1985

Criminal Justice and the Mental Health Expert: A Critical Examination

Elliot. Shamis
University of Central Florida

CRIMINAL JUSTICE AND THE MENTAL HEALTH EXPERT: A CRITICAL EXAMINATION

BY

ELLIOT SHAMIS
B.A., State University of New York at Albany, 1973

THESIS

Submitted in partial fulfillment of the requirements
for the Master of Arts degree in Clinical Psychology
in the Graduate Studies Program of the
College of Arts and Sciences
University of Central Florida
Orlando, Florida

Spring Term
1985

TABLE OF CONTENTS

INTRODUCTION 1

CHAPTER I: A History of Insanity 10

CHAPTER II: Law and Psychology 32

CHAPTER III: Psychologists in Court 57

CHAPTER IV: Looking Ahead 84

AUTHOR NOTES 90

REFERENCES 91

INTRODUCTION

The growth and development of the social sciences, particularly psychology, over the past 100 years, has been paralleled by an increasing use and acceptance of psychologists as expert witnesses within the criminal justice system. This is hardly surprising, and on the face of it, not at all controversial. Psychologists have come to be considered experts in matters of human behavior (Hoch & Darley, 1962), and concomitantly in the subset of criminally relevant behavior. As such, they are considered privy to information about criminals and criminal behavior which would otherwise be unavailable to courts and juries, and so have gained acceptance as expert witnesses.

Closer examination, however, of the psychology/criminal justice interface reveals an area teeming with ambiguity and controversy (Huckabee, 1980; Shah, 1969). At one extreme position are those who would severely restrict the role played by the social sciences in the courtroom (Morse, 1978; Szasz, 1979). At the other are those who would have the social sciences play a much larger role in determination of what exactly constitutes criminal conduct, as well as in the dispositions of criminal offenders (Bromberg, 1979; Lane & Kling, 1978; Monahan, 1977; Silverman, 1969). These two

poles, and the myriad of positions that fall between them, reflect the philosophical underpinnings of the varied conceptions of legal insanity. It is only through an examination of these conceptions, including their evolution over the years, that the role of psychology in the courts can be understood. Accordingly, the various tests of insanity that have been employed will be examined in some detail.

This is a difficult area to get to the core of, and not just because it concerns the interface of two quite different fields, law and psychology. Rather, it is proposed that an essential difficulty is the fact that practitioners from both fields underestimate, or even ignore, the basic differences between these areas. The examination of insanity tests will show that social scientists have been, and continue to be, woefully uninformed about the workings of the legal system and the principles underlying it. Lawyers and judges, for their part, have often been bewildered and mystified by psychology, thereby being unclear as to how to accommodate the genuine insights psychology can provide to the criminal justice system. Yet despite the ignorance and confusion that demonstrably pervade the interface, there is room for optimism. There is evidence to suggest that non-expert jurors can, and have been, able to understand the issues and make appropriate decisions in "insanity" cases (Fingarette &

Hasse, 1979; Moore, 1980; Witty, 1982). This is not to suggest that the psychological expert is superfluous, but simply overextended in terms of his/her courtroom role. The solution to the confusion may lie largely in understanding what juries have always understood, if only implicitly, about criminal responsibility.

Before examining specific insanity tests, one of the cornerstones of our criminal justice system must be explored. I refer to the fact that a criminal event involves not just a specific action, but some sort of criminal intention as well. In considering this area, it becomes clear that the traditional requirement of "mens rea," variously interpreted as guilty mind, evil mind or criminal intent (Platt & Diamond, 1978), virtually necessitates some form of insanity defense, regardless of what it is called or how it is worded. Traditionally and properly, the law requires an escape valve, which will serve to protect those not meeting the requirements of mens rea from criminal responsibility and prosecution. Understanding this escape valve is the key, and it is the same understanding attributed to juries above.

Our current system of justice is but the latest result of an evoluationary process, the beginning of which predates the formalized development of psychology and psychiatry by at least several hundred years. Yet, those early criminal justice systems invariably allowed for certain exceptions to

the usual presumptions of responsibility (Robinson, 1980). These exceptions generally included children, and those deemed mad, a judgement apparently made fairly easily: it required substantial evidence of extreme intellectual deficit and social malfunction. At this point, the decision to excuse was strictly a legal and social decision; there was simply no other way.

The early formalized insanity tests seemed to reflect the popular understanding of madness. Understanding may seem like a curious word to use, in light of the great lack of insight that prevailed, until relatively recently, regarding mental disorders. What was understood, however, if only implicitly, was the notion that lack of rationality, in certain situations and for certain persons, defeated, in part or in whole, the ascription of criminal responsibility (Fingarette & Hasse, 1979; Moore, 1980). This notion, this understanding to which I keep referring, has shown itself to be nearly impossible to satisfactorily codify, at least to date.

As psychiatry and psychology became formalized and accepted, the medical model of madness concurrently achieved widespread acceptance, both in society and in the courts. Indeed, most insanity tests developed over the past 100 years make reference to "diseases of the mind" (Hermann, 1983). That these diseases had unknown or obscure etiologies and equally unknown cures was of little

consequence, apparently. What was important was that there were now social sciences with which to understand and humanely deal with "madmen," and the enthusiasm engendered by this seemingly enlightened approach was bound to infuse the criminal justice system. The problems which this would ultimately engender were initially held in check by an understanding among juries (an understanding now often forgotten) that mental illness, whatever it was and wherever it came from, was just one factor to be considered in making judgements about criminal responsibility (Neu, 1980). Another limiting factor was the fact that insanity defenses were rarely used, and even more rarely used successfully.

In any case, the criminal justice system has been burdened with a succession of insanity defenses which have been ambiguous, have typically included references to knowledge both personal and not verifiable, and which have tended to confuse or even bewilder juries. Still, juries continued to make the necessary judgements. But from time to time, close calls would arise: For any given insanity test, there will be persons who will unquestionably be deemed insane, or equally unquestionably sane. But for others, judgement is more difficult. Fortunately, from the point of view of criminal justice, psychology and psychiatry had progressed to the point where they could provide experts to help the courts deal with some of their thornier cases.

Experts could now appear in court to explain madness: what it was (invariably a disease entity), where it came from, how to treat it, etc. This gave rise to a considerable difficulty, one which persists to this day. The problem is this: As a rule, we don't hold a person responsible for developing cancer or kidney disease, so it would seem reasonable to apply this same standard to mental illness as well. So, if criminally relevant behavior is directly resultant from mental illness, the alleged criminal clearly is not responsible for his/her act, certainly no more than a polio victim is held responsible for his/her paralysis. But if mental illness entails a lack of responsibility, what is left for the jury to decide? The answer, of course, is nothing, except perhaps which of the opposing experts to agree with. While this may allow for an illusion of judicial decision-making, it is clear that the significant determinations are made by expert witnesses. While the law has often, and recently (Morse, 1982), recognized that this is a bad way of conducting judicial business, the nature, or at least the wording, of the insanity tests themselves seem to invite the social scientist into the courtroom. While the invitation is understandable, the tests rarely define how the experts should contribute, or how these contributions should be considered. "A fundamental reason for the insanity defense is to provide a legal framework to aid the court, the jury

and attorneys in evaluating the testimony of psychiatrists and placing it in proper legal, social and moral perspective" (Stone, 1975, p. 227).

The mental health professionals who testify in criminal proceedings often disagree with each other, a situation engendering a variety of effects. As mentioned, disagreement allows the jury to make a decision, even if it is not the one they were chosen to make. And while the "battles of the experts," at least in highly publicized trials, often result in public dissatisfaction with both the legal and psychological professions, a more important problem is that such battles tend to obfuscate the essential nature of the decisions the court requires be made, as well as who is best equipped, legally, morally, and otherwise, to make them.

This, then, is at the heart of the matter to be dealt with in this paper: What is the nature of the relationship between the criminal justice system and the mentally disturbed offender? Specifically, three questions will be addressed. First, what is insanity? There is of course no unitary answer to this question, as amply evidenced by the multitude of insanity tests that have been, and continue to be employed. Accordingly, the historical and contemporary insanity tests will be reviewed, along with their roots in mens rea and other common threads, with an aim towards explicating the concept of insanity. Secondly, what is the proper relationship between psychology and the criminal

justice system? This is a controversial area, and the answer is critically and almost inextricably linked to the answer to the first question of what insanity is. To get at the answer to this question, some central concepts from both the law and psychology will be considered. Also, a number of conflicts, both within the field of psychology (particularly involving the medical model), and between psychology and criminal justice (e.g., determinism versus free will, and treatment versus social control) will be examined. Thirdly, what is the proper role of the expert psychological witness in criminal justice proceedings? Clearly, the answer to this depends very much on the answers to the first two questions. That, plus a consideration of what psychologists actually do in court, for better or worse, will lead to some conclusions about what, if anything, psychologists should be doing in court.

A strongly critical eye is required for getting to the heart of the problems at this interface, and many of the writers I will cite are certainly critical of much that they see. It must be acknowledged, however, that many commentators view both historical and contemporary developments in this area as quite benign, and see events as leading to an inevitable and happy union of criminal justice and clinical psychology (Monahan, 1977). This point of view will be considered as well.

Discussion of insanity suggests that it will never be finally and conclusively defined to everyone's satisfaction. These are matters, after all, about which reasonable people may reasonably disagree. Yet, despite the confusion that exists at the psychology/law interface, clarity of purpose, as well as an integration of many seemingly disparate viewpoints, is both desirable and attainable. I hope this paper will contribute to that end.

After considering future needs for both research and education, I will offer a summary and conclusions, but will not offer my own ideas for the "ideal" insanity defense. Most writers on this subject do that, and I have no wish to contribute to the clutter. I will, however, spend some time considering the Disability of Mind (DOM) doctrine offered by Herbert Fingarette (1979), which comes closer than most proposals in identifying the central issues, and dealing with them appropriately and competently.

CHAPTER I

A History of Insanity

Insanity is not a recently developed concept. As Moore (1980) points out, "legal insanity in some form has been an excuse from criminal responsibility for centuries" (p. 27). The criminal justice systems of most civilizations throughout history have recognized that certain persons who commit what otherwise would unequivocally be considered illegal acts should not be held responsible for these acts. I refer, of course, to situations that clearly go beyond the traditionally employed and commonly accepted excuses of ignorance, accident and compulsion; inadvertant homicide is not considered murder, otherwise illegal acts committed at gunpoint generally are not prosecuted, etc. To understand the nature of the excuses which legal insanity provides for, we need to turn to the concept of "mens rea."

Mens rea, variously interpreted as guilty mind, evil mind, or criminal intent, is a concept dating to antiquity:

> The principle of 'mens rea' or 'guilty mind' was recognized in the Talmud, which specified that minors, the deaf and dumb, mental defectives and the mentally disordered were not to be held culpable for crimes. The very harsh and punitive Greek Draconian Code also embodies mens rea in a very clear distinction between involuntary homicide and murder. Children and the insane were exempted from contractual obligations under the Code of Justinian. (Rieber & Vetter, 1978, p. 6)

Even at this early point, we can see the genesis of problems and questions which have confused and confounded society up to contemporary times. What exactly is mens rea? How does one clearly distinguish between a guilty mind and an innocent mind? Who is best able to make judgements concerning these distinctions? These, and other equally critical, substantive issues, will be dealt with in-depth later in this paper. But now, we need return to the historical review of the concept of insanity.

Though the concept of mens rea is ancient, "it remained for Christian ethics to extend and elaborate upon its metaphysical and pragmatic ramifications" (Platt & Diamond, 1978, p. 55). These extensions and elaborations take the form of a myriad of insanity tests, of which the most significant will be considered shortly. Insanity generally refers to a legal standard: "Legal insanity is a test of capacity for choice and action; it is a formulation designed to determine responsibility" (Hermann, 1983, p. 7). This definition highlights a point of overriding importance, that being, that insanity is, first and foremost, a legal concept. This is easy to forget, in light of the wide variety of popular usages the term has acquired, as well as the wide variety of misuses that the term is subjected to by both legal and mental health professionals. However, by keeping the primarily legal nature of insanity uppermost in our minds, we can facilitate our understanding and

resolution of certain sharply-contested issues, including expert psychological testimony, that are addressed later in this paper.

In his excellent review of historical insanity tests, Bromberg (1979) informs us that "the first available test of insanity dates to 1265, and was stated by Bracton, archdeacon of Barnstable: 'An insane person is one who does not know what he is doing, is lacking in mind and reason and is not far removed from the brutes'" (p. 5). It is worth noting that this earliest of insanity tests is composed of ordinary, everyday language, and suggests a judgement that ordinary, everyday people were quite capable of making. Of course, there was no alternative - the social sciences had yet to evolve - but this is precisely the point: Insanity was a viable concept centuries before there were mental health experts to explain what it was, as well as who deserved to be categorized as insane.

The next major test, enunciated by Sir Mathew Hale in 1671, stated that "such a person is laboring under melancholy distemper hath yet ordinarily as great understanding a child of fourteen years hath, is such a person as may be guilty of treason or felony" (Bromberg, 1979, p. 5). This early test points out an enduring problem with insanity tests, which concerns the ambiguity of the language with which they must be composed. In this case, the term understanding may certainly be variously interpreted. At

any rate, this test asserts a strong relationship between intellectual deficit and excuse from criminal responsibility. As Hermann (1983) explains, "Hale proceeds to explicit recognition of the defense of insanity; since liberty or freedom of the will presupposes understanding, it follows that where there is a total deficit of the understanding, there is no free act of the will in the choice of things or actions" (p. 25). So, if there is no free will, there can be no criminal intent, no mens rea, and no criminal responsibility ascribed.

In 1724 Judge Tracy, in the Arnold case, provided some needed clarification to the Hale test in elaborating on understanding: "Not every kind of frantic humour...points him out to be a madman as is exempted from punishment; it must be a man totally deprived of his understanding and memory and doth not know what he is doing, no more than an infant, than a brute, or a wild beast" (Bromberg, 1979, p. 6). It is interesting to note that whereas Hale apparently allowed for degrees of insanity, for Judge Tracy it was an all or nothing affair: "Rex vs. Arnold became authority for the proposition that total insanity was required for exculpation from a criminal conviction where madness was the proferred defense" (Hermann, 1983, p. 29). In any event, what both of these tests make clear is that although "craziness" may be a necessary precondition to a determination of insanity, it alone is certainly

insufficient for making that judgement. The question is not "is this person crazy"? but rather, "is this person crazy enough to be considered insane"?

Next to be considered is the Hadfield case of 1800. The defense attorney, Erskine, offered the following defense: "By insanity, I mean that state when the mind is under the influence of delusions, where the reasoning proceeds upon something which has no truth...but vainly built upon some morbid image formed in a distempered imagination" (Bromberg, 1979, p. 7). This defense was accepted and simplified (perhaps oversimplified) by Judge Kenyon: "If a man is in a deranged state of mind at the time, he is not criminally responsible for his acts" (Hermann, 1983, p. 32).

Several aspects of this test merit comment. For one, this test is a departure from "wild beast" in that the emphasis has shifted from the absence or deficit of intellect to the presence of morbid delusions. For another, this test seems to be a step backward in precision, for whereas Judge Tracy specified the conditions that would excuse, Judge Kenyon simply referred to derangement. Finally, Hadfield may be viewed as the first modern insanity test, insofar as it clearly anticipates one of the currently used tests, that of the American Law Insistute (ALI): "This charge (Hadfield) approached the standard most recently

adopted in one American jurisdiction (ALI), that where the capacity to appreciate or conform is impaired, the defendant is not culpable and cannot justly be held responsible" (Hermann, 1983, p. 32).

It must be mentioned at this point that we are now considering the time period when the medical model of insanity was beginning to hold sway. Indeed, "by 1800, many of the influential writers on the subject agreed that in nearly every case of insanity there was a disease of the brain" (Robinson, 1980, p. 37).

The last significant test prior to M'Naghten arose from the Bellingham case in 1812, which saw a change in emphasis from 'deprivation of understanding' to 'distinguishing good from evil'" (Bromberg, 1979, p. 7). Once more we see an erosion of intellectual criteria, clearly inherent in the idea of understanding, and substitution of criteria which are broader and ambiguous, adding as they do emotional and even religious components to the cognitive basis.

Perhaps the most well-known legal definition of insanity is the M'Naghten test (M'Naghten's Case, 1843). Although not a breakthrough in any real sense, the test is significant in that it is still widely used today (including in the state of Florida). The test itself states "that to establish a defense on the ground of insanity, it must be clearly proved that at the time of committing the act, the

party accused was laboring under such defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong." The emphasis on the ability to understand the difference between right and wrong has led many to refer to M'Naghten as the "right and wrong" test.

As stated, M'Naghten broke no new ground: "The 'right and wrong' test was used in England to determine the criminal capacity of children as early as the fourteenth century. It has been widely used in the United States for both children and the insane since 1800. The essential concept and phraseology of the rule were already ancient and thoroughly embedded in the law" (Platt & Diamond, 1978, p. 78). Yet even though M'Naghten said nothing really new, it is still in widespread use over 140 years later, and for that reason alone is deserving of close scrutiny.

One noteworthy aspect of this test is the reference to "disease of the mind." Although the medical model of madness had been gaining ground for some time, it had not been codified in law until this point. Since that time, the concept of "mental disease" has become an institutionalized aspect of virtually all insanity defenses, despite the fact that it is a concept of constantly changing, not to mention ambiguous criteria. "Common to all tests is the use of the concept 'mental illness' or 'mental disease'. However, it

is a common failure of these tests that they lack significant definition or provision of normative criteria for the concept of 'mental disease'" (Hermann, 1983, p. 129).

M'Naghten, in emphasizing knowledge of right and wrong, clearly establishes an intellectual, or cognitive definition of insanity, and as such, may be accurately viewed as a reversion to earlier standards. Consequently, M'Naghten, at least in terms of how it is most often interpreted, provides a relatively narrow definition of insanity, applicable to few people in rare circumstances. "The M'Naghten ruling has been viewed as a restrictive ruling reflecting an outmoded and discredited faulty psychology, which classified mental processes into cognitive, emotional and control components and considered a person as insane only if serious cognitive or intellectual impairment was evident. Consequently, the M'Naghten ruling tends to limit the definition of insanity to a condition suffered by the most deteriorated psychotics" (Rieber & Vetter, 1978, p. 49). This statement makes it clear why insanity defenses, in jurisdictions where M'Naghten is operative, are rarely raised and even more rarely successful. More importantly, however, this statement reflects an often seen and critical confusion about the relationship between criminal justice and social science. Specifically, Rieber and Vetter have based their remarks on a faulty assumption, namely that the criminal

justice system is obliged to follow trends and developments within the field of psychology, and to alter its standards of criminal responsibility accordingly. This point of view is not only logically indefensible, but potentially dangerous as well. The problem with subverting, even in part, the field of criminal justice to the field of psychology[1], especially considering the extremely disparate natures of these two areas, is that justice and our democratic ideals may be threatened. This will become clearer when expert psychological testimony is discussed, which will amply illustrate the dangers in question. For now, it will suffice to note an origin of these problems in M'Naghten itself, which exhibits the beginning of a shift in decision-making responsibility from lay juror to expert witness: "M'Naghten removes such considerations (e.g., delusions) from the opinions and reflections of jurors and locates them in the realm of 'expert testimony' where questions of physiology must be settled" (Robinson, 1980, p. 41).

Just a year after M'Naghten, an important decision was handed down in an American trial. The decision in the Rogers (1844) case broke with the past in asserting that simply the presence of mental disturbance might suffice to excuse from criminal responsibility: "The jury must acquit - even when there is a sense of right and wrong, even when the delusion and the act have no coherent relation -

when it is shown that the prisoner was of diseased mind and the act was the result of disease" (Robinson, 1980, p. 50). Despite its vagueness and absence of guidance it provides for making the required judgement, the Rogers case sustained an influence over considerations of insanity, particularly in the United States, for well over a hundred years. Indeed, the famous Durham rule of 1953, which will be considered shortly, is directly anticipated by Rogers.

As stated earlier, M'Naghten was a test that focused on the cognitive aspects of mental functioning. "The M'Naghten Rule asserts that responsibility is a function of the intellect" (Leifer, 1964, p. 825). But many authorities thought, and continue to think, that such a focus provided an incomplete, or even distorted understanding of those criminal acts and actors warranting a determination of insanity. Thus, "the claim that M'Naghten focused exclusively on cognition led to the development of the 'irresistible impulse' doctrine as supplemental to M'Naghten in some states" (Hermann, 1983, p. 38). The doctrine itself, first codified in the Parsons case (Parsons v. State, 1887), states that a person should be considered insane if "though conscious of the nature of the act and able to distinguish between right and wrong and know that the act is wrong, yet his will, by which I mean the governing power of his mind, has been otherwise than

voluntarily so completely destroyed that his actions are not subject to it, but are beyond his control" (pp. 886-887).

A problem here is that although irresistible impulse is generally considered as a supplement to M'Naghten, what it actually does is provide an alternative. This doctrine states that a person whose cognitive faculties are intact may still be found insane if his mind is disturbed in another area. "Succinctly put, the irresistible impulse doctrine is a test for insanity that holds that account should be taken of the effect of insanity upon emotions and will power" (Hermann, 1983, p. 38). It thus becomes clear that the adoption of irresistible impulse owes at least as much to the thinking underlying Rogers (and Durham) as it does to the perceived shortcomings of the M'Naghten rule.

The Durham decision (Durham v. U.S., 1954), also known as the "product test," simply states that "an accused is not criminally responsible if his unlawful act was the product of mental disease or defect" (p. 54). This test clearly reflects the thinking underlying Rogers, which refused to require a direct, causal relationship to be established between some specific aspect of mental disturbance and a specific illegal act. Instead, it requires only that the existence of some sort of mental disturbance be established, and a demonstration that, somehow, this disturbance resulted in a criminal act. This loosening of judicial standards reflects a triumph for the

medical model, which was indeed the intent. "This test was envisioned as an improvement on M'Naghten in that it moved away from moral judgments to the more factual basis of medical concepts" (Brakel & Rock, 1971, p. 381). Although the "factual" basis of psychiatric concepts is debatable at best (and will be explored later), it is a notion that has largely been accepted by society at large and by the judicial system in particular. It is therefore hardly surprising that "Durham was decided explicitly to facilitate psychiatrists in placing their knowledge before the court, which they felt they could not do under the M'Naghten test" (Moore, 1980, p. 37).

Though Durham was designed to allow greater latitude for expert psychiatric testimony, it in fact went too far. Psychiatrists moved away from the roles of advisors and providers of information, to the roles of decision-makers, from witness status to that of the triers of facts. Indeed, "many psychiatrists interpreted Durham as an invitation for them to decide who should and who should not be held criminally responsible" (Dershowitz, 1968, pp. 29-30).

The ability of psychiatry to expand its influence in court was further heightened by the nature of the terms used in the Durham rule, specifically mental illness, mental defect and product. This contributed to the impression that the required decisions were medical and not legal. Further, the varying interpretations these terms may be given, even

within the psychiatric community, tended to allow for a wide variety of psychiatric testimony. "The imprecision of the definitions of these critical terms are the greatest defect in the Durham opinion, and subsequent efforts at clarification did not prove satisfactory" (Hermann, 1983, p. 46).

The increase in psychiatric influence in the criminal courtroom necessarily resulted in a parallel diminution of the jury's power and responsibilities. Quite simply, the Durham rule eroded the traditional and rightful charge of juries to make judgments about criminal culpability. "One problem was that there was no standard by which the jury could make a determination as to whether or not the defendant ought to be held responsible if medical experts testified that the act was produced by a mental disease or defect" (Huckabee, 1980, p. 16).

This shift in the responsibility for judicial decision-making is directly attributable to the faulty assumption, discussed earlier, that M'Naghten was based on an outmoded psychology and was therefore inappropriate as a legal standard. In fact, the Durham rule is the best example we have of the confusion that pervades the psychology/criminal justice interface, and clearly illustrates how this confusion is linked to the inability, or unwillingness, of each field to come to grips with the essential and critical differences, in terms of philosophy, perspective and operations, that exist between the two fields. "(Durham)

changes the legal definition of responsibility from a competent intellect to a well integrated personality. This is to assume that the M'Naghten ruling was an erroneous characterization of human nature rather than a criterion for the ascription of legal responsibility, and betrays the psychiatric tendency to redefine all human events in its own terms" (Leifer, 1964, p. 827).

The Durham rule was subjected to substantial criticism, and was ultimately supplanted by the test proposed by the American Law Institute. The ALI test (United States v. Brawner, 1972), finalized in 1962 and now recognized as the standard for insanity within the federal court system, states that "a person is not responsible for criminal conduct if at the time of such conduct, as a result of mental disease or defect, he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law." Even a cursory glance at this test reveals that it contains nothing that is truly new, much less revolutionary. Instead, we have a modernized rehash of earlier tests, once again associated with the misguided assumption that legal standards should be formulated in accordance with contemporary psychological thought. "Basically, it recasts the M'Naghten test and the irresistible impulse test in

terms felt to be compatible with modern psychiatric opinion" (Hermann, 1983, p. 50).

It is not surprising that those who embrace the "misguided assumption" discussed above, who favor the increasing influence of psychology on the judicial system, are likely to view ALI as a definite advance over earlier tests. For example, psychiatrist Walter Bromberg, who views both psychiatry and criminal justice in terms of their potential for social engineering, thinks ALI is a better test: "The essential improvement over M'Naghten was the use of the word 'appreciate' rather than 'know' to include the full meaning of cognition with its emotional component" (Bromberg, 1979, p. 55).

On the other hand, and as had become customary in this review of insanity tests, we again see serious problems with the definition and interpretation of critical terms. "Appreciate" is one such term, which the ALI rule does not even attempt to define. Of course, if a jury cannot adequately comprehend the term, it is likely that psychiatry will be given that much more leeway to explain it. To the extent that this is valid, we have a better insight into the approval psychiatry bestows upon "appreciate," as well as a strong suggestion that psychiatry conceded little influence after all when Durham was left by the wayside.

A similar discussion is applicable to an even more contentious phrase, "substantial capacity":

> Mental illness or defect is defined variously by various authorities, but what constitutes substantial capacity? Where does capacity start to become insubstantial or when does it cease to be insubstantial, nonsubstantial? That is really the question which, when we take the stand in such matters, the courts have to grapple with. (Portnow, 1974, p. 7005)

Portnow asks some good questions, but offers no answers. This is not to single out Portnow, for these questions are not really psychiatric ones, and there is really no reason to presume that psychiatry has any special insight into them. Indeed, Huckabee notes that "over the years since the development of the ALI test, psychiatrists have conceded to me that they do not really know what the word substantial in the ALI test means" (Huckabee, 1980, p. 22).

Though psychiatry may be confused by the wording or phraseology of insanity statutes, such confusion rarely translates into reduced testimonial zealousness in the courtroom. Also noteworthy is the tendency of psychiatry to place the burden of resolving contentious issues completely upon the shoulders of the judiciary (Portnow says the courts have to grapple). This is accompanied by an equal and opposite effort on the part of the criminal justice system. Indeed, the literature is replete with examples of both camps washing their hands of problematic areas,

insisting that the other side must deal with them. This incessant shirking of what should be mutual concerns poses a significant impediment to progress is dealing with, much less resolving, problems of the law/psychology interface.

Though M'Naghten and ALI are the predominant insanity tests at this time, other standards are in use. California, for example, has been a leader in the development and use of the doctrine of diminished capacity. This doctrine is based on the assumption that "criminal intent - indeed the capacity for premeditation and malice, is altered by mental or emotional disorders and reduces the degree of the crime" (Diamond, B. L., in T. G. Harris, 1969, p. 55). Specifically, the doctrine holds that a defendant is held responsible for a lesser crime than he would be if there were no mental illness or incapacity (Harris, 1969).

The problems and shortcomings of the other insanity tests discussed earlier are generally applicable to diminished capacity, and need not be repeated here. However, all those problems take on a larger significance insofar as diminished capacity effectively increases the scope of psychiatric excusing. "A defendant's degree of mental impairment may qualify him for a successful defense of diminished capacity but not for support of the insanity plea. This is consistent with the cases and authorities. . .indicating that less serious mental

disorders are admissible under the mens rea concept than under the insanity defense" (Huckabee, 1980, p. 38).

There can be no doubt that diminished capacity represents an expanded, medical model insanity defense, with greater opportunity for, and a broader scope of expert psychiatric testimony. Not surprisingly, some curious defenses have been raised under diminished capacity. Perhaps the most notable is the "Twinkie" defense, successfully employed by Dan White, who in November 1978 killed San Francisco's mayor and one of its supervisors. The killings were apparently carefully planned and executed. Part of the defense included psychiatric testimony as to the effects of White's overindulgence in junk food. White was found guilty of a lesser charge, and was recently released from incarceration. There can be little doubt that "today, psychiatrists can be found to tell a jury that almost any stressful situation, from habitual gambling to a junk food diet should be considered in assessing a person's responsibility for his acts" (Newman & Rogers, 1983). Given the increased public awareness of, as well as public policy recognition of the nature of and problems regarding stress, the above definitely points in the direction of increased psychiatric influence on the criminal justice system.

The use of the term mens rea in the quote above about diminished capacity, requires explanation. At the outset of this paper, mens rea was defined as guilty mind, or evil mind, and certainly could not coexist with a determination of insanity. However, the term has now acquired, at least in this country, a new and specialized meaning, wherein mens rea is "used to denote specific mental states that are required, by the definitions of specific criminal offenses, to accompany the acts that produce or threaten harm" (Hermann, 1983, p. 111). This shift in meaning represents a change from a moral judgment to one that is morally neutral. This is viewed as a positive step by those who advocate the doctrine of diminished capacity, wherein psychiatric testimony directly on mens rea, in terms such as purposely, knowingly, recklessly, negligently, etc., is permitted. But it is clear that this process involves a marked departure from the intent of most insanity defenses, and is not a proper substitute for them. "The defense of insanity... does not necessarily deny that the accused possessed the mens rea incorporated in the definition of the offense charged; rather, it is an overriding 'sui generis' defense that is concerned not with what the actor did or believed but with what kind of person he is" (Hermann, 1983, p. 13). While this perhaps overstates the case, it does serve to remind us of the essential moral element inherent in most

insanity defenses, an element striking by its absence in the legally neutral mens rea, or diminished capacity defenses.

It is clear that this morally neutral approach allows for greater latitude in expert psychiatric testimony. Since the specialized definition of mens rea is inherent in virtually all criminal statutes, as expressed in the concept of criminal intent, the potential for greater psychiatric influence in criminal court is obvious. Indeed, "the ultimate victory for those who desire the medical model would be the total abolition of the traditional insanity defense, and substitution of wide open psychiatric testimony directly on mens rea" (Huckabee, 1980, p. 63).

One more test will be considered before concluding this history of insanity. I refer to the "justly responsible" test, formulated by Judge Bazelon, an active figure in the law/psychology interface. The test states that "a defendant is not responsible if at the time of his unlawful conduct his mental and emotional processes or behavior controls were impaired to such an extent that he cannot justly be held responsible for his act" (Hermann, 1983, p. 56). While in some ways this test is a vast improvement over the others I have discussed, it is of quite-limited utility. It puts the decision-making authority squarely in the hands of the jury, where it rightly belongs, by avoiding language which would

seem to require experts to assist in needed determinations, and even to make decisions themselves. It tells the jury what it needs to decide. Yet it doesn't provide a clue as to how the decision should be arrived at. Hermann (1983) elaborates on the pros and cons:

> A principle feature of the Bazelon formulation is that it avoids any explicit reference to mental disease or defect. This avoids the often misleading formulations of psychiatric diagnosis and nomenclature, and directs attention to the critical question of whether the defendant lacked understanding and the ability to make a meaningful choice of action...Under the justly responsible standard the jury is given the power to redefine the law in each case; the major defect of the justly responsible standard is that it fails to set a legal standard. (p. 58)

The above discussion of insanity is intended to provide an essential background to an investigation of expert psychological testimony. Several points bear repeating. First and foremost, it cannot be emphasized too strongly that "insanity is a legal matter, that is, a matter involving social and moral values and principles, and not simply a medical-scientific matter" (Neu, 1980, p. 82). Second, the concepts of understanding and rationality seem common to all insanity tests, either explicitly or implicitly. It is important to remember that these terms, although used by mental health professionals, do not belong to them, and are quite usable by and comprehensible to average persons. Finally, though I have criticized many

insanity tests for unduly allowing the expansion of psychiatric influence in court, it is important to note that a good insanity defense will provide for a sense of balance and perspective in criminal proceedings, in which mental health professionals are involved. "A fundamental reason for the insanity defense is to provide a legal framework to aid the court, the jury and attorneys in evaluating the testimony of psychiatrists and placing it in proper legal, social and moral perspective" (Huckabee, 1980, p. 66).

CHAPTER II

Law and Psychology

As a first step towards examining the confusion that exists at the psychology/law interface, we need first examine the particular confusions that each field brings to this juncture. Since the insanity defense is, as previously stated, a legal standard, I will begin with the law.

Insanity provides for an excuse from criminal culpability. But on what, precisely, is this excuse based? Moore (1980) outlines the commonly understood bases: "In criminal law as in morals, two general sorts of conditions excuse: ignorance that is not itself culpable, and compulsion. There are thus basically two kinds of traditional insanity tests: those based on the ignorance of the mentally ill accused person; and those based on some notion of his being compelled to act as he did" (p. 31). This statement at first appears to be both simply factual and not at all controversial. M'Naghten would appear to be a defense based on ignorance, while irresistible impulse would appear to be virtually synonymous with compulsion. However, upon close scrutiny, the relationships between insanity and ignorance, and between insanity and compulsion, do not hold up very well. In point of fact, ignorance is,

more often than not, clearly insufficient for criminal exculpation. I am no less guilty of murder if I kill Jones by mistake when I intended to kill Smith. The law does not allow me to forget that armed robbery is a crime, and if I attack someone under the mistaken belief that this person means me harm, this is still an assault. In short, ignorance per se would not seem a good basis for an insanity defense, yet this seems to directly conflict with the apparently clear cut relationship between ignorance and insanity which tests such as M'Naghten apparently embody. What then is the proper relationship between ignorance and responsibility?

Fingarette and Hasse (1979) provide a fascinating and compelling analysis of this issue, preparatory to the introduction of their "Disability of Mind" doctrine, which will be explored later. What they suggest is that it is the relationship between ignorance and insanity, and not ignorance per se, that is of critical importance:

> When we do allow exculpatory force to such a background of false beliefs, beliefs normally irrelevant to exculpation, what we require is their rootedness in mental derangement. This exculpatory condition is distinctive and essential, and is neither reducible to nor translatable into terms of mistaken or false beliefs, for these alone would NOT exculpate in this context. It is the well that is poisoned, not the cup. (p. 33)

In fact, the very notion of mistake seems to lose much of its meaning without a presumption of rationality. Without

the capacity to be correct, to choose correctly, it seems senseless to speak of being mistaken. It is clear that, at least in this context, mistake and madness are mutually exclusive concepts, and the former, therefore, can hardly be considered as good evidence for the latter: "If the insanity defense is to be reasoned about at all, then, it is essential to see at the outset that it is likely to be a distinctive defense whose real significance lies in its contrast with such defenses as ignorance or mistake, that presuppose the basic capacity for rational conduct" (Fingarette & Hasse, 1979, p. 25).

Perhaps the insanity tests themselves deal with this criticism insofar as they usually make reference to mental disease or defect. However, these concepts are fraught with their own problems, and their use does not really challenge the perception that it is ignorance, albeit perhaps an extreme case of such, that exculpates. The tests contain, however badly worded or expressed, the essential concepts necessary for understanding the exculpatory basis for the insanity defense. They simply fail to express the proper relationship between them, and so proper emphasis is misplaced: "In summary, the basic truth about the 'not knowing' and 'not appreciating' clauses is that they do not in themselves express an ultimately exculpatory ground. Rather, they in turn derive such exculpatory significance as they do have in the insanity context from the reference back

to their source in mental disability, in the more radical condition of mind that amounts to impairment of capacity for rational control of conduct" (Fingarette & Hasse, 1979, p. 43).

Fingarette and Hasse apply a similar analysis to the concept of compulsion. Aside from the perhaps insoluble problem of distinguishing an irresistible impulse from an impulse that is not resisted, it is clear that compulsion, per se, provides little, if any insight into "insane" criminal conduct. "Viewed from the standpoint of involuntariness as strictly conceived in criminal law, the conduct one sees in insanity seems to me a model of 'voluntary' conduct. It is (typically) purposeful, intentional and effectively executed; it is often premeditated, planned and prepared" (Fingarette & Hasse, 1979, p. 15). Crudely put, the "insane" killer wanted his victim to be dead, and obviously accomplished this. This is not to say that the killer may not rightfully be deemed insane, only that lack of voluntariness is a concept that is insufficient for arriving at that judgment. This assimilation of insanity to involuntariness finds its origins in dubious, complicated and obscure connections, and is therefore likely to continue to be a troublesome issue at the law/psychology interface.

And so we see that although insanity defenses appear to be, and function as if they are truly based on the traditional defenses of ignorance and compulsion, they are,

in fact, attempting to deal with a more profound truth, with a level of understanding that at once contains and transcends such particulars as ignorance and compulsion. Sadly, however, and perhaps only because of the deceptive simplicity with which these specifics present themselves, the larger, more significant but more difficult concept of rationality is deprived of the primary consideration it merits in determinations of insanity. Based as it is upon a long, historical tradition, this problem of improper emphasis, which is now a major point of confusion which the law brings to the law/psychology interface, will be difficult to overcome.

I have used the term responsibility before. In fact, this paper began by defining insanity as an excuse from criminal responsibility. However, the term can be, and is, used in different ways in different contexts, so some clarification is in order. Moore (1980) explains the retrospective use of the term, which is the operative usage in the context of insanity: "We hold people responsible for certain events in the past. We make such 'ascriptions of responsibility' based on a host of criteria, involving concepts of causation, intention, voluntariness and action, and matters of justification or excuse" (p. 25). This definition is useful for two reasons. Firstly, it correctly asserts that responsibility is an ascription - not a fact,

not a scientific question, not a problem of right and wrong - but quite simply a judgment or evaluation that all sorts of people have always made about all sorts of other people. Secondly, in showing that there are numerous criteria that may be considered in ascribing responsibility, it strongly suggests why the term is so variously used. People are free to ascribe as they wish, and given the variety of criteria they may consider, it is not at all surprising that ideas of what constitutes being responsible often differ significantly. It is not surprising, for example, that one person will consider a particular lawbreaker as clearly responsible and guilty of a crime, while the next will consider him as equally clearly non-responsible and insane. Neither person is inherently right or wrong; each is simply, for reasons involving personality, experience, culture, etc., making a different, and perhaps, equally valid ascription.

However, this process does not translate into court very well (recall Bazelon's justly responsible test). Juries cannot make up the law as they go along. Fortunately, the law has endeavored, if not always successfully, to develop a more consistent ascription of responsibility, based upon a much more limited set of criteria. I turn now to the prepotent criterion, understanding.

Understanding is another term which, like responsibility, defies simple and even singular definition. Again, understanding is properly viewed as a term of ascription. Furthermore, the term is illuminated by the relationship that exists between ascriptor and ascriptee. "Only if we can see another being as one who acts to achieve some intelligible end in light of some rational beliefs will we understand him in the same fundamental way that we understand ourselves and our fellow men in everyday life" (Moore, 1980, p. 61). This makes clear the fact that a determination that someone lacks, or does not lack understanding is a complex and social procedure, involving elements of individual psychology, social and moral judgment. Of course, this process is well suited to a court of law, where conflicts between individual and society are resolved, and moral judgments are constantly made. This should remind us that whereas specific aspects of understanding, or rationality, may be singled out for scrutiny and evaluation by professional social scientists, these reductions are not the same as, and are no substitute for, the larger and richer concept of understanding, replete with its philosophical and sociological components.

Having acquired a clearer sense of the concept of understanding, we can now examine its relationship to responsibility, of which it is a primary constituent. "The

Renaissance idea of individuality and the Enlightenment's emphasis on understanding as a precondition for responsibility combine to provide the essential preconditions for criminal punishment, i.e., individual responsibility. The insanity defense developed in the modern period as a device for precluding criminal responsibility where the mental condition of a defendant was such that he lacked understanding" (Hermann, 1983, p. vi). In short, where there is no understanding there is equally no responsibility. It would also seem to follow that when there is decreased or limited understanding, there should be a corresponding diminution of ascribed responsibility, and, therefore, criminality.

We also need to keep in mind that there is no automatic relationship between mental disturbance and deficits in understanding: "The significant issue, then, is not whether an individual suffered from some form of mental illness but whether, as a result of a mental illness, the person lacked understanding and control of his actions at the time he acted" (Hermann, 1983, p. 8). While the reference to mental illness actually confounds the issue, the statement is sufficiently awkward to illustrate the difficulty in trying to articulate the relationship between understanding, or rationality on the one hand, and ignorance and involuntariness on the other. The former terms form the context in

which the latter ones operate. Ignorance and involuntariness lose their meaning when divorced from the more fundamental, more meaningful, and perhaps more human concept from which they spring. I turn now to another confounding construct, namely mental illness.

The concept of mental illness is an integral part of the concept of insanity. All insanity tests in current use make explicit reference to mental illness (or mental disease, or mental defect, etc.). Of course, this reference to mental illness both facilitates and sustains the use of psychologists as expert witnesses in court. However, no insanity test specifies precisely what is meant by mental illness, or even elaborates on meaningful criteria. Rather, it is presented as a given, as a unitary, precise and accepted concept about which the psychological community has achieved consensus. It is presumed to be a matter not analagous to, but coequal to physical illness. In short, mental illness is considered to be a matter of fact, a fact about which experts may be expected to provide specialized information and insight. Just how valid is this assessment?

Leifer (1964), in an analysis akin to Moore's earlier remarks about responsibility, challenges the "factual" nature of mental illness: "Neither 'intention' not 'mental disease' are facts, but are ascriptive terms like responsibility...The determination that a defendant has mental illness is based on certain facts about his behavior,

and is therefore, let us be clear, not an additional fact, but a name for a class of facts" (p. 829). Writing over 20 years ago, Leifer seems to have foreseen the ascending position of the concept of mental illness in insanity considerations, and his criticism is now more than ever well taken, at least as an attempt at balancing the now almost uncritical acceptance of this concept. On the other hand, this critique does little more than illustrate the distinction between physical and functional disorders, a distinction which, in and of itself, has little relevance to, and holds no interest for criminal justice. However, upon further investigation, we arrive at more complex and compelling issues of science and philosophy, issues largely ignored by criminal justice, and poorly understood when they are considered. In short, we shall discover that it is not so much the concept of mental illness that poses problems for the court system, but rather its rootedness in a social science which, in many ways and perhaps almost by definition, translates quite poorly to the legal arena. This idea will be explored shortly, but first I need turn to an important aspect of mental illness, about which people have had their "facts" straight for a very long time.

I have been using the term mental illness in its primarily technical and professional sense (or senses). Despite the many and varied uses and meanings it has, mental

illness is a central concept in all the social sciences. However, it is also a concept which the population at large has used, in one way or another, for centuries. Further, the popular concept has remained relatively stable, consistent and consensual to this date. "Our ancient paradigm of mental illness...is reserved for those gross deviations from intelligibility we still capture with the more severe statements, 'he is crazy,' or 'he is insane,' or 'he is mad.' These notions capture the essential notion of the ancient conception of mental illness as madness; that mentally ill people are different from us in ways that we find hard to understand" (Moore, 1980, p. 60). Once again we see the centrality of the concept of rationality, both as a criterion for ascribing responsibility, and also as a significant process within those doing the ascribing. Once again we see the determination of insanity to be a social and moral procedure. Moore (1980) elaborates on the criteria involved in the "popular" conception of mental illness: "There is an old, socially-sanctioned, well established set of views which supports the identification of mental illness only with the violent, extreme psychoses, and within this context of ideas, mental illness emerges as the ultimate catastrophe that can happen to a human being" (p. 61). These views are contemporary as well as historical, and are in fact the bases for many insanity

tests. Indeed, Moore goes on to point out that "each of these tests is best viewed as an attempt to adjust the then prevailing views about mental illness to well established moral and legal paradigms of excuses from responsibility" (p. 31). One might well ask at this point where the problem is! We have seen that the prevailing views about mental illness have been relatively constant, and legal paradigms generally exhibit a similar constancy. I suggest that a major problem has arisen due to the substitution of a technical and professional meaning of mental illness for the popular and historical usage just discussed. When Moore (1980) says that "mental illness has for centuries been a concept dealt with by the law because it negates, in some way or another or to some degree, the basic postulate of responsibility on which the law rests" (p. 25), he is clearly referring to the popular usage, a meaning which virtually implies a tautological relationship between mental illness and insanity. Further, this meaning recognizes, and indeed compels us to recognize the social and moral nature of the concept of mental illness, and leads us to an understanding of insanity that is non-technical, and not professionalized. "Mental disease, at least in relation to criminal insanity and responsibility, is not a purely medical notion. It is not a matter simply for experts to decide; it involves the sorts of questions of social and

ethical value that ordinary lay people who serve on juries have equal competence to consider" (Neu, 1980, p. 86). However, it is clear that this is not the sense of mental illness used by most mental health professionals, nor is it much in evidence in the court system. Rather, it has been superseded by a more technical and professional meaning(s), a meaning that though perhaps useful and fruitful for purposes of psychology, poses significant problems for the legal system. I turn now to this professionalized usage of mental illness, and to a consideration of how it and its rootedness in social science greatly confounds issues at the interface.

If the popular usage of mental illness entails a social and moral determination, then the professionalized usage entails a scientific one. It is largely due to the presumed scientific nature of their endeavor that mental health experts have achieved status as expert witnesses. As such, they can provide the court with factual data pertaining to mental illness. But how factual are the facts? How scientific is the endeavor? Part of the answer is suggested by the generally agreed upon idea that the medical model of madness provides the framework for discussing and evaluating mental disorders. Instructive here is the fact that we are dealing with a medical model, not medicine, an analogy and

not the thing itself. Perhaps then, we are also dealing with an analogy of science, and not science itself?

Robinson (1980) points out that "for an undertaking to be scientific, it must frame its explanations in terms of universal laws, which is to say that it must be in possession of such laws" (p. 23). The social sciences, the mental health sciences, do not appear to be in possession of such laws. For one thing, psychology's insights and understandings are largely statistical in nature. This is to say that we know much about the aggregate, but little for certain about particular individuals. Two parts hydrogen and one part oxygen will always produce water, but human individuals are not nearly as predictable as molecules. Further evidence is suggested by the fact that science attempts to explain by utilizing causes, while psychology more often refers to reasons. These two terms are not properly interchangeable, and attempts to do so result in serious confusion. Causes always have effects, and so are experimentally manipulable. Reasons, however, in referring to mental or logical processes, are more elusive, debatable, and somewhat limited in terms of predictive utility. Of course, matters of psychophysiology, psychopharmocology, nutrition, etc., are areas where causes may be properly considered, but then these areas have at least as much to do with medicine, with the traditionally understood sciences, as with psychology. In short, the social sciences "form a

separate class of inquiries, and the separation lingers no matter how many of the methods, concepts or findings they might borrow from genuinely scientific undertakings" (Robinson, 1980, p. 26).

I do not mean to suggest that psychology is not a science, and its introduction into court therefore inappropriate. In fact, when considered unto itself, or even as part of the larger system of social science, psychology would appear to meet many of the criteria for scientific endeavor. For example, a well-constructed psychological experiment will conform to the same sorts of standards and practices as will one in physics. Further, psychology has achieved numerous and important insights and understanding across the entire spectrum of human experience. Nonetheless, it must be conceded that psychology, regardless of its success, or the extent to which it employs the scientific method, is a breed apart from traditional science. Consequently, many of its concepts need to be considered as differing in kind, not just degree, from the more traditional counterparts. Shah (1969) considers this in discussing the concept at hand:

> It appears, then, that in contrast to the fairly specific objective and precise criteria for determining physical disease, the criteria and norms used in defining mental disease are neither specific nor objective, nor are they separable from a multitude of ethical and social considerations inherent in the labeling process. Not surprisingly, therefore, the term 'mental disease'

> is often applied in a somewhat indiscriminate way to a motley collection of interpersonal and social behaviors, judged deviant according to varying psychological and cultural norms used by persons applying such labels. Understandably, therefore, the definitions tend to be vague and are often remarkably circular and lacking in uniformity and reliability. It would seem that the term 'mental disease' is actually used in a metaphorical sense to refer to a variety of social and psychological maladjustments and related human problems...The term seems at times to be used as a ready explanation for almost any type of behavior that does not make sense, reveals no clear or reasonable motivation, or disturbs our sensibilities. (p. 24)

Again, this is not to argue against the value or utility of mental illness as a scientific concept. For social scientific purposes, its similarity to more standard scientific conceptualization is more than sufficient. However, it is through its interaction with other fields of endeavor, particularly fields that are decidedly non-scientific, that the significant differences from traditional science come to the fore and pose problems of understanding. Robinson (1980), elaborating on his earlier remarks about universal laws, points out that in law:

> acquittal is based on reasonable proof that the disease was relevantly connected to the act, and was not merely coextensive with it. What is required is convincing proof that the overwhelming majority of human beings, were they similarly affected, could be plausibly expected to commit the act of which the personal stands accused. This is to say that we require proof that the act was governed by nothing less than a law of nature. (p. 61)

Except for matters of brain physiology and chemistry, psychology possesses few, if any, laws of nature (Robinson,

1980). But this would be but a minor problem if only it were recognized. Instead, the substitution of the specialized meanings of mental illness, those used by professionals in psychiatry and psychology, for the long standing societal meanings has gone largely unnoticed. Furthermore, this shift in meanings, which both constitutes and represents the ascendance of the medical model of insanity within the criminal justice system, is at once a cause and effect of increased psychiatric activity in the courtroom: "An important, if subtle, consequence of psychiatric involvement has been the gradual introduction of a medical model in place of the law's efforts to articulate legally relevant criteria. The cost of this substitution has been confusion of purpose" (Dershowitz, 1968, p. 29).

The problem, then, is not that psychology is not a bona fide science wherein, accordingly, mental illness is not a legitimate concept. Rather, in refusing to recognize, much less clarify, the essential differences between physical and mental illnesses, psychology has allowed itself to answer questions it cannot answer, and indeed should not even be asked. For example, the post-diction of mental states by experts is at best a dubious proposition. Further, such post-diction becomes more problematical when it opens the door to testimony on such non-psychological issues as culpability and responsibility. The ascendance of the medical model, with its reliance on the mental illness

concept, has confused both judges and juries, and distracted them from their primary task of evaluating and resolving disputes between individuals and society, disputes which involve essentially moral and social considerations. So long as juries are not informed about the special, unique nature of such "facts" as mental illness, and so long as mental illness remains an integral part of insanity statutes, continued confusion will result. Moore (1980) reminds us of the essential task of the jury: "If criminal law is to reflect our shared notions of culpability, an excuse from punishment based on those moral notions ought to utilize those same moral criteria. The only question appropriate to juries is thus one appealing to their moral paradigm of mental illness: Is the accused so irrational as to be non-responsible?" (p. 62).

To this point, I have discussed a number of conflicts and controversies that operate at the law/psychology interface. A question that naturally arises is whether these conflicts are deep-seated and inherent in the interface, or are just practical, albeit complicated matters that we could reasonably hope to resolve. Sadly, analysis suggests that the former is the case. At its most basic level, the law operates on an assumption of free will. It has always been such, and indeed it is hard to imagine how the law could function without a presumption of individual free agency. Psychology, on the other hand (and

particularly the psychology of the medical model), operates from an almost completely opposite perspective, that of determinism. The insights of quantum physics, with its emphasis on uncertainty and indeterminism, not withstanding (which is quite legitimate, since they have largely been lost on psychology) (Shamis, 1976), an endeavor which views itself as scientific, which strives to explain and predict, and which prides itself on its moral neutrality, could hardly function without a deterministic presumption. Huckabee (1980) summarizes the conflict:

> Another problem is the inherent determinism of psychiatry, which conflicts in principle with the notion of free will. The freedom of will concept has been a cornerstone of the criminal law for centuries. The deterministic training and attitude of many psychiatrists is in an entirely different tradition. It has been a major stumbling block in the relationship between lawyers and psychiatrists in criminal law matters. (p. 8)

This is clearly a conflict of principles, of basic premises, which not surprisingly does not allow for neat and simple resolution. In fact, the insanity defense may be viewed as the fundamental expression of this conflict. Stone (1975) concludes that "the insanity defense is the contradictory juncture between a deterministic modern theory of causes of action, and an enduring theory of the morality of action. I conclude that the contradiction is insoluble, because the epistemological structures rise on different foundations" (p. 227).

Several particular examples of this contradiction may serve to illuminate some of the confusion existing at the interface. One concerns the opposite kinds of decision rules employed by the law and psychology, rules which both give substance to and amplify the essential incompatibility between free will and determinism.

> The basic legal decision rule in criminal law states: 'When in doubt, acquit.' The general rule in medicine may be stated as follows: 'When in doubt, continue to suspect illness.' There is a fairly common set, not only in psychiatrists, but also in clinical psychologists, psychiatric social workers and psychiatric nurses, to look for signs of psychopathology and maladjustment. (Shah, 1969, p. 26)

This helps to show how a specific act, by a specific individual, can be viewed so disparately by two different fields. These fields reflect two different viewpoints, and stem from two very different, and basically different, ways of making sense of the world. This poses no problem when each field stays within its particular confines. But put in the same room (i.e., a courtroom), the conflict becomes apparent and troublesome.

Another aspect of this conflict becomes apparent in contrasting the treatment orientation of psychology with the punishment model employed by the criminal justice system. A psychologist is quite properly concerned with a specific client's psychological dysfunction in particular, and this client's overall welfare in general, while the court is primarily interested in an accused person's particular

criminally relevant action, and the larger issue of the relationship between that action and society. Once again, these two orientations do not mesh well. "The treatment and welfare orientation of psychiatrists is a major factor in the continuing problems of criminal law and psychiatry. The interests of justice are, to a significant extent, limited by the treatment-oriented feelings of psychiatrists, rather than the law" (Huckabee, 1980, p. 8). This is to suggest that mental health professionals, when appearing in court in their professional capacities, are to a certain extent bringing along their own rules, and resisting the use of others. Twenty years ago Judge Warren Burger (1964) said he had "heard psychiatrists frankly say that if they conclude that their patient is ill and in need of treatment, they consider it their professional obligation to try to make certain that he goes to a mental institution rather than a prison, even if it is necessary to 'tailor' their expert testimony to accomplish that end" (p. 7).

This conflict between treatment and punishment orientation is clearly evident in considering evidentiary standards. While useful evidence may properly be obtained from a wide variety of sources, the court is in no way obligated to use this evidence in the same way as it is used by the source professionals providing it. "While medical evidence, including medical diagnostic criteria, is certainly relevant for making a determination about

capacity, it is unlikely that the same conceptual criteria used for determining need of care and treatment will be congruent with the criteria used to determine capacity for conforming conduct" (Hermann, 1983, p. 129). Simply put, while an individual may meet all the diagnostic criteria to unquestionably merit a determination of psychopathology, there is no parallel, necessary relationship between the same evidence, when used in court, and any legal conclusion. As has often been mentioned, insanity is not a psychiatric concept, and so there exist no diagnostic criteria for it. "While psychopathological diagnosis might suffice for the mental health professional, what the law requires is a social and moral determination that the person in question is so fundamentally different from others by virtue of his or her craziness that he or she cannot be considered a normal person to whom the usual rules apply" (Morse, 1978, p. 392).

Once again, the decidedly non-scientific nature of insanity determinations is revealed. We need to keep reminding ourselves that although science can illuminate many of the aspects of human existence, it cannot answer, and certainly not by itself, moral questions. This in no way suggests that psychology cannot or should not provide information to the court relating to considerations of insanity, but only that the experts should not draw final

conclusions. Szasz (1984) quite accurately summarizes these concerns:

> The fact is that the distinction between disturbance and depravity - between madness and badness, between mental illness and criminality, call it what you will - is not a specialized or technical judgment doctors can make because they possess a medical degree; or psychiatrists can make because they possess training in diagnosing and treating mental illness...The distinction is a 'moral judgment,' which is why a jury, and no one else, is supposed to make it. (p. 148)

The preceding has been an attempt to explore and explicate some of the conflicts between the law and psychology, conflicts of both basic principles and practical orientation. However, these conflicts are reduced to only minor proportions when the two systems are viewed as parallel, if not similar, institutional mechanisms for achieving social harmony. Bromberg (1979) focuses on the similarities between the two fields in his analysis:

> Both law and psychiatry, in spite of their differences in conceptualization, procedures and techniques, seek to codify, understand and correct human misbehavior through punishment, rehabilitation and psychotherapy, respectively. Viewed broadly, the law codifies misbehavior in terms of the degree of the crime, while psychiatry codifies maladaptation in terms of diagnosis. The law aims to assess responsibility for misbehavior, i.e. crime, through the concept of intent, specific or general; psychiatry aims to assess the genesis of criminal action via study of the criminal's mental conflicts and personality trends. The law's goal is to modify behavior through punishment, rehabilitation...; psychiatry's goal is to modify misbehavior through medical therapy or psychotherapy. The justification for law is the attainment of justice in our socio-economic milieu; the justification for psychiatry is

> balancing the individual's bio-psycho-social system. Both disciplines represent attempts at a kind of social engineering. (p. 3)

While it is clear that both the law and psychiatry, at times and in part, assume functions which may usefully be considered as furthering social engineering purposes, to characterize each field as such is unwarranted. For one thing, most mental health professionals, and I suppose most legal people, would reject the idea that their primary function is social engineering. Bromberg's conception of psychiatry is rather narrow, certainly not universal, and largely outdated, stressing as it does adaptation, while ignoring such factors as growth and change. More importantly, it is clear that the majority of people seen by psychiatrists do not misbehave, certainly not in a legally relevant sense. Indeed, those deemed mentally disturbed show no greater inclination to criminality than does the population at large (Morse, 1978). Finally, in ignoring the important distinctions between the two fields, Bromberg seems to suggest that greater integration is desirable and easily attained, which in fact suggests increasing psychiatric influence in court.

A similar predisposition to increase psychiatric influence in court may be seen in the suggestion "that persons currently labeled 'criminal' and persons currently labeled 'mentally ill' should be exposed to the same kind of judicial decision-making process. Different directions

would be taken only after the decision to deprive the person of his rights had been reached" (Penn, Stover, Giebink and Sindberg, 1969, p. 11). This idea, which clearly aims at eliminating the insanity defense as we know it, shares with Bromberg an implicit belief that a jury of peers is insufficient, or unqualified, to make the needed judgments. It is this kind of thinking which underlies the increased involvement of mental health professionals in court. I have thus far tried to show how this thinking is based on confusion and error, and to suggest that what appears to be progressive attempts at improving our criminal justice system have actually subverted some of its most basic tenets, and put the whole system in peril. This will become clearer in the final part of this paper, when the specifics of expert psychological testimony are examined. Neu (1980) provides the moral that I have tried to illustrate in this part: "What may seem an enlightened and humane movement for reform, may in fact constitute an assault, a dangerous assault, on freedom and dignity" (p. 100).

CHAPTER III

Psychologists in Court

Having examined some of the social, moral, legal and psychological issues relevant to the law/psychology interface, and having attained some insight into the origins, intent and meaning of insanity tests, it is now time to turn to a consideration of psychologists' actual conduct in criminal courtrooms, particularly those where insanity defenses are being employed. Psychologists fill a number of roles in criminal justice: they play a major part in determinations of competency to stand trial, they offer predictions of dangerousness for certain defendants, and they file amicus curiae (friend of the court) briefs to provide the court with information needed for meaningful adjudication of particular cases, generally through such organizations as the American Psychological Association (Kolasa, 1972).

Most importantly for purposes of this paper, psychologists serve as expert witnesses, for both the defense and the prosecution, in trials where an insanity defense has been offered. Kolasa (1972) provides a working definition of an expert witness: "An expert witness must be able to deduce correctly from hypothetical facts related to some profession, science or occupation beyond the scope of

the average layman and must have the knowledge, skill or experience in that area to help the triers of fact in his/their decisions" (p. 502). Two questions immediately present themselves. First, is psychology even relevant to insanity defense considerations? Second, is expert psychological testimony genuinely helpful to the jury? One must conclude that these questions are presumed to be answerable in the affirmative, given the relative lack of attention they receive from professionals in this area. Indeed while the literature abounds with material which instructs on how to be a better expert witness or how to better deal with opposing expert testimony, there has been relatively little comment on the proper role, much less the mere propriety, of expert psychological testimony. Gass (1981), in reviewing a study of the law/psychology interface, also notes this unfortunate phenomenon:

> The chapter devoted to the expert witness is disappointing insofar as it skirts the fundamental issue of what the psychological expert's role in the courtroom 'ought' to be. As psychologists enter their seventh decade as expert witnesses in the U.S., a few scholars have begun to challenge the utility of psychological techniques and testimony in resolving certain legal issues. The authors...pay scant attention to the question of whether the science of psychology, in general, is sufficiently accurate to justify its acceptance by courts as reliable and valid scientific evidence. (p. 339)

So even though the existence and practice of expert psychological testimony is tacitly approved of by the psychological community[2], the questions asked above are

still open ones, answerable in a wide variety of ways. Responses range from banishment of psychologists from court, to giving preeminence to psychological evaluations over legal determinations. The remainder of this paper consists largely of an exploration of these various responses, with an aim towards elucidating what the role of the psychological expert ought to be, if in fact psychologists are worthy of expert status in the first place.

The participation of psychologists in insanity cases has come to be considered as both necessary and natural. Bromberg (1979) explains the predominant viewpoint when he states that "interference with responsibility for crime requires psychiatric evaluation to aid the court in unraveling such kaleidoscopic kinds of human behavior" (p. 59). However, this seemingly neutral explanation for expert psychiatric testimony in fact begs the question, insofar as no justification for the "requirement" is offered. In truth, the behavior of all people, disturbed or not, is more or less equally kaleidoscopic, yet psychological testimony is deemed irrelevant to most criminal proceedings. Further, the indisputable fact that insanity defenses predate the modern sciences of psychology and psychiatry argues against the "necessity" of expert psychological testimony. I am by no means disputing the propriety of having psychologists in court, only the view that they are necessary to the process. In fact, it is

conceivable that an insanity case could be tried without experts at all (though I know of no such case). Nonetheless, psychologists are in court because defense attorneys ask them to support their clients' claims of insanity, and also because prosecutions need their own experts to refute those of the defense. Given the obligations of a defense to do all it can on behalf of its client, this practice appears legitimate and acceptable (although again, not necessary). However, this legitimacy has been challenged on the grounds that the testimony psychologists offer does not merit expert status.

One line of attack upon expert psychological testimony is based upon the wide variety of such testimony that appears, finding its ultimate expression in the by now well-known courtroom battles of opposing psychological experts. The question asked is how can a true science offer two opposing views simultaneously? Of course experts from many fields disagree, and this does not in itself diminish the legitimacy of providing expert testimony. However, this issue can be seen as part of the controversy over the scientific nature of psychology, as discussed in Chapter II. At that time, it was suggested that psychology could rightfully and usefully be considered as science, albeit science with a difference. But for many, this difference is deemed too large to represent merely a difference in degree.

It is viewed as a difference in kind, the difference between science and non-science. And indeed, the wide variety of expert testimony that even a single case may elicit is more easily understood within a non-scientific context. Newman and Rogers (1983), non-scientists both, offer that "psychology and psychiatry are a conglomeration of speculative theories, and generally the theory that a particular psychiatrist will choose is chosen for reasons other than scientific validation. He likes the sound or feel, or the way the theory works for him." The various "camps" in psychology do not spend much of their time accusing each other of being wrong, yet these camps stem from widely divergent theoretical positions, and result in equally diverse practices. Psychiatrist Leifer (1964) arrives at a similar conclusion: "It is a fact that the psychiatrist is using his personal judgment, and not that psychiatry is a young or inexact science, that explains the notorious disagreements between psychiatrists in courtroom procedures" (p. 827).

Robinson (1980) is another who challenges the presumed scientific nature of psychology, and in so doing even excludes the possibility of meaningful expert testimony:

> At present, given the nature of law as an institution and given the state of the 'social sciences,' there can be no meaning attached to the term 'expert testimony' as that term is used in connection with the insanity defense. There is no

> science of 'mental disease.' All that 'expertise' can refer to here is a textbook knowledge of tests of doubtful validity, and a clinical knowledge of some of the eccentricities of the human mind. By none of the historical standards does crime qua crime qualify as a 'disease.' By none of the historical scientific standards does psychiatric or psychological testimony qualify as 'evidence,' since such testimony does not confine itself publicly verifiable facts. (p. 63)

Robinson's conclusion represents one extreme position on this issue, yet his argument is well-taken, and could usefully be considered as an attempt at balancing what has been a largely uncritical acceptance of expert psychological testimony. One problem with the argument is the repeated allusion to "historical standards." These standards are by no means cast in stone, and might reasonably be expected to evolve and adapt to changing times. The reference to "publicly verifiable facts" is important, but is simply reflective of Robinson's "non-scientific" critique, and in no way extends the argument.

The question remains: Is psychology science, or not science, or science but different? The answer is debatable, but the question may in fact be academic, or even irrelevant. Whether good science or bad science or something else entirely, psychology as a field of endeavor, as a repository of immense amounts of information about human beings, is clearly the best available source of information about human behavior. Psychologists may know

less about human behavior than dermatologists know about skin, but no one knows more about human behavior than psychologists. The game may be primitive and sometimes confusing, but it is the only game in town, and psychologists would seem entitled to expert status, if only by default. Besides, all of these arguments seem based on a faulty assumption, namely that expert testimony needs to be scientific. Recalling the generic definition of expert testimony provided earlier, this is simply not true. Professional trade organizations, among others, provide expert witnesses without making any claim to being scientific.

The following remarks by Ziskin (1975) are worth citing at length for several reasons. They clearly summarize the "non-science" argument against expert psychological testimony. They also provide some insight into a practical and very real basis for appreciating the use, growth and acceptance of such testimony. Finally, it inadvertantly provides a means of understanding, possibly even resolving, the confusion centered on this issue:

> Despite the ever increasing utilization of psychiatric and psychological evidence in the legal process, such evidence frequently does not meet reasonable criteria for admissibility and should not be admitted in a court of law and, if admitted, should be given little or no weight. It is unfortunate that because of the need of the courts for the assistance they hope these 'experts' can provide, because of the requirement that attorneys use any means legally available to

> advance the cause of their clients, and because of the ignorance or unwillingness to face facts on the part of the experts involved, such testimony continues to be accorded scientific status. In the light of current scientific evidence, there is no reason to consider such testimony as other than highly speculative. (p. 1)

Ziskin subverts, albeit understandably, his own argument when he refers to the "scientific status" of expert testimony. He clearly misses the point. He implies that the judgment of psychology by science is the critical issue, when the real issue is the law's judgment of psychology which, as discussed above, need not involve considerations of science at all. This can be explained by again returning to the medical model. Psychology's adoption of this model would imply a science parallel to medical science. As the scientific nature of psychology is disputed, the power of the medical model to impart legitimacy upon psychology is concomitantly reduced. Psychology thereby becomes less attractive as a source of expert testimony.

In summary, psychology has developed a bit of a public relations problem, largely brought upon itself. There is irony in the fact that the "medical" part of medical model allowed psychology to gain acceptance in court, while the "model" part has now virtually turned on psychology and exposed its limitations. Nonetheless, expert psychological witnesses have been available to the courts for some time,

and should continue to be so. Besides, it will shortly become clear that the significant contentious issue is not psychology in court, but the specific testimony that psychologists often offer, testimony that often bears little relationship to psychological practice. In brief, expert psychological testimony would be far less controversial if it were limited to matters psychological.

Psychologists are experts in psychology, and that is what they should talk about. Neu (1980) suggests some basic parameters: "What one wants from expert witnesses in an insanity defense trial is testimony about the nature and causes of any psychological incapacities from which an individual may suffer. Diagnostic labels and clinical conclusions are less important than the details on which they are based" (p. 87). The point about labels and conclusions cannot be overstressed. Such may not only confuse both judges and juries, but as will be seen later, may actually impede juries in making their own connections and drawing their own conclusions. However, if psychological testimony stayed within the confines of Neu's suggestion, there would likely be little controversy over it. But a problem immediately arises when we recognize that the only incapacities that matter were those existing in the past, sometimes the distant past, when the specific crimes occured. It is one thing to testify about a current mental state; it is quite another to discuss a state of mind

that existed months, perhaps years in the past, and often well before the expert witness examined the accused. This retrospective analysis is risky at best, and such testimony is rightfully open to dispute. Such disputation is clearly presented by Ziskin (in Newman & Rogers, 1983): "Forensic psychiatrists in my opinion have misled the judiciary, the legislature and the general public into believing that they have the capacity to accurately assess somebody's mental state months prior to ever having seen them, when in fact there is no scientific evidence that will support that contention." This objection cannot be sidestepped by employing my suggested conceptualization of psychology as science with a difference. If psychologists cannot accurately post-dict mental states, particularly to a singular moment in time, they simply should not offer such testimony.

Sadly, another branch of expert testimony has shown psychologists more than willing to offer testimony clearly beyond their competence. The matter of predictions of dangerousness, more often applicable to civil cases but relevant to criminal proceedings as well, has been exhaustively researched, and the evidence is clear: Psychologists cannot accurately predict dangerousness (Lane & Kling, 1978; Morse, 1978; Shah, 1977; White, 1982). Despite the evidence, courts continue to ask psychologists to make such predictions, and many continue to oblige them.

Overextending the limits of their expertise is one problem; departing completly from their area of expertise is far more serious, yet this is ultimately the result of much expert psychological testimony. Recall the discussion of the legal and social nature of insanity tests. When psychologists offer testimony directly on the tests employed, they not only subvert the proper role of the jury, but they are clearly out of their element. For one thing, the language of insanity tests is decidedly non-psychological. Haward (1979) suggests a problem with nomenclature: "Psychologists are forced to compress their scientific concepts into purely legal notions like 'disease of the mind' which are meaningless to a scientist" (p. 52). The problem with language, however, is secondary to the fact that psychologists have no expertise to offer the court regarding issues of law and morality. Juries certainly have a right to any information psychologists may offer regarding a defendant claiming insanity. They also have the right to accept or reject such testimony as they see fit. But when psychologists comment directly on the ultimate issue of a defendant's sanity, they assume the roles of expert jurors, roles they have no qualifications for, roles they should not be invited to fill, roles which really do not even exist. Newman and Rogers (1983) elaborate: "Unfortunately, the way the law is presently structured, in things like the insanity

defense, the psychiatrist is required to make a conceptual leap. He must go from his diagnosis of schizophrenia, or his finding that this person had a serious distortion in the understanding of reality, to what is in essence a non-psychiatric conclusion, a legal conclusion, namely that this person was not able to tell right from wrong; and this is the kind of thing that a psychiatrist is not scientifically or professionally equipped to do because they are really moral decisions."

There are clearly many problems with expert psychological testimony. Not the least of which is psychology's apparent unwillingness to adapt to the conceptualizations and practices attendant to the legal arena, which are quite different from those it is familiar and comfortable with. On the other hand, the criminal justice system, for reasons of its own, has largely accommodated, and even encouraged psychology's awkward sojourns through the courts. There are significant social and historical forces at work here, forces which help to explicate both the excesses of expert psychological testimony as well as the courts' acceptance of such. Before examining these forces, Fingarette and Hasse (1979) offer a useful summary of the problems expert testimony engenders: "As things stand now, expert testimony reflects either of two unhelpful tendencies: either it moves into depths and nuances of diagnosis and of technical terminology that easily leaves a jury stranded; or it

achieves pseudo-clarity by allowing expert witnesses to offer a sequence of medical sounding cliches that conform verbally to legal formulas but provide no factual insight to the jury" (p. 11).

Despite the often-heard complaint by psychologists that they are forced to compress their psychological testimony to accommodate legal standards, clearly no psychologists have been coerced or compelled to provide such testimony. Simply by virtue of its willing participation in the process must psychology bear at least part of the responsibility for the excesses of expert testimony. Not withstanding the remunerative aspects of such testimony, psychologists generally offer expert testimony with the conviction that they play an important and necessary part in the process, and at least indirectly are furthering the cause of justice. To the extent that this is true, it is not surprising to find psychology anxious to increase its standing and influence within the criminal justice system. The implementation of the Durham rule is the best example of psychology's efforts at adapting the system to its own standards and procedures. Even though Durham has long since been superseded, psychology's efforts to expand and solidify its influence have continued, to the point where many of its questionable activities go unchallenged. To attorney Dershowitz (1968), "it is a discouraging history of usurpation and abdication; of an expert being summoned for a

limited purpose, assuming his own indispensability, and then persuading the law to ask the critical questions in terms which make him more comfortable and his testimony more relevant to the questions posed, but to make the questions less relevant to the purposes of the law" (p. 30).

Although the end result Dershowitz refers to is perhaps less common today than it used to be, the process he describes may help us to understand the increasingly secure place of psychology within the criminal justice system. That psychology has expanded its influence is not open to question. A serious question does remain, however, as to whether psychology's influence has exceeded that which its expert status rightfully affords. This must be answered in the affirmative, and not just because psychology is answering questions it should not be asked. Of greater concern is the message which the social sciences have subtly but consistently tried to convey to the courts as well as the general public, namely that there exist two distinct classes of people processed by the courts: criminals and the mentally disturbed. Psychology has put itself forward as being able to distinguish between these two groups. By virtue of this assertion, in conjunction with its unwillingness to both appreciate and accept the legal nature of legal standards of insanity, psychology has exceeded the limits of its expertise. In so doing, the nature of

criminal justice as it relates to insanity has been significantly altered. Torrey (1974) has suggested that:

> by lobbying for the nonresponsibility for a class of individuals called the mentally ill, psychiatry has contributed large amounts of mud to the clear stream of reason. Psychiatrists have been allowed to gradually assume increasing responsibility for deciding who can stand trial, and, once on trial, who is guilty. The decision-making process has become increasingly medical and decreasingly judicial. (p. 184)

The medicalization of justice is a matter of grave concern, having the potential of undermining the entire system. Due to the confusion arising from differing uses of the term mental illness, as well as to the unwillingness of psychology to face up to the fact that legal standards and psychological ones are fundamentally different, this medicalization has proceeded slowly and subtly, but steadily. In fact, the changes have gone largely unnoticed, and their implications unconsidered. And to the extent that this medicalization of criminal proceedings has distorted the normal process of trial by jury, as it clearly has, then the implications for social policy are certainly serious and profound. Fortunately, the trends just discussed are not proceeding inexorably, and some indications of reversal and remedy will be discussed shortly.

It would be both wrong and unfair to place the entire burden of responsibility for the excesses of expert

testimony completely upon the psychological practitioners who offer such testimony, simply because such testimony has largely been welcomed by the courts. Quite simply, such testimony allows the court to deal with certain individuals more easily and comfortably than if such testimony were not forthcoming. The extent to which the process is medicalized is the extent to which it has yielded decision-making authority, and therefore responsibility, for certain individuals, namely those persons pleading insanity. Such persons raise vexing problems for criminal justice, and deference to experts can provide an easy way out (Torrey, 1974).

These problems are again related to the problem of different conceptions of mental illness, the ambiguity of insanity tests and the confusion regarding legal and psychological standards. Clearly, the legal community must come to grips with the same issues as the psychological community. Equally clearly, and again perhaps with the best of intentions, the criminal justice system has often seen fit to allow the excesses of expert testimony. Whatever the motivation, however, one cannot ignore the fact that the use of experts continually serves to take pressure off the courts to deal directly with certain contentious individuals. Leifer (1964), who focuses on the semantic aspects of these problems, suggests that "the use of a

'scientific expert' to aid in the determination of responsibility eases the burden of the court by giving the impression that the determination rests on a scientifically determined fact rather than on an ambiguous matter of semantics" (p. 827).

Szasz (1979), whose views on what he considers the mythical status of mental illness are by now well-known, logically applies his views to the medical arena through the concept of psychiatric diversion, which he defines as "any psychiatric intervention in connection with individuals who are charged with or convicted of a crime, as well as with individuals whose 'misbehavior' might but need not be construed as constituting lawbreaking" (p. 135). Needless to say, Szasz strongly disapproves of any expert testimony, which represents one of the clearest expressions of psychiatric diversion. By virtue of the controversial nature of Szasz' basic views, concepts that arise from them will be no less contentious. However, the process Szasz describes, regardless of how it originates, does help to shed some light on the reason for the courts' allowance of expert testimony which may be excessive. Szasz is expanding on the utilitarian aspects of such testimony, from the courts' point of view, when he says that psychiatric diversion "provides a mechanism that simultaneously allays the citizens' guilt for punishing certain acts and actors, and satisfies their need for security by depriving certain

acts of their legitimacy and certain actors of their liberty" (p. 139). Unfortunately for Szasz, in arguing against expert testimony he strongly, if paradoxically and unwillingly, supports the concept of an insanity defense. The similarities between the above and the discussed traditional understanding of mental illness are undeniable. The idea that certain people who commit crimes should not be held responsible, by virtue of craziness, irrationality, etc., has a long and legitimate tradition and is, after all, precisely what insanity tests attempt to convey. The fact that some jurors might feel guilty about disposing of some cases without the option of an insanity verdict if anything argues for the legitimacy of such an option. Nonetheless, Szasz might be more favorably disposed towards the process were it not for the inordinate influence that psychiatry and psychology have attained. It is precisely the extent of this influence that the concept of psychiatric diversion is most tellingly addressed to. Szasz also draws attention to the issue of the morality of punishment, an issue most writers in this area pay scant attention to. In sum, and again regardless of the origins of the concept, psychiatric diversion provides a reasonable conceptualization for understanding a process which clearly facilitates excessive expert testimony. So long as excessive testimony is accepted, Szasz' critique will have serious merit, "partly because psychiatric diversion subverts the rule of law, and

partly because the rhetoric of diagnosis and therapy diverts attention from the fact of wrong doing and the moral legitimacy of punishment" (Szasz, 1979, p. 235).

There are, of course, other ways of viewing the problem of excessive testimony. Slovenko (1982) apparently views them as of little consequence, preferring instead to concentrate on what he views as the ultimately beneficial results that accrue to the system as a result of expert testimony of any ilk. His conclusion is worth repeating:

> Psychiatric testimony, whether or not acceptable, opens options to judge and jury. It brings flexibility and an element of humanity into the law. What is accepted as an excuse, or as proof, depends on whether one is sympathetic to it. The tendency is to find a causal nexus between one horrible condition or incident and another, although they may have little or nothing to do with each other. Whether a judge or jury accepts or declines excusing testimony is for them to decide - but without some testimony they may not be able to rationalize a decision they would like to return. The scale is the symbol of justice, but the court does not want measurement or empirical evidence. Empirical evidence is too boring, too dehumanizing, and would not fulfill the function of the trial as a morality play. (p. 119)

It is interesting that an analysis which clearly contains elements of psychiatric diversion is so favorable to the enterprise. More to the point, the acceptability of psychiatric testimony is too important a question to be glossed over. However, the question of acceptability may be answered by considering the confusion the passage shows between what constitutes evidence and what constitutes

decisions. Experts are intended to provide evidence to help juries reach decisions. When "excusing testimony" is offered, this is no longer evidence, but a conclusion, a decision which is meant to be decided by a jury. Excusing testimony is thereby unacceptable, as it clearly exceeds the competence of any expert, and improperly impedes the jury in its pursuit of justice, via an impartial weighing of the evidence given in testimony.

After examining the confusion that dominates this intersection of law and psychology, it would be surprising indeed if such confusion had not permeated the most critical link in the process, namely the jury itself. If laywers and psychologists approach the interface without a firm grasp, or at least concern with the essential issues, then juries will quite naturally react to this confusion in their deliberations. Simon (1980), reporting on some of her extensive work with experimental jury situations, states:

> During the trial, in cross examination both defense psychiatrists had insisted that insanity was a judicial term and involved a determination which they did not feel qualified to make. This statement was a source of considerable puzzlement in practically every deliberation. One juror expressed it this way: 'What I don't clearly understand is are we talking in terms of legal insanity; or technical insanity; or medical insanity, the jargon of the psychiatrists?' (p. 59)

It is insufficient to simply say that jury confusion is but a reflection of the confusion of the professionals involved. Rather, and as the above quote merely hints, jury confusion is directly related to excessive expert testimony. Simon refers to an often-heard disclaimer that many experts make, wherein they rightfully express their limitations in answering legal questions. Unfortunately, this disclaimer is then, as often as not, cavalierly cast aside, and the legal questions are answered anyway. It is no wonder that juries get confused. First they hear the experts provide information which may help them arrive at a verdict, then they hear a verdict suggested to them. The difference between a jury arriving at a verdict, using data provided by experts in the process, and a jury simply deciding to agree or disagree with one or more experts, is no less than the difference between trial by jury, a hallmark of democratic life, and trial by experts, a concept without legal status and decidedly undemocratic in its implications. This is the subversion of the jury's role to which I have referred throughout this paper. Juries find themselves trying to resolve issues which should not even be issues. "The jury worked hard at resolving to their own satisfaction the problem of who should have final say about what happens to the defendant - a jury of laymen or a group of medical experts" (Simon, 1980, p. 58). The answer to this question

is so obvious that it should not even be asked. That it is asked is simply reflective of psychology's unwillingness to heed its own disclaimers. If psychologists ceased answering questions inappropriate to them, juries would be much more able to fill, and more sure of, their roles and responsibilities.

On the other hand, there are ways for psychological experts to help. They should provide information about defendants that judge and jury might otherwise not hear. Testimony should avoid any professional jargon which could confuse a jury. Retrospective probability data and clinical impressions may be provided (Morse, 1978), and the witness should be sure to convey the nature of such evidence. As discussed, psychology is a science rather unique unto itself, and this special nature needs to be communicated to the jury, not hidden from it behind medical sounding cliches and terminology. Particular care should be used in offering testimony about an individual's conduct or thought that occurred well before any court-related psychiatric evaluation. Informed opinion is welcome, but again only so long as it is presented as such.

Ideally, testimony directly on matters of mental illness or psychiatric diagnosis should present no problem, for jurors would be clear on the important distinctions between legal and psychiatric standards, and understanding

of the fact that the two bear no necessary relationship to each other. However, the criminal justice system is far from an ideal system, and the inclusion of such testimony only serves to cloud the issues to be decided. Besides, it is specific information the jury needs, not the labels the professionals use to organize the information. Under current circumstances, labels may impede rather than help the jury. Accordingly, Morse's (1978) prescription for proper expert testimony seems well within reason:

> In sum, in my opinion mental health professionals should not testify about diagnoses or report conclusion about mental illness or even abnormality. They should simply tell the court about the allegedly disturbed person's thoughts, feelings and actions that the court is not likely to hear from family, friends, neighbors or other lay observers. Then the judge or jury can decide the legal issue of normality presented by the behavior of the disturbed person. (p. 396)

The recent and locally celebrated insanity defense trial of Thomas Provenzano provides bountiful evidence for the types of testimonial excess I have been addressing. The trial itself was fairly typical, dominated as it was by the now familiar battle of the experts. Also as is typical, most witnesses were not at all reticent about addressing the issue of the defendant's sanity directly. But perhaps of even greater concern is the expert testimony offered before the trial began. As is customary in cases such as this, three psychiatrists were appointed to examine Provenzano to

determine competency to stand trial. This really means nothing more than that the defendant can understand the charges against him/her, and can cooperate with his or her attorney in preparing a defense. However, two of the psychiatrists in this case offered far more than an evaluation of competency to stand trial. As reported in the Orlando Sentinel of February 25, 1984 (Trager, 1984a), "(Psychiatrist A), though acknowledging that Provenzano had suffered from psychological problems, concluded that he was sane at the time of the shooting and is competent to stand trial" (p. B5). A second expert offered a similar appraisal. Though I have spoken earlier of the problems with experts answering questions they should not be asked, here we have experts answering questions they were not asked at all. As disturbing as such pronouncements are, more so is the fact that no objection was made, in any public quarter, to the experts offering them. Other experts disagreed, of course, but no one disputed the propriety of making and airing such judgments. Such a situation offers compelling evidence for the increased medicalization of the legal process, at least insofar as insanity is concerned, as well as for the institutionalization, and thereby implied legitimacy, of such medicalization. The tragedy is that this process has occurred slowly and subtly, so that few are

even aware of how the nature of the legal process has been altered.

The trial itself, not surprisingly, contained the same excesses. On June 19, 1984 (Trager, 1984b), the Sentinel featured a front page story headed "Doctors say Provenzano was sane", and the lead paragraph reads: "Three court-appointed psychiatrists testified for the prosecution Monday that Thomas Provenzano was legally sane at the time of the shootout" (p. A1). Again we clearly see the technical problems associated with post-dicting a state of mind existent well before the psychiatric interview. More importantly, we see a subversion of the jury's purpose; experts making judgments only a jury should make, juries getting confused, and justice suffering.

By now it is clear that the problems of excessive expert testimony cannot be separated from the problems with currently used insanity tests. These two areas are connected in myriad, subtle, but always symbiotic ways. Accordingly, no amount of reducing excessive psychological testimony will be sufficient to clear up the confusion and injustice at the interface without a concomitant effort to improve insanity statutes, which both support and allow for such testimony. Along these lines, the "Disability of Mind" doctrine (DOM) of Fingarette and Hasse (1979) merits strong consideration. It states:

> If a person's mental powers are impaired in such a way as to disable him at least to some material extent from rational control of his conduct in respect to the requirements of the criminal law, the person in that respect acts with materially lessened criminal responsibility. If the impairment is of such magnitude that he is in chief part disabled, he acts in that respect without criminal responsibility. (p. 200)

This doctrine is valuable for a number of readily apparent reasons. Most basically, it captures better than any other standard the historical and popular understanding of what it means to be mentally ill. It makes no reference to disease or mental defect, and in fact would de-medicalize the insanity defense. Expert psychological testimony would then become an optional part of the process, not an inherent aspect. In short, the suggestion that psychologists offer less in their testimony, particularly as regards conclusion drawing, is likely to achieve real meaning only in the context of a legal standard such as DOM. By placing decision-making power firmly in the hands of the jury, where it rightly belongs, DOM could go a long way towards restoring expert testimony to its rightful purpose of simply aiding the jury in its task.

While DOM has much to recommend it, it is not perfect. Though it would set a legal standard, the central concept of rationality goes largely undefined, and as such is open to varying interpretation. But perhaps it cannot be otherwise, for as a social concept rationality may require a degree of flexibility and adaptability to accommodate the infinitely

wide variety of situations where it is an issue. Fingarette and Hasse (1979) point out that "the discrepancy between a defendant's actual capacities and those normally presumed must be assessed in light of the specific circumstances of the particular act. The jury must decide whether the discrepancy is enough, and of suitable kind, to ascribe non-responsibility" (p. 233).

DOM is unique in other respects. Not only does it allow for findings of complete or partial disability, but the jury would also determine whether the defendant had any culpability in his or her disability. Such a determination is absent in other insanity tests, and its inclusion gives jurors needed flexibility in assessing responsibility. The criminal justice system would do well to look closely at DOM.

CHAPTER IV

Looking Ahead

The picture I have drawn of the interface of criminal justice and psychology is admittedly less than flattering. Some might view my concerns about the dangers of excessive expert testimony to the entire system as alarmist. It is true that the issues I have discussed have been considered by relatively few until fairly recently. However, I have tried to show that these issues have actually been with us for many hundreds of years. It is only the fact of the curious evolution of the law/psychology interface that has served to diminish both public and professional awareness of the basic issues, issues concerning rights and responsibilities. In short, the concerns I voice are not new or original; it is, however, extremely difficult for them to find wide expression within the current legal-psychological climate.

There have been some encouraging developments. In 1982, the California Penal Code (1982) was changed to prohibit expert psychological witnesses from offering conclusions on the matter of sanity, thereby restoring ultimate decision-making power to the jury, where it properly belongs. This is an important step, but only a first step. The code still allows the court to accept

expert testimony about a defendant's state of mind at the time of an alleged offense. The line between legal and psychological standards will almost certainly remain blurry, and jurors will continue to be confused. Still, California juries may now have a better sense of their own responsibilities.

A similar change went into effect in the federal courts in late 1984. According to the A.P.A. Monitor, "the mental health expert will be restricted in court to explaining the nature of the defendant's mental disease or defect. The witness will be prohibited from commenting on whether that condition contributed to the commission of the crime, that is, if it prevented the defendant from understanding that he was committing a wrongful act" (Cunningham, 1984, p. 25). Once again a very positive step, yet still the medical model remains quite intact, and only time will tell if this one change, important as it is, will translate into more genuine decision-making power being returned to juries.

To recapitulate this thesis: The insanity defense, a legal and social instrument, has attended virtually all human legal systems. It is basically a manifestation of a deeply felt and historically held concept wherein a lack of rationality implies at least a diminution of ascribed responsibility. Problems surfaced with the development of the social sciences, most particularly psychology and

psychiatry. Through a process both complex and convoluted, legal standards and psychological practice became not just intertwined, but confused. As insanity statutes became more scientific sounding, and as social scientists strove to become, or at least appear, more scientific, the judicial process became less just, in the sense that "trial by one's peers," a time-honored, democratic ideal, appears to have been significantly compromised. The evolution of insanity tests and the rise in the influence of expert psychological witnesses follow parallel paths, and are in fact mutually sustaining processes. It is impossible to specify clearly how we got from there, when justice was administered without any experts at all, to here, where expert testimony is often excessive, and where conclusions that are uncalled for, even unasked, are routinely answered.

There is certainly need for further research. We need to understand more about how juries operate, about the differential effects of various insanity tests. We need to examine closely such alternative ideas as DOM to see how they may help improve the system. We need to know more about such admittedly amorphous but important concepts as responsibility; how it develops, how it changes, how people apply it to themselves and others. Yes, there is a lot we need to know. But far more urgent is the need for others to know that which is already available. In researching this paper I have become convinced that everyone needs to know

more about the workings of the law. Lawyers and judges need to know much more about psychology - its basic concepts, its practices, and equally important its limitations and shortcomings. Psychologists working in this area need far greater understanding of not only contemporary legal practice, but its underlying philosophy as well. In short, there is a far more pressing need for education than research. Of course, in this regard, research into means of accomplishing the varied types of education needed is both urgent and necessary.

Speaking for psychology, there is much we can do. We can stop answering questions beyond our competence, which includes making conclusions on strictly legal matters. We should remind ourselves, and help others to become aware of the fact that insanity is not a psychological concept, and that we really have nothing to say about it directly. Above all, and inherent in all my comments, is the need for greater honesty, first with ourselves, and then with others. The medical model opened up many doors for psychology, but may now impede its progress in the legal arena. By detaching ourselves from this model even a little bit, we may find more avenues to understanding open to us. Psychology will be enhanced, not diminished, by its owning up to its limitations; it would only open up more possibilities, and offer some hope of furthering the cause of justice. As Robinson (1973) warns, "The greatest danger is that the

public will think we know what we are doing instead of appreciating the experimental nature of our enterprise. Recognizing that it is experimental, society will be able to determine the extent to which it wishes to participate" (p. 133).

Throughout this paper I have used the term excessive to describe expert testimony which is inappropriate and unjustified. The word is useful in that it clearly specifies a simple and straightforward remedy, for this is surely a case where less is better. In order to insure that juries continue to make needed judgments, in an atmosphere not dominated by expert pronouncement, it is necessary only that the experts refrain, or be restrained, from promoting their own conclusions, conclusions only juries should make. We need constantly to remind ourselves of the disclaimer the experts often make but then forget. The ultimate finding to be arrived at is a social judgment, and psychology has no expertise to offer in making such judgments (Gass, 1981).

In short, a psychologist should never offer an opinion as to a defendant's sanity. There can be little doubt that if this serious testimonial excess were eliminated, much of the criticism leveled against expert testimony would evaporate. For example, Robinson's (1980) contention that "the inclusion of such 'experts' places jurors in the position of diagnosticians once they accept the testimony of

'experts' as evidence" (p. 63) would lose most of its relevance and impact in the absence of conclusion drawing by the experts. There should be no serious objection to experts helping in the decision-making process, so long as they just help and do not themselves decide.

AUTHOR NOTES

[1]For purposes of this paper, and despite their many real world differences, the terms psychology and psychiatry, psychologist and psychiatrists, etc., will be used interchangeably.

[2]In a closely related area, White (1982) reports the results of a survey of Ohio psychologists, of whom 72% thought psychologists should be involved in dealth penalty proceedings, while only 18% thought they should not be involved at all.

REFERENCES

Brakel, S. J., & Rock, R. (Eds.). (1971). The mentally disabled and the law. Chicago: University of Chicago.

Bromberg, W. (1979). The uses of psychiatry in law. Westport, CT: Quorom.

Burger, W. (1964). Psychiatrists, lawyers and the courts. Federal Probation, 24(7), pp. 3-10.

California Penal Code, Section 1027, a & c (1982).

Cunningham, S. (1984, December). Defense has insanity burden under federal anti-crime law. APA Monitor, p. 25.

Dershowitz, A. (1968, February/March). Psychiatry in the legal process: A knife that cuts both ways. Trial Magazine, pp. 29-33.

Durham vs. United States, 214 F. 2d 862 (D.C. Cir. 1954).

Fingarette, H., & Hasse, A. (1979). Mental disabilities and criminal responsibility. Berkeley: University of California.

Gass, R. (1981). (Review of Law and psychological practice). Law and Human Behavior, 5, 337-342.

Harris, T. (1969, September). Psychiatrist Bernard L. Diamond tells of the bizarre paranoia he found in Sirhan B. Sirhan. Psychology Today, pp. 48-55.

Haward, L. (1979). The psychiatrist as expert witness. In D. P. Farrington, K. Hawkins, & S. Lloyd-Bostock (Eds.), Psychology, law and legal processes (pp. 35-43). Atlantic Highlands, NJ: Humanities Press.

Hermann, D. (1983). The insanity defense: Philosophical, historical and legal perspectives. Springfield, IL: Charles C. Thomas.

Hoch, E., & Darley, J. (1962). A case at law. American Psychologist, 17, 623-654.

Huckabee, H. (1980). Lawyers, psychiatrists and criminal law: Cooperation or chaos? Springfield, IL: Charles C. Thomas.

Kolasa, B. (1972). Psychology and law. American Psychologist, 27, 499-503.

Lane, P., & Kling, J. (1978). To tell or not to tell: The psychotherapist's dilemma. Unpublished manuscript, Florida State University, Tallahassee.

Leifer, R. (1964). The psychiatrist and tests of criminal responsibility. American Psychologist, 19, 825-830.

M'Naghten's Case, 8 Eng. Rep. 718 (1843).

Monahan, J. (1977). Social accountability: Preface to an integrated theory of criminal and mental health sanctions. In B. D. Sales (Ed.), The criminal justice system (pp. 241-255). New York: Plenum.

Moore, M. (1980). Legal conceptions of mental illness. In B. A. Brody & H. T. Englehardt, Jr. (Eds.), Mental illness: Law and public policy (pp. 25-69). Dordrecht, Holland: D. Reidel.

Morse, S. (1978). Law and mental health professionals: The limits of expertise. Professional Psychology, 9, 389-398.

Morse, S. (1982). Reforming expert testimony. Law and Human Behavior, 6, 45-47.

Neu, J. (1980). Minds on trial. In B. A. Brody & H. T. Englehardt, Jr. (Eds.), Mental illness: Law and public policy (pp. 73-105). Dordrecht, Holland: D. Reidel.

Newman, E., & Rogers, R. (Writers). (1983). N. B. C. white paper: Crime and insanity (film). New York: N.B.C.

Parsons vs. State, 81 Ala. 577, 2 So. 854 (Ala. 1887).

Penn, N., Stover, D., Giebink, J., & Sindberg, R. (1969). Some considerations for future mental health legislation. Mental Hygiene, 53, 10-13.

Platt, A., & Diamond, B. (1978). The origins of the 'right and wrong' test of criminal responsibility and its subsequent development in the United States. In R. W. Rieber & H. J. Vetter (eds.), The psychological foundations of criminal justice (pp. 51-89). New York: John Jay.

Portnow, S. (1974). (Testimony). Hearings on reform of the federal court criminal laws (S.1 and S.1400) before the subcommittee of criminal laws and procedures of the Senate Committee on the Judiciary, 93d Cong. 2d Sess., Part X.

Rieber, R., & Vetter, H. (Eds.) (1978). The psychological foundations of criminal justice. New York: John Jay.

Robinson, D. (1973). Therapies: A clear and present danger. American Psychologist, 28, 129-133.

Robinson, D. (1980). Psychology and law: Can justice survive the social sciences? New York: Oxford University.

Rogers: The trial of Abner Rogers (1844). G. T. Bigelow & G. Bemis. Boston: Little Brown.

Shah, S. (1969). Crime and mental illness: Some problems in defining and labeling deviant behavior. Mental Hygiene, 53, 21-33.

Shah, S. (1977). Dangerousness: Some definitional conceptual and public policy issues. In B. D. Sales (Ed.), The criminal justice system (pp. 91-119). New York: Plenum.

Shamis, E. (1976). None of the above. Saskatchewan Psychologist, 76(3), 18-25.

Silverman, H. (1969). Determinism, choice, responsibility and the psychologist's role as an expert witness. American Psychologist, 24, 5-8.

Simon, R. (1980). The jury: Its role in American society. Lexington, MA: Lexington Books.

Slovenko, R. (1982). Psychological testing as a basis for expert testimony: Use or abuse. In R. Rosner (Ed.), Critical issues in American psychiatry and the law (pp. 92-119). Springfield, IL: Charles C. Thomas.

Stone, A. (1975). Mental health and law (HEW, NIMH Pub. No. ADM 76-176). Washington, DC: U. S. Government Printing Office.

Szasz, T. (1979). Insanity and irresponsibility: Psychiatric diversion in the criminal justice system. In H. Toch (Ed.), Psychology of crime and criminal justice (pp. 133-144). New York: Holt, Rinehart and Winston.

Szasz, T. (1984). The therapeutic state. Buffalo: Prometheus.

Torrey, E. (1974). The death of psychiatry. Radnor, PA: Chilton.

Trager, L. (1984a, Feb. 25). Lawyers to request that Provenzano trial be moved. The Orlando Sentinel, pp. B1, B5.

Trager, L. (1984b, June 19). Doctors say Provenzano was sane. The Orlando Sentinel, pp. A1, A6.

United States vs. Brawner, 471 F. 2d. 969 (D.C. Cir. 1972).

White, C. (1982). Ethical guidelines for psychologist participation in death penalty proceedings: A survey. Professional Psychology, 13, 327-329.

Witty, S. (1982, November). Jurors' blurred views of insanity. Psychology Today, p. 14.

Ziskin, J. (1975). Coping with psychiatric and psychological testimony (2nd ed.). Marina del Ray, CA: Law and Psychology Press.