

a second-step finding that the crime was the "product" of the disease. Once the jury finds that the effects of the mental disease are present which *McDonald* requires, the issue of "product" relation with the crime will in many cases be virtually decided. If the jury finds the defendant suffering from a mental condition which impairs his control over his behavior, which is the *McDonald* standard, then it is an easy jump to the finding that the mental condition caused the particular behavior involved in the criminal case. The government's burden of proof is substantially redistributed—not reduced, but redistributed.

Under *McDonald* the government has the burden of proof beyond a reasonable doubt to show that the defendant was not suffering from a mental disease which impairs control of behavior, or that the crime was not a product of that disease. Where a defendant did in fact not suffer from *that kind* of mental disease, it will probably be less difficult for the government to carry its burden than it was under *Durham* to prove that the defendant did not suffer from a mental disease of *any kind*. But if the jury finds against the government on that issue—that is, finds that the defendant suffered from a mental disease which impaired his control of behavior—it will be *more difficult* under *McDonald* than it was under *Durham* to prove that the criminal behavior was not caused by the mental disease. If control over behavior in general is found to be impaired by the mental disease, it will be virtually impossible for the government to sort out the particular criminal act and show that it alone of the defendant's total conduct was not the result of that impairment. This is not to say that the *McDonald* standard makes the government's case harder, but only that the case will swing more completely on the issue of mental disease. As prosecutors, we are, on the whole, better off.

In this respect the *McDonald* rule is not dissimilar to the standard of responsibility proposed in section 4.01 of the American Law Institute Model Penal Code and proposed for New York. Under the ALI rule, there is no question of causal connection between mental condition and the particular crime, but only on examination of mental condition and its behavioral consequences. Under *McDonald*, the causal connection between mental condition and the particular act is still involved, but it is the caboose on the train. Its direction is determined by the finding of behavioral consequences of the mental condition.

MEDICAL PRACTICE UNDER "DURHAM" AND M'DONALD'

So much for legal experience under *Durham* and for the legal changes wrought by *McDonald*. It remains to examine the application of the two by the psychiatrists, chiefly those at St. Elizabeths Hospital, where most of the defendants are examined.

After pretrial mental examination under District of Columbia Code, section 24-301, the practice of both St. Elizabeths and District of Columbia General Hospitals has been to report to the court on mental condition and causal connection with the crime. The report identifies a mental disease, if any, and states an opinion one way or the other, or demurs, on the question whether the act was a "product." There is reason to believe that the more experienced doctors are reluctant to make a finding of mental disease without some evidence of its effect on conduct. They tend to look for behavioral consequences, as one element of mental disease, in rather the fashion suggested in *McDonald*. This was medical practice under *Durham* even before *McDonald*. The practice appears to have resulted partly from the native skepticism of doctors and partly from an awareness on their part that the "mental disease" finding was to be used for a criminal responsibility test and therefore should have a built-in relevance to responsibility for behavior and to the defendant's power of choice.

Such an approach to the finding of mental disease is not, in many cases, used by the more junior staff psychiatrists. On the contrary, many of the junior medical staff appear to approach the question from the opposite angle, and seem disposed to infer mental disease from the starting point of criminal conduct. The result of this approach, of course, is to resolve both the mental disease question and the "product" question against a finding of responsibility.

It is more owing, perhaps, to the liberal trend in medical analysis, than to the legal standards of *Durham*, that there has been a steady and rapid increase in