

# Law and Psychiatry: A Stormy Marriage

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## The Impasse

The domestic tranquility of the law and forensic psychiatry has been disturbed recently by an escalated request that psychiatric experts be excluded from court trials. Still, separation of the parties is not imminent and divorce seems unthinkable, although disharmony exists. Disquiet over psychiatric testimony is not new; numerous judicial statements can be found in case law over the years remarking on the immiscibility of the two disciplines. Alexander Brooks in his textbook<sup>1</sup> puts the situation gently: "... Extensive incorporation of psychiatric thought and language in a legal standard does not promise to aid legal judgments without at the same time forfeiting important goals of the legal system." Most legal authorities praise the insights psychiatric experts provide, for example in criminal cases, but insist that "Those insights must be viewed in the context of a legal rather than a medical judgment."<sup>2</sup> Others were more vigorous. A Federal Judge in *US v. Pollard*,<sup>3</sup> after hearing three qualified psychiatrists testify that an offender was in a "dissociative reaction" at the time of a bank robbery, stated that he found "much comfort" in the assistance of mental specialists in sentencing, still remarked, "There are compelling reasons for not blindly following the opinions of experts... on issues of fact."

In the late 1960s, Judge Bazelon<sup>4</sup> rejected the *Durham* test for criminal irresponsibility because, in part, "The insanity defense was entirely in the hands of the experts... That state of affairs pleased no one..." In the controversy surrounding the *Durham* rule, Judge Bazelon made it clear that "Our society has chosen not to give this decision (to testify about the defendant's criminal responsibility) to psychiatrists... rather to 12 lay representatives of the community." At the same time, he accepted the value of psychiatric testimony in giving "expert" information about the defendant's mental condition.<sup>5</sup>

Some years before in *Wolff*, Justice Mosk of the California Supreme Court stated on review of a murder case claiming insanity,<sup>6</sup> "... To accept the defendant's thesis would be tantamount to creating by judicial fiat a new defense plea of 'not guilty of schizophrenia.' To do so... would be bad law and apparently still worse medicine..." In 1979, the Deputy District Attorney of Sacramento County, Ronald Tochtermann, decried the use of psychiatric testimony in the *Chase* case<sup>7</sup> in terms which aptly express legal objections: (1) Psychiatrists should not be allowed to state their present diagnosis; (2) they should not be allowed to ante-diagnose a defendant, (3)

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they should not be allowed to offer opinions as to the cause of a charged criminal act; (4) they should not be allowed to testify in terms of ultimate legal conclusions; e.g., ability to deliberate." Most significant is the now Judge Tochterman's objection to the expert being allowed to offer an opinion as to the *cause* of the crime because of mental disease or mental impairment.

Beyond these legal opinions about the value of psychiatric testimony, shrill denunciation of the place of psychiatrists in a court of law by psychoanalysts, psychiatrists, journalists and others, has arisen. Several decades ago, Gregory Zilboorg wrote:<sup>8</sup> "It is most pertinent to differentiate between the doctor of medicine who is engaged in the business of detection of crime or otherwise serves the ends of penal justice and the psychiatrist who is called upon to examine and testify to the mental condition of a defendant . . ." Dr. Szasz' diatribe against forensic psychiatrists is too well known to require documentation when he inveighed against the "prostitution" of experts in the same Chase case of which Judge Tochterman spoke. Recently (1978) Richard Gambino, a professor of educational psychology, wrote an article in the *Saturday Review*,<sup>9</sup> quoted by a Supreme Court Justice in California in the Drew case,<sup>10</sup> which stated: "Psychiatry is a healing art. Its function is to understand and cure, not to define moral or legal responsibility or to accomplish justice." Journalists such as Nicholas von Hoffman presumably speak for the public when they floridly denounce psychiatric testimony in criminal cases, "expensive, dilatory lolligagging . . ."

### **Motivation: Psychiatry's Contribution**

Aside from reasonable and unreasonable complaints, the crux of the problem revolves around whether those psychologic factors in the criminal's make-up developed by a psychiatric study can be presented in court as the *cause* of a given crime. It is true that a psychologic profile does not automatically imply causation, but the purpose of such testimony is for the lawyer's use in estimating his client's criminal responsibility. Psychologic factors so adduced include motivation, and the whole issue of criticism regarding expert testimony hangs on this point: is motivation with all its facets to be discussed from the witness stand or is it an unmentionable aspect of the evaluation of a criminal and his act?

The law generally neglects motivation in favor of *intent*. The difference between motive and intent was well expressed by the Supreme Court of Idaho<sup>11</sup> in ruling on a trial court's "refusal to prove motive" in a larceny case. Here, the Justice stated: "Motive generally is defined as that which leads or tempts the mind to indulge in a particular act . . . (it) differs from intent (in that it's) purpose is to use a particular means to effect a certain result. Motive . . . is not considered an essential element in any crime unless made so by statute."

At this point a difficult philosophic problem arises: what is the *causal* import of motivation compared to intent? Since the psychiatrist's and psychologist's interest in motive is primary, it is difficult for them to envi-

sion or understand any type of social misbehavior without an attempt to analyze motivation. The law has a slightly different view: California Jury Instructions,<sup>12</sup> for example, states: "Presence of motive tends to establish guilt. Absence of motive may tend to establish innocence. You will, therefore, give its presence or absence . . . the weight to which you find it to be entitled."

Some years ago (1952) Weihofen and Guttmacher<sup>13</sup> drew attention to this dichotomy in writing: "Psychiatrists may object that this legal concept of 'intent' is a naive oversimplification of the process by which a person 'makes up his mind' to commit a crime . . . It is time for a reexamination of the criminal-law dogma that motive is irrelevant". As is often repeated, the court's goal is justice, not primarily therapy. Still, occasionally a Supreme Court Justice rules, as in *State v. Rawland*,<sup>14</sup> (Minnesota), "Evidence in a murder case . . . should be received freely . . . of the entire man and his mind as a whole." More commonly, as in a New Jersey case<sup>15</sup> when Williard Gaylin, a competent psychiatrist, testified concerning the accused in a murder case, "(This) man is a helpless victim of his genes, his life environment . . . the unconscious forces dictate his behavior," the presiding justice answered, ". . . If the law were to accept such a medical doctrine . . . the legal doctrine of *mens rea* would all but disappear from the law." In a concurring opinion, another justice stated: "Dr. Gaylin's view seems quite scientific . . . It rests upon an elementary concept of cause and effect . . . a deadend approach to the mystery of our being . . . Dr. Gaylin wisely leaves that subject to the philosopher . . ."

Here is an example of a dynamically evaluated case meeting the law's negative view of unconscious factors head-on.

What, then, is the place of a dynamic psychiatry in the legal system? The answer is that it serves an explanatory function primarily and that it is not an integral part of our legal institution, but the corollary of this statement, i.e., that the law neglects the emotions in a criminal act, is not entirely true. The criminal law does take cognizance of conscious and unconscious motivation under the principle of "crimes of passion." This principle is defined as "Provocation which arouses passion rendering the perpetrator unable to reason to the extent necessary to form a deliberate purpose to take a life . . . when the circumstances arousing his passion is such that a reasonable man would be similarly governed."<sup>16</sup> In this sense, passion described as an "intense, overpowering emotion" (Webster) takes no account of the psychological subtleties and background of such emotion.

In spite of an apparent impasse, a curiously parallel tendency in the two disciplines has been evolving over the centuries. Both the criminal law and psychiatry has gone through semantic changes concerning responsibility for crime signaling a definite melioristic trend. For example, in descriptive psychiatry the changes over two centuries moved from Madness, to Lunacy, Insanity, Mental Disease, Psychosis, Mental illness, Mental Reactions, Syndromes, Dysfunction, Altered Orientation and the current designation, Mental Disorder. The Diagnostic and Statistical Manual II (1968)

and DSM-III (1980) abandoned mental "disease" for mental "disorder." Similarly, criminal law passed through an evolution from the ancient Wild Beast test, the McNaghten, Durham, Currens, Model Penal Code and Diminished Capacity tests. For psychiatry, these changes meant increased insight, less intrusive treatment methods and a decreased stigmatization of mental abnormalities. For the law, it meant less cruel punishment, the rise of rehabilitation efforts, reduction in the death sentence and a more enlightened penal practice.

As the mental health movement has improved, the less pejorative or belittling the diagnosis, the more sympathy and empathy displayed for the person so designated. This trend was operative not only for medicine and psychiatry, but also for society, as it removed the aura of supernaturalism that hovered over mental abnormalities. It also allowed a perception of the similarities between the dynamics of mental illness and those of 'normal' mentation. In effect, over the decades, society has benefited from this humanistic tolerance. In short, the introduction of a dynamic point of view has been a triumph for psychiatry and for forensic psychiatry, but the brute fact remains that our virtuosity and those of our psychological forebears is denigrated, even dismissed as an obstruction to justice.

### **A Suggested Use of Psychiatry**

There is a way to utilize the mass of material developed by forensic psychiatrists in their study of crime and criminals which will not impinge on, or conflict with, the moral imperative of our system of justice. Our explanations of antisocial behavior in the individual may not fit legal design, but they can serve society. Law and forensic psychiatry are dedicated to a common task—the control of misbehavior, one through legal punishment, the other through understanding and possible therapy. The proposal to be advanced here would function outside the courtroom, but is aimed at those who might some day face the law in the courtroom. Those convicted and sentenced are not the prime target; the target is the potential offender. The means will be through entertainment via television, the most powerful and persuasive agent operative on the minds of Americans. Entertainment is stressed because admonition and preachment has been of no avail. Entertainment can bring out psychologic features in the viewer's mind that no exhortation can reach. This proposal would illuminate the viewer's inner feelings about the event portrayed in crime stories, thus reaching unconscious or preconscious fantasies that erupt in crime. It will require a rewriting of crime stories to expose the subtle communication that passes unseen between the criminal and his public, but first, some remarks on the thinking behind this idea.

Preparatory to this analysis, consider the paradoxical notion that crime is a creative experience. It is well known among criminologists that there is a drive for creative satisfaction among criminals. The acts, whether murder, embezzlement, rape or assault, constitute a new set of emotional configurations in the offender's life. A crime has to be considered in *status nascendi*,

the moment of happening. Phenomenologically, a criminal act is a new alignment of human feelings, sometimes planned, sometimes fortuitous, based on a motive or seized as it arises spontaneously. The motive may be increased self-esteem, ego mastery or revenge. For example, the professional larcenist has his group of peers who exchange experiences, successes or failures, sensitive to their techniques and reputations. A professional thief knows the conditions favorable to his trade, just as the businessman understands problems of production and merchandising. The violent offender satisfies deeper motives to create new family constellations by destroying old ones, acting-out infantile hostilities long smoldering within him. Hence, one can call homicide a psychologically creative act, whether thought-through, i.e. deliberate, or born on an impulse. The closer one comes to the phenomenology of a criminal act, the more one needs action rather than words to understand the motives revealed. How many times has an offender under examination said honestly, "I don't know what happened . . . it just came over me." Even a reenactment of a crime through hypnoanalysis does not supply the full flavor of the moment of crime.

The feelings underlying a criminal act are not far distant from those of the law-abiding person. Indeed, the criminal acts out the fantasies of his public in a sort of reciprocal reaction between the unconscious of society with its antisocial fantasies and the surface actions of the criminal. This does not imply any mystical bond existing concerning evil throughout humanity. It does mean that society unconsciously projects its antisocial impulses to the offender, who masochistically accepts his position as scapegoat. In a word, society loves its crime, but hates its criminals.

### **Society's Involvement**

We come now to the use of entertainment in television crime stories to demonstrate these psychologic truths. Entertainment is, in essence, a "game." The game replicates anxiety-provoking situations mobilizing defenses against hidden motives and feelings. It is an "as if" postulate avoiding a head-on conflict with real dangers, such as competition, acquisitiveness, aggression, cunning, deceit, victory by force, the triumph of skill and so on. To a spectator, a game is entertaining insofar as it liberates his or her fantasies. In fact, the closer a dramatic presentation comes to reality, the less entertaining it is, as witness the documentary film. The writer or director is intuitively aware of the public's unconscious needs and fashions his story as a game. He knows that the "Who Dun It" in a mystery play is a "You Dun It." The game, i.e., the entertainment, functions as a defense against those feelings threatening to burst forth, a circumstance that can easily be observed in the bated breath, the gasp, the expression of horror, the tension displayed by a viewer of a movie or television presentation portraying a gruesome homicide. In fact, one can say the "thrill" so eagerly sought by our youth in fiction or other presentations is itself a sign of the uprush of aggressive fantasies held in check by the realistic portion of the ego.

Since this proposal is interested in prevention, it must be realized that the potential offender can be anyone: the self-absorbed driver suffused with fantasies of destruction who drives a car carelessly or aggressively, the over-sensitive person struggling with his or her humiliations, the drinker whose larcenous or lethal impulses creep out under cover of the ego-dissolving effect of alcohol, the neurotic who carries his inferiority on his sleeve, unable to tolerate lowered self-esteem, the clerk dreaming of grandiose revenge on an impersonal and hated tyrant corporation, the hyperkinetic adolescent over-invested in his power image, the individual whose thin ego carries the weight of rejection in fancy or fact, the addict who cannot face life's pressures; these and other emotional crises are well known to forensic psychiatrists.

There are other evidences of the public's preoccupation with aggressive fantasies. Consider our language and the frequency with which the word "death" occurs in jest or "dead" earnest. A spent bill is "dead;" "sudden death" ends an athletic contest; a marksman is a "dead" shot; a "dead" issue, a bill is "killed" in committee, an accused is found "dead to rights;" we recognize a "dead" shot, "dead" reckoning, beating a "dead" horse, "dead" center, the "dead" of night, "dead" drunk, a "dead" pan expression; people "kill" time, complain they are "dead" tired, the "party is dead" and "death and taxes"—all carry metaphoric meaning far removed from homicidal impulses. Does this mean that Freud's "death wish," Thanatos, has forced its way into language? Is it a sublimation of a universal masochism? So powerful a theme, the very underbelly of violent crime, must be meaningful in the social ego.

### **The Anatomy of Crime Stories**

Consider also the anatomy of a murder mystery, whether in literature, movies or television. The structure of the story betrays its psychologic significance for the reader-viewer. A killing has occurred; enter the detective, usually portrayed as a moral, emotionless, dedicated man, whose scientific, objective attitude commands respect. He immediately looks for clues. Here, a vague sense of anxiety arises in the viewer-reader: the clue functions to defend against an unconscious guilty feeling. If the detective is intuitive and clever, the super-ego is assuaged by the intellectual game of scientific deduction. If the detective is presented as a bungler for comedy relief, the viewer's empathy for the criminal is temporarily strengthened. (This is more evident in stories involving larceny, embezzlement, jewel thefts and the like.) As the clue is developed, the play becomes more engrossing, the work of repression within the viewer is intensified.

Then follows the chase and shoot-out. This device allows the viewer's identification to shift from the *hunted* to the *hunter*. The super-ego is beginning to exert pressure on the unconscious of viewer and author. The chase replaces the defense of intellectualization to that of motility, at the same time increasing a conscious loyalty towards the legal authorities, but the denouement is rarely simply that of capture of the offender. Capture of

the criminal encounters difficulties: the final scene may be a warehouse filled with impedimenta, a garage with obstructing cars, a factory setup with innumerable pipes, pillars, fences, passageways, anything that would impede an easy capture and a simple end. This device permits a balance to develop within the viewer-reader: the work of repression is successful, justice triumphs, as the criminal is apprehended; the viewer relaxes in psychologic comfort, the play is ended. A homeostasis has occurred within the viewer's ego.

One more detail is needed to further assuage the super-ego. Restitution for the luxury of indulging antisocial fantasies in the viewer is allowed for in the play's ending. The killer or thief, now recognized as a "psychopath," is imprisoned so he can repent, or he may be delivered to a loyal woman or religious man for his redemption, or if he has been killed by the police, his crime has been a sacrifice for a "cause" or for a wrongfully accused relative. That old sleuth Conscience has to be satisfied for the play to be a psychologic success. The split in the reader-viewer's ego must be healed.

### **A Proposal to Reach the Public**

If this analysis makes sense, it points the way for the forensic psychiatrist to contribute material, viewpoints and attitudes to help authors and directors portray motives and impulses antecedent in *both* protagonist and spectator in crime stories. It will demand a new kind of writing. A cathartic effect is not the sought-for result. The thrust of this preventive therapeutic concept is to show viewers that perpetrators and victims of violent crimes are closely related psychologically. To recognize one's inner self in an entertainment medium is to lift fantasy to the level of reality for the potential aggressor where it can be weighed and dealt with. Herein lies the possibility of crime prevention based on solid psychological verities with which forensic psychiatrists are particularly familiar.

This proposal may arouse vigorous objections in that such reconstruction of our most popular television presentations of crime stories will release a flood of violent emotion. The only measure of this eventuality is the reaction of the viewing public to the increasing, even overwhelming, intimacy of television programs covering medical and dental, sexual, divorce, venereal, child-bearing, surgical, ethnic, prison practice and educational problems. Has exposure of this array of human problems resulted in greater help for more people or greater morbidity in our population? The fascination which has greeted these presentations and the fervid discussion aroused provides evidence of the former reaction. Is there any reason to expect less benefit in the long run for viewers in turning the camera, so to speak, upon their own emotions?

The findings of forensic psychiatry utilized by imaginative enterprising producers in the ubiquitous mystery murder crime stories can help the media reach a society desperately involved in violence.

## References

1. Brooks, Alexander D.: Law, Psychiatry and the Mental Health System. Little, Brown Co., Boston, 1973, p. 212.
2. Brooks, ib., p. 212.
3. United States v. Pollard, 282 F. 2nd 450 (6th Cir. 1960).
4. Bazelon, Judge, New Gods for Old: "Efficient" Courts in a Democratic Society. 46, NYU Law Rev. 653, (1971).
5. Washington v. US. 390 F. 2nd 444 (US Cir. DC 1967).
6. Peo. v. Goedecke, 65 CA 2nd 850, (423 X) 423 p.
7. Tochterman, Ronald: Controlling the Testimony of Psychiatric Witnesses. CA Dist. Attys. Assn., Criminal Law Monthly, Vol. 1, No. 4, July, 1979, p. 1.
8. Zilboorg, Gregory: The Reciprocal Responsibility of Law and Psychiatry. The Shingle, 83, (April, 1949).
9. Gambino, Richard: The Murderous Mind: Insanity v. the Law, Saturday Review, 10, March 18, 1978.
10. Peo. v. Drew, 22 CA 3rd 333, CA Repr. 275 (1978).
11. State v. Stevens, 454 P. 2nd 945 (1969).
12. California Jury Instructions, Crim. 2.51 (Evidence and Guides).
13. Gutmacher, Manfred and Weihofen, Henry: Psychiatry and the Law, W. W. Norton and Co., New York, 1952, p. 402.
14. State v. Rawland, 199 NW 2nd 774 (1974).
15. State v. Sikora, 219 A. 2nd 193 (1965) 44 NJ 453.
16. Loewy, Arnold, Criminal Law, West Pub. Co., St. Paul, MN, p. 32. □