

Justice Brennan also refers to the "distinguished Drs. Karl Menninger and Joseph Sotten" and he quotes approvingly and at length from Judge Bazelon, the author of the *Durham* opinion, but he does not mention Drs. Frederic Wertham and Hervey M. Cleckley or other distinguished psychiatrists who hold a different opinion of the current law and of the forensic use of psychiatry. Finally, there is no reference to any of the judges of some 20 jurisdictions, State and Federal, who have rejected the *Durham* rule and other proposed alternatives to the M'Naghten rules, not even to the particularly thoughtful opinion of the chief justice of the supreme court of his own State in *State v. Lucas*, 30 N.J. 37, 152 A. 2d 50 (1959).

JUSTICE DOUGLAS THINKS DURHAM IS IMPROVEMENT

In a lecture a few years ago to group of psychiatrists, Justice William O. Douglas hailed the *Durham* rule as a great improvement on the "rigid," the "arbitrary, fixed" M'Naghten rules.⁶ He first attributed the M'Naghten test to political pressure, public clamor, and newspaper publicity, but later he said: "The only warrant of the M'Naghten rule of insanity was tradition." "To most psychiatrists," he continued, the *Durham* decision "was a break with legal tradition that was long overdue." It has the great advantage of permitting the psychiatrist to "speak to the court and to the jury in the language of his discipline," he declared.

Justice Douglas, in my opinion, was seriously mistaken in every one of these statements. Not the least significant evidence of this is that an overwhelming majority of the judges who have had an opportunity to pass on the question have rejected the *Durham* rule and the psychiatry summoned in support of it. The irony of these implied and expressed criticisms of the M'Naghten rules is that these justices, especially sensitive to the protection of civil liberties, do not realize that if the M'Naghten rules are abandoned, the consequence will probably be a "tyranny of experts".⁷ The vaunted "humanitarianism" of some psychiatrists contemplates the long-term incarceration of vast numbers of persons who have violated no law, as well as the detention of thousands of petty offenders for as long a time as the so-called experts withhold their favorable prognosis. It is unfortunate that these justices do not raise a question regarding the touted claim that adequate knowledge exists to discharge the above vital functions fairly and with warranted assurance in the validity of the "experts'" decisions.

What is especially significant is the probability that if judges as able and conscientious as Justices Brennan and Douglas lack the knowledge required to deal soundly with this problem, then many other judges and lawyers are in a similar situation. In sum, we face a complex 20th-century problem whose solution requires much more than sympathy with unfortunate persons charged with the commission of crimes.

INFORMED DISCUSSION SHOULDN'T BE CURTAILED

Can anything be done to remedy this situation, especially in its relation to issues of the gravest importance that will no doubt be presented in due course to the Supreme Court? Certainly it would be a mistake for judges to refrain from public speaking and printed publication, for then important potential contributions would not be made and the occasional need for further study would be unknown.

It may be suggested, in the first place, that when a judge delivers a public lecture and has it published in a widely read journal, it is both fair and necessary that the views he expresses be subjected to the same sort of searching criticism as the published views of others. But objectivity is very difficult to maintain when a Justice of the U.S. Supreme Court is concerned.

Moreover, one can hardly ignore the fact that although we avow a free market in ideas as the best test of truth, the heads of well-financed psychiatric institutions and powerful officials enjoy strategic positions in the formation of public opinion. The implications are alarming when a Justice of the Supreme Court appears to have accepted certain philosophical versions of psychiatry.

It would, of course, be absurd to imply that either Justice Brennan or Justice Douglas would approve any philosophy that depreciated human freedom. What

⁶ Douglas, "The Durham Rule: A Meeting Ground for Lawyers and Psychiatrists," 41 Iowa L. Rev. 485 (1956).

⁷ Wertham, "Psychoauthoritarianism and the Law," 22 U. Chi. L. Rev. 337 (1955).