

PSYCHOAUTHORITARIANISM AND THE LAW*

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THAT THE LEGAL PROFESSION IS READY for far-reaching progress and reforms with regard to forensic psychiatry has been again demonstrated by the recent decision in *Durham v. United States*.

This opinion is a most revealing document. To the extent that it relies on and quotes current psychiatric authorities, it is on shaky ground.¹ The publications cited contain serious errors, and discuss the question of legal insanity in the abstract without any substantial proof for their assertions.² Judge Bazelon's final conclusion is unfortunately based on the psychiatric vagaries found in some of these publications. He substitutes a new test for the *M'Naghten* rule. In essence it requires that the plea of legal insanity must be based on a demonstration that the crime was the product of mental disease. If he had had better psychiatric advice, Judge Bazelon would have known that this is precisely how the *M'Naghten* rule has been interpreted in practice by experienced psychiatrists. In civil courts, before lunacy commissions, and in courts-martial of the Army and Navy, I have testified that if this particular mental disease had not existed there would have been no crime. Using this interpretation of the rule, for example, I testified

* This comment was to have been included in a book review by Dr. Wertham appearing in this issue at p. 569. In view of its relevance to the Durham case, however, it has been included in the symposium.

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¹ I have critically examined and analyzed this type of literature in a number of publications: Review of Zilboorg, *Mind, Medicine and Man*, 108 *New Republic* 707 (May 24, 1943); Review of Overholser and Richmond, *Handbook of Psychiatry*, N.Y. Times Book Review (Jan. 4, 1948); Review of Guttmacher and Weihofen, *Psychiatry and the Law*, 3 *Buffalo L. Rev.* 41 (1953); Review of Branham and Kutash, *Encyc. of Criminology*, 12 *Psychosomatic Medicine* 267 (1950); Review of Cohen, *Murder, Madness and the Law*, 48 *Nw. U. L. Rev.* 810; Review of East, *Society and the Criminal*, 27 *N. Y. U. L. Rev.* 183 (1952); *The Road to Rapallo (The Ezra Pound Case)*, a *Psychiatric Study*, 3 *Am. J. of Psychotherapy* 584; *Why Do They Commit Murder?*, N.Y. Times Mag. p. 8 (Aug. 8, 1954).

² The Report of the Committee on Psychiatry and Law of the Group for the Advancement of Psychiatry (May 1954) contains this classical definition (p. 6): "Mental illness is a behavioral expression of ego impairment"! Is such doubletalk supposed to help a jury?

for a seventeen-year-old youth who had killed his mother; over the objection of the psychiatrist for the prosecution, he was forthwith committed to an institution for the criminally insane.³

If a crime is really the product, the result, the symptom of a psychosis, it is inevitable that the person who committed it cannot sufficiently distinguish between right and wrong and/or sufficiently know the nature and quality of his act. This fact is known to any psychiatrist who understands that the *M'Naghten* rule refers to the "true capacity of the individual," to use Judge Cardozo's words.⁴ Whether Judge Bazelon's new definition will improve the present unfortunate state of forensic psychiatry is doubtful. As a legal test this new definition is insufficient: it gives undemocratic leeway to the partisan and/or bureaucratic expert, and, on account of its wording, lends itself to grave abuse. It does not guide the jury as to the degree of mental disease, a term which includes psychosis and neurosis. Two cases will indicate the importance of this point. A mature, well-educated man had sexual relations with a child. He was sentenced to death, but on account of his standing in the community this sentence was commuted to life imprisonment. Released after a few years, he committed the same offense again. He was then sent for observation to a psychiatric hospital, where I had occasion to study him. There was no question that his criminal acts were "the product of mental disease." He had an infantilistic fixation on children as sex objects. Yet the law of legal insanity is not intended to exculpate such a man who does not suffer from a psychosis, i.e., a major mental disease, and who is not commitable. Another example is the case of a physician who received a jail sentence for practicing criminal abortions. Released from jail, he started the same activities again. Analysis of his case showed that he had a long-standing neurotic drive to prove his mastery over the female sex in its procreative function. There was no doubt that his activities were the product of a mental disease. But again, in my opinion, it was not of such a degree as to fit within any usable test of legal insanity. Just as there is the danger, therefore, that cases which should not be included under Judge Bazelon's definition might be included, there is also the risk that deserving cases of severe psychosis might be excluded. A psychiatrist might argue that even a man suffering from definite delusions of persecution had shown "aggression" before, and a murder

³ Wertham, *Dark Legend* (1941).

⁴ *The Psychiatry of Criminal Guilt*, in Cahn, *Social Meaning of Legal Concepts* (1950).

committed by him is therefore not entirely the product of his mental disease. In the *Durham* case itself, the psychiatric expert testified that he was unable to form an opinion as to what influence "the abnormal thinking and the abnormal experiences—delusions of persecution" had on Durham's "anti-social behavior." If a psychiatrist cannot give a simple *yes* or *no* answer to such a simple and crucial question, a new definition will not help him. Judge Bazelon's legal openmindedness shows that lawyers are eager to receive concrete psychiatric information. If we have nothing to offer but psychological speculations and highhanded pronouncements, no progress is possible. Only if we overcome this psychoauthoritarianism will psychiatry find its proper place in the courtroom and play, as it should, a strong but subordinate role.