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Harold P. Graser
University at Buffalo School of Medicine

PSYCHIATRIC CRIMINOLOGY: IS IT A VALID MARRIAGE? FURTHER CONSIDERATIONS

HAROLD P. GRASER*

PROFESSOR HALL, in his provocative paper, acknowledges that there exists a marriage between Law and Psychiatry, but he seems to be searching to see if there should be an annulment. There is enough unhappiness in the marriage that "something must be done," but there also seems to be enough worth in the union that I would recommend a vigorous program of joint psychotherapy, rather than a dissolution.

A first step toward successful therapy is to elicit at least an understanding of the minimal needs of each discipline and then an effort to successfully communicate these needs, each to the other.

Professor Hall has defined the essential requirements for a criminal law acceptable to the lawyer, namely: (1) the principle of legality; (2) the intent to commit the act; (3) the act itself; (4) the sanction.

Major problems, as related to psychiatry, are concerned with the aspect of intent, and with the problem of fitting the psychiatric concept of determinism into the legal framework. The psychiatrist is charged with evaluating the accused to determine if he has the substantial capacity to possess a criminal intent. In most jurisdictions this requires an answer to the question "is the defendant idiotic, imbecilic, or insane to the extent he can or cannot form an intent and know how to carry it through?" The psychiatrist working with the lawyer very soon meets the assertion that "given normal intelligence there will be normal control of conduct."[1]

It is true that variations in intelligence will determine whether a crime is committed in a clever or in a blundering manner, but intelligence is not the significant factor in determining if behavior will be criminal or socially acceptable. Problems with normal intelligence or cognitive defects, as these phrases are used in the law and are being used in this paper, will include memory, orientation, retention and recall, and all of the factors included in what the psychiatrists call *sensorium*. If these defects are severe, the individual not only cannot have the required criminal intent, but would probably not be capable of carrying out the crime. The other psychopathological manifestations that cause the major problem (and which I feel are not nearly as unformulated as Dr. Diamond alleges)[2] include motivation, ideation, and volition. It is defects in these areas that place their bearers in such categories as sociopath, schizophrenic, character disorder, and neurotic, and it is in quantifying these defects

* M.D.; Assistant Clinical Professor of Psychiatry, State University of New York at Buffalo, School of Medicine.

1. Spoken of by Professor Hall as being generally accepted; see Hall, *Psychiatric Criminology: Is it a Valid Marriage? The Legal View, supra* p. 356.

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

that the significant difficulty occurs. Not only is there no satisfactory measuring instrument, but function changes under conditions of stress. Furthermore, and most important, what constitutes a stress is not definable in a specific manner so it can be written into a statute, but rather is unique to each individual. This is a fact lawyers and juries find most difficult to accept.

These points lead to the "clash" of experts, but the clash does not usually represent any wide divergence of views. Instead it reflects the difficulty of both judging and trying to quantify at least three variables: (1) the specific defect of motivation, ideation, or volition; (2) the specifics of what is stressful for the individual defendant; (3) the degree of stress at a time remote from the examination. The legal necessity of stating "with reasonable medical certainty" that the defendant is or is not substantially capable requires that a judgment be made. Two opinions may be extremely similar and yet provide opposite answers.

An illustration of this problem is the most accurate measurement available of a mental attribute, namely the IQ score. At some point there must be assigned a definition of mental deficiency. No matter how one struggles to conceptualize the problem, legal necessity requires a definite "yes" or "no" answer which can just as well be symbolized as a number which marks the point between yes and no. If 70 is assigned as the cutoff point, an IQ of 69 indicates mental deficiency. An individual with an IQ of 70 is innocent of being mentally defective. An individual with an IQ of 69 is guilty.

No one designing tests or using tests has the slightest belief that there is any profound difference between an IQ of 69 and an IQ of 70 or the slightest doubt that on different days with a different examiner, or under different conditions of stress, the 69 could be a 74 or a 64; yet somehow the experts, the advocates and the judge must help the jury evolve a verdict that is the equivalent of an exact number, not plus or minus five. The jury must say 69—guilty; or 70—innocent.

To continue the analogy, it is fortunate that most people do not fall into this area. It is no problem to assign an IQ of 50 to the defective group and an IQ of 115 to the nondefective group.

The elements of insanity are not as measurable as the elements of "idiotic or imbecilic," but there is the same kind of continuum with an area clearly sane and an area clearly insane. In fact, the experts do agree on the majority of defendants as being either clearly sane or clearly insane. It is this gray area, that can never be defined or refined away, that will continue to cause conflict as long as we wish to maintain, as a legal test, that the defendant must have substantial capacity to form intent.

This concept of a continuum from clearly sane to clearly insane, with its gray area where experts clash can also be used to focus on the concept of "determinism." As a practical matter, the person far along toward the "sick" end of the continuum, does indeed fit very well into the conceptual model of having

his actions wholly determined by unconscious forces. As one moves along the continuum toward the "healthy" or "normal" or "sane" end of the spectrum, at least a sufficiently significant amount of behavior is free of unconscious dictate to allow the "free will" choice of behavior and allow the psychiatric view to be comfortably aligned with the legal usage of responsibility.

I should now like to comment on the assertion "all criminals are mentally diseased, every crime was irresistible; there is no difference between deliberate harm-doing and negligent damage or even accidents and so on."[3]

This view concerns itself with the same fundamental problem currently extensively argued by the psychiatrist, Thomas Szasz. He takes the view that mental illness is a myth, that everyone is responsible, that no one should be excused from the consequences of his acts, and that no one should be deprived of liberty only because he is mentally ill. There should be no involuntary patients and no restraint of the mentally ill except for an act prohibited by law.[4] I believe, in essence, he would eliminate the "intent" aspect of the four points outlined by Professor Hall. There are other social scientists who would eliminate the sanction aspect, or at least the punishment dimension of the sanction and substitute rehabilitation.

These ideals are currently reflected in a number of laws and opinions and are being implemented in various ways.

In our own state, the sexual psychopath law[5] has been in effect for over a decade. This allows a sentence of one day to life or, in effect, provides a sentence for being "dangerous" instead of a precise sentence for a precisely proscribed harm.

In 1962, a California law making the status of being a drug addict a crime was struck down by the United States Supreme Court.[6] The Court did suggest that "in the interest of the general health or welfare of its inhabitants, a State might establish a program of compulsory treatment for those addicted to narcotics. Such a program might require periods of involuntary confinement."[7] Mr. Justice Douglas, concurring, noted that "the addict is a sick person. He may, of course, be confined for treatment or for the protection of society. Cruel and unusual punishment results not from confinement but from convicting the addict of a crime."[8]

In March of last year the Fourth Circuit Court of Appeals ruled unanimously that chronic alcoholics must be treated as victims of a disease, not as criminals.[9] New York State, in step with these pronouncements does, have a civil commitment statute for chronic alcoholics as well as the drug addict.[10]

3. Hall, *supra* note 1, at 354; Dr. Hall goes on to criticize this view also.
4. See generally Szasz, The Myth of Mental Illness (1961).
5. See N.Y. Sess. Laws 1950, ch. 525.
6. Robinson v. California, 370 U.S. 660 (1962).
7. *Id.* at 665.
8. *Id.* at 676.
9. Driver v. Hinnant, 356 F.2d 761 (4th Cir. 1966).
10. N.Y. Mental Hyg. Law § 423; *cf. id.* § 307.

A narcotic addict, in New York State, caught with illegal drugs can now be provided with an extensive, and I might add, expensive rehabilitation program. The alcoholic rehabilitation program is not yet as well organized. It has recently become a crime to possess sedatives or stimulents in improper containers.[11] The possessors of these drugs can be arrested but even if addicted there is no treatment program for these addicts.[12]

These trends of the law are due, at least in part, to the growing theoretical view that behavior is largely a culturally determined learning process modified by the unique indoctrination of each set of parents or parent figures and the varying biological capacities of the individual. The value systems, character structure, and even the neurotic and psychotic behavior patterns are learned much like a language. Language, including accent patterns, slang patterns and intonation patterns, is "determined" by the environmental situation which can be used in various ways by each individual. Life patterns, like languange patterns, can be understood and modified; the law seems to be saying it doesn't matter if they are labelled "criminal" or "sick"—there are patterns of behavior which are unacceptable. In the interest of the general health and welfare of its inhabitants, the state is going to establish compulsory treatment program involving involuntary confinement for a sufficient time to teach a living pattern within acceptable limits.

Even now nearly thirty-three percent of those in New York State correction institutions have a history of drug use. About ninety-six percent of the inmates had some sexual experience, and each person has had an experience which was illegal under some statute.[13] We may indeed soon be able to fit all of those now confined in correctional institutions into one of these newly evolving treatment-rehabilitation-indeterminate sentence programs, and reach the state that, depending on one's view, can be called ideal or dangerous; namely, there will be crime with no punishment. We will be left with the principle of legality and of action assigned to the law, the problem of intent and sanction assigned to the social scientist.

11. N.Y. Pub. Health Law § 3383.
12. Thus, if addicted, it behooves one to choose the right drug.
13. *Cf.* Kinsey, Pomeroy & Martin, Sexual Behavior in the Human Male (1948).