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THE INDIGENT ACCUSED, THE PSYCHIATRIST, AND THE INSANITY DEFENSE *

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Thousands of printed pages and a near-infinity of spoken words have been lavished on the question whether the language of *McNaughten*, *Durham*, or something else should supply the law's test of criminal responsibility. Yet the only empirical evidence available indicates that the words of the test are not very significant; jurors decide cases in much the same way under any of the standards.¹ Far more significant functionally are the evidence the jury is permitted to hear, the witnesses through whom evidence is presented, and the manner in which lawyers and experts approach their tasks. Most important, however, is whether the accused has a psychiatrist at all to aid him in making his defense. Nevertheless, for all the preoccupation with the wording of the insanity test, virtually nothing has been done systematically to

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¹ James, *The People v. Martin Graham: Legal and Lay Attitudes Toward Mental Illness*, 1957, unpublished University of Chicago Jury Project; James, *Jurors' Assessment of Criminal Responsibility*, 7 SOCIAL PROBLEMS 58, 68 (1959).

assure that a psychiatrist will be available at the times when he is most needed. The problem is a general one, but it is obviously most acute for the indigent, who comprise a high percentage of the so-called criminal classes.

A shift in focus, from the words of the insanity defense to the practices and institutions surrounding it, is long overdue. This Article will begin the process by considering the procedures available to the indigent accused who asks the state for the assistance of a psychiatrist.

I. THE ADVERSARY MODEL AND THE PSYCHIATRIST

Our initial premise is that an "adequate defense" requires that the accused be equipped to learn whether he has a defense and, if he does, to present it effectively at trial. This follows from the assumptions which underly an adversary system. Such a system is fashioned from a model which presupposes that men, their testimony and their concepts are inevitably "biased," that they are shaped by different backgrounds, value systems, personalities, and perceptual equipment. In accordance with this model, roles are assigned to specially motivated persons, the parties and their counsel, which call upon them to make the best possible case for their side.² The parties present "their" witnesses, "their" versions of events, "their" theories of law. Such a model requires that the parties engage in a constant process of "correction" of the adversary's material. Witnesses must be penetratingly cross-examined, opposing versions of events comprehensively presented, and conflicting legal theories crisply propounded. In short, the model presupposes that the parties are roughly comparable in legal, investigative, and expert resources. The system will not function well if they are not. In the case of the indigent accused, there can be no illusion that he comes prepared "equally" with the prosecution to participate in an adversary process³ or that complete equality can ever be

² It is assumed in the text that the indigent accused raising the question of his mental condition will be represented by counsel. Yet there is no certainty that one will be provided for him. Under the sixth amendment, indigent criminal defendants in the federal courts have a right to assigned counsel. *Johnson v. Zerbst*, 304 U.S. 458, 462-65 (1938). In state courts, the right exists in capital cases and in other cases in which, on the particular facts, it is essential to a fair trial. Taken into consideration in non-capital cases are the defendant's age, education, experience, mental capacity, and the nature of the offense with which he is charged. *Hamilton v. Alabama*, 368 U.S. 52 (1961); *Cash v. Culver*, 358 U.S. 633, 636-38 (1959); *Betts v. Brady*, 316 U.S. 455, 461-73 (1942). Where the right exists, "effective assistance" must be provided. *Powell v. Alabama*, 287 U.S. 45, 71-73 (1932); *Diggs v. Welch*, 148 F.2d 667 (D.C. Cir.), cert. denied, 325 U.S. 889 (1945). See generally BEANEY, *THE RIGHT TO COUNSEL IN AMERICAN COURTS* (1955).

³ The generalized procedural advantage enjoyed by the state with respect to pre-trial disclosure is discussed in Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 *YALE L.J.* 1149, 1180-92 (1960); Louisell, *Criminal Discovery—Dilemma Real or Apparent?*, 49 *CALIF. L. REV.* 56 (1961).

achieved. Nevertheless, substantial equality is certainly a minimal condition in a procedural system oriented towards a fair trial.

The assistance needed to assure substantial equality and an "adequate defense" will obviously depend upon the particular defense in issue. Handwriting experts will be needed in one case, ballistics experts in another, and investigative aid in yet a third. When the defense is insanity, two issues immediately arise: first, whether a psychiatrist is essential to the presentation of the defense; second, the extent to which he need be available and the capacities in which it is necessary that he function.

The cases repeatedly say that expert testimony is not "essential" to raise the insanity defense; lay testimony alone, often that of friends and relatives, will suffice to carry the issue to the jury.⁴ Yet it is clear that only the grossest of aberrations will be persuasively presented through such witnesses.⁵ Moreover, the person alleging insanity at the time of the crime is not likely to appear very aberrant at the time of trial. In most jurisdictions, he may stand trial and interpose insanity only if he is "competent to stand trial."⁶ This means that, at the very moment when he is trying to persuade the jury of his past "insanity," he is sufficiently rational to understand the proceedings and to cooperate in his defense. To persuade a jury that someone who behaves as they do was insane at some prior date is an almost impossible task, however artfully the legal distinction between competency and insanity may be drawn.⁷ Only rarely will it suffice for the defendant to present witnesses to his past life. In the overwhelming majority of cases, he cannot expect to succeed unless he can present an expert witness to bridge the gap between past unreason and present reason in the language and manner of the polished professional.

⁴ In Maine, Massachusetts, and New York, severe restrictions are placed on the admission of lay opinions as to mental condition. In the other states, lay opinion on sanity is generally admitted. It must, however, ordinarily be based upon the lay witness's personal knowledge of the underlying facts. Everywhere, of course, the "facts" themselves may be presented through lay witnesses. 7 WIGMORE, EVIDENCE § 1938 (3d ed. 1940, Supp. 1962).

⁵ See Address by Shirley Star, "The Public's Attitude Towards Mental Illness", National Opinion Research Center, University of Chicago, 1955.

⁶ The defense of insanity may occasionally be made by a person found later to be incompetent. This occurs in the ten or eleven states following the common-law position which gave the trial judge discretion to submit both issues—competency to stand trial and insanity at the time of the crime—to the jury simultaneously. WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE 456 (1954). As to the question of competency to stand trial, see generally *id.* at 428; LINDMAN & MCINTYRE, THE MENTALLY DISABLED AND THE LAW 357 (1961); Annot., 142 A.L.R. 961 (1943).

⁷ There is wide variation as to defendant's burden of proof. In about half the states, the defendant must prove his irresponsibility, usually by a preponderance of the evidence. Elsewhere, and in the federal courts, the prosecution bears the ultimate burden, so that it is technically sufficient for the defendant to raise a reasonable doubt as to his sanity. See WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE 212-72 (1954).

There is another reason for characterizing the psychiatrist as an essential witness. Many, perhaps most, jurisdictions permit, invite, or require a psychiatrist to testify to his conclusions regarding the defendant in the very words of the test of criminal responsibility.⁸ Though lay persons may also be permitted to testify in these terms, it is obvious that a psychiatrist testifying for the prosecution to the absence of "mental disease" or "mental defect" appears better qualified than a layman testifying to the contrary. Similarly, the testimony of a psychiatrist for the prosecution that the defendant "knew right from wrong" or that he "knew the nature and quality of his act" has a ring of authority which no layman can duplicate.⁹

The conventional assertion that expert testimony is not "essential" to raise the insanity defense, therefore, means little more than that the defense may be submitted to the jury on lay testimony alone. In practical terms, a successful defense without expert testimony is likely to come only in cases so extreme, or so compelling in sympathy for the defendant, that the prosecutor is unlikely to bring them at all. In marginal cases, psychiatric testimony for the defense is unquestionably necessary, particularly because prosecutors invariably produce experts to describe as "normal" what lay testimony for the defense had sought to picture as "abnormal."

It is far easier to agree on the importance of the psychiatric witness to the defense than on the functions he should perform. All too often it is assumed that he is needed only to examine the accused before trial and to appear as a witness at the trial. Yet if the issues are to be clearly defined and developed by the parties in the manner contemplated by an adversary system, it will be necessary for him to do much more. Expert testimony does not arise full-blown. It must be prepared with a sensitive concern for the context in which it is to be presented. Problems of communication must be met and overcome. Stereotypes entertained by lawyer and expert must be dispelled. Assumptions and workways must be explored and understood.

The very first contact between lawyer and psychiatrist, the request that a mental examination be performed, provides a useful illustration.

⁸ *United States v. Giteau*, 12 D.C. 498, 546 (1882); KING & PILLINGER, *OPINION EVIDENCE IN ILLINOIS* 230-31 (1942); WEIHOFEN, *MENTAL DISORDER AS A CRIMINAL DEFENSE* 284-85 (1954); 7 WIGMORE, *EVIDENCE* §1921 (Supp. 1962). *Contra*, *State v. Palmer*, 161 Mo. 152, 173-74, 61 S.W. 651, 657 (1901); GLUECK, *MENTAL DISORDER AND THE CRIMINAL LAW* 309 n. (1925).

⁹ In experiments conducted at the University of Chicago, using actual jurors and real but recorded cases, it was concluded that "most jurors granted to the experts the recognition appropriate to their specialized training and greater knowledge." Greater weight was given to testimony based upon personal examination than to that based upon hypothetical questions. No significant difference was noted, however, in the effect of long, detailed, and straightforward reports as opposed to those stating technical conclusions. James, *Jurors' Evaluation of Expert Psychiatric Testimony*, 21 OHIO ST. L.J. 75, 95 (1960).

Unless each has some sense of the purpose of the examination, it will not be satisfactory one. If, for example, that purpose is to ascertain competence to stand trial, it may call for different procedures than if the purpose is to determine sanity at the time of the crime or to determine whether civil commitment is presently warranted.¹⁰ The length and nature of the interviews, the need for psychological and neurological tests, the gathering of the defendant's life history¹¹—all will depend upon the degree to which the lawyer understands where the psychiatrist's competence ends and that of psychologists, neurologists, and other specialists begins, and the degree to which psychiatrists understand enough about a trial to appreciate their limited role in it.

Ideally, this preparation will make clear to the psychiatrist that his testimony is merely one stage in a series of phased presentations of material; that the ultimate objective of his testimony and of the rules of evidence which control its presentation is the portrayal of this defendant and his act in terms meaningful to judge and jury. In pursuit of that objective, he must not be tempted to out-lawyer the lawyers. He is not obligated to manipulate concepts to attain objectives he thinks desirable; nor is he obligated to offer his opinion on matters of which he has no knowledge.

If this exploration of issues does occur before the psychiatrist conducts his examination, it will inevitably educate the lawyer in some of the intricacies of psychiatry so that he will be better equipped to perform his role. The lawyer who is unfamiliar with the point at which knowledge of mental life slides over into conjecture can hardly be expected to examine his own witness skillfully, much less his adversary's, or to make intelligent decisions about the kinds of witnesses he needs to prove or disprove various illnesses. He must be familiar with the usage of terms like "schizoid" or "paranoid," their relation to the psychoses of schizophrenia or paranoia, the distinction between an acute state and a state of remission, the psychotic's often rational behavior, and the manner in which hallucinations and delusions differ from daydreams and firm convictions. In short, if the lawyer is not to become the agent of a mindless anti-intellectualism, he must learn

¹⁰ See *Winn v. United States*, 270 F.2d 326, 328 (D.C. Cir. 1959), *cert. denied*, 365 U.S. 848 (1961); *Blunt v. United States*, 244 F.2d 355, 364 n.23 (D.C. Cir. 1957).

¹¹ A detailed life history should be prepared in most cases. Conducted by a social worker, the study should result in a description of the defendant's school and work experiences, his contacts with courts, family service agencies, psychiatric clinics, mental hospitals. See generally ENGLISH & FINCH, *INTRODUCTION TO PSYCHIATRY*, 70-100 (2d ed. 1957); NOYES & KOLB, *MODERN CLINICAL PSYCHIATRY* 130-69 (5th ed. 1958). The psychiatrist need not have examined the defendant in order to testify. Defendant's life history and the circumstances surrounding the act he committed may be supplied in the form of a hypothetical question. It is generally agreed, however, that this type of testimony is confusing to the jury and of less value than testimony based upon the psychiatrist's personal observations.

from his psychiatric witness where points of bona fide disagreement exist and how much ought properly to be made of them.¹²

In such a close working relationship, the psychiatrist can play a very real part in the development of witnesses and in the clarification of issues. Indeed, even legal issues are better defined when both psychiatrist and lawyer analyze rigorously what it is the law requires from the psychiatrist. For example, does the psychiatrist have the appropriate information when the law asks whether the accused knew right from wrong at the time of the crime? Is "mental disease" a useful concept upon which to ground the insanity defense? Or would it be preferable to base it on psychosis? Assuming the former, should it be held as a matter of law that a schizophrenic suffers from mental disease and a psychopath does not? Or should judicial notice be taken?¹³ If the lawyer understands enough psychiatry to present these issues to the courts, there will be a sharpening of focus and a clearer delineation of relevant issues.

If an accused is to raise an "adequate" insanity defense, he will need the psychiatrist in all of the capacities described above. He will need the psychiatrist as a witness. He will need his aid in determining the kinds of testimony to be elicited, the specialists to be consulted, and the areas to be explored on cross-examination of opposing psychiatrists. And he will need him as a creative contributor to the development of the law in this field.¹⁴

II. PATTERNS OF PSYCHIATRIC ASSISTANCE

The indigent accused seeking psychiatric assistance will find several patterns of case and statute law.¹⁵ In some states, his plea of in-

¹² See generally HOLLINGSHEAD & REDLICH, *SOCIAL CLASS AND MENTAL ILLNESS* 28-29, 155-65 (1958); JAHODA, *CURRENT CONCEPTS OF POSITIVE MENTAL HEALTH* (1958); SZASZ, *THE MYTH OF MENTAL ILLNESS* (1961); WOOTTON, *SOCIAL SCIENCE AND SOCIAL PATHOLOGY* 203-67 (1959); Bowman & Rose, *A Criticism of the Terms "Psychosis," "Psychoneurosis" and "Neurosis,"* 108 AM. J. PSYCHIATRY 161 (1951); Friedman, *Conformity and Nonconformity*, in *PSYCHIATRY AND THE LAW* 41 (Hoch & Zubin ed. 1955); Hartmann, *Psycho-analysis and the Concept of Health*, 20 INT'L J. OF PSYCHO-ANALYSIS 308 (1939); Stouffer, *Indices of Psychological Illness*, in *THE LANGUAGE OF SOCIAL RESEARCH* 63 (Lazarsfeld & Rosenberg ed. 1955); Weihofen, *The Definition of Mental Illness*, 21 OHIO ST. L.J. 1 (1960).

¹³ See generally Davis, *Judicial Notice*, 55 COLUM. L. REV. 945, 952-59, 966-67 (1955).

¹⁴ Clearly, these functions will involve varying degrees of identification with the parties. At some almost imperceptible point in the conversations between an expert and the lawyer who seeks his testimony, there is a risk that the psychiatrist may become so involved with the party for whom he appears that his judgment may be distorted. This is, of course, a problem common to all witnesses. Once the risk is pointed out, however, the adversary process should serve as a correction to excess zeal. See text accompanying note 55 *infra*. The ideal solution—which would provide the defense with two psychiatrists, one to testify and one to assist in the trial—is not possible in view of the limited resources presently available.

¹⁵ The several patterns of case and statute law found among the states are presented in the Appendix, pp. 1092-93 *infra*.

sanity will bring into play provisions for appointment by the court of "impartial experts" to examine him without regard to his indigence. In others, he may petition the court to appoint a psychiatrist of his choice at state expense. Where there is a public defender, there may be a fund available for the payment of expert witnesses. And in some states, the accused may have several sources upon which to draw. For example, in California, Massachusetts, New York, and Rhode Island, there are at least four different procedures. Yet in ten other states, there is no procedure available for the indigent to obtain psychiatric aid, other than the general subpoena power. In the states between the two extremes, there is great variation. What emerges is a patchwork of devices instituted at various times in almost random fashion to accord the accused protection ranging from optimal to none. These devices will be examined in order to determine what is available to the indigent accused and what should be made available to him if he is to be assured an "adequate" insanity defense.

A. *The Impartial Expert Statutes*

The most common of the procedures are the statutes providing for court appointment of a psychiatrist in cases involving insanity or incompetency. These statutes, which exist in thirty-one states and the District of Columbia,¹⁶ do not turn on indigence. Their original objective was to eliminate through the introduction of an impartial expert, the "battle of experts" which had been, in the eyes of many, discrediting both psychiatry and the insanity defense.¹⁷ Nevertheless,

¹⁶ ALA. CODE tit. 15, § 425 (1959) (limited to capital cases); ARK. STAT. ANN. §§ 43-1301 to -1303 (1947), as amended, §§ 43-1301 to -1312 (Supp. 1961); CAL. PEN. CODE ANN. § 1027; COLO. REV. STAT. ANN. § 39-8-2 (1953); CONN. GEN. STAT. ANN. § 54-40 (1958); DEL. CODE ANN. tit. 16, § 5142(c) (1953) (authorizes state mental hygiene clinic to "observe, examine, study, and treat any person charged with any offense . . . when requested to do so by a judge or judges thereof."); FLA. STAT. ANN. §§ 917.01-03 (1944); HAWAII REV. LAWS § 258-36 (1955); IND. ANN. STAT. § 9-1702 (1956); KY. REV. STAT. § 203.340 (1959) (limited to habitual criminals); LA. REV. STAT. ANN. §§ 15:267-69 (1950); ME. REV. STAT. ANN. ch. 27, § 118 (1954); MD. ANN. CODE art. 59, §§ 7, 11 (1957); MASS. ANN. LAWS ch. 123, §§ 99, 100A (Supp. 1961); MICH. STAT. ANN. § 28.967 (Supp. 1961); N.H. REV. STAT. ANN. § 135.17 (1955); N.Y. CODE CRIM. PROC. §§ 658-62; N.C. GEN. STAT. § 122-91 (Supp. 1961); N.D. REV. CODE §§ 29-20-01, -03 (1960); OHIO REV. CODE ANN. § 2945.40 (Page 1954); ORE. REV. STAT. § 136-150 (1961); PA. STAT. ANN. tit. 50, §§ 1222, 1225 (1954); R.I. GEN. LAWS ANN. §§ 9-17-19 to -20 (1956); S.C. CODE § 32-927 (Supp. 1960); TENN. CODE ANN. § 33-513(5) (Supp. 1961); UTAH CODE ANN. § 77-24-17 (1953); VT. STAT. ANN. tit. 13, § 4803 (1959); VA. CODE ANN. § 19.1-228 (1960); W. VA. CODE ANN. § 6198 (1961); WIS. STAT. ANN. § 957.27 (West 1958); WYO. STAT. ANN. §§ 7-241 to -242 (1957); D.C. CODE ANN. § 24-301 (1961). In the footnotes that follow we shall refer to these sections without repeating the citations. A similar provision is applicable to federal criminal trials. 18 U.S.C. § 4244 (1958).

¹⁷ See articles cited note 37 *infra*. There was a period when some courts held that court appointment of an expert violated the principle of separation of powers. It was said to involve an abandonment by the judge of his neutral position and a tacit expression of his opinion to the jury. *People v. Dickerson*, 164 Mich. 148, 153-55, 129 N.W. 199, 200-01 (1910). A few more recent decisions express a similar

by authorizing the appointment of a psychiatrist at government expense, they do make available a witness where there would otherwise be none. Appointment under these statutes may come when either the prosecutor, the court, or the defense asserts that the defendant is not competent to stand trial. Or it may come when the accused interposes the insanity defense.¹⁸

There are two types of examination procedures which sometimes exist alongside each other. The first involves commitment to a mental hospital,¹⁹ the second, designation by the court of a psychiatrist to examine the accused either in the jail or in his office.²⁰ Whichever procedure is used, the examination is ordinarily made by a psychiatrist employed by the government. In fourteen states and the District of Columbia, these are staff members of the state mental hospital or mental health department.²¹ In five others, a government psychiatrist must be a member of an examining commission appointed by the court.²² In twelve states, in the federal courts, and under the Model Penal Code, any competent, disinterested expert may be appointed, including a government employed psychiatrist.²³ Indeed, where psychi-

view. *People v. Scott*, 326 Ill. 327, 345-47, 157 N.E. 247, 255-56 (1927); see *People v. Pugh*, 409 Ill. 584, 588, 100 N.E.2d 909, 911 (1951). But the overwhelming current of authority since *Jessner v. State*, 202 Wis. 184, 186-95, 231 N.W. 634, 636-39 (1930), has found court appointment of an expert to be "a most appropriate" judicial function, ancient in origin, and offering great advantage in the search for truth. See, e.g., *Hunt v. State*, 248 Ala. 217, 20 So. 2d 186, 190-93 (1946); *People v. Strong*, 114 Cal. App. 522, 300 Pac. 84 (1931); *Commonwealth v. Butler*, 405 Pa. 36, 44-45, 173 A.2d 468, 472-73 (1961).

¹⁸ Where the issue is competency to stand trial, the defendant cannot always be expected to demand an examination for himself. But where insanity at the time of the crime is in issue, most states require that the defendant plead insanity before the procedure can be invoked. In California, Colorado, and Indiana, the court is required to invoke the procedure whenever the insanity defense is raised. In Tennessee, either defense counsel or prosecution may apply. Under the statutes of Arkansas, Florida, New York, South Carolina, Virginia, and West Virginia, the judge has explicit statutory authority to invoke the procedure without a request from the defendant. See statutes cited note 16 *supra*. As a practical matter, this authority in the court may depend upon the prosecutor's "suggestion" that the statutes be used. The problem of judicial assertion of the insanity defense, over the defendant's objection, has recently become a much controverted one. See *Overholser v. Lynch*, 288 F.2d 388, 392-94 (D.C. Cir. 1961), *rev'd*, 369 U.S. 705 (1962); Halleck, *The Insanity Defense in the District of Columbia—A Legal Lorelei*, 49 GEO. L.J. 294, 316 (1960).

¹⁹ See, e.g., COLO. REV. STAT. ANN. § 39-8-2 (1953).

²⁰ See, e.g., FLA. STAT. ANN. § 917.01 (1944).

²¹ Alabama, Arkansas, Delaware, Kentucky, Maine, Maryland, Massachusetts, New York, North Carolina, New Hampshire, South Carolina, Tennessee, Vermont, Wyoming, and the District of Columbia.

²² California, Colorado, Louisiana, Virginia, and Ohio. In Ohio although the patient is to be under observation by the state hospital staff, the court may appoint physicians who are not staff members to the examining commission.

²³ Under MODEL PENAL CODE § 4.05 (Tent. Draft No. 4, 1955), and in North Dakota and Wisconsin the court may choose between a government hospital staff member or another competent disinterested physician. In the federal courts and those of Connecticut, Florida, Indiana, Michigan, Oregon, Pennsylvania, Rhode Island, South Dakota, Utah and West Virginia, the judge may select any neutral expert; use of a government employed psychiatrist is permissible.

atrists are scarce, courts are compelled to draw on government employees if they are to comply with the mandatory provisions of laws requiring psychiatric examination.²⁴

Typically, the statutes contain no statement of minimum qualifications for the examiner.²⁵ In practice, either state hospital personnel will be used or the examiner will be selected by the judge, often assisted by suggestions from counsel, on the basis of his and their knowledge of the medical community. In only a handful of places are prepared lists used.²⁶ In California and Oregon, they are often prepared with the cooperation of the local medical association.²⁷

Nor do the statutes detail the kind of examination to be conducted. The judge is not obligated to instruct the expert on the questions his examination should prepare him to answer and the role he is to play in the proceedings. Most often, the judge will do no more than explain briefly the applicable test of competency or responsibility.²⁸ The amount of time spent by the examiner may vary from one-half hour, as in one city in Michigan,²⁹ to twelve hours in a city in Ohio.³⁰ In mental hospitals, the commitment period may be for several weeks,³¹ but this indicates very little about the proportion of that period actually

²⁴ LA. OPS. ATT'Y GEN. 432 (1938-40). In North Dakota, "the court usually sends the defendant down to the State Hospital for observation. The reason is simply that there are not psychiatrists available elsewhere in general." Communication from William S. Murray, Att'y, Bismarck, N.D.

The term "communication" is used in the footnotes throughout this Article to designate the raw research material collected in conjunction with writing the Article. As here used, it includes questionnaires, covering letters, memoranda, other letters, and informal documents, received in October and November, 1961, unless otherwise indicated. All of the material is on file in the offices of the principal author, and of the *University of Pennsylvania Law Review*.

²⁵ In many states, the expert need not even be a psychiatrist. See note 44 *infra* and accompanying text.

²⁶ Communications from Mark Brandler, Judge, Super. Ct., Los Angeles, Cal.; Perry A. Maynard, Michigan State Bar Comm. on Crim. Jurisprudence, Lansing, Mich., Feb. 13, 1962; John Holloway, Oregon State Bar Ass'n, Portland, Ore.

²⁷ Communications from Lewis Drucker, Judge, Super. Ct., Los Angeles, Cal.; John H. Holloway, Oregon State Bar Ass'n, Portland, Ore. In New York the court also often seeks the advice of the medical society. Communication from Alexander Herman, Asst. Dist. Att'y, New York County, N.Y.

²⁸ *E.g.*, communications from William S. Murray, Att'y, Bismarck, N.D.; A. H. Ellett, Dist. Judge, Salt Lake City, Utah; Richard S. Kaplan, Indiana State Bar Ass'n Medical Legal Comm., Gary, Ind. In California the examiner is supplied with a form including, *inter alia*, the following items: "Kindly make an examination of this defendant and report your findings to the court as to the defendant's _____; was the defendant sane at the time of commission of offense? Is he sane at the present time?" Communication from Mark Brandler, Judge, Super. Ct., Los Angeles, Cal.

²⁹ Communication from Perry A. Maynard, Michigan State Bar Comm. on Crim. Jurisprudence, Lansing, Mich.

³⁰ Communication from Ralph Robinson, Psychiatric Clinic, Crim. Ct., Cleveland, Ohio.

³¹ *E.g.*, Tennessee (30 days); Wyoming (60 days).

devoted to examination of the accused. Upon completion of the examination, reports must be made and copies furnished to the court, the prosecution, and defense counsel, but little guidance is given as to their contents.³² About half of the responses to our questionnaire indicated that the reports contained only conclusions.³³ In a few states, the reports contained some additional information about the patient's life history, his present condition, and his history of mental disorder.³⁴

If the court-appointed expert supports the insanity defense, then the indigent defendant's needs are met, at least in part. However, none of the statutes specify whether defense counsel may call upon the "impartial expert" to aid him in preparing his case.³⁵ This function may well go unfilled and, indeed, ordinarily does. If, on the other hand, the psychiatrist should support the prosecutor's case, then the indigent accused will remain without any psychiatrist to bolster his defense. Indeed, he will be worse off than before since the prosecution may now have as witnesses both its psychiatrist and the "impartial" expert.

³² A typical statute provides only that the hospital staff member is "to conduct observations and investigations of the mental condition of the defendant, and to prepare a written report thereof." ARK. STAT. ANN. § 43-1301 (Supp. 1961).

³³ Communications from J. S. Tarwater, M.D., Alabama State Hosp., Tuscaloosa, Ala.; John M. MacDonald, M.D., Colorado Psychopathic Hosp., Denver, Col.; William J. T. Cody, M.D., Hawaii State Hosp., Kaneohe, Hawaii; Bruno Radauskas, M.D., Spring Grove State Hosp., Baltimore, Md.; J. O. Crist, M.D., Lima State Hosp., Lima, Ohio; William S. Hall, South Carolina State Hosp., Columbia, S.C.; Superintendent, Vermont State Hosp., Waterbury, Vt.; Theodore G. Denton, M.D., Central State Hosp., Petersburg, Va.; James A. Ryan, M.D., District of Columbia General Hosp., Washington, D.C., March 8, 1962.

³⁴ Communications from H. L. McPheeters, M.D., Comm'r of Mental Health, Louisville, Ky.; D. A. Pooler, M.D., Bangor State Hosp., Bangor, Me.; Emile Grunberg, Massachusetts Correctional Institution, East Bridgewater, Mass.; John L. Smalldon, M.D., New Hampshire State Hosp., Concord, N.H.; Prison Ward, Bellevue Psychiatric Hosp., New York, N.Y.; H. S. Barahal, M.D., Pilgrim State Hosp., West Brentwood, N.Y.; Walter A. Sikes, M.D., Dorothea Dix Hosp., Raleigh, N.C.; William P. Camp, M.D., Norristown State Hosp., Norristown, Pa.; William N. Karn, Jr., M.D., Wyoming State Hosp., Evanston, Wyo.

The fees paid for these examinations varied widely, in obvious relationship to the time and care devoted to the tasks. Questionnaire responses indicate that the usual fee is \$150 in Louisiana (William J. O'Hara, Judge, Crim. Dist. Ct., New Orleans, La.); \$100-250 in Ohio (Ralph Robinson, Psychiatric Clinic, Crim. Ct., Cleveland, Ohio); \$100 in Connecticut (Judge Thim, Super. Ct., New Haven, Conn.). Elsewhere it is slightly lower, e.g., \$24-100 in West Virginia (Ralph E. Pryor, Judge, First Judicial Cir., Wellsburg, W. Va., Feb. 3, 1962); \$35 in California (Lewis Drucker, Judge, Super. Ct., Los Angeles, Cal.); \$35 in Oregon (James W. Crawford, Judge, Cir. Ct., Portland, Ore.).

³⁵ It seems clear the defense counsel may at least call the expert as a fact witness, and cross-examine him if he is called by the court or prosecutor. The most that is expressly provided with respect to his aid in the preparation of the defense is that names and addresses of such experts be furnished to defense counsel (Louisiana and Ohio), that the written report be made available to him (Alabama, Louisiana, Massachusetts, and Hawaii) and that he may call the expert as his own witness (California, Colorado, Rhode Island, and Utah). See note 16 *supra*. Occasional consultation between the examiner and the prosecutor or defense counsel is reported, mainly to prepare the expert for testifying and to aid in cross-examination of opposing witnesses.

Though most statutes do not explicitly provide for designating the witness as court appointed, such designation occurs virtually everywhere.³⁶ Indeed, every judge and commentator who has discussed the desirability of court appointment has noted the fact of *court* designation in arguing that it is a necessary corrective to the "partisan" battle of experts.³⁷ As a consequence, judge and jury tend to believe the court's "impartial" expert. Similarly, prosecutors dismiss proceedings and defense counsel forego reliance on the insanity defense in accordance with the "impartial" psychiatric opinions.³⁸ Court appointment may, therefore, result not only in an additional psychiatrist for the prosecution, but in one whose opinion is likely to be overwhelmingly convincing. If this added aura coincided with an added ability to find the "truth," it might be difficult to reject the method producing it, even if it seemed to work against the indigent accused. It might then be said that the state's obligation to assure substantial equality had

³⁶ In Wisconsin, the designation is explicitly required. *Accord*, MODEL EXPERT TESTIMONY ACT § 8. Elsewhere, as in Indiana, the designation follows implicitly from the fact that the expert's evidence follows that of both prosecution and accused. IND. ANN. STAT. § 9-1702 (1956). In still other jurisdictions such as Louisiana and Ohio, the designation is brought home to the jury by the fact that the expert is examined by the court. LA. REV. STAT. ANN. § 15:268 (1951); OHIO REV. CODE ANN. § 2945.40 (Page 1954). In Alabama, it appears to be discretionary with the trial court whether it will permit the expert to testify that he was appointed by the court. Hunt v. State, 248 Ala. 217, 220, 225, 27 So. 2d 186, 189, 194 (1946).

³⁷ See Glueck, *Psychiatric Examination of Persons Accused of Crime*, 36 YALE L.J. 632, 636 (1927); Guttmacher, *The Psychiatrist as an Expert Witness*, 22 U. CHI. L. REV. 325, 330 (1955); Lefler, *The Criminal Procedure Reforms of 1936—Twenty Years After*, 11 ARK. L. REV. 117, 125 (1957); Overholser, *The Briggs Law of Massachusetts: A Review and an Appraisal*, 25 J. CRIM. L., C. & P.S. 859, 874 (1935); Weihofen, *Eliminating the Battle of Experts in Criminal Insanity Cases*, 48 MICH. L. REV. 961, 967-68, 972 (1950); Weihofen, *An Alternative to the Battle of Experts: Hospital Examination of Criminal Defendants Before Trial*, 2 LAW & CONTEMP. PROB. 419, 422 (1935). The system employed on the continent is similar but it operates against the backdrop of an inquisitorial system, in which the trial judge or magistrate has the primary responsibility for investigating the facts. When he deems it necessary, he appoints experts from official lists or from medico-legal institutes. Because of the supposed impartiality of the court's expert, his opinion is usually decisive. See generally Harder, *Forensic Psychiatry in Switzerland*, 9 CLEV. MAR. L. REV. 467 (1960); Ploscowe, *The Expert Witness in Criminal Cases in France, Germany and Italy*, 2 LAW & CONTEMP. PROB. 504 (1935); Schroeder, *Problems Faced by the Impartial Expert Witness in Court: The Continental View*, 34 TEMP. L.Q. 378 (1961). Apparently, at least in the Scandinavian countries, if the expert psychiatrist concludes that defendant was insane at the time of the crime, the defendant will not be prosecuted. Communication from Professor Johs. Andenaes, Institute of Criminology and Crim. Law, University of Oslo, Oslo, Norway, Mar. 20, 1961.

³⁸ See McGarty v. O'Brien, 188 F.2d 151, 156 (1st Cir.) (dictum), *cert. denied*, 341 U.S. 928 (1951). This is substantiated by responses to our questionnaires indicating that it is rare for the court-appointed expert to have to testify at a trial. If he appears, there is seldom an opposing psychiatric witness. If there is one, he is most likely to appear for the defense. And in virtually all cases in which the issue was litigated, the fact finders agreed with the court-appointed witness. Communications from Mark Brandler, Judge, Super. Ct., Los Angeles, Cal.; John M. Murphy, Public Defender for New Haven County, New Haven, Conn.; Richard S. Kaplan, Indiana State Bar Ass'n Medical Legal Comm., Gary, Ind.; Ralph Robinson, Psychiatric Clinic, Crim. Ct., Cleveland, Ohio; Ralph E. Pryor, Judge, First Judicial Cir., Wellsburg, W. Va., Feb. 3, 1962.

ended when it made available an "impartial" expert; certainly, the state should not have to subsidize "shopping" for a witness favorable to the defense.³⁹

Unfortunately, the impartial expert does not bring "truth" with him. Indeed, the assumptions underlying that notion are remarkably naive. It is assumed that there is a body of knowledge which the partisan expert will not produce because he feels obligated to give answers favoring his client, that if the financial relationship is removed, there will then be a scientist able to describe the entire picture. There is little basis for believing that the ethical state of the profession is so low or psychiatrists' income so inadequate as to warrant attaching additional weight to a psychiatrist's testimony merely because he is not in the pay of one of the parties. Even the more sophisticated justification—that a court-appointed expert's judgment would not be clouded by identification with one of two adversaries—is not persuasive. The testimony of all witnesses is subject to the very same process of distortion. It hardly seems reasonable to insulate from the adversary process the psychiatrist, who is perhaps the one among them who has been trained to minimize the effect of identification upon his perception and judgment.⁴⁰

An impartial expert could be justified only if there was consensus among psychiatrists on the answers to questions likely to arise in the courtroom, on the qualifications of persons competent to present such answers, and on the techniques to be used at the various stages of examination. No such consensus can be said to exist.⁴¹

First, with respect to qualifications, the court-appointed expert is usually a government psychiatrist. He works in a mental hospital or a health department. He is, therefore, less likely than those in private practice to have a psychoanalytic orientation,⁴² with all that implies for finding no mental disease in persons charged with crime.⁴³ Moreover, he may not even be a qualified psychiatrist. Un-

³⁹ See McGarty v. O'Brien, *supra* note 38, at 157. Compare United States v. Hines, 148 F. Supp. 73, 74 (E.D.N.Y. 1957), *rev'd on other grounds*, 256 F.2d 561 (2d Cir. 1958), in which the court refused to appoint a handwriting expert at public expense, pointing out that if one had already examined the specimen and formed an opinion, he would be subject to an ordinary subpoena and, if not, defendant was merely speculating as to what the expert testimony would be; he should not be able to do so at government expense.

⁴⁰ See Diamond, *The Fallacy of the Impartial Expert*, ARCH. CRIM. PSYCHODYN. 221 (1959). See also Zeisel, *The New York Expert Testimony Project: Some Reflections on Legal Experiments*, 8 STAN. L. REV. 730, 738 (1956).

⁴¹ An earlier statement on the subject is to be found in an Address by Abraham S. Goldstein, "The Psychiatrist and the Legal Process: The Proposals for Impartial Experts and for Preventive Detention," American Orthopsychiatric Ass'n, March 24, 1961.

⁴² Diamond, *supra* note 40, at 221, 228.

⁴³ See Guttmacher, *supra* note 37, at 328.

der many statutes, the court is free to choose any physician, without regard to whether he has had special training or experience in psychiatry.⁴⁴ And there is a great deal of pressure upon him to do so. There is a great shortage of psychiatrists; even mental hospitals face severe personnel shortages which require them to hire psychiatrists who are either lacking in experience or who are not certified by the appropriate professional board.⁴⁵ It is certainly an overstatement to say, as did Professor Weihofen in an early flush of enthusiasm, that a system of court appointment is "almost 100% foolproof."⁴⁶

Second, with respect to disagreement among psychiatrists, underlying the so-called "battle of experts" is not the lure of gold or "identification" with patients but rather "identification" with work ways, value systems, and differing schools of psychiatry.⁴⁷ The organically oriented psychiatrist will often find himself reading the patient's history and symptoms differently from the dynamically oriented psychiatrist. The history each will elicit from the accused, his family, and his friends will differ. The potential for disagreement is magnified in the trial of the insanity defense because the defendant will almost always be a borderline case.⁴⁸ The jury must determine long after the offense

⁴⁴ In West Virginia he need only be a "physician," in Michigan a "reputable physician" and in Louisiana, a "disinterested physician," who is defined as one who "shall have been duly licensed in this state or another state and shall have been graduated from a legally chartered medical school or college and shall have been in the actual practice of medicine for three years since graduation and for three years last preceding the acceptance of appointment for examination." LA. REV. STAT. ANN. § 15:269 (1951). Moreover, the coroner, who is not a psychiatrist, must, if possible, be one of the examining physicians. *Ibid.* In one case in which the coroner testified as to defendant's mental condition, he used the term "epileptic personality," which, despite repeated questioning, he was unable to define. See *State v. Sauls*, 226 La. 694, 707, 77 So. 2d 8, 12 (1954). Michigan's sex offender statute, MICH. STAT. ANN. § 28.967(4) (1954), is exceptional in its definition of qualifications. Each of the three examining psychiatrists must have at least five years experience in the exclusive practice of psychiatric diagnosis and treatment and be chosen from a list of not less than six compiled by the Department of Mental Health. In West Virginia "it is not uncommon for a medical doctor to be appointed with a psychiatrist to make the examination and report to the Court. . . . In the three counties in which I preside . . . only Ohio County has psychiatrists or neurologists." Communication from Ralph E. Pryor, Judge, First Judicial Cir., Wellsburg, W. Va., Feb. 3, 1962.

⁴⁵ See ALBEE, MENTAL HEALTH MANPOWER TRENDS 228, Table 18 (1959). Public hospitals are such busy places, it is unlikely that the average patient is seen for more than a few hours by a ward physician. Diamond, *supra* note 40, at 231. Of the seven questionnaire responses received reporting that present state hospital facilities were inadequate to perform the tasks assigned them by statute, four attributed this primarily to inadequate staff. Communications from Granville L. Jones, M.D., Arkansas State Hosp., Little Rock, Ark.; Emile Grunberg, M.D., Massachusetts Correctional Institution, East Bridgewater, Mass.; Superintendent, Vermont State Hosp., Waterbury, Vt.; Theodore G. Denton, M.D., Central State Hosp., Petersburg, Va.

⁴⁶ Weihofen, *Insanity as a Defense in Criminal Cases in Colorado*, 9 ROCKY MT. L. REV. 213, 215 (1937).

⁴⁷ See the references in note 12 *supra*.

⁴⁸ Those who are seriously disturbed are likely to be committed, before trial and by agreement, to a mental institution either because they are not competent to stand trial or because they are civilly committable.

whether such a "borderline" defendant was responsive to the sanctions of the legal order at the time of the offense and yet chose to ignore them. As part of this decision, the jury may have to conclude that a psychotic who is often rational was not rational on a given date, and that the act in question can properly be traced to his illness. In so doing, an appraisal must be made of the methods used by the expert to arrive at his judgments, the kinds of evidence upon which he relied, the techniques he used to elicit it and to test its accuracy. If the expert is at all candid, he will concede that his testimony represents a series of estimates drawn from various clues—some from the patient's life history, some from his performances in clinical tests, some from the nature of the situation in which he found himself on the occasion in question.

Any and all of these factors may remain unknown to the jury if defense counsel is unable to elicit them on cross-examination or to present his own version—both of which require that a psychiatrist be available to the accused. The jury may never learn that what is psychotic to one expert may be neurotic to another, that what some call psychopathy may be interpreted by others as a failure of communication between a Class I psychiatrist and a Class V offender.⁴⁹ Indeed, differences among the examining physicians may not even be brought to the attention of the court. Reports from most state hospitals usually contain briefly stated conclusions, and they almost never indicate the minority views held by some members of the staff.⁵⁰

It may be suggested that there is no need to scrap the impartial expert in order to insure that disagreements will be aired. For example, why not simply build disagreement into a board of experts? Indeed, why not authorize the defendant to name one of the psychi-

⁴⁹ The terminology is drawn from HOLLINGSHEAD & REDLICH, *SOCIAL CLASS AND MENTAL ILLNESS* 66-135 (1958).

⁵⁰ Of 17 responses to a questionnaire on the subject to superintendents of state hospitals, 13 indicated that minority views, which may exist, are never recorded in the report. Communications from J. S. Tarwater, M.D., Alabama State Hosp., Tuscaloosa, Ala.; Granville L. Jones, M.D., Arkansas State Hosp., Little Rock, Ark.; D. A. Pooler, M.D., Bangor State Hosp., Bangor, Me.; Emile Grunberg, M.D., Massachusetts Correctional Institution, East Bridgewater, Mass.; John L. Smalldon, M.D., New Hampshire State Hosp., Concord, N.H.; Prison Ward, Bellevue Psychiatric Hosp., New York, N.Y.; H. S. Barahal, M.D., Pilgrim State Hosp., West Brentwood, N.Y.; Walter A. Sikes, M.D., Dorothea Dix Hosp., Raleigh, N.C.; J. O. Crist, M.D., Lima State Hosp., Lima, Ohio; William S. Hall, M.D., South Carolina State Hosp., Columbia, S.C.; Superintendent, Vermont State Hosp., Waterbury, Vt.; Theodore G. Denton, M.D., Central State Hosp., Petersburg, Va.; William N. Karn, Jr., M.D., Wyoming State Hosp., Evanston, Wyo. Only in Pennsylvania, Maryland, Tennessee, and the District of Columbia, is this done, and even there, extremely rarely. Communications from W. P. Camp, Norristown State Hosp., Norristown, Pa.; Bruno Radaukas, M.D., Spring Grove State Hosp., Baltimore, Md.; James A. Taylor, M.D., Assoc. Prof., Dept. of Psychiatry, Western Tennessee Medical School; James A. Ryan, M.D., District of Columbia General Hosp., Washington, D.C., March 8, 1962.

atrists to serve on such a board? This already occurs in several states. In Ohio, the defendant is examined by two government psychiatrists employed by a court clinic, but he may have a psychiatrist of his choice appointed to the examining commission.⁵¹ In Connecticut, judges appoint an examining board made up of two or three psychiatrists and often choose them upon recommendations from the state's attorney and defense counsel.⁵² Arguably, such a procedure gives the defendant all the benefits he could receive from appointment of the witness as his own, except that the expert he designates may not support his defense. Obviously, he should not be entitled to have experts appointed at government expense until one takes the position he wants.⁵³ The board does present certain problems. If it consists of nominees of the prosecution, the defense, and the court, it is likely to repeat the problem already posed by a "court" expert. If there are only two members, one for the prosecution and one for the defense, controversy will continue in the borderline cases. In short, such a proposal would simply build into the expert board the very issues which are presently aired in the so-called "battle of experts." And because the board would examine and deliberate together and perhaps even file a joint report, it is likely that such genuine disagreement would be muted. The very issues and normative problems calling most for decision by a jury would have been screened out.

In sum, the "impartial" expert may be more or less qualified, more or less oriented so as to be predisposed for or against the accused. It is not a matter of bias of a *government* psychiatrist for the *government's* case.⁵⁴ Government has become too pluralistic to charge bias to all who work for it. Few would argue, for example, that a pro-government bias is inevitable in judges, probation workers, assigned counsel and public defenders. The issue is entirely different. It can be understood only against the backdrop of an adversary system. In such a system, knowledge is presumed to be finite. Only a limited category of incontrovertibles—that of judicial notice—exists. The "impartial expert" intrudes upon the model of the ineluctably fallible man since his is the only expert testimony the state is obligated to provide. If his testimony supports the state's position, as is likely to

⁵¹ Communication from Ralph Robinson, Psychiatric Clinic, Crim. Ct., Cleveland, Ohio. This occurred in five or six of the 115 cases referred to the clinic during 1959 and 1960. Such experts were paid fees ranging from \$100 to \$250.

⁵² Communication from John M. Murphy, Public Defender for New Haven County, New Haven, Conn.

⁵³ See note 38 *supra* and accompanying text.

⁵⁴ Arguably there may be added pressure on the government psychiatrist to find defendant sane because he is the person who will probably have to deal with the accused should the jury find him not guilty on grounds of insanity.

be the case, the accused will have no resources available to make the kind of corrections the adversary process assumes he is able to make. He will then have to rely on the conventional methods of impeaching experts—by challenging, for example, their professional standing, their competence, the thoroughness of their examination, and their impartiality.⁵⁵ Of course, as lawyers become more knowledgeable in this field, even the “impartial” expert and his findings will be subjected to closer scrutiny than has heretofore been the case. But this will hardly suffice to provide the indigent accused with the “adequate defense” which only his own expert can assure.

B. The General Subpoena Power

In the ten states which have no specialized procedure,⁵⁶ as in all other states, counsel may call upon the persons who have dealt with the accused in the course of what is often an extensive psychiatric history. The accused may have been involved with school authorities, clinics, family service agencies, mental hospitals, and juvenile authorities, leaving behind him reports of psychiatrists, neurologists, clinical psychologists, and social workers. The authors of such reports are valuable fact witnesses who need be paid no more than a nominal witness fee. In the case of the indigent, even that fee will often be paid by the state.⁵⁷

When subpoenaed, these experts may be required to testify to the details of their relationship with the defendant, their test findings, their diagnoses, and the like.⁵⁸ This testimony may, without more, persuade judge or jury to infer from the prior history that the accused was insane at the time of the crime. There will, however, be cases in which the time gap between the past condition and the crime is so great that a jury could not properly infer that the condition persisted. It may

⁵⁵ See *United States ex rel, Smith v. Baldi*, 192 F.2d 540, 547 (3d Cir. 1951), *aff'd*, 344 U.S. 561 (1953). *McGarty v. O'Brien*, 188 F.2d 151, 157 (1st Cir.), *cert. denied*, 341 U.S. 928 (1951). It was argued recently in the District of Columbia that a defendant is entitled to a “meaningful mental examination.” Such an examination, it was urged, cannot be obtained from a government psychiatrist. The reasons suggested were: (1) defendant will inevitably be less than candid when he speaks to a government psychiatrist, particularly if he knows that his disclosures may be introduced into evidence against him, even if only on his mental condition; (2) since defendant’s interests are most apt to be served by dynamically-oriented psychiatrists who are relatively rare in government service, judicial discretion should be exercised to permit a defendant to select his own psychiatrist. Brief for Defendant, p. 15, *United States v. Flint*, Misc. No. 1387, D.C. Cir., Dec. 3, 1959. Both contentions were rejected without comment. Order, *United States v. Flint*, *supra*.

⁵⁶ Alaska, Arizona, Georgia, Idaho, Kansas, Mississippi, Montana, New Mexico, New Jersey, and Washington.

⁵⁷ See note 73 *infra*.

⁵⁸ See cases collected in Annot., *Compelling Expert to Testify*, 77 A.L.R.2d 1182, 1186 n.12 (1961).

then be necessary to show through expert testimony that the prior condition was such that it would ordinarily have persisted up to the time of the crime; or that the past condition, though not in itself sufficiently serious, was such that it would deteriorate by the time of the crime. If the information sought may be supplied by a testifying psychiatrist without special preparation, based on a spot application of his expertise to facts known to him by virtue of his prior relationship with the accused, then the court will generally compel it.⁵⁹ A slight extension of this approach would be to put the missing facts in evidence through other witnesses and then present them to the expert as part of a hypothetical question. There is some authority for requiring the expert who is also a fact witness to state an opinion upon facts presented to him in this manner.⁶⁰ For psychiatrists already involved in the life of the defendant, the time required to serve such limited additional functions is hardly an undue burden.

A separate question arises when the witness sought by the defendant is a psychiatrist who has had no prior contact with the defendant, or whose prior contact does not lend itself to current use on the witness stand. The cases unanimously hold that such an expert will not be required to prepare himself to testify through examinations, tests, or research.⁶¹ In this instance, the interest in obtaining information for the trial process gives way completely to the interest in paying people for their labor.

Between the extremes of the psychiatrist as fact witness and the psychiatrist as performer of substantial labors, there may be a middle ground. The psychiatrist new to the case could have information regarding defendant's mental condition supplied by a hypothetical question; or he might be able to testify regarding psychiatric matters without relating them specifically to the accused, leaving the task of appli-

⁵⁹ The view generally stated is "that an expert may be compelled, without extra compensation, to give his opinion as to the matter in question, or to state an opinion already formed and existing, or which is based on facts or conditions previously observed or upon an examination or investigation previously made, or which does not require any special study or investigation." *Id.* at 1187-88. Though the annotation does not label this position as "the most widely held view," we do so advisedly, drawing from the cases upon which the annotation is based.

⁶⁰ *Id.* at 1188 n.3; *State v. Bell*, 212 Mo. 111, 126-27, 111 S.W. 24, 28 (1908); *Philler v. Waukesha County*, 139 Wis. 211, 215, 120 N.W. 829, 830-31 (1909): "[I]f from the witness's observation or from the hypothetical facts stated to him he has consciously in mind either knowledge or an opinion, such knowledge or existent opinion is a fact as to which he may be required to testify; but, as is often the case, and in the higher branches of expert learning perhaps usually, an amount of study, experimentation, thought, and reflection may be necessary to the formation of an opinion, and the witness may often honestly answer that he has not formed such opinion" See also *Barnes v. Boatmen's Nat'l Bank*, 348 Mo. 1032, 1038, 156 S.W.2d 597, 600-01 (1941); *Burnett v. Freeman*, 125 Mo. App. 683, 690, 103 S.W. 121, 122 (1907).

⁶¹ See note 59 *supra*.

cation to judge and jury; or he might be asked to attend the proceedings, listen to the evidence, and render an opinion on the basis of observations in court. This poses the question of whether case law might be expanded to bring such limited uses of a psychiatrist under the general subpoena power. It may be argued that the psychiatrist who had "witnessed" the materials in his field of expertise should be as much subject to process as those who have witnessed "facts" at some time in the past.⁶²

There are a few cases which hold that the expert who is not a fact witness must answer hypothetical questions put to him on the witness stand.⁶³ But the more usual position rejects the use of process against the psychiatrist who is not a fact witness. Such a person, the argument runs, is merely one of a large class who might aid the court's inquiry, and therefore his public duty is of a lesser order than that of the expert who is also a fact witness, or of fact witnesses generally. The argument is not persuasive. If a witness was needed to testify to the weather at a particular time and place, he could hardly resist subpoena merely because he was a member of a large class. The same is true of persons testifying to another's reputation, or of an eyewitness who may have been only one of a large number who observed the event. The real basis for the distinction is the reluctance to impose a substantial burden on a limited class of persons, particularly when services are involved for which substantial payment is traditionally made.

Yet there are two situations in which persons are required to make comparable sacrifices in furtherance of the administration of justice. First, in most states, lawyers may be assigned to represent indigent defendants—usually without fee, except in capital cases. They must devote considerable time in preparing and presenting the case. Payment for investigators, secretaries, and other incidental expenses will probably have to come from their own pockets.⁶⁴ Although the constitutionality of such procedures has been challenged on the ground that the legislature lacks the power "to say to the physician, the

⁶² In addition to the cases cited in note 60 *supra*, see *Blair v. United States*, 250 U.S. 273, 281-82 (1919), describing the duty to testify in court or before a grand jury as one "which every person within the jurisdiction . . . is bound to perform upon being properly summoned, and for performance of which he is entitled to no further compensation than that which the statutes provide. The personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public. . . . [T]he witness is bound not only to attend but to tell what he knows in answer to questions framed for the purpose of bringing out the truth of the matter under inquiry."

⁶³ See, *e.g.*, *Board of Comm'rs v. Lee*, 3 Colo. App. 177, 179, 32 Pac. 841, 842 (1893); *Dixon v. People*, 168 Ill. 179, 191, 48 N.E. 108, 110-11 (1897).

⁶⁴ The New York cases are reviewed in *People v. Marx*, 10 Misc. 2d 1053, 168 N.Y.S.2d 562 (Queens County Ct. 1957).

surgeon, the lawyer, the farmer, or anyone else, that he shall render this or that service, or perform this or that act in the line of his profession or business, without remuneration,"⁶⁵ the courts have generally upheld them.⁶⁶ The attorney's status as an officer of the court has been said to impose upon him the obligation to aid the court, or he has been said to share in a general obligation to assist in the administration of justice.⁶⁷ Second, citizens are everywhere required to perform jury duty with little or no compensation. Such service requires not only thought and concentration for sustained periods, but, for many, it entails considerable loss of earnings. Yet the Supreme Court has described jury service as a duty of citizenship which "cannot be shirked on a plea of inconvenience or decreased earning power."⁶⁸

These analogies suggest that the state's interest in resolving disputes may require that certain groups—particularly those possessed of specially useful information—donate their time to the administration of justice. From this, one might assume that the indigent accused could obtain psychiatric assistance through an expansion of the general subpoena power. Yet there is an obvious distinction between lawyers and jurors on the one hand and psychiatrists on the other. It can be more readily said that lawyers bear a special responsibility for the administration of justice. And jurors are drawn from so large a group that burdens can be distributed equitably. Psychiatrists satisfy neither criterion. Moreover, statistics suggest the undesirability of using psychiatrists as such a group.⁶⁹ There are only 8,912 practicing psychiatrists in the United States—one for every 18,800 people—and they are distributed very unevenly. Further, dynamically oriented psychiatrists, who might well be the experts of choice for the accused, are far fewer in number and are more heavily concentrated in major urban areas. There are just not enough psychiatrists to support the luxury of a free market approach to the problem. Five cities alone—New York, Chicago, Los Angeles, Boston, and Washington—account for 63% of the total number of psychoanalysts. Even in the urban centers where the supply might meet the demand, too many defendants might summon the services of too few psychiatrists. Though this problem might be solved administratively—for

⁶⁵ *County of Dane v. Smith*, 13 Wis. 585, 588-89 (1861).

⁶⁶ *E.g.*, *Presby v. Klickitat County*, 5 Wash. 329, 332, 31 Pac. 876, 877 (1892).

⁶⁷ *People ex rel. Whedon v. Board of Supervisors*, 192 App. Div. 705, 183 N.Y. Supp. 438 (1920); *People v. Marx*, 10 Misc. 2d 1053, 1057, 168 N.Y.S.2d 562, 566 (Queens County Ct. 1957); *Presby v. Klickitat County*, *supra* note 66, at 332, 31 Pac. at 877.

⁶⁸ *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 224 (1946).

⁶⁹ See ALBEE, *MENTAL HEALTH MANPOWER TRENDS* 59, tables 28-30, 32, 37, 48 (1959).

example, by creating panels to distribute the burden—the resulting system would still not be one of choice. Economic considerations apart, the psychiatrist so summoned is likely to be both hostile and grudging of his time. Indeed, this is so potent a factor that it has deprived of any force the two or three statutes which seem to require the expert to testify even when he has no personal knowledge of the case.⁷⁰

Clearly, the indigent accused supplied only with counsel and relying solely upon the general subpoena power is not in a position to present an “adequate” insanity defense. Only if he has a substantial psychiatric history in the jurisdiction in which he is tried is he likely to be able to present psychiatric testimony. Even then, he may encounter problems in bringing the history up to date or in eliciting more generalized opinions. Moreover, he cannot expect any substantial commitment of time from a psychiatrist in performing the mutual orientation functions which we suggest are so important. Though some zealous psychiatrists donating their time to some defendants may enable those defendants to achieve “adequate” defense, the law does nothing to assure a satisfactory minimal standard. The impenetrable barrier is the right of the expert to be paid for his services—a right which the courts will probably continue to recognize.

C. *Subsidizing the Defense*

Courts have generally refused to hold, in the absence of a statute authorizing it, that defense experts should be paid by the state.⁷¹ The approach has been a passive one which leaves the parties as before—mismatched. There have been rare occasions, however, when courts have asserted an inherent power to appoint a psychiatrist for the accused and have him paid by the state.⁷² But the dominant view re-

⁷⁰ ALA. CODE, tit. 7, § 366 (1960); IND. ANN. STAT. § 2-1722 (Supp. 1962); cf. MONT. REV. CODES ANN. § 25-414 (1947). These statutes do not necessarily require testimony from the expert who has no personal knowledge but they can be so construed. This construction is suggested by the history of the Indiana statute. See *Buchman v. State*, 59 Ind. 1 (1877); *Dills v. State*, 59 Ind. 15, 24 (1877) (dissenting opinion). The statute, which was enacted four years after these cases, has produced no reported litigation and Indiana counsel consulted by us say they know of no instance in which it has been used to obtain psychiatric aid for the indigent defendant. Communications from Cleon H. Foust, Professor, Indiana Univ. School of Law; Charles W. Symmes, Att’y, Indianapolis, Ind. For some years, there has been an alternative procedure—appointment of experts by the court—under IND. ANN. STAT. § 9-1702 (1956). Its existence may account in part for the paucity of case law under the earlier statute.

⁷¹ See *State v. Weeks*, 78 N.H. 408, 409, 101 Atl. 35, 36 (1917); *Commonwealth v. Green*, 346 Pa. 172, 175, 29 A.2d 491, 493 (1943); *Philler v. Waukesha County*, 139 Wis. 211, 217, 120 N.W. 829, 831 (1909).

⁷² See, e.g., *Commonwealth ex rel. Smith v. Ashe*, 364 Pa. 93, 105-06, 71 A.2d 107, 113, cert. denied, 340 U.S. 812 (1950). During the hearing on a habeas corpus

mains one which denies the judge the power to tax the public with the cost of assuring that available defenses are adequately made. There are, however, a number of statutory patterns which either deal explicitly with the problem or which may be used in an attempt to meet the need. Most common are the statutes which provide for state compensation of witnesses called by an indigent accused.⁷³ These are ordinarily invoked by the filing of an affidavit alleging the necessity for such testimony.⁷⁴ Though some were presumably intended to authorize only payments of an ordinary witness fee,⁷⁵ the great majority refer merely to "witnesses," leaving for decision whether expert witnesses may be paid expert fees.⁷⁶

Unfortunately, there is virtually no case law on the question. Only two appellate cases have been found, neither of which is precisely on point. Both indicate that "expert" fees are not contemplated. One

petition, the trial judge testified that if a psychiatrist had been "asked for" by the indigent defendant's counsel, one would have been appointed, although there was no provision in the Pennsylvania statutes for the state to furnish such assistance. Some of the answers to questionnaires indicate that "inherent power" may be invoked more frequently than is usually assumed and that psychiatric assistance is furnished without regard to the statutes. Communications from Jacob A. Latona, County Judge, Erie County Ct., Buffalo, N.Y.; Aram A. Arabian, Att'y, Providence, R.I. Nor is reliance on "inherent power" without precedent in a closely related area. In Wisconsin, for example, the courts are said to have power, apart from statute—and even in the face of a statute to the contrary—to order payment of counsel for an indigent accused out of public funds. Such compensation is said to be "proper and just," for the state is "vitaly more interested in saving an innocent man from unmerited punishment than in the conviction of a guilty one." *Carpenter v. Dane County*, 9 Wis. 274, 276-77 (1859); *County of Dane v. Smith*, 13 Wis. 585, 588 (1861).

⁷³ COLO. REV. STAT. ANN. § 39-7-32 (1953); DEL. SUPER. CT. CRIM. R. 17(b); FLA. STAT. ANN. §§ 932.36-37 (1944); HAWAII REV. LAWS § 222-11 (1955); MICH. STAT. ANN. § 28.1252 (1954); MINN. STAT. ANN. § 357.32 (1957); NEB. REV. STAT. § 29-1903 (1956); N.D. CENT. CODE § 31-01-19 (1960); N.H. REV. STAT. ANN. §§ 604:1-2 (1955); OKLA. STAT. ANN. tit. 22, § 718 (1937); R.I. GEN. LAWS ANN. § 12-17-8 (1956); UTAH CODE ANN. § 21-5-14 (1953); WIS. STAT. ANN. § 325.10 (1958); WYO. STAT. ANN. § 7-245 (1957). See also D.C. CODE ANN. § 23-109 (1961); FED. R. CRIM. P. 17(b). In several other states provision exists for payment of defense witnesses whether or not defendant is indigent. CAL. PEN. CODE § 1329; CONN. GEN. STAT. ANN. § 54-153 (1958); IOWA CODE ANN. § 781.2 (1950); MASS. ANN. LAWS ch. 277, § 66 (1956) (limited to capital and life-imprisonment cases); NEV. REV. STAT. § 48.300 (1961); N.Y. CODE CRIM. PROC. § 617; S.D. CODE § 36.0401 (Supp. 1960); TEX. CODE CRIM. PROC. art. 1036 (1950).

⁷⁴ In Rhode Island the affidavit need refer only to defendant's inability to procure his own witnesses. In Delaware a motion or request from defendant is all that is required. In a few states, for example, Minnesota and Nebraska, if the defendant proves unable to pay his witnesses after trial, the county will do so. Statutes cited note 73 *supra*. Where the procedure is for the defendant to make a request before trial, decision is within the court's discretion. *Goldsby v. United States*, 160 U.S. 70, 73 (1895); *Murdock v. United States*, 283 F.2d 585, 587 (10th Cir. 1960), *cert. denied*, 366 U.S. 953 (1961); *Dupuis v. United States*, 5 F.2d 231 (9th Cir. 1925).

⁷⁵ In California, Nevada, South Dakota, and Texas, the provision for state compensation of defense witnesses appears either in the same section as, or the one following, the section setting the ordinary witness fees. Statutes cited note 73 *supra*.

⁷⁶ Along with the provision authorizing payment of witness fees for the indigent, a few states have another one authorizing the court to set reasonable fees for expert witnesses. DEL. CODE ANN. tit. 10, § 8906 (1953); MICH. STAT. ANN. § 27.918 (1935); MINN. STAT. ANN. § 357.25 (1957). In these states a construction applying the witness statutes to expert fees seems more likely than where there is no judicial control over fees.

involved a request for the appointment of a second psychiatrist to appear for the defendant at public expense.⁷⁷ The trial judge rejected the request, and his action was upheld on appeal. The appellate court pointed out that one expert witness had already been paid by the state and suggested that such payment had been improper. "[T]he defendants were not entitled to have an expert witness summoned at an expense to the public greater than the statutory witness fee and mileage. There is no statute providing for fees of medical witnesses or alienists in excess of those allowed non-expert witnesses."⁷⁸ The other case⁷⁹ arose out of a request for state payment of a psychiatrist to examine the defendant before trial. The request was denied, the court holding that the statute did not cover the costs of preparing for trial.⁸⁰ These statutory constructions, albeit narrow, are consistent with a preexisting case law treating fees for the indigent's witnesses as a matter of grace and holding generally that there is no right to the appointment of expert witnesses at public expense. Nevertheless, those who drew these statutes were unquestionably aware of the existence of the two classes of witnesses. Their failure to distinguish between the classes or to limit the courts' power to approve witness fees beyond the ordinary supports a broader view.

Whatever the legislators intended, they wrote their statutes broadly, and most trial judges seem to have so construed them. In order to ascertain the practice under these statutes, we wrote to the trial court clerks in the largest cities in ten states having such legislation.⁸¹ Eight responded. Seven said that these statutes are construed to authorize the payment of more than the ordinary witness fee to experts.⁸² One said that such fees were authorized only if the "state jointly uses" the expert.⁸³ None had an accurate count of the number of times the statute had been invoked for this purpose.⁸⁴

⁷⁷ *Osborn v. People*, 83 Colo. 4, 11, 262 Pac. 892, 895 (1927).

⁷⁸ *Ibid.*

⁷⁹ *State v. Weeks*, 78 N.H. 408, 101 Atl. 35 (1917).

⁸⁰ *Id.* at 409, 101 Atl. at 36; see *Henry G. Clark*, 104 Mass. 537 (1870).

⁸¹ Dist. Ct., Denver, Colo.; Super. Ct., New Haven, Conn.; Cir. Ct., Jacksonville, Fla.; Cir. Ct., Honolulu, Hawaii; Super. Ct., Concord, N.H.; Dist. Ct., Bismarck, N.D.; Dist. Ct., Oklahoma City, Okla.; Dist. Ct., Salt Lake City, Utah; Cir. Ct., Milwaukee, Wis.; Dist. Ct., Cheyenne, Wyo.

⁸² Communications from John M. Murphy, Public Defender for New Haven County, New Haven, Conn.; Bill M. Davis, Ass't Clerk, Cir. Ct., Jacksonville, Fla.; Kenneth C. Amona, Court Fiscal Officer, Honolulu, Hawaii; Henry P. Callahan, Clerk, Super. Ct., Concord, N.H.; Dale Smith, Court Clerk, Oklahoma City, Okla.; Harry J. Zdrojek, Clerk of Munic. and Dist. Cts., Milwaukee, Wis.; Barney Cole, County Att'y, Cheyenne, Wyo. In Connecticut, the statute is not ordinarily used because the Public Defender system has made it obsolete. Communication from John M. Murphy, *supra*.

⁸³ Communication from Joseph G. Jeppson, Dist. Judge, Salt Lake City, Utah.

⁸⁴ Where estimates were made, they ranged from three authorizations in several years in Milwaukee, Wis., to four a year in Concord, N.H. The fees authorized also varied greatly, ranging from \$50 per day to \$500 maximum for all services rendered.

Statutes in a few states authorize the judge to fix fees for experts which will compensate them reasonably for their time.⁸⁵ They say nothing as to whether the state will pay the fee if the defendant is unable to, but they do protect him against the possibility of being charged an unreasonably high fee. Iowa has gone even further by legislating a fixed fee for experts,⁸⁶ but inflation has made the statute obsolete.

Only a handful of states have statutes explicitly directed to the problem of state payment for expert aid. Their objective is to deal with "what is a matter of common knowledge, that upon the trial of certain issues, such as insanity or forgery, experts are often necessary both for prosecution and for defense. . . . [A] defendant may be at an unfair disadvantage if he is unable because of poverty to parry by his own witnesses the thrusts of those against him."⁸⁷ Rhode Island has a statute providing that "In criminal cases in the discretion of the court, on request of the defendant, expert witnesses may be furnished for the defendant at the expense of the state, on such terms and conditions as may be prescribed by the court."⁸⁸ It is apparently the practice in that state for the court, on motion, to appoint a psychiatrist selected by the state and to pay him \$100 for the examination and \$100 for each day of testimony.⁸⁹ California has a statute and a practice similar to Rhode Island.⁹⁰ New York is much more restrictive;⁹¹ its statute is applicable only to capital cases and limits both the number of experts the accused may use and the amount which may be expended. No more than \$1,000 is made available. Under this statute, defense

⁸⁵ Statutes cited note 76 *supra*.

⁸⁶ The fee is fixed at \$4 per day, which is somewhat higher than the ordinary witness fee. IOWA CODE ANN. § 622.72 (1950). According to Professor Samuel M. Fahr of the University of Iowa Law School, "[T]his section of the Code has fallen into complete disuse. Fallen may be a misnomer . . . because it never has been used freely. . . . [I]n a very few instances it has been used to compensate—if that word is appropriate—psychiatrists who have voluntarily testified for indigent persons. So far as I know it has never been used to require testimony." Communication from Professor Fahr, Dec. 21, 1961.

⁸⁷ *Reilly v. Berry*, 250 N.Y. 456, 461, 166 N.E. 165, 167 (1929) (Cardozo, C.J.).

⁸⁸ R.I. GEN. LAWS ANN. § 9-17-19 (1956).

⁸⁹ What is not clear is whether this practice, which is reported by a former public defender, occurs under this statute, under an inherent power of the court, or as part of the general public defender apparatus. Communication from Aram A. Arabian, Att'y, Providence, R.I.

⁹⁰ CAL. CODE CIV. PROC. § 1871; *cf.* *People v. Gorg*, 45 Cal. 2d 776, 780, 291 P.2d 469, 471 (1955); *People v. Rickson*, 112 Cal. App. 2d 475, 479, 246 P.2d 700, 703 (Dist. Ct. App. 1952); *People v. Spraic*, 87 Cal. App. 724, 727, 262 Pac. 795, 797 (Dist. Ct. App. 1927).

⁹¹ N.Y. CODE CRIM. PROC. § 308; see *People v. Marx*, 10 Misc. 2d 1053, 1054-55, 168 N.Y.S.2d 562, 564 (Queens County Ct. 1957); *People v. Fernandez*, 202 Misc. 190, 194-95, 109 N.Y.S.2d 561, 565 (Sup. Ct. 1951).

counsel is ordinarily permitted to choose his own psychiatrist.⁹² The compensation paid the expert will vary.⁹³

In a few states, provisions for reimbursement of assigned counsel for reasonable expenses incurred in the course of conducting the defense⁹⁴ are sometimes construed broadly enough to authorize reimbursement for funds spent on experts. Such an interpretation of the Massachusetts statute, limited to capital cases, is made clear by the existence of a court rule setting forth conditions for the authorization.⁹⁵ Under it, requests by defense counsel for the appointment of a psychiatrist have been routinely granted.⁹⁶

All of these statutory schemes represent an attempt to work within and to subsidize the adversary process. Where they exist, they are an important and useful resource. But they are, for the most part, not adequate to the need. They leave unsettled the kinds of services which the defense may obtain from a psychiatrist and the extent to which other specialists may be used; they make expert aid a matter for the court's rather than counsel's discretion; and they leave court determination of the expert's fees on a case-by-case basis. In short, they involve the court entirely too much in what should properly be defense counsel's sphere, making him justify in advance his feeling that he would like to pursue certain avenues of cross-examination or defense.⁹⁷

Moreover, the public subsidy approach tends to make an expert available to counsel unqualified to use him. The assigned-counsel system, which still dominates the American scene, ordinarily "pits against prosecutor and police an inexperienced defense counsel—ill versed in the techniques of trial of criminal cases, possessed of no investigative assistance and motivated only by his sense of injustice and professional responsibility."⁹⁸

The "adequate defense" of which we have spoken is likely to be provided only by counsel experienced in the trial of criminal cases.

⁹² Communications from Abraham N. Geller, Judge, Ct. Gen. Sess., New York County, N.Y., Dec. 6, 1961; Jacob A. Latona, Judge, Erie County Ct., Buffalo, N.Y.

⁹³ In Buffalo, it ranges from \$25 to \$50 for an examination with additional amounts for each day of testimony. *Ibid.*

⁹⁴ *E.g.*, CAL. PEN. CODE § 987a; IND. ANN. STAT. § 13-1404 (1956); MASS. GEN. LAWS ANN. ch. 277, § 56 (1956); N.H. REV. STAT. ANN. § 604:3 (Supp. 1961); N.Y. CODE CRIM. PROC. § 308; PA. STAT. ANN. tit. 19, § 784 (Supp. 1961).

⁹⁵ MASS. SUPER. CT. R. 96 provides, "[T]he court will not allow compensation for services of an expert or expert witness for the defense in a capital case unless an order of the court or a justice naming such expert or expert witness and authorizing his employment was made before he was employed."

⁹⁶ See *McGarty v. O'Brien*, 188 F.2d 151, 157 (1st Cir.), *cert. denied*, 341 U.S. 928 (1951) (dictum).

⁹⁷ *Cf. Jencks v. United States*, 353 U.S. 657 (1957).

⁹⁸ Goldstein, Book Review, 28 U. CHI. L. REV. 772 (1961).

If the criminal law bar were sufficiently large, and if assignments of counsel were made from their ranks alone, it might well make sense to develop for the use of assigned counsel a system of public subsidy for investigation and expert assistance. Possibly one can justify making such resources available to assigned counsel generally in the hope that he will learn how to use them. But the question would still remain whether it would not be preferable to put the state's resources into a professionalized defender system. According to a recent report, a system of paid, assigned counsel would not only cost a good deal more, it could never hope to develop the special knowledge and competence which can be expected from an office exclusively concerned with the defense of the indigent accused.⁹⁹ Such a professionalized facility already exists in many places in the form of a public defender or a private legal aid society.¹⁰⁰ When they are staffed by lawyers who give them a substantial portion of their work-week, they begin to compare favorably with the prosecutor's office. To become genuinely comparable, however, they would need the extralegal assistance—for example, investigators and experts—the state commits to the prosecution of crime. Unfortunately, very few defense agencies have funds adequate for such purposes. If more than the lawyer's services are needed, he must invoke the procedures generally available to the indigent accused. Although the courts may be more generous in applying these procedures to a defender agency than to assigned counsel,¹⁰¹ the underlying problems remain. Permission to hire an expert or investigator must be obtained from the court through a showing of special need; the sums requested may be pared down; counsel is not free to secure assistance at the time of need.

In a handful of defender offices, usually located in large cities, the appropriation is large enough to meet some of these problems. Instead of the petition to the court for subsidy on a case-by-case basis, funds are provided to the defender on an annual basis. From these,

⁹⁹ SPECIAL COMMITTEE TO STUDY DEFENDER SYSTEMS, EQUAL JUSTICE FOR THE ACCUSED 64, 81 (1959).

¹⁰⁰ As to public defenders, see *e.g.*, CAL. GOV'T CODE §§ 27700-11; CONN. GEN. STAT. REV. §§ 54-80-81 (Supp. 1961); D.C. CODE ANN. §§ 2-2201 (1961); ILL. ANN. STAT. ch. 34, §§ 5601-09 (Smith-Hurd Supp. 1961); IND. ANN. STAT. §§ 13-1401-06 (1956); MINN. STAT. ANN. §§ 611.12-13 (1947); NEB. REV. STAT. §§ 29-1804-05 (1956); OKLA. STAT. ANN. tit. 19, §§ 138.1-6 (Supp. 1961); R.I. GEN. LAWS ANN. §§ 12-15-1-7 (1956); VA. CODE ANN. §§ 19.1-12-13 (Supp. 1960). Public defender offices exist, pursuant to local ordinance, in St. Louis, Mo., Columbus, Ohio, and Shelby County, Tenn. See SPECIAL COMMITTEE TO STUDY DEFENDER SYSTEMS, *op. cit. supra* note 99, at 144. Private defender organizations or legal aid societies exist in a considerable number of cities—*e.g.*, New York, Washington, D.C., Philadelphia. *Id.* at 50-51.

¹⁰¹ See communications from John M. Murphy, Public Defender for New Haven County, New Haven, Conn.; Aram A. Arabian, former Public Defender, Providence, R.I.

he may retain such investigative or expert assistance as he needs.¹⁰² This approach envisions a defense office independent of the court and as free to control its operations as the office of the prosecution.

III. ASSURING EQUALITY IN THE CONDITIONS OF LITIGATION

Our survey of existing patterns of psychiatric assistance has found virtually all of them inadequate. It remains to be seen whether courts will play a dominant role in compelling changes or whether statutory reform will prevail. There is evidence which indicates that both fronts will be active in the near future. Bar associations have addressed themselves increasingly in recent years to assuring "equal justice for the accused."¹⁰³ The federal government, the Ford Foundation, and others are working on the problem.¹⁰⁴ Improvement should follow as the bar and the public learn the shocking extent to which equal justice has been denied.

Meanwhile, pressures from courts are increasing. Passive for so long in shaping the conditions of litigation, the courts, under the leadership of the Supreme Court, have begun to face up to the states' obligation to assure high standards in the administration of criminal justice. Beginning with the confession cases and extending through the right-to-counsel and search-and-seizure cases, the courts have moved dramatically from a passive position to one of aggressive intervention in criminal procedure.¹⁰⁵ It was to be expected that these currents of change would be channelled to the problem of the indigent accused seeking expert aid.

¹⁰² In Los Angeles, Oakland, San Francisco, Memphis and Chicago the staff includes a full-time investigator. Bliss, *Defense Detective*, 47 J. CRIM. L., C. & P.S. 264, 265 (1956). In the District of Columbia, the recently created Legal Aid Agency has four full-time investigators. It has sometimes employed psychiatrists on its own initiative but, as a general matter, it uses the federal statute providing witness fees for indigent defendants. Communication from Charles B. Murray, Director, April 16, 1962. Only six of fifty defenders responding to a questionnaire indicated the existence of a fund for extraordinary expenses such as those for expert witnesses. See INSTITUTE OF JUDICIAL ADMINISTRATION, PUBLIC DEFENDERS 15 (1956). A federal bill, which would establish a public defender in the federal courts with a provision for reimbursement "for expenses necessarily incurred by him in the performance of his duties," presumably including experts, has repeatedly failed of passage in Congress. H.R. 2696, 87th Cong., 1st Sess. (1961); S. REP. No. 232, 86th Cong., 1st Sess. 4 (1959). See also *Hearings Before the House Committee on the Judiciary*, 86th Cong., 2d Sess., ser. 13, at 7 (1960).

¹⁰³ See SPECIAL COMMITTEE TO STUDY DEFENDER SYSTEMS, EQUAL JUSTICE FOR THE ACCUSED (1959).

¹⁰⁴ U.S. Dept. of Justice, Press Release, April, 1961, describing the appointment of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice; Conversations with consultants to the Ford Foundation and the Vera Foundation. See also, INSTITUTE OF JUDICIAL ADMINISTRATION, PUBLIC DEFENDERS (1956).

¹⁰⁵ See generally Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1 (1956).

In *McGarty v. O'Brien*¹⁰⁶ and *United States ex rel. Smith v. Baldi*,¹⁰⁷ defendants claimed that because they had been denied a psychiatrist of their own choice, paid by the state, they did not have the "fair trial" which the fourteenth amendment guarantees. The *Baldi* majority, in rejecting defendant's claim, held that there was no right "to receive at public expense all the collateral assistance needed to make" a defense. Such a principle, once established, would extend not only "to psychiatric consultation . . . [but also] to consultation with ballistics experts, chemists, engineers, biologists, or any type of expert whose help in a particular case might be relevant."¹⁰⁸ The dissenting judges, on the other hand, refused to class psychiatric assistance as "collateral" to the making of an adequate defense. They thought the issue should be determined on a case-by-case basis. "[I]f . . . there are grave indicia of mental disease, and it appears as well that counsel cannot prepare his client's case properly without the aid of a psychiatrist, one must be appointed by the court if due process is to be had."¹⁰⁹

For the court in *McGarty*, decisions would have to be made on a case-by-case basis to determine "how far the state, having the obligation to afford to the accused a fair trial, a fair opportunity to make his defense, is required under the due process clause to minimize this disadvantage [of not having his own psychiatrist]."¹¹⁰ Applying this standard to the case before it, the court concluded that a system of examination by a state psychiatrist was constitutionally adequate. The state has no "constitutional obligation to promote . . . a battle of experts by supplying defense counsel with funds wherewith to hunt around for other experts who may be willing, as witnesses for the defense, to offer the opinion that the accused is criminally insane."¹¹¹ Though less was made of it, *Baldi*, too, involved testimony by a court-appointed psychiatrist. Whether due process would have been accorded in either case if there had been no psychiatric examination whatever is left unresolved. *McGarty* also rejected the suggestion that the disadvantage suffered by the defendant in not having his own psychiatrist might be a denial of the equal protection of the laws. It reasoned that the disadvantage was "not imposed by the State, but results from the financial situation in which the accused finds himself."¹¹²

¹⁰⁶ 188 F.2d 151, 154 (1st Cir.), *cert. denied*, 341 U.S. 928 (1951).

¹⁰⁷ 192 F.2d 540, 546 (3d Cir. 1951), *aff'd*, 344 U.S. 561, 568 (1953).

¹⁰⁸ 192 F.2d at 547.

¹⁰⁹ *Id.* at 559.

¹¹⁰ *McGarty v. O'Brien*, 188 F.2d 151, 155 (1st Cir.), *cert. denied*, 341 U.S. 928 (1951).

¹¹¹ 188 F.2d at 155.

¹¹² *Id.* at 157.

Five years after *Baldi* and *McGarty*, the Supreme Court decided *Griffin v. Illinois*.¹¹³ The Court held that an indigent defendant, convicted of armed robbery and seeking to perfect an appeal, had been deprived of equal protection of the laws when he was denied a transcript of his trial without charge, even though due process did not require that he be allowed to appeal. According to Justice Black, speaking for the Court, "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."¹¹⁴

Even if *Griffin* is taken to assure substantial equality rather than complete equality, it still undercuts sharply the positions in *McGarty* and *Baldi*. Those cases dealt more with due process than equal protection, more with minimal standards of fairness than with assuring the poor "the kind of trial" a wealthy man gets. With the shift in emphasis to equal protection, the existence of a procedure for court appointment, so crucial to the earlier cases, becomes less determinative of the issue. Although such a procedure may assure that the insanity defense will be tried, in some minimal sense, it does not assure substantial equality in the conditions of the trial. The indigent defendant remains without "his" psychiatrist to assist him in preparing and trying his case. And he may remain without the psychiatrist whose orientation will make the issue appear to the jury to be a substantial one. Yet these are clearly available to persons of means.

The potential applicability of *Griffin* to the myriad situations in which a defendant is disadvantaged by his poverty is obvious. Certainly it portends a time when the states will have to shoulder the very financial burdens paraded as "imaginary horrors" in *Baldi*. Nevertheless, the principle underlying *Griffin* has been extended slowly and even grudgingly,¹¹⁵ perhaps because it promises so radical a revision of the trial process. In no case has it been applied to an indigent accused asserting a right to expert assistance. Indeed, in the three cases

¹¹³ 351 U.S. 12 (1956). See Allen, *Griffin v. Illinois: Antecedents and Aftermath*, 25 U. CHI. L. REV. 151, 156-57 (1957); Hamley, *The Impact of Griffin v. Illinois on State Court-Federal Court Relationships*, 24 F.R.D. 75, 79 (1958); Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 10 (1956); Willcox and Bloustein, *The Griffin Case—Poverty and the Fourteenth Amendment*, 43 CORNELL L.Q. 1, 23 (1957).

¹¹⁴ 351 U.S. at 19.

¹¹⁵ *Burns v. Ohio*, 360 U.S. 252 (1959); *Eskridge v. Washington State Bd. of Prison Terms & Paroles*, 357 U.S. 214 (1958) (per curiam); *Patterson v. Medberry*, 290 F.2d 275 (10th Cir.), cert. denied, 368 U.S. 839 (1961); *United States ex rel. Brown v. Lane*, 196 F. Supp. 484 (N.D. Ind. 1961); *People v. Berman*, 19 Ill. 2d 579, 169 N.E.2d 108 (1960); *People v. Wilson*, 7 N.Y.2d 568, 166 N.E.2d 838, 200 N.Y.S.2d 40 (1960); *People v. Breslin*, 4 N.Y.2d 73, 77, 149 N.E.2d 85, 87, 172 N.Y.S.2d 157, 160 (1958). It has been suggested that the *Griffin* case is limited to instances in which the exercise of a right, for example, the right to appeal, is conditioned upon financial ability. See Comment, 55 MICH. L. REV. 413, 420 (1957).

decided since *Griffin* in which the issue of the "right to an expert" has been raised, the decisions have been based principally upon non-*Griffin* grounds.

In *United States v. Brodson*,¹¹⁶ defendant had been charged with tax evasion. In a motion to dismiss the indictment, he alleged that the Internal Revenue Service had levied a jeopardy assessment on his funds, and that this prevented him from retaining an accountant to assist his counsel which, in his view, meant he was being denied either the "effective assistance of counsel" under the sixth amendment or a fair trial under the fifth amendment. Defendant's motion was dismissed principally because the court thought the issues could not be decided until the case had been tried, since only then could it be ascertained whether the services of an accountant were really necessary to his case and whether he had in fact been unable to retain one. On the substantive issue, the court said there was no requirement of expert aid "invariably and as a matter of law,"¹¹⁷ the implication being that cases might arise in which the claim could be held to be meritorious. The dissenters felt that *Brodson* was such a case. They found denial of the effective assistance of counsel inhering in the fact that services of an accountant were particularly crucial in a tax case.¹¹⁸ The fact of indigence was considered significant not in itself, however, but rather because the government had *made* the defendant indigent.¹¹⁹ In short, the implications of *Griffin* were not explored because the facts and the procedural posture of *Brodson* made it inappropriate to do so.

*State v. Crose*¹²⁰ presented the issue more directly. The defendant contended that his right to counsel under the due process clause of the fourteenth amendment included within it a right to the appointment of a psychiatrist at state expense. The court rejected the contention, holding that the right to an expert could not be derived from the right to counsel. Apparently, the court believed a fair trial might be conducted without experts, although it conceded that, "as a practical matter, . . . [the right to] the assistance of experts in advance of trial often lies at the very heart of a successful defense."¹²¹ Whether the indigent may be denied the raw materials available to the affluent for constructing a "successful defense," which is the *Griffin* point, was not passed upon by the court.

¹¹⁶ 241 F.2d 107 (7th Cir.), *cert. denied*, 354 U.S. 911 (1957).

¹¹⁷ 241 F.2d at 110.

¹¹⁸ *Id.* at 115.

¹¹⁹ *Id.* at 111. Compare note 110 *supra*.

¹²⁰ 88 Ariz. 389, 392, 357 P.2d 136, 137 (1960).

¹²¹ *Id.* at 392, 357 P.2d at 138.

The third case, *Willis v. United States*,¹²² suggested that due process might be satisfied by virtually any psychiatric testimony bearing on insanity and available to the accused. The court held that there was no obligation on the part of the state to supply a psychiatrist for the accused; the defense of insanity could have been raised by summoning existing fact witnesses, among whom were psychiatrists. The equal protection issue was not raised.

Several cases now filed in the District of Columbia Circuit involve allegations that the right to equal protection is not satisfied by a court-appointed psychiatrist.¹²³ These cases are pressing the issues to solution, a solution which is likely to be consistent with the general tenor of case law in this field. Hopefully, the day is not far off when the state will fully assume the obligation of assuring substantial equality in trial conditions.

IV. CONCLUSION

In the course of examining the psychiatric-assistance procedures available to the indigent accused alleging insanity, we have seen that the processes of criminal justice in the United States are evolving from a relatively "pure" adversary system, with all that implies for leaving state and accused unequal, to a system which recognizes public responsibility for all facets of the administration of criminal justice. This evolution began with judicial insistence that the prosecution assume a divided role—not only as adversary party but also as protector of the processes of justice. It gathered momentum with increasing recognition by judges that they too had an obligation to assure a fair trial, particularly in criminal cases. But it has not resulted in anything like the European experience, where the state's interest in every aspect of the trial has often led to oppression.¹²⁴ Instead, a creative accommodation has occurred in which the adversary method of trial is retained but in which the system's ultimate function is not lost sight of. Decisions dealing with the right to counsel, appeals by the indigent, and discovery are particular instances of such accommodation. Still largely unresolved, however, is the problem considered in this Article, namely, the extent to which the state should assure to those it prosecutes, particularly the indigent, the opportunity to present the fullest possible defense. In the context of the insanity defense, several patterns exist, some explicitly directed to the problem but most dealing with it

¹²² 285 F.2d 663, 665 (D.C. Cir. 1960).

¹²³ *E.g.*, *United States v. Naples*, No. 16436, D.C. Cir., May 8, 1962.

¹²⁴ See HOWARD, *CRIMINAL JUSTICE IN ENGLAND* 391-94 (1931); Ploscowe, *The Development of Present-Day Criminal Procedures in Europe and America*, 48 HARV. L. REV. 433 (1935).

peripherally. Counsel representing the indigent accused currently find a patchwork of procedures upon which to draw in their quest to present an adequate defense. Virtually nowhere are they likely to find all they will need. There seem to be just enough fragmentary devices to satisfy the consciences of those who care more for the face of justice than for the heart. In the long meanwhile between present half measures and future solution, defense counsel will have to depend more on their ingenuity and zeal than on facilities made available to them by the state.

APPENDIX †

<i>Jurisdiction</i>	<i>Provision for appointment of impartial expert or government hospital examination</i> ¹	<i>State compensation of defendant's expert witnesses explicitly authorized by statute</i> ²	<i>General statute providing for payment of defendant's witnesses under certain circumstances</i> ³	<i>Public Defender provision</i> ⁴	<i>Statutory provision for reimbursement of assigned counsel</i> ⁵
Alabama	×				
Alaska					
Arizona					
Arkansas	×				
California	×	×	×	×	×
Colorado	×		×		
Connecticut	×		×	×	
Delaware	×				
Florida	×		×		
Georgia					
Hawaii	×		×		
Idaho					
Illinois				×	
Indiana	×			×	×
Iowa			×		
Kansas					
Kentucky	×				
Louisiana	×				
Maine	×				
Maryland	×				
Massachusetts	×		×		×
Michigan	×		×		
Minnesota			×		
Mississippi				×	
Missouri					
Montana					
Nebraska			×	×	
Nevada			×		
New Hampshire	×		×		×
New Jersey					

APPENDIX (Continued)

<i>Jurisdiction</i>	<i>Provision for appointment of impartial expert or government hospital examination</i> ¹	<i>State compensation of defendant's expert witnesses explicitly authorized by statute</i> ²	<i>General statute providing for payment of defendant's witnesses under certain circumstances</i> ³	<i>Public Defender provision</i> ⁴	<i>Statutory provision for reimbursement of assigned counsel</i> ⁵
New Mexico					
New York	X	X	X	X	X
North Carolina	X				
North Dakota	X		X		
Ohio	X				
Oklahoma			X*	X	
Oregon	X				
Pennsylvania	X				X
Rhode Island	X	X	X	X	
South Carolina	X				
South Dakota			X		
Tennessee	X				
Texas			X		
Utah	X		X*		
Vermont	X				
Virginia	X			X	
Washington					
West Virginia	X				
Wisconsin	X		X*		
Wyoming	X		X*		
District of Columbia	X		X	X	
Federal	X		X		

† This appendix is based on the materials referred to in the Article. Inevitably, the attempt to categorize what may be a complex of law and practice will fall short in some instances.

* Used to pay experts' professional fees. See text accompanying notes 87-88 *supra*.

** Not used to pay experts' professional fees. See text accompanying note 84 *supra*.

¹ See text accompanying note 16 *supra*.

² See text accompanying notes 88-91 *supra*.

³ See text accompanying note 73 *supra*.

⁴ See text accompanying note 100 *supra*.

⁵ See text accompanying note 94 *supra*.