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PSYCHIATRISTS IN ADMINISTRATION OF CRIMINAL JUSTICE

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It is one of the firmly held traditions in American life that people of different groups could work together very satisfactorily if only they would try to understand each other's problems. Now psychiatrists on one hand, and those who administer criminal justice on the other, are sometimes at swords' points. Lawyers and judges feel that psychiatrists are not of much help to them, and misinformed psychiatrists feel that jurists are Philistines when it comes to understanding the human mind.

TRUTH AND THE EXPERT

The traditional position of the psychiatrist is this: he is a scientist who has certain facts accumulated over years of study and toil and he is willing to put these facts at the disposal of the courts. The court, as he sees it, is an instrument for discovering and pronouncing the truth, and the psychiatrist, as he sees himself, is an instrument for revealing the truth. When the picture is drawn so baldly, you see at once what is wrong with it. The court is not so much a place for ascertaining the truth as it is a forum in which each side is allowed to display its version of truth. The psychiatrist does not deal with a body of scientific fact in the sense that the chemist does. To most questions in chemistry the answer is definitely either yes or no, right or wrong. But it is hard to frame a single question in psychiatry to which there is an unequivocal answer. Indeed, I wonder if any psychiatrist can make a professional statement which all would agree is 100 percent true. It is a fact that a mixture of silver nitrate and sodium chloride will consistently lead to a precipitate of silver chloride. But is it a fact that a mixture of this personality and that personality will consistently lead to a predicted result?

Let us look a little more closely at this question of revealed truth in psychiatry compared to truth in other areas in which experts operate. You have, in courts, experts in finger-printing, ballistics, and toxicology. You have experts also in psychiatry, real-estate values, and handwriting identification. But truth and fact in the first group is not the same concept as truth and fact in the second. If a competent and honest fingerprint expert says that the fingerprint on the door matches the fingerprint of this defendant, he is reporting a fact almost as definite as the fact that this piece of paper is ten inches long. This is truth; its denial is error. If the rifle markings on a bullet match those of a test bullet, the ballisticians can say that

they came from the same gun. This too is truth almost as clear as the inch measurement of a footprint. So when the toxicologist says that there was arsenic in the specimen of bean soup which the wife fed to her loving husband, the toxicologist is reporting something close to an absolute fact.

But what about the real estate expert who says that if a fertilizer plant is erected on Lindell Boulevard real estate values will decline 25 per cent? Is this truth? Let us assume that the realtor is both competent and honest. Still, it is *not* truth in the same sense that the inch measurement of this piece of paper is truth. An equally competent and honest real estate agent could argue that a fertilizer plant will improve the value of property on Lindell Boulevard.

This then is the kind of truth which the psychiatrist studies. Whether Mr. X has a psychoneurosis, an immature personality or a simple schizophrenia is not a simple *fact*. At least it is not a fact in the same sense as whether Mr. X is a giant or a dwarf, a thin man or a fat man, is a fact. When the psychiatrist pictures himself as a simple scientist anxious to report simple truths he does himself scant justice. To hear some psychiatrists talk you would assume that the situation is this: here is a man who has a scar 3.5 inches long. Here is the doctor who has measured it. He wants to testify about this simple fact but the lawyers and judges will not let him. They surround it with all kinds of rules, red-tape, and formulas so that the poor expert is not allowed to tell the jury the simple fact that the scar is 3.5 inches long.

Before you shed any tears over the plight of the expert so harrassed, remember that the truth which he wants to put into the record isn't quite like that. What this psychiatrist wants to say perhaps is this: this man has a lot of anxiety but basically he is a psychopath and he knew he was doing something wrong but he just didn't care. He is a psychopath who knew he was doing wrong and he is fully responsible. But this is not fact. It is an opinion. An equally competent and honest psychiatrist can say that the anxiety outweighed the weak super-ego hence there was more neurosis than psychopathy in the picture. And a third honest psychiatrist can argue that this is a schizoid picture and not neurotic. And, if you ask whether the defendant knew he was doing wrong, the doctor may retort, "what do you mean by wrong?" For that matter, he can ask, "what do you mean by 'know'?" Do you mean *understand* wrong, or *grasp* fully the implications of how wrong it is." Well, if you fly much higher into this semantic stratosphere you better tighten your seat belts.

Psychiatrists thus disagree with one another. They answer one question by asking another. This is evidence of their honesty. In this kind of expert testimony, it is agreement, not disagreement which is suspicious. If footprint expert A says that the print was 12.5 inches long, and expert B says it was 14 inches long, then one of them is dishonest. It had to be one or the other. But, if Dr. X says that this patient could not grasp the implications of his act, while Dr. Z said he certainly could, then the disagreement is no evidence of dishonesty. Indeed, if one side brings to the stand a parade of psychiatrists all of whom agree perfectly on these interpretations, then I would be suspicious of their honesty. In many areas, the psychiatrist reports opinions rather than facts. This being so, we have to destroy the model which some psychiatrists and most lawyers have erected for the expert. According to this model, the expert examines a thing or a person and ascertains a simple truth which he reveals to

court. If this were the true state of affairs, lawyers would have the right to complain when psychiatrists disagree and psychiatrists would have the right to demand immunity from cross examination.

THE COURT-APPOINTED PSYCHIATRIST

From time to time groups of psychiatrists want to limit their testimony to service as a friend of the court. For example, not one thousand miles from here is a local psychiatric society which many years ago adopted and has since reaffirmed a code of psychiatric ethics. The first item reads: "No member of this society may testify in criminal cases except as an appointee of the court."

This is the kind of sanctimony which frightens me. If all psychiatrists in the country took this position, it would play havoc with criminal justice. A defendant's mental state is a part of his guilt. He is entitled to have witnesses heard on his own behalf. But this ethical canon would deprive the defendant of the right of offering a witness as to his mental state which is an inherent part of his guilt or innocence. It is no answer to say that a court-appointed psychiatrist performs that function. In the first place a psychiatric opinion is *not* a simple right-or-wrong, yes-or-no matter. In the second place, a court might appoint a psychiatrist who suffers from crotchets and prejudices of his own. With the defendant unable to offer a more objective psychiatrist as a witness, the defendant would be irrevocably bound by the opinions and whimsies of the judge-appointed doctor with no chance in the world of showing that there are two sides to that picture.

I know a psychiatrist who believes that all crime is a maturation of juvenile delinquency and all juvenile delinquency is due to the influence of radio, television, and comic strips. He is entitled to that opinion and when he airs it in court those who disagree are entitled to challenge the opinion and show it is wrong. But that doctor might be named as psychiatrist to a court. Under this canon, the defendant is chained to the whimsies of this one man. He cannot challenge them. I suppose such a proposition is illegal because it would deprive a defendant of the right to offer witnesses. But if organized psychiatry ever took this position they could probably enforce it through their own associations. No reputable psychiatrist would risk defying the ethical code. That would compel defendants to protect their own rights by retaining only those fringe specialists who didn't belong or didn't care about the association, and you can see what that would lead to.

I do not deny the value of a non-partisan psychiatrist. Let every judge have as an advisor one whose opinion he respects. But, I do hope that no one will want to deprive either the prosecutor or the defendant of the right to have the question of criminal responsibility presented by a doctor of his own choosing.

CROSS-EXAMINATION OF THE PSYCHIATRIST

So much for the idea of a court-appointed psychiatrist having a monopoly of truth. Corollary to this is the claim of some psychiatrists that they should be immune to cross examination. Many psychiatrists, particularly those who practice only psychotherapy, tell me that they will never go to court because they are not treated there with dignity and respect. The usual plea is this: "Here I go to court to report some

simple scientific fact. I'm the expert and they should let me have my say and give it the respect that a professional man has the right to anticipate. If my automobile mechanic says to me, 'Doctor you have too many folds in your manifold,' I don't question it. He's the expert. But in court, when I report the simple scientific truth, you know what happens? Some shyster starts to tear me apart. A lawyer who can't tell the difference between abreaction and catharsis starts to cross-examine me. What right does a man who knows no psychiatry have to challenge an expert? I refuse to put up with that kind of indignity, so I don't go to court at all."

Psychiatrists will know the real, if unconscious, reason that keeps the doctor out of the witness box. This demand for immunity from cross examination, is a corollary of the "friend-of-the-court" idea. It implies that the psychiatrist is reporting a simple truth, revealed only to him but invisible to less expert eyes.

This is an unhealthy idea. To begin with, no specialty is so dependent on public support as psychiatry. Every psychiatrist has a duty to make his doctrine clear to the public and to submit to inquiry about it. Because psychiatric truths are largely matters of opinion, the psychiatrist must be willing to be cross-examined in support of his opinion and to answer questions raised about differing opinions. There is an arrogant sanctimony in the idea that other witnesses should be subject to cross-examination, but that the psychiatrist deals with such divinely established truths that he should be immune.

If a psychiatrist is afraid of cross-examination, he must feel insecure about his doctrine or his diagnosis. One of his roles in the administration of criminal justice is to tell the court what he can about the mental state of the defendant. He can not refuse to let that opinion be further explored through the device of cross-examination.

PSYCHIATRIC JARGON

The psychiatrist has another function: he must communicate. This brings up the question of psychiatric jargon. As the doctor veers away from scientific terminology into popular language, the meaning value of his words tends to blur. Just as an exercise, try to express in simple 8th grade English the concept of an unconscious desire for punishment, the meaning of the apparently flattened affect in schizophrenia, and the way in which a person must yield to a compulsion even though he knows he should not. Yet it is incumbent on every psychiatrist to develop a popular lexicon of rough equivalents so that he may express technical ideas in readily comprehended and reasonably exact lay counterparts. For instance, the word "mood" does not have precisely the same meaning as the technical word "affect" and the words "etiology" and "cause" are not perfect synonyms. Still, for practical purposes, etiology does mean cause and affect does mean mood.

To complicate matters, many psychiatric terms were once ordinary English words which were modified by psychiatrists, but which retain their old meaning to the layman. Words like association, maniac, adjustment, catharsis, analysis, anxiety, compensation, incompetent and dozens of others have general English meanings apart from their technical meanings in psychiatry. To the psychiatrist the word hysteria suggests blindness or paralysis; to the jury it suggests a temper tan-

trum. To the layman, the word anxiety means that the patient is anxious to prove something, whereas to the psychiatrist it means an unconsciously rooted fear. Psychiatrists generally agree that a psychopath is not insane. To the jury nothing is more obvious than that a psychopath is a refugee from a psychopathic ward and is therefore insane. The psychiatrist will enhance his role in the administration of justice if he will take the trouble to translate these technical terms in his thinking before he ever climbs into the witness box.

The lawyer and the judge *do* know something about psychiatric terms and that is what sometimes causes difficulty. It is a commonplace to report that "what gets you into trouble are not the things you don't know, but rather the things you do know that ain't so." The lawyer and the juror misunderstand us because they *do* know some of our words and ideas. The juror has heard the word "moron." He knows it means "sex fiend." He thinks a concussion of the brain is a fracture of the skull, and a super-ego is a sense of self importance. The psychiatrist stultifies his role if he allows such misunderstandings to develop by default.

THAT HYPOTHETICAL QUESTION

Another helpful device is the hypothetical question. This helps keep the psychiatrist honest, because he can shape his answer to fit the hypothesis and let the lawyers settle among themselves which hypothesis is correct. The hypothetical question is the great safety valve of forensic psychiatry. It permits a doctor to say *black* on direct examination and *white* on cross-examination and be correct both times.

Although the hypothetical question is really a friend in need, it sometimes takes a beating from critics who have never tried to do without it. Medical diagnosis is based on history, subjective complaints and objective findings. The first two of these three, history and complaints, are hearsay. The doctor wasn't there when the illness was developing so he has to take someone's word for it that the fever started last Tuesday. And, he can't prove that the patient has a headache. He has to take his word for that. Thus, hearsay is two-thirds of medical diagnosis. In psychiatry, hearsay may—in one sense—represent practically 100 percent of the diagnosis. How do you know that this man has a delusion of persecution or grandeur? Because of what he says—which is hearsay. How do you know this patient is afraid of open spaces or that that one has palpitations? Hearsay; all hearsay.

Now lawyers are rightly suspicious of hearsay. One of the rules of the game is that court decisions will not be based on hearsay if any better testimony is available. But since so much of medical diagnosis is based on hearsay, there has to be some way of getting around this rule. And the hypothetical question is the answer. The lawyer, in effect, says "assume that this history was correct, that the complaints were genuine; then, considering your own objective observations, what is the diagnosis?"

Of course the other lawyer can make a different assumption and then maybe your answer will be different. I read a record in which a doctor was asked for a diagnosis, assuming the following facts: boy wanders all over the country, gets arrested frequently, picked up a ride and when the car stopped for a red light he beat up the driver because the driver wouldn't agree to take him all the way; then when

arrested told his cell-mate he hated people rich enough to own cars; and that he never had worked in his life because only suckers work; and that all life was a matter of dog eat dog and he was going to eat others before they could eat him. The doctor said that assuming all this and nothing else, this was the picture of a psychopath. And then, in answer to another question, he said that a psychopath knew when he was doing wrong. So the newspapers headlined it as testimony that the expert said the defendant was legally sane.

Next day on cross-examination he was given a different hypothesis. He was told to assume that the boy communicated with God, had been diagnosed as schizophrenia repeatedly, and that he beat up the driver of the car because when the red light was reflected on the driver's face, the hitch-hiker said this proved that he was a communist and he had a divine mission to beat up communists and so on. Now the expert said this boy is a schizophrenic and the newspapers reported that the doctor who yesterday said the defendant was sane was saying today that he was insane.

The doctor told the truth both times. The hypotheses were different.

If it were not for the hypothetical question, the doctor would have had to decide which set of facts to believe. This is an adjudicative, not a medical function. The doctor listens to each hypothesis and gives an answer to each. The hypothetical question has saved many a doctor from being partisan and selecting which of two sets of alleged facts he had to believe. If a hypothetical question is absurd, the doctor can point out the inconsistencies, or ask if he may make certain additional assumptions. It would be a great blow to professional honesty if the hypothetical question were given up. It allows the honest doctor to give a professionally sound answer to any hypothesis without worrying about the accuracy or partiality of the witnesses who built up the history. It makes his life easier because he gets a history stripped to the bone with all extraneous matter excluded and the issue thrown into sharp focus. It permits him to adhere to the truth regardless of which side it affects, since the doctor can modify his answers as the attorney modifies his hypothesis. The hypothetical question is a boon and psychiatrists should resist any effort to get rid of it.

THE PSYCHIATRIST'S ROLE

What is the psychiatrist's role with reference to responsibility and irresponsibility of a defendant? As a general rule, it is for the jury to say whether the defendant was responsible, and this it does by its verdict. In some courts the psychiatrist is expected to testify as to whether the defendant knew that he was doing wrong, though in other tribunals even this is a question for the jury. In those jurisdictions the psychiatric witness gives a clinical diagnosis and perhaps says whether he thinks the defendant was *capable* of knowing whether he was doing wrong without stating that he did or did not know he was doing wrong. In states which permit irresistible impulse, the psychiatrist would say whether the defendant was or was not in the grip of such an impulse.

As I see it, here is what the law may expect of the psychiatrist: the clinical diagnosis, a statement as to whether the defendant was capable of knowing the nature,

quality and wrongfulness of the act; whether he had sufficient mentality to plan, premeditate and deliberate; whether he is mentally capable of cooperating in his defense and of advising counsel; whether an irresistible impulse existed and if so whether such an impulse was part of a psychosis, part of a compulsive neurosis, or part of a rage reaction in an otherwise normal person. In this way, the doctor contributes to the guilt-finding function of the court. He can also contribute to the sentencing function if the defendant is convicted. He can explain the possibilities and methods of rehabilitation and he can furnish factors which the court might want to weigh in mitigation of guilt or in fixing the sentence.

WHAT THE PSYCHIATRIST CANNOT DO

These, and other functions, the psychiatrist has. But there are also certain contributions he cannot be asked to make. For example, you must not expect him to use the courtroom for a lecture hall and combine his testimony with a full indoctrination course in mental hygiene. You cannot expect him to use the witness stand as a soap box and combine his testimony with a crusade for reforms in the law. You must expect him—and he must expect—to take the law as he finds it when he examines, reports on a defendant, or testifies about him. If he thinks that the law is wrong, he is expected to press for reforms through organizational and legislative channels and not through *obiter dicta* appended to his testimony. You must be clear about the different roles of the psychiatrist as a witness and the psychiatrist as a teacher. As tempting as it may be, the witness stand is simply not the place for pedagogy or pedantry.

Nor must you expect the psychiatrist to cure the criminal. Some law breakers have been subjected to intensive psychotherapy and sometimes brilliant results have been reported. But this is exquisitely rare. It is doubtful if, today, a man with a tendency to forge checks, engage in homosexual practices, perpetrate assaults, pass counterfeit money or use the mails to defraud, is going to be cured of that tendency by a course in psychotherapy. Psychiatry has enough trouble relieving patients whose emotional conflicts convert into clinical symptoms; it has not yet had much success with those whose emotional conflicts convert into antisocial behavior. I do not deny the importance of emotional factors in such behavior. I merely deny the effectiveness of available present day psychotherapy in bringing about permanent relief.

We psychiatrists want to be helpful. But you just can't ask us to solve industrial strife, marital unhappiness, crime, delinquency, and international ill-will. Let us not be oversold!

We cannot, for example, ask that the courts turn over to our custody the management and control of all offenders with psychiatric diagnoses. Since most people are *not* convicted of any crime, it follows that whoever is convicted is, in a sense, abnormal by definition. He deviates from the norm. Therefore, he is abnormal, and therefore you can, if you want, attach some kind of psychiatric label to anybody convicted of anything. This concept would sweep up thousands of antisocial people in the category generally labeled "psychopath." What would we do with these psychopaths if we had them in our hospitals? Could we give any assurances of even being able to retain them securely to protect society? We could not. A hospital is

not, and must not become a prison. Could we give any assurance as to reasonable chances of rehabilitation?

We have to avoid the curious situation that exists in some places, particularly at the magistrate court level, where the judge keeps saying that this defendant is a sick man to be treated, not a criminal to be punished, and therefore won't the psychiatrist please take over. When this occurs we like to think it is a sign of an enlightened judge who has been indoctrinated by the convincing logic of our psychiatric arguments. Sometimes it is. Sometimes though it is simply a judge who wants to get off a hot spot. For instance, he may not know what to do with a sex offender. He does not want to imprison him, either because of fear that in the one-sex environment of prison the sexual deviation will become worse; or because such a sentence might stamp the judge as old-fashioned. He is afraid to put him on probation lest the offensive behavior continue and bring down popular scorn on the judge for turning the offender loose. To make matters worse he simply cannot understand how a grown-up man can get satisfaction out of exposure before children, so there he is in a tough spot. No matter what the magistrate does here, he is sure to be wrong.

At this point, Dr. Fixit enters the picture. Dr. Fixit is a psychiatrist and has all the answers. *He* knows why the defendant likes to behave this way before children. *He* knows how to relieve him of this drive. If he can't cure the exhibitionism, at least he can fix it so that the defendant will be able to live comfortably with the compulsion. Of course the neighbors won't be able to live comfortably with this kind of deviate, but that isn't the doctor's worry. The doctor's sworn duty is to help a patient, not a neighborhood. So the court turns this over to the psychiatrist and by one brilliant stroke the judge solves his judicial dilemma. He places the defendant on probation with the proviso that he obtain psychotherapy. Having thus neatly disposed of his problem and established his enlightened philosophy, he can go to lunch full of rectitude and up-to-dateness.

This is a role in which the psychiatrist is not well cast. It is bad enough if the doctor wants to be Dr. Know-it-All. It is worse if he wants to be, or is compelled to be, Dr. Fixit. I am unable to escape from the conclusion that crime is socially defined; it is largely socially determined; it ought to be dealt with by social instruments.

THE COURT'S RESPONSIBILITY

So far I have spoken only of the psychiatrist's responsibilities to the court. It seems only fair to say that the court has some responsibilities to the psychiatrist. Asked to examine a defendant, the doctor should be given an adequate history, access to the probation office records, school records and so on. He deserves some consideration about the timing of his testimony. While he cannot ask for immunity from cross-examination, he is entitled to freedom from sarcastic attacks on his motives, his appearance, his accent, his word choice, and his honesty.

The court room is a well lighted stage. The doctor's reputation may be enhanced or destroyed, not by the soundness of his testimony, but by his general behavior in this forensic limelight. The psychiatrist's work is sensitive to public opinion—much more so, for example, than the work of the pathologist or orthopedist. Furthermore, the public is suspicious of what they call "brain specialists" and are eager for any

evidence that the psychiatrist is a crackpot himself. Finally, the psychiatrist labors in a field in which every layman considers himself something of an expert. All of these considerations make it incumbent on the psychiatrist that, in his court appearances, he avoid the one extreme of seeming to be a courtroom tout, and the other extreme of being a stuffed shirt. There is great temptation in both directions. The psychiatrist of more sedate temperament may use the witness box as a lecture platform, spouting solemnly and exploding indignantly when questioned. He gives the picture of a pompous pedant. At the other pole is the court room familiar who calls attendants and lawyers by their first names, who spends hours in court room corridors exchanging gossip and who waits with obvious interest the outcome of every case. It is worth a footnote to say that the psychiatric witness is well advised to fade out as soon as he has testified. Lingering around the court creates two impressions, both of them bad. One is that he is not busy, the other is that he has an improper, perhaps personal, interest in the verdict. By contrast, a prompt departure from the court house emphasizes that he is disinterestedly willing to let justice take its course. And, incidentally, that he has other work to do.

You lawyers are often impatient with us because, instead of giving crisp, blunt, unequivocal answers, we seem to be a bit unsure. These disagreements make you suspect that psychiatry is not an exact science, and in that you are right. And you chide us for those disagreements. But remember, even the United States Supreme Court can disagree about the plain meaning of words written by other men.

If the law is so inexact a science that even the words of men are not clear to other men, you must forgive us doctors for not always being sure about the obscure and unconscious meanings of the deeds of men.