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Criminal Law - Guidelines for Expert Testimony in the Insanity Defense - Making the "Product" Palpable

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including such searches carried out in spite of the violent resistance of the person searched."[76]

The total effect of the *Huguez* decision is one of tighter restrictions on border officials in the area of body cavity searches. Not only will the customs agents have to show substantial evidence to back up the initiation of any such search in the future, but they will have to handle the suspect in an extremely gentle manner. Also, the agents will have to take more care to pass on all information and suspicions they have to the physician before he attempts any medical examination.

Whether this will result in additional protection for innocent travelers or simply in the reversal of more narcotics convictions remains to be seen.

> That the rule of exclusion and reversal results in the escape of guilty persons is more capable of demonstration than that it deters invasions of right by the police. . . . Rejection of the evidence does nothing to punish the wrong-doing official, while it may, and likely will, release the wrong-doing defendant. . . . It protects one against whom incriminating evidence is discovered, but does nothing to protect innocent persons who are the victims of illegal but fruitless searches.[77]

Janetta Fowler

[76] Henderson v. United States, *supra* note 16, at 806-07.

[77] Irvine v. California, 347 U.S. 128, 136 (1953).

CRIMINAL LAW—GUIDELINES FOR EXPERT TESTIMONY IN THE INSANITY DEFENSE—MAKING THE "PRODUCT" PALPABLE

A jury convicted Thomas Washington, appellant, of rape, robbery and assault with a deadly weapon. The principal defense was insanity. The District of Columbia Court of Appeals affirmed the conviction, holding that sufficient evidence had been adduced to preclude a directed verdict. However, the court went on to criticize the quality of the evidence and wrote a model instruction setting forth guidelines for future testimony by expert witnesses on the insanity defense in criminal prosecutions. *Washington v. United States,* 390 F.2d 444 (D.C. Cir. 1967).

The *Washington* case presents an interesting intertwining of criminal law substantive and evidentiary issues. The general scope of the opinion encompasses the insanity defense to criminal responsibility. Specifically, Chief Judge Bazelon, who wrote the opinion of the court, adjudged the role of psychiatric expert opinion testimony. But equally noteworthy are the implications of his expositive opinion, which typify the struggle courts are having

with the insanity defense. Can behavioral scientific knowledge, which necessarily begins with a deterministic premise, be adapted to the present system of criminal justice, which operates upon the premise that most men freely will their acts? Can a determination of criminal responsibility in the individual case be made? Although the *Washington* court assumed the affirmative to both these questions in rendering its decision, Judge Bazelon, by way of *obiter dicta,* questioned the validity of those assumptions.

In affirming Washington's conviction, the court accepted appellant's challenge "to settle once and for all the proper role of labels and conclusions in insanity cases."[1] While the court felt it could not disturb the fact determination of the jury, it should ensure that future verdicts be based on relevant, meaningful evidence. *Washington v. United States* was thus used as the means for elucidation on the role of the psychiatric expert witness in a criminal trial.

In order to understand what the court saw as the psychiatrist's proper function, a review of the history of the insanity defense in the District of Columbia is necessary.

Prior to 1954, insanity sufficient to negate capacity to form the requisite *mens rea* was tested by the formula in *M'Naghten's Case*[2] coupled with the "irresistible impulse" test.[3] The *M'Naghten* Rule read:

> Every man is to be presumed to be sane, and . . . to establish a defense on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know he was doing what was wrong.[4]

The "irresistible impulse" test added "that if his reasoning powers were so far dethroned by his diseased mental condition as to deprive him of the will power to resist the insane impulse to perpetrate the deed, though knowing it to be wrong," the accused should then also be acquitted.[5]

Using the term "disease of the mind" had the significant effect of making expert medical testimony highly relevant, whereas, prior to that time, the jury had evaluated the evidence without any such assistance.[6] Psychiatrists

[1] Reply Brief for Appellant at 3, Washington v. United States, 390 F.2d 444 (D.C. Cir. 1967).

[2] 8 Eng. Rep. 718 (1843).

[3] Smith v. United States, 36 F.2d 548 (D.C. Cir. 1929).

[4] M'Naghten's Case, *supra* note 2, at 722.

[5] *Supra* note 3, at 549. The *M'Naghten* Rule with or without the "irresistible impulse" test remains the law in many jurisdictions today.

[6] Prior to *M'Naghten,* the test had been whether defendant "doth not know what he is doing, no more than . . . a wild beast." GLUECK, MENTAL DISORDER AND THE CRIMINAL

were called upon to illuminate defendant's mental state at the time of the crime. Usually the inquiry was limited to the narrow scope of the test questions. However these tests were widely criticized as being concerned with the cognitive aspects of the mind to the exclusion of the emotional and volitional.[7]

The rule in *Durham v. United States*[8] was announced by the District of Columbia Circuit Court of Appeals with the expectation that it would eliminate these objections and provide meaningful facts from which the jury could determine blameworthiness. There the court formulated the standard "that an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect."[9] The legal test was thus broadened to include whatever was the latest relevant scientific knowledge about the insane mind. Concomitantly, it was expected of the psychiatrist that he would fulfill his function in a manner which would allow him to employ the full range of his expertise. He was to limit himself, however, to advisory opinions on the clinical facts concerning the accused's mental state and avoid moral or legal conclusions. Unfortunately, the witness' uncertain diagnostic conclusions were too readily received as conclusive of the legal issue. Accentuation of the psychiatrist's greater insight regarding the defendant's mental condition was probably responsible for this predicament, as also was the misconception that the test was the same in both a normative and medical sense.[10]

Despite this mistaken notion, there was a clear conception of what the ideal psychiatric witness would provide in his testimony. The court in *Carter v. United States* expected the witness to describe and explain any mental disease in terms of how it originated, evolved and influenced the defendant's mental and emotional processes.[11] Stress was placed on the assertion that

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LAW 138-39 (1925), citing Rex v. Arnold, 16 How. St. Tr. 695, 764 (1724). Under this rule no expert was needed.

[7] *See generally* CARDOZO, WHAT MEDICINE CAN DO FOR THE LAW 28 *et. seq.* (1930); GLUECK, MENTAL DISORDER AND THE CRIMINAL LAW (1925); GUTTMACHER & WEIHOFEN, PSYCHIATRY AND THE LAW 403-23 (1952); MENNINGER, THE HUMAN MIND 450 (1937); OVERHOLSER, THE PSYCHIATRIST AND THE LAW 41-43 (1953); RAY, MEDICAL JURISPRUDENCE OF INSANITY (1st ed. 1838) (4th ed. 1860).

[8] 214 F.2d 862 (D.C. Cir. 1954).

[9] *Id.* at 874-75. *Compare* MODEL PENAL CODE § 401 (Proposed Official Draft 1962): "(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law. (2) The terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct."

[10] Evidence of this misconception can be found in the opinion of the court in *Carter v. United States,* 252 F.2d 608, 617 (D.C. Cir. 1956): "Durham was intended to restrict to their proper medical function the part played by the medical experts. Many psychiatrists had come to understand there was a 'legal insanity' different from any clinical mental illness."

[11] *Id. Accord,* Hawkins v. United States, 310 F.2d 849, 852 (D.C. Cir. 1962).

more important than the expert's conclusions were the reasoning and data which formed them.

Notwithstanding such distinct directives, abuses continued in that experts testified conclusively as to whether the defendant had a mental disease. As a result, the same abnormal mental condition might one week have been insufficient to exculpate the defendant, and the next week be considered to conform to the definition.[12] This was possible because no clearly defined distinctions existed between what was clinically and what was legally a mental disease.

The District of Columbia appellate court finally recognized this semantic confusion and in *McDonald v. United States*[13] gave legal meaning to the term "disease":

> [A] mental disease or defect includes any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls.[14]

In addition, the court required that the jury should decide whether what the experts said was a disease was in fact such according to the legal definition.[15]

Even though the functions of the psychiatrist and the jury were sharply delineated as to the existence of mental disease or defect, transgressions persisted. By using pejorative scientific labels which were conclusory in effect, the intent of the *McDonald* court was circumvented.[16] In the *Washington* case, the court referred to the expert's testimony as often being "a confusing mass of abstract philosophical discussion and fruitless disputation . . . about legal and psychiatric labels and jargon," and lacking in pertinent underlying information.[17]

With the insanity defense, in general, words such as "insane," "psychotic,"

[12] *See, e.g.*, Blocker v. United States, 288 F.2d 853 (D.C. Cir. 1961); In re Rosenfield, 157 F. Supp. 18 (D.D.C. 1957).

[13] 312 F.2d 847 (D.C. Cir. 1962).

[14] *Id.* at 851. In *Durham v. United States, supra* note 8, at 875, "disease" was defined as "a condition which is considered capable of either improving or deteriorating"; "defect," as "a condition which is not considered capable of either improving or deteriorating and which may be either congenital, or the result of injury, or the residual effect of a physical or mental disease."

[15] McDonald v. United States, *supra* note 13, at 851. This was a retrenchment from the position in *Carter v. United States, supra* note 10.

[16] *See, e.g.*, Washington v. United States, 390 F.2d 444, 447-50 (D.C. Cir. 1967), where the court objected to the "disputes and conclusions about medical and legal terminology—about whether a person is 'normal' if he is not 'too neurotic,' about whether Washington was suffering from a 'neurosis,' about whether he has a 'schizoid personality' as opposed to 'traits of a schizoid nature,' about whether 'he has sociopathic symptomology,' or whether instead 'he has aggressive antisocial activity, ...'"

[17] *Supra* note 16, at 447. *See, e.g.*, Henderson v. United States, 360 F.2d 514, 518-21 (D.C. Cir. 1966); Heard v. United States, 348 F.2d 43, 50-51 (D.C. Cir. 1965); Rollerson v. United States, 343 F.2d 269, 271 (D.C. Cir. 1964).

and "schizophrenic" superabound. Scant personal history on the origin and development of defendant's behavioral patterns ever appears in the testimony even where lengthy psychiatric reports exist. Instead, each side presents witnesses who use conclusive and esoteric language which is contradictory to that used by the opposing witnesses.[18]

Noted medico-legal writers have objected to this diagnostic categorization and have urged instead that the testimony focus on describing and making intelligible the defendant's personality and behavior. To be meaningful and helpful to the jury, the testimony should include information on defendant's mental, emotional and voluntary processes; the nature of any mental disease or defect, and the relationship of such disease or defect to the type of conduct for which defendant has been charged; the degree of intensity with which he has delusions and hallucinations; the extent to which he is capable of deferring gratifications or to which he comprehends the consequences of his actions; and, the probability that any such condition which would be relevant to the crime charged was, in fact, influencing him at the time the crime was committed.[19] Labels and esoteric terminology should be avoided whenever possible, not only because they will more likely be incomprehensible to the jury, but because in the developing sciences of psychiatry and psychology, they imply a precision which is non-existent.[20] An expository type of testimony is also called for because of the evidentiary requirement that expert opinion have an ascertainable basis in fact.[21]

In order to obtain meaningful testimony and to preclude confusing terminology, the trial judge should fulfill his role as a supervisor of the evidence by limiting the psychiatrist's use of medical labels and by ensuring that when these labels are used that their meaning is explained to the jury in a way which relates to the accused.

The *Washington* court also discussed the legal labels, "product" and "mental disease or defect," which are used in the *Durham* test for criminal responsibility. Concern was expressed that these are too often used by the witness in a legal-moral rather than medical sense with a consequent usur-

[18] *See* GOLDSTEIN, THE INSANITY DEFENSE 41 (1967). Goldstein's criticisms were aimed at psychiatric testimony regardless of the test employed.

[19] *Id.* at 26, 28, 30, 34; Salzman, *Psychiatric Interviews As Evidence: The Role of the Psychiatrist in Court—Some Suggestions and Case Histories*, 30 GEO. WASH. L. REV. 853, 854-55, 858 (1962). *See, e.g.*, McDonald v. United States, *supra* note 13, at 851; Carter v. United States, *supra* note 10, at 617-18; Rollerson v. United States, *supra* note 17, at 272-73.

[20] *See* MENNINGER, THE VITAL BALANCE 25 *passim* (1963); Salzman, *supra* note 19, at 859.

[21] "This is merely an application of the general principle of the knowledge qualification." 2 WIGMORE, EVIDENCE § 562 (3d ed. 1940). *See* MCCORMICK, EVIDENCE 24 (1954); UNIFORM RULE OF EVIDENCE 57.

pation of the jury's function.[22] In an attempt to obviate this practice, the court decided to prohibit psychiatrists from testifying directly in terms of "product," "result," or "cause." Any clinical connotation to these words was considered inconsequential when weighed against their ordinary, and, in this case, legal meaning. The court refrained from prohibiting testimony on whether defendant suffered from a "mental disease or defect," even though it too was seen as a part of the ultimate issue to be determined by the jury, because the term might have clinical significance to the psychiatrist, and, if prohibited, would only be replaced by other conclusory labels. Hope was expressed that the guidelines established by the elucidation on the psychiatrist's role would adequately prevent misuses.[23]

Concern with the peril in "product" testimony had been voiced five years earlier by Judge Burger in his dissent in *Campbell v. United States:*[24]

> [W]hen a qualified expert psychiatrist with the mantle of professional standing, and medical degrees in a high calling, tells a jury that the act charged is *not* the "product" of any "mental disease," he is stating a conclusion *that the defendant ought to be found guilty.*[25]

In adopting this position the *Washington* court cited Judge Burger's admonition along with several cases in the jurisdiction, beginning with *United States v. Spaulding,*[26] holding that an expert cannot give his opinion or conclusion on the ultimate fact in issue.

The court made further reference to McCormick as supporting this position.[27] McCormick, however, saw the general doctrine barring witnesses from giving opinions on an ultimate fact in issue as going beyond the bounds of common sense reluctance.[28]

> It is believed, however, that this general rule [banning opinions on the ultimate fact issue] is unduly restrictive, is pregnant with close questions of application, and often unfairly obstructs the party's presentation of his case. Even the courts which profess adherence to the rule fail to apply it with consistency. All such courts, for example, disregard the supposed rule, usually without explanation as to why it should not be applied, when value, sanity, handwriting and identity are in issue.[29]

[22] The functions were clearly delineated in *McDonald v. United States, supra* note 13.

[23] Washington v. United States, *supra* note 16, at 454-56.

[24] 307 F.2d 597 (D.C. Cir. 1962).

[25] *Id.* at 613 (Burger, J., dissenting).

[26] 293 U.S. 498 (1935).

[27] Washington v. United States, *supra* note 16, at 456 n.31.

[28] McCormick, Evidence 26 (1954).

[29] *Id.* Other authorities have discarded the rule banning ultimate issue opinion entirely. 7 Wigmore, Evidence §§ 1920-21 (3d ed. 1940); Uniform Rule of Evidence 56 (4).

In showing the relationship of any disease or defect to the alleged offense, it seems absurd to draw a distinction between employing words which establish a causal relationship and employing a word such as "product" on the sole basis that the latter is an infringement on the ultimate fact issue which the jury is deciding. Judge Fahy's position in the concurring opinion[30] is more reasonable and realistic.

> More important, such an opinion [on the product or causal issue] does not relate to a matter of common knowledge or observation as to which the expert in psychiatry does not often have knowledge superior to that of the "lay or uneducated mind." True it is that the jury of laymen must form a judgment on the issue of criminal responsibility, but this does not bar from the jury such assistance in forming that judgment as a person specially qualified by education and experience in psychiatry might afford.[31]

The *Washington* court is probably correct in citing McCormick as supporting the barring of psychiatrists from speaking directly in "product" terms. However, the reason would not merely be that there is an opinion on the ultimate issue. More probably it would be due to the use of the exact word which is a part of the legal test. Nothing is added to the jury's understanding and the word creates a "substantial danger of undue prejudice."[32] Furthermore, regarding the "product" and "disease" labels, many psychiatrists feel that they have no more expertise than laymen to make these conclusionary determinations. They see the criteria as involving primarily moral considerations. In addition, they do not feel capable of making diagnostic statements which are scientifically certain about the defendant's mental state.[33] To answer in terms of the test questions might reinforce any misin-

[30] Washington v. United States, *supra* note 16, at 461 (Fahy, J., concurring specially in affirmance).

[31] Washington v. United States, *supra* note 16, at 461. *Accord,* United States Smelting Co. v. Parry, 166 F. 417, 411 (8th Cir. 1908).

[32] McCormick, *supra* note 28, at 27; Uniform Rule of Evidence 45.

[33] *See* Guttmacher, *The Psychiatrist As An Expert Witness*, 22 U. Chi. L. Rev. 325, 327 (1955): "[T]here will at times be doubt as to whether or not the act was the product of the existing mental abnormality." Menninger, The Vital Balance 25, 33 (1963): "This trend in diagnosis away from the concept of understanding the afflicted individual and back toward the goal of identifying and tabulating 'the disease' seems regressive and archaic to us. It implies a precision of findings and a conformity of pathology which do not—in our opinion—exist. . . . To refer to a constellation of symptoms as constituting a schizophrenic picture is very different from referring to the individual presenting these symptoms as a victim of 'schizophrenia' or as being a 'schizophrenic.' Some symptoms are by definition 'schizophrenic,' but no patient is. The same patient may present another syndrome tomorrow." Roche, The Criminal Mind 266 (1958): "The 'product test' is a subjective determination upon which is pivoted the question of moral responsibility, *i.e.* penalty, which the court or jury can and should resolve. . . . I would submit that if the product question is withheld from the expert and confined to the triers, psychiatry can function properly. The jury can decide the matter under applicable law as instructed by the court, since it is determining a moral (legal) issue in its own terms." *See also*

terpretations. Moreover, the essential reason for barring test questions is that the conclusions are not as important as are the details upon which they have their basis.

In setting forth guidelines for the psychiatrists, the *Washington* court indicated a lack of confidence in the adversary system as a watchdog for enforcement of its rulings.[34] The complexity of the insanity issue seems the primary cause for any failures in the system. Because of his superior insight, the expert witness can easily become both an advocate and juror. Because counsel is more interested in the general finding than in the substance of it, he probably encourages abuses by seeking the best witness rather than the best expert.[35]

In order to ensure that their directives were implemented, the *Washington* court drafted an instruction which was appended to the decision.[36] It summarized the salient points made in the decision, advising the psychiatrist of the kind of testimony he was to provide and the manner in which he was to present it, cautioning him against unsatisfactory practices. The court indicated that a copy of this instruction was to accompany all orders requiring mental examinations and that the instruction was to be read in open court in the presence of counsel and the jury immediately after the first psychiatric witness has been qualified. However, Judge Bazelon observed that the instruction might not improve the adjudication of criminal irresponsibility and that this eventuality might necessitate absolute prohibition of the use of legal labels, a refashioning of the insanity defense, or even abrogation of the defense entirely.

The latter two possibilities raise the undecided substantive issue in *Washington v. United States*—whether a determination of criminal responsibility can be made. Assuming for the moment that it can, consider Judge Bazelon's suggested refashioning of the insanity defense: "An alternative to *Durham-McDonald* would be to make the ultimate test whether or not it is just to blame the defendant for his act."[37] Judge Fahy touched upon the flaw in this concept when he stated, "[t]his basic moral decision (on blameworthiness) is made by society, not by juries."[38] To amplify the judge's point, the jurors are the arbiters of the facts, not of the law. Law is a principle, a rule of duty, or in this instance, a rule of exculpation. To say that jurors would

Suarez, *A Critique of the Psychiatrist's Role as Expert Witness*, 12 J. FORENSIC SCI. 172 (1967).

[34] Washington v. United States, *supra* note 16, at 455 n.30.

[35] McCormick, *supra* note 28, at 35.

[36] Washington v. United States, *supra* note 16, at 457-58.

[37] Washington v. United States, *supra* note 16, at 457-58.

[38] Washington v. United States, *supra* note 16, at 462 (Fahy, J., concurring specially in affirmance).

determine criminal irresponsibility on the basis of whether defendant is blameworthy is to say they would make their determination on the basis of what each thinks the law is (*e.g.*, some would apply the equivalent of the *M'Naghten* test, while others of deterministic bent might excuse defendant in any case).

Refashioning the test instead of the defense (although the court did not suggest this) would serve no purpose. The principal existing tests (*i.e.*, *Durham-McDonald,* American Law Institute, *M'Naghten-* "Irresistible Impulse") are essentially the same in that they seek the same result of excusing those who commit criminal acts without having the requisite mental intent. The ALI and *M'Naghten* tests only seem more normative because they are expressed in terms of symptoms. The symptoms, however, add nothing in terms of utility and detract from the equal application of the criminal law in that persons lacking criminal intent could yet be found guilty should the tests be strictly construed and applied. *Durham,* on the other hand, is not nearly as clinically oriented as it appears. This is especially true since the *McDonald* and *Washington* decisions. To determine that the alleged offense was a "product" of some "mental disease or defect" which "substantially affects mental or emotional processes and substantially impairs behavior controls" is not any less an abstract value judgment than to determine that defendant "did not know the nature and quality of his act" or was affected by an "irresistible impulse."

Regarding all of the standards, they seem no more than imperfect versions of the obverse of the general principle underlying our criminal law—that men are criminally responsible for those acts which violate the law and are committed with evil intent and of their own free will.

The subjectivization necessary to use such a principle when insanity is the defense seems an inevitably frustrating endeavor. The problem is that the facts giving rise to the legal principle are incapable of concrete determination.[39] As Justice Marshall recently stated in *Powell v. Texas,*[40] where the Supreme Court affirmed the conviction for public drunkeness of one who was to some degree compelled to drink:

> It is one thing to say that if a man is deprived of alcohol his hands will begin to shake, he will suffer agonizing pains and ultimately he will have hallucinations; it is quite another to say that a man has a "compulsion" to take a drink, but that

[39] This same problem destroys the court's attempted analogy between the conclusory legal labels of "mental disease or defect" and "negligence" in footnote 28. Washington v. United States, *supra* note 16, at 454. The court correctly observed that the labels need not in themselves provide guidance to the jury. The conclusions are based on other considerations. But it is here where the problem arises. With "negligence," the facts giving rise to the conclusion are capable of concrete determination. But the same is not true with "mental disease or defect."

[40] 392 U.S. 514 (1968).

he also retains a certain amount of "free will" with which to resist. It is simply impossible, in the present state of our knowledge, to ascribe a useful meaning to the latter statement. This definitional confusion reflects, of course, not merely the underdeveloped state of the psychiatric art but also the conceptual difficulties inevitably attendant upon the importation of scientific and medical models into a legal system generally predicated upon a different set of assumptions.[41]

The reasoning of the decision seems more ascribable to the insanity defense. In fact, Justice Marshall cited the *Washington* decision in support of his statement. In concurring, Justice Black also cited the *Washington* case, and made the following point:

Almost all of the traditional purposes of the criminal law can be significantly served by punishing the person who in fact committed the proscribed act, without regard to whether his action was "compelled" by some elusive "irresponsible" aspect of his personality . . . . Punishment of such a defendant can clearly be justified in terms of deterrence, isolation, and treatment. On the other hand, medical decisions concerning the use of a term such as "disease" or "volition," based as they are on the clinical problem of diagnosis and treatment, bear no necessary correspondence to the legal decision whether the overall objectives of the criminal law can be furthered by imposing punishment.[42]

Judge Bazelon's last suggested alternative, elimination of the insanity defense, would seem, therefore, to merit consideration.

Expanding upon the points raised by Justice Black, in the realm of behavioral science, categorization of abnormality has as its purpose the suggestion of some dispositional treatment. Such diagnosis has no necessary relevancy to a determination of criminal responsibility. However, in the legal realm, categorization has as its primary purpose the determination of criminal responsibility. Disposition is only considered after the criminal responsibility question has been resolved.[43] As has been discussed previously though, the diagnostic fact determination for establishment of *mens rea* seems an impossible one. It is plausible then, that society's interests would be better served by excluding considerations of mental illness prior to the dispositional stage of the proceeding.[44]

Thus, the *Washington* decision is perhaps more important for the issues raised than those resolved. Judge Bazelon's remarks concerning a refashioning or abolition of the insanity defense should not be summarily dismissed as

[41] *Id.* at 526.

[42] *Id.* at 540-41 (Black, J., concurring).

[43] *See* Annot., 45 A.L.R.2d 1448 (1956).

[44] *See* Weintraub, *Criminal Responsibility: Psychiatry Alone Cannot Determine It,* 49 A.B.A.J. 1075 (1963): "My thesis is that insanity should have nothing to do with the adjudication of guilt, but rather should bear only upon the disposition of the offender after conviction, and that the contest among *M'Naghten* and its competitors is a struggle over irrelevancy."

obiter dicta. Read in conjuction with the opinions in *Powell v. Texas,* such comments may indicate the advent of new developments in the area of criminal law. Nonetheless, conceding the existence of the insanity defense, the decision of the *Washington* court ranks as a needed reform measure.[45]

Matthias Lydon

[45] The Fourth Circuit Court of Appeals has adopted the *Washington* court's reasoning insofar as the governing of psychiatric expert opinion testimony is concerned in *United States v. Wilson,* 399 F.2d 459 (4th Cir. 1968) and *United States v. Chandler,* 393 F.2d 920 (4th Cir. 1968).

LANDLORD-TENANT—BREACH OF COVENANT TO REPAIR—RECOVERY OF CONSEQUENTIAL DAMAGES: THE RESTATEMENT RULE AS THE TENANT'S WEAPON

Prior to signing a lease for a house, Meda and Joe Reitmeyer obtained from Harold Sprecher, their prospective landlord, an oral promise that he would either repair or provide materials for the repair of a certain obvious defect. The defect was in the rear porch of the demised dwelling and consisted of loose or missing wood in the porch floor. The Reitmeyers occupied the premises under the lease on August 3, 1965, with knowledge that the defect had not been repaired. They subsequently gave occasional reminders to Sprecher concerning his covenant to repair the defect. These reminders were not heeded. On October 7, 1965, Meda Reitmeyer fell at the point of, and as a result of, the defective flooring and sustained personal injuries. The Reitmeyers brought an action against Sprecher in tort for his negligent failure to repair the defect and sought to recover for the personal injuries suffered by Mrs. Reitmeyer. Although the cause of action arose from defendant's breach of his covenant to repair, plaintiffs alleged a tortious failure to perform such contract. Hence, the plaintiffs claimed as the basis of their cause of action the existence of a contract, yet the damages were not for the landlord's breach of contract but for his negligence in failing to perform his contractual duties. Nor did the complaint contain any allegations that the defective portion of the dwelling was under the control or in the possession of the landlord. The house occupied by the Reitmeyers, as entire premises, was under the complete control and in the possession of the tenant. Since the basis of the alleged tort liability was the contract, the Reitmeyers contended that the oral promise was supported by consideration, the consideration being their having entered into the lease in reasonable reliance upon the promise to