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THE PSYCHIATRIST AND THE LAW, by  
Winfred Overholser. Harcourt, Brace and Co., New  
York, 1953. Pp. 147. \$3.50.

Richard Arens

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THE PSYCHIATRIST AND THE LAW, by Winfred Overholser. Harcourt, Brace and Co., New York, 1953. Pp. 147. \$3.50.

It is common knowledge that contemporary interdependences have increasingly led lawyers and psychiatrists to an awareness of a community of legal-psychiatric interest.<sup>1</sup>

It is equally common knowledge that the awareness in question has often been too insecure to sustain a meaningful and productive collaboration and that hence, forensic psychiatry, as a product of legal-psychiatric collaboration, has been handicapped.<sup>2</sup>

The accepted institutional model of forensic psychiatry has thus been molded, at least in part, by the dominant patterns of intercommunication between lawyers and psychiatrists. Contemporary forensic psychiatry has therefore progressed in direct proportion to the contemporary pace of the rapprochement between the legal and psychiatric professions, *i.e.*, at snail's pace, though significantly without standstill. *The Psychiatrist and the Law* has been written in quest of a foundation for inter-professional harmony. It falls far short of such an ambitious goal. However, it proves its effectiveness along more modest lines. Thus, at its best, it performs a valuable missionary task for the "law" and "psychiatry" in highlighting validly isolated problem areas of defective inter-professional communication which disturb the sound, institutional growth of forensic psychiatry. Beyond this, it must be welcomed as a further impetus to the trend of a widening popular demand for the rational reappraisal of the contemporary institutional practice. It cannot, however, with the best of possible good will in the world be said to make a definitive contribution to the advancement of the sought-for understanding between the "law" and "psychiatry" on its own merit. The significant data presented are not novel. The meaning of the data appears too frequently misunderstood or misinterpreted. It is not altogether

1. See generally, ALEXANDER & STAUB, *THE CRIMINAL, THE JUDGE AND THE PUBLIC* (1931); COHEN, *MURDER, MADNESS AND THE LAW* (1952); MONEY-KRYLE, *PSYCHOANALYSIS AND POLITICS* (1951). See more specifically Dession, Freedman, Donnelly & Redlich, *Drug-Induced Revelation and Criminal Investigation*, 62 *YALE L.J.* 315 (1953); McDougal, *The Law School of the Future: From Legal Realism to Policy Science in the World Community*, 56 *YALE L.J.* 1345 (1947). Cf. FRANK, *LAW AND THE MODERN MIND* (1930); COURTS ON TRIAL (1949); PATTERSON, *JURISPRUDENCE* 587-594 (1953). See also *State v. Carr*, 196 N.C. 129, 144 S.E. 698 (1928); *State v. Driver*, 88 W.Va. 479, 107 S.E. 189 (1921). Cf. *United States v. Hiss*, 88 F. Supp. 559 (S.D.N.Y. 1950).

2. See, *e.g.*, GLUECK, *MENTAL DISORDER AND THE CRIMINAL LAW* (1925); PARTRIDGE, *BROADMOOR* (1953); Kinberg, *Forensic Psychiatry Without Metaphysics*, 40 *J. CRIM. L. & CRIMINOLOGY* 555 (1950).

surprising in this connection that the psychiatrist should blunder largely within legal doctrine as the lawyer has so often blundered within the concepts utilized by psychiatry. Both the lawyer and the psychiatrist should be criticized under such circumstances, not for transcending the traditional bounds of their respective expertise, but instead, for failing to delve into each other's experience in sufficient depth to achieve the necessary accuracy for a valid three-dimensional legal-psychiatric evaluation of the "is" and "ought."

Comment by the lawyer upon psychiatry and by the psychiatrist upon law is to be welcomed, with the proviso that it be based on more than a cursory or superficial understanding, i.e., that it be preceded by an elementary but systematic inter-disciplinary integration of law and psychiatry from the respective perspectives of the lawyer and of the psychiatrist. This in no way presupposes a medical school education for lawyers, or a law school education for psychiatrists.<sup>3</sup>

*The Psychiatrist and the Law* constitutes a compilation of lectures delivered by Dr. Winfred Overholser as the recipient of the 1952 Isaac Ray Award, conferred annually by the American Psychiatric Association, upon the individual adjudged as "most worthy by reason of his contribution to the improvement of the relations of Law and Psychiatry."<sup>4</sup> The advice of Mr. Justice Felix Frankfurter, Judge Justin L. Miller and Professor Sheldon Glueck is acknowledged by the author as having "greatly aided" the preparation of his lectures, and hence, the preparation of the book itself.<sup>5</sup>

The first lecture is devoted to tracing the history of modern psychiatric thought, a summary of contemporary concepts of the "make-up of personality"<sup>6</sup> and personality development, as well as a "brief statement concerning the general classification of mental disorders."<sup>7</sup> Here the author is at his best, and his best is the most concise and readable survey of a psychoanalytically viewed "substance of psychiatry" encountered by this reviewer. It is probably the best introduction of this length (36 pages) available to lawyers and law students in this field at this time.

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3. For a persuasive proposal of necessary changes in educational patterns from legal perspectives see Lasswell & McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L.J. 203 (1943). See also FRANK, *COURTS ON TRIAL* (1949).

4. OVERHOLSER, *THE PSYCHIATRIST AND THE LAW* ix (1953).

5. *Id.* at x.

6. *Id.* at 11.

7. *Id.* at 25.

From here on in, the author steps upon uncertain ground. His second lecture, devoted to the exploration of differences of viewpoint between "law" and "psychiatry," fails to come to grips with the real problems on any but the most superficial basis. His attack upon the prevailing standard of legal responsibility proceeds upon the oft-repeated theory that the M'Naghten Rules reflect an antiquated conception of human personality in terms of a rigid compartmentalization of the recognized areas of mental functioning. A test based on the "awareness" of the nature and quality of the act is thus stigmatized as inadequate in presenting an exclusively intellectual criterion of cognition, derived from an age ignorant of the interaction of all areas of mental functioning: "One of the fundamental assumptions of the law is that most acts are done on a basis of reasoning."<sup>8</sup> Such criticism falls wide of the mark. A misdirected volley permits existing defects, admittedly discoverable in our system of legal responsibility, to escape unscathed. The misconception underlying such psychiatric attacks has long been laid bare, although it continues to raise "some differences of viewpoint" where none appear to exist. Rebuttal of such misguided arguments has come from both legal and psychiatric quarters and deserves restatement. Thus, the lawyers have invited psychiatric attention to the fact that the law under attack embodies, of necessity, an essentially socio-political as distinct from a medical standard:

"The dissatisfaction of psychiatrists and social workers brought into contact with the criminal law is . . . a by-product of an issue which cannot be adequately represented as a mere discrepancy between eighteenth century legal-psychological dogma and modern conceptions of psychology and psychiatry. Those who appear to have assumed that it could be, have proceeded upon a curiously superficial understanding of the meaning and function of the legal formulae of responsibility and of intent . . . inherited though they are from the Common Law of a more primitive day. For the law is not, and never was, designed as a treatise on psychology or any of the social sciences. Its formulae, while couched in terms

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8. *Id.* at 41. See, e.g., N.Y. PENAL LAW § 1120 (1909): "An act done by a person who is an idiot, imbecile, lunatic or insane is not a crime. . . . A person is not excused from criminal liability as an idiot, imbecile, lunatic or insane person, except upon proof that, at the time of committing the alleged criminal act, he was laboring under such a defect of reason as: 1. Not to know the nature and quality of the act he was doing; or 2. Not to know that the act was wrong." Cf. M'Naghten's Case, 8 Eng. Rep. 718, 4 How. St. Tr. (N.S.) 847 (H.L. 1843).

of outmoded psychological concepts, reflect an underlying social policy with respect to the disposition of offenders and the degree of collective responsibility toward the underprivileged and maladjusted which American communities are accustomed to assume, and which appears to be by no means as outmoded as the concepts in which it is expressed. . . . The psychiatrist may be able to describe a given offender. He may shed considerable light on the factors which conditioned his development and present state. It is within his province to indicate to what extent the offender may prove amenable to treatment. . . . But there existing science stops. What varieties of personality the community shall take the trouble to maintain even though they have demonstrated their inability to get along with the group, what individuals it shall undertake to rehabilitate at public expense . . . are primarily questions of social values and of politics. . . ."<sup>9</sup>

They have long noted "that no reason exists why courtroom infiltration of psychological knowledge should not result in expanding the concept of awareness or knowledge of the M'Naghten Rules to embrace both that of the emotional as well as of the intellectual variety, without benefit of statutory change."<sup>10</sup>

Psychiatrists, in turn, have repeatedly demonstrated the possible compatibility of contemporary psychiatric theory and contemporary legal doctrine. A classic summary of this concept of coexistence has declared:

"The question asked of us is monotonously the same: Did the defendant know the nature and quality of the act and if he did, did he know that it was wrong. The crux of the question revolves around the word 'know'. . . . What makes it possible for a civilized, mentally healthy human being to resist a murderous impulse is not the cold detached reasoning that it is wrong and dangerous but the automatic emotional, mostly unconscious, identification with the prospective victim, an identification which automatically inhibits the impulse to kill and causes anxiety. . . . What must be emphasized here is that we should take cognizance of the

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9. Dession, *Psychiatry and the Conditioning of Criminal Justice*, 47 YALE L.J. 319, 331-32 (1938). Cf. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 477-538 (1947). For a recent statement of the law of insanity in traditional legal terms, see Comment, 27 SO. CALIF. L. REV. 181 (1954).

10. Killian & Arens, *Use of Psychiatry in Soviet Criminal Proceedings*, 41 J. CRIM. L. & CRIMINOLOGY 136, 142 *et seq.* (1950). See also HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 477-538 (1947).

fact that understanding is not a purely intellectual process and that the word 'know' as it is used in the phrasing of the criminal law dealing with insanity is now used by psychiatrists in a sense totally different from that used a hundred or more years ago, that the meaning of the word 'know' was changed not suddenly but gradually, not by the arbitrary fantasies of psychiatrists but by invincible pressure of newly discovered facts about the working of the human psychic apparatus. How can we have one conception of knowledge when examining our patients and another as soon as we are sworn in at the witness stand? The incongruity, we are all inclined to contend, is the fault of the law. I think this is not the case; *the incongruity is caused by the lack of clarity as to standards within the medical profession itself*. It is doubtful whether an enlightened judge would be able to oppose the psychiatrist if he insists that he cannot take the word 'know' for granted any more than he can the word 'responsibility'. . . . The psychiatrist . . . will feel on much more solid ground . . . if he carries with him his strict clinical standard directly to the witness stand."<sup>11</sup> (Italics supplied.)

Dr. Overholser's exposition of "Some Differences of Viewpoint" makes no attempt to deal with this growing body of refutation of his primary assumptions.

It appears, in fact, as though he were chronically disabled by semantic rigidity from meeting with the lawyer upon common ground in this area of discussion. Unable to resolve the "complex" concerning "awareness" or "understanding" in the sense of the law of responsibility he is incapacitated from proceeding to a

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11. Zilboorg, *Misconceptions of Legal Insanity*, 9 AM. J. OF ORTHOPSYCHIATRY 540, 552-53 (1939).

The lawyer's acceptance of this psychiatric perspective is shown by HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 486-88 (1947): "The severe criticism of the criminal law by various psychiatrists has spread the illusion that the chief difficulty . . . in the way of adequate adjudication is a traditional legal indifference to Science. But the plain fact is that the chief limitation on any solution of the problems arising from mental disease is the lack of medical and psychiatric knowledge of mental disease. . . ."

"Closely related to the above are certain aspects of the language problem, especially the frequent criticism by psychiatrists of legal terminology. . . ."

"The sophistry of such criticism is indicated in the prevailing practices of numerous psychiatrists who have participated in the trial of insanity cases for a great many years. They have regularly 'translated' the legal terms into the language of their discipline. . . ."

For an early pre-psychoanalytic example of judicial flexibility in the construction of a necessary testamentary "awareness" of both emotional and intellectual proportions, in accord with contemporary psychoanalytic knowledge, see *Delafield v. Parish*, 25 N.Y. 9 (1862).

further and much needed inquiry into the effect of the existing law upon the shaping of individual and social "conscience." To the enlightened contemporary social scientist "there is no innate form of responsibility. Every society consistently trains for or at least carefully prepares the individual for the assumption of responsibilities."<sup>12</sup> What is the effect, then, of, e.g., the M'Naghten Rules on the training or preparation for individual responsibility conducive to democratic social order? Only an adequate empirical investigation on an inter-disciplinary basis is capable of providing any meaningful answer. Dr. Overholser's incapacity in reaching common ground with the lawyer in verbal interpretation blocks his effective participation in such a task.

In the absence of significant scientific contributions in this area of investigation,<sup>13</sup> Dr. Overholser's failure in this regard must be felt as a keen loss by both lawyers and psychiatrists.

His consequent suggestions for legal change, whether it be in the area of responsibility for crime or contractual or testamentary capacity, etc., etc., cannot, therefore, be seriously considered upon the basis of the argument which he presents. He has not come to grips with any of the deeper issues.<sup>14</sup>

His advocacy of "truly indeterminate sentences with adequate court clinics and with psychiatric services in correctional institutions"<sup>15</sup> for all cases involving emotional instability represents traditional psychiatric preference today, without, how-

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12. MANNHEIM, FREEDOM, POWER AND DEMOCRATIC PLANNING 207 (1950). The problem, of course, is twofold. One is the effect of the law in the task of the repression of the "criminal" impulses of the "non-criminal" masses in the absence of adequate media of mass therapy; the other is the effect of the law as a part of the social scene upon the formation of the superego. Cf. BENEDICT, PATTERNS OF CULTURE (1934).

13. An oversimplified analysis of the function of "punishment" in "conscience-formation" has tended to highlight the problem still awaiting solution, without providing any valid answer of consequence. See De Grazia, *Crime Without Punishment: A Psychiatric Conundrum*, 52 COL. L. REV. 746, 756 (1952):

"The association of wrong with punishment is so strongly bred into the individual from his cradle to his grave as to be conditioned. When a wrong is committed we inevitably expect punishment. Prior to the formation of the superego, the child's wrongs are met with punishment, i.e., either the infliction of physical pain or withdrawal of love by the parents. It is this very process of punishment which is the basis for the later formation of the superego through identification with the parents. The introjection of the parental prohibitions results in superego formation, so that commission of a wrong, thereafter, creates feelings of guilt and expectation of punishment."

Cf. WEST, CONSCIENCE AND SOCIETY (1951).

14. A more careful study as a guide to policy formulation is exemplified by Green, *Proof of Mental Incompetency and the Unexpressed Major Premise*, 53 YALE L.J. 271 (1944).

15. OVERHOLSER, THE PSYCHIATRIST AND THE LAW 51 (1953).

ever, any showing of awareness of the profound problems of political and civil rights implicit in the enlargement of customary administrative psychiatric discretion, exemplified by a situation which finds at least in theory, the psychiatrist "on top" instead of "on tap," as perhaps in the case of the originally contemplated administration of the new sex-offender laws in New York and in Pennsylvania.<sup>16</sup>

He is significantly more enlightening when he directs his psychiatric skill to a more general analysis of law in terms of the underlying motivations of legislators in a given field. Thus, he furnishes a useful popular description of the passage of "sexual psychopath" laws under the impetus of growing "public excitement" about the "sex fiend" and the demand "to do something" about him in the absence of any significant increase in the rate of sex crime.<sup>17</sup> He could usefully have gone on to an analysis of the personality dynamisms within the body-politic bent upon the intensification of legislative severity in the treatment of the sex offender, but he contents himself with noting that "the wave of sex crimes is mostly an 'apparition produced by . . . offended dignity'" and that a "bogey has been raised" divorced from existing realities.<sup>18</sup> Perhaps this is all that is called for—at least with regard to the psychologically enlightened audience. He may well have been justified in assuming, if he did, that the state of mind of a civic élite productive of such fantasies and ensuing panic reactions, is too obvious to require explicit psychiatric comment.

The author treads cautiously in mentioning in general terms the "administrative ineffectiveness" of most "sexual psychopath" laws "as they now stand."<sup>19</sup> He explicitly lists the Pennsylvania

16. See, e.g., N.Y. PENAL LAW §§ 1944-a (1950), 2188 (1950), 2189-a (1950); PA. STAT. ANN. §§ 1166-1172 (Purdon, 1951).

One of the psychiatric progenitors of the New York statute has made explicit acknowledgment of the uncertainty of adequate psychiatric care under present conditions and has questioned the wisdom of the presently accepted legislative draft. See ABRAHAMSEN, WHO ARE THE GUILTY? 254 (1952): "The success of such a law requires the largest possible psychiatric facilities in order to implement it. It was originally suggested . . . that an institute for criminal behavior be established where most of these . . . cases could be treated, where psychiatric personnel could be trained and where further research on delinquents, including sex-offenders, could take place. Unfortunately, these proposals were scrapped, which may seriously hamper the success of the law."

17. OVERHOLSER, THE PSYCHIATRIST AND THE LAW 48-49 (1953).

18. *Id.* at 49. Cf. Sutherland, *The Sexual Psychopath Laws*, 40 J. CRIM. L. & CRIMINOLOGY 543 (1950). Bensing, *A Comparative Study of American Sex Statutes*, 42 J. CRIM. L. & CRIMINOLOGY 57 (1951). Consult also FREUD, THE PROBLEM OF ANXIETY (1936).

19. OVERHOLSER, THE PSYCHIATRIST AND THE LAW 51 (1953). Cf. Sutherland, *The Sexual Psychopath Laws*, 40 J. CRIM. L. & CRIMINOLOGY 543 (1950).



and New York laws as exceptions.<sup>20</sup> No further comment is forthcoming. The New York law, to take one example, provides for the "truly indeterminate sentence" advocated by Dr. Overholser and appears, therefore, to enjoy his psychiatric approval on that score, as well as beyond that, insofar as it is exempted from his criticism of other "sexual psychopath" laws—notwithstanding the fact that it provides for such "therapy" as is available in state prisons.

In the light of contemporary knowledge it hardly needs stating that the record for the therapeutic rehabilitation of the sex-offender, presented by available modes of imprisonment, has been less than distinguished. It is also widely accepted today that contemporary punitive attitudes in this field are countertherapeutic in that they tend to the advancement, rather than the diminution of existing deviations.<sup>21</sup>

The author's third lecture attempts to cover the subject of the mental patient and the hospital.

It is essentially a partisan appeal for legislation which would provide the procedural apparatus capable of operating with minimum publicity and maximum speed in the judicial commitment of the mentally ill person to the mental hospital. The author validly draws upon his general clinical and his specifically forensic-psychiatric experience to inveigh against the hazards to mental health of commitment by jury trial and the detention of a patient in a jail pending the disposition of commitment proceedings, a phenomenon still encountered in several of our state jurisdictions.<sup>22</sup>

He is patently eager to dispel the "myth" that "many sane persons are improperly sent to mental hospitals and detained there—the so-called 'railroading' myth"<sup>23</sup>—too eager, in fact. This dismissal of this "myth" is peremptory. It is true that "rail-

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20. OVERHOLSER, *THE PSYCHIATRIST AND THE LAW* 51 (1953). See N.Y. PENAL LAW § 1944-a (1950); PA. STAT. ANN. §§ 1166-1172 (Purdon, 1951).

21. ABRAHAMSEN, *WHO ARE THE GUILTY?* 253-54 (1953); Wertham, *A Psychiatrist Looks at Psychiatry and the Law*, 3 *BUFF. L. REV.* 41, 50 (1953). See also DRUMMOND, *THE SEX PARADOX (AN ANALYTICAL SURVEY OF SEX AND THE LAW IN THE UNITED STATES TODAY)* 144 (1953). Cf. Karpman, *Psychosis as a Defense Against Yielding to Perverse (Paraphiliac) Sexual Crimes*, 44 *J. CRIM. L. & CRIMINOLOGY* 22 (1953).

22. OVERHOLSER, *THE PSYCHIATRIST AND THE LAW* 77-78 (1953). A more "up-to-date" pattern of legislation governing the commitment and custodial care of the mentally ill is exemplified by the N.Y. MENTAL HYGIENE LAW §§ 70-90.

23. OVERHOLSER, *THE PSYCHIATRIST AND THE LAW* 80 (1953).

roading" can for most cases be safely ruled out as attributable to conscious psychiatric malice as a matter of both common sense and general experience and does not, therefore, demand detailed refutation in a book of this length. A "railroading," however, consisting not only of the improper commitment of the "sane" person, but also of the infliction of medically contra-indicated measures upon the "insane" after his commitment, or the "therapeutic" incarceration of the "insane" without therapy—and attributable not to conscious psychiatric malice, but rather to psychiatric negligence and/or incompetence and/or indifference, cannot be dismissed in this cavalier fashion.<sup>24</sup> To

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24. If it be assumed that "power corrupts and absolute power corrupts absolutely," the inflation of psychiatric power as a result of legislative failure to provide adequate "checks and balances" must give rise to serious public concern. The ratio of a handful of reported malpractice suits against psychiatrists as against the multiplicity of reported malpractice suits against other medical practitioners cannot be adequately explained as attributable to a disparity in numbers between psychiatrists and other medical practitioners, and/or the allegedly higher standards of psychiatric ethics. A more probable inference is that, absent new and adequately certain and objective legislative standards, psychiatric malpractice, however flagrant, is, by virtue of its subjective characteristics, infinitely less susceptible to judicial proof than the malpractice of other medical practitioners. See, *e.g.*, *Gasparini v. Manginelli*, 196 Misc. 547, 92 N.Y.S.2d 575 (Sup. Ct. 1949); *Farber v. Olkon*, 246 P.2d 710 (Cal. Civ. App. 1952). To assert that what amounts to a virtual immunization from effective judicial scrutiny of the psychiatric profession is not productive of mischief is to assume a virtue among psychiatrists undiscoverable among other mortals. If, and only "if men were angels" should effective legal restraints be safely abandoned as unnecessary—in the tradition of the democratic social order.

It is noteworthy, for example, that courts have provided scant, if any, relief against the existing abuse of electric shock "therapy." Psychiatrists, administering such "treatment" without consent have not infrequently been shielded by the assertion of an emergency as justification. See, *e.g.*, *Farber v. Olkon*, 146 P.2d 710 (Cal. Civ. App. 1952). Unduly high standards of proof have kept too many patients from recovering for physical injuries sustained in the course of electric shock "therapy." See, *e.g.*, *O'Rourke v. Halcyon Rest*, 281 App. Div. 838, 118 N.Y.S.2d 693 (2d Dep't 1953).

Pre-frontal lobotomy operations exemplify another potential source of violation of individual rights and appear to require particularly urgent restraint by effective legislation. It has thus been observed (*Drummond, op. cit. supra* note 21, at 82, that the "need for adoption of legislation against promiscuous use of . . . [this] operation by public institutions to which court commitments are sent is fortified by the glaring fact that lobotomy could readily be used as a satisfactory means of controlling obstreperous inmates who are a nuisance to prison wardens and guards, which the emotionally and mentally deranged admittedly are." The "voice of caution" suggests indeed that the law interpose a "prior restraint" against the discretionary psychiatric transformation of a man into a "human vegetable."

If psychiatrists, moreover, are to accept the democratic tradition as the basis for legal-psychiatric collaboration it is high time for them to reexamine their varying forms of custodial care and "therapy" in the light of the standards furnished by the continuing judicial expansion of existing concepts of punishment (or deprivation) which are subject to constitutionally secured procedural safeguards. See, *e.g.*, *Wong Wing v. United States*, 163 U.S. 228 (1896); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); *Schneiderman v. United States*, 320 U.S. 118 (1943); *United States v. Lovett*,

ignore this problem in its entirety appears tantamount to a confession of indifference to the traditional democratic values of a free society—unless one were to proceed *ab initio* upon the assumption of a dogma of psychiatric infallibility. Almost all, if not all, lawyers in contemporary society will make short shrift of any such assumption. There can be no doubt, therefore, that psychiatrists will have to renounce any pretensions to such an infallibility, and hence proceed to a recognition of the reality of the lawyer's concern with "due process" if legal-psychiatric collaboration is to develop in this area.<sup>25</sup>

Dr. Overholser may well deny the validity of such a warning when applied to him and point to his general demand for the observance of humanitarian standards of hospital care:

"Once the patient has been sent to the hospital, he is, of course, entitled to the best available care, and there is a responsibility on the part of the state to see to it that adequate personnel are provided to give him the care which he needs."<sup>26</sup>

Such an explicit or implicit denial on his part, if it should be deemed to exist, would come with bad grace against the background of contemporary psychiatric practice. The author maintains silence as to the duties of the psychiatrist in the absence of "adequate facilities." The silence becomes meaningful in the

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328 U.S. 303 (1946); *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951).

See also Mr. Justice Frankfurter, speaking for the Court in *Wolf v. Colorado*, 338 U.S. 25, 27 (1949):

"Due process of law . . . conveys neither formal nor fixed nor narrow requirements. It is the compendious expression for all those rights which the courts must enforce because they are basic to our free society. But basic rights do not become petrified as of any one time, even though, as a matter of human experience, some may not too rhetorically be called eternal verities. It is of the very nature of a free society to *advance in its standards* of what is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights." (Italics supplied.)

25. That this cavalier dismissal of the problem of possible wrongful commitment and kindred issues does not constitute an isolated phenomenon in contemporary psychiatric thinking is brought out by GUTTMACHER & WEIHOFEN, *PSYCHIATRY AND THE LAW* (1952). Another well-known psychiatrist with considerable experience in the field of forensic psychiatry has seen fit to record this observation as his comment upon such an attitude. Wertham, *A Psychiatrist Looks at Psychiatry and the Law*, 3 *BUFF. L. REV.* 41, 48 (1953): "Wrong commitments happen more often than the authors seem to admit. I know of thousands of commitment papers made out after a few minutes' examination. And I know state hospitals where patients have not seen a doctor for two years."

26. OVERHOLSER, *THE PSYCHIATRIST AND THE LAW* 97 (1953).

light of the recent judicial decision featuring Dr. Overholser as the defendant in an action brought against him as the superintendent of St. Elizabeth's Hospital in Washington, D. C., by one of his patients confined to that hospital under the "sexual psychopath" statute of the District of Columbia.<sup>27</sup> The patient had sued to regain his freedom upon *habeas corpus*. He had introduced evidence at the hearing upon the petition that he was confined in a place of confinement for the criminal insane "and that he . . . [was] confined there with many wild and violent insane persons. . . . [He had] testified without contradiction that he had been assaulted by mentally deranged persons in shackles. He [had] described noisome, unnatural and violent acts by inmates in . . . [his] Hall."<sup>28</sup> (Italics supplied.)

The United States District Court for the District of Columbia had discharged the writ of *habeas corpus* and an appeal had followed. The United States Court of Appeals for the District of Columbia had vindicated the petitioner-patient by a unanimous reversal of the decision below. It remanded the case to the District Court for further proceedings in accord with its appellate opinion which declared:

"Both the intent and the terms of . . . [the 'sexual psychopath'] statute are for the commitment of these persons to a hospital for remedial treatment. . . . [The individuals so committed] are denominated 'patients'. . . . [The] facts which petitioner asserts depict a place of confinement for the hopeless and the violent, not a place of remedial restriction. . . . The incarceration of this petitioner in a place maintained for the confinement of the violent, criminal, hopeless insane, instead of in a place designed and operated for the treatment of the mentally ill who are not insane, is not authorized by the statute."<sup>29</sup>

Dr. Overholser moves into safer and sounder terrain with his last lecture on the subject of "The Psychiatrist as a Witness." A valid summary of the history of the developing practice of psychiatric courtroom expertise is followed by the largely misconceived allegation of existing prejudice against the psychiatric witness. The allegation is founded, in part, upon the occasionally careless judicial employment of medical language, solely designed, however, to serve as the equivalent of available legal

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27. *Miller v. Overholser*, 206 F.2d 415 (D.C. Cir. 1953).

28. *Id.* at 418.

29. *Id.* at 418-19.

terminology and in no way rationally determinable as signifying the judicial adoption or rejection of any particular medical view. It is founded in equal measure upon the refusal of the author to consider any interpretation other than that this loose judicial employment of medical terminology involves a judicial meddling with medicine. He would be less appalled at a judicial statement that "considering insanity as a disease" should be viewed as a "vicious principle"<sup>30</sup> if he were prepared to concede that the learned judge may have employed the term "insanity," not in any biological sense, but loosely, to signify nothing more than the absence of responsibility in the legal sense. Dr. Overholser clearly is not one of the medical practitioners guilty of the semantic sophistry attributed by Jerome Hall to numerous psychiatrists who translate "the legal terms into the language of their discipline," and conversely acquire the facility for translating the language of their discipline into legal language.<sup>31</sup>

Beyond this Dr. Overholser registers a valid and much needed objection against the widespread practice of permitting any physician to testify as an expert in psychiatric matters;<sup>32</sup> he wisely commends the emerging practice of joint psychiatric examination by the experts of the two adverse parties;<sup>33</sup> and he accurately underscores the inherent rights of the courts to summon experts, independently, upon their own motion (*ex mero motu*).<sup>34</sup>

Here, as elsewhere, in urging a greater freedom from traditional restrictions for the psychiatrist, he seems unaware of the underlying problems of civil liberties in a democratic state.<sup>35</sup>

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30. OVERHOLSER, *THE PSYCHIATRIST AND THE LAW* 109 (1953).

31. HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 487 (1947). The high frequency of present psychiatric failure to grasp the full significance of semantics accounts for yet another block in the communication between lawyers and psychiatrists. Psychiatrists, as a group, would do well to ponder once again the elementary lessons of such a pioneering work as OGDEN & RICHARDS, *THE MEANING OF MEANING* (1923). The contribution of semantic sophistication to legal-psychological scholarship of a high order has been recently exemplified by James & Dickinson, *Accident Proneness and Accident Law*, 63 HARV. L. REV. 769 (1950).

32. OVERHOLSER, *THE PSYCHIATRIST AND THE LAW* 110-119 (1953).

33. *Id.* at 117. *Cf.* N.Y. CODE OF CRIM. PROC. §§ 658, 662 *et seq.*, 870-76 (ranging in years of effectuation from 1939 to 1953).

34. OVERHOLSER, *THE PSYCHIATRIST AND THE LAW* 119 (1953). *Cf.* 9 WIGMORE, *EVIDENCE* § 2434 (3d ed. 1940). An incisive comparative evaluation of this problem has been presented in an as yet unpublished manuscript, "The Law of Evidence in Civil and Common Law Systems," by Professor Arthur Lenhoff, read at the Comparative Law Round-Table Conference of the AALS Convention of 1953.

35. OVERHOLSER, *THE PSYCHIATRIST AND THE LAW* 112-117 (1953). *Cf. id.* at 55-57. The psychiatric liberties allowed in *United States v. Hiss*, 88 F. Supp.

Dr. Overholser concludes with a recommendation for the abolition of capital punishment and the expression of hope for the "development of mutual understanding between the representatives of law and psychiatry."<sup>36</sup>

This reviewer, in turn, can but conclude with the hope that the near future will see a psychiatric literary contribution which is significantly more conducive to the "development of mutual understanding between the representatives of law and psychiatry," than *The Psychiatrist and the Law*.

In the meantime he is prepared to welcome Dr. Overholser's book to the none too overcrowded shelves of most law libraries in this field.

*Richard Arens\**

LEARNING PARLIAMENTARY PROCEDURE, by Alice Sturgis. McGraw-Hill Book Co., New York, 1953. Pp. xvi, 358. \$4.00.

There are numerous manuals on parliamentary law, but if any of us should be asked to name one of them offhand, he would most likely name *Robert's Rules of Order*, a book which, as

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559 (S.D.N.Y. 1950), which have Dr. Overholser's apparent endorsement have been interpreted as threatening to the liberties of free people by more perceptive observers. See, e.g., Miller & Miller, Book Review, 20 U. OF CHI. L. REV. 598, 601-02 (1953):

"The psychiatric testimony of the experts called by the defense raised issues about civil rights as disturbing as the problem of multiple jeopardy involved in such trials. Hiss was one of the first victims of the 'new look' in justice—admit your guilt before the investigating committee and the grand jury, and become a hero; deny it, and face a perjury trial because the statute of limitations has expired and you cannot be convicted for the act. He also suffered from the recently modish procedure suggested by the phrases 'forgery by typewriter,' 'trial by newspaper,' 'guilt by association,'

"But it was Chambers who became the victim of a moot point in the administration of justice, when, in the second trial, Judge Goddard permitted psychiatrists to testify as experts to discredit the credibility of his testimony. Although Chambers was not a party in the case and could get no redress, his personality was given a most unsympathetic airing in open court and the press. One wonders whether this precedent gives the witness much more protection than he would have before some of the more blatant congressional investigating circuses. Adding to the shakiness of the whole episode is the fact that psychiatry has not yet reached the advanced level of competence which would properly permit its practitioners to claim expertness in the field of political affairs. Psychopathic personalities are not always liars, and the oversold field of psychiatry is not yet so advanced that its adherents can tell when Chambers' testimony was fact and when fable. Claims of ability to make such a distinction from observing the behavior in court of a person who has not even been interviewed or examined could scarcely increase public esteem for modern psychiatry."

*Cf.* JOWITT, THE STRANGE CASE OF ALGER HISS 218-224 (1953).

36. OVERHOLSER, THE PSYCHIATRIST AND THE LAW 134 (1953).

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