

The Devil's Advocate

The other day a friendly psychiatrist told me that he was worried about forensic psychiatrists and thought that they were playing "cops and robbers." I was so taken aback by the remark that I failed to follow up and ask for a bill of particulars.

Thinking about his words later, it occurred to me that the criticism was anachronistic. Today's forensic psychiatrists are a rather sophisticated lot, and usually they are aware of what they are doing, even when they don't know why. They have undergone a raising of consciousness and a heightening of their appreciation of the civil and other rights of patients. Apprehension over the "prisoners of psychiatry"¹ and the "therapeutic state,"² if ever justified, has become somewhat dated. Instead, "dumping" is the current problem.

Nonetheless, there have been examples of "cop-outs" by psychiatrists playing cop. Prior "Advocate" columns have cautioned against the use of psychiatrists to elicit confessions or admissions from unrepresented suspects, at a clinic or state hospital,³ because of the actual or potential conflict of interests necessarily involved. There also are other ethical problems where any form of deception is practiced or ulterior purposes are served by one responsible for treatment.⁴ This does not mean, however, that it is questionable or unethical for a psychiatrist to conduct a psychiatric interview or to make a mental status evaluation on behalf of the state for the purposes of reporting and later courtroom testimony.

There may be greater danger that the forensic psychiatrist figuratively may assume the role of "robber," or accessory to crime, when he fails to report to authorities or prospective victims a serious crime threatened by his patient.⁵ Here, identification with the patient and his needs may lead to an abuse of confidentiality and privilege in the erroneous belief that loyalty to the patient is unqualified by social imperatives.⁶ Neither the psychiatrist nor the lawyer is entitled to sit back and remain silent when a patient or client actually threatens future serious criminal conduct and appears likely to carry the threat into execution.

Apart from the above elementary principles, there is a larger dimension of role-playing by expert witnesses. Cynical lawyers have long noted that the so-called "impartial expert" rarely is impartial. He often has his own axe to grind. On the witness stand his humanity is revealed by the enthusiasm manifested on direct examination and the hostility which he displays on cross-examination. Thus, the adversary process often forces the expert to choose sides, and more often than not, the expert is out to win. He wants his judgment to be vindicated and wants to obtain the personal satisfaction which comes from sharing in victory. Such is par for the course.

It is not the adversary process alone which triggers the particular

performance; other stimuli include the drama and spectacle of the occasion. The courtroom appeals to the latent Thespian in most of us. Both counsel and witness are frustrated actors. Because it is assumed that live broadcasts of trials inevitably bring out the ham in us, the American Bar Association has attempted to ban such broadcasts. What has been ignored by the A.B.A. is the fact that public trials are great theater, whether televised or not.

If all the world's a stage, the courtroom is a three-ring circus. The judge, counsel, and the accused all perform before the jury. The jury divides its attention and alternates in identifying with each of the actors. Observers such as Judge Jerome Frank⁷ and Paul Reiwald⁸ have noted the phenomena, and have pointed to the psychodynamics of trials. Forensic psychiatrists are in a unique position to add to our understanding of the many facets of the legal process because they may occupy the dual roles of participant and observer. It would be interesting to get further reports from such sources, because I suspect that most of us are continually playing "cops and robbers" in the courtroom setting and that my psychiatrist friend really was complaining about his frustration with frustrated actors.

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References

1. See Ennis B: Prisoners of Psychiatry. Harcourt, Brace, Jovanovich, 1972
2. See Kittrie NN: The Right to Be Different. Penguin Books, 1971
3. See The Devil's Advocate, 4 Bulletin 92 (1976), but compare Goldzband MG: Dangerousness, 1 Bulletin 238 (1973).
4. The classic case is *Leyra v. Denno*, 347 U.S. 556 (1954).
5. See The Devil's Advocate, 2 Bulletin 271 (1974)
6. Compare Stone A: Suing psychiatrists to safeguard society. 90 Harv L Rev 358 (1976).
7. See Frank J: Law and the Modern Mind. Tudor, 1936
8. See Reiwald P: Society and its Criminals. William Heineman, 1949