

*The Basic Difficulty*

The basic difficulty in the Durham rule is that it makes the legal test of criminal insanity the same as the medical test of mental disease. These are constitutionally incompatible. The orderly and equal treatment of accused persons requires that they be subject to a fixed standard applicable to all cases. On the other hand, psychiatry must advance from case to case and by experimentation and adaptation, and change is of the very essence of its progress. Furthermore, the legal test which divides accused persons into those who are to be punished for their acts and those who are to be treated for their illness involves considerations beyond the competence of psychiatry.

A secondary difficulty, but one close to the interests of psychiatrists who have given actual testimony, has been the procedure in eliciting expert testimony. Psychiatrists have been required to answer questions as to whether the accused was capable of distinguishing between right and wrong; as to whether his will had been destroyed by his mental disease so that he could not control his actions; and as to whether the criminal act was the product of his mental disease. These have been objected to as calling for answers which psychiatry cannot supply. The requiring of such answers in cases involving the insanity defense has historical sanction; but there is nothing in the experience or information of our Committee which compels the practice, which is not followed in other criminal trials involving mental and personality questions.

The legal issue whether an accused person is guilty or not guilty of a criminal offense must always be determined on two questions: (1) whether he committed the act (or omitted the required act); and (2) whether at that time he had the requisite criminal intent. In criminal charges involving the so-called specific intent or knowledge, the jury must determine whether the accused formed an intent to kill, or an intent to commit a felony, or an intent to defraud; whether he had an evil purpose and motive; whether he "knew" that property which he received was stolen property; whether he intended to evade and defeat his legal obligations. In this connection the