

6-1962

## The Companion of the New Hampshire Doctrine of Criminal Insanity

John Reid

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/vlr>



Part of the [Criminal Law Commons](#)

---

### Recommended Citation

John Reid, The Companion of the New Hampshire Doctrine of Criminal Insanity, 15 *Vanderbilt Law Review* 721 (1962)

Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol15/iss3/3>

This Article is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Law Review by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact [mark.j.williams@vanderbilt.edu](mailto:mark.j.williams@vanderbilt.edu).

# The Companion of the New Hampshire Doctrine of Criminal Insanity

John Reid\*

*The problem of criminal responsibility is one of the most difficult in criminal law. Of the various solutions that have been devised, the author suggests that the New Hampshire-Scottish approach—with its emphasis on insanity as a question of fact for the jury—is the most desirable.*

## I. INTRODUCTION

As Professor Mueller stated in the 1960 *Annual Survey of American Law*, the time has come for courts and writers to abandon the myth that the *Durham* rule<sup>1</sup> and the New Hampshire doctrine of criminal insanity<sup>2</sup> are the same.<sup>3</sup> *Durham* and New Hampshire are not the same. Unquestionably both these approaches to the criminal law's most persistent<sup>4</sup> and time-consuming<sup>5</sup> problem had their embryo in the dissatisfaction felt by their respective authors with the *M'Naghten* rules.<sup>6</sup> But there is an important difference. The New Hampshire judges were dissatisfied with the *M'Naghten* rules for legal reasons; the *Durham* judges for medical

---

\*B.S.S., Georgetown University; LL.B., Harvard University; M.A., University of New Hampshire; member of the New Hampshire bar.

1. The *Durham* rule, which has certain later refinements to be noted, was laid down in *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954).

2. The New Hampshire doctrine was formulated in two cases, *State v. Jones*, 50 N.H. 369 (1871); *State v. Pike*, 49 N.H. 399, 408 (1869) (Doe, J., concurring). See also *Broadman v. Woodman*, 47 N.H. 120, 149 (1865) (Doe, J., dissenting).

3. Mueller, *Criminal Law and Administration*, 1960 ANNUAL SURVEY OF AMERICAN LAW 99, 105-06 (1961); 36 N.Y.U.L. REV. 117-18 (1961).

4. Over sixty years ago it was said: "There is probably no feature of criminal law which is so frequently the subject of judicial consideration and opinion as that of insanity as an excuse for crime." *Commonwealth v. Wireback*, 190 Pa. 138, 146, 42 Atl. 542, 545 (1899).

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. The *M'Naghten* rules provide a rational test which limits the issue of criminal responsibility to whether the defendant knew what he was doing or knew that it was wrong. It was formulated by the Law Lords, in response to a series of questions posed by the House of Lords, when they replied: "[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." *M'Naghten's Case*, 10 Clark & F. 200, 210, 8 Eng. Rep. 718, 722 (H.L. 1843).

reasons. The New Hampshire judges turned to legal history to find their substitute; the *Durham* court turned to modern science.

The New Hampshire doctrine of criminal insanity evolved out of theories held by the New Hampshire judges about the law of evidence: that is, their insistence on the distinction between law and fact (they regarded "insanity" as an unmixed question of fact); their dislike of legal presumptions (they thought *M'Naghten* was not so much a rule of substantive law as a legal presumption, based on faulty medical theory and bad law, that a man is sane unless he does not know the difference between right and wrong); their belief that the burden of proof (*i.e.*, the burden of persuasion) rests on the party who seeks to prove the *legal* affirmative; and their study of history which convinced them that on the issue of criminal responsibility the courts had usurped the fact-finding function of the jury by formulating rules which not only turned questions of fact into matters of law but also excluded the "best" evidence (such as nonexpert opinion evidence).<sup>7</sup> Instead of devising a new definition of insanity,<sup>8</sup> they rejected all legal definitions.<sup>9</sup> The New Hampshire doctrine was, to them, not so much a definition of criminal responsibility<sup>10</sup> as an affirmation that no satisfactory definition can be devised to solve what they regarded to be a question of fact.<sup>11</sup>

The *Durham* rule, on the other hand, is based on the District of

7. For a full discussion of the evolution of the New Hampshire doctrine out of these theories of evidence and legal history see Reid, *A Speculative Novelty: Judge Doe's Search for Reason in the Law of Evidence*, 39 B.U.L. Rev. 321 (1959).

8. "If you ever write a criticism upon it [the New Hampshire doctrine], allow me to suggest that I utterly repudiate the idea of introducing a new principle . . ." Letter From Charles Doe to Isaac Ray, Jan. 18, 1869, in Reik, *The Doe-Ray Correspondence: A Pioneer Collaboration in the Jurisprudence of Mental Disease*, 63 YALE L.J. 183, 193 (1953).

9. They felt that any definition or test, like "insanity" itself, should be a question of fact for the jury. "It is a question of fact whether any universal test exists, and it is also a question of fact what the test is, if any there be." *State v. Jones*, 50 N.H. 369, 388 (1871).

10. Judge Ladd believed it impossible to develop a test for it would take years of studying an "immeuse 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." *Id.* at 395.

11. "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." *Id.* at 392-93.

Columbia judges' finding that *M'Naghten* and its variants<sup>12</sup> do not measure up to the requirements of modern medicine;<sup>13</sup> bypassing considerations of evidence and legal history, these judges sought to formulate a new test to take the place of the old.<sup>14</sup> Regardless of the *Durham* court's original intention,<sup>15</sup> it has in later cases moved far away from whatever isogenous beginning it may have shared with New Hampshire.<sup>16</sup> In particular, it has not agreed with New Hampshire's insistence on the distinction between law and fact, and has consistently treated as matters of law what the New Hampshire doctrine regards as questions of fact.<sup>17</sup>

Despite the differences in the theories and the practices of these two approaches to criminal insanity, the great bulk of the literature dealing with the subject has lumped them together, not merely as similar, but as identical. Occasionally a writer has recognized that they have points of dissimilitude,<sup>18</sup> but on the whole the tendency has been to treat them as

---

12. *M'Naghten* is an old rule which is applied in more than two score jurisdictions and has, therefore, been refined or reinterpreted. Perhaps the leading refinement is the addition of volition to the *M'Naghten* criterion of rationality. This is usually cited as a separate rule altogether and called the "irresistible impulse test," but in practice it does little more than graft onto *M'Naghten's* question whether the defendant knew what was right the additional question whether he could adhere to the right. Although an Alabama case is commonly cited as the origin, *Parsons v. State*, 81 Ala. 577, 597, 2 So. 854, 866 (1887), Massachusetts is generally regarded as the leading "irresistible impulse" jurisdiction. It has formulated the test as follows: "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). See also Chief Justice Shaw in *Commonwealth v. Rogers*, 48 Mass. (7 Met.) 500 (1844).

13. "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 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).

14. "We are urged to adopt a different test to be applied on the retrial of this case." *Id.* at 869. "The rule which we now hold must be applied on the retrial of this case . . ." *Id.* at 874.

15. It is true that in the *Durham* case itself the court recognized, in negative terms at least, a kinship with the New Hampshire doctrine. When he first formulated the new rule Judge Bazelon said: "The rule . . . is not unlike that followed by the New Hampshire court since 1870. . . . [A]n accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect." *Id.* at 874-75.

16. Silving, *Mental Incapacity in Criminal Law*, in *CURRENT LAW AND SOCIAL PROBLEMS* 3 (1961); Reid, *Understanding the New Hampshire Doctrine of Criminal Insanity*, 69 *YALE L.J.* 367, 389-98 (1960).

17. *Id.* at 389-91.

18. 29 *Rocky Mt. L. Rev.* 250, 251 n. 9 (1957); 12 *S.C.L.Q.* 602 (1960).

the same in federal cases,<sup>19</sup> state decisions,<sup>20</sup> books,<sup>21</sup> treatises,<sup>22</sup> articles,<sup>23</sup> annual surveys,<sup>24</sup> law notes,<sup>25</sup> and book reviews.<sup>26</sup> This has been unfortunate, for not only has it caused authorities in other states, while discussing and rejecting the *Durham* rule, to ignore the merits of the New Hampshire doctrine,<sup>27</sup> but it has even led courts in New Hampshire itself to equate the two approaches and thus make the New Hampshire doctrine subject to all the weaknesses *Durham* is heir to.<sup>28</sup> It is, therefore, of value, both from the viewpoint of understanding the New Hampshire doctrine and of understanding how it differs from the *Durham* rule, to note that while it is different from *Durham* it is similar to another approach to criminal insanity. If the New Hampshire doctrine is finally to be recognized as offering a different solution than *Durham*, if it is to be appreciated as a conservative solution based on law as opposed to *Durham's* radical solution based on medicine, then there is no better way except to compare it to, and associate it with, the Scottish approach to criminal insanity. For the true companion of New Hampshire is not *Durham*—it is Scotland.

## II. THE SCOTTISH APPROACH

It is little appreciated in America that Scotland is a jurisdiction in many ways separate and distinct from the rest of Great Britain. In noncriminal matters it is usually listed among the civil law countries,<sup>29</sup> while in criminal

19. *United States v. Currens*, 290 F.2d 751 (3d Cir. 1961); *Anderson v. United States*, 237 F.2d 118, 127 (9th Cir. 1956).

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

21. WEIHOFEN, *THE URGE TO PUNISH* 7 (1956). *But see id.* at 174 n.12.

22. PERKINS, *CRIMINAL LAW* 763-65 (1957).

23. Wechsler, *On Culpability and Crime: The Treatment of Mens Rea in the Model Penal Code*, 339 ANNALS 24, 37 (1962); Cohen, *Criminal Responsibility and the Knowledge of Right and Wrong*, 14 U. MIAMI L. REV. 30 (1959).

24. Collins, *Criminal Law, Procedure, and Administration*, 1958 ANNUAL SURVEY OF MASSACHUSETTS LAW § 12.1, at 120 (1959).

25. Note, 1960 WIS. L. REV. 528, 530.

26. Book Review, 21 MODERN L. REV. 700 (1958).

27. In one Massachusetts case, defense counsel without mentioning *Durham* in its brief urged the adoption of the New Hampshire doctrine 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 criminal act, back into the hands of the jury. Brief for Defendant, p. 41, *Commonwealth v. Chester*, 337 Mass. 702, 150 N.E.2d 914 (1958). The court, however, chose to treat the New Hampshire doctrine as establishing a test similar to *Durham*, and, after paying New Hampshire scant attention, proceeded to discuss and reject what it obviously regarded as the more prestigious side of this "rule," the *Durham* decision. *Id.* at 712-13, 150 N.E.2d at 919-20. See Reid, *Understanding the New Hampshire Doctrine of Criminal Insanity*, 69 YALE L.J. 367, 388-89 (1960).

28. *State v. De Mandel*, Rockingham State No. 4513, 1959. For discussion see Reid, *The Working of the New Hampshire Doctrine of Criminal Insanity*, 15 U. MIAMI L. REV. 14, 30-32 (1960).

29. Smith, *Strange Gods: The Crisis of Scots Law as a Civilian System*, 1959 JURID. REV. 119.

law, though closer to the common law tradition, it has often trudged paths different from those followed in England and America. On the question of responsibility it has taken a position similar to New Hampshire's. Both felt the harsh bite of doctrinal castigation for more than three quarters of a century during which they were branded as prodigal mavericks chasing foolish notions, only to see their positions finally taken seriously, not because they had been explained in a new or more intelligible manner, but because they had been accepted by jurisdictions usually regarded as possessing that elusive quality known as "prestige." Just as the *Durham* court in 1954 adopted its own modified version of the New Hampshire doctrine eighty-five years after it was first formulated, so in 1957 England adopted a limited version<sup>30</sup> of Scotland's most famous legal idiosyncrasy—the doctrine of diminished responsibility—ninety years after it was first formulated.<sup>31</sup>

Not only has Scotland trudged different legal paths from most of the English-speaking world, but it uses a phraseology foreign to American ears, employing such terms as panel (the prisoner at bar), diet (hearing),<sup>32</sup> and procurator-fiscal (local prosecuting attorney). Its assize (jury) is made up of fifteen members who reach their verdicts by majority vote and who may return a verdict of "not proven"—the so-called "Scotch verdict."<sup>33</sup>

One of the features of Scotland's criminal law is that it has commanded little attention from writers. This may be one reason why confusion exists in that jurisdiction on the subject of legal responsibility. For it must be admitted that a few Scottish authorities do not regard Scotland as following an insanity doctrine similar to New Hampshire's, but rather list Scotland as one of the jurisdictions which follow the *M'Naghten* rules. For example, the leading treatise on Scottish criminal law sums up the defense of insanity in pure *M'Naghten* terms:

---

30. That is, limited to capital cases only.

31. England adopted the doctrine by statute. For discussions of the English as compared to the Scottish approaches to diminished responsibility see Keith, *Some Observations on Diminished Responsibility*, 1959 JURID. REV. 109; Elliott, *The Homicide Act, 1957*, 1957 CRIM. L. REV. (Eng.) 282; Gibb, *Diminished Responsibility for Crime*, 1959 S.L.J. (news) 85; Griew, "*Diminished Responsibility*" and the *Trial of Lunatics Act, 1883*, 1957 CRIM. L. REV. (Eng.) 521; Smith, *Diminished Responsibility*, 1957 CRIM. L. REV. (Eng.) 354; Williams, *The Psychopath and the Defence of Diminished Responsibility*, 21 MODERN L. REV. 544 (1958); Williams, *The Homicide Act, 1957, and Diminished Responsibility—An Abdication of Responsibility?*, 21 MODERN L. REV. 318 (1958); Note, *Diminished Responsibility—Scottish Authority and the Interpretation of the Homicide Act*, 227 L.T. 227 (1957).

32. Two diets are fixed in most trials on indictment. These are called the First or Pleading Diet and the Second or Trial Diet. The venue of the first is variable. It is at the First or Pleading Diet that the plea of insanity is tendered. It is a special plea which must be recorded at this Diet or else it cannot be raised at the Second or Trial Diet. Hoal, *Criminal Procedure in Scotland*, 64 S.A.L.J. 319, 325-26 (1947).

33. For an outsider's explanation of Scottish criminal procedure see Hoal, *Criminal Procedure in Scotland*, 64 S.A.L.J. 319 (1947); "Alpha," *Scotch Criminal Procedure*, 64 S.A.L.J. 488 (1947).

Insanity or idiocy is a defence and exempts from conviction and punishment. But there must be an alienation of reason, such as misleads the judgment, so that either the person does not know "the nature or quality of the act" he is doing, or, "if he does know it, that he does not know he is doing what is wrong."<sup>34</sup>

To support this the author cites four cases, three of which are of doubtful value. One dates back to 1844 when the *M'Naghten* rules were about a year old and still very much in the news;<sup>35</sup> another listed the *M'Naghten* criteria as being *among several* which the jury should consider in determining whether the accused was insane at the time of the offense;<sup>36</sup> and the third applied the *M'Naghten* test not to past insanity, but to insanity in bar of trial.<sup>37</sup> On the other hand there is one case of fairly recent date not cited by the author in which the jury was instructed in *M'Naghten* language.<sup>38</sup> Even this case cannot be said to fit into the orthodox *M'Naghten* pattern, however, for, after charging the jury in terms of the right-wrong test, the judge instructed it to consider, *as a pure question of fact*, the defense of mental dissociation due to toxic exhaustive factors.<sup>39</sup>

Admittedly it is difficult to say to just what extent the *M'Naghten* formula is the law of Scotland since the High Court of Justiciary was not established until 1926 and it has never had occasion to consider the

34. MACDONALD, CRIMINAL LAW OF SCOTLAND 9 (5th ed. Walker & Stevenson 1948).

35. H.M.A. v. Gibson, 2 Bro. 332 (1844). The Lord Justice-General, Lord Cooper, did not lend much weight to this case when he dismissed it by telling the Royal Commission on Capital Punishment: "[I]t may interest you to know that when the question of giving evidence before this Commission arose I had some difficulty in finding in Scotland a copy of the *M'Naghten* Rules, and I had eventually to get them from a copy of an English text-book. So it is quite wrong to suppose that the *M'Naghten* Rules in their full vigour are current in Scotland. They were once reported in a foot-note to a Scottish decision about 100 years ago . . ." ROYAL COMMISSION ON CAPITAL PUNISHMENT, MINUTES OF EVIDENCE 437 (1950). *But see id.* at 170.

36. H.M.A. v. Milne, 41 Irv. 301, 343 (1863). This aspect of the case is discussed below.

37. "[I]t is clear that he [the accused] is unable from his mental state, to distinguish between right and wrong, and cannot give any reasonable instructions for the conduct of his defence. In these circumstances the panel is not a fit subject for trial." H.M.A. v. Robertson, 3 White 6, 17 (1891). It is significant to note that in a later case the court rejected an alienist's testimony that the accused was fit to plead because he understood the nature and quality of his deed. The court said the alienist was mistaken in thinking this was the legal test. H.M.A. v. Sharp, [1927] Just. Cas. 66, 69, [1928] Scots L.T.R. 26 (High Ct. Just. 1927).

38. H.M.A. v. Ritchie, [1926] Scots L.T.R. 308 (High Ct. Just. 1925).

39. "[W]here the defence is that a person, who would ordinarily be quite justified in driving a car, becomes—owing to a cause which he was not bound to foresee, and which was without his control—either gradually or suddenly not the master of his own action, a question as to his responsibility or irresponsibility for the consequences of his action arises, and may form the ground of a good special defence. The question, accordingly, which you have to determine is whether, at the time of the accident, the accused was or was not the master of his own action. So put, the question becomes a pure question of fact." *Id.* at 309.

question.<sup>40</sup> Nevertheless, most commentators tend to agree with Lord Keith who told the Royal Commission that "it is not part of our law,"<sup>41</sup> and, except for the case just referred to, the reports back them up. As early as 1867 Lord Deas is reported as saying that he thought "the simplest and most unambiguous way" to state the law of insanity to the jury was to tell them that

if the jury believed that the prisoner, when he committed the act, had sufficient mental capacity to know, and did know, that the act was contrary to the law, and punishable by the law, it would be their duty to convict him. This, his lordship thought was a safer and more accurate mode of putting the question before the jury, than to ask them to consider whether the accused knew right from wrong; for an assassin might believe it was morally right to kill his victim, and yet be responsible to the law, and punishable accordingly.<sup>42</sup>

This was the first Scottish case to repudiate the *M'Naghten* rules, but on the basis of it alone the sunderance would not have been irreconcilable. For when he said the test should be whether the accused knew the act was contrary to the law and punishable by the law, Lord Deas was merely anticipating by eighty-five years the definition which the English Court of Criminal Appeal would give to the word "wrong" in the *M'Naghten* rules.<sup>43</sup> And when he described the test he was rejecting in the narrow terms of knowing "right from wrong" he was describing what latter-day apologists insist was never part of the *M'Naghten* rules.<sup>44</sup> Therefore it might be asserted that far from rejecting the *M'Naghten* rules, Lord Deas was actually adopting, in modified form, what they would one day be in England. But what Lord Deas said was only the first step in the development of the Scottish approach to criminal insanity, and the fact that he did not abandon *M'Naghten* terminology while repudiating what he thought was the *M'Naghten* test may be proof of what Lord Keith meant when he remarked of Scottish judges: "We talk about it, but we do not use it as an authoritative formula."<sup>45</sup> This was demonstrated by subsequent

40. In this regard it is well to note that the High Court of Justiciary has the final word as to Scottish criminal law. Cases can not be appealed from it to the House of Lords.

41. "[W]hen the *M'Naghten* formula came out it was reported in one of our old reports, but if you had the whole fourteen Scottish Judges here and asked them to produce the *M'Naghten* they would probably not be able to because it is not part of our law. We talk about it, but we do not use it as an authoritative formula." ROYAL COMMISSION ON CAPITAL PUNISHMENT, MINUTES OF EVIDENCE 440 (1950).

42. *H.M.A. v. Dingwall*, 5 *Irv.* 466, 475-76 (1867).

43. *Regina v. Windle*, [1952] 2 *Q.B.* 826. Most *M'Naghten* jurisdictions, however, have rejected the idea that the word "wrong" in the test is limited to legally wrong and have ruled that it means morally wrong. *People v. Schmidt*, 216 *N.Y.* 324, 340, 110 *N.E.* 945, 949 (1915); *King v. Porter*, 55 *Commw. L.R.* 182, 189-90 (1933).

44. HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 472-73, n.67 (2d ed. 1960).

45. ROYAL COMMISSION ON CAPITAL PUNISHMENT, MINUTES OF EVIDENCE 440 (1950).



cases in which judges moved even further from *M'Naghten* than Lord Deas had done but nevertheless kept some remnants of its theory in their instructions, as Lord M'Laren did in 1886 when he is reported to have told a jury:

In most cases which courts of law were called upon to deal with, it was in general not difficult to say, from the nature of the act and the circumstances in which it was committed, whether there was legal responsibility for the results which happened. In considering such questions, courts of law had regard to the nature and consequences of the acts committed, and not much to the nature and character of the disease, and endeavoured to arrive at a conclusion by a consideration of whether the prisoner understood the consequences of his act, and that there was legal responsibility for those consequences.<sup>46</sup>

While this charge abandoned any reliance upon knowledge of right or wrong it nevertheless retained traces of *M'Naghten* terminology.

The first clean break with *M'Naghten*-oriented thinking was in 1874 when the Lord Justice Clerk told a Scottish jury:

[T]he indication relied on [to prove insanity] may be ambiguous. In this case they are eminently so. Your only guide is the history of the man's life; and you must apply the light which it gives to the more recent condition of his mind, and the evidence of the medical men.<sup>47</sup>

Here, five years after the New Hampshire court made the definition of insanity a question of fact, we find a Scottish judge telling a jury to consider all the facts available, that their only guide is the accused's history. Like the New Hampshire judges he rejects the *M'Naghten* notion that the problem of criminal responsibility can be wrapped up in a single, all-inclusive definition. Two years later he went as far as he thought practical by asking the jury whether the accused had an "unsound mind."

In regard to the question of sanity which has been raised. A man is not responsible for his actions if he be of unsound mind. If he be of sound mind, if it be not proven that his mind is unsound, even although he be of feeble or excitable mind, or variable temperament, driven about by jealousy, or pride, or self-consequence, or anger, or temper, moved by trifles, or indifference to grave consequences,—he is responsible. While the human mind is liable to all the shades of such conditions, none of them indicate insanity—unsoundness of mind—unsoundness by reason of disease.<sup>48</sup>

While the last sentence, by stressing that the unsoundness of mind must be by reason of disease,<sup>49</sup> leaves the Scottish insanity approach open to a criticism that often has been leveled at the New Hampshire doctrine,<sup>50</sup>

46. H.M.A. v. Brown, 1 White 93, 103 (1886).

47. H.M.A. v. Miller, 3 Coup. 16, 19 (1874).

48. H.M.A. v. Macklin, 3 Coup. 257, 259 (1876).

49. See also H.M.A. v. Barr, 3 Coup. 261, 264 (1876).

50. "While the New Hampshire rule is to be commended for its frankness, it still

Lord Moncreiff avoided this difficulty by not attempting to define what he meant by "disease," and leaving it as a question of fact for the jury.

There are three important aspects of this charge (which might be termed the "unsound mind" approach) that should be noted. First, Lord Moncreiff skirted the subject of insanity, preferring to describe circumstances which might amount to sanity rather than offer an example of insanity.<sup>51</sup> This was to become a characteristic of Scottish judges when dealing with insanity and diminished responsibility.<sup>52</sup> Second, he placed stress on the idea of mental unsoundness; on the defendant's state of mind. This too would become a characteristic of Scottish judges when dealing with diminished responsibility.<sup>53</sup> Third, and most important, he refused to define "unsound mind."

It may be asked, what are the indications from which unsoundness of mind may be inferred? I can lay down no general test which can be applied to solve such a question. At one time lawyers were apt to avoid all difficulty by enquiring whether a prisoner knew right from wrong; and as, in point of fact, except in acute mania or ideocy, there are very few lunatics who do not know right from wrong in the sense of being capable of appreciating and

---

retains the outworn notion that 'insanity' is a definite state of mental disorder." Tulin, *The Problem of Mental Disorder in Crime: A Survey*, 32 COLUM. L. REV. 933, 943 (1932). Similarly one commentator has pointed out that New Hampshire is 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." Wechsler, *The Criteria of Criminal Responsibility*, 22 U. CHI. L. REV. 367, 369 (1955). For a viewpoint that New Hampshire is not based on such a postulate see Reid, *Understanding the New Hampshire Doctrine of Criminal Insanity*, 69 YALE L.J. 367, 410-11 (1960).

51. Judge Doe did much the same thing in formulating the New Hampshire doctrine. See *id.* at 381-82.

52. "I am going to take the responsibility of telling you, in so many words, that it will *not* suffice in law for the purpose of this defence of diminished responsibility merely to shew that an accused person has a very short temper, or is unusually excitable and lacking in self-control. . . . It must be much more than that." H.M.A. v. Braithwaite, [1945] Just. Cas. 55, 57-8, [1945] Scots L.T.R. 209, 210 (High Ct. Just. 1944). See Smith, *Diminished Responsibility*, 1957 CRIM. L. REV. (Eng.) 354, 357.

53. Lord Justice-Clerk Alness said of diminished responsibility: "It is very difficult to put it in a phrase, but it has been put in this way: that there must be aberration or weakness of mind; that there must be some form of mental unsoundness; that there must be a state of mind which is bordering on though not amounting to insanity; that there must be a mind so affected that responsibility is diminished from full responsibility to partial responsibility . . ." H.M.A. v. Salvage, [1923] Just. Cas. 49, 50-51, [1923] Scots L.T.R. 659, 660 (High Ct. Just.). See also H.M.A. v. Muir, [1933] Just. Cas. 46, 48-49, [1933] Scots L.T.R. 403 (High Ct. Just.). It may be that the Scottish judges are prepared to draw a distinction between an "unsound mind" (insanity) and an "abnormal mind" (diminished responsibility) for in one case the Lord Justice-Clerk said: "The question for you on the special defence is whether or not you are satisfied that the prisoner was in an abnormal state of mind at the time. If you are satisfied that his state was not normal, but that there was something about it which made it reasonably doubtful whether he was sane or not, then you will be entitled to acquit him, not, of course, of the full penalty [*i.e.*, not find him insane], but of the more serious crime." H.M.A. v. Graham, 5 Adam 212, 218, [1906] Scots L.T.R. 579 (High Ct. Just.).

even acting on the distinction, much unreasoning inhumanity has been the result of this unscientific maxim.

If it is said that a man is sane if he can form sound judgments on the subject of moral duty this is only stating the problem in another form, and is not solving it; for a sane judgment on right and wrong can only be formed by a man of sound mind.<sup>54</sup>

This is the key to the Scottish approach to criminal insanity.

### III. SCOTLAND AND NEW HAMPSHIRE

Despite the voluminous attention which has been paid the problem of legal responsibility during recent years,<sup>55</sup> the similarity between the New Hampshire doctrine and the Scottish approach to criminal insanity has hardly been noticed.<sup>56</sup> This is to be expected. For the general debate which has whirled about the subject has tended to concentrate on the comparative failings and merits of the *M'Naghten* rules, the irresistible impulse test, the *Durham* rule, and the Model Penal Code test.<sup>57</sup> Little heed has been paid to the rather ancient, somewhat unsophisticated, and undoubtedly droll approach followed in the two agrestic and out-of-the-

---

54. *H.M.A. v. Macklin*, 3 Coup. 257, 259-60 (1876). One day later the Lord Justice-Clerk went somewhat closer to defining "unsound mind" when he spoke of it in terms of controllability and disease: "A man is said to be of unsound mind when his mind is diseased, so that, in some at least of ordinary relations of life, he is incapable, by means of disease, of controlling his conduct and actions. It is a very inadequate test of the presence or absence of a diseased mind, whether the man is capable of knowing the difference between right and wrong. To judge with perfect accuracy of the distinction between right and wrong is the highest attribute of the human conscience. To be capable of forming the conception of moral obligation is compatible with many states of mental insanity. A large proportion of the inmates of our asylums are not only capable of forming the conception of moral obligation, but act upon it habitually." *H.M.A. v. Barr*, 3 Coup. 261, 264 (1876).

55. TOMPKINS, *INSANITY AND THE CRIMINAL: A BIBLIOGRAPHY* (1960).

56. The writer has come across only one reference to this similarity. It occurred during Mr. Justice Frankfurter's appearance before the Royal Commission, when he remarked that it was probably better not to revise the *M'Naghten* rules but to do "what they do in Scotland, because it is what it gets down to in the end anyway." The Commission chairman, Sir Ernest Gowers, then remarked, "This is apparently what they do in New Hampshire," and he went on to read a portion of Judge Doe's charge to the jury in *State v. Jones*. Justice Frankfurter, despite the fact that he had just alluded with some pride to the fact that he had lived in neighboring Massachusetts for a quarter of a century, declined to follow this lead and the subject was dropped. ROYAL COMMISSION ON CAPITAL PUNISHMENT, *MINUTES OF EVIDENCE* 587 (1950).

57. MODEL PENAL CODE § 4.01(1) (Tent. Draft No. 4, 1955). As enacted in Vermont this test provides: "(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks adequate capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. (2) The terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct. The terms "mental disease or defect" shall include congenital and traumatic mental conditions as well as disease." VT. STAT. ANN. § 4801 (1958).

way jurisdictions of Scotland and New Hampshire. Yet the homogeneity is so marked, and the homouusia is so pronounced, that one cannot help wondering why the *Durham* judges did not include Scotland in the oblique acknowledgement which they paid New Hampshire.<sup>58</sup>

Before calling attention to the similarities between Scottish and New Hampshire cases, two differences should be pointed out. There is a presumption in Scots law that a man is sane;<sup>59</sup> there is none in New Hampshire.<sup>60</sup> The panel in Scotland has the burden of proving himself insane;<sup>61</sup> in New Hampshire the State has the burden of proving the opposite.<sup>62</sup> These differences would hardly be worth mentioning were it not that distrust of presumption was one of the cornerstones upon which Judge Doe built the New Hampshire doctrine.<sup>63</sup> To Doe, a presumption was an unwarranted usurpation by the court of the fact-finding function of the jury, and, in the instance of the insanity defense, was especially obnoxious since the logical consequence of the presumption of sanity was to shift the burden of proof. He termed as "manifestly wrong" the denouement of legal logic that the burden was on the defendant to prove his own insanity "either beyond reasonable doubt, or by a preponderance of evidence."<sup>64</sup> Despite the fact that Doe later expressed the wish that he had omitted discussion of burden of proof,<sup>65</sup> it is important to any consideration of the New Hampshire doctrine. For not only is it a key element in the theory

---

58. See note 15 *supra*.

59. *H.M.A. v. Mitchell*, [1951] Just. Cas. 53, [1951] Scots L.T.R. 200 (High Ct. Just.).

60. At least when the question of sanity is raised under the general issue. *State v. Pike*, 49 N.H. 399, 408 (1869) (concurring opinion); *State v. Bartlett*, 43 N.H. 224 (1861).

61. *H.M.A. v. Mitchell*, [1951] Just. Cas. 53, [1951] Scots L.T.R. 200 (High Ct. Just.).

62. *State v. Pike*, 49 N.H. 399, 431 (1869) (concurring opinion).

63. Doe regarded the *M'Naghten* rules, themselves, to be a legal presumption. Reid, *A Speculative Novelty*, 39 B.U.L. REV. 321, 341-42 (1959).

64. *State v. Pike*, 49 N.H. 399, 431 (1869) (concurring opinion). Today, only one American jurisdiction, Oregon, requires that the defendant prove this defense beyond a reasonable doubt. See discussion, MODEL PENAL CODE § 4.03, at 193 (Tent. Draft No. 4, 1955).

65. "The whole of the long paragraph in page 431 [of 49 N.H.] should I think be omitted. It relates to the burden of proof and tends to rouse the hostility of all courts that put the burden on the defendant. The bad effect of that paragraph appears in what Stone J. calls his dissenting opinion [*Parsons v. State*, 81 Ala. 577, 608 (1886) (dissenting opinion)] . . . He thinks he dissents because . . . he is inclined to doubt the soundness of any view entertained by a court who differs with him on burden of proof. The class of people influenced by such considerations is very numerous; and you don't want to alarm or irritate them unnecessarily. Therefore I should certainly omit the paragraph on the burden of proof." 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, 265-67 (no date). Judge Stone said of Doe's emphasis on the burden of proof: "He antagonized every authority I have ever seen or heard of on the subject." *Parsons v. State*, 81 Ala. 577, 608 (1886) (dissenting opinion).

behind New Hampshire,<sup>66</sup> it is also a key element in any evaluation of precedents from the one state in which the doctrine is law. This would be inherent in any legal rule which makes an issue or definition purely a question of fact. For if, as in New Hampshire, the definition of responsibility is a question of fact,<sup>67</sup> and if, as in New Hampshire, the prosecution must prove the defendant's sanity beyond a reasonable doubt,<sup>68</sup> then it follows that the defendant with a marginal or not-too-apparent degree of mental sickness will have a better chance of being found insane than if he has to prove his own insanity beyond a reasonable doubt.<sup>69</sup> The difference between Scots law and New Hampshire law then comes down to a practical difference; a difference which might or might not become important in practice when juries are asked to rule on a defendant's sanity in a very close fact situation. From this point of view the difference seems of less consequence because Scots law, even though it has a presumption of sanity, does not place on the defendant an onus as great as that on the crown, but rather makes it a question of the balance of probabilities.<sup>70</sup>

Turning now to the similarities between the New Hampshire doctrine and the Scottish approach to insanity, and laying aside the differences,<sup>71</sup> the first likeness which might be noted is that apparently neither Scotland nor New Hampshire were ever pure *M'Naghten* jurisdictions. As instructions handed down just a few months apart indicate, both Scotland and New Hampshire, while they still were adhering to *M'Naghten* terminology, went beyond the simple right-wrong test and added embellishments of their own.<sup>72</sup> Another factor to be noted is that Scotland does not employ

66. See text accompanying notes 6-11 *supra*.

67. It may be contended by some that in a *M'Naghten* jurisdiction insanity is also purely a question of fact, but this is not so. In a *M'Naghten* jurisdiction the jury is asked, as a question of fact, whether the defendant was insane at the time of the act. Insanity, itself, is not a question of fact; rather, it is defined by the court in terms of knowing or appreciating wrongfulness—terms which reflect medical thinking in 1843. In New Hampshire, on the other hand, the jury is not only asked as a question of fact whether the defendant was insane when the crime was committed, but is also asked to determine as a question of fact what constitutes insanity. It is allowed to consider, as a question of fact, the various viewpoints expressed by the alienists who testified, and need not, unless it is convinced of their wisdom, follow nineteenth century definitions.

68. For the current law in New Hampshire see the charge to the jury in *State v. De Mandel*, Rockingham State No. 4513 (1959).

69. See generally Reid, *The Working of the New Hampshire Doctrine of Criminal Insanity*, 15 U. MIAMI L. REV. 14, 24-25 (1960).

70. *H.M.A. v. Mitchell*, [1951] Just. Cas. 53-54.

71. Which, as far as this writer can evaluate, are limited to presumptions and burden of proof.

72. For example, in 1863 Scotland gave in one case tests of whether the panel knew what he was doing, knew the nature and quality of the act, apprehended and appreciated its consequences and effects, whether he knew what was right from what was wrong, whether he knew what was murder in the eye of the law or what was a punishable act, and whether he had insane delusions. *H.M.A. v. Milne*, 41 Irv. 301, 343 (1863). Two years earlier a New Hampshire jury was instructed in

the English verdict of "guilty but insane;" rather it adheres to the "not-guilty-by-reason-of-insanity" verdict used in the United States.<sup>73</sup> Also, a Scottish panel may plead generally that he is not guilty and further that he was insane at the time of the act,<sup>74</sup> just as a defendant may do in New Hampshire.<sup>75</sup>

Perhaps the most striking nonsubstantive similarity between Scotland and New Hampshire is the infrequency with which the insanity plea is employed. The defense of insanity is seldom raised in either jurisdiction.<sup>76</sup> Rather, insanity is almost always treated as a procedural matter and disposed of before trial; that is, by the New Hampshire plea of unfitness

---

almost every conceivable test (except, perhaps, the memory test), including whether the defendant was cunning in avoiding detection or able to recognize acquaintances or transact business, whether he understood the nature and character of his act and its consequences, whether he had a knowledge that it was wrong and criminal, and a mental power sufficient to apply that knowledge to his own case, and whether he knew, if he did the act, he would do wrong and receive punishment. To this New Hampshire added the irresistible impulse test as it was then defined in Massachusetts. *State v. Bartlett*, 43 N.H. 224, 225 (1861) (reporter's note).

73. "The verdict of 'guilty but insane' is not employed in Scottish practice . . . Where insanity is established as a defense the form of verdict returned by the jury is as follows:

"The jury find that the Pannel [*sic*] committed the act charged but was insane at the time of committing the same, and they therefore acquit him on the ground of insanity."

"On such a verdict being returned, the judge in terms of the Act [Lunacy Act, 1857, 20 ¶ 21 Vict., c. 71 (Scotland)] orders the accused to be detained at His Majesty's Pleasure." Lord Justice-General, Lord Cooper, *Supplementary Memorandum*, in ROYAL COMMISSION ON CAPITAL PUNISHMENT, MINUTES OF EVIDENCE 1429 (1950). The last line of Lord Cooper's memorandum marks a procedural difference between New Hampshire and Scotland. For in New Hampshire there is no statute requiring that a person acquitted by reason of insanity be committed. In a recent New Hampshire case a defendant found to have been insane at the time of the act was discharged by the court. *State v. Burns*, Merrimack State No. 6162 (N.H. 1960).

74. "The prisoner pleads generally that he is not guilty; and further, that at the time of the commission of the crime he was insane." *H.M.A. v. Miller*, 3 Coup. 16, 17 (1874).

75. A New Hampshire defendant may raise the defense of insanity either under the general issue or by a special statutory plea of "not guilty by reason of mental derangement" which has been held to be in the nature of a plea of confession and avoidance which concedes the commission of the physical act charged. *State v. Forcier*, 95 N.H. 341, 63 A.2d 235 (1949); *State v. Long*, 90 N.H. 103, 106, 4 A.2d 865, *trial court's refusal to grant new trial aff'd*, 6 A.2d 752 (1939).

76. The Scottish dependence on the plea in bar offers one of the chief contrasts between Scottish and English procedure. In Scotland the defense of insanity at the time of the commission of the criminal act is not nearly as frequent as in England, largely because of the emphasis placed on the plea in bar. Scottish witnesses testifying before the Royal Commission went to great lengths to stress this factor. They all agreed with what Lord Cooper, the Lord Justice-General, said in reply to a question about the defense of not guilty by reason of insanity: "Such cases are extraordinarily rare. The normal case, as I said a moment ago, is that insanity is pleaded in order to stop the trial. I cannot recall having ever conducted a trial where insanity was pleaded to avoid conviction. According to my information such cases are exceedingly rare." ROYAL COMMISSION ON CAPITAL PUNISHMENT, MINUTES OF EVIDENCE 437 (1950).

to stand trial<sup>77</sup> and by Scotland's plea in bar.<sup>78</sup> Perhaps because they do not define what is meant by insanity at the time of the act, there has been a tendency in both jurisdictions to confound past and present insanity when dealing with the issue as a procedural matter before trial.<sup>79</sup> This is quite evident in current New Hampshire practice;<sup>80</sup> less so in Scotland.<sup>81</sup> It may be one of the least desirable consequences of making the insanity defense a question of fact, for it is conceivable that the lack of a definite test has clouded the problem in the minds of local officials and led them to feel that the procedural issue and the substantive issue are the same.

---

77. The New Hampshire rule on fitness to stand trial has never been before the state supreme court.

78. "It means insanity which prevents a man from doing what a truly sane man would do and is entitled to do—maintain in sober sanity his plea of innocence, and instruct those who defend him as a truly sane man would do." *H.M.A. v. Brown*, 5 *Adam* 312, 343 (1907). In Scotland the plea in bar of trial is a jury issue: "It is a duty imposed on you . . . to say whether in your judgment he is in the condition of a truly sane man, who cannot only tell his counsel how to defend him, but can tell his counsel, with the certainty of not being deceived, what he was really doing at the time during which the act is said to have been committed." *Id.* at 346. *But see H.M.A. v. Miller*, 3 *Coup.* 16 (1874), where the trial judge observed that it appeared from the medical evidence the defendant could understand and answer coherently questions put to him and that therefore the defense ought to withdraw the plea of present insanity. For recent leading cases see *H.M.A. v. Wilson*, [1942] *Just. Cas.* 75; *Russell v. H.M.A.*, [1946] *S.C. (J.)* 37, [1946] *Scots. L.T.R.* 93, 1960 *CAMB. L.J.* 5, 7-8.

79. "There may, of course, be circumstances in which the question whether a man was responsible for his actions at the date when a crime was committed involves entirely different considerations from the question whether he is fit to instruct his defence; but in the present case it appears from the evidence that the mental condition of the accused is practically the same now as it was when the deed was done. I cannot but think that in such cases it would be more desirable that the determination of the question whether the accused is insane and was insane at the date when the crime was committed should be left to the jury. But the course of practice has been that, when a plea of this kind is tabled in bar, the judge should hear the evidence in support of it which is tendered by the accused, and should pronounce judgment thereon." *H.M.A. v. Sharp*, [1927] *Just. Cas.* 66, 67.

80. A study of recent New Hampshire Superior Court cases shows that, during the pre-trial stage, no effort is made to distinguish between a finding of unfitness to stand trial and a State-accepted plea of insane at the time the act was committed. In both the problem is usually treated under the heading of "insanity." The state hospital reports to the county attorney that it believes the suspect to be "insane," the county attorney passes on this report to the grand jury, and the grand jury notifies the court that "the Grand Jury omit to find an indictment against A.B. for the reason of his insanity . . ." No elaboration is given as to whether this is past or present insanity. For a typical case of this type see *State v. Tenney*, Merrimack State No. 400 & No. 408 (N.H. 1957). This case is set forth in appendix F to *Rcid, The Working of the New Hampshire Doctrine of Criminal Insanity*, 15 *U. MIAMI L. REV.* 14, 57-58 (1960).

81. In Scotland the difference in theory behind the two pleas is always kept in sight. If the jury finds the panel presently insane the trial is stopped and he is committed. If it finds he is presently sane the jury still must decide whether he was insane at the time he committed the act. *H.M.A. v. Higgins*, 7 *Adam* 229, 230-31 (1913).

If (from the point of view of practice followed in the two jurisdictions) this is a drawback to making insanity a question of fact, then it must be noted that there is an advantage by which it is far outweighed. For by making insanity a question of fact and not a matter of judicial definition, both New Hampshire and Scotland appear to have eliminated the antagonism which seems to exist in *M'Naghten* jurisdictions between the medical profession and the legal profession over the question of criminal responsibility. This has led to a favorable climate of cooperation which explains, in part, why almost all insanity pleas in New Hampshire and Scotland have been settled at a preliminary stage. The practice in New Hampshire has been recently described in a separate article.<sup>82</sup> Experience in Scotland is much the same.<sup>83</sup> In Scotland, as in New Hampshire, the prosecution, whenever it suspects that either past or present insanity may be a factor, seeks a medical determination of the issue and acts according to the medical advice which it receives.<sup>84</sup> No New Hampshire case has been found in which the State has challenged the report of court-appointed psychiatrists, and so long as the present atmosphere of cooperation exists it is unlikely that a report ever shall be challenged.<sup>85</sup> Admittedly there are flaws in this. For one thing it has led New Hampshire lawyers to rely blindly on the experts without looking behind their reports to be sure they are not limiting their findings of insanity to persons who would make

---

82. Reid, *The Working of the New Hampshire Doctrine of Criminal Insanity*, 15 U. MIAMI L. REV. 14 (1960).

83. There is one important difference. In Scotland the lack of insanity cases must be attributed to the availability of the defense of diminished responsibility as much as to the plea in bar. "The defence of insanity has been rare in modern Scottish practice, partly because a person who is certifiably insane at the time of trial is not, as a rule, in Scotland allowed to thole an assize [*i.e.*, to undergo trial], and partly because those whose mental abnormality does not amount to certifiable insanity are dealt with as cases of diminished responsibility." Smith, *Diminished Responsibility*, 1957 CRIM. L. REV. (Eng.) 354, 355.

84. "If it appears to the prosecutor that an accused person may be insane or a defective, he is bound to bring before the court any available evidence of the accused's mental condition. This information is also made available to the accused's legal advisor. In practice, reports are made to the Crown prosecutor by prison medical officers on all untried prisoners who show signs that they may be insane or defectives. In cases of murder, the accused is always examined as to his mental condition (although the statutory requirement for England and Wales does not apply to Scotland) and usually an examination is made by electro-encephalograph." *Inquiry on the Treatment of Abnormal Offenders in Europe*, 12 INT'L REV. CRIM. POLICY (U.N.) 3, 27 (1957). See also *Memorandum Submitted by the Scottish Home Department*, in ROYAL COMMISSION ON CAPITAL PUNISHMENT, MINUTES OF EVIDENCE 60 (1949); the testimony of the Crown Agent, L.I. Gordan, *id.* at 177-78; the testimony of the Vice-Dean of the Faculty of Advocates, J. Walker, *id.* at 453.

85. On the reverse side, very, very few defense counsel in New Hampshire ever challenge a finding of sanity by the state hospital. This too can be attributed, in part, to the New Hampshire doctrine, since many lawyers seem to feel that the question of fact is, for all practical purposes, resolved by the pre-trial report of the court-appointed psychiatrists. See Reid, *The Working of the New Hampshire Doctrine of Criminal Insanity*, 15 U. MIAMI L. REV. 14 (1960).



desirable hospital patients from a therapeutic point of view.<sup>86</sup> For another, Scottish courts have adopted a rather smug confidence that their practice is somehow foolproof, and have, as a result, sometimes taken positions which could be detrimental to the rights of the accused.<sup>87</sup> These are, however, flaws which could easily be corrected, and are not inherent in the system itself. Rather it would seem that New Hampshire and Scotland have, as a result of their approach to the insanity defense, worked out a practice which some commentators have been urging for many years<sup>88</sup> and which Massachusetts had hoped to accomplish with its much-publicized Briggs Law.<sup>89</sup> They have done this not by conscious effort but rather as a natural result of making insanity a question of fact, while Massachusetts, despite its famous statute, has not obtained the results it consciously sought, chiefly because it saddled the Briggs Law with the *M'Naghten*-irresistible impulse test.<sup>90</sup>

Closely tied to any policy of adjudicating insanity pleas prior to trial is the question whether the issue of insanity may be raised by the prosecution as well as by the defense. Although the question has seldom arisen, it seems to be the general common law rule that the State may not go forward and produce evidence at the trial to prove insanity over the objections of the defendant.<sup>91</sup> In a minority may be New Hampshire and

86. *Id.* at 42.

87. For example, one Scottish jury was told by the presiding judge: "Observe this: the accused is perfectly sane and fit to plead. There is no question about his sanity. If the accused were insane or were said to be insane, he would never be tried on a charge. There would be an inquiry before a judge, and if found to be insane, he would be ordered to be detained during His Majesty's pleasure . . ." *Carragher v. H.M.A.*, [1946] Just. Cas. 108, 110.

88. Weihofen, *Eliminating the Battle of Experts in Criminal Insanity Cases*, 48 MICH. L. REV. 961 (1950).

89. MASS. ANN. LAWS c. 123, § 100A (Supp. 1961).

90. Under the Briggs Law, the court-appointed psychiatrist is supposed to direct his examination towards an inquiry into the accused's appreciation of the wrongfulness of his act. "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).

91. The Royal Commission on Capital Punishment, even though it advocated the adoption of an insanity "test" somewhat similar to that of Scotland and New Hampshire, rejected the suggestion that the prosecution or the Court should be allowed to raise the issue and observed: "It has . . . been accepted as the law of England that the issue of insanity at the time of the offense may not be raised by the judge or by the prosecution, but only by the defence." ROYAL COMMISSION ON CAPITAL PUNISHMENT, REPORT CMD No. 8932 ¶ 443 (1953). Since that time the introduction by statute of the defense of diminished responsibility has created a special problem and in one case the Crown was permitted to raise the "defense" of insanity on cross-examination to "rebutt" evidence of diminished responsibility. R.

Scotland.<sup>92</sup> There is no doubt that in both jurisdictions either the court or the prosecution may raise, on its own motion, the question of present insanity, *i.e.*, whether the accused is unfit to stand trial.<sup>93</sup> A more difficult matter is whether the court or the prosecution may raise, on its own motion, the question of past insanity, *i.e.*, whether the accused was insane at the time the offense was committed. Although the matter has never been settled by appellate decision in either New Hampshire or in Scotland a strict reading of the New Hampshire statute<sup>94</sup> indicates that the court may not raise, *ex proprio motu*, the issue of past insanity; a different rule probably prevails in Scotland.<sup>95</sup> Of greater importance is whether or not the prosecution may do so. It has recently been suggested that in New Hampshire the State may raise, even over the objections of the defendant,

---

v. Bastian, [1958] 1 All. E.R. 568, 42 Crim. App. R. 75 (1958). See generally M.H.L., *Defence of Insanity or Diminished Responsibility—Calling of Witnesses by Prosecution: Onus of Proof*, 102 SOL. J. 682 (1958). See also R. v. Kemp, [1956] 3 Weekly L.R. 724, 727 (Bristol Summer Assizes).

92. For the law of South Africa see R. v. Holliday, [1924] So. Afr. L.R. 250 (App. Div.); R. v. Ngema & Cele, [1960] 1 So Afr. L.R. 137, 141 (App. Div. 1959).

93. In New Hampshire this practice is recognized by statute. N.H. REV. STAT. ANN. § 135:17 (1955). In Scotland the practice has long been recognized by custom. "Although no question as to sanity be raised by the accused, the prosecutor may raise the question, and the Court, if they see cause, will, *ex proprio motu*, investigate whether the accused be a fit subject for trial or not. It has been authoritatively decided that the Court has power either (a) to hold a preliminary inquiry as to the mental condition of the accused before calling him to plead, or (b) to call upon the accused to plead, leaving it to the jury at trial to say whether he is capable of pleading." MACDONALD, *CRIMINAL LAW OF SCOTLAND* 271 (5th ed. Walker & Stevenson 1948) (see cases cited). In one case the Solicitor General raised the issue of present insanity by asking whether the accused was capable of entering a plea. The defense counsel, claiming that his client was able to instruct him, objected. The Lord Justice-General observed: "It seems to me quite clear from the decided cases that from a very early period the Court considered it always competent if they thought it expedient, to make an inquiry into the state of a prisoner's sanity with the view of seeing whether the prisoner should be allowed to plead . . ." He ruled, however, that no preliminary investigation would be ordered since it was a question of discretion and he felt the wishes of the accused should be considered. H.M.A. v. Brown, 5 Adam 312, 321-22 (1907). In an earlier case the Crown raised the issue of insanity in bar of trial, the accused objected to the leading of this evidence, and insisted he was ready and anxious to be tried. The court held he was unfit to stand trial. H.M.A. v. Robertson, 3 White 6 (1891). For a detailed discussion of these cases, see Christie, *Insanity and Recent Criminal Practice*, 19 JURID. REV. 165, 166-69 (1907-08).

94. "When a person is indicted for any offense, or is committed to jail on any criminal charge to await the action of the grand jury, any justice of the court before which he is to be tried, if a plea of insanity is made in court, or said justice is notified by either party that there is a question as to the sanity of the respondent, may . . . order such person into the care and custody of the superintendent of the state hospital, to be detained and observed by him until further order of the court." N.H. REV. STAT. ANN. § 135:17 (1955).

95. "I have no doubt that a Scottish judge could and would raise *ex proprio motu* the issue of the accused's capacity if the necessity arose . . ." *Supplementary Memorandum Submitted by the Lord Justice General*, in ROYAL COMMISSION ON CAPITAL PUNISHMENT, MINUTES OF EVIDENCE 429 (1950).

the issue of past insanity,<sup>96</sup> and this argument is supported not only by the wording of the statute<sup>97</sup> but by long-standing policy and practice.<sup>98</sup> In Scotland there seems to be little doubt that the Crown may raise the issue of insanity at the time the act was committed, even over the objections of the accused.<sup>99</sup> While such power in the hands of the prosecution may occasionally prove detrimental to the defense,<sup>100</sup> it is an essential prop to the approach to insanity which has been developed in these two jurisdictions, especially in New Hampshire. For if, as mentioned in the last paragraph, a direct result of making the problem of criminal responsibility a question of fact in Scotland and New Hampshire has been to end the antagonism between law and medicine which still exists in most *M'Naghten* jurisdictions,<sup>101</sup> then a result of the end of this antagonism has

96. "Whether or not the State may go forward and produce evidence at the trial to prove insanity over the objections of the defendant has never been decided in New Hampshire. The statute seems to imply that it may . . . One objection is that if the jury agrees with the State and finds the defendant insane and the defendant is then committed indefinitely, he cannot appeal because technically he has been found not guilty. It is submitted that this offers no problem in New Hampshire since a State-raised issue of insanity is raised under the general issue of not guilty. The Supreme Court, therefore, might hold that a defendant who pleads not guilty and offers evidence that he is not insane to rebut the State-raised issue of insanity, yet is found 'not guilty by reason of mental derangement' as provided by the statutory plea, has the same rights of appeal as if he had been found 'guilty.'" Reid, *The Working of the New Hampshire Doctrine of Criminal Insanity*, 15 U. MIAMI L. REV. 14, 34 (1960).

97. See note 94 *supra*.

98. In New Hampshire it is standard practice for the county attorney to inform the grand jury that the suspect has been found insane by court-appointed psychiatrists and for the grand jury to omit to find an indictment for that reason. (As already noted, there is confusion whether this is past or present insanity and usually the two are confounded. See note 80 *supra*.) In two recent cases in which the grand jury omitted to indict because of insanity, the report of the state hospital referred to both past and present insanity. *State v. Zela*, Merrimack State No. 351 and No. 370 (N.H. 1958); *State v. Temey*, Merrimack State No. 400 and No. 408 (N.H. 1957). While it is likely that neither the county attorney nor the members of the grand jury stopped to consider whether they were basing their action on past or present insanity, in legal theory, at least, we must regard them as considering only past insanity since the proper function of the grand jury is limited to the probable guilt of the defendant for some past action and is not concerned with his present fitness to stand trial. Now since in these and similar cases the defendants were never represented by counsel and the issue of insanity—insanity at the time of the commission of the offense—was raised by the State, it follows that present New Hampshire practice sanctions the theory that the prosecutor may, on his own motion, raise the issue of past insanity.

99. See the testimony of Lord Keith, ROYAL COMMISSION ON CAPITAL PUNISHMENT, MINUTES OF EVIDENCE 420 (1950). *But see* *H.M.A. v. Wilson*, [1942] Just. Cas. 75.

100. The "defense of insanity" may be inconsistent with other defenses, such as self-defense or provocation, and if the prosecution introduces the "insanity defense" the defendant's chances of proving his innocence by these other defenses may be jeopardized. Griew, "Diminished Responsibility" and the *Trial of Lunatics Act, 1883*, [1957] CRIM. L. REV. (Eng.) 521, 525.

101. Justice Frankfurter and Judge Biggs have recently testified to this antagonism created by the *M'Naghten* rules. Frankfurter: "That poor creature, Daniel M'Naghten,

been an abandonment in Scotland and New Hampshire of the old theory, still current in some quarters,<sup>102</sup> that a "liberal" insanity defense will prove an escape hatch for criminals.<sup>103</sup> This in turn has led to the adoption, in New Hampshire at least,<sup>104</sup> and perhaps also in Scotland,<sup>105</sup> of a new, positive and dynamic theory, *i.e.*, that the insanity defense should be employed by the prosecution to protect the public from the mentally ill and socially dangerous. To implement this theory and give it impetus as a social policy New Hampshire prosecutors have discarded the idea that the insanity defense is important only in capital cases.<sup>106</sup> Instead, in one small county alone during the last three decades the issue of insanity<sup>107</sup> has been raised in cases involving such noncapital offenses as arson, robbery, aggravated assault, larceny, breaking and entering in the night, breaking and entering, and bigamy.<sup>108</sup> They have realized that the public may be better protected if mentally-ill criminals are hospitalized until cured rather than imprisoned for a set term and then released without regard to their present mental state.<sup>109</sup> Thus, they do not leave the detection of mentally-sick criminals to the chance that prison administrators may recognize their potential dangerousness and may seek civil commitments at the end of their sentences. This not only represents a fairer and more realistic approach, but keeps the release of these persons under the supervision of the criminal courts.<sup>110</sup> Finally, New Hampshire practice

---

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, November 3, 1952, in Note, *The Real Mhicneachdain*, 74 L.Q. REV. 321 (1958). Judge Biggs: "Homicide remains the field in which law and psychiatry are furthest apart. Here the trajectory between the two disciplines is the greatest and most constant . . . ." BIGGS, *THE GUILTY MIND: PSYCHIATRY AND THE LAW OF HOMICIDE* 116 (1955).

102. This has been given by some courts as a reason for rejecting the *Durham* rule. See *Sauer v. United States*, 241 F.2d 640, 648 (9th Cir. 1957); *Howard v. United States*, 232 F.2d 274, 283 (5th Cir. 1956). See also *In re Rosenfield*, 157 F. Supp. 18, 20 (D.D.C. 1957).

103. For a discussion of the New Hampshire doctrine and the theory that a "liberal" insanity defense will be an escape hatch see Reid, *Understanding the New Hampshire Doctrine of Criminal Insanity*, 69 YALE L.J. 367, 404-07 (1960).

104. Reid, *The Working of the New Hampshire Doctrine of Criminal Insanity*, 15 U. MIAMI L. REV. 14, 32-38 (1960).

105. At least the policy of protecting the public by weeding out and segregating mentally ill criminals seems inherent in the frequency with which Scottish prosecutors request psychiatric examinations of suspects.

106. This idea has been recently expressed by judges (*State v. Lucas*, 30 N.J. 37, 82, 87, 152 A.2d 50, 74, 77 (1959) (concurring opinion)) and by psychiatrists ("Abolish capital punishment and the dispute between lawyers and doctors ceases to be of practical importance." EAST, *SOCIETY AND THE CRIMINAL* 65 (1951)).

107. Both past and present insanity.

108. See generally Reid, *The Working of the New Hampshire Doctrine of Criminal Insanity*, 15 U. MIAMI L. REV. 14, 35 (1960).

109. *Id.* at 32-38.

110. Goldstein & Katz, *Dangerousness and Mental Illness: Some Observations on the Decision To Release Persons Acquitted by Reason of Insanity*, 70 YALE L.J. 225 (1960).

indicates a greater faith in, and a greater reliance on, psychiatric therapy to protect the public than is found in many *M'Naghten* jurisdictions.<sup>111</sup> Scottish policy accomplishes much the same thing, though its scope is not as wide as in New Hampshire since Scottish thinking still tends to associate past insanity only with capital cases.

Significant as are these historical, theoretical and procedural similarities between the New Hampshire doctrine and the Scottish approach to criminal insanity, of more importance are the two substantive principles which they share in common and which distinguish them from the legal "rules" followed in other jurisdictions, especially the *Durham* rule. First, in neither Scotland nor in New Hampshire is there a requirement that a causal connection be found between the mental disease and the criminal act. Second, in both Scotland and New Hampshire the meaning of key words such as "unsound mind" and "insanity" are questions of fact for the jury.

It must be admitted that among commentators there is disagreement whether Scotland or New Hampshire require that the jury find the defendant's mental illness caused the criminal act before he can be exculpated. Most writers have asserted that there is such a requirement. For example, citing an 1842 precedent, MacDonald says that delusion and the crime committed must be found to have a connection if insanity is to be a valid defense in Scotland.<sup>112</sup> Later case law, however, does not support this contention. In 1876, for example, the Lord Justice-Clerk referred to causation as a factor which the jury might consider to strengthen the implication of insanity but not as a requirement to prove it.<sup>113</sup> Much of the literature discussing the New Hampshire doctrine also takes the position that causation must be found by the jury. This is because of the stress on the word "product" in both the *Pike* case and the *Jones* case.<sup>114</sup> But in view of the evolution of the New Hampshire doctrine from the law of evidence, in view of the fact that at no time did

---

111. California, a *M'Naghten* jurisdiction, seems to feel there is a better way to protect the public from the mentally abnormal: "[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).

112. MACDONALD, *CRIMINAL LAW OF SCOTLAND* 10 (5th ed. Walker & Stevenson 1948).

113. "If you think that the delusion under which he thus laboured was an insane delusion, then the man's mind was not sound, and you will rightly acquit him on that ground; the more so, that the delusion led directly to the act." *H.M.A. v. Macklin*, 3 Coup. 257, 261 (1876).

114. It has been said that the probable New Hampshire meaning of the word "product" is proximate causation, Weihofen, *The Flowering of New Hampshire*, 22 U. CHI. L. REV. 356, 363 (1955), 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).

the New Hampshire judges attempt to define "product," and in view of the fact that they expressly held that all definitions of "insanity" (or "responsibility" or "mental disease," etc.) are questions of fact for the jury, the better position is that the New Hampshire doctrine does not require that a causal connection between the mental disease and the act be shown to excuse legal responsibility.<sup>115</sup> With this in mind it would seem that, despite some contradictory words,<sup>116</sup> Judge Doe expressed the New Hampshire position on causation when he said: "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."<sup>117</sup> He 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."<sup>118</sup> This shows that he intended not only the word "product" to be a question of fact,<sup>119</sup> but also *whether or not a finding of causation is necessary to be a matter for the jury.*<sup>120</sup>

The position of New Hampshire as well as Scotland was summed up by Lord Moncreiff when he told a jury, "I do not say that you must be able to connect the particular delusion with the act charged. That is the question of fact which we are engaged in ascertaining."<sup>121</sup>

The principle of leaving as questions of fact words, definitions and elements, which other approaches to criminal insanity require be spelled out and explained to the jury, is not only a characteristic which the New Hampshire doctrine shares with Scotland, but is the unique feature which separates them from *M'Naghten*, from the irresistible impulse test, from the Model Penal Code rule, and, most notably, from *Durham*.<sup>122</sup> This is

115. See generally Reid, *Understanding the New Hampshire Doctrine of Criminal Insanity*, 69 YALE L.J. 367, 392-94 (1960).

116. "An act produced by mental disease is not a crime . . . . Insanity is not innocence unless it produced the killing of his wife." *State v. Jones*, 50 N.H. 369, 370 (1871) (syllabus).

117. *Ibid.*

118. *Id.* at 376 (reporter's note).

119. For by saying, "Whether an act may be produced . . . when no connection can be discovered," Doe was telling the jury that they were to define "produced," *i.e.*, product.

120. "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 [the necessity of] causation is a question of fact and not of law." Reid, *Understanding the New Hampshire Doctrine of Criminal Insanity*, 69 YALE L.J. 367, 393 (1960).

121. *H.M.A. v. Miller*, 3 Coup. 16, 19 (1874).

122. As will be discussed below, the *Durham* court not only rejects the New Hampshire-Scottish position that the necessity of finding causation is a question of fact, but it also has held that what is meant by causation "must be explained, not

the pivot upon which both turn. And the key question of fact, the one true distinguishing aspect of New Hampshire and Scotland is that they recognize insanity to be a question of fact. Other jurisdictions claim that they too make insanity a question of fact. But what they really do is leave to the jury the narrow question whether or not, when the defendant committed the crime, he met certain "qualifications": *i.e.*, did he know what he was doing was wrong,<sup>123</sup> or was he subject to an irresistible impulse,<sup>124</sup> or did he lack substantial capacity to appreciate the criminality of his act,<sup>125</sup> or did he have a mental illness certified to by medical experts.<sup>126</sup> New Hampshire and Scotland, on the other hand, treat "insanity" as a pure question of fact. As has been often expressed in New Hampshire:

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.<sup>127</sup>

A Scottish judge demonstrated a greater talent for brevity when he told a jury the exact same thing:

The question [of insanity] is one of fact, the matter of fact being whether, when he committed the crime, the prisoner was of unsound mind. The Counsel for the Crown very properly said that this was entirely for you. It is not a question of medical science, neither is it one of legal definition, although both may materially assist you. It is a question for your common and practical sense. Was he, in your opinion, a man of sound mind on the 25th of May.<sup>128</sup>

Neither "mental disease" in New Hampshire nor "unsound mind" in Scotland is a subject of judicial definition, but the meaning of both are questions of fact for the jury.

The New Hampshire judges developed the theory that the definition of

---

merely stated." *Carter v. United States*, 252 F.2d 608, 615 (D.C. Cir. 1957).

123. *M'Naghten* rules.

124. Irresistible impulse test.

125. Model Penal Code rule.

126. *Durham* rule.

127. *State v. Jones*, 50 N.H. 369-70 (1871) (syllabus).

128. *H.M.A. v. Miller*, 3 Coup. 16, 17 (1874). "The question of sanity or insanity, that is to say, the soundness or unsoundness of the mind of the prisoner is in such an inquiry as this is a question of fact, to be judged by you on the ordinary rules on which men act in daily life. It is neither a question of law nor a question of science,—although scientific research may throw light upon the fact, and legal principle may be used to apply it. Still the question remains as one of fact for you to consider, as regards the prisoner at the bar, whether at the time this crime was committed he was or was not of unsound mind." *H.M.A. v. Barr*, 3 Coup. 261, 263 (1876).

insanity is a question of fact in much greater detail than did the Scottish judges, applying it, for example, to "tests" like the irresistible impulse test<sup>129</sup>—and, indeed, to the very teachings of medical science.<sup>130</sup> But the Scottish judges carried the doctrine to its ultimate legal conclusion when they ruled that the degree of required mental sickness dividing the defense of insanity from the defense of diminished responsibility should not be one of definition, but is a question of fact.<sup>131</sup> The Scottish courts have also been more consistent in their instructions to the jury. For, while New Hampshire judges have often begun their instructions by stating that insanity is a question of fact and then contradicted themselves by speaking of one or more aspects of insanity as though they were matters of law,<sup>132</sup> the Scottish judges have paid less attention to theory and yet, in practice, have apparently been quite uniform in applying the doctrine that insanity is a question of fact, even though there are no appellate decisions requiring they do so.<sup>133</sup>

129. "Whether it is a possible condition in nature, for a man knowing the wrongfulness of an act, to be rendered, by mental disease, incapable of choosing not to do it and of not doing it,—or whether a defendant, in a particular instance, has been thus incapacitated,—are obviously questions of fact." *State v. Pike*, 49 N.H. 399, 408, 442 (1869) (concurring opinion).

130. "Whether the old or the 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." *Id.* at 438.

131. Lord M'Laren told one jury that although the indictment read murder the evidence of the panel's mental condition at the time was such that murder could not be seriously considered. Rather, the issue was whether the defendant was so deranged as to be insane or only to a lesser degree so as to be guilty of culpable homicide by reason of diminished responsibility. "He would not lay down any general rule or definition of what constituted insanity, which enable the jury to discriminate between murder [*i.e.*, insanity] and culpable homicide [*i.e.*, diminished responsibility] where aberration of mind, induced by the misconduct of the accused, is pleaded." *H.M.A. v. Brown*, 1 White 93, 102-03 (1886). This doctrine, that the distinction between insanity (as a defense to murder) and diminished responsibility is a question of fact can be traced back to Lord Deas, the originator of the defense of diminished responsibility, who told a jury: "[I]n a question between murder and culpable homicide, it was not incompetent for the jury to take into account the weak or diseased state of the panel's mind at the time of the act, whether arising from *delirium tremens*, not amounting to insanity, or from some other disease or infirmity which might reasonably appear to them to form an important element in extenuation of the offence." *H.M.A. v. Granger*, 4 Coup. 110-111, 16 Scot. L.R. 253, 261 (Cir. Ct. Just. 1878). For a more recent case see *H.M.A. v. Muir*, [1933] Just. Cas. 46, 48-49, [1933] Scots L.T. 403 (High Ct. Jnst.).

132. Since *State v. Jones* the New Hampshire courts have, with a few exceptions, recognized that the definition of "insanity" is a question of fact for the jury. They have not always, however, regarded the New Hampshire doctrine as making the ancillary aspects of insanity also questions of fact. Thus there are some cases in which the court told the jury that they must find causation, and other cases in which it was held that the insanity must destroy "intent" if it is to exculpate. See the cases in Reid, *The Working of the New Hampshire Doctrine of Criminal Insanity*, 15 U. MIAMI L. REV. 14 (1960), especially the instructions in the cases set forth in appendix C, *id.* at 50.

133. In Scotland there is no *State v. Jones* to guide the judges, yet, as Lord Keith



In summing up, it can be said that the New Hampshire doctrine and the Scottish approach to criminal insanity not only share procedural similarities but are almost identical in substantive law as well.

#### IV. THE NEW HAMPSHIRE-SCOTLAND APPROACH COMPARED TO OTHER SOLUTIONS OF THE RESPONSIBILITY PROBLEM

To fully understand and appreciate the New Hampshire doctrine and the Scottish approach to criminal insanity, it is necessary to explore not only the areas in which they are similar to each other but also the ways in which they differ from the more orthodox rules for determining criminal insanity, *i.e.*, the rules which define insanity by using formulated "tests" which the jury must follow. In the United States there are five tests. They are the *M'Naghten* rules, the irresistible impulse test, the Model Penal Code rule, the *Currens* test, and the *Durham* rule.

##### A. *The M'Naghten Rules*

As has already been noted, both the New Hampshire and the Scottish positions on criminal insanity are many light years in advance of the *M'Naghten* rules with which they share very little in common. About the only difference between Scotland and New Hampshire in this regard is that Scotland rejected the "right-wrong" approach,<sup>134</sup> while New Hampshire expressly rejected *M'Naghten* itself.<sup>135</sup>

---

testified, they follow in practice, to a remarkable degree, the theory of the New Hampshire doctrine:

"5216. (Mr. *Fox-Andrews*): When the defence of insanity is raised, does the presiding judge in directing the jury inform them what amounts to insanity for their purpose?—[The Hon. Lord Keith] as I said, my own experience of what a judge does in such a case is limited. The judge may well direct the jury that on all the evidence that they have heard, they have to consider whether this man is insane or not, treating it perhaps as a question of fact on the evidence. I am not satisfied that he would necessarily refer to the *M'Naghten* Rules.

"5217. I follow that, but I tried before, I see, in August of last year, to get an answer to this question from another witness. It may be there is not an answer, or it may be that the answer is—'No, he does not tell them what insanity is'—but I should like to know if you could help us. In such a case does the presiding judge tell the jury what for their purpose amounts to insanity?—I would say he does not do so categorically.

"5218. Or at all?—Some judges might and some might not. I do not think I can go further than that.

"5219. It rather sounds as though in effect he says—'looking at the whole of the evidence, do you think this man is insane or not?' Would you think that is a fair representation as to what does happen?—And leaving it to the jury?

"5220. Yes?—I think in many cases that is the way a judge would deal with the matter." ROYAL COMMISSION ON CAPITAL PUNISHMENT, MINUTES OF EVIDENCE 419 (1950).

134. See note 54 *supra* and note 144 *infra*.

135. See Judge Ladd's discussion in *State v. Jones*, 50 N.H. 369, 388 (1871).

### B. The "Irresistible Impulse" Test

The New Hampshire judges also expressly rejected the irresistible impulse test because, they said, it invaded an area which was properly a question of fact.<sup>136</sup> Since it is generally believed that the defense of diminished responsibility was "introduced because it is felt that human personality is so complex that one has to recognize degrees in mental conditions,"<sup>137</sup> it has been suggested that the Scottish judges who formulated it had in mind the problem of the irresistible impulse or lack of self-control.<sup>138</sup> But the truth is that diminished responsibility was designed to alleviate a harsh situation which in many jurisdictions was taken care of by dividing murder into degrees.<sup>139</sup> In actual fact, the idea of impulsiveness as a judicial "test" for criminal responsibility was frowned upon in Scotland as early as 1874 and the broader approach was deliberately followed.<sup>140</sup>

136. "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) (Doe, J., concurring). See also *State v. Jones*, 50 N.H. 369, 390 (1871).

137. ROYAL COMMISSION ON CAPITAL PUNISHMENT, MINUTES OF EVIDENCE 440 (1950).

138. This has been suggested by Lord Cooper, among others. ROYAL COMMISSION ON CAPITAL PUNISHMENT, MINUTES OF EVIDENCE 440 (1950). Lord Keith thought it a reaction against the rule that capital punishment had to be imposed in all murder convictions. *Id.* at 419; Lord Keith of Avonholm, *Some Observations on Diminished Responsibility*, 1959 JURID. REV. 109, 110.

139. Lord Deas thought his doctrine of diminished responsibility was based on a principle of natural justice which found expression in other nations where murder was divided into degrees. *H.M.A. v. Ferguson*, 4 Coup. 552, 558, 19 Scot. L.R. 341 (High Ct. Just. 1881). See also Smith, *Diminished Responsibility*, 1957 CRIM. L. REV. (Eng.) 354, 356.

140. "It is not whether the impulses or passions by which he was actuated were too strong for his power of moral restraint—which in a greater or less degree may be true of every man—but whether, in the ordinary relations of life, you think it proved that the prisoner was or was not responsible for his actions—was he a man whom you would have been prepared to treat, upon the evidence before you, in the ordinary dealings between man and man, as one who was not responsible for his actions in respect of his mind being diseased?" *H.M.A. v. Barr*, 3 Coup. 361, 364 (1874). This points up rather clearly the differences in the theory behind New Hampshire and Scotland. Judge Doe rejected the irresistible impulse test because it invaded what was properly a question of fact. Note 140 *supra*. Here the Lord Justice-Clerk did not follow theory quite so closely. He rejected it because it was not the proper issue. The proper issue was whether the accused had a diseased mind (the definition of which was a question of fact). In so doing he moved in the direction of a test of civil committability, though he did not propose it. There is a danger that Scotland has been moving more and more in that direction lately, perhaps due to the emphasis placed on settling the insanity issue at the pre-trial stage. Some Scots seem to feel criminal insanity means certifiable insanity, and that anything less is dealt with by the defense of diminished responsibility. See Smith, *Diminished Responsibility*, 1957

*C. The Model Penal Code Rule*<sup>141</sup>

It has been suggested that the Model Penal Code proposes to test criminal capacity by a "standard" rather than by a "rule."<sup>142</sup> From a New Hampshire point of view this is meaningless semantics for even if called the "substantial capacity standard" this is still a test which limits the jury to the question whether the defendant had substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. As such it is an invasion of the fact-finding function of the jury and no matter how many experts and criminologists slaved over its formulation it would have been rejected by the New Hampshire judges for turning fact into law.<sup>143</sup> When the Scottish approach was first being devised, Lord Deas employed some of the Model Penal Code's terminology, notably the word "capacity," and also the idea that the inquiry should be directed to the accused's appreciation of the *legal* wrongfulness of his act.<sup>144</sup> Since then, however, there has been no effort to follow his lead. Over eighty years before the Model Penal Code rule was drafted, the philosophy behind it was rejected by the Lord Justice-Clerk in a paragraph which not only also rejected *M'Naghten* but summed up Scottish case law in regard to both:

On the other hand, it is entirely imperfect and inaccurate to say that if a man has a conception intellectually of moral or legal obligation, he is of sound mind. Better knowledge of the phenomena of lunacy has corrected some loose and inaccurate language which lawyers used to apply in such cases. A man may be entirely insane, and yet know well enough that an act which he does is forbidden by law. Probably a large proportion of those who occupy our asylums are in that position. It is not a question of knowledge, but of soundness of mind. If the man have not a sane mind to apply his knowledge, the mere intellectual apprehension of an injunction or prohibition may stimulate his unsound mind to do an act simply because it is forbidden, or not to do it because it is enjoined. If a man has a sane appreciation of right and wrong he is certainly responsible; but he may form and understand the idea of right and wrong and yet be hopelessly insane. You may discard these attempts at definitions altogether. They only mislead.<sup>145</sup>

---

CRIM. L. REV. (Eng.) 354, 355.

141. See note 57 *supra*.

142. PERKINS, CRIMINAL LAW 766 (1957).

143. "The law does not change with every advance of science . . ." *State v. Pike*, 49 N.H. 399, 438 (1869) (Doe, J., concurring). See quotation at note 132 *supra*.

144. "[I]t was for the common sense of a jury to determine whether at the time he committed the act he had capacity enough to know the act was contrary to law and punishable by the law . . ." *H.M.A. v. Dingwall*, 5 Irv. 466, 479 (1867). In another case the judge put the question of insanity to the jury on all the evidence but qualified the question of fact by saying *weakness of mind* could not be insanity where the defendant knew he was breaking the law and could be punished. *H.M.A. v. Ferguson*, 4 Coup. 552, 557-58, 19 Scot. L.R. 341, 342 (High Ct. Just. 1881).

145. *H.M.A. v. Miller*, 3 Coup. 16, 18 (1874). Quoted with approval in *H.M.A. v. Sharp*, [1927] Just. Cas. 66, 69, [1928] Scots L.T. 26, 28 (High Ct. Just. 1927).

#### D. The "Currens" Test

The newest formula for determining criminal insanity is the Third Circuit's *Currens* test.<sup>146</sup> It is nothing more than the second half of the Model Penal Code rule, an extension of the "irresistible impulse" idea.<sup>147</sup> It is, therefore, a test for responsibility in the form of a single question<sup>148</sup> which the New Hampshire judges would have found even more unsatisfactory than the Model Penal Code rule.<sup>149</sup> It will also gain little favor in Scotland. As the Lord Justice-Clerk observed in the paragraph just quoted:

If the man have not a sane mind to apply his knowledge, the mere intellectual apprehension of an injunction or prohibition may stimulate his unsound mind to do an act simply because it is forbidden, or not to do it because it is enjoined.<sup>150</sup>

#### E. The "Durham" Rule<sup>151</sup>

Because so much of the current literature dealing with insanity as a defense in criminal law has been devoted to discussing the *Durham* rule and because so many of the writers on the subject have identified the New Hampshire doctrine and the *Durham* rule as one, an understanding of New Hampshire can best be obtained by understanding how it differs from *Durham*. For the same reason, the American reader can gain a better appreciation of the uniqueness of the New Hampshire-Scottish approach

146. *United States v. Currens*, 290 F.2d 751 (3d Cir. 1961).

147. Feeling that the first or "cognitive" section of the Model Penal Code rule overemphasizes the rational element in criminal responsibility and, being little more than surplusage, tends to distract the jury from the crucial issues, the Third Circuit accepted only the second or "volitional" section and formulated its test in the following terms: "The jury must be satisfied that at the time of committing the prohibited act the defendant, as a result of mental disease or defect, lacked substantial capacity to conform his conduct to the requirements of the law he is alleged to have violated." *Id.* at 774.

148. A question which would limit competent psychiatric testimony to volition alone and make the jury's task disarmingly simple whenever an accused admits he would not have committed the act had a policeman been at his side. It would seem then that the author of the *Currens* rule has done the very thing he once criticized the *Durham* judges of doing—he has formulated a test which might, if not handled perceptively, lead blindly down the path of retrogression by putting emphasis upon monomania. See BIGGS, *THE GUILTY MIND: PSYCHIATRY AND THE LAW OF HOMICIDE* 155 (1955).

149. It is interesting to note that for purposes of summarily dismissing the New Hampshire doctrine in the *Currens* case, Judge Biggs said it was the same as the *Durham* rule even though, in his book, he recognized differences and called New Hampshire "a more straightforward solution." BIGGS, *THE GUILTY MIND: PSYCHIATRY AND THE LAW OF HOMICIDE* 156 (1955).

150. *H.M.A. v. Miller*, *supra* note 145.

151. Besides the District of Columbia, the *Durham* rule is law in Maine, ME. REV. STAT. ANN. c. 149, § 38-A (Supp. 1961), and the Virgin Islands, V.I. CODE tit. 14, § 14 (1957).

to criminal insanity by understanding how it is similar to, and in what respects it differs from, the *Durham* rule.

### 1. *Presumption of Sanity*

On the question over which New Hampshire law differs most sharply from Scots law, *i.e.*, whether there is a presumption of sanity, the *Durham* rule stands between the New Hampshire position that such a presumption is an unwarranted usurpation by the court of the fact-finding function of the jury and the Scottish position that the accused must prove his sanity by a balance of probabilities. The District of Columbia's rule is 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.'"<sup>152</sup> In assigning the burden of persuasion to the Government, New Hampshire and *Durham* are in accord. They part company over the issue whether the "presumption of sanity" is evidence which the jury may consider and weigh along with evidence directly testified to. It appears to be the law in the District of Columbia that the trial court may direct the jury to consider the presumption of sanity along with other evidence.<sup>153</sup> In New Hampshire it would probably be improper.<sup>154</sup>

### 2. *Pre-trial Observation*

As in New Hampshire and Scotland the prosecutor in the District of Columbia may, and frequently does, move for psychiatric examination of the defendant prior to trial.<sup>155</sup> Pre-trial observation is an integrated and indispensable part of the approach to the insanity problem in all three jurisdictions. The difference between *Durham* on the one hand and Scotland and New Hampshire on the other is that in the District of Columbia the lower courts have a duty to direct the scope of the examination.<sup>156</sup> While this seems proper and desirable,<sup>157</sup> it was carried to an extent alien

152. *Tatum v. United States*, 190 F.2d 612, 615 (D.C. Cir. 1951). This rule was affirmed in *Wright v. United States*, 250 F.2d 4, 7 (D.C. Cir. 1957).

153. *Douglas v. United States*, 239 F.2d 52, 55 (D.C. Cir. 1956) (dictum).

154. Judge Doe felt such an instruction would be wrong, not only because it confused law with fact, but because it made the plaintiff produce more than a preponderance of the evidence, when, as a matter of New Hampshire law, "it was not necessary for the plaintiff to produce anything more than the slightest preponderance; or to produce a preponderance of any thing but evidence." *Lisbon v. Lyman*, 49 N.H. 553, 563 (1870). Earlier when Doe made the same argument in the *Pike* case, Judge Jeremiah Smith, speaking for the majority, dismissed it by observing that a presumption of sanity is, in many cases, "a question merely verbal; a question of the propriety of certain forms of expression." *State v. Pike*, 49 N.H. 399, 408 (1869).

155. *Winn v. United States*, 270 F.2d 326 (D.C. Cir. 1959).

156. *Calloway v. United States*, 270 F.2d 334 (D.C. Cir. 1959). In an earlier case it was stated that the prosecution has a similar duty. *Blunt v. United States*, 244 F.2d 355, 364 n.23 (D.C. Cir. 1957).

157. The Model Penal Code attempts to meet the problem by spelling out what the report of the examination must contain. MODEL PENAL CODE § 4.05(3) (Tent. Draft No. 4, 1955).

to New Hampshire law, and perhaps also to Scots law, when the court of appeals, in reversing one case, told the psychiatrist that from a medical as well as legal point of view he had conducted an improper examination (even though it had satisfied the trier of facts) and informed him how he should have conducted it.<sup>158</sup> Such a pronouncement is an inherent danger of any legal doctrine which seeks to solve the problem of criminal insanity with medical formulae—as *Durham* does. The District of Columbia judges, in searching for their rule, studied the works of psychiatrists;<sup>159</sup> in adopting the school of thought they felt most attractive, they enshrined in legal dogma what previously had been medical theory.<sup>160</sup> By coming to the judicial conclusion that there is such a thing as “bad” medicine,<sup>161</sup> and by convincing themselves that they had unriddled the enigma that had baffled jurisprudents ever since Daniel M’Naghten was found “not guilty,” the *Durham* judges wrote into their rule the subaudition that, if they extirpate law for medicine, then medicine must reciprocate by abandoning “bad” practice in favor of the psychiatric theories endorsed by the court. The logical result, therefore, was that the court of appeals, sitting as a board of medical experts, should not only overturn jury verdicts on the ground that they were contrary to the evidence of accepted and approved alienists,<sup>162</sup> but should also tell psychiatrists how to conduct their medical examinations. This would be improper in any jurisdiction making insanity a question of fact, for there the approbation of expert testimony, as well as the validity of the methods alienists use in arriving at their conclusions

158. “For all that appears in the record before us, the witness obtained all his information from appellant. Thus, although appellant blamed his marital difficulties, it is not shown that the psychiatrist obtained any information from appellant’s wife. Nor does it appear that the psychiatrist had the benefit of any information from appellant’s employer or co-workers, who testified at the trial that after 1956 appellant had changed ‘terribly,’ that he stared into space, talked to himself, was upset, moody, brooding, and looked like he was going to ‘crack up.’ It may be that the psychiatrist viewed this information as unnecessary for a determination of trial competency. But such information is an essential part of the supporting data which makes the experts opinion meaningful upon the issue of criminal responsibility.” *Calloway v. United States*, 270 F.2d 334, 335 n.1 (D.C. Cir. 1959).

159. “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.” *Howard v. United States*, 232 F.2d 274, 283 (5th Cir. 1956) (Cameron, J., dissenting).

160. “[T]his is what the language of the *Durham* decision does. It reifies 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).

161. “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 . . .” *Durham v. United States*, 214 F.2d 862, 874 (D.C. Cir. 1954).

162. The cases are discussed below.

and the authenticity of the theories to which they prescribe, are for the determination of the triers of fact.<sup>163</sup>

### 3. Rejection of the "Tests" for Insanity

As New Hampshire and Scotland, the *Durham* court specifically rejected the orthodox tests for insanity.<sup>164</sup> And one *Durham* case contains words which come near to endorsing the New Hampshire position that the correctness of these tests is now a question of fact.<sup>165</sup> But the *Durham* rejection was not based (as was New Hampshire's) on the theory that the law is not concerned with the validity of any medical theory; rather, it was based (as was Scotland's) on the belief that the orthodox tests were inadequate.<sup>166</sup> Unlike Scotland and New Hampshire the *Durham* court did not make the weight to be given the right-wrong theory a question of fact for the jury. Instead it said that knowledge of right and wrong (while no longer the sole test of criminal responsibility) was a "symptom" of mental disease<sup>167</sup> and, later, that it was as a matter of law "one of the earmarks of legal insanity."<sup>168</sup> The same is true of the "irresistible impulse" test which also was found inadequate.<sup>169</sup> Its validity has not been recognized as a pure question of fact but apparently it, too, is a symptom which "the court may permit the jury to consider."<sup>170</sup> As a result of this approach the *Durham* court has not only failed to reject the orthodox tests in the sense that Scotland and New Hampshire have rejected them, but has caused confusion and difficulty for lower court judges. For example one judge came to the conclusion that the jury must be given the orthodox tests in addition to the *Durham* rule.<sup>171</sup> This would be error in New Hampshire and it would be contrary to practice in Scotland.

---

163. It seems a fair guess that a *Durham* court would have overturned the conviction in *State v. Long*, 90 N.H. 103, 4 A.2d 865, *trial court's refusal to grant new trial aff'd*, 6 A.2d 752 (1939).

164. *I.e.*, *M'Naghten* and the "irresistible impulse" test. *Durham v. United States*, 214 F.2d 862, 874 (D.C. Cir. 1954).

165. "In so holding, however, we did not purport to bar all use of the older tests: testimony given in their terms may still be received if the expert witness feels able to give it, and where a proper evidential foundation is laid a trial court should permit the jury to consider such criteria in resolving the ultimate issue 'whether the accused acted because of a mental disorder.' In aid of such a determination the court may permit the jury to consider whether or not the accused understood the nature of what he was doing and whether or not his actions were due to a failure, because of mental disease or defect, properly to control his conduct." *Douglas v. United States*, 239 F.2d 52, 58 (D.C. Cir. 1956).

166. See note 158 *supra*.

167. *Durham v. United States*, 214 F.2d 862, 874-75 (D.C. Cir. 1954).

168. *Wright v. United States*, 250 F.2d 4, 12 (D.C. Cir. 1957).

169. See note 161 *supra*.

170. See note 165 *supra*.

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

#### 4. Definition of Words

One of the most significant distinctions between the New Hampshire-Scottish approach to criminal insanity and the *Durham* rule, is whether words should be explained and defined. The *Durham* position was summed up in *Carter v. United States*:

A trial judge faced with a defense of insanity in a criminal case ought not attempt to be brief or dogmatic. He ought to explain—not just state by rote but explain—the applicable rules of law and the duties of the jury in respect to the matter. He should explain not only in general terms but in terms applicable to the disease and the act involved in the case at bar.<sup>172</sup>

The difficulty with this from a New Hampshire-Scottish point of view is twofold. First, as the explanation becomes more elaborate the definition of “insanity” becomes less a question of fact and more a matter of law.<sup>173</sup> Second, the explanation has itself sometimes become a definition, as for example, the *explanation* of “mental disease and mental defect.” The undesirable aspects of this are also twofold, and can easily be appreciated by considering the consequences the *Durham* court has encountered as a result of defining “mental disease” and “mental defect.” First, it has led to a semantic difficulty for both court<sup>174</sup> and counsel.<sup>175</sup> Second, it has led the *Durham* court to adopt positions from which it has later backed down.<sup>176</sup> This demonstrates the inherent fault of the *Durham* rule. It

172. *Carter v. United States*, 252 F.2d 608, 618 (D.C. Cir. 1957).

173. “One precedent is held to justify another. Every matter of fact turned into law, opens the way for a further annexation of the province of the jury to the province of the court, and a gradual absorption.” *State v. Hodge*, 50 N.H. 510, 524-25 (1869) (Doe, J.).

174. “Hereafter for simplicity’s sake we will say simply ‘disease,’ but in so doing we mean to include ‘defect.’” *Carter v. United States*, 252 F.2d 608, 615 n.10 (1957).

175. One counsel stopped to define what he meant. “Mental disease is used in this brief, except where it appears in direct quotations, to mean a medically recognized abnormal mental condition. It may include ‘mental disease,’ a deterioration of mental condition occurring at and after a definite point in life, and ‘mental defect,’ a disorder existing at or near birth.” Brief for Amicus Curiae, p. 16 n.1, *Stewart v. United States*, 214 F.2d 879 (D.C. Cir. 1954).

176. For example, the *Durham* court, because it regarded such terms to be definable as a matter of law, held that it was *not error* for a trial court to charge the jury that an alienist had testified that he found “no mental disease whatever in the defendant” even though the doctor had said, “We found, at least in our opinion, he had what is known as a personality disorder, specifically, sociopathic personality disturbance.” *Lyles v. United States*, 254 F.2d 725, 729 n.4 (D.C. Cir. 1957). This decision was handed down at a time when Saint Elizabeths regarded sociopathy not to be a mental disease or mental defect. *Briscoe v. United States*, 248 F.2d 640, 644 n.6 (D.C. Cir. 1957). Therefore, the court of appeals, since it thought proper to define such terms as “mental disorder,” could find no error in this case. But when Saint Elizabeths reversed itself and announced that henceforth sociopaths would be regarded as criminally insane, the circuit court also reversed itself and said that sociopaths should be considered as coming within the meaning of disease and defect. *Blocker v. United States*, 274 F.2d 572 (D.C. Cir. 1959). This is a clear example of *Durham’s* reliance upon medicine and is one of the clearest areas in which it differs from New Hampshire and Scotland.



seeks to escape the unrealistic boundaries of the orthodox tests, yet at the same time control the jury's verdict. Thus, while it has professed to make the definition of "mental disease and mental defect" as much a question of fact as is the definition of "mental disease" in New Hampshire or the definition of "unsound mind" in Scotland, it has failed to do so. By defining the distinction between "disease" and "defect" (a distinction which seems to have no pragmatic purpose), it has opened the door to a definition of the phrase "mental disease and mental defect" itself.<sup>177</sup> When this happens, criminal insanity is no longer a question of fact.<sup>178</sup>

### 5. Causation

Among the terms which *Durham* courts are supposed to "explain" is the phrase "product of."<sup>179</sup> This forms another clear demarcation between *Durham* and the New Hampshire-Scottish approach to criminal insanity. For, as has already been discussed,<sup>180</sup> New Hampshire and Scotland not only make the definition of causation a question of fact but they also make *the necessity of finding causation a question of fact*. In the *Durham* case the court laid down, as a matter of law, that a causal connection must be found between the mental disease and the criminal act to exculpate.<sup>181</sup> In later cases the court defined the amount of causation required in terms of "but for"<sup>182</sup> and as a "relationship between the disease and the criminal act . . . such as to justify a reasonable inference that the act would not have been committed if a person had not been suffering from the disease."<sup>183</sup> What the *Durham* court has done, in effect, is limit the definition of "mental disease and mental defect" (*i.e.*, "insanity") to those types of mental disorders which lend themselves to a causal connection. This can be objected to from a *Durham* point of view since it could be bad medi-

177. As, for example, sociopathy. See *ibid.*

178. Thus in the one New Hampshire case which has confused the New Hampshire doctrine with the *Durham* rule, the court decided it had to define what it meant by the phrase "mental disease and mental defect." *State v. De Mandel*, Rockingham State No. 4513 (N.H. 1959). See discussion in Reid, *The Working of the New Hampshire Doctrine of Criminal Insanity*, 15 U. MIAMI L. REV. 14, 30-31 (1960).

179. "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 608, 615 (D.C. Cir. 1957).

180. See text accompanying notes 112-21 *supra*.

181. In its model charge the 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." *Durham v. United States*, 214 F.2d 862, 875 (D.C. Cir. 1954).

182. *Douglas v. United States*, 239 F.2d 52 (D.C. Cir. 1956). See also 7 BUFFALO L. REV. 303 (1958); 19 U. PITT. L. REV. 671 (1958); 2 VILL. L. REV. 263 (1957).

183. *Carter v. United States*, 252 F.2d 608, 616 (D.C. Cir. 1957).

ciné.<sup>184</sup> More significantly, it can be objected to from a New Hampshire point of view since it makes "insanity" a matter of legal definition and not a question of fact. Of perhaps the greatest significance, however, has been the extension of the causality requirement in post-*Durham* cases. In *Carter v. United States* the court held that the trial judge must tell the jury that in order to convict it has to find "that beyond reasonable doubt no relationship existed between the disease and the alleged criminal act which would justify a conclusion that but for the disease the act would not have been committed."<sup>185</sup> This not only has placed on the prosecution a burden extremely difficult to meet forensically,<sup>186</sup> but it has made the *Durham* rule the target of many justified animadversions<sup>187</sup> which cannot be leveled at either the New Hampshire doctrine or at the Scottish approach to criminal insanity.

#### 6. Role of the Expert Witness

Perhaps the most difficult problem to be dealt with by any rule which seeks to make insanity a question of fact is the role to be played by the expert medical witness. Or more particularly, whether expert opinion should be given greater weight than lay opinion. Originally the New Hampshire court excluded from evidence the opinions of nonexpert witnesses on the question of mental capacity.<sup>188</sup> It was on this point that Doe dissented from the majority in *State v. Pike*.<sup>189</sup> Believing that "best evidence" should always be given to the triers of fact, he insisted it was illogical to make insanity a question of fact while at the same time withholding from the jury some of the most important facts bearing on the issue. He made the admission of nonexpert opinion testimony one of the

184. Some psychiatrists object to the notion of cause as a test for relating mental disease to legal responsibility: "Mental disease does not cause one to commit a crime nor does mental illness produce a crime. Behavior and mental illness are inseparable—one and the same thing." Roche, *Criminality and Mental Illness—Two Faces of the Same Coin*, 22 U. CHI. L. REV. 320, 322 (1955). In fact, psychiatrists may even prefer the New Hampshire-Scottish solution of making causation a question of fact to the *Durham* rule which was formulated for their benefit. The same author has observed that "if mental illness causes some to commit crimes, and not others, do we have a reliable method of discriminating those crimes which have no causal nexus with mental illness? . . . the answer is that psychiatry has yet to discover a method. . . . I would submit that if the product question is withheld from the expert and confided to the triers, psychiatry can function properly." ROCHE, *THE CRIMINAL MIND* 260-66 (1958).

185. *Carter v. United States*, 252 F.2d 608, 618 (D.C. Cir. 1957).

186. "In our experience psychiatrists generally are unwilling or unable to give testimony on the absence of causality, particularly to the extent required by the Government." Gasch, *Prosecution Problems Under the Durham Rule*, 5 GATHOLIC LAW. 5, 21 (1959).

187. For Jerome Hall's penetrating indictment of the *Durham* rule on this score see HALL, *CRIMINAL LAW* 500-18 (2d ed. 1960).

188. *Boardman v. Woodman*, 47 N.H. 120 (1865).

189. 49 N.H. 399, 408 (1869) (Doe, J., dissenting). See also *Boardman v. Woodman*, 47 N.H. 120, 140 (1865) (Doe, J., dissenting).

cornerstones of the New Hampshire doctrine;<sup>190</sup> it was not until a few years later, when the supreme court accepted his arguments and held that laymen could be asked to give their opinions as to someone's capacity,<sup>191</sup> that the New Hampshire doctrine, as it was originally formulated by Doe,<sup>192</sup> was adopted completely. Implicit in Doe's thesis is the principle that the jury should be allowed to attribute whatever weight it feels proper to both expert opinion and lay opinion, accepting or rejecting as it sees fit, and need not be bound to accept expert testimony merely because the only contradictory evidence came from lay witnesses. For, after all, this is the ultimate question of fact. Lord Moncreiff, in a Scottish case, went one step further than Doe, and told a jury that "medical opinion is a mere fact" which it was to weigh according to its best judgment.<sup>193</sup> The *Durham* court has also professed to take a similar view.<sup>194</sup> Here again, however, *Durham* practice has not synergized with *Durham* theory. Shortly after *Durham* was handed down, a commentator observed that

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 *juridical* (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.<sup>195</sup>

In *Douglas* the *Durham* judges cast their lot with the psychiatrist. They held that the rule that a verdict must not be disturbed because it is contrary to expert testimony is "not authority for disregarding expert testimony. It must be considered with the other evidence, not arbitrarily rejected."<sup>196</sup> With this as its theme, the *Durham* court has consistently reversed jury

---

190. Reid, *A Speculative Novelty*, 39 B.U.L. REV. 321, 337-40 (1959); Reid, *Understanding the New Hampshire Doctrine of Criminal Insanity*, 69 YALE L.J. 367, 370-76 (1960).

191. *Hardy v. Merrill*, 56 N.H. 227 (1875). This was a civil case which expressly adopted what Doe asserted in *Boardman*. *Id.* at 252. In a later case involving the defense of criminal insanity, the court said: "The dissenting opinion relative thereto [*i.e.*, lay opinion evidence] in *State v. Pike* . . . now prevails as authority." *State v. Hause*, 82 N.H. 133, 136, 130 Atl. 743, 745 (1925).

192. In a probate case. *Boardman v. Woodman*, 47 N.H. 120, 140 (1865) (dissenting opinion).

193. "Now as to the fact of soundness or unsoundness, that is not to be taken merely on medical opinion; but medical opinion is a mere fact, more or less important according to the knowledge of the patient possessed by the witnesses." *H.M.A. v. Miller*, 3 Coup. 16, 18 (1874).

194. "Durham was intended to restrict to their proper medical function the part played by the medical experts." *Carter v. United States*, 252 F.2d 608, 617 (D.C. Cir. 1957).

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

196. *Douglas v. United States*, 239 F.2d 52, 59 (D.C. Cir. 1956).

verdicts, either because it felt the jury had "arbitrarily rejected" some expert testimony<sup>197</sup> or because it felt the jury had rendered a verdict which expert testimony did not sustain, especially on the grounds that the prosecution had failed to prove there was no causation.<sup>198</sup> This is completely at variance with the New Hampshire-Scottish approach of making insanity a question of fact, an approach which ironically has been best expressed by a dissenting *Durham* judge.<sup>199</sup> The sharp incongruence between *Durham* and New Hampshire was delineated by two cases involving the opinion evidence of peace officers. The *Durham* court looked askance upon the opinions of the policemen and dismissed their testimony as to the sanity of the defendant as dubious stuff which no jury was capable of evaluating in its proper light.<sup>200</sup> The New Hampshire court has not only sustained the testimony of a sheriff that the defendant had winked at him while undergoing "an examination of his mental condition by medical experts," but saw no error in the fact that the trial judge himself had asked the witness what he thought the wink meant or that the witness had replied that it was his opinion the defendant was dissembling.<sup>201</sup> The court felt it was for the jury to say what weight should be given this evidence. There is authority to sustain the view that on this point Scots law is closer to New Hampshire law than to *Durham*. At least the judges who formulated the Scottish approach to criminal insanity felt that as a

---

197. "[S]ome of the doctors who examined Wright were unable to say that he was mentally ill at the time of the shooting. But this does not detract from the testimony of the doctors who were able to state an opinion that he was ill at that time." *Wright v. United States*, 250 F.2d 4, 8 (D.C. Cir. 1957). As the dissent pointed out, the medical testimony was extremely shaky. *Id.* at 15-17 (dissenting opinion).

198. "We find it impossible to hold in the face of the generally uniform testimony of the three disinterested psychiatrists, the only ones who testified that this test [*i.e.*, 'exclusion beyond reasonable doubt of the hypothesis that the conduct was caused by a diseased mind'] essential to the validity of the verdicts was met." *Douglas v. United States*, 239 F.2d 52, 59 (D.C. Cir. 1956). "The emphasis by the Circuit Court, in reversing repeated convictions, is on the failure of the prosecution to establish beyond a reasonable doubt that the act was *not* the product of the disease." HALL, GENERAL PRINCIPLES CRIMINAL LAW 506 (2d ed. 1960).

199. "Yet the testimony of the only witnesses who had observed Wright on the day of the murder was that he was then of sound mind. These witnesses were laymen, to be sure, but their testimony was indisputably admissible; and the verdict shows it was convincing as well. Apparently the majority view is that the testimony of five psychiatrists who thought Wright was insane when he killed his wife so overwhelmed the contrary testimony of lay witnesses that the jurors were unreasonable in not accepting their opinion. The majority say there was no conflict in the medical testimony [see note 197 *supra*]; even if that were correct, its clash with the lay testimony would nevertheless form an issue of fact for the jury." *Wright v. United States*, 250 F.2d 4, 14-15 (D.C. Cir. 1957) (dissenting opinion).

200. "What we have said elsewhere about an opinion of sanity expressed by an untrained lay witness having no prolonged and intimate contact with the accused disposes of the testimony of the policemen in this case." *Fielding v. United States*, 251 F.2d 878, 880 (D.C. Cir. 1957).

201. *State v. Hause*, 82 N.H. 133, 136-37, 130 Atl. 743, 745 (1925).

matter of law medical evidence need not be given greater weight in determining the question of fact than lay evidence. Lord Deas told one jury that "the evidence of medical men in questions of this kind was no more valuable than the common-sense judgment of the associates and friends of the panel . . . ."202 In an earlier case, tried two years after *Boardman* and two years before *Pike*, he explained why, in words which could easily have been borrowed from Doe's dissents, *i.e.*, since insanity is a question of fact, it is for the triers of fact to say what weight shall be attributed to opinion evidence:

The question of sanity or insanity, as a defence against responsibility to the criminal law, was not, however, in a case like this, a medical question, but a question for the jury on the whole evidence, medical and non-medical, the grounds for the opinion being equally for the consideration of the jury with the opinions themselves.<sup>203</sup>

In the District of Columbia, jury verdicts will be overturned if they are based on lay opinion evidence and "arbitrarily reject" medical opinion evidence, *i.e.*, if they reject medical opinion evidence which commends itself to the court of appeals.

### 7. Role of Medicine

Under the *M'Naghten* rules, the irresistible impulse test, and the Model Penal Code test the definition of insanity is a question of law. Under the New Hampshire doctrine it is a question of fact. Under the *Durham* rule, both because the court was searching for a "new rule" based on modern science and because juries are required to render decisions based on the testimony of alienists, it is a question of medicine. It is sometimes thought that under Scots law, too, the definition of criminal insanity is a question for current medicine. There have been scattered expressions of this both in the literature<sup>204</sup> and in case law.<sup>205</sup> The preponderance of opinion,<sup>206</sup>

202. *H.M.A. v. Gove*, 4 Coup, 598, 19 Scot L.R. 594 (High Ct. Just. 1882) (diminished responsibility).

203. *H.M.A. v. Dingwall*, 5 Irv. 466, 478 (1867).

204. "The *M'Naghten* Rules have never been part of the law of Scotland. . . . The Scottish criminal courts have followed the advances of reliable medical knowledge regarding insanity; have long accepted that a plea of insanity may be founded in impairment of volition by mental disease; and have declined to be bound by any sacrosanct formula." Smith, *Diminished Responsibility*, 1957 CRIM. L. REV. (Eng.) 354, 355.

205. Lord Dunedin expressed the *Durham* philosophy in one Scottish case when he said: "[C]ourts of law, which are bound to follow so far as they can the discoveries of science and the results of experience, have altered their definitions and rules along with the experts." *H.M.A. v. Brown*, 5 Adam 312, 343, 14 Scots L.T.R. 952, 957 (High Ct. Just. 1907).

206. Even Lord Dunedin's remark, *ibid.*, was not an unqualified endorsement of the *Durham* philosophy. Rather it was an isolated, and probably a not-too-carefully considered utterance which not only contradicts the statement quoted at note 208 *infra*, but is also at variance with the theory he expressed when he said: "But Acts of

however, as well as the theory behind Scots law and the fact that Scottish judges do not expect their juries to follow blindly the testimony of expert medical witnesses, shows that the Scottish approach to criminal insanity is much closer to the New Hampshire doctrine in this respect than it is to the *Durham* rule. Both New Hampshire courts and Scottish courts have rejected the *Durham* notion that the law can find a satisfactory definition of insanity by wading in the swamplands of psychiatry. Judge Ladd summed up the New Hampshire position when he expressed the belief that such a search was futile "because it is an attempt to find what does not exist, namely, a rule of law wherewith to solve a question of fact."<sup>207</sup> Lord Dunedin summed up the Scottish position by observing that no one could say what insanity is and doubting whether "if we had all the doctors here who are learned on that subject, that any two of them would agree on a definition."<sup>208</sup> Even if a *Durham*-type search for a definition was undertaken in a scientific manner, Judge Ladd had little faith in the outcome, since it could well come up with a result "which might itself turn out to be nothing more than a theory or an opinion after all. At any rate it would be a deduction of fact."<sup>209</sup> Five years after Ladd wrote this dictum, the Lord Justice-Clerk endorsed his thought if not his theory when he told a jury that while "scientific evidence may be useful . . . you are as good judges of the sanity of a man, as exhibited in his daily life, as any lawyer or doctor can be. Indeed," he added, "much better."<sup>210</sup> The result is the same. Both reject the *Durham* theory that current medicine holds the key to the problem of criminal responsibility. The difference is that New Hampshire substitutes a theory of its own, *i.e.*, that the definition of criminal insanity is, and by the dictates of nature must be, a question of fact. The Scottish judges took a more practical approach. As Lord Moncreiff summed it up:

Soundness or unsoundness of mind is a fact which is to be judged not merely or mainly as a question of law or of science, but on the ordinary rules which apply in daily life.<sup>211</sup>

Judge Doe summed up for New Hampshire:

Whether the old or the 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

---

Parliament cannot deal with scientific opinions, and therefore it is left to juries to come to a common-sense determination on the matter [of criminal insanity], assisted by the evidence led and any direction which the judge can give." *H.M.A. v. Brown*, 5 Adam 312, 343, 14 Scots L.T.R. 952, 957 (High Ct. Just. 1907).

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

208. *H.M.A. v. Brown*, 5 Adam 312, 343, 14 Scots L.T.R. 952, 957, (High Ct. Just. 1907).

209. *State v. Jones*, 50 N.H. 369, 395 (1891).

210. *H.M.A. v. Macklin*, 3 Coup. 257, 260 (1876).

211. *Ibid.*

of them are correct . . . nor does it maintain a fantastic consistency by adhering to medical mistakes which science has corrected. The legal principle 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. 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.<sup>212</sup>

#### 8. Conclusion

The New Hampshire doctrine and the Scottish approach to criminal insanity are different from, and in many ways in oppugnance to, the *Durham* rule. For the *Durham* court has not made the definition of criminal insanity a question of fact; it has not as a matter of law rejected the validity of the orthodox tests; it has placed an unreasonably heavy burden on the prosecutor by requiring that the prosecution prove beyond a reasonable doubt that there was no causal connection between an established mental illness and the criminal act; it has required that trial judges explain and elaborate terms which would otherwise be matters of fact; it has given the medical witness the final say on criminal responsibility; and it has subordinated the criminal law to the tergiversating theories of psychiatry. In sum it has formulated a new rule which has become almost as difficult to apply as the orthodox tests it was designed to replace. The confusion which the need to explain terms has spawned led one *Durham* judge to suggest that "the best way to deal with the rule which requires such elaborate exploration is to discard it in favor of the pre-existing rule . . ." <sup>213</sup> A better way would be to adopt the New Hampshire-Scottish approach and make insanity and the terms incident to insanity questions of fact for the jury.

#### V. THE TEACHING OF SCOTLAND

Because the theory behind the New Hampshire-Scottish approach to criminal insanity—the theory that insanity is a question of fact—was developed to a greater extent by the New Hampshire court than it has been in Scots law, it is by comparing the Scottish approach to the New Hampshire doctrine that we best gain an appreciation of its philosophical basis. In seeking an understanding of how the two work in practice, however, it is to Scotland which we look to shed light on New Hampshire, not New Hampshire to shed light on Scotland. This is because Scotland has a population almost ten times the size of New Hampshire, has had many

<sup>212</sup>. *State v. Pike*, 49 N.H. 399, 438 (1870) (concurring opinion).

<sup>213</sup>. *Catlin v. United States*, 251 F.2d 368, 373 (D.C. Cir. 1957) (dissenting opinion).

more reported cases, and has dealt with a greater variety of insanity pleas. A study of Scots law, therefore, answers several questions which have sometimes been asked about the New Hampshire doctrine.

First of all, since a greater number and variety of insanity pleas have been entered in Scotland, an examination of Scots case law reveals much about the potential scope of the New Hampshire doctrine. Because New Hampshire is a small state with a low crime rate the few insanity pleas which have been entered there are mostly of the orthodox type, that is they rested on one type or stage of a recognized mental illness.<sup>214</sup> Scottish cases have covered a much wider range than have New Hampshire cases.<sup>215</sup> In Scotland the defenses of insanity and diminished responsibility have been based on psychic epilepsy,<sup>216</sup> mental dissociation,<sup>217</sup> automaton,<sup>218</sup> toxic exhaust fumes,<sup>219</sup> acute physical suffering,<sup>220</sup> somnambulism,<sup>221</sup> and even temulence, if it renders the accused incapable of forming the specific

214. Indeed, it is sometimes contended that "insanity" in the New Hampshire doctrine is limited to pathological defects. The argument is based on the New Hampshire judges' discussion of Isaac Ray's theory that insanity is derived from an abnormal condition of the brain. Wechsler, *The Criteria of Criminal Responsibility*, 22 U. CHI. L. REV. 367, 370 n.12 (1955). But if this were true the definition of insanity would not be a question of fact. Reid, *Understanding the New Hampshire Doctrine of Criminal Insanity*, 69 YALE L.J. 367, 410-11 (1960).

215. For a discussion of the scope of the New Hampshire doctrine based on New Hampshire cases see Reid, *The Working of the New Hampshire Doctrine of Criminal Insanity*, 15 U. MIAMI L. REV. 14, 15-26 (1960).

216. H.M.A. v. Mitchell, [1951] Just. Cas. 53, 54, [1951] Scots L.T.R. 200 (High Ct. Just. 1951) (held as a matter of law that psychic epilepsy is insanity). In one *M'Naghten* jurisdiction it was ruled that it is a question of fact whether epilepsy is a mental disease. *Oborn v. State*, 143 Wis. 249, 126 N.W. 737 (1910). For a *Durham* case which criticized the prosecution for not gathering information on the defendant's medical background, stressing particularly that the report the defendant had epilepsy should have been looked into, see *Williams v. United States*, 250 F.2d 19, 25 (D.C. Cir. 1957).

217. H.M.A. v. Ritchie, [1926] Scots. L.T. 308, 309 (High Ct. Just. 1925).

218. H.M.A. v. Fraiser, 4 Coup. 70 (1878); MACDONALD, *CRIMINAL LAW OF SCOTLAND* 98 (5th ed. Walker & Stevenson 1948).

219. See note 39 *supra*.

220. In the case of a new mother accused of infanticide, Lord M'Laren told the jury: "It is a perfectly legitimate topic of conversation that according to the evidence the act was done immediately after delivery, and apparently without premeditation, at a time when the woman would be experiencing acute physical suffering, when she was alone and without assistance, and had apprehensions as to the disclosure of her condition; and that she may have been guilty of an attack upon the person of her child, which was illegal and criminal, and yet may have done so without realizing the intention of taking the life of the child." H.M.A. v. Abercrombie, 2 Adam 163, 166 (1896) (found not guilty on the grounds of insanity). In a recent New Hampshire case of similar circumstances the defense did not plead insanity. *State v. Gordon*, Strafford Criminal No. 3183 (1959).

221. Pleaded successfully on the defense of diminished responsibility by a woman of inebriate habits who put her grandchildren on a fire while under a hallucination caused by drinking. H.M.A. v. Brown, 1 White 93, 24 Scot. Law Rep. 44 (High Ct. Just. 1886).



intent required to constitute the crime.<sup>222</sup> To suggest that because these defenses have succeeded in Scotland they will also succeed in New Hampshire is as misleading as to say that because they have succeeded once in Scotland they will succeed again in Scotland. This would not be true in any jurisdiction which makes the scope of criminal insanity a question of fact. That a New Hampshire jury found in one case that dipsomania was not insanity<sup>223</sup> would not preclude a future New Hampshire jury from finding that it is, any more than the fact one Scots jury limited delirium tremens to diminished responsibility<sup>224</sup> would preclude future Scottish juries from finding an accused who suffered from it either was insane or had no defense at all. The facts and not psychiatric labels would control.<sup>225</sup> The most that the *Pike* jury can be said to have done is to have rejected, on the facts of the case, the contention that this dipsomaniac-defendant was insane, just as in Scotland the most the jury in *H.M.A. v. Granger* did was reject the contention, on the facts presented to it, that the accused on trial was not responsible because he was in a paroxysm of delirium tremens. Whether or not being in a paroxysm of delirium tremens means that the defendant at bar is criminally insane depends on the facts of the case. An accused cannot claim that he must automatically be judged criminally insane just because he suffers from a condition that has been labeled delirium tremens.<sup>226</sup>

Since the definition of insanity is a question of fact in New Hampshire, it would be possible for a defendant there to contend, as has been contended in Scotland, that "insanity" is not limited to pathological factors but may include conditions which are physiological, toxic, or infectious. Whether such defenses could succeed would depend on the facts of each case and on the good sense of New Hampshire juries.

The wisdom of this approach is kenneled by considering the psychopath

222. *H.M.A. v. Campbell*, [1921] Just. Cas. 1, [1920] Scot L.T.R. 317 (High Ct. Just.); *Kentucky v. H.M.A.*, [1944] Just. Cas. 171, 179, [1945] Scots L.T.R. 11 (High Ct. Just. 1944). *But see H.M.A. v. Savage*, [1923] Just. Cas. 49, 50, [1923] Scot L.T.R. 659 (High Ct. Just.).

223 *State v. Pike*, 49 N.H. 399 (1870).

224. *H.M.A. v. Granger*, 4 Coup. 86, 16 Scot. L.R. 253 (High Ct. Just. 1878).

225. Reid, *The Working of the New Hampshire Doctrine of Criminal Insanity*, 15 U. MIAMI L. REV. 14, 20-22 (1960).

226. "Whether a man in a paroxysm of *delirium tremens* is responsible, is another question. But he is not of unsound mind because he has had delirium tremens." *H.M.A. v. Miller*, 3 Coup. 16, 18 (1874).

"It is said that the jury have affirmed insanity because (so it is contended) *delirium tremens* is insanity. I cannot regard this as the meaning of the verdict. What the jury obviously meant [when it returned a verdict of diminished responsibility] was that the existence of the disease of *delirium tremens* was an extenuation of the offence, in the absence of which they must have found a verdict of murder, but in respect of which extenuation they found a verdict of culpable homicide [*i.e.*, manslaughter]." *H.M.A. v. Granger*, 4 Coup. 86, 16 Scot L.R. 253, 259 (Cir. Ct. Just. 1878).

offender. Psychopathy is, at best, an imperspicuous term.<sup>227</sup> Yet *Durham*, with its great stress on medical labels, is according it a legal certainty which medical science can not sustain.<sup>228</sup> In New Hampshire whether the defendant has psychopathy (*i.e.*, a mental disease which excuses criminal responsibility) is not the question of fact which the jury must determine. Rather they are faced with an issue which they are to resolve by weighing

227. The chimerical qualities of the term "psychopath" are demonstrated by the following exchange between two medical men, Dr. Eliot Salter and Dr. Henry Yellowlces:

"A psychopath, as I understand it, and as I think the majority of people in our profession understand it, is someone who cannot be diagnosed, at any rate, as suffering from one of the recognized forms of insanity. You do not call a man a psychopath if you think he is suffering from schizophrenia, general paresis or melancholia?—No.

"7403. I should have thought it was an essential element in certifying someone insane that he should be suffering from one of the recognised and recognisable forms of insanity?—One of the recognisable forms, of course, but not necessarily one of the 'recognised' ones.

"7404. In fact, I should say that one could not certify someone of whom one could say no more than that he was a psychopath?—You are falling into the error, if I may say so, which I mentioned earlier. You are talking about a psychopath as if it were something we could clearly define. I have certified many hundreds of psychopaths. To say a man is a psychopath, and, therefore, has certain symptoms, or a certain degree of mental illness, is quite meaningless.

"7405. A psychopath is someone who is not suffering from a graver condition, an illness in the stricter sense of the word. You do not call someone whom you can diagnose as suffering from general paresis a psychopath?—I do not confuse a psychopath with a general paresis.

"7406. There is a diagnostic quality about the conception of a psychopath?—Is there?

"7407. The psychopathic is not suffering from an established recognisable form of insanity?—I do not know what you mean. It depends on the psychopath and the recogniser.

"7408. Admittedly a psychopath may become insane, but if he is insane, then you do not diagnose him as being a psychopath, do you? You diagnose insanity?—No, insanity does not merely consist of the 'big four' diagnostic labels.

"7409. I think we can only just agree to differ there. I have never yet seen a patient certified as insane only on the ground of being a psychopath?—No, of course you have not, because nobody would certify a patient as being insane on a label. One certifies a patient insane, because the facts indicate insanity, and you can observe many facts indicating insanity in a large number of people loosely termed psychopaths. It is perfectly simple." ROYAL COMMISSION ON CAPITAL PUNISHMENT, MINUTES OF EVIDENCE 539 (1950).

228. Now that Saint Elizabeths has reversed its original position and certifies psychopaths as insane, the *Durham* court feels the official opinion of the hospital is entitled to great weight. *Blocker v. United States*, 274 F.2d 572 (D.C. Cir. 1959). Earlier, when the hospital's opinion disagreed with that of some of the court (see argument in favor of treating psychopathy as a mental disease, *Lyles v. United States*, 254 F.2d 725 n.2 (D.C. Cir. 1957) (dissenting opinion)), the court suggested that for government witnesses to express their opinion on this point "inevitably encroaches upon the jury function." *Briscoe v. United States*, 248 F.2d 640, 644 n.6 (D.C. Cir. 1957). These cases are in keeping with the medical-orientation of *Durham*. In fact, just after the rule was first handed down, one observer predicted it would occur when he wrote: "Another advantage of the new [*Durham*] rule is that it is broad enough to include psychopaths—if the medical witnesses will consider them mentally disordered." Weihofen, *The Flowering of New Hampshire*, 22 U. CHI. L. REV. 356, 358 (1955). (Emphasis added.)

all the pertinent facts, by asking whether this particular defendant (be he labeled a psychopath or a psychotic) was responsible for his act and not whether he came within the diagnostic concept of psychopathy.<sup>229</sup> The Scottish position is not so pellucid. The situation there is somewhat confused due to the defense of diminished responsibility. Although there is no authority that a psychopath can not plead insanity,<sup>230</sup> there seems to be an undercurrent of feeling that the psychopathic offender belongs in the category of diminished responsibility.<sup>231</sup> Nevertheless, it is still a question of fact whether this particular psychopath is wholly or only partially responsible,<sup>232</sup> and when a Scottish jury rejects the application of diminished responsibility to a psychopath-defendant it does so only for the psychopath-defendant who is being tried on the basis of the facts presented in the case.<sup>233</sup>

---

229. For a discussion of psychopathy and the New Hampshire doctrine see Reid, *The Working of the New Hampshire Doctrine of Criminal Insanity*, 15 U. MIAMI L. REV. 14, 19-26 (1960). In New Hampshire the chief value of psychiatric terms would be their use by alienists as tools of communication.

230. In one early case the jury was told that insanity was a question of fact, but was cautioned in terms that today might include psychopaths: "Now this does not mean that his mind was easily bent to crime—that his resolution was weak—that his cravings were strong—that the steadfastness of his mind, and his power of resistance to the promptings of evil, has been weakened by a long course of dissipation. . . . So far from these things exempting from punishment, they are, for the most part, the very cases for which criminal laws exist." H.M.A. v. Miller, 3 Coup. 16, 17-18 (1874).

231. For discussion on psychopaths and the defense of diminished responsibility see Lord Keith of Avonholm, *Some Observations on Diminished Responsibility*, 1959 JURID. REV. 109, 116; Williams, *The Psychopath and the Defence of Diminished Responsibility*, 21 MODERN L. REV. 544, 548; Robertson, *Recent Leading Cases*, 58 JURID. REV. 143, 147 (1946).

232. It has sometimes been suggested that in the *Carraher* case the Scottish court rejected the contention that a psychopath-defendant could plead diminished responsibility. Note, *Diminished Responsibility—Scottish Authority and the Interpretation of the Homicide Act*, 227 L.T. 227, 228 (1957). Actually the trial judge put the issue to the jury as a question of fact, although in conceptual terms: "They [the alienists] say the accused is a psychopathic personality; they have told us what they understand by psychopathic personality, and the defence says proof of psychopathic personality is enough for a jury to hold a man has diminished responsibility. Well, it is for you to say in the light of what I have read to you as the law regulating diminished responsibility whether there really is evidence to support in your judgment this defence . . ." *Carraher v. H.M.A.*, [1946] Just. Cas. 108, 112, [1946] Scots L.T.R. 225 (High Ct. Just.). The defendant was found guilty and appealed. The High Court did not criticize the trial judge for presenting the issue to the jury, but did say he "might" have been warranted in withdrawing it had he wished because the court "has a duty to see that trial by judge and jury according to law is not subordinated to medical theories." *Ibid.* "*Carraher*, it is thought, is not authority for the view that 'psychopathic personality' or 'character disorder' can never be accepted in Scotland as justifying the defence of diminished responsibility." Smith, *Diminished Responsibility*, [1957] CRIM. L. REV. (Eng.) 354, 359.

233. This was made clear during the questioning of the Vice-Dean of the Faculty of Advocates by the Royal Commission: "Supposing as medical science developed it appeared that the view which the court had taken of these psychopathic personalities who were ruled out in the case of *Carraher* was wrong, and that they really were

Another aspect of the New Hampshire doctrine illuminated by Scots case law is the control exercised by the trial judge over the jury's resolution of the question of fact. Although there have been very few cases in which New Hampshire juries have returned a verdict of "not guilty by reason of mental derangement," it seems reasonable to suggest that when they do they are greatly influenced by the attitude of the judge.<sup>234</sup> At the very least it is to be expected that, given no extrinsic test or standard with which to guide their deliberations, they will rely even more strongly than they might otherwise on any animus on the part of the judge, and that this in turn will create a diathesis either for or against conviction.

That judicial proclivity will help shape the decision on the question of fact was demonstrated by two Scots cases tried in Glasgow on consecutive days, May 9, 1876 and May 10, 1876. In both cases the presiding judge was Lord Moncreiff, the Lord Justice-Clerk. In both the crucial testimony was furnished by the same alienist—the Superintendent of the Royal Lunatic Asylum at Gartnarel. In both the panels were charged with similar crimes—the murder of a female member of their family. In both the jury returned an unanimous verdict.<sup>235</sup> And in both the outcome was greatly influenced—if not prefigured—by the attitude the judge demonstrated in his summation. The chief differences between these two cases, aside from the testimony, were the judicial attitudes demonstrated and the verdicts which followed from them.

In the first case Lord Moncreiff practically invited the jury to find the defendant-matricidist not guilty by reason of insanity:

But if a man is clearly proved to labor under insane delusions, he is not of sound mind. Now, that the prisoner here laboured under a strong delusion about his mother is certain; and the question for you is was it an insane delusion? On that matter you have heard the medical evidence,<sup>236</sup> and the account of the idea he entertained that his mother and the doctor were in league to give him medicines to induce him to become a Roman Catholic. That part of the case impressed me very much; because that is an idea which no sane man could hold.<sup>237</sup> The other suspicions were not necessarily

---

suffering from some form of mental disease, would it be possible for the courts to give effect to that advance of knowledge and bring them within the sphere of diminished responsibility without the *Carraher* verdict being reversed?—I think so, because the evidence would be different. If it was shown at a later stage that *Carraher*, who had a psychopathic personality was really suffering from an impairment of his intellect by disease, then he would come within the diminished responsibility rule. What the judges protested against in the *Carraher* case was the acceptance of medical evidence which merely applied epithets to the man." ROYAL COMMISSION ON CAPITAL PUNISHMENT, MINUTES OF EVIDENCE 450 (1950).

234. See transcript in *State v. Burns*, Merrimack State No. 6162 (N.H. 1960).

235. A majority verdict is sufficient for conviction under Scots law.

236. Dr. Yellowlees testified: "The delusion was such that it would probably have led to violence. I think the deed of which he is accused was the direct result of the insanity under which he laboured." *H.M.A. v. Macklin*, 3 Coup. 257, 259 (1876).

237. This statement probably goes beyond the point where a New Hampshire judge

indications of insanity. If you think the delusion under which he thus labored was an insane delusion, then the man's mind was not sound and you will rightly acquit on that ground; and the more so, that the delusion led directly to the act. The self-mutilation which occurred afterwards is also an indication of a disturbed intellect.<sup>238</sup>

The panel was found not guilty and the jury declared "that he was acquitted by them on account of such insanity."<sup>239</sup>

In the second case Lord Moncreiff practically urged the jury to find the defendant-uxoricidist guilty as charged:

It is quite true, as Dr. Yellowlees stated,<sup>240</sup> that a man, by brooding over an unfounded conclusion, may lose his moral restraint, and, forming a wrong conclusion, act upon it. But, alas! gentlemen, it is vain to say that a man shall not be responsible for his actions because he has formed a wrong conclusion, and has allowed it to weigh upon his mind. I cannot say that because his mind broods over indications—often, it is true, trifles light as air—which he comes to think proofs of other things done in secret, and without witnesses, and incapable of proof, and because he allows himself to be possessed with that feeling, therefore he should not be held responsible for his actions. If, however, you should be of opinion that the prisoner was acting under a conclusion that was not only unsound in the sense of not being well founded, but that it was a conclusion he had formed because his mind was insane, that, no doubt, if you find ground for it, would amount to evidence of insanity. But if it is proved that he suspected his wife with or without a cause, and that, being a man of violent and irritable temper, he would brook the interference of his mother-in-law no longer, and chose to vent his passion in this way, there is not only here no case of freedom from responsibility, but I can see no approach to it. Gentlemen, I have stated these views to you because, while you cannot help commiserating the unfortunate prisoner at the bar, you will see at once how far it would go to break the bonds of society, and admit principles destructive of the regulating effect of the law, were such a defence as I have indicated to be sustained without the real ground and foundation on which alone it must rest.<sup>241</sup>

[I]f you think that although the man was of violent temper, and brooded over his fancied calamities until he lost control of himself, yet that he was sane as far as soundness of mind is concerned as any other criminal who commits acts of this kind, I am sure that however painful your duty may be you will bravely and conscientiously discharge it.<sup>242</sup>

The panel was found guilty and was executed on May 31, 1876—twenty-one days after the trial.

---

would go, since in New Hampshire it is a rule in all cases—not just those dealing with criminal insanity—that a judge must not comment on the evidence.

238. *H.M.A. v. Macklin*, 3 Coup. 257, 261 (1876).

239. *Ibid.*

240. Dr. Yellowlees testified that "the panel suffered from unfounded suspicions which gradually grew in strength, and at last induced a morbid state of mind." *H.M.A. v. Barr*, 3 Coup. 261, 263 (1876).

241. *Id.* at 265.

242. *Id.* at 268.

The lesson, therefore, which Scots case law teaches us about the New Hampshire doctrine is that the oft-stated fear that the jury will be left without guidance is groundless.<sup>243</sup> This fear is based on two assumptions. First, that without a standard to hold them in check juries will run wild, exculpating defendants for any abnormality, fancied or real. This not only ignores the good sense of American jurors,<sup>244</sup> but fails to take into account the fact that it has never happened in Scotland as is shown by a study of Scots case law. Second, that the jury needs a standard in order to avoid being lost in the wilderness of psychiatric jargon; that without a test jurors will have no idea where to turn for guidance. This assumption not only ignores the fact that the jury has received guidance from the testimony of expert witnesses who have explained their terms as clearly as any judge can explain the *M'Naghten* terms (such as "quality," "wrong" and "nature"), and by both counsel in their arguments and summations,<sup>245</sup> but it also overlooks the fact that the jury can, and does, receive much guidance from the instructions of the trial judge, as proven by a study of the two Scots cases just discussed. And if this last point is criticized, then it should be pointed out that the judge can also do this in a jurisdiction which employs one of the orthodox tests, even *M'Naghten*.<sup>246</sup> The difference is that a *M'Naghten* judge would have to be less honest about his institutions.

---

243. See Reid, *Understanding the New Hampshire Doctrine of Criminal Insanity*, 69 YALE L.J. 367, 401-03 (1960).

244. A point already discussed in Reid, *The Working of the New Hampshire Doctrine of Criminal Insanity*, 15 U. MIAMI L. REV. 14, 25 (1960).

245. This objection, that jurors need a test because psychiatry is a subject too difficult for them to grasp, has been considered by judges in both Scotland and New Hampshire, and has been rejected for reasons typical of the jurisprudence in their respective jurisdictions. Lord Cooper spoke of experience: "In my experience the issue of insanity in an accused very rarely presents any real difficulty. The matter is always exhaustively shifted by the Crown at the stage of preparation of the case, and in the great majority of cases where insanity is pleaded either in bar of trial or to elude conviction, the expert testimony of eminent alienists, with or without factual evidence, places the matter beyond all reasonable doubt." Lord Justice-General, Lord Cooper, *Supplementary Memorandum*, in ROYAL COMMISSION ON CAPITAL PUNISHMENT, MINUTES OF EVIDENCE 429 (1950).

Judge Doe spoke of the theory that insanity is a question of fact: "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 (1870) (concurring opinion).

246. "The right and wrong test may be applied in such a way as to convict almost anyone except a total idiot or a raving maniac, or in such a way as 'to allow very considerable fish of the malefactor species to escape from the judicial net.'" Ballantine, *Criminal Responsibility of the Insane and Feeble Minded*, 9 J. CRIM. L., C. & P.S. 485, 488 (1919).

## VI. CONCLUSION

That the Scottish approach to criminal insanity is similar to the New Hampshire doctrine is important to those who wish to sail between the Sirene of *M'Naghten* and the Lorelei of *Durham*. "New Hampshire," it has been suggested, "is too small, too free from crime—unfortunately for research purposes—and also too free from statistical records, to permit statistically valid conclusions."<sup>247</sup> But Scotland, an English-speaking jurisdiction employing the jury system to determine questions of fact in criminal cases, is large enough to permit valid conclusions. And Scottish lawyers believe that their practice of making the defense of insanity a question of pure fact for the jury has worked well. When asked "Does it really amount to this, that you think it wise in Scotland not to have any formula, but just to leave the issue as a question of fact to the jury?", a representative of the Scottish bar replied, "Yes, I think so."<sup>248</sup> And the Lord Justice-General, Lord Cooper, testified: "In my experience the issue of insanity in an accused very rarely presents any real difficulty."<sup>249</sup> This verdict, based on the records of a large jurisdiction, fully substantiates the judgment of the New Hampshire lawyers for whom the present Chief Justice of the State Supreme Court spoke when he wrote:

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 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.<sup>250</sup>

Thus, the New Hampshire doctrine can no longer be dismissed as an untested eccentricity. To the respectability of its long life and its association with the distinguished name of Doe must be added the attribute of having had its solution to the problem of criminal responsibility proven successful in a large jurisdiction; a jurisdiction embracing great industrial, commercial, and educational centers as well as landward areas (such as Sutherland) which are as bucolic as any within the shadows of the White Mountains. Those, then, who would reject the New Hampshire doctrine must do so on its merits and not, as the Canadian Insanity Commission did, on the grounds that it is an untried agrestic oddity.<sup>251</sup> And its merits are

247. WEIHOFEN, *THE URGE TO PUNISH* 134 (1956).

248. ROYAL COMMISSION ON CAPITAL PUNISHMENT, *MINUTES OF EVIDENCE* 449 (1950).

249. Lord Justice-General, Lord Cooper, *Supplementary Memorandum*, in ROYAL COMMISSION ON CAPITAL PUNISHMENT, *MINUTES OF EVIDENCE* 429 (1950).

250. Letter From Hon. Frank R. Kenison, Chief Justice of New Hampshire, to Hon. J. C. McRuer, Chief Justice of the High Court for Ontario, May 2, 1955, quoted in appendix A, *Reasons for Dissent*, REPORT OF THE ROYAL COMMISSION ON THE LAW OF INSANITY AS A DEFENCE IN CRIMINAL CASES (Canada) 60-61 (1956).

251. REPORT OF THE ROYAL COMMISSION ON THE LAW OF INSANITY AS A DEFENCE IN CRIMINAL CASES (Canada) 31 (1956).

that it is the one American approach to insanity not based on medical dogma<sup>252</sup> but on the principles of the law of evidence as evolved from Anglo-American legal history. It has been said that *M'Naghten* is "the rule of reason."<sup>253</sup> *Durham*, then, is the rule of medicine and the Model Penal Code test, the rule of academe. The New Hampshire doctrine can claim none of these appellative depictions. The most that can be said for it is that it is the rule of law—the fundamental rule of law that questions of law are for the court and questions of fact for the jury and insanity is a question of fact.

---

252. As Judge Doe pointed out, the *M'Naghten* rules were based on the best medical opinions of that day: "When the authorities of the common law began to deal with insanity, they adopted the prevailing medical theories." *State v. Pike*, 49 N.H. 399, 437 (1870).

253. This is the boast of America's most militant *M'Naghtenite*, Professor Jerome Hall. *Harvard Law Record*, April 11, 1957, p. 1, col. 4.



