

the *Durham* rule does not represent a radical departure from the historic traditions of the law.

It is true that a larger number of persons have been found not guilty by reason of insanity under the *Durham* rule than under the preexisting tests. But this does not prove that the rule is either a success or a failure. The optimum number of persons who should be acquitted of criminal charges by reason of mental disorder is not a legal or a psychiatric question—it is not a scientific issue—it is a moral question. We do not know whether all persons who should have been absolved of criminal responsibility in the District since 1954 have in fact been absolved. It may also be true that a few persons have unjustly escaped responsibility—that they have succeeded, as the prisoners in the District jail so inelegantly put it, in “bugging out.” It is my impression, however—and the hospital authorities could confirm this better than I—that persons who are presently being found not guilty by reason of insanity in the District are very sick people indeed.

It is also essential to keep the magnitude of this problem in a realistic perspective. The largest number of defendants acquitted in any one year on grounds of insanity was 67 in 1962. According to statistics prepared by the U.S. attorney's office, there were 1,493 persons charged in the District court with criminal offenses in that year. In other words, the percentage of persons found not responsible out of those charged was roughly 4.7 percent. I do not believe that this is an unreasonably high percentage.

It is, I think, significant that after a decade of living under the *Durham* rule, there are very few informed persons in the District who would favor turning the clock back to the *M'Naghten* and irresistible impulse tests. When such a proposal was made in effect to the bar association in 1959, it was turned down by a large majority of those voting. The *Durham* rule has been supported for 10 years by a majority of the nine members of the court of appeals, including three of the last four chief judges—Judge Edgerton, Judge Prettyman, and Judge Bazelon. There are, of course, some judges and lawyers who are dissatisfied with and critical of the *Durham* test. But I think it noteworthy that nearly everyone now agrees, in the light of a decade of experience, that the preexisting tests were inadequate and unjust.

II

I should like to comment next—very briefly—on several of the provisions in title 2 of H.R. 7525.

First, the bill would establish a new test of criminal responsibility for the District. This test is set out on page 2 of the bill (lines 15 to 19). It has been stated that this test is based upon the formulation recommended by the American Law Institute in the Model Penal Code. For the convenience of the committee, I have prepared an exhibit which sets forth the various tests of responsibility which we are discussing. As you will note from this exhibit, the American Law Institute test does not contain the words “to know” which are a part of the responsibility test in H.R. 7525. This “to know” phrase can be traced back to the discredited *M'Naghten* test. I would reject the test set out in the bill for that reason alone.

Assume, however, that the “to know” phrase were deleted from the test in the bill so that the standard was identical with the proposal of the American Law Institute. Speaking for myself, I have no serious objection to adoption of the American Law Institute test. I do think that it is complex and rather awkwardly phrased. I am also impressed by the fact that the psychiatric consultants to the American Law Institute dissented from this test. If a change in the responsibility test in the District were now to be made by statute, I personally would prefer the test proposed by Chief Judge Biggs of the Court of Appeals for the Third Circuit in *Currens v. United States*. The test of responsibility formulated by him reads as follows:

“The jury must be satisfied that at the time of committing the prohibited act the defendant, as a result of mental disease or defect, lacks substantial capacity to conform his conduct to the requirements of the law which he is alleged to have violated.”

I must say, however, that I do not think that any practical purpose would be served at this point in making this change in the District. I do not believe that the outcome of cases where the insanity defense is involved would be substantially different if the applicable test of responsibility in the District were the American Law Institute standard or the *Currens* rule instead of the *Durham* rule. I am reinforced in this conclusion by an observation of the very able U.S.