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# Reconciliation of the Legal and Psychiatric Viewpoints of Delinquency, The

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# THE RECONCILIATION OF THE LEGAL AND PSYCHIATRIC VIEWPOINTS OF DELINQUENCY

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I have approached this particular subject of the relationship between psychiatry and the law, with considerable misgiving. Constant contact with the Children's Courts throughout the state, interviews with lawyers, and the reading of published statements by distinguished members of both the medical and legal professions have painfully brought home the realization that the hiatus between the legal and psychiatric viewpoints toward delinquency is widening daily.

To anyone who has given the subject careful consideration, this difference of opinion seems harmful and unnecessary, for both professions stand firmly upon the common ground of the welfare of the individual and of the state. There is no opposing conflict such as exists between the concepts of materialism and idealism, of science and religion, of expediency and right, for all of these cults contain factors irreconcilable with each other—gaps that cannot be bridged by any logic mankind has yet devised. Between the doctor and the judge, the conflict is more apparent than real, and the situation offers abundant hope that the differences can be resolved by small but important readjustments on the part of both parties concerned. It seems advisable to give consideration to some of the rocks upon which the opinions of the two professions split.

First, let us enumerate some of the things the doctor does that are in the eyes of the lawyer particularly galling or amusing. Foremost in this category must be placed the conflicting testimony given by experts (so-called, as some of you would doubtless add). The Leopold-Loeb, Thaw and McCoy trials still smart within the memory of all of us. The results of these and of other trials of recent years doubtless have undermined expert testimony as a procedure of value in our courts and have given rise to bitter denunciations such as the following from Judge Davis of the Supreme Court of Maine which I quote briefly: "If there is any kind of testimony that is not only of no value but even worse than that, it is, in my judgment, that of medical experts.

[1]Psychiatrist of the State Commission for Mental Defectives, Read at the 17th Annual Conference of the New York State Magistrates' Association, October 24th, 1925, at Herkimer, N. Y.

They may be able to state the diagnosis of a disease more learnedly, but upon the question whether it has, at a given time, reached a stage that the subject of it was incapable of making a contract or is irresponsible for his acts—the opinions of his neighbors, of men of good common sense, would be worth more than that of all the experts in the country."[2]

The situation which will bring out such a statement bears analysis. In the first place, who is a qualified expert? The law, of course, is not concerned with the multitudinous quibbles between the various schools in the field of medicine. It is interested in getting facts which do not seem to be ascertainable from the usual witness called upon the stand, and which are not subject to verification by the court or jury on account of the very nature of the testimony involved. Unfortunately, the expert is called upon not only for facts, but also for opinions, and consequently his qualifications to give such must be carefully evaluated by the court. As we all know, there is a procedure for the determination of qualifications, but is it really clear in the legal mind just what may be expected by submitting as expert testimony the evidence of osteopath, chiropractor, neurologist, psychologist and psychiatrist as of equal weight? Yet this practice is by no means an infrequent one.

It must be remembered that the science of psychiatry, although of some years' standing, has received adequate stimulus only since the war. Formerly psychiatric problems were handled frequently by the neurologists whose training and interests lay not with mental processes per se but with the intracacies of the diagnosis of brain tumors, paralysis, disturbances of the sensations in the skin, and all other processes in which the nerve tissue had been affected. Many of these eminent physicians have been called upon the witness stand recently, but due to advancing years, or lack of time or interest, most of them have not kept up with the rapid advance of this new branch of medicine, psychiatry. Consequently, we have the spectacle of equally distinguished neurologist and psychiatrist at odds with each other in the courtroom. Then there is the psychologist with no medical training whatever, but who is competent to measure the intelligence of an individual. The general practitioner may also be mentioned who has never had a course in psychiatry nor who understands even the first principles of the science, since it was not taught in the medical schools of his day. The only expert qualified to give testimony on the mentality of a prisoner is the psychiatrist who is a graduate of a class A medical school, who

[2]Quoted from July issue of the Journal of Delinquency, Vol. IX, No. 4. Thos. J. Orbison, "Expert Testimony."

has had an interneship in a general hospital, and who has had several years additional experience in caring for the mentally unwell.

The failure of the court to make adequate distinctions as to qualifications of experts is by no means the only factor in the conflict existing in expert testimony, for it can be pointed out that even the properly qualified psychiatrists disagree among themselves. How can this be explained? One causative factor is already receiving much adverse comment by the bar, namely, the practice which permits either prosecution or defense to secure what expert testimony it will. The psychiatrist, then, becomes more or less duty-bound to offer his testimony in such a manner as will be of most benefit to the side which pays his fee. One should not read contempt into this procedure, as many cynically inclined individuals are tempted to do, for after all, the fault lies not with the parties concerned but rather with the mode of offering the evidence. It should be for the court to select and to pay its experts for unbiased statements. This would secure less conflict in testimony and would take a blot from psychiatry which it does not deserve.

Another factor making for conflict in testimony is the intangibility of the questions involved. To the lay mind, the problem of determining whether or not an individual is insane is a simple one. It is a general belief that either a man is a "nut" or he is not, and that is all there is to it. The man of the street still entertains fallacious ideas about insanity that have been handed down through the centuries along with his superstitions and prejudices. Few people have ever seen an insane individual and most of their ideas are obtained from sensational newspaper articles, moving pictures, or caricatures on the stage. They still believe the insane are violent and are ready to tear anyone to pieces, or that they are silly and talk "foolishly." There still fails to be a widespread recognition of the fact that many of the most dangerous insane types are to all appearances normal and that their vicious, twisted ideas can be discerned only by prolonged observation and delicate technique. This explains why the psychiatrist objects to the procedure which centers a trial about fine distinctions between right and wrong, responsibility and irresponsibility. It is necessary for legal purposes, such as validity of contracts, settlement of estates and appointment of guardians that these distinctions be made, but many times this is not possible in a crowded courtroom. It is suggested that where the question of responsibility is not obvious, that the matter be decided in the classification prison where extended observation can be made. The final disposition will ensure greater confidence in all concerned. The very possibility that these abnormal tendencies can be concealed so

successfully from the unskilled observer gives the individual freedom and opportunity for carrying out his crafty schemes. The court records are full of such types who have concealed a delusion for years until it finally culminates in murder or violent assault.

All these fine distinctions require careful consideration on the part of the expert, but unfortunately the witness stand is a very poor place for consideration, as has been stated. Under the cross-fire of an attorney, who all too often wants to show the court he really understands more about mental abnormalities than the expert himself, the whole truth becomes an impossibility. It is a distressing situation for the psychiatrist and he is far from being at his best in such an antagonistic atmosphere. In fact, many of our reputable psychiatrists refuse to subject themselves to the painful process, and consequently sometimes the courts have had to depend for expert testimony on younger medical men who are anxious to make a name for themselves but who are far too often poorly qualified for their task. The solution offered to this problem is that written testimony be submitted to the court, and that the cross-examination be made with the sole idea of rendering statements contained therein clearer to the jury and to the court. By this method alone can the expert say what he really intends to say.

I would also call to your attention another factor making for dissension between psychiatrists. The physician, by the very nature of his work, is thrown largely upon his own resources. He does not have the careful check made upon his work that is found in the case of the legal mind which searches the precedents of years, nor of the business man with his automatic control—the balance sheet. The doctor remains liable solely to this patient and to his conscience. Of course, he will not deliberately and wilfully injure his patient, and it can be truthfully said that by and large the medical man is sincere, hard working and careful. Nevertheless, in the course of time, he builds up certain formulae which have been found by him to be practical and serviceable, and eventually these set to the mold of conviction. This procedure tends to narrow one's viewpoint and to bring a certain positivism into one's convictions that is not well founded. The result is that the beliefs of the physician many times will not bear the cold, white light of analysis on the witness stand and will conflict with those of his confreres.

Aside from this matter of the conflicting testimony of experts, there is a second objection that the legal body has to the doctor's testimony, namely, doubt as to the actual motives back of the entire work of

the psychiatrist. There is a current belief that the psychiatrist is endeavoring to make out all criminals insane or as having some peculiar mental twist which deserves sympathy and not punishment. Much of this source of dissatisfaction can be traced to the increasing tendency on the part of astute attorneys to resort to technicalities so as to delay court proceedings for a more propitious opportunity or to secure a favorable verdict for their client. Recent verdicts of insanity, based upon expert testimony, have seemed to many a "flagrant miscarriage of justice." Here again it would seem advisable for the court alone to decide by virtue of expert testimony previously submitted, in cases involving a "reasonable doubt," as to the validity of the defense basing its case upon the grounds of insanity.

Another factor which throws doubt upon the ultimate ideals of psychiatry is the recent movement to better conditions within the prisons. To many people, this seems to take away the sting of punishment and to subvert the purposes of imprisonment. One not infrequently hears that prisons have become clubhouses where a criminal may sojourn with even more comfort than he enjoys outside the walls. The movement to many people has seemed to be sentimental. In their minds, the psychiatrist, the Welfare League and the Parole Board are fads of the kid glove class which serve to offset all the courts may do toward bringing about justice. I must pause to expostulate against this view. Are these individuals aware that the psychiatrist stands for more or less permanent segregation of all types of confirmed criminals, such as is already in force at Napanoch? This is not the cry of sentimentalism, but it is rather the challenge that decent organized society throws down to misfits who strike repeatedly at its foundations.

Some of the doubts as to the motives back of psychiatry may be traced to a phenomenon which has followed every great war. The human mind, focused upon the stark reality of any prolonged war, tends to swing over into introspective and highly speculative fields once the tension of the battle is over. No sooner had the roar of the guns died away than mysticism sprang full-fledged into being. And we came finally to the sorry spectacle of isms and ologies rubbing elbows with staid Medicine and dignified Religion. The laity could not be expected to discriminate between the complexities of Freud and the mouthings of the mystic and the clairvoyant. In an age which has produced the Peace Ship, the Dayton Trial, the Fundamentalist and the Modernist, misgivings have naturally arisen within the minds of the more thoughtful, and psychiatry has had to suffer with the rest.

The conflicting testimony of experts and the doubtful motivation of psychiatry, then, are serious obstacles to the complete understanding between the legal and medical professions. To these, I would suggest the addition of a third—the difficulty of expression of the psychiatrist. Many individuals who have had an intimate contact with the routine of the courts have watched with increasing amazement the general inability of the expert to get his material over to the jury in understandable form. Frequently he seems muddled and at times he apparently is far from being as learned as his qualifications would imply. Probably the element conducing most to this state of affairs is the use of long names and high sounding phrases. As I have stated elsewhere, psychiatry is a fledgling in the field of medicine. Its concepts have not been thoroughly worked out and there are still many physicians practising this specialty who have failed to arrive at a complete understanding of many of the expressions they daily use. You may be surprised to learn that psychiatric terms are changing so rapidly that there is not a single dictionary extant which meets the situation, although splendid general medical dictionaries are legion. I would ask you to recall that psychiatry is a science which studies abnormal mental processes and consequently has as its chief working tools, abstract ideas. I would have you define some concrete object such as chair or table, and then define an abstract concept such as pity, love or revenge. Some of the difficulties that bestrew the path of explicit psychiatric expression will become manifest in this way. The doctor, however, has not done his share in clarifying his statements, and the future should bring decided improvement in this respect.

Especially aggravating to the legal mind is the medical expert's frequent failure to understand the very fundamentals of law and of testimony. He is offering himself as an expert and he is being highly remunerated as such, but he knows not whereof he speaks. This would seem, then, to be another source of the expert's difficulty in expressing himself. As a matter of fact, medical-legal testimony is a science in itself and very few are qualified to practice it. Those men who stand out in this field have devoted the major portion of their time to it alone. In a foregoing statement, I called attention to the liability of younger, more poorly qualified men to take the place of their betters in the minor hearings on insanity. Many of the hospitals for the insane throughout the country send the younger men on the staff to testify because of the dislike of the older men for the job. This procedure serves its immediate purpose in most instances but frequently it fails to make an adequate impression upon the court as to the possibilities of this form

of testimony. It discourages an expansion of the service. The tendency to verbosity, the constant effort to qualify statements, and the lack of directness cannot fail to prejudice the clear thinking logician against the young man and his science. The remedy for these factors of inexpressibility on the part of the medical expert has been pointed out already. A written statement prepared for the court by the psychiatrist in which his findings are clearly put forth would obviate the difficulties.

In the conflicting testimony of experts, their doubtful motivation and general inexpressibility, we have been noting some of the dfficulties that beset the psychiatrist. Perhaps it will be well to examine the reverse side of the shield. What does the psychiatrist think of the "due processes of law"? If he were severely questioned, his foremost complaint probably would be that the law seems to be built around tradition, precedence and a certain adherence to technicalities that make for the perpetuation of social ideas long since obsolete. He sees in the law a procedure which deals with the individual as a machine or a parcel of property which has certain "inalienable rights" to be protected at all costs. He sees the law as having only one weapon in its armatorium—the penal code. He sees the almost childlike belief that pronouncement of sentence means the end of the court's obligation to the individual and a final disposition of the case. He would replace this procedure with one that considers the criminal before the bar to be a vital human being, stirred profoundly by emotions and instincts which determine his behavior. He would consider that the criminal is subject to the laws of heredity and of environment, any aberrations of which must be taken into consideration before it is possible to reach a full understanding of him and his relation to the community. Then, and only then, can the problem of his resocialization be attempted. The psychiatrist in arriving at these conclusions has often failed to realize that the law, as it now stands, is not the expression of a limited group but that it is the voice of the people, the moral code that has been built up through the centuries when psychiatry was a thing unknown. And like most well built structures, it can be moved and changed but slowly. This is well, for the law has always remained the one solid thing around which the thousand currents of changing opinions have ebbed and flowed. Many members of the Bar have felt, however, that certain changes in court procedure would be beneficial to all concerned, although this seems far from accomplishment at present. Perhaps we can take a leaf from the pages of Hoag and Williams of the Los Angeles courts, to account for this. These psy-

chiatrists feel that certain eminent jurists and medical experts are prone to block any reform in court procedure because prerogatives will be lost which have been very serviceable in keeping them in the public eye in a sensational manner. That, of course, is highly problematical.

Not only does the psychiatrist differ from the attitude that the law has for the criminal, but he also feels that the dealing out of justice is slow and involved, and the court calendars unnecessarily crowded. Certain measures have been adopted by the courts to expedite the disposition of cases, but many of these devices are of doubtful value. Suppose we enumerate a few of them. There is the acceptance of the plea of guilty, for instance, which eliminates trial and the time-consuming process of impaneling jury. Not infrequently the criminal is urged by his attorney to do this so that he may get a lighter sentence. The very essence of the conception that any individual charged with a felony is entitled to trial is subtly undermined in this manner. Then there is the nol prossing of cases upon payment of court costs by the defendants, which tends to perpetuate the belief entertained by many offenders that even the law has its price. A certain percentage of the nol prossed cases, of course, have been due to the likelihood that conviction would never be secured because of defection of witnesses, lack of evidence, and so forth. Such cases should never be brought into court.

When the probation system came into being, the judges of the Children's Courts found they had in this most excellent aid to the law a means for the quick disposition of cases. This procedure naturally is only temporizing, for the individual probably will come to court again and again until final judgment is passed. The probation system is a very decided advance in the treatment of the delinquent, but it is founded on the assumption that the delinquent's case has been carefully studied before he is admitted to probation. This, unfortunately, many justices have failed to realize. What remedy does the psychiatrist have for these practical but doubtful speeding-up processes of the court? He believes that a not inconsiderable number of delinquents awaiting trial can be culled out by psychiatric examinations and be remanded by the judge on the basis of these findings directly to institutions for mental defectives or insane delinquents. Such examinations in other cases may clearly point the way to probation or the indeterminate sentence, thus clearing the calendar and giving time for a more adequate hearing of cases than is now possible.

Moreover, the psychiatrist has the opinion the court is not consistent in its attempts to speed up legal processes, for there are many

weary delays while attorneys battle over technicalities which seem to defeat the very purpose for which the law has been made. Then again, judges have been known to insist upon pressing cases to trial regardless of the positive nature of expert testimony that has been offered. Of what value is it that one expert witness after another be laboriously cross-questioned if the evidence thus obtained comes to naught?

The foregoing paragraphs have shown in a general way the divergence of opinion between law and psychiatry on the question of expert testimony and its relation to court procedure. Conflicting testimony of experts, the desire to twist all criminology into the field of the abnormal mind, and the lack of concise testimony—these complaints on the legal side are arrayed against the countercharges of the psychiatrist who sees nothing in the law but a machine-like routine, unnecessary speeding-up or weary delays in the dealing out of justice, and a failure to utilize properly all the facilities at its disposal. Both sides are wrong to a certain extent, but the differences are not irreconcilable. Some suggestions to this effect have been made in the body of this discussion. It has been proposed that time of the court and the interests of conciseness can best be served by submitting a written statement to the justice before trial containing the complete findings of the psychiatrist. This should be couched in understandable terms and the psychiatrist should be cross-questioned, if necessary, to make his views to the jury clearer. The psychiatrist should be employed by the court alone so that reputable, unbiased expert opinion would be ensured. By such processes, the dignity and value of the psychiatrist's reports will be enhanced in value, it is hoped, to the point where certain, well-defined cases of feeble-mindedness and insanity can be remanded directly to the proper institution without trial.

All this takes money. Who is going to pay for such service? The larger cities, such as Buffalo, Rochester and New York in this state, have already seen fit to establish such procedure in part. The smaller communities must look to state aid. And it is of this project I wish to speak for a few moments. The New York State Commission for Mental Defectives has had in operation for several years a number of clinics to which children of all types could be brought. Recent expansion has raised the number to nearly fifty and has extended the scope to include all types of maladjusted children, regardless of the level of intelligence. It has seemed desirable, however, to develop a special technique and a special service for the delinquent child alone. Accordingly, in September of this year there was undertaken a project, which is probably unique for New York State. Fourteen districts

have been established, each district comprising generally a county. Three days' clinic service every six weeks is extended to each district. Approximately, eighteen children can be examined within that period. The question most frequently asked in this connection is how can the cases on the calendar be examined by such long-spaced service? A judge wants his information at the time the child is brought before him. This is quite true and the only way this situation can be met at present is to examine routinely the cases on probation. This serves a twofold purpose. Many of these probation cases (which the probation officer can readily select for the clinic) will appear again before the judge. The data obtained previously will have the force of a newly made examination. Of course, cases on the calendar at the time of the clinic will have first call. The second service rendered is the building up of a fund of information for the court which in its entirety will give much valuable data on the delinquencies in that particular district. All reports of examinations are verbatim and consequently complete. Recommendations are usually made but only with the desire of presenting the psychiatric viewpoint and never with the idea of influencing the decisions of the court. The case remains throughout under the complete control of the judge and the probation officer. Later the service may be extended to include adults.

Each child will have a thorough physical examination, a series of the best known tests for intelligence and an examination into the history of the development of instincts, emotions and physical factors throughout life. Somewhere in this developmental survey will be found divergencies which bring the child into sharp conflict with his environment. The delinquent tendency, then, becomes more understandable and the proper disposition of the case more evident. The combined time of the psychologist's and psychiatrist's examination of each child is approximately two and a half hours. Is not a thorough study of each child in this manner a real, worthwhile service to the court? After all, cannot the psychiatrist and the court get together despite the unpopularity to which expert testimony has, for the present sunk?