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The Scope of Legal Psychiatry

Law and psychiatry as distinct disciplines overlap inevitably in many ways. There are many areas in which the two potentially or actually have concerns in common, and these seem to be expanding all the time. These areas are rather heterogeneous, and range from the understanding and treatment of the criminal offender to social issues such as abortion or gun control, and all the way to highly philosophical problems such as confidentiality or the involuntary detention of the dangerous. In actuality, however, the degree and type of interaction between the two disciplines has been remarkably narrow and constricted as this article will demonstrate in depth.

It is the purpose of this article to suggest and promote a much broader scope of interaction between law and psychiatry. More important perhaps, it will attempt a critique of the nature of such interaction, since such is offered as the core problem in the existing difficulties. The article will begin with a review of the traditional collaboration between the disciplines; it will then examine different speculations or explanations that have been offered as to the sources of failure and friction; and finally, it will consider ways in which the interaction can be improved in the future.

Traditional Activities of the Legal Psychiatrist

Traditionally, the legal psychiatrist has been identified in one of two ways: (1) as the expert witness who provides either a personal appearance in court or some report or communication which he has prepared; and (2) as the therapist of offenders usually functioning in the context of an inpatient penal or correctional setting. To date, both of these roles have created an amazing amount of friction, misunderstanding, and widespread dissatisfaction among members of both disciplines. Legalists typically complain that they are dissatisfied with psychiatry, that they have no faith in its contributions, that they feel it is basically wasteful, and that therefore they have little if any use for it as they know, define, and understand it. Likewise, it is no secret that most of the members of the psychiatric profession have a strong aversion to becoming involved with anything that has legal implications. As a result, the task has been left to a small band of "professional" experts who carry the bulk of all activities in connection with interacting with the legal process. In Los Angeles, for example, over ninety percent of all the evaluations and testimonies needed in various criminal, commitment, and domestic relations matters are provided by a group of psychiatrists that could be listed in approximately a dozen names, and whose activities are almost exclusively devoted to legal consultations. The rest of the several

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hundred psychiatrists in the area rarely, if ever, become involved with anything that could be called legal. Thus, to most legalists, the entire profession is identified and represented by the small group with which they have frequent dealings.

The Expert Witness

This is the one traditional area of direct interaction and exchange between the psychiatric and legal professions. It has done little to bridge the gaps between the disciplines, to promote reciprocal education, or to avoid a mounting frustration on both sides of the fence. Legalists view psychiatric expert witnesses as confusing the issues rather than resolving them. Psychiatric experts feel that their contributions are repeatedly misunderstood and ignored, and that the activity results in predictable embarrassment and frustration. Certainly, in a series of recent celebrated cases behavioral scientists—particularly psychiatrists—by their performances (with Ruby, Sirhan, etc), inadvertently did a great deal to interfere with the public image of psychiatry.

It is not within the scope of this paper to attempt a review of the problems with the expert witness. Suarez has already published a probing analysis of this dilemma [*1*]. Suffice it to say that the problem is viewed as one of failure of *role* definition. That is, the legalists expect certain contributions which the psychiatrist is not able to provide, and psychiatrists have typically failed to inquire critically as to the appropriateness and value of the task expected of them or as to possible alternate contributions that they might be able to offer.

The Psychiatrist as Therapist of Offenders

With regard to the treatment of offenders, one again encounters a very interesting phenomenon because penologists, judges, and others will categorically state that psychiatry has proved to be a dismal failure in terms of rehabilitating and correcting offenders, and in preventing them from repeating. However, a more objective analysis would evidence the fact that the entire question of the therapy of offenders has never really been attempted to date.

There have been very few psychiatrists who have been connected with the penal system. Their contributions have been almost exclusively within the context of either individual or group therapy to the offenders, regardless of orientation, and thus it has been limited to direct service to the inmates. Given what we know of the impact of institutions on their patients or inmates, it is not at all surprising that even the best staffed of institutions providing "adequate" therapy to its population would not be able to tip the balance and overcome the many anti-therapeutic aspects of the institution itself.

A position in a correctional institution is, of course, not a very appealing prospect to the psychiatrist. Typically, it pays a small salary, and cannot hope to compete with private practice. It exists in out of the way locations, which are not culturally or intellectually appealing to a professional. It exposes the professional to unending red tape, and to frustrations above and beyond the failures of his therapeutic attempts. He usually ends up performing a great deal of administrative work, attending meetings, doing evaluations, and writing reports. It is not surprising that, with some known exceptions, the type of individual that is attracted to this job is someone who tends to be rather schizoid, with a fairly high propensity for alcohol, and who functions in an apathetic and unimaginative way. Thus, for a number of reasons psychiatrists have not answered the challenge appropriately, and instead of providing large numbers of the most qualified within their ranks, they have provided very few and many of questionable ability.

Sources of Interdisciplinary Conflict

Many explanations have been offered to account for the obvious interdisciplinary failures. These will be reviewed in order of increasing substance and sophistication, as follows: (1) semantics and terminology; (2) philosophy and orientation; (3) mutual ignorance; and most important (4) the roles of psychiatrists in the legal system.

Semantics and Terminology

The most obvious problem, and unfortunately the most commonly overrated as the main source of conflict, is that of semantics. The semantics issue does, of course, produce its share of misunderstanding by blocking effective interdisciplinary communication. A semantics problem exists even within the psychiatric profession, for it employs terms that are vague, poorly defined, highly conceptual, and rather imprecise, thus resulting in their being used in radically different ways. Attempts to adopt a universal psychiatric nomenclature [*2*] have helped more with the completing of insurance forms than they have with the meaningful and consistent communication within the profession.

Legal terminology is no better, and where law and psychiatry overlap, the legal profession has unfortunately adopted terms that are medical and psychiatric sounding, such as "insanity," "incompetency," and "mentally disordered sex offender." The latter term, for example, masquerades very strongly as a diagnostic label and is often mistaken as such by psychiatrists who should know better, and who persist in labeling patients they evaluate as such, losing sight of and confusing the fact that this is really a legal judgment, just as insanity is a legal judgment, and not a diagnostic assessment.

The word "insanity" itself, which is no longer used in psychiatric communications, is used in the legal system in countless ways, such as in the context of criminal responsibility, involuntary commitment, and different types of competency. It is unfortunate that this word is used so extensively in legal contests to denote so many different things, and that the legal profession somehow assumes that it has a very definite and applicable definition in the psychiatric context as well.

Even so, if the issue of semantics were the only gulf dividing the disciplines, it could have been overcome quite easily by now. But as will be seen below, semantics is not the sole problem, nor is it anywhere near the most critical one.

Philosophy and Orientation

In analyzing the two disciplines from the viewpoint of philosophy and orientation, it is easy to see why the two do not accommodate each other more harmoniously. It is all too clear that the external demands made on psychiatry are very dissimilar and divergent from those made on the legal system. As a result, law tends to see the world in terms of black and white, while psychiatry sees it in gradations. Robitscher [*3*] has pointed out that law is all logic and reason, or at least it sets out to be; but, for a legal system to function, it must be more than merely logical and reasonable. It must be definite, relying on precedent and rules. So, in the course of time, all functioning legal systems become legalistic, and in the process some of the logic and reason gets left behind.

By contrast, contemporary psychiatry, highly influenced by the psychodynamic approach, deals with the illogical and the unreasonable. Freud's central idea was that human actions have their sources both in the conscious, which may be governed by reason, and the unconscious, which is not governed by reason, intellect, or logic, and which, in fact, is by definition unreasonable. Psychiatry as a science has the capacity to examine itself and change according to the demands of new knowledge and new needs. By

contrast, law as a process seems extremely rigid to the scientist because of its reliance on precedence and authority, and its reluctance to roll with the punches or to adjust to new situations. In all interactions, psychiatry when consulted by the law has been asked to provide narrow and precise observations in keeping with the legal structure. The time has come when we can begin to wonder if perhaps we could expect the legal process to make certain alterations and adjustments in order to abandon its absolutistic approach, its dealing with issues as if they were black and white, and the drawing of sharp lines in the context of cases where then the situation must be simplistically placed on one side or the other of that line.

Mutual Ignorance

Another source of potential conflict is the mutual ignorance of how each discipline functions. This is exemplified by the attitudes and actions of the legal profession toward psychiatry, which evidence little knowledge and many misconceptions about psychiatric orientation, theory, practice, and ultimate aims. This phenomenon is well illustrated by a consideration of the notion and definition of "mental illness."

In the 19th Century, when psychiatry was very much linked to neurology, it was fashionable to seek an organic explanation for every condition, and short of that, to develop a nosology of very precise symptom complexes and classifications that led to a rigid scheme of diagnostic labels. At this stage, the classical medical model for illness was employed in the psychiatric context. As the psychiatric scope has broadened, and we have become more sophisticated in understanding the causes and manifestations of psychopathology, we have found it of little use to continue to employ the classical medical model. Mental illness or psychopathology is now viewed as the interaction of complex forces which defy categorization along the criteria demanded by the narrow use of the medical model.

At the forefront of the attack on the medical model are the writings of Thomas Szasz, who in *Law, Liberty and Psychiatry*,[2] states that there is not such a thing as "mental illness," but that the term exists "only in the same sort of way as do other theoretical concepts." Szasz adds that "mental illness has outlived whatever usefulness it may have had and that it now functions as a convenient myth. As such, it is a true heir to religious myths in general, and to the belief in witchcraft in particular." Szasz concludes:[3]

> When I assert that mental illness is a myth, I am not saying that personal unhappiness and socially deviant behavior does not exist; but I am saying that we categorize them as diseases at our own peril.
>
> The expression "mental illness" is a metaphor which we have now come to mistake for a fact. We call people physically ill when their body functioning violates certain anatomical and physiological norms; similarly, we call people mentally ill when their personal conduct violates certain ethical, political, and social norms. This explains why many historical figures, from Jesus to Castro, and from Job to Hitler, have been diagnosed as suffering from this or that psychiatric malady.

The changes within the psychiatric approach to the concept of mental illness have not been felt or acknowledged at all within the legal context. A good illustration of this is how the term is used in delineating the law on insanity or criminal responsibility. Regardless of the test of criminal responsibility, which varies from one jurisdiction to another, it is always found that "mental illness" or "disease" is a premise that must be satisfied before one goes on to prescribe the specific criteria to be used in ascertaining the presence or

[2] Szasz, T. S., *Law, Liberty, and Psychiatry*, Macmillan, New York, 1963, pp. 11–12.
[3] Ibid., pp. 16–17.

absence of criminal responsibility. Since the statutes or the courts never define mental illness in this context, it is evident that legalists assume this to be a clear and viable concept which can be ascertained in every given case, and which can be readily identified and answered by the behavioral scientist before considering the presence of the stricter "legal" criteria for the test of insanity. There is very little in any statute or decision that reflects the fact that the behavioral sciences are beginning to look at psychopathology as being synonymous with the life style and actions of the individual himself, rather than as the result of some discrete "illness," such as appendicitis or tuberculosis, from which stem all the actions which are found to be unacceptable.

It should also be recognized that psychiatrists tend to be very ignorant and demeaning of the legal process. It is imperative that any behavioral scientist who hopes to make some contribution to and possibly some change within the legal process must gain some understanding of that process and thus must have a fair degree of awareness of the setting in which he is working. That does not mean that he must embrace, agree with, or limit himself to the philosophy and orientation of the system, but without some degree of such awareness and sophistication in the area, he is likely not only to be lost, but to be mocked and dismissed as naive.

Role Definition and Delineation

Beyond the problems of semantics, philosophy and orientation, and mutual ignorance, is yet another and probably the most important problem in the interaction between law and psychiatry, namely the definition and delineation of the roles that are to be played by the psychiatrist in the context of the legal process. We shall analyze this contention in the context of several major legal areas where psychiatrists have traditionally been called upon to lend their expertise. In all major areas of interaction between the disciplines, the consultation has been sought by the legal process; and the ground rules for the psychiatrist's activity have been strictly set by legalists. As will be illustrated below, this state of affairs, and the failure of any challenge against it by the psychiatric profession, has led not only to the perpetuation of the system as it was found, but worse yet, to the severe obstruction and failure of the potential and meaningful contributions that could have been made by the psychiatric consultant.

Involuntary Commitment—For a long period in history, even before the formal birth of psychiatry and the existence of psychiatrists, the mentally ill were handled in such a way that they were often not only committed and put away, but at times were even punished for their illness. Thus the concept of using various guises—such as the categorization of the mentally ill as demons or witches—to segregate and eliminate them has existed for quite some time. In fact, Pinel made a name for himself in history by removing the chains from the "prisoners;" that is, those patients who had been placed in institutions because they were sick and weird, rather than because they had committed any criminal offense. Although Pinel's contribution called for a more humane and meaningful treatment of the mentally ill, it was not very long before psychiatrists were involved directly and actively in the process of involuntary commitment. In all jurisdictions the mentally ill are still involuntarily committed; and worse still, they are often placed in institutions where they receive very little care, and which sometimes offer very little more than did the institutions of centuries ago. The basic difference, of course, is that the psychiatrist's evaluation in the form of a report or testimony has now become a key item in the commitment procedure, with apparently very little concern or challenge on the part of psychiatrists as to the fact that they may be relegating patients to lengthy periods of institutionalization, a decision that is likely to prove anti-therapeutic in most cases.

The dilemma of involuntary commitment should raise a number of vital questions with regard to psychiatric participation. Should the term "mental illness" be used as a means of institutionalizing socially disabled persons? If so, by what criteria are behavioral scientists to define such mental illness and thus utilize it in the determinations? How can a line be drawn between the individual who is put away and one who is not? What kind of care will the individual receive in the particular institution to which he is committed? Should he not have a moral and constitutional **right** to receive at least **adequate** treatment? Should not psychiatrists insist upon designating the place and maximum length of commitment? Do psychiatrists always consider practical alternatives to commitment in each case, such as the availability of outpatient therapy and other essential care?

There is very little debate about these questions, and most of the psychiatrists who participate in involuntary commitments do little more than evaluate each case, present the needed testimony, and serve as rubber stampers for the process. In short, psychiatrists are now failing in both their social and professional roles by accepting and carrying out the narrow and potentially dangerous role given them by the legal process without bothering to explore in any depth the consequences of such a role or more meaningful and desirable alternative methods of interaction.

Incompetency to Stand Trial—This much overused concept provides another good example of the problems with role definition. The concept of incompetency to stand trial was originally developed as an aid to the defendant. It was felt that it would be unfair to try individuals who were so disoriented or removed from reality that they could not properly participate and aid in a meaningful defense. It was decided that it would be more just in such instances to postpone the trial until such a time as the defendant was in a more satisfactory mental condition. From this humane and altruistic beginning, however, incompetency to stand trial has, especially in this country, degenerated ironically into yet another form of putting away undesirables for indefinite periods of time, all without having to be very much concerned about some of the due process issues that are present in the criminal law. Most of the psychiatrists who have participated in such hearings would undoubtedly be shocked and disturbed to learn that data available from studies, such as in Massachusetts and Pennsylvania, reveal that almost all of the individuals who are found to be incompetent to stand trial end up spending fantastically long periods of time, often an entire lifetime, in institutions where they are tragically forgotten and receive little or no care. Just because that is the result of the existing legal system and its process, however, is no justification for psychiatric participation. Both out of concern for the patient involved, and more specifically because psychiatrists are so directly involved, it is essential that they confront themselves as well as the legal process with the issue of whether to continue to participate in an activity which has proven by a wide margin to be actually harmful to those people it is purporting to help. And yet, despite the available data, most psychiatrists, in most jurisdictions, day in and day out, continue to provide testimony as to incompetency which represents the critical data necessary for court decisions to institutionalize such individuals.

The Insanity Defense—Several centuries back, the courts and legislators decided that there were some criminal offenders who were so deranged that on moral grounds they should be treated differently from the "run of the mill" offender who committed similar antisocial acts. This always relatively small group was to be classified as "insane" or "irresponsible" and awarded a different, supposedly better, fate. At one time in history, this was reasonable and appealing, because offenders were generally treated so ruthlessly and inhumanely that the prospect of an alternative handling of such individuals was appealing to crusaders who wanted to undo some degree of the existing injustice. Such a

concept probably also served to soothe the guilt felt by all for the manner in which most offenders were treated. It was not long before psychiatrists were involved as important agents in these determinations.

The continued participation in this particular determination can and should be challenged on both theoretical and practical grounds. In theory the notion hinges on the premise that there are two types of offenders, the "bad" and the "sick." Legal criteria for differentiation, or at least for those who are to be put in the "sick" category are spelled out, and the psychiatrist is then expected, using both his general expertise and the application of those criteria, to isolate the rare case that meets the criteria. In fact, given the evolution of the concept of mental illness and given all that is understood about its different sources, today it is not theoretically sound or defensible to speak of two distinct categories of the "sick" and the "bad." These determinations are now more a matter of moral or social judgments, and have no justification or basis in scientific fact. Studies of inmate populations in different penal institutions reveal that inmates tend to run the entire gamut of personality types and psychiatric disorders, not too dissimilarly from the population at large.

In practice, the defense of insanity has proven to be so unwieldy and undesirable to the defendant who succeeds with it, that it is rarely used, except in cases where there is a threat of capital punishment, and only then as a last resource. The available data shows that individuals who have succeeded in the plea of "not guilty by reason of insanity" usually serve very long periods of time in institutions that are for all practical purposes no different from correctional ones. Thus the appeal for the defense has markedly dwindled. Fortunately, with the recent U.S. Supreme Court holding as to the unconstitutionality of capital punishment, it is likely that the insanity defense will be used far less frequently in the future.

The serious challenge remains, however, as to whether the psychiatric profession can continue to participate in any sort of psychiatric defense as it now exists, and which seems to be indefensible on both theoretical and practical grounds. Instead, it seems that psychiatrists should press for the more critical issue, namely the enlightened handling of the offender with a focus toward rehabilitation, and away from retribution or mere custody. By participating in the exercise of a psychiatric defense, psychiatrists are clearly perpetuating not only the concept, but also its current utilization; and they are simultaneously failing to direct their attention to the potential contributions that the psychiatric discipline can offer in terms of the offender's post-verdict and pre-sentence handling and his ultimate therapy and rehabilitation.

Sexual Deviation—The history of the social and legal attitudes toward sex that have culminated in specific statutes is fascinating and has been reviewed extensively and critically. Suffice it to say that whereas a dual reason is usually offered as to the rationale for such legislation, namely the protection of society and the rehabilitation of the offender, in practice only the former is seriously considered, at least to the extent that such unfortunate individuals spend lengthy periods in institutions, thus apparently protecting society. Psychiatrists tend to become involved primarily in the context of "sexual psychopath" statutes, in which they evaluate the alleged offender by law, and submit a report which becomes a critical document in the determination of whether the individual is to be found a "sexual psychopath" or not, and possibly sent away to an institution for a period of from "one day to life."

Psychiatric participation in laws dealing with sexual behavior perpetuates the existence of legal practices which are extremely severe and unbelievably outdated. By concentrating their sole efforts in the direction of examining selected candidates and submitting reports,

psychiatrists are failing to carry out tasks which include the education of lawyers, judges, legislators, and the public; and they are also not placing increased emphasis on the issue of rehabilitation instead of mere isolation and removal from society.

Domestic Relations and Custody Determination—Unlike the previous examples where the use of a psychiatrist raises grave questions of appropriateness and social validity, in the area of domestic relations his utilization to date is much less controversial. Given the laws on divorce and the custody of children, it is appropriate for courts and lawyers alike to turn to the behavioral sciences for help in some of the determinations. Although psychiatrists are failing to act as educators and legislative consultants to any marked degree, nevertheless, the data and opinions that they can contribute, if done properly and in a professional way, are helpful to both the individual litigants and society as a whole. However, as with previous situations, psychiatrists have accepted the tasks all too readily, and have not generally bothered to inquire as to how else they might be effective. In this context specifically, they have fallen into the trap of conceding to the magical thinking displayed by the legal system and assuming that all of the problems of divorce and custody are disposed of by a judicial determination, no matter how unwise or poorly founded.

As a matter of fact, the post divorce period often represents an even more traumatic and difficult phase for the people involved in family disruption. As behavioral scientists, psychiatrists have failed to emphasize this period and have failed to persuade or acquaint the judiciary with the need for further jurisdiction and involvement in the post-divorce period. In other words, in reviewing the different legal steps involved in divorce and custody problems, it is not difficult to see that all of the effort, both diagnostic and therapeutic, is channeled into the pre-divorce period that is culminated by the judicial decision, and very little, if any, attention is paid to the subsequent fate of the litigants. Psychiatrists know that there are problems because they are seen as isolated cases in therapy, and because the litigants often return to the courts over and over again to settle the most minute of disputes which are, of course, nothing more than illustrations of the failure of proper adjustment by the parties concerned.

Conclusion

Through the use of a number of examples of contemporary interaction between law and psychiatry, this article has promulgated the thesis that the basic problem between law and psychiatry today is the fact that psychiatric involvement has always been called for and regulated by the legal system. This had resulted in both the perpetuation of the laws of the system as they exist, but even more important, in the failure of the psychiatric participants to be challenged and stimulated to identify and formulate other and often more meaningful contributions than those that they were being asked to provide.

Legal psychiatry should perhaps be the purest example and epitome of social psychiatry. A consultant is or should be someone who does more than accept the task given to him and merely carry it out. Instead, he should rephrase the questions posed to him, redefine and re-identify the problems from his perspective, and then ultimately modify and remold the task for which he is called. For the most part, psychiatrists have failed to do that in their interactions with the legal system. As a result, not only have they disappointed those who call them in as consultants, but they have done very little to bring about a significant contribution on behalf of the psychiatric profession, the greatest of which would be the bringing about of changes within the legal system that would allow it to operate more meaningfully and successfully.

Frazer [*4*], in *The Golden Bough*, writes that "The movement of highest thought has been from magic through religion to science." Law is, or should be, a behavioral science.

There is not much problem in supporting such a proposition. Law is concerned with the way things should be. It tries to maintain and protect the desired order. It identifies, in a systematic way, the disruptive elements. And finally, it is committed to preventing or correcting the existing deviations. Perhaps the greatest contribution would be to help it become more scientific and less magical and religious.

Roche [5], in the first chapter of his book, *The Criminal Mind*, attempts to clarify the concepts of "science" and "scientific." He points out that we often fail to regard science as a method of thinking, of viewpoints and attitudes that lead to a successful solution of social problems. The legal system is not basically scientific, and in fact it often behaves in a very unscientific way. Psychiatrists cannot afford this, either as professionals or as citizens. Becoming scientific does not involve any change in its goals or ideals. It does imply a greater concern with methodology. If the psychiatric profession can succeed in enabling the legal system to assess itself and its functioning, then a great task shall have been accomplished; for as it exists now, the system is not at all geared to be introspective or self-challenging, nor does it function with any degree or attempt at global coordination. Psychiatric interactions, as defined and arranged by the legal system are unimaginative and feed the self-perpetuation. If psychiatrists begin by examining and challenging their roles in the legal process, then in time, they may be able to offer it something new and useful.

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