

accused suffering from a defect of reason so that he did not know what he was doing, or if he did know the nature of his act, did he know it to be wrong? The basic trouble with this test is that it focused exclusively upon the defendant's intellectual capacities, and it ignored the emotional component of personality. To put it another way, most insane people know the difference between right and wrong in an intellectual sense; like children, they can give you the right answer, but they do not really feel the answer. They are incapable of controlling their conduct in conformity with their knowledge. The irresistible impulse test was unsatisfactory since it did not cover cases of a mental illness characterized by a long period of deterioration. In short, the two tests were too narrow; they did not cover many cases involving persons who unquestionably suffer from severe mental disorder.

I think it fair to say that the issue of mental illness in connection with criminal behavior was largely a neglected issue in the District before the *Durham* case. Neither the bench nor the bar seemed to be particularly conscious of the problem. For example, in 1953, the year before *Durham*, 2,559 persons were named as defendants in criminal cases filed in the district court; 1,017 defendants were tried but only 3 persons were found not guilty by reason of insanity. I do not think it can be seriously disputed that this abnormal situation was a result, in large part, of the obsolete and unjust standards of criminal responsibility which then prevailed in the District. There was, if you please, a kind of "wasteland" in this area of the law.

The *Durham* decision reflected, I believe, a conviction by a majority of the judges sitting on our court of appeals that mental disorder was a significant factor in criminal behavior in a substantial number of instances, and that the existing rules and procedures were totally inadequate for dealing with the problem. The *Durham* rule was primarily designed, I suggest, to produce a more just and accurate classification of defendants at the trial stage. In other words, it was designed to facilitate more accurate discrimination between those defendants who should be punished and those who should be absolved from responsibility and hospitalized. This objective was to be attained primarily through a test which would make it possible for psychiatrists to give a complete and honest report to the judge and jury of their findings with respect to the accused's mental condition—a situation that simply was not possible under the existing tests. An assumption underlying the *Durham* decision was that if a jury receives comprehensive information concerning the defendant, it will more likely render a just verdict.

As a test of responsibility, the *Durham* rule, it seems to me, has two great virtues: First, it focuses the jury's attention sharply and directly on the problem of the relationship, if any, between mental disorder and the alleged offense. Second, it has the virtue of simplicity; I believe that it is intelligible to jurors.

For me, the least satisfactory part of the rule is the "product" aspect. I think there is considerable force to the argument that this phrase is logically ambiguous. I recognize too that it has presented difficulties for the prosecution in some instances because psychiatrists who find a mental disease are reluctant to say that an act is not a product of the illness. A good deal of the difficulty has arisen, I believe, because the product issue is treated—erroneously in my view—as a psychiatric question. The psychiatrists are asked: "Was the offense, in your opinion, a product of the mental disease?" I believe this is an impermissible question. Whether the crime is a product of mental disease is an ultimate issue to be resolved by the jury on the basis of the totality of the facts presented.

Last year the court of appeals undertook to clarify the meaning of the phrase "mental disease or defect." In the *McDonald* case, the court said that "the jury should be told that a mental disease or defect includes any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls." I may add that I think one of the most important points about the *McDonald* case has been overlooked. The case involved a mentally retarded person with an IQ of 68, and I believe the case stands for the point that mental retardation is a defect within the meaning of the *Durham* test.

The *Durham* rule is consistent with the fundamental ideology of the criminal law. It does not alter the principle that a jury—12 laymen, good and true, chosen at random—determine whether the accused shall be held accountable. *Durham* does not change the principle that a person found to have criminal intent may be punished. Contrary to some things that have been said about it,