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INSANITY AS A DEFENSE IN CRIMINAL LAW

S. OLEY CUTLER, S.J.*

AT THE PRESENT TIME it is estimated that there are some 17,000,000 Americans (one in ten) suffering from mental or emotional disorders. There are over 750,000 patients in mental hospitals (as many as are in all other hospitals combined), with a current admission rate of 300,000 new patients each year. The magnitude of mental illness in our nation, America's number one health problem, is indeed alarming. The present low state of mental health in the United States, therefore, points up vividly the urgent necessity for a careful yet thorough study of this major problem and its total impact on the law — for the area of mental disability law has recently been described as “a new legal frontier.”¹

With the close of World War II there has also been a comparable growth in crime and other forms of lawlessness in the United States. While not many who comprise the vast number of the mentally ill ever become involved with the criminal law, the impact of one upon the other has been often deemed worthy of consideration. The result has been numerous, often voluminous studies in the very area where mental illness and the criminal law must often meet: when insanity is raised as a defense to responsibility for criminal activity. Almost all of these studies, at one stage or another, come unavoidably around to a discussion of fundamentals: of crime, punishment, the elements of human behavior, the question of why man so acts towards his fellow man and towards the society that has protected and prospered him.

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¹ Kittrie, *Mental Disability Law*, 3 STUDENT LAW. J. 5 (June 1958).

Any discussion of "tests" of insanity in the law or of insanity as a legal concept must of necessity, therefore, discuss to some extent the fundamental notions both of crime and of mental illness. What has been objectional in too many of such discussions is the tendency to equate the two. Thus,

It is my personal opinion . . . that no person in our society is in a normal state of mind when he commits a murder. I believe this holds even when monetary gain appears to be the sole motive for the offense.

My criticism of this and similar articles [i.e., a note on the M'Naghten Rule] centers on the assumption that the basic philosophy is correct. This concept is based on the concept of "free will," that man is free to exercise his will for good and evil.²

Or again: "Man's variegated character and wide capacities have blinded us to the fact that he is in fact as passive to his creation and development, and hence as unaccountable for his actions as an inanimate machine."³

Dr. Guttmacher and Professor Weihofen in their book *Psychiatry and the Law* quote with approval the remark of Mr. Justice Frankfurter:

We must agree with Justice Frankfurter when he writes, "We can no longer rest content with the adequacy of the conception of criminal intent as an expression of full and free choice between doing a prescribed act or not doing it." But translating this into the concept that all malefactors are mentally sick people is a *reductio ad absurdum*.⁴

² Glueck, *Changing Concepts in Forensic Psychiatry*, 45 J. CRIM. L., C. & P. S. 123, 130-31 (1954).

³ Fearey, *Concept of Responsibility*, 45 J. CRIM. L., C. & P. S. 21, 24 (1954).

⁴ GUTTMACHER & WEIHOFFEN, *PSYCHIATRY AND THE LAW* 25-26 (1952).

I feel certain, however, that the loftiness of purpose that pervades many of these discussions on the difficult subject of responsibility is more indicative of the authors' true sentiments than are these sporadic confoundings of the power of free will with its occasional diminished capacity. Nonetheless, those who write so assuredly of the philosophy of freedom and its perennial relationship to criminal jurisprudence should not fail to acquaint themselves with the real teaching of the great scholastic philosophers who fathered the philosophy of that jurisprudence.⁵

It is significant, I think, that the *Durham* rule, which has so often been attacked for its implied denial of free will, should have been the occasion for the appearance of an article, written by a distinguished psychiatrist, entitled *Criminality and Mental Illness — Two Faces of the Same Coin*.⁶ The symposium on *Durham*, which carried this article, was noteworthy in that it brought to the forefront of discussion many of the really basic issues involved in the question of insanity as a defense in criminal cases. It is basic considerations of this nature that I will discuss in this article.

Insanity — a Legal Concept

It is said in defense of *Durham's* "product" test that it enables law to catch up with the advances made in medical science, especially in that of psychiatry. This argument, it appears to me, is based upon an erroneous approach to the entire problem. It was first stated in the famous *New Hampshire Pike*⁷ decision:

⁵ Cf. FORD & KELLY, 1 CONTEMP. MORAL THEOLOGY 221 n.16 (1958).

⁶ Roche, *Criminality and Mental Illness — Two Faces of the Same Coin*, 22 U. CHI. L. REV. 320 (1955).

⁷ *State v. Pike*, 49 N.H. 399 (1869).

It was for a long time supposed that men, however insane, if they knew an act to be wrong, could refrain from doing it. But whether this supposition is correct or not, is a pure question of fact. The supposition is a supposition of fact, — in other words, a medical supposition, — in other words a medical theory. . . . The knowledge test in all its forms, and the delusion test, are medical theories, introduced in immature stages of science, in the dim light of earlier times, and subsequently, upon more extensive observations and more clinical examination, repudiated by the medical profession. But legal tribunals have claimed those tests are immutable principles of law, and have fancied they were abundantly vindicated by a sweeping denunciation of medical theories.⁸

These "insanity tests," if held as valid medical tests of an immutable character by the older courts, were as misleading then as is the reasoning of Mr. Justice Doe, just quoted. These "tests" in themselves are not tests of mental illness, based upon medical theories. If they ever were, they were justly repudiated by an enlightened medical profession. But as they are used in the law, as symptoms, as clinical evidence of mental disease, they are never so purported to be and I seriously doubt if any court ever held that they were. It is not the law's purpose or special competence to determine mental illness. Rather, its job is to measure irresponsibility in its relationship to legally prohibited conduct and to do so, in the case

⁸ *State v. Pike*, 49 N.H. 403, 437 (1869). "The opinions in *State v. Pike* are to be found in 49 New Hampshire Reports, pp. 399, 403. There is a reporter's note at p. 399 stating: 'This case was decided in June Term, 1869, and should have appeared in 48 N.H. It was examined and reaffirmed in *State v. Jones* [50 N.H. 369 (1871)], Rockingham June Term, 1871.' The decision in *State v. Pike* is erroneously shown as having been decided in June 1870." BIGGS, *THE GUILTY MIND* 221 n.66 (1955).

of the two above-mentioned knowledge and delusion tests, by the use of criteria most descriptive, as well as most determinative, of an individual's capacity to entertain a criminal intent as well as to commit the illegal act.

To state that these indicia of irresponsibility are merely facts (and indeed, medical facts), as was done in *Pike* and on countless occasions since, is seriously to obfuscate the entire issue and to solve none of its problems. This is precisely the point which, in a recent case,⁹ the Supreme Court of Nevada singled out for especial criticism in the *Pike* approach: "Under this decision insanity was not defined as a matter of law, but in effect was made a question of fact to be determined by the jury as any other fact would be determined."¹⁰

What is a question of fact, what of law, are unavoidably inter-related in this problem. The point that must always be insisted upon is that insanity is a legal concept. As such, the court must define and explain it by necessary criteria to a jury and not leave it up to their good common sense and moral instinct, without any proper guidance. The guides or criteria of "knowledge," etc., may be poor, inadequate ones in the light of presently available knowledge from the medical sciences. However, the basic line of approach to the problem of irresponsibility taken by the *M'Naughten* rule, for example, is legally sound. As Professor Weschler said:

The attacks on *M'Naughten* rule as an inept definition of insanity or as an arbitrary definition in terms of special symptoms are entirely misconceived. The rationale of the position is that there are

⁹ *Sollars v. State*, 316 P.2d 917 (Nev. 1957).

¹⁰ *Id.* at 918.

cases in which reason cannot operate and in which it is totally impossible for individuals to be deterred.¹¹

Insanity — Towards a Definition

If insanity, then, is a legal concept, what is its definition, what is its importance to the criminal law, and its relevance, even, in the light of modern scientific progress? Not all lawyers and jurists, not to mention psychiatrists, are happy with the term "insanity." Judge Biggs, for example, says that ". . . the divergence between law and psychiatry is caused in part by a legal fiction, represented by the words 'insanity' or 'insane,' which are a kind of lawyers' catch-all and have no clinical meaning."¹²

Because of its importance to the right understanding of the requirements for and defenses to crime, insanity as a legal concept is very essential to the law. This concept is admittedly a difficult one to understand, and yet, despite the difficulty, a definition must be attempted. As the judge in *Sollars v. State*,¹³ declared:

A definition is necessary. "Insanity" and "sound mind" are terms used by statute. . . . The court, then must continue to recognize the statutory concept of "insanity" as the basis of relief from criminal responsibility. The term must be given meaning and significance if a jury is to be able to find such a condition to exist.¹⁴

This same case, too, has answered its own difficulty as well as any court could:

"In criminal law 'insanity', by whatever test it may be ascertained, may be said to be that *degree or quantity* of mental disorder which relieves one of the criminal respon-

sibility for his actions."¹⁵

It is the lack of even this degree of precision, indeed of any definition at all, which is so fatally ambiguous in *Durham*, as we shall see. Any test that lacks criteria to aid a jury in arriving at its factual determination of the defendant's irresponsibility, and which fails to define what amounts to irresponsibility, fails as a test.

While admitting, for example, that gradations of mental illness do exist,¹⁶ nevertheless, the *Durham* court expects the jury to decide for itself, without further guidance, in the same fashion as juries do with respect to expert testimony in a damage suit:

In such cases, the jury is not required to depend on arbitrarily selected "symptoms, phases or manifestations" of the disease as criteria for determining the ultimate question of fact upon which the claim depends. Similarly, upon a claim of criminal irresponsibility, the jury will not be required to rely upon such symptoms, as criteria for determining the ultimate question of fact upon which such claim depends.¹⁷

The tort example which the court here uses is one of total disability under an insurance policy. The choice of the comparison is manifestly unfortunate. In the first place, damage awards, as all know so well, are too frequently the results of prejudice, ignorance, and whim — a situation which should not lightly be introduced into the field of criminal law.

Insanity Tests

What then of the various tests for determining criminal irresponsibility when insanity is raised as a defense in criminal

¹¹ ALI, MODEL PENAL CODE, §4.01, at 156, Comment (Tent. Draft No. 4, 1955).

¹² BIGGS, *op. cit. supra* note 8, at 117.

¹³ *Sollars v. State*, *supra* note 9.

¹⁴ *Sollars v. State*, 316 P.2d. 917 (Nev. 1957).

¹⁵ *Ibid.*

¹⁶ *Durham v. United States*, 214 F.2d 862, 871 (D.C. Cir. 1954).

¹⁷ *Id.* at 875.

proceedings — what of these tests presently in use and their proposed alternatives? The articles in this symposium have fulsomely treated both the traditional tests, as well as the *Durham* substitute now in use in the District of Columbia. In turn, this article has shown why some sort of criteria as a guidance to the jury must be had. At the same time the query often arises, “Why any reform of the traditional *M’Naghten* rule at all?” The chief argument for change with which there is now fairly general agreement is that there is need for some sort of enlightened reform in this area. After all, in enlightening the jury as to the criteria, whatever they be, that they are to use in arriving at their factual determination of responsibility, expert testimony at trial must be used. Much progress has been achieved up to the present time in the quality of that testimony, based on medical advances through the years, which cannot but be recognized. By the same token, there is likewise by this time, fairly general dissatisfaction with the results attempted by *Durham*, as well as with the rule of that case in se. The reaction of the federal judiciary, and those state courts which have considered it, are fairly indicative of this feeling of disappointment and dissatisfaction.

The Fifth Circuit in *Howard v. United States*¹⁸ rejected the “product” test. Here a conviction of robbery with use of a dangerous weapon was affirmed despite the insanity plea, with Judge Rives dissenting. The latter was very critical of the *M’Naghten* rule. Upon a rehearing en banc, the case was reversed, but on grounds other than that of insanity defense.

Two cases from the Ninth Circuit are

quite significant because *Durham* came directly into issue on the appeals. In *Anderesen v. United States*,¹⁹ the court declared that being bound by the rulings of the United States Supreme Court in *Davis*²⁰ and *Fisher*,²¹ it could not follow *Durham* and indeed it had:

. . . no desire to join the courts of New Hampshire and the District of Columbia in their “magnificent isolation” of rebellion against *M’Naghten*, even though New Hampshire has been traveling down that lonesome road since 1870. See *State v. Pike*, 49 N.H. 399. Rather than stumble along with *Pike*, we prefer to trudge along the now well-traveled pike blazed more than a century ago by *M’Naghten*.²²

In *Sauer v. United States*,²³ the same court again rejected *Durham*, while saying of *M’Naghten*: “the right and wrong test has withstood the onslaught of critics, not because it is scientifically perfect, but because the courts regard it as the best criteria yet articulated for ascertaining criminal responsibility which comports with the moral feelings of the community.”²⁴ This argument at first blush seems stuffily conservative, yet upon afterthought, it strikes one as really getting to the heart of the matter — the very same argument delineated at the outset of this article, namely, that any test must really do what it purports to set out to do, test incapacity for responsible criminal activity, without in any way jeopardizing the fundamental principles of our legal system. This is stated with no sense of hauteur, but rather, restates and recognizes the truth of what

¹⁸ 237 F.2d 118 (9th Cir. 1956).

¹⁹ *Davis v. United States*, 160 U.S. 469 (1895).

²⁰ *Fisher v. United States*, 328 U.S. 463 (1946).

²¹ *Andersen v. United States*, *supra* note 19, at 127.

²² 241 F.2d 640 (9th Cir. 1957).

²³ *Id.* at 649.

¹⁸ 229 F.2d 602 (5th Cir. 1956).

Professor Jerome Hall of Indiana University Law School observed in this regard:

Yet the M'Naghten Rules can no doubt be improved, to give more scope to current interdisciplinary knowledge and to employ language that will facilitate the use of psychiatric testimony. Any improvement must be based on a view of human behaviour that is both psychologically sound and compatible with legal principles. The essential legal premise is that man is, in significant measure, a rational being; and a psychological theory that is not only consistent with this but independently valid as well, is that man functions as a unitary being. That is, reason, will, feeling, and so on coalesce; in normal persons they are integrated.²⁵

In 1951 the Court of Appeals for the Third Circuit affirmed a denial of a writ of habeas corpus for one Smith, convicted of first degree murder and sentenced to death.²⁶ The basis of the petitioned writ was the insanity defense. The court divided four-three, with Chief Judge John Biggs dissenting, joined by Judges Staley and McLaughlin. The dissent said:

The law when it requires the psychiatrist to state whether in his opinion the accused is capable of knowing right from wrong [Smith was tried under a Pennsylvania M'Naghten type rule], compels the psychiatrist to test guilt or innocence by a concept which has almost no recognizable reality. . . .

We can see no reason why the legal test of irresponsibility for the commission of a crime should not be based upon the principle that if the mental illness of the accused is the proximate, or a contributory cause of the crime, then the accused may not be found guilty of murder.²⁷

²⁵ Hall, *Psychiatry and Criminal Responsibility*, 65 YALE L. J. 761, 775 (1956).

²⁶ United States *ex rel.* Smith v. Baldi, 192 F.2d 540 (3d Cir. 1951).

²⁷ *Id.* at 568.

There has been no discernable trend around the country to adopt the *Durham* approach.²⁸ In fact, as we have already seen, in one state the "product" test was strongly condemned.²⁹ Nonetheless, at least three states, Pennsylvania, New York and Massachusetts, have the problem of a revision of the insanity defense under study.

The Durham Test Considered

The advocates of the *Durham* approach often put their critics at serious disadvantage, for in their facile approach to the difficult and complex subject of responsibility, they make a refutation of *Durham* appear platitudinous. This is due to the fact that those of other opinions take their stand on the hard facts of social protection and the maintenance of the hard core of legal principles, while the defenders of *Durham* resort to an individualistic, more clinical approach with all its personalistic, emotional overtones. As Dr. John Cavanagh, a contributor to this symposium, has but recently declared: "The recent decisions of the courts seem to overlook society's needs and show an almost sentimental concern for the defendant. Perhaps what we need is a more rational and less emotional approach to this problem."³⁰

In their critiques of *M'Naghten*, the proponents of *Durham* insist that the former's chief weakness is exclusive reliance upon a single symptom of mental

²⁸ The *Durham* rule was not considered in United State v. Smith, 5 U.S.C.M.A. 314, 17 C.M.R. 314 (1954) and in Bryant v. State, 207 Md. 565, 115 A.2d 502 (1955) and in Thomas v. State, 206 Md. 575, 112 A.2d 913 (1955).

²⁹ Sollars v. State, 316 P.2d 917 (Nev. 1957).

³⁰ *The Aftermath of the Durham Rule*, address delivered by John R. Cavanagh to the Jacobi Medical Society, Feb. 17, 1958.

disorder,³¹ and that, even with "irresistible impulse" added to it, the *M'Naghten* rule is scarcely more successful for it continues to remain isolated from the realities of modern-day psychiatric science. A symptom is a subjective manifestation of disease not necessarily requiring a conclusion that the disease in fact exists. It seems irrelevant, then, to a responsibility test whether knowledge be a comprehensively accurate note from a clinical point of view. For a jury, for example, to reach a finding of criminal irresponsibility, justifying a defense of insanity, logically it would seem warranted in coming to that conclusion if either or both of these facts were presented: (1) if the defendant lacked the capacity to distinguish between right and wrong; to know the nature and quality of the act committed, or (2) if he were unable to restrain himself from legally prohibited conduct; to adhere, that is, to the requirements of law.

To bolster his objection to a knowledge test, Judge David Bazelon in *Durham* cites Dr. Isaac Ray, who in his famous *Medical Jurisprudence of Insanity*, had declared:

. . . that the insane mind is not entirely deprived of the moral discernment, but in many subjects is perfectly rational, and displays the exercise of a sound and well balanced mind is one of those facts now so well established, that to question it would only betray the height of ignorance and presumption.³²

However, it is not the knowledge test aspect of *M'Naghten* with which *Durham* is at odds at all, but rather its stringently legal approach to the critical problem of determining insanity on the basis of criteria

intelligible to a jury of laymen. The author of *Durham* is at pains to make this point obvious: "The fundamental objection to the right-wrong test, however, is not that criminal irresponsibility is made to rest upon an inadequate, invalid, or indeterminable symptom or manifestation, but that it is made to rest upon *any* particular symptom."³³

Thus, *Durham* stands committed by such vagueness of expression to no norm or criterion whatsoever. What it purports to effect is, of course, a more humanitarian approach to the grave problems that underlie our entire system of penology, criminology and law enforcement. It is not too much, I think, to say as did the Court in *Fisher*,³⁴ that this is properly the province of the legislative branch of government, which is that branch in a democracy most responsive to the popular will and to "the moral feelings of the community."

From this defective no-norm formula of *Durham* springs a cognate difficulty, that of usage of the unqualified term "product." Inhering in the very concept of productivity is that of causality. It is upon this facet of *Durham* that the reporter for the American Law Institute expresses dissatisfaction:

The difficulty with this formulation inheres in the ambiguity of "product." If interpreted to lead to irresponsibility unless the defendant would have engaged in criminal conduct even if he had not suffered from the disease or defect, it is too broad: an answer that he would have done so can be given very rarely; . . . If interpreted to call for a standard of causality less relaxed than but-for cause, there are but two alternatives to be considered: (1) a mode of causality involving total incapacity or (2) a mode of causality which

³¹ *Durham v. United States*, 214 F.2d 862, 871 (D.C. Cir. 1954).

³² RAY, *MEDICAL JURISPRUDENCE OF INSANITY* 32 (1st ed. 1838).

³³ *Durham v. United States*, *supra* note 31, at 872.

³⁴ *Fisher v. United States*, 328 U.S. 463 (1946).

involves substantial incapacity. . . . But if either of these causal concepts is intended, the formulation ought to set it forth.³⁵

With this viewpoint Professor Jerome Hall is in agreement when he states:

[T]he emphasis of the *Durham* test is on the question of causation; and here too the jury can do no more than speculate. . . . The criminal law is concerned with voluntary conduct, and the problem of "causation" is therefore quite different there from what it is in the realm of mechanics. To make sense of "causation" in the sphere of purposive conduct means to take account of the actor as a rational being. A harm is imputed to (is caused by) a human actor *because* he voluntarily brought it about. And to say that he voluntarily brought it about is to say also that cognition was involved in the conduct. This is how the problem of causation must be dealt with in analysis of purposive conduct; this, indeed, is the logic of the M'Naghten Rules and of integrative psychology.³⁶

Inevitably such a rule, by bringing to the fore the testy causality factor, leads to confusion in the legal mind, to chaos in the lay juror's mind, and grieves both the rigid traditionalist in these matters and the progressive who is desirous of serious reform in this prickly area of the criminal law. The older test was eminently workable for a jury, despite the scientific objections. The knowledge and the later gloss on that rule by way of the "irresistible impulse" test threw the question of criminal responsibility into sensible, easily understandable concepts — did this man, who now professes insanity at the time of the act, did he then have those attributes of criminal purposefulness, determination and deliberate-

ness, such as we identify with the typical criminal? Of course not. He wasn't even capable of thinking such a program out or putting it into effect — he was insane. Note now, the shift in emphasis on to a more uncertain, speculative ground. Ultimately it relegates the fundamental question of causality back to a nether region as yet a scientific mystery — what causes insanity? As an eminent government research psychiatrist recently said to me in this regard, "Tell me what causes insanity, and what it is, and perhaps I could say what insanity does and doesn't cause in human behavior."

As early as the year following *Durham*, misgivings about the efficiency of a "product" test were being expressed from authorities as expert in this field as Chief Judge Biggs of the Third Circuit.³⁷ The *Durham* court itself, in the insanity cases since the original ruling, has discovered itself enmeshed in the entangling web of its own making. In the *Douglas* case³⁸ the court speaks of the casual relationship between the mental condition of the defendant and the criminal act in terms of the tort causality "but" or "except for," a concept in itself under much and continued study by the experts within that field of law. The *Douglas* case is important in that it marks a significant development in the procedural aspects concerning the reading of the *Durham* instructions to a jury. This, in turn, demands that the defense counsel pitch his insanity defense along one of several available lines, under the "knowledge" rule, "irresistible impulse" or that of the *Durham* "product" test. Accordingly, then, he must request appropriate instructions, while the trial court itself must step gingerly

³⁵ ALI, MODEL PENAL CODE §4.01, comment 159 (Tent. Draft No. 4, 1955).

³⁶ Hall, *Psychiatry and Criminal Responsibility*, 65 YALE L. J. 761, 779-80 (1956).

³⁷ BIGGS, THE GUILTY MIND 155 (1955).

³⁸ *Douglas v. United States*, 239 F.2d 52 (D.C. Cir. 1956).

over many pitfalls to prevent reversible error in the manner in which it expresses these various alternatives.

In the *Carter* case³⁹ while the insanity issue was at the core of the issues involved, it was not the basis of the reversal handed down by the court of appeals. Nonetheless, Judge Prettyman, speaking for himself and Judges Burger and Bazelon, devotes eight of the decision's twenty pages to a discussion of the causation problem implicit in the "product" test. The trial judge's explanation of "product" was found both inadequate and insufficient. The lower court had instructed the jury that:

By this term "product" or "causal connection," you are told that the criminal act must be a consequence, a growth, natural result or substantive end of a mental abnormality or unsoundness in order for the defendant to avail himself of the defense of insanity.

The criminal act of the defendant, if you find he did the act, must have resulted or been produced by the unsoundness of his mental condition, not in a minor or nominal way, but in the sense of being in direct relation to and the consequence of the diseased or defective mental condition.⁴⁰

Judge Prettyman then explains once and, apparently for all times, what is meant by the term "product" in the usage of the Court of Appeals for the District of Columbia:

There must be a *relationship* between the disease and the act, and that relationship, whatever it may be in degree, must be, as we have already said, *critical* in its effect in respect to the act. 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", "causa-

tive factor"; the disease made the effective or decisive difference between doing and not doing the act. The short phrases "product of" and "causal connection" *are not intended to be precise*, as though they were chemical formulae. . . .⁴¹

To a jury the effect of such an explanation as this is to "justify reasonably the conclusion that 'but for this disease the act would not have been committed'." How this jury determination is to be aided by expert testimony in this type of case, is further stated:

[T]he facts must be informed with some particularity. This must be done by testimony. . . . Description and explanation of the origin, development and manifestations of the alleged disease are the chief functions of the expert witness. . . . The law wants from the medical experts . . . opinion as to the relationship, if any, between the disease and the act of which the prisoner is accused.⁴²

In this consideration of the use of expert testimony to enlighten the jury's factual determination as to the existence of a possible exculpatory mental condition in the defendant, it is not intended to exclude pertinent, competent lay testimony as to these facts.

As said on this point, "Lay witnesses may testify upon observed symptoms of mental disease because mental illness is characterized by departures from normal conduct."⁴³

More directly akin to the causation problem is the *Wright* case⁴⁴ decided just a week after *Carter*. In this case Judge David Bazelon, author of the *Durham* rule, speaking for a majority of the court, called for a

⁴¹ *Id.* at 617.

⁴² *Id.* at 617-18.

⁴³ *Id.* at 618.

⁴⁴ *Wright v. United States*, 250 F.2d 4 (D.C. Cir. 1957).

³⁹ *Carter v. United States*, 252 F.2d 608 (D.C. Cir. 1957).

⁴⁰ *Id.* at 615.

reversal of the trial court on the grounds that the government in its prosecution of the case had failed to establish its burden of proving defendant's sanity beyond a reasonable doubt.

This case best illustrates the fallibility of the *Durham* test inasmuch as the expert testimony of the eleven psychiatrists in the case was ostensibly at odds. Asked if there were insanity in the case, Dr. Parretti said "yes," Dr. Miller said, "Could very well be." Dr. Richman said Wright was mentally ill at the time of the shooting. Dr. Gilbert thought probably he was mentally ill at the time. Drs. Todd, Cavanaugh and Tartoglino could not say; Dr. Epstein and Dr. Cushard, meanwhile, asked in terms of the "product" test, testified they had insufficient data upon which to voice an opinion.

Judge Bazelon contends that there was no conflict in the medical testimony since none of the experts stated Wright was not ill at the time of the alleged crime or that the act was not the product of mental illness.

In this opinion, the very author of the *Durham* test presents a most interesting, if curious, description of causality in the criminal insanity situation. This point came up for court consideration in the case inasmuch as there was to be a retrial of the case and in the original trial, the judge there had refused a requested instruction on the meaning of causality in the "product" test.

Judge Bazelon introduces the question of causality with an odd query:

When we say that one event causes another, do we mean it is a cause of it, or the *principal* cause, or the *exclusive* cause? When a jury is told it may convict the accused if it finds that, though he was mentally ill when he committed the act, the illness did not cause the act, may it convict if it finds that the illness was *one of the*

causes of his act, but not the *exclusive cause*? The answers to these questions are to be found in *Carter v. United States*, 101 U.S. App. D.C. at page —, and 252 F.2d at 614 and *Douglas v. U. S.* (1956) 99 U.S. App. D.C. 232, 239 F.2d 52, 59.⁴⁵

Because of the lack of the requested instructions, Judge Bazelon contends that the jury in the first trial of the case could have found itself faced with impossibly difficult skeins of causal relationships to unravel.

I believe that philosophical preoccupations with concepts such as "principal" and "exclusive" cause and a confusion on the facts is inevitable with the "product" test because of its latent ambiguity on the all-important causality question.

Because of its inherent ambiguity on the pivotal point of causation, the *Durham* rule may very well inhibit that very freedom of the psychiatrist to testify which it had hoped to insure. The report of the Committee on Psychiatry and Law of the Group for the Advancement of Psychiatry takes serious account of the ethical involvement in court of the psychiatrist as an expert witness. In fact its own feelings on this score seem to be seriously at odds with *Durham*. As it declared:

The psychiatrist can meet the requirements for the defense if he does so in his own terms. The central issue of the trial is the proof that the accused committed the act charged. The central psychiatric issue is the actual determination of the mental status of the accused: the joint issue is the rational disposition of the defendant. The psychiatrist can answer the condition — "in consequence of such illness he committed the act" — *not in the sense that mental illness causes the crime*, but in the sense that mental illness vitiates the normal ca-

⁴⁵ *Id.* at 12.

capacity for control.⁴⁶

In accordance with this point of view, the authors of the G.A.P. report suggest the following definition of mental illness:

s. I Mental illness shall mean an illness which so lessens the capacity of a person to use (maintain) his judgment, discretion and control in the conduct of his affairs and social relations as to warrant his commitment to a mental institution.

s. II Where Mental Illness is a Defense: No person may be convicted of any criminal charge when at the time he committed the act with which he is charged, he was suffering from mental illness as defined by this Act and in consequence thereof, he committed the act.⁴⁷

Other Proposed Tests

In light of my foregoing remarks concerning the *Durham* rule, do I then suggest the retention of the *M'Naghten* rule as such *sine addito*? No, I think not. What is wrong with the *M'Naghten* rule lies not in its approach to the problem of legal insanity, but rather in that it demands too much. It calls, for all purposes, for total impairment of the cognitive powers, and when the "irresistible impulse" test is added on to it, demands complete impairment of the volitional power as well.

While taking a similarly legal approach to the problem of criminal responsibility, the Model Penal Code of the American Law Institute calls not for total incapacity, but justly demands "substantial" impairment.

It states:

s. 4.01 Mental Disease or Defect Excluding Responsibility.

⁴⁶ CRIMINAL RESPONSIBILITY AND PSYCHIATRIC EXPERT TESTIMONY, COMMITTEE ON PSYCHIATRY AND LAW OF THE GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, REPORT NO. 26, 8 n. 26 (1954). (Emphasis added.)

⁴⁷ *Id.* at 8.

(1) A person is not responsible for criminal conduct if at the time of such conduct he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.

(2) The terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.⁴⁸

The entire formulation of this code has the virtue of much laborious study, as well as the combined efforts of top legal and scientific talent. It in turn has been subjected to rigid scrutiny and study by various individuals and groups since its initial publication. Not all who have studied it approve of its insanity test formulation. As can be seen, it adheres substantially to traditional lines, sufficiently modified as to make the test more generally practicable. Although "productivity" is indeed a feature of the ALI test, it does not carry with it the fatal ambiguity of the *Durham* product formula, which the Institute studied but rejected as hopelessly and dangerously vague.⁴⁹

The Judicial Council of Massachusetts in 1957 made a study of the insanity test with an eye to a revision of its own standards. The majority of the study committee supported the Model Penal Code approach. One dissent, however, suggested that "the legal test of insanity [be left] to develop under our judicial decisions as the local law of Massachusetts."⁵⁰

The operative rule on the question of the

⁴⁸ ALI, MODEL PENAL CODE §4.01, at 27 (Tent. Draft No. 4, 1955).

⁴⁹ *Cf.* ALI, MODEL PENAL CODE, comments 159 (Tent. Draft No. 4, 1955).

⁵⁰ *Minority Report as to Defense of Irresponsibility in Criminal Cases*, 1957 JUDICIAL COUNCIL OF MASS. 64.

insanity defense in Massachusetts today states:

One whose mental condition is such that he cannot distinguish between right and wrong is not responsible for his conduct, and neither is one who has the capacity to discriminate between right and wrong but whose mind is in such a diseased condition that his reason, conscience and judgment are overwhelmed by the disease and render him incapable of resisting and controlling an impulse which leads to the commission of a [crime]. . . .⁵¹

While this committee gives recognition to the fact that the knowledge test, with "irresistible impulse" added to it, "take[s] due account of the fact that capacity for knowledge and control are the constituents of a responsible action and that it is precisely these capacities that are impaired when mental disease or defect produces irresponsibility,"⁵² nonetheless, the majority of the committee felt that these older tests demand too much in the way of totality of impairment of the mental powers which "know" and "control" acts. Certainly the only legitimate object of any reform in the standards for determining criminal responsibility in this area would be so to broaden the tests as to allow for more just pleas of exculpation, when they arise, without at the same time sacrificing important safeguards to public safety and the maintenance of a firm and responsible system of justice.

Such safeguards, I believe, are found in the Model Penal Code, when it states that: "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."⁵³

This test, as can easily be seen, retains the basic norms of the older *M'Naghten* rule, and "irresistible impulse," while making substantial improvements upon their mode of expression. The phrase "to appreciate" is a fair and just addition, for it includes cases of people whose mental condition has caused a deterioration of their capacity for judgment, *i.e.*, in making a practical, moral evaluation of a situation — a more illuminating and meaningful formula than the former "distinguish between right and wrong" standard.

Furthermore, the Model Penal Code without demanding total incapacity of the mental processes, still calls for a "substantial" impairment.

This test has been attacked by some on the ground that by its use of the words "result of" it introduces the most obnoxious feature of *Durham*, which the Institute itself explicitly rejected.⁵⁴ This, of course, is no real objection at all, because the Model Penal Code indeed introduces productivity to its tests, for a notion of productivity hovers about any insanity test. What makes it objectionable in *Durham* is its unlimited, unqualified usage.

As for the phrase "to conform his conduct to the requirements of law," undoubtedly this quite satisfactorily introduces a volitional aspect into an insanity rule which satisfies good morals, good medicine and good law. It is likewise a more happy and

⁵¹ *Commonwealth v. McCann*, 325 Mass. 510, 91 N.E. 2d 214, 217 (1950). *Cf.* *Commonwealth v. Rogers*, 48 Mass. (7 Met.) 500 (1844).

⁵² *Majority Report as to Defense of Irresponsibility in Criminal Cases*, 1957 JUDICIAL COUNCIL OF MASS. 57.

⁵³ ALI, MODEL PENAL CODE, §4.01(2) (Tent. Draft No. 4, 1955).

⁵⁴ ALI, MODEL PENAL CODE, comments 159 (Tent. Draft No. 4, 1955).

desirable result than the occasional presence of that satellite to the knowledge rule, the "irresistible impulse" test.

It is this particular phrase that especially annoys Mr. Muldoon, of the minority to the Massachusetts Judicial Council Report:

. . . I think the law as commonly understood may need clarifying along lines suggested in the majority report as to knowledge and control and the capacity for the criminal intent. My difficulty [with the "to conform . . ." phrase] with the words . . . is their vagueness as a guide for a judge in decision or instructions to a jury.⁵⁵

In support of his own reservations on this matter, Mr. Muldoon notes a like discontent on the part of a Canadian Commission Report of 1957, which said: "We think the main proposal [§401] has many features of our law as presently interpreted and applied, but [it] has the defect of having no jurisprudence to support it and would be much more difficult to present to a jury."⁵⁶

However, the present test in Canada⁵⁷ which Mr. Muldoon seems so to admire, attempts too much in a single statute, and, therefore, gives the statute in question a rigidity that would be out of step with

⁵⁵ *Minority Report as to Defense of Irresponsibility in Criminal Cases, 1957 JUDICIAL COUNCIL OF MASS.* 63.

⁵⁶ *Ibid.*

⁵⁷ The Canadian test reads in part:

(1)

(2) For the purposes of this section a person is insane when he is in a state of natural imbecility or has disease of the mind to an extent that renders him incapable of appreciating the nature and quality of an act or omission or of knowing that an act or omission is wrong.

(3) A person who has specific delusions, but is in other respects sane, shall not be acquitted on the ground of insanity unless the delusions caused him to believe in the existence of a state of things, that, if it existed, would have justified or excused his act or omission. . . . *Ibid.*

future new classifications of species of mental illness.

Proposals of Study Subcommittee of Governor Harriman's Conference on the Defense of Insanity

On May 29, 1958, the Study Subcommittee of the Governor's Conference on the Defense of Insanity issued its interim report. For all purposes the test advocated by the group is that proposed by the Model Penal Code. In the actual insanity test, this group inserts "to know" before "to appreciate." The present section 1120 of the New York State Penal Law covers this point. Following the *M'Naghten* rule, it speaks of knowledge of the "nature and quality" of the act he was doing or, in the alternative, no knowledge that the act was wrong. The Governor's Committee felt that one who is incapable of appreciating the wrongfulness of his act is necessarily unable to know and to appreciate its "nature and quality."

With the drafters of the Model Penal Code, the Governor's Committee likewise agreed that "the terms 'mental disease or defect' do not include an abnormality manifested *only* by repeated criminal or otherwise anti-social conduct."⁵⁸ The draftsmen thus excluded positively from the concept of mental disease or defect, the sociopathic or so-called psychopathic personality disorders. This medical classification admittedly covers a wide grey area between persons definitely disordered and those more mildly so. Characteristics of this group would be the inability to conform to the usual norms of social conduct. It was felt that as yet, this area is too undefined by the mental sciences as to allow exculpation on

⁵⁸ *Cf. GOVERNOR'S CONFERENCE REPORT ON THE DEFENSE OF INSANITY (April 1958).* (Emphasis added.)

that basis. As they declared themselves on this important point:

It seems quite clear that *M'Naghten* cannot safely be relaxed, as we propose to recommend, unless a stricter view of mental disease underlies the principle to be applied. For it is wholly circular in reasoning, as many psychiatrists agree, to define the concept of disease solely by reference to the phenomena which must be the product of disease for irresponsibility to be established. Thus whether the matter be viewed in terms of its intrinsic logic or, even more clearly, in terms of social policy, the statute must make clear the diagnosis of psychopathy shall not suffice to lay the basis for a claim of irresponsibility. In the present state of knowledge we are satisfied that there is no escape from treating persons of this order as subject to conviction and a problem for the organs of correction.⁵⁹

The Diminished Responsibility Problem

A related problem relates to the question of diminished responsibility. Put succinctly, the question in practice amounts to this: Whether mental disease, not amounting to insanity, can, by affecting the mental state of accused, reduce the degree of the crime charged? New York State statutory law to a slight extent already recognizes this theory inasmuch as first degree (common-law) murder carries with it a mandatory death sentence,⁶⁰ while in felony murder cases and some others, jury discretion is permitted in recommending life imprisonment.⁶¹ The sanction for second degree murder is twenty years to life. New York case history on this point is interesting. In the *Sindram* case,⁶² decided in 1882, the

court rejected the diminished responsibility concept. Here Sindram had shot and killed the landlady of his boarding house, apparently in retaliation for receiving notice to leave the premises on the day previous. Insanity was not raised as a defense at the trial. Rather, it was argued by counsel that the defendant's violent act had been the result of anger and impulse, so that he lacked that state of mind, due to eccentricities, etc., but short of insanity, necessary to have formed the requisite premeditation and deliberation for a first degree murder charge. The court did not agree, stating: "[T]he theory that eccentricities of character and inordinate passion can render a sane man incapable of committing an offense which involves deliberation is wholly inadmissible."⁶³

In *People v. Moran*,⁶⁴ however, the Court of Appeals seems to have taken another stand on this matter:

Feebleness of mind or will, even though not so extreme as to justify a finding that the defendant is irresponsible, may properly be considered by the triers of the facts in determining whether a homicide has been committed with a deliberate and premeditated design to kill, and may thus be effective to reduce the grade of the offense.⁶⁵

It appears that within the limits here indicated, the doctrine of diminished responsibility is recognized by nine states, and is probably so in another five; it has been rejected by six states, and is probably so in five others.⁶⁶

Section 4.02 (2) of the Model Penal Code, in view of the above division of legal opinion, suggests this:

⁵⁹ *Id.* at 202.

⁶⁰ 249 N.Y. 179, 163 N.E. 553 (1928).

⁶¹ *Id.* at 180, 163 N.E. at 553.

⁶² *Cf.* *Stewart v. United States*, 214 F.2d 879, 883 n. 13 (D.C. Cir. 1954).

⁵⁹ *Id.* at 5.

⁶⁰ N. Y. PENAL LAW §1044.

⁶¹ N. Y. PENAL LAW §1045.

⁶² *Sindram v. People*, 88 N.Y. 196 (1882).

(1) Evidence that the defendant suffered from a mental disease or defect shall be admissible whenever it is relevant to prove that the defendant did or did not have a state of mind which is an element of the offense.

(2) Whenever the jury or the Court is authorized to determine or recommend whether or not the defendant shall be sentenced to death or to life imprisonment upon conviction, evidence that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect shall be admissible in favor of sentence of life imprisonment.⁶⁷

Both the Davis Bill, recently introduced into Congress to modify the existing law on criminal responsibility for the District of Columbia, and the interim report of the Governor's subcommittee studying this same problem in New York State have endorsed paragraph one of section 4.02 of the Code, but neither felt it politic to embrace the more controversial second paragraph. On this point, the Governor of New York's subcommittee had this to say of paragraph one:

The reason for the proposal is that some courts in the United States decline for reasons of policy to accord to evidence of mental disease or defect an admissibility co-extensive with its relevancy to prove or disprove a material state of mind. In the District of Columbia, for example, evidence of mental disease is not admissible in a first degree murder case to prove that the defendant was incapable of the deliberation necessary for conviction, a result sustained by the Supreme Court of the United States. See *Fisher v. U. S.*, 328 U.S. 463. There is an intimation in *People v. Moran*, 249 N. Y. 179, that the law of New York is otherwise,

that in determining whether a defendant could deliberate, mental disorder, whatever its degree, is a feature of the evidence to be considered. This is so plainly right, in our view, in point of policy, that any doubt upon the issue ought to be dispelled by a revision of the statutes on this subject.⁶⁸

In the District of Columbia a graphic illustration of this problem at the present time is Willie Lee Stewart. He had twice been tried and convicted on the identical charge of first degree murder. Both times his appeals to the Court of Appeals, D. C. Circuit, had been successful. Likewise, in both trials, Stewart's defense was that of insanity. In the first appeal Stewart successfully argued reversible error on the basis of an erroneous instruction to the jury. What makes this first appeal (pre-*Durham*) of particular interest is its strong reliance upon the diminished responsibility theory — a position especially taken by the amicus curiae brief in the case. Clearly, Mr. Chayes, author of this brief, illustrates how the contemporary pressures for reform of the "insanity tests" are intimately tied with more basic questions of criminal law, criminology and law enforcement themselves. Of course, to broaden the approach for the less-than-insanity type cases is, in the District of Columbia, directly to challenge the holdings in *Fisher v. United States*.⁶⁹

The offense charged in *Stewart* was homicide committed in the course of a robbery, hence premeditation and deliberation to kill needed no proof to establish the offense of first degree murder. The question raised by Stewart's counsel was whether Stewart had or could have had the necessary mens rea to commit the underlying felony. Re-

⁶⁷ ALI, MODEL PENAL CODE, §4.02, at 28 (Tent. Draft No. 4, 1955).

⁶⁸ GOVERNOR'S CONFERENCE REPORT ON THE DEFENSE OF INSANITY 5 (April 1958).

⁶⁹ 328 U.S. 463 (1946).

versal of the case was forthcoming, but, as we said, on other grounds. The court refused to accept the position of the amicus in the case, declaring:

Despite the force of the considerations presented so persuasively by the amicus, we have concluded that reconsideration of our decision in *Fisher* should wait until we can appraise the results of the broadened test of criminal responsibility which we recently announced in *Durham*. Only upon such an appraisal will it be possible to determine whether need for the rule remains.⁷⁰

The retrial of *Stewart* for the third time on the original charge is expected shortly.⁷¹

Actually the area within which proponents of diminished responsibility argue for reform is very narrow. In this restricted aspect of the problem, there is, I think, much merit in their position. Legal demarcations are at best obscure, if not impossible to determine at all. Psychiatry itself, as on the question of sociopathology, and here, must be on much more sure ground before its testimony can be adopted as a trusted and useful ally. As the report of the Group for the Advancement of Psychiatry itself declared anent this point:

Certainly in keeping with our concepts of mental life and behavior there can be little question of differences of responsibility for given acts, but we have not as yet devised a formula for measuring them. Consequently, in workaday practice we perforce cling to the expedient of "common sense" in estimating diminished responsibility in all cases. Here the psychiatrist may do somewhat better than the man on the street, but

not much.⁷²

Conclusion

Criminality and mental illness have been said to be but two faces of the same coin.⁷³ Such is not the case at all. As we have tried to show this viewpoint is neither "good morals, nor good science nor good law." It is this fallacious evaluation of what man is, on part of many psychiatrists, lawyers and writers on the subject of criminal irresponsibility that has given rise to suspicions as to the real motivation behind reform in this area. As one recent writer put it:

But there is an opposite extreme which is still more dangerous because it promotes a conception of human nature which is basically false. This is the viewpoint that undermines all human responsibility by reducing man to a mechanism or making his conduct the mere product of his instinct or of his unconscious drives. . . . There is such a thing as freedom. There is such a thing as normality. Men do deliberately choose what is wrong and what is criminal.⁷⁴

Characteristic of this erroneous viewpoint are statements that appear at times even in judicial decisions, such as:

[The law] assumes that there is a faculty called reason which is separate from instinct, emotion and impulse, that enables an individual to distinguish between right and wrong and endows him with moral responsibility for his acts. . . .

. . . The modern science of psychology . . . does not conceive that there is a sep-

⁷⁰ *Stewart v. United States*, 214 F.2d 879, 883 (D.C. Cir. 1954).

⁷¹ For an informative analysis of the arguments for and against the concept of partial or diminished responsibility readers are referred to *Fox v. State*, 316 P.2d 924 (Nev. 1957).

⁷² CRIMINAL RESPONSIBILITY AND PSYCHIATRIC EXPERT TESTIMONY, COMMITTEE ON PSYCHIATRY AND LAW OF THE GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, REPORT No. 26, 6 n. 21 (1954).

⁷³ Roche, *Criminality and Mental Illness—Two Faces of the Same Coin*, 22 U. CHI. L. REV. 320 (1955).

⁷⁴ FORD & KELLY, 1 CONTEMP. MORAL THEOLOGY 221 (1958).

arate little man at the top of one's head called reason whose function it is to guide another wrong little man called instinct, emotion, or impulse in the way he should go. . . .⁷⁵

Certainly this entire question of insanity and the law is a much broader one than simply the fashioning of new legal rules on the part of the experts. Since this latter phase of the question covers but one area of the larger one of responsibility before the law in general, it takes on aspects that are simultaneously medical, ethical, legal and sociological. It should be remembered that the Royal Commission Report on Capital Punishment, with the healthy realism that the law usually reflects, recognized too, the many-faceted features of this question:

A just and adequate doctrine of criminal responsibility cannot be founded on legal principles alone. Responsibility is a moral question, and there is no issue on which it is more important that the criminal law should be in close accord with the moral standards of the community. There can be no pre-

⁷⁵ *Hollaway v. United States*, 148 F.2d 665, 666-67 (D.C. Cir. 1945). See also Hill, *The Psychological Legalism of Thurman Arnold*, 22 U. CHI. L. REV. 377 (1955).

established harmony between the criteria of moral and criminal responsibility, but they ought to be made to approximate as nearly as possible. The views of ordinary men and women about the moral accountability of the insane has been gradually modified by the development of modern science, and if the law cannot be said to have kept pace with them, it has followed them at a distance and has slowly adjusted itself to their changes. . . .

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 with which the law is intimately concerned and to which solution medicine can bring notable aid, and it is one which is most appropriately decided by a jury of ordinary men and women, not by medical or legal experts.⁷⁶

This is, I believe, a fair and judicious evaluation of this entire issue. As such, it appears more in keeping with our democratic society that admittedly needed reforms in the field of criminal responsibility should be effected by the people themselves through the intelligently informed legislative process, rather than by the legitimate exercise of judicial authority.

⁷⁶ Royal Commission on Capital Punishment, 1949-53, REPORT, Cmd. No. 8932 at 79 (1953).

