IV. CONCLUSION

The purpose of the lesser standard for children is to allow for their immaturity, indiscretion, inexperience and incapacity, but it is not to excuse childish acts merely on the basis of the amount of time they have or have not lived. Rather than rote application of a simple chronological age test, it seems more logical to consider the elements of intelligence, experience, maturity, capacity and training where they may be pertinent.

It is unrealistic to say that a child seven years old absolutely has no capacity to take care of himself. Recognition of some dangers is so simple that even a very young child is able to understand the hazards after the danger has been properly explained to him. On the other hand, many dangers are so disguised that reasonable men could not differ as to the child's incapacity to understand and appreciate the existence of the danger. In the latter situation the court might rule as a matter of law as to the incapacity of the infant.

The Massachusetts rule is the modern trend, and adoption of it serves to settle many confusing areas without relinquishing any protection already afforded the child. Its application gains for the law a needed flexibility which prevents inequitable results from accruing against the slightly negligent defendant.

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COMMENTS

CRIMINAL LAW—INSANITY—THE AMERICAN LAW INSTITUTE FORMULATION AND ITS IMPLICATIONS FOR SOUTH CAROLINA*

The traditional majority definition of legal insanity is expressed in *McNaghten's Case*.[1] That venerable rule established in 1843 reduces the basic issue to the question of "whether the accused had a sufficient degree of reason to know that he was doing an act that was wrong." Many jurisdictions while essentially adhering to the *McNaghten* Rule have also theorized that the cognitive factors are not the only elements that may preclude inhibition; that even though cognition still obtains, mental disorder may produce a total incapacity for self-control. This irresistible impulse doctrine is primarily an inquiry as to whether, at the time of his criminal act, the accused suffered from a diseased mental condition which deprived him of the will to resist the insane impulse. It has been applied to supplement the basic *McNaghten* formula in those jurisdictions which recognize it.[2]

Dissatisfaction with the *McNaghten*-Irresistible Impulse Rule arose, and the search for alternatives dates back to 1954[3] and *Durham v. United States*,[4] the first open rejection of the *McNaghten*-Irresistible Impulse formula.[5] The supplanting rule adopted by the *Durham* court was the simple statement that "an

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

1. 10 Cl. & F. 200, 8 Eng. Rep. 718 (1843).

2. The primary importance of this rule has been as a supplement to *McNaghten*. See, *e.g.*, Sauer v. United States, 241 F.2d 640 (9th Cir. 1957); Commonwealth v. Chester, 337 Mass. 702, 150 N.E.2d 914 (1958); Thompson v. Virginia, 193 Va. 704, 70 S.E.2d 284 (1952).

3. Actually New Hampshire never adopted the *McNaghten* rule, and since State v. Peak, 49 N.H. 399 (1870), it has employed a product-type formula to which *Durham* has similarities.

4. 214 F.2d 862 (D.C. Cir. 1954).

5. As was stated in United States *ex. rel.* Smith v. Baldi, 192 F.2d 540, 567 (3d Cir. 1951) (dissent), the *McNaghten* Rule assumes " a logic-tight compartment in which the delusion holds sway leaving the balance of the mind intact." This is the basic objection to *McNaghten*. The human mind is an entity and cannot be broken into parts, one sane and the other insane. In focusing on the cognitive aspect of personality, *McNaghten* made no allowance for those who could distinguish good and bad, but could not control their behavior. This one-sided emphasis on the cognitive "straitjacketed" psychiatric testimony in that these experts were forced to answer the question whether the defendant could "know" right from wrong, and were unable to explain other symptoms which pointed to irresponsibility.

accused is not criminally responsible if his unlawful act was the product of a mental disease or defect."[6] This rule avoided *McNaghten*'s excessive emphasis on the cognitive element of the personality, and it further allowed psychiatric experts to testify to all relevant information about a defendant, rather than to limited opinions about whether he knew right from wrong. "*Durham* was a right step in the wrong direction,"[7] however, for in its simplicity it had failed to define the key terms used—"disease," "defect" and "product." It was "couched as an abstract indefinite generality . . . whereas the [right-wrong] standard was a concrete proposition that laymen could apply."[8] This vagueness posed the threat that bewildered juries might abdicate their roles as the triers of fact in favor of the opinions of technically rather than legally oriented psychiatrists.

"Every court which . . . considered *Durham* . . . rejected it,"[9] and the American Law Institute chose in 1955 to adopt in its Model Penal Code a different rule, stating that:

> (1) A person is not responsible for criminal conduct if at the time of such conduct as a result of a mental disease or defect he lacks substantial capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law.
>
> (2) The term mental disease or defect does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.[10]

This rule has proved more acceptable than *Durham*. Since its formulation the Fifth[11] and Eighth[12] Circuits have paid lip service to the institute's efforts while adhering to the traditional *McNaghten* Rule, as supplemented by the irresistible impulse doctrine. The District of Columbia,[13] Third,[14] and Tenth[15] Circuits have altered their rules so as to closely conform to the Model Penal Code formula.[16]

6. Durham v. United States, 214 F.2d 862, 864 (D.C. Cir. 1954).
7. Blocker v. United States, 288 F.2d 853, 858 (D.C. Cir. 1961) (dissent).
8. United States v. Fielding, 148 F. Supp. 46, 52 (D.D.C. 1957).
9. Blocker v. United States, 288 F.2d 853, 866 (D.C. Cir. 1961).
10. MODEL PENAL CODE § 4.01 (Tent. Draft No. 4, 1955).
11. Carter v. United States, 325 F.2d 697 (5th Cir. 1963).
12. Carter v. United States, 332 F.2d 728 (8th Cir. 1964).
13. McDonald v. United States, 312 F.2d 847 (D.C. Cir. 1962).
14. United States v. Currens, 290 F.2d 751 (3d Cir. 1961).
15. Wion v. United States, 325 F.2d 420 (10th Cir. 1964).

In February of 1966 the Second Circuit, indicating that *McNaghten* and the previously applied alternatives had become outdated in the light of recent advances permeating the field of criminal psychology, in *United States v. Freeman*[17] became the first of the courts of appeal to accept the Model Penal Code definition of insanity without modification. *Durham* began the search for an alternative to the *McNaghten*-Irresistible Impulse Rule, and *Freeman* marks at least a temporary end to that search, for the rule it established appears to be the most feasible alternative yet provided.

The majority of our courts have thus far been hesitant to adopt any new ideas concerning the determination of insanity questions, principally because none of the alternatives yet provided have offered a reliable means of moving away from the old formula. *Durham* failed, and the partial applications of the code formula have not been truly significant. The impetus behind the movement for change has been scholastic rather than practical, and the reluctance to change undoubtedly reflects a distrust of formulas suggested by psychiatrists, who have not yet agreed among themselves upon an adequate definition of "mental disease." The Model Penal Code formula adopted in *Freeman* can solve this dilemma because its terminology bridges the gap between the time tested, but outdated, *McNaghten* Rule used in

16. The Tenth Circuit in *Wion* adopted in toto the Institute formula, but included a jury charge about defendants ability "to know what he was doing." (The Institute used "appreciate" to reflect that "knowledge" divorced from any appreciation of the import thereof is useless.) The District of Columbia Court achieved its similarity in the context of the *Durham* formula. It first required a critical relationship between the disease and the alleged act (Carter v. United States, 252 F.2d 608 [D.C. Cir. 1957]; Douglas v. United States, 239 F.2d 52 [D.C. Cir. 1956]) and, more importantly, defined "disease" and "defect" to include any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavioral controls. (McDonald v. United States, 312 F.2d 751 [D.C. Cir. 1962]). The Third Circuit in *Currens* adopted as its test only the "capacity to conform his conduct to the requirements of law" facet of the Institute test, probably in an attempt to be shed of *McNaghten*'s cognitive emphasis. The *Freeman* case points out, however, that *McNaghten* was faulty not in that it dwelt on the cognitive, but that it did so *exclusively*. It might be well to note that the Ninth Circuit is the only other circuit court to face squarely the issue of possible departure from the *McNaghten* rule. It held in Sauer v. United States, 241 F.2d 640 (9th Cir. 1964), that it would await the Supreme Court for change, feeling itself bound by that Court's precedent (See note 25 *infra*). It did go on record, however, as rejecting both the *Durham* and *Currens* rules. Whether that court avoided mention of the MODEL PENAL CODE formula because it felt that this might be the direction of future change is yet to be seen.

17. 357 F.2d 606 (2d Cir. 1966).

the courts and the updated, but untested, theories of the legal laboratory. *Freeman* inculcates recent advances in insanity trials, primarily in its liberalization concerning the use of expert testimony, into a formula which is a clear statement in modern terms of the old *McNaghten* - Irresistible Impulse Rule. It achieves a clarity in definition of the issues which partial adoptions of the code have missed. The *Freeman* court recognized that the suggested test may require "futher emendation in the light of tomorrow's discoveries," but it has at least established a formula which can presently remedy the problem of reconciling past and present.

Freeman is basically an attempt to translate the traditional *McNaghten* (plus irresistible impulse) formula into modern terminology. The "substantial capacity" terminology was employed in order to eliminate black and white thinking. While the presence of *any* defect may not be sufficient to establish legal insanity, a finding of total incapacity may likewise be unnecessary. "Appreciate" replaced "know" because of the prevailing view that even though one might have intellectual awareness that his act is wrong, this can have little significance when divorced from appreciation of the moral or legal import of behavior. *Freeman* is also an attempt to provide for meaningful psychiatric testimony. Psychiatric testimony is approved when that testimony is based on "thorough" examination, with the provision that such testimony is to be admitted only as expert testimony, and not as legal pronouncement. With respect to this expanded use of psychiatric testimony, *Freeman* involves change from *McNaghten*, but the basic theory undergirding the Model Penal Code rule adopted therein is a restatement of the same elements—cognition and volition—which are the bases for the *McNaghten*-Irresistible Impulse Rule. This latter is the test used presently in many states and, previous to the post-1954 changes, all federal courts.

South Carolina's rule on insanity was basically formulated in 1898 by the Supreme Court's approval of a circuit court charge stating in part:

> [T]o relieve himself from responsibility . . . he must show that . . . by reason of a mental defect . . . at the time of the act he did not know that the act he committed was wrong, or criminal, or punishable . . . . [I]f he is . . . capable of forming a correct judgment as to its being morally or legally wrong he is . . . responsible . . . . [T]he difficulty would be great . . . of establishing satisfactory proof whether an impulse was or was not uncontrollable.[18]

Many years and numerous cases[19] have seen no change, and in its most recent confrontations with the insanity problem the court in 1957 continued its repudiation of the irresistible impulse doctrine[20] and in 1961 reaffirmed loyalty to the *McNaghten* Rule.[21] *Bundy* was decided at a time when "the subject of the mind and its influence on the body is very difficult and obscure, even to the most learned," and a question arises as to whether recent progress on mental study has not so elucidated the insanity issue as to reveal fallacies in the rule adopted under that early decision. Revision seems to be necessary, and *Freeman* provides for the first time a means of properly accomplishing this end.

The adoption of *Freeman* in South Carolina would occasion a departure from our present rule, but change should involve fewer problems than at first seem apparent. Our courts presently employ rules of evidence sufficiently liberal to pose only minor problems in the adoption of *Freeman*'s provisions regarding expert testimony.[22] The most critical problem would be the lack of any volitional (irresistible impulse) clause within our rule.[23] Many courts have refused to accept the doctrine of irresistible impulse because of the difficulty involved in actually proving the existence of such impulses. *Freeman* meets this problem by requiring that the impulse be the result of a proved mental defect in the nature of an actual physical abnormality and not a mere tendency toward antisocial conduct.[24] While South Carolina has perhaps been wise in its nonrecognition of the vague irresistible impulse position, it cannot be doubted that valid irresistible impulse situations do occur. *Freeman* acknowledges that such volitional problems exist, and its formulation offers a precise and affirmative method of submitting them to a jury, which must in South Carolina stretch *McNaghten* in order that the irresponsible

18. State v. Bundy, 24 S.C. 439, 58 Am. Rep. 262 (1898).
19. *E.g.*, State v. Fuller, 229 S.C. 439, 93 S.E.2d 463 (1956); State v. Keller, 224 S.C. 257, 78 S.E.2d 373 (1953); State v. Gilstrap, 205 S.C. 412, 32 S.E.2d 163 (1944); State v. McGill, 191 S.C. 1, 3 S.E.2d 257 (1939); State v. Jackson, 87 S.C. 407, 69 S.E. 883 (1910).
20. State v. Allen, 231 S.C. 391, 98 S.E.2d 826 (1957).
21. State v. Thorne, 239 S.C. 164, 121 S.E.2d 623 (1961).
22. *Id.* at 170, 121 S.E.2d at 625.
23. State v. Allen, 231 S.C. 391, 98 S.E.2d 826 (1957).
24. MODEL PENAL CODE, § 4.01 (2) (Tent. Draft No. 4, 1955).

not be criminally incarcerated. Much of the uncertainty concerning the irresistible impulse idea has been removed, and it should be recognized that this new formulation offers a very real opportunity to improve the legal approach to insanity.

One further point concerning the prospective importance of *Freeman* should be noted. The adoption of an insanity rule based on its theory will present potential problems of crowded facilities in that it provides for compulsory incarceration of those who are adjudged insane, while present South Carolina law[25] makes such incarceration discretionary with the trial judge. The *Freeman* rule would increase the number of those sent to mental facilities for two reasons. Judges would be required to commit all individuals to appropriate facilities upon a finding of criminal insanity, and juries would be more willing to find an individual criminally insane if they were aware that the criminally insane are automatically incarcerated (that is, that those found not guilty by reason of insanity will not be set free). One of the most appealing advancements indicated in *Freeman* is that the criminally insane would be incarcerated in mental institutions rather than in penal facilities. The detention must last until rehabilitation is satisfactorily completed; therefore the possibility is eliminated that there will be the recidivism which might follow a short non-rehabilitative jail sentence.

The *Freeman* court could put no teeth into its compulsory detention requirement, for at present there is no federal law requiring such incarceration. The court was constrained to leave this matter of enforcement to the states until such a law could be effected. South Carolina is fortunate in having the legal framework by which to effect such incarceration, but our law providing for discretionary incarceration must be amended to make that incarceration mandatory. It would be possible to adopt the *Freeman* definition of insanity without initiating this program of compulsory detention, but to do so would rob the rule of one of its key points. Even if it is necessary to do this until our facilities are capable of handling an increased number of patients, however, the *Freeman* definition of insanity should be adopted.

Freeman has presented South Carolina and the majority of American jurisdictions with a workable alternative to the *McNaghten* Rule, and concurrently with the problem of whether change is proper at the present time. Favoring a change is the

25. S.C. CODE ANN. §§ 32-969, -970 (1962).

fact that under the perceptive eye of the Supreme Court[26] there is a growing trend in the courts toward the idea of a revision of insanity law. The decisions since *Durham* have muddied the water of the insanity problem, and our highest Court must soon act to clarify the issues. When a decision comes it is doubtful that *McNaghten* will be its basis for a preponderance of the recent Supreme Court decisions[27] provide liberal allowances for individual freedoms. A liberal insanity rule would be in keeping with this trend. A liberalization in the approach to legal determinations of insanity appears inevitable, and the only choice available to the states may well be whether to initiate the change or await it.

The issue is still in flux, and the ultimate solution to the problem may not yet exist. A better solution than *McNaghten* does now exist, however, and it deserves close consideration.

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26. In spite of the influx of conflicting opinions since *Durham*, the United States Supreme Court has not yet chosen to clear the confusion with a definitive statement of what the law of insanity should be. In fact the Supreme Court last dealt extensively on the insanity problem in Matheson v. United States, 227 U.S. 540 (1913); Hotema v. United States, 186 U.S. 413 (1902), and the twin Davis cases, Davis v. United States (I), 160 U.S. 469 (1895); Davis v. United States (II), 165 U.S. 373 (1897). In these cases the Court gave approval to jury charges employing *McNaghten*, but the correctness of that rule as opposed to any other theory was not in issue. Subsequent cases are equally barren of direct challenge to *McNaghten*. (In Leland v. Oregon, 343 U.S. 790 [1952], the Court held that there was no due process requirement for the states to stop using the Right-Wrong test.) The ambiguity which has resulted has left different opinions as to whether the lower court can adopt views other than *McNaghten*. The Ninth Circuit in Sauer v. United States, 241 F.2d 640 (9th Cir. 1964), *cert. denied*, 354 U.S. 940 (1965), held that it could not act until the Supreme Court or Congress did so, but the Third Circuit in United States v. Currens, 290 F.2d 751 (3d Cir. 1961), the Tenth in Wion v. United States, 325 F.2d 420 (10th Cir. 1964), *cert. denied*, 377 U.S. 946 (1965), the District of Columbia in Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954), and the Second in United States v. Freeman, 357 F.2d 606 (2d Cir. 1966), have held that there is no compulsion on lower courts to use *McNaghten*. It is felt that the highest Court would have granted certiorari in some of the many cases which have reached it, if it wished to clear the muddy water. Perhaps, as has been suggested, the Supreme Court has not laid down a rule because it is motivated by a desire to see the issue discussed and developed on the lower levels before it makes a definitive statement.

27. *E.g.*, Miranda v. Arizona, 384 U.S. 436 (1966); Douglas v. California, 372 U.S. 353 (1963); Wong Sun v. United States, 371 U.S. 471 (1963); Mapp v. Ohio, 367 U.S. 643 (1961); Sherman v. United States, 356 U.S. 369 (1958).