

## The Devil's Advocate

In my review of Andy Watson's revised edition of *Psychiatry for Lawyers*, *supra*, reference is made to the famous case of *Regina v. Dudley and Stephens* and the fact that the Home Secretary commuted sentences to the time served while awaiting trial. Thus, although the House of Lords went on record against sin (cannibalism) and rejected the asserted defense of *necessity*, a concession to human frailty was made by the compassionate Home Secretary. What actually occurred raises the problem of "What is law?"

It is obvious that there is more than one "law" involved if one considers what actually happened in *Dudley and Stephens* and its sequel. There was the "law" expressed in terms of legal principles in the opinions of the Lords. There also was the law exercised by the Home Secretary, who had the power to commute or pardon.

Many other examples might be given to illustrate the many meanings of law and its operative processes. In the field of family law, another example is the case of *Williams v. North Carolina*, where after two Supreme Court hearings a conviction of bigamous cohabitation was sustained. However, by the time the legal processes had been exhausted, the spouse of one of the meretricious partners had died and the other cuckolded spouse had obtained a divorce, so that after vindication of public morality, the miscreants were permitted to marry and never serve time. Again, North Carolina was permitted to go on record against sin, but at the same time the parties avoided the hardship of time in the common gaol.

This compromising and ambivalent attitude of the law is shown by the operation of discretion and checks and balances within the system. It has been said that there is more law at the end of a nightstick than anywhere else. From the cop on the beat to the sentencing authority there is virtually unchecked discretion. If law is what is done officially, as well as legal rules, principles, concepts, and the legal process, one must look beyond what courts say to the results of decision. The lesson to be learned from such cases as *Dudley and Stephens* and *Williams v. North Carolina* is that the *whole law* of a case includes its consequences. Yet, oddly enough, there are relatively few follow-ups as to consequences. Nobody bothers.

This is so even though unless we know what happens, it is impossible to judge the soundness of a decision or statute. To ignore the result is similar to reading a "who-dun-it" and skipping the last chapter and the *denouement*.

Legislatures also tend to ignore the non-political and non-economic consequences of particular enactments, which means that a lobbyist has his best chance when his pet measure, if adopted, will gain votes but cost little. Legislative bodies, however, with their access to investigative and reporting agencies, do not have the excuse that courts may have for eschewing follow-ups.

It took legislatures and courts many years to admit that denying a divorce did not save a marriage. Even a casual investigation would have disclosed that when divorce was denied reconciliation did not occur. Now that divorce is readily available in most states, often upon unilateral demand, it is time that we had more studies on what happens to the family after divorce. Wallenstein and Kelly, and a few others, have reported relatively small-scale samplings, but we do not have full-scale surveys or national statistics on what happens to either the parties or the children of divorce. Morton Hunt, in *The World of Formerly Married*, gives us a report on the post-divorce sex life of some divorced persons, and William Goode in *After Divorce* supplies some figures from Wayne County, but we have yet to see the whole picture.

Mental health professionals and counselors are aware of the complications that may follow divorce, and post-divorce counselling services have been established in a few communities, but as divorces increase the problem grows, and it is increasingly evident that we are doing too little and that it may be too late. The trauma of divorce and the legal system's failure to plan for the future of the broken family may produce a social problem not unlike that occasioned by alcoholism. Now that fault has been all but eliminated from the grounds for divorce, there is released time to help the parties to adjust to separation.

If the judge, legislator, and lawyer should be aware of the consequences of a decision or statute, to whom should he or she turn? To the extent that law attempts to regulate and control human behavior, as well as to settle private disputes, the answer in this age of "experts" obviously is that he or she should turn to the psychiatrist of all seasons. Notwithstanding the current controversy over the predictability score card of psychiatrists with regard to individual behavior, it may be safe to assume that they have the training and experience to predict human behavior in general if given the relevant data. Moreover, they may have special competence to predict the reactions of various kinds of persons in response to various kinds of stress.

For example, it should be obvious that the most advantageous use of the so-called forensic psychiatrist in the criminal process may be at its beginning and end, *i.e.*, at a screening, if any, before trial, and at the time of disposition. The reality of the present system is that too many of the wrong people are able to "cop a plea" or are subjected to trial or are sent to prison. And some of the wrong people are acquitted. It probably is true that newspaper and media publicity exerts a greater influence on the criminal process than the insights of behavioral scientists. Of course, what is needed to make the system work is an informed selectivity as to cases to prosecute, and a greater diversity of institutions and programs for those found guilty. It just doesn't make sense to go along with rampant and indiscriminate plea bargaining and the building of more maximum security prisons.

In short, there is a horrible allocation of resources, and we seem to learn nothing from experience. Millions of federal funds have been poured out to state and local law enforcement agencies to buy "choppers," "dum-dum" bullets, tanks, and other gadgets of warfare, but scant attention has been paid to improving the system in the light of available knowledge regarding crime and punishment and the pragmatic consequences of the system itself. The clamor for law and order verges on hysteria, and emotion rather than

reason controls public policy. The public school system is another blighted area of great concern. Here too the bureaucrats are well entrenched and determined to maintain the status quo at all costs — tragic costs in terms of educational failure. Considering the high percentage of pupils coming from single parent homes, does it make sense to send a fatherless boy to a school where he may not see a male teacher until he's ready for gym or "shop"? Is the training and experience of psychiatrists relevant to the crisis in public education?

Still another target for involvement may be the welfare system, where for years social workers have called the shots. The foster care system alone is a tremendous financial burden, and in New York City costs the taxpayers almost \$300 million dollars a year. The AFDC program costs about \$8 billion dollars a year. What psychiatric input has there been into these and other such programs? Welfare agencies traditionally have objected to close attachment between foster parents and foster children and have been known to remove children when bonds of love and affection developed. The excuses are that foster parents sign contracts with a clause providing that they shall not seek to adopt, and that foster placement is intended to be an interim measure until the natural parent achieves parenting competence. Is this realistic? The figures show that at best only one child out of four ever gets out of the foster care system.

There is a lot of paranoid thinking in the public sector and a persistent refusal to judge institutions, systems, and programs in terms of how they work. If mental illness usually entails an inability to perceive reality, it is clear that we have a sick society, or, as an alternative, we are saddled with an insensitive bureaucracy. Perhaps both.

A competent lawyer never loses sight of the long term advantage for his client; the wise judge reckons with the probable consequences of his decision; and the specialist in human behavior thinks in terms of reactions and inter-relationships. It is the psychiatrist's concern with the "whys" of human behavior that gives him a special competence to give advice for the alleviation of pressing social problems that may be insoluble. As experts on "reality," psychiatrists should feel free to point out the folly of our ways, and the ways of our follies. If Diogenes were alive, he would go out looking for a pragmatist, since they are so sorely needed.

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