

Book Review

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Book Review

THE PSYCHOLOGY OF THE CRIMINAL ACT AND PUNISHMENT.
By Gregory Zilboorg. New York. Harcourt, Brace and Co.,
1954. Pp. xi, 141. \$3.50.

In 1953, Dr. Gregory Zilboorg¹ was chosen as the second recipient of the Isaac Ray Award and was asked therefore to deliver a series of lectures at Yale University under the joint auspices of the Schools of Medicine and Law. The award is annually conferred upon one who, in the judgment of a committee of the American Psychiatric Association, is most worthy by reason of his contribution toward improved relations between Law and Psychiatry. It is interesting to note that it was the author, himself, who was chiefly instrumental in causing the Association to establish the award a year earlier. Its first recipient, Dr. Winfred Overholser, was author of *The Psychiatrist and the Law*,² a small book based upon lectures delivered at Harvard University in 1952.

The Psychology of the Criminal Act and Punishment is an amplification of Dr. Zilboorg's Yale presentation, the lectures serving as an outline for the book. The author begins with a chapter, titled *The Nature and the Quality of the Act*, in which he describes what he terms "the eternal struggle between the striving to punish and the yearning to understand and forgive".³ Though he ascribes this ambivalent urge to mankind as a whole and to each member thereof, he indicates, that, as a group, the legal profession primarily seeks to punish, while the medical profession, particularly the psychiatric segment, seeks to understand. The emphasis of the law is upon the act, the accent of medicine is upon the individual actor. Zilboorg shows how the psychological phenomenon of identification⁴ plays a part in the divergency of legal and medical attitudes. Training, experience, and goal, he feels, tend to cause the doctor to identify himself with the patient. Those same elements,

¹ Author of: HISTORY OF MEDICAL PSYCHOLOGY (1941); THE MEDICAL MAN AND THE WITCH (1935); MIND, MEDICINE AND MAN (1943); SIGMUND FREUD, HIS EXPLORATION OF THE MIND OF MAN (1951).

² Reviewed 14 Md. L. Rev. 390 (1954).

³ ZILBOORG, 4.

⁴ An unconscious process by which an individual incorporates within himself a mental picture of an object and thinks, feels and acts as he conceives the object to think, feel and act. HINSIE AND SHATZKY, PSYCHIATRIC DICTIONARY (Part II, Supplement 1953).

however, cause the lawyer to shun any semblance of identification with the criminal and, indeed, to "establish the greatest possible psychological distance between himself and the criminal".⁵ This, the author claims, is a very important source of the evident lack of understanding between law and psychiatry.

Dr. Zilboorg pleads for the introduction of more science, particularly medical science, into the courtroom, confident that "emotional decisions which so often appear disguised as judicious decisions" will thus be avoided.⁶ He passionately condemns the McNaghten Rule⁷ as "the monster of the earnest psychiatrist which prevents him from introducing into the courtroom true understanding of human psychology and of the psychology of the criminal act".⁸ No formalistic exclusion rules should bar introduction of any detail or aspect which would aid in the psychological understanding of a criminal act. To support his almost phobic abhorrence of the McNaghten Rule, Zilboorg quotes Sir James Stephen;⁹ however, in so doing, he handily lifts pertinent phrases out of context.¹⁰ When inquiring into the meaning of the McNaghten phrase "nature and quality of the act" Zilboorg assigns to it a moral rather than a cognitive connotation. "Nature" and "quality" as well as knowledge "that he was doing what was wrong" are collectively treated in terms of the immorality of the act.¹¹ The author apparently does not consider the actor's perception of the physical steps he takes nor his awareness of the harmful physical consequences of those steps to be anything more than an enlargement of the concept of morality explicit in

⁵ ZILBOORG, 14.

⁶ *Ibid.*, 7.

⁷ "... to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong." McNaghten's Case, 10 Clark & Fin. 200, 210, 8 Eng. Rep. 718, 722 (1843).

⁸ The author is by no means alone in his condemnation of the McNaghten formula. See WEIHOFFEN, *MENTAL DISORDER AS A CRIMINAL DEFENSE* (1954), 63 *et seq.*; GUTTMACHER and WEIHOFFEN, *PSYCHIATRY AND THE LAW* (1952), 407-408; STEPHEN, *HISTORY OF THE CRIMINAL LAW OF ENGLAND* (1883), 154, 159; GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, *CRIMINAL RESPONSIBILITY AND PSYCHIATRIC EXPERT TESTIMONY*, REPORT No. 26 (1954), pp. 2-5. See also *Durham v. U. S.*, 214 Fed. 2d 862 (1954), noted 15 Md. L. Rev. 44 (1955). Cf. Davidson, *The Psychiatrists Role in the Administration of Criminal Law*, 4 Rutgers L. Rev. 578, 587 (1950), in which it is stated: "... one stark fact remains. Unless a man is held answerable for what he knows he should not do, there will be no enforceable sanction against criminal behavior."

⁹ STEPHEN, *HISTORY OF THE CRIMINAL LAW OF ENGLAND* (1883).

¹⁰ Compare ZILBOORG, p. 18 with STEPHEN, *op. cit.*, *ibid.*, Vol. II, p. 154.

¹¹ ZILBOORG, 16, 17.

the last phrase of the Rule.¹² Such a unitary concept is in accord with a modern fundamental theory of psychiatry, namely, that a mental disorder which manifests itself primarily in one sphere of mental activity indicates disorder of the total mind and not merely of a segment of the psychological apparatus as a whole. The " 'nature and the quality of the act' has no meaning whatsoever unless we bring it into harmony with the total personality of the criminal. . . ."¹³

In his second chapter, Zilboorg attacks the commonly held belief that punishment has a deterrent effect upon criminal activity. He presents statistics to the reader which tend to show that there exists little, if any, correlation between severity of punishment and incidence of crime. Jurisdictions where capital punishment has been abolished are shown to have a lower homicide rate than those in which execution is practiced.¹⁴ It would seem that factors other than the nature of punishment might well influence such statistical findings. These Zilboorg acknowledges but treats as trivial.

The author attempts to substantiate his claim that punishment is worthless as a deterrent by the use of cases that unfortunately are not particularly in point. Bonnie Brown Heady, the co-conspirator in the Greenlease case, who calmly reads a comic book after confessing to her crime is cited as one who is not deterred by the thought of imminent execution.¹⁵ It would seem that Heady's conduct might be classified simply as bravado at a time when no amount of reflection on her crime could act as a deterrent. He quotes from Maudsley's description of the trial of Burton to show the ineffectiveness of the deterrence principle. However, it should be noted that Burton was suffering from a curious, though psychologically recognized, desire to be punished.¹⁶ To state that the execution of Burton would not deter others who are possessed of a like compulsion does nothing to support the author's theses. However, in pointing out man's progression towards more humane punishment Zilboorg presents a compelling argument that society does not truly subscribe to the deterrent theory.

¹² Note the interpretation of these terms and their application to Hadfield's Case, 27 How. St. Tr. 1282, 1321 (1800), as described in STEPHEN, *op. cit.*, *supra*, n. 9, vol. II, 159. See also DAVIDSON, FORENSIC PSYCHIATRY (1952), 4, 5.

¹³ ZILBOORG, 26; GLUECK, MENTAL DISORDER AND THE CRIMINAL LAW (1925), 226-227; Durham v. United States, *supra*, n. 8.

¹⁴ ZILBOORG, 28.

¹⁵ *Ibid.*, 30.

¹⁶ *Ibid.*, 26; MENNINGER, MAN AGAINST HIMSELF (1938).

Nevertheless, Zilboorg believes that the criminal must be isolated from the rest of us. "He has a moral responsibility to meet, a sin to expiate . . .,"¹⁷ a duty to disclose his psychological secret. Since an electrocuted, hanged or gassed corpse has no psychology, Zilboorg wants the living criminal to be preserved and set aside as the subject of a psychological inquiry into the workings of the criminal mind.¹⁸ At this point it is difficult for the reader to escape a fleeting thought of Buchenwald.

In the chapter, *Some Differences In Professional Psychology*, Zilboorg points out the chasm between the divergent attitudes and goals of the legal and medical professions. Apprehension and punishment on the one hand or restoration, correction and cure on the other? Herein lies a fundamental difference in legal and medical viewpoint and aim. There is no easy remedy¹⁹ but stimulation of the curiosity of both professions in the understanding of the criminal is prescribed. Through this he hopes that extensive reforms in our systems of punishment and rehabilitation may be brought about.

Zilboorg complains that the law in hesitating to accept psychological explanations of human conduct justifies its reluctance on the ground that the jury should be confronted only with information it can understand. That a jury has no knowledge of the techniques of identifying blood or determining the presence of poison in a given organ, is manifest, yet the jury is permitted to take the results of such techniques on faith, so to speak. The author doubts that between this sort of evidence and a psychological opinion an honest distinction can be drawn.

The antagonism between law and psychiatry, the hostility between members of the two professions, is described as "but a reflection of the universal antagonism with which humanity is burdened".²⁰ However, the generalized hostility which man possesses may be differently channeled or directed depending upon training and environment. The lawyer is born and lives, Zilboorg believes, in the midst of established rules and principles to which he is bound to pay homage under the doctrine of *stare decisis*, which is, itself, one of these principles. On the other hand, the doctor's training and experience is with, of and for the in-

¹⁷ *Ibid.*, 32.

¹⁸ *Ibid.*, 33.

¹⁹ *Ibid.*, 33-35.

²⁰ *Ibid.*, 38.

dividual patient. Of necessity the physician identifies himself with his patient for he is brought to realize that he himself is subject to the same ills.

The conflict is essentially this — “the lawyer . . . is taught emotionally, sociologically, and professionally to be estranged from the people who will become his major concern . . . the physician is taught to become emotionally, sociologically, and professionally one with the people and medical conditions which are to become his chief professional concern”.²¹

In Zilboorg's psychological terminology, the “aggressive capacity” of the doctor is directed against the affliction, that of the lawyer — against the violator as well as the violation of the law.

The author believes that mutual medico-legal hostility may be dissipated and perhaps ultimately disappear only if the two professions recognize and agree that the personality is an indivisible totality in which both conscious and unconscious aggressive tendencies exist.²² Without joint acceptance of this concept neither psychological cure, just punishment nor effective rehabilitation of the criminal is believed possible.

In his fourth chapter, *Aggression and Transgression*, Dr. Zilboorg describes and develops his psychological theory concerning the relationship of unconscious hostility to crime. His explanation is something like this: Aggression is universal. It is a special instinctual drive which is omnipresent in all of us. The criminal's acts are motivated by “a desire to do injury, or enhance his own sense of power. . . .” They are expressions of aggression. In psychological terms, he is “acting out” his hostility. From birth onward the individual protests. He learns that his expressions of hostility are not always welcome and he proceeds with the difficult task of “handling (his) aggression”, of checking overt and unacceptable aggressive responses.²³

According to the modern theory of dynamic psychology, inhibition of an aggressive drive only represses it. It does not disappear except from the consciousness of the individual. It “gets free sway in the unconscious . . .” and “causes considerable anxiety and a sense of guilt. . . .”²⁴ If the aggression is turned inward, suicide may result, if turned outward, murder. It is the neurotic or criminal who

²¹ *Ibid.*, 41.

²² *Ibid.*, 44.

²³ *Ibid.*, 49.

²⁴ *Ibid.*, 50.

gives in to the pressure of his hidden and unconscious drives and "acts out" his repressed aggression.

Zilboorg's observation that the incidence of suicides varies inversely as the number of homicides and that the suicide rate decreases during time of war seems to bear out his psychological analysis. The reader, however, may wish for a more authoritative source of such generalized statistics.

When the law demands a full yet simple explanation of the reason why a particular individual has submitted to these pressures and has acted out his hostility, the psychiatrist has difficulty. That which he attempts to describe does not lend itself to exact measurement or definition.²⁵ The author likens the material with which the psychiatrist works to pieces of a jigsaw puzzle. A single piece has no real meaning save as part of the complete picture. It is only through a jigsaw method of reconstruction that an individual's "psychological totality" can be synthesized and perceived. In order to comprehend the enigma of the criminal, knowledge of his developmental history is therefore essential; however, unfortunately, the executioner frequently cheats psychiatric research of this opportunity. We are told that often the true motive behind the execution or punishment in general is nothing more than counter-aggression of the executioners themselves and that ". . . criminal and pathological forces cannot be stamped out with counter-aggression".²⁶

In his chapter, *Some Sources of the Drive to Punish*, the belief is advanced that the problem of convicting or not convicting the criminal involves in essence a psychological struggle between jurist and doctor.²⁷ Zilboorg dogmatically states, "The court, the prosecutor, the jury, insofar as they are punitive agents, are all motivated by their aggressive reactions toward the criminal."²⁸ He categorizes these judicial agencies as "agencies of counter aggression" who direct their hostility toward the criminal aggressor. They are animated by the self-same drives as those which impel the prisoner in the dock.

The author supports this rather uncomfortable characterization with the observation that since under our system punishment follows after the anti-social act and does not precede it in an attempt at prevention, and since it is at

²⁵ *Ibid.*, 53.

²⁶ *Ibid.*, 66.

²⁷ *Ibid.*, 69.

²⁸ *Ibid.*, 75.

most an ineffective deterrent — a thesis he expounded earlier — the criminal law represents hostility against the criminal rather than concern about the safety of the public.²⁹ Our quick justice allows us to get rid of the evildoer and forget the offense.³⁰

Zilboorg maintains that “. . . the average man is the carrier of the very impulses which are called criminal when they are acted out”.³¹ In the non-criminal these impulses are repressed and result in anxiety unless they are dissipated in an acceptable way. In relation to the criminal we may make one of two opposing choices; deny similarity with the culprit and wreak our hostility upon him, or admit our affinity and assume a more tolerant, charitable attitude to the actor even though we condemn the act.

We are told that those who have a part in the condemnation of a transgressor are themselves burdened thereby. It is brought to our attention that the average prosecutor or jurist rarely witnesses the execution he was instrumental in achieving. This, Zilboorg explains, is because he who metes out punishment does so in an unconscious spirit of revenge which in turn creates a feeling of guilt.

His assumption that punishment causes guilt is a clear indication to the author that it can never be completely satisfactory to the human conscience nor can it attain its declared object, viz., the prevention of crime through deterrence, penitence and rehabilitation.³²

Zilboorg, however, does not advocate liberation for the transgressor. He disclaims the notion, which society seems to have, that the psychiatrist fancies to free the criminal and let him loose to prey upon the luckless citizen. The author's alternative to punishment is not entirely clear to the reviewer unless perhaps it be confinement for the purpose of psychological experimentation.

In the concluding chapter, *Some Suggestions About Psychiatry and Psychiatrists*, Zilboorg notes the distrust with which the doctor and particularly the psychiatrist is perceived by the public. When he extends his interests into neighboring fields and beyond mere body temperature, pulse rate and clinical diagnosis, he is viewed with suspicion. Hostility is particularly evident in the courtroom. Here the psychiatrist is suspect on various grounds; that he advocates liberation of the criminal, that he is impetuous

²⁹ *Ibid.*, 77.

³⁰ *Ibid.*, 87.

³¹ *Ibid.*, 79.

³² *Ibid.*, 94.

and rashly desires change in penal law and that he often disagrees with his fellows, — the latter, a rather incongruous reason to be advanced by a lawyer, Zilboorg suggests. The author admits no validity to any of these arguments. He paints a picture of lawyer versus lawyer hostility with the innocent psychiatrist in between, saying that there is no “clash of opinion but a clash of lawyers, with psychiatrists in the role of baseball bats”.³³

Zilboorg protests that the usual questions put to the psychiatrist in a criminal case are moral or legal but in no sense psychiatric questions. He argues that clinical psychiatry does not know of a condition called legal insanity. It “never saw it, and after almost two hundred years of clinical investigations seriously doubts its existence”.³⁴

He charges that our legal system has become formalized and the technicalities of legal procedure have been given more importance than they deserve. The reader will perhaps agree that the law is at times over-zealous in preserving form and technical procedure. However, one must be aware that the formalities were early developed as a guard against arbitrary findings and today are still effective protective devices.

According to the author, psychiatry unlike the law, cannot be formalized, but must adapt itself to the unique individual toward which it is presently directed. He complains that under our system of criminal procedure no opportunity is provided for a proper presentation of the psychiatric point of view.³⁵ The common procedural principal permitting an “expert for each side is a corrupting, immoral principle. . . .”³⁶ Psychiatry, therefore, cannot properly represent either prosecution or defense. In no other way than as friend of the court may the psychiatrist be competent and effective.

Since Law will not accede to Medicine’s pleas and make the desired reforms, the author suggests that Medicine itself take the initiative. He advises Psychiatry through its organization, the American Psychiatric Association, to formulate its own moral code to govern every qualified psychiatric witness. Adoption of canons of ethics by the psychiatrists’ accrediting agency would aid in lessening the expert’s antipathy toward the courts and the legal profession. Among the rules, Zilboorg suggests the following:

³³ *Ibid.*, 112.

³⁴ *Ibid.*, 125.

³⁵ *Ibid.*, 121.

³⁶ *Ibid.*, 119.

First — No qualified psychiatrist may appear either for the accused or the State. To do so would be considered a violation of established ethical principles of his profession.³⁷ Secondly, — The use of the hypothetical question must be discontinued.³⁸ Zilboorg advises that the witnesses may refuse to answer such a question since it will be characterized as unethical under the Association rules.³⁹ Thirdly — A panel of psychiatric experts must be created, the list to be offered to both the defense and prosecution, each side to have the right to make an agreed number of peremptory challenges, — much the same as in the selection of a jury, — until a given number of psychiatric experts are chosen to serve as court appointed witnesses.⁴⁰ Cross-examination by either side would be permitted, and the findings, whether in agreement or not, would be made available to each side. This last proposal closely resembles a recently suggested plan to provide for court appointed medical experts in Maryland.⁴¹ This procedure, however, contemplates the appointment of a single expert from the panel rather than several as suggested by Zilboorg. The practice of permitting an opinion to be voiced by a solitary expert clothed with the authority of the court has been questioned.⁴²

³⁷ Such a rule may perhaps be questioned on the ground that a witness who refuses to testify would subject himself to citation for contempt. Though this may be the practice as regards an ordinary witness or even an expert witness when testifying as to conduct which he actually observed, it is unlikely to be applicable to the expert in his capacity as an opinion witness. Thus, he may perhaps safely decline to make a study of facts not within his personal knowledge in order to form an opinion and testify as to this for prosecution or defense, since to do so would be professionally unethical. In any event, it is quite improbable that counsel would seek to force under subpoena an undeniably hostile witness to disclose his expert opinion. 12 AM. JUR., CONTEMPT, Sec. 16, p. 400.

³⁸ For a criticism of the hypothetical question, see McCORMICK, EVIDENCE (1954), 33, Sec. 16. On advantages of the hypothetical question from the doctor's viewpoint, see DAVIDSON, FORENSIC PSYCHIATRY (1952), 281.

³⁹ It would seem, however, that if the duty of serving as witness is once undertaken, the expert would then be subjected to the legally accepted form of evidentiary procedure. Though his refusal to serve as a witness save as a friend of the court may be conceded, it is questionable whether, having submitted, as it were, to normal court procedure, he would be permitted to qualify his testimony by excluding the distasteful hypothetical question. Cf. MODEL CODE OF EVIDENCE (1942), Rule 409; UNIFORM RULES OF EVIDENCE (Handbook of the National Conference of Commissioners on Uniform State Laws, 1953), Rule 59, p. 194.

⁴⁰ Dr. Zilboorg ignores the fact that in many areas the paucity of qualified psychiatrists would make such procedure well nigh impossible.

⁴¹ Daily Record, January 11 & 12, and February 1, 1955.

⁴² The plan has been criticized by the Maryland State, the Baltimore City and the Baltimore County Bar Associations on the ground that it is likely to create evils similar to those it was designed to abolish, and these Associations have expressed disapproval of it. It has been suggested that if the case is one where an honest difference of opinion exists within the medical profession itself, this divergence may be reflected by the experts called by

As a final point, and apparently as an afterthought, Dr. Zilboorg introduces a rather novel but interesting theory of penology. He theorizes that society's aggression toward the accused and its vengeance by way of severe punishment upon him may only aggravate his hostility and thus block redemption and rehabilitation. It is suggested that the most effective cure for criminality and delinquency may rest in the mechanisms of self-punishment. The salvation of the delinquent may stem from "the ever-present social instincts of man"⁴³ which produce within him a sense of guilt. It is this hidden anxiety which the psychiatrist must utilize in his efforts toward re-education and ultimate rehabilitation of the criminal.

In general, this small volume contains a good deal of interesting and provocative material which might help the legal profession in its largely unsuccessful attempts to understand the psychiatric branch of the medical profession. However, it fails to create an atmosphere conducive to a rapprochement of the two fields of endeavor. Redundancy of ideas, a general disinclination to organize the material in a logically progressive manner, and inadequacy of citations mar the work. Possibly the explanation for these minor deficiencies may rest upon the fact that the book is an amplification of material which was originally presented orally in the Yale lectures.

The impression of a tendency toward exhibitionism, sensationalism, and self-satisfied condescension may antagonize the reader. It is unlikely that the author intended his thoughts to be complacently encountered; portions of his work border on the melodramatic and apparently are included only for the sake of sensationalism. As disgusting a case history as that of Albert Fish, if necessary at all, could have been presented adequately without squandering six or more pages on superfluous repulsive details.⁴⁴ Pointing out every lurid fact of this case is of no conceivable benefit to the reader, though perhaps it may be of some hidden psychological value to the author.

Zilboorg is rather extreme in a number of his analyses. For example, he interprets the conduct of certain English pickpockets who carried on their activities in the shadow

the opposing parties. Therefore, to the public as well as to the jury the expert witness who dares to disagree with the gospel of the court sponsored prophet is likely to appear as a charlatan and the counsel of the party employing him as a shyster espousing an unfounded cause. Furthermore, the jury is not psychologically free to determine the "truth" or "falsity" of the conflicting opinions.

⁴³ ZILBOORG, 130.

⁴⁴ *Ibid.*, 56-63, 64, 66, 67, 83.

of the gallows as “. . . their revenge for their own vicarious execution”.⁴⁵ It might be quite interesting to hear his explanation for similar petty thievery one encounters at county fairs, in railroad stations or on the Broadway and Seventh Avenue subway.

Notwithstanding its shortcomings, *The Psychology of the Criminal Act and Punishment* is recommended to members of the legal profession as a thought-provoking work which will help them toward a deeper appreciation of some of the obscure motivations of the criminal, the psychiatrist and, indeed, fellow members of the bar.

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⁴⁵ *Ibid*, 66.

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