Mental Disorders and Criminal Responsibility; Obscenity Statutes and First Amendment Freedoms;
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 lawmakers. 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 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. Acclaimed in some quarters as a "step towards enlightened justice" and criticized in others as "vague" and "ill-defined," the standard nonetheless prevails in the District of Columbia though with certain misgivings as the recent case of Blocker v. United States 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 Burger 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...", 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.
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).

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 obscenity and the consequent efforts by
the states, in their legitimate roles as pro-
tectors 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 freed-
oms 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 unconven-
tional or unpopular ideas, which are pro-
tected, 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, 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 ac-
cused’s awareness of the contents; and in Roth v. United States, 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.”

Although these decisions provided no
precise definition of obscenity they none-
theless 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 the court
was called upon to construe Section 1141
of the Penal Law which provided that: “A
person who sells... or has in his posses-
sion with intent to sell... any obscene... book... [is] 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, Ob-
scenity, 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).
statute and decisional law, to embrace that which will preserve its validity.  

The difficult problem of reconciling first amendment freedoms with the public welfare was even more pronounced in People v. Richmond County News. 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..." However, it interpreted section 1141 as applying "only to what may properly be termed 'hard-core' pornography." 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.
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.*

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.

10 *Ibid.* (Emphasis added.)
11 Id. at p. 9 (dissenting opinion).
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