

Catholic University Law Review

Volume 14 | Issue 1

Article 1

1965

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Recommended Citation

Richard Arens, Dom D. Granfield & Jackwell Susman, *Jurors, Jury Charges and Insanity*, 14 Cath. U. L. Rev. 1 (1965).

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Jurors, Jury Charges and Insanity

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INTRODUCTION

IN 1954, the United States Court of Appeals for the District of Columbia Circuit adopted the *Durham* rule. It held in brief "that an accused [was] not criminally responsible if his unlawful act was the product of mental disease or mental defect."¹

Speaking through Judge Bazelon, the Court repudiated the "right-wrong" test as the controlling test of criminal responsibility and declared:

The science of psychiatry now recognizes that a man is an integrated personality and that reason, which is only one element in that personality, is not the sole determinant of his conduct. The right-wrong test, which considers knowledge or reason alone, is therefore an inadequate guide to mental responsibility for criminal behavior.²

¹ *Durham v. United States*, 214 F. 2d 862 (D.C. Cir. 1954).

² *Id.* at 871.

This is part of a series of studies made possible by a grant from the Norman Foundation in New York and by Grant M-5009 of the National Institute of Mental Health. The authors acknowledge a debt of gratitude to Professor Harold D. Lasswell of the Yale Law School for encouragement, comment and criticism. He is of course to be absolved from the limitations of the work. They also acknowledge a debt of gratitude to the Law School of the Catholic University of America for facilitating the completion of this study. A word of appreciation is due to Mr. Thomas Willging, a third-year law student at the Catholic University of America for research assistance.

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Thereafter, as seen by Judge Bazelon, in *Durham v. United States*, the jury was "not required to depend on arbitrarily selected 'symptoms, phases, or manifestations' of the disease as criteria for determining the ultimate questions of fact. . . ."³ Instead it was to "be guided by wider horizons of knowledge concerning mental life."⁴

Summarizing the problem confronting the jury under the new test, Judge Bazelon declared:

The question will be simply whether the accused acted because of a mental disorder, and not whether he displayed particular symptoms which medical science has long recognized do not necessarily, or even typically, accompany even the most serious mental disorder.⁵

He concluded by linking the new rule to traditional conceptions of Absolute Justice under the Categorical Imperative of the Penal Law:

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 criminally responsible for those acts. Our traditions also require that where such acts stem from and are the product of a mental disease or defect as those terms are used herein, moral blame shall not attach, and hence there will not be criminal responsibility.⁶

Seen at first glance *Durham* directly invited the consideration of the non-psychotic disorder as a valid exculpatory mental illness. Early hopes for the expansion of the insanity defense appeared to receive the explicit encouragement of the court during the next six to seven years. By 1957 post-*Durham* case law had explicitly recognized non-psychotic psychopathology as capable of effecting an acquittal by reason of insanity. The matter had been put succinctly in these words by Judge Bazelon:

The assumption that psychosis is a legally sufficient mental disease and that other illnesses are not is erroneous.⁷

When a juror after several hours of deliberation "asked for further instructions as to whether 'in determining insanity . . . any other consideration . . . might be included . . . than dementia or schizophrenia,'" and the trial court refused to act upon this request, a conviction was reversed by the court of appeals.⁸ As expressed by the Court of Appeals, "[t]he refusal to answer the

³ *Id.* at 875.

⁴ *Id.* at 876.

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Briscoe v. United States* 248 F. 2d 640, 641 (D.C. Cir. 1957).

⁸ *Wright v. United States*, 250 F. 2d 4 (D.C. Cir. 1957).

juror's question and the denial of the requested instruction constitute reversible error. . . ."⁹

To facilitate acquittal under the productivity test of the *Durham* rule, the Court of Appeals furnished a standard of some elasticity. The requirement that the act be a "product of" a disease was not to be viewed as a requirement of direct or exclusive causal relationship between crime and illness but solely as one of necessary or critical relationship in what was inevitably a multiple chain of causal events. As expressed by the court:

When we say the defence of insanity requires that the act be a 'product of' a disease, we do not mean that it must be a direct emission, or a proximate creation, or an immediate issue of the disease in the sense, for example, of Hadfield's delusion that the Almighty had directed him to shoot George III. We do not mean to restrict this defense to such cases; many mental diseases so affect areas of the mind that some or all of the mental elements requisite to criminal liability under the law are lacking. We mean to include such cases.

When we say the defense of insanity requires that the act be a 'product of' a disease, we mean that the facts on the record are such that the trier of the facts is enabled to draw a reasonable inference that the accused would not have committed the act he did commit if he had not been diseased as he was. 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', 'causative 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. They mean that the facts concerning the disease and the facts concerning the act are such as to justify reasonably the conclusion that 'But for this disease the act would not have been committed.'¹⁰

The evolving *Durham* jurisprudence, highlighted by these developments, was of course subject to the gloss of constitutional and common law requirements as to "reasonable doubt" and burden of proof. Upon the presentation of "some evidence" of mental disease or defect "settled law . . . placed upon the prosecution the burden of proving sanity beyond a reasonable doubt."¹¹ In this context the burden of convincing the jury clearly rested upon the government. For it was the government which was then required to disprove either the defendant's pathological state or the existence of the necessary

⁹ *Id.*, at 11.

¹⁰ *Carter v. United States*, 252 F. 2d 608, 616-617 (D.C. Cir. 1957).

¹¹ *Goforth v. United States*, 269 F. 2d 778, 779 (D.C. Cir. 1959) and see cases of *Davis v. United States*, 160 U.S. 469 (1895) and *Tatum v. United States*, 190 F. 2d 612 (D.C. Cir. 1951) cited therein.

causal relationship and to do so beyond reasonable doubt. The nature of that burden was most aptly conveyed in negative terms. As expressed by the Court of Appeals, which disclaimed the formulation of "an instruction which would be either appropriate or binding in all cases," jury instructions under the *Durham* rule "should in some way convey to the jury the sense and substance of the following:

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 that act, but believe beyond a reasonable doubt that the act was not the product of such mental abnormality, you may find him guilty. *Unless you believe beyond a reasonable doubt either that he was not suffering from a diseased or defective mental condition, or that the act was not the product of such abnormality, you must find the accused not guilty by reason of insanity.* Thus your task would not be completed upon finding, if you did find, that the accused suffered from a mental disease or defect. He would still be responsible for his unlawful act if there was no casual 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.¹²

In this light, an instruction by the trial court could not be couched in such terms as:

Now, a person is relieved of the responsibility for a crime by reason of insanity, *where it is found, first, that he was suffering from a mental defect or a mental disease at the time of the offense, and, second, that his act was the product of that mental defect or disease.* . . . Now, you are instructed that if you find that the defendant, Comer Blocker, committed the act complained of, that is, the shooting of Frances B. Hall on April 5th, 1957, while he was suffering from a mental disease or defect, then you must consider the second requirement spoken of before you may find him not guilty by reason of insanity. . . .

Turning then to the shooting . . . if your answer to the first requirement is yes, the defendant, Comer Blocker, was suffering from a mental disease or defect, and if you find that the defendant, Comer Blocker, did in fact commit such acts, then *you must find that it resulted from or was produced by the unsoundness, or by the mental illness.* . . . Now, *if you find that then you may find the defendant, Comer Blocker, not guilty by reason of insanity.*¹³

Addressing itself to the merits of the quoted jury charge, the Court of Appeals declared:

¹² *Durham v. United States*, *supra* note 1, at 875. (Emphasis supplied).

¹³ Quotation by the Court of Appeals of trial court charge in *Blocker v. United States*, 288 F. 2d 853, 855 (D.C. Cir. 1961). (Emphasis supplied).

This part of the instruction is plainly erroneous. The words 'where it is found', 'you must find' and 'if you find' informed the jury that the burden of convincing them—which is the burden of proof—was on the defendant.¹⁴

Significantly, however, these landmark decisions were accompanied by increasingly vigorous dissents, suggestive of a widening rift between appellate judges on the use of the insanity defense. Several of the judges expressly demanded a repudiation of the *Durham* rule.¹⁵ Opinions, seemingly still aberrational as of 1959, expressed themselves as opposed to the insanity defense in cases in which evidence of mental illness was not obviously reflective of psychotic psychopathology.¹⁶ Thus, a defendant who testified about himself in terms reflective of delusions and visual hallucinations was held to have presented "some evidence of insanity" requiring the shifting of the burden of proof to the government and the giving of appropriate instructions of insanity as a defense to the jury. Failure to provide such instruction was held error warranting reversal.¹⁷ On the other hand, a defendant who presented evidence that he had "become increasingly indolent, [that he had] a violent temper, and . . . [had made] an unprovoked and unusually violent attack upon another for some concocted grievance" and had seemed incoherent after his arrest was held not to have made out such a case.¹⁸ The majority of the court expressed this view in this connection:

To hold that an insanity issue is presented in a criminal case merely because the accused had become increasingly indolent, has a violent temper, and then makes an unprovoked and unusually violent attack upon another because of some concocted grievance, would be tantamount to holding, as many psychiatrists profess to believe, that any person who commits a crime is mentally ill and should receive treatment instead of punishment. We are not prepared to make such ruling.¹⁹

While the court as a whole had, in the early phase of *Durham* jurisprudence, assented to the proposition that a non-psychotic mental illness was sufficient for acquittal by reason of insanity,²⁰ it had at no time followed through by requiring the trial court to charge the jury to the same effect.

¹⁴ *Ibid.*

¹⁵ See *e.g.*, respectively, Opinions of Burger, J. and Wilbur K. Miller and Bastian, JJ. in *Blocker v. United States*, *supra* note 13.

¹⁶ *Smith v. United States*, 272 F. 2d 547 (1959).

¹⁷ *Goforth v. United States*, *supra* note 11.

¹⁸ *Smith v. United States*, *supra* at 550. As summed up by Bazelon, J., dissenting: [t]he victim of the attack, testified that he [the accused] first placed his hands over her eyes, that he said nothing for a while, and that he then began to beat her and continued the beating as they went down the street for a distance of about a block and a quarter, all the while saying things that made no sense to her. Another witness testified that, as appellant was dragging his wife along the street, he stopped to bind up her wound with a handkerchief; and that, when the police arrived, appellant sat down and held the victim in his arms.

¹⁹ *Id.* at 549.

²⁰ *Briscoe v. United States*, *supra* note 7.

One is bound to note parenthetically in this connection that a search of jury charges in the District Court of the District of Columbia covering the years 1959 through 1961 failed to disclose a single instance in which a jury had been explicitly apprised of the possibility of an acquittal founded on a finding of non-psychotic mental disorder.

By the turn of the decade, moreover, the Court of Appeals was no longer referring to the insanity defense of the non-psychotic individual as a desired end. A departure from the paths originally charted by *Durham* seemed at length to be dramatized in *McDonald v. United States*.²¹ There a panel of the court, including Judge Bazelon, the author of the *Durham* rule, held that acquittal by reason of insanity depended on a finding of such disease as "substantially affect[ed] mental or emotional processes and substantially impair[ed] behavior controls."²² By 1963, the court seemed explicitly bent upon repudiating the probability, if not the possibility, of an insanity acquittal based on non-psychotic mental disorder. For it held:

There must be a *serious* mental disease, and satisfactory evidence of causation, before a verdict of acquittal by reason of insanity must follow as a matter of law.²³

By this time trial judges who sought to put "the right and wrong gloss" on the insanity charge could count on the support of a majority of the Court of Appeals Judges. By 1962 the wheel seemed to have turned full circle. In *Simpson v. United States*,²⁴ decided that year, the Court of Appeals declined to find plain error in an insanity instruction by the District Court which read:

As an example of this casual connection or relation, if a person at the time of the commission of a crime is so deranged mentally that he cannot distinguish between right and wrong, or, being able to tell right from wrong, he is unable by virtue of his mental derangement to control his actions, then his act is the product of his mental derangement.

The observation does not seem inapposite that if the Court of Appeals had indeed sought to invite acquittal by reason of non-psychotic mental disorder at any time, it was clearly no longer doing so by 1963 or indeed since that time.²⁵

²¹ 312 F. 2d 847 (D.C. Cir. 1962).

²² *Id.* at 851.

²³ *Hightower v. United States*, 325 F. 2d 616, 619 (D.C. Cir. 1963). (Emphasis supplied).

²⁴ 303 F. 2d 411 (D.C. Cir. 1962).

²⁵ Nor does it seem inapposite to remark that where the issue before the court was release from confinement at St. Elizabeths Hospital as distinct from hospitalization as an alternative to imprisonment in the conventional sense, the court continued to recognize the broadest spectrum of non-psychotic psychopathology—significantly as a basis for the denial of liberty. See, e.g. *Overholser v. Leach*, 257 F. 2d 667 (D.C. Cir. 1958); *Overholser v. Russell*, 283 F. 2d

Before *McDonald*, however, and this ensuing avalanche, a study project subsidized first by the Norman Foundation and later by the National Institute of Mental Health (between 1959 and 1963) sought to determine the degree to which the non-psychotic mental disorder was securing significant acceptance as a valid exculpatory mental illness in the courtroom. The emerging project focused on the understanding of the doctrine governing insanity acquittals by the critical decision makers in the District of Columbia. A key category of such decision makers was of course the jury. Needless to say, the insanity defense was at that time gauged by the standards of pre-*McDonald* case law.

The part of the study reported in these pages was designed to secure information as to the understanding of the *Durham* jurisprudence by the jury audience. It was hypothesized that jurors had a low comprehension of what was said to them by judges near the conclusion of the trial about the law of insanity. It was further hypothesized, however, that a clear and succinct statement of the new law could significantly affect juror reaction.²⁶ A focus of inquiry therefore was the question as to whether the statement that "the assumption that psychosis is a legally sufficient mental disease and that other illnesses are not is erroneous" was in fact brought to the attention of the jurors in any meaningful way.

THE JURY BACKGROUND

Attitude studies have portrayed the thinking of the average man and presumably the average juror about the mentally ill. The studies corroborated the general impression gleaned from lawyers interviewed in the Washington area by project staff members throughout 1959 and 1960. Lawyers thus interviewed suggested for the most part that a mental illness sufficient to secure acquittal by reason of insanity was to be equated with extreme forms of psychosis and that the public in their view appeared to group toward a M'Naghten type formulation in the appraisal of criminal responsibility on its own initiative.²⁷ The views of other researchers in this field tended to be similar.

Reporting on the work of the National Opinion Research Center at the University of Chicago carried out almost a decade ago, Shirley A. Starr voiced a substantially identical opinion:

195 (D.C. Cir. 1960) and see Arens, *The Strange Case of Frederick Lynch: Due Process and the Rights of the Mentally Ill*, 13 CATHOLIC U. L. REV. 3 (1964).

²⁶ Kelley, Hovland, et al., *The Influence of Judges' Attitudes in Three Methods of Attitude Scaling*, 42 SOC. PSY. 147-158 (1955); Pintner and Forlano, *The Influence of Attitude Upon Scaling of Attitude Items*, 8 SOC. PSY. 39-45 (1937).

²⁷ The M'Naghten rule, the "right-wrong" test, stems from the famous M'Naghten case decided by the House of Lords. 8 Eng. Rep. 718 (1843). By that time, however, the test had already become prevalent. HALL, PRINCIPLES OF CRIMINAL LAW, 480 (1947).

In practice, people make it clear that they do not generally regard behavior as proof of mental illness, unless three interrelated conditions obtain. First of all, they look for a breakdown of intellect, an almost complete loss of cognitive functioning or, in short, a loss of reason. And so, in explaining why a particular example is not mentally ill, they frequently say things like, 'A lot of people who are nervous, their minds are as good as they ever was' or 'she knows what she is doing so her mind can't be affected.' Second, people expect, almost as a necessary consequence of this loss of rationality, that the behavior called mental illness must represent a serious loss of self-control, usually to the point of dangerous violence against others and certainly to the point of not being responsible for one's acts. Here people say an example is mentally ill because 'He isn't in control of himself' or because 'He's getting dangerous for the people who live with him,' or someone else is not mentally ill because 'He isn't doing things he shouldn't be doing' or because 'He isn't really out of control; he could stop acting that way if he wanted to.'

Now all of this, I am sure, has a most familiar sound to all of you. . . . It is, of course, about the same set of moral norms and premises about man and his nature that underlies all of our legal codes, governing who shall be held responsible and punished for his acts and who shall be exempt from punishment by reason of insanity. Or, in other words, it is an expression of an internally consistent, rather well organized, morally grounded view of human nature and of human conduct that is deeply engrained in Western civilization.

According to this view of man, rationality and the ability to exercise self control are the central, basically human qualities. From this, it follows that the normal person is rational, he is able to control himself and is responsible for his acts, and his acts are reasonable, appropriate to the circumstances in which he finds himself and intelligible to others in the light of those circumstances. Given this view of normalcy, it follows quite consistently that if mental illness represents the loss of normalcy or its opposite, it must necessarily turn out to be a rather extreme form of psychosis.²⁸

The results of yet another Chicago study bear critically on the problem of juror reaction to the insanity defense. A recorded criminal trial was played to twenty mock jury panels. The experimental transcript was modeled after the real trial of *United States v. Durham*. Repetitious sections in the record, however, had been condensed or deleted. Regular jurors were used, drawn from the jury pools of Chicago metropolitan areas. The experiment was conducted in a court house. The "jurors" were told that their deliberations were being recorded and that their verdict could in no way affect the outcome of the case. They were also told that the judges of the court were interested

²⁸ Starr, *The Public's Ideas About Mental Illness*, Paper presented to the Annual Meeting of the National Association for Mental Health, Sheraton Lincoln Hotel, Indianapolis, Ind., 1955.

in the result of the experiment for guidance in policy-making decisions. Thereafter, in mock proceedings, half the number of available "jury panels" was instructed in terms of the right-wrong standard of the *M'Naghten* rules. The other half was instructed in terms of the *Durham* rule.

The researchers reported that a frequent criterion of differentiation between sane and insane behavior in a larceny or robbery prosecution was the nature of the items that the defendant stole. Thus the fact that such items were of little value indicated to some jurors that the crime was not carried out for profit, *i.e.*, that there was no rational purpose behind his behavior. Other jurors, who argued in favor of a defendant's sanity, relied upon the fact that a defendant had committed a crime against property as distinct from a crime of violence against a person—a matter suggestive to those jurors of some rational purpose and hence sanity.

A frequently cited fact suggestive of insanity to the public, as represented by this experimental group, was the defendant's behavior when caught by the police. Jurors thus pointed out that one defendant was hiding, cowering, or playing possum and that another was trying to escape, the former tending to be regarded as "abnormal", the latter as "normal" in such jury estimations. The researcher concluded:

Two points emerge. The first is that all jurors, those instructed under *M'Naghten* as well as those instructed under *Durham*, believed that cognition was the crucial factor in determining responsibility. The second point is that the *Durham* jurors appeared to have no more difficulty than the *M'Naghten* jurors in construing the instructions to suit beliefs concerning the centrality of cognition.²⁰

The hypothesis seems plausible, in the light of these findings, that most jurors would be predisposed to view an insanity defense as calling for nothing short of highly persuasive evidence of severe psychotic disorientation. This has been corroborated by an impressionistic survey of lawyers interviewed by the Project throughout 1959 and 1960, which has been referred to *supra*. Lawyers within that sample have consistently reported their feelings that jury acceptance of an insanity defense hinged upon the establishment of psychotic psychopathology, preferably one characterized by dramatic intellectual disorientation.

Another Chicago jury study has suggested that jury instructions might fail in their purpose because they are not understood by those to whom they are addressed. Ten mock juries listened to a criminal trial in which a plea of insanity had been entered in defense of an act of housebreaking. The jurors were selected from the jury pools. The deliberations were transcribed and

²⁰ James, *Jurors' Assessment of Criminal Responsibility*, 7 SOC. PROB. 58-68 (1959).

analyzed. One category of analysis applied to the deliberations was "reference to the court's instructions." The author, Professor Rita James, reported that the jurors spent 8 per cent of their time on the court's instructions and that they were approximately 58 per cent accurate in recalling these instructions. This was seen as the lowest accuracy rate of recall of any material heard during the trial. Professor James did not comment further except to note that "the accuracy of the grade-school juror's interpretation of the Court's instructions . . . [was] significantly less than that of high-school and college jurors."⁸⁰

Presumably the case heard by the mock juries in this study was also the *Durham* case. On retrial, the judge's instructions were couched almost verbatim in the language of the Court of Appeals, which had reversed the lower court. While not itself a model of clarity, the language appeared more comprehensible than current usage in the District Courts of the District of Columbia.

The experimental study undertaken by the Project in the District of Columbia in 1963 was designed to point up more definitely the level of comprehension of charges in use almost a decade after the *Durham* decision. It would seem plausible in the light of the foregoing that the pedagogic function of jury charges countering the public's misconceptions should clarify the law of exculpatory mental disease required by early *Durham* jurisprudence. Failure of that pedagogic function would seem to emerge from the materials following.

College Students as Mock Jurors: An Experiment

Subjects

A phase of the 1963 study in the District of Columbia was conducted with the cooperation of 229 undergraduate students, drawn from sociology and psychology courses of local universities. (American University, George Washington University and Howard University). These undergraduates listened to jury charges and took comprehension tests designed to register their understanding of the material to which they had been exposed.⁸¹

Their motivation, probably inferior to that of a regular jury panel, could not be regarded as insignificant in view of the elective character of their socio-psychological studies and the voluntary nature of their participation.

⁸⁰ James, *Status and Competence of Jurors*, 65 AM. J. SOC. 563-567 (1959) (referring to level of education).

⁸¹ The choice of classes was made by the departmental heads of sociology and psychology, usually on the basis of the relevancy of the study to the subject of instruction. The individual instructors were apprised of the investigation by a project staff member and asked to say nothing to their classes in advance except that they would be subjects in an experiment and were free to participate or not participate as they chose. The subjects were all beyond their first years of college but were otherwise undifferentiated.

It might be assumed, moreover, that the "testwiseness" of the subjects further operated to increase their overall comprehension score on the test.³²

Material to Be Understood

The material read to the subjects consisted of jury charges used in trials in 1961 and 1962. An informal concensus of criminal trial lawyers, based on the manifest leaning of trial judges, was used to establish a four judge spectrum of judicial opinion ranging from one judge sympathetic toward, to one dubious about, the utility of the insanity defense under the early standards of the *Durham* rule. At one end of the scale was Judge D, representing maximal sympathy to the *Durham*-type insanity defense; he was hypothesized as closely followed by Judge A. Judge C preceded Judge B, who in turn was viewed as the least sympathetic of the four judges vis-a-vis *Durham*-type insanity and thus represented the other end of the spectrum. A charge, used by each of these judges in an actual trial, was read to the selected audiences.³³ A different charge was read to each of four subsamples, comprising groups of 48, 55, 56, and 70 subjects respectively. In addition to obtaining charges with a view to covering the spectrum indicated, the charges were also selected with a view to obtaining variation in complexity as well as variation in length, significantly, however, subject to the limitation that the charges could not exceed a reading period of thirty minutes.

Test Used

An eighteen-item test was constructed to determine the rate of comprehension of the charges read.³⁴ The questions were deliberately couched in the legal language of the jury charges in order to stimulate recall.³⁵ By reviving the exact memories of the charge it was hoped to increase comprehension and thus offset some of the differences between the experimental groups and actual juries.

The following four question were regarded as critical in the light of earlier *Durham* jurisprudence:

5. What is the rule governing an acquittal on grounds of insanity?
9. What degree of mental disease or defect is needed for an insanity acquittal?
10. Will minor mental diseases (*i.e.* psychoneuroses or personality disorders) qualify for an insanity acquittal?

³² Most appeared alert and interested as the charge was read to them, in contrast to the lack of attention of regular jurors observed by practicing members of the bar during the judge's charge. This impression was corroborated by the fact that the overwhelming majority of students remained behind at the conclusion of the comprehension test to discuss the implications of the materials.

³³ See generally FURST, *CONSTRUCTING EVALUATION INSTRUMENTS* 208-210 (1958).

³⁴ See Appendix.

³⁵ Bloom, *Thought Processes in Lectures and Discussions*, 7 J. GEN. EDUC. 160-169 (1953).

18. May the jury acquit a defendant by reason of insanity if at the time of the commission of the crime he knew what he was doing and understood that he was wrong?

The validity of the test is based on rational rather than empirical methods. Validity in this instance is a question of the relevance of the test content to the subject matter of the charges as well as that of the test form to the objectives of the study. This investigation is pathbreaking but by no means definitive; we hope to stimulate further research in this area, not foreclose it.

Scoring and Analysis of Data

The response to each question in the test were tabulated as "accurate", "inaccurate" or as "no response". The data was then summarized in percentages designed to provide a rate of comprehension for each jury charge.

Procedure

After the test forms had been passed out a project staff member read the following instructions, *inter alia*, to the class:

We are interested in how well a judge's instruction to a jury are understood. In effect, we are asking you to imagine you are a jury. The trial is almost over. Before you reach a verdict, the judge will inform you as to your role in the case. . . .

A jury charge, as such information is called, will be read to you. After hearing it, please fill out the questionnaire as completely and concisely as you can.

The subjects were given approximately thirty minutes to answer the questions.

Initial Findings

The impression gleaned from the emotional response to the questions is in many ways as significant as the statistical evaluation of the data which follows. We have sought to highlight this impression by the juxtaposition of the actual language of each charge with typical examples of obviously erroneous replies provided by respondents.⁸⁶ Since the issues were closely related, the questions inevitably overlapped and the charge material quoted below necessarily related to more than one question.

Judge A's charge on the subject matter of questions 5, 9, 10 and 18 read in salient part as follows:⁸⁷

⁸⁶ We judge obvious error of course entirely from the standpoint of Durham case law before *McDonald v. United States*, *supra* note 21.

⁸⁷ *U.S. v. Lewis*, Criminal Action No. 821-61.

Stated briefly, the general standard in determining if a person is responsible for his actions is this: The accused is not criminally responsible if his unlawful act was the product of a mental disease or disorder. As you will note, this standard embraces two distinct and necessary elements. One such element is that the defendant must have been suffering from a mental disease or a mental defect at the time of the unlawful act; and secondly, the unlawful act must have been the product of the mental disease or mental defect.

Let me explain in a little greater detail the pertinent elements of this standard, they being, one, mental disease or mental defect, and two, the unlawful act being the product of the mental disease or mental defect. A mental disease is a condition of the mind that is considered capable of improving or deteriorating. . . .

Now what do I mean when I say that the unlawful act must be the product of the mental disease or mental defect? I mean this: that the facts of the record are such that you the jury may draw a reasonable inference that the accused would not have committed the act that he did commit if he had not been mentally diseased or mentally defective at the time.

In other words, there must be a relation between the mental disease or the mental defect and the act and whatever it may be in degree, it must be critical, decisive, determinative or causal in its effect in respect to the act. The phrases 'product of' and 'causal connection' are not intended to be as precise as though they were chemical formulae. They mean that the facts concerning the mental disease or mental defect and the facts concerning the act are such as to justify reasonably the conclusion that but for this mental disease or mental defect, the act would not have been committed.

Question No. 5, we repeat, inquired as follows:

What is the rule governing an acquittal on grounds of insanity?

The following answers were characteristic of those erroneously responding to it:

Mentally insane, such that the person is not reasoning or using his mind in the ordinary sense. "He must be completely unreasonable, incapable of thinking."

Question No. 9, we repeat, inquired as follows:

What degree of mental disease or defect is needed for an insanity acquittal?

The following answers were characteristic of those erroneously responding to it:

To the effect that the person had no knowledge or control of his actions at the time of the crime.

The disease or defect must be to the degree that the crime would not have

been committed without it. Probably to the degree that the person had no control over his act.

A mental disease or defect for an insanity acquittal would have to be serious enough to color judgment.

When the insane person is completely unconscious of what he is doing.

Reasonable doubt as to the defendant's sanity, that he was able to judge his actions at the time of the crime.

To the extent that the individual was not responsible for his actions.

To the point it was not his fault for committing crime.

Question No. 10, we repeat, inquired as follows:

Will minor mental diseases (*i.e.*, psychoneuroses or personality disorders) qualify for an insanity acquittal?

The following answers were characteristic of those erroneously responding to it:

I do not think that these minor mental diseases would qualify for an insanity acquittal as the person would probably still have control over his acts and could distinguish right from wrong.

Yes, if they make the person unable to distinguish between right and wrong but usually these minor ones don't.

They shouldn't, actually every person has a slight case of neuroses, but psychosis, yes.

Question No. 18, we repeat, inquired as follows:

May the jury acquit a defendant by reason of insanity if at the time of the commission of the crime he knew what he was doing and understood that it was wrong?

The following answers were characteristic of those erroneously responding to it:

Yes, if the insanity caused a compulsion which the person was unable to control.

No, but how can we make sure that he knew it was wrong and still be insane, if he knew it perfectly well and did it with intention. . . .

Yes, mental disease might impel him to act.

The charge by Judge B on the subject matter of questions 5, 9, 10 and 18 read in salient part as follows:³⁸

. . . there are certain types of persons afflicted with mental diseases or mental defects who are held responsible for particular crimes, and the test is this: If the defendant was suffering from some mental disease or from some mental

³⁸ U.S. v. Brown, Criminal Action No. 744-61.

defect, or to put it another way, from diseased or defective mental condition, at the time when the crime was committed, and further—and this is very important—if the crime itself was the product of that mental disease or mental defect, then, and only then, the defendant is not responsible for his criminal act.

Now, let me repeat. If you find that the defendant was not suffering from a mental disease or mental defect at the time of the commission of the offense, then you may not find him not guilty on the ground of insanity. But even if you find that he was suffering from a mental disease, but if you find that the crime was not the product of the mental disease or mental defect, then, too, you may not find him not guilty on the ground of insanity.

Now what makes a crime the product of mental disease? If the defendant is so mentally ill or so mentally defective that he is unable to distinguish between right and wrong and is unable to realize that what he was doing was wrong, then the crime would be a product of the mental illness or mental defect.

However, it is not in every case in which the accused is suffering from some mental abnormality or some mental deficiency or defect or from some mental disease or disorder that he is to be deemed free from liability for his crimes and not responsible for his acts. There are many abnormal persons or many persons with mental deficiencies or persons suffering from mental disorders or diseases or personality disorders whom the law holds responsible, in certain instances, for a crime that such a person may commit. Obviously there are good reasons for this.

Further, even if the defendant could distinguish between right and wrong and if he could realize that what he was doing was wrong, yet because of his mental derangement or defect he was unable to adhere to the right and was unable to refrain from doing wrong, then also the crime can be said to be a product of mental disease.

On the other hand, if in spite of a mental illness or a mental defect the defendant was able to distinguish between right and wrong and to know that what he was doing was wrong and, further, if he was able to refrain from doing wrong and able to adhere to the right and was under no compulsion or inner urge or irresistible impulse by reason of his mental illness or defect the criminal act, then, too, it cannot be said that the crime was the product of mental illness.

First, what is the evidence of the question as to whether the defendant was suffering from any disease or mental defect at the time he committed the alleged crime? You will recall that the crime is charged to have been committed on August 31st, 1961. On January 25th, 1962, about five months later, it was determined at a staff conference that the defendant was suffering from a mental disease at the time of the conference, five months later. The doctors admit that the defendant was not clearly or flagrantly insane. There are two diagnoses, in a sense. Some of the members of the staff conference reached the conclusion that the defendant was suffering from a mental illness, the name of which is schizophrenic reaction, paranoid type. Dr. Owens, who presided at the staff conference and who is the superior officer of the other two expert witnesses,

testified that in his opinion the defendant was suffering from a lesser mental disease, known as paranoid personality, and that, too, was not insanity. The majority of the doctors were unable to form an opinion whether the defendant suffered from mental illness on August 31st, when the crime is charged to have been committed. However, two of the members of the staff conference, Dr. Dobbs and Dr. Platkin, testified that in their opinion the mental illness from which the defendant was suffering had been in existence for some time. They all agreed that the defendant was of normal intelligence and had no mental defect, therefore, or mental deficiency.

Now let us take the lay testimony. The two police officers who made the arrest testified that the defendant was with them for three or four hours on the day of his arrest, on August 31st, and that in the course of that time they observed him, they questioned him, and that they found him normal and of sound mind.

Now, all three doctors who testified in this case agree that the defendant's mental disease, if he had it, was not of a kind that would have prevented him from distinguishing between right and wrong and that he would have been able to tell and to know that what he was doing was wrong. Dr. Platkin further testified—I think I want to modify my remark. Two of the three doctors had agreed that the defendant was not prevented by mental disease from distinguishing between right and wrong and that he would be able to know that what he was doing was wrong. Dr. Dobbs, the lady doctor, said she could not form an opinion, she did not know. Well, I think she said one thing at one time and another thing at another time. She said at one time that he would have been able to distinguish right from wrong, but that she had difficulty in saying whether he was moved by an irresistible impulse. Dr. Platkin, however, was definite that the defendant could distinguish between right and wrong, could have known that what he was doing was wrong, and also that he was not moved by any irresistible impulse or any compulsion caused by mental disease, that what he was led by was just his addiction and not any mental disease. Dr. Owens testified that in his opinion the defendant was able to distinguish between right and wrong and to adhere to the right as of the date of his examination.

Question No. 5, we repeat, inquired as follows:

What is the rule governing an acquittal on grounds of insanity?

The following answers were characteristic of those erroneously responding to that question:

If insane, the defendant must not be able to judge right from wrong. He must be in this state at the time the crime was committed.

Enough evidence must be given to prove beyond a reasonable doubt that the defendant was not in control of his faculties during the crime.

That the mental disease rendered him helpless re his actions.

The defendant must be diagnosed as being incapable (insane) of understanding the nature of his crime at the time it was committed.

The defendant has to be proven beyond a reasonable doubt that he is insane or incapable of making decisions or caring for himself.

Question No. 9, we repeat, inquired as follows:

What degree of mental disease or defect is needed for an insanity acquittal?

The following answers are characteristic of those erroneously responding to that question:

The person doesn't know right from wrong or that he knows right from wrong but is still unable to do the right because of certain impulses which influence him to do wrong.

Any degree which prevents rational thinking. A mind which goes awry of what society expects.

To the extent that they interrupted correct thinking or instigate unreasonable occurrences.

When the person cannot distinguish right from wrong.

Knowing that the person was insane and incapable of making decisions at the time of the crime is sufficient.

The degree to which the defendant is completely unaware or has no control over his actions.

Question No. 10, we repeat, inquired as follows:

Will minor mental diseases (*i.e.*, psychoneuroses or personality disorders) qualify for an insanity acquittal?

The following answers are characteristic of those erroneously responding to that question:

No, because the person still knows when he is doing wrong.

If it can be proven that the mental disease kept the defendant from knowing right from wrong and/or adhering to the right. However, psychoneuroses or personality disorders are not usually of the order to inhibit such distinctions.

No, it must be insanity affecting a person's concept of right and wrong.

Obviously from what the judge told the jury I must answer *NO*.

No—nearly everyone suffers from some minor mental disorders.

Question No. 18, we repeat, inquired as follows:

May the jury acquit a defendant by reason of insanity if at the time of the commission of the crime he knew what he was doing and understood that it was wrong?

The following answers were characteristic of those erroneously responding to that question:

No, if he could help himself. Yes, if he couldn't help himself or stop himself.

Yes, they can, but it would not be in keeping with their instructions. In other words they should not.

Under the law as stated in the judge's charge to the jury—*NO!*

The charge by Judge C on the subject matter of questions 5, 9, 10 and 18 read in salient part as follows:³⁹

In order for a person to be relieved of responsibility for crimes by reason of insanity, first, he must have suffered from a mental disease or defect at the time of the offense and secondly, his acts must have been the product of the mental disease or defect.

It is not necessary that any particular type of mental disease or defect be proved. All that is necessary is that the defendant was suffering from any mental disease or defect at the time of the offense.

The degree of mental illness is not controlling. The question for your determination is whether the defendant was in fact suffering from any mental disease or defect.

Now, as to the second element, that the criminal act was the product of the mental abnormality. This simply means that the act resulted from or was produced by or was caused by the mental disease or defect suffered by the defendant or to put it another way, that the defendant would not have committed the offense but for his mental disease or defect.

As one example of this causal connection or relation, if a person at the time of the commission of a crime is so deranged mentally that he cannot distinguish between right and wrong or able to tell right from wrong, is unable by virtue of his mental derangement to control his actions, then his act is the product of his mental derangement.

Question No. 5, we repeat, inquired as follows:

What is the rule governing an acquittal on grounds of insanity?

The following answers were characteristic of those erroneously responding to it:

That person didn't know right from wrong when crime was committed.

The defendant must not have been responsible for his acts because of his mental condition; he had no control over his actions.

Was crime committed while defendant was affected by his disease—could he tell right from wrong and control his conduct?

Question No. 9, we repeat, inquired as follows:

What degree of mental disease or defect is needed for an insanity acquittal?

The following answers were characteristic of those erroneously responding to it:

Any degree that would impair an individual's judgment at the time of the crime.

A bad one—the person must be completely incapable of controlling himself.

Enough so that defendant doesn't know difference between right or wrong—or that, because of the nature of the illness, he couldn't keep from committing the crime.

³⁹ U.S. v. Horton, Criminal Action No. 59-62.

That the defendant was mentally incompetent at the time the actions were committed.

The degree to which the individual can no longer be held responsible for his acts.

He need be injurious to himself or society.

Person not capable of handling self.

When the defendant is not responsible for his actions he can't control them and has as a result of the disorder lost his senses of right and wrong.

That the person didn't realize what he was doing at the time of the crime.

Question No. 10, we repeat, inquired as follows:

Will minor mental diseases (*i.e.*, psychoneuroses or personality disorders) qualify for an insanity acquittal?

The following answers were characteristic of those erroneously responding to it:

There is no set answer for this. It depends on how seriously the psychoneuroses or personality disorders have effected the person's orientation with reality and how deeply rooted the causes of these disorders may be.

Not usually. If the defendant is aware of what he is doing and that it is wrong he is not acquitted.

If these neuroses or disorders are of such a degree of anxiety or frustration so as to compel the individual to involuntary action.

Only if they prevent the defendant from controlling his actions.

Yes, certainly, if they influenced the act, providing the jury thinks the man was sufficiently abnormal.

No. For in the cases of the psychoneurosis and personality disorders the individual has not lost contact with reality and he is still able to distinguish right from wrong.

Question No. 18, we repeat, inquired as follows:

May the jury acquit a defendant by reason of insanity if at the time of the commission of the crime he knew what he was doing and understood that it was wrong?

The following answers were characteristic of those erroneously responding to it:

No. Insanity is judged, I think, by a demonstration that the defendant didn't know the difference between right and wrong.

If the person were insane, his reasoning ability would be affected, and he therefore would not realize the moral implications of his crime. If he knew what he were doing I would have doubts as to his insanity being the cause of the crime. I don't think the jury should acquit the defendant on these grounds alone.

Yes—but it must be shown that the defendant was suffering from insanity and not a disease.

It may if they decided that he could not control himself.

No (contradiction in terms).

No, the person is guilty if he knew what he was doing at the time, then he wouldn't have been considered to have a mental disease.

The charge by Judge D on the subject matter of questions 5, 9, 10 and 18 read in salient part as follows:⁴⁰

This defense of insanity has two parts. First, it must appear that the defendant at the time the offense was committed was suffering from some mental disease or to put it in a somewhat different way, he must have been suffering from a diseased mental condition at the time the crime was committed.

Second, it must appear that the crime was a product of this mental disease.

In certain instances the law does not hold an insane person responsible for his acts. In order to be responsible for his acts, a person must have the mental capacity to commit the act with which he is charged. It is not however, in every case in which the accused is suffering from mental abnormality or some mental disease that he is not to be held responsible for his act. There are many abnormal persons whom the law holds responsible in certain instances for a crime that such a person commits.

On the first point of the defense of insanity, the Court instructs you that by mental disease is meant mental illness, some medically recognizable disease of the mind. By disease is meant a condition which is considered capable of either improving or deteriorating. Further, in determining whether the defendant was insane, that is, whether he was suffering from mental disease on the day of the commission of the crime, you also have a right to consider whether he knew the difference between right or wrong, or even though he knew the difference between right and wrong, whether he acted under the compulsion of an irresistible impulse or had been deprived of or lost the power of his will, but you are not limited in these matters, but may consider all of the evidence in order to reach a conclusion as to whether or not the defendant was or was not suffering from a mental disease at the time in question.

Question No. 5, we repeat, inquired as follows:

What is the rule governing an acquittal on grounds of insanity?

The following answers were characteristic of those erroneously responding to it:

The rule governing an acquittal on grounds of insanity states that the defendant must have been insane (to the extent that he didn't know right from wrong) at the time of the crime.

Defendant found not guilty because his actions were beyond his control.

⁴⁰ U.S. v. Brooks, Criminal Action No. 355-62.

Question No. 9, we repeat, inquired as follows:

What degree of mental disease or defect is needed for an insanity acquittal?

The following answers were characteristic of those erroneously responding to it:

The defendant must be proved seriously mentally ill enough at the time he committed the crime or that he was so mentally ill he didn't know what he was doing or he knew what he was doing but he had an irresistible urge to commit the act.

A high enough degree to cause the defendant to commit a crime (compulsion).

The degree that the person has had a history of irresponsible acts due to this illness.

To the degree that the mentally ill person commits a crime. Many people suffer from mental defects or diseases but are not so afflicted as to commit a crime without the knowledge of the commission of the crime, or that the act they are performing is a criminal one. I think the best answer is whether they are impaired to such a degree as to know right from wrong or are unaware of the crime itself after they committed it.

To the degree of not knowing why one committed the crime.

When one is harmful to himself and those around him.

Question No. 10, we repeat, inquired as follows:

Will minor mental diseases (*i.e.*, psychoneuroses or personality disorders) qualify for an insanity acquittal?

The following answers are characteristic of those erroneously responding to question No. 10:

Yes, if they place the ability to control one's actions beyond one's will.

Question No. 18, we repeat, inquired as follows:

May the jury acquit a defendant by reason of insanity if at the time of the commission of the crime he knew what he was doing and understood that it was wrong?

The following answers are characteristic of those erroneously responding to it:

Yes, if the defense has proved that the defendant was urged on by a compulsion.

No, because if he knew it was wrong then just why did he do it in the first place?

No!!!

Analysis of Findings

A statistical analysis was also undertaken to provide further depth.

From this perspective it was clear that the rate of comprehension of the law of insanity was dramatically low for each judge. While the experimental group's comprehension on separate questions varied from 11 per cent to 69 per cent, more significance should be attached to the bottom marginal percentage for each question. From this perspective the variation between questions is only 30 per cent to 43 per cent. It is also clear that the rate of comprehension from charge to charge is low. The right hand marginal averages show that charge A had an average comprehension rate of 40 per cent, the highest of the four; charge C has the lowest comprehension rate, 31 per cent. Parenthetically, it may be observed, there appears to be no obvious relation between length of charge and comprehension. The shortest charge, A, did in fact have the highest rate of comprehension, but the longest charge, D, did not have the lowest rate.

This is documented in Table I on a charge by charge and judge by judge basis.

TABLE I

*Group Comprehension Rates on Selected Questions
of Productivity and Mental Disease*

| Charge | Questions | | | | Overall Percent |
|------------------------------------|-----------|-------|--------|--------|--------------------|
| | No. 5 | No. 9 | No. 10 | No. 18 | |
| A (231 lines long: 48 subjects) | 39% | 50% | 52% | 20% | (40%) |
| B (440 lines long: 55 subjects) | 18% | 11% | 35% | 69% | (33%) |
| C (484 lines long: 70 subjects) | 31% | 36% | 41% | 17% | (31%) |
| D (539 lines long: 56 subjects) | 33% | 28% | 47% | 28% | (34%) |
| Overall Percent | (30%) | (30%) | (43%) | (33%) | |

What these findings mean can be graphically portrayed. In three out of four trials, only one-third of the jurors could be expected to recall the judge's charges with significant accuracy during deliberations on the law of insanity.

We note that the mock jury's comprehension of judicial instructions was distinctly lower than the 58 per cent accuracy count found in the Chicago study. This finding is suggestive but not conclusive. The designs of the two experiments were different. There is thus a lack of direct comparability between their results. For significant answers to the question of whether there has been a decline in the quality of instructions to the jury, a sample of charges, drawn from the early years following *Durham* would have to be compared with a sample drawn from later years.

A comparison of the accuracy of recall of the insanity defense aspects of the charge with that of the burden of proof statements contained in the self-same judicial instructions is however more helpful. Table II provides such an analysis on a charge by charge and judge by judge basis.

TABLE II

*Comprehension of Productivity and Mental Disease
Compared with Burden of Proof, Based on Selected
Questions*

| <i>Judge</i> | <i>Mental Illness</i> | <i>Burden of Proof</i> |
|--------------|---------------------------|--------------------------------|
| A | 40% | 38% |
| B | 33% | 35% |
| C | 31% | 48% |
| D | 34% | 50% |

What was said of the law of insanity must now be said of the burden of proof in the charges: comprehension was dramatically low. We must note at this stage that the law of the insanity defense is typically discussed but once, near the conclusion of the charge, while the burden of proof requirement is repeated at least twice or three times throughout the body of the charge. If repetition is important to comprehension, the burden of proof instruction should have a more positive effect. Failure to secure such an effect is particularly discouraging to a democratic social order.

If comprehension of the charge by the jury is to be analyzed as well as described, two variables must be dealt with: comprehension as a function of judge's message to the jury and comprehension as a function of the jury's reception of the message, *i.e.*, the charge.

A relevant inquiry is whether the low rate of comprehension is explainable by the quality of the mock jurors utilized or the judicial proclivities manifested in the charge. One may properly assume in this connection that a difference in comprehension in a postulated direction between two homogeneous samples would provide meaningful substantiation of these assertions.

It is common knowledge in the District of Columbia that the local universities which took part in this study draw their students from predominantly different segments of the population at large. It was therefore assumed that classes at the same college were more like one another intellectually and academically than they were like classes at any other university, hence that each college sample had a high degree of homogeneity.

College Sample I was composed of three classes or subsamples. Each class was read a different charge: one by Judge A, another by Judge B, the third

by Judge D, respectively. The three classes comprising College Sample II were also read charges by Judges A, B and D, respectively. College Sample III, however, was made up of only one class or subsample which was read the charge by Judge C. This was not intentional but stemmed from scheduling difficulties.

For the purpose of testing the hypothesis that there was no difference between the comprehension rates of the subjects in this study and the comprehension rates noted in the Chicago mock jury, the scores of the subsample classes were combined. This was repeated for the purpose of comparing comprehension of burden of proof with that of the insanity defense. This procedure provided the data utilized in Tables I and II. Thus as shown by those tables, Judge A's charge, to use that example, was comprehended by 40 per cent of the subjects (the subjects were combinations of students from both College I and College II).

The question arises as to whether the inadequate comprehension discovered in this context is attributable to the quality of the audience or the manifest attitude of the judges. Since Samples I and II were qualitatively distinguishable and were read the same charges, they could definitely be assumed capable of providing some useful answers. Sample III represented the only college to have heard Judge C's charge and therefore cannot be compared with either of the other samples; it was omitted in the analysis of differences between judges and between samples set forth in Table III.

TABLE III

Experimental Jury Comprehension Rates for Each Charge

| Sample | Judge | | | Overall Percent |
|---------------|-------|-----|-----|-----------------|
| | A | B | D | |
| I | 41% | 33% | 46% | (40%) |
| (78 subjects) | 27* | 27* | 24* | |
| II | 37% | 36% | 40% | (38%) |
| (82 subjects) | 21* | 28* | 33* | |

* number of subjects in each class

Test results reflect a slight, although not statistically significant, difference between the samples. As Table III shows, Sample I achieved an overall comprehension rate of 40 per cent whereas Sample II received only 38 per cent in comprehension. The college for Sample I had a higher academic standing than the college for Sample II. The expectation that Sample I would have a significantly higher proportion of subjects comprehending the charge has not been realized. From the perspective of this study, these results may then be interpreted to mean that comprehension will not be significantly increased regardless of the quality of the jury.

Table III also provides data to test the assertion that there is a difference between rates of comprehension of charges attributable to the manifest leaning of the judges toward the insanity defense. It was postulated, *supra*, that the judges would rank B, A and D, (moving from low to high) in making their respective instructions comprehensible. That is, it was expected that the judges would hold their positions relative to one another, from sample to sample, regardless of the actual rate of comprehension. The data show a difference in comprehension of charges stemming from different judges in the exact direction forecast.

In Sample I, moving from low to high comprehension on the part of the audience, the judges rank B, A and D; in Sample II they also rank B, A and D. The hypothesis seems thus substantiated by these data; the difference between judges is significant.

We note parenthetically that it has been only recently that the legal system and its decision-makers (judges, lawyers and jurors) have been subjected to anything approximating systematic empirical inquiry, particularly with regard to the personality variable. Our data suggest the need for intensified research to assess more precisely the role of this variable in this field.⁴¹

The results, in sum, must be regarded as scientifically tentative; further research is clearly needed. In the meantime, it does not appear immodest to suggest that these results are significantly suggestive of the actual working of our trial system.⁴² The emerging picture does not lend itself to self-congratulation by any of the decision-makers involved, be they judges, jurors, or lawyers.

CONCLUSION

Jurors, as judged by the samples analyzed and reported, manifest startlingly low comprehension of the charge materials with which they are presented.

This conclusion does not come as a surprise to trial lawyers. It has thus been commonplace among trial lawyers to assume that it "is wholly unrealistic that a lay jury can absorb instructions in a complex case and later in the jury room, relying solely on memory to recall the contents of the instructions with the necessary precision to decide the issues meaningfully and according to the law and the evidence."⁴³

Some observers have characterized the jury instruction in a complex case as tending to be "a tangled complexity of verbiage, much of which is neither

⁴¹ WEYRAUCH, *THE PERSONALITY OF LAWYERS: A COMPARATIVE STUDY* (1964) is deserving of widespread attention in this context.

⁴² The results are indeed consistent with the views of the fate of the insanity defense expressed by the majority of trial lawyers interviewed by project staff members in the District of Columbia in 1959-1960.

⁴³ Raymond, *Merits and Demerits of the Missouri System of Instructing Juries*, 5 ST. LOUIS U. L.J. 317, 319 (1959).

usable nor understandable by laymen."⁴⁴ Available empirical evidence does not contradict the validity of these observations in the context of the insanity defense in the District of Columbia. Such evidence in fact points inexorably to the failure of the pedagogic function of the trial court, a failure which invites in turn the usurpation of the law-determining function by the jury. It seems obvious in the context of the insanity defense as well as in any other context, that jurors are bound to fall back upon a jurisprudence of their own in the absence of clearcut guidance from the bench.

We refer again to the data furnished by the public opinion surveys, discussed above, highlighting the difficulty manifest by the public in conceptualizing mental illness. The popular conception has thus been couched in terms of bizarre behavior manifestations, suggestive of the "Wild Beast Test," and an inability to distinguish right from wrong, or some other cognitive failure, suggestive of the M'Naghten Rules.

In the light of the data furnished by our study, it seems obvious that these conceptions, rather than those of early *Durham* jurisprudence guide and control jury deliberations in cases involving the insanity defense in the District of Columbia.⁴⁵ These conceptions moreover would seem to be reinforced, however subtly, by some jury charges.⁴⁶ *Plus ça change, plus c'est la même chose*. The impact of early *Durham* jurisprudence on the trial proceedings is in sum not observable even in the days when such jurisprudence represents official doctrine.

Far more shocking than the morass of ignorance respecting mental disease and defect is the operative presumption of the defendant's guilt expressed in the studied reactions of mock jurors as to burden of proof. Thus, the low comprehension characterizing the assessment of the insanity defense is fully matched by the low comprehension governing the assessment of the burden of proof. This finding is particularly ominous because plainly correct instructions as to burden of proof are given on at least two or three occasions in each charge while the insanity defense is dealt with only once as a general rule.

It seems relevant to point out in this connection that the comprehension of instructions seems to vary depending, in significant measure, upon the nature of the instructions and their source. Inquiry into the individual judicial proclivities in this field seems no more irrelevant than in others.⁴⁷ It

⁴⁴ Note, 98 U. PA. L. REV. 223-4 (1949).

⁴⁵ We refer to "early" *Durham* jurisprudence by design and raise the question as to whether the later case law of the United States Court of Appeals covering the last three years has not effectively destroyed the legal validity of the proposition, once championed by the court, that "the assumption that psychosis is a legally sufficient mental illness and that others are not is erroneous." Cf. *Briscoe v. United States*, *supra* note 7, with *McDonald v. United States*, *supra* note 21, and *Hightower v. United States*, *supra* note 23.

⁴⁶ Motivations of the trial judges, among other variables affecting the insanity defense, are assessed by means of a "content-analysis" of such jury instructions in a study now in process of preparation for publication by the co-authors.

⁴⁷ See generally LASSWELL, *POWER AND PERSONALITY* (1948).

may be suggested at this time that the attitude of the judge towards the rights of the accused as well as toward the insanity defense may be material in affecting the degree of jury comprehension of the applicable law contained in the jury instructions. Obviously this is something which requires extensive testing under far more rigorous conditions than obtained in the study which we have described.

Regardless of judicial attitude, however, the fact remains, we repeat, that jurors' comprehension of the analyzed materials did not even achieve the 58 per cent comprehension rate reported in the Chicago study.

We conclude in sum that the studied instructions have not been conducive to fair or enlightened jury fact-finding. Research designed to provide a model jury charge in this field, to speak of no others, is overdue.⁴⁸

Without awaiting the results of such research however we suggest that the jury charge might well be improved by making it somewhat shorter and structurally more memorable and by focusing it explicitly on such areas of jury misconceptions as have been laid bare. The avoidance of the conveyance of judicial bias, conscious or unconscious, subtle or otherwise, is of course critical and will be the subject of a study based upon "content analysis."

It seems reasonable to endorse the practice prevailing in some jurisdictions of permitting the jury to take copies of the charge into the jury room and thus avoid the needless addition of the fallibility of human memory to other imponderables, affecting the fate of the accused.⁴⁹

We would also endorse a system of "training for jury service." The subjection of prospective jurors to indoctrinating lectures on the rules which they are likely to be called upon to apply—not the least of which is the presumption of innocence of the accused—does not seem an exorbitant price for a public order dedicated to the maintenance of human dignity. Ideally—it would seem to us—such lectures would be given by members of the appellate bench.⁵⁰

Most compelling of all, however, is the task of educating the public at large for which lawyers must assume primary responsibility. For until such time as the public itself elects to place a "prime value on the individual—

⁴⁸ Such research could well involve measurement of readability. See generally FLESCHE, *HOW TO TEST READABILITY* (1951). The lessons derived from such a study could in turn be utilized in the formulation of a tentative model charge. Such a charge could then be subjected to comprehension testing with appropriate controls. Final reformulation of the model charge could then take place in the light of the over-all experience.

⁴⁹ See generally Cunningham, *Should Instructions Go Into Jury Room*, 33 J. of State Bar of Cal. 278 (1958).

⁵⁰ Varying degrees of indoctrination of prospective jurors including a judicial address to prospective jurors outlining their duties and responsibilities have received appellate approval in the past. See, e.g., *People v. Izzo*, 14 Ill. 2d 203, 151 N.E. 2d 329 (1958); *People v. Lopez*, 32 Cal. 2d 673, 197 P. 2d 757 (1948), *Horton v. United States*, 256 F. 2d 138 (6th Cir. 1958). Cf. The suggestions for reforms, designed to render trial by jury less dangerous, made by the late Judge Jerome Frank, in FRANK, *COURTS ON TRIAL*, 145 (1950).

any individual, be he citizen or alien, useful or harmful, sane or mad,"⁵¹ we are bound to witness a continuation of distressing discrepancies between aspiration and performance.⁵²

APPENDIX

Comprehension Test

1. What defense did the defendant raise in answer to the criminal charges?
2. What are the possible verdicts the jury can return in this case?
3. What verdict do you think the judge favored? Why?
4. What is your understanding of the duty of the jury under the following circumstances respectively:
 - (a) The defendant presents some evidence that the crime or crimes charged against him are the products of a mental disease and there is no rebuttal by the prosecution?
 - (b) Upon consideration of the evidence of prosecution and defense witnesses, the defendant appears to have been the victim of a mental disease as of the time of the crime and equally significant inferences are possible in either direction as to whether the crime was a product of the mental disease?
5. What is the rule governing an acquittal on grounds of insanity?
6. What disposition is made of a person found not guilty by reason of insanity?
7. What is a mental disease?
8. What is a mental defect?
9. What degree of mental disease or defect is needed for an insanity acquittal?
10. Will minor mental diseases (i.e., psychoneuroses or personality disorders) qualify for an insanity acquittal?
11. Must the defendant have a mental disease at the time of the trial to be found not guilty by reason of insanity?
12. What is assumed to be true about the defendant's mental condition before any evidence is offered?
13. What is the effect of some evidence of mental disease?
14. Is this the same as the effect of some evidence of insanity?
15. What should be the verdict if the evidence indicated, respectively, beyond a reasonable doubt that:
 - (a) the defendant had no mental disease or defect?
 - (b) the defendant had a mental disease or defect but his act was not the product of the disease?
 - (c) the criminal act was the product of the defendant's mental disease?
16. What should be the verdict if the evidence raised a reasonable doubt
 - (a) that the defendant was a victim of mental disease as of the time of the crime?
 - or
 - (b) that the defendant's crime was caused by a mental disease?

⁵¹ Dession, *The Technique of Public Order*, 5 BUFFALO L. REV. 22 (1955).

⁵² Such discrepancies of course are by no means confined to the insanity defense or indeed of the criminal trial. See ARENS AND LASSWELL, *IN DEFENSE OF PUBLIC ORDER* (1961).

17. What is the difference, if any, between a crime produced by insanity and a crime produced by mental disease or defect?
18. May the jury acquit a defendant by reason of insanity if at the time of the commission of the crime he knew what he was doing and understood that it was wrong?