UNDERSTANDING THE NEW HAMPSHIRE DOCTRINE
OF CRIMINAL INSANITY

JOHN REID†

THE New Hampshire insanity doctrine was evolved over eighty-eight years ago from three judicial pronouncements—a dissent,¹ a concurring opinion,² and a majority decision.³ After stirring a brief flurry of interest, it then lay dormant—ignored, misunderstood, and generally viewed as the peculiar eccentricity of a one-horse state. Interest revived in 1954 when the District of Columbia Circuit adopted a new test for insanity and said it was “not unlike that followed by the New Hampshire court since 1870.”⁴ The excitement which greeted the “*Durham* rule” has touched off an extensive debate⁵ and placed the New Hampshire doctrine back in the limelight.

The *Durham* rule and the New Hampshire doctrine have been linked together by friends and foes alike. Demands for their adoption in other jurisdictions have been countered by charges that they are a surrender to “doctors’ notions” and the product of defeatism.⁶ This linkage is unfortunate, for the two are not the same. Their differences, while not so pronounced as their similarities, are important enough to justify their separate consideration. *Durham* has not suffered from this association. It has been recognized as what it is—a new test for insanity based on medical, not legal, principles.⁷

†Member of the New Hampshire bar.

1. Boardman v. Woodman, 47 N.H. 120, 149 (1865) (dissenting opinion of Doe, J.).

2. State v. Pike, 49 N.H. 399, 408 (1869) (concurring opinion of Doe, J.).

3. State v. Jones, 50 N.H. 369 (1871).

4. Durham v. United States, 214 F.2d 862, 874 (D.C. Cir. 1954).

5. “Indeed, it is probably no exaggeration to say that this subject is receiving more attention today than any other subject in the criminal law.” Commonwealth v. Chester, 337 Mass. 702, 711, 150 N.E.2d 914, 919 (1958).

6. Professor Jerome Hall has been quoted as saying in an address: “A current wave of irrationalism, born of fear and defeat, threatens to engulf all rational thinking on the subject of criminal responsibility. The M’Naghten Rule is the rule of reason.” Harvard Law School Record, April 11, 1957, p. 1, col. 4.

7. The District of Columbia Court was persuaded to this doctrine chiefly by treatises on subjects other than law . . . by Weihofen, Zilboorg, Deutsch, Glueck, Guttmacher, Overholser, Reik, and others doubtless learned in the field of psychiatry. I am not willing to accept their teachings and to reject completely the philosophies of such eminent jurists as Blackstone, Greenleaf, Justices Harlan, Fuller, Brewer, Shiras, White and Reed, and Judges Sibley and Hutcheson.

Howard v. United States, 232 F.2d 274, 283 (5th Cir. 1956) (dissenting opinion of Cameron, C.J.).

It is the New Hampshire doctrine that has suffered. Because of the emphasis usually placed on the more recent *Durham* case and its "not unlike" New Hampshire dictum, there has been a tendency to assume that the new rule merely refines the old, offering, perhaps, modern psychiatric disclosures to add respectability and sophistication, but otherwise echoing the crude traulisms of some agrestic judges. This has led to a further misunderstanding of the New Hampshire doctrine, which is not based on contemporary medical knowledge, but is the restatement of a legal doctrine resting entirely on common-law principles. It deserves to stand or fall on its own merits. This Article will undertake to compare the New Hampshire rule with the *Durham* decision, pointing up the differences in approach and consequences between the two concepts, and between these theories and other doctrines, in order to arrive at a true understanding of the New Hampshire rule.

THE DURHAM DECISION

Monte Durham was accused of housebreaking. The defense contended he had not been legally responsible at the time he committed the act. When he was first tried the criterion for insanity in the District of Columbia was two-fold: The first part was the knowledge test of the *M'Naghten* rules; the second was what Judge Biggs has termed the "irresistible impulse" gloss.⁸

The *M'Naghten* rules, English in origin and formulated by the Lord Justices in response to public pressure,⁹ provided a rational test which limits the issue of insanity to whether or not the defendant knew what he was doing or knew that it was wrong.¹⁰ The irresistible impulse test, American in origin and formulated in response to medical dissatisfaction with *M'Naghten*, attempted to supplement *M'Naghten*'s sole emphasis upon cognition by tacking on a test based on volition.¹¹ Neither test has been without medical critics.¹²

8. BIGGS, *THE GUILTY MIND: PSYCHIATRY AND THE LAW OF HOMICIDE* 116 (1955).

9. The case itself was not appealed to the Lord Justices, but came as a series of questions posed by the House of Lords which reflected the nation's concern following *M'Naghten*'s unexpected acquittal by reason of insanity. *M'Naghten's Case*, 10 Cl. & F. 200, 203, 8 Eng. Rep. 718, 720 (H.L. 1843).

10. [T]o establish a defence 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.

Id. at 210, 8 Eng. Rep. at 722.

11. One whose mental condition is such that he cannot distinguish between right and wrong is not responsible for his conduct, and neither is one who has the capacity to discriminate between right and wrong but whose mind is in such a diseased condition that his reason, conscience and judgment are overwhelmed by the disease and render him incapable of resisting and controlling an impulse which leads to the commission of a homicide.

Commonwealth v. McCann, 325 Mass. 510, 515, 91 N.E.2d 214, 217 (1950).

The leading cases expounding the irresistible impulse test are *Parsons v. State*, 81 Ala. 577, 597, 2 So. 854, 866 (1886); *Commonwealth v. Rodgers*, 48 Mass. (7 Met.) 500 (1844).

12. "Homicide remains the field in which law and psychiatry are farthest apart.

The *M'Naghten* rules have been impugned for attempting to apply a rational test to irrational behavior and for forcing psychiatrists to deal with mental states and conditions that have little existence except as legal conceptions. The irresistible impulse test has been accused of failing to consider the importance of the emotional, or affective, influence on mental stability.

From the date of their formulation, the *M'Naghten* rules won wide acceptance throughout the common law world, but the controversy concerning the irresistible impulse test has been as obstreperous as the one surrounding *Durham* today. The English courts gained the applause of many American lawyers by refusing to consider it,¹³ and most state courts have rejected it, some for being inconsistent with the theoretical basis of accountability.¹⁴

The *Durham* court did two things: First, it took judicial notice of the fact that the law of the District was not consistent with the most advanced notions of contemporary psychiatry; and second, it sought a new test which would be conformable with science.¹⁵ After perusing medical books and treatises, Judge Bazelon, writing for the court, had little difficulty concluding that *M'Naghten* was no longer adequate by present day medical standards and that the irresistible impulse test was also obsolete.¹⁶

The court sought a simple test and it produced the simplest available: "The rule . . . is not unlike that followed in the New Hampshire court since 1870 [A]n accused is not criminally responsible if his unlawful act was the

Here the trajectory between the two disciplines is the greatest and most constant and hence the most easily measurable." BIGGS, *op. cit. supra* note 8, at 3-4. In the leading New Hampshire case Judge Doe made the same point: "A striking and conspicuous want of success has attended the efforts made to adjust the legal relations of mental disease." *State v. Pike*, 49 N.H. 399, 429 (1869) (concurring opinion). Thus Mr. Justice Frankfurter could truthfully observe, "That poor creature, Daniel M'Naghten, not only killed an innocent man, but also occasioned considerable conflict between law and medicine." Letter From Mr. Justice Frankfurter to Sir William J. Haley, Nov. 3, 1952, in Note, *The Real Mhicneachdain*, 74 L.Q. REV. 321 (1958).

13. No less a figure than David Dudley Field has remarked: "I commend the answer of that sturdy English judge who, when told that the defendant had committed homicide under an irresistible impulse, replied that the law of England had also an irresistible impulse to punish him for it." Field, *Emotional Insanity*, 7 ALBANY L.J. 273, 277 (1873).

14. The law does not recognize any moral power compelling one to do what he knows is wrong. "To know the right and still the wrong pursue," proceeds from a perverse will brought about by the seductions of the evil one, but which nevertheless, with the aids that lie within our reach, as we are taught to believe, may be resisted and overcome, otherwise it would not seem to be consistent with the principles of justice to punish any malefactor.

State v. Brandon, 53 N.C. 463, 467 (1862).

15. "We are urged to adopt a different test to be applied on the retrial of this case." *Durham v. United States*, 214 F.2d 862, 869 (D.C. Cir. 1954).

16. We find that as an exclusive criterion the right-wrong test is inadequate in that (a) it does not take sufficient account of psychic realities and scientific knowledge, and (b) it is based upon one symptom and so cannot validly be applied in all circumstances. We find that the "irresistible impulse" test is also inadequate in that it gives no recognition to mental illness characterized by brooding and reflection

product of mental disease or mental defect."¹⁷ The *Durham* court, with a passing reference, associated itself with the New Hampshire rule (or rather associated the New Hampshire rule with its own), but did not rest its decision upon it. Whether this was because the court recognized a distinction between the two rules or wanted to be considered a pioneer unembarrassed by any provincial partner, the opinion does not say. But associated the rules have been, partly because they stand alone together in " 'magnificent isolation' of rebellion against *M'Naghten*"¹⁸ and its "gloss," and partly, too, because they both do away with definitions and fine technicalities and give to the jury the general issue of "mental disease" as a question of fact. Even such an ardent admirer of both doctrines as Judge Sobeloff has oversimplified their similarity:

The full merit of the New Hampshire decision and of the more recent District of Columbia opinion in the *Durham* case is precisely that they do not attempt to embody one set of medical theories in place of another. . . . The whole point is not to restrict the test to particular symptoms, but to permit as broad an inquiry as may be found necessary according to the latest accepted scientific criteria.¹⁹

Opening the door to a broad scientific inquiry may be one of the merits of the New Hampshire doctrine but it is not the point. The point of New Hampshire is that it redefines the role of court and jury and returns to the jury its historic common-law fact-finding function. This reallocation of functions is in turn one of the merits of *Durham*, but in view of its medical foundation it cannot truthfully be said to be the point.²⁰

THE NEW HAMPSHIRE DOCTRINE

Judge Doe and the Law of Insanity

Although the New Hampshire formula for legal accountability was devised by "that worthy triumvirate of the New Hampshire jurists of the 1860's Judges Doe, Perley, and Ladd,"²¹ the praise or responsibility for having

and so relegates acts caused by such illness to the application of the inadequate right-wrong test. We conclude that a broader test should be adopted.

Durham v. United States, 214 F.2d 862, 874 (D.C. Cir. 1954). One psychiatrist has commented: "The opinion presents adequately the major faults that modern psychiatry finds in the 'knowledge' and the 'irresistible impulse' tests." Guttmacher, *The Psychiatrist as an Expert Witness*, 22 U. CHI. L. REV. 325, 326 (1955). Another commentator has said of Bazelon's opinion: "No halting, wavering, or apologetic pen, his. He deftly wrote off the *M'Naghten* test for the forensic failure it had become, and recorded with swift and bold strokes a new test, a pragmatic test, that would carry with it as many hopes as fears." De Grazia, *The Distinction of Being Mad*, *id.* at 339, 340.

17. 214 F.2d at 874-75.

18. See *Andersen v. United States*, 237 F.2d 118, 127 (9th Cir. 1956).

19. Sobeloff, *Insanity and the Criminal Law: From McNaghten to Durham, and Beyond*, 41 A.B.A.J. 793, 795 (1955), 15 MD. L. REV. 93 (1955).

20. See De Grazia, *supra* note 16, at 346.

21. Guttmacher, *The Quest for a Test of Criminal Responsibility*, 111 AM. J. PSYCHIATRY 428 (1954).

first conceived it and for persuading his colleagues to adopt it appertains entirely to Judge Charles Doe,²² "the pioneer Judge in regard to the revolt against the right and wrong theory."²³ Doe was no ordinary judge, but has been called one of the ten greatest jurists in American history by Dean Pound,²⁴ and by those others who have compiled such a list.²⁵ It would be almost impossible to overestimate the unparalleled extent to which he dominated the court of his state. Almost singlehandedly he rewrote New Hampshire law, providing it with the most advanced procedure of the day.²⁶ He anticipated by fifteen years the theories on evidence which would make Thayer famous,²⁷ and handed down some of the most influential decisions of the nineteenth century.²⁸ To gain an understanding of the New Hampshire insanity doctrine, we must first understand the jurisprudential theories and prejudices of Charles Doe, upon which the doctrine is based.

The key to Doe's formulation of the New Hampshire doctrine is fourfold. First, he believed that a measure for insanity is primarily a problem, not of substantive criminal law, but of evidence. Second, he held the theory that nineteenth century American courts had destroyed the ancient "uniformity, consistency and symmetry of the common law" by ignoring or forgetting the basic principle which separates law from fact, and, by turning facts which should have been decided by the jury into law expounded by the court, had encouraged a practice which "introduces arbitrary rules and disorganizing exceptions into the scientific system of the law, overwhelms that reason which is the life of it, and changes the law into a chaotic collection of fragmentary and incoherent regulations, to be mastered only by sheer force of a rare and marvellous memory."²⁹ Third, he insisted that the jury should be given the

22. As his distinguished present-day successor has remarked, "to Judge Doe belongs the credit." Letter From Hon. Frank R. Kenison, Chief Justice of New Hampshire, to Hon. J. C. McRuer, Chief Justice of the High Court of Ontario, May 2, 1955, copy on file at New Hampshire Supreme Court. Judge Kenison has elaborated on this theme in Kenison, *Pioneers in Criminology XII: Charles Doe (1830-1896)*, 47 J. CRIM. L., C. & P.S. 277 (1956). Dean Pound once noted that Doe "is the one usually cited." Remarks quoted in *Discussion of the Report on "Insanity and Criminal Responsibility,"* 2 J. AM. INSTITUTE CRIM. L. & CRIMINOLOGY 538, 544-55 (1911).

23. *Necrology: Chief Justice Doe*, 13 MEDICO-LEGAL J. 458 (1895).

24. POUND, *FORMATIVE ERA OF AMERICAN LAW* 4, 30-31 n.2 (1938).

25. See Hurst, *Who Is the "Great" Appellate Judge?*, 24 IND. L.J. 394, 397 (1949).

26. By liberalizing the right of amendment to an unheard of extent, he did away with the distinction between law and equity, and between the various writs of action, without the aid of statutes, while at the same time preserving the wording, continuity, and traditions of common law procedure. Reid, *From Common Sense to Common Law to Charles Doe: The Evolution of Pleading in New Hampshire*, N.H.B.J., April 1959, p. 27.

27. See Hening, *Charles Doe*, in 8 LEWIS, *GREAT AMERICAN LAWYERS* 241, 272 (1909).

28. See Note, *Doe of New Hampshire: Reflections on a Nineteenth Century Judge*, 63 HARV. L. REV. 513 (1950).

29. *Gray v. Jackson & Co.*, 51 N.H. 9, 37 (1871). (Citations omitted.) The case dealt with a question of the liability of a common carrier, but the quotation is an apt illustration of Doe's opposition to the practice of turning fact into law.

best evidence possible, even including nonexpert opinion evidence on the question of insanity.³⁰ Finally, his uncompromising dislike of presumptions led him to view the *M'Naghten* rules primarily as unwarranted presumptions of law which presume a man sane unless he is unable to meet a standard of rationality arbitrarily set by the court.³¹

Doe's view of insanity as an evidentiary problem is pointed up by the fact that it first occurred to him, not in a criminal action, but in a probate appeal, *Boardman v. Woodman*.³² In that case the trial judge had instructed the jury to employ the "delusion" test, not the *M'Naghten* rules.³³ The majority upheld the verdict; Doe felt that the exclusion of nonexpert opinion evidence and the giving of the instructions on the delusion test constituted reversible error. Since Doe viewed tests for insanity as unwarranted presumptions, it hardly mattered to him what test based on what medical theory was used. Although much has been made lately of Doe's interest in medicine,³⁴ he was primarily concerned with the restoration of the distinction between law and fact. His first step, however, was to satisfy himself there was a conflict between them. Isaac Ray's *Medical Jurisprudence of Insanity*³⁵ convinced him that the "de-

30. About half of each of the two opinions which Doe wrote dealing with insanity are devoted to the problem of the admissibility of nonexpert opinion evidence. See *State v. Pike*, 49 N.H. 399, 408 (1869) (dissenting opinion); *Boardman v. Woodman*, 47 N.H. 120, 140 (1865) (dissenting opinion). On the question of nonexpert opinion evidence, Doe's written opinion in *Pike* was a dissent, while on the question of a test for insanity his opinion was intended to speak for the entire court, although it is usually cited as a concurring opinion.

31. For a complete discussion of Judge Doe's views concerning the law of evidence, his attempt to restore the distinction between law and fact, an examination of his dislike of presumptions, his theories concerning best evidence and burden of proof, and the historical context from which he developed the New Hampshire insanity doctrine, see Reid, *A Speculative Novelty: Judge Doe's Search for Reason in the Law of Evidence*, 39 B.U.L. REV. 321 (1959).

32. 47 N.H. 120, 140 (1865) (dissenting opinion).

33. The judge charged that "mere moral insanity; insanity of the moral nature, that is disorder of the moral affections and propensities, will not, unless accompanied by insane delusion, be sufficient to invalidate a will or to incapacitate a person to make one" *Id.* at 122 (reporter's note).

34. See Reik, *The Doe-Ray Correspondence: A Pioneer Collaboration in the Jurisprudence of Mental Disease*, 63 YALE L.J. 183 (1953). It has been said that Doe formulated his doctrine "largely under the influence of Isaac Ray's significant writings. . . ." Overholser, *Psychiatry's Contributions to Criminal Law and Procedure*, 12 OKLA. L. REV. 13, 16 (1959).

35. This was the book that helped acquit *M'Naghten*. On the opening day of the trial *M'Naghten's* chief counsel, Alexander J. E. Cockburn, Q.C. (later Lord Chief Justice), showed it to the jury and said: "I hold in my hands perhaps the most scientific treatise that the age has produced upon the subject of insanity in relation to jurisprudence—it is the work of Dr. Ray." BIGGS, *op. cit. supra* note 8, at 100. Thus, Ray helped create the situation that brought about the formulation of the *M'Naghten* rules he so deplored. He was also partly responsible for the irresistible impulse doctrine, for it was his testimony in the *Rodgers* case which helped persuade Chief Justice Shaw to enunciate it. LEVY, *THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW* 215 n.33 (1957). Although

lusion" test was unsound by the standards of contemporary medical thought,³⁶ and therefore must also be unsound as a legal fiat.³⁷ Unlike the *Durham* court, Doe was not so much interested in what was bad psychiatry as in what was good law. Thus, although convinced that both the delusion test and the *M'Naghten* rules were unsound medically, he was not ready to reject them unless he could also prove them unsound legally. He believed that the rule which New Hampshire should adopt in their place must be based on legal principles, and not on medical theories:

A mere negation of the obsolete medical theory is not enough. An affirmation of some definite proposition which you contend for as true, is indispensable. You must have an affirmative proposition, simple, plain and easily understood, which the court can give the jury as positive law, and which the jury can apply to the evidence in every case. It must be safe, practical and workable, and broad enough to cover the whole ground.³⁸

In the *Boardman* case, Doe demonstrated by exhaustive historical research that the delusion test for civil capacity had been misconstrued from a finding of fact into a rule of law.³⁹ This, he believed, was the "affirmative proposition" he needed—the fact that the ancient judges had not realized that their concept of mental illness was not the final one, and by expressing their opinions to the jury, had changed a question of fact into a question of law. Subsequently, in his concurring opinion in *Pike*, Doe thought a failure to appreciate the functions and procedures of the old time courts had led modern scholars to assume erroneously that insanity had always been treated as a question of law.⁴⁰ Doe saw an analogy in witchcraft. Lord Hale had been accustomed

Dr. Ray favored the New Hampshire formula he was a realist and was willing to accept the fact that the law moved slowly. Thus he urged courts not yet ready to follow New Hampshire's lead to at least consider the merits of the irresistible impulse doctrine.

If it be competent to ask the expert whether the prisoner retained his perceptions of right and wrong, can it be contended that it is not equally competent to ask whether the disease may not have so perverted the action of his moral faculties, that he was irresistibly inclined to evil rather than good, or had lost the power of pursuing the one and avoiding the other?

Ray, *The Law of Insanity*, unsigned article, 4 AM. L. REV. 236, 247 (1870).

36. Letter From Charles Doe to Isaac Ray, March 23, 1869, in Reik, *supra* note 34, at 194.

37. See *Boardman v. Woodman*, 47 N.H. 120, 150 (1865) (dissenting opinion).

38. Letter From Charles Doe to Clark Bell, Jan. 10, 1889, in Bell, *Editorial: The Right and Wrong Test in Cases of Homicide by the Insane*, 16 MEDICO-LEGAL J. 260, 264 (1889).

39. For a detailed discussion of Doe's juggling the historical roots of the delusion test see Reid, *supra* note 31, at 343-44.

40. When new trials had not come into use (3 Bl. Com. 405; *Witham v. Lewis*, 1 Wills [Wils.] 55; Quincy Mass. Reports 558; Hilliard on New Trials ch. 1, §§ 2, 3); when prisoners were not allowed the assistance of counsel in relation to matters of fact (4 Bl. Com. 355; 11 St. Tr. 476, 19 St. Tr. 944); and juries were punished

to instruct his juries that the existence of witches was an established fact, and Doe felt this was similar in origin to Hale's insanity charge.⁴¹ He contended that "The judicial practice of directing or advising juries in matters of fact . . . has carried into reports and treatises, on various branches of the law, many opinions of mere matters of fact."⁴²

Having thus developed the historical basis for his argument, Judge Doe in *Pike* advanced the theory that all legal tests for capacity and accountability were inexcusable invasions of the province of the jury.

Without any conspicuous or material partition between law and fact, without a plain demarcation between a circumscribed province of the court and an independent province of the jury, the judges gave to juries, on questions of insanity, the best opinions which the times could afford. In

at the discretion of the court . . . (4 Bl. Com. 361); the sphere of the court was latitudenarian.

State v. Pike, 49 N.H. 399, 437-38 (1869) (concurring opinion).

Several typographical errors in *State v. Pike* should be noted for a correct understanding of the case. In 1889 Doe wrote: ..

49 is badly printed. The reporting and proof reading were wretched; and you will need to bear that in mind if you make any use of State v. Pike. Without calling your attention to palpable misspelling, I suggest some instances in which the reporter and proof reader did not improve the copy.

Page Line

429 9 For "and" read "or"

429 12 Join the two paragraphs

431 25 For "sanity" read "insanity"

433 7 Insert quotation marks before "I"

435 7 from bottom, omit "That"

436 10 from bottom. The two paragraphs should be united in one.

437 2 from bottom. For "Wills, read "Wils." [sic]

439 Last line. Insert "Ann Reg. 1850" and the page of that book where the case is stated.

440 At the end of the first paragraph insert "Ann Reg. 1863" and the page of that book where the case is stated.

443 Line 7 from bottom. Omit "Legal."

I have marked the above in my copy of 49 N.H. and there are probably other important errors which a careful reader will detect besides mere misspellings. I have not access to the "Ann Rg" [sic] to day and have no mem [sic] of the omitted pages. There are probably many blunders and errors of all kinds in the opinion for which the writer is responsible; but it ought not to suffer from the mistakes of the reporter and proof reader.

Letter From Charles Doe to Clark Bell, Jan. 10, 1889, in Bell, *supra* note 38, at 265.

41. The doctrines of insanity and witchcraft stated by Lord Hale, were held by him in common with the most enlightened classes of the most civilized nations. He was not their author, nor was he responsible for them. They were equally doctrines of fact; one was no more a matter of law than the other; and they are equally entitled to oblivion, although the ancient doctrine of insanity outlived the ancient doctrine of witchcraft.

49 N.H. at 436.

42. *Id.* at 438.

this manner, opinions purely medical and pathological in their character, relating entirely to questions of fact, and full of error as medical experts now testify, passed into books of law, and acquired the force of judicial decisions. Defective medical theories usurped the position of common-law principles.⁴³

Doe did not question the scholarship of the early judges, but willingly admitted they had sought guidance from the best medical sources available.⁴⁴ He blamed these sources for having led them astray,⁴⁵ and would have agreed with the *Durham* court that they would have been better left unread.⁴⁶ Unlike the *Durham* court, however, he did not consider this too important. The fact that the knowledge test was based, as he said, on "prevailing medical theories"⁴⁷ was of little significance. Tests, whether medically valid or medically unsound, were still a usurpation of the common law. "The legal principle," he said, "however much it may formerly have been obscured by pathological darkness and confusion of law and fact, is, that a product of mental disease is not a contract, a will, or a crime."⁴⁸ With this in mind, he asserted that tests of mental disease were no more matters of law than tests of physical

43. *Ibid.* For a more complete examination of Doe's theories and his historical analysis see Reid, *supra* note 31; Letter From Charles Doe to Dr. Isaac Ray, May 18, 1868, in Reik, *supra* note 34, at 189-90, in which Doe explained his theory of legal history in terms which the medical man could understand. That Ray appreciated the argument is apparent from the following passage from an article he wrote with Doe's help: "In former times when juries were ignorant, experts unknown, and counsel not allowed to speak for the prisoner in relation to any matter of fact, courts were obliged, in justice to the latter, to instruct the jury respecting matters of fact, and especially was this so in cases involving questions of insanity." Ray, *supra* note 35, at 248.

44. "Not only was . . . [Lord Hale] guided by the best medical authorities of his day, but he carefully used the language of medical men." *State v. Pike*, 49 N.H. 399, 435 (1869) (concurring opinion).

45. "But such books led Nicholl, in the decision of a question of fact, to pronounce a *dictum* concerning a matter of fact, and that *dictum* has been received as a final determination of a question of law." *Boardman v. Woodman*, 47 N.H. 120, 150 (1865) (dissenting opinion).

46. "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." *Durham v. United States*, 214 F.2d 862, 872 (D.C. Cir. 1954).

47. *State v. Pike*, 49 N.H. 399, 437 (1869) (concurring opinion). Doe may have been guessing at this. A later commentator, while adducing proof that the right-wrong test had been based on then contemporary medical theory, admitted an inability to verify this thesis completely. Keedy, *Insanity and Criminal Responsibility II*, 30 HARV. L. REV. 724, 736 n.112 (1917). Others have taken a contrary view. "But the M'Naghten rules, far from being a creation of nineteenth century legal mind, were a restatement of very old law—the novelty being merely the restriction of the test to the particular conduct in issue." Hall, *Responsibility and Law: In Defense of the M'Naghten Rules*, 42 A.B.A.J. 917 (1956). "The rationality test in the M'Naghten rule had its origin in a thirteenth-century legal treatise by Bracton and hence ultimately its source may be traced to the Greek philosophers Plato and Aristotle." Gasch, *Prosecution Problems Under the Durham Rule*, 5 CATHOLIC LAW. 5 (1959).

48. *State v. Pike*, 49 N.H. 399, 438 (1869) (concurring opinion).

disease.⁴⁹ "If a jury were instructed that certain manifestations were symptoms or tests of consumption, cholera, congestion, or poison," he wrote in *Boardman*, "a verdict rendered in accordance with such instructions would be set aside, not because they were not correct, but because the question of their correctness was one of fact to be determined by the jury upon evidence."⁵⁰

This was the background in which Doe formulated the instructions he felt should have been given. In essence these instructions are the New Hampshire doctrine:

The question whether Miss Blydenburgh had a mental disease was a question of fact for the jury, and not a question of law for the court. Whether delusion is a symptom, or a test, of any mental disease, was also a question of fact, and the instructions given to the jury were erroneous in assuming it to be a question of law. The jury should have been instructed that if the writing propounded in the probate court was the offspring of mental disease, the verdict should be that Miss Blydenburgh was not of sound mind.⁵¹

The Theory of the New Hampshire Doctrine

Though the New Hampshire formula was conceived in probate law, it first saw the light of day in criminal law, during the trial of Josiah L. Pike, indicted for first degree murder. Doe was one of the presiding judges at that trial, serving as junior to Chief Justice Ira Perley. Pike offered the defense that he was a dipsomaniac and had not been responsible for his actions at the time of the killing. Judge Doe persuaded the Chief Justice to charge the jury along the lines suggested in the *Boardman* dissent.⁵² Thus Perley was the first judge to enunciate the New Hampshire formula, a fact much to Doe's liking;

49. I think the common law is as follows: it does not recognize "only a certain kind or degree of insanity as having any legal consequences;" it recognizes insanity as disease, and so far as contracts and crimes are governed by the common law, they cannot be produced by disease of the mind. Whether, in any particular case there is mental disease, and, if there is, whether a certain transaction is a product of that disease,—are questions of fact for the jury and not of law for the court. The court can only instruct the jury that a product or an offspring of mental disease is not a contract or a crime.

Letter From Charles Doe to Isaac Ray, May 18, 1868, in Reik, *supra* note 34, at 189.

50. *Boardman v. Woodman*, 47 N.H. 120, 148 (1865) (dissenting opinion). *But see* Hall, *supra* note 47, at 986 ("One reason for this practically universal stipulation of essential criteria of insanity is that life and liberty depend upon the determination of the existence of this disease . . . No such ultimate value is involved in the legal determination of fractures or typhoid.").

51. *Boardman v. Woodman*, *supra* note 50, at 147-48 (dissenting opinion).

52. The court instructed the jury . . . that, if they found that the defendant killed Brown in a manner that would be criminal and unlawful if the defendant were sane—the verdict should be "not guilty by reason of insanity" if the killing were the offspring or product of mental disease in the defendant; that neither delusion nor knowledge of right and wrong, nor design or cunning in planning and executing the killing and escaping or avoiding detection, nor ability to recognize acquaintances, or to labor or transact business or manage affairs, is, as a matter of law, a test

he entertained high hopes that Perley's prestige⁵³ would lend it respectability in the eyes of the profession,⁵⁴ and aid its speedy adoption in other jurisdictions.⁵⁵

Under the law as it then stood, the justices of the Supreme Judicial Court who presided as *nisi prius* judges at trial term, also reviewed their own decisions as appellate judges during law term. Thus, when Pike appealed his conviction, Doe was able to develop in a concurring opinion the theoretical basis for Perley's charge.

The defendant did not except to the main part of the instructions which rejected the old tests, but only to Perley's ruling that "whether there is such a mental disease as dipsomania, and whether defendant had that disease, and whether the killing of Brown was the product of such disease, were questions

of mental disease; but that all symptoms and all tests of mental disease are purely matters of fact to be determined by the jury.

State v. Pike, 49 N.H. 399, 402 (1869) (reporter's note). "You will see that . . . [Perley] adopted my formula exactly." Letter From Charles Doe to Isaac Ray, Dec. 21, 1869, in Reik, *supra* note 34, at 192.

You will note—and this is most important—that the issue of the accused's mental state was a question of *fact* for the jury; in other words, whether Pike possessed the capacity to entertain criminal intent, or *mens rea*, was a question of fact. The M'Naghten formula supplies a legal, but not a factual, test. This is its weakness. The New Hampshire rule correctly supplies a test of fact.

Biggs, *op. cit. supra* note 8, at 114.

53. Ira Perley was the leading New England jurist between the decline of Shaw and the emergence of Doe, with the possible exception of Isaac Redfield, whose chief fame rested on his black-letter treatises. Although Rufus Choate said that no man in New England knew more law than Perley, he has not left the stamp of his personality upon the law of New Hampshire as have Doe's other famous predecessors, Smith, Richardson, and Parker. In retrospect it would seem that he was primarily honored for the charm and talent he displayed entertaining weary lawyers in the hotel lobbies during the evenings of trial week and the fearsome temper he was unable to control either at *nisi prius* or law term. Nineteenth century New Hampshire used to sing a song about Perley:

A giant in learning, a giant in mind;

A lion in temper, both savage and kind; . . .

54. When Dr. Ray was preparing his article on the *Pike* case for the *American Law Review*, Doe insisted that all credit be given to Perley: "I think the legal mind of the country is ready to receive our doctrine, and needs only the authority of such a name and position as Perley's as responsible legal endorser . . ." Letter From Charles Doe to Isaac Ray, May 17, 1869, in Reik, *supra* note 34, at 195.

55. Doe had an unbounding optimism that other courts would recognize the merits of the New Hampshire formula and adopt it, though it might take as long as one hundred years. Letter From Charles Doe to Isaac Ray, March 23, 1869, in *id.* at 194. Doe probably would have been surprised at the "retrogression" of the law in jurisdictions such as Massachusetts where the court, which in 1844 under the guidance of Chief Justice Shaw was willing to listen with sympathy to Dr. Ray, eventually came to the conclusion that a trial judge, having personally observed the accused testify, could form a judgment on his responsibility "more reliable as a practical guide to accomplishment of justice than the refined distinctions and technical niceties of alienists and experts on psychopathic inferiority." Commonwealth v. Devereaux, 257 Mass. 391, 395, 153 N.E. 881, 882 (1926).

of fact for the jury."⁵⁶ The court upheld the ruling. It would have been inconsistent to throw out the old tests as invading the province of the jury while at the same time ruling as a matter of law that certain recognizable symptoms constituted a mental disease. Taking a position somewhat different from that of the *Durham* court, Doe said: "Whether the old or new medical theories are correct, is a question of fact for the jury; it is not the business of the court to know whether any of them are correct."⁵⁷

Six months after the *Pike* decision was handed down Doe presided at another murder trial in which the plea of insanity was entered. Hiram Jones of Newmarket was an uxoricide who had crept up behind his wife one morning and slit her throat "from ear to ear" with a razor, because, he explained, she "was unfaithful to her marriage vows."⁵⁸ In its request for instructions the defense specifically asked the court to charge the jury that delusion, knowledge of right and wrong, and the irresistible impulse were all tests for criminal responsibility.⁵⁹ Doe refused, and instead gave substantially the same charge Perley had given in *Pike*. The defense excepted and entered an appeal. This is the only reported case in which the New Hampshire doctrine has been squarely in issue before the court.

In the written opinion in *State v. Jones*, Judge Ladd⁶⁰ upheld Doe's ruling. The defense contended that the question of insanity was a mixed one of law and fact,⁶¹ and that the court in furnishing a test would not constitute an invasion of the jury's province. Ladd disagreed. "It is a question of fact," he said, "whether any universal test exists, and it is also a question of fact what the test is, if any there be."⁶²

In view of these considerations, we are led to the conclusion that the instructions given to the jury in this case, that "If the defendant killed his wife in a manner that would be criminal and unlawful if the defendant were sane, the verdict would be 'not guilty by reason of insanity,' if the killing was the offspring or product of mental disease in the defendant," was right; that it fully covers the only general, universal element of law involved in the inquiry; and, therefore, that any further step in the direction indicated by the requests would have been an interference with the province of the jury, and the enunciation of a proposition which,

56. *State v. Pike*, 49 N.H. 399, 402 (1869) (reporter's note).

57. *Id.* at 438 (concurring opinion). In the opinion of the court, Smith, J., wrote: If there are any diseases whose existence is so much a matter of history and general knowledge that the court may properly assume it in charging a jury, dipsomania certainly does not fall within that class. The court do [*sic*] not profess to have the qualifications of medical experts. Whether there is such a disease as dipsomania is a question of science and fact, not of law.

Id. at 408.

58. *The Republican Statesman* (Concord, N.H.), Nov. 4, 1870, p. 3, col. 2.

59. *State v. Jones*, 50 N.H. 369, 372 (1871) (reporter's note).

60. Ladd was appointed to the court the same week the *Jones* trial was held. *The Portsmouth (N.H.) Journal*, Oct. 29, 1870, p. 2, col. 1.

61. *State v. Jones*, 50 N.H. 369, 373-76 (1871) (argument for defendant).

62. *Id.* at 388.

in its essence, is not law, and which could not in any view safely be given to the jury as a rule for their guidance, because, for ought we can know, it might have been false in fact.⁶³

Durham has been praised for overruling not only the *M'Naghten* test but the irresistible impulse test as well.⁶⁴ Judge Ladd is deserving of even more praise, for in upholding Doe's instructions in *State v. Jones* he not only overruled *M'Naghten* and the irresistible impulse test, but also the delusion and the knowledge-that-the-act-was-punishable tests.⁶⁵

Although Judge Ladd summarily rejected the defendant's request that these tests be specifically given, he was nevertheless willing to discuss each individually. His views upon the various tests are the only available reflection of the attitude of Doe's colleagues regarding their legal, medical, and moral aspects, and thus offer an important insight into the thinking of the New Hampshire judges.

Ladd paid scant attention to the *M'Naghten* rules. He believed that while they might sound fine in theory, they did not work in practice.⁶⁶ Medical criticism was left to psychiatrists and the *Durham* court.

Judge Ladd likewise refused to be drawn into an extended discussion of the irresistible impulse test. Most critics of the test insist that since there is no psychiatric distinction between volition and intellect, a separate consideration of the will is unnecessary, since a defect of the will cannot occur without a parallel deficiency of the intellectual powers, and, as a result, is fully covered

63. *Id.* at 398.

64. See Kalven, *Insanity and the Criminal Law—A Critique of Durham v. United States: Introduction*, 22 U. CHI. L. REV. 317, 318 (1955).

65. In fact, prior to 1869, New Hampshire judges were inclined to instruct juries to consider almost every test that had been devised (except, perhaps, the memory test), including such oddities as whether the defendant was cunning in avoiding detection or able to recognize acquaintances or transact business, factors usually offered in evidence as symptoms relating to the knowledge test but which, in New Hampshire at least, had themselves occasionally assumed the status of tests.

Typical of insanity instructions prior to *Pike* are these:

[A]lthough the person may be laboring under partial insanity, if he still understand [*sic*] the nature and character of his act and its consequences, if he has a knowledge that it is wrong and criminal, and a mental power sufficient to apply that knowledge to his own case, and to know, if he does the act, he will do wrong and receive punishment, such partial insanity is not supposed to exempt him from responsibility for criminal acts. If it be proved to the satisfaction of the jury, that the mind of the accused was in a diseased and unsound state, the question will be, whether the disease existed to so high a degree that, for the time being, it overwhelmed the reason, conscience, and judgment, and whether the prisoner, in committing the act acted from an irresistible and uncontrollable impulse.

State v. Bartlett, 43 N.H. 224, 225 (1861) (reporter's note). It is not difficult to find the sources of this charge. The nature-character, right-wrong test came to New Hampshire from the *M'Naghten* rules, while the irresistible impulse test, and knowledge-the-act-was-punishable test, are lifted verbatim from Shaw's charge in *Commonwealth v. Rodgers*, 48 Mass. (7 Met.) 500, 502 (1844).

66. See *State v. Jones*, 50 N.H. 369, 388 (1871).

by the *M'Naghten* knowledge test.⁶⁷ Others feel that the law cannot afford to recognize "any moral power compelling one to do what he knows is wrong,"⁶⁸ or that "the expressions 'sudden impulse,' and 'subversion of the will,' are inaccurate and misleading; at least, under our jurisprudence."⁶⁹ Judge Ladd simply observed that an irresistible impulse "is an act in which reason, conscience, judgment, and will do not participate; in a word, it is a product of mental disease";⁷⁰ thus its existence is a question of fact for the jury. Doe had earlier adopted the same reasoning.⁷¹

In his critique of the delusion test Judge Ladd did not dwell upon its medical aspects⁷² but rather professed himself shocked by its flaccid reasoning and "exquisite inhumanity."⁷³ He followed the same nonmedical approach in repudiating the knowledge-of-punishment test and the memory test.⁷⁴

67. "When the *M'Naghten* rules refer to the inability to know the difference between right and wrong *in concreto*, the doctrinal reference is to the absence of *mens rea*, because the substance of *mens rea* is nothing but an awareness or appreciation of the wrongfulness or prohibited quality of the conduct." Mueller, *Criminal Theory: An Appraisal of Jerome Hall's Studies in Jurisprudence and Criminal Theory*, 34 IND. L.J. 206, 217 (1959). See also Hall, *Psychiatry and Criminal Responsibility*, 65 YALE L.J. 761, 773-781 (1956). Both Hall and Mueller would seek to recognize volition in the *M'Naghten* rules by broadening the word "knowledge." Hall, *Responsibility and Law: In Defense of the M'Naghten Rules*, 42 A.B.A.J. 917, 984-88 (1956); HALL, *STUDIES IN JURISPRUDENCE AND CRIMINAL THEORY* 289 (1958); Mueller, *Criminal Law and Administration*, in 1958 ANN. SURVEY AM. L. 113 n.20 (1959); Mueller, *On Common Law Mens Rea*, 42 MINN. L. REV. 1043 (1958).

68. *State v. Brandon*, 53 N.C. 463, 467 (1862).

69. *Parsons v. State*, 81 Ala. 577, 610, 2 So. 854, 875 (1886) (dissenting opinion of Stone, C.J.).

70. *State v. Jones*, 50 N.H. 369, 390 (1871).

71. It was for a long time, supposed that men, however insane, if they knew an act to be wrong, could refrain from doing it. But whether the supposition is correct or not, is a pure question of fact. The supposition is a supposition of fact,—in other words, a medical supposition,—in other words, a medical theory. Whether it originated in the medical or any other profession, or in the general notions of mankind, is immaterial. It is as medical in its nature, as the opposite theory.

State v. Pike, 49 N.H. 399, 437 (1869) (concurring opinion).

72. Psychiatrists do not recognize as possible such an ideal, clear cut case of delusion as Chief Justice Shaw visualized when he introduced the delusion test to America. Shaw ruled that proof of delusion is sufficient to rebut an indictment for murder if the delusion "is such that the person under its influence has a real and firm belief of some fact, not true in itself, but which, if it were true, would excuse his act." *Commonwealth v. Rodgers*, 48 Mass. (7 Met.) 500, 503 (1844).

73. It practically holds a man confessed to be insane, accountable for the exercise of the sane reason, judgment, and controlling mental power, that is required of a man in perfect mental health. It is, in effect, saying to the jury, the prisoner was mad when he committed the act, but he did not use sufficient reason in his madness. *State v. Jones*, 50 N.H. 364, 387-88 (1871).

As Doe pointed out, "[T]he English Courts have never recognized delusion as the test." *State v. Pike*, 49 N.H. 399, 435 (1869) (concurring opinion). But today it is law in Canada: "(3) A person who has specific delusions, but is in other respects sane, shall not be acquitted on the ground of insanity unless the delusions caused him to believe in the existence of a state of things that, if it existed, would have justified or excused his act or omission." CAN. CRIM. CODE § 16 (1959).

74. *State v. Jones*, 50 N.H. 369, 389, 390 (1871).

On the whole, Ladd believed the search for tests futile, like hunting for a square circle.

It is entirely obvious that a court of law undertaking to lay down an abstract general proposition, which may be given to the jury in all cases, by which they are to determine whether the prisoner had capacity to entertain a criminal intent, stands in exactly the same position as that occupied by the English judges in attempting to answer the question propounded to them by the House of Lords in . . . [the *M'Naghten*] case; and whenever such an attempt is made, I think it must always be attended with failure, because it is an attempt to find what does not exist, namely, a rule of law wherewith to solve a question of fact.⁷⁵

The Wording of the New Hampshire Doctrine

What are the words of the New Hampshire formula? Usually cited is Judge Ladd's dictum:

At the trial where insanity is set up as a defence, two questions are presented:—First: Had the prisoner a mental disease? Second: If he had, was the disease of such a character, or was it so far developed, or had it so subjugated the powers of the mind, as to take away the capacity to form or entertain a criminal intent?⁷⁶

If he were asked what the wording is, Doe would protest that the question is misleading for it implies the formula is a "test," which it certainly is not.⁷⁷ But words are necessary in the practice of law, and realizing this Doe suggested that the following headnotes to *State v. Jones* "are a pretty full statement, in the necessary affirmative, workable form of the N.H. doctrine." They had been given "in form" by Perley in the *Pike* case, and "literally" by himself in *Jones*.⁷⁸

At the trial, the court charged the jury that if the defendant killed his wife in a manner that would be criminal and unlawful if the defendant were sane, the verdict should be "not guilty by reason of insanity," if the killing was the offspring or product of mental disease in the defendant. Neither delusion, nor knowledge of right and wrong, nor design or cunning in planning and executing the killing and escaping or avoiding detection, nor ability to recognize acquaintances, or to labor, or transact business, or manage affairs, is, as a matter of law, a test of mental disease; but all symptoms and all tests of mental disease are purely matters of fact, to be determined by the jury. Whether the defendant had a mental

75. *Id.* at 392-93.

76. *Id.* at 393.

77. If you ever write a criticism upon it, allow me to suggest that I utterly repudiate the idea of introducing a new principle . . . —that my strategic point is this: the principle contended for . . . is as old and venerable and fundamental and elementary as any principle of the common law. . . . I dare say this seems to you disingenuous and Jesuitical, but it does not seem so to me.

Letter From Charles Doe to Isaac Ray, Jan. 18, 1869, in Reik, *supra* note 34, at 193; Letter From Charles Doe to Clark Bell, Jan. 10, 1889, in Bell, *supra* note 38, at 264.

78. *Ibid.*

disease, and whether the killing of his wife was the product of such disease, are questions of fact for the jury.

Insanity is mental disease—disease of the mind. An act produced by mental disease is not a crime. If the defendant had a mental disease which irresistibly impelled him to kill his wife—if the killing was the product of mental disease in him—he is not guilty. Insanity is not innocence unless it produced the killing of his wife.⁷⁹

If the defendant had an insane impulse to kill his wife, and could have successfully resisted it, he was responsible. Whether every insane impulse is always irresistible, is a question of fact. Whether in this case the defendant had an insane impulse to kill his wife, and whether he could resist it, are questions of fact.

Whether an act may be produced by partial insanity when no connection can be discovered between the act and the disease, is a question of fact.⁸⁰

Presumptions, Burden of Proof, and the New Hampshire Doctrine

For a complete understanding of the New Hampshire formula it is necessary to remember that Doe envisioned the insanity formula as only one aspect of the general problem of defining the separate duties of court and jury. His objections to the *M'Naghten* rules and similar tests were based at least in part on his belief that these tests created presumptions which operated to shift the burden of proof. He was particularly critical of the presumption of sanity,⁸¹ feeling it was error to throw upon the defendant the burden of prov-

79. To mention a "symptom" such as the irresistible impulse seems inconsistent with the theory, purpose, and spirit of the New Hampshire formula, but Ladd did not think Doe had committed error. "The instructions as to insane impulse seem to be quite correct, and entirely within the same principle. If the defendant had an insane impulse to kill his wife, which he could not control, then mental disease produced the act." *State v. Jones*, 50 N.H. 369, 399 (1871). It is worthwhile to note that Doe did not give this instruction negatively. That is, he did not say that if the defendant did *not* act under an irresistible impulse he was sane.

80. *Id.* at 369-70 (syllabus). Ladd said that these instructions were "only the direct logical consequence" of the principle that the jury must not be given an instruction which "might have been false in fact." *Id.* at 398. Actually Doe mentioned only the first four headnotes on page 370 of 50 *New Hampshire Reports*, but it is unlikely he intended to omit the preceding one, which is, after all, what he proposed in *Boardman v. Woodman* transposed to the criminal context.

81. In relation to the burden of proof on the question of sanity in criminal cases, the English and nearly all the American authorities have been manifestly wrong. The uniform rule in England and the general rule in this country, has been that the burden was on the defendant to prove sanity [this should read "insanity," see note 42 *supra*] either beyond reasonable doubt, or by a preponderance of evidence. *State v. Pike*, 49 N.H. 399, 431 (1869) (concurring opinion); see *Commonwealth v. Clark*, 292 Mass. 409, 415, 193 N.E. 641, 645 (1935).

[Today] American jurisdictions appear about equally divided on this issue with twenty-one states . . . requiring the prosecution to establish responsibility beyond a reasonable doubt, and twenty-one states requiring in effect that the defendant establish irresponsibility by a preponderance of the evidence. One state, Oregon, re-

ing his own insanity⁸² for such a practice encroached upon the province of the jury.⁸³

In later years Doe regretted placing so much emphasis upon burden of proof. After reading Judge Stone's dissent in *Parsons v. State*,⁸⁴ he realized that the burden of proof issue tended "to distract attention from the real issue and throw the whole controversy into confusion."⁸⁵ Accordingly, he expressed the wish that he had omitted the discussion of burden of proof in *State v. Pike*.⁸⁶ But regardless of whether burden of proof is mentioned, Doe's theory concerning presumptions, and their relationship to the principle of the distinction between law and fact, remains the cornerstone of the New Hampshire formula.

The Requirement of Mens Rea

The *Jones* case has been commented upon with approval for placing the question of *mens rea* squarely before the jury.⁸⁷ And because of Ladd's definite pronouncement that the jury, in determining whether a mental disease excused accountability, is actually determining whether *mens rea* has been destroyed, the New Hampshire formula has been said to rest "upon the fundamental principle that criminal responsibility requires a guilty intent, or *mens rea*, as well as a prohibited act."⁸⁸

Although, in the *Pike* case, Doe did not specifically link the requirement that the action complained of be the product of a mental disease to the concept

quires that the defendant prove this defense beyond a reasonable doubt, and the law in the remaining five states is not clear.

MODEL PENAL CODE § 4.03, appendix C, at 193 (Tent. Draft No. 4, 1955). The *Model Penal Code*, § 4.03 makes irresponsibility an affirmative defense.

82. Doe contended that in New Hampshire there was no presumption of sanity. In this he was supported by *State v. Bartlett*, 43 N.H. 224 (1861). In many states the presumption is strong. Massachusetts is an example.

83. On this point the law of New Hampshire and the law of the District of Columbia agree. At the time of the *Durham* case the rule was that "as soon as 'some evidence of mental disorder is introduced, . . . sanity, like any other fact, must be proved as part of the prosecution's case beyond a reasonable doubt.'" *Tatum v. United States*, 190 F.2d 612, 615 (D.C. Cir. 1951). This rule was recently affirmed. *Wright v. United States*, 250 F.2d 4, 7 (D.C. Cir. 1957).

84. 81 Ala. 577, 597, 2 So. 854, 867 (1886) (dissenting opinion).

[Doe] also declared, in terms, that "There was error in the refusal of the court to instruct the jury that there is no legal presumption of sanity; and also in the instruction that every person of mature age is presumed to be sane until there is evidence tending to show insanity." In this he also stood opposed to his brother judges. He did more. He antagonized every authority I have every seen or heard of on the subject.

Id. at 608, 2 So. at 874.

85. Letter From Charles Doe to Clark Bell, Jan. 10, 1889, in Bell, *supra* note 38, at 266.

86. See Letter From Charles Doe to Clark Bell, Jan. 10, 1889, in Bell, *supra* note 38, at 265-67.

87. Comment, 25 TEXAS L. REV. 295, 296 (1947).

88. WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE 113 (1954).

of *mens rea*, he nevertheless agreed with Ladd that the capacity to form intent is an essential prerequisite of crime. This view fits logically into the common law base on which he built the "doctrine." Since he conceived the New Hampshire formula as a restoration of the "true" principles of common law, it is not likely that he intended to abandon the historic common law requirement of *mens rea* (or "malice aforethought" as it is called in homicide). In fact, in the *Boardman* case he asserted that intent is "the very element of crime" and left little doubt that he considered the requirement of *mens rea* to be a part of the New Hampshire formula.⁸⁹ Even on the civil side (where Doe sometimes gave, in an even more abbreviated form, the charge he had outlined in *Boardman*)⁹⁰ the New Hampshire court has held that the capacity to form intent is a factor which must be considered in cases involving insanity.⁹¹

Some writers have interpreted this retention of the common-law requirement of *mens rea*, to mean that, under the New Hampshire doctrine, mental disease, to be sufficient to excuse responsibility, must destroy the capacity to form criminal intent.⁹² But this argument seems to be based on a misunderstanding of *State v. Jones*.

Judge Ladd's strongest pronouncement on the issue of a disease-intent relationship is the previously quoted dictum that one of the questions presented in an insanity case, is "was the disease of such a character, or was it so far developed, or had it so subjugated the powers of the mind, as to take away the capacity to form or entertain a criminal intent."⁹³ Taken by themselves, without regard for the theory behind the New Hampshire doctrine, these words seem to call for a finding of a definite disease-intent relationship.⁹⁴ But

89. *Boardman v. Woodman*, 47 N.H. 120, 147 (1866) (dissenting opinion).

90. In an important case in Cheshire county, where Caleb Cushing was counsel, there was an issue as to the mental capacity, in respect to which both sides requested very fine-spun instructions. After hearing their suggestions, . . . [Doe] said: "I am going to tell the jury that if this man knew what he was about, the transaction will stand; and, if he didn't, it won't." A look of unutterable disgust came over General Cushing's intellectual countenance, but neither party excepted.

SMITH, MEMOIR OF HON. CHARLES DOE 15 (1897), Smith, *Memoir of Charles Doe*, 2 PUBLICATIONS OF SO. N.H.B.A. 125, 137 (1897). For another example of New Hampshire instructions on insanity in civil cases, see *Fogg v. Moulton*, 59 N.H. 499, 500 (1880).

91. *E.g.*, *Jewell v. Colby*, 66 N.H. 399, 400 (1890).

92. See Brief of Amicus Curiae, pp. 30-31, *Stewart v. United States*, 214 F.2d 879 (D.C. Cir. 1954); Note 30 IND. L.J. 194, 203-04 (1955).

93. *State v. Jones*, 50 N.H. 369, 393 (1871).

94. It was argued before the *Durham* court, while decision in *Durham* was still pending, that Ladd did intend to define "mental disease" by requiring an intent relationship:

The alternative formulation of the New Hampshire rule—whether the mental disease had so far subjugated the mind of the accused that he was unable to form criminal intent—is more troublesome. Literally applied, it could result in more severity than the present right-and-wrong test. Only if "intent" is conceived as the product of the total personality does the test fall in line with present conceptions of mental disorder. Viewed in a certain light, incapacity to form criminal intent is just as much a symptom of mental disorder as capacity to distinguish right from

such an interpretation implies a violation of the doctrine's basic tenet that what constitutes "mental disease" is a question of fact, since it would mean, in effect, that the court laid down, as a matter of law, a definition of "mental disease." It would be a definition because a court, which instructs a jury that mental disease, to be sufficient to excuse responsibility, must destroy the capacity to form criminal intent, would be doing more than merely setting the degree of "mental disease" necessary; it would also be limiting the jury to a specific type or symptom of "mental disease," and a very narrow and limited type at that.

Moreover, another statement in Judge Ladd's opinion indicates that the New Hampshire doctrine does not define "mental disease" to include only diseases of the mind which can be said to destroy the capacity to form criminal intent. Concerning a New Hampshire jury's duty to relate the disease to intent, Ladd stated:

Whether the defendant had a mental disease, as before remarked, seems to be as much a question of fact as whether he had a bodily disease; and whether the killing of his wife was the product of that disease, was also as clearly a matter of fact as whether thirst and a quickened pulse are the product of fever. . . . Enough has already been said as to the use of symptoms, phrases, or manifestations of the disease as legal tests of capacity to entertain a criminal intent. They are all clearly matters of evidence, to be weighed by the jury upon the question whether the act was the offspring of insanity: if it was, a criminal intent did not produce it; if it was not, a criminal intent did produce it, and it was crime.⁹⁵

It has been suggested that Ladd meant that the extent to which the mental disorder reduced the possibility of forming a criminal intent would be the extent to which the disorder may be said to have caused the act.⁹⁶ But this interpretation is not the only one possible, and, since the New Hampshire judges expressly declined to define "mental disease" but insisted that the existence, symptoms, and result of "mental disease" were all questions of fact, its correctness seems doubtful. A more consistent interpretation would be that Ladd was instructing the jury to determine whether the act was the product of mental disease, and, that if it was not the jury could conclude that it was the product of intent. He did not direct the jury to first decide whether the mental disease affected intent *per se*. From this viewpoint, much of the New Hampshire emphasis upon *mens rea* is negative, since a finding of no intent would automatically follow a finding of mental disease serious enough to excuse the act.⁹⁷ Rather than laying down, as a matter of law, that the

wrong. From this point of view it entails the same difficulties with expert testimony and the same distortion of the issues for the jury.

Brief of Amicus Curiae, pp. 30-31, *Stewart v. United States*, 214 F.2d 879 (D.C. Cir. 1954).

95. *State v. Jones*, 50 N.H. 369, 398-99 (1871).

96. Note, 30 IND. L.J. 194, 203 (1955).

97. Compare the analysis of Ladd's words given here with Doe's dictum in *Boardman v. Woodman*, 47 N.H. 120, 147 (1866) (intent cannot exist without a capable mind).

mental illness must directly destroy volition or at least have some lesser effect upon it, the New Hampshire judges merely recognized *mens rea* as a common-law element of crime, and said that if the mental disease was of such a nature that the jury found, as a fact, that the crime was its product, then it could also find that the defendant had lacked capacity to form intent.

To look at the New Hampshire doctrine from the viewpoint of *mens rea* is to highlight another difference between it and the *M'Naghten* rules. The right-wrong test considers only knowledge and ignores volition. But knowledge is only one aspect of intent. And if *mens rea* is, in fact, a common-law requirement of crime, the ignoring of volition offers another example of the way in which the *M'Naghten* rules violate the spirit of the common law and the New Hampshire doctrine restores it.

Thus it is possible to say that because the New Hampshire doctrine pays specific attention to the problem of *mens rea* by at least recognizing its existence, it is more liberal and has a wider range than *M'Naghten* rules. But there is another side to this coin. For, by allowing the jury to consider *mens rea* (as in fact it allows the jury to consider every aspect of the intellect when determining what constitutes mental illness), the New Hampshire formula also directs that the ability to form criminal intent is an element of common law crime. This may give New Hampshire a narrower scope than the rule recently suggested by the Royal Commission on Capital Punishment. The English proposal, placing the emphasis upon whether the accused "*ought not to be held responsible*,"⁹⁸ rather than on whether he *is not responsible*, should not find it necessary to make the assumption that a mental illness, serious enough to produce a crime, is also serious enough to affect the capacity to form intent. It could thus be said that the proposed English rule is the true "no test" rule while New Hampshire might be called the "common-law" rule.

Here, as in a comparison with *Durham*, there is a difference in the objectives sought by the formulators. The Royal Commission, finding the *M'Naghten* rules inadequate, is merely suggesting the substitution of another, though radically different, rule. The Commission is not calling for a return to principles of common law. It did not reach its conclusion by first deciding that insanity is legally a question of fact. Like the *Durham* court, it took a different approach to the problem than New Hampshire did, and it may be an accident of truth that all three ended up with somewhat similar results.⁹⁹

98. "(19) We consider (with three dissentients) that a preferable amendment of the law would be to abrogate the *M'Naghten* Rules and 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 that he ought not to be held responsible." Royal Commission on Capital Punishment, *Report*, CMD. No. 8932, at 276, 116 (1953).

99. It is interesting to note that in 1861 the New Hampshire court was invited to adopt a rule somewhat similar to that proposed by the Royal Commission when a defendant requested the following instructions: "That if upon the whole evidence they are of the opinion that it was more probable that the prisoner was insane so as not to be responsible for his acts, then that he was sane, they ought to find him not guilty by reason of insanity." *State v. Bartlett*, 43 N.H. 224 (1861).

Influence of the New Hampshire Doctrine

As Dr. Overholser laconically understated it, "there is some doubt whether the old New Hampshire rule, that the relationship between insanity and an alleged criminal act is a question of fact, produced a very profound impact upon legal thinking."¹⁰⁰ It would be inaccurate to say that during the eighty-three years between *Pike* and *Durham*, the New Hampshire formula was rejected by American courts. The truth is that it has not even been considered,¹⁰¹ and can truthfully be called "Judge Doe's octogenarian wallflower."¹⁰² One reason for this is the comparatively ignored position of the New Hampshire court. Doe, himself, lamenting the fact that New Hampshire is "no geographical name of weight," regretted that the New Hampshire formula had not originated in some larger state, since if it could have been called the New York or Massachusetts rule, its name "would carry some weight as authority."¹⁰³ Proof that Doe was right is found in the reception given *Durham*. Some observers hailed it as "a spur to the modernization of the law of insanity in other jurisdictions"¹⁰⁴ which could not be effected by anything coming from New Hampshire.¹⁰⁵

Another reason the New Hampshire formula has been ignored by American courts is that it is often regarded as just another "liberal" test supplanting the *M'Naghten* rules,¹⁰⁶ and not, as Doe hoped, a principle "as old and venerable and fundamental and elementary as any principle of the common law."¹⁰⁷ Again the reaction to *Durham* illustrates this. Most commentators have ex-

100. Overholser, *Psychiatry's Contribution to Criminal Law and Procedure*, 12 ORELA. L. REV. 13, 17 (1959).

101. "Not only has it not been adopted elsewhere; it was not even discussed. It was worse than rejected, it was ignored. Certain writers endorsed it from time to time, but the courts of other states paid it no attention whatever." WEIHOFEN, *THE URGE TO PUNISH* 7 (1956).

102. Weihofen, *The Flowering of New Hampshire*, 22 U. CHI. L. REV. 356, 363 (1955).

103. Letter From Charles Doe to Clark Bell, Jan. 10, 1889, in Bell, *Editorial: The Right and Wrong Test in Cases of Homicide by the Insane*, 16 MEDICO-LEGAL J. 260, 264 (1889).

104. 40 CORNELL L.Q. 135 (1954).

105. "The impact of the *Durham* case stems from the fact that it was decided by one of the more influential American courts, and its influence, far more than that of the New Hampshire courts, presumably enhances the likelihood that the *Durham* test will be accepted by other courts." Comment, 29 TUL. L. REV. 576, 588 (1955). "[T]he difference between adoption of the rule by a one-state minority and its adoption by one of the most influential of the eleven circuits is readily apparent. In the present instance it is much more likely that the rule will have a profound impact on American judicial development." Note, 43 GEO. L.J. 58, 63-64 (1954).

106. The New Hampshire doctrine has been called the "'product' test," Wechsler, *The Criteria of Criminal Responsibility*, 22 U. CHI. L. REV. 367, 369 (1955), and the "Mental-Cause" rule, Note, 43 GEO. L.J. 58, 63 (1954). Recently it has been treated as a test in both federal and state courts. See *Sauer v. United States*, 241 F.2d 640 (9th Cir. 1957); *Commonwealth v. Chester*, 337 Mass. 702, 150 N.E.2d 914 (1958).

107. Letter From Charles Doe to Isaac Ray, Jan. 18, 1869, in Reik, *The Doc-Ray Correspondence: A Pioneer Collaboration in the Jurisprudence of Mental Disease*, 63 YALE L.J. 183, 193 (1953).

pressed the belief that the two rules are substantially similar.¹⁰⁸ But Doe insisted that friends of the New Hampshire formula present it as restoring ancient principles of common law and not as a new "test," or else, he said, it would never gain acceptance.¹⁰⁹ By 1889 he realized his prediction was true, for courts rejecting the New Hampshire formula were doing so on the grounds they wanted no new "test" and were not even considering the common-law argument he had advanced.¹¹⁰

Although in the five years since *Durham* several federal courts have considered and rejected a New Hampshire-*Durham* approach, it is of interest here to note only one state case, *Commonwealth v. Chester*.¹¹¹ There, defense

108. See, e.g., Guttmacher, *The Psychiatrist as an Expert Witness*, 22 U. CHI. L. REV. 325, 327 (1955); Note, 43 GEO. L.J. 58, 63 (1954); Note, 29 TEMPLE L.Q. 338, 343 (1956). The courts have made the same mistake. See *Thomas v. State*, 206 Md. 575, 584, 112 A.2d 913, 917 (1955); *Commonwealth v. Chester*, 337 Mass. 702, 712, 150 N.E.2d 914, 919-20 (1958).

109. The legal profession alone is to be convinced. And that profession is to be convinced only by the argument that our rule is the ancient, original theory of the common law,—older than Hale or Coke. State a legal proposition as new, and you waste your time arguing in support of it. . . . I do verily believe that to claim that your and my rule is a new one is to prevent its ever being adopted by the courts.

Letter From Charles Doe to Isaac Ray, Jan. 18, 1869, in Reik, *supra* note 107, at 183.

110. *State v. Pike*, to which you refer, was decided twenty years ago next June. During that time I have looked in vain for a noticeable attempt to show error in the New Hampshire law on the subject of legal tests of insanity. There have been decisions affirming the old test of knowledge of right and wrong in criminal cases. It has been said that in some cases insanity ought not to be a defence. It has been said in substance that the New Hampshire rule is impolitic and dangerous,—that if insanity causes a man to do something which he knows to be wrong and which would be criminal if he were sane, he should be punished for his mental disease.

Many things have been said. But since the decision in the *State v. Pike* was published I have seen nothing that can be regarded as a serious effort to grapple with the argument of the common law question, and show error in the New Hampshire rule. If any effort of that kind entitled to a moment's consideration in the judgment of a good common-law lawyer, has been made since publication of *State v. Pike* it has escaped my observation.

Letter From Charles Doe to Clark Bell, Jan. 10, 1889, in Bell, *supra* note 103, at 263.

A third reason why the New Hampshire formula failed to influence the law of insanity is that few defense attorneys have urged its adoption. Weihofen, *supra* note 102, at 363 n.22. One explanation for this may be the manner in which the *Pike* case was written. As John Shirley, court reporter at the time *Pike* was written, often said, Doe was guilty of "the obscurity of over-elaboration." SMITH, MEMOIR OF HON. CHARLES DOE 19-20 (1897), Smith, *Memoir of Charles Doe*, 2 PUBLICATIONS OF SO. N.H.B.A. 125, 141-2 (1897). His opinions were simply too long, too involved, and too combative in tone. Indeed, the general frivolity of one is reputed to have prevented his appointment to the highest court. See Reid, *Of Men, and Minks, and a Mischievous Machinator: Did the Mink Case Keep Judge Doe Off the United States Supreme Court?*, N.H.B.J., Jan. 1959, p 23.

111. 337 Mass. 702, 150 N.E.2d 914 (1958).

counsel, without mentioning *Durham*, urged the adoption of the New Hampshire formula and presented it in its correct ostent, as nothing more than placing the fact-finding duty of whether there was a mental disease, and, if so, whether the mental disease produced the slaying, back into the hands of the jury.¹¹² The court, however, chose to treat *Pike* as establishing a rule,¹¹³ and, after paying it scant attention, proceeded to discuss and reject the more prestigious *Durham* rule.¹¹⁴

NEW HAMPSHIRE AND DURHAM COMPARED

The Distinction Between Law and Fact

The most striking difference between the New Hampshire formula and the *Durham* rule is the theoretical basis behind each. Even if they were exactly similar in application, the combined medical and need-for-a-new-test bases of *Durham* would give it appeal to, and a greater chance of adoption with, courts that otherwise might not be impressed with the common-law "fact finding function of the jury" theory that lies behind the New Hampshire formula. The opposite, of course, is also true. Looking at this variance of philosophies from another point of view, it is arguable that Judge Ladd's conviction that a satisfactory legal test could never be discovered by medicine¹¹⁵ will appeal

112. The New Hampshire Court has held that the question of responsibility or irresponsibility is one of fact for the jury, and that the only rule that the Court can give the jury is if the defendant had a mental disease, and if the criminal act was the product of that mental disease, to acquit him. All symptoms and all tests of mental disease are purely matters of fact to be determined by the jury.

Brief for Defendant, p. 41, *Commonwealth v. Chester*, 337 Mass. 702, 150 N.E.2d 914 (1958).

113. "In substance that rule is that an accused is not criminally responsible if his unlawful act was the product of mental disease." 337 Mass. at 712, 150 N.E.2d at 919.

114. *Id.* at 712-13, 150 N.E.2d at 920.

Although he was confident in the eventual triumph of the New Hampshire formula, "Judge Doe was skeptical about its acceptance in Massachusetts. 'Oh, no,' said he . . . , 'in Massachusetts they won't condescend to take the law from New Hampshire.'" *The Exeter (N.H.) News-Letter*, Feb. 18, 1910, p. 2, col. 1.

115. Judge Ladd believed that it was nearly impossible to develop a safe "test" even if one were desired, for it would take years of studying an "immense mass of evidence, as complicated and difficult to understand as can well be conceived," and then "it would be necessary to compare cases and classes of cases one with the other, to weigh facts against facts, to balance theories and opinions, and finally to deduce a result which might itself turn out to be nothing more than a theory or opinion after all. At any rate it would be a deduction of fact." *State v. Jones*, 50 N.H. 369, 395 (1871).

It is interesting to note that Ladd anticipated the difficulties experienced by the recent commissions which studied the question of legal accountability in Britain and Canada. Both functioned during the same decade, both studied an "immense mass of evidence" (including the New Hampshire formula), and they reached completely opposite conclusions. The English Commission reported that all tests were useless and unjust, see Royal Commission on Capital Punishment, *Report*, Cm. No. 8932 (1953), while the Canadian recommended not only the retention of the *M'Naghten* rules and the delusion test, but said that even the irresistible impulse test was an unnecessary innovation, ROYAL

to legal traditionalists; while the putative attempt by the *Durham* court to reallocate the duty of determining accountability between the judge and the jury (and perhaps even the psychiatrist)¹¹⁶ will be appreciated by courts which insist insanity is primarily a mixed question of law and fact, and not of fact alone.

This is not to say that the *Durham* court was entirely uninterested in restoring the question of fact to the jury, or that the New Hampshire judges were not interested in medicine¹¹⁷ or pleased with the reception their formula received from the medical profession.¹¹⁸ But it does point up pragmatic arguments by which so radical a departure from the traditional rules may be made to appeal to otherwise opposing schools of thought.

The difference in bases, however, is not purely theoretical, but has serious practical consequences. The *Durham* court rejected the New Hampshire approach of refusing to rule that any particular overt condition or action was a manifestation of mental disease, and instead has ruled, as a matter of law, that knowledge of right and wrong, while no longer the test for mental disease, was a symptom of it.¹¹⁹ Thus the *Durham* judges refused to heed Doe's dictum that the law is not concerned with the correctness of any medical

[CANADIAN] COMMISSION ON THE LAW OF INSANITY AS A DEFENCE IN CRIMINAL CASES, REPORT 30, 46 (1956).

116. In the final analysis, the *Durham* decision may be read as an attempt by the court more properly to reallocate the duty of determining insanity—among the judge, the jury and the expert psychiatric witness. . . . As between the jury and the psychiatric witness, the *Durham* court appeared doubtful, inclined toward the psychiatrist, then wavered toward the jury. In the end . . . the decision left unresolved the question whether the controlling criterion, "mental disease or defect," was intended to be *psychiatric* (in the sense that psychiatric conceptions of "mental disease" would legally be equated to "insanity") or *jural* (in the sense that the jury's view of "mental disease" would control.) Upon this "pending" decision hangs the critical issue of whether psychiatrist or jury will have the final say of criminal responsibility.

De Grazia, *The Distinction of Being Mad*, 22 U. CHI. L. REV. 339, 347 (1955).

"However, it is not the knowledge test aspect of *M'Naghten* with which *Durham* is at odds at all, but rather its stringently legal approach to the critical problem of determining insanity on the basis of criteria intelligible to a jury of laymen." Cutler, *Insanity as a Defense in Criminal Law*, 5 CATHOLIC LAW. 44, 50 (1959).

117. For a discussion of medicine by Doe, see *Boardman v. Woodman*, 47 N.H. 120, 149-50 (1866) (dissenting opinion).

118. The satisfaction with which the charge to the jury in *State v. Pike* is understood to have been received by the most enlightened members of the medical profession, proves to my mind, not that we have thrown down old landmarks to adopt any theory based on a partial, imperfect, or visionary view of the subject, but that, in a matter where we must inevitably rely to a great extent upon the facts of science, we have consented to receive those facts as developed and ascertained by the researches and observations of our own day, instead of adhering blindly to dogmas which were accepted as facts of science and erroneously promulgated as principles of law fifty or a hundred years ago.

State v. Jones, 50 N.H. 369, 400 (1871) (Ladd, J.).

119. "While capacity to distinguish right from wrong is no longer the earmark of legal sanity, the lack of that capacity is one of the earmarks of legal insanity." Wright

theory, and did the very thing for which they condemned the *M'Naghten* judges, transforming contemporary medical theory into judicial fact.¹²⁰ As a result, the *Durham* court has not only offered definitions on questions which New Hampshire would leave to the jury,¹²¹ but, despite clearly stated intentions to the contrary,¹²² may also be said to have set itself up as the ultimate trier of facts, reversing convictions when it has disagreed with the jury's conclusions as to the value of specific expert psychiatric testimony.¹²³

"Disease" v. "Disease or Defect"

The second difference between *Durham* and New Hampshire lies in the *Durham* court's statement that "an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect."¹²⁴ The addition of the words "mental defect" to the New Hampshire term "mental disease," has led some to feel the *Durham* case is an extension of *State v. Jones*.¹²⁵ Even accepting the argument that "mental defects" covers somato-psychic disorders (organic psychoses) and that "mental disease" does not,¹²⁶ this seems a mere logomachy. Upon a reading of *Boardman, Pike, and Jones*, it is readily apparent that Doe and Ladd made no distinction between disease and defect (or disorder, sickness, affliction, disability, etc.), but grouped all phases and conditions of mental instability under the term "disease." Thus, it might be argued, it is New Hampshire, and not *Durham* with its "categories," which is the broader. Whether this makes an appreciable difference in actual practice is doubtful, and it can be safely conjectured that New

v. United States, 250 F.2d 4, 12 (D.C. Cir. 1957). Knowledge of right and wrong are merely possible symptoms of mental disease, which "do not necessarily, or even typically, accompany even the most serious mental disorder." *Durham v. United States*, 214 F.2d 862, 876 (D.C. Cir. 1954).

120. To believe that one's own theories are facts is considered by many contemporary psychiatrists as a "symptom" of schizophrenia. Yet this is what the language of the *Durham* decision does. It specifies some of the shakiest and most controversial aspects of contemporary psychiatry (*i.e.*, those pertaining to what is "mental disease" and the classification of such alleged diseases) and by legal fiat seeks to transform inadequate theory into "judicial fact."

Szasz, *Psychiatry, Ethics, and the Criminal Law*, 58 COLUM. L. REV. 183, 190 (1958).

121. "The phrases 'product of' in *Durham* and 'except for' in *Douglas* [239 F.2d 52 (D.C. Cir. 1956)] were not attempts to phrase in a single expression a rule as to insanity in criminal cases. Such a single phrase would be an impossible task. The matter must be explained, not merely stated." *Carter v. United States*, 252 F.2d 603, 615 (D.C. Cir. 1957).

122. See *Carter v. United States*, 252 F.2d 603, 617-618 (D.C. Cir. 1957); *Starr v. United States*, 264 F.2d 377, 385 (D.C. Cir. 1958).

123. See *Fielding v. United States*, 251 F.2d 878 (D.C. Cir. 1957); *Wright v. United States*, 250 F.2d 4 (D.C. Cir. 1957); *Douglas v. United States*, 239 F.2d 52 (D.C. Cir. 1956). See also *Bradley v. United States*, 249 F.2d 922, 926 (D.C. Cir. 1957) (dissenting opinion of Bazelon, J.).

124. 214 F.2d at 875.

125. See *United States v. Fielding*, 148 F. Supp. 46, 51 (D.D.C. 1957).

126. See Cavanagh, *A Psychiatrist Looks at the Durham Decision*, 5 CATHOlic U.L. REV. 25, 31 (1955).

Hampshire's "mental disease" and *Durham*'s "mental disease or mental defect" mean the same thing.

Of more significance in the application of the two rules is the problem of semantics posed by the word "disease." Despite the medical origin of the word (Doe took it from Dr. Ray), one psychiatrist doubts if "disease" has medical validity and thinks "it would be desirable to completely discard the term mental disease in favor of mental illness or mental disorder."¹²⁷ But Dr. Guttmacher, who first suggested the term "mental disorder" to the American Law Institute, changed his mind: "It would be preferable to use the term mental disease rather than mental disorder. Mental disorder is too tenuous a concept to write into law."¹²⁸ This problem may be of some significance in applying the *Durham* rule—where a definition would not be out of order—but here again we find an advantage in New Hampshire's insistence that all matters, including definitions and even choice of words, are questions of fact.¹²⁹

Causation

Another distinction between the *Durham* case and the New Hampshire doctrine is that *Durham* "stresses the need for showing a causal relationship between mental disorder and act."¹³⁰ It has been suggested that because of the word "product," the New Hampshire formula also requires that causal connection between the mental disease and the act be shown to excuse legal accountability.¹³¹ And, linking this to *mens rea*, it has been concluded that the New Hampshire doctrine calls for "a specific mode of causality, namely, the total destruction of the actor's capacity for self-control, the nonconcurrence of his will."¹³² But these arguments fail to consider two factors: First, that the

127. *Id.* at 32.

128. Guttmacher, *The Quest for a Test of Criminal Responsibility*, 111 AM. J. PSYCHIATRY 428, 432 (1954).

129. One attempt to define "mental disease" was made in the American Law Institute's Model Penal Code: "The terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct." MODEL PENAL CODE § 4.01(2) (Tent. Draft No. 4, 1955). Vermont added to this definition as follows: "The terms 'mental disease or defect' shall include congenital and traumatic mental conditions as well as disease." VT. STAT. ANN. tit. 13, § 4801(2) (1958).

130. Note, 30 IND. L.J. 194, 205 (1955). In its "model charge to the jury," the *Durham* court said: "Thus your task would not be completed upon finding, if you did find, that the accused suffered from a mental disease or defect. He would still be responsible for his unlawful act if there was no causal connection between such mental abnormality and the act." 214 F.2d at 875. The causation requirement was extensively discussed in *Carter v. United States*, 252 F.2d 608, 615-18.

131. It is said that the probable meaning of the New Hampshire word "product" is proximate causation, Weihofen, *supra* note 102, at 360, and that "the term *product* denotes separateness and implies causation," Roche, *Criminality and Mental Illness—Two Faces of the Same Coin*, 22 U. CHI. L. REV. 320, 322 (1955). It was also argued before the *Durham* court while the case was pending decision that the New Hampshire doctrine requires causation. Brief of Amicus Curiae, p. 30, *Stewart v. United States*, 214 F.2d 879 (D.C. Cir. 1954).

132. Wechsler, *supra* note 106, at 370. "[I]n the New Hampshire cases . . . there

New Hampshire doctrine is not a "test" under which the word "product" is definable as a matter of law; second, just what it was that the New Hampshire judges said. For, while Doe in the *Jones* case specifically refused a request to charge that "any degree of insanity . . . makes . . . [the defendant] incapable of crime and not responsible, though the jury may be unable to trace any connection between the partial insanity and the act complained of,"¹³³ he did tell the jury: "Whether an act may be produced by partial insanity when no connection can be discovered between the act and the disease, is a question of fact."¹³⁴ By declining to rule that causation was not necessary, Doe was consistent with his tenet that instructing jurors as to what form the alleged mental disease must take to make the act noncriminal would be an interference with their function. On the other hand, by specifically telling them that even in cases of partial insanity no connection between disease and act need be found, he left the question of causation open. Hence, under the New Hampshire doctrine, causation is a question of fact and not of law.¹³⁵

It may be that this distinction between *Durham* and New Hampshire is largely technical. The New Hampshire doctrine, by recognizing the ability to form a criminal intent as a common-law element of murder, while at the same time refusing to define the extent to which mental disease must destroy the will and reason, may actually have insured that a causation test will be applied. For it is difficult to conceive of a jury which will not seek a causal relationship if it is not expressly instructed to the contrary.

Still, the fact that causation, in theory, is not a vital part of the New Hampshire doctrine is no mere verbal distinction, since the *Durham* rule's requirement of causation creates a discernible practical cleavage between the two. One factor is that the *Durham* rule, which was devised in response to medical pressure, may prove less acceptable to many schools of psychiatry which object to the notion of cause as a means of relating mental disease to responsibility.¹³⁶ Of perhaps greater importance is the possibility that *Durham* will prove more

are indications that the requirement of causality is satisfied only if the mental disease rendered the defendant incapable of controlling his acts." Note, 54 COLUM. L. REV. 1153, 1155 (1954).

133. *State v. Jones*, 50 N.H. 369, 376 (1871) (reporter's note).

134. *Id.* at 370.

135. Compare the views of the Royal Commission, which doubted whether no connection could be discovered in cases where the disease was strong enough to excuse the act, because the greater the disease the more probable the causal relationship. The Commission agreed with New Hampshire that the means employed to measure that relationship should be a question of fact:

Where a person suffering from a mental abnormality commits a crime, there must always be some likelihood that the abnormality has played some part in the causation of the crime; and, generally speaking, the graver the abnormality and the more serious the crime, the more probable it must be that there is a causal connection between them. But the closeness of this connection will be shown by the facts brought in evidence in individual cases and cannot be decided on the basis of any general medical principle.

Royal Commission on Capital Punishment, *Report*, CMD. No. 8932, at 99 (1953).

136. "Mental illness does not cause one to commit a crime nor does mental illness

attractive to legal traditionalists in states where the doctrine of causation is a well developed and highly sophisticated principle of law.

The *Durham* decision's requirement of causation also creates a few practical differences in application. As Judge Biggs suggests, it might, if not handled perceptively, lead blindly down the path of retrogression by putting emphasis upon monomania.¹³⁷ Furthermore, it might tend to restore the old stress on definitions, something the New Hampshire court believed was legally unwarranted, and the *Durham* court professes to think is medically futile.

On the credit side, the *Durham* requirement provides the judge with at least one method of control—that of instructing the jury in terms of causation—thus limiting the range of inquiry to tangible and recognizable degrees of mental illness. For causation, if strictly construed, would require the act to be traced directly to a definable disease, and the general term “mental illness” could not be effectively used by defense counsel in any vague, all-embracing sense to cover such lesser ills as a simple neurosis of mild proportions.¹³⁸ This might serve to counteract any “abuse” some fear may result from giving the jury a completely indefinite standard. Judge Biggs, however, feels that on the whole, “the very fact that so much explanation and elaboration is required initially does suggest . . . that the New Hampshire rule is a more straightforward solution than the present District of Columbia decision may turn out to be.”¹³⁹ Since the problem of causation has given the *Durham* court so much difficulty,¹⁴⁰ a deemphasis of that problem may well be preferable from the viewpoint of psychiatry,¹⁴¹ of the prosecutor,¹⁴² and even perhaps of jurisprudence.¹⁴³

produce a crime. Behavior and mental illness are inseparable—one and the same.” Roche, *supra* note 131, at 322.

137. BIGGS, *THE GUILTY MIND: PSYCHIATRY AND THE LAW OF HOMICIDE* 155 (1955).

138. *Id.* at 155.

139. *Id.* at 156.

140. The *Durham* court itself, in the insanity cases since the original ruling, has discovered itself enmeshed in the entangling web of its own making. In the *Douglas* case [239 F.2d 52 (D.C. Cir. 1956)] the court speaks of the causal relationship between the mental condition of the defendant and the criminal act in terms of the tort causality “but” or “except for,” a concept in itself under much and continued study by the experts within that field of law.

Cutler, *supra* note 116, at 51.

141. “The psychiatrist can answer the condition—‘in consequence of such illness he committed the act’—not in the sense that mental illness causes the crime, but in the sense that mental illness vitiates the normal capacity for control.” COMM. ON PSYCHIATRY AND LAW, GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, REPORT No. 26, CRIMINAL RESPONSIBILITY AND PSYCHIATRIC EXPERT TESTIMONY 8 n.25 (1954).

142. Causality is the mainspring of *Durham*. But when the Government is obliged to prove beyond a reasonable doubt that either the accused is not suffering from a mental disease or defect, or if he is, that beyond a reasonable doubt the criminal act is not the critical decisive result of the disease, the Government is given what in many instances may be an impossible burden.

Gasch, *Prosecution Problems Under the Durham Rule*, 5 CATHOLIC LAW. 5, 32 (1959).

143. As a matter of fact the problem of proving a causal connection is not essentially

Mens Rea

A fourth distinction between New Hampshire and *Durham* is the New Hampshire discussion of *mens rea*. The *Durham* court did not emphasize a mental disorder-criminal intent relationship,¹⁴⁴ but neither did Doe in the *Pike* case. It has been suggested that the *Durham* court was persuaded not to do so by an amicus curiae brief submitted in *Stewart v. United States* while decision in *Durham* was still pending,¹⁴⁵ which suggested that New Hampshire, because of its mention of intent, was so harsh that it might insure that only serious and advanced mental disorders would confer immunity from punishment.¹⁴⁶ Whether or not the *Durham* court was influenced by this analysis, it is not valid, primarily because the New Hampshire doctrine does not necessarily call for a rigid disease-intent relationship. Even accepting, arguendo, the theory that New Hampshire does require that the disease affect intent, this analysis ignores the fact that New Hampshire still leaves to the jury the question of what degree of illness constitutes "mental disease." Furthermore, the New Hampshire judges made no attempt to define intent as it relates to mental disease. But to a jury operating under the freedom of the New Hampshire doctrine, the intent to murder would include such sophisticated notions as an awareness of the value which Western society places upon human life and an understanding of the consequences of the act to the victim and his family as well as to the actor. Thus, even assuming a New Hampshire requirement that the disease affect intent, those mental types which lie between "sanity" and "insanity" might receive the benefit of jury consideration of the same mitigating circumstances which would be considered under a doctrine of diminished responsibility, which the *Stewart* brief was arguing for. Also, the New Hampshire doctrine offers greater protection to the public, for, by allowing the jury to bring in a verdict of not guilty by reason of insanity, it makes it possible to commit these people for an indefinite period until cured,

different in this disorder-and-crime situation than in others. How can we prove causation? We don't; instead, we present the raw factual material and then try to induce the state of mind in the judge or jury that will prompt him or them to say that the relationship of cause and effect exists. . . . We ask for their estimate—their guess. . . .

WEIHOFEN, *op. cit. supra* note 101, at 94.

144. The nearest the *Durham* court came to requiring a finding that the mental disease affect intent, was this vague dictum:

The legal and moral traditions of the western world require that those who, of their own free will and with evil intent (sometimes called *mens rea*), commit acts which violate the law, shall be criminally responsible for those acts. Our traditions also require that where such acts stem from and are the product of a mental disease or defect as those terms are used herein, moral blame shall not attach. . . .

Durham v. United States, 214 F.2d 862, 876 (D.C. Cir. 1954).

145. See Note, 30 IND. L.J. 194, 204-05 n.59 (1955).

146. Brief of Amicus Curiae, pp. 30-31, *Stewart v. United States*, 214 F.2d 879 (D.C. Cir. 1954).

rather than simply imposing a less severe criminal penalty,¹⁴⁷ as would occur under the diminished responsibility rule.¹⁴⁸

It may be that when the occasion arises, the District of Columbia court will "refine" the *Durham* rule by requiring that mental disease affect the *mens rea* much as Ladd "refined" the New Hampshire formula when he said that the jury, in determining whether a mental disease excused accountability, is actually determining whether the *mens rea* has been destroyed. Absent a reference to *mens rea*, the *Durham* rule may be closer, in this respect, to the rule proposed by England's Royal Commission. The most that can be said is that the fact the *Durham* rule is primarily a medical test while the requirement of free, reflective intent is a legal notion, leads one to predict that *mens rea* will not become part of the *Durham* law. But the same could have been said for causation.

The Ends Sought

Finally it may be noted that the ends sought by New Hampshire (to discard legal presumptions and give the jury the full fact-finding duty) and by *Durham* (to discard obsolete medical theories and bring the law up to date) offer an opportunity to compare these two rules with other tests, both old and new. While Doe spoke in terms of who should do the blaming, the

147. It has been suggested, however, that the latter alternative represents a better policy:

There can be no doubt that, in the feeble-minded, judgment, moral sense and appreciation of right and wrong are defective, and the power of self-control is substantially less than that of a normal person On the whole, however, medical witnesses appeared to consider that, save in exceptional cases, the feeble-minded should be regarded as having diminished responsibility rather than as being wholly irresponsible, and we accept this view.

Royal Commission on Capital Punishment, *Report*, CMD. No. 8392, at 121 (1953).

Admittedly neither the *Durham* nor the New Hampshire rule fully answers the contention that "any process which views the mental condition of a defendant in black and white terms is a blunt instrument for dealing with such a multiform phenomenon as mental disease," Brief of Amicus Curiae, p. 32, *Stewart v. United States*, 214 F.2d 879 (D.C. Cir. 1954), in that under both doctrines the defendant must ultimately be adjudged either wholly responsible or not responsible. Nevertheless there would seem to be merit in the position taken by the District of Columbia court that greater experience under the *Durham* rule is necessary before deciding whether adoption of the diminished responsibility doctrine is desirable. See *Stewart v. United States*, 214 F.2d 879, 883 (D.C. Cir. 1954). The same position can be taken in regard to New Hampshire.

148. The interpretation of the New Hampshire rule given here is not inconsistent with the trend in some *M'Naghten* jurisdictions to hold that evidence of the defendant's feeble-mindedness is relevant to the question of intent to commit minor crimes, even though insufficient to satisfy the *M'Naghten* rules themselves, see, e.g., *Robinson v. State*, 113 Ind. 510, 16 N.E. 184 (1888) (larceny); *Jessup v. Commonwealth*, 185 Va. 610, 39 S.E.2d 638 (1946) (same), and that evidence of intoxication is admissible to prove that the accused was unable to form the intent prerequisite to conviction of first degree murder, see e.g., *Commonwealth v. Taylor*, 263 Mass. 356, 161 N.E. 245 (1928); *People v. Cummings*, 274 N.Y. 336, 8 N.E.2d 882 (1937).

Durham court spoke of who can be properly blamed,¹⁴⁹ the Royal Commission of who ought to be blamed,¹⁵⁰ and the Model Penal Code of who shall not be blamed,¹⁵¹ or, in the alternative, of who may justly be held to blame.¹⁵² While the New Hampshire doctrine stresses whether the accused had a mental disease and reminds the jury that *mens rea* is a common-law element of crime, the *Durham* rule stresses whether he had a mental disease which is recognized by the latest advances of medical science, the *M'Naghten* rules stress whether the disease prevented him from having a certain type of knowledge, the irresistible impulse test whether it affected his power to control his actions, and the Royal Commission whether it affected the moral right of the community to hold him responsible.

Still another approach which has been advocated by the Group for the Advancement of Psychiatry is the "commitability" test, which equates criminal accountability with civil commitability.¹⁵³ This test has been suggested before,¹⁵⁴ but in view of the wide variance and often ambiguous application of state and federal statutes governing commitment, it is doubtful if it would effect the uniformity which most psychiatrists seem to desire.¹⁵⁵ It might also prove harshly unjust, for decisions on civil commitment are often made at informal hearing, and in criminal cases conducted under the proposed test these could

149. See Kalven, *Insanity and the Criminal Law—A Critique of Durham v. United States: Introduction*, 22 U. CHI. L. REV. 317, 318 (1955).

150. See note 98 *supra*.

151. MODEL PENAL CODE § 4.01(1) (Tent. Draft No. 4, 1955).

152. MODEL PENAL CODE § 4.01(1) (alternative (a)) (Tent. Draft No. 4, 1955) provides: "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect his capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law is so substantially impaired that he cannot justly be held responsible." The Reporter comments: "Alternative (a) proposes to submit the issue squarely to the jury's sense of justice, asking expressly whether the capacity of the defendant 'was so substantially impaired that he can not justly be held responsible.'" MODEL PENAL CODE § 4.01, comment 4, at 159 (Tent. Draft No. 4, 1955).

153. " 'Mental illness' shall mean an illness which so lessens the capacity of a person to use (maintain) his judgment, discretion and control in the conduct of his affairs and social relations as to warrant his commitment to a mental institution." COMM. ON PSYCHIATRY AND LAW, GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, REPORT NO. 26, CRIMINAL RESPONSIBILITY AND PSYCHIATRIC EXPERT TESTIMONY 8 (1954).

154. Theodore Roosevelt once did so in a negative manner when he refused to commute a death sentence saying: "I have scant sympathy with a plea of insanity advanced to save a man from the consequences of crime, when, unless that crime had been committed, it would have been impossible to persuade any reasonable authority to commit him to an asylum as insane." Letter of Theodore Roosevelt, From the White House, Aug. 8, 1904, in MCKERNAN, THE AMAZING CRIME AND TRIAL OF LEOPOLD AND LOEB 282 (Signet ed. 1957).

155. At least one psychiatrist opposes it: "This seems to me of doubtful value; the questions involved are historically and socially dissimilar and little is to be gained by equating them." Guttmacher, *The Quest for a Test of Criminal Responsibility*, 111 AM. J. PSYCHIATRY 428, 430 (1954).

easily be accorded by unsympathetic judges a respectability approaching *res judicata*.¹⁵⁶ Yet it has the merits of a definite, easily definable norm which any jury could understand.¹⁵⁷ The question which the prosecutor would ask the alienist, "Was the disease of such a nature that the defendant would have been subject to commitment at the time of the act?" would be alarmingly simple. The very fact it is a test (or a presumption that only the civilly committable are criminally insane) which the jury must follow, makes it incompatible with the New Hampshire formula.

CRITICISMS OF THE NEW HAMPSHIRE DOCTRINE

Although one purpose of this Article is to point up the differences between the New Hampshire formula and the *Durham* rule, it is of advantage to consider them similar when studying the animadversions that have been leveled upon them. Criticisms of one are often criticism of the other, for their opponents usually fail to differentiate between them. For convenience, these criticisms may be grouped under three general headings: policy, medical, and legal.

Policy

Lack of Necessity for a New Test

One of the most frequently stated objections is that a new test is unnecessary. This argument is advanced by two different schools of thought: those who insist the *M'Naghten* rules are completely satisfactory; and those who believe that while they are not perfect, they do the job as well as any test possibly can. A similar argument is based on the assumption that, although the *M'Naghten* rules appear unjust in theory, their harshness is always mitigated by the judge and jury whenever justice requires. Hence there is no need to tinker with the law just to bring theory into conformity with practice. This contention, often repeated although sometimes questioned, was accepted as true by Judges Doe,¹⁵⁸ and Ladd,¹⁵⁹ and rejected by them as unworthy of

156. In a few instances the committability test might be beneficial to the accused. It would avoid, for example, results such as that in *People v. Willard*, 150 Cal. 543, 89 Pac. 124 (1907), in which the accused was found guilty of murder under the *M'Naghten* test, even though he had perpetrated the crime only moments after he had been formally adjudged insane and ordered committed.

157. Judge Biggs tends to approve it on the theory it will lessen the danger that minor mental ills can be used as a defense to homicide. Biggs, *op. cit. supra* note 137, at 155-56.

158. "And the situation is still more impressive, when the judge is forced by an impulse of humanity, as he often is, to substantially advise the jury to acquit the accused on the testimony of the experts, in violation of the test asserted by himself." *State v. Pike*, 49 N.H. 399, 441 (1869) (concurring opinion).

159. "[I]n almost every case where any rule has been given on the subject, it has been modified and explained to meet the facts of the particular case, or to carry out the personal views of the judge on the matter of insanity." *State v. Jones*, 50 N.H. 369, 390-91 (1871).

The views of Judge Somerville were similar. "The result in practice, we repeat, is, that the courts charge one way, and the jury, following the alleged higher law of humanity,

serious consideration. They would have agreed with what Mr. Justice Frankfurter recently told the Royal Commission, that rules "honoured in the breach and not in the observance" are discredited, and that "the law serves its best interests by trying to be more honest about it."¹⁶⁰

Mr. Justice Frankfurter believed the trouble lay in the fact that rules of law were "arrested at the state of psychological knowledge of the time when they were formulated."¹⁶¹ Doe also believed this, but in line with the New Hampshire argument that insanity is essentially a question of fact, he went further and insisted:

If our precedents practically established old medical theories which science has rejected, and absolutely rejected those which science has established, they might at least claim the merit of formal consistency. But the precedents require the jury to be instructed in the new medical theories by experts, and in the old medical theories by the judge.¹⁶²

He thought the law was brought into conflict with itself by the practice of judges instructing juries that knowledge of right and wrong is the test for insanity after allowing alienists to testify that it is not.¹⁶³ "Either the expert testifies to law," he said, describing the dilemma, "or the judge testifies to fact."¹⁶⁴

Doe, no more than Frankfurter, could be satisfied with the assertion that in find another, in harmony with the evidence." *Parsons v. State*, 81 Ala. 577, 587-88, 2 So. 854, 861 (1886).

160. I think that to have rules which cannot rationally be justified except by a process of interpretation which distorts and often practically nullifies them, and to say the corrective process comes by having the Governor of a State charged with the responsibility of deciding when the consequences of the rule should not be enforced, is not a desirable system. . . . I am a great believer in being candid as possible about my institutions. They are in large measure abandoned in practice, and therefore I think M'Naghten Rules are in a large measure shams. That is a strong word, but I think the M'Naghten Rules are very difficult for conscientious people and not difficult enough for people who say, "We'll just juggle them."

Royal Commission on Capital Punishment, *Report*, CMD. No. 8932, para. 290, at 102 (1953). Compare the following views: "*M'Naghten's Case*, by the moral flavor of its test, gave juries an excuse to hang only the right men. The best solution lies then not in a new rule, but in a new jury." 30 HARV. L. REV. 179, 180 (1916).

161. Royal Commission on Capital Punishment, *supra* note 160, at 102.

162. *State v. Pike*, 49 N.H. 399, 438-39 (1869) (concurring opinion).

163. *Id.* at 441.

164. *Id.* at 442.

To say that the expert testifies to the tests of mental disease as a fact, and the judge declares the test of criminal responsibility as a rule of law is only, to state the dilemma in another form. For, if the alleged act of a defendant, was the act of his mental disease, it was not, in law, his act, and he is no more responsible for it than he would be if it had been the act of his involuntary intoxication, or of another person using the defendant's hand against his utmost resistance; if the defendant's knowledge is the test of responsibility in one of those cases, it is the test in all of them.

Id. at 441.

practice the jury follows the alienist and thus the rules need not be changed since they do not obstruct justice. To accept this proposition would be ignoring the very principles upon which law is based. "If the tests of insanity are matters of law," Doe said, "the practice of allowing experts to testify what they are, should be discontinued; if they are matters of fact, the judge should no longer testify without being sworn as a witness and showing himself qualified to testify as an expert."¹⁶⁵

A recent example of the practice Doe criticized occurred in *Commonwealth v. Chester*.¹⁶⁶ There several alienists testified that while the defendant was aware of the nature and consequences of his act at the time of the homicide,¹⁶⁷ he suffered from a condition defined generally as personality disorder,¹⁶⁸ that he fell into two types under this general heading;¹⁶⁹ that he had a self-destructive tendency and an obsession of guilt,¹⁷⁰ and may have been unaware of the

165. *Id.* at 441.

[W]hether they are questions of fact or of law, when an expert testifies that there may be such a condition [as an irresistible impulse], and that, upon personal examination, he thinks the defendant is, or was, in such condition—that his disease has overcome, or suspended, or temporarily or permanently obliterated his capacity of choosing between a known right and a known wrong,—and the judge says that knowledge is the test of capacity, the judge flatly contradicts the expert. Either the expert testifies to law, or the judge testifies to fact. From this dilemma, the authorities afford no escape.

Id. at 442.

166. *Commonwealth v. Chester*, 337 Mass. 702, 150 N.E.2d 914 (1958).

167. The alienist for the Commonwealth testified that Chester knew the difference between right and wrong. Brief for Defendant, p. 28, *Commonwealth v. Chester*, *supra* note 166.

168. All defense alienists agreed to this. Dr. de Marneffe testified: "Personality disorder is characterized by impulsive action of very sudden onset in the particular individual concerned." *Id.* at 17.

169. Dr. Washburn, for the defense, testified: "I feel that under the general category of personality disorder, this man falls into really . . . two sub-types of personality disorder: these are (1) Passive aggressive personality which reveals two trends (1) Is a passive obstructionism and (2) Is overt aggressive uncontrolled outbursts." *Id.* at 15.

170. This self-destructive tendency was evident at the trial. On the witness stand the defendant testified: "I want the members of the jury to understand one thing. I am not looking for your sympathy. . . . I wanted to go to the electric chair as quickly as possible. I have not changed my opinion." Later the defendant exercised his privilege under Massachusetts law to address the jury following the judge's charge and said: "It is my opinion that any decision other than guilty, guilty of murder in the first degree, with no recommendation for leniency, is a miscarriage of justice. That is all." Finally after the judge had imposed the death sentence the defendant said, "Thank you." 337 Mass. at 709-10, 150 N.E.2d at 918.

Twice before the trial Chester attempted suicide.

The day after he gave himself up to police he tried to burn himself in a cell at Brookline police station.

Later, while in Dedham Jail awaiting trial, he slashed his wrists. He was discovered in time and the gashes stitched by doctors.

Boston Herald, Nov. 29, 1958, p. 5, col. 1.

When he heard of plans to commute his sentence he objected. "With guards at his

social impact of his action.¹⁷¹ The judge admitted this testimony as evidence despite the fact that he intended, in effect, to direct the jurors to ignore it by instructing them that the knowledge test and the irresistible impulse test were the only factors they could consider in determining the legal accountability of the defendant. Only after a conviction was returned did the state psychiatrists break free of Massachusetts insanity rules and advise the Governor that Chester was insane.¹⁷² Thus it can be seen that the *M'Naghten* test creates a hostile atmosphere for the expert witness, even in Massachusetts where he is practicing in the supposingly friendly climate of the "model" Briggs Law.¹⁷³

Lack of a Standard for the Jury

The Supreme Judicial Court of Massachusetts upheld Chester's conviction and rejected the New Hampshire-*Durham* approach saying:

shoulder, he was allowed use of a prison typewriter to write a letter pleading with the Governor to allow him to die." *Ibid.* Finally the man whom Massachusetts law judged sane succeeded in killing himself—strangled on a noose improvised from his sweater and attached to the bars of the cell door. Boston Daily Globe, Nov. 29, 1958, p. 2, col. 3-4. He was in the death row at the state prison and not in a hospital for the insane.

171. Dr. Washburn, for the defense, testified: "Although this man was intellectually aware of the nature and the social consequences of his deed before and at the time he shot his girl friend, he did not have a normal emotional awareness of the impact this act might have on his own life or hers." Brief for Defendant, p. 15, Commonwealth v. Chester, 337 Mass. 702, 150 N.E.2d 914 (1958).

172. See Boston Daily Globe, Nov. 29, 1958, p. 2, col. 2. The Governor then recommended to the Executive Council that the sentence be commuted. *Ibid.*

173. Under the Briggs Law, MASS. ANN. LAWS ch. 123, § 100A (Supp. 1958), the state-appointed psychiatrist is supposed to direct his examination towards an inquiry into the accused's knowledge of right and wrong.

However, the psychiatric inquiry is in practice directed generally toward determining the accused's mental condition without regard to legal theory, except perhaps as it is embodied in the "product of mental disease" test of the *Durham* decision or New Hampshire law. Since the examiner, if called as a witness in the criminal proceedings, will have to testify in terms of the *M'Naghten* test, he faces serious problems, including ethical problems, in reconciling his examination with the demands of the existing insanity rules.

Kreutzer, *Re-Examination of the Briggs Law*, 39 B.U.L. REV. 188, 192 (1959).

These problems would not be solved by the Model Penal Code, for the psychiatrist would still conduct his private examination along the lines of the New Hampshire doctrine, and then be required to testify as to specific patterns of behavior. As one psychiatrist stated:

I do not really feel that we psychiatrists want to preempt this whole area but we do resent having to focus on concepts in which, unfortunately, we have no very special claim to knowledge. Your formula [the Model Penal Code] is certainly far better than the McNaghten formula, but it still forces psychiatrists not to think in terms of mental disease but in terms of general social behavior, without reference to the conceptual system with which he is familiar.

Letter From Manfred Guttmacher to Herbert Wechsler, Nov. 22, 1954, in MODEL PENAL CODE § 4.01, appendix C, at 189 (Tent. Draft No. 4, 1955).

We are not convinced that the rule of the *Pike* and *Durham* cases is a better rule than that of *Commonwealth v. Rodgers*.¹⁷⁴ Whatever may be said against the rule of *Commonwealth v. Rodgers* and similar rules they at least have something that can be called a standard, albeit an imperfect one, to guide the triers of fact. The *Durham* rule leaves the triers with virtually none.¹⁷⁵

The quoted passage contains another criticism commonly made of the New Hampshire formula—that it is so vague it tends to confuse the jury and is therefore practically worthless as a standard.¹⁷⁶ But the New Hampshire doctrine was never intended to be a standard. A standard would be, in fact, a presumption and this was the very thing Doe sought to avoid. The idea that the triers of fact should be allowed to hear all the facts has struck one court as permitting the jury “to enter the realm of speculation,”¹⁷⁷ and another as completely useless.¹⁷⁸ Certainly this is one of the most serious criticisms of the New Hampshire formula; many who might otherwise be attracted by the common law argument upon which Doe based his doctrine are prepared to reject it in the belief that the jury needs guidance. The majority of the recent Canadian Commission on the Law of Insanity listed the absence of a guiding standard as a telling objection to the New Hampshire formula, which the minority wanted to recommend.¹⁷⁹

Although the demand for a standard may be based upon a valid need, the

174. 48 Mass. (7 Met.) 500 (1844); see note 11 *supra*.

175. 337 Mass. at 713, 150 N.E.2d at 920.

176. This argument is especially common in jurisdictions where insanity is defined by statute. See *Sollars v. State*, 73 Nev. 248, 253, 316 P.2d 917, 919-20 (1957):

To leave “insanity” undefined would be to eliminate the entire statutory concept of insanity as the limited and uniform basis for relief from criminal accountability. It would substitute in its place a jury power of moral judgment unlimited by those very bounds which statute law contemplates and based solely upon the conscience and common sense of 12 persons.

177. *State v. Craig*, 52 Wash. 66, 71, 100 Pac. 167, 169 (1909).

178. In light of the esoteric nomenclature used in the field, and the hypertechanical divergence between various schools of psychiatric thought, as well as because of the complexity and sheer uncertainty of the area under exploration, it can readily be imagined what wholesale want of enlightenment would eventuate from *purely* medical testimony from the witness-psychiatrist.

United States v. Smith, 5 U.S.C.M.A. 314, 324, 17 C.M.R. 314, 324 (1954).

179. That a law which lays down the legal test of criminal responsibility in terms of whether the accused is suffering from a disease of the mind and whether the act for which he is charged is the product of the disease of the mind, would present difficulties, is apparent on analysis. . . . If the test were, “Did the accused suffer from mental illness at the time the act was committed, and was the act a product of mental illness?” it would open up a still wider field for forensic debate, involving a definition of mental illness, a subject about which there is considerable difference of medical opinion. We think that this would add much to the confusion of lay juries.

ROYAL [CANADIAN] COMMISSION ON THE LAW OF INSANITY AS A DEFENCE IN CRIMINAL CASES, REPORT 31-32 (1956).

theories recently advanced to support the argument would not have impressed Judge Doe. He would not have been troubled by the criticism that the New Hampshire doctrine puts a premium upon the persuasive abilities of lawyers and alienists, but would have contended that this was a return to the common law; that the jury is supposed to be the trier of facts; and that the persuasive abilities of opposing participants should play a greater role than the persuasive abilities of the Lord Justices who formulated the *M'Naghten* rules.

Doe recognized the search for a standard as a regrettable dilemma, but insisted that the difficulties surrounding the question of mental disease and criminal responsibility could not be solved by convenient rules of law since they were factual, not legal, difficulties.¹⁸⁰ He did not believe that any rule of law based upon convenience could be just.¹⁸¹ Judge Ladd was also well aware of the convenience offered by a simple, easily understood law,¹⁸² yet refused to take the comfortable way out.¹⁸³ The New Hampshire judges preferred to accept the risk of confusing the jury, rather than the risk of depriving the defendant of a full hearing on the issue of insanity. Moreover, it is arguable that the term "mental disease" is no more vague or confusing than the various tests that were supposed to simplify the issue.¹⁸⁴ Professor Weihofen at one time suggested that

the present practice of giving the jury long and involved instructions on the subject of responsibility, in effect often comes to the same thing [as asking if the defendant suffered from a mental disease]: the jury, unable to understand these long instructions, simply disregard them entirely, and settle the question of whether the defendant was "crazy" or not upon "horse sense."¹⁸⁵

And later that,

no matter how the jury is charged, the way they actually approach the question in the jury room is probably pretty much in accord with the New Hampshire rule. They may not articulate it precisely, but if they are convinced that the defendant really was seriously disordered, and that it was this fact that led to the crime, they will usually acquit.¹⁸⁶

180. "It is often difficult to ascertain whether an individual had a mental disease, and whether an act was the product of that disease; but these difficulties arise from the nature of the facts to be investigated, and not from the law; they are practical difficulties to be solved by the jury, and not legal difficulties for the court." *State v. Pike*, 49 N.H. 399, 438 (1869) (concurring opinion).

181. See *Boardman v. Woodman*, 47 N.H. 120, 150 (1865) (dissenting opinion).

182. See *State v. Jones*, 50 N.H. 369, 393-94 (1871).

183. See *id.* at 394.

184. See 28 So. CAL. L. REV. 86, 89 (1954).

185. WEIHOFEN, *INSANITY AS A DEFENSE IN CRIMINAL LAW* 83 n.43 (1933). *But see* ROYAL [CANADIAN] COMMISSION ON THE LAW OF INSANITY AS A DEFENCE IN CRIMINAL CASES, REPORT 32 (1956).

186. WEIHOFEN, *THE URGE TO PUNISH* 47 (1956). For a discussion of a recent experiment conducted by the University of Chicago to determine whether juries will reach different verdicts when given different tests for insanity, concluding that they would not, see *id.* at 45-46.

Insanity as an Escape Hatch

The fear of confusing the jury which causes some to insist that a standard or test is necessary has two aspects. The first, that the jury will not understand the medical jargon tossed about by the opposing alienists,¹⁸⁷ while the most frequently expressed is by no means the most important. What primarily worries the advocates of a standard is that the jurors will think they understand the jargon too well. It is feared they will be lulled into a confidence of their own knowledge by the deceptively easy task of recognizing a symptom and then tagging it with a definition; that relishing the role of doctor they will apply this new "knowledge" without restraint and fail to see the forest for the trees, allowing prisoners with minor mental ills to enjoy the free services of twelve amateur psychiatrists. It is thus contended that a definite standard is needed to prevent criminal use of the defense of insanity as an escape hatch.¹⁸⁸

This fear is especially prevalent among those who feel a liberal rule will make insanity a favorite stratagem.¹⁸⁹ Although such an argument has little to do with the question "what test should be adopted,"¹⁹⁰ the *Durham* decision was criticized in the public press for just this reason.¹⁹¹ Partly to counter this criticism by making the insanity plea less attractive, and partly to ensure that it does not serve as an "escape hatch" for those using it legitimately, legislation has been passed in the two jurisdictions which follow *Durham* providing for commitment of defendants found not guilty by reason of insanity,¹⁹² and the courts have undertaken to redefine the implications of commitment as well as to place a judicial check upon release from hospitalization.¹⁹³

Regardless of what the ultimate result of the *Durham* decision may be, the record shows that in New Hampshire no escape hatch has been opened.¹⁹⁴ In both the *Pike* and *Jones* cases the defendant was convicted and sentenced to death. (This may be why the New Hampshire formula was born in com-

187. *Parsons v. State*, 81 Ala. 577, 599, 2 So. 854, 868 (1886) (dissenting opinion of Stone, C.J.). See also note 178 *supra*.

188. See *Howard v. United States*, 232 F.2d 274, 283 (5th Cir. 1956).

189. See *Sauer v. United States*, 241 F.2d 640, 648 (9th Cir. 1957); *In re Rosenfield*, 157 F. Supp. 18, 20 (D.D.C. 1957).

190. See WEIHOFEN, *op. cit. supra* note 186, at 135.

191. See, *e.g.*, U.S. News & World Report, Feb. 11, 1955, p. 62.

192. D.C. CODE ANN. §§ 24-301(c), (d), (e) (Supp. VII, 1959); V.I. CODE ANN. tit. 5, § 3637 (1957). See also MODEL PENAL CODE § 4.08 (Tent. Draft No. 4, 1955).

193. See, *e.g.*, *Overholser v. Leach*, 257 F.2d 667 (D.C. Cir. 1958); *In re Rosenfield*, 157 F. Supp. 18, 21 (D.D.C. 1957). At the same time the court of appeals has required that the trial judge inform the jury that a verdict of insanity will not set the accused free to walk the streets, *Lyles v. United States*, 254 F.2d 725, 728 (D.C. Cir. 1957), and has held that refusal to permit defense counsel to advise the jury of the consequences of a verdict of insanity and failure of the trial judge to inform the jury of the consequences of a verdict of insanity is reversible error, *Catlin v. United States*, 251 F.2d 368 (D.C. Cir. 1957).

194. "In New Hampshire in the last 30 years there have been in all 55 indicted for murder; 46 were convicted of murder in the first and second degree; 7 were acquitted on account of insanity; none were found unfit to stand trial on account of insanity." ROYAL

parative obscurity and has never been as controversial in the public press as the *Durham* rule.) In the *Pike* case, it is probable that the jury, exercising its privilege to determine what is and what is not a mental disease, refused to regard dipsomania as such. Thus, the very first trial under the New Hampshire formula may be proof that a defense based on symptoms easily recognizable to any jury of laymen will not lead automatically to acquittal.

The *Jones* case was a much more complicated matter. Jones was considered insane by the community;¹⁹⁵ convincing evidence was offered to show that his neighbors and his family regarded him as dangerous;¹⁹⁶ the court had the benefit of the best alienists available who said Jones was sane;¹⁹⁷ and finally the jury found the defendant insane, but not enough to excuse him.¹⁹⁸ This case shows that the New Hampshire formula will not set every man free.¹⁹⁹ Indeed, here it was the community which thought Jones insane and the experts who thought him sane.

Judge Doe was certainly not interested in opening an escape hatch, for he refused to give the following instructions: "If the defendant was diseased in mind to any extent whatever, and the mental disease under which he labored had any influence whatever in leading him to kill his wife, he was not re-

[CANADIAN] COMMISSION ON THE LAW OF INSANITY AS A DEFENCE IN CRIMINAL CASES, REPORT 31 (1956).

New Hampshire is too small, too free from crime—unfortunately for research purposes—and also too free from statistical records, to permit statistically valid conclusions.

But it certainly can be said that the available evidence does not in the least support the idea that the New Hampshire rule has resulted in undue pleas of insanity In no other state have there been so few cases.

WEIHOFEN, *op. cit. supra* note 186, at 134.

195. "[I]t is conceded in *Nepmarket [sic]* that the man is really insane. He has given repeated proofs of mental aberration." *The Dover (N.H.) Enquirer*, June 30, 1870, p. 3, col. 1.

196. Jones had once been put under bonds by the town of Newmarket for threatening people with firearms and knives. And on the evening before the murder he had drawn a knife and would have slit his daughter's throat had his son not intervened. Because the son feared his mother and sister were in danger he spent the night on a lounge just outside the room where they were sleeping. When he woke the next morning he found his mother lying on the floor with her throat cut and his father standing over her with a razor in his hand. "He said that his father complained of pain in his head and acted as if he did not know what he was about." A little later the murderer attempted suicide by slashing his own throat. *The Daily Patriot (Concord, N.H.)*, Oct. 28, 1870, p. 2, col. 2.

197. "The medical experts, Dr. Clement A. Walker of the Boston Insane Hospital, Dr. J. P. Bancroft of the N.H. Asylum and Dr. Walker of Dover [N.H.], agreed that the prisoner showed few, if any, signs of insanity, and that no facts detailed by the witnesses tended to establish mental aberration." *Ibid.*

198. *State v. Jones*, 50 N.H. 369, 375 (1871) (argument for defendant).

199. The fact that the jury considered Jones insane, but not insane enough to be excused, may tend to demonstrate that an average jury will not necessarily interpret the New Hampshire formula to include a doctrine similar to "diminished responsibility." Compare text accompanying notes 147-48 *supra*.

sponsible."²⁰⁰ Doe's refusal was in line with his theory that all questions relating to insanity are questions of fact, including to what extent the disease must control the mind.²⁰¹ And the verdict shows that the jury was willing and able to weigh this question along with all others and to understand its significance. It is worthwhile to remember that Jones was the uxoricide of a nagging and adulterous woman, who may have had the sympathy of the community and perhaps even of the all male jury.

Another New Hampshire defendant (who enjoyed the sympathy of no one) was Howard Long, indicted for the sex-motivated slaying of a young boy in 1937. Long was sent to the State Hospital for observation prior to his trial. The staff was divided on the question of his sanity. Most agreed he had some sort of mental disease.²⁰² He was termed both "not responsible"²⁰³ and "very dangerous."²⁰⁴ The jury, however, did not obtain the benefit of these views for only the director of the hospital testified,²⁰⁵ and he was of the opinion that Long "was sane" and had no "mental disease," although he admitted that Long was a "psychopathic personality."²⁰⁶ The prosecution also relied heavily on the opinion testimony of lay witnesses who had found Long sane in their various contacts with him.²⁰⁷ The defense produced its own alienist who called Long a "mental leper,"²⁰⁸ but received scant help from its lay witnesses.²⁰⁹ The jury returned a verdict of guilty and Long was sentenced to die.²¹⁰ This case, one of the only three reported

200. *State v. Jones*, 50 N.H. 369, 372 (1871) (reporter's note). Judge Ladd wrote: "We should be slow to establish any doctrine on this important subject which we could see would be likely to result in the escape of malefactors from punishment, or afford encouragement to a fictitious defence of insanity . . ." *Id.* at 399.

201. "The law does not declare every act of an insane person a nullity, because the law does not know that every act of an insane person is necessarily caused by his insanity." Letter From Charles Doe to Isaac Ray, May 18, 1868, in Reik, *The Doc-Ray Correspondence: A Pioneer Collaboration in the Jurisprudence of Mental Disease*, 63 YALE L.J. 183, 190 (1953).

202. Brief for Defendant, pp. 6, 7, *State v. Long*, 90 N.H. 103, 4 A.2d 865, 6 A.2d 752 (1939).

203. *Id.* at 7.

204. *Ibid.*

205. It was upon this point, and not upon any matter pertaining to the New Hampshire doctrine itself, that the case was appealed, the defense contending that the Director had suppressed the opinions of his staff and had given the jury the unfair impression that his own findings were concurred in by the entire staff, and that this amounted to newly discovered evidence which entitled the defendant to a new trial.

206. The doctor testified that Long did not fit any of the four essential types of insanity which he classified as: "The deluded type. Dementia. Depression. The elated type." He also laid stress upon the fact Long belonged to neither of the two types of insane persons "who hang their heads in apparent shame." The *Leconia* (N.H.) *Evening Citizen*, Dec. 10, 1937, p. 6, col. 7.

207. See *Foster's Daily Democrat* (Dover, N.H.), Dec. 10, 1937, p. 1, col. 4.

208. The *Leconia* (N.H.) *Evening Citizen*, Dec. 13, 1937, p. 1, col. 6-7.

209. See *Foster's Daily Democrat* (Dover, N.H.), Dec. 13, 1937, p. 1, col. 3.

210. Jones and Long had little in common except a resignation to their fates. After he was sentenced to die Jones said to the sheriff, "What is to be will be." The *Dover*

utilizing the defense of insanity under the New Hampshire doctrine since *State v. Jones* in 1871,²¹¹ dramatically illustrates that the defendant will not necessarily benefit from the broad inquiry permitted.

Other aspects of the law as applied in New Hampshire which make it unlikely that the doctrine is an escape hatch are: first, that in New Hampshire, unlike the District of Columbia, it is not held, as a matter of law, that greater weight must be given to expert psychiatric testimony than to nonexpert opinion evidence, whenever the two are in conflict;²¹² second, that a statutory plea of "not guilty by reason of insanity" is in the nature of a plea of confession and avoidance which concedes the commission of the physical act charged.²¹³

Finally it should be noted that inherent in the argument that the New Hampshire doctrine is an escape hatch is the fear that defendants found not guilty by reason of insanity are, after a short rest in a hospital, set free to sin again. But this was not true under the old rules,²¹⁴ and it would not be true in a New Hampshire jurisdiction. In fact, the New Hampshire doctrine, by making it possible to recognize more wrongdoers as mentally ill, may offer a surer protection to the public than do the *M'Naghten* rules. For *M'Naghten*, by calling a mentally disturbed person sane, sends him to prison, where he receives no special help and is released after he has served his term without regard to whether he is still dangerous.

"Doctors' Notions"

Another objection to the New Hampshire formula, usually raised along with those that it is unnecessary, confusing, inconvenient, and an escape hatch,

(N.H.) Enquirer, Oct. 20, 1870, p. 2, col. 1. And while being questioned at the State Hospital, Long told a doctor, "What's to happen will happen." The Laconia (N.H.) Evening Citizen, Dec. 10, 1937, p. 6, col. 7. This seems to have been a common sententious utterance among condemned men in New Hampshire. Isaac Sawtelle, the most notorious fratricide in American history, sentenced by Doe to die on Christmas Day, 1890, remarked to a turnkey on learning the Supreme Court had rejected his petition for a new trial, "Well, what must be, must be." Independent Statesman (Concord, N.H.), Dec. 17, 1891, p. 8, col. 1.

211. The others are *State v. Forcier*, 95 N.H. 341, 63 A.2d 235 (1949); *State v. Hause*, 82 N.H. 133, 130 Atl. 743 (1925). In neither of these was the New Hampshire doctrine itself challenged on appeal.

212. The *Durham* court has reversed convictions on the theory that the jury accorded too much weight to nonexpert opinions and not enough to expert evidence. See cases cited note 123 *supra*. The New Hampshire court has refused to do this, even when the non-expert opinion was based on so dubious a factor as a wink by the accused to a policeman while undergoing psychiatric examination. *State v. Hause*, 82 N.H. 133, 136, 130 Atl. 743, 745 (1925).

213. *State v. Forcier*, 95 N.H. 341, 63 A.2d 235 (1949); *State v. Long*, 90 N.H. 103, 106, 4 A.2d 865, 6 A.2d 752 (1939). A plea of not guilty by reason of insanity raised under the general issue is not.

214. "Dr. William Alanson White made a study many years ago showing that, on the average, perpetrators of homicide committed to institutions for the insane spent more time in confinement than those sentenced to penal institutions." Guttmacher, *The Quest for a Test of Criminal Responsibility*, 111 AM. J. PSYCHIATRY 428, 430 (1954).

is the argument that it was devised solely to please the medical profession.²¹⁵ Perhaps no objection worried Doe more. Warning Dr. Ray that there exists a "very numerous class of lawyers and judges who can easily be stampeded by the cry 'medical theory,' 'scientific innovations,' and 'doctors' notions,'" ²¹⁶ he insisted that the New Hampshire formula be presented as a rule of common law defining the fact-finding function of the jury rather than a test based on the latest medical knowledge.

Perhaps the best example of this objection is Professor Jerome Hall's recent attack on the *Durham* decision. Hall points out that medicine is not a trustworthy guide for law and quotes Jung to show that there are "many methods, standpoints, views and convictions which are still at war with one another in psychiatry."²¹⁷ Doe would have replied that while medicine may be in disagreement on many points, the law is in agreement as to the distinction between law and fact and that the New Hampshire doctrine, by recognizing the jury as the sole triers of fact, saves the law from being drawn into the medical war.²¹⁸ Hall wonders whether, in the light of existing knowledge and experience, lawyers, judges, and laymen should be expected to accept the idea that a rational man—one who knows right from wrong and knows what he is doing—may be insane.²¹⁹ The New Hampshire judges would have countered this with Dr. Ray's succinct observation, that the "rational" test is very reasonable, "if insane men would but listen to reason."²²⁰ Hall suggests that the assault on the *McNaghten* rules implies "the presumption that lawyers are amateurs in the field of human psychology."²²¹ Doe might have replied that the defense of the rules based on outdated medical theory while misunderstanding the common-law basis of the New Hampshire formula and its rejection of medical presumptions implies that lawyers are amateurs in the field of law. Finally, Hall asserts that the assault on the rules "assumes that even the

215. See *Smith v. United States*, 5 U.S.C.M.A. 314, 324, 17 C.M.R. 314, 324 (1954); note 7 *supra*.

216. Letter From Charles Doe to Isaac Ray, March 23, 1869, in Reik, *supra* note 201, at 194.

217. Hall, *Responsibility and Law: In Defense of the McNaghten Rules*, 42 A.B.A.J. 917, 918 (1956). "This difference of opinion alone would seem to administer the coup de grace to the irresistible impulse test." *Sollars v. State*, 73 Nev. 248, 255, 316 P.2d 917, 921 (1957).

218. [The New Hampshire doctrine] would not attempt to write into law any psychiatric dogma, no matter how sound it may appear today. It would not define mental disease or defect, but would leave the law free to incorporate new content into those terms with the advance of scientific knowledge. Nor would it dictate to the psychiatrist any artificial formula for determining whether the act was the product of disease or defect. And when we are dealing with as dynamic and rapidly changing a science as psychiatry, isn't it better not to write into static law any dogmatic concepts?

WEIHOFEN, *op. cit. supra* note 186, at 78.

219. Hall, *supra* note 217, at 919.

220. RAY, *MEDICAL JURISPRUDENCE OF INSANITY* 49 (5th ed. 1871).

221. Hall, *supra* note 217, at 919.

most thoughtful layman's experience with his fellow men and his sensitive insight into the functioning of his own personality in elementary acts for which persons are held responsible are wholly fallacious."²²² In his opinion "a rule of law specifying the essential elements of insanity is . . . warranted on factual grounds because intelligent laymen, rather than psychiatrists, are the best judges of what is normal and what is abnormal conduct, and the legal tests reflect the layman's experience."²²³ Doe would have asked why the laymen whom Hall feels should be trusted must be judges and lawyers, and not jurors. After all, Doe was willing to trust the layman even more than his critics and if the "layman's experience" is valid, as Professor Hall suggests, the New Hampshire formula would seem to be the best means of utilizing that experience.

Professor Hall was speaking primarily about the *Durham* rule, yet others, such as Judge Stone in *Parsons v. State*,²²⁴ have used the same arguments against the New Hampshire doctrine. This revealed a complete misunderstanding of the theory behind it and greatly disappointed Doe, who believed Stone was afraid "some new medical refinement is concealed under our rule; and . . . insists upon calling himself a dissenter lest he should be responsible for something dreadful, he knows not what."²²⁵

Doe had always been most emphatic in his insistence that medical principles were not the basis of the New Hampshire formula and had even gone so far as to say that "books written by physicians or men of science, are neither proofs on questions of fact for a jury, nor authorities on questions of law for a court."²²⁶ He would not have agreed with the minority report of the Canadian Commission on the Law of Insanity which advocated adoption of the New Hampshire formula because it allows "for the advance of medical science without requiring amendment."²²⁷ Although Judge Doe would have appreciated the need for flexibility, especially in code jurisdictions such as Canada, he insisted the New Hampshire doctrine was not based on any such notion. "The law does not change with every advance of science," he said, "nor does it maintain a fantastic consistency by adhering to medical mistakes which science has corrected."²²⁸

222. *Ibid.*

223. *Id.* at 987.

224. 81 Ala. 577, 578, 2 So. 854, 867 (1886) (dissenting opinion).

225. Letter From Charles Doe to Clark Bell, Jan. 10, 1889, in Bell, *Editorial: The Right and Wrong Test in Cases of Homicide by the Insane*, 16 MEDICO-LEGAL J. 260, 266 (1889).

226. *Boardman v. Woodman*, 47 N.H. 120, 150 (1865) (dissenting opinion). Oliver Wendell Holmes said much the same thing: "[W]e may express a doubt whether doctors would regard a work on 'medical jurisprudence' as a sufficient hand-book of science; and we are very confident that few lawyers would feel strongly bound by its opinions on a point of law." Holmes, unsigned Book Review, 1 AM. L. REV. 377 (1867).

227. ROYAL [CANADIAN] COMMISSION ON THE LAW OF INSANITY AS A DEFENCE IN CRIMINAL CASES, REPORT 63 (1955) (dissenting report).

228. *State v. Pike*, 49 N.H. 399, 438 (1869) (concurring opinion).

Medical Objections

Objections to the New Hampshire-*Durham* approach on purely medical grounds have been rare. Ever since Isaac Ray praised Doe's *Boardman* dissent, psychiatrists have felt they had found a home in New Hampshire.²²⁹ In a poll of the 1954 meeting of The American Psychiatric Association, eighty-five percent of the membership, offered five alternatives, voted approval of the New Hampshire formula which was correctly explained as not simply rejecting all existing legal tests but as presenting the entire question of legal accountability as one of fact for the jury.²³⁰

It remained for a lawyer, Professor Wechsler, to object to the New Hampshire formula on medical grounds. He contends that Doe is guilty of the very thing he accused Hale and Coke of doing—accepting as conclusive the prevailing medical view of the day—and finds “considerable irony in the modern, dynamic, functional psychiatrist's disposition to regard the Doe-Ray conclusions as gospel on the subject of the legal tests,”²³¹ when these conclusions are based on the outdated postulate that there is “a clear antithesis between a human action produced by disease and one that is the product of volition and intention.”²³² Admittedly, as Wechsler points out, the New Hampshire judges “viewed disease and will as mutually exclusive causes of behavior,”²³³ because of their belief in Dr. Ray's now rejected theory that insanity is derived from

229. But some have questioned the validity of the term “mental disease”:

Even if we were to accept the term disease, when it is modified by *mental* there are further difficulties. There are four large groups of mental disorders: the psychoneuroses, the psychoses, personality or character disorders and the somato-psychic disorders (organic psychoses) One can only surmise that the [*Durham*] court is using the term as signifying a psychotic state (nearest legal equivalent, unsound mind) because only a very limited group of psychiatrists would consider that either the psychoneurotic or the individual with the personality disorder should be considered irresponsible for criminal acts. If the court intends to include all of these groups in the term mental disease there cannot fail to be endless confusion and chaos.

Cavanagh, *A Psychiatrist Looks at the Durham Decision*, 5 CATHOLIC U.L. REV. 25, 30-31 (1955).

230. 3% voted for doing away entirely with the plea of insanity; 2% favored the *M'Naghten* rules; 3% the irresistible impulse test added to the *M'Naghten* rules; 7% for the committability test. Guttmacher, *supra* note 214, at 432 n.2.

231. Wechsler, *The Criteria of Criminal Responsibility*, 22 U. CHI. L. REV. 367, 370 n.12 (1955).

232. *Id.* at 369. Professor Wechsler points out elsewhere:

The difficulty with this formulation inheres in the ambiguity of ‘product.’ If interpreted to lead to irresponsibility unless the defendant would have engaged in the criminal conduct even if he had not suffered from the disease or defect, it is too broad: an answer that he would have done so can be given very rarely; this is intrinsic to the concept of the personality and unity of mental processes that psychiatry regards as fundamental.

MODEL PENAL CODE § 4.01, comment 5, at 159 (Tent. Draft No. 4, 1955).

233. Wechsler, *supra* note 231, at 370 n.12.

an abnormal condition of the brain.²³⁴ But they did not base the New Hampshire formula upon such a theory of mutual exclusivity. The jury could accept it or not, and far from instructing what constitutes a mental disease, Doe refused even to charge that there is such a condition, but left it to the jury as a question of fact.²³⁵

Legal Objections

Insanity is a Mixed Question of Law and Fact

Some critics have asserted that Doe was wrong when he insisted that insanity is purely a question of fact; instead, they claim, it is a mixed question of law and fact. This was one of the most telling points raised by Judge Stone's dissent in *Parsons v. State*.²³⁶ Doe failed to consider it, assuming from the beginning that insanity was a question of fact.²³⁷ This minor premise of his basic syllogism is the weakest part of his argument. His failure to realize

234. *Ibid.*

235. *State v. Pike*, 49 N.H. 399, 442 (1869) (concurring opinion). Professor Wechsler, on the other hand, is the one who has fallen into the same error as Hale and Coke. He has written into the Model Penal Code psychiatric concepts which may one day prove erroneous.

The advantage of the Durham [and New Hampshire] formulation over that of the Model Code is clear. The former is dynamic and adaptable to new developments in psychiatry, whereas the Model Code proposal is merely a restatement of two well-established but psychiatrically defective attempts to diagnose mental illness by a single symptom.

Overholser, *Psychiatry's Contributions to Criminal Law and Procedure*, 12 OKLA. L. REV. 13, 19 (1959).

236. The error of Judge Doe's position, as I understand it, and, in fact, of the whole New Hampshire court, lies in the assumption that the question of sanity or insanity is one purely of fact. I admit it is largely so; but no question of judicial contestation can ever become solely a question of fact. Law pervades every human transaction, every question of status, every inquiry of right and wrong, as vital force pervades every fibre, every corpuscle of the living animal . . .

It is my opinion that the inquiry of insanity, like most others in judicial administration, is a mixed question of law and fact. Of law, as to the extent and measure of mental disorder, which absolves from legal accountability. Of law, necessarily, in determining the pertinency of testimony offered in proof or disproof of the alleged disorder.

Parsons v. State, 81 Ala. 577, 609, 2 So. 854, 874 (1886) (dissenting opinion).

237. Ladd, on the other hand, viewed the New Hampshire doctrine as dealing with a mixed question:

The instructions given also imply that this is a mixed question of law and fact; that the only element of law which enters into it is, that no man shall be held accountable, criminally, for an act which was the offspring and product of mental disease. Of the soundness of this proposition there can be no doubt. Thus far all are agreed; and the doctrine rests upon principles of reason, humanity, and justice, too firm and too deeply rooted to be shaken by any narrow rule that might be adopted on the subject.

State v. Jones, 50 N.H. 369, 394 (1871).

that most students would regard insanity as a mixed question, or one which cannot possibly be divided,²³⁸ can be attributed to his tendency to view principles in terms of black and white.

It might be said that Doe was inconsistent since he was willing to define such mixed questions as tort liability for the jury, yet refused to define insanity. As a result he appears to be outside the mainstream of the common law by defining one concept as a matter of law and not the other. But a distinction may be drawn. Tort liability can be compared to homicide which both Doe and his critics would recognize as involving questions of law. On the other hand, insanity is an element of homicide much as the standard of the average, prudent man is an element of tort liability. And although certain aspects of the prudent man's character have been frozen into law in various states, it would be considered error for a judge to purport to draw a conclusive picture of such a man for the jury to apply in all cases. Yet it is considered proper to draw a conclusive picture of the insane man, even though this process might as easily be left to the jury's experience as the other. There are many examples similar to the average prudent man doctrine in the common law universally recognized as questions of fact. Judge Doe might well argue that it is those who insist upon defining characteristics in the case of insanity, but not in other instances, who are outside the mainstream of the common law tradition.

Concept Too Vague To Conduct Jury Trial

Judge Stone voiced another strong objection to the New Hampshire doctrine; under it the judge would be relegated to the role of a mere "looker on."²³⁹ Doe was not impressed with this argument. That the judge "must sit quietly" not intruding his personality into the proceedings was just what he wanted. As for the belief the judge would have no standard to guide him in making rulings, Doe had experienced no difficulty in the *Jones* case. He simply admitted all the evidence that judges governed by the *M'Naghten* rules were accustomed to admit, but did not have to tell the jury to disregard everything except the part pertaining to knowledge of right and wrong. After all, though "mental disease" may be an all embracing area when compared to that opened by the *M'Naghten* rules, it is certainly easier to rule upon the admissibility of evidence offered to prove the existence of mental disease than to decide whether the same evidence relates to the more narrow question of knowledge.

238. See 1 BISHOP, CRIMINAL LAW § 377 (9th ed. 1923).

239. *Parsons v. State*, 81 Ala. 577, 609, 2 So. 854, 874 (1886) (dissenting opinion).

Who is to determine the pertinency of the evidence offered? Not the presiding judge, for not knowing what constitutes insanity, he can not know what facts and circumstances tend to prove its existence. Can there be judicial administration without a presiding umpire to determine the disputes of opposing litigants? As well put a locomotive in motion without an engineer, or launch a ship without a pilot or rudder.

Ibid.

Disregard of Precedent

The New Hampshire formula has also been challenged on the ground that it precludes the development of consistent precedents.²⁴⁰ Along the same line it has been contended that the New Hampshire formula is an abrupt break with established precedent. Doe admitted this, but insisted that the precedents were error and should be corrected.²⁴¹ "Tried by the standard of legal precedent, the instructions [in the *Pike* case] are wrong," he said; "tried by the standard of legal principle, they are right."²⁴²

Lack of Uniformity

One critic has objected that, with no criteria, the New Hampshire formula allows no appeal to the highest court in the state and, as a result, can never be uniformly applied.²⁴³ Since under the New Hampshire doctrine all matters pertaining to insanity are questions of fact, any errors which occur will be errors of fact, hence nonreviewable. Doe realized this but was unconcerned. "Juries may make mistakes," he said, "but they cannot do worse than courts have done in this business . . ."²⁴⁴ Doe rather approved the idea that each case opens "an entirely new subject."²⁴⁵ When the manner in which courts have

240. *Smith v. United States*, 5 U.S.C.M.A. 314, 17 C.M.R. 314 (1954); Comment, 29 TUL. L. REV. 576, 586 (1955).

241. The manifest imposture of an extinct medical theory pretending to be legal authority, cannot appeal for support to our reason or even our sympathy. The proverbial reverence for precedent, does not readily yield; but when it comes to be understood that a precedent is medicine and not law, the reverence in which it is held, will, in the course of time, subside.
State v. Pike, 49 N.H. 399, 438 (1869) (concurring opinion).

242. *Id.* at 429. By "principle," Doe meant the common-law principle of the distinction between law and fact. He probably would have agreed that there were other principles involved which do not change, though precedents applicable to them may. Compare Lucey, *Holmes-Liberal-Humanitarian-Believer in Democracy?*, 39 GEO. L.J. 523, 551 (1951):

The principle that murder is wrong does not change, but our knowledge of when an act constitutes murder or does not constitute murder may change. By science and experience we have learned that a man may be insane on a point and yet not fulfill the requirements of the old wild-beast theory. We know now that men were convicted of murder who were not guilty because of insanity. The idea is similar to that expressed by Cardozo in *MacPherson v. Buick Motor Co.* [217 N.Y. 382, 391 (1916)]. "The principle that the danger must be imminent does not change, but the things subject to the principle do change."

243. 40 CORNELL L.Q. 135, 138 (1954).

244. Letter From Charles Doe to Isaac Ray, April 14, 1868, in Reik, *The Doc-Ray Correspondence: A Pioneer Collaboration in the Jurisprudence of Mental Disease*, 63 YALE L.J. 183, 188 (1953).

245. "One jury is not bound by the verdict of another jury on the general question of fact or science, as courts sometimes feel themselves bound by decisions on general questions of law. My result takes off the shackles of precedent and authority,—opens the subject to be decided in each case as an entirely new subject." *Ibid.*

"juggled" the *M'Naghten* rules is considered, it becomes evident that uniformity was not a strong point of the old tests either.

Abandoning the Law to Medicine

Professor Hall has asserted: "The responsibility of lawyers is to support and improve the law—not to abandon it and allow power to be concentrated in the hands of experts."²⁴⁶ Doe might have replied that under the *M'Naghten* rules power is concentrated even more than it is under the New Hampshire doctrine, for under *M'Naghten* it is concentrated in the hands of "experts" who believe the right-wrong test is the sole criteria for responsibility, and not in the hands of experts generally.

Failure To Change the Law

It has been suggested that the New Hampshire-*Durham* approach will not change the outcome of cases. This probably can never be proven conclusively, one way or the other,²⁴⁷ just as it can never be proven whether the *Commonwealth v. Chester* trial²⁴⁸ would have had a different outcome if the jury had been instructed in the New Hampshire doctrine as the defense requested.

Of far greater importance is the contention advanced by Judge Holtzoff that the "*Pike* and *Durham* formula" does not even change the law.

If the test of insanity in criminal law is whether the crime is a product of a mental disease or a mental defect, the result would seem to be the same as it would be if the criterion were whether the defendant by reason of mental disease or mental defect was unable to adhere to the right and to refrain from doing wrong. It may perhaps be said that an act committed by a person who though suffering from some mental abnormality is, nevertheless, able to distinguish between right and wrong, and whose will has not been so over-powered as to prevent him from adhering to the right, can hardly be deemed the product of a mental disease or a mental defect. In one sense it may be argued that the two tests are interchangeable. The basic difference between them is that the *Pike* and *Durham* formula is couched as an abstract, indefinite generality, which accords a greater freedom and range to scientific speculation and inquiry, and does not impose on expert witnesses a duty of precision of thought or statement; whereas the other standard is a concrete proposition that a layman can apply, and which offers a more or less definite guide, in so far as any guide is possible in this abstruse field.²⁴⁹

Judge Holtzoff even suggests the jury must be given all three tests.²⁵⁰

246. Hall, *supra* note 217, at 989.

247. But see note 200 *supra*.

248. Discussed in text at notes 111-14, 166-75 *supra*.

249. *United States v. Fielding*, 148 F. Supp. 46, 52 (D.D.C. 1957).

250. *Id.* at 51. Judicial attitudes such as this may explain why Vermont, which adopted the Model Penal Code test, took the trouble specifically to provide that the *M'Naghten* test was abolished. VT. STAT. ANN. tit. 13, § 4802 (1958).

Whatever may be said for the validity of this argument as applied to the *Durham* rule, it has no application to the New Hampshire formula. Besides presuming that "mental disease" is definable, and that inability to know right from wrong²⁵¹ or to adhere to the right are the only possible forms of insanity, the argument is based on the assumption the New Hampshire formula is a "test." Any rule, such as New Hampshire's, which rejects all presumptions in a certain fact situation and instead leaves all questions of fact to the jury, is bound to be more than a generality "which accords a greater freedom and range to scientific speculation and inquiry." It is a basic change in the law itself.

If, in an actual trial, the jury chooses to agree with Judge Holtzoff that the only outward manifestations of insanity which excuse responsibility are those which show that the knowledge of the defendant has been destroyed and his will overpowered, then the outcome will be the same as under the old tests. But this is a coincidence of fact, and not of law. For a New Hampshire judge to charge the jury on all three "tests" would be reversible error.

Constitutionality

It has been occasionally argued that the judge, by allowing insanity to go to the jury as a question of fact, has abrogated a function he cannot constitutionally abrogate.²⁵¹ This theory has never been seriously entertained by any court.²⁵²

Conversely it has been argued that the old tests are unconstitutional. This, too, has never been seriously entertained, except perhaps in New Hampshire. Maryland has recently said that no constitutional question is involved.²⁵³ And the United States Supreme Court (which has apparently presumed this a matter of "what test?" and not of who is the proper fact-finder)²⁵⁴ has refused to hold that medical science has proved the *M'Naghten* rules unconstitutional,²⁵⁵ even suggesting that any change in the law should be left to the legislature.²⁵⁶

The New Hampshire judges, however, thought a test of insanity might at the very least violate the rights of the defendant. To Judge Doe the refusal of the *M'Naghten* rules to allow the jury to consider the question of volition

251. "The definition of penal responsibility . . . is a high prerogative which judges, educated for the office as they are, and appointed by the state as the guardians at once of the sovereignty of the law and the liberty of the citizen, cannot surrender or divide." 1 WHATON & STILLE, MEDICAL JURISPRUDENCE § 170 (5th ed. 1905).

252. One court, however, has said: "Basic to the fundamental concept of a government of laws rather than of men is the conviction that juries must reach their verdicts under standards spelled out by instructions given by the Court applying guides furnished by accepted principles of the law." *Howard v. United States*, 232 F.2d 274, 283 (5th Cir. 1956).

253. *Thomas v. State*, 206 Md. 275, 284, 112 A.2d 913, 918 (1955).

254. See *Leland v. Oregon*, 343 U.S. 790, 800-01 (1952); *Fisher v. United States*, 328 U.S. 463, 476 (1946).

255. *Leland v. Oregon*, 343 U.S. 790, 800 (1952) (also rejecting doctrine of diminished responsibility).

256. *Fisher v. United States*, 328 U.S. 463, 476 (1946).

was shocking, since it punished a man for his "inability to make the choice—he is punished for incapacity, and that is the very thing for which the law says he shall not be punished."²⁵⁷ Judge Ladd, in an era before the term "due process of law" became popular, said that the New Hampshire formula "was always law, and always must be law, while justice is administrated upon principles at all consonant with the calls of civilization and humanity."²⁵⁸ Unofficially (in private correspondence) Doe was willing to go further and expressed the belief that tests for insanity violated the constitution.

Whether the question of test will be safer in the hands of the jury or not, I am satisfied that it is a question of fact which, under our Constitution, cannot be taken from the jury. In this respect, the theory of the British Constitution is like ours,—questions of fact are for the jury.²⁵⁹

Impracticability

The argument that the New Hampshire formula does not work can be neither repudiated nor substantiated. There simply is not enough evidence. During the past several decades New Hampshire has had an average of less than two indictments for homicide each year. This is not the stuff from which conclusive statistics are drawn. What evidence we do have seems to indicate that the New Hampshire formula has proven satisfactory from the viewpoint of both medicine²⁶⁰ and law.²⁶¹ At the very least, it is certainly no less workable than the *M'Naghten* rules.²⁶²

257. *State v. Pike*, 49 N.H. 399, 441-42 (1869) (concurring opinion).

258. *State v. Jones*, 50 N.H. 369, 399 (1871). "No argument is needed to show that to hold that a man may be punished for what is the offspring of disease would be to hold that he may be punished for disease. Any rule which makes that possible cannot be law." *Id.* at 394.

259. Letter From Charles Doe to Isaac Ray, April 14, 1868, in Reik, *supra* note 244, at 188. Doe had previously expressed the view the delusion test "was not a part of the common law of England when that common law was adopted in our constitution." Boardman v. Woodman, 47 N.H. 120, 148 (1865) (dissenting opinion).

260. The author has consulted psychiatrists who have testified in criminal cases in New Hampshire, in which pleas of insanity have been made. There, as elsewhere, such pleas are generally entered only in homicide cases and, to be sure, the good people of New Hampshire rarely indulge in murder. But the law is reported to work admirably in those few cases in which it has been used.

Guttmacher, *The Psychiatrist as an Expert Witness*, 22 U. CHI. L. REV. 325, 326 (1955).

261. The New Hampshire rule has worked successfully in this state. It has not been criticized or found impractical by either prosecutors or defenders and the verdicts of juries under the New Hampshire rule have reached a result which would seem to be more consistent with ordinary wisdom than is possible under the *M'Naghten* Rules.

Letter From Hon. Frank R. Kenison, Chief Justice of New Hampshire, to Hon. J. C. McRuer, Chief Justice of the High Court of Ontario, May 2, 1955, copy on file at New Hampshire Supreme Court.

262. Let us examine the chief bases for dissatisfaction [with *M'Naghten*]. First among these is the inability of the psychiatrist to determine the existence or the nonexistence of the individual's capacity to distinguish right from wrong at the

CONCLUSION

In conclusion we may note that the New Hampshire judges' search for a principle conformable with ancient common law, and the *Durham* judges' search for a test conformable with the latest advances of science embody, and at the same time challenge, the very notions of the community. In the end it will be these notions which will determine the fate of the two doctrines. And it may well be that they alone will cause the final rejection of the New Hampshire doctrine, if it is to be rejected. For the New Hampshire judges failed to appreciate the role which social considerations must play in the final determination of this question.²⁶³ Doe, who saw so clearly that critics of the New Hampshire formula would refuse to challenge it on the issue he had chosen, that of common law, and would take refuge behind the red herring of "doctors' notions," did not realize that the most telling arguments would be based on the needs, ends, and customs of society, although these arguments, too, would be disguised under the name of law.

The New Hampshire doctrine poses serious questions about the relationship of law and psychiatry, about the boldness of judicial legislation, and about the function of the jury and its competency to perform that function. It calls to our attention the ends of criminal law and the question of where the line should be drawn in insanity, if at all.²⁶⁴ It raises such serious issues as: the desire of the state to protect society²⁶⁵ and the demands of society to protection from the state;²⁶⁶ the best means by which that protection can be effected,²⁶⁷ and to what

time of the crime . . . as yet, no one has even suggested a test or a method for measuring the specific capacity of the individual to make ethical judgments.

Guttmacher, *Principal Difficulties With the Present Criteria of Responsibility and Possible Alternatives*, MODEL PENAL CODE § 4.01, appendix B, at 171 (Tent. Draft No. 4, 1955).

263. In a letter to Judge Doe, Dr. Ray acknowledged that sociology must be considered, but apparently felt it offered no problem here when he said that the New Hampshire formula was "in accordance with the temper and habits of our people." Letter from Isaac Ray to Charles Doe, Jan. 12, 1869, in Reik, *supra* note 244, at 193.

264. When Sir James Crichton-Brown suggested a new legal test for insanity in 1889 critics complained that it did "not discriminate carefully enough between those weak minds which the law punishes rightfully, and others which should be allowed the refuge of the word 'insanity.'" 3 HARV. L. REV. 279, 280 (1889).

265. "[T]he question of sexual psychopathy becomes wholly immaterial after the imposition of sentence involving the death penalty. The nature of the sentence in such case assures the protection of society from any future activities of the defendant, regardless of whether or not he may be a sexual psychopath." *People v. McCracken*, 39 Cal. 2d 336, 346, 246 P.2d 913, 919 (1952).

266. One may readily grant that the [*Durham*] decision reversing the conviction for the July, 1951, offense and establishing the new insanity plea rule amply safeguards Durham and his legal rights. If the prospect, however, is for another brief sojourn in St. Elizabeths, and then a fourth discharge, there is a deplorable lack of protection of the rights of the people of Washington. The old notion that law-abiding citizens are entitled to protection from criminals, whether sane or insane, seems to be as outmoded as the right-wrong test in insanity pleas.

Editorial, Washington Evening Star July 5, 1954, p. 8, col. 1.

267. "The community's security may be better protected by hospitalization . . . than by imprisonment." *Williams v. United States*, 250 F.2d 19, 26 (D.C. Cir. 1957).

measures a person found not-guilty-by-reason-of-insanity should be subjected;²⁶⁸ just how important it is for the law to be in harmony with science,²⁶⁹ and which is more vital,—the community's concern for the victim of a crime or psychiatry's concern for the victim of a diseased mind;²⁷⁰ the validity of punishment as a deterrent,²⁷¹ and the notion that the mentally ill may be as easily deterred as the sane;²⁷² the need to emphasize the concept of guilt by casting a stigma upon the wrongdoer be he morally responsible or not,²⁷³ and the public's demand that antisocial actions be uniformly revenged without consideration for the special

268. He should be kept under observation in the institution for a sufficiently long period, even after a cure appears, in order to make certain that the apparent cure is not merely temporary, or as it is known in psychiatry, a period of remission. Safety of the public demands nothing less, while the defendant has no right to complain at being taken at his word.

In re Rosenfield, 157 F. Supp. 18, 20 (D.D.C. 1957).

269. "[T]he law is not a medical or metaphysical science, and . . . its search is for practical rules which may be administered without inhumanity for the security of society by protecting it from crime . . ." *Bryant v. State*, 207 Md. 565, 593, 115 A.2d 502, 515 (1955); *accord*, *State v. Noel*, 102 N.J.L. 659, 677, 133 Atl. 274, 281 (Ct. Err. & App. 1926).

270. Far transcending the confidence of psychiatry in its own norms and its natural compassion for a "sick" defendant is the concern of society as a group for the victim of the crime and the victims of others whose actions he may inspire. Society insists upon a standard of moral responsibility to protect its safety . . . It insists that responsibility should be the usual norm and excuse the challenged exception. Farrell, *A Judge Views the M'Naghten Rule*, 4 CATHOLIC LAW. 311, 314 (1958).

271. Condemnation can have no effect—favorable or unfavorable—in a high though unknown percentage of cases. Some psychotics, of course, cannot comprehend consciously or unconsciously, the informational content of what is said to them. Some mental defectives can perceive that they are being censored, and weep; but the justification of the criticism may be wholly lost by virtue of a low intelligence function, so that no appropriate memory imprint occurs.

Lasswell & Donnelly, *The Continuing Debate Over Responsibility: An Introduction to Isolating the Condemnation Sanction*, 68 YALE L.J. 869, 887 (1959). It is well accepted that the mentally disordered are not subject to deterrence in the same manner as are normal persons. See Von Hentig, *The Limits of Deterrence*, 29 J. CRIM. L., C. & P.S. 555, 559 (1938).

272. Among those who subscribed to this belief was David Dudley Field:

The government of insane asylums is a standing contradiction of some prevalent theories respecting insane criminals. It acts upon the assumption that the unsound of mind are influenced by motives, and can be restrained by fear. One of the most eminent of our physicians, on being asked by me whether the insane are not affected by fear of punishment, answered: "Yes, there is scarcely one of them who, if he wasted his butter, and were told that if he wasted it again it would be taken from him, would not refrain from doing so."

Field, *Emotional Insanity*, 7 ALBANY L.J. 273, 277 (1873).

273. "I think it is highly desirable that criminals should be hated, that the punishments inflicted upon them should be so contrived as to give expression to that hatred, and to justify it so far as the public provision of means for expressing and gratifying a healthy natural sentiment can justify and encourage it." 2 STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 81-82 (1893).

circumstances in each case;²⁷⁴ the common belief that the plea of insanity is often a sham;²⁷⁵ the problem of whether the medical-legal conflict is really significant enough to warrant consideration,²⁷⁶ or whether in the end insanity is not primarily a question of social purposes;²⁷⁷ and finally the question of which is more important, the necessity for certainty which the New Hampshire formula cannot offer,²⁷⁸ or the necessity for justice which the *M'Naghten* rules and like "tests" often fail to offer.²⁷⁹

These are considerations of policy, customs, fears, and ends; and influential though they may be in persuading men to reject the New Hampshire doctrine, they do not, any more than does the medical criticism that New Hampshire is unsound by emphasizing intent, or the argument of lawyers that it is based on "doctors' notions," challenge the validity of the common-law foundation upon which Judge Doe built the formula. Doe waited twenty years for someone to accept his challenge and prove that the New Hampshire formula was based on an erroneous theory of law. No one ever did. Time and again he saw his argument scorned and rejected, but never on the issue which it raised. With a feeling of exasperation he wrote to the editor of the *Medico-Legal Journal* to offer the challenge once again:

274. [M]ost people have a feeling that "justice" requires a law breaker to suffer, just as they think that sin should entail suffering in the sinner. Personally I do not share that feeling However, it would be unwise, and incidentally impracticable to disregard it as a constituent element; it is extremely strong in most people.

Extracts of a Letter From Hon. Learned Hand, 22 U. CHI. L. REV. 319 (1955). But compare *Boardman v. Woodman*, 47 N.H. 120, 147 (1865) (dissenting opinion) ("The question is, not whether they are relieved by some special and peculiar exception, from the operation of the general law, but whether they have done anything, which under general law, amounts to a contract or a crime.").

275. The supposed insurmountable difficulty of distinguishing between feigned and real insanity has conducted, probably more than all other causes together, to bind the legal profession to the most rigid construction and application of the criminal law relative to this disease and is always put forward in objection to the more humane doctrines

RAY, MEDICAL JURISPRUDENCE OF INSANITY § 341 (3d ed. 1855).

276. "Moreover, choice of a test of legal sanity involves not only scientific knowledge but questions of basic policy as to the extent to which that knowledge should determine criminal responsibility." *Leland v. Oregon*, 343 U.S. 790, 801 (1952).

277. "The truth appears to me to be that the question goes to the heart of whatever we choose to make our purpose in criminal punishment. It is only indirectly, or at second hand, a psychiatric question." Extracts of a Letter From Hon. Learned Hand, in 22 U. CHI. L. REV. 319 (1955).

278. "Society wants a legal standard by which to judge whether or not a man should be held responsible for his acts in order to establish certainty in the law, both for protection of the accused and for aid of the trier of fact." Note, 30 IND. L.J. 194 (1955).

279. The injustice of *M'Naghten* became, momentarily at least, apparent even in Massachusetts when Jack Chester killed himself, see note 170 *supra*, and the headlines in one newspaper read: "Suicide Spurs Probe of State Sanity Law." *Boston Daily Globe*, Nov. 29, 1958, p. 1, col. 4.

I do not suggest that the legal argument in that case is unanswerable. It may deserve no answer. It may be beneath the notice of sound lawyers. I merely ask if you are aware of, or can you find anything, that a sound lawyer would regard as an answer, worthy of consideration. If you can find nothing of the kind, would it be well to ask your readers why those who reject the New Hampshire rule, have allowed twenty years to pass without making any noteworthy attempt to expose the error of it, or to attack it upon any ground of common-law principle? The grounds of that rule are distinctly set forth in our decisions, and are in every library used by the judges and leading lawyers of this country.

If those grounds are too feeble to deserve an answer, let them go. If their feebleness will not consign them to oblivion, why has not somebody taken them up fairly, met them fully and squarely, and demonstrated their unsoundness by common-law argument addressed to the legal intelligence [*sic*] of the country? Why don't [*sic*] somebody assume that easy task now? How long will it be before the candid minds of the profession will demand a satisfactory answer to these questions? Such minds are not swayed by superficial or general allusions, or mere assertion. They insist upon argument solid, thorough and profound, going to the bottom of the subject, free from cavil and sophistry, shunning no difficulty and misrepresenting no position of an adversary. I merely suggest in the course of your writing on the subject, an appeal perhaps in the interrogative form, to the candor of the legal profession, for an explanation of the fact that twenty years have passed without any material answer being made [*sic*] to the N.H. argument on the common-law question.²⁸⁰

Sixty-nine more years have passed since Doe wrote this letter and his challenge has gone unaccepted.

The New Hampshire doctrine devises no test, but rejects all tests; creates no presumptions, but rejects all presumptions; it is not so much a rule of law as an affirmation that there are no rules of law to determine legal accountability. It is not an isolated principle of criminal law, but a universal principle applicable as well on the civil side.²⁸¹ It may fail to consider fully the problem of ends, needs, and public policy, but it is the only pronouncement on insanity which seriously considers the problem of legal function—the correct function of the judge and jury, of the determiner of law and the decider of facts. It may be that Judge Doe failed to consider the practical, utilitarian value of a jury of laymen confronted with the language of psychiatry, but he did consider the value and validity of an old presumption of law which, from a mistaken assumption of fact, had grown into *stare decisis*. It may be that Judge Doe has accentuated the role to be played by the prejudices and intolerance of the jury, but he did so by eliminating the prejudices and intolerance of the judge. It may be that Judge Doe gives to the jury a vague question of fact, but he is offering it in place of dubious rules of law.

280. Letter From Charles Doe to Clark Bell, Jan. 10, 1889, in Bell, *Editorial: The Right and Wrong Test in Cases of Homicide by the Insane*, 16 MEDICO-LEGAL J. 260, 264 (1889).

281. It is interesting to note that Minnesota has recently applied the "product of mental disease" criteria in a civil case even though it is bound to the right-wrong test in criminal cases. *Anderson v. Grasberg*, 78 N.W.2d 450 (Minn. 1956).