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[*United States v. Freeman*, 357 F.2d 606 (2d Cir.
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Criminal Law--Defenses--Mental Impairment [*United States v. Freeman*,
357 F.2d 606 (2d Cir. 1966)]

Erratum

PAGE 1207, FOOTNOTE 22, LINE 2: change "Plocker" to "Blocker." PAGE 1208, FOOTNOTE 30, LINE 3: change "Plocker" to "Blocker." PAGE 1209, PARAGRAPH 1, LINE 10: change "irresponsible" to "responsible."

that the majority in *Katchen v. Landy* stressed the congressional intent of the act and only briefly mentioned the "equity argument."³³ Perhaps the Court is of the opinion that this policy of expediency is sufficient in and of itself to imply consent by a creditor to summary jurisdiction throughout the bankruptcy proceeding.

It was previously pointed out that the distinctions between summary and plenary suits are largely procedural, and that despite the denial of a jury trial, the creditor is still afforded due process of law.³⁴ These arguments apply equally to unrelated counterclaims, but it must be remembered that section 23(b) seems to preserve the creditor's right to a plenary suit unless he consents to a summary proceeding. It is submitted that there is no small distinction between compulsory and permissive counterclaims in this area and that perhaps the courts should re-examine the problem before denying a jury trial where a creditor may be subject to a large unrelated counterclaim. However, in view of the recent liberal trend of case law and commentary, the Supreme Court may already be prepared to apply *Katchen* to erase the distinction between compulsory and permissive counterclaims in bankruptcy.

CHARLES P. ROSE, JR.

CRIMINAL LAW — DEFENSES — MENTAL IMPAIRMENT

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

Mental impairment as a defense to criminal prosecutions exists under varied forms in American law. According to the widely followed rule in *M'Naghten's Case*,¹ the accused is not criminally responsible if, at the time of the wrongful act, he did not know the nature and quality of that act, or if knowing it, he did not realize that his act was wrong.² Some jurisdictions have supplemented this rule with the "irresistible impulse" test³ which dictates a verdict of not guilty by reason of insanity if the accused, though aware that his act was wrong, was nevertheless incapable of controlling his con-

tion between compulsory and permissive counterclaims in this area. *Interstate Nat'l Bank v. Luther*, 221 F.2d 382 (10th Cir. 1955), *appeal dismissed*, 350 U.S. 944 (1956); *In re Nathan*, 98 F. Supp. 686 (S.D. Cal. 1951).

³³ *Katchen v. Landy*, 382 U.S. 323, 328-29 (1966).

³⁴ See text accompanying note 24 *supra*.

duct at the time.⁴ The 1954 case of *Durham v. United States*⁵ enunciated still another rule which relieves the accused from criminal responsibility if "his unlawful act was the product of mental disease or mental defect."⁶

The Second Circuit, in the recent case of *Freeman v. United States*,⁷ has become the first federal court to adopt verbatim both elements of the new test of mental impairment which has been proposed by the American Law Institute:

(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.⁸

This test, like its predecessors, has also been thoroughly criticized; but the acclaim from the highly respected Second Circuit in *Freeman* should give added impetus to the growing acceptance of the test.⁹

In the *Freeman* case, the defendant Charles Freeman was indicted for the illegal possession and sale of narcotics. Expert testimony indicated that he was laboring under both physical and mental impairment, largely as a result of narcotics addiction and alcoholism. He was diagnosed as a sociopathic personality with schizoid traits,¹⁰

¹ 10 Clark & Fin. 200, 8 Eng. Rep. 718 (1843).

² M'Naghten's Case, 10 Clark & Fin. 200, 210, 8 Eng. Rep. 718, 722 (1843).

³ E.g., *Sauer v. United States*, 241 F.2d 640 (9th Cir.), cert. denied, 354 U.S. 940 (1957). The test is "nowhere relied on as sole criterion of criminal responsibility." LINDMAN & MCINTYRE, *THE MENTALLY DISABLED AND THE LAW* 332 (1961).

⁴ *Sauer v. United States*, supra note 3, at 643.

⁵ 214 F.2d 862 (D.C. Cir. 1954).

⁶ *Durham v. United States*, 214 F.2d 862, 875 (D.C. Cir. 1954). It is now held in the District of Columbia that "a mental disease or defect includes any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls." *McDonald v. United States*, 312 F.2d 847, 851 (D.C. Cir. 1962). (Emphasis added.)

⁷ 357 F.2d 606 (2d Cir. 1966).

⁸ MODEL PENAL CODE § 4.01 (1962).

⁹ The Third Circuit Court of Appeals, in *United States v. Currens*, 290 F.2d 751 (3d Cir. 1961), predicated responsibility upon the accused's "substantial capacity to conform his conduct to the requirements of the law." *Id.* at 775. However, the Tenth Circuit Court of Appeals adopted the entire section 4.01(1) of the Model Penal Code in *Wion v. United States*, 325 F.2d 420, 430 (10th Cir. 1963), cert. denied, 377 U.S. 946 (1964), and expressly rejected *Currens* for its failure to recognize the cognitive aspect of the test. *Id.* at 427.

¹⁰ The sociopath is ill primarily in terms of society, rather than in terms of physical discomfort. Sociopathic reactions, however, are often indications of severe under-

and although the defendant was capable of acting purposefully, he had only limited ability to know that his acts were wrong.¹¹ At trial, his defense of lack of responsibility, as measured by the *M'Naghten* rule,¹² was not sustained, and he was convicted on both charges. Judge Kaufman, speaking for the Second Circuit in the instant case, reversed the convictions and abandoned that circuit's test of criminal responsibility.¹³

The *Freeman* opinion set forth the several tests of mental impairment adopted in various other jurisdictions and outlined the criticisms traditionally aimed at them. *M'Naghten* was rejected primarily because of its exclusive reliance on the cognitive elements of the accused's personality.¹⁴ Such reliance was deemed not only psychologically unsound but, in Judge Kaufman's view, also socially undesirable to the extent that continual offenders convicted under the strict *M'Naghten* test soon serve their prison sentences and are set free to endanger again the public welfare. A broader definition of mental impairment, however, would allow indeterminate civil commitment of the potential recidivist.¹⁵ The rule has also been faulted because it recognizes no degree of incapacity¹⁶ and "shackles"

lying personality disorders or organic brain injury or disease. The impairment may be exhibited in various anti-social reactions, including sexual deviation and addiction. *Mental Disorders*, AMERICAN PSYCHIATRIC A. DIAGNOSTIC & STATISTICAL J. 38-39 (Special Reprint 1965). A person showing schizoid traits might exhibit qualities of coldness, emotional detachment, fearfulness, or day dreaming. *Id.* at 35.

¹¹ United States v. Freeman, 357 F.2d 606, 609-12 (2d Cir. 1966).

¹² Irresistible impulse and *M'Naghten* were the tests of mental impairment in the Second Circuit during Freeman's trial. However, it was stipulated at trial that irresistible impulse did not apply. United States v. Freeman, *supra* note 11, at 612 & n.12.

¹³ United States v. Freeman, 357 F.2d 606, 624 (2d Cir. 1966).

¹⁴ *Ibid.* Wechsler, *Criteria of Criminal Responsibility*, 22 U. CHI. L. REV. 367, 373 (1955). Cognition has been defined as "the capacity of one to know and appreciate the nature and quality of his act, and to know that it was wrong." *Wion v. United States*, 325 F.2d 420, 427 (1963).

¹⁵ United States v. Freeman, 357 F.2d 606, 618 (2d Cir. 1966). Such a test has also been criticized because of the burden it places on psychiatric hospitals. Diamond, *From McNaughten to Currens, and Beyond*, 50 CALIF. L. REV. 189, 193 (1962); *Insanity as a Defense*, in ANNUAL JUDICIAL CONFERENCE, SECOND JUDICIAL CIRCUIT OF THE UNITED STATES, 37 F.R.D. 363, 374 (1964) (panel discussion, remarks of Judge Weintraub). A noted authority, Professor Jerome Hall, has pointed out that "from a medical viewpoint, it may be absurd to release an offender at a fixed time that in fact has no relation to rehabilitation. But if no law fixes an upper limit, there is no adequate protection for any convicted person against life imprisonment." Hall, *Psychiatry and Criminal Responsibility*, 65 YALE L.J. 761, 766 (1956).

¹⁶ United States v. Freeman, 357 F.2d 606, 618 (2d Cir. 1966). The test of mental impairment under the *M'Naghten* rule is categorically stated whereas the Model Penal Code test recognizes intermediate degrees of mental capacity. Under the latter test, the accused is not responsible for criminal conduct if he lacks *substantial* capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. MODEL PENAL CODE § 4.01(1) (1962).

expert psychiatric testimony.¹⁷ The irresistible impulse test was discarded as "inherently inadequate"¹⁸ since its language "carries the misleading implication that a crime impulsively committed must have been perpetrated in a sudden and explosive fit."¹⁹ The test, therefore, excludes those uncontrollable actions which may have resulted from a long period of brooding. The *Durham* rule, though lauded by the court, nevertheless was said to raise "near impossible problems of causation,"²⁰ while failing "to give the fact-finder any standard by which to measure the competency of the accused."²¹

The Model Penal Code test is an attempt to circumvent these criticisms while preserving some valuable aspects of the old rules. As in *M'Naghten*, section 4.01(1) of the code recognizes that the determination of criminal responsibility is "not a medical but a legal, social [and] moral judgment,"²² and that cognition is an important consideration in determining responsibility.²³ Although remnants of "irresistible impulse" are also evident, the language of section 4.01(1) clearly avoids the limitations of that earlier test.²⁴ Whereas the irresistible impulse test was particularly concerned with uncontrollable acts arising from a sudden impulse, the Model Penal Code considers all the offensive acts of the accused, including those conceived in longer periods of brooding. Section 4.01(1) also departs from the old rules by predicating criminal responsibility upon only a *substantial* capacity to "appreciate" or "conform."²⁵

Section 4.01(2) limits the terms "mental disease or defect" by excluding abnormalities manifested only by "repeated criminal or otherwise anti-social conduct."²⁶ The drafters of the test apparently felt this restriction indispensable;²⁷ however, the section has been

¹⁷ *United States v. Freeman*, *supra* note 16, at 619. However, it has been said that, in practice, courts have broadly interpreted the *M'Naghten* rule with the result that "all psychiatric evidence relevant to the defendant's medical condition is admitted." Hall, *supra* note 12, at 774. This type of permissive approach was evident in the recent first-degree murder case of *State v. Colby*, 6 Ohio Misc. 19 (C.P. 1966), wherein the defendant was found not guilty "by reason of insanity."

¹⁸ *United States v. Freeman*, 357 F.2d 606, 620 (2d Cir. 1966).

¹⁹ *Ibid.*

²⁰ *Id.* at 621.

²¹ *Ibid.*

²² *Id.* at 619; *accord*, *Wion v. United States*, 325 F.2d 420, 427 (10th Cir. 1963), *cert. denied*, 377 U.S. 946 (1964); *Plocker v. United States*, 288 F.2d 853, 866 (D.C. Cir. 1961) (concurring opinion), *cert. denied*, 375 U.S. 923 (1963).

²³ *United States v. Freeman*, 357 F.2d 606, 624 (2d Cir. 1966).

²⁴ *Insanity as a Defense*, *supra* note 15, at 393 (remarks of Professor Wechsler).

²⁵ *Ibid.*

²⁶ MODEL PENAL CODE § 4.01(2) (1962).

²⁷ Wechsler, *supra* note 14, at 376.

severely criticized by psychiatrists.²⁸ The language is intended to hold the sociopath (or psychopath) responsible,²⁹ but use of this section may hamper the effectiveness of the test in a jurisdiction where psychiatrists have classified the "sociopathic personality" as a mental disease and testify to that effect.³⁰ This problem of labels may be insignificant, however, since psychiatric testimony as to the accused's condition will almost always indicate additional symptoms of mental disorder besides recidivism or other anti-social behavior.³¹

The Model Penal Code test is said to reflect a more progressive legal attitude toward the defense of mental impairment.³² Nevertheless, some confusion has arisen with respect to the rule's application. One prominent authority has asserted that the phrases, "appreciate the wrongfulness of his conduct" and "capacity to . . . conform his conduct to the requirements of law," in section 4.01(1) may be applied as mutually exclusive alternatives.³³ If this interpretation is followed, the new test would then be only as effective as those individual tests which the Model Penal Code was specifically drafted to replace. Judge Kaufman, at one point in his opinion, appeared to indulge in this interpretation,³⁴ but a closer reading of the opinion suggests that he has, in effect, considered the tests to be cumulative. Therefore, both factors would have to be evidenced before a person could be adjudged not responsible for his criminal acts.

A second difficulty relates to the language of the Model Penal Code formulation. A comparison of the terms used in the various tests indicates the semantic refinements drafted into the Model Penal Code; but, as with the prior tests, the terms have not been precisely defined. Because of this lack of definition, "result of" is probably no more explicit than "product"; nor is "appreciate" better than "know."³⁵ Perhaps the greatest significance of the new

²⁸ Diamond, *supra* note 15, at 194 & n. 23; Kozol, *The Psychopath Before the Law*, 44 MASS. L.Q. 106, 116 (1959).

²⁹ MODEL PENAL CODE § 4.01, comments at 157 (1962).

³⁰ The problem appeared in 1957 in the District of Columbia when, over a particular weekend, the psychiatrists at St. Elizabeth Hospital changed their definition of the term "mental disease." *Plocker v. United States*, 228 F.2d 853, 860-61 (D.C. Cir. 1961) (concurring opinion), *cert. denied*, 375 U.S. 923 (1963).

³¹ Kozol, *supra* note 28, at 116.

³² Allen, *The Rule of the American Law Institute's Model Penal Code*, 45 MARQ. L. REV. 494, 505 (1962).

³³ HALL, CRIMINAL LAW 500 (2d ed. 1960).

³⁴ *United States v. Freeman*, 357 F.2d 606, 623 (2d Cir. 1966).

³⁵ *But see, Insanity as a Defense, supra* note 15, at 393-94.

test lies in the fact that even a narrow interpretation will probably lead to more verdicts of not guilty "by reason of mental impairment" than were obtained under a *M'Naghten*-irresistible impulse combination.³⁶ An increase in such verdicts would place a greater burden upon civil commitment legislation, and the resulting influx of criminal patients at civil institutions would force the hospital to adopt containment practices which are contrary to the "open door" methods used for non-offenders.³⁷ The effect would be detrimental to psychiatry and could breed complacency in penal reform,³⁸ while reinforcing public distrust of both psychiatry and the law.

This last difficulty reaches the crux of the problem involved in adopting *any* new test of mental impairment. Any reconstruction necessarily presupposes that the test is a valid aspect of criminal law.³⁹ Within traditional criminal law principles, the test operates to disprove the guilty intent of the accused. Unlike other defenses, however, its successful use leads to civil incarceration rather than acquittal. The court, then, is choosing not between guilt and innocence, but only between forms of commitment, effecting, as Judge Kaufman suggests, a separation of the "truly irresponsible" criminal from the "irresponsible" one.⁴⁰ Such a separation is without reason, of course, if in fact it can be shown that all criminals are "truly irresponsible." One psychiatrist makes the guarded prediction that, in a few years, psychiatry will be able to prove the illogic of the distinction.⁴¹ Such a prediction suggests that reform should focus not on the semantics of the test but rather on basic criminal law principles.⁴²

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³⁶ See Diamond, *supra* note 15.

³⁷ *Ibid.* In some respects our hospitals may in fact be worse than prisons. One authority states that 80% of our psychiatric institutions are purely custodial and offer no treatment, even to non-criminal patients. Schmideberg, *The Promise of Psychiatry: Hopes and Disillusionment*, 57 Nw. U.L. REV. 19, 22 (1962).

³⁸ See Diamond, *supra* note 15, at 193; Schmideberg, *supra* note 37, at 22.

³⁹ *But see* Goldstein & Katz, *Abolish the "Insanity Defense" — Why Not?*, 72 YALE L.J. 853 (1963), in which the authors question the validity of *mens rea* as a fundamental concept in criminal law and the related use of a test of criminal responsibility.

⁴⁰ *United States v. Freeman*, 357 F.2d 606, 615 (2d Cir. 1966).

⁴¹ Diamond, *supra* note 15, at 198.

⁴² Diamond, *supra* note 15, at 201-05. See also Goldstein & Katz, *supra* note 39, at 872. Judge Kaufman himself has taken the view that revising the old tests may not provide an adequate remedy. *Insanity as a Defense*, *supra* note 15, at 394-95 (remarks of Judge Kaufman). However, being limited to just that, the Second Circuit apparently felt that more humane treatment would be given to the accused under the Model Penal Code test.