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# PROSECUTION PROBLEMS UNDER THE DURHAM RULE

OLIVER GASCH\*

AS LONG AS JUSTICE has been a treasured concept, man has struggled with the problem of crime committed by those who are not responsible. In Roman Law it was believed that the insane lacked free will and were therefore incapable of volitional activity.<sup>1</sup> The rationality test<sup>2</sup> in the *M'Naghten* rule<sup>3</sup> had its origin in a thirteenth-century legal treatise by Bracton and thence ultimately its source may be traced to the Greek philosophers Plato and Aristotle.

For more than a hundred years, the *M'Naghten* rule, evolved by the Justices of England at the request of the House of Lords, has been accepted in this country,<sup>4</sup> in England, and in British Commonwealth nations as the criterion for the guidance of judges and juries in such cases.

One of these *M'Naghten* areas was the District of Columbia. In this unique district<sup>5</sup> in which the federal courts have exclusive jurisdiction over serious common-law crimes, the *M'Naghten* doctrine was augmented and modified by the "irresistible impulse" doctrine in the *Smith* case.<sup>6</sup> However, in 1954, the *Durham* decision<sup>7</sup> was enunciated. Views concerning this latter case have differed widely.<sup>8</sup> The *M'Naghten* rule

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<sup>1</sup> DEUTSCH, *MENTALLY ILL IN AMERICA* 38 (1937), quoted in 5 *CATHOLIC U.L.REV.* 64 n.5 (1955).

<sup>2</sup> Hall, *Responsibility and Law: In Defense of the McNaghten Rules*, 42 *A.B.A.J.* 917 (1956).

<sup>3</sup> 10 *Cl. & Fin.* 200, 8 *Eng. Rep.* 718 (H.L. 1843).

<sup>4</sup> *But see* *State v. Pike*, 49 *N.H.* 399 (1870), wherein the court held that an accused is not criminally responsible if his unlawful act was the result of mental disease or mental defect.

<sup>5</sup> Stephens, *The State of the Docket and the Need for Additional Judges*, 16 *D.C. B.A.J.* 57, 60-62 (1949).

<sup>6</sup> *Smith v. United States*, 36 *F.2d* 548 (D.C.Cir. 1929).

<sup>7</sup> *Durham v. United States*, 214 *F.2d* 862 (D.C. Cir. 1954).

<sup>8</sup> See, e.g., Hall, *Responsibility and Law: In Defense of the McNaghten Rules*, 42 *A.B.A.J.* 917 (1956); Kalven, *Insanity and the Criminal Law - A Critique of Durham v. United States*, 22 *U.CHI.L.REV.* 317 (1955); Sobeloff, *Insanity and the Criminal Law: From McNaghten to Durham and Beyond*, 41 *A.B.A.J.* 793 (1955).

as modified by the "irresistible impulse" test was therein overthrown as the exclusive criterion<sup>9</sup> for determining responsibility in criminal cases:

The rule we now hold must be applied on the retrial of this case and in future cases is not unlike that followed by the New Hampshire Court since 1870. It is simply that an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect.<sup>10</sup>

What then are the particular problems of the prosecutor under this formulation and related cases? They may be divided roughly into two categories: pre-trial problems and trial problems.

Throughout this entire discussion it should be borne in mind that the interest of the United States Attorney in a criminal prosecution is not that he shall win the case but that justice shall be done. He is "the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. . . ."<sup>11</sup> As the circuit Court said in one of our leading cases involving the defense of insanity: "Our collective conscience does not allow punishment where it cannot impose blame."<sup>12</sup>

<sup>9</sup> *Durham v. United States*, *supra* note 7. "We find that as an exclusive criterion the right-wrong test is inadequate in that (a) it does not take sufficient account of psychic realities and scientific knowledge, and (b) it is based upon one symptom and so cannot validly be applied in all circumstances. We find that the 'irresistible impulse' test is also inadequate in that it gives no recognition to mental illness characterized by brooding and reflection and so relegates acts caused by such illness to the application of the inadequate right-wrong test. We conclude that a broader test should be adopted." *Id.* at 874.

<sup>10</sup> *Id.* at 874-75.

<sup>11</sup> *Berger v. United States*, 295 U.S. 78, 88 (1935).

<sup>12</sup> *Holloway v. United States*, 148 F.2d 665, 666-67 (D.C. Cir. 1945), *cert. denied*, 334 U.S. 852 (1947).

## Pre-trial Problems

### *The "Some Evidence Rule"*

The minimal character and quality of the evidence which invokes this special defense of insanity is illustrated by two of the leading cases, *Tatum*<sup>13</sup> and *Durham*,<sup>14</sup> in the so-called "some evidence" rule.

*Tatum* was convicted of carnal knowledge of a 9-year old child. His conviction was reversed for the reason that "as soon as 'some evidence of mental disorder is introduced, . . . sanity, like any other fact, must be proved as part of the prosecution's case beyond a reasonable doubt'."<sup>15</sup> In *Durham* the court explained what constitutes "some evidence," as follows:

In *Tatum* we held that requirement satisfied by considerably less than is present here. *Tatum* claimed lack of memory concerning the critical events and three lay witnesses testified that he appeared to be in "more or less of a trance" or "abnormal" but two psychiatrists testified that he was of "sound mind" both at the time of examination and at the time of the crime.<sup>16</sup>

The mere raising of insanity as a defense does not dislodge the presumption of sanity. However, our experience indicates that it is not difficult for the defense to find "some evidence" of insanity in cases tried in the District of Columbia.<sup>17</sup> Further, since there

<sup>13</sup> *Tatum v. United States*, 190 F.2d 612 (D.C. Cir. 1951).

<sup>14</sup> *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954).

<sup>15</sup> *Tatum v. United States*, *supra* note 13, at 615.

<sup>16</sup> *Durham v. United States*, *supra* note 14, at 866.

<sup>17</sup> *Cf. Lebron v. United States*, 229 F.2d 16 (D.C. Cir.), *cert. denied*, 351 U.S. 974 (1956). In this historically interesting case four Puerto Rican terrorists fired indiscriminately from the gallery of the United States House of Representatives, severely wounding several Congressmen. One of four court-appointed counsel during the trial told the court: "it has occurred to us . . . there is probably something mentally wrong with them. "[B]ecause of . . . their lack of remorse, their

is no obligation on the defense to notify the court or the prosecution of this defense prior to trial, it may be more difficult for the prosecution to obtain a mental examination.

In this connection reference is made to the most recent case involving Monte Durham. Following the second reversal of his conviction for housebreaking and larceny, this defendant entered a plea of guilty to petty larceny.<sup>18</sup> After serving his sentence he was indicted for robbery in June of 1958. As a protective measure the Government sought a mental examination. The defense objected. The Government relied on the history established in the previous cases. The trial court denied the Government's motion, holding that the Government had failed to show any current evidence of mental incompetency.<sup>19</sup>

peculiar attitude towards this entire situation, . . . I am firmly convinced there is a strong probability that these people are mentally unstable." Citing *Wear v. United States*, 218 F.2d 24 (D.C. Cir. 1954), the court said such a motion for mental examination will not be granted if not made in good faith or if frivolous. The motion did not state the substance of statutory grounds then applicable under 18 U.S.C. §4244. Also it should be noted the Government had caused the defendants to be examined by three psychiatrists who found them sane. Counsel argued that the rule of the *Tatum* case, *supra* note 13, as well as of *Wright v. United States*, 215 F.2d 498 (D.C.Cir. 1954), should be invoked because "some evidence" of insanity had been adduced. The court ruled that the considerations mentioned were insufficient to raise the issue of insanity.

<sup>18</sup> *Durham v. United States*, 237 F.2d 760 (D.C. Cir. 1956). At trial Durham relied on the defense of insanity. Because of the objection of the defense to the examination of Durham by a psychiatrist selected by the Government, psychiatric testimony was limited to defense psychiatrists. The jury returned a verdict of guilty. The trial court entertained a motion for a finding of not guilty by reason of insanity, and entered such a judgment *n.o.v.*

<sup>19</sup> *Durham v. United States*, Criminal Case No. 719-58 (D.D.C. June 1958).

Though the "some evidence" rule must be kept in mind throughout a trial, it is first considered in the pre-trial stage. Whenever it appears to either the defense or the prosecution that there is "some evidence" of mental illness which would have a material relationship to the question of productivity under the *Durham* doctrine,<sup>20</sup> then either party should move for mental observation in a mental hospital.<sup>21</sup>

It has been our experience that such a period of observation in a mental hospital has a salutary effect in weeding out the malingerer. Passing reference to *Taylor v. United States*<sup>22</sup> demonstrates the point. Dr. Gilbert, a psychiatrist, on order of the court had examined Taylor at the district jail five times. He concluded that Taylor at the time of the alleged offenses was of unsound mind, suffering from dementia praecox, with symptoms that included confusion, memory failures, hostility, hallucinations and delusions. Taylor was committed to St. Elizabeth's Hospital. After seven months at the Hospital the superintendent certified that Taylor was competent to stand trial. Dr. Epstein, a psychiatrist at the hospital, testified at the trial that Taylor had told him that he had not suffered from hallucinations or delusions but that he had been "going along with a gag" in describing such episodes. Dr. Epstein concluded that Taylor suffered from a sociopathic personality disturbance with an antisocial reaction and had a psychopathic personality but was not psychotic or insane.

The appellate court held that privilege

<sup>20</sup> *Williams v. United States*, 250 F.2d 19, 25 (D.C.Cir. 1957).

<sup>21</sup> See 18 U.S.C. §4244 (1952); D.C.CODE ANN. §24-301 (Supp. VI 1958).

<sup>22</sup> 222 F.2d 398 (D.C.Cir. 1955).

between patient and physician made the receipt of this testimony error. It should be noted that Dr. Epstein had raised the question as to the propriety of his testimony at the trial level. Subsequent to this reversal, Congress passed a law by reason of which such testimony is admissible whenever the defense of insanity is interposed in a criminal case for assault or homicide, and only when the interests of justice so demand it.<sup>23</sup>

### *Wear v. United States*<sup>24</sup>

This case places a broadened interpretation on section 4244 of Title 18, United States Code, which relates to the competency of an accused to stand trial. The effect of this decision is to require that motions made for mental examination to determine competency to stand trial must be granted unless they are lacking in good faith or plainly frivolous. The statute uses the term "reasonable cause." This decision equates that expression with the concept of "not frivolous." This situation had to be corrected by statute. Now the initiation of proceedings is to depend on "the Court's own observations or . . . prima facie evidence submitted to the Court."<sup>25</sup>

### *The "Gunther" Hearing*

The single issue involved in the appellate review of Gunther's rape conviction was whether an accused person who had been committed as incompetent to stand trial may be retried without a judicial hearing to determine his competency.<sup>26</sup> In this case there had been filed with the court a certificate of the superintendent of the hospital

wherein the accused was confined to the effect that he had regained his competency.

The court quoted a colloquy between Senator Wiley, Chairman of the Subcommittee of the Judiciary Committee of the Senate, and Judge Magruder as illustrative of the intention of Congress to require a judicial determination of competency prior to trial if there has been a previous judicial determination of incompetency.<sup>27</sup> The court further concluded that the interests of justice would be served by a remand to the district court for hearing and determination of whether appellant was competent to stand trial when he was tried and sentenced.<sup>28</sup> Only if there were a finding of incompetency would the conviction be disturbed.

The court distinguished its holding in *Perry v. United States*<sup>29</sup> which was reversed and remanded for a new trial. In *Perry* there had been no previous court determination of incompetency and hence no medical certificate was filed attesting that the accused had recovered his sanity and was competent to stand trial.

However, failure to hold a *Gunther* hearing does not always result in a reversal.<sup>30</sup> *Wells v. United States*<sup>31</sup> was an interesting variation. At sentencing, the sanity point was raised. Wells was committed to a mental hospital. Three years later he was adjudged competent and sentenced. Counsel moved for a new trial

<sup>27</sup> *Id.* at 495.

<sup>28</sup> *Id.* at 497. Justification for a *nunc pro tunc* hearing to determine competency is found in the parallel procedure provided in 18 U.S.C. §4245 (1952).

<sup>29</sup> 195 F.2d 37 (D.C.Cir. 1952).

<sup>30</sup> *Taylor v. United States*, 222 F.2d 398 (D.C. Cir. 1955) (dictum).

<sup>31</sup> *Wells v. United States*, 239 F.2d 931 (D.C. Cir. 1956).

<sup>23</sup> D.C. CODE ANN. §24-308 (Supp. VI 1958).

<sup>24</sup> 218 F.2d 24 (D.C.Cir. 1954).

<sup>25</sup> D.C. CODE ANN. §24-301 (Supp. VI 1958).

<sup>26</sup> *Gunther v. United States*, 215 F.2d 493 (D.C. Cir. 1954).

and the appeal followed the denial thereof. The appellate court ordered a *Gunther* hearing to determine whether Wells was competent at the time he was tried. If the determination were in the affirmative then the sentence would stand. If there were found to be an inadequate basis for the determination of competency at the time of the trial, then a new trial would be ordered.

### *Timeliness of Pre-trial Motions Relating to Mental Examinations*

In the *Wright*<sup>32</sup> and *Williams*<sup>33</sup> cases the court in the strongest terms emphasized the importance of timely mental examinations. Judge Bazelon observed in the *Williams* case:

If Williams' violent act in 1949 sprang from mental disorder — if, indeed, he has a mental illness which makes it likely that he will commit other violent acts when his sentence is served, imprisonment is not a remedy. Not only would it be wrong to imprison him, but imprisonment would not secure the community against repetitions of his violence.<sup>[34]</sup> Hospitalization, on the other hand, would serve the dual purpose of giving him the treatment required for his illness and keeping him confined until it would be safe to release him.<sup>[35]</sup> Society's great interest

in the proper disposition of such cases would be disserved if the Government, in prosecuting them, adopted an attitude of passivity or resistance to the production of evidence. . . .

In the light of the foregoing, we hold that appellant was denied a speedy trial. We reverse the conviction and remand the case to the District Court for dismissal of the indictment.<sup>[36]</sup>

In *Wright*,<sup>37</sup> Judge Bazelon, again speaking for the court and answering the Government's attack on the psychiatric evidence, said: "If the Government feels that psychiatric opinions which come into evidence ought to be based on examinations of greater scope and intensity than has been the practice heretofore, it can and should arrange to have such examinations made."<sup>38</sup>

There can be no doubt as to the importance of timely mental examinations in those cases where there is a showing that "some evidence" of mental illness exists which relates materially to the causal connection under the *Durham* rule between mental illness and the criminal act.

It has been generally assumed that insanity is an affirmative defense.<sup>39</sup> There

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pitalization after the termination of the sentence, administrative provision is made for the filing of a civil commitment proceeding by the prosecution. See also 18 U.S.C. §§4247, 4248 (1952).

<sup>32</sup> *Williams v. United States*, *supra* note 33, at 26. The court's footnote 15 points out that Williams' previous confinements to St. Elizabeth's Hospital were for the sole purpose of restoring sufficient competency to permit him to be tried.

<sup>37</sup> *Wright v. United States*, 250 F.2d 4 (D.C.Cir. 1957).

<sup>38</sup> *Id.* at 9.

<sup>39</sup> ALI, MODEL PENAL CODE, §4.03(1), at 28 (Tent. Draft No. 4, 1955): "Mental disease or defect excluding responsibility is an affirmative defense. . . ." At page 213 of the transcript of the proceedings (1955) at which, on the motion of Judge Parker, this formulation was adopted, Mr. Wechsler, the Institute Reporter, observed: ". . . I think that puts a close finger on it as the burden of the issue that is raised in 4.03(1) and we say —

<sup>32</sup> *Wright v. United States*, 250 F.2d 4 (D.C. Cir. 1957).

<sup>33</sup> *Williams v. United States*, 250 F.2d 19 (D.C. Cir. 1957).

<sup>34</sup> The court's footnote 14: "Under his present sentence, Williams may be released by September 1958."

<sup>35</sup> It seems to the Government that the emphasis on the protection of society is certainly desirable. It should be observed, however, that provision is made for the mental hospitalization of jail or penitentiary inmates who become insane during the course of their term of imprisonment. See D.C. CODE ANN. §24-302 (Supp. VI 1958). After transfer of such an individual to a mental hospital and when the superintendent thereof believes that such a person is in need of further mental hos-

is much logic behind the proposal in the American Law Institute Model Penal Code:

Evidence of mental disease or defect excluding responsibility shall not be admissible unless the defendant at the time of entering his plea of not guilty or within ten days thereafter or at such later time as the court may for good cause permit files a written notice of his purpose to rely on such defense.<sup>40</sup>

It is submitted that the defense is in a much better position to ascertain whether insanity will be interposed as a defense than the Government. Such a written notice would permit the Government to file an appropriate motion for a mental examination under hospital conditions. This of course some defendants may not desire. But if the question is raised in good faith, full and adequate opportunity for a mental examination is clearly in the interests of justice.<sup>41</sup>

### Trial Problems

#### The Jury

Nothing is more likely to characterize a criminal trial than a wide area of conflict in the testimony both factual and expert. It is quite understandable that Judge Bazelon in his *Durham* opinion should decide to extend, rather than limit, the jury inquiry.<sup>42</sup>

and I think all will agree — 'Mental disease or defect excluding responsibility is an affirmative defense.' That means the additional burden of producing evidence is on the defendant. Everyone would agree to that and that is the law everywhere."

<sup>40</sup> ALI, MODEL PENAL CODE, §4.03(2) (Tent. Draft No. 4, 1955).

<sup>41</sup> Cf. Royal Commission on Capital Punishment, 1949-1953, REPORT, Cmd. No. 8932, at 79, 152, 153 (1953), wherein it is stated that the issue of insanity at the time of the offense can be raised only by the defense.

<sup>42</sup> "[T]he jury's range of inquiry will not be limited to, but may include, for example, whether an

Much of the criticism of the *M'Naghten* doctrine stems from psychiatrists and academic lawyers who considered it obsolete and inadequate.<sup>43</sup> The majority of judges and practicing lawyers on the other hand supported the *M'Naghten* rule on the ground that it was a good practical test and that it was not possible to devise a better one.<sup>44</sup>

The gist of the criticism is that it relies on the cognitive phase of mental life.<sup>45</sup> But the knowledge or rationality tests which Professor Sheldon Glueck criticizes are defended with equal logic by Professor Jerome Hall when he questions whether, in the light of existing knowledge and

accused, who suffered from a mental disease or defect did not know the difference between right and wrong, acted upon the compulsion of an irresistible impulse, or had 'been deprived of or lost the power of his will. . . .'" *Durham v. United States*, 214 F.2d 862, 876 (D.C. Cir. 1954).

<sup>43</sup> Royal Commission on Capital Punishment, 1949-1953, REPORT, Cmd. No. 8932, at 106 (1953).

<sup>44</sup> *Ibid.*

<sup>45</sup> *Id.* at 113. The court in *Durham* quoted Professor Sheldon Glueck of Harvard Law School with approval: "It is evident that the knowledge tests unscientifically abstract out of the mental make-up but one phase or element of mental life, the cognitive, which, in this era of dynamic psychology, is beginning to be regarded as not the most important factor in conduct and its disorders. In brief, these tests proceed upon the following questionable assumptions of an outworn era in psychiatry: (1) that lack of knowledge of the 'nature or quality' of an act (assuming the meaning of such terms to be clear), or incapacity to know right from wrong, is the sole or even the most important symptom of mental disorder; (2) that such knowledge is the sole instigator and guide of conduct, or at least the most important element therein, and consequently should be the sole criterion of responsibility when insanity is involved; and (3) that the capacity of knowing right from wrong can be completely intact and functioning perfectly even though a defendant is otherwise demonstrably of disordered mind." *Durham v. United States*, *supra* note 42, at 871.

experience, lawyers, judges and laymen should be expected to accept the notion that a rational person may be insane.<sup>46</sup> This leads to what Professor Hall regards as the critical question: If the normal personality operates as a unit, as a coalescence of the various functions, how is it possible that an essential phase of it, *i.e.*, volition, can be very seriously diseased while at the same time intelligence remains normal?<sup>47</sup>

Widely divergent views are entertained as to the ability of the average jury to weigh the broadened scope of psychiatric testimony. Dr. Isaac Ray, who played a major part in the formulation of the New Hampshire doctrine which is the forerunner of *Durham*, felt that juries were manifestly unfit to solve the question of insanity in a criminal case.<sup>48</sup>

Dr. Manfred Guttmacher, an outstanding contemporary forensic psychiatrist, commented that the New Hampshire formula has a tendency to make the psychiatrist the arbiter.<sup>49</sup> While the jury might disregard the testimony of the psychiatrist on the issue of whether the criminal act was the product of the disease, the doctrine gives psychiatric opinion great weight. The question is "whether the diagnosis of irresponsibility should be phrased in psychiatric terms, and left largely to the expert testimony of psychiatrists or whether it should be spelled out in much more general behavioral terms so that the psychiatrist

would have much less control in reaching a decision."<sup>50</sup>

It will be recalled that the Royal Commission study concluded that the *M'Naghten* rule should be supplemented by adding an additional test for the guidance of the jury, namely, that they be required to find that the defendant had the capacity to prevent himself from committing the crime.<sup>51</sup> As an alternative conclusion it was found that it would be preferable to abrogate the rule and to leave to the jury the determination "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."<sup>52</sup>

There are many who have taken the position that the issue is too difficult for the jury.<sup>53</sup> However, the Royal Commission study expresses the contrary view, and quotes the testimony of Mr. Justice Frankfurter:

I know the danger and the arguments against leaving too much discretion, but I submit with all due respect that at present the discretion is being exercised but not candidly. . . . I think probably the safest thing to do would be to do what they do in Scotland, because it is what it gets down to in the end anyhow.<sup>54</sup>

<sup>46</sup> *Ibid.* "As a legal test this new definition is insufficient: it gives undemocratic leeway to the partisan and/or bureaucratic expert, and, on account of its wording, lends itself to grave abuse. It does not guide the jury as to the degree of mental disease, a term which includes psychosis and neurosis." Wortham, *Psychoauthoritarianism and the Law*, 22 U.CHI.L.REV. 336, 337 (1955).  
<sup>51</sup> Royal Commission on Capital Punishment, 1949-1953, REPORT, Cmd. No. 8932, at 110 (1953).

<sup>52</sup> *Id.* at 116.

<sup>53</sup> See note 48 *supra*.

<sup>54</sup> Royal Commission on Capital Punishment, *supra* note 51, at 115. For the practice of Scotland see text accompanying notes 57-59 *infra*.

<sup>46</sup> Hall, *Responsibility and Law: In Defense of the McNaghten Rules*, 42 A.B.A.J. 917, 919 (1956).

<sup>47</sup> *Id.* at 985, referring to 65 YALE L. J. 761, 775 (1956).

<sup>48</sup> Cavanaugh, *A Psychiatrist Looks at the Durham Decision*, 5 CATHOLIC U.L. REV. 25, 30 (1955).

<sup>49</sup> See ALI, MODEL PENAL CODE, Appendix C, §4.01, at 188 (Tent. Draft No. 4, 1955).



The *M'Naghten* rule is not part of the laws of Scotland but its principles were adopted in 1844 and have been broadly followed<sup>55</sup> from that time. Lord Justice General Dunedin, after commenting on the difficulty of defining insanity, said: ". . . and therefore it is left to juries to come to a common-sense determination on the matter, assisted by the evidence led and any direction which the judge can give."<sup>56</sup> The law in Scotland on this subject is adequately summarized:

"The test of insanity now used is complicated and difficult to express. . . . It might now be stated as *whether the accused had or had not a sane understanding of the circumstances of his act.*"<sup>57</sup>

Lord Justice General Cooper told the Royal Commission that in his charge to the jury he would refer to the *M'Naghten* rule and "embroider and elaborate" it "to the effect that the matter for their consideration was whether, on the expert testimony and factual evidence, the accused had shown the probability to be that he was not responsible for his actions by reason of a defect of reason."<sup>58</sup>

When the jury retired the question they would put to themselves probably would be, "Is the man mad or is he not?"<sup>59</sup>

It is in this setting of what the Scotch Law and practice is that we must consider the remarks of Mr. Justice Frankfurter: ". . . I think probably the safest thing to do would be to do what they do in Scotland, because it is what it gets down to in the end anyhow."<sup>60</sup>

<sup>55</sup> *Id.* at 90.

<sup>56</sup> *Id.* at 91.

<sup>57</sup> *Ibid.* (Emphasis added.)

<sup>58</sup> *Id.* at 99.

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*

In England, however, the majority of witnesses were opposed to the suggestion that the *M'Naghten* rule be abrogated and and that the jury be left to decide the issue of responsibility without the aid of any legal criterion.<sup>61</sup>

The nub of the question is discussed by the Royal Commission:

In our view the question of responsibility is not primarily a question of medicine, any more than it is a question of law. It is essentially a moral question,<sup>[62]</sup> with which the law is intimately concerned and to whose solution medicine can bring valuable aid, and it is one which is most appropriately decided by a jury of ordinary men and women, not by medical or legal experts.<sup>63</sup>

Reference should here be made to the observation of the Lord Chief Justice that a jury can always be trusted to do justice.<sup>64</sup>

It should be recognized that the *Durham* opinion states plainly: "Juries will continue to make moral judgments . . .," but the sentence continues: ". . . still operating under the fundamental precept that 'Our collective conscience does not allow punishment where it cannot impose blame'."<sup>65</sup>

In this sentence may be found the explanation of the reversals of jury verdicts

<sup>61</sup> *Id.* at 97.

<sup>62</sup> *Durham* still recognizes that "the legal and moral traditions of the western world require that those who, of their own free will and with evil intent (sometimes called *mens rea*), commit acts which violate the law, shall be [held] criminally responsible for those acts." *Durham v. United States*, 214 F.2d 862, 876 (D.C.Cir. 1954).

<sup>63</sup> "Whatever the state of psychiatry, the psychiatrist will be permitted to carry out his principal court function which, as we noted in *Holloway v. U.S.*, 'is to inform the jury of the character of [the accused's] mental disease [or defect]'." *Durham v. United States*, *supra* note 62, at 876.

<sup>64</sup> Royal Commission on Capital Punishment, 1949-1953, REPORT, Cmd. No. 8932, at 82 (1953).

<sup>65</sup> *Durham v. United States*, *supra* note 62, at 876.

in the *Douglas*,<sup>66</sup> *Wright*,<sup>67</sup> and *Fielding*<sup>68</sup> cases. The jury made the moral judgment but the "collective conscience" of the appellate court did not allow the punishment to be imposed where it could not impose blame.

The significance of these three reversals is that the reviewing court was:

. . . unable to say that the juries were warranted on the evidence in failing to entertain a reasonable doubt that except for a diseased mental condition Douglas would have committed the robberies, that is, we are unable to say that the juries were warranted in reaching an abiding conviction that the abnormal mental condition definitely ascertained as early as December was not a cause without which the September robberies would not have occurred. Being of this opinion, after according due deference to the verdicts of the juries and to the denials by the trial court of new trials, we are constrained to conclude that it would be inconsistent with applicable legal standards to hold on the records as presently constituted that punishment for criminal conduct, rather than treatment for a mental disease, was the remedy.<sup>69</sup>

Here the factual issue was between the lay testimony on which the Government relied, namely, that of the victims of the armed robbery, the bell boy and the night manager of the hotel, and the police officers who made the arrest, on one hand, and psychiatrists on the other. In substance this lay testimony was to the effect that Douglas talked normally, was aware of what he was doing, and gave no indication of any delusions. The lay testimony supporting the

defense of insanity came from Douglas' sister who said that on some days he acted perfectly normal and on others he did not and that in her opinion he was suffering from a mental disease during April and May, 1952, the period to which most of her testimony related. The sister also testified that he had attempted suicide on three or four occasions, that he suffered from headaches, pulled his hair, struck his head against the wall, and threatened her with physical violence for no apparent reason. There was some corroboration from the brother and a roomer who testified that Douglas suffered severe headaches during which he would moan and say, "By —, they are killing me."

The defense relied also on the testimony of a psychiatrist, Dr. Gilbert, who examined Douglas in jail on December 6 and 13, 1952, following two robberies in different hotels on September 11, 1952. Dr. Gilbert's diagnosis was dementia praecox. He said this condition had existed for "several months" or "at least a few years." He also concluded that "from the symptoms present I would think there was a very definite causal connection."

Another psychiatrist, Dr. Epstein, who saw Douglas weekly at St. Elizabeth's Hospital to which he was committed from January 1953, until July 1954, at which time he was found competent to stand trial, diagnosed the condition as schizophrenic reaction paranoid type. This doctor was unable to testify as to how long Douglas had been ill or whether he was ill on the date of the robberies.

The district court charged the jury on the issue of insanity and the defendant was found guilty. The appellate court found no objection to the instructions, but still reversed. The court said: "In an appropriate

<sup>66</sup> *Douglas v. United States*, 239 F.2d 52 (D.C. Cir. 1956).

<sup>67</sup> *Wright v. United States*, 250 F.2d 4 (D.C. Cir. 1957).

<sup>68</sup> *Fielding v. United States*, 251 F.2d 878 (D.C. Cir. 1957).

<sup>69</sup> *Douglas v. United States*, *supra* note 66, at 59.

case there is a duty to set aside a verdict of guilty and to direct a verdict of not guilty by reason of insanity — a duty to be performed with caution, however, because of the deference due to the jury in resolving factual issues."<sup>70</sup>

The court found that the earlier *Holloway* case<sup>71</sup> was not a barrier to its conclusion. There the court had said that a jury verdict should not be set aside on the ground that it was contrary to expert psychiatric opinion.<sup>72</sup> The distinguishing factor between the two cases is that expert testimony is to

. . . be considered with the other evidence, not arbitrarily rejected. A jury may not be upheld in arbitrarily convicting of crime. We as the reviewing court must be able to say that the result is rationally consistent with the evidence, measured by the required degree of proof.<sup>73</sup>

In *Wright v. United States*,<sup>74</sup> the circuit court sitting *en banc* reversed a second degree murder conviction of Clarence L. Wright. Judge Bazelon in the majority opinion set forth the rationale of the decision. Whenever some evidence of insanity is raised by the defense, it becomes the duty of the Government to prove sanity at the time of the offense beyond a reasonable doubt. When it appears that reasonable jurymen could not conclude beyond a reasonable doubt that the criminal act was not the product of defendant's mental disease, there is a duty to set aside the verdict of guilty and to direct a verdict of not guilty by reason of insanity or to

order a new trial. However, the nature and quantum of the evidence of sanity which the Government must produce to sustain its burden and take the case to the jury will vary in different cases.<sup>75</sup>

Here, again, the Government had relied on lay testimony and cross-examination of psychiatrists. Of the eleven psychiatrists who testified, only one, Dr. Perretti, gave the unequivocal answer that the mental illness caused the criminal act. Three other psychiatrists expressed their opinions in degrees of probability. The court said: "Obviously, unequivocal opinions, if obtainable, are more desirable than equivocal ones. But the opinion to which a psychiatrist testifies, need only be 'the type of clinical opinion he is accustomed to form and to rely upon in the practice of his profession'."<sup>76</sup> In answer to the Govern-

<sup>70</sup> Some six months after *Durham* and long before *Douglas*, in the University of Chicago Symposium on *Durham*, Edward de Grazia, Esq., wrote: "The psychiatric character of *Durham's* controlling criterion, 'mental disease or defect,' pose problems for the jury and the judge. Does the term embody a jural concept or a psychiatric one? If jural, then the words are but a practical synonym for insanity, and unopposed psychiatric testimony that a defendant suffers from some alleged mental disease or defect need not necessarily compel a judgment of acquittal by reason of insanity. . . . If, however, it be taken that the court's use of the term 'mental disease or defect' was psychiatric rather than jural, then it may be urged that any mental disorder or behavior pattern agreed upon by psychiatrists to constitute mental disease should conclusively generate a finding of insanity and a judgment of acquittal by reason thereof. . . . Psychiatrists tend of necessity to view all aberrant behavior (whether criminal or neurotic) as manifestations of sick minds. As a result, psychiatric witnesses may be expected generally to find some 'mental disease' to cover the case, whatever the defendant's symptomatic criminal behavior may be. . . ." de Grazia, *The Distinction of Being Mad*, 22 U.CHL.REV. 339, 343 (1955).

<sup>76</sup> *Wright v. United States*, *supra* note 74, at 8.

<sup>70</sup> *Id.* at 57.

<sup>71</sup> *Holloway v. United States*, 148 F.2d 665 (D.C. Cir. 1945), *cert. denied*, 334 U.S. 852 (1947).

<sup>72</sup> *Id.* at 667.

<sup>73</sup> *Douglas v. United States*, 239 F.2d 52, 59 (D.C. Cir. 1956).

<sup>74</sup> *Wright v. United States*, 250 F.2d 4 (D.C. Cir. 1957).

ment's attack on the character and quality of this psychiatric evidence, it stated: "If the Government feels that psychiatric opinions which come into evidence ought to be based on examinations of greater scope and intensity than has been the practice heretofore, it can and should arrange to have such examinations made."<sup>77</sup> But the prosecution cannot always arrange an early psychiatric examination.<sup>78</sup>

In the *Wright* case the dissent was written by Judge Wilbur Miller, with two other judges concurring. After setting forth the facts of the murder, he emphasized the admissibility of the lay testimony and the acceptance of it by the jury; he also pointed out the many conflicts between the testimony of the psychiatrists which furnished a basis for the rejection of this testimony by the jury.

As weak as the evidence of insanity was, there was unquestionably a conflict of testimony on the single crucial question whether Wright was mentally responsible on the morning of the crime. The evidence therefore presented a typical jury question which conceivably could have been decided either way. The decision was for the jury, however, and not for us; we have no right whatever to substitute our judgment for that of the jury when there is evidence to support its verdict, no matter what evidence there may have been to the contrary and no matter how much we may wish to decide the question the other way. Cf. *Bradley v. United States*, 102 U.S. App. D.C. 17, 249 F. 2d 922, [decided September 20, 1957]. The reversal of Wright's conviction is, I think, arbitrary and unjustifiable.<sup>79</sup>

<sup>77</sup> *Id.* at 9.

<sup>78</sup> *United States v. Durham*, Criminal Case No. 719-58 (D.C.D.C. June, 1958), Durham's most recent charge in which the trial court refused the Government's application for mental examination in the face of the objections of Durham's counsel.

<sup>79</sup> *Wright v. United States*, 250 F.2d 4, 16 (D.C. Cir. 1957).

In *Bradley v. United States*,<sup>80</sup> the jury's verdict was affirmed with Judge Bazelon dissenting. The majority reviewed the "equivocal" testimony of the psychiatrist and recounted the lay testimony including that of the victim which indicated methodical planning on the part of the defendant. The arresting officers had noted no abnormal behavior on the part of Bradley who had been steadily employed as a roofer and electrical worker.

The dissent emphasized that the psychiatrist, Dr. de Filippis, is an expert whose qualifications were not impugned by the Government. As to whether the robbery was the product of Bradley's mental condition, the doctor said in his opinion it was although he could not say so with any degree of certainty. He felt the disease (dementia praecox, paranoid type) had existed for two or three years, a period which included the robbery.

The dissent took the position that the Government had failed to prove beyond a reasonable doubt the sanity of the defendant at the time of the criminal act and that reliance upon the lay testimony of the victim and the two policemen was improper. "Capacity to plan does not prove that the planner is not suffering from an advanced condition of dementia praecox. A criminal act 'may be coolly and carefully prepared; yet . . . still the act of a madman'."<sup>81</sup>

<sup>80</sup> 249 F.2d 922 (D.C.Cir. 1957).

<sup>81</sup> *Id.* at 928. The reference in the language quoted is to the Royal Commission Report, dealing with the objections to the irresistible impulse doctrine, namely, that the designation carries the implication of impulsive conduct. The text of the thought to which reference was made reads as follows: "The criminal act, in such circumstances, may be the reverse of impulsive. It may be coolly and carefully prepared; yet it is still the act of a madman. This is merely an illustration; similar

The case of Jimmy Fielding<sup>82</sup> follows the familiar pattern of the *Douglas* and *Wright* cases. The jury believed the lay testimony and was not persuaded by the psychiatric testimony. Fielding was convicted of the second degree murder of his wife's uncle. His defense was insanity. Following the shooting on February 5, 1954, he was arrested and jailed. Dr. de Filippis examined him in the jail and diagnosed his condition as dementia praecox. Following a hearing, he was committed. Twenty-nine months later he was certified competent to stand trial and after a *Gunther* hearing<sup>83</sup> was tried and found guilty. The defense moved for a judgment of acquittal by reason of insanity notwithstanding the verdict. From the denial of the motion the appeal followed.

Judge Bazelon's opinion for the majority was to the effect that the motion for judgment *n.o.v.* should have been granted because the Government had failed to sustain its burden of proving beyond a reasonable doubt that the shooting was not the product of appellant's mental illness. Two psychiatrists who examined Fielding at the hospital on a number of occasions expressed the opinion that he was suffering from schizophrenia at the time of the shooting and that the shooting was the product of the illness.

The Government relied on lay testimony, namely, the police officers and the appellant's wife and his brother. The court held

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states of mind are likely to be behind the criminal act when murders are committed by persons suffering from schizophrenia or paranoid psychoses due to disease of the brain." Royal Commission on Capital Punishment, 1949-1953, REPORT, Cmd. No. 8932, at 110 (1953).

<sup>82</sup> Fielding v. United States, 251 F.2d 878 (D.C. Cir. 1957).

<sup>83</sup> See text accompanying note 25 *supra*.

that this testimony taken together was not "sufficiently probative in the face of the strong showing of insanity made by the defense to permit reasonable jurymen to conclude beyond a reasonable doubt that appellant was sane at the time of the shooting."

In dissenting, Judge Danaher emphasized that the majority had substituted its judgment for that of the trier of facts who saw and heard the witnesses, and was in the best position to appraise the evidence and the weight to be accorded to it. This judge further expressed the view that the jury was not bound to credit the opinions of psychiatrists but rather it is free to accept or reject their testimony just as it may do as to the testimony of any other witness.

#### *The Psychiatrist as a Witness*

There has been noted many times the dissatisfaction of psychiatrists with the *M'Naghten* rule. They say it has failed to keep pace with the progress made in their profession; it places an undue restriction on their testimony; it requires them to express opinions in the field of moral responsibility for which they are not trained and lack competence.

While recognizing that the *Durham* rule has a tendency to make the psychiatrist the arbiter<sup>84</sup> rather than the jury, some psychiatrists nevertheless do see advantages in the new rule.<sup>85</sup>

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<sup>84</sup> See note 45 *supra* and accompanying text.

<sup>85</sup> Comment, 5 CATHOLIC U.L. REV. 74 (1955). "Psychiatrists, in giving expert testimony as to the mental condition of the defendant at the time of the criminal act, need no longer play the role of a pseudo-doctor or pseudo-lawyer. Since he is no longer confined within the narrow limits of the antiquated tests, the psychiatrist is now free to present to the jury his complete analysis of the defendant's mental condition." *But see The Aftermath of the Durham Rule*, address delivered by

To appreciate the importance of psychiatric testimony, one must look to the *Carter* case,<sup>86</sup> wherein the *Durham* rule is restated. The court said:

Generally speaking, in order to return a verdict of guilty notwithstanding the defense of insanity, the jury must find (1) that beyond reasonable doubt the accused is free of mental disease; or, if the finding is "No, he may have a mental disease," then (2) that beyond reasonable doubt no relationship existed between the disease and the alleged criminal act which would justify a conclusion that but for the disease the act would not have been committed.<sup>87</sup>

Proving the *absence* of a "critical" rela-

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John R. Cavanagh to the Jacobi Medical Society, Feb. 17, 1958: "The new rule, the *Durham* Decision, was widely acclaimed as being an advance both from the legal and psychiatric points of view. Psychiatrically, one of its greatest values was supposed to be that it would allow the psychiatrist to 'present his testimony about the mental condition of the accused in concepts that are familiar to him and medically realistic.' This is probably true except that there never was a time when he could not do so. True, when he had presented his facts he was asked under the old rule the M'Naghten questions.

"Under the new rule, however, he may be asked not only these M'Naghten questions but also the frequently impossible to answer *Durham* question. To this day, four years and thirty-five cases later there is no satisfactory definition of the terms in this decision. Even when the judges of the lower courts have quoted verbatim from the sample instruction given in the *Durham* Decision, they have been unable to give one satisfactory to the Appellate Court. As for leaving the psychiatrists free to 'talk, unfettered by arbitrary legal formulae,' I am sure that many of you will agree that 'unfettered' psychiatric testimony in the physician's own terms is not likely to add to the clarity of his statement to the jury [or the judge in many cases]. This frequently leaves the jury without any guides to aid them in their decision. It is on the contrary likely to leave them floundering in a morass of psychiatric terminology." *Ibid.*

<sup>86</sup> *Carter v. United States*, 252 F.2d 608 (D.C. Cir. 1957).

<sup>87</sup> *Id.* at 618.

tionship between the mental illness and the criminal act is an extremely difficult undertaking. Still it must be done in every case where there is "some evidence" of insanity.<sup>88</sup> It obviously is the type of proof that can be furnished only by expert testimony. This makes the psychiatrist the arbiter<sup>89</sup> if he is to testify on this point at all.<sup>90</sup>

What may result is a battle of the experts in which the psychiatrists might inadvertently be put in the position to pre-empt the entire area.<sup>91</sup> Actually, the battle of experts would have very little meaning for a jury, particularly if it were in an already controversially confused field such as psychopathy.<sup>92</sup>

<sup>88</sup> See *Durham v. United States*, 214 F.2d 862 (D.C.Cir. 1954); *Tatum v. United States*, 190 F.2d 612 (D.C.Cir. 1951).

<sup>89</sup> See note 49 *supra* and accompanying text.

<sup>90</sup> See note 85 *supra*.

<sup>91</sup> See ALI, MODEL PENAL CODE §4.01, (Tent. Draft No. 4, 1955), in which there is contained a series of letters between Dr. Guttmacher and Professor Wechsler. Dr. Guttmacher, in speaking of the "product" formula, wrote:

"It seems to me that you have very strong resistance against this and philosophically you may be entirely justified in feeling so. It is hard for me to be completely objective about this, perhaps it is for you. I think this really comes down to the meat of the matter; whether the diagnosis of irresponsibility should be phrased in psychiatric terms and left largely to the expert testimony of psychiatrists, or whether it should be spelled out in much more general behavioral terms, so that the psychiatrist would have much less control in reaching a decision.

"I do not feel that we psychiatrists want to pre-empt this whole area but we do resent having to focus on concepts in which, unfortunately, we have no very special claim to knowledge. Your formula [ALI rule] is certainly far better than the McNaghten formula, but it still forces psychiatrists not to think in terms of mental disease but in terms of general social behavior, without reference to the conceptual system with which he is familiar." *Id.* at 188.

<sup>92</sup> *Id.* at 191. Professor Wechsler to Dr. Guttmacher:

Some appreciation of the reluctance of the psychiatrist to be a witness and of his antipathy to traditional courtroom procedures may be gained from the observations of one of the most experienced forensic psychiatrists. Dr. Guttmacher wrote:

Instead of having his views received with the deference and respect to which he is accustomed, he is likely to be disconcerted — if this is his first experience — on cross-examination to hear his professional competence and even his intelligence impugned and his pronouncements ridiculed, misstated, and twisted into absurdities (or perhaps exposed as being absurdities by a lawyer displaying a surprising familiarity with the scientific learning and literature on the subject). Is there any wonder that the medical expert often dislikes and even resents the role he is forced to play?

To be sure, most of the objections of the psychiatric expert to court procedures are common to all medical testimony and even to expert testimony in general. However, psychiatry, because of its complex nature is less capable than any other medical specialty of having its conclusions reduced to yes or no answers or to have them brought out satisfactorily through questioning by non-medically trained attorneys.<sup>93</sup>

The Royal Commission has considered the question of the divergent views of the various schools of psychiatry, the absence of universally accepted terminology, and the marked difference of views often encountered in the same case. It was noted that these differences among psychiatrists persist even in the field of law and ethics

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“What could be a less constructive way to litigate the issue of a psychopath’s responsibility than to have you testify that psychopathy is not a disease and someone like Karpman or Cleckley testify that it is. Would a controversy pitched in these terms be likely to educe a meaningful judgment from the court or jury on the issue of responsibility?” *Ibid.*

<sup>93</sup> *Id.* at 180.

and particularly the issue of criminal responsibility and the extent to which mental abnormality would serve to absolve the offender from the criminal consequences of his act.<sup>94</sup> The Royal Commission expressed the opinion that these difficulties would be very grave, perhaps insuperable, if responsibility were a medical question.<sup>95</sup>

It emphasized the importance of establishing understandable criteria for the guidance of the jury in view of the fact that some medical evidence is obscure and may be imperfectly understood by the jury.<sup>96</sup>

In the *Carter* opinion<sup>97</sup> the court also set forth the chief functions of the expert witness, as follows:

The chief value of an expert’s testimony in this field, as in all other fields, rests upon the material from which his opinion is fashioned and the reasoning by which he progresses from his material to his conclusion; in the explanation of the disease and its dynamics, that is, how it occurred, developed, and affected the mental and emotional processes of the defendant; it does not lie in his mere expression of conclusion.<sup>98</sup> The ultimate inferences *vel non* of

<sup>94</sup> Royal Commission on Capital Punishment 1949-1953, REPORT Cmd. No. 8932, at 100 (1953).

<sup>95</sup> *Id.* at 108. “[E]ven if it were on other grounds desirable to do so, it would, in the present state of medical knowledge, be out of the question to remove the issue of criminal responsibility from the courts and entrust its determination to a panel of medical experts, as has sometimes been suggested.” *Ibid.*

<sup>96</sup> *Id.* at 108.

<sup>97</sup> *Carter v. United States*, 252 F.2d 608 (D.C. Cir. 1957).

<sup>98</sup> Psychiatrists may not be able to produce evidence on the basis of which they render a conclusion. In commenting on the *Durham* decision, Dr. Gregory Zilboorg wrote: “[T]he trial judge in the *Monte W. Durham* case tried to pin Dr. Gilbert down on the issue of whether Durham’s transgressions were a result of his mental illness. The answer to such a question in this case should have been a bold and unequivocal ‘Yes’ — provided the court would not demand the impossible from the

relationship, of cause and effect, are for the trier of the facts.<sup>99</sup>

It will be noted that the trend to place greater reliance on expert psychiatric testimony is illustrated by the contrast between the *Holloway*<sup>100</sup> case and the *Douglas*<sup>101</sup> case. In *Holloway*, the court cautioned that the jury verdict would not be set aside even if it were contrary to expert opinion unless it shocked the conscience of the court. In *Douglas*, the jury verdict was set aside for the reason that the jury arbitrarily rejected "expert testimony."

The limitations on psychiatric testimony imposed by privilege have even been removed by statute. In *Taylor v. United States*,<sup>102</sup> privilege was construed to extend to admissions of feigning insanity by a patient accused of crime to a psychiatrist in a Government hospital to which the accused was committed. Subsequently, Congress has made it clear that where the defense is insanity no limitations flowing from privilege shall prevent the psychiatrist from testifying to admissions of the patient pertaining to the alleged illness.<sup>103</sup>

In the *Fielding* case,<sup>104</sup> psychiatric testimony generally was the subject of a critique:

Since *Douglas* we have had occasion to observe that there may be "deficiencies in

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psychiatrist and insist that he produce 'evidence' of how this particular act was the result of this particular illness." Kalven, *Insanity and the Criminal Law — A Critique of Durham v. United States*, 22 U. CHI. L. REV. 317, 335 (1955).

<sup>99</sup> Carter v. United States, *supra* note 97, at 617.

<sup>100</sup> *Holloway v. United States*, 148 F.2d 665 (D.C. Cir. 1945), *cert. denied*, 334 U.S. 852 (1947).

<sup>101</sup> *Douglas v. United States*, 239 F.2d 52 (D.C. Cir. 1958).

<sup>102</sup> 222 F.2d 398 (D.C.Cir. 1955).

<sup>103</sup> D.C. CODE ANN. §14-308 (Supp. V 1958).

*But see* text accompanying note 23 *supra*.

<sup>104</sup> *Fielding v. United States*, 251 F.2d 878, 881 (D.C.Cir. 1957).

the process by which we collect the evidence upon which cases like this turn";<sup>[105]</sup> that the psychiatric examinations upon which the expert witnesses' testimony is based may be "inadequate in that they do not gather enough information to pin-point the origin of [the] illness";<sup>[106]</sup> that "the facts required by way of psychiatric testimony are a 'description and explanation of the origin, development and manifestations of the alleged disease . . . how it occurred, developed, and affected the mental and emotional processes of the defendant \*\*\*,'" and that "the examinations conducted by the psychiatrists must be of a character they deem sufficient for the purpose of determining the facts required."<sup>[107]</sup> . . ."<sup>108</sup>

### *Lay Testimony*

Lay testimony, particularly the type on which the Government relies, has been downgraded by the circuit court in the recent decisions since *Durham*.

Lay witnesses may testify upon observed symptoms of mental disease, because mental illness is characterized by departures from normal conduct. Normal conduct and abnormal conduct are matters of common knowledge, and so lay persons may conclude from observation that certain observed conduct is abnormal. Such witnesses may testify only upon the basis of facts known to them. They may testify as to their own observations and may then express an opinion based upon those observations. Of course the testimony of a lay witness with training in this or related fields may have more value than the testimony of a witness with no such training. Also obvious upon a moment's reflection is the fact that, while a lay witness's observation of abnormal acts by an accused may be of great

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<sup>105</sup> *Wright v. United States*, 215 F.2d 498 (D.C. Cir. 1954).

<sup>106</sup> *Blunt v. United States*, 244 F.2d 355 (D.C. Cir. 1957).

<sup>107</sup> *Carter v. United States*, 252 F.2d 608 (D.C. Cir. 1957).

<sup>108</sup> *Fielding v. United States*, *supra* note 104, at 881.



value as evidence, *a statement that a witness never observed an abnormal act on the part of the accused is of value if, but only if, the witness had prolonged and intimate contact with the accused.*<sup>109</sup>

This language is especially helpful to one seeking to establish the defense of insanity. Obviously, those having "prolonged and intimate contact" with him are his family and friends. Those who were in contact with the accused at the time of the crime and thereafter are practically ignored in spite of the fact that the act itself is a vital part of the *Durham* formula.

It is in a sense, comparable to the situation wherein a ball game was decided by a home run in the ninth inning. Two spectators are being interviewed. One saw the entire game except the decisive home run. During that point of time he had gone to the hot-dog stand. The other spectator came in just as the player who hit the home run came to bat. He saw the homer and the game was over. My point is that he who witnessed the critical play of the game<sup>110</sup> should not as a witness be ruled less important than one who had seen the game except for the home run which decided the ball game.

Other cases are even more pointed in downgrading any lay testimony which in-

dicates absence of abnormal conduct and which usually comes from witnesses to the criminal act or those who saw the accused about the time of the act. In *Fielding*, the Government offered no psychiatric testimony. It did offer the testimony of Fielding's wife and brother as well as the police officers. These witnesses testified that the accused was normal or was "not unsound." The court said:

All of the lay testimony offered by the Government taken together was not sufficiently probative, in the face of the strong showing of insanity made by the defense, to permit reasonable jurors to conclude beyond a reasonable doubt that appellant was sane at the time of the shooting. What we have said elsewhere about an opinion of sanity expressed by an untrained lay witness having no prolonged and intimate contact with the accused disposes of the testimony of the policemen in this case. The conclusions of normalcy and soundness of mind expressed by appellant's brother and wife, stand not much higher than those of the policemen. Both were out of touch with appellant for a considerable time until just before the shooting and neither professed to have any training or experience in the judgment of sanity. Moreover, their actual observations, upon which their opinions must rest, were hardly consistent with conclusions of normalcy or soundness of mind. . . .<sup>111</sup>

It is interesting to note that in reversing the *Fielding* conviction the appellate court gave the Government the opportunity of retrying the case: "If the Government feels that it can produce [*psychiatric*] evidence on the issue of appellant's sanity at the time of the shooting which it could not produce or thought it unnecessary to produce at the last trial. . . ."<sup>112</sup>

<sup>109</sup> *Carter v. United States*, *supra* note 107, at 618. (Emphasis added.) *But see* *Queenan v. Oklahoma*, 190 U.S. 548 (1903); *Connecticut Mut. Life Ins. Co. v. Lathrop*, 111 U.S. 612 (1884).

<sup>110</sup> See *Lyles v. United States*, 254 F.2d 725 (D.C. Cir. 1957). The court seems to recognize this point: "The basic concern of the law at that point is whether the accused was in such mental condition that he should be held responsible for his crime. The inquiry, and the decision, must be as of the time of the offense. Evidence as to the accused's mental condition either before or after the offense may be admissible, but it is admissible only in so far as it is relevant to his condition as of the time of the offense." *Id.* at 729.

<sup>111</sup> *Fielding v. United States*, 251 F.2d 878, 880 (D.C. Cir. 1957).

<sup>112</sup> *Id.* at 881.

A few days after the opinion was released an order of the court struck the word *psychiatric*. Thus we may conclude that though psychiatric testimony is not specifically necessary, it is very desirable to have it *if possible*. Under the circumstances the case could not be retried and Fielding is at present confined in a mental hospital.

In *Douglas v. United States*,<sup>113</sup> lay testimony of the victims of the two robberies and the police officers who interrogated defendant after his apprehension was held insufficient to sustain the Government's burden of excluding the hypothesis of insanity beyond a reasonable doubt. In *Wright v. United States*,<sup>114</sup> the court quoted from the *Carter* case<sup>115</sup> on the lay witness point and arrived at the same conclusion. In *Blunt*<sup>116</sup> the lay testimony was more extensive. It included the detailed statement of a New Jersey police officer who had Blunt in custody and after interviewing him extensively brought him before a magistrate for arraignment. Lay testimony in *Bradley*<sup>117</sup> was relied on by the Government, when the majority saw evidence of planning, and the conviction was sustained. Though the *Kelley* case<sup>118</sup> did not turn on the lay testimony point, it does contain a ruling that the jury could have decided the sanity of the accused based on the extensive testimony of an auto salesman who spent almost a day with Kelley filling out blanks and talking generally,

<sup>113</sup> 239 F.2d 52 (D.C.Cir. 1958).

<sup>114</sup> 215 F.2d 498 (D.C.Cir. 1954).

<sup>115</sup> *Carter v. United States*, 252 F.2d 608 (D.C. Cir. 1957).

<sup>116</sup> *Blunt v. United States*, 244 F.2d 355 (D.C. Cir. 1957).

<sup>117</sup> *Bradley v. United States*, 249 F.2d 922 (D.C. Cir. 1957).

<sup>118</sup> *Kelley v. United States*, 236 F.2d 746 (D.C. Cir. 1956).

although two psychiatrists thought he was of unsound mind.

### ***Burden of Proof***

In the federal courts following *Davis v. United States*,<sup>119</sup> decided in 1895, the burden has been upon the Government, whenever the defense of insanity is raised properly by evidence, to prove sanity beyond a reasonable doubt. Of course, both this case and *Guiteau's Case*<sup>120</sup> applied this burden on the basis of the *M'Naghten* rule which casts a less onerous burden on the Government. To prove sanity beyond a reasonable doubt, or to prove beyond a reasonable doubt that there is *no* direct critical, causal connection between the criminal act and the mental illness of which only "some evidence" need be shown is a horse of another color. In our experience psychiatrists generally are unwilling or unable to give testimony on the absence of causality, particularly to the extent required by the Government.

Burden of proof in cases involving the defense of insanity is about equally divided in state jurisdictions. Twenty-one states and the federal courts require the Government to prove responsibility beyond a reasonable doubt. A defendant pleading this defense is required to prove irresponsibility by a preponderance of the evidence in another twenty-one states.<sup>121</sup> Oregon requires a defendant interposing insanity as a defense to prove it beyond a reasonable doubt.<sup>122</sup> The English position is that every man is presumed sane and responsible until the

<sup>119</sup> 160 U.S. 469 (1895).

<sup>120</sup> 10 Fed. 161 (1882).

<sup>121</sup> ALI MODEL PENAL CODE, Appendix C, §4.03, at 193 (Tent. Draft No. 4, 1955).

<sup>122</sup> The Oregon statute was sustained as constitutional in *Leland v. Oregon*, 343 U.S. 790 (1952). It is within the orbit of a state's power to try violations of its criminal laws.

contrary is shown to the jury's satisfaction. The defense of insanity must be clearly proved.<sup>123</sup>

### *Taylor Case Instructions*

*Taylor v. United States*<sup>124</sup> was reversed for several reasons not pertinent at this point of our discussion. However, the sixth point discussed sets forth the instruction language of the trial judge's instruction to the jury on the consequences of a verdict of not guilty by reason of insanity. The same point has been raised in several subsequent cases,<sup>125</sup> and some were reversed because of the failure of the trial court to give the *Taylor* instruction. The instruction is:

But we think when an accused person has pleaded insanity, counsel may and the judge should inform the jury that if he is acquitted by reason of insanity he will be presumed to be insane and may be confined in a "hospital for the insane" as long as "the public safety and . . . [his] welfare" require.<sup>126</sup>

In the second *Durham* case<sup>127</sup> the appellate court, speaking through Judge Bazelon, held that it was error for the trial court to tell the jury that if they found the

accused not guilty by reason of insanity, it would be his duty to commit him to St. Elizabeth's where he would remain until determined to be of sound mind by the hospital authorities; and that if the authorities adhere to their last opinion on this point he will be released very shortly. This latter comment was labelled "plain error."<sup>128</sup> It was pointed out that by statute the jury should not be told that the accused has been found competent to stand trial.<sup>129</sup> There is a difference, the court said, between competency to stand trial and such soundness of mind that would warrant discharge from a hospital. The superintendent's letter illustrates the point. He said Durham suffers from a psychological illness but is competent to stand trial and is able to consult with counsel and assist in his own defense.

Among other points considered in *Lyles v. United States*<sup>130</sup> were the *Taylor* case instructions. The court was sharply divided.<sup>131</sup> The majority opinion established the circumstances in which the *Taylor* instructions mandatorily must be given. Unless the defense requests to the contrary, the trial judge, ". . . whenever, *hereafter* the defense of insanity is fairly raised . . . shall instruct the jury as to the legal meaning of a verdict of not guilty by reason of insanity in accordance with the view expressed in this opinion."<sup>132</sup>

<sup>123</sup> *Id.* at 761.

<sup>124</sup> 222 F.2d 398 (D.C. Cir. 1955).

<sup>125</sup> 18 U.S.C. §4244 (1952).

<sup>126</sup> 254 F.2d 725 (D.C. Cir. 1958).

<sup>127</sup> *Id.* at 727.

<sup>128</sup> *Id.* at 729. (Emphasis added.)

<sup>129</sup> The new *Taylor* instructions are as follows: "[T]he jury should simply be informed that a verdict of not guilty by reason of insanity means that the accused will be confined in a hospital for the mentally ill until the superintendent has certified, and the court is satisfied, that such person has recovered his sanity

<sup>123</sup> ALI, MODEL PENAL CODE, *supra* note 121, at 194.

<sup>124</sup> 222 F.2d 398 (D.C. Cir. 1955).

<sup>125</sup> *Lyles v. United States*, 254 F.2d 725 (D.C. Cir. 1958); *Catlin v. United States*, 251 F.2d 368 (D.C.Cir. 1957); *Bradley v. United States*, 249 F.2d 922 (D.C.Cir. 1957); *Tatum v. United States*, 249 F.2d 129 (D.C.Cir. 1957); *Blunt v. United States*, 244 F.2d 355 (D.C.Cir. 1957); *Durham v. United States*, 237 F.2d 760 (D.C.Cir. 1956); *Kelley v. United States*, 221 F.2d 822 (D.C.Cir. 1956).

<sup>126</sup> *Taylor v. United States*, 222 F.2d 398, 404 (D.C. Cir. 1955). The court then commented that while this fact has no theoretical bearing on the jury's verdict, it may have a practical bearing. *Ibid.*

<sup>127</sup> *Durham v. United States*, *supra* note 125.

It was pointed out that ordinarily the jury has no concern with the consequences of a verdict but since a verdict of not guilty by reason of insanity has no commonly understood meaning, the court thought the jury has a right to know the significance of such a verdict.

Judge Bazelon, who concurred with this, dissented in *Bradley v. United States*.<sup>133</sup> He took the position that the trial court's *Taylor* instruction was error in that it mentioned only that if Bradley were found not guilty by reason of insanity he would be committed to a hospital where he would remain until it was judicially determined that he is of sound mind, at which time he will be released. It was pointed out that the omission of the language that Bradley must also show that he would not be dangerous to himself or others in order to obtain a release from a mental hospital if committed. The majority observed that the *Taylor* instructions were mandatory only prospectively after the *Lyles* case.

After Tatum's second conviction, his appeal centered around the trial court's refusal to give the *Taylor* instructions.<sup>134</sup> The Government had brought the matter to the trial court's attention; the defense did not request that the instruction be given. In that state of the record, Judge Burger, speaking for the majority, was constrained to observe that:

The complaining witness was 9 years old

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and will not in the reasonable future be dangerous to himself or to others, in which event and at which time the court shall order his release either unconditionally or under such conditions as the court may see fit." *Id.* at 728. This instruction follows the language of the 1955 statute. See D.C. CODE ANN. §24-301 (Supp. VI 1958).

<sup>133</sup> 249 F.2d 922 (D.C.Cir. 1957).

<sup>134</sup> *Tatum v. United States*, 249 F.2d 129 (D.C. Cir. 1957).

when the offense occurred in 1949. One purpose of Rule 30 was to preclude a defendant from exploiting his own failure to make timely objections. In this case there is not even a basis for suggesting the failure was an oversight of counsel.

To encourage, or even tolerate this one-sided "Russian Roulette" with the courts could lead to a breakdown of all law enforcement in a system already plagued by multiple trials. Tatum's next plea, if we gave him one, could well be that he has been denied a speedy trial.<sup>135</sup>

### *Jury Instructions Generally*

When the Court of Appeals for the District of Columbia Circuit formulated the *Durham* doctrine, it emphasized that whenever there is "some evidence" that the accused suffered from a mental disease or defect the trial court must provide the jury with guides for determining whether the accused can be held criminally responsible. After commenting that the appellate court could not formulate an instruction appropriate or binding for every case, Judge Bazelon set forth the sense and substance of what must be given to the jury under the new rule.<sup>136</sup>

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<sup>135</sup> *Id.* at 132.

<sup>136</sup> *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954). The suggested instruction appears as follows: "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

In explanation of the new instructions, reference was made in a court footnote to the Royal Commission Report. This paragraph in its entirety suggests a causal connection between mental abnormality and crime but emphasizes that it is a legal, not a medical question. Emphasis is also laid on the facts of the crime.<sup>137</sup>

Before setting forth the suggested instructions the Court wrote two interesting sentences about the older tests:

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responsible for his unlawful act if there is no causal connection between such mental abnormality and the act. These questions must be determined by you from the facts which you find to be fairly deducible from the testimony and the evidence in this case." *Id.* at 875.

<sup>137</sup> *Id.* at 875 n. 49. Royal Commission on Capital Punishment, 1949-1953 REPORT, Cmd. No. 8932, at 99 (1953):

"It has often been said that the question of criminal responsibility, although it is closely bound up with medical and ethical issues, is primarily a legal question. There is an important sense in which this is true. There is no *a priori* reason why every person suffering from any form of mental abnormality or disease, or from any particular kind of mental disease, should be treated by the law as not answerable for any criminal offense which he may commit, and be exempted from conviction and punishment. Mental abnormalities vary infinitely in their nature and intensity and in their effects on the character and conduct of those who suffer from them. Where a person suffering from a mental abnormality commits a crime, there must always be some likelihood that the abnormality has played some part in the causation of the crime; and, generally speaking, the graver the abnormality and the more serious the crime, the more probable it must be that there is a causal connection between them. But the closeness of this connection will be shown by the facts brought in evidence in individual cases and cannot be decided on the basis of any general medical principle. On the other hand, few persons, if any, would go so far as to suggest that anyone suffering from any mental abnormality, however slight, ought on that ground to be wholly exempted from responsibility under the criminal law. It therefore

We find that as an exclusive criterion the right-wrong test is inadequate in that (a) it does not take sufficient account of psychic realities and scientific knowledge, and (b) it is based upon one symptom and so cannot validly be applied in all circumstances. We find that the "irresistible impulse" test is also inadequate in that it gives no recognition to mental illness characterized by brooding and reflection and so relegates acts caused by such illness to the application of the inadequate right-wrong [*M'Naghten*] test."<sup>138</sup>

In reaching this conclusion the court quoted Dr. Isaac Ray, Professor Sheldon Glueck, Justice Cardozo, The GAP Report and many other psychiatric and legal writings. The denunciation of the older tests seemed so unequivocal and complete that the Government concluded that in so far as its jurisdiction is concerned, *M'Naghten* and irresistible impulse had for all practical purposes joined the dodo bird.<sup>139</sup>

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becomes necessary for the law to provide a method of determining what kind and degree of mental abnormality shall entitle offenders to be so exempted; and also to decide what account shall be taken of lesser degrees of mental abnormality, whether by way of mitigation of sentence or otherwise." *Id.* at 99. (Underlined text was omitted from the court's quotation.)

<sup>138</sup> *Durham v. United States*, *supra* note 136, at 874.

<sup>139</sup> Professor Harry Kalven, Jr., in his introductory article to the University of Chicago Law Review Symposium on *Durham*, wrote that the decision "directly and unequivocally repudiated the classic *M'Naghten* test for insanity as a defense in a criminal case." Kalven, *Insanity and the Criminal Law — A Critique of Durham v. United States*, 22 U. CHI. L. REV. 317 (1955). Dr. Philip Q. Roche, in the same Symposium concluded: "the *Durham* opinion abandons the right-and-wrong rule and likewise rejects the 'irresistible impulse' test." Roche, *Criminality and Mental Illness — Two Faces of the Same Coin*, 22 U. CHI. L. REV. 320 (1955).

Then came *Douglas v. United States*.<sup>140</sup>

But in *Durham* we concluded that the advance of psychiatric knowledge demonstrated the fallacy of making these particular "symptoms, phases or manifestations" the exclusive criteria to guide the jury. In so holding, however, we did not purport to bar all use of the older tests: testimony given in their terms may still be received if the expert witness feels able to give it, and where a proper evidential foundation is laid a trial court should permit the jury to consider such criteria in resolving the ultimate issue "whether the accused acted because of a mental disorder". In aid of such a determination the court may permit the jury to consider whether or not the accused understood the nature of what he was doing and whether or not his actions were due to a failure, because of mental disease or defect, properly to control his conduct.<sup>141</sup>

About a year ago, in the *Carter*<sup>142</sup> and *Wright*<sup>143</sup> cases, the trial judges were given supplemental data on what must be contained in instructions to the jury on the *ultimate issue*, that is, causation or productivity.

The trial court's instructions in *Carter* were made the subject of criticism. After quoting the language of the objectionable instruction,<sup>144</sup> the court said that ". . . the purport of the instruction, and the clear impression left by it, was that, in order to acquit, the jury must reach *affirmative* con-

clusions of mental disease and the causal connection between the disease and the act."<sup>145</sup> Before this quoted language, there appears recognition of the fact that a court cannot state the whole of its instructions in one sentence.

The appellate court emphasized that: "When the issue of insanity is properly raised by evidence, as it was in this case, the burden is on the Government to prove sanity beyond a reasonable doubt."<sup>146</sup> Since the *Davis*<sup>147</sup> case in 1895, this has been the law in the federal courts. Under the *Durham* doctrine as expressed in *Carter*: "To claim exemption from responsibility for a criminal act an accused must assert two conditions: (1) that he suffered from a mental disease or defect and (2) that his alleged criminal act was the product or result of that disease or defect."<sup>148</sup>

When this defense is raised the Government may assert one or the other or both of two propositions: (a) that the accused had no mental defect or disease or (2) that even if he did the criminal act was not the product thereof. The burden is upon the Government to establish beyond a reasonable doubt whatever position it takes upon the issue.

The appellate court further found the term product or causal connection had not been adequately set forth. The *Durham* case, it said, ". . . merely extended the established rule to apply the defense to all acts which would not have been com-

the offense. You must find that the act was the result, the product of the mental abnormality." *Carter v. United States*, *supra* note 142, at 614.

<sup>145</sup> *Ibid.*

<sup>146</sup> *Ibid.*

<sup>147</sup> *Davis v. United States*, 160 U.S. 469 (1895).

<sup>148</sup> *Carter v. United States*, 252 F.2d 608, 615 (D.C.Cir. 1957).

<sup>140</sup> 239 F.2d 52 (D.C. Cir. 1956).

<sup>141</sup> *Id.* at 58.

<sup>142</sup> *Carter v. United States*, 252 F.2d 608, 614 (D.C.Cir. 1957).

<sup>143</sup> *Wright v. United States*, 250 F.2d 4 (D.C.Cir. 1957).

<sup>144</sup> "In order for you to acquit on the ground of insanity, you must find both of these elements present. It is not sufficient for you to find merely that the defendant was suffering from a diseased or defective mental condition when he committed

mitted except for a mental illness of the accused."<sup>149</sup>

In describing what it meant by the relationship between the criminal act and the mental disease, the court said it must be critical: "By 'critical' we mean decisive, determinative, causal; we mean to convey the idea inherent in the phrases 'because of,' 'except for,' 'without which,' 'but for,' 'effect of,' 'result of,' 'causative factor'; the disease made the effective or decisive difference between doing and not doing the act."<sup>150</sup>

A revealing court footnote informs us that this is the manner of *stating* the defense. The burden of proof once it is *raised* is on the Government. So the issue to be put to the jury is whether the Government has met this defense beyond a reasonable doubt.<sup>151</sup>

Psychiatrists shake their heads when asked to give an opinion *beyond a reasonable doubt* as to the *absence* of a direct, critical, causal, controlling, decisive relationship between the criminal act and the disease or defect, some evidence of which has been introduced. That issue is for the jury. The Government simply discusses the disease and "its dynamics." Even those psychiatrists who feel able to testify on this point after making an examination are likely to change their minds when they receive a subpoena.

The prosecutor's job, once "some evidence" has been introduced, is like that of the lady trying to remove a spot of tar from the fine delicate fabric of an evening dress. Many a self-reliant lady confronted with a spot of tar on the evening gown she must wear that night does not even attempt to

remove it. She changes the gown. Only the judges can change the Rule.

*Wright v. United States*<sup>152</sup> was decided a week after the *Carter* case. In *Carter*, so far as the instructions are concerned, it was possible to agree that the trial court had rephrased the standard *Durham* instructions. It is even possible to agree that as rephrased by the trial court they might have been a shade less onerous in so far as the Government is concerned. But in *Wright*, the trial court had instructed as to a fourth possible verdict — not guilty by reason of insanity. The appellate court said: "The charge included a recital, virtually *in haec verba*, of the sample instruction suggested in *Durham v. United States*, . . . and a statement of the Davis rule that the prosecution must prove sanity beyond a reasonable doubt."<sup>153</sup>

The appellate court was critical of the "contrasting treatment" of two of the possible verdicts, namely, not guilty by reason of insanity and not guilty. It felt that there was a possibility that the jury might infer that in order to acquit by reason of insanity it would be necessary for them to reach the affirmative conclusions that *Wright* was insane at the time of the crime and that the act was the product of the illness. The court also commented that the sample *Durham* instructions were not meant to be an inflexible directive to be followed by rote. "Where, as here, the need for more appears, it is the duty of the judge to fill in the sketch, as may be appropriate on the basis of the evidence, to provide the jury with light and guidance in the performance of its difficult task."<sup>154</sup>

<sup>149</sup> *Id.* at 616.

<sup>150</sup> *Id.* at 617.

<sup>151</sup> *Id.* at 617 n. 16.

<sup>152</sup> 250 F.2d 4 (D.C.Cir. 1957).

<sup>153</sup> *Id.* at 10-11.

<sup>154</sup> *Id.* at 11.

The court also criticized the refusal of the trial court to give a *M'Naghten* instruction for which there was an evidentiary basis. Instructions in line with *Douglas*<sup>155</sup> and *Stewart*<sup>156</sup> should also have been given. It was also felt that "causal connection" should have been defined. The court observed that in *Carter*<sup>157</sup> there is an elaboration of the meaning of this term.

Judges Wilbur Miller, Danaher, and Bastian dissented in the *Wright* case. Judge Miller wrote:

For the reasons stated I cannot concur in the majority's disposition of the case, which seems to me to be a usurpation of the jury's function, and another example of what I regard as an alarming judicial tendency to magnify the rights of criminals at the expense of the public interest in the strict enforcement of the criminal laws, particularly in cases where the defense of insanity is interposed. This reversal allows a murderer to go unpunished and, in all probability, will result in his almost immediate release from any custodial restraint.<sup>158</sup>

After referring to the passage from the majority opinion in which the "contrasting treatment" of two possible verdicts was set forth as constituting a danger from which the jury might conclude that in order to acquit Wright by reason of insanity it would be necessary for them to reach an affirmative conclusion of sanity, the dissent continues:

This means that the majority think there is danger that the jury might infer from the charge that Wright had the burden of prov-

<sup>155</sup> *Douglas v. United States*, 239 F.2d 52 (D.C. Cir. 1958).

<sup>156</sup> *Stewart v. United States*, 247 F.2d 42 (D.C. Cir. 1957).

<sup>157</sup> The date of *Carter* is October 24, 1957. The date of the *Wright* opinion is one week later, October 30, 1957; the date of the second trial was December 14-22, 1955.

<sup>158</sup> *Wright v. United States*, 250 F.2d 4, 16 (D.C. Cir. 1957).

ing he was insane at the time of the crime when in fact the Government had the burden of proving sanity after some evidence of insanity had been brought forward. The danger is fanciful; the majority's apprehension probably springs from their failure carefully to examine the complete charge. Judge McLaughlin made it quite clear that in the circumstances the burden was on the Government to prove sanity beyond a reasonable doubt.<sup>159</sup>

The dissent then discusses the impact of the *Durham* rule, and its lack of acceptance

<sup>159</sup> *Id.* at 17. The dissent continues: "For example, he said to the jury: 'You are instructed that if you, the jury, believe beyond a reasonable doubt that the defendant Clarence L. Wright committed the criminal act with which he is charged, and was not suffering from a mental disease or from a mental defect at the time he committed the said criminal act, you may find him guilty.' and again he said, using almost *verbatim* the language of the *Durham* case:

'You are further instructed that unless you believe beyond a reasonable doubt either that the defendant was not suffering from a disease or mental condition, or that the act was not the product of any mental disease or mental defect, you must find the accused not guilty because of insanity;' to which he later added this:

'Now, to summarize: If you find that the Government has established beyond a reasonable doubt all of the essential elements of the crime as I have delineated them to you, and if you also find beyond a reasonable doubt that defendant was not suffering from a mental disease or a defective mental condition at the time the criminal act was committed, then you may find the defendant guilty.' Finally Judge McLaughlin said this to the jury:

'Ladies and gentlemen of the jury, every person is presumed to be sane until the contrary appears. This presumption is founded on human experience. This presumption *does not mean, however, that the burden of proof is on the defendant to prove insanity.* If the defendant offers any evidence that the defendant was legally insane at the time of the deed, the presumption of sanity vanishes from the case. The burden is then on the prosecution, the Government, to establish the sanity of the defendant.

'In other words, on the issue of insanity, or of mental incapacity, as it is otherwise called, just



in other jurisdictions,<sup>160</sup> and concludes that it is to be preferred to the looser rule announced by the court in *Wright*.

Upon analysis one is constrained to anticipate an even more formidable difficulty: assuming the defense has announced the defense of insanity but that the "some evidence" offered has been inconclusive and the Government has not produced evidence beyond a reasonable doubt as to defendant's sanity, is it logical to assume or conclude that in the state of the record the jury will return a finding of not guilty by reason of insanity? It seems more logical to me that the jury upon careful consideration of the instructions would feel impelled to return a straight "not guilty" verdict. That this has not, to my knowledge, happened is a tribute to the common sense of the jury. But, as our juries gain knowledge

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as on every other issue in the case, the burden of proof is on the prosecution, and that burden must be sustained beyond a reasonable doubt.<sup>1</sup> In view of the carefully worded and repeated admonitions to the jury, it seems to me there is no basis whatever for the majority's apprehension that the jury might infer from the instructions that the burden of proof was on the defendant." *Ibid.* (Emphasis added.)

<sup>160</sup> "The Durham case has been pressed upon and rejected by the United States Court of Military Appeals, the Fifth and Ninth Circuits, and the highest courts of Maryland, Montana, California, Indiana, Vermont and Washington. *United States v. Kunak*, 5 USCMA 346 (1954); *Howard v. United States*, 5 Cir., 1956, 232 F.2d 274; *Ander- sen v. United States*, 9 Cir., 1956, 237 F.2d 118; *Thomas v. State*, 1955, 206 Md. 575, 112 A.2d 913; *State v. Kitchens*, 1955, 129 Mont. 331, 286 P.2d 1079; *People v. Ryan*, 1956, 140 Cal.App. 2d 412, 295 P.2d 496; *Flowers v. State*, Ind. 1956, 139 N.E.2d 185; *State v. Goyet*, Vt. 1957, 132 A.2d 623; *State v. Collins*, Wash. 1957, 314 P.2d 660. Cf. *State v. White*, 58 N.M. 324, 270 P.2d 727, decided by the Supreme Court of New Mexico May 12, 1954, a few weeks before the Durham decision. As far as I know the Durham rule prevails nowhere else except in New Hampshire, its birthplace." *Id.* at 18 n. 3.

of the implications of confinement in an insane asylum,<sup>161</sup> they may become reluctant to find this verdict in the case of one wherein there is doubt concerning insanity and where the condition shows little hope of improvement.<sup>162</sup>

The question I raise is simply: Should a verdict of not guilty by reason of insanity be predicated on *doubt*? When juries learn this they may well resolve the issue by a verdict of "not guilty." Heretofore the dilemma has been resolved in some cases by finding the defendant "guilty" when the evidence of criminality is strong and uncontradicted and the evidence of insanity is weak, inconclusive, and contradictory.

The dissent concludes by indicating that the majority opinion further complicates a complex and difficult problem and predicts that the trial judges who have heretofore found the rule difficult to understand and apply will now find it even more difficult. In *Catlin v. United States*,<sup>163</sup> the same judge also dissented, saying in substance that if one knew what he was doing was wrong, but freely and voluntarily chose to do it and was not impelled by an irresistible impulse, he should be held criminally responsible for his act even though he thought the moon was made of green cheese. He concluded by calling for the overruling of the *Durham* rule.

In a separate concurring opinion, Judge Burger gave an explanation of the objective of the *Carter* opinion, and emphasized that mental disease to exculpate must be

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<sup>161</sup> See *Overholser v. Leach*, 257 F.2d 667 (D.C. Cir. 1958); de Grazia, *The Distinction of Being Mad*, 22 U. CHI. L. REV. 339, 350 (1955).

<sup>162</sup> See *Overholser v. Leach*, *supra* note 161. In such a case, as counsel argued, the verdict may be to a sentence of life imprisonment.

<sup>163</sup> 251 F.2d 368 (D.C.Cir. 1957).

shown<sup>164</sup> to have a positive causal relationship to the criminal act and that it must be shown to be controlling, decisive, and compelling. He concluded by observing:

These are complicated, difficult and trying problems for the law enforcement officers, for the profession and for the courts, and solutions are often elusive. As with all difficult legal problems the pronouncements of *Carter v. United States* require concentrated, thoughtful study, and where that is given improved understanding and better administration of justice will follow.<sup>165</sup>

### Psychopathy

This special problem is one of the most challenging and difficult that has been encountered. The psychopath is easier to recognize than to define.<sup>166</sup>

The American Law Institute meets the issue head on: "The terms 'mental disease or defect' do not include an abnormality

<sup>164</sup> If this were the opinion of the Appellate Court it would appear that the defense would have the burden of proof on the issue of insanity as a defense. This is the rule in twenty-one states and under a broad formulation like *Durham* would be most appropriate. This doctrine leaves the defendant in control of this issue which can be raised by the slight quantum of "some evidence." The prosecution has the obligation of proof of sanity or lack of causality beyond a reasonable doubt and may not even know of the defense until the trial.

<sup>165</sup> *Catlin v. United States*, 251 F.2d 368, 373 (D.C.Cir. 1957).

<sup>166</sup> "The psychopath is distinguished both from the subject of mental disease (the psychotic) and from the neurotic by exhibiting no definite point in time at which his abnormality began, but by remaining always fundamentally the same sort of person, although subsidiary changes may occur in the course of time. It has been suggested that the differences may be put in the form of a simple analogy: in the psychotic we suppose that there has been some radical breakdown in the machinery; in the neurotic we suppose that it is working badly, though perhaps only temporarily so; in the psychopath we suppose that the machinery

manifested only by repeated criminal or otherwise anti-social conduct."<sup>167</sup>

Dr. Manfred Guttmacher, one of the psychiatric consultants of the American Law Institute's study on Criminal Responsibility, wrote Professor Wechsler of the Institute:

*Psychopathy.* Very few in this group should be exculpated, and only where it can be shown or deduced that the individual has made real efforts to control his criminal impulses and has found it impossible to do so. Whether there be recommended for the severely psychopathic individuals, special types of verdicts, indeterminate sentences and special types of institutions are matters that should be fully considered.<sup>168</sup>

The purpose of the Institute draft section 4.01(2) was to require that there be other evidence of mental abnormality than the mere fact of repetitive offending before the offender could claim immunity from responsibility.<sup>169</sup>

In cases which have reached the circuit court, this waste basket<sup>170</sup> category has produced only a few in which it has even been

was built to an unusual pattern or is faulty. We believe that this analysis of the essential difference between psychopathic personality and mental disease represents the highest common measure of agreement among members of the medical profession at the present time, though we recognize that it would not be universally acceptable; many of the adherents of the psychoanalytic school would not recognize the fundamental distinction and would regard psychopathic personality as a form of mental disease." Royal Commission on Capital Punishment, 1949-1953, REPORT Cmd. No. 8932, at 136 (1953). See also *Id.* at 139.

<sup>167</sup> ALI, MODEL PENAL CODE Appendix C, §4.01(2), (Tent. Draft No. 4, 1955).

<sup>168</sup> *Id.* Appendix C, §4.01, at 186.

<sup>169</sup> ALI REPORTER 212 (1955).

<sup>170</sup> REPORT, N. J. COMM'N ON HABITUAL SEX OFFENDER 39 (1950).

mentioned<sup>171</sup> and only one in which it has been a justiciable issue.<sup>172</sup>

John D. Leach was charged in three indictments with certain offenses related to armed robbery. His defense in part was that he was a sociopath.<sup>173</sup> The jury found him not guilty by reason of insanity. He was committed to a mental hospital. A few months thereafter he filed *pro se* a habeas corpus petition alleging that he was of sound mind and could no longer be held.

Seven psychiatrists testified. Two called by the petitioner gave testimony that he was of sound mind and that he had never suffered from mental disease. All seven agreed that he was a "sociopathic personality with dyssocial outlook" and that he would be dangerous to the community if now released.

The district court appeared to be more impressed by the testimony of the two psychiatrists called by the petitioner and ordered him released.

On the respondent's motion for summary reversal, the circuit court reversed the order of discharge. The opinion distinguished between those committed to a mental hospital following a finding of not guilty by reason of insanity,<sup>174</sup> and those who are the subject of a civil commitment. In explaining the significance of the statute which applies to those found not guilty by reason of insanity, the court said in the *Leach* case:

The test of this statute is not whether a

<sup>171</sup> *Perry v. United States*, 256 F.2d 892 (D.C. Cir. 1958); *Buscoe v. United States*, 248 F.2d 640 (D.C. Cir. 1957); *Taylor v. United States*, 222 F.2d 398 (D.C. Cir. 1955).

<sup>172</sup> *Overholser v. Leach*, 257 F.2d 667 (D.C. Cir. 1958).

<sup>173</sup> *Sociopath* is a more recent term equivalent to *psychopath*.

<sup>174</sup> D. C. CODE ANN. §24-301 (Supp. VI, 1958).

particular individual, engaged in the ordinary pursuits of life, is committable to a mental institution under the law governing civil commitments. Cf. *Overholser v. Williams*, 1958, 102 U.S. App. D.C. 248, 252 F. 2d 629. Those laws do not apply here. This statute applies to an exceptional class of people—people who have committed acts forbidden by law, who have obtained verdicts of "not guilty by reason of insanity," and who have been committed to a mental institution pursuant to the Code.<sup>175</sup> People in that category are treated by Congress in a different fashion from persons who have somewhat similar mental conditions, but who have not committed offenses or obtained verdicts of not guilty by reason of insanity at criminal trials. The phrase "establishing his eligibility for release," as applied to the special class of which Leach is a member, means something different from having one or more psychiatrists say simply that the individual is "sane." There must be freedom from such abnormal mental condition as would make the individual dangerous to himself or the community in the reasonably foreseeable future.<sup>176</sup>

This case may well have a salutary effect on those who enter the defense of insanity as a device for avoiding criminal responsibility. Psychiatrists generally agreed that the chances of any significant change in his condition were slight. Leach's future conduct at the hospital will be watched with great interest by all.

If Leach had been able to procure his release from the hospital within a few months after his participation in the criminal act and his trial therefor, it would have cast grave doubt upon the efficacy of the *Durham* doctrine. The circuit court in requiring such a person as Leach to show that

<sup>175</sup> Here the court refers to *Williams v. United States*, 250 F.2d 19, 26 (D.C. Cir. 1957).

<sup>176</sup> *Overholser v. Leach*, 257 F.2d 667, 670 (D.C. Cir. 1958).

he is no longer suffering from mental abnormality and that he is not likely to be dangerous in the reasonably foreseeable future to himself or others has in effect plugged the hole in the dike. The dike, however, must be constantly watched for other leaks which may inundate the community and reduce the doctrine to a mockery. One of the cases we are watching closely is that of *United States v. Hough*, *infra*.

### Conclusion

It is probably still too early to venture an evaluation of the *Durham* rule. Last fall *Durham*, as we understand it, was the subject of modifications and definite extensions. I refer to the *Carter*,<sup>177</sup> *Wright*,<sup>178</sup> *Lyles*,<sup>179</sup> *Fielding*,<sup>180</sup> and *Williams*<sup>181</sup> cases.

As thus extended and modified it has resulted in an increased number of acquittals by reason of insanity.<sup>182</sup> This increase furnishes no basis for alarm. However, what is just over the horizon in the nature of future changes only time will reveal.

Reversals and retrials are time consuming and costly. The deterrence value of the criminal law is impaired and sometimes lost completely by delay in the ultimate

disposition of cases. The new rule is vague and lacking in criteria understandable by an average jury, and difficult to apply. If the ultimate objective is a non-punitive system with mental hospitals and psychiatrists substituted for prisons and penologists, it is properly a problem for Congress, both legally and in a budgetary sense.

As of the present time, the burden imposed on the prosecution is exacting and often practically impossible to bear.<sup>183</sup> In cases comparable to the *Hough*<sup>184</sup> case it will proceed on an *ad hoc* basis. Convincing a jury that there is a basis for their determination of responsibility is less difficult than sustaining such a conclusion before the appellate court, as we

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<sup>183</sup> See *Hough v. United States*, Criminal No. 566-57 (D.D.C. 1957). Defendant had shot and killed her former fiancé who had come to her apartment to express condolences on the death of her father. Psychiatrists agreed she was suffering from paranoid schizophrenia at the time of the act. One psychiatrist said this condition had been known to him for about 12 years and that he had recommended her hospitalization years ago. Because of the unanimity of medical opinion as to the severity of the disease and its relation to the killing we concurred in the motion for a finding of not guilty by reason of insanity. Three months after the insanity verdict and about 18 months after the fatal shooting which occurred as the victim was looking out of a window with his back turned to the defendant, her conditional release was recommended by the Superintendent of the hospital. All psychiatrists including the Superintendent, who testified at the conditional release hearing, agreed that the defendant is still suffering from paranoid schizophrenia, a major mental illness. The Superintendent expressed the opinion that the proposed release posed little danger to the community. Other equally distinguished psychiatrists disagreed. The district court denied the application. Much of the progress achieved in establishing community acceptance of the *Durham* doctrine would be lost through the premature release of still potentially dangerous persons.

<sup>184</sup> *Ibid*.

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<sup>177</sup> *Carter v. United States*, 252 F.2d 608 (D.C. Cir. 1957).

<sup>178</sup> *Wright v. United States*, 215 F.2d 498 (D.C. Cir. 1954).

<sup>179</sup> *Lyles v. United States*, 254 F.2d 725 (D.C. Cir. 1958).

<sup>180</sup> *Fielding v. United States*, 251 F.2d 878 (D.C. Cir. 1957).

<sup>181</sup> *Williams v. United States*, 250 F.2d 19 (D.C. Cir. 1957).

<sup>182</sup> There were seventeen acquittals by reason of insanity in the fiscal year 1958. This is 141% of the average number of such acquittals in the years following *Durham*. Reversals which resulted in such determinations are included.

have learned in *Carter*,<sup>185</sup> *Wright*,<sup>186</sup> and *Fielding*.<sup>187</sup>

The question still remains: Are we approaching a point wherein the psychiatrist will further dominate this area? There are definite indications that juries no longer are free to reject the inconclusive conclusions of the psychiatrist.<sup>188</sup> Will this trend lead ultimately to acceptance of the philosophy of determinism<sup>189</sup> and the abandonment of the principles of free will?<sup>190</sup>

There are those who feel that we are headed toward a totally nonpunitive system of rehabilitation in mental institutions. That such a system would impair the concept of deterrence is clear.

It seems to me that the objectives of modernizing the *M'Naghten* rules as modified by the *Smith*<sup>191</sup> decision are clearly justified. The extent of the more recent changes and whether it is the most desirable method of achieving true progress is debatable.

A more convincing basis for the interposition of the defense of insanity would be established if a statute were enacted or a rule of court were promulgated which required the defense to give timely notice of this defense. Fourteen states have by statute required such notice. The ALI Model Criminal Code requires notice (see

<sup>185</sup> *Carter v. United States*, 252 F.2d 608 (D.C. Cir. 1956).

<sup>186</sup> *Wright v. United States*, 215 F.2d 498 (D.C. Cir. 1954).

<sup>187</sup> *Fielding v. United States*, 251 F.2d 878 (D.C. Cir. 1957).

<sup>188</sup> See *Wright v. United States*, *supra* note 186; *Fielding v. United States*, *supra* note 187.

<sup>189</sup> See Kaplan, *Barriers to the Establishment of a Deterministic Criminal Law*, 46 Ky. L. J. 103, 111 (1957).

<sup>190</sup> *Durham* does not go this far.

<sup>191</sup> *Smith v. United States*, 36 F.2d 548 (D.C. Cir. 1929).

§4.03). Notice and the opportunity for a psychiatric examination by a Government-selected psychiatrist would minimize the opportunity for a defendant to feign insanity as a defense.

If we are to expect the jurymen to pass intelligently on the issue of responsibility, then they should be given understandable criteria for their guidance. Causality is the mainspring of *Durham*. But when the Government is obligated to prove beyond a reasonable doubt that either the accused is not suffering from a mental disease or defect, or if he is, that beyond a reasonable doubt the criminal act is not the critical decisive result of the disease, the Government is given what in many instances may be an impossible burden.

This very important question under the *Durham* doctrine would be avoided if the defense were required to assume the burden of proof by a preponderance of the evidence insofar as the defense of insanity is concerned. Twenty-one states now follow this rule. Assuming the burden of proof under the *M'Naghten* rule as required by the *Davis* case, *supra*, is a far less onerous task insofar as the Government is concerned than to prove the negative of productivity.

An anomalous result may follow. An accused who introduces "some evidence" of mental disease or defect forces the Government to prove beyond a reasonable doubt the absence of a critical causal connection between the act and the disease. If the Government fails to bear this burden, the vague quantum of proof of "some evidence" of mental disease may result in confinement in a mental institution. Is this due process?

How long such "patients" will remain in our already overcrowded and understaffed mental hospitals no one knows. The law

now requires that such confinement last until the superintendent certifies and the court finds the individual has recovered his sanity and is no longer dangerous to himself or others. Such a determination involves great difficulty and admitted uncertainty.<sup>192</sup> Deterrence as a protection to the public would be materially diminished.

My own feeling is that *Durham* and subsequent cases extending the causality concept in an effort to modernize our criminal law concepts have overshot the mark.

A significant development has taken place recently in the District of Columbia. The Committee on Legal Aspects of Psychiatry of the Washington Psychiatric Society met jointly with the Bar Association Committee on Criminal Responsibility. The Chairman of the Committee on Psychiatry, Dr. Richard Board, in expressing the opinion of his committee, stated that if the *Durham* decision were applied strictly it would probably require a finding of not guilty by reason of insanity in approximately 90 per cent of all criminal cases. Dr. Board pointed out that mental hospitals are not available to discharge this commitment responsibility, and even if they were, he feels that a prison commitment would be more likely to produce desirable results in most of the cases. Dr. Board pointed out that under the *Durham* decision most sociopaths would certainly be found not guilty by reason of insanity, but that from the standpoint of the community, prison confinement would be more likely to be productive of affirmative results in the direction of rehabilitation.

Under the *Durham* rule, psychiatrists recognize the difficulty with which the Government is confronted in obtaining ex-

<sup>192</sup> de Grazia, *The Distinction of Being Mad*, 22 U. CHI. L. REV. 339, 350 n. 41 (1955).

pert testimony on the negative of causation. This is particularly true when such opinion must be expressed and proved beyond a reasonable doubt. Seven out of eight members of the Committee on the Legal Aspects of Psychiatry of the Washington Psychiatric Society felt that the American Law Institute rule on criminal responsibility as modified by them is preferable to the *Durham* rule.

The American Law Institute formulation broadens the opportunity for the psychiatrist to present his facts, observations, and conclusions, unfettered by *M'Naghten*, but retains control in the court and jury of the issue of responsibility. The Institute formulation is expressed in general behavioral terms: "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."<sup>193</sup>

I am told that the word "wrongfulness" was substituted for the word "criminality" in the proposed New York Code by the Commission appointed by Governor Hariman.<sup>194</sup> It seems to me *wrongfulness* should be in the A.L.I. formula either in addition to *criminality* or in substitution thereof.

During the past month, I learned from Professor Livingston Hall, the Vice Dean of the Harvard University Law School, that the Special Commission on Capital Punishment and Insanity of Massachusetts has recommended, according to a newspaper account, that an acquittal would be justified

<sup>193</sup> ALI, MODEL PENAL CODE §4.01(1) (Tent. Draft No. 4, 1955).

<sup>194</sup> INTERIM REPORT, GOVERNOR'S CONFERENCE ON THE DEFENSE OF INSANITY (April 1958).

"if the jury is convinced that the accused did not know the nature or quality of his act, did not know it was wrong, or was incapable of preventing himself from doing it." This formula is taken from para. 317 of the Royal Commission Report. It, too, is a modernization of *M'Naghten* and follows the proposals of the British Medical Association. Maryland is also considering a change in the *M'Naghten* doctrine. Under the chairmanship of Dr. Manfred S. Guttmacher, the American Law Institute rule has been recommended.

From the time of recorded history, and certainly throughout the Old Testament and the New, the teaching is upon righteousness and avoidance of those concepts considered wrong by our collective conscience. Of such basic considerations are our laws conceived and enacted. Juries understand right and wrong. Capacity is another fundamental concept: Does he have the capacity to conform his conduct to the requirements of law or does he lack capacity. The American Law Institute formulation as proposed for New York modernizes *M'Naghten*, retaining its understandable criteria for the guidance of the jury. It broadens *M'Naghten* to include the volitive as well as the cognitive. Psychiatrists are given the opportunity of expressing their findings and conclusions freely and within the scope of their training but are not called upon to act as the arbiters of the criminal court controversy on the issue of responsibility.

The proposed Massachusetts formulation is comparable in concept to the A.L.I. rule. The development in Maryland is also encouraging, though as previously indicated I prefer the word "wrongfulness" to the word "criminality." Confusion may result from the use of the word "criminality,"

in that it is more legalistic and less inclusive than "wrongfulness."

There is convincing evidence that strong efforts are being made to improve the administration of justice by bringing this problem out into the open. Two outstanding studies, the Royal Commission Report which is world-wide in scope and the American Law Institute study, have reached the conclusion that affirmative steps should be taken to modernize the rules which govern those cases in which insanity is interposed as a defense. The United States Court of Appeals for the District of Columbia Circuit has boldly and courageously struggled with this age-old problem in the *Durham* cases and some forty others in the last four years.

The judicial case-by-case method to which our Court of Appeals is limited is not always the most effective means of writing new law. Hearings at which divergent views can be expressed and at which those who entertain such views can be questioned are desirable and in many instances necessary in order to furnish the fairest and most just basis for the evolution of a new rule in so controversial a field as this. It is obvious that important budgetary problems are related to whatever rule is evolved. Only Congress can appropriate and authorize the expenditure of funds. Probably no single decision has inspired so much thought, discussion, approval, and condemnation as the rule in the *Durham* case.

Based on the Government's experience in these many cases, I feel that this most important problem should be the subject of a legislative inquiry to determine the nature and character of rules for the guidance of trial courts and counsel in those cases wherein the issue is the responsibility of the accused.