Law, Psychology, and the Courts

Rethinking Treatment of the Young and the Disturbed

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For my family

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LAW, PSYCHOLOGY, AND THE COURTS

CHAPTER 1

RETHINKING LAW, PSYCHOLOGY, AND THE COURTS

Introduction

THE INTERACTION of law and psychology and their relation to the courts is currently an important and much discussed topic among lawyers, mental health workers, students, teachers, and the public at large. Wherever one looks, the subject matter of this book appears: in the increasing divorce rate with changing attitudes toward the custody of children; in the recent well-publicized trials with psychological and psychiatric testimony about defendants; in concern over the juvenile crime rate and what to do about troublesome, difficult adolescents; in the controversy about punishment and rehabilitation and their respective places in the courts and correctional institutions. In all these instances and more, the subject of law, psychology, and the courts generates much interest and debate and has great theoretical and practical significance.

In the last two decades I have been involved in a number of capacities with problems of law, psychology, and the courts: as a member of the Harvard Voluntary Defenders, as a teacher, and as a clinical psychologist with day-to-day practical and academic experience. I have seen the topic from quite different perspectives and tried to integrate practical material from the courts, mental hospitals, schools, and community settings with theoretical material from other writers and from teaching.

Recently, courts have been looking into areas from which, only a few years ago, they remained apart. They have been turning increasingly to psychology and the mental health professions for help in solving difficult human problems. In some ways it is curious that this relationship has developed between the judicial system and the mental health system, for they spring from two great bodies of knowledge with very different assumptions about human nature and approaches to human behavior. One,

the legal system, essentially views man as rational and holds him responsible for his actions; the other, the mental health system, sees him as determined largely by outside forces and seeks to help him change his responses to them. The partnership between the legal and the mental health systems, while curious, is growing; in court clinics, in correctional institutions, and elsewhere its effects are widely visible.

This book examines the effects of that partnership. It tries to close the gap between those dealing with day-to-day problems and those working with more abstract concepts by examining three different methods through which law and psychology interact in the courts. In each instance, it argues that the third method is preferable.

First Method — Traditional

The first method by which courts handle difficult human problems, the traditional one, emphasizes the legal aspects of a situation, views psychology as a hindrance or a minor help at best, and emphasizes punishment over rehabilitation.

Thus, the traditional method of handling criminals is to lock up large numbers of them for long periods of time and to consider their incarceration to be only for punitive purposes. The traditional method of punishing delinquents is to define the category broadly to include those whose acts would not be criminal were they adults — as stubborn children, truants, and runaways — as well as those whose acts would be criminal if they were adults — as murderers, robbers, and assaulters — and then to subject them to severe punishments for long periods of time in often degrading institutions.

The traditional method for dealing with children whose parents are divorcing and can not agree on matters of custody and with defendants accused of crime but thought unable to assist their lawyers in preparing for trial are familiar. In custody battles, children generally go to their mothers and fathers are given court-enforceable visitation rights. In issues of competency to stand trial, defendants are sent to mental hospitals for observation and evaluation, often remaining in them for long periods of time as incompetent to stand trial.

The traditional method, then, takes a broad view of who should fall within the scope of the criminal law, punishes defendants harshly and for long periods of time, and relegates to the mental health system difficult and troubled individuals on the assumption that that system will keep those individuals incarcerated for long periods of time.

Second Method — Reform

The second method by which courts handle difficult human problems, the one currently dominant in both theory and practice, the reform method, views psychology as an important aide in the legal system, feels that psychological knowledge humanizes and makes more effective the legal system, and emphasizes rehabilitation over punishment.

This method has come about as a reaction against the harshness, severity, and length of the punishment meted out under the traditional method. It reflects the psychological view that people's behavior is determined by early childhood experiences and by environmental forces over which the individual has little, if any, control. Thus, the reform method seeks to lessen the punishments, to substitute rehabilitation for punishment, and to make the society at large responsible for individual antisocial acts. The emphasis on therapeutic change, the influence of psychological determinism, and the effort to see all persons as capable of being led to acceptable social behavior and all situations as meliorable underlie the reform method.

Thus the liberal reform method for handling criminals is to close up prisons and other such facilities, to favor community-based corrections, and to offer many rehabilitative services in lieu of punishment or as a contingent feature of more traditional punishments. The liberal reform method of dealing with delinquents is to remove many sanctions or restrictions from those who are defined as delinquent and to offer psychological and social services to them. Additionally, diversion programs have sought to remove young people from the formal procedures of the court system while at the same time providing rehabilitative programs for them. Although the reform method defines broadly those who come before the courts, as stubborn children,

runaways, and truants, it seeks to dedelinquentize those offenses by making of them cries for help.

As regards children whose parents are divorcing and battling about custody of the children, the reform method advocates that the more fit parent receive custody of the children regardless of whether that parent is the mother or father, that psychologists and other mental health professionals be involved in the determinations of custody, and that joint custody be a strongly considered alternative to the usual one-parent custody arrangements. The reform method retains court-enforceable visitation by the noncustodial parent and attempts to counsel both custodial and noncustodial parents in their rights and duties toward their children.

In issues of competency to stand trial, defendants are still examined by psychologists and psychiatrists, but the reform method suggests many techniques to avoid prolonged periods of incarceration for those defendants and to attempt to make more replicable judgments about the defendants' capacities to assist their counsel and to understand the charges against them.

Like the traditional method, the reform method takes a broad view of who should fall within the scope of the criminal/delinquent laws, but unlike the traditional method, it attempts to emphasize rehabilitation, to promote humane treatment of the offender, and to substitute psychological judgments for legal judgments. Diversion from the justice system and inclusion within the mental health system are two hallmarks of the reform method.

Third Method — Rethinking

There is a third method for handling the difficult human problems which appear in court and that is the method advocated throughout this book. Called the rethinking method, it starts with the basic details of a situation, reanalyzes them, fosters analogies to comparable situations, and attempts to find through such examination the proper interaction of law and psychology in the courts. At least two major principles form the rethinking method: the way to solve a problem is first to define it specifically and to focus intensely on the problem itself and not on the distracting elements which surround it; and second, to separate

the components of the problem into their constituent parts in order to deal with those parts and not to be misled into making each part of the solution contingent on all other parts, so that if any one part does not succeed, nothing can succeed.

This method recognizes that some people do commit serious crimes, such as murder, assault and battery, and armed robbery, and that they ought to be swiftly and effectively arrested and tried for they are a menace to other people and a danger to society. This book advocates punishing such people for their crimes. It advocates leaving alone people who do not commit such crimes, whether they be truant, sexually deviant, or using substances not good for them.

Thus, the rethinking method for handling criminals and delinquents is to specify clearly and narrowly the acts which are prohibited, to make the consequences for violating those prohibitions clear and their application swift and sure, and to allow the individuals to take the consequences of their antisocial acts. This clear rethinking of the consequences of behavior would be one step of the rethinking process. The second step, to follow on the first, would be to offer the kind of help to the offender which is thought to alleviate the various causes of the behavior, however they might be defined — economic, psychological, social, medical, religious, occupational, educational, or whatever.

Inasmuch as the category of individuals termed delinquent or criminal or in need of services would be small — it would exclude stubborn children, runaways, truants, indulgers in so-called victimless crimes, and other such deviant, difficult, troublesome, obnoxious, or unpleasant persons — there would be no need to punish large numbers of individuals. Those punished would know exactly what the punishments would be in advance of their antisocial acts. After their punishment, they would be offered genuine rehabilitative services, just as nonoffenders would be.

As regards awarding custody and determining competency to stand trial, the rethinking method quite radically alters the familiar way of handling these matters. The rethinking method suggests that in a custody dispute the children have the option of deciding with which parent to go, the noncustodial parent has no court-enforceable rights to visitation, and the resultant

redistributed families be treated like all other families. In a dispute about a defendant's competency to stand trial, the rethinking method suggests that such defendants be treated as are all other defendants, that legal, not mental health, personnel make the crucial decisions, and that trials proceed after reasonable delays using all available services to make them run as smoothly as possible.

Chapters

Each chapter in the book compares these three methods of handling problems in the courts. In dealing with both criminal and civil matters in this special field, the book attempts to put the legal and psychological aspects of court work in perspective. In exploring a number of topics within the basic theoretical framework, it makes practical suggestions for the way in which law and psychology ought to interact in the courts. Thus, each chapter argues for the rethinking method.

Chapter 2. "Requiring Punishment, Offering Rehabilitation." This chapter proposes an alternative to the commonly held model of the criminal justice system as simultaneously punishing, rehabilitating, and deterring. It suggests a two-step process to make the criminal justice system more responsive and effective.

Chapter 3. "Punishing Young Criminals." This chapter presents three cases and argues that neither the traditional method of punishing large numbers of youngsters nor the reform method of emphasizing rehabilitative services to youngsters in trouble is effective or just. Rather, this chapter proposes a clear method of punishing young criminals in a proportionate and sound way.

Chapter 4. "Handling Runaways." This chapter, following on the material outlined in the preceding chapter, argues for a new method of handling runaways: society ought not to force their return but ought to provide whatever real help is voluntarily sought.

Chapter 5. "Furnishing Legal Services to the Young." This chapter argues that lawyers ought to furnish real legal services. "Children in need of services" deserve as much true legal representation as delinquents and adult criminals.

Chapter 6. "Treating in the Court Clinic Setting." This chapter presents two cases and argues that adolescents ought not to be treated for personal problems in such a way that they are coerced

more than they would have been for the delinquent acts which brought them to the attention of the court in the first place.

Chapter 7. "Awarding Custody." This chapter also contrasts the three methods and argues for the third. The traditional method awards custody to the mother in the absence of overwhelming evidence of her unfitness; the reform method advocates awarding custody jointly or to the more fit parent; the rethinking method requires sole custody in situations where the parents cannot resolve the dispute themselves, emphasizes the child's own choices, and removes the court from enforcing visitation by the noncustodial parent.

Chapter 8. "Determining Competency to Stand Trial." This chapter argues that the current system of delaying the start of trials to determine the competency of the defendant to stand trial ought to be modified drastically. It suggests that all defendants are competent to stand trial, although there may be delays required by specific circumstances.

Chapter 9. "Applying the Rethinking Method." This chapter suggests the wider applicability of the themes in the book by describing the rethinking method for dealing with five other problems in courts: abuse and neglect of children, pretrial diversion, youthful decision-making, drunk driving, and divorce and marriage.

Chapter 10. "Facing Ethical Issues in Court Settings." This chapter argues that psychologists working in court settings face many dilemmas which the ethical standards of the profession do not resolve. It reconceptualizes the psychologists' role with involuntary clients as essentially one following adjudication of guilt. It suggests that psychologists expend more effort in providing the best assessment, treatment, consultation, training, and research they can to voluntary clients. The book concludes by saying that this rethinking method for resolving ethical issues will make the roles and functions of psychologists in court settings ethically sound and legally and psychologically important.

Themes

Five major themes run throughout this book. Two of them have already been discussed briefly. The first of those is that a narrow approach be taken in applying law and psychology to the