

Space does not permit any discussion of the evolution of the so-called "tests of insanity." All of them, until the establishment of the New Hampshire rule in 1870 and the *Durham* rule in 1954, drew a sharp line of dichotomy between sane and insane, the latter implying total loss of reason. Yet the law itself in a number of states has recognized that there is a "gray" area between the black and the white. I refer to the establishment in certain jurisdictions of the so-called sex psychopath group. Although this group is not at all well-defined psychiatrically, the demand for such legislation arose as a result of public recognition of the fact that many persistent sexual offenders show themselves to be entirely unamenable to routine correctional treatment, that although they are not "insane" in the eyes of the law they are by reason of mental deviation not readily deterrable. Some of these offenders are sociopaths, more of them in my opinion are neurotic, but in any event the principle has been established that here is a group of something other than frankly "insane" persons who should be dealt with by an indeterminate period of detention and, where possible, treatment; actually a fair proportion of these offenders are amenable to psychiatric treatment. Although there is in the District of Columbia a sexual psychopath act, there is no question in my mind that under the *Durham* rule these persons could be acquitted as insane and confined, since their acts are quite clearly the product of mental disorder.

I have indicated already that I have some reservations, to put it mildly, concerning the American Law Institute formulation of criminal irresponsibility. The formulation appears to me to be a combination of the *M'Naghten* rule ("capacity to appreciate the criminality") and the irresistible impulse test ("conform his conduct to the requirements of law"). This formulation met the approval of the majority of the committee and has been adopted by the Institute; it is a fact, however, that all three of the psychiatric consultants on the committee take exception to it. I am not sure that a psychiatrist is competent to pass on whether or not the accused has "adequate capacity" to appreciate the criminality or to conform his conduct. Subsection (2) of 4.01, which purports to exclude sociopathic personality from the definition of mental disease or defect, fails to do so because it fails to recognize the fact that the sociopath has many other symptoms than the mere antisocial behavior.

So far I have endeavored to outline some of the psychiatric concepts underlying the testimony of the expert psychiatric witness. I have indicated, too, the objections of the psychiatrist to testifying under the *M'Naghten* rule. As a matter of fact, many patients in mental hospitals who by any test whatever would be considered to be "insane" have at least some glimmering and sometimes a strong sense of what is right and what is wrong. The test is unrealistic and moralistic, and is out of tune with psychiatric knowledge. It was attacked by legal writers as well as physicians soon after it was enunciated, and the literature is replete with criticisms of it. An interesting study could be made, perhaps, of the psychology of the reasons why the *M'Naghten* rule has appeared to be almost immortal in spite of all of the psychiatric progress that has been made in the last 117 years. Judge Doe, of New Hampshire, who is responsible for the so-called New Hampshire rule, arrived at his formulation after prolonged study, concluding as he did that the matter of the mental state of the offender is as much a matter of fact as his presence at the scene of the crime. He held, too, that the law had no call to attempt to define disease. He said:

"What is a diseased condition of mind is to be settled by science and not by law—disease is wholly within the realm of natural law or the law of nature. The municipal, civil law established by men for human government, does not declare what is disease of the mind any more than it declares what is disease of the lungs or liver."

The Court of Appeals of the District of Columbia in 1954, apparently by somewhat different reasoning, arrived at a similar result, namely that the proper test, if any, was whether or not the act was the product of mental disease or defect.

SOME DURHAM RULE CHARGES ANSWERED

One of the charges made against the *Durham* rule is that it is vague. Certainly the *M'Naghten* rule appears on the surface only not to be vague, although it is entirely out of tune with reality. But as Chief Judge Simon Sobeloff well says, "What we ought to fear above all is not the absence of a definition but being saddled with a false definition" (41 A.B.A.J. 793, 796 (September 1955)). The fuller meaning of "product" was clarified in the decision of *Carter*