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Criminal Responsibility: Florida Legislative Reform of M'Naghten

Brian Alexander Rosborough

CRIMINAL RESPONSIBILITY: FLORIDA LEGISLATIVE REFORM OF M'NAGHTEN

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

Appellant was arrested on two counts of selling narcotics and brought to trial before the United States District Court for the Southern District of New York. In his defense the appellant contended that, at the time of the narcotics sale, he did not possess sufficient capacity and will to be held responsible for the criminality of his acts. The defendant's alleged condition failed to satisfy the rigid requirements of the M'Naghten "right and wrong" test of criminal responsibility,[1] and he was convicted. On appeal the United States Court of Appeals, Second Circuit HELD, the M'Naghten formula would no longer serve as the test for criminal responsibility in that circuit. In its place the court adopted the Model Penal Code proposal of the American Law Institute. The conviction was reversed and the case remanded for a new trial under the ALI test for criminal responsibility.

While the most topical controversies in criminal law today concern the rights of an accused, *Freeman* is a reminder that the provocative riddle of criminal responsibility remains unsolved. Efforts to supplement or replace the M'Naghten Rule with a more meaningful test have persisted for generations with varying degrees of success. Yet despite a flood of literature from both legal and behavioral scholars inveighing against the retention of M'Naghten, Florida and a majority of states continue to adhere to the 123-year-old template that supposedly separates the sick from the wicked.[2] Although the Florida Supreme Court has acknowledged that the M'Naghten test is unsatisfactory,[3] it refuses to change for want of a more suitable substitute.[4] But the impossibility of attaining perfection is no excuse

1. M'Naghten's Case, 10 Clark & F., 200, 210, 8 Eng. Rep. 718, 722 (H.L. 1843). "[T]o establish a defense on the ground of insanity, it must be clearly proved that, at the time of 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. The mode of putting the latter part of the question to the jury on these occasions has generally been, whether the accused at the time of doing the act knew the difference between right and wrong . . . ."

2. See Moore, *M'Naghten Is Dead—Or Is It?*, 3 HOUSTON L. REV. 58 (1965); Note, *Why Not Bury M'Naghten's Moldy Ghost?*, 12 U. FLA. L. REV. 184 (1959).

3. Piccott v. State, 116 So. 2d 626, 631 (Fla. 1959) (Hobson, J. dissenting in part), *cert. denied*, 364 U.S. 293 (1960).

4. To date Florida has considered and rejected the "irresistible impulse" test and the Durham or New Hampshire Rule. See Cole v. State, 172 So. 2d 898 (3d D.C.A. Fla. 1965); Piccott v. State, note 3 *supra*; Davis v. State, 44 Fla. 32, 32 So. 822 (1902).

for an "ostrich approach" toward the problem of criminal responsibility. While Florida is marking time, others have responded to the persuasive advocacy of change. Several federal courts and a few state legislatures have made considerable improvements on their tests for legal insanity. Significantly, the most recent developments appear to be patterned after the American Law Institute test adopted in *Freeman*. As Florida has never considered the ALI proposal, its new language may offer the guidelines needed to renovate M'Naghten.

The Model Penal Code test of legal insanity evolved from an extensive study of criminal conduct initiated by the American Law Institute in 1953. Leading legal and medical minds applied themselves to the task of articulating a definitive formula for criminal responsibility. After nine years of research and consideration, section 4.01 was formally adopted by the Institute. The ALI test provides:[5]

> (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 the law.
>
> (2) The terms "mental disease or defect" do not include abnormality manifested only by repeated or otherwise antisocial conduct.

Since its inception, the ALI test has been adopted verbatim by the Second[6] and Tenth[7] Circuit Courts of Appeals. Other circuit courts have drawn from the language of the Model Penal Code in fashioning tests of their own. In each instance there was implicit recognition that the recipe for criminal responsibility promulgated by the American Law Institute contains indispensable ingredients that the law cannot afford to ignore.

The ALI formula is composed of two principal ingredients, knowledge of behavior and control of behavior. While the M'Naghten test acquits a defendant only for lack of knowledge, the ALI formula will not attach liability if either ingredient is substantially lacking. Similarly, in approaching the problem of criminal responsibility, the circuit courts of appeals have endeavored to break down behavior into its various elements. In *United States v. Currens*,[8] the Third Circuit Court of Appeals chose to emphasize the element of control. The court reasoned from the premise that *mens rea* is is based on an assumption that a person has a capacity to control his

5. MODEL PENAL CODE §4.01 (Final Draft 1962).
6. United States v. Freeman, 357 F.2d 606 (2d Cir. 1966).
7. Wion v. United States, 325 F.2d 420, 430 (10th Cir. 1963).
8. 290 F.2d 751 (3d Cir. 1961).

behavior and to choose between alternative courses of conduct. Accordingly, where there is a reasonable doubt whether the actor possesses capacity of choice and control, there is a reasonable doubt that he possessed the necessary guilty mind.[9] The cardinal issue for determination, according to the court, was whether the actor had substantial capacity to conform his conduct to the requirements of law. In fact, the court was so concerned about emphasizing the capacity to control behavior that it elected to delete all reference to the cognitive element in fashioning its test.[10] In *Dusky v. United States*,[11] the Eighth Circuit expressed its preference of tests in terms of three necessary elements: the defendant's *cognition*, his *volition*, and his *capacity to control* his behavior. "If those 3 elements . . . are emphasized in the court's charge as essential constituents of the defendant's legal sanity, we suspect that the exact wording of the charge and the actual name of the test are comparatively unimportant . . . ."[12] Again, in *Feguer v. United States*,[13] the Eighth Circuit articulated its three requisites as "knowledge, will, and choice."[14]

Perhaps the most notable testimony to the success of the ALI proposal is found in its use to amend the provisions of a previous rule promulgated in *Durham v. United States*.[15] In *McDonald v. United States*,[16] the Circuit Court of Appeals for the District of Columbia relied on language of the American Law Institute in attempting to correct the existing deficiencies in its own test. The *Durham* court redefined mental disease and defect to include "any abnormal condition of the mind which *substantially* affects mental or emotional processes and *substantially* impairs behavioral controls."[17] Like the Courts of Appeals for the Second, Third, Eighth, and Tenth Circuits, the *Durham* court has recognized that capacity for self-control is a necessary ingredient to any comprehensive test of criminal responsibility.

Although the Fifth Circuit still abides by M'Naghten, there has been some indication that the court is ready to amend the tra-

9. *Id.* at 773.

10. The rule adopted in *Currens* provided: "The 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 which he is alleged to have violated." *Id.* at 774.

11. 295 F.2d 743 (8th Cir. 1961).

12. *Id.* at 759.

13. 302 F.2d 214 (8th Cir. 1962).

14. *Id.* at 244.

15. Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954). "[A]n accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect." *Id.* at 874.

16. 312 F.2d 847 (D.C. Cir. 1962).

17. *Id.* at 851. (Emphasis added.)

ditional "right and wrong" terminology. In *Carter v. United States*[18] a perjury conviction involving the insanity issue was affirmed per curiam by an equally divided court. The arguments of the dissent suggest that some members of the court have begun to analyze the question of behavior in terms of its requisite elements. While emphatically pointing out that "McNaghten is dead,"[19] the dissent was reluctant to abandon the prevailing requirement for distinguishing right from wrong. However, the dissent did indicate that perhaps additional elements of behavior should be considered. The "standard should concern itself with whether defendant understood and appreciated the act in question and its consequences, and whether it was a result of a free exercise of will or choice."[20] If "free exercise of will or choice" can be interpreted as "the capacity to control behavior," then it would appear that the dissent's suggestion in *Carter* is an endorsement of the two-pronged test proposed by the American Law Institute.

The federal courts are not the only disciples of the new ALI following. The Model Penal Code test has been adopted, in whole or in part, by several state legislatures.[21] When *Freeman* was decided, for example, two of the three states in the Second Circuit, New York and Vermont, had previously rejected M'Naghten in favor of statutory substitutes patterned after the ALI test. Recognizing their enterprise, the *Freeman* court acknowledged: "It would be incongruous, indeed, if the federal courts which have traditionally concerned themselves with formulating guidelines for fairer trials were to remain frozen to the old M'Naghten Rules while the state courts

18. 325 F.2d 697 (5th Cir. 1963).

19. *Id.* at 707.

20. *Id.* at 705.

21. On July 1, 1965, New York State rejected M'Naghten and adopted a test based largely upon the ALI formulation. N.Y. PEN. LAW §1120 provides: "A person is not criminally responsible for conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity to know or appreciate either: (a) the nature and consequence of such conduct; or (b) that such conduct was wrong." Until July 28, 1961, statutory law of Illinois contained no test for criminal responsibility. The state courts followed M'Naghten, supplemented by the "irresistible impulse" test. In 1961 the state legislature on recommendation of the joint committee to revise the Illinois Code, adopted the ALI MODEL PENAL CODE test verbatim. ILL. ANN. STAT. ch. 38, §6-2 (Smith-Hurd 1961). Vermont has provided by statute that "the M'Naghten test of insanity in criminal cases is hereby abolished." VT. STAT. ANN. tit. 13, §4802 (1957). In addition, Vermont enacted as its rule for determining criminal responsibility, a formulation strikingly similar to §4.01 of the MODEL PENAL CODE: "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 adequate capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirement of law." VT. STAT. ANN. tit. 13, §4801 (1957).

in this Circuit pursued the more modern and enlightened course."[22] If the Florida Legislature were to assume the initiative in drafting similar legislation, the Fifth Circuit Court of Appeals would find itself in the same position as was the Second Circuit prior to *Freeman*. Legislative reform would not only ameliorate determinations of criminal responsibility in Florida, but it would also be timely and helpful to the Fifth Circuit in its efforts to renovate M'Naghten.

The ALI test is certainly not the ultimate in faultless definition. Perfection is unattainable when dealing with such a fluid and evolving concept as criminal responsibility. Nevertheless, the Institute's proposal is a manifest improvement over the present M'Naghten standard. The test is simple yet comprehensive. It may be intelligently charged upon by the judge and easily understood by the jurors. While it retains the cognitive element of M'Naghten, the ALI test is equally concerned with the actor's capacity to control his conduct. Finally, the new test is conducive to liberal admissibility of evidence rather than artificially structured testimony. Under M'Naghten the testifying psychiatrist can be confined by the court to his opinion whether the defendant could distinguish between right and wrong at the time of the act. Because such an opinion goes to the sole inquiry of M'Naghten, it is the psychiatrist's judgment and not the jury's that determines the issue of insanity. The ALI test alleviates this predicament by leaving to the jury the determination whether cognition or control were *substantially* lacking and not whether they were simply present or absent. Herein is a frank recognition that there are gradations of degree in any determination of insanity and that such a determination is best left to the common sense of the jury. In the words of Professor Wechsler, a proponent of the Model Penal Code: "One would expect jury skepticism and the system is healthier for that jury skepticism."[23]

There need be no misapprehension that the ALI test will produce a system "soft on criminals" or given to excusing defendants simply because they had been deprived as children. First, the Code makes it absolutely clear that mere recidivism or narcotics addiction will not *of themselves* justify acquittal.[24] Section 4.01 (2) expressly provides that the terms "mental disease or mental defect" do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.[25] Secondly, a verdict of "not guilty by reason of insanity" would not necessarily allow the offender to go free. Florida

22. United States v. Freeman, 357 F.2d 606, 624 n.56 (2d Cir. 1966).

23. Annual Judicial Conference, Second Circuit, 1964, *Insanity as a Defense*, 37 F.R.D. 365, 385 (1964).

24. United States v. Freeman 357 F.2d 606, 625 (2d Cir. 1966).

25. MODEL PENAL CODE §4.01 (2) (Final Draft 1962).

Statutes, section 919.11[26] authorizes the court to commit an accused acquitted by the jury for the cause of insanity: "[I]f the discharge or going at large of such insane person shall be considered by the court manifestly dangerous to the peace and safety of the people . . . ." Adoption of a more liberal test for criminal responsibility could be conditioned on a more liberal interpretation of the phrase "manifestly dangerous." Courts could use the two laws hand-in-hand to provide for institutional commitment in marginal cases. The objective in every case would be the same as before – to render the dangerous person harmless. Furthermore, a practice of indefinite commitment would deter "normal" defendants from choosing to defend on the ground of insanity.

Whatever the choice of wording for a test of criminal responsibility, some reform is due. Blind adherence to an outmoded standard, sorely at variance with enlightened legal and medical scholarship, can no longer serve the needs of the present. The American Law Institute has provided an acceptable format. All that remains is for the legislature to seize the initiative and demonstrate its responsiveness to changing times.

BRIAN ALEXANDER ROSBOROUGH

26. FLA. STAT. §919.11 (1965).