University of Miami Law Review

Volume 23
Number 2 *Winter-Spring 1969*

Article 16

5-1-1969

Criminal Insanity -- Another M'naghten?

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CRIMINAL INSANITY—ANOTHER M'NAGHTEN?

The United States District Court for the Eastern District of Virginia, trying a case without a jury, applied the M'Naghten and irresistible impulse test[1] to determine the sanity of the defendant. On appeal to the United States Court of Appeals, Fourth Circuit, *held*, conviction affirmed: The M'Naghten test is rejected in favor of the insanity formulation of the American Law Institute which provides that a person is not responsible for his criminal conduct if, at the time of such conduct, he lacked the substantial capacity to appreciate the criminality of his act or to conform to the conduct prescribed by law.[2] However, a showing that the defendant failed to act like a normal person is not sufficient to indicate a lack of substantial capacity. *United States v. Chandler*, 393 F.2d 920 (4th Cir. 1968).

At early common law, madmen[3] and idiots[4] were not held responsible for their conduct. It was not until the Eighteenth Century, however, that standards began to evolve to determine the sanity of an accused.[5] Two such standards—the "wild beast" test[6] and the "good and evil" test[7]—were employed in both English and American courts until the advent of the liberal, but shortlived, criterion of sanity formulated in *Had-*

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1. M'Naghten's Case, 10 Cl. & Fin. 200, 8 Eng. Rep. 718 (1843). Also spelled "McNaughten" or "M'Naughten." The M'Naghten, or "right-wrong" insanity test provides a complete defense to an individual unable to distinguish right from wrong with respect to the particular act by reason of mental disease or mental defect. Its supplement, the "irresistible impulse" test, exculpates the person if because of some mental disease or defect he was unable to overcome a sudden impulse to commit the act. *See* notes 9, 27 *infra*.

2. The American Law Institute test contained in the MODEL PENAL CODE § 4.01 (adopted 1962), 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. BRACTON in DE LEGIBUS ET CONSUETIDINIBUS ANGLIAE defined a madman as one who did not know what he was doing, who lacked mind and reason, and who was not far removed from the brute. 1 F. WHARTON & M. STILLE, MEDICAL JURISPRUDENCE 510 (5th ed. 1905).

4. An idiot was defined by Fitzhebert, a judge of Common Pleas, as "such person who cannot account or number twenty pence, nor can tell who was his father or mother, nor how old he is . . . ." 1 HAWKINS, PLEAS OF THE CROWN 2 (8th ed. 1824), *cited in* Cohen, *Criminal Responsibility and the Knowledge of Right and Wrong*, 14 U. MIAMI L. REV. 30, 32 (1959).

5. *See generally* F. WHARTON & M. STILLE, *supra* note 3; Cohen, *supra* note 4.

6. Rex v. Arnold, 16 How. St. Tr. 695, 764 (1724) established the "wild beast" test for determining insanity. It proscribed that a man should be held insane if he is "[T]otally deprived of his understanding and memory, and . . . doth not know what he is doing, no more than an infant, than a brute or a wild beast. . . ."

7. It was Hawkins' belief that persons "under a natural disability of distinguishing between good and evil, as infants under the age of discretion, ideots [sic], and lunaticks [sic]" should be exculpated from criminal responsibility. 1 HAWKINS, *supra* note 4, at 1.

field's Case which held that the act of the accused must be "so under the guidance of reason" that he should be responsible for same.[8]

The most powerful precedent for the determination of legal insanity was established in the case of Daniel M'Naghten.[9] The test was a reversion to the Eighteenth Century "good and evil" test, focusing on whether the accused knew right from wrong regarding his particular act. It was quickly adopted by all but one of the states,[10] and except for those courts which considered the impulsiveness of the accused's conduct as a factor in determining his sanity,[11] the M'Naghten test maintained its stranglehold on the criminal law of insanity until 1954.[12] At that time, the District of Columbia Circuit, responding to the advances being made in medicine and psychology, revised its test to allow the defense of insanity to any accused whose "act was the product of mental disease or mental defect."[13] Eight years later, the American Law Institute set forth its compromise, the "substantial capacity" test.[14]

The increasing efforts being made by state legislatures and courts to develop a workable criterion for determining insanity reflect an awareness that the objectives of criminal law, namely, the protection of the public and the rehabilitation of the wrongdoer,[15] are not being furthered under the M'Naghten test. Realizing that the deterrent effect of criminal

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8. Hadfield's Case, 27 How. St. Tr. 1281 (1800). This case, as pointed out by Haynsworth, C.J. in United States v. Chandler, 393 F.2d 920, 924 (4th Cir. 1968), is most progressive in emphasizing volitive as well as cognitive aspects of the accused's act. Judge Haynsworth's approval of this decision is intriguing in that Hadfield's Case is most strongly aligned with Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954), a case which judge Haynsworth cautions is subject to much "misinterpretation" (393 F.2d at 925).

9. *See* note 1 *supra*. M'Naghten, suffering from delusions of persecution, planned to assassinate the Prime Minister, Robert Peel, but mistakenly killed his secretary. The House of Lords recommended acquittal for the reason that:

> [T]he 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, 10 Cl. & Fin. 200, 210, 8 Eng. Rep. 718, 722 (1843).

10. New Hampshire, in State v. Pike, 49 N.H. 399 (1869), renounced M'Naghten, contending that insanity was a question of fact for the jury and that the effect of M'Naghten was to allow either an expert to testify conclusively as to the defendant's legal insanity or to allow the judge to decide whether the defendant in fact had the capacity for criminal responsibility. Instead, New Hampshire adopted the following formula for determining insanity:

> [T]wo questions are presented: First: Had the prisoner a mental disease? Second: If he had, was the disease of such a character, or was it so far developed, or had it so far subjugated the powers of the mind, as to take away the capacity to form or entertain a criminal intent? State v. Jones, 50 N.H. 369, 392-93 (1871) (J. Ladd's dictum).

11. *See* note 1 *supra*; note 27 *infra*.

12. United States v. Chandler, 393 F.2d 920, 925 (4th Cir. 1968).

13. Durham v. United States, 214 F.2d 862, 875 (D.C. Cir. 1954). *See also* note 8 *supra*; note 31 *infra* et seq.

14. *See* note 2 *supra*.

15. W. CLARK & W. MARSHALL, A TREATISE ON THE LAW OF CRIMES 56 (6th rev. ed. 1958).

law was inapplicable to the insane, and that society would be equally protected by their institutionalization as by their imprisonment, the insanity defense was designed to determine whether or not an accused possessed the state of mind for criminal responsibility.[16] However, once psychologists recognized that the inability to distinguish right from wrong was not diagnostic of insanity,[17] it became difficult to testify as to a defendant's behavioral traits in such a way that a jury, applying M'Naghten, could find the defendant legally insane.[18]

In recent years M'Naghten has been criticized,[19] not because of its inherent defects, that is, its focus on the cognitive aspect of insanity and its concern with the particular criminal act,[20] but because of the results these defects have produced. Its limited approach has prevented the introduction of relevant psychiatric testimony,[21] and has resulted in the incarceration of people recognized as being medically insane.[22] Never-

16. *Id.* at 336.

17. As stated in Durham v. United States, 214 F.2d 862, 871 (D.C. Cir. 1954):

> The science of psychiatry now recognizes that a man is an integrated personality and that reason, which is only one element in that personality, is not the sole determinant of his conduct. The right-wrong test, which considers knowledge or reason alone, is therefore an inadequate guide to mental responsibility for criminal behavior.

See note 34 *infra*.

18. In effect, the jury was limited to determining the credibility of the psychiatrist's testimony since it was the psychiatrist who had to testify, not as to the effect of the defendant's mental disease on his behavior, but as to its effect on his ability to distinguish between right and wrong. *See* Comment, *The Insanity Defense Under the Michigan Revised Criminal Code*, 14 WAYNE L. REV. 863, 867-68 (1968); note 21 *infra*.

19. The criticisms of M'Naghten are best summarized in United States v. Freeman, 357 F.2d 606, 622 (2d Cir. 1966).

20. Commonwealth v. Rodgers, 48 Mass. (7 Met.) 500 (1844), was one of the earliest cases to object to M'Naghten because it was concerned only with the accused's actual knowledge of right and wrong. However, it was not until the middle of the Twentieth Century that psychologists and criminologists noted the practical implications of M'Naghten's limited approach.

In a paper delivered to the Third National Conference on Research and Teaching in Criminology, Dr. Herbert Wechsler pointed out that the M'Naghten test does not go far enough in distinguishing those people needing curative treatment because "it confines its attention to the actor's cognitive capacity, for even though cognition may obtain, mental disorder or defect may destroy capacity for self-control." H. WECHSLER, CODIFICATION OF CRIMINAL LAW IN THE UNITED STATES: THE MODEL PENAL CODE OF THE AMERICAN LAW INSTITUTE 24 (1968) [hereinafter cited as WECHSLER].

21. Since the jury is concerned only with the accused's ability to distinguish between right and wrong, as a practical matter, the psychiatrist is limited to testifying as to the effect of the accused's mental disorder on his ability to so discriminate. Consequently, the psychiatrist is required to make a moral judgment, rather than to testify as to the relation of a mental disease to a criminal act. Panel Discussion, *Psychiatry and the Law*, 32 F.R.D. 481, 550 (10th Cir. Jud'l Conf. 1962). *See also* note 18 *supra*.

Several courts following M'Naghten believe that the limitation on psychiatric testimony is justified since the law has only an incidental interest in determining whether a mental disease existed which acted to produce the criminal conduct. Its main interest is in determining whether to charge the accused with criminal responsibility for his conduct. *See, e.g.*, State v. Crose, 88 Ariz. 389, 357 P.2d 136 (1960); Perry v. State, 143 So.2d 528 (Fla. 2d Dist. 1962); Commonwealth v. Woodhouse, 401 Pa. 242, 164 A.2d 98 (1960).

22. In the recent case of Fuller v. State, 423 S.W.2d 924, 925 (Tex. Crim. App. 1968), the defendant was declared insane at the time of the insanity hearing but was released from

theless, M'Naghten is still regarded as the legal test of insanity in a majority of states[23] for the reason that courts consider it efficient and reliable.[24]

Only one federal circuit[25] and five state courts[26] have supplemented M'Naghten with the irresistible impulse test[27] so as to allow the defense of insanity to an accused who might know right from wrong, but who was unable to make this distinction because of a sudden compulsion.[28] The rationale of these jurisdictions is to eliminate the "cog-

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the State Hospital in time to stand trial. Subsequently, he was found guilty of the murder of his wife; the court, applying M'Naghten, stated that: "mere mental deficiency or derangement, though it may constitute a form of insanity known to and recognized by medical science, does not excuse one for crime." *Accord*, People v. Wood, 12 N.Y.2d 69, 236 N.Y.S.2d 44, 187 N.E.2d 116 (1962). *See generally* Mueller, *Criminal Law and Administration, 1958 Annual Survey of American Law*, 34 N.Y.U.L. REV. 83, 85-86 (1959).

23. *E.g.*, M'Naghten has been strictly applied in Chase v. State, 369 P.2d 997 (Alas. 1962); State v. Schantz, 98 Ariz. 200, 403 P.2d 521 (1965); People v. Nicolaus, 48 Cal. Rptr. 353, 409 P.2d 193 (1966) (wherein the court declared that M'Naghten would be upheld until the legislature saw fit to change the statute); Piccott v. State, 116 So.2d 626 (Fla. 1960), *cert. denied*, 364 U.S. 293; State v. Jenkins, 236 La. 256, 107 So.2d 632 (1958); State v. Dhaemers, 276 Minn. 332, 150 N.W.2d 61 (1967) (wherein the court indicated its disapproval of M'Naghten, but held that it was bound by statute); Spurlock v. State, 212 Tenn. 132, 368 S.W.2d 299 (1963).

In State v. Shoffner, 31 Wis. 2d 412, 143 N.W.2d 458 (1966), Wisconsin allowed the defendant to choose between M'Naghten and the American Law Institute's test. However, if he chooses the latter, he waives the statutory provision that the burden of proof is on the government.

For a complete listing of those jurisdictions following M'Naghten, *see* annot., 4 A.L.R.2d 1040 (Supp. 1965, 1968).

24. In State v. Page, — R.I. —, 244 A.2d 258 (1968), the court, in affirming a conviction of 1st degree murder, held that the record was devoid of any evidence probative of the invalidity of M'Naghten, but it conceded that because of the increasing knowledge about mental illness which questioned M'Naghten as determining criminal responsibility of the mentally ill, the court would consider the use of another test, provided it was shown that the test was more *reliable* and had greater *efficiency*. *Accord*, State v. Lucas, 30 N.J. 37, 152 A.2d 50 (1959).

25. Anderson v. United States, 237 F.2d 118 (9th Cir. 1956).

26. Judicial interpretation of statutes resulted in the application of M'Naghten supplemented by irresistible impulse in Lee v. State, 265 Ala. 623, 93 So.2d 757 (1957); Early v. People, 142 Colo. 462, 352 P.2d 112 (1960); Longoria v. State, 168 A.2d 695 (Del. 1961); Flowers v. State, 236 Ind. 151, 139 N.E.2d 185 (1956); People v. Krugman, 377 Mich. 559, 141 N.W.2d 33 (1966).

27. Parsons v. State, 81 Ala. 577, 2 So. 854 (1887), explains that the irresistible impulse supplement allows the insanity defense to an accused, having the knowledge to discriminate between right and wrong, if the following conditions concur:

> (1) If, by reason of the duress of such mental disease, he had so far lost the *power 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*. *Id.* at 597, 2 So. at 866-67.

See note 1 *supra*.

28. The irresistible impulse concept is criticized for this very reason. Although volition has an important effect on one's conduct, it has been contended that the doctrine's emphasis on the accused's will at the time of the act implies that only a sudden, explosive action will satisfy the test. As the court in Durham stated:

> The term "irresistible impulse", however, carries the misleading implication that "diseased mental condition[s]" produce only sudden, momentary or spontaneous inclinations to commit unlawful acts. . . . [T]he . . . test is . . . inadequate in

nition" defect of M'Naghten and thereby extend the boundaries of what might be considered relevant psychiatric testimony.[29] However, psychiatrists regard the irresistible impulse test as being basically unsound for it implies that the defendant's character underwent some sudden change, and impulsiveness itself is due to a developed mental disease.[30]

The Durham test,[31] followed only in the District of Columbia[32] and Maine,[33] was the first attempt to attune the criminal law of insanity to the developments in the field of psychiatry.[34] Although the courts insisted that their standard incorporated the M'Naghten Rule,[35] the reason for the formulation providing the defense of insanity to an accused whose act is the product of a mental disease or defect,[36] was that medical and psychological advances required a *new* test.[37] Intuitively, the Durham Rule accomplishes the objective of allowing for the introduction of all relevant testimony as to the defendant's psychiatric make-up, overcoming the medical objections to M'Naghten.[38] However, by giving psychiatrists such wide latitude in testifying, it has been contended that they

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that it gives no recognition to mental illness characterized by brooding and reflection and so relegates acts caused by such illness to the application of the inadequate right-wrong test. Durham v. United States, 214 F.2d 862, 873-74 (D.C. Cir. 1954).

29. Since the test considers volition as well as cognition, the psychiatrist would be required to testify as to whether there existed a mental disease which could, and in fact, did give rise to impulsive conduct.

30. *See* S. RUBIN, PSYCHIATRY AND CRIMINAL LAW: ILLUSIONS, FICTIONS AND MYTHS 64 (1965).

In addition to being inconsistent with psychiatric theory, the irresistible impulse supplement has been rejected as being inconsistent with the legal theory of accountability. *E.g.*, State v. Brandon, 53 N.C. (8 Jones L.) 463, 467 (1862), wherein the court stated that "the law does not recognize any moral power compelling one to do what he knows is wrong."

31. *See* note 13 *supra.*

32. D.C. CODE ANN. § 24-301, Comment I-3 (1961), provides that in determining whether the defendant should be exculpated from criminal responsibility "the question is whether the accused had a mental disease or defect and whether his alleged criminal act was the product of such disease or defect."

33. ME. REV. STAT. ANN. tit. 15, § 102 (1964), *construed* in State v. Park, 159 Me. 328, 193 A.2d 1 (1963).

34. Reid, *Understanding the New Hampshire Doctrine of Criminal Insanity*, 69 YALE L.J. 367, 389 (1960), points out, as one of the major differences between the New Hampshire doctrine and Durham, that the theoretical basis of the latter was the formulation of an insanity test to reflect medical developments. *See* note 17 *supra.*

35. "While capacity to distinguish right from wrong is no longer *the* earmark of legal *sanity*, the lack of that capacity is *one* of the earmarks of legal *insanity*." Wright v. United States, 250 F.2d 4, 12 (D.C. Cir. 1957).

36. Both Maine and the District of Columbia exclude repeated anti-social acts and conduct induced by intoxicating liquor or drugs from the category of a "mental disease or mental defect." *Compare* O'Beirne v. Overholser, 193 F. Supp. 652 (D.D.C. 1961), *with* ME. REV. STAT. ANN. tit. 15, § 102 (1964).

37. *See* note 34 *supra.*

38. The advantages of the Durham rule in securing testimony concerning the accused's mental condition, are cited in Stewart v. United States, 247 F.2d 42, 44 (D.C. Cir. 1957):

> The *Durham* rule . . . allows the psychiatrist to testify in terms of mental health or illness without being required necessarily to answer questions on what he may consider "non-medical topics [such] as 'malice,' 'right and wrong,' and 'criminal intent.'"

usurp the power of the jury to determine insanity.[39] This result was inevitable since the word "product" created such problems in causation[40] that the jury was without any definite standard to apply to the psychiatrist's factual testimony.[41]

Under these tests, the courts were faced with deciding between two[42] mutually-exclusive goals: (1) they could use a test that was efficient and reliable; or (2) they could use a test which allowed a scientific determination of the defendant's sanity. To compromise these objectives, the American Law Institute proposed a test which allowed the insanity defense to one who, as a result of a mental disease or defect, lacked the substantial capacity to appreciate the criminality of his act or to conform to standards prescribed by law.[43]

Adopted in eight states[44] and seven federal circuits,[45] this test em-

39. This problem was highlighted in Blocker v. United States, 288 F.2d 853 (D.C. Cir. 1961), wherein a psychiatrist testified that Blocker, possessing a sociopathic personality disorder, did not have a mental disease. The jury verdict found Blocker sane and guilty. Within several weeks, another psychiatrist testified that a sociopathic personality disorder was a mental disease, and subsequently both psychiatrists agreed to classify the disorder as a mental disease. On the basis of this reclassification, the defendant was adjudged insane in the second trial.

In order to prevent a recurrence of this result, McDonald v. United States, 312 F.2d 847 (D.C. Cir. 1962), held that the question as to the existence or non-existence of a mental disease was a question for the jury, regardless of the expert's opinion.

A further clarification of the province of the psychiatrist and the jury appeared in Washington v. United States, 390 F.2d 444 (D.C. Cir. 1967). The court not only forbade testimony as to whether the act was the product of mental illness, but also provided that the judge must instruct the expert that his conclusions must be supported by testimony as to the "investigations, observations, reasoning and medical theory [leading] to [his] opinion." *Id.* at 457. It was felt that this requirement would lessen the likelihood of psychiatrists testifying in terms of labels (*e.g.*, schizophrenia, neurosis) which inherently contain moral and legal, as well as medical, judgments. *Id.* at 452-55.

40. There was some confusion as to whether "product" meant "direct emission" from or "proximate creation" of the disease (Wright v. United States, 250 F.2d 4, 12 (D.C. Cir. 1957)), or whether it referred to some mental disturbance, in the absence of which no criminal act would have resulted. (As the appellant erroneously contended in United States v. Chandler, 393 F.2d 920 (4th Cir. 1968)).

Carter v. United States, 252 F.2d 608 (D.C. Cir. 1957), purported to resolve the issue by providing that there must be a necessary and critical relationship between the mental disease and the resultant criminal behavior such that the act would not have been committed in the absence of the disease. *But cf.* WECHSLER at 25, where the word "product" is cited as being the "patent ambiguity" of Durham.

41. In United States v. Chandler, 393 F.2d 920 (4th Cir. 1968), Haynsworth, C.J. states that Durham "was subject to misinterpretation as prescribing a diagnostic . . . test. . . . Moreover, it posed very substantial problems for a jury in grasping its province and discharging its responsibility . . . ." *Id.* at 925.

42. Although three tests were discussed, both the M'Naghten test and the M'Naghten-irresistible impulse test were advantageous in that they met the efficiency objective, yet were deficient in that they failed to provide for a scientific determination of insanity.

43. MODEL PENAL CODE § 4.01 (adopted 1962). *See* note 2 *supra.*

44. Six states—Illinois, Maryland, Missouri, Montana, New York (limited to lack of substantial capacity to "know or understand") and Vermont—have adopted the MODEL PENAL CODE § 4.01. *See* WECHSLER at 24. In addition, Massachusetts and Wisconsin have recently applied it judicially. *See, e.g.*, Commonwealth v. McHoul, 352 Mass. 544, 226 N.E.2d 556 (1968); State v. Shoffner, 31 Wis. 2d 412, 143 N.W.2d 458 (1966); note 23 *supra.*

bodies the essentials of the M'Naghten-irresistible impulse test in modern terminology,[46] and alleviates the causation difficulties[47] of the Durham test by prescribing the results the mental disease must generate.[48] Thus, the test provides a definite standard for a jury, and simultaneously removes the absolutism of M'Naghten, thereby allowing for the introduction of relevant psychiatric testimony, through the "substantial capacity" requirement.[49]

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45. Blake v. United States, No. 23,945 (5th Cir., Feb. 12, 1969); United States v. Smith, No. 18,095 (6th Cir., Nov. 25, 1968); United States v. Chandler, 393 F.2d 920 (4th Cir. 1968); United States v. Shapiro, 383 F.2d 680 (7th Cir. 1967); United States v. Freeman, 357 F.2d 606 (2d Cir. 1966); Wion v. United States, 325 F.2d 420 (10th Cir. 1963), *cert. denied*, 377 U.S. 946; United States v. Currens, 290 F.2d 751 (3d Cir. 1961).

When the United States Court of Appeals for the Third Circuit adopted an insanity test substantially similar to the one proposed a year later by the American Law Institute, it was thought that "perhaps the Supreme Court [had] . . . not laid down a rule for the federal courts in respect to the criminal responsibility of the mentally ill because it desire[d] to treat the circuits as it [did] the States, as laboratories for the development of substantive law." United States v. Currens, *supra* at 769.

Also, it should be noted that several of the circuits substitute the word "wrongfulness" for "criminality" in subsection (1) of the American Law Institute definition. *See, e.g.*, United States v. Shapiro, *supra*, where, after discussing in detail the wording of the American Law Institute test, the United States Court of Appeals for the Seventh Circuit followed the preference of the Second Circuit in United States v. Freeman, *supra*, for the word "wrongfulness." The new instruction on insanity in the Seventh Circuit is as follows:

> [T]he prosecution must establish beyond a reasonable doubt that the defendant did not have a mental disease, or defect, or that despite the mental disease or defect he had substantial capacity both to appreciate the wrongfulness of his conduct, and to conform his conduct to the requirements of the law. United States v. Shapiro, *supra* at 686.

Similarly, the Fifth Circuit, in its recent adoption of the American Law Institute test, preferred "wrongfulness" to "criminality" since it was a broader term, allowing the insanity defense to an accused who believed his conduct to be morally justified even though he recognized that it might be criminal. *See* Blake *supra*.

Notwithstanding the use of "wrongfulness" as an index for insanity, the Eighth Circuit has refused to accept the "laboratories" philosophy of the *Currens* Court, *supra*. In Pope v. United States, 372 F.2d 710 (8th Cir. 1967), the court refused to find error in a charge to the jury on the issue of insanity where the instruction required positive findings on the defendant's cognition, his volition, and his capacity to control his behavior since a variation of M'Naghten-irresistible impulse test was still valid. In an appendix the court reviewed the law in the various federal courts. 372 F.2d 710, 737-39.

46. Any differences existing between the words "right and wrong" and "appreciate the criminality [wrongfulness] of his conduct," and between the words "irresistible impulse" and "conform his conduct to the requirements of law," appear to be only semantic. As a practical matter, by narrowly construing "substantial capacity," a court could easily adopt the American Law Institute test, and yet apply the M'Naghten-irresistible impulse test.

47. *See* note 40 *supra*.

48. The result of this mental disease must be either a failure on the part of the accused to understand his wrongful conduct (in M'Naghten terms, a lack of cognition), or a failure to conform his conduct to a proscribed norm (in irresistible impulse terms, a lack of volition). Under Durham, however, the result of the mental disease need only be an unlawful act.

49. The importance of the words "substantial capacity" in distinguishing the American Law Institute test from M'Naghten-irresistibel impulse test, is emphasized by WECHSLER, at 24, where he states:

> [N]o test is workable that calls for the complete impairment of ability to know or to control. . . . Disorientation . . . might be extreme and still might not be total; what clinical experience revealed was closer to a graded scale with marks along

In the instant case,[50] the United States Court of Appeals for the Fourth Circuit, sitting en banc, affirmed the decision of the United States District Court for the Eastern District of Virginia. In so doing, the court made alternative findings within the American Law Institute's formulation and in terms of the M'Naghten-irresistible impulse test, rejecting the latter. The gravamen of the appeal was that the defendant suffered from a mental or emotional abnormality,[51] in the absence of which she would not have murdered her husband. The court's decision, however, was predicated on the theory that this contention was inconsistent with the true meaning of Durham[52] and with the express language of the American Law Institute test: namely, that mental disease does not mean an abnormality manifested only by repeated criminal or anti-social conduct.[53] The court further stated that the American Law Institute's formulation was being adopted, in preference to the other insanity tests, because it imposed no limitation on psychiatric testimony, and left the jury free to make its findings according to a definite, practicable standard which society proscribed.[54]

It would seem that the primary objective of the Fourth Circuit was to portray itself as being a progressive court. Such a conclusion is inescapable when one considers that the court, notwithstanding its decision that Mrs. Chandler would be sane regardless of the test applied,[55] pro-

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the way. . . . If . . . [an examiner] must speak to utter incapacity *vel non*, delusional psychosis . . . would be the only instance where his testimony could be meaningful, although he knew that the disorder was extreme. To meet this aspect of the difficulty, . . . the criterion [for determining insanity] should ask if there was, as a result of disease or defect, a deprivation of "substantial capacity" to know or to control, meaning thereby the reduction of capacity to the vagrant and trivial dimensions characteristic of the most severe afflictions of the mind.

Such was the rationale of the court in United States v. Shapiro, 383 F.2d 680 (7th Cir. 1967). The trial court had given the jury a definition of insanity substantially similar to the one approved by the United States Supreme Court in Davis v. United States, 165 U.S. 373, 378 (1897). In comparing the American Law Institute and *Davis* definitions, the court of appeals noted:

that Davis requires complete destruction of power of self-control where the ALI requires only that the defendant have less than "substantial capacity" to conform his conduct. It is our impression that in this difficult field absolutes are not realistic, and that the ALI approach is preferable. 383 F.2d 680, 685.

50. United States v. Chandler, 393 F.2d 920 (4th Cir. 1968).

51. Mrs. Chandler was diagnosed as having a "passive aggressive personality with alcoholic features," and as being the type of person who was inclined to exaggerate human characteristics, and who was given to express her anger in violence. *Id.* at 922.

52. It was Mrs. Chandler's contention that her personality disorder was such that a psychiatrist would consider it a mental disease, and that by reason of Durham, she should not be held criminally responsible since her act was the product of this disease. The court pointed out that according to Washington v. United States, 390 F.2d 444 (D.C. Cir. 1967), and McDonald v. United States, 312 F.2d 847 (D.C. Cir. 1962), the psychiatrist's opinion is not conclusive in this regard. United States v. Chandler, 393 F.2d 920, 928-29 (4th Cir. 1968).

53. MODEL PENAL CODE § 4.01 (adopted 1962). *See* note 2 *supra*.

54. United States v. Chandler, 393 F.2d 920, 926 (4th Cir. 1968).

55. The court affirmed the district court's finding that Mrs. Chandler's act was not an irresistible impulse. It held that the record was devoid of any evidence showing she lacked substantial capacity to control her actions. Finally, it concluded, that "[o]n this appeal . . .

ceeded to dispense with precedent and adopt the American Law Institute test. On closer examination, it appears that the true reason for adopting a new test, when the facts did not warrant such action, was to inaugurate the American Law Institute's formulation in a situation where its M'Naghten-irresistible impulse character[56] could be easily disguised. Only under these innocuous facts was the court able to avoid the embarrassment of defining "substantial capacity" and of revealing its true progressive nature.

MICHELLE HOLTZMAN

JOINDER OF THE LIABILITY INSURER AS A PARTY DEFENDANT

Suit was brought against the insured and her insurer for damages sustained by the plaintiff from alleged negligent operation of the insured automobile. A final order was entered striking all portions of the complaint joining the insurer as a party defendant, and dismissing the insurer as a party to the cause. On appeal by the plaintiff, the District Court of Appeal, First District *held*, reversed and remanded: Subsection (a) of Rule 1.210, Florida Rules of Civil Procedure permits joinder of an insurer under a liability insurance policy as a party defendant. The complaint alleged facts which, if true, made the insurer a proper party defendant; therefore, it was error to grant the motion to strike and to dismiss the insurer as a party defendant. *Bussey v. Shingleton*, 211 So.2d 593 (Fla. 1st Dist. 1968), *petition for certiorari filed.*

At common law, joinder in one action of counts based on contract and on tort was prohibited.[1] Although some modern statutes have manifested a trend toward speeding up eventual recovery against an insurer by permitting the insurer to be joined in the original action, such joinder of a cause of action in tort against the owner or driver of a vehicle with a cause of action in contract against the insurer or indemnitor of the owner on the insurance policy or indemnity bond is still not allowed in the majority of jurisdictions.[2] However, several jurisdictions have statutes

it is only contended that she is not responsible under a misconstruction of *Durham*, which . . . has been expressly rejected by the District of Columbia Circuit . . . ." *Id.* at 929.

Perhaps recognizing the incongruity of this decision, the Fifth Circuit was more circumspect in its adoption of the American Law Institute test. In Blake v. United States, No. 23,945 (5th Cir., Feb. 12, 1969), the court's conclusion that the case was an appropriate one for adopting the American Law Institute test, was predicated on its finding that the evidence was such that the defendant could not successfully assert the insanity defense under a M'Naghten-irresistible impulse charge, but that he might succeed under a substantial lack of capacity type charge.

56. *See* notes 46, 48 *supra.*

1. 1 AM. JUR. *Actions* § 75 (1936).

2. Smith Stage Co. v. Eckert, 21 Ariz. 28, 184 P. 1001 (1919); Universal Auto. Ins. Co. v. Denton, 185 Ark. 899, 50 S.W.2d 592 (1932); Armijo v. Ward Transp., Inc., 134 Colo.