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Book Review of Law and Psychiatry

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LAW AND PSYCHIATRY

By SHELDON GLUECK. Baltimore: The Johns Hopkins Press, 1962. ix. 181 pp. \$4.95.

This book, with slight modifications, is the series of four lectures delivered by its author at the Schools of Law and of Medicine, Tulane University, in April, 1962, under the Isaac Ray Award of the American Psychiatric Association. In spite of its relatively short length, it contains a treasure of information and well-considered opinion which should be of inestimable value to lawyers, law students, judges and everyone interested in orderly progress toward solving the knotty problems inherent in the often maligned defense of insanity to criminal charges.

Recognizing that lawyers and psychiatrists have been in conflict over not only the formulation of what legal rules should govern the defense of insanity, but also over the nature of what proof gives rise to the application of such rules, Professor Glueck carefully analyzes the important dilemmas which frequently prevent agreement between the two. This portion of the book, found in the first chapter, is an outstanding example of pure exposition. Here the reader will find, unencumbered by opinion or prejudice, an explanation of the opposing concepts of free will and the conditioned individual. Interwoven with this discussion is a consideration of the closely connected problem of degrees of responsibility and blameworthiness. This discussion is made meaningful in practical terms by application to the *M'Naughten*, *Durham*, and A. L. I. rules and English-Scot ideas of diminished or partial responsibility. A related dilemma discussed by Professor Glueck stems from the fact that the law, in defining the substance of various crimes as well as the essentials for relief from responsibility, takes no account of the psychological and sociological considerations which psychiatrists regard as basic to the explanation of human conduct. In short the fact that motive is irrelevant, except in a very few crimes, removes from judicial consideration what is known as "the *affective* or emotional aspect of mental life." Other dilemmas mentioned, but not discussed at length until the final chapter, deal with the shortage of psychiatrists necessary to rehabilitate those excused from punishment because

of mental disease and the fact that many members of the legal profession are distrustful of psychiatric thinking because of the relative newness of psychiatry as a science.

With the dilemmas laid bare, Professor Glueck proceeds to a consideration of what factors should, in modern society, be significant in formulating not only a workable, but also a psychiatrically oriented rule by which to allow juries or judges to evaluate the defense of irresponsibility for the commission of crime. These factors are well worth summarizing: (1) the test must be in terms familiar enough to be understood by jurymen, (2) it must be just, not subjecting to punishment one whose crime probably resulted from mental aberration, (3) it must be in harmony with modern psychiatric concepts yet flexible enough to encompass new discoveries, (4) it must allow the psychiatric expert witness to state his diagnosis in dogmatic "yes" or "no" terms, (6) it should not require the psychiatric expert to commit himself to a conclusion regarding the responsibility of the accused for the crime charged, and (7) it must be protective of society, not permitting dangerous persons to be at large in the community. Current tests—from *M'Naughten* to *Durham* and the A. L. I. rule—are measured against these factors and, of course, found wanting. However, the fact that current rules are found wanting by Professor Glueck does not mean, except possibly as to the *M'Naughten* rule, that they are condemned as utterly useless. The reader gains the definite impression that the *Durham* rule, for example, could be of significant value if the courts using it would take the initiative in defining, from case to case, the meaning and application of the terms, "product" and "mental disease."

One criticism of the *M'Naughten* rule will likely encourage some disagreement. Relative to his fifth criteria for a desirable test, Professor Glueck points out that often the psychiatric expert witness is limited to giving "yes" or "no" answers while testifying and that he is not permitted to explain his answers. Doubtless this is true in New York as shown in the example quoted from *People v. Horton*, 308 N. Y. 1, 20-21, 123 N. E. 2d 609 618-619 (1954). But the fact remains that many trial judges in other jurisdictions do permit the psychiatric expert to propound at length in qualifying his answers. And even where qualification is not permitted on cross-examination, there is

ample opportunity for it to be done on redirect. As a result many psychiatrists who have attempted to understand the judicial process are able, even when testifying under the *M'Naughten* rule, to escape the confines of merely cognitive values. Into their testimony they weave many considerations of "total personality," motive and causation and conclude, in terms acceptable to the law as well as psychiatry, that the accused did not know what he was doing. Perhaps the real trouble is not in any of the current expressions of the legal test for insanity but in the fact that many juries will not accept psychiatric testimony because they realize so much of it is based on self-serving declarations of the accused coupled with the genius that comes only from hindsight.

Notwithstanding, this is inherent in the dilemmas explained by Professor Glueck and his criticism serves well to focus attention on the fact that the problem is not merely one of formulating an acceptable test. Hand-in-glove with this task are two further considerations—the question of the procedure to be followed and the question of the quantum or quality of proof to be used before the question of irresponsibility is raised in the trial setting. While Professor Glueck is definitely not of the school that would abolish the jury in cases involving the defense of irresponsibility, he realizes the value of using neutral alienists both before and during trial. Massachusetts' Briggs Law calling for pre-trial examination by neutral psychiatrists is cited as one example of reducing the "battle of experts." The A. L. I.'s *Model Penal Code* is also cited as featuring pre-trial mental examination when notice is given that irresponsibility is to be a defense to criminal charges.

It is in his discussion of the *Durham* decision, to which an entire chapter is devoted, that Professor Glueck reveals the problems concerning the difficulties of producing evidence satisfactory to satisfy the requirement that the jury find the defendant was suffering from a "mental disease" at the time of the commission of the allegedly criminal act. "What . . . is 'mental disease' in the *Durham* formula?" he asks. "Does it include the more extreme and obvious psychoneuroses? Does it include the psychopathic or 'sociopathic' personality types?" While these questions are not given, and probably cannot be given, categoric answers, it is pointed out that the District of

Columbia Court is fulfilling its duty of refining the basic formula in the light of the exact problems presented case by case. Yet, even so, it becomes apparent that such a process can lead to confusion unless not only *Durham* but *M'Naughten* and the A. L. I. rules as well are coupled with a rule of evidence which will afford some boundary, some defined frame of reference, as guideposts for the jury. One cannot help coming to the conclusion that it is not entirely the responsibility of the law to formulate such a rule. Since it must of necessity entail much of the substance of psychiatric definition of mental disease, psychiatry as a science must come to agreement on basic tenets and assist lawyers, judges and legislators in framing such tenets in language meaningful to the triers of fact.

As to what quantum of evidence it takes to raise the question of irresponsibility, it is apparent that the law itself suffers from a great deal of variance. In the District of Columbia, for example, Glueck mentions that *some* evidence of insanity is all that it needed to rebut the presumption of sanity. It then becomes the burden of the prosecution to prove the defendant sane beyond a reasonable doubt. This, of course, is often a difficult burden to bear, and as Glueck demonstrates provides one of the major criticisms of the *Durham* case.

On the basis of his evaluation of the *Durham* rule, Professor Glueck formulates a rule of his own. In essence his rule has three facets: (1) if the accused is found to be suffering from mental disease of defect which impaired his powers of thinking, feeling, willing or self-integration and that such impairment *probably* made it impossible for him to understand or control the act with which he is charged as a normal person understands and controls his acts, he should be found *not guilty on the ground of insanity*; (2) if the accused is suffering from a mental disease or defect in the manner above, but it is *doubtful* that such impairment made it impossible for him to understand or control the act with which he is charged as the normal person understands and controls his acts, he should be found only *partially responsible*; (3) if the accused be found not to be suffering from mental disease or defect at the time of the crime, he should be found *guilty*.

It is considered advisable, also, for the judge to instruct the jury what corrections or punishments will be meted out to the

accused in the event of any one of the three findings. In the event of a finding of (1), the accused will be committed to a public mental hospital for supervision and treatment until such time as a court will find on the basis of the superintendent's certification that the accused is no longer dangerous. A finding under (2) will result in the accused's being committed to a public mental hospital until a court will find on the basis of certification by the superintendent that he is no longer criminally dangerous and then he will be transferred to the jurisdiction of correctional and paroling authorities. A finding under (3) will result in punishment as prescribed by law.

Readers may be tempted to jump to the conclusion that the Glueck formulation makes the assumption that because one has some sort of a mental disorder he is therefore criminally irresponsible. And if this is so, one of the most criticized features of the *Durham* rule is not cured. Yet, partially saving the Glueck formula from such criticism is the coupling of his rule with a rule of procedural evidence which calls for the accused to make an initial showing of mental illness by a preponderance of proof "(and therefore of probability)" (if the rule were adopted without its partial responsibility feature) before the prosecution would be deprived of the presumption of sanity. Yet the reader will, perhaps, have lingering doubts about the advisability of equating mental illness in general with irresponsibility for crime. Yet, as Glueck mentions, psychiatrists do recognize that not all personality variances from the norm are mental illnesses. The trouble may be that the psychiatrists have not convinced legislatures and the public of this knowledge.

However, to yield to the temptation of such criticism is to sell Professor Glueck very short. Actually, his suggestion for armistice between law and psychiatry is built on more lasting foundations than merely creating new legal tests for insanity on abstract, academic bases. His formulation is, rather, an inherent part of the realization that our methods of dealing with those who commit grave anti-social acts really accomplish only one result—that of punishment by society. There is little in prison life and administration that results in either deterrence or in rehabilitation. As Glueck, along with many others, has

demonstrated time and again, our system lends itself best to fostering recidivism.

The real problem, then, in resolving the conflict between law and society lies not merely in determining the best legal test by which to adjudge an accused responsible or not for a criminal act. More basic reforms are needed. Glueck suggests a clinic approach to those who have committed criminal acts and who have mental aberration involved in the commission of the act. But, at the same time, he is careful to document the fact that existing public mental institutions are not equipped for the job and that few psychiatrists have the training for such work. Further, as he so clearly and cogently suggests very little is actually known from an interdisciplinary viewpoint or from a basic research view of the causes of criminal motivation. The opportunities for research are practically without limit.

Although realizing that there is much to be done before existing systems are changed, Professor Glueck gives sincere reasons for great expectations. Perhaps the most important of the reasons, from the viewpoint of the lawyer, is the fact that law and psychiatry are coming to something of a friendly understanding. Many psychiatrists have convinced lawyers that their science has much to offer the law, and many lawyers have likewise convinced scientists not only of the desirability of the stability of law but also of the fact that sound improvement in law is much to be desired.

Law and Psychiatry: Cold War or Entente Cordiale, then, provides an important and most significant contribution to American Legal Literature. Its discussion of basic problems and dilemmas is sound and unbiased. Its suggestions for improvement are characterized by soundness of logic and complete evaluations of the relevant legal and social factors involved. Many law teachers will make it required reading for students of criminal law. All who read it will profit from its thorough understanding of the problems involved and its honest suggestions for answers to those problems.

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