Guilt and Innocence in the Pre-Sentence Psychiatric Examination: Some Ethical Considerations

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The pre-sentence stage of the criminal justice process appears to many to be the most legitimate point of psychiatric intervention. There is, for example, a considerable body of opinion within the psychiatric profession to the effect that the psychiatrist should have nothing to do with the determination of guilt or innocence, but should participate only after the verdict is in. Once guilt has been established, it is felt, the psychiatrist may properly advise the court as to the most fitting disposition.[1,2,3,4]

This apparently simple position becomes anything but simple as soon as one scrutinizes it a little more closely. Complexities arise from a number of different directions. These include the supposedly laid-to-rest question of guilt or innocence, the content of the psychiatrist's report, and the nature of psychiatric diagnosis.

In token of these complexities is the following paradox: the psychiatrist's task, when he has to advise the court, is easiest when the defendant is most obviously ill. Then the psychiatrist will make the same recommendations that he would make for any other similarly ill patient not adjudged guilty of an offense. The questions of criminality, culpability, and punishment become irrelevant. The non-forensic psychiatrist is as well equipped to advise here as is the forensic specialist. No unique ethical issue arises.

It is when the defendant is not so ill that ethical considerations emerge. The first of these, viewed in logical sequence, is the matter, supposedly settled once for all in our original assumption, of guilt or innocence. It is to this question that the present paper is directed.

It is perfectly true that guilt has been legally determined already, or we would not be making a *pre-sentence* examination. But guilt from a *legal* standpoint is not fact-finding on which to base a psychiatric opinion. The psychiatrist must arrive at an independent factual premise for his psychiatric conclusions, and the declaration of guilt in the legal sense has no direct correspondence with the raw material he requires even as to external events, still less as to motivations, intents, and the like. Yet there is the danger that the psychiatrist's inquiry may be prejudicial to a defendant if the question of guilt in the legal sense is later reopened, for example upon the withdrawal of a guilty plea or the appeal of a conviction.

It would accordingly appear advisable for the psychiatrist not to inquire about the offense. In many cases this may be the best solution. The

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psychiatrist does not like to see himself as an inquisitor.

Yet many will feel that an examination that omits attempted clarification of the offense is an inadequate examination, since it passes over something significant in the history of the defendant and certainly of interest to the court. This is particularly true if the offense is a bizarre, relatively isolated event in the life of the defendant. Everything then hinges on whether the supposed act did in fact occur.

Whether guilt in the legal sense was arrived at by a process of plea-bargaining or by conviction upon trial, it cannot serve as adequate premise for a psychiatric opinion. The psychiatrist is expected to set forth his own estimate of the defendant. Perhaps it would be more honest of him to phrase his report in terms of alternative hypotheses, such as to say, if the defendant committed this act in such a manner, then I conclude this; if he did not, then I conclude that. Maybe some psychiatrists do report in this way, and possibly we all should. But psychiatrists are under pressure to produce definitive answers, even when the questions are not clearly stated, and sometimes, attempting to oblige, we succumb to illegitimate expectations.

Besides, I cannot believe that an acknowledgedly open-minded attitude as to the defendant's guilt on the part of the psychiatrist would be tolerated very long, since such skepticism would seem to question the sanctity of the legal process and smack of lese majesty. Yet it is not altogether fair to expect the psychiatrist to accept on faith a determination he has had no part in making, not merely for the purpose of performing a concrete act on someone else's authority – the correction authorities do that when they execute sentences on the court's mandate – but for the purpose of drawing further supposedly independent medico-psychiatric conclusions. This, of course, raises the whole question of how far the scientific objectivity of the court psychiatrist goes. For if he is forced to build on a legal decision, but clothe his conclusion in medical or psychiatric terms and sign his name to it, he is in effect endorsing a verdict that was not his, and so vitiating the scientific nature of his own work.

The defendant who is subject to pre-sentence psychiatric examination either has been found guilty after trial or has pleaded guilty, usually to a less serious offense than that originally charged against him. In these days of overcrowded court calendars and wholesale plea-bargaining there has been much adverse criticism of the practice of permitting a defendant to "cop a plea." Conviction after trial is considered a more reliable, fairer method of procedure. Of course it is not infallible. And it was never designed with the idea of providing the raw material for a psychiatric appraisal.

Juries, indeed, do not state their specific findings or set forth the factual basis for their conclusions; they come up with a simple verdict of guilty or not guilty. The verdict is a very dry bone indeed for the psychiatrist to clothe in the living flesh of a factual reconstruction that shall serve as the premise for a psychiatric opinion. Moreover, the evidence on which the jury bases its verdict is not available to the psychiatrist, who, of course, has not attended the trial. Neither is a record of the deliberations of the jury in the jury-room, which would undoubtedly be more enlightening than the verdict. The verdict frequently results from compromise. As such, it may be

incompatible with any position based on the application of the law to the evidence presented. So the psychiatrist must look elsewhere for his own working hypothesis.

If the defendant has pleaded guilty, similar considerations prevail. The guilty plea is the product of an agreement, hence an unreliable indication of what really took place. Reckless endangerment, as a plea, is a pale reflex indeed of an attempt at murder, and makes little sense for a psychiatric interpretation of the motives of a would-be killer. On the other hand, the defendant often comes before the psychiatrist denying everything except that he is the unfortunate victim of compromising circumstances and inept or inadequate defense counsel!

The fiction is that the psychiatrist somehow does not *need* the facts. It would be felt that he ought not to be at the trial; his presence there indeed would be considered a little indecorous, because, besides being too busy, he is supposed to rise above questions of fact – guilt and innocence are beneath him as well – and in some Olympian manner come up with a transcendant psychiatric truth. Psychiatric trust, based on otherworldly data if it is based on anything, neglects mundane facts. We seem to hear occult instructions, coming from some arcane source, telling us, never mind what the defendant did, or whether he really did it. Assume he probably did something. Anyway, he is before the court for sentencing, so find out what is wrong with him – and there had better be something wrong, else why do we need psychiatrists? Really, no one likes the idea that normal people commit crimes: it is unsettling and it raises questions about the social structure.

With a little more appreciation, let us hope, of his own limitations, the psychiatrist proceeds to the interview. If he has any expertise, it is in interviewing. Faced with the problem of finding a factual basis for the conclusions he is to make, and confronted with someone in a position to know the facts, the psychiatrist may be expected to have recourse to the usual tools of his trade, asking, listening, observing. But inquiry of an alleged offender about the offense is inquisition, even if it is done by a doctor. This fact may at times be more prominent in the consciousness of the defendant, at other times in that of the psychiatrist. The latter may feel himself inhibited by the nature of the material he is attempting to obtain in what appears to be a confidential atmosphere. The former may be more or less trusting, more or less suspicious. But in any case there is ample scope for ambiguity as to role relationships – doctor-patient, inquisitor-accused. This is not very palatable.

Perhaps the psychiatrist should say, if this is to be inquisition, let us not cavil at it. The defendant had his opportunity; he has been adjudged guilty, one way or another, and can no longer claim the rights of a free citizen. One of the measures at the court's disposal, once guilt has been established, is the psychiatric examination. Psychiatric examination, even with inquisitorial overtones, will protect everybody's interests. If the defendant confesses, everyone's conscience will be eased, the defendant's no less than the public's. If he is mentally ill, his treatment can only be advantageous to all concerned. If there are mitigating psychological features, the psychiatrist will be able to give the court notice of them.

Unfortunately, these arguments suggest their own opposites. The

defendant may have been adjudged guilty. Assuming even that he is, indeed, guilty, and does not withdraw a plea or appeal a conviction, is he to be denied protection against further self-incrimination? To what extent should psychiatric treatment be compulsory on court mandate? If mitigating features are to be brought to the court's attention, what about motivations that exceed the actual offense?

But beyond all this, it seems, is the role of the psychiatrist as he sees himself and as the defendant sees him as he inquires into the criminal activity. The psychiatrist will, of course, put the defendant on notice by identifying himself with the court. But at the same time, by word and manner, consciously and unconsciously, the psychiatrist will attempt to ingratiate himself with the defendant; otherwise no rapport, no interview will be possible. Nor can the psychiatrist effectively, merely by stating his role as court officer, divest himself of his authority as a healer, with the tacit reassurance that this affords the defendant. While the defendant may, through the adjudication of guilt, have lost some of the rights attending a free citizen, he cannot have lost the right against deception, nor can the psychiatrist or the court or the state have acquired that right against him. With deception we must link intimidation: for the psychiatrist is an authority with powers the defendant has no way of estimating or resisting.

In this brief outline we have considered some of the ethical problems related to the psychiatrist's assumption of the inquisitorial function. Not all of them will arise in any one case, of course; many are mutually exclusive. The psychiatrist will use his judgment in appraising each case on an individual basis, and act in accordance with his conscience, sometimes inquiring, sometimes not, shaping his participation to the circumstances. The psychiatrist who carries out examinations for the courts will already have made some kind of peace with the judicial system.

We have spoken throughout as if there were no restrictions on the use, against a defendant, of his utterances in a psychiatric examination. Of course there are. But these are not always observed in practice, nor are they absolute. I am indebted to Abraham L. Halpern, M.D., for bringing to my attention the *Al-Kanani* and *Edney* cases.[5] The dilemma of the psychiatrist who brings out something prejudicial to a defendant is *moral* and is therefore not relieved by mere legal considerations. Once a secret is revealed, it is no longer a secret.

These issues are not new, yet they operate in a changing context. There is increased concern with crime, much dissatisfaction with the criminal justice system, and at the same time augmented solicitude for the rights of defendants. Meanwhile, psychiatry has been placed in a defensive position on several fronts. It is accordingly incumbent upon us to remain sensitive to the fundamental issues concerned with our professional activity as they evolve with the times.

References

1. Halleck SL: Psychiatry and the Dilemmas of Crime. New York, Harper and Row, 1967
2. Menninger KA: The Crime of Punishment. New York, Viking, 1968
3. Halleck SL and Bromberg W (eds.): Psychiatric Aspects of Criminology. Springfield, Thomas, 1968 (see chapter by Halleck, p. 11 ff.)
4. Halleck SL: The Politics of Therapy. New York, Science House, 1971
5. Halpern AL: The insanity defense: A juridical anachronism. Psychiatric Annals 7:8 (August 1977)