

# Problems of a Psychiatrist in Operating Under the M'Naghten, Durham and Model Penal Code Rules

John R. Cavanagh M.D.

Follow this and additional works at: <http://scholarship.law.marquette.edu/mulr>



Part of the [Law Commons](#)

---

### Repository Citation

John R. Cavanagh M.D., *Problems of a Psychiatrist in Operating Under the M'Naghten, Durham and Model Penal Code Rules*, 45 Marq. L. Rev. 479 (1962).

Available at: <http://scholarship.law.marquette.edu/mulr/vol45/iss4/2>

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact [megan.obrien@marquette.edu](mailto:megan.obrien@marquette.edu).

# PROBLEMS OF A PSYCHIATRIST IN OPERATING UNDER THE M'NAGHTEN, DURHAM AND MODEL PENAL CODE RULES\*

JOHN R. CAVANAGH, M.D.\*\*

Prior to July 1, 1954, there was very little of the confusion concerning the legal responsibility of the mentally ill in criminal cases which we have today. On that day the United States Court of Appeals for the District of Columbia entered the practice of psychiatry with the Durham Decision. This rule actually was a resurrection of an old New Hampshire rule of 1870. The New Hampshire rule which was expressed in almost identical terms as the Durham Rule, rested quietly in the archives of its courts for almost 90 years, not being adopted by any other state. Its revivication by the U.S. Court of Appeals for the District of Columbia was accompanied by the loud acclaim of a few lawyers, a few psychiatrists, and a few judges. It was not then, and has not in the seven years since, been accepted in any other jurisdiction and has been specifically rejected by 20 states.

Desperate measures have been employed to keep life in this rule in spite of the fact that attempts to employ it have resulted only in confusion and legal loopholes. It has been referred to as "vague," "confusing," "ambiguous" and "misleading."<sup>1</sup> The decision itself was so vague that the court felt compelled to issue in rapid succession a series of clarifying decisions, none of which was very helpful. When no one enthusiastically embraced this judicial attempt to legislate and when the impractical aspects of the rule became glaringly apparent, we witnessed the unbelievable spectacle of certain judges, leaving the bench and going to the public platform and to the press in its defense.<sup>2</sup> A matter such as this is not a political issue with emotional overtones to be decided by an appeal to the public. The question of the determination of the legal responsibility of the mentally ill should be discussed quietly by experts on the subject, and then recommendations made to the legislative branches of government which are those branches in a democracy most responsive to the people's will and "to the moral feelings of the community."

Public appearances of judges in defense of their decisions are not

---

\* Presented as part of a Symposium on Insanity as a Defense in Criminal Law at Marquette University Law School.

\*\* Doctor of Medicine, Washington, D.C.

<sup>1</sup> *Blocker v. United States*, 288 F. 2d 853, 857 (D.C. Cir. 1961).

<sup>2</sup> *Prettyman, The Problem of the Incompetent*, 18 WASH. & LEE L. REV. 219 (1961).

only inappropriate but are quite misleading.<sup>3</sup> Other judges of the court who prefer to express their opinions from the bench in the traditional manner of judges may not reach the public with their opinions. This leads to the erroneous opinion that all the judges on the court are in agreement that because lawyers and psychiatrists will not cooperate, the public is being deprived of the full value of the Durham Rule. Legislation is better handled by the elected representatives of the people rather than by judicial legislation. Another aspect of the judicial handling of the subject of criminal responsibility seems to be a developing sentimentality and emotionalism on the subject. Every right of the offender should be protected, but in doing so we should not overlook the rights and the need for protection of the rest of the citizens. The recent decisions of some courts seem to overlook society's needs and show a sentimental concern for the defendant. Perhaps what we need is a more rational and less emotional approach to this problem. If I seem to speak only of the Durham Rule it is because I practice in Washington where we have been constantly exposed to its vagueness. For those who may not be familiar with the wording of the Durham Rule, it is stated quite simply in these words:

An accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect.<sup>4</sup>

It is indeed a simple enough statement. Judge Prettyman, speaking at Washington and Lee University, said it was plain, simple sense. "The rule," he added, "is simple; it is direct; it is true; it is not novel or startling."<sup>5</sup> Everyone does not feel this way. For example, such opinions as this are quite common in regard to the Durham Decision: "Observing this, one writer concluded that 'Durham then puts forth, in my opinion, a legal principle beclouded by a central ambiguity, both unexplained and unsupported by its basic rationale.' The need in this area is for more clarification, and the Durham instruction does not supply it. Judge Learned Hand put it this way: 'I have read the opinion that you mention, and perhaps it is all that can be said; but, frankly, it did not seem to me to give us any guidance that perceptibly would help.'"<sup>6</sup>

To these statements may be added this statement from the concurring opinion in the *Blocker* case:

One of the fallacies of the formulation of the "disease-product" test of *Durham v. United States*, apart from its being stated in terms unfamiliar to jurors, was the tacit assumption that the test and the instruction to the jury could be stated "simply." It

<sup>3</sup> *Ibid.*

<sup>4</sup> *Durham v. United States*, 214 F. 2d 862 (D.C. Cir. 1954).

<sup>5</sup> Prettyman, *supra* note 2, at 229.

<sup>6</sup> *Insanity as a Defense in Criminal Cases: The Durham Rule or the M'Naghten Rule in Illinois*, 1957 J.A.M.A. 1491.

cannot be stated simply, because it is the most complicated, elusive and difficult problem in the criminal law.<sup>7</sup>

This difference of opinion has led to some ill-considered statements. For instance, a usually conservative judge made this comment:

Were it not tragic, it would be amusing, but the fact is that most judges and lawyers regard psychiatry as a sort of crystal gazing, or a magician's trick show, with mumbo-jumbo incantations and ladies suspended in air, all done with mirrors.<sup>8</sup>

It is ridiculous to believe that any intelligent person in this day holds this view about psychiatry.

But our purpose here is not to analyze the Judges of the Court of Appeals, but to take a psychiatric look at the legal responsibility of the mentally ill.

### *General Principles*

Before discussing this subject more specifically, there are certain general principles which must be recognized and discussed:

1. The Psychosomatic Unity of Man
2. The Psychic Structure
  - a. Cognition
  - b. Responsibility and Freedom of the Will
3. Causality and Productivity
4. Disease and Defect

Most important of all is this: Insanity is a legal, not a medical concept. I shall state this as an axiom and shall not discuss it further.

### *The Psychosomatic Unity of Man*

Man functions as a unit. What affects one aspect of his personality affects all other parts. Physical illness and mental illness form a continuum. What is more important for our purpose is the fact that when one aspect of the personality is affected, all other aspects of the personality are affected in a proportion related to the severity of the original disturbance. For example, if there is a disturbance in cognition it may be expected to affect volition, judgment, etc. When the Court in the Durham Decision spoke of the knowledge of "right and wrong" as being a symptom, they could have said quite correctly that in view of the psychosomatic unity of man this knowledge was actually an integral part of the disorder. The value of the "right and wrong" concept is that the ethical sense is a more easily measurable aspect of the personality than any other except intelligence. One cannot as accurately measure affect, or imagination, or will, but we can measure ethical values, and

---

<sup>7</sup> Blocker v. United States, *supra* note 1, at 871.

<sup>8</sup> Prettyman, *supra* note 2, at 233.

estimate the accuracy of the individual's subjective evaluation of reality.

### *The Psychic Structure*

For didactic purposes the personality must be described piece-meal, but we should not picture it as a compartmented structure. It is actually a functioning unit with a constant frictionless interchange between its component parts. It is as if each component was a mirror which by its reflection activates the other parts. As long as each mirror reflects its proper degree of light in the right direction and with proper intensity there is a normal interchange. If something happens to one or more of the mirrors, it will disturb the whole mechanism. So it is with the component parts of the mind.

As we view the personality in this frame of reference it becomes clear:

1. That man functions as a unit;
2. That disturbances in one part of the personality can be expected to produce a disturbance in all other parts;
3. That much of the mental functioning is in reference to a "particular act";
4. That the ethical sense is more easily measured than any other aspect of the mental apparatus except intelligence;
5. In addition we must recognize that man possesses a freedom to act or not to act.

The determination of the individual's knowledge of "right or wrong" in regard to "the particular act" at the time he performed it is not a symptom alone but a reaction of the total personality of the individual who has been affected by mental illness. Each mental illness predominately affects one part of the personality. In the schizophrenic, for example, it is the imagination, in the sociopathic personality it is the evaluative function of the practical intellect. Time does not permit a discussion of this material at this time.

### *Cognition*

This concept of the unity of the personality is important in view of the loose thinking which has been prevalent in regard to the so-called "right-wrong" test. When properly understood, it is a far more practical and workable test than the Durham Rule. We hear of the "Knowledge Test." It is usually spoken of in a belittling way as if it were still employed as it was in the days when a life sentence might be given for the theft of a spoon or a loaf of bread. In days when evidence of "knowledge" consisted of a statement by the pastor that the individual had been taught it was wrong to steal. I believe that most psychiatrists misunderstand the M'Naghten Rule which is more frequently referred to today as the "Right-Wrong" test. It is implied that this test requires only an abstract knowledge of right and wrong. This concept is in error.

This rule is used in 31 states in each of which it is expressed somewhat differently. The Supreme Court of the State of Wisconsin, for example, stated the rule in these terms:

The term insanity in the law means such an abnormal condition of the mind from any cause, as to render the afflicted one incapable from distinguishing between right and wrong in the *given instance* and so render him unconscious of the punishable character of his act. [Emphasis supplied.]<sup>9</sup>

This reference to "in the given instance" follows the original M'-Naghten Rule which was worded as follows:

The mode of putting the latter part of the question to the jury on these occasions had generally been, whether the accused at the time of doing the act knew the difference between right and wrong; which mode, though rarely, if ever, leading to any mistake with the jury, is not, as we conceive, so accurate when put generally and in the abstract, as *when put with reference to the party's knowledge of right and wrong, in respect to the very act with which he is charged.*<sup>10</sup>

Those opposed to the use of the M'Naghten Rule also feel that it is in error because it emphasizes the cognitive and omits the volitional aspect of man's nature. This statement is misleading because man functions as a unit. Reason, will, feeling all coalesce and in the normal person are integrated. What affects one part affects all other parts. What is more important for our purpose is the fact that when one aspect of the personality is affected, all other aspects of the personality are affected in a proportion related to the severity of the original disturbance.

Before accepting the opinion of those who scorn the "knowledge" test, we must recognize that without knowledge there cannot be a free, human act. As St. Augustine said long ago, *Nil volitum quin prae-cognitum.*<sup>11</sup> On this point the distinction between *conceptual cognition* and *evaluative or deliberative cognition* is important. This distinction is seldom made by the opponents of the "knowledge test." Most of those who speak of the "right and wrong" test seem to have in mind only conceptual cognition.

*Conceptual cognition expresses what the object of knowledge is. Evaluative cognition expresses what importance or value it has to the individual.* Although most normal adults perceive both of these aspects of cognition in the same act, neither factually nor conceptually do these two cognitions express the same thing. They express diverse aspects of the same object. *These two aspects of cognition associated with a free*

<sup>9</sup> *Kwosek v. State*, 8 Wis. 2d 640, 100 N.W. 2d 339 (1960).

<sup>10</sup> Quoted by John R. Cavanagh, *Responsibility of the Mentally Ill*, 4 CATHOLIC LAW. 329, n. 28 (1958).

<sup>11</sup> ST. AUGUSTINE, VIII DE GENERI AD LITTERAM 14, 32 (nothing can be willed which is not first known.)

will prepare the individual to perform a free, human act. It is likely that the terms "nature and quality of the act" used in certain definitions of the M'Naghten Rule are derived from these philosophical terms.

Conceptual cognition is almost always present. Even though one is mentally ill or defective, his intellectual concept of a house remains that of a house—if he sets fire to the house, he realizes that he is setting a house on fire. *Evaluative cognition* is more subject to affective or emotional influences and *may be absent or defective* for a number of reasons, the most important of which for our present purpose is emotional disturbance or mental illness. It is possible also that such evaluative cognition may be present but the individual *may pay no attention to it*. Father Ford gives this description:

A child of five years who sets fire to his father's hayloft, although he has conceptual cognition both of the hayloft and the fire, *does not have* evaluative cognition of the crime, that is the *objectively very serious* violation of right order which he perpetrates; and consequently this violation cannot be imputed to him. He does have, however, both conceptual and evaluative cognition of his act inasmuch as it is a *wrongful childish deed*, and accordingly, in this respect his action is imputed to him and is deserving of punishment. But an adult who posits the same external act, generally has not only conceptual cognition, but also evaluative cognition of the crime he commits, but he pays no attention to it; because notwithstanding it he proceeds to the commission of the crime, and therefore he should be fully accountable for it.

Whenever a man, who because of his age is presumed to be endowed with the power of sufficiently evaluating something, is said nevertheless to have acted without sufficient evaluative cognition, that can arise either from the fact that he *did not want*, or from the fact that *he was unable*, to evaluate or weigh the proposed action sufficiently. One who *does not want* to acquire this knowledge will generally not escape either the subjective imputability or the objective obligatory force of his act, since he affects ignorance, and it is hardly ever possible to discern whether sufficient evaluative cognition was lacking—at least of a confused and implicit kind. But one who is *unable* to evaluate at least the substance of the proposed action, is obstructed in his natural power of appreciation, either by an impediment which is merely temporary and transitory (drunkenness, delirium, violent fever, etc.) or by an habitual defect (whether congenital or acquired during the course of his life); this type of habitual defect is present in not a few mental diseases and psychic anomalies, among which in recent times has been numbered so-called constitutional immorality.<sup>12</sup>

It is apparent, therefore, that when one speaks of cognition it in-

<sup>12</sup> John Ford, S.J., *Criminal Responsibility in Canon Law and Catholic Thought*, 3 BULLETIN OF THE GUILD OF CATHOLIC PSYCHIATRISTS 10-11 (1955).

cludes also emotional and unconscious factors which help to contribute to the evaluative or affective knowledge. Viewed in this way, it is apparent that the "knowledge" test includes much more than mere conceptual cognition.

*Responsibility and Freedom of the Will*

Responsibility results from the recognition by the average man that he is answerable to a higher authority, whether parents, city, state, or God, for approval or blame. Such answerability has no meaning unless the individual is capable of earning reward or meriting blame; *in other words, unless he possesses a free will*. Responsibility, as we have just defined it, depends on free will as effect depends on cause. All men at all times have recognized that culpability for a free act is a reality.

The subject of the freedom of the will is not a new one for lawyers. For example, Mr. Justice Cardozo said that all law in Western civilization is:

. . . guided by a robust common sense which assumes the freedom of the will as a working hypothesis in the solution of legal problems.<sup>13</sup>

And Mr. Justice Jackson in a similar vein said:

Whatever doubts (theologians, philosophers and scientists) have entertained as to the matter, (of free will) the practical business of government and administration of the law is obliged to proceed on more or less rough and ready judgments based on the assumption that mature and rational persons are in control of their own conduct.<sup>14</sup>

In spite of the fact that the whole theory of the criminal law is based on the idea of personal freedom to act or not to act, the author of the Durham opinion at least implicitly denies it in an article in the *Saturday Evening Post*, where he says:

Evil, of course, can only be punished or forgiven. But illness is supposed to be ameliorated or cured. Thus the name we put to our failures makes a difference. We all tend to believe in free will when we entertain hopes for the future, but switch to determinism when recalling our past failures. *I suggest we extend the same consideration to the failures of others.*<sup>15</sup>

It is important to have a clear understanding of the writer's definition of free will. A prominent psychiatrist in a discussion with an associate of mine, once remarked "How can you say that any man is free? Just because I *want* to become a doctor doesn't mean that I *can* become one." This clearly indicates a lack of correct understanding.

If an individual does not have this freedom to act or not to act, then

<sup>13</sup> *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937).

<sup>14</sup> *Gregg Cartage & Storage Co. v. United States*, 316 U.S. 74, at 79-80 (1942).

<sup>15</sup> Bazelon, *The Awesome Decision*, *Saturday Evening Post*, Jan. 23, 1960, at 32-56.

he should not be punished because the act of which he is guilty was not his responsibility. It is on this theory that insanity is a defense in a criminal case. It is considered that if the individual's concept of reality is distorted to a sufficient extent that he acts on erroneous or false premises which arise out of his mental illness that he is not responsible for his act.

*Responsibility does not mean "punishability."* It means only that the individual, whose responsibility is under examination, at the time he performed a certain act or acts, was in such a state of mental health that, barring external coercion, he was able to act freely on the basis of a *proper subjective* evaluation of his act or acts in accordance with objective reality. This is the evaluation which the psychiatrist is asked to make. If, on the basis of this opinion, the individual is punished, it is a separate action in which the psychiatrist plays no part.

This last statement requires further discussion. To be responsible the individual must be able to distinguish subjective ideas of right and wrong from the objective reality of right and wrong. In other words, a person may judge subjectively that he was doing right whereas objectively he was doing wrong. For example, a man may have the idea that the speed limit on a highway was seventy miles per hour, whereas, if he read the highway signs he would realize that the limit was fifty. If this man were driving his car at sixty-five miles per hour, *subjectively*, he would believe himself to be doing right whereas a highway patrolman might catch up to him and tell him that he is breaking the law.

*Responsibility for his act will be based upon the patient's subjective judgment of himself as acting rightly or wrongly.* But there is little doubt that when reference is made to the *Right and Wrong* test of responsibility, the question of right and wrong here refers to the *right and wrong* of the objective order. That is to say, the mentally ill man has misapprehensions of objective reality, like our driver in the first possibility. The presence of misrepresentations of reality does not in itself relieve a man of responsibility. It would, however, if this misapprehension was due to mental illness. It will undoubtedly relieve him of *any guilt*, if he sincerely believed, on the basis of his misrepresentations, that he was doing right.

I would like to repeat at this point that it is the role of the psychiatrist to determine the facts on which this responsibility is based; it is the role of the court to determine guilt.

One cannot emphasize this point too much. The psychiatrist in his examination is to determine the mental state of the individual and its relation to his subjective conception of reality and as to whether he was acting in accord with this concept. But it must be borne in mind as Judge Thurman Arnold stated in the *Holloway* case:

"Reconciliation between the medical tests of insanity and the moral tests of criminal responsibility is impossible . . . (because their) purposes are different. . . ." *Fixing standards of criminal responsibility is a legal, not a medical problem, and if we adopt a test based, as it should be, on legal concepts which grow from our traditional, ethical and moral standards, we need not be concerned about reconciling the two.* The expert witness describes the mental capacity of the accused in his terms and by his scientific standards and the jury applies to the evidence society's legal standard in terms of capacity to exercise will and choice and decides whether the accused is to be punished or treated. [Emphasis supplied.]<sup>16</sup>

Too many of us fail to recognize this important fact. It is one of the most important errors in the Durham Rule. This rule is medically, not legally oriented. In an attempt to combine the two concepts the result has been a scramble of words not understandable by either profession.

Judge Burger in the *Blocker* decision recognizes this problem quite clearly:

As we tried to cope with the flood of cases and problems arising out of our 1954 decision, it is plain that this court made a sincere and maximum effort to render the new test workable. That it is not workable and ought to be changed is, as suggested, a consequence of its being medically rather than legally oriented and being cast in language which is vague and confusing in some respects and restrictive in others. Having adopted a standard of criminal responsibility with "built in" ambiguities, we virtually invited "reasonable doubt" in every case where the issue was presented. The correct direction of *Durham* was to broaden the scope of medical inquiry but the incorrect step was to try to do this in terms which ignore the elements of recognition of wrongdoing and capacity to control conduct. As has been shown, the majority of psychiatric writers do not want the jury inquiry limited to the terms of the medical inquiry.<sup>17</sup>

#### *Causality and Productivity*

A cause is that which positively brings about or produces the existence of something else. Can we ever say with certainty that in this sense any criminal offense was caused by mental illness? Or could we state the contrary with equal certainty, i.e., did the mental illness cause the crime? Or could we more easily state that because of faulty subjective judgments based on mental illness the individual committed the offense? This would seem to be true.

What are we to think of the relationship of cause and effect in the case of a schizophrenic patient who because of an upsurge of his sexual appetite commits a crime to obtain funds to pay a prostitute? Did the illness produce the offense in this case?

<sup>16</sup> Judge Thurman Arnold, as quoted in *Blocker v. United States*, *supra* note 1, at 868.

<sup>17</sup> *Blocker v. United States*, *supra* note 1, at 864-865.

Why do so few schizophrenics commit crimes? Is there not some other factor to be considered? Is "productivity" a legal or a medical question? What is so imperfectly spelled out cannot help but confuse a jury and by the mere fact of being imperfectly defined may be altered by jury after jury so that there will be no uniformity in the administration of the law.

Psychiatrists cannot fail to have difficulty in channeling their views into this narrow passageway. Legal responsibility should not be concerned with such a nebulous relationship. Responsibility should be considered only with whether the criminal act was intimately interwoven into the texture of the mental illness and was a predictable outgrowth of it. Causality too frequently has a doubtful meaning when applied to psychiatric concepts.

In this area the American Law Institute Rule<sup>18</sup> is not so "either-or" in its wording. In stating that "substantial capacity" must be present for responsibility it leaves more room for discussion but eventually in practice a sharp line must be drawn and this would end with a "yes or no" answer being required in court for the psychiatrist. This would put it in the same category as the Durham Rule in demanding an unqualified answer to a question of cause and effect which can seldom be done.<sup>19</sup> It is only fair to say that Drs. Overholser, *et al*, find little of value in the A.L.I. Rule:

*Specifically, "substantial" and "capacity" are psychologically vague, ambiguous, unclear and complex quantitative concepts. More important, "to appreciate the criminality" is an involved cognitive phrase at least as likely to lead to confusion as "knowledge of right and wrong." Further, since criminality is an illegal act with an accompanying mental state, is there not a logical inconsistency or tautology here? For if the offender cannot "appreciate the criminality," then his act is not criminal, and if it is criminal then he must have "appreciated" it.<sup>20</sup>*  
Father Cutler admits that:

Although "productivity" is indeed a feature of the A.L.I. test, it does not carry with it the fatal ambiguity of the *Durham*

<sup>18</sup> The ALI Rule is stated in the following words:

Mental Disease or Defect Excluding Responsibility.

(1) 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 of his conduct or to conform his conduct to the requirements of law.

(2) The terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct. MODEL PENAL CODE §4.01 (Tent. Draft No. 4, 1955).

<sup>19</sup> Cutler, S.J., *Insanity as a Defense in Criminal Law*, 5 CATHOLIC LAW, 54 (1959).

<sup>20</sup> Freedman, Guttmacher, and Overholser, *Mental Disease or Defect Excluding Responsibility*, 118 AM. J. PSYCH. 32-34 (1961).

product formula, which the Institute studied but rejected as hopelessly and dangerously vague.<sup>21</sup>

I would now like to speak specifically of the Durham and American Law Institute Rules.

*The Durham Rule and the A.L.I. Rule*

Having expressed disagreement with the Durham Rule, it is only fair to say why I do so.

I would like to preface these remarks with this quotation:

The advocates of the *Durham* approach often put their critics at serious disadvantage, for in their facile approach to the approach to the difficult and complex subject of responsibility, they make a refutation of *Durham* appear platitudinous. This is due to the fact that those of other opinions take their stand on the hard facts of social protection and the maintenance of the hard core of legal principles, while the defenders of *Durham* resort to an individualistic, more clinical approach with all its personalistic, emotional overtones.<sup>22</sup>

Some of the objections to *Durham* as I see them are the following:

The terms "disease" and "defect" are inadequately defined. If, as defined by the Court in *Durham*, "disease" is a condition which is capable of improving or getting worse, and a "defect" is a condition which does not change, then what is left? It is apparent that any disease will get better, get worse, or remain unchanged. The rule, according to this definition, would embrace all psychiatric disorders from the mildest to the most severe. In the absence of a better definition, it leaves the decision as to what constitutes disease to the expert witness. This, at best, is unsatisfactory because of the great variance among psychiatrists of the relationship between mental illness and crime. The Rule is seemingly designed to maximize the opinion of some psychiatrists that all criminals are mentally ill. It has, in fact, been recommended that soon the courts will no longer dispense justice but will become Psychiatric Clinics.

The lack of definition of mental disease in the Durham Rule permits such incidents has happened in the *Leach* case when St. Elizabeth's Hospital decided in the middle of a trial that henceforth the hospital would consider that patients diagnosed as Sociopathic Personality Disturbance would be considered to have a "mental disease" in terms of the Durham Decision. However arbitrary and unscientific such an action might seem, it is compounded when we note that a few days after this decision, a staff physician of St. Elizabeth's Hospital, testifying in open court in reply to a question of the presiding judge on whether all the physicians on the staff of the hospital agreed with the announcement of

<sup>21</sup> Cutler, *supra* note 19, at 54.

<sup>22</sup> Cutler, *supra* note 19, at 49.

the assistant superintendent, replied in substance that all the staff physicians did not agree but that no one would be sent from the hospital to testify in such cases unless they did concur. One of the great claims made for the Durham Rule is that a psychiatrist could testify freely and in his own frame of reference. What happens to this freedom if the staff physicians of a hospital are to be allowed to testify in court only if they agree with the opinion of the superintendent? More than this, since in the *Blocker* case the court apparently conceded the power of St. Elizabeth's Hospital to drastically enlarge the scope of a rule of law by an arbitrary "week-end" decision would anyone be safe from the results of similar actions in the hands of an unscrupulous group of politicians? Lewis seems to recognize this danger when he says:

If crime and disease are to be regarded as the same thing, it follows that any state of mind which our masters chose to call "disease" can be treated as crime and compulsorily cured.<sup>23</sup>

The belief that all criminals are sick people was in the beginning confined to a small group of psychoanalytically oriented psychiatrists. Even after the concept became more widespread there was some restraint on the belief that judges retained the traditional belief of the criminal law that criminals were responsible for their misdeeds unless they had a mental illness. When, however, judges begin to believe that all criminals are mentally ill, we need to take stock. For example, how else are we to interpret the statement of an appellate judge (which to date I have not seen contradicted). "I would have thought that repeated criminal acts might well be the most cogent proof of a mental abnormality." Since all degrees and kinds of mental abnormality are embraced by "disease" or "defect" under Durham, what will happen if both judges and psychiatrists begin to use the "disease-product" relationship? When we get beyond a narrow fringe area of "disease-product" opinion, we are getting into a *terra incognita* where there are no facts and only tenuous hypotheses.

Fathers Ford and Kelly point out some of the dangers inherent in this viewpoint:

But there is an opposite extreme which is still more dangerous because it promotes a conception of human nature which is basically false. This is the viewpoint that undermines all human responsibility by reducing man to a mechanism or making his conduct the mere product of his instinct or of his unconscious drives. . . . There is such a thing as freedom. There is such a thing as normality. Men do deliberately choose what is wrong and what is criminal.<sup>24</sup>

<sup>23</sup> C. S. Lewis, *The Humanitarian Theory of Punishment*, THE CATHOLIC MIND, 254-60 (May-June, 1961).

<sup>24</sup> Quoted by Cutler, *supra* note 19, at 59.

The term "product" used in Durham is misleading. There is no real evidence that "mental disease" can cause or produce criminal acts. Not only is this true, but an attempt to establish such a relationship at least implicitly denies the freedom of the will, a fact upon which all criminal law is based. Even if we assume for purposes of discussion that there is a causal relationship between mental illness and a criminal act, would this mere concomitance excuse the individual of responsibility? I doubt that it would.

By opening the door so wide, as I have previously mentioned, the Durham Rule excuses by reason of insanity the "sociopathic personality" from responsibility for criminal offenses. Not only is this true, but when the sociopath is sent to a mental hospital in accordance with (Section 24:301 (D) ) of the District of Columbia Code, there is no way to release such an individual from the hospital because he must be "cured" before discharge from the hospital, and since there is no effective treatment for the sociopath, he could remain there until death. It must be emphasized that *Sociopathic Personality Disturbance* is not a clean-cut, easily identifiable *Disease*, but rather a syndrome which may be quite variable in its manifestations. In the American Law Institute Rule an attempt is made to correct this glaring defect in Durham by specifically excluding the condition from the term "mental disease or defect."<sup>25</sup> It should also be noted that in the Diagnostic Nomenclature of the American Psychiatric Association emphasis is made of the fact that the syndrome may occur as a symptomatic manifestation of many underlying disorders.<sup>26</sup> Diagnostically and prognostically, therefore, all Sociopathic Personality Disturbances cannot be grouped and described as a definite entity. One must admit at least differences of degree in the disturbances. For this reason no general rule can be made in regard to the degree of illness of these individuals. The only characteristic which they all have in common is that they are behavior disorders. In the diagnostic nomenclature of the American Psychiatric Association there are three subdivisions under the classification of *Sociopathic Personality Disturbance*:

- a) Antisocial Reaction
- b) Dyssocial Reaction
- c) Sexual Deviation

If we are to be logical, then, if we say that *Sociopathic Personality Disorder, Antisocial Personality*, is a disease or defect in terms of the Durham Rule, then should we not also include *Sociopathic Personality Disorder, Sexual Deviation* as a disease under the Rule? This diagnosis

<sup>25</sup> "The terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct." MODEL PENAL CODE § 54.01 (Tent. Draft No. 4, 1955).

<sup>26</sup> DIAGNOSTIC NOMENCLATURE OF THE AMERICAN PSYCHIATRIC ASSOCIATION 38 (1952).

includes such conditions as homosexuality, transvestitism, pedophilia, sexual sadism (including rape, sexual assault and mutilation). One would have little difficulty seeing a causal relationship between pedophilia and pederasty. Is this, however, a "disease" which would in all cases excuse one from punishment? I cannot be convinced of this, but it seems to be a logical conclusion from the St. Elizabeth's decision in the *Leach* case. The American Law Institute Rule attempts to avoid this difficulty by specifically excluding disorders characterized only by disturbed behavior. Although the A.L.I. Rule may have certain advantages over Durham and M'Naghten, I am not sure that in this provision it does not become diagnostic and invade the area of psychiatric competence. Ultimately the decision of whether a disorder belongs in this group is going to depend on the psychiatric examination. It should probably be left there.

If the psychiatrists in a case all were to agree that the defendant had a "mental disease" and the act was the product of such a "disease," there is not much left for the jury to decide.

The Durham Rule leaves the decision in the case largely up to the psychiatrists. If there is any doubt about this, reference should be made to the *Douglas* opinion in which it is stated that the case is left in the hands of the jury only if there is disagreement among the psychiatrists and if the expert testimony supports guilt.<sup>27</sup>

On the contrary, the suggestion which has been made to have the psychiatrist testify only to the clinical facts as he sees them and without any statement of his conclusion for the guidance of the jury is equally undesirable. Even though the judge instructs them in the rule of law, it is unlikely that the jury can translate the psychiatric language into the legal framework offered to them. There must be some transition from the purely clinical to the purely legal.

To illustrate this point may I present a somewhat lengthy but interesting case report. May I also ask you to imagine yourselves as jurors listening to this testimony knowing that you will be required to offer an opinion on the sanity of the individual whose illness is being described:

This subject was born and reared in a small country town. He has been sickly since early youth and has been diagnosed as having hyperpituitary and hypogonadal endocrine disturbance. He tended to be shy with women and preferred the company of men. He was guided by his feelings in what he said and did because if his feelings did not support him in his work of fulfilling certain commitments, he would become at least miserable, if not depressed. He spoke in a high-pitched, rasping voice and suffered from diplopia and severe eyestrain, which were increased when he was fatigued or excited. Under these circumstances he would

<sup>27</sup> Blocker v. United States, *supra* note 1, at 863.

suffer from headache, nausea, indigestion, and depression. Periodically he would lapse without warning into a state of withdrawal, during which he was described by his friends as "ugly and stupid looking," "dull," "sad and detached." He told friends that he was never without "melancholy."

His mother died when he was nine years of age, and although his step-mother was kind and devoted, he retained a persistent, gloomy mother-fixation association with a preoccupation for melancholy and tragic songs and poetry about the dead and the past. He was engaged three times. His first fiance died in an epidemic following which the subject became depressed with a severe suicidal drive which lasted for months. His second fiance he could not marry because of a severe revulsion to her. His third fiance he finally married, but due to an intense depression he was unable to appear at the wedding ceremony. Following this he again became depressed, incoherent, and suicidal for several weeks. These attacks occurred at frequent intervals and persisted for years.

When his son died, before the body was placed in its coffin, the subject did a strange thing. Although usually considerate of others and especially of children, he sent for his son's playmate to see the life-like appearance wrought by the embalmer. The boy, who had sat a long time holding the dead boy's hand on the day he died, had to be carried from the room and was in bed for days after. When the boy was buried, the subject had it twice disinterred to look upon it. When a clergyman remonstrated with the subject that his grief was sinful and unworthy of a Christian, our subject remained unimpressed until the clergyman explained that God was not the God of the dead but of the living, that his son was alive.

The subject was then reported to have jumped up, exclaiming, "Alive? Alive?" and indulged in a highly colored, emotional scene.<sup>28</sup>

That is the case. If the psychiatrist stops at this point and gives no summation, answers no questions which fit his description into a legal frame of reference, what would the jury decide? What opinion have you formed?

Perhaps some of you have already recognized that this is a brief description of the medical history of Abraham Lincoln. He has been variously diagnosed as being Manic-Depressive, Schizophrenic, or neurotic, any or all of which diagnoses may be wrong, but the important fact here is that the presence of numerous and severe psychiatric manifestations does not always mean irresponsibility. There must be some interpretation of the psychiatric facts to the jury.

### *Summary*

In conclusion the following principles should be adhered to in any

---

<sup>28</sup> Edward J. Kempf, M.D., *Abraham Lincoln's Organic and Emotional Neurosis*, 67 ARCHIVES OF NEUROLOGY & PSYCHIATRY 419-33 (1952).

rules for determining responsibility for conduct in those who are mentally ill:

1. The basic tenets of the M'Naghten Rule as properly understood should be retained. In this test the mentally ill defendant's responsibility should be determined on the basis not only of his conceptual cognition, but of his evaluative cognition as well.
2. The "Unresisted urge test," sometimes erroneously known as the irresistible impulse test, should be retained. Under this test the individual is considered not responsible when, even if he knows what is right, he is unable by reason of mental illness to adhere to this judgment. Properly understood, this concept preserves the principle of the freedom of the will. Without individual freedom there is no basis for the criminal law.
3. Since every act is based on a conscious (if erroneous) subjective judgment, there is no value in introducing the Unconscious to the jury. The Unconscious undoubtedly influences, but does not determine the individual's behavior.
4. Psychiatric testimony concerning the patient's mental state should be unhampered in its presentation to the jury. However, at its conclusion properly directed questions designed to serve as guideposts for the jury in regard to the defendant's responsibility should be asked.
5. The psychiatrist's opinion must be his own and unhampered by administrative decision.
6. The principle of individual freedom to act or not to act must be preserved.
7. The difference between responsibility and guilt must be clearly understood.

Finally, as for the three rules, my own inclination would be to eliminate the Durham Rule for the many reasons mentioned above. The American Law Institute Rule tries to eliminate the defects of Durham, but I believe falls short of its goal for the same reason that Durham falls short. Its terms are too difficult to define. Its value is in its effort to clarify the status of the sociopath. M'Naghten, with all its faults, seems to this writer the most satisfactory and understandable to both psychiatrists, judges and juries.