

Forensic Psychiatry, Its Place and Its Promise

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Forensic psychiatrists have always experienced problems when testifying before the bar of justice—some burdensome, some answered relatively easily. Indeed their position in court was ill defined until Benjamin Rush (1812) and Isaac Ray (1838) placed psychiatry on a more credible basis. After Ray solidified the field testifying was largely in the hands of Superintendents of Insane Asylums from whom “alienists,” often neurologists, evolved.¹ In earlier days, as in *Rex v. Arnold* (1724)² public officials performed testimonial duty. In *Arnold* one Mr. Allen, a Commissioner of the Peace, examined the accused finding him “mad [with] tumult, confusion and wicked devices” (paranoia?). The prosecutor, Serj. Chesire, functioning as attorney, objected to Allen’s testimony on the grounds that a “madman could receive instructions on how to behave mad.”

Two and a half centuries later Justice William Douglas (1968) echoed this suspicion in a truck accident case.³ He warned against “psychiatric probing” in these words:

If the defendant is turned over to the plaintiff’s doctors and psychoanalysts . . . the door will be open to grave miscarriage of justice . . . for

a fee a doctor can easily discover something with any patient . . . his report may overawe or confuse the jury. . . .

The notion of exploring and presenting the dynamics of emotional and cognitive details can be said to have been stimulated by Clarence Darrow’s defense in the Leopold and Loeb murder case.⁴ In 1922 he called men of the caliber of Bernard Glueck, William A. White and William Healy to openly discuss their findings of “diseased motivation, split personality and homosexuality” in the accused pair. The case became a hallmark for forensic testimony introducing psychoanalytic concepts in explaining the pair’s motivation in deliberately killing a boy of 14 years.

Dynamic interpretation of criminal acts were applauded. By 1934, Dr. Gregory Zilboorg, a New York psychoanalyst, announced the “golden years of the awakening in the field of psychiatric criminal justice” at a meeting in the New York Academy of Medicine devoted to the subject.⁵ Dr. Glueck, who also participated, added:

The only hopeful approach . . . to criminal conduct lies in scientific individual treatment in place of the mechanical procedure . . . of the legal approach.

Psychiatrists were enlivened by this burgeoning field, Dr. Karl Menninger, Chairman of the American Psychiatric

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Association Committee on Legal Aspects of Psychiatry, was equally enthusiastic. He wrote an impressive document that would serve as a "white paper" for the forensic profession, ending with the conclusion (1934):⁶

Criminal behavior can be scientifically studied, interpreted and controlled. . . . Radical changes must be made in penal practice.

Meetings between the American Bar Association and the psychiatric groups agreed that the two disciplines must "pool their interests and opinions in the two fields."⁷

This agreement began to bear fruit with a study by Drs. Hubert W. Smith and Harry Solomon (1944)⁸ on emotional reactions following injury (traumatic neurosis) until then written off as a "predisposing neurotic background." Dr. Smith pleaded for liability in such cases. This opening allowed emotional analysis to enlarge forensic psychiatry. The number of contributors that followed were legion: Franz Alexander and Staub in their *The Criminal, the Judge and the Public*; Ben Karpman's *The Sex Offender and his Offenses*; Hervey Cleckley's *The Mask of Sanity*; Lindner's *Rebel Without a Cause*; Guttmacher and Weihofen's *Psychiatry and the Law*; Frederick Wertham's *The Show of Violence*; Henry Davidson's *Forensic Psychiatry*; Bernard Diamond's papers; and others.

While forensic psychiatry was taking form the expected close relation between the law and psychiatry was cooling, especially over the introduction of motivation in testimony. Professor Goldstein

of Yale Law School commented in his book *The Insanity Defense*:⁹

The new rule which appeared on the scene in the 1950's represented a flight from the law.

Professor Jerome Hall, an outstanding legalist, put his objection of the psychiatric invasion of the law more mildly:¹⁰

. . . the psychiatrist may exercise his role of scientific theorist . . . but explanations in those terms are not an adequate description of the choice and action of the criminal.

And a professor of law at Boston University made his point sharply:

Psychiatric testimony is too complex: courtroom confrontation with different theoretical explanations . . . leads to chaos, disrespect of the needs of the community. . . .

Introduction of psychoanalytic concepts, the unconscious, repression, projection, etc., was criticized in a New Jersey case.¹¹ Dr. Willard Gaylin had testified regarding the defendant:

. . . [this] man is a helpless victim of his genes . . . distorted personality . . . that unconscious forces dictate his behavior.

The New Jersey Supreme Court, in review, stated:

. . . if the law were to accept such a doctrine . . . the legal doctrine of *mens rea* would disappear from the law . . . Dr. Gaylin's view seems quite scientific . . . [but] is a dead-end approach to the mystery of our being . . . wisely left to . . . the philosopher.

To serve the court as expert witness, forensic psychiatrists had to learn the goals, basic axioms, and philosophy of the law; this we did. By 1969, our organization came into being under the efforts of Tuchler, Rapoport, Thomas and many others. There was much to learn of the adversary system, demands

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of “yes” or “no” answers, etc., as well as weeding out headline-seeking experts, and “hired guns.” To quote Dr. Stanley Prentice’s history of our movement:

Between 1960 and 1969 . . . loose formulations of the interrelations of psychiatry and the law . . . came to a point of hesitant definition.

By 1978, the field was consolidated enough to establish the American Board of Forensic Psychiatry and to set up examinations for applicant diplomates. One aspect of improvement in expert testimony was the matter of psychological motivation of the criminal before the bar, stressed by Guttmacher and Weihofen (1952).¹²

. . . psychologists cannot conceive of trying to understand human behavior without asking *why* the individual acted as he did. It is time for re-examination of the criminal-law dogma that motive is irrelevant.

But what appeared to be a valid direction for forensic psychiatrists’ research was scorned by Dr. C. B. Farrar, distinguished editor of the *Journal of the American Psychiatric Association*, who reviewed Guttmacher and Weihofen’s book:

. . . [they] want to replace a vague concept by a still vaguer one . . . [the] emotional situation of the accused . . . at the time of the crime is about as slippery a mental image as possible to conjure up and as futile. . . .

More virulent was the response of Marshall Houts, editor of *Trauma*, reviewing the *State v. Jack Ruby* trial in 1964:¹³

The jury . . . should not be subjected . . . to listening to the imprecise technical jargon of the psychiatrist whose compendium of knowledge of human behavior remains woefully limited. . . .

While we strove to understand the law,

some attorneys mocked testimony of forensic psychiatrists by invoking “green-back neurosis”; “secondary gain,” considered a ploy to prolong the emotional effect of injury; malingering; suspected collusion between sympathetic doctors and their patients, etc. Unexpectedly, the cooling wind between the two groups, once dedicated to “pooling their interests” became colder. Gregory Zilboorg, once a stalwart supporter of the “golden age” now (1949) decried:¹⁴

. . . the psychiatrist who testifies as to the mental condition of a defendant . . . is merely a specialist . . . who hires himself . . . for value received . . . he is not a healer . . . nor a servant in the ministry of medical mercy.

Karl Menninger also changed his views, expressing himself in vigorous language:¹⁵

We psychiatrists should keep out of the courtroom. We don’t belong there, we cannot function effectively there, we do not understand the language addressed to us. . . .

In one sense the opposition between the two parties dealt with the accent on *diagnosis* according to the ever-changing *Diagnostic and Statistical Manual*.¹⁶ Stating or describing a diagnosis does not answer legal questions as *mens rea* or the emotional state of a defendant at the time of the crime. Seymour Halleck and his Task Force coworkers¹⁷ have recently reviewed this problem in the light of:

The imperfect fit between diagnosis and the substantive law of mental disability.

Halleck and associates point to the possibility of psychiatrists:

[being] tempted to find more significance and certitude in a diagnosis than is justified by

current knowledge . . . [since] it involves moral dimensions and societal needs.

This is the specific factor in the law's distrust of forensic testimony, its reliance on diagnosis to explain conduct.

Modifications in diagnoses from DSM-I, in 1952, to the expected changes in the forthcoming DSM-IV in 1994 are difficult to explain to laymen, especially in the personality area. For example, what was diagnosed "Psychopathic Inferiority" became Sociopathic Personality in 1952, thus shifting the accent to social areas. In DSM-II (1968) homosexuality was removed from sociopathology to become sexual "orientation." By 1980, DSM-III removed drug and alcoholic addiction from the Sociopathic category. In 1987, DSM-III-R placed Antisocial Personality in a cluster with Borderline Histrionic and Narcissistic personality. DSM-IV, to be released in 1994, might include such diagnostic entities as Masochistic and Sadistic Personality, Self-Defeating Personality, Luteal (ovarian) Phase Dysphoria, Battered Wife Syndrome, and Paraphilic Coercive Disorder (impulse to rape), among others. Admittedly such details are beyond the average jury's perception.

Perhaps the effort to explain a defendant's misbehavior should not be couched in diagnostic terms, although its convenience for communication between colleagues, for statistical reasons, etc., is obvious. DSM-III-R concedes, in an introductory passage, that:

. . . each mental disorder is not a discrete entity with sharp boundaries. . . .

The lack of "sharp boundaries" precludes an exact quantitative psychiatry,

hence the oft-repeated phrase: "Psychiatry is as much an art as a science." The scientific aspects are quantifiable as demonstrated in brain scans, magnetic resonance imaging (MRI), and positron emission tomography (PET) techniques, which combined with computer synthesis, have occasioned a virtual revolution. On the other hand, motivation inquiry depends on analysis of unconscious factors clearly not quantifiable.

In spite of the "art and science" posture of psychiatry, the practical problem for forensic experts is the law's basic position that proven transgression of approved laws requires punishment. It must be noted, however, that the phrase "correction" has been implied in penal placements of offenders. This, if I understand the legal position correctly, means that correction occurs automatically in the sentenced person, certainly not in the way our field understands psychotherapy to function.

From the standpoint of forensic psychiatry's future, there is no reason to expect greater freedom among experts bringing motivation into the courtroom via testimony. Such inclusion was the very reason hope arose during the 1930s for the advent of the "golden age" of our subspecialty to become a new psychological criminology. If a diagnosis with its various contingencies is difficult for the law to absorb, how much more complex would be an exposition of motivation through art forms be for laymen to accept?

An answer would be to educate society that criminal impulses are a "given"; that law-abiding persons have already

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experienced anger, hate, aggressive feelings, or fantasies of the criminal but *controlled* them. It would take the form of revising crime stories, television, and movie offerings to demonstrate society's own identification with aggression. Obviously such an idea could be called naive, even quixotic. Still, motivation for crime excites everyone's attention, consciously or unconsciously; and we cannot forget that social attitudes and polity have, over the centuries, slowly but inevitably changed legal thinking.

It is manifestly clear that the American public is fascinated with crime through crime stories, movies, television, novels, murder mysteries, and firearm possession. Society's attachment is both conscious and unconscious. Tracing the conscious and unconscious forces in the portrayed criminal for all to see and experience would, in varying degrees, illuminate their *own* identification with the aggressor. As I have put it: *Society loves its crimes but hates its criminals*.¹⁸ Perception of their own inner fantasies of violence could hence have a therapeutic effect.

Improbable as this idea may seem to our legal colleagues, such an eventuality over time, will take the form of a widespread species of group therapy, a "brain washing" of potential offenders. I have advanced this theory in the past when it was branded "visionary" and Utopian. But ideas can invade public consciousness in unexpected ways. Forensic psychiatry, dwelling on the borderland of fixed legal precedent, plus our interest in motivation could effect changes.

Some such approach could be forensic

psychiatry's function before legal tribunals. Both fields represent a kind of social engineering. I have always felt the law and psychiatry are allies: the law deals with social misbehavior through correction; psychiatry tries to treat misbehavior through therapy.

This could be our promise.

References

1. Bunker HA: The alienist and neurologist, in *One Hundred Years of American Psychiatry*. Edited by Hall JK. New York: Columbia University Press, 1944, p 219
2. *Rex v. Arnold*. Court of Common Pleas, 10 George I, A.D. 1724
3. *Schlagenhauf v. Holder*. 379 US 104 (1964)
4. *Stone I: Clarence Darrow for the Defense*. Garden City, NY: Doubleday & Co., 1941, pp 405-10
5. Zilboorg G: Legal aspects of psychiatry, in *One Hundred Years of American Psychiatry*. New York: Columbia University Press, 1944, p 576
6. Committee Report. *Am J Psychiatry*, 91:422, 1934
7. *Psychiatry in relation to crime*, in *A Psychiatrist's World: The Selected Papers of Karl Menninger*. Edited by Hall B. New York: Viking Press, 1959, p 729
8. Smith HW: Relation of emotion to injury and diseases: legal liability for psychic stimuli. *Va L Rev* 30:193, 1944
9. Goldstein A: *The Insanity Defense*. New Haven, CT: Yale University Press, 1967
10. Hall J: The legal view, in *Psychiatric Aspects of Criminology*. Edited by Halleck S, Bromberg W. Springfield, IL: Chas. C Thomas, 1968
11. *State v. Sikora*, 210 A. 2nd 193, (NJ 1965), 1965
12. Guttmacher M, Weihofen H: *Psychiatry and the Law*. New York: W. W. Norton, 1952, p 402
13. Houts M: The real lesson of Jack Ruby, in

- Trauma. San Francisco: Matthew Bender & Co., 1964, p 413
14. Zilboorg G: The reciprocal responsibility of law and psychiatry. *Shingle* 83 (April), 1949
 15. Menninger K: Presidential address, American Psychoanalytic Association meeting, May 1942
 16. American Psychiatric Association: Diagnostic and Statistical Manual of Mental Disorders, Vol. II, 1968; DSM-III, 1980; DSM-III-R, 1987
 17. Halleck S, Hoge S, Miller R, Sadoff R, Halleck N: The use of psychiatric diagnosis in the legal process: Task Force Report of the American Psychiatric Association. *Bull Am Acad Psychiatry Law* 20:481-99, 1992
 18. Bromberg W: *Crime and the Mind*. New York, Macmillan Co., 1965, pp 415-7