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sidewalks in proper condition and thereby reserves to itself the right of control over the sidewalk.[55]

An abutting owner certainly has some extra benefits from the sidewalk, as it constitutes an approach to his premises, beyond the benefits enjoyed by the general public. This might well impose upon him the duty of calling the police to alert them of a nuisance which falls within his peculiar knowledge. He might even have the duty, depending upon the particular character of the nuisance, to give a general warning to invitees. But, the extension of a further duty by directing that he go out on the public sidewalk and there direct and control the activities of strangers is too severe a burden.[56] To do this is to give the storekeeper an extra duty for the performance of which he has not the legal authority, leaving him with legal liability when he fails to perform an impossible task.

URBAN A. LESTER

Defense of Insanity—A Weapon of Oppression

In line with recent decisions concerned with *Insanity as a Defense to Criminal Punishability*[1] the Court of Appeals of the District of Columbia, once again, invites controversy and confusion; "poses serious complications to law enforcement in the District of Columbia;"[2] and "throws more mud into already muddy waters."[3] In the case *Taylor v. United States*,[4] the court, announcing through a majority opinion a judicial construction of the District of Columbia Doctor-Patient Privilege Statute[5] and the Federal Privilege Statute,[6] ruled that a defendant pleading insanity as a defense may invoke privilege to prevent testimony concern-

[55] For a discussion of the constitutionality of statutes which limit the municipality's liability for defects in sidewalks see Note, 83 A.L.R. 288 (1933).

[56] But see *Tushbant v. Greenfield's Inc.*, 308 Mich. 626, 14 N.W. 2d 520. In this case the court granted an injunction which required abutting restaurant proprietor to supervise people on a public sidewalk. The dissenting opinion, however, forcefully argues: "The police have exclusive charge of the matter of conduct of persons on the streets. It is erroneous to order a private party to assume any control of persons on the streets whatsoever." p. 631, 522. See Note, 2 A.L.R. 2d 437 (1948).

[1] *Gunther v. United States*, 215 F. 2d 493 (1952); *Durham v. United States*, 214 F. 2d 862 (1954).

[2] Petition for Rehearing *en banc*, page 2 (No. 12,034 1955)—United States Court of Appeals in *Taylor v. United States*. N.B. As of the date of this publication, petition for rehearing has not been granted.

[3] See: Letter of Dr. John R. Cavanagh to Gerard J. O'Brien, Assistant United States Attorney, which appears in the appendix of the Petition for Rehearing.

[4] Slip Opinion, United States Court of Appeals—No. 12034 (Mar. 14, 1955).

[5] Title 14, § 308 of the District of Columbia Code (1951).

[6] 18 U.S.C. § 4244.

ing his mental condition being revealed by a *treating* psychiatrist from a public institution where the defendant was committed pending mental restoration to competency.

Taylor Decision and the "Gagging" of Psychiatrists

Defendant (Taylor) was indicted for robbery, housebreaking and grand larceny in the District of Columbia. Before trial, in proceedings under the Federal Privilege Statute,[7] a psychiatrist was ordered by the court to "examine" the defendant. After five examinations, he was found mentally incompetent to stand trial. At the trial, the *examining* psychiatrist testified in support of the defense of insanity and opinionated that the defendant at the time of the alleged offenses was of unsound mind. Defendant was then committed to St. Elizabeth's Hospital until mentally competent to stand trial.[8] Upon certification by the superintendent of the hospital that defendant was mentally competent, he was tried in the District Court of the United States for the District of Columbia. His only defense was insanity.

The prosecution called to the witness stand a staff psychiatrist and attending physician in the ward in which the defendant was confined for *treatment* at St. Elizabeth's. This psychiatrist promptly suggested that what he learned from the defendant was privileged. The lower court ruled that it was not and the psychiatrist testified to the following: that defendant told him during a series of recorded interviews that he, the defendant, had not suffered from hallucinations or delusions but had been "going along with a gag" in describing such episodes. These admissions made on the part of defendant were also repeated to a group of doctors who heard him in a body. Defendant was convicted and sentenced to imprisonment. Defendant appealed to the United States Court of Appeals for District of Columbia. The Court of Appeals reversed, holding *inter alia* that: (1) the *treating* psychiatrist's testimony was inadmissable by reason of the D. C. Privilege Statute;[9] (2) no effort on the part of defendant to waive this privilege would have been effective, since it had been judicially determined that he was incompetent to stand trial; and (3) since the *treating* psychiatrist's testimony is inadmissable by reason of the local privilege statute,[10] it is unnecessary to consider whether some or all of such testimony would have been inadmissable by reason of the Federal Privilege Statute[11] if the *treating* psychiatrist had merely *examined* defendant and not *treated* him.

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[7] *Ibid.*
[8] 18 U.S.C. § 4246.
[9] See note 5 *supra.*
[10] *Ibid.*
[11] See note 6 *supra.*

Major Issue of Law and Fact

Whether, in a case where insanity is asserted as a defense, there exists an "ordinary" Doctor-Patient relationship between an accused, who is committed to a psychiatric institution for *treatment,* and the *treating* psychiatrist as to all communications elicited during the course of *treatment.*

"Privilege" Legislation and Non-Judicial Construction

At common law, there was no privilege as to communications between physician and patient.[12] There is a code provision in the District of Columbia which is in derogation of the common law.[13] The code reads:

> In the courts of the District of Columbia, no physician or surgeon shall be permitted, without the consent of the person afflicted, or of his legal representative, to disclose any information, confidential in its nature, which he shall have acquired in *attending* a patient in a professional capacity and which was necessary to enable him to act in that capacity, whether such information shall have been obtained from the patient or from his family or from the person or persons in charge of him: PROVIDED, That this section shall not apply to evidence in criminal cases where the accused is charged with causing the death of, or inflicting injuries upon a human being, and the disclosure shall be required in the interests of public justice.

" 'The local statute is very broad. It forbids disclosure by the physician of any information obtained by him in his professional capacity.' "[14] There is no distinction made in the privilege statute between *treatment* and *examination.* The general rule, however, in jurisdictions having a privilege statute is that "attending" has been interpreted to mean *treatment* and *not* examination.

> Where the physician or surgeon is consulted for the purpose of examination only, and not for treatment, communications made to him or information acquired by him, on such examination, are not privileged.[15]

In the Proviso Clause which deals with criminal cases, the D. C. statute also fails to distinguish between *treatment* and *examination.* It is important to bear this in mind for further consideration of this clause.

On the other hand, the local statute as applied is discriminatory. It permits evidence to be introduced only in criminal cases which involve bodily harm. Of the cases arising under this code provision, the main one applicable to criminal proceedings is *Catoe v. United States.*[16] In this case, the oral admissions against interest made by the accused during psychiatric *examination* were admitted into evidence. The court, overruling the defendant's objection under the code, held that the circumstances of the psychiatrist representing the government was not an *ordinary* doctor-patient relationship and the statute was not for that reason

[12] *Rhodes v. Metropolitan Life Insurance Co.,* 172 F. 2d 183, 184 (5th Cir. 1949).
[13] See note 5 *supra.*
[14] *Sher v. De Haven,* 91 U.S. App. D.C. 257, 260, *cert. den.* 345 U.S. 936 (1952).
[15] 107 A.L.R. 1495.
[16] 76 U.S. App. D.C. 292 (1942).

applicable because the defendant was being *examined* in connection with a probable prosecution, and took no ailment or complaint to them as his doctors. The court thought that in general the *ordinary* doctor-patient relationship does exist, even in criminal cases when the patient is undergoing *treatment.* It also seemed to recognize that in some "treatment situations," the doctor-patient relationship would not be privileged when it said:

> . . . thus even his own doctor could have been called to testify if the interest of public justice required it. The application of this criterion 'public justice' is a matter of discretion with the trial judge.[17]

The court reached their conclusion by the exclusive consideration, however, of the fact that it was a *bodily-harm* crime and clearly within the Proviso Clause of the D. C. Privilege Statute.

The Federal Privilege Statute, which was considered but not applied by the *Taylor* court, is necessary for an effective discussion of the instant problem. It provides:

> No statement made by the accused in the course of any *examination* into *sanity* or *mental competency* provided for by this section, whether the examination shall be with or without the consent of the accused, shall be admitted in evidence against the accused on the issue of *guilt* in any criminal proceeding. (Emphasis added.)

The immediate question which arises is: does this congressional legislation for the Federal Courts supersede the D. C. Privilege Statute.

Although the purpose of this statute concerns itself with *examination* for competency to stand trial, its wording reveals that it applies also to examination into the issue of whether the defendant was insane at the time of the crime as raised by his defense. *Examination* into the issue of insanity might reasonably be interpreted to include information elicited during *treatment* as well as that obtained during *examination* for competency to stand trial.

On its face, only admissions against interest as to *guilt* for crime, are the communications which fall within the intendment of this statute as privileged. Any such admissions, whether made during the course of *treatment* or during *examination* for mental competency to stand trial, would be excluded from evidence in a "criminal proceeding"—i.e. at the trial. It is the Government's contention that the Congressional legislation does supersede the D. C. Privilege Statute. When it is contended that:

> This statute pre-empts the field of privileged testimony in criminal cases and repeals pro tanto the District Code provisions in so far as it could be interpreted to make the diagnosis and testimony of (the treating psychiatrist) privileged,[18] . . .

the only issue to be resolved is whether the statement of the accused that he was not suffering from hallucinations and delusions but was "going along with a gag,"

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[17] *Id.* at 295.

[18] Brief for the Government, United States Court of Appeals pps. 56, 57, *Taylor v. United States,* See note 4 *supra.*

constitutes inadmissable "evidence against the accused on the issue of guilt."

It is inevitable that confusion will result from the failure to understand the difference between responsibility and guilt.[19] The statement of the defendant that he was "going along with a gag," is not an admission with respect to *guilt* for the crime. It is an admission of sanity, of the invalidity of his defense, and of his *responsibility* for the commission of the crime.

Taylor Decision and the "Handcuffing" of Prosecutors

The Court of Appeals in the principal case, in its exclusive application of the D. C. Privilege Statute, effected a very broad, exclusionary rule in making all communications during the course of *treatment* privileged. The apparent rationale behind such holding is that treatment and cure of mentally-ill persons must be the primary consideration and that treatment in order to be effective must be based upon a confidential relationship, *in toto.* What about punishment for crime? The court should not consider the cure of the mentally-ill accused who is awaiting criminal prosecution of greater importance, than the discovery at the time of the crime, of his true mental condition, upon which his debt to society hinges.

The nature of the particular communication made during the *treatment* of the accused should be determinative of its privileged character. A confidential communication of a *personal* nature, which is necessary to enable the attending psychiatrist to treat the patient in a professional capacity for the purpose of mental rehabilitation, should ordinarily be privileged, ***providing that such communication is not relevant to the issue of insanity in any way.*** However, if such communication *is* relevant in any way to the issue of insanity, whether or not the communication is confidential and/or personal, it should not be considered privileged for it is necessary to have such testimony presented to the jury for a proper and just determination of guilt.[20] If the communication is thus relevant, it becomes at once, the subject of rebuttal on the part of the prosecution. Hence, if such testimony is admitted into evidence, the handcuffs will be removed from the prosecuting attorney and a rebuttal which will lead to a proper determination of *responsibility* is possible.[21]

A Proposal for Judicial Construction and Legislative Revision

If it is to be decided that the Federal Privilege Statute does not supersede the D. C. Privilege Statute, then it is the opinion of the writers that: (1) the word "attending" in the D. C. statute should be interpreted to exclude from privilege,

[19] See: Cavanagh, A PSYCHIATRIST LOOKS AT THE DURHAM DECISION, 5 Catholic U. L. Rev. 35 (1955).

[20] "The further determination of whether the individual is guilty is a matter for the judge and jury." See note 19 *supra.*

[21] At a meeting of a special subcommittee of the District Council of Law Enforcement, Mr. O'Brien, prosecuting attorney in the *Taylor* Case, explained: "If the psychiatrist can't testify, we cannot rebut. Our future procedure is a question mark."

communications made during the course of *treatment* of an accused who has defended on the grounds of insanity; and (2) the Proviso Clause of the D. C. Privilege Statute should have the following as an additional provision:

> Provided also, that this section shall not apply to evidence elicited either during the course of *treatment* or *examination*, by an accused, who has pleaded insanity as a defense, not only to a bodily-harm crime but to any crime. Since no communication can be considered as an admission on the issue of *guilt* for the crime, but only of *responsibility*, such evidence shall be admitted against the accused in any criminal proceeding.

In the absence of this proposed revision, there exists an inconsistent discrimination in favor of those who commit *bodily-harm* crimes in the light of the *Catoe* decision.[22]

If in the "interest of public justice" communications made (even to his own doctor to whom he has taken a complaint)[23] by an accused who has committed a *bodily-harm* crime are not privileged, why should a greater consideration be given to the establishment of a confidential relationship between the psychiatrist and the mentally-ill accused, who commits a *non bodily-harm* crime, by holding such communications privileged?[24] The gravity of the crime should not be determinative of whether or not a privilege exists. Either all communications are to be privileged, or none. To hold all communications privileged is to give greater emphasis to the psychiatric concern for treatment and cure, than to the legal concern of punishment for crime in the interest of public justice and protection.

Reactions and Proposals by the Authorities

There is a movement under way in the District of Columbia, conducted by a special subcommittee of the District Council of Law Enforcement, after having analyzed all the recent decisions of the Court of Appeals affecting insanity questions in criminal cases, to get congressional action on suggested *new* laws in order to provide a proper balance between the accused and the public interest.[25] The committee said that the *Taylor* decision ". . . will make it most difficult to unmask malingerers and will seriously impede government psychiatrists in making sound diagnosis in difficult cases." The committee "urgently" recommended that in

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[22] See note 16 *supra*.

[23] *Complaint* may be reasonably construed to embrace both *treatment* and *examination*.

[24] See note 21 *supra*. Mr. O'Brien pointed out that if the defendant, George Taylor, had scratched the victim he is accused of holding up at knife point, the privilege statute would not have applied because the law now specifically excludes privilege in cases where murder or bodily-harm is done. He urged that the exclusion should apply to all felonies so the government will be able to rebut claims of insanity. This opinion is in line with the author's proposed statutory revision to exclude all crimes.

[25] Legislative Proposals: (1) Defendants acquitted by reason of insanity should be mandatorily committed to a mental hospital for an indefinite period. (2) Judges should once again have the right to determine whether the request for a mental examination is reasonable. (3) A certificate from St. Eliabeth's of competency to stand trial should be sufficient for the commencement of trial without the necessity of a court hearing.

cases where insanity is interposed as a defense to crime, there should be a change in the existing law as to the doctor-patient privilege.[26]

As a public official, and as one who has been long interested in the possible assistance which psychiatry may render to the courts, Dr. Winfred Overholser[27] expressed his great concern over the majority opinion of the *Taylor* case. In reference to the suggested legislator, Dr. Overholser says:

> If the interpretation of the law is what the majority of the panel says it is, it would seem necessary, if the wheels of justice are not to be clogged, to seek legislative remedy. I trust, however, that there may be some reconsideration by the Court of Appeals in order that justice may be done by the defendant and that the interests of the public, court, and prosecution may be protected.

Judge Prettyman, in his dissenting opinion in the principal case, did not think that the testimony of the government psychiatrist was privileged. He stated:

> When pursuant to the dictates of criminal justice a person is confined by order of the court in a state institution for the mentally ill, the relationship beween him and the doctor on the staff at that institution is not the ordinary relationship between physician and patient contemplated and treated by the statute which confers the doctor-patient privilege. Under such circumstances the Government, as a matter of public concern, is entitled to the benefit of the testimony of those doctors, whether as to diagnosis, treatment or observation. It is contrary to the interests of justice to give such an accused person power to close the mouths of those doctors.

Dr. John R. Cavanagh[28] suggests that the following conclusions seem warranted in regard to the *Taylor* decision:

1. That in this case the testimony was not privileged.
2. That information given to a group of physicians is not a privileged communication.
3. That prisoners in government hospitals do not establish the same confidential relation with their physicians as do private patients.
4. That the relationship between a government employee and a government physician is not privileged if the information imparted is against the public interest or interferes with the administration of justice.
5. That one cannot distinguish between treatment and diagnosis in psychiatry.
6. That this decision keeps the physicians best qualified to testify in certain cases from doing so.
7. That this decision further impedes and complicates the handling of psychiatric cases in court.
8. That the statute in the District of Columbia could be interpreted to mean that only information necessary for the *curative treatment* of the prisoner is privileged.

Conclusion

The velvet glove of mercy softens the gaveled hand of justice. The defense

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[26] Legislative Proposal: Under the *Taylor* Decision, the privilege which now bars a psychiatrist from testifying about a prisoner he has treated should be weighed and the psychiatrist should be allowed to testify if the prisoner bases his defense on insanity at the time of the crime.

[27] See: Letter of Dr. Winfred Overholser to Leo A. Rover, United States Attorney, which appears in the appendix of the Petition for Rehearing, see note 2 *supra*.

[28] See note 3 *supra*.

of insanity is offered by the law, not as a sword, but as a shield to every man accused of crime. The allowance of a doctor-patient privilege to exist between a Government Psychiatrist and an involuntary ward of the state, is to convert this shield into a weapon of oppression.

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GENNARO J. CONSALVO

Natural Law and Artificial Insemination

In a divorce action involving the custody of a child born of artificial insemination by donor,[1] the Cook County Illinois Superior Court, Gorman, J., ruled that the child thus conceived is illegitimate. Judge Gorman also held that the practice of heterologous artificial insemination *with or without* the consent of the husband is contrary to public policy and good morals, and constitutes adultery on the part of the mother. Homologous artificial insemination,[2] on the other hand, wherein the semen of the husband is used rather than that of a third party donor, is not contrary to public policy and good morals and presents no legal problems.[3]

That this condemnation by Judge Gorman would not be condoned by all is evidenced by the following statement of one of the country's leading medical practitioners:

> Physicians to the human race are, in comparison with physicians to dumb brutes, leagues behind in both scientific investigation and the successful practice of artificial insemination. To be sure, we are trammeled by conventions, moral codes and frailties of human character, which never hinder the stockbreeder.[4]

Others are asking for a clarification of the legal position of the new procedure:

> Artificial insemination is a modern procedure and it is time that society take a modern stand on the problem even though it may finally define it as illegal, to be considered in the same category as criminal abortion. At least any stand would constitute a bit of terra firma in a sea of uncertainty. However, it is unlikely that the procedure will be considered illegal in later years.[5]

Still other writers on the medical point of view declare that the need for heterologous artificial insemination is steadily diminishing. For example, Dr. Folsome puts it this way:

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[1] Heterologous; usually abbreviated A.I.D.

[2] Homologous; usually abbreviated A.I.H.

[3] *Doornbos v. Doornbos*, 23 U.S.L. WEEK 2308 (Dec. 13, 1954); *appeal pending.*

[4] Guttmacher, *The Role of Artificial Insemination in the Treatment of Human Sterility*, 19 BULLETIN OF THE NEW YORK ACADEMY OF MEDICINE 576 (1943).

[5] Abel, *The Present Status of Artificial Insemination*, 85 SURGERY GYNECOLOGY AND OBSTETRICS 528 (1947).