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PSYCHIATRIC CRIMINOLOGY: IS IT A VALID MARRIAGE? THE LEGAL VIEW*

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IN this discussion "criminal law" refers to the common law crimes—murder, manslaughter, rape, assault, battery, robbery, burglary, arson, and larceny, and to related or similar statutory crimes. The history of the law, from the thirteenth century on, is marked by the reception of ideas which originated in Ancient Greece, were modified in mediaeval philosophy, and have been further developed since then in innumerable discussions and decisions. Thus, the legal view, reflecting the salient features of the criminal law, is largely an expression of the realism and rationalism of Western thought.

More particularly, the legal view connotes: first, the principle of legality, "the rule of (criminal) law"; second, the moral connotation of "crime" expressed in the principle of mens rea (the intention to commit a proscribed harm or recklessness regarding its commission); third, that action is an essential element of every crime; and finally, the significance of the distinctive sanction of criminal law—punishment, although it is recognized that other sanctions (corrective, preventive or compensatory) have an important place in peno-correctional programs and, also, that there are no sharp differences that wholly separate each sanction from the others.

The principle of legality[1] signifies that, however harmful, sinful and immoral an act may be, it is not a crime unless it has been definitely forbidden by a criminal law, and that any punishment imposed on a convicted person must also be definitely prescribed by law; and in Anglo-American jurisdictions "definitely" implies the precision manifested in a system of numerous, detailed cases. The correlatives of the principle of legality (emphatically articulated to avoid misunderstanding or dilution) are the prohibition of retroactive penal law and the canon of strict interpretation—vague laws must be declared invalid and ambiguous ones must be narrowly construed.

Legality is deeply rooted in Western culture; even Soviet Russia, which abandoned the principle of legality in 1922, claims to have reinstated it in 1958. The Nazi abondonment of legality in 1935, like the earlier Soviet one, reflected the desire of those in power to punish and eliminate enemies of the regime; judges were to conform not to law, where that would exclude liability, but to the "sound feelings of the people" as interpreted by the dictator. This policy was implemented by the use of medical and other experts whose efficiency was not hampered by law. Little wonder that the "rule of law" has often been declared the greatest political contribution of Western civilization!

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1. See Hall, General Principles of Criminal Law ch. 2 (2d ed. 1960).

But it is also true that the principle of legality has frequently been criticized on the ground that any system of rules, however just, cannot take due account of the unique characteristics of particular situations and persons. It is therefore not surprising that psychiatrists sometimes take an adverse view of law, while lawyers oppose its erosion. This does not imply that there is always opposition; *e.g.*, the influence of psychiatric thought is reflected in many laws and in their administration. What is implied is that there are limits beyond which the precise, distinctive structure of Western criminal law dissolves; a point is reached where a choice must be made between government by law and government by experts.

I have stressed the safeguards against government made available by the principle of legality, but it is equally important to recognize the converse of that, namely, that persons whose conduct does fall within the legal definition of a crime *must* be held criminally liable. If we want the rule of law to protect us from arbitrary prosecution, we must also, if we are consistent, want the rule of law to include the conduct of criminal offenders. A system, if one can call it that, which finds no man *is* a criminal cannot find that any man *is not* a criminal. We have in effect abandoned criminal law if we exclude either function.

In this century considerable flexibility in the criminal law and its administration has been effected by probation, suspended sentence, waiver of the felony charge, parole and so on. This has been carried even farther with respect to children and youthful offenders. Questions are now being raised regarding their right to counsel and various other constitutional safeguards which are recognized in criminal courts. One may approve most of the above changes and at the same time insist on the retention of what is essential to the survival of the rule of law—the precise definition of criminal conduct, prescription of the maximum sentence and, of course, the ban on retroactivity. It is not always easy to recognize the limits beyond which legality should not be diluted, *e.g.*, when a looser definition of criminal conduct is still "sufficiently" definite to satisfy the principle. In the nature of the problem, disagreement must be expected, but this obviously does not mean that in a system of detailed case-law the significance of extreme demands or changes is not easily recognized.

Those who would reject the above minimal safeguards not only ignore political history, they also exaggerate the extent of relevant knowledge, the competence and altruism of the authorities and, it must be confessed, sometimes appear to be reaching for the mantle of Plato's philosopher-king! But would anyone wish to be charged in a criminal prosecution with being "dangerous" instead of being charged in the precise terms of our present law? And what convicted person would prefer to have the length of his incarceration depend not on a previously promulgated definite statute, on whether he was

convicted say, of petty larceny, and not manslaughter, but on the opinion of a psychiatrist that he may safely be liberated?[2]

Freud, unlike some Freudians, recognized the importance of criminal law. Instead of equating punishment with vengeance,[3] he spoke of "the decisive step toward civilization" and "the first requisite of culture,"[4] saying also that "culture must be defended against the individual, and its organization, its institutions and its laws, are all directed to this end. . . ."[5] In this view, law may be regarded as the "basic" value in the sense that all other values, including the practice of medicine and the cultivation of the arts and sciences, are dependent on it.

Accordingly, in developing a theory of psychiatric criminology, it is essential to distinguish facts from values. While the discovery of facts by psychiatrists may strongly influence legal reform, that knowledge must be distinguished from the relevant policies. The "sense of guilt" refers to psychological tension, but that is not the ethical or legal meaning of "guilt." So, too, if one chooses, "punishment" may be defined in factual terms as an emotional reaction, but that, again, is not its ethical-legal meaning. Finally, "responsibility" may signify the probability of being subjected to sanctions, but that does not express the ethical-legal meaning of the term.

Because of these ambiguities and Freud's emphasis on repression, his view of law (which resembles Hobbes' theory) is problematic. Despite many expressions in his writing which are quite compatible with traditional morality, it can hardly be said that he solved the problem of transition from a hypothetical state of savagery, where intelligence functioned only to maximize instinctual desire, to the appearance of values which cannot be derived from that empirical model. Certainly the theory that law functions *only* as a policeman to preserve order has long been abandoned; it is evident that law also helps to guide conduct in the achievement of many valuable goals. Although penal sanctions are available, a large part of modern law in fact has only an indirect, frequently remote connection with repression.[6]

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2. See, *e.g.*, Karl Menninger, *Verdict Guilty—Now What?*, 219 Harper's Mag. 60 (Aug. 1959):

> If we were to follow scientific methods, the convicted offender would be detained indefinitely pending a decision as to whether and how and when to reintroduce him successfully into society. . . .
>
> This civilized program. . . is held back by many things—by the continued use of fixed sentences in many places. . . . *Id.* at 62.

3. Freud, The Future of an Illusion (Jones ed. 1928):

> There are innumerable civilized people who would shrink from murder or incest, and who yet do not hesitate to gratify their avarice, their aggressiveness and their sexual lusts, and who have no compunction in hurting others by lying, fraud and calumny, so long as they remain unpunished for it; and no doubt this has been so for many cultural epochs. *Id.* at 19-20.

4. Freud, Civilization and Its Discontents [hereinafter cited Civilization] 59 (Riviere trans. 1930).

5. Freud, The Future of an Illusion 9-10 (Jones ed. 1928); 19 Freud, Standard Edition of Complete Psychological Works 208 (Strachey ed. 1961).

6. There are, of course, various interpretations of Freud's moral philosophy. He said,

The legal view cannot be elucidated or understood unless one also takes due account of the legal requirement of action. From a religious or ethical point of view, internal mental states may be of paramount importance and theories concerning the sense of guilt and other unconscious states may have similar significance in psychiatry. But because of its distinctive functions, law draws a hard line between internal states and external actions. A criminal frame of mind is essential but it is not sufficient to incur criminal liability; there must also be action—the effort which actualizes the mens rea in the proscribed harm. Accordingly, the ethical significance of the criminal law is based on its support of not only such values as personality, property, duty, responsibility, and many wide-ranging achievements but also of the value of freedom; and this implies that normally action is sufficiently free to justify relevant judgment and the imposition of deprivations.

All of this is challenged by an all-embracing "determinism," a subject which merits detailed discussion that is impossible here.[7] But it is possible to draw certain distinctions in order to recognize the need for determinism in psychiatric research and also leave room in therapy for a "sufficient" degree of individual autonomy that is significant as well for ethical and legal purposes.

In a rigorous sense, "determinism" implies the mechanics which characterized physical science up to the present century. It is not necessary here to consider the relevance of the moot character of "causation" in the current philosophy of physical science or to emphasize the fact that, as far as psychiatry is concerned, scientific determinism is an hypothesis or method, not the implication of a body of knowledge expressed in a large system of distinctive generalizations, that is characteristic of physical science. Even if one accepts the thesis that action for reasons is a fixed process, it seems incongruous to apply "determinism" univocally to the movement of billiard balls and to the jettison of cargo to save lives. It is not merely that some human actions defy the hypothesis of determinism, as did Mrs. Straus' in remaining with her husband in the wreck of the Titanic; it is also that, even where all sane persons would do the same thing, nevertheless, their action cannot be adequately described in terms of the co-variation of facts. Unless consciousness, intention, and goal are read into the description of human action, there is little more than a similarity in the logic of statements about the movement of things and the actions of human beings; and logical analogy is notoriously incomplete.

Contrasted with scientific explanation is the knowledge derived from the study and description of on-going problem-solving. Suppose a psychiatrist has

for example, "Mankind is proud of its exploits and has a right to be." Freud, Civilization 46. He supported moral codes (see Hartman, Psychoanalysis and Moral Values 15 (1960)); and he sometimes wrote as a Platonist, saying, *e.g.*, "The ideal condition of things would of course be a community of men who had subordinated their instinctual life to the dictatorship of reason." Freud, Character and Culture 145 (Rieff ed. 1963).

7. See generally Hook (ed.), Determinism and Freedom in the Age of Modern Science (1958); see also Waelder, *Psychic Determinism and the Possibility of Predictions*, 32 Psychoanalytic Q. 15-42 (1963).

a serious personal problem; does he merely survey his past scientifically and predict what he will do? Obviously not. After having attended to all of that, he still confronts his problem—what is the best thing to do? What ought he to do? Unless one believes that such questions are meaningless, he assumes that there are better and worse solutions, and he seeks the best solution. Far from being a mere projection of past history into the future or a prediction, it includes a creative element, a novel construction. Having solved his problem, the psychiatrist may revert to his roles of scientific theorist and historian, but explanation in those terms is not descriptive of his thinking, choosing and acting in the solution of his problem.

Accordingly, the function of the jury, when the issue is criminal responsibility, is different from that of the scientific psychiatrist, although the two are interrelated in important ways. Both confront the past concerning a criminal harm as well as that of the defendant charged with its commission. But the jury has a special concern with the theoretical and genetic explanations of the behavior in issue. Informed in these ways by psychiatric testimony, the jury seeks to discover the competence of the defendant to act freely, *i.e.*, as a normal adult, at the time he committed the harm in issue. In its role of problem-solver, the jury tries to understand and identify with the defendant as actor and problem-solver, and it expresses its judgment of a legally relevant issue as the authorized agent of the community. Since there are better and worse solutions, a verdict can be justified or criticized on rational grounds. But a psychiatrist who takes a scientific view of a defendant's action and the jury's verdict can only say that these events were determined by various causes; he should therefore refrain from criticism. Indeed, if the above actions were viewed as strictly determined, that should also apply to the psychiatrist's diagnosis as well as to his therapy; but to say that these were determined is quite different from saying that they were correct.

It is widely recognized that normal adults have a sense of freedom. It is also frequently said that one of Freud's greatest contributions was his discovery of how to increase the freedom of neurotics and, indeed, of all persons to some extent, by increasing their awareness of their unconscious experience. But if freedom is only the sense of freedom, what is the point of this eulogy of Freud? Nor is treating freedom as a sort of delusion compatible either with the increase of euphoria in any intelligent person or with the efforts of psychiatrists and their patients to attain health. Neither is it compatible with ordinary experience; and it is quite implausible regarding extraordinary ("out of character") efforts to solve difficult problems.

The notion that action is wholly determined by unconscious forces,[8] which has gotten abroad, is accordingly both troublesome and dangerous. It is troublesome not only because it is unsupported by evidence but also because there are

8. See, *e.g.*, Wiseman, *Use and Abuse of Psychiatry in a Murder Case*, 118 Am. J. Psychiatry 289, at 293 (1961).

many contradictions in discussions of this subject. These contradictions go even to the point of challenging the existence of an unconscious aspect of the personality, as distinguished from its pre-conscious phase (or that a theory of "the unconscious" is necessary or helpful). Some very able psychiatrists have said that little is known about the unconscious or the effect of the conscious mind on the unconscious.[9] If the unconscious is influenced by the conscious mind, as is implied, the popular dichotomy is fallacious along with the belief in a one-way influence. This notion of a one-way dominating influence of the unconscious makes nonsense of all discussion, including statements regarding the influence of the unconscious, as well as of systems of thought that comprise the various sciences and the law of advanced cultures.

The danger of that thesis is the consequent depreciation of intelligence, "that malady of the times whose nature it is to worship instinct and pour scorn on reason,"[10] as a distinguished psychiatrist put it. It is reflected in assertions that all criminals are mentally diseased, that every crime was irresistible, that there is no difference between deliberate harm-doing and negligent damage or even accidents, and so on. Freud employed "the unconscious" to account for mistakes and lapses of various sorts and he "never presumed that he had fully explained rational thought and action by the elucidation of the unconscious forces which lie behind them."[11] He wrote briefly about persons so afflicted with a sense of guilt that they sought punishment. The late Dr. Alexander made a great deal of this suggestion, but when he discussed the matter with Dr. Healy, the latter told him that such criminals are very rare in this country.[12]

The influence of unconscious experience on legal systems has been little explored; but of course no one claims that any legal system is wholly rational. In its long history, the common law could not possibly have escaped some accretion of irrational tendencies and of the pressure of biased interests. Subject to certain consequent limitations, the common law of crimes by and large does comprise a defensible system of ideas. It is also rational in its logic of procedure and its insistence on and conformity to evidence; and it consequently presupposes the rationality of normal adults—whether they are defendants, judges, juries or expert witnesses.

One of the most serious difficulties in the way of constructing a sound psychiatric criminology is not criticism of the M'Naghten rule on the ground of its incompleteness, but the total rejection by some psychiatrists of its rational criteria. For the M'Naghten rule only applies to the problem of mental disease the rational presuppositions and significance of the legal system. Law and morality are expressed in terms of certain rules and principles and these function

9. Kubie, *Problems and Techniques of Psychoanalytic Validation and Progress*, in Psychoanalysis as Science 94, 108 (Pumpian-Mindlin ed. 1952); Reik, *A Declaration of Intellectual Independence*, in Psychoanalysis and the Future 149 (1957).

10. Hartmann, Essays on Ego Psychology 9 (1964).

11. Pumpian-Mindlin, *The Position of Psychoanalysis in Relation to the Biological and Social Sciences*, in Psychoanalysis as Science 133 (Pumpian-Mindlin ed. 1952).

12. Alexander & Staub, The Criminal, the Judge and the Public 11-12 (rev. ed. 1962).

in the context of daily action. It is assumed (as it must be, if the principle of legality is not a myth) that normal adults have the competence to understand the simple rules of everyday morality expressed in criminal law, and to recognize that certain actions violate those rules and are morally wrong. Conformity to law undoubtedly involves phases of personality additional to a narrow intellectual perception of reality and rules of morality. But the specification of rational criteria implies neither mere conceptualization nor that other criteria are not important.

What then is one to make of the following statement by a well-known forensic psychiatrist?

> I assert, without attempting to prove it here, that all psychiatrists of high caliber and experience invariably . . . in their own reasoning about the defendant's mental condition, in their own appraisal of the mentally ill defendant's criminal responsibility, they give cognitive defects small measure compared to other psychopathological manifestations. . . .
>
> The difficulty is that these "other criteria" of criminal responsibility are, in most instances, unformulated, unexpressed, idiosyncratic to the particular expert, perhaps even to the particular defendant, . . . That expert testimony in criminal trials appears chaotic, inconsistent, and sometimes absurd is no reflection upon the state of knowledge of psychiatry. Rather it reflects upon the obstinacy of the law, which demands an impossible adherence to a fiction of little relevancy to the issue being decided.[13]

A few pages later, this psychiatrist, in discussing schizophrenia, speaks of it as "a very serious, . . disturbance in the integration of thought and feeling, together with . . . malignant alterations, in the nature of the patient's ability to conceptualize. . . ."[14]

In venturing the following observations, my purpose is not to criticize any psychiatrist's work but to consider relevant legal problems and especially to explain some of the difficulties confronted by legal scholars who wish to understand the use of psychiatry in law and to assist in the construction of a sound psychiatric criminology. For example, there is, first, the above admission that the knowledge of "other criteria" than "cognitive defects" is "idiosyncratic to the particular expert" which may imply that psychiatrists should, in effect, be invested with the authority to render final decisions in criminal cases. There is, next, the long-standing fact of disagreement among psychiatrists regarding the M'Naghten rule,[15] which alone raises doubts about assertions in such terms as "all psychiatrists of high caliber." Some psychiatrists and even schools of psychiatry place particular emphasis on rationality or on responsibility.

13. Diamond, *From M'Naghten to Currens, and Beyond*, 50 Calif. L. Rev. 189-90 (1962).

14. *Id.* at 195.

15. See, e.g., Bromberg, Crime and the Mind 49 (1965); Wertham, *Psychoauthoritarianism and the Law*, 22 U. Chi. L. Rev. 336-38 (1955); Hall, General Principles of Criminal Law 520-22 (2d ed. 1960).

Freud said, "A loss of reality must be an inherent element in psychosis . . . ."[16] Indeed, when criticism of law is not the immediate subject of discussion, many psychiatrists seem to agree that serious cognitive disorder is an important phase of psychosis;[17] *e.g.*, there are the above quoted remarks on schizophrenia. All of this raises questions about the alleged "small measure" given cognitive defects.

If normal cognitive functions are essential in normal personality, it is difficult, at least for some legal scholars, especially in light of the above corroboration, to accept the thesis that although a person's cognitive functions are normal, he may nevertheless be psychotic. Moreover, a logical defense of this position would seem barred by the wide acceptance of the psychology of the integration of the various functions of the personality. If "integration" means that each mental function affects the others and that each function is what it is, in part, by virtue of the effect of its interaction with the other functions, how can the "irresistible impulse" hypothesis or other formulations of similar import be consistently supported?

One therefore suspects that the ambiguity of such terms as "know" and "integration" is at the root of much of the current disagreement on this subject; or perhaps it is forgotten that temporary insanity is a defense despite the fact that during long periods of time there may be normal or apparently normal functioning with only rare lapses into a psychotic condition. Again, if it is forgotten that "the subject matter of psychoanalysis . . . is the nonrational, the non-logical, the emotional elements in the human being,"[18] there is a simple explanation for much of the criticism of the more inclusive psychology of the criminal law.

The tendency of critics of the M'Naghten rule is to say that "know" means mere conceptualization, the logic of which apparently allows integrative functions to be evaluated separately from that, as seriously impaired. But there is general acceptance in law of the psychology of integration, *e.g.*, given normal intelligence, there will be normal control of conduct. In addition, the frequent use of such terms as "realize" and "appreciate," as well as the wide latitude allowed psychiatric testimony, also negative the thesis that "know" in the M'Naghten rule has a narrow intellectualistic meaning. The difficulty of proceeding on the assumption that psychosis is compatible with concomitant normal cognitive functions becomes apparent as soon as one tries to talk about emotions, drives or behavior in ways that are socially and legally significant without covertly taking account of rationality. This is also evident in the inability to formulate any so-called test of insanity, except in the most vacuous terms, without including some reference to cognitive functions. All of this suggests that instead of remaining rooted in the unpromising terrain of literal, narrow interpretation

16. 2 Freud, Collected Papers 277 (Riviere ed. 1949).

17. See Zilboorg, *The Sense of Reality*, 10 Psychoanalytic Q. 183 (1941). "Irrationality is still accepted as a criterion of severe mental illness." *Id.* at 184.

18. Pumpian-Mindlin, *op. cit. supra* note 11, at 132.

of "know," attention should be centered on the clarification of the various psychiatric theories concerning integration and other ego functions in terms relevant to the social purposes of criminal law.

A related tenet of the above criticism of criminal law is the allegation that "the law" indulges in the fiction that there is either complete normality or utter insanity, that defendants are either wholly responsible or entirely irresponsible. But this too is a simplism that rests on mistaken notions. In any discussion of this, one must first distinguish the broad question whether a person should be subjected to a sanction, from the question (if an affirmative answer has been given) what should be the nature and extent of that sanction? The first question must be decided in either/or terms; if the consequence of a judicial decision is that you go free or that you go to prison, you are apt to appreciate the either/or logic of the law—if you are innocent.

In the area of the second question, degree of responsibility is widely recognized; indeed, to determine that is the principal function of advanced systems of criminal law. The framework of the legal valuation has been suggested above: a scheme of ordinary values and corresponding harms (disvalues); a concept of the normal adult and, correspondingly, of infancy, psychosis and other abnormality; and qualification of "normal conduct" or "normal adult" in terms of unusual pressures or temporary disability, *e.g.*, coercion, mistake, or intoxication, and also in terms of intention, recklessness, and negligence. Within this legal framework and in further refinement of responsibility, there is a large discretionary individualizing process. It begins with the layman, for example, the employer who prefers restitution to prosecution of his employee for embezzlement; and it extends to police, prosecutors, judges (especially in the pre-sentence hearing) juries, and the numerous administrators of probation, parole and peno-correctional institutions. In these large areas of administration, the defendant's mental condition, education, maturity, past record and social situation as well as unusual influences on him are studied and more or less taken into account.

But it is quite understandable that many thoughtful persons remain dissatisfied with the extent to which the degree of responsibility of individual offenders is probed and given effect. For "degree of responsibility" restates the age-old problem which Plato discussed in the *Statesman*. It symoblizes the current search for perfect justice which inevitably challenges the rule of law; and sometimes it culminates in a *Weltanschauung* in which even the most advanced, flexible legal system seems doomed to aggravate an already tragic human condition. Certainly, human justice at its best is far from omniscient, individual differences among offenders are infinite, and there are unsolved theoretical problems in ethics, as in psychiatry and law. In such a situation,

19. See, *e.g.*, Fisher v. United States, 328 U.S. 463 (1946); Regina v. Ward, [1956] 1 Q.B. 351.

each scholar must follow his own perception of "the truth" or of "perfect justice" while he tries, as best he can, to be receptive to alternative solutions.

On the other hand, it is a very different matter so far as the practical problem-solvers are concerned. Here the choice is not between the existing law and perfection but between this law and a better, feasible solution. The tasks of judges, juries, lawyers and administrators are urgent and they have important immediate effects on human beings. Their decisions cannot be expected to satisfy every opinion. Nevertheless, as far as the general scheme of legal-moral values is concerned, it should be remembered that our criminal law represents the considered judgment of thoughtful laymen informed by science and expert opinion in a long stretch of history; it is also the law of a constitutional democracy. In the clash of expert opinions and the vagaries of philosophers, the morality expressed in the criminal law is therefore entitled to some preference or priority so far as the practical problem-solving is concerned; and that preference is given, not for a crude statistical reason or "majority principle," but because of the likelihood that the well-considered and refined judgments of thoughtful laymen regarding everyday morality are the best available index of the soundness of the relevant values. How to maintain that preference and still profit from critical discussion is a perennial problem of democratic society.

I have discussed some of the practical difficulties in the way of constructing a sound psychiatric criminology and have also suggested that a psychiatry which takes due account of ego studies, finds responsibility significant, and is compatible with other legal values and the functions of criminal law can make very important contributions to the solution of those problems and many others. Of these, only the briefest mention is possible.

It is evident, at least in the legal view, that while the foundations of the criminal law are sound, there are various parts of it where reforms are very much needed. For example, in criminal homicide the required mens rea is "objective"; *i.e.*, if the hypothetical "reasonable man" would have known or foreseen the risk of serious danger to life, the defendant is held criminally liable even though in fact, despite his sanity, he did not know or foresee that risk.[19] Many students of the criminal law have criticized this rule,[20] but they are met by the insistence that it is not feasible to employ a subjective test—how can it be determined with assurance that a defendant who does not plead insanity nevertheless did not function as a normal adult in the given situation? This problem extends far beyond the present recognition of so-called "partial responsibility" restricted to the possibility of conviction for manslaughter rather than murder. There are other phases of the law of criminal homicide,[21] and there are other crimes where objective liability still prevails

20. Hall, General Principles of Criminal Law 160-68 (2d ed. 1960).
21. *E.g.*, provocation and "cooling time."

largely because the superior subjective test, in terms of the defendant's actual state of mind, seems unsupportable by cogent evidence.

Many scholars have also urged that criminal liability should be restricted to voluntary wrongdoing and, that inadvertent negligent behavior should not be punishable.[22] Those who take the contrary position assume that negligent harmdoers could have used due care. But since it is probable that some of them behaved negligently under unusual conditions of fatigue, confusion, emotion or other pressures, judgments based on past performance may be mistaken. No psychiatric study has, to my knowledge, been made of negligent harmdoers (as distinguished from persons involved in accidents).[23] We, therefore, lack knowledge on the basis of which there can be critical appraisal of the assumption that these persons could have used due care.

For reasons indicated above, efforts to solve practical problems influence the construction of the relevant theoretical disciplines. The history of criminology, especially the abandonment of the Italian positivists' theory of the "natural crime," is also significant with regard to a psychiatric criminology. It implies not that all the rules and concepts of the criminal law must be accepted for the purposes of psychiatric criminology, but that the principal features of a legal structure which is the product of centuries of experience cannot be dismissed as an artificial construct of technicians. It is equally plain that the subject matter of a psychiatric criminology is not legal rules alone, but that it also includes the relevant behavior. It is therefore evident that psychiatric studies of the internalization of norms would be very helpful in constructing the basic concept of the subject matter of psychiatric criminology. Finally, psychiatric criminology should represent all of the perspectives described in the above discussion of determinism and problem-solving. Difficulties arise only when it is claimed that one of these perspectives preempts the entire field. But there is room and need for generalizations in terms of co-variation, for genetic explanation, and for the analysis and description of problem-solving. Each represents an important distinctive point of view, and the aggregate of the relevant knowledge would comprise a sound psychiatric criminology.

22. Hall, *Negligent Behavior Should Be Excluded from Penal Liability*, 63 Colum. L. Rev. 632 (1963).

23. Ehrenzweig, *A Psychoanalysis of Negligence*, 47 Nw. U.L. Rev. 855 (1953).