

that that is a person we ought to punish. No one really, I think, seriously is arguing that.

The real argument is coming about in more borderline kinds of cases. That is really where the argument is being waged. And the question is whether or not the *Durham* rule is taking up too many of those borderline cases. But these extreme cases, people who may be subject to discipline in a hospital, nobody really seriously argues that they should be held not criminally responsible. Some of those people are even reached under the *McNaughten* rule. Take those people, for example. They could be disciplined in a hospital. But everybody would agree they should be found not guilty by reason of insanity.

The situation in the District in 1954, was that we had the *McNaughten* test and we had what was called the irresistible impulse test. That is the test some of you may have seen in the James Stewart movie, "Anatomy of a Murder." He discovered this test one day in the law books. It is a very limited test. It is limited to cases of a sudden impulsive kind of act, and very inadequate.

Now, to give you some idea, Senators, of what the situation was in the District in 1954, let me say that the truth is there was a kind of wasteland in the law of criminal responsibility in the District. The truth is that the judges and the bar were by and large unaware, unconscious of this problem. And I think that the statistics bear that out to the hilt.

Let me just show you what those statistics are.

The statistics prepared by the U.S. attorney's office show that in 1953, the year before *Durham*, 2,559 persons were named defendants in criminal cases in the District of Columbia, and only 3 persons were found not guilty by reason of insanity.

Now, I do not think there can be the slightest question that that situation was a product of the fact that we just had obsolete, inadequate, unjust rules of criminal responsibility that just did not reach the problem. And that—lawyers pretty much concluded it was futile to attempt to present the defense, and judges were just not paying much attention to the problem.

The *Durham* rule then represented, I think, the recognition of the fact by the judges of the court of appeals that mental disorder in criminal cases was a serious problem.

I think that fact was clear to them from the fact that they were getting the record of all these cases from the district court, from their own observation. And the fact was that the rules we had in the District dealing with criminal responsibility simply were inadequate. The test for responsibility was inadequate, the pretrial procedures were inadequate, the posttrial procedures were inadequate. And the point about the *Durham* rule was that basically it was designed to enable psychiatrists to testify in their own language about the mental condition of the accused. In other words, it made psychiatry legitimate in a criminal case.

Psychiatrists previously were being asked "Does this defendant know the difference between right and wrong," to which their answer was "How should I know—that is not a question I as a psychiatrist can answer, that is an ethical question." Whereas under the *Durham* rule at least the psychiatrists who were allowed to testify on the basis