PSYCHIATRY *and* THE LAW

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Foreword

No GENERAL book on legal psychiatry has appeared in this country during the past quarter century—a period marked by far greater progress in the practice and in the influence of psychiatry than any similar period in history. At no time has there ever appeared a joint effort of a psychiatrist and a lawyer to interpret legal psychiatry. If this book has special value it lies primarily in the fact that it is a joint effort. The stereoscopic presentation of legal-psychiatric problems provides, we believe, a deeper and clearer perspective than can be had through the eye of either the psychiatrist or the lawyer alone.

One cannot escape the fact that there are incompatibilities in outlook and in focus between psychiatry and the law, and that resistances have grown up between psychiatrists and lawyers as a result. Some of these sources of misunderstanding and mistrust will be discussed in Chapter 1 and others at various points throughout this book.

There is no reason to look upon this situation with black pessimism. There is clearly in progress an evolution, which considering the slow pace of legal change, is moving with great speed. Within recent decades there has been a nationwide reform of commitment procedures; many courts no longer even require the presence of psychotic patients at incompetency hearings; legal acceptance has been given to the existence of emotional disorders by the recognition of sexual psychopathy; a number of juvenile and adult courts now have official psychiatric clinics to advise them, etc. For a number of years there has been a joint Committee of the American Bar Association and American Psychiatric Association at work on problems of mutual concern. The Rockefeller Foundation has just given a five-year grant to the

American Law Institute to write a model criminal code. It was recognized that the lawyers, law professors, and judges could not proceed with this until they had secured the co-operation of competent psychiatrists, who are now serving with them on the Advisory Committee.

Doubtless with increased co-operation between psychiatrists and lawyers, still more rapid progress could be achieved. This could best be accomplished if law students were given adequate instruction in the fundamentals of psychiatry and if medical students were given a real understanding of basic legal principles and methods.

This book presumes to serve a place in this movement. It does not propose to offer a psychologically oriented philosophy of the law, although portions are necessarily devoted to psychiatric and legal theory. Nor is it a primary purpose of the authors to concentrate on the flaws in legal psychiatry, in the hope of reforming its structure and its practice. Certainly change and improvement is needed in many areas, and the authors do not hesitate to indicate this. But they have attempted to temper their judgments and their recommendations with practical wisdom. The chief purpose of the authors is to provide a source book and practical guide on medicolegal psychiatry for students and practitioners of law and medicine.

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PSYCHIATRY *and* THE LAW

CHAPTER 1

The Place of Psychiatry in the Law

THERE WAS a time when the medicine man and the lawgiver had much in common. Both were men of mystery and magic, members of a sacerdotal class in close communion with the gods. The early physician bent his efforts not to curing disease, but to propitiating the gods and exorcising the evil spirits that had taken possession of the unfortunate victim. The ancient lawgiver spoke with the authority of divine sanction, and when the ruler-judge decided a dispute, the judgment was assumed to be the product of direct inspiration. Themis, the goddess of justice, was for the Greeks the divine agent who suggested judicial awards to earthly judges as well as to gods; and it was to Hermes, god of science and invention, whose serpent-entwined staff is still the symbol of the physician, and to Apollo, god of healing, that the physician appealed in his incantations.

But all this was long ago, and in the intervening centuries the doctor and the lawyer have gone down their own divergent paths, until today their viewpoints are so dissimilar that they have difficulty in understanding each other. The education of the modern physician emphasizes experimentation and cautions against the scientific hazards of generalization. Legal training, on the other hand, stresses skill in deducing general propositions from the wilderness of single instances which cases present; and the practicing lawyer soon learns that it is prudent to do things the way the courts have approved,

rather than to risk a client's interests by trying out theories and methods not sanctioned by precedent. Unhappily, this reliance on precedent, which is so important and so sound where *certainty* is the primary objective—for example, where a lawyer wants to make sure that his client's will or deed is in a form which the courts will uphold—can become absurd when applied to psychiatric questions. Anglo-American lawyers think nothing of citing cases a hundred years old—the leading case on criminal insanity is older than that. But psychiatry is almost wholly a twentieth-century science, and when a lawyer quotes as authority a pronouncement on "monomania," "moral insanity," or "partial delusion" handed down by the supreme court of the state in 1901, it is scientifically as preposterous as it would be to cite a textbook of the same vintage on atomic fission or on aviation. Again, the focus of the law is on society primarily, and only secondarily on the individual; in psychiatry the emphasis is almost exclusively on the individual. And even when the law focuses on the individual in order to protect him fully, it disregards what psychiatrists have come to consider certain inalienable personal rights, e.g. the right to private confidences and sympathetic handling. In many instances courts insist without hesitation on the public exposure of a psychotic individual's behavior and secret revelations, and not infrequently on public disclosure of the diagnosis and prognosis in the presence of the patient. Hospital commitments all too often have the aura of criminal proceedings. Free will is the chief cornerstone of the criminal law, while psychiatric experience of necessity develops some degree of adherence to a philosophy of determinism. The criminal law stands as the relentless dispenser of punitive sanctions while permissiveness and forbearance permeate psychiatric thinking.

The lawyer is likely to regard the doctor as a man who presumably knows a lot about the human organism but who is sadly ignorant of the complexities of social organization, and who therefore is inclined to be naïvely impatient of the delays and red tape which legal and political action involve. The doctor, in turn, sees the lawyer as a man absorbed in petty formalities and technicalities. Because the

distinction between the advocate's function and the scientific investigator's has probably never been pointed out to the doctor, he is likely to regard the lawyer's willingness to serve almost any client as vaguely meretricious. This feeling is reciprocated by lawyers who have observed too many expert witnesses displaying a conscious or unconscious partisanship ill becoming representatives of the scientific tradition. Rarely do these lawyers reflect that it is the prevailing legal procedure which forces expert testimony into a partisan mold.

Psychiatry is that branch of medical science which deals with the diagnosis and treatment of mental disorders. There have, of course, been healers of the mind since the beginning of history. The general belief until relatively modern times was that the insane were possessed by the devil; the only fundamental difference between the insane individual and the criminal was that the former was an unwilling host, while the latter solicited and voluntarily gave harbor to the evil spirit. Flagellation was used widely in the treatment of both, the rationale being that it was the means of driving out the evil spirit. Sir Thomas More, the author of *Utopia* and Lord Chancellor under Henry VIII, wrote proudly of his disposition of a case of lunacy that had relapsed: "I caused him to be taken by the constables and bound to a tree in the street before the whole town, and there striped him till he waxed weary." There were, of course, isolated leaders with clearer vision, but they had few followers.

In the ancient world, epilepsy was thought to be a divine visitation. Yet the great physician Hippocrates, who lived in the golden age of Pericles, protested: "The sacred disease appears to be no wise more divine nor more sacred than any diseases; but has a natural cause from which it originates like other affections." Because of the general belief that mental illness was in a very special medical category, little or no progress was made in its treatment for centuries. The great clinician Sydenham, who practiced in England in the seventeenth century, had scarcely as much understanding of the nature and treatment of mental disease as Hippocrates, his predeces-

sor by two thousand years. He prescribed for "mania" a potion containing more than sixty ingredients, including the blood and flesh of vipers. This was followed by the inevitable bleeding and purging of the seventeenth- and eighteenth-century physician. "Young subjects, if of sanguine habit, are to be bled to the extent of nine ounces on two or three occasions, with three days between each bleeding." Warning was given not to exceed this amount, "otherwise idiocy and not recovery will result."

As late as 1862 there was still a doubt in the minds of some as to whether psychiatry was properly a field of medicine at all. The Lord Chancellor of England in that year deplored the introduction into the criminal law of medical opinions and medical theories proceeding "upon the vicious principle of considering insanity as a disease." And even in 1924 a later Lord Chancellor said that psychology was a vague science, "a most dangerous science to apply to practical affairs."

It is true that prior to the beginning of the twentieth century, the diagnosis and treatment of mental illness was characterized, not only by vague terminology, but by confusion and ignorance. Both world wars gave a marked impetus to the growth and recognition of psychiatry. Before World War I most psychiatrists were hospital men; they were on the resident staffs of institutions. Office psychiatry was of the exhortative and supportive type and was done chiefly by general medical practitioners or by neuropsychiatrists. The latter were physicians with training in organic neurology, which was believed to give them a special competence to practice psychiatry. In medical schools, psychiatry was usually taught in the department of medicine or of neurology. Today, all first-class medical schools have separate departments of psychiatry. During World War II psychiatry was given equal rank with medicine and surgery in the office of the Surgeon General of the Army.

It may be well to clarify the differences between psychiatrists, psychoanalysts, and psychologists.

Psychiatrists are medical graduates—they are M.D.'s. There is no law in any state forbidding a physician from declaring himself

a specialist in whatever branch of medical practice he chooses, but specialty boards have been established in most branches of medicine, empowered to certify physicians as qualified to practice their particular specialty upon examination, and after meeting rigid training requirements. The Board of Psychiatry requires at least three years of postgraduate training in a recognized training hospital. The psychiatric societies such as the American Psychiatric Association and the American Psychoanalytic Association will admit to membership only those who meet their required standards.

The present census by the American Psychiatric Association shows that there are 7,500 psychiatrists in the United States. Eighty-five per cent of them are members of the American Psychiatric Association. Three thousand are certified by the American Board of Psychiatry and Neurology; 855 are practicing psychoanalysts (although a smaller number are actual members of the American Psychoanalytic Association). The psychiatrists are equally divided between those whose major work is hospital psychiatry and those whose major work is private practice.

The psychoanalysts, the most vocal and most publicized group within the psychiatric profession, are a small minority, as the figures show. The American Psychoanalytic Association requires a medical degree for membership and, in addition, that the candidate shall have been fully psychoanalyzed himself, shall have attended special courses in the theory of psychoanalysis, and shall have treated a number of patients under the guidance of carefully selected leaders. A thorough psychoanalysis, such as is recommended for those who will later practice it, requires a minimum of 250 hours. Many psychiatrists have had partial or complete analyses but have not fulfilled all the other requirements for membership in the American Psychoanalytic Association. There were only 404 members of this Association in 1951. Anyone, even a layman, can call himself a psychoanalyst, but of course he cannot represent himself as a member of the Association unless he has been admitted to membership. In similar associations in most other countries, nonmedical graduates with specialized training are eligible for full membership. But the

American Psychoanalytic Association, despite constant agitation on the subject, has remained adamant in excluding nonmedical analysts.

Psychoanalysis is that branch of psychiatry which was conceived and created by Sigmund Freud. It lays its emphasis upon the unconscious rather than the conscious productions of the patient. It makes use of the method of free association. The patient, as fully relaxed as possible, spills forth whatever happens to come into his mind. The psychiatrist plays a relatively inactive role—leading the patient on rather than guiding him. During the analysis the patient forms a very special relationship with the psychiatrist known as the "transference." In reliving the past, the patient takes the analyst as the prototype of persons most influential in his early life—generally the parents. By the analytic technique, depths of the personality are plumbed that would otherwise be inaccessible. Psychoanalysis is restricted almost exclusively to the treatment of neuroses. However, the principles derived from it have wide application in the understanding and treatment of other psychiatric conditions.

It is inevitable in a relatively new science, and particularly in one that deals with imponderables, that many schools of thought should arise. This is altogether healthy. Alexander and French in Chicago have stated that they feel that a short analysis, lasting six weeks rather than two years, is adequate in many cases. Karen Horney and her followers believe that orthodox psychoanalysis places too much emphasis upon the early development of the individual in his family group and pays too little attention to more general social forces. Often an amazing amount of heat is generated between the proponents and antagonists of the various analytic schools.

Psychologists, in contrast to psychiatrists and psychoanalysts, are not physicians. Instead, they have taken graduate courses in universities leading to the degree of M.A. or Ph.D. in psychology. This is also a field that has expanded remarkably during the past quarter-century. Today there are child psychologists, social psychologists, industrial psychologists, educational psychologists, clinical psychologists, criminal psychologists, etc.