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THE INSANITY DEFENSE—AN EFFORT TO COMBINE LAW AND REASON

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"I may appeal to all who hear me, whether there are any causes more difficult, or which, indeed, so often confound the learning of the judges themselves, as when insanity, or the effects and consequences of insanity, become the subjects of legal consideration and judgment."

—THOMAS ERSKINE, *The Trial of James Hadfield*

With popular interest in psychiatry increasing, the attention commanded by the defense of insanity has been growing.¹ Although much criticism of the most commonly used standards has come from non-lawyers,² one of the major censures and alternate proposals emanates from a particularly busy federal appellate court,³ and another from the American Law Institute.⁴ Yet none of the existing or proposed insanity standards provides a harmonious marriage between today's psychiatric knowledge and our common-law system of trial by jury.

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¹ See, e.g., Bazelon, *The Awesome Decision*, *The Saturday Evening Post*, Jan. 23, 1960, p. 32.

² See, e.g., COMM. ON PSYCHIATRY AND LAW OF THE GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, CRIMINAL RESPONSIBILITY AND PSYCHIATRIC EXPERT TESTIMONY (Report No. 26, 1954); ZILBOORG, *THE PSYCHOLOGY OF THE CRIMINAL ACT AND PUNISHMENT* (1954).

³ See *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954).

⁴ MODEL PENAL CODE §§ 4.01-.09 & comments (Tent. Draft No. 4, 1955).

Whereas critics decry the *McNaughton*⁵ rules' failure to reflect a conception of the personality which is compatible with the views of modern psychiatry, the application of more modern proposals in the framework of our traditional legal method of trial by jury seems, at best, strained. Yet emphasis must be placed upon the jury trial. As long as the insanity defense is to have a place in our common-law criminal trial, then trial personnel—trial lawyers, trial judges, and, most important, trial jurors—are the persons who must use whatever standards the law fixes for determining criminal responsibility. In evaluating the various insanity defense standards, the capabilities of the triers of fact, functioning within the framework of a criminal jury trial, cannot be ignored.

This article, after examining the jury-trial application of each of the insanity standards, present and proposed, will suggest a possible alternative: to remove the insanity issue from the jury so that contemporary scientific knowledge can be employed in a setting that will be more conducive to rendering this knowledge helpful.

While considering the methods by which our common-law trial juries determine questions of insanity, however, one should bear in mind that the imperfections of this defense do not jeopardize the administration of justice in most cases. The impression that the *McNaughton* rules are sending a multitude of insane persons to prison is without foundation.⁶ The fear that adoption of one of the newer and more scientific standards would allow a number of skilled malingerers to avoid prison is equally unjustified.⁷ Without detracting from the fascination posed by problems of the insanity defense, or from the importance to sound law enforcement of their solution, it must be recognized that quantitatively both of these alarmist views are far removed from reality.

⁵ The spelling of this oft-misspelled name here follows that used by the accused himself.

⁶ Thus, a letter from Daniel Gutman, formerly counsel to the Governor of New York, says that "many serious crimes are committed by persons who are mentally ill but who, in the light of the McNaghten rule, must be adjudicated as sane; and herein lies the danger." N.Y. Times, Aug. 13, 1959, p. 26, col. 5. Cf. BIGGS, *THE GUILTY MIND* 121-45 (1955); WERTHAM, *THE SHOW OF VIOLENCE* 65-94 (1949). However, a survey of more than 71,000 examinations conducted over a twenty-five year period by the Psychiatric Clinic of the New York County Court of General Sessions reveals that the number of convicted defendants considered psychotic "has rarely exceeded 1% annually, and has generally been far less." See MESSINGER & APFELBERG, *A QUARTER CENTURY OF COURT PSYCHIATRY* 6 & chart 1 (1957). See, to the same general effect, Guttmacher, *The Psychiatric Approach to Crime and Correction*, 23 *LAW & CONTEMP. PROB.* 633, 640 (1958); Hagopian, *Mental Abnormalities in Criminals Based on Briggs Law Cases*, 109 *AM. J. PSYCH.* 486, 488 (1953).

⁷ Compare Roche, *Durham and the Problem of Communication*, 29 *TEMP. L.Q.* 264, 270 (1956), with Clayton, *Six Years After Durham*, 44 *J. AM. JUD. Soc'y* 18-19 (1960).

Of those defendants who might make a bona fide claim of insanity, very few assert this defense and have it tried out before a jury. This is true for two reasons. Many defendants may as a matter of discreet foresight prefer not to defend on the ground of insanity.⁸ This will depend in large part on the gap between the likely limits of sentence for the crime charged and the indefinite institutional commitment faced by one acquitted as insane. A last-ditch tactic, this defense is rarely employed except in capital cases when it is invoked to forfend against the ultimate in punishment.⁹ In addition, many defendants who might make an insanity defense at trial never get the opportunity to do so; their insanity makes them unfit to stand trial and subject to commitment to a mental institution as long as the illness continues.¹⁰ By the time such a defendant has regained his sanity and is returned to stand trial, the prosecutor, considering the duration of the defendant's commitment or the difficulties of proving an old case, may drop the charges or offer a lesser plea.¹¹

I. THE JURY SYSTEM

The selection of an insanity standard for use in our criminal courts cannot be based solely on psychiatric considerations. Psychiatry is concerned with mental health or illness, law with order in society. The law must emphasize not the illness of persons who commit crimes, but whether—consistent with fairness to the accused—attributing criminal responsibility will further a peaceable and well-ordered community. Moreover, because the judgment of conviction or acquittal is made by a criminal trial jury functioning in our common-law tradition, intelligent selection of a proper standard for mental responsibility requires full appreciation of the strengths and weaknesses of juries and of the rules which govern jurors' deliberations.

A standard for the guidance of lay jurors cannot be patterned after one that might be used for the staff conferences of a mental institu-

⁸ See Berman, *Is It Time To Revise the McNaughton Rule Relating to the Defense of Insanity in Criminal Law?*, 29 N.Y. STATE B.A. BULL. 407, 414 (1957); Weihofen, *A Question of Justice: Trial or Execution of an Insane Defendant*, 37 A.B.A.J. 651, 654, 710 (1951); Royal Comm'n on Capital Punishment, *Report*, CMD. No. 8932, at 106 (1953) [hereinafter cited as Royal Comm'n Rep.]. In Tremblay v. Overholser, 199 F. Supp. 569 (D.D.C. 1961), a federal court held that it is improper for a trial court to compel a defendant to adopt an insanity defense.

⁹ See, e.g., Royal Comm'n Rep. 104-05; Krash, *The Durham Rule and Judicial Administration of the Insanity Defense in the District of Columbia*, 70 YALE L.J. 905, 908, 926-27 (1961); cf. Foote, *A Comment on Pre-Trial Commitment of Criminal Defendants*, 108 U. PA. L. REV. 832, 834-35 (1960).

¹⁰ See, e.g., Müller, *Procedure to Determine Responsibility and Fitness to Proceed in Criminal Cases*, 3 CRIM. L. REV. 29 (1956). See generally WEIHOFFEN, *MENTAL DISORDER AS A CRIMINAL DEFENSE* 428-74 (1954).

¹¹ See Ploscowe, *Suggested Changes in the New York Laws and Procedures Relating to the Criminally Insane and Mentally Defective Offenders*, 43 J. CRIM. L., C. & P.S. 312, 316-17 (1952).

tion.¹² This results not only from the differences in schooling of jurors and of psychiatrists, but from the use in jury trials of concepts that would be deemed exceedingly strange were they employed in the hospital psychiatric conference. Among these are the necessity for unanimity among the sizable number of conferees, the obligation of that "diagnostician" (the prosecutor), who urges that no illness is present, to prove his conclusions beyond a reasonable doubt, and the exclusion from consideration of items likely to be highly relevant to a psychiatric diagnosis. In considering standards for the insanity defense, these items and how they operate must be kept in mind.

A. The Need for Unanimity Among Lay Jurors

In criminal cases a jury verdict generally requires the concurrence of all.¹³ Jurors, however, ordinarily lack any common discipline in or mutual understanding of psychiatry that might tend to guide their thinking along similar lines. Not only do our laws not provide for special juries of psychiatrists or psychologists in cases in which mental condition may be the only fact at issue, but in practice either the prosecutor or defense counsel would ordinarily challenge peremptorily any psychologist, social worker, or identifiable amateur "psychiatrist" on the jury panel in an insanity defense case. He would fear that such a juror might judge the opinions of expert witnesses in the light of his own training rather than pursuant to the rules supplied in the court's charge and that the other jurors might look to him for expert advice, rather than to the witnesses' testimony.

Since jurors must act unanimously despite their lack of any common psychiatric training, the standard provided for their determination of whether or not a defendant is to be held responsible for his anti-social acts should be one that they can apply in terms of their own everyday experiences and common sense.¹⁴

If, on the other hand, the insanity standard compels jurors to make unaccustomed medical diagnoses in the area of abnormal

¹² See Hall, *Psychiatry and Criminal Responsibility*, 65 YALE L.J. 761, 770-71 (1956). Compare Guttmacher, *Why Psychiatrists Do Not Like to Testify in Court*, *Prac. Law.*, May 1955, p. 50, at 51.

¹³ There has been some consideration of changing the rule that requires unanimity for the rendering of a criminal verdict; a few states have already done so, and Scotland has never had such a rule. See DEVLIN, *TRIAL BY JURY* 54-57 (1956); ORFIELD, *CRIMINAL PROCEDURE FROM ARREST TO APPEAL* 481-83 (1947).

¹⁴ Harold Laski, writing to Mr. Justice Holmes about his experience in chairing a discussion of criminal responsibility between a criminal lawyer and a "great mental specialist" remarked: "The medicals spoke passionately of 'uncontrollable impulses' and such like; Humphreys [the attorney] always drove them back to the vital point of getting definitions which could be explained by a judge to an average jury, and I thought he showed admirably that the refinements of psychological analysis are not yet ripe for legal use." 1 HOLMES-LASKI LETTERS 805 (Howe ed. 1953).

psychology, they will have to rely almost wholly upon the expert diagnosticians. In most insanity cases that go to trial the experts will differ in their diagnoses.¹⁵ Consequently, the chances that conscientious jurors will all be able to agree that they have been convinced beyond a reasonable doubt are diminished.

The charge to a jury is, in most jurisdictions, delivered orally. Although jurors may return to ask that parts be recited to them again or explained further, the charge, unlike an exhibit, cannot be carried into the jury room for detailed study.¹⁶ Although appellate courts worry over slight verbal improprieties in charges, realistically, the broad sweep of a charge is likely to be what counts most to jurors. A charge expressed in scientific terminology and abstractions, rather than in homely examples from which jurors can draw its essence, may be confusing.¹⁷ Rather than guide the jurors, it may minimize chances for agreement or cause them to resort to their own devices.¹⁸ In jurisdictions in which the judge may comment on the evidence and the credibility of the witnesses—in effect, express his own opinion on the merits of the case—the charge may serve as a guiding force toward unanimity among the jurors, especially when there are testimonial conflicts that might otherwise tend to split them asunder.¹⁹ But these jurisdictions are a minority in the United States.²⁰

Finally, there is the recent and pervasive influence of motion pictures, television, and the press. Beside propagating various forms of pseudo-psychiatric learning, these media have been dealing frequently with the role of the *independent* juror and the theme of the innocent man charged with crime.²¹ Insofar as they have increased defendants' protection against thoughtless or callous juries, their influence is desirable. But experience indicates that they may also have fostered

¹⁵ See Cavanagh, *The Responsibility of the Mentally Ill for Criminal Offenses*, 4 CATHOLIC LAW. 317, 322-23 (1958); Davidson, *Psychiatrists in Administration of Criminal Justice*, 45 J. CRIM. L., C. & P.S. 12-14 (1954); Hall, *supra* note 12, at 770-73; Meyers, *The Riddle of Legal Insanity*, 44 J. CRIM. L., C. & P.S. 330 (1953).

¹⁶ See generally ORFIELD, *op. cit. supra* note 13, at 448-56.

¹⁷ Compare the language used in *McNaughton* charges, text accompanying notes 58-59 *infra*, with the proposed *Durham* charge, note 83 *infra*.

¹⁸ See Royal Comm'n Rep. 82-85, 102.

¹⁹ The Wickersham report, commenting on the use of expert testimony concerning insanity, has noted: "We must rely chiefly on strong trial judges, enabled to charge the jury with respect to the expert evidence and guide them to an intelligent appraisal of it." NAT'L COMM'N ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON CRIMINAL PROCEDURE 37 (1931).

²⁰ See ORFIELD, *op. cit. supra* note 13, at 457-59. See generally Otis, *Comment to the Jury by the Trial Judge*, 27 A.B.A.J. 749 (1941). In England, "a judge is permitted to express his opinion freely and, if he wishes, strongly." DEVLIN, TRIAL BY JURY 118 (1956).

²¹ Thus, in "Twelve Angry Men," a television play later made into a motion picture, an eleven-to-one pro-conviction jury, by the story's end, voted solidly—and apparently justly—for acquittal. See also FRANK & FRANK, NOT GUILTY (1957).

imaginary and speculative doubts, leading to hung juries or acquittals in cases where the facts, realistically considered, afford no basis for either. Insanity defense cases, in which apparently honest experts are commonly in total disagreement, are particularly vulnerable to this kind of thinking by jurors.

B. *The Prosecution's Burden of Proof*

Although the original formulation of the *McNaughton* rules included a presumption that persons are sane and responsible for their crimes "until the contrary be proved to their [the jurors'] satisfaction,"²² thus placing on the defendant the burden of proving his insanity,²³ in about half of the states in the United States the burden of proof of "sanity" or of the defendant's ability to possess the necessary criminal intent, as with all elements of the crime, rests on the prosecution.²⁴ The significance of the prosecution's burden of proof, an element of major importance in the trial of a criminal case, is completely lost on some who have written to urge major changes in our standards of sanity in criminal trials.²⁵

As all criminal conduct is, by definition, a departure from the norm in an essentially law-abiding society, so most criminal conduct may—in the eyes of a respectable body of psychiatric opinion—be some indication of "disease."²⁶ If wrongful conduct may be indicative of "disease" and the existence of "disease" may in turn tend to excuse from criminal responsibility, the burden of proving the existence or absence of "disease" and the measure of proof that is required can be most important. If the prosecution must prove that disease was absent or that the crime did not result from it, and must do so by proof beyond a reasonable doubt, then—assuming that juries are able to and do follow instructions—the prosecution can seldom be successful. However, if the defendant must prove by a preponderance of the

²² *M'Naghten's Case*, 10 Clark & F. 200, 210, 8 Eng. Rep. 718, 822 (H.L. 1843).

²³ See Royal Comm'n Rep. 81. As a concomitant to the burden of proof being on the defendant, if the trial judge finds that no real evidence of insanity has been produced, he can withdraw the defense from the jury's consideration. See *DEVLIN, TRIAL BY JURY* 85-86 (1956).

²⁴ See *WEIHOFEN, op. cit. supra* note 10, at 212-72. The defendant universally has the burden of coming forward and claiming insanity, but this burden must be distinguished from the burden of proof.

²⁵ See, e.g., *COMM. ON PSYCHIATRY AND LAW, op. cit. supra* note 2; *Roche, supra* note 7, at 264.

²⁶ See, e.g., *ABRAHAMSEN, WHO ARE THE GUILTY?* 125 (1952); *ROCHE, THE CRIMINAL MIND* 29 (1958); *Karpman, Criminality, Insanity and the Law*, 39 *J. CRIM. L. & C.* 584 (1948). These ideas are not new. See 2 *STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 126 (1883). Dr. Gregory Zilboorg traced the concept that all crime springs from madness back to *DUNS SCOTUS* and *St. Thomas*, in the thirteenth century. *ZILBOORG, THE PSYCHOLOGY OF THE CRIMINAL ACT AND PUNISHMENT* 75-76 (1954).

evidence that his wrongful act in fact did result from a disease, the result may be quite different.

C. *The Rules of Evidence and Privilege*

In evaluating efforts to bring modern psychiatry into the common-law jury trial by means of a scientifically sound test which juries are to apply to questions of sanity, some highlights of the manner in which science may come out second best in our law courts should be considered.²⁷ Briefly, information which might be useful in determining a defendant's mental condition may be made inaccessible to the prosecution, information which is accessible may nevertheless be excluded from evidence, and information which is admitted may be subject to distortion by the form in which it must be presented.

1. The Defendant's Privileges

A foundation stone of modern psychiatry is the concept that we are all, to a great extent, the products of our past experiences.²⁸ If a sound psychiatric diagnosis is to assist in determining whether or not a defendant is criminally responsible, the psychiatrist must have an opportunity to observe and talk with the patient and—more important—to encourage the patient to talk about himself. But the privilege against self-incrimination bars compelling a defendant to provide testimonial evidence which may be used against him.²⁹ Although the courts have struggled to find a lack of compulsion in instances in which psychiatric examinations have been ordered, logically, this privilege would seem to preclude mandatory examinations in the course of which the defendant might be encouraged to discuss his own allegedly criminal conduct.³⁰

²⁷ For a thorough critique of the role of the rules of evidence in the search for the truth in our adversary system, see MORGAN, *SOME PROBLEMS OF PROOF UNDER THE ANGLO-AMERICAN SYSTEM OF LITIGATION* 169-95 (1956).

²⁸ See GUTTMACHER & WEIHOFEN, *PSYCHIATRY AND THE LAW* 18-26 (1952); NOYES & KOLB, *MODERN CLINICAL PSYCHIATRY* 20-32 (5th ed. 1958). For case histories, see ABRAHAMSEN, *WHO ARE THE GUILTY?* (1952) and *THE PSYCHOLOGY OF CRIME* (1960).

²⁹ See 8 WIGMORE, *EVIDENCE* §§ 2263, 2265 (McNaughton rev. 1961).

³⁰ Among the reasons advanced to justify such examinations in the face of the privilege have been: that the defendant consented, see *Jessner v. State*, 202 Wis. 184, 189-90, 231 N.W. 634, 637 (1930); that the defendant was free not to cooperate with the examiners or to answer their questions, even though the examination was court ordered, see *Hunt v. State*, 248 Ala. 217, 224-26, 27 So. 2d 186, 193-94 (1946); *Clements v. State*, 213 Ark. 460, 462-63, 210 S.W.2d 912, 913 (1948); *People v. Furlong*, 187 N.Y. 198, 209-12, 79 N.E. 978, 982-83 (1907); *Commonwealth v. Musto*, 348 Pa. 300, 305-07, 35 A.2d 307, 311 (1944); that the ordering court would bar the use in evidence of any "confession" elicited in the examination, see *State v. Myers*, 220 S.C. 309, 313, 67 S.E.2d 506, 507-08 (1951); and simply that such examination is the "ordinary procedure," *People v. Truck*, 170 N.Y. 203, 212, 63 N.E. 281, 283 (1902). The assertion of an insanity defense has itself been said to constitute a waiver of the privilege

The full impact of this rule is best seen when viewed in the light of the prosecution's burden of proving guilt beyond a reasonable doubt. If the standard is to be psychiatrically oriented—with "disease" and "causation" among the ultimate questions—experts are almost certain to be necessary witnesses. But if the prosecution's experts are to be cut off from conducting a complete examination of the defendant, how can the prosecution reasonably be expected to be able to sustain its burden? Since the goal of defense counsel in a criminal trial need only be to sow successfully the seed of reasonable doubt, it may serve a defendant to assert his privilege, to prevent court or prosecution experts from examining him, and at the same time to call as his own witnesses friendly experts to whose examinations he has willingly submitted.³¹ If a defendant's refusal to submit to questioning cannot be the subject of comment by the court or prosecutor in the presence of the jury,³² the prosecution will find it difficult to resolve a doubt which may, to laymen untutored in the law, appear reasonable: Why has the prosecution, having the burden of proof, not procured an expert to examine the defendant and testify as to his sanity?

insofar as it might otherwise be violated by a psychiatric examination. See *People v. Esposito*, 287 N.Y. 389, 397-98, 39 N.E.2d 925, 928 (1942). *But see* *People v. Fazio*, 132 N.Y.S.2d 107 (County Ct. 1954). A prior confession by the defendant has been cited to show that the purpose of the examination was solely medical and not to compel the defendant to incriminate himself. *United States ex rel. Daverse v. Hohn*, 198 F.2d 934, 937 (3d Cir. 1952), *cert. denied*, 344 U.S. 913 (1953). In cases arising under state sexual psychopath laws, which provide for psychiatric examination, examinations have been held not to constitute any invasion of the privilege in that they are for use in civil, not criminal, proceedings. See *People v. Chapman*, 301 Mich. 584, 602-04, 4 N.W.2d 18, 26-27 (1942); *In re Moulton*, 96 N.H. 370, 372-73, 77 A.2d 26, 27-28 (1950); *State ex rel. Sweezer v. Green*, 360 Mo. 1249, 1253-54, 232 S.W.2d 897, 900 (1950).

Professor Fred Inbau has suggested another basis for finding mandatory psychiatric examinations not an invasion of the privilege: that the examination need not touch on the events at the time of the crime directly. INBAU, *SELF-INCRIMINATION—WHAT CAN AN ACCUSED PERSON BE COMPELLED TO DO?* 55-58 (1950).

The constitutionality of such testimonial compulsion is still debated. Compare MODEL PENAL CODE § 4.05, comment (Tent. Draft No. 4, 1955), with Weihofen, *Procedure for Determining Defendant's Mental Condition Under the American Law Institute's Model Penal Code*, 29 TEMP. L.Q. 235, 239-41 (1956).

³¹ See Halleck, *The Insanity Defense in the District of Columbia—A Legal Loreli*, 49 GEO. L.J. 294, 302-03 (1960).

³² If the jury is not permitted to draw adverse inferences from a defendant's failure to testify, see 8 WIGMORE, EVIDENCE § 2272, at 427 n.2, 435 nn.4 & 5 (McNaughton rev. 1961), and this same principle prevents either testimony or comment indicative of a defendant's failure to answer questions put by the police, *People v. Travato*, 309 N.Y. 382, 131 N.E.2d 557 (1955), logically, it would seem also to bar testimony or comment indicative of a defendant's refusal to submit to psychiatric examination. *But cf.* *United States ex rel. Draper v. Denno*, 113 F. Supp. 290 (S.D.N.Y.), *aff'd mem.*, 205 F.2d 570 (2d Cir. 1953) (refusal to allow administration of sodium amyltal during psychiatric examination); *State v. Smith*, 230 S.C. 164, 94 S.E.2d 886 (1956) (refusal to submit to chemical test for intoxication). On the other hand, some modern commentators disapprove even the underlying rule barring comment on refusal to testify, and a few states have abandoned it. See McCORMICK, EVIDENCE § 132 (1954).

There are two further aspects of our accusatory system which permit the defendant to sit tight and say nothing, seriously hampering the prosecution's ability to prepare for trial. One is the physician-patient privilege.³³ Although that privilege is deemed waived to the extent that the defendant himself invades it,³⁴ until he actually puts in medical evidence on his own behalf, the defendant may successfully prevent the prosecution from inspecting the results of any psychiatric examination to which he may have submitted; in some jurisdictions he can even close the records of a public hospital to which he has been committed and seal the lips of any publicly employed physician who may have examined him.³⁵

Second, in the many jurisdictions where the defendant need not even plead an insanity defense before his trial commences,³⁶ the prosecutor may be barred from anticipating and commenting to the jurors concerning that defense until after all of the state's proof has been put in.³⁷ Hence, a defendant may have it within his control to prevent any inquiry on *voir dire* into what preconceptions prospective jurors may have as to standards for determining criminal responsibility or their ability to evaluate fairly and intelligently the highly specialized testimony of psychiatric experts.

2. Rules of Relevance and Hearsay

Not only must psychiatric experts have a full opportunity to examine the defendant if their testimony is to be as helpful as possible, but, if the ultimate decision is to be rendered by lay jurors who have heard the probably conflicting testimony of expert witnesses, much of the information on which the experts' diagnoses are premised must be

³³ See generally Chafee, *Privileged Communications: Is Justice Served or Obstructed by Closing the Doctor's Mouth on the Witness Stand?*, 52 *YALE L.J.* 607 (1943). With regard to psychiatric testimony in particular, see GUTTMACHER & WEIHOFEN, *PSYCHIATRY AND THE LAW* 269-84 (1952).

³⁴ See 8 WIGMORE, *EVIDENCE* §§ 2388-90 (McNaughton rev. 1961).

³⁵ See cases cited in 8 WIGMORE, *EVIDENCE* § 2382(3), at 839 n.10 (McNaughton rev. 1961). Two extreme recent examples sustaining claims of privilege are *People v. Decina*, 2 N.Y.2d 133, 138 N.E.2d 799, 157 N.Y.S.2d 558 (1956) (testimony of county hospital physician who had treated defendant after his arrest while he was under guard) and *In the Matter of Criminal Abortions in the County of Kings*, 286 App. Div. 270, 143 N.Y.S.2d 501 (1955) (grand jury investigating abortions barred from inspecting records of county hospital). In *Taylor v. United States*, 222 F.2d 398 (D.C. Cir. 1955), a conviction was reversed on the ground that the trial judge erred in compelling the testimony of a doctor who treated the defendant during the period of his pretrial commitment to a federal institution while unable to stand trial; the doctor testified that the defendant said he was "going along with a gag" when he claimed to have hallucinated. District of Columbia law has since been amended to make such testimony available. See D.C. CODE ANN. § 14-308 (Supp. 1960).

³⁶ See WEIHOFEN, *op. cit. supra* note 10, at 357-61; Gasch, *Prosecution Problems Under the Durham Rule*, 5 *CATHOLIC LAW* 5, 6-7 (1959).

³⁷ Compare *Boyle v. State*, 229 Ala. 212, 154 So. 575 (1934); *Williams v. State*, 68 So. 2d 583 (Fla. 1953), involving comment on disposition of defendant if acquitted by reason of insanity.

presented to the jury in evidence. Without this, the jury cannot be in a position to pass on the conflicting opinions, for they can have no basis for judging the reliability of the hypotheses on which they are based. But this is prevented by several basic rules of the criminal trial court.

Strict standards of relevance must govern the admissibility of proof in order to avoid a proliferation of issues.³⁸ And even relevant items must sometimes be excluded to avoid prejudice: background information seemingly relevant may be excluded to protect a defendant from being convicted of the crime with which he is charged because jurors' hostilities are aroused by the suggestion that he has also been involved in other crimes.³⁹

Although the psychiatrist will rely on the entirety of the patch-quilt he is able to piece together from all the information he can collect—directly or indirectly—about his patient, statements of a person who does not appear as a witness, though made to a witness and relevant to the defendant's conduct, are ordinarily excludable hearsay.⁴⁰ A psychiatrist may find it very useful to know whether the defendant has manifested mental illness before the act for which he is criminally charged. He may rely on the opinions of colleagues who have examined the defendant at other times and on the records of mental hospitals containing such opinions. Yet if the prior experts are unavailable for qualification and examination in the courtroom, and if counsel is alert to object, these earlier diagnoses may be excluded as uncross-examinable opinion evidence.⁴¹

3. Form of Examination

When the expert psychiatric witness has not had an opportunity to examine the defendant, he may still testify as to his sanity on the basis of evidence in the record put to him in the form of hypothetical questions. A long list of items taken from the record is posed to the witness and he is asked to assume their existence and to give his opinion, based on that assumption, as to the defendant's mental condition. Obviously, careful selection of the elements of the question can

³⁸ See Holmes, J., in *Reeve v. Dennett*, 145 Mass. 23, 28, 11 N.E. 938, 943-44 (1887): "[S]o far as the introduction of collateral issues goes, that objection is a purely practical one, a concession to the shortness of life."

³⁹ See *People v. Molineux*, 168 N.Y. 264, 61 N.E. 286 (1901).

⁴⁰ See *People v. Mancuso*, 4 App. Div. 2d 1010, 168 N.Y.S.2d 331 (1957); 5 WIGMORE, EVIDENCE § 1361 (3d ed. 1940).

⁴¹ See Note, 48 COLUM. L. REV. 920, 929-30 (1948). Compare *Lyles v. United States*, 254 F.2d 725, 731 (D.C. Cir. 1957), cert. denied, 356 U.S. 961 (1958), with *United States v. Balance*, 59 F.2d 1040, 1041-42 (D.C. Cir. 1932). As to the wisdom of excluding diagnoses contained in psychiatric hospital reports, in the absence of testimony by the expert whose conclusions are being reported, see Diamond, *The Fallacy of the Impartial Expert*, in ARCHIVES OF CRIMINAL PSYCHODYNAMICS 221 (1959).

go far in molding the opinion that is elicited. This selectivity can produce questions that hypothesize an individual bearing only a superficial resemblance to the defendant. As a consequence, many psychiatrists have long been displeased with this manner of expressing their opinions.⁴² If, however, the ultimate question that the jurors must decide is not a technical, medical one, requiring heavy reliance upon psychiatric concepts, any confusion interjected by answers to misleading hypothetical questions may be resolved by that common sense which is the sound leavening that jurors are deemed to possess.

II. EXISTING AND PROPOSED STANDARDS OF RESPONSIBILITY

Having reviewed some of the differences between a psychiatric conference and a criminal trial, this article will now consider the impact of these differences upon the effective use of each of the principal tests for criminal responsibility.

A. The *McNaughton Rules*

[T]he jurors ought to be told in all cases that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, 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 was doing, or, if he did know it, that he did not know he was doing what was wrong.⁴³

This statement of the law by the judges of England, in answer to questions posed by the House of Lords regarding Daniel *McNaughton's* case in 1841, when the infant science of psychiatry was replacing demonology as the source of explanations of criminal insanity,⁴⁴ was based on the belief that man, a creature of his own free will, was to be held criminally responsible and was to be punished when he *chose* to indulge in antisocial conduct. Thus the law would deter other potential malefactors who would be aware of the possibilities of punishment in exercising their own power of free choice.⁴⁵

⁴² See OVERHOLSER, *THE PSYCHIATRIST AND THE LAW* 114-17 (1953); Davidson, *Psychiatrists in Administration of Criminal Justice*, 45 J. CRIM. L., C. & P.S. 12, 16-17 (1954); Guttmacher, *supra* note 12, at 51-52.

⁴³ *M'Naghten's Case*, 10 Clark. & F. 200, 210, 8 Eng. Rep. 718, 722 (H.L. 1843).

⁴⁴ See BIGGS, *THE GUILTY MIND* 3-34, 71-77 (1955); HENDERSON & GILLESPIE, *PSYCHIATRY FOR STUDENTS AND PRACTITIONERS* 4-9 (8th ed. 1956); NOYES & KOLB, *op. cit. supra* note 28, at 11-19.

⁴⁵ For a penetrating analysis indicating the viability of deterrence in today's penal systems, see Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB. 401 (1958). See generally Michael, *Psychiatry and the Criminal Law*, 21 A.B.A.J. 271, 275-76 (1935).

How do the *McNaughton* rules hold up today when psychiatry teaches that what we may "choose" to do is frequently the result not of unadulterated free choice, but of what we are and what we have experienced?

1. Emphasis on Cognition

The *McNaughton* rules rely wholly on the defendant's cognition, on his ability "to know the nature and quality of the act" and to "know he was doing what was wrong." But it has become quite clear—at least to most psychiatrists—that often one may know full well what he is doing and may know that it is both immoral and illegal but still may lack the ability to control his actions in accord with this knowledge.⁴⁶

Insofar as the *McNaughton* rules fail to relieve persons of criminal responsibility who in fact lack the ability to control their actions, justice under them is imperfect in that they treat as criminals some persons whose wrongful conduct is not deterrable.⁴⁷ To this extent, the *McNaughton* rules are not only bad science but unsound law.

In an effort to take account of mental illnesses which are not typified by disturbances of cognition, Sir James Fitzjames Stephen,⁴⁸ in the late nineteenth century, and Professor Jerome Hall⁴⁹ and others⁵⁰ in our present generation have urged that the word "know" involves something broader than mere perception. As man is an "integrated personality," his knowledge, his will, and his ability to act are all intertwined. The word "know," as used in *McNaughton*, can be taken to mean not only the ability to perceive by use of the senses and intellect, but the ability to guide or control one's action in the light of this perception.

This suggestion suffers two distinct disabilities. It is not now and never has been the law anywhere; no judicial authority has been found suggesting that the word "know" should be explained in a charge

⁴⁶ See, e.g., COMM. ON PSYCHIATRY AND LAW, *op. cit. supra* note 2, at 4; Royal Comm'n Rep. 79-80; Hacker & Frym, *The Legal Concept of Insanity and the Treatment of Criminal Impulses*, 37 CALIF. L. REV. 575, 581-82 (1949); Reik, *The Doe-Ray Correspondence: A Pioneer Collaboration in the Jurisprudence of Mental Disease*, 63 YALE L.J. 183, 184-85 (1953).

⁴⁷ The jury may, under some circumstances, act as a safety valve against such injustice by "juggling"—as Mr. Justice Frankfurter put it—the matters before them to avoid inequity. Royal Comm'n Rep. 102.

⁴⁸ 2 STEPHEN, *op. cit. supra* note 26, at 163-68.

⁴⁹ Hall, "Psychiatry and the Law"—*A Dual Review*, 38 IOWA L. REV. 687, 696 (1953); Hall, *Responsibility and Law: In Defense of the McNaghten Rules*, 42 A.B. A.J. 917, 989 (1956).

⁵⁰ See, e.g., New York Governor's Conference on the Defense of Insanity, Interim Report of the Study Committee, May 1958, pp. 3-4 [hereinafter cited as N.Y. Conference Rep.].

to a trial jury in this fashion.⁵¹ Moreover, the advantage of the *McNaughton* rules—that they can be explained in language and by examples readily understandable to laymen—is forfeited if jurors must be told that an apparently simple and common word like “know” has a meaning that they probably never have heard ascribed to it. The jurors will then have to resolve the additional problems raised in the never-never land of control—questions presently irrelevant under the *McNaughton* standards, though embraced in the irresistible impulse, *Durham*, and American Law Institute tests, hereinafter considered.

2. Difficulties Posed for Experts

The *McNaughton* standards refer the triers of fact to common sense and to morality. The determinations they are asked to make can be made best through reference to the defendant's own actions. But because the problem is loosely termed one of “insanity” and underlying mental illness is part of the defense, psychiatrists are often called upon to testify. Psychiatrists, however, are likely to experience difficulty when testifying as experts under the *McNaughton* rules.⁵² Their scientific discipline does not qualify them to deal with the nice moral distinctions of the “right” and “wrong” frame of reference any better than laymen.⁵³ They are obliged to use laymen's and legal language to express scientific conclusions, are prone to use the word “know” in the sense that has most meaning for them—as embracing not only perception but control, in the fashion already discussed. In so doing, they become sitting ducks for cutting cross-examination by prosecutors or trial judges who use the word as the law and the common sense of trial jurors define it.⁵⁴

⁵¹ See Royal Comm'n Rep. 80: “This somewhat strained and artificial interpretation . . . has not, however, found favour with the judiciary, or with members of the legal profession generally.”

⁵² See ZILBOORG, *op. cit. supra* note 26, at 106-08, 111-24; N.Y. Conference Rep. 5-7; Stevenson, *Insanity as a Defense for Crime: An Analysis of Replies to a Questionnaire*, 25 CAN. B. REV. 871, 876-77 (1947). But see Cavanagh, *supra* note 15, at 321; Wertham, *A Psychiatrist Looks at Psychiatry and the Law*, 3 BUFFALO L. REV. 41, 48 (1953); *cf. The Experience of Psychiatrists With the McNaughten Rules*, 140 N.Y.L.J. No. 91, Nov. 10, 1958, p. 4.

⁵³ COMM. ON PSYCHIATRY AND LAW, *op. cit. supra* note 2, at 4-5; Guttmacher, *supra* note 12, at 55-56; Waelder, *Psychiatry and the Problem of Criminal Responsibility*, 101 U. P.A. L. REV. 378, 380-81 (1952).

⁵⁴ In *People v. Metesky*, typewritten minutes of the hearing in New York County, Feb. 23, 1957, pp. 10-13, the judge, conducting a hearing on the question of defendant's ability to enter a not guilty plea to the indictment, examined the psychiatric expert in this fashion:

Q. . . . Did he know that he was setting off bombs? Did he believe that he was setting off bombs or setting off switches . . . ? Did he know what he was doing? A. Within the normal framework I do not think so.

Q. Do you suppose that he thought he was eating pie at the time? A. If I may interject a remark. I mean a large-percentage of the cases suffering from the mental disorder which he suffers from—

3. Simplicity for Trial Jurors

Despite the facts that the *McNaughton* rules are in blatant conflict with modern psychiatric learning and that they often function as stumbling blocks to honest expert witnesses, their hardiness has been repeatedly affirmed in recent years by both judicial action⁵⁵ and legislative inaction.⁵⁶ Perhaps the principal justification for their continued life is that they provide tests that are so elementary that trial jurors can readily understand and follow them without being dependent upon the experts. Although the words "nature and quality of the act," and knowledge that "he was doing what was wrong" may, at first blush, seem cloudy,⁵⁷ our law allows them to be communicated by concrete examples which have unmistakable meaning for lay jurors. A defendant is chargeable with having known the *nature* of his act if the jury determines that when he fired a revolver he knew he was firing a revolver and did not believe he was writing with a pen.⁵⁸ He is deemed to have known the *quality* of his act if, for instance, when "he plunged that knife into a human being . . . [he knew] whether he was plunging it into a human being or putting it into a stick of wood."⁵⁹ And he may be deemed to have known "he was doing what

Q. I am not interested in other cases. . . . A. I don't think so in the normal framework. . . .

Q. I am asking you, in your opinion: If he did or did not know the nature of what he said he was going to do? A. I don't think—again I also have to say, I don't think that he knew it in the way a normal individual would.

Q. I didn't ask you to say about a normal individual. I am asking you a simple question: Did he know, in your opinion, that exploding a bomb is exploding a bomb? A. Yes, I think he knew that. . . .

Q. . . . Did you think that he had an idea that exploding the bombs in places where people are gathering or met together, is against the conscience of this community? A. I don't think he did. If he did it didn't make any impression on him.

⁵⁵ See cases cited note 81 *infra*, rejecting the *Durham* test.

⁵⁶ Only three jurisdictions have recently moved away from *McNaughton* through legislation: Maine, Vermont, and Illinois. See notes 82, 111-12 *infra*. In New York, the Interim Report of a Study Committee of the Governor's Conference on the Defense of Insanity, released in May 1958, recommended that New York abandon the *McNaughton* rules in favor of a standard approximating that of the American Law Institute. However, no legislative action has been taken. In Massachusetts, similar legislation has been proposed by a team of experts—also without provoking favorable legislative action. See Kozel, *The Psychopath Before the Law*, Mass. L.Q., July 1959, p. 106, at 115-16. New Jersey and California also have commissions that have, for some time, been considering the desirability of changes from the *McNaughton* standards.

⁵⁷ WEIHOFEN, *THE URGE TO PUNISH* 35-38 (1956), notes the ambiguities contained in the express language of *McNaughton*; his critique, however, does not consider the manner in which the courts have given this language certainty.

⁵⁸ See Record, pp. 4418-19, *People v. Burke*, 1 N.Y.2d 876, 136 N.E.2d 711, 154 N.Y.S.2d 637 (1956).

⁵⁹ See Record, p. 2353, *People v. Byers*, 309 N.Y. 908, 131 N.E.2d 580 (1955) (question of the court to the defense expert).

was *wrong*” if his actions reveal his consciousness of guilt. This may be shown by some effort on his part to avoid discovery or to escape from apprehension: hiding the murder weapon, wiping away blood or fingerprints, or making false denials when questioned by police. Any of these actions are likely to indicate his own recognition that what he did was “wrong.”⁶⁰

Trial jurors, having heard well-presented testimony, should be able to draw some picture in their minds of the defendant's actions while committing the crime and of his subsequent conduct before and upon apprehension. Applying the *McNaughton* standards to this mental tableau, they need only use their common sense to determine whether the whole picture is of someone who “knew what he was doing,” or of a maniac, suffering under delusions. Using *McNaughton*, they need not go behind that picture.

Although there may have been testimony involving reports of psychiatric examinations, this merely provides background, possibly helpful, but not vital to the jury's determination. *McNaughton* jurors are free to disregard this kind of information or to minimize its importance. Although the standards in theory require that the inability to know the nature and quality of one's acts or to distinguish right from wrong stem from “a defect of reason, from disease of the mind,” a finding of such disease or defect follows almost automatically when it is found that a defendant was in such a state that he did not know the nature, quality, or wrongfulness of his actions. Hence, under *McNaughton*, no emphasis need be placed on the medical question of illness.

McNaughton, therefore, is well adapted for use with the various rules of a common-law jury trial, outlined in the first section, which exclude or distort information which might be relevant to a psychiatric finding of illness. As long as the jurors are given a clear picture of the defendant's conduct at or about the time of the criminal act, they have enough evidence to determine his responsibility under this test. All other information is distinctly subordinate to the defendant's actions when committing the crime. So there are ordinarily no necessary side-issues to be multiplied, and jury confusion—which confounds both unanimity and the resolution of all reasonable doubts—may be minimized.⁶¹

⁶⁰ Knowledge of “wrong” does not require recognition that one's act is illegal. CARDOZO, *What Medicine Can Do for Law*, in *SELECTED WRITINGS* 371, 386 (1947).

⁶¹ See Berman, *Is It Time to Revise the McNaughton Rule Relating to the Defense of Insanity in Criminal Law*, 29 N.Y. STATE B.A. BULL. 407, 412-14 (1957); Cavanagh, *supra* note 15, at 325; Moreland, *Mental Responsibility and the Criminal Law—A Defence*, 45 Ky. L.J. 215, 219 (1956); Waelder, *supra* note 53, at 379.

B. Irresistible Impulse

In the 1830's, the irresistible impulse defense, often known as that of "temporary insanity," was introduced independently but almost simultaneously in both England and America. In England its life was exceedingly short.⁶² Two Ohio cases started its American career.⁶³ In each the judge charged the jury to look to the defendant's freedom to act in addition to his ability to tell right from wrong. Thereafter, acceptance of the irresistible impulse test by the state courts that considered it was not uncommon; at present, as a supplement to the *McNaughton* rules, it appears to be the law in almost a third of the states.⁶⁴

The irresistible impulse test emphasizes the lack of conscious control—the inability to govern one's actions.⁶⁵ Most psychiatrists today agree that mental illness may generate uncontrollable impulses; they think irresistible impulse to be a sound addendum to *McNaughton*.⁶⁶ But even this combination draws some psychiatric criticism because it does not go far enough.

1. Psychiatric Criticisms

The irresistible impulse test deals only with those inexorable drives that so command the person caught in their grip that he is powerless to resist them. It does not deal with those subconscious

⁶² In 1840 Lord Chief Justice Denman charged the jury in *Regina v. Oxford*, 9 Car. & P. 525, 546, 175 Eng. Rep. 941, 950 (Nisi Prius 1840), that "if some controlling disease was, in truth, the acting power within him which he could not resist," the defendant was not to be held criminally responsible for having fired a pistol at the Queen. Three years later, however, when the judges of England were consulted as to the law of insanity in *McNaughten's Case*, they made no mention of any such "controlling disease" test, probably because their answers were confined to the questions put to them in a particular case which concerned a defendant who had committed a crime by reason of a delusion. GLUECK, *MENTAL DISORDER AND THE CRIMINAL LAW* 236-37 (1925); Keedy, *Irresistible Impulse as a Defense in the Criminal Law*, 100 U. PA. L. REV. 956, 959-61 (1952). Irresistible impulse was expressly rejected as "a most dangerous doctrine" in *Regina v. Burton*, 3 F. & F. 772, 780, 176 Eng. Rep. 354, 357 (1863), and in 1922 a bill to make it a valid defense, as recommended by the Lord Chancellor's Committee, failed of passage, see Royal Comm'n Rep. 81.

⁶³ *State v. Thompson*, Wright 617, 622 (Ohio 1834); *Clark v. State*, 12 Ohio 483, 494 n. (1843).

⁶⁴ See MODEL PENAL CODE app. A, at 161 (Tent. Draft No. 4, 1955); Keedy, *supra* note 62, at 976-85.

⁶⁵ An early and oft-cited formulation of the test is found in *Parsons v. State*, 81 Ala. 577, 597, 2 So. 854, 866-67 (1887). The court there held a defendant to be relieved of criminal responsibility:

(1) If, by reason of the duress of . . . mental disease, he has 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.

The requirement that the impulse be the sole cause of the act does not exist any longer in most jurisdictions. See WEIHOFEN, *MENTAL DISORDER AS A CRIMINAL DEFENSE* 90-91 (1954).

⁶⁶ See authorities cited note 46 *supra*. But see WERTHAM, *THE SHOW OF VIOLENCE* 13-14 (1949).

drives which may have the same effect of forcing the actor to do their bidding, but to which, because he is not consciously aware of them, he responds in the belief that he is making a free choice. Behaviorists, who hold that many of our conscious choices are governed by these unconscious motivations, urge that the person who commits a crime as a result of them should not be held criminally accountable.⁶⁷ Neither *McNaughton* nor irresistible impulse permits such a result.

Psychiatric thought is also critical of the noun "impulse" in the title usually given this test. This word suggests that, like a sudden fall of a triphammer, the drive that has occasioned the wrongful act has suddenly come and as quickly terminated. But the test is one that calls for the existence of mental illness, and even psychoses that may suddenly erupt are the product of preexistent factors and are never dissipated mere moments after their onslaught. Contemporary psychiatry knows of no such fleetingly serious mental disease.⁶⁸ A more accurately descriptive title, therefore, might be the "irresistible urge" or the "brooding propulsion" test.⁶⁹

2. Practical Value

Apart from these criticisms by psychiatrists, lawyers have expressed objections to it on practical grounds. Acceptance of the irresistible impulse test seems to stem from the fact that it provides a convenient formulation which incorporates into the law a sound psychiatric idea—that man is not always the captain of his fate—, while presenting jurors with the "out" for which they search in certain highly charged emotional situations. It gives the "group mind"—the community mores as expressed through the jurors—a way to give the defendant a break without, apparently, doing violence to the law.⁷⁰ It is especially useful in homicide cases in which conviction invariably means lengthy incarceration, if not execution. In such cases it is a standard ideally suited for use in acquitting the killer who has the

⁶⁷ See Kaplan, *Criminal Responsibility*, 45 Ky. L.J. 236, 245, 248-49 (1956); Karpman, *supra* note 26; Lukas, *A Criminologist Looks at Criminal Guilt*, in SOCIAL MEANING OF LEGAL CONCEPTS 113, 143-46 (1950).

⁶⁸ Cavanagh, *A Psychiatrist Looks at the Durham Decision*, 5 CATHOLIC U.L. REV. 25, 42 (1955); Zilboorg, *A Step Toward Enlightened Justice*, 22 U. CHI. L. REV. 331, 333 (1955). See also Davidson, *Irresistible Impulse and Criminal Responsibility*, 1 J. FOR. SCI. 1, 15-16 (1956).

⁶⁹ See Cavanagh, *supra* note 68, at 42-43; De Grazia, *The Distinction of Being Mad*, 22 U. CHI. L. REV. 339, 342 (1955).

⁷⁰ See NAT'L COMM'N ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON CRIMINAL PROCEDURE 36-37 (1931); Comment, *Temporary Insanity—Arguments and Proposals for Its Elimination as a Defense to Criminal Prosecution*, 49 MICH. L. REV. 723, 729 (1951).

jurors' sympathies, whether he is the mercy killer, the outraged spouse who kills on finding his mate *in flagrante delicto*, or the justifiably aggrieved defendant who kills in the blindness of a righteous vengeance.⁷¹

Used in this "rough justice" fashion, irresistible impulse offers no problems for trial juries.

Serious jury problems are created, however, if the irresistible impulse test is viewed as posing a standard each of the elements of which the jurors are pledged to consider and to evaluate. Those problems posed for juries by the use of such terms as "mental disease" and "product," in a proper irresistible impulse charge, will be dealt with more fully in the following sections of this article, which consider the *Durham* and American Law Institute standards. Basic, however, is the problem of how twelve jurors are to be expected to agree unanimously in drawing that exceedingly vague line that separates an act which is both the product and the principal symptom of a mental illness from an act produced by a fury or passion that so engulfs a sane man that he fails to inhibit his actions. In other words, when is the act, because of illness, irresistible, and when is it simply unresisted?⁷² Whether the prosecution or the defendant has the burden of proof can be decisive.⁷³

C. The *Durham* Standard

"It is simply that an accused is not criminally responsible if his unlawful act was the product of mental disease or defect," is the disarmingly facile manner in which the Court of Appeals for the District of Columbia, in 1954, announced the insanity defense standard in *Durham v. United States*.⁷⁴

Judge Bazelon, speaking for the court, after reversing on the clear error of the trial court in finding no evidence of insanity at the time of the crime sufficient to place the burden of proving sanity upon the government—a burden clearly not met—,⁷⁵ went on to consider what ought to be the proper insanity standard upon retrial.⁷⁶ After noting

⁷¹ See GUTTMACHER & WEIHOFFEN, *PSYCHIATRY AND THE LAW* 258-59 (1952); Comment, *Recognition of the Honor Defense Under the Insanity Plea*, 43 *YALE L.J.* 809 (1934); cf. 29 *TEMP. L.Q.* 386 (1956).

⁷² On the difficulty of this question, see Sollars v. State, 73 *Nev.* 248, 254-55, 316 *P.2d* 917, 920 (1957); Royal Comm'n Rep. 94-96; Floch, *The Concept of Temporary Insanity Viewed by a Criminologist*, 45 *J. CRIM. L., C. & P.S.* 685 (1955); Moreland, *supra* note 61, at 220-21.

⁷³ See *Commonwealth v. Calhoun*, 238 *Pa.* 474, 484-85, 86 *Atl.* 472, 475-76 (1913); *Commonwealth v. Mosler*, 4 *Pa.* 264, 267 (1846).

⁷⁴ 214 *F.2d* 862, 874-75 (D.C. Cir. 1954).

⁷⁵ *Id.* at 866-68.

⁷⁶ *Id.* at 869-76.

the impossibility of articulating an adequate legal definition of insanity, the court concluded that it was preferable to supply no definition at all! The jury should determine the ultimate question of fact as to what constitutes "mental disease or defect" and as to whether the criminal act was its "product," unrestrained by any further guiding rule of law. "The question will be," the court said, "simply whether the accused acted because of a mental disorder, and not whether he displayed particular symptoms which medical science has long recognized do not necessarily, or even typically, accompany even the most serious mental disorder."⁷⁷

The effect claimed for the *Durham* rule is that it permits the law to grow with scientific advances while remaining immutable in expression by leaving the question of mental disease to the jury as a question of fact.⁷⁸ In the present age, in which knowledge of some psychiatric concepts is widely disseminated, the popular appeal of *Durham* is obvious. To reject using the latest psychiatric knowledge in favor of a prepsychiatric, if not prehistoric, standard would seem reactionary. And yet, despite the hosannas that greeted *Durham*,⁷⁹ it has come under sharp attack in the very court that enunciated it⁸⁰ and has been rejected by every other court that has considered it during the years since its enunciation.⁸¹ Only one state

⁷⁷ *Id.* at 876.

⁷⁸ See *id.* at 876.

⁷⁹ Three Isaac Ray Award books agree in their praises of *Durham*: BIGGS, *THE GUILTY MIND* (1955); ROCHE, *THE CRIMINAL MIND* (1958); WEIHOFEN, *THE URGE TO PUNISH* (1956). Accord, DESSON, *Psychiatry and Public Policy*, 5 BUFFALO L. REV. 48, 49 (1955); DOUGLAS, *The Durham Rule: A Meeting Ground for Lawyers and Psychiatrists*, 41 IOWA L. REV. 485 (1956); GUTTMACHER, *Why Psychiatrists Do Not Like To Testify in Court*, Prac. Law., May 1955, p. 50, at 56; OVERHOLSER, *Psychiatry's Contributions to Criminal Law and Procedure*, 12 OKLA. L. REV. 13, 18 (1959); SOBOLOFF, *Insanity and the Criminal Law: From McNaghten to Durham, and Beyond*, 41 A.B.A.J. 793, 795 (1955).

⁸⁰ See *Blocker v. United States*, 288 F.2d 853, 857-72 (D.C. Cir. 1961) (Burger, J., concurring).

⁸¹ *United States v. Currens*, 290 F.2d 751, 773-74 (3d Cir. 1961); *Voss v. United States*, 259 F.2d 699 (8th Cir. 1958); *Sauer v. United States*, 241 F.2d 640 (9th Cir.), *cert. denied*, 354 U.S. 940 (1957); *Howard v. United States*, 232 F.2d 274, 275 (5th Cir. 1956); *United States v. Hopkins*, 169 F. Supp. 187, 188-91 (D. Md. 1958); *United States v. Smith*, 5 U.S.C.M.A. 314, 321, 17 C.M.R. 314, 321 (1954), *rev'd on other grounds sub nom. Reid v. Covert*, 354 U.S. 1 (1957); *State v. Crose*, 88 Ariz. 389, 394, 357 P.2d 136, 139 (1960); *Downs v. State*, 231 Ark. 466, 468, 330 S.W.2d 281, 283 (1960); *People v. Nash*, 52 Cal. 2d 36, 338 P.2d 416 (1959); *Castro v. People*, 140 Colo. 493, 508-09, 346 P.2d 1020, 1028-29 (1959); *State v. Davies*, 146 Conn. 137, 145-49, 148 A.2d 251, 255-57, *cert. denied*, 360 U.S. 921 (1959); *Longoria v. State*, 168 A.2d 695, 699-701 (Del.), *appeal dismissed and cert. denied*, 368 U.S. 10 (1961); *Piccott v. State*, 116 So. 2d 626, 627 (Fla.), *appeal dismissed and cert. denied*, 364 U.S. 293 (1960); *People v. Carpenter*, 11 Ill. 2d 60, 66-68, 142 N.E.2d 11, 13-15 (1957); *Flowers v. State*, 236 Ind. 151, 162-66, 139 N.E.2d 185, 192-95 (1957); *State v. Andrews*, 187 Kan. 458, 357 P.2d 739 (1960); *Thomas v. State*, 206 Md. 575, 112 A.2d 913 (1955); *Commonwealth v. Chester*, 337 Mass. 702, 712-13, 150 N.E.2d 914, 919-20 (1958); *State v. Finn*, 257 Minn. 138, 100 N.W.2d 508 (1960); *State v. Goza*, 317 S.W.2d 609 (Mo. 1958); *Sollars v. State*, 73 Nev. 248, 251, 316 P.2d 917, 918-19 (1957); *State v. Lucas*, 30 N.J. 37, 67-72, 152 A.2d 50, 66-68 (1959);

legislature, that of Maine, has enacted a version of the *Durham* rule.⁸²

Why has it been so generally rejected?

1. The Function of the Jury

Although *Durham* was formulated in a case reviewing a conviction by a trial judge sitting without a jury, the need is for a standard capable of simple expression in a charge orally delivered to a jury of laymen. How *Durham* measures up in this regard can best be evaluated by considering the charge that Judge Bazelon's opinion suggests.⁸³

Although *McNaughton* embraces the concepts of insanity and causation (it deals with a criminal act that results from a "defect of reason" arising from "disease of the mind"), it stresses the symptom: the acts performed by the defendant which are indicative of not knowing right from wrong, and so forth. In applying this standard—putting aside, momentarily, considerations as to burden of proof—the jury, in practice, performs its function in a single step: if the defendant's act manifests the crucial symptom, a symptom which the lay juror can recognize without the aid of experts, then, by that fact, the necessary "disease" is deemed to exist. In contrast, when applying *Durham*, the facts which the jurors must find directly, unassisted by court guidance as to significant symptoms, are those which most laymen are unqualified to recognize: the existence of "disease or defect" and whether or not the criminal act was the disease's "product."

State v. Robinson, 168 N.E.2d 328, 331 (Ohio Ct. App. 1958); *Commonwealth v. Woodhouse*, 401 Pa. 242, 164 A.2d 98 (1960); *State v. Kirkham*, 7 Utah 2d 108, 319 P.2d 859 (1958); *State v. Goyet*, 120 Vt. 12, 55-61, 132 A.2d 623, 650-54 (1957); *State v. Collins*, 50 Wash. 2d 740, 751-55, 314 P.2d 660, 666-68 (1957); *Kwosek v. State*, 8 Wis. 2d 640, 648-49, 100 N.W.2d 339, 342-43 (1960); *State v. Kitchens*, 129 Mont. 331, 286 P.2d 1079 (1955) (dictum). *But cf. Anderson v. Grasberg*, 247 Minn. 538, 555, 78 N.W.2d 450, 461 (1956) (husband's right to succeed to wife's share of their joint tenancy not affected by his having killed her "where his unlawful act was the product of mental disease").

⁸² "An accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect. The terms 'mental disease' or 'mental defect' do not include an abnormality manifested only by repeated criminal conduct or excessive use of drugs or alcohol." ME. REV. STAT. ANN. ch. 149, §38A (Supp. 1961).

⁸³ If you the jury believe beyond a reasonable doubt that the accused was not suffering from a diseased or defective mental condition at the time he committed the criminal act charged, you may find him guilty. If you believe he was suffering from a diseased or defective mental condition when he committed the act, but believe beyond a reasonable doubt that the act was not the product of such mental abnormality, you may find him guilty. Unless you believe beyond a reasonable doubt either that he was not suffering from a diseased or defective mental condition, or that the act was not the product of such abnormality, you must find the accused not guilty by reason of insanity. Thus your task would not be completed upon finding, if you did find, that the accused suffered from a mental disease or defect. He would still be responsible for his unlawful act if there was no causal connection between such mental abnormality and the act.

Mental disease or defect is most often unaccompanied by tissue pathology.⁸⁴ Indeed, the various forms of mental illness are merely imprecisely defined patterns of nonphysical symptoms one of whose aspects is false subjective judgments, and a manifestation of which may be crime.⁸⁵ The honest judgments of honest experts will often differ as to whether the same manifestations constitute a "mental disease or defect."⁸⁶ Indeed, such classifications as exist are susceptible of overnight change—and have, on at least one occasion, been so changed locally—by fiat of a particular institution.⁸⁷

Nor is the "product" concept entirely clear; the degree of causal connection between illness and crime necessary to make the latter the product of the former is uncertain.⁸⁸ Logically, if the criminal act would not have taken place *but for* the disease—if the disease was in any part a contributing factor in producing the act—then the act may be said to have been a "product" of the disease. It is absurd to expect the prosecution to be able to find an honest psychiatrist who can testify that a defendant's disease *in no way* contributed to his criminal conduct; if a person's acts are the product of his entire personality, no expert can say that the crime was clearly independent of the alleged mental disease.⁸⁹ And so the seemingly two-pronged *Durham* question—embracing both "disease" and "product"—really boils down to a single one: whether or not disease was present. If the prosecution has the burden of proof, any reasonable doubt on this question requires acquittal.

⁸⁴ Because "disease" usually connotes tissue pathology, it has been suggested that *Durham* might better be phrased in terms of "mental illness" or "mental disorder." See Cavanagh, *supra* note 68, at 27-30.

⁸⁵ See Szasz, *Psychiatry, Ethics, and the Criminal Law*, 58 COLUM. L. REV. 183, 190 (1958).

⁸⁶ See works cited note 15 *supra*. There is considerable uncertainty as to the borderline between mental disease and mental health. See NOYES & KOLB, *MODERN CLINICAL PSYCHIATRY* 545 (5th ed. 1958); Abrams, *Who Is Psychotic?*, 4 J. FOR. SCR. 395, 396-99 (1959); Weihofen, *The Definition of Mental Illness*, 21 OHIO ST. L.J. 1, 4-6 (1960).

⁸⁷ In 1957, the Acting Superintendent of St. Elizabeth's Hospital, Washington, D.C., announced a revision of the classification pursuant to which staff members had been testifying that psychopaths or sociopaths were without mental disorder. Such persons were thereafter to be considered as suffering from a mental disease. See *In re Rosenfield*, 157 F. Supp 18, 20-21 (D.D.C. 1957), *modified*, 262 F.2d 34 (D.C. Cir. 1958); Cavanagh, *The Responsibility of the Mentally Ill for Criminal Offenses*, 4 CATHOLIC LAW. 317, 323 n.20 (1958); McGee, *Defense Problems Under the Durham Rule*, 5 CATHOLIC LAW. 35, 40-41 (1959); *Report of Committee on Criminal Responsibility of the Bar Association of the District of Columbia*, 26 J.B.A.D.C. 301, 306-07 (1959).

⁸⁸ See Cutler, *Insanity as a Defense in Criminal Law*, 5 CATHOLIC LAW. 44, 50-52 (1959); Gasch, *Prosecution Problems Under the Durham Rule*, 5 CATHOLIC LAW. 5, 21, 26 (1959); Krash, *The Durham Rule and Judicial Administration of the Insanity Defense in the District of Columbia*, 70 YALE L.J. 905, 929-32 (1961); 54 COLUM. L. REV. 1153, 1155 (1954).

⁸⁹ See ROCHE, *THE CRIMINAL MIND* 265 (1958); cf. ABRAHAMSEN, *THE PSYCHOLOGY OF CRIME* 250 (1960). See also *Report of Committee on Criminal Responsibility*, *supra* note 87, at 302, 307-10.

If *Durham* is the standard, experts *must* be called to provide the definition of mental illness as well as some guidance concerning the degree of imbalance necessary to constitute it and to furnish their own opinions as to whether or not such an illness existed.⁹⁰ As honest experts are likely to differ, jurors, who are completely unqualified to judge scientific opinion, must sit as referees between the experts. Although ostensibly triers of fact, jurors under *Durham* are thus not employed to determine a fact, but rather to select standards and ultimately an opinion from among the conflicting viewpoints embraced by the experts.⁹¹ Although the trappings of the jury system remain, the true purpose, that of providing a nonprofessional *trier of fact*, has gone out of it.⁹²

The requirement that a criminal jury act on the basis of the prosecution's proof beyond a reasonable doubt is, in theory, justified by the fact that a determination of guilt or innocence ordinarily is a determination of absolutes—either the defendant did or he did not commit the specific criminal act that has been charged. Although this fact may be shrouded in doubts because of the insufficiency of credible evidence, if all possible potential proof were available, its existence or non-existence could be established with utter certainty. Such certainty being a theoretical possibility, in order that the individual defendant shall receive maximum protection our jury system provides that if the proof falls short of this certainty to an appreciable degree the defendant is not to be convicted.

⁹⁰ In several District of Columbia cases, the court has reversed convictions because the prosecution failed to produce any psychiatric expert testimony to meet that of the defense experts. See, e.g., *Fielding v. United States*, 251 F.2d 878 (D.C. Cir. 1957); *Wright v. United States*, 250 F.2d 4, 7-10 (D.C. Cir. 1957). In each case, the Government had relied upon the testimony of police and lay persons as to defendant's conduct, which apparently the jurors found sufficient to convince them of defendant's mental responsibility, despite the contrary testimony of defense experts. See generally Note, 58 COLUM. L. REV. 1253, 1259-61 (1958).

⁹¹ More than a half century ago, Learned Hand, observing that juries are not competent to resolve conflicts between experts, proposed the use of advisory tribunals of experts to resolve conflicts and inform the jurors of their decision in much the manner in which a judge charges a jury on the law. Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 HARV. L. REV. 40, 50-58 (1901). The impact of the *Durham* rule in similarly transferring to the experts the determination of the ultimate fact question has elsewhere been noted. See Morris, *Criminal Insanity: The Abyss Between Law and Psychiatry*, 12 RECORD OF N.Y.C.B.A. 471, 490-91 (1957).

⁹² It is no answer to note that expert opinions are frequently relied upon in jury trials. Civil cases afford a poor analogy. A jury verdict in a civil case—usually rendered in terms of dollars—may represent a compromise between jurors divided in their evaluation of the experts' testimony. Not only do such compromises represent violations of jurors' oaths, but they have no place in a criminal court where the verdict is "guilty" or "not guilty." Moreover, in civil cases proof need not be beyond a reasonable doubt. In criminal cases, the testimony of fingerprint and handwriting experts on questions of identification, chemical experts concerning narcotic drugs, etc., unlike that of psychiatrists testifying under the *Durham* rule, is not to provide opinions on the ultimate question of guilt. Moreover, the areas for expert testimony in criminal cases are, by and large, areas in which honest and equally qualified experts relying on the same hypotheses could reasonably be expected to come up with the same opinion.

In cases in which the ultimate problem for the jurors is not one of determining whether a theoretically ascertainable fact exists, where they are asked to adopt opinions as to whether certain facts *shall be deemed sufficient to constitute* illness causative of the crime, concepts of unanimity and proof beyond a reasonable doubt lack even theoretical merit.⁹³

This does not mean, of course, that jurors with *Durham* as their standard never reach a verdict of guilty. It simply means that, in theory, in most litigated cases, they should not.⁹⁴ As long as the law does not prescribe standards for mental responsibility and as long as there is some conflict between honest experts entertaining differing theories, how can laymen be presumptuous enough to reject unanimously the views of any expert as not being "reasonable"? The answer is, of course, that theory and practice are often two different things. Jurors are answerable to no one, and so they can be just this presumptuous. They can ignore all of the expert testimony and bring in a visceral verdict.⁹⁵ They can listen to all of the testimony and be so taken in or confused by the forensic skill of one psychiatrist that they may discount the learning offered by the other.⁹⁶ But it hardly weighs in favor of a rule, especially one that claims acceptance for its incorporation of modern science into the law, to urge that the triers of fact may violate their obligation to accept the law as given them by the court and disregard the rules that they are informed are to govern their deliberations.

In fact, under *Durham*, acquittals have increased somewhat.⁹⁷ Their likelihood, or that of hung juries, would seem to reflect the degree of conscientiousness on the part of the jurors. Reversals of

⁹³ Although psychiatrists have long insisted on the jury's unfitness to determine questions of sanity, see OVERHOLSER, *THE PSYCHIATRIST AND THE LAW* 79 (1953); RAY, *THE MEDICAL JURISPRUDENCE OF INSANITY* §46 (5th ed. 1871), some writers have suggested that the jury's capacity to handle such an imprecise concept as "reasonable man" demonstrates its ability to decide issues of sanity, *Report of Committee on Criminal Responsibility*, *supra* note 87, at 325 (memorandum of dissent); Note, 29 *TEMP. L.Q.* 338, 244 (1956). The analogy is unsound. The concept of the "reasonable man" deals with the normal, everyday experiences with which the average juror is familiar and as to which most jurors will usually be found to agree. Not so in the area of the abnormal, where laymen are, by definition, inexperienced—especially in the area of the abnormal processes that constitute mental illness, where the jury will often find division in the opinions of those who are qualified to inform them. Unfamiliarity and disagreement as to an imprecise concept are most disruptive in a criminal trial. Cf. note 92 *supra*.

⁹⁴ See Gasch, *supra* note 88, at 33.

⁹⁵ See Royal Comm'n Rep. 82, 84, 85, 102.

⁹⁶ See OVERHOLSER, *THE PSYCHIATRIST AND THE LAW* 109-10 (1953); Weihofen, *Eliminating the Battle of Experts in Criminal Insanity Cases*, 48 *MICH. L. REV.* 961, 962 (1950).

⁹⁷ See Clayton, *Six Years After Durham*, 44 *J. AM. JUD. Soc'y* 18, 19-20 (1960); Gasch, *supra* note 88, at 31; Krash, *supra* note 88, at 948-50; Note, 58 *COL. L. REV.* 1253, 1266 (1958).

convictions have been frequent, the appellate court recognizing that a conviction may sometimes indicate jury disregard of the expert testimony.⁹⁸ In the *Durham* court, the danger of dishonest witnesses appearing on behalf of neurotic malingerers is minimized because the federal rule permitting judicial comment on credibility⁹⁹ allows the trial judge who recognizes a professional mountebank to advise the jury on the weight to be given his testimony.

Under *Durham*, the experts rule the witness box to the extent of being permitted to testify in terms which their professional training qualifies them to use.¹⁰⁰ This should render them more at ease and theoretically more valuable in the courtroom. The lay juror, however, unschooled in science, may experience some difficulty in following and absorbing the short course in psychiatry that will be conducted by means of a dialogue between lawyer adversaries and the experts. The potential for confusion is considerable where twelve persons must listen to highly technical testimony for days on end, largely without asking questions or discussing the testimony among themselves during that period.¹⁰¹ And such confusion, it has been pointed out, increases the likelihood of disagreement or the uncertain feeling that nothing has been proved beyond a reasonable doubt.

Finally, even in the face of unanimous testimony on the part of the expert witnesses that the defendant was not suffering from a mental disease or defect, proof that he committed a particularly heinous crime is, of itself, likely to plant in the lay mind, which is apt to equate aberrance with insanity,¹⁰² the seed of a "sound reason to believe" that the crime was the product of that mental illness which *Durham* intentionally leaves undefined.

2. Evidential Problems

In the *Durham* case, the court of appeals relied on the testimony of the defendant's mother that the defendant had hallucinated on occa-

⁹⁸ See, e.g., *Fielding v. United States*, 251 F.2d 878 (D.C. Cir. 1957); *Wright v. United States*, 250 F.2d 4, 10 (D.C. Cir. 1957); *Douglas v. United States*, 239 F.2d 52, 59 (D.C. Cir. 1956); cf. *Commonwealth v. Cox*, 327 Mass. 609, 100 N.E.2d 14 (1951). See also *Gasch*, *supra* note 88, at 31.

⁹⁹ *Quercia v. United States*, 289 U.S. 466 (1933).

¹⁰⁰ See *Douglas*, *supra* note 79, at 488; *Guttmacher, The Psychiatrist as an Expert Witness*, 22 U. CHI. L. REV. 325, 329 (1954).

¹⁰¹ See, e.g., N.Y. CODE CRIM. PROC. § 415: "The jury must also, at each adjournment . . . be admonished by the court, that it is their duty not to converse among themselves on any subject connected with the trial, or to form or express any opinion thereon, until the cause is finally submitted to them."

¹⁰² "To the jury nothing is more obvious than that a psychopath is a refugee from a psychopathic ward and is therefore insane." *Davidson, Psychiatrists in Administration of Criminal Justice*, 45 J. CRIM. L., C. & P.S. 12, 16 (1954).

sions during the months preceding his crime.¹⁰³ This testimony is a mere teaser compared to the manner in which the *Durham* standard, by stressing otherwise undefined "mental illness," may authorize reliance on events which are remote in time, place, and subject matter from the crime charged. Under *McNaughton*, the jurors concentrate on the defendant's actions at the time of the crime. But when, as under the *Durham* and the American Law Institute standards, "mental illness" is the key, conduct of a defendant months or years before the crime may be even more important than eyewitness testimony about the crime itself, and the witnesses to such noncontemporary conduct are likely to be the defendant's family or old friends.¹⁰⁴ All of the problems enumerated in the first part of this article—problems that stress the incompatibility between today's science of psychiatry and our common-law criminal jury trial—are accentuated under the *Durham* standard.

3. Post-Acquittal Problems

Although *Durham* may be successful in saving from criminal conviction some psychotics who might not fare as well under the older insanity standards (and may have the questionably desirable side-effect of saving psychopaths and neurotics), whether this result is more enlightened from the viewpoint of the individual defendant, and better protective of his rights, is subject to debate.

The District of Columbia reacted speedily to the *Durham* case; Congress promptly provided for the commitment and detention of each person acquitted as insane until it is found that he "will not in the reasonable future be dangerous to himself or to others" ¹⁰⁵ Such legislation is the expected result of any standard that increases the rate of acquittal of persons who, although technically sane enough to stand trial (and, hence, in all probability, not subject to indefinite commitment *as insane*), are of such mental instability that their relapse is a real and substantial possibility.¹⁰⁶

¹⁰³ 214 F.2d at 864.

¹⁰⁴ See Gasch, *supra* note 88, at 19-21.

¹⁰⁵ D.C. CODE ANN. § 24-301(c)(3) (Supp 1960), *Overholser v. Leach*, 257 F.2d 667 (D.C. Cir. 1958), *cert. denied*, 359 U.S. 1013 (1959); see Goldstein & Katz, *Dangerousness and Mental Illness, Some Observations on the Decision To Release Persons Acquitted by Reason of Insanity*, 70 YALE L.J. 225 (1960); Krash, *supra* note 88, at 926-27, 940-48; Note, 68 YALE L.J. 293 (1958); Note, 44 GEO. L.J. 489, 502-05 (1956). The commitment standard established by this statute is limited to the District of Columbia. In rejecting *Durham*, the Court of Appeals for the Ninth Circuit noted that the choice it faced was not between confinement and commitment (as it now is in the District), but between confinement and freedom. *Sauer v. United States*, 241 F.2d 640, 650-51 (9th Cir.), *cert. denied*, 354 U.S. 940 (1957).

¹⁰⁶ See MODEL PENAL CODE § 4.08 & comment (Tent. Draft No. 4, 1955); N.Y. Conference Rep. 14-18. Some question has been raised, however, as to the constitu-

A defendant whose legal insanity has spared him execution for a capital crime is, in the eyes of our community, better off committed than dead. But if commitment is the inevitable result of acquittal by reason of insanity, the accused whose criminal sentence would have been limited to a stated number of years may often expect to spend the rest of his life as an institutional inmate.¹⁰⁷ No right of appeal exists from the acquittal that led to his commitment. The length of his incarceration is, at least in the first instance, wholly within the control of administrative personnel acting pursuant to medical standards, not of courts guided by principles of law.

Whether commitment or imprisonment is more desirable during its duration from the standpoint of the defendant will depend upon the adequacy of the psychiatric personnel available, the nature of the medical treatment and rehabilitation programs, the extent of crowding of the facilities, and the character of other members of the institutional population.¹⁰⁸

D. The American Law Institute Proposal

(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 of his conduct or to conform his conduct to the requirements of law.

(2) The terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.¹⁰⁹

This test for criminal insanity, suggested in a tentative draft of the American Law Institute's Model Penal Code in 1955, has not

tionality of such commitment statutes. See Goldstein & Katz, *supra* note 105, at 238-39; McGee, *supra* note 87, at 39. Frank S. Hogan, New York County District Attorney, wrote to Dr. Paul H. Hoch, New York State Commissioner of Mental Hygiene, on July 28, 1959, that "where such release hinges not on the person's own welfare, but on the informed speculation of psychiatric experts (of various schools of thought) as to whether his freedom may in the future represent any danger to others, there is certainly the possibility of such legislation either being stricken down as violative of due process, or being most narrowly construed." The constitutionality of the District of Columbia's commitment statute has been sustained. *Ragsdale v. Overholser*, 281 F.2d 943, 948 (D.C. Cir. 1960). A new statute in New York, N.Y. CODE CRIM. PROC. § 454, enacted in 1960, providing for the commitment of defendants acquitted by reason of insanity as long as they remain dangerous to themselves or others, has not been tested in the New York appellate courts as of this writing.

¹⁰⁷ See Halleck, *The Insanity Defense in the District of Columbia—A Legal Lorelei*, 49 GEO. L.J. 294 (1960); Szasz, *Hospital Refusal to Release Mental Patient*, 9 CLEV.-MAR. L. REV. 220 (1960); cf. Note, 110 U. PA. L. REV. 78, 98 (1961).

¹⁰⁸ See ROCHE, *THE CRIMINAL MIND* 240-41 (1958); De Grazia, *The Distinction of Being Mad*, 22 U. CHI. L. REV. 339, 348-55 (1954); McGee, *supra* note 87, at 39. See generally Guttentag, *Prison vs. Closed Ward, Their Philosophical Relationship*, 45 KY. L.J. 251 (1956).

¹⁰⁹ MODEL PENAL CODE § 4.01 (Tent. Draft No. 4, 1955).

experienced the warm reception that might have been anticipated for it as a consequence of the earlier lack of a satisfactory standard and of the caliber of the experts who gathered, via the Institute, determined to fill this void. In the seven years since its publication, only one federal circuit, the Third,¹¹⁰ and two states, Vermont,¹¹¹ and Illinois,¹¹² have adopted it—each in somewhat altered form.¹¹³

The Institute standard seeks to combine facets of the rules previously considered. It is suggestive of *Durham* in the emphasis it places on the diagnosis of "mental disease or defect"; in language it is somewhat reminiscent of *McNaughton* ("capacity . . . to appreciate the criminality of his conduct"); and it embraces an improved irresistible impulse test ("capacity . . . to conform his conduct to the requirements of the law"). By this combination it overcomes *McNaughton's* narrow emphasis on cognition, while eliminating the psychiatrically unsound stress on momentary or sudden compulsion associated with irresistible impulse. It seeks to give jurors more guidance than they receive from the brief *Durham* standard by limiting the defense of insanity so as to require something more than the existence of that vague affliction called "mental disease or defect."

1. Imprecision of the ALI Standard

The Institute's draftsmen have hedged the conditions under which mental disorders exculpate by using words of degree—"substantial capacity" and "appreciate." But they have not defined what degrees these words entail. Unlike the word "know," as used in *McNaughton*, which has a common, absolute meaning (at least to laymen), these

¹¹⁰ *United States v. Currens*, 290 F.2d 751, 774 (3d Cir. 1961): "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."

¹¹¹ VT. STAT. ANN. tit. 13, § 4801 (1958). Vermont substitutes "adequate capacity" for "substantial capacity" in the first sentence of the ALI formulation, and adds the following language after the second sentence: "The terms 'mental disease or defect' shall include congenital and traumatic mental conditions as well as disease."

¹¹² ILL. ANN. STAT. ch. 38, § 6-2 (Smith-Hurd 1961). This version substitutes "criminally responsible for conduct" for the ALI's "responsible for criminal conduct," and "mental disease or mental defect" for the ALI's "mental disease or defect."

¹¹³ The N.Y. Conference Rep. 7 suggests the adoption of the ALI standard in New York with very minor changes in wording. In order to emphasize that "appreciate" means more than "know" as used in *McNaughton*, the New York group suggests that "substantial capacity . . . to know or to appreciate" be substituted for "substantial capacity . . . to appreciate," and that "criminality of his conduct," which might possibly embrace overly nice legal technicalities, be replaced by "wrongfulness of his conduct."

Efforts to introduce the ALI standard in the District of Columbia, replacing *Durham*, have so far been unsuccessful. See Note, 58 COLUM. L. REV. 1253, 1265 (1958). But on June 26, 1961, the House of Representatives, without debate, passed a bill that would effect this change, H.R. 7052, 87th Cong., 1st Sess. (1961). No action has been taken by the Senate.

words were intentionally chosen for their imprecision.¹¹⁴ The difficulty is that they encourage differences among expert witnesses not over whether the defendant's capacity was impaired but over whether the degree of impairment observed should be deemed "substantial" and over the depths of awareness that must exist before one may be deemed to "appreciate" the criminality of his conduct. Jurors too have their own notions about what these words mean and may often disagree among themselves not because they see the "facts" differently, but because they have no common understanding of the categories into which they must fit those facts.

Ordinarily, this kind of danger is minimized by proper instructions from the bench. But how is a judge to charge a jury under the ALI rule? He could state that "substantial capacity" and "appreciate" were to be defined by reference to the jurors' own beliefs as to whether the defendant's capacity was such that he *ought* to be held responsible.¹¹⁵ If this is to be the charge, it would encourage jurors, in reaching the verdict, to let their own moral or emotional judgments cut across both the testimony of the experts and the other court-given rules of law. On the other hand, any charge that tries to define these words more precisely than their inherently elusive character permits would negate the very elasticity that the ALI draftsmen meant the words to incorporate.

By its introduction of undefined concepts of degree, the Institute standard is less easily followed by jurors than either *McNaughton* or *Durham*.¹¹⁶ Ordinarily, vagueness of standards is not desirable in a

¹¹⁴ MODEL PENAL CODE § 4.01, comment at 158-59 (Tent. Draft No. 4, 1955), notes:

The draft, accordingly, does not demand *complete* impairment of capacity. It asks instead for *substantial* impairment. . . . If substantial impairment of capacity is to suffice, there remains the question whether this alone should be the test or whether the criterion should state the principle that measures how substantial it must be. To identify the degrees of impairment with precision is, of course, impossible both verbally and logically. The recommended formulation is content to rest upon the term "substantial" to support the weight of judgment; if capacity is greatly impaired, that presumably should be sufficient.

¹¹⁵ See note 117 *infra*.

¹¹⁶ *McNaughton* is narrowly limited: it only excuses persons whose illness is so severe that they do not know what they are doing. *Durham* is extremely broad: if conscientiously followed, it would excuse all persons whose criminal acts were, *even in part*, the result of any mental illness. Somewhere in between are the irresistible impulse test and the American Law Institute proposal; each poses a standard inherently so flexible that jurors can—within broad limits—adapt it to excuse whichever defendants they choose, without doing either any violence.

The chief Reporter and principal draftsman of the Model Penal Code has criticized the *Durham* rule for its ambiguity. See Wechsler, *The Criteria of Criminal Responsibility*, 22 U. CHI. L. REV. 367 (1955). Ambiguity, however, should not be confused with breadth of application. It is submitted that although *Durham* is broader and would, in all probability, excuse more persons than the ALI proposal, the latter engrafts further ambiguities on those already contained in *Durham* and in fact offers conscientious jurors less guidance.

criminal trial, where jurors must be unanimous and proof must be beyond a reasonable doubt.

Under the ALI rule, jurors do not perform their traditional function of finding facts, nor do they—as under *Durham*—merely choose from among conflicting experts' opinions. Rather, they engage in a two-stage endeavor: first, as under *Durham*, they must choose an opinion; second, if the opinion that they adopt is that the defendant was mentally ill, then they must exercise their own moral or emotional choice as to whether or not the degree was such that they believe that he ought to be held criminally responsible. (Indeed, the Institute's draftsmen have gone so far as to suggest an alternative proposal which is in other respects similar to the standard here considered except that it expressly permits the jurors to do what they deem "just."¹¹⁷)

2. Elimination of Psychopathy as a Defense

In considering *Durham* it was noted that a reputable school of psychiatrists considers most antisocial acts to be symptomatic of mental disease or defect and that since under *Durham* mental disease or defect excuses from criminal responsibility, in most cases at least a sound ground exists for a juror's reasonable doubt as to almost any defendant's legal sanity.¹¹⁸ The Institute formulation has tried to avoid this theoretical justification for wholesale acquittals by providing that "the terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct." But this proviso may be the source of great difficulties.

Not only is it unlikely that any psychiatrist would base his diagnosis of the criminal psychopath—the intended object of the ALI proviso—solely on criminal or antisocial conduct,¹¹⁹ but, even in the face of such diagnosis, the proviso might be ineffective both because it would be impossible for the defense of insanity, supported largely by evidence of prior crimes, to be denied as a matter of law,¹²⁰ and be-

¹¹⁷ The alternative rewrites the end of the first sentence, quoted above, to read: "if . . . his capacity . . . is so substantially impaired that he cannot justly be held responsible." MODEL PENAL CODE § 4.01, alternative (a) (Tent. Draft No. 4, 1955). Similarly, the Royal Comm'n Rep. 116 recommends a standard that would "leave the jury to determine whether at the time of the act the accused was suffering from disease of the mind (or mental deficiency) to such a degree that *he ought not to be held responsible*." (Emphasis added.) See also Wechsler, *supra* note 116, at 372.

¹¹⁸ See pp. 790-94 *supra*.

¹¹⁹ Kozol, *The Psychopath Before the Law*, Mass. L.Q., July 1959, p. 106, at 116 (1959). With this knowledge, any reasonably skillful defense attorney, functioning under the ALI rule, would be certain to elicit—quite possibly on cross-examination of the prosecution's own witnesses—some evidence of the defendant's abnormality other than his criminal or antisocial acts.

¹²⁰ The possibility of jury confusion is great. The difference between mental disease and psychopathy—if any—is not simple. In *Stewart v. United States*, 214

cause the prosecutor's invocation of the proviso with an offer to prove a history of similar prior crimes would be met with a probably effective objection that the evidence was inadmissible because of its prejudicial effect.¹²¹

Finally, it seems unsound to freeze the intention of the proviso into law. Although psychopaths are generally not deterrable,¹²² some slight headway is being made in rehabilitation by means of psychiatric therapy,¹²³ and further progress—including a possible breakthrough in treatment of psychopathy—are possible.

3. Other Provisions of the ALI Code

The standard for the defense of insanity is only one facet of the American Law Institute's fairly comprehensive approach to the problems presented by this defense. The Institute has also considered the assertion of insanity in support of diminished responsibility, the necessity of pleading insanity, mandatory examination of defendants by court appointed psychiatrists and the nature of their reports, the power of the court to direct an acquittal by reason of insanity, limitations on privately engaged experts, and commitment of acquitted but dangerous defendants.¹²⁴ Some of the provisions of the Code which tend to make its insanity standard more compatible with our jury system will be considered in the next section of this article. It is submitted, however, that the language of the Institute's proposal is so fraught with imprecision and the likelihood of juror disagreement if conscientiously followed that no harmonious marriage between it and our jury system of

F.2d 879, 881-82 (D.C. Cir. 1954), decided two weeks after *Durham*, the trial judge had tried in his charge to distinguish psychopathy from mental disease. The difficulty he experienced in the attempt was one of the reasons the conviction was reversed. In *People v. Horton*, 308 N.Y. 1, 123 N.E.2d 609 (1954), the defendant's conviction for murdering his father was affirmed. The state's experts had testified that he was not *psychotic* at the time of the killing, but that he was a "*psychopathic personality*." Commenting on the insanity defense, Judge Van Voorhis, a distinguished jurist who later served on the Governor's Subcommittee on the Defense of Insanity, relied on *these* experts to conclude that "their testimony indicates the probability of mental disease." *Id.* at 17-18, 123 N.E.2d at 617 (dissenting opinion). Psychiatrists find the distinction between mental health and mental illness no easier to draw. See authorities cited notes 15, 86 *supra*.

¹²¹ See note 39 *supra* and accompanying text.

¹²² See CLERKLEY, *THE MASK OF SANITY* (3d ed. 1955), the leading work dealing with the so-called psychopathic personality; ABRAHAMSEN, *WHO ARE THE GUILTY?* 154-64 (1952); HENDERSON & GILLESPIE, *PSYCHIATRY FOR STUDENTS AND PRACTITIONERS* 384-402 (8th ed. 1956); NOYES & KOLB, *op. cit. supra* note 86, at 545-63; Note, 19 *RUTGERS L. REV.* 425 (1955).

¹²³ See CLERKLEY, *THE MASK OF SANITY* 535-38 (3d ed. 1955); HENDERSON & GILLESPIE, *op. cit. supra* note 122, at 403-34; Biggs, *Procedures for Handling the Mentally-Ill Offender in Some European Countries*, 29 *TEMP. L.Q.* 254 (1956); Lipton, *The Psychopath*, 40 *J. CRIM. L. & C.* 584 (1950); Ross, *Some Implications and Results of the Psychiatric Treatment of Inmates*, 1 *J. FOR. SCI.* 117 (1956).

¹²⁴ See MODEL PENAL CODE §§ 4.02-09 (Tent. Draft No. 4, 1955). See generally WEIHOFFEN, *THE URGE TO PUNISH* 102-29 (1956).

trial can be anticipated as long as the prosecution has the burden of proving criminal responsibility beyond a reasonable doubt to a unanimous jury.

III. A PROPOSED PSYCHIATRIC OFFENDER LAW

The criticisms of existing and proposed standards of criminal responsibility made in the preceding portion of this article have assumed that: (1) if conduct which would otherwise be criminal has resulted from mental illness, the actor should be spared criminal conviction; (2) the standard for determining whether the conduct was the result of mental disorder should be designed to work within the system of factfinding in which it is invoked; (3) if a defendant is seriously disturbed, although he may be spared criminal conviction, there should be procedures for quarantining him from the community in order to protect the community; and (4) a defendant should not be dealt with more harshly in regard to the duration of his institutional commitment because of his assertion of the insanity defense than he would be if he had failed to assert it.

Although current psychiatric learning indicates that an appreciable amount of antisocial conduct is caused by mental imbalance, illness, or defects, our methods of criminal law enforcement have not adjusted, generally, to make effective use of this knowledge. In some areas of law enforcement, however, as certain cohesive areas of antisocial activity have been isolated, traditional methods of criminal law have yielded to newly devised approaches to the particular problems. Thus, children of tender years are no longer held *criminally* responsible. Their difficulties are considered in special children's courts where the procedures are not adversary, are likely to be highly informal, do not use juries, and have as their goal the reclamation of the youngsters.¹²⁵ Special procedures for dealing with adult "sexual psychopaths" have been attempted, although without marked success.¹²⁶ If the various rules for the insanity defense have not succeeded in reconciling law and psychiatry in the jury trial forum, should not a new and bolder approach that goes beyond simply rewriting the insanity "standard" be tried?

To this end, a "Psychiatric Offender Law"¹²⁷ will be proposed and examined in this section. The proposal would establish a suffi-

¹²⁵ See LUDWIG, *YOUTH AND THE LAW* 37-130 (1955).

¹²⁶ See Swanson, *Sexual Psychopath Statutes: Summary and Analysis*, 51 J. CRIM. L., C. & P.S. 215 (1960). See also *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270 (1940) (sustaining constitutionality).

¹²⁷ There is no magic in the suggested title. It is proposed, with full cognizance of its ambiguity, as being preferable to a title that might more pointedly suggest mental illness. The title given to the procedure and to the persons whose conduct is evaluated pursuant to this procedure is of minimal importance.

ciently flexible method to permit the fullest consideration of a defendant's mental condition and the impact of any illness on the criminal act he is charged with having committed. It would afford to defendants who wished them the full benefits of up-to-date psychiatric opinions. A defendant seeking these benefits would waive the right to a jury trial and the physician-patient privilege, and would agree to institutional commitment for observation and full psychiatric examination.¹²⁸

Specific language for a model statute is not suggested. Rather, an attempt is made to evolve some of the principles and to point out some of the problems that draftsmen will ultimately have to consider if the method outlined should meet with favor.

A. Procedure

1. Election of Psychiatric Offender Consideration

The new statute would first come into play after a defendant had been arrested for a crime and had consulted with counsel. At that time, or within a limited period thereafter,¹²⁹ any defendant¹³⁰ would have the right to elect to be considered for psychiatric offender treatment. The right to such consideration would rest wholly with the defendant; no extensive prior criminal record, no prosecutor's objection, and no court reluctance would be allowed to deny this. (Whether, however, after such consideration had been given, the defendant would in fact be adjudicated a psychiatric offender, or alternatively would be convicted or acquitted of crime, would depend upon factors considered hereinafter.) The defendant's formal election, on the advice of counsel, to be considered for psychiatric offender treatment would consti-

¹²⁸ As to the defendant who fails to elect psychiatric offender treatment, see pp. 812-13 *infra*.

¹²⁹ It seems desirable to require reasonable promptness for several reasons: it would reduce the likelihood of malingering or of the development of any genuine reactive psychosis between the time of apprehension and examination; it would increase the likelihood of accuracy in the diagnosis of the defendant's mental condition as of the time of the crime; and it would minimize the use of the Psychiatric Offender Law for purposes of delay. Of course, if, at the time of arrest, the defendant is so disturbed that he cannot make an intelligent choice whether to request psychiatric offender consideration, he would not thereafter be barred from this election when he recovered his capacity to make it. If the defendant elects psychiatric offender consideration after arrest but before a formal charge—indictment or information—has been returned, the promptness of the defendant's choice should not prevent the prosecution from completing the formalities necessary to charge crime. They would probably be a prerequisite if the court should ultimately reject the defendant's prayer for psychiatric offender adjudication and convict him of crime.

¹³⁰ In order to avoid strain on available facilities, which would have to be developed over time, it might be desirable initially to limit the application of the Psychiatric Offender Law to persons charged with felonies. The goal, however, should be to include all crimes. Often, minor offenses, such as indecent exposure, shoplifting, and various acts of sexual dalliance with children, are symptomatic of deep-seated mental disturbance.

tute a waiver of trial by jury and of the physician-patient privilege insofar as that privilege pertained to any data that might shed light on the defendant's mental condition. It would also constitute a waiver of the privilege against self-incrimination to the extent of constituting a consent to testifying in court in the psychiatric offender proceeding, and to submitting to institutional commitment for a complete psychiatric examination. The results of such mental examination, however, would be admissible only in the psychiatric offender proceeding, and there only on the question of the defendant's mental condition and appropriate treatment; they would not be admissible on the question of whether or not the defendant had committed the illegal act.

2. Psychiatric Examination

Upon the defendant's election of psychiatric offender treatment, the court would be required to commit him for mental observation.¹³¹ The circumstances of the commitment should be such that if the institutional psychiatrists were not satisfactory to either the defense or the prosecution, either side would have the right to produce at least one psychiatrist who would have a full opportunity to examine the defendant during the course of his commitment and to consult with the other examining psychiatrists.¹³² If the court should learn that the defendant had previously undergone other mental examinations—and questioning the defendant for this purpose would be appropriate—whether they

¹³¹ With the consent of all the parties, commitment might be dispensed with. This might be appropriate in cases of defendants whose apparent mental imbalance led to prompt commitment on arrest and concerning whom full psychiatric reports are available to the court, without the need for any fresh workup. In such cases, the court should have the authority to order whatever further investigation seems necessary, but it would seem futile to require a full commitment and examination.

¹³² Provision for privately retained psychiatrists in a proceeding that is not adversary in nature but is designed to give the court the maximum amount of information is important. The pressures created by volume at public institutions, sometimes coupled with inexpertise because of poor pay, may render reports by so-called "court psychiatrists" inadequate. See Cohen, Sears & Ewalt, *Observations on the Chapin Case and "The Briggs Law,"* Mass. L.Q., Dec. 1956, p. 30; Karpman, *On Reducing Tensions and Bridging Gaps Between Psychiatry and the Law*, 48 J. CRIM. L., C. & P.S. 164, 171-72 (1957); Note, *Psychiatric Court Clinics*, 29 TEMP. L.Q. 347, 358-59 (1956). Moreover, in view of the many divergent schools of psychiatric thought, any particular "court psychiatrist"—in expressing his own opinions, shaped by his particular discipline and prejudices—may express a view sharply at variance with the view others might entertain with equal honesty. See Davidson, *supra* note 102, at 14. In instances in which "court psychiatrists" are used, and a jury is the trier of fact, these defects may have particular impact, as jurors tend to accept without criticism the views of the court-appointed expert whose mode of appointment tends to label him "impartial." See Kreutzer, *Re-Examination of the Briggs Law*, 39 B.U.L. REV. 188, 193-94 (1959); Weihofen, *Crime, Law, and Psychiatry*, 4 KAN. L. REV. 377, 382-83 (1956). But with a judge as trier of fact, as this psychiatric offender plan contemplates, such labels should be of less significance. Possibly to assure the legitimacy of privately employed psychiatrists, there should be some minimal standards; one writer considering the question of psychiatric testimony has suggested a statutory requirement that experts be Diplomates of the American Board of Psychiatry and Neurology. Kreutzer, *supra* at 196.

had been conducted at public institutions or privately, it would subpoena the records of those examinations and make them available to all the examining psychiatrists. Similarly, the defendant would be fingerprinted in order that his full criminal history might be obtained and made available. Access would be given the psychiatrists to adjudications of juvenile delinquency and of youth crime, although normally state law might render them unavailable.¹³³

3. Psychiatric Report

The examining psychiatrists would be encouraged to confer together, and, if feasible, to agree upon a single comprehensive written report to the court. This report would evaluate the defendant's mental condition at the time of the examinations and—separately—at the time of the crime with which he was charged. It would also consider, as far as scientific knowledge permitted, the impact of that condition upon the defendant's allegedly criminal conduct. In cases in which the examining psychiatrists perceived some mental abnormality to exist at the time of their examinations, their report would evaluate its effect on the defendant's ability to have intelligently elected psychiatric offender consideration. It would also contain the experts' recommendations for treatment of the defendant and their prognosis for the future should their treatment recommendations be followed. In cases in which agreement among the psychiatrists was not possible, separate written reports would be submitted to the court.

4. Preliminary Matters for the Court

Equipped with the psychiatrists' reports, the court would proceed to dispose of the charge. If the experts found present mental illness, the court would have to determine whether the defendant had had the capacity intelligently to choose psychiatric offender treatment. Testimony could be taken to assist the court in resolving this question. The proceedings would be similar to those now used to determine a defendant's ability to stand trial.

If the defendant's election is found to have been understandingly made, he would be permitted to concede having committed the wrongful act, and thus to dispose of that question.¹³⁴ When the psychiatrists

¹³³ See, e.g., N.Y. CODE CRIM. PROC. § 913-a.

¹³⁴ In most instances in which the insanity defense is asserted, there is little contest by the defendant concerning the unlawful *act*. Yet under present jury trial methods, the prosecution must prove these facts. This can be purposeless and time consuming. There can be no simple *quid pro quo* to encourage defendants to concede these facts. However, since psychiatric offender proceedings would not be strictly adversary in nature, but should be a joint effort by the court, defense counsel, and

were in agreement as to their report, the court would then either adjudge the defendant a psychiatric offender or reject the claim of mental illness as the foundation for the wrongful act and convict the defendant of crime. But if there was no concession as to the criminal act, the psychiatrists disagreed, or their reports were inconclusive, then the court would order a trial of these issues before it.

5. Admissibility of Evidence

In such a trial, the examining psychiatrists would be subject to call and to examination by both defense and prosecution counsel and by the court; possibly they might be permitted to put questions to each other. Great latitude would govern the admission of evidence. Objections to hearsay testimony that provided information about the defendant's background—information relevant for diagnostic purposes—would not go to admissibility, but would merely affect the weight the court would give it. Medical opinions contained in hospital reports of prior examinations of the defendant would be acceptable under similar limitations. Evidence of prior convictions or of prior criminal acts that might bear on the defendant's mental health would be admitted. Since the conclusions of the experts would have been based on their inspections of other hospital reports, on the "histories" they would have received, and on their own personal examinations of the defendant, hypothetical questions should be largely unnecessary.¹³⁵ Insofar as they might be used, however, the hypotheses should be the result of agreement between the parties—with the court as arbiter if needed—so that all expert opinions would have common factual starting points. The defendant's election of psychiatric offender consideration having constituted his consent to testifying in that proceeding, court and counsel would have the right to put questions to him unless there was psychiatric agreement that the questioning might seriously impede the defendant's recovery.

the prosecutor to get at the roots of particular conduct in an effort to cure and to rehabilitate, whether or not a defendant conceded the facts of his antisocial act might be one element considered by the court in evaluating the bona fides of the claim of mental illness. The concession of such illegal conduct would not, of course, preclude such proof as might be needful to give the court some picture of the defendant's apparent mental state at the time of his actions.

¹³⁵ The Model Penal Code provides for court-appointed examiners of the defendant who asserts an insanity defense, reports by such persons, and optional examination and report by psychiatrists of the defendant's own choosing. See MODEL PENAL CODE §§ 4.05, 4.07 (Tent. Draft No. 4, 1955). The comment, *id.* at 198, notes that the Code proposal to bar expert opinion from persons other than those who have examined the defendant "prevents what may be regarded as the least defensible use of the hypothetical question—testimony by an expert who has not examined the defendant as to a diagnosis of the defendant's mental condition and perhaps as to his responsibility, based solely upon a hypothetical statement of facts and alternatively also upon his observation of the defendant in court."

In summary, the procedure would be an effort to get at the truth, uninhibited by much of the formalism that applies in jury trials. It would be held in loose rein by the fact that presiding—and sitting as judge of both fact and law—would be an arbiter whose discipline in the law made him mindful of the weaknesses likely to exist in testimony that would, in a common-law trial, be excluded pursuant to valid and timely objections.¹³⁶

6. Roles of the Judge and the Experts

The responsibility for making the decision of acquittal, criminal conviction, or adjudication as a psychiatric offender would be solely the court's and would not be shared by the psychiatrists. Placing this responsibility on the judge seems desirable for several reasons. Not only do his training and background render him particularly perceptive in evaluating testimony, but the act which gave rise to the proceeding was an affront to the laws which he is charged with administering. As long as uncertainty and dissension persist in the science of psychiatry, the continued use of our traditional judicial arbiter, hopefully objective, seems desirable.

Notwithstanding its ultimate responsibility, the court would be allowed to rely heavily upon the assistance of experts. Off-the-record consultation between the court and the psychiatric witness might even be expressly made proper. After the close of the evidence and such informal consultation, the court might reopen the hearing, if need be, to admit such further expert testimony as these informal discussions indicated should appear in the record, as proper foundation for its contemplated decision. Of course, further testimony in opposition—if any—would also have to be admitted. The statute should also provide that if any of the psychiatric experts disagreed with the decision of the court, they would be obliged to file in writing their reasons for disagreeing, and that that "critique," along with an opinion which the court would similarly be obliged to file, would become part of the record to be considered by the appellate court in the event of an appeal. The very compulsion to file these statements would itself operate as a force for agreement between the judge and the psychiatric witnesses.

¹³⁶ Not only would familiarity with problems of relevancy, hearsay, opinion evidence, and the like prove helpful in evaluating testimony which would no longer be inadmissible—these objections having been in large part eliminated—but the professional training of a lawyer or judge should tend to develop some sophistication that may be helpful in the search for the truth. *BLAYFAIR & SINGTON, THE OFFENDERS* 281 (1957) suggest, however, that the question of mental capacity must be taken completely from the courts—that "juries—and, for that matter, judges too—are inevitably biased by the crime committed."

B. Standard for Adjudication as a Psychiatric Offender

The Psychiatric Offender Law should provide a vehicle for applying scientific knowledge at whatever level it has reached at any particular time. Consequently, the insanity defense standard to be used with it should impose minimal limitations by way of defining the kind of mental illness that will exculpate. The *Durham* standard—that the “unlawful act was the product of mental disease or defect”—is the broadest proposal that has been advanced; it affords maximum flexibility in incorporating changing psychiatric concepts into the law. If *Durham* were to be accepted as the standard for adjudicating a defendant a psychiatric offender, should the day come when reliable psychiatric authorities substantially agree in defining neurotics or psychopaths as persons suffering from a “mental disease or defect,” then defendants in those categories would become proper candidates for consideration under the statute.

The *Durham* standard is preferable for purposes of the Psychiatric Offender Law to that suggested by the American Law Institute for two reasons. The degree words of the ALI proposal would make it too easy for “old-fashioned” judges, judges who might have little faith in psychiatrists, to reject almost all applicants for psychiatric offender consideration. And the ALI proviso concerning psychopaths would enact into law a concept which scientific opinion may some day show to be undesirably rigid.

Because of the breadth of the *Durham* standard, as well as the potential divergence of psychiatric opinion today in litigated cases, it is suggested that in psychiatric offender proceedings the burden of proving “mental disease or defect” should be on the defendant, sustainable by proof constituting the preponderance of the credible evidence.¹³⁷ If the burden of proof were to be handled in this fashion, then when *prevalent* scientific opinion indicated that an abnormality from which the defendant suffered constituted a mental disease or defect, he would be adjudicated a psychiatric offender. This would avoid placing the prosecution in the impossible position, already considered, of proving sanity beyond a reasonable doubt in a situation in which credible scientific opinion was split—regardless of how one-sided such split might be—as to whether or not there was mental illness.¹³⁸

¹³⁷ The burden of proving the criminal act, if it has not been conceded, would remain on the prosecution, requiring proof beyond a reasonable doubt. Although this complexity of burdens might confuse a jury, judges should be able to handle it with ease. See also Gasch, *Prosecution Problems Under the Durham Rule*, 5 CATHOLIC LAW, 5, 32 (1959).

¹³⁸ A compromise course—that the prosecution have the burden of proving sanity by a preponderance of the evidence—is rejected. This would weight the scales in favor of psychiatric offender adjudication, rather than conviction for crime, in in-

C. Disposition of the Psychiatric Offender

Today, when the defense of insanity is asserted, the jury verdict must be "not guilty," "guilty," or "not guilty by reason of insanity." Under a psychiatric offender statute, the choices open to the court would be to find the defendant "not guilty" or "guilty" or to adjudicate him a psychiatric offender. Which course would be proper would depend upon the sufficiency of proof as to both the criminal act and mental illness. In any case in which the wrongful act was established but no mental disease or defect was proven, the defendant would be convicted and sentenced in the usual manner. In any case in which the defendant's criminal conduct was found to be the product of a mental disease or defect, pursuant to the standard just discussed, he would be adjudicated a psychiatric offender.¹³⁹

The disposition of an adjudicated psychiatric offender should depend on the state of his mental illness at the time of adjudication and on its prognosis.¹⁴⁰ If his illness has been minor or it is virtually cured, he might be conditionally released, subject to whatever probational supervision the court might think desirable. If he is still dangerous, though his illness is treatable, he should be committed to a curative and rehabilitative institution. And if he is dangerous and his illness is not subject to any known cure, he should be committed to an institution where he can be cared for and confined, isolated from the community, but where he can also be treated should his illness change or a cure be developed. In determining the proper disposition of each offender, the court would doubtless rely heavily upon the reports and testimony of the examining psychiatrists and his conferences with them. This information should be more complete and more carefully tested in a properly conducted psychiatric offender proceeding than in the presentence investigations which are used today in many jurisdictions.¹⁴¹ As noted before, the court's action should be subject to "dissents" by the experts and to appellate review.

stances in which there was roughly an even split in scientific opinion as to whether or not mental illness existed. Until there has been some experience under the proposed Psychiatric Offender Law, this seems undesirable. Later, however, if the legislation has worked well in practice, it might be thought desirable to increase the number of defendants adjudicated under it, and this could be accomplished by altering the burden of proof or rewriting the standard for adjudication to include, perhaps, "any other mental disorder."

¹³⁹ For purposes of such adjudication, the particular crime with which he was originally charged would be irrelevant. As to the wisdom of this kind of elasticity, see Karpman, *supra* note 132, at 164-65.

¹⁴⁰ For the elements to be considered and their significance, see GUTTMACHER & WEIHOFEN, *PSYCHIATRY AND THE LAW* 396-97 (1952); Waelder, *Psychiatry and the Problem of Criminal Responsibility*, 101 U. PA. L. REV. 378, 389-90 (1952).

¹⁴¹ Probation reports, often gathered without any assistance from the accused, are likely to contain much untested hearsay about the defendant's personality, his

More must be said, however, about the *duration* of the commitment of psychiatric offenders. The traditional concept of committing a mentally ill defendant until he regains his sanity is yielding to one of commitment to last as long as the patient remains potentially dangerous to himself or to others—even although sanity may have been meanwhile regained.¹⁴² If defendants are to be encouraged to litigate the question of mental illness, special attention must be given to the likely results of defendants' successes in such litigation. The potential duration of resultant commitments must not be so much longer than the alternative criminal sentences that defendants would see no advantage in defending on the ground that they were mentally ill.

There are two ways of accomplishing this end. One is simply to establish maximum terms for commitments under the Psychiatric Offender Law corresponding to those under the penal laws. The other is to adopt flexible sentencing provisions that would permit low-minimum-to-life sentences for all crimes.¹⁴³

The latter proposal is unlikely to be accepted. Not only have the legislatures failed, except in the case of sexual psychopath laws of a few states,¹⁴⁴ to adopt such sentencing laws, but those that do exist have been employed very cautiously.¹⁴⁵ Judges tend to set specified terms, possibly in order to insure that the punishment will not exceed the crime and that, on the other hand, administrative action will not turn a dangerous defendant loose prematurely. In short, legislative and judicial experience seems to indicate that there is little prospect that sentencing practices soon will be revised in order that they may conform with the practice now existing for mental commitments.

family background and education, and so forth. Under a Psychiatric Offender Law, the defendant's cooperation in uncovering and verifying this kind of information can be anticipated; this and the chance to cross-examine witnesses giving testimony about the defendant's mental health should produce a more accurate and helpful picture.

It has been urged that, in conjunction with retaining *McNaughton* as the standard for guilt, an expanded form of probation report be used and psychiatric considerations be fully explored, in a hearing conducted subsequent to the determination of guilt, for purposes of aiding the court in making its disposition of the defendant. See Hofstadter & Levittan, *The McNaughton Rules—A Re-Appraisal and a Proposal*, 140 N.Y.L.J., Nos. 53-57, Sept. 15-19, 1958, p. 4; Rubin, *A New Approach to M'Naghten v. Durham*, 45 J. AM. JUD. Soc'y 133 (1961); cf. ROCHE, *THE CRIMINAL MIND* 272-74 (1958). Although such a procedure would give the court much the same information as it would be likely to have in a psychiatric offender proceeding, it is submitted that it comes too late. By the time the judge finds, for example, that the defendant had no real control over himself when he did the unlawful act, he is having to decide the fate of one who has already been found guilty.

¹⁴² See notes 105-06 *supra* and accompanying text.

¹⁴³ See ERICKSON, *WARDEN RAGEN OF JOLIET* 237-39 (1957); GUTTMACHER & WEIHOFEN, *PSYCHIATRY AND THE LAW* 444-46 (1952).

¹⁴⁴ *E.g.*, PA. STAT. ANN. tit. 19, §1166 (Supp. 1961); see GUTTMACHER & WEIHOFEN, *op. cit. supra* note 143, at 123-34; WEIHOFEN, *MENTAL DISORDER AS A CRIMINAL DEFENSE* 202-03 (1954).

¹⁴⁵ See, *e.g.*, *Commonwealth ex rel. Robinson v. Maroney*, 175 Pa. Super. 529, 107 A.2d 188 (1954).

The idea of limiting a mental commitment to a predetermined number of years, fixed according to the crime that initially led to that commitment, rather than having its termination depend wholly upon the patient's recovery, may seem unacceptable at first blush. Logically, a dangerous person who has committed a crime should be subject to continued isolation, regardless of the nature of the crime, as long as he remains dangerous. But this is true whether the crime and the continued dangerousness are the products of mental illness or of criminal tendencies that do not rise to the level of mental illness. In this respect our law has developed along divergent paths: it confines the person who had initially been charged with a crime and had been acquitted as insane, and keeps him confined for as long as he remains dangerous; but it releases after a term of years the criminal whose wrongful act was identical and whose dangerous propensities are equally clear, just because he has never, in a court of law, been found to be "insane."

It is suggested that this duality makes no sense and should be terminated. A procedure should be instituted providing for the commitment of still dangerous persons who are about to complete a term of years in a penal establishment or to be released from a mental hospital under the terms of their commitments.¹⁴⁶ With such a procedure

¹⁴⁶ A recommitment procedure for soon-to-be-released but dangerous persons would be an important aspect of the proposed psychiatric offender scheme. Indeed, such a procedure would seem desirable in *any* sentencing scheme other than one making extensive use of day-to-life sentences. This need is indicated by today's high rates of recidivism. See, e.g., FEDERAL PRISONS, 1959, at 26, noting that of the 10,613 persons committed to federal prisons during 1959 for terms in excess of one year, 7,179, or 67.6%, had served previous prison terms. There are laws providing for the continued commitment of prisoners who are dangerous *and insane or mentally incompetent*. See, e.g., 18 U.S.C. § 4247 (1958). It is suggested that such provisions be extended to apply to persons who may be psychopathic, whether or not they are considered to be mentally ill.

A recommitment procedure for soon-to-be-released but dangerous persons would protect defendants to an extent that day-to-life prison sentences and existing mental commitment procedures do not. The initial period would be roughly proportional to the severity of the crime, and then the burden would be on the state, through representatives of the institution, to justify the decision to continue depriving the inmate of his freedom. Cf. Halleck, *supra* note 107, at 318-20. See also Szasz, *Hospital Refusal To Release Mental Patient*, 9 CLEV.-MAR. L. REV. 220 (1960).

A procedure calling for civil commitment of persons considered to be dangerous, if limited in its application to those convicted of crime or adjudicated as psychiatric offenders would seem to be constitutional. Although it would provide for the commitment of persons some of whom were sane and none of whom had committed any new crime, as the legislature might have called for the imposition of day-to-life terms or indeterminate commitments for all such persons initially, this procedure calling for a good deal less, and basing the decision as to continued commitment on a logical ground, would seem permissible. There would be, of course, the problem of determining whether or not a person did represent a continuing danger to himself or to others. But various statutes and proposals now utilize this test to judge the propriety of releasing committed persons. See notes 105, 106 *supra*. Taking the same test but shifting the burden of initiating the procedure to the state and charging it with the burden of proving the probability of such danger by a preponderance of the evidence should militate in favor of the lawfulness of the proposed statute.

in force, the initial mental commitment resulting from a psychiatric offender adjudication might be limited to a specified term of years, with earlier release permitted whenever the defendant should cease to be dangerous. The outside limits of initial commitments would be made proportional to the severity of the underlying criminal acts so that a defendant would not find himself prejudiced by having chosen to litigate his mental illness under the Psychiatric Offender Law.¹⁴⁷

D. Appeal

In order to minimize the particular idiosyncrasies that particular trial judges might bring to these novel proceedings, it is suggested that the appellate courts be given broad power to review and modify a trial judge's rejection of psychiatric offender adjudication. The appropriate court should be empowered to substitute its own findings of mental illness for the trial judge's criminal adjudication if one or more of the psychiatric experts has filed a report asserting grounds for his "dissent" from the trial judge's actions. Similar broad authority to review the trial court's exercise of its discretion in its commitment or sentence of the defendant should also be given.

Although such appellate power should be conferred, it should be exercised sparingly and with self-restraint. Appellate courts should recognize that in dealing with a psychiatric offender proceeding, some depth of understanding of the defendant's personality is desirable. The full and firsthand familiarity with the witnesses, including the defendant, enjoyed by the trial court ordinarily would far better qualify it in this regard than would a hasty appellate perusal of a cold trial record, or even intensive study of some narrow aspects of it. Appreciation of the significance of this difference in familiarity when dealing with a question as many-faceted as that of a defendant's mental illness should inhibit over-hasty reversals.

E. Special Problems of Psychiatric Offender Legislation

The common-law framework for determining criminal guilt is founded on an adversary relationship between the defendant and the community which prosecutes him. The defendant is completely relieved of cooperating in the community's effort to prove his guilt. Moreover, ordinarily he has an absolute right to the choice of that

¹⁴⁷ WEIHOFEN, *MENTAL DISORDER AS A CRIMINAL DEFENSE* 203 (1954), notes that New Jersey, Wisconsin, and Wyoming have laws providing that sex offenders are to be committed to mental institutions, but limiting the time they are to spend there to the maximum provided by law for the crime for which they have been convicted.

method for having the question of his guilt adjudicated that may best lend itself to efforts on his part at confusion: trial by jury.

The reasons for insistence on adversary proceedings disappear as the law moves away from rigid concepts of criminal guilt, demanding retribution, toward increasing recognition that aberrant actions are likely to be the products of mental illness, and that cure and rehabilitation—rather than vengeance—best serve both the community and the individual transgressor.

1. Constitutional Objections

Some of the features of the adversary system are locked into our legal framework by the United States Constitution and the constitutions of many states. For instance, trial by jury is guaranteed, and legislative efforts to limit such trials solely to the question of whether the defendants committed the prohibited acts, without regard to their criminal intent, have foundered on constitutional grounds.¹⁴⁸

Constitutional safeguards such as the right to trial by jury and the privilege against self-incrimination would be inapplicable if psychiatric offender proceedings were deemed essentially noncriminal in nature.¹⁴⁹ But it is unlikely that a body of law that functions in an area previously considered criminal would be so deemed. Nevertheless, the constitutional obstacles are not insuperable. Since the safeguards afforded the defendant can be waived, serious constitutional questions may never arise if psychiatric offender treatment is not made mandatory, but is within the defendant's election.¹⁵⁰

2. Defendant's Election of Psychiatric Offender Consideration

A defendant electing to be considered under the proposed law would gain certain benefits from this choice. If adjudicated a psychiatric offender, he would be spared a criminal conviction, and the sole aim of his "sentence" would be his cure and rehabilitation. Moreover, there would be no minimum period for which he would have to be

¹⁴⁸ See *Sinclair v. State*, 161 Miss. 142, 132 So. 581 (1931); *State v. Strasburg*, 60 Wash. 106, 110 Pac. 1020 (1910).

¹⁴⁹ Cf. *Frank v. Maryland*, 359 U.S. 360 (1959).

¹⁵⁰ The rights guaranteed to criminal defendants by the fifth, sixth, and fourteenth amendments, and by similar provisions of state constitutions are those rights enjoyed by criminal defendants at the time of the adoption of these constitutional provisions. See *Powell v. Alabama*, 287 U.S. 45, 60-65 (1932); *Twining v. New Jersey*, 211 U.S. 78, 100-02 (1908). Defendants therefore have no constitutional right to adversary proceedings in which juries will consider the question of whether, under disputed tenets of modern psychiatry, their wrongful actions resulted from mental illnesses. In making new standards for exculpation from criminal guilt available to defendants—not as replacements for the older tests, but as alternatives to them—the law must be able to provide procedures in which such alternatives will be able to function effectively. Compare cases cited note 30 *supra*.

detained. On the other hand, there are factors that might deter some defendants from making this choice. Where the illness is dubious or feigned, the chances of success would be lessened by the informal nature of the proceedings, including the obligation that the defendant testify and submit to psychiatric examination, and the loss of the jury as a factfinder.

It is suggested that for the defendant who fails to elect psychiatric offender consideration, the alternative should be *McNaughton*. That it is the most appropriate standard for use in our common-law jury trial has already been fully explored. Defense tacticians would thus be forced to fish or cut bait. If there were genuine indications of serious mental disorder, they would ordinarily benefit by electing psychiatric offender consideration. If not, the weakness of their claim would, in all likelihood, be revealed by the rigidity of pure *McNaughton*.

3. Elimination of the Jury

A number of thoughtful critics, defenders, and historians of the insanity defense have urged the propriety of leaving the decisional function with the jury.¹⁵¹ They have suggested that jurors, non-professionals drawn from the community, give expression to the "group mind," that they provide some elasticity in law enforcement which is desirable, and that trial by jury is the essence of our democratic society.

Much of the reluctance to part with the jury in judging insanity defenses is based on the feeling that if the law is meticulously applied, it may on some occasions be harsher than the equities require and that jurors can give the law humane flexibility.¹⁵² Tempering justice in this fashion may be desirable if the standard for mental illness is a narrow one, such as *McNaughton*. However, if a new insanity defense standard is selected because of its alleged scientific soundness, it makes little sense to urge that the trier of fact used with the old standard, who imparted to that standard a flexibility not present in its express

¹⁵¹ See ZILBOORG, *THE PSYCHOLOGY OF THE CRIMINAL ACT AND PUNISHMENT* 84 (1954); Royal Comm'n Rep. 100; Hall, *Responsibility and Law: In Defense of the McNaghten Rules*, 42 A.B.A.J. 917, 987 (1956); Moreland, *Mental Responsibility and the Criminal Law—A Defence*, 45 Ky. L.J. 213, 219-20 (1956).

¹⁵² See DEVLIN, *TRIAL BY JURY* 154 (1956):

The fact that juries pay regard to considerations which the law requires them to ignore is generally accepted. I do not mean by that that they frequently and openly flout the law, but that they do not always succeed in separating the wheat from the chaff. Certainly a jury is not as good a separating machine as a judge would be; and the reason why a jury is to be preferred in some cases is because there are some cases in which a little admixture of chaff is not a bad thing.

See also note 47 *supra*.

language, must be retained with the new. Indeed, to urge that jurors should be the triers of fact under a psychiatric offender statute because of the elasticity that they may interpolate into the law would be to say that although science may tell us that a particular defendant was mentally ill and that his crime was the product of that illness, if the community is sufficiently wrought up it should have the right, through its representatives, the jurors, to abjure science and convict the defendant criminally.¹⁵³

Moreover, the trial jury is primarily a *factfinder*. But when either of the principal new insanity standards is invoked the jurors serve largely to select an *opinion* from among the conflicting ones posed by the experts. Elimination of the jury from such a decision does not therefore constitute any improper delegation of *fact-finding* to a trier other than the jury.

Indeed, as the underlying question posed by the conflict between the experts under a psychiatric offender statute would be whether the defendant should be dealt with as a criminal or as an ill person, the decision for the court would, in a broad sense, be one as to "sentence." As sentencing responsibility traditionally reposes in the court and is not the concern of juries, and as a defendant's mental and emotional picture is properly considered by a court at the time of sentencing, dispensing with the jury in psychiatric offender proceedings seems not inappropriate.

Lastly, in meeting the argument that opposes taking the sanity question from the jury, it must be recognized that the determination of criminal responsibility involves a mixed question of fact and law. Finding whether or not specific symptoms of abnormality actually plague the defendant is a question of fact. But assuming that these symptoms are found, there is still the need to determine whether they constitute the kind of "mental illness" that will exonerate from criminal guilt. Determination of this question involves a choice for the trier of fact that has the impact of a rule of law: if "illness" exists, it operates to excuse from guilt; non-"illness," if found on the same set of facts, would fail to do so.¹⁵⁴

Because mental illness is this mixed fact and law question, it is appropriate that it be resolved by a single agency. As the new standards and trial by jury are largely incompatible, and for the rea-

¹⁵³ Perhaps this has been happening in the District of Columbia, where juries, since *Durham*, have rendered a number of guilty verdicts in cases in which the appellate court has ruled that the records would not sustain a verdict that the defendant's freedom from mental illness had been established beyond a reasonable doubt. See cases cited note 98 *supra*.

¹⁵⁴ See Reid, *Understanding the New Hampshire Doctrine of Criminal Insanity*, 69 YALE L.J. 367, 411-12 (1960).

sons enumerated in these paragraphs, the judge seems a more suitable agency for this resolution than does the jury.

IV. CONCLUSION

Only some initial legislation in the direction discussed in this article and careful administration by able men will tell whether a psychiatric offender statute is the answer to the insanity defense dilemma. It is submitted, however, that one clear truth can be seen now: if discussions concerning insanity as a criminal defense are to continue with profit, they must consider more than just drafting a new insanity "standard" for use in the old procedural framework.

Once we have realized the futility of arguing in the abstract about formulae, our work may lead to a means of successfully uniting the age-old principles of law with the newer findings of psychiatry. To accomplish this, some elements of our older legal institutions may have to give way to newer counterparts, designed to be workable when confronted with novel scientific revelations. The proposed outline of psychiatric offender legislation is offered as one such design.