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THE LAW AND THE MENTALLY ILL

THE DEFINITION OF MENTAL ILLNESS

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I

Mental illness is a medical concept, and so it would seem self-evident that its definition should come from the medical profession and not from either legislators or judges.

But mental illness is a phenomenon that the law does recognize and that may have various legal effects. It may render a person irresponsible for his criminal act; it may justify a court order for his involuntary hospitalization; it may render him incompetent to make a will or a binding contract; it may constitute grounds for divorce. However, mental illness in and of itself does not have any of these legal effects. There must be mental illness; but there is always a second requirement, that the illness be of such form or degree as to meet some legal criterion. In a will contest, where the question is whether the testator was "sane" when he made his will, the question is not merely whether he then had a medically recognized form of mental illness. If not, then of course he was not "insane" in any sense. But even if medical experts agree he was mentally ill, the law asks a further question, which is, broadly, did his mental illness deprive him of sufficient mind to know what he was doing? Did he know it was a will he was executing; did he understand the nature and extent of his property and his obligations toward those persons who are related to him or who have some moral or legal claim upon him? In a commitment proceeding, the question is somewhat different, namely, is his mental condition such that for his own safety or the safety of others he should be confined in a mental institution. In a criminal case, the "test" is still different. Just what the criminal law test should be has been the subject of a vast amount of debate. But every-

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one agrees that some criterion over and above the mere existence of mental illness is called for.

In short, in each legal situation, the insanity issue really has two parts:

(1) Was the person mentally ill?

(2) If so, was the illness such as to satisfy the legal criterion or test?

Much confusion has been caused by the failure to keep this rather elementary analysis clear. The confusion is aggravated by use of the ambiguous terms "insane" and "insanity." Sometimes these terms are used to refer to mental illness per se, sometimes to the legal consequences of such illness. For example, in criminal cases where the defendant had prior to the criminal act been judicially committed to a mental institution, it is sometimes argued that such proof of prior existing "insanity" should be presumed to continue and so the defendant should be presumed to have been "insane" at the time of the act. This argument is valid enough if by "insanity" is meant merely mental illness per se (and assuming the commitment was for a form of mental illness that can actually be presumed to continue and that the commitment was not too far in the past). But sometimes the word "insanity" is given a shifting meaning, so as to imply that proof that the person was so mentally ill as to need hospital care and treatment some time in the past leads to the presumption that at the later date he was so mentally ill as not to know the nature and quality of the criminal act he was committing or that it was wrong (or whatever the "test" of criminal responsibility may be in that jurisdiction).[1] Another illustration is afforded by cases holding that a person who has been committed to a mental institution is incompetent to make a contract or a will, on the reasoning that he has been adjudicated "insane."[2] The adjudication of course was

[1] For cases, see Weihofen, Mental Disorder as a Criminal Defense 228-29, 234 (1954). In some of the cases where the courts refused to hold that proof of prior commitment required a conclusive presumption that defendant was criminally irresponsible at the time of the act, the result was based on the fact that the time interval between the commitment and the criminal act was so long that he might have recovered his sanity. But in at least one case, this way out was closed to the court. In People v. Willard, 150 Cal. 543, 89 Pac. 124 (1907), as the judge at the conclusion of a commitment hearing was signing the commitment order, the patient drew a pistol and shot the complaining witness dead. Being thus forced to face the issue, the court properly held that the fact that the person had just been found so mentally ill as to require hospital care did not raise a conclusive presumption that he was so mentally ill as not to know the nature of his act or that it was wrong.

[2] Cubbison v. Cubbison, 45 Ariz. 14, 40 P.2d 86 (1935); Sanders v. Omohundro,

merely that because of mental illness he needed hospital care and treatment; that is not the equivalent of an adjudication that his illness was such as to render him incompetent to make a contract.[3] An adjudication of the need for hospitalization is not res judicata on the question of contractual competence. Medically, it is not true that all patients in mental hospitals lack the understanding necessary to make any kind of contract, no matter how simple.

Where the elementary distinction we are discussing is made, it is sometimes expressed by speaking of the first issue as "medical insanity" and the second as "legal insanity." But this is unfortunate phrasing, because instead of making clear that *both* questions are always involved in any "legal" issue of insanity, it may give the implication that the medical and legal professions disagree in the definition of mental illness.

The first of our two questions, the existence of non-existence of mental illness per se, is not often a real issue. It is around the second that most of the legal cases revolve. In few of the criminal insanity cases is the issue whether the defendant was truly disordered at all, or merely malingering. The only situations where such malingering is likely to be successful is where the jury is looking for an excuse to acquit anyway; the man who shoots his wife or her lover caught in *flagrante delicto,* and then pleads "temporary insanity" and is acquitted, probably did not fool the jury into thinking he was actually insane; the acquittal is merely the jury's way of applying the "unwritten law." A dubious claim of self-defense might have been just as effective. In the great majority of cases, there is fairly convincing evidence, and often no serious denial, that the defendant was mentally abnormal to some extent. The crucial question is whether the abnormality was such as to come within the legal test of irresponsibility—not whether he was or was not schizophrenic or paranoid, but whether, by reason of such illness, he was incapable of knowing right

204 Ark. 1040, 166 S.W.2d 657 (1942); Rohrer v. Darrow, 66 Colo. 463, 182 Pac. 13 (1919); Walker v. Graves, 174 Tenn. 336, 125 S.W.2d 154 (1939).

Under Ohio Law, no person in a mental hospital (except a "sane epileptic," a voluntary patient, or a person temporarily in the hospital for observation) is deemed competent to execute a contract or deed unless approved by the committing court. Ohio Rev. Code § 5123.57 (1954). The opposite provision, such as found in the Draft Act Governing Hospitalization of the Mentally Ill, seems sounder: that every patient in a mental hospital retains his civil rights, including the right to contract, unless he has been adjudicated incompetent.

[3] The better view is, therefore, that evidence of prior hospitalization is admissible and entitled to some weight to prove incompetency to contract, but it is not conclusive. Ross, "Commitment of the Mentally Ill; Problems of Law and Policy," 57 Mich. L. Rev. 945, 988 (1959).

from wrong. The same generalization may be ventured concerning non-criminal cases.

But this absorption in the legal consequences of mental illness tends to divert attention from the fact that the question of mental illness itself *is* an issue, and in some cases may be important.

II

We have said that the existence of mental illness, like physical illness, is a medical question. This implies that just as in cases where the issue is the existence or non-existance of tuberculosis or a bone fracture, the law should look to factual evidence, and especially, where the fact is not easily apparent, to expert evidence. On its face, it would seem as absurd for the law to attempt its own definitions of mental illness as it would to define for itself what constitutes a physical ailment. Of course, experts on mental disorder may and do disagree, although anyone familiar with personal injury cases knows that disagreements among doctors concerning the nature, extent and effects of physical injuries are hardly any less prevalent. But this is a matter of proof. That the facts may be difficult to establish does not make them any less medical facts.

Unfortunately, the matter is not that simple. Turning to the medical profession to define "mental illness" for us, we find no clear answer. A century ago, "mental disease" was a fairly clear concept; all such disease was thought to be the product of lesions in the brain. Today, psychiatrists recognize that many mental disorders seem to be wholly functional; a post-mortem examination shows no organic pathology of any kind. So long as organic pathology was assumed to be involved, it was possible to regard the mentally ill as clearly distinct from those who were "sane." But since the recognition of functional disorders, and especially since Freud, the view that there is a clear, qualitative division between the sane and the mentally ill has largely been abandoned in favor of the quantitative view, that there is no such clear line between the two; there is rather an unbroken continuum from normal to abnormal. But if there is no longer merely black and white, but a continuous shading from one to the other, it becomes apparent that asking the medical expert where he draws the line between two shades of gray is not quite like asking him whether a bone is or is not fractured.

Drawing the line between mental illness and mental health is difficult for another reason. The concept of physical illness deals with the body as a physical object. Psychiatry, it is commonly said, deals with illnesses of the "mind." But the "mind" does not exist as a physical object. Determining whether the "mind" is ill is therefore

a materially different task from that of determining whether the body is ill. Dr. Arthur P. Noyes, a leading psychiatrist, has well stated the difference:

> While other branches of medicine deal with parts of the organism, psychiatry or psychobiology studies the individual as a whole, as a biologic unit living in an environment that is essentially social in nature, and deals with the biopsychic life, the total integrated behavior of the human organism. It deals with data from the biologic, social and psychologic sciences.[4]

But determing whether "the total integrated behavior of the human organism" is healthy or not is obviously not easy. In this context, the concept of "health" is itself ambiguous. Behavior that might be socially well integrated in one culture may be considered "crazy" in another.[5]

The groups most difficult to classify are the so-called psychopaths and severe character neurotics. Psychiatrists are not agreed whether any of these should be included within the term "mentally ill." Most English psychiatrists seem to say no; but in this country psychopathy is recognized as a sub-group under "Mental Disorder" in the standard classification system of the American Psychiatric Association.[6] The training, orientation and philosophy of the particular psychiatrist is likely to be more of a factor in his diagnosis of such cases than any factual questions that can be settled by observation and examination.

At one time, the staff of St. Elizabeth's Hospital in Washington, D.C. took the position that "sociopathic personality disturbance" (the current term to replace "psychopathic personality") should not be regarded as mental disease within the meaning of the test for criminal irresponsibility. The therefore testified that persons so diagnosed did not have a mental disease or defect. Not long afterward, the hospital changed its view and decided that a sociopathic personality disturbance should be considered a mental illness. Thereafter when called to testify in court concerning the mental condition of persons so diagnosed the hospital doctors testified that they were "mentally ill," or "suffering from a mental disease."[7]

This incident points up the fact that the existence or non-existence of mental illness is not solely a factual question to be determined by objective observation or examination. It is also a question calling for a policy or philosophical judgment concerning what kinds of abnormality should be included in the term "mental illness." It is so

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4 Noyes, Modern Clinical Psychiatry 66 (4th ed. 1953).

5 Szasz, "Psychiatry, Ethics And The Criminal Law," 58 Col. L. Rev. 183 (1958).

6 American Psychiatric Ass'n. Diagnostic And Statistical Manual 85 (1952).

7 Blocker v. United States, — F.2d — (1959).

much a matter of policy that the question has been raised whether the psychiatrist on the witness stand should even be permitted to say whether in his opinion the person was suffering from mental illness, or from a mental disease or defect. It has been argued that this would be asking him for his opinion as to what is or is not within the legal concept of insanity,[8] a question which it is solely for the jury to decide and so outside the doctor's province.[9]

Another view is that this is a matter of legal policy to be determined neither by the medical experts or by the jury, but by the law[10] itself. The Model Penal Code being drafted by the American Law Institute, after setting forth its test of mental disease or defect excluding responsibility, adds a provision that: "The terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct." (Sec. 4.01) The purpose is to exclude the so-called psychopathic personality. The reasoning seems to be that (1) the law must act on the assumption that most members of society are susceptible to being influenced by the threat of criminal sanctions; (2) the only exceptions that should be recognized are persons who (a) are socially recognized as being different from ourselves; (b) whose differentness is socially recognized as sickness; and (c) upon the identification of whose condition the experts are most likely to agree among themselves and also with laymen.[11]

Our question in this paper is not whether that conclusion is sound, but the somewhat different, though related, question whether it is wise at this stage of psychiatric development to freeze such a conclusion into a written code. I suggest that it is not. The very concept (and even the name) of psychopathic personality disturbance is a vague and changing one. Research into the nature and etiology of the various conditions that have been lumped together under this label is only beginning. It is entirely possible that we shall see an important break-through in the next few years, which may show that

[8] Defense counsel so argued in Blocker v. United States, *supra* note 7.

[9] Judge Bazelon of the Court of Appeals for the District of Columbia said of the decision of the St. Elizabeth's Hospital staff that sociopathic or psychopathic personality should not be regarded as mental disease within the meaning of the Durham rule, Durham v. United States, 214 F.2d 862 (1953). "This inevitably encroaches upon the jury function ." Briseol v. United States, 248 F.2d 640, 644n (1957).

[10] Whether, if "the law" should determine this matter, it should be laid down by the legislature or by judicial decision is a question not discussed in this article.

[11] The official comments to this provision do not spell out the reasoning. However, it is found in Swartz, "The Definition of Mental Disease," Tests of Criminal Responsibility (1955). Professor Swartz, assistant to the Reporter, submitted this memorandum to the Advisory Committee on October 8, 1955.

these conditions, or some of them, are properly classifiable as mental illnesses, perhaps even organic illness (some experiments have reported finding among psychopaths certain characteristic brain wave patterns similar to those found in epileptics). It therefore seems premature for the law by its own fiat to say that psychiatry will not, at least in the near future, be able to show that these persons are mentally ill, and that they shall therefore be subjected to punitive and not therapeutic treatment. One outstanding characteristic of these persons is that they are not deterred by the threat of punishment or even its actual infliction.[12] The punitive approach is therefore the defeatist one, that there is nothing we can do about such cases except to take them out of circulation for a few years. To take this position concerning a group who are probably responsible for the major part of our violent crimes,[13] just when psychiatry is beginning to have some hopes for finding causes and cures, seems an unduly pessimistic one to freeze into law.

The Model Penal Code provision to exclude psychopaths from the definition of mental disease or defect does not undertake a general definition of mental disease or defect. There seem to be few instances in which law-makers have ventured to formulate a general definition.

A few commitment laws undertake to define "mental illness" or a "mentally ill person" for the purposes of such laws, and these usually do so in terms of need for care and treatment.[14] The Draft Act Governing Hospitalization of the Mentally Ill has a broader definition; it defines "Mentally Ill Individual" as one "having a psychiatric or other disease which substantially impairs his mental health."[15] But since mental illness is merely the opposite of mental health, it is not very helpful to define mental illness as an illness that impairs mental health. Perhaps the word "substantially" adds something, though it is not clear what. The Wisconsin Mental Health Act simply says "Mental illness is synonymous with insanity."[16] It seems that any definition that is not too restrictive is likely to be too general to be very meaningful.

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12 Brancale, "Psychiatric and Psychological Services," in Tappan, Contemporary Correction 195 (1951).

13 Dr. E. Glover, testifying before the British Royal Commission on Capital Punishment, said: "The true psycopath . . . can be the most dangerous, and in the absence of proper treatment, intractable criminal." And again, "Most crimes of violence are pathological, perhaps 70%." Royal Commission on Capital Punishment, "Minutes Of Evidence," 492, 512.

14 N.Y. Mental Hygiene Law § 2 (1951); Pa. Stat. Ann. tit. 50, § 1072 (1954).

15 "A Draft Act Governing Hospitalization Of The Mentally Ill," U.S. Pub. Health Service Publication No. 51 (rev. ed. 1952).

16 Wis. Stat. § 50.001 (1957).

Experience in Pennsylvania shows that the definition of "mental illness" in that state's Mental Health law is vague enough to allow the courts to intrude the M'Naghten Rule in situations where that rule does not properly apply (e.g., where the question is mental competency to stand trial, or, after trial, to be punished).[17]

> Although it was carefully drafted in accordance with psychiatric and administrative principles far more acceptable than M'Naghten, its attempt to define "mental illness" in one paragraph, for application to such varying situations as voluntary admission to institutions, transfer between institutions, commitment of those not charged with crime, those charged with crime and those convicted of crime and sentenced, could not but result in such vagueness of description as to leave much to the discretion of its administrators, interpreters and, we may add misinterpreters.[18]

There seems to be little in the record to lead us to believe that any useful purpose would be served by departing from the policy that the law has, with very few exceptions, followed in the past, of leaving it to psychiatry to wrestle with the question of what does and does not come within the concept of "mental illness," instead of attempting to lay down a legal definition.[19]

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[17] See Commonwealth v. Patskin, 375 Pa. 368, 100 A.2d 472 (1953); Commonwealth v. Moon, 383 Pa. 18, 117 A.2d 96 (1955) and other cases discussed in Carroll & Leopold, "The Current Influence of Psychiatric Concepts in Determining Criminal Responsibility in Pennsylvania," 31 Temp. L. Q. 254 (1958).

[18] Carroll and Leopold, *supra* note 17, at 257. See also Polsky, "Present Insanity—From the Common Law to the Mental Health Act and Back," 2 Vill. L. Rev. 504 (1957).

[19] The recent report of the British Royal Commission on the Law Relating to Mental Illness and Mental Deficiency recommended: "In our opinion it would do more harm than good to try to include in the law a definition of psychopathic personality on the analogy of the present legal definition of mental defectiveness. It is far preferable that, in referring to various forms of mental disorder, the law should use general terms which will convey a sufficiently clear meaning to the medical profession without trying to describe medical conditions in detail in semi-medical language . . . . It would in any case be particularly difficult to find a suitable detailed description of psychopathic personality. Such a description would probably have to mention the particular aspects of the personality which may be affected, and possibly also try to give some guide as to the cause of the disorder. But there are too many different types of psychopathic personality, and too little is at present known about their essential nature and causes, for a description of this kind to be easily agreed; and even if one were agreed now, increasing knowledge might soon make it out of date. Lack of knowledge about the nature and causes of particular forms of disorder does not mean that they cannot be recognized and successfully treated in individual patients." Royal Commission on the Law Relating to Mental Illness and Mental Deficiency (1954-1957). Report. Comnd. 169. H.M.S.O., (1957). Quoted in Morris, Comment, 21 Modern L. Rev. 63.

III

The second issue in any "insanity" case, the issue whether the mental illness was of such nature or scope as to meet the legal criterion for the particular legal consequence sought, is a question of a quite different kind from the one which we have just discussed, the question of the existence or non-existence of mental illness as such.

To illustrate from the law governing commitment to a mental hospital by court order: as a basis for an order of commitment, the court must of course find that the person is mentally ill. But that is not enough. The law everywhere requires some further finding. What further finding should be required? That if allowed to remain at liberty he is likely to injure other persons? Suppose he is likely only to injure himself (e.g., a depressed patient who is likely to commit suicide)? Suppose he is not dangerous to anyone, but hospital care and treatment would be beneficial to him? Suppose he is not dangerous but hospital care would be beneficial, and he is too disordered to make an intelligent evaluation of his condition and needs?

Whatever legal rule is laid down will reflect a judgment on the basic policy question of the extent to which the state should interfere with the liberty of the individual in the interest of all. The extreme libertarian will perhaps be willing to deprive a person of his liberty only when that liberty endangers others. As for the individual who is sane enough most of the time to understand that in his depressed phases he may commit suicide and who prefers to run that risk rather than go to the hospital, the libertarian extremist might want to allow that choice. At the other extreme are those who would allow the state to act for the person's own good, even when he does not want it. In between, there is room for several other lines of demarcation for those who would weigh individual liberty against social welfare. The Draft Act Governing Hospitalization of the Mentally Ill faced this problem expressly, and chose to permit compulsory hospitalization not only of persons who were dangerous to others, but also to themselves, and also those who are not dangerous but who need hospital care and treatment but who because of the nature or stage of their illness have lost the power to make an intelligent choice or have become so confused as no longer to be able to make a decision having any relation to the factors bearing on the question of hospitalization. Those who heed hospitalization but retain the capacity for choice cannot be compelled to enter a hospital unless dangerous.

This is a policy decision. Some doctors, lawyers and social scientists may disagree with it.[20] When a psychiatrist is asked for

[20] See Whitmore, "Comments on a Draft Act for the Hospitalization of the Mentally Ill," 19 Geo. Wash. L. Rev. 512, 522 (1951).

an opinion whether a given person should be committed, it is therefore important to see clearly just what the import of the question is. If the legal criteria for commitment are not made clear in the question, the doctor may be asked to apply his own political philosophy, determine the fundamental policy issue by his own lights, and give us his policy decision. None of us truly believe that this is purely a medical question to be decided by medical experts. Yet this may be close to what we actually allow under statutes which provide for examination and report by a panel of physicians appointed by the court. When the court, under the belief that the modern and enlightened way to handle commitment cases is to rely on expert scientific examination, gets into the habit of accepting more or less automatically the recommendations of the panel or commission, we may have the medical experts exercising their judgment not only on the medical issue of the existence or non-existence of mental illness, but also on the policy question of what the state ought to do about any given case of illness.[21]

The same point applies in other situations. In contract law, there is the same need for a policy choice. Granting that the person is intellectually weak or unstable; that he is suggestible, gullible, and easily confused or misled; that the psychiatrists agree that he is mentally deficient or even psychotic, whether he should on this ground be allowed to repudiate a contract or transaction depends upon other considerations besides the existence or non-existence of mental illness.

> It is a serious matter to deprive a person of his civil capacities or to relieve him of his civil responsibilities. Even though we no longer favor quite as rugged a form of individualism as we did half a century ago, we are still reluctant to exercise too much paternalistic restraint on what we regard as both the right and obligation of the individual to live his own life and abide by the consequences. We do not believe that society should ordinarily interfere to protect fools against their own folly. Infants and psychotic persons we do so protect, but the latter must be "insane" to the extent that they cannot be expected to take care of themselves, and not merely to the extent that therapy is indicated. Moreover, in determining the kind and degree of protection the law should give such persons, it is necessary to strike a balance betwen their interests and the legitimate interests of businessmen and others dealing with them.[22]

This balancing of interests may require taking into account whether the other party acted innocently, whether the contract seems to be a fair one, and whether the parties can be put back in *status*

[21] Ross, "Commitment of the Mentally Ill; Problems of Law and Policy," 57 Mich. L. Rev. 945, 960-64 (1959).

[22] Guttmacher & Weihofen, Psychiatry And The Law, 324 (1952).

quo ante or whether because the money has been spent or the goods used up this is impossible.[23] The expert judgment of an economist or businessman on the effect of a policy countenancing repudiation of contracts is as relevant to this policy issue as the judgment of a psychiatrist.

During the past twenty years, the public has been much concerned about sex offenders. In some states, laws have been enacted to commit to mental institutions persons suffering from such emotional instability or impulsiveness of behavior or failure to appreciate the consequences of their acts as to render them irresponsible for their sexual acts and thus dangerous to themselves and to others. No conviction of any crime is required under some of these statutes. This of course reflects a valid desideratum: it is socially desirable to apprehend and commit the potential sex offender before he commits an offense. On the other hand, it certainly sacrifices personal liberty, and on unsure ground. It is a serious matter to lock up a person who has not actually committed any offense, on a prediction that he is likely to do so, based on vague constructs such as "emotional instability or impulsiveness of behavior, or lack of customary standards of good judgment." More recent statutes therefore permit such commitment only upon conviction of a sex crime.[24] Again, the choice is a matter of public policy. Psychiatric information about the magnitude of the public danger presented by "sex offenders" and the possibility of identifying potential offenders before the fact are certainly relevant, but the ultimate choice must be based primarily on one's philosophy of government, one's evaluation of the need for social control versus the importance of individual freedom.[25]

In criminal law, it has been pointed out that the "test" of insanity is not a clumsy effort by the legal profession to define a psychosis. It is an attempt to answer the policy question: granting that the defendant is more or less mentally abnormal, what should we do with him? Should he be dealt with by the state's penal-correctional program, or by the medical-therapeutic? The answer depends upon our concept of "justice" and the purpose of punishment, our penal policy, the institutional facilities we have available or that the taxpayers are willing to provide, and other considerations. The law, speaking for the community, has to consider the patient, his

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[23] See Comment, "Mental Illness and Contracts," 57 Mich. L. Rev. 1021 (1959).

[24] For a summary of the statutes in various states, see Weihofen, Mental Disorder As A Criminal Defense 195-206 (1954).

[25] For discussions of these considerations, see Fahr, "Iowa's New Sexual Psychopath Law—An Experiment Noble in Purpose?" 41 Iowa L. Rev. 523 (1956); Guttmacher & Weihofen, "Sex Offenses," 43 J. Crim. L., C. & P.S. 153 (1952).

health and his rights and responsibilities as a free man, the interest of society in the health and safety of its members generally, and also various other, perhaps competing, interests. "If total community policy is to be served, a rather complex arbitration may be involved."[26]

It is true that where the legal rule concerns mentally disordered persons, any answer should accord with current psychiatric knowledge.

> It is therefore proper and necessary to enquire from time to time whether the doctrine of criminal responsibility, as laid down by the common law and applied by the courts, takes due account of contemporary moral standards and of modern advance in medical knowledge about the effects of mental abnormality on personality and behavior.[27]

But the ultimate decision is not merely a psychiatric one. It is a major policy decision. This is the legal rationale of the point frequently made by psychiatrists, that they ought not to be asked for their opinions on this policy issue, but should testify only on the medical issue, the existence or non-existence of mental illness. One of the main criticisms that psychiatrists have leveled against the legal test of insanity in criminal cases is that the medical expert, instead of being allowed to restrict himself to giving his medical diagnosis and the basis for it, is asked to give an opinion on whether the accused knew the nature and quality of his act and that it was wrong —questions that are legal, ethical, quasi-religious, but not scientific.

That the psychiatrist should refuse to answer such questions was the position taken in at least one Pennsylvania case. Defense counsel asked his expert to describe the defendant's condition and to give his diagnosis in medical terms, but he refused to ask him whether defendant was "insane" or knew right from wrong, saying that these were legal issues. Dr. Philip Q. Roche of Philadelphia refers to the case in his book, *The Criminal Mind,* and supports the position taken.[28]

Dr. Winfred Overholser, superintendent of St. Elizabeth's Hospital in Washington, D.C., has similarly said,

> So long as medical men are compelled to answer questions on such non-medical topics as "malice", "right and wrong", and "criminal intent", so long will the expert be placed in a false light and full justice at times fail to be done the accused.[29]

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[26] Dession, "Deviation and Community Sanctions," Psychiatry and the Law 1, 11 (Hoch & Zubin ed. 1955).

[27] Report, Royal Commission on Capital Punishment, para. 281 (1949-53).

[28] Roche, The Criminal Mind 142 (1958).

[29] Overholser, "The Place of Psychiatry in the Criminal Law," 16 B. U. L. Rev. 322, 329 (1936). See also Zilboorg, The Psychology Of The Criminal Act and Punishment, 112-13 (1954).

At least one law professor, Sheldon Glueck of Harvard, has expressed agreement with this view:

> The most fruitful source of error and confusion in this field of law is traceable to the requirement that the expert say categorically whether or not the hypothetical person (whom everyone knows to be the defendant on trial) did or did not know right from wrong. This question is purely within the province of the jury, who must answer it as they must any other matter of questionable fact; all the expert should be asked to do, and all his training qualifies him to do, is to pass judgment, not upon the ethicolegal question of right and wrong, but upon the *medical question* of whether or not the defendant was mentally unsound, a question that his peculiar training and experience, and his study of the offender's case, entitles him to answer.[30]

So far as I am aware, no one has ever seriously attempted to answer this contention. It deserves attention.

Let us grant that the primary function of the psychiatric witness should be to give us his diagnosis—to tell us (1) the basis for it, i.e., the examination, tests, observation or other data on which he bases his conclusion; (2) what his conclusion is, i.e., whether the person is mentally ill, and if so, what illness he has; (3) the nature and characteristics of this illness; (4) its origin, development and probable future course. But as we have said, the law is never interested in mental illness *as such.* Law is not a panacea for personal problems; it is a form of social control, and it comes into play only where social control seems called for. But while the question of whether control is called for in a given situation is thus a legal question (and as we have said, one that involves important policy judgments), this does not mean that it is improper for the law to obtain expert psychiatric data on which to base a legal judgment. On an application for compulsory commitment to a mental institution, why should we not ask the psychiatrists not only whether the person is mentally ill, but also such questions as whether he is likely to injure others if allowed to remain at liberty, or whether he would be benefitted by hospitalization? These are "legal" issues, as we have said, but they are issues on which psychiatric opinion would certainly be helpful. There is no reason apparent why we should not ask for such an opinion or why a psychiatrist should refuse to give it.

It is to be noted that most of the demands that psychiatrists not be asked for opinions beyond a medical diagnosis focus on criminal cases and on the traditional right-and-wrong test of criminal responsibility. It is questions such as whether the accused knew that he was doing wrong that psychiatrists object to answering. The objection is

30 Glueck, Mental Disorder And The Criminal Law 309n (1925).

so wide-spread and so bitter that we of the law cannot shrug it off as unreasonable. I believe it has a valid basis. But I do not think that the basis suggested in the statements quoted above is the valid one. As I understand these statements, they assume that the medical function is limited to that of diagnosis, to determining, on the basis of competent examination, whether any pathology exists, and if so, to pigeonholing that condition in one of the medically accepted classifications. But is that the extent of the doctor's function? What about prognosis? What about prescription? Certainly to us laymen these are the heart of the doctor's work. More important to us than knowing the medical name for what ails us are the questions: Will I die? Can you heal me? What must I do to get well? Should a doctor refuse to answer these questions on the ground that they are not "medical" questions? He may not be *able* to answer, because medical science (or, at least, he) does not know the answer. There are still unknown areas in every field. But that is very different from saying that it is a matter outside his jurisdiction. A lawyer may not know the answer to a legal problem, because the question has never been authoritatively decided (so far as he is aware) but that would not justify his refusing to answer it on the ground that it is not a legal question.

In a criminal case, should a doctor refuse to say whether the accused knew right from wrong on the ground that this is a legal and not a medical question? I suggest not. There is no such dichotomy between legal and medical questions. There are many "legal" issues on which psychiatrists may and properly do express expert opinions—whether a person would be dangerous if allowed at liberty, whether a testator understood what he was doing when he made his will, whether a party to a contract understood the nature of the transaction. Whether the accused knew at the time that his act was wrong is, in theory, no more legal or less medical than these others. To the extent that psychiatrists can say whether a defendant is corrigible or incorrigible, deterrable or non-deterrable, and so enable the sanctioning authorities to foresee the probable consequences of various sanctioning alternatives, they can make an important contribution to the growth of sound legal doctrine and administration.

The real reason why psychiatrists object to testifying concerning knowledge of right and wrong, I suggest, it not that such questions are legal and not medical, but that they are badly conceived and worded. Unlike the legal criteria employed in other situations, the right and wrong test of criminal responsibility seems to most psychiatrists to employ concepts so alien to the conceptology of modern psychiatry that they cannot work with it. Secondly, they find the test is based upon or intertwined with ethical and philosophical attitudes and as-

sumptions that are out of harmony with their own. Indeed, some of these attitudes and assumptions of the law may seem to the psychiatrist to be fundamentally and dangerously wrong: our belief that people have free choice to do or refrain from doing an act, and that they are therefore justly held responsible for their acts; our faith in threats of *punishment* to deter people from committing crime; our reliance on fear and on retributive justice; our assumption that long imprisonments will teach criminals to behave themselves. He cannot help carrying this attitude with him into the court room. There he finds the legal issues as drawn irrelevant or at least inadequate to what he deems to be the basic problem. He becomes emotionally involved. Yet because he appears in the capacity of a scientific expert, he does not want to be emotionally involved. He resents the position in which he finds himself.

But there is a big difference between objecting to all this and wanting to withdraw from it, between saying that the traditional test rests on unsound psychiatry and saying that it has nothing to do with psychiatry. It is one thing to argue that this test rests on such unsound or outmoded assumptions, or uses such unscientific terms, that no meaningful answers are possible. It is another thing to say that the test of criminal irresponsibility is a legal concept and that therefore a psychiatrist should refuse to concern himself with whether a given individual meets the test or not. The first objection could presumably be met by changing the test; the second could not be met at all. If the psychiatric assumptions that the law rests upon are unsound, there is the more need for psychiatrists to continue trying to set us straight, and not abandon us to our ignorance.

IV

Conclusions

In every situation in which the law allows mental illness to have some legal effect, the issue actually has two parts:

a. Was the person at the time in question mentally ill?
b. If so, was his mental illness of such degree or scope as to satisfy the legal criterion for that kind of situation?

Although both of these are "legal" issues in the sense that both are essential to the deciding of the case, the first is almost always left by the law to be decided as a matter of psychiatric fact or theory. And while the psychiatrists' answer to this question is sometimes not as clear-cut or as unanimous as laymen may like, it is probably unsound for the law to try to clear up the difficulty by legal fiat. It is reported that one legislature once undertook to enact that the value

of *pi* should henceforth be 3.1416. But scientific or other problems that are inherently difficult and uncertain are not rendered clear and easy by legislative knot-cutting.

The second of the two issues, that of the proper degree or "test" of mental illness that shall be required for any given legal consequence to follow, is a legal question in the stricter sense that its solution depends not solely upon scientific or other factual data, but upon a policy judgment as to the extent to which mental illness should be given the particular legal effect.

Such policy decision, however, like most policy decisions, should not be made in a vacuum. Experts in various relevant fields of learning, including psychiatrists, may well be able to contribute helpful data that will throw light on what the proper rule should be. Even more, they can provide the data necessary for intelligent application of the rule.

But one should not lose sight of the distinction between this factual background and the ultimate policy decision.

The generalization above, that experts can supply data that will be helpful in deciding the legal policy issue, applies in the particular issue of mental irresponsibility for crime as it does elsewhere. Suggestions that psychiatrists should refuse to testify to opinions on whether a defendant satisfies the requirements of the "test" of criminal responsibility rest more soundly on objection to the specific test that the law employs (particularly the right and wrong test) rather than on the ostensible argument that this is a "legal" matter on which it is improper for psychiatrists to give an opinion.