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Book Review

Oscar Altshuler*

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“An accused is not criminally responsible if his unlawful act was the product of mental disease or defect.”¹ With this pronouncement in 1954, the United States Court of Appeals for the District of Columbia significantly broadened the test of criminal responsibility in the District of Columbia which at that time was governed by the right-wrong test² and the irresistible-impulse test.³ Psychiatrists generally were jubilant. At last they were to be recognized in the field of criminal law. To others, this simply stated test appeared at first glance humane, reasonable, and understandable. Few could argue with the principle that it would be unconscionable to punish where there is no blame.

But the simplicity was all on the surface. What was meant by “mental disease or defect?” These were not scientific terms about which there was any substantial agreement among psychiatrists. When was a criminal act the “product” of a diseased mind? The expert had the burden of explaining but a lay jury would have the final word. As difficulties in applying the new test increased, dissatisfaction also grew among lawyers, judges and even among psychiatrists. Congress, fearing that *Durham* would result in dangerous criminals being freed, quickly passed an amendment to the D.C. Code providing for mandatory commitment to a mental hospital of anyone found not guilty by reason of insanity.⁴

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1. *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954).

2. *M'Naghten Case*, 8 Eng. Rep. 718 (1843); *United States v. Guiteau*, 12 D.C. 498, 550, 1 Mackey 498, 550 (1882).

3. *Smith v. United States*, 36 F.2d 548 (D.C. Cir. 1929).

4. D.C. CODE ANN. § 24-301(a), as amended, Aug. 9, 1955. This intent of Congress was slowly eroded until finally, in early 1968, the appellate court ruled that, following a verdict of not guilty by reason of insanity, a defendant before he could be committed to a mental hospital, was entitled to a judicial determination as to whether he was then, at the time of verdict, mentally ill (according to civil commitment standards) and likely to injure himself or others because of such mental illness. *Bolton v. Harris*, 395 F.2d 642 (D.C. Cir. 1968).

In 1959, through a grant to the Washington School of Psychiatry, Richard Arens, an attorney in the District of Columbia, was named director of a project to study the operation of the insanity defense in the District of Columbia. Pursuant thereto, various persons, including private and public psychiatrists and defense attorneys, were interviewed. But the major source of data was to come from trial of selected criminal cases by members of the project staff under the direction of Mr. Arens. This would permit the gathering firsthand of pertinent facts from the initial steps of prosecution through final appeal. Funds were even available for the hiring of private psychiatrists for use by the defense. In all, more than twenty cases were tried under the study. Unfortunately for the project, opposition to it grew to such proportions that the project died, apparently some time in 1963.

Mr. Arens, now Professor of Law at the State University of New York at Albany, School of Criminal Justice, and Visiting Professor of Law at McGill University, entitles the public report of his study, *Make Mad the Guilty*. There is little flagging of interest as we share Professor Arens's experiences selected from cases which he personally tried. His style is fluent and dramatic. He calls his project "a study in horror,"⁵ for it is obvious to him that *Durham* failed in its purpose and "the District of Columbia is now significantly behind jurisdictions upholding more or less enlightened versions of the M'Naghten rules."⁶ And who is to blame for this failure? Defense attorneys, prosecutors, trial judges, appellate judges, the Supreme Court, psychiatrists generally, the Washington Psychiatric Association, and the American Psychiatric Association. No one is spared. And all opposition to *Durham* is dismissed with the sweeping conclusion that "the underlying problem is essentially one of resistance to change."⁷

This is an oversimplification. I frequently found myself bristling in defense of many accused by the author throughout the book and I feel it is only fair that I take this opportunity to speak up to some extent in their behalf.

Perhaps the greatest reason for opposition to *Durham* is the belief on the part of many—lawyers, judges, doctors, jurors—that again the innocent victim ends up as the forgotten man. In the foreword to *Make Mad the Guilty*, mention is made of a certificate of commendation awarded by the American Psychiatric Association to Judge Bazelon for his writing of *Durham* and other opinions. The commendation noted that "he has removed massive barriers between the psychiatric and legal professions and opened path-

5. R. ARENS, *MAKE MAD THE GUILTY* 257 (1969).

6. *Id.* at 251.

7. *Id.* at 258.

ways wherein together they may search for better ways of reconciling human values with social safety.”⁸ Professor Arens’ study left him both disillusioned and bitter, but perhaps much of his difficulty lies in the fact that he became so absorbed with human values that he ignored the need for achieving some balance with social safety. Others did not so forget and this was essentially the basis for their opposition to the new test.

Some saw *Durham* as a widening of the door through which criminal responsibility could be avoided, with no real way to prevent abuses. Some were skeptical of the ability of psychiatry as a science to competently play the role it was so eager to assume. Psychiatry in its infancy knew little of the treatment of mental illness, especially in the field of the personality disorder.

The author is extremely harsh in his criticism of the professional staff of St. Elizabeths Hospital, indicating that they were generally biased and prejudiced against defendants who raised the defense of insanity. In this respect it is worth noting a comment by Judge (now Chief Justice) Burger in *Proctor v. Harris*:

But the fact remains that psychiatrists are physicians, not advocates; nevertheless, when they express views which are not in accord with those harbored by the confined patient or his counsel, there is a partisan tendency to regard such an expert as an adversary. It is absurd to suggest that Government psychiatrists are ‘uncooperative’ in this context; we can readily take judicial notice that over a dozen of years or more the medical views of these Government psychiatrists, as a whole, generally turned out to be more favorable to defendants than to prosecutors in verdicts of not guilty by reason of insanity. In observing this we do so to acknowledge, and not in any sense to challenge, their independent stance as professional people.⁹

What part has defense counsel been playing? Some confess to raising the insanity defense merely to avoid possible criticism from the appellate court. Many attorneys feel that our adversary system requires that they be concerned only with attempting to secure a defendant’s freedom, without regard to his need for treatment. This policy often continues over into the treatment area where commitment to St. Elizabeths Hospital may, for lack of funds, facilities and personnel, offer more custody than treatment. Defense counsel then demands the defendant’s release for failure of the hospital to provide adequate and appropriate treatment and the defendant may be back on the street shortly after having been found not guilty by reason of insanity.

Can mandatory commitment be justified without treatment? This issue

8. *Id.* at 7.

9. 413 F.2d 383 (D.C. Cir. 1969).

was decided first in *Rouse v. Cameron*,¹⁰ where it was held that a patient in St. Elizabeths Hospital could question by habeas corpus whether he was receiving adequate and appropriate treatment. Then followed *Covington v. Harris*,¹¹ which permitted habeas corpus to be used to require the hospital to justify not only the need for continued detention in the hospital but in a particular part of the hospital. And the most recent of such cases, *Williams v. Robinson*,¹² permitted the use of habeas corpus to question the legality of a patient's transfer from a medium security division to the maximum security division of St. Elizabeths Hospital.

Besides a concern for the protection of society, there is for most judges the everyday problem of trying to communicate to a lay jury the legal meaning of the *Durham* rule as a guide to the jury's deliberations. A look at the sample instructions assembled by the author (Appendix II) is sufficient to bring home the extent of this problem.

These are but a few matters of concern to judges, lawyers and psychiatrists which color their attitudes towards the *Durham* rule. Professor Arens, like many others, is completely involved in his compassion for the criminally sick, somehow feeling that the victim of crime, presumably mentally well, can take care of himself. To many equally compassionate persons, the coin of justice has two sides.

To those who are interested in reading Professor Arens' book, I would recommend another study, *Criminal Responsibility And Mental Disease*, by Dr. C.R. Jeffery.¹³ The work is of especial interest since Dr. Jeffery, a sociologist, joined the research project headed by Professor Arens in 1962 as senior social scientist and co-investigator. We thus have the unusual opportunity of viewing the study through the eyes of both an attorney and a sociologist. Taken together the books are helpful in understanding the many practical and philosophical difficulties which underlie attempts to change the law of criminal responsibility.

10. 373 F.2d 451 (D.C. Cir. 1966).

11. 419 F.2d 617 (D.C. Cir. 1969).

12. Civil No. 23,763 (D.C. Cir., decided June 19, 1970).

13. Springfield, Illinois: Charles C. Thomas, 1967.