MEDICO-LEGAL PROBLEMS IN DRAFTING A CRIMINAL CODE

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I SEE my task as that of a reporter, telling you of an experience in relation to the proposed reshaping of the criminal law in the United States. Of the many things I tried to learn during a year working at Harvard Law School and from visiting many correctional institutions in the United States, that which interested me most was the work of the American Law Institute in drafting a Model Penal Code in which I was privileged to play a very small part. The word "Penal" in the phrase "Model Penal Code" is an unfortunate one in Australian ears—what the Americans mean by that phrase is a combined model criminal code and a model code for the organization of correctional services—prison, probation, and parole. Tonight I shall concern myself mainly with the drafting of the criminal code provisions.

The justification for such an effort lies in what I regard as the graceless shape of our own criminal law. It is a system that has some of the advantages of an evolutionary system, but which has followed a strange process of evolution by which, when new arms and legs are found to be necessary, the judges either create them or the legislature devises them, without lopping off the old arms and legs. Through this evolutionary process the criminal law now constitutes a reasonably effective working system—all in all, better than the American system—but one which stands, I think, in considerable need of thinking through, of reorganization, of reshaping.

Should anyone doubt that the criminal law is an important area of the law, I would like to state by way of rebuttal a short paragraph by the man who is primarily responsible for the drafting of the Model Penal Code, Herbert Wechsler: "This

is the law on which men place their ultimate reliance for protection against all the deepest injuries that human conduct can inflict on individuals . . . it governs the strongest force that we permit official agencies to bring to bear on individuals. Its promise as an instrument of safety is matched only by its power to destroy. . . . . Nowhere in the entire legal field is more at stake for the community or for the individual."[1]

Despite its importance, this is an area of law which has received relatively little attention from the higher echelons of the legal profession, and not a great deal of attention from psychiatrists or other social scientists. It remains the product of a fragmentary, disorganized and accidental growth, capable of comprehension only by one with a goodly understanding of its history. If it is as important as I have suggested, then the justification for the type of endeavour that the American Law Institute brought to bear on it is obvious, because there have not been many authors who have critically considered the basic principles of the criminal law. I submit that between Sir James Fitzjames Stephen, writing in the nineteenth century, and Dr. Glanville Williams, writing at present, there are no names which stand out as contributing significantly to an understanding of the criminal law.

Perhaps the real justification for my effort here tonight is that it is unlikely to do very much harm. The last audience with whom I discussed this topic was a group of convicts at the Utah State Penitentiary, all very interested in the problem, and it did not seem to do much harm to them. It was over two months before there was a riot at that prison.

The Model Penal Code discussions, quite apart from their content, are interesting for their organization. There is one senior reporter, Herbert Wechsler, of Columbia University, five associate reporters, three of them lawyers, one a psychiatrist and one a sociologist, and four research associates, who are lawyers. These ten people collaborate on tentative drafts to submit to the Advisory Committee. They have already done four years' work and the project may well occupy two or three more years of intensive effort. The first group to which tentative drafts are submitted is an Advisory Committee. One does not attend an Advisory Committee meeting prepared to sit down and then to turn one's mind to what has been drafted. The

[1] Harvard Law Review 1098 (1952).

tentative draft and a few hundred pages of argument will have reached you months before the meeting, and you are expected to be fully informed and ready to work. I found the Advisory Committee a wonderful group to work with; it includes a few of the more eminent Federal and State judges such as Judges Learned Hand, Parker, and Curtis Bok, who have made major contributions to knowledge of the criminal law, several district attorneys, three forensic psychiatrists, three sociologists, two social workers, the two leading prison administrators in America (Sanford Bates and James Bennett), a handful of academic lawyers and one professor of English, Lionel Trilling, whose task is to make the drafting more graceful than it otherwise would be. He has since resigned!

The discussions of this group run over a diligent weekend. The quality of discussion impressed me greatly. There was no feeling of any need constantly to bear in mind the status of various members of the group, which to a degree inhibits some of our Australian committee discussions. After a little while everyone was involved in free and stimulating argument. From the Advisory Committee the amended draft goes to the Council of the American Law Institute. From the Council, further amended, it is submitted to the members of the American Law Institute at their annual meeting. Each provision of the Code has been roughly six months in preparation and six months in criticism and redefinition.

This project is of importance to us in Australia. When people such as I have described spend years facing problems of criminal law, in a system of law almost identical to our own and encompassing medico-legal problems identical with those we face, it seems to me we have much to learn from their work.

When they talk of a Model Penal Code they do not have in mind legislation by which it is hoped to impose uniformity of practice and law throughout the States of America; that would be impossible, and I doubt if it would be desirable. They intend merely to devise a code which may stimulate discussion and possibly serve as a model for the legislature of any State which may desire to reform any or all aspects of criminal law; it thus offers a great deal to us as well as to the American States, for we too can pick and choose.

I will not burden you by trying to offer a complete coverage of the present provisions of the Code. Rather I have selected for comment a few topics which I hope may interest you.

Insanity and Criminal Responsibility

The task is to define a defence of insanity to a criminal charge and to plan the evidentiary and procedural processes in receiving expert psychiatric testimony on this issue in the courts. I will not canvass the M'Naghten rules with you, those too frequently discussed and misunderstood rules of criminal responsibility by which if it can be shown for the accused that at the time of committing the crime he did not know what he was doing, or if he knew what he was doing, that he did not know it was wrong, he will be found not guilty on the ground of insanity. Assuming your acquaintance with these rules, let me mention two other strands of authority which were present in the minds of the draftsmen of the Model Penal Code provisions on this topic, the report of the Gowers Commission and the decision in the case of Monte W. Durham.

The Gowers Commission, with one dissentient, recommended (Report of the Royal Commission on Capital Punishment 1949-1953) that the M'Naghten rules should be amended to read "the jury must be satisfied that, at the time of committing the act, the accused, as a result of disease of the mind (or mental deficiency) (*a*) did not know the nature and quality of the act or (*b*) did not know that it was wrong or (*c*) was incapable of preventing himself from committing it". With three dissentients the Commission made the more far-reaching recommendation that "the test of responsibility laid down by the M'Naghten rules is so defective the law on the subject ought to be changed" and that the best course would be "to leave the jury to determine whether at the time of the act the accused was suffering from disease of the mind (or mental deficiency) to such a degree he ought not to be held responsible". This latter recommendation would, in effect, leave it to the jury to ask themselves "is he so insane that we ought not, in our unfettered moral judgment, hold him responsible?" The work of the Gowers Commission was extensively considered at the Model Penal Code discussions.

There was also a recent case in America which has stimulated much discussion, that of Monte W. Durham. Durham, a housebreaker and petty thief, had spent many years of his life in prison; if not in prison he was to be found in a mental hospital. The circle of crime, mental hospital, prison, although not necessarily in that sequence, made up his life. This had gone

on for over twelve years. Once he had served in the American armed forces but that made no difference, and he had gone from an army prison to an army mental hospital, and so on. No doubt Durham was legally responsible for his crimes within the M'Naghten rules, but for reasons that were personal to the case, a series of chances, and the sudden stubbornness by the doctor giving evidence, who after doing what was expected of him for years suddenly decided he would not continue to play the perjurious game, produced what has been and will remain an important case in American jurisprudence. Eventually the conviction on Durham's housebreaking charge was reversed by the Court of Appeal of the District of Columbia.

In one of my two classes at Harvard I had, as a graduate student, the ex-associate of one of the judges of this Court and thus I learnt some of the unreportable details of their deliberations. At all events, that Court ordered a retrial for Durham and offered this criticism of the M'Naghten rules: "By its misleading emphasis on the cognitive, the right–wrong test requires court and jury to rely upon what is, scientifically speaking, inadequate, and most often, invalid and irrelevant testimony in determining criminal responsibility. . . . The fundamental objection to the right–wrong test, however, is not that criminal irresponsibility is made to rest upon an inadequate, invalid or indeterminable symptom or manifestation, but that it is made to rest upon *any* particular symptom. In attempting to define insanity in terms of a symptom, the courts have assumed an impossible role, not merely one for which they have no special competence." The Court phrased the following rule, as the rule to be applied on the retrial, "*the accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect*". On the retrial Monte Durham was again convicted. He appealed again and this second conviction was also reversed. I do not know where it stands now but as a matter of personal therapy it may be of interest to report that Monte Durham has been involved in litigation now for $3\frac{1}{2}$ years and during this time he has been neither in a mental hospital nor prison nor involved in crime. He has taken a wonderful interest in the shape of the law. It has been an expensive but effective cure.

The Durham case and the Gowers Royal Commission have caused much argument in the professional journals. I take it that the medical journals were as full of it as the law journals.

Certainly I saw some comment in the medical journals. Several of the outstanding forensic psychiatrists in the United States decided they would not support the Durham rule, largely because of the ambiguity in that word "product". What does it mean to say that the act is a product of a mental condition? All this seems to me to do is to begin again the task of defining a test of insanity in and around a new word, the word "product". The Model Penal Code Commissioners took this view but also rejected the revolutionary test offered by the English Royal Commission on the ground that we have an obligation—and by "we" I mean here lawyers and doctors—to offer on this purely medico-legal problem some guidance to a jury on how they are to exercise their judgment; we should not leave it to their unfettered moral sense. The Model Penal Code therefore recommends the following test: "*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 of his conduct or to conform to the requirements of law.*"

There are some comments I should like to make about that suggested test. In essence this test modifies the M'Naghten rules so that they are not an absolute, black or white, test. The test stresses the accused's "substantial capacity to appreciate", his "substantial capacity to conform"; the American Law Institute is of the view that such a test is the one that best distinguishes the deterrable from the non-deterrable criminal, and this, after all, is the fundamental purpose of this law. I take it that the justification of a defence of insanity is that some people are so obviously, so palpably, immune from the control of the criminal law that we should not impose a sanction on them. To call this the lack of substantial capacity to appreciate that they are committing a crime, or substantial capacity to control themselves, will be as effective a distinguishing process as we are likely to devise.

The next section of the Code is a new development in this whole area of the defence of insanity. The terms "mental disease or defect" are expressly stated not to include "an abnormality manifested only by repeated criminal or otherwise antisocial conduct". There is thus an endeavour specifically to exclude the psychopath from this defence. Indeed, elsewhere the Code provides a power to increase the sentence on people with certain types of psychological deficiency akin to that loosely

described as psychopathy. This provision is that a sentence may be extended beyond the usual maximum on an offender whose mental condition is abnormal and whose "criminal conduct has been characterized by a pattern of repetitive or compulsive behavior or by persistent aggressive behavior with heedless indifference to consequences; and that such condition makes him a serious danger to others". The Code thus uses psychological abnormality at one end to excuse sentences and at the other end to increase sentences.

Property Crimes

Until the middle of the eighteenth century crimes against property, theft and cognate offences were predominately the creature of the Common Law, the judges stretching and shaping existing doctrine to encompass a wide variety of immoral sharp practices. Thereafter, the legislature joined the judges in this task of plugging holes in the wall of the law of larceny to stop rogues who tried to creep through, rather like our income tax legislation. The result is fortuitous in growth and uneven in coverage.

It is a technical, rigid branch of the law, complete with the finest distinctions, comprehensible only in relation to a series of historical accidents. Those drafting the Model Penal Code have endeavoured to take what is best from existing law and to add to it the concept of unjustified or unauthorized appropriation instead of the variety of older terms used to designate particular techniques by which one may be deprived of one's property—taking, obtaining, embezzling, secreting, illegally using, receiving, and so on. They have tried to develop a draft which is more rapidly comprehensible by the layman, to draw a clearer line between sharp business practice and fraudulent activity, and to render the law both more knowable and more rational.

Sentencing

I want to report the broad lines of the Institute's efforts on sentencing and parole; the details are not of immediate importance. We are at present in Victoria going through a substantial change in the techniques of sentencing which, after July 1, will be applied in this State. We are statutorially accepting something like the American idea of parole. There is a passage of power from the Courts to an Administrative Tribunal.

This Tribunal is, fortunately, to be presided over by a judge of the Supreme Court; but there nevertheless remains a passage of power from the judge, when he faces the criminal in the dock, to the Board, which will make its decision as to the date of release of the convicted prisoner first from prison and then from parole. We are doing this at a time when American thought is more and more endeavouring to curtail these administrative discretions, more and more trying to define criteria which Parole Boards shall apply, and endeavouring to render less anarchical the pattern of sentencing that applies in America, where it is felt by many (let me speak of America for safety's sake) that the personal characteristics of the judge may play a very large part, indeed too large a part, in the sentence that will be imposed and the sentence that will be served.

In order to attack the anarchy of sentencing, the Model Penal Code prescribes maximum terms for the three categories of offences—felonies, misdemeanours and petty misdemeanours —the gravity of the harm to the community fixing the maximum terms which can be imposed, the court then having the power to control, within limits, the minimum term which the sender must serve if he is committed to prison. On specific findings of fact, the Court may extend the maxima prescribed in the Code. There are four grounds on which the Court may do this—if it finds (1) that the defendant is a persistent offender, whose commitment for an extended term is necessary for the protection of the public; (2) that he is a professional criminal; (3) that he is a dangerous, mentally abnormal person found on psychiatric examination to present a serious danger to others; (4) that he is a multiple offender, whose crimes were so numerous that consecutive sentences for them all would be longer than the extended term.

The Court having prescribed the minimum and maximum term that the offender is to serve in accordance with the above provisions, the power to determine the exact period of his imprisonment within these limits is passed over to a Parole Board which is to be independent of the department of prisons. The Code then prescribes a whole list of conditions and factors which the members of the Parole Board should take into account in exercising their difficult discretion. The point of this is that it is believed that, unless you define the conditions on which an administrative board, such as a Parole Board, shall exercise its discretion, it is liable to be swayed, no matter how

it tries to approach the problem, by irrational, ill-defined feelings, and that this is such a vital matter, the defence of liberty and the protection of the community, that just as we have tried in the courts in defining crimes to build up a theory, a practice, on which to rest our decisions, so the same effort to define our reasons for decisions should be made by a Parole Board.

There is also in the Code an endeavour to prescribe the conditions on which a man should be released on parole because there has been a habit, in America, to put prisoners on parole under conditions which are excessively virtuous and unrealistic. It will frequently be made a condition of release on parole that the offender should abstain from alcohol during the period of his parole. This is farcical once it is realized that in practice such conditions will but rarely be adhered to. Unless there is some specific reason to justify the provision of such a restrictive condition it is hard to see its utility. Of course, if a man's crimes were closely associated with alcoholism such a condition would be justified and desirable.

To the lawyer an interesting part about this attempt to define precisely the conditions upon which an administrative discretion shall be exercised is that such provisions are legally unenforceable. The Code sets out ten factors which a Parole Board must take into account and lists certain types of data that it must have, but there is no way of compelling it to meet these requirements. This does not mean, however, that such an attempt is futile. The reasoning is that people doing this work do not, in the main, require the threat of legal coercion to compel them to do what is regarded as just, and that in all but the most exceptional cases an unenforceable requirement of this type will be amply sufficient to lead them to meet its terms.

Violations and Regulatory Offences

One problem that has beset the criminal law, particularly after the first World War, although one can find cases a hundred years old in which the problem was present, is the adaptation of the criminal law to act as a regulatory, social legislative force in the community; the use of the criminal law to ensure that milk shall have a certain proportion of butter-fat content, that the tobacco you buy shall not be adulterated, that cigarettes will not be sold to you after hours. The pattern of our present legislation reveals penal clauses appended to a very large number

of our Federal and State statutes, creating criminal sanctions for the non-observance of the terms of a wide variety of statutes.

Licences are frequently required, and selling without a licence will be a criminal offence; selling bread and milk after 7 o'clock may be a criminal offence; selling alcohol to one who is drunk will be a criminal offence; and these examples could be multiplied a thousandfold. Many people believe that by using the criminal law for these purposes for punishment, even if a man is ignorant of doing wrong, or if he thinks it is five to seven when in fact it is five past, you are diluting the effect of the criminal law and perverting it to ends which it should not properly serve. In Lord Halsbury's phrase, this whole process illustrates "the Draconic character which usually animates philanthropic legislation". And it seems that the idea of strict liability rapidly spreads. When you get used to strict liability for regulatory public welfare offences, you very easily carry it over into more serious traditional crimes.

It seems to me that if the criminal law is an important force in the community, it is because its major task is that of dealing with immoral wrongdoing and dangerous crimes, not these regulatory peccadillos. On the other hand, you have here a very real problem of social control. If a legislative majority decides that cigarettes shall not be sold after seven o'clock, you cannot too readily allow the offender to plead with success that he thought it was five to seven, because it is too hard to prove. Also, there must be some legal mechanisms of enforcing obedience to our many rules of social and economic organization.

The Model Penal Code solution to this dilemma is, I think, of interest. They have created a new grade of offence which they have called a "violation". Tinkering about with words does not do much but it is a move in the right direction. It is then provided that whenever strict or absolute liability is provided for any material element of an offence, that offence shall be only a "violation". A "violation" is not a crime for any purpose of consequential disability and may be punished only by a fine or civil penalty or forfeiture, never by imprisonment or probation.

This middle ground between crime and civil liability is imposed by the Code on all public welfare offences. It seems to me an effective compromise between the need to control certain types of activity and the need not to abuse the punitive pro-

cesses of the criminal law. It is a responsible suggestion which, I think, merits our attention.

Sexual Offences

In the United States there has been a positive rash of sexual psychopath laws. Twenty-nine States have passed such laws. They vary from State to State, but their general character is this: upon conviction of a sexual offence (and that is often defined very widely) power is given to the Court, sometimes after and sometimes without a preliminary psychiatric examination, to sentence the offender either to prison or to a State mental institution, until such time as a responsible authority is prepared to certify he will not offend again if released. There are sometimes some minor safeguards against the possible abuse of these powers. However, in my view, the only thing that has saved these sexual psychopath laws from too great an abuse is the fact they are largely ignored by the courts, except in one State where there is another mechanism saving them. In that State so many are being sentenced that merely to keep facilities for these offenders working you have to discharge some at the other end, and that is in its own queer way preventing too great an abuse of power.

The Model Penal Code has avoided this risk of gross injustice and yet given sufficient sentencing powers when they gave power to the Court to extend the term of the abnormal offender. The Code expressly opposes the impossible assumption of knowledge implicit in the sexual psychopath laws for, in truth, we do not have the treatment knowledge or the skills in prediction to make them morally tolerable laws.

Another recommendation of the Code is the immediate relevance to our social conditions. The Code provides that as between consensual males homosexuality shall not be an offence. As Judge Learned Hand put the matter, in an aphorism which overstates the case, "This is a matter of taste, not law." Surely the law is here achieving harmful results by its present prohibition. Of course, homosexual relationships achieved by force or by fraud, or with a minor, remain punishable, and the Code has wide definitions of force, fraud, and minority, giving as wide, if not slightly wider, protection than that which is thrown around heterosexual conduct by the existing criminal law.

I do not want to rehearse with you the reasons for this decision. It cannot now be regarded as an odd view of possibly

an academic group that the Church of England Moral Welfare Council last year recommended to the Home Office in England a law in these terms, and now that a group of Catholic priests, sociologists and psychiatrists convened by Cardinal Griffin have likewise made similar recommendations to the Home Office. There is now very responsible opinion amongst two influential groups from two important churches, joining what has been a long and unvarying argument by sociologists and such lawyers as have interested themselves in the matter, that consensual homosexual conduct between males, although we may detest it, should not be proscribed by the criminal law where it serves as a blackmailer's charter, causes occasional suicides, and is grossly ineffective.

We spent half a day at the Advisory Committee on the Model Penal Code discussing legislation against obscenity. In the period that I was involved in these Advisory Committee discussions, this was the only time that I had the feeling that they were completely lost. But here they were. They disagreed with what was at present done in this matter, but could not agree as to what should be done. There was the very greatest difficulty in defining a satisfactory test of "obscenity'. As a matter of fact, the single proposition upon which everyone at that table agreed was that these paper-covered books that have suggestive exteriors and which, upon perusal, prove to be something you could give your maiden aunt, should somehow be prohibited!

On bigamy there is an interesting provision. They have retained the classification of felony, misdemeanour and petty misdemeanour which conditions the maximum sentence that may be imposed. They have made bigamy merely a misdemeanour if at the time of the second "marriage" the second "wife" knew that the man with whom she was going through the ceremony was married; the more serious offence is retained for the situation where the "wife" does not know of this. We use the word "bigamy" to cover a whole host of situations. Where the woman is deceived, the crime is of the nature of obtaining by false pretences. Where she knows that he is married or knows of the danger that he is married, I find it hard to see the evil we are punishing, other than the dislike we have of getting our public records in confusion. This whole area of the law sounds in mystical theological overtones. I think we have the situation where, in Bernard Shaw's phrase, though

some bigamists are villains, most are merely incorrigible optimists, certainly not to be punished. That distinction seems to me one that we might well draw more clearly in our law.

Conclusion

I think that we in Australia would be wise, particularly in the States of Victoria, New South Wales and South Australia, to make a similar attempt to reshape our criminal law. The need is there, and we have a tremendous amount to learn from the project which I have discussed with you tonight.

Discussion

Dr. Guy Springthorpe said that he was particularly interested in the attempt made in Durham's case to vary the M'Naghten rules. These rules have always been the subject of criticism by medical men, and in particular they do not deal satisfactorily with cases in which the alleged criminal is suffering from an acute depressive psychosis. Such a person knows that his act is legally wrong but believes that he is doing a kindness to his victim by sending him out of a gloomy world. The Durham case shows a legal consciousness of problems already well known to experienced psychiatrists and illustrates the growth of the law in accordance with developing knowledge.

Judge Norris recalled an experience relevant to Professor Morris's comments on laws providing that a man convicted of a sexual offence is not to be released until certain experts have certified that it is safe to release him. In August 1955 he had sentenced an accused man who pleaded guilty to a charge of gross indecency with another male person. He had no prior convictions, but it had appeared that the act which was the subject of the charge was not an isolated act. Evidence given by a psychiatrist indicated that there was a reasonable hope of improvement. He released the accused on a bond that he enter a mental institution as a voluntary patient, but in fact he entered the institution on 5th September and was released on 21st September, and was thereafter seen only by social workers and not by a psychiatrist. In March, 1956 he was again arrested and charged with conduct identical with that which had been the basis of the first charge. In April, 1956 the authorities of the institution were satisfied that he might

safely be finally discharged, being quite unaware that he had been convicted of the second offence in March.

DR. J. K. ADEY said that his view was that criminal liability should not turn upon an issue of sanity or insanity, but upon the issue whether the person should be held responsible for his acts. While Professor Morris had suggested that such a state of law would throw a heavy burden on a jury, he felt that the judge's assistance should lighten that burden.

MR. JUSTICE BARRY said that the American Law Institute had made some distinguished contributions to legal learning in various fields. Money had been found for it by the Carnegie Foundation and its members had provided both enthusiasm and disinterested scholarship.

There was an unrealized revolution going on within the criminal law, arising from a dissatisfaction with the classical concept of criminal responsibility. The real meaning of criminal responsibility was liability to punishment and nothing more. As the temper of the community softened in respect of punishment, so its approach to the concept of criminal responsibility will alter.

In Victoria, an acquittal on the ground of insanity resulted in the detention of the prisoner in a mental institution for an indeterminate time. As a result the defence of insanity was raised only in desperate capital cases, and the problem which arises in Durham's case could not, as a practical matter, arise in our courts.

American institutions for the sexual psychopath had failed in their purpose largely by reason of lack of money to provide proper staff and facilities. In any case, considerable caution was required before the idea of confining persons to institutions for an indefinite time was accepted. It was not unfair to say that the sexual psychopath needed protection against, amongst others, those who wished to do him good.

He thought that the greatest contribution which the psychiatrist could make in the field of criminal law was to assist in distinguishing between those persons who might benefit from treatment and those who would not.

MR. J. V. DILLON, S.M., said that he found attractive the idea of distinguishing between offences which were violations of social rules and those which were traditionally and morally

crimes. He referred to a Public Service Board form which required persons to answer the question whether they had been convicted of a criminal offence. Some persons, confronted with this form, confessed to having been convicted of parking a vehicle in a prohibited place, while others thought that they could properly and honestly answer the question by saying they had not been convicted when in fact they had been punished for such offences as starting price betting.

PROFESSOR MORRIS, in reply, said: I have only a few comments to make. Concerning Dr. Springthorpe's discussion of the Durham case, might I say that I do not think that psychiatric opinion is unanimous in the American journals on the value of these new rules. The criticisms of the M'Naghten rules in the course of the judgment in Durham are not really in dispute; they are obviously sound. But there is considerable doubt, particularly amongst some who are closely involved with the courts, whether the Durham test is the best solution. Here I would like to mention a point Dr. Adey made—of course, he is correct—that it is a question of responsibility, not of any medical condition. We will use the word "insanity", but here it is synonymous with "not responsible in the common law for a given act". The word has several different meanings in law, and all differ from whatever meaning you will give it if you are unwise enough to use it as a psychiatric term, which I take it you are not. The question is responsibility. Whom are you going to hold punishable, or more particularly—if you put it into Mr. Justice Barry's more useful terms—whom are you going to hold socially accountable? Virtually all people for whom the problem arises are going to be treated in one institution or another. The issue becomes—whom do you want to hold in a medical custodial situation? whom do you want to hold in segregation? whom do you want to call prisoners? whom do you want to call patients? In substance you can do substantially the same things by way of treatment in both places and there will not be much difference in the duration of the time you hold them. For the type of cases we have here I do not think it is sufficient to say "call it responsibility and leave it to a jury" because I do not think a jury is particularly good in knowing what we mean. If we use a jury I think we have an obligation to give them some idea of what purposes we are trying to serve, what is the effect of the judgment they are to

give, realizing that in the end they may not either understand or accept what we say, but at least giving them some guidance on the facts and issues they should call to mind. The view of the Durham rules by which, if you give some evidence of mental disease or defect, the jury should acquit unless it can be established that there is no connection, no product relationship, between the mental condition and criminal offence, is far too wide a defence and would have the effect of holding anyone who had a diagnosable mental condition and who committed a crime not responsible in law for it. This would mean a large migration from prisons to mental institutions and this is by no means necessarily a humane or socially useful migration.

In America this defence tends, with respect to Mr. Justice Barry, to be more widely applied than it is here. A series of convictions there involves a compulsory life sentence for repeated felonies; and, further, the situation in America is that a person who is acquitted on this ground can be, in the American terminology, not sufficiently responsible to be convicted of his crime, but capable of being "sprung from a mental hospital on Habeas Corpus". Statistically this defence is not important, intellectually it is searching out our view of a major social problem. We are facing an issue which I think Mr. Justice Barry posed for you excellently and which is really the heart of the matter—the question of individual responsibility. I think this issue will remain intellectually important until it ceases to be of any practical importance to any people at all. For my own part, I would vote for the formulation of the defence advanced in the Model Penal Code.

On the question of the depressive psychoses raised by Dr. Springthorpe, it seems to me that these were the types of cases which supported the argument for an irresistible impulse test. With this type of case in mind, the Model Penal Code considered that the question "Could he *substantially* control himself?" was the best formula.

I do not know how to phrase a reply to Judge Norris. I wish we could have an argument about it. I do not think consensual adult homosexual conduct should be a criminal offence. I dislike the indecent—the lavatory—aspect, and I dislike the conduct, but I do not think that we have techniques of changing the behaviour of many homosexuals. Nevertheless, if we attempt to "cure", the mental hospitals do have better techniques for this purpose than do the prisons.

Probably unless there is in the homosexual a deep inner desire to change his behaviour, recognized by him, nothing much can be done to effect a change. Merely to put him in gaol to keep him out of the way and to prevent him from being a nuisance is not a very efficient, and certainly not a very humane, way of handling a minor inconvenience.