

The Use and Abuse of Cross-Examination In Relation to Expert Testimony: The Second Alger Hiss Trial*

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The purpose of this paper is to attempt a balanced evaluation of the legal practice of cross-examination of the expert witness as exemplified in a particularly well-known trial, with a view toward differentiating the legitimate and illegitimate techniques that have become well-embedded in the legal "art" and practice. This may not have the result of getting my professional readers to be willing to joyously submit themselves to what oftentimes proves a gruelling and humiliating ordeal, but such sketchy elucidation of purpose *may* serve the worthwhile end of encouraging understanding, in part at least, of why lawyers continue to act like lawyers when they are confronted on the witness stand with an imposing and learned authority whose only wish is to speak the truth as he sees it. Why should his deliverance not be taken *ex cathedra* by the jury? Why all this petty animosity and imputations *ad hominem* officially sanctioned in a proceeding that should be a dispassionate and scientific inquiry into the existence or non-existence of certain disputed facts? And especially, why do we in the legal profession treat the expert so shabbily when we need him so dearly, and sufficient deterrents already exist to keep him shy of the courtroom?

It is pretty easy to see why court appearance with its attendant threat of vigorous cross-examination by opposing counsel is usually an emotionally disturbing experience for the professional man, be he physician, laboratory technician, theoretical scientist, or engineer. First, the skilled witness is not accustomed to having his views and objectivity put in question by someone not his scientific peer — there is an obvious ego involvement in his personal formulations and judgments. Self-respect cannot be diminished without a consequent painful sensation. Secondly, the courtroom situation is strange, artificial and seemingly arbitrary, and slightly authoritarian in character. The judge towers over the witness like a citadel of technicality. And lastly, there are obvious semantic barriers, augmented by inhibiting procedural rules, which militate against the establishment of an easy rapport with a lay judge and jury. The degree of unpleasantness associated with a court appear-

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ance is of course further dependent on the personality and sophistication of opposing counsel. Although he is out to win his case rather than to do justice in any absolute sense, enlightened self-interest dictates against an impulsive headlong attack without planning or specific purpose in mind. As seasoned trial practitioners have repeatedly admonished, "more often than not, the cross-examination of a truly skilled or expert witness affords him the opportunity to enlarge upon and emphasize his direct testimony."¹ Abusive and purely destructive cross-examination may often supply its own corrective. But this assumes, of course, that the honest, thoroughly competent, and well-prepared witness can acquit himself adequately in the forensic rough-and-tumble of the courtroom. Not too many experts have a flair or stomach for the game. The laboratory and clinic not being notably conducive to production of such verbal agility, there may even be a negative correlation between such trait and real professional competence and integrity. And yet even if the expert makes undeservedly a miserable showing, the collective heart of the jury may be compassionate enough to take his side against the bully lawyer.

Only Satan himself can decry the exposure on the witness stand of the mercenarily-motivated "professional witness" or the pompous fraud, so I will assume in this discussion that the major objection taken to present cross-questioning practices relates to the impairment and distortion produced thereby in the evidence given by the sincere, qualified and not consciously biased expert. If we set up certain norms for the purpose of distinguishing abusive from useful types of cross-examination, they cannot be those of the scientific parley seeking to achieve a calm consensus, but must reflect the realities of the present institution of civil or criminal jury trial. The parties in litigation being held responsible for appointing the experts, it must come as no surprise to learn that they customarily seek out only those whose opinions will favor their claim or defense, with only secondary attention being given to the prospective witness's professional qualifications to render such an opinion. So although we will seek to determine whether and to what extent present techniques of expert witness cross-examination are conducive to the ascertainment by the jury of the true facts in dispute, we must accept some compromise in our standards in light of the partisan position in which the experts are perforce placed, and the notoriously low minimal standards of competency judicially exacted in most areas of *expertise*.²

¹ Busch, *LAW AND PRACTICE IN JURY TRIALS* (1949) §396, p. 637.

² Experience on the Continent has shown that especially in criminal matters, the element of bias is not totally eliminated by court appointment of so-called neutral examiners. Ploscowe, *The Expert Witness in Criminal Cases in France, Germany, and Italy*, 2 *LAW AND CONTEMPORARY PROBLEMS* 504 (1935).

Without dealing further in generalities; let me descend to the details of a portion of a recent federal criminal trial that became the focus of both national and international attention—namely, the case of the United States versus Alger Hiss. What I intend to analyse and interpret here is one controversy within the larger controversy over the guilt or innocence of the defendant. About the latter controversy I have nothing very new or incisive to offer. My subject is the evidence given by the defense psychiatrist, Dr. Carl A. L. Binger, and particularly his treatment at the hands of the capable prosecutor Thomas F. Murphy on cross-examination. I select this particular instance of cross-examining an expert witness because it so well illustrates the uses and abuses of this practice and because it involved the application of so many of the commonly approved techniques which trial attorneys employ. In addition it also highlights the basic anomaly of lay appraisal of expert opinion.

Dr. Binger was called by the defense in both trials of the perjury charge.³ His expert testimony, as offered, was directed to the credibility of the chief prosecution witness, David Whittaker Chambers. In the first trial before District Judge Kaufman, which resulted in a hung jury, Binger's evidence was held inadmissible by the court because, in its words; "the record is sufficiently clear for the jury, using its experience in life, to appraise the testimony of all the witnesses who have appeared in this courtroom." In the second trial Judge Goddard permitted Binger to testify, explaining "that the value of psychiatry has been recognized. It is apparent to me that the outcome of this trial is dependent to a great extent upon the testimony of one man—Whittaker Chambers. Evidence of insanity is not merely for the judge on the preliminary question of competency but goes to the jury to affect credibility."⁴ As is well known, the second trial resulted in a verdict of guilty. This outcome is certainly not conclusive on whether the introduction of the psychiatric testimony was ill-advised or not, as we are unable to fathom the thought processes of the jury. The question of the value of this sort of evidence has been much mooted in the professional literature since then. Many of the people who are still convinced of the defendant's innocence have deprecated it⁵ while

³ Hiss' alleged perjury consisted in falsely asserting before a federal grand jury in the Southern District of New York on December 15, 1948 that (1) he had never "turned over" any State Department documents to Whittaker Chambers; and that (2) he had not seen the said Chambers between the date of January 1, 1937 and the hearings of the House Committee on Un-American Activities in the summer of 1948.

The accuser's side of the story is given in Chambers, *WITNESS* (1952).

⁴ *United States v. Hiss*, 88 F. Supp. 559 (S.D.N.Y. 1950).

⁵ Bendiner, *The Ordeal of Alger Hiss*, *NATION* (Feb. 11, 1950) p. 123.

many, who are otherwise disposed with respect to the merits of the case, are generally in favor of the precedent established by the evidentiary ruling in the second trial.⁶ If any alignment can be discerned, pro or con the Binger testimony, it is between lawyers and psychiatrists, the latter holding that the good doctor may have delivered his "profession a blow from which it may take 50 years to recover."⁷ Modern lawyers, far from being resistant to scientific enlightenment tend to grasp at any straw which they feel might perhaps reduce the dreadful uncertainty of litigation. One dissenting legal voice must, however, be noted—the Earl Jowitt in his book on the *Hiss* case prides himself on the fact that English trial practice tolerates no such nonsense.⁸ In all fairness to Binger's professional colleagues who thought he did the cause and the profession a disservice, it is observed that opposition stemmed not from a reluctance to assist our courts in the evaluation of the reliability of the mentally abnormal witness, but from a skepticism regarding this witness's methods and diagnostic criteria.

In response to hypothetical questions, which took over an hour to recite, both Dr. Binger and psychologist Henry Murray of Harvard University concluded that Chambers was suffering from a condition known as psychopathic personality, "a disorder of character the distinguishing features of which are amoral and asocial behavior, with a tendency towards making false accusations." A vast amount of time was expended in the examination and cross-examination of these two witnesses—their evidence occupies nearly 450 pages of the transcript. Before turning to a discussion of prosecutor Murphy's methods of impeachment, let me briefly touch on the problem of admissibility and weight of this sort of evidence, as an understanding of its medico-legal nature may help us decide whether the conclusions of the behavioral scientists were accorded their proper respect at the trial. Traditionally, a common law jury is supposed to be able to detect the presence of falsehood by observing the demeanor of the witness on the stand, and by balancing his possible motives for lying against his possible motives for truth-telling. Opposing counsel on cross will presumably elicit damaging disclosures of bias or interest, obvious defects in observation, recollection, and narration, prior inconsistent assertions, past felony convictions, and possibly bring in community reputation for un-
 veracity. These are extrinsic facts from which the jury will infer

⁶ See 11 ALA. LAWYER 212 (1950); 30 NEB. L. REV. 513 (1951); 1950 ANNUAL SURVEY OF AMERICAN LAW 804, 804-07 (N.Y.U. 1951); 59 YALE L. J. 1324 (1950).

⁷ Quotation from Ellen Johns in the NEW LEADER, January 14, 1950. See also the disapproving view expressed in Guttmacher & Weihofen, PSYCHIATRY AND THE LAW (1952) c. 15, p. 364.

⁸ Jowitt, THE STRANGE CASE OF ALGER HISS (1953) c. XXI, p. 221.

a subjective element of credibility or deception. But we can only estimate what is going on in a man's mind by putting ourselves in his position, insofar as this is possible. This is the common sense way of arriving at some conclusions as to someone else's motives, viz., *identification*. The premise here is that the personality dynamics of the witness in question are substantially similar to those of the jury — mutual normality.⁹ But suppose that the witness is apparently "different"; that although legally competent in the sense that he is not completely out of touch with reality, he has certain observable and well-recognized symptoms of mental derangement. The jury expects now that the witness will be motivated in some peculiar fashion not susceptible to the identification approach. The identifying link is then consciously broken. Hence, other things being equal, this lay body drawn from the general community, will accord greater weight to the opinion of a psychiatric examiner that such-and-such a mental condition, which has visible signs, bears tellingly on the degree of probability that the "fact" witness is telling the truth. The testifying psychopathologist here is illuminating a mental terrain which the average citizen has never glimpsed, and assuming that the expert is technically qualified and free from corruption and interest, the jury will normally accept his word as fact in their deliberations.

Now let us consider the witness with no manifest symptoms of mental disorder, who can testify in a rational and coherent manner and possesses intellectual attributes well above the average. No one contends that the man is psychotic or in lawyer's parlance, "insane" for any purpose, but opposing counsel do, let us say, contend that he is a pathological liar due to a behavior disorder known medically as "psychopathy." According to their behavior experts, this disorder, if present, may impair social judgment and moral responsibility to a greater degree than paranoia or other functional mental diseases. The judge is faced initially with two problems: (1) does such a condition exist — has it been medically substantiated? and (2) has sufficient observation and study of the alleged psychopath been made so as to afford reasonable certainty that the diagnostic label fits? On the first point the judge might hold after perusing the relevant psychiatric treatises, that the subject matter, that is, witness credibility, is such that it can be adequately handled by sound lay intelligence, assertion of the possibility of superior expert handling being a delusion or an empty pretense. To another judge, this clinical entity and its meaning in relation to behavior, may have moved from the precincts of speculation into the realm where *experto credite* holds sway.¹⁰ Logically,

⁹ Cf. Alexander, F., *THE FUNDAMENTALS OF PSYCHOANALYSIS* (1948) c. I.

¹⁰ See Ladd, M., *Expert Testimony*, 5 *VAND. L. REV.* 414, 417-21 (1952).

because the present medical learning on psychopathic behavior is so far outside common knowledge, the jury can less indulge its common sense about human behavior and is more dependent on expert help in drawing inferences from established data. Of course, we know that the very opposite effect occurs largely because of the common man's emotional resistance to psychiatry. What bolsters this popular antipathy to revelation of the mysteries of emotional health, is the disagreement in this area even amongst the medical workers themselves. Dr. Binger recognized this fact in his book, *More About Psychiatry* (1949):

Much of what medical men say and write about is controversial and is overlaid with strong feeling. This is inevitable in a living science. Disagreement exists chiefly in the frontiers of knowledge. Where methods are empirical, where experiment and predictability are not yet possible, where scientific fact is unsupported by adequate theory — there will be differences of opinion and disputation. . . . And especially is this true in psychiatry, where methods are less precise, statistics hard to come by, theoretical conceptions tentative. We disagree among ourselves — and hotly, too — on such matters as psychoanalysis, shock therapy, and others.

Even Dr. Hervey Cleckley, who has been in the vanguard in recognizing the "psychopath" as a profoundly disordered individual,¹¹ admits that he "is not reluctant to grant that this disorder, viewed theoretically, is a subtle one, and the psychopathology I suggest is debatable and scarcely to be proved in courts."¹² Psychiatrist Philip Roche has argued that a diagnosis such as Binger made of Chambers is little better than "name-calling" based as it necessarily was (in view of the socio-pathic nature of the disorder) on value judgments as to social behavior.¹³ It is a character defect, not an abnormality of personality. Possibly some day if psychiatry continues to develop at its present rate, the matter of psychopathy will enter the realm of general community knowledge so that even lay witnesses can testify reliably about it (as they can now about "insanity").

But if the trial judge decides that sufficient medical certainty exists concerning the meaning of the diagnostic term "psychopathic personality," he will still have to decide whether only clinical observation of the witness whose credibility is challenged will suffice as a factual basis for a competent opinion of this sort. Whether a courtroom diagnosis based on data presented in court is feasible

¹¹ See Cleckley, *THE MASK OF SANITY* (2d ed. 1950) *passim*.

¹² Cleckley, *The Psychopath Viewed Practically*, in *HANDBOOK OF CORRECTIONAL PSYCHOLOGY* (Lindner & Seliger eds. 1947) p. 412.

¹³ Roche, *Truth Telling, Psychiatric Expert Testimony and the Impeachment of Witnesses*, 22 Pa. Bar. Ass'n. Q. 140 (1951).

should probably be left for decision to the qualified psychiatrist. At least he is better qualified than the jury to assess personality disorders. Ideally in the *Hiss* case, the court should have been empowered to order clinical examination of the witness by a court-appointed psychiatrist. Lacking this opportunity to interview and examine Chambers, Binger could only express his opinion in response to a hypothetical question reciting every incident, discreditable or considered suggestive of abnormality, developed in the defense attorney's long cross-examination of Chambers and the testimony of an old school friend; and based on his study of Chamber's various writings and translations and his observations of him on the witness stand.¹⁴ Ideally again, there was no reason why the defendant should have been entitled to a highly selective summation of the most damaging parts of Chamber's testimony and the odder aspects of his behavior — under section 9 of the Model Expert Testimony Act which attempts to remedy this abuse, Binger would have stated his opinion as formulated from his attendance upon the testimony given, but could be required on direct or cross-examination "to specify the data on which his inferences were based."¹⁵ After answering the hypothetical in the manner previously indicated, Dr. Binger for a whole day drew telling analogies between these symptoms and Chamber's known behavior and writings. Then began the jousting match with the prosecutor. According to the account of the trial by Francis X. Busch, Murphy "rose to the occasion magnificently."¹⁶ Whether this handsome encomium is justly deserved we will now attempt to determine by an analysis of the measures he attempted to use for depreciation of the direct testimony.

Binger from all accounts made a fairly effective witness for the defense. He was poised and confident, and articulate if not glib. He had had a brilliant career in medicine and was obviously a man of great ability. A shrewd cross-examiner might have approached the challenge of his testimony in generally two quite different ways. The first way, which was *not* followed, would have been to assume a sympathetic and receptive attitude toward the field of knowledge involved, with some display of respect for and grasp of the field. The expert can then often deal with the lawyer

¹⁴ Binger diagnosed Chambers as a psychopath largely on the basis of twelve characteristics: 1. Repetitive lying. 2. Stealing. 3. Withholding truth. 4. Insensitivity to the feelings of others. 5. Playacting and assuming false names. 6. Bizarre and unusual acts. 7. Vagabondage. 8. Instability of attachment. 9. Panhandling. 10. Abnormal emotionality. 11. Paranoid thinking. 12. Pathological accusations.

¹⁵ MODEL EXPERT TESTIMONY ACT, §9, 9 U.L.A.

¹⁶ Busch, *GUILTY OR NOT GUILTY?* (1952) p. 275.

in his own terms which can prove dangerous if the latter is only superficially grounded in the subject matter. However, the well-prepared lawyer can often by so doing demonstrate to the jury that the expert has exaggerated his qualifications or has had little experience with the particular type of case involved. Murphy might have shown, for instance, that Binger's major training, researches, and his chief experience had been in the field of internal medicine, and that his knowledge of behavior disorders "smelled of the library." While this might have been the indicated approach in some accepted technological field, in psychiatry it plainly was not. While the jury might perhaps have been impressed by a display of erudition on the part of the prosecutor, utilized skillfully to expose the speculative character of the science of psychiatry as it relates to diagnosis and treatment of so-called "borderline" types, what would be more emotionally satisfying to them would be a debunking operation which tended to pander to their prejudices. Murphy, of course, may in all sincerity personally reject the findings and insights of modern dynamic psychiatry. In any event, in the words of Alistair Cooke, Mr. Murphy "asked no title more glorious than that of representing the humble layman. And he stood for the ordeal like Hamlet's Horatio, the time-honored *punctum indifferens*, more commonly recognized in this country as the gruff, genial, no-nonsense, all-American regular fellow."¹⁷ Quite a few of the prosecutor's more sarcastic sallies can only be attributed to a distaste for the psychiatric profession in general, e.g., "Have you been psychoanalysed?" And after Binger had alluded to certain "extraordinary analogies between the Hiss-Chambers relationship and the one between two fictional characters in a German novel translated by Chambers, Murphy interjected rhetorically, "Did you find any such analogies in the child's book *Bambi*?" (which Chambers had also translated). But certainly a large number of the questions put by the government man to the psychiatrist were legitimate in seeking to elicit valuable responses going to the weight to be accorded the expert opinion evidence, and would have been proper in any inquiry no matter how dispassionate and fair-minded. Take the matter of interest which the doctor might have in the outcome of the litigation. He was not being paid any fee, nor would he accept one if offered. His wife was associated in some educational work with Priscilla Hiss. It is hard to say, as an abstract matter, which kind of expert might show a greater want of scientific objectivity in his testimony—the selfless partisan of what appeared to be a great liberal cause, or the courthouse medical mercenary who works on a contingent fee basis. Because the hypothetical questions contained only those factual assumptions favorable to the

¹⁷ Cooke, A GENERATION ON TRIAL. (1950) p. 306.

theory of the defense, it was certainly fair game to supplement the hypotheses with additional facts, and ask for an opinion on the hypotheses as modified. For example, Murphy showed that though the doctor had read assiduously in the literary works of Chambers he was unfamiliar with his more celebrated "cover pieces" done for *Time* magazine. Binger had based his diagnosis largely on the basis of twelve characteristics, such as repetitive lying, panhandling, instability of attachments. When pressed the doctor could only account for about "ten lies over a period of 33 years."¹⁸ There was absolutely no evidence in the case that Chambers had cadged money on the public streets—another symptom excused! Chambers had been married to his present wife Helen for 18 years—hardly consistent with the asserted inability to form stable attachments. The expert had also made some errors in observation such as the finding that Chambers rarely answered questions directly but qualified his responses with phrases like "it would have been," or "it should have been." Actually, by count in the record, Chambers had used one or the other of those expressions only ten times in 770 pages of the official transcript, whereas defendant Hiss had used them 158 times in 550 pages of testimony. If any exception could be taken to Murphy's techniques on the score of purposeful distortion, it would be to his method of attacking Binger's conclusion as unjustified by the facts assumed. The technique here is to minimize the importance of each behavioral peculiarity which was allegedly symptomatic of psychopathy.¹⁹ To no apparent avail did the witness protest that he had to consider the totality of the picture. "Judgment cannot be isolated according to specific parcels of information." Yet the impression which the prosecutor was attempting to create in the jury's mind was that if each factor standing alone is of no significance clinically, how can the sum of a series of zeros rise to anything more appreciable. This method of attack is especially devastating and correspondingly unfair in connection with a diagnosis of psychopathy, which concerns pre-eminently the whole life pattern or style of the individual and does not derive support from the finding of any gross psychoneurotic symptoms.²⁰

I certainly do not wish to judge of the wisdom of Dr. Binger's offering himself as expert in this type of case. As students of legal

¹⁸ After exacting this admission from the Doctor, Murphy then queried: "What's par for the course, doctor?"

¹⁹ E.g., "Now doctor, you stated in your direct testimony that one of the behavioral traits on which you based your diagnosis was the witness' predilection for wildly hued and designed sport shirts. Now we all know that Bing Crosby is given to wearing such apparel. In your opinion then, doctor, has Mr. Crosby a psychopathic personality?"

²⁰ Lindner, R., *REBEL WITHOUT A CAUSE* (1944) c. I.

medicine, the question we must seek to answer is whether Binger only slept in the bed he had prepared for himself, or whether current legal rules and practices are so diabolically contrived as to make all such experts look like fools in the public gaze. If I prefer to believe the former, it is not because I think the whole psychiatric project ill-conceived, but because in my view, the psychiatrist must take his risks of popular ridicule if the important job of enlightening the public concerning the "new psychology" is to be carried on. Psychiatry, if it is to make any strides in mental hygiene education must emerge from the clinic and analytic chamber and submit itself to public cross-examination. The verbal tilt between Murphy and Binger, on which was focused both national and international attention, clearly personified this great issue of our day. While a few such skirmishes may be lost, by such efforts the war may yet be won in terms of eventual widespread understanding of the dynamics of human behavior.

CONCLUSION

Even though the Government called no psychiatrists of their own to provide diametrically opposed conclusions as to the structure and dynamics of Chamber's personality, the problem of the "battle of experts" was still involved in the second *Hiss* trial. Pitted against Dr. Binger's tentative findings was the "four-square common sense" of the prosecutor. There is an obvious anomaly in permitting a lay jury to resolve the conflict, as expert opinion is only admitted when the triers of fact are confronted with issues which cannot be determined intelligently on the basis of ordinary judgment and practical experience gained through the usual affairs of life. Almost a half century ago, Learned Hand suggested in the course of a brilliant article,²¹ that the only way out of this paradox was to establish an expert tribunal which would hear the competing theories, reject the spurious or achieve a synthesis of views, and then so advise the trial judge. These findings would presumably then be controlling on the jury.

Of the other techniques of cross-examination of an expert highlighted by the *Hiss* trial, many are reasonably defensible as aids to investigation. These would include technical attacks upon training and special competency, and upon personal interest or bias. An especially valuable purpose often pursued by the cross-examiner of the expert witness who is personally immune from impeachment, is the disclosure of additional but not necessarily inconsistent medical data or propositions favorable to the opponent's theory of the case. Here the cross-examiner really makes the witness his own client's expert. Concedely there are absurdities

²¹ Hand, L., *Historical and Practical Considerations Regarding Expert Testimony*, 15 HARV. L. REV. 40 (1901).

countenanced in the type of cross-questioning consequent upon use of the so-called "hypothetical question," but the indicated reform here is obviously complete abolition of "this monstrosity created by the legal imagination."²² Frequent complaint is also made of the question-and-answer method of eliciting information from a trained observer. Dr. Manfred Guttmacher found by means of a questionnaire that many psychiatrists winced at being required to reply to the questions which were given them by answering yes or no, rather than being permitted to freely express their knowledge and opinions.²³ In justification, the lawyer might argue that only thus can a truly responsive and legally competent expression be secured; and further, that no qualifying information is permanently suppressed as the doctor can signal his distress to proponent's attorney so that the total picture can be developed on re-direct examination. And *mirabile dictu*, Frederic Wertham thinks "it is a godsend that there are at least some situations where psychiatrists are forced to give a simple answer to a simple question."²⁴

²² See White, W. A., *INSANITY AND THE CRIMINAL LAW* (1923) p. 86.

²³ Guttmacher, M. S., *The Doctor in Court—Viewpoint of the Psychiatrist*, XIII MARYLAND L. REV. 305, 307 (1953).

²⁴ Wertham, F., *A Psychiatrist Looks at "Psychiatry and the Law,"* 3 BUFFALO L. REV. 41, 48 (1953).