

endorsed by mental health specialists who have had the most intimate contact with the administration of criminal justice, including the country's two most eminent authorities, Dr. Winfred Overholser, Superintendent of Saint Elizabeth's Hospital and Dr. Manfred Guttmacher, Chief Medical Officer of the Supreme Bench of Baltimore.⁷ The *Durham* rule is supported by a substantial number of practicing lawyers in the District. It should not be abandoned without clear and convincing evidence that it is not satisfactory, and without reasonable assurance of a more satisfactory test. The majority has failed to make a case on either of these grounds.

We are in agreement with the majority in two significant respects. *First*, the majority affirmatively and explicitly recommends against a "return" to the tests of responsibility which the *Durham* rule superseded (Report, p. 11). We regard the pre-existing tests (which we discuss below) as inadequate, obsolete, and unjust. *Second*, the majority recognizes the desirability of permitting psychiatric experts to testify freely as to their diagnosis and opinions (Report, p. 12). This was perhaps the chief objective of the *Durham* test. We do not claim that the *Durham* formula is perfect, or that it is immune from criticism. We differ from the majority, however, in their critique of *Durham* and in the merits of their proposed statutory substitute.

We think it incumbent upon us, in light of the basic importance of the question⁸ and the far reaching implications of the majority's report, to indicate the reasons which impel us to differ from our associates on the committee.

⁴ Sobeloff, *Insanity and the Criminal Law: From McNaghten to Durham and Beyond*, 41 A.B.A.J. 796 (1955).

⁵ Douglas, *The Durham Rule: A Meeting Ground for Lawyers and Psychiatrists*, 41 Iowa L. Rev. 485 (1956).

⁶ See e.g. Roche, *Criminality and Mental Illness—Two Faces of the Same Coin*, 22 Univ. of Chicago L. Rev. 320 (1955); Zilboorg, *A Step Toward Enlightened Justice*, Id. at p. 331.

⁷ Guttmacher, *The Psychiatrist as an Expert Witness*, 22 Univ. of Chicago L. Rev. 325 (1955).

⁸ "[T]he question at bar, [i.e., the test for determining responsibility] far from being ordinary, is perhaps the most controversial problem existing in the criminal law today." Barnes, J., in *Sauer v. United States*, 241 F. 2d 640, 644 (9th Cir. 1957).