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# THE RULE OF THE AMERICAN LAW INSTITUTE'S MODEL PENAL CODE\*

FRANCIS A. ALLEN\*\*

Although I doubt that Dean Seitz was aware of it, there was very little chance that I would refuse his invitation to participate in this Symposium. In our household it is almost a family policy to accept every reasonable opportunity to visit Wisconsin. We have, in fact, adopted this state as our second home. But there was another reason to welcome this occasion, for it provided an opportunity, not to repay a debt, but to acknowledge an obligation. We in Illinois have just completed the task of enacting a comprehensive revision of our substantive criminal law. The Wisconsin Code of 1955 provided assistance and inspiration at every stage in the drafting of the new Illinois law. The Wisconsin achievement was, moreover, an important factor in persuading many in Illinois that substantive revision was both a feasible and a desirable undertaking. I believe it may safely be predicted that the leadership of Wisconsin in this area will continue to be felt as other states, notably New York and California, confront the task of substantive revision.

One of the pieces of business left unfinished in the Wisconsin Code of 1955 was a legislative formulation of the tests of criminal responsibility relating to persons suffering from mental disorders. I am told that recent events in this state have created particular interest in this problem; and the calling of this Conference corroborates the existence of that interest. Viewed historically, no other question of the substantive criminal law has attracted the attention or stimulated the controversy that has surrounded this issue. A library of substantial size would be required to house all the literature on the tests of responsibility that has appeared in the English-speaking nations during the past century and a quarter. No one, I am sure, has read all of this literature. Indeed, only one with pronounced masochistic tendencies could do so; for much of what has been published on all sides of this controversy is more impressive for its bulk than its cogency. The enormous expenditure of energy that has been lavished on the tests of responsibility has had its unfortunate aspects. The concentration on this issue and the acrimony it has often produced have tended to obscure the facts that mental disorder creates many problems for the system of criminal justice other than that of determining who shall be relieved of criminal liability and to inhibit efforts to devise solutions to problems requiring practical and thoughtful consideration.

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It may be worth a moment to identify some of these other problems. There is, first of all, the problem posed by the defendant who is mentally incompetent to stand trial or plead to the criminal charge. The procedures employed in many jurisdictions are wholly inadequate to insure identification of such persons, with the result that in some instances, particularly those involving the impoverished accused, persons incompetent to stand trial are in fact tried, convicted, sentenced, and introduced into state correctional institutions poorly equipped to deal with them. The problems of the incompetent accused are not at an end even when his condition is noted prior to trial, for the "right" not to be tried while incompetent conflicts with another basic interest of the defendant—the right of speedy trial. A defendant who has been confined in a mental institution for months or even years prior to trial may be seriously handicapped in maintaining his defense once criminal proceedings are resumed. Again, there are problems relating to the commitment of persons found not guilty because insane. Assuming that commitments to mental institutions are to be automatic in such cases (and such seems to be the present legislative tendency), what criteria should govern the ultimate release of such persons? No one familiar with American systems of correction can be unaware that they are rarely staffed or equipped adequately to deal satisfactorily with the problems of mental disorder among inmates of penal institutions. A recent study in the *Michigan Law Review* reminds us that mental disorder may provide tough problems for other aspects of the correctional process, such as the administration of parole.<sup>1</sup> As one gets closer to the problem of criminal responsibility he observes that the question of who has the burden of proof on the insanity issue is a matter of genuine importance. In some jurisdictions the law (as it should) clearly places the burden on the prosecution once the issue has been raised in some substantial way by the defense. Although the law is clear in such states, many courts at both the trial and appellate levels have refused seriously to apply it, with the result that for all practical purposes the burden of persuasion remains with the defendant. The consequences of this attitude may be particularly serious when the defendant asserting the insanity defense is indigent or of limited means. All of these problems and many more co-exist with the problem of articulating a test of criminal responsibility. They must be confronted no matter how the issue of responsibility is submitted to the jury. It would require a good deal of boldness to assert that the practical consequences of the way in which these issues are resolved are in any sense less important than those resulting directly from the differing formulations of the tests of responsibility.

<sup>1</sup> Comment, *Criminal Law—Insane Persons—Influence of Mental Illness on the Parole Return Process*, 59 MICH. L. REV. 1101 (1961).

It is, of course, not my purpose in making this recital to suggest that the formulation of the test of responsibility is a trivial or unimportant matter. The contrary is true. At the pragmatic level one of the real reasons for seeking a formulation of a test that commends itself to the various groups importantly concerned with the problem is that achieving this goal may go far to release attention and energy for the solution of the other problems of mental disorder that insistently require confrontation. It has been suggested by one who observed recent history in the District of Columbia that the way in which the test of responsibility is expressed may subtly influence the way in which other problems are approached even though, analytically, those problems are quite distinct from the issue of criminal responsibility.<sup>2</sup>

But basically the reason for concern with the issue of criminal responsibility as affected by mental disorder is not that this concern may contribute to solution of other problems. The problem of determining criminal responsibility is a problem in itself and important in itself. The function of the test of responsibility is to identify those who, on a calm and sober view, must be regarded as ineligible for the processes of criminal justice with their inherent stigmatic and punitive ingredients and who, therefore, must be conceived solely as the recipients of care, custody, and therapy. The moral incongruity and the inexpediency of subjecting such persons to the condemnatory procedures of the criminal law is a perception that has been given some form of expression in the Anglo-American law for the past seven hundred years. It should be noted, also, that the problem of criminal responsibility as affected by mental disorder is not to be approached as a matter *sui generis*, but as part of the broader issues of criminal liability. The insanity defense reflects one of what Professor H. L. A. Hart calls the "excusing conditions" in the criminal law<sup>3</sup> and is closely associated with other doctrines such as mistake, coercion and duress, infancy, and the like. The statement of the insanity defense thus must be of concern to anyone interested in achieving a full, rational, and sensible formulation of the law of criminal liability.

Not only is the formulation of the tests of responsibility a matter of genuine importance, it is a task of great difficulty. The Reporter of the American Law Institute's Model Penal Code is surely correct when he says: "No problem in the drafting of a penal code presents larger intrinsic difficulty than that of determining when individuals whose conduct would otherwise be criminal ought to be exculpated on the ground that they were suffering from mental disease or defect when they acted

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<sup>2</sup> Krash, *The Durham Rule and Judicial Administration of the Insanity Defense in the District of Columbia*, 70 YALE L. J. 905, 907-8 (1961).

<sup>3</sup> HART, LEGAL RESPONSIBILITY AND EXCUSES IN, DETERMINISM AND FREEDOM IN THE AGE OF MODERN SCIENCE (Proceedings N.Y. Inst. of Phil., 1958).

as they did.”<sup>4</sup> As is well known, the test of responsibility recognized in the overwhelming majority of Anglo-American jurisdictions is the *M’Naghten* rule, supplemented in some American jurisdictions by the so-called irresistible-impulse test. The *M’Naghten* rule, either alone or in conjunction with “irresistible impulse,” has been subjected to a barrage of criticism that has persisted for over a century and has emanated, not only from medical and psychiatric sources, but from many members of the legal profession, as well. I must say frankly that it seems to me that much of this criticism misses the point and reflects serious misconception of the function a test of responsibility is called upon to perform. I believe we fall in error, however, if because much of what has been said appears irrelevant and unhelpful, we reject out of hand *all* criticisms of the *M’Naghten* rule. It would, after all, be a rather remarkable circumstance if it should turn out to be true that nothing in the case against *M’Naghten* is worth attention or that the statement of all the judges of England in 1843, in what was essentially an advisory opinion, represents a kind of inviolable perfection.

The *M’Naghten* formulation relieves from criminal responsibility those who do not know “the nature and quality” of their acts or who do not know that their acts are wrong.<sup>5</sup> No one, I believe, would deny that one who qualifies under this test should be exculpated. It must be clear that the law is incapable of deterring one who, literally, does not know what he is doing or, if he knows, lacks capacity to evaluate the ethical and moral character of his conduct. The criticisms of *M’Naghten* are directed to other considerations. The basic attack is that *M’Naghten* applied literally and without distortion fails to encompass all persons whom justice and good sense would dictate should be relieved of the criminal consequences of their acts. This basic proposition is accompanied by other assertions to which attention must now be given.

It would not be possible and certainly not desirable to recite every count that has been returned in the indictment of *M’Naghten*. But it is important to note a few of them. First, many have urged that the *M’Naghten* rule incorporates an over-intellectualized concept of mental disorder. The key word is “know.” Yet, it is said, in many cases of advanced psychosis, cases which everyone would deem appropriate for exculpation, the defendant may have a rudimentary verbal knowledge of right and wrong. What he lacks is understanding of the sort that involves the emotional or affective parts of his personality. In fact, as Dr. Zilboorg has stated, the separation between the intellectual and affective aspects of personality may be the primary symptom of some types of serious mental afflictions.<sup>6</sup> Some have urged that the word

<sup>4</sup> A.L.I., MODEL PENAL CODE 156 (Ten. Draft No. 4, 1955).

<sup>5</sup> 10 Cl. & F. 200, 8 Eng. Rep. 718 (1843).

<sup>6</sup> Zilboorg, *Misconceptions of Legal Insanity*, 9 AM. J. ORTHOPSYCHIATRY 540, 552-53 (1939).

"know" is subject to reinterpretation in the light of modern conceptions of mental disorder and that no alteration in the *M'Naghten* formula is required to bring this about. Many careful observers are persuaded, however, that this aspect of the formula is a persisting source of confusion and misunderstanding. Second, the *M'Naghten* rule is said to be defective in failing to give explicit recognition to volitional disorders, disorders, that is, that deprive the person of control over his behavior. The irresistible-impulse gloss on the *M'Naghten* rule represents an effort to meet this objection. There is a considerable body of opinion, however, which holds that the irresistible-impulse test, at least in its usual formulation, is inadequate. I shall return to this matter very shortly.

The third cluster of objections to the *M'Naghten* rule involves the word "wrong." Some of these criticisms appear extreme and ill-conceived. Thus, one frequently hears it said that psychiatrists are men of science and *qua* psychiatrists know nothing of the concepts of right and wrong. Hence, *M'Naghten* requires them to deal with an inappropriate and uncongenial issue. But surely it must be clear that the expert witness is not called to testify as to what *is* right or wrong, but rather as to whether the defendant was incapacitated by his mental disorder from making moral and ethical discriminations. The latter is not an ethical question at all. Even if this were less clear, one would be tempted to point out that the moral question in cases in which the insanity defense is likely to be advanced is ordinarily not a very difficult or subtle one. There is a related point, however, of much greater substance. Some psychiatrists, including Dr. Guttmacher, have candidly asserted that in many cases, cases in which it may fairly be doubted that the defendant was capable of conforming his conduct to the commands of the law, it is practically impossible for the expert to determine whether or not the defendant possessed rudimentary capacity to distinguish right from wrong.<sup>7</sup> This testimony is impressive and its implications are important for the problem at hand.

Fourth, *M'Naghten* is said to be defective because it requires a *total* incapacity to evaluate the moral character of one's behavior. There is persuasive evidence that such total and absolute incapacity rarely exists even in seriously disturbed persons, including those who are not fit subjects for the peno-correctional process.

Fifth, it is frequently asserted that *M'Naghten*, by focusing on the issue of knowledge of right and wrong, tends to narrow unduly the scope of expert testimony and thereby deprives the jury of testimony useful and relevant to its consideration of the ultimate issue. Professor Hall, among others, has questioned this assertion;<sup>8</sup> and it is true that we

<sup>7</sup> *Supra* note 4, at 171-172.

<sup>8</sup> See, HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 519 (2d ed. 1960).

lack a comprehensive factual study of the matter. The fact appears to be that practices of trial courts vary considerably in the scope afforded examination of expert witnesses. On the basis of incomplete knowledge, I find it difficult to conclude that this criticism of *M'Naghten* is wholly lacking in substance.

Finally, a more generalized objection may be mentioned. The deficiencies and ambiguities of the *M'Naghten* rule, it is asserted, induces practices both at the judicial and administrative levels that are not compatible with any reasonable interpretation of the legal rule. The result is the development of a widening disparity between law in the books and law in action in this important area, and provides evidence of the need for sober reconsideration of the written law.

These, then, are some of the points advanced in the critique of *M'Naghten*. It is clear that these points vary considerably in their cogency and persuasiveness. It was the conclusion, however, both of the American Law Institute and of those who participated in the recent revision of the Illinois Criminal Code, that the case against *M'Naghten* contains matters of real substance, clearly adequate to justify a thorough-going reconsideration of the traditional tests of responsibility and to provide grounds for a realistic hope that a modern formulation could be devised that would make important contributions to the justice and rationality of the criminal law. The result of this belief and this hope is the Model Penal Code test. Response to the new formulation has been encouraging. Although it was made public only about five years ago, it has been enacted by legislation in Vermont and Illinois. A bill proposing the test was adopted by the Oregon legislature but was vetoed by the Governor on grounds that can hardly be regarded as convincing. An advisory commission proposed its adoption in New York, but action has been delayed pending a complete revision of the criminal law of that state. A somewhat bowdlerized version of the test was accepted by the Federal Court of Appeals for the Third Circuit in the case of *United States v. Currens*, decided in May of this year.<sup>9</sup> Its influence has been felt on law-revision efforts as far away as Australia. The evidence seems to suggest that the Model Penal Code test will receive wide acceptance in the years to come.

The Model Penal Code provides as follows:

(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.

(2) The terms "mental disease or defect" do not include an

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<sup>9</sup> 290 F. 2d 751 (3d Cir. 1961).

abnormality manifested only by repeated criminal or otherwise anti-social conduct.<sup>10</sup>

This language reveals on its face several of the assumptions that guided Professor Weschler and others who assisted him in drafting the Model Penal Code formulation. First, a test of responsibility should give expression to an intelligible principle. It is the obligation of the law to determine the applicable principle and to express it with all possible clarity and exactitude. There should be full disclosure of the principle to the jury. The jury should not be kept in doubt or be required to infer within what framework of principle its difficult decision must be made.

The formulation succeeds in achieving these objectives with considerable success. Clearly, it is neither just nor expedient to subject persons to punishment and condemnation who, because of mental disorder, are incapable of responding to the threats and commands of the law. Who are these undeterrables? According to the Model Penal Code test, they are those whose mental condition renders them incapable of appreciating the criminality of their conduct or of conforming their behavior to the law's commands. Some, particularly those who support the rule of the *Durham* case, urge that a test of responsibility ought not to include what are characterized as particular symptoms of mental disorder. The reason given is that a reference to symptoms may render the legal test outmoded as new knowledge of human behavior is acquired. With all deference I suggest that such a proposition reflects a fundamental misconception of the function the test of responsibility must serve. Unless one is willing to take the view that mental disorder in any degree exculpates, the legal test must be concerned with the particular effects of the disorder on the conduct of the accused. If the principle expressed in the legal formulation is sound, it will not be outmoded by advances in knowledge of human behavior that make it possible to determine with greater certainty and facility whether the mental condition of a given individual places him within or without the scope of criminal liability. If, in other words, it is a sound legal judgment that one who lacks capacity "to conform his conduct to the requirements of law" should be exculpated, this judgment is not rendered invalid by the circumstance that medical science may one day be able to determine with greater precision that the defendant does or does not possess that capacity.

It will be observed that in its reference to capacity to conform conduct to the requirements of the law, the Model Penal Code expressly takes into account impairments of volitional capacity. The test does not use the language of "irresistible impulse" and thus avoids the implica-

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<sup>10</sup> *Supra* note 4, at 27.

tion that such disorders can be reflected only in sudden or spontaneous acts in contrast to those that are preceded by a period of brooding and reflection. Some proponents of *M'Naghten* deny the necessity of including a reference to volitional disorders in the test of responsibility on the theory that a lack of capacity to control behavior is always accompanied by a deficiency in the intellectual capacity to "know" that the conduct is wrong. It should be observed, however, that much expert opinion casts doubt on the proposition that one lacking capacity to control his behavior by reason of mental disorder will always reveal a deficiency in his intellectual capacity sufficient to produce exculpation under the *M'Naghten* test. But even assuming that incapacities of volition are always accompanied by intellectual disabilities and that these incapacities will manifest themselves in approximately the same degrees of seriousness, there seems to be no reason why a statement of the legal principle should be expressed in terms of the one to the exclusion of the other.

You will also notice in reading the language of the Model Penal Code that it speaks, not of total incapacity to appreciate or conform, but of lack of "substantial capacity." It is not the purpose of this mode of statement to achieve a dramatic expansion of exculpation, nor will this be its effect. The purpose rather is to bring the statement of the legal principle into consonance with the underlying facts. As suggested earlier, there are many cases of advanced mental disorder in which rudimentary capacities of cognition and volition exist but which clearly present inappropriate occasions for the application of criminal sanctions. In other cases of advanced mental disorder, no judgment, however expert, can determine whether or not these rudimentary capacities exist. There is real point in a statement of the legal principle that adequately reflects these facts. The truth is that probably most persons acquitted under *M'Naghten* do possess some capacities, however limited, for making moral evaluations of their behavior, despite the requirement of total incapacity. The danger is that if the test does not adequately reflect the reality, caprice and inequities in its administration will result.

It is worth noting also that the Model Penal Code formulation employs the word "appreciate" rather than the word "know." It could hardly be suggested that this verbal refinement is likely to produce any direct consequences in jury behavior. But it may provide a basis for a somewhat broader scope for expert testimony, by suggesting the relevance to the legal inquiry of disabilities in the emotional or affective aspects of defendant's personality. Confusion as to the relevance of these considerations under the traditional *M'Naghten* formula is, it will be recalled, one of the sources of persistent dissatisfaction with the administration of the insanity defense.

One cannot talk about the Model Penal Code test for long without

being required to offer comparisons with another much-discussed formulation, the rule in the *Durham* case. I wish to say at the outset that I am in sympathy with many of the objectives of those who support *Durham* and that I find much to admire in the concern expressed by the District of Columbia Court of Appeals for the whole range of problems created for a system of justice by mental disorder. But as you would expect me to say, the *Durham* formulation presents me with real difficulties, and I am persuaded that the Model Penal Code test represents a sounder approach to the problem of criminal responsibility as affected by mental disorder. We shall hear more of *Durham* today, and, in any event, time does not permit me to attempt a full analysis.

As you know, the *Durham* test is, in the language of that test, "simply that an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect."<sup>11</sup> These few words have already produced a literature of formidable size. A summary of some of the complaints made to *Durham* may be found in the concurring opinion of Judge Burger in *Blocker v. United States*, decided by the Court of Appeals for the District of Columbia Circuit earlier this year.<sup>12</sup> Probably the feature of the *Durham* test that has attracted more critical attention than any other is the phrase "the product of." True enough, any test of responsibility presents a problem of tracing a causal connection between the mental disorder and the criminal act. But the "cause" element bears an entirely different and greater weight in *Durham* than in the Model Penal Code test or the traditional formulations; for in the latter, unlike *Durham*, the jury seeks a causal connection between mental impairment and certain specified effects on the defendant's behavior. If, in determining whether the defendant's act was "the product of" his mental disorder, the jury is invited to speculate as to what portion of the conduct was caused by the defendant's "normal self" and what portion of the conduct was caused by the "disease," the formula appears as offensive to contemporary notions of "integration of personality" as the *M'Naghten* formulation it was designed to replace. As the late Judge Brosman of the Court of Military Appeals observed, it is doubtful "that a criminal act can be committed which is *not*, in some sense, a product of whatever mental abnormality may coexist."<sup>13</sup> The point, however, is not that *Durham* results in the wholesale acquittal of criminal defendants who, on one theory or another, ought to be regarded as proper subjects for the peno-correctional process. Here, as elsewhere, an ounce of experience may be worth a pound of speculation; and experience in the District of Columbia does not reveal any startling increase in criminal acquittals. The point is a different one. It is that the product test fails

<sup>11</sup> *Durham v. United States*, 214 F. 2d 862, 874-875 (D.C. Cir. 1954).

<sup>12</sup> *Blocker v. United States*, 288 F. 2d 853, 857 (D.C. Cir. 1961).

<sup>13</sup> *United States v. Smith*, 5 USCMA 314, 17 CMR 314 (1954).

to express an intelligible principle and fails to provide the jury an adequate framework within which to exercise its power of decision. This is also the conclusion of Judge Biggs, who must surely be regarded as a sympathetic adherent to the underlying objectives of the *Durham* formulation. In his recent opinion in the *Currens* case, Judge Biggs wrote:

As we have previously pointed out, the psychiatrist, under the *Durham* formula, may give the jury a complete picture of the defendant's mental condition. It is not enough, however, . . . to give the jury a complete picture of the defendant's mental condition. The jury must be further provided with a standard or formula by means of which it can translate that mental condition into an answer to the ultimate question of whether the defendant possessed the necessary guilty mind to commit the crime charged. Our second objective is, therefore, to verbalize the relationship between mental disease and the concept of 'guilty mind' in a way that will be both meaningful to a jury charged with the duty of determining the issue of criminal responsibility and consistent with the basic aims, purposes and assumptions of the criminal law.<sup>14</sup>

Judge Biggs added: "The *Durham* formula obviously does not meet these requirements."<sup>15</sup>

Perhaps the point can be given further clarification. In 1954 a distinguished committee of the Group for the Advancement of Psychiatry undertook to reformulate the tests of criminal responsibility. The result of these labors was a formula which, in several particulars, resembles the *Durham* rule. Thus, the G.A.P. proposed that "No person may be convicted of any criminal charge when at the time he committed the act with which he is charged he was suffering with mental illness as defined by the Act, and in consequence thereof, he committed the act."<sup>16</sup> The substantial identity of the phrases "in consequence thereof" and "the product of" is immediately apparent. The interesting thing is that in the published draft of the G.A.P. proposal a footnote appears under the phrase in question. That note reads, in part, as follows:

The psychiatrist can answer the condition—"in consequence of such illness he committed the act,"—not in the sense that mental illness *causes* the crime, but in the sense that mental illness vitiates normal capacity for control.<sup>17</sup>

Notice what occurred. It was apparently felt that some further explanation was required to make the formulation meaningful to the *expert witness*. But what about the jury? The explanation in the footnote was not made part of the formulation. If the additional language

<sup>14</sup> *Supra* note 9, at 772-73.

<sup>15</sup> *Id.* at 773.

<sup>16</sup> G.A.P. (Comm. on Psych. and Law, Report No. 26, May, 1954) "Criminal Responsibility and Psychiatric Expert Testimony" 8.

<sup>17</sup> *Ibid.*

is helpful to the understanding of the psychiatrist, if it is part of the essential principle that should govern these cases, what considerations of logic and good sense can be summoned to justify withholding the statement from the body which must ultimately decide the issue? It is no answer, I believe, to say, as was said in the *Durham* opinion, that in the final analysis the jury makes a moral judgment as to the justice of imposing criminal penalties on the particular defendant. This may well be true. But it is no adequate reason for leaving the jury at large on the issue or supplying inadequate guidance. Surely there are relevant criteria for the making of moral decisions as well as any other. Surely, we are not justified in assuming that the relevant criteria will be immediately apparent to a lay jury called upon to determine the disposition of one suffering from mental disorder who has inflicted serious injury on another. The task we ask the jury to perform is difficult enough without complicating the matter through inadequate articulation of the principle the jury's action is expected to express.

One other aspect of the Model Penal Code test must be mentioned and I shall be through. No general definition of "mental disease or defect" is attempted, but part (2) of the paragraph undertakes to say what they are not: "The terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct." Quite obviously this sentence attempts to deal with the difficult issue posed by the so-called sociopath or psychopathic personality. No doubt, this part of the formulation reflects a number of considerations. First, the widely differing and conflicting criteria employed by practitioners in the diagnosis of the psychopath may be expected to produce peculiarly difficult issues for jury consideration. Thus, as the late Professor Sutherland noted, at one time as many as ninety-eight percent of inmates admitted to state prison in Illinois were diagnosed as psychopathic personalities, while at the same time not more than five percent were so diagnosed in similar institutions in other states.<sup>18</sup> Second, doubts have been expressed as to the wisdom of channeling those diagnosed as psychopathic into institutions of medical custody. These doubts relate both to the welfare of the person committed and to the proper functioning of the hospitals to which he would be committed. Third, many have expressed a fundamental skepticism of the integrity of the sociopathic category. Barbara Wooton, an English writer, has recently expressed this view with considerable asperity. Miss Wooton says:

. . . the psychopath makes nonsense of every attempt to distinguish the sick from the healthy delinquent by the presence or absence of a psychiatric syndrome, or by symptoms of mental

<sup>18</sup> Sutherland, *The Sexual Psychopath Laws*, 40 J. CRIM. L. & CRIMIN. 543, 550 (1950).

disorder which are independent of his objectionable behavior. In his case no such symptoms can be diagnosed because it is just the absence of them which causes him to be classified as psychopathic. He is, in fact, *par excellence*, and without shame or qualification, the model of the circular process by which mental abnormality is inferred from anti-social behavior while anti-social behavior is explained by mental abnormality."<sup>19</sup>

I believe it is safe to predict, however, that much more will be heard on this issue in the years ahead. In the *Currens* case, the court, through Judge Biggs, indicated that in the Third Circuit psychopathy will be regarded as a mental disease for the purposes of the insanity defense. The same result, of course, has been reached in the District of Columbia, although a recent study asserts that few such persons have actually been acquitted in that jurisdiction on the grounds of insanity. It should be noted, also, that the Model Penal Code does not in terms exclude psychopathy from the definition of mental disease. The label is not outlawed. I assume that one diagnosed as a psychopath may qualify as one suffering from a mental disease so long as the indications advanced to support that conclusion include more than repeated criminal or anti-social behavior.

Let me add a brief word in conclusion. The Model Penal Code formulation creates no revolution. It reflects the traditional insights of the criminal law. Indeed, it seems to me that it reflects those insights more perfectly than the formulations of the insanity defense traditionally applied. The Model Penal Code recognizes that the law of criminal responsibility must state a principle that is both intelligible and compatible with the general principles of criminal liability. But the test also reflects a progressive spirit. All is not well with the administration of the law of criminal responsibility, and part of our present difficulties can fairly be attributed to the old formulae. The draftsmen gave careful attention to the specific complaints made of *M'Naghten* and met these objections with, I believe, substantial success. I commend the Model Penal Code test to your thoughtful consideration.

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<sup>19</sup> WOOTON, SOCIAL SCIENCE AND SOCIAL PATHOLOGY 250 (1959).