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## THE PSYCHOLOGIST: A NEGLECTED LEGAL RESOURCE ††

EUGENE E. LEVITT†

The legal profession long has acknowledged the need for expert witnesses in the legal determination of mental illness and allied conditions. Courts and attorneys have made frequent and unquestioned use of the medical profession's mental health expert, the psychiatrist. Yet the psychiatrist's nonmedical counterpart, the psychologist, largely has remained unknown as a potential aid to the legal profession and therefore is seldom called upon. Members of the legal profession, like the lay public, either are apt to confuse the functions of psychologists and psychiatrists or, at the other extreme, to be unaware of the overlap in their disciplines. Thus, a poll of lawyers and judges in 1961 disclosed that sixty-five per cent favored confidentiality of communication for the clients of psychiatrists, but only thirty-six per cent approved extending the privilege to the clients of psychologists.<sup>1</sup> It has been suggested that:

Perhaps some of the less than enthusiastic support for privilege for the clients of psychologists stems from confusion in the minds of the legal profession as to what a psychologist does with clients that would need to be privileged.<sup>2</sup>

The psychologist has no formal medical training and is not qualified to engage in diagnosis or treatment of those illnesses which are purely physical. The clinical psychologist, however, is well trained and often highly experienced in the diagnosis and treatment of mental and emotional illnesses as well as problems of a personal or interpersonal nature. About a third of the country's 30,000 psychologists fall into this category. In addition to clinical practice, psychology has many subspecialties which are scientific rather than professional. The psychologist-scientist is usually

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†† Based on an address delivered to the Judicial Conference of Indiana, Sept. 5, 1968.

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It is not the purpose of this comment to provide a legal analysis of the psychologist in court but to suggest a psychologist's view of the law's effect on his field of expertise. In recent years the legal profession increasingly has become aware of the contributions which may be made by various non-legal disciplines. However, the resources of certain disciplines largely have remained untapped. In the material presented below, Dr. Levitt expresses a psychologist's frustration at the state of the law regarding his profession. [The Editors.]

1. Note, *Functional Overlap Between the Lawyer and other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 YALE L.J. 1226 (1962).

2. Geiser & Rheingold, *Psychology and the Legal Process: Testimonial Privileged Communications*, 19 AM. PSYCHOLOGIST 831 (1964).

known as an experimental psychologist, and his specific expertise is determined by his area of interest. His experiments may be in the field of school learning, public attitudes, vision or hearing, the effects of drugs on behavior, or problem-solving by groups.<sup>3</sup>

Experimental psychologists are found largely in university laboratories, and only rarely do they deal with patients or have contact with psychiatrists. Many clinical psychologists, on the other hand, work harmoniously with psychiatrists in hundreds of hospitals, clinics and private offices. Nevertheless, during the past two decades, an intense and often bitter rivalry has sprung up between the two professions on the state and national level.<sup>4</sup>

Psychiatrists and clinical psychologists agree that their professional pursuits overlap. At the heart of the controversy is the question of responsibility for the patient or client. Psychiatrists argue that the diagnosis and treatment of mental problems or "illness" is a medical matter and that only psychiatrists, as medical doctors, are qualified to accept the ultimate responsibility for patient care. Psychologists may diagnose or treat only under the supervision of a psychiatrist.<sup>5</sup> By implication, it is concluded that only psychiatrists are equipped to render an independent opinion in court concerning an individual's mental or emotional status.

Psychologists argue that the psychiatrist's reasoning is traditional but illogical, that psychologists are, by training and experience, as qualified to render the same independent judgments as are psychiatrists, and that medical training is not an absolute prerequisite for the assumption of responsibility for patient care.

Courts have taken widely varying positions on the matter of qualifying psychologists as expert witnesses.<sup>6</sup> Legal hassles over the status of

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3. The following references contain detailed information on psychology and psychologists: AMERICAN PSYCHOLOGICAL ASSOCIATION, *A CAREER IN PSYCHOLOGY* (1965); K. CLARK, *AMERICA'S PSYCHOLOGISTS* (1957); B. LUBIN & E. LEVITT, *THE CLINICAL PSYCHOLOGIST: BACKGROUND, ROLES, AND FUNCTIONS* (1967).

4. See Brody, *Interprofessional Relations, or Psychologists and Psychiatrists are Human, Too, Only More So* in B. LUBIN & E. LEVITT, *supra* note 3, at 247-52; Hildreth, *Psychology's Relations with Psychiatry: A Summary Report* in B. LUBIN & E. LEVITT, *supra* note 3, at 253-58.

5. This position was adopted by the Council of the American Psychiatric Association in November, 1951, and was published the following month in the Association's *Newsletter*. It stands today essentially unchanged as the official stance of organized psychiatry.

6. Decisions admitting expert testimony by a psychologist include, *e.g.*, *Hidden v. Mutual Life Insurance Co.*, 217 F. 818 (4th Cir. 1954); *People v. Hawthorne*, 293 Mich. 15, 291 N.W. 205 (1940); *Carter v. State*, 376 P.2d 351 (Okla. Crim. 1962); *Watson v. State*, 161 Tex. Crim. 5, 273 S.W.2d 879 (1954). In *Watson v. State*, the presiding judge commented in part:

A psychiatrist is certainly best qualified to pass upon a question of mental

psychologists in court have led to some peculiar rulings. For example, while a physician without psychiatric training was allowed to testify on the basis of physical examination concerning the intelligence of the deceased in a case of testamentary capacity, the trial judge refused to consider the contention of the opposing attorney that the establishment of intelligence is a function of a test administered by a qualified psychologist.<sup>7</sup> Today, thirty-five years later, it is unlikely that many judges would adopt such an extreme position. In another odd ruling, a psychologist was qualified as an expert in terms of education and experience but was permitted to give an opinion only as a layman and not as an expert witness on the question of whether the accused was sane at the time of the murder.<sup>8</sup>

The controversy between clinical psychologists and psychiatrists came to a head, at least as far as the law is concerned, in *Jenkins v. United States*.<sup>9</sup> The defendant, who relied solely on a defense of insanity, was convicted of housebreaking and several counts of assault. In ruling on the evidence given by the three defense psychologists, the lower court judge had instructed the jury as follows:

The court also holds that a psychologist is not competent to give a medical opinion as to a mental disease or a mental defect. Therefore, you will not consider any evidence to the effect that the defendant was suffering from a mental disease or a mental defect on June 10, 1959, according to the testimony given by the (three) psychologists.<sup>10</sup>

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illness . . . . We think that also of those qualified to give an opinion, superior to that of a layman, would be a practicing psychologist. . . .

161 Tex. Crim. at 8, 273 S.W.2d at 882.

In *People v. Hawthorne*, the concurring judges of the Michigan Supreme Court stated in part:

[We] 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 . . . .

[We] do not think that 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.

293 Mich. at 22-3, 291 N.W. at 208.

These decision presaged the eventual, landmark ruling in *Jenkins v. United States*, *infra* note 9.

Decisions excluding such testimony include, *e.g.*, *Frederick v. Stewart*, 172 S.C. 188, 173 S.E. 623 (1934); *see also*, Weitz, *An Expert Witness*, 12 AM. PSYCHOLOGIST 42 (1957). *See generally*, McCary, *The Psychologist as an Expert Witness in Court*, 11 AM. PSYCHOLOGIST 8 (1956).

7. *Frederick v. Stewart*, 172 S.C. 188, 173 S.E. 623 (1934).

8. Related in Stopol, *A Recent Court Experience*, 12 AM. PSYCHOLOGIST 42 (1957). An informal polling of the jurors by the defense attorney after trial revealed that at no time did the jury question the expertness of the testifying psychologist.

9. 307 F.2d 637 (D.C. Cir. 1962).

10. The circumstances of the case, the complete texts of the amicus curiae briefs,

On appeal both the American Psychological Association and the American Psychiatric Association presented amicus curiae briefs. In a 7-2 decision, the Court of Appeals reversed the trial court stating in part:

We agree with the weight of authority . . . that some psychologists are qualified to render expert opinion in the field of mental disorder. . . . [W]e hold . . . that the lack of a medical degree, and the lesser degree of responsibility for patient care which mental hospitals usually assigned to psychologists are not automatically disqualifications.<sup>11</sup>

Judge Fahy, in his concurring opinion, added:

The main feature of the present opinion . . . is its holding that psychologists may qualify as experts on the question of mental disease or defect under the standards set forth in the opinion.<sup>12</sup>

In the recent case of *United States v. Riggleman*, the Fourth Circuit Court of Appeals held that:

. . . [T]he determination of a psychologist's competence to render an expert opinion based on his findings as to the presence or absence of mental disease or defect must depend upon the nature and extent of his knowledge; it does not depend on his claim to the title of psychologist or psychiatrist.<sup>13</sup>

Under the *Jenkins* and *Riggleman* rationale, a mental or emotional status is not uniquely a medical matter and does not necessarily require the testimony of a medically-trained person; therefore, a properly-trained clinical psychologist is a qualified expert witness. Attorneys and courts may find psychologists more available or accessible—and doubtlessly cheaper—than psychiatrists. Psychiatrists are heavily concentrated in the larger, metropolitan areas of the country.<sup>14</sup> While this is also true of clinical psychologists in private practice, there are many more who are

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and the opinion of the court, are reproduced in Hoch & Darley, *A Case at Law*, 17 AM. PSYCHOLOGIST 623 (1962).

11. 307 F.2d at 643-46.

12. *Id.* at 647.

13. 411 F.2d 1190, 1191 (4th Cir. 1969).

14. See NATIONAL INSTITUTE OF MENTAL HEALTH, *THE NATION'S PSYCHIATRISTS*, Public Health Service Publication No. 1885 (1969). It is indicated that as of mid-1965, 108 of Indiana's 176 psychiatrists lived in a city with a population of 50,000 or more, while only 16 resided in non-urban areas of the state.

Experience suggests that the hourly rate of compensation for a psychiatrist in Indiana is from 25-50 dollars, whereas the average psychologist receives from 20-30 dollars.

located in towns and smaller cities by virtue of being on the faculty of a college or university.

While questions of mental and emotional condition probably represent the most common forensic utilization of the mental health professional, there are a number of other important occasions in which the testimony of a qualified psychologist could be of value to the court. Adjudication of competency questions, either to handle one's affairs in general or in specific instances such as testamentary capacity, may be aided by the utilization and interpretation of psychological tests. In custody cases, a specific competency—an ability to provide care in the best interests of a child—is in question. Although there are no fixed rules to follow in determining child-rearing ability, decisions of this nature often must be made by divorce courts and juvenile courts. The direct question is one of child welfare, but the personality of relevant adults is likely to be important in determining their impact on a developing organism. A psychologist's opinion may be based on a body of information which goes beyond his own tests or clinical impressions, such as reports by welfare workers, social workers, and general physicians, which he is capable of integrating into a meaningful whole.

The social psychologists can make a potentially useful contribution to the legal process where matters of the public mind are concerned. Consider, for example, trademark litigation. The Lanham Trade-Mark Act of 1946 states that a word or name cannot be used as a trademark if it is "likely to cause confusion or mistake or to deceive purchasers."<sup>15</sup> In litigation involving alleged violations of the Act, the central issue is the existence of confusion in the public mind, resolution of which necessarily requires an empirical measurement of the public's "state of mind," either by laboratory experiment or by a public opinion survey. In 1921, the Coca-Cola Company brought suit against a new corporation, the Chero-Cola Company, on the grounds that the name "Chero-Cola" constituted a trademark infringement.<sup>16</sup> The point at issue, of course, was whether or not the public would confuse Chero-Cola with the established brand name, Coca-Cola, and damage the latter's market. Controlled laboratory experiments to determine the probability of such confusion actually were carried out and testimony regarding them was received in the *Coca-Cola* case but was not placed in issue or commented upon. A public opinion survey was first received as evidence in 1940 in the case of *United States v. Aluminium Co. of America*.<sup>17</sup> Such opinion surveys were not given

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15. 15 U.S.C. §§ 1051 *et. seq.* (1964).

16. *Coca-Cola Co. v. Chero-Cola Co.*, 273 F. 755 (D.C. Cir. 1921).

17. 35 F. Supp. 820, 823-24 (S.D.N.Y. 1940).

any material weight until 1959 in the case of *United States v. E. I. du Pont*,<sup>18</sup> where a sampling of stockholders was taken to determine certain tax implications in the event that the government succeeded in its divestiture suit under section 7 of the Clayton Act.

The state of the public mind is also at issue in libel and slander actions and motions for change of venue. A poll or survey could aid the court in determining objectively whether or not a particular reference actually did bring public hatred, contempt, scorn or ridicule upon the plaintiff. It could ascertain if a sufficient number of citizens of a community had actually prejudged the guilt or innocence of a defendant to the extent that a fair trial would be improbable.<sup>20</sup> The psychologist would also be able to define "a sufficient number" and to estimate the improbability of a fair trial in numerical terms from the proportion of citizens prejudging a particular defendant.

In addition to rendering expert opinion and conducting experiments and surveys, psychologists have served the courts by reviewing scientific literature on a particular subject or issue, and presenting an overview. Probably the best known of these cases was *Henderson v. United States*,<sup>21</sup> in which segregation on a racial basis was successfully challenged. Psychologists reported on reviews of the social science literature indicating that segregation is based on an untenable concept of racial inferiority and is harmful to the public interest.

The research interests and expertise of psychologists extend into almost every area of human behavior. While there is no one psychologist who is an expert on all forms of human endeavor, there is probably at least one who is an expert in any particular form of behavior. Thus, the potential of utilizing psychologists as expert witnesses is considerable.

An automobile collision case may involve the claim that circumstances interfered with the vision of a driver. The experimental psychologist could be called to testify concerning such phenomena as the ability of the eye to perceive a yellow stop sign against a backdrop of the setting sun, the point at which the eye would first become aware of headlight beams of another car approaching at an angle of thirty degrees, or average human reaction time in applying brakes.

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18. 177 F. Supp. 1 (N.D. Ill. 1959). See generally, King & Spector, *Ethical and Legal Aspects of Survey Research*, 18 AM. PSYCHOLOGIST 204 (1963); Geiser & Newman, *Psychology and the Legal Process: Opinion Polls as Evidence*, 16 AM. PSYCHOLOGIST 685 (1961).

19. 15 U.S.C. § 18 (1964).

20. This has actually been attempted. See Woodward, *A Scientific Attempt to Provide Evidence for a Decision on Change of Venue*, 17 AM. SOCIOLOGICAL REV. 447 (1952).

21. 339 U.S. 816 (1950). See generally, Kendler, *Contributions of the Psychologist to Constitutional Law*, 5 AM. PSYCHOLOGIST 505 (1950).

Psychologists have been involved in assessing the behavioral effects of various kinds of consciousness-altering chemicals such as alcohol, narcotic drugs, barbiturates, and marijuana. Testimony on such matters might be pertinent in cases ranging from assault to homicide.

R. S. Redmount, who is both an attorney and a psychologist, suggests a number of possible legal uses of the psychologist, including the following, hypothetical instance. "Mrs. Fright" was a passenger on a commercial airline flight. During a period of bumpiness in the air, Mrs. Fright became hysterical, moaned and shrieked, shouted that the plane was going to crash and threatened to jump out of it. The steward, observing Mrs. Fright's panic, slapped her in the face as a therapeutic measure. It proved to be successful, and Mrs. Fright, who apparently suffered no physical injury, did not cause any more difficulty for the remainder of the flight. Later, Mrs. Fright brought suit against the airline and the steward for assault, claiming that she suffered physical and mental anguish and is now permanently fearful of flying, which handicaps her in the course of her business. The opinion of a clinical psychologist could bear on questions such as whether or not the steward's action was appropriate to correct Mrs. Fright's behavior and whether it is likely that it could result in a permanent fear of air travel; moreover, the witness could assist in a proper framing of the issue for the court.<sup>22</sup>

The legal profession to a large extent has neglected to utilize a large group of potential experts who have experience, training and competence in human behavioral problems. The contention can be made that at least one psychologist can be found who is qualified to render an expert opinion on a question concerning any form of human behavior. The remaining problem facing the individual attorney or judge is locating and enlisting the services of the appropriate psychologist expert. One solution for the court lies in the use of a psychological consultant, a knowledgeable senior member of the profession who is well acquainted with the interests and abilities of his colleagues. This consultant would be in an advantageous position to advise the court whether the opinion of a psychologist would be helpful as well as which particular psychologist would make the most appropriate expert witness. He could also advise the court concerning the experience and sophistication of psychologists called as expert witnesses by attorneys practicing in the court's jurisdiction. The cost of such a consultant service would be minimal. Assistance might even be obtained

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22. Redmount, *The Use of Psychologists in Legal Practice*, 11 *PRAC. LAW.* 23 (1965). See also H. LIEBENSON & J. WEPMAN, *THE PSYCHOLOGIST AS A WITNESS* (1964).



on a volunteer basis. In any event the cost would be more than justified by the implementation of justice which it would provide.<sup>23</sup>

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23. It should be noted that the use of psychologists as consultants to the court, as impartial witnesses, or as expert witnesses for one attorney or the other will not provide a panacea to the legal profession. Problems inherent in the use of any expert witness, such as the occasional "battle of the experts" or the stigma that attaches to the expert when he is labeled "for" or "against" one side of the litigation will be just as troublesome when the psychologist enters the courtroom as in the case of any other expert. See Lasson, *The Psychologist as an Expert Witness in Assessing Mental Disease or Defect*, 50 A.B.A.J. 239 (1964); Smith, *The Ideal Use of Expert Testimony in Psychology*, 6 WASHBURN L. REV. 300 (1967). [The Editors.]