The Devil's Advocate

"When *I* use a word," Humpty Dumpty said to Alice, "it means just what I choose it to mean—neither more nor less." The Humpty Dumpty syndrome is widespread and may have reached epidemic proportions. Licensed professions have been known to take license with words and phrases. And then there is Madison Avenue, and "political dialogue," not to mention "poetic license."

As utterers and listeners, lawyers and psychiatrists by training are supposed to be experts on communication. Yet in both receiving and sending there appears to be a lot of static. We may as well face up to the fact that we, among others, play fast and loose with words and in turn are victimized by other word manipulators. For example, proclamations and statutes in legal terminology and the use of psychiatric nomenclature both entail far-reaching consequences and have magical dimensions.

The late Thurman Arnold a few years ago delighted legal realists when he wrote two provocative books on *The Folklore of Capitalism*[1] and *The Symbols of Government*.[2] Readers such as H. L. Mencken, Harold J. Laski, and Stuart Chase applauded Arnold's exposure of the pitfalls of language, and Chase was motivated to produce a companion piece on *The Tyranny of Words*.[3] For a brief time, the legal profession dwelt upon word magic, but aside from Mellinkoff's *The Language of the Law*,[4] semantics did not become a serious concern in the profession, and even Marshall McLuhan has had but a minor impact on legal communicators. Lawyers accept the fact that statutes do not necessarily mean what they say, and to win a case advocates have been known to engage in sloganeering.

Psychiatry can take little comfort in calling the legal kettle black. It too has coined words and phrases with amorphous meanings and uncertain content.[5] Sensitivity to nonverbal as well as verbal communication enhances the risk of obfuscation. If the legal profession is committed to Procrustean techniques, the profession of psychiatry makes a strange bedfellow. The point is, not that our professions are peculiarly susceptible to word magic, but that as "experts" we should be aware of who is doing what to whom.

The rise and fall of the Nixon empire puts us on notice that citizens had better learn to look behind words and appearances and to pull the curtains on public relations campaigns. Courts had better reckon with the consequences of decisions, and psychiatry had best add a pragmatic dimension to its art.

Of course, the classic example of sloganeering in the medicolegal area is the phrase *res ipsa loquitur*, which has induced Pavlovian response in many a judge. Like medical prescriptions written in Latin, a legal concept attains status when it is encased in an alien tongue. More recently, a phrase coined by a psychiatrist,[6] eagerly adopted by a court,[7] has caught hold in literature. I refer to "the right to treatment." Although a healthy skepticism about the phrase was expressed by a distinguished psychoanalyst,[8] nonetheless it has gained currency, and with the *Wyatt* decision,[9] it assumes the role of a categorical imperative. Although a felicitous phrase may be a happy production for its author, it also may tranquilize the uncritical reader. Words may inhibit as well as inspire thought.

Sedation by words is most effective when the author resorts to the last refuge of scoundrels. At our present level of consciousness, an attribution of patriotism is achieved by the assertion that a claim or interest has the dignity of a civil right or liberty that is constitutionally protected. So clothed, the asserted interest becomes relatively impervious to attack by competing interests, and may win uncritical acceptance.

Yet, as Mr. Justice Holmes pointed out, "the word 'right' is one of the most deceptive of pitfalls; it is so easy to slip from a qualified meaning in the premise to an unqualified one in the conclusion."[10] Holmes also said, "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."[11]

The "right to treatment" slogan constitutes a threat to the practice of psychiatry because now that the concept is enthroned by *Wyatt* it may be applied indiscriminately. It may open up a whole new dimension of malpractice litigation against therapists. Already, collateral slogans are being spawned. It is now claimed that the "prisoners of psychiatry"[12] are entitled to "the least restrictive alternative" in treatment.[13] In other words, courts may pass upon which course of treatment is most acceptable.

The political consequence of slogans such as the above, and also the legal doctrine of "informed consent," will be the judicial review of medical judgment. Although we may accept the need for a system of checks and balances in a democratic society, and we may assume that medicine and psychiatry should not be immunized from court review or legal sanctions, it is important to note just what is happening. To some a Pandora's box has been opened; to others the privileged status of doctors has been eliminated. Probably, the reality lies somewhere in the middle. A reasonable prognosis may be that malpractice litigation against psychiatrists will increase, insurance premiums will go up, and an occasional patient, free of the transference phenomenon, will be ungrateful enough to seek and obtain a recovery against an inept psychiatrist. Due to the idiosyncratic nature of psychotherapy and its many schools of thought, it is doubtful that courts will condemn any but the most "way out" forms of therapy. To date, the cases indicate that seduction,[14] assault and battery,[15] and total neglect[16] are not kosher. Otherwise, there is considerable leeway for improvisation. And usually for the ex-patient to win, he will need the expert testimony of another psychiatrist that malpractice in fact occurred. In short, the legal situation may be cause for alarm, but we hope that it will not trigger paranoia.

References

1. Yale Univ Press, 1937
2. Yale Univ Press, 1937
3. Harcourt, Brace and Company, 1937
4. Little, Brown and Company, 1963
5. For example, see and compare the psychiatric classifications given in the Appendix to Menninger's The Vital Balance, 1963
6. Birnbaum: The right to treatment. 46 ABAJ 499 (1960)
7. Rouse v Cameron, 373 F 2d 451 (DC Cir 1966)
8. See Katz: The right to treatment—an enchanting legal fiction? 36 U Chi L Rev 755 (1969)
9. Wyatt v Aderholt, 503 F 2d 1305 (5th Cir 1974)
10. American Bank and Trust Co v Federal Bank, 256 US 350, 358 (1921)
11. Towns v Eisner, 245 US 418, 425 (1918)
12. See Ennis: Prisoners of Psychiatry, 1972
13. See Chambers: Alternatives to civil commitment of the mentally ill: practical guides and constitutional imperatives. 70 Mich L Rev 1107 (1972); and Morris, Institutionalizing the rights of mental patients: committing the legislature. 62 Calif L Rev 957, 960 (1974)
14. Landau v Werner, 105 Sol J 257, 1008 (1961); and Zipkin v Freeman, 436 SW 2d 753 (Mo 1969)
15. Hammer v Rosen, 7 AD 2d 216, 181 NYS 2d 805, modified, 7 NY 2d 376, 165 NE 2d 756 (1960)
16. Donaldson v O'Connor, 493 F 2d 507 (5th Cir 1974)