LAW
AND PSYCHIATRY

Cold War or Entente Cordiale?

Sheldon Glueck

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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
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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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LECTURE I
DILEMMAS IN THE PARTNERSHIP OF LAW AND PSYCHIATRY

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. As a young graduate student at Harvard in 1925, I perpetrated my first book, *Mental Disorder and the Criminal Law*; and I there ex-


palliated 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. 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; 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

Dilemmas in the Partnership

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 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 beneficial 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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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
corresponding exactly to the gravity of his offense." 6 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 insanity 7 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 that all of these learned men succeed in their quest for knowledge in a new field. But, the law has always insisted upon an exercise of will. 8


8 Pound, R., CRIMINAL JUSTICE IN CLEVELAND, op. cit. supra note 5, at 586.

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

State v. Andrews, 187 Kan. 458, 469, 357 P.2d 738, 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 guilt, as well as the cases of criminal negligence, are disregarded in the above connection.

DILEMMAS IN THE PARTNERSHIP

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 psychologic definition of an


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 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

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."
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

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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 paradox 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 methodological 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 696 (1934).
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 feeblemindedness 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 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 unhampereed 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 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. . . .

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

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

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

\[\text{17} \text{ The American Law Institute, Model Penal Code § 4.01 (Prop. Official Draft 1962). For alternatives, see Tent. Draft No. 4 1955.}\]

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 cannot 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. At that time, members of a jury in a 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 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 either complete re-


21 Id. at 132.
responsibility or full irresponsibility, is shown by the following charge to the jury by Lord Justice-Clerk (Anlness) 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

ROYAL COMMISSION ON CAPITAL PUNISHMENT, op. cit. supra note 19, at 376.

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 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. 465, 476, 66 S.Ct. 1118, 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 issues involved. Murphy and Rutledge, J., also dissented. Fisher was executed. See also Weil, H., & Overholser, W., Mental Disorder Affecting the Degree of a Crime, 50 Yale L. J. 699 (1947); Note, Premeditation and Mental Capacity, 46 Colum. L. Rev. 1005 (1946); cf. People v. Wells, 33 Cal.2d 330, 202 P.2d 83 (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 stage instead of the trial stage. However, as the text both in Lectures I and II 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-Analytic (Minutes of Evidence, 318, 424), 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. 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." 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*, 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 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

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28 LAW AND PSYCHIATRY

29 DILEMMAS IN THE PARTNERSHIP

25 The only allusion I have been able to find that even remotely supports the inference is a notice in *The Scotsman* on Lord Dees, 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.) JUDICIAL REVIEW 115 (1959).

26 *Holmes*, op. cit., supra note 17, at 1.

27 GLIEK, op. cit., supra note 2, at 472-480.
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

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. 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"! 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


30 See, for example, GLUECK, S. & E. T., 500 CRIMINAL CAREERS 294 (New York, Alfred A. Knopf 1938).
there is a great shortage of psychiatrists and other therapeu­
tic personnel to fulfill the obligation implied in acquit­
tals on the ground of insanity. This serious fact of life has been
emphasized in some recent decisions objecting to the sup­
posed ultraliberalism of the famous Durham decision in the
District of Columbia.11 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 psy­
chiatrist 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 in­
crease 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

11 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 pervasive 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.12 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.13 The anomaly is the Trial of Lunatics

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


13 Id. at 277-278. Evidently the original purpose of the anomalous Eng­
lish 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 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 prop­
erty 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
Act 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 acquitted. 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).

The English verdict 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.

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36 Act 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."

37 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." 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.


36 Both the Aikin 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 yet 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).
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 condamnatory label of “guilty” and the consequent “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 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 dictum and in the testimony of aliens were crystallized by the trouble-brewing advisory Opinion of the Judges of England in the well-known Daniel M'Naghten's Case. When I planned these lectures, I determined not to devote any time to whipping the dead horse of M'Naghten. But in examining

2 Id.
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 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."

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." 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 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 . . . he did not know he was doing what was wrong.¹

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.²

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."³

It is this feature of

² HANSARD's DEBATES 627 (Nov. 21, 1956), regarding a parliamentary debate on capital punishment.
the \textit{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 \textit{M'Naghten} Rules are in large measure shams. That is a strong word, but I think the \textit{M'Naghten} Rules are very difficult for conscientious people and not difficult enough for people who say 'We'll just juggle them.'" \footnote{Bazelon, D., Equal Justice for the Unequal, Isaac Ray Lectureship Award Series 5-6 (mimeographed 1961).}

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 forming 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 \textit{M'Naghten} and "irresistible impulse" rules have been 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 "knowing" in the \textit{M'Naghten} rule, for example—which in the nature of an act or "knowing" its quality or wrongfulness—no court has read it to mean more than "intellectually comprehended." 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.\footnote{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."—Stephenson, J. F., 2 A HISTORY OF THE CRIMINAL \textit{LAW} \textit{OF ENGLAND} 154 (London, Macmillan Co. 1892). Despite this tainted source, the English and American stressors have been adhering to the \textit{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 \textit{M'Naghten}, a paranoid 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, 10 Cr. App. Rep. [1922] 104, 109, where it was said that the "old rigour of the rule in \textit{M'Naghten's Case}" had not been relaxed; and that the old tests were still in force and did not include the irresistible impulse principle.}

\footnote{Bazelon, D., Equal Justice for the Unequal, Isaac Ray Lectureship Award Series 5-6 (mimeographed 1961).}
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 knowl­
edge 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, insu­
lated 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 863, 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 ra­
tional person may be insane. Yet . . . that is precisely the objective of the
extremist criticism of the M'Naghten Rules."—Hall, J., Responsibility and
It is submitted that Hall confuses "rational" with capacity to reason. There

FROM M'NAGHTEN TO DURHAM

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 the 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 knowl­
dege, the accused's mental disease was such as very prob­
ably 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 unim­
peachable logic from false premises or delusions. There are patients in
mental hospitals who are notable 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; Weihofen, H., The Urge to Punish 174-175 (New
of mental processes, that the destroyed “will power” seriously affected the cognitive capacity. 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 irresistibleness of a particular impulse. 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:

*“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 restless 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.”

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 pronunciamento 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.” 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

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13 See especially, *Farrere v. State*, 81 Ala. 577, 596, 2 So. 854, 868 (1886). See also *GLUECK*, op. cit. supra note 1, at 233, 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. 806, 814 (1939): “It may be true enough that although a prisoner has acted in the commission of the act 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. But this was put succinctly by Greer, J., during the argument of the case of *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.”


15 *State v. Fuller*, 25 Iowa 67, 84 (1868).

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

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-

22 State v. Mewberter, 46 Iowa 88 (1877).
ment, in a mental hospital for as long a time as he remains dangerous. 17

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. 18

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 connected with such mental disease, in the relation of cause and effect, as to have been the product of it solely. 19

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." 20 Indeed, the great English jurist, Stephen, in a brilliant analysis in 1883,21 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-

17 81 Ala. 577, 596, 2 So. 854, 868 (1886).
18 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 causes 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. J., THE COMMON LAW 54-55 (Boston, Little, Brown & Co. 1881).
19 WIGMORE, J. H., supra note 1, at 167-168.
20 See Lecture III, notes 55, 57.
21 CLERKE, supra cit. supra note 1, at Chaps. 9, 10. For a dramatic recent case showing how the role of epilepsy can be overlooked even by psychiatric findings and other clinical signs see the illuminating article by Banay, R. S., Epilepsy and Legal Responsibility: 18 Years of Medical-Legal Impasse, 8 CONSEQUENT PSYCHIATRY 9-14 (1962).
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.39

1 Bratty v. Attorney-General for Northern Ireland, 3 W. L. R. 985, 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 colorblind, 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 nonsane," thus the trial judge was right in not sending this defense to the jury. (973-975, 983, 984, 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 for a jury to do so rather than allow a dangerous person to be at large" (980). (7) "Automatic" 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." (973).
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 . . . 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. 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, 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. 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

34 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 this 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 involvements—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 1920 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 case 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

a 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, 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. Brancalle 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

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. C. 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 intellective 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." 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
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. 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 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." The psychiatric witness would then not be chained to the giving of dogmatic affirmative or negative answers to the questions

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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 “know-

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
as disease." 98 Recently, also, the state of New York has been influenced by the A. L. I. formulation. 99

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. 100

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

99 "4120. 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.
100 United States v. Currens, 290 F.2d 751, 775 (3d Cir. 1961). Judge Biggs premised 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, 162 F.2d 540 (3d Cir. 1961).

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." 101 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 splicly to remember that "after all ... juries are

101 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?"

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, 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, claimed that there are cases where certifiably insane defendants had been found guilty and sentenced to death. This recalls the persuasiveness of the early American commentator on the criminal law, Bishop, who said: "The memorials of our jurisprudence are written all over with cases in which those who are now understood to have been insane have been executed as criminals." 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 *M'Naghten* 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 *M'Naghten* 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 hospital—his own hangman."
institution.

How long will Massachusetts continue to subject its de­
ranged killers to the deadly injustice of the McNaghten Rule?
The Commonwealth killed Jack Chester. It is
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 re­
spect 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.

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 examina­
tion 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 recom­
mended. 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 psy­
chiatric 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 men­
tal 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 vocabu­
larv 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.
Acrs 356 (1937).
mony with its own concepts. 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. 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 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 involved.
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.
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."s

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, 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 and State v. Jones, they were influenced by a farsighted psychiatrist, Dr. Isaac Ray, whose benign spirit, by the way, I

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s1 State v. Jones, 50 N.H. 989, 994 (1871).
s2 Durham v. United States, 254 F. 956 (D.C. Cir. 1916).
s3 49 N.H. 396 (1870); see also Boardman v. Woodman, 47 N.H. 120 (1869).
s4 50 N.H. 989 (1871).
s5 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
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


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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1 OF 3
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."

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 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. 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." 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,
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, means, 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 psychopath 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-

gory of "Mental Disorders." 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. 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 besmear the judgment regarding the other symptoms bearing on the fundamental issue of pathology as opposed to normal mental health.

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 Stevart v. United States, the 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, 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, 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

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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 discussion in United States v. Currens, 290 F.2d 751, 761-765 (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 neuropathy, frequently involves moral blame but can result in legal irresponsibility.
16 For the role of certain physiological-endocrinological and metabolic disturbances in bringing about temporary mental aberration, see Podolsky, E., The Chemical Arous 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 Reuty v. Attorney-General for Northern Ireland, 3 W. L. R. 965 (1961). The role of "psycosomatics" 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." Ure, R. C. Jr., Changing Concepts in Forensic Psychiatry, 45 J. CRIM. L. & P. S. 153, 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, 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-

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 housebreaking 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

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


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." 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." 

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 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

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criminal responsibility 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, conduct 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 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.


Durham and Beyond

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 excusable 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 of fact in the case which followed Delaware v. Andrews, 187 Kan. 460, 357 P.2d 739 (1960); Kwosek v. State, 8 Wisc. 2d 647, 100 N.W.2d 339 (1960); United States v. Campbell, 280 F.2d 751, 773-774 (3rd Cir. 1960).
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 sufficiently 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-

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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 mesalliance 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 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 have not been the accused.

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 decision 38 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 case 39 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 criticism of the so-called 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.

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 605, 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 notions for psychiatric examinations in a greater number of cases, it has not resulted in a significant increase in acquittals by reason of insanity. See Krasn, op. cit. supra note 11, at 905; but compare infra note 52.
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-existing 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 760, 314 P.2d 690 (1957); State v. Murphy, 56 Wash. 2d 761, 335 P.2d 323 (1959); State v. Coia, 317 S.W.2d 609 (Mo. 1958); People v. Nash, 52 Cal.2d 40, 338 P.2d 416 (1959);Downs v. State, 231 Ark. 466, 330 S.W.2d 351 (1960); State v. Robinson, 168 N.E.2d 328 (Ohio 1959); Ficocct v. State, 115 So.2d 620 (Fla. 1959);Commonwealth v. Woodhouse, 401 Pa. 243, 164 A.2d 98 (1960); Howard v. United States, 232 F.2d 374 (5th Cir. 1956).


43 Tanner v. United States, 241 F.2d 640 (9th Cir. 1957), cert. denied, 324 U.S. 940 (1917).
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
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 be. 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 a term of confinement fixed by the court 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 Carrern 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 WEISBROD, H., MENTAL DISORDERS 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 520 (1951).

accused's claim of insanity. 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 the field, 157 F.2d 612 (D.C. Cir. 1951); Dusky v. United States, 295 F.2d 743, 754-755 (8th Cir. 1961).

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." 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

human personality may not properly be compartmentalized? 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.

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 (monograph, p. 60.) See also Flannery, T.A., Meeting the Insanity Defense, 51 J. Cass. L. & Pol. Sci. 309-316 (1960/1961), dealing with the techniques of cross-examining psychiatrists.

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. And considering the varieties and stages of intellectual and 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.

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 probationary 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-
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.14

14 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 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...
for his enlargement if he has been committed or imprisoned."

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 released, or is restored to sanity. Statutes in a few states is no danger of relapse. Maryland, without statute, require that the test is of the person and the state's interest. In some half the states, authority to and a jury trial is required in three states, permitted in one. In seven of the courts, the court may act "only after the hospital authorities have certi­from a commission of experts." Requirement of a certificate has been held for a patient who has committed a criminal act has recovered sufficiently to be genuinely difficult for a superintendent—or anyone else—to determine when would not be dangerous. (But of an acquitted of murder (or of manslaughter, in Massachusetts) are committed by the hospital superintendent. In Maryland, without statute, requires that the released, the person will be a danger to himself or to the safety of the person and property of others."

There are no sure criteria for predicting the future course of conduct. A few states permit conditional release. A few states authorize hospital authorities to discharge con­victed until he recovers or is restored to sanity. In a few states the statutes are "silent or unclear." The implication being that such persons are dis­chargeable as other patients, usually by the hospital superintendent. In superintendent, and alienist designated by them). In one state, discharge is granted of murder (or of manslaughter, in Massachusetts) are committed by the superintendent. In Maryland, without statute, requires that the released, the person will be a danger to himself or to the safety of the person and property of others.

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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.loan 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 continued detention.)

The author of the report is of opinion that "of these several procedures, the simplest seems the least burdensome—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 50 at 394-399, 505-643.

58 MASS. GEN. LAWS, Chap. 123, §101. In Glasaon v. West Boylston, 128 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 Soakeman in the "Taunton Lunatic Hospital." Soakeman 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 thereafter 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-
especially in the District of Columbia. A few illustrations of the chief problems involved must suffice. Since 1935, the District Code (Sec. 24-301) has provided for automatic commitment 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.

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. 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. 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 sociological 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, is 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.
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..."

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 depending essentially 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 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. 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.

Overholser v. Leach, 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..."

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, 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 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. 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 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 irresponsibility and the irresistible impulse rule.
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." 

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. So, also, the Virgin Islands. 

Sees 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, the custody of the Commissioner of Mental Health and Corrections presented from the report rejecting drugs or normality manifested only by repeated criminal conduct or excessive use of alcohol." 

Institute as the test of insanity as a defense in criminal cases .... This new concept has had very hard sledding. 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.

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.
in these simple words: "No act done by a person in a state of insanity, can be punished as an offence." 11

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.

expressions 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." 1

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. 2 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

1 Dusky v. United States, 295 F.2d 741, 759 (8th Cir. 1961).
2 "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 leaden-footed laggard." —Frankfurter, J., dissenting, in Fisher v. United States, 325 U.S. 463, 478-479, 66 S.Ct. 1318, 1325-1326 50 L.Ed. 1303 (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 premorbidisation and deliberation.

WIDER HORIZONS

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 never been absorbed or sloughed off. It will become entirely consistent only when it ceases to grow."

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 andcriminal behavior cannot be "cured" by

1 Holmes, O. W. JR., THE COMMON LAW 56 (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 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 (1930). 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.

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.7 For a recent critique, Tenney, C. W., Jr., Sex, Sanity and Stupidity in Massachusetts, 42 B. U. L. Rev. 1-9 (1962).

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, Teev, 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. Jurors 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." 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." 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 program are fully aware 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:

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
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.

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. 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 Guttman, 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. "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
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 (ictus 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 pervasive 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." 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.


It is considerations of this kind that led me, back in 1925, to recommend the establishment of a "Sociolegal Commission," or "Treatment Tribunal." 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, cautery, 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.\textsuperscript{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

\textsuperscript{16} The Nichomachean Ethics, V, viii, 1157a.

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,\textsuperscript{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

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.

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. More significantly, 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 with- out 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, 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 felons.

the institutions at which they would serve the sentence, and
prescription and supervision of the training and correctional
institutions
rector of Corrections.
program.
156
hearing representatives to
and complete study of the cases of all prisoners whose terms
of imprisonment are to be determined by it or whose appli­
cations for parole come before it ....
the hearing of a case is required to 'prepare a case study and
the case hearing representative assigned to participate in
the hearing of cases relating to term
minimize conflicts between the authority and the Director
evaluation which he [must] submit to the AuthOrity.'
23 To minimize conflicts between the authority and the Director
of Corrections, the code carefully sets out the areas of co­
operation between them.29
23 CAL. PENAL CODE §5076.1. The authority may also fix other times and
and sympath~tic
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,
and education.30
The national government has also in recent years greatly
improved the implementation of its sentencing and cor­
rectional practices under the dynamic and dedicated Di­
rector of the Federal Bureau of Prisons.31 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 sen­
tencing, 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.32 It must
32 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 re­
commendations 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. §5075.5.
31 See the various writings of James V. Bennett, Director, Bureau of
Prisons, U.S. Department of Justice, especially Reconciling Legal and Cor­
30 The most impressive analysis of the problem is probably that of Pro­
fessor Tappan. See TAPPAN, V., CRIME, JUSTICE, CORRECTION 435 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 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-

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." 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 exposes 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-

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,* 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. The increase in adequacy has on the whole continued since 1959. For example, the ratio of physicians to patients has increased from .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 1938 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.

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.”

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 mental hospitals will continue to slow 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).

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).
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 decision\textsuperscript{37} 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 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.” 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.” 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.” 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.
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. 1901).

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.46 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

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. 45

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 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 Columbus 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


47 See GLUECK, S. & R. 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 abroad. 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; 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-
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." 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 many 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.

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58 Bennett, J. V., A Briefing for Lawyers on Prisons, in Reconciling Legal and Correctional Values, op. cit. supra note 57, at 10.
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