

## Summary and Discussion: The First Day of the Symposium

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Dr. Westlake, Dr. Feather, my distinguished colleagues, ladies and gentlemen. I've had a perfectly marvelous time listening to this magnificent panel of speakers and have found them extremely stimulating.

I think I am one of those fools on the bench for whom Judge Bazelon is not responsible. I'm a trial judge, and of course it's the trial judge who sees the psychiatrist. The appellate judge reviews what the psychiatrist has told to the trial judge, what the trial judge has distorted and spewed out in some unacceptable fashion, so that you and I (addressing you as members of the psychiatric profession) are frequently *in pari delicto*. And one of the reasons (as has been pointed out by one of the speakers) that we are *in pari delicto* is that you and I don't understand each other and the appellate courts don't understand either of us. So we all get a good start.

Now, I'd like to begin by reviewing what the speakers have said and then add a comment or two of my own before we begin the question period or the comment period as your choice will make it.

First of all, Dr. Quen began with a review of the life and accomplishments of the person who gave this symposium his name, Dr. Isaac Ray. I'm not going to attempt to rehash what Dr. Quen did so well, except to point out that the thesis of Dr. Quen's remarks was the real nub of Dr. Ray's accomplishments, the very nub of what his message is to us: that it is the duty of society, and particularly the duty of the medical profession, to treat and help the mentally ill; and that this duty is not assisted by the adoption of shibboleths or slogans, particularly when those shibboleths and slogans, if applied without discrimination, may be counter-productive. This was the lesson, I think, that Dr. Quen wanted to present to us when he suggested that *habeas corpus*, or to put it another way, the release of the mentally ill, was not necessarily a remedy for inadequate treatment. He also brought out the difficulty which Dr. Ray had in communicating with the members of the legal profession. Interesting, that the passage of a century has not improved the clarity of communication. And as a matter of fact, the problem rather takes us back, I suppose, to the legendary account in the Bible of the tower of Babel.

When I was growing up, I always thought that, when the Almighty decided that men had gone far enough in the building of their tower and decided to have them speak in different tongues, this meant that one group started to speak Hebrew and another group started to speak Latin and another Babylonian or Chaldean. But in my more mature years I have come to the conclusion that they were all speaking English. However, they all belonged to different professions, and, although the words were the same, the connotations were different. Such words perhaps as "the right to treatment," "lever," "fulcrum,"

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“hoist,” “bricks,” all had different connotations, and they all began running in several different ways at once.

Of course you know Dr. Ray wasn't the first person to have difficulty talking to a judge. Judges are irritating people, largely because they are lawyers, and you recall, do you not, that one of Shakespeare's conspirators in one of his historical dramas suggested to a fellow conspirator: “When the revolution is over, let us kill all the lawyers.” Now this suggestion has been repeated from time to time down the centuries, and some years ago, nearly four hundred to be more precise, a much maligned individual had an encounter with a very crusty judge in which he had difficulty understanding him. You've all heard a great deal about James the First of England. He is presented always as a very difficult person who believed in the divine right of kings. But I would like just to illustrate for you this difficulty of communication by reading an excerpt from Coke's Reports and also from his biography, called *The Lion and the Throne*, about an encounter between Coke, who was then chief justice of the Court of Common Pleas, and James the First. Common law judges, the king said, “were like papists who quoted scripture and then put upon it their own interpretation to be received unquestioned.” (I'll digress here to remind you of Dr. Quen's thesis that one should accept the determinations of the adversary system.) “Just so, judges allege statutes reserving the exposition thereof to themselves.” At this point someone, probably Bancroft, brought up the touchy matter of James' own power. At this point James shook his fist and Sir Julius Caesar, after one brief sentence, stopped taking notes. (I'll digress here to say that Sir Julius Caesar was a civil, not a common lawyer.) Coke's Report picks up the story: “Then the king said that he thought the law was founded upon reason and that he and others had reason as well as the judges. To which it was answered by me that true it was that God had endowed his majesty with excellent science and great endowments of nature but his majesty was not learned in the laws of his realm of England and causes which concern the life or inheritance or goods or fortunes of his subjects are not to be decided by natural reason but by the artificial reason and judgment of law which requires long study and experience before that a man can attain to be cognizant of it. And that the law was the golden metwand and measure to try causes of the subject which protected his majesty in safety and peace, with which the king was greatly offended and said that then he should be under the law which was treason to affirm as he said. To which I said that Bracton saith, '*Quod rex non debet esse sub homine sed sub deo et lege*' that the king should not be under man but under God and the law.”

Now you see judges were getting into difficulty even then. That statement of Coke's was probably the precursor of his downfall, which did not occur for some time thereafter. But just think of this dour Scot, who was pretty well schooled in all things pertaining to kingship, being told by this unimportant judge that he couldn't reason in accordance with the laws of his realm of England, that it wasn't natural reason which governed the law, not common sense, but some sort of artificial reasoning known only to the initiate. Judges and lawyers have been getting away with this argument ever since.

I think that it was the message of Dr. Quen's paper that the law wasn't always right in the fashion in which it addressed itself to the problems of treatment of the mentally ill and that it was appropriate on the part of the psychiatrist occasionally to speak out against the law when the psychiatrist thought the law was wrong. This was true whether the issue related to the M'Naghten rule or the Durham rule or the American Law Institute rule of criminal responsibility, or whether it related to the right to treatment and the ramifications thereof. Now then, in response to this we had a very fine presentation by Judge Bazelon, who of course has been preeminent in the field of the consideration by the legal profession of the problems of the psychiatrist, criminal responsibility, the right to treatment and all the matters which are ancillary thereto. And it was the message of Judge Bazelon that the adversary system is really a method of exposing differences which already exist. It is a method of putting problems into the light of day so that they

may be exposed and perhaps be resolved. He suggested that psychiatrists should not resent the efforts to place the problems of treatment of the mentally ill into this context. It was really, I suppose his encapsulated message that judges do not create the dilemma; it is their function to attempt to resolve it. Judges cannot avoid decisions. This fact, I think, was one of the central points of Judge Bazelon's address. Judges must decide cases which are presented to them whether they want to decide them or not. They must determine whether a person remains within or leaves an institution. They must determine whether damages are to be awarded or not, whether injunctive relief is to be granted or not. The judge might rather do anything else in the world than decide a particular case, but he must decide it for good or ill. The adversary system is not an end in itself, but is simply a method for the resolution of disputes.

Thereafter Dr. Rappeport discussed the element of enforced treatment. As we know, many civil libertarians, lawyers, judges and psychiatrists take the position, harking back to the days of Dr. Ray, that no one should be forced to do anything he doesn't want to do (I am reminded of the movement for elimination of the mechanical restraints in Dr. Ray's day). However, Dr. Rappeport pointed out that there are a number of individuals who will not seek or accept treatment save on an enforced basis. Is there a right to be different, a right to be a sociopath, is there a right to engage in persistent criminal conduct, is there a right to be warehoused without psychiatric assistance? When we discuss the right, we should of course consider the concomitant price of exercising that right, and he suggested to us that enforced treatment in many instances may be the only treatment that will be rendered. He indicated to us that at the Patuxent Institution and in many other situations enforced treatment has been markedly successful.

Then we come to Dr. Stone, the last speaker, whose eloquence I'm sure still rings in your ears (I feel totally inadequate to summarize that address, as I do of all the rest). However, he pointed up to us that the right to treatment and the various legal actions growing out of the right to treatment present us with certain dilemmas bringing us back to Dr. Quen and Dr. Ray. Just dumping people out of institutions because they are not being adequately treated therein may not be a resolution of the problem. The awarding of damages against hapless psychiatrists who are willing to serve in institutions may be counterproductive; it will certainly not assist in the upgrading of treatment in those institutions where recruitment is already a problem. He suggested to us that the true approach, if the judiciary must undertake the burden of these problems, is to require that the services be furnished, as in *Wyatt vs. Stickney* or as sought in *Robinson vs. Weinberger*, the current pending litigation. However, he points out to us the great difficulties of litigation, the great perils of litigation and the ambivalence with which psychiatric personnel view this litigation. Moreover, he suggests that if we're going to consider litigation, we have to view the problem in its total context. We can't throw somebody out of an institution and forget him. We can't award damages without thinking of what the ramifications of that action may be. And therefore we must look at the problem as a whole.

I think that this is probably the principal composite message that all of the speakers have for us: that we must avoid the simplistic solution. You recall that many years ago a president of the United States who was known for his laconic statements, Calvin Coolidge, in commenting upon the war debts said "Well, they hired the money didn't they?" Winston Churchill, in reviewing that statement, said that it was true but scarcely exhaustive. This oversimplification, I think, is frequently characteristic of the judicial approach to the problems of psychiatry. The decision rendered frequently has merit, but it is seldom or perhaps never exhaustive. There are certain limitations to the judicial process. At the outset I don't want any of you non-lawyers to get the impression that the adversary system was created by a group of jurisprudential philosophers sitting around a table and working out a method by which disputes would be resolved. The adversary system was developed because the kings of England were too penurious to set up any

other method to resolve disputes. Actually this system developed as did all of the early British legal institutions, including the bail system, because the king was too limited in resources to build jails. It was designed as a means of private enterprise, inexpensive resolution of difficulties. Let the parties do the resolving, and if they do, the king need not make the otherwise necessary expenditures. There are many other areas of the world where the adversary system would not be looked upon with great favor. So therefore let us not take the position that it is the only method by which disputes may be resolved. And let us not take the position that the adversary system is necessarily the only one that will work in the area of mental health. The one thing that we can say, without contradiction, about the judiciary in the United States is that perforce it deals with problems when everyone else ignores them. The segregation problem was ignored by the legislative and executive branches for generations, and of course ultimately it was dealt with by the judiciary. The one man, one vote decisions came about as a result of the abdication of legislators from their clear obligation to apply to the electorate equality of opportunity to express a political determination. Certainly the enormous proliferation of Title 42 Section 1983 suits, to which Dr. Stone has adverted in the area of mental health, has been paralleled in many other areas with which I shall not bore you. Of some five to six thousand cases which you may find in the United States code annotated under the rubric of Title 42, Section 1983, probably ninety percent have been brought in the last ten years relating to issues which legislators and executives have ignored for decades.

However, though the judiciary deals with such matters when it must, no less an authority than former Dean Pound has indicated that its resolution is usually inadequate. Its dealing is inadequate because it decides the case between A and B. It does not explore the total ramifications of the field, and consequently when A and B walk out of the courtroom, perhaps 50% satisfied, we are left with all the rest of the figures of the alphabet to many multiples of prime who are not dealt with at all. What we see, then, is a rather bizarre picture of the branch which is least capable of resolving general problems being the only one which by virtue of its very nature is willing or forced to make adjudication. Now I think that to some extent this picture may be derived from the addresses of the speakers. I think that as we look at the problem and begin our question period, perhaps we ought to consider whether we can deal with the issues differently. Let us not be controlled by the constraints of the adversary system. Let us not be controlled by the constraints of the legislative pendulum. Let us look at a system that we would consider to be better, ideal if you will, and perhaps we can dedicate this symposium ultimately to the achievement of that end.