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PSYCHOLOGY, MENTAL ILLNESS, AND THE LAW – A
POSTSCRIPT ON EPILEPSY

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IN the previous installment of this study¹ the subject of epilepsy was intentionally omitted, on the theory that this is a general medical problem rather than one in the field of mental illness. A psychiatrist suggested to the author that epilepsy had been overlooked.² Investigation confirms the wisdom of her suggestion, for in West Virginia epilepsy as a legal subject is closely related to mental illness. For instance, the Governor's Conference on Mental Health, meeting in Charleston in September, 1958, recommended, *inter alia*, that appropriate persons "study laws pertaining to epilepsy and update them in the light of new knowledge medically, psychologically, vocationally, etc. The responsibility of the Mental Health Department for care and treatment of this group of citizens would extend only to those whose treatment needs involved that for mental illness or retardation, rather than epilepsy."³

Fortunately, a comprehensive study of epilepsy and the law was published only three years ago, written jointly by the dean of a law school and a prominent physician who is a specialist in epilepsy.⁴ They begin their book by pointing out that today, with the use of new medicines, ". . . over 50 per cent of epileptics may achieve complete control of seizures and an additional 30 per cent may have their seizures so reduced in frequency and severity that they are capable of rehabilitation. . . ."⁵ In addition to treatment by drugs, surgical techniques relieve some cases of epilepsy caused by injury. And both medicine and surgery grow more effective year by year. The authors estimate that there are between 800,000 and 1,500,000 epileptics in the United States. Reckoning on the basis of these figures and of the ratio of the population of West Virginia to that of the United States, one finds that there are at

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¹ 60 W. VA. L. REV. 55, 133 (1957-58).

² Letter from Dr. Thelma V. Owen, of Huntington, W. Va., April 2, 1958.

³ Group 8, Recommendation 10 (mimeographed). Group 1, Recommendation 1a, proposed legislation to improve "archaic commitment laws regarding the mentally ill, mentally retarded, alcoholic and epileptic."

⁴ BARROW & FABING, *EPILEPSY AND THE LAW* (1956). Barrow is dean of the University of Cincinnati College of Law, and Fabing is chairman of the Legislative Committee of the American League Against Epilepsy.

⁵ *Id.* at 1. Dean Barrow recently informed the writer that since the book was published further progress has been made in treatment of epilepsy, so that a higher proportion of epileptics can control or reduce their seizures. Interview, Dec. 30, 1958, at Chicago, Ill.

The rest of this paragraph, except where otherwise indicated, is based on chapter 1 and the first part of chapter 2 of the book.

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least 10,000 epileptics in West Virginia, or one of every two hundred persons. Of these an unknown number are confined in the various state mental institutions,⁶ for the West Virginia statute defines a "mentally ill person" to include an epileptic for the purpose, *inter alia*, of commitment to such institutions.⁷ The social stigma of epilepsy is a vestige from ancient times when the epileptic was thought to be possessed of devils and also from the nineteenth century when bromide was used to treat epilepsy, causing the epileptic to appear sluggish and mentally retarded. The stigma also derives from the now discredited belief that epilepsy is an inherited disease. "The position of modern medical authorities is that epilepsy is not inheritable but that a predisposition to the disorder may be inherited as a recessive trait. The incidence of inheritance of the tendency is now deemed much lower than was assumed in the past. . . . Seizures arise from a multiplicity of causes unrelated to inheritance, such as intracranial tumors, brain injury and resulting scar, infections of the nervous system, and other traumatic conditions. The proportion of idiopathic cases [those in which the cause is not discernible] decreases as knowledge of the causes of epilepsy places more and more cases in the acquired category. . . ."⁸ Moreover, any person may have an epileptic seizure, "the difference between epileptics and so-called normal persons being that the seizure threshold of the epileptic is lower."⁹

In the light of this medical knowledge, it is no longer justifiable to classify the epileptic along with the person suffering from a mental illness or mental deficiency. Yet that is just what the West

⁶ The Department of Mental Health does not have records showing the total number of epileptics confined in the state mental hospitals. Letter to the author from Morton D. Schumann of Division of Professional Services, Feb. 4, 1959. He further advises: "To further complicate matters is the fact [so far as the records in the Department headquarters show,] that patients in our hospitals are not diagnosed as epileptics. They are given a diagnosis either of Acute Brain Syndrome Associated with Convulsive Reaction or Chronic Brain Syndrome Associated with Convulsive Reaction. In each of these diagnoses in addition to presence of seizures there should also be symptoms of mental illness such as mental dullness, slowness of associated thinking, impairment of memory and other intellectual functions as well as apathy. We therefore from our diagnoses have no way of determining those patients who suffer only from epilepsy or from a combination of epilepsy and mental illness as the diagnostic description always indicates presence of some mental incapacity. This further results in our inability to determine how many epileptics are committed each year." At three of the state mental hospitals — Huntington, Weston, and Spencer — for the fiscal year ended June 30, 1957, a total of 41 newly admitted patients were diagnosed as having chronic brain syndrome associated with convulsive disorder, the second category mentioned above. At the end of the year there were in these hospitals 278 patients so diagnosed.

⁷ W. VA. CODE ch. 27, art. 1, § 1 (Michie 1955), quoted *infra* note 10.

⁸ BARROW & FABING, *op. cit. supra* note 4, at 12-13.

⁹ *Id.* at 6.

Virginia law does in most instances. The epileptic is subject to commitment to a state mental institution and consequent suspension or loss of civil rights.¹⁰ (Technically he is subject to possible sterilization while in the hospital.¹¹) An epileptic is not forbidden to marry in West Virginia, as in some states, but after he is married, his spouse may obtain an annulment.¹² This right of annulment is apparently based on the theory that epilepsy is inherited, a theory now largely discredited. An epileptic is also subject to disadvantages under the workmen's compensation system, in relation to the reserve fund for second injuries.¹³ Finally, he may be refused a

¹⁰ W. VA. CODE ch. 27, art. 1, § 1 (Michie 1955), provides as follows: "Mentally Ill. — For the purposes of this chapter, a 'mentally ill' person is (a) one having a psychiatric or other disease which substantially impairs his mental health, or (b) a mental defective, or (c) an epileptic." Article 5 of the same chapter provides for commitment. See previous discussion in 60 W. VA. L. REV. at 65-70 (1957).

¹¹ W. VA. CODE ch. 16, art. 10 (Michie 1955), "Sterilization of Mental Defectives." Operations for eugenic sterilization have not been performed in West Virginia since 1955. Letter from Morton D. Schumann to the author, Feb. 4, 1959. But the legal authority for the operation still remains.

BARROW & FABING, *op. cit. supra* note 4, at 29, reported that only eighteen states permitted sterilization of epileptics, and not all of these practiced it. See generally O'Hara & Sanks, *Eugenic Sterilization*, 45 *Geo. L.J.* 20 (1956).

¹² W. VA. CODE ch. 48, art. 2, § 1 (Michie 1955), provides in part that "all marriages solemnized when either of the parties was an insane person, feeble-minded person, idiot, imbecile, or an epileptic, . . . shall be void from the time they are so declared by a decree of nullity."

¹³ BARROW & FABING, *op. cit. supra* note 4, at 70-72, state: "The resistance to employment of epileptics has had a similar history in the case of persons handicapped by loss of an arm or other member. If an employee loses an arm, or other member, he is entitled to receive under Workmen's Compensation Laws the amounts prescribed for this permanent but partial injury. If the same employee in a second accident loses the other member his disability becomes total. Although the two injuries were identical, the second injury would involve a much greater payment because of the totality of the disability. Therefore, employers were moved by this consideration of greater financial risk to refuse employment to applicants handicapped by loss of a member. To offset this greater liability for second injuries forty-three states have adopted Second Injury Funds. [Citing, *inter alia*, W. VA. CODE ch. 23, art. 3, § 1 (Michie 1955).] The object of this legislation is to spread the risk of employing the handicapped over all employers and, thus, to avoid the excuse that employment of the handicapped would increase Workmen's Compensation costs to the particular employer who hires a handicapped person. Under Second Injury Fund provisions, the amount of the payments charged to the employer for the loss by an employee of one arm, or other member, is the same, whether it is the loss of a first arm in a first accident or the loss of the second arm in a second accident. The difference in the compensation payable upon the loss of one member, resulting in partial disability, and upon the loss of the second member, rendering disability total, is defrayed from the Second Injury Fund." The authors go on to point out that in the majority of states, including West Virginia, the second injury must, to be compensable, result in total and permanent disability. Therefore permanent partial disability is not covered by the second injury fund. This provision thus tends to discourage employment of epileptics as well as other handicapped persons, because if such a person is hurt and consequently has a permanent partial disability, such an accident will be compensable from the regular workmen's compensation fund, but the claim will usually result in an increase in the employer's rates of payment into the fund.

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driver's license if the commissioner of motor vehicles sees fit to interpret the word "mentally incompetent" to include an epileptic. And this interpretation seems to be the correct one when the licensing statute¹⁴ is read in *pari materia* with the statute defining a mentally ill person for purposes of commitment and the like.¹⁵ It would be unfair to deny a driver's license to an epileptic who could furnish a physician's certificate that he had his disease completely under control. Ohio and Wisconsin have adopted statutes permitting issuance of a temporary or conditional license which must be renewed periodically upon a re-examination and new report by the epileptic's physician.¹⁶

These disabilities which the law imposes upon the epileptic are not only an anachronism but a needless indignity. They encourage and preserve ostracism of the epileptic. Furthermore, they retard his rehabilitation, keeping him in a dependent condition when he might become a self-sustaining, self-respecting citizen. Indeed, it is at least arguable that the laws of West Virginia concerning the epileptic, like many of the laws concerning the mentally ill, do more harm than good.

Fortunately this deplorable situation can be remedied, insofar as epilepsy is concerned, by enactment of a few simple statutes and by corresponding reforms in administrative practices. No elaborate survey or study need be made, for such a study has already been made.¹⁷ It lies ready to be applied in West Virginia. Accordingly, the following recommendations are offered:

1. Procedure for commitment of the epileptic to state mental hospitals should be revised. The recommendations made previously as to the mentally ill¹⁸ would apply also to epileptics. The Legislature, relying upon the advice of the director of mental health and other experts, should consider whether a person suffering only from epilepsy should be confined in a state mental institution at all.

¹⁴ W. VA. CODE ch. 17B, art. 2, § 3 (Michie 1955), provides: "The department shall not issue any license hereunder: . . . (5) To any person, as an operator or chauffeur, who has previously been adjudged to be afflicted with or suffering from any mental disability or disease and who has not at the time of application been restored to competency by judicial decree or released from a hospital for the mentally incompetent, upon the certificate of the superintendent of such institution that such person is competent and not then unless the commissioner is satisfied that such person is competent to operate a motor vehicle with safety to persons or property."

¹⁵ Note 10 *supra*.

¹⁶ See BARROW & FABING, *op. cit. supra* note 4, ch. 4 and appendices.

¹⁷ *Id.*, *omnis*.

¹⁸ 60 W. VA. L. REV. at 65-70 (1957).

2. The right of annulment of marriage because of epilepsy¹⁹ should be restricted or eliminated entirely. If the epileptic concealed the existence of his disease from his spouse, then she could probably get an annulment on the grounds of fraud.²⁰ If the epileptic was *non compos mentis* at the time of the marriage ceremony, again annulment would probably be obtainable apart from the epilepsy. But where the epileptic can control his disease through medicines, annulment seems inappropriate and unfair. To permit annulment for epilepsy in this day and age is equivalent to permitting annulment for diabetes or heart disease.

3. Eugenic sterilization because of epilepsy should be stricken from the statute.²¹ Indeed, eugenic sterilization for any defect may be scientifically out of date. The wisdom of one generation if not re-examined is the folly of the next.²²

4. Claims should be permitted against the second injury reserve fund of the workmen's compensation fund for injuries to epileptics (and other handicapped workers) which result in permanent partial disability.²³

5. Statutes and regulations concerning the issuance of drivers' licenses to epileptics should be clarified. Legislation adopted recently in Ohio could serve as a model.²⁴

6. A campaign of public information and education about epilepsy should be undertaken by appropriate public agencies and private associations prior to and along with the proposed changes in legislation.

¹⁹ Note 12 *supra*.

²⁰ See W. VA. CODE ch. 48, art. 2, § 2 (b) (Michie 1955).

²¹ Note 11 *supra*.

²² See *Buck v. Bell*, 274 U.S. 200 (1927), upholding the constitutionality of sterilization of mental defectives. The West Virginia statute was enacted in 1929, W. Va. Acts 1929, ch. 4.

²³ See note 13 *supra*.

²⁴ OHIO REV. CODE § 4507.08(e) (1958), also in appendix A in BARROW & FABING, *op. cit. supra* note 4.