

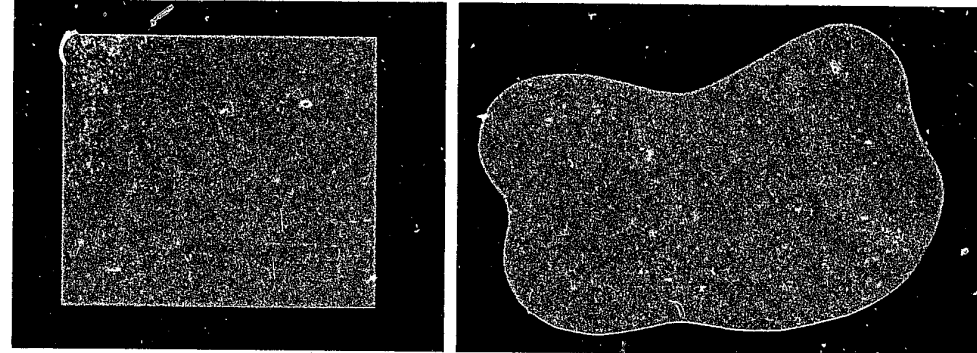
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Cold War or *Entente Cordiale*?

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LAW AND PSYCHIATRY:
Cold War or *Entente Cordiale*?

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The Isaac Ray Award Lectures

Sheldon Glueck, *Law and Psychiatry* (1962)

LAW AND PSYCHIATRY

Cold War or Entente Cordiale?

Sheldon Glueck

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To Mr. Justice Felix Frankfurter

PREFACE

WITH BUT slight modifications, this book consists of a series of four lectures delivered at the School of Law and the School of Medicine of Tulane University in early April, 1962, under the Isaac Ray Award of the American Psychiatric Association. I am grateful to the Association for its recognition. I have long been interested in the relationship of psychiatry to criminal law; and the Award stimulated me to re-examine views I expressed in 1925, in *Mental Disorder and the Criminal Law*. For readers interested in the more technical aspects of the problem I have supplied ample documentation in the notes.

It is a pleasure to record my thanks to Dr. Herbert E. Longenecker, President of Tulane, Dr. Ray Forrester, Dean of the School of Law, and Dr. Maxwell E. Lapham, Dean of the School of Medicine, for their sponsorship of these lectures. I am most happy, also to express my appreciation to Dr. Robert G. Heath, Professor and Chairman, Department of Psychiatry and Neurology, and Mr. Ralph Slovenko, Associate Professor of Law, Tulane University, for their cordial welcome to my wife and myself. The kindness of all these gentlemen has more than justified the South's well-known reputation for gracious hospitality.

My thanks are due to Mr. Thomas Chittenden of the Massachusetts Bar, a former student of mine at the Harvard Law School, for aid in digesting numerous recent decisions and for letting me "try out" these lectures on him. I am also appreciative of the excellent typing of the manuscript by

Miss Dorothea Munro and Mrs. Mary Sheahan Reggiani and of patient administrative aid by Miss Lillian Buller.

I am also indebted to Mr. Philip A. Putnam, Assistant Librarian, and Mr. George A. Strait, Assistant Librarian for Reference, Harvard Law School, for their highly skillful aid in locating relevant materials.

As ever, my deepest obligation is to my wife, for her unfailing encouragement and companionship, both general and intellectual.

. . . .

A long time ago I had the pleasure of being examined by a Harvard committee consisting of a distinguished psychologist, the late Professor William McDougall, a vibrant physician and social reformer, the late Dr. Richard Clarke Cabot, and a brilliant and friendly legal scholar, Professor Felix Frankfurter. The occasion was a doctoral examination during which I plunged enthusiastically (and in some peril of drowning) into a turbulent stream of law running one way and psychopathology running the other, and ethics adding its own whirlpool. I have never forgotten the reassuring leading questions thrown to not at me, like lifesavers, by Professor Frankfurter. Since then, I have enjoyed the stimulation of Professor (later, Mr. Justice) Frankfurter in my roles as student, colleague, and friend.

I cordially dedicate this little work to him in the confident assurance that his generous spirit will play down its shortcomings and play up whatever merit it may have.

Harvard Law School,
April, 1962

SHELDON GLUECK

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LAW AND PSYCHIATRY:

Cold War or *Entente Cordiale*?

LECTURE I

DILEMMAS IN THE PARTNERSHIP OF LAW AND PSYCHIATRY

I

WHEN THE AMERICAN PSYCHIATRIC ASSOCIATION tendered me the *Isaac Ray Award*, I hesitated to accept it. I felt I had already made whatever modest contribution I was destined to make to the vexing problem of the relationship of criminal law to psychiatry; and it seemed to me that I could add little that is new to what had since been said by the learned lawyers and psychiatrists who preceded me in the series of *Isaac Ray Lectures*.¹ As a young graduate student at Harvard in 1925, I perpetrated my first book, *Mental Disorder and the Criminal Law*;² and I there ex-

¹ Bazelon, D., *Equal Justice for the Unequal. Isaac Ray Lectureship Award Series* (mimeographed 1961); Biggs, J. Jr., *THE GUILTY MIND: PSYCHIATRY AND THE LAW OF HOMICIDE* (New York, Harcourt, Brace & Co. 1954); Guttmacher, M., *THE MIND OF THE MURDERER* (New York, Farrar, Straus & Cudahy 1960); Roche, P. Q., *THE CRIMINAL MIND* (New York, Farrar, Straus & Cudahy 1958); Overholser, W., *THE PSYCHIATRIST AND THE LAW* (New York, Harcourt, Brace & Co. 1953); Weihofen, H., *THE URGE TO PUNISH* (New York, Farrar, Straus & Cudahy 1956); Zilboorg, G., *THE PSYCHOLOGY OF THE CRIMINAL ACT AND PUNISHMENT* (New York, Harcourt, Brace & Co. 1954).

² Glueck, S., *MENTAL DISORDER AND THE CRIMINAL LAW* (Boston, Little, Brown & Co. 1925).

patiated at length—693 pages of length, to be precise—on the issues of law, morals, psychiatry, and psychology entangled in the “defense of insanity.” I have been wondering whether, with the thirty-seven years that have intervened, I ought not to conclude that the Statute of Limitations has run against my claim to say more on that notorious defense.

As to judicial growth since 1925, the most significant contribution is that of the now famous 1954 decision of the United States Circuit Court of Appeals for the District of Columbia in the *Durham* case.³ The opinion in that case was based on a belated recognition of certain ideas long current among those who had been calling for modernization of the law’s dealing with the mentally ill defendant. It is nevertheless true that Judge Bazelon’s formulation on behalf of the court in *Durham* remains a significant landmark in a swampy and murky area of the law. A vast literature—psychiatric, legal, and moralistic—has grown up around it;⁴ and since it reawakens certain fundamental questions above and below the surface of the Criminal Law, I was persuaded to dig again into these troublesome yet fascinating areas.

The *Isaac Ray Lectures* are intended to advance friendly understanding between psychiatrists and lawyers in tasks in which both must participate. As is so often true of partners in a joint enterprise where each has a different job to perform for the success of the whole, disagreements are likely to arise. Lawyers tend to look upon psychiatrists as fuzzy apologists for criminals, while psychiatrists tend to regard lawyers as devious and cunning phrasemongers. I

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

⁴ See TOMPKINS, D. C. (ed.), *INSANITY AND THE CRIMINAL LAW* (Berkeley, University of California, Bureau of Public Administration 1960). This compilation contains many hundreds of references, including those to books which in themselves contain bibliographies. See also LINDMAN, F. T., & MCINTYRE, D. M. JR. (eds.), *THE MENTALLY DISABLED AND THE LAW: THE REPORT OF THE AMERICAN BAR FOUNDATION OF THE RIGHTS OF THE MENTALLY ILL* (Chicago, University of Chicago Press 1961).

will not attempt to assess the quantum of hyperbole in these two excited judgments. Typically, the difference of point of view among the two professions revolves around the defense of insanity in prosecutions for crime. But the area of conflict as well as possible improved cooperation between the two professions is much wider. Too great effort has been expended upon the very small proportion of criminal cases which involve the defense of insanity and not nearly enough on the much larger area of constructive possibilities of professional cooperation in the general run of cases.

Yet when lawyer confronts psychiatrist and the gauge of battle is whether or not the accused because of claimed mental illness is irresponsible, the defense of insanity remains the fighting symbol of contrasting points of view. It is for that reason that one is obliged, in a series of lectures involving the interplay of law and psychiatry, to devote major attention to the implications of that defense.

In the present lecture I propose to examine certain fundamental dilemmas involved in an accommodation of the points of view of jurists and psychiatrists. I expect to do little more than to expound these tension-inducing issues and thereby to raise some questions which I trust will be interesting and challenging. In the two succeeding lectures I propose to go into and beyond basic legal decisions. In the final lecture I shall present a prospectus of certain desirable potentials of the Criminal Law in closer partnership with an ever vitalized Psychiatry and related disciplines.

II

A basic ethical and psychological stumbling block in an analysis of crucial problems of substantive Criminal Law and of sentencing policy is the ancient enigma about whether man possesses “freedom of will” or is instead the

of criminalism, the moral wings of Icarus have already been melted too far and that mankind is in danger of falling into a sea of self-destruction through the soft doctrines of "permissiveness," of therapy in place of punishment, and of too ready verdicts of "not guilty by reason of insanity." The jurist tends to believe that what is needed is stern, albeit fair, punishment for conscious and deliberate wrongdoing which, he is convinced, could have been avoided. He fortifies his position on the grounds of both "just retribution" and deterrence of the offender and prospective wrongdoers. He is willing, nowadays, to concede that perhaps something ought to be done to help the criminal once he has been formally convicted and has "paid the price" of his blameworthiness; but he is inclined to imply that this is the "quality of mercy" rather than any right and reason deriving from the attribution of criminality largely to forces beyond the conscious ken and control of the offender.

The typical psychiatrist, on the other hand, concerned as he is with understanding and therapy in the individual case, tends at the trial to overlook his role as a member of the collectivity of society whilst emphasizing his mission as clinician and doctor. If argued with, it is likely that he would not completely exempt delinquents and criminals of all blame, any more than he relieves his own children of all blame. In his practice he deals often with the reality of the feeling of guilt—both its destructive and its therapeutic currents. Even while insisting on the dominance of subconscious motivation and of early parent-child affective and disciplinary relationships in determining the mental state and behavioral tendencies of his adult patient, he holds him "responsible" to meet the psychotherapeutic session-hours on time and to pay his bills with reasonable promptitude.

The psychiatrist has also observed that with the progress of therapeutic efforts and the release in the disturbed person of repressed materials, the patient gains in understanding, confidence and power—qualities which might be equated with gain in the quantum of old-fashioned "freedom of will." The psychiatrist has seen, too, that even when on a level of conscious communication he sympathetically encourages the patient to control his impulses and improve his efforts and conduct, the patient quite often shows surprising capacity to do so. The psychiatrist also knows of instances, on the other hand, where the comfortable, protected environment of a private mental hospital has induced certain patients to cling to their illnesses, when, with some effort on their part as well as encouragement and therapy by the doctor, they would have developed enough capacity for intelligent choice and self-control to enable them to step once more into the arena of life on the outside.

It would seem, then, that the psychiatrist's personal experience must raise doubts in his mind about the imperious and universal sway of deterministic cause-and-effect in human mind and conduct.

As far as the law is concerned, the conditions of guilt and punishability are set forth with what many judges regard as adequate clarity but about which perceptive legal scholars have long expressed skepticism. For example, of the well-known concept of "criminal intent" in the law, Dean Roscoe Pound long ago said: "Historically, our substantive criminal law is based on a theory of punishing the vicious will. It postulates a free agent confronted with a choice between doing right and doing wrong and choosing freely to do wrong. It assumes that the social interest in the general morals is to be maintained by imposing upon him a penalty

the offender both morally blameworthy and legally culpable because, he claims, the offender could have avoided doing the prohibited act. The jurist thereby expresses a face of truth based on his interpretation of experience. The psychoanalyst who insists that human behavior is largely conditioned by subconscious forces and by crucial experiences of early, dependent childhood concludes that the attitude toward human failing should be sympathetic and therapeutic rather than condemnatory and punitive. Thereby he too is expressing an aspect of truth. And the geneticist, who reminds us realistically of a feature of the problem which many behavioral and social scientists tend to ignore—that there are such tough, and as yet unyielding, substances as genes and protoplasm—is likewise expressing an aspect of truth.

Who shall decide, when doctors disagree,
And soundest casuists doubt, like you and me?

Can these apparently contradictory truths be reasonably accommodated?

It is important that this be done, for these conflicts of basic and emotionally charged belief lead to misunderstandings and clashes of policy and action in daily practice.

Thus the judge, concerned at the trial or in appellate decisions with concepts of conscious, intentional wrongdoing, guilt and punishment, tends to be suspicious of the positivistic and therapeutic attitudes of the psychiatrist, who seeks and often finds causative chains which to him explain the dynamics of antisocial behavior. To the typical jurist the doctrine, "tout comprendre c'est tout pardonner," is fraught with danger to society. He believes that under the mistakenly beneficent sun of modern clinical explanations

of criminalism, the moral wings of Icarus have already been melted too far and that mankind is in danger of falling into a sea of self-destruction through the soft doctrines of "permissiveness," of therapy in place of punishment, and of too ready verdicts of "not guilty by reason of insanity." The jurist tends to believe that what is needed is stern, albeit fair, punishment for conscious and deliberate wrongdoing which, he is convinced, could have been avoided. He fortifies his position on the grounds of both "just retribution" and deterrence of the offender and prospective wrongdoers. He is willing, nowadays, to concede that perhaps something ought to be done to help the criminal once he has been formally convicted and has "paid the price" of his blameworthiness; but he is inclined to imply that this is the "quality of mercy" rather than any right and reason deriving from the attribution of criminality largely to forces beyond the conscious ken and control of the offender.

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corresponding exactly to the gravity of his offense."⁵ However, Pound points out, as a matter of fact "We know that the old analysis of act and intent can stand only as an artificial legal analysis and that the mental elements in crime present a series of difficult problems."⁶

He is of course right. Study of the motivating traits and factors of criminalism shows how little, in most instances, there is of "free will" in the simple, naive sense of the traditional Criminal Law. Yet the troubling fact confronts us that the defense of irresponsibility on the ground of insanity⁷ is but a specific instance of the more general and fundamental legal proposition about which Pound and others have raised such serious doubts; the proposition, namely, that no person can be held criminally liable and punishable for an unlawful act, unless he has "sufficient mental capacity" to "entertain a criminal intent," or to have a *mens rea*, or "guilty mind." And this has immediate, serious, practical implications. For example, a 1960 Kansas decision has the following to say:

. . . it may be noted, that Freudian psychiatrists tend to discount the existence of the capacity in the individual to exercise his free will. Perhaps, it should be noted also that there are other schools of psychiatry beside the Freudian. It is not for the lawyer to decide between these schools. We can only wish all of these learned men success in their quest for knowledge in a new field. But, the law has always insisted upon an exercise of will.⁸

⁵ Pound, R., Introduction to SAYRE, F. B., CASES ON CRIMINAL LAW xxxvi-xxxvii (Rochester, N.Y., Lawyers' Cooperative Publishing Co. 1927). See also POUND, R., CRIMINAL JUSTICE IN CLEVELAND 586 (The Cleveland Foundation 1922).

⁶ POUND, R., CRIMINAL JUSTICE IN CLEVELAND, *op. cit. supra* note 5, at 586.

⁷ To avoid this cumbersome phraseology, I shall hereinafter refer to it, as I have previously, as the "defense of insanity," although strictly speaking it is rather the defense of criminal irresponsibility by reason of insanity.

⁸ State v. Andrews, 187 Kan. 458, 469, 357 P.2d 739, 747 (1960). The comparatively unimportant instances of absolute liability in statutory offenses for which, by definition, no mental state need be proved for a finding of guilty, as well as the cases of criminal negligence, are disregarded in the above connection.

And a 1961 decision in the United States Court of Appeals, Eighth Circuit, quoting extracts from opinions of Mr. Justice Cardozo, Mr. Justice Jackson and Judge Thurman W. Arnold has this to say:

The law, to this date at least, 'assumes the freedom of the will as a working hypothesis in the solution of its problems' and also assumes 'that mature and rational persons are in control of their own conduct.' It has been aptly said that 'In the determination of guilt, age-old conceptions of individual moral responsibility cannot be abandoned without creating a laxity of enforcement that undermines the whole administration of criminal law.'⁹

And a recent Wisconsin case attacks the most thought-provoking test of irresponsibility of our day by saying that "The Durham rule, while paying lip service to 'freedom of will,' is so broad that it ceases to be a practical and workable test under the jury system."¹⁰

It is clear, therefore, that freedom of will is a cherished concept in law.

Now a major source of the difficulties and complexities in the attempt to put an ethical floor under the legal hypothesis of freedom of will as the foundation of guilt is the habit of asking whether or not *man*, in the abstract, "possesses freedom of will." This generalized metaphysical approach to the problems facing us in the confrontation of the typical jurist with the typical psychiatrist cannot get us very far. The concept of freedom of choice and control must be pulled down from the clouds and be psychologically defined. As I have stated, an understandable psychological definition of an

⁹ Dusky v. United States, 295 F.2d 743, 753-754 (8th Cir. 1961). The cases cited by the court in the Dusky decision are: Stewart Machine Co. v. Davis, 301 U.S. 548, 590, 57 S.Ct. 883, 892, 81 L.Ed. 1279, 1292 (1937) (Cardozo, J.); Gregg Cartage & Storage Co. v. United States, 316 U.S. 74, 80, 62, S.Ct. 932, 935, 86 L.Ed. 1283, 1288 (1942) (Jackson, J.); Fisher v. United States, 149 F.2d 28, 29 (D. C. Cir. 1945) (Arnold, J.); *affirmed* 328 U.S. 463, 66 S.Ct. 1318, 90 L.Ed. 1382 (1946). See also People v. Nash 52 C.2d 36, 53-54 (1959).

¹⁰ Kwosek v. State, 8 Wis.2d 640, 653, 100 N.W.2d 339, 345 (1960) (Hallows, J., concurring). See also People v. Wolff, 40 Cal. Rep. 271, 394

individual's freedom of will is his particular capacity for conscious, purposive, controlled action when confronted with a series of alternatives. As soon as "freedom of will" is so defined, it becomes evident that individuals differ in their capacity to make necessary choices and to manipulate the means to achieve ends with reference to the prohibitions of the penal code. They differ in this respect just as they vary in intelligence, physique, health, or any other human quality.

It may help us to see this, if we imagine a simple chart which shows the freedom-determinism proportions of a feebleminded person, an extreme psychotic, an average "sociopathic" or psychopathic personality, a genius who (unlike some geniuses) also happens to be a well-integrated personality, and the fictional "average, reasonable man" resorted to often as a standard measuring-rod by the law. Let us imagine a line for each of these five types, with limits from 0 percent to 100 percent; and assume that each such line is partly made up of dashes, to represent capacity for free choice, and partly unbroken, to represent deterministic dominance. We may then picture, hypothetically, that the feebleminded person's freedom-determinism graph will consist of, say, 10 percent broken line, representing the small amount of his endowed intelligent free-choosing capacity, and 90 percent unbroken line, representing the amount of predetermined blocking of freedom of conscious, purposive choice and control. His capacity for planful self-management is very low, owing largely to the natural limits laid down in the genetic heritage with which he was born.

The psychotic's graph will consist of, say, 10 percent to 40 percent broken line, depending on the type and stage of his illness and the degree of interference with his original

Pac.2d 959 (1964): "The doctrine of 'irresistible impulse' as a defense to crime is, of course, not the law of California; to the contrary, the basic behavioral concept of our social order is free will."

native capacity for conscious, purposive choice and control, while the balance will be the conditioned quantum. In the case of a psychotic a stage in the disease may have been reached where the capacity for knowledgeable, purposive, goal-aimed, and socially acceptable adjustment of conduct is relatively low; this owing partly to genetic *Anlage*, partly to faulty parent-child emotional and disciplinary relationships during the first few years of life, partly to neglect of early and effective treatment, and partly to chance traumatic experiences.

The chart of the psychopath or sociopath will consist of, say, 30 percent to 45 percent broken line or amount of free-choice capacity, the balance rigidly controlled. In his case there is often some pathological constitutional involvement plus malformation of character through faulty rearing and chance; and the degree of capacity for consciously purposed and effectively controlled conduct can be estimated only in the light of a detailed, verified history of prior symptoms and behaviour patterns under various conditions of stress and calm.

The graph of the well-integrated genius will consist of perhaps a 70 to 90 percent range of innate creative-choice capacity with relatively little deterministic dictation.

Finally, the free-choosing capacity of the "average, reasonable" or "prudent" abstract standard man of the law will range, let us say, between 50 and 65 percent, leaving a 50 to 35 percent quantum of solid-line, or deterministic, dominance. While the abstract type is, theoretically, always the same, it should not be forgotten that individuals measured against or compared with it, of course, vary in capacity for conscious, purposive, controlled choice and action; for it is not a sharp dividing line that is involved, but a broad standard with a hazy and therefore not inflexible

penumbra. The same is true of the other illustrations which of course also deal with types and involve individual variations in degree.

Of course, all such speculation, intended to make more concrete and vivid a complex ethico-psychological concept, is a gross oversimplification, both in the estimates of the quantum of free-choice area and in the assessment of the genetic and environmentally conditioned participants in setting the limits of free-choosing and free-acting capacity. The rough picture I have sketched also suggests a too mechanical relationship of the free and the controlled elements in the total situation. It may nevertheless be of some help in visualizing this abstract and speculative problem.

The upshot of the matter seems to be that, looked at *individually*, men are both free and determined but the proportions of creative choice and shackled conditioning vary among them on the basis of original endowment, chance influences, and sociocultural impacts, especially those of the first few plastic years of life. It is impossible to measure the various biologically and culturally conditioned components of personality in the individual case with respect to freedom and determinism, although indirect clues may be obtained through such means as Rorschach Tests, psychiatric interviews and lengthy psychoanalysis.

Now the law's prohibitions embraced in the definition of the constituents of each crime and modified in the defense of insanity are, perforce, directed toward, and in individual cases tested by, the "average reasonable man," the typical, modal man in the community. As Holmes put it, in his classic *The Common Law*, standards of the criminal law ". . . are not only external, . . . but they are of general application. They require [a person] . . . at his own peril to come up to a certain height. They take no account of incapacities, unless

the weakness is so marked as to fall into well-known exceptions, such as infancy or madness. They assume that every man is as able as every other to behave as they command."¹¹ Unfortunately, this general standard does not solve the harassing problem of just law-enforcement in the individual case at the trial; that is designed to determine whether a particular defendant *deviates "sufficiently"* because of mental disease or defect from this abstract standard of the "average man, the man of ordinary intelligence and reasonable prudence," to be deemed not responsible and therefore not guilty.

I think it is reasonable to assume that the recognition of biological and sociocultural causality in human behavior does not exclude altogether a realistic concept of capacity for choice which different persons possess in varying degree. True, the law is compelled to deal with a standard of the typical or average man. But despite the presence of mechanism in some aspects of personality it does not necessarily follow that individual embodiments of this modal man do not have some modicum of capacity for consciously and purposefully intervening in the causal chain to guide their behavior to conform to legal prohibitions and sanctions, however much this creative capacity may vary in individual instances. I think it is some such assumption that lies at the bottom of the moral-legal concept of responsibility. Those psychiatrists who cling to a rigid determinism in the belief that the "demands of science" require this, are confusing cause-and-effect linkage once a train has been initiated, with capacity to intervene at the outset and at various stages in initiating or modifying a causative sequence. Such psychiatrists are behind the times. In recent years even physical

¹¹ HOLMES, O. W. JR., *THE COMMON LAW* 50-51 (Boston, Little, Brown & Co. 1881).

science has rejected a rigid and inflexible cause-and-effect determinism for a theory of "indeterminacy" or probability. In the view of Eddington, while "the admission of indeterminism in the physical universe does not immediately clear up all the difficulties—not even all the physical difficulties—connected with Free Will . . . it so far modifies the problem that the door is not barred and bolted for a solution less repugnant to our deepest intuitions than that which has hitherto seemed to be forced upon us."¹²

And this view fits in with the ordinary and preferred conceptions of mankind. If we analyze the basis of moral responsibility we are likely to conclude that it arises from the general feeling and belief, founded on life's ordinary experiences, that a person possessed of the usual human faculties to an apparently usual degree is capable of acting, and therefore is expected to act, according to an accepted, socially required standard of morality and law if anarchy is not to result. Acts which do not attain this standard, when authored by a person of obviously normal mental constitution, are deemed immoral and treated as illegal. Our morality, and in turn our law, are thus based upon a conception of the

¹² See the stimulating essays by EDDINGTON, A., *NEW PATHWAYS IN SCIENCE* (New York, Cambridge University Press 1935), particularly Chaps. IV, V, and VI. Another writer on science has this to say:

"Nevertheless, the realistic imagination had managed to accommodate itself by means of vague images to the paradoxes of relativity, when it was announced that in connection with atomic problems no precise charting of the space and time positions of individual electrons was possible under the human conditions of approach, but only a charting within the limitations of statistical averages; and that for similar reasons only statistical predictions of electronic behavior rather than individually governing predictions could be made. The realistic imagination which had for three hundred years raised the cry of a complete ontological determinism of reality, now raised the cry of a complete ontological *indeterminism* of reality . . . It may be sufficient . . . to point out that the limited methodological determinism of science, which is all that science has ever been able to establish effectively with regard to physical experience, is in no way contradicted by the recent developments but rather receives a new expression in the statistical formulations with regard to atomic problems."—Ginsburg, B., *Science*, 13 *ENCYCLOPEDIA OF THE SOCIAL SCIENCES* 602 (1934).

mental makeup of the great majority of people; and we begin to excuse from responsibility when we see that the mental equipment of the particular actor is so different from that of the general run of men that he could not have met the moral-legal problem presented to him by internal desire and external enticement in the way that most persons, under similar circumstances, would have met it.

And yet one cannot shake off the conviction that if the criminal law and its disgrace-bringing punitive sanctions are to continue to be founded on a theory of freedom of will, then both in logic and fairness responsibility and punishment ought to be accommodated to the *precise degree* of free will and consequent blameworthiness existing in the particular defendant. We may concede that the fact that there is some, though individually varying, capacity for conscious, purposive self-direction in making and executing choices is at least a partial, legitimate basis for the moral justification of blameworthiness when a person commits a crime. But how shall we assess the quantum of blameworthiness? The trouble is that human ingenuity has not been able to devise any reliable measuring-rod to enable even the expert to gauge the amount of free will possessed by any particular defendant. Hence, so far as concerns the substantive law's dealing with guilt or innocence, with culpability or blamelessness, at the *trial* stage of the proceedings, great difficulty has been encountered in developing a set of rules that are both ethically just and scientifically sound. There are, after all, few cases where companions, parents and the social order itself do not share responsibility for a criminal offense. Yet the stigma and the punishment are inflicted on the person who is the immediate offending agent, no matter what other influences may have participated and no matter whether the accused's capacities may be sub-

normal to any degree less than the none too clear, generalized standard of subnormality laid down by the law.

The criminal law must, however, be practical; so that from the time it was decided that for reasons of deterrence, on the one hand, and humanitarianism on the other, something had to be done to exempt from punishment those defendants who showed obvious layman's signs of mental aberration, such as extreme feeble-mindedness or confusion or delusions, the law has attempted to define "tests" of irresponsibility. The attempt has been to make some allowance for exceptions yet to bar from exculpation those persons who, though recognized by psychiatrists as mentally abnormal, are nevertheless deemed "not so insane" as to deserve escape from condemnation and punishment for their acts.

This does not mean that the law nowadays cruelly takes no account whatsoever of mitigating circumstances. For while the actual amount of capacity for free choice in the individual case cannot be measured at the trial stage, what can later be at least roughly assessed for the purposes of sentence and correctional treatment, are the environmental *interferences* with the quantum of free choice capacity with which nature endowed the particular individual. The fact that careful social investigation discloses many such interferences in the lives of most delinquents and criminals is not only a valid moral basis for attenuation of blameworthiness but a sound reason also for transforming the legal apparatus from a backward-looking, retributively punitive and therefore largely self-defeating incarceration of the offender into an opportunity to aid him in removing, through re-education, training and psychotherapy, as many as possible of the discovered interferences with his native potential for free choice and self-control. The sociocultural interferences I speak of are such factors as broken or emotionally distorted

families, drunken or criminalistic parents, deprivation of parental love and care in childhood, damaging forms of early discipline, and the like; but there are of course interferences with the capacity for free choice and control of conduct about which nothing can be done, such as an extremely unfortunate genetic endowment.

Systematic investigation of interferences with capacity for relatively unhampered choice can thus be of much help; but, as indicated, these can be resorted to only after conviction, when the length, place and type of sentence are under consideration. When the preceding problem of guilt or nonguilt is involved, the law is concerned with the extent to which mental aberration has interfered with standard capacity for freedom of choice. And here the matter is far from simple. It must be borne in mind that, at best, a psychiatric diagnosis and the *ex post facto* behavioral inferences drawn from it can speak only in terms of probability; rarely, if ever, does the experienced alienist commit himself to anywhere near a dogmatic, hundred percent certainty. For example, after thorough and detailed tracing and evaluation of the entire life history of the subject, the most that a psychiatrist will venture is that X is relatively free from compulsive influences in his usual behavior, while Y is relatively enslaved by them; or that X has good ego-strength, Y relatively poor.

Yet the law has attempted to lay down sharp rules or "tests" of exculpation of some—by no means all—mentally disabled defendants.

III

When we come to examine these various tests of irresponsibility of the mentally ill in the next two lectures, we shall

notice deceptively simple yet realistically complex, and even baffling, concepts embodied in their formulation. We shall notice, also, that the villains in the piece usually are the presence (or absence) of a condition that can rightfully be called "mental disease" or "defect" and the extent of the causative linkage between such disorder, if proved, and the crime. These are obviously questions of *degree*. They derive in turn (although this is not obvious on the surface) from the fact of differences in the *effect* of various types of mental illness, at different stages, in varyingly endowed and circumstanced individuals, on the quantum of capacity for free choice and control. Let me give some illustrations of these baffling issues of degree.

The famous *M'Naghten* rules, laid down in England in 1843 and relied upon exclusively in most American jurisdictions, require that,

the jurors ought to be told in all cases that every man is to be presumed to be sane, and to possess a *sufficient degree of reason* to be responsible for his crimes, until the contrary be proved to their satisfaction; and that, to establish a defence on the ground of insanity, it must be *clearly* proved that, at the time of the committing of the act, the party accused was labouring under *such* a defect of reason, *from disease of the mind*, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong. . . . The usual course therefore has been to leave the question to the jury whether the accused had a *sufficient degree* of reason to know he was doing an act that was wrong. . . .¹³

This may sound clear and simple; but, not to stress the varied possible interpretations of the concepts "disease of the mind," and "not to know," when you consider such expressions as "sufficient *degree* of reason," "*such* a defect of

¹³ Daniel M'Naghten's Case, 10 C. & F. 200, 210-211, 8 Eng. Rep. 718, 722-723 (1843). (Emphasis supplied.)

reason," "*clearly* proved," and from "*disease of the mind*," you see at once that the test is full of inherent ambiguities involving difficult problems of degree and going back to varied quantities of free-choice capacity as affected by all kinds and stages of mental illness. Yet, surprisingly, the lord chancellor, in asking the judges of England for an advisory opinion on the state of the law of responsibility when acquittal of the paranoiac, M'Naghten, of the murder of Sir Robert Peel's secretary had greatly alarmed the public, gave it as his reassuring conviction to the House of Lords that the law is "clear, distinct, defined!"¹⁴

Another illustration of the basic importance of the always vexing question of degree is that of an early Alabama decision adopting the "irresistible impulse" rule as an adjunct to the *M'Naghten* right-wrong test. There the criterion of irresponsibility laid down required the alleged crime to have been "so connected with such mental disease, in the relation of cause and effect, as to have been the product of it *solely*,"¹⁵—a question of degree of connection simple enough in its extremity but far from simple to prove or disprove at a trial.

The famous *Durham* decision of a few years ago in the District of Columbia¹⁶ affords another example of the baffling complexity of the problem of degree, a problem, incidentally, that is of course not absent from other fields of law although perhaps most puzzling in our field. The *Durham* pronouncement requires that the criminal act must have been the "*product* of the disease," omitting the Alabama case injunction that it must be its product "*solely*." But under it, also, difficult questions of degree have arisen in

¹⁴ HANSARD'S DEBATES 288, 714, 717 (1843).

¹⁵ Somerville, J., in *Parsons v. State*, 81 Ala. 577, 596 2 So. 854, 868 (1886).

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

respect to the quantum and the closeness of the causal nexus of mental disease and criminal act required by *Durham's* "product" test for the defendant's exculpation.

The American Law Institute's *Model Penal Code* formula affords still another illustration of the legal difficulties presented by the fact that there is no black and white in mental illness. That test, essentially a semantic expansion of the *M'Naghten* knowledge concept and the irresistible impulse idea, requires that the accused lack "substantial capacity" either to "appreciate the criminality [wrongfulness] of his conduct or to conform" it to the "requirements of law." Alternative formulations require that these capacities be "so substantially impaired" that the accused "cannot justly be held responsible," or that he lack "substantial capacity to appreciate the criminality of his conduct."¹⁷ Here, too, as might be expected, the question has been asked (as indeed it has been asked in other fields of law), "How substantial is 'substantial'?" We can all agree that substantial means something more than slight or than just a very little. But how much more? (And, incidentally, does not the provision that the accused's capacities must have been so substantially impaired that he cannot justly be held responsible amount to a non-illuminative circular statement?)

Thus these tests, designed to guide juries in determining irresponsibility when it is claimed the accused committed the act while suffering from mental disorder, all involve the always baffling problem of degree. And they reflect, in legal concepts, the reality of ethico-psychological gradations of individual capacity for free, conscious, purposive choice and control.

How is this puzzling and unmeasurable matter of degree

¹⁷ The American Law Institute, MODEL PENAL CODE §4.01 (Prop. Official Draft 1962). For alternatives, see Tent. Draft No. 4 1955.

to be dealt with in the realities of trials, in the demands of justice, and in the requisites of psychiatry?

Perhaps the most promising attack on the problem has been through the device of a verdict intermediate between full "guilty" and full "not guilty," a mid-position of "partial" or "diminished" or "attenuated" responsibility. You might well ask: Does not this middle verdict merely evade the central issue that there are in fact unmeasurable degrees of capacity for free choice as there are gradations of mental illness? How "partial" or to what extent "diminished" or "attenuated" must the condition be to justify the jury in finding this ambiguous middle position?

One must concede that there are inherent difficulties. But I do not think that the intermediate verdict is merely an evasion. It is rather a device for some practical management of a condition that presents a permeative difficulty. It enhances precision, and therefore justice, because the election it presents to the jury is not the all-or-nothing choice between full guilt and complete innocence but one involving recognition of the admixture of some blameworthiness and some ground for exculpation in the situation where the mental abnormality can not be said to be long-lasting or so extreme as to leave no doubt of its presence and of its inducement of antisocial behavior; or where the mental disturbance consists not of a frank, easily recognizable psychosis, but of a psychopathic or sociopathic state.

The provision of a mid-position between complete guilt and complete innocence in cases involving mental defect or disease is both just and reasonable. In its basic attitude and in implementation of its basic attitude traditional law, while setting a standard of the average man, draws too sharp a line between offenders acquitted by reason of insanity and the general run of offenders. The defendant found "not guilty

because of insanity" is thereby absolved of all blame for his crime and, in theory at least, is given hospitalization and treatment for his illness which, it is assumed, he could not have helped. The convicted offender who is only partially the victim of mental aberration is paid off in the bitter wages of sin and is packed off to prison on the dogmatic assumption that he is fully to blame. Apart from these obvious alternative consequences of conviction or acquittal by reason of insanity, there is the more subtle distinction between the disgraceful public branding of the convict with the scarlet letter and the private scrap of relief of the acquitted mentally ill offender and his grieving family that an explanation other than evil character has been found for the revolting act of crime and thereby the stigma of public condemnation and disgrace has been reduced. But morals should draw no such sharp and biting line between the sick and the damned, the exculpated and the convicted. Even nature, in its blind morality, does not mark off such a ruthlessly rigid boundary between the ill and the well, and civilized mankind through its law, aided by the insights of psychiatry and psychology, ought not to do so.

The concept of partial responsibility, limited, however, to cases of *homicide*, has been developed by the courts in Scotland since 1867.¹⁸ At that time, members of a jury in a

¹⁸ H.M. Advocate v. Dingwall, 5 Irvine [1867] 466. The chief cases in the development of the concept of diminished responsibility in Scotland appear to be: H.M. Advocate v. Savage [1923] J.C. 49; Kirkwood v. H.M. Advocate, [1939] J.C. 36; H.M. Advocate v. Braithwaite, [1945] J.C. 55. For informative articles, see Williams, G., *Diminished Responsibility*, 1 MEDICINE, SCIENCE AND THE LAW 41-53 (1960), and Edwards, J. Ll.J., *Diminished Responsibility—A Withering Away of the Concept of Criminal Responsibility?*, in ESSAYS IN CRIMINAL SCIENCE (London, Sweet & Maxwell 1961). See, especially, Professor Edwards' thoughtful analysis of the implications of the English Mental Health Act of 1959 and its relationship to the concept of criminal responsibility.

trial for murder were instructed by the judge that, while it was difficult to recognize the crime involved as anything less than murder, "it was not beyond their province to find a verdict of culpable homicide," equivalent to manslaughter. Their attention was directed to the special circumstances of the case, including the fact that the accused appeared not only to be peculiar in his mental constitution but "to have had his mind weakened by successive attacks of disease." The judge thought the state of mind of the prisoner might be an "extenuating circumstance." The jury came in with a mid-verdict of "culpable homicide" instead of murder. This device has been resorted to in a number of cases after 1867; and although in one case in 1913 the judge objected to its introduction, "it has now been accepted by the High Court of Justiciary as part of the law of Scotland."¹⁹

Two distinguished physicians testified before the British Royal Commission on Capital Punishment in 1953 that the concept of diminished responsibility ought to be applied to psychopaths. The Commission learned from other witnesses that this useful doctrine may also "cover a wide variety of different clinical groups, including epileptics, mental defectives, alcoholics, and persons suffering from conditions 'bordering on insanity.'"²⁰ The evidence before the Royal Commission reflected the opinion that the concept of diminished responsibility in homicide cases "works well and fairly and that juries do not take refuge in it without justification."²¹ That the doctrine as judicially developed in Scotland is not, however, without its practical difficulties of the kind presented by the alternative of either complete re-

¹⁹ ROYAL COMMISSION ON CAPITAL PUNISHMENT 1949-1953 REPORT 131 (Cmd. 8932) (London, H.M. Stationary Office 1953).

²⁰ *Id.* at 132.

²¹ *Id.* at 133.

sponsibility or full irresponsibility, is shown by the following charge to the jury by Lord Justice-Clerk (Alness) explaining the meaning of diminished responsibility in the *Savage* case:

It is very difficult to put it in a phrase, but it has been put in this way: that there must be aberration or weakness of mind; that there must be some form of mental unsoundness; that there must be a state of mind which is bordering on, though not amounting to insanity; that there must be a mind so affected that responsibility is diminished from full responsibility to partial responsibility—in other words, the prisoner in question must be only partially accountable for his actions. And I think one can see running through the cases that there is implied . . . that there must be some form of mental disease. Well, ladies and gentlemen of the jury, that is a very difficult region of the law. . . . You will consider whether . . . the prisoner has proved to your satisfaction that on that night and in particular at the hour when the incident occurred, his mental state was unsound, that he was in a state of mental aberration, and not fully responsible for his actions.²²

I think you will agree that the judge's instructions to the jury as to the meaning and the method of determination of a verdict of diminished responsibility is rather cloudy.

Though partial responsibility in homicide was discussed, also not without ambiguity, by the British Royal Commission on Capital Punishment in 1953,²³ it was not until 1957, in the

²² H.M. Advocate v. Savage [1923], J.C. 49. Compare Regina v. Byrne, 2 Q.B. 396 (1960).

²³ ROYAL COMMISSION ON CAPITAL PUNISHMENT, *op. cit. supra* note 19, at 276.

Two types of partial responsibility are discussed in the literature:

1) The first is the concept which might better be designated by the cumbersome expression, full responsibility, but, owing to absence, by reason of approved abnormal mental condition, of one of the required special mental elements of the crime, responsibility for a *lesser grade* of the offense than that charged, as for second degree murder (with life imprisonment instead of the death penalty) where the "premeditation and deliberation" statutorily required for first degree has been canceled by proof (according to the prevailing standard) of a mental abnormality which made capacity to premeditate and deliberate highly unlikely. A contention that there can be mental illness of a kind or degree not adequate for complete exculpation under the tests of irresponsibility but relevant on the issue of whether or not a special

English Homicide Act, that the concept was enacted into law. Section 2 (1) of the Act provides that,

Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing.²⁴

Thus England has by statute adopted a principle recognizing the problem of degree of mental illness, in homicide cases only, however, which had long been judicially developed in Scotland. I have somewhere come across a sly suggestion that the development of the concept of diminished responsibility in Scotland was helped along by the fact

state of mind required in the definition of such a crime as first degree murder, e.g., premeditation or deliberation, was rejected by the Supreme Court in *Fisher v. United States*, 328 U.S. 463, 476, 66 S.Ct. 1318, 1324-1325, 90 L.Ed. 1382, 1389 (1946). In a dissenting opinion by Mr. Justice Frankfurter, a persuasive argument was presented for permitting consideration of such a state on the special and specific mental issue involved. Murphy and Rutledge, *JJ.*, also dissented. Fisher was executed. See also Weihofen, H., & Overholser, W., *Mental Disorder Affecting the Degree of a Crime*, 56 YALE L. J. 959 (1947); Note, *Premeditation and Mental Capacity*, 46 COLUM. L. REV. 1005 (1946); cf. *People v. Wells*, 33 C.2d 330, 202 P.2d 53 (1949); Note, 22 SO. CAL. L. REV. 471-474 (1949).

2) The second type of partial responsibility refers to a mental abnormality not sufficient to meet the extreme requirements of the tests of irresponsibility but one which the jury has nevertheless found to exist. This applies not merely to homicides but to all offenses. This condition might perhaps be dealt with under the doctrine of mitigation of punishment after a plea or finding of guilty, provided there is judicial discretion. It deals with taking mental disorder of a borderline nature into account at the sentencing instead of the trial stage. However, as the text both in Lectures I and III indicates, it can be dealt with as a possible modification of the substantive law to be applied within the ambit of the trier of facts.

²⁴ The Homicide Act, 1957 §2. The Royal Commission on Capital Punishment, in 1950, considered this recommendation, made by witnesses before it, including the British Medical Association and the Institute of Psycho-Analysis (Minutes of Evidence 318, 547), but did not recommend adoption of diminished responsibility because "so radical an amendment of the law of England" would not be "justified for this limited purpose."—ROYAL COMMISSION ON CAPITAL PUNISHMENT, *op. cit. supra* note 19, at 144.

that a gallant judge exercised his legal ingenuity to devise a way to save from the death penalty a fair lady defendant who obviously had committed a murder, whose condition, obviously, could not meet the strict *M'Naghten* tests, and who obviously (alas!) was in danger of capital punishment.²⁵ If this be true, it is a tantalizing illustration of the oft-quoted dictum of Holmes that "the life of the law has not been logic; it has been experience."²⁶

The doctrine of diminished responsibility in the British Isles is confined to defendants accused of homicide. In 1925, in *Mental Disorder and the Criminal Law*,²⁷ I recommended adoption of a provision for semi- or partial responsibility in all felony cases, not merely murder; and tried to supply the jury with specific pegs on which to hang this middle verdict.

I adverted to the fact that under the law mental disease (or defect) per se does not necessarily relieve from responsibility, and that therefore even if the jury find that the accused was mentally disordered when he committed the crime, they are required to take the further step of determining if he was also irresponsible. In that connection they must decide whether this particular mentally disordered defendant knew the physical nature of the act and knew its wrongfulness in the sense that it was condemned by the morals, religion, and laws of modern civilized society, and

²⁵ The only allusion I have been able to find that even remotely supports the inference is a notice in *The Scotsman* on Lord Deas, to whose ingenuity the development of the doctrine of diminished responsibility in murder cases (the only one beside treason which carried a fixed death penalty, the other permitting of mitigation of sentence) is largely attributable: "Still be it also set down to his credit that he often manifested a singular kindly consideration for respectable men and good-looking women who did not belong to the criminal classes and who had been landed in the dock by one sudden explosion of passion or by one false step." Quoted by the Rt. Hon. Lord Keith of Avonholm, in *Some Observations on Diminished Responsibility*, 4 (N.S.) JURIDICAL REVIEW 113 (1959).

²⁶ HOLMES, *op. cit. supra* note 11, at 1.

²⁷ GLUECK, *op. cit. supra* note 2, at 478-480.

whether if he did have such knowledge, he was able to control his impulses in respect to the act. I suggested that if the jury's answer to either of these questions regarding a defendant, though they had decided he was mentally disabled, was "Yes," they were to find him *semi-responsible*. If their answer to either of the questions was "No," they were to find him *totally irresponsible*. Only if in their initial step they found the accused to be *not* mentally disordered at all, were they to declare him *fully responsible*.

This provision was designed to take care of the various borderline conditions of mental aberration, such as psychopathic personalities, clear and extreme psychoneurotics, epileptics with mental disturbance and persons in the early stages of the psychoses, especially schizophrenics. In such conditions the law's sharp distinction between the wholly responsible and wholly irresponsible is unjust, unrealistic, and contrary to modern psychiatric assessment of mental pathology and behavioral capacity. For such borderline conditions the concept of partial responsibility, with its accompanying medico-correctional connotations, is peculiarly appropriate; for while persons having such conditions may have some conception that their conduct is prohibited, they are emotionally unstable; and while they may have some control of impulse, their power to choose and guide impulses to behavior is pathologically below that displayed by the average adult in the ordinary affairs of life though not as profound and as far removed from reality as among extremely disturbed or chronic psychotics. True, the criminal law must perforce be framed with reference to the average mental capacity of the great majority of persons in respect to the interrelated processes of comprehension, affective response and inhibitory power. But there is an area neither well within nor well without the average. By allowing for a

partial exculpatory effect of mental illness that has not proceeded so far as virtually to destroy all capacity to assess the significance of one's acts or to guide and control them, the concept of partial responsibility should provide the jury with as specific a set of indications related to common experience as can be hoped for in their complex endeavor. How the idea of partial responsibility might be made to fit into a test I shall later propose, I shall consider in the third lecture.

Thus far I have discussed the fundamental dilemma in the field under survey; the free will-deterministic attitudes and the correlative problem of degrees of responsibility and blameworthiness.

IV

A related dilemma, hinted at previously, is the fact that the law, in its definition of crime and provision of the requisites for relief from responsibility, omits psychological and sociological considerations which psychiatrists regard to be crucially significant to the explanation of conduct.

To hold a person responsible, the law requires proof that he committed the prohibited act and that he did it intentionally. If we look at these requirements of the technical, substantive law from the point of view of the causation of conduct, they mean that the actor was consciously aware that what he was about to do was prohibited by law, that the intention to do it preceded and accompanied the act, that the exercise of the muscles in the pattern of his purposed act was under a degree of control attributable to the average normal and reasonable man. But notice that all these do not describe the entire chain of even psychological causation

that resulted in the act, let alone sociocultural environmental influences. No provision is made for *motives* of the act, except in the few special crimes where motive is taken into consideration, as in a killing claimed to have been in self-defense, a killing by an officer to effectuate arrest of a felon under extreme circumstances, or a killing by a soldier of an enemy in time of war. And certainly unconscious motivation is not at all relevant in the law.

This disregard of motive extends to the prevailing tests of irresponsibility of the insane in their ignoring of the most significant of all psychological forerunners and accompaniers of acts of crime as well as of ordinary behavior; namely, the *affective* or emotional aspect of mental life. As Dr. Bernard Glueck, Sr. said many years ago,

The motives for all indulgence or abstinence in behavior are derived from emotional tones (pleasurable or unpleasurable imagery, attraction and repulsion, strivings and counter-strivings). Upon the strength of these feelings depends the intensity of the motive, and by the same token, the urge for action. In the battle of motives, the decision rests with the side which possesses the preponderance of affectivity. . . . If a thorough consideration of emotional factors is absolutely essential for the understanding of behavior in general, this is especially true for the understanding of the behavior of the psychopath, whose main distinguishing characteristic of constitution is a *pathological affectivity*.²⁸

It is indeed difficult to find a study of predelinquents or delinquents nowadays which does not stress the need of investigating the child's emotional life in relation to the development of his personality, character, and typical management of desires.

But, it is well to emphasize, that apart from the usual irrelevancy of motive and affect as justification or excuse

²⁸ GLUECK, B., Review of BIRNBAUM, K., *THE PSYCHOPATHIC CRIMINAL*, in 3 *MENTAL HYGIENE* 157, 158 (1919).

under the criminal law, other links in the chain of causation are ignored in determining guilt or innocence. As I have mentioned, in ascertaining legal blameworthiness in terms of the "guilty mind," such influences as a childhood spent in a home without affection or without proper discipline or without family unity, or in a household of extreme poverty, or under gang stimulation or threats—all these and other etiological influences are ignored.

The emphasis of psychoanalytic experience on the events of the first few years of life as conditioners of the personality and conduct-tendencies is too well known to require comment. Mrs. Glueck and I have, over the years, constructed a series of screening tables for use in predicting behavior on the part of children not yet showing outward signs of delinquency and in forecasting recidivism on the part of those already delinquent.²⁹ Based on researches into many and varied samples of offenders, these tables bring out inductively the damaging effect of various pressures of unwholesome home and family experience in early life, in inclining the growing child toward social maladjustment, delinquency, criminalism and recidivism. They suggest that it is not the law's classic "criminal intent" that is of prime significance in behavior, but the why, the how, and the roots of intention. How little, indeed, of the true picture of the murderer, thief, or rapist, and of the motivations for his wrongdoing, is revealed by the offense he is charged with committing with "criminal intent!"³⁰ And how very necessary is more thorough and revealing psychological and sociological knowledge to any constructive efforts to redeem those offenders whose character can be effectively modified and

²⁹ GLUECK, S. & E. T., *PREDICTING DELINQUENCY AND CRIME* (Cambridge, Mass., Harvard University Press 1959) (with an Introduction by Earl Warren).

³⁰ See, for example, GLUECK, S. & E. T., *500 CRIMINAL CAREERS* 294 (New York, Alfred A. Knopf 1930).

to keep in safe and lawful incarceration those who continue to present a social hazard!

One must, of course, recognize that subtle symptoms of motive and affect are not susceptible of clear definition in the substantive law, or of consideration under the adversary system of our courts and under the technical rules of evidence, not to stress the difficulty encountered in uncovering such influences even clinically. And since there must be some lawful and just basis for the state taking hold of a person for corrective therapy or punishment or both, the substantive criminal law and the adversary procedure of trials cannot altogether be avoided. Perhaps it will some day be possible to limit criminal law to matters of behavior alone, leaving psychological questions of "intent," "premeditation," "deliberation," and motivation to special tribunals made up of psychiatrists and psychologists. But there are many inherent difficulties involved in such a behavioristic criminal law which would take us too far afield to enter into. The probabilities are that the values sought, that is, the deeper probing of motivation and etiology and the determination of the individual offender's likelihood of reform or recidivism when subjected to one type of sentence or another, can be obtained not by radically disturbing the present substantive criminal law but rather by coping with the fundamental issues through a professional "Treatment Tribunal" which will begin to operate after the finding of guilt in the prevailing way. I shall have something to say about this in the final lecture.

V

There is time for but a very brief mention of two other serious legal-psychiatric dilemmas: the first is the fact that

there is a great shortage of psychiatrists and other therapeutic personnel to fulfill the obligation implied in acquittals on the ground of insanity. This serious fact of life has been emphasized in some recent decisions objecting to the supposed ultraliberalism of the famous *Durham* decision in the District of Columbia.³¹ The other dilemma and source of suspicion of psychiatry on the part of certain members of the legal profession has its roots in the days when the psychiatrist was regarded as a practitioner of such supposedly devious arts as hypnotism and "animal magnetism;" and it is nourished by the indubitable fact that mental medicine still has a long way to go in discovering the causes and cures of many psychic illnesses.

These are serious problems. I shall touch on them in the closing lecture; not in the hope that I can contribute much to their solution, but rather in suggesting a few directions of promising future development.

VI

We can conclude this aspect of the discussion by hopefully predicting that reasonable accommodation of the points of view of law and psychiatry is possible; that it is moreover proceeding, albeit slowly; and that it will continue to increase as both disciplines become more aware of their common stake in protecting society through reduction of recidivism by therapeutics and education as well as by disciplinary techniques.

Yet it cannot be ignored that the conflict of points of view of psychiatry and law in respect to the defense of insanity

³¹ See Lecture III, *infra*, referring to criticism of the *Durham* decision, and relevant notes.

has deep and stubborn roots. I will have time to give but one example. It illustrates a permeative conflict between the urge to attribute guilt and blame and the recognition of the effect of disease on conduct.

In the glorious days of Queen Victoria there occurred, in 1883, a case among several that shocked her subjects. One Roderick MacLean fired a pistol at the beloved Queen. Though, luckily, he missed her, he was prosecuted for high treason. He, however, was found not guilty by reason of insanity.³² When her Majesty was told of this, she was much annoyed; for several other attempts had previously been made on her life. "What did the jury mean," she asked, "by saying that MacLean was not guilty? It was perfectly clear that he was guilty—she had seen him fire the pistol herself. It was in vain that Her Majesty's constitutional advisors reminded her of the principle of English law which lays down that no man can be found guilty of a crime unless he be proved to have had a criminal intention. Victoria was quite unconvinced. 'If that is the law,' she said, 'the law must be altered': and altered it was. In 1883, the Act was passed changing the form of the verdict in cases of insanity"; and a "confusing anomaly" was enacted which has long remained upon the statute book.³³ The anomaly is the Trial of Lunatics

³² This was one of a series of seven attempts to attack the Queen, "all but one, strangely enough, by adolescents."—STRACHEY, L., *QUEEN VICTORIA* 275-276 (London, Chatto & Windus 1921).

³³ *Id.* at 277-278. Evidently the original purpose of the anomalous English verdict of guilty but insane was to place the future of the acquitted defendant in the hands of the Home Secretary, something that could not be done so readily if the verdict was *not guilty* by reason of insanity, since a person found not guilty has definite rights, such as habeas corpus, in the matter of his discharge from an institution to which he has been committed upon acquittal. The English verdict of guilty but insane, however, led to such absurd results in a collateral case involving the inheritance of property by one who had killed his father and eldest brother in order to succeed to the estate (the law being that "no person can obtain or enforce any rights resulting to him from his own crime") that it inspired the London editor of *LAW NOTES* to express himself in this graphic language: "We have

Act³⁴ which provides that when a person is found to have been insane when he committed the crime, the jury is to return the special verdict that "the accused was guilty of the act or omission . . . but was insane, at the time when he did the act or made the omission." In practice this verdict has been formulated as "guilty but insane."

Fundamentally, this type of jury evaluation is of course internally inconsistent; for if a defendant was insane (that is, mentally ill) when he committed the crime, why should he be deemed *guilty*, even on the fiat of a queen, and even on the fiat of such a queen? However, who can measure the extent to which moral guilt exists even among the mentally ill? This difficulty is the quintessence of the problem we have examined; namely, the fact, deserving of emphasis, that in the assessment of the irresponsibility of the mentally ill, one is not dealing with moral or legal black and white any more than when one examines mental health and mental illness he finds only night and day and no twilight and dawn.

Incidentally, the editor of the publication, *The Practical Statutes of the Session 1883* (46 & 47 Victoria), pointed out at the time of enactment of the verdict of "guilty but insane" that the pre-existing statute had provided that the jury bring

all heard of funny verdicts, but did ever twelve of the biggest fools that ever got into a jury box evolve a more perverse verdict than the wisdom of the sovereign legislature has contrived? It might come straight out of 'Alice in Wonderland'."—LAW NOTES (June 1915). In Appeal of Felstead, 11 Cr. App. Rep. 129 (1914) it had previously been held that the verdict, "Guilty, but Insane" really meant a verdict of acquittal. Therefore, in the property case there was no reason why the murderer could not succeed to the property of the father and brother he had murdered. The Committee on the Reform of the Law of Insanity recommended the changing of this verdict to the following: "That the accused did the act (or made the omission) charged, but is not guilty on the ground that he was insane so as not to be responsible according to law at the time." So far as I know this has not yet been done. See REPORT OF THE COMMITTEE ON INSANITY AND CRIME 12 (London, H.M. Printing Office 1923).

³⁴ 46 & 47 Vict. (1883).

in a special verdict of "not guilty on the ground of insanity" if they found that the accused committed the crime but was insane at the time. Thereupon the court was empowered, then as now, to order the detention of the acquitted defendant "during Her Majesty's pleasure," that is, until it was officially decided that he could safely be at large. The editor complained that "It is not easy to see how this change in the law is an improvement," and pointed out that there had been no difficulty in carrying out the pre-existent provisions. He added, peevishly: "Why the present statute was passed it is difficult to understand, unless it be ascribed to that officiousness which will not leave well enough alone."³⁵ It is not recorded whether Queen Victoria read this testy comment on the statute she had brought about and, if she did, what *her* comment was.

The English verdict³⁶ of guilty but insane is atypical; the usual verdict in other jurisdictions is "not guilty by reason of insanity." It is important to note that the *consequence* of such formal acquittal has a considerable bearing on the satisfactory or unsatisfactory nature of *any* criterion of irresponsibility in action. Relatedly, the result of a finding of "guilty" where such defense has failed is also intimately associated with the values or the shortcomings of any test of irresponsibility. Where the consequence is capital punishment, juries and even judges may sometimes stretch the particular test to permit of avoidance of the death penalty.

³⁵ PETERSON, W. (ed.), *THE PRACTICAL STATUTES OF THE SESSION 1883* [46 & 47 Vict.] 115-116 (1883).

³⁶ Both the Atkin Committee of 1922 and the Royal Commission on Capital Punishment in 1953 recommended that the relevant statute be amended to make the verdict "not guilty on the ground" that the accused "was insane so as not to be responsible according to law at the time."—ROYAL COMMISSION ON CAPITAL PUNISHMENT, *op. cit. supra* note 19, at 157. At the present writing, this has not been done. Decisions of the Court of Appeal in 1958, for example, still regard the verdict as "Guilty by insane." See, for example, *Regina v. Nott*, 43 Cr. App. Rep. [1958] 8-9.

This partially accounts for the fact that there is considerable confusion, both at the trial stage and the appellate stage, in the interpretation of such seemingly simple criteria of irresponsibility as the *M'Naghten* rules of "knowledge" of the "nature and quality" of the act and of its "wrongfulness."

Such considerations must be borne in mind when we come to assess the worth of the various tests of irresponsibility in the next two lectures.

VII

In this lecture I have analyzed certain basic dilemmas in the administration of criminal justice, with special reference to the mentally ill, and have sought to suggest a realistic way of coping with perhaps the basic one of these—the problem of degrees of blameworthiness and degrees of mental unsoundness. There are of course other related dilemmas that confront the doing of justice in criminal cases. There is, for instance, the fundamental, underlying conflict between the law's attempt to protect both society's interest in the general security and society's interest in the welfare of the individual. There is the difficulty of accommodating the desiderata of "individualized justice" to the patterns of mass experience as revealed by statistics; and, relatedly, there are the competing demands of rule and discretion in the imposition of sentence. There is the conflict between the goal of "prompt and efficient law enforcement" and the need to shield the individual against violation of his constitutional rights.³⁷

³⁷ Valuable discussions of this dilemma have appeared in recent Supreme Court decisions. See, especially, *Culombe v. Connecticut*, 367 U.S. 568, 81 S.Ct. 1860, 6 L.Ed.2d 1037 (1961).

Dilemmas and conflicts in human affairs are not an un-mixed evil. At least they show that the problems to be faced are very much alive and demand our best thought. They induce continuous re-examination of standards and practices. They may impel us to discover anew that, with all the rules and tests and laws, it is *men*—fallible men—on whom we cannot in the final analysis avoid depending.

In closing, I should like to leave with you a statement regarding this matter of dilemmas in the ethical field, which is not irrelevant to our own concern. It is by that wise pioneering psychologist, William James; a passage from his distinguished work, *The Will to Believe*:

... The intuitional moralists deserve credit for keeping most clearly to the psychological facts. They do much to spoil this merit on the whole, however, by mixing with it that dogmatic temper which, by absolute distinctions and unconditional 'thou shalt not's', changes a growing, elastic and continuous life into a superstitious system of relics and dead bones. In point of fact, there are no absolute evils, and there are no non-moral goods, and the *highest* ethical life—however few may be called to bear its burdens—consists at all times in the breaking of rules which have grown too narrow for the actual case. There is but one unconditional commandment, which is that we should seek incessantly, with fear and trembling, so to vote and to act as to bring about the very largest total universe of good which we can see. Abstract rules indeed can help; but they help the less in proportion as our intuitions are more piercing, and our vocation is the stronger for the moral life. For every real dilemma is in literal strictness a unique situation; and the exact combination of ideals realized and ideals disappointed which each decision creates is always a universe without a precedent, and for which no adequate previous rule exists.³⁸

³⁸ JAMES, W., *THE WILL TO BELIEVE: THE MORAL PHILOSOPHER AND THE MORAL LIFE* (New York, Longmans, Green & Co. 1897).

In succeeding lectures, I shall not treat the dilemmas presented today as Gordian knots, to be cut with but little ado. Nor do I promise to unravel them. If it were that simple, they would not be taunting us with the defiant label, "dilemma." All I propose to do is to call your attention to various lights and shadows that play about these quandaries when they raise their heads in connection with one or another "test" of the irresponsibility of the insane. I hope, finally, to make some suggestions for living with the dilemmas in some more comfortable posture than under either an armed truce or a cold war between lawyers and psychiatrists.

LECTURE II

FROM M'NAGHTEN TO DURHAM

I

IN THE FIRST LECTURE we examined some of the tension-generating dilemmas involved in the "defense of insanity." Before considering how they might be eased, it will be necessary to explore a field about which much has been written: the "tests" evolved by the law to mark off those persons whose mental aberration is deemed to be serious enough to justify their exemption from criminal responsibility. These the law distinguishes from persons who, even though mentally abnormal to some extent, are deemed fully responsible for their criminal acts. Most judges and legislators shrink from the notion that psychic aberration, *per se*, should excuse from the condemnatory label of "guilty" and the consequential "deserved punishment." How the line is to be defined, and where drawn, in terms of a legal test or yardstick which a jury of laymen can understand and apply to the facts in evidence, especially the psychiatric testimony, is the bone of contention between lawyers and psychiatrists.

At this point in the discourse I confess to some misgiving. For who would have the temerity to pass judgment on the law, especially so puzzling and emotion-arousing corner of it as concerns the defense of insanity? While to Lord Coke the law is the "perfection of reason," to Dickens's Mr. Bumble, "the law is a ass—an idiot." Let us see if we can helpfully tread a middle road between the signposts pointing to these extremes.

I have no doubt that many of you are acquainted with the legal tests of the irresponsibility of the insane; but a critical review of the field is called for by the general theme of these lectures. And I am in hopes that, without boring you, I can set your minds to thinking more realistically about law and psychiatry on the battlefield of responsibility. Let us, at the outset, therefore consider the desiderata of a modern touchstone of irresponsibility as related to mental disease or defect.

I would state them as follows: (1) The test must be couched, as far as possible, in such familiar terms as to be an understandable and helpful guide to the average lay jury. (2) It must be just, not subjecting to the stigma of criminal conviction and the punishment of execution or of long imprisonment a defendant whose mental aberration was somehow probably involved in the commission of the prohibited act. (3) The test must be fairly in harmony with authoritative conceptions of contemporary psychiatry, and flexible and general enough to take account of new and reasonably well established discoveries in that discipline. (4) It must permit the psychiatric expert witness to state his diagnosis of the accused's probable condition, not in terms of fragmentary, separated symptoms, but as an organic whole arrived at upon consideration of clinically observable symptoms, the patient's past history, and the

application of such contemporary scientific investigatory devices as are used in the psychiatric examination of *non-criminal* patients for purposes of diagnosis and prognosis. (5) The test must not demand of the expert that he state his diagnosis either piecemeal or in dogmatic "Yes" or "No" terms. (6) The test should not require him to commit himself to a conclusion regarding the *responsibility* of the accused for the crime, but leave that legal (and moral) issue to the judgment of the jury where it belongs. (7) Finally, the test of irresponsibility must be protective of society, not leading to the discharge into the open community of actually or potentially dangerous persons.

I am sure you will agree that a rule which meets all these desiderata is extremely difficult, if not impossible, to design. But let us bear them in mind as we turn now to the most common test that the law has evolved.

II

In 1843, the various ideas in legal opinion and dictum¹ and in the testimony of alienists² were crystallized by the trouble-brewing advisory *Opinion of the Judges of England* in the well-known *Daniel M'Naghten's Case*.³ When I planned these lectures, I determined not to devote any time to whipping the dead horse of *M'Naghten*. But in examining

¹ For historical sketches, see GLUECK, S., *MENTAL DISORDER AND THE CRIMINAL LAW* Chap. 5 (Boston, Little, Brown & Co. 1925), and BIGGS, J. JR., *THE GUILTY MIND: PSYCHIATRY AND THE LAW OF HOMICIDE* (New York, Harcourt, Brace & Co. 1954).

² *Id.*

³ 10 C. & F. 200, 8 Eng. Rep. 718 (1843). "There are at least 10 variant spellings of this name."—ROYAL COMMISSION ON CAPITAL PUNISHMENT 1949-1953 REPORT 75, note 2 (Cmd. 8932) (London, H.M. Stationery Office 1953). Judge John Biggs gives an excellent historical and political account of the contemporary meaningfulness of M'Naghten's acquittal. See Biggs, *op. cit. supra* note 1, at Chap. IV; see also his opinion on behalf of the United States Circuit Court of Appeals, Third Circuit, in *United States v. Currens*, 290 F.2d 751 (3d Cir. 1961).

the recent cases, I soon discovered that despite the passage of almost four fast-moving decades since I published *Mental Disorder and the Criminal Law*⁴ the old *M'Naghten* horse was far from defunct. Countless decisions still pay homage to *M'Naghten*; and so I must beg my auditors to accompany me into what has been aptly called "the cloudy land of *M'Naghtenism*."⁵

M'Naghten, an extreme paranoiac entangled in an elaborate system of delusions, was found not guilty on the ground of insanity in a prosecution for murder of Sir Robert Peel's secretary whom he mistook for that statesman. It was established at the trial that the accused had long been convinced that Sir Robert, the Prime Minister, was persecuting him. All classes of Victorian society were greatly indignant at *M'Naghten's* acquittal, especially since several prior attempts had been made against members of the royal house. In a delightful blend of wit, wisdom and royal concern, Queen Victoria said she "did not believe that anyone could be insane who wanted to murder a Conservative Prime Minister!"⁶ The agitation was such that the House of Lords was impelled to submit certain questions to the judges of England for an authoritative statement of the existing law. Several inquiries were put to the judges, but here it is enough to recall that their response to the key question was the following:

To establish a defence on the ground of insanity, it must be clearly proved that, at the time of committing of the act, the party accused was labouring under such a defect of reason,

⁴ GLUECK, *op. cit. supra* note 1.

⁵ BIGGS, *op. cit. supra* note 1, at 219, note 38.

⁶ "The crack that Queen Victoria objected to *McNaghten* being adjudged insane after he tried to murder Sir Robert Peel, on the ground that 'she did not believe that anyone could be insane who wanted to murder a Conservative Prime Minister' was by long odds the best crack of the week"—231 PUNCH 627 (Nov. 21, 1956), regarding a parliamentary debate on capital punishment.

from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it . . . he did not know he was doing what was wrong.⁷

Lord Brougham's reason for putting the questions to the assembly of judges of England was that their assistance would be invaluable in that

it would lead to more uniformity in the language they used on future occasions in charging and directing juries on this most delicate and important subject. They would no longer indulge in that variety of phrase which only served to perplex others, if it did not also tend to bewilder themselves, as he supposed it sometimes did; but they would use one constant phrase, which the public and all persons concerned would be able to understand.⁸

That Lord Brougham's hope was illusory is abundantly proved not only by the confusion that the *Opinion of the Judges* has led to in subsequent cases both in England and in the United States, but from the inherent difficulty of obtaining sharp precision of the kind referred to in his confidently expected "one constant phrase." The verbal exactitude of the right-wrong test is highly deceptive. It is doubtful whether there is any field of law in which there has been as much confusion and variation in interpreting the very same words of a seemingly simple legal formula as there has been in the courtroom operation of the *M'Naghten* rules. In 1953 the Royal Commission on Capital Punishment, after long and penetrating study, recognized the practical flexibility of the test by pointing out that "in cases where a plea of insanity is disputed, the Rules may be strictly applied, [and] in cases where their strict application would result in a manifestly unjust verdict, they may be 'stretched' or even ignored."⁹ It is this feature of

⁷ Daniel *M'Naghten's* Case, 10 C. & F. 200, 210, 8 Eng. Rep. 718, 722 (1843).

⁸ HANSARD'S DEBATES 288, 732-733 (1843).

⁹ ROYAL COMMISSION ON CAPITAL PUNISHMENT, *op. cit. supra* note 3, at 85; see also 79-84.

the *M'Naghten* rules which Mr. Justice Frankfurter, in his testimony before representatives of the Royal Commission, severely criticized in these words:

To have rules which cannot rationally be justified except by a process of interpretation which distorts and often practically nullifies them, and to say the corrective process comes by having the Governor of a State charged with the responsibility of deciding when the consequences of the rule should not be enforced is not a desirable system. . . . [The rules] are in large measure abandoned in practice, and therefore I think the *M'Naghten* Rules are in large measure shams. That is a strong word, but I think the *M'Naghten* Rules are very difficult for conscientious people and not difficult enough for people who say 'We'll just juggle them.'¹⁰

The truth is that, in actual administration, the tests of irresponsibility have had the rigidity of an Army cot and the flexibility of a Procrustean bed. Which one has depended on individual juries, on the particular trial judge's ruling on the relevancy and materiality of evidence sought to be admitted, on the scope allowed to the summing up by counsel at the close of the trial, and on the construction by the appellate tribunal of the words of the test in the light of the trial record. It must be remembered that once the defendant is acquitted, that is the end of the matter. The trial record is examined only in cases of appeal after conviction; and it is in reviewing such cases for errors at the trial that the appellate tribunal can guide courts in formulating their instructions to the jury and in pouring meaningful content into the artificial tests. That they have in fact not done so was the complaint of Judge Bazelon in his lectures in the *Isaac Ray* series last year. He pointed out that,

There is something quite curious about the manner in which both the *M'Naghten* and "irresistible impulse" rules have been

¹⁰ *Id.* at 102.

construed by the courts. Neither has been used creatively in the manner we like to think represents the "genius of the common law." Despite the potential breadth of a word like "know" in the *M'Naghten* rule, for example—whether "knowing" the nature of an act or "knowing" its quality or wrongfulness—no court has read it to mean more than "intellectually comprehend." And this although we have long known that even the best intentioned of men often find themselves acting in ways and for reasons they cannot justify in rational terms.¹¹

But apart from its illusory precision, and from the question long ago raised by that acute commentator on the English law, Sir James Stephen, about the questionable legal authoritativeness of the very influential advisory opinion of the English judges,¹² there are weaknesses in it which have become ever more evident as both British and American trial and appellate courts have attempted to apply it. Among these the most devastating is the psychiatric: The various versions of the *M'Naghten* "knowledge tests" unscientifi-

¹¹ Bazelon, D., Equal Justice for the Unequal, Isaac Ray Lectureship Award Series 5-6 (mimeographed 1961).

¹² "I cannot help feeling . . . and I know that some of the most distinguished judges on the Bench have been of the same opinion, that the authority of the answers is questionable. . . . They do not form a judgment upon definite facts proved by evidence . . . and they do not arise out of any matter judicially before the House."—STEPHEN, J. F., 2 A HISTORY OF THE CRIMINAL LAW OF ENGLAND 154 (London, Macmillan Co. 1883). Despite this tainted source, the English and American streams have been adhering to the *M'Naghten* rules. Justice Maule, one of the fifteen learned judges, in a separate set of answers protested that the answers should not have been given except in the form of a judgment and upon the facts actually proven in a case, instead of upon a series of hypothetical questions as put by the House of Lords. The questions asked the judges were circumscribed and were intended to cover only the psychoses in which delusional manifestations are the most striking symptoms, especially paranoia; moreover, the judges knew quite well that the questions referred to the case of *M'Naghten*, a paranoiac with a relatively circumscribed delusional system. Hence the extension of the tests to cases of mental disorder which were not dreamed of in the judges' philosophy is unwarranted, even if the legal authoritativeness of the answers be assumed. But see Appeal of Ronald True, 16 Cr. App. Rep. [1922] 164, 169, where it was said that the "old rigour of the rule in *McNaghten's Case*" had not been relaxed; and that the old tests were still in force and did not include the irresistible impulse principle.

cally abstract out of the total personality but one of its elements, the cognitive capacity, which in this age of dynamic psychiatry and recognition of the influence of unconscious motivation has been found to be not the most significant mental influence in conduct and its disorders. *M'Naghten* proceeds upon such questionable assumptions of an outworn era in mental medicine as that lack of knowledge of the "nature or quality" of an act, or incapacity to "know right from wrong" is the exclusive or most important symptom of mental disorder; that such knowledge (even if one ignores the view of modern psychiatry of the role of unconscious motivation of acts) is the sole instigator and guide of conduct or, at least, the most important element in conduct, so that only *its* absence should justly be the criterion of irresponsibility; and that capacity to assess the nature and quality of an act and its rightness or wrongness can be intact and can function as in the case of the average reasonable man, even though a defendant be otherwise demonstrably of disordered mind.¹³

Not only is the famous test vague and uncertain, and not only does it embalm outworn medical notions, but even from the point of view of assumedly separate, insulated mental functions it is also too narrow a measure of irresponsibility. It does not take account of those disorders that manifest themselves largely in disturbances of the impulsive and affective aspects of mental life.¹⁴

¹³ This analysis, from my *MENTAL DISORDER AND THE CRIMINAL LAW and Psychiatry and the Criminal Law*, 12 *MENTAL HYGIENE* 575, 580 (1928), is quoted in *Durham v. United States*, 214 F.2d 862, 871 (D.C. Cir. 1954).

¹⁴ GLUECK, *op. cit. supra* note 1, at Chaps. 9, 10. Professor Jerome Hall says that "in the light of existing knowledge and experience, lawyers, judges and intelligent laymen cannot be expected to accept the notion that a rational person may be insane. Yet . . . that is precisely the objective of the extremist criticism of the *M'Naghten Rules*."—Hall, J., *Responsibility and Law: In Defense of the McNaghten Rules*, 42 A. B. A. J. 917, 919 (1956). It is submitted that Hall confuses "rational" with capacity to reason. There

III

Despite these and other weaknesses, the *M'Naghten* knowledge rules still comprise the exclusive yardstick in more than half the states.¹⁵ The other American jurisdictions have extended the scope of the measure of irresponsibility to include the so-called irresistible impulse test. The decisions which accept disorder of the impulsive-inhibitory manifestations of mental process as excluding criminal responsibility are based on recognition of the psychiatric view that other psychodynamics, in addition to the cognitive, are involved in behavior and its aberrations, and on the view of some legal scholars that to constitute responsibility and guilt a normal functioning of the volitional capacity is as necessary as a normal functioning of the knowing and reasoning expressions of the accused's mental life. The cases which recognize irresistible impulse as a defense take into account the fact that where, despite the requisite knowledge, the accused's mental disease was such as very probably to have impelled him to the commission of a criminal act, his will was "overpowered" or his "free agency" was at the time destroyed, or, on the basis of the interrelationship

are severe paranoiacs who are not rational though they reason with unimpeachable logic from false premises or delusions. There are patients in mental hospitals who are subtle metaphysicians, brilliant chemists, excellent mathematicians, skillful lawyers; but there is valid cause for their being in the custody of hospitals rather than at large in the community. There is sane reasoning and insane reasoning; there is superficial rote "knowledge" of the difference between "right and wrong" and there is knowledge rooted in a normally integrated personality, knowledge which reacts to experience with the whole understanding and affective climate.

¹⁵ In 1956 Weihofen listed twenty-nine states as providing only the right-wrong test; WEIHOFFEN, H., *THE URGE TO PUNISH* 174-175 (New York, Farrar, Straus & Cudahy 1956).

of mental processes, that the destroyed "will power" seriously affected the cognitive capacity.¹⁶

Among the objections to this test in jurisdictions which shun it are the following:

It is claimed to be extremely difficult to prove the actual irresistibility of a particular impulse.¹⁷ In most instances, however, it is no less difficult to prove lack of comprehending knowledge of the particular act at the time of the offense—the keystone of the nature-and-quality and right-and-wrong tests. Certain difficulties are unfortunately inherent in the complex problem of a mind in action.

The Latin poet, Horace, has somewhere reminded us that

¹⁶ See especially, *Parsons v. State*, 81 Ala. 577, 596, 2 So. 854, 868 (1886). See also GLUECK, *op. cit. supra* note 1, at 232, and decisions and note at 267-273. Regarding the relation of irresistible impulse to the knowledge tests in the light of the indivisibility of mental activity, Dixon, C.J., has the following to say in *Brown v. Regina*, Argus L. R. 808, 814 (1959): "It may be true enough that although a prisoner has acted in the commission of the acts with which he is charged under uncontrollable impulse, a jury may nevertheless think that he knew the nature and quality of his act and that it was wrong and therefore convict him. But to treat his domination by an uncontrollable impulse as reason for a conclusion against his defence of insanity is quite erroneous. On the contrary, it may afford strong ground for the inference that a prisoner was labouring under such a defect of reason from disease of the mind as not to know that he was doing what was wrong. The law has nothing against the view that mind is indivisible, and that such a symptom of derangement as action under uncontrollable impulse may be inconsistent with an adequate capacity at the time to comprehend the wrongness of the act. This was put succinctly by Greer, J., during the argument of the case of *Rex v. True* 16 Cr. App. Rep. [1922], 164, at p. 167, in stating how in an earlier case he had directed the jury. His Lordship said: 'What I really told the jury was that the definition of insanity in criminal cases was the one laid down by the judges in *MacNaghten's Case*, but that men's minds were not divided into separate compartments, and that if a man's will-power was destroyed by mental disease it might well be that the disease would so affect his mental powers as to destroy his power of knowing what he was doing, or of knowing that it was wrong. "Uncontrollable impulse" in this event would bring the case within the rule laid down in *MacNaghten's Case*.' For that reason, even if no more had been said than that uncontrollable impulse does not amount to a defence, the fact that the subject was mentioned would make it necessary to put before the jury the true operation of uncontrollable impulse as a possible symptom of insanity of a required kind and degree."

¹⁷ See, for example, *State v. Bundy*, 24 S.C. 439, 445 (1885).

"anger is brief lunacy"; but sharp distinction has been jauntily made by some tribunals between acts supposed to be "mere outbursts of frenzy" and acts flowing from "true irresistible impulse." The judges have confidently decided, from a review of the evidence in the trial record, whether the facts demonstrate a truly resistless flow of energy caused by disease or belong to the category of expressions of anger. Sometimes jurists have rendered confusion worse confounded. Even a careful and open-minded judge answered the question "whether passion or insanity was the ruling force and controlling agency which led to the homicide" by saying that if the members of the jury "believe that the homicide was the direct result or offspring of insanity," they should acquit; if of "passion, . . . they should convict"; but, with more caution than illumination, he added "unless it be an insane passion."¹⁸

Going farther than the argument of difficulty of proof of irresistible impulse, it is claimed in some decisions that there is in fact no such thing as the psychiatric phenomenon of a pathologic drive so compulsively strong as to be practically uncontrollable. The classic ironic pronouncement on this point is that of Baron Bramwell, who asked whether the prisoner would "have committed the act if there had been a policeman at his elbow," and who argued, in *Regina v. Haynes* back in 1859, that "if an influence be so powerful as to be termed irresistible, so much the more reason is there why we should not withdraw any of the safeguards tending to counteract it."¹⁹ This approaches a begging of the question; for if the impulse is, *ex hypothesi*, pathologically nonresistible, then "safeguards" would be of little avail. Baron Bramwell's contribution to psychiatric

¹⁸ *State v. Felter*, 25 Iowa 67, 84 (1868).

¹⁹ 1 *Foster & Finlason's Nisi Prius Cases*, 666, 667 (1859).

penology has more recently been followed by a Canadian judge who charged a jury, "The law says to men who say they are afflicted with irresistible impulses: 'If you cannot resist an impulse in any other way, we will hang a rope in front of your eyes, and perhaps that will help.'"²⁰

All such instances overlook the fact that most patients in mental hospitals are deterrable; but that does not make them less mentally ill. And unless we are ready to disgrace and punish the mentally ill for their crimes, the question of their deterrability does not appear to have much relevance. Suppose, for example, that a hospitalized mental patient has been warned by the attendant again and again that he must control his temper or be deprived of various privileges and even more severely punished; and suppose that he has always been deterred by such warnings but despite this he kills a fellow patient on the spur of the moment through the subterranean mental dynamics of some delusional system. Are we ready to execute such a person despite his mental illness on the ground that he himself had in the past proved that he was deterrable?

Let me now contrast with the type of judicial psychiatrizing of Baron Bramwell and the Canadian judge, the open-mindedness of Chief Justice Dillon, in Iowa, who said as far back as 1868 that if medical men can definitely establish that a mentally diseased person may know right from wrong in the abstract and yet be driven irresistibly by his disease to commit a criminal act, "the law must modify its ancient doctrines . . . recognize the truth" and permit exculpation when such condition is proved.²¹ It was such open-mindedness that permitted the Iowa court to say, in 1877,²² that inability to distinguish right from wrong

²⁰ Rex v. Creighton, 14 Can. Cr. Cas. 349 (1908).

²¹ State v. Felter, 25 Iowa 67, 82 (1868).

²² State v. Mewherter, 46 Iowa 88 (1877).

and lack of understanding and knowledge of the character and circumstances of the act, *and* lack of power of will to abstain from it, constitute irresponsibility; and to say, in 1901,²³ that the fact that the impulse to steal is inspired by avarice or greed will not preclude the defense of insanity, if volition was weakened to such an extent as to leave the afflicted one powerless to control the impulse.

The main reason for appellate courts refusing to weave the irresistible impulse doctrine into the fabric of the law of irresponsibility is the claim that such a defense is dangerous to society. This is a chief criticism also of the District of Columbia *Durham* decision, which I shall consider in the third lecture. An early Alabama case warned that "adoption of the irresistible impulse test would destroy the social order, as well as personal safety."²⁴ And later a West Virginia judge similarly warned that it would be very dangerous to life to tell juries that a man who committed a murderous act he knew to be wrong and criminal was excusable if he did that act "at the command of irresistible impulse."²⁵ Yet the late Judge Cardozo, an extraordinarily perceptive jurist and sensitive citizen, observed, in mentioning the fact that some states recognize that "insanity may find expression in an irresistible impulse," that he was "not aware that the administration of their criminal law has suffered as a consequence."²⁶ In this connection, it must be borne in mind that nowadays the typical outcome of acquittal on the ground of insanity is not automatic discharge of the defendant, as in ordinary cases of "not guilty," but rather his commitment for control, and, if possible, treat-

²³ State v. McCullough, 114 Iowa 532, 535, 87 N.W. 503, 506 (1901).

²⁴ Boswell v. State, 63 Ala. 307, 321 (1879).

²⁵ State v. Harrison, 36 W.Va. 729, 753, 15 S.E. 982, 990 (1892).

²⁶ Cardozo, B., *What Medicine Can Do for Law*, in *LAW AND LITERATURE AND OTHER ESSAYS AND ADDRESSES* 108 (New York, Macmillan Co. 1931).

ment, in a mental hospital for as long a time as he remains dangerous.²⁷

The irresistible impulse test, added to the right and wrong rule, of course gives much broader scope both to the expert witness in testifying on the accused's mental condition and to the jury in assessing the presence or absence of responsibility. It catches in its exculpatory net many persons with mental aberration whom the knowledge tests miss, such as those whose mental processes have been affected by long-standing epileptic seizure states, general paresis, senile dementia and perhaps even extreme compulsive neuroses.²⁸

Apart from this, it reflects a sounder position from the point of view of legal analysis. In the historic case of *Parsons v. State* Mr. Justice Somerville was asked in 1886 to reconsider the opinion of the highest court of Alabama in an earlier decision in which the court had added the irresistible impulse test to the right-wrong rule. Pointing out that sound legal analysis of the definition of a crime makes "freedom of will" just as necessary an element in guilt as knowledge of right and wrong, he said that the jury should be informed that even if the mentally disordered accused had the requisite knowledge,

he may nevertheless not be legally responsible if the two following conditions concur: (1) If, by reason of the duress of such mental disease, he had so far lost the *power to choose* between the right and wrong, and to avoid doing the act in question, as that his free agency was at the time destroyed. (2) And, if, at the same time, the alleged crime was so con-

²⁷ See *infra* Lecture III, notes 55, 57.

²⁸ GLUECK, *op. cit. supra* note 1, at Chaps. 9, 10. For a dramatic recent case showing how the role of epilepsy can be overlooked even by psychiatrists unless they take into account the results of electro-encephalographic findings and other clinical signs, see the illuminating article by Banay, R. S., *Epilepsy and Legal Responsibility: 18 Years of Medico-Legal Impasse*, 8 CORRECTIVE PSYCHIATRY 8-14 (1962).

nected with such mental disease, in the relation of cause and effect, as to have been the product of it *solely*.²⁹

It would seem obvious that a mental disease which seriously affects the volitional-inhibitory capacity of the defendant ought thereby to destroy the prosecution's case. It is elementary that a complete legal analysis of the conditions of guilt involves both an act element and an intent factor, however much the two may be united psychologically. Wigmore, the leading American authority on the law of evidence, puts it in these words: "the distinct element in criminal intent consists not alone in the voluntary movement of the muscles (*i.e.*, in action), nor yet in a knowledge of the nature of an act, but in a combination of the two,—*the specific will to act, i.e.*, the volition exercised with conscious reference to *whatever knowledge the actor has on the subject of the act.*"³⁰ Indeed, the great English jurist, Stephen, in a brilliant analysis in 1883,³¹ came to the conclusion, despite *M'Naghten's Case*, "that the law, as it stands, is, that a man who by reason of mental disease is prevented from controlling his own conduct is not responsible for what he does." And concerning the proof that should be admitted in such cases, Stephen said that "the existence of any insane delusion, impulse, or other state which is com-

²⁹ 81 Ala. 577, 596, 2 So. 854, 868 (1886).

³⁰ WIGMORE, J. H., 2 EVIDENCE §242 (Boston, Little, Brown & Co. 3rd ed. 1940). Wigmore's discussion is in a different context than the tests of irresponsible insanity. Holmes says, in part, "The act is not enough by itself. An act, it is true, imports intention in a certain sense. It is a muscular contraction and something more. A spasm is not an act. The contraction of the muscles must be willed. . . . The reason for requiring an act is, that an act implies a choice, and that it is felt to be impolitic and unjust to make a man answerable for harm, unless he might have chosen otherwise. But the choice must be made with a chance of contemplating the consequence complained of, or else it has no true bearing on responsibility for that consequence."—HOLMES, O. W. JR., THE COMMON LAW 54-55 (Boston, Little, Brown & Co. 1881).

³¹ STEPHEN, *op. cit. supra* note 12, at 167-168.

monly produced by madness, is a fact relevant to the question whether or not he can control his conduct, and as such may be proved and ought to be left to the jury." Only last year, the House of Lords, in affirming a decision of the Court of Criminal Appeal in Northern Ireland in a murder case involving the unusual defense of a "state of automatism" induced by psychomotor epilepsy, went out of its way to suggest the need of the prosecution establishing both conscious awareness and voluntary control where sufficient proof of abnormal mental state has been introduced to present a jury question. Though dismissing the appeal, the House of Lords (Viscount Kilmuir L.C.) put the matter of our present interest in this language.

Normally the presumption of mental capacity is sufficient to prove that [the defendant] acted *consciously and voluntarily*, and the prosecution need go no further. But if, after considering the evidence properly left to them by the judge, the jury are left in real doubt whether or not the accused acted in a state of automatism, it seems to me that on principle they should acquit because the necessary *mens rea*—if indeed the *actus reus*—has not been proved beyond a reasonable doubt.³²

³² *Bratty v. Attorney-General for Northern Ireland*, 3 W. L. R. 965, 977 (1961); emphasis supplied. The defendant had put in three defenses: (a) "not guilty" since at the material time he was in a state of automatism because suffering from an attack of psychomotor epilepsy; (b) "guilty of manslaughter," since incapable of forming an intent to murder because "his mental condition was so impaired and confused that he was so deficient in reason that he was not 'capable of forming' such intent"; (c) "guilty but insane" because suffering from a disease of the mind within the *M'Naghten Rules*. The trial judge left the insanity defense to the jury, which rejected it; he refused so to leave the other defenses. The case is interesting for a discussion of automatism and its relations to the defense of insanity. Among the holdings and views is (1) that there are in law two types of automatism, insane and noninsane, and that a judge is under a duty to leave either type for consideration of the jury where the defense had laid a proper foundation therefore by "positive evidence in respect of it," which is "a question of law for the judge to decide." (973-975). (2) Where the only cause alleged for the claimed unconscious act was "a defect of reason from disease of the mind, namely psychomotor epilepsy, and that cause was rejected by the jury, there could be no room for the alternative defense of automatism,

In view of the fact that many authorities have long recognized that for conduct to be criminal in law it must ordinarily be not only intentional but under *voluntary* control, it is hard to understand why the majority of American courts have not extended the test of irresponsibility to include irresistible impulse. Some courts seem to be legally color-blind, in that they fail to see the relationship of the constituents of *actus reus* and of *mens rea* in general, to the tests of irresponsibility by reason of insanity or mental deficiency in particular.

Although the irresistible impulse test supplements the right-and-wrong formula and thereby widens the scope of exculpation to include more mental disorders, even that measure of irresponsibility is, from a psychiatric point of view, inadequate. As the British Royal Commission on Capital Punishment and the Court of Appeals for the District of Columbia have pointed out, the weakness of the concept is that it is too narrow and specialized a symptom, carrying . . . an unfortunate and misleading implication that, where a

either insane or noninsane," thus the trial judge was right in not sending this defense to the jury. (973-975, 982, 982-985). (3) Since appellant must be deemed to have been sane and responsible, there was no basis for the argument that he lacked an intent to kill or cause grievous bodily harm and therefore no issue of manslaughter to be left to the jury (978, 983, 987). (4) Where, on the evidence, on the issue of automatism, the jury remains in doubt whether the act was voluntary, they should acquit (983, 984, 985). (5) (*Per Lord Denning*) "Disease of the mind," within *M'Naghten*, is not limited to the functional psychoses (such as schizophrenia) but such conditions as epilepsy or cerebral tumor, or "any mental disorder which has manifested itself in violence and is prone to recur is a disease of the mind. At any rate it is the sort of disease with which a person should be detained in hospital rather than be given an unqualified acquittal" (981). (6) (*Per Lord Denning*) "The old notion that only the defense can raise a defense of insanity is now gone. The prosecution are entitled to raise it and it is their duty to do so rather than allow a dangerous person to be at large" (980). (7) "Automatism" was defined by the Court of Appeal as "connoting the state of a person who, though capable of action, is not conscious of action, and it is a defence because the mind does not go with what is being done." (972).

crime is committed as a result of emotional disorder due to insanity, it must have been suddenly and impulsively committed after a sharp internal conflict. In many cases, such as those of melancholia, this is not true at all. The sufferer from this disease experiences a change of mood which alters the whole of his existence. . . . The criminal act, in such circumstances, may be the reverse of impulsive. It may be coolly and carefully prepared; yet it is still the act of a madman . . . similar states of mind are likely to lie behind the criminal act when murders are committed by persons suffering from schizophrenia or paranoid psychoses . . .³³

Obviously, then, even the combination of the *M'Naghten* rules and the irresistible impulse test is not sufficient to cover the various mental disorders that can seriously affect the comprehension and control of behavior and ought therefore to be taken into account by the law of responsibility.

IV

Before seeking an improvement, a word should be said about the delusion concept.³⁴ One question asked the Judges of England following *M'Naghten's* acquittal was whether a person who commits an offense in consequence of an "insane delusion as to existing facts" is excused. The learned judges replied that if the hypothetical defendant "labours under . . . partial delusion only, and is not in other respects insane, . . . he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real." This was illustrated by saying that if the deluded individual were to believe a man is about to take his life and kills him, "as he supposes in self-defence,

³³ ROYAL COMMISSION ON CAPITAL PUNISHMENT, *op. cit. supra* note 3, at 110. *Durham v. United States*, 214 F.2d 862, 873-874 (D.C. Cir. 1954).

³⁴ See GLUECK, *op. cit. supra* note 1, at 247.

he would be exempt from punishment." On the other hand, if a person delusively believes that the victim had inflicted a serious injury to his character and fortune—something that would not excuse a sane individual—a deluded person killing him in revenge would not be excusable.³⁵ Obviously, this is a faulty conception of delusion. It presupposes an insulated, logic-tight compartment in which the delusion alone holds sway, leaving the balance of the mind intact and sound.

In the development of the tests, delusion has been entangled in both right-wrong and irresistible impulse. Its use, like theirs, can be criticized in that it represents a singling out of one symptom from a general pathologic process, largely in paranoia and paranoid schizophrenia, as if that symptom were isolated from the entire disease pattern. Moreover, delusion is not necessarily more significant in distorting behavior than are other deranged mental dynamisms in the total pathological context. To make responsibility hinge on the presence or absence of delusions is thus to assume too narrow and fragmented a view of mental illness and its effect on conduct.

V

In general, then, it may be said that the lifting out of context of any of the three symptoms employed in the prevailing tests—absence of knowledge, irresistible impulse, delusion—and the making of one or another of these signs crucial to the ultimate inference of irresponsibility, runs

³⁵ 67 HANSARD'S DEBATES 288, 718 (1843). For a discussion of the later evolution of the delusion concepts in the decisions involving right-wrong and irresistible impulse, see GLUECK, *op. cit. supra* note 1, at 247.

counter to fundamental facts of psychopathology; namely, the interrelationship of mental processes in disease as well as in health and the fact that expression of an illness most strikingly in some cognitive, volitional-impulsive, or affective symptom is but a diagnostic revelation of a *permeative* disturbance of the total personality and of the conduct flowing from such a shaken organism. To the extent that these symptoms can be viewed separately, their real significance is not, *per se*, the absence of capacity to know the nature of an act or its wrongfulness, or to control impulses or compulsions; nor is it the presence of delusions or hallucinations. The true meaning of these symptoms is rather that they are storm-signals of the breakdown of the personality's, especially the ego's, integrity to such an extent as to interfere with the subject's capacity to manage himself and to function without danger to self and others in the day-to-day reality-demands of a free environment. It is such disintegrative process, affecting largely the ego in its control of primitive impulses, that is perhaps the most common denominator and fundamental indicator of the disease process and of the patient's efforts to counteract it. These internal dynamisms bring about such externally obvious symptoms as withdrawing behavior, apathy, cognitive disorientation, confusion, excessive and persistent irritability, delusion, ideas of reference, hallucination, compulsive drives and others. The person who is mentally ill is in a process of losing his wholeness. Being "whole" entails the meeting of life's responsibilities with fair success commensurate to capacity, and doing so without the need of escape into an inner world, without such massive and persistent anxiety as to paralyze capacity for purposive action directed to clearly conceived goals, and without such unbearable and persistent tension or gross distortion of

reality as to make dissocial or antisocial behavior much easier than socially acceptable conduct. Being mentally disintegrated means having lost normal capacity for the assumption and the carrying out of responsibility from an ethical, cultural and, finally, legal point of view.

VI

Because of the relation of mental illness and its symptoms to the capacity to act in accordance with moral and legal norms, the psychiatric assessment of the person tends to bridge the gap between psychopathology and behavior. It is here that the alienist raises objection to the fact that, regardless of his attempt to present a rounded organic picture of the accused's mental state and dynamisms, he is pinned down and bedeviled by the lawyer's demand of "Yes" or "No" answers to questions as to the extent to which the defendant knew the wrongfulness of his act when he committed the offense or could have controlled his specific impulse to commit the crime. The prevailing legal tests tend artificially to limit and distort the presentation of the clinical picture as the examining psychiatrist has seen it, whilst demanding of him dogmatic answers to issues that belong rather to the concededly fallible but unavoidable judgment of a lay jury; namely, the relation of the psychiatric findings about the accused to the presence or absence in him of legal responsibility in respect to the specific criminal act. Were the jury allowed to project the knowledge and irresistible impulse tests against the background of unhampered psychiatric reports on the accused's condition and history—made as is done by a trained and experienced practitioner of mental medicine when he observes

and examines the patient thoroughly, applies the necessary medical, psychological, chemical and biological tests, and takes a reliable history of hereditary and developmental involvements³⁶—then the jury might more effectively and fairly apply *whatever* yardstick of irresponsibility the jurisdiction has put its faith in.

The effectiveness of the various legal tests as actually administered depends, then, in large measure on the extent to which the trial judge permits the admission of various parts of psychiatric testimony as relevant to the issue presented by a particular test. For example, some appellate courts, reviewing convictions, have struggled with the question whether the instruction as to volitional disturbance is properly to be given in the charge to the jury in all instances where the defense of insanity is in issue or must be given only in cases clearly involving the impulse-inhibiting capacity. An Illinois case in 1920³⁷ limited the test to situations where the evidence tends to indicate a disturbance in spheres other than cognitive. That decision went so far into the realm of psychiatry as to say that while the irresistible impulse test is not to be generally laid down to the jury, still, "in cases of partial insanity of the type known as paranoia," it is not sufficient for the trial judge to mention merely the knowledge tests. A 1921 case³⁸ ventured even farther into psychiatry in defining the scope of testimony. After limiting the "delusion test" to cases where the proof tends to show that the disease, paranoia, "is in its first or earliest stage of development," the decision states that, since "paranoia is a progressive disease," the irresistible impulse

³⁶ For a good description of thorough methods of psychiatric examination, see EWALT, J. R., STRECKER, E. A., & EBAUGH, F. G., *PRACTICAL CLINICAL PSYCHOLOGY* 75-98 (New York, McGraw-Hill Book Co., 8th ed. 1957).

³⁷ *People v. Lowhone*, 212 Ill. 32, 48, 126 N.E. 620, 638 (1920).

³⁸ *Woodhall v. State*, 149 Ark. 33, 231 S.W. 186 (1921).

doctrine applies only "where the disease has progressed . . . to its second or persecutory stage, or subsequent stages, when its form and hallucinations are such as to indicate that its victim, because of the disease, is no longer able to control his will and actions."

The dissenting opinion of Judge Van Voorhis in *People v. Horton*,³⁹ a more recent (1954) New York case, shows how a strict technical adherence to the boundaries of a test can hamstring and distort psychiatric testimony and result in confusion on the part of the jury:

. . . The testimony offered by Dr. Brancale was to the effect that appellant's act was the product of persecution by his father and that being actuated by such a delusion, appellant did not understand that his act was wrong. He testified that, although apparently aware that he was killing his father, only "seemingly" did appellant even know what he was doing. This answer was stricken out by the trial court. The next question was: "Q. Doctor, did he know what he was doing when he committed those acts? A. The answer is no. He was psychotic at the time and did not know the nature and quality of his acts." This answer also was stricken out. In response to a similar question, the answer was: "A. No, he was in a schizophrenic state." All but "no" was stricken out. The doctor then said: "I wish to qualify my responses." In answer to the next question of similar import, the doctor said that [the defendant] was still responding to his delusional idea. This answer was also stricken out by the court. Finally, the doctor was compelled to answer categorically "No." He added, however: "Your Honor, I think I should be permitted to qualify my

³⁹ 308 N.Y. 1, 20-21, 123 N.E.2d 609, 618-619 (1954). For another illustration, see Wiseman, F., *Psychiatry and Law: Use and Abuse of Psychiatry in a Murder Case*, 118 AM. J. OF PSYCHIATRY 289-299 (1962). For a helpful charge to a jury in an insanity case, see the instructions of Dixon, J., in *Rex v. Porter*, 55 C. L. R. 182 (1936). I am indebted to Mr. Justice Frankfurter for calling my attention to this case. For a skillful use of legal concepts in reviewing a conviction, see the opinion of Sir Owen Dixon, Chief Justice of Australia, in *Brown v. Regina*, Argus L. R. 808, 813-815 (1959).

answers on this, in all fairness."

The Court: "You should answer the question." Defendant's attorney took an exception to holding the witness to a "yes" or "no" answer. A little later the District Attorney stated: "You concede, then, Doctor, that this series of connected activities seemed to be rational? A. Seemed to be rational just as the case of a paranoid praecox. They are a whole series of connected activities, yet they are a most serious and most malignant form of schizophrenia. Just as the ability to rationalize doesn't make it rational." This answer was stricken out and the jury instructed to disregard it.

Judge Van Voorhis goes on to say:

This contest between the court and the witness, . . . lends color to the comment of Dr. G. H. Stevenson, F.R.S.C., at page 732 of Volume XXV of the Canadian Bar Review (1947) that: "The psychiatrist's difficulties with the M'Naghten Rules begin with the administration of the oath. He is sworn to tell the whole truth, but the rules, because of their concern only with the intellectual aspects of mental function, prevent him from telling the whole truth about the accused's mental condition. If he attempts to tell of the disorganized emotional aspects which may have caused the crime, he may be sharply interrupted by the trial judge and ordered to limit his comments to insanity as defined by the M'Naghten Rules. . . . He is in an impossible position—sworn to tell the whole truth and prevented by the court from telling it!"

Judge Van Voorhis then shows the critical damage done the defendant's case by the trial judge's hamstringing of the psychiatrist:

In ruling out this branch of Dr. Brancale's testimony upon the ground that it was immaterial whether appellant perpetrated this homicide in response to this delusional idea, the trial court thereby instructed the jury, in effect, that appellant's counsel's theory of fact on the subject of insanity was either incredible or irrelevant. This error went uncorrected when it came to the charge.

One of the advantages of the *Durham* case is that, under

it, artificial restraints on the scope of the psychiatric testimony are considerably reduced because of that decision's broadening and deepening of the area legally relevant and material on the issue of responsibility. While the American Law Institute's *Model Penal Code*, which I shall consider later in this lecture, commendably supplies a provision for enlargement of psychiatric testimony, it still would seem to hamper the witness's freedom by requiring that he express an opinion on the extent of impairment of defendant's capacity, because of mental disorder, to "appreciate the criminality" of his conduct or to "conform" it to the "requirements of law."⁴⁰ This is another way of saying that the expert witness must state his views on the inference of legal responsibility or irresponsibility, as laid down in the A.L.I. test, that is, on the accused's capacity to comprehend that the specific act was criminal and his power to incline the particular impulse involved in the specific crime away from an unlawful goal. These are, however, inferences which the jury ought to be left to draw from the testimony; and if the psychiatrist is required to express an opinion on them his expertise is likely so to dominate as to make him, rather than the jury, the decider of responsibility or irresponsibility.

The difficulty in all this springs from the tendency to confuse duties of judge, jury, and expert in the trial drama. So far as guilt or innocence is concerned, it is the jury which is

⁴⁰ The American Law Institute, MODEL PENAL CODE §4.05 (3) (Proposed Official Draft 1962). I am aware that "the modern tendency seems to be in accord with" the rule that "where the matter under inquiry is properly the subject of expert testimony the fact that the opinion elicited is on an issue or point to be decided by the jury does not render it inadmissible"—Blanc, V. H., *The Expert Witness in Criminal Trials*, 52 J. CRIM. L., C. & P. S. 317, 320 (1961). For the reason given in the text, I am of the opinion that in insanity cases it is preferable to leave the ultimate inference of responsibility or irresponsibility exclusively to the jury to arrive at on the basis, among other proof, of expert testimony undistorted by rigid Yes or No answers to the questions presented by the tests of irresponsibility. The difficulty is that the psychiatric and legal issues tend to run into one channel.

the final arbiter. The jury's function is to arrive at the ultimate inference of legal responsibility which is to be deduced by it from the facts and opinions in evidence. The judge's duty is to inform the jury as to the principles and standards of law applicable, including of course the test which in the particular jurisdiction is to be used in determining the absence of responsibility. The psychiatrist's function ought to be limited to the giving of a rounded and thorough picture of the defendant's condition at the time of the offense, in the light of his examination of the accused and of his experience with various mental illnesses at different stages of evolution and remission. This should be derived from psychiatric interviews and such clinical examinations as are normally applied in the practice of mental medicine.⁴¹ The scope and content of the questioning by counsel should be so controlled, and the subsequent instructions to the jury so framed, as to make it clear that the ultimate inference of responsibility or irresponsibility in applying the prevailing legal rules is to be drawn by the jury from the expert testimony and other relevant proof. Clearly, the utmost learning and skill are called for on the part of the judge in insanity trials.

While, technically, the psychiatrist's giving of an opinion on the "ultimate fact" or inference of responsibility or non-responsibility may be deemed to be not an invasion of the jury's province, because the jury may of course reject the psychiatric opinion, still, as I have pointed out, it results in such dominance by the psychiatric witnesses that the expert status of one or another of them can swing the basic issue one way or another. Nevertheless, bound as the psychiatric witness is by the various tests as guides to what is deemed relevant from the legal point of view, he is too often not free to give his diagnosis of the accused's condition in the

⁴¹ See *supra* notes 28 and 36.

manner and with the concepts he employs when rendering diagnoses and opinions in cases of mental illness not involving criminal behavior. Not only is there a tendency to cabin, confine, and confuse him, by a too rigid and literal application of the evidential rules of relevancy and materiality to the verbal boundaries of the legal tests, but to compel him to render dogmatic, unqualified opinions regarding the presence or absence of data that comprise the very elements of the particular legal test involved and the assessment of which belongs properly with the jury.

However, while it seems clear that the expert ought to be allowed to testify in terms of psychiatry and not in terms of law embodied in the tests, one must not overlook the dilemma this poses to the conscientious trial judge. If he permits too great an elasticity from the point of view of the law of evidence, he may destroy any significance of the tests as legal road-maps to the determination of irresponsibility.

I should think that the psychiatrist would have less ground for concern if courts generally followed what seems to be the preferable policy, set down in a leading case on evidence, permitting the expert witness to "express his own opinion either as to the possibility, probability, or actuality of the matter of fact about which he is interrogated."⁴² The psychiatric witness would then not be chained to the giving of dogmatic affirmative or negative answers to the questions

⁴² *Grismore v. Consolidated Products Co.*, 232 Iowa 328, 346, 5 N.W.2d 646, 657 (1942). The proposition accords with the views of WIGMORE, *op. cit. supra* note 30, §1920, and with Rule 409 of the American Law Institute's MODEL CODE OF EVIDENCE based on the Uniform Expert Testimony Act of the National Conference on Uniform State Laws (1937). In *Rollerson v. United States*, 343 F.2d 269 (1964), Bazelon, C. J., speaking for the court, in recognizing the difficulty of drawing the line between "underlying facts and conclusions," gave valuable advice to psychiatrists in connection with testifying in insanity cases. See also *Jackson v. United States* 336 F.2d 579 (1964), in which Judge Bazelon speaks of the shortages and shortcomings of the human and institutional resources for implementation of the defense of insanity.

crucial to the legal tests, without opportunity for ample qualification and explanation.⁴³

VII

There have of course been many attempts to improve the tests.⁴⁴ One of the more recent ones is the following formula in the American Law Institute's draft of a *Model Penal Code* adverted to in another connection above: "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirement of law." This is followed by the caveat—directed at the psychopathic offender—that ". . . the terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct."⁴⁵

The A. L. I. test is apparently a rewording, in more sophisticated language, of the familiar *M'Naghten* and irresistible impulse rules. The substitution of "appreciation" for "knowl-

⁴³ As showing a recent attempt of a court to liberalize the effect of *M'Naghten* via the technique of stretching the scope of admissible evidence under it, in *State v. Carlson*, 5 Wis.2d 595, 93 N.W.2d 354, 607 (1958), the Supreme Court of Wisconsin, which follows the right-wrong test, said: "We are of opinion . . . that if the offered testimony, together with other expert testimony, had sufficiently tended to prove that at the time of the offense defendant was subject to a compulsion or irresistible impulse by reason of the abnormality of his brain, the testimony should have been admitted. Even under the right-wrong test, no evidence should be excluded which reasonably tends to show the mental condition of the defendant at the time of the offense." In a later case, however, *Kwosek v. State*, 8 Wis.2d 640, 651 100 N. W.2d 339, 346 (1960), the court cautioned that this did not mean adoption of the irresistible impulse test. Cf. *Commonwealth v. Chester*, 337 Mass. 702, 711, 150 N. E.2d 914, 919 (1958).

⁴⁴ See GLUECK, *op. cit. supra* note 1, at 419-496, ROYAL COMMISSION ON CAPITAL PUNISHMENT, *op. cit. supra* note 3, at 93 *et seq.*; *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954), *United States v. Currens*, 290 F.2d 751 (3rd Cir. 1961).

⁴⁵ The American Law Institute, MODEL PENAL CODE § 4.01. (Prop. Official Draft 1962). As finally voted, the 1962 Draft added the word "wrongfulness" in brackets.

edge" may be helpful to the jurymen in widening and deepening the scope of their consideration of the accused's alleged cognitive impairment to include more than the superficial verbalization of correct literal answers to simple questions. On the other hand, it may be expected that prosecutors will not take pains to instruct the jury that "appreciation" has the kind of profound meaning of knowledge intended in the familiar biblical plea, "Father, forgive them, for they know not what they do." To make the A. L. I. formulation operate as an improvement, it will be necessary for the judge to bring out the deeper and more comprehensive meaning of the concept "appreciate" to an extent that will counteract the average jurymen's interpretation of it as equivalent to simple and superficial cognition.

There is also a question of the extent to which a lay jury will be able to grasp the significance of such an expression as "to conform his conduct to the requirement of the law."

The A. L. I. test has been rejected by a majority of the Canadian Royal Commission on the Law of Insanity,⁴⁶ by the Massachusetts Special Commission on Insanity,⁴⁷ and by the New Jersey Supreme Court.⁴⁸ On the other hand, Vermont enacted a statute specifically abolishing the *M'Naghten* test, and substituted a statute based on the A. L. I. Code. However, it carries the important modification that, instead of "substantial capacity," it provides for "adequate capacity," and to the A. L. I.'s exclusion of the psychopathic personality (on the ground that it tends to be defined essentially on the basis of existence of persistent unexplained recidivism), it adds an expansion of the terms "mental disease or defect" to include "congenital and traumatic mental conditions as well

⁴⁶ REPORT OF THE ROYAL COMMISSION ON THE LAW OF INSANITY AS A DEFENCE IN CRIMINAL CASES IN CANADA 32-33 (1957).

⁴⁷ Report of the Special Commission on the Problem of Legal Insanity, 43 Mass. L. Q. (No. 4) xvi (1958).

⁴⁸ *State v. Lucas*, 30 N.J. 37, 72, 152 A.2d 50, 68-69 (1959).

as disease."⁴⁹ Recently, also, the state of New York has been influenced by the A. L. I. formulation.^{49a}

In 1961, Chief Judge John Biggs, speaking for the majority of the United States Court of Appeals in the Third Circuit, in the *Currens* case, presented a formula which modifies the A. L. I. criteria in terms suggested in part (c) of a test proposed by the Royal Commission on Capital Punishment and adopted by it, in turn, from recommendations of the British Medical Association. The *Currens* case test is:

The jury must be satisfied that at the time of committing the prohibited act the defendant, as a result of mental disease or defect, lacked substantial capacity to conform his conduct to the requirements of the law which he is alleged to have violated.⁵⁰

It will be observed that this test adopts the "substantial capacity to conform" part of the A. L. I. formula but omits the cognitive aspect embraced in the clause, "appreciate the criminality of his conduct." Judge Biggs justifies this on the ground that the latter overemphasizes the cognitive element

⁴⁹ VERMONT STAT. ANN., Title 13, §§4801, 4802. (Emphasis supplied.)

^{49a} "§1120. Mental disease or defect excluding responsibility. A person is not criminally responsible for conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity to know or appreciate either: (a) The nature and consequence of such conduct, or (b) That such conduct was wrong." N. Y. Laws 1965, C. 593, Sec. 1. It will be observed that the provision, "to conform his conduct to the requirements of the law," was not enacted despite its recommendation by the Temporary State Commission on Revision of the Penal Law and Criminal Code, B-4. The Commission's recommendation regarding the scope and content of psychiatric testimony was, however, enacted into law, again omitting the provision regarding conformance of the defendant's conduct to the requirements of the law, and also omitting the following recommendation of the Commission: "or to have a particular state of mind which is an element of the crime charged." Proposed New York Penal Law Drafted and Recommended by the Temporary State Commission on Revision of the Penal Law and Criminal Code, B-7.

⁵⁰ *United States v. Currens*, 290 F.2d 751, 775 (3d Cir. 1961). Judge Biggs presaged a judicial reform of the tests (without calling it by the objectionable term "judicial legislation") in his important dissent in *United States ex rel. Smith v. Baldi*, 192 F.2d 540 (3d Cir. 1951).

in criminal responsibility which, he observes, "would rarely be significant, and indeed would be absent, in the case of an individual in an extreme state of stuporous catatonic schizophrenia . . . and in the case of the raving maniac or the imbecile."⁵¹ This is of course true. Yet one wonders whether the *Currens* formula, in omitting altogether any reference to cognition, does not come close to throwing the baby out with the bath. Its "substantial capacity to conform conduct to the requirements of the law" depends not merely on normal power of inhibition but also on normal, instead of delusional, confused, stuporous or otherwise defective power of comprehension of anticipated acts and their usual consequences. In order to "conform" anticipated conduct to legal requirements a person must have a conception of the substance of that which is to be conformed and of that which it is to be conformed to. The relevant objection to *M'Naghten* is not that it uses cognition in the test, but that the absence of knowledge is its *only* measure of irresponsibility. Moreover, from the point of view of coherence with traditional legal analysis, to omit all reference to impairment of comprehending cognition and confine the test to impairment of capacity to conform conduct to the demands of law comes close to omitting the *mens rea* element and limiting guilt to the presence of the *actus reus* element.

It must however be conceded that *whatever* formula for the testing of irresponsibility is adopted, there will be difficulties. Indeed, it can be shown that the traditional analysis of the foundation of responsibility into act and intent is itself subject to question in the light of modern psychology. Yet to be of use a test must take into account the fact that, typically, it is a yardstick to be applied by a jury of laymen. Lord Goddard, former Lord Chief Justice of England, has warned us spicily to remember that "after all . . . juries are

⁵¹ *Id.* at 774, note 32.

not drawn from university professors. . . . They are ordinary men and women." He asks, "Would not it be only confusing them if one went into metaphysical and philosophical distinctions between what is emotion and what is intellect and matters of that sort?"⁵² One may add that though professors with more or less learning analyze, word by word, the existing and proposed tests, they should not forget that such an intellectual exercise in the scholar's study is quite different from what goes on in the typical juryroom. Nevertheless, I must shamefacedly confess that in the next lecture I too will climb out on a limb with a test of irresponsibility.

Although you must by now realize that there is much more to our vexing problem than a formula for a "test," attempts to improve on *M'Naghten* ought not to be discouraged. Despite the fact that its rules have sometimes been given a degree of flexibility which enabled the jury, in some particularly pathetic case, to smuggle in the irresistible impulse test under the flag of the right-wrong rule,⁵³ or to twist its words into a meaning that could not reasonably be put on them, or even to ignore the rules altogether, there have also been tragedies under *M'Naghten*. Some witnesses before the Royal Commission on Capital Punishment, although reporting that in practice the *M'Naghten* rules have in recent years been more liberally interpreted by judges and less literally applied by juries,⁵⁴ claimed that there are cases where certifiably insane defendants had been found guilty and sentenced to death. This recalls the persuasion of the early American commentator on the criminal law, Bishop, that "the memorials of our jurisprudence are written all over with cases in which those who are now understood to have been

⁵² *Regina v. Spriggs*, 2 W. L. R. 162, 166 (1958).

⁵³ See *supra* note 43.

⁵⁴ ROYAL COMMISSION ON CAPITAL PUNISHMENT, *op. cit. supra* note 3, at 82 *et seq.*

insane have been executed as criminals."⁵⁵ A few years ago a conservative Boston newspaper published an editorial entitled, "Who Killed Jack Chester?" in which it played the spotlight on the weaknesses of the traditional tests of irresponsibility in these dramatic words:

Jack Chester, who murdered his girl friend, hanged himself yesterday in his State Prison cell.

That's what the news report says.

But the real killer of Jack Chester was the Commonwealth of Massachusetts. Chester was merely the hangman—his own hangman.

How can this be said when Gov. Furcolo had already asked the Executive Council to commute Chester's death sentence to life imprisonment and the Council was preparing to do so?

It can be said because the Commonwealth of Massachusetts observes to this moment that *McNaghten* Rule, an archaic legal interpretation which permits a defense of insanity in murder cases only if the accused cannot distinguish between right and wrong or is driven by an irresistible compulsion.

A jury decided that Jack Chester knew right from wrong, and that the compulsion which drove him to shoot Beatrice Fishman nine times was not irresistible. One cannot quarrel with a conscientious jury's decision. Yet who can deny that Chester was suffering from a serious illness of the mind?

The illness was characterized by a sense of guilt so great that Chester could accept for himself no punishment less than death—the punishment he meted out to himself yesterday.

What would have happened if the jury had not had to judge Chester by the *McNaghten* Rule; if some more realistic rule had applied and he had been found innocent by reason of a substantial mental defect and confined in a mental hospital?

One cannot be certain. Individuals with deep nihilistic urges seek satisfaction with terrible single-mindedness. Suicides do occur in mental institutions. But such institutions generally are more alert to prevent suicide attempts. And Jack Chester stood a better chance of having his urge alleviated in a mental

⁵⁵ Bishop, J., CRIMINAL LAW §390 (Chicago, T. H. Flood & Co. 9th ed. 1923).

institution.

How long will Massachusetts continue to subject its deranged killers to the deadly injustice of the McNaghten Rule?

The Commonwealth killed Jack Chester.⁵⁶

It is in implicitly recognizing the great variety of possible linkages between pathological mental states and behavioral manifestations that the simple *Durham* provision that "an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect" has an advantage over competing tests from the point of view of psychiatry.

VIII

Thus far I have been speaking largely about substantive law definitions of tests of irresponsibility; but by now you must realize the vital significance of adequate *procedural* provisions in the administration of the tests. The draftsmen of the American Law Institute's *Model Penal Code* deserve credit for setting down forward-looking procedures in respect to the psychiatric examination and testimony. They have, for example, provided that when notice is given of intention to plead insanity the *court* must appoint at least one qualified psychiatrist or request the superintendent of the local public hospital to designate such psychiatrist, to examine and report upon the defendant's mental condition.⁵⁷

⁵⁶ Who Killed Jack Chester?, *The Boston Herald*, Nov. 29, 1958, p. 6. For an excellent appraisal of the case *Commonwealth v. Chester*, 337 Mass. 702 (1958) see Wiseman, F., *op. cit. supra* note 39.

⁵⁷ American Law Institute MODEL PENAL CODE §4.05 (1) (Prop. Official Draft 1962). "The Medico-Legal Society of Massachusetts proposed a statute in 1897 which provided that the parties to any proceeding in court, before the trial, may agree upon an expert who shall make such an examination of the case as may in his judgment be necessary. The proposed statute provided further that, if the parties do not agree, the court upon motion of

Such a provision for a relatively neutral alienist in addition to those employed by the parties has long been recommended. It should reduce bias and tend to counteract the objectionable "battle of experts." The A. L. I. draft also provides that the court may order that the accused be committed for the period necessary for the examination, and "may direct that a qualified psychiatrist retained by the defendant" participate in the examination. The psychiatric report must include a description of the examination and a diagnosis.

The A. L. I.'s administrative adjuncts to its proposed tests properly provide, also, that counsel for the defense and for the prosecution must each be furnished a copy of the psychiatric report. It is specifically required, too, that upon examination of the report, the court may, without resort to a trial, enter a judgment of acquittal on the ground of mental disease or defect which excludes responsibility. Finally, under the A. L. I.'s provisions, the psychiatrist must "be permitted to make any explanation reasonably serving to clarify his diagnosis and opinion"—a wise requirement—though it does not specifically provide for permitting him to speak in terms of "possibility, probability, or actuality of the matter of fact about which he is interrogated."

It must be anticipated, I suppose, that as long as the mental issue is to be tried by a jury of laymen, there is danger of befuddlement of so untutored a trier of facts through addition to the law's adversary system and vocabulary of an adversary system of conflicting psychiatric testi-

either party, or upon its own motion, may appoint one or more persons learned in the special branch of science involved in the case, and that no medical expert shall be admitted to testify before any court except as thus provided and except in criminal cases where either party may call other medical witnesses"—Commissioner's Note, UNIFORM LAWS ANN. 9A, MISC. ACTS 356 (1937).

mony with its own concepts.⁵⁸ This derives inevitably from differences in theoretical orientation, experience, and talent for oral testimony of the experts assembled for the prosecution and the defense. The well-known Massachusetts Briggs Law for pre-trial examination of accused by psychiatrists appointed by the Commissioner of Mental Health has tended to reduce but has not altogether eliminated the notorious "battle of experts." Even the *Durham* decision cannot do away with this inherent difficulty.

For a long time it has been suggested that reform would come if the jury were permitted to pass only on whether or not the accused committed the act charged, leaving the insanity issue to be dealt with later by a panel of psychiatrists.⁵⁹ Apart from the fact that such a proposal is likely to encounter constitutional objections regarding the right to trial by jury on the mental, as well as the behavioral, ingredient of responsibility, one cannot be certain that the proposal

⁵⁸ For a good illustration of the entanglement of psychiatric expertise, prosecution cross-examination, judicial instructions, and the state's ambivalent attitude toward capital punishment, see Wiseman, *op. cit. supra* note 39.

⁵⁹ The late Dr. William A. White, during his lifetime dean of American psychiatrists, in an address in 1911 recommended that the jury's task be confined to deciding only whether or not the accused committed the offense charged, without resort at that stage to the defense of insanity. "This fact being established should give the State authority over the person of the offender, and he should be taken into custody, dealt with in accordance with the sort of person he is, and not turned back into the community until this may be done with safety. . . . A pleading of insanity is a virtual confession of the offense charged. The jury passes on that offense. It convicts the man. He is sent to the nearest state hospital for the insane. If his defense holds good, there is where he belongs, and not in jail. If he is not insane, there is the place to determine that fact. Those in charge of the institution are more competent to pass on this point than is the jury. If the accused is found sane, the defense fails, and he is remanded to the judge for sentence for his crime." For variations on this theme, see GLUECK, *MENTAL DISORDER AND THE CRIMINAL LAW*, *op. cit. supra* note 1, at 461-472. A Washington statute, providing for abolition of the defense of insanity, was declared unconstitutional as violative of the state constitution's due process clause which was held to include the right to trial by jury "upon every substantive fact going to the question of guilt or innocence."—*Strasburg v. State*, 60 Wash. 106, 118, 110 Pac. 1020, 1023 (1910). In *MENTAL DISORDER AND THE CRIMI-*

is desirable despite the present difficulties the jury has in insanity trials. A jury of twelve is more likely to arrive at a just decision in close cases involving the admixture of psychiatry, law, and morals than is either a single judge or a panel of psychiatrists of conflicting theoretical orientations and varying experience. By discussing the different aspects of the proof under guidance of some understandable legal criterion which reminds them, on the one hand, that the law does not exempt from responsibility solely on slight proof of mental aberration, and gives them, on the other, sufficiently simple descriptions of the areas of possible behavioral involvement when mental disorder is present, they have a basis for comparison of the defendant with the ordinary people

NAL LAW 466 I gave reasons why I did not think that the jury as a responsibility determining agency should be eliminated even if no constitutional barrier existed. More recently, Wiseman, basing his views on analysis of a recent Massachusetts case-history, came to the conclusion that "The explanation of a crime to a jury by a competent psychiatrist may be too complex both intellectually and emotionally for a jury to understand and act on." He went on to suggest that "a jury trial is not an appropriate forum for the presentation of psychiatric explanations of behavior. The function of a jury in a murder trial should be limited to a finding that an accused did or did not commit the offense charged."—Wiseman, *op. cit. supra* note 39, at 298-299. He recommends that in such cases, once "guilt" of the act has been established, a "Sentencing Authority" composed in part of psychiatrists and other professionally trained people, should, in the absence of capital punishment, decide upon treatment. Compare my recommendation of a "Socio-Penal Commission" after conviction, in *MENTAL DISORDER AND THE CRIMINAL LAW* 485-487; and see pp. 151-159 *infra*.

In his brilliant brief in the first *Durham* argument on appeal, Mr. Abe Fortas (aided by Mr. Abe Krash), concluded that a fundamental reform of the entire field of treatment of offenders is called for. "The courts would determine whether the defendant committed the act. The fact being ascertained, further disposition of the defendant would depend upon the judgment of trained personnel as to rehabilitation or therapeutic possibilities rather than upon judgment as to 'responsibility.' Criminal administration would focus upon prevention and therapy in terms of the potentiality and responsiveness to therapy of each individual rather than upon conceptions of criminal 'intent,' which, however phrased, remain abstractions that are difficult to determine, awkward to administer and often barren in results."—DONNELLY, R. C., GOLDSTEIN, J., & SCHWARTZ, R. D. (eds.) *CRIMINAL LAW* 741 (New York, Free Press of Glencoe 1962).

of their own experience. Nobody can hope for perfect jury decisions in all cases; but, obviously, perfection would be impossible, also, if the task were turned over to psychiatrists at the stage in the proceedings where the issue is guilt or innocence. However, once there has been a conviction, whether with or without the defense of insanity, it is highly desirable that all the resources of the motivational and behavioral disciplines should be brought into play to determine the nature and implementation of the sentence in the individual case, as well as its duration. I shall discuss this important matter in the closing lecture.

In the next lecture I shall consider the basic implications of the much-debated *Durham* case.

LECTURE III

DURHAM AND BEYOND

I

IN THE FIRST LECTURE, we examined some dilemmas involved in the defense of insanity. In the second, we saw that the prevailing tests of the irresponsibility of the mentally disordered contain grave faults not only from the point of view of modern psychiatry but also from that of legal analysis of the bases of responsibility and guilt.

Apart from the legal argument, suppose a defendant with mental disability at a stage of evolution where some cognitive capacity and some control of impulse can be proved but there are also present such grave symptoms as confusion, withdrawal, or excessive, continuous moodiness and brooding or other indications of an incubating disease process involving largely the ego or the total personality. What then? Pathological processes, like healthy ones, are interrelated, not insulated; and, from a psychiatric point of view, the accused is indubitably ill and belongs in a hospital. Is he nevertheless to be deemed guilty, to be stigmatized a criminal and, if he commits a homicide, subjected to the death penalty or hopeless life imprisonment? Is not the pronouncement of such a doom by society's laws against a member

suffering from mental illness contrary to elementary morality? Almost a century ago, the Supreme Judicial Court of New Hampshire said, in the germinal case of *State v. Jones*, "No argument is needed to show that to hold that a man may be punished for what is the offspring of disease would be to hold that a man may be punished for disease. Any rule which makes that possible cannot be law."¹

Perhaps it was considerations of this kind that led two pioneering tribunals, the Supreme Judicial Court of New Hampshire in decisions in 1870 and 1871, and the United States Court of Appeals for the District of Columbia in the *Durham* case in 1954,² to break away from the traditional "tests" and to recognize a broader and deeper basis of irresponsibility in mental illness. This of course also carried with it a call for a broader and deeper scope of psychiatric testimony properly admissible in evidence as relevant to the assessment of responsibility. If you are interested in the major influences that brought about the District of Columbia Circuit Court of Appeals formulation, you should study the *Durham* decision, in which Judge Bazelon cites and quotes from many legal and psychiatric authorities in support of the simple yet startling conclusion that "an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect." As to the century earlier decisions of the New Hampshire Court in *State v. Pike*³ and *State v. Jones*,⁴ they were influenced by a farsighted psychiatrist, Dr. Isaac Ray,⁵ to whose benign spirit, by the way, I

¹ *State v. Jones*, 50 N.H. 369, 394 (1871).

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

³ 49 N.H. 399 (1870); see also *Boardman v. Woodman*, 47 N.H. 120 (1866).

⁴ 50 N.H. 369 (1871).

⁵ The following passage from Dr. Ray's treatise clearly sets forth his views on the defense on insanity:

"It appears, then, that as a test of responsibility, delusion is no better

thank my presence here today. Dr. Ray's work was effectively quoted from in 1843 during the London trial of M'Naghten at the Old Bailey. It was also respectfully considered in 1883, in Sir James Stephen's learned treatise on the *History of the Criminal Law in England*. Dr. Ray's book was able to persuade the New Hampshire Court to come to an original, not to say revolutionary, conclusion. It is summarized in the following key words in the *Jones* case in 1871, approving Judge Charles Doe's simple yet profound charge to a jury:

If "the killing was the offspring or product of mental disease, the defendant should be acquitted."

This unadorned formula, agreed the New Hampshire appellate court on review, "fully covers the only general, universal element of *law* involved in the inquiry." It went on to say that

Whether the defendant had a mental disease . . . seems as much a question of fact as whether he had a bodily disease; and whether the killing of his wife was the product of that disease was also as clearly a matter of fact as whether thirst and a quickened pulse are the product of a fever. That it is a difficult question does not change the matter at all. The difficulty is intrinsic; [and] symptoms, phases, or manifestations of the

than those before mentioned. The truth is, there is no single character which is not equally liable to objection. Jurists who have been so anxious to obtain some definition of insanity, which shall furnish a rule for the determination of responsibility, should understand, that such a wish is chimerical from the very nature of things. Insanity is a disease, and, as is the case with all other diseases, the fact of its existence is never established by a single diagnostic symptom, but by the whole body of symptoms, no particular one of which is present in every case. To distinguish the manifestations of health from those of disease, requires the exercise of special learning and judgment; and, if no one doubts this proposition, when stated in reference to the bowels, the lungs, the heart, the liver, the kidneys, etc., what sufficient or even plausible reason is there, why it should be doubted when predicated of the brain?"—RAY I., *MEDICAL JURISPRUDENCE OF INSANITY* 39-40 (Boston, Little, Brown & Co. 5th ed. 1871). See also Reik L. E., *The Doe-Ray Correspondence: A Pioneer Collaboration in the Jurisprudence of Mental Disease*, 63 *YALE L. J.* 183 (1953).

disease as legal tests of capacity to entertain a criminal intent . . . are all clearly matters of evidence, to be weighed by the jury upon the question whether the act was the offspring of insanity; if it was, a criminal intent did not produce it; if it was not, a criminal intent did produce it, and it was a crime.⁶

This was strong confirmation of the instruction to the jury in the earlier *Pike* case. There, it had been urged that the defendant was "suffering from dipsomania, claimed to be a species of insanity"; and the court had instructed the jury that "whether there is such a mental disease as dipsomania, and whether the defendant had that disease, and whether the killing of Brown was the product of such disease were questions of fact for the jury." Those instructions were held correct on appeal.

One might say that the judges in New Hampshire in the early 1870s went back to the basic principle from which legal criteria of responsibility must ultimately derive; namely, that the prosecution has to prove capacity to commit a legally prohibited act and capacity simultaneously to entertain a criminal intent. This means a guilty mind related to the prohibited act and not merely a piece of a guilty mind or a guilty mind without accompanying capacity to guide and control and inhibit intended conduct. It is elementary that the law requires both an *actus reus* or an unlawful act (or omission) voluntarily performed under conscious guidance (not, for example, the behavior of a somnambulist), and a *mens rea* or a mind capable of and in fact desiring and intending, an act known by the actor to be criminal.

The New Hampshire rule is, in essence, the philosophy of the now famous decision in our own day, *Durham v. United States* which I shall presently analyze. In the meantime, the

⁶ State v. Jones, 50 N.H. 369, 398-399 (1871).

New Hampshire decisions may have left in your mind some question as to whether there really is any specific legal yardstick of irresponsibility apart from a general finding of mental disease or defect and a jury's conclusion as to whether or not the pathological state was sufficiently related to the defendant's crime to attribute blameworthiness to him under the guilty mind and guilty act formulae. To put it realistically, perhaps the pragmatic issue in all this is neither the capacity of knowing the nature of an act nor of controlling an impulse, but whether or not the jury, on the basis of its lifelong experience, believes it is dealing with a self-managing personality.

II

In the *Durham* case, in 1954, the United States Court of Appeals for the District of Columbia reviewed the defendant's conviction of the crime of housebreaking. It is curious that the significant opinion which resulted should have flown from such a comparatively nonserious offense. The major decisions in the insanity field have involved the crime of murder; and the consequence of conviction has, typically, been either the death sentence or life imprisonment. The appellate tribunal was urged to reverse Durham's conviction on the grounds that the trial court had not correctly applied the rules governing "burden of proof" and that the existing right-wrong and irresistible impulse tests should be superseded as obsolete.

Durham had a long and varied record of imprisonments for thefts as well as commitments and treatment for mental illnesses, including discharge from the Navy because found to be suffering from a "profound personality disorder." After

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attempted suicide, he had been transferred to Saint Elizabeths, the government hospital for the mentally ill, where his condition was diagnosed as "psychosis with psychopathic personality." Discharged as "recovered," he soon got into more trouble passing bad checks, and was found by a jury in a "lunacy inquisition," to be of unsound mind. Readmitted to the government hospital, he was this time diagnosed as "without mental disorder; psychopathic personality." Upon discharge, after the readmission, he was arrested and tried for housebreaking.

The prosecutor informed the trial judge that because of past commitments of Durham and filings without trial of charges against him, he did not think he ought to take the responsibility of dropping the present case. The prosecutor feared that the mental hospital would let the accused "out on the street" again, and if he "committed a murder next week" the prosecutor would be held at fault. Therefore he decided to go to trial on one case where the burglarious accused had been caught right in the house. The prosecutor reasoned that if the court then sent the defendant back to the hospital and he was again discharged the fault would not be the prosecutor's but the hospital's.

Durham waived trial by jury. The trial judge rejected his defense of insanity and Durham was convicted.

After reviewing the testimony of the psychiatric witness and of the defendant's mother, the Court of Appeals reversed the conviction. It concluded that "the psychiatric testimony was unequivocal that Durham was of unsound mind at the time of the crime," and that the trial judge had not properly applied the prevailing evidential rule that "as soon as 'some evidence' of mental disorder is introduced, sanity, like any other fact, must be proved as part of the

prosecution's case beyond a reasonable doubt."⁷

The Court of Appeals might have rested there; because, as it itself said, it reversed the conviction and remanded the case for a new trial on the basis of the error regarding proof. But the court took the occasion to pass also on the argument that the prevailing tests are not satisfactory criteria for determining responsibility, and should therefore be superseded.

After casting an eye over the history of the English rules, and pointing out that the right-wrong test, approved in the District of Columbia in 1882, had there been supplemented in 1929 by the irresistible impulse test, the court called attention to the fact that as early as 1838, Dr. Isaac Ray, "one of the founders of the American Psychiatric Association, in his now classical *Medical Jurisprudence of Insanity*," had designated the right-wrong principle a "fallacious test" of criminal responsibility.⁸ The court further noted that Judge Cardozo in 1928 had observed that "Everyone concedes that the present [legal] definition of insanity has little relation to the truths of mental life."⁹ The Court of Appeals also quoted other writers in law and psychiatry, revealing the basic inadequacies of both the knowledge and the irresistible impulse tests of irresponsibility. "In attempting to define insanity in terms of a symptom," it said, "courts have assumed an impossible role, not merely one for which they have no special competence. As the English Royal Commission on Capital Punishment emphasized, it is dangerous 'to abstract particular mental faculties, and to lay it down that unless these particular faculties are destroyed or gravely impaired,

⁷ See *Tatum v. United States*, 190 F.2d 612, 615 (D.C. Cir. 1951).

⁸ *Durham v. United States*, 214 F.2d 862, 870 (D.C. Cir. 1954).

⁹ *Id.*, at 870, quoting Cardozo, B., *What Medicine Can Do for Law*, in *LAW AND LITERATURE AND OTHER ESSAYS* 106 (New York, Harcourt, Brace & Co. 1931).

an accused person, whatever the nature of his mental disease, must be held to be criminally responsible.'"

The court pointed up the chief objections to the prevailing criteria of irresponsibility in these words:

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

Invoking its authority to formulate tests of irresponsibility in the District of Columbia and its "inherent power to make the change prospectively" the Court then enunciated the radical change for the future which is the heart of the *Durham* decision; namely, that the rule to be applied on the retrial of Durham and thereafter is, "simply, that *an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect.*" As the court noted, and as you will have noted, this is essentially the New Hampshire doctrine.¹⁰

¹⁰ Reid argues that there is a fundamental difference between the New Hampshire and the *Durham* positions, in that the former makes insanity a pure question of fact for the jury while *Durham*, more psychiatrically oriented, tends to interfere with the jury's fact-finding function.

"The New Hampshire doctrine devises no test, but rejects all tests; creates no presumptions, but rejects all presumptions; it is not so much a rule of law as an affirmation that there are no rules of law to determine legal accountability. . . . It may fail to consider fully the problem of ends, needs, and public policy, but it is the only pronouncement on insanity which seriously considers the problem of legal function—the correct function of the judge and jury, of the determiner of law and the decider of facts. It may be that Judge Doe failed to consider the practical, utilitarian value of a jury of laymen confronted with the language of psychiatry, but he did consider the value and validity of an old presumption of law which, from a mistaken assumption of fact, had grown into *stare decisis*. It may be that Judge Doe

The court then expounded certain critical aspects of the new rule: First, it defined the term "disease" in the "sense of a condition which is considered capable of either improving or deteriorating," and the term "defect" in the "sense of a condition which is not capable of either improving or deteriorating, and which may be either congenital, or the result of injury, or the residual effect of a physical or mental disease." A troubling question it therefore left open is: What, apart from the dynamism of improvement or deterioration, is "mental disease" in the *Durham* formula? Does it include the more extreme and obvious psychoneuroses? Does it include the psychopathic or "sociopathic" personality types? Chief Judge Biggs, a predecessor of both Judge Bazelon and myself in the *Isaac Ray Lecture* series, while rejecting *Durham* in a recent scholarly opinion in the *Currens* case on behalf of the United States Circuit Court of Appeals for the Third Circuit,¹¹ gives persuasive reasons for not slamming the legal door shut where the claim of irresponsibility derives from the fact that the accused is a psychopath or, in more modern terminology, a "sociopath." In my opinion the technical legal term, "insanity," in *Durham* embraces persons deemed by psychiatry to be pathological, whether their aberration is a psychosis or some other psychiatrically recognized pathological state. The American Psychiatric Association's *Diagnostic and Statistical Manual*, in its 1952 edition, includes psychopathic or sociopathic personality in the cate-

has accentuated the role to be played by the prejudices and intolerance of the jury, but he did so by eliminating the prejudices and intolerance of the judge. It may be that Judge Doe gives to the jury a vague question of fact, but he is offering it in place of dubious rules of law."—Reid, J., *Understanding the New Hampshire Doctrine of Criminal Insanity*, 69 YALE L. J. 367, 420 (1960).

¹¹ *United States v. Currens*, 290 F.2d 751, 761-763 (3d Cir. 1961). See also *Blocker v. United States*, 274 F.2d 572 (1959); and Krash, A., *The Durham Rule and Judicial Administration of the Insanity Defense in the District of Columbia*, 70 YALE L. J. 905, 932-933 (1961).

gory of "Mental Disorders."¹² If the chief criterion for legal insanity be lack of blame in acquiring the pathological state, it would seem that the absence of fault involved in a person's becoming a psychotic exists, likewise, in the acquisition of the "borderline" pathological states, and that the test should include them, albeit so defined as to minimize the possibility of diagnostic reasoning in a circle by requiring more evidence than proof of only persistent criminalism as the basis of the psychiatric judgment.¹³ Psychopaths (and extreme and long standing psychoneurotics) are persons suffering from pathological conditions that seriously disturb capacity for foresight, and organization and control of conduct. The specific causal linkage in a particular case may not be as obvious, or direct, or dramatic as in the frank psychoses; but it is often involved where the fact that the person has a prior criminal record does not elbow out or becloud the judgment regarding the other symptoms bearing on the fundamental issue of pathology as opposed to normal mental health.¹⁴

That the District of Columbia Court has been fulfilling its duty of gradual refinement of its basic formula in the light of special problems presented in specific cases, may be illustrated by two decisions. In *Stewart v. United States*,¹⁵ the

¹² *United States v. Currens*, *supra* note 11.

¹³ There is a progressive expansion of knowledge regarding the psychopathic personality which embraces neurological, psychological and sociocultural influences in the development of this clinical type and which demonstrates that there are observable symptoms and etiological influences apart from a history of criminalism. See *infra* note 14.

¹⁴ See the discussion in *United States v. Currens*, 290 F.2d 751, 761-763 (1961). See also McCORD, W. & J., *PSYCHOPATHY AND DELINQUENCY*, esp. Chap. 3, *The Problem of Diagnosis*, and Chap. 4, *The Causes of Psychopathy*. As to lack of blameworthiness as a criterion, it must be remembered that a psychosis deriving from a social disease, such as neurosyphilis, frequently involves moral blame but can result in legal irresponsibility.

¹⁵ *Stewart v. United States*, 214 F.2d 879 (D.C. Cir. 1954). See also *Taylor v. United States*, 95 U.S. App. D.C. 373, 222 F.2d 398, 404 (D.C. Cir. 1955), and *McDonald v. United States*, 312 F.2d 847 (1962).

court reversed and remanded a conviction for retrial under the *Durham* test (adopted only two weeks earlier) on the ground that it is error to charge the jury in a way from which they could infer that a mental disease is always physiological in nature,¹⁶ and error, also, to charge that a psychopath is a person of low intelligence and is never "insane" within the view of the law. The court reasoned that the trial judge had invaded the functions of expert witnesses and jury by treating factual issues either as having been settled by the testimony or as being matters of law. Questions of the nature of mental disease, it argued, are for the jury to assess in determining whether the standards of exoneration have been met. It is a matter of fact, not of law, whether a psychopathic personality meets the test.

On the other hand, in *Smith v. United States*,¹⁷ the court (Bazelon, J. *dissenting*) held that testimony that accused had, prior to an attack on his wife with a dangerous weapon, become increasingly indolent, that he had a violent temper and that he made the unprovoked and unusually violent

¹⁶ For the role of certain physiological-endocrinological and metabolic disturbances in bringing about temporary mental aberration, see Podolsky, E., *The Chemical Brew of Criminal Behavior*, 45 J. CRIM. L., C. & P. S. 675-678 (1955); Fox, S., *Delinquency and Biology*, 16 U. MIAMI L. REV. 65 (1961). For the relationship of insanity and other influences to varying induced states of automatism, see *Bratty v. Attorney-General for Northern Ireland*, 3 W. L. R. 965 (1961). The role of "psychosomatics" is frequently discussed in modern psychiatric literature; less space is given to the role of somatopsychics.

¹⁷ *Smith v. United States*, 272 F.2d 547 (D.C. Cir. 1959). Compare the following: "It is my personal opinion, based upon examination of men in the death house at Sing Sing, that no person in our society is in a normal state of mind when he commits a murder."—Glueck, B. C. Jr., *Changing Concepts in Forensic Psychiatry*, 45 J. CRIM. L., C. & P. S. 123, 130-131 (1954). In *Satterwhite v. United States*, 267 F.2d 675 (D.C. Cir. 1959), the court concluded that it was error to deny defendant's motion for a directed verdict on the ground of insanity, contrasting the expert testimony of psychiatrists as to the defendant's mental disease prior to the crime with that of government's witnesses, a police officer, and another lay witness who had helped to subdue the accused and had described him as "appearing in a daze."

assault because of a supposedly "concocted grievance," was held to be not sufficient evidence to present the insanity issue for consideration of the jury.

So much for the difficulties in interpreting the key legal term, *insanity*.

Regarding the question of proof, the District of Columbia Court pointed out that, according to precedent in federal cases,¹⁸ whenever "some evidence" exists "that the accused suffered from a *diseased* or *defective* condition" at the time of the prohibited act, "the trial court must provide the jury with guides for determining whether the accused can be held criminally responsible." In respect to such guidelines, the court said that the instruction should "in some way convey to the jury the sense and substance of the following":

If you . . . believe beyond a reasonable doubt that the accused was not suffering from a diseased or defective mental condition at the time he committed the criminal act charged, you may find him guilty. If you believe he was suffering from a diseased or defective mental condition when he committed the act, but believe beyond a reasonable doubt that the act was not the product of such mental abnormality, you may find him guilty. Unless you believe beyond a reasonable doubt either that he was not suffering from a diseased or defective mental condition, or, that the act was not the product of such abnormality, you must find the accused not guilty by reason of insanity.

Considering the possibility of the jury concluding that a condition of mental abnormality is by itself sufficient to relieve from responsibility, the court added the following caveat to its illustrative generalized charge:

. . . your task would not be completed upon finding, if you did find, that the accused suffered from a mental disease or defect. He would still be responsible for his unlawful act if there was no causal connection between such mental ab-

¹⁸ *Davis v. United States*, 160 U.S. 469, 16 S. Ct. 353, 40 L. Ed. 499 (1895). (Emphasis supplied.)

normality and the act.

As we shall see, the difficulty of defining the necessary etiological nexus has stimulated much adverse criticism of the *Durham* decision.¹⁹

I should mention that after reversal of the conviction, and upon a new trial, Durham was again convicted of house-breaking and petty larceny and sentenced to a term of one to four years. Because the trial judge's instruction to the jury that the accused would remain in the hospital until determined to be "of sound mind" was followed by the prejudicial statement that "if the authorities adhered to their last opinion on this point, he will be released very shortly," the second conviction of Durham was also reversed.²⁰

III

I have gone into the *Durham* case in this detail because such a review seems necessary to the evaluation of that now-famous judicial pronouncement, from the points of view of psychiatry and law.

The following implications of *Durham* seem clear:

First, it widens the scope of the relationship of various mental illnesses to irresponsibility. Like the New Hampshire cases, it takes account in one fell swoop of the injustice of stigmatizing and punishing (sometimes with death) persons whose antisocial acts are related to mental disorder, if the outstanding symptoms of that illness in any particular case

¹⁹ See, generally, Wechsler, H., *The Criteria of Criminal Responsibility*, 22 U. CHI. L. REV. 367 (1955); Hall, J., *Psychiatry and Criminal Responsibility*, 65 YALE L. J. 761 (1956); DeGrazia, E., *The Distinction of Being Mad*, 22 U. CHI. L. REV. 339 (1955); Gasch, O., *Prosecution Problems under the Durham Rule*, 5 CATH. LAW. 5 (1959). See also *United States v. Currens*, 290 F.2d 751, 771-775 (3d Cir. 1961).

²⁰ See *Durham v. United States*, 237 F.2d 760 (D.C. Cir. 1956).

do not happen to be dramatized in terms of absence of cognition or of complete confusion and absolutely nonresistible impulsive or compulsive drives. Thus the court realistically recognizes facts stated as far back as 1871, by Justice Ladd, in New Hampshire, quoting from Dr. Isaac Ray's writings in these striking words: "To persons practically acquainted with the insane mind, it is well known that in every hospital for the insane are patients capable of distinguishing between right and wrong, knowing well enough how to appreciate the nature and legal consequences of their acts, acknowledging the sanctions of religion, and never acting from irresistible impulse, but deliberately and shrewdly."²¹ To like effect an experienced psychiatrist who was one of my predecessors in the series of *Isaac Ray Lectures*, the late Dr. Gregory Zilboorg, said in 1943: "Except for the totally deteriorated, drooling, hopeless psychotics of long standing, and congenital idiots . . . the great majority and perhaps all murderers know what they are doing, the nature and quality of the act, and the consequences thereof, and they are therefore 'legally sane' regardless of the opinions of any psychiatrist."²²

Secondly, the *Durham* rule, by broadening the area of mental illnesses related to nonresponsible behavior, permits, correlatively, a much wider and deeper scope of psychiatric testimony. It thereby allows the alienist to present his assessment of the offender to the jury comprehensively and in his own terms, as he would were he in a clinic, diagnosing and discussing a patient *not* accused of crime. This is possible under the *Durham* formula because the scope of probative relevancy on the question of the relationship of mental disease to irresponsibility has been widened to include all

²¹ *State v. Jones*, 50 N.H. 369, 395 (1871), quoting RAY, *op. cit. supra*, note 5, at §43.

²² ZILBOORG, G., *MIND, MEDICINE AND MAN* 273 (New York, Harcourt, Brace & Co. 1943).

mental illnesses irrespective of any particular symptoms or stages. This is, moreover, done without casting out, where they are involved, the elements of the more familiar symptoms of confusion, planlessness, paranoid fear and uncontrolled behavior embodied in the knowledge, impulse, and delusion tests.

In this connection, the *Durham* formula makes possible a continuous adjustment, with the progress of psychiatry, of the medical data on the relation of which to behavioral capacity criminal responsibility must be assessed. As the court says, "Whatever the state of psychiatry, the psychiatrist will be permitted to carry out his principal court function which . . . 'is to inform the jury of the character of [the accused's] mental disease or defect.'"

Thirdly, the court points out that the division of labor implied in the *Durham* decision permits the jury "to perform its traditional function, to apply 'our inherited ideas of moral responsibility to individuals prosecuted for crime' . . . Juries will continue to make moral judgments, still operating under the fundamental principle that 'Our collective conscience does not allow punishment where it cannot impose blame.'" But, adds the court, "In making such judgments, they will be guided by wider horizons of knowledge concerning mental life. The question will simply be 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."

Fourthly, the court attempts to tie its reasoning into general principles of criminal law, when it says that "The legal and moral traditions of the western world require that those who, of their own free will and with evil intent (sometimes called *mens rea*), commit acts which violate the law, shall be

criminally responsible for those acts"; but it adds that "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."

It would seem, then, that the *Durham* decision resolves the major issues which for a great many years have been plaguing the field we are examining.²³

IV

Why, then, has its solution of the vexing problem of irresponsibility not been generally adopted? For even in the judicial bosom of the United States Circuit of Appeals for the District of Columbia itself, all is not harmonious with reference to *Durham*. In the *Blocker* case,²⁴ for example,

²³ I have one suggestion for possible improvement of the *Durham* test. I would phrase its content in the following language:

A defendant is not legally responsible for the criminal act in question if he committed it while he was substantially under the influence of mental disease or defect.

This seems to me to have the advantage of emphasizing not the pathological condition, but the *total personality and character* under enslavement of the pathological forces. The suggested formulation also tends to accept the assumption that had the defendant not been mentally disordered he would not have committed the crime. The requirement for exemption from responsibility is less than a "but for" linkage of disease and crime, but the adjective "substantially," admittedly troublesome, is included to warn the jury to exercise care in its assessment. I believe the test proposed is a realistic and humane one, in harmony with the pathological processes in the psychoses as these affect the total dynamic system of feeling, judgment, contact with reality and control of desire and conduct. Modern knowledge of the deep-rooted, ramified, subtle and sinister evolutions of a developing psychosis should convince one that to hold a mentally diseased person responsible and punishable despite his illness, if it cannot be established that his act was *exclusively* the product of his mental illness, is unjust. If the accused was *under the influence* of a mental illness when he committed the act, then whatever he did, including the crime, was the deed not of a normal person but of a mentally ill one; the act is therefore attributable to the defendant's being mentally disordered. In the text I suggest a more detailed test to meet the basic criticisms of *Durham*.

²⁴ *Blocker v. United States*, 288 F.2d 853, 857-872 (D.C. Cir. 1961).

United States Circuit Judge Burger complains of the obscurity of the term, *disease*, in the *Durham* formula, forgetting that both *M'Naghten* and irresistible impulse also require proof of "disease of the mind." He complains about the concept, *product*, not satisfied with the clarification given in the *Carter* case which followed *Durham* and which we shall consider later. He complains that psychiatrists belong to different schools of thought, forgetting the fact that (alas!) judges, also, belong to different schools of thought.

But let us not be facetious. Let us rather seriously examine the chief reasons advanced by judges for rejecting *Durham*. Many decisions, both in various United States Courts and in state jurisdictions, have steered away from *Durham*, largely on the following grounds:

First, and foremost, it is claimed that, unlike *M'Naghten*, *Durham* provides the jury with no explicit standard;²⁵ that the jury ought not to determine the question of exculpatory insanity without some specific guides as to the nature of mental incapacity required;²⁶ that, in brief, the *Durham* measure is so vague as to leave the jury virtually without guidance.

Is it true that the *Durham* formula largely leaves the jury without guidance? The decision itself anticipates this criticism, and replies that,

The questions of fact under the test we now lay down are as capable of determination by the jury as, for example, the questions juries must determine upon a claim of total disability under a policy of insurance where the state of medical knowledge concerning the disease involved, and its effects, is

²⁵ *Commonwealth v. Chester*, 337 Mass. 702, 713, 150 N.E.2d 914, 920 (1958).

²⁶ *Sollars v. State*, 73 Nev. 248, 316 P.2d 917 (1957); *State v. Goza*, 317 S.W.2d 609 (Mo. 1958); *State v. Andrews*, 187 Kan. 460, 357 P.2d 739 (1960); *Kwosek v. State*, 8 Wis. 2d 647, 100 N.W.2d 339 (1960); *United States v. Currens*, 290 F.2d 751, 773-774 (3d Cir. 1961).

obscure or in conflict. 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 questions of fact upon which the claim depends. Similarly, upon a claim of criminal irresponsibility, the jury will not be required to rely on such symptoms as criteria for determining the ultimate questions of fact upon which such claim depends. Testimony as to such "symptoms, phases or manifestations," along with other relevant evidence, will go to the jury upon the ultimate questions of fact which it alone can finally determine.²⁷

It is, however, insisted that the *Durham* formulation does not offer a sufficient definition of the crucial concepts of mental *disease* and mental *defect*. This cannot be denied. But is not this difficulty inherent? As pointed out, it plagues not only the *Durham* test but cases involving the application of the *M'Naghten* and the irresistible impulse rules; they, too, depend on prior proof of disease or defect of the mind. Back in 1870, in the *Pike* case,²⁸ the New Hampshire court pointed out that while "It is often difficult to ascertain whether an individual had a mental disease, and whether an act was the product of that disease, . . . these difficulties arise from the nature of the facts to be investigated, and not from the law; they are practical difficulties to be solved by the jury, and not legal difficulties for the court." Judge Bazelon, in his *Isaac Ray Lectures* last year, had some perceptive and hopeful words to say about the capacity for growth of a test of irresponsibility judicially conceived, not in mechanical, narrow, literal terms, but in the wider and deeper context of criminal justice and human psychology:

However imprecise the concept of mental disease, it is one of the few generalizations used by psychiatrists which is suffi-

²⁷ *Durham v. United States*, 214 F.2d 862, 875-876 (D.C. Cir. 1954).

²⁸ *State v. Pike*, 49 N.H. 399, 438 (1870). See also *State v. Jones*, 50 N.H. 369, 393-394 (1871).

ciently comprehensible to a layman to make it useful as a rubric under which development can occur . . . problems of definition and interpretations are, in a common law system like ours, the very ones which supply its most dynamic element. For my part, I should not be unhappy if the concepts of 'mental disease' and 'product' were treated as the opening wedge in a case-by-case creation of finer standards—perhaps similar in nature to what has taken place in the law of negligence. There is unquestionably work for judges to do under *Durham* if it is to be saved from the stagnation which so long characterized *M'Naghten*.²⁹

Certainly courts have a challenge to stimulate clarification of the tests, case by case, through creative effort that pours meaning into them yet allows their boundaries to remain relatively unambiguous. But this is not easy; and, as we shall see, it entails risk of undermining the rules of legal limitation altogether.

But let me remind you that those who believe that, in contrast to the supposedly too vague *Durham* formula, the right-wrong test is a crystal-clear yardstick for the jury to apply, are greatly mistaken. The important words of the knowledge tests were not clearly defined even when laid down by the judges of England in 1843. In practice, instead of the *M'Naghten* rules being definite measures of irresponsibility, they constitute vague, confusing, and even conflicting criteria. While courts seem to have given little attempt to define "mental disease," the words, "nature," "quality," "knowledge," "right," "wrong," have been subjected to various simple, or strained interpretations.³⁰ In fact, when one examines the decisions, he must conclude that the right-and-wrong test, in its various guises and dis-

²⁹ Bazelon, D., *Equal Justice for the Unequal*. Isaac Ray Lectureship Award Series 11-12 (mimeographed 1961).

³⁰ See GLUECK, S., *MENTAL DISORDER AND THE CRIMINAL LAW* 217-225 (Boston, Little, Brown & Co. 1925).

guises in the different American jurisdictions, is faulty not only because of its legal enshrinement of questionable psychiatry, but also because it is altogether too vague and uncertain to bring about any reasonable predictability of results. The confusion in the *M'Naghten* criteria is perhaps best shown by the fact that while competent witnesses before the British Royal Commission on Capital Punishment claimed the rules to be firmly fixed measuring-rods of irresponsibility, other, equally competent witnesses extolled their elasticity, some going so far as to suggest that the *M'Naghten* rules permit of inclusion of disorders of impulse.³¹

Over a hundred years ago the New Hampshire court put its finger realistically on the difference between the law in books and the law in action, when it said:

It is clear . . . that judges have adapted their language to the facts of the particular case before them; and that when anything is said about knowledge of right and wrong, or knowledge of the quality of the act, or any other legal test, it has been, and will inevitably continue to be, qualified and explained in such a way, to meet the evidence upon which the jury are to pass, that its character as a rule entirely disappears.³²

It seems obvious, then, that the search for any sharp black versus white dividing line between responsibility and irresponsibility is vain, and that we must be content with a reasonably flexible standard but one made as understandable and practical as the *mésalliance* between law and psychiatry will permit.

Continuing, now, with other criticisms of *Durham*, perhaps the most frequent of these is the view that it relies

³¹ ROYAL COMMISSION ON CAPITAL PUNISHMENT 1949-1953 REPORT 81 (Cmd. 8932) (London, H.M. Stationery Office 1953).

³² *State v. Jones*, 50 N.H. 369, 393 (1871).

too greatly on an unsatisfactory, undefined "product test,"³³ and that it is questionable whether the product requirement has any real meaning.³⁴

There is, admittedly, some ambiguity regarding the degree of etiological nexus necessary. This has been largely remedied by clarification in the *Carter* case.³⁵ Contending that the *Durham* decision was merely an extension of the established rule "to apply the defense to all acts which would not have been committed *except for* a mental disease," the court, in *Carter*, explained that the "product test" does not require the act to be a direct or immediate result of a mental disease. Rather, it says, the relationship between disease and act must be "critical" or "determinative" so that "the accused would not have committed that act if he had not been diseased as he was . . . The short phrases 'product of' and 'causal connection,' " it goes on to expound, "are not intended to be precise . . . as though they were chemical formulae." They mean merely that the facts must be such "as to justify the conclusion, 'But for the disease the act would not have been committed.'"³⁶ In other words, the disease must have made "the effective or decisive difference between doing or not doing the act." Not only the immediacy of the connection but also the degree of progression of the disease itself—something always extremely difficult to determine—is not controlling, just so long as the jury conclude that *without* the disease the accused would

³³ *State v. Goyet*, 120 Vt. 12, 132 A.2d 623 (1957); *People v. Carpenter*, 11 Ill. 2d 60, 142 N.E.2d 11 (1957); *Sauer v. United States*, 241 F.2d 640 (9th Cir. 1957), *cert. denied*, 354 U.S. 940 (1957). Compare *State v. Jones*, 50 N.H. 369, 375 (1871).

³⁴ *Flowers v. State*, 236 Ind. 151, 139 N.E.2d 185 (1956); *State v. Lucas*, 30 N.J. 37, 152 A.2d 50 (1959).

³⁵ *Carter v. United States*, 252 F.2d 608 (D.C. Cir. 1957). See also *Stewart v. United States*, 247 F.2d 42 (D.C. Cir. 1957).

³⁶ "It was a short, simple step, inevitable and evolutionary after the opinion of this court in *Smith*" (which had added irresistible impulse to right-wrong).—*Carter v. United States*, 252 F.2d 608, 616 (D.C. Cir. 1957).

not have committed the crime.

Despite this explanation, however, it must be conceded that the extreme burden imposed on the government of disproving causal connection between the disease and the act once the accused has introduced "some evidence" of mental disorder, tends greatly to weaken the "product" requirement in *Durham*. Later in this lecture I will make a suggestion for strengthening the burden of proof aspect. In the meantime, it should be recalled that the *M'Naghten* test, which the critics of *Durham* prefer, is itself not without ambiguity regarding causal nexus of mental disorder and symptom, as is shown by the clause, "the accused was labouring under such a defect of reason, from disease of the mind," etc.

Still another objection to *Durham*, this from the point of view of the aims and means of the criminal law, is the argument that it comes close to equating mental abnormality with criminal irresponsibility, and that it may even open the door to eventual nonpenal treatment of *all* criminals.³⁷ It is not clear that *Durham* will have this effect. However, the point of view expressed is shown in a 1960 Arizona

³⁷ Judicial concern that the adoption of the *Durham* formula will result in a wholesale exoneration of criminal offenders is well illustrated by a recent Delaware case:

"It is . . . impossible . . . to determine at this time what the final result of the effect of [the *Durham* rule] in the trial of murder cases will be. It is conceivable that the adoption of too broad a standard might result in holding that any person who commits a crime is suffering from mental illness and therefore not guilty . . . we feel that it is better and safer for society to follow the road we know, even though it may have many bumps and turns, rather than follow a seemingly more modern road, the destination of which is at present uncertain."—*Longoria v. State*, 168 A.2d 695, 701 (Del. 1961). Early studies of the operation of the *Durham* formula in the District of Columbia, however, came to the conclusion that while the new test has contributed to a greater awareness among lawyers and judges of problems of mental abnormality and to motions for psychiatric examinations in a greater number of cases, it has not resulted in a significant increase in acquittals by reason of insanity. See Krash, *op. cit. supra* note 11, at 905; but compare *infra* note 52.

decision³⁸ which, clinging to *M'Naghten*, argues that, although the question whether the defendant had a mental illness which caused the criminal act is one for psychiatry, its answer does not suffice to resolve the legal issue of the presence or absence of criminal responsibility, while in the court's opinion *M'Naghten* is adequate for the resolution of this legal issue.

A recent Connecticut case³⁹ rejects *Durham* on the ground, among others, that it will make the psychiatrist's judgment virtually conclusive. And another recent decision reminds us that there are not enough psychiatrists or facilities to treat all mentally abnormal criminals whom the judicial critics take for granted *Durham* will exonerate.⁴⁰ This is an argument for possible postponement of the *Durham* rule in some jurisdictions; not for its rejection in principle. In the last lecture I shall have something to say about the shortage of trained psychotherapists. As to the argument that *Durham* will make the psychiatrist's judgment conclusive on the issue of guilt because it allegedly equates mental disorder with irresponsibility, the explanations in the *Carter* case would seem to be an adequate reply. The requirement of some causal connection between disease and crime and the delineation of the distinctive roles of expert and jury under judicial guidance would tend to minimize the anticipated danger. The *Carter* case notes that in rejecting the notion that there exists a legal insanity different from clinical mental illness, *Durham* confines medical experts to a determination that the accused did or did not suffer from a medically recognized mental illness at the time of the act in question.

³⁸ *McCarrell v. State*, 357 P.2d 139 (Ariz. 1960).

³⁹ *State v. Davies*, 146 Conn. 137, 148 A.2d 251 (1959).

⁴⁰ *State v. Andrews*, 187 Kan. 458, 357 P.2d 739 (1960).

There may, nevertheless, be some merit to the criticism that *Durham* tends to equate mental disease with irresponsibility, inasmuch as it also permits "expert medical opinions as to the relationship, if any, between the disease and the act of which the prisoner is accused." True, it goes on to say that "the conclusions, the inferences from the facts, are for the trier of facts"; but, one may legitimately inquire, May it not be that if the psychiatrist is asked his views as to the linkage "between the disease and the act" his opinion will carry controlling weight with the jury in making the "conclusions and inferences from the facts" which the jury is supposed to make?

Thus far I have discussed objections to *Durham* involving its vagueness and the role of psychiatrists.⁴¹ However, perhaps the most influential argument advanced against *Durham* springs from the fear that it grossly impairs the deterrent influence of punishment. It is argued by the critics that society has the right to protect itself even against many offenders who happen to be mentally ill by psychiatric standards; and *Durham*, it is claimed, will lead to wholesale acquittal of criminals,⁴²—a weakening of deterrence under a rule which the critics regard as obviously much looser than *M'Naghten*.⁴³

⁴¹ I have not gone into a number of decisions which have rejected *Durham* on the technical ground that the court is bound by the basic doctrine of *stare decisis* which compels adherence to pre-existent decisions and upholding of precedents to insure stability and predictability in the law. Some courts have felt bound by the terms of an existing statute. See *State v. Collins*, 50 Wash. 2d 740, 314 P.2d 660 (1957); *State v. Murphy*, 56 Wash. 2d 761, 355 P.2d 323 (1960); *State v. Goza*, 317 S.W.2d 609 (Mo. 1958); *People v. Nash*, 52 C.2d 40, 338 P.2d 416 (1959); *Downs v. State*, 231 Ark. 466, 330 S.W.2d 281 (1960); *State v. Robinson*, 168 N.E.2d 328 (Ohio 1958); *Piccott v. State*, 116 So.2d 626 (Fla. 1959); *Commonwealth v. Woodhouse*, 401 Pa. 242, 164 A.2d 98 (1960); *Howard v. United States*, 232 F.2d 274 (5th Cir. 1956).

⁴² *Commonwealth v. Woodhouse*, 401 Pa. 242, 164 A.2d 98 (1960).

⁴³ *Sauer v. United States*, 241 F.2d 640 (9th Cir. 1957), *cert. denied*, 354 U.S. 940 (1957).

In my considered opinion after many years of research and reflection, the protective effect of the deterrent thrust of the criminal law, especially in capital cases and rape, has been overestimated. I know of no reliable proof that a severely punitive code in fact protects society more than a milder one does. The evidence assembled by the British Royal Commission on Capital Punishment a few years ago⁴⁴ would seem to raise doubt about the efficacy of general deterrence reflected in capital punishment. At all events, effective protection of the public derives largely from instruction by family and church, and, so far as concerns public institutions, it comes not nearly so much from one or another test of the irresponsibility of the insane—which at most deal with but a small portion of the totality of offenders—as it does from the existence of efficient and fair police, courts, correctional, therapeutic, and rehabilitative agencies.

V

I have discussed the chief objections to *Durham* which have been raised in recent judicial pronouncements. If I may now recast the most fundamental of these criticisms, I would put it in the following terms: Unlike the *M'Naghten* and irresistible impulse tests, *Durham* fails to provide necessary intervening links between mental aberration and irre-

⁴⁴ ROYAL COMMISSION ON CAPITAL PUNISHMENT, *op. cit. supra* note 31, at 23. For an excellent brief discussion of the death penalty, see WEIHOFEN, H., *THE URGE TO PUNISH* 146 *et seq.* (New York, Farrar, Straus & Cudahy 1956). See also the scholarly SELLIN, T., *THE DEATH PENALTY: A REPORT FOR THE MODEL PENAL CODE* (Philadelphia, American Law Institute 1959); and *id.* *Capital Punishment*, 25 FEDERAL PROBATION (1961); and MacNamara, D. E. J., *Crime and Capital Punishment*, 8 KINGS COUNTY GRAND JUROR 6-7 (1961).

sponsibility. The traditional tests require the jury to find not merely the presence of mental illness but that the disorder had an effect in destroying or at least greatly limiting the processes of mentation, comprehension, and self-control basic to guided behavior. *Durham*, on the other hand, jumps directly from the finding of mental disease to the finding of lack of responsibility without specifying that the jury should go through the intermediate stage of assessing the effect of the mental illness on the processes crucial to rational and controlled conduct. This deficiency in *Durham* is important, because the concepts embodied in the traditional tests—lack of knowledge of the nature, quality and wrongfulness of a contemplated act, loss of power of controlling antisocial impulses—are not merely symptomatic of mental disorder at certain stages but are also indications of the probable destruction of the popular basis of moral accountability in the daily traffic of life. It may be assumed on the ground of general experience that where a jury finds that the pathological condition of the accused affected his cognitive and self-controlling powers (as provided by *M'Naghten* and irresistible impulse), they are more likely, than under *Durham*, to be correct in a conclusion that the crime was indeed the "product of mental disorder" and that therefore the defendant is not blameworthy. Where the jury is required by the legal definitions to look for proof of the presence or absence of cognition and control, it is likely to seek for these intervening links in a chain of which one end is mental disorder, the other conduct; or, to vary the figure, the jury is likely to make deliberate use of at least two intermediate steppingstones between psychopathy and crime with which daily experience has made them familiar.

It must be conceded that, put in some such fashion, this type of argument has merit. It attacks the Achilles' heel of

Durham, if that test has any fundamental weakness. However, the difficulty even with this argument is its incompleteness; for the tests rivaling *Durham* do not take account of the fact that in addition to cognition and volition there are other symptomatic steppingstones between mental disease and conduct. Moreover, in *all* tests the basic problem confronting the jury, before it can walk at all on any steppingstones provided by a legal test, is to determine whether or not there exists mental disease or defect.

However, if intervening links between mental disorder and criminalistic behavior are deemed indispensable to a satisfactory test, I venture to suggest the following formulation as perhaps more realistic and more in harmony with expanding psychiatric knowledge than either *M'Naghten* alone or *M'Naghten* supplemented by irresistible impulse, or the American Law Institute's formulation, or the *Currens* decision. I shall put the test in terms of instructions to the jury. While it is understood that the prosecution must prove every element, including sanity, beyond a reasonable doubt, I am deliberately omitting reference to burden of proof in spelling out the test because I think this should be separately charged, in order to reduce the chance of confusing the jury. It will be noted that I include a provision for a mid-verdict of partial responsibility.

The proposed test is as follows:

If you are convinced that the defendant, at the time of the crime, was suffering from mental disease or defect which impaired his powers of thinking, feeling, willing or self-integration, and that such impairment probably made it impossible for him to understand or control the act he is charged with as the ordinary, normal person understands and controls his acts, you should find him *Not guilty on the ground of insanity*.

If you are convinced that the defendant, at the time of the crime, was suffering from mental disease or defect which im-

paired his powers of thinking, feeling, willing or self-integration, *but you doubt* whether such impairment probably made it impossible for him to understand or control the act he is charged with as the ordinary, normal person understands and controls his acts, you should find him only *Partially responsible*.

If you are convinced that the defendant was *not* suffering from mental disease or defect at the time of the crime, you should find him *Guilty*.

There is a difference of opinion as to whether the jury should be told what the consequence of their verdict will be⁴⁵ I am convinced that this is desirable; and, if it is, I suggest the following addition to the charge:

If you find the defendant *Not Guilty on the ground of insanity*, he will be committed to a public mental hospital for

⁴⁵ See *Lyles v. United States*, 254 F.2d 725 (D.C. Cir. 1957) *Cert. denied* 356 U.S. 961 (1958). In a separate opinion, *Prettyman and Burger, JJ.*, said: "We think that when the instruction is given, the jury should simply be informed that a verdict of not guilty by reason of insanity means that the accused will be confined in a hospital for the mentally ill until the superintendent has certified, and the court is satisfied, that such person has recovered his sanity and will not in the reasonable future be dangerous to himself or to others, in which event and at which time the court shall order his release either unconditionally or under such conditions as the court may see fit" (728). *Bastian* joined *Miller and Danaher, JJ.*, and, while concurring in the result (affirmance of conviction on several grounds), said: "It seems to me unwise and unnecessary that a jury be told the result of their verdict of 'not guilty by reason of insanity.' In Federal courts, as at common law, the jury are not usually told the quantum of punishment which may be meted out if they convict, or that probation may be granted" (732). *Bazelon, J.*, with *Edgerton, C.J.* and *Washington, J.*, dissenting: "The false assumption that acquittal by reason of insanity, like outright acquittal, frees the accused to walk out on the streets may lead juries to convict, despite strong evidence of insanity at the time of the crime . . . From the fact that the accused is on trial, the jury inevitably infers that he is at least sane enough to be tried. There is danger that they may leap from this inference to the conclusion that, if acquitted by reason of insanity and hospitalized, he would immediately be released. But . . . qualification for release from a mental hospital is a different thing from competency to stand trial and evidence of present mental condition 'is not admissible for the purpose of attempting to show the probable mental condition of the accused at some future time of possible release.' I would, therefore, hold, where the defense of insanity is relied on, that the jury should be instructed, as a protective measure, that a person may be mentally competent to stand trial and yet suffering from such mental illness as to justify holding him under hospital restraint if he should be acquitted by reason of insanity" (734-735).

supervision and treatment until such time as the superintendent will certify, and a court will thereafter find, that he is no longer criminally dangerous. If you find him *Partially responsible* he will be committed to a public mental hospital until such time as the superintendent will certify, and a court will thereafter find, that he is no longer criminally dangerous, and thereupon he will be transferred to the jurisdiction of the correctional and paroling authorities to be dealt with in accordance with the sentencing and paroling provisions, taking account of his former status of partial responsibility. If you find him *Guilty*, he will receive the punishment provided by law.

It seems to me that the test embodied in these proposals is in harmony with the desiderata of a modern-day guide to a jury that I mentioned at the outset of the prior lecture. It supplies the more important and familiar psychological and behavioral links between mental aberration and criminal conduct which are omitted in the New Hampshire and *Durham* formulations. It is simpler in language, yet more comprehensive in relevant symptomatic and behavioral content, than the American Law Institute's formulation; and it supplies the omissions of the *Currens* test.

By taking specific account, in layman's language, not only of cognitive but also of affective, volitional and integrative impairment, the proposed criterion, like the *Durham* test, allows ample scope to psychiatric testimony. At the same time it does not imply a compulsion that the psychiatrist pass a clinical judgment on such moral and metaphysical concepts as right and wrong. Although the test deals with specific mental processes, the psychiatrist remains free to state his diagnosis as an organic whole. While the proposed test does not set forth specific syndromes of the various disease entities—something impossible and undesirable in a legal test—it does bring out *major areas and functions* of

pathological involvement and their relationship to the comprehension and control of conduct.

The test also indicates that it is the jury's function, not the psychiatrist's, to make the inference of responsibility or irresponsibility from the testimony on mental disorder, by deciding whether or not the *influence* of the disease or defect on the comprehending and controlling functions involved in conduct was or was not such as to render it improbable that the accused understood the material, moral and legal significance of the act he is charged with and could have managed himself in the way the ordinary person understands and controls his actions. Thus the proposed test calls the attention of the trier of fact to a rough yardstick taken from daily life, by inviting each jurymen to measure the accused's condition and conduct at the time of the crime against a standard derived from his day-to-day experience with ordinary normal persons.

While the test is sufficiently general to embrace the entire gamut of psychic aberration, whether expressed essentially in impairment of one, or of another, or of several or all mental functions, it carries a protection against abuse in the requirement that the impaired mental processes must have been such as *probably*—not merely possibly—to have affected normal understanding and control of conduct. There is a familiar legal analogy in the preliminary hearing on a person charged with a crime, where the examining magistrate is required, before he can "bind over" the accused, to find facts justifying "probable," rather than only *possible*, cause to believe that the accused committed the offense. The contrast between probability and possibility recognizes the inescapable fact of degrees of power of knowledgeable control as influenced by extent of mental aberration at various stages. At the same time, it reminds

the jury that a conviction of the existence of a state of probability must be reached by a greater quantity or better quality of proof than is involved in a state of mere possibility.

Finally, the proposed test is in harmony with basic principles of criminal law in recognizing that establishment of a status of irresponsibility must embrace both the normally informed intention to commit an act known to be a crime (*mens rea*) and the normally controlled act known to be criminal (*actus reus*).

While the proposed test focuses on but two of the most usual expressions of mental disorder relevant to conduct, that is, markedly diminished cognitive and self-managing capacities, the provision for recognizing impairment of the affective, the volitional-inhibitory, and the general integrative powers, in addition to the cognitive, is as far as it is practical to go in a standard to be applied by a lay jury. Ideally, to be of maximum aid, a test ought to be stated in a form that takes account of the fact that mental aberration can express itself in protean handicaps at different stages of its waxing and waning. Sometimes the emphasis is on cognitive confusion or stupor; sometimes on ever-mounting broodiness, anxiety and withdrawal from reality; sometimes on a temporarily disturbed if not permanently damaged psychosomatic apparatus involving at one end such distortions in the "biochemical individuality" as hypoglycemia or calcium starvation and at the other, excessive excitability, reduced control of the flow of desire and impulse, or increase in primitive aggressiveness; sometimes the emphasis is on neurological damage; sometimes on a visibly general and permeative ego impairment or personality disintegration. But all these and other psychopathological disabilities (functional or organic) cannot be included in a test of irre-

sponsibility simple and clear enough for a lay jury to comprehend. Emphasis on visible impairment of one or more of the major and most familiar manifestations of mental activity and on the relation of such impairment to the chief constituents of conduct is as far as one can usefully go in framing a measuring-rod for an average group of average laymen.

Specific reference, in the proposed test, to the major areas of disturbed psychic function in mental disease is not contradictory to the modern conception of unsoundness of mind as something involving, not separated mental mechanisms, but the total organism. The alternative to specification of the disturbed mental functions is an approach similar to the New Hampshire and *Durham* rules, which probably do not give a lay jury sufficiently discernible pegs on which to hang the ultimate conclusion of irresponsibility. And specific reference, in the proposed test, to both affective involvement and self-integration would appear to make it clear to a jury that in mental illness it is not merely cognitive disturbance but general personality impairment that is involved.

However, if the time is ripe for the taking of "judicial notice" of certain fundamentals of latter-day psychiatry, then the proposed test might include, at the end, some such guiding statement as the following:

In considering your verdict, you are instructed that the law recognizes that mental disorder involves the total personality and not separate segments without influence on one another. You are further instructed that motives for conduct can be either conscious or unconscious. Finally, you are instructed that in some mental illnesses various physiological or neurological disturbances can bring about psychological and behavioral disorders.

Let me next attempt, more pointedly than I did in the first

lecture, to justify the mid-verdict of partial or diminished responsibility included in the proposed test. It seems to me that there is a sound and reasonable basis for such a verdict from the points of view of morality, of the public attitude toward blameworthiness, of the nature of mental disablement, and of legal analysis. I am of the conviction that it is morally wrong and distasteful to hold to full blame, stigma and punishment one who is mentally ill even though—and here the inherent difficulty of proof in this field must not be ignored—it cannot be clearly established that his illness brought about the crime. It is true that illness *per se* does not excuse from fault; or defendants suffering from cancer, for example, would be exempt from responsibility for their crimes. But mental disorder ought to be regarded as an exception. Unlike other diseases, it is the kind of disablement that typically affects the initiation, planning and control of conduct. The provision of a verdict of partial responsibility not only takes account of the inherent difficulty of proof of specific connection between the mental aberration and the crime, but is based on the recognition that a complex problem of degree is involved. The mid-verdict provides for treatment, supervision and correction of the mentally ill, yet protects society and satisfies the demand for some social expression of disapproval of the offender's behavior where, though some illness exists, its serious involvement in the misconduct charged is doubtful or ambiguous. In homicide cases, the chief consequence of the mid-verdict would be to remove mentally defective, sociopathic, prepsychotic and extreme long-standing neurotic offenders from the class subject to the indignity and disgrace of capital punishment or hopeless life imprisonment. In these and other cases the correctional and paroling authorities can deal with such persons in the light of the

indeterminate sentence and paroling provisions generally prevailing, taking account of the time spent in hospitalization and of the fact that juries have found them only partially responsible. Such persons will of course remain hospitalized until certified and found to be no longer dangerous so far as mental illness is concerned.

The test I propose, especially its middle verdict feature, will probably be regarded as involving so fundamental a change that if it should find favor it will preferably be enacted as a statute rather than left to "judicial legislation."

VI

Let me now turn from the tests of irresponsibility to consider another relevant problem; that is, determination of which party, at a trial involving the defense of insanity, has the initial task of "coming forward with the evidence," as well as the quantum of proof necessary for that purpose; and, relatedly, which side has the "burden of persuasion" on the whole case. This problem requires attention if we would improve the practical impact of any test, but particularly of the *Durham* formula.

Uniformly, the initial burden is imposed on the accused who claims insanity; because a state of sanity is assumed by the law at the outset, it need not be evidentially established by the government as part of its case. The prosecutor is entitled to rely on this "presumption," which is simply the recognition that, ordinarily, human beings are of sound mind. So far as the defendant is concerned, his initial burden of producing evidence to support his claim that he is irresponsibly insane has been discharged when, in the sound discretion of the trial judge, enough proof has been intro-

duced to raise a question of the accused's mental state at the time of the act that is fit to be considered by the jury. If this duty of raising doubt as to whether the accused is an exception to the presumption of sanity is not fulfilled, the judge must rule on that issue in favor of the government; and the prosecutor can then have clear sailing on the presumption.

In connection with the matter of the initial burden of producing proof of insanity, the troublesome question is, What amount of evidence is enough to justify the trial judge in sending that issue to the jury to be taken into account in its assessment of responsibility? In most jurisdictions, the quantum that will surmount the initial hurdle set by the law's presumption is proof "sufficient to raise a reasonable doubt" of the defendant's mental condition.⁴⁶ Less than that does not obliterate the presumption of sanity which the government may rely upon without proof. But in the federal courts, as we have seen in connection with *Durham*, and in certain state jurisdictions as well, the lower standard of only "some evidence" is enough.⁴⁷ In fact, cases in the District of Columbia after *Durham* go so far as to suggest that *any* quantum, even a mere "scintilla," is sufficient to compel the judge to allow the jury to consider the

⁴⁶ C. J. S. CRIMINAL LAW §924 (1940). See also WEIHOFEN, H., MENTAL DISORDER AS A CRIMINAL DEFENSE 227 (1954); on the implications, see GLUECK, *op. cit. supra* note 30, at 40-46. For an illustration of a case where the government failed to sustain its burden of proving appellant was sane, and proceedings thereon, see *Pollard v. United States*, 285 F.2d 81 (6th Cir. 1960); cf. *People v. Robinson*, 22 Ill. 2d 150, 174 N.E.2d 820 (1961).

⁴⁷ *Davis v. United States*, 160 U.S. 469, 488, 16 S.Ct. 353, 40 L.Ed. 499 (1895); *Douglas v. United States*, 239 F.2d 52 (D.C. Cir. 1956); *Tatum v. United States*, 190 F.2d 612 (D.C. Cir. 1951); *In re Rosenfield*, 157 F. Supp. 18 (D.D.C. 1957); *Goforth v. United States*, 269 F.2d 778 (D.C. Cir. 1959); *Flowers v. State*, 236 Ind. 151, 139 N.E.2d 185 (1956); *Torske v. State*, 123 Neb. 161, 242 N.W. 408 (1932).

accused's claim of insanity.⁴⁸ Now this, in turn, compels the government to establish, by proof beyond a reasonable doubt, that at the time of the crime the defendant suffered from *no* mental disease or defect. But in the District of Columbia it evidently does more. Since not only mental disablement but cause-and-effect relationship between the disorder and the crime are specifically involved in the terms of the "product" rule, the prosecutor must also prove beyond a reasonable doubt that even if the accused was mentally disordered his criminal act was not the product of the disease or defect. To rebut the accused's claim that he would not have committed the act "but for" the mental aberration (which is the essence of the "defense of insanity"), the prosecutor is required in effect to convince the jury that the defendant would have committed the offense even if he had not had a mental disease or defect. In other words, to establish responsibility the prosecutor must prove *no* connection between the mental disorder and the crime, but to establish lack of responsibility the defendant need prove only *some* connection. The inequality of the respective tasks reminds one that the defense in proof of "product" can succeed if, as William James put it in another connection, it produces only one white crow to prove there is a species of white crows; while the prosecution, to establish that the crime was *not* the product of the disease, is virtually required to explore the entire crow world to demonstrate that there are *no* white crows. As the Court of Military Appeals pointedly asks, "Would not the presence of *any* abnormality operate to create reasonable doubt in the accused's favor if there is aught to the view—consistently reiterated by psychiatrists—to the effect that

⁴⁸ Tatum v. United States, 190 F.2d 612 (D.C. Cir. 1951); *In re Rosenfield*, 157 F. Supp. 18 (D.D.C. 1957).

human personality may not properly be compartmentalized?"⁴⁹ An experienced prosecutor in the District of Columbia has complained that the *Durham* formulation makes the government's task virtually impossible *whenever* the defense introduces even a scintilla of proof of mental aberration.⁵⁰

It is true, as the District of Columbia Court of Appeals has observed, that the "nature and quantum of evidence of sanity which the Government must produce to sustain its burden . . . will vary in different cases. Evidence of sanity which may suffice in a case where defendant has introduced merely 'some evidence' of insanity may be altogether inadequate in a case where the evidence of insanity is substantial."⁵¹ But this fact does not equalize the onus of prosecutor and defendant, since it opens the door to the defendant's influencing the members of the jury on a

⁴⁹ United States v. Smith, 5 U.S.C.M.A. 314, 322, 17 C. M. R. 314, 322 (1954).

⁵⁰ Gasch, O., *Prosecution Problems under the Durham Rule*, 5 CATH. LAW. 5, 25 (1959). This opinion is shared by a psychiatrist who has had extensive experience in the practical operation of *Durham*, Dr. Winfred Overholser, Superintendent of Saint Elizabeths: "One of the practical difficulties in the operation of the insanity defense in the District of Columbia is the ease with which the burden of proof can be shifted to the prosecution. It is my impression that in most jurisdictions a *prima facie* case or preponderance of the evidence has to be introduced before it becomes incumbent upon the prosecution to overcome allegations of mental illness. The Courts in the District of Columbia, however, have seemingly tended to permit even a scintilla or less of evidence to shift the burden in a way which the United States Attorney finds it almost impossible to meet. This easy shifting of the burden would, to my mind, operate, regardless of the 'test' employed, to pose a difficult problem for the prosecution."—Statement of Winfred Overholser, M.D., before Subcommittee on Constitutional Rights of the Senate Judiciary Committee, May 2, 1961 (mimeographed, p. 60.) See also Flannery, T.A., *Meeting the Insanity Defense*, 51 J. CRIM. L., C. & P. S. 309-316 (1960/1961), dealing with the techniques of cross-examining psychiatrists.

⁵¹ Wright v. United States, 250 F.2d 4, 7 (D.C. Cir. 1957). As a model of skillful analysis of the evidence in this complex issue, Judge Bazelon's opinion is to be commended. See also Hopkins v. United States, 275 F.2d 155, 157 (D.C. Cir. 1959); Dusky v. United States, 295 F.2d 743, 754-755 (8th Cir. 1961).

technical medical question in which they are not experts; and the government has no right of appeal from an acquittal on the ground of insanity.

It has besides, been claimed that the "some evidence" device and the burden on the government to prove all constituents of its case beyond a reasonable doubt increase the temptation of accused persons to resort to the defense of insanity in very doubtful, but very serious, cases in order to evade the risk of execution or life imprisonment. Statistics in the District of Columbia tend to support this claim.⁵² And considering the varieties and stages of intellectual and

⁵² "Prior to the *Durham* decision less than 1 percent of the criminal cases tried in the U.S. District Court for the District of Columbia resulted in verdicts of not guilty by reason of insanity. The *Durham* decision was handed down on July 1, 1954. Thereafter the percentage did not change remarkably. However, in the year 1957 the percentage was 1.5; in 1959 it climbed to 6 per cent. The following year, 1960, it became 8 percent. During the first 6 months of fiscal 1961 the figure rose to 14.2 percent and in the month of February of 1961 it was 25 percent. This means that in February, 1961, 25 percent of the persons tried in the District Court for the District of Columbia for criminal offenses were found not guilty by reason of insanity. It is evident that the shift in statistics occurred at about the time of the 'big switch' in the Leach case."—*Report No. 563, 87th Cong. 1st Sess., H. of Reps., June 22, 1961, commenting on H.R. 7052. Cf. supra note 37.* The defendant does not always have easy sledding even in cases where there is ample proof of mental aberration. A recent state case illustrates a rather extreme instance of the significance of defendant's burden of bringing in proof "sufficient to raise reasonable doubt and overcome the presumption of sanity." The appellate court refused to reverse a conviction of murder in a case in which (a) the accused had been a patient in a mental hospital for six or seven weeks, some ten years before the present homicide, suffering from an acute hallucinatory condition related to heavy drinking, (b) a year later he had shot and killed his baby and attempted suicide and was convicted and confined in a penitentiary, and (c) there was other evidence, by his relatives, of various psychotic symptoms displayed by the accused. The court refused to reverse, particularly in the absence of proof that the accused's "prior mental condition was of a permanent or continuing nature" and in consideration not only of the entire record but of the fact that defendant had been adjudged sane by restoration proceedings after his discharge from the mental hospital and the fact that the medical record had stipulated that if the director of the Behavior Clinic of the Criminal Court was called as a witness "he would testify that the defendant knew the nature of the murder charge against him and was able to cooperate with his counsel in the defense to such a charge."—*People v. Robinson, 22 Ill. 2d 150, 174 N.E.2d 820 (1961).* Compare note 37, *supra*.

emotional abnormality, such claim may indeed have some validity. It will be recalled that Polonius, in expounding Hamlet's mental state to the Queen, philosophized that "To define madness, what is't but to be nothing else but mad?" And, as the fabled Quaker lady is supposed to have observed to her spouse, "Everybody is daft but thee and me, and thee too art a bit balmy." Indeed, a widely used textbook on psychiatry reminds the medical student of the difficulty of diagnosis in close cases, in these words:

We wish to repeat that every psychopathic and psychoneurotic symptom has its miniature "normal" mental life representation—blueness of spirits, instead of pathologic grief and melancholia; innumerable superstitions, beliefs and practices, instead of compulsive behavior and phobias; slight inferiority reactions, instead of psychotic and psychoneurotic self-accusation; mild worry, instead of intense anxiety, etc.

We reiterate, too, that prevailing mood and emotion determine the strength and direction of psychotic and psychoneurotic symptoms, just as they control the thinking in "normal" psychic life.⁵³

All in all, then, it would seem that some adjustment of the burden of proof situation is reasonably called for.

If the mid-verdict of *partial* responsibility were adopted, the prosecutor would not be in so difficult a position; his probative scope would not be confined to his present single goal of establishing beyond a reasonable doubt the extreme status of complete and unalloyed responsibility. He would be enabled, in the face of the initial advantage of the defense, to establish at least an intermediate position of attenuated criminal responsibility despite testimony as to the presence of some mental abnormality. In such event, it seems reasonable to suggest that the rule which now de-

⁵³ EWALT, J. R., STRECKER, E. A., & EBAUGH, F. G., *PRACTICAL CLINICAL PSYCHIATRY* 84 (New York, McGraw-Hill Book Co., 8th ed. 1957).

prives him in the District of Columbia and certain state jurisdictions of the presumption of sanity upon even a slight initial showing of mental aberration might be retained; for even mild psychic disorders can, in certain instances, lead, however deviously, to criminal conduct. If, on the other hand, provision is not made for the mid-verdict of partial responsibility, it would appear fairer and more realistic to require the defendant to make an initial showing of mental illness by a preponderance of proof (and therefore of probability) before the prosecution would be deprived of the support of the legal presumption of sanity.

In making such a suggestion, I am not unmindful of the fact that juries find it hard to distinguish between such legalistic quanta of proof; but if guidance can help it ought to be given.

Another way of dealing with the situation would be by means of the more radical change in the burden of persuasion. This would entail adopting the rule followed in some states which makes the insanity claim to irresponsibility an "affirmative defense" and thus places the onus, not on the prosecution but on the defendant, to convince the jury (usually by a preponderance of proof) of his *lack* of responsibility because of insanity. This approach is embodied in a bill abolishing *Durham* in the District of Columbia, which passed the House of Representatives and was pending in the Senate in 1961. However, such a solution runs counter to the general principle of law requiring the government to establish all constituents of guilt, including the accused's state of mind, beyond a reasonable doubt.⁵⁴

⁵⁴ Assuming enough evidence of insanity has been introduced to get to the jury, the problem of the "burden of persuasion" permeates the trial. This involves the indication of which of the two sides will not prevail if, on the evidence on the entire case, the jury is not convinced of one or another of their respective contentions. Here, too, there is variation among the juris-

VII

There is next to be considered one of the most vexing problems in relation to any test of irresponsibility, but one which has been brought into focus by the *Durham* decision; namely, the question of what happens to the defendant upon acquittal, and the related matter of what provisions exist

dictions. Many states, as well as the federal courts, in line with the general principle of law requiring the prosecution to establish all constituents of guilt, place the burden of proof of responsibility beyond a reasonable doubt on the government. The other jurisdictions require that the *defendant* shall persuade the jury of his *lack* of responsibility, albeit only by the civil law standard of a preponderance of the evidence. Such jurisdictions regard the issue of criminal responsibility where the defense of insanity is involved as an "affirmative defense" to be established by the accused. See *Report No. 563*, 87th Cong. 1st Sess. H. of Rep., June 22, 1961, commenting on H. R. 7052. A third position is to retain the burden of persuasion on the prosecution, where, in basic legal principle, it belongs, but to require the government to prove sanity by only a preponderance instead of beyond a reasonable doubt. Admittedly, the legal concern with problems of this kind envisages greater sophistication on the part of the average jury than it usually possesses. Oregon used to require the defendant to establish his irresponsibility *beyond a reasonable doubt*.—ORE. REV. STAT. §§136-390 (1955). This was revised in 1957 to require proof by a preponderance; ORE. REV. STAT. §§136-390 (1959). In *Leland v. Oregon*, 343 U.S. 790, 798-799 72 S.Ct. 1002, 1007, 96 L.Ed. 1302, 1306 (1952), the Supreme Court, affirming 190 Ore. 598, 227 P.2d 785 (1951), held (Frankfurter and Black, JJ., dissenting) that due process was not violated by the prior requirement that the defendant prove his irresponsibility beyond a reasonable doubt. However, the majority seemingly based its decision partly on the fact that the trial judge had clearly charged that the state had the burden of proof as to the mental elements, although he had also instructed, in accordance with the statute, that the defendant must prove his irresponsibility (insanity) beyond a reasonable doubt. For discussions of the problems involved in the burden of going forward with the evidence and the burden of persuasion, see GLUECK, *op. cit. supra* note 30 at 41; Note, *Two Constitutional Problems in Proving Insanity*, 48 NORTHW. U. L. REV. 94 (1953/1954); Note, *Burden of Proof of Insanity in Criminal Cases*, 15 MD. L. REV. 157, 168 (1955); LINDMAN, F. T., & MCINTYRE, D. M. JR. (eds.), *THE MENTALLY DISABLED AND THE LAW: THE REPORT OF THE AMERICAN BAR FOUNDATION ON THE RIGHTS OF THE MENTALLY ILL* 349-351 (Chicago, University of Chicago Press 1961).

for his enlargement if he has been committed or imprisoned.⁵⁵

⁵⁵ A comprehensive report on the disposition of mentally ill defendants was prepared under the auspices of the National Probation and Parole Association. In most states a person acquitted on the ground of insanity is confined until he recovers or is restored to sanity. Statutes in a few states require, also, a finding that his discharge will not be dangerous or that there is no danger of relapse. Maryland, without statute, requires that the test is whether, "if released, the person will be a danger to himself or to the safety of the person and property of others." In some half the states, authority to discharge is vested in the *court* of original commitment or some other court; and a jury trial is required in three states, permitted in one. In seven of such states, the court may act "only after the hospital authorities have certified that the person has recovered"; in three, only "after obtaining a report from a commission of experts." Requirement of a certificate has been held constitutional. A few states authorize *hospital authorities* to discharge committed acquitted persons, without court order; and in a few states the statutes are "silent or unclear," the implication being that such persons are dischargeable like other patients, usually by the hospital superintendent. In one state discharge is after hearing before a *commission* (judge, hospital superintendent, and alienist designated by them). In one state, discharge is either by lunacy commission or superior court judge. In two states persons acquitted of murder (or of manslaughter, in Massachusetts) are committed for life, subject to discharge by the *governor* on finding that such discharge would not be dangerous. (But see *infra* note 58.) In North Carolina release of an acquitted committed person is by special legislative act (if the offense is capital), by the governor otherwise. Release by *habeas corpus* or special statutory procedure is variously available in practically all states. "It is genuinely difficult for a superintendent—or anyone else—to determine when a patient who has committed a criminal act has recovered sufficiently to be safely released. Sanity is a relative term. Individuals who make 'good hospital patients' are sometimes poor risks for release. . . . In fact, the more completely a person accepts the regulated environment of the hospital, the more unfitted he may be to deal with the demands of an unregulated free life. There are no sure criteria for predicting the future course of conduct or misconduct of a released patient." A few states permit conditional release. While for obvious reasons it is very desirable to provide postrelease psychiatric supervision, only eight states "make statutory provision for such conditional release or convalescent leave."—*Disposition of the Mentally Ill*, in THE LAW OF CRIMINAL CORRECTION 56 *et seq.* (New York, National Probation and Parole Association n.d.). In the District of Columbia and many other jurisdictions, automatic commitment seems to follow from a presumption of continuing mental abnormality and a great probability of additional injury to society upon immediate release without prior psychiatric treatment. §§24-301 of the D.C. Code was held, in *Ragsdale v. Overholser*, 281 F.2d 943 (D.C. Cir. 1960), not to offend due process, because of the reasonableness of the assumption that mental illness will not cure itself in a relatively short time and because of the danger involved in letting mentally abnormal persons (called in the decision a "special" class) who have demonstrated

A case in the Ninth Circuit Court⁵⁶ points out that in the federal jurisdictions outside the District of Columbia there is no statute requiring the jury to specify that its finding of not guilty was due to its acceptance of the defense of insanity, and that there is likewise no mandatory commitment statute which operates automatically upon acquittal on that ground. Of course, a jurisdiction where commitment to a mental hospital upon acquittal is not provided should, for obvious reasons of prudence, implement its substantive law with such a provision.⁵⁷ However, on the

antisocial tendencies be freed at once upon acquittal. Previously, upon acquittal on the ground of insanity in the District of Columbia, the court after a jury trial and finding of existing insanity, certified the fact to the Secretary of the Interior who had the discretion of having such person confined in the mental hospital—D.C. CODE §927 (1919). Note, also, dissenting opinion by Clark, J., in *Lynch v. Overholser*, 82 S. Ct. 1063, 1072 (1962). Professor Weihofen has written instructively about treatment of the mentally ill who have committed offenses. See Weihofen, H., *Institutional Treatment of Persons Acquitted by Reason of Insanity*, 38 TEXAS L. REV. 849-869 (1960); and *Treatment of Insane Prisoners*, 1 U. ILL. L. FORUM: CURRENT PROBLEMS IN CRIMINAL LAW 524-532 (1960).

⁵⁶ *Sauer v. United States*, 241 F.2d 640 (9th Cir. 1957), *cert. denied*, 354 U.S. 940 (1957). This factor has not led the Third Circuit to retain the *M'Naghten* and irresistible impulse tests. See also *United States v. Currens*, 290 F.2d 751, 775-776 (3rd Cir. 1961).

⁵⁷ In every state jurisdiction, nowadays, a person acquitted on the ground of insanity is usually committed to a mental hospital, such institutions of course varying markedly in physical facilities, qualifications and number of personnel, and therapeutic or mere custodial provisions. The report (discussed *supra* note 55) suggests four classes of commitment: (1) *Mandatory, automatic* (in ten states and the District of Columbia the verdict itself is regarded as justifying a presumption of continued mental illness at the time of acquittal, and the statutes therefore requiring forthwith commitment without further inquiry as to the defendant's mental status at the time of acquittal.) (2) *Commitment in court's discretion*—authorized but not required in a majority of states, upon acquittal by reason of insanity. However, "only in a highly unusual case would a judge feel justified in allowing a person to go at large who has just been acquitted . . ." In seven of these states the judge is required to conduct an investigation to determine if the acquitted person is still disordered and in need of confinement; but the "majority allow him to order commitment without any such inquiry. And the fact that no hearing on the issue of his present condition is required or had does not make the procedure unconstitutional." (3) Three western states require an *independent jury trial* on continuance of mental illness. (4) Eight require the *jury that acquits* to indicate whether the defendant is still insane or has

significance of such a course a difference of opinion exists.

Some say that the point to emphasize is that the accused, acquitted on the ground of insanity, has proved himself dangerous by the very commission of the crime. Indeed, Massachusetts has gone so far as to provide mandatory commitment for life upon acquittal on the ground of insanity in the case of murder or manslaughter, subject only (until very recently) to release by governor and council.⁵⁸

recovered, and in the latter event he is entitled to unconditional discharge. (In New Jersey, the court, upon such verdict, must make its own inquiry as to continuance of insanity.)

The author of the report is of opinion that "of these several procedures, the simplest seems the soundest—mandatory automatic commitment," this on the ground that it is proper to subject an acquitted defendant in an insanity case "to a period of hospitalization, to make sure that he has recovered and is not likely to repeat such an act. At the same time, this procedure does not substantially impair the defendant's rights . . . If he has actually since recovered, the hospital to which he is sent can be relied upon to discover and report this fact. Even if the hospital authorities fail, he has the right in almost every state to raise the question of his present sanity upon a writ of *habeas corpus*." On the other hand, "the independent jury trial, to decide whether a defendant who has just been acquitted because of insanity at the time of the act continues to be insane, is certainly the most cumbersome of all the ways of handling the matter."—*Disposition of the Mentally Ill, op. cit. supra* note 55, at 17-20. See also, GLUECK, *op. cit. supra* note 30 at 394-399, 505-643.

⁵⁸ MASS. GEN. LAWS, Chap. 123, §101. In *Gleason v. West Boylston*, 136 Mass. 489 (1884), this section was incidentally considered in an action by the treasurer of the Commonwealth to recover expenses paid by the Commonwealth for support of one Spakeman in the "Taunton Lunatic Hospital." Spakeman had been indicted for murder and acquitted by reason of insanity and committed to the hospital for life. "At the time of his commitment," said the court, "he was not, and he has not at any time since been, an insane person or lunatic." It was held that the act by which it was provided that the expense of maintaining persons committed to an insane hospital should be borne by the respective towns did not include persons acquitted of capital offenses because of insanity, and the state was liable for their support. Speaking of the Act of 1873 (§101) the court said: "This statute does not require, or permit, the court to inquire whether the defendant is insane at the time of the commitment to the hospital. The verdict of not guilty by reason of insanity imports in law a finding that the defendant committed the homicide, but was insane at the time he committed it; and the duty of the court thereupon is to order his commitment without inquiry as to his present mental condition. There are different provisions in cases of acquittal, by reason of insanity, of offenses other than homicides. In such cases, the court cannot commit a person thus acquitted to a lunatic hospital, unless it is satisfied that he is insane at the time of the commitment. . . . The practi-

This harsh provision has meant virtually life imprisonment; and in fact until very recent years the institution involved was more a prison than a hospital. Such a disposal of an *acquitted* person is in direct contradiction to the fact that mental illness has resulted in legal exculpation because of blamelessness.

Other authorities regard the acquitted defendant as in the same position as a *noncriminal* patient but one about whom sufficient doubt has been raised by his mental condition to justify his commitment to a hospital, as is done with the ordinary mentally ill, until such time as under appropriate judicial proceedings initiated by the hospital authorities or the patient it is determined that he is no longer dangerous.

In this connection, considerable litigation has arisen

cal effect of the Statute of 1873 is to provide that, in case of an indictment for homicide, the insanity of the defendant is not a defence which entitles him to an unconditional acquittal, but that he shall be detained in confinement until it appears to the Governor and Council that he may be discharged and set at large without danger to others. He is not committed to the hospital for the purpose of treatment as a lunatic. He is not held there as other inmates are held; he cannot be discharged, as others can be, by the trustees, or by a court upon proof that he is not insane, or, if insane, can be sufficiently provided for by himself or his friends, or the town of his settlement. . . . He is confined in the hospital as a place of detention, because his being at large would be dangerous to the peace and safety of the community." (490) More recently, in *Golden, petitioner*, 341 Mass. 672, 171 N.E.2d 473 (1961), the court (*per Wilkins, C.J.*) explicitly disapproved the dictum in the *Gleason* case (at 674, 474), reasoning that the statute was of doubtful constitutionality if it limited release to the governor and council. It suggested that a single justice of the Supreme Judicial Court would have the power to release under G. L. 123, §91, or, barring that, release could be by *habeas corpus*. There has been at least one instance of release under §91 by a single justice. §88, which provides for a temporary twelve-month release ("conditional release") subject to appropriate conditions imposed, has also been used in at least one case. Thus, by a wise judicial interpretation of statutory language as not setting down only one exclusive path to discharge, the way has been opened for the judge and expert to work out rational release methods centering around the judgment that the patient will not be dangerous if released.

especially in the District of Columbia.⁵⁹ A few illustrations of the chief problems involved must suffice. Since 1955, the District Code (Sec. 24-301) has provided for automatic commitment⁶⁰ upon a verdict of not guilty by reason of insanity, a determination which of course relates to the defendant's condition at the time of the crime. This may, however, be long before the trial and before hospitalization following acquittal. The code also provides for an accused's commitment as unfit to stand trial—a condition pertaining to the time of trial or shortly before. Release from the hospital depends upon the patient's ability to prove, *beyond a reasonable doubt*, that he will not in the foreseeable future be dangerous to himself or others. In *habeas corpus* proceedings (Sec. 24-301 [g]), the patient must establish beyond a reasonable doubt that the hospital superintendent has acted arbitrarily and capriciously in refusing to certify him to the District Court for discharge.

⁵⁹ See, for example, *Isaacs v. United States*, 284 F.2d 168 (D.C. Cir. 1960); *Curry v. Overholser*, 287 F.2d 137 (D.C. Cir. 1960); *Overholser v. Russell*, 283 F.2d 195 (D.C. Cir. 1960); *Carter v. United States*, 283 F.2d 200 (D.C. Cir. 1960); *Hodges v. United States*, 282 F.2d 858 (D.C. Cir. 1960); *United States v. Amburgey*, 189 F. Supp. 687 (1960); *Hayward v. Overholser*, 191 F. Supp. 464 (1960); *Lewis v. Overholser*, 274 F.2d 592 (D.C. Cir. 1960); *Blocker v. United States*, 288 F.2d 853 (D.C. Cir. 1961); *O'Bierne v. Overholser*, 287 F.2d 133 (D.C. Cir. 1961); *United States v. Naples*, 192 F. Supp. 23 (1961); *Rucker v. United States*, 288 F.2d 146 (D.C. Cir. 1961); *Sturdevant v. Settle*, 192 F. Supp. 534 (1961); *Longoria v. State*, 168 A.2d 695 (Del. 1961); *State v. DiPaolo*, 168 A.2d 401 (N. J. 1961); For a leading case on conditional release, see *Hough v. United States*, 271 F.2d 458 (D.C. Cir. 1959) see further *Overholser v. Leach*, 270 F.2d 667 (D.C. Cir. 1958); *In re Rosenfield*, 157 F. Supp. 18 (1957).

In *Lynch v. Overholser*, 82 S.Ct. 1063 (1962), the Supreme Court (Clark, J., dissenting) held that accused was unlawfully hospitalized under the District of Columbia's automatic commitment statute. His effort to change earlier pleas of not guilty of bad check passing to guilty were refused by the trial judge, who found him not guilty by reason of insanity on the basis of a letter from the hospital authority and psychiatric testimony that the crimes were the "product" of accused's manic depressive psychosis.

⁶⁰ See *supra* notes 55, 57.

Judicial control of the release of persons acquitted on the ground of insanity and thereupon committed to a mental hospital can be more strict than is administrative control of release of ordinary prisoners on parole.⁶¹ In this connection, several questions are presented: Is the burden of proof beyond a reasonable doubt, especially under *habeas corpus*, a fair one to place on the committed, but previously acquitted, hospital patient? The District of Columbia District Court has shown a tendency to be rather cautious in ordering releases, this owing partly perhaps to public feeling that the *Durham* test is looser than its predecessors. The court also relies heavily on expert testimony; so that a patient, to have any realistic chance of release, is required to secure outside psychiatric witnesses.⁶² Since the burden on the patient to establish the fact of sufficient recovery or remission of his illness is unduly heavy, it would seem advisable to provide for the rendering of periodic reports to the court on the progress of committed patients.

Another matter requiring further clarification is: What kind of question does the petition for release present? Is it one exclusively psychiatric, involving only an estimate of therapeutic progress, or is it also an ethical and sociolegal question, involving not only the court's conclusion as to the patient's present dangerousness but also, despite his acquittal, issues of retribution and deterrence?

Another issue, about which a difference of opinion evidently exists in the District of Columbia, whether the justice of imposing heavy criteria and burden of proof on the acquitted patient who seeks release from the hospital is grounded on the type of crime he originally committed.

⁶¹ See, for example, *Hough v. United States*, 271 F.2d 458 (D.C. Cir. 1959); *Overholser v. Leach*, 257 F.2d 667 (D.C. Cir. 1958).

⁶² In *Curry v. Overholser*, 287 F.2d 137 (1960) the court noted that it is an obligation of the Government to provide this in meritorious cases.

Since a large measure of his future harmfulness depends on the type of conduct he became involved in previously, should "dangerousness" be limited to the probability of future crimes of violence, or should danger of committing property crimes be included? Although this point was long doubtful and is still not without some ambiguity, the Court of Appeals for the District of Columbia in 1960 devised the following test which is intended to place emphasis on general protection of the public: "We think the danger to the public need not be possible physical violence or a crime of violence. It is enough if there is competent evidence that he may commit any criminal act. . . ."⁶³

Related to this problem is the fact that it is possible to interpret the release statute as depending essentially upon the patient's receiving and being able to benefit from treatment. However, the court seems to think that the statute should be interpreted as "custodial" as well; so that a dangerous patient can be lawfully continued in custody whether or not treatment is possible and will benefit him. Obviously, in extreme cases, such a policy could result in the incarceration. Suppose the accused, found not guilty because of insanity on a charge of petit larceny, is a psychopathic personality and is committed to a hospital instead of being sent for a brief term to prison. His release depends upon future estimates of his mental condition and his dangerousness. If, after a reasonable period of treatment the expert consensus is that he is incurable but that his future dangerousness, if he is released, will probably be confined to petit larceny, is his continued detention justifiable? Or should "dangerousness" be limited to crimes of

⁶³ Overholser v. Russell, 283 F.2d 195, 198 (D.C. Cir. 1960); see also Fahy, J., dissenting in Overholser v. Lynch, 288 F.2d 388 (D. C. Cir. 1961), and note 59 *supra*.

aggression against the person, such as homicide, robbery, rape?

Some cases argue that since the patient's original decision to resort to the defense of insanity was a voluntary one, he cannot be held to object to continued confinement.⁶⁴ In this connection it seems that some lawyers in the District of Columbia have developed the practice of estimating probable length of hospital stay against probable prison term, in deciding on their course of action. The question arises whether the court is justified in cutting into the freedom of choice of the accused and his counsel in a case where the defendant had previously been committed as unfit to stand trial and, after hospital treatment, had been certified back but thereupon changed his original plea of not guilty by reason of insanity to the ordinary plea of guilty. In one such case the trial court refused to allow the change. It introduced the issue of insanity into the case, evidently over the objection of accused (who was charged with passing bad checks), directed a verdict of not guilty by reason of insanity, and thereupon again committed the defendant to the hospital. The Court of Appeals of the District of Columbia, in a strong effort to limit the accused's power of choice of plea under the adversary system, upheld the trial court, saying that "Society has a stake in seeing to it that a defendant who needs hospital care does not go to prison." The Supreme Court reversed.⁶⁵

⁶⁴ Overholser v. Leach, 270 F.2d 667 (D.C. Cir. 1958). In Overholser v. Lynch, 288 F.2d, 388, 393-394 (D.C. Cir. 1961), the court said, "We think . . . that the decision was one which appellee and his counsel did not have an absolute right to make . . . In the case before us, had Lynch not been treated, he might have been in and out of jail for the rest of his life on bad check charges. Now that he has received treatment, he is well on the way to unconditional release, without probability of repeat offenses (*cert. granted*, 29 LAW WEEK 3382 [June 20, 1961], *oral argument heard*, Jan. 16, 1962, 30 LAW WEEK 3227). Evidently, the court is concerned about the accused and his counsel shopping around for the most lenient deal regardless of the interests of social protection.

⁶⁵ Overholser v. Lynch, 288 F.2d 388, 393 (D.C. Cir. 1961). See strong

The absurdity as well as the danger to social order to which partisan shopping around for the procedure deemed most lenient to the accused can lead is illustrated by *Rex v. Binns*,⁶⁶ a decision of the English Court of Criminal Appeal rendered a century after *M'Naghten*. This was an application for leave to appeal against a sentence of four years' penal servitude for the crime of wounding with intent to do grievous bodily harm. The judges denied the application; but the importance of the case derives from the illustration of the helplessness of some courts to prevent socially harmful manipulation of the processes of justice even where clear evidence of dangerous mental disease exists. I quote an extract from the opinion of one of the judges:

... I observe that this is yet another case similar to at least two which have been before this Court recently, where a person who is in fact a lunatic and certifiable as such is brought up and charged on indictment with a crime. That person has acuteness enough to realize that, if she sets up the defence of insanity which would certainly be accepted by the jury, she would go to a criminal lunatic asylum, but that if she pleads guilty to the crime the Court has no power to make any such order, and she will go to prison for a comparatively short time—a time much shorter than the period which she could be kept in a criminal lunatic asylum. She therefore pleads guilty, and so the Court has no power to do what everyone must agree it ought to have the power to do, that is, to send her

dissent by Clark, J., in *Lynch v. Overholser*, 82 S.Ct. 1063, 1077-1079 (1962): "To make the commitment procedure effective only on the defendant's option limits the statute's protection of the public, forces an unfortunate choice on attorneys appointed to represent defendants, convicts those who are innocent by reason of insanity and deprives them of the treatment afforded by a humanitarian public policy. . . . The criterion of §24-301 (d)—merely whether there is a reasonable doubt that the accused was capable in law of committing the offense—is a far cry from the test of civil commitment, where it must be proven to the satisfaction of the court that the accused is actually insane. . . . In short, petitioner has no constitutional right to choose jail confinement instead of hospitalization."

⁶⁶ *Rex v. Binns*, 31 Cr. App. Rep. [1946] 55 cf. notes 59, 65, *supra*.

to a criminal lunatic asylum, which is the only place where she can properly be kept. That is what has happened in this case. It has happened twice before. This Court has drawn the attention of the authorities to the matter and has suggested that this is a case where the state of the law is in urgent need of alteration. This wretched woman is not responsible for her actions according to our law. The medical officer, an independent witness, says she is a dangerous homicidal lunatic, and yet the only thing the Court can do is to say that she must go to prison like any other person who has broken the law. . . . This absurd situation has at long last been remedied by judicial decision holding that the prosecution may, and indeed has a duty to, enter a defense of insanity where necessary to protect the public against a dangerous mentally ill defendant.⁶⁷ I quoted the case as an illustration of the need of legislative or judicial control of an expectable tendency of defendants and lawyers to look at the problem of an accusation of crime in terms of what course of action will be most "lenient" to the accused rather than in terms of therapeutic opportunity and of protection of the public. Incidentally, the case also vividly illustrates the bankruptcy of the *M'Naghten* rules. The defendant, conceded by doctor and judges to be mentally ill, was contrary enough to twiddle her thumb at the famous knowledge tests by her shrewd insight regarding the practical difference in consequence of possible pleas. She knew the "nature and quality" of her acts right enough; yet the court had to concede that she was not responsible.

In the District of Columbia still other questions arise from the feeling that *Durham* is more liberal to the accused than either *M'Naghten* alone or *M'Naghten* supplemented by the irresistible impulse rule. Such problems show that there is an almost organic relation between the tests of irrespon-

⁶⁷ See *Bratty v. Attorney-General for Northern Ireland*, 3 W. L. R. 965, 980-981 (1961) and cases cited therein.

sibility, the consequences of acquittal or conviction upon a plea of insanity, the nature and the length of incarceration in hospital or penal institution, and the procedures for discharge. Whatever the test, its effectiveness in practice depends upon such a context of incarceration, hospitalization, treatment, and manner of release. At all events, the jury should have the right to be informed of the practical significance of a verdict of "not guilty by reason of insanity."⁶⁸

* * *

The *Durham* concept has had very hard sledding. It has been rejected by numerous scholars, by at least four United States Circuit Courts of Appeal, by the United States Court of Military Appeals, by the supreme courts of some nineteen states; and the House of Representatives passed a bill replacing *Durham* in the District of Columbia by what is essentially the A. L. I. test, but the Senate has thus far failed to enact it. On the other hand, three members of the House Committee on the District of Columbia persuasively dissented from the report rejecting *Durham*, and the state of Maine has proved the unreliability of the dictum, "as Maine goes so goes the nation," in one area, by adopting the *Durham* rule by statute.⁶⁹ So, also, the Virgin Islands.⁷⁰

⁶⁸ See *Lyles v. United States*, 254 F.2d 725 (D.C. Cir. 1957). See *Report No. 563*, 87th Cong., 1st Sess., H. of Reps., June 22, 1961, describing H.R. 7052, "Based upon the formulation recommended by the American Law Institute as the test of insanity as a defense in criminal cases. . . . This new formulation is intended, not so much as a repudiation of the *Durham* rule, as an effort to develop it, give it more specific content, and establish criteria to provide guidance to trial courts and juries."

⁶⁹ The Maine statute contains cautionary provisions excluding "an abnormality manifested only by repeated criminal conduct or excessive use of drugs or alcohol" and requiring the commitment of acquitted defendants to the custody of the Commissioner of Mental Health and Corrections "to be placed in an appropriate institution for the mentally ill for custody, care and treatment."—*State of Maine*, H.P. 1144,—L.D. 1576, An Act Relating to Criminal Acts Due to Mental Disease, adding §§38-A and 38-B to R. S. C. 149 (May, 1961).

⁷⁰ V. I. CODE ANN. Tit. 14, §1, 14 (1957).

Analysis of the situation in the various Federal Circuits shows the following: In the First Circuit there is apparent willingness to change the tradi-

It took four score years for a court to awaken the sleeping princess of New Hampshire, and it may take as long to prove whether the judicial kiss implanted by Judge Bazelon was one of life or of death.

While I believe that the criticisms of *Durham* are not sufficiently persuasive to counteract its valuable potentialities, provided judges become more conscious of their creative role in pouring content into *Durham's* simple formula, I have also ventured to suggest a test that seems to me to retain the advantages of *Durham* yet to supply the relevant links between disease and behavior which many judges, legislators, and commentators claim *Durham* lacks.

Since these lectures are being given in New Orleans it is interesting to note, however, that Edward Livingston's famous *System of Penal Law*, prepared for the state of Louisiana, a code far ahead of its time when published in New Orleans in 1824, seems to have anticipated the spirit of the New Hampshire and District of Columbia doctrines

tional tests if opportunity presents itself. *Beltram v. United States*, 302 F.2d 48. In the Second Circuit there are no recent decisions, and it is presumed that it retains the traditional *M'Naghten* rule. The Third Circuit follows the *Currens* rule, discussed herein on pp. 70-71. In the Fourth Circuit there are no recent appellate decisions, though some District Court judges seem to be applying a variant of the A. L. I. test. In the Fifth Circuit, the court appears to be following the traditional test. *Boremgen v. United States*, 326 F.2d 326. In the Sixth Circuit there is general adherence to *M'Naghten* and irresistible impulse. *Pollard v. United States*, 282 F.2d 450. In the Seventh Circuit there appears to be an application of *M'Naghten* and some elements of the A. L. I. rule and the Illinois rule. *U. S. v. Cain*, 298 F.2d 934. The Eighth Circuit appears to approve a test if it contains cognition, volition and capacity to control, but the actual instructions given appear to be essentially *M'Naghten*. *Dusky v. United States*, 271 F.2d 385. The Ninth Circuit feels bound to adhere to the *Davis* rule set down by the Supreme Court. *Sauer v. United States*, 241 F.2d 640. While suggesting prospective adherence to the A. L. I. rule, the Tenth Circuit approved a rule more in line with the traditional. *Wion v. United States*, 325 F.2d 420. I am indebted to Prof. A. M. Dershowitz for calling my attention to the situation in the Circuits. There has also been some re-examination of the traditional rules in State courts, since this book was first published. See, for example, *Newsome v. Kentucky*, Ky. 366 S.W.2d 174 (1962); Cert. denied, 375 U.S. 887 (1963); and *People v. Wolff*, 40 Cal. Rptr. 271, 394 Pac.2d 959 (1964).

in these simple words: "No act done by a person in a state of *insanity*, can be punished as an offence."⁷¹

In closing this lecture I must again remind you that the preoccupation of law with psychiatry is not and should not be limited to the "defense of insanity." There is much more to be done in the collaboration of psychiatry and law than is dreamt of in this relatively narrow though militant area. In the next and final lecture I propose to examine some of these more promising and wider-ranging opportunities.

⁷¹ LIVINGSTON, E., SYSTEM OF PENAL LAW 17 (New Orleans, printed by Benjamin Levy, 1824).

LECTURE IV

WIDER HORIZONS FOR LAW AND PSYCHIATRY

I

IN THE PAST TWO YEARS, two federal judges have given respectful nudges to the Supreme Court in the hope of enticing it to state authoritatively just what the test of the irresponsibility of the insane is and ought to be. Speaking of the state courts, Chief Judge Biggs, in the *Currens* case, pointed out that,

The accent has been placed by the Supreme Court on the legal conclusion that the requirements of due process have been met by State tribunals if they have applied the M'Naghten Rules.

And as to the federal courts, he is of the opinion that,

Certainly the Durham decision and the Durham formula are not egregious error or the Supreme Court would have corrected them. . . . We believe [he says on behalf of the Court of Appeals of the Third Circuit] that the Supreme Court in view of the present state of medical knowledge, would not approve the M'Naghten Rules and would not impose them as the test to be applied today by a jury to determine the criminal responsibility of a mentally ill defendant in a trial in a federal court.¹

In support of this belief, Judge Biggs quotes Mr. Justice Frankfurter's devastating critique of *M'Naghten* before the Royal Commission on Capital Punishment and Mr. Justice Douglas's disapproval of the *M'Naghten* Rules.

Judge Blackmun also adverts to the "extra-judicial ex-

¹ United States v. Currens, 290 F.2d 751, 768-769, 770 (3rd Cir. 1961).

pressions of two present members of the Supreme Court of the United States evincing dissatisfaction with *M'Naghten*," and to "what this presages for *M'Naghten's* reception when and if that court undertakes to review it."²

Perhaps the Supreme Court has postponed a direct review of *M'Naghten* and other tests in the federal system because the justices have felt that no case has as yet come up which squarely provides proper judicial basis for examining the problem from top to bottom.³ It may be that the court, aware of the intense interest aroused by the *Durham* decision, and the debates it has engendered among both psychiatrists and lawyers, is allowing time for professional opinion to crystallize. Perhaps the court has refrained on the ground that a test more in harmony with modern medicopsychiatric conceptions must await the human and institutional means for its implementation, a significant point which I shall discuss later. In the meantime, while it may be hoped that the

² *Dusky v. United States*, 295 F.2d 743, 759 (8th Cir. 1961).

³ "This is not the occasion to decide whether the only alternative is between law which reflects the most advanced scientific tests and law remaining a leadenfooted laggard."—Frankfurter, J., dissenting, in *Fisher v. United States*, 328 U.S. 463, 478-479, 66 S.Ct. 1318, 1325-1326 90 L.Ed. 1382, 1390 (1946). The case turned on that type of "partial responsibility" (mistakenly so called) which deals with permitting proof of mental aberration to determine the grade of crime committed in cases involving a question of capacity for such special states of mind as premeditation and deliberation. See GLUECK, S., *MENTAL DISORDER AND THE CRIMINAL LAW* 310, note 1 (Boston, Little, Brown & Co. 1925).

The Supreme Court has denied *certiorari* in several cases in which petitioners urged that the *M'Naghten* rule should be re-examined. The latest denial was in *Wion v. United States*, 325 F.2d 420 (1963); 377 U.S. 946 (1963). The Court was urged to reverse a conviction in the Tenth Circuit in which the trial court defined criminal irresponsibility in terms of the right-and-wrong and irresistible impulse tests. The appellate court was conscious of the importance of the role of psychiatry but pointed out that the values sought in changes of the tests of irresponsibility can better be obtained through improved implementation of the sentencing function. See also *Newsome v. Kentucky*, Ky. 366 S.W.2d 174 (1962); Cert. denied, 375 U.S. 887 (1963). It is too bad that the Supreme Court has not as yet rendered a *Per Curiam* opinion in declining *certiorari* in insanity cases, since an expression of opinion might guide both Federal and State courts in future development of the intricate problems involved in the defense of insanity.

American court of courts will not too long postpone an examination of the problem, one might bear in mind Holmes's wise reminder of the growing principle of the law:

The truth is, that the law is always approaching, and never reaching, consistency. It is forever adopting new principles from life at one end, and it always retains old ones from history at the other, which have not yet been absorbed or sloughed off. It will become entirely consistent only when it ceases to grow.⁴

But without further speculation on the future status of the tests of irresponsibility, let us devote this lecture to an exploration of some of the wider horizons of useful cooperation between members of the legal and psychiatric professions.

II

In one of the *Satires* of the Roman poet, Juvenal, he wisely observes that "no man becomes bad all at once." It is this oft-neglected truism that lends the proper perspective to the problem of crime, of which the defense of insanity is but a small and rather special element. And it is this truism that must ultimately lead to a revolution in society's treatment of delinquency and criminalism.

But before any fundamental change in the criminal law and its administration can be possible, a long period of education is necessary, designed to change the basic conceptions of those who mold public opinion and who think that the most effective way to control crime is simply to make punishment more drastic and long-lasting.

It is high time it were generally realized that persistent delinquent and criminal behavior cannot be "cured" by

⁴ HOLMES, O. W. JR., *THE COMMON LAW* 36 (Boston, Little, Brown & Co. 1881).

either the threat or the execution of pain-inflicting punishment. The chief reason for this is that the appeal to fear is an appeal to but one constituent of the total, deep-rooted personality involved in wrongdoing. Public prison statistics generally, and the intensive follow-up studies which Mrs. Glueck and I have conducted over the years specifically, have demonstrated beyond any reasonable doubt that the product of routine penal administration is much more likely to be recidivism than reform.⁵

What kind of approach to the crime problem gives greater promise?

Let us consider a few suggestions in the direction of an answer to this embarrassingly challenging question.

At the outset, I think it is high time that we had the grace, humility, and good sense to leave the dealing out of moral retribution to the Supreme Being and to confine mundane efforts to concerns more promisingly and justly within our competence. That is one reason why I devote this lecture to exploring some wider horizons for law and psychiatry than those involved in the overexaggerated defense of insanity. If lawyers and psychiatrists are destined to continue to quarrel, it would be better to enlarge the stakes. There is a broader field to be won, a field embracing not merely the relatively small number of offenders who plead insanity but, much more comprehensively, *all* persistent and serious offenders as well as predelinquents.

This approach to the wider horizons for law and psychiatry in dealing with crime involves many complex problems and procedures; and within the compass of this single

⁵ See BARNES, H. E., & TEETERS, N. K., *NEW HORIZONS IN CRIMINOLOGY* 58 (Englewood Cliffs, N.J., Prentice-Hall, Inc. 1959); GLUECK, S. & E. T., *500 CRIMINAL CAREERS* (New York, Alfred A. Knopf 1930); *id.* *LATER CRIMINAL CAREERS* (New York, The Commonwealth Fund 1937); *id.* *CRIMINAL CAREERS IN RETROSPECT* (New York, The Commonwealth Fund 1943).

last lecture I can touch on only a few of them. I propose, first, to discuss the role of court-clinics in making it possible to discover psychopathy among those awaiting trial and thereby to reduce unnecessary prosecutions of the mentally ill; the contribution of such clinics to aiding judges in the sentencing process and to serving classification and treatment agencies in correctional activities; and the aid of clinics and related facilities in the early recognition of potential delinquents, to facilitate timely therapeutic intervention. I plan, next, to discuss a fundamental reform in the administration of criminal justice consisting essentially of a more realistic division of labor between judge and behavioral therapist. Thereafter, I shall discuss the crying need of thoroughgoing improvement of the public mental hospitals of America and the great importance of increasing the number of psychiatrists and practitioners of related arts. I can only touch upon the fundamental necessity of expanding research programs in psychiatry and adjunctive disciplines. Finally, I shall briefly discuss the call for enrichment of curricula not only in preparing psychotherapeutic personnel but in extending opportunities for relevant extralegal study to law students.

III

Many of the problems we have been considering in the prior lectures might be more effectively dealt with if there existed well-staffed clinics to which persons accused of serious offenses could be sent for thorough examination and study. An illustration is the Massachusetts Briggs Law,⁶

⁶ MASS. GEN. LAWS ANN. Chap. 123, §100A (1959). Few states have adopted the Briggs Law despite many years of favorable comment. "Not much use has been made of the Kentucky law. In Michigan, on the other

which provides for psychiatric examination of persons indicted for capital offenses, those known to have been indicted for any other offense more than once, and those previously convicted of a felony. The examinations are made by neutral psychiatrists, appointed neither by the parties nor by the court but by the Department of Mental Health, and before it is known whether the defendant will "plead insanity." Most of the examinations are conducted at the jail where the accused is being detained for trial. The report is filed with the clerk of court and is accessible both to the judge and to counsel for each party. While the report is itself not admissible in evidence, the examiners may be called upon to testify.⁷ The procedure of the Briggs Law tends to discover, before trial, those accused who are in one form or another mentally aberrant. It thus spares many ill defendants and their relatives the stigma and humiliation of a criminal proceeding. If the psychiatrist appointed by the Department of Mental Health reports that the accused is "insane," he is usually not subjected to trial but committed to a mental institution; and if he is declared to be "sane" defense counsel rarely raises the issue at the trial. The statute

hand, the law has been conscientiously applied, and 947 cases were examined during the first ten years of the law's operation (1939-1949). In a large majority, counsel for the prosecution and the defense have accepted the findings of the examining commission."—GUTTMACHER, M., & WEIHOFEN, H., *PSYCHIATRY AND THE LAW* 260 (New York, W. W. Norton & Co., Inc. 1952). For a case illustrating the possible value of a Briggs Law in a state which does not have it, see *People v. Motis*, 179 N.E.2d 637 (Ill. 1962).

⁷ There are, however, weaknesses in the administration of the Briggs Law. It is, for example, difficult to obtain psychiatrists qualified by modern clinical education and experience to devote much time to this public service for the modest fee involved. Appointees are likely to be retired institutional psychiatrists who spent most of their active years in public mental hospitals in the rather routine care of patients. A serious effort is, however, being made to improve the administration of the Briggs Law. For a recent critique, Tenney, C. W. Jr., *Sex, Sanity and Stupidity in Massachusetts*, 42 B. U. L. REV. 1-9 (1962).

has brought about a considerable diminution in the use of conflicting alienists in insanity cases; for the unbiased status of the experts who make the examinations, and the known modesty of their examination fee, has put them at an advantage over partisan, highly remunerated experts. Juries have recognized the probability of less bias in the examiners appointed by the Department of Mental Health than in alienists employed by either side. The Briggs Law not only saves the Commonwealth much time and money in avoiding unnecessary prosecutions, but disposes of mentally ill offenders more humanely by sending them to hospitals instead of prisons; and it helps to bridge the gap between law, psychiatry, and related disciplines by bringing to the attention of prosecutors and judges the data of psychopathology.

However, perhaps the most important, though least obvious, role played by the Massachusetts law is that of a harbinger of a new administration of criminal justice which is still far off but toward which, it would seem, the advance of criminological and psychiatric investigation, in company with legal research, should gradually impel us; namely, the basing of each offender's treatment in *all* cases—not merely those involving the defense of insanity—not on the mechanical dosages of punishment prescribed in advance by the legislature, but on the rational exercise of discretion enlightened by the reports of psychiatric, psychological and social workers who ought, nowadays, to be indispensable adjuncts to criminal courts and to classifying agencies and correctional establishments.

Another promising movement in Massachusetts is the development of a court-clinic service for both adult and child offenders. Begun in 1956, it has gradually evolved to the stage where there are clinics in thirteen district courts (for misdemeanants and juvenile delinquents) and one in a

superior court (for felons). The clinics serve in several capacities: They diagnose defendants in cases in which any question is raised about mental status, so that "the judge, rather than being forced to make a quick layman's appraisal, has the psychiatrist in court to act as his direct resource on such question. . . . Where formerly the judge was required to commit a person to a mental hospital for observation for thirty-five days if he thought the person might be mentally ill, the court clinic is available to offer a clinical impression on the individual immediately."⁸ The court-clinics not only reduce materially the number of persons committed for observation to the crowded public mental hospitals, but, even more important, they perform two vital functions after conviction: they render an informed evaluation of the make-up and background of the individual offender, aiding the judge in making effective sentencing decisions, and they help the probation officer in supervising both adult and juvenile probationers by adding, to the usual oversight practices, the vital ingredient of at least some psychotherapy. "Approximately 50% of the offenders seen for diagnosis in the Court Clinics are given psychiatric treatment."⁹ In many instances not only the defendant, but members of his family, are interviewed and afforded some psychotherapeutic attention.

Naturally, the key element in this experimental operation is personnel. Those directing the program¹⁰ are fully aware

⁸ Annual Report of Court Clinics Program, Division of Legal Medicine, Department of Mental Health (Mass.), July 1, 1961, at 1 (mimeographed). "Court-ordered observations from the criminal courts of Massachusetts account for eight to twenty-five percent of the total admissions to each of the hospitals in the state, even at present with twelve court clinics in operation."—*Ibid.*

⁹ *Ibid.*

¹⁰ Generally in charge of this program is Dr. Donald H. Russell, a dedicated psychiatrist. Liaison agent with judges and probation officers—involving a very important function—is James M. Devlin, a former probation officer of many years' experience. Encouraging the project is the well-known psychiatrist, Dr. Harry Solomon, Commissioner of Mental Health in Massachusetts.

of this, and from the beginning they have built into the project a training program designed to attract young psychiatrists, psychologists, and social workers.

No systematic attempt has as yet been made to check the ultimate results of the court-clinic project; but judges and probation officers are very enthusiastic about the practical, day-to-day aid they receive, not only in greater understanding of the individual offender but in expanded general knowledge of personality distortions and their relationships to antisocial behavior. Let me quote a few of many commendatory comments by judges:¹¹

The Clinic has been a welcome addition to our Court. Just as the Probation Officer supplies useful, indeed essential, information about the physical background of persons brought before the Court, so the Psychiatrist explores the mental background and whenever this shows a disturbed individual, the Psychiatrist interprets the symptoms to the Judge.

The Clinic is of value to the Court in dispositions of criminal cases, particularly those involving crimes of a sexual nature. In this type of case, it is important to know the likelihood of the defendant repeating the offense in question and also whether or not the defendant might commit a crime of violence, or one involving children. As a result of observation and advice of the Clinic, the Court, on some occasions, grants probation where it would otherwise have imposed a sentence to the House of Correction and, conversely, the Court occasionally imposes a sentence to the House of Correction because of advice of the Clinic that probation would subject the community to undue risk. Its most important use is psycho-therapy given to those referred to it.

The Clinic is one of the most important and helpful auxiliaries which this Court has. Roughly, one-quarter or more of the criminal and delinquency cases which come before the

¹¹ These are extracts from numerous letters accompanying the Report mentioned *supra* note 8. Many more might have been quoted, but those in the text give an adequate assessment of the various values of the court-clinics according to a fair sample of the judges.

Court are seen by the Clinic, . . . as a preliminary to trial, disposition or for treatment under the direction of the Probation Department. . . . The Clinic is most helpful . . . in the Juvenile field, where it often can treat and help parents of delinquents. The mentally ill or disturbed parent is, many times, the cause of delinquency, and medical help to the parent or parents may solve the problem. . . . No other agency, to our mind, is better preventive medicine.

[The clinic] creates good public relations with lawyers, police and other community agencies. Fathers, mothers, wives and other relatives are quite pleased and comforted in knowing of the Clinic and the possible treatment of the patients.

[The clinic] has been especially helpful to us in evaluating juveniles promptly. . . . We very frequently and successfully place a person, especially a juvenile, on probation on condition he attends the Clinic, and we have found this very satisfactory in many cases.

I find it difficult to express the feeling of security that I know when it is my privilege to refer to [the clinic doctor] and his associates people who I feel require the services of the Clinic. Very shortly after the Clinic was established in 1957, I acquired this feeling of security because of the good results that seemed immediately forthcoming from referral to the Clinic.

One could quote many more enthusiastic and appreciative comments by judges and probation officers. As you may surmise, not a little of the value of the court-clinic program is its indirect effect in demonstrating to judicial and probation personnel that such surface indications as the crime committed are not always reliable in assessing the motivations and etiological involvements. Through the conduct of seminars and demonstration case-conferences, the clinics are also extending their educative influence to social workers, behavioral scientists, and law students.

IV

The provision of clinics to aid courts in assessing cases for possible commitment to mental hospitals, in making sentencing decisions, and in informing probation officers would be a great step forward in all states.¹² But experiments of the kind going on in Massachusetts, and, for example, at the pioneering Baltimore Criminal Court Clinic under the direction of Dr. Manfred Guttmacher, a predecessor in the *Isaac Ray* lecture series, are not enough. A more fundamental attack on the crime problem is nowadays called for, based on a theory more promising of the protection of society through rehabilitation of offenders than is the hallowed basic philosophy of traditional criminal law. Persuasive recent researches have revealed—something that profound philosophic and poetic observers of the human drama have long known—that character is formed largely during the first few years of life.¹³ "Knowledge of right and wrong" of a kind that will really influence behavior both normally and in crises must be planted in the soil of parental affection and of fair, consistent, firm but kindly discipline during early childhood, if such knowledge is to play a dominant role in a person's social relationships as he grows to adulthood. In our punishing of many defendants as fully blameworthy on the assumption that they could have done other than they did

¹² One of the first such clinics in America is that of the Baltimore Supreme Criminal Bench which for many years has been under the direction of a pioneer in this field and a former lecturer in the Isaac Ray Award series, Dr. Manfred Guttmacher. See GUTTMACHER & WEIHOFEN, *op. cit. supra* note 6, at 260-265. New York City has had a court-clinic for several years and some other cities have more recently established them.

¹³ GLUECK, S. & E. T., *UNRAVELING JUVENILE DELINQUENCY* (New York, The Commonwealth Fund 1950; Cambridge, Mass., Harvard University Press 1951, 1957).

if they only tried hard enough, we are often proceeding on the questionable supposition that, with the arrival at a magic age-line, mature personality and self-governing, law-abiding character are suddenly and necessarily present—except only in cases of very extreme mental disease or defect. This may be deemed indispensable to social protection through law; but let us have clearly in mind what we are doing.

Think of how many children who became delinquents and criminals never really had adequate training in choosing between the right and the wrong, the good and the bad, the wholesome and the morbid, because of glaring parental ignorance, or excessive or erratic or lax discipline in the home during their formative years. Think of how many delinquents and criminals, on the other hand, suffered the frustrations of a too rigid and even sadistic climate of conformity in the home; so that they, too, never had adequate practice in the exercise of such capacity for freedom of choice and action as nature may have endowed them with.

Of course, the law must draw lines for purposes of fixing responsibility formally; and the law dictates that beyond a certain age (varying, nowadays, in different jurisdictions) the child must be treated as an adult. But the line-drawing provisions do not eliminate the long, intricate, and subtle chain of causation often involved in the adult's crime. Toward the beginning of this lecture I quoted on this theme the Roman poet, Juvenal. At this point it seems appropriate to add the wisdom of another great poet, the French playwright, Racine, who, in *Phèdre*, reminds us that "Crime, like virtue, has its degrees; and timid innocence was never known to blossom suddenly into extreme licence." The limitation of the substantive law analysis of criminal guilt to the *actus reus* and to the *mens rea*, that is, to the immediate act and intention, chops off the etiological chain that made the

offender what he is at the trial, at a stage when character has already been rigidly formed or malformed.

Perhaps we must long continue to abide by the traditional legal analysis in fixing criminal responsibility; but there seems no longer any valid excuse for not taking a more realistic tack when it comes to sentencing and its implementation. At that stage it would perhaps be of some advantage for legislation and administration frankly to substitute for the concept of responsibility and culpability the simpler and less emotion-arousing concept of *amenability to social control*. Under this there is no necessary commitment on the issue of the extent of freedom of will, of blameworthiness and moral guilt. When a person is held to be legally subject to removal from open society because of his dangerousness, it does nobody much good to continue to speak and act in terms of blame, guilt, and "just retribution." Such an attitude has proved to be abortive both in curing and deterring. Take away "the cop on the beat" and the offender coped with in pursuance of such an attitude tends to repeat his criminalism, because his motivation to be law-abiding is largely external, negative, and fear-inspired; it was not built into his character-structure as a positive system of abiding desires and values. He has been managed under a gross oversimplification of the motivations, especially the subconscious motivations, that enter into the commission of antisocial acts.

However, to hold him *amenable to social control* carries different implications. It means, in effect, that without passing judgment on the extent of his moral blameworthiness, and irrespective of the internal and external forces involved in his commission of crime, society has the right to protect itself against him, exactly as, irrespective of the fact that "typhoid Mary" cannot be blamed for the unfortunate event of her having contracted a highly communicable disease,

society has an obvious inherent right to protect itself against her spreading the disease. But correlative to this right of society is its duty, as well as its farsighted policy, to help the offender to help himself to avoid recidivism. Therefore, substitution of amenability, and all it implies, for responsibility and its implications and consequences, should mean substitution of a *causal attitude* for one emphasizing purposive wicked wrong-doing as a supposedly isolated phenomenon expressive of a will free from the entanglements of hereditary chains, environmental traumas, and the enticements of bad example. And such a causal attitude will make it logical to turn our prisons into essentially therapy-aimed establishments. It will make it important to employ measures to predict the chances of probable relapse as opposed to fairly continuous law-abidingness on the part of individual patients in these hospitals for treatment of character-distortion. On the other hand, it will also justify, in incurable cases, extended, sometimes even lifelong, incarceration to protect society against the dangerously aggressive, until such time as medical, social, educational, and religious research and experimentation develop means of more promising treatment of those at present incurable. Thus, the proposed system, which I shall outline shortly, will have to be implemented with wide-zone indeterminate sentence statutes and with ever improving therapeutic and corrective facilities. It will have to provide for periodic review of the status of the prisoner, so that his right to be released within the indefinite sentence span at a stage where he is no longer very likely to be dangerous will be respected and protected. Most of all it will have to be implemented with a sufficient number of competent and dedicated personnel, enthusiastically interested in looking into the causes of the individual's social maladjustment as expressed in criminal conduct, and sincerely

oriented toward the prime goal of therapy both for humanitarian reasons and as the only rational way to enhance the protection of society.

In brief, I envisage before the turn of the century a marked development in the philosophy of the administrative aspects of the criminal law if not its definitions of the elements of responsibility, that will be most strikingly characterized by the twilight of futile blameworthiness and the businesslike search for likely causes and for effective therapies. At first blush, this seems like a basic internal contradiction between the substantive criminal law and its agencies of implementation; but it reflects the permeative dilemma on the moral issue of freedom of will: people are both free and determined. The quarrel with the substantive criminal law derives from the conception that the average defendant is necessarily much more free than conditioned. The proposed theory does not deny *liability* in the sense that the prohibited act came from the accused, but for far-sighted practical as well as humanitarian reasons it puts the microscope on the causes *beyond* "free will" that have made the defendant commit a crime, and the type of therapeutic and corrective intervention that will most promisingly reduce his tendency to repeat.

Is all this an impossible dream?

There are indications that something of this philosophy has already seeped into the basic legal blueprint of a few states, even though they are far short of having adequately implemented the theory in their courts and correctional facilities.

I have recently examined the constitutions of the states and find that a few, at least, contain, in those basic documents of the aims and structure of government, *specific commitments to an exclusively forward-looking philosophy*

of the criminal law. Since this fact is not generally known, let me quote some of these constitutional commitments:

Indiana I, 18: "The penal code shall be founded on the principles of reformation, and not of vindictive justice."

Montana III, 24: "Laws for the punishment of crime shall be founded on the principles of reformation and prevention."

Oregon I, 15: "Laws for the punishment of crime shall be founded on the principles of reformation, and not of vindictive justice."

Wyoming I, 15: "The penal code shall be framed on the humane principles of reformation and prevention."

These latter-day expressions of a candidly realistic point of view to govern the administration of criminal justice are significant not only because the framers deemed it important to embody them in the foundation document of government and law, the constitution, but because the point of view expressed supplies a forward-looking leitmotif to the entire system of criminal justice. It is necessary that the criminal law should as nearly as possible have a leading aim, to integrate more or less conflicting subordinate aims and to minimize contradictions and inconsistencies in a state's management of its offenders. I do not mean, nor I suppose did the framers of these constitutional guidelines intend, that *only* the objective of reformation should always govern. What I mean is that reformation through therapy should deliberately be the *prime* or integrative aim of the criminal law to which the other objectives should be recognized as subordinate though auxiliary. Thus the establishment of broad-zoned indeterminate sentences does not carry with it the danger that there will be no deterrence whatsoever. Indeed, there may thereby be more deterrence than under a regime of fixed sentences or pseudo-indeterminate sentences. For an offender will not know, in advance of his crime, just how long he will have to be under correctional control and sub-

ject to therapeutic intervention; and in fact certain offenders may have to remain under control for a longer term than if the sentence had been legislatively fixed or narrowly restricted in advance. Again, incarceration in an advanced correctional and therapeutic institution, with up-to-date psychological, psychiatric, and social treatment, with facilities for the acquisition of useful trades, with recreational outlets, with active religious guidance, and other aids to self-understanding and social rehabilitation does not necessarily mean there will be less deterrence than there is in incarceration in the traditional type of prison. Conversations with both prisoners and prison officials must convince one that *any* kind of enforced restraint is a hurtful deprivation of freedom, and to that extent, specifically distasteful and therefore deterrent. As to retribution, neither the victim of the crime nor the state gains anything by emphasizing this element which is, in effect, socialized revenge. And since it tends more to the development of a grudgeful frame of mind than a friendly attitude which a sympathetic corrective therapeutic regime would encourage, it is to that extent defeative of the state's prime and ultimate objective in criminal law—the effective protection of society. As for the general moral-educational aim of the criminal law—its public definition and continued re-emphasis of what constitutes prohibited behavior—a regime motivated essentially by therapy and rehabilitation would not measurably reduce this. If the aim be to use the law to drive home the ancient lesson that the wages of sin are punishment, it is doubtful whether the criminal law as administered in the modern metropolis, and involving hundreds of cases daily with only a few sordid ones given publicity, is the best teacher of general morality. That had better be left to the home, the school, and the church. But to the extent that the criminal law can teach morality,

the emphasis on correction through therapy will not materially reduce the effectiveness of the lesson sought to be inculcated. One does not, nowadays, have to bring to his aid the thumbscrew, the fagot, the dungeon, and the guillotine as teaching materials in a course on public morality any more than one must resort to painful punishment in order to inculcate moral principles privately.

In connection with the advanced therapeutic philosophy, it should be pointed out that the sentence ought not to be imposed immediately after conviction because, among other reasons, the public clamor should not distort the disposition of the case. As the late Chief Justice Stone observed in another context, "the sober second thought of the community . . . is the firm base on which all law must ultimately rest."¹⁴ Sentence should be decided upon when public agitation has died down sufficiently—a need recognized at present in another aspect of administration of the criminal law, the provision for a change of venue which takes account of the unfair influence inflamed public opinion can have at the trial stage. But a more basic reason for postponement of the sentence is that the crime itself tells very little about the effective motivations of the offense, or about the individual offender's potentialities for reform or recidivism, or of the most promising type of sentence and treatment for him. These matters require intensive, time-consuming investigation and testing of the total personality by persons trained in various behavioral and motivational disciplines; they cannot be determined by looking merely at the crime committed, or the prior criminal record or even the probation officer's investigation report which often is based on brief inquiry regarding essentially surface matters.

¹⁴ Stone, H., *The Common Law in the United States*, 50 HARV. L. REV. 4, 25 (1936).

It is considerations of this kind that led me, back in 1925, to recommend the establishment of a "Sociolegal Commission," or "Treatment Tribunal."¹⁵ It seems reasonable to assume that correctional action can be improved fundamentally by separating, in personnel and technique, the guilt-determining function of the courts from the sentence-imposing and succeeding steps. While a legally trained judge can act as an impartial referee during a technical trial, ruling upon the exclusion or inclusion of evidence, instructing the jury on the law governing the case and performing other strictly legal functions, his education and habit of mind have not specially qualified him for the delicate task of determining and guiding the type of treatment most suitable to the individual offender on the basis of reports of scientific observation, tests, and investigations. True, where the judge comes in close contact with those specially trained in the motivational disciplines, as in the Massachusetts court-clinic situation, he can learn something about the springs of human action and the influence of divisive social pulls and pressures. But to understand an offender thoroughly takes special experience and requires observation of his behavior over a substantial period of time. Thus, as far as the sentence and its implementation are concerned, the judge of the future must be a social physician. A great many years ago, Aristotle recognized the true role of the sentencing judge in these words:

The knowing of what is just and what unjust, men think no great instance of wisdom, because it is not hard to understand those things of which the laws speak. They forget that these are not just acts except accidentally. To be just, they must be done and distributed in a certain manner. And this is a more difficult task than knowing what things are wholesome. For in this branch of knowledge it is an easy matter to know honey,

¹⁵ GLUECK, *op. cit. supra* note 3, at 485-487.

wine, hellebore, cauter, or the use of the knife; but the knowing how one should administer these with a view to health, and to whom, and at what time, amounts in fact to being a physician.¹⁶

Thus it would seem desirable that the work of the criminal court should cease with the finding of guilt or innocence. The procedure thereafter should be guided by a professional treatment tribunal to be composed, say, of a psychiatrist, a psychologist, a sociologist or cultural anthropologist, an educator, and a judge with long experience in criminal trials and with special interest in the protection of the legal rights of those charged with crime. Such a tribunal would begin to function, beyond the point to which the substantive and procedural criminal law has carried the case, to determine the sentence and to plan and supervise its implementation.

The primary duty of such a sentencing and treatment-guiding body would be to determine the therapeutic plan appropriate to the individual as a member of a class whose past responses to various forms of sentence have been systematically investigated. The treatment tribunal would determine not only which offenders can safely be allowed to be on probation in the community, but also the locale and the tentative and ultimate duration of incarceration in the individual case. It would perform its functions on the basis of intensive psychiatric, psychological, and social reports based on examination of each offender at a diagnostic and classification center to which the criminal court judges would commit offenders without fixing either the institution or length of sentence. The ultimate duration and type of corrective treatment would of course call for modification in the light of the progress of the individual offender under the program of psychological, characterial, and social therapy prescribed in each case by the treatment tribunal. The

¹⁶ The Nichomachean Ethics, V, viii, 1137a.

tribunal would require periodic reports upon the progress of each offender, to be used as a basis for modifying the original therapeutic and corrective plan and for determining the most promising time for parole or release of the inmate.

In the work of a treatment tribunal, it would soon be recognized that one cannot effectively "individualize" the correctional treatment of any offender without assessing him, in relevant particulars of personality and background, on the basis of a standard derived from scientific study of thousands of other offenders. By systematically comparing the individual offender with a composite portrait of many others, in respect to characteristics previously demonstrated, through follow-up studies, to be really relevant to future reform or recidivism under various conditions, the tribunal will have a chance truly and realistically to individualize treatment. This important adjunct to sentencing and classification processes is now available in the form of "prediction tables," various types of which have in recent years been developed by intensive research and some of which are in process of validation on samples of cases other than the ones on which they were constructed. Those of you who are interested in this development are invited to consult *Predicting Delinquency and Crime*,¹⁷ a work published not long ago by Mrs. Glueck and myself. It presents a system of prognostic instruments based on many years of follow-up of a variety of samples of delinquents and criminals. There are tables indicating the relevant factors and the statistical chances of success or failure under ordinary probation, probation with suspended sentence, incarceration in boys' correctional establishments, in a reformatory for young-adult male offenders, in a reformatory for women, in jails and houses of correction, or in prison; as well as behavior while on parole and during

¹⁷ GLUECK, S. & E. T., *PREDICTING DELINQUENCY AND CRIME* (Cambridge, Mass., Harvard University Press 1959).

extensive postparole periods. By consulting tables of this kind, the choice of sentence and time of release might be improved through selecting that disposition of each case which has been proved, through careful follow-up investigations of past offenders, to be most likely to induce reform instead of recidivism.¹⁸

That the concept of a treatment tribunal or, as it is more often referred to nowadays, an "authority," is neither visionary nor impractical is suggested by the fact that sentencing by a specially qualified board was recommended many years ago by so practical and humane a statesman as the late Governor Alfred E. Smith of New York.¹⁹ More significantly,

¹⁸ Use of prediction tables, based on the systematic intercorrelation of traits and factors found relevant to future behavior with actual responses in terms of satisfactory vs. unsatisfactory postsentence behavior under various types of peno-correctional treatment, has been criticized on the ground that such tables do not take account of the fact that the aims of society as expressed in criminal law comprise not merely correctional treatment but also such matters as "just retribution," and deterrence through the inducing of fear of punishment, and the teaching of the lesson to the public that bad conduct is contrary to morality.

A simple answer to this objection is that it is impossible to supply any practical yardsticks to measure off the quantum of the retributive or deterrent or educative elements that should be included in assessing the length and place of sentence and to predict their probable relationship to the subsequent behavior of the defendant at the bar or of any class of prospective offenders. Besides, any judge who, taking account of the indications of the prediction tables, still believes that the particular case requires special emphasis upon the ingredients of retribution, deterrence or education, however unmeasurable these may be, is of course free, as he is at present without using prediction tables, to bring them into the total situation in tailoring his sentence to the needs as he sees them. It is however the merit of the system of prediction that, at least in the central task of determining the relationship of traits and factors in personality and environment to variations in expectable behavioral response of offenders to different types of sentence and treatment, and during reasonable test-periods beyond, there is presented a method of relative precision based on experience that has been reviewed and organized. An island of fact is blocked out in a sea of speculation, guesswork, and "hunch" in which it is practically impossible to measure the elements of retribution, deterrence, or education of the general public. Of course, it must be borne in mind that in relatively minor offenses that are committed daily by thousands of persons, such as traffic-law violations, it is much easier to bring about deterrence by severe sentences for a period than it is in the familiar felonies.

¹⁹ See PROGRESSIVE DEMOCRACY: ADDRESSES AND STATE PAPERS OF ALFRED E. SMITH 209-210 (New York, Harcourt, Brace & Co. 1928). See

some features of this type of sentence-fixing by specialists have been enacted into law in California, Hawaii, and Washington. I shall have time to touch upon only the California provision. In 1944 that state set up the first "adult authority" as a division of the reorganized Department of Correction.²⁰ Subject to statutory limitations regarding habitual criminals, while the courts of California determine whether a sentence shall be a fine, probation or imprisonment, if it is to be imprisonment they are required to sentence only to the minimum and/or maximum general terms set up in the penal statutes;²¹ and these permit of wide ranges for the play of subsequent administrative discretion in fixing sentences and times of release despite legislative intervention in fixing minimum terms for certain offenses.

After the offender has been thoroughly examined and studied at a diagnostic center, he is interviewed by a member of the Adult Authority and tentative dates are set for his time of release and time of discharge from parole. These dates are subject to subsequent refixing at six-month intervals. Paroles are also revoked by the authority.²² When first established, the Adult Authority was given various administrative duties, such as supervision of the "reception-guidance centers," classification of prisoners to determine

also GLUECK, *op. cit. supra* note 3, at 485-487; and *id. Principles of a Rational Penal Code*, 41 HARV. L. REV. 453-482 (1928).

²⁰ CAL. PENAL CODE §§5057. For a helpful discussion of the Washington experience, see Hayner, N. S., *Sentencing by an Administrative Board*, 23 LAW AND CONT. PROBS. 477 (1958).

²¹ "Every person convicted of a public offense, for which imprisonment in any reformatory or State prison is now prescribed by law shall, unless such convicted person be placed on probation, a new trial granted, or the imposing of sentence suspended, be sentenced to be imprisoned in a State prison, but the court in imposing the sentence shall not fix the term or duration of the period of imprisonment."—CAL. PENAL CODE §1168.

²² *Philosophy, Principles and Program of the California Adult Authority* 1-2 (Department of Corrections, State of California January, 1949); *California Adult Authority, Principles, Policies and Program* 4 (Department of Corrections, State of California June, 1952).

the institutions at which they would serve the sentence, and prescription and supervision of the training and correctional program. These functions were later placed under the Director of Corrections.

The Authority is required to meet at each of the state institutions "at such times as may be necessary for a full and complete study of the cases of all prisoners whose terms of imprisonment are to be determined by it or whose applications for parole come before it. . . ."²³ It may employ case-hearing representatives to "participate with the Authority in the hearing of cases relating to term fixing and paroles, and the case hearing representative assigned to participate in the hearing of a case is required to 'prepare a case study and evaluation which he [must] submit to the Authority.'"²⁴ To minimize conflicts between the authority and the Director of Corrections, the code carefully sets out the areas of cooperation between them.²⁵

²³ CAL. PENAL CODE §5076.1. The authority may also fix other times and places.

²⁴ *Philosophy, Principles and Program of the California Adult Authority*, *op. cit. supra* note 22.

²⁵ CAL. PENAL CODE §§5077, 5079. "The Adult Authority is empowered to advise and recommend to the Director of Corrections on general and specific policies and procedures relating to the duties and functions of the director. The director is empowered to advise and recommend to the Adult Authority on matters of general and specific policies and procedures relating to the duties and functions of the authority. The director and the authority shall meet for the purposes of exchange of information and advice. The director shall annually attend at least six Adult Authority hearings on fixing of sentences and release dates.

"It is the intention of the Legislature that the Adult Authority and the Director of Corrections shall cooperate with each other in the establishment of the classification, transfer, and discipline policies of the Department of Corrections, to the end that the objectives of the State Correctional System can best be attained. The director and the Adult Authority shall, not less than four times each calendar year, meet for the purpose of discussion of classification, transfer, and discipline policies and problems and it is the intent of the Legislature that whenever possible there shall be agreement on these subjects. But for the purpose of maintaining responsibility for the secure and orderly administration of the prison system, the Director of Corrections shall have the final right to determine the policies on classification, transfer and discipline.

Regarding qualifications of members of the Adult Authority, the California law provides that

Persons appointed to the Adult Authority shall have a broad background in and ability for appraisal of law offenders and the circumstances of the offense for which convicted. Insofar as practicable members shall be selected who have a varied and sympathetic interest in corrections work including persons widely experienced in the field of corrections, sociology, law, law enforcement, and education.²⁶

The national government has also in recent years greatly improved the implementation of its sentencing and correctional practices under the dynamic and dedicated Director of the Federal Bureau of Prisons.²⁷ Here, too, there is a recognition that the crucial aspects of the traditional sentence-fixing function and of classification, treatment, and release, though interrelated, require specialization of function.

It is of course not suggested that all states should, by the day after tomorrow, adopt the California or federal system or other patterns of professional specialization of the sentencing, treatment, and paroling functions. It is necessary first to convince the public, the legislature, and the legal profession of the improvement expected to result from the new system. Besides, respectable authority exists opposing the transfer of the sentence-deciding function from the judge and turning it over to a special professional body.²⁸ It must

"In the event there is no agreement the Adult Authority shall file in writing with the Board of Corrections a statement of its proposals or recommendations to the director, and the director shall answer such statement in writing to the Adult Authority, and a copy of both documents shall be transmitted to the Governor and to the Board of Corrections."—*Id.* §5003.5.

²⁶ *Id.* §5075.5.

²⁷ See the various writings of James V. Bennett, Director, Bureau of Prisons, U.S. Department of Justice, especially *Reconciling Legal and Correctional Values*. Sterling Lecture Series, Yale University Law School, 1960.

²⁸ The most impressive analysis of the problem is probably that of Professor Tappan. See TAPPAN, P., *CRIME, JUSTICE, CORRECTION* 455 *et seq.* (New York, McGraw-Hill Book Co. 1960). Professor Tappan provides an

also be conceded that it is possible to obtain many of the benefits of modern criminological advance without setting up a special sentencing and treatment-planning body. These include broad-zone indefinite sentences roughly graded to the public conception of the respective gravity of different types of crime yet allowing much room for individualization, establishment of competent study and classification centers, provision of professionally trained probation, parole, and institutional staffs, and systematic efforts to reintegrate former offenders into the industrial, recreational, and religious institutions of the community.

A major objection raised to fundamental reform of the management of the crime problem is the claim that psychiatry is as yet a very undeveloped art. But despite its shortcomings, dynamic psychiatry offers the greatest promise of any single discipline for discovery of the complex causes and motivations of emotional, intellectual, and behavioral maladjustment and for developing effective prophylactic and therapeutic techniques. For the psychiatric approach necessarily deals with the blended *interplay* of the forces of nature and nurture, instead of grossly overemphasizing innate predisposition, on the one hand, or external environment and general cultural influences, on the other.

Before leaving the topic of fundamental reform of the sentencing and treatment processes, it is important to stress one matter that is indispensable. Whether the modification of existing organizations and practices will entail a radical

excellent, realistic critique of the "authority" conception in theory and practice. One of the most difficult problems is presented by the tendency of legislatures to enact minutely varying sentencing provisions and to hold on to their prerogative with one hand whilst seemingly surrendering it to a professional body with another. Thus, the California apparatus of statutory controls has been characterized as "the most elaborate, and perhaps most disorganized, in any American jurisdiction."—Note, *Sentencing Criminals in California—A Study in Haphazard Legislation*, 13 STAN. L. REV. 340 (1961).

reduction of the role of the trial judge in sentence-fixing or will take other paths (such, for example, as the forward-aiming sentencing provisions of the American Law Institute's *Model Penal Code*), one thing is certain: the need of protecting fundamental rights. History has demonstrated that danger lurks even (or perhaps especially) in the most loftily motivated reforms, unless legal protections are provided against arbitrary acts of misguided zealots.²⁹

V

Let me next turn to three permeative and very serious problems in the field of mental illness which must be grappled with soon and on a large scale if there is to be an effective modernization of the law of insanity and if the kinds of reforms I have just discussed are ever to have a fair chance to demonstrate their usefulness. I refer, first, to the shabby condition of many public mental hospitals in most states; secondly, and relatedly, to the critical shortage of psychiatrists, psychiatric social workers, nurses and other practitioners of psychotherapy; thirdly, to the pressing need for widespread, intensive, and above all imaginative, research to improve the techniques employed by such practitioners.

As to the state of public mental hospitals, many such institutions fall far short of even a modest standard; indeed, some can be more accurately described as huge modern survivors of eighteenth-century English "gaols" or "bedlams." A few years ago the results of a wide-ranging five-year in-

²⁹ See Allen, F. A., *The Borderland of Criminal Law: Problems of "Socializing" Criminal Justice*, 32 SOC. SERV. REV. 107 (1958); TAPPAN, *op. cit. supra* note 28, at 463-468; and Kadish, S. H., *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 HARV. L. REV. 904-931 (1962).

vestigation of American mental hospitals was made public by the Joint Commission on Mental Illness and Health, under the direction of Dr. Jack Ewalt, an experienced psychiatrist and hospital administrator, aided by a carefully selected staff and by impressive advisory and consultative committees. The survey disclosed widespread abuses, including the fact that the great majority of state mental hospitals are little more than "convenient closets" for the storage of the mentally ill and that "more than half the patients in most State hospitals receive no active treatment of any kind designed to improve their mental condition."³⁰ Only recently, too, a special committee on psychiatric services in New York City, headed by Dr. Lawrence C. Kolb, reported conditions in the mental institutions of America's largest city that can only be designated as shocking.³¹

These exposés raise a serious question for our special concern: May not the hesitancy of judges and legislators to modernize the old tests of irresponsibility be motivated largely by their knowledge of the backwardness of public mental hospitals and of the relative weakness of even modern dynamic psychiatry in terms of etiological mastery and therapeutic effectiveness? Such a question, in turn, reminds us that social reform, certainly in a democracy, can never be neatly planned ahead of time to permit of simultaneous and correlative development of all aspects of a public problem on a broad front. Are courts justified in holding back legal reform because so much needs to be done to reform the agencies of psychiatric implementation of the law? Or is it

³⁰ The quotations are from a contemporary (Mar. 24, 1961) newspaper interview with Dr. Ewalt. The work of the commission is effectively summarized in *ACTION FOR MENTAL HEALTH* (New York, Basic Books 1961).

³¹ Report of the Special Advisory Committee on Psychiatric Services to the Commissioner of Hospitals, New York City, Sept. 21, 1961 (mimeographed).

better, in the long run, to proceed with the meeting of crying needs in the expectation that a forward thrust in one area will dramatize and stimulate a correlative forward movement in a neighboring area?

I am not sure of the answers to such questions; but temperamentally I am on the side of those who, while not blind to neighboring needs, staunchly go forward with the job of cultivating their own immediate corner of the vineyard. That is why I admire the pioneering spirit of Judges Bazelon and Biggs in their efforts to improve the backward legal aspects of the insanity problem, and I admire, likewise, the pioneering spirit of such psychiatrists as Doctors Ewalt and Kolb in exposing, though it is not always complimentary to their profession, the serious shortcomings in the understanding and care of the mentally ill and what should be done, and done soon, to remedy them.

But let me now state a few sample facts from the report of the Joint Commission on Mental Illness and Health, showing that not only has the mental health problem been rightly recognized as a grave national emergency, but that steps are under way to cope with it along several fronts. The American public should be grateful to the Joint Commission, a multi-disciplinary body representing 36 national agencies interested in mental health and welfare, for its comprehensive and candid five-year study of the public mental hospital situation. In 1955 Congress enacted a joint resolution³² which has become known as the Mental Health Study Act. Because of the enlightened public policy declared in that resolution substantial appropriations were made possible which, together with smaller private grants, financed the wide-ranging study of the state of America's public mental hos-

³² P.L. 182, 84th Cong. 1st Sess., Chap. 417, H. R. 256.

pitals. A number of important monographs have grown out of this survey; but the most significant publication, which every responsible citizen should take the time to read, is the summary volume, *Action for Mental Health*,³³ which comprises the final (1961) report of the Joint Commission.

I wish it were possible to give even a brief précis of this epoch-making study. Let me, however, state that not only does it call a spade a spade but it presents a well-supported series of recommendations which define goals reasonably within reach of America if the citizenry, the educational authorities, and the governmental bodies will realize the great dimensions and the pressing needs of the problem of mental illness. But the importance of the survey does not derive simply from the publication of *Action for Mental Health*. During its five-year program, interim disclosures were such as to stimulate much progress in improving the situation, especially with reference to personnel. For example, between 1956 and 1959 the number of physicians employed in public mental hospitals became 40 percent more adequate to the minimum standards set up by the American Psychiatric Association, the number of psychologists 28 percent more adequate, the number of registered nurses 25 percent, the number of other nonregistered nursing staff members 16 percent and the number of psychiatric social workers 9 percent. "This increase in adequacy came about through the addition of almost 12,800 [persons] in the five major patient-care categories."³⁴ The increase in adequacy has on the whole continued since 1959. For example, the ratio of physicians to patients has increased from

³³ See *supra* note 30.

³⁴ Fact Sheet Number 16, Sept., 1961, at 1 (Joint Information Service of the American Psychiatric Association and the National Association for Mental Health, Washington).

.68 per 100 resident patients in 1958 to .82 in 1960; the ratio of professional patient-care personnel (physicians, registered nurses, psychiatric and other social workers, psychologists and psychometrists, occupational and other therapists) has increased from 3.4 per 100 resident patients in 1958 to 4 in 1960; the ratio of psychiatrists per 100,000 of the general population increased from 8,700 in 1956 to 11,150 in 1960.³⁵

This, you will agree, is progress. But "despite these gains, the hospitals [in 1959 still] had fewer than one-fourth of the registered nurses they needed, and only a little more than sixty percent of the physicians they needed." While "the numbers of psychologists and other, non-registered nurses and attendants were more than eighty per cent adequate, . . . the mental hospitals [in 1959] needed an additional 45,181 persons to bring the total number of staff in these categories up to the 154,695 required by minimum American Psychiatric Association standards."³⁶

There is of course much room for improvement in all the states. The encouraging thing is, however, that a dynamic and what promises to be a continuing influence has at last been injected into the problem of the public mental hospitals. The professional bodies concerned with psychiatry have at last taken intelligent, informed, and aggressive action not only to diagnose the shortcomings of our public mental hospitals, and not only to make sensible recommendations, but to stimulate the education of the public, fraternal, and other groups, as well as legislators to the truly critical needs of this crippling social problem. We may therefore reasonably expect that improvement of the condition of America's

³⁵ 1962 Edition, Fifteen Indices, Feb., 1962, at 8-10, 16-17 (Joint Information Service of the American Psychiatric Association and the National Association for Mental Health, Washington). For progress in a related field see Muth, L. T., *After-Care Services in the United States, a Progress Report of State Hospital Programs* (mimeographed 1960).

³⁶ Fact Sheet Number 16, *op. cit. supra* note 34, at 1.

public mental hospitals will not lag behind modernization of the legal aspects of our problem. Indeed, we can confidently anticipate an interstimulation of the efforts of the psychiatric and legal professions.

You may recall that one of the arguments opposing the *Durham* rule which appeared in a recent judicial decision³⁷ is that there are not enough psychiatrists for the treatment of all the mentally abnormal offenders whom *Durham* would, supposedly, exonerate. This is unfortunately still true in most parts of the United States. There is immediate and pressing need for psychiatrists and other personnel trained in the behavioral and motivational disciplines. Perhaps one line of approach would be for the medical schools, in collaboration with faculties of psychology, sociology, and anthropology, to develop a training pattern which would not require the standard medical curriculum but would concentrate on the understanding and treatment of emotional and characterial disorders and lead to some such degree as Doctor of Mental Medicine.

There is also great need for early expansion of special vocational schools for the training of auxiliary professional and subprofessional personnel in the mental health and related fields—social workers, nurses, vocational and recreational specialists, attendants, and others. It is of course important that the students in such schools be carefully chosen on personality and characterial bases and with regard to their dedication. It is being more and more recognized that not merely the psychiatrists or psychoanalysts but other employees of a hospital generate its atmosphere and determine whether it has a hopeful and therapeutic climate, or a pessimistic, cynical, and even sadistic atmosphere. The

³⁷ *State v. Andrews*, 187 Kan. 460, 357 P.2d 739 (1960).

efforts of the professional therapist can be thwarted by the stupidity, ignorance, cruelty, and indeed the emotional problems generally, of other staff members. And, per contra, there are institutions where even an illiterate but wise and sympathetic ward attendant or janitress has accomplished more to aid patients than a sophisticated but fundamentally unsympathetic or professionally miscast psychiatrist after many expensive "therapeutic sessions."

In this connection, another road that needs to be systematically explored is to discover "therapeutic personalities" in the general population whose services, under psychiatric guidance, might be enlisted on either a voluntary, or part-time paid basis. We have all known persons in almost every walk of life whom nature has endowed with an attractive or "magnetic" personality; persons who, without professional schooling, happen to possess the precious natural gifts of insight and empathy; persons to whom people turn in their troubles. In this connection, Mrs. Glueck and I have often thought that some such research as what I am about briefly to describe should yield valuable scientific and social dividends: We propose that serious effort should be made to assemble a substantial roster of such specially endowed individuals and to study them psychiatrically and psychologically, in order to see if it is possible to define their relevant characteristics and to see whether psychological tests can be evolved which would aid in the selection of therapeutic personalities in the future. Such tests might, for example, help to transfer certain police officers who are now wasting their particular gifts in directing traffic—work which many others could do equally well—to guidance of predelinquents and delinquents, work for which they happen to possess special talents. Under professional oversight, such persons could greatly multiply the therapeutic influence called for

in probation, parole, institutional efforts, and such helpful adjunctive activities as Big Brother work.

The Joint Commission on Mental Illness and Health recognized the need of nonprofessional assistance in the vast and many-faceted problem of the mentally ill. For example, the commission urged that "the volunteer work with mental hospital patients done by college students and many others should be encouraged and extended."³⁸ It recognized "that non-medical mental health workers with aptitude, sound training, practical experience, and demonstrable competence should be permitted to do general, short-term psychotherapy—namely, treatment by objective, permissive, nondirective techniques of listening to [people's] troubles and helping them resolve these troubles in an individually insightful and socially useful way. Such therapy," the commission said, "combining some elements of psychiatric treatment, client counseling, 'someone to tell one's troubles to,' and love for one's fellow man . . . should be undertaken under the auspices of recognized mental health agencies."³⁹ And speaking of counseling of persons "under psychological stress" which they cannot tolerate, the commission advised that "in the absence of fully trained psychiatrists, clinical psychologists, psychiatric social workers, and psychiatric nurses, such counseling should be done by persons with some psychological orientation and mental health training and access to expert consultation as needed."⁴⁰ The commission also pointed out that "a host of persons untrained or partially trained in mental health principles and practices—clergymen, family physicians, teachers, probation officers, public health nurses, sheriffs, judges, public welfare workers, scoutmasters, county

³⁸ ACTION FOR MENTAL HEALTH, *op. cit.* *supra* note 30, at xi.

³⁹ *Id.* at x.

⁴⁰ *Id.* at xii.

farm agents, and others—are already trying to help and to treat the mentally ill in the absence of professional resources," and that "with a moderate amount of training through short courses and consultation on the job," such persons can be equipped with additional skill as "mental health counselors."⁴¹

These and other recommendations having to do with expansion of personnel to aid the mentally ill and those under great psychological stress are justified by the commission in its candid policy statement:

In the absence of more specific and definitive scientific evidence of the causes of mental illnesses, psychiatry and the allied mental health professions should adopt and practice a broad, liberal philosophy of what constitutes and who can do treatment within the framework of their hospitals, clinics, or other professional service agencies, particularly in relation to persons with psychoses or severe personality or character disorders that incapacitate them for work, family life, and everyday activity.⁴²

Educational and training reforms are called for not only in the psychiatric field, but also in the legal. Law schools have an obligation to enrich their curricula in the areas dealing with problems of persons and human relations in addition to their present heavy emphasis on problems of property. They have an obligation, also, to induce more law students to adopt careers in the fields of criminal justice. Back in 1886, Judge Holmes extended the perspective of the informed student, in his lecture on "The Profession of the Law." ". . . Your business as thinkers," he informed his eager young listeners, "is to make plainer the way from some thing to the whole of things; to show the rational connection between your fact and the frame of the universe. If your

⁴¹ *Ibid.*

⁴² *Id.* at 41.

subject is law, the roads are plain to anthropology, the science of man, to political economy, the theory of legislation, ethics, and thus by several paths to your final view of life."⁴³ More recently, Judge John Biggs, one of my predecessors in the *Isaac Ray Lectures*, chided our profession with the all too true observation that "The Law schools of the country and the lawyers and we judges have spent too little time in the adopting of techniques for improving the human race as distinguished from punishing it."⁴⁴

For better or for worse, society has entrusted the administration of justice to lawyers—not to psychiatrists, not to sociologists, not to cultural anthropologists. But if criminal justice is to be substantially bettered, its administrators must be equipped with more than a knowledge of law. They must have enough acquaintance with the basic concepts of the motivational and human-relational disciplines to bring into play the insights these may offer in the more effective control of behavior. Further, the administrators of justice must have the motivation to conceive their job in terms of a dedicated vocation employing not only the verbal tools of legal logic but the dynamisms involved in the understanding and modification of human attitudes, motives, and conduct.

Today, the graduate of a good law school, if indeed he can at all be induced to practice what is often conceived to be the shady business of criminal law, possesses the training which with some experience enables him, as prosecutor or defense counsel, to do an acceptable job; or, as judge, to preside over a trial fairly under the rules of procedure and evidence. But when it comes to such discretion-exercising

⁴³ Holmes, O. W. Jr., *The Profession of the Law*, in SPEECHES 23 (Boston, Little, Brown & Co. 1891).

⁴⁴ BIGGS, J. JR., *THE GUILTY MIND: PSYCHIATRY AND THE LAW OF HOMICIDE* xi (New York, Harcourt, Brace & Co. 1955).

and crucially important functions as are involved, for example, in determining whether to prosecute or resort to commitment proceedings, or in selecting the most promising sentence, the typical lawyer is likely to be more or less at sea. As Chief Justice Warren has emphasized, "Disparities in sentence alone have attracted nationwide attention and have even prompted the Congress of the United States to enact legislation establishing institutes and joint councils on sentencing to which judges and other individuals might come to discuss the problem."⁴⁵

The data in the reports of probation officers, parole agents, psychiatric clinicians and personnel of correctional establishments, even when available, can have but limited meaningful significance to prosecutor or judge unless those officials have derived some necessary interpretative insights offered by the relevant paralegal disciplines.

For such reasons I recommended establishment of a "West Point" of Criminal Justice, an educational and training institution dedicated to raising the standards and vision of police officials, prosecutors, defense counsel, judges, correctional administrators and others concerned with all aspects of criminal justice. The setting up of several such nationally financed educational institutions is designed, also, to serve as a public symbol of the importance of criminal justice in the American polity and of the dignity and social significance of dedicated practice of the law.^{45a} Senator Edward M. Kennedy has introduced a bill embodying the principles involved (S. 1288), and similar bills have been introduced in the House of Representatives. In addition to the traditional law curriculum, it is provided that the four-year course embody such extralegal subjects as the biologic, social, and

⁴⁵ Warren, E., in Foreword to GLUECK, S. & E. T., *op. cit. supra* note 17, at xix.

^{45a} Glueck, S., *Law and the Stuff of Life*, 14 HARV. LAW S. BULLETIN, 3-6 (1963).

economic conditions generating delinquency and crime, and emphasize interrelated problems of law, psychiatry, psychology, sociology, and other disciplines relevant to the more understanding and efficient administration of justice.^{45b}

Although the Harvard Law School faculty, after much debate and consideration by a special committee, unanimously approved the project, funds are still being awaited for the launching of such a program.

VI

Many other things might be said in pursuance of our general topic. One of these is the tremendous importance of encouraging basic relevant research by competent and imaginative investigators. As to the law, the American Law Institute and the American Bar Foundation have been doing meaningful practical research. As to psychiatry, various private foundations, fraternal orders, the National Institute of Mental Health, and, more recently, the American Medical Association are encouraging investigations in the etiology, modes of therapy, and results of therapeutic efforts. The Joint Commission on Mental Illness and Health emphasizes a point of view that is given much lip service but tends to be ignored in practice because of the attitude expressed by the saying when "the house is on fire, let's do something 'practical.'" The commission urges that "a much larger proportion of total funds for mental health research should be invested in basic research as contrasted with applied research. Only through a large investment in basic research can we hope ultimately to specify the causes and characteristics sufficiently so that we can predict and therefore

^{45b} See Glueck, S., *Wanted: A New Legal Profession*, 32 *THE POLICE CHIEF*, 24-32 (1965); and *A Federal Act to Establish the Roscoe Pound Academy of Criminal Justice*, 2 *HARV. J. ON LEGISLATION*, 131-145 (1964).

prevent various forms of mental illness or disordered behavior through specific knowledge of the defects and their remedies."⁴⁶

Psychiatric research is following psychological, physiological and chemical paths. This is wise; for mental illness appears to be the outcome of chemistry at one end and culture at the other, and limitation of inquiry to psychological symptoms may mean that investigators are dealing more with the smoke than with the fire. There is a small choice group of researchers in psychiatry who have the creative insights to dig patiently to the roots of the psychoses, especially that most tragic and wasteful of all diseases, schizophrenia. Among these daring and dedicated Columbuses of the mind is the distinguished Dr. Robert G. Heath, Professor and Chairman of the Department of Psychiatry and Neurology at Tulane, of whose path-breaking researches I have some knowledge. No talent or resource should be spared in seeking answers to the tragic enigmas of the most malignant mental diseases; for the study of the distortions of personality and character is basic to the knowledge of what is essential in humankind. If man is not to be destroyed, he must master the energy of the atom inside himself as well as that outside himself.

Finally, and at some risk of being misunderstood, I must urge expansion of the type of researches which Mrs. Glueck and I have been carrying on for many years.⁴⁷ These include

⁴⁶ *ACTION FOR MENTAL HEALTH*, *op. cit. supra* note 30, at viii, 231; see also *Proceedings, American Medical Association, Preliminary Program, Conference on Mental Health 178, 185-194* (Chicago, Sept. 29-Oct. 1, 1961, mimeographed). For some conception of the variety and depth of researches called for both in determining etiology and improving empirical methods of psychotherapy and related treatment measures, see TANNER, J. M. (ed.), *PROSPECTS IN PSYCHIATRIC RESEARCH* (Oxford, Blackwell 1953).

⁴⁷ See GLUECK, S. & E. T., *op. cit. supra* notes 5, 13; and *id.* *ONE THOUSAND JUVENILE DELINQUENTS* (Cambridge, Mass., Harvard University Press

follow-up investigations into the conduct of delinquents and adult offenders of various characteristics and backgrounds who have been subjected to different types of penal and correctional management. They include studies in the inductive syndromization of numerous physical and psychological traits and sociocultural factors found to distinguish offenders from control groups of nonoffenders. They include the development and testing of instruments for the early detection of *potential* delinquents, as well as the previously mentioned prediction devices to be used as aids in sentencing and paroling. Validation experiments have been and are being conducted which are designed to test one such instrument based on certain crucial factors of parent-child relationships. Known in the literature as the "Social Prediction Table," this aid to prognosis is being used experimentally to discriminate between potential delinquents and potential nondelinquents during the age of five to six years, and among older children having difficulties in the school setting, to distinguish real delinquents from pseudo delinquents. As is true of any scientific endeavor, only careful testing and experimentation on a variety of samples can demonstrate the value of such predictive devices and how they might be improved on the basis of experience. Uninformed and prejudiced criticism of predictive instruments is facile and not helpful. I think it can be conservatively stated that the Social Prediction Table is meeting the test of a useful screening device for detecting potential delinquents, both here and

1934); *id.* FIVE HUNDRED DELINQUENT WOMEN (New York, Alfred A. Knopf 1934); *id.* JUVENILE DELINQUENTS GROW UP (New York, The Commonwealth Fund 1940); *id.* AFTER-CONDUCT OF DISCHARGED OFFENDERS (New York & London, Macmillan Co. 1945); *id.* DELINQUENTS IN THE MAKING (New York, Harper & Bros. 1952); *id.* PHYSIQUE AND DELINQUENCY (New York, Harper & Bros. 1956); *id.* FAMILY ENVIRONMENT AND DELINQUENCY (London, Routledge, Kegan Paul 1962; New York, Houghton, Mifflin 1962).

abroad.⁴⁸ It seems likely, also, that the predictive approach can be developed not only to indicate future delinquents but also to aid in prognostication of future mental illness.

* * *

In coming to the end of these lectures, I conclude that there are signs that the long-lasting cold war between the legal and psychiatric professions is coming to a close. The increasing conferences between representatives of the two professions, exemplified notably in the work on the *Model Penal Code* of the American Law Institute and in the American Bar Foundation's impressive analysis of the problems of the mentally disabled and the law;⁴⁹ the mutual recognition of the limitations and the potentialities of each profession; the warm welcome of aid from clinics by judges in Massachusetts and elsewhere; the fact that both lawyers and psychiatrists are invited to commemorate the bold insights of Dr. Isaac Ray through lectures before medical and legal scholars and interested laymen—these are but a few of the favorable straws in the wind. True, in an opinion poll taken a few years ago, in which "some 4,000 persons, includ-

⁴⁸ See Glueck, E. T., *Toward Improving the Identification of Delinquents*, 53 J. CRIM. L. C. & P. S. 164 (1962); *id.* *Identifying Juvenile Delinquents and Neurotics*, 40 MENTAL HYGIENE 24 (1956); Glueck, S., *Ten Years of Unraveling Juvenile Delinquency: An Examination of Criticisms*, 51 J. CRIM. L. C. & P. S. 283 (1960); and GLUECK, S. & E. T., *op. cit. supra* note 17.

⁴⁹ See the illuminating correspondence between Dr. Manfred Guttmacher and Professor Herbert Wechsler relative to the problem of defining criteria of irresponsibility in MODEL PENAL CODE 182-192 (Tent. Draft No. 4 1955); and LINDMAN, F. T., & MCINTYRE, D. F. JR. (eds.), *THE MENTALLY DISABLED AND THE LAW: THE REPORT OF THE AMERICAN BAR FOUNDATION ON THE RIGHTS OF THE MENTALLY ILL.* (Chicago, University of Chicago Press 1961). That there is increasing recognition of the relevancy of psychiatry to the problems encountered in the administration of justice is shown by the increasing introduction, in recent years, of courses in psychiatry and psychology in the curricula of law schools. See Macdonald, J. M., *The Teaching of Psychiatry in Law Schools*, 49 J. CRIM. L. C. & P. S. 310 (1958). See the Comment by H. Weihofen, *loc. cit.*, at 314.

ing lawyers, physicians, clergymen, businessmen, housewives and other groups were queried, . . . only in the legal profession" was there "a relatively major distrust of psychiatry"; and true, also, "over 40 per cent of the lawyers did not think it worthwhile to obtain a psychiatrist's help when someone begins to act strangely."⁵⁰ Yet there are such judges as Bazelon and Biggs, to mention but two, who have done especially distinguished work in inviting mutually helpful legal-psychiatric collaboration. And despite criticisms of the law of insanity, no psychiatrist nowadays goes so far as to pick up the rallying cry of the demagogue, Jack Cade, in Shakespeare's Henry VI, Part II: "The first thing we do, let's kill all the lawyers."

With the steady improvement of psychiatric research and insight, we may expect psychiatric testimony to be more cautious and illuminative. With the steady expansion of legal learning influenced by relevant paralegal disciplines, we may expect a less mechanical jurisprudence to be reflected in judicial decisions. As is to be anticipated, there are individuals in both camps who tend to carry a professional chip on the shoulder. But on the whole I think it can be said with a fair amount of accuracy that there has been a considerable thaw in the cold war and that the practitioners of the ancient arts of medicine and law are at long last approaching a sympathetic and realistic understanding. And this, I think, gives promise of ripening in the not too distant future into an *entente cordiale*.

⁵⁰ Bennett, J. V., A Briefing for Lawyers on Prisons, in Reconciling Legal and Correctional Values, *op. cit. supra* note 27, at 10.

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