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Law and Psychiatry: Cold War or Entente Cordiale? By Sheldon Glueck.

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LAW AND PSYCHIATRY: COLD WAR OR ENTENTE CORDIALE? By Sheldon Glueck; Baltimore: The Johns Hopkins Press, 1962. Pp. 181. \$4.95.

Early in 1962 Professor Sheldon Glueck was chosen as that year's recipient of the Isaac Ray Award and was asked, therefore, to deliver a series of lectures at Tulane University under the joint auspices of the Schools of Medicine and Law. The award is annually conferred upon one who, in the judgment of a committee of the American Psychiatric Association, is most worthy by reason of his contribution toward improved relations between law and psychiatry.¹

Law and Psychiatry: Cold War or Entente Cordiale? is an amplification of Professor Glueck's Tulane presentation, the lectures serving as a foundation for the book. The author begins with a chapter titled, *Dilemmas in the Partnership of Law and Psychiatry*, in which he outlines a number of the more important conflicts between the two disciplines. To the layman and to the average practitioner a casual reference to psychiatry in relation to the law creates at once the picture of a criminal trial in which the defense of insanity is pleaded. It is true that here the clash between the two professions is most vividly presented and, as the author points out, "the defense of insanity remains the fighting symbol of contrasting points of view" ((2) Glueck, 5).

Glueck directs himself first to some of the fundamental problems that underlie substantive Criminal Law and its implementation through the sentencing process, for example, the basic contrast between the concept of "freedom of will" on the one hand and of "determinism" on the other. He defines freedom of will as the "capacity creatively to initiate sequences or to break into casual chains by an effort of the will" ((3) Glueck, 6).

The author presents a trio of attitudes, each having an aspect of the truth; that of the jurist, the psychoanalyst, and the geneticist. The jurist, perhaps because of his training, involving as it does some reverence for such legal doctrines as "stare decisis," and perhaps, at least partially, because he is conditioned to attempt to thwart and punish for the criminal act rather than to understand the motivations of the actor, as a "free will" disciple, stresses the blameworthiness and culpability of the offender and holds him legally accountable; after all could he not have avoided carrying out the proscribed act? The psychoanalyst, or the analytically oriented psychiatrist, because of his training perhaps, tends to identify himself with the offender, and thus finds himself in something of a therapeutic role. His attitude approaches the deterministic. He emphasizes the influence of subconscious forces welling from the complex of the unconscious repository of the resultants of crucial experiences

1. The previous recipients and the books that have resulted from their lectures are: Overholser, W., *The Psychiatrist and the Law* (New York, Harcourt Brace & Co., 1953); Zilboorg, F., *The Psychology of the Criminal Act and Punishment* (New York, Harcourt Brace & Co., 1954); Biggs, J. Jr., *The Guilty Mind: Psychiatry and the Law of Homicide* (New York, Harcourt Brace & Co., 1954); Weihofen, H., *The Urge to Punish* (New York, Farrar, Straus & Cudahy, 1956); Roche, P. Q., *The Criminal Mind* (New York, Farrar, Straus & Cudahy, 1958); Guttmacher, M., *The Mind of the Murderer* (New York, Farrar, Straus & Cudahy, 1960); Bazelon, D., *Equal Justice for the Unequal* (mimeographed, 1961).

of early dependent childhood. Finally, the geneticist whose accent is upon those admittedly present, though, because modification is difficult if not impossible, often ignored, constitutional factors with which the individual is endowed, urges that attention be given to such sources of behavior.

The author asks, "Can these apparently contradictory truths be reasonably accommodated?" (Glueck, 7) and expresses the belief that an affirmative answer is possible. With the definition of freedom of will as the individual's "particular capacity for conscious, purposive, controlled action when confronted with a series of alternatives," it is clear that specific individuals vary "in their capacity to make necessary choices and to manage the manipulation of means to achieve ends with reference to the prohibitions of the penal code" (Glueck, 12). Within a sample of human beings there is a spectrum of variance in the capacity to make a free choice just as in other respects and in other human qualities there are variances. Man's choice is both free and determined, and viewed as a distinct individual, a particular man's ability either to exercise free choice or to have his conduct determined and involuntarily controlled may vary, the strength or weakness of his freedom of choice depending upon the character of that specific individual's constitutional endowment, chance influences to which he has been subjected and socio-cultural impacts of his earlier years of life. Professor Glueck feels that those who adhere to a strict deterministic view "are confusing cause-and-effect linkage once a train has been initiated, with capacity to intervene at the outset and at various stages in initiating or modifying a causative sequence" (Glueck, 15). A psychiatrist who takes this position, he believes, is "behind the times."

In regard to holding one accountable for his conduct, the law has sought to take into consideration the extent to which his mental condition has interfered with his capacity for freedom of choice. The law's concern with the deterrence of others while at the same time treating the mentally incapacitated with a measure of humanitarianism has resulted in "tests" of responsibility. These tests, Professor Glueck points out, are founded upon the extent to which the offender's mental aberration has interfered with standard capacity for freedom of choice and simply deal with the initial question of guilt or innocence. Environmental interferences are given but little weight at this point in a criminal proceeding but may, or should be, of importance when the question of sentencing or disposition of the offender is faced.

A further dilemma is found in the fact that while the jury is confronted with the all or nothing choice of guilty or not guilty, yet for its guidance it is presented with a "test" involving a question of degree. Each test contains this problem. Even *M'Naghten*,² in whose support its adherents argue clarity and a lack of ambiguity, contains such phrases as "*sufficient* degree of reason," "it must be *clearly* proved," "labouring under *such* a defect of reason, from disease of the mind" and "a *sufficient* degree of reason." As a possible solution

2. Daniel M'Naghten's Case, House of Lords (1843).

of this difficulty Glueck suggests that use of an intermediate verdict, a finding of "partial" or "diminished" or "attenuated" responsibility. Thus the jury may be permitted a choice "involving recognition of the admixture of some blame-worthiness and some ground for exculpation" as in the case of a mental abnormality not so extreme as to leave no doubt of its presence or not so readily recognizable as a frank psychotic state. There is little difficulty in distinguishing a raving madman from a man of sound understanding; but between the extremes, there is every degree of intellect and every degree of mental capacity. Lomeour has said, there is no mistaking midnight for noon, but at what precise moment does twilight become darkness?

In the absence of some such intermediate position, the author strongly and, this reviewer agrees, properly condemns the "law's sharp distinction between the wholly responsible and wholly irresponsible." Such all or nothing alternatives are "unjust, unrealistic, and contrary to modern psychiatric assessments of mental pathology and behavioral capacity" (Glueck, 29). The author briefly indicates additional points of contact and of conflict between law and psychiatry. For example, he points out the failure of the law to take into account *motive* save in those relatively few instances where motive is specifically in issue such as a homicide perpetrated in self-defense. In its disregard, the law has ignored one of the essential aspects of mental life, viz., the emotional or *affective* aspect. The prevailing tests of responsibility, *M'Naghten*, A.L.I., the *Curren*³ rule, fail to take into account the idea that the mind is a totally integrated mechanism, that mental processes function in relation to one another so that any disorder of the intellectual, volitional or emotional aspect of the mind, as the case may be, cannot be present without affecting the personality as a whole and conduct flowing from the personality. This proposition is a reiteration of the author's earlier comment in 1925 in *Mental Disorder and the Criminal Law*.

Throughout his primary lecture the author repeatedly emphasizes a fundamental difficulty: the responsibility of the mentally ill for offensive conduct should not be considered a question calling for an all or nothing answer any more than there is only full mental health or total mental illness.

In his second chapter, titled *From M'Naghten to Durham*, Professor Glueck discusses the prevailing tests of irresponsibility used when insanity is introduced as a defense in a criminal action. He begins by outlining the desired elements of an ideal test and then proceeds to indicate in what manner and to what extent the current tests have met or failed to meet those requirements. He devotes considerable time to *M'Naghten*, pointedly showing that its so-called verbal exactitude is illusory and that it considers only one of the several aspects of the total personality, viz., intellectual capacity. He condemns *M'Naghten* with the paragraph, "Not only is the famous test vague and uncertain, and not only does it embalm out, worn medical notions, but even from the point of view of

3. *United States v. Curren*, 290 F.2d 751 (3d Cir. 1961).

assumedly separate, insulated mental functions it is also too narrow a measure of irresponsibility. It does not take into account those disorders that manifest themselves largely in disturbances of the impulsive and affective aspects of mental life" (Glueck, 48).

In regard to the test of irresponsibility which enlarges upon *M'Naghten* by engrafting this "irresistible impulse," Glueck apparently feels that though the scope of exculpation is somewhat widened thereby, yet, and certainly from the psychiatric point of view, the measure of irresponsibility is still inadequate. Again the author emphasizes a point which, in fact, he urges throughout the book; that the law should recognize in any test of irresponsibility "the interrelation of mental processes in disease as well as in health and the fact that expression of an illness most strikingly in some cognitive, volitional-impulsive, or affective symptom is but a diagnostic revelation of a *permeative* disturbance of the total personality and of the conduct flowing from such a shaken organism" (Glueck, 60). Professor Glueck characterizes the proposal of the American Law Institute in its *Model Penal Code*: "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirement of law,"⁴ as merely an apparent rewording, in more sophisticated language, of the *M'Naghten* and irresistible impulse rules.

The author's objection to the Biggs formulation in the *Currens* case⁵ rests upon the fact that in the *Currens* formula all reference to cognition is omitted. This indeed is similar to the usual objection to *M'Naghten* in that therein it is *only* cognition that is given weight as a measure of responsibility.

In this chapter Professor Glueck also discusses procedural changes as well, for example, the provision in the American Law Institute's *Model Penal Code* providing for a court appointed psychiatrist in cases where insanity is pleaded as a defense.⁶ The author contends that this should "reduce bias and tend to counteract the objectionable 'battle of experts'" (Glueck, 75). It is, of course, to be hoped that such a desirable result would obtain. However, it is conceivable that such a plan might perhaps create evils similar to those it was designed to abolish. One might suggest that if the case be one where difference of opinion exists within the medical profession itself, as where there are two schools of medical thought, this divergence may be reflected by the experts called by the opposing parties. Under such circumstances, to the public as well as to the jury the expert witness who dares to disagree with the gospel of the court-sponsored prophet may likely appear as a charlatan and the counsel of the party employing him as a shyster espousing an unfounded cause. Furthermore, it may be argued, the jury is not psychologically free to determine the "truth" or "falsity" of the conflicting opinions.

4. Model Penal Code § 4.01(1) (Prop. Official Draft 1962).

5. United States v. Currens, *supra* note 3, at 775.

6. Model Penal Code § 4.05(1) (Prop. Official Draft 1962).

Professor Glueck in his third chapter, *Durham and Beyond*, considers in depth the provocative *Durham* case⁷ and points out the implications of the adoption of its rule. Primarily it would effect a widening of the area of mental illness in relation to irresponsibility. Furthermore, by extending the scope of mental illness related to nonresponsible behavior there would result a greater freedom for the psychiatric expert in presenting his assessment of the offender to the jury. Also, the rule, it is claimed, would return to the jury its traditional function of making moral judgments, and would not assign to the psychiatric witness such an unaccustomed, inappropriate and unwanted burden.

On its face, the *Durham* decision appears to resolve the principal dilemmas which have troubled those who profess interest in this confused area of forensic psychiatry. Why, then, Glueck asks, has not *Durham's* solution of the vexing problem of irresponsibility been generally adopted? The author lists several objections that have been advanced. Among these, perhaps the most frequently stated is that the *Durham* formulation leaves the jury without adequate guidance. One could infer that conversely *M'Naghten* provided for the jury a crystal clear road and well-illuminated guideposts. Glueck shows that this is simply not true. *M'Naghten's* terms, "mental disease," "nature," "quality," "knowledge," "right," "wrong" have all been subjected to varied interpretations. In fact, the *M'Naghten* formula, by far the most widely adopted, is so vague and uncertain that reasonable predictability is unlikely.

Another objection often encountered is that the "product test" of *Durham* has no real meaning. What is the required causal relation between the act of the offender and his mental condition? Do we have here an application of the "but for" concept, do we depend upon the idea of "substantial factor"? Admittedly this is a troublesome question. However, Glueck apparently feels that the court in the *Carter* case⁸ has sufficiently resolved the problem by defining "product" to mean that "the disease made the effective or decisive difference between doing and not doing the act."⁹

A third objection, noted by the author, is that *Durham* may, it is feared, exculpate all criminals, freeing them from the prospect of penal incarceration but relegating them to mental institutions. The author believes that this is not necessarily true and that, at least, judging from early statistics, the feared result has not occurred.

Some jurisdictions, it is pointed out, have rejected *Durham* on the ground that it would tend to make the psychiatric expert's judgment conclusive. The *Carter* case, the author believes, provides an adequate rebuttal to this contention. The medical expert is confined to a determination that the accused did or did not suffer from a medically recognized illness at the time of his act; it is within the province of the trier of facts to "draw a reasonable inference that

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

8. *Carter v. United States*, 252 F.2d 608, 616-17 (D.C. Cir. 1957).

9. *Id.* at 617.

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the accused would not have committed that act he did commit if he had not been diseased as he was."¹⁰

To the often raised objection that there are not enough psychiatrists or psychiatric facilities to care for all those the opponents of *Durham* expect to be exonerated, Professor Glueck makes the point that this, at the most, might be a reason for postponement but not a rejection of *Durham* in principle.

As to a final and quite common argument against *Durham*, that it weakens the deterrent influence of punishment, Glueck remarks that in his opinion the deterrent effect of the criminal law, especially in capital cases has been grossly overestimated, and that effective protection of the public comes not so much from one or another test of responsibility as it does from the "existence of efficient and fair police, courts, correctional, therapeutic and rehabilitative agencies" (Glueck, 103).

At this point in his work Professor Glueck hazards to suggest a test that he believes to be more in harmony with advancing psychiatric knowledge than any of the prevailing formulations, *M'Naghten*, *M'Naghten* with "irresistible impulse" added, the American Law Institute's suggestion, or the *Curren's* decision. He puts it in terms of instructions to the jury. The proposed instructions read:

If you are convinced that the defendant, at the time of the crime, was suffering from mental disease or 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 he is charged with as the ordinary, normal person understands and controls his acts; you should find him *Not guilty on the ground of insanity*.

If you are convinced that the defendant, at the time of the crime, was suffering from mental disease or defect which impaired his powers of thinking, feeling, willing or self-integration, *but you doubt* whether such impairment probably made it impossible for him to understand or control the act he is charged with as the ordinary, normal person understands and controls his act, you should find him only *Partially responsible*.

If you are convinced that the defendant was *not* suffering from mental disease or defect at the time of the crime, you should find him *Guilty* (Glueck, 105-106).

It is the author's belief that it would be desirable to inform the jury of the consequences of its verdict, be it "Not guilty on the ground of insanity," "Partially responsible" or "Guilty," and he suggests a further instruction to be given the jury for that purpose.

The test the author proposes has indeed a number of advantages over any of the prevailing formulas. It is concerned with the total personality of the offender, the intellectual, volitional and emotional spheres of impairment, whereas all but the intellectual had been omitted in the *M'Naghten* test. It

10. Carter v. United States, *supra* note 8, at 617.

takes into account the causal relation and the links thereof, whereas the latter are ignored in the *Durham* rule. It is more comprehensive as to relevant symptomatic and behavioral content than the American Law Institute's suggestion. It provides the omissions of the *Currens* formulation. In addition it allows full freedom to the psychiatric expert and does not compel him to render moral judgments. Indeed, the author's proposal presents to the jury a usable measure whereby it can assess the accused in the light of its everyday experience with ordinary persons of reasonably normal behavior.

The introduction of a verdict of "partially responsible" is the most interesting and, it seems to the reviewer, important element of Professor Glueck's suggestion. Such a device makes it possible to provide treatment, correction and render therapeutic aid to one who is admittedly mentally ill though the fact-finder has not been convinced that the mental illness actually brought about the offender's criminal behavior. The author states, "I am of the conviction that it is morally wrong and distasteful to hold to full blame, stigma and punishment one who is mentally ill even though . . . it cannot be clearly established that his illness brought about the crime" (Glueck, 111).

In addition, a mid-verdict of *partial* responsibility would be likely to lessen the quite heavy burden placed upon the prosecution in those jurisdictions where the defendant's introduction of "sufficient evidence of insanity to raise a reasonable doubt" is effective to shift the burden of proving sanity to the prosecution. This, of course, would be even more true where the initial presumption of sanity is rebutted by "some evidence" of insanity or, as in some jurisdictions, simply a mere "scintilla."

Professor Glueck's last lecture, titled, *Wider Horizons for Law and Psychiatry*, is in many respects the most far-seeing or, at least, far-reaching of all. He is convinced that the result of present day routine penal administration is more likely to lead to recidivism than to reform. The prime aim of criminal law should, he thinks, be reformation through therapy, the other objectives, such as deterrence, for example, though not to be ignored, should be subsidiary. "Dynamic psychiatry offers the greatest promise of any single discipline for discovery of the complex causes and motivations . . . of maladjustment and for developing effective prophylactic and therapeutic techniques. For the psychiatric approach necessarily deals with the blended *interplay* of the forces of nature and nurture, instead of grossly overemphasizing innate predisposition, on the one hand, or external environment and general cultural influences, on the other" (Glueck, 158).

The author discusses the role of court clinics whereby pre-trial evaluation may reduce unnecessary prosecutions of the mentally ill and such a unit's further important function in assisting the judge in the sentencing and disposition of the offender.

Professor Glueck proposes that the work of the criminal court cease with a finding of guilt or innocence. Thereafter, a professional treatment tribunal

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should take charge to determine the appropriate therapeutic and correctional plan. Such a type of program, now in operation in California,¹¹ is described by the author (Glueck, 154 et seq.).

Those objectors to reform in general and to a psychiatrically oriented program in particular have argued that, not only is psychiatry an undeveloped art but that there is a critical shortage of psychiatric personnel and that such a program as Glueck suggests is not, therefore feasible. One must confess that the criticism has some merit. However, Glueck queries, "are courts justified in holding back legal reform because so much needs to be done to reform the psychiatric implementation of the law?" (Glueck, 160). The author is obviously not one to hesitate but would go forward with the hope and belief that this perhaps would stimulate action in related areas.

As to increased psychiatric facilities and personnel, Professor Glueck cites *Action for Mental Health*,¹² a report of the Joint Commission on Mental Illness and Health,¹³ in support of his belief that auxiliary and sub-professional psychiatric personnel should be enlisted to fill the need for fully accredited professionals. Furthermore, he urges that those related disciplines, law for example, should in their educational programs include a study of "those areas dealing with problems of persons and human relations in addition to their heavy emphasis on problems of property"¹⁴ (Glueck, 167). Theory of personality development, behavior problems of childhood and adolescence, psychology of motivation, clinical problems of psychiatry, these and more should be available for study for those who do now or will in the future administrate justice.

Professor Glueck concludes with the somewhat hopeful, though restrained, expression of belief that the cold war between the legal and psychiatric professions is coming to a close.

With the steady improvement of psychiatric research and insight, we may expect psychiatric testimony to be more cautious and illuminative. With the steady expansion of legal learning influenced by paralegal disciplines, we may expect a less mechanical jurisprudence to be reflected in judicial decisions I think it can be said with a fair amount of accuracy that there has been a considerable thaw in the cold war and that the practitioners of the ancient arts of medicine and law are at long last approaching a sympathetic and realistic understanding. And this, I think gives promise of ripening in the not too distant future into an *entente cordiale* (Glueck, 174).

This short work is, in the view of this reviewer, an outstanding contribution to the law-psychiatry field. The psychiatry-law area, a confused and often bitter battleground to say the least, has been for a good many years the source of an immense flood of writing, chiefly of the "chip on the shoulder" type. There

11. Cal. Penal Code § 5057.

12. New York, Basic Books, 1961.

13. Appointed by virtue of P.L. 182, 84th Cong., 1st Sess. Chap. 417, H.R. 256.

14. It should be noted that an increasing number of law schools have become aware of this need: Harvard, Yale, Michigan, Univ. of Maryland, Temple, etc.

have been many defensive contributions in support of an individual psychiatric or legal position. Here, however, Professor Glueck has not adopted the adversary role but with remarkable insight and restraint presents ideas founded upon a deep understanding of the tenets of both professions and an appreciation of the difficulties resulting from their disparate aims.

This is a book that the lawyer, the student of law, the psychiatrist, the psychologist, the individual interested in the many aspects of the behavioral field would do well to read. And to read again.

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