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## VALUES, CONCEPTS, AND THE ASSESSMENT OF PERSONAL DEVIANCY

ROBERT S. REDMOUNT\*

PERSONAL deviancy is an arresting subject. It involves the highly significant political consideration of the government of men by one another. It involves the perplexing moral problem of determining responsibility for behavior. It concerns the challenging intellectual issue of developing an adequate understanding of the problem. Characteristically, these elemental perspectives are fused, and a diversity of opinion results. It results preliminarily from a lack of clear communication.

### I

#### PROFESSIONAL PERCEPTIONS AND BIASES

In principle, it is the mark of a profession that it accentuates certain values and certain knowledge in dealing with a problem. From a unitary legal perspective, personal deviancy is primarily a matter of governing man with a firm sense of order and propriety. From a single psychiatric viewpoint, it is essentially the concern of developing and applying knowledge of human behavior.

The reckoning for each profession comes in its confrontation with social reality. Law and psychiatry are pre-eminently ministrants of human needs. On a distinctly practical level, each encroaches on the ground the other hallows. Lawyers dwell in knowledge of personal deviancy, and psychiatrists fan the fires of social value preferences. These are familiar effects.

Of equally critical regard, at least, is the effect "contamination"

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\* A.B. 1943, M.S. 1947, Pennsylvania State University; Ph.D. 1949, New York University; LL.B. 1957, Yale University. Member of the Connecticut bar; Certified Psychologist, New York. Author of several articles relating psychology to law.

by social urgency has upon familiar professional dispositions. Knowledge of psychiatry becomes obscured by the necessity for knowledge. Law's need for decision impairs and obscures well-articulated and intelligent decision-making. To obscure the confusion, each relies on the hallowing influences of its traditions and on its symbolic identification as a paragon in its operational sphere.

#### A. An Analytical View of Psychiatry

The equivocal status of knowledge in psychiatry springs differing perceptions among psychiatrists concerning their field. One constellation of thought focuses on the abomination of diffuse concepts and applications. In this view, psychiatry presently lacks intellectual rigor and discipline, and the challenge is to mold an intellectual field that is reasonably discrete in its organization and properties. Intellectual properties, and moral dispositions and decisions are confused. There is uncritical regard for the extrapolation of theoretical models in physical and biological science to the field of psychiatry. And focal interests and objectives are poorly defined.

One of the fresh contributors on the psychiatric scene, Szasz, has made particular note of the infusion of moral and social value decisions in some of the concepts and operations of psychiatry. His examination of malingering, for example, leads him to view this phenomenon not as a discrete behavioral entity, self-possessed in its operations, but as a social and moral judgment of a person's behavior in particular circumstances.<sup>1</sup> Similarly, he is disposed to view the familiar diagnostic label "psychopathic personality" not as veritable analysis of behavior, but as judgment. "To have a 'psychopathic personality' is only a more elegant way of expressing moral condemnation."<sup>2</sup>

Szasz censures psychiatry on this account, and he also censures the psychiatrists who practice social and moral judgment-making in the name of psychiatry. In a spate of articles,<sup>3</sup> he takes particular note of

<sup>1</sup> Szasz, *Malingering: 'Diagnosis' or 'Social Condemnation'*, 76 ARCH. NEUR. & PSYCHIAT. 432 (1957). For a view of malingering as a syndrome of illness and symptomatic of severe psychopathology see Eissler, *Malingering*, in PSYCHOANALYSIS AND CULTURE 218 (Wilbur & Munsterberger eds. 1951).

<sup>2</sup> Szasz, *Psychiatry, Ethics and the Criminal Law*, 58 COLUM. L. REV. 183, 195 (1958).

<sup>3</sup> Szasz: *Some Observations on the Relationship Between Psychiatry and Law*, 75 ARCH. NEUR. & PSYCHIAT. 297 (1956); *Psychiatric Expert Testimony—Its Covert Meaning and Social Function*, 20 PSYCHIATRY 313 (1957); *The Concept of Testamentary Capacity*, 125 J. NERV. & MENT. DIS. 474 (1957).

the forensic psychiatrist. He observes that the latter is merely a pawn in a legally sponsored morality play, else he is making social policy under a disguise of intellectual privilege. Viewing psychiatric testimony in terms of purpose and effects, he deduces that judgments on such matters as "insanity" and "testamentary capacity" have no psychiatric (intellectual) meaning.<sup>4</sup> They are only fungible legal concepts that make a choice of accepting or rejecting particular behavior more congenial. The psychiatrist who testifies on "insanity" acts in a sacerdotal function and merely states his preferences.<sup>5</sup>

The problem of appropriate theoretical models is a more familiar dilemma to the psychiatrist.<sup>6</sup> Here enters the conflict that is crudely fashioned as a struggle between the psychoanalysts and the "organically oriented" psychiatrists. Is mental disorder a "maladjustment" to be studied within a social framework and conceived in terms of social science? Or is it a "disease" to be viewed within a biological framework and probed in terms of the laws and operations that apply here? To say that there are concomitants of both is description that falls far short of explanation, and it begs the question. The differences in theoretical axes, which currently compete for eminence in the explanation and accountability of human behavior, have profound social and political implications. The biological view posits the idea of normality on a statistical and clinical basis. The thresholds of behavior are fixed pre-

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<sup>4</sup> Szasz, *The Concept of Testamentary Capacity*, 125 J. NERV. & MENT. DIS. 474-76 (1957). Cf. note 22, *infra*, and related text.

<sup>5</sup> Szasz, *op. cit. supra* note 2, at 189, 195-96 and Szasz, *op. cit. supra* note 4, at 475-77.

<sup>6</sup> Many references to the problem, and to the basic division in thought are found in DYNAMIC PSYCHIATRY (Alexander & Ross eds, 1952). See Alexander & Szasz, *The Psychosomatic Approach in Medicine*, *id.* at 369-71; Brosin, *A Review of the Influence of Psychoanalysis on Current Thought*, *id.* at 508-34; Whitehorn, *Psychodynamic Approach to the Study of Psychoses*, *id.* at 255-67.

For sharply contrasting views of "mental illness" see, as an instance of the "organic" approach, COBB, BORDERLANDS IN PSYCHIATRY (1946) and, as an instance of the "dynamic" or "psychoanalytic" approach, ENGLISH & FINCH, INTRODUCTION TO PSYCHIATRY (2d ed. 1957). Cf. references in note 48, *infra*, and related text and references in notes 57-61, *infra*, and related text.

Clearly, the division is not impenetrable. See, as an instance of some combining of "dynamic" and "organic" approaches, MASSERMAN, PRINCIPLES OF DYNAMIC PSYCHIATRY (1946). Further, the relationship of the "organic" and "dynamic" views to one another is not static.

The preponderance of any one view for any particular type of illness is at least in part a function of increments in knowledge attributable to research. The prestige of one view or another shifts somewhat in accordance with the results from each that contribute more plausible explanation, or confirmed changes and reversal in behavior.

dominantly in terms of a physical-biological orbit, and optima are expressed in terms of mechanical efficiency and linear growth. The psychosocial view, in our current state of knowledge, projects as the ultimate issue the *acceptability* of behavior in terms of social value judgment. Conformity within a range of social expectations and plasticity according to the exigencies of social situations are the essential denominators. While these two views may be artfully reconciled, they stand for important differences in one's view of experience and reality.

Psychiatry is squarely in the middle of the issue, and very much in pain. Borrowing on a medical heritage, its disposition has been to *assume* a biological framework. However, the assumption is in line of fire from substantial numbers of psychiatrists who find that they are unable to operate in the area of human behavior in biological terms that are either too remote or too irrelevant to afford good explanation.

It is only a step in logic to hold that as the operations in psychiatry are uncertain, its operational sphere is indefinite. As a component of the institution of medicine, its activities concentrate along the divisions and characteristics of operation afforded in hospital practice. The severely malfunctioning individual (socially or biologically) is seen on an inpatient or outpatient basis and is routinely administered the medical panoply of physical and mental examinations, laboratory tests, and personal history inquiry. He is given chemical prescriptions, psychological succorance, and routinized observation through visits and appointments.

But it is not at all strange today to find the psychiatrist in the role of social entrepreneur, operating in an institutional context outside of medicine or from executive and policy-making command posts blandly labeled "psychiatrist's office." He counsels on international problems, industrial relations, educational policies, and the social *weltanschauung*, openly, or by implication in the emphases he gives the personal problems of individual clients. The operational medium for what is essentially an expository role is the analysis of personality and multidimensional meanings in actions and attitudes. The psychiatrist, in a normal remedial capacity in which he capitalizes on psychological skill and knowledge, advances public policies that reflect elements of particularistic social philosophy and political interest. There are some psychiatrists, notably Redlich,<sup>7</sup> who seek a distinction—or at least clarification—for psychiatry not only in terms of operations, but also in terms of opera-

<sup>7</sup> Redlich, *The Concept of Health in Psychiatry*, in *EXPLORATIONS IN SOCIAL PSYCHIATRY* 138 (Leighton, Clausen & Wilson eds. 1957).

tional spheres. They entertain a more sophisticated view of their profession.

Cogently, the introspective approach to psychiatry tends to concentrate among those psychiatrists with substantial academic affiliations. They can best pause to reflect upon, analyze, and criticize the basic structure and operations of their discipline. They view a macrocosm of experience, and they are not pressed to assume an identification and authority to bring to bear immediate results in the application of psychiatry to particular social problems. Their strength is as much in their intellectual identifications as in their social and political power.

Characteristically, however, it is a more sacral view of psychiatry that abides. The authority of psychiatry within its medical sphere of ministration is reassuring to a needful public, even among those who would invoke its power only in desperation and at the last moment. Also, the barbituate effects of power dull the analytical dispositions and sensibilities of psychiatrists and create of power a shining object of desire in a socially significant profession. These reciprocal processes aggrandize psychiatry, but in terms of power and prestige rather than knowledge and penetration.

Typically, as a result, it is more traditional and familiar to focus on the integrative features that tend to reflect the strength and probity of the profession. These are nominal adherence to medical practices, a fixed diagnostic system, however limited, and traditional forms of prescription and treatment within the conceptual framework of health and disease.<sup>8</sup> Expressly or by implication, pride is shown in the measure of coherence and discipline of the intellectual framework, and in the social value and persuasion of its offerings. Such a view has a significant bearing on how much social power the profession can and does achieve. The distinction between intellectual authority and the accretion or insulation of social power is sometimes faint. In fact, the properly determinative intellectual boundaries become shrouded in a fog of *some* valid operation and beneficial result, *some* clarity and consistency of point of view, *some*

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<sup>8</sup> "The methods of psychiatry which purport to establish differences between normal and abnormal are in many respects patterned after the methods of medicine . . . . These methods may be divided into 1) eliciting the *history* of the subjective symptoms, 2) obtaining objective signs, and 3) using laboratory techniques. Yet it is quite obvious that elicitation of subjective symptoms is more important in psychiatry than in internal medicine and that obtaining objective signs is more difficult and limited." Redlich, *supra* note 7, at 145. Cf. Szasz, *The Problem of Psychiatric Nosology*, 114 AM. J. PSYCHIATRY 405 (1957).

fibrous institutional framework, and *some* pomp and pretense that is impenetrable without knowledge of the profession.

The development and proof of knowledge, and the insulation and expansion of power with or without that knowledge, are virtually inseparables in the practical applications of psychiatry. There may exist, in fact, a mutual dependency that broadens the base and extends the services of psychiatry, but at the risk of greater diffusion and uncertainty in its intellectual premises.

It is in the light of such analysis that one may better understand the views and dispositions of psychiatric advocates. They emphasize either the discreteness of psychiatry's point of view or else the probity of its contribution, and in both instances, they aim to achieve a larger degree of integrity and recognition for the profession. Thus, among psychiatrists, there are those, notably in the forensic field, who magnify particular perspectives and ignore others so as to achieve a discreteness of function for psychiatry. "Psychiatry is a therapeutic discipline, law a sanctioning one, and policy science a decision-making one."<sup>9</sup> The emphases are correct, but, judged by results, they exaggerate the degree of practical distinction that exists. In the forensic setting, the psychiatrist of this prepossession focuses on the need to establish professional hegemony.<sup>10</sup> He seeks the freedom—and power—of the profession to operate on its own terms. He is cutting out a role of distinction in the courts. Implicit, but not established, is a degree of intellectual discipline and substance, not such as can command respect but such as must do so.

The other emphasis also obscures the operations of psychiatry but aims to enhance its prestige. Through highly selective perception and definition, the discipline is given great intellectual credit. Distinguished psychiatrists, mostly addressing themselves to psychiatric laymen, project a firm basis of faith in the order and discipline in the conceptual framework and operations of psychiatry. Thus, Overholser says: "There is general agreement among psychiatrists upon the essential facts and the significance of words and actions, although there are minor differences in theory";<sup>11</sup> and, from Strecker: "The fund of psychiatric information in the area of causation is as great and often greater than

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<sup>9</sup> Freedman, *Conformity and Nonconformity*, in *PSYCHIATRY AND THE LAW* 41 (Hoch & Zubin, eds. 1955).

<sup>10</sup> See Szasz, *Some Observations on the Relationship Between Psychiatry and Law*, 75 *ARCH. NEUR. & PSYCHIST.* 297, 299 (footnote) (1956).

<sup>11</sup> OVERHOLSER, *THE PSYCHIATRIST AND THE LAW* 23 (1953).

in any other fields of medicine."<sup>12</sup> An interesting personal twist, partially stemming from the fact that dispute is rife regarding the concepts of psychiatry, is given by the curmudgeon who flouts his professional brothers and laymen alike by giving indication that only *he* has the proper grasp and correct interpretation of psychiatric concepts.<sup>13</sup> His rebellion is appealing, if one has a negative disposition toward psychiatry anyhow, but it is hardly a bulwark and it is mostly misleading.

The legal profession's doubts about psychiatry are usually manifest in terms of a skepticism about the intellectual probity of the latter profession.<sup>14</sup> In depth, however, the doubts are the expression of anxiety concerning the challenge, ever enlarging, to the pre-eminence and unquestioned authority of law and legal disciples in directing social viewpoints. In terms of influence over men, law comes to power through the medium of social relations. The psychiatrist, however, exercises primal power over the individual, addressing himself to the latter firstly and directly, hence reaching the heart of the matter. Regardless of the intellectual limitation, social pretension, and political naivete that are perceived from close analysis, psychiatry is increasingly successful, though yet in small measure, in both an intellectual and political sense. Its more astute students tend to be quite penetrating and produce beneficences of insight and/or personal possibility that are not to be ignored. The effect, for the profession, is to enable it to provide a combination of relief, *and hope*.

#### B. An Analytical View of Law

In law, it is the equivocal basis of decision that generates differences between lawyers in viewing their field. One enduring view is that constancy and stability in the ordering and exercise of power is the enduring goal and purpose of law. A highly disciplined framework of decision is required—notably one that posits experience in terms of substantial similitudes, collapsing the elements of time and novelty so that they inevitably conform to the pre-existing framework of interpretation. Through an agglutinative process, authoritative decisions are bound together, and one must henceforth search the principles of de-

<sup>12</sup> STRECKER, *BASIC PSYCHIATRY* 9 (1952).

<sup>13</sup> See Wertham, *A Psychiatrist Looks at Psychiatry and the Law*, 3 *BUFFALO L. REV.* 41 (1953).

<sup>14</sup> See the militant criticism of psychiatry on this account by Hall, *Psychiatry and Criminal Responsibility*, 65 *YALE L.J.* 761 (1956). *But see* a review by Redmount, *Professor Hall's Jurisprudence, Criminal Theory and Psychiatry*, 3 *ARCH. CRIM. PSYCHODYNAMICS* 430, 432-35 (1959).

cision to guide all future outcomes. The highest mark of professional efficiency is to commit the least violence to experience and yet develop concepts for its interpretation that enable it to conform to the rigorous framework and operation of law without seriously disrupting the latter.

Herein, the essence of the view is that law is, foremost, authority and decision. All other elements, such as knowledge and behavior, *must* be, or be made, conformable to the framework and the operations in standard use to recognize and exercise authoritative power.

In one way or another, a variety of reflective viewpoints about law espouse this heavily dominant notion and elaborate various aspects of this central thesis. Among the legal scholars, Bodenheimer stresses "the yearning of human beings for order, regularity and predictability in the operation of social and governmental processes."<sup>15</sup> The importance of "generality" and of "rules" is the central thesis in Patterson's jurisprudence.<sup>16</sup> Hart sees the need for clarifying the verbal content and implication in law,<sup>17</sup> and Fuller stresses the emphasis to be made in terms of "order and good order" in law.<sup>18</sup> Cohen emphasized the need for "clear distinction in law" and accentuated the importance of logic.<sup>19</sup> There exists something of an ultimate advocacy of order in the theoretical positions of the distinguished jurists, Kelsen<sup>20</sup> and, earlier, Austin.<sup>21</sup> Both the concept of justice and the evidence of experience are sacrificed by them in the effort to create a transcendent system of authority and power.

In the end, however, the real impact of the general view is that it expresses the majority disposition of those *practically* concerned with and operating in the sphere of law today.

It is in the operation of law and fundamentally this legal viewpoint that one perceives some grotesque consequences. For one, there is a recalcitrant and a deceptive view where systematic knowledge is con-

<sup>15</sup> Bodenheimer, *Law as Order and Justice*, 6 J. PUB. L. 194, 196 (1957).

<sup>16</sup> PATTERSON, *JURISPRUDENCE*, 101-06, 117-26 (1953).

<sup>17</sup> See Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958).

<sup>18</sup> Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 644-48 (1958).

<sup>19</sup> See COHEN, *REASON AND THE LAW* 159, 243 (1950); COHEN, *LAW AND THE SOCIAL ORDER* 194 (1933).

<sup>20</sup> KELSEN, *GENERAL THEORY OF LAW AND STATE* 3, 15-24 (Wealberg transl. 1945). Note Kelsen's comment in the preface to his treatise that law is "anti-ideological" (implying, for the most part, an insensitivity to the experiential qualities of law). *Id.* at XVI.

<sup>21</sup> AUSTIN, *LECTURES ON JURISPRUDENCE* (5th ed. 1911).

cerned. There is a marked tendency in practice to confuse the conveniences of power exploitations with knowledge of experience. In matters relating to personal deviancy, for example, legal constructions, such as "insanity," "testamentary capacity," and the like, seem to convey the idea of knowledge about the matter. They are, in fact, intellectual *non sequiturs* alluding to some diffuse, impressionistic views of behavior but actually representing no more than a rationalization for decision. In a series of articles,<sup>22</sup> Milton Greene has dissected these legal denominators of personal deviancy and has demonstrated that the concepts have no internal validity and only incidental correlation with knowledge. They are the means of accounting for decision. Their basis is as much, and more, value preference than anything else.

In so far as there is a desire to employ and to conform knowledge in the service of political and legal authority, the tendency is to abuse systematic views and understandings. Knowledge, and the imprimaturs of knowledge, such as professional identity, are fair game where the contest is for a proper and/or successful exercise of power in the context of authority operations. Because it is the form and the fit of decision in relation to the legal framework that is important, there is little interest in the systems and the proper application of knowledge *in extenso*. The effect is tantamount to an anti-intellectual disposition, for too intense an inquiry may move one too far afield from comfortable views and natural biases of certain power positions. There is both distrust and displeasure where the forms of knowledge do not easily and quickly conform to the dictates and practices of the authority structure.

Common experience, as well as systematic knowledge, suffers an ordeal under law. The touch of common experience upon law, and vice versa, tends too often to produce a corrosive effect on both. The legal practitioner, whether judge or attorney, is caught in the vise of an urgent social view on the one hand, and the heavy emphases of law on the other. Since he many times cannot sate one without doing

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<sup>22</sup> Green: *Proof of Mental Incompetency and the Unexpressed Major Premise*, 53 YALE L.J. 271 (1944); *Fraud, Undue Influence and Mental Competency; a Study in Related Concepts*, 43 COLUM. L. REV. 176 (1943); *The Operative Effect of Mental Incompetency on Agreements and Wills*, 21 TEX. L. REV. 554 (1943); *Public Policies Underlying the Law of Mental Incompetency*, 38 MICH. L. REV. 1189 (1940).

Green states, "Orthodox judicial tests of mental incompetency have become largely a matter of ritual. They are formulated, they are solemnly intoned, and they are largely disregarded by the courts themselves. And yet, with such a clumsy tool placed in their hands, courts seem to have applied it to hew out a just result in the great majority of cases." Green, *Judicial Tests of Mental Incompetency*, 6 MO. L. REV. 141, 165 (1941).

an injustice to the other, he frequently exploits one or both in order to bring about a compromise. The result is that law, concerned with the form and exercise of much power, is diluted and made unstable by the operation of experience and order, and satisfaction in experience is frustrated by the uncertain operation of law. The contrived solution, based on mere convenience, falls under a barrage of criticism for its insensitivity to experience and its unethical disposition toward law.

In its practical aspects, law is in an anxiety state. It knows not whether to insist on its traditions, subscribe more to common experience, or enlarge and strengthen its intellectual focus. At times, it does all three, but with poor result because of the lack of consciousness of clarity of purpose. The major tendency, however, is to rely upon the strengths and certainties of tradition and accentuate the strengths and benefits of authority. It is the remainder that is frustrated.

Contrastive in important respects is the view that law and legal decisions are primarily an agency of social service. The doctrinal content of this view is ultimately advanced in the work of Lasswell and McDougal.<sup>23</sup> The view focuses on *operational* consistencies in law as the means to social satisfaction and social utility. A fuller knowledge of the scope and complication as a social problem, anticipating effects as well as purpose, affords the better prospect of stability in the operation of law. Clarity and profundity of social analysis permit striking to the heart of a social problem. These, in turn, contribute to a more righteous and effective exercise of the power in law, and insulate its power. Respect for knowledge is keen in this view, and experience is ordered more according to its proximate aim. This regard of law makes of it an elaborate enterprise in social communication and social administration, more than it is the imperium of ethical dispositions and unapproachable power. Time is brought abreast of itself, and current social and economic denominators of experience are self-determinative influences on social development, capable of affording some of their own ethical and social aims for incorporation into law.

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<sup>23</sup> See Lasswell & McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L.J. 203 (1943); McDougal & Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 AM. J. INT'L L. 1 (1959); McDougal, *The Comparative Study of Law: Value Clarification as an Instrument of Democratic World Order*, 61 YALE L.J. 915 (1952). Cf. Dession & Lasswell, *Public Order Under Law; The Role of the Advisor-Draftsman in the Formation of Code or Constitution*, 65 YALE L.J. 174 (1955); Lasswell & Donnelly, *Continuing Debate Over Responsibility: An Introduction to Isolating the Condemnation Sanction*, 68 YALE L.J. 869 (1958).

The view is speculative, and from this vantage, its talents are unquestioned. Logically completed, however, its consummate interest in the primal importance of intellectual and social order carries the danger of subverting all values in the interest of expediency and efficiency. Practically, its disciplined function may require sensing and interpretive skills whose attuning to a social problem go well beyond the present capacities of man.

The scope of the view and its complications in its application to the problem of personal deviancy is demonstrated by Dession,<sup>24</sup> a collaborator of Lasswell's in the sphere of criminal law. Personal deviancy becomes, in its entirety and without further overtones, a problem of social engineering.

The canonical and the empirical views of law share a heavy appetite for order, and it is only in order, socially, legally, or intellectually defined, that experience takes meaning. From the prolegomenon that law must have order, it seems to follow that order is to be the natural result from the application of effort. It is cold welcome that a third point of view, forthcoming, receives from the large majority of lawyers who think of law in these terms.

The third view is carried part-way to its destiny in the writings of Frank.<sup>25</sup> Observing subtlety, diversity, and complexity in experience, Frank calls to account the characteristic efforts of law to bend all experience to a degree of certainty that turns out to be merely specious. He objects not to order, but to the insubstantial premises and ethical diversions out of which order is made. Given its correct emphasis, this view accents the individuality and unity of experience, with observations beginning from the experiencing individual and running outward into social trends. Its companionate premise for law, a thought rarely given serious concern, is that decisions nearest the intimacy of experience must be viewed and governed by intimate contact. Decisions being

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<sup>24</sup> Dession: *The Technique of Public Order: Evolving Concepts of Criminal Law*, 5 BUFFALO L. REV. 22 (1955); *Sanctions, Law and Public Order*, 1 VAND. L. REV. 8 (1947); *Psychiatry and Public Policy*, 18 PSYCHIATRY 1 (1955) (reprinted in 5 BUFFALO L. REV. 48 (1955)); *Justice After Correction*, 25 CONN. B.J. 215 (1951); *Deviation and Community Sanctions*, in PSYCHIATRY AND THE LAW 1 (Hoch & Zubin, eds. 1955). Cf. Lasswell & Donnelly, *supra* note 23.

<sup>25</sup> Frank's most notable work expounding his basic viewpoint is his *LAW AND THE MODERN MIND* (1930). Some of his other works are: *COURTS ON TRIAL* (1949); *Judicial Fact Finding and Psychology*, 14 OHIO ST. L.J. 183 (1953); *Mr. Justice Holmes and Non-Euclidian Legal Thinking*, 17 CORNELL L.Q. 568 (1932); *Short of Sickness and Death: A Study of Moral Responsibility in Legal Criticism*, 26 N.Y.U.L. REV. 545 (1951).

unique, and appropriate specifically to the circumstances, they are hardly the instance for the stringent application and demonstration of general principles of conduct. Nor do they meet well the requirements of a simple, unimpassioned, yet sophisticated statistic. Principles are grafts on behavior, but no single instance of behavior is fully apposite to the principle involved. In the famous aphorism of Holmes, "general propositions do not decide concrete cases."<sup>26</sup> Necessary is a degree of concordance, if there is to be social survival, but all the same, flexibility and sensitivity in viewing experience are more important. Perversity in the interpretation of a principle of conduct is worse in its personal and social effects than conduct without manifest guidance. The view assays a basis of faith in man that risks the possibility of substantially less order with the prospect of greater freedom, and also greater chaos. There is also an intellectual undercurrent that speaks to the possibility that the capacities of the human personality to develop adequate order from experience may not, and may not need to, rely on the strident notes of law in this regard. The accent is on our present lack of knowledge, and the misfortune is that the law presumes so much as to its necessary conduct.

## II

### CAUSE, DESCRIPTION, AND EVALUATION IN THE PSYCHOLOGICAL ANALYSIS OF DEVIANT BEHAVIOR

Professional accounts of personal deviancy need to be viewed prismatically. They illuminate the problem, but in a manner usually calculated to serve professional loyalties as much as sovereign truth. Both law and psychiatry obscure the issues of personal deviancy in the need to attend to their own advancement as spiritual guardians of personal and social welfare. The present need is to define the problem of personal deviancy apart from the partly insidious emotional demands of professional identification.

Personal deviancy is, among other things, an implication about an individual that most frequently stems from his act of social deviation. It also reflects the operation and amplification of one or more of a number of assumptions about personal behavior. And, it contemplates an authoritative decision that is usually intended to influence the course of deviancy.

The translation of behavior in terms of personal deviancy contemplates three successive phases of assessment. There is, first, the matter

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<sup>26</sup> See Holmes' dissenting opinion in *Lochner v. New York*, 198 U.S. 45, 76 (1905).

of accounting for the behavior. D. E. Cameron puts the problem succinctly, in terms of power. The need is to establish "basic premises . . . concerning power—the word being used as meaning the force which brings things about."<sup>27</sup> Then there is the connected issue of how behavior is to be organized and perceived. Settling this matter affords a basis for distributing judgments, and results in a schema of diagnosis and classification. Lastly, but of major importance, is the element of identifying consensual and authoritative opinion about behavior. This serves as a means to decision in recognizing and coping with personal deviancy and incidentally confirms some viewpoint and assumption about behavior.

#### A. The Problem of Causation

The "power to bring things about" is, in reality, the ascription of power to certain agents to produce certain effects under an identifiable set of conditions. It may be God's power to create rain when water is needed to produce crops. It may be the government's power to exact peaceful solutions when a particular matter is in dispute. It may be individual man's power to assume an empathic interest and afford assistance when his family is in straits.

Typically, the focus is on the identification of the agencies of power in accounting for behavior. It is here that major intellectual and moral traditions play a vital role. Divine power is the most familiar account. It is expressed directly in the overt acts of God or indirectly in the stewardship given man, through his intellectual powers, over God's estate. It is man's cultivated moral disposition that binds him to God's will and consigns to the latter ultimate control. The power is sublime and unapproachable, leaving to man only the possibility of seeking approbation. He cannot match or increase the power of God, but he may abuse it.

Implicit in the ecclesiastic view is another and radically opposed concept that moves the seat of power over behavior to man. Individual and collective man, through the application of human effort, may not only thwart God, but can also establish his own definitions and practices in behavior. Free in the sense of having the whole prerogative for making decision, he can, after the essential thought of the early behavior psychologist, Watson, "make of himself an engineer or a ditch

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<sup>27</sup> Cameron, *A Theory of Diagnosis*, in *CURRENT PROBLEMS IN PSYCHIATRIC DIAGNOSIS* 34-35 (Hoch & Zubin eds. 1953).

digger."<sup>28</sup> The deliberate adjustment of human experience, through conditioning influences induced by man collectively, as by government, or individually, can create any result. Man is totally responsible, and he alone and by his reasoning is capable of determining his behavior. Social limitations on the behavior of individual men are themselves the palpable products of individual behavior and are reversible as a matter of individual and collective choice.

The crux of the difference in the two views of power over behavior has to do with the sources of reason and emotion. One strain of thought conceives of these sources as fixed properties in human constitution and essentially limited in their possibilities for modification. They are reflected in experience in terms of observable and regular characteristics of biological and social structure and consonant patterns of behavior. Man's biological or social endowments, God-given or otherwise explained, limit and define his potentials for personal expression and imply control over behavior in terms of the inevitability of his make-up. He can be typed, but he cannot substantially change.

Thought at the other extreme stresses the benefits or detriments of experience in molding the composition of reason and emotion, and hence of behavior. Both reason and emotion are fungible in the hands of man, and predetermination is what remains when one cannot account for behavior in rational terms and as a result of astute observation. Sometimes the idea is phrased differently—that man's native endowments are substantial, but that they may also be substantially modifiable.

Evolutionary thought and experimental emphases have pervaded most of the thinking about behavior and personality in recent generations. The focus is partly on the fixity of endowment but largely on the possibilities for change. The intellectual framework stresses the continuity of experience. The genetic and experimental methods minutely analyze the details of experience. The core of regularity exists in projected entities or structures of being, such as "instincts" or "genes" or "custom." Diversity results from a variety of trained perceptions of experience. Man is seen to operate with different purposes and effects, but always in a manner that is at least partly a reaction to his socially or biologically given constitutional characteristics.

Modifiability (of behavior) is the problem that cuts through a morass of claims about influence and searches the core of power in man's

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<sup>28</sup> See WATSON, *BEHAVIORISM* 211-48 (1928). Man's determinative influence in fostering his destiny was Watson's enthusiastic psychological and ethical preachment.

control. Here, man's actions in pharmaceutical prescription, psychological suggestion, social manipulation, or surgical intervention are observed to change the course of individual biological and social experience, and to produce distinct behavioral consequences. However, critical definitions of this power require elaborations in terms of the length of time required for effect, the breadth of personal and social experience to be involved, the difficulty and degree of certainty of the influencing means, and the kind of effect and change that results. These are the marks of man's power over behavior, and their magnitudes are the subject of widely differing opinion. Geneticists see small changes over long periods of time, beyond the reach of man in his generation, under conditions of rigidly controlled social experiment that could imply substantial limitations on behavior for large numbers of people. Psychoanalysts can envisage large changes over a period of months and years, providing the individual involves most of his energies and experiences with the analyst and is shown or can develop tolerance in social circumstances. The biological physician claims substantial change, but only in highly selected instances, achieved generally over a comparatively short period of time, involving the complete subjection and disablement of the individual and tolerance by intimates. The cultural and social entrepreneur generally hazards that substantial change in personal behavior requires relatively long periods of time, years or more, amidst substantial social commotion or change but with a minimum of steadfast absorption of purely individual time and energies.

Mostly, the means of modifying individual behavior are complex and expensive. The result is not infrequently uncertain, notably as to many particular viewpoints and particular persons. At times, there is a lack of enduring effect, and frequently the effect is not adequate or consistent when tested through a cycle of biological, psychological, and social influence. Withal that man's power over his behavior is consistently and gradually increasing, notably through the refinement of genetic and experimental approaches, he still must individualize his predictions about changing behavior. He must carefully probe and assess the bases of power in particular persons before he can afford reasonably astute judgment regarding the reversibility of particular behavior.

Viewing altogether the differences in view on the agencies of power over behavior, it is mostly the varying anthropocentric accounts that compete for eminence in the minds of men. Today, choice is based

upon generally partisan representations of knowledge and achievement relating to each. Since the representations generally tend to exaggeration, the ultimate determinant of behavior in the minds of men is partly a matter of knowledge and partly a matter of faith. Some believe in God's influence, others in some form of inevitability through non-malleable constitution, and others in the variety of possibility for evolution and change at the direction of man's reason.

From an analytical standpoint, the problem of what agency powers behavior is directly related to the effects the behavior creates, at least in the first instance and short of any formal proof. The judgment is directly related to the capacity of man to analyze his conduct in intellectual and pragmatic terms. Generally, if effects are viewed in circumscribed fashion, so that they seem limited in scope, they tend to be ascribed directly to individual man himself. As effects become more remote and analysis more difficult, the probability is that higher or more remote power will be called upon for account. The difference, at this point, is in perception.

When faith by itself predominates more than analytical abilities, the process is sometimes different. Faith in the power of God may pervade all observance of experience so that even experience of the simplest kind and most minute significance is attributable to God. Faith in the power of reason makes of complex behavior and effects a matter of man's control, frequently without the necessary discrimination between reality and possibility in control.

Intermediately, there can be, and generally is, great dispersion of thought and belief about the seat of power over behavior, particularly in the light of complicated effects. Both practical considerations of management of behavior and limitations of proof about power sources contribute to this result. Temporal and spatial order in experience assumes and requires man's adaptability to control, hence his power over his own behavior in its essential aspects. To assume differently, viewing the problem macroscopically, is to invite disorder. On the other hand, there is liability in the proof that man is so well-ordered and doubt as to the premises regarding the extent of his power to affect his behavior. This one can believe if, for example, one's perceptions are as sharp as and are attuned in the manner of those working in a Freudian orbit. The limitations on proof resulting here give credence to accounts of power that mostly go beyond the cultivated skill of individual man. His society, his biological constitution, or his God are invoked to account for his actions.

Finally, definitions of power over behavior, in addition to a consideration of agents of power and the effects of power, reflect a judgment regarding the "conditions" that influence the character of power. In speaking of conditions, one is, in effect, postulating the idea of necessity in behavior. The perception of particular circumstances serves to determine whether individual man should and must have power or whether some other factor is to be held accountable for behavior. Conditions may serve as an imperative for man in his behavior. On the other hand, the postulation and perception of conditions may serve to absolve man of accountability. There is in assessing conditions, some basis for delimiting responsibility, and the determination seems to be born of reason.

Conditions for an individual, whether biological and within him or social and external, may be characterized in terms of harmony and stability. In such circumstances, man most likely appears free to choose his behavior and is likely to be held accountable for it. Alternatively, even if he is not deemed entirely free, the lack of provocation in circumstances calls for the expectation that he can and will conform in his behavior to a majority attitude. If conditions are viewed as unsettled, then it is most likely that power over man's behavior will appear as diverted to some source or cause other than man himself. Were man held accountable under all conditions, then man's power would be attenuated. There would be reduced expectations that man is able to develop conforming behavior and a clarity of purpose.

Judgment as to conditions tends to be highly selective in practice and may be quite variable. The result is a diffusion of ideas, reflecting a difference in disposition, regarding man's power over behavior.

#### B. Diagnosis and Classification

The choice of categorization for behavior is directly the outgrowth of causal analysis or assumption. Having established one's articles of faith or some other basis of understanding, one then proceeds to an intellectual framework to make the premises regarding behavior articulate and meaningful in a biological or social context. A framework for the analysis and judgment of behavior is developed in terms of implicit conceptions of cause.

If God is the forge, then classification is a matter of moral disposition and only the will of God matters. Dereliction from God's course can be treated only as a matter of spiritual salvation. To this end, one catalogues sins and prescribes the penance out of which salvation is

formed. If, manifestly, man does seem to control some of his behavior and resultant effects, the only significance is that God has willed the power to man, and man is to be judged in terms of his representation of God on earth. In this respect, he is good or bad. If bad, he is made to suffer in the name of God.

If cause is primarily attributed to man's biological or social constitution, then behavior deviancy is a matter of the correct identification of kinds of constitutional defects. Personal deviancy is precisely accountable, at least in theory, in terms of particular defects. Observable characteristics of size, shape, or proportion are observed in terms of departure from an essentially statistical concept of normality. The deviation is correlated with selected aspects of behavior, notably those that are abnormal and rare by rough statistical count. Familiar correlations of behavior deviancy with constitutional defect are the connection between "physique" and "temperament", and "physique" and "delinquency."<sup>29</sup> The equivalence on a social level, using the idea of social constitution, is the equation of sanctioned patterns of sex, aggression, and acquisition in a society or some segment of it, and individual behavior concomitants. Correlations may be established between an "acquisitive" society and individual "competitive" behavior, and an "aggressive" society and "suspicious" behavior, for example.<sup>30</sup> Mostly, the tendency is to view behavior from the constitutional viewpoint as highly ordered, definable, and inexorable. The emphasis is on the careful identification of structure and behavior. A full catalogue of descriptions exhausts the range of accountability, but this is presently no more than a theoretical possibility.

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<sup>29</sup> There are vigorous supporters for the view that behavior, particularly deviant behavior, is closely and systematically *correlated* with physical and chemical components of body constitution. The psychiatrist Kretschmer, developed the thesis that certain "psychotic" disorders are correlated with physique and temperament. KRETSCHEMER, *PHYSIQUE AND TEMPERAMENT* (Sprott transl. 1926). Currently, Sheldon, in a much more sophisticated theoretical framework and more carefully planned research, is exploring various dimensions of physique in relation to various kinds of behavior deviations. See SHELDON, *VARIETIES OF DELINQUENT YOUTH* (1949).

Notable anthropologists and sociologists have studied the relationship between physique and criminal or anti-social behavior. See GLUECK & GLUECK, *PHYSIQUE AND DELINQUENCY* (1956); HOOTEN, *CRIME AND THE MAN* (1939); LOMBROSO, *CRIMINAL MAN ACCORDING TO THE CLASSIFICATION OF CESAR LOMBROSO* 283-309 (1911).

<sup>30</sup> Benedict's classic anthropological study, *PATTERNS OF CULTURE* (1950) notably comes to mind. See her discussion of the "acquisitive" Kwakiutl tribe and the "aggressive" Dobus. See also KARDINER, *THE PSYCHOLOGICAL FRONTIERS OF SOCIETY* (1945).

When man's leverage over his behavior is emphasized, the conceptual terms that connote deviancy imply the modifiability of behavior. "Disease" and "maladjustment" relate processes in which the cardinal aspect is change or the possibility of change.

Within a genetic or developmental framework of behavior, there is change to and from a state of maturity.<sup>31</sup> Structural growth, physiological functions, and psychological and social behavior reach some optimal point of development. The crux of normality<sup>32</sup> in this process is that the individual changes at a rate that reflects commonplace development, and that is identifiable by different observers at different points or stages of chronological growth. Optimum is the point of greatest efficiency, in terms of structure and physiological function, or the greatest perceptivity, in terms of psychological and social behavior. Deviancy reflects failure or exaggeration in the rate of change. Change may be so slow that maturity is not timely gained or may never be reached. Change may be so large that strangeness, discomfort, inadequacy, or inappropriateness in behavior may result.

In elaboration, body structure and activity—the nervous system, for example—evolve in time through a regular cycle of development to some finite point of growth.<sup>33</sup> Intellectual facility, a by-product of emergent brain function and social experience, evolves through characteristic stages of development, reaches a point of maximum efficiency, and then slowly recedes in later life.<sup>34</sup> Personal desires, essentially

<sup>31</sup> "Maturity" may, of course, be defined by reference to something other than a biological or a psychological framework. For instance, an essentially religious concept of maturity, the "whole" man or the "spiritual" person, connotes additional ideas that go beyond the scope or the necessity of the focus presented here on the problem of personal deviancy.

<sup>32</sup> "Normality" is rather a mangled and obscure concept in the field of mental health. Amplification and discussion of the concept is presented in a number of articles. E.g., Redlich, *supra* note 7; Kubie, *The Fundamental Nature of the Distinction Between Normality and Neurosis*, 23 *PSYCHOANALYTIC QUARTERLY* 167 (1954); Redlich, *The Concept of Normality*, 6 *AM. J. PSYCHOTHERAPY* 551 (1952); Smith, *Optima of Mental Health*, 13 *PSYCHIATRY* 503 (1950); Engel, *Homeostasis, Behavioral Adjustment and the Concept of Health*, in *MID-CENTURY PSYCHIATRY* 33-59 (1951); Hacker, *The Concept of Normality and Its Practical Significance*, 15 *AM. J. ORTHOPSYCHIATRY* 47 (1945).

<sup>33</sup> For an analysis of the characteristics and activities of the nervous system with particular reference to psychological meanings see COBB, *FOUNDATIONS OF NEUROPSYCHIATRY* (5th ed. 1952). Most references in this area, such as WECHSLER, *CLINICAL NEUROLOGY* (6th ed. 1947) and GRINKER, *NEUROLOGY* (3rd ed. 1946), are beyond comprehensibility for the medically uninitiated.

<sup>34</sup> See WECHSLER, *THE MEASUREMENT AND APPRAISAL OF ADULT INTELLIGENCE*,

crude, primitive, and self-preservative early in life, evolve into more sophisticated and sublimated forms comports with the pressures and necessities of social living.<sup>85</sup> They reach a point where the individual is simultaneously aware of this diffusion of his own needs and of the diffusion of possibilities for satisfaction in his environment. The rate of evolution in brain development, intellectual facility, and personal desire for a particular person may be faster or slower than in common experience. Further, the individual's optimum or maximum point of growth may be above or below familiar perceptions. In these, there rests the basis for judging deviancy.

An experimental framework views change from a somewhat different perspective. Here, there is change from and to a state of balance between structural, physiological, psychological, and social components of behavior. A "state of balance" expresses the idea of normality and may be adjudged phenomenologically and empirically.<sup>86</sup> The phenomenological judgment of balance indicates a relatively tensionless state or at least a state of manageable tension, characterized by feelings of interest or involvement, of satisfaction or happiness. This the person under study may adduce for himself, or others committed to the responsibility of a decision may make the judgment for and with him. The empirical assessment of a state of balance enlists a reference beyond mere feeling. There cannot be balance or normality if one of the components of behavior fails to range within common experience. A mentally deficient person may be "happy" in the phenomenological sense but not balanced or normal, at least to the extent that some aspects of his psychological functioning may be out of proportion and severely limited. Balance or normality can exist only when the concordance of elements of behavior is based partially on the observation that each is substantially common and familiar. Optimum, in the experimental framework, represents a state of satisfaction defined by personal feeling or group judgments of feeling, or it represents an expression of the commonplace in behavior and experience defined by reference to rules, custom,

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135-43 (4th ed. 1958). See also Jones & Conrad, *The Growth and Decline of Intelligence*, 13 GENET. PSY. MONOGR. 223 (1933).

<sup>85</sup> On the evolution of need structure and the categorization of needs see MURRAY, *EXPLORATIONS IN PERSONALITY* 54-242 (1938). For diverse theoretical and methodological approaches to the substantially related matter of human motives see *ASSESSMENT OF HUMAN MOTIVES* (Lindzey ed. 1958). See also the section on "motives" in MENDINGER, *THE HUMAN MIND* 265-362 (3rd ed. 1949).

<sup>86</sup> See references in note 32 *supra*.

and fixed expectations.<sup>37</sup> Deviancy is the failure to effect necessary changes and alignments in time so as to provide or maintain the conditions of stability necessary for satisfaction and conformity. One or more components—structural, physiological, psychological, or social—may develop or combine to disturb the individual's equilibrium or adjustment.

Brain lesions may contribute to dysfunction in neural patterns, and the individual may find his capacities for thought and social response acutely and uncomfortably affected.<sup>38</sup> Emotional blocks may limit one's responsiveness and range in social behavior.<sup>39</sup> Personal psychological and social patterns may not be consonant with structural and physiological development. In essence, change is disproportionate in its consequences and disturbance results.

"Disease" and "maladjustment" are the conceptual labels that denote undesirable change, whether from a genetic or homeostatic point of view. They communicate a judgment about an individual in terms that are generally clearer than are the references to the underlying facts. In some instances, the conceptual framework and the attending facts underlying particular diseases or maladjustments are quite clear. There may be reference to notable constitutional factors or to specific parasitic agents that impose themselves upon and infiltrate the individual. For example, structural limitations in the composition of the brain may be observed to correlate with a very slow rate of intellectual development and less than optimal peak.<sup>40</sup> The limitation is denominated mental deficiency. *Treponema pallidum*, an infectious agent, may be identified in body tissue and observed to impair the functioning of the central nervous system. This may contribute to changes in psychological and

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<sup>37</sup> Determinations of the "commonplace" relative to rules, customs and expectations presents a problem of some complications. It is necessary to make reference to specific cultural, political or legal spheres of operation. The "commonplace" in experience may not be substantially similar in Mississippi and in New York, on the "wrong" side of the tracks and on the "right" side, in the church and in the market place, etc.

<sup>38</sup> On the relation between brain damage and intellectual and social performance, see the extensive review of findings by Kelbanoff, Singer, & Wilensky, *Psychological Consequences of Brain Lesions and Ablations*, 51 PSYCHOL. BULL. 1 (1954). See also HALSTEAD, BRAIN AND INTELLIGENCE (1947).

<sup>39</sup> This view and observation provides the early and basic underpinning of psychoanalysis. It is dramatically presented in Freud's earliest work in psychoanalysis. The first cases of "hysteria" provide the raw material out of which the thesis of emotional blocking evolved. FREUD & BREUER, *STUDIES IN HYSTERIA* (Brill transl. 1937).

<sup>40</sup> Among notable studies of the relationship between brain structure and mental deficiency, see BENDA, *MONGOLISM AND CRETINISM* (1946).

social behavior characterized by erraticism and emotional and intellectual vagary. The "disease" is known as paresis.<sup>41</sup>

Sometimes it is the exhaustion and disrepair from abuse or inattention, leading to breakdowns in existing personal processes, that make for a determination of disease or maladjustment. An example of this in social generation is the malignant influence of an insensitive father and an alcoholic mother in the family situation.<sup>42</sup> They can create stresses for a child that may contribute to inconsistent or even bizarre behavior. Debilitation, to cite another instance, may result from continual stress in the form of danger to self-preservation. Unabated service in the battle lines in time of war may contribute to this disintegration of personal controls in behavior.<sup>43</sup>

The postulated causes are observed and identified in terms of particular behavior of the individual. They might be verified by observation and measurements of a predicted kind relating cause and behavior, as in the instances above. Verification may come in another fashion. Corrective measures specifically based on the assumption of particular cause may contribute specific changes or reversals in behavior. Change may be accountable in terms of the manipulation of causal factors.

The development of proof, in the form of a factual verification for a conceptual premise, is a contentious matter. Optimally, proof certain occurs when there is some characteristic connection between an event or circumstance and structural characteristic, physiological activity, psychological disposition and acuity, and social behavior. The evidence of proof is the degree of predictability prevailing that an event having certain behavioral effects or characteristics in one of the above cycles of experience will have particular behavioral effects or concomitants in the other cycles. Alternatively, proof is the evidence that certain events

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<sup>41</sup> The discovery of a specific etiological agent in paresis is usually cited as the best instance of a psychiatric disturbance in which cause and behavior are rather clearly related. The historical development of this highly significant occurrence in psychiatry is traced in ZILBOORG & HENRY, *HISTORY OF MEDICAL PSYCHOLOGY* 526-51 (1941). See also ZILBOORG, *MIND, MEDICINE AND MAN* 299 (1943).

<sup>42</sup> Intimate family influences on the development of personality are increasingly the subject of minute study. The "dynamics" of family relations are being studied particularly in connection with specific personality disturbances. For a general orientation to the role of family dynamics in relation to personality development and problems, see ACKERMAN, *THE PSYCHODYNAMICS OF FAMILY LIFE* 99-264 (1958). Cf. *NEUROTIC INTERACTION IN MARRIAGE* (Eisenstein ed. 1956), particularly Mittelman's chapter, *Analysis of Reciprocal Neurotic Patterns in Family* and the chapter by Mahler & Rabinovitch, *The Effects of Marital Conflict in Child Development*.

<sup>43</sup> See GRINKER & SPIEGEL, *MEN UNDER STRESS* (1945); see also RENNIE & WOODWARD, *MENTAL HEALTH IN MODERN SOCIETY* 68 (1948).

can be variously correlated and predicted within any one comprehensive conceptual framework in one of the four experimental modes: structural, physiological, psychological, or social. It is necessary that the conceptual framework, in the light of observables, "hang together" without doing violence to the reasonable meanings and knowledgeable intentions one can attribute to the theory.

It is characteristic as to personal deviancy that it frequently fails of proof at several simultaneous levels or cycles of experience. One may know of the behavior socially and psychologically but not physiologically. So is it with many deviancies commonly noted under the conceptual labels "neurosis" or "psychosis." Or, one may observe structural or physiological significances and not be able to detect social and psychological concomitants. This is so, for example, in the study of brain waves, where deviations from common experience, observable through electroencephalography, do not regularly obtain psychological or social correlates. "Epileptics" and "primary behavior disorders" may reflect aberrational brain wave patterns, but so may some "normal" individuals.<sup>44</sup> "Proof" of deviancy within a single, comprehensive conceptual framework of behavior is usually easier. This is generally because most schemata are not sufficiently definitive so as to avoid certain vagaries and considerable license in interpretation. Freudian theory, with its substantial reliance upon elaborate inferences and elusive intuitions, is an instance in point. Proof exists only when the nature of perception and communication in relating fact to theory is clear. Too frequently, it tends to be haphazard and somewhat heuristic.

Proof of influence, or the basis of change, in personal behavior is frequently relative and uncertain. The finding of cause in "disease" or "maladjustment" may be much more a premise, a guess, or a convenience than a verified or a verifiable explanation. Mostly, there is partial proof, certain enough to derive probability implications as to the basis of

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<sup>44</sup> See GIBBS & GIBBS, *ATLAS OF ELECTROENCEPHALOGRAPHY* (1941) noting that approximately ten per cent of individuals denominated "normal" reflect abnormal brain wave patterns on the electroencephalogram. See also Hill & Watterson, *Electroencephalographic Studies of Psychopathic Personalities*, 5 *J. OF NEUR. & PSYCHIAT.* 47 (1942); Simons & Diethelm, *Electroencephalographic Studies of Psychopathic Personalities*, 55 *ARCH. NEUR. AND PSYCHIAT.* 619 (1946); Gottlieb, Ashby & Knott, *Primary Behavior Disorders and Psychopathic Personality*, 56 *ARCH. NEUR. AND PSYCHIAT.* 381 (1946).

On the subject of epilepsy, reference is best made to one of the great contributions in this area of study, LENNOX, *SCIENCE AND SEIZURES* (1941).

deviancy, but also uncertain enough so that value judgments rather than facts can entirely govern opinion.

Notwithstanding the uncertainty, there is wide adherence in gauging deviancy to conceptual models of behavior that emphasize the element of change. There is a commitment of faith in this disposition, faith that man, either immediately or ultimately in time, is the governor of his behavior. Experimental applications to behavior, in the form of surgical or pharmaceutical intervention, psychological suggestion, and social manipulation, produce some observable effects and change. The reasons may be vague or contrived, but empirically, there is success to buttress the view that behavior is modifiable by resort to the powers and cultivated skills of man. On an empirical, better than on a firm conceptual, basis, man can alter some structure and guide some physiological, psychological, or social processes so as to create behavior change. Such experience reinforces the assumption that man can modify man's behavior. It leads to a schematization of behavior, notably behavior deviancy, in terms of a detailed description of behavior appearances, first of all.<sup>45</sup> Then, there is elaboration in terms of the intensity, the length, and the recency of notable behavior.<sup>46</sup> And in order to denote more clearly the nature and the prospect of change, there is distinction between the immediate existing "cause" in behavior and more remote "causes."<sup>47</sup>

The prevailing diagnostic schemata of psychiatry are principled on the values of empiricism and experimentalism, and they express a faith in the prospect of ameliorative change. They rely upon references to the characteristics and processes in behavior that have proven the most amenable in explaining and predicting behavior in the past. For the most part, these are heavily funded with constructs from biological structure and physiological behavior. The manual of mental disorders developed by the American Psychiatric Association reflects the character-

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<sup>45</sup> All of the substantial earlier and current texts and manuals in psychiatric nosology reflect this characteristic. *E.g.*, KRAEPELIN, *CLINICAL PSYCHIATRY* 115 (Diefendorf adaptation rev. 1921); BLEULER, *PSYCHIATRY* 230-624 (Brill transl. 1924).

<sup>46</sup> These are the emphases that have been most substantially advocated and developed by a pioneer of modern psychiatry, Adolph Meyer. His stress was on the evaluation of the total experience of the individual in relation to his present mental illness, in a "life chart." See 2 *THE COLLECTED WORKS OF ADOLPH MEYER* 1-20, 52-73, 224-258 (Winters ed. 1951); see generally, *Id.* at 381-500. *Cf.* Strecker, *op. cit. supra* note 12, at 57-60, 66-71.

<sup>47</sup> See Strecker, *op. cit. supra* note 12, at 15-31.

istic view.<sup>48</sup> A major category of deviancy consists of "brain disorders," "caused by or associated with impairment of brain tissue function."<sup>49</sup> This grouping contemplates primarily a statistically small element in psychological deviancy, those suffering from infectious brain disease or brain injury. Another category is labeled "psychophysiological, autonomic and visceral disorders" or, in more common psychiatric parlance, "psychosomatic illness." Here, reference is to symptoms due to a chronic and exaggerated state of the normal physiological expression of emotion.<sup>50</sup> An affinity for further biological and physiological references is reflected in the commentary on other psychiatric categories. Thus, "psychoses" are "disorders of psychogenic origin or *without clearly defined physical cause or structural change in the brain.*"<sup>51</sup> And, "mental deficiency" is considered a "defect of intelligence existing since birth, *without demonstrated disease or known prenatal causes.*"<sup>52</sup>

<sup>48</sup> AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (1952). See also very similar classification systems of the American Armed Forces and the British Armed Forces, conveniently reproduced in SADLER, PRACTICE OF PSYCHIATRY 123-27 (1953). The many psychiatric installations of the Veterans Administration use a classification system patterned after and nearly identical to that of the American Armed Forces.

The preponderance of the biological viewpoint is reflected in "classic" texts of psychiatry. See the preponderant accounts of "cause" in "mental diseases" given by BLEULER, *op. cit. supra* note 45, at 200-13. The hospital-orientated view of treatment in psychiatry is reflected at 214-25. See also KRAEPELIN, *op. cit. supra* note 45.

<sup>49</sup> AMERICAN PSYCHIATRIC ASSOCIATION, *op. cit. supra* note 48, at 14.

This category of mental disorder is presented in conventional and highly competent instructional form by HENDERSON & GILLESPIE, PSYCHIATRY 440-570 (7th ed. 1950). For a "dynamic" psychoanalytically based presentation of these disorders see ENGLISH & FINCH, INTRODUCTION TO PSYCHIATRY 424-507 (2d ed. 1957).

<sup>50</sup> AMERICAN PSYCHIATRIC ASSOCIATION, *op. cit. supra* note 48, at 29. For a readable account of the basic thought and conception of the psychosomatic disorders and for a description of specific kinds of disturbance see ALEXANDER, PSYCHOSOMATIC MEDICINE (1950). See also GRINKER, PSYCHOSOMATIC RESEARCH 13-104 (1953).

<sup>51</sup> AMERICAN PSYCHIATRIC ASSOCIATION, *op. cit. supra* note 48, at 24. On the functional psychotic disorders, see HENDERSON & GILLESPIE, *op. cit. supra* note 49, at 227-387. For a comparatively simple, clear exposition of a "dynamic" orientation on psychoses, see ENGLISH & FINCH, *op. cit. supra* note 49, at 332-423.

<sup>52</sup> AMERICAN PSYCHIATRIC ASSOCIATION, *op. cit. supra* note 48, at 23. For an elaborate presentation and consideration of this diagnostic entity see TREGOLD, MENTAL DEFICIENCY (9th ed. 1956). See also some vital distinctions relating to the basis of "real" mental deficiency in KANNER, A MINIATURE TEXTBOOK OF FEEBLEMINDEDNESS, *passim* (1949). A clear exposition and brief discussion of problems in the adjustment to and handling of mental deficiency is contained in SARASON, PSYCHOLOGICAL PROBLEMS IN MENTAL DEFICIENCY 263-360 (3rd ed. 1957). See also KIRK & JOHNSON, EDUCATING THE RETARDED CHILD (1951).

There is also some diversity, or uncertainty, in the conceptual premises of the psychiatric schema. This is manifested in those major reference categories that depart from the biological-physiological frames of reference. "Psychoneurotic disorders," a currently well-populated category, allude to a person's *sense* of well-being, hence his attitude toward and awareness of himself. These "disorders" are characterized by "anxiety, which may be directly felt and expressed or which may be unconsciously and automatically controlled by the use of various psychologic defense mechanisms."<sup>53</sup> The focus is on the manner in which the individual attunes himself to the world<sup>54</sup> and draws judgment from the individual himself and from a person with cultivated perceptivity—namely, the psychiatrist.

Finally, there is one other major conceptual category, "the personality disorders." The category substantially repeats the behavior grouping heretofore known under a label of gathering notoriety, the "psychopathic personality." It is notable for its vagueness and its gross and circumspect reference to behavior. It refers to<sup>55</sup>

[disorder] characterized by developmental defects or pathologic trends in the personality structure, with minimal subjective anxiety and little or no sense of distress. In most instances, the disorder is manifested by a life-long pattern of action or behavior, rather than by mental or emotional symptoms.

In theoretical terms, this reference to behavior is inane and smacks considerably more of value judgment than of analysis.<sup>56</sup> However, though this category is so badly drawn in conception, it is substantially significant in its commitment to social observation as the means of identifying, and perhaps of explaining, deviancy.

Psychiatric nosology is something of a mosaic, reflecting some dominant trends of professional thinking regarding personal deviancy. Its

<sup>53</sup> AMERICAN PSYCHIATRIC ASSOCIATION, *op. cit. supra* note 48, at 31. On the neuroses, see HENDERSON & GILLESPIE, *op. cit. supra* note 49, at 146-226; ENGLISH & FINCH, *op. cit. supra* note 49, at 139-231. A "somatically-oriented" approach to this disorder is presented in ALVAREZ, *THE NEUROSES* 127-344 (1951).

<sup>54</sup> "The neuroses are more a dys-ease than a disease; they are manifestly difficulties in interpersonal relations." REDLICH *supra* note 7, at 144. *Cf.* HORNEY, *THE NEUROTIC PERSONALITY OF OUR TIME* (1937).

<sup>55</sup> AMERICAN PSYCHIATRIC ASSOCIATION, *op. cit. supra* note 48, at 34. See also HENDERSON & GILLESPIE, *op. cit. supra* note 49, at 388-406; ENGLISH & FINCH, *op. cit. supra* note 49, at 232-91. For a larger treatment of this disorder see HENDERSON, *THE PSYCHOPATHIC STATES* (1939). For a view of psychopathic personality as masking a more severe personality disorder see CLECKLEY, *THE MASK OF SANITY* 380-420 (3rd ed. 1955).

<sup>56</sup> See SZASZ, *supra* note 2; *cf.* SZASZ, *supra* note 1.

dedication is to the idea that man can know the well-springs of his behavior. Implicit in this view is the thought that he has the power of substantial influence. While such is the faith, the facts of the classification system reflect the uncertainties on an operational level. Conception consists substantially of heuristic description, frequently detailed, and with an implication that deviancy is subject to movement and change in time.

As a matter of tradition, in professional identification and in intellectual formulation, the theoretical frameworks of biology and physiology have dominated causal talk. But increasingly, deviancy is being hinged to a social framework of explanation. The differing views contend for eminence and are frequently fused as the best or, at least, the safest means of explanation. The idea that deviancy is primarily a quality of social and psychological experience is being exploited in a classification system being evolved by Karl Menninger.<sup>57</sup> He and his co-workers conceive mental illness<sup>58</sup>

as an impairment in self-regulation whereby comfort, production and growth are temporarily surrendered for the sake of survival at the best level possible, and at the cost of emergency coping devices which may be painful. . . . Our emphasis is on the *degree of disorganization* and its course or trend of development.

Classification is important in terms of what it indicates "in regard to the process of organization, disorganization and reorganization of the personality in a state of attempted adjustment to environmental reality."<sup>59</sup> Menninger, in a still nascent venture, proposes to<sup>60</sup>

set up a scale of well-being—in other words, a scale for the successfulness of an individual-environment adaptation—at one end of it would be health, happiness, success, achievement and the like and at the other end misery, failure, crime, delirium and so forth. . . . We can say that some people are relatively healthy, that some are relatively sick.

Highly significant to such a schema of diagnosis is the condition and operation of the various sensing mechanisms or processes of the individual personality that mediate adjustments with external reality. The analysis of perception, intellection, emotion, and motor behavior is the meat of the operational system. Derivative of this and in need of acute

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<sup>57</sup> Menninger, *The Unitary Concept of Mental Illness*, 22 BULL. OF THE MENNINGER CLINIC No. 1, p. 4 (Jan. 1958).

<sup>58</sup> *Id.* at 11.

<sup>59</sup> *Ibid.*

<sup>60</sup> *Id.* at 10.

consideration is the individual's sense of self, the character of his relationships to others and to physical and social elements in his environment. The consistency and manageability of the individual's personality and behavior is reflected in his adaptability to, and ability to cope with, a variety of social situations. Particular measure is taken as these situations increase along dimensions of unfamiliarity, difficulty, and stress.<sup>61</sup>

Deviancy in Menninger's scheme is understood as a limitation in the consistency, impressionability, and malleability of an individual, viewed from the perspective of psychological and social experience. Relative to existing psychiatric classification systems, Menninger proposes to be somewhat more specific and explicit about these matters. Personal sensing and social behavior are to be less a matter of insignificance or inference and more a matter of direct and focal concern in the identification and assessment of personal deviancy.

To the present, over-all, the functional benefits of psychiatry cannot be interpolated so as to produce a rigorous intellectual system that copes effectively with the matter of personal deviancy. There is faith, and there is partial explanation, but neither does entirely well without the other. The explanatory and evaluative accounts of deviancy afforded by nosological psychiatry are convenient, but there is substantial doubt that they have the unction of a reasonably complete truth.

### C. Normative Judgments About Behavior

Judgments regarding personal behavior are a common necessity and responsibility for all persons. They represent our capacity to perceive and to learn from experience, and to organize experience in such a manner as to establish a basis or pattern for relating to one another. Behavior, our own and that of others, is characterized so as to give it meaning and a place in the order of things.

In the matter of judging behavior, there are two fundamental considerations. Firstly, there is the problem of who makes the judgment, implying purpose. Secondly, there is the matter of affording a basis for judgment, implying means.

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<sup>61</sup> There is an implication for this point of view in the character of "mental" (psychological) examination for patients advocated in MENNINGER, *A MANUAL FOR PSYCHIATRIC CASE STUDY* (1952). Examination should, among other things, be directed to the patient's "integrative functioning," namely his "relations to self," "relations to others" and "relations to things"; and, his "reactions to disintegrative threat" in terms of "first order devices," "second order devices" and "third," "fourth" and "fifth order" devices. *Id.* at 93-97.

The layman's judgment of another's behavior is likely to be crudely and pointedly defined. It is essentially unadulterated by orderly and sophisticated conceptual notions that incorporate more of behavior, or some of behavior, more systematically. His measure is familiarity, or comprehensibility to himself, in the light of crude perceptions of himself and similar observations of others through his own social experience and such symbolic experiences as reading books and newspapers. Were he to order the basis of his conceptions, he would likely discover a fusion of several frames of reference. In part, his judgment reflects the operation of idealized notions of what behavior ought to be. Partly, his idea of familiarity is what behavior is expected to be if a person is to fit comfortably and successfully into his prevailing environment. In part, his determination indicates behavior absolutely essential to the development and maintenance of a reasonably orderly condition in life. And, mostly, he judges on the utterly pragmatic basis of what he and other people are and do. The fusion of ideas obscures any single, clear conceptual premise as to the basis of normality and affords only the generalization that the normal is the familiar adduced from many simultaneous perspectives that mostly cohere.

Implicit in the layman's judgment is the idea that conformity to a *personally familiar* scheme of behavior and values is essential to continued social relations. Fortunately, the preferences for idealized behavior, the requirements of order and conformity, and common expression tend to the development of substantially similar behavior patterns among individuals in any given milieu and within any particular span of time. Evolutionary trends under stable conditions are mostly so slow that there is an appearance of constancy and fixity. Expectations in behavior are essentially common.

Deviancy is the sense of the alien or the opposed, one or both. The deviant is the unfamiliar, but distinction lies in the idea that the merely strange may be tolerated, while the distinctly threatening cannot be. The *tendency* to deviation is the critical element identifying deviancy that is of particular concern to most individuals and to their society. It is a composition of different or oppositional behavior *and* the inability to effect change directed toward the familiar. It is the combination that is the particular object of concern, though the merely alien may also create momentary anxiety.

Judgments of behavior contemplate that the latter is acceptable, tolerable, or objectionable. To the extent that there exists substantial

elements of familiarity, in the sense of comprehensibility, the auguring is for acceptance or condonation of behavior.<sup>62</sup> Unfamiliarity, on the other hand, breeds a sense of the alien and the threatening. It evokes a desire to safeguard what is considered normal and right, and to reinforce notions and feelings about the adequacy and propriety of one's own behavior. Behind the judgment of the unfamiliar is a strong emotional bent associated with self-preservation. This becomes the essential stake of the layman in perceiving and judging personal deviancy.<sup>63</sup>

Familiarity in a slightly different guise is the most common yardstick of the expert analyst in the nature and causes of behavior. His conceptual framework is the ordering instrument for behavior. It contains, explicitly or by implication, rules regarding the range of behavior to be perceived and the means of analysis. It also contains within it, in diagnostic schema, gradations of behavior that represent deviations from normality. In the preponderance of instances, normality is a matter of familiarity and is gauged crudely or carefully by statistical frequency. The behavior expert's premises in judgment are distinguishable only in the accentuation on empirical evidence regarding what does take place. Hence, though concepts and language provide more precisely communicated discriminations of behavior, the distinctions between normality and deviation still rest upon an assessment of what characterizes most people on given matters of composition, action, and attitude. Conceivably, the orthodox psychoanalytic position provides for some departure from this view in the direction of an equation between normality and idealized behavior. The concept of "psychosexual maturity" is frequently more in the nature of a suggestion and a hope than a practical reality.

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<sup>62</sup> One is here reminded of the pungent comment by the social critic Orwell. "It may be that a lunatic is merely a minority of one." ORWELL, NINETEEN EIGHTY-FOUR (1949).

Implicitly, the concern is with the concept of normality. See references in note 32, *supra*, and related text.

<sup>63</sup> As Alexander phrases the problem in relation to a legal-judicial framework, the layman is concerned that "the common sense of justice remain uninjured." It is the function of the law-in-operation to protect notions of justice based on the idea that what one must do for the sake of social conformity or order, others also must do. In citing the psychological character of a sense of justice, Alexander has references only to behavior that is destructively aggressive in its nature and effect, not to the variety of behavior that is different in other respects and not inherently destructive. ALEXANDER & STAUB, *THE CRIMINAL, THE JUDGE AND THE PUBLIC* 13 (rev. ed. 1956). See also REIWALD, *SOCIETY AND ITS CRIMINALS* 268-82 (1950); WEIHOFEN, *THE URGE TO PUNISH* 136-46 (1956). Cf. WEST, *CONSCIENCE AND SOCIETY* 152, 165 (1945).

In the main, the layman's and the behavior expert's judgment of behavior are likely to reach the same conclusion, particularly when behavior is very near or very far from normality. It is only where the differences between gross and finer perceptions of behavior make for singularly distinct observations as between expert and layman that a significant difference in judgment is likely to result. The expert may prove more penetrating in his observations. Ultimately, it is not so much his more prodigious framework of knowledge, as such, but his more highly developed perceptual skill that provides any basis for special acknowledgment. The conceptual structure aids, but does not supply, discriminative ability for making judgments about personal behavior.

Psychiatric judgment is a composite of perceptual skill, elaborate description, and behavior preference viewed in the light of what is familiar. The operations leading to judgment in psychiatry vary somewhat from those of the layman, though the outcome may be the same. In large part, the psychiatrist's perceptual acuity is developed out of carefully cultivated self-discipline that permits him to observe without the necessity of making quick value judgments. In this, he differs from the layman, whose dispositions are more readily and quickly translated into judgments. The psychiatrist is also taught to view behavior prismatically, so that his range of perception is enlarged beyond the unidimensional view of the layman that lends itself to quick translation of behavior into logical terms. The psychiatrist will reflect longer and take more into account in assessing personal behavior.

The terms of description in the conceptual framework of psychiatry permit a more minute description and delineation of behavior. Having the benefit of enlarged perception and delayed social judgment, the psychiatrist can make more specific analysis and classification of behavior without running afoul of emotions and value judgments that tend to preempt careful detailing.

It is in the process of transmuting observation and fact to judgment that the psychiatrist finds himself in the same procrustean bed as the layman. He, too, must pass upon behavior within a frame of reference that implies desirability or its opposite. His standard of judgment is most generally "adjustment" or "maturity,"<sup>64</sup> conceptual terms that he generally uses to reflect a notion of what most people do or become. The measure is on the same order as the layman's "likeness" or

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<sup>64</sup> See references in note 32, *supra*, and related text.

"familiarity," but the psychiatrist's calibrations of behavior tend to be more specific.

The judgmental norm of the psychiatrist entertains certain implications that are not characteristic of the layman's view. The layman, in forming judgment, does not operate within any systematic conceptual framework. His judgment is a finite matter. Its consequence is to reinforce attitudes and feelings about patterns of experience. It serves as a basis for insulating rather than investigating behavior. The psychiatrist's assumption differs in that he more seriously entertains the possibility of modifying and influencing behavior. Here, judgment of normality is merely intermediate, and the ultimate concern is the remediability of behavior or, from another perspective, the power of the psychiatrist to produce change. Judgments that cavalierly ignore the prospects for change are distressing to him, since his basis of faith is in the prospect of change. This, then, is the predilection of psychiatry, though it varies in degree with psychiatrists and affects their individual perceptions and conceptions of psychiatry in different ways.

The legally trained person, who is more the layman's kin in matters of personal behavior, does not discriminate the facts of behavior any better than the layman. But judgment to him is a much more compelling matter. He seeks affirmation of the principles of order and comprehension, at least within the conceptual framework on which he is reliant for his ability to transact matters relating to experience. He tends to idealize the human personality in order to have it comport with requirements of social stability. Idealized conceptions of normality in individual behavior tend to be fostered, though concern with the daily dispositions in social living provide for the lawyer a secure anchor in practical reality. He, too, is substantially governed by what characterizes the majority and the familiar in behavior. His stake is not perfection of the individual, not even the idea of a greater personal happiness, but rather, insulation of the *order* in which the individual lives. Individual deviation, in this respect, is a hindrance, not a challenge. Yet, the lawyer's goals are ostensibly similar to the layman's. He wishes to reassert and protect a familiar view of experience, and the prospect of individual change is to him a secondary matter.

In the public forum of the trial court, the divergencies of the lawyer, the layman, and the psychiatrist come to roost. The nominal operations of the trial court tend to exploit a dangerous fallacy—that the matter of personal deviancy is one of specific identification within a

reliably conceptualized descriptive framework of behavior.<sup>65</sup> In truth, interpretations of behavior vary with perceptual acuity, with the adequacy and detail of available description, with differences in formulation and differences in the purpose of accounting. Communication between different networks of understanding—legal, lay, and psychiatric—is extremely crude and tends to produce serious distortion when forced into a single mold under the persuasion that it is merely an identification of behavior deviancy. At best, any generalization as to the existence of deviancy is extremely crude without an awareness of the processes that enter into a determination.

Psychiatrists, though more perceptive, have only a slightly more refined norm of behavior than the layman. Raw description is better effected than the accounting of behavior in terms of cause, effect, and desirability. Yet, the psychiatrist's faith imposes on his judgment and he may color his description in terms of an assumption or a desire that he influence the further course of behavior. His choice from available conceptual frameworks frequently generates this purpose.

The layman is not engaged like the psychiatrist in the matter of personal deviancy. He perceives to a lesser degree and with less refinement. Whatever the behavior, its significance to him is that it secure his interpretations of experience so as to insure safety and stability. Consequently, his interpretations vary more with his sense of personal need, guided by emotion, than with social or intellectual exigencies. It is sufficient that he perceive less—only what is important to him—analyze less, and arrive at less sophisticated conclusions regarding behavior. Fortunately, in the common instance, there is considerable shared need and shared experience, so that there is not complete diversity of opinion among laymen.

The law operative interprets behavior in the light of the benefits of order. This, at least, is his basic disposition. To this end, the only important facts are those that comport with swift logical interpretations to produce a sense of order. Any conceptual framework that amplifies behavior in terms of other purposes is irrelevant. The anticipation is immediate order and meaning, not the remote possibility of such. In

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<sup>65</sup> See, in this connection, "tests" of "insanity," in the law, such as the "McNaghten rule" and the "irresistible impulse" test. WEIHOFEN, *MENTAL DISORDER AS A CRIMINAL DEFENSE* (1954); See also discussion of the newer "Durham rule" as a "test" of insanity. *Insanity and the Criminal Law—A Critique of Durham v. United States*, 22 U. CHI. L. REV. 317 (1955).

consequence, man's power over behavior is mostly important in decision in that it is effected, not in that it can be effected.

Courts are confronted with these singular dispositions, and the task is not to find the facts, but to affirm a position that entails particular notions as to the character and importance of facts, values, and concepts. In this, there appears to be no settled preference—circumstances sometimes favoring the importance of the layman's point of view, sometimes the psychiatrist's, and sometimes the lawyer's.

A more settled and systematic view of personal deviancy can only come about in the evolution of a comprehensive framework to be used in assessing matters relating to personal behavior. Only in this is there the possibility of true communication and clearer decision as between lawyer, psychiatrist, and layman.

### III

#### A CONCEPTUAL FRAMEWORK FOR INQUIRY INTO PERSONAL DEVIANCY

##### A. Basic Values and Premises

"Personal deviancy" is a concept that embraces a state of knowledge and the disposition of society. On the one hand, it affords a representation of knowledge about behavior, and on the other, it reflects a point of view regarding social necessity or desirability. Constructs are utilized to bridge the two perspectives and translate "deviancy" into reasonably operational terms. These consist of description, cause, and consequence, and they afford the means of dealing with deviancy in a knowledgeable and purposeful manner. "Deviancy" thus becomes an entity, and actionable.

Deviancy, contrasted to deviation, implies more than the identification of specific behavior in terms of some scale of familiarity. It is *determined* behavior and reflects a *system* of operation. The concept of deviancy is meaningless unless one contemplates the cycle of generation, movement, and change. Behavior events and circumstances are merely the incidents of operation. To understand the operation, one must find some accord in terms of a generative influence.

Also vital to the concept of deviancy is the recognition that familiarity, in terms of a range of personal and social experience, is a critical discriminative factor.<sup>66</sup> It provides a measure for adducing order in the assessment of experience and in scaling judgment.

A generative process and a scale of familiarity provide the basic data of knowledge and judgment relating to deviancy. Given these

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<sup>66</sup> See notes 32 & 63, *supra*, and related texts.

fundamentals, one can then amplify cause, description, and consequence in behavior.

The contentious claims to knowledge and the diverse systems of explanation regarding deviancy impose the obligation of a specific policy in selecting an appropriate framework for study. That perspective in the quest for knowledge which closely mirrors ethical values is the most pertinent for legal administration. The methodology that greatly respects empirical evidence in dealing with personal deviancy gives the most essential approach, because of its presumptive guarantee of justice. The working ideal that encourages and contemplates the maximum possibility of governing change in behavior is the most desirable, affording both means and encouragement in the insuring of social order.

When preeminent legal values in the matter of personal deviancy are identified, it becomes clearer that the approach of empirical science, though it may be used to reflect other values, also serves best the needs of law. A proper character of inquiry will simultaneously safeguard formidable legal values and permit the honorable use of the most advanced and systematic knowledge.

Finally, as an element of basic orientation, the manifold of description and theory, ranging from the biological to the cultural perspective, requires reduction to a concise base of reference. The focus of inquiry should be reduced and fixed to the most meaningful terms of reference to serve both economy and clarity. The most appertinent focus is on those facilities and operations that mediate between an individual's experiencing of himself and his experiencing of physical and social reality, and between his biopsychological and sociocultural processes. They are his psychological resources, his thinking, feeling, wanting, and perceiving. These are the processes, considered independently and interdependently, that give content to the inquiry into personal deviancy. They are the proximate sources of consistency and meaning in a person's behavior and behavior tendency. Conveniently, they can be referred to as "psychological experience."

#### B. Purpose and Precaution in Inquiry

Inquiry that ranges across psychological phenomena is inevitably an admixture of fact and conclusion several times over. Facts here imply a prior theoretical disposition born of a particular set of tentative or established conclusions and causing the particular fact to be noted. Simultaneously, facts afford a basis around which conclusions are reached. The interdependency is so substantial if the matter is carefully

scrutinized, that one must conclude a premise. The findings regarding personal deviancy are a largely unallocable combination of facts and conclusions.

The political decision-maker—judge, lawyer, juror, and the like—must decide the weight to be given findings relating to deviancy in the light of policies of social risk or invariability. His function is not to draw conclusions as to deviancy from the facts presented, as the matter is frequently put. Rather, he must clarify social policy in the light of specific findings of both a factual and judgmental nature.

In this area of tenuous knowledge, it would be desirable to evolve scales or indicia of probity in order to clarify and safeguard the substantial bases of decision. Findings ought to be characterized in terms of the kinds and degree of validity they possess. For one, at each step of inquiry, it would be pertinent to know whether statements or conclusions are essentially reliant upon empirical evidence, logical inference, or intuitive judgment. The degree to which a systematic framework of inquiry and explanation is involved, as against more impressionistic and limited formulation or understanding, is also of pertinence. Finally, one may apportion findings in terms of a continuum ranging from pure knowledge to pure faith. On the one hand, there is largely incorruptible knowledge and rationality. Intermediately, there is knowledge having some presumption of validity in terms of some adherence to one or more systems of explanation. And at the other extreme, there is determination resulting largely from pure faith.

The indicia of probity—of the validity and reliability of findings—if appended to a firm conceptual framework, provide the political decision maker's means of enlightenment and safe passage in an area of inquiry that is so much in a state of flux.

### C. The Conceptual Analysis of Personal Deviancy

There are four fundamental phases of inquiry. As a means to conclusion in the matter of personal deviancy, they are ordered largely in terms of a progression. Firstly, there is a need to characterize present functioning; this serves largely to identify the problem. Secondly, there is the need for a determination regarding the consistency and continuity of psychological experience; here, one perceives the extent of the personal problem of deviancy. Thirdly, there needs to be an ascription of generative influences and their potential; the basis of psychological experience is afforded. And, finally, there must be an assessment of

probabilities for the maintenance or modification of psychological experience; a decision regarding modifiability is posited.

1. *The characterization of present functioning*

There is both quantum and character in the assessment of thinking, feeling, wanting, and perceiving. "How much" or "what degree" is a salient feature and implicitly serves to suggest common or exaggerated behavior tendency. Thinking varies in acuity and probity to a degree that is reducible to quantitative discrimination, as in intelligence tests.<sup>87</sup> The range in individual variation runs from that which is denominated defective and dull to that which is bright and superior. Feelings in individuals can be discriminated on a gradient of intensity. There are differing individual thresholds, generally and with reference to particular kinds of experience, for various emotions. Feelings of rage, fear, love, etc., can be qualified by judgments affording an evaluation of their intensity in individuals. The individual experiences feelings on a scale ranging from operational blandness and indifference to levels of great strength and intensity.<sup>88</sup> Wanting, too, is a matter of degree, the sense of need and desire being stronger in some areas of experience than others for an individual, and varying among persons. Sexual experience, power, property, and others, are wants that can be identifiable by measure.<sup>89</sup> And perceiving is also a matter of breadth and limitation.

<sup>87</sup> See particularly, Thurstone's theory and measurement of intelligence. THURSTONE, *THE NATURE OF INTELLIGENCE* (1926); THURSTONE, *PRIMARY MENTAL ABILITIES* (1938).

Not all measurement of intelligence correlates specifically with an analytical view of thinking processes. The better known measures of intelligence today measure general adaptational responses in which thinking facility is the important but not the exclusive determinant of intelligence. E.g., WECHSLER, *op. cit. supra* note 34, at 7; STODDARD, *THE MEANING OF INTELLIGENCE* 4 (1943).

<sup>88</sup> Here one is reminded of the paucity of feeling held and reflected by many of those denominated "psychopath," at one extreme, and the intensity of feeling possessed by some "neurotics," at the other extreme. On this characteristic of the "psychopath," see CLECKLEY, *op. cit. supra* note 55, at 389, 395-99; HENDERSON, *op. cit. supra* note 55, at 128-29. On the character of various feelings and the way in which they manifest themselves in neurotics, see particularly the highly readable sections devoted to the neurotic in WHITE, *THE ABNORMAL PERSONALITY* 202-304 (2d ed. 1956). In these sections are copious references to the fundamental studies and observations of the role of feeling in the neurotic.

<sup>89</sup> See, in this connection, the theoretical formulation of the matter of personal needs, having some equivalence to the term wants, and the experimental inquiries described in MURRAY, *op. cit. supra* note 35. See also the analysis of needs (wants) more from a social frame of reference—reflected in large part as "social values"—and the analysis of the operation of a particular need, power, in certain personalities. LASSWELL, *POWER AND PERSONALITY*, 1-93 (1948).

Perceptivity varies according to the range and depth of stimuli that an individual is able to experience: the perceptual quality in his experience ranges in the degree of his sensitivity.<sup>70</sup>

As to the one element of functioning, magnitude, the problem of deviancy may be initially posited as a matter of too much or too little, having in mind some impressionistic or carefully calculated observation and judgment of the common range of psychological experience. However, the assessment of magnitude is not of itself profound or significant. Psychological experiences are interdependent to such an extent<sup>71</sup>—thinking upon feeling, feeling upon perceiving, perceiving upon wanting, etc.—that substantial indices in terms of the length and quality of experience are vitally necessary for reliable judgment. Further, psychological experience is as much masked as observed, so that what appears is only significant in relation to what does not. Behind rage, there may be fear; and behind a desire for property, there may be a desire for power. Simple quantification is not enough in the face of the need to understand a process and not merely to recognize an effect.

“What kind” represents another aspect of assessment. Psychological experiences may reflect qualities of uncertainty, unforeseeability, or inflexibility, whatever the magnitude. Thinking may be bizarre, perhaps delusional in character.<sup>72</sup> It may be rigid, insensitive, and ritualistic.<sup>73</sup> It may be vague and indecisive or confused, inconsistent,

<sup>70</sup> See particularly, articles by Klein & Schlesinger, Witkin, Torrey, and Bruner & Postman in *PERCEPTION AND PERSONALITY: A SYMPOSIUM* (Bruner & Krech eds. 1950). Cf. the orientation of the early Gestalt psychologists and their development of some fundamental aspects of awareness. ELLIS, *GESTALT PSYCHOLOGY* (1938).

<sup>71</sup> The psychological literature is replete with references to this phenomenon. E.g., RAPAPORT, *EMOTIONS AND MEMORY* (2d ed. 1950); *ORGANIZATION AND PATHOLOGY OF THOUGHT* 311-493 (Rapaport ed. 1951); SCHILDER, *MIND: PERCEPTION AND THOUGHT IN THEIR CONSTRUCTIVE ASPECTS* (1942) (physiological and psychological functions are interrelated within a psychoanalytic framework); FESTINGER, *A THEORY OF COGNITIVE DISSONANCE* (1957) (exploration in a non-psychoanalytical framework of the relationship between an awareness based primarily on thought, and the nature of person wants). On the connection between perception, wanting, thinking, etc. see generally, *Perception and Personality: A Symposium*, *op. cit. supra* note 70; also, notably the article by Miller, *Unconscious Process and Perception* in *PERCEPTION, AN APPROACH TO PERSONALITY* (Blake & Ramsey eds. 1951).

<sup>72</sup> See Cameron, *Deterioration and Regression in Schizophrenic Thinking*, 34 *J. ABN. & SOC. PSY.* 265 (1939); *LANGUAGE AND THOUGHT IN SCHIZOPHRENIA* (Kasanin ed. 1946). See also Cameron, *The Development of Paranoiac Thinking*, 50 *PSY. REV.* 219 (1943).

<sup>73</sup> See ODIER, *ANXIETY AND MAGIC THINKING* 57-60 (Schoelly & Sherfey transl. 1956); Goldstein & Scheerer, *Abstract and Concrete Behavior: An Experimental Study with Special Tests*, 53 *PSY. MONOGR.* 1 (1941). Cf. references in note 72 *supra*.

and poorly organized.<sup>74</sup> Feeling may be inappropriate, emitting laughter where convention creates the expectation of tears, or joy when sorrow is expected.<sup>75</sup> Feeling may be overly persistent.<sup>76</sup> Hostility or fear or sorrow, regardless of the intensity, may endure beyond reasonable time. Or feelings may vacillate and compete to the degree that they fail to reflect definition, consistency, or clarity.

Wanting, too, may be unreasonable in the face of circumstances.<sup>77</sup> The character of desire may suggest peculiarity or rigidity. There may be uncertainty and vacillation to a degree that predicting and standardizing behavior for the individual, other than in terms of confusion, becomes impossible. And perceiving, like the other psychological experiences, may tend to uncertainty and indecisiveness, so that there is a lack of consistency and clarity. There may be peculiar or idiosyncratic omis-

<sup>74</sup> See HANFMANN & KASANIN, *CONCEPTUAL THINKING IN SCHIZOPHRENIA*, 66-78, 82-83 (1942); Cameron, *Deterioration and Regression in Schizophrenic Thinking*, 34 J. ABN. & SOC. PSY. 265 (1939); Cf. GOLDSTEIN & SCHEERER, *supra* note 73.

<sup>75</sup> Most notable for inappropriate and bizarre affective expression is the "hebephrenic schizophrenic." See brief behavioral description in WHITE, *op. cit. supra* note 68, at 548-50.

<sup>76</sup> The most notable instance is the extent of depression, particularly in the entity known as "manic-depressive psychosis." For various aspects of the development, manifestation, and characterization of depressive behavior see DEPRESSION (Hoch & Zubin eds. 1954). On the significance of exaggerations in pleasurable feeling, one opposite of depression, see the psychoanalytical account of LEWIN, *THE PSYCHOANALYSIS OF ELATION* (1950).

<sup>77</sup> Perhaps the most notable and most observed deviations of urge or desire in Western culture have to do with sex, largely because of the meticulous emphases given to sexual expression here. Anthropological and medical accounts have delineated the distinctions. From the medical province there are the "classics," the studies of KRAFT-EBBING, *PSYCHOPATHIA SEXUALIS* (Rebman transl. rev. ed. 1934) and Havelock Ellis' 6-volume exploration of the cultural, biological, and psychological facets of the problem, *STUDIES IN THE PSYCHOLOGY OF SEX* (1900-06). The more substantial part of orthodox Freudian theory and clinical findings focuses upon the accounts of sexual need and expression. From the anthropological realm, two accounts of sexual experience are most pertinent here. MALINOWSKI, *SEX AND REPRESSION IN SAVAGE SOCIETY* (1927); SEWARD, *SEX AND THE SOCIAL ORDER* (1946).

The other formidable urge or desire that gives rise to frequent deviant behavior in our culture is what is known as aggression. The literature on personal aggression is not as well-focused as that on sex deviation, perhaps because the concept itself is not as well-rooted and identified. Worthy of note in the present context are REDL & WINEMAN, *THE AGGRESSIVE CHILD* (1957); DOLLARD, MILLER *et al.*, *FRUSTRATION AND AGGRESSION* (1939). Scott, in a recent, very brief exposition ordered, and expostulated on, the causes of "maladaptive" aggression along a continuum ranging from heredity and physiological explanation to social causation. SCOTT, *AGGRESSION* (1958). For a view of aggression as it is turned inward by and upon the individual himself see MENNINGER, *MAN AGAINST HIMSELF* (1938).

sions and additions in perceiving, as in the instance of hallucinations and other repetitious error.<sup>78</sup>

The sometimes conditional influence of circumstances calls into need another issue about present psychological experiences: "how complete and pervasive?" If there is uncertainty, unforeseeability, or inflexibility in thinking, feeling, perceiving, and wanting, one needs to know the consistency and comprehensiveness of such experience. Confusion, for example, may exist only with reference to certain impinging circumstances, and these need to be identified. On the other hand, delusion, as an instance, may be so regular and substantial that all of experience is virtually absorbed by and placed in service of the distortion of reality. The judgment of regularity and pervasivity in elements of personal deviancy is not only rationally but also emotionally significant. It implies the degree of threat that the individual poses to society and tends in itself to pre-empt decision on how much isolation from society the individual is to receive sheerly as a means of societal protection.

Speaking of the susceptibilities of judgment, they tend to be most acute when the decision-maker fails to use adequate perspective. The assessment of psychological functioning, at every step, makes implicit reference to the common experience of large numbers of individuals. Usually, the reference group is not formally constituted, and judgment results from casual, unregulated impressions of experience, beginning with one's own. Occasionally, the judgment is the result of a highly disciplined census concerning typical experience, likely the product of formal research and adapted by "experts" in their opinion. Judgmental perspectives and viewpoints are more adequate and disciplined when they contemplate substantial, identifiable references for "general" behavior and psychological experience.

Not only surmise but observation as well may afford a limited basis for judgment. The curt appearance of particular uniformities in psychological experience may reflect the operation of a narrow range of observation or observability. Psychological experience is more easily evidenced on the exterior of the individual, but it also ranges within.

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<sup>78</sup> The most dramatic distortions in perception occur in alcoholics who are in a state of delirium. For an account of and analysis of perceptual and other behavioral distortions under these circumstances, see CAMERON & MAGARET, *BEHAVIOR PATHOLOGY*, 452-77 (1951).

Perceptual limitation because of brain injury, and the psychological consequences, are described by GOLDSTEIN, *AFTEREFFECTS OF BRAIN INJURIES IN WAR* 74-79 (1942). Among other psychiatric classifications, distortive perceptual phenomena are particularly notable in the category of "paranoid schizophrenia."

Assessment that does not contemplate the full course of experience provides an unpenetrating view of behavior propensities.

2. *The consistency and continuity of psychological experience*

The need for a time perspective in psychological experience is particularly established in view of the elaborateness, complication, and subtlety of such experience. The need is to identify a course of experience that both identifies and assures meaning. Evidence of consistency or variability in time, of fixity or change, affords strength to interpretation.

Characteristically, there is a familiar range and quality of an individual's thinking, feeling, wanting, and perceiving that evolves in time, reaches a zenith, and then becomes fixed and/or tends to recede. In general, the penetration of thinking, the depth of feeling, the character of wanting, and the acuity of perceiving tend to evolve and settle in consistent fashion for an individual. There is a stability of characteristic that is amplified, but not changed, in time. One may be intellectually bright, emotionally confused, persistent in some particular kinds of wants and needs, or perceptually distortive. Trends in experience tend to be consistent and more evident in a span of time.

A radical breach or change is unlikely without the acute intervention of alien and uncommon circumstances. Momentary psychological experience of nearly any kind suggests the pertinence of considering and evaluating the circumstances that create such unique effect. Particular wartime exposure,<sup>79</sup> accidental injury,<sup>80</sup> and other intense, acute stress-producing experiences<sup>81</sup> may generate traumatic momentary effects on psychological function. In their most significant aspects, their influence is immediate rather than continuing, though they may sometimes serve to complicate subsequent psychological experience. The need here is to assess the prospects of irretrievable damage to continuing function and the prospect that a like provocative circumstance will reoccur.

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<sup>79</sup> See references in note 43 *supra*.

<sup>80</sup> Of particular interest here are the effects of brain injury on behavior. Notable is the work of GOLDSTEIN, *op. cit. supra* note 78. See also GOLDSTEIN & SCHEERER, *supra* note 73. Cf. HOCH & KALINOWSKI, SHOCK TREATMENTS, PSYCHOSURGERY, AND OTHER SOMATIC TREATMENTS IN PSYCHIATRY (2d ed. 1952). See references in note 38 *supra*.

<sup>81</sup> On psychological stress, particularly as related to surgery and analyzed simultaneously from a psychoanalytic and an experimental psychology perspective, see JANIS, PSYCHOLOGICAL STRESS (1958). Stress reaction as a maladaptation in the individual's relationship to his social environment is the subject of brief analysis by an outstanding inquirer into psychosomatic behavior—WOLFF, STRESS AND DISEASE (1953).

### 3. *Specific generative influence in psychological experience*

Here one seeks *sources* relating to exaggeration, peculiarity, or uncertainty in psychological experience. Both trends and instances in experience reflect the operation of predisposing influences. These may have been cumulative, to the point where they reach a certain and perhaps constant pitch and consequence. Inconsistent, uncertain, or insubstantial family relations early in life, for example, may provoke in time a degree of instability and disturbance as to constitute personal deviancy. There may be an immediate event, either independent of or superimposed upon already existing influence, that may develop an intensity and stress unequal to the individual's characteristic modes of handling experience. The effects of battle-line experience,<sup>82</sup> of giving birth,<sup>83</sup> of accident or surgery<sup>84</sup> can create acute disturbance in psychological experience. Or, the predisposing influence may reflect "endowment," some pre-experiential event or process, as in some mental deficiency,<sup>85</sup> that substantially channels or limits subsequent experience.

The emphases of individual and social structure may reflect the organic bases for psychological difficulties. Persons may be distorted or incomplete in some aspect of their physical make-up, most notably in brain structure, with consequent immediate limitation or predisposition to severe functional problems.<sup>86</sup> An immediate social structure with primitive values, as in antisocial substrata in society, can reflect and, more particularly, can generate a lack of substantial emotional control or emotional sensitivity.<sup>87</sup> The facility of structure, both physical and

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<sup>82</sup> See references in note 43 *supra*.

<sup>83</sup> The occasional acute 'psychotic' experiences here and their background are briefly described in CECIL & LOEB, *MEDICINE*, 1672-73 (9th ed. 1955). For a more detailed presentation and discussion, see Jacobs, *Etiological Factors and Reaction Types in Psychoses Following Childbirth*, 89 J. MENT. SCI. 242 (1943).

<sup>84</sup> See references in notes 80 & 81 *supra*.

<sup>85</sup> For an account of mental deficiency particularly reflecting the importance of genetic theory see PENROSE, *BIOLOGY OF MENTAL DEFECT* 61-91 (1949). Perhaps the scholar most familiarly associated with the genetic viewpoint regarding personal behavior is KALLMANN, *HEREDITY IN HEALTH AND MENTAL DISORDER* (1953), and see the treatise by the same writer on heredity factors in "schizophrenia." KALLMANN, *THE GENETICS OF SCHIZOPHRENIA* (1938). Cf. references in note 29 *supra* and related text.

<sup>86</sup> See, e.g., reference in note 40 *supra*.

<sup>87</sup> Sutherland's observations on white collar crime and his concept of "differential association" are pertinent here. SUTHERLAND, *WHITE COLLAR CRIME* 234 (1949). More from the psychological than Sutherland's sociological viewpoint, see the section on etiology and development in delinquent behavior in *SEARCHLIGHTS ON DELINQUENCY*

social, may be modified in time by the experience of inquiry, illness, or other sudden stress that causes and/or exacerbates psychological disturbance or modifies it in other ways.

Disturbance is, additionally or independently, a function of physiological, psychological, or social upset. A disease process, an intense maladjustment, or a social upheaval may each and all contribute sufficient identifiable effect to indicate a reasonably specific "functional" basis for psychological malaise.<sup>88</sup>

Generative influences need to be weighed for their predictive value, both retrospectively and prospectively. Here one seeks to identify the powers, single and specific, in series or covarying and interacting, that "move" an individual and most consistently produce certain effects in the person. Clearly, the most convincing data, taken under the carefully controlled circumstances of formal research endeavor, afford the best assurance of reliable assumption. The extent and the relevance of information about causes and effects, weighing always the pertinence of the particular individual's experience to the research findings available, becomes the basis of confidence in assessing both past and prospect. Unless prediction on a particular basis is known to be nearly perfect, the most comprehensive view of "cause" is the most necessary. The expert with the more comprehensive and reflective viewpoint, or the group of experts affording a composite view, are the guarantors that the matter of "cause" is being thoroughly assessed.

#### 4. *Probabilities in the maintenance and modification of psychological experience*

The prospect of continuity in psychological experience, in accordance with trends and occurrences of the past, is a matter of predicting stability of process, similitude in circumstances, and the improbability of intervention. A stable process is likely to have predictable consequences. This takes the form of a predictable kind or degree of change, or no change at all but only continuation or reoccurrence. Exaggeration, confusion or vagueness, and peculiarity in psychological experience may be constant and characteristic, or these may evolve, usually in a predictable

193-274 (Eissler ed. 1949), particularly Johnson's contribution on "superego lacunae." See also WEINBERG, SOCIETY AND PERSONALITY DISORDERS 288 (1952).

<sup>88</sup> Instances of these "functional" disturbances have been noted heretofore. See, for example, war as social upheaval and its psychic damage, amplified in the references in note 43 *supra*. Paresis, as a disease process, has clear-cut "functional" meanings and consequences. And, for an instance of intense maladjustment as both source and product of functional personal disturbances, see references to family maladjustments and personal behavior in note 42 *supra*.

way, with the natural growth or diminishment of a malignant social or biological process.

Similitude in circumstances assumes that the conditions of a person's life, viewed from probable psychological consequences, are or are not to be markedly altered. Here, one is predicting the circumstances of personal and social experience, with reference to both their consistency and to the prospect of change. To the extent that a change in circumstances is at all foreseeable, its stress-producing characteristics must be assessed. Changed circumstances are viewed in relation to the quality of an individual's continuing psychological experience so as to predict their probable impact on psychological operation. Changes in one's general state of health, in family composition, economic characteristic, etc. are circumstances that may have serious impacts on psychological functioning.

Designed intervention, usually constituting some manipulation of persons' power and freedom, may have the most exacting consequences if it is designed properly and correctly observed for effect. Restrictions and specifications of contact, in the form of some kind of assignment to some kind of institution and injunctions for or against some kinds of participation or association, may provide the conditions for change.<sup>89</sup> Subjection to particular remedial, change-evoking techniques, such as psychological analysis and suggestions, vocational and intellectual instruction, surgical and pharmaceutical therapy, and/or manipulation of persons and social environments impinging on the individual, provides the means of change.

Intervention is costly, and the assessment of cost in terms of the kinds and degrees of commitment of the individual and his milieu is an important matter. The risk and burden of proposed intervention is, in fact, or ought to be largely determinative of the disposition to be made of personal deviancy, particularly as it is weighed in relation to considerations of need for social stability and regularity. One would want to know whether dependency for a beneficial individual result rests upon manipulation and, if so, what kind of manipulation of the individual himself, members of his family, his community, established social practices, patterns of values, etc. The duration of the structuring and limitation of behaviors is also an essential factor of cost and is itself a matter of feasibility. And the possible negative risks or consequences

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<sup>89</sup> Cf. Lasswell & Donnelly, *Continuing Debate Over Responsibility: An Introduction To Isolating Condemnation Sanctions*, 68 YALE L.J. 869, 884-90, 894-98 (1958); Dession, *Psychiatry and Public Policy*, 18 PSYCHIATRY 1, 7-8 (1955) (reprinted in 5 BUFFALO L. REV. 48 (1955)).

that attend intervention, in terms of alteration of the individual or his milieu, need to be considered.<sup>90</sup>

Finally, and most critically, an essential determination must be made of the probabilities of success before substantial value and material resources are committed to the process of intervention.<sup>91</sup> Absolute, successful prediction is generally unlikely. However, if the benefits of research and experience are too insubstantial to warrant a prediction of any regular success, then one must acutely weigh the burden and benefit of a presumption of success against the commitment of public and private resources to a solution that is mostly experiment. If, in these circumstances, experiment is the choice, then the range and possibility of experimental choice ought to be considered in more exacting, challenging fashion.

In the better legal view, personal deviancy is not a matter of personal guilt, but of social responsibility. An individual's deviant act is notice to society that he constitutes, in some measure, a social problem. Proof of deviant behavior attaches the particular interest and concern of society to a particular individual. It delineates some measure of culpability and springs the forces that subject the individual, particularly, to limitations in power and freedom. The assessment of personal deviancy is, then, the means to decision in establishing the further relationship of the particular individual to social order.

The need for a comprehensive conceptual framework in the assessment of personal deviancy is acute. It is necessary at least as a frame of reference for sifting the findings and methods of esoteric diagnostic schemes, and, beyond this, it is a model for inquiry and exploration. The legal decision-maker, for one, must have insight and perspective in framing his questioning and evaluation. Without a firm conceptual framework, his operation in the realm of deviancy is blind, fortuitous, and subject to the distortive influence of provincial, chauvinistic, and obscure thought. A good conceptual framework is a meaningful scaffolding where too many chaotic facts and impressions prevail. It is necessary to a sense of purpose and order in a delicate and complicated social problem area, where understanding and decision by legal decision-makers cannot be adequately bargained or delegated.

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<sup>90</sup> Cf. references in note 88 *supra*.

<sup>91</sup> See Dession, *Justice After Conviction*, 25 CONN. B.J. 215, 223, 226-29 (1951), and references in note 88 *supra*. Jerome Hall puts the matter thusly: "Legal Controls cannot be abandoned in response to the alleged findings of current science until it has ascertained whether the scientific knowledge necessary for effective operation of the new laws is actually available." Hall, *Psychiatry and Criminal Responsibility*, 65 YALE L.J. 761 (1956).