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# DEFENSE PROBLEMS UNDER THE DURHAM RULE

HUGH J. MCGEE\*

WHAT WOULD BE THE REACTION of the bar, the bench, the press and the community as a whole if the following legislation were recommended to the Congress of the United States?<sup>1</sup>

No psychopath, alcoholic, sexual deviate, or psychoneurotic person shall be convicted of *any crime* committed in the District of Columbia unless the Government shall prove beyond a reasonable doubt that the defendant's criminal act was not the product of said condition.

Certainly a furor would be created by the mere attempt to enact such legislation, even if it were to be subsequently modified to provide for treatment of the persons so acquitted.

Congress does not, and would not, contemplate such a change in the law which, in effect, would amend every criminal provision of the D.C. Code, and all criminal provisions of the United States Code applicable to the District of Columbia. Nevertheless, it is substantially the law in the District of Columbia today, as the result of the now famous *Durham* decision<sup>2</sup> and the fifty-odd cases handed down since then attempting to explain or qualify its deceptively simple language.

The community's alarm or concern over this revolutionary change in our system of criminal jurisprudence was temporarily quieted by the passage of Public Law 313<sup>3</sup> in the 84th Congress. This statute provides for mandatory commitment of those found not guilty by reason of insanity, and removes the judicial discretion which previously existed to release a person who, though insane at the time of the offense, has obviously recovered completely. Society and the United States Attorney's office were thereby assured that any one who escaped conviction by means of an insanity defense, legitimate or otherwise, would not escape confinement in a mental institution.<sup>4</sup>

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<sup>1</sup> Congress is the legislative body for the District of Columbia. U.S. CONST. art. I, §8.

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

<sup>3</sup> D.C. CODE ANN. §24-301(d) (Supp. 1958).

<sup>4</sup> So that a criminal who successfully feigns mental illness in an attempt to "bug out" will receive his *punishment* in a mental institution rather than in a jail.

In criminal cases involving mental competency the problems of defense counsel will differ greatly, but I am certain that no jurisdiction will surpass the District of Columbia in the number or complexity of such problems. To say that the law has been fluid<sup>5</sup> since *Durham* would be a tragic understatement. The rule or test set forth in *Durham* has been the subject of tremendous controversy in legal and psychiatric circles.<sup>6</sup> It has been hailed as the

<sup>5</sup> The principal criticism of the cases following *Durham* is that each has been decided on an *ad hoc* basis, and that in many instances the appellate court has substituted its determination of the facts for that of the trial court. The following is from Judge Wilbur K. Miller's excellent dissent in *Knight v. United States*, 250 F.2d 4, 14 (D.C. Cir. 1957), where eleven psychiatrists testified at the trial: "Apparently the majority view is that the testimony of five psychiatrists who thought Wright was insane when he killed his wife so overwhelmed the contrary testimony of the lay witnesses that the jurors were unreasonable in not accepting their opinion." *Id.* at 15. "About all the medical testimony in its entirety proved to a certainty is that psychiatry is not an exact science." *Ibid.* "The action of the court in this case disturbs me for another reason to which I have already made reference: it is an exercise of appellate review of a jury's factual finding reached on conflicting evidence but supported by substantial proof. Traditionally such a finding cannot be disturbed on appeal. I suggest that stable rules of law and consistent application of them are essential for the guidance of bench and bar in trial practice and procedures. Instability and inconsistency result when an appellate court retries each case on a new and different standard and substitutes its own determination for that of the jury concerning a defendant's mental status and its causative effect." *Id.* at 18. "For these reasons I think the majority opinion further complicates a complex and difficult problem, and . . . will add to the confusion already engendered by the *Durham* rule, as given *ad hoc* interpretations in subsequent opinions of this court. It is made more vague by what the majority say here. I am sure the District Court judges, who have heretofore found it difficult to understand and apply the rule, will now find it more difficult." *Id.* at 19.

<sup>6</sup> The court acknowledged in its opinion that it

emancipation of the psychiatrist as a witness and as the recognition of psychiatry as a science — but whatever its appraisal in academic circles, it has been the cause of nothing but confusion in the courts of the District of Columbia.

The frequency of the explanatory and qualifying opinions is increasing as time goes on, and because of the completely unique concept (*i.e.*, of treating rather than punishing) underlying the *Durham* rule, it is likely that they will continue to increase. These decisions and the passage of Public Law 313, which has been expanded and interpreted in the *Leach*,<sup>7</sup> *Starr*,<sup>8</sup> and *Rosenfield*<sup>9</sup> cases, make it incorrect to refer to *Durham* as the law in the District of Columbia. A more accurate means of expressing the law would be "*Durham*, et seq."

The problems of defense counsel begin

was exercising a legislative or "judicial function or revising and enlarging the common law" in the absence of an expression by Congress. *Durham v. United States*, 214 F.2d 862, 874 n.44 (D.C. Cir. 1954). It is interesting to note here that the State of Maryland has declined even to expand the *M'Naghten* rule. *Bryant v. State*, 207 Md. 565, 115 A.2d 502 (1955); *Thomas v. State*, 206 Md. 575, 112 A.2d 913 (1955).

<sup>7</sup> *Overholser v. Leach*, 257 F.2d 667 (D.C. Cir. 1958). After a lengthy hearing at which seven psychiatrists testified for almost six days, Judge Schweinhaut of the district court ordered *Leach's* release, but the circuit court reversed, saying: "There must be freedom from such abnormal mental condition as would make the individual dangerous to himself or the community in the reasonably foreseeable future." *Id.* at 670.

<sup>8</sup> *Starr v. United States*, No. 13,865, D.C. Cir., October 17, 1958 (rehearing en banc). In a dissenting opinion in which four of the nine judges concur it is stated: "The majority concludes, however, that leaving out the safety element of the test was the logical thing to do, because, as a matter of law, mere danger will not justify confinement if the defendant has 'recovered his sanity.'" *Id.*

<sup>9</sup> *In re Rosenfield*, 157 F. Supp. 18 (D.D.C. 1957).

immediately upon being appointed or retained, principally because of rulings by the circuit court to the effect that a mental examination must be granted, when requested, provided only that the motion be not frivolous and made in good faith.<sup>10</sup>

The decision as to whether to request a mental examination must be weighed with the greatest care because of the serious consequences<sup>11</sup> of a successful plea of not guilty by reason of insanity. Then, too, the expanded concept of mental disease, which now encompasses all of the so-called "personality disorders,"<sup>12</sup> makes it quite simple to obtain psychiatric testimony to the effect that your client is suffering from a mental disease. Prior to the *Leach* case insanity was closely related to psychosis,<sup>13</sup> and the presence of a psychosis was not difficult for even a lawyer to recognize.

The opinion in the *Durham* case and sev-

eral of the subsequent decisions in this field have clearly indicated<sup>14</sup> that personality disorders will be considered as mental diseases for the purposes of determining criminal responsibility. Although the psychiatrists were in substantial accord immediately following *Durham* that the so-called personality disorders would not be considered mental diseases,<sup>15</sup> they are now prepared to testify that a person suffering from any of the listed disorders is suffering from a mental disease.<sup>16</sup> A brief perusal of the psychiatric nomenclature referred to above is essential before one can realize the all-inclusiveness of these categories. On careful consideration, it can be seen that almost anyone, if not everyone, could be placed in one of these groupings. Upon the introduction of *some* evidence of any one of these so-called mental diseases it then becomes the burden of the government to disprove causal connection<sup>17</sup> between the disease and the offense.

The initial decision whether to plead insanity must depend to a large extent upon the probable sentence if convicted. In capital cases the penalty and nature of the

<sup>10</sup> *Wear v. United States*, 218 F.2d 24 (D.D.C. 1954). "When the claim of insanity is not frivolous, to allow the court to determine that there is no cause to believe that an accused may be insane or otherwise mentally incompetent would be inconsistent with the legislative purpose to provide for the detection of mental disorders 'not . . . readily apparent to the eye of the layman.' . . . We therefore hold that a motion on behalf of an accused for a mental examination made in good faith and not frivolous, must be granted under the statute." *Id.* at 26-27.

<sup>11</sup> Under Public Law 313 as presently interpreted it could easily result in life imprisonment in the maximum security ward of St. Elizabeth's Hospital.

<sup>12</sup> For a complete definition of terms see AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (1952).

<sup>13</sup> This appears to be the case in England where the British Royal Commission found insanity regarded medically to mean that "the patient is suffering from a major mental disease (usually a psychosis)." Royal Commission on Capital Punishment, 1949-53, REPORT Cmd. No. 8932 (1953).

<sup>14</sup> See, e.g., *Briscoe v. United States*, 248 F.2d 640 (D.C. Cir. 1957); *Lyles v. United States*, 254 F.2d 725 (D.C. Cir. 1957), *cert. denied*, 356 U.S. 961 (1958).

<sup>15</sup> See *Insanity and the Criminal Law — A Critique of Durham v. United States*, 22 U. CHI. L. REV. 317 (1955). See also testimony before the American Law Institute and testimony before the District of Columbia Law Enforcement Council, Subcommittee on Insanity as a Criminal Defense.

<sup>16</sup> *Leach v. Overholser*, Habeas Corpus No. 33-58 (the district court proceedings which ordered Leach's release).

<sup>17</sup> See *Carter v. United States*, 252 F.2d 608, 614 (D.C. Cir. 1956); *Douglas v. United States*, 239 F.2d 52, 55 (D.C. Cir. 1956); *Wright v. United States*, 215 F.2d 498 (D.C. Cir. 1954).

offense<sup>18</sup> require<sup>19</sup> a motion for mental examination; however, in all misdemeanors and the lesser felonies where the punishment might range from probation to ten years, it is extremely difficult to decide whether "not guilty by reason of insanity" would be a wise plea. The standard or standards for release, under Public Law 313 as amended by judicial interpretation, are so completely vague and indefinite that no lawyer could evaluate the possible sentence against indefinite incarceration in the maximum security ward of a mental institution. The question of obtaining treatment for a bona fide mental illness becomes relatively unimportant, as treatment is theoretically available in all federal penal institutions and, upon expiration of the defendant's sentence, a much more affirmative finding<sup>20</sup> is required for continued confinement and treatment.

The prerequisite certification of "freedom from such abnormal<sup>21</sup> mental condition as would make [him] dangerous to himself or the community in the reasonably foreseeable future"<sup>22</sup> puts a defendant in such an indefinite status as to release

that no conscientious lawyer should attempt the defense of insanity unless confronted with life imprisonment or capital punishment. Here then we see that at the very beginning of a criminal case counsel faces severe criticism for not preparing to interpose, to an alleged crime which could have a maximum of one year in jail, a defense which might result in his client's confinement in a mental institution for life. The strong possibility that any of the neuroses or personality disorders could result in indefinite hospitalization is borne out by the uniform psychiatric testimony to the effect that these illnesses are seldom,<sup>23</sup> if ever, cured.<sup>24</sup>

The *Durham* decision itself was hailed for its liberal approach toward the progress of psychiatry and the inhumanity of confining a sick person to a penal institution. However, the present status of the law makes a plea of insanity far from humane. Most persons classified as personality disorders or neurotics are rational and, therefore, will personally choose the lesser of the two alternative punishments. It is safe to say that, with the standards for release as they presently exist, a person would have to be absolutely insane to plead insanity when charged with a minor criminal offense. From the point of duration of possible incarceration the person charged with the misdemeanor would be wiser to enter a plea of guilty even if he has a legitimate

<sup>18</sup> Many psychiatrists feel that any person who kills another must be, ipso facto, mentally ill.

<sup>19</sup> This is the writer's opinion.

<sup>20</sup> 18 U.S.C. §§4241-47 (1952). The last section provides, in substance, that a prisoner may be held even after the expiration of his sentence if he ". . . is insane or mentally incompetent, and that if released he will probably endanger the safety of the officers, the property, or other interests of the United States, and that suitable arrangements for the custody and care of the prisoner are not otherwise available. . . ."

<sup>21</sup> The doctors at St. Elizabeth's Hospital are in substantial accord that this certification could only be made for an infinitesimally small percentage of persons who have committed a crime.

<sup>22</sup> *Overholser v. Leach*, 257 F.2d 667, 670 (D.C. Cir. 1958).

<sup>23</sup> The only suggested treatment for these illnesses is psychotherapy, which is a lengthy treatment, not readily available, and depends to a large extent upon the patient's complete cooperation.

<sup>24</sup> Dr. Duvall in the original *Leach* case testified that when a recovery occurs in a sociopath (formerly known as a psychopathic personality), you must wonder whether the original diagnosis was correct. This aspect of psychiatric testimony is almost indefensible.

defense of insanity.

An equally serious consideration is the quality of confinement. Although St. Elizabeth's Hospital is regarded highly for its professional and physical facilities, to be confined 24 hours a day with seriously ill mental patients can do more harm than good. Conceivably, a mildly ill "inadequate personality" could spend several years in a maximum security ward with convicted homicidal maniacs upon *acquittal* by reason of insanity for petit larceny or a traffic violation.

Although the decisions setting the standards for release are fairly recent, many patients and prisoners awaiting trial are fully aware that they would probably serve less time under more pleasant conditions if they were to be convicted than if they were successful in a plea of insanity. I was recently asked by a patient at the hospital, who had charges pending against him, to "unbug" him. He meant by this that his personal analysis of the amended *Leach* case had caused him to regret his initial decision to "bug out." I doubt if this man will ever again permit counsel to offer a defense of insanity in his behalf, but whoever represents him will unquestionably be criticized for not presenting the defense because of the man's history of mental difficulty. This man also stated that he couldn't stand the company any longer and that he would much rather be in jail. This was not the first time I have heard this sentiment expressed; in fact, one client of mine who had served time in many penal institutions all over the country said that he would prefer any one of the jails he had been in to Howard Hall.<sup>25</sup> Although there seems to

<sup>25</sup> The maximum security ward of St. Elizabeth's Hospital.

be little complaint about the food or facilities, it is a general complaint that the constant fear of attack by patients is almost unbearable. Second only to the fear is the weird and almost unbelievable conduct of the fellow inmates. An unannounced visit to a disturbed ward of a mental hospital will probably suffice to confirm these complaints to a large extent. Such a visit will do much to dispel anyone's feeling that hospitalization is intrinsically humane and unquestionably of benefit to the recipient.

For many of these patients the doctors readily admit that there is no known cure or successful treatment, so that their only treatment consists of "observation in a controlled environment."<sup>26</sup> This situation, plus the complaints and the zombies which line the walls on some of the less-disturbed wards, has convinced me that there is much more than just "time" to be considered in pleading a man not guilty by reason of insanity.

While I am personally convinced that the present standards for release following a commitment pursuant to Public Law 313 are so vague and indefinite as to be unconstitutional, I have grave doubts as to whether the conditions of confinement of these persons does not likewise constitute cruel and inhuman punishment.

One case typical of the myriad of latent problems in the law as it now stands remained undecided as recently as December 23, 1958.<sup>27</sup> In the case of Edith Louise Hough, a patient committed under Public Law 313, the Superintendent of St. Elizabeth's Hospital certified to the court that

<sup>26</sup> Which is the psychiatric nomenclature for confinement.

<sup>27</sup> *United States v. Hough*, District Court (unreported).

the patient's condition was such that she was entitled to conditional release. The United States Attorney, who usually represents the hospital, presented psychiatric testimony to the effect that she was still dangerous, and the court, after a hearing, denied counsel's request for her conditional release. During the hearing testimony brought out that the patient had been leaving the hospital grounds regularly without an attendant. The court subsequently ruled that this constituted a conditional release without the statutory judicial sanction. The superintendent of the hospital has stated that these unattended visits were part of a rehabilitation program for the patient and had a definite therapeutic effect. The circuit court held that these persons are in a different category from the regularly committed patients, and the statute and its legislative history clearly bear this out. What is this category then? Is there a connotation of punishment, even though the patient has been "acquitted" and has "no blame"?

Herein lies one of the basic difficulties which is inherent in the law as it stands today. The proponents of *Durham* would place almost unlimited responsibility and discretion upon the psychiatrists<sup>28</sup> as to the disposition and treatment of criminals in the belief that this is the humane and sympathetic thing to do, whereas Public Law 313 was passed to guarantee confinement of these persons, to limit the psychiatric discretion as to release, and to limit the use of the defense of insanity.

Until the law becomes crystallized and some reasonable basis exists upon which a prognosis can be made for release, all

decisions to plead insanity must be cautiously weighed. The need for crystallization or clarification of the law on this subject is urgent.

There can be no *crystallization* of the law under *Durham* because changes in psychiatric thinking and testimony can amend the law at any time.<sup>29</sup> In the *Leach* case what was then thought to be the law was amended at a meeting of the psychiatrists at St. Elizabeth's Hospital on the third day of a six-day criminal trial. A conference of hospital psychiatrists had previously found Leach to be "competent to stand trial" and "of sound mind." When the defense of insanity at the time of the commission of the offense was raised during the criminal trial the two psychiatrists from St. Elizabeth's Hospital testified that although he was suffering from a sociopathic personality disturbance, he was "sane, not mentally ill, not mentally sick," and that he was "not suffering from any mental disease or disorder." The following day after expert testimony was presented by the defendant to the effect that a "sociopath" does suffer from a mental disease and that Leach was "mentally ill," the government presented Dr. Addison B. Duvall, Acting Superintendent of St. Elizabeth's Hospital, who testified that at a conference of officials at St. Elizabeth's Hospital that morning they (the psychiatrists) had decided that they would no longer classify sociopaths as being "without mental disorder"<sup>30</sup> and that the doctors from St. Elizabeth's Hospital who testified in criminal cases henceforward would

<sup>28</sup> See *Overholser v. Leach*, 257 F.2d 667 (D.C. Cir. 1958).

<sup>29</sup> See *United States v. Leach*, Cr. No. 450-57, in which Leach was found not guilty by reason of insanity by a jury.

<sup>30</sup> This had been the administrative procedure for many years.

testify that persons diagnosed as sociopaths would be considered as suffering from a "mental disease."<sup>31</sup>

In Leach's habeas corpus proceeding to obtain his release from St. Elizabeth's Hospital pursuant to the jury's finding of not guilty by reason of insanity, five doctors from St. Elizabeth's Hospital testified that although Leach's mental condition had not changed in any respect,<sup>32</sup> he was now suffering from a mental disease, a mental disorder, and two even stated that he was of "unsound mind." These doctors explained their change in opinion as being caused by their independent reading and research on the subject, and their *belated recognition* of advanced psychiatric thinking.

Since the change in policy by St. Elizabeth's Hospital in the Leach case, the United States Attorney's Office is having as many defendants as possible examined at District General Hospital<sup>33</sup> where the attitude of the psychiatrists has been more conservative with regard to testimony on presence of mental disease.

This difference of opinion among government institutional psychiatrists is nothing compared to the range of opinion to be found among private psychiatrists. Either extreme may, of course, be retained to examine the client during or without an examination by government psychiatrists. Much care must be taken in the selection of a psychiatrist, and in this connection a lot will depend upon the attorney's famil-

ilarity with the professional thinking of the different psychiatrists available, and also upon the funds available for the defense of the case. Independent psychiatric testimony can be very expensive, especially when lengthy examination and trial is necessary.<sup>34</sup>

A seasoned prosecutor can give a psychiatric witness the same going over that a defense attorney might be able to give the government's witness, so that it is desirable to have a doctor with as much courtroom experience as possible.<sup>35</sup>

In the actual trial of the case the same problems exist as in other jurisdictions except that they are aggravated here by the vastness of the concept of "mental disease," and the uncertainty of the law upon review by the United States Court of Appeals for the District of Columbia Circuit.<sup>36</sup> The general tenor of these decisions has been to favor the defendant who is seeking treatment, even to the extent of finding prejudicial error in counsel's failure to argue insanity to the jury when there was so little evidence of insanity that to argue the point might have insulted the intelligence or alienated the sympathies of the jury.<sup>37</sup> All of these decisions raise incidental ques-

<sup>34</sup> Although private psychiatrists can be obtained in the indigent case by motion, the prosecution has a definite advantage because of the doctors' reluctance to leave their remunerative practices for lengthy court appearances at court-set fees.

<sup>35</sup> Most government psychiatrists have that experience as the result of many court appearances and frequent briefings on the law by prosecutors.

<sup>36</sup> The lack of precedents in New Hampshire and the District is further complicated by the differences in opinion which exist among the nine judges of the Court. See, e.g., the per curiam preface to the separate opinions in *Lyles v. United States*, 254 F.2d 725 (D.C. Cir. 1957).

<sup>37</sup> *Clark v. United States*, 259 F.2d 184 (D.C. Cir. 1958). In a classic dissent Judge Burger said, "The majority holds that counsel committed fatal error in failing to argue the issue of insanity to the jury and for conceding that a lesser degree of

<sup>31</sup> See Cavanagh, *The Responsibility of the Mentally Ill for Criminal Offenses*, 4 CATHOLIC LAWYER 317, 332 (Autumn 1958).

<sup>32</sup> Most of them had not even seen him since the original trial.

<sup>33</sup> A municipal hospital. St. Elizabeth's is a federal institution which takes care of District of Columbia patients because of limited municipal facilities.



tions<sup>38</sup> which counsel must guess at wildly, and to which the answer will depend upon the division of the Court which might hear the case.

In spite of the fact that this community was nowhere near ready for such a radical change as *Durham*, Public Law 313 as homicide occurred. Implicit in the holding is the finding that this conduct constituted ineffective assistance of counsel. I dissent on the grounds that it is wholly unwarranted for counsel to be required by an appellate court to argue to a jury an issue or point which, as a matter of deliberate and calculated tactics, he considers it in his client's interest to abandon. Celebrated criminal defense advocates, as well as more modestly endowed lawyers, have done this for centuries. Indeed a defense lawyer who would try to make out an insanity defense on the 'evidence' of insanity in this record might well be charged with incompetence for taking the risk of alienating the jury's sympathies." *Id.* at 186.

<sup>38</sup> *Clatterbuck v. United States*, Misc. 1006, in which Judge Bazelon said, "The foregoing matters raise disturbing questions: Was petitioner properly found competent to stand trial? See *Bishop v. United States*, 96 U.S.App.D.C. 117, 223 F.2d 582 (1955), reversed on other grounds, 350 U.S. 961 (1956). Was petitioner deprived of the effective assistance of counsel at crucial stages in these proceedings? See *Von Moltke v. Gillies*, 332 U.S. 708 (1948). What is the effect of the court's refusal at the second competency proceeding to provide, at Government expense, both a transcript of the original competency proceeding and psychiatrists to testify in his behalf? See *Williams v. United States*, 102 U.S.App.D.C. 51, 250 F.2d 19 (1957). Do the findings of fact made pursuant to the limited hearing conducted upon this court's remand constitute a bar to consideration of some or all of these issues? Should the hearing on the motion to vacate sentence have been confined in scope to consideration of the allegations of the movant, whose mental history suggests a prima facie inability to be master of his own pleadings? See *Lebkicker v. United States*, No. 13932 (per curiam order dated March 24, 1958); *Belton v. United States*, No. 13690, decided May 15, 1958; *Blunt v. United States*, 100 U.S.App.D.C. 266, 244 F.2d 355 (1957). If so, by what evidence adduced at trial was petitioner's sanity at the time of the offense proven 'beyond a reasonable doubt,' as is required once some evidence of insanity has been introduced?"

sured society and the government that individuals who had committed criminal acts would get at least as much, and probably more, punishment upon an acquittal by reason of insanity than they would upon conviction. The Congress, in passing Public Law 313, never contemplated that the "personality disorders," would be considered as mental disease within the meaning of *Durham*. Nor did they realize that the concept of "mental disease" set forth in *Durham* would be the only entrance requirement to St. Elizabeth's Hospital for many, possibly for life, at government expense.<sup>39</sup> No thought whatsoever was given to the expense factor, because it was clearly not considered that the admission and release requirements would be changed so quickly.

So we see that Public Law 313,<sup>40</sup> which was intended to protect society from a small percentage of offenders who might escape conviction because of the vagueness and uncertainty of *Durham*, has become the oppressive instrument for limiting legitimate defenses of insanity because of the present inescapable standards for release, which postulate indefinite incarceration under grim circumstances.

Although I have been fairly certain from the beginning that *Durham* was bad law<sup>41</sup>

<sup>39</sup> The District of Columbia Council on Law Enforcement subcommittee failed to anticipate the passive nature of the charge to the jury which would be the basis for life imprisonment, without any affirmative finding that the criminal act was actually committed by the individual (or whether justification existed), and they also failed to anticipate the change in psychiatric thinking with regard to the so-called "personality disorders."

<sup>40</sup> An indispensable crutch for *Durham*. See congressional history.

<sup>41</sup> Principally because of the patent ambiguity and certainty of jury confusion inherent therein.

I have tried not to reject it without a fair trial and full consideration because of my tremendous respect for the majority of *Durham's* proponents.<sup>42</sup> The *Durham* rule has now had four and one-half years to prove itself workable, and has brought only chaotic uncertainty to lawyers, judges and jurors.

The prevalence of semantic problems in this field is further complicated by the insertion by the *Durham* rule of the concept of "causality," which insidiously vests in the psychiatrist the ultimate decision as to responsibility.

And this is done, despite the protestations to the contrary,<sup>43</sup> by permitting or requiring the expert to answer the questions of whether the act was the product of the disease.<sup>44</sup>

It is here, in the psychiatrist's determination of "what degree" of casual connection is necessary for exculpation that he

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

<sup>42</sup> An alert, intelligent, liberal and, in many instances, very sincere group of active and effective people whose fight for the rights of the individual (in other fields of law) almost amounts to dedication.

<sup>43</sup> *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954).

<sup>44</sup> Under the decisions the government has the burden of disproving mental disease and causal connection. This cannot be done without expert testimony, and this is not obtainable because the psychiatrists readily explain that they have no competency to testify on "causality" or "productivity" as they are concepts similar to "right and wrong" and have no medical meaning. Nor do all psychiatrists agree with "treatment rather than punishment." The fiscal and physical facilities are totally inadequate to handle our enormous penal population in hospitals, and the profession of psychiatry is neither ready, willing nor able to cope with the problems which would be thrust upon them. We would need at least ten times the number of psychiatrists we now have to maintain the institutions alone.

must call on his own personal philosophy and make his own *moral* judgment on the question of criminal responsibility.

By the answer to this question, his moral judgment is submitted to the jury in the guise of expert testimony.

By laughing away *M'Naghten* and *Smith*<sup>45</sup> as antiquated, obsolete and unrealistic, the proponents of *Durham* have been able to persuade its critics into searching for a definition of insanity or a new rule which is better than *Durham*. This has been a tremendous piece of strategy because it has set the excellent minds of those who feel and "know" that *Durham* is "wrong" to the almost impossible task of finding a workable substitute for *M'Naghten* and *Smith*, which are time tested and based on solid philosophical concepts.

Congressman John Dowdy of Texas submitted a bill in the 85th Congress which contained the following provision:

In any criminal prosecution in a court of competent jurisdiction in the District of Columbia where the insanity of the defendant is raised as a defense, the test for determining the defendant's criminal responsibility shall be the common law test as such common law test was in effect in the District of Columbia on June 30, 1954.<sup>46</sup>

It is certain that the proponents of treatment rather than punishment will criticize or condemn the above section of Congressman Dowdy's bill as reactionary and regressive, but it would at least put an end to

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<sup>45</sup> *Smith v. United States*, 36 F.2d 548 (D.C. Cir. 1929) had supplemented the *M'Naghten* rule with the "irresistible impulse" test in the District of Columbia before *Durham*.

<sup>46</sup> H.R. 13774, 85th Cong. 2d Sess. §2 (1958). It is understood that this section will be submitted to the present Congress as a separate bill.