



Fall 9-1-1961

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Recommended Citation

E. Barrett Prettyman, *iii. The Problem Of The Incompetent*, 18 Wash. & Lee L. Rev. 219 (1961).
Available at: <https://scholarlycommons.law.wlu.edu/wlulr/vol18/iss2/5>

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Washington and Lee Law Review

Member of the Southern Law Review Conference

Volume XVIII

Fall 1961

Number 2

THREE MODERN PROBLEMS IN CRIMINAL LAW*

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The Juvenile, the Indigent, and the Incompetent pose three pressing unsolved problems in modern criminal law. To be sure, they have long been pressing problems, but under present-day conditions and modes of living they loom larger and larger, and more and more acute. They demand the attention not only of people in responsible places but of the community at large, not only of the legal profession but of all citizens.

What I have to say is based upon my own experience, a sort of distillate of my own observations, a statement of my own philosophy on these subjects. I make no attempt, except on a few points, to consider, assemble, digest or reflect opinions of courts or texts of scholars. There is no exegesis, although perhaps a dash of homiletics. Of course, consciously or unconsciously I have lifted or absorbed ideas and expressions from other people, but I repeat them here only so far as they have become my own.

I

The Problem of the Juvenile

To many people the most serious current problem in respect to crime is juvenile delinquency; and they may well be right. Mostly, of course, it is a city problem, but it reaches out into towns and some-

*These are the thirteenth annual John Randolph Tucker Lectures, delivered at the School of Law, Washington and Lee University, on April 21-22, 1961. A few minor editorial changes have been made in adapting the lectures for publication.

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times, I suspect, into the country. Its causes are many and complex. Hereditary and environmental factors loom large. But not the least of these causes, and directly relevant to the immediate discussion, is lack of discipline at home—a statement readily recognized as one of the most obvious of social truisms. This lack stems from three conditions: (1) no home at all, as is the case in great sections of the population in many cities; (2) broken homes, with resultant indifference toward the fate of the complicating children; and (3) the product of the philosophy practiced in many very fine homes, which is that growing children must not be disciplined lest they suffer psychological trauma. We are in fact now reaping the harvest from seed which was sold us and which we sowed. The ads said that children must grow up without cultivation. We let them do so, and now we ponder with woeful lamentations how they got the way they are. We, or at least many of us, deliberately planted a crop of juvenile delinquency.

The problem of juvenile delinquency is basically and well-nigh entirely a broad community problem of vast sociological concern involving many sociological perplexities. The resuscitation of a disciplined family unit as the prevailing practice for the care of children in this country is an objective of vast proportions, perhaps utterly unattainable. But however great may be our concern with the whole matter, we shall here consider only a small segment of the general subject. Law enforcement officers and courts have to deal with those juveniles who are alleged to have violated some rule of law. Even this fraction of the problem is of major importance. It alone is the subject of our present interest.

Juveniles commit acts which, if committed by adults, would be crimes. At least they are violations of law. Thus juveniles come within the area of the responsibility of law enforcement officers. These transgressors are called "delinquents" in the jargon of the professionals in the field. Judicial power is invoked because a formal determination that a person has violated a law is an action requiring judicial authority; and the commitment of a person to an institution is a judicial act. There are those who urge that the delinquency of youngsters up to fifteen years old is a problem for the police and the welfare workers. I emphatically disagree. It seems indisputably clear to me that judicial power should be available in all these cases, even down to those of six and seven years of age. Changes of custody, commitment to institutions and lessons learned from contact with the law ought to be subject to judicial consideration with all its connoted attributes.

Our concern, then, is with judges and law enforcement officers and juveniles. By rule generally adopted throughout this country, the line between juveniles and adults is at age eighteen. More of that borderline later. For now, let us look at some facts. I take the District of Columbia, because that is the jurisdiction with which I am familiar. We look at the report of the Juvenile Court there for the fiscal year 1960, the latest report. The figures shown, being so limited as to time and place, would not serve as the data for a precise scientific demonstration, but they will serve as illustrations sufficient for our present purposes.

According to the 1960 census, the population of the District of Columbia includes an estimated quarter-million people less than eighteen years old. During the last year some 3,500 complaints of delinquency by these youngsters were lodged with the Juvenile Court, excluding traffic offenses. This is about fourteen complaints a day, which is close to two complaints every working hour. Oftentimes several of these complaints concerned the same child or the same occurrence. Combined accordingly, they made up about three thousand cases. I know that statistics are soporific, if indeed not lethal, in a paper or a speech, but if you will visualize about ten cases a day except on Sundays you will get the picture. Some 2,300 children were involved.

About half of these youngsters were new to the court, while the other half were repeaters, having been there two, three or four times during that year or in previous years. A considerable number had been there five or more times.

We pause to note that the delinquency complaints referred to the Juvenile Court are not the whole of the juvenile delinquency picture. The Police Department, in its Youth Aid Division, screens out and disposes of nearly as many complaints as it refers to the court. Many complaints lodged with the school authorities and the public welfare people are not referred to the court. And voluntary social agencies make every effort to avoid the referral of marginal cases. We are now discussing only those matters with which the court—that is, the judge himself or his staff—must deal.

Of the cases referred to the court, about five out of six concerned boys. Eight of these delinquents were seven years old. About nine hundred of the cases referred, or more than a third of them, were against boys sixteen or seventeen years old. Charges against the boys increased steadily as their ages increased; the most charges were in the last year of their juvenile status; the boys appeared to grow worse

as they grew older. On the other hand, for 1960 at least, the misbehavior among girls reached its highest at ages fourteen and fifteen and then sharply declined. If 1960 is a typical year, the reason for the break would be an interesting inquiry.

The offenses with which these young people were charged ranged from truancy to rape and homicide. Among the girls, by far the most frequent offenses were petit larceny and being beyond the control of their parents. I suppose all of us would easily guess that statistical fact, which reflects the lure of small, pretty things and resentment against parental restriction. But not so easily guessed, perhaps, is that the young ladies were also charged with aggravated assaults, drunkenness and robbery. I was somewhat surprised that the report showed only one charge of prostitution and only one other charge of a sex offense so far as the girls were concerned.

Among the boys, by far the largest number of charges were for housebreaking. Assaults (aggravated and simple), petit larceny, robbery and the unauthorized use of automobiles made up the bulk of the remainder. There was some disorderly conduct, some drunkenness, quite a few purse-snatchings, not a particularly large number of sex offenses and some miscellaneous felonies and misdemeanors. Two homicides were charged, both of them against boys sixteen or seventeen years old, and five rapes, two of them charged against boys under sixteen.

Now, what happened to these cases? About a third of them (877) were disposed of by the Director of Social Services of the court's staff without the need for action by the judge himself, and another approximate three hundred (274) were dismissed by the judge. Of the remainder, most by far of the offenders (533 of the new cases) were put on probation. The next largest number (354 of the new cases) were committed to the legal custody of the Department of Public Welfare. This means that the younger ones were, for the most part, put in foster homes, and the teenagers were usually confined in a so-called Child Center for periods from nine to fifteen months. A comparatively small number (70) were committed to the National Training School. This is the reformatory. A somewhat greater number (105) were "waived" to the District Court, the court of general criminal jurisdiction. We shall see what that means in a moment.

Thus, in a thumbnail sketch, of about 2,300 children involved in charges of violations of law, the court waived about a hundred cases for trial in the regular criminal court, committed seventy to a youth reformatory, committed about 350 to the custody of the pub-

lic welfare authorities, put a few more than five hundred on probation and the rest were dismissed or otherwise disposed of.

With this brief background in mind I present four points. Point one is that juveniles constitute a particular and peculiar species of the genus human being. In respect to the applicability of criminal law, these people under eighteen years of age are in three classes by age. As we all know, children seven years or younger are conclusively presumed to be incapable of crime. This is an ancient rule of our common law. Those between eight and fourteen years are presumed to be incapable of crime, but this is a rebuttable presumption, rebuttable by facts. Generally speaking, youngsters up to age fourteen are not so hardened or sophisticated or intractable as are their elders. They pose problems, but they are more annoying than difficult, requiring more patience than ingenuity. The real problems of delinquency are posed by the fifteen, sixteen and seventeen-year-olds. These years constitute the hard core of the teen age. These are teenagers and the real problem of juvenile delinquency is a part of the teen-age problem.

Adults, no matter how loving and interested, rarely, if ever, appreciate the perplexities of a teenager; even less frequently do they understand his reactions to his perplexities. As a human being moves along from childhood into the passageway of years leading to full adulthood, the whole of life and of living rapidly unfolds before his astonished eyes. The physical world, trees and animals, the marvels of electricity, the well-nigh overwhelming realization of the existence of stars millions of light-years away, the sudden appearance on his face of a beard, the mysteries of that indefinable absorption called sex, the wonders of his own body—how it can run and jump and throw and swim—the dramatic changes in its make-up, the astonishing fact of his own mind—its sudden power to see and think and understand—all these pour in upon this fresh new consciousness. The vast implications of religion, of politics, some parts of some sciences, history, and then the vague nuances of manners come pressing in upon this young being as he goes in a few brief years from childhood to manhood. And among all these unbelievable facets of the world into which he is willy-nilly being pushed by the weeks and months and years, none is perhaps more mysterious than the fact of an organized society. Some people somewhere, whom he does not know, called the legislature, forbid that he shoot squirrels in the public park, or heave bricks through a neighbor's window or take an apple from a grocery store which has bushels of apples. What is this business of an organized community? It makes so little sense. Will somebody please explain it to him?

In the turmoil of their perplexities teenagers do the darndest things, as measured in an adult's guidebook. They swallow live goldfish, play "chicken" in motor cars, drive with their feet instead of their hands on the steering wheel, cut their hair long or short, or part long and part short, or flat or in pony tails; the boys grow beards, and the girls wear blue jeans; they fight just for the fun of it; they talk endless hours over the telephone; they are forever wanting to do whatever the gang does. They constitute a specialty in the medical and teaching professions.

And at the same time these boys and girls of ages fifteen, sixteen and seventeen are our hope, our joy, our greatest real asset. They are sweeter, gentler, braver, fairer, better behaved, more honest, more forgiving, less selfish and less arrogant than are a vast majority of their elders.

Good and bad, these complicated, fast-changing animals violate what the adult world denominates "the law."

The young delinquents in this age group differ widely. Their characteristics differ, and the causes of their difficulties differ. I shall not talk about the youngsters who are neurotic, mentally ill or otherwise incapacitated. They are indeed a serious problem, but it is a medical problem, a problem of treatment, not of law enforcement. They are not to be overlooked, but they are not within the scope of our present problem. As to the healthy majority of juvenile delinquents some experts divide them into adaptive and maladaptive.¹ An adaptive delinquent boy, they tell us, is relatively normal, rather bold, venturesome, aggressive, probably muscular and quite certain of himself. Violation of law is for him a more or less successful means of getting what he wants—prestige, money, good times, adventure, sexual experience. He has a good opinion of himself, is usually warm in his attitudes toward his associates, a braggart probably. The maladaptive delinquent, the experts tell us, is the opposite type. These boys lack confidence, are resentful, depressed, discouraged and bitter. No one ever wanted them, and they know it. They suffer from intolerable frustration. They hate society and all its parts. These are the explosive ones, the repeaters, the sullen ones. But, whatever may be the clinical nomenclature in the categorization of these young lawbreakers, it is obvious to any observer that they differ in characteristics, and differ radically. Only a fool would say that all teenagers are alike. They may be the same age, but they are not of the same nature.

¹See, e.g., Federal Probation (Dec. 1958); Jenkins, *The Nervous Child* 11 (1955).

My first proposition, then, in respect of the law and juvenile delinquency is that the problem is in major part a problem of the teen age and the teenager is a unique being of many peculiarities, good and bad. And, moreover, he is a most impressionable person, impressionable with both the good and the evil with which he comes into contact. This proposition is in direct conflict with the view held by some that teenagers are merely young adults and that teen-age law violators are merely young criminals, nothing more nor less. Such people, in my view, are just the Mr. Wilsons in a world full of Dennis-the-Menaces. Nevertheless they sometimes write laws and rules concerning juveniles.

My second point is that in this teen-age group are some hardened criminals, fully developed hoodlums even at that age. They are a minority in number, to be sure, but an acute feature nevertheless. Even to an amateur observer this one distinct grouping of delinquent juveniles is clear—the seasoned hoodlums and the others. There is small difficulty in determining the course to be followed with the youthful outlaws. They must be treated like the hoodlums they are. They, as I have just said, are a minority, perhaps not more than 20 per cent of the delinquent total, but they rate the headlines and arouse public emotions. A boy seventeen years old, weighing two hundred pounds, six feet in height, having committed two or three or four robberies at the point of a gun or assaults with a tire iron, is no child in respect to the law. An organized gang of terrorists is no infantile affair. Mr. J. Edgar Hoover, whom I so greatly admire, becomes positively emotional, even lyrical, when he discusses this group of young brigands. In a recent Bulletin he wrote:

“At the same time, the brutality of the crimes committed by teenagers certainly pales the all-inclusive, pampering, palliative phrase of ‘juvenile delinquency’ which is used today.

“Daily I am appalled by news items and reports which come across my desk revealing the disgusting and sordid picture of acts almost too obscene to be attributable to those who are still in the second ten years of their lives.

“Last summer, for instance, I read news accounts of five youthful gangsters between the ages of 15 and 18 who committed some of the most barbaric acts imaginable. Like a snarling wolfpack, the gang attacked two families in a park in a midwestern city. . . .

* * *

“Yet, there are still among us muddleheaded sentimentalists who would wrap teenage brigands in the protective cocoon of the term ‘juvenile delinquency,’ with emphasis upon all of its connotations of youthful prankishness.”

But nobody whom I know thinks these hardened outlaws should be treated as children with normal childish propensities, or coddled, or nursed, or treated in any wise other than as criminals in need of the discipline applicable to criminals of their type. Certainly I do not. I would heartily agree with Mr. Hoover that the term "juvenile delinquent" is a misnomer when applied to these outlaws, however youthful. Maybe the need is for a form of rehabilitative training; maybe it is a form a probation; maybe it is the ultimate of incarceration of the severest type; maybe the tough bitterness must be broken before the residue is curable. But, whatever the treatment may be, a tough hoodlum should be treated as the hoodlum he is, even though he is only sixteen or seventeen years old.

But all this is a far cry from saying that all teenagers are potential criminals or that every teenager who violates a law is a hoodlum. Most of these transgressing youngsters are not hoodlums or criminals at all. They have yielded to the incomprehensible complexities of their time of life or to pressures from circumstances not of their making or under their control. They are venturesome, they are rebellious, they are resistant, they are careless, they are impudent. They are often spoiled. They are Tom Sawyers showing off before Becky Thatchers in an automobile world. They have strange inferiority complexes. They suffer from the normalcies of adolescence. But many of these perfectly normal boys and girls who become for one reason or another enmeshed in the toils of law enforcement machinery are inherently part of the hope of the Nation. A boy who out of sheer bravado smashes a store display counter can oftentimes be transformed by realistic treatment into an eventual community leader toward a better life. He starts out with spirit and courage and imagination. He needs to be taught that ours is an ordered, which is to say an organized, society and that he is destined to live in it whether he likes it or not.

The problem in respect to young hoodlums is how to sift them out from the others. How should a teen-age criminal be identified, and who should do the identifying? In Washington we have worked out what I consider an excellent system in this phase of the problem. Our Juvenile Court judge met with representatives of our court of general criminal jurisdiction (the District Court) and our prosecuting attorney, and together they evolved a set of criteria that determine when a given case should be transferred from the juvenile authorities to the court of general jurisdiction. Such criteria include repeated offenses, unusually vicious acts, unusual sophistication and purpose, unusual maturity, and so on. Thus the hardened criminals are sifted

out from the others by publicly known standards, and once separated they are given the treatments available for adult law violators in the regular criminal courts. Such a transfer is called a "waiver" because technically the Juvenile Court waives its jurisdiction.

There is a school of thought that all sixteen and seventeen-year-olds who come athwart the law should be tossed into the slot designed for criminals—to be booked, fingerprinted, mugged and presented to grand juries. This school operates under the slogan, "Lower the age limits for juvenile courts." I oppose this thesis with all my heart. The premise of these outcries is that such a purse-net seining operation would dispose of the young hoodlums. And so it would, but it would be an operation so wasteful of civic usefulness and so destructive of much good character as to be scandalous. The great majority of this age group, I repeat and insist, are far from being criminals or, indeed, hardened in any respect. It would be worse than vicious, it would be stupid, to treat all erring teenagers as though they were criminals, to stamp their names on the criminal record books, to brand them with a charge and a number as indelibly as if with a branding iron, to throw them into prolonged close association with case-hardened criminals to learn the ways and the philosophies of outlaws, to destroy or ignore their potentialities for good citizenship. We treat our wild life better than that. You are not allowed to kill all the fish in a river to get a few carp, or to poison a whole feeding area to destroy a few hawks. It is hard for me to imagine a civilized proposal to label as criminals young people who are not criminals. But that is precisely the realistic result of the "lower-the-age-limit" proposal. The sane treatment of the young hoodlums is to sift them out from among the juvenile delinquents and then treat them as the criminals they are.

My third point is that law enforcement in respect to juveniles has two overall objectives, both difficult. Primarily these are tasks for parents and teachers. But when delinquency progresses to the point where acts in violation of law are actually committed, the law and its officers become involved. The first objective is to curb the lawlessness, whether it be deep-rooted or merely experimental. One thing is clear, certain and indisputable. Adolescents must be taught that they are irretrievably destined to live in an organized society, that there is a power called authority and that authority, sometimes called the law, must be obeyed. The time to do this teaching is before the adolescent violates the law. But some adolescents do not learn then. So they must be taught after they have transgressed a rule. These devils, both big and little, must be curbed. The public will not and

should not permit youngsters, no matter how underprivileged, or on the other hand, how privileged, to choke passersby on the street, steal tires off cars or set fire to closed warehouses. This is a must. The public is entitled to be protected against such depredations, whether committed by habitual outlaws or by first offenders, and, insofar as first offenders are the perpetrators, the public has the right to have repetition prevented. The National Probation Association gives this protection of the public as the primary obligation of juvenile courts.

The second objective is to save for the community as much of this potential usefulness as can be saved, to preserve these teenagers for good citizenship. The ordinary teenager who comes into conflict with the law needs a chastisement, custom-made to fit him and his offense, sufficient to make violation of law an unpleasant recollection, and then he needs a helping hand to make easy his development into an asset to the community. Any other objective on the part of the law, insofar as these youngsters are concerned, would be a complete contradiction of our whole concept of society and the function of the law in respect to it. The basic objective of law enforcement in respect to juveniles is to impress the lesson of law, authority and an ordered society. The statement of the objective is easy; the accomplishment is difficult almost to the point of impossibility.

Our teen-age group falls into parts according to source. Many of them come from homes where there is a father or a mother or both, who are indeed parents and capable of exercising parental authority. Here the law has allies. Papa or Mama is happy to take jolly good care of their errant junior. Next, many of these youngsters come from broken homes, where considerations other than the well-being of the offspring have priority on the family agenda. Here the law must apply a measure of its sternness to one or the other of the delinquent or dilatory parents. This is sometimes a difficult problem, but by no means insoluble. The law can be rough with adults.

One of my firm beliefs, derived from a lifetime of close contact with youngsters, is that rebellious youth learns more from a short, sharp chastisement than from long, laborious philosophical beratings, however learned. A sixteen-year-old boy learns more righteousness by a sudden deprivation or a pain than he does from a dozen dissertations on the iniquities of the new generation. These children need to be chastised, with a degree of severity proportionate to the offense and the spirit with which it was committed. Maybe a deprivation of some sort, or a restraint, or a penance. But it should be quick, positive and decisive. Such treatment is possible and practical if you are operat-

ing upon a background of a home, however poor a sample, and some minimal standards of decency and morals in the child's upbringing, derived from home or school or church.

But then we reach the uncrackable inner shell of the problem of juvenile delinquency in our time. What do you do with a boy or girl who has no home? Many—very many—of these erring youngsters have no home at all. They know no family worthy of the name. Born out of wedlock or deserted before they realize they are in this world, they are passed around from hand to hand or pummeled about incessantly in their efforts to scrounge their daily food or to sneak a night's sleeping place. What do you do with a boy or girl who violates the law but who has no home or responsible parent? I do not know the answer, but I know that this is the hard, insoluble heart of the problem. Obviously we can put these children in institutions. But what institutions? And for how long? For what purpose? With what treatment? What substitutes for love and affection and a measure of security? How afford them a measure of hope? How make citizens out of this material? What are you going to do with the boy or girl who has no father or mother, or whose father or mother, or both, are alcoholic, shiftless, uninterested? A boy aged fourteen who is already a confirmed drug addict? A girl who at fifteen years is already an accomplished prostitute? Or a boy who at seventeen has been arrested a dozen times for housebreaking? How do you correct or chastise a boy or girl who has nothing and therefore can be deprived of nothing? What do you do with a child who has never received in his whole lifetime one single word of affection or encouragement? How do you teach such adolescents that justice exists—that justice is fair, firm, considerate, interested?

And let me carry this inquiry one step further, as a tangential venture into delicate territory. What do you do with a child whose well-to-do father brags about his cheating on taxes, or about a successful swindle of a customer, or about the schemes by which he violates the antitrust laws or the traffic laws? Or a child whose teachers regard cheating on exams as a normal procedure in life?

And so, in summary, my third point has been that the objectives of law enforcement in respect to youngsters who are not already hardened criminals, hoodlums, are: (a) that their lawlessness be curbed and (b) that they be molded into good citizens; and the point is further that these objectives are difficult of achievement.

My fourth point is that the rights of these young people are particular and peculiar. All of us have studied that category of legal

rules and principles which appears in *American Jurisprudence* and *Corpus Juris* under the index heading, "Infants." Persons who are there treated as Infants are denominated here as "Juveniles." The applicable law, as we all know, is particular and peculiar.

Nevertheless I have heard it said that the Bill of Rights knows no age groupings; that the rights to life, liberty and property are the same for all people of all ages; that it would be preposterous to say that the great constitutionally protected freedoms are subject to rigid arbitrary age limits. This sort of thing, if taken seriously, can be tragic. The rights of an infant are not the same as, or even similar to, the rights of adults. One of the great rights of liberty is surely the right to vote. Minors cannot vote. Another right of liberty is the right to go where you please as you please. An infant under sixteen cannot drive a car. A juvenile can be compelled to go to school, surely a restriction upon his free choice of activity. He can be denied the right to work. He cannot marry. And as to property the principle is clear and simple: He cannot own it clear and free; his ownership is subject to his own repudiation when he is no longer an infant. The basic right of a juvenile is not to liberty but to custody. He has a right to have somebody take care of him, and if his parents do not afford him this custodial privilege the law will force them to do so. The whole field of the law of infants and property is so involved as to constitute a happy labyrinth for devotees of the complicated. In short, the rights of infants in respect to liberty and property are as different and distinct from those rights of adults as are hominy grits from codfish cakes.

What about bail? Indictment? Counsel? Confrontation by witnesses? Self-incrimination? Jury Trial? Public Hearing? The courts of this country are in well-nigh unanimous agreement that a proceeding against a child in a juvenile court is not a "criminal proceeding" within those provisions of the Constitution which prescribe certain standards and procedures for "Criminal proceedings." In *Pee v. United States*² our Court of Appeals cited to that proposition decisions of the highest courts of forty-two states, Hawaii (not then a state) and the District of Columbia. The proceeding in a juvenile court is not a criminal proceeding; but let us be careful to note that this rule does not apply to every proceeding which might be labeled "Juvenile Court." If the court is just a regular criminal court for juvenile offenders, it is a criminal proceeding. "Juvenile Court" in this context means a tribunal and staff organized and operated upon the

²107 App. D.C. 47, 274 F.2d 556 (D.C. Cir. 1959).

philosophy and program of a juvenile court. Those qualifications I shall describe in a moment. Right now we affirm that a juvenile court proceeding in a juvenile court is not a criminal proceeding. As to that there is no doubt.

But an infant in court is entitled to fair play; he is, in other words, entitled as of right to due process of law. The point at this stage is that the due process to which an infant is entitled is a process suitable to his status and his substantive rights. It is not the due process to which an adult is entitled. Indictment is unknown in the process for a juvenile, as too harsh, too destructive for the sort of treatment of the young our society wants. The right to release from detention pending investigation and trial depends, in a juvenile court philosophy, upon the availability of a home for the protection of the youngster and then, in sequence, the need for a foster home or of governmental custody of some sort and the nature of the child himself. It is not dependent, as is true with respect to adults, upon the ability to furnish a dollar-value security. The right to counsel is not an indispensable right in every case of a juvenile of whatever nature. Rather, in so far as children are concerned, as the court pointed out in *Shioutakon v. District of Columbia*,³ if personal liberty is at stake in a given proceeding and serious questions of a legal nature must be answered on the child's part, counsel is an essential factor in fair process. The sum of it is that juveniles have particular and peculiar legal rights, and they require particular and peculiar treatment.

Thus I come to my thesis. It evolves easily and inevitably from my four points. The thesis is that law enforcement for juveniles requires special processes and special personnel. In other words, I support the modern philosophy that the juvenile court is not just a criminal court for juvenile offenders but a court and a court staff designed for and devoted to the treatment of teenagers not in the hoodlum class and their younger brothers and sisters who run afoul of the law.

The threshold problem of the law and the juvenile is a problem of evaluation and classification. The initial puzzle is a vast multiplication of the difficulty of a father with his son. What sort of youngster is this one I have on my hands? To deal with juveniles you must first decide what sort of juvenile each one is. And then you must decide what to do with each particular youngster. Who can analyze a teenager? Only a specialist. Who knows how to treat teenagers who are

³98 App. D.C. 371, 236 F.2d 666 (D.C. Cir. 1956).

caught in the toils of the law? Only a specialist. Teenage is a specialty problem in every profession and science. A judge and a supporting staff with trained insight into the characteristics and potentialities of youngsters are required to sift out the hoodlums; to spot the bad apples in the barrel, as it were. None but specialists could hope to achieve the joint objectives of law enforcement in respect to these young people. The regular criminal courts, designed to deal with the stark, grim realism of crime and criminals, attuned to the rules of that stern process, are not equipped to apply the refinements of the rules applicable to infants, or to juveniles.

What sort of machinery is needed for this task? The answer is a wide organization of specialists, an expert staff, the whole headed by a fully adequate bench of specialist judges. Of course, in positing an extensive organization I am thinking about cities. But the same principle, even if not in the same size, applies in towns and in counties where there is a real problem of juvenile delinquency. At the ground level of the structure sympathetic police officers attuned to the complexities of juvenile delinquency are needed. These are the men who first come into contact with these youngsters, often at the very scene of their outlawry. The police can do yeoman service in preventive medicine and in separating the out-patients from those needing other treatment. Next should be a corps of specialists in child behavior. We often call them social workers, or welfare workers, or child experts. But these labels have acquired connotations, largely undeserved, I think. These people need a considerable knowledge concerning the make-up and the inner functioning of the amazing adolescent apparatus. As the song goes, "You Gotta Have Heart," but you also have to be stern.

Then comes a competent court staff—clerks, lawyers, marshals and the like. At the apex of the structure are the judges. Work with juvenile delinquents requires judge-power, and plenty of it. It requires judges for a number of reasons. As I have already pointed out, the commitment of a juvenile, his punishment and his removal from the custody of his parents, if any, are acts of judicial power. Moreover in these cases youngsters first come into contact with the law in its more serious phases. The lesson they there learn is indelible. Their impression of the law, the voice and hand of the ultimate authority in the community, is here and now crystallized. It should be the picture of a judge, a measure of formality, a deliberate carefulness, a great portion of consideration, and above all an obvious consciousness of the dignity and power of the law.

The problems of minors and the law are difficult problems, not to

be solved by hysteria, or quick brilliance, or rubber-stamp disposition, or en masse; even less so by brutality or ignorance. They are to be solved by inexhaustible patience, firmness and gentleness, perseverance, vision. The proper disposition of complaints against juveniles takes time—time for each separate case. These are not Monday-morning drunks to be pushed through a grinder—"ten days. Next case." Only a stupid community treats its juveniles as so much round steak to be ground. They are distinct and exceedingly delicate humans of possible great usefulness and great accomplishment. This much we surely know. And we know that juveniles require some measure of some sort of law enforcement. My thesis is that, if an organized society is to remain organized and civilized, in this day and age it must have among its law enforcement agencies an agency for juveniles which is expert, firm, fair, dedicated, careful, intelligent, designed and operated to teach these erring kids the never-to-be-forgotten lesson that the rules which make our society safe and productive must be obeyed. The hoodlums among them ought to be sifted out, not coddled or treated as infants but put in the processes designed for the treatment of criminals. The tasks of the law in respect to the remainder of normal robust, rambunctious teenagers are to protect society against them with emphatic measures, to impress upon them indelibly the concept of an ordered society, and to retrieve every ounce of usable material from this great mine of golden ore. These tasks take dedicated specialists, dedicated judges. They are specialty tasks of vast public importance.

II

The Problem of the Indigent

This section concerns the problem of the criminal law and the indigent. I shall discuss only one phase of that problem—representation by counsel. There are some recent developments and also some undeveloped suggestions in substantive law in this area, but these latter I shall not be able to touch. I shall deal with the matter principally as it presently occurs in the federal judicial system, but state courts and state bars face the same or similar puzzles.

The Sixth Amendment to the Federal Constitution provides that in criminal prosecutions the accused shall enjoy the right to the assistance of counsel for his defense. This was originally understood to mean that, if an accused in a criminal case had, or could get, a lawyer, he was entitled to have that lawyer appear and represent him. He merely had a right to have a lawyer assist him in his defense. In those days the thought that an accused without money and without any other means of securing counsel ought to be supplied with a lawyer without cost to him was regarded as merely a humanitarian impulse aroused by civilized society's concern for its unfortunates. Like so many of its philosophical compeers, it was ideal but unreal.

Then, in 1938, came *Johnson v. Zerbst*.⁴ In that case the Supreme Court held that counsel for the defense is a requisite to a court's jurisdiction to enter a judgment of conviction. A paragraph from that opinion can well be quoted because it is probably the most important paragraph in existence in this field of the law. The Court said:

"Since the Sixth Amendment constitutionally entitles one charged with crime to the assistance of counsel, compliance with this constitutional mandate is an essential jurisdictional prerequisite to a federal court's authority to deprive an accused of his life or liberty. When this right is properly waived, the assistance of counsel is no longer a necessary element of the court's jurisdiction to proceed to conviction and sentence. If the accused, however, is not represented by counsel and has not competently and intelligently waived his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life or his liberty. A court's jurisdiction at the beginning of trial may be lost 'in the course of the proceedings' due to failure to complete

⁴304 U.S. 458 (1938).

the court—as the Sixth Amendment requires—by providing counsel for an accused who is unable to obtain counsel, who has not intelligently waived this constitutional guaranty, and whose life or liberty is at stake. If this requirement of the Sixth Amendment is not complied with, the court no longer has jurisdiction to proceed.”

The new form into which the problem of legal representation for the indigent was thus cast has not been fully appreciated, I think, by the bench, the bar or the public generally, as represented by its legislators. In the federal system today a lawyer for the defense is an essential element in a valid prosecution.

This rule applies, of course, only in the federal system, since that is the area controlled by the Sixth Amendment. But in January, 1961,⁵ on a petition for habeas corpus involving a conviction in a non-capital case in a Florida state court, a unanimous Supreme Court of the United States held that if the allegations of the petition were true, the failure to appoint counsel for the defense violated the due process clause of the Fourteenth Amendment. The concurring opinion in that case states succinctly the state of the law on the point.⁶ Moreover, as an Appendix to the opinion in the *McNeal* case shows, thirty-three states, Virginia among them, now require the appointment of counsel in all felony cases, and in at least ten more states counsel is required in capital cases. So the problem of counsel for indigent defendants in criminal cases exists and is growing in difficulty in all the federal courts and in a considerable majority of the state courts.

If counsel must be provided in the trial of an accused without funds to engage a lawyer, the next question is how to provide counsel. Of course, where the cases are few the problem is small; but where the cases are many the problem is large. Therefore it is greater in populous counties and in cities than it is in rural communities or in small towns.

May we look at the figures in the District of Columbia, that being the only jurisdiction with which I am personally familiar? In 1955 the Bar Association of the District of Columbia appointed a Commission of distinguished persons to study and report on this problem. That Commission, with finances at its command for a staff, spent two years upon its task. Its report, almost 200 printed pages, is one of the all-time outstanding documents in this field. It found that the

⁵*McNeal v. Culver*, 365 U.S. 109 (1961).

⁶The key cases are: *Powell v. Alabama*, 287 U.S. 45, 68 (1932); *Betts v. Brady*, 316 U.S. 455 (1942); *Chandler v. Fretag*, 348 U.S. 3, 9 (1954); *Cash v. Culver*, 358 U.S. 633, 636 (1959).

annual appointments for indigents required in all the courts in Washington total 7,500. This staggering figure is made up of: 88 appointments in the Court of Appeals; some 2,600 in the District Court, which is our court of general jurisdiction, about 1,000 of these latter were in criminal cases and the remainder in habeas corpus proceedings, so-called 2255 cases,⁷ and mental health matters; some 4,500 in our Municipal Court, which has jurisdiction of offenses where the sentence may include imprisonment up to a year; and some 300 appointments in the Juvenile Court. After the recitation of these figures it would be anticlimactic to say that Washington, D.C. has a serious problem of major proportions in this matter. And I venture to assert that other populous communities have correspondingly grave perplexities in respect to it.

The practicalities thus faced are divided sharply by the natures of the several proceedings in which the accused may be involved. In an appeal in the Court of Appeals, ample time is available for the selection of counsel and for his preparation of the case. Legal points are the subject of his work, and so legal research is his chief duty. Almost any lawyer with intelligence and industry can present a case on appeal. Many lawyers engaged in specialties, say taxes, or communications or antitrust do excellent work when undertaking to analyze, research and present a criminal case on appeal. Indeed some of the outstanding presentations of these cases that I recall in our court have been by such lawyers. Moreover, almost any lawyer likes to be appointed once in a while to a case in the appellate court. If he is young he likes the experience. If he is old he gets a thrill out of being able to render unpaid public service and to recall to his active nostalgic attention the plight of accused persons and his ability to battle in their behalf. There are difficulties in respect to counsel in the appellate court, but they are relatively minor.

In the trial court of general jurisdiction, where felony cases under indictments are tried, the practical problems are different from those in the Court of Appeals. There is still some measure of time available to an appointed lawyer. An indictment is returned, and counsel is straightaway appointed. The right of his client and the urge of the court is for a speedy trial, but he is entitled to enough time to prepare—to seek witnesses, track down his possible defenses and otherwise make ready. But in these proceedings familiarity with the courtroom is well-nigh essential. Once under way, a criminal trial moves along without noticeable interruption until it is over. Decisions to

⁷I.e., motions made under 28 U.S.C. § 2255 (1958).

be made by counsel are frequent and the necessity is often wholly unexpected. The trial of a felony indictment is really no place for a lawyer ill at ease in a courtroom contest.

In courts of limited jurisdiction, sometimes called the police court, or the magistrates court, or, as in Washington, the Municipal Court, where misdemeanors are tried and preliminary hearings in felony cases are held, many important cases are heard. The great characteristics of this court are the vast number of the cases and the necessity for speed. In our Municipal Court the serious criminal cases go to a branch of the court called the United States Branch. In this branch some 8,000 cases a year are tried, which means an average of thirty cases a day if the court sits five days a week for fifty-two weeks. Our Commission estimated that seventeen appointments of counsel for indigents are made every day in this court. In a vast majority of these cases one of the prime necessities is speed of disposition. If the offense is petit larceny or simple assault, where the probable consequence is probation or a small fine which might be supplied by a friend, relative or employer, or even a short term in jail, the accused wants to get it over with and get back to work. The court must move the load along. There is no time to telephone lawyers or to wait around while somebody makes up a slow mind.

In other tribunals different conditions obtain. The Juvenile Court, the Mental Health Commission, the Coroner and the United States Commissioner all have the problem of indigent representation. We cannot stop here to picture the details of their particular proceedings. This reference to them will be enough to identify them and to call attention to their peculiarities.

In different jurisdictions in this country several different methods are employed to insure legal representation for these people. One system is a full-time, paid government officer who acts as counsel for the defense. This is the public defender. It is a method vigorously supported by many and in use in many places. But there are objections of great force to this way of doing the task. For many years, and even still with less vigor, I oppose it. There are two grounds for the objection. The first is theoretical. It is that a man's defense ought not to be in the hands of the same government which is prosecuting him. If he is entitled to a defense, it is a defense unrestricted by the prosecuting government in any way. The second objection is practical. It is hard to see how such a public official could fail to be pressured by the weight of his burden. He rarely, indeed never, has a staff comparable in size to that of his opponent, the prosecutor. And this opponent has at his command the entire facilities of the police for investigation

purposes. The case for the state is usually pretty well prepared before it is given to the prosecuting attorney, whereas the poor defense lawyer is thrust without notice or preparation into the controversy when it is hot and ready to go. Nevertheless the calendar must move along, and it is no part of the function of the defense to delay trials. So the pressure to plead a great number of accused guilty on the best terms obtainable must indeed be terrific. A cynic at our bar recently described a public-prosecutor-public-defender system as a sort of professional wrestling match, a good show but no contest, both boys from the same stable. But this is a cynic's view and is not accurate. The system undoubtedly works well under many circumstances; it is a necessity in many places; and even I am happy to admit that it is better than no system at all.

On the other end of the scale of desirability, is hit-or-miss appointment by the court, without either compensation or reimbursement to the appointee. Where the calendar is light and the appointments few, this system is satisfactory. The bar has pride in discharging this part of its public responsibility, and when the job is not prohibitively excessive the bar does it willingly, cheerfully and skillfully. But where the calendar is heavy and the cases many, the reliance upon haphazard appointments of private practitioners, without more, is impossible as a method. In Washington we tried some time ago a plan of volunteer attorneys. Many volunteered, but when the burden became apparent, the list dwindled to almost none. Few lawyers object to a criminal case at their own expense of time and out-of-pocket expenditures once every couple or three years. But our Commission noted that more than thirty of the lawyers on our volunteer list had three or more appointments in the last six months of the year under study. The system was a failure.

In between these two extreme systems is what I deem to be a most happy medium. It stems from the Commission study. Backed by expert yeoman service on the part of members of the bar and the bench, and assisted by some interested members of the Congress, we succeeded in Washington in setting up a semi-public, semi-private system. Its name is the Legal Aid Agency. We have a Board of Trustees consisting of seven lawyers in private practice designated by the chief judges of the several courts and the top official in our local executive branch of government (the President of the Board of Commissions). The Trustees serve without pay. Under them is a full-time, paid Director, and under him is a paid staff composed of lawyers, investigators and clerks. They have offices in the Courthouse. They are paid by appropriations from the public treasury, but they are responsible

to the private bar as represented by the private lawyers who are the Trustees. It is a necessary part of this plan, due to paucity of funds, that the Director is empowered to use for defense work not only his own paid staff but also the available pro bono publico services of the members of the entire bar. But we hope some sort of order, some sort of system, can be brought out of the chaos that continues to exist. The Director may be able to work out, with the cooperation of the Bar Association, a schedule whereby lawyers willing to take part in the program may specify well in advance the time, the amount and the nature of the work they are willing to do. The idea is that the full-time staff should bear the hard core of the day-by-day burden of this enormous load of cases and that the private bar should assist to the full when called upon by its own members who are the Trustees.

This system appeals to me strongly. The lawyers appearing for these people are responsible to no government officer. The finances are not subject to the fluctuation and exhaustions of public drives for funds. The burden is borne by the public treasury, which is proper since the services of these lawyers for the defense are, under the rule of *Johnson v. Zerbst*, necessary to complete the court for the purpose of trial. And the system is fully flexible to meet the varying pressures of heavy calendars, in that it can utilize varying numbers of members of the bar in private practice as the demands of the moment may be. The system also includes investigators to aid in the preparation essential to defense work.

The difficulty with all the systems yet devised for jurisdictions where the defense of indigents runs to large numbers of cases is money. Money to pay, or to supply needed assistance to, or even to reimburse, private lawyers who undertake the task; money to pay full-time defenders; even money to operate a system like ours in the District of Columbia, employing paid counsel only in part. It is a curious and most interesting fact that Congress appropriates some \$18,000,000 a year for medical care for the indigent in the District of Columbia but almost flatly refuses to appropriate anything for the legal necessities of these same people. For many years our Bar Association sought earnestly and expertly to get Congress to make provision for some sort of compensation, almost nominal though it might be in the normal scale of the marketplace, for the lawyers in private practice who agree to undertake this work from time to time. Despite some support among members of Congress, they never could get a bill through a Committee. And the Department of Justice,

backed by large segments of the national bar, has struggled for years without the slightest success to obtain public defenders even on a minimum basis for the federal courts. When we went to the Congress with the report of our Commission, we asked, as the Commission had recommended, for \$225,000 to care for the defense in an estimated 7,500 cases. This represented fourteen staff attorneys and twenty-five volunteers at \$25.00 a month, plus secretarial and clerical help. Congress gave us \$75,000. This meager amount furnishes for the Legal Aid Agency a Director, and, as of now, three staff lawyers, three investigators and three clerk-stenographers. Nevertheless the Board of Trustees has gone cheerfully to work to make these few dollars stretch as far as they will go. All of us are hoping.

Why is so much money so easily obtained for medical care for the poor and so little money obtainable by any sort of effort for their legal care? I sometimes think it is because the doctors are better politicians than are we lawyers. To be sure, a majority of all legislators are lawyers, but maybe familiarity breeds contempt. Maybe the trial of a law suit seems a simple matter to a lawyer-legislator, whereas a surgical operation or a medical diagnosis appears an awesome matter requiring commensurate compensation. And, moreover, when a man's doctor tells him thus and so, a mysterious aura surrounds the statement. What the doctor advises, I do. But a mere lawyer is just another fellow like me. Maybe our medical brethren, no mean workmen in the practical phases of life, make full use of this difference in viewpoint. But of course the difference in result is really a difference in the political appeals of the two subjects. A politician who supports a measure for the relief of the sick is hailed as a public servant par excellence. He is even following Biblical advices. But a politician who advocates a measure of assistance to criminals, or those accused of crime, makes no votes by that attitude; indeed he partakes of the nature of a public enemy; at least he sympathizes with hoodlums and violators of the law. Save for a few instances, such as Daniel in the case of Susannah, the Bible contains few, if any, laudatory accounts of lawyers; indeed the opposite is perhaps true. So a bill for money for relief of the indigent sick presents an attractive cause, honey for voters; a bill for the protection of the rights of those accused of crime is anathema at the ballot box. I do not know what we can do about it. I only know that our doctor friends get money when they ask for it; we whistle to resounding silences.

For purposes of availability for the defense of criminal cases, the private practicing bar is divisible into parts. In the first part, of course,

is the so-called criminal bar, *i.e.*, the lawyers who specialize in criminal cases. These are few in number. Among them are some—not too many but not too few—who are able, ethical, industrious and abreast of the law. But in the lower echelons the character of the practitioner is less than optimum. As one astute young observer said to me, “These men have all been influenced by the impact of their environment.” The fact is in Washington, and I suspect it to be true everywhere else in the country, that the bar specializing in criminal law is totally inadequate in numbers, if in no other respect, to defend all the indigents accused of crime.

Next are the young lawyers. And the demonstrable fact is that, by and large, young lawyers, fresh come to the bar, give the indigent criminal the best representation he gets, if the system is a volunteer, or unpaid representation. These young lawyers are eager, bright, industrious, aggressive and fearless. When they undertake to defend an indigent criminal, they really defend him. They may lack experience and courtroom skill, but they work, and generally they love it. Nevertheless, quite clearly it would be viciously unjust as a major program to place the burden of defending indigents upon young lawyers as they arrive at the bar. Not only would it be unjust to the junior bar; it would be equally unjust to accused people for the community to say, “We will confide your defense to the inexperienced.”

Next is the group in the very upper tier of practitioners of the law. Here are the men who are successful, able and really skillful. These are the men who advise on great matters. They are giants in the practice. But they have not tried a criminal case since they were youngsters just come to the bar. Oh, yes, they remember that day twenty, thirty or forty years ago when they cross-examined that cop and tripped him up. But they have not seen the inside of a courtroom since before the *Wan* case,⁸ let alone *McNabb*⁹ or *Mallory*.¹⁰ They are willing appointees to an occasional case, and they are wonderful in an appellate court. But before a jury in a criminal trial they are neophytes.

From which group, then, should the court appoint lawyers to represent indigents accused of crime? Well, the judges appoint some of each—sometimes from one group, sometimes from another. The accused gets defense of high character and superb industry. But the question projects itself: Is this system—the haphazard selection from

⁸Ziang Sung Wan v. United States, 266 U.S. 1 (1924).

⁹McNabb v. United States, 318 U.S. 332 (1943).

¹⁰Mallory v. United States, 354 U.S. 449 (1957).

the bar—satisfactory to meet the serious obligation of the bench, the bar and the community in populous areas?

The program of relying upon volunteers—lawyers who come forward and without invitation or persuasion offer to undertake the tasks of this representation—is, as I have already briefly said, unworkable and wholly impractical. Relatively few come forward and, when those who do come forward find themselves inundated with assignments, the list dwindles to nothing in short order. When no funds for compensation are available and the court must make assignments from the bar, the only course for the judges to follow is to appoint from the lists of bar members, regardless of acceptance or willingness, and compel compliance—not by harsh means, of course, but by the gentle compulsion of a court's call to public professional duty. I must keep repeating, lest the limits of the subject be forgotten even momentarily, that I am not talking about less populous jurisdictions where a case or two every term of court is no great burden and is well cared for by willing members of the bar usually attendant upon sessions of the court. I am talking about jurisdictions where these appointments run into tens or even hundreds per week. Reliance upon volunteers or even upon unresisting conscripts in these sections of the country, especially in the cities, is not a system in which the bar can take pride.

The fact of the matter is that the bar of cities and more populous counties is faced with a stark, unadorned, unconditional choice: It must either supply the manpower to perform the tasks of this representation, or it must obtain from legislatures the money to pay for the representation. To the extent that it does not do one, it must do the other. The money may be for the salaries of adequate full-time staff attorneys or for compensation, at least to the extent of complete reimbursement for private attorneys who do this work. There is no such thing as "free" legal time and talent; the lawyer doing the work pays if nobody compensates him. The time is past when advice and counsel for all defendants in serious cases can be considered mere day-dreaming by academic dogooders of no practical content. The task is a practical one, and it is not in the dim future; it is here with us now.

The bar, I repeat, has a stark choice: put up the talent or get the money to supply the talent. My own idea is that the financial burden is properly a community burden, just as is the burden of medical care for the indigent, but the needed funds for our purposes are not easily forthcoming. The bar itself ought to see to it that the legislatures supply the needed money. That the bar has this re-

sponsibility may perhaps be a shocking concept. Money with which to pay lawyers is perhaps an unbecoming wish on the part of lawyers. But this, I insist, is a practical, unemotional problem. Legal time and talent cost money.

And so I come to a thesis. It is quite simple. It is that the organized bar ought to assume responsibility for this problem and not only undertake but achieve a solution. Note that I do not say the bar ought to undertake the representation of these people. The bar does that cheerfully. But the matter is not that simple. It is a problem not only of great size but of many complexities. There are a score of unanswered points of difficulty. To be specific I suggest that the American Bar Association and our state bar associations are responsible for this representation and all its complicated facets; that the associations ought to assume that responsibility; they ought to say, "Yes, this job is ours. We here and now undertake it." I say the bar ought to solve this problem. By that I mean work it out. I mean the bar has not met its responsibility by discussing the subject, or studying it, or resolving on it or making reports, however splendid. The bar ought to get results in actual concrete terms. I am fully aware of the American Bar Association Committee on Legal Aid Work and of the important policy statement approved by the House of Delegates in February of last year. I know about the wonderful work of the National Legal Aid and Defender Association; and of the landmark report of the Bar Association of the City of New York; and of the various Congressional hearings and studies and reports. What I am saying is that what has been and is being done is not enough. We have been viewing this matter in the same interested but detached fashion that we as an organized professional group view the Connally Amendment, or Communist infiltration or judicial legislation. Let the organized bar establish means and methods by which lawyers are on their feet in the courtroom defending these people. My thesis is that the representation of indigents in criminal cases is a direct responsibility of the bar, a burden it ought to assume, a problem which it ought not merely study but solve, and solve not merely in words and phrases but with physically observable actions and money.

Note that I say "problem"—the bar should assume responsibility for a solution of the problem. Representation of the indigent in criminal cases is a problem. It is not merely a cause or a program. Indeed it is a group of problems, each one difficult. I tried to find a synonym to vary the monotony of "problem" and to vivify my thesis, but I found no satisfactory one. Webster gave me only mystery,

enigma, riddle, puzzle and conundrum. I would like a word indicating both a puzzlement and real substance, a puzzlement of actualities rather than of abstractions.

I suggest that this large problem is a composite of a number of smaller ones, and I mention only a few. First is the question of what, for these purposes, is an indigent. Or, to avoid the deep sands of semantics, let us put it this way: Under what financial circumstances is a person accused of crime entitled to legal service at no cost to himself? Of course a person with nothing in any way, shape or form is indigent. But suppose that, although he has no ready cash, he has a good job. Or suppose he has assets such as a car, a television set or a refrigerator. Suppose he has a good job and some cash but has a wife and children. Suppose he has no readily convertible asset but has an equity in a home. Suppose he has in his pocket a hundred dollars but owns not another sou. Suppose he earns plenty but spends more and so is always in debt. Suppose he has nothing himself but has a wealthy father, a thrifty brother or a kindly employer or friend. Suppose he can make no present payment but could make a satisfactory installment arrangement. Suppose he cannot pay a fee commensurate with the service needed but could pay a small proportion of it. Suppose his wife works and really supports the family and is willing, if need be, to shoulder the burden of his defense, even though for what reason no objective observer can discern. The District of Columbia Legal Aid Act says "unable to pay modest attorney's fee." What does "unable to pay" mean? And what does "modest fee" mean—assuming the statute refers to a modest fee and not to a modest attorney? The fact is there are no authoritative, or generally accepted, standards for evaluating indigency for these purposes. There is no guidebook for determining when, under a variety of financial circumstances, the community should supply legal service without cost to a person accused of crime.

Indigency, a committee of our Junior Bar has said, is a function not only of a defendant's resources but of his debts, dependents and other obligations, and of the probable costs of his defense. This is a suggested answer to what is perhaps the basic question at this point. Should a man's right to counsel without cost be determined by his own personal financial ability alone, or should the available assistance of family or friends be taken into account also? Our Junior Bar Committee proposes as a rough thumbnail test, at least as a starting point: Can the accused make bail? This test cuts across many baffling inquiries, and it rests upon a substantial base. If an accused

can command resources sufficient to supply security to a bondsman, he can command enough to produce a modest lawyer's fee. Of course this is only part of the puzzle, but it indicates the nature of the matter.

Frankly, I have no firm view on what type or degree of indigency justifies a defense at public expense. I am sure that a person accused of crime who has means with which to compensate counsel ought not be allowed to saddle his trouble upon the taxpayers. And I am also of fixed opinion that the organized bar ought to formulate acceptable rules for this community obligation. The organized bar ought to produce a set of standards for this measurement, and then it ought to cause the establishment and use of those standards throughout the country. The first part of this task is difficult; the latter part is more difficult.

The second constituent problem is how to administer standards of indigency if we had suitable standards. Even if criteria be known, how ascertain the necessary facts? Here is an accused man in jail awaiting indictment for an alleged felony, or trial for an alleged misdemeanor. He says he has nothing and cannot pay. How can his claim be checked? Who should do it? The time, if the representation is to be early and effective, is short—maybe a few hours. A general affidavit, in some such terms as those of our statute—"unable to pay"—is obviously useless. An affidavit as to specific facts would probably be more helpful but hardly satisfactory.

Another constituent problem is posed by the practice of making *ad hoc* appointments as indigent cases arise. In respect of felonies a clerk calls a lawyer when an indictment comes down. In respect of misdemeanors the court frequently simply designates some lawyer in the courtroom. Neither practice gives even minimal satisfaction. There should be some sort of system. My own notion is that somebody, either an official or full-time officer of the bar, should prepare and follow a schedule, arranging with lawyers or firms of lawyers for service at a convenient designated future date or dates. Instead of calling a lawyer and saying, "Mr. Jones, we have an indictment for robbery returnable tomorrow. Can you come down and defend?", the call should be, "Mr. Jones, we would like to have you defend an indigent sometime. Could you suggest a convenient date, preferably within the next four to six months?" In respect to misdemeanor cases which flow through the lower courts in great numbers each day, my own notion is that assignments should be on a time basis rather than on a case basis. The prosecutors come into these courts prepared to present

eight, ten or a dozen cases in quick succession. The defense of the indigents on such a docket could, I think, be organized upon a similar basis. Instead of agreeing to take a case, counsel might agree to serve a day, or two days, or even three days. Advance preparation is easily possible with a bit of cooperation from the prosecutor. Some such method would be a vast improvement. Of course it is the method where public defenders operate. However my main point at this stage is that the appointment of outside attorneys ought to be on a systematized calendar basis, arranged far in advance. Willing lawyers ought to be able to pick their own time for this service at their own professional convenience.

Another constituent problem which we have already discussed is: What lawyers should be appointed? Of course in many places a lawyer is a lawyer and, if a member of the bar, can try a criminal case as easily as he can probate a will, try a damage suit or negotiate a contract. But in other places many lawyers in active practice never go near a courtroom, and others go there only to try civil cases. Should the court restrict appointments to specialists in criminal law? Or to trial lawyers only? Should young lawyers be appointed? Should older lawyers be appointed? Or should appointments be made across the board indiscriminately? My own view is that any and all lawyers holding a certificate to practice ought to be subject to this call. But here again I think some sort of system ought to be established. Under our present Legal Aid Agency the Director can select the lawyers to fit the cases. He can, privately of course, grade the available lawyers by ability and experience and assign them accordingly. He can give young counsel simple cases and give the difficult ones to lawyers who perhaps in their younger days were prosecutors or who have handled satisfactorily less important criminal assignments. However that may be, I return to my text. The organized bar ought to propose a solution for this phase of the general problem.

Still another constituent problem is how to supply assigned counsel with facts and witnesses. Investigators as well as lawyers are needed. Undertaking the conduct of a trial in a courtroom is one thing; searching around in the dark areas where many of these people live and where many of these crimes occur and wild night searches for will-o'-the-wisp witnesses, are quite different matters. But lawyers cannot successfully defend without facts and witnesses. Our experience is that this lack of assistance in respect to facts is one of the chief complaints of lawyers who undertake this work, and rightly so.

And, again, a problem is the lack of available basic material on

law points commonly presented in criminal cases. Appointed counsel under present practices must research for himself all such problems as those posed by searches and seizures, confessions, entrapment, insanity, arrests, warrants, etc. Criminal law has a language all its own. Rules take on the names of cases—a *McNabb* question, a *Kelly* question, an *Accarino* case, the *Allen* instruction, and so on. The prosecutors have all this material at their finger tips. An appointed lawyer, even from the civil trial field, usually has little or none of it. Somehow somebody ought to keep available up-to-date material on the questions which frequently arise in these cases. This is another point at which the system newly adopted in the District of Columbia has particular strength. The Director can prepare stock memoranda on frequently encountered questions and can act as collector, cataloguer, coordinator and annotator for recent developments in the field.

And, again, there is the problem of how far the court ought to accede to the wishes of the accused in respect to counsel for the defense. Very often defendants familiar with the ways of crime request or demand the appointment of certain outstanding criminal lawyers, who obviously cannot carry the whole burden and indeed ought not be called upon individually to do more of this work than any other member of the bar. Also we understand that in the mysterious network of the jail-house grapevine, appointed counsel successful in one type of trial—say a robbery case—acquire a label as an expert in that type. And then every defendant accused of that offense rejects all appointments until a lawyer bearing that label in their underground classification is designated. In Washington we have had defendants reject four or five appointments successively. On the one side it can be said that such practice is pure abuse. On the other side it can be queried whether a defendant can be forced to trial with a lawyer in whom he says he has no confidence. Of course this is primarily a matter for the courts, but I submit that the bar, being directly involved, ought to help out by suggesting a thoughtful answer.

Another important subsidiary problem is protection of the bar against vilification for its services. An appointed lawyer unsuccessfully defends at a trial. Thereupon the convicted one *pro se* appeals with vicious attacks upon the professional competence of his erstwhile defender. This is especially frequent when the defendant has been in the penitentiary for a while and has been advised by the legal lights there, amateur and self-educated but ingenious and industrious. A collateral attack is planned, but, since only jurisdictional or constitutional points are available for this purpose, the convicted one

and his new advisors make up a long list of alleged mistakes and derelictions of the trial lawyer and bundle them all together in one specification of incompetence, translated into lack of assistance of counsel which is a constitutional question. The papers go into the public file, and the lawyer, who with the highest of motives undertook the trial as a public service, finds himself faced with charges of incompetence and unethical neglect. This is especially vicious when the allegations are such that a hearing must be had. The bar, I submit, ought to be able to devise a protection for itself against such practices. I have often thought they could be stopped if the bar persuaded all parole boards to consider false charges of this sort a major adverse factor in connection with parole. Certainly the courts ought to be extremely careful—indeed thoroughly skeptical—in evaluating charges of misfeasance or nonfeasance against appointed counsel, who in fact have performed their tasks in the sight and hearing of the court.

There are problems in the pre-indictment stages of a criminal case. An accused frequently needs assistance upon arrest, before a committing magistrate or a commissioner or before a coroner. All these situations present peculiar difficulties.

Then there are a number of puzzles at the appellate level. What should be the guidelines for determining when to allow appeals without cost? What should be the rules for supplying transcripts at the expense of the state? What are the obligations of appointed trial counsel in respect to appeals? What are the obligations of lawyers appointed to conduct appeals who are of opinion there is no appealable error? At this point I make so bold as to submit a suggestion, even though it is not solidified in my thinking. In the first place, I think it ought to be authoritatively established that a lawyer appointed for a trial has no professional obligation to follow through an appeal. He may, but is not required to do so. On the other hand, obviously the indigent client ought not be left unprotected if he has an appeal of merit. It seems to me a special rule of court might be advisable to meet this dilemma. Let it be understood that counsel appointed for trial duty should make a routine notation of appeal where permissible time is short. Require him to state then, as part of his notation, that an appeal is contemplated and is possible. Require that counsel appointed for the appeal file within, say, thirty days a notation of affirmance or withdrawal of the appeal, based upon his own professional appraisal. All this may, of course, be an impractical notion, but some answer should be authoritatively promulgated. And

then there are the problems of collateral attacks by way of habeas corpus and motions under section 2255, Title 28, of the United States Code. How many such attacks should be permitted? How limit the use of the Great Writ? Should such attacks be entertained five, ten or fifteen years after a trial?

And, of course—I repeat—the overall omnipresent problem is money. It is little less than outrageous that appointed lawyers who must give of their time must also pay all necessary expenses involved. Some measure of compensation, even if no more than enough to meet the running expenses of an office while the lawyer is absent on this duty, is little enough; anything else is disgraceful. The organized bar ought to obtain the money for the needs of this service.

All these constituent subsidiary problems are practical problems. They are not exercises in philosophy or ethics or public spirit or themes for dissertation. They call for action, methods susceptible of operation in the workaday world, tough, translatable into everyday use. Results are needed. This is no longer a sentimental matter. It is a real difficulty in a real world, calling for hard-headed doers who are mechanics rather than poets.

There are, of course, many different systems in operation for these purposes. There are successful public defenders' offices in some places, notably in Los Angeles. There is the magnificent work being done in some places, notably New York, by the Legal Aid Societies, but these are groups of public-spirited citizens, lay as well as of the bar, activated by community interests. There is our semi-public, semi-private Legal Aid Agency in Washington. The Commission which made the basic study for this step was established by the Bar Association, but the drive which produced the accomplishment of the recommendations of the Commission was fueled and sparked by the Judicial Conference of the Circuit. Georgetown Law Center last year offered a Master's degree in Trial Advocacy and secured funds to provide ten scholarships for these graduate students. These young men try cases defending indigents in the daytime and in the evening swap notes and take classes in subjects related to trial work. The American bar could, if it chose, supply scores of such scholarships and thus at one time elevate the plane of trial advocacy throughout the country and also provide practical assistance to needy defendants. All these are commendable but isolated accomplishments. But there has been no massive cohesive assault upon the entrenched inertia and apathy in this phase of the administration of justice with all the necessary preliminaries of organization, direction and logistics essential to a great nationwide effort determined upon results.

I return to my thesis. I submit that the organized bar has the responsibility—not just *a* responsibility but *the* responsibility—for a solution to the basic problem and all the underlying subsidiary problems respecting the representation of indigents in criminal cases in this country; that the organized bar ought to assume this responsibility; that it ought to solve the whole of the problem and all its parts; and that it ought to solve them with realistic results. It should solve them not with pious resolutions or reports, however skillful and admirable, but with established procedures, which means rules on the books, money available, some legislation no doubt and lawyers on their feet in the court equipped with facts, witnesses and current law. It is a big job, a pressing one, a challenging one, worthy of the power and the character of the American bar. The organized bar ought to design a solution, direct it, supply it, and man it.¹¹

¹¹Scholarly discussions of this subject will be found in an address by United States District Judge Albert A. Ridge, of Kansas City, Mo., at the Eighth Circuit Judicial Conference in 1959 (an extensive bibliography, including cases, is attached); and in a symposium shortly to be published in the Minnesota Law Review. Supreme Court cases are *Ellis v. United States*, 356 U.S. 674 (1958); *Hill v. United States*, 356 U.S. 704 (1958); *Cash v. United States*, 357 U.S. 219 (1958); *Page v. United States*, 359 U.S. 116 (1959); *Johnson v. United States*, 352 U.S. 565 (1957); *Farley v. United States*, 354 U.S. 521 (1957); *Griffin v. Illinois*, 351 U.S. 12 (1956). In the Circuit Courts are *Cash v. United States*, 104 App. D.C. 265, 261 F.2d 731 (D.C. Cir. 1958), rev'd, 357 U.S. 219 (1958); *Mitchell v. United States*, 104 App. D.C. 57, 259 F.2d 787 (D.C. Cir. 1958), cert. denied, 358 U.S. 850 (1958); *Hill v. United States*, 101 App. D.C. 313, 248 F.2d 635 (D.C. Cir. 1957), rev'd, 356 U.S. 704 (1958); *Hodges v. United States*, 108 App. D.C. 375, 282 F.2d 858 (D.C. Cir. 1960), cert. granted, 810 U.S. 365 (1961); *United States v. Johnson*, 254 F.2d 175 (2d Cir. 1958), dismissed, 357 U.S. 933 (1958); *United States v. Johnson*, 238 F.2d 565 (2d Cir. 1956), rev'd, 352 U.S. 565 (1957); *United States v. Branch*, 238 F.2d 577 (2d Cir. 1956); *Weber v. United States*, 257 F.2d 585 (8th Cir. 1958), cert. denied, 358 U.S. 912 (1958); *Warren v. United States*, 263 F.2d 263 (8th Cir. 1959); *White v. United States*, 266 F.2d 597 (8th Cir. 1959).

III

The Problem of the Incompetent

This section concerns the criminal law and the incompetent. The problem has several substantive parts of substance and many procedural subsidiaries. I shall discuss only one part, the one which concerns responsibility for the commission of a criminal act. In the parlance of the present, this means a discussion of the opinion promulgated in the District of Columbia in the *Durham* case.¹² In that opinion our court held that "an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect." The pronouncement stirred up the most amazing outbursts, and such efforts as have been made to apply the doctrine have likewise aroused enormous controversies.

I was not the author of the *Durham* opinion; I was not even on the panel which handed it down. But I boastfully claim to be its granddaddy. I encouraged it at all stages; I believed in it then, and I believe in it now. My brother Bazelon, who wrote the *Durham* opinion, and I reached the same result. Our initial motivations, the original incitements of our interests, were undoubtedly different. He, being interested and expert in modern psychiatry, approached from the standpoint of the modern psychiatrist. He was initially intrigued by the wide gulf existing between medical science and the rules of criminal responsibility and about the handicaps pressed upon a medical expert attempting to aid a court in solving the questions posed by a defense of insanity. I, having been cast by circumstances into official responsibility in related areas, approached the problem from the basic doctrines of the common law in respect to crime and, guided by those doctrines, followed along the route hewn out by the progress of our knowledge of the human mind. Our emphases were at times different. Nevertheless along much of the way toward a conclusion our thinking was the same.

Holdsworth remarks, "No part of the criminal law is so fluid as this, largely because it is a question partly belonging to legal and partly to medical science; and because the latter science has, as medical knowledge advances or the fashion in medical theory changes, adopted very variable views on this matter."¹³ He refers his readers to

¹²*Durham v. United States*, 94 App. D.C. 228, 214 F.2d 862 (D.C. Cir. 1954).

¹³8 Holdsworth, *History of English Law* 439 (2d ed. 1937).

Sir James FitzJames Stephen,¹⁴ who wrote to the same effect about a hundred years ago.

It seems to me that the *Durham* decision unplugged long-pent-up harassments of many sorts and thus brought down upon itself condemnations not remotely related to it. It has been subject of virulent, even emotional, critical assertions which, to me at least, do not have the slightest foundation. I chose this subject because of the opportunity it affords to formalize somewhat a bit of my own observation in this area, and to comment upon some of the practicalities in it.

At least a little understanding of an enormous amount of background is necessary for any reasonable comprehension of this problem. The history and philosophy of the criminal law itself is part of this material. Much of the available scientific knowledge relating to the human mind, and particularly its abnormalities, is part of it. Of course we cannot here attempt any such study in detail, but maybe we can sketch a little, perhaps enough to permit us to orient our sights correctly in the midst of present-day active discussions of the subject.

In our common-law jurisprudence law and morals are inextricably intertwined. We accept the concept that the basic rules of conduct for mankind—the Commandments—were formulated and transmitted directly to us by God himself. From that root sprang the moral code and also the criminal law, one subjective and the other objective. To violate the one is a sin, to violate the other is a crime. Common-law crimes are based upon intangible concepts of “right” and “wrong”, conceptions of the moral code. But, being punishable by humans, a crime, in contrast to a sin, must involve an overt act. The two systems begin together, diverge, crisscross and often coincide. They have many common puzzlements, and one of these is: By what rule should liability to sanctions—whether public, private or spiritual—be determined? Quite obviously, to be liable to sanctions one must in sense be responsible. When should a man be held responsible for his acts? What makes him responsible? Here we come to a basic postulate of almost all religions, almost all modern civilizations and all criminal law. That postulate is that man is endowed with a will and a capacity to exercise it; he has a power of choice as to his actions. He can sin or not sin, commit a criminal act or not commit one, just as he chooses. From that premise it follows as an easy and obvious conclusion that a man is to be held responsible when he chooses to do that which is violative of law or morals, and does it. A crime, then, in the common law has two elements, (1) a decision to perform an

¹⁴2 Stephen, *History of the Criminal Law of England* (1883).

overt act which is violative of some proscription of the state and (2) an actual commission of that act.

In very ancient times the only ingredient in liability to penalty was participation in a criminal act.¹⁵ But Holdsworth tells us that "Bracton's treatment of homicide [around 1250 A.D.], which was influenced by a canon lawyer, Bernard of Pavia, shows that the law is beginning to attach some importance to the existence of a *mens rea*."¹⁶ At any rate, so far as our common law is concerned, throughout all its recorded history the maxim has been "*Actus non facit reum nisi mens sit rea*."¹⁷ Russell says the maxim seems to have originated in a remark by St. Augustine. It should be carefully read. It says, "An act does not make one accountable [or responsible, or punishable] unless his mind is accountable." The words "*reus*" and "*rea*" are two genders of the same word and mean "one who is accountable or responsible."¹⁸ The maxim applies the same word to the act and to the mind. As to both, the maxim prescribed an element of moral blameworthiness.¹⁹ As we all know, the words "*mens rea*" have evolved through the centuries into meaning a criminal intent, and folks with less than profound scholarship take off into the wild blue yonder to ascertain what a criminal intent may be. But, whatever those ramblings, it is perfectly clear that a criminal law which imposes punishments for physical violations of ethical precepts must have consciousness as an indispensable element of culpability. "*Mens rea*," an accountable mind, was part of the ethical or moral component of common law crime.

No matter what scholarly talent we might summon to our assistance, I think we could not achieve a summation of the proposition so satisfactory as that written by Mr. Justice Jackson in *Morissette v. United States*.²⁰ I would like to say here what the learned Justice there said, and I could not do so more succinctly than he or with comparable style. Therefore I simply quote him. He wrote.

"The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion.

¹⁵See 1 Russell, Crimes 19 (11th ed. 1958).

¹⁶Holdsworth, Some Makers of English Law 17-18 (1871).

¹⁷Stephen has a delightful footnote comment on maxims. They are, he says, "rather minims than maxims, for they give not a particularly great but a particularly small amount of information." He calls them "little more than pert headings of chapters." 2 Stephen, History of the Criminal Law of England 94, n.1 (1883).

¹⁸See 1 Russell, Crimes, 23-24; 2 Stephen supra note 17 at 94; Harper, Latin Dictionary.

¹⁹See note 13 supra at 435.

²⁰342 U.S. 246, 250-52 (1952).

It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory 'But I didn't mean to,' and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution. Unqualified acceptance of this doctrine by English common law in the Eighteenth Century was indicated by Blackstone's sweeping statement that to constitute any crime there must first be a 'vicious will.' Common-law commentators of the Nineteenth Century early pronounced the same principle, although a few exceptions not relevant to our present problem came to be recognized.

"Crime, as a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand, was congenial to an intense individualism and took deep and early root in American soil. As the states codified the common law of crimes, even if their enactments were silent on the subject, their courts assumed that the omission did not signify disapproval of the principle but merely recognized that intent was so inherent in the idea of the offense that it required no statutory affirmation. Courts, with little hesitation or division, found an implication of the requirement as to offenses that were taken over from the common law. The unanimity with which they have adhered to the central thought that wrongdoing must be conscious to be criminal is emphasized by the variety, disparity and confusion of their definitions of the requisite but elusive mental element. However, courts of various jurisdictions, and for the purposes of different offenses, have devised working formulae, if not scientific ones, for the instruction of juries around such terms as 'felonious intent,' 'criminal intent,' 'malice aforethought,' 'guilty knowledge,' 'fraudulent intent,' 'wilfulness,' 'scienter,' to denote guilty knowledge, or 'mens rea,' to signify an evil purpose or mental culpability. By use or combination of these various tokens, they have sought to protect those who were not blameworthy in mind from conviction of infamous common-law crimes."

A footnote quotation from Dean Roscoe Pound is so pithy as to warrant repetition here. It is: "Historically, our substantive criminal law is based upon 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."²¹

Sir Edward Coke, writing in the early 1600's, opens his chapter "Of Crimes"²² with this statement: "In criminal causes as felony, &c,

²¹Id. at 250, n.4.

²²3 Co. 1st Inst. 526.

the act and wrong of a madman shall not be imputed to him, for that in those causes, *actus non facit reum, nisi mens sit rea*, and he is *amens (id est) sine mente*, without his mind or discretion”

Clearly enough, if a mental element is essential to a criminal act, a person without a mind—*sine mente*—is incapable of a crime. A helpless idiot or a raving maniac cannot be guilty of a crime. So far, so good; so much is simple. And, if a person be mad at some times and of normal mind at other times, he is not responsible at the former. This also is a simple thesis. But, from the earliest times down to the present, the insoluble problem has involved those who are only partially *sine mente*. What should be the responsibility of those who are mad but not wholly without a mind?

Here again we must go back to some basic developments in our common law. In Biblical times, as we all know, lunacy was regarded as possession by the devil, and if we had access to the legal lore of those days we would undoubtedly find, I should think, that a lunatic, being possessed by the Evil One himself, could not be held responsible for evil actions. From the earliest times of the Roman law, insanity, whatever that was thought to be, was held to be exculpatory of criminal liability. In Britain in 1225 one accused of larceny, we are told, put himself upon the country, and the jurors “say that they do not suspect him, save of a fowl which he took in his madness at time when he was lunitic.”²³ The *Encyclopedia Britannica*²⁴ tells us that the reasoning was simple: “The insane person having no intelligent will, and being thus incapable of consent or voluntary action, could acquire no right or incur no responsibility by his own acts” Then, with the rise of the science of the mind and the recognition that insanity, or madness, is a disease, medically cognizable, classifiable and in many cases curable by medical methods, the ancient rule took on the new concept as part of itself. From the very earliest of the recorded English decisions, the premise upon which the rule of exemption has rested is disease of the mind. Certainly as early as 1800 the concept of disease as being the nature of madness, insanity or lunacy, as those terms had long been used in the law, and the consequent concept of disease as the basis for exoneration from criminal acts were well established. Disease is humanly ascertainable, and its effects on the activities of its victims are humanly discernible. So far as I can ascertain, the word “disease” has been the word used for at least a hundred and sixty years.

²³1 Select Pleas of the Crown 119 (Seldon Soc. 1887).

²⁴13-14 *Insanity* 611 (11th ed.).

The three early cases usually featured in any history of this subject are *Arnold's Case* in 1724,²⁵ *Lord Ferrer's Case* in 1760,²⁶ and *Hadfield's Case* in 1800.²⁷

At this point I insert an important parenthesis. Much present-day discussion confuses the law as to responsibility with the rules as to procedure—the burden of proof and the duty of the jury. These are two almost totally unrelated subjects. In discussing *M'Naghten* and, later, in *Durham*, we are discussing the law as to responsibility. We are not discussing the procedural aspects of a trial. In the federal system the rule of procedure, established by the Supreme Court in 1895 in *Davis v. United States*²⁸ is that if an accused presents enough evidence to overcome the presumption of sanity, the burden shifts to the prosecutor to establish sanity beyond a reasonable doubt. In many states insanity is an affirmative defense and must be established by the defendant by a preponderance of proof. In Oregon, I believe, he must establish it beyond a reasonable doubt. Those rules apply no matter what the law of responsibility for a crime. The Supreme Court established the federal rule when *M'Naghten* was the accepted law of responsibility more than half a century before *Durham*. Nevertheless, despite the duality, people who should know better constantly intermingle the two into a most discouraging snarl. How profitably could you discuss the law as to the liability of a principal for the torts of his agent, if your coconversationalist continually weaves into his remarks the rules relating to the burden of proof in a negligence action? Here I am attempting to discuss the law as to responsibility; I am not here concerned with the rules of procedure, or the burden of proof on a trial, or the *Davis* case.

Thus we come to the great landmark, which is *M'Naghten's Case*, in 1843.²⁹ *M'Naghten* had a delusion that Sir Robert Peel had injured him. He mistook a Mr. Drummond for Sir Robert and killed him. The jury, under instructions by Chief Justice Tindal, acquitted on the ground of insanity. A great public clamor arose, a phenomenon not unknown in our own time under similar circumstances. The House of Lords thereupon addressed to the judges five questions. Fourteen of the fifteen judges agreed upon answers. Questions and Answers II and III are the heart of the matter. They were:

²⁵16 How. St. Tr. 695 (C.P.).

²⁶19 How. St. Tr. 886 (H.P.).

²⁷27 How. St. Tr. 1282 (K.B.).

²⁸160 U.S. 469 (1895).

²⁹10 Cl. & F. 200, 8 Eng. Rep. 718 (H.L. 1843).

"QUESTION II.—'What are the proper questions to be submitted to the jury when a person, afflicted with insane delusions respecting one or more particular subjects or persons, is charged with the commission of a crime (murder for instance), and insanity is set up as a defence?'

"Question III.—'In what terms ought the question to be left to the jury as to the prisoner's state of mind at the time when the act was committed?'

"Answer II. and III.—'As these two questions appear to us to be more conveniently answered together, we submit our opinion to be that the jury 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. That, to establish a defence on the ground of insanity, it must be clearly proved that at the time of committing the act the 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 mode of putting the latter part of the question to the jury on these occasions has 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, 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. If the question were to be put as to the knowledge of the accused, solely and exclusively with reference to the law of the land, it might tend to confound the jury by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to a conviction; whereas the law is administered on the principle that every one must be taken conclusively to know it without proof that he does know it. If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable, and 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; and this course we think is correct, accompanied with such observations and corrections as the circumstances of each particular case may require.'"³⁰

It is important to a maintenance of balance in the atmosphere of present-day discussions of madness and the criminal law that we note several features of the *M'Naghten* rules.

³⁰2 Stephen, *supra* note 17 at 157-59 quoting from *M'Naghten's Case*.

1. The answers are premised upon disease of the mind. The words are "defect of reason from disease of the mind."

2. No so-called right-and-wrong test was laid down. Nowadays it seems popular to ask a witness whether the accused knew the difference between right and wrong, and to instruct the jury in like language. No such test was laid down in *M'Naghten*. The judges there expressly, in restrained British fashion, condemned that test. They said that such mode of putting the matter "is not, 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." The way the judges put the matter was "that he did not know he was doing what was wrong."

3. The opinion of the judges was vigorously, even viciously, attacked. Stephen declared it not to be the law of England, unless it were construed to have a meaning which the judges did not give it. He vigorously attacked the answers. The Royal Commission of 1953 said that the "test in *M'Naghten* is so defective that the law ought to be changed."³¹ Our own Mr. Justice Cardozo, while Chief Justice of the Court of Appeals of New York, said of it, somewhat pithily, "It is idle to look to this decision for precise and scientific statement."³²

4. the doctrine of *M'Naghten* was not new. Its importance was that, while the rules it laid down had been expressed from time to time by many judges or panels of three judges,³³ this time all but one of their Lordships agreed and pronounced a joint view. This made it authoritative so far as British courts were concerned, even if British scholars remained unconvinced.

5. Many questions arise under *M'Naghten*. What is "right"? What is "wrong"? What is "know"? What is "the nature of the act"? How can you tell whether a man knew the nature of his act? Or how tell whether he knew his act was wrong? These questions have plagued many thoughtful judges, as the reported cases readily show.

6. Although *M'Naghten* was not a general exposition or a judicial judgment, it has been adopted by judges as a general doctrine. It was a set of answers to specific questions. And these questions did not relate to insanity or mental illness in general terms, but specifically to delusions.

³¹Royal Commission on Capital Punishment 1949-1953 Report (Cmd. 8932) (1953).

³²*People v. Schmidt*, 216 N.Y. 324, 110 N.E. 945, 947 (1915).

³³Russell refers to several cases in 1812. 1 Russell, Crimes 114-15 (11th ed. 1958).

Question IV in *M'Naghten* has been largely overlooked. It was whether "If a person under an insane delusion as to existing facts commits an offence in consequence thereof, is he thereby excused?" And the answer likewise was premised upon "in consequence thereof." The answers to Questions II and III, as we have already noted above, were premised upon "such a defect of reason *from* disease." *M'Naghten* premised a causal connection between a disease of the mind and the mental consequences of the disease which in turn, the judges held, excused from liability for the criminal act.

Let us be emphatic and clear in one proposition about *M'Naghten*. If a person by reason of a disease of his mind does not know that what he is doing is wrong, he should not be held responsible. No one, I think, disagrees with that. If *M'Naghten* had said no more than that, no one would quarrel with it. The disagreement arises because *M'Naghten* makes that measurement the only measurement. The *M'Naghten* rule in effect and in practice is that *only if* an accused does not know what he did was wrong can he be held exempt. Those of us who do not agree with *M'Naghten* believe that an intellectual comprehension of wrongfulness is not the only test of an accountable mind; or to state it conversely, we believe there are other conditions of mind which produce an absence of that mental element essential to criminality. *M'Naghten* is correct as far as it goes; it does not go far enough to be accurate; it is only a partial statement.

Furthermore let us note, while we are viewing *M'Naghten*, that the process of inquiry there prescribed is a three-stage process. First, does the accused suffer from a mental disease? Second, as a consequence of disease does he fail to know the nature of his act or that it was wrong? Third, if the answers to the first two inquiries are "Yes," the conclusion is that he is not responsible for his act. The process must, the rule holds, pass through a determination of the accused's cognizance *vel non* of the moral (or the legal) characteristics of his act. We shall have occasion to refer to this stage in the *M'Naghten* process when we consider *Durham*.

After *M'Naghten* some courts took a half-way step along the route medical science has long since advanced. Some courts, including our own court in Washington, added to the criteria of *M'Naghten* the so-called "irresistible impulse" test. This means that even if a man knows what he is doing and knows it is wrong, nevertheless he is not to be held responsible if he is under an irresistible impulse to do it. This was a great and good step. But there are still other conditions of the mind consequent to disease which culminate in criminal acts—other con-

ditions besides knowledge *vel non* and impulses. Melancholia, brooding, many impairments of volition, many derangements or disorders demonstrated by behavioral criteria, are obvious ones.

It is an interesting parenthesis that the British courts continue to reject an irresistible impulse as relieving from responsibility. As late as March, 1960, the Privy Council, in an opinion by Lord Tucker,³⁴ reaffirmed the *M'Naghten* rules in their original content. The High Court of Australia had held that an uncontrollable impulse "may afford strong ground for the inference that a prisoner was laboring under such a defect of reason from disease of the mind as not to know that he was doing what was wrong." The Privy Council held this general line to be error. Their Lordships said that evidence of an irresistible impulse may be considered as any other relevant evidence, but their Lordships were emphatic that irresistible impulse is no defense *per se* in Britain, and further that the British law will not recognize an irresistible impulse as a symptom from which the jury may without further evidence infer insanity within the *M'Naghten* rules. The harshness of the British law has been much ameliorated, however, by Parliament, which has indeed swung far in the opposite direction and by statute has recognized the doctrine of diminished responsibility.

Meantime, before and after *M'Naghten* many great writers discussed this subject. Lord Hale published his *Pleas of the Crown* in 1736 and discussed the subject, although briefly. Sir William Blackstone also treated it a few years later (1758-1766) but likewise briefly. Then in the field of criminal law came Sir William Russell's *Crimes*, first printed in 1819, and then Sir James FitzJames Stephen, whose monumental *History of Criminal Law of England* was published in 1883. Both of these latter writers devote many pages to madness and crime. Stephen, in particular, is fascinating to a modern reader.

Then in 1954, more than a hundred years after *M'Naghten*, came the *Durham* decision in our jurisdiction. In it the court said, as we have already noted: "[A]n accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect." Short, simple, direct.

The rule in *M'Naghten* and the rule in *Durham* begin with the the same inquiry—disease. (For simplicity's sake I use "disease" to include "defect.") Does the accused have a disease of the mind? Both contemplate medical testimony on that point, and in practice such testimony has been the custom under both rules. Under both rules

³⁴Attorney Gen. for the State of So. Australia v. Brown, 34 A.L.J.R. 18 (1960).

the inquiry proceeds to the consequences of the disease. The words used to depict this path are different, but they mean the same thing—"from," "by reason of," "in consequence of," "product of," "but for," "through," and so on. All authorities have struggled for words by which to convey this concept, and none has succeeded as yet; but they all seek to express the idea of causality. Writing, let us remember, about a hundred years ago, Stephen had this to say: "The different legal authorities upon the subject have been right in holding that the mere existence of madness ought not to be an excuse for crime, unless it produces in fact one or the other of certain consequences."³⁵

At this point the inquiries under the two rules separate. Under *M'Naghten* the consequences under inquiry concern the intellectual power to perform two specific ideas. Did the accused know the nature of his act, and did he know it was wrong? Under *Durham* the consequence inquired about is the act itself. Was the alleged criminal act a consequence of the disease?

To my mind *Durham* just makes plain, simple sense. If we posit that man is endowed with a power of choice—free will, if you please—and with power to fit his action to his choice, and if we further posit that disease of the mind may nullify those endowments, I cannot see for the life of me why we should not conclude simply, directly, and without abstruse peregrination that if the act is a consequence of the disease, the man is not liable. I hark back to the phrase used by Mr. Justice Jackson in *Morissette*: "to protect those who were not blameworthy in mind."

Medical science, yet in its infancy in this field, is discovering more and more about the human mind. *Durham* says only that, whatever the intermediate characteristics of the mental disease may be, if the act falls within any of its consequences, the act is not imputable. The rule is simple; it is direct; it is true; it is not novel or startling. It is a small step in the development of a rule of law which has been developing since before the time of Justinian.

The situation reminds me of a condition which obtained some years ago in the District of Columbia in respect to another area of medicine and the law. We had a statute, enacted about as long ago as *M'Naghten*, which listed certain diseases, described them as acutely communicable and provided that sufferers from these diseases must be quarantined. The medicos, in the process of discovering more and more about bacteria and viruses and such, began to discover new diseases which were acutely communicable, some of them even more

³⁵ Stephen, *History of the Criminal Law of England* 125 (1883).

so than those of the calomel-castor-oil-morphine days, but the new diseases were not on the statutory list. The enforcement officers upon dramatic occasions went into frenzies. As Corporation Counsel, and responsible in the matter, I superimposed upon the *M'Naghten*-like rule a *Durham*-like rule and directed that, if a person had a medically recognized, acutely communicable disease, he should in the public interest be quarantined. The Congress enacted a more modern statute. The basic proposition looked clear and simple to me those twenty-five years ago, and it looks clear and simple to me now.

The reason for the limited scope of *M'Naghten* is plain. Its thesis, that if a man knows his act is wrong he is responsible, is the thesis of strict moralists.³⁶ The early Nineteenth Century in England was a period of strict morality. The turbulence of the 1700's was gone, or going, but the influence of ecclesiastics upon the government and law of Britain was tremendous, whether the church in power was Roman or Anglican. Until 1640 ecclesiastical courts in Britain had jurisdiction over many crimes, enforcing their decrees by excommunication which carried heavy disabilities.³⁷ The Roman Catholic Emancipation Act was not enacted until 1829.³⁸ It was not until 1846 that Jews were relieved from their prior disabilities. It was still then held that those who denied the truth of all religion were guilty of a criminal offense. In 1841 Lord Denman, C.J., trying an indictment for blasphemous libel, told a jury that "if they thought that the libel tended to question or cast disgrace upon the Old Testament, it was a libel."³⁹ In 1850 it was held that a trust which contemplated an object inconsistent with Christianity failed.⁴⁰ There was great debate about whether an honest denial of Christianity was a criminal blasphemy.⁴¹ "Deodands," which were animals or inanimate objects associated with the death of a man and therefore to be dealt with for appeasement of God's wrath, were not abolished until 1846.⁴² The idea that the

³⁶It is not so of all the moral theologians. The Code of Canon Law of the Roman Catholic Church, for example, recognizes "on the part of the will a defect of freedom." Canon 2200, No. 1; see Ford and Kelly, *Contemporary Moral Theology*. And that Code, interestingly enough, recognizes diminished responsibility, a step which the courts of this country, even in our jurisdiction, have not yet taken.

³⁷See 2 Stephen, *History of the Criminal Law of England* 401-13 (1883), discussing Archdeacon Hale's *Precedents in Criminal Causes*.

³⁸10 Geo. 5, c. 7. 8 Holdsworth, *supra* note 13 at 412.

³⁹8 Holdsworth, *supra* note 13 at 413.

⁴⁰*Briggs v. Hartley*, 19 L.J. Ch. 416-17, 15 L.T.O.S. 273 (1850); 8 Holdsworth, *supra* note 13 at 414.

⁴¹*Shore v. Wilson*, 9 Cl. & F. 524, 8 Eng. Rep. 450 (H.L. 1842); see Starkie, *Libel* (2d ed. 1830).

⁴²9 & 10 Vict., c. 62; see 1 Russell, *Crimes* 19 (11th ed. 1958).

Church and State were a single society with many common objects was just beginning to disintegrate.⁴³ Victoria was Queen. As the legalists put it, this was an era of strict liability. This was the setting of *M'Naghten*.

It is not strange that in the year 1843 the judges should be of opinion that a person who knew his act was wrong was responsible. It is a strict and stringent doctrine. It embodies the notion that a man's will is a matter of control with him no matter what his condition; and he is responsible for it. And so it was held that, given knowledge, that is, an intellectual comprehension, of the nature of his act and that it is wrong, a man is responsible. Such was the rule of 1843. But I submit it is not a true rule for 1961. We know now that under some conditions of disease a man cannot control either his will or his acts, even if he knows as a matter of intellectual process that his doings are wrong. As I have already pointed out, the two mental conditions specified in *M'Naghten* are not the only conditions of a diseased mind which result in criminal acts. They include only what the experts call cognition. There are vast other areas of the mind sometimes affected by disease and in turn affecting human action. I submit to you that, if a person is not in fact, by reason of disease, responsible for an act, he ought not be held legally liable for it; and that is precisely what *Durham* says.

The philosophical concept of *Durham* is that the morality of an act and its classification as lawful or unlawful is a legislative matter. If the legislature is of opinion that a certain act is immoral and denominates it a crime, that settles the morality question. The questions posed by a defense of insanity upon a trial are simple questions of fact. *Durham* says a claim of non-responsibility for an act should not be sifted through a subjective sieve of individual moral cognition on the part of the accused.

What is meant by "disease" and "product of" in the *Durham* opinion? Several attempts have been made to provide synonyms, but not very successfully. Take "product of" first. The idea is perhaps elusive; certainly it is very elusive if one tries hard not to understand it. What is meant by an act being the product of a disease? It means, says the court which promulgated *Durham*, that "but for" the disease the man would not have committed the act. What does that mean? The answer requires a thumb-nail sketch of the operations of medical science. That science has collected, assorted, coordinated and classified data in categories concerning the aches, pains and miseries which

⁴³ Holdsworth, *supra* note 13 at 36, 47, 81; 8 *id.* at 403.

beset mankind. Having taken notice of various distressing symptoms suffered by men—headache, pain in legs, grey skin, blood in urine and so on, the medical scientists have ascertained what basic conditions are indicated by the various combinations of these observable phenomena, have classified them and given the various conditions, or combinations of symptoms, names—pneumonia, diabetes and so on. They call these conditions diseases. Given the symptoms, the medico tells you what ails you in a word or two. This is diagnosis. Then medical science tells us what to do for the several conditions it knows about. Sometimes it recognizes a condition—or disease—but does not know what to do about it. It calls such conditions incurable. If it knows what to do, it calls its prescriptions treatment. Medical science sometimes can tell what the results of a given condition— or disease—will be. The medico says to a man, “You have glaucoma. In six months you will be blind.” Or to another, “Stay in bed three days. Drink lots of water. And you’ll be all right.” Or in respect to another, “This man has a cancer. He will be dead in a year.” Sometimes the doctor tells a patient he will feel weak for a while and gives him some pep pills. This forecasting of future events is called prognosis.

When the event which the medico recognizes as within the area of events possibly consequent to a disease happens, it is usually spoken of as a result of the disease. We say, “He died as the result of a heart attack.” Or, as the Geritol ad man says, “You feel weak and depressed due to tired blood.” The customary language descriptive of an event which could have been discerned in advance by a medico because of his knowledge of the characteristics of a disease, is the language of result, or consequence, or product, related back to the disease.

Except that psychiatric science is still in the calomel-quinine era, its pattern and operation are like the rest of the medical science. It discerns conditions of the mind from observations of symptoms in behavior. It gives these conditions names and calls them diseases. It prescribes for and treats them. It knows that certain of these conditions—diseases—tend to cause certain behavioral activities, or tend to release natural restraints upon certain other behavior. The branch of medical science which concerns the mind has diagnosis, treatment and prognosis. The great trouble with this science, as I have suggested, is that not too much is known as yet. The medicos do not know too many of the basic conditions indicated by combinations of symptoms and have not yet classified with reasonable certainty too many prognoses. Their subject matter is too entangled with normal processes of the mind. A man may act like a brute without suffering

from any abnormal or unhealthy basic condition in his mind; he is a natural, healthy brute. The science of the mind is about where the science of the body was before it discovered bacteria. Nevertheless, despite its difficulties and its shortcomings, medical science does recognize certain symptoms as indicating basic derangements or maladies of the mind; it gives those basic conditions names, and we call them diseases; it knows that some certain consequent activities may ensue from certain basic mental conditions. Within a limited scope the medicos know, from scientific research, that given a certain basic condition—disease—certain behavioral activities may occur. They can say, "This man is dangerous." or "This man will be helpless in society but safe to have around." Or, looking backward, they can say, "That act of this man was within the area of consequential behavior which medical science has established by research and observation as phenomena accompanying the basic malady—disease—in his mind." In layman's language, we say, briefly, that this act was the result of, consequence of, or product of that disease. There was a causal connection, we say, between that disease and that act. We use the same terms we use in respect to physical events consequent to physical ailments. And that is what is meant by "product of" in the *Durham* opinion.

"Disease" means a basic malady or derangement of normal parts or functions which medical science has identified, can diagnose, and for which it has discovered a reasonable prognosis. And there we have the two great mysteries in *Durham*, as I see it.

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, perhaps all done with mirrors. I suppose most of us experience a feeling of revulsion at the thought of lunacy inquisitions. But psychiatry is not an unintelligible occult ritual. It is part of the science of medicine. Psychiatrists are experts in that science. They are no more than that; they should be no less. And right at this point comes much of the furor and confusion in this area.

The bar and bench are perfectly familiar with the examination and cross-examination of experts in the science of physical medicine. Negligence cases involving complicated medical questions are daily grist in our judicial mills. Even so, it must be noted that the presentation of expert testimony was so bad in this field that a few years ago the American Medical Association produced an excellent moving picture showing how doctors should and should not be questioned and

cross-questioned and how responses should be made. Moreover, the bar and bench are familiar with some parts of the mental abnormality field. Contests over wills on the ground of mental incapacity on the part of the testator are commonplace. Lawyers put experts on the stand and examine them confidently, skilfully, with purpose and result, concerning the state of the mind of a man who has been dead these many years and whom the witness never saw. Every capable trial lawyer knows how to do that. Nevertheless, for some reason, many, if not most, of our profession stand appalled at the very idea of expert medical testimony in a criminal case. They want to put a doctor on the stand and proceed this way: "Doctor, did you ever examine this man?" "Yes." "How many times?" "Twice." "How long each time?" "Fifteen minutes." "In your opinion does he know right from wrong?" "No." "Thank you. Step down." Maybe that example is a bit exaggerated, but not too much so.

An expert medical witness, *i.e.*, a psychiatrist, is an expert in medicine and nothing else. He is not an expert in the law. He does not know legal terms. He has no responsibility for the guilt or innocence of the accused. He should have no notions on that subject. He is a witness. He is not a lawyer or any kind of advocate. He is restricted to facts and to his expert opinion upon purely medical phases of those facts.

The most important feature of an expert's testimony consists of the facts upon which he bases an opinion. If the facts as he knows them are scanty or wrong, his opinion will probably be sketchy or wrong. Of course, sometimes the medico can reach an opinion by his own observation. He can tell a broken leg when he sees one, and he can detect pus in the blood by looking in his microscope. But in many, many cases diagnosis is a composite of much data, many tests and much history. The examiner of such a witness must develop how much and what data the witness had and used.

Let me illustrate by a simple example what I am trying to say. Suppose you walked into the office of a doctor you had never seen before that day and said, "Doc, I want to know what my physical condition is. Am I in good health?" Suppose the doctor said, "Yes, you are fine." Just like that. You would say, would you not, "Well, Doc, how do you know that?" Then suppose he said, "Oh, you look pink and bright, well fed and not too fat. You look healthy." Now, I ask you: Would you be satisfied with that? Would an insurance company write you a policy on that? No. I suggest to you that if you walked into a strange doctor's office and asked him for an opinion on your physical

condition, he would say: "Why, yes, I will be very happy to advise you on that. When do you want to come in?" And you might say, "Come in for what?" And he would say, "For tests." And so it would develop that the doctor would take specimens of your blood and your urine, make a recording of your heartbeat on a fancy tape recorder, look in your eyes with a microscope called an ophthalmoscope, listen to your lungs, X-ray your chest, give you barium on an empty stomach and look at your insides through a king-sized reading glass, hit you in various spots with a rubber hammer, poke things in your ears and throat, pick at your teeth, push and pull at this and that; and ask you a thousand questions, including when your father, mother, brother and sisters may have died and all your childhood diseases. Now, if an expert does all this and needs all this factual data in order to express an opinion upon so relatively simple a question as your present physical condition, what ought an expert do, and what questions ought you as an examining lawyer ask him, if he is about to express an opinion on a man's mental condition? In respect of a man's mind his behavior is the prime index. Erskine, later Lord Chancellor, defending Hadfield for firing a loaded horse-pistol at George III, called a dozen or so witnesses who testified as to incidents of behavior by his client. He said he had twenty more such witnesses, but the Lord Chief Justice stopped the trial, saying the man was obviously insane. This is the process of skillful advocacy.

Under *Durham* the opinion of experts is desired on two points and two points only, both factual: (1) whether this defendant had at the time of his offense any mental disease and (2), if he then had a disease, whether the act this man is alleged to have committed was the product or consequence of the disease. The first phase of a psychiatrist's testimony should be to develop in detail what factual data, what tests, are required by medical science in order to ascertain the state of the man's mind; and what information, what data, what results of tests, what observations were before the doctor in the case. Then the second phase is the process to be followed from data to conclusion. What does medical science teach about this data? These symptoms? These facts? Then his conclusions: Did the accused, in his opinion, as a matter of reasonable medical certainty, have or not have any mental disease, that is, any basic mental malady or derangement which medical science has established as a recognizable condition within the scope of the medical science? Was or was not the act alleged to have been committed by the accused within the area of the activities which medical science teaches are concomitant with, results of, consequences

of, products of this disease? The testimony of a psychiatrist in a criminal case, his direct questioning and his cross-examination, should fall within exactly the same general form as does the testimony of medical experts in other fields of medicine. This is not a mystery; it is a matter of professional scientific capacity on the part of the expert, and equally, or more so, on the part of the examining lawyer.

Durham permits medical experts to testify as they should testify, that is, as medical experts. Such experts are accepted as qualified to express opinions on matters of medical science, nothing else. So they are competent to testify on the two subjects we have discussed above. These are matters upon which medical science teaches. But medical experts are not qualified to testify as moralists. They are not expert on the subject of right and wrong. Why make them sift their medical opinions on matters of medical science through a concept of moral philosophy?

We insert a caveat. Experts cannot dispose of deep-seated problems by putting labels on some factors or results. Because so-and-so says this is a "disease"—stamping a label on it, so to speak—is not enough to justify adopting the label as conclusory. What is required is the pronouncement of medical scientists, based upon their well-regarded, thorough research and observation, giving effect to the good faith and objective accuracy of scientists. *Durham* makes such testimony possible.

The American Law Institute, as we all know, has devoted some years to the preparation of a Model Penal Code. It proposes to deal with responsibility for crime. Its present draft is a rule as follows:

"(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."

This proposed rule rests upon mental disease and upon causality between disease and the criminal act. But the course of causality under its prescription is a tortuous one, it seems to me. Frankly, I do not understand "substantial capacity," and I foresee, or think I can foresee, great difficulty if a trial judge should undertake to instruct a jury on the matter. I foresee like difficulties in the phrase "appreciate the criminality of his conduct." Certainly I do not understand the proposition that "mental disease" in the rule does not in-

clude abnormalities demonstrated only by repeated criminal conduct. I would have thought that repeated criminal acts might well be, under some circumstances, the most cogent proof of a mental abnormality.

Durham is attacked on many grounds. It is said that the terms "disease" and "product" are new, unfamiliar and confusing. They may indeed be inadequate, and certainly other words or phrases might be better vehicles for conveyance of the thoughts intended. But, as we have seen, "disease" is the word used for as long as we have recorded history of the subject, and "product" is but a synonym for "consequence" or "result." The judges used "from" and "in consequence of" in *M'Naghten*. Stephen used "produce" in stating what he thought the law then was. Justice Somerville, in the *Parsons* case in 1887,⁴⁴ used "the product." The American Law Institute proposes to use "a result of." All the proposed rules and authoritative expositors use "disease" as the basic platform upon which all else rests. So far as I know, nobody has yet suggested better words for the purpose, and the two ideas—mental illness and a causal connection between the illness and the act—are the two foundation stones upon which the whole of this law rests. I submit these attacks on the words of *Durham* will not withstand even casual examination into the history of the matter.

Durham is also attacked upon the ground that it lets the psychiatrists who appear as expert witnesses testify upon the exact ultimate question which the jury must decide, and thus usurps the function of the jury. I do not understand the reasoning back of this contention. In a criminal case in which insanity is the defense, the questions of fact under the *Durham* rule (leaving out for the moment the *Davis* burden-of-proof-rule)⁴⁵ are whether the accused had a mental disease and whether the act he committed was caused by, produced by, a consequence of, or a result of, the disease. These are facts. They are testified to by witnesses. Then the judge tells the jury what the law is. Then the jury considers the factual issues, applies the law as the judge stated it, including the rules as to burden of proof, and returns to the courtroom with a one-phrase announcement. This latter is the ultimate function of the jury. No witness can testify directly to it, and the reason he cannot do so is because it involves the law as the judge thinks it is, not the law as a witness might think it is. If a witness testifies to a fact which is among the facts the jury must find, he is not thereby usurping the function of the jury. To be sure,

⁴⁴*Parsons v. State*, 81 Ala. 577, 2 So. 854 (1887).

⁴⁵*Davis v. United States*, 160 U.S. 469 (1895).

one of the functions of the jury is to find each fact, but that is not the *ultimate* question.

It is said the psychiatrists find difficulty in the *Durham* doctrine. Possibly so, although many rejoice over the liberation from the confines of *M'Naghten*. But to those who think this feature of the present situation an outcropping of *Durham*, I suggest they read what the psychiatrists of a hundred years ago had to say. One Dr. Maudsley of that time seems to have had command of a vocabulary which might well be envied by his modern profession successors. Stephen's remarks upon these attacks sound as though they were dated 1961. Said he, *inter alia*, "the subject has excited a controversy between the medical and the legal professions in which many things have been said which would, I think, have been better unsaid."⁴⁶

It is argued that psychiatrists may find difficulty "channeling their testimony through the legal confines of 'disease.'" But "disease" is a medical term, not a legal one. Without intending to be facetious, I suggest that a doctor who cannot testify in terms of disease ought to avoid the witness chair; surely he could not qualify as an expert in medical science. We need not repeat what we have already said at some length concerning medical testimony and its necessities. Such testimony, under *Durham*, ought to be a medical matter and no more.

It is asserted that *Durham* favors the determinist school. Of course the *Durham* opinion expressly recites its premise of a free will. And how a rule which proceeds from a medically cognizable disease and goes no further than the products of such a disease tends towards determinism I cannot fathom.

Upon *Durham* is heaped the blame for the difficulties of the burden-of-proof rule, which, as we have seen, is that when an accused presents enough evidence to overcome the presumption of sanity, the prosecutor must then establish sanity by proof beyond reasonable doubt. But *Durham* had nothing whatsoever to do with that rule. The Supreme Court of the United States established it in 1895 for all federal courts. *Davis v. United States*⁴⁷ was a long, careful exposition by Mr. Justice Harlan, writing for a unanimous court. This requirement as to the burden of proof has been the unquestioned law in the federal system for sixty-five years, more than a half-century before *Durham* was even surmised.

It is said that *Durham* would result in fantastic releases of criminals. Seven years' experience belies these forebodings.

It is said that *Durham* poses a new test "couched in language of

⁴⁶2 Stephen, *History of the Criminal Law of England* 124 (1883).

⁴⁷See note 44 *supra*.

causality." The test of causality was indeed once new, but the newness dates more than a hundred years ago; possibly about the time when this country was new.

It is said that under *Durham* the capacity to restrain one's illegal impulse is not an important and decisive factor for consideration by the jury. Of course the opinion in *Durham* expressly points out that it in no way impinges upon the critical effect of evidence of an impulse, irresistible or otherwise, if there is factual evidence of an inability to control an impulse. Indeed *Durham* goes further than impulses and encompasses the whole gamut of lack of controls. *M'Naghten*, not *Durham*, is the rule which denies critical effect to an inability to control impulses, as the recent decision of the House of Lords, to which we have referred, makes indubitably clear. Perhaps this objection to *Durham* arises from a notion that the "product of" phrase means a compelling instigation of the criminal act by the disease. That the phrase has no such meaning was made clear by our court in *Carter v. United States*.⁴⁸ "Product of" means what all the phrases describing causality have meant over the years. No one has suggested that "in consequence of" or "from" in *M'Naghten*, or "as a result of" in the American Law Institute proposal means only results actively instigated. "Product of" in *Durham* means what we have already described. If a disease nullifies power of control over an act, in common parlance the act is a result of, a consequence of or a product of the disease. Our court emphasized this meaning in *Douglas v. United States*⁴⁹ and in *Carter*.

To devotees of syllogistic cogitation, the thought process from disease to any consequence thereof involves some unphrased assumptions, but to the ordinary person in the workaday world the matter is simple and clear. Joe has a limp as the result of polio. Or that automobile accident was a result of bad brakes. The first statement involves an assumption that if Joe had not had polio, he would not have a limp. And the second assumes that had the brakes been good, the accident would not have happened. Moreover, to make the first statement clear, it is not necessary to state that the polio virus affected the locomotive nervous system, which in turn caused an atrophy of the leg muscles. And, in respect to the auto accident, it is not necessary for clarity or precision to say that a defect in the brakes nullified the driver's power of control, or paralyzed his ability to effectuate his will, and this inability or paralysis brought

⁴⁸102 App. D.C. 227, 252 F.2d 608 (D.C. Cir. 1957).

⁴⁹99 App. D.C. 232, 239 F.2d 52 (D.C. Cir. 1956).

about actions which culminated in the accident. So in *Durham* it was not necessary to say that, if the disease paralyzed control over an illegal impulse and an act thereupon occurred, which it is assumed would not have otherwise occurred, the man is not responsible. A simple direct statement was enough.

Some contend that a jury should be told more than is indicated in the suggested charge in the *Durham* opinion. I quite agree. The instruction of our Judge Cox on the insanity issue in *Guiteau's Case* takes up twenty printed pages in Federal Reporter.⁵⁰ The suggestion in *Durham* was of substance only. I should think a trial judge would go to great lengths to make this complicated, elusive issue as clear as he possibly could. Much background material and explanatory matter should be included, I would think.

So much for *Durham* and its troubles. At the beginning of this section I referred to other substantive parts of the general problem in respect to crime and incompetents. I mentioned two of them. Neither is related to *Durham*. Both arise under any rule of responsibility for crime, whether it be *McNaghten*, *Durham*, *A.L.I.* or just a poll-parrot "right and wrong." One problem is competence to stand trial. This concerns the ability of the accused at the time of his trial to understand the charges against him and to assist in his own defense. A third substantive part of the problem concerns the accused who, having been acquitted of a crime and committed to a mental hospital, seeks release. Here the question is whether the applicant has regained his mental health and will no longer be dangerous to himself or others. As a moment's thought will demonstrate, the three substantive parts of the general problem—*i.e.*, responsibility for an act, competence for trial and condition for release—involve different conditions of mind, different rules of law and different medical inquiries. We do not have time to discuss these two other problems.

I also said I would list some of the procedural problems in this area. I do so now, but very briefly. These problems arise under any rule as to insanity and crime. They in no way depend upon *Durham*. Let us look at mental examinations to determine competency to stand trial. What are the standards? Can they be ordered despite protest by accused? Can they be had privately without court order? What sort may be ordered? For example—commitment for thirty, sixty or ninety days for purposes of examination? Suppose the accused refuses to be interviewed and stands mute? Can the government obtain such an examination for the purpose of getting the accused off the street for a while? Can the accused obtain such an examination

⁵⁰10 Fed. 161 (1882).

in order to obtain free material for a defense of insanity to the indictment? Suppose no facilities for such an examination exist; does undue delay in making the examination affect the right to a speedy trial? Should an examination for competence to stand trial also include examination for responsibility as of the date of the offense? Supposed an accused never gains competence to stand trial; can he be indefinitely confined without a finding of insanity and without trial? What is the nature of the judicial process in respect to mental examinations prior to trial? The list of procedural enigmas in respect to crime and the incompetent is a long one.

I return for a final moment to *Durham*. The great debatable question as to *Durham* is whether society should boldly say that if by reason of disease a man is not in fact responsible he is not in law responsible. The reason this is a bold step is that, once it is taken, another horizon looms ahead—and after that fog. What if a man without disease is not in fact responsible for an act? Suppose he is not responsible because of circumstances? Of course we have a doctrine of nonresponsibility based upon physical circumstances showing lack of responsibility. And we used to have a subjective mental compulsion doctrine applicable to married women. But what of the vast subjective circumstances with which life itself must deal—ignorance, poverty, lack of education, inherited traits and so on. Against the step in *Durham* is the potent cry that the social order depends upon rigid adherence to established rules of moral right and wrong, solidified by legislative enactment into rules of law, and that to breach that dyke is to imperil the whole structure. My own notion is that the cry is a far one. I suppose I do not go all the way with the philosophy of *Durham*. But *Durham* adheres to the line of disease as the *sine qua non* of relief from liability. It is a tenable line, I think, and I would maintain it. Maybe, someday, medical science might itself declare all deviations from norms of behavior to be due to medically cognizable derangements of human parts. In such event maybe we would have to reappraise, or even reconstitute, the whole of the criminal law. But these are not presently foreseeable contingencies. As of now the area enclosed by medical science seems to me to be a workable area. If you want to attack *Durham*, take the position that society cannot afford to say that a man will not be held legally responsible, if, due to disease, he is not in fact responsible for his act. Or, to state it in the converse, say that to protect itself society must hold responsible some whom it knows full well are not in fact responsible. Argue that society cannot risk the doctrine of *Durham* because after that might come the deluge.

