Psychiatry and the Law -- A Dual Review

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A Lawyer’s Viewpoint
The impact of psychiatry on twentieth century Americans, involving, as it does, basic attitudes toward life, psychologies of human nature, and the reform of legal institutions, must challenge thoughtful persons to take stock of the situation. The requisite analysis is not the subject of this paper, but the principal lines of a relevant inquiry can be suggested. On the one hand, it must be recognized that psychiatry has probed deeply into the instinctual and emotional aspects of personality, and that it can exhibit hidden drives, conflicts, and mental disorders which should be considered in any careful estimate of human conduct. On the other hand, the theses that the life of every person is molded in an infancy dominated by the Oedipus complex, that all conduct is rigorously determined by antecedent experiences, mostly instinctual, that moral obligation is merely a rationalized false pretense, and so on—these can certainly not be accepted as scientific truths even if very loose criteria are employed. And if it be granted that they are defensible premises within the confines of a clinic, does it follow that they are also applicable or even relevant to the types of conduct and the issues which are met in legal problems? These broad inquiries permeate the special problems to be discussed concerning Psychiatry and the Law, and one cannot be confident that he has even raised the correct questions until the philosophy of the various psychiatries has been distinguished from the empirical knowledge contributed by them.

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* Editor’s Note: Because of the apparent significance of Psychiatry and the Law, the Iowa Law Review is here publishing reviews by recognized experts in the fields of criminal law and psychiatry. In preparing their reviews of Psychiatry and the Law, Professor Hall and Doctor Menninger were advised that they had “relatively unlimited freedom to discuss the book and set forth [their] own thoughts regarding its subject.” Both reviewers prepared their manuscripts and submitted them independently for publication.

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* See the references to the studies cited in Salter, The Case Against Psychoanalysis 159-179 (1952).
The Guttmacher-Weihofen book represents successful collaboration between representatives of the two indicated disciplines. It marks important progress in forensic psychiatry, which is recent and much needed. When the writer surveyed the field in 1945, an unmitigated strident abuse of law, lawyers, and judges characterized the forensic forays of psychiatrists in this country. The situation today, evidenced by the Guttmacher-Weihofen book, is vastly improved. There are occasional recurrences of the former bias, but such lapses are rare, and they are more than compensated for by the authors’ informed attitude and approach.

The first third of the book consists of a simple exposition of mental disorders, illustrated by brief case-histories. It covers the psychoneuroses, the manic-depressive and schizophrenic psychoses, psychopaths, sex offenders, organic brain disorders, and congenital intellectual deficiency. This part of the book provides an interesting introduction to theories of psychiatry, mostly Freudian. It is not sufficiently detailed

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2 It is a much better contribution to forensic psychiatry than Alexander and Staub, The Criminal, The Judge, and The Public (Zilboorg, trans. 1931), which was also the joint work of a psychiatrist and a lawyer.

3 Hall, Mental Disease and Criminal Responsibility, 45 Col. L. Rev. 677 (1945), reprinted with revisions in the writer’s General Principles of Criminal Law c. 14 (1947).

4 Id. and of. the writing of Dr. Norwood East, a distinguished English psychiatrist with over forty years’ experience in legal and penological problems, especially his Society and the Criminal (London 1949, Springfield, Ill. 1951). A typical statement by Dr. East is: “But a measure of emotional insight is essential for the clinical work of a physician, whose main purpose is to comfort and cure. Hence, almost inevitably, his approach to medico-legal problems is less free from bias as a rule than is the intellectual impersonality of the lawyer, or the detached disposition of the exact scientist.” Id. at 213.

5 It seems probable that the opinions of psychiatrists in this country have been influenced by American attitudes regarding lawyers, as contrasted with the high prestige of the English bar, and by adverse views of law in central and eastern Europe, shown, e.g., in Alexander and Staub, op. cit. supra note 2 at 15-16.

Other opinions by Dr. East, which are important for the present inquiry, are summarized in his above cited book on pages 8, 16, 18, 19, 49, 51, 53, 223-4, 265, 268-9, 273.

6 “The criminal law stands as the relentless dispenser of punitive sanctions, while permissiveness and forbearance permeate psychiatric thinking.” (4) “... our present antiquated legal structure, ...” (81) “It takes rigorous legal training to develop a tolerance for this sort of word-magic.” (423).

E.g., their noting that “the law... is itself a subtreasury of time-tested psychology, most of it quite sound” (12); their refutation of criticism of law and courts by psychiatrists who do not understand the relevant legal problems (18, 210); and their recommendation that the medical schools should include instruction “by lawyers, judges, and psychiatrists experienced in medicolegal work.” (221).
to serve specialized needs; and there is often little more than a description of an underprivileged family background and a persistent criminal career. However, as to the disposition of cases and sentence, there is merit in the authors' suggestion that "psychiatry can make its greatest contribution to criminal justice at this point." Then follow chapters on the psychiatrist as an expert witness, privileged communication, veracity, hospitalizing the mentally ill, and the effect of mental incompetency on guardianship, contracts, wills, marriage, and tort liability. Succeeding chapters deal with mental disorder in relation to criminal responsibility, and the book concludes with a plea for prevention and reform.

Although the book is an important forward step in forensic psychiatry, it does not provide an adequate analysis of certain basic problems, e.g., the differences between legal functions and those of psychiatrists, and the relationship between certain legal rules and psychiatry. What still needs emphasis and clarification is that litigation is a dispute involving precious rights and values as well as sharp disagreements among reputable psychiatrists, the implications of which are not resolved by authority, i.e., official appointment of the experts. The problem, moreover, is obscured when the knowledge represented in law and its administration is opposed to psychiatric or other empirical knowledge; actually, it represents the testing and adaptation of psychiatry and other empirical knowledge to the solution of legal problems, even though there is an inevitable lag behind the vanguard of science. Especially with reference to a discipline like psychology, the correct formulation of problems requires recognition of the fact that a vast amount of such knowledge has been incorporated into and tested by the legal process. The authors' acknowledgment of this is in gratifying contrast to the recently prevailing attitude among psychiatrists who wrote about law. What needs to be done, however, is to follow the implications through the investigation of problems and the assessment of claims of the various psychologies to superior knowledge. The neutral formulation of problems in that perspective, a critique of the psychology now used in law, and the clarification of legal functions as

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7 P. 265.

8 This general problem has recently been discussed by the writer in Some Basic Questions Regarding Legal Classification for Professional and Scientific Purposes, 5 J. of Leg. Ed. 329 (1953).

9 "Dealing as it does mainly with human behavior, the law very likely has more to teach psychology than to learn from it. The law has had a long history and very able students and practitioners." THORNDIKE, MAN AND HIS WORKS 133 (1943).

10 See note 6 supra.
contrasted with medical functions remain insistent needs despite the progress represented in the Guttmacher-Weihofen book.

As regards the last of these, it is sometimes recognized that insanity and criminal responsibility are legal questions while mental disease is a medical problem. But unless the differences are articulated and illustrated in simple examples of medical practice and legal proceedings, misconceptions are fostered, e.g., that "legal insanity" is an imagined disease conjured up by presumptuous lawyers. Guttmacher and Weihofen help to clarify the meaning of the legal tests, but they do not push their analysis far enough. "The test", they say, "is not a fumbling and ancient attempt on the part of the law to define a psychosis, as some psychiatric critics seem to assume. The tests attempt to isolate those offenders who, because of their mental disorder, are nondeterrable..." This is hardly a satisfactory solution of a central problem, and the restriction of objectives to deterrence is untenable. Moreover, in the writer's opinion, the tests do define psychosis to the extent of specifying rationality and focusing upon phases of conduct which are socially and legally important. There is nothing technical or arbitrary about that, and some psychiatrists have recognized that their studies and diagnoses should take account of such conduct.

The legal tests have been defined by thoughtful persons, lay and professional, aided by the best available experts, over centuries of experience. They are stated in terms suited to the conditions, problems, and purposes of the legal process. They involve some questions which some psychiatrists do not ask their patients, but that they are questions which psychiatrists understand and can assist the courts to answer is abundantly evidenced by the helpful participation of many psychiatrists in court proceedings. The Guttmacher-Weihofen

12 P. 420.
13 "... the term insanity to-day is usually limited to persons who suffer from a major mental disease which we [psychiatrists] know as a psychosis and who are thereby irresponsible according to law, or certifiable as insane." East, op. cit. supra note 4 at 62.
14 "Irrationality is still accepted as a criterion of severe mental illness. ..." Zilboorg, The Sense of Reality 10 Psychanal. Q. 183, 184 (1941).
15 "Psychiatric critics of the criminal law have often complained that the law does not give them the opportunity to bring the science of psychiatry and psychoanalysis to bear in a criminal case. Such complaints are groundless. ... The law, therefore, not only makes possible but, as I see it, demands the scientific diagnosis of a mental disease from the psychiatric expert. That includes the use of all modern
book will, of course, facilitate more systematic investigations of this important problem.

Very inadequate, however, and even misleading is the authors' discussion of the place of motive in the criminal law. "[The law], they say, "is not interested in why he meant to do it." And they comment: "To the psychologist, this is a curious notion, for he cannot conceive of trying to understand human behavior without asking why the individual acted as he did." The legal significance of motive has been analyzed in some detail in the professional literature on criminal law, hence the above treatment of the problem is unfortunate. "The law" is very much interested in motive, as is shown in the initiation and withholding of prosecution, waiver of felonies, the admission of evidence of motive relevant to the act in issue, pre-sentence investigations and hearings, the administration of probation, suspended sentence, and parole laws, and elsewhere. The principal point, however, is that the meaning of exclusion of motive from the substantive law is that it is not relevant to the definition of a crime. The premise is that no matter how good the motive may be, one who intentionally or recklessly commits a harm forbidden by criminal law, commits a crime, i.e., the definitions of crimes may not be supplanted by individual estimates, on the basis of evaluating motives, that a crime was or was not committed. Our legal order assures the necessary minimum of objectivity and certainty, and for the most part allocates motivation to the sphere of administration where, whatever the final disposition, the basic premise is not repudiated (and when psychiatrists, examining a cooperating person, can give the court substantial assistance).

One of the most helpful parts of the Guttmacher-Weihofen book is the authors' discussion of the "partly responsible". They do not pursue the common criticism that the law stupidly draws a sharp line between sane and insane, although they appreciate the importance of the soundest possible treatment of the numerous "not-sane not-insane" persons.16

methods, be they psychosomatic tests, projective tests, Rorschach test, mosaic test, electroencephalograms, or psychoanalytic studies of the inner life history. The expert who is required to make a scientific diagnosis is entitled, if he is asked to substantiate it, to refer to any of these methods.17 Wertham, The Psychiatry of Criminal Guilt, in SOCIAL MEANING OF LEGAL CONCEPTS—CRIMINAL Guilt 163 (N. Y. U. School of Law, 1950).

15 P. 402.

16 In theory and in public opinion the hospital stands at the opposite pole from the penitentiary; but in practice there are punitive aspects in involuntary commitment in a hospital, and the more progressive penal institutions make provision for treatment by classification, psychiatric and other medical service, and diversification of work. "The view usually maintained by prison psychiatrists in this country, that
The authors' discussion of the *Fisher* case and the rule that intoxication may be shown to exclude premeditation and, thus, first degree murder, is persuasive within the limited context considered. It would have been even more significant if they had related their discussion to the objective standard of liability. The authors merely refer to that but account for the prevailing decisions by the fact that lawyers "have been distracted by the tests of insanity" and that the courts fear that juries could not discriminate between degrees of mental disorder. That may be true but the underlying difficulty is presented by the established rule of objective liability applied to homicide and certain other areas, e.g., mistake of fact. This rule runs counter to the subjective liability applied in most of the criminal law and should be wholly eliminated from the criminal law. That would take care not only of killings by such persons as Fisher but, also, of many other types of cases, including those involving persons who are inexperienced or conditioned by a foreign culture, rather than mentally deficient.

In a flight from the scholarly thinking which characterizes the greater part of their book, the authors suggest that it makes no difference whether a person who committed a crime was sane and guilty or "not guilty by reason of insanity." "In either case," they say, "he has shown himself a menace to society who must be taken into custody and control. Why worry over whether that control is based on criminality or insanity?" In support of this notion, the authors espouse what they call "the new direction" and "the new approach", which turns out to be a sketchy version of recent criminological positivism, with the usual humanitarian claims, the pretense to scientific support, and the cold admission that it may, of course, be necessary to incarcerate petty offenders for life ("even though the only crime he has actually committed was a minor one") if the psychiatrist-king decides that they

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punishment may be a valuable adjunct to treatment in selected cases of criminal behavior associated with a minor mental abnormality, appears to be gaining ground." EAST, op. cit. supra note 4 at 288-9.

Legal provision for the "partly insane", the "not-sane not-insane", implemented by special institutions, would not alter the nature of the legal issues or the type of decision required. For, again, for purposes of legal control, the intermediate group would need to be distinguished at the one extreme from the fully normal and, at the other, from the obvious psychotics.

17 P. 426.
18 P. 430.
19 Ibid.
20 Hall, General Principles of Criminal Law c. 6 (1947).
21 P. 443.
"cannot safely be released". It is a pity that so good a book was marred by such loose talk; and the authors, revealing their own doubts, turn to a position sharply opposed to the "scientific controls". "The point is", they say, "that the problem is a moral one." There are dangers in unlimited control by experts. So much depends upon the parents' "respect or disregard of basic moral principles". Thus the one thesis is cancelled out by the other; and the last words return to the common sense morality embodied in the criminal law.

The most important part of the book is the authors' discussion of the M'Naghten Rule and the "irresistible impulse" test. They aptly point to the ambiguity of the word "wrong" in the M'Naghten formula, but they do not analyze the existing conflict in the decisions.

They give their most detailed attention to the "irresistible impulse" test, which is again asserted to be law in at least fourteen states and, perhaps, in four additional ones. It would have been helpful had the authors resolved the principal doubt regarding this assertion, namely, is the "irresistible impulse" test accepted in all those states as a sufficient alternative to the M'Naghten Rule? Unless that is clearly shown to be the case (and not merely recognition that impulsive actions may be evidence of irrationality, as defined in the M'Naghten Rule), the "irresistible impulse" test has not been accepted.

The authors' support of the "irresistible impulse" test does not contribute substantially to the solution of that very important problem. For reasons stated above, it does not clarify the functions of judges and juries, as distinguished from those of expert witnesses, to assert that: "Whether a truly irresistible impulse can exist is a question for psychiatrists rather than for judges to decide, and dogmatic judicial denials that such a condition is possible have rather gone out of fashion." Besides, that merely assumes that psychiatry or a particular school of psychiatry is superior to the psychology represented in the

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22 P. 445.
23 P. 447.
24 P. 455.
25 The problem has been revived by decisions of the English Court of Criminal Appeal holding that "wrong" means "contrary to law." Reg. v. Windle (1952) 1 T.L.R. 1344.
26 P. 409.

"It is sometimes suggested that the mental condition of an accused person should be taken out of the hands of the jury, and that a medical referee sitting with the presiding judge should determine the issue. I believe this suggestion is thoroughly mischievous." "... an intolerable burden would be placed upon psychiatry in its adolescence if it had the last word in a criminal court." EAST, op. cit. supra note 4 at 17, 18.

Cf. WEST, CONSCIENCE AND SOCIETY 103-4 (1942).
criminal law concerning certain socially important conduct. And it completely ignores the fact that psychiatrists are sharply divided on this problem and that many of them, perhaps most of them, support the prevailing judicial estimate.\textsuperscript{27} It is all the more surprising because, although they quote Dr. Frederic Wertham's complete rejection of "irresistible impulse", the authors ignore his analysis and the facts which led him to a position flatly opposed to that of the exponents of "irresistible impulse".\textsuperscript{28}

Since the "irresistible impulse" test is urged as a sufficient substitute for, or alternative to, the \textit{M'Naghten Rule}, it directly implies the exclusion of irrationality from the criteria that a person is psychotic. The authors advert\textsuperscript{29} to the criticism suggested by this writer in 1945, namely, if the various functions of the personality are integrated (as the authors agree)\textsuperscript{30} how can a person understand what he is doing, realize that inflicting a serious injury on a human being is grossly immoral but, nevertheless, at the same time be so impaired in his power to control his conduct that he is "irresistibly impelled" to commit a major harm?\textsuperscript{31} They attempt to meet the difficulty by stating: "But while it is true that the affective, cognitive, and conative processes of the mind are interrelated, certain forms of mental disease may affect one more than the others. A disorder manifesting itself in impulsive acts may affect intelligence somewhat, but it is quite possible that impulsiveness may have reached the point where it can be said that it is

\textsuperscript{27} \textit{Hall}, op. cit. supra note 20 at 507 n. 99, 512 n. 21, 518 n. 45 (1947), and see note 28 infra.

\textsuperscript{28} Their quotation of \textit{Wertham} is \textit{The Show of Violence} (1949) on pp. 410-411. In a later publication Dr. Wertham more fully explained his complete rejection of "irresistible impulse":

"In my opinion the criminal law which makes use of the conception of irresistible impulse is not an advance belonging to the present 'scientific social' era. It is a throwback to, or rather a survival of, the previous 'philosophical psychological' era. The concept of irresistible impulse derives from a philosophical, speculative, synthetic psychology. It forms no part of and finds no support in the modern dynamic psychoanalytic study of mental processes." \textit{Wertham}, op. cit. supra note 14 at 164.

\textsuperscript{29} P. 410.

\textsuperscript{30} Pp. 14, 171, 324.

\textsuperscript{31} The authors would emphasize very strong urges rather than sudden, overwhelming, momentary "impulses", but such reformulation, apt as it is, does not alter the problem raised above. When they say that certain offenders "are the victims of urges so strong that most normal persons could not resist them under most circumstances" (411), that seems to imply that "irresistible impulse" does not involve a serious mental disorder. Nor is it persuasive that normal persons who did not resist are distinguishable from psychopathic ones who could not resist on the basis of whether the respective motivations were "external" or "internal". \textit{Ibid}. 
"irresistible, and yet intelligence has not deteriorated so much as to obliterate knowledge of right and wrong."\textsuperscript{32}

Does this explanation aid solution of the problems raised by the theory of "irresistible impulse" in relation to integrated personality? "Emotions and will are also part of mentation", say the authors. "Man... functions as a totality..."\textsuperscript{33} But what are we to understand them to mean by these sentences in the light of their assertion quoted above? In modern psychology, integration (a theory dating from Plato's \textit{Parmenides}, and central in Aristotle) has meant the personality functioning as a unit as opposed to the operation of separate faculties. This suggests the analogy of a compound rather than that of a mixture, a whole or coalescence rather than an interrelation of separate parts. How, then, is it possible for the personality to be seriously disordered in some basic functions while others remain substantially unimpaired?

The gaps in relevant empirical knowledge trouble thoughtful judges and lawyers and prevent their doing the kind of job they want to do. For example, the degree and extent of mental disorder involved in alcoholic and narcotic addiction, epilepsy, pyromania, kleptomania, and various manifestly sexual offenses such as exhibitionism raise difficult legal problems precisely because the available empirical knowledge is inadequate. Similar doubts concern certain types of delusion. The authors apparently hold that the entire personality is involved in any delusion;\textsuperscript{34} but there is other expert opinion that some paranoid conditions indicate only eccentricity, not disease. Perhaps the theory of integration of the personality must be abandoned or drastically modified. But the decision of legal issues cannot wait upon the advance of clinical knowledge and the improvement of psychological theories.

The best part of a good book is that it stimulates the reader to think about the unsolved problems which merit further study. This is not the place to formulate a detailed program suggested by \textit{Psychiatry and the Law}. But with reference to the subject of the authors' most careful analysis, the problem of the \textit{M'Naghten Rule}, it seems to the writer that there are three available avenues to attain sound objectives, which ought to be explored.

(1) A great deal more should be made of "temporary insanity" than has been done. This does not imply that lay notions of "temporary insanity" should be adopted but, instead, that abrupt lapses into psychoses of very short duration be explained. Whatever the direction of sound psychiatric implementation might be regarding, \textit{e.g.}, kleptomania, the

\textsuperscript{32} P. 410. This is also the position taken by Keedy, \textit{op. cit. supra} note 11 at 990.

\textsuperscript{33} Pp. 171, 14.

\textsuperscript{34} Pp. 417-418.
point is that at the minute of taking what to normal persons is, say, a silk handkerchief, that object is something quite different to the kleptomaniac. Functioning in accordance with the "reality principle" is greatly disordered at that time or, as the lawyers put it, there is no knowledge of the nature and quality of the act.

(2) A further possible solution of present difficulties is to give the word "know" in the **M'Naghten Rule** an interpretation consistent with the prevailing view that the various psychological functions are integrated, i.e., to know that an act is morally wrong means more than merely conventional or logical recognition of its immorality. It means that the knowledge is permeated by feeling, that a person has assimilated the knowledge into his self and not that, as an icy spectator or in mere lip-service, he acknowledges that he "knew", etc. This view of knowing in the realm of morality is supported by daily experience. It is consistent with the psychiatrist's "mechanism of identification", e.g., ability to identify one's self with a prospective victim, as a phase of normal functioning. The difference between knowledge of a mathematical equation or a scientific law and moral knowledge which, as stated, includes affective tones and assimilation within the personality, is emphasized in existentialism and by some psychiatrists.  

If the above meaning of moral knowledge (restricted to the serious harms dealt with in criminal cases where insanity pleas are raised) is valid, psychiatrists who have been insistent on the adoption of the "irresistible impulse" test as a sufficient substitute for the irrationality required by the **M'Naghten Rule** should reconsider their interpretation of the moral understanding of psychotic persons. It may be added

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35 The writer's proposal in this regard is discussed by **CLECKLEY, THE MASK OF SANITY** 495-501 (2nd ed. 1950). See also, **WERTHAM, THE SHOW OF VIOLENCE** 86 (1949), and **WERTHAM, op. cit. supra** note 14 at 167.

36 In Professor Keeley's article, **Irresistible Impulse as a Defense in the Criminal Law**, 100 U. of Pa. L. Rev. 956, 959 (1952), it is reported that of 102 psychiatrists who answered questionnaires sent them by Dr. P. Q. Roche, to the question, "Are there cases where a person, suffering from mental derangement, knows that it is wrong to inflict bodily harm (killing, maiming, ravishing) upon another person, but owing to the mental derangement is incapable of controlling (resisting) the impulse to commit such bodily harm?", 93 answered "yes", 9 "no", and 6 had no definite opinion.

Regarding the significance of these data, the following questions arise:

1. How representative a sample of the 7500 practicing psychiatrists in this country are the 102 who answered the questionnaire?

2. Did the questionnaire alert the recipients to the issues connected with the words "knows that it is wrong" etc. by referring to the view, generally accepted among psychiatrists, that the personality is integrated?

3. Were those questioned invited to say what, as psychiatrists, they understood
that, despite the deplorable state of the polemics on the above questions (and we do not know to what extent psychiatrists who write on legal problems represent their profession’s views), many psychiatrists actually proceed along the indicated lines and find neither themselves nor the accused at any disadvantage because the M’Naghten Rule is framed in nineteenth century words. They have grasped what every competent lawyer knows, namely, that the old bottles can hold new wine, and they interpret the legal words in terms of current psychiatric knowledge.

(3) The third suggestion is that the M’Naghten Rule be amended to include and require consideration of certain impulsive actions as evidence of irrationality.

One might raise many other questions suggested by Psychiatry and the Law and, indeed, in close reference to it, formulate a detailed program for future research in forensic psychiatry. But the last word here must be to congratulate Doctor Guttmacher and Professor Weihofen for an important contribution which, one may believe, heralds an era of fruitful collaboration between representatives of two ancient professions.

JEROME HALL

A Psychiatrist’s Viewpoint

Here is a book that psychiatrists and lawyers have been looking for. It is one that they have needed for a long time. It is one which doctors who are not psychiatrists and lawmakers who are not lawyers will find extremely valuable. It is one which faces up to a host of problems

“Knows” to mean in the above context or to indicate what evidence supported their opinion?

4. Was the attention of those questioned called to the opinions of psychiatrists who flatly repudiate “irresistible impulse” as wholly unscientific? See notes 27 and 28 supra.

The preparation of questionnaires and the interpretation of answers have received considerable study in recent social science.

37 “During the debate Lord Haldane said that he never heard of the M’Naghten rules embarrassing any judge when justice required an acquittal. Indeed, the elasticity of the law is clear to all.” “There can be no doubt, in the minds of those who have considered in detail the medical evidence in many trials for murders, that the urgent need of to-day is not a reform in the law regarding criminal responsibility, but an improvement in quality of our evidence as forensic psychiatrists.” EAST, op. cit. supra note 4 at 49, 51.

“I know of no case where a man was wrongly declared legally insane or wrongly declared legally sane in which this miscarriage of justice was later on clearly established and acknowledged, where the outcome would have been different had the legal definition of insanity been different.” WEETHAM, op. cit. supra note 14 at 160.

38 This was suggested by the writer, op. cit. supra note 20 at 536-37. For relevant English and Australian decisions, see id. at 526.
which concern not only these professionals, but every citizen of this country and, indeed, of every country; for these are problems of human behavior and particularly human misbehavior.

For several thousand years the legal profession and the medical profession have shared with the clergy and the teaching profession a rank of special privilege. The teachers and preachers were ranged against the lawyers and doctors in the sense that the first two professions had a positive approach and aimed at helping mankind onward and upward, whereas lawyers and doctors traditionally took over when human weakness or misfortune extracted an individual from the line of progress.

For centuries there was no overlapping of the areas of competence and responsibility. To be felonious was a clearly defined state which was for the lawyer to deal with. To be sick, on the other hand, was an equally definite condition which was for the doctor to handle; ignorance was a problem for the teacher, and sin for the clergyman.

It is hard to say just when this simple, convenient arrangement began to dissolve into a mesh of conflicts, ambiguities, and uncertainties. The lawyers began to say that teachers should be responsible for the inculcation of ideals of social conformity. Teachers began to object to the arbitrary prohibitions of the church. The church began to expect more loyal support from the law and the doctors began to do some preaching and teaching in the name of hygiene and the prevention of illness. The clergy began to heal; the lawyers began to teach; the doctors began to claim a better understanding of misbehavior than that of either the lawyers or the preachers.

Where are we now? We are in a state of confusion, especially in regard to the effective management, control and correction of "delinquency." That there has always been aberrant behavior in the world, no one can have any doubt, even without any attempt to agree upon a definition of it. The general phenomenon of deviation from a mass tendency is so familiar in every day experience that it is much easier to grasp the notion of queerness, exceptionalism, aberrance, in common sense terms than to define it in mathematical or scientific terms. There may not be any such thing as an average man or a normal man, but we all know what is meant by a queer man—or we think we do. Perhaps I should put my emphasis on the fact that we think we do, because by various ways of construing the definition, it might be possible to show that we are all mistaken. But let's give ourselves the benefit of the doubt.

Now society is interested in queerness, in aberrances of behavior, only when these become disturbing to society, i.e., to others than the doer. Medicine, on the other hand, is traditionally concerned with aberrances
that distress the doer himself. Medicine is oriented toward the problem of survival, or rather threatened non-survival, the alarm signal of which is pain. Pain is something the individual feels. The danger and pain which aberrant behavior cause society have been of concern to medical science only indirectly because of the secondary danger and pain implied for the individual who provokes it.

This is not to say that medical science has no social concern or that legal science has no individual concern. The progress in public health and preventive medicine on the one hand and the cherished legal provisions for individual civil rights on the other argue eloquently to the contrary. But in a general way, law is socially oriented and medicine is individually oriented.

During the past hundred years, both have expanded in previously neglected directions, not only in practice but, what is much more important, in theory. Lawyers have come to see that the welfare of society cannot be insured without provision for the molecular, that is to say, individualistic approach to some cases and doctors have come to realize that the physical and mental health of the individual cannot be insured without broad social considerations. The result has been a rapid extension and overlapping of the two fields. Overlapping leads to conflict, or at least to antithesis, and the proper logical progress is toward synthesis. The appearance of this book indicates that we are moving in that direction.

This fusing of previously antagonistic views was dramatically illustrated in a recent local event, which I will describe briefly. The ten-year-old daughter in a middle-class family was threateningly molested by a disagreeable character who, it turned out, had been up to such mischief upon several previous occasions. When he was apprehended, the mother of the molested girl was urged to prefer charges for a criminal suit. This she hesitated to do until she had talked to various legal authorities. One state official assured her that the only appropriate treatment for such an offender was castration. The prosecuting attorney counselled her that a criminal charge, if sustained, probably would result in a five-year sentence to prison from which the man would be released after two years; he urged her to solicit the assistance of psychiatrists in an effort to have the man declared dangerously insane in order that he might be permanently detained. Psychiatrists whom she approached declined to call him “insane” and were alarmed at the implication that it might be their responsibility to deprive a man of his liberty for the rest of his life unless they could certify that they had cured him of a malignant tendency. It was decided to discuss the case,
ostensibly as a moot trial, before a group of psychiatrists, lawyers, judges and state officials interested in the problem.

And here was the astonishing thing: At this moot "trial," the lawyers almost to a man took the position that the offender should be treated as abnormal, while the psychiatrists took the position that he should be tried as if he were normal. The lawyers didn't deny that a crime had been committed, but preferred to see this as evidence of a sickness, while the psychiatrists, without denying that he was abnormal, took the position that a crime had been committed for which the state had a prescribed penalty. Thus, while both agreed on the facts (namely, that he was an offender, that he was dangerous, and that he was aberrant) neither wanted to take the responsibility of dealing with him within the limits of the existing machinery. Both sides agreed that for his own sake and for the sake of society, the accused should be isolated, but whereas the psychiatrists felt that the lawyers were in the better position to effect this, the lawyers felt that the psychiatrists were in the better position to effect it.

Our penal code was drawn up on the assumption that its regulations, prohibitions and penalties would be taken into consideration by and influence the decision of each and all of the individuals governed by it who were tempted to violate the regulations. The law assumes that certain people, otherwise normal, may be tempted to violate a prohibition set up by society, but it stipulates that a given individual who wishes to disregard this prohibition puts himself in jeopardy and if convicted incurs a certain penalty. The lawyers are today strongly affected by the realization, acquired from recent advances in our psychological knowledge, that the behavior of some individuals is not determined or even influenced by a consideration of realities (including the reality of law and penalty). With the excuse of ignorance of the law, say the lawyers, we know how to deal; but with psychological incapacity to be properly affected or influenced by the knowledge of the law, we don't know how to deal. Tradition-bound though they may seem at times, lawyers are keen observers. They know, without being told by psychoanalysts, that some individuals do not act from conscious decision but on the basis of irrational, illogical impulses and that they are not influenced before or after by what constituted authorities threaten to do to them. This poses a problem for legal philosophy.

The lawyers formerly solved this dilemma in one of three unsatisfactory ways: they persuaded themselves that these cases were exceptional and had to be regarded as unfortunate instances of the incompetence of social regulation to cooperate fairly or effectively with all individuals. "The greatest good for the greatest number is bound to
work some injustices. Punishment won’t do any good and it won’t do us any good and will just cost society money and give society a false sense of security, but what else can we do?’’

A second unsatisfactory way in which lawyers attempted to solve their dilemma was to appeal to society to allow judges a greater latitude in respect to the sentence. The third unsatisfactory method was to say that such individuals were not normal and did not come under the assumptions of the law in regard to rational, normal judgment; so: “Let us turn them over to the psychiatrists, who have some special authorizations for handling such individuals.’’

Now the psychiatrists have their reasons for rejecting this transferred responsibility. ‘‘We are,’’ they say, ‘‘primarily doctors and not jailers. We are not prepared to treat individuals, against their will, for conditions which they themselves may not want to get rid of. The authority to detain individuals indefinitely, pending their willingness to accept treatment and carry it through successfully, has not been clearly assigned to us, nor would we be eager to accept it if it were. As therapists we are put in an untenable position if a patient is compelled to come to us and compelled by us to remain our prisoner until he accepts and successfully utilizes our therapeutic offerings. Doctors for ten thousand years have been in the position of receiving suppliants; their patients beg for treatment, they pay of their substance for treatment. The psychology of doctors is such that to be put into the position of attempting to compel a patient to accept their treatment and to detain him until he does is too disturbing.’’

For this dilemma, a solution, which at first blush seems promising, is for the legal authorities to take all responsibility for the detention of such individuals and for psychiatrists to take the responsibility only for treating them. The trouble with this solution is that in order to accomplish it, someone has to say first of all that such an individual is in need of such treatment; secondly, someone has to do the treating; and thirdly, someone has to say (officially) that the treatment has effected a change in the individual so that he is no longer a menace.

And who is to do these things? Who is to say that such a patient needs this kind of handling instead of the standard procedure? And as to who shall decide what kind of treatment is to be given and administer it, it is certainly an open professional secret that we psychiatrists do not know how to treat such patients in a curative way, or — to put it more accurately — we do not know of any specific treatment which can be regarded as promising what society wants. And, incidentally, where are we to find the psychiatrists to even attempt it, or to do research in the area? Is the national (and international) shortage of
psychiatric personnel a secret? And, finally, after an offender has been treated in whatever groping and uncertain ways the psychiatrist may have attempted, what prophet wants to take the responsibility of saying that the patient is well and may be released and will do society no more harm?

This in simple outline form is the practical dilemma of psychiatry and the law. The dilemma has a dozen collateral aspects or facets. There is the problem of communication, of diagnosis, of testimony, of evidence, of conviction, of veracity and even of philosophy. The illustration I gave in which the lawyers seemed to have taken the part of the psychiatrists, and the psychiatrists the part of the lawyers is typical. Everyone is mixed up about it. It is scarcely a question any more of an argument between two sides. It is a matter of general confusion, and any thoughtful group of individuals discussing the topic soon finds its members arguing against themselves.

For example, Professor Edward De Grazia of Washington recently published in the Columbia Law Review a rather sharp criticism of "the psychiatric argument for abolishment of punishment." He quotes quite a number of us, including myself, and waxes wroth with us for proposing that one can look at all misbehavior as an evidence of something mentally wrong with the individual. Now, as a lawyer, he looks at "something wrong" from the standpoint of its social inacceptability, and deplors my point of view that something wrong be looked at as an evidence of the need for treatment. Now he and I do not really differ, I think, if we define "treatment." As I use the word, putting a man in jail may be the best possible treatment (or at least one step in the treatment), but again it might not be—indeed, usually isn't. With what he understands me to have said, he disagrees and I agree with his disagreement. In an effort to get across to the public our position that what any one does, even a criminal offender, is the product of many forces which have caused an unendurable internal stress in that man, we psychiatrists have perhaps used the word "sickness" too loosely. And, in an effort to indicate our dissatisfaction with the effects of pre-measured official punishment as a routine "treatment" of all misbehaving individuals, we have given the impression, I am afraid, that we don't believe in the propriety of punishment, ever. The word punishment frightens us (doctors) so much that we get unrealistic about it. If one insists on sticking his hand into steaming water, it gets burned. If he kicks an angry dog, he gets bitten. Now he can't blame society for having some of the attributes of boiling water and an angry

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dog, i.e., it has its characteristics and gives fair warning. Society doesn't like to be kicked in the teeth and is certain to attempt to defend itself, by threats of action and by action. I don't think that any psychiatrist would deny that a twenty-five dollar penalty for running a red light has a deterrent effect on most of us. The fact that has always impressed us psychiatrists is that for some individuals the penalty that deters us, does not deter them! The mistake we have made is to give lawyers the impression that we believe, therefore, that no penalties deter anyone from anything.

We psychiatrists have not made it sufficiently clear that attempting to understand an individual whom we treat is not necessarily to condone all the behavior of such an individual, or even to expect inevitable penalties for such behavior to be waived merely because he is in treatment. Not all my colleagues agree with me about this. But I think we psychiatrists have sometimes put ourselves in a bad light by giving the impression that if a man is taking treatment, he should be permitted some offensiveness without penalty. For example, I personally will not accept for outpatient psychotherapy a man subject to homosexual tendencies who will not agree to eschew homosexual activities during the treatment period. Many normal people in the world, for one reason or another, manage to remain continent in spite of temptation, and I see nothing unjust in expecting a person afflicted with a temptation toward an illegal type of gratification to control his behavior and remain continent during the period of treatment in which we attempt to relieve him of his pathological propensities. I am willing to try to help him with his temptations; but not with his crimes. I am willing to try to help a man who is tempted to commit murder or arson, but I am not willing to treat a man—as an outpatient—who can't resist doing so. I grant that homosexual seductions, etc. are less serious than arson or murder, but the principle is the same.

All of this may seem to be a far cry from the review of this book in which an outstanding psychiatrist and outstanding legal authority join hands in providing us with a practical guide to common problems of psychiatry and the law. But actually the dilemmas I have been describing are just what this book is about.

Doctor Guttmaecher is known to all of his colleagues as a thoughtful, scholarly scientist, with a great deal of experience in this area. Professor Weihofen is not personally known to me, but is the author of a book dealing with insanity and the criminal law, and has served in important public responsibilities. What they have done is to outline, in some nineteen chapters, a systematic joint approach to the overlap

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1 Weihofen, Insanity as a Defense in Criminal Law (1933).
in their respective fields which I have been discussing. The first half of the book is devoted to an account of the main classical categories of mental disorder, with case illustrations of the ways in which patients afflicted with these syndromes became involved in legal complications. Then comes a chapter about the psychiatrist on the witness stand, which emphasizes the difference between the information expected of a doctor in the courtroom as compared to the type and method of communication which he supplies at a diagnostic conference. This is followed by two chapters dealing with the complicated topic of privileged communications and the privilege against self-incrimination.

The next two chapters have to do with the question I raised above in regard to who shall say that a person who does not believe himself to be in need of treatment must put himself in a position to undergo treatment even against his will, and perhaps against the will of some of his friends and foes.

This in turn leads to three chapters on mental disorder as psychiatrically conceived and criminal behavior as legally conceived. The views of numerous colleagues and jurists are cited. The upshot of this section is approximately what I have said in my lengthy introduction: we all seem to agree that our present machinery and our present procedure are far from adequate, satisfactory or proper. It is no longer a question of law versus medicine, of one side against the other; there is a general agreement that we are confused and groping and that we have only begun to trust one another enough to join in discussions and studies and proposals which will point to a more progressive, more effective, more scientific, and more just method of dealing with those fellow citizens of ours who have lost their way.

In their earnestness, humility, and mutual respect, Doctor Guttmacher and Professor Weihofen have set us a magnificent example, and incidentally supplied us with a most useful book. It presents the problem, it discusses the existing inadequate solutions, it proposes some improvements. Perhaps its most useful effect will be to stimulate further collaboration between our professions, continued study, research and discussion, with the net result of making this book — let us hope soon — gloriously out of date.

KARL MENNINGER