of the personality.[11] Such a limitation has had two detrimental results. First, it does not allow a jury to identify those who can distinguish between right and wrong but cannot control behavior. Consequently, there is no recognition of any degrees of incapacitation. Either the

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[6] 357 F.2d at 613. See also, Moore, Jr., *M'Naghten Is Dead—Or Is It?*, 3 HOUSTON L. REV. 58 (1965), which suggests that the Supreme Court's inaction is not mere coincidence, but is motivated by a desire to encourage the circuits to discuss and develop alternative tests before making a definitive ruling.

[7] The Third Circuit, in United States v. Currens, 290 F.2d 751 (3d Cir. 1961), adopted all of the ALI rule except the part which reads "appreciate the wrongfulness of his conduct. . . ." The Tenth Circuit, in Wion v. United States, 325 F.2d 420 (10th Cir. 1963), adopted the ALI rule, but would add that the jury be instructed that to return a guilty verdict they must be convinced that the defendant at the time of the act was mentally capable of knowing what he was doing, was mentally capable of knowing that it was wrong, and was mentally capable of controlling his conduct.

[8] 21 AM. JUR. *Criminal Law* § 33 (1965).

[9] 357 F.2d at 607.

[10] *Id.* at 615. See also, Allen, *The Rule of the American Law Institute's Model Penal Code*, 45 MARQ. L. REV. 494, 496 (1962), which states that

> the function of the test of criminal responsibility is to identify those who, on a calm and sober view, must be regarded as ineligible for the processes of criminal justice with their inherent, stigmatic and punitive ingredients and who, therefore, must be conceived solely as the recipients of care, custody and therapy.

[11] 357 F.2d at 618. See BRIGGS, THE GUILTY MIND 145 (1955).

defendant knew right from wrong or he did not. Thus, many convicted, mentally-ill offenders are imprisoned where psychiatric care was unavailable. The result has been the release of recidivists from prison with society at their mercy.[12] Secondly, M'Naghten implicitly shackled the significance of expert testimony. Rather than explain the functions of the mind, the psychiatrist had to confine his expression to an opinion on defendant's capacity for determining right from wrong. The social climate of Victorian England, the age in which M'Naughten's rule was formulated, is a great contrast to the complex society of today. Great strides made in psychiatry and psychiatric treatment are too important to restrict the psychiatrist to a mere opinion on one's ability to determine right from wrong. Parenthetically, the ultimate deciders of responsibility—juries—should not be deprived of information vital to final verdict.[13] Indeed, the court in *Freeman* accuses M'Naghten of being a sham.[14] Supporting this was the suggestion that the principle behind M'Naghten, namely, that defect of cognition as a consequence of mental disease is the primary factor in determining legal insanity, had probably never been other than a legal fiction.[15]

In lieu of M'Naghten, the court sought to adopt a more workable rule. After a brief discussion rejecting two other tests, the "irresistible impulse"[16] and the *Durham* rule,[17] the court said that the American Law Institute rule, while not perfect, was more adaptable in applying the principles of a fluid and evolving science[18] to a complex area of criminal law. One may better appreciate such a conclusion after a review of the historical development of this test.

In 1953 the American Law Institute [hereinafter referred to as ALI] began an exhaustive study of the problem of criminal responsibility. Under the direction of noted scholars,[19] leading legal and medical minds, the Institute undertook to draft an acceptable rule. Debates,

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[12] 357 F.2d at 618.

[13] *Id.* at 620.

[14] *Id.* at 619.

[15] Diamond, *From M'Naghten to Currens and Beyond*, 50 CALIF. L. REV. 189 (1962). *Cf.* United States v. Baldi, 192 F.2d 540, 568 (3d Cir. 1951) (dissenting opinion).

[16] The court in *Freeman* disposed of the "irresistible impulse" test on the basis that psychiatrists question the existence of such an impulse. Also, the court stated that the term was too narrow and carried the misleading implication that a crime committed impulsively must have been perpetrated in a sudden and explosive fit. 357 F.2d at 620.

[17] While recognizing that the *Durham* rule may have been vast improvement over *M'Naghten*, the court did not accept it because it failed to give the fact-finder any standard by which to measure the competency of the accused. 357 F.2d at 621-22.

[18] 357 F.2d at 623.

[19] Such scholars included Herbert Wechsler of Columbia University as Chief Reporter and Louis B. Schwartz of the University of Pennsylvania as Co-Reporter.

arguments, drafts, and re-drafts on the subject of criminal responsibility preceded the adoption of the final rule. The final draft was not accepted until nine years after the research and exploration had begun.[20] This rule represents the first major attempt to draft an insanity rule through the combined efforts of professionals closely associated with the subject. *Freeman* represents the first major federal jurisdiction to adopt the test *in toto*.

The court's reasoning in adopting the ALI rule clearly reflects the rationale behind the M'Naghten rejection. Rather than focus on one particular aspect of personality, the Model Penal Code formulation recognizes that mental disease may impair the functioning of the mind in numerous ways.

Concomitantly, the rule espoused insights from psychiatry that absolutes are ephemeral and variations inevitable.[21] Furthermore, the court emphasized that meaningful psychiatric testimony is possible under the new test. Thus, an "inquiry based on meaningful psychological concepts can be pursued,"[22] which should result in the use of terms precise enough to provide the jury with workable standards when instructed by the judge.[23] The separate branches of the test, phrased alternatively, will protect from criminal sanctions those persons mentally irresponsible for their actions. Finally, the court, making no pretensions that the ALI rule is faultless, indicated that the genius of the common law system has been its responsiveness to changing time. The law must serve the needs of the present while drawing from the past. Psychiatry has become an important branch of modern medicine; the development of a legal principle should reflect such evolution.[24]

Insanity tests for judging criminal responsibility currently provoke as much controversy as any other problem in criminal law.[25] Whether or not *Freeman* will initiate a trend towards total adoption of the ALI rule remains to be seen. That there is a great need for a change in the area of criminal responsibility has been repeatedly manifested.[26] Per-

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[20] 357 F.2d at 622.

[21] *Ibid.*

[22] *Id.* at 623.

[23] Note the following caveat: "I believe that mental disease is a complex and intricate matter and we cannot make it simple and understandable to everyone just by inventing simple words or phrases to describe it." 112 CONG. REC. 2855 (1966) (Remarks of Senator Thomas J. Dodd).

[24] 357 F.2d at 624-625.

[25] Commonwealth v. Chester, 337 Mass. 702, 150 N.E.2d 914 (1958): "Indeed, it is probably no exaggeration to say that this subject is receiving more attention today than any other subject in the criminal law."

[26] GUTTMACHER & WEIHOFEN. PSYCHIATRY AND THE LAW 415 (1952). See also, United States v. Malafronte, 357 F.2d 629 (2d Cir. 1966); People v. Krug-

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haps the time is ripe for the Supreme Court to grant certiorari to an insanity case. By adopting a standard, the Court could put an end to the divergence of opinion existing among the federal courts as to which best satisfies justice. Many state courts would also be persuaded by a Supreme Court decision. Until the Court adopts a position on this issue, the confusion and complexity will continue to intensify.

*Joe Bill Campbell*

CRIMINAL LAW—LAWYERS—FEES—ATTORNEY'S FEES FOR INDIGENT CRIMINAL DEFENDANTS.—The circuit court appointed counsel to represent a defendant in a Kentucky Rules of Criminal Procedure 11.42 motion proceeding. The motion was denied. Counsel moved the court for allowance of a fee, to be paid by the county or other public source, for his services in the proceeding. The motion of counsel was denied. Both motions were appealed together. *Held*: Affirmed. While there is merit in the proposition that assigned counsel should be compensated, in the absence of legislation providing funds for this purpose, attorneys will be required to devote their time and knowledge to the representation of indigents in criminal cases as a fulfillment of a professional duty. *Warner v. Commonwealth*, 400 S.W.2d 209 (Ky. 1966).

Appellant-counsel, relying on a decision of the United States District Court for the District of Oregon,[1] argued that the public use of his services and knowledge by the court was an unlawful deprivation of property without just compensation under the fifth amendment of the United States Constitution. The Oregon federal court said that while, historically, the privileges of the attorney in society once required him to represent the indigent without compensation, the special privileges of his position no longer exist.

> The production of witnesses for an indigent defendant is a phase of due process—the supplying of a transcript of proceedings to an indigent defendant through services, expertise, and facilities of the court reporter is a phase of due process, as is the supplying of mental and physical examination through the services and expertise of a physician, and so must also be a supplying of a license, time, expertise, office facilities and expense of an attorney for the indigent. The supplying [of an attorney at every stage] . . . is a public purpose.[2]

(Footnote continued from preceding page)
man, 141 N.W.2d 39 (Mich. 1966) (citing *Freeman*); Commonwealth v. Ahearn, 218 A.2d 561, 572 (Pa. 1966) (dissenting opinion).

[1] Dillon v. United States, 230 F. Supp. 487 (D. Ore. 1964).
[2] *Id.* at 493.