

# THE IMPACT OF PSYCHIATRY UPON JURISPRUDENCE

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In recent years the long history of the effects of psychiatry upon jurisprudential thinking and upon legal systems have been re-examined with exceptional diligence. These contributions render it opportune to reconsider the present-day significance of psychiatry for systematic thinking about law.<sup>1</sup>

Psychiatric knowledge is in some ways distinctive. (1) We rely upon it for much of our current understanding of how some extremes of thought and behavior are immediately dependent upon organic factors. (2) We owe to psychiatric research our present awareness of the pervasive role of unconscious factors in shaping human response. (3) Psychiatry has devised methods for the study and treatment of extreme conditions, some of which can be transferred to the preventive strategy of everyday life. (4) Psychiatric science has profoundly affected the social and psychological sciences by calling attention to the subtler interplay of the growth of individual personality and the character of the social context to which each person is exposed. We have learned the finer structure of culture, class, interest, and personality at various levels of crisis as a side effect of modern psychiatry.<sup>2</sup>

The tasks of jurisprudence are various since this discipline is related to legal institutions in ways that correspond to the relation of economics to economic institutions. Economics and jurisprudence provide language *about* their fields of inquiry; they are not the language *of* these fields. When the vocabulary of a given legal system creeps into a system of jurisprudence it is essential to disregard the meanings found in legal convention and to follow the meanings chosen for the distinctive purposes of jurisprudence. These aims are in no sense exclusively academic. All active participants in adjudication, arbitration, legislation, and related operations of a conventional

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<sup>1</sup> All the volumes originally given as Isaac Ray Lectures under the auspices of the American Psychiatric Association may be cited in this connection.

<sup>2</sup> Research is moving ahead so rapidly that it is necessary to keep in touch, not with textbooks, but with articles in the principal journals. Concerning the impact of psychoanalysis and other developments in psychiatry upon law and other disciplines, see *Psychoanalysis and the Social Sciences* (Roheim ed. 1947); Lasswell, "Impact of Psychoanalytic Thinking on the Social Sciences," *The State of the Social Sciences*, (White ed. 1956); *Psychiatry and Law* (Hock and Lubin ed. for The American Psychopathological Association 1955).

legal order achieve a "working jurisprudence" of their own. They learn, for instance, which judges are likely to apply doctrines and statutes differently. One function of jurisprudence is to make practical wisdom articulate and to subject it to critical evaluation in the light of the goals of the public order as a whole.

1.

The present discussion moves within the context of a policy-oriented jurisprudence.<sup>3</sup> A jurisprudence of this kind locates law within the social process as a whole. Law is most usefully understood as part of the decision process. Decisions are sanctioned choices; or, to be more precise, choices enforceable, if necessary, by the use of severe deprivations. By conceiving the province of law as *authoritative* and *controlling* decision we emancipate the conception of law from the ignominy of referring exclusively to words, or the absurdity of serving as a label for every act of power.

The generalizations of jurisprudence can be put in two chief categories: principles of content; principles of procedure. If we postulate the goal of a given legal process as the realization of human dignity, for instance, the principle is in the category of content. If we go further and specify that human dignity is to be understood as the optimum participation by individuals in the shaping and sharing of all values in the social process, we are still referring to the content of what decision makers should think about. If we say that all problems confronting a decision maker should be approached by the deliberate, successive and interacting use of five tools of thought, we are enunciating a basic principle of procedure, since we are considering the order in which the mind of a decision maker can best bring various kinds of content to the focus of his attention. More inclusively stated, we are formulating a principle of "spiral" (successive) examination of a problem in terms of goal, trend, condition, projection, and alternative.

It is apparent that policy-oriented jurisprudence is open to influence from the field of psychiatry at many points. How, for example, shall we specify the goal of human dignity in meaningful terms if one of the chief emphases in psychiatric knowledge is upon chemical factors that affect the subjectivities and behaviors of the individual, and upon the unconscious residues of childhood development? If we turn from questions relating to goal and ask about trend, we look to psychiatric research for means of assessing trends in the degree of free-

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<sup>3</sup> A recent statement by M. S. McDougal is "Perspectives for an International Law of Human Dignity," Proceedings of the American Society of International Law 107 (Presidential address 1959).

dom enjoyed by individual members of a body politic. Similarly, in regard to conditioning factors, it is from psychiatry that we draw the data and methods by which to assess the impact of organic or unconscious components. All projections of future development, and all alternatives of policy, depend to a degree upon such knowledge.

2.

Jurisprudence is concerned with providing tools appropriate to the examination of public order systems as a whole and of any specific detail, such as a given controversy, within the whole; we speak of public order as a system of human relationships which are sought to be protected and perfected through the legal order.<sup>4</sup> The legal order comprises the decision process in so far as it is authoritative and controlling. Phrasing the conception of public order more formally, it refers to the basic patterns of value shaping and sharing, and the fundamental institutional practices, which are sought to be protected and fulfilled through the legal components of the decision process.

In applying this conception to the United States, for example, it is possible to say that the proclaimed goal of American society, which is realized in part, is widespread rather than narrow participation in the shaping and sharing of all values. Among the basic institutions specialized to the decision process (power value) we name federalism, the tri-partite separation of powers, and the protection of individual rights. American economic institutions which receive various degrees of legal protection include relatively great freedom of contract, and broad scope for the private ownership and management of resources for profit-making purposes. The American respect (social class) system is, in proclaimed theory, based upon non-discrimination and the recognition of individual merit. The system of enlightenment includes widespread reliance upon private initiative in the gathering, dissemination and use of information and estimates relating to specific incidents or to the factual context as a whole. The institutions relating to occupational, professional and artistic skill embrace all the schools and associate activities specialized to the transmission of know-how, and the setting and application of general standards of excellence. Institutions specialized to rectitude, like churches, emphasize the formulation, justification, and application of standards of responsible conduct, and the transmission thereof. American institutions relating to affection (family, friends) emphasize freedom in the choice of one partner at a time (serialized monogamy). Institutions relating to

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<sup>4</sup> See McDougal & Lasswell, "The Identification and Approval of Diverse Systems of Public Order," 53 *Am. J. Int'l L.* 1 (1959); Dession, "The Technique of Public Order: Evolving Concepts of Criminal Law," 5 *Buffalo L. Rev.* 22 (1955).

health, safety and comfort are encouraged to nurture private initiative within a public framework designed to improve the shareable level of enjoyment.

## 3.

These brief indications of the meaning of public and legal order enable us to be more definite about the many points at which psychiatric conceptions, methods and findings enter into the purview of jurisprudence. Since jurisprudence is concerned with the decision process, it is pertinent to suggest how psychiatry contributes to our understanding of all decision functions.

Consider the *intelligence* function. Can psychiatry help to answer *who* shall decide *what* information is obtained and disseminated in the body politic? In general, it is clear that our goal is to leave these activities in the hands of private media of communication. But is it necessary to leave psychiatrically ill or handicapped people in charge of, or with ready access to, channels of such vital importance to sound judgment on public affairs? From psychiatry we are obtaining tools of diagnosis which can be applied to help ascertain the magnitude of the problem.

Connected with the intelligence function are those who, acting to further the legitimate goal of national security, perform the censorship or the official propaganda role, engage in espionage and counter-espionage in military matters, or act as agents in obtaining "political police" types of intelligence; that is, information on the basis of which judgments of "loyalty" or "disloyalty" can be made. Should these operations be in the hands of psychiatrically ill or handicapped individuals? Here again the magnitude of the problem is capable of being discovered by using the tools of psychiatry.

Corresponding questions arise in regard to the *recommending* function. Our goal is freedom of individual and organized advocacy of recommended courses of public action. But does this make it necessary to permit psychiatrically ill or handicapped persons to organize and direct political parties and pressure groups, or to obtain access to public forums in order to propose or try to incite action?

We face similar problems if we consider the *prescribing* function. Our democratic objective signifies that we are in favor of wide participation. However, are we bound to permit psychiatrically ill and handicapped persons to vote in candidate and issue elections? To run for an office in a constitutional convention or a legislature? To continue in office?

If we think of the *invoking* function our democratic goal suggests that the door shall be wide open in the recruitment of personnel to

acquire the technical skill needed. But is it required of democracies that they shall allow psychiatrically ill or handicapped persons to become policemen and prosecutors?

The *application* function includes the final assessment of conduct according to the existing code of prescription. Are we committed by our democratic goal to permit judges, juries, administrative commissions, and officials in the defense and civil services to include the psychiatrically ill and handicapped?

The *appraisal* function has to do with the relation between policy goal and the steps undertaken up to date to accomplish these goals. Appraisals include the examination of legislative and administrative measures, for instance, and the assessment of their efficacy. Does democratic theory require that we allow the psychiatrically ill and handicapped to operate as auditors and inspectors?

The *terminating* function puts an end to prescriptions and arrangements made under their authorization. This function usually has fewer specialized organs than the other functions, although many arbitration, mediation and conciliation agreements provide for special machinery. Our question is whether democratic theory requires that we permit psychiatrically ill or handicapped individuals to take these roles?

#### 4.

The foregoing problems relate to various phases of the decision process in a given public order context. However, the scope of jurisprudential curiosity is in no sense restricted to these decision phases. It is necessary to evaluate the degree to which other-than-governmental activities are carried out in harmony with the overriding goals of the community.

When we look into practices that are regarded as "economic," for example, it is not uncommon to find "bottlenecks" of influence whose social consequences are especially important. The leadership of large corporations and trade unions, for instance, come in this category. If we are to remain consistent with our basic goal must we acquiesce when key spots are occupied by psychiatrically ill or handicapped persons?

Corresponding queries are appropriately raised in reference to all the remaining value-institution processes in a given social context. Such questions have frequently been asked regarding family institutions: e.g., must believers in private initiative adopt the claim that they must approve marital and sexual relationships when psychiatrically ill and handicapped persons are involved?

We shall not pursue this tentative inventory further. It has served its purpose if it has made our position more definite that juris-

prudence has much to learn from the use of psychiatric means of discovering the presence of psychiatrically ill and handicapped individuals in various spots throughout the entire context of a given society.

## 5.

Although it is important to discover the facts concerning the distribution of psychiatrically ill and handicapped persons throughout the decision and other social processes, we are unable to evaluate the data until a further set of facts is obtained: Is the presence of a psychiatrically ill or handicapped person destructive to him or to others? In a word, are the goal values of the public order system damaged or threatened? To what extent? In regard to which values and practices?

Consider, for example, the incidence of psychiatric illness or handicap at any given section in time in the U.S. among individuals over 21 years of age and who now have, or might have, the right of access to the electorate in elections for federal and other offices. At present we are surprisingly uninformed about aggregate figures, although rough estimates can be made according to accepted categories of illness and defect.<sup>5</sup> A comprehensive inquiry would ask whether psychiatric diagnosis bears any ascertainable relation to the capability of individuals to perform a specified minimum of participation in elections. By specified minimum we mean a standard that has been laid down by public authorities or that is stated by the scientific observer for the purpose of narrowing his research and making it most pertinent to policy alternatives.

Creative work in jurisprudence would seek to formulate such minimum standards and to obtain research estimates of the impact of "psychiatric variables" upon "political participation variables."<sup>6</sup> Existing official specifications of minimum level are exceedingly vague, and must for the most part be inferred from the qualifications laid down for voting or citizenship. But it is possible to set up "hypothetical standards" by taking into consideration our basic goal of human dignity and the practices which are current in a given context.

Human dignity implies, for example, that individual freedom of choice is to receive the fullest opportunity for expression compatible with the freedom of choice of others. A key question then is: Do the psychiatric variables so modify individual freedom of choice that the

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<sup>5</sup> See Leighton, Clausen, & Wilson, *Explorations in Social Psychiatry* (1957) especially Chapter 9 by Gruenberg & Bellin.

<sup>6</sup> A valuable summary of present knowledge is Lane, *Political Life: Why People Get Involved in Politics* (1959) especially Chapter 9, "How Are Unconscious Needs Expressed in Politics?"

person (or category of persons) is unable to participate as a member of the electorate at any specified level of performance? Further, if the individual (or category) does participate, what differences does it make? For instance, do hospitalization and other therapeutic practices operate so effectively that persons are withdrawn from active participation with no need of exclusion from voting? In view of the size of electorates shall we say that psychiatric variables have not had a significant impact upon the electoral outcome, hence can be disregarded?

The previous queries ask about *past and present events* as described by dependable information regarding *trends* in the magnitude of the variables in which we are interested and the weight of these variables as they *condition* one another. (The question about "hospitalization," for example, asks about conditioning and also about trends.)

We must go further and consider *future* events involving the variables with which we are concerned. Assuming that no official policies are changed what *projections* are probable? Will hospitalization, e.g., increase and further diminish any adverse results of permitting participation?

Finally, we ask about *alternative policies* in regard to the future. At what *cost* in terms of man-hours spent in research and promotional activity, or in enforcement, can various policy purposes be obtained (such as disqualification of voters with given clinical diagnoses)?

## 6.

The last question cannot be satisfactorily answered without much more detailed policy specification than has been discussed thus far. Assuming for the moment that the case has been made for a *considerable degree of destructiveness* in the past and (barring policy change) in the future, what policy alternatives are to be evaluated and in what terms? All policies, past and potential, must be made specific in terms of *who is authorized to decide what using what procedure*. More detailed delineation of the "who" calls for the specification of qualifications, modes of selection, and methods of personnel management.<sup>7</sup> It is also necessary to spell out jurisdiction according to the domain, scope and range of values and institutions; and to describe procedures according to the strategies available for using the base values at the disposal of decision makers.

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<sup>7</sup> Concerning the manner of man who becomes a judge in our civilization and the interplay of unconscious factors in the judicial process reference can be made to the early work of F. Alexander and his lawyer colleague, Staub, *The Criminal, The Judge, and The Public* (1956); and the penetrating observations scattered among the writings of the late Judge Jerome Frank.

When policy alternatives are defined it is feasible to begin a new search of the past for comparable situations and to mobilize methods and experts to obtain estimates of future costs and gains in terms of all pertinent values.

7.

We may have implied—although we do not desire to pre-judge the result—that the careful study of psychiatric variables affecting membership in the electorate may lead to the recommendation of “no policy change.” Such an outcome is much less thinkable if we consider the probable result of studying the role of psychiatric factors which affect the possible disqualification of legislators, chief executives, defense officials, civil administrators, judges, and other decision makers at other phases of the deciding process.

Large as these questions are they in nowise exhaust the issues within the decision process which jurisprudence can hope to clarify in some degree with psychiatric knowledge. Another set of problems has to do with the *discovery of deviation* from the prescribed norms of the system of public order and the use of *sanctions* or *corrective measures* in regard to *responsible* or *threatening deprivers*.

A typical task of judicial tribunals confronted by conflicting claims of parties is to decide whether a situation existed or exists in which a deviation from community prescriptions occurred. Besides inflicting a deprivation upon all who are identified with the prescription, the situation also typically contains persons who claim that they suffered loss or were blocked from gain (or were or are threatened with such deprivations). The losses or gains may be in terms of wealth, power, respect, well-being, affection, rectitude, enlightenment or skill.

From the standpoint of a jurisprudence of human dignity those persons who exercise their freedom of choice to seek the net gains which they expect to obtain by taking a chance and violating community prescriptions are *responsible* deviants (deprivers). They are liable to the sanctioning measures prescribed by the community since they are able to choose or to reject conformity. Primary and sanctioning prescriptions are laid down by the community as a means of influencing the conduct of all who have had at least a standard minimum opportunity (and capability) to learn the patterns of the value and institutional system which is sought to be protected by the legal system.

Psychiatric knowledge has had an especially strong impact in connection with conceptions of responsibility and with procedures by which deprivers are sorted out and dealt with. Psychiatric knowledge



shows that often, *though not invariably*, those who are psychiatrically ill or handicapped are among the deprivers *largely* as a consequence of psychiatric variables. To the degree that psychopathological variables dominate, the individual is acting without freedom of choice and cannot be regarded as responsible from the standpoint of a public order of human dignity. To the extent that such individuals threaten to be deprivers of themselves or others they are *corrective* problems and liable to appropriate measures. Corrective measures aim at restoring or bringing the individual's freedom of choice to at least the minimum level that enables one to participate in the culture of a body politic.<sup>8</sup>

## 8.

It was asserted above that the most important effect of psychiatry has been procedural. We emphasized the point that psychiatric variables *vary in degree of impairment* of freedom of choice pertaining to past or prospective deprivations contrary to public order prescriptions. Who shall decide?

The fundamental principle is plain enough: The authorized decision makers of the legal system. There has, however, been great confusion in the procedures whereby the decision makers have brought to their attention the factual statements, predictions and forecasts of qualified psychiatrists and other specialists. The chief confusion has arisen from *failure to understand the questions* that can be put to the psychiatrist without asking him to abandon his role as a physician and to infringe upon the role proper to the decision maker, whether judge or jury.

Part of this confusion regarding proper questions comes from failure to perceive that the legalistic language to be applied by the community decision maker is best applied when it is *not* used to interrogate psychiatrists. Legalistic terminology may employ such expressions as "insane," "of unsound mind," "knowledge of right and wrong." It is not the role of the psychiatrist to use this mode of thought or talk; and the judge who couches questions to a psychiatrist in these terms, or who allows such terms to be employed in addressing a psychiatrist, or in the testimony of psychiatrists, is both confused, and confounding confusion.

The psychiatrist can be helpful to the court if he seeks to make clear in his own language, or in the language common to the culture, whether an individual is psychiatrically ill or handicapped, or was at a specified past time. He can be asked to explain how psychopatholog-

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<sup>8</sup> See Lasswell & Donnelly, "The Continuing Debate Over Responsibility: An Introduction to Isolating the Condemnation Sanction," 68 Yale L. J. 869 (1959).

ical variables typically affect the conduct of individuals under specified types of circumstances. The circumstances referred to can be suggested by past situations involving the defendant, or by situations in which he may possibly be thrown in the future. Psychiatric generalizations, like all scientific generalizations, take the form of "if, then" statements of probability. It is not appropriate to ask the psychiatrist to make a forecast of how the defendant will act under hypothetical conditions—whether, for example, he will attempt to kill himself or someone else. The task of estimating the future of specific individuals is properly within the sphere of the decision maker who has the benefit of several sources of information about past incidents and the current state of scientific predictions. On the last point—the current state of psychiatric generalization—it is always useful to obtain from the psychiatrist an estimate of the degree to which, in his judgment, there is professional consensus, or a high degree of experimental (or other) confirmation.

In the United States, progress is being made in avoiding the confusions that arise when incorrect questions are asked or when the double language point is overlooked in the phraseology of questions. Progress is also occurring in another procedural matter. "Sentencing" is often separated from the initial determination of what we here call responsibility or, in the case of a non-responsible defendant, of a threatening depriver. In the former case sanctioning measures are indicated; in the latter, corrective measures. The decision makers, the types of relevant testimony, and procedures can wisely vary between the two sets of problems.

## 9.

By this time it is perhaps apparent that while psychiatry has affected jurisprudential conceptions and methods, this impact is far from exhaustive of the possibilities. We have scanned a few problems relating to the decision process itself; and there remains the task of examining the entire social process for the purpose of ascertaining whether the destructive impact of psychopathological variables is sufficient to justify new community prescriptions.

The decision process itself has been far from exhaustively covered even by implication. For example, we have had nothing to say about the special problems of converting military arenas into civic arenas by policies which are chiefly persuasive rather than coercive. This is the distinctive problem of public order in the world arena as a whole. Psychiatric investigations have abundantly documented the point that unconscious predispositions in a group need not dominate conduct in a given situation unless certain environmental factors are

also present. Personalities not only possess unconscious drives to sweep aside all authoritative restraint, they also include such automatic structures as the "super ego" (conscience), which typically operate to hold rebelliousness or active aggression in check. The internal checks are dissolved or broken through under crisis conditions in which the conscience is "divided against itself," half supporting and half inhibiting the expression of destructive drives. Hence psychiatric views of personality confirm in part the traditional wisdom of many schools of jurisprudence who see in the perfecting of institutional practice the ultimate safeguard against breaches of public order. Where the practices are non-existent or vague and contradictory the forecast is clear: Under crisis conditions the mounting stress within and among participants increases the probability of active coercion.

This point has been made in detail by Ranyard West for the world community as a whole. But a more challenging problem is what light psychiatry throws upon the policies to use in seeking to transform the military into a civic arena. Without pursuing the analysis in this place we can at least emphasize the suggestiveness of psychiatric analysis and procedures for the reduction of tension in individuals and groups. We speak of this as the strategy of *catharsis*. There is also the strategy of piecemeal change or *reform*; and, finally, the exceedingly doubtful and dangerous strategy of wholesale or revolutionary *reconstruction*, where the difficulties of keeping control of events has hitherto proved to be insurmountable.

This much is very clear: If human beings are to participate in the decision process with optimum rationality a level of activation is required that is sufficient to sustain attention without allowing stresses to accumulate to the point that renders discussion and agreement impossible.

The future effect of psychiatry upon jurisprudence will be greatly facilitated by the perfecting of an appraisal function that keeps all who share in the decision process informed of the changing distribution of psychopathological factors throughout the world arena, together with an estimate of the extent to which these factors condition destructive effects. In the light of such "trend" and "condition" knowledge it will be possible to "project" the future on the assumption of no change of policy, and also to evaluate the probable effect of alternative policies upon the maximization of the goals of the preferred system of public order.