

Legal Relations of the Mentally Ill: A Functional Approach

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A recent article in a popular magazine is headed in large red type: "WHO'S RIGHT — THE LAWYER OR THE DOCTOR?"¹ The article itself is responsibly written and does not amount to a diatribe against law and lawyers by scientists or the reverse attack on scientists by lawyers or judges that so often appears. It does, however, bring to public focus a feeling that there exists a basic antagonism in forensic psychiatry and psychology.

Actually, much professional literature does reflect rather violent feelings back and forth among men trained to think in radically different patterns.² Many refuse to consider the probability that there has been too much "right or wrong" talk in this area already. When men incompletely understand each other, it is often found that tempers flare. To counteract this trend, the "law-science movement"³ has sprung forth with the idea that what is needed is an affirmative integration of the efforts of persons trained in the law and of those trained in science. It is this spirit which has prompted this special symposium and others like it.

The fundamental tenet of the law-science approach can be simply stated: In an age of science, those human principles designed to regulate human conduct ("rules of law") should be firmly grounded upon insights developed by the various sciences.

To achieve this goal, there must be a fundamental semantic cooperation of lawyer and scientist. "Communication barriers" have been erected between professional men as their individual specialties have grown. As each area of investigation has progressed, shorthand expressions ("technical jargon") have appeared. Communication is thereby facilitated among members of the

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¹ Deutch, *Woman's Home Companion*, June 1952, p. 44. Similar titles have recently appeared in the technical literature. For example, see Shindell, *Medicine vs. Law: A Proposal for Settlement*, 151 J.A.M.A. 1078 (1953).

² The main currents of this "conflict talk" are set out by Hall, *Mental Disease and Criminal Responsibility*, 45 COL. L. REV. 677 (1945), substantially reprinted as Chapter 14 of GENERAL PRINCIPLES OF CRIMINAL LAW 477 (1947).

³ Smith, *The Philosophical and Practical Basis for the Synthesis of Law and Science*, 31 TEXAS L. REV. 625 (1953); Editorial, *The Tulane University Law-Science Program*, 25 TULANE L. REV. 214 (1951); Brosman, *Two Recent Program Additions*, 24 TULANE L. REV. 108 (1949).

specialist group, but a verbal "iron curtain" is drawn as far as the specialist in another discipline is concerned.⁴

It has been the lawyer's task traditionally to serve the function of "humanist" as regards technical information. In a case where some scientific fact or theory is in issue, the advocate has been faced with a problem of digesting available technical knowledge and then translating it into readily understood terms for benefit of a tribunal lacking in specialized education or knowledge. Because of this history, scientists rightly expect lawyers to lead the way in forging law-science linkages. It will be our purpose here to call attention to several landmark efforts in this evolution in what has been called "psychological law."⁵

I. CONTRACTS AND WILLS

In civil cases the lawyer often encounters problems of mental illness in contract cases and will contests. Other instances in which such problems arise in a similar vein include guardianship proceedings, litigation involving family problems, and tort actions against the mentally ill. We will confine ourselves to contracts and wills in this discussion.⁶

Perhaps the most illuminating study in this area is that fashioned by Green on mental incompetency.^{7, 8, 9, 10, 11} Reaffirming

⁴ This professional isolationism has been well recognized by forward-looking psychiatrists. "Law and medicine, because they have each been pursuing their own ends independently, have come to talk, as it were, different languages. The aims of both professions are however, I believe, the same, so far at least as they affect the common weal, but they have thus far been unable to get together largely because they do not understand each other. Each profession has its background and traditions and habits of thought radically different from the other and finally each in his turn comes to talk its own language, which members of the other profession do not understand. There is a sore need for overcoming this difficulty of understanding, but so long as doctor and lawyer meet only as witness and cross-examiner there is little hope. We must get together and work together, and it is on the basis of the recognition of a common purpose that an understanding will come." White, *The Need for Cooperation Between the Legal Profession and the Psychiatrist in Dealing with the Crime Problem*, 52 A.B.A. REP. 497, 498 (1927).

⁵ Wharton speaks of the speciality of psychological law in his treatise on *MENTAL UNSOUNDNESS, EMBRACING A GENERAL VIEW OF PSYCHOLOGICAL LAW* (Published as Book 1, WHARTON AND STILLE'S *MEDICAL JURISPRUDENCE* [3d ed. 1873]).

⁶ A more all-inclusive presentation is that of Guttmacher and Weihofen, *Mental Incompetency*, 36 MINN. L. REV. 179 (1952), which forms the substance of Chapter 14 of their treatise, *PSYCHIATRY AND THE LAW* 323 (1952).

⁷ Green, *Public Policies Underlying the Law of Mental Incompetency*, 38 MICH. L. REV. 1189 (1940).

⁸, *Judicial Tests of Mental Competency*, 6 MO. L. REV. 141 (1941).

the view that the term "insanity" has come to have little usefulness because of its sematic abuse, he substitutes "mental incompetency" — "that type or degree of mental disorder, in any particular case, which is legally significant and which produces a different legal result than would have flowed from the same situation had not that particular type or degree of mental disorder been present."¹²

As I interpret Green's work, the following propositions seem to have great force:

1. Public policy underlying this law consists of derivations of two fundamental interests —

(a) Security

(1) "It is the policy of the law to protect the security of transactions;

(2) "It is the policy of the law to protect the security of acquisitions; and

(3) "It is the policy of the law to protect the social institution of the family."¹³

(b) Equality

"People are not equals in any real or substantial sense, and the law has recognized this truth. In realizing the glaring discrepancy between the real and the ideal, the law has sought to remedy the situation by producing equality where inequality had heretofore existed. It has developed a policy of equalization, which it has put into effect by extending a measure of protection to those classes of persons who are not, in any real sense, the equals of their contemporaries in the society in which they live."¹⁴

This protective policy assumes three forms:

(1) "Protection of the public or of society at large from the acts of the mental incompetent.

(2) "Protection of the incompetent from society, because of the unequal position which he occupies toward his fellow men.

(3) "Protection, not of society, nor of the incompetent himself, but of the family or dependents of the incompetent."¹⁵

⁹, *Fraud, Undue Influence and Mental Incompetency*, — *A Study in Related Concepts*, 43 COL. L. REV. 176 (1943).

¹⁰, *The Operative Effect of Mental Incompetency on Agreements and Wills*, 21 TEXAS L. REV. 554 (1943).

¹¹, *Proof of Mental Incompetency and the Unexpressed Major Premise*, 53 YALE L. J. 271 (1944).

¹² Green, *supra*, note 7, at 1191-92.

¹³ *Id.* at 1207.

¹⁴ *Id.* at 1207-08.

¹⁵ *Id.* at 1213.

2. In establishing judicial tests for mental incompetency, i. e., drawing a line of demarcation between the "normal" and the "mentally incompetent," a subjective standard is ostensibly applied whereas in reality an objective standard is used. Though the traditional "understanding test"¹⁶ is stated as the rule of law, judges, of necessity, cannot probe the inner reaches of the mind. Rather, "they base their judgments, just as the psychiatrists do, upon the behavior of the person investigated, only they do not admit they are doing it. Having examined (from the evidence produced at trial) the behavior of the individual, insofar as that behavior was revealed to the court, the judge (or jury) then passes upon the question as to whether or not that behavior conformed to the standard set by the law. Since the standard is phrased in terms of mind, and not in terms of behavior, the fact finder draws the necessary inference of the state of the individual's mind from his observed behavior. In other words, he must translate his actual finding into the language of the standard which has been set up. But the fact remains that what is actually happening is that judges, no less than psychiatrists, are employing an essentially behavioristic technique. The difference lies in the fact that the judges do not do it deliberately, but still conduct their inquiry as if they were not examining behavior, but instead were scrutinizing mind."¹⁷
3. Since the law is necessarily concerned with separating somewhat arbitrarily those persons who are "normal" and those who do not meet the test of "mental competency," cases which fall close to the line often present difficulties. In order to compensate for lack of a "sliding scale of legal effects," the law is able to mitigate possible harsh results in these borderline cases by integrating concepts of fraud and undue influence with those of mental incompetency.
4. In establishing the operative effect of a finding of mental incapacity on wills or contracts (i. e., are they "void" or "voidable"), courts must weigh two conflicting public policies. "One policy is to protect the incompetent or his dependents. The other is to uphold the security of transactions. These policies are at war with each other. If full recognition is given to the former the instrument will be held utterly void. If full recognition is given to the latter the instrument will be held valid. However, the modern tendency is to adopt neither of these extreme positions but rather to effect some sort of compromise between these conflicting policies. The compromise is effected under the guise of calling the instrument 'voidable,' but in measuring the legal consequence flowing from this concept the courts try to work out a

¹⁶ *In re Humphrey*, 236 N.C. 141, 71 S.E.2d 915, 917 (1952).

¹⁷ Green, *supra* note 8, at 161. See also Malan, *The Behaviouristic Basis of the Science of Law*, 8 A.B.A.J. 737 (1922), 9 A.B.A.J. 43 (1923).

result which will balance the competing equities in the concrete case."¹⁸

5. Evidentiary facts used to establish the probandum of mental incompetency can be conveniently classed in four groups:
 - (a) "Symptomatic conduct of the alleged incompetent;
 - (b) "Opinion testimony of incompetency;
 - (c) "Organic condition and habits of the alleged incompetent;
 - (d) "Moral aspects of the transaction and its consequences."¹⁹

Green submits that probative value increases as one goes down the list. Indeed, he suggests that a sub-category of (d) is often controlling. This consideration is "whether or not the transaction conforms to the normal pattern of similar transactions."²⁰ The touchstone of this entire thread of the law as concerns the science of proof,²¹ is forcefully distilled by Green with an assist from Llewellyn:

"It is submitted that in determining the issue of mental incompetency, more frequently than otherwise, courts are passing upon the abnormality of the transaction rather than on the ability of the alleged incompetent to understand the transaction. To rephrase this thought in terms of legal doctrine, we might say that since, both in unconscious desire and in articulate effort, the court is seeking evidence on whether mental incompetency *has affected the particular transaction*, the dominant factor in the evidence is whether the court sees *the particular transaction in its result* as that which a reasonably competent man might have made."²²

The reader is, of course, referred to Green's masterful analysis of the cases in this area which found the general propositions set out. It has been the pitfall of many lawyers, and more particularly of scientists, to be unable or unwilling to look beyond the bare statements of rules of law for their functional underpinnings. When the more pervasive principles are examined, however, I feel that increased understanding is mutually promoted between scientists and lawyers. It amounts to a process not unlike depth-analysis of the psychiatrist, the meticulous dissection of the anatomist, or the astute probing for cause and effect of the medical clinician.

II. HOSPITALIZATION OF THE MENTALLY ILL

Current attention as regards hospitalization is largely centered

¹⁸ Green, *supra* note 10, at 589.

¹⁹ Green, *supra* note 11, at 275.

²⁰ *Id.* at 298-99.

²¹ See *infra* note 38.

²² Green, *supra* note 11 at 307-07.

on the *Draft Act Governing Hospitalization of the Mentally Ill*.²³ Since hospitalization of the mentally ill is now predominately within the scope of state medicine, it was entirely proper that an agency of the federal government concern itself with drafting this important model legislation. It can be hoped that within a relatively short span of years the several states will see fit to consider and adopt the Act in its essential features.

Again, we see the older term "insanity" discarded in favor of more useful terminology. By Section 1, (a), a mentally ill individual is defined as "an individual having a psychiatric or other disease which substantially impairs his mental health."²⁴ Here, we are more properly dealing with a clinical diagnosis of psychiatric illness than we were when considering mental incompetency. Goals of the law are different in the two situations. The rationale of hospitalization has to do with treatment and rehabilitation. With mental incompetency, we were more concerned with the ability of the individual to carry on certain transactions. There is a valid reason, therefore, for establishing clinical criteria of mental illness when hospitalization is at issue, though we feel justified in looking to a standard of "fairness or unfairness of the individual transaction" in litigation involving mental incompetency.

Under provisions for voluntary hospitalization, treatability appears as the primary concern. Any person who is mentally ill under the definition cited, or who has symptoms of mental illness, comes within the purview of this part of the Draft Act. Of course, effective implementation of such provisions in hospitalization laws is beyond present contemplation due to the shortage of facilities and trained personnel—a reflection of traditional public apathy toward the mentally ill.

With involuntary hospitalization, the criteria for admission involve not only the fact of mental illness, but also additional social factors. Under the standard nonjudicial procedure with certification by two designated examiners, it is required "that they have examined the individual and that they are of the opinion that

- (A) he is mentally ill, and
- (B) because of his illness is likely to injure himself or others if allowed to remain at liberty, or
- (C) is in need of treatment in a mental hospital, and because of his illness, lacks sufficient insight or capacity to make responsible application therefor."²⁵

It becomes apparent, then, that there is no necessary correlation between "mental incompetency" and "mental illness which is

²³ PUBLIC HEALTH SERVICE PUBLICATION No. 51, A DRAFT ACT GOVERNING HOSPITALIZATION OF THE MENTALLY ILL (1952). The text of the Act, devoid of commentary, is reprinted in DAVIDSON, FORENSIC PSYCHIATRY 377 (1952).

²⁴ DRAFT ACT, *supra* note 23, at 4.

²⁵ *Id.* at 6.

treatable or which may endanger the physical safety of the patient or others." In the past, these terms have too often been confused as a result of using the term "insanity." Today we find persons who require hospitalization but who are not mentally incompetent. So also, there are mentally incompetent individuals who could not benefit from hospitalization and who are not patently dangerous to others. Justice is certainly not fostered by lumping all of these people together under the label, "insane."

A scope note prefacing the Draft Act indicates that the definition of mentally ill person excludes the mentally defective, but is intended to "include persons who are psychopaths, chronic alcoholics, or members of other special groups . . . to the extent that the individual meets the criteria set forth in the definition."²⁶ This brings us to a consideration of one of the greatest enigmas confronting law and medicine today — what to do about the so-called "psychopath" or "neurotic character" — the person who is not "out of touch with reality" but whose disorder lies in the fact that he suffers from "a form of neurotic reaction which has as its principal symptom a deviation of behavior which is antisocial and undesirable by present day moral and legal standards."²⁷ In short, his disturbance in personal adjustment is "taken out on his environment" rather than internalized as is the case with other neurotics.

Traditionally, the state mental hospitals have been primarily devoted to the care of psychotic individuals. Often, when "psychopaths" were admitted upon request of law enforcement officers or others because of violent behavior, these people caused such disturbances in the hospital that administrators were wont to release them as soon as possible. Since many psychiatrists adhered to a "gentlemen's agreement" type of approach to "sanity hearings," they were willing to equate "insanity" with "psychosis," and since the "psychopath" was not technically psychotic, they opined that he was not "insane" and so was eligible for release despite his potential for destruction.

Since the newer legislation contemplated under the model Draft Act makes provision for hospitalizing "psychopaths," it will be up to the public to demand facilities for their treatment (if treatable) or their social isolation (if they are sources of danger to the community).

These are only the more apparent offsprings of the clarification in definition of mental illness. Others are certain to follow if the legislation is widely adopted. Our thought in stressing a revised terminology has been to contrast "mental incompetency" with "mental illness" (as defined in the Draft Act). Now let us turn

²⁶ *Id.* at 1.

²⁷ STRECKER, EBAUGH, AND EWALT, *PRACTICAL CLINICAL PSYCHIATRY* 311 (7th ed. 1951).

to another semantic problem involving "responsibility" and "accountability."

III. CRIMINAL RESPONSIBILITY OR ACCOUNTABILITY

The professional literature abounds in discussions of mental states and the criminal law. My limited purpose here is to invite attention to three crucial constellations of inquiry in this field:

1. Substitution of "accountability" for "responsibility" in the legal test of mental disease sufficient to establish a defense to crime;
2. Substitution of "clinical language" for "punitive terms" in the rehabilitation of criminal offenders;
3. Basic changes in criminal law administration to uphold the law and yet salvage human resources now being dissipated.

The first of these hinges on a very provocative article that appeared just last year.²⁸ Instead of inquiring as to whether "the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong," the inquiry becomes, "was the defendant suffering from disease of the mind and if so, was it sufficient to render him unaccountable under the law for the crime charged?"²⁹ As explained by the authors, "the question then becomes not whether his knowledge of the quality or nature of the act, and his comprehension that he was doing wrong was affected, but whether the total personality (*i. e.*, the ego), was impaired by mental disease to a degree rendering him unable to adjust to society's rules.³⁰ . . . The anticipated benefit in expert testimony by the use of the concept 'accountability' is in the direction of providing an objective description and analysis of subjective phenomena in persons accused of crime in conjunction with an estimation of the degree of ego impairment resulting from his illness. In estimating the impairment of the whole organism, not merely a traditionally restricted area of mental function will be the subject of the test, but the degree of disturbance of total personality function will be examined. . . . What the psychiatrist estimates is the degree of socio-biologic impairment (illness) of the person in terms of present day psychologic knowledge. The jury would decide to accept or reject the psychiatrist's opinion of how accountable the prisoner is without recourse to the 'knowledge of right or wrong' test. The suggested test is broader and more realistic. It is not

²⁸Bromberg and Cleckley, *The Medico-Legal Dilemma; A Suggested Solution*, 42 J. CRIM. L., CRIMINOLOGY, AND POLICE SCIENCE 729 (1952).

²⁹The older language is quoted from M'Naghten's Case, 10 Clark & Finney 200, 210; 8 Eng. Rep. 718, 722 (1843). The suggested test is that of Bromberg and Cleckley, *supra* note 28, at 742.

³⁰Bromberg and Cleckley, *supra* note 28, at 744.

applied to an arbitrary isolated 'moral sense' but to the functional capacity of the actual human organism as he is encountered in practical life and in medical study."³¹

This approach to the problem of determining criminal accountability is certainly of the functional variety, but many people are concerned lest we center all our attention on "insanity as a defense in criminal cases." Is not the post-conviction stage worthy of more emphasis? Since juries can be capricious and "convict the innocent" or convict the mentally ill who are nevertheless "accountable" in their eyes, what of these victims? What of the many convicts who manifest social or emotional pathology that does not enter into the "defense of insanity"?

Again, in this, our second inquiry, new concepts are being applied. Recently, the Attorney General of the United States announced³² that the Federal Youth Corrections Act³³ would be promptly implemented.³⁴ Clinical terms of "treatment and rehabilitation" replace "punishment and retribution"! Rumbblings of the many ways in which modern dynamic psychology and psychiatry are being brought to bear in this movement are cogently spotlighted by a distinguished lawyer and psychoanalyst, Marcel Frym.³⁵ When the insights of scientists are effectively marshalled to actually treat and rehabilitate criminal offenders — the process now underway — we can look forward to a further step which may mitigate problems inherent in the first two inquiries.

This third improvement, though perhaps appearing radical at first blush, has actually been advocated for many years by persons learned in the law. Wharton's analysis, published eighty years ago, to my mind is a classic and deserves quotation:

If the views taken in the preceding sections be sound; if in the first place, there are inherent difficulties in the way of making insanity a ground of defense on the trial of a man who, on this hypothesis, is psychologically incapable of either tendering or preparing any such issue; if, in the second place, we must recognize sanity and insanity as pressing into each other gradually at a line that cannot be judicially defined, each being capable of various degrees;

³¹ *Id.* at 744-45.

³² K.C. Times, May 23, 1953, p. 1, col. 3.

³³ 64 STAT. 1035 (1950), 18 U.S.C. Ch. 402 (Supp. 1951).

³⁴ See also Bennett, *Blueprinting the New Youth Corrections Program*, 15 FEDERAL PROBATION, 3 (Sept. 1951).

³⁵ *The Criminal Intent; Outdated Concept*, 31 TEXAS L. REV. 260 (1953). In addition, see Hacker and Frym, *The Legal Concept of Insanity and the Treatment of Criminal Impulses*, 37 CALIF. L. REV. 575 (1949). In earlier years, Karl Menninger spearheaded this development. MENNINGER, *THE HUMAN MIND* 443-460 (3d ed. 1945); *Medicolegal Proposals of the American Psychiatric Association*, 52 A.B.A. REP. 486 (1927); *The Psychiatrist in Relation to Crime*, 51 A. B. A. REP. 751 (1926).

if, in the third place, it be right that the present system of confinement of insane criminals be remodeled—then it will become necessary for those to whom the work of legislation is committed to amend the law so as to require the question of insanity to be determined by a competent tribunal *after* a conviction of the fact of guilt. For the following undeniable evils result from the present system:

a. A tribunal of at least but secondary competence is charged with the determination of the most difficult and yet most momentous question to which human observation can be applied.

b. A subject is introduced into the question of guilt or innocence, as to which no fixed judicial rules can be laid down, and which really concerns only the character and the extent of punishment.

c. We find by this process the *sane* convict; the *malignant insane* convict, who requires discipline and is in some degree morally responsible; the *innocent insane* convict; and the *lunatic*, who is in confinement but is not charged with crime: for all of whom there is in some jurisdictions but *one* common method of discipline provided, viz., that of the penitentiary; in others, but *two*, that of the penitentiary and of the ordinary lunatic asylum. The result of this is acquittals in some cases, where there should be convictions; convictions in other cases, where there should be acquittals, and in almost all cases an erroneous system of punishment.

The remedy for these difficulties is one to which we must come sooner or later, and for which the common law has been from the beginning always striving, and yet losing from almost its very grasp. It is to confine the inquiry before the court and jury to the mere *factum* of the commission of the offence; reserving the question of the treatment to be determined by a special commission of experts, to be appointed for the purpose of examining convicts alleged to be insane. The proposition to be put by the court to the jury, under such circumstances, is not, "Was the defendant capable of judging between right and wrong?" a proposition which no jury can determine, but "Did he," as a matter of fact, "commit the specific act charged?" For whether he committed it as sane or insane, the result is, if the offence in point of law is indictable, that the safety of society requires that he should be placed in seclusion for such a period as will promote the joint ends of personal reformation and the preservation of the well-being of the community at large. If he be guilty without the palliation of mental infirmity, certainly the severest penal code—with the single qualification of cases of murder in the first degree—can ask nothing more than this. If, on the other hand, he was at the time laboring under mental derangement, in no other way can the extent of his responsibility be accurately determined and the proper degree of discipline adjusted. For this great question of sanity or insanity can really be only determined by those to whose daily and hourly care the convict is committed, and who have

thus full opportunity of inquiring into his antecedent as well as his present condition. "Thus," to adopt the language of an intelligent commentator, "except as regards the curative course to be adopted, on our view of the case, the subtle line of distinction which there have been so many abortive attempts to draw, between criminal and non-criminal lunatics, is of no practical importance, and the unavailing search, unless as a matter of metaphysical speculation, may be abandoned as unnecessary. In either case, the person concerned, whether called a lunatic, or an ordinary criminal, should be so placed as to put it out of his power to inflict further injury, and to afford the most likely means for his cure." And thus, also, not only will the sanction of human life and property be protected from the recurrence of those monstrous acquittals, by which, under the plea of insanity, the most dangerous criminals are suffered to run at large, but the interests of humanity will be subserved by a proper discipline, as well as a just classification, of those whose accountability is diminished or destroyed.³⁶

By thus abolishing, in effect, the defense of insanity, a fundamental change in the philosophy of criminal law would be effected. It is evident that society is not yet ready for such drastic reform.³⁷ A prerequisite, it seems, will be a successfully established rehabili-

³⁶ WHARTON, *op. cit. supra* note 5, at 764-769. In conjunction with the citation of nineteenth century commentators, a remark by Val Satterfield, Chairman, Psychiatry Section, American Academy of Forensic Sciences, is instructive. He calls attention to the tendency of modern students of forensic psychiatry to gloss over the writings of nineteenth century observers and in so doing to lose a number of potent insights (personal communication).

³⁷ Judge Parker, in a majority opinion of the Supreme Court of Washington, considers the state's argument that modern humane treatment of convicts "practically removes them from the realm of punishment and places them in a position but little different from those other unfortunate members of society which the state is obliged to care for and restrain of their liberty; not because they have committed wrong, but because of their menace to society and themselves without fault of their own, the insane The argument seems, to be, in its last analysis, that because of modern humane methods in caring for and treating those convicted of crime, there is no longer any reason for taking into consideration the element of will on the part of those who commit prohibited acts, when their guilt is being determined for the purpose of putting them in the criminal class for restraint and treatment. Learned counsel's premise suggests a noble conception, and may give promise of a condition of things towards which the humanitarian spirit of the age is tending; yet the stern and awful fact still remains, and is patent to all men, that the status and condition, in the eyes of the world and under the law, of one convicted of crime is vastly different from that of one simply adjudged insane. We cannot shut our eyes to the fact that the element of punishment is still in our criminal laws." *State v. Strasburg*, 60 Wash. 106, 110 Pac. 1020, 1025 (1910). See also Tulin, *The Problem of Mental Disorder in Crime: A Survey*, 32 COL. L. REV. 933, 952-53 (1932); Rood, *Statutory Abolition of the Defense of Insanity in Criminal Cases*, 9 MICH. L. REV. 126 (1910).

tation program that has vigor if the lurking constitutional objections are to be overcome.

In working through the functional interrelations of these three facets of criminal justice, we gain a clearer realization of the distinct problems that arise in the criminal law as opposed to the psychiatric problems found in civil litigation. Let us now move into the arena of the courtroom and look at witnesses and parties that may be mentally ill.

IV. THE MENTALLY ILL ON THE WITNESS STAND AND AS PARTIES IN PERSONAL INJURY LITIGATION

The ramifications of this subject have not yet been explored in any great detail. A broad framework for investigation, however, has been constructed by Wigmore and Smith. Wigmore lists "mental derangement" as one of the generic human traits to be considered in analyzing testimonial evidence and cites a copious literature, much of which is outdated however.³⁸ We need a modern series of systematic psychological studies of witnesses, it seems to me, before we can crystallize functional generalizations that amount to more than "courtroom hunches," valuable as these may be.³⁹

Smith has been developing a series of comprehensive investigations involving problems of mental illness as they arise in personal injury litigation.⁴⁰ Through the active cooperation of many scientists in diverse fields, he has been extremely successful in weaving together a functional approach to the so-called "traumatic neuroses and psychoses." Since the law-science integration in this field is undergoing rapid development currently, it is rather premature at this juncture to attempt detailed report on its progress. Suffice to say, we are presently hammering out the fundamentals in the courtroom (through medicolegal consultation work), in the classroom (through lectures, demonstrations, and discussions in forensic neurology and psychiatry), in special lectures (to claims men and plaintiff's attorneys in particular), and in medicolegal research projects (emphasizing intensive student participation).

³⁸ THE SCIENCE OF JUDICIAL PROOF 345 (3d ed. 1937).

³⁹ BURTT, LEGAL PSYCHOLOGY (1931) manages only a single paragraph on this topic (p. 115). Recently, however, more study has been given this fertile area. See, for example, Note, *Psychiatric Evaluation of the Mentally Abnormal Witness*, 59 YALE L. J. 1324 (1950), and Orenstein, *Examination of the Complicating Witness in a Criminal Court*, 107 AM. J. PSYCHIAT. 684 (1951).

⁴⁰ *Cross-Examination of Neuropsychiatric Testimony in Personal Injury Cases*, 4 VAND. L. REV. 1 (1950); *Psychic Interest in Continuation of One's Own Life: Legal Recognition and Protection*, 98 U. OF PA. L. REV. 781 (1950); Smith and Cobb, *Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli*, 30 VA. L. REV. 193 (1944), 19 ANN. INT. MED. 873 (1943); Smith and Solomon, *Traumatic Neuroses in Court*, 30 VA. L. REV. 87 (1943), 21 ANN. INT. MED. 367 (1944).

V. CONCLUSION

From our survey of several problem areas in the legal relations of the mentally ill, it is possible to suggest certain guides for the future development of forensic psychiatry and psychology.

1. Broadly conceived notions of law-science integration are required.⁴¹ No longer can the scientist shrug his shoulders and say that these medicolegal problems do not concern him. Lawyers and judges cannot continue to dodge their responsibility to act in the light of the best psychological information extant.

2. Communication barriers must be bridged between scientific specialists and lawyers. Until men in these various disciplines make deliberate effort to become conversant with the various viewpoints that have been developed in the "other man's province," future progress is problematical. The limited number of men who are today trained in both science and the law cannot "go it alone." They require active cooperation from all sides.

3. Public apathy toward problems of the mentally ill has been reflected in the archaic condition of statutory law in many states. For the most part, provision for periodic revision to keep pace with current situations is non-existent. Lawyers have a special duty in this field⁴² and many are showing increased interest in the problems involved.⁴³

4. In this review, I have examined the viewpoints of several authorities who have made significant contributions toward our understanding of basic problems in limited areas of psychological law. It is not represented that this amounts to a thorough survey or an extensive analysis. The aim has been merely to throw a spotlight on several of the leading guideposts to the future.

5. Finally, we must recognize the tentative nature of our present insights and give heed to the counsel of a great legal scholar, Bishop:

This subject of insanity is practically difficult. Men of sane mind know themselves but imperfectly, and they comprehend others less than themselves; nor is there language to convey, in exact form even the little knowledge we possess of the sane mind. When, therefore, we undertake

⁴¹ "It is not easy to over-estimate or to exaggerate the importance of the subject;—the great difficulties that surround it,—its bearing upon personal liberty and life,—the rights of property and the safety of society,— all enhance the necessity of approaching insanity with a true appreciation of the strength of the ramparts behind which it is intrenched." ELWELL, *A MEDICO-LEGAL TREATISE ON MALPRACTICE, MEDICAL EVIDENCE, AND INSANITY* 371-72 (4th ed. 1881).

⁴² Melaney, *Commitment of the Mentally Ill: Treatment or Travesty?*, 12 U. OF PITT. L. REV. 52 (1950).

⁴³ The American Bar Association has had a Special Committee on Rights of the Mentally Ill for ten years. 68 A.B.A. REP. 183 (1943).

to investigate the phenomena of insanity, to discuss them, and to deduce from the principles of law the legal rules to govern them, we are embarrassed with difficulties which should make us cautious, and restrain us from any extensive laying down of doctrines for unseen future cases. So that *caution* should guide judges, counsel, and juries in their investigations of insanity. They may well restrict their theories to the particular facts in issue, and though they accept the aid of experts it should not be overlooked that they are liable to err. . . . We think ourselves wiser upon this subject than were our fathers; undoubtedly we are but there is wisdom yet to be acquired.⁴⁴

⁴⁴ 1 BISHOP, THE CRIMINAL LAW 240 (8th ed. 1892).