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FROM McNAGHTEN TO DURHAM, AND BEYOND — A DISCUSSION OF INSANITY AND THE CRIMINAL LAW†

By SIMON E. SOBELOFF*

It is an inveterate weakness of program chairmen as a class, that when they invite a speaker they are reluctant to indicate the subject they wish him to discuss. Their habitual response to the invitee's inquiry is, "Oh, just talk to us." Not so with your good Mr. Chandler. When he suggested a talk on "insanity and the criminal law," I seized upon it with alacrity, not because I was so presumptuous as to fancy myself an expert, but because it relieved me of the responsibility of making the selection. I soon found, however, that it was only a preliminary and temporary relief, for the subject is complicated and difficult, and its literature is as voluminous as it is interesting.

Let me first of all state that I speak only for myself. Proposals for improvement of criminal law and procedure are under consideration in the Department of Justice, and likely the matters which I shall touch upon today, informally and non-technically, will be given thorough consideration and the results embodied in a program for legis-

† Because of the great interest aroused by the Durham case, which has already been the subject of a note in the REVIEW, De Vito, *Insanity As A Defense — McNaghten Rule Repudiated by the District of Columbia*, 15 Md. L. Rev. 44 (1955), the REVIEW feels particularly privileged to be able to present the views of the Solicitor General of the United States on the subject, as embodied in an address delivered before the National Conference of Bar Councils, in the Supreme Court Building, Washington, D.C., on May 19, 1955. This article also appears in Vol. 41, No. 9 (1955) of ABA Journal and is used with its permission.

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lation which it is hoped will be presented by the Department next year.

As the assigned title indicates, we are concerned here today only with the question of criminal responsibility. We are not dealing with problems of mental capacity to contract or generally to manage one's affairs, or with the standards to be followed in civil commitment proceedings — although what will be said here necessarily has a bearing on these questions.

How far persons suffering from mental disease, mental deficiency, or other forms of mental abnormality, should be held legally responsible for breaches of the criminal law, is something that has stirred vigorous debate for a long time. As you know, in ancient times lunatics were not regarded as suffering from disease but were believed to be possessed of demons, the result of their evil passions. For this wickedness they therefore deserved to be and were beaten, kept in chains, and not uncommonly sentenced to death by burning or hanging. If acquitted, they went free, often a menace to their own and others' safety. An early formulation of a rule to determine criminal responsibility may be traced to England in the early part of the eighteenth century when it was declared that an accused might escape punishment if he could not distinguish good and evil — that is, to use the quaint language of Justice Tracy, if he "does not know what he is doing, no more than . . . a wild beast."[1]

The extreme and picturesque requirement that to qualify for immunity the accused shall know no more than a wild beast was altered and moderated somewhat about 1760.[2] The terms "right and wrong" were substituted for "good and evil," and he no longer needed to be reduced to a bestial level. The generally prevalent American rule stems directly from the famous *McNaghten* case,[3] in 1843, in which fourteen out of fifteen English Justices agreed that:

> ". . . the jurors ought to be told in all cases that every man is to be presumed to be sane, and to possess a suffi-

[1] Rex v. Arnold, 16 How. St. Tr. 695, 764 (1724).
[2] Ferrer's case, 19 How. St. Tr. 886 (1760).
[3] 10 Cl. & Fin. 200, 8 Eng. Rep. 718 (1843).

> cient 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."[4]

This test, known familiarly as the "right and wrong test," turns on a specified and very limited symptom of insanity, which science no longer deems necessarily or even typically associated with most serious mental disorders. Only the drooling idiot can be said to have no knowledge of right and wrong, and he almost never gets into the criminal court. Judging the issue of insanity according to the right-wrong test exclusively is like saying as a matter of law that the only acceptable symptom in defining appendicitis is a pain in the abdomen and that no other diagnostic symptom is valid.

In most jurisdictions this is still the law today. Courts have adhered tenaciously to this rule despite a heavy and persistent barrage of criticism for more than a hundred years. Almost from the moment the *McNaghten* rule was born, it was strongly attacked, not only by physicians, but also by such eminent lawyers as Sir James Fitzjames Stephen, author of the classic "History of the Criminal Law in England."[5] A quarter of a century ago, Mr. Justice Cardozo summed up the almost universal judgment. "Everyone," he said, "concedes that the present definition of insanity has little relation to the truths of mental life."[6]

Mr. Justice Cardozo also said:

> "If insanity is not to be a defense, let us say so frankly and even brutally, but let us not mock ourselves with a definition that palters with reality. Such a method is neither good morals nor good science nor good law."[7]

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[4] *Ibid*, 210, 722.
[5] 2 STEPHEN (1883) 154 et seq.
[6] CARDOZO, WHAT MEDICINE CAN DO FOR THE LAW (1930) 32.
[7] *Ibid.*

A present member of the United States Supreme Court, Mr. Justice Frankfurter, recently stated in testifying before the British Royal Commission on Capital Punishment:

> ". . . The M'Naghten Rules were rules which the Judges, in response to questions by the House of Lords, formulated in the light of the then existing phychological knowledge . . . I do not see why the rules of law should be arrested at the state of psychological knowledge of the time when they were formulated . . . If you find rules that are, broadly speaking, discredited by those who have to administer them, which is, I think, the real situation, certainly with us — they are honoured in the breach and not in the observance — then I think the law serves its best interests by trying to be more honest about it . . . I am a great believer in being as candid as possible about my institutions. They 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' . . . I dare to believe that we ought not to rest content with the difficulty of finding an improvement in the M'Naghten Rules."[8]

The Royal Commission reported in 1953 that the "right and wrong" test has been objected to by experienced doctors for over a hundred years as

> ". . . based on an entirely obsolete and misleading conception of the nature of insanity, since insanity does not only, or primarily, affect the cognitive or intellectual faculties, but affects the whole personality of the patient, including both the will and the emotions. An insane person may therefore often know the nature and quality of his act and that it is wrong and forbidden by law, and yet commit it as a result of the mental disease."[9]

Despite unyielding resistance to any restatement of the rule, it was observed nearly sixty years ago, that judges

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[8] Report of the Royal Commission on Capital Punishment (1949-1953), Cmd. No. 8932, 102.

[9] *Ibid*, 80.

of England "generally have not hesitated so to interpret the law as to bring within its exonerating scope cases in which its narrow, literal interpretation would have had a different result."[10]

In fact, Stephen[11] is among those who insisted that if a person is prevented by mental disease from controlling his conduct he cannot be said in any true sense to "know the nature of his act," and that it is to be argued, therefore, that such a person is not criminally responsible, even under the *McNaghten* rule; but this strained interpretation of the rule has not appealed to the judiciary.

In a few American jurisdictions, there has been a minor modification or supplementation of the rule, so as to exempt from criminal responsibility persons suffering from irresistible or uncontrollable impulse. But the word "impulse" is unsatisfactory for it covers only a small and very special group of the mentally ill. The word "impulse" is suggestive of some sudden episode, and it is well known that in many cases the sufferer acts not suddenly or impulsively, but cooly and with ingenious calculation. This is characteristic of many who suffer from schizophrenia or paranoid psychosis. Long and sustained brooding is characteristic of certain familiar forms of mental illness.

In 1869 the Supreme Court of New Hampshire,[12] in the *Pike* case, handed down an historic opinion sweeping aside the *McNaghten* rule. It renounced *McNaghten's* insistence on the right-wrong test. The New Hampshire Court did not, however, adopt a new set of symptoms to ascertain insanity, for to do so would, in its view, have been as arbitrary as the old rule. The court recognized simply that an accused is not criminally responsible if his unlawful act was the result of mental disease or mental defect. Under this decision, no longer is insanity defined as a matter of law; instead it is made a question of fact to be determined like any other fact. This determination rests upon testi-

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[10] *Ibid*, quoting an 1896 Report of a Committee of the Medico-Phychological Association.

[11] STEPHEN, *op. cit*, *supra* n. 5. 167 *et seq.*

[12] State v. Pike, 49 N. H. 399 (1869).

mony of the psychiatric expert respecting the latest knowledge of human behavior and his interpretation of such knowledge in terms of his observations of the accused.

More than thirty years before the New Hampshire Court decided the *Pike* case, Dr. Ray, who was consulted by Justice Doe, writer of the opinion in that case, attracted widespread attention in both the medical and legal professions by his book which is remarkable indeed for the clarity and modernity of the views therein expressed.[13]

If any of you are interested in tracing the development of thought on this entire subject, you will find that one of the most rewarding pieces of legal literature is the opinion of Judge Somerville in the Supreme Court of Alabama, written in 1886.[14] The merit of this opinion, which reviews not only the legal but the medical knowledge of the day, is highlighted by a dissent which declares that, while the majority opinion sounds interesting and persuasive, the dissenter deems it his duty as a judge to take into account only legal authorities and that extra-legal writings cannot be considered safe guides in judicial administration.

The intervening years have brought abundant confirmation of the idea that responsibility implies reasonable integration of the total personality which includes the emotions as well as the intellect. Medical psychology teaches that the mind cannot be split into watertight, unrelated, autonomously functioning compartments like knowing, willing and feeling. These functions are intimately related and interdependent. We know today that the external manifestations of mental disease follow no neat pattern permitting pat legal definitions suitable for universal application.

I also invite your attention to an interesting and instructive discussion by Chief Judge Biggs of the Third Circuit in *United States v. Baldi*,[15] who stated:

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[13] RAY, A TREATISE ON THE MEDICAL JURISPRUDENCE OF INSANITY (1st ed. 1838).

[14] Parsons v. State, 81 Ala. 577, 2 So. 854 (1887).

[15] 192 F. 2d 540, dis. op. 549, 568 (3rd Cir. 1951).

> "The human mind . . . is an entity. It cannot be broken into parts, one part sane, the other part insane. The law, when it requires the psychiatrist to state whether in his opinion the accused is capable of knowing right from wrong, compels the psychiatrist to test guilt or innocence by a concept which has almost no recognizable reality."

There is nothing more futile than the search for an absolute test as a matter of law; for it is a scientific fact, which has passed into common knowledge that no such single test exists. We do not insist on a legal formula in diagnosing other diseases; why in this instance? It is a question of fact like any other, to be decided after hearing the explanations of the experts. The weight to be assigned to a single phenomenon is not to be determined by a rule of law but in a factual judgment. If the issue in a case was whether a bone was fractured, and surgeons were told they could give their diagnosis and prognosis but must disregard x-ray pictures as irrelevant, no one would think that desirable. If on an issue whether someone had typhoid the pathologist were told that he must not consider the laboratory tests, but only one symptom, temperature, which is solemnly declared legally conclusive, who would have confidence in such testing or such procedure? While the tests psychiatrists use may lack the precision and finality often associated with the x-ray and microscope, it is scarcely arguable that the issues will be better decided if the most advanced and enlightened thought is barred from the witness stand.

Justice Doe in the New Hampshire *Pike* case argued that the McNaghten formula was false and should be rejected because it adopted as law a mistake of fact, and that the mistakes of science are not science and they are not law. As Justice Doe expressed it in a letter to his friend, Dr. Ray, "The theory of the common law is that it is unchangeable, that lawyers and judges may make mistakes, as well as men of science, but that the law, being the perfection of reason, does not consist of such mistakes, any more than astronomy consists of the idea that the earth

is flat and that the sun passes over it."[16] This is an interesting and penetrating observation.

Again, he argues, "The mistake of our predecessors was in taking judicial notice of contemporaneous medical opinion and adopting it as law."[17] He points out that the rejection of a proven mistake is not to make the law variable, but is merely a refusal to continue according judicial notice to a fact once it is shown not to be a fact at all. No new proposition of law is involved.

There has been much spirited discussion throughout the country since the recent decision of the *Durham* case,[18] in which the Court of Appeals for the District of Columbia Circuit, handed down a notable opinion by Judge Bazelon in which he was joined by Judges Edgerton and Washington. The full nine-Judge bench declined to review this decision which adopted in substance the eighty-five year old New Hampshire rule, relieving the courts in this jurisdiction of the unbending *McNaghten* rule with its discredited right-wrong test.

The full merit of the New Hampshire decision and of the more recent District of Columbia opinion in the *Durham* case is precisely that they do not attempt to embody one set of medical theories in place of another, for even if it were possible to frame a test embodying more modern knowledge there would still be the danger that in the progress of science the new rule itself might be found inadequate. The whole point is not to restrict the test to particular symptoms, but to permit as broad an inquiry as may be found necessary according to the latest accepted scientific criteria.

Professor Whitehorn of the Johns Hopkins Medical School, in a memorandum prepared for a Commission on Legal Psychiatry appointed in 1948 by the Governor of Maryland, wrote:

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[16] Letter of July 22, 1868, quoted in Reik, *The Doe-Ray Correspondence: A Pioneer Collaboration in the Jurisprudence of Mental Disease.* 63 Yale L. J. 183. 191 (1953).

[17] *Ibid.*

[18] Durham v. United States, 214 F. 2d 862 (D. C. Cir. 1954); see Note, *Insanity as a Defense — McNaghten Rule Repudiated by the District of Columbia*, 15 Md. L. Rev. 44 (1955), noting the Durham case.

> "Psychiatrists are challenged to set forth a crystal-clear statement of what constitutes insanity. It is impossible to express this adequately in words, alone, since such diagnostic judgments involve clinical skill and experience which cannot wholly be verbalized. . . . The medical profession would be baffled if asked to write into the legal code universally valid criteria for the diagnosis of the many types of psychotic illness which may seriously disturb a person's responsibility, and even if this were attempted, the diagnostic criteria would have to be rewritten from time to time, with the progress of psychiatric knowledge."[19]

The Court in the *Durham* case directs trial judges within its jurisdiction to instruct juries that where there is some evidence of mental disease or defect, in order to convict they must find two things: (1) that the accused was not suffering from a mental defect or disease, and (2) that even if he was, the criminal act was not the product of that condition, for if the jury finds that the mental disease did not cause the act, it should have no influence on the question of the defendant's guilt.

Critics of this view have not been entirely consistent. On the one hand it has been claimed by some of them that the *McNaghten* rule does not need to be changed, for, like the judges mentioned in the Royal Commission's Report,[20] juries have frequently exercised a so-called "moral judgment" to ameliorate the severity of the *McNaghten* rule. Hence, it is argued that even if the rule seems in terms to require the defendant to be held responsible, since he knew the nature of his act and that it was wrong, if the jury nevertheless recognized that a mental condition caused his act, they would likely refuse to convict. But why, we permit ourselves to ask, should we maintain a rule that must be breached in order to make it work?

On the other hand, the *Durham* rule has been criticized on the score of its vagueness, for it does not pronounce as a matter of law precisely what symptoms are sufficient for a finding of mental irresponsibility. *This criticism seems*

[19] Quoted in GUTTMACHER & WEIHOFEN, PSYCHIATRY AND THE LAW (1952) 419-420.

[20] *Supra*, n. 10

to me without merit. The facts as to mental condition will be endless in their variety. It is for the psychiatrists, after a study of the defendant, to inform the jury of their observations and interpret them in the light of their knowledge and experience. The jury will consider the evidence of the psychiatrists as they do expert testimony in any field. No longer will they be restricted to the artificial and discredited right-wrong test. They will not be forced to ignore the question of the extent to which the defendant's lack of control over his emotions has deprived him of control over his acts, or, if you please, has overcome his will, for that is crucial in arriving at an intelligent verdict. This does not mean that the law will no longer recognize that a man has free will within normal limits of mental health. As Judge Bazelon said in the *Durham* case:

> "The jury's range of inquiry will not be limited to, but may include, for example, whether an accused, who suffered from a mental disease or defect did not know the difference between right and wrong, acted under the compulsion of an irresistible impulse, or had been deprived of or lost the power of his will . . . .
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> "Juries will continue to make moral judgments, still operating under the fundamental precept that 'Our collective conscience does not allow punishment where it cannot impose blame.' But in making such judgments, they will be guided by wider horizons of knowledge concerning mental life."[21]

To put it in general terms, the jury will, as heretofore, be called on to distinguish whether the act was done with evil intent *(mens rea)* for which there is criminal responsibility, or was the product of a mental condition that makes the act not one of free will, and hence not criminally punishable. The right-wrong test is not completely abandoned; it is merely dethroned from its exclusive preeminence.

Judges and lawyers boast that there is no definition of fraud; they think this is in aid of the law's effectiveness

[21] *Supra*, n. 18.

and does not weaken it. Its very vagueness is said to be a source of strength, for it renders the law more adaptable to unpredictable conditions. Or, to take another example: Is the so-called definition of negligence really a definition? What could be fuzzier than the instruction to the jury that negligence is a failure to observe that care which would be observed by a "reasonable man" — a chimerical creature conjured up to give an aura of definiteness where definiteness is not possible. Have you ever tried to imagine what goes on in the minds of jurors when they are handed such a formula? No two of them would agree on what the standard of due care is. Yet it is the best possible working rule, and we do quite well with it in specific situations. We recognize that the alternative of a fixed formula, however ingenious, is bound to prove disappointing in practice.

Every man is likely to think of himself as the happy exemplification of "the reasonable man"; and so the standard he adopts in order to fulfill the law's prescription will resemble himself, or what he thinks he is, or what he thinks he should be, even if he is not. All these shifts and variations of his personal norm will find reflection in the verdict. The whole business is necessarily equivocal. This we recognize, but we are reconciled to the impossibility of discovering any form of words that will ring with perfect clarity and be automatically self-executing. Alas, there is no magic push-button in this or in other branches of the law.

To pursue the point further, consider such a term as "due process." Is there a pat definition to tell us what is "due" in due process? I had a wise teacher at law school who concluded his lecture on undue influence in his course in testamentary law by summarizing, "In short, undue influence is influence which under all the circumstances is undue." Look at such words and phrases as "reasonable", "practicable", "obscene", "unfair competition", or "cruel and unusual punishment." Such standards, found in almost every branch of the law, are the bases for judgments of law as well as fact. They are all as capable of expansion and contraction as the subjective judgment of those who

interpret them. They must derive their meaning largely from the common sense of the people who apply these terms.

The concept of causality expressed in the *Durham* court's use of the word "product" has also been criticized as leaving too much to the fact finders' discretion, but this is no broader a discretion than courts habitually accord juries when they charge them to determine proximate cause in negligence cases.

What we ought to fear above all is not the absence of a definition but being saddled with a false definition. We must avoid the rigidity which precludes inquiry, which shuts out light and insists on concepts that are at odds with things known and acknowledged not only by the medical profession but by all informed men.

The *McNaghten* rule requires medical witnesses to testify in terms that to them were artificial and confining. A doctor can offer expert judgment when he talks of illness, disease, symptoms, and the like. When he is forced to adopt the vocabulary of morality and ethics, he is speaking in what to him is a foreign language and in an area in which he claims no expertness. If the wrong questions are asked, it should surprise no one if wrong answers are given. Is it not preferable to permit the medical witnesses sufficient latitude to describe the condition and express their findings in terms they consider significant and meaningful?

This very day the American Law Institute is considering the proposed Model Penal Code, which submits several alternative provisions concerning mental disease or defect as excluding responsibility. Three different formulations have been presented. The first declares that "a person is not responsible for criminal conduct if . . . he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law."[22]

Another stresses lack of responsibility if his "capacity either to appreciate the criminality of his conduct or to

[22] AMERICAN LAW INSTITUTE, MODEL PENAL CODE (Tentative Draft No. 4, 1955) Sec. 4.01.

conform his conduct to the requirements of law is so substantially impaired that he cannot justly be held responsible."[23] Note that the ultimate question to be determined by the jury is whether the accused can *justly* be held responsible for his act.

The third formulation emphasizes capacity to appreciate punishment as a restraining influence.[24]

Even if there were time I should consider it unprofitable to burden you with the minutiae of the arguments pro and con that have been advanced concerning these several versions. The debate seems to reveal a greater degree of accord than of actual disharmony. All seem to be agreed that *McNaghten* is obsolete. All are agreed that there are conditions, recognized as disease or defect, which in good morals should excuse the afflicted one from criminal responsibility. All concur that not every mental abnormality should be deemed sufficient to relieve of responsibility. Imposture and evasion must be prevented in the interest of society. All are likewise agreed that a person who has committed a criminal act and is found not guilty by reason of insanity should be put in detention and remain there as long as necessary to protect society. Where to draw the line between what is and what is not sufficient evidence of insanity is a matter of judgment in the particular case; it cannot be described with precision in advance. Saying that the disease must be "serious" as some insist, would not achieve the hoped for certainty, for such terms are themselves inexact.

The same observation may be made in respect to the suggestion that the defendant should be deemed responsible if he has the capacity to respond to a single influence, namely, the threat of punishment. Psychiatrists of great eminence have declared that this is too difficult to isolate for psychiatric judgment. Moreover, this again singles out one factor and exalts it to a special legal status, when the problem needs to be considered as a whole in the light of all the circumstances.

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[23] *Ibid*, Alternative formulations of Sec. 4.01.
[24] *Ibid.*

In the comments accompanying the American Law Institute draft of a penal code, it is recommended that the concept of mental disease or defect should exclude "the case of the so-called 'psychopathic personality'." This proposed exclusion rests on the assertion that "psychopathy 'is a statistical abnormality; that is to say, the psychopath differs from a normal person only quantitatively or in degree, not qualitatively; and the diagnosis of psychopathic personality does not carry with it any explanation of the causes of the abnormality'."[25] To me, with all deference, this is unconvincing. The New Hampshire or *Durham* approach seems preferable. It makes the causes of abnormality matters of fact for the juries to determine in each case upon the basis of explanations furnished them by the psychiatric expert witnesses. Dr. Overholser of St. Elizabeths has said that "psychopathic personality" is a wastebasket classification. The very term is used in the profession in different senses to describe different things. Therefore, it is unwise to provide a blanket exclusion or blanket inclusion of that particular characterization. Indeed, in the official nomenclature of the American Psychiatric Association, the very term has been dropped as meaningless.

I note in passing that many pyromaniacs or kleptomaniacs would probably be held responsible under this Institute proposal, since they are frequently termed "no more than psychopathic personalities." Many psychiatric authorities think these cases are obsessive-compulsive neurotics. Those suffering from these diseases may well not be psychotic; yet, by common agreement they often lack that degree of integration which is necessary for legal responsibility. I suspect that there will be a tendency here first to make a judgment as to what is the wise and fair disposition of the individual case and then to announce a classification accordingly, and not the other way about. Attempting to categorize cases as a matter of law according to these vague distinctions would only complicate the difficulty. Not an unbending rule, but enlightened under-

[25] *Ibid*, Comments on Sec. 4.01, p. 160.

standing of the special facts of each case should be our aim, especially where there is a broad twilight zone.

I confess to a feeling that the niceties of these several verbalizations by the Institute or by Courts will escape the jury. Any of these variations, if adopted, will probably result in something not very different from what the Court of Appeals for the District of Columbia Circuit has declared as the law, when it stated:

> "It was the jury's function to determine from all the evidence, including the expert testimony, not only whether appellant suffered from an abnormal mental condition, but also whether the nature and extent of any condition . . . was such as to relieve him of criminal responsibility under the standards then prevailing."[26]

But whichever formulation is accepted, it is an advance because it allows the jury to receive more light. The testimony presented to them will be cast in terms that are meaningful to the witnesses and that can be more amply explained.

Much of the reluctance to change the *McNaghten* rule is doubtless occasioned by the fear that if the criteria for determining insanity are broadened, instances may multiply of violators escaping punishment and being released after a brief detention in a mental institution. The Court in *Durham* was not unmindful of the apprehension. It pointed out that an accused who is acquitted by reason of insanity is presumed to be insane and may be committed under the District of Columbia statute for an indefinite period. The Court recommended that trial courts invoke this commitment procedure "so that the accused may be confined as long as 'the public safety and . . . [his] welfare' require".[27] This is also the insistence of the American Law Institute proposals.

Let us look at a typical case. An accused is found incompetent to stand trial; that is, he cannot fully understand the charge against him and assist in his defense. He is committed and after a period of confinement is certified

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[26] Stewart v. United States, 214 F. 2d 879, 882 (D. C. Cir. 1954).
[27] *Supra*, n. 18, 876. fn. 57.

competent to stand trial. If upon trial he is found not guilty by reason of insanity at the time of the offense, he is not necessarily entitled to release. The inquiry into mental competency to stand trial and assist in one's defense is not the same as either the question of criminal responsibility or whether he may safely be permitted at large after acquittal.

So experienced an authority as Dr. Manfred Guttmacher, Chief Medical Officer of the Supreme Bench of Baltimore, assures us that "the truth of the matter is that the finding 'not guilty by reason of insanity' has not resulted in the premature release of offenders into the community. Dr. William Alanson White made a study many years ago showing that, on the average, perpetrators of homicide committed to institutions for the insane spent more time in confinement than those sentenced to penal institutions."

No restatement of the rule will revolutionize the practical operation of the criminal courts in dealing with mental illness as a defense. The change which is under consideration will not spell ruin to law enforcement; neither will it bring salvation. Juries will doubtless continue to bring to bear their unscientific notions upon the scientific testimony that has been adduced before them. This is not an unmixed calamity, for juries often find ways, sometimes with the benign acquiescence of judges to mitigate rigidities and absurdities in the law; juries, who are not very different from judges in this respect, will still tend to reflect the community sense of justice which courts cannot wholly ignore in maintaining public order. The restatement will not of itself eliminate from the courtroom unseemly conflicts between experts. This is a separate problem, but these conflicts will at least relate to things that are genuine and not fictitious.

There is no reason to fear that the proposed change will so relax the law as to weaken its sanctions or its deterrent influence. After all, commitment to a hospital for the insane for an indefinite period is no more inviting a prospect than a fixed term in jail. It is no soft and coddling disposition. *Durham* is a case in point. Having been declared

mentally incompetent to stand trial and assist in his own defense, he was committed to a mental hospital. There is reason to believe that as a result of several years of treatment there he may be cured. If so, society's needs will have been better met than by any prison sentence, long or short.

Which offers greater protection to society — detention and treatment in a hospital, and ultimately a medical judgment that the person is not likely to offend again; or a penitentiary warden's certificate that the prisoner has served his sentence and has been discharged regardless of his medical condition? It must be remembered that prison terms do expire and prisoners are released. Such release gives no assurance whatever of safety to the community. Statistics of recidivism may well temper our faith in the prison system. Detention and treatment of sick people rather than holding them to full accountability comports with our traditional concept of the dignity of the individual. It takes into due account the public safety and fully vindicates the proper interests of public justice. Let us give the new rule a chance; and as we gain in wisdom from experience necessary refinements and revisions in practice can be made.

I conclude by suggesting that there is need for continuing research to enlarge the resources of knowledge in the problems of mental health and behavior, and for changes in court procedures as well as in the substance of the law. Means must be found to bring the legal and medical professions together on common ground. If psychiatry is to provide maximum guidance and assistance to juries, psychiatric witnesses must learn to avoid technical jargon which baffles laymen. We need better institutional facilities — perhaps of a more specialized character — to deal with the criminally insane and those who may be prevented by timely help from becoming such. Members of this group of lawyers who feel a concern for improvements in legal procedures and in public justice have important work in their respective communities.