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THE PSYCHOLOGIST IN TODAY'S LEGAL WORLD

DAVID W. LOUISELL*

INTRODUCTION

On five occasions during the past several years the writer has had the opportunity of addressing meetings of psychologists on some of the current legal problems of interest to them and their profession.¹ Each meeting was followed by a question period which helped the writer to comprehend the more acute current interests and problems of psychologists, and of lawyers called upon to advise them and their professional groups, which concern the clinical practice of psychology, the conduct of litigation and judicial administration.² This article is a response to requests that the writer's remarks and answers to questions be reduced to permanent form. Perhaps most of this article is of primary interest to the clinical or practicing psychologist, whether full-time or part-time, but some of the problems discussed are also of interest to the psychologist in teaching, research, industrial work, or counseling at educational in-

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1. These occasions were the fourth annual conference of the Minnesota Psychological Association, Minneapolis, May 23, 1952; two addresses sponsored by the Conference of State Psychological Associations at annual meetings of the American Psychological Association, Cleveland, September 6, 1953, and New York City, September 5, 1954; Conference of Administrators of College and University Counseling Programs, Center for Continuation Study, University of Minnesota, November 20, 1953; meeting of the Illinois Psychological Association, Urbana, April 3, 1954.

2. For a psychologist's appraisal of some currently important legal problems faced by his profession and its practitioners, see Wiener, *Some Legislative and Legal Problems of Psychologists*, 8 *The American Psychologist* 564 (Oct. 1953). For a detailed report of a psychometric study of the case of a notorious murderer who was prosecuted under the Lindbergh Kidnapping Law, 18 U. S. C. § 1201, for kidnapping and killing a family of five, see Smykal and Thorne, *Ethological Studies of Psychopathic Personality: II. Asocial Type*, 7 *Journal of Clinical Psychology* 299 (1951). Several psychologists as well as psychiatrists apparently appeared as expert witnesses in the federal case, one of them being the author Smykal. *Id.* at 314. The federal court sentenced defendant to 300 years imprisonment. Later, defendant was prosecuted for murder by California, urged the defense of insanity, but was convicted and sentenced to death. *People v. Cook*, 39 Cal. 2d 496, 247 P. 2d 567 (1952). The opinion of the California court refers to testimony by "psychiatrists" and "alienists" but not "psychologists."

stitutions or otherwise. The principal subjects discussed are (1) the psychologist as an expert witness, (2) the status of statutory regulation of psychological practice in the United States vis-a-vis medical licensure statutes, (3) the privilege of confidential communication between the psychologist and his patient or counselee, (4) miscellaneous potential legal pitfalls to be avoided by the practicing psychologist.

(1) THE PSYCHOLOGIST AS AN EXPERT WITNESS

While there is no dearth of literature on existent and potential psychological devices and techniques for scientific appraisal of witnesses and diagnosis of testimony,³ as well as on the psychology of legal practice and advocacy⁴ including criminal law administration,⁵ there seem to be few cases and little recent discussion directly concerned with the psychologist functioning as an expert witness himself.⁶ This of course contrasts with the vast literature con-

3. See, e.g., Münsterberg, *On the Witness Stand* (1908, 1923); 3 Wigmore, *Evidence* §§ 875, 934, 934a, 935, 997-999a (3d ed. 1940); Eliasberg, *Forensic Psychology*, 19 So. Cal. L. R. 349 (1946); Frank, *Judicial Fact-Finding and Psychology*, 14 Ohio State L. J. 183 (1953); Wigmore, *The Science of Judicial Proof* §§ 310-317 (3d ed. 1937); Wigmore, *Professor Muensterberg and The Psychology of Testimony*, 3 Ill. L. R. 399 (1909) (a satiric critique of the ambitious claims for experimental psychology of Hugo Münsterberg, professor of psychology at Harvard, who wrote early in this century. A bibliography of Münsterberg's articles, some of which were reprinted in *On the Witness Stand*, *supra*, appears in 3 Wigmore, *Evidence*, § 875, n. 1, p. 368); Hutchins and Slesinger, *Spontaneous Exclamations*, 28 Co. L. R. 432, 439 (1928); Burt, *Legal Psychology*, chs. II-VIII (1931); Britt, *The Rules of Evidence—An Empirical Study in Psychology and Law*, 25 Corn. L. Q. 556 (1940); Terman, *Psychology and the Law*, 4 Kans. City L. Rev. 59 (1936).

4. See, e.g., Robinson, *Law and the Lawyers* (1935); Frank, *Law and the Modern Mind* (1930); Kennedy, *Psychologism in the Law*, 29 Geo. L. J. 139 (1940); Riesman, *Some Observations on Law and Psychology*, 19 U. Chi. L. Rev. 30 (1951); Watkins, *Jurisprudence and Contemporary Psychology*, 18 N. D. Lawyer 1 (1942); Summary of a Conference on Law and Psychology, 5 Jour. Legal Ed. (1953); Osborn, *The Problem of Proof*, ch. VI, (2d ed. 1926); McCarty, *Psychology for the Lawyer*, *passim* (1929); Britt, *The Lawyer and the Psychologist*, 36 Ill. L. Rev. 621 (1942); Vinson, *The Use and Limitations of Clinical Psychology in Studying Alleged Mental Effects of Head Injury*, 31 Tex. L. Rev. 820 (1953).

5. See, e.g., Burt, *Legal Psychology*, chs. VIII-XIX (1931); Schmielberg, *Psychological Factors Underlying Criminal Behavior*, 37 J. Crim. L. & Criminology 458 (1947); Schmidl, *Psychological and Psychiatric Concepts in Criminology*, 37 J. Crim. L. & Criminology 37 (1946).

6. Articles by Rogers, *An Account of Some Psychological Experiments on the Subject of Trade-Mark Infringement*, 18 Mich. L. Rev. 75, 99 (1919), and Eliasberg, *Psychiatric and Psychologic Opinions in Court*, 39 J. Crim. L. & Criminology 152 (1948), touch on the psychologist as an expert witness. The Oct., 1935 issue of *Law and Contemporary Problems* was devoted to expert evidence, with discussions on medical and psychiatric testimony, criticisms of the adversary use of experts, and other articles. The introductory article is by Rosenthal, *The Development of the Use of Expert Testimony*, 2 Law & Contemp. Prob. 403 (1935).

cerned with the psychiatrist as an expert witness.⁷ Yet the great Wigmore tells us:

"Nevertheless, within the limitations of these special judicial rules [pertaining to partisan presentation of evidence in an adversary proceeding], judicial practice is entitled and bound to resort to all *truths of human nature established by science*, and to employ *all methods recognized by scientists* for applying those truths in the analysis of testimonial credit. Already, in long tradition, judicial practice is based on the implicit recognition . . . of a number of principles of testimonial psychology, empirically discovered and accepted. In so far as science from time to time revises them, or adds new ones, the law can and should recognize them. Indeed, it may be asserted that the Courts are ready to learn and to use, whenever the psychologists produce it, any method which the latter themselves are agreed is sound, accurate and practical. If there is any reproach, it does not belong to the Courts or the law. A legal practice which has admitted the evidential use of the telephone, the phonograph, the dictograph, and the vacuum-ray, within the past decades, cannot be charged with lagging behind science. But where *are* these practical psychological tests, which will detect specifically the memory-failure and the lie on the witness-stand? There must first be proof of general scientific recognition that they are valid and feasible. The vacuum-ray photographic method, for example, was accepted by scientists the world over, within a few months after its promulgation. If there is ever devised a psychological test for the valuation of witnesses, the law will run to meet it. Both law and practice permit the calling of any expert scientist whose method is acknowledged in his science to be a sound and trustworthy one. Whenever the Psychologist is really ready for the Courts, the Courts are ready for him."⁸

While Wigmore in the foregoing paragraph seems primarily concerned with psychological techniques and devices, there, as elsewhere when he considers in detail scientific psychological diagnosis of testimony, he acknowledges that "Psychometrical data so obtained would of course have to be brought in by the expert witness obtaining them. In that respect the psychometrist would stand on

7. See, e.g., Gradwohl, *Legal Medicine*, Ch. 31, *Forensic Psychiatry*, (by Satterfield), esp. 884-887 (1954); McCormick, *Evidence* §§ 99-100 (1954); Guttmacher & Weihofen, *Psychiatry and the Law*, chs. 9-11 (1952); Zilboorg, *The Psychology of the Criminal Act and Punishment*, ch. 7 (1954); Davidson, *Forensic Psychiatry*, chs. 15-23 (1952); Bychowski and Curran, *Current Problems in Medico-Legal Testimony*, 37 *J. Crim. L. & Criminology* 16 (1946); *Criminal Responsibility and Psychiatric Expert Testimony*, Committee on Psychiatry and Law of the Group for the Advancement of Psychiatry, Rep. No. 26 (1954); *Barnes v. Boatmen's Nat. Bank*, 348 Mo. 1032, 156 S. W. 2d 597 (1941), presents an interesting consideration of the psychiatrist functioning as an expert witness on a contingent-fee basis.

8. 3 Wigmore, *Evidence* 367-368.

the same footing as the expert witness to insanity, called under the traditional practice."⁹ But we search in vain for any substantial analysis, in Wigmore or elsewhere in American legal literature, of the psychologist functioning as an expert witness. This may be due at least in part to Wigmore's, and other writers', primary concern that the law utilize as soon as feasible all available psychological techniques, devices and knowledge, and their relative indifference to whether the vehicle of such use be the psychiatric or psychological profession, or both. And the lack of adequate scholarly attention to the specific problem of the psychologist as an expert witness may also be explained by the paucity of published cases in point. In any event, the aggressive claim of the second paragraph below from *Psychiatric and Psychologic Opinions in Court* by Eliasberg,¹⁰ a physician also trained in psychology, insofar as it pertains to the psychologist as an expert witness, seems as yet to find small counterpart in the published American cases:

"Great progress has been achieved in the differential psychology of testimony. The testimony of children, of boys and girls of prepubertal age, of adolescents of primitive state of mind, of morons, of dwellers in rural areas, the influence of special training, skill, social psychological ties, food, alcohol, drugs were experimentally investigated. At the same time psychology was furthered through the findings of the neurologists especially in cases of aphasia and agnosia. Here it was shown that apparently simple mental processes, as the perceptions, consist of components and that each of them may be put out of commission separately.

"Psychology, assimilating all these teachings to its own findings, has finally become a full fledged science. Small wonder, then, that it demanded to be heard and to contribute its insight to the solution of burning problems, not as a hand-maiden that carries the train but, to use the famous comparison of Kant, walks ahead of her mistress and bears the torch for her."¹¹

Of course the paucity of published cases involving psychologists as expert witnesses is not a certain indication of the extent to which they presently are functioning as such in the trial courts. It is rather notorious that although no American appellate court has yet approved of the judicial use of the lie detector, it is not infrequently used with consent of the parties in the trial courts.¹² But such use ordinarily produces no published judicial opinion.

9. *Id.* at 639.

10. 39 J. Crim. L. & Criminology 152 (1948).

11. *Id.* at 153.

12. See 35 Minn. L. Rev. 310, 311 (1951); Note [1943] Wis. L. Rev. 430, 435; note 59, *infra*.

Several years ago in Minnesota a psychologist appeared as an expert witness for the state in a sensational murder trial¹³ of an adolescent who had murdered his foster mother. Because no appeal followed the conviction in that case, there is no published transcript of the testimony nor published judicial opinion on the psychologist as expert witness.¹⁴ One can only speculate on the number of

13. *State v. Pett*, District Court, Carver County, 8th Judicial District, Chaska, Minnesota (1952).

14. The psychologist who testified at the Pett trial is Dr. William Schofield of the University of Minnesota. He has kindly permitted the writer to quote verbatim a portion of his manuscript describing his experience at the trial:

"During this same trial the writer was asked in direct examination for his opinion concerning the state of mind of the defendant. As part of this opinion, the writer expressed the judgment that the defendant was 'not insane.' At this point the defense attorney appropriately objected that the witness was not qualified to render an opinion as to the sanity of the defendant since such opinions could only be given by a physician. The judge correctly sustained the objection, remarking gratuitously that while he was not at all sure what a psychologist was or could do, he was fully cognizant that the law of the state specified that opinions as to mental illness were the responsibility of a physician. He then instructed the jury to disregard *that portion* of the writer's previous statement in which the opinion 'not insane' was given.

"This is a particularly pertinent example of a common element of courtroom psychology! The writer's opinion in response to the question concerning the defendant's mental condition had been a lengthy statement which included observations that the defendant, in handling the various psychological examinations previously described in detail, had demonstrated that he saw the world about him as most people did and that he was capable of responding to it as most people did, that he could comprehend instructions and carry them out accurately, that he was in full command of a superior general intelligence, and that he revealed no gross abnormalities in his thinking processes or emotional responsiveness. It was at the end of these observations that the writer stated the summarizing opinion that the defendant was not suffering psychosis or insanity. In effect, the judge had (with legal correctness) instructed the jury to disregard the expert witness' interpretation of his findings but not the specific factual observations on which that interpretation was based. This little courtroom procedure is not *prima facie* a logical fallacy, and this particular example bears a kinship to the frequent acceptance of the clinical and other data of scientific investigators whose interpretations of the data may be eschewed."

For a psychiatrist's account of the medical evidence in the Pett case, see Michael, *Were the Medical Witnesses in the Robert Pett Case in Fundamental Disagreement?* 20 *Hennepin Lawyer* 103 (1952). In Minnesota a lay witness may testify as to the mental capacity of a person he has observed after testifying to the facts which he has observed and upon which his opinion is based. *Cannady v. Lynch*, 27 Minn. 435, 440 (1881); *Geraghty v. Kilroy*, 103 Minn. 286, 288, 114 N. W. 838 (1908); *Johnson v. Hanson*, 197 Minn. 496, 499, 267 N. W. 486 (1936); *Bird v. Johnson*, 199 Minn. 252, 253-254, 272 N. W. 168 (1937). In Minnesota even a medical witness, at least a general practitioner, whose expert opinion on mental capacity is based upon his observations of the subject, must fully state such observations. *Scott v. Hay*, 90 Minn. 304, 312, 97 N. W. 106 (1903). *Quaere*, whether the Minnesota Supreme Court today would hold a certified psychologist, or other psychologist professionally regarded as qualified, to be a competent full-fledged expert witness on the issue of mental capacity, if his competency were challenged by objection. *In re Restoration to Capacity of Masters*, 216

similar instances, which, taking the country as a whole, may be not inconsiderable.

Nevertheless, in view of the development of various branches of psychology, including its rapidly expanding clinical practice, it does seem surprising that more appellate courts have not been called upon to consider the psychologist as an expert witness. Speaking generally, this is not because the psychologist is unready for the courts. If the profession's knowledge and skill are not yet utilized in judicial administration to the full extent presently feasible

Minn. 553, 13 N. W. 2d 487 (1944) was a proceeding on petition for restoration to capacity of a woman who had been adjudged a feeble-minded person. The probate and district courts denied the petition for restoration, but the Supreme Court reversed because the district court had applied against petitioner too strict a rule as to the *quantum* of proof. One of the witnesses called in opposition to the petition was a psychologist. The transcript shows that no objection was made to the competency of his testimony. Of his testimony the Supreme Court said:

"The psychologist . . . was not a graduate physician or psychiatrist and did not claim to be a specialist on questions of insanity. He held a master's degree from the University of Minnesota, where he had majored in educational psychology. For eight years he had been employed by the state as a psychologist for the Bureau of Psychological Service in the Division of Public Institutions, devoting most of his time to conducting tests to determine the intelligence quotient (I.Q.) of persons committed to state institutions as feeble-minded. His qualifications as an expert in this field cannot be questioned. Even laymen are entitled to express in general terms their opinion as to the condition of another's mind, upon a suitable showing that they have had an opportunity to observe the mental characteristics and habits of such other, so as to form a reasonable conclusion or inference from the facts observed. . . .

"The testimony of the psychologist would have been more satisfactory, however, had he recited more fully his observations of [the woman involved] and given more details as to the character and extent of the tests to which he submitted her. Instead of asking details of the witness, counsel was content to ask merely for the witness's *ipse dixit* that [the woman involved] was a feeble-minded individual. Her mental age (M.A.), he said, was ten years and four months, her intelligence quotient (I.Q.) 64.

"The witness, upon direct examination, admitted that [the woman involved] 'seemed to respond quite well' to the tests, and he admitted further, on cross-examination, that while she was on the witness stand she 'did a creditable job on multiplication tables,' and that she corrected counsel when he made a mistake in questioning her. When asked, 'How many witnesses did you ever hear on the witness stand that made a better witness and answered the questions more intelligently than she did,' [the psychologist] replied, 'That is a question, of course, I cannot answer.' In fact the witness declined to take into consideration, in expressing his conclusions, her testimony from and her demeanor upon the witness stand." (*Id.* at 559-560.)

Minnesota now has a certification statute providing for the certification of certain psychologists. Minn. Stat. §§ 148.79-148.86 (1953). There is further statutory recognition of psychologists in Minnesota in that consultation by the commissioner of public welfare with a psychologist as well as with a physician is a pre-requisite to the performance of certain operations upon institutionalized feeble minded and insane persons. Minn. Stat. §§ 256.07, 256.08 (1953).

and desirable, perhaps this is partly because psychologists are not yet sufficiently aggressive in displaying their wares to the courts and to lawyers. It may chiefly be because trial lawyers are not doing the creative or imaginative thinking necessary to adapt psychological developments to testimonial uses.

The psychologists, in common with other professional men, often seems to display an undue hesitancy, amounting almost to fear, to taking the witness stand. Sometimes of course such professional hesitancy is selfishly inspired by realization of the disproportionate expenditure of time in relation to the financial compensation for testifying. This is often an unjustifiable and immoral attitude which engenders public antipathy to professions whose members excessively indulge this attitude. The very definition of a profession implies public service as well as profit, and professional *noblesse oblige* dictates performance of obligations to judicial administration as not the least of the public services. However, the psychologist's hesitancy to take the witness stand more often seems to be inspired by an unreasonable concern over cross examination, a fear of ridicule or harsh treatment typified by the cinema version of trials with its incessant "answer 'Yes' or 'No' ", or a lack of confidence in his ability to communicate adequately in semantics comprehensible by non-psychologists. While such hesitancy is understandable, and such concerns not wholly lacking in foundation, they often proceed from a distorted notion of modern litigation and the true function of the expert witness in it. Therefore it may be profitable briefly to consider the basis for expert testimony in relation to the psychologist's potential contribution to judicial administration.

*Bratt v. Western Air Lines*¹⁵ represents what may be characterized as the "modern common-sense" approach to the problem of the expert witness and his contribution to judicial fact ascertainment. That was a suit to recover for the death of an airplane passenger who lost his life in a crash which killed the entire crew and all but one of the passengers. The flight crew were highly trained and qualified, and the air was smooth and weather conditions favorable. The crash was apparently caused by a structural failure in flight. However, it was the defendant company's position that the crash was not caused by any mechanical or structural defect of the plane, or any other cause within its control. In an attempt to show that a defective and unsafe right horizontal stabilizer of the plane was the proximate cause of the crash, plaintiff offered the

15. 155 F. 2d 850 (10 Cir. 1946).

evidence of an aviation mechanic. There was extensive examination and cross examination pertinent to the mechanic's qualifications as an expert. The court of appeals summarized this testimony:

" . . . He [the mechanic] became interested in aviation in 1927 and since that time has owned three planes of his own; he has flown numerous types of planes including multi-engine and twin-engine aircraft, and has approximately eleven hundred air hours to his credit. The only time he has flown a DC-3 (the type here involved) was after it was taken into the air by a qualified pilot who let him then take the controls. He has never had a commercial pilot's license, but has held a private license and now holds a student's license. In 1943 he worked eleven months for Western Airlines as an 'apprentice mechanic' and is now employed as an aviation mechanic by the Thompson Flying Service. His work with the Western Airlines required a general knowledge of aircraft and as a part of his duties he did general maintenance work, including inspection and repairs. He has not been certified by Federal authorities and therefore never signed any Civil Aeronautics Authority forms as an official inspector, but made them out under the supervision of a licensed 'A & E.' He has studied the 'C.A.A.' manuals and Western Airlines maintenance manuals and read other literature pertaining to the operation, maintenance and construction of DC-3 equipment. He has studied aerodynamics through study courses and classroom work, having attended a class at least once a week for over two years, in addition to manuals and books published for the 'C.A.B.' He stated that he had studied 'load factors and structural aerodynamics;' that he knew metals and had experimented with heat alloy. He also examined the wreckage of the plane at the point of the accident. Over objections of counsel, the court permitted him to describe the purpose of ailerons, stabilizers and rudders, and to discuss the various parts and structures of an airplane with reference to their purpose and function in flight. . . ."¹⁶

However, the trial court would not permit this witness to answer the following question:

" . . . Now taking into consideration your own knowledge and experience and the evidence that I have mentioned—the weather records, the photographs, barograph card—and assuming the testimony of Lt. Gardner [sole survivor of the crash] to be true, I will ask you whether or not you were able to form or express an opinion with a reasonable degree of certainty as to whether the right horizontal stabilizer and the elevator with it was the first part of the first section of this plane to fail in flight?"¹⁷

To that question the trial court sustained an objection made by defendant's counsel on the ground that the witness was not

16. *Id.* at 852-853.

17. *Id.* at 852.

qualified to render such an opinion. The jury returned a verdict for defendant. This ruling of the trial court was one of the reasons the court of appeals reversed the case and remanded it for a new trial.

In respect of the scope of expert testimony and the qualifications of a witness to speak as an expert, the court of appeals quoted from American Law Institute, Model Code of Evidence: "A witness is an expert witness and is qualified to give expert testimony if the judge finds that to perceive, know or understand the matter concerning which the witness is to testify, requires special knowledge, skill, experience or training and that the witness has the requisite special knowledge, skill, experience or training."¹⁸ The court of appeals then pointed out that the trial court's refusal to let the aviation mechanic give his opinion, was apparently based on its impression that a witness to be competent to give such an opinion "must have either experienced an accident of this kind, or be an 'expert who had figured it out mathematically and had taken into consideration every factor' that goes to the use of the various parts of an airplane." After rejecting as a requirement personal involvement in such an accident "because as we all know, few ever survive to relate their experience,"¹⁹ the court of appeals pointed out that a witness may be competent to testify as an expert although his knowledge was acquired through the medium of practical experience rather than scientific study and research. It then stated:

"The witness had no scholastic standing in the science of aerodynamics, but he was a man of practical experience who said he had made an actual study of the structural stress and strain of the parts of an airplane, and that based upon his examination of the wreckage at the point of the accident and other facts available to him, he had an opinion concerning which of the parts of the plane structurally failed first in flight, and was therefore the proximate cause of the accident. It may be that his testimony was of little value when judged by the substance of direct testimony, or when compared with the testimony of those whose opinions are steeped in the lore of scientific research. But, 'the law does not require the best possible kind of a witness.' . . . The testimony of a country doctor concerning the sanity of his patient is as readily admissible as the testimony of the most renowned psychiatrist."²⁰

The court then enunciated what to this writer is the essence of the "modern common-sense" approach to expert testimony: will such

18. Rule 402.

19. *Bratt v. Western Air Lines*, 155 F. 2d 850, 853 (10 Cir. 1946).

20. *Id.* at 853-854. It should of course be noted that the last sentence respecting a country doctor and a psychiatrist refers to admissibility and not probative value or weight.

testimony as a practical matter aid the tribunal in finding out the truth?

"It must be remembered that the court is not the judge of the quality of the evidence, nor does the witness perform the function of a juror—he can only contribute something to the jury's information and if he can, he should be permitted to do so. Especially is this true, where as here the answer to the crucial question is necessarily left to those claiming special knowledge based upon experience. . . ."21

An outstanding authority in his most recent work, McCormick on Evidence,²² neatly and succinctly puts the rationale of expert evidence:

"An observer is qualified to testify because he has first hand knowledge which the jury does not have of the situation or transaction at issue. The expert has something different to contribute. This is a power to draw inferences from the facts which a jury would not be competent to draw. To warrant the use of expert evidence, then, two elements are required. First, the subject of the inference must be so distinctively related to some science, profession, business or occupation as to be beyond the ken of the average layman, and second, the witness must have such skill, knowledge or experience in that field or calling as to make it appear that his opinion or inference will probably aid the trier in his search for truth. The knowledge may in some fields be derived from reading alone, in some from practice alone, or as is more commonly the case, from both. . . ."23

Do not issues often arise in modern litigation as to which the psychologist has "a power to draw inferences from the facts which a jury [or judge, for that matter, sitting without a jury] would not be competent to draw"? The answer is certainly in the affirmative to an extent not indicated by the published cases. In the field of mental abnormality alone—psychoses or insanity, mental incompetence, mental illness, various gradations of mental retardation—to name but one general category of psychology's competence, one would expect to find a substantial number of cases in which a psychologist had appeared as an expert witness. But in contrast to the innumerable cases wherein a psychiatrist has functioned as an expert witness in this field, the published opinions seemingly have little to say about the psychologist in this role.

People v. Hawthorne,²⁴ however, is a case directly in point. It was a prosecution of defendant for homicide for killing his wife's

21. *Id.* at 854.

22. McCormick, *Evidence* (1954).

23. *Id.* at 28-29; see Davis, *Administrative Law* 466 (1951).

24. 293 Mich. 15, 291 N. W. 205 (1940). See also *In re Restoration to Capacity of Masters*, 216 Minn. 553, 13 N. W. 2d 487 (1944).

paramour. The defense was insanity. Defendant's counsel introduced in evidence the testimony of a physician, who testified as an expert, and several lay witnesses, who testified with regard to their opinions of defendant's insanity from observations of his conduct and actions. Defendant's counsel also sought to qualify, as an expert witness on insanity, a professor of psychology from the Michigan State Normal College. This psychologist was a graduate of several educational institutions and held the degrees of Bachelor of Arts, Master of Arts, Bachelor of Divinity and Doctor of Philosophy in Psychology. He had done graduate work at the University of California, Columbia University, Boston University, Harvard University Medical School, and the Boston Psychopathic Hospital. He had been a full professor at several universities before becoming affiliated with the Michigan State Normal College, where he had been eleven years up to the time of the trial. He had given courses in normal and abnormal psychology, experimental psychology, educational psychology, mental tests and measurements, psychology and criminology, problems in marriage and family, and problems of child-welfare. One of his texts had been through five editions. He had written articles on the subject of human behavior that appeared in publications throughout the United States. He specialized in the particular field of psychology devoted to motivation and motives of human conduct. He was not of course a practicing physician nor a graduate of a medical college. He had never treated insanity nor was he licensed to practice medicine in any form. However, he had knowledge of the anatomy of the brain, having studied physiological psychology and neurology. He had given insanity and diseases of the brain special study.

The trial court sustained the prosecuting attorney's objection to the competency of this psychologist as an expert on insanity, although it did give the defense an opportunity to recall the psychologist, who had known the defendant as a college student, to testify as to any observations while in contact with the defendant and any conclusions. On appeal to the Supreme Court of Michigan, one of defendant's principal contentions was that the trial court had erred in holding the psychologist to be incompetent as an expert on insanity. Three justices of the supreme court, who concurred in an opinion which on the other issues in the case is the opinion of the court, thought that the trial court was correct in this holding. On this point, after briefly summarizing the psychologist's qualifications, they said only:

“. . . Insanity, however, is held to be a disease, . . . and,

therefore, comes within the realm of medical science, which comprises the study and treatment of disease. Only physicians can qualify to answer hypothetical questions as experts in such science. The court was not in error in excluding the testimony sought to be offered."²⁵

The remaining five justices, a majority of the eight constituting Michigan's Supreme Court, held diametrically contrary views on the psychologist's competency as an expert witness. Speaking through Butzel, J. they said in part:

"I concur in affirmance, but I cannot agree with the proposition of my brother McAllister that because insanity is a disease and comes within the realm of medical science that only physicians are competent to answer hypothetical questions on behalf of a defendant in a criminal case. The law does not require a rule so formal, and I do not think we further the cause of justice by insisting that only a medical man may completely advise on the subject of mental condition. . . ."²⁶

"... I do not think it can be said that his [the psychologist's] ability to detect insanity is inferior to that of a medical man whose experience along such lines is not so intensive."²⁷

"... No case has been called to my attention where a general medical training has been held to be the *sine qua non* of the competency of a trained specialist to advise on the matter of insanity. . . ."²⁸

"... There is no magic in particular titles or degrees and, in our age of intense scientific specialization, we might deny ourselves the use of the best knowledge available by a rule that would immutably fix the educational qualifications to a particular degree."²⁹

Nevertheless the five justices who expressed the foregoing views also concurred in the affirmance of the judgment of the trial court because they thought that the prejudicial effect of any error of the trial court was removed when that court gave the defense an opportunity to recall the psychologist to testify as to any observations while in contact with the defendant and any conclusions.³⁰ To complete the picture of this case, it should also be noted that the five justices, though thoroughly convinced that a qualified psychologist may be a competent expert witness on insanity, nevertheless stated the caveat that "[w]hen a nonmedical is offered as an expert on

25. 293 Mich. 15, 20, 291 N. W. 205 (1940).

26. *Id.* at 22.

27. *Id.* at 23.

28. *Ibid.*

29. *Id.* at 25.

30. In view of this opportunity afforded the defense by the trial court, it appears that from a realistic viewpoint the defense actually had the chance to use the psychologist as an expert except that it was precluded from use of a technique commonly used to adduce expert evidence, namely, the hypothetical question.

subjects in the orbit of medical science, the trial court is put on guard and should take greater precaution in the preliminary inquiry to determine the witness's qualifications and the extent of his knowledge than might be necessary when a graduate of a medical school is proposed."³¹

Another case from an eminent court, *People v. Rice*,³² although not directly pertinent in that it did not involve a psychologist, is significant as indicating that the physician, while legally favored as an expert witness on insanity, is not the only specialist capable of being such a witness. That case was also a prosecution of defendant for homicide, with a defense of insanity. The witness called by defendant on the issue of insanity was not a doctor of medicine but a manufacturer of medicines and publisher of medical books. He had studied to some extent medicine and nervous diseases. The trial court held that he was not competent as an expert although he could be examined as a layman. New York's highest court, the Court of Appeals, affirmed the trial court on the ground that the witness had not been sufficiently qualified as an expert. However, the court said:

"After a careful consideration of the subject we have reached the conclusion that if a man be in reality an expert upon any given subject belonging to the domain of medicine, his opinion may be received by the court, although he has not a license to practice medicine. But such testimony should be received with great caution, and only after the trial court has become fully satisfied that upon the subject as to which the witness is called for the purpose of giving an opinion, he is fully competent to

31. 293 Mich. 15, 24-25, 291 N. W. 205 (1940); cf. *Frederick v. Stewart*, 172 S. C. 188, 173 S. E. 623 (1934) where the contention was rejected that before a physician could classify a person as a moron he had to be given certain psychological tests by a psychiatrist or a psychologist. 172 S. C. at 194-195. In *United States v. Chandler*, 72 F. Supp. 230 (D. Mass. 1947), *aff'd*, 171 F. 2d 921 (1st Cir. 1948), *cert. denied*, 336 U. S. 918 (1949), a prosecution for treason, after defendant's counsel made a motion to inquire into the sanity of the defendant on the ground that he was unable to understand the charges against him, the district court ordered defendant transferred to a government hospital for a mental examination. There he was examined by psychiatrists for the government, and by a psychologist for the defense. The opinion states that all the experts testified at length, but the psychologist's testimony is not detailed. 72 F. Supp. at 237. *Stemmer v. Kline*, 128 N. J. L. 455, 26 A. 2d 489, 684 (1942), was a suit for malpractice resulting in the ruination of a child in its mother's womb caused by X-ray applications. The majority of the court held there was no legal liability for negligently causing harm to an unborn child. Colie, J., while disagreeing with that holding, concurred in reversal of plaintiff's judgment because one of plaintiff's experts based his opinion in part on hearsay. This expert was "a doctor of philosophy with extensive experience in the field of psychology and connections with many institutions handling mental deficients." *Id.* at 460. The opinion analyzes the hearsay problem without distinguishing between this psychologist and a doctor of medicine.

32. 159 N. Y. 400, 54 N. E. 48 (1899).

speak. The witness Fenner was not *prima facie* competent, for he had not been licensed to practice medicine. It was essential, therefore, to prove him to be an expert before the defense acquired the right to have him testify as to the sanity or insanity of the defendant."³³

Psychology's purported competence in respect of mental status or processes is of course not limited to the mind which deviates from the normal because of psychoses or mental retardation. Often in litigation the status of the normal mind is the pivotal issue, as for example when the intention of a party is legally controlling or significant on the issue involved. *People v. McNichol*³⁴ was a prosecution for issuing a worthless check. The defense was that defendant on the day involved, without eating any breakfast, had consumed a pint of whiskey and four cans of beer, and that he had no recollection of what his conduct was at the time of the alleged offense. Prior to his trial defendant had been examined by a clinical psychologist who had subjected him to an examination while defendant was under the influence of sodium pentathol, a so-called truth serum. During the trial defendant sought to introduce in evidence a report of statements he had made during this examination, but this testimony was excluded by the trial court. However, the clinical psychologist did testify at the trial, in response to hypothetical questions, that one who had consumed the quantity of liquor defendant had consumed would not be conscious of an intent to do an act to obtain money—that his intent would not be a conscious intent. He also testified that subconscious matter might be brought out by putting the party into an hypnotic state by the administration of sodium pentathol; that he had so treated the defendant and that during the treatment notes had been made of what was said by defendant. But, as stated, the trial court would not permit the psychologist to state the context of these notes. The trial court's judgment of conviction of defendant was affirmed despite defendant's contention that such exclusion of the notes was error. There is no suggestion in the opinion of the appellate court that it was wrong for the trial court to permit the clinical psychologist to testify to the extent indicated above.

There is no reason why psychology's potential contribution to judicial fact ascertainment should be limited to criminal jurisprudence. *United States v. 38 Dozen Bottles*³⁵ was a seizure action

33. *Id.* at 410-411. See *Fox v. Peninsular White Lead & Color Works*, 92 Mich. 243, 249 (1892), where a non-physician was allowed to give his observations as to cutaneous diseases resulting from chemicals.

34. 100 Cal. App. 2d 554, 224 P. 2d 21 (1950).

35. 114 F. Supp. 461 (D. Minn. 1953).

brought under the Federal Food, Drug and Cosmetic Act³⁶ charging that the drug "Tryptacin" was misbranded by reason of failure of its labeling to bear adequate directions for use. One issue was whether a newspaper advertisement of the drug conveyed the impression that the drug was offered as a cure for ulcers. In holding that it did, the court depended in part on the testimony of experts in the field of advertising and marketing psychology. The court said:

"In addition to reading and examining the advertisement, I base my finding as to the impression conveyed by the advertisement upon the evidence presented on that point. Libelant's witnesses, Dr. James N. Mosel and Dr. Howard P. Longstaff, experts in the field of advertising and marketing psychology, presented exhaustive analyses of the content of the advertisement and the effect which it was intended to have upon the prospective purchaser of the drug. Such testimony is admissible to determine the meaning of an advertisement. Federal Trade Commission v. National Health Aids, Inc., D. C. Md., 108 F. Supp. 340.

"Moreover, Dr. Mosel introduced evidence relative to two hundred individuals whom he surveyed concerning the impression which they received from the 'Tryptacin' advertisement. A substantial portion of those interviewed indicated that they received the impression from the advertisement that 'Tryptacin' would 'stop', 'cure' or otherwise bring about some permanent relief of ulcers. The forms filled out by the individuals questioned, interview cards, and tabulations made by Dr. Mosel of the answers received, were placed in evidence by libelant."³⁷

Claimant's opposing evidence on the import of the advertisement's language included testimony of two representatives of a firm which handled the drug's advertising. These advertising men testified that in their opinion the advertisement offered the drug as a means of relieving acid pain and not of curing stomach ulcers. They also testified that they had showed the advertisement to a number of their associates in the advertising business, newspaper censorship boards and other persons, and inquired as to the impression the advertisement made; and that not a single person questioned received the impression that the advertisement offered a cure for stomach ulcers. There was similar testimony by doctors, who had discussed the meaning of the advertisement with other doctors, nurses, patients and others. Claimant's evidence obviously did not impress the court as cogently as libelant's did, possibly

36. 21 U. S. C. § 301 *et seq.* (1952).

37. 114 F. Supp. at 462-463. For a discussion of the hearsay problem involved in the testimonial use of public opinion surveys, see 37 Minn. L. Rev. 385 (1953).

because claimant's had not been accumulated and presented in accordance with recognized scientific criteria for valid testing procedures. In any event, the court said of claimant's evidence:

" . . . The likelihood of error or prejudice developing in the course of such interviews would seem to be great, particularly since none of the witnesses of claimant, including both advertising men and doctors, were qualified by education or experience in the taking of formal public opinion surveys."³⁸

Thus the psychologist's training in statistics and scientific techniques necessary to validate testing procedures would seem to give him an advantage in certain kinds of expert testimony not necessarily possessed by the businessman or other professional men.

There is currently pending before Chief Judge Gunnar H. Nordbye in the United States District Court for the District of Minnesota an anti-trust suit³⁹ for treble damages brought by a theatre owner against a number of movie distributors. One of plaintiff's claims is that it should have a position in the movie distribution scheme, a so-called playing position, better than the typical neighborhood theatre. Plaintiff called a psychologist as an expert witness to establish the range and degree of competition between plaintiff and other theatres and to show the drawing power of plaintiff's theatre. In view of the apparent paucity of published material on the actual functioning of the psychologist as an expert witness, it may be valuable to make available both to the legal and psychological professions the testimony of that psychologist. Accordingly, the transcript of his testimony, on both direct and cross-examination, is attached as an appendix to this article.⁴⁰

38. 114 F. Supp. at 463.

39. Robbinsdale Amusement Co. v. Warner Bros. Pictures Distributing Corp., Civil No. 4584 (4th Division, Minneapolis).

40. There may be a rich vein, not exhausted by this writer, for further research into the possible previous use of psychologists as expert witnesses, in the records of Federal Trade Commission, trade mark and perhaps patent cases. As early as the dawn of this century it was clearly recognized that the resolution of such issues as confusion between marks in trade mark cases could be facilitated by psychological techniques. See Rogers, *The Unwary Purchaser. A Study in the Psychology of Trade Mark Infringement*, 8 Mich. L. Rev. 613 (1910). It may be that behind the general reference to "expert evidence" in appellate opinions in trade mark cases, there are records wherein the experts were psychologists. See Burt, *Legal Psychology*, Ch. XX, p. 424, *Trade-Mark Infringement* (1931). In *Coca-Cola Co. v. Chero-Cola Co.*, 273 Fed. 755 (App. D.C. 1921), on the issue of whether marks were so similar as to be likely to cause confusion in the public mind or to deceive a purchaser, the court made only a passing reference to the testimony in the opposition proceedings in the Patent Office on application for registration of "Chero-Cola," saying "Nearly 3,000 pages of testimony were taken, and elaborate briefs have been filed. Many decisions by courts in this country and in England are cited, and, besides, we are invited to listen to the teaching of psychology on the subject." (273 Fed. at 756.) But we know from Rogers, *An Account of Some Psychological Experiments on the Sub-*

There is a group of cases which, superficially viewed, might be construed in derogation of psychology's claims to competence to provide expert witnesses. This superficial view, however, yields to precise analysis which shows that these cases turn upon some refined evidential rule, usually concerned with impeachment or character evidence, and properly have no derogatory connotation respecting the psychologist as an expert witness. Typical is *State v. Driver*,⁴¹ where defendant was convicted of an attempt to commit rape upon a girl twelve years old. When this girl was offered as a witness for the state defendant objected to her competency on the ground that she was a "moral pervert, and not trustworthy." However, she was allowed by the trial court to testify, and defendant attempted to impeach her testimony by evidence from the chief psychologist of the Ohio Bureau of Juvenile Research to the effect that the girl was "a lying moron and unworthy of belief." The West Virginia Supreme Court affirmed the conviction, holding that the trial court's preclusion of this impeachment was proper, thus limiting impeachment of a witness' truth and veracity to the conventional method of showing poor community reputation for those qualities. Whatever is thought of the court's restriction of impeachment to the orthodox method,⁴² the decision clearly is not a rejection of the psychologist *per se* as an expert witness; in fact in the same case a physician's testimony was similarly rejected as improper impeachment. In *People v. Villegas*,⁴³ where defendant was charged with armed robbery, his defense was that he was coerced into participation by his co-defendant who threatened him and menaced him with a gun. Defendant called a witness whom he attempted to qualify as a psychologist. Defendant offered to prove that the psychologist had known defendant for fourteen years and that by reason of her study of psychology she was in a position to testify that defendant's will power was weak, that his physical condition was bad, and that he therefore was without sufficient force to "resist the impulse of this other boy to take him out on

ject of Trade-Mark Infringement, 18 Mich. L. Rev. 75 (1919), that elaborate psychological tests were made by an experimental psychologist and submitted to the trade mark examiner in the form of a report by the psychologist, formal proof of the report having been waived. The report, although objected to, was received, and commented on at length by the examiner. 18 Mich. L. Rev. at 99-103.

41. 88 W. Va. 479, 107 S. E. 189 (1921).

42. Wigmore insisted that "No judge should ever let a sex-offense charge go to the jury unless the female complainant's social history and mental makeup have been examined and testified to by a qualified physician." 3 Wigmore, Evidence 460. Is it a significant indication of his thinking that he refers in this connection only to a "qualified physician"?

43. 29 Cal. App. 2d 658, 85 P. 2d 480 (1938).

these robberies."⁴⁴ In affirming the trial court's preclusion of this testimony, the appellate court said simply:

"... It was both incompetent and immaterial, and she [the psychologist] was entitled only to testify, as she was permitted under the court's ruling to do, concerning the general reputation of appellant [defendant] in the community in which he lived for the traits involved in the offenses charged."⁴⁵

Thus the court was unwilling, as a matter of evidence law, to permit the defendant in a criminal case to do more, in respect of so-called character evidence, than make the conventional showing that he has a good community reputation for the traits involved in the crime charged.⁴⁶ There is in the case no necessary deprecation of a psychologist *per se* as an expert witness.

In the well-known case of *United States v. Hiss*⁴⁷ the trial judge who presided at the second trial permitted testimony offered by the defense, in an attempt to impeach the credibility of a principal government witness, which did not fall into the conventional impeachment pattern to which the West Virginia court adhered in *State v. Driver*. In the *Hiss* case both a psychiatrist and a psychologist were permitted to testify over government objection that such witness was in their opinion a psychopathic personality.⁴⁸ The psychologist who so testified also had the degree of doctor of medicine, but he was from the Harvard Psychological Clinic, had worked for many years in psychology and testified, "I would call myself a psychologist."⁴⁹ The brief opinion of the trial court⁵⁰ permitting this method of impeachment, and refusing to follow *State v. Driver*, was written in reference to the testimony of the psychiatrist, but the decision to admit the psychiatrist's testimony ap-

44. *Id.* at 663.

45. *Ibid.*

46. *Cf.* *People v. Jones*, 266 P. 2d 38 (Cal. 1954). In that case defendant was charged with lewd acts upon the person of his young niece. At his trial defendant offered the evidence of a psychiatrist that he had examined defendant twice, once without drugs and once with sodium pentathol, and that defendant was not a sexual deviate. The trial court rejected this offer on the ground that it did not constitute proper character evidence. The California Supreme Court, however, held that this testimony should have been admitted as evidence of good character showing defendant's disinclination to this type of crime. See Falknor and Steffen, *Evidence of Character: From the "Crucible of the Community" to the "Couch of the Psychiatrist,"* 102 U. of Pa. L. Rev. 980 (1954).

47. 185 F. 2d 822 (2d Cir. 1950), *cert. denied*, 340 U. S. 948 (1951), *on motion for a new trial*, 107 F. Supp. 128 (S.D. N.Y. 1952), 201 F. 2d 372 (2d Cir. 1953), *cert. denied*, 345 U. S. 942 (1953).

48. Transcript of Record, *United States v. Hiss*, pp. 2550, 2812.

49. *Id.* at 2800.

50. 88 F. Supp. 559 (S.D. N.Y. 1950).

parently also settled the question of admissibility of the psychologist's testimony.

The psychologist is discouraged sometimes by what he interprets to be an unduly slow acceptance by the courts of his claim to an expertise which can be helpful in judicial fact ascertainment. He should remember, however, that the conservatism of the law is at least in part dictated by its preoccupation with vital issues of property, liberty and even human life itself, and not academic debate. A certain amount of cultural lag is perhaps inevitable. Until a new technique or device is accepted as accurate and reliable in its own scientific orbit, it can hardly be expected to play a role in disposing of men's property, liberty or lives. And quite reasonably, the accuracy and dependability of the technique or device must appear to the court's satisfaction. When the scientific validity of a new technique or device is accepted as "capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy,"⁵¹ the courts reasonably may be expected to take judicial notice of such acceptance and permit judicial use of the technique or device unless there is a valid reason for exclusion despite scientific acceptance.⁵² The absence of such scientific acceptance does not necessarily mean that the technique or device is untrustworthy. But such absence does mean that the proponent of the technique or device for judicial use must affirmatively establish by evidence the fact of dependability. Thus, when a party calls a psychologist as an expert witness in a domain as to which psychology's expertise does not yet enjoy such scientific acceptance, the burden is on that party to prove that psychology does have pertinent expertise in the field involved.

This is well put in *Frye v. United States*.⁵³

"Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized principle or discovery, the thing from which the

51. Uniform Rules of Evidence, National Conference of Commissioners on Uniform State Laws, Rule 9(2) (d).

52. This paper is not concerned with exclusion of evidence on constitutional or other policy grounds without regard to scientific validity of the evidence, *e.g.*, U. S. Const. Amend. V's provision that no person "shall be compelled in any criminal case to be a witness against himself" or "be deprived of life, liberty, or property, without due process of law," and analogous state provisions. Illustrative cases are *State v. Cram*, 176 Ore. 577, 160 P. 2d 283 (1945); *Rochin v. California*, 342 U. S. 165 (1952); see McCormick, *op. cit. supra* note 22, at 264, 298.

53. 293 Fed. 1013 (App. D.C. 1923).

deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

...⁵⁴

Often courts are willing or even eager to accept so-called amicus curiae briefs from persons or associations not directly involved in the pending litigation who have nevertheless an interest in its adjudication.⁵⁵ Psychologists or their professional associations which have an interest in judicially establishing the competence, reliability and trustworthiness of a particular psychological technique or device may from time to time have the occasion to submit such a brief to a court. Naturally the effectiveness of such a brief is dependent upon the thoroughness, accuracy and scholarly quality of the scientific data it marshalls in support of its thesis. Such a brief to be effective requires close collaboration between the lawyers and the scientists whose technique or device is involved.

The history of judicial treatment of various scientific devices should give encouragement to scientists inclined to think judicial steps toward acceptances of their wares too desultory. Not long ago courts were rendering decisions of paternity in illegitimacy proceedings against men whose innocence was scientifically established by the exclusory nature of the blood tests. Now, however, the courts are holding that where it is shown that the testing processes were accurate, exclusory results from blood testing must be deemed conclusive.⁵⁶ The "drunkometer" may be on its way to judicial acceptance,⁵⁷ and the so-called truth serum is making its claims.⁵⁸ While the lie detector, in the absence of stipulation for its use, has not yet been accepted by any American appellate court, the judicial attitude toward it may fairly be said to be a friendly one of "wait-

54. *Id.* at 1014. That the law's conservatism in accepting new psychological data, techniques and devices is not without roots in logic and sound policy, see Kennedy, *Psychologism in the Law*, 29 Geo. L. J. 139 (1940); Terman, *Psychology and the Law*, 4 Kansas City L. Rev. 59 (1936); cf. Britt, *Blood-Grouping Tests and the Law: The Problem of "Cultural Lag,"* 21 Minn. L. Rev. 671, 695 (1937); Britt, *Blood-Grouping Tests and More "Cultural Lag,"* 22 Minn. L. Rev. 836 (1938).

55. See, e.g., Revised Rules, Supreme Court of the United States, Rule 42, Briefs of an Amicus Curiae (effective July 1, 1954).

56. Compare *Berry v. Chaplin*, 74 Cal. App. 2d 652, 169 P. 2d 442 (1946), with *Jordan v. Mace*, 144 Me. 351, 69 A. 2d 670 (1949) and United States *ex rel. Lee Kum Hoy v. Shaughnessy*, 123 F. Supp. 674 (D.C. N.Y. 1954). See McCormick, *op. cit. supra* note 22, at 378-383; 35 Minn. L. Rev. 515 (1951).

57. See Note, *Drunkometer as a Test for Intoxication*, 24 Rocky Mt. L. Rev. 253 (1952); McCormick, *op. cit. supra* note 22, at 375-377.

58. See Dession, Freedman, Donnelly and Redlich, *Drug-Induced Revelation and Criminal Investigation*, 62 Yale L. J. 315 (1953); McCormick, *op. cit. supra* note 22, at 373-375; Note, 23 A. L. R. 2d 1306, 1310 (1952).

ing to be shown"; in fact, the courts have gone as far in accepting it as its most prominent proponents would have them.⁵⁹

Perhaps, therefore, there is an attitude among scientific men including psychologists too prone to be critical of the courts for their conservatism respecting scientific data and devices, and judicial treatment of the expert witness. Recently a psychiatrist, in reviewing the much-discussed *Psychiatry and the Law*,⁶⁰ made certain observations which, though specifically directed to psychiatrists, are not impertinently applied to other professional experts, including some psychologists. He said:

"The authors [of *Psychiatry and the Law*] disapprove of the current legal definition of insanity. It is true that many psychiatrists object to being pinned down to a *yes* or *no* an-

59. All American appellate courts called upon to decide the question have held lie detector test results inadmissible in evidence, in the absence of a stipulation between opposing counsel authorizing admission. *Frye v. United States*, 293 Fed. 1013 (D.C. Cir. 1923); *State v. Bohner*, 210 Wis. 651, 246 N. W. 314 (1933), 18 Minn. L. Rev. 76; *People v. Forte*, 279 N. Y. 204, 18 N. E. 2d 31 (1938); *People v. Becker*, 300 Mich. 562, 2 N. W. 2d 503 (1942); *State v. Cole*, 354 Mo. 181, 188 S. W. 2d 43 (1945); *State v. Lowry*, 163 Kan. 622, 185 P. 2d 147 (1947); *Boeche v. State*, 151 Neb. 368, 37 N. W. 2d 593 (1949); *State v. Pusch*, 77 N. D. 869, 46 N. W. 2d 508 (1950); *People v. Wochnick*, 96 Cal. App. 2d 124, 219 P. 2d 70 (1950); *Henderson v. State*, 94 Okla. Cr. 45, 230 P. 2d 495 (1951). *But cf.* *People v. Kenny*, 167 Misc. 51, 3 N. Y. S. 2d 348 (County Ct. 1938); see 35 Minn. L. Rev. 310, n. 3. The cases are discussed in a series of A. L. R. Annotations: 34 A. L. R. 147 (1925); 86 A. L. R. 616 (1933); 119 A. L. R. 1200 (1939); 139 A. L. R. 1174 (1942); 23 A. L. R. 2d 1306 (1952). In one of the recent cases, the Minnesota Supreme Court reversed a conviction for arson because the trial court permitted the state to show that defendant had refused to submit to a lie detector test. *State v. Kolander*, 236 Minn. 209, 52 N. W. 2d 458 (1952). In a careful opinion for the court, Knutson, J. said: "We have no doubt that the lie detector is valuable in investigative work of law enforcement agencies and may frequently lead to confessions or the discovery of facts which may ultimately lead to the solution of many crimes; but we are in accord with the rule that the lie detector has not yet attained such scientific and psychological accuracy, nor its operators such sureness of interpretation of results shown therefrom, as to justify submission thereof to a jury as evidence of the guilt or innocence of a person accused of a crime." 236 Minn. at 221-222. *Cf.* *Tyler v. United States*, 193 F. 2d 24 (D.C. Cir. 1951), *cert. denied*, 343 U. S. 908 (1952). Results of a lie detector test have been admitted pursuant to stipulation, which precludes a claim of inadmissibility on appeal, *People v. Houser*, 85 Cal. App. 2d 686, 193 P. 2d 937 (1948). *Compare* *Le Fevre v. State*, 242 Wis. 416, 8 N. W. 2d 288 (1943), which ignored a stipulation in excluding results, *with* *State v. Lowry*, *supra*, which emphasized that no stipulation was involved; see 35 Minn. L. Rev. 311 (1951); [1943] Wis. L. Rev. 430; 23 A. L. R. 2d 1306, 1311 (1952). The writer in recent years has noticed newspaper reports to the effect that trial courts have used lie detector tests for various purposes. See [1943] Wis. L. Rev. 430, 435; McCormick, *op. cit. supra* note 22, at 370, n. 6. Inbau as recently as 1946 seemed to favor admission in evidence of lie detector test results only pursuant to stipulation. Inbau, *The Lie-Detector*, 26 B.U.L. Rev. 264, 271 (1946); *compare* McCormick, *op. cit. supra* note 22, at 371-373, esp. 372, n. 13.

60. By Guttmacher and Weihofen, (1952). For a laudatory appraisal, see Book Review, Hall and Menninger, 38 Iowa L. Rev. 687 (1953).

swer. But I think it is a godsend that there are at least some situations where psychiatrists are forced to give a simple answer to a simple question. Social living, with which the law deals, makes this necessary. Instead of the test of the 'irresistible impulse' the authors suggest 'inability to adhere to the right.' This would describe most people as well as most murderers.⁶¹ There is room for critical discussion of the different legal definitions of insanity. But this book is a good example of the unfortunate tendency to emphasize this point as if it were the main trouble with present-day forensic psychiatric usage. Instead of putting their own house in order, psychiatrists like to claim that most, if not all, that is wrong are the legal definitions. Throughout this book the impression is given that the lawyers are backwards and psychiatrists progressive. Many lawyers, judges and district attorneys would like to get psychiatric advice and help, as well as treatment, for defendants. Their main trouble is to get psychiatrists in cases where large fees are not available. They have much less difficulty with other medical specialties."⁶²

Generalizations are dangerous, and many lawyers including the writer will react to the above criticism with numerous instances they have observed of psychiatrists grappling with problems as difficult and complex as the human mind must face, with a consummate skill and soul-searching conscientiousness and selflessness that is the ideal for professional service. But all professions, including psychology, may well bear in mind the wholesome admonition of the master psychologist:

"The fault, dear Brutus, is not in our stars,
But in ourselves, that we are underlings."⁶³

Psychologists have often asked the writer questions on a very practical level as to the appropriate method and demeanor of a psychologist called as an expert witness. The varying conditions of judicial administration from place to place in the United States, including the different philosophies, attitudes, temperaments and capacities of trial judges, make generalizations hazardous. The following observations, however, are confidently ventured. The qualified, careful, scholarly psychologist, who sticks to his own field of competence, has nothing to fear in taking the witness stand. Such an expert has no reason to stand in awe of cross examination. If a question can accurately and simply be answered "Yes" or "No", no witness, not even a scientist, should resent judicial insistence that

61. But see *Durham v. United States*, 214 F. 2d 862 (D.C. Cir. 1954).

62. Wertham, *A Psychiatrist Looks at Psychiatry and the Law*, 3 Buffalo L. Rev. 41, 48-49 (1953).

63. Shakespeare, *Julius Caesar*, Act 1, sc. ii. That much of the antipathy of the scientist to the judicial process is rooted in confusion resulting from the differing semantics of the scientist and jurist, is a theme pursued in a later installment of this article.

it be so answered. If it cannot fairly be so answered, no reasonable trial judge is going to insist upon such an answer.

The prudent psychologist will, before taking the stand, carefully explain to the lawyer of the party invoking his services what he can and what he cannot honestly state under oath. He will realize that he is not an advocate but a witness. If called by the court as a neutral witness, he will realize that he is even more removed from the spirit of advocacy than when functioning as a partisan witness.⁶⁴ He will be candid in acknowledging the degree of certainty with which he holds his opinions. He will recognize that there is no innate excellence in professional jargon, and will clearly explain in words understandable by the non-psychologist the meaning of technical terms. He knows that carefulness and intellectual honesty are as recognizable, and even more important, inside as outside the courtroom. He will be frank to admit the limitations of his specialty or of his own expertise within it.⁶⁵ He will realize that his function, however important, is not to decide the case but to contribute what knowledge he can to those who have the burden of decision. However critical of particular lawyers, judges or juries, he will

64. One of the most common criticisms of expert testimony, especially medical and psychiatric testimony, is its partisan source and nature. See, e.g., Weihofen, *An Alternative to the Battle of Experts: Hospital Examination of Criminal Defendants Before Trial*, 2 Law & Contemp. Prob. 419, 420 (1935); Bychowski and Curran, *Current Problems in Medico-Legal Testimony*, 37 J. Crim. L. & Criminology 16, 31 (1946). The writer is not entirely sympathetic with the prevailing view that the use of the so-called neutral or court-appointed expert is a reform which will substantially solve the evils of expert testimony. This view reaches its extremity in Zilboorg, *The Psychology of the Criminal Act and Punishment* (1954), where the author, a psychiatrist, stated: "The principle of an expert for each side is a corrupting, immoral principle. . . ." *Id.* at 119. So far as this writer knows, no one has satisfactorily demonstrated why the especial competence of the adversary system as a fact-finding device is so vitiated because the subject of inquiry is a scientific question. Too often it is assumed that there is some magic in the mere shifting of responsibility from private hands to state agencies. Yet it must be acknowledged that profound scholarship is behind the movement toward the court-appointed expert, e.g., Morgan, *Suggested Remedy for Obstructions to Expert Testimony by Rules of Evidence*, 10 U. Chi. L. Rev. 285, 293 (1943); 2 Wigmore, *Evidence* 644 *et seq.*, although it is to be carefully noted that at least Wigmore would not *replace* but only *supplement* partisan expert testimony. *Id.* at 648. See Fed. R. Crim. P. 28; Uniform Rules of Evidence, National Conference of Commissioners on Uniform State Law, Rule 59, both of which provide for court-appointed experts but reserve to the parties the right to call expert witnesses of their own selection. The real reform in this field, it seems to the writer, as in so many other fields of professional activity, is greater integrity by the professional man. But such a reform is at once too simple, and too difficult!

65. "When testifying as an expert witness, a psychologist should make only such statements as he is qualified to offer on the basis of his professional training and experience, and which he can substantiate by evidence that would be acceptable to recognized specialists in his same field." Principle 1.22-2, *Ethical Standards of Psychologists* (proposed), American Psychological Association 14 (1953).

never be scornful of the judicial process. He will be at once, confident but not cock-sure; proud of his profession but humble in his awareness of human limitations.

The psychologist, indeed the scientist generally, may do well to match to a degree the law's conservatism with his own. Perhaps few things are so shocking to the conscience of a liberty-loving people, and therefore inimicable to the progressive application of sound scientific principles in the regulation of society, as the serious curtailment of human liberty by applying "scientific" conclusions unsupported by the underlying data, or by drawing in the name of science moral conclusions unwarranted by the realities.⁶⁶

(To be continued)

APPENDIX TO THE PSYCHOLOGIST IN TODAY'S LEGAL WORLD

NOTE: This is the transcript of the testimony of the psychologist in *Robbinsdale Amusement Co. v. Warner Bros. Pictures Distributing Corp., et al.*, United States District Court, District of Minnesota, Fourth Division, Civil No. 4584 pending before Chief Judge Gunnar H. Nordbye, referred to in the preceding article at n. 39 and accompanying text. The following transcript includes the direct examination, cross examination and redirect examination of the witness verbatim, except that in the interest of economy of space, portions of the direct examination are omitted and the omissions indicated by asterisks. This testimony appears at pp. 991-1046 of the official transcript. Because this case is *sub judice* at the time this article goes to press, no comment whatever on the testimony is made or intended. The appearances of counsel are: Larson, Loevinger, Lindquist, Freeman and Fraser, by Lee Loevinger and Louise A. Herou, for plaintiff; David Shearer and David Preus for Warner Bros. Pictures Distributing Corp., Universal Film Exchange, Inc., United Artists Corporation, Twentieth Century Fox Film Corporation, Paramount Film Distributing Corporation, Loew's, Incorporated, Columbia Pictures Corporation and RKO Radio Pictures, Inc.; Mathew J. Levitt and Edward C. Raftery for Minneapolis Theatres, Inc.; Mandt Torrisson for Minnesota Amusement Company.

KENNETH E. CLARK,

a witness called by and on behalf of the plaintiffs, being first duly sworn, was examined and testified as follows:

66. Illustrative, to this writer, of such unjustified curtailments of liberty essentially in the name of science are the situations presented by *Psychopathic Personality of Dittrich*, 215 Minn. 234, 9 N. W. 2d 510 (1943) (law-abiding, capable, hard-working farmer, of good moral character, at least so far as his relations with the community were concerned, condemned to indefinite commitment under the psychopathic personality law because of his ardent sexual nature); *In re Restoration to Capacity of Masters*, 216 Minn. 553, 13 N. W. 2d 487 (1944) (mother of ten apparently normal children, two serving in army, committed as feeble-minded and family broken up, apparently essentially because she was thought a sloppy housekeeper; I.Q. fixed at 64 by psychological testing). See Louisell, Book Review, 79 *The Scientific Monthly* 332 (Nov. 1954).

Since this article went to press, *Watson v. State*, 273 S. W. 2d 879 (Tex. Cr. App. 1954) has been published, in which a psychologist testified as an expert on the issue of insanity in a murder case. The writer is also informed that *Hidden v. Mutual Life Ins. Co.* (4th Cir. 1954) involved a psychologist as an expert witness, but the opinion is not yet published and has not been seen by the writer. See *The Daily Record*, Baltimore, Dec. 25, 1954, p. 5.

DIRECT EXAMINATION

By Mr. Loevinger :

Q. State your name and address please?

A. Kenneth E. Clark, 117 Arthur Avenue Southeast, Minneapolis.

Q. What is your occupation, Dr. Clark?

A. College professor.

Q. Where?

A. At the University of Minnesota.

Q. What is your subject?

A. My subject is psychology.

Q. Do you have any specialty within that field?

A. Yes, sir. I am a specialist in evaluation and measurement, with particular emphasis on opinion, attitude and interest measurement.

Q. What degrees do you hold in that field?

A. I have a Bachelors Degree, Masters Degree and PhD in psychology from Ohio State University.

Q. And what work have you done in this field?

A. Since receipt of my degree in 1940, I came to the University of Minnesota as an instructor in psychology. In 1942 I was employed by the Army Air Force as a personnel technician, transferred after a year to the Personnel Research Section of the Adjutant General's office of the War Department, and after another year was commissioned in the Navy as an enlisted classification officer. I served two years in the Navy, returned to the University of Minnesota in 1946 and since that time have been there as an assistant professor and an associate professor of psychology with the exception of the summer of 1951, at which time I was head of the Classification and Survey Research Branch of the Bureau of Naval Personnel of the Navy Department.

Q. And have you worked for various other Government agencies in this same field?

A. I have been employed as an expert consultant to the Chief of Naval Personnel, particularly with regard to problems in classification and survey research and have served as consultant in various commercial surveys of one sort or another.

Q. And does this field include what is popularly called Public Opinion Measurement and Market Analysis?

A. Yes, sir. It does. I teach a course at the University of Minnesota called Public Opinion, Principles and Techniques of Public Opinion Analysis to be precise, and of course projects in public opinion analysis and along with my other work at the University also serve as a member of the laboratory for research and social relations, also have a contract through the University with the Office of Naval Research for the development of interest measures, also am currently this year and last year on the half-time appointment on the University since I am working on the other half time as project director for a survey of psychological activities in the country, this is under an arrangement between the American Psychological Association which is our chief professional organization and the National Science Foundation, which is a Governmental agency, and my program is designed to indicate matters with regard to national policy for training and utilization of scientists, particularly with regard to psychology.

* * * *

Q. Are you familiar with and do you know the established standards of scientific reliability and validity of public opinion and market analysis for such an investigation?

A. Yes, sir.

Q. And did I consult you and employ you in this case to determine first the geographical source of the Terrace Theatre patronage and second,

the willingness of the public to pay a higher admission price to see pictures on an earlier run at the Terrace Theatre?

A. Yes, sir, you did.

Q. Did you conduct such an investigation?

A. I did.

Q. What did you do?

A. I explored first the issues which would be involved in a survey of this sort and prepared a preliminary questionnaire. I then consulted with some of my associates and particularly with Dr. Robert O. Jones who is head of journalism research at the University of Minnesota and who has in his employ a sizeable number of very well trained interviewers who are used for such matters as readership surveys for the local newspapers and various other projects. I have used this staff in the past for various kinds of studies and have found them to be quite reliable. What I did then was to ask him for a recommendation of two of the best of his staff and inasmuch as the kind of project I had was one which was somewhat different from their usual sort of work and also has a kind of prestige appeal for them I think that I succeeded in getting two of their best interviewers. These interviewers then were taken by me and Dr. Jones to the Riverview Theatre where we tried out an interview procedure to see whether or not we could stop patrons in the lobby and ask them a small number of questions and do this without getting any sizeable number of refusals. At this time also we varied the form of question used so that we felt we were getting the kind of information that would have some relevance to the issue concerned. As a result of this preliminary work we moved to the Terrace Theatre on the evening of November 5th and—

THE COURT: What year?

THE WITNESS: 1954.

* * * *

Q. Are you satisfied that you succeeded in validating a form of question or interview that would ascertain the desired information?

A. I believe that the interview that we used does provide information which is a reasonably precise reflection of the opinions of the persons who came to the Terrace Theatre.

* * * *

Q. When did you make your investigation at the Terrace Theatre?

A. On the evening of November 5, 1954, the evening of November 6, the afternoon and evening of Sunday, November 7, the evening of November 8, the evening of November 10, all in this year.

Q. Did you note whether the picture being shown at the Terrace Theatre was also being shown at other theatres in the City of Minneapolis?

A. Yes, I did. By referral to the local newspapers, the picture which was being shown during all of those days, except the evening of November 10, was The Rear Window and this was showing also at seven other local theatres.

Q. Can you name them?

A. The Uptown Theatre, the Riverview Theatre, the Hopkins Theatre, the Richfield Theatre, the Varsity Theatre, the Hollywood Theatre, and the Heights Theatre.

Q. Did you personally supervise the interviewing?

A. I did for the most of the time of the interviewing. I was at the Terrace Theatre each evening during some time or other, with the exception of one evening. I was there for the entire evening the first evening of interviewing and for the entire evening the second evening of interviewing and having satisfied myself with regard to the procedures the interviewers were following I then left and come back for spot checking on their later work.

Q. Were the results recorded in any manner?

A. Each interview was noted on a separate mimeographed form.

Q. And how large a sample of the Terrace patrons were interviewed?

A. We interviewed a total of 981 persons. However, we also asked, we interviewed only one person out of each party coming to the theatre. We asked for the number of persons in the party with whom this person was affiliated and this gives a total coverage, if we include all members of the party as being contacted through their representative, of 2,609 persons.

Q. Approximately what percent of the persons, of the adults attending the Terrace during the period of interviewing were interviewed?

A. We attempted to contact one out of every two parties, and I think that we came very close to making that average.

Q. Is this a fair sample?

A. The fairness of the sample is not in terms of proportion of the total patrons interviewed, but rather in terms of two factors. First, whether or not there is any bias in the sampling of the respondents, and by getting one out of two the likelihood of such bias is reduced. The primary purpose in my supervising the interviewers was to insure that there was no other unobserved factor of bias which might be operating. The critical point in terms of the adequacy of the sample other than this is in terms of the size of the sample and I think a sample of 981 interviews, the results which are obtained become quite stable. Had we increased the sampling so as to interview all of the persons who had attended the Terrace Theatre during this time the results we would obtain would differ very slightly, perhaps just one percentage point at the outside and perhaps, on the average, by as little as two-tenths of one percent from that which we obtained from our sampling of 981.

Q. Did the results on various days of the week correlate or differ?

A. I have made some spot checks which lead me to believe that there is little difference in the kind of responses obtained for different days. There is some slight fluctuations, but these fluctuations are those which would be expected if they had been drawn randomly from the total population rather than drawn for a given date.

Q. Were scientific standards of validity and reliability observed in this review?

A. I believe so. I, as a Professor in this area, I feel a need to have some contact with practical problems and to practice the kind of things that I instruct my students to do, and I believe I maintained those standards in this survey.

Q. Were the results of your survey or canvass significant or meaningful?

A. Yes, sir. I believe that the results have a considerable amount of new information in the sense that they provide a kind of insight with regard to the questions asked that would not have been obtained without such a survey.

Q. Do you have the results of your canvass tabulated?

A. Yes.

Q. And formulated?

A. Yes, sir.

Q. Will you tell us what the results of your canvass were?

MR. TORRISON: Before you ask that question, may we know what the nature of the interview was.

By Mr. Loevinger:

Q. Suppose you tell us the specific problems to which your scientific statistics relate?

A. The questions which were posed to me for the survey was first to indicate the origins of the Terrace patrons, that is from whence they come to attend a movie at the Terrace. Secondly, to find out whether or not persons coming to the Terrace Theatre would be willing to pay downtown prices for pictures of the sort which they might see.

THE COURT: Say that again.

THE WITNESS: Whether or not they would be willing to pay downtown prices at the Terrace Theatre to see movies of the sort they would see at downtown theatres. The specific questions which were asked were, after a brief introduction by the interviewer, and here a considerable latitude is permitted. Our suggested form is merely to say, "Good evening, may I ask you a few questions," but this need not be followed by the interviewer. From here on all the questions must be stated specifically by the interviewer.

"How far did you come to see this movie? Where did you come from?"

The instructions to the interviewer was to record the address from which the person came. For Minneapolis this was to be a street address in terms of an intersection preferably rather than a specific house number or street. For outlying communities it was to be the name of the community. Those for Robbinsdale they recorded merely Robbinsdale. For Crystal they recorded Crystal. For Golden Valley they recorded Golden Valley. Of course in some instances they—a specific address was given and was recorded. The second question was:

"When was the last time you went to a movie at a large downtown theatre?"

The primary record here was to be the length of time. Sometimes the respondent indicated the name of the theatre and if it was given it was recorded, although our instructions were in general not to record this.

The third question was—

THE COURT: Third or fourth?

THE WITNESS: Third is:

"Would you have been willing?"—

The first question had two parts and we call it one:

"How far did you come to see the movie," and, "Where did you come from?" The second, "When was the last time you went to a movie at a large downtown theatre?"

The third:

"Would you have been willing to come to this theatre at that time and pay the downtown price to see the same picture?"

To this question there were three alternatives which the interviewer might use to record the response, "Yes," "No," "Doubtful." Doubtful would be of course in the instance where the person would qualify the response or indicate that this was something that he found too difficult to make a categorical answer to.

Then we also asked:

"How many persons are there in your party tonight?"

This was the fourth question.

THE COURT: Is that part of 3?

THE WITNESS: It is numbered on my form as question 3. It should be numbered 4. It is a later question. "How many persons are there in your party tonight?" And a record was made of the number of persons. The interviewer then also recorded certain other information which was not part of the interview. He recorded the approximate time of the interview, the date, the sex of the respondent, the estimated age. But these analyses, none of these responses was used, with the exception that the analyses for dates were made on a spot check basis as I indicated previously.

By Mr. Loevinger:

Q. What results did you obtain?

A. My results are in tabulated form with respect to the specific questions which are asked. The first question—

MR. RAFTERY: Before we get into these results, we would like to file an objection, particularly to the question which we deem is an improper question on the survey:

"Would you be willing to pay what you pay down town."

I submit that proof of that, this may be arguing against the weight or it rather than competency of it, but I would like to reserve an objection to that part.

MR. SHEARER: I would, too, and I want an additional objection that there is no foundation for the Doctor's testimony because the interviewers are not produced and we don't have the persons who actually took the interviews.

MR. LOEVINGER: I have specific authority on this.

MR. SHEARER: May it please the Court, I would be willing to withdraw my objection if under the same circumstances we may present the same data and the same sort of data in our case without producing a great flock of witnesses who took interviews. If we may have that understanding I will withdraw the objection.

MR. LOEVINGER: I have no notion of any evidence the defendants are going to offer. If they come in here with some office boy they got who got a bunch of fellows together down there asking questions I am going to object. Whatever the ruling the Court makes here is certainly the law of this case and of course we are bound by it.

THE COURT: What do you understand the appropriate ruling?

MR. LOEVINGER: I understand to be the proper ruling in this situation an expert of this character is thoroughly qualified when he has assured the Court that his methods and techniques were carried out with scientific standards to testify as to the results.

THE COURT: I haven't any doubt about that, but the question is whether or not the defendants have a right to cross-examine the interviewers. That is the only problem I have. In other words, Dr. Clark was not there all the time. He is taking the report the interviewers made to him as to the results of their interrogations that they made during the time that he was not there. If he had been the interviewer I haven't any doubt you have laid sufficient foundation.

MR. LOEVINGER: The cases are very clear in this kind of a situation, with specific reference to surveys, that an expert in this situation may testify for the very obvious reason as to this character of evidence when properly and scientifically conducted, because it would be impossible to produce any evidence in any other fashion in many cases.

THE COURT: Your position is then when you have a competent man in charge of the interviewers and if he testifies that the interviewers are competent men, then that fact, you contend, without more, he may accept their reports and may offer analyses such as Dr. Clark now proposes to do?

MR. LOEVINGER: Yes, sir, providing he is competent and does testify it was conducted in accordance with recognized standards of scientific validity.

THE COURT: I don't know that there are any recognized standards of an interview of this type. But be that as it may, your contention is, as I understand it, absent the interviewers reflecting the verity of the interviews that they may have made, that the head of the party, if he testifies that they were competent men and the interviewing was done according to recognized standards—I don't know just what that means—I don't know whether a Professor of Psychology knows any more about what the questions are—you told him what the questions were that were to be asked.

MR. LOEVINGER: I did not, sir.

THE COURT: Obviously he had to determine these questions in light of what you told him and I suppose a Doctor of Psychology wouldn't know any more about that than yourself, maybe far less.

MR. LOEVINGER: I think not. I told him the problem, but he formulated the questions.

THE COURT: These questions are lawyers' questions. They are not a Doctor of Psychology's.

MR. LOEVINGER: That is not correct. Your Honor is mistaken.

THE COURT: I am not deflating the value of the interviews, but I say I don't know that there are any recognized standards that we can observe in determining questions such as you have framed here to these patrons. But your position is that all you need to do is to have a qualified head of the party and he then states that the interviewers are competent men and they followed his instructions to the best of his ability, if that is the rule, I suppose then the defendants may assume that the same ruling will be made with respect to the interviews you have, if you have made some.

MR. SHEARER: Well, Your Honor, that's all I am getting at, and I haven't any question that the Doctor here conducted his interviews and instructed his interviewers in an honest fashion, but I want the same rule to apply to any such information as we may produce, and I want that understanding, that's all.

MR. LOEVINGER: I never suspected that this Court would think of applying different rules to different parties.

THE COURT: Well, all I had in mind is that I confess I don't know whether there are any decisions that have passed upon a proffer of evidence of this kind, that the head of the party who was a competent man, as undoubtedly Dr. Clark is, and schooled in making surveys of public opinion, and a man of standing, if that is the rule that you say has been recognized by courts, well, good and well.

MR. LOEVINGER: Yes, sir.

THE COURT: I would be interested in seeing what you have.

MR. LOEVINGER: Would Your Honor like some citations?

THE COURT: What are they?

MR. TORRISON: It could well become the rule in this case if all the parties agree to it.

MR. SHEARER: All I want from counsel is a statement that we may do the same thing that he is seeking to do.

MR. LOEVINGER: I am stating my position, Your Honor, what I conceive the law to be, and I am sure the Court is going to apply the same law to the defendants.

THE COURT: What do you conceive the law to be?

MR. LOEVINGER: I conceive the law to be that a scientifically qualified expert in the field of public opinion and market analysis investigation may testify as to the results of a poll conducted in accordance with scientific standards of validity and reliability.

THE COURT: And without calling the interviewers?

MR. LOEVINGER: Without calling the interviewers personally. Yes, sir.

THE COURT: You may proceed.

By Mr. Loevinger:

Q. Incidentally, Dr. Clark, who did formulate those questions?

A. I did. I think that a point of clarification might be indicated at this point. The purpose of the survey was stated to me by you. This purpose, however, was a purpose which had to be achieved in some manner or other and the manner of achieving the purpose and the actual formulation of the questions to be used in the interview was something that I did. With regard to the standards for formulation of questions, I think the critical point is a two-fold one. First, that the question be one which results in a response which is not misleading to the person who interprets the tabulation of responses. By this I mean that the questions ought not to be loaded in such fashion that one particular response is more likely to be evoked from a person than another, that it has a more favorable position as a response than some other, and there is considerable literature on this subject with which I am quite familiar and I would be happy to cite if requested.

The second point is to insure that the data obtained from each respondent can be, is comparable to that from each other respondent so that what we may do is to take our 981 interviews and pool them, and this is a

critical problem with regard to the formulation of questions to insure that the mode of asking the question sets the same kind of problem for each one of the respondents. If what it does is set a different kind of problem for each person, thus, if the wording of the question is changed at the whim of the interviewer, what you are doing is presenting a different kind of issue for respondents and cumulate responses then is not appropriate because these responses are no longer comparable. Likewise, if very large words are used, or words which are not well known to all persons, for example, I avoided the use of "first-run" such as referring to movies since this would not be a term that would have meaning. Likewise, I avoided the presentation of a choice situation that did not have any reality to it. To ask on a casual contact with a stranger as to whether or not this person likes to come to the Terrace Theatre rather than to some other theatre does not have very much meaning. To move back to the last time when he made a choice which involved going to a downtown theatre and then asking him to review the choice gets you into some reality component with regard to the issue and it was after playing around with the problem that this particular form of question was arrived at, and this question form was determined by me after playing around with a variety of forms at a trial session at the Riverview Theatre in which there were no, neither Mr. Loevinger was present nor the Volks or anybody else was present but Professor Jones of the Journalism Department and I were there, and worked out the formulation of questions at that time. What we found was this formulation of questions provided a situation which took only a short period of time for the interview and which did not confuse the respondent. He was answering in terms of the issue as we presented it.

Now, I personally am satisfied that the form of the question gives evidence that has some meaning for the issues as you originally stated them to me.

* * * *

Q. Now, will you tell us what the results of your investigation at the Terrace Theatre were?

A. Our first question dealt with the origins of the patrons. We found that of the patrons interviewed 15.8 per cent came from Robbinsdale, 10.8 per cent from Crystal and New Hope Township—

THE COURT: Again, please?

[The witness gave percentages from various communities.]

By Mr. Loevinger:

Q. Have you plotted this geographical origin of the Terrace Theatre patronage on a map?

A. Yes, I have, and I have the map here.

Q. Is this the map?

(Plaintiff's Exhibit 92 marked for identification.)

By Mr. Loevinger:

Q. Showing you a document marked Plaintiff's Exhibit 92 for identification which appears to be a large mounted map, I ask you to tell me what that is?

A. This is a mounted map of Minneapolis and suburbs on which has been placed a red dot to represent each of the interviews which was completed. There are a couple words of explanation about the map. The red dots on the margin represent interviewees who lived beyond the area depicted by the map, and these dots are placed in the approximate direction from whence these patrons came. Thus, the dots on the righthand side of the map reflect mostly persons who came from St. Paul. There are a small number who came from regions farther east than St. Paul. Likewise those on the north side of the map represent the region including Anoka, Osseo and the like.

The other point of explanation is that the dots for the City of Minneapolis itself are placed in terms of the specific location given by the inter-

viewee for some of the other areas such as St. Louis Park and Hopkins and Edina. The respondents frequently did not give a specific address or at least one was not reported, in which case the dots were spread out in such a way as to indicate the general region from which they came and the number coming from the region with a careful effort being made to have the center of gravity of that set of dots being approximately the center of gravity of the community.

Q. And making allowance for the fact that the dots are large enough so that they can't indicate a precise location, does this fairly represent the results of your survey as to the geographical origin of the Terrace patronage?

A. I believe that insofar as the area except for the margins of the map is concerned.

Q. Yes.

A. That this gives a more accurate picture of the origin of the patrons than the percentages I just read. I believe this is a quite accurate presentation of the origin of these patrons.

MR. LOEVINGER: I offer Plaintiff's Exhibit 92 in evidence.

MR. TORRISON: No objection.

THE COURT: It may be received.

MR. SHEARER: No objection.

(Plaintiff's Exhibit 92 received in evidence.)

By Mr. Loevinger:

Q. Now, as to the other part of the survey relating to admission price, will you tell us what the results of your survey was?

MR. TORRISON: Wasn't there an intermediate question? May I ask the witness a question, Your Honor?

THE COURT: I suppose so.

MR. TORRISON: Was the second question, last time that large downtown theatre related to the final question with respect to admission prices?

THE WITNESS: Yes, sir.

MR. TORRISON: In your usage?

THE WITNESS: Yes, sir, in our usage. Yes, the second question, the analysis of the two questions separate, however, and I can give those as separate responses.

By Mr. Loevinger:

Q. Well, suppose you present to us in your own way now, Doctor, what the results of the rest of your investigation were, and what you deem the significance to be.

MR. TORRISON: Well, if the Court please, I have no primary objection to the results of the questioning as to the last time they visited a large downtown theatre. I do have an objection to the testimony relative to the fourth question on the ground that it's wholly irrelevant and immaterial to any issue in this case. I may say that as the question is named, "Would you have been willing to come to this theatre at that time to the same picture at the same price as you paid downtown admission prices," is certainly not relevant or material. There has been no, admittedly no demand here at any time of any defendant for a first-run exhibition of these theatres and the issue just isn't before us as to whether or not they would come to a first-run showing at the Terrace Theatre. That's not in issue in this case.

MR. LOEVINGER: I think the significance will appear from the testimony, Your Honor. Mr. Torrison is trying to argue the inferences again.

MR. SHEARER: Well, Your Honor—

THE COURT: Well, you don't contend, do you, that you should have had a first-run?

MR. LOEVINGER: No. No. But we do contend we should have had a move-over, and the move-overs were at the first-run prices, and I think the testimony, the evidence will show Dr. Clark will testify and I am sure I am

not suggesting anything to him because he has all of his results down, that with respect to the Terrace Theatre patronage, the price is not an important factor, that the Terrace with any kind of a better playing position can attract patrons and charge first-run prices without any difficulty.

MR. TORRISON: Of course, if the Court please, there has been no proof here whatever of a demand for any move-over privilege or anything of that nature so that—

MR. LOEVINGER: That's in documentary form.

MR. TORRISON: No foundation.

THE COURT: Well, I think that goes to the weight of it probably, rather than to the relevancy. Overrule the objection.

MR. RAFTERY: May we add to the objection any inquiry based on a question of this character is just delving into the realm of speculation. The figures that have gone in here on the different and varied results of a playing of a picture whether it's first-run downtown or last run, on the very figures put in by the plaintiff in those various exhibits, the results on each picture was different all the way down the line. We are dealing with a business that caters to taste and fancy. It's a business that is so speculative that any question such as this question, and I don't mean to be offensive to the Doctor, I think it's a loaded question just as he described it, "Would you be willing to pay what you paid downtown if you came here to the Terrace to see the same picture," or, "would you be willing to come to the Terrace and pay what you have paid downtown?" Now, another element of speculation that it might have been that that very person who was interviewed was downtown for dinner and went to the theatre downtown. I think any question such as No. 4 is going to get us into a realm of speculation that no soothsayer or prophet could give an answer. Again, I know if I were walking in the theatre and a gentlemanly interviewer or lady interviewer, we haven't found out whether ladies or gentlemen that did the interviewing, were to ask me a question like that I would say, "Oh, sure," and walk on. It's a pure loaded question.

MR. SHEARER: Your Honor, I might add to that, that I want to point out the extreme difference between questions 1 and 2 and question 4. This one having to do with the speculation about willingness to pay. The first two questions, that is a question of fact, "Where do you live?" Well, that's just pure fact. The other one is a question of history and memory, history plus memory. As a matter of fact, "When did you last go to a downtown theatre," and the question that the Doctor is now being interrogated about is, as my colleague says, purely speculation.

[Counsel for plaintiff referred to *United States v. 38 Dozen Bottles, etc.*, 114 F. Supp. 461, at 462. See note 35 to article, and accompanying text.]

* * * *

THE COURT: I don't believe the case is in point.

MR. LEVITT: I don't either.

THE COURT: But I see no objection to the question. He may answer.

MR. LOEVINGER: We may have lost the question.

THE WITNESS: I believe you asked me to summarize the rest of the survey. The second question dealt with the length of time—

THE COURT: Of course, I might say—pardon me for interrupting—that I fully recognize the tendency of people to answer certain questions one way and it may well be that people that come to a theatre and are asked whether or not they would go to this theatre and pay the same price as they would downtown if they could get a better run or something of that kind the natural tendency is to say, "Why, sure," but that goes to the weight of it. I don't think it goes to the relevancy and that is a matter we will have to argue out later.

MR. LOEVINGER: All right.

THE WITNESS: Our second question dealt with the length of time intervening between the time they had attended the theatre and the time previously gone to a large downtown theatre.

THE COURT: No, I thought you were asked what your interview showed with reference to what the persons replied as to whether or not they would pay the downtown price at the Terrace for the same type of picture that was displayed, I suppose, first-run downtown, isn't that it, Mr. Loevinger?

MR. LOEVINGER: Yes. I think the two questions are related, Your Honor. I suggested he just present his results in his own fashion.

THE COURT: All right.

THE WITNESS: It's necessary to consider the prior question first since a number of persons could not answer the question about the downtown prices since their reply to the preceding question was that they never went to a downtown theatre and the analysis I have made here I have broken the data by each of the regions which I used on the first question, but I can present the results just in terms of the totals and then a couple of trends. 54 per cent of the patrons interviewed said that they had attended, they had gone to a movie at a large downtown theatre within the preceding three months, three months or less, and that was 54 per cent. 26 per cent responded with some time interval larger than three months, but a year or less, so that more than three months to a year encompasses 26 per cent of the response.

MR. TORRISON: And less than what, Doctor?

THE WITNESS: Less than, between three months and a year. 20 per cent responded that they had not been to a downtown theatre in the preceding year, it had been over a year since they had been to a downtown theatre. With regard to the question, "Would you have been willing to come to this theatre at that time and pay the downtown price to see the same picture," 69 per cent said yes, 8 per cent said no, 6 per cent gave a doubtful response. The response was recorded as doubtful since the question could not give a yes or no response. And 17 per cent were not asked the question because their response had been that they rarely or never attended the downtown theatre.

MR. TORRISON: What was the number that were doubtful?

THE WITNESS: 6 per cent, sir. Now, these percentages vary somewhat by areas and the only two areas that show a substantial deviation are south-east Minneapolis and St. Paul where there is a larger number of no responses. The other variations, I think, can be explained as being pretty much within the realm of chance fluctuations although there are some trends that are of some interest. With regard to the no answer category, this is a rather interesting category since it indicates the number of persons who rarely or never attend downtown theatres, 26 per cent of the persons from Crystal and New Hope were in this category, 22 per cent of the persons from Robbinsdale, but only 8 per cent of the persons from south Minneapolis, 6 per cent of the persons from St. Paul and 5 per cent of the persons from southeast Minneapolis. We also computed the average size of the groups of the patrons attending the Terrace Theatre, and this average size fluctuates a little bit, not very much, and the average size is 2.66 persons, about 2 $\frac{2}{3}$ persons on the average, comprising.

By Mr. Loevinger:

Q. What are your conclusions as to the significance of admission price with respect to the Terrace patronage?

MR. TORRISON: Objected to as speculative, irrelevant, incompetent, and no foundation.

MR. LOEVINGER: This is expert testimony, Your Honor.

THE COURT: I will sustain the objection.

By Mr. Loevinger:

Q. Do you have an opinion as to, based on your experience in market analysis and public opinion research, and your background in psychology, as to whether or not an increase in the Terrace admission price coupled with an earlier playing position would have any effect upon its patronage?

MR. TORRISON: Objected to, no foundation, incompetent.

THE COURT: Yes. I will sustain the objection.

MR. LOEVINGER: May I ask the grounds of the ruling?

THE COURT: Yes. I don't think there is sufficient foundation laid for that question and I don't believe it's within the realm of proper expert testimony.

MR. LOEVINGER: Let me ask you, Doctor, whether this is the kind of matter as to which people in your field are asked to reach conclusions?

THE WITNESS: One of the kinds of work with which I have been engaged in as much as any other is in the field of political participation, and I am a member of a team of researchers at the University which has concerned itself with problems of the prediction of who will vote and how they will vote in terms of survey data, in terms of knowledge of characteristics of individuals and the like. I think that in this kind, in that particular area it is taken for granted that the best estimates that can be made about future events can be made in terms of collection of data about intentions and preferences and opinions of individuals. In the 1948 election which has undergone probably more searching analysis than any other because of the error of the large nationwide surveys in predicting the outcome, the analyses indicate that, whereas the initial feeling was that a large part of the error came because it was necessary to ask persons about intentions, and when you ask about intentions you don't get as good a data as you do when you ask about past behavior. These analyses indicate that there is no basis for making this sort of discrimination between the kinds of data that you collect in surveys. Thus, the sort of data collected in market research surveys generally are done more carefully and with better interviews than is the case for political surveys and this is due to the fact there is more money available for such surveys, so what you can do is to put more emphasis on the quality of the data which are collected. In these sorts of surveys you ask specific questions about intent and these questions of intent turn out to be of very considerable value in making predictions. The best illustration I know of this is a long series of studies which have been made by the Federal Reserve Banks—Federal Reserve Bank—through the Survey Research Center at Michigan to get some estimate of plans for purchasing of commodities and these surveys have turned out to be so useful as far as prediction of actual demand, that they have become standard practice and are paid a great deal of attention to by economists. I think this is the only way I can answer the question.

By Mr. Loevinger:

Q. Let me ask you whether public reaction to changes in price is a typical subject of inquiry within your field of specialization?

A. It is an area of inquiry which has been receiving more attention because what has been demonstrated that traditional economic theory has not been able to make the kinds of predictions of business cycles and of trends that ought to be made. As a matter of fact, the recent survey of the outcomes of forecasters using business cycles and the like showed an error in forecasting which was greater than that of a person knowing nothing about the field would have made just by chance. It's for this reason—

THE COURT: Doctor, you haven't talked to these people but a very few number; you haven't seen them. So from the viewpoint of psychology, you haven't any insight at all at this time except you are looking at 69 percent out of 981 persons and they stated that they would just as soon pay the downtown prices. You don't need to be a psychologist—you don't need to be an expert in psychology to make an interpretation of that, do we?

THE WITNESS: That is right.

THE COURT: It is merely, by way of attempting to say that because of this interview 69 percent of the people said they would just as soon pay downtown prices if they could see a picture, I suppose as early as downtown, that you assume to deduce from that sort of response—from that, what response there would be from the people in Minneapolis in the event the Terrace had a run that would enable them to see pictures approximately at the same time the downtown theatres operate them, is that about it?

THE WITNESS: Without interpreting the data I would say these data would provide a better basis for a prediction than any other data that I could suggest might have been collected. But I do not feel any need to interpret the data. I think they stand by themselves. It seems to me what I need to do is indicate I have confidence in these data.

THE COURT: What qualification do we have to have in order to make the interpretation that you now seek to indicate?

THE WITNESS: I framed this particular question because I did not want to be in the position of having to interpret it. I think this question, it seems to me, speaks for itself.

THE COURT: That may be.

THE WITNESS: And does not require any interpretation by an expert in the field. It seems to me that here is the record of the responses. I feel that this question is not a loaded question. I do not think that it has a load in it, but it is deliberately loaded against the Terrace Theatre and not for it, by putting the words about downtown prices towards the end of the question. I inquired of some of the persons who had asked the questions and checked with the interviewers and they said there were times when the person heard only the downtown price part of the question and these responses nonetheless are overwhelming, the response yes, even though some of them missed a part of the question. It is true some of them are in a hurry. They are not listening carefully. This is not the ideal situation for any close contacts with the persons, so that some of the persons said yes even though the only part they had heard was, "Would you pay higher prices," and they responded to it this way. Therefore, if this question is loaded, I feel it is loaded to produce a "No" response rather than a "Yes" response. But I feel no need to make any further interpretation.

* * * *

Q. Do you have all of the results you have testified about set forth in written form?

A. Yes, sir. Also there is a copy of the specific interview form which was used.

(Plaintiff's Exhibit 93 marked for identification.)

By Mr. Loevinger:

Q. Showing you a document marked Plaintiff's Exhibit 93, which consists of a number of typewritten sheets with various headings, I ask you if those are the sheets which set forth in specific detail the results you have described to us and figures you have stated sometimes approximately?

A. Yes.

MR. LOEVINGER: I offer Plaintiff's Exhibit 93 in evidence.

* * * *

MR. TORRISON: I have no objection to the exhibit except for the data contained upon the third page, containing typewritten material and which relates to the question, "Would you have been willing to come to this theatre at that time and pay the downtown prices to see the same picture." I object to that portion of the exhibit.

THE COURT: I have already ruled on that.

MR. TORRISON: But I didn't want to—

THE COURT: I will receive the exhibit.

(Plaintiff's Exhibit 93 received in evidence.)

. CROSS-EXAMINATION

By Mr. Torrison:

Q. You have now identified the Terrace Theatre as being represented by a green star in the center of the concentration of red dots, is that correct?

A. Yes, sir.

Q. Each of those red dots represents one interview, Professor?

A. Yes, sir.

Q. And you attempted to interview one person out of every other party, was that your testimony?

A. Our plan was to interview a person, a single individual from each of every other party, restricting our interviews to adults. We did not interview youngsters.

Q. And you found that the average number in each party was 2.66. Was that the average?

A. Yes, sir.

Q. So that if each patron were projected upon this map, it is your testimony that the concentrations would be emphasized by 2.6 times 2?

A. That is right.

Q. Do you know what the downtown admission price is at Radio City?

A. I do not know.

Q. What is the downtown admission price at the Orpheum?

A. I would guess it is a dollar, but I do not know from recent experience.

Q. Well, how many of the people you interviewed would know more about it than you?

A. This is a question on which I have no information.

Q. Now, do you know what the downtown price of a picture that played at Radio City three months ago was?

A. No, sir.

Q. Do you know what the downtown price was six months ago?

A. No, sir.

Q. How could anyone with the same knowledge or less knowledge than you have on that situation intelligently answer the question that you propounded as to whether they would be willing to come to the theatre at that time and pay the downtown price to see the same picture?

A. It is precisely for this reason, the lack of adequate memory, that we did not put a specific price, but rather carried in the question the inference that a downtown price would be a higher price than they were paying at the Terrace Theatre.

Q. Of course that may be an inference. That may have been the load in the question, but which downtown price were they to base their answer on, the downtown price for Cinemascope or for run of the mill pictures? What were they to base it on?

A. The precise question had indicated that we were talking about a picture at a large downtown theatre, so certainly it does not refer to small downtown theatres. Other than this, what we are doing is capitalizing on the assumption of a differential in price as the key point on which we are asking the question. It seems to me this gives a more realistic data than to say would you pay fifty cents more or twenty-five cents more or something of the sort.

Q. When you say large downtown theatre you are referring to the Radio City, I presume, and the State and the Hennepin Orpheum. Are they the large downtown theatres?

A. Yes, although for some of our respondents the question was the St. Paul downtown area rather than the Minneapolis area and we are referring in general to large downtown theatres. Our reference is to theatres which carry first run pictures, which we couldn't ask that question because of the inability of the respondents to make that kind of differentiation. In our pre-tests this was the form of question. This issue was the issue that we directed most of our attention to and on our tryout of the questioning at the Riverview Theatre we found that when we said the large downtown theatres this would carry forward the impression of the Orpheum, the Radio City, and the State.

Q. The first run theatres?

A. Yes.

MR. TORRISON: That is all.

MR. RAFTERY: You are testifying—telling us the operation of a man's mind, are you not?

THE WITNESS: I suppose one might say that. This is my field of specialty.

MR. RAFTERY: It is mind reading.

MR. LOEVINGER: I object to that. Psychology is a well established field and to attempt to characterize it by a derogatory—

THE COURT: I didn't hear the question.

MR. LOEVINGER: He said it is mind reading. To characterize it by derogatory terms is simply gratuitously insulting to the witness and—

THE COURT: Mind reading, I suppose, used in the technical sense is not derogatory.

MR. RAFTERY: That is all.

REDIRECT EXAMINATION

By Mr. Loevinger:

Q. Have you attended downtown theatres yourself in the last six months, Dr. Clark?

A. Yes, sir.

Q. How long ago?

A. About three months ago, two months perhaps. I paid a dollar admission at the World, which was not the question that was asked.

Q. You can remember the price you paid the last time you attended a downtown theatre?

A. Oh, yes, very well.

Q. And you were able to compare your willingness to pay that price with your willingness to pay a similar price at some other theatre?

A. I observed the price at the Terrace was 85 cents, and I recall this differential was 15 cents.

MR. LOEVINGER: That is all.

MR. RAFTERY: And you went to the World because they had a picture there you wanted to see. Isn't that the fact?

THE WITNESS: Yes, sir.

(Witness excused.)