

## BOOK REVIEW

THE POWERS OF PSYCHIATRY. By Jonas Robitscher. Boston: Houghton Mifflin Company, 1980. Pp. viii, 557, Price \$17.95.

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Psychiatry and law are often seen as adversaries. Many psychiatrists claim that mentally ill patients are denied needed treatment because of legal obstacles placed by the meddling of lawyers and courts. Lawyers, for their part, often assert that psychiatrists violate the constitutional rights of individuals. The hostility between these two points of view appears irreconcilable.

Dr. Jonas Robitscher, both an attorney and a board certified psychiatrist,<sup>1</sup> wrote in 1966 a thoughtful, conciliatory book addressed to both lawyers and psychiatrists.<sup>2</sup> Now, Dr. Robitscher has given us a more forceful book, *The Powers of Psychiatry*, which demands the attention not only of doctors and lawyers but also of legislators and the general public. He documents, largely from secondary published sources, an alarming litany of pervasive psychiatric abuses in almost every aspect of modern American life.

The conflict between law and psychiatry erupts into public view frequently in connection with civil involuntary mental health commitments. A typical example of the vehemence of the opposing points of view occurred in the spring of 1978, when Dr. Thomas Szasz, a maverick psychiatrist adamantly opposed to involuntary mental health commitments, gave a public lecture at Philadelphia's City Hall, under the auspices of the Philadelphia Bar Association. The audience responded vociferously. Former mental patients who had been committed to hospitals against their wills—some for years—emphatically approved his message. Others, principally friends and relatives of allegedly mentally ill persons no longer subject un-

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<sup>1</sup> Dr. Robitscher is the Henry R. Luce Professor of Law and Behavioral Sciences at Emory University and the 1976 winner of the prestigious Isaac Ray Award for significant contributions in the area of forensic psychiatry.

<sup>2</sup> J. ROBITSCHER, *PURSUIT OF AGREEMENT: PSYCHIATRY AND THE LAW* (1966).

der Pennsylvania's New Mental Health Law<sup>3</sup> to commitment at will, passionately opposed his views.

The problems of involuntary mental health commitments, as well as the insanity defense and psychiatric testimony in general, have been the subjects of much discussion in legal and psychiatric literature. The great contribution of *The Powers of Psychiatry* is the revelation of the enormous range of activities in which psychiatrists and psychiatry play a crucial and little understood role. Although Dr. Robitscher repeatedly maintains that psychiatry, when practiced properly, does benefit some patients, his exploration of the many uses and abuses of psychiatry is damning evidence of a profession gone amok.<sup>4</sup> Had this book been written by a journalist or a lawyer, it might be dismissed simply as a parade of horrors.<sup>5</sup> But Robitscher is neither an outsider nor a reporter looking for sensational material. He is a highly respected practicing psychiatrist, a distinguished professor, and a recent winner of the prestigious Isaac Ray Award for significant contributions in the area of forensic psychiatry. Clearly, we must accord his observations significant weight.

Psychiatry's uses and abuses are qualitatively different from the venality and incompetence that are endemic to all professions. Psychiatry has the potential to warp a human life or psyche in ways not readily visible and seldom remediable. Mental hospitals, usually located in the country far from prying eyes, do not reveal their secrets to the public. The work of psychiatrists, in opinions given to courts, employers, the military, and family members, may never become known to the person who is the unwilling subject of psychiatric or psychological study. Dr. Robitscher tellingly points out that psychiatry deals not only with seriously disordered, deranged, criminal, or violent people, but with the whole population: the infant whose custody is disputed, the parents whose child may be taken from them, the school child who is tested, classified, labelled, and perhaps stigmatized, the job-seeker and job-holder who are also tested and classified, hired and fired on the basis of psychiatric opin-

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<sup>3</sup> Mental Health and Mental Retardation Act of 1966, 50 PA. STAT. ANN. §§ 4101-4704 (Purdon 1969) (amended 1976).

<sup>4</sup> The reader should refer to chapter 21 of Robitscher's book, which contains an eclectic listing of 51 ways in which psychiatrists exercise authority. J. ROBITSCHER, *THE POWERS OF PSYCHIATRY* 401-05 (1980) [hereinafter cited as ROBITSCHER]. The list, while illustrative of the author's thesis, is by no means comprehensive.

<sup>5</sup> See, e.g., H. JAMES, *CRISIS IN THE COURTS* (1968); C. SILBERMAN, *CRIMINAL VIOLENCE, CRIMINAL JUSTICE* (1978) (collating examples of injustices and incompetence, principally from newspaper reports and interviews).

ions, the poor and the non-poor seeking medicaid and insurance benefits, those accused of crime, those convicted of crime, the elderly, and ordinary people who do not consider themselves mentally ill, as well as the media and the general public, whose perception of norms of behavior and aspiration are affected by psychiatric theories.

*The Powers of Psychiatry* is organized by categories of situations in which psychiatrists intervene in the lives of individuals or participate in organizational and governmental decisions. Dr. Robitscher does not give an historical or analytical outline of the profession and its problems. But his overlapping, and sometimes repetitive, descriptions of psychiatric involvement in the lives of Ezra Pound, Virginia Woolf, General Edwin Walker, and countless less well-known individuals, make apparent psychiatry's erratic course of development in both diagnosis and treatment.<sup>6</sup> Robitscher is painfully aware that the identification and treatment of people assumed to be mentally ill has, throughout the relatively short history of psychiatry, been inconsistent, dangerous, and often bizarre.

In the nineteenth century, drugs such as laudanum and barbituates were widely used with serious addictive results. Then there was a switch to verbal treatment. Later, psychosurgery was in vogue. Various parts of the patient's body were removed, from the colon to the brain. Significantly, the originator of the lobotomy was awarded a Nobel prize.<sup>7</sup> Today, few reputable psychiatrists would prescribe psychosurgery. It is widely recognized that these operations resulted in little, if any, benefit and in fact caused great permanent harm.<sup>8</sup> At present the pendulum has swung back to drugs such as thorazine, milltown, lithium, anti-depressants, and other mood-altering chemicals, many of which are addictive and can cause brain damage. These drugs are widely prescribed today for all kinds of patients from the "hyperkinetic child" to the hostile senior citizen who resents institutionalization. Shock therapy and induced convulsions were once accepted treatments and then abandoned.

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<sup>6</sup> Dr. Robitscher does not subscribe to the view, held by a small number of psychiatrists, that there is no such thing as mental illness. See, e.g., T. SZASZ, *THE MYTH OF MENTAL ILLNESS* (1974). He believes that there are people who are seriously disturbed, cannot function, and/or are a threat to themselves and others. See ROBITSCHER, *supra* note 4, at 15.

<sup>7</sup> This illustrious member of the healing profession was the Portuguese neurologist Egas Moniz, who utilized the lobotomy as a treatment for schizophrenia. ROBITSCHER, *supra* note 4, at 88.

<sup>8</sup> Dr. Robitscher estimates that, between the lobotomy's introduction into American psychiatric practice in the early 1940s and its virtual demise in the 1950s, 40,000 to 50,000 such operations were performed. Many less-developed countries, which cannot afford expensive programs of drug therapy for their citizens, continue to rely on the lobotomy as a means of psychiatric treatment. *Id.* 88-89.

There is now a trend towards "aversive" behavior modification. No one can now be certain what good or ill effects such treatment has. One must therefore conclude that extreme modalities of therapy are often employed freely without adequate prior testing, only to be abandoned for new fads.

Dr. Robitscher paints an equally disquieting picture of the unscientific and variable nature of psychiatric diagnosis.<sup>9</sup> If psychiatry were subjected to the standards of precision the law requires for statutes,<sup>10</sup> diagnoses such as "sociopath," "psychopath," "schizophrenic," "antisocial personality," and "passive-aggressive" would be rejected as void for vagueness. Even the categories of mental illness fluctuate. For example, the psychiatric establishment tergiversates in its assessment of so-called deviate sexual behavior. In 1973, the American Psychiatric Association removed homosexuality from its list of mental "diseases," despite extensive disagreement. Masturbation was at one time treated as a dangerous disease causing permanent mental impairment. Now it is considered normal behavior. Some psychiatrists have even advised it as a form of therapy. Nonetheless, on the basis of such broad and protean concepts, the law deprives people of their liberty and property, relieves them of responsibility, and/or provides them with substantial economic benefits.<sup>11</sup>

As psychiatry fluctuated in its definitions of mental illness and its specifications of the appropriate therapies, so has the legal profession wavered in its approach to the role of psychiatry in the law.

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<sup>9</sup> The subjective and discretionary nature of psychiatric diagnosis is illustrated by the testimony of the late Dr. Manfred Guttmacher in an unreported case from Berks County, Pennsylvania. At issue was whether the defendant, a thirteen year-old boy, was of sufficient emotional maturity to be prosecuted for murder as an adult. In the face of evidence that the defendant was a slow learner in school, perhaps because he suffered by comparison with his brighter twin brother, Dr. Guttmacher testified that the boy was as bright as the average fourteen year-old and should therefore be prosecuted as an adult. Ironically, Dr. Guttmacher, himself the twin brother of the distinguished Alan Guttmacher, did not find the twinship to be important, despite the great significance psychiatrists generally place on being a twin.

<sup>10</sup> See *Connally v. General Constr. Co.*, 269 U.S. 385 (1926) ("[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.").

<sup>11</sup> One of the most celebrated examples of psychiatric waffling involves the meaning of the diagnostic term "sociopath." At the trial of one Comer Blocker, charged with the murder of his common-law wife, a psychiatrist from St. Elizabeth's Hospital testified that sociopathy was not a mental disease. Blocker, although diagnosed a sociopath, was thus deprived of a chance for an acquittal by reason of insanity. Shortly after Blocker's conviction, the St. Elizabeth's psychiatric staff changed its mind and determined that sociopathic individuals were mentally ill after all. This psychiatric "flip flop," as it was popularly called, won Blocker a new trial. ROBITSCHER, *supra* note 4, at 168-70.

A generation ago, psychiatrist Manfred Guttmacher and law professor Henry Weihofen advocated displacing courts and lawyers with psychiatrists.<sup>12</sup> Many lawyers and judges believed in psychiatry's claimed ability to diagnose and treat criminals. The medical model of crime was ascendant.<sup>13</sup> Institutions such as the prison hospital at Patuxent, Maryland, were created to "treat" and "cure" anti-social adult criminals and juvenile delinquents. No one knows how many people were indefinitely incarcerated in such institutions, until the courts declared "defective delinquent" statutes unconstitutional and ordered the release of adults held beyond the maximum terms otherwise permitted for their offenses.<sup>14</sup> Comparative longitudinal studies of persons subjected to such treatment reveal little difference between the treated offenders and the untreated control group.<sup>15</sup> In like manner, the legal and criminological establishments once adhered to the notion of rehabilitation through imprisonment, without substantial evidence of its efficacy. Recently, however, rehabilitation has been abandoned for retributive theories.<sup>16</sup>

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<sup>12</sup> M. GUTTMACHER & H. WEIHOFFEN, *PSYCHIATRY AND THE LAW* (1952).

<sup>13</sup> Thus developed the insanity defense as articulated in *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954), *overruled*, *United States v. Browner*, 471 F.2d 969, 981 (D.C. Cir. 1972). *Durham* altered the traditional test of insanity so as to exculpate from criminal responsibility those whose forbidden acts were the "product" of a mental disease or defect, as established primarily by expert psychiatric testimony. 214 F.2d at 874-76. Eighteen years later, the District of Columbia Circuit in *Browner* abandoned the *Durham* approach, in part because it created "value dominance" by the psychiatric experts giving testimony. 471 F.2d at 981-83. Robitscher himself derides the use of psychiatric testimony in situations in which judges and juries are fully competent to draw reasonable conclusions. ROBITSCHER, *supra* note 4, at 27-28.

<sup>14</sup> See, e.g., *Commonwealth v. Pifer*, 440 Pa. 172, 269 A.2d 909 (1970), in which the Pennsylvania Supreme Court held that commitment of a prison inmate to a state institution for mental defectives under the authority of a repealed Pennsylvania statute was improper because the statute fell short of providing constitutionally required due process safeguards. The statute, 61 PA. STAT. ANN. §§ 541-542.6 (Purdon 1964) (repealed 1968), was repealed two years before the *Pifer* decision.

<sup>15</sup> See, e.g., B. BERELSON & G. STEINER, *HUMAN BEHAVIOR: AN INVENTORY OF SCIENTIFIC FINDINGS* 631 (1964); E. POWERS & H. WITMER, *AN EXPERIMENT IN THE PREVENTION OF DELINQUENCY: THE CAMBRIDGE-SOMERVILLE YOUTH STUDY* (1951); McCord, *A Thirty Year Follow-Up of Treatment Effects*, *AMERICAN PSYCHOLOGIST* 284-89 (1978). McCord studied a treatment program for juvenile delinquency prevention founded in 1935 by Dr. Richard Clark Cabot. The study compared 325 men who had been in the treatment program with 325 "matched mates" assigned to a control group and concluded that the untreated men committed fewer crimes than those subjected to treatment.

<sup>16</sup> In 1962, the American Law Institute, in an official draft of the Model Penal Code, extolled rehabilitation as a primary goal of sentencing. MODEL PENAL CODE § 1.02(2)(b) (Proposed Official Draft 1962). More recent discussions of the issue are less committed to the notion of rehabilitation and more mindful of the affirmative value of punishment. See generally TWENTIETH CENTURY FUND, *FAIR AND CERTAIN PUNISHMENT: REPORT ON CRIMINAL SENTENCING* (1976). See also FORER, *CRIMINALS AND VICTIMS: A TRIAL JUDGE REFLECTS ON CRIME AND PUNISHMENT* (1980), in which the writer analyses sentencing fads.

Although Dr. Robitscher's method is descriptive and anecdotal, rather than analytical, the reader is led to conclude that psychiatry has assumed its extraordinary position in American society in part because public and private agencies, seeking paternalistic, authoritative, and simplistic answers to complicated social and individual problems, have turned to psychiatrists to relieve themselves of decisionmaking responsibility, and in part because enormous economic benefits accrue to psychiatrists, agencies, and on occasion, even the patients, from using psychiatric opinions.

Robitscher's most useful and insightful observations are embedded throughout the book in reports on specific cases. From them I cull the following significant and seldom recognized problems:

1. Psychiatry is a two-tier profession—one for the rich and one for the poor.

2. The United States is developing into a "therapeutic state" in which psychiatric judgments are imposed by governmental authorities upon the public.

3. The helping professions are a "growth industry."

4. Psychiatry and mental health is a big business that has economic consequences far beyond providing treatment for mentally ill patients. Although Dr. Robitscher does not examine these problems in depth<sup>17</sup> or offer remedial proposals,<sup>18</sup> he does, however, graphically reveal that these pervasive and serious issues deserve careful consideration.

In 1968, the Kerner Committee reported: "Our nation is moving toward two societies, one black, one white—separate and unequal."<sup>19</sup> Lawyers have long known that the legal profession is divided into two classes that mirror this fundamental split in American society: private, well-paid, and well-prepared counsel for

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<sup>17</sup> For example, Dr. Robitscher does not deal with the serious problems concerning the competence and accountability of mental health personnel. Many unqualified people hold themselves out as professionals and advise and treat unwary members of the public; in many jurisdictions, licensing requirements are loose or non-existent for psychologists, marriage counsellors, and school counsellors and therapists.

<sup>18</sup> One interesting suggestion is the encouragement of more humanistically oriented people to enter the field of psychiatry. This, as Dr. Robitscher observes, would require the abolition or drastic restructuring of the medical degree requirement for psychiatrists, clearly a reform that will not come easily. ROBITSCHER, *supra* note 4, at 480-81.

<sup>19</sup> REPORT OF THE NAT'L ADVISORY COMM'N ON CIVIL DISORDERS 1 (1968).

the predominantly white middle-class and wealthy; and salaried employees of public and quasi-public agencies for the predominantly non-white poor. Although many able individuals work for these agencies for the poor, it is abundantly clear that there is not a one-to-one relationship between lawyer and client and that, on the whole, the quality of legal services is not comparable. Dr. Robitscher presents convincing evidence that, similarly, two separate and unequal classes of psychiatric and psychological practices exist. The poor receive routine examinations (or non-examinations)<sup>20</sup> by employees of public and quasi-public agencies. Often these are professionals who may feel their allegiance is owed to the agency rather than the patient. The wealthy, by contrast, receive as much time and attention as they choose to pay for, as well as the undivided loyalty of their own psychiatrists and psychologists. The social, moral, and constitutional implications of such a denial of equal protection, in the instances in which judicial decisions are predicated upon the findings of psychiatrists and psychologists, are disquieting and demand further examination.

The "therapeutic state" concept impinges on and warps many aspects of the law. The "right to treatment" doctrine was enthusiastically embraced by some courts.<sup>21</sup> But no comparable doctrine establishing the right to refuse treatment has emerged.<sup>22</sup> The doctrine of "the least restrictive environment"<sup>23</sup> provides some measure of protection for elderly and allegedly mentally ill persons. But a right to remain in the environment of one's choice has yet to be articulated or enforced. Significantly, people who have not been convicted of a crime or adjudged insane are none-

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<sup>20</sup> On occasion, psychiatrists render a report without ever having seen the subject. L. FORER, *NO ONE WILL LISSEN: HOW OUR LEGAL SYSTEM BRUTALIZES THE YOUTHFUL POOR* 140-46 (1970); cf. Also, *Psychiatric Autopsy; The Dead Are Psychoanalyzed at Murder Trials; Technique Aids Suspects Pleading Self-Defense*, Wall St. J., July 23, 1980, at 46, col. 1 (describing the recent use of the "psychiatric autopsy" in which psychiatrists who have never seen the deceased diagnose his before-death mental condition).

<sup>21</sup> See, e.g., *Rouse v. Cameron*, 373 F.2d 451 (D.C. Cir. 1966); *Johnson v. Solomon*, 484 F. Supp. 278, 299 (D. Md. 1979).

<sup>22</sup> Some courts, however, have issued protective orders restraining the forcible administration of drugs upon protesting patients and prisoners. See, e.g., *Davis v. Hubbard*, 49 U.S.L.W. 2215 (N.D. Ohio Sept. 16, 1980) (state may not administer psychotropic drugs to state mental patient without his informed consent, unless patient presents a danger to himself or others).

<sup>23</sup> See, e.g., *Holderman v. Pennhurst State School & Hosp.*, 612 F.2d 84 (3d Cir. 1979), cert. granted, 100 S. Ct. 2984 (1980) (holding that the Developmental Disabilities Services and Facilities Construction Act § 111, 42 U.S.C. § 6010 (1976), establishes a right to the least restrictive environment on behalf of mentally retarded persons); *Johnson v. Solomon*, 484 F. Supp. 278, 299 (D. Md. 1979) (holding that the right to treatment encompasses the right to the least restrictive environment in juvenile civil commitment proceedings).

theless forced to live in accordance with the dictates of mental health personnel. Courts, social workers, psychiatrists, and some lawyers compel individuals to reside in places that may be cleaner, have better supervision, and are perhaps more esthetically appealing than the residence of choice. Similar decisions separate children from their natural parents and place them with strangers, on the basis of testimony that the proposed environment is better for these children.

Government intrusion for therapeutic reasons into the lives of law abiding citizens has developed insidiously. Admittedly, in most, but not all, cases the motivation is good. The desire to help the young, elderly, and infirm is laudable. However, it often results in foisting upon these classes of people, and upon those who are merely eccentric or non-conforming, severe restrictions in life style, place of residence, and other choices, all in the name of a therapeutic state.

Certain zoning ordinances,<sup>24</sup> laws prohibiting various types of sexual contact among consenting adults,<sup>25</sup> and pornography laws<sup>26</sup> are but a few of the legislative enactments promulgated under the guise of the state's health and welfare powers, but that are, in reality, therapeutic measures to enforce certain behavioral norms. Dr. Robitscher suggests that such intrusions into the lives of the citizenry are undesirable and unnecessary. Whether they are compatible with a free democratic society is an issue that requires searching consideration by the legal profession and the public.

Concomitant with the development of a therapeutic state is the burgeoning of mental health personnel. According to the preliminary report of the President's Commission on Mental Health, issued in 1977, "[a]t any one given time 25 per cent of the population is under the kind of emotional distress that results in symptoms."<sup>27</sup> Because vast numbers of people are encouraged to seek

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<sup>24</sup> Zoning ordinances using familial relationships as a criterion with which to regulate occupancy are an example. Courts have differed on the constitutionality of such laws. *Compare* Village of Belle Terre v. Boraas, 416 U.S. 1 (1973) (upholding the constitutionality of a town ordinance prohibiting multi-family dwellings) *with* Moore v. City of East Cleveland, 431 U.S. 495 (1977) (striking down on constitutional due process grounds a similar ordinance because it limited the definition of family to include only certain categories of related individuals).

<sup>25</sup> See, e.g., 26 GA. CODE ANN. §§ 26-2002 to 2006, 26-2009 to 2010 (1978), which outlaw sodomy, bestiality, "seduction," incest, adultery and fornication.

<sup>26</sup> Although manifesting some confusion about the proper definition of obscenity, the Supreme Court has consistently upheld such laws against constitutional attack. See, e.g., Kaplan v. California, 413 U.S. 115 (1973); Ginsberg v. New York, 390 U.S. 629 (1968).

<sup>27</sup> THE PRESIDENT'S COMM'N ON MENTAL HEALTH, TASK PANEL REPORTS, app. vol. II, at 20 (1978).



therapy for these symptoms, mental health services are perhaps one of the major growth occupations. Furthermore, a large proportion of American psychiatrists, psychologists, counsellors and therapists are now paid directly or indirectly from public funds. Many antipoverty programs, designed to provide mental health services for the poor, have been of dubious benefit to them.<sup>28</sup> Indeed, the real beneficiaries of these programs may well have been the middle-class employees of the agencies. However, such expenditures of public monies are rarely, if ever, presented as an issue upon which the voters can express an opinion. Obviously, however, in times such as the present, when public budgets are shrinking, monies spent on mental health detract from expenditures for other public needs, such as education, housing, environmental protection and the like. Intelligent, informed public choices should be made. Dr. Robitscher demonstrates clearly that the amount of money spent on school counsellors, compulsory marriage counselling, court psychiatrists and psychologists, and community mental health personnel are not de minimis.

All too often, such health personnel acquire a vested interest in maintaining their programs.<sup>29</sup> For example, in 1978, \$1.1 billion was paid to people classified as mentally disabled under social security.<sup>30</sup> Clearly, there is a danger that the mental health clinics that treat the mentally ill or the institutions in which they reside, both paid in whole or in part from public funds, may find little incentive to "cure" and discharge these people.

Dr. Robitscher also points out that individuals are granted or denied compensation, reimbursement for medical expenses, reimbursement for equipment and supplies, tax deductions, and countless other financial benefits based upon the opinions of mental health professionals. He suggests that, on occasion, these decisions may not be based on medical factors but on social considerations. Although courts have long been criticized for "result oriented" decisions, judicial decisions are at least made after public trials and are subject to appellate review. Opinions of mental health professionals, on the other hand, are made in the privacy of an office or clinic, rarely subject to adversarial questioning or careful review. Not only the right to liberty, but the right to property

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<sup>28</sup> Dr. Robitscher informs us that a psychiatrist once prescribed a washing machine for an overworked woman of limited means. As a therapeutic measure, it was paid for by medicaid. Without such a prescription, the purchase would not have been compensable. ROBITSCHER, *supra* note 4, at 216.

<sup>29</sup> *Id.* 129.

<sup>30</sup> *Id.* 131.

and entitlements, is frequently affected by the in camera decisions of mental health personnel.

*The Powers of Psychiatry* is an important book. Dr. Robitscher, in his wide-ranging examination of the activities of psychiatrists and other mental health professionals, has performed a significant service in laying before the public examples of the manifold overt and hidden powers granted, explicitly or by default, to these individuals and their institutions. He challenges psychiatrists, sociologists, lawyers, and political scientists to explore the serious implications of the uses and abuses of psychiatry and to respond intelligently.