Law and Mental Disorder
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Dedication

To Elizabeth H. and the late John A. Sutro. As a member of my Board of Visitors when I was dean of the law school, Jack kept me from many mistakes with his always sharply focused advice. The endowed chair that Elizabeth steered to the law school, together with her warm personal support, have provided me time and inspiration to complete my part of this book.

George J. Alexander

To my wife, Jamie, and my daughter, Hallie, whose constant love and support sustained me throughout the preparation of this book. Without them, I was more apt to be its subject rather than its author.

Alan W. Scheflin
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experience to our work. We disagree with each other just short of being unable to support each other’s work. Yet we respect each other and have a good time when we teach and write together. We are already talking about another book.

George J. Alexander
Santa Clara, California
August 1998

From the time we began co-teaching the Law & Psychiatry course almost 25 years ago, I have been delighted to have George as my mentor, colleague and friend. Our views are close enough to permit us to work together comfortably, yet different enough to demand that each of us provides that extra measure of proof and persuasion that stimulates discussions, both in and out of class. Because of George, this is a much better book than one I might have written by myself. Many times in our private discussions or co-teaching, I have been excited and envious as George pulled together concepts in ways so distinct from my own thinking. Thank you, George.

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I have learned a great deal about the interaction between law and mental health from the many times I have appeared in court as an expert witness. Working on these difficult and complex cases increases my understanding about how lawyers attack and also defend mental health professionals.

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I save for last the most special acknowledgements. From my parents, my brother, and the extended family present while I was growing up, I developed a special interest in the varieties of human communication and expression. I appreciate the contribution they have made in support of my studies in mental health.

My wife, Jamie, and my daughter, Hallie, fill my life with love and laughter. Writing a book can be a lonely enterprise, but they were most understanding about the time spent away from them. Now that the book is completed, the opportunity to spend more time with them is a double reward.

Alan W. Scheflin
San Francisco, California
August 1998
Preface

Although law is quite ancient, psychiatry and clinical psychology are essentially creatures of the twentieth century. Crazy behavior has raised legal issues since the birth of legal rules, but it was not until the middle of this century that professional healers have played a major role in the framing and resolution of these issues. The impact of psychiatry and psychology on the law during the last several decades has been enormous.

The last several decades have also witnessed an astonishing growth and expansion of clinical settings in psychology and psychiatry. This growth and expansion in turn has created new genres of legal problems, not to mention a richness of cases. Consequently, today the field of law and mental disorder is far more vast than any single course could reasonably encompass.

In *Law and Mental Disorder* we decided to break tradition by examining the field as something more than an advanced constitutional reprise. Although we have retained the constitutional material where needed, our primary focus has been on (1) assessing the fundamental assumptions of psychology and psychiatry, (2) exploring the hard questions, such as whether these fields are science or art form, and (3) examining how their substance influences law, and whether other solutions are feasible. We are concerned not just with the lawyer’s grasp of cases and statutes, but also with the healers’ understanding of their own profession and of ours. We hope students will acquire insight into what psychologists and psychiatrists think and do in clinical and courtroom settings.

We have taken into account that law and mental disorder issues will be taught in basic classes. We therefore have attempted to raise the most controversial, the most heatedly debated, and the most scintillating ethical and legal problems in the field. In place of in-depth analysis of a particular area, we have attempted to provide materials that will trigger discussion and perhaps generate unanticipated interest in the field. We want the course to be emotionally and intellectually provocative and memorable for students, even those who otherwise had little prior interest in the subject.

These materials have been shaped over the last decade by our experiences in the classroom. We have sought cases, problems, and issues that have generated intense discussions. Areas of less appeal to students have been dropped. With some subjects, generally those where common knowledge is lacking, we have provided detailed notes. More familiar areas have been presented with less documentation.

*Law and Mental Disorder* is divided into three major parts. Part I explores the expanding world of the psychiatrist/psychologist. Chapter 1 has been crafted
to stimulate thinking about just how powerful and expansive psychiatry has become. As a society, is this increase in responsibility given to mental health professionals warranted? These questions become increasingly important when we return to them directly in Chapter 4, which details the role of the psychiatrist in the courtroom.

After raising many issues in Chapter 1, the material begins systematically to respond to those questions. Chapter 2 raises the question of who may practice mental health. Can any one of us give advice to others for a fee? Now that electronics will permit it, can professionals give advice on the Internet?

Chapter 2 also begins another theme that runs throughout the book—when the same problem is presented to a psychiatrist, a priest, and an attorney, are their solutions the same? Psychiatrists, priests, and attorneys have fiduciary relationships with patients, parishioners, and clients, as well as an obligation to maintain strict confidences. In what ways do their roles differ? Does the law treat each profession appropriately?

Chapter 3 moves us into the clinical world of the therapist. In general, what goes on in the therapist's office is private. If, however, the therapist violates the ethics of his or her profession or fails to perform competently at the appropriate standard of care, that privacy is breached. In this Chapter, several of the most controversial current ethical and legal issues facing psychiatry are confronted.

As previously noted, Chapter 4 moves us from the therapist's office to the courtroom. This pivotal chapter forces a direct confrontation with the essence of psychiatric functioning. What exactly do psychiatrists know about the workings of the mind? In addition to this problem of the validity of psychiatric opinion, we also have the problem of its reliability. Will psychiatrists agree with one another in the diagnosis of patients when presented with identical cases? Without validity or reliability, expert testimony is mere speculation or conjecture. In court, the psychiatrist is asked about the past (insanity defense), the present (competence to stand trial) and the future (if released, will the defendant be dangerous?). How effective are psychiatrists at each of these tasks?

In a recent study of psychologists in the United States, England, and Sweden, researchers asked for responses to the following request: “Describe, in a few words or in more detail, an incident that you or a colleague have faced in the past year or two that was ethically challenging or troubling to you.” Colnerud, “Ethical Dilemmas of Psychologists: A Swedish Example in an International Perspective,” 2(2) European Psychologist 164 (1997). See also Pope and Vetter, “Ethical Dilemmas Encountered by Members of the American Psychological Association: A National Survey,” 47(3) American Psychologist 387 (March 1992). The most frequently reported troubling ethical issues all dealt with confidentiality. In response to this concern, Part Two deals with a single subject—how is confidential information to be treated? Chapter 5 opens with the therapist-patient privilege and the ethical duty to preserve confidences. The rest of the chapter, and the remaining three chapters in Part Two, deal with situations in which the legal privilege and the ethical duty to preserve confidentiality are insufficient shields to preserve the patient’s privacy.
In the studies referred to in the preceding paragraph, one of the most frequently reported troubling confidentiality issues involved the mandated child abuse reporting laws. The second half of Chapter 5 deals with this topic.

Chapter 6 shifts from a legislatively created duty to report child abuse to the judicially created duty to warn third parties of threats made against them by patients. California’s *Tarasoff* case, which created the duty, is discussed, and its nationwide ramifications are explored. Should priests and attorneys also be under a similar duty? What about friends and relatives? After the contours of the *Tarasoff* duty are examined, a final section deals with the little-discussed problem of the *Tarasoff* warning’s impact on the therapist-patient privilege.

While Chapter 6 involved compelling psychiatrists to reveal patient secrets, Chapter 7 focuses on the situations in which patients can be compelled to reveal their own secrets, either expressly (compelled psychiatric examinations) or by waiver (filing a lawsuit and claiming emotional harm).

Chapter 8 completes the extended treatment of confidentiality by examining the ability of the patient, and also a variety of third parties (relatives, adversarial litigants, the government), to gain access to the patient’s mental health and medical records. By the end of the chapter, it becomes clear that the walls erected to shield the disclosure of the patient’s most intimate thoughts are quite porous.

Part Three brings together a range of problems involving legal rights and responsibilities. It will seem the most familiar to those weaned on prior texts. Here are the constitutional issues and basic philosophical approaches. We expect that students who have worked through the book to this point will now find this previously familiar ground a bit surrealistic, however. Concepts of responsibility and causation may now seem much harder to apply. The material asks the student to consider how one can be held responsible for an irrational mental state and whether the state can and should imprison (or, more precisely, involuntarily hospitalize) those in that condition. It asks what role public apprehension plays in how mental patients are treated. Of what importance, if mental disorder is not simply bad behavior, is the desire of the state to cure the afflicted person? Are there limits to the state’s ability to “cure” something that the incarcerated person has not chosen to cure voluntarily? Can we know what a mentally disordered person would choose to do if not mentally disordered? Would that knowledge be important?

Since an individual’s mental condition can be elusive and future dangerousness hard to predict accurately, may the state protect itself from feared violence by quarantining those of whom it is most frightened, irrespective of their actual potential for harm?

In Chapter 9, we examine the strain that apparent irrationality puts on a person’s right to trial of criminal accusations and how the state deals with those it finds unable to assist in their own defense. Related questions include whether the state can force the defendant to be drugged to “rationality” and whether the right to self representation serves such defendants. We then examine the history and permutations of the insanity defense to the crime itself.

In Chapter 10, we examine the treatment of those found unfit for trial or not responsible of the charged crime by insanity, noting that the state does not treat
them as persons who have been found generally not guilty. We finally explore the ability of the state to treat those whose irrationality seems predictive of future danger like those found mentally unfit or not responsible for actual crimes.

By Chapter 11, we are through with considerations of criminal and quasi-criminal confinement and ready to explore commitment based solely on mental state. We explore both “voluntary” commitment and involuntary commitment and ask how the law views them. On the one hand, the standards for admission seem lower than in criminal cases; on the other the law still substantially protects the “patients” from their “treatment” if they resist. Obviously, something is different about this form of medical treatment.

Chapter 12 describes some of the major mental health treatments provided to patients. The first half of the Chapter examines a variety of somatic cures which have been a major source of litigation against psychiatrists. The second half of the Chapter addresses the issue of what exactly is curative in a therapeutic encounter. Are “talking cures” effective? What role does the placebo effect play in healing? Are prayers “treatments”? In exploring answers to these questions, the current antagonism between the psychotherapists and the biological psychiatrists is used to ask even more fundamental questions about the nature of psychiatry itself.

Patients over time have had two inconsistent legal positions in regard to treatments. Chapter 13 addresses these positions by chronicling the development of a right to treatment and a right against treatment. Here we see constitutional principles in confrontation with sound medical judgment. Which should prevail?

Finally, in Chapter 14 we summarize the many ways, other than confinement and involuntary treatment, that mental disorder affects legal outcomes. There are many adjustments of law to what are often called competencies. We enumerate a partial list and more carefully examine competency in the basic fields of torts, contracts and the right to manage property. Finally, we explore the ultimate incompetency: incompetency to manage the basic aspects of one’s life. That incompetency leads to conservatorship or guardianship, under which a court appointed official makes basic decisions for the ward.

With the conclusion of the material in Chapter 14, the conscientious student will have acquired answers to the questions posed as the title of Chapter 1: Who is Crazy? Who Decides? Who Cares?