

## INTRODUCTION

A few weeks ago the Temporary Commission on Revision of the Penal Law of New York asked me to submit to the New York state legislature a statement of our experience in the District of Columbia with the *Durham* rule of criminal responsibility.<sup>1</sup> In response, I put down my own views of the *Durham* rule, and the successor rules laid down in *McDonald v. United States*,<sup>2</sup> together with some thoughts on their relative merit or demerit versus the New York proposal, and what follows is substantially the text of the statement that I submitted. These observations will serve, I hope, as a useful review of local developments in criminal responsibility, of at least as much interest to the legal profession in the District of Columbia as to the New York legislature.

While this is not the place for theorizing, I would like to fix a starting point for what I have to say. It is important to be certain precisely for what purpose a rule of law is to be used. To me a rule of criminal responsibility ought to answer two purposes. First, it must be a test of *responsibility*. This means that we accept the axiom that some moral choice must be made between the guilty and the innocent, between those who are morally culpable and are to be punished and those who are not. If a moral choice is not to be made, it is nonsense to talk of criminal responsibility. And if responsibility is the blossom that we are trying to pick from the thorns, the test of responsibility must measure the degree of choice open to the defendant. A test of responsibility should not be shaped to irrelevant uses—such as determining merely whether the defendant needs mental treatment, or whether his mental condition made it more or less likely that he would commit the criminal act. Nor should we be diverted by the skepticism of psychiatrists toward the validity of the concept of moral culpability. We have passed beyond that crossroad, if we are at the point that we are looking for a rule of *responsibility*.

Second, the rule must be one that is not incomprehensible to juries. It must recognize the fact that the issue of responsibility is decided by the unscientific process of litigation, and the rule must define the issue in a way that permits jury determination in more or less familiar terms without throwing the ultimate issue open to hopeless speculation.

At the risk of slight over-simplification, I should like to emphasize that the *Durham* rule, as it is commonly known, is no longer the law in the District of Columbia. It was modified in basic part by *McDonald v. United States*,<sup>3</sup> decided by the United States Court of Appeals for the District of Columbia Circuit sitting *en banc*, on October 8, 1962. My discussion will take up *Durham* before *McDonald*, then the new rules laid down in *McDonald*, then the practical application of both standards by psychiatrists in the District of Columbia.

## THE DURHAM RULE

*Durham* is best understood as a shorthand expression for the basic rule of responsibility laid down in *Durham v. United States*,<sup>4</sup> as the court of appeals applied and interpreted it in eighty-odd cases over a period of eight and a half years, plus a number of subsidiary rules laid down in court decisions in which criminal responsibility was an issue. Space only permits a highlight examination of the sedimentary deposit subsequently added to *Durham* up to the time of *McDonald*.

*Durham* was decided in 1954. The rule of the case was, and is, that a person is not responsible for a criminal act if he suffered at the time from a mental disease or defect and if the act was a "product" of the disease or defect. On its face it would appear a reasonable rule calling for inquiry into mental affliction and its causal connection with the criminal act. But very serious problems have arisen in applying the rule over the years, to the point that it was not well focused as an inquiry into responsibility, it was confusing to juries, judges, and medical witnesses alike, and it set a series of traps in the path of the prosecution which, in my judgment, did not serve the interests of justice.

1. One major criticism of *Durham* has always been that "product" was too vague a term. "Product" in what sense? How should the trial judge explain

<sup>1</sup> The New York Legislature is presently considering a proposal to adopt the American Law Institute's formulation in lieu of the rather strict version of the *McNaghten* rule now obtaining there. This proposal is cast as an amendment of sec. 1120 of the Penal Law.

<sup>2</sup> No. 16,304, D.C. Cir., Oct. 8, 1962.

<sup>3</sup> *Ibid.*

<sup>4</sup> 94 U.S. App. D.C. 228, 214 F.2d 862 (1954).