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THE WORKING OF THE NEW HAMPSHIRE DOCTRINE OF CRIMINAL INSANITY

JOHN P. REID*

THE WORKING OF NEW HAMPSHIRE

The New Hampshire doctrine of criminal insanity is over ninety years old — a very respectable lifetime for a legal principle. Despite this, it is one of the most abused and misunderstood rules in American law. It has been nearly entombed by courts and commentators who have tended to equate it with the *Durham* rule of the District of Columbia.¹ *Durham* and New Hampshire are not the same; *Durham* was formulated in response to medical criticism of the tests for insanity; New Hampshire, on the other hand, is based on the fundamental principle of the common law which distinguishes between questions of fact and questions of law. The oft-stated assumption that ever since it was first expounded by Judge Charles Doe² it has lain dormant — an inactive legal oddity, half remembered but never used — is a contributing factor in the miscomprehension of the doctrine and an explanation of the inattention of the commentators to the New Hampshire doctrine. This belief has been repeated by friends³ as well as foes,⁴ and has even been supported by such comforting but not too accurate statements as “the good people of New Hampshire rarely indulge in murder.”⁵ The truth is that the New Hampshire doctrine has led a surprisingly active existence when we consider the size of the state. More than that it may, perhaps, be credited with creating an atmosphere of tolerance and cooperation between psychiatrists and lawyers which might serve as a model in other jurisdictions. It is the purpose of this paper to examine how the New Hampshire doctrine has worked and to determine what contribution it has made to criminology.

THE DEFINITION OF NEW HAMPSHIRE

The New Hampshire doctrine is not so much a definition of legal responsibility as a rejection of all definitions; it is not so much a test for insanity as an affirmation that no satisfactory test can be devised. Unlike the *M'Naghten* rule, the New Hampshire doctrine is not a principle of

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

2. *State v. Pike*, 49 N.H. 399, 408 (1869) (concurring opinion); *Broadman v. Woodman*, 47 N.H. 120, 149 (1865) (dissenting opinion).

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

4. Note, 30 IND. L. J. 194, 211 (1955).

5. Guttmacher, *The Psychiatrist as an Expert Witness*, 22 U. CHI. L. REV. 325, 327 (1955). See also, Royal Commission on Capital Punishment, *Report*, CMD. No. 8932, 285 (1953).

substantive law. Unlike the *Durham* rule, it is not a legal formula based on the latest advances of medicine. Unlike the Model Penal Code rule, it is not a compromise worked out by academic experts.

The New Hampshire doctrine was evolved out of the evidentiary theories of the New Hampshire court based on research into legal history conducted by Chief Justice Doe. It is, in essence, a rule of evidence rather than a rule of criminal law. It owes its formulation to the New Hampshire judges' insistence on the distinction between law and fact (they regarded "insanity" as a question of fact), their dislike of legal presumptions (they thought that *M'Naghten* was not a rule of substantive law but rather a legal presumption, based on faulty medicine 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 (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 legal 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 non-expert opinion evidence).⁶

The New Hampshire doctrine, then, is a recognition that "insanity" is a question of fact. It was first expressed by Judge Doe when he told the jury in a murder case:

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.⁷

This in essence, is the New Hampshire doctrine.

THE LIMITS OF NEW HAMPSHIRE

One of the reasons given in other jurisdictions for rejecting the New Hampshire doctrine (perhaps the major reason along with the argument that it leaves the jury with no guides for reaching a decision) is that "hospital authorities would be too likely to find all persons who are charged with serious crimes to be insane."⁸ The prospect of allowing those who are qualified to comment on the existence of mental disease a free hand *when reporting to the courts*, seems to send a shudder down the

6. For a full treatment of the evolution of the New Hampshire rule out of Doe's theories on the law of evidence, see, Reid, *A Speculative Novelty: Judge Doe's Search for Reason in the Law of Evidence*, 39 B.U.L. REV. 321 (1959).

7. *State v. Jones*, 50 N.H. 369 (1871) (syllabus).

8. Weihofen, *Eliminating the Battle of Experts in Criminal Insanity Cases*, 48 MICH. L. REV. 961, 970 (1950).

spines of judges and prosecutors in many jurisdictions. The experience in New Hampshire shows this fear is groundless. The psychiatrists in that state have been no more willing than the legal profession or the judiciary to find excuses for exculpating wrong-doers.⁹ It apparently never ceases to surprise some lawyers to learn that many psychiatrists believe in punishment.¹⁰

The attitude of psychiatrists can not be ignored in any consideration of the scope and limits of the New Hampshire doctrine. Procedure for identifying and disposing of the criminally insane in New Hampshire has become formalized. The question of whether an accused is insane is almost always raised by the State, which files a petition asking that the accused be committed to the State Hospital for examination. With hardly an exception the finding of the State Hospital as to whether the respondent was sane or insane at the time the crime was committed and whether he is now competent to stand trial is accepted by both the prosecution and the defense. Thus, from a practical point of view, the scope of the New Hampshire doctrine is determined by psychiatrists at the State Hospital and turns to a great extent upon what type and intensity of mental disease and illness they are willing to certify as coming within the meaning of "insanity."

It is difficult, however, to determine the scope of the New Hampshire doctrine as applied by the State psychiatrists since, when reporting a person insane, they do not specify what type of disease he is suffering from. During the first decade of the century when the reports were more detailed, the Hospital certified and the courts accepted as insane, respondents

9. In evaluating what significance can be attributed to the reports of the New Hampshire State Hospital cited and quoted throughout this paper, it should be noted that it is one of only thirteen fully approved state hospitals in the United States, according to the Central Inspection Board Report of 1955. *Report to the Governor of New Hampshire by the American Psychiatric Association* entitled A MENTAL HEALTH PROGRAM FOR NEW HAMPSHIRE 255 (1958).

10. For example, Dr. Henry Yellowlees told the Royal Commission on Capital Punishment in 1950 (at par. 7291):

It was well said of a criminal some years ago that he was suffering from mental illness, but that the mental illness was a kind for which the best and only treatment was hanging by the neck. That was rather cynically put, but I think it was right. I do not for a moment say that no man who is mentally ill should be hanged.

Later Dr. Yellowlees was questioned by a fellow psychiatrist.

"7394. (Dr. Slater): You said at the beginning of your evidence, in answer to a question from the Chairman, that you thought it was perfectly proper that some insane persons should be executed? — I think I said 'mentally ill.'

"7395. Yes, that some mentally ill persons should be executed. Can you tell me what function execution has in such a case? What good does it do? — It protects society. It serves as a warning to other people, and it is the kindest way of dealing with a patient who will never be anything but a torment to society and himself.

"7396. Society can protect itself by other means, can it not? — Undoubtedly." Royal Commission on Capital Punishment, *Minutes of Evidence*, Twenty-third day, Thursday, June 1, 1950, pp. 534, 539.

indicted for murder whose conditions were characterized as "hypochondriasis,"¹¹ "organic brain degeneration,"¹² and "chronic dementia."¹³

It is, instead, easier to determine the limits beyond which the State psychiatrists have refused to go. This is because, when reporting a respondent to be sane, they quite often mention to the court mental conditions they have diagnosed in the particular patient but which they do not regard as amounting to insanity. An obvious example is feeble-mindedness¹⁴ which, like mental deficiency,¹⁵ is not equated with "insanity" in any jurisdiction despite the warnings of some writers that this will be the result of any relaxation of the *M'Naghten* rules.¹⁶ Similar categories are those of the sociopathic or psychopathic personalities. The State Hospital has consistently reported that a sociopathic personality without psychosis is not insane.¹⁷ The same is true for psychopathic personalities which do not

11. *State v. Marcoux*, Strafford Criminal Docket No. 436 (1907).

12. *State v. Glass*, Strafford Criminal Docket No. 127 (1902). In this case the defendant was indicted for murder of his brother. A psychiatrist obtained by his family wrote to the court that he committed the act under the influence of delusions of conspiracy and that he was insane at the time. On petition by the County Solicitor the Court ordered him committed for observation to the State Hospital which reported: "Glass is suffering from organic brain degeneration, that he has as the result of such disease hallucinations of the special senses, systematized delusions and impaired will power and that he is consequently insane and irresponsible." As a result of this report the State accepted the plea of "not guilty by reason of insanity." Glass is one of several persons adjudged criminally insane who have been committed to the New Hampshire State Prison rather than the State Hospital.

13. *State v. Morgan*, Strafford Criminal Docket No. 435 (1907).

14. *State v. Merchand*, Strafford Criminal Docket No. 2347 (1947) (arson).

15. In one case the State Hospital reported that the patient committed for pre-trial observation was "not mentally ill" but was "functioning at a mentally deficient level of intelligence." As a result the County Solicitor moved that the court commit the defendant to a special school. *State v. Kennedy*, Strafford Equity Docket No. 7611 (1957).

16. When the *Durham* rule was formulated with the words "mental disease and defect" one psychiatrist thought the flood gates had been opened:

Mental defect in this part of the definition seems to indicate defective brain tissue. . . . *Mental defect* would include mental deficiency as it is usually understood. Here again the criteria for irresponsibility are liberalized because if the individual were a high grade moron who was quite aware of what he was doing, the psychiatrist would have to testify that he was suffering from a mental defect.

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

This criticism was leveled at the *Durham* rule and has no validity in regard to New Hampshire which places no emphasis upon the words "disease" and "defect" but leaves them as questions of fact for the jury. Reid, *Understanding the New Hampshire Doctrine of Criminal Insanity*, 69 YALE L.J. 367, 391 (1960). In the two jurisdictions in which insanity is a question of fact for the jury — New Hampshire and Scotland — a line has been drawn at mental deficiency. For a Scots case involving a plea in bar see, *H. M. Advocate v. Breen*, [1921] Just. Cas. 30, 38 (Scot.) (but for an unusual New Hampshire situation involving feeble-mindedness see Appendix D).

17. In one case the Hospital reported "that he [*i.e.*, the defendant] is not insane and that he is competent to stand trial, even though he is suffering from a sociopathic personality." *State v. Mansfield*, Strafford Criminal Docket No. 2689 (1953) (breaking, entering and larceny). In a similar case the Hospital reported: "Psychiatric examination revealed no abnormalities or psychotic determinants. Neurological examination was negative. Psychological examination revealed characteristics of sociopathic personality

have an undiagnosed psychosis.¹⁸ It seems to be virtually a policy that a person will not be certified as criminally insane unless he is a psychotic. This was clearly demonstrated by the Staff conference, held to discuss a pedophilic indicted for first degree murder, which is set forth in Appendix A. Almost everyone felt the patient was a psychopath, but very few were willing to say he had a psychosis, and as a result he was certified as sane, and subsequently tried, convicted and hanged. The outcome seemed to hinge on whether he could be labeled a psychotic, not whether he had a mental illness which might be explained to a jury. As one doctor put it, "I agree it is a character neurosis but what else can you call it besides psychopathic personality — and if there isn't any evidence of psychosis you have to face that and call him not insane and let him face punishment for his crime."¹⁹ This is not a correct interpretation of the New Hampshire doctrine.

The New Hampshire doctrine of criminal insanity is based on the fundamental proposition that whether or not a defendant was suffering from insanity at the time of the criminal act (and should not be held responsible) is a question of fact. It not only rejects the notion that there is a universal test for determining insanity (in effect a legal presumption that "insanity" can exist only in relation to well-defined characteristics), but it also rejects the notion that "insanity" is limited to certain diagnosed types of mental disease which can be labeled with such clinical designations as "psychosis." It is the fact and not the nomenclature which is the pivot of New Hampshire. It is for the jury to say whether a described mental

disorder without evidence of organic or functional psychosis. Electro-encephalogram done on November 30th was within normal limits.

"As a result of this total evaluation, the conclusion is that he is without mental disorder and is competent to stand trial. There are no contributing organic or functional factors which would account for his behavioral pattern." *State v. Woods*, Strafford Criminal Docket No. 2912 (1956) (breaking and entering).

18. In one case the State psychiatrist reported that the defendant "... is not insane, but in my opinion he has a psychopathic personality." *State v. Sheehy*, Strafford Criminal Docket No. 2271 (1945) (murder).

In the case of a seventeen year old killer the report read: "As a result of my examination of Harvey Blake on December 2, 1953, as requested by the court, I find that he is responsible for his acts. However, it is to be noted that he has shown definite psychopathic traits for several years past, but these psychopathic traits do not make him insane or irresponsible." *State v. Blake*, Merrimack State Docket No. 9473 (1953) (murder). This case shows that psychiatrists, when given a free hand to define insanity as they are in New Hampshire (subject to the jury's redefinition), will not always confuse the abnormal with the irresponsible. Here is how the defendant described the crime:

I shot him on purpose. I shot twice. I walked onto the field, up to the wood pile and he was standing there and he had a dollar bill in his hand and put it in his pocketbook, only I thought it was more. I didn't know what I was doing. I pointed the gun up there and let it go off. He fell down. I guess he was still breathing. He said, 'You might as well finish me off, you started it.' So I put another bullet in and shot that one. Then I took the pocketbook and found it was a dollar bill and that is when everything started to turn black and I found I was running up the road and that is all till I got home. I put my gun up on the rack, my belt back in the drawer and went and ate supper.

19. See Appendix A, p. 45, lines 2-5.

disease (be it a psychosis or not), in the light of all the facts, amounts to legal insanity which will excuse criminal liability. If the jury considered that a psychotic was responsible for his actions it would not matter that the same defendant if tried in a *M'Naghten* jurisdiction would be entitled to a directed verdict of not guilty.²⁰ By the same token it is for the jury to characterize as "insanity" or as mere deviations in normal personality such mental illnesses as acute and chronic brain disorders, psychophysiological autonomic visceral (psychosomatic disorders), psychoneurotic disorders, and personality disorders (psychopathic personalities). This, in theory, is the scope of the New Hampshire doctrine.

The theory has never been fully tested in practice primarily because the State Hospital has limited its definition of insanity to psychosis and defense counsel in New Hampshire has shown a remarkable willingness to go along with whatever the Hospital says. This policy on the part of the Hospital may be criticized from a medical point of view,²¹ but it seems to be perfectly correct from the legal perspective. For, after all, when the court asks the Hospital for a report on the respondent's mental condition, it is asking the Hospital for an opinion as to whether that mental condition excuses the criminal act. When the Hospital reports that the man is "sane" it is doing nothing more than expressing the belief of the Staff that no mental disease existed at the time of the act which, in their opinion, exculpates the defendant. By adding that the defendant, while not "insane," is a psychopath, the report, in effect, "hands the ball" to the defense counsel who, on the whole, have refused to run with it. Thus the limits of the New Hampshire doctrine have been fixed short of psychopathy partly by the Hospital's policy of limiting "insanity" to psychosis, and also, and perhaps even more important by defense lawyers in New Hampshire who either agree that "insanity" is limited to psychosis (*i.e.*, they do not believe a jury will find anyone but a psychotic "insane") or else have failed to realize the full scope of the New Hampshire doctrine.²²

The limits to the New Hampshire doctrine can be set only by the jury, not by alienists or defense counsel. It is for the jury to say whether or not psychopathy comes within the area of "insanity." A New Hampshire jury, unlike a *Durham* jury, does not do this by deciding whether a

20. This marks one of the major differences between the New Hampshire doctrine and the *Durham* rule. In the District of Columbia a jury verdict will be overturned if it ignores what the alienists and the Court of Appeals consider to be the area of insanity.

21. "[U]nder the New Hampshire and the Durham Rules, the only ground on which it can be said that a sociopath was not insane, would be the declaration that sociopathy is not a mental disease. Psychopathic personality would be in the same category. The District of Columbia Court has held, of course, that whether a sociopath is mentally diseased is a question of fact which should be decided by the jury. I am in agreement with this myself. There are all degrees of sociopathy and doubtless the juries' verdicts will depend in a large measure on the severity of the disorder." Personal Letter From Manfred S. Guttmacher to John Reid, March 1, 1960.

22. This seems to be the true explanation, as will be seen later.

"psychopath" is "insane,"²³ but whether or not a particular defendant, who is diagnosed as a psychopath, was responsible for a criminal act he is found to have committed. They are dealing with a question of fact, not a question of tests or labels.²⁴

Among the questions of fact which a New Hampshire jury might properly consider is the fact that some psychiatrists do not believe that psychopathy should excuse criminal liability.²⁵ It is for the jury to decide how much weight should be given to this "fact." It is not surprising however that some New Hampshire prosecutors have interpreted this medical opinion as settling the question as a matter of law. Thus an Attorney General once stated that "the psychopath is sane in every respect. As far as the medical attitude is concerned, the psychopath is a sane person and not an insane person."²⁶ This may be good medicine (and, if good medicine, good law in a *Durham* jurisdiction), but it is merely evidence to be considered by the jury under the New Hampshire doctrine.²⁷

Whether a jury would regard a psychopath as criminally insane is doubtful. In a Scottish case involving diminished responsibility, the prosecutor argued that the term "psychopathic personality" was "something so nebulous that only a psychiatrist could attach any meaning to it."²⁸ The judge, however, allowed the jury to consider whether the psychopath-

23. The *Durham* approach places a greater stress on labels: "But it is for the jury, not the judge, to decide whether a given psychiatric diagnosis [i.e., psychopathy], if accepted, brings the accused within the legal definition of insanity." *Taylor v. United States*, 222 F.2d 398, 404 (D.C. Cir. 1955).

24. The problem of the psychopath recently troubled the New Jersey Court which, in rejecting the *Durham* rule, asked: "Is, for instance, the diagnostic label 'psychopathy' a mental disease or defect?" *State v. Lucas*, 30 N.J. 37, 71, 152 A.2d 50, 68 (1959). This points up one of the difficulties with the *Durham* stress on "disease" and "defect," a problem that does not exist under the New Hampshire doctrine. See note 16 *supra* (but see also note 83 *infra*). The New Jersey court did not consider the New Hampshire doctrine, probably in the belief that rejection of *Durham* is rejection of New Hampshire.

25. In 1950 Dr. Henry Yellowlees was asked to name some clinical classes which might be held responsible for crime even though "certificably insane." He replied:

I think the answer is that the chief class that might be held responsible, although they could be held also certifiably insane, are those people who are now very loosely termed 'psychopaths' . . . in that broad group which are called psychopaths you have a large number of persons many of whom could quite well be certified and many of whom should and could be held responsible for what they do.

Royal Commission on Capital Punishment, *Minutes of Evidence*, Twenty-third Day, Thursday, June 1, 1950, par. 7328, p. 536. See also Note, 10 *RUTGERS L. REV.* 425, 435 (1955).

26. Tiffany, *Background of the Sexual Psychopath Law*, in *PUB. N. H. MEDICO-LEGAL SOCIETY* 27, 29 (1954).

27. This is especially evident when we consider that in the same speech the Attorney General admitted: "This disease [sexual psychopathy] renders them irresponsible for sex acts. This disease is somewhat similar to that of an insane person in regards to his general action." *Id.* at 28.

28. *Carraher v. H. M. Advocate*, [1946] *Just. Cas.* 108, 115 (Scot.).

defendant came within the scope of diminished responsibility²⁹ and the jury found that he did not. The significance of this case, so far as the New Hampshire doctrine is concerned, is that the jury in rejecting the application of diminished responsibility to a psychopath was rejecting it only for this psychopath-defendant on the basis of the facts in this one case. And when the Scottish judges on appeal refused to reverse the verdict on the defendant's argument that a medical finding of psychopathy should lead automatically to a legal finding of diminished responsibility, they were not holding that psychopathy could never be related to diminished responsibility.³⁰ The same would be true in any New Hampshire insanity case. The facts and not the concepts would control.³¹ It is submitted, therefore, that defense counsel operating in a New Hampshire jurisdiction could, and in some cases should, challenge a finding by the State Psychiatrists that a psychopath is not insane, and take the question to the

29. Actually, in his instructions, the trial judge put the issues to the jury 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. Advocate, [1946] Just. Cas. 108, 112 (Scot.).

30. This was brought out during the questioning of the Vice-Dean of the Faculty of Advocates (the Scottish Bar Association) by the Royal Commission on Capital Punishment.

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 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*, Nineteenth Day, April 5, 1950, par. 5628, p. 450. It has since been held in England (where, as distinguished from Scotland, diminished responsibility has been established by statute and not by judicial precedent) that evidence of psychopathic personality is not irrelevant in establishing the plea of diminished responsibility. *R. v. Dunbar*, [1957] 2 All E.R. 737 (Crim. App.).

31. This is also true in Scotland as the Crown Agent, L. I. Gordon, noted: "The question is, was the accused when he inflicted the injuries in such a condition as to form the intention to kill or do serious harm. If not then it is immaterial that his mental condition, though one of perfect sanity, may be described as psychopathic personality." Royal Commission on Capital Punishment, *Minutes of Evidence*, Seventh Day, November 3, 1949, par. 10, p. 170.

Judge Bazelon, the originator of the *Durham* rule, has said much the same thing.

The law does not attach consequences to medical labels. Legal consequences depend rather upon the jury's determination, from all the facts, as to the individual's mental health or illness. Testimony that the individual suffers from a named condition, e.g., psychosis or psychopathy, is of aid to the jury only to the extent that the jury is otherwise informed of the nature of the condition.

Lyles v. United States, 254 F.2d 725, 734-5 note 4 (D.C. Cir. 1957) (dissenting opinion).

jury. This has been done in *M'Naghten* jurisdictions,³² and while most psychopaths are found responsible and hanged,³³ some *M'Naghten* juries have found them "not guilty by reason of insanity."³⁴ If this can be done under the *M'Naghten* rules it is all the more reason why it can be done under the New Hampshire doctrine where the defendant has a right to have such matters determined by the jury as questions of fact and should not have his fate settled by medical fiat.

The view of the New Hampshire State Hospital that a psychopath is not "insane" has been challenged in only one important case, *State v. Long*.³⁵ Long was a pedophilic who, rather than risk detection, killed a young boy who stubbornly and courageously resisted his advances. After his arrest it was discovered that he had killed another boy under much the same circumstances in another county. At the conference of the Staff of the State Hospital (the transcript of which is reproduced in Appendix A) it was fairly well agreed that Long was a psychopath. There was disagreement, however, as to whether he was "insane." The Superintendent, who considered he was "sane,"³⁶ was disturbed by this,³⁷ and, suppressing the opinions of his subordinates, reported to the court that Long was sane. He called him a "crooked stick," "in the twilight zone"³⁸ and told the jury that "Long has no mental disease."³⁹ The defense, insisting Long was a "Mental Leper,"⁴⁰ pleaded the statutory defense of "not guilty by reason of mental derangement" which is in the nature of a plea of confession and avoidance which concedes the commission of the physical act charged.⁴¹ As a result the only issues at the trial were whether Long was insane and whether he should be hanged.⁴² The State called at least thirty-three witnesses, only one of whom, the Superintendent of the State Hospital, was a psychiatrist. The defense produced nine witnesses, several of whom

32. *People v. Hector*, 104 Cal. App.2d 392, 231 P.2d 916 (1951); *State v. Maish*, 29 Wash.2d 52, 185 P.2d 486 (1948).

33. *R. v. Rivett*, 34 Cr. App. R. 87 (1950).

34. GUTTMACHER & WEIHOFEN, *PSYCHIATRY AND THE LAW* 94 (1952). Fifteen days after *Durham* was handed down the District of Columbia Court held that it had been error for a trial judge, operating under the combined *M'Naghten*-irresistible impulse tests, to instruct the jury that a psychopath "is not insane within the meaning of the law." *Stewart v. United States*, 214 F.2d 879, 881 (D.C. Cir. 1954).

35. 90 N.H. 103, 4 A.2d 865, 6 A.2d 752 (1939).

36. The Superintendent was Dr. Dolloff, and, as will be discussed later, he believed the test for insanity was or should be whether the defendant knew what he was doing was wrong.

37. "I am so emotionally upset by the unanimity of opinion that the man is insane that I am thrown off balance and don't know what to do." Appendix A, pp. 46-47.

38. Tiffany, *Background of the Sexual Psychopath Law*, in PUB. N. H. MEDICO-LEGAL SOCIETY 27, 29 (1954).

39. *The Laconia* (N.H.) *Evening Citizen*, Dec. 10, 1937, p. 1, col. 7. "I would says [sic] that Howard Long is not insane; that he comes within the limits of sanity."

40. *The Laconia* (N.H.) *Evening Citizen*, Dec. 13, 1937, p. 1, cols. 6 & 7.

41. *State v. Forcier*, 95 N.H. 341, 63 A.2d 235 (1949); *State v. Long*, 90 N.H. 103, 106, 4 A.2d 865, 6 A.2d 752 (1939). The defense of insanity raised under the general issue is not an admission of the act.

42. In New Hampshire the issue of capital punishment is resolved by the jury.

were alienists.⁴³ The question which the jury had to decide was whether this psychopath, whom nearly everyone considered dangerous because of his mental condition, was, as the Superintendent of the State Hospital insisted, sane or whether he was insane. Thus for the first and apparently only time the New Hampshire doctrine was being tested in a capital case involving a psychopath.⁴⁴ Unfortunately, however, it cannot be considered a fair test because after correctly instructing the jury that there was no test "as a matter of law," the presiding judge contradicted himself by saying:

Whether the respondent had sufficient mental capacity to entertain a criminal intent is a question of fact for the jury. Was he so far deficient that he was not able to form or to entertain a criminal intent? If so, then his acts were the product and result of his abnormal mental condition. If, on the other hand, he had the mental ability to appreciate what he was doing, and sufficient mental power to control his actions, then reason must have prompted his acts, they were not caused or produced by insanity, but were assented to and concurred in by his will, and were, therefore criminal.

Thus the judge did, in effect, establish a "test" of sorts, but whether the jury followed his earlier statement that there is no test or whether it felt bound to convict if it found the defendant was able "to appreciate what he was doing and [had] sufficient mental power to control his actions," the fact remains that the *Long* case offers us our best illustration of the relationship of psychopathy to the New Hampshire doctrine. Aside from the unfortunate wording of the charge it was a correct application of the doctrine, for the true test should be not whether the Superintendent believed that a defendant who comes within the term "psychopath" is sane, but whether the jury, on the basis of all the evidence, thought *this* defendant was responsible. The decision that Long was guilty of murder in the first degree seems correct, not because the jury followed the rejected right-wrong test which the State Hospital was still applying at

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

44. This is not the only time a psychopath has been charged with murder in New Hampshire. Rather it is the only capital case in which the defense challenged the State Hospital's determination that a psychopath is not insane. In 1953, for example, a seventeen year old boy was committed to the hospital for observation after he was accused of murder. The criminal psychiatrist at the Hospital reported to the court that the boy was not insane although he was a psychopath. ("As a result of my examination of Harvey Blake on December 2, 1953, as requested by the court, I find that he is responsible for his acts. However, it is to be noted that he has shown definite psychopathic traits for several years past, but these psychopathic traits do not make him insane or irresponsible.") (also quoted in footnote 18 *supra*). The boy's court-appointed counsel decided not to challenge this report, perhaps because the State was not asking for the death penalty, and the defendant was sentenced to life imprisonment. *State v. Blake*, Merrimack State Docket No. 9473 (1953).

For a case of first degree murder in which the defense psychiatrist thought the defendant was a psychopath although the Director of Correctional Psychiatry at the State Hospital did not mention it in his report that the young defendant was sane, see *State v. Rankin*, Strafford Criminal Docket No. 3230 (1960).

that time, but because, on the special facts of the case,⁴⁵ twelve average people could easily, without difficulty, agree that Long was not suffering from any mental disease which was responsible for the criminal act, or could be said to excuse the criminal act, or of which the criminal act could be considered to be the product.

The *Long* case does not prove that a psychopath who does not have a psychosis could not successfully plead insanity under the New Hampshire doctrine. The most it shows is that, given the same set of facts, an American jury is not likely to return a verdict of not guilty by reason of insanity, and that a psychopath has a hard row to hoe if he wishes to convince a jury that he is insane and therefore not responsible for his criminal acts by reason of psychopathy alone. The limits of the New Hampshire doctrine have not been set by *State v. Long*, nor will they be set by any one case or combination of cases as long as insanity remains a pure question of fact.

What *State v. Long* does do is shed light on the various interpretations which have been given the New Hampshire doctrine. For, had the jury interpreted the New Hampshire doctrine in the same way the California Supreme Court did (when it rejected it),⁴⁶ that is, that the defendant should be adjudged insane if the act would not have been committed "had the taint not existed," then it would have found Long not guilty by reason of insanity because undoubtedly he would not have gotten into the predicament which led to the killing of the boy if he had not suffered from pedophilia. Rather, they followed an interpretation of the New Hampshire doctrine which either agreed with Professor Weihofen that "the mental disease must be such as to have rendered the defendant incapable of the guilty intent required to constitute the crime"⁴⁷ or with the theory that it makes insanity purely a question of fact.

Even had the *Long* jury accepted the notion that the concept of psychopathic personality should be equated with legal insanity, it would not mean that juries in other jurisdictions which might adopt the New Hampshire doctrine would necessarily do likewise. In New Hampshire the defendant need only introduce "some" evidence of mental disorder to rebut the

45. After his first burst of anger at being rejected had resulted in physical injury to the boy, Long attempted to comfort his victim and bandaged the wound he had inflicted. It was while he was doing this that he apparently reflected on the danger which the boy, if he talked, represented to his freedom. (Long had a record of institutionalization.) He then dragged the boy to a secluded spot, murdered him, and very methodically attempted to cover his tracks. He might have escaped detection had not the police been able to place him near the scene of the crime by the marks his automobile tires left on the dirt road.

46. *People v. Hubert*, 119 Cal. 216, 51 Pac. 329 (1897).

47. WEIHOFEN, *MENTAL DISORDER AS A CRIMINAL DEFENSE* 116 (1954). Whether or not Professor Weihofen is correct in his belief that the New Hampshire doctrine rests "upon the fundamental principle that criminal responsibility requires a guilty intent, or *mens rea*, as well as a prohibited act" (*Id.* at 113) is a matter which has not yet been settled by the courts. For a contrary view see Reid, *Understanding the New Hampshire Doctrine of Criminal Insanity*, 69 *YALE L.J.* 367, 383-6, 395-6 (1960).

presumption of sanity. Once this is done the burden is shifted to the prosecution not only to prove sanity but to prove it *beyond a reasonable doubt*.⁴⁸ In this regard New Hampshire represents one extreme. In many jurisdictions this is not the rule. In some the prosecution need prove sanity only by a preponderance of the evidence. In others the burden of going forward does not shift and the defendant still has the onus of proving his insanity, either by a preponderance of the evidence or even beyond a reasonable doubt. Thus, whether or not a defendant could successfully argue that a mental disorder is "insanity" could well depend on the burden of proof required. If the defendant must prove his insanity beyond a reasonable doubt he would probably have to show a greater sickness (or degree of sickness) than if he need only prove it by a balance of probabilities, and a much greater sickness than if the State must prove his sanity either by a preponderance of the evidence or beyond a reasonable doubt. The fact that a New Hampshire jury, which was told that the burden rested on the State to prove beyond a reasonable doubt that a psychopathic defendant was sane, nevertheless found that Long was not insane, shows that other jurisdictions which refuse to adopt the New Hampshire doctrine because there would be no telling where it might lead are basing their argument on a false premise. The limits of New Hampshire are fixed by the practical common sense of American jurors, a factor which is entitled to more credit than it usually receives from courts which refuse to consider any modification of the *M'Naghten* rules.

If anything, it is easier to delineate the outer limits of the New Hampshire doctrine than the inner. This was demonstrated by one case in which the jury found the defendant to be *medically insane* but not *legally insane*.⁴⁹ The Supreme Court upheld the verdict and the defendant was hanged. This marks one of the chief differences between *Durham* and New Hampshire. The *Durham* rule, which is oriented on medicine, requires that such a verdict be set aside if the psychiatric evidence agrees he is *medically insane*.⁵⁰ It gives the jury a free hand in the area of exculpation, but places restrictions (in the form of appellate review) on the jury's warrant to convict.⁵¹ The New Hampshire doctrine, on the other hand, leaves the question of fact to the jury and any determination that a "medically insane" defendant was legally responsible for his criminal actions is, in effect, a resolution of that question of fact which is solely within the province of the jury and can not be disturbed.

Courts in other jurisdictions as well as writers have criticized the New Hampshire doctrine because it places no limit on exculpation. But they

48. See the charge to the jury in *State v. DeMandel*, Rockingham State Docket No. 4513 (1959).

49. *State v. Jones*, 50 N.H. 369, 375 (1871) (defendant's argument).

50. *Fielding v. United States*, 251 F.2d 878 (D.C. Cir. 1957); *Wright v. United States*, 250 F.2d 4 (D.C. Cir. 1957); *Douglas v. United States*, 239 F.2d 52 (D.C. Cir. 1956).

51. Reid, *Understanding the New Hampshire Doctrine of Criminal Responsibility*, 69 *YALE L.J.* 367, 389-91 (1960).

have been thinking in terms of concepts developed from the operation of *M'Naghten* and *Durham* which are legal rules or theories. The New Hampshire doctrine is not theoretical but practical. It is not a rule of law but a rule of practice which can be judged only by how it operates. And jurors being what they are the most valid criticism of the New Hampshire doctrine might well be, not that it gives juries too great a license to exculpate, but that it gives them too great a license for holding mentally ill defendants responsible for their acts. It is significant that no prosecutor has been found in New Hampshire who criticizes the doctrine.

THE FAILING OF NEW HAMPSHIRE

As has been previously suggested, *State v. Long* is an exception to New Hampshire practice. In most cases the issue is resolved by the report of the State Hospital since in almost every instance it is accepted by both the defense and the prosecution.⁵² As a result, any weaknesses in the operation of the New Hampshire doctrine are weaknesses in procedure peculiar to that state, and not in the doctrine itself.

One apparent weakness to the casual observer is the brevity of the State Hospital's reports. At the turn of the century these reports contained information necessary to both the defense and the prosecution in determining whether a finding of sanity or insanity should be challenged.⁵³ Today,⁵⁴ however, the reports content themselves mainly with informing the court whether the State Hospital found the defendant "sane" or "insane."⁵⁵ Although defense counsel may obtain an account of what the State Psychiatrists found by filing motions for discovery,⁵⁶ they usually tend to rely upon the Hospital's determination, without attempting to ascertain what it means by the concept "insanity."

This does not seem to be in the best interest of defendants (at least those few who would prefer to be found insane rather than guilty) because, quite often, the Hospital has defined "insanity" far short of what may be

52. No case has been found in which the prosecution rejected the finding of the State Hospital that a defendant was insane.

53. For examples of these turn-of-the-century reports see *State v. Glass*, Strafford Criminal Docket No. 127 (1902) (see note 12 *supra*); *State v. Morgan*, Strafford Criminal Docket No. 435 (1907).

54. For examples of more recent reports see Appendix D; *supra* notes 15, 17, 18; *infra* notes 55, 57, 135, 136.

55. The word "insanity" has often been criticized by psychiatrists as a legal term which has little validity in medicine. Yet, the psychiatrists at the State Hospital persist in using it to the exclusion of all others. In only a few instances has the word "insanity" been supplemented by terms like "responsible" (see report in *State v. Blake*, Merrimack State Docket No. 9473 (1953) *supra* notes 18 and 44) or "disease affecting his mind which would result in the acts." *State v. Bernard*, Strafford Criminal Docket No. 2867 (1957).

This is to inform you that the observation and study of Lloyd G. Bernard, committed to this hospital on August 16, 1957, have been completed. Examination reveals that the patient does not have a disease affecting his mind which would result in the acts which led to his arrest. In my opinion he is, therefore, not insane and is free of mental disease so that he is competent to participate in legal proceedings.

56. See the motions which were granted in *State v. Rankin*, Strafford Criminal Docket No. 3230 (1960).

argued before a jury under the New Hampshire doctrine. For one thing, the State Psychiatrists seem to require that a causal relationship exist between the mental disease and the criminal act.⁵⁷ This is not implicit in the New Hampshire doctrine. Whether or not a causal link must be discovered between the disease and the act in order for the defendant to be found "not guilty by reason of insanity" is a question of fact for the jury.⁵⁸ It is perfectly proper for the prosecution to argue to the jury that it should not find a defendant irresponsible for his actions unless it also finds that these actions were caused by mental disease, and it is also just as proper for the State Psychiatrist, on the witness stand, to support his argument. But for defense counsel in New Hampshire to automatically accept a report by the State Hospital that the defendant is not insane, without determining whether this is based on the fact that the State Psychiatrists were unable to find a connection between the alleged crime and a diagnosed mental illness, could greatly affect the rights of his client. Of course, most defense counsel would seriously doubt the chances of persuading a jury that the respondent should not be held accountable if they are unable to show that the criminal act was caused by a mental disease⁵⁹ (even when the State Psychiatrist readily admits that the defendant is suffering from mental disease). Yet there is always a possibility that the jury will feel no connection need be shown or that an alienist can be found to testify that such a connection either does exist or need not exist.⁶⁰

A second factor which defense counsel in a New Hampshire jurisdiction should consider, before accepting a report by a court-appointed psychiatrist

57. An example of this is found in some reports like the following: "Examination reveals that the patient does not have a disease affecting his mind which would result in the acts which led to his arrest. In my opinion he is, therefore, not insane" *State v. Bernard*, Strafford Criminal Docket No. 2867 (1957). "Our determination of the question is based . . . [on] whether the individual was suffering from some form of mental illness, disease, or derangement which could account for the commission of the crime." Personal Letter From Harrison M. Baker, M.D., Director of Correctional Psychiatry, New Hampshire State Hospital, to John Reid, March 30, 1960.

58. Judge Doe, the originator of the New Hampshire doctrine, instructed a jury, "Whether an act may be produced by partial insanity where no connection can be discovered between the act and disease, is a question of fact." *State v. Jones*, 50 N.H. 369 (1871). See discussion, Reid, *Understanding the New Hampshire Doctrine of Criminal Responsibility*, 69 *YALE L.J.* 367, 392-4 (1960). It must be admitted, however, that some commentators have interpreted the New Hampshire doctrine as requiring causation. Wechsler, *The Criteria of Criminal Responsibility*, 22 *U. CHI. L. REV.* 367, 370 (1955); Weihofen, *The Flowering of New Hampshire*, 22 *U. CHI. L. REV.* 356, 360 (1955); Note, 54 *COLUM. L. REV.* 1153, 1155 (1954); Brief of Amicus Curiae, p. 30, *Steward v. United States*, 214 F.2d 879 (D.C. Cir. 1954).

59. It may be that this is what happened in *State v. Jones*. That the jury thought Jones responsible even though he was "insane" may be explained either by the fact that they felt the "insanity" was not of a serious enough degree to excuse, or else they found there was no causal connection between the "insanity" and the uxoricide and that such a connection must be shown to justify a verdict of "not guilty by reason of insanity."

60. Some psychiatrists believe that the attempt to prove causation (an integrated requirement of the *Durham* rule) is meaningless: "Mental illness does not cause one to commit a crime nor does mental illness produce a crime." Roche, *Criminality and Mental Illness — Two Faces of the Same Coin*, 22 *U. CHI. L. REV.* 320, 322 (1955).

that his client is "sane," is that sometimes these experts based their judgments solely upon the old tests for insanity, such as the *M'Naghten* rules. Again, it is perfectly proper for the prosecution under the New Hampshire doctrine to argue before a jury that the defendant should be held responsible if he knew that what he was doing was wrong. The important distinction between New Hampshire and a *M'Naghten* jurisdiction is that, unlike a *Durham* jury,⁶¹ a New Hampshire jury may accept or reject the right-wrong test. The correctness of *M'Naghten* is, in effect, a question of fact. The New Hampshire doctrine breaks down procedurally when the State Hospital certifies a man to be "sane" on the basis of the *M'Naghten* rules or the irresistible impulse test, and defense counsel accepts the report without questioning the reasoning behind it.

It is ironic that some psychiatrists have been condemning the *M'Naghten* rules and the irresistible impulse test ever since they were formulated, while in the one state where they have not been law for over ninety years other psychiatrists have often applied them as the sole criteria for determining the accountability of persons accused of crime. During the 1930s, for example, the Superintendent of the State Hospital consistently applied the *M'Naghten* right-wrong test.⁶² He believed that there were four "essential" types of insanity—the deluded type, dementia, depression, and the elated type.⁶³ He told the jury in the *Long* case that there were two types of insane persons "who hang their heads in apparent shame. Long belongs to neither of these two classes."⁶⁴ It may also be that he applied the irresistible impulse test to Long; although, if he did, it was probably for the purpose of verifying that no psychosis existed.⁶⁵ Once more it must be noted that the New Hampshire doctrine permits the

61. "While capacity to distinguish right from wrong is no longer *the* earmark of legal *sanity*, the lack of that capacity is *one* of the earmarks of legal *insanity*." (Emphasis not supplied.) *Wright v. United States*, 250 F.2d 4, 12 (D.C. Cir. 1957).

62. I was County Solicitor [of Merrimack County] from 1930 to 1944.

During that period it was my practice to arrange for persons charged with felonies to be committed to the State Hospital for observation in advance of trial. I do not remember a case in which a person so committed was ever found insane by the Superintendent of the State Hospital. The Superintendent always took the position in these cases that I had to do with that the test for insanity was whether the person knew the difference between right and wrong.

Personal Letter From Willoughby Colby, Esquire, to John Reid, January 27, 1960.

63. *The Laconia* (N.H.) *Evening Citizen*, Dec. 10, 1937, p. 6, col. 7.

64. *Ibid.*

65. As I recall it, Dr. Dolloff examined Long repeatedly. He found the key as he believed, in the answer to a series of questions he asked Long; to this purpose: Do you ever seek connection with women? Yes. What do you do when the woman resists? I let her alone. He therefore concluded that the sexual urge was controllable, hence Long was sane. I think that a number of the hospital staff at the time disagreed with Dr. Dolloff. I do not know why, but I have wondered whether to some psychiatrists a psychosis seems the controlling factor as a matter of course. But that is not our legal rule.

Letter From Hon. Elwin L. Page, former Associate Justice, N.H. Supreme Court to Hon. Amos N. Blandin, Jr., Associate Justice, N. H. Supreme Court, quoted in a personal communication from Hon. Amos N. Blandin, Jr., to John Reid, February 25, 1960.

State Hospital to define "insanity" by whatever means or test it pleases. Whether or not the test the Hospital uses is correct is a question of fact for the jury. The difficulty is that few defense counsel appreciated this, and as a result they accepted the Hospital's report as determinative of the question of fact. Thus the State Psychiatrists were responsible for perpetuating in New Hampshire the right-wrong test which the legal profession had rejected in 1869, partly on the belief that they represented medical error.⁶⁶ Today, however, this is no longer true, for the State Psychiatrists reach their conclusions on grounds more closely related to the question of fact which the jury would determine if the issue went to trial.⁶⁷

The suggestion that some New Hampshire attorneys have failed to grasp the full scope of the New Hampshire doctrine is not an idle guess. The records of a few cases show that defense counsel believed that insanity was governed by one or more of the tests which are law in other jurisdictions.⁶⁸ Thus the State Psychiatrists can hardly be blamed for using the *M'Naghten* criteria (assuming they were applying it because they thought it was the law of New Hampshire and not because they thought it was the correct medical test); especially when we consider that, as recently as 1957, the Clerk of Court of one county instructed the Superintendent of the State Hospital that, under *State v. Jones*, the test for insanity in New Hampshire was knowledge of the difference between doing right and wrong, and whether there was an irresistible impulse.⁶⁹

66. Although the New Hampshire doctrine is fundamentally based on the legal principle that *M'Naghten* is an unwarranted presumption which usurps the fact-finding function of the jury (see Reid, *A Speculative Novelty: Judge Doe's Search for Reason in the Law of Evidence*, 39 B.U.L. REV. 321 (1959)), it cannot be denied that Judge Doe was strongly impressed by the fact that the right-wrong test was considered by some psychiatrists to be "bad" medicine (see Reik, *The Doe-Ray Correspondence: A Pioneer Collaboration in the Jurisprudence of Mental Disease*, 63 YALE L.J. 183 (1953)).

67. [T]he question as to the determination of insanity as practiced in cases in which criminal action is contemplated or in which an individual has committed some crime, is determined in the hospital on the basis of the New Hampshire Rule which, in essence, is a product rule. Our determination of the question is based, not upon existence of the fact that the individual knew the difference between right and wrong (basically the essence of the *M'Naghten* Rule), but whether the individual was suffering from some form of mental illness, disease, or derangement which could account for the commission of the crime. Ultimately this is a question of fact to be determined by a jury, if in our opinion, the individual was not found to have any form of mental illness.

Personal Letter From Harrison M. Baker, M.D., Director of Correctional Psychiatry, N. H. State Hospital, to John Reid, March 30, 1960.

68. This may be explained, in part, by the fact that New Hampshire is one of the two jurisdictions in the United States which does not have a law school. All New Hampshire lawyers are trained outside the state, especially in *M'Naghten*-bound Massachusetts.

69. In passing, and without attempting to infringe upon your province, it is my understanding, after eighteen years as a practicing attorney and eleven years as Clerk, that the legal yardstick which is applied in these cases is: Did the respondent know the difference between (doing) right and (doing) wrong when the action was committed?

In a case *State v. Jones*, 50 N.H. 369, the Supreme Court found . . . 'an act produced by a mental disease is not a crime; if the defendant, (respondent)

Some lawyers have not only believed that New Hampshire has a test for determining insanity, but have acted on that premise. One defense counsel, who discovered that the State Hospital, which reported his client to be sane, had overlooked the fact that the man was an epileptic, petitioned the court for a second examination so that, as he put it, it could be determined "whether he is inflicted with 'insanity or mental derangement' within the meaning of Revised Laws, ch. 429, s. 2."⁷⁰ When the second report of the State Hospital confirmed that the defendant was "sane," the lawyer, apparently believing that the determination had been made on the basis of some test which defined insanity "within the meaning" of the statute,⁷¹ changed his client's plea to guilty.⁷²

It is not surprising, therefore, to discover that some judges have instructed their juries in a way far removed from the New Hampshire premise that insanity is a question of fact. In one recent case the jury was even charged in *M'Naghten* terms.⁷³ The judge did this at the request of the respondent,⁷⁴ despite the fact that the Supreme Court has said such a request should not be granted.⁷⁵ To do so defeats the New Hampshire doctrine, since it means that insanity is no longer a question of fact but is limited to the definition which the judge gives it,⁷⁶ and such a definition can not be left to the choice of the defendant.

Similarly other judges, while steering clear of concepts such as right-wrong or irresistible impulse, have stressed intent to such a degree that they have, in effect, instructed the jury that the defendant must not be found insane unless the mental disease from which he suffers interfered with his ability to form a criminal intent.⁷⁷

Finally, as might be expected, there are cases in which counsel and court have equated the New Hampshire doctrine with the *Durham* rule.

had a mental disease which irresistibly impelled him to kill and the killing was the product of mental disease, he is not guilty . . . ' In said case, on a trial for murder, the defense was insanity (at the time of commission of the alleged crime).

Letter From the Clerk of Court, Merrimack County Superior Court to the Superintendent, N.H. State Hospital, Jan. 29, 1957, filed with the papers in *State v. Tenney*, Merrimack State Docket No. 400 (1957).

70. Motion for Recommitment (Emphasis added), *State v. Sheeney*, *Stafford Criminal Docket No. 2271* (1945).

71. The statute merely recognized insanity as a special, statutory defense separate from the general issue of not guilty.

72. He was undoubtedly satisfied with the sentence of 23 to 40 years.

73. See the charge in *State v. Snow* reproduced in Appendix C.

74. Who also asked for the irresistible impulse test, see, *Respondent's Requests for Instructions No. 5*, *Respondent's Bill of Exceptions*, p. 53, *State v. Snow*, 98 N. H. 1, 93 A.2d 831 (1953).

75. In one case the defendant appealed when the trial judge refused to charge in *M'Naghten*-irresistible impulse terms and instead instructed the jury that insanity was a question of fact. The verdict was upheld, *State v. Jones*, 50 N.H. 369 (1871).

76. See discussion, Reid, *Understanding the New Hampshire Doctrine of Criminal Insanity*, 69 *YALE L.J.* 367, 414-15 (1960).

77. See the charges reproduced in Appendix C.

In one trial the defense asked for and the court granted the following instruction:

"An accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect."⁷⁸

This was lifted word for word from the *Durham* case.⁷⁹ From a New Hampshire point of view there is nothing wrong with this charge⁸⁰ (since it leaves to the jury as a question of fact how much causation is required by the word "product"). The court, however, by adopting *Durham* terminology ran into the same trouble which the *Durham* judges,⁸¹ and the framers of the Model Penal Code⁸² had encountered, and decided it had to define what it meant by the phrase "mental disease and mental defect."⁸³ This demonstrates the difficulty which can arise by identifying New Hampshire with *Durham*, for the New Hampshire doctrine makes all matters, including definitions and even choice of words, questions of fact.⁸⁴ It would be error for a New Hampshire court to define either "disease" or "defect" since to do so would be to define "insanity" and under the New Hampshire doctrine the definition of insanity is a question of fact. Yet, such an "error" is a natural consequence of confusing New Hampshire with *Durham*. So long as this is done the New Hampshire doctrine is bound to become more and more diluted with the flaws and compromises which *Durham* is heir to.

This points up what is the greatest weakness of the New Hampshire doctrine. It is identified with the *Durham* rule. Not only have most of the

78. *State v. DeMandel*, Rockingham State Docket No. 4513 (1959) (breaking, entering and larceny).

79. *Durham v. United States*, 214 F.2d 862, 875 (D.C. Cir. 1954).

80. The court also ruled (in terms which seem to require that the mental disease must affect *mens rea* if the defendant is to be held insane):

No person should be convicted of a criminal charge when at the time of the act or omission alleged he was suffering from mental disease and by reason of such mental disease he did not have the particular state of mind that must accompany such act or omission in order to constitute the crime charged.

State v. DeMandel, Rockingham State Docket No. 4513 (1959).

81. *Durham* courts have insisted on stressing the distinction between "disease" and "defects," even suggesting:

The New Hampshire test and that adopted in the *Durham* case are precisely the same, except that the *Durham* case extended it to include mental defects; whereas the New Hampshire doctrine seems to have been originally limited to mental diseases.

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

82. "The terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct," MODEL PENAL CODE 4.01 (2) (Tent. Draft No. 4, 1955). This definition did not satisfy the Vermont legislature which added to it the qualification: "The terms 'mental disease or defect' shall include congenial and traumatic mental conditions as well as disease." VT. STAT. ANN. tit. 13, § 4801(2) (1958).

83. The Court ruled: "The word 'mental defect' . . . is given the meaning advanced by counsel for the defendant of 'permanent or lasting mental disease.'" *State v. DeMandel*, Rockingham State Docket No. 4513 (1959).

84. See discussion, Reid, *Understanding the New Hampshire Doctrine of Criminal Insanity*, 69 YALE L.J. 367, 391-2 (1960).

leading commentators⁸⁵ and several of our state courts⁸⁶ regarded New Hampshire and *Durham* as similar, but, as the case just discussed shows, some New Hampshire judges and lawyers do also. If this continues to be the trend the New Hampshire doctrine is doomed. For the *Durham* rule, with its greater number of reported decisions and the greater prestige which its "pioneering" court enjoys, will submerge the older doctrine, and New Hampshire will shift from a rule of law which adheres to the fundamental legal principle that questions of fact are for the jury to a rule of medicine which adheres to whichever of the latest advances of science appeal to the appellate judges.

THE ACHIEVEMENT OF NEW HAMPSHIRE

The weaknesses which have been discussed are outweighed by the advantages of the New Hampshire doctrine. These advantages, like the weaknesses, are more inherent in the procedural practice which has grown up in New Hampshire rather than in the doctrine itself. Yet practice can not be wholly separated from doctrine, partly because many of the procedures and customs which have been developed for dealing with the criminally insane in New Hampshire may be attributed to the spirit of cooperation which the New Hampshire doctrine (by abandoning unrealistic tests) has fostered between the legal and medical profession.

Perhaps the most remarkable achievement of New Hampshire procedure is that prosecutors in that state have come to regard the verdict of "not guilty by reason of insanity" as a tool for protecting the public and rehabilitating the wrong-doer rather than as an escape route for criminals. There is a general acceptance among them that prison is not the best place for every type of offender and that the law has a duty to prevent future crimes as well as punish past ones. They regard psychiatrists with less suspicion than seems to be the rule for prosecutors in other American jurisdictions. This has been demonstrated in many cases. A typical example involved a defendant indicted for unnatural acts with a minor, who was before the court for sentence following a plea of guilty. The issue of "sanity" was not raised,⁸⁷ yet the problem of disposition troubled the authorities. Asked by the court for a recommendation, the County Solicitor said:

85. See, e.g., Guttmacher, *The Psychiatrist as an Expert Witness*, 22 U. CHI. L. REV. 325, 327 (1955).

86. For example, one court was asked to adopt the New Hampshire doctrine which was correctly explained in appellant's brief as making "insanity" a question of fact for the jury. The court, instead of considering New Hampshire, undertook to discuss and reject *Durham*. *Commonwealth v. Chester*, 337 Mass. 702, 150 N.E. 2d 914 (1958). More recently the Florida Court identified *Durham* and New Hampshire. It did so in a case in which it professed to reject the New Hampshire doctrine, but since it referred to New Hampshire as the irresistible impulse and moral insanity test the most it can be said to have rejected is an unresearched phantom. *Piccott v. State*, 116 So.2d 626, 627 (Fla. 1959).

87. The defendant had been committed for observation under New Hampshire's sexual psychopath statute and had been "found not classifiable as a sexual psychopath."

It is also difficult for me to know the right recommendation with someone with this type of tendencies, the involvement with boys who are still growing, still adolescents, may be misled perhaps one way or the other. . . . I think any respondent with this kind of tendency should be supervised, that there should be a deterrent perhaps over his head so that perhaps it would help him control his own tendency. I would recommend that rather than any type of jail sentence that is terminated right away.⁸⁸

Whether this "protection-to-the-public" theory is an outgrowth of the New Hampshire doctrine is open to debate. It is significant that it is shared by the one other jurisdiction in the English-speaking world which makes insanity a question of fact, Scotland,⁸⁹ and also by the *Durham* court,⁹⁰ while it is rejected by some *M'Naghten* jurisdictions which continue to identify the public's protection with the criminal's punishment.⁹¹

One reason for the development of the protection-to-the-public theory in New Hampshire is the fact that the State may, on its own initiative, raise the issue of insanity.⁹² In perhaps nine out of every ten cases in

88. Transcript of Hearing, *State v. Rathburn*, Rockingham State Docket No. 4541 (1959).

89. I cannot assent to the contention that the protection of the public is to be disregarded, nor the implied separation of the panel's [accused's] own protection from that of the public. . . . The interests of society include the reformation of the criminal, the prevention of the repetition of the crime by him or by others, and the protection of other members of the community. When a panel [an accused] is convicted of a crime committed under an impulse which he is less able to resist than the normal person, and when there is evidence that the impairment of his powers of resistance may come into play after a long interval during which there have been no premonitory signs of danger, and when the crime has been one of atrocious ferocity, the protection of the public against its repetition is especially relevant.

H. M. Advocate v. Kirkwood, [1939] Just. Cas. 36, 40-41 (Scot.) (this case involved a plea of diminished responsibility, not insanity, yet the court held that protection of the public required that the defendant be segregated from society for the rest of his life).

90. If Williams' violent act in 1949 sprang from mental disorder — if, indeed, he has a mental illness which makes it likely that he will commit other violent acts when his sentence is served, imprisonment is not a remedy. Not only would it be wrong to imprison him, but imprisonment would not secure the community against repetitions of his violence. Hospitalization, on the other hand, would serve the dual purpose of giving him the treatment required for his illness and keeping him confined until it would be safe to release him. Society's great interest in the proper disposition of such cases would be deserved if the Government, in prosecuting them, adopted an attitude of passivity or resistance to the production of evidence.

Williams v. United States, 250 F.2d 19, 26 (D.C. Cir. 1957).

91. [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).

92. "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).

which insanity (at the time of the offense as well as present insanity) is a factor, it is the prosecution which first introduces it. This is done by moving for pre-trial examination and commitment to the State Hospital. 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. The Royal Commission on Capital Punishment which urged that England adopt an insanity "test" somewhat similar to New Hampshire's, felt that this was going too far.⁹³ 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.⁹⁴ It is submitted that this offers no problem in New Hampshire since a State-raised issue of insanity is raised under the special, statutory defense of insanity which is different in legal consequences from the defense of insanity raised under the general issue of not guilty.⁹⁵ 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."

A more serious objection to allowing the state to introduce the issue of insanity is that it may jeopardize the defendant's chances of proving himself not guilty by some other defense. This, of course, would depend upon the defense.⁹⁶ The question has never been raised in New Hampshire.

93. Royal Commission on Capital Punishment, *Report* CMD No. 8932, para. 443 (1953). The Royal Commission said that "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." *Id.* This is not quite true. See, *R. v. Bastian*, [1958] 1 All. E. R. 568 (Cent. Crim. Ct.); *R. v. Kemp* [1956] 3 Weekly L. R. 724, 727 (Bristol Summer Assizes); *R. v. Holliday*, [1924] So. Afr. L. R. 250, see also the South African cases of *R. v. Ngema and Cele*, [1960] 1 So. Afr. L. R. 137, 141 (App. Div.) (1959).

94. This is discussed in *R. v. Holliday*, [1924] So. Afr. 250 (App. Div.) and in LANSDOWN & VAN DEE RIET, *JUDICIAL INTERPRETATIONS OF THE SOUTH AFRICAN CRIMINAL PROCEDURE ACTS* 143-4 (1956).

95. *State v. Forcier*, 95 N.H. 341, 63 A.2d 235 (1949); *State v. Long*, 90 N.H. 103, 106, 4 A.2d 865, 6 A.2d 752 (1939).

96. The wording of the simple principle that insanity is an *issue* to be raised by the defence is satisfactory so long as the existence of insanity as a state of fact is inconsistent or potentially inconsistent with other defences. To raise the issue of insanity certainly may reduce the force, as factual material for the jury's consideration, of evidence of, for example, self-defence. But there may, to argue hypothetically for the present, be other defences which are not factually inconsistent with the evidence of insanity; defences, that is to say, capable of being convincingly established by facts which admit of the interpretation 'insanity also.' If such defences exist, and if it is right that the principle that insanity is an issue to be raised by the defence alone is to be attributed largely to the fact that there may be another defence in some degree reduced in force by evidence of insanity, then it becomes apparent that the principle is perhaps not, for all purposes, correctly worded.

Griew, "Diminished Responsibility" and the *Trial of Lunatics Act*, 1883, [1957] CRIM. L. REV. 521, 525.

Perhaps the most significant factor to be learned from the New Hampshire approach to criminal insanity (*i.e.*, the protection-to-the-public attitude combined with the State's power to raise the issue) comes from a study of cases in which the prosecution has introduced the question of insanity. Some judges⁹⁷ and psychiatrists⁹⁸ have suggested that insanity is important only in cases involving capital punishment. The New Hampshire experiment proves that this is not so once the plea of insanity comes to be recognized as a weapon for the prosecution as well as for the defense. In most of the cases in which the State has raised the issue of insanity, the death penalty has not been a factor.⁹⁹

A study of the records in only one middle-size county reveals that, in addition to such capital offenses as homicide,¹⁰⁰ uxoricide,¹⁰¹ and infanticide by an unwed mother,¹⁰² the State has raised the issue of insanity in cases involving arson,¹⁰³ robbery and intent to rob,¹⁰⁴ aggravated assault,¹⁰⁵ larceny,¹⁰⁶ breaking and entering in the night,¹⁰⁷ breaking and entering,¹⁰⁸ and bigamy.¹⁰⁹ In other cases the State has petitioned for observation at

97. *State v. Lucas*, 30 N.J. 37, 82, 87, 152 A.2d 50, 74, 77 (1959) (concurring opinion).

98. "Abolish capital punishment and the dispute between lawyers and doctors ceases to be of practical importance." *EAST, SOCIETY AND THE CRIMINAL* 65 (1951).

99. This was demonstrated by a reply which the Solicitor of Belknap County sent to Judge Blandin who was conducting a survey on the utility of the New Hampshire doctrine for Professor Weihofen.

Replying to your letter of November 29, 1954, the question of insanity has arisen in five felony cases [between Jan. 1, 1953 and Nov. 1, 1954] and in each case I brought up the question before indictment or before waiver of indictment.

One of these five is awaiting report, one was found sane and was released on probation and carved his initials on the breast of a girl he thought was his girl friend and wasn't (this was done in Mass. so don't get excited), two were found mentally deranged at the time of the offense and the Grand Jury, after a vote they should otherwise be indicted, omitted to indict by reason of mental derangement, and in the other case the defendant was found to lack sufficient intelligence to be able to defend himself.

Letter From Thomas P. Cheney, Esquire, to Hon. Amos N. Blandin, Jr., quoted in a Personal Communication from Hon. Amos N. Blandin, Jr., to John Reid, February 25, 1960.

100. *State v. Sheehy*, Strafford Criminal Docket No. 2271 (1945).

101. *State v. Rankin*, Strafford Criminal Docket No. 3230 (1960).

102. *State v. Gordon*, Strafford Criminal Docket No. 3183 (1959).

103. *State v. Merchand*, Strafford Criminal Docket No. 2347 (1947). In one arson case the County Solicitor's motion for commitment for observation read in part — "That there is a question as to the sanity of the respondent and no doubt a plea of 'not guilty, by reason of insanity,' will be made by the respondent in case of indictment by said Grand Jury." *State v. Goodwin*, Strafford Criminal Docket No. 2027 (1938).

104. *State v. Allen*, Strafford Criminal Docket No. 2605 (1952).

105. *State v. Cahill*, Strafford Criminal Docket No. 1868 (1934).

106. *State v. Daniel*, Strafford Criminal Docket No. 2296 (1945).

107. *State v. Smith*, Strafford Criminal Docket No. 1843 (1933).

108. *State v. Bernard*, Strafford Criminal Docket No. 2867 (1957). In this case the County Solicitor petitioned for examination because the defendant had made several suicide attempts while in the lock-up. For the Hospital's report that he was sane see note 55 *supra*.

109. *State v. Moulton*, Strafford Criminal Docket No. 1713 (1930).

the suggestion of the court¹¹⁰ or has joined with the defense in raising the issue of insanity.¹¹¹

It would seem, therefore, in view of the fact that New Hampshire prosecutors not only are willing to introduce the issue of insanity whenever there is reason to suspect that a defendant is suffering from a mental disease but also have accepted without challenge the Hospital's determination of the defendant's condition, that practice in New Hampshire long ago reached the level of cooperation between law and medicine which the *Durham* judges have been seeking.¹¹² But unlike the District of Columbia,¹¹³ it reached this level of cooperation without turning the appellate court into a board of psychiatric experts who decide questions of fact which, in New Hampshire, properly belong to the jury.¹¹⁴ It was probably to this approach the Chief Justice of New Hampshire was referring when he wrote that the New Hampshire doctrine has brought about results "which would seem to be more consistent with ordinary wisdom than is possible under the *M'Naghten* Rules."¹¹⁵

Sometimes the court, the prosecution and defense counsel are anxious to put more stress on a defendant's mental condition than are the psychiatrists. This happens in "tough" cases. The New Hampshire doctrine is flexible and the plea of insanity can occasionally offer an easy way out.¹¹⁶ (It can also be an effective delaying weapon for the defense.)¹¹⁷

110. *State v. Woods*, Strafford Criminal Docket No. 2912 (1956) (breaking and entering).

111. *State v. Morgan*, Strafford Criminal Docket No. 435 (1907) (murder). This is the only case of those mentioned in this paragraph in which the defendant was found to be insane by the Hospital.

112. "The *Durham* opinion removes a long-existing barrier to communication between lawyers and physicians." Roche, *Criminality and Mental Illness—Two Faces of the Same Coin*, 22 U. CHI. L. REV. 320, 324 (1955).

113. For evidence that the *Durham* court has not been successful in creating an atmosphere such as exists in New Hampshire, at least among prosecutors, see Gasch, *Prosecution Problems Under the Durham Rule*, 5 CATHOLIC LAW. 5 (1959).

114. Reid, *Understanding the New Hampshire Doctrine of Criminal Insanity*, 69 YALE L.J. 367, 389-91 (1960).

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

116. I recalled an experience I had [while County Solicitor] probably twenty-five years ago in which an elderly woman got mad at the man she kept house for and put some cyanide of potassium in his coffee. She was subsequently indicted for first degree murder. When her case came up the Court accepted a plea of not guilty by reason of insanity and ordered her committed to the State Hospital until she was discharged by the Court. Actually, in my opinion, the Court thought she would not live very long and that all things considered that was the best way to dispose of the case—in fact she did not live but a few years.

Personal Communication From Willoughby A. Colby, Esquire, to John Reid, January 27, 1960.

117. In the *Forcier* case [95 N.H. 341, 63 A.2d 235 (1949)], we knew that our client was not insane, but at the time he was indicted and arraigned, there was very bad feeling in the community. We were pleased to have the opportunity to go up to the Supreme Court on the issues raised by the peculiar plea that was entered, so that the hot heads in the area would have time to cool off. This is a practical situation that I find to be effective.

Thus in the case set forth in Appendix D the court, with the active support of the County Solicitor and the defense, forced the State Hospital to accept a patient it did not want. It would be difficult to say that in the few times this happens it does not serve the ends of justice or protect the public.

In summing up the achievements of the New Hampshire doctrine it is necessary to note that though the State has shown remarkable willingness to raise the issue of insanity, it does so only in a small minority of cases where the facts warrant it;¹¹⁸ that Attorneys General in New Hampshire are as prosecution-minded as those in other states and must be convinced that the mental illness is a genuine factor in a case before they will follow the "approach" which has been referred to;¹¹⁹ and that courts require that psychiatric evidence bear on the issue of responsibility as well as rehabilitation.¹²⁰ They insist that there be a balance between law and medicine. This is the achievement of New Hampshire. For by rejecting the *M'Naghten* attempt to subordinate medicine to law and the *Durham* attempt to subordinate law to medicine, the New Hampshire doctrine has

Time is a great healer of wounds. This proved so in the Forcier case, because after all the hearings had been concluded and the Supreme Court had ruled, we came back to the Superior Court and entered a plea of guilty and Forcier was not given a terribly severe sentence, but actually a moderate one.

We had used private psychiatrists in this case for the purpose of rebutting some of the opinions which appeared in the report of the psychiatrists at the State Hospital, for the purpose of showing the Court, on the question of sentence, after we entered a plea of guilty, that Forcier was in need of help, particularly psychiatric help, which would enable him to straighten out his problems and become a useful and valuable citizen, and that a long stay in the State Hospital was not the solution. As I mentioned earlier, Forcier definitely was not insane. We knew it, the State knew it, and the Court was aware of that fact as well.

Personal Communication From Robert Shaw, Esquire, to John Reid, February 17, 1960.

118. The State does not even petition for psychiatric observation in all murder cases. See *State v. Congdon*, Strafford Criminal Docket No. 1660 (1928); *State v. Mevitgs*, Strafford Criminal Docket No. 1179 (1919).

119. Thus in a recent case the Attorney General, while he was willing to accept a plea of second degree from an uxoricide and less than life imprisonment, nevertheless would not agree that psychiatric evidence called for a sentence of from five to ten years. This led defense counsel to comment that the Attorney General, who was on vacation, was unfamiliar with the facts and was "controlling this case from the beaches of Sunny Florida." *Manchester (N.H.) Union Leader*, March 25, 1960, p. 11, col. 5.

120. At a hearing to determine sentence of a defendant who had pleaded guilty of second degree murder, the Chief Justice of the Superior Court, after listening to psychiatric evidence offered in mitigation of sentence, observed:

It was quite interesting to hear the testimony of the psychiatrist, and the Court was impressed. However, the testimony simply relates to the rehabilitation of an individual who may be mentally disturbed. It did not, apparently, and has not taken into consideration that a man who killed somebody has to be punished. It would be indicated from the testimony that the person had no mental disturbance and was completely all right, that he is free to be let loose, which, of course, would not be the infliction of any punishment. So, having in mind that the Respondent may need some treatment and may some day be safe to be let at large, he still must be punished, regardless of his mental condition at the moment, for the crime, and that has not been touched upon at all by the psychiatrist.

Transcript of Rearrangement Hearing, pp. 24-5, March 24, 1960, *State v. Rankin*, Strafford Criminal Docket No. 3230 (1960).

made law and medicine *working* partners in the quest for justice in the shadow land of legal responsibility.

THE LESSON OF NEW HAMPSHIRE¹²¹

If there is any conclusion which can be drawn from this survey, it is that the suggestion the New Hampshire doctrine is a dormant legal principle (sometimes implied from the fact that it has not been appealed since first formulated),¹²² is wrong. The New Hampshire insanity doctrine has not only led a very active life, it has been creative. It has suscitated an "approach" to the problem of criminal insanity which contains lessons for other, more conceptual-minded jurisdictions.

Admittedly there have not been enough cases from which to draw positive conclusions concerning the reaction of juries to the New Hampshire doctrine.¹²³ There have, however, been enough pre-trial commitments for observation to the State Hospital to show that psychiatrists (at least those in New Hampshire), when asked their opinion on the question of fact, do not confuse criminal responsibility with mere mental disturbance. As actual cases demonstrate, they have sometimes been more conservative

121. These conclusions are not trammled by the fact that this survey has, to a large extent, been limited to one county. Strafford is a typical county and since the *nisi prius* judges in New Hampshire ride the circuit and take turns presiding in each of the ten counties, what is done in Strafford is representative of the entire state.

122. "So far as the insanity defense is concerned, there has not been a reported case since the two cases in which the 'New Hampshire rule' was established in 1869 and 1871." Weihofen, *The Flowering of New Hampshire*, 22 U. CHI. L. REV. 356, 357 (1955). This is not quite true. There have been at least five cases appealed to the Supreme Court in which "the insanity defense" was a factor in the trial court. *State v. Snow*, 98 N.H. 1 (1953); *State v. Johnson*, 96 N.H. 4, 69 A.2d 525 (1949); *State v. Forcier*, 95 N.H. 341, 63 A.2d 235 (1949); *State v. Long*, 90 N.H. 103, 4 A.2d 865, 6 A.2d 752 (1939); *State v. Hause*, 82 N.H. 133, 130 Atl. 743 (1925). Professor Weihofen is correct, however, when he says that "No criminal case involving the rule governing mental irresponsibility has been appealed to the State Supreme Court since 1871." WEIHOFFEN, *THE URGE TO PUNISH* 134 (1956). This can be explained, not by the fact the doctrine has been dormant, but because, ever since the *Pike* case jettisoned the *M'Naghten* and irresistible impulse tests and the *Jones* case ruled that a New Hampshire defendant was not entitled to a specific "test," there have been no grounds for appeal. In the cases where the trial court either misinterpreted the doctrine or instructed in terms of one of the old tests, failure to appeal was undoubtedly due to the fact that counsel did not appreciate the full scope of the doctrine or believed the old test was still law. Thus in a 1952 case the defense not only failed to appeal a *M'Naghten* instructions (See Appendix C) but in its brief told the Supreme Court — "The test of responsibility for crime, where the offense [sic] of insanity is set up, is the power or capacity of the defendant to distinguish between right and wrong in reference to the particular act in question." Brief for Defendant, p. 9, *State v. Snow*, 98 N.H. 1, 93 A.2d 831 (1953).

123. Of course it could be said, as some have argued, that New Hampshire juries reach the same verdicts as *M'Naghten* juries since they all apply the New Hampshire doctrine.

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

WEIHOFFEN, *THE URGE TO PUNISH* 47 (1955).

than lawyers.¹²⁴ Because of the procedure followed in New Hampshire, this determination made by the psychiatrists at the pre-trial stage is the true key to the working of the doctrine. Since almost all insanity pleas are disposed of at this time, it is here that the doctrine's full impact is felt. For psychiatrists are able to examine the accused in accordance with medical concepts, and need not limit themselves to the sole question of whether he knew that what he was doing was wrong. Their determination as to his responsibility can be accepted or rejected by the defense or the State (and, if rejected by either side and the matter goes to trial, by the jury); but the significant factor is that the diagnosis of his "medical condition" can be formulated unhampered by tests designed to describe his "legal condition." The decision as to his criminal accountability is a separate step and is made in the light of the medical report by the lawyers or, if they fail to agree, by the jury. They, too, are free from the meshes of outmoded tests and can base their decision on the individual himself, rather than on what he knows. The problem is usually resolved by a consideration of where he belongs (both for his benefit and the benefit of the community) and not what he has done. This is the perspicacity of the New Hampshire doctrine. In the few cases which get to trial the judges have often stumbled in their instructions to the jury and have failed to present the issue as a pure question of fact. In the vast majority of cases, however, the matter has been resolved short of trial, and the decision arrived at by defense and prosecution has been based on the facts established by untrammelled psychiatrists. It is at this stage that the success of the New Hampshire doctrine is to be found.

Like Scotland, which also makes responsibility a question of fact¹²⁵ (but unlike *Durham*),¹²⁶ the New Hampshire doctrine has not yet been

124. See Appendix D, also note 135 *infra*.

125. For a description of Scottish practice see the testimony of the Lord Justice in Ordinary, Lord Keith of Avonholm in, Royal Commission on Capital Punishment, *Minutes of Evidence*, Eighteenth Day, Tuesday, April 4, 1950, p. 419, paras. 5216-20.

126. Originally the government psychiatrists in the District of Columbia viewed psychopaths and insanity in the same manner the New Hampshire State Hospital did. The Assistant Superintendent of St. Elizabeths announced that psychopathic personalities should not be regarded as having a "mental disease" for purposes of the *Durham* rule. Unlike the New Hampshire Supreme Court in *State v. Long*, however, the *Durham* court did not feel that the correctness of this opinion by the government psychiatrists was a question of fact for the jury. Rather, as Judge Bazelon put it, "This inevitably encroaches upon the jury function." *Briscoe v. United States*, 248 F.2d 640, 644 n. 6 (D.C. Cir. 1957) (*dictum*). Just how this encroaches on the jury function is not clear unless the Court felt the government psychiatrists should express no opinion, *one way or the other*, on the issue whether psychopathy is a "mental disease." That the Court did not mean this is demonstrated by a recent case which reversed a conviction based on such evidence, because St. Elizabeths had, since the conviction, reversed its opinion and had announced that henceforth psychopaths would be certified as insane. The Court now felt that the official opinion of the Hospital was entitled to great weight. *Blocker v. United States*, 274 F.2d 572 (D.C. Cir. 1959). These cases point up the fundamental distinction between New Hampshire and *Durham*. Under the New Hampshire doctrine the correctness of expert opinion is a question of fact for the jury and it does not matter whether this opinion coincides with the psychiatric theories of the appellate court. As Judge Doe said, "whether

interpreted to cover psychopaths. There is no reason why, in the proper situation, it could not.¹²⁷ Whether psychopathy is a "mental disease" within the meaning of the doctrine is a question of fact for the jury. It is not for the courts or hospitals to say whether it is or is not. This is one of the strong points of the doctrine — it is not tied to psychiatric concepts.¹²⁸ Nor is it tied to legal truisms. As a result, New Hampshire has been able to break away from the notion that the insanity defense belongs primarily in capital cases. It has even spurred the State to discard the traditional view that insanity is an escape hatch and to adopt (and actively pursue) the policy that a finding of insanity may be as beneficial to the community as to the accused.

Perhaps the chief lesson of New Hampshire is this protection-to-the-public approach which is an accidental result and not an indigenous part of the doctrine. By restoring the matter of criminal responsibility to the jury as a question of fact, it has had the undesigned, but fortunate effect, of ending what Justice Frankfurter has called the "conflict between law and medicine."¹²⁹ In the atmosphere of greater cooperation which has resulted, the State has come to regard psychiatry as a partner in its attempt to protect the public from potentially dangerous wrong-doers, be they murderers or felons. This, in turn, has had the incidental effect of making the entire debate over *M'Naghten* versus *Durham* seem less important from a New Hampshire point of view, since it has led to placing great stress on settling the issue before, rather than during, trial. That this cannot be entirely separated from the doctrine's main thesis (*i.e.*, that insanity is a question of fact), is highlighted by practice in Scotland which

or not a medical theory is correct is a question of fact. It is not for the court to say if any medical theory is correct. 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. The law does not change with every advance of science. . . ." *State v. Pike*, 49 N.H. 399, 408, 438 (1869) (concurring opinion).

127. Opinion may be swinging in that direction in Scotland as seen by the testimony of Dr. C. D. Bruce, Medical Superintendent, Criminal Lunatic Department (Scotland) who was asked if the concept of diminished responsibility ought to apply to psychopaths.

It could. Whether it ought or not, I am not quite sure yet. We do not know the whole extent of the psychopathic problem yet. Further study of it may invoke much greater fields of clinical psychiatry than we know. . . . I think it ought to include some of the less defined types. On the other hand the grosser form comes in the realm of certification of lunacy [*i.e.*, insanity].

Later he was asked if it was desirable or justifiable to consider psychopaths as certifiable lunatics. "Yes, I do. Even Dr. Hopwood, who objects to their presence in Broadmoor, admitted that too, if you remember." Royal Commission on Capital Punishment, *Minutes of Evidence*, 20th day, April 6, 1950, pp. 453-4, paras. 6075-6, 6095.

128. This raises the question why (if in New Hampshire the State is permitted to raise the issue of insanity and the jury is not barred from considering any mental illness in deciding the question of fact) New Hampshire needs a Sexual Psychopath Statute.

129. Letter From Mr. Justice Frankfurter to Sir William J. Haley, Nov. 3, 1952, in Note, *The Real Mhicneachdain*, 74 L. Q. Rev. 321 (1958).

settles most of its cases by pleas in bar.¹³⁰ New Hampshire defense counsel as well as prosecutors have taken the attitude that the Hospital's report should usually decide the issue.¹³¹ This mutual trust between law and medicine is, of course, far from perfect,¹³² yet it is doubtful if there is any American jurisdiction in which there is better cooperation between the two professions than New Hampshire.¹³³

130. For a description of Scots practice see the testimony of the Crown Agent, Royal Commission on Capital Punishment, *Minutes of Evidence*, Seventh day, Thursday, Nov. 3, 1949, p. 177, paras. 1983-5 and p. 178, paras. 1993-5. Also, testimony of the Vice Dean of the Faculty of Advocates, *Id.* Nineteenth day, April 5, 1950, p. 453, paras. 5695-97. As in New Hampshire, the plea of insanity has been rare, partly because most Scottish cases are determined by the pre-trial psychiatric examination. Smith, *Diminished Responsibility*, [1957] CRIM. L. REV. 354, 355. The public policy behind the plea in bar was discussed in *Russell v. H. M. Advocate*, [1946] Scots. L.T.R. 93. In 1927 the Lord Constable said: "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. Advocate v. Sharp*, [1927] Just. Cas. 66, 67 (Scot.). So confident are the Scots of this practice that Lord Russell told a jury:

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 insane, he would be ordered to be detained during His Majesty's pleasure.

Carraher v. H. M. Advocate, [1946] Just. Cas. 108, 110 (Scot.). Also as in New Hampshire, the prosecution is permitted to raise the issue of insanity, at least as to competency to enter a plea. WALKER & STEVENSON, *MACDONALD ON THE CRIMINAL LAW OF SCOTLAND* 271 (5th ed. 1948) and cases cited. *But see H. M. Advocate v. Brown*, 5 Adam 312, 321-2 (Scot. 1907). Testimony taken before the Royal Commission implied that the prosecution can even raise insanity as a plea in defence. Royal Commission on Capital Punishment, *Minutes of Evidence*, Eighteenth Day, Tuesday, April 4, 1950, p. 420, paras. 5233-37.

131. New Hampshire usually follows a different practice than most jurisdictions. The issue is usually not settled by a hearing following a plea of incompetency to stand trial. Rather the Grand Jury, after the County Solicitor has informed it of the State Hospital's determination that the accused is insane, notifies the court that it has refused to indict by reason of insanity. The accused is then committed.

132. It may be a commentary, however, that what little criticism is aired in public by New Hampshire lawyers is aimed, not at the inability of psychiatry to effect the cures claimed by it, but at the failure of some psychiatrists to attempt those cures. Thus an attorney defending a man indicted for first degree murder told reporters:

My disgust is with the New Hampshire State Hospital where Mr. Rankin had voluntarily submitted himself as a patient a year before he committed this crime and was found to be mentally ill and yet was released while still suffering from his mental condition; had he been confined there until his mental difficulties had been cured, Mrs. Jeannette Rankin might well be alive today and my client, Herbert Rankin, would now be a free and mentally healthy citizen.

Foster's Daily Democrat (Dover, N.H.), March 24, 1960, p. 3, col. 3.

133. Psychiatrists have sometimes succeeded in toning down the "battle of the experts" in New Hampshire. Consider the following request by one defense alienist who believed the State Hospital had overlooked a significant fact in its diagnosis. (Defense counsel agreed to the suggestion.)

I have the greatest respect for Dr. Dolloff's judgment, and do not relish the idea of contradictory or controversial psychiatric testimony in a murder trial (or in any other trial for that matter). Contradictory testimony by experts makes big headlines in the newspapers and is responsible for a great deal of the ridicule to which psychiatrists are subject. I would prefer, if it

The final conclusion that may be drawn from this survey is that the working of the New Hampshire doctrine depends upon the procedure devised to implement it. Neither the protection-of-the-public approach, nor the full utilization of the doctrine as a defense, can be completely developed if the question of whom the public should be protected from and who is insane is left to the unchallenged determination of the State Hospital. Yet this is what usually happens in New Hampshire. To correct this the judiciary and the bar must cease to be rubber stamps and assume a more active role in the determination and disposition of these cases, not only to see that the law is administered in as uniform a manner as possible, but also to avoid the pitfalls inherent to any legal system which leaves questions of fact to the experts. Some of these pitfalls have cropped up under present New Hampshire practices. For one thing, State psychiatrists have occasionally limited the issue in a manner not required by the doctrine; as for example, when they base their findings on causation.¹³⁴ Secondly, the State Hospital, like most psychiatric institutions, is overcrowded and, as a result, the State psychiatrists (who, as medical men, are primarily interested in therapy and are reluctant to fill beds with incurables) have sometimes avoided certifying immedicable defendants "insane" *even when they consider them dangerous due to mental illness*.¹³⁵ Finally, the reports

becomes necessary, to have a conference with Dr. Dolloff or to reexamine this boy in company with him than to have the question of epilepsy sprung on him on the witness stand, and I know Dr. Dolloff would prefer it.

Letter From Miner H. A. Evans, M.D., to William H. Sleeper, Esquire, February 20, 1945. State v. Sheehy, Strafford Criminal Docket No. 2271 (1945).

134. "Examination reveals that the patient does not have a disease affecting her mind which would result in the acts which led to her arrest." Medical Report in State v. Gordon, Strafford Criminal Docket No. 3183 (1959). "Examination reveals that the patient does not have a disease affecting his mind which would result in the acts which led to his arrest." Medical Report in State v. Trefethen, Rockingham State Docket No. 4512 (1959). See also notes 55, 57 *supra* for a similar report in State v. Bernard, Strafford Criminal Docket No. 2867 (1957).

135. Consider the case of a twenty-six year old man indicted for fellatio. He pleaded not guilty by reason of insanity and was committed for observation. The State Hospital reported that it had "... formed the opinion that he is sane, but is suffering from a condition diagnosed as psychopathic personality with pathologic sexuality." In reply to an inquiry from the Office of the Attorney General the Superintendent of the State Hospital wrote:

Dr. Howard felt that the patient probably was the aggressor in the sexual relationship, and that due to the aggressive characteristics in his personality it was improbable that he would respond to psychotherapy. Dr. Howard feels for the same reasons that *there is a possibility that this individual may become a danger to society*.

"I have no reason to doubt that Dr. Howard's evaluation of this problem is a correct one, and that the patient would be unlikely to be assisted by psychotherapy in the State Hospital." Letter From John L. Smalldon, Superintendent, to William S. Green, Assistant Attorney General, February 16, 1949 (Emphasis added).

The State then decided not to pursue the matter any further. "The letter seems to me to leave no alternative except to commit Forcier to prison." Letter From William S. Green, Assistant Attorney General, to Robert Shaw, Esquire, February 21, 1949, State v. Forcier, Strafford Criminal Docket No. 2398 (1949) (for a different interpretation of this case by defense counsel see note 117 *supra*.)

This does not occur in every case, of course. One defendant charged with attempted murder was reported "dangerous to be at large," presently insane, to have

of the State Hospital are so perfunctory that the Court, the State, and the defense cannot be sure what they are being asked to endorse.¹³⁶ These defects would not exist in jurisdictions adopting the New Hampshire doctrine which require detailed psychiatric reports.¹³⁷ For in those states defense counsel could not only ascertain whether the psychiatrists were applying a stricter test than necessary, but also whether they were approaching the problem from a conceptual viewpoint by equating criminal insanity with psychiatric terms like psychosis. And the prosecution would be better able to use the doctrine to implement a policy of protecting the public if it knew that incurables were being certified as sane even though dangerous by reason of mental illness, and if, in the case of a pyromaniac or a kleptomaniac, it knew just how irresistible the impulse was, just how the doctors felt the compulsion would respond to therapy, and just how repetitive the offender was likely to be.

Despite these defects (which are attributable to procedure practiced in New Hampshire and not to the doctrine itself), it can be said that the New Hampshire doctrine has worked successfully in the one jurisdiction in which it is law. That contrary to the fears of some commentators that it would prove an escape hatch for criminals, it has primarily been utilized by prosecutors seeking to segregate mentally ill offenders. If the New Hampshire doctrine has any inherent weakness, it is that it is misunderstood. Psychiatrists have missed its implications; defense counsel have not appreciated its full scope,¹³⁸ and at least one court has confused it with *M'Naghten*. Worst of all another court equated it with *Durham*. If such

been insane at the time of the act and to be incurable ("...the prospects for any marked improvement, even under intensive treatment, are very remote.") *State v. Zela*, Merrimack State Docket No. 351 (1958).

136. The full text of one report reads: "I find that through an oversight a report on Raymond Goodwin, Jr. was never sent in. I wish now to report that I have formed the opinion that he is insane." *State v. Goodwin*, Strafford Criminal Docket No. 2027 (1938).

137. The hospital authorities in some of these states [i.e., those with statutes providing for pre-trial observation] have not hesitated in their reports, to go beyond a merely formal finding of 'sane' or 'insane,' and to make specific diagnoses, such as dementia praecox, cerebral arteriosclerosis, mental deficiency, etc., and also to make recommendations for the proper treatment or disposition of the defendant.

Weihofen, *Eliminating the Battle of Experts in Criminal Insanity Cases*, 48 MICH. L. REV. 961, 970 (1950).

138. Of course, many defense counsel have refused to test the full limits of the New Hampshire doctrine and have entered a plea of guilty to a lesser charge rather than press the insanity defense because, if found insane, their client might be committed to the Hospital for a longer period of time than if sent to prison. Consider the statement released to the press by one attorney, explaining why he had withdrawn the plea of not guilty of first degree murder by reason of insanity and had pleaded guilty to second degree.

This decision was made in the light of the fact that the sentence for first degree murder could be life in prison, or even the death sentence and even if the plea of guilty [sic] by reason of insanity had been accepted, *the sentence would have been life confinement in the New Hampshire State Hospital*. It was, therefore, in the light of other sentences in similar circumstances that we deemed it best to plead guilty to second degree murder."

Foster's Daily Democrat (Dover, N.H.), March 24, 1960, p. 3, col. 3 (Emphasis added).

is to be the trend of the law, the future of the New Hampshire doctrine does not appear bright. Once judges undertake to define words in the manner of *Durham* then insanity is no longer a pure question of fact and New Hampshire has been irrevocably changed. Yet such will undoubtedly result from any official linkage since the New Hampshire doctrine is bound to be nubilated by the greater prestige which the District of Columbia circuit enjoys. This is unfortunate, because New Hampshire has all the merits of *Durham* — but few of its faults.

APPENDIX A

Transcript of Hospital Staff Meeting in the Long case

There is perhaps no aspect of equating legal responsibility with medical responsibility which worries lawyers more than the possibility that therapy-minded psychiatrists will disregard the problems of public policy. It is of interest, therefore, to consider the staff meeting of the New Hampshire State Hospital held to determine whether Howard Long should be reported as sane or insane. The discussion ranges from Long's medical condition to the problem of community safety. It is not clear whether the "they" and the "them" the good doctors continually refer to are the prospective jurors, the judges, or those rascals — the lawyers.

Participating are Staff psychiatrists and psychologists.

His emotional responses are greatly impaired and there is manneristic and impulsive escape for them indicating a degree of disintegration and splitting. He has obviously been a neurotic character from early childhood and I believe there are enough evidences of disintegration to warrant a diagnosis of schizophrenia, simple type, being made. He cannot logically be held responsible for his acts.

Dr. Gau: I'm sorry I cannot agree with all that. To me he is just another psychopathic personality, markedly so. I think he could answer much different than he does. I think he is shrewd and following a definite pattern in his answers.

Dr. Gal: If you talked to him for an hour and still said he was shrewd —

Dr. Gau: Shrewd enough to have gotten along fairly well — what was he doing up there — having a little business and getting along pretty good.

Dr. Gal: For a while — fair. He had an income from his stepfather so he did not have to be too shrewd in his business and could get along without money in the business. In fact he got into several difficulties because he did not pay his bills for painting his store. He called in the executor of the estate to pay the bills.

Dr. Gau: That also speaks for psychopathic — thinks he can get away with things the average individual has to do — paying bills, leading a straight life. He thinks he can do the contrary and get away with it.

He got away with it many times. I fail to see any evidence of an out and out psychosis. I agree it is a character neurosis but what else can you call it besides psychopathic personality — and if there isn't any evidence of psychosis you have to face that and call him not insane and let him face punishment for his crime.

Dr. Wells: I am inadequate to discuss the case but I think a lot of his action would go along with a low intellect. Whether a man of this type of character neurosis — whether he would get over sexual drives and be a normal person — it is what I'd like answered. He might go along to a certain age and develop a change of life or something and that's all there is to it — or whether they continue along that line.

Dr. Gal: You can't let him go along indefinitely killing children.

Dr. W: If he had sodomy and was satisfied — he evidently got along with it for some time and then had to take it up again and had the drive.

Dr. D: Is there any record from the prison?

Dr. Gal: Yes, but we don't have much. Most of it is repeating what the Boston Psychopathic said. Shall I read it?

Dr. D: Yes.

Dr. H: He has a definitely inadequate personality and it seems the continued acts he has had and his psychological tests seem sufficient to put him in the schizophrenic group.

Dr. J: He is on the borderline to me. It is a difficult case. As you formulated it he is either a psychopathic personality with strong schizophrenic traits or a simple praecox. I really think it is more or less a toss-up. A strong case could be built up for either side, I think.

Dr. B: It is very hard to tell whether he should go in the schizophrenic group or psychopathic. To me the most abnormal thing is his unusual fatalistic attitude — everything is predestined and you cannot help it. If you drive fast you just got to drive fast and if you assault and murder children, it is predestination. He apparently realizes that his conduct is considered asocial by the majority of people but yet he feels he just cannot avoid doing it. Whether that makes him definitely psychotic I can't say. I'd be inclined to call him a simple praecox in a psychopathic individual. I think he has always been psychopathic and perhaps has gone beyond the limits of even psychopathic now. He is a very dangerous man in the community and I think they made a serious mistake when he was let out in Mass.

Dr. D: What was the basis of letting him out?

Dr. Gal: Judge Stone was executor of the estate. As far as I know, good behavior. Judge Stone was executor of the estate and made application for his release and a judge — I've forgotten his name — signed the order for release and he was put on parole for a year.

Dr. D: He must have had some recommendation from the institution.

Dr. Gal: There is nothing in the record to indicate it. They put it all on the court. They said he was ordered released by the court.

Dr. B: It seems from the psychiatric and psychological standpoints these people who have had perversions with children repeat the offense if they have the opportunity and that is where the danger lies. If he is called psychotic he should be in an institution always.

Miss R: The psychiatrists did not want him to go out but the judge was anxious to get him out.

Dr. O: I think he is a very sick man and although he does not know it, I think his attitude is somewhat right. He can't possibly be held responsible for his early conditioning and inadequate development of personality. I don't think just because his anti-social acts are of a sexual nature that it necessarily means he has to be labeled a psychopathic. I think the whole personality picture is more of a simple schizophrenic. Of course because there isn't anything that can be done with him it does not make any difference whether he goes to prison or stays here. Do you think there is a possibility of his becoming suicidal?

Dr. Gal: I think there is a possibility of his murdering an attendant. His aggression has never been directed against himself but it has been explosive manifestations against someone else.

Dr. O: He is always going to be a dangerous man to handle.

Dr. F: I usually prefer to emphasize the constitutional factors rather than conditioning. Both are prominent. I think his fatalistic attitude is one of the most important features here. It is very noteworthy. He is using it presumably to cover up his ideas of inadequacy. He is trying to explain, excuse and forgive on that basis. It would be interesting to learn when he developed that attitude and what the circumstances were. I am almost a believer in lack of free will. There is much to be said for it. After all, we all have certain characteristics that make us do certain things. I may be a fast driver because I have those characteristics and someone else may be a cautious one because of the same characteristics. To a certain extent that is lack of free will. It is a very broad subject but there is something to be said.

Dr. O: Don't you think he says it because of his fundamentally passive nature?

Dr. F: To explain his inadequacy and excuse these things he has been doing. I definitely agree he is a dangerous element.

Dr. Ranger: Without psychosis, psychopathic personality, emotional immaturity — pathological sexuality.

Dr. D: I am so emotionally upset by the unanimity of opinion that the man is insane that I am thrown off balance and don't know what to

do. I wonder if my judgment is defective. I can't see it in the same light you do.

Dr. F: You have the concept of the court in mind too.

Dr. D: As psychiatrists we have to have some reconciliation with the courts and if I think a man is insane regardless of what the court thinks I will so state. Question of whether he should be kept here or in prison is another question. I could say he was insane and the court could give him a life sentence in prison without any difficulty. The fact we say he is insane does not mean he has to come here. It has been done before. I reported a case once before as insane and the judge didn't pay any attention to it and sent the man to state prison. Another case I sent in the woman was not insane and the judge decided she was and sent her here, so the court reserves its own opinion regardless of any idea of the psychiatrists. As a rule they are satisfied to take our opinion and in the great majority we turn them back as not insane. This is a very outstanding case that will cause a lot of feeling in the way it is handled by the court. That is not really our problem either. Looking at the case purely as psychiatrists I feel about it the way Dr. Ranger does. I think his diagnosis fitted in with my mental conception of such cases. I don't take a lot of stock in what he says about everything being so predestined. I think if I discussed it with him more at length I think I could shake him down. When you put him in a corner with a bit of logic he runs to cover saying he does not understand which helps him out. How many accidents did he get into driving his car?

Dr. Gal: Five.

Dr. D: Were they serious?

Dr. Gal: Yes.

Dr. D: I wonder how they kept allowing him to drive?

Dr. Gal: He did have his license revoked for drunken driving. After he got out of the army it was renewed.

Dr. D: Did he injure anyone?

Dr. Gal: One woman very severely but most of it was smashing his car. He ran her down.

Dr. D: Does he admit he intended to kill these children?

Dr. Gal: No.

Dr. D: It was just an aftermath — being frustrated?

Dr. Gal: The first one of the children jumped out of the car.

Dr. D: There was some question whether it was an accident, wasn't there? The few times I have seen him he does not present the picture of praecox. I think he is more emotionally upset over this than he admits.

It has been my experience that praecoques are not quite so aggressive and murderous as he is.

Dr. F: Would he be held in first degree?

Dr. D: Yes. They will charge him with the most serious type and then — if they make it any less and if it should develop that he did it with malice aforethought they could not give him the extreme penalty. They can start at the top and work down but not at the bottom and work up. I feel he is a psychopath and strongly sexed — and undoubtedly of limited mentality. The psychologist says he is definitely deteriorated.

Miss R: Definitely inefficient — 4.4.

Dr. D: What does that mean?

Miss R: I'd not go so far as to say the inefficiency was permanent, which is what deterioration implies.

Dr. Gal: There are many evidences of psychiatric deterioration which I have enumerated.

Dr. Gau: Did he seem to try to answer questions?

Miss R: He cooperated very well.

Dr. J: Could you consider that the murder of these people was a homosexual panic to a psychotic degree?

Dr. Gal: I don't know. I hadn't thought of it in that way. I can't think of any reason for thinking so.

Dr. B: Are they the result of frustration?

Dr. Gal: Aggressive to a psychotic degree.

Dr. Ra: I think our analytical study gives conscious and unconscious motives but it does not remove the fact he did these things and socially it is important. I don't care why a fellow throws a stone at me but what is important is that he did it. I think people should be judged by what they do and not by how they rationalize.

Dr. F: What chance do you think he has of getting off with less than life? We have to consider that.

Dr. D: He can't get out of it for less than life. If they agree he is insane they could send him down here. I doubt if they would send him here. If I said he was insane they would probably send him to jail anyway. The question of punishment does not enter here. It is as much punishment for him to be sent to PIA for life as to prison for life, as far as punishment goes.

Dr. O: Are his lawyers going to be able to get him free?

Dr. D: No.

Dr. O: They did before.

Dr. F: He might serve five years or so.

Dr. D: He was not charged with murder before.

Dr. F: Don't life murderers get out after ten years or so?

Dr. D: Some do but this one never will. Most of those that get out — it is an episode in their lives — followed by good behavior. This fellow of course now they find he has a terrible record, — two children dead and the whole background of sexual misbehavior, so if they once get him locked up I think he will stay there.

Dr. Ra: Why not string him up and let the state protect itself?

Dr. D: Society is just that sadistic. Society will delight in having this fellow hang. They say what's the matter if he is insane — why not string him up.

Dr. D. I think one reason people are trying to find a psychosis is an attempt to be fair toward him. Personally we might like to see him hang but I feel we must be fair as psychiatrists.

APPENDIX B

No comprehensive survey of the New Hampshire lawyers seeking to evaluate the Bar's reaction to the New Hampshire doctrine has even been conducted. Such a survey would not be very meaningful, however, since very few attorneys have had any contact with it. Among the few who have there is unqualified endorsement. As Judge Blandin said, referring to the study he undertook for Professor Weihofen, "the data here is scanty. However, not a single person among those whom I canvassed had the slightest criticism of the rule, and all who expressed an opinion — and this included most of them — were favorable to it." Perhaps the most significant factor for non-New Hampshire skeptics to ponder is that the judges and prosecutors polled felt the doctrine works well and that it serves its purpose better than M'Naghten or Durham.

Frank R. Kenison, Chief Justice of the N.H. Supreme Court:

"My experience with the rule is somewhat limited and for the most part confined to the period of time when I acted as County Solicitor, Assistant Attorney General, and Attorney General. The New Hampshire rule has never been any handicap to the prosecution where the defense of insanity was raised. By the same token I have never heard the rule criticized by defense attorneys in criminal cases. Occasionally one hears a mild criticism to the effect that the test is no test at all and leaves too much discretion in the jury. However, it has worked satisfactorily in this state and there is evidence that it is being considered favorably in other jurisdictions."

"The New Hampshire rule has worked successfully in this state. It has not been criticized or found impractical by either prosecutors or

defenders and the verdicts of juries under the New Hampshire rule have reached a result which would seem more consistent with ordinary wisdom than is possible under the M'Naghten Rules."

Francis W. Johnston, former Chief Justice of the N.H. Supreme Court, Justice of the Superior Court, and Attorney General:

"My belief is that the N.H. Rule is a good one. . . . The N.H. rule seems simpler and more accurate. The jury is not required to find specifically whether the defendant was capable of knowing the difference between right and wrong or how much he was capable of understanding otherwise or whether he had an irresistible impulse, all of which issues must be difficult of determination."

Stephen M. Wheeler, Associate Justice N.H. Supreme Court, former Chief Justice of the Superior Court, and Solicitor of Rockingham County:

"I have had no criticism of our rule, and such experience as I have had with this type of case does not indicate the necessity for any change therein. As a practical matter, it doesn't seem to make much difference whether a respondent at the time of the commission of the act was incapable of understanding the nature and quality of the act or that it was wrong or ' . . . the killing was the offspring or the product of mental disease,' and I doubt if it would make much difference with the jury. However, I believe our rule presents a better definition or yardstick of insanity when used as a defense in criminal cases than the so-called 'right or wrong' test."

Amos N. Blandin, Jr., Associate Justice, N.H. Supreme Court, former Associate Justice, N.H. Superior Court:

"For the past thirty years I have dealt rather extensively with psychiatrists, and especially so during the last decade. From this association, I have gathered that the profession has much to offer and that it also has much to learn, as I think the majority of psychiatrists will agree. For this reason, among others, I believe that the Durham rule, with its stress on psychiatric evidence and on trying to keep up with the latest developments in that field, will often result merely in exchanging an old error for a new, and perhaps a worse one. Our rule permitting the jury to weigh all the testimony of both expert and lay witnesses seems to me far better at the present state of our knowledge. In this way we will move a bit more slowly but a bit more surely, as it gives an opportunity for time to prove or disprove various and sometimes sharply conflicting psychiatric theories."

APPENDIX C

Recent Charges Under the New Hampshire Doctrine

There have not been many New Hampshire cases in which the issue of insanity has actually gotten to the jury. In the few that have, the court has more often than not stumbled over the question of fact and has usually slipped into the "error" of treating some issues as matters

of law. Following are three charges in which this has happened in varying degrees.

In the first case, *State v. Snow*, the judge did not treat the New Hampshire doctrine as posing a question of fact, but rather chose to treat it as a test—i.e., a “product” test. He apparently agreed with Judge Holtzoff who has contended that the “*Pike and Durham* formula” does not change the law but merely is an addition to the *M’Naghten* rule and the irresistible impulse test and suggested that the jury should be given all three.* This is more or less what the judge in *State v. Snow* did. He not only linked the New Hampshire terminology of “product” with irresistible impulse (“... the taking of the money with the intent to deprive the owner [must be] the product of a diseased mind and one that he could not control”) but he even introduced the notion of right-wrong and then formulated the “product” test as an addition to it:

“So you have to consider that on the question of whether or not King Snow, on the night in question, was able to distinguish say between right and wrong, and that on top of that the act was not the product of a diseased mind.”

In the second case, *State v. Goodrich*, the court started out correctly by stating that insanity was a question of fact. But the judge then turned around and contradicted himself by ruling as a matter of law that if the defendant “could form or entertain a criminal intent” or if “he had the mental ability to control his actions, then reason must have prompted his acts and they were not caused, nor produced by his abnormal mentality, but were assented to and concurred in by his will and were criminal.” It was clearly error for the court to hold that if the defendant could control his actions he was not insane. As has already been mentioned there is some dispute whether it is error to require that the mental disease take away the capacity to form or entertain a criminal intent. The court was quoting from Judge Ladd’s opinion in *State v. Jones*** which is usually cited as the authority for that proposition. But Judge Doe, in charging the jury in that case, did not mention intent and Ladd’s words are mere *dictum*.

In the third case, *State v. Kowalski*, the court did not mention intent. Instead it followed rather closely Doe’s charge in *State v. Jones*. In calling the jury’s attention to the possibility of irresistible impulse it did not make the same error as the judge in *State v. Goodrich* and say that if the defendant could not control his actions he was sane. Rather it ruled that if the irresistible impulse impelled the defendant to commit the act

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

**“At the trial where insanity is set up as a defence, two questions are presented:— First: Had the prisoner a mental disease? Second: If he had, was the disease of such a character, or was it so far developed, or had it so subjugated the powers of the mind, as to take away the capacity to form or entertain a criminal intent?” *State v. Jones*, 50 N.H. 369, 393 (1871).

in such a way that the jury found that "the killing was the product of mental disease in him," then he was not guilty. If any quarrel can be had with this charge it is that the court did not leave the definition of "product" as a question of fact but rather held that it meant causation by ruling that "Insanity is not innocence unless it produced the killing." This sentence was lifted from Judge Doe's charge in *Jones*, but the court did not qualify it, as Doe did, by adding — "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." In the other two charges the court did not undertake to define "product."

In reading these charges it should be kept in mind that New Hampshire judges are not allowed to comment on the evidence.

STATE v. SNOW¹

"Now, the defense, first, has indicated an outright denial of everything by the plea; says that he is not guilty. And they further say that at the time alleged, if you should find that he did take the money, that he lacked the capacity, mental capacity, to commit a crime because he lacked the capacity to intend to commit a crime; in other words, that he was suffering from what is known as mental derangement. It used to be referred to as insanity. We call it mental derangement, but it has the same effect.

"That means that on the day in question, or the night in question, when he took the money, if he took it, that he was so far out of his mind by reason of mental disease, that he had no control over his impulses; in other words, that the taking of the money with the intent to deprive the owner was the product of a diseased mind and one that he could not control.

"If you could find that he could control his mind, and that the taking was something of his own will; it makes no difference if he were partially mentally deranged. If the taking of the money was produced by a concurrence of his will and his mental disease, it would still be a crime. The taking must be done by something he can't control, an impulse that is the result of the product of a diseased mind. So you have to consider that on the question of whether or not King Snow, on the night in question, was able to distinguish say between right and wrong, and that on top of that the act was not the product of a diseased mind.

"Now, he might be able to distinguish a little bit between right and wrong, but he was still under the pressure of that mental situation, he would still not be guilty. So it comes right down to the question who had

1. Respondent's Bill of Exceptions, pp. 50-1, *State v. Snow*, 98 N.H. 1, 93 A.2d 831 (1953).

control, his diseased mind or himself normal. You have to decide that. If he was not insane, then the act is a crime, and you would return a verdict of guilty."

STATE v. GOODRICH²

"Now, there is no hard and fast rule that may be applied to determine whether a person is insane or not within the meaning of that term as used in the criminal law. The question is whether the acts were the product of mental disease at the time. Now, neither the presence or absence of delusions, nor the knowledge of right and wrong, nor design, nor cunning, nor lack in executing the crime, or in attempting to avoid detection, nor ability or inability to learn in school, or to read or to remember, or to transact business or perform labor, or to manage affairs or to tell the truth is, as a matter of law, alone a test of mental capacity. Whether the respondent had sufficient mental capacity to entertain a criminal intent at the time is a question of fact for you, Mr. Foreman and gentlemen of the jury. Was he so far deficient at the time that he was not able to form or entertain a criminal intent? If so, then his acts were the product and result of his abnormal mental condition. If, on the other hand, he had the mental ability to control his actions, then reason must have prompted his acts and they were not caused, nor produced by his abnormal mentality, but were assented to and concurred in by his will and were criminal.

"In passing upon these questions you should take into consideration not only the appearance of the respondent on the witness stand, but all of the evidence before you which has any bearing upon the symptoms, phases or manifestations of abnormal mentality at the time. And from the whole, using your best judgment and common sense, determine whether the respondent did or did not have the mental capacity to entertain and to carry into effect a criminal intent at the time that these acts were alleged to have been committed. . . .

"Now I will turn to the indictment with respect to aggravated assault. . . . Now, if you find beyond a reasonable doubt that Mr. Goodrich committed an assault, that is the act, the physical act of assault, then here again insanity at the time would be a complete defense. I have already explained to you what we mean by insanity, and it's a matter for you, as I have told you with reference to the other indictment, for you to determine whether at the time the respondent had sufficient mental capacity to entertain the criminal intent. If there is any reasonable ground to believe that the respondent did not have the use of his reason at the time, then you must find him not guilty by reason of insanity."

2. State v. Goodrich, Grafton State Docket, No. 1668 & 1669 (1950).

STATE v. KOWALSKI

"The defendant, as you know, has pleaded not guilty to this charge and has introduced evidence that he was mentally deranged, insane, at the time, and not responsible for his act or acts. If, applying the law as I have laid it down, you find the defendant killed his wife in a manner that would be criminal and unlawful if the defendant were sane, the verdict would be 'Not guilty by reason of insanity,' if the killing was the offspring or product of mental disease in the defendant. Whether the defendant had a mental disease and whether the killing of his wife was the product of such disease are questions of fact for you to determine and decide. Insanity is a mental disease, disease in the mind. An act produced by mental disease is not a crime. If the defendant had a mental disease which irresistibly impelled him to kill his wife, if the killing was the product of mental disease in him, he is not guilty. He is as innocent as if the act had been produced by another person using his hand against the utmost resistance. Insanity is not innocence unless it produced the killing. If the defendant had an insane impulse to kill his wife and could have successfully resisted it, he is responsible. Whether every insane impulse is always irresistible is a question of fact for you to decide. Whether the defendant in this case had an irresistible impulse to kill his wife, and whether he could have resisted it is a question of fact for you to decide."

APPENDIX D

The flexibility of the New Hampshire doctrine can lead to unusual situations in practice. In the case of *State v. Grant*,¹ for example, we find the lawyers insisting that a defendant is mentally ill and should be in the State Hospital and the psychiatrists insisting that he is legally sane and should be in the jail or the Industrial School.

The defendant was indicted for Sodomy. After a period of observation the State Hospital reported that he was not insane. This troubled the County Solicitor, for the defendant was obviously feeble-minded, and he told the Court:

This is a case where he needs help more than punishment but it would seem to be something that he is a danger to other people and of course to send him to jail or something and then it's the same situation all over again.

Grant pleaded guilty and at his hearing the following exchange took place:

Defense Counsel: "He informs me in a very childish manner that the reason he got off on this tangent was that they sterilized him up at the Laconia School and he felt he could

1. *State v. Grant*, Strafford Criminal Docket No. 2622 (1952).

have nothing to do with women and couldn't marry and realizing the gravity of the offense that he would never do it again. Of course I think that he should be in some institution where he could have some psychiatric care and someone with some psychiatric training and experience would be in a position to state whether he should be let out in society or not. I don't think confining him to a penal institution is the answer in this case. I think it ought to be put back in the lap of the Examining Board of the State Hospital."

The County Solicitor: "I think it would be a good idea to put it back in their lap but I don't know whether that would work or not. I am sure the Court knows more about it than I do. Whether you have to be insane or something to be in the State Hospital."

The Court: "Well I am going to defer sentence in this case until tomorrow morning and contact the State Hospital in the morning."

The next day the defendant changed his plea to "not guilty by reason of mental derangement." The County Solicitor accepted the plea and the Court ordered the defendant to be committed at the State Hospital "until discharged by due course of law." The State Hospital however chose to regard the commitment as merely temporary, for purposes of observation, and thirty-six days later sent the Court a report which was more in the form of a protest.

Donald Grant, who was committed to the New Hampshire State Hospital on September 12, 1952, for observation as to his sanity, has been observed and examined as to his sanity. As a result of these observations and examinations, I have formed the opinion that he is not insane and that he is not suitable for continued custody in a hospital for the insane. Psychological testing has revealed that he is feeble-minded (intelligence quotient -63) and that his judgment, from that cause, is defective.

"It has been suggested by the Strafford County Solicitor that he might be employed in some manner at the State Hospital and at the same time be assisted by a psychiatrist. However, he is not intellectually competent to work as an attendant caring for mentally ill patients and for the same reason he is unable to work in a State Hospital industry. Also, because he is feeble-minded, he is not amenable to treatment by a psychiatrist. He is considered to be in need of confinement and supervision for the protection of the public, and to require training such as is afforded in an institution for the feeble-minded of the Laconia State School type. Since the law prevents admission to the latter institution, where I feel his care is indicated, it is my opinion that he should be confined to the Industrial School or in a jail.

The lawyers did not appreciate the State Hospital's advice. As the defense counsel saw it the psychiatrists were passing the buck:

"I think the difficulty in this case arises from the efforts on the part of the Examining Board to shirk their responsibility and

get rid of him from the State Hospital in Concord. Reading their report they say he has a degree of mental defectiveness and general immaturity. . . . I certainly agree and feel that this man should be institutionalized but because of the fact that the doctors at the State Hospital want to duck their responsibility I don't think that this man because of that reason should be sent to some penal institution."

The Court agreed and the defendant was left in the State Hospital.

Thus in this case the State Psychiatrists asserted that a feeble-minded person was not "legally insane." The lawyers insisted that he was. The lawyers won.

APPENDIX E

Disposition of a case in which the State Hospital Certifies the Respondent sane

Cases in which the question of mental competency arises in New Hampshire follow a fairly regular pattern. The issue of insanity seldom reaches the jury. In the average case the County Solicitor moves to commit for observation and his motion is always granted. If the Hospital reports that the accused is insane, the prosecution usually asks the grand jury to certify that it refuses to indict by reason of insanity and the court orders the defendant committed until released by due process of law. In by far the majority of cases, however, the Hospital reports that the patient is sane and competent to stand trial. He then usually enters a plea of guilty, and is sentenced accordingly. A representative example is the *Howland* case¹ which occurred in 1939. Referring to it recently, the County Solicitor explained that he had petitioned for commitment almost as a matter of routine.

"As I recall it, there were no particular facts in the *Howland* case requiring an examination of the defendant, except that he had quite a record elsewhere, and it is my recollection that my motion was suggested by the State Police and the Attorney General and such action seemed to be the common practice in all homicide cases.

"So far as I know it is simply a practice of long standing."²

Howland was indicted for first degree murder on February 2, 1939. He was arraigned on March 30 and pleaded not guilty. At the arraignment the County Solicitor filed the following motion:

"To any Justice of said Court:

"Counsel for the State in the above case respectively requests, in accordance with the custom in such cases, that, there being a question as to the sanity of the Respondent, the Court order the Respondent into the care and custody of the Superintendent

1. *State v. Henry Howland*, Strafford Criminal Docket No. 2052 (1939).

2. Letter from John Beamis, Esquire, March 18, 1960.

of the State Hospital in Concord in our County of Merrimack, to be detained and observed by him until further order of the Court, or until such person shall have been ordered discharged from the hospital by the trustees upon a report to them by the Superintendent that such person is not insane."

Dated at Dover, N.H., this 29th day of March, 1939.

Thomas P. Cheney (s)
Attorney General

John F. Beamis, Jr. (s)
County Solicitor

Beneath this petition the Court wrote the following order:

"Upon consideration of the foregoing petition, it is ordered that the respondent John H. Howland be committed to the care and the custody of the Superintendent of the State Hospital in Concord in our County of Merrimack, there to be detained and observed by him until further order of the Court."

March 30, 1939

Aloysius J. Connor (s)
Presiding Justice

The Sheriff delivered the accused to the State Hospital that very day.

On April 19, twenty days later, the State Hospital sent the Court the following report:

"I have examined John H. Howland, committed to this hospital for observation, and have formed the opinion that he is sane."

Yours truly,

Chas. H. Dolloff (s)
Superintendent

On April 25, the Court ordered Howland transferred from the Hospital to the county jail. On May 1st, he changed his plea to "guilty of murder in 1st degree" and the following mittimus was entered:

"May 1, 1939 — Sentence

"It is ordered that the respondent be committed to the state prison, there to be confined during the remainder of his life."

Aloysius J. Connor
P. J.

APPENDIX F

Disposition of a case in which the State Hospital Certifies the Respondent insane

In New Hampshire the prosecution always accepts the State Hospital's decision that a respondent is insane and rather than seek a conviction it

asks the court to commit him as criminally insane. A typical case was that of Byron Tenney,¹ a very old man.

On January 3, 1957, the accused was bound over by the New London Municipal Court on the charge of first degree murder. On the same day the County Solicitor petitioned the Superior Court that the accused be committed for observation and the petition was granted.

On February 14, the State Hospital filed the following report:

"Byron F. Tenney was admitted to this hospital on January 23, 1957 by order of Judge Stephen M. Wheeler. His advanced age and cardiovascular disease result in physical disability to the extent that he is carried on our Danger List, implying the likelihood of imminent death.

"Complete physical, mental, and psychologic examinations have disclosed that his mental condition, due to hardening of the arteries in the brain, is such as to render him psychotic. He is confused, disoriented, and often irrelevant, only fleetingly aware of the reality about him. He is, therefore, incompetent mentally and has been insane for a considerable period of time prior to admission to the hospital. His behavior which constituted the charges against him was, therefore, the product of disease."

On February 19 the Superior Court "sentenced" the accused to the State Hospital under R.S.A. 135: 17 & 18.

At the April term of the Grand Jury the County Solicitor sought an indictment against Tenney for murder. Across the front of the indictment the foreman of the jury wrote:

"The Grand Jury omit to find an indictment against Byron Tenney for the reason of his insanity and the Grand Jury so certify that finding to the Court."

On the same day, April 2, 1957, the Court ordered Tenney "committed to the N.H. State Hospital for life, there to remain until or unless earlier discharged, released or transferred by due course of law."

On December 15, 1959 the old man died, a patient at the State Hospital. He had been arrested, committed for observation, adjudged insane, and indefinitely committed as criminally insane without once having counsel of record.

1. *State v. Tenney*, Merrimack State Docket, No. 400 and No. 408 (1957).