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# A PSYCHIATRIST LOOKS AT PSYCHIATRY AND THE LAW

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*Psychiatry and the Law* is presented to us with a claim of considerable magnitude. On the jacket it is described as "a unique and indispensable guide". In the Foreword we are promised "a deeper and clearer perspective". The latter phrase is not without significance, for a perspective should as a rule be not *deep* but wide. The book is written jointly by a legal authority on the subject and a psychiatrist. That in itself is a good idea and the authors are correct in stating that this gives the book its "special value". There is, however, the difficulty that the reader does not know which portions are written by whom. It is to be presumed that the psychiatric parts are written by the psychiatrist.

There are altogether nineteen chapters. They deal with or touch upon almost every phase of the subject. Gotten out by an excellent publisher, the book is well printed, has an index and a list of Cases Cited. In contrast to this formal persuasiveness, the text itself has grave shortcomings. I consider it important to point out some of them because it can be safely predicted that this book, already well on its way to being regarded as authoritative, will do a great deal of harm to a lot of unfortunate people.

What does one expect from such a book from the psychiatric point of view? First of all, an exposition of the well-established data of clinical psychiatry, especially with regard to diagnosis, symptomatology and prognosis. That must be the foundation of any discussion of the application of psychiatric knowledge to legal procedure. Such data exist; they are as much beyond debate and conjecture as the well-established data of internal medicine. Many lawyers—and some psychiatrists—do not know that such a body of clear-cut facts exists and that it is based on painstaking research. They will not learn it from this book, for here the well-established, the probable and the conjectural are mixed. The very atmosphere of confusion between the certain and the assumed that we deplore in the courtroom when psychiatric experts contend with one another, permeates this book.

Psychiatrists are apt to object to the fact that the law in the field of mental disorders makes a sharp distinction between legal insanity and legal sanity. That puts psychiatry under the obligation to explain to the legal profession how science classifies mental diseases. The classification of mental diseases nowadays

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is in essentials the same in this country and practically all others. It has withstood the test of time and clinical experiment. It was worked out by the psychiatrist Kraepelin and is based on a number of theoretical principles. It was only with the introduction of the Kraepelinian system that a truly scientific collaboration between psychiatry and the law became possible. But these matters are not clearly set forth here and without this, the application of present day clinical psychiatry to the law cannot be fully understood. This book states that "the concept of a manic-depressive is a confusing one". It is not at all, if one explains concretely and in detail why Kraepelin introduced this term to clarify a previously confused and obscure field of psychopathology. It is true that there have been interesting and in my opinion largely valid psychoanalytic theories about this disease. But they are still conjectural and they lie entirely on the periphery as far as practical medico-legal questions are concerned. They refer to the finer psychological structure of the disease. The average duration of manic-depressive attacks is not accurately given. The extravagant claim is made that "electro-shock therapy is almost specific for manic-depressive psychosis",—a claim which for forensic discussion is certainly misleading.

Having called the term *manic-depressive* confusing, the authors find schizophrenia, which is the name of the most common psychosis, "sufficiently enigmatic". It is enigmatic only since they define it wrongly as meaning "splitting of the mind"<sup>1</sup> That is not what Bleuler, who introduced the term, meant by it. They state that the definition of schizophrenia as "the progressive maladaptation of the individual to his environment seems at least philosophically sound". I think it is hopelessly vague. There are all sorts and conditions of man where progressive maladjustment occurs which are surely not schizophrenic.

It is strange to find in a book on legal psychiatry that the differentiation of "paranoid schizophrenia, paranoia and the paranoid states . . . has no significant practical value"<sup>2</sup> In many cases the differentiation of paranoid states and schizophrenia is one of the key issues. The term *paraphrenia* should also have been discussed in this connection. Of paranoid delusions, a crucial psychopathological phenomenon, the authors say that the patients feel "that the whole world" . . . is "hostile"<sup>3</sup> That is incorrect and a layman's way of speaking. Here a real and exact discussion of delusions would have been necessary. Van Gogh was not

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1. GUTTMACHER AND WEIHOFEN, *PSYCHIATRY AND THE LAW* 73 (1952).

2. *Id.* at 76.

3. *Ibid.*

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a schizophrenic, "fully fledged" or otherwise, but an epileptic, as careful research has proved. Nor is Ezra Pound a schizophrenic. If this case is mentioned at all, the whole blatantly inadequate psychiatric report to the court should have been mentioned, too.

Obsessive-compulsive neurosis is an important condition in the discussion of any psychology of action. Psychoanalysis made one of its greatest contributions in elucidating this disease. But the authors define it wrongly. They say that "the patient has some dominant fear or worry . . ." <sup>4</sup> In a most severe form of obsessive-compulsive neurosis the patient may not show any fear or worry. He may enter the doctor's room inconspicuously wiping off the doorknob with a handkerchief so as not to be infected by germs. This act may have become so automatic for him that the very *absence* of fear may be what is characteristic and malignant. Supposing that I would testify to this elementary clinical fact in a courtroom and the cross-examiner would say: "Don't you know that Guttmacher and Weihofen say the opposite?" I would have to prove that this is not an authoritative text.

Instead of making clear the details of the relationship between compulsions and other impulses, the authors hide behind the alibi that this "would involve technical considerations too abstruse for a work of this type."<sup>5</sup> And they confuse the whole issue by throwing together pyromania, kleptomania, exhibitionism and a dash of "irresistible impulse."<sup>6</sup> Speaking of "true kleptomania" does not make it any better, for they do not explain what false kleptomania would be. It must be added that there is excellent literature on this whole subject which is not mentioned:

We are not much better off in the information we are given about psychopathic personalities. The authors state that the "incapacity to conduct oneself 'with decency and propriety in the business of life' is the outstanding characteristic of the true psychopath."<sup>7</sup> I do not see how either a psychiatrist or a lawyer can do anything with such a definition. In the further discussion no clear distinction seems to be made between neurotic character, neurosis and psychopathic personality. For example, they say that "most sex offenders suffer from anti-social neurotic character disorders."<sup>8</sup>

A whole page is devoted to an illness which does not exist, the Ganser syndrome or "true Ganser syndrome," which the

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4. *Id.* at 55.  
5. *Id.* at 56.  
6. *Id.* at 57.  
7. *Id.* at 87.  
8. *Id.* at 100.

authors assume was quite common in Germany formerly. There is no single case studied with modern methods which would bear out that this is in any sense a clinical entity. The discussion of malingering—a condition that is in the mind of every lawyer and juror—is wholly inadequate. The authors make the statement that “certain unstable individuals have the ability to let themselves drift into a . . . quasi-psychotic condition.”<sup>9</sup> This is doubletalk and it is not where psychiatry ends but where psychiatry should begin. Without any documentation, the authors state that “most malingers . . . have a seriously warped, neurotic character structure.”<sup>10</sup> To the extent that this is meaningful, it is contrary to my experience both in peace and war. In discussing neurasthenia, another condition in which psychoanalysis and psychosomatic medicine have done so much, this book says: “A high proportion of the cases occur in rather generally inadequate individuals.” Can a psychiatrist be more vague than that, lumping together groups of people and berating them as “rather generally inadequate”? This is precisely the kind of thing which brings psychiatry into disrepute.

With regard to heredity the authors summarize the findings of Lange, who tried to prove the hereditary causation of crime by studies of twins. I had occasion to see the original material on which this claim was based. The cases were inadequately studied and the data are not only inconclusive, but tend to prove, if anything, the opposite of what Lange tried to show.

The very first sentence of the book is wrong. It states that psychiatry has made “far greater progress” during “the past quarter century” than in any similar period in history. Later the statement is made that prior to the beginning of the twentieth century there was only “vague terminology,” “confusion and ignorance.”<sup>11</sup> But Kraepelin and Freud made their most important contributions, especially as far as any legal application is concerned, before 1900—which is well over half a century ago. The alleged great recent advance of psychiatry is contrasted by the authors with “the slow pace of legal change.” But their proof is not substantial.

They speak of the improvement in the procedure for commitment of mental patients. That may be true for some localities; but it is not correct as a whole. In the largest psychiatric city hospital in the United States, from which very many patients are committed, the procedure is anything but modern. Judges of the

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9. *Id.* at 42.

10. *Id.* at 55.

11. *Id.* at 6.

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Supreme Court go into the hospital and sit in judgment in clinical matters of psychiatric determination which they do not know and cannot know. I know of shameful errors and injustices that have been done in this way. It is entirely unnecessary for judges to go to the hospital at all. Whole series of patients have been committed from this hospital by competent and humane psychiatrists without any need of a court hearing. The procedure of having a judge routinely sit in judgment over a sick man in a hospital was introduced during the "past quarter century" at a time when the psychiatric management of this hospital was in a particularly deplorable state.

As further proof of the recent progress of psychiatry, the authors adduce "the recognition of sexual psychopathy." Is that something to boast about? We have known for a long time how to treat patients with sexual difficulties by psychotherapy and many can be helped, as we found in the Quaker Emergency Service Readjustment Center. But at present only an infinitesimal proportion of sex offenders who do not have money for expensive treatment can get any treatment worth speaking of, even if they seek it long before they have any trouble with the law. Considerable space is devoted to a discussion of sex offenders. But the fundamental fact is left out that many sex offenders are harmless homosexuals. Instead of a lot of medicolegal hairsplitting, it would have been better to have a frank discussion of why people are punished instead of being helped.

The third proof is the "official psychiatric clinics" to advise the courts. There are very few of them. More important, the work done in some of those that do exist is sometimes slipshod. In the largest clinic of this type, the psychiatrists were given only half an hour to examine a prisoner, whether his crime was murder or anything else. On the basis of this examination reports were made to the courts. If a conscientious psychiatrist asked for a little more time or for permission to see a prisoner a second time, it was refused. These rules were made not by the courts but by psychiatrists.

If we want to improve the relation between psychiatry and the law, psychiatrists have to be a little more humble and self-critical. The authors state of court psychiatrists that "results have been particularly good in juvenile cases." Does the present status of juvenile delinquency bear this out? Where are the follow-up studies that alone could prove this? It would have been more accurate to say that good results could be obtained, and have been obtained in numerically insignificant instances.

The authors say that they do not wish to dwell on "the flaws in legal psychiatry." That is perfectly justified. But is it possible to disentangle the essence of their subject without a frank critique of what is being done in psychiatry today? The discrepancy between what is really being accomplished and what is merely on paper has become too great for that. The authors say that we must wait for "more exactness in medicine and psychiatry."<sup>12</sup> But that is a wrong emphasis. It would have been far more important to point out the many misuses and social abuses of psychiatry which could be corrected right now.

The success of a book on forensic psychiatry must depend on the concreteness and clearness of its formulations. This book has too many generalizations which are anything but clearcut. We are told that the concept of mental disease has been revolutionized (by whom?) and that "mental disorders are to-day viewed primarily as failures in the socio-adaptive capacity of the individual." If a psychiatric expert were asked in front of a jury what mental disorder is and he gave that sort of a definition, no one could blame the jurors if they found it too vague. If they have read the article on mental disease by Albert Q. Maisel in the *Ladies Home Journal*<sup>13</sup> they would be accustomed to much more scientific clarity. Other such generalizations: "Man is today regarded as an integrated organism." So is a mouse. "The basic personality structure is manifested in everything that a person does." That is true of a sparrow, too; everything it does is based on what it fundamentally is. Such statements do not help because they are platitudinous. As a matter of fact, if one takes this sentence in a really concrete psychiatric case, it is not even true. I have known men whose "basic personality structure" is decent, considerate and sympathetic. And yet under the unfortunate concatenation of circumstances and of social pressures they acted in fact contrary to their "basic personality structure," if such a phrase can be properly defined at all.

Another such general statement: "A careful analysis of a child of five makes it possible to project fairly accurately his adult character." Where has that ever been done? Has anybody ever foretold at the age of five the character of a Hitler, a Shakespeare, an Edison, an Albert Fish or Robert Irwin? Psychiatrists are not prophets, and as long as they claim that they are the law will certainly have to surround their testimony with strict definitions, restrictions and safeguards.

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12. *Id.* at 12.

13. *Is Mental Disease Mental?*, *Ladies Home Journal*, July 1953, p. 48.

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In all phases of psychiatric criminology there is at present in practice considerable discrimination against Negroes. Instead of pointing this out or acknowledging it, this book has a suggestion of the same thing. We are supposed to believe that Negroes are apt to have "mediocre intellectual endowments" and to be "socially unsophisticated."<sup>14</sup> Speaking of transitory abnormal states in such prisoners, the authors refer to states of "emotional numbness." What is that supposed to mean? Such an expression may be used in front of a jury to explain a more technical statement; but in a textbook it is inappropriate, especially when followed with the generalization—which certainly should not apply to all such cases—that they are "generally held to be responsible agents." The section on "normal criminals" gives Negroes as examples.<sup>15</sup> The authors speak of "inferior biological endowment" and "racial patterns." In this section on "normal criminals" we also hear of a "servant" and of a "hillbilly moonshiner." Are there no "normal criminals" who are white, businessmen, politicians or professional men? The view that criminal activity is just as much due to biological endowment as to the environment is against the weight of modern scientific knowledge and is socially unprogressive. We do not want to go back to Lombroso, but forward from Freud. The function of psychiatry is to help people individually and socially, and that cannot be accomplished with such Nietzschean statements as "Our extensive social welfare programs defeat the normal biological tendency of the survival of the fittest."<sup>16</sup>

There are a number of full case reports, but they cannot be regarded as models. They contain many details the relevance of which is not evident and not indicated. It would have been necessary in the end to tie these details together and make them dynamically significant.

Some of the newer developments in psychopathology are not considered at all. There is no mention of the catathymic crisis. Instead of discussing such attempts as psychodynamic understanding of violent acts, the authors speak of murderers "who become overwhelmed and overpowered by force of circumstances." Such expressions are too general and modern psychiatrists attempt to be more specific and dynamic. The mosaic test—almost indispensable in the diagnosis of youthful schizophrenia and paraphrenia—is not included.

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14. GUTTMACHER AND WEIHOFEN, *op. cit.* *supra* note 1, at 39.

15. *Id.* at 385.

16. *Id.* at 190.



The book contains a lot of interesting and instructive legal material. There is a considerable difference between the legal and the psychiatric sections. The legal author's style is clearer, more definite, less oblique and not so condescending. The psychiatrist who looks for legal information will therefore find this book far more enlightening than will the lawyer who looks for definite psychiatric guidance.

The authors make a number of recommendations for the future. Whatever the merits of some of them, they suffer by and large from a number of general defects. Just as a doctor cannot prescribe the proper remedy if he has not made the proper diagnosis, so you cannot make recommendations for social conditions unless you recognize their extent and seriousness. Wrong commitments happen more often than the authors seem to admit. I know of thousands of commitment papers made out after a few minutes' examination. And I know state hospitals where patients have not seen a doctor for two years. In the face of this, the authors say<sup>17</sup> that "psychiatrists have come to be much more interested in the therapeutic purposes of commitment than in the merely custodial." Since when? The book's recommendations are too formalistic. They refer to the form rather than to the content of what is being done. A lot of fuss is made about legal safeguards of commitment and then in the model act the patient is to be examined "at least once every six months."<sup>18</sup> What kind of safeguard and treatment is that?

There is in this book a bias to whitewash psychiatric procedure on the one hand and to give the psychiatrists far too much power. I think it would be a calamity if the disposition of criminal cases would be taken out of the hands of judges and given into the hands of psychiatric and other experts. The authors recommend what they call "an ingenious table" for the psychiatrist<sup>19</sup> with regard to disposition. According to this most primitive and formalistic scheme, the unfortunate defendants are divided into eight categories. In six of these categories the psychiatrist advises punishment or custody. Can that still be called psychiatry?

The authors disapprove of the current legal definition of insanity. It is true that many psychiatrists object to being pinned down to a *yes* or *no* answer. But I think it is a godsend that there are at least some situations where psychiatrists are forced to give a simple answer to a simple question. Social living, with which the law deals, makes this necessary. Instead of the test

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17. *Id.* at 294.

18. *Id.* at 313.

19. *Id.* at 396.

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of the "irresistible impulse" the authors suggest "inability to adhere to the right."<sup>20</sup> This would describe most people as well as most murderers. There is room for critical discussion of the different legal definitions of insanity. But this book is a good example of the unfortunate tendency to emphasize this point as if it were the main trouble with present-day forensic psychiatric usage. Instead of putting their own house in order, psychiatrists like to claim that most, if not all, that is wrong are the legal definitions. Throughout this book the impression is given that the lawyers are backward and psychiatrists progressive. Many lawyers, judges and district attorneys would like to get psychiatric advice and help, as well as treatment, for defendants. Their main trouble is to get psychiatrists in cases where large fees are not available. They have much less difficulty with other medical specialities.

The authors maintain that "the courts have made this distinction between proof of mental disorder and proof of mental irresponsibility, but have too frequently used the ambiguous word 'insanity' to refer to both."<sup>21</sup> When courts speak of *insanity* they refer to legal insanity and that is defined for every court.

Are matters really as complicated and "ambiguous" as these authors make them out? We psychiatrists do not like to call a man "insane," just as we doctors do not like to call a man a "cripple." But suppose a man has one leg shorter than the other and limps as a result. A lay person can testify that he saw this man limp and noticed his shorter leg and that therefore he regards him as a cripple. That corresponds to a lay witness testifying in court that a man talked irrationally. A doctor can also testify that a man is a cripple, if so required by a legal definition, although he would not use that word in his daily practice. But he will substantiate his opinion by an exact orthopedic diagnosis, a discussion of how the condition came about, how long it lasted, the precise measurements of the deviation and the prognosis. That is the position of the psychiatrist in court. He must give a *yes* or *no* answer to the question of legal insanity; but he must also give a scientific psychiatric diagnosis, discuss the symptoms of the condition, its cause, pathology, course and prognosis. The trouble with current forensic psychiatry is not that the psychiatrists are prevented from being clear, understandable and down-to-earth by the legal part of their testimony. The trouble comes with the *psychiatric* part of their testimony, when they are required to give a straightforward statement without ambiguity about the mental

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20. *Id.* at 411.

21. *Id.* at 415.

disease involved. This book gives no help in this direction. It uses as psychiatric characterizations expressions which are much more unpsychiatric than any legal definition; e. g. "a borderline mental case . . . may crack under the strain . . ." or "the ego of the prisoner collapsed."

Among their suggestions for a new legal test of insanity is the phrasing that the disorder "manifested itself by significantly distorting social judgment."<sup>22</sup> That is an ambiguous phrase which is not an improvement on anything. Impairment of judgment is a well-defined clinical symptom; but what is "social judgment"? And what is the difference between an impaired judgment and a "distorting" one? And the word "significantly" is of course the point at issue and is that question of fact which the jury has to decide.

What the authors do not seem to see is that there is no fundamental difference between the interests of the individual and the interests of society. We want to protect the victim; but we also want to protect the murderer from becoming a murderer.

This book also embodies a threat to civil liberties. The authors want to give power to a tribunal of experts and according to their judgment "the person could be held as long as necessary, whether that be for a few days or for the rest of his life."<sup>23</sup> Who would check the experts,—their selection, their decision, their promise that the prisoner will get treatment, what kind of treatment he really gets, the criteria for recovery and the whole financial set-up and background? We already have the preposterous situation where psychiatrists approve that homosexuals are incarcerated where they cannot have any contact with the other sex and are treated by psychotherapy and kept until they have made a good heterosexual adjustment! All that is unrealistic psychiatry. The authors go so far<sup>24</sup> that they want to eliminate the defence of insanity entirely, which would lead us back to medieval times.

I am most disappointed with the chapter on prevention. We are regaled with the old stereotyped clichés: "The seeds of most mental disorders, of vice and crime, of alcoholism and perversion, of brutality, hatred, miserliness, and innumerable other highly unlovely traits are sown in the first years of childhood." Where is the substantial proof of that? Where are the cases? Freud showed that *one* root of adult neurosis goes back to early child-

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22. *Id.* at 421.

23. *Id.* at 445.

24. *Id.* at 446.

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hood. He warned against applying this to delinquency. If all the emphasis is placed on early childhood, all the social influences which really mold a person's character and life are neglected. That is the cancer of present-day hyper-individualistic psychiatry. Instead of doing justice to social pressures that lead to crime, the authors give us the "over-protective mothers" and recommend birth control as a remedy against delinquency.<sup>25</sup>

The literature quoted is characterized by provincialism. The classical studies of European psychiatric criminology are neglected. On the other hand, dubious modern writings are accepted at face value. One can say of this book that, apart from the excellent strictly factual legal material, it reflects well the chaos, the injustice, the loose thinking and the social unprogressiveness of today's forensic psychiatry for children and adults. The remedy for such a situation consists not in definitions but in deeds. Let us practice the laws we have before making new ones. Let us be less speculative and more scientific in psychiatry in general. Let us treat abnormal adult and juvenile delinquents equitably and in sufficient numbers; let us equalize a little bit the facilities for the poor and the rich; let us put all emphasis on treatment and prevention; let us give more attention to the individual and to society before the crime rather than afterwards; let us get away from both paid partisanship and bureaucratic officialdom. Then the lawgivers will have no difficulty in codifying our good clinical procedures.

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25. *Id.* at 456.