THE PSYCHOLOGICAL REALISM OF THURMAN ARNOLD

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ONE IS INCLINED ON FIRST ENCOUNTER with the "unprecedented" holding in *Durham v. United States* to see in it only a rare but salutary judicial capitulation to the onslaughts of modern "dynamic psychiatry." Here we have the glorious spectacle of an influential federal court emerging unanimously from the outer darkness of medieval legalism into the sunlight of scientific truth. The court of appeals plants itself self-consciously and firmly in the vanguard of enlightened psychological thought; none but the hide-bound reactionary (to whose musty theological thinking the insights of the behavior scientists is impervious) can gainsay that progress has been made. To the scholar who has followed the century-old medico-legal battle over the nature or existence of legal tests for insanity, the issue has seemed comparatively clean-cut, between ignorance, inertia, or apathy on the one side and knowledge and humanism on the other. The disillusioned observer of our legal system can now take new hope that the courts of their own initiative can purge themselves of hoary and ill-working error.

But like most problems of such really immense complexity, it could scarcely be possible that the alternatives presented are limited to such absolute blacks and whites. The differences in perspective represented in the dispute must be describable not merely in terms of receptiveness or opacity to modern psychology (and the degrees of enlightenment in between), but also in terms of significant differences in total orientation of the thinker or critic, who, we may assume, can understand and accept as valid the body of theory and knowledge known as "dynamic psychiatry" and still, by dint of his appreciation of other more fundamental values that are at stake, rationally oppose the crusading psychiatrist in his head-long foray against the dogmas of "legal insanity." The fascinating aspect of the recent pronouncement in *Durham* is that it was made by a court which for a brief interval in the recent past had as a member a social philosopher of

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just this distinctive turn of mind. The reference, of course, is to the influential and articulate Thurman W. Arnold who sat as an associate judge for two terms, departing in July of 1945 for private practice. Whether Judge Arnold imparted to his fellow jurists his views on the true function of the criminal jury trial and his doubts as to the utility of changing the mythology and ritual that surround it cannot be verified. Nevertheless he wrote two revealing opinions, *Holloway v. United States*¹ and *Fisher v. United States*,² which in their implications and tendencies seem to militate against the wisdom of the reform effected in *Durham*. Judge Bazelon does not cite *Fisher* for the good technical reason that it is easily distinguishable on both its law and facts; he cites *Holloway* in three places: once to support the present innovation, and twice to demonstrate the continuity of legal tradition. In this handling of precedent I have no quarrel, nor do I think the present court of appeals was remiss in not taking up and disposing of the Arnold position as it may be found in the interstices, nuances, and overtones of his judicial work. Though Arnold's reasons for supporting the legal status quo are deserving of searching evaluation, such a critical essay would doubtless be inappropriate in a formal court opinion.

So my point in discussing the ideas and attitudes of Thurman Arnold and contrasting them with the reasoning and result of the current court of appeals in the *Durham* case is not to disclose any technical legal arguments which may have been slighted or insufficiently answered. It is rather to present and elaborate an interesting and, I fear, neglected "school of thought" concerning the existence and character of certain factors which limit the rate and degree of change possible within the institutions of the criminal law. Though I can pretend no personal attachment to all of Arnold's formulations, it is impossible not to recognize that they exert a powerful hold on a particular cast of mind which, if anything, seems to be growing in prevalence under the vague banner of "neo-conservatism." It is possible, of course, that the author of these ideas and insights may no longer entertain them,³ and that his writings which embodied them were but the product of youthful iconoclasm and the fashionable disillusionment of the '30's. Their substance, however, cannot be dismissed as literary hyperbole.

¹ 148 F. 2d 665 (App. D.C., 1945).

² 149 F. 2d 28 (App. D.C., 1945).

³ E.g., Arnold, *Mob Justice and Television*, 187 *Atl. Monthly* 68 (June 1951).

Mr. Arnold's attitude toward our business civilization is strikingly similar to that of the detached cultural anthropologist while watching with lively curiosity a ceremonial dance among the Zuni Indians.⁴ His work may be described as a dispassionate study "of the folkways of the people [in order] to determine what kind of formulae most appeal to them."⁵ His "science of government" is vitally concerned with what he called "the technique of public acceptance."⁶ In contradistinction to the other legal realists of his time,⁷ Arnold did not believe that greater knowledge of social and psychological reality by the mass of the governed would necessarily lead to a better world.⁸ On the contrary, social stability depends on the preservation of man's ignorance and false view of himself—his capacity to ignore the unconscious and unacknowledged parts of his personality, which play an unrecognized role in his actions.⁹

His basic ideas might be expressed thus: Our behavior as social and political animals is actually determined largely by irrational impulses which, though they enable us to satisfy physiological needs, do not satisfy our compelling desire to make a rational and moral order out of a chaotic world. Our self-esteem prevents us from accepting the truth that our psychological endowment precludes free and deliberate choice between good and evil. Hence we build elaborate structures of rationalization that we call legal and economic thinking. These structures are our ideals, our "folklore." Of course, the "creeds" of our various institutions are not considered by their members as mythology, but, on the contrary, as "sound thinking," as truth, as natural law, as a body of inevitable principles. Because there is no correspondence between the ideal constructions we project and the actual practices that go on in the world, we create legal rituals and popular symbols

⁴ "The Supreme Court of the United States has for years offered a more fascinating study in primitive ritualism than anything that the Malaysian tribes had to offer." Arnold, *The Folklore of Capitalism* 348 (1937).

⁵ Arnold, *Apologia for Jurisprudence*, 44 *Yale L. J.* 729, 731 (1935).

⁶ Arnold, *Law Enforcement—An Attempt at Social Dissection*, 42 *Yale L. J.* 1, 24 (1932).

⁷ E.g., Frank, *Courts on Trial* c. XXXII (1949).

⁸ Cf. Brinton, *The Shaping of the Modern Mind* 224-25 (1950).

⁹ See Arnold, *The Symbols of Government* 250 (1935). Cf. Mead, *Male and Female* 449 (1949); Mead, *An Anthropologist Looks at the Report*, in *Problems of Sexual Behavior* (Symposium on First Kinsey Report) 58-69 (1948). Cf. further, Lerner, *The Shadow World of Thurman Arnold*, 47 *Yale L. J.* 687, 689 (1938): "Arnold implies—although it would be better if he said it clearly—that most of us dare not face the Medusa-head of social reality: it would turn us to stone."

which keep us unconscious of the discrepancy between illusion and reality, and facilitate a rough adjustment to an imperfect world.¹⁰ And while these "little pictures" of the world, in the form of ideas and ideals—neat, tidy, trim, but simply not true—which we interpose between ourselves and the real world often hinder the solution of practical human problems (like feeding the unemployed during a depression), we need them for our morale and consolation, and our institutions would lose vitality without them. Any event which disturbs the people's belief in a "logical heaven where Reason is enthroned"¹¹ must be attributed by them to some "devil" such as "politics" or "human nature." The union of law and the social sciences is impossible because it would tend to undermine popular faith in legal order and certainty. The "Law" cannot be made scientific but to remain effective must only keep abreast of popular attitudes.¹² Thus, "[f]rom any objective point of view the escape of the law from reality constitutes not its weakness but its greatest strength. . . . If judicial institutions become too 'sincere,' too self-analytical, they suffer the fate of ineffectiveness which is the lot of all self-analytical people. . . . They lack that sincere fanaticism out of which great governmental forces are welded."¹³

Such ideas pervade Arnold's view of the function of criminal courts and the "creed" of law enforcement. Trials, both criminal and civil, are purely ceremonial in function and are hardly a sensible manner of settling disputes. The true function of courts is not fact-finding but the dramatization of the ideals behind government. "[T]he public judicial trial . . . symbolizes . . . the heaven of justice which lies behind the insecurity, cruelty, and irrationality of an everyday world."¹⁴ The ideals dramatized in the criminal trial are the dignity of the state as an enforcer of the law simultaneously with showing the dignity of an individual who is an avowed opponent of the state. The criminal trial with its elaborate safeguards for the accused against governmental abuse "is a consequence of security." "So important is

¹⁰ "Every human institution is the embodiment of all sorts of contradictory ideals going in different directions" and exists not only to accomplish certain practical tasks but to satisfy our "emotional needs" which would not be satisfied without its pretense to "science and rationality." Arnold, *Trial by Combat and the New Deal*, 47 *Harv. L. Rev.* 913, 919 (1934).

¹¹ Arnold, *op. cit.* *supra* note 5, at 730.

¹² Arnold, *op. cit.* *supra* note 9, at 100.

¹³ *Ibid.*, at 44.

¹⁴ *Ibid.*, at 129.

the criminal trial to the whole ideological structure of government that its disappearance in favor of an efficient and speedy way of accomplishing the incarceration of persons supposed to be dangerous to the social order, is always a sign of psychological instability of a people."¹⁵ The jury exists in order to absorb the criticism of the numerous unsatisfactory results reached in the trial of cases; it deflects it from the law to the judicial system itself. The law remains blameless and perfect.¹⁶ The ideal of a justice which cannot ignore personal and human factors is reconciled with the creed of unflinching law enforcement by permitting mitigating circumstances to "creep into the evidence in devious and highly diverting ways" such as through scientific and impartial testimony on *mens rea*: "The problem disguises itself as a problem of the treatment of insane persons."¹⁷ But the practical function of the issue of criminal insanity is to permit the jury to consider the mitigating circumstances in connection with a sane offender. The "conflicting psychiatrists will disappear from our criminal trial" not by means of a re-definition of criminal responsibility, but by solving the conflict of the ideal of law enforcement with the ideal of mitigating circumstances "in some other way."¹⁸ A legal definition of insanity is, insofar as it affects a trial, "a ritual by which juries are put in the proper frame of mind to decide a particular case" and "a method of Appellate Court control of juries and trial courts." The legal formula in the instruction "should be tested only by its effectiveness in fitting in with the preconceived ideas of jurors—not as an absolute standard to be enforced."¹⁹ The search by both professions for a new psychiatric definition of insanity betrays a misapprehension as to the chief function of the criminal court, and incidentally indicates that the "ideal of law enforcement" is not disappearing with the infiltration of (behavior) scientists into the criminal law field.²⁰ But the psychiatrists, to the extent that they do not conform to the "creed," may yet destroy the vitalizing ideals of our legal institutions, for "[t]hey bring with them an absolutely contrary assumption—that the problem of crime does not concern law enforcement but instead the maladjusted individual."²¹ The criminal court is a great stabilizing agency which

¹⁵ Ibid., at 130.

¹⁶ Ibid., at 144.

¹⁷ Arnold, op. cit. supra note 6, at 20.

¹⁸ Ibid.

¹⁹ Ibid., at 23.

²⁰ Ibid.

²¹ Ibid., at 22.

still appeals enormously to the public, and without the drama of its trials, "it is difficult to imagine on just what institution we would hang our conflicting ideals of public morality. It is hard to imagine government except in the light of a protector of decency and morals through a series of parables which are a guide to the honest and a terror to the outlaw."²²

The influence of such ideas may be seen in the decisions Judge Arnold handed down during his stay on the court.²³ In *Holloway v. United States*,²⁴ the sole contention on appeal from a conviction of rape was that the verdict was against the weight of the evidence on the question of sanity. There was no claim that the traditional tests for insanity were unreasonable or unrealistic. In affirming the conviction despite overwhelming evidence of the psychic pathology of the accused,²⁵ Judge Arnold felt compelled to deliver an apologia for a legal system which countenanced such unfortunate results.

In the first place, said Arnold, the issue of criminal responsibility is not an issue of fact in the same sense as the question of whether the defendant committed the act charged. If this issue were not so distinctive, but only an ordinary factual one, the judgment would have to be reversed. Now, why is it that the jury is to be given this unreviewable authority on so crucial an issue? It is because, said Arnold, there can be no empirical method of verifying the accuracy or even the "reasonableness" of their determination of it. For the basic premises upon which the jury operates are false in the light of the modern science of psychology. But erroneous as these legally supported assumptions may be, they are defensible as an institutional matter if they comport with the "instinctive sense of justice of the ordinary man." The ordinary juror, when he considers the mechanism

²² Arnold, *op. cit.* supra note 9, at 148.

²³ In his decisions Arnold nevertheless displayed a considerable grasp of and sensitivity to psychiatric subtleties, and a desire to make their force felt in the law. Thus, in *Overholser v. DeMarcos*, 149 F. 2d 23 (App. D.C., 1945), Arnold reiterated a suggestion that the lower courts, on habeas corpus by an indigent from a mental hospital, might be aided by ordering mental examinations by specialists from a neutral commission of experts.

²⁴ 148 F. 2d 665 (App. D.C., 1945).

²⁵ Defendant had been classified as an "abnormal psychopathic personality" during his earlier commitments to mental hospitals. A few months after his last release from Gallinger Hospital to his mother he raped two women on the same day. Two neutral psychiatrists testified that Holloway was of unsound mind, and at the time of the offense could not tell right from wrong. This evidence was contradicted by a third psychiatrist, who, however, was unaware of defendant's previous mental record.

of human behavior, sees a "little picture" of a "separate little man in the top of one's head called reason whose function it is to guide another unruly little man called instinct, emotion, or impulse in the way he should go." This separate faculty of reason, if unimpaired by mental disease, can distinguish between right and wrong action and can direct the behavior of the whole organism in accordance with such choice; hence, if a man can reason he is morally responsible for his acts and should be punished for engaging in wrongful behavior. A man who can talk rationally is usually "sane" and thus morally responsible for his conscious deeds. These common beliefs about human conduct are of course, said Judge Arnold, utterly irreconcilable with psychiatric findings and insights, but this is no objection to their being embodied in legal theory because the function of the jury which is to follow this theory is moral judgment, not diagnosis or therapeutics. On this view, a lay jury as well as lay witnesses are far more competent to determine "responsibility" than the experts.²⁶ Nay, more than that, logically, the experts are incapable of reaching a moral judgment which is responsive to the question the jury must answer; for they are strangers to the "folklore" of human behavior. If one does not believe in the existence of witches, he can hardly be of much utility as a witch-hunter. Lastly, Judge Arnold asserts that an adoption of the point of view of the psychiatrists would offend traditional ideas of morality with a consequent loss in popular respect for the criminal law.

*Fisher v. United States*²⁷ gives further evidence of Judge Arnold's inverted use of psychological knowledge—not to modernize an archaic legal process but to embrace all the traditional rigidities and artificialities of the criminal law. Fisher was an impulsive and aggressive psychopath with low emotional response and borderline mental deficiency. "His whole behavior was that of a man of primitive emotions reacting to the sudden stimulus of insult and proceeding from that point without purpose or design."²⁸ Unable to satisfy the accepted tests of in-

²⁶ But cf. *Overholser v. DeMarcos*, 149 F. 2d 23, 24 (App. D.C., 1945), where Judge Arnold stated: "[T]he release of an inmate of a mental institution does not depend upon legal standards of responsibility for crime . . . which a court is qualified to apply. Where, as in this case, the petitioner was duly committed, the issue which must ultimately be decided is whether he has sufficiently recovered from a mental disease so that he may be safely released. *Lay judgment on such an issue is of little value.*" (Emphasis supplied.)

²⁷ 149 F. 2d 28 (App. D.C., 1945).

²⁸ Per Frankfurter, J., *Fisher v. United States*, 328 U.S. 463, 481 (1946).

sanity, the defendant was convicted of first-degree murder. He appealed the refusal of an instruction to the effect that his mental disorder should be considered as showing "partial responsibility" and a lack of the deliberation and premeditation necessary to constitute first-degree murder. The court of appeals affirmed, holding that Fisher's culpability should be judged "as if" he were a normal individual.²⁹

Now it seems quite clear that irrespective of whether the treatment criteria for murder are based on a deterrent, retributive, or reformatory philosophy, the personal equation of the accused should be taken into account rather than some abstract standard of conduct. For if the defendant was in fact incapable of planning and executing a killing with coolness and calculation under the stress of an emotional situation because he was mentally abnormal, there is no utility or justice in treating him with greater severity than the man who kills on sudden impulse without adequate provocation—he is neither more dangerous, more culpable, or less capable of reform.³⁰ Why then should Judge Arnold reject the obviously sound principle that the amount of legal guilt decreases in the same ratio as mental disease gains in intensity? One practical reason might be that the doctrine would result in mentally disordered criminals receiving shorter prison terms and being turned loose on society sooner than the sane and perhaps less dangerous offenders.³¹ Some of the psychopaths that might benefit from the proposed rule might not be committable for an indefinite stay in a hospital. But Judge Arnold speaks not of these objections, but in pontifical language reminiscent of Lord Coleridge says: "In the determination of guilt age old conceptions of individual moral responsibility cannot be abandoned without creating a laxity of enforcement that undermines the whole administration of criminal law."³² So the jury and law-abiding public must not be told that there is really no difference of kind but only of degree between the "normal" and the mentally ill, and that to the psychiatrist, mental pathology appears as a continuous series of cases of varying functional impairment and disorientation, running the gamut from a mild neurosis

²⁹ Affirmed on other grounds, 328 U.S. 463 (1946).

³⁰ The Fisher decision has been uniformly condemned by the law reviews, though none gave more than passing attention to the Arnold opinion in the court of appeals. Consult, e.g., Taylor, *Partial Insanity as Affecting the Degree of Crime—A Commentary on Fisher v. United States*, 34 Calif. L. Rev. 625 (1946); Weihofen and Overholser, *Mental Disorder Affecting the Degree of a Crime*, 56 Yale L. J. 959 (1947).

³¹ Consult Williams, *Criminal Law: the General Part* 364 (1953).

³² 149 F. 2d 28, 29 (App. D.C., 1945).

to an extreme psychosis. It might be socially disastrous, Arnold seems to be saying, if it became generally recognized that psychologically the "criminal" is not a breed apart, but is much like the ordinary man who has not been so stigmatized.

I

A critique of the court's holding in the *Durham* case by one who professes Arnold's philosophy, then, might run as follows. By scrapping the old tests, the court has partially withdrawn legal sanction from the popular assumption that the cognitive phase of mental life is the most important factor in governing human conduct.³³ The jury will no longer be indulged in their "folklore" of criminal psychology which regards "reasoning" as the real cause of behavior. Instead they will be told that mental disease affects every facet of the psychosomatic organism; that deep-seated emotional currents may move men to act more often than their realistic reason and will would let them, and in directions which are at times contrary to the very core of rational behavior; and that "unhealthy" mental processes are only quantitatively different from normal ones.

Now according to the court, the jury under the new dispensation is still supposed to apply its "inherited ideas of moral responsibility to individuals prosecuted for crime."³⁴ But if the jury truly considers and takes to heart the insights and evaluations conveyed by the psychiatrist, who under the view adopted in *Durham* is now set free "to communicate his unique understanding of psychic realities to the Court and jury,"³⁵ the area of moral judgment will be greatly contracted. Modern psychiatry has in fact partially undermined conventional morality; it has revealed a certain ineptness and crudity in the operations of man's powers of moral control and shown that con-

³³ The implied assertion that the ideological basis is identical for both of the accepted "tests of insanity" has especial validity in the District of Columbia. Technically speaking, a genuine irresistible-impulse rule did not obtain there, but the Court of Appeals in the "landmark" case of *Smith v. United States*, 36 F. 2d 548 (App. D.C., 1929), made a rather questionable concession to the principle, by holding that the "impulse must be such as to override the reason and judgment and obliterate the sense of right and wrong to the extent that the accused is deprived of the power to choose between right and wrong." *Ibid.*, at 549. Sheldon Glueck described such a formula as merely an intentionally vague variant of the "knowledge tests" open to misconstruction by juries "looking for a loophole by which to acquit a defendant who pleads insanity." Glueck, *Mental Disorder and the Criminal Law* 239-40 (1925).

³⁴ P. 876, quoting from the *Holloway* case.

³⁵ Report by the Committee on Psychiatry and Law of the Group for the Advancement of Psychiatry, *Criminal Responsibility and Psychiatric Expert Testimony* 2 (1954).

science is a factor in the mind that is capable of doing harm as well as good.³⁶ To the extent that the jury is persuaded to adopt the approach of the experts there will occur a substitution of understanding for censure. In what sense then is the jury free to apply its inherited ideas of morality? As Mercier observed, responsibility is "not a quality of the person who has inflicted the pain, but a demand on the part of others that he shall suffer."³⁷ So if the experts find that the criminal act was the outward manifestation of a diseased mind, the jury can hardly be expected to adopt a punitive attitude unless they have been deaf to both the instructions and evidence. Suffering decreed by the jury for purposes of psychotherapy and not in a spirit of hostility or revenge would be undesirable because such a body of laymen is singularly incompetent to prescribe and control treatment. If the experts disagree as to the psychogenesis of the act, then, of course, the jury is free to decide whom to believe. But unlike the old system where the doctors were compelled in their testimony to pass moral or ethical judgments under guise of the medically meaningless "knowledge" tests,³⁸ the degree of disagreement as to the relevant medical data should under the "new rule" be much less³⁹—assuming of course the participation of well-qualified psychiatric experts. In transforming the tests of insanity from legal "folklore" to questions of scientific fact, the institution of the jury has been deprived of its *raison d'être*.

It has, of course, always been an anomaly that such scientific questions as the existence or presence of mental illness were left to the jury. But it was justifiable under the old system because the jury was engaged in the pursuit of demons, and though this was irrational, so was the whole ceremony of trial if its primary aim was to investigate scientifically certain disputed facts. The out-moded belief in "faculty psychology" furnished the theoretical substructure for the dramatization of the ideal of moral responsibility—pull that ideological prop out and the system must lose its social effectiveness. It is much like furnishing a primitive medicine-man with such modern diagnostic tools as an X-ray machine, a cardiograph, or an electro-

³⁶ E.g., Karpman, *The Sexual Psychopath*, 42 J. Crim. L. & Criminology 184, 194 (1951).

³⁷ Mercier, *Criminal Responsibility* 41 (1926).

³⁸ Zilboorg, *The Psychology of the Criminal Act and Punishment* 112-14 (1954).

³⁹ Report by the Committee on Psychiatry and Law of the Group for the Advancement of Psychiatry, *op. cit.* supra note 35, at 5.

encephalograph; he will not only probably fail to use them to advantage, but if perchance he gains by them some accurate knowledge of the human organism and how it functions, it will so contradict his mystical presuppositions that he will likely decline into torpor and pessimism.

II

Arnold is concerned lest the "instinctive sense of justice" of the community be offended by official adoption of some of the underlying assumptions of modern psychiatry in determining which lawbreakers are more to be pitied than censured. It is in regard to this greater concern for the demands of society than for the needs of the individual offender⁴⁰ that Arnold parts company with most of the medical critics of the law. Such emphasis as his on the social aspects of punishment, though possibly exaggerated, is of value as a wholesome corrective to the psychiatric preoccupation with the offender as patient. This is not in any way to imply that either Arnold or other more traditional thinkers like Holmes, Jerome Hall, or Michael and Wechsler who find social justification for criminal punishment are not dissatisfied with its effects on the individual made subject to it, or believe that such an elaborate system of threats is necessary for control or suppression of the occasional dangerous individual. Arnold in fact maintained that there would be no progress in our treatment of the criminal problem until we cease regarding it as a moral one and adopt the same attitude toward criminals as we do now toward the insane.⁴¹

⁴⁰ Cf. Holmes, *The Common Law* 41 (1881): "The first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong."

Arnold's argument may be distinguished from the related but less speculative thesis urged by Professor Dession. Consult Dession, *Psychiatry and the Conditioning of Criminal Justice*, 47 *Yale L. J.* 319 (1938). He argues that the M'Naghten rules reflect a policy of our society toward its underprivileged and maladjusted classes. Upon considering the present state of psychiatric knowledge, the resources for rehabilitation presently available, and the probability that the society may not be too enlightened in selecting the categories of persons it defines as "unfit," he concludes that the social policy "appears to be by no means as outmoded as the concepts in which it is expressed." *Ibid.*, at 331. Further, since the needs of the delinquent do not differ materially from those of other social unfortunates, our society could hardly justify a more generous rehabilitative policy toward criminals than toward other socially maladjusted classes. Dession's conclusion is that the substantive law should not be changed since the public is still unwilling to pay for more than a "symbolic performance." This argument furnishes an independent ground for disfavoring the Durham case, since the probable effect of the new rule will be to increase the number of criminal defendants who are admitted under indefinite stay to the already overcrowded mental hospitals of the District.

⁴¹ Arnold, *op. cit.* *supra* note 9, at 167.

The point is rather that individual welfare can be sacrificed to the existence of social order and morality.

The question, then, which Arnold wishes us to ask is what social effects might be expected to flow from such a partial abolition or mitigation of punishment as is involved in the *Durham* ruling. In other words, conceded that remission of punitive treatment may be a relief and benefit to defendants who can successfully invoke the new rule, what degree of psychological readjustment is being asked of those who directly or indirectly administer criminal sanctions—namely the public?

According to most of the modern writers in the field, if society in general had to forego punishment of the criminal, it would be deprived of one of its main outlets for the antisocial aggressiveness that it has so guiltily but effectively repressed. Flugel and Reiwald stress the mechanism of projection of guilt onto the criminal as the unconscious motive for making him suffer.⁴² They argue that by this means the individual can relieve his sense of personal sin without having to actually suffer the expiatory punishment—a most convenient and even pleasant device. The criminal is “a more etiolated successor” of the medieval devil⁴³ and hence can be dealt with for the purpose of a disguised living out of our own aggressive hostile impulses. Our ever-increasingly “socialized” civilization may not be willing to sacrifice this outlet unless various forms of “sublimations” are acquired. This may be what Stephen meant by his famous remark that: “I think it highly desirable that criminals should be hated, that the punishments inflicted upon them should be so contrived as to give expression

⁴² Flugel, *Man, Morals and Society* 168–70 (1945); Reiwald, *Society and Its Criminals* (1950) (passim).

Dr. Franz Alexander and others have suggested another unconscious motive for punishing the criminal. Described as the principle of expiation or atonement, it is not so much projection as an unconscious empathy with the culprit. Consult, e.g., Alexander and Staub, *The Criminal, the Judge, and the Public* 207 et seq. (Zilboorg's transl., 1931). According to this view our common sense of justice is offended not only when the innocent are wrongly punished but also when an offender escapes his supposedly well-deserved punishment. The punitive aspects of punishment are a needed ally of the conscience or super-ego against the instinctual drives. *Ibid.*, at 214. If crime is not followed by punishment in all cases in which we feel that had we indulged our antisocial tendencies we would have been punished, loss of faith in the social structure may follow with a consequent relaxation of inhibitions. It is *as if* we consciously reasoned: “If another person escapes his just deserts for violating the law, why should I continue to conform?” This may be the idea that Judge Arnold had in mind in his discussion in the *Fisher* case. See pp. 383–84 *supra*. Under this thesis, the *Durham* case might “offend traditional ideas of morality” (and hence disturb the pre-existing stable equilibrium between social and antisocial forces).

⁴³ Reiwald, *op. cit. supra* note 42, at 93.

to that hatred, and to justify it so far as the public provision of means for expressing and gratifying a healthy natural sentiment can justify and encourage it."⁴⁴ But in order to justify hatred toward the culprit and thereby drain off some of the excess aggressivity in society, whether "appetitive" or "reactive," the scapegoat must appear to the aggressors to belong to "another" group. We cannot guiltlessly punish those whom we love or consciously identify with—a truth that is brought poignantly home to any parent. The members of the out-group must be portrayed as the very incarnations of evil, much as were the early Christians in Rome or the Jews in Nazi Germany. Much of the formalism of the criminal trial and especially the procedure attending the infliction of capital punishment are means of insulating the accused from contact not only with the jury, who should not get to know him too well, but also from the law-enforcing officials who must not be over-burdened by remorse. If it is true as reported that eighty per cent of all delinquents, juveniles and adults, are characterologically similar to the average population, it is small wonder that the modern educated juror shows some ambivalence in his attitude toward the defendant he must solemnly judge.⁴⁵ Certainly the citizenry's righteous indignation with the law-breaker is bound to suffer diminution under a system of justice which is truly concerned with the psychodynamics of crime, for the jury will find as a result of the fuller psychiatric explanation now officially encouraged that the criminal in the dock, far from fitting the Lombrosian stereotype, is not dissimilar in his impulses from most of the law-abiding members of society. Even if the jurors are persuaded that the separation between "criminal" and "normal" is one of degree rather than kind, it does not follow that they will necessarily sympathize with the offender or condone his behavior, but it does follow that any idea of vengeance against human wickedness will find a less hospitable setting in their minds than heretofore. With the demonology of the old "knowledge" tests gone, they will either accept the assertions of the psychiatrists or reject all or part of them out of unconscious resistance. But while the area within which the jury may vent its instinctual aggression as "catharsis" may have been substantially limited, the present rule operating in its jury-trial environment still leaves the jury free in most instances to practice the folklore of a retributive system of justice. It is to these matters that we now must turn.

⁴⁴ 2 Stephen, *History of the Criminal Law of England* 81-82 (1883).

⁴⁵ Zilboorg, *op. cit.* *supra* note 38, at 84.

III

One of the most striking things about the opinion in the *Durham* case is the absence of any real discussion therein of what constitutes a "mental disease" under the new rule. All that the court attempts in this respect is a differentiation between the terms mental "defect" and "disease," the latter being described as a "condition which is considered capable of either improving or deteriorating." The potential coverage of the new rule is thus very great, running the gamut from a mild neurasthenia to an organic psychosis with impaired perception or disturbed consciousness. The court, it would seem, deliberately refrained from imposing any limitations on the term "mental disease" because under its rationale this is essentially a question of fact for the jury to decide on the basis of the scientific evidence adduced at the trial. Why the jury should be permitted to define in each case what kind or degree of mental abnormality affords exemption from punishment is difficult to understand unless we look to considerations of broader policy.

First, the concept of mental disease is not well defined even among specialists. The reasons for this confusion are easy to see: (1) The term in its broadest signification is the antithesis of mental "normality." If the question of what constitutes normality even within our own culture can be learnedly disputed, how can it be definitely stated what conditions must be present for mental illness?⁴⁶ Certainly the presence of certain well-recognized symptoms is no absolute criterion. It has even been argued by some that our society as a whole is so "sick" or neurotic, that only those who rebel against conforming to its conventions are truly sane.⁴⁷ (2) The term may be used in a restricted sense to connote a need for institutional care in the public interest. The members of a group so defined might be expected to respond to routine methods of therapy, or not, in which latter case only protective custody would be necessary. Even as so used, the term is not beyond controversial interpretation, as witness the issue over whether the psychopath and sex deviate should be committed.⁴⁸ The term might be given still other functional definitions depending on the particular purpose to be served by the classification.

⁴⁶ Consult Horney, *The Neurotic Personality of Our Time* c. 1 (1937).

⁴⁷ Consult, e.g., Lindner, *Prescription for Rebellion* (1952).

⁴⁸ Compare Cleckley, *The Mask of Sanity* c. 32 (1950), with Thompson, *The Psychopathic Delinquent and Criminal* c. X (1953).

Because the law should not pronounce on scientific matters which are in a continual state of flux, it follows that neither court nor legislature should seek to lay down general criteria of "mental disease" for purposes of determining criminal responsibility, unless, of course, the maintenance of age-old but currently common beliefs is more important for some of the reasons previously canvassed than correspondence of the legal rules with the views of modern science. Mental illness being a "behavioral expression of ego impairment," it is clearly futile to attempt to designate what psychiatric labels that are given certain syndromes or entities correlate with diminished responsibility, for the doctors are not only prone to adding new or changing old labels but to putting new psychic reality behind the traditional nosology. But, it may be asked, even if each case of claimed "mental disease" is unique, why should not the function of deciding whether a claimed form of mental abnormality may affect responsibility for crime be reposed in the trial judge who has been properly informed by the experts on both sides? The jury, if the judge's decision of this "question of fact" is affirmative, would then only be asked to determine whether the claimed condition actually existed in the defendant at the time of the act. For example, the judge might decide in the face of conflicting psychiatric opinion the vexing question of whether a violent act can constitute a symptom in an obsessive-compulsive neurosis.⁴⁰ Though not an ideal way of settling fine points of psychiatric theory, it would certainly be more "rational" than letting the jury muddy the waters.

But the court's allocation of functions on this issue as between trial judge and jury may be justified as a necessary compromise with the reality of a still predominantly punitive system of criminal justice. So long as there is retention of any of the "metaphysics of moral responsibility" it makes sense to let the jury, as a microcosm of the law-abiding public, decide whether or not to impose the same standards of righteousness on certain of the maladjusted or nonconformists as they seek to impose on themselves. In cases involving the obviously deranged, dissociated, or feeble-minded offender, common sense should prove sufficient to evoke compassion rather than outrage. It is where the so-called "borderline types" are concerned that resistance to the imparted insights of psychiatry is likely to be found. If Arnold was right in positing the existence of a common belief that men who can

⁴⁰ Consult Wertham, *The Show of Violence* 14 (1949).

talk rationally are sane, then the psychopath, the neurotic, and the sex deviate are bound to be judged without much regard to the unconscious dynamics of their offensive behavior. But at least such a belief, if held, will not, as before in the District courts, find reinforcement in the instructions of law, and the talesman will presumably be exposed more extensively to the mysteries of the human mind as revealed from the witness chair. All in all, there seems little probability that under the new rule there will be more "arbitrary popular justice by a lay jury"⁵⁰ than under the "arbitrary and confusing tests" which the court repudiates. This is so, not because the new rule "represents the real question which even under [pre-] existing law the jury as a practical matter propound[ed] to itself,"⁵¹ but because it affords a greater degree of control over jury decisions. Whereas before it was well-nigh impossible for the trial judge or appellate court to review the jury finding of capacity in the defendant to "know" that his act was wrong, the new rule calls for conclusions of fact which, at least in those extreme cases involving the manifestly psychotic, are subject to empirical verification and hence to revision or a new trial if the jury has exceeded the bounds of "reasonableness." Of course there is present the danger that the jury under the seductive influence of a persuasive spokesman for the more advanced wing of psychiatry will acquit, on grounds of insanity, predatory individuals who are both untreatable under existing facilities and techniques, and deterrable by threats of legal punishment. Moreover, even when the jury responds dispassionately to reliable expert opinion by acquitting a "borderline" type whose punishment is *not* required in the interests of deterrence, certain unfortunate results might follow. In the first place, the public in general who have not shared the jury's intimate acquaintance with the offender's psyche may "sense injustice" with loss of "respect for the criminal law." Secondly, such dispositions, if notorious enough, may tend to weaken the deterrent effect of the law upon those whom it is possible to deter. These are the potential offenders who hope by simulation and false testimony to win exemption if they can induce the tribunal to make a mistake. The chances of an erroneous acquittal (though assuredly not an erroneous conviction) are considerably enhanced under the new rule.⁵²

⁵⁰ Glueck, *Mental Disorder and the Criminal Law* 264 (1925).

⁵¹ Such was the argument urged in support of the proposal to reject the traditional tests in Illinois. Cited in Wechsler and Michael, *A Rationale of the Law of Homicide*, 37 Col. L. Rev. 701, 756, n. 188 (1937).

⁵² *Ibid.*, at 756.

Further, the offender who can be medically classified only as a psychopath or neurotic may under present hospital conditions and practices receive little therapeutic attention and be shortly returned to the free community to make room for "more serious" cases.

But if there is some justification for letting the jury define the kind or degree of mental abnormality which confers immunity, there seems to be none for letting them also decide what, if any, connection existed between the mental disease and the act. For surely this is a more technical question than the first, rendering even less appropriate and useful the tools afforded by common sense. Yet again it is obvious from the court's language that in this inquiry too it thinks the jury should be given a veto power over scientific assertions which run counter to ingrained popular notions of "human nature." Thus, in the difficult "borderline" cases, the jury will probably be indulged in the expression of a "reasonable doubt" whether the act "was the product of such abnormality" even in the face of a complete consensus on the part of the experts to the contrary. Where, however, the defendant is manifestly psychotic and the act, according to the psychiatrists, is clearly symptomatic of the disorder, the judge under the new rule could hardly tolerate such capricious disregard of evidence by the jury, unless the "law in action" is to prove false to the humane impulse behind the new reform, which is simply that no one should be punished for his disease. Such contingencies should be rare, although there is always the possibility of an avenging jury, in capital cases of great atrocity, that can be dissuaded from their destructive goal by neither evidence nor law; one recalls, for instance, the well-known cases of Albert Fish and Father Schmidt.⁵³

To say that an act was caused or was the result or product of mental disease means at least that "but for" his illness the defendant would not have committed the offense. If proof of this alone were sufficient for exculpation, then almost all offenders suffering from at least a moderate degree of psychic maladjustment should be acquitted, as it is probable that no matter what the nature of the symptoms or how "isolated" the disorder "distorted social judgment or seriously interfered with the exercise of customary social control."⁵⁴ This follows from the modern medical finding of the all-pervasive influence on social or interpersonal behavior of serious mental illness. Although

⁵³ Zilboorg, *op. cit.* supra note 38, at 56-58; White, *Insanity and the Criminal Law* 63-80 (1923).

⁵⁴ Guttmacher and Weihofen, *Psychiatry and the Law* 420-21 (1952).

under the *Durham* rules this line of reasoning doubtless prompted the court to impose on the prosecution the burden of proving *sanity* beyond a reasonable doubt after "some evidence" of mental unsoundness had been introduced, the jury will be charged to convict a mentally-ill offender if they believe beyond a reasonable doubt that the act was not the product of such mental abnormality. The implication is that the mentally abnormal generally are immune from punishment for only *some* of their delinquencies but not for *all* of them. But if the defendant's neurotic character structure played any determining role in the criminal manifestation which brings him to court, how can the jury without further guidance ever decide what quantum of pathological influence indicates treatment rather than punishment? Lawyers have learned from long experience with problems of attribution that the concept of legal causation has no affinity with its namesake in science and philosophy, and depends for its intelligent application on knowledge of the purpose behind the inquiry. Consequently, if the jury is to be told anything about why they should decree punishment for some "abnormal" offenders and not for others, the preferable social policy should be expressed in terms of general and special deterrence. Some people, the jury could be told, can be restrained most of the time from doing some things by a rather remote threat of legal punishment; on the other hand, most people who refrain most of the time from doing forbidden things are not really restrained by external threats but by an internalized control called conscience. That even inmates of mental hospitals sometimes can be controlled by threats of immediate and certain unpleasant treatment suggests that the principle is pragmatically valid, although less so, for obvious reasons, when the threatened deprivation is relatively remote and uncertain as it usually is in the criminal law. Psychiatrists could tell the jury the degree of ego impairment involved, and the extent to which the defendant's conscious ego participated in his act. Or an evaluation of the offender's conduct might be phrased in terms of the proportion of "intrinsic" to "extrinsic" motivation or provocation.⁵⁵

But suppose that the jury in a capital case is told all this, and after conscientious and intelligent deliberation concludes that, although the defendant was mentally ill to the extent that his normal capacity for control was vitiated, his unlawful behavior can be influenced by the anticipation of legal consequences. The defendant, however, is the

⁵⁵ Consult Weihofen, *Mental Disorder as a Criminal Defense* 84-85 (1954).

victim of urges so strong that most persons would be helpless to resist them under most circumstances. Should the man be punished or treated as a patient or both? The jury's dispositional alternatives are four: (1) guilty as charged; (2) not guilty; (3) not guilty on grounds of insanity; (4) disagreement resulting in passing the question to another bewildered group of men and women. Conceivably, the jury could also, under the *Durham* rule, find guilt of a lesser degree of crime but this might also have disadvantages if the defendant is dangerous to a degree where only an indeterminate preventive custody will protect the community.⁵⁶ This perplexing situation seems to me to epitomize the absurdity of expecting to achieve rational results by engrafting scientific techniques and thinking onto an inherently irrational structure of beliefs, practices and folklore.⁵⁷ For if the jurors behave rationally, they will find themselves hemmed in on all sides by legal barriers utterly irreconcilable with the empirically tested propositions on which they have been adjured to act. The jury is asked to make a composite diagnostic picture of the offender out of all it has heard in order to anticipate the effect of various forms of treatment on him. It is effectively stymied in the supposititious case given above from doing a realistic job by the juridical "bed of Procrustes" which compels the jurors to report their prognosis, and prescription for mediating between the needs of society and the offender, in the crude and absolutistic terms of a primitive, harsh morality.

Conclusion

But the court of appeals, wisely I think, has so formulated the new rules for submission of the "insanity" issue to the jury that on the crucial matter of punishment they will be free in most instances to

⁵⁶ If the diagnostic characterization is *dangerous, deterrable, treatable*, the indicated disposition is *punishment or treatment*. There being eight possible permutations of the three diagnostic variables, there should be the same number of dispositional alternatives. Consult Waelder, *Psychiatry and the Problem of Criminal Responsibility*, 101 U. of Pa. L. Rev. 378 (1952).

⁵⁷ Cf. Arnold, *The Symbols of Government* 9-10 (1935): "While it is of the utmost importance that the principles of an institution appear to be logically consistent, it is of equal importance that they be loose enough to allow for the dramatization of all sorts of mutually inconsistent ideals. The various advocates of social and economic plans, of procedural reforms, of better ways of handling criminals, of more humanitarian treatment of workers, and all the other various sensible reforms which are so constantly advocated never realize this. They suffer agonies of futile rage against society because it is so slow to accept the most obvious schemes for improvement. The trouble with their schemes is that they violate currently important symbolism. Therefore even if the reform is accomplished it is apt to find itself twisted and warped by the contradictory ideas which are still in the background in spite of the reform."

practice the folklore of a retributive system of justice. That this is as it should be is suggested by some of the arguments, alluded to above, against destroying in the present stage of society the ideological structure of the criminal trial "in favor of an efficient and speedy way of accomplishing the incarceration of persons supposed to be dangerous to the social order."⁵⁸ To my thinking the change in law effected in *Durham* is on the whole a beneficial one if viewed as a transitional device toward a more realistic system of social defense, wherein the behavior scientist can contribute his skill more effectively in the resolution of problems of disposition and treatment. Great reforms such as these are not accomplished overnight and require for success the laying of groundwork by conditioning of the public mind. Jurors who serve in the courts of the District now have an enhanced opportunity to undergo a form of adult education in the dynamics of human behavior. While this may not produce greater juror competence it should eventually convince those whose minds are at all accessible that the problem of understanding the criminal and planning his therapy, so as to be able to return him ultimately to a world that he can both accept and enjoy, is a problem of baffling complexity from whose attempted solution the amateur should respectfully withdraw. Such arrogance and moral superiority must vanish with the dawning of greater self-knowledge and insight.

The lesson of "psychological realism" is that a system of folklore will not be exchanged for one of empirical reality so long as it continues to be emotionally satisfying to most people.⁵⁹ The change cannot be wrought by official fiat without imperilling social stability. While people will accept intellectually the fact that the present system breeds only waste, cruelty, and more crime, there is no incentive to alter it basically if it continues to be harmonious with the other practices of living. If we genuinely desired to reduce the crime rate, we would have directed our efforts to the conditions typically found associated with delinquency, such as poverty, broken homes and ill health. Yet the growth of our social conscience has been so slight as to be presently incapable of sustaining ambitious programs of community and social planning. Hence we cling to the punitive system of control as a distraction from the disturbing realities. Such considerations as these should not be taken as a counsel of despair but as a needed antidote to the effects of an overly heady optimism.

⁵⁸ *Ibid.*, at 130.

⁵⁹ Consult Kardiner, *The Psychological Frontiers of Society* c. 14 (1945).