

tional right-wrong and irresistible impulse tests. This proposal has been codified by the legislatures of Illinois and Oregon.

Arguments for *Durham* rule:

Proponents of the *Durham* rule appear to use three arguments in its support:

1. Courts following the right-wrong and irresistible impulse tests tended to exclude expert testimony on the nature of the mental illness, limiting psychiatrists to testimony whether the subject was capable of distinguishing right from wrong and of resisting impulses. Psychiatrists point out that these terms have no medical meaning, and it is undoubtedly true that restrictive rulings of judges kept relevant medical evidence from juries;

2. There was a general feeling that the traditional rules were construed too strictly, probably resulting in jail sentences for some persons who should, instead, have been committed to mental institutions; and

3. Psychiatry has developed immensely since the traditional rules were formulated, rendering those rules hopelessly obsolete.

A majority of observers believe that there is much justification for the first two objections. Both the *Durham* rule, which now applies in the District of Columbia, and the American Law Institute rule, which H.R. 1932 would substitute for the *Durham* rule, would seem to satisfy them.

The third objection probably reveals the true conflict between the *Durham* rule and the American Law Institute rule. When it is said that the traditional rules are hopelessly obsolete because of the advances of psychiatry, it is assumed that the traditional rules attempted to define mental illness. If the assumption is correct, the objection is valid.

But many observers believe the traditional rules did not attempt to define insanity; they merely defined the moral elements of punishability—which are not medical tests—and stated that if mental illness, regardless of what kind or the manner defined, negated the existence of the moral elements, the accused was not punishable.

The *Durham* rule makes no reference to any moral criteria. It provides merely that if a man is mentally ill, and the crime was a product of the mental illness, he is not punishable. The moral element is presupposed; it is assumed that anyone who is mentally ill, and whose act is the product thereof, is not morally blameworthy.

The American Law Institute rule, on the other hand, restates the traditional rules and preserves the moral test. It provides that if a man knew he was doing wrong and could have refrained, he acted with evil intent and is therefore blameworthy. This rule specifically renders the sociopath or the psychopath, whose abnormal behavior is manifested only by repeated criminal or otherwise antisocial conduct, responsible for his conduct.

In case of clearcut mental abnormality, both rules lead to acquittal by reason of insanity. But in borderline cases, where the mental illness is slight—for example, mildly sociopathic individuals—the *Durham* rule tends to lead to acquittal and the American Law Institute rule tends to lead to conviction, providing the jury feels the mental illness was not of sufficient severity to excuse the accused.