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Beyond Psychiatric Expertise (by Ben Bursten, M.D.)

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BOOK REVIEW

BEYOND PSYCHIATRIC EXPERTISE. By Ben Bursten, M.D. Illinois: Charles C. Thomas. 1984. Pp. v, 256.

“Mental illness”¹ is an important concept in the law. In a criminal proceeding, an adjudication of mental illness is used to exculpate an accused who might otherwise be adjudged guilty of a crime, and to relieve him from the imposition of a criminal sanction² (though, of course, this person may be involuntarily confined for the purpose of administering ‘treatment’). In a civil proceeding, ironically, an adjudication of mental illness is most often used as a basis for *depriving* a person of what would otherwise be a constitutional or legal right, on the grounds that the person was not competent to choose freely.³ Thus, “mental illness” is a concept which the law uses both to expand and to contract a person’s rights and is, therefore, a concept which deserves to be analyzed clearly and applied carefully.

Anglo-American criminal law has, at different times, considered various legal standards for determining whether a criminally accused ought to be excused from criminal responsibility on the grounds that he is mentally ill or insane.⁴ Dr. Bursten’s admirable book concerns problems generated by the application of the familiar “Durham

1. [T]here is no satisfactory definition that specifies precise boundaries for the concept “mental disorder” . . . [Nevertheless,] each of the mental disorders is conceptualized as a clinically significant behavioral or psychological syndrome or pattern that occurs in an individual and that is typically associated with either a painful symptom (distress) or impairment in one or more important areas of functioning (disability). In addition, there is an inference that there is a behavioral, psychological, or biological dysfunction, and that the disturbance is not only in the relationship between the individual and society. (When the disturbance is *limited* to a conflict between an individual and society, this may represent social deviance, which may or may not be commendable, but is not by itself a mental disorder.)

DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 5-6 (3d ed. 1980) [hereinafter cited as DSM III].

2. See, e.g., W. LAFAVE & A. SCOTT, CRIMINAL LAW § 37, at 283 (1982). “[A] verdict of not guilty by reason of insanity [is required] if it is found that the defendant had a mental disease which kept him from controlling his conduct.” *Id.* [hereinafter cited as LAFAVE & SCOTT].

3. See, e.g., N.Y. MENTAL HYG. LAW § 78.01 (McKinney Supp. 1984-85).

4. Here the terms “mentally ill” and “insane” shall be used interchangeably.

rule.”⁵ Bursten explains that, under the Durham rule, a criminally accused must be found not guilty by reason of insanity if his unlawful act was the product of mental illness.⁶ As Bursten conceives it, the application of this standard requires a two-stage analysis. First, one must determine whether the accused is suffering from mental illness.⁷ Second, one must conduct what Bursten considers a separate and independent inquiry as to whether the alleged unlawful act was a *product* of the mental illness.⁸

How do we determine whether a criminally accused, or anyone else, is suffering from a mental illness? How is the concept of “mental illness” to be analyzed? First and foremost, the behavior of a mentally ill person deviates from what is expected, or what is considered normal. However, people who are not mentally ill also behave in odd, unexpected, or deviant ways. Both psychiatry and the law assume that a particular bit of behavior alone is not sufficient evidence of whether a person is or is not mentally ill. A person who is alleged to have performed some particularly brutal, depraved, or irrational illegal act is not presumed to be insane. On the contrary, his action is taken only as grounds for suspicion that he may be mentally ill and as a reason for appointing a psychiatrist to conduct further examination. Therefore, anyone who defends the view that the concept of “mental illness” has some clear meaning must provide some further criteria for distinguishing a person who is odd, brutal, or irrational, but sane, from a person who is mentally ill.

Bursten does not minimize these problems. He presents interesting case studies and examples⁹ which illustrate various dilemmas confronted by the practising psychiatrist who must decide whether a patient’s behavior is or is not a sign of mental illness. Is a patient who refuses medical or other assistance sick or merely unwise? What about a decedent who leaves a fortune to a pet cat, ignoring the more usual objects of his bounty? Is a patient who reports debilitating stress sick or merely lazy? Or is the patient perhaps attempting to gain the sympathy of the therapist? Is he sick or manipulative? Is

5. See *Durham v. United States*, 214 F.2d 862, 874-75 (D.C. Cir. 1954). See also LAFAYE & SCOTT, *supra* note 2, § 38, at 286. (“[A]n accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect.”).

6. B. BURSTEN, M.D., *BEYOND PSYCHIATRIC EXPERTISE* 4-5 (1984) [hereinafter cited as BURSTEN].

7. *Id.* at 23.

8. *Id.* at 45. See LAFAYE & SCOTT, *supra* note 2, at 286. “[A]n act is a ‘product’ of mental disease or defect if the defendant would not have committed the act but for the disease or defect” *Id.*

9. BURSTEN, *supra* note 6, at 7-22.

a patient who is annoying, disruptive, or cantankerous sick, or merely unpleasant? Is a person who is unable to function normally and adapt to the demands of life sick, or does he merely lack experience in coping with the normal rigors of life? Does he require psychiatric treatment, or merely guidance and counseling?

Bursten presents other dilemmas suggesting even deeper issues. The very perception of a person's behavior as abnormal or undesirable already presupposes a normative judgment. Bursten reports a "mild illness" recognized by Soviet psychiatry called "sluggish schizophrenia." It is characterized by "withdrawal of interest, rejection of traditions, pessimism, and reformism," and victims of this "illness" tend to be "critical of the government."¹⁰ Is this person's behavior sick or praiseworthy? We must beware of the misuse of psychiatry to stigmatize a person as mentally ill when all we mean is that we disagree with his beliefs and attitudes or disapprove of his behavior.

Bursten approaches the problem of defining *mental* illness by offering an analysis, culled from the work of several scholars, of the *general* concept of illness. This analysis has important implications for the law in both civil and criminal contexts. First, there must be a "cluster" of "undesirable" characteristics which "takes a natural course," and, "there is presumed to be a rational explanation for this course in terms of antecedents and outcome."¹¹ Further, "[t]his cluster has a predominantly biological process as its focus . . . a predominantly individual rather than social focus . . . [and] [t]his cluster is beyond the individual's control; he or she cannot choose to change the characteristics by will power."¹² Bursten's second chapter is devoted to an analysis and clarification of this definition. The problem with Bursten's approach is that it begs the crucial question of whether *mental* illness is just a special case of the general notion of illness, capable of being explained in the same way as illness generally, or indeed, whether mental illness is a concept which may be clearly explicated at all.

There are good reasons for suggesting that "mental illness" is a very different sort of concept from "physical illness" and, further, that the false analogy between the two concepts has been responsible for profound and systematic confusions both in medicine and the law. The crucial point, widely overlooked in discussions of mental illness, is that the relationship between the symptom of a disease and

10. *Id.* at 7-8.

11. *Id.* at 27-28.

12. *Id.* at 28.

the disease itself is essentially different when one is speaking of mental rather than physical illness. Oversimplified, the point is this: in the case of physical illness, the cluster of characteristics associated with the disease is a sign or symptom of the disease; the disease itself is some physical state which may be specified and defined according to some physical criteria which are distinct from the behavioral signs or symptoms of the disease. In the case of mental illness, or at least some mental illness, there is no equivalent distinction between symptom and disease; the observed cluster of behavioral characteristics *is* the disease.

In the case of a physical disease, the observable behavioral characteristics provide evidence for a causal inference as to the actual nature of the disease. This inference may be confirmed or disconfirmed by some independent test or observation disclosing the existence of some unwanted physical or biochemical condition; for example, the presence of a bacterium or virus, or the obstruction of some physiological function. By contrast, most mental illnesses are *defined* by the presence of behavioral characteristics.¹³ There is no further test or experiment by which the existence of mental illness can be confirmed or disconfirmed. With physical illness, there is a distinction between the symptoms and the illness; with mental illness, there is not. For example, Bursten describes schizophrenics as follows: “their thinking is distorted, they cannot integrate their feelings with their actual situation, and they behave oddly.”¹⁴ There is, for most “mental illnesses,” no further experiment or test by which the physician can confirm or disconfirm the hypothesis, formulated on the basis of his observation of external behavioral characteristics, that the

13. See DSM III, *supra* note 1, at 7.

DSM III . . . attempts to describe comprehensively what the manifestations of the mental disorders are, and only rarely attempts to account for *how* the disturbances come about . . . This approach can be said to be “descriptive” in that the definitions of the disorders generally consist of descriptions of the clinical features of the disorders.

Id. (emphasis in original). Some examples of disorders defined by behavioral characteristics are as follows: Schizotypal Personality Disorder (“various oddities of thought, perception, speech, and behavior not severe enough to meet the criteria for schizophrenia”), *id.* at 312; Cyclothymic Disorder (“chronic mood disturbance of at least two years’ duration, involving numerous periods of depressions and hypomania, but not of sufficient severity and duration to meet the criteria for a major depressive or manic episode”), *id.* at 218; and Antisocial Personality Disorder (“a history of continuous and chronic antisocial behavior in which the rights of others are violated, persistence into adult life of a pattern of antisocial behavior that began before the age of 15, and failure to sustain good job performance over a period of several years”), *id.* at 317-18.

14. BURSTEN, *supra* note 6, at 29.

illness is present. All he can do is to predict further behavioral responses to particular situations.

Hence, there is, for most mental illnesses, no distinction between the treatment of the disease and the mere suppression of symptoms. To treat the mental "disease" is to simply take actions designed to alter the patient's behavioral responses in a manner desired by the therapist, by society, and perhaps by the patient himself. By contrast, with physical disease, that distinction is essential; it marks the difference between "curing" the disease, and merely "controlling" or "managing" it.

I have hedged throughout by referring to "most" mental illnesses. My point is that, as Bursten reports, there is inconclusive evidence that some conditions which we refer to as mental illnesses in fact have a physical or biochemical basis.¹⁵ If this proves to be the case for some or all "mental illnesses," the consequence will be that there is no important distinction between physical and mental illnesses. As long as there is a distinction between symptom and disease, then it is possible to treat the disease by exerting influence upon the physical and biochemical states which constitute it.

An essential component of an adequate analysis of the concept of "illness," overlooked by Bursten is that to identify an illness, a distinction must be made between the symptoms of the illness and the illness itself, and that the facts constituting the illness must be independently verifiable without reference to the facts characterizing the symptoms. The definitions of illness given by Bursten do not provide the necessary criteria whereby the presence of a mental illness may be verified independently of the cluster of behavioral characteristics associated with the "illness."¹⁶ Unless such criteria can be given, there literally is no such thing as mental illness in any sense analogous to the concept of physical illness.

If these conclusions are accurate, they have not merely abstract and analytical importance, but enormous practical value as well. The law often justifies treating two people differently on the grounds that one is mentally ill. But if there is no such objectively identifiable condition as "mental illness," independent of a cluster of behavioral characteristics, this justification fails. The law must then acknowledge that it treats some people different solely because it disapproves of their behavior, and that it believes that there are sufficient reasons

15. *See id.* at 35-36.

16. BURSTEN, *supra* note 6, at 26-28. Bursten identifies six criteria to consider in assessing "illness." *See supra* text accompanying notes 10, 11.

to use the power of the state to deprive these people of rights which they would normally be accorded.

I do not suggest that the law is always unjustified in treating a person differently based upon his behavior. I do not deny the obvious: that there are people who are “crazy” in an informal sense which relates to elements of their behavior; that there are people who behave irrationally, and, indeed, who behave in a systematically and predictably irrational manner; and that such systematic behavior may be explained in terms of the person’s experience and life history. There are people whose behavior constitutes a danger to themselves and to others, and people whose behavior deprives others of their rights and confounds their reasonable expectations. It may sometimes be humane and desirable for the law to intervene to protect the rights and expectations of others, even if this means depriving one person of what would normally be his liberty. But if I am right as to the essential disanalogy between physical and mental illness, the law is deluded when it imagines that the justification for depriving a person of his liberty is that he is in an objectively verifiable condition known as “mental illness.” This finding is based upon a conceptual confusion and is a smokescreen for what the law actually does, which is to conclude directly that the person’s liberty must be interfered with because his behavior is objectionable and undesirable.

Having offered and defended an analysis of the concept of “mental illness,” one which I have found necessary to reject, Bursten goes on to consider the second major issue posed by the Durham test, that is, how to determine whether an alleged unlawful act was a product of mental illness.¹⁷ Bursten points out that the formulation of the Durham test makes it possible for a criminally accused person to be labelled insane and still be convicted; for an accused to be adjudged not guilty by reason of insanity, he must not only be found insane, but further, the criminal act of which he is accused must be a *product* of his mental illness. Bursten argues that we must distinguish between a person who is wholly mentally ill and a person who is only partially mentally ill.¹⁸ The distinction is important because Bursten believes that when a person is “wholly” mentally ill, all of his actions are a product of his illness, whereas, when a person is partially mentally ill, some of his actions are a product of the “healthy aspect,” and some of the “sick aspect.”¹⁹

17. BURSTEN, *Supra* note 6, at 45. See *supra* note 8 for a definition of “product.”

18. BURSTEN, *supra* note 6, at 49.

19. *Id.* at 50.

The metaphorical notions of “parts” or “aspects” of a mind or psyche are greatly in need of analysis, and Bursten is less helpful than he might be. He attempts to explain his concept of an “unhealthy part” by distinguishing among cognitive, emotive and impulsive dysfunctions. A person may have a deficiency or disturbance in “information processing” in some areas.²⁰ An emotion may be so “strong” as to amount to partial mental illness.²¹ Or a person may be subject to “urge mechanisms” which may amount to partial mental illness, though these impulses are not definable as either cognitive or emotive processes.²²

Even accepting Bursten’s account of healthy and unhealthy parts of a psyche, the fundamental question remains: “[H]ow is a specific behavior allocated between the sick and the healthy parts?”²³ Bursten’s answer opens a Pandora’s box of philosophical and legal problems. When a decision is made in the context of a healthy function, “the choosing mechanism is not impaired by the context. If the behavior was influenced by the sick part, it was caused in a deterministic sense because impairment of the choosing mechanism and cause and effect are criteria by which sick clusters of mental characteristics have been defined.”²⁴ This answer presupposes, as Bursten acknowledges, a libertarian answer to the question of human free will, that is, human beings choose actions freely in the sense that the actor could have acted differently had he so chosen. But, if an action belongs to the “cluster of characteristics” which partially define the mental illness, then it follows by definition that this action is not freely chosen and the actor could not have chosen differently.

One interesting legal implication of Bursten’s analysis is that the “product of mental illness” standard for exculpating a criminally ac-

20. *Id.* at 51. Some of the problems of cognition include: “[d]elusions (false beliefs), hallucinations, defects in memory, problems in orientation (appreciation of time, place, person and situation), inability to concentrate or to calculate, and difficulty in employing syllogistic reasoning or in slowing down one’s racing thoughts.” *Id.*

21. *Id.* at 53. “While behavior can be termed healthy when it occurs in the context of a variety of emotions, there are certain situations in which the emotional coloring is called an illness.” *Id.* For example, the emotional state of a suicidal patient may be considered “partial mental illness.” *Id.*

22. *Id.* For example, kleptomania may be considered “a specific deficit in the urge mechanism.” *Id.* at 54. Many sex offenders have similar impulsive reactions. On the other hand, manic individuals, while having a similar problem, have cognitive and broader emotional problems. The difference is one of degree rather than quality. “There is no scientific way to determine the point of which the urge mechanisms have been set so high that the ability to choose is compromised.” *Id.*

23. *Id.* at 55.

24. *Id.*

cused is either equivalent to, or includes within its meaning, the “irresistible impulse” standard.²⁵ Bursten’s analysis of the term “product” amounts to the claim that an action is a product of mental illness only if the actor could not have chosen otherwise. Though Bursten is not entirely clear about this, it appears that he thinks that the converse implication is also true. He apparently maintains that for every action where the actor could not have chosen otherwise, excluding cases of physical coercion, it follows that the person is at least partially mental ill. And it is precisely the meaning of the “irresistible impulse” standard that the actor’s will was overridden, perhaps temporarily, such that he was unable to choose differently.

The major problem with Bursten’s “product” analysis is logical and philosophical. A person’s action is a product of mental illness only if he could not have chosen otherwise. But, according to Bursten, a person’s ability to choose freely is overridden only if he is mentally ill. Therefore, in order to determine whether an action is a product of mental illness and to avoid reasoning in a circle, one of two conditions must be met. Either we require some independent criterion or evidence for determining whether the person could have chosen differently, independent of the presence or absence of mental illness, or we require an analysis of “mental illness” independent of the free-choice criterion. If neither of these two conditions are met, then Bursten is committed to a logical absurdity. We decide whether a person could have chosen otherwise by determining whether he is mentally ill, but in order to know whether he is mentally ill, we must know whether he suffers from a cluster of behavioral characteristics over which he has no control, that is, we must know whether he could have chosen differently.

This dilemma is crushing to Bursten. He has not given an analysis of “mental illness” independent of the condition that there be a cluster of behavioral characteristics which the person cannot choose to change.²⁶ Nor can he provide such an analysis without destroying the analogy between physical and mental illness which is so central to his review of the concept. On the other hand, it is difficult to imagine what would constitute evidence as to whether or not a person was free to choose otherwise. Clearly, we cannot conduct an experiment where we place the subject in exactly the same situation repeatedly and observe whether he ever chooses differently. Even if

25. See LAFAVE & SCOTT, *supra* note 2, at 284-86.

26. For a discussion of Bursten’s criteria for identifying “mental illness,” see *supra* text accompanying notes 10, 11.

this were possible, and the subject repeatedly made the same choice, it would not confirm the universal claim that the person could not have chosen differently. Can we validly infer from a person's behavior, or from some other observable facts, conclusions about his freedom to choose otherwise? Bursten would have to answer this question to rescue his product of mental illness analysis from circularity.

In fact, Bursten's conclusion that we sometimes know that a person is unable to choose otherwise than he did is sorely lacking in evidence. The only "evidence" supporting this conclusion is that many people find themselves in a situation where they have an intense emotional reaction and a strong motive to react with a violent or criminal action. Most people in this circumstance do not react violently or criminally, but on occasion some do. People sometimes feel an intense compulsion to commit a violent or criminal act, but there is no evidence that this subjective feeling is necessarily more intense or different in nature in those people who do react violently from those who do not. Until evidence has been produced in support of the hypothesis that an actor is sometimes unable to choose differently than he does, this claim must be regarded as unworthy of belief.

Bursten makes several puzzling claims and admissions with respect to the arguments by which he defends his central conclusions, including admissions from which the title of the book is derived. He admits that his analysis of mental illness presupposes a libertarian theory of free will; "only if the libertarian stance is adopted is there even hope to distinguish between mental illness and nonillness."²⁷ Yet he also states that "[w]hether a libertarian position is adopted is a matter of policy, not fact."²⁸ He acknowledges that "in equivocal cases, the decision to call a cluster of mental characteristics mental illness is a matter of policy,"²⁹ but one must conclude from the above argument that the very distinction between mental illness and health, even in non-ambiguous cases, is ultimately based upon an assumption of policy. Later in the book, Bursten appears to shift his ground somewhat when he states categorically that "[t]he position taken in this book is that the decision of whether behavior is a *product of mental illness* is not a matter of scientific expertise but a matter of social policy."³⁰ If this is his view, I completely agree.

27. BURSTEN, *supra* note 6, at 40.

28. *Id.* at 43.

29. *Id.*

30. *Id.* at 167 (emphasis in original).

Therefore, we must consider who, in a legal proceeding, should decide whether or not a person is mentally ill. Since “mental illness” is first a psychiatric concept, it would seem reasonable for the law to defer to the professional psychiatrist in deciding who is to be judged insane. As we have seen, Bursten admits that in some cases, this judgment is not a question of objective fact, but is based upon policy considerations which the psychiatrist has no special competence to decide, and that the judgment is, therefore, “beyond psychiatric expertise.”³¹ I have maintained that Bursten’s arguments, when pushed to their logical consequence, show that the determination of mental illness is never a demonstrable matter of fact. It does not follow that psychiatric testimony in legal proceedings is useless or unnecessary. The trained observer of human behavior and the human mind may help us to understand the causes of a person’s past and present behavior, and to predict the person’s future behavior, but there is no scientific category of “mental illness” upon which legal determinations should be based.

Especially in a civil context, the law must not lose sight of the fact that the goals and purposes of psychiatrists are different from those of judges and lawyers, and that the concept of “mental illness” functions differently in law and psychiatry. In declaring that a patient is suffering from a mental illness, a psychiatrist is declaring his opinion that the patient is suffering from a recognizable illness with specific causes and symptoms, which are likely to respond to a particular treatment or therapy. Even assuming, contrary to my view, that this is possible, the psychiatrist’s determination may or may not imply anything as to whether that person deserves to be involuntarily confined. Even in the context of a conceptual scheme which acknowledges the existence of “mental illness,” this is not the key issue in civil legal proceedings; rather, the issue is whether the person is competent to make choices for himself, or whether his future behavior may be dangerous to him or to others. Enlightened courts have recognized that this determination is not a direct function of whether a person is mentally ill.³²

Notwithstanding the above, I found Bursten’s book to be a thought-provoking, well written and wide-ranging exploration of a multitude of difficult, even intractable issues. His chapter on how a psychiatrist attempts to determine whether a patient is malingering,

31. *Id.* at 5.

32. *See, e.g.,* *Winters v. Miller*, 446 F.2d 65, 68-69 (2d Cir. 1971) (confined mental patient was adjudged competent to make the decision to refuse certain medications).

that is, simulating symptoms,³³ is a fascinating glimpse into the reasoning process of the trained and skilled psychiatrist. Indeed, it is this chapter which comes closest to providing the empirical evidence to demonstrate that some persons are unable to choose certain actions freely.

Bursten makes the interesting point that the policy decision as to whether or not to describe an act as a product of mental illness has an interdependent cause and effect relationship with the societal attitude towards that behavior. Sometimes the attitude comes first; the decision whether to label an act as "sick" depends upon whether the society regards the act with compassion, with outrage, or with indifference. Behavior which society chooses to regard with compassion is more likely to be regarded as sick and a campaign to persuade society to regard some behavior as sick may be a device to induce society to regard that type of behavior with compassion.

Bursten argues that assuming that "product of mental illness" decisions are based on social policy and are of value to society, it is still reasonable to attempt to achieve intellectual guidelines for controlling, or at least directing, these decisions. He argues that to leave such decisions to the discretion of a judge risks a whimsical and capricious result.³⁴ The countervailing danger is that when a psychiatrist utters the magic talisman "mentally ill," the judge will feel that his decision is bound and controlled by this finding. It is this danger which I find more troublesome.

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33. BURSTEN, *supra* note 6, at 83-93.

34. *Id.* at 70.

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