

and the jury who are to make the legal decision. It is this second and to some extent competing function which concerns us. Confusion arises from this paradoxical effort to combine in one formula: (1) The criteria by which the courts will hold a man not legally responsible (*i.e.*, punishable); and (2) the conditions for the exposition of the psychiatrist's knowledge.

The question clearly should be: How may the courts optimally elicit testimony from the psychiatrist concerning psychopathology so that its own legal question concerning responsibility may be answered with maximum information at its disposal?

The two major formulae, competing to supplant MacNaughton, are the proposed American Law Institute prescription and the Durham Decision.⁴ In our view both are refreshing and encouraging advances over MacNaughton and reveal significant agreement. The similarities between them might be summarized as follows:

1. Each is intended to free from responsibility a man who has committed an illegal act which is the result of, or the product of, mental disease or defect.
2. Each includes mental pathology—illness, disease, or defect.
3. Each rejects exclusively cognitive or intellectual approach.
4. Neither formula, presumably, is primarily concerned to define mental illness but rather to indicate what degree of severity of mental illness protects an individual against the punitive and stigmatizing impact of criminal law.
5. Each incorporates the concept of causality, with the words "product of" and "as the result of." Both "product" and "result" refer to the cause. Cause is the circumstance, condition, event, which necessarily brings about or contributes to a result.

Within this framework we state our reservations concerning the American Law Institute formula. We hold that the subtlety, complexity, and obscurity of its psychological entities and its actual intrusion into the field of psychiatric diagnosis unnecessarily limit the contributions of psychiatry, present and potential, and needlessly restrict the medical and psychological resources upon which the court may draw. The legal requirements concerning appreciation of criminality and conformance of conduct and the negative definition that repeated criminal or otherwise antisocial conduct is not mental disease effect a gratuitous entrance into medical and scientific arenas which is unnecessary and may be harmful to the law's purposes.

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

"To conform his conduct to the requirements of law" is an inverse restatement of irresistible impulse which has proven to be an almost unusable defense. To lack "substantial capacity to conform his conduct to the requirements of law" is to have an irresistible impulse.

The terms "mental disease" and "defect" specifically exclude "an abnormality manifested only by repeated criminal or other antisocial conduct." To refer to mental disease and then to limit its meaning is to rob the court of the worth of the psychiatrist's expertness precisely to the degree that it limits his ability to transmit clinical information. It predisposes to failure in communication. The phrase "mental disease or defect" should serve as a focus for the communication and description of the combined behavior, feeling, ideas, of a person so as to inform judge or jury.

If the courts wish to determine whether mental disease or defect exists, then the law must use not only the semantics but the substance of psychiatry. It cannot, for example, meaningfully adopt psychiatric words, and then appropriate to itself the right to establish psychiatric diagnosis criteria even by exclusion. It legally excludes forms of behavior which may themselves be symptomatic of pathology, for antisocial behavior may be the manifestation of illness. Repeated illegal or antisocial conduct is a manifestation of a personality, and this personality may be a sick one. There is a quality of behavior

⁴ Durham Decision: An accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect [94 U.S. App. D.C. 228, 214 F. 2d 862 (1954)].