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Mental Disorders and Criminal Responsibility; Obscenity Statutes and First Amendment Freedoms;

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POSTSCRIPTS

*Mental Disorders and Criminal Responsibility**

The difficulty in arriving at a satisfactory standard of criminal responsibility when mental disorders are involved is a task which continues to disquiet both bench and bar. Although modern psychiatry has made great strides in the past century in its investigation of the basic connections between mental disorders and the subjective element of crime, the translation of this newly-acquired knowledge into a workable legal standard has eluded the law-makers. Hence, the nineteenth century "right-wrong test," supplemented in some jurisdictions by the so-called "irresistible impulse" rule, remains the most acceptable standard of criminal responsibility in the United States.

But the general acceptance accorded the "right-wrong test" has not resulted in diminishing criticism of its adequacy, more often than not on the ground that it fails to take account of the new knowledge concerning mental disorders. It was, in fact, this very type of criticism which prompted the Court of Appeals for the District of Columbia to adopt the so-called *Durham*¹ rule in 1954. In its most fundamental form the *Durham* rule stated that an accused was not criminally responsible if his unlawful act was

the product of a mental disease or a mental defect.² Acclaimed in some quarters as a "step towards enlightened justice"³ and criticized in others as "vague" and "ill-defined,"⁴ the standard nonetheless prevails in the District of Columbia though with certain misgivings as the recent case of *Blocker v. United States*⁵ indicates.

In the *Blocker* case the Court of Appeals for the District of Columbia sitting en banc reversed a murder conviction on the ground that the giving of contradictory instructions to the jury resulted in improperly placing the burden on the defendant of establishing his defense of insanity. But the significance of the case stems not from its holding, but rather from an elaborately documented concurring opinion in which Circuit Judge Burger⁶ assails certain "mechanical and restrictive aspects" of the *Durham* test for determining criminal responsibility. Characterizing the *Durham* opinion as "a wrong step but in the right direction . . .,"⁷ Judge Burger contended

² The distinction between a disease and a defect as used in the *Durham* rule is that the former is capable of improvement or deterioration, while the latter is not.

³ See, e.g., Zilboorg, *A Step Toward Enlightened Justice*, 22 U. CHI. L. REV. 331 (1953).

⁴ See, e.g., Wechsler, *The Criteria of Criminal Responsibility*, 22 U. CHI. L. REV. 367, 373 (1955).

⁵ 288 F.2d 853 (D.C. Cir. 1961).

⁶ *Blocker v. United States*, 288 F.2d 853, 857 (D.C. Cir. 1961) (concurring opinion). Chief Judge Miller and Circuit Judge Bastian joined in the views expressed by Circuit Judge Burger although dissenting as to the particular case. *Id.* at 872.

⁷ *Id.* at 858.

*See *Mental Disease and Criminal Responsibility* — a two part Symposium, 4 CATHOLIC LAWYER 294 (1958); 5 CATHOLIC LAWYER 3 (1959). See also 7 CATHOLIC LAWYER 64 (1961).

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

that in giving instructions to the jury concerning insanity the court had lost sight of the "basic idea that man should be held criminally responsible for his voluntary acts resulting from the exercise of his will."⁸

Referring to the *Durham* rule as the "disease-product" test, and using the word "disease" to encompass both mental diseases and mental defects, Judge Burger argued that the terms "disease" and "defect" were distinguishable solely on the ground that the former was not a static mental condition while the latter was, and hence that neither term had any real legal definition or content. He contended that a jury as a practical matter had to adopt the differing meanings given those terms by expert witnesses, and he concluded that "no rule of law can possibly be sound or workable which is dependent upon the terms of another discipline whose members are in profound disagreement about what those terms mean."⁹

Turning to the term, "product," Judge Burger labeled it inadequate and stated that:

[A]ssuming arguendo that a criminal act can be the product of a "mental disease" that fact should not per se excuse the defendant; it should exculpate only if the condition described as a "mental disease" affected him so substantially that he could not appreciate the nature of the illegal act or could not control his conduct.¹⁰

The Judge also was very critical of the role of experts in the administration of the *Durham* rule, and viewed the problem as "one of the soundness of a rule whose very terms encourage, if not require, the experts to state conclusions in the terms of the ultimate issue."¹¹ He suggested that the court

"firmly prohibit all questions which allow the experts literally 'to tell the jury how to decide the case'."¹²

The Judge further noted the "inordinate number of appeals and appellate opinions" under the *Durham* rule, and attributed them to the "vagueness" of the standard and failure to consider "the elements of recognition of wrongdoing and capacity to control conduct." Advocating a return to basic postulates of the criminal law, he stated that: "No test for criminal responsibility can be adequate if it does not place squarely before the jury the elements of cognition and capacity to control behavior."¹³

The concurring opinion of Judge Burger is to some degree indicative of the problem faced by the courts in attempting to fashion a standard of criminal responsibility in the area of mental disorders. The *Durham* rule was an effort by the Circuit Court of the District of Columbia to make better use of scientific knowledge in questions of mental disorder — a basis for much of the dissatisfaction, past and present, with the "right-wrong test." However, as Judge Burger and others have pointed out, the *Durham* rule in its practical operation fails to take proper account of the cognitive element.

The correct direction of *Durham* was to broaden the scope of medical inquiry, but the incorrect step was to try to do this in terms which ignore the elements of wrongdoing and capacity to control conduct.¹⁴

The *Durham* rule still prevails in the District of Columbia. But in view of Judge Burger's opinion and the concurring sentiments of several other judges, it is perhaps to be expected that a perceptible change in the nature of the instructions to the jury

⁸ *Ibid.*

⁹ *Id.* at 860.

¹⁰ *Id.* at 862.

¹¹ *Id.* at 863.

¹² *Ibid.*

¹³ *Id.* at 867.

¹⁴ *Id.* at 865.

will be forthcoming, and that more attention will be paid the elements of cognition and free will, while at the same time preserving that facet of the *Durham* rule which admits of broader recognition of medical and scientific knowledge.

*Obscenity Statutes and
First Amendment Freedoms*

In recent years *The Catholic Lawyer* has devoted much attention to the problem of obscenity¹ and the consequent efforts by the states, in their legitimate roles as protectors and promoters of the public welfare, to thwart the steadily increasing appearance on our newsstands of publications with little "redeeming social value." Although the states may validly exercise their police power in the interests of the public welfare, this power is not without qualification. Hence, in the area of publications, where the very precious first amendment freedoms are involved, the inherent police power of the states often takes a "back-seat" to the fundamental constitutional rights of the individual.

It seems quite well-settled that obscene publications are not protected by the first amendment. But the distinction between obscenity and the advocacy of unconventional or unpopular ideas, which are protected, is a "shadow-land" in which courts and legislatures alike often find themselves hopelessly lost in a forest of semantics. The Supreme Court, however, in several of its decisions has laid down some basic guide-lines which state legislatures in pre-

paring, or state courts in construing, statutes somewhat scrupulously follow to avoid rendering them unconstitutional. Thus, in *Smith v. California*,² the Court held unconstitutional a California penal statute which proscribed, and was construed to impose strict liability for, *mere possession* of obscene prints, *regardless of the accused's awareness of the contents*; and in *Roth v. United States*,³ the Court stated that the test of obscenity was "*whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.*"⁴

Although these decisions provided no precise definition of obscenity they nonetheless have had a marked effect on state courts in dealing with obscenity statutes. This "effect" is very apparent in several recent decisions of New York's Court of Appeals interpreting that state's obscenity statute. In *People v. Finkelstein*⁵ the court was called upon to construe Section 1141 of the Penal Law which provided that: "A person who sells . . . or has in his possession with intent to sell . . . any obscene . . . book . . . [i]s guilty of a misdemeanor." The defendants contended that the statute was unconstitutional in that it punished for *mere possession*, since it did not *expressly* require the element of *scienter*.

In obvious deference to the *Smith* case, the Court of Appeals "interpreted" the statute as implicitly including *scienter* as a necessary element for conviction, later stating that: "In any event, the statute is at least susceptible of either interpretation, and we are, therefore, clearly obliged by

¹ Tobin, *State and Federal Censorship*, 3 CATHOLIC LAWYER 312 (1957); St. John-Stevas, *Obscenity, Literature and the Law*, 3 CATHOLIC LAWYER 301 (1957); Sheerin, *Censorship in Contemporary Society*, 3 CATHOLIC LAWYER 292 (1957). See also 3 CATHOLIC LAWYER 180 (1957); 2 CATHOLIC LAWYER 74 (1956).

² 361 U.S. 147 (1959).

³ 354 U.S. 476 (1957).

⁴ *Id.* at 489. (Emphasis added.)

⁵ 9 N.Y.2d 342, 174 N.E.2d 470, 214 N.Y.S.2d 363 (1961).

statute and decisional law, to embrace that which will preserve its validity."⁶

The difficult problem of reconciling first amendment freedoms with the public welfare was even more pronounced in *People v. Richmond County News*.⁷ In that case the defendants had been convicted of violating section 1141, but the Appellate Division reversed because *scienter* had not been proven. In a 4-3 opinion the Court of Appeals affirmed the reversal, but on the ground that the magazine involved was not obscene. The majority opinion recognized the *Roth* case as having established "the broad boundaries of any permissible definition of obscenity under the United States Constitution. . . ."⁸ However, it interpreted section 1141 as applying "*only to what may properly be termed 'hard-core' pornography.*"⁹ An indication of what the court considered "hard-core" pornography is to be found in a later remark:

⁶ *Id.* at —, 174 N.E.2d at 471, 214 N.Y.S.2d at 364-65.

⁷ Law Report News, vol. 22, no. 39, p. 6 (unrevised opinion).

⁸ *Id.* at p. 7.

⁹ *Id.* at p. 8. (Emphasis added.)

The fact is, however, that, while the magazine contains many stories or pictures which are aesthetically tasteless and without any redeeming social worth, none of them is pornographic. Numerous pictures and cartoons of nude or semi-nude women and numerous descriptions and depictions of sexual arousal and satisfactions are to be found . . . *but it contains nothing which smacks of sick and blatantly perverse sexuality.*¹⁰

The difference of opinion as to how serious a limitation first amendment freedoms place on the state's police power is clearly indicated by the following remark from the dissenting opinion:

We find nothing in the First Amendment nor in the language of the *Roth* case . . . which dictates the strict construction of section 1141 now proposed. . . . By limiting the applicability of that section only to what [is] termed "hard-core pornography," we would be adopting a far more stringent test than is required under present constitutional standards, and in effect be opening the door to obscenity so widely as to be tantamount to a repeal in large measure of section 1141.¹¹

¹⁰ *Ibid.* (Emphasis added.)

¹¹ *Id.* at p. 9 (dissenting opinion).



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