

attorney for the District, Mr. David Acheson. In an article he recently published in the *Georgetown Law Journal*,¹ he has stated that between two-thirds and three-fourths of the insanity acquittals are uncontested cases where the hospital staff is unanimous that the defendant had a mental disease and the crime was a product. He has written that "in cases of this kind, it would probably make little difference whether the District of Columbia had *Durham*, the American Law Institute proposal, or *McDonald*."

I think it would also be inadvisable to freeze the responsibility test at this point in a statute. The whole field is presently in a great state of ferment. I believe it would be advisable to await experience with other tests.

Second, H.R. 7525 would make an important change in the rules of evidence which apply where insanity is in issue. Subsection (c)(1) [p. 3, lines 8-10] provides that "mental disease or defect excluding responsibility is an affirmative defense which the defendant must establish by showing of substantial evidence." In all Federal courts, including the District, it is the law that a defendant creates an issue as to responsibility by presenting some evidence of mental disorder. I am aware of no valid reason why this burden should be increased. It must be remembered that the vast majority of defendants in criminal cases are indigent and poorly educated or even entirely illiterate. The jury should not be foreclosed from considering the responsibility issue if there is some relevant credible evidence.

Third, another significant change in existing law would be made by section (i) which appears on page 13 of the bill (lines 12-15). It provides that "the jury shall not be told by the court or counsel for the defendant at any time regarding the consequences of a verdict of not guilty or acquittal by reason of insanity." The court of appeals has held that—unless the defendant waives the point—the trial judge must inform the jury that the defendant will be hospitalized until he is no longer dangerous in the event he is acquitted on insanity grounds. This instruction seems to me necessary and appropriate. Laymen commonly know the consequences of a guilty or not guilty verdict, but they are not generally familiar with the fact that a defendant acquitted on insanity grounds will be hospitalized. An insanity defense of great merit may be rejected by a jury influenced by the specter of lunatics turned loose on a community.

III

Finally, I should like to say just a word about the relationship of mental disorder to the issue of the incidence of crime in the District.

I do not believe it can be seriously argued that there is any correlation between the crime rate and the existence of an enlightened rule as to criminal responsibility. I am not aware of any evidence showing that a substantial number of crimes have been committed by persons who believed they could escape criminal responsibility by invoking the insanity defense. To the contrary, there are many people who feel that confinement in a mental institution is a worse fate and carries a greater stigma than imprisonment. St. Elizabeths Hospital authorities have been very conservative in approving the release of defendants acquitted on insanity grounds. Various studies which have been made suggest that, given the same offense, the period of hospital confinement will probably exceed the time that would be spent in prison if the defendant were found guilty.

Some critics of the court of appeals have accused it of being tenderhearted and sentimental. I would say, on the contrary, that *Durham* is the product of a court willing to face the realistic fact that mental disorder in connection with crime is a serious problem; of a pragmatic court willing to experiment; of an open-minded court responsive to scientific development. Our court of appeals has given the issue of judicial administration of the insanity defense more intensive consideration than any other court in the English-speaking world. I would say that it has done a superb job. I do not think that a case can be made out for enactment of title 2 of H.R. 7525.

Mr. KRASH. What I thought might be helpful to the committee would be if I were to briefly serve as the development of the doctrine of responsibility and to indicate how the *Durham* case arose out of it,

¹ Acheson, *McDonald v. United States: The Durham Rule Redefined*, 51 *Georgetown L.J.* 580, 589 (1963).