

Court has rendered nearly fifty opinions touching nearly every aspect of the insanity defense, e.g., competence to stand trial, scope of the doctor-patient privilege, instructions to the jury, problems relating to release of a person from a mental institution, etc.¹⁵ This corpus of law constitutes an outstanding contribution to enlightened judicial administration of the insanity defense.

The *Durham* test is substantially the same as a test promulgated some eighty years ago in New Hampshire. *State v. Pike*, 49 N.H. 399 (1869); *State v. Jones*, 50 N.H. 369 (1871). The test devised by the majority has not been sanctioned by any court, legislature, or commission which has studied the problem. The proposed test is patterned after the test recommended in the Model Penal Code by the American Law Institute, but it differs from the A.L.I. test in critical respects.

IV

OBJECTIONS TO THE MAJORITY TEST

The committee majority accepts, at least by implication, the criticism of the pre-existing tests which prompted adoption of the *Durham* rule. Thus, the majority report acknowledges that it is "desirable" that the psychiatrist should be "free" in testifying as to the Defendant's mental condition (Report, p. 12). The majority report further reflects the change of attitude which has taken place since *Durham* in affirmatively recommending against a return to the pre-existing tests. But the test devised as a substitute for *Durham* by the majority is subject, in our view, to serious objections.

At the threshold, there is an objection of fundamental importance which the majority report treats lightly. The majority propose that the new standard of criminal responsibility be embodied in a statute. In the District of Columbia there is presently no statute defining criminal responsibility. The power

¹⁵ Only a few of these cases have related to the *Durham* rule *per se*. Problems such as fitness to stand trial would exist under any rule of responsibility. For the most part, the decisions represent a long overdue review by the Court of procedural problems involved in administering the insanity defense.