

v. *United States* (252 F. 2d 608 (D.C. Cir., 1957)) as meaning that the mental disease, or defect was decisive or critical in bringing about the act.

It is also alleged that the jury cannot arrive at a conclusion on such vague instructions. This seems to me a specious argument, for juries appear to have very little difficulty in deciding what is a reasonable man, what is due care, what is negligence, what is malice or premeditation, just as in other types of cases they seem to arrive at some conclusion about causation. Under the *Durham* rule, they can be given guidance by full psychiatric evidence. Certainty is an illusory virtue in any conclusions involving the behavior of human beings, and this is recognized by the American Law Institute formulation of "substantial" or "adequate" capacity. Very few things in this world are certain, and even the law does not demand more than a finding beyond a reasonable doubt.

Still another allegation against the *Durham* rule is that it will increase the number of acquittals by reason of insanity. I grant that the number has increased to some extent. From the date of the *Durham* decision (July 1, 1954) through November 16, 1960, two hundred twenty-nine persons have been found not guilty by reason of insanity and committed to Saint Elizabeths Hospital in accordance with the statute, with increases particularly in the past two years (59 and 100 respectively). This statute (D.C. Code § 24-301 (1961)), passed in 1955 after the *Durham* decision, provides for mandatory commitment to Saint Elizabeths Hospital until such time as the hospital finds and the court agrees that the offender has improved sufficiently to be released without danger to himself or others in the "reasonable future"; in such case he is entitled to a conditional release, or if he has recovered he is entitled to an **unconditional release**. Of these persons committed under this provision, forty-two have been released unconditionally and an additional sixteen conditionally; few, if any, of these persons have been returned to the hospital. Six others have been released on writs of habeas corpus, meaning that the court has released the patient without the contemplated certification from the hospital.

One fact which sometimes escapes attention when acquittals by reason of insanity are being criticized is that in a substantial number of cases the period of confinement resulting has been far greater than if an ordinary sentence had been imposed. Several persons have been committed to Saint Elizabeths Hospital after acquittal of such charges as threats, disorderly conduct, unauthorized use of automobile, or even drunkenness. In spite of the trivial nature of the charge, some of these persons have been found to be seriously ill mentally and potentially dangerous. After all, if an individual is mentally ill and dangerous, it would seem to be to society's advantage at least to keep him in custody until he can be released safely. I venture to suggest that the odds are in favor of a period of sequestration in the hospital that is longer than if a sentence were being served. As for the subject, he has the advantage of being given treatment for his mental disturbance if that is practical. When one considers the large number of criminal cases going through the courts of the District it hardly seems that the public peace and safety have been very greatly threatened. The provision for mandatory commitment has been sustained by the Court of Appeals (*Ragsdale v. Overholser*, 281 F. 2d 943 (D.C., Cir., 1960)). For a more detailed study of the operation of the *Durham* rule, see James Clayton's article in the June 1960 issue of the *Journal of the American Judicature Society*, and the study by Abe Krash in 70 *Yale Law Journal* 905-952, May 1961.

THE VIEWS OF CHIEF JUSTICE WEINTRAUB

The concurring opinion of Chief Justice Weintraub of the Supreme Court of New Jersey in *State v. Lucas* (152 A. 2d 50 (1959)) is one of the recent decisions upholding the *M'Naghten* rule. It is a thoughtful document and one entitled to serious consideration by psychiatrists, although I must respectfully disagree with some of the views expressed. There is no doubt, of course, that society must be protected from the insane as well as the sane; in the District of Columbia the legislation enacted by the Congress takes care of this matter fully as well perhaps as does the liberation of convicted persons by parole boards, and probably better. I doubt whether the implication that the psychiatrist would "discard all concepts of insanity as a defense and deal with transgressors as unfortunate mortals" is quite within the facts. There are a very few psychiatrists who might consider the criminal act as strong presumption of mental illness, but they are greatly in the minority. I doubt, again, whether the lack of existing psychiatric facilities is sufficient objection to the adoption of such a rule as *Durham*. After all, if further institutions or those of a different sort