"product" to the jury in his instruction? What causal mechanisms should the medical witness describe to the jury and the jury search for in evidence? As practice developed, the juries could expect precious little guidance from the medical witness or the judge. Psychiatrists, of course, do not define the legal term "product." Many believe that it is impossible to say whether a particular act is the product of a mental disease and those psychiatrists customarily express no opinion on that issue.[5] One effort was made by the court of appeals to explain "product" in terms of a variety of causal synonyms:

"When we say the defense of insanity requires that the act be a 'product of' a disease, we mean that the facts on the record are such that the trier of the facts is enabled to draw a reasonable inference that the accused would not have committed the act he did commit if he had not been diseased as he was. There must be a relationship between the disease and the act, and that relationship, whatever it may be in degree, must be, as we have already said, critical in its effect in respect to the act. By 'critical' we mean decisive, determinative, causal; we mean to convey the idea inherent in the phrases 'because of,' 'except for,' 'without which,' 'but for,' 'effect of,' 'result of,' 'causative factor'; the disease made the effective or decisive difference between doing and not doing the act. The short phrases 'product of' and 'causal connection' are not intended to be precise, as though they were chemical formulae." [6]

This decision turned jury instructions toward circular definitions for a brief period, but these definitions were not widely followed by trial judges.

Some trial judges attempted to explain the "product" concept in terms of particular causal mechanisms of which there was evidence in the particular case. For example, in *Campbell* v. *United States*[7] the issue of "product" was tried by both sides on the question of the defendant's ability to exercise good judgment and his ability to control his conduct. The trial judge's instruction to the jury explained "product" in those terms—the terms chosen for litigation by the parties themselves. But a divided panel of the United States Court of Appeals for the District of Columbia (2–1) reversed the conviction, holding that the capacity-for-control test was only one type of the causal relationships that were possible under *Durham*, and that the instruction had erroneously narrowed the jury's understanding of "product" by excluding other possible causal standards. The majority did not attempt to point out what other types of causal connection was possible. Rehearing of the case *en banc* was sought, but was denied by a margin of one vote.

A related difficulty with the "product" concept is the attitude toward it that has evolved among medical witnesses. Their prevailing view is that, while occasionally one can say that an act *was* a product of mental disease, one can rarely if ever say that an act was *not* a product. To analogize, one can sometimes find a needle in the haystack, but one cannot find that there is *not* a needle in the haystack. The consequence of this view is that when the psychiatrist *can* come to a firm opinion on the issue of "product," it is almost invariably in favor of the defendant. No dice could be more loaded than this. It is not the fault of the psychiatrist. When the test of causal connection is as limitless and vague as the "product" concept, certainty can only exist on the affirmative finding, never on the negative.

Part of the problem is that medical witnesses are permitted under *Durham* to testify to an ultimate issue in the case, the "product" question. This practice carries both a legal and a practical evil. Legally, a witness is supposed to limit his testimony to fact or to expert opinion. "Product" is neither. It is a legal-factual ultimate conclusion, analogous to the issue of negligence, on which surely no witness would be permitted to speak. Practically, "product" is quite outside of the normal, expert frame of reference of the witness. It is a judgment that most psychiatrists do not make professionally in diagnosis or treatment.

2. A second major difficulty with the "product" rule has been a virtually automatic presumption, once mental disease is shown, that the act was a product of the disease. This presumption arises immediately upon a bare showing of mental disease, without *any* evidence of a causal connection. If the defendant can show "some evidence" [8] of mental disease, and if the medical witnesses say they don't know whether or not the act was a product, the government loses

[5] The effect of such a disclaimer is treated p. 583, infra.
[6] *Carter* v. *United States*, 102 U.S. App. D.C. 227, 236, 252 F. 2d 606, 617 (1956).
[7] 113 U.S. App. D.C. 260, 307 F. 2d 597 (1962).
[8] The phrase comes from *Davis* v. *United States*, 160 U.S. 486 (1895).