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## BOOK REVIEWS

**INSANITY DEFENSE.** By Richard Arens. New York: Philosophical Library, 1974. Pp. xxv-328. Cloth, \$12.50

David Granfield\*

Professor Arens' *Insanity Defense* skillfully chronicles the life and death of the *Durham*<sup>1</sup> rule: its birth in 1954, its brief years of ambiguous vigor, its fatal illness after *McDonald*<sup>2</sup> in 1962, and its demise with *Brawner*<sup>3</sup> in 1972. *Durham* established the following test: "An accused is not criminally responsible if his unlawful act was the product of a mental disease or mental defect."<sup>4</sup> This *Durham* rule, moribund more than half of its existence, is for Professor Arens a kind of juridic tragedy reflecting "the frailty of the rule of law against powerful and entrenched interests." (p. 304)

In his splendid introduction, Harold Lasswell characterizes Professor Arens' analysis as prototyping—"selective participation in an ordinary institutional setting." (p.xvi) This was begun in 1959 with a grant from the Norman Foundation to the Washington School of Psychiatry to study the development of the insanity defense in the District of Columbia. Professor Arens was the director. His major concern was whether psychosis alone was a legally sufficient mental illness. Originally limited to research, the project expanded to include litigation. But after Professor Arens' second victory in the Supreme Court, *Kent v. United States*<sup>5</sup> (the first was *Lynch v. Overholzer*<sup>6</sup>), further cases were denied the project. Finally, a formal opinion from the Comptroller General of the United States declared that the use of public

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1. *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954).
2. *McDonald v. United States*, 312 F.2d 847 (D.C. Cir. 1972).
3. *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972).
4. 214 F.2d at 874.
5. 383 U.S. 541 (1966).
6. 369 U.S. 705 (1962).

funds for the study of the insanity defense in litigation was outside the bounds of congressional authority. Although this was a frustrating setback from a practical viewpoint, sufficient data had been gathered for a sound appraisal of the *Durham* rule, for a detailed appreciation of anti-*Durham* forces and for an informed critique for future innovations in criminal law.

The book is well organized. The first three chapters set the stage. Chapter One presents the challenge that was *Durham* and asks "the question of how far a given community is willing to assume meaningful responsibility for the acts of the mentally ill." (p.3) Chapter Two outlines the short but tempestuous life of the project to be detailed in later chapters. Chapter Three generalizes about the increasingly hostile environment "describing the more or less consistent attitudes and practices of judges and psychiatrists who deal with the mentally or emotionally disturbed offender in the District of Columbia." (p.29)

The bulk of the book, the next four chapters, illustrates with factual abundance the emerging trends. Professor Arens discusses four major cases of the many he tried as part of the project, each one a dramatic and revealing commentary on the state of what he labelled "judicial psychiatry and psychiatric justice." The *Lynch* case (Ch. IV) concerns due process and the rights of the mentally ill accused. Here is the paradox of the insanity defense as a prosecutorial weapon. Even a Supreme Court decision failed to safeguard fully the defendant's rights or his life. The *Bradley* case (Ch. V) concerns the difficulty in obtaining impartial psychiatric testimony without which the insanity defense is meaningless. The *Wilson* case (Ch. VI) concerns the rights of the mentally ill who are also poor and is included "in part as an illustration of the adage that regardless of applicable legal doctrine—and the *M'Naghten* rule would no more have affected the outcome than the *Durham* rule—'money talks'." (p. 143) The *Rivers* case (Ch. VII) concerns a subject of greater importance today than it was over ten years ago—the right of the drug addict to plead the insanity defense. His situation, with mandatory minimum sentences and restrictions on parole, may well be much worse than that of the convicted murderer; yet the insanity defense is not easily available to him in most jurisdictions.

The "Epilogue: Back to Methuselah," in effect a final chapter, brings the analysis of the insanity defense in the District of Columbia to full circle. This epilogue is more like an epitaph. Professor Arens calls *Browner*, "a formal death certificate for the *Durham* rule." (p. 289) It is, in fact, a slightly modified "twentieth century formulation of *M'Naghten*, sponsored by the conservative American Law Institute." (p. 292) Moreover, he notes sig-

nificantly that *Browner* has perpetuated the very thing for which it faulted *Durham*—"psychiatric usurpation," for the new doctrine renders "the power of the government psychiatrist explicitly and visibly more powerful than ever before." (p. 296)

"What went wrong?" he asks. In a word, he sees the failure of *Durham* as the result of "maladministration." He blames both a self-serving psychiatric establishment and a reactionary judicial system. The real problem is not the language of the test. He insists that the formula is largely irrelevant, aside from its symbolism, but that *Browner's* greatest harm was in destroying the symbolic value of *Durham*. The crucial factor is how the community and the establishment understand and implement a formula however worded: "The most forward looking doctrine of exculpatory mental illness will founder upon the reefs of inadequate psychiatric facilities, materially and intellectually impoverished hospitals, and the hostility of a significant segment of the public—including much of the psychiatric and judicial professions." (p. 300) Like so many things in today's world, *Durham* apparently died of a bad environment.

Professor Arens writes, one may well have suspected, as an advocate; but his convictions are based on objectivities. Experiencing at first hand the obstacles to a just assessment of criminal responsibility, he has marshalled all his intellectual strength and legal judgment in an appeal, grounded on hard facts, to constitutional principles as well as to principles of common decency and common sense. The adversary system produced *Durham* and traduced *Durham*; as an adversary, Professor Arens, with a balance of passion and prudence, challenges its fate and attempts to vindicate its memory. He brings to its defense a trial lawyer's sense of immediacy, a scholar's quest for universal relevancy and an artist's instinct for nemesis and tragedy.

The *Insanity Defense* focuses its spotlight on the plight of the mentally ill defendant in the District of Columbia. But this light also reveals much about the plight of all such defendants throughout the United States. In his deep commitment to equal justice and the rights of the accused, Professor Arens with moral indignation yet with dispassionate analysis prods the conscience of the community. For him, *Durham* was a forlorn hope and a light that failed, but those who read his book will find a new hope and a clearer light in the humanistic concern for and the perceptive analysis of the fate of that most miserable of the consumers of the law—the insane defendant accused of serious crime.

**PSYCHOTHERAPY, CONFIDENTIALITY AND PRIVILEGED COMMUNICATION.** By Ralph Slovenko with Gene L. Usdin. Springfield, Illinois: Charles C. Thomas, 1966. Pp. 198. Cloth.

**Martha J. Whelley\***

In the prefacing remarks of this monograph—American Lectures in Behavioral Science and the Law—Judge Wright of the U.S. Court of Appeals, Washington, D.C. and Joseph Satten, M.D., Director of Law and Psychiatry, the Meninger Foundation at Topeka, Kansas present lucid views of this text. Of special merit is Judge Wright's contention that there is increasing concern for the rights of privacy as well as the legal recognition of the need for a "definitive treatise on the subject as the law now stands." (p.vii) It is indeed ironic that now, seven years after the publication of this text, substantial illegal actions on the part of government have again brought into focus the importance of citizens' constitutional rights as well as the very real possibility that such rights can be so easily violated. It remains to be seen whether President Ford's recent recommendations regarding the rights of privacy will lead Congress to reiterate both the intrinsic value of such rights to our constitutional form of government and the means to protect these rights in the face of the sophisticated computer and electronic age.

Dr. Joseph Satten adds a psychiatric view of Slovenko's work by pointing out, "The importance of this work lies more in the questions it raises than in the answers it suggests." (p.x) With the suggestion of the potential for exploitation of psychiatric testimony, Dr. Satten raises serious questions as to the adversary system's use of psychiatric testimony. He poses both ethical and legal problems, such as, "whose interests are to prevail and under what circumstances, when the third party (e.g. police, employer, government) wants information from the psychiatrist that the patient does not want to be released?" (p.xi) And further, "[s]hall psychiatrists passively take the position that psychotherapy is simply another form of medical treatment, or shall they move to establish that psychotherapy is different from ordinary medical treatment, at least with regard to the need for confidentiality?" (p.xi) And what of the intrinsic value of the written record relative to

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its importance to teaching and research as well as its value to the ongoing process of patient treatment? Will a narrow view of the legal needs impose irrevocable damage by sabotaging the educational and treatment goals? Satten concludes with a challenge to psychiatry by suggesting that the important issues raised by these authors should serve as an inspiration to psychiatrists to strike the balance and interact actively if the values of both the law and psychiatry are to be served and the rights of the individual saved. (p.xii)

In the introduction, the authors cite both ancient and contemporary prescriptions in defense of the physician's privilege, namely the ethical code of Hippocrates, in which physicians pledge that "whatsoever I shall see or hear in the course of my profession in my intercourse with men, if it be what should not be published abroad, I will never divulge, holding such things to be holy secrets." (p.4) They refer also to the Code of Medical Ethics of the American Medical Association which upholds the right of such professional confidence, stating, "A doctor owes to his patient absolute secrecy on all which has been confided to him or which he knows because of the confidence entrusted to him." (p.5)

The authors point out, however, that society must also be served so that under certain circumstances, namely in the areas of public health and crime control, a doctor's professional duty to his patient gives way to his role as a citizen. Statutes in some states, as well as the AMA, provide that the physician must reveal confidences if required to by law, and/or when disclosure is in the interest of public policy. So, with these introductory remarks, the authors explicate the broad parameters of confidentiality and privileged communication, discuss the implication of legal testimonial privilege, cite some criticisms of the medical privilege, and state the prevailing restrictions on such privileges.

Proceeding to the heart of their thesis, there is an excellent discussion of the complexities and the possibly disabling legal implications of the confidential communication privilege. The text cites the four criteria specified by the late Dean John Wigmore of the Northwestern University School of Law:

- (1) Does the communication in the usual circumstances of the given professional relation originate in a confidence that it will not be disclosed?
- (2) Is the inviolability of that confidence essential to the achievement of the purpose of the relationships?
- (3) Is the relation one that should be fostered?
- and (4) Is the expected injury to the relation, through the fear of later disclosure, greater than the expected benefit to justice in obtaining the testimony?" (p. 10)

The authors suggest that "these postulates are concerned with the general rather than the particular." (p.11) They point out that a wide variety of

professions and/or occupations seek and are sometimes granted "a privilege of non-disclosure, including the well-known communication between client and attorney, husband and wife, penitent and priest, patient and physician, and others who have sought privilege in a professional relationship such as journalists." (p.9)

The principle thesis involves psychotherapy and confidentiality of privilege, stemming for the most part from the medical privilege enacted in many states prior to the twentieth century. However, "[t]he development of life and accident insurance, workmen's compensation, and liability of common carriers, rapidly expanded the role of the medical privilege," so that "the confidentiality protected by the medical privilege is not substantial. Numerous exceptions have been made by the courts, to the extent that little remains of the statute." (p.17)

After considering the wide variety of state statutes, from the early, broad coverage to present day versions which may be of limited application and/or subject to arbitrary interpretation, these authors also suggest that a physician, if not covered by his own state privilege statute, can be protected by the attorney privilege.

Referring again to Wigmore's criteria, these writers focus on the contention of Wigmore and others that "little can be said of the view that the physician-patient relationship satisfies [all of] these conditions." (p.20) The authors support these contentions with the following observations: "First of all, it is said, a communication of a patient to a physician rarely originates in a confidence that it will not be disclosed." (p.20) It might, for example, refer to diseases that carry no shame and/or are often publically known. Further, there is often little actual verbal discussion and/or conversation between the physician and patient which can be legitimately protected. Finally, many emotional problems are shared with a wide range of professionals for which there is no established privilege. "Second, confidence is not considered essential for the achievement of the purpose of the relationship." (p.21) It appears that lack of statutory protection does not dissuade people from seeking medical help. Ultimately, "in weighing 'evidence versus privilege', or better put, in balancing the unbalanceables, it is considered that the injury to the physician-patient relationship by disclosure is not greater than the social benefit gained by the disposal of litigation based on all of the evidence." (p.22)

As a result of these criticisms of the medical privilege statutes, state legislatures have sought to place specific restrictions upon their application. Such testimony has lost some of the deference accorded it in the past, and a con-

dition prevails which can best be characterized as circumvention of this privilege. In the words of the text:

The medical privilege is claimed most often in three areas: contested will cases where the testamentary capacity of the patient is under inquiry; actions for bodily injuries where the plaintiff's prior physical condition is at issue; and actions on life and accident insurance policies where representations of the insured as to state of personal health are at issue. In these three situations, in one way or another, the privilege may be effectively circumvented. (p. 28)

At the center of the dissertation lies the contention that medical privilege restrictions previously noted do not necessarily apply to psychotherapy as they might apply to a physician treating physical or organic disorders. However, because "these statutes have been subject to . . . much criticism and qualification" and because "the court is not in a position to interpret the same statute broadly when a patient in psychotherapy is involved in a case, yet construe the same statute narrowly when a patient of a surgeon is concerned," (p.38) the authors suggest that there is a need for a special statute, in both states which do and states which do not have medical privilege statutes, which would apply to the psychiatric-patient relationship. A simple summary could not adequately represent the comprehensiveness of the supporting arguments. Instead, the defense of the Group for the Advancement of Psychiatry in its 1960 report on privileged communication is cited. The authors also maintain that Wigmore's criteria are met in every detail.

[T]he special character of psychiatric treatment . . . requires confidentiality as a *sine qua non* for successful therapy . . . [T]he confidential relationship needs to be safeguarded . . . [A] psychiatrist best fulfills his professional responsibility to the community by maintaining primary emphasis on problems of treatment . . . Privilege has been challenged on the ground that it substantially obstructs justice by withholding evidence. It is our belief that the social value which effective psychiatric treatment has for the community far outweighs the potential loss of evidence resulting from the withholding of testimony by a psychiatrist about his patient. The absence of privilege, among other results, may obstruct the need to have unencumbered access to psychiatric treatment resources. (p. 50)

Having established a principled foundation, the writers go on to test their hypothesis regarding the merits of confidentiality as applied to psychotherapy. They cite situations in which the psychotherapist tends to abrogate the privilege either by negligent or irresponsible actions, such as discussions of patients at social affairs, in corridors or similar public places. At the same time there are legitimate and necessary ends which necessarily take priority over the maintenance of confidentiality. Such instances are related to the helping

process during treatment, in which other professionals of similar ethical persuasion can and sometimes must be privy to confidential information. For example, in child therapy, which, incidentally, is particularly applicable to this reviewer's clinical practice, much information is shared with parents, and with their permission, educational and other professionals who deal with the juvenile patients. When there is known parental incompetence, as in child abuse cases, a number of states have enacted strict legislation which not only protects the professional informant, but actually encourages such reporting. These laws, however, are primarily concerned with physical abuse. "Mental" abuse, often more profound in view of its long-term effect, is not as yet covered by state statutes, presumably because of the many intangibles which sometimes defy definition as well as the difficulty of establishing a valid cause and effect relationship.

In an endeavor to clarify many questions that arise from the GAP efforts to foster a view of psychiatrist-patient relationship which reflects the attorney-client relationship, the authors cite both the Connecticut statute and the analysis of Professors Goldstein and Katz of Yale Law School. The Connecticut statute provided a fairly specific documentation and definition of the psychiatric-patient privilege, and the analysis of Goldstein and Katz specifies further the conditions of application and exception. The authors suggest that this statute "promises to have influence in other jurisdictions." Other states vary considerably in the specificity of their statutes; there is apparently an on-going process in some states to grant independent privilege to psychologists, but as of this writing social workers and marriage counselors, for example, had not been granted a privilege. (p. 101)

Space does not permit exhaustive discussion or review of the number of problem and contributing factors which effect the application of unique state statutes and respect for the general philosophy of the privilege communication principle. The authors, however, make countless specific references to such problems as divorce, alienation of affection, custody of children, birth control, personal injury cases, probate cases, life and accident insurance policies, social security disability claims, personnel screening, hospital and health records, office and clinic records, group therapy, military cases, public security, communications to facilitate crime or fraud, lunacy commissions, presentence reports, therapy in correctional institutions, and execution of sentence and the death penalty.

Coming full circle with their comprehensive treatment of the book's thesis, the authors cite the historical as well as the contemporary view that "the essence of any privilege . . . is that it may be waived by the person who enjoys it." (p.152). They conclude by stating, "The word 'privilege'

ordinarily connotes an immoral state of affairs—inequality and unfairness, a person who has access to special comforts without deserving them. But 'privilege' to maintain confidentiality in the law of evidence has different roots. It stems from our aversion of forcing a person to testify against himself." (p.167) And, "without the legal sanctity of a privilege, treatment may be effectively fettered by the fear of the patient that what is said in therapy may be compelled on subpoena in the courtroom. Weighting the conflicting values, the benefit of preserving the confidence seemingly inviolate outbalances the possible benefit of permitting litigation to prosper, significant as is that consideration." (p.169). Finally, "the problem in the law is where to draw the line separating the privileged from the unprivileged. Wigmore's four conditions warranting a privilege are satisfied in the practice of psychotherapy." (p.169).

The authors conclude, in harmony with their introductory statements, that "the prescription of the venerable Greek physician, Hippocrates, in his oath of ethics, remains the physician's best guide even for the space age." (p.198)

This reviewer recommends this sensitive and highly informative monograph to all in the helping professions who seek the rationale for the principles of confidentiality and privilege, and as an important source book in an age when privacy is often challenged. The person seeking help is indeed a privileged person, in every sense of the word. Guttmacher and Weihofen convey these sentiments with eloquence:

The psychiatric patient confides more utterly than anyone else in the world. He exposes to the therapist not only what his words directly express; he lays bare his entire self, his dreams, his fantasies, his sins and his shame. Most patients who undergo psychotherapy know that this is what will be expected of them and that they cannot get help except on that condition . . . It would be too much to expect them to do so if they knew that all they say—and all that the psychiatrist learns from what they say—may be revealed to the world from a witness stand.<sup>1</sup>

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1. L. GUTTMACHER & H. WEIHOFFEN, *PSYCHIATRY AND THE LAW* (1952), quoted in D. LOUISELL, *THE PSYCHOLOGIST IN TODAY'S WORLD: PART II* 745 (1957).