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## INSANITY AND THE CRIMINAL LAW—A CRITIQUE OF DURHAM v. UNITED STATES

### INTRODUCTION

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ON JULY 1, 1954, in *Durham v. United States*<sup>1</sup> the Court of Appeals for the District of Columbia, speaking through Judge Bazelon and with the concurrence of Judges Edgerton and Washington, directly and unequivocally repudiated the classic *M'Naghten* test for insanity as a defense in a criminal case. Said the court:

The rule we now hold must be applied on the retrial of this case and in future cases is not unlike that followed by the New Hampshire Court since 1870. It is simply that an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect.<sup>2</sup>

The *M'Naghten* test has been with us as a formula for a little over a century and has from its inception been the subject of bitter controversy. Yet the *Durham* case is the first time a court, heeding the criticisms of the test, has explicitly repudiated it. When so basic a rule which has survived so much criticism for so long a time finally falls officially, we sense that a great event in law has taken place. And it remains a great event even though there be disagreement as to how much difference this change of wording in the test for insanity makes, and even though there be not a little skepticism as to whether the change makes any difference to the outcome of cases. Nor does it diminish the novelty of the *Durham* case that Judge

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<sup>1</sup> 214 F. 2d 862 (App. D.C., 1954). Throughout the remaining articles of this symposium on insanity, quotations from the *Durham* case will be cited by page number only.

<sup>2</sup> Pp. 874-75.

Bazelon is not creating a new rule out of whole cloth, but is quite explicitly adopting the rule New Hampshire has had. The New Hampshire model has been available for adoption for a long time.

The sweep of the decision is underscored by the fact that the District of Columbia had added the "irresistible impulse" test to the *M'Naghten* formula in 1929; it is therefore the combined test which is now found wanting. The decision thus, among other things, marks the passing of the long debate over irresistible impulse.

The careful and psychologically literate opinion of Judge Bazelon sparks many reflections about the ends of the criminal law, about the relationship today of law and psychiatry, about our dependence on the jury to solve our most difficult questions, about the process of judicial legislation, about the practical limitations on reform in the criminal law. I would here pause to emphasize only that the decision fully retains the moral context of the criminal law. For Judge Bazelon talks not in the idiom of who best can be deterred by punishment and who best can be saved by therapy. He talks in terms of whom we can properly blame. Thus: "Juries will continue to make moral judgments, still operating under the fundamental precept that 'Our collective conscience does not allow punishment where it cannot impose blame.'"<sup>3</sup> And again: "Our traditions also require that where such acts stem from and are the product of a mental disease or defect . . . moral blame shall not attach, and hence there will not be criminal responsibility."<sup>4</sup> It is here that I would find the source of much of the significance, perplexity, and fascination of the issue of criminal insanity. For it would appear that we cannot in handling the marginally insane criminal readily avoid the profound and pervasive educating impact of law. In deciding publicly whether Monte Durham goes to jail or goes to a mental hospital the legal system touches deeply our sense of where the blameworthy, and the praiseworthy, begins and ends in our daily life.

The details of the case itself and the structure of Judge Bazelon's opinion appear fully enough in the series of comments that follow. On its facts, the *Durham* case was ironically appropriate to the large purpose for which it was the occasion: it was tried without a jury and the trial judge, by being so explicit as to the reasoning behind his finding that there was no evidence of insanity, provides a striking instance of the difficulties of the *M'Naghten* rule when taken literally;

<sup>3</sup> P. 876.

<sup>4</sup> *Ibid.*

it is a case in which the psychiatrist struggles with little success to fit his testimony to the "right-wrong" formula; it is a case where the prosecutor bluntly tells the court he is pressing charges chiefly in order to shift responsibility off his shoulders for any future crimes Durham might commit and to place it back on St. Elizabeth's Hospital—"then if they let him out on the street it is their responsibility."<sup>5</sup> And it is a case in which the difficulties of psychiatric diagnosis are painfully apparent; Durham prior to this conviction had been in St. Elizabeth's Hospital four times in six years. And upon each of his first three releases he soon thereafter committed a crime. The crime for which he is here convicted was committed only two months after his release from St. Elizabeth's and only three months before he was again committed to St. Elizabeth's.

The *Durham* case, then, is an exciting one, deserving of study. The editors of the *Review* have invited several distinguished students of the problem in the fields of law and psychiatry to comment briefly on the case. Each commentator has been given a free choice in selecting the aspects of the decision he wished to discuss; each has utilized a slightly different approach. The result is the informal symposium on the case here presented.

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The editors of the *Review* had also invited Judge Learned Hand to participate. Judge Hand declined, but at their insistence he graciously granted permission to quote from his letters to them—"if you wish to publish such inconclusive comments as these." Even when declining to speak, Judge Hand is greatly worth listening to:

I have read the opinion that you mention, and perhaps it is all that can be said; but, frankly, it did not seem to me to give us any guidance that perceptibly would help.

The truth appears to me to be that the question goes to the heart of whatever we choose to make our purpose in criminal punishment. It is only indirectly, or at second hand, a psychiatric question.

My own ideas, insofar as I have any, are that there are two controlling factors to consider. One is how far imprisonment is effective as deterrent. . . . The other factor is that most people have a feeling that "justice" requires a law breaker to suffer, just as they think that sin should entail suffering in the sinner. Personally I do not share that feeling, which is a vestige, I believe, of very ancient primitive and irrational beliefs and emotions. However, it would be unwise, and incidentally impracticable to disregard it as a constituent element; it is extremely strong in most people.

<sup>5</sup> P. 865.