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THE ROLE OF THE PSYCHIATRIST AND PSYCHIATRIC TESTIMONY IN CIVIL AND CRIMINAL TRIALS

John J. Broderick*

Introduction

In this article an evaluation of the role of the psychiatrist as an expert witness will be made as well as an examination of the functions of the psychiatrist and psychiatry in the pre- and post-trial phases. Finally, recommendations for improvement will be discussed.

Just recently Nathan Leopold, Jr., was released from a state penitentiary where he had spent the past thirty-three years of his life for the "thrill slaying" of fourteen-year-old Bobby Franks. Leopold and Loeb both entered pleas of guilty. In the trial which began on July 23, 1924, in the Criminal Court of Cook County, Illinois, psychiatry played a very prominent part. Clarence Darrow, the defense counsel, relied heavily upon the testimony of psychiatrists to establish the mental condition of the defendants in order to avoid the death sentence and have them committed to a penitentiary. This case is of interest because the court was presented with an opportunity "to determine the mental condition of persons accused of crime, according to the dictates of science and modern psychiatry, without arbitrary and unscientific limitations imposed by archaic rules of law."¹

In recent decades psychiatry has grown in importance and the psychiatrist is being called upon more and more, by both parties, to testify upon issues in cases involving crimes and wills.² Many problems have arisen regarding the acceptance of such testimony and the weight to be given to it.

As Dr. Roche has suggested, both the lawyer and the psychiatrist must re-examine the premises upon which they base their concepts of mental illness and the subject element of crime.³

[The] conflict cannot be resolved until the lawyer and the psychiatrist join in an acceptance that the "real world" is unconsciously shaped and colored by our language habits which predispose certain interpretations; that the verbal world of abstraction is illusory and detached from the facts of life. Furthermore, as long as traditional criminal justice continues as an autonomous system of supernatural concepts, which cannot be defined in terms of experience, the positive sciences will continue outside of its operations and the relations of criminal law and psychiatry will remain tensional.⁴

With this in mind, the problem areas, the reasons they have arisen or exist and the possible solutions will now be discussed.

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1 MCKERNAN, THE AMAZING CRIME AND TRIAL OF LEOPOLD AND LOEB vii (1957).

2 GUTTMACHER AND WEIHOFEN, PSYCHIATRY AND THE LAW 10, 11 (1952).

3 ROCHE, THE CRIMINAL MIND ix (1958).

4 *Id.* at x.

The Problems Stated

Psychiatry is that branch of medical science which deals with the diagnosis and treatment of mental disorders.⁵ A psychiatrist is defined by Webster as, "a specialist in psychiatry, an alienist."⁶

The general rule is that any doctor by reason of his education and training is presumed competent to advise the trier of fact. He need not be a specialist in any particular branch of his profession nor have any experience of his own on the particular question involved in the case.⁷

As McCormick points out:

An observer is qualified to testify because he has first hand knowledge which the jury does not have of the situation or transaction at issue. The expert has something different to contribute. This is the power to draw inferences from the facts which a jury would not be competent to draw. To warrant the use of expert testimony, then, two elements are required. First, the subject of the inference must be so distinctively related to some science, profession, business or occupation as to be beyond the ken of the average layman, and second, the witness must have such skill, knowledge, or experience in that field or calling as to make it appear that his opinion or inference will probably aid the trier in his search for truth. The knowledge may in some fields be derived from reading alone, in some from practice alone, or as is more commonly the case, from both.⁸

To properly determine the role of the psychiatrist as an expert witness it is necessary to examine the views of the legal writers and the courts.

McCormick states that the use of psychiatric testimony in cases involving mental disorders and defects suggests itself as a potential aid in determining the credibility of key witnesses in any kind of litigation.⁹ In one type of case, namely that of sex offenses, there seems to be general agreement among the text writers that this type of testimony is indispensable.¹⁰ However, as shall be seen, the courts appear to be more hesitant in accepting such testimony. Wigmore is in favor of psychological diagnosis of testimony by all recognized modern methods.¹¹

The use of psychiatric testimony on the issue of credibility of a witness was vividly demonstrated in the Alger Hiss trial when the judge held that the admission of psychiatric testimony was admissible to impeach the credibility of the government's witness, Whittaker Chambers.¹² The outcome of this trial was dependent to a large extent upon the testimony of one man — Whittaker Chambers. Mr. Chambers' credibility was one of the major issues upon which the jury had to pass since the opinion of the jury is the decisive authority on this question. Dr. Binger, a psychiatrist as a witness for the defendant, was per-

5 GUTTMACHER AND WEIHOFEN, *supra* note 2 at 5.

6 WEBSTER, *NEW INTERNATIONAL DICTIONARY* 2001 (2d ed. 1955).

7 MCCORMICK, *EVIDENCE* § 13 (1954); TRACY, *THE DOCTOR AS A WITNESS* 36 (1957).

8 MCCORMICK, *op. cit. supra*, note 7.

9 *Ibid.*

10 3 WIGMORE, *EVIDENCE* §§ 924a, 934a, 963 (3d ed. 1940); MCCORMICK, *EVIDENCE* § 45 (1954); *Psychiatric Evaluation of the Mentally Abnormal Witness*, 59 *YALE L.J.* 1324 (1951).

11 3 WIGMORE, *EVIDENCE* §§ 997-999 (3d ed. 1940); Redmount, *The Psychological Bases of Evidence Practices: Intelligence*, 42 *MINN. L. REV.* 559 (1958).

12 *U. S. v. Hiss*, 88 *F. Supp.* 559 (S.D.N.Y. 1950); GUTTMACHER AND WEIHOFEN, *supra* note 2, ch. 15.

mitted, over objection, to testify that Chambers, Hiss' accuser, was a psychopathic personality with a "tendency toward making false accusations."¹³ The court stated:

The existence of insanity or mental derangement is admissible for the purpose of discrediting a witness. Evidence of insanity is not merely for the judge on the preliminary question of competency, but goes to the jury to affect credibility [citations]. Since the use of psychiatric testimony to impeach the credibility of a witness is a comparatively modern innovation, there appear to be no federal cases dealing with this precise question. However, the importance of insanity on the question of credibility is often stressed. There are some State cases in which such testimony^o has been held to be admissible or which indicate that if this question had been presented, it would have been admissible.¹⁴

The judge further stated that he had given full consideration to the government's argument against the admission of this testimony. However evidence concerning the credibility was relevant and material; under the circumstances in the case, and in view of the foundations laid, it was received, but in his charge to the jury he advised them of the weight which may be given to such testimony.¹⁵

The fact that Alger Hiss was convicted indicates that the testimony of the psychiatrist is not controlling upon the jury but will be weighed along with other evidence presented.

There are state court cases in which psychiatric testimony was admitted to impeach the credibility of a witness. For example, in *People v. Cowles*,¹⁶ the defendant, who was charged with statutory rape, called two medical practitioners, who had observed the girl, and in answer to hypothetical questions they expressed opinions that she was a pathological falsifier, a nymphomaniac, and a sexual pervert. The court held that the testimony should have been received for its bearing upon the question of the weight to be accorded the testimony of the girl and the question of whether the mind of the girl was so warped by sexual contemplation and desires as to lead her to accept the imagined as real, or to fabricate a claimed sexual experience.

Here we have the court admitting the testimony of two medical practitioners as to the credibility to be accorded the testimony of the girl upon whom the act was allegedly perpetrated.

The court in *State v. Wesler*¹⁷ was in full accord with the holding in the *Cowles* case. The court allowed the testimony of two psychiatrists that the girls, with whom indecent liberties were allegedly taken, were psychopaths and immoral and that psychopaths are prone to be untruthful, but the court held that this did not require the jury to reject the girls' stories.

13 *Ibid.* In the first Hiss trial, Dr. Binger was not allowed to testify. N.Y. Times, July 1, 1949, p. 1, col. 2. In *People v. Carpenter*, 11 Ill. 2d 60, 142 NE.2d 11, 17 (1957), the court referred to a psychiatrist witness' definition of psychopathic personality as a "waste basket" classification.

14 *U.S. v. Hiss*, 88 F. Supp. 559 (S.D.N.Y. 1950). See 59 YALE L.J. 1324, 1337-39 (1951); 30 NEBR. L. R. 513-520 (1951); see also CURRAN, LAW AND MEDICINE 575-582 (1960).

15 *Ibid.*

16 246 Mich. 429, 224 N.W. 387 (1929).

17 137 N.J.L. 311, 59 A.2d 834 (1948).

In *Miller v. State*,¹⁸ the testimony of a doctor who was superintendent of a hospital for the insane that the girl, said to be a nymphomaniac, was normal, was held to be admissible as to credibility and was for the jury to weigh.

In the case of *Rice v. State*,¹⁹ the defendant was convicted of taking indecent liberties with a twelve-year-old girl. The court set aside the conviction, relying on the testimony of a doctor that the girl "had a mental condition calculated to induce unreal and phantom pictures in her mind." The girl's testimony was wholly uncorroborated, and the court held its truth to be highly improbable and against the experience of mankind.

The preceding cases illustrate that the testimony of a psychiatrist is normally admitted, but only to affect credibility. This testimony is not conclusive on the jury, and it is weighed along with any other evidence which may be presented.

In addition, leading authorities on the law of evidence advocate the admission of testimony of this character. McCormick points out that:

There is a special danger of sympathy swaying judgment on credibility in sex cases, but the need exists for appraising the testimony with all the resources of psychiatric science in every case where there is ground for believing that a witness on whom the issue depends is subject to some mental abnormality which might significantly affect his credibility.²⁰

Dean Wigmore has long advocated the use of psychiatric examination and testimony in cases in which a woman or young girl has charged a man with a sexual crime. He expressed the view that the complainant's social history and mental makeup, especially in sex crimes, has in many cases a direct relation to veracity. A narration of events that may appear straightforward and convincing may be the result of multifarious psychic complexes creating an actual belief in an imaginary story.²¹

The psychiatrist also plays a leading role in many will contest cases. The reason is that, in order to determine whether the testator possessed the required intent to make a testamentary disposition by will, his mental condition at the time of making the will is of the utmost importance. The question to be asked now is: Will the courts allow the psychiatrist to testify as to the testator's mental condition at the making of the will, and what weight will be given to such testimony?

The court in one case held that whether a person is suffering from senile psychosis, or senile dementia, or illness of mind due to senility, is in first instance a question for the men of the medical profession (psychiatrists in this case) who have made a special study of nervous and mental diseases, and their evidence on the question of the effect of such ailments upon the mind and mentality should be given substantial weight on issue of testamentary incapacity, since insanity and testamentary incapacity are akin.²²

This case seems to follow the holdings of the previous cases on sex crimes in which the testimony was admitted but its weight was for the jury. The court

18 49 Okl. Cr. 133, 295 (1930).

19 195 Wis. 181, 217 N.W. 697 (1928).

20 McCORMICK, *supra* note 10 at § 45.

21 3 WIGMORE, *supra* note 10 at §§ 924a, 931-934, 934a.

22 Hulbert, *Psychiatric Testimony in Probate Proceedings*, 2 LAW & CONTEMP. PROB. 448 (1935).

stated that substantial weight should be given to the testimony on the issue of testamentary incapacity, but it was still not conclusive, so as to take the determination from the jury.

The court, in one will contest case in which two psychiatrists who had never seen the testatrix testified that she was capable of understanding the nature and consequences of her acts at the time of the execution of the will, commenting on the weight to be given to this testimony stated:

Whether a person is suffering from senile psychosis, or senile dementia, or illness of mind due to senility, is in the first instance a question of fact to be determined by men of the medical profession who have made a special study of nervous and mental diseases; their evidence on the question of the effect of such ailments upon the mind and mentality must be given substantial weight. Insanity and testamentary incapacity are akin as are sanity and testamentary capacity, and in this field, the evidence and testimony of doctors must be given much weight.²³

Again, in *Rich's Estate*,²⁴ it was held that the testimony of a psychiatrist, in response to a hypothetical question that the testatrix whom he had never known was insane when she executed a will, was unsatisfactory and insufficient to affect the validity of the will. It did not establish the fact that the abnormality of mind which he ascribed to the testatrix had a direct influence on her testamentary act when she executed her holographic will. The court, quoting from *Estate of Dolbeer*,²⁵ emphasized that this type of testimony is weak:

The witnesses were skilled alienists, it may be conceded, but the evidence thus adduced of one who has never seen the person, and who bases his opinion upon the facts given in a hypothetical question, is evidence the weakest and most unsatisfactory. Such questions themselves are always framed with great particularity to meet the views of the side which presents the expert. They always eliminate from consideration the countervailing evidence, which may be of a thousand fold more strength than the evidence upon which the question is based. They are astutely drawn and drawn for a purpose and that purpose never is the presentation of all the evidence. It is never to present the fair and accurate view, but the purpose always is to frame a question such that the answer will announce a predetermined result. This kind of expert testimony, given under such circumstances, even the testimony of able and disinterested witnesses, as no doubt these were, is in the eye of the law of steadily decreasing value.²⁶

Although the court is highly critical of the utilization of the hypothetical question, in the above circumstances, underlying tones in the court's decision seem to indicate that testimony under other circumstances would be viewed more favorably — particularly in a case where the defendant had been personally examined by the psychiatrist.

Another problem that presents itself is the use of psychiatric testimony to show the accused's disposition or propensity. In other words, can a person accused of a crime use the testimony of psychiatrists as experts to show that his

23 *American National Red Cross v. Gumberts*, 207 Okl. 96, 247 P.2d 735, 739 (1952).

24 79 Cal. App.2d 22, 179 P.2d 373 (1947).

25 149 Cal. 227, 86 Pac. 697 (1906).

26 *Rich's Estate* 79 Cal. App.2d 22, 179 P.2d 373, 379 (1947).

mental makeup and personality is such that he would not have the propensity to the acts involved in the crime charged?

One of the prime examples of the law's avoidance of any true psychological understanding of the defendants who came before the courts stems from the orthodox rule of character evidence, which makes "character" and "reputation" synonymous. As almost universally applied, it allows proof of the defendant's character only by evidence of his general reputation in his community and evidence of the individual opinion of the witness of the actual personality of the defendant is excluded.²⁷

The United States Supreme Court, elaborating on this rule, stated:

When the defendant elects to initiate a character inquiry, another anomalous rule comes into play. Not only is he permitted to call witnesses to testify from hearsay, but indeed such a witness is not allowed to base his testimony on anything but hearsay. What commonly is called "character evidence" is only such when "character" is employed as a synonym for reputation. The witness may not testify about defendant's specific acts or courses of conduct or his possession of a particular disposition or of benign mental or moral traits, nor can he testify that his own acquaintance, observation and knowledge of defendant leads to his own independent opinion that defendant possesses a good general or specific character inconsistent with commission of acts charged. The witness is, however, allowed to summarize what he has heard in the community, although much of it may have been said by persons less qualified to judge than himself. The evidence which the law permits is not as to the personality of the defendant but only as to the shadow his daily life has cast in his neighborhood.²⁸

In 1954, the California Supreme Court made a radical departure from the orthodox rule which limits proof of character to reputation evidence and permitted the defense to submit expert psychiatric opinion evidence of the actual personality traits of the defendant who was charged with the commission of lewd and lascivious acts upon the person of his nine-year-old niece. It rested its decision primarily upon a California statute providing for the psychiatric examination of persons convicted of a sex offense involving a child below the age of 14. These proceedings, subsequent to convictions, were authorized in order to determine whether the offender was a sexual psychopath. The court held that the testimony was admissible as evidence of good character showing the defendant's disinclination to this type of crime. Furthermore, the psychiatrist was permitted to testify although his opinions were based in part on a narco-analysis interview with the defendant.²⁹

As Professor Curran has pointed out,³⁰ the Supreme Court of California refused to follow *People v. Sellers*,³¹ a district court of appeal case, decided in

27 WIGMORE, *supra*, note 10 at §§ 1980, 1981, 1983; Curran, *Expert Psychiatric Evidence of Personality Traits*, 103 U. PA. L. R. 999 (1955); Falknor and Steffen, *Evidence of Character: From the "Crucible of the Community" to the Couch of the Psychiatrist*, 102 U. PA. L.R. 980 (1954); ZILBOURG, *THE PSYCHOLOGY OF THE CRIMINAL ACT AND PUNISHMENT* 14 (1954).

28 *Michelson v. United States*, 335 U.S. 469, 477 (1948).

29 *People v. Jones*, 42 Cal. 2d 219, 266 P.2d 38 (1954); Curran, *supra* note 27; Falknor and Steffen, *supra* note 27.

30 Curran, *supra* note 27, at 1002.

31 103 Cal. App. 2d 830, 230 P.2d 398 (1951).

1951. In that case, the defendant was charged with a crime of homosexual perversion. The court refused to admit expert psychiatric testimony by the defendant that he was not a homosexual, stating:

The law does not make a distinction as to the type of person who may commit the act charged. It is a punishable offense whether the person is normal or abnormal. The proffered evidence is not . . . a type of circumstantial evidence admissible for the purpose of proving the performance or non-performance of a criminal act.³²

The reason that the court in the *Jones* case refused to follow the *Sellers* case was that:

The reasoning of that case overlooks the accepted fact that homosexual acts of the nature there considered constitute abnormal conduct indulged in by persons with a propensity for it; normal individuals do not resort to such acts, hence a showing of sexual normality in that respect has relevancy to the non-performance of homosexual acts.³³

Thus, two different California courts reached opposite conclusions on the question — one court permitted the psychiatrist to testify as to a defendant's mental make-up, the other court refused to do so. Professors Falknor and Steffen disagree with the *Jones* decision, on the ground, that, "if expert opinion is to be received that defendant is not a 'sexual deviate' or a 'homosexual,' on what principle may there be excluded psychiatric opinion that he is not a 'thief,' a 'robber' or a 'murderer.'" ³⁴ Professor Curran on the other hand agrees with it and feels it is significant not only in challenging one "orthodox doctrine" but also as evidence of the dynamic growth of one legal system in the area of proof. In his opinion,

if the courts became convinced that definite personality traits, such as those generally recognized in sex deviates and homosexuals, are developed and classified by medical science in regard to other types of crimes, then such evidence should be admitted. . . . Here we are leaving the door open in the courtroom for advances in medical science to show us the means of bringing our system closer to reality and truth.³⁵

In *State v. Sinnot*,³⁶ the defendant was convicted of sodomy with a male child under the age of 16 years. New Jersey has a statute similar to the California statute in the *Jones* case. There the New Jersey Supreme Court refused to permit a psychiatrist, who had given the defendant a neuropsychiatric examination and an examination after sodium pentothal had been administered, to testify that defendant's mind was normal and his disposition benign, at least in so far as sex offenses were concerned, since such testimony was more or less equivalent to evidence of good character. The court said:

32 *Id.* at 399.

33 *People v. Jones*, 42 Cal. 2d 219, 266 P.2d 38 (1954).

34 Falknor and Steffen, *supra* note 27, at 990.

35 Curran, *supra* note 27, at 1013; *People v. Ford*, 304 N.Y. 679, 107 N.E.2d 595 (1952), where in a prosecution for first-degree murder the accused's mental ability for premeditation was in issue, doctor who expressed that accused did not have such ability was properly prevented from testifying as to test of defendant made while defendant was under the influence of sodium amytal.

36 43 N.J. Super. 1, 127 A.2d 424, (App. Div. 1956), *aff'd*, 24 N.J. 408, 132 A.2d 298 (1957).

Moreover, if we admit testimony as to the trait or susceptibilities in sex cases, there would seem to be no logical reason for excluding it from other criminal prosecutions.³⁷

The court pointed out that the ability of psychiatry to determine the propensities, or the lack thereof, to commit a sodomous act, is still in a state of refinement and that historically, it has not been "disadvantageous for the courts to lag a little."³⁸

It is interesting to note that psychiatry recognizes the difficulty in ascertaining whether one is a homosexual since "the homosexual is not typically mentally ill, nor are the mentally ill typically homosexual."³⁹

Another view of homosexuality is that its origin is never environmental or acquired but always constitutional or biological.⁴⁰ The homosexual is not a psychopathic personality but is often so classified; one of the reasons being that in the minds of some physicians any sexual deviation is unequivocally associated with antisocial behavior.⁴¹

A statistical analysis⁴² of 250 sex offenders examined at the New Jersey Diagnostic Center reached the following results: of 33 homosexual acts committed there were 24 child victims;⁴³ 17 of the homosexual offenders were found to be under the Act⁴⁴ for sex offenders, 16 were not.⁴⁵ The report makes no psychiatric diagnosis by individual sex offense, but it is surprising to discover that in total there were more offenders who were considered normal than there were suffering from serious personality disorders.⁴⁶ Therefore, lack of deviational traits would appear to have little bearing on whether one had committed a specific act which is a sex offense.

Some courts are inclined to admit psychiatric testimony while others express doubt as to its efficacy. In *Boyd v. State*,⁴⁷ the court held that in a murder prosecution, a psychiatrist's expert testimony that, in his opinion, the defendant suffered from insane delusions and lacked sufficient mentality to comprehend the difference between right and wrong as to a crime connected with such delusions was competent evidence on the question of the defendant's mental state, but not conclusive on the jury. The court said in this case that expert testimony is intended to aid the jury in arriving at correct conclusion on issue made, but the jury is not bound by expert opinion and may disregard it or give such testimony credence or not as the jury sees fit.

The opinion in *Boyd* is essentially the same as that stated in the case of *Fitzhugh v. State*,⁴⁸ where a mother was convicted of manslaughter in the first degree for the killing of her own child. The court held that the opinions of

37 *State v. Sinnott*, 132 A.2d 298, 310 (1957).

38 172 A.2d 424, 429.

39 COLEMAN, ABNORMAL PSYCHOLOGY AND NORMAL LIFE 418 (1950).

40 101 AMERICAN JOURNAL OF PSYCHIATRY 682 (1945).

41 *Id.* at 686.

42 FRANKEL, PSYCHIATRIC CHARACTERISTICS OF SEX OFFENDERS (1950); PLOSCOWE, SEX AND THE LAW ch. VII (1951).

43 *Id.* at 3.

44 N.J. STAT. ANN. § 2A:164-3 (West 1954).

45 FRANKEL, *supra* note 42 at 9.

46 *Id.* at 4.

47 207 Ga. 567, 63 S.E.2d 394 (1951).

48 35 Ala. 18, 43 So. 2d 831 (1949).

experts in the field of mental disorders as to the accused's sanity are admissible in a criminal prosecution but such opinion evidence is not conclusive on the jury. The report of the psychiatric examination of three mental specialists was admitted in evidence.

The view of a federal court is seen in *United States v. Gundelfinger*,⁴⁹ where the court said that the principal function of a psychiatrist who testifies on mental state of an abnormal offender is to inform the jury of the character of his mental disease, and psychiatrist's moral judgment reached on basis of his observations is relevant, but it cannot bind jury, on issue of criminal responsibility, except within broad limits. This federal court decision doesn't make any changes in the usual ruling on this point by the courts which permit such testimony.

The court in the case of *State v. Putzell*⁵⁰ looked upon the use of the hypothetical question with a critical eye as the courts did in the sex violation cases and the cases concerning the contest of wills. In a prosecution for first-degree murder, in this Washington case, the court held that the question as to the sanity of the defendant at the time of the homicide, upon all of the evidence and the law as given by the court was the responsibility of the jury, and it was not bound by the doctor's conclusions given in answer to hypothetical questions relating to sanity. All of the doctors who testified were specialists in the field of psychiatry.

The Supreme Court of Pennsylvania, in *Commonwealth v. Patskin*,⁵¹ expressed some doubt as to the efficacy of expert psychiatric testimony. In a proceeding for the commitment of Patskin to a mental hospital, after a conviction for first degree murder, the court referred to its opinion affirming Patskin's conviction as follows:

. . . The defendant's actions, statements and confessions—even without the corroborating testimony of the Commonwealth's expert witnesses and lay witnesses—wholly refute the opinion evidence of defendant's expert medical witnesses.⁵²

In a footnote in the commitment proceedings, the court said:

The profession and prestige of psychiatry has been gravely damaged by the testimony of some of its experts on the subject of insanity in homicide cases, as a result of which considerable doubt of the soundness or dependability of their conclusions has been raised in the minds of the courts and juries alike. While the science of psychiatry has made tremendous strides, the Courts of Pennsylvania have at this stage of scientific knowledge refused, and we believe wisely refused, to substitute psychiatric tests or conclusions for our long and wisely established "right and wrong" test.⁵³

It is interesting to note that both the *Model Code of Evidence*⁵⁴ and the *Uniform Rules of Evidence*⁵⁵ allow opinion evidence as to the personality traits

49 102 F. Supp. 177 (D.C. Pa. 1952).

50 40 Wash. 174, 242 P.2d 180 (1952); OVERHOLSER, *THE PSYCHIATRIST AND THE LAW* 112-14 (1953).

51 375 Pa. 368, 100 A.2d 472 (1953).

52 *Commonwealth v. Patskin*, 372 Pa. 402, 93 A.2d 704, 714 (1953).

53 *Id.* at 473.

54 *MODEL CODE OF EVIDENCE*, RULE 306 (1942).

55 *UNIFORM RULES OF EVIDENCE* 46, 47 (1953).

of an individual. Thus, there exists a battleground of opposing views within the courts and among legal writers on the question of the admissibility and worth of psychiatric testimony.

It appears that courts and legal writers are suspicious and distrustful of psychiatric testimony. Thus, it may be helpful to peruse the views of the psychiatrists, who are well aware of legal distrust of their field, in order to determine why these difficulties exist and how they may be alleviated.

Dr. Zilbourg points out that one of the roots of the perennial conflict between psychiatry and the law arises from the fact that the officers of the law avoid any semblance of identification with a criminal or an "insane" person because they feel that such identification might weaken their purely legal judgment. They scrupulously protect themselves against any tendency they might discover within themselves to put themselves psychologically in the defendant's place. On the other hand, the psychiatrist is in an entirely different psychological position since his job is to delve into the deeper motives and the inner substance of the act for which the defendant is standing trial. Thus Dr. Zilbourg states:

The law seems to be afraid that psychiatry might understand the transgressor too well and might forgive too readily. Psychiatry seems to be afraid that the law actively avoids any true psychological understanding of the transgressor, because the law's business is to keep its punitive promises and not wax sentimental by way of scientific understanding.⁵⁷

In his recent book, Dr. MacDonald agrees with Dr. Zilbourg that one barrier to a more enlightened outlook in the treatment of the criminal is the lack of understanding between the two professions—law and psychiatry. He points out that since the judge passing sentence on the offender is concerned with the rehabilitation of the offender as well as the protection of society, he should possess some knowledge of psychology and sociology or the willingness to pay attention to the advice of experts in the fields.⁵⁸

Dr. Davidson, in his book on forensic psychiatry, written as a psychiatric legal guide for physicians, said that the position of the psychiatrist as viewed by the courts today is as follows:

Usually the psychiatrist comes to court as an expert and is thus expected to give not only findings and facts but also opinions, prognoses, conclusions, and evaluations. Whether a particular doctor is acceptable as an expert depends, in a large degree, on the discretion of the judge. It is general practice for courts to permit any physician to testify as an expert if he can establish any reasonable claim to specialized knowledge, even though his qualifications might not meet standards of specialists' organizations or boards. The judge's position is usually this: let the doctor testify—the jury can appraise the validity and credibility of his testimony themselves and compare his testimony and qualifications with those of other experts.⁵⁹

56 ZILBOURG, *THE PSYCHOLOGY OF THE CRIMINAL ACT AND PUNISHMENT* 13 (1954); ZILBOURG, *MIND, MEDICINE AND MAN* 249 (1943).

57 *Id.* at 46.

58 MACDONALD, *PSYCHIATRY AND THE CRIMINAL* 194 (1958).

59 DAVIDSON, *FORENSIC PSYCHIATRY* 243, 244 (1952); see McCORMICK, *EVIDENCE* § 13 (1954); TRACY, *THE DOCTOR AS A WITNESS* 36 (1957).

Professor Green emphasizes that the reputation of psychiatry as a science has suffered because of its connections with criminal law, and for this reason the legal profession is suspicious of the psychiatrist. He states that in an important murder trial, where the defense is insanity, it is more or less common spectacle for a group of psychiatrists of equal eminence to be lined up on each side of the case. This creates a tendency in the judicial mind to view their opinions with suspicion. This suspicion is not removed if such a situation occurs in a civil case. It is not uncommon for groups of equally prominent psychiatrists to be lined up on either side of an important will contest. This further tends to confirm and strengthen the suspicions.⁶⁰

Dr. MacDonald gives a psychiatrist's answer to Professor Green's criticism when he states:

The legal profession is critical because psychiatrists sometimes disagree in the witness stand. This is a revealing criticism coming as it does from persons who are dependent upon disagreement for their very livelihood. Psychiatry is not an exact science and there will always be disagreement, especially so long as the psychiatrist has to express his opinion within the rigid framework of an artificial and unsatisfactory test of criminal responsibility.⁶¹

Another reason why the legal profession is suspicious of psychiatrists is the failure of the psychiatrists themselves to agree on the meaning of certain terms. As we have already seen, this was vividly illustrated in the *Hiss* case, where a psychiatrist testified that Chambers, the star witness, was a "psychopathic personality."⁶² Roche states that the most telling objection to such expert testimony was that there is no agreement among psychiatrists as to what a psychopath really is. He feels that this lack of agreement makes such impeachment procedure ineffective and untenable.⁶³

Dr. Davidson emphasizes that the language barrier between the lawyer and the psychiatrist is a serious one in the trial of a case. There is the problem of translating medical jargon into plain English.⁶⁴ A word may have a specialized meaning in psychiatry but a standard nonmedical dictionary will give a different definition than that presented by the psychiatrist. The difference between the general and special meaning may be striking. When the psychiatrist speaks he means one thing, but the jury and the lawyer hear something else. An example would be the word "psychopath," which to a juror obviously means "insane"; the psychiatrists who quarrel as to the meaning of the word are generally agreed on one point, that is, whatever else it may mean, it does not equal insanity.⁶⁵

At least one court has expressed a fear that acceptance of psychiatric theory to too great an extent will bring about a breakdown in law enforcement. The court said:

60 Green, *Proof of Mental Incompetency and the Unexpressed Major Premise*, 53 YALE L.J. 271, 285 (1944); Broderick, *The Physician as an Expert Witness—Some Psychological Aspects*, 34 NOTRE DAME LAW. 181 (1959).

61 MACDONALD, *supra* note 58 at 196. See also Overholser *supra* note 50 at ch. iv.

62 U. S. v. Hiss, 88 F. Supp. 559 (S.D.N.Y. 1950).

63 Roche, 22 PENN. BAR ASS'N. Q. 140, 149-151 (1951).

64 DAVIDSON, *supra* note 59 at 283.

65 *Ibid.*

Defendant contends that because a criminal or murderer is a weak, unstable, aggressive, dangerous moron who is mentally deficient, the sentencing Judge or Court (1) must consider his record during his entire life and particularly reports of every psychologist and psychiatrist who has examined him, and (2) must be controlled by these reports and impose a sentence in the case of murder in the first degree not higher than life imprisonment. This contention carries the theory or doctrine of "diminished responsibility" to an extreme and would vest in a psychiatrist and not the Courts the right and power to determine and fix punishment for crimes. Such a theory or philosophy would soon transfer the punishment of criminals from Court to psychiatrists and would inevitably result in a further breakdown of law enforcement and eventual confusion and chaos. Fortunately, our cases are opposed to such an undesirable result.⁶⁶

Suggested Solutions to the Problems

The late Justice Stephens was of the opinion that in criminal cases where insanity was involved, or where, after conviction, the appropriateness of treatment in respect to the criminal rather than the crime is in question, the courts can learn much from administrative tribunals. He suggested the use of investigators acting for the court, in addition to and not in substitute for similar experts acting for the parties.⁶⁷

In the *Patskin* case, mentioned above,⁶⁸ the court cited the Pennsylvania Mental Health Act, which provides that upon the petition of counsel for defendant (or district attorney or warden, or any other responsible person) a Sanity Commission, consisting of a qualified psychiatrist, a physician and an attorney, shall be appointed by the court to investigate the mental condition of the person charged with crime and to report thereon. The court, although it construed this provision of the Act to be discretionary and not mandatory, did appoint such a commission.

In Massachusetts the Briggs Law provides for a routine mental examination by the department of mental diseases of persons accused of a capital offense and persons known to have been indicted for any other offense more than once. It provides for the filing by the department of a report of its investigation with the Clerk of the Court in which the trial is to be held, making the report accessible to the Court, the district attorney and to the attorney for the accused, and making it admissible as evidence of the mental condition of the accused.⁶⁹

Under the Briggs Law and similar statutes, the physician is permitted to function as a specially trained advisor or consultant, appearing in an impartial role. As a result of this statute the "battle of the experts" has practically disappeared in Massachusetts.

⁶⁶ Commonwealth v. Elliot, 89 A.2d 782, 785 (1952).

⁶⁷ Stephens, *What Courts Can Learn from Commissions*, 19 A.B.A.J. 141, 42 (1933); see 2 WIGMORE, EVIDENCE § 563 (3d ed. 1940) for collection of state statutes.

⁶⁸ Commonwealth v. Patskin, 375 Pa. 368, 100 A.2d 472 (1953).

⁶⁹ GEN. L. 1920, c. 123 § 100 A, as amended St. 1941, c. 194 § 11; St. 1953 § 17; St. 1957, c. 236; Overholser, *The History and Operation of the Briggs Law of Massachusetts*, 2 LAW AND CONTEMP. PROB. 436, 444 (1935); Simms, *Criminal Procedure—Present Insanity—Determination of the Issue When Raised Before Trial*, 27 N.C.L. REV. 258 (1949).

Dr. Flower decries the fact that the Briggs Law only applies to certain recidivist offenders and to first offenders indicted for murder. He feels it should be extended to first offenders indicted for second degree murder, manslaughter, arson, assault, robbery, and other crimes. However, this may be impossible because as presently constituted the Briggs Law is cumbersome administratively and the time interval for examination is not sufficient. Often the examining physicians are presented with authorizations for four to twelve persons at one time. It may well be an impossibility to give an adequate examination, complete the case writeups and get the final reports to the court prior to the trial. Finally, the Briggs Law examinations should be revised and reoriented so that they would do more than to "state definitely whether, in the opinion of the examiner, the prisoner is suffering from any mental disease or defect which would affect his criminal responsibility." They should contribute information useful to the magistrate in disposition, useful to the probation officers in a planned program, and useful to a continuing psychotherapy program in a penal institution.⁷⁰

Under the laws of New York,⁷¹ a person who is insane is not legally responsible for the commission of a crime. Even if a person is sane at the time of the commission of a crime, if he thereafter becomes insane he may neither be tried, sentenced nor punished. By the provisions of the Code of Criminal Procedure,⁷² if, upon the defendant's arraignment there are reasonable grounds for believing that defendant is in such a state of idiocy, imbecility, lunacy, or insanity, so as to be incapable of understanding the proceedings or making his defense, the court may order the defendant committed to the custody of the Director of the Division of Psychiatry of the Department of Hospitals.⁷³ Upon receipt of the prisoner, the Director of the Division of Psychiatry must promptly designate two qualified psychiatrists from the staff of such division to make an examination of the prisoner. Upon completion of the examination, the Director must transmit to the court forthwith a complete report of the findings of the qualified psychiatrists who have conducted the examination to the effect that the defendant is, or is not, at the time of such examination, in such a state of idiocy, imbecility, lunacy, or insanity as to be incapable of understanding the charge against him in the proceedings or of making his defense. If they find that the prisoner is in such a state, the report must include a recommendation as to appropriate institution to which such defendant should be sent. The report of the psychiatrists made to the court may not be received in evidence upon the trial of the defendant but is filed by the court in the Office of the Clerk of Court and is subject to inspection only on an order of that court.⁷⁴ The court must cause a copy of the report to be served on the prosecutor of the county where the crime was committed and upon the counsel for the defendant. If they do not accept the findings of the psychiatrists and wish to controvert

70 Flower, *The Psychiatric Examination of Offenders in Massachusetts*, in HOCH AND ZUBIN, *PSYCHIATRY AND THE LAW* 97, 104-105 (1955).

71 N.Y. PENAL LAW § 1120; N.Y. CODE OF CR. PRAC. § 658-662 f.

72 *Ibid.*

73 Barshay, *The Defense of Insanity in Criminal Cases*, in HOCH AND ZUBIN, *PSYCHIATRY AND THE LAW* 116, 117-119 (1955).

74 *People v. Draper*, 104 N.Y.S.2d 703, *aff'd* 303 N.Y. 653, 101 N.E. 2d 763 (1951).

them, the court shall afford an opportunity to counsel for defendant and the district attorney to do so before him. If after the hearing is concluded, the court is of the opinion that the defendant is in such a state of idiocy, imbecility, lunacy or insanity as to be incapable of understanding the charge against him, or the proceedings, or of making his defense, the trial must be suspended until such time as the defendant is no longer in such a state. The court will then commit the defendant to a state hospital for the insane of the Department of Correction or any other appropriate state institution. of the Department of Mental Hygiene.

A defendant so committed must remain confined in such institution until he is no longer in such a state of idiocy, imbecility, lunacy or insanity as to be incapable of understanding the charge against him or of making his defense thereto. Upon the occurrence of such an event, the director of the institution wherein such defendant is confined, must inform the court, the district attorney and the defendant's counsel of such fact, so that the person so confined may be forthwith returned to the authority by which he was originally held in confinement. The court must order the sheriff, without delay, to bring such defendant from such institution and commit him in proper custody; then, the proceedings against the defendant are to be resumed and the defendant brought to trial, or his indictment otherwise disposed of.

If the defendant is found not to be presently insane, and the court, after hearing the qualified psychiatrists and all appropriate parties, approves such findings, proceedings against the defendant are resumed as if no examination had been held at all. Present insanity is then barred as an issue before the petit jury, but this does not preclude the defendant from interposing the defense of past insanity or insanity at the time of the commission of the crime.

If the defendant, after examination, is found sane he proceeds to trial. If the judge before final judgment reaches the conclusion, based on his own observations or on facts called to his attention, that the defendant has become in such a state of idiocy, imbecility, lunacy, or insanity, so as to be incapable of understanding the proceedings or making his defense, he may suspend the trial or delay the execution of the judgment and comply with the procedure above described.⁷⁵

To sum it up, no person can be tried, sentenced, or punished when he is in such a state of idiocy, imbecility, lunacy, or insanity, so as to be incapable of understanding the proceedings or making his defense.

At the federal level, the importance of a psychiatric examination is recognized by the following provision of the United States Code:

Whenever after arrest and prior to the imposition of sentence . . . the United States Attorney has reasonable cause to believe that a person charged with an offense against the United States may be presently insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly to assist in his own defense, he shall file a motion for a judicial determination of such mental competency of the accused, setting forth the ground for such belief with the trial court in which

⁷⁵ Barshay, *supra* note 73.

proceedings are pending. Upon such a motion or upon a similar motion in behalf of the accused, or upon its own motion, the court shall cause the accused . . . to be examined as to his mental condition by at least one qualified psychiatrist, who shall report to the court.⁷⁶

These statutory provisions indicate the recognition which is steadily being given to the field of psychiatry by the legal profession. The defendant is not only protected during the trial, but also before the trial where his sanity is in issue. They also act as a good antidote to the distrust created when the defense hires a psychiatrist to testify regarding the defendant's sanity. The court appointed psychiatrist cannot be accused of testifying in behalf of the party who is paying him. On the contrary he is a disinterested and impartial witness and the jury is in a better position to evaluate his honest opinion without shrugging it off as of little or no value.

As we have seen, very little weight is given to the hypothetical question and testimony based on court room observations by the psychiatrist. The psychiatrist should not testify unless he has been able to give the defendant a thorough examination. If his testimony is based on a thorough examination it will be more reliable and more weight will be given to it.

The giving of a thorough examination raises many problems. Frequently, it may be impractical to provide for the number of interviews necessary to make a valid determination of mental soundness. Davidson points out that experienced court examiners reach their diagnosis after a single interview in 90 or 95 percent of the cases, even when they have an opportunity to request further consultation.⁷⁷ The psychiatrist should make as thorough an examination as time and cost will allow.

The psychiatrist should also give his testimony in terms that the layman can understand, and when using technical terms he should explain their meaning. This will aid in overcoming the language difficulties between the field of psychiatry and the law. The jury must be able to understand the testimony in order to give it any weight. Testimony in understandable terms will save the psychiatric witness from much ridicule and embarrassment.

In order to remedy the difficulties now existing the psychiatrist must make a greater effort to understand the law and to prepare himself properly for any testimony which he may have to give. Books written by psychiatrists and specialists in the field of mental disorders or forensic psychiatry should be an invaluable aid to the psychiatrist. The lawyer in turn should make every effort to learn as much about the field of psychiatry as possible. MacDonald, the psychiatrist, states in his book that psychiatry and psychology are neglected subjects in the majority of our law schools.⁷⁸ It would be a great aid to the attorney if such courses were included in the law school curriculum. It would help to make an unfamiliar and hard to understand field more understandable. Until such steps are taken the gap between psychiatry and the law will close very slowly. Both fields should do everything possible to hasten the closing of this gap.

76 63 Stat. 686, 18 U.S.C. § 4244 (1951).

77 DAVIDSON, *supra* note 59 at 35.

78 MACDONALD, *supra* note 58 at 195.

There is no doubt that the psychiatrist as an expert witness has much to offer to the law. The psychiatrist attempts to know the whole man. To know the whole man he must understand the workings of his mind as well as his physical being. The psychiatrist is striving to gain such knowledge and the field of law should not lag behind in its effort to do the same. Our system of law is founded upon the theory of justice and in order to do justice the law must know whether the accused is mentally sick; if he is, then curative and corrective rather than punitive measures should be taken. The *Leopold case*⁷⁹ is a prime example of a probing into the mind of the accused. A plea of guilty to murder was entered, but the judge, upon considering the testimony of psychiatrists, gave long prison sentences rather than the death sentence which would normally be imposed for such a crime.

Most courts today would undoubtedly accept the principle that psychiatric evidence should be received, at least in the judge's discretion, when its value outweighs the cost in time, distraction, and expense. However, one court has stated that "while physicians are better qualified to testify to a diseased condition than a layman, their testimony on the subject of mental capacity of an individual whom they have been privileged to observe is not entitled to any greater weight than that of the layman."⁸⁰ The value of such evidence seems to depend upon the importance of the witness's testimony, and upon the opportunity of the expert to form a reliable opinion. As the courts have held, an opinion based upon a hypothetical question seems almost valueless here. One psychiatrist calls the hypothetical question "a logical monstrosity, an artificial and pompous creation of the human mind, which wishes to get as far away as possible from reality and from the living human being and talk about both as if they do not exist in fact and decide what to do with both in fact. I have always considered the hypothetical question immoral in all its aspects and I have one answer for it . . . as a psychiatrist I was taught to look at people and things with the eyes and mind of a trained clinical psychiatrist. As a doctor, I know nothing of make believe, and I was taught by the whole history of my specialty to observe facts and people and not supposition made-to-order and badly made to boot."⁸¹

Only slightly more reliable is an opinion derived from the subject's demeanor and his testimony in the courtroom as illustrated by the *Hiss case*.⁸² Most psychiatrists would say that a satisfactory opinion can only be formed after the accused has been subjected to a clinical examination. It appears that a discretionary power should be recognized in the judge, upon application before trial, to order such an examination, subject to the consent of the accused, and to limit the psychiatric evidence in the other forms to cases where it has not been feasible to make a clinical examination. In criminal trials a thorough examination of the accused is of the utmost importance in order to determine whether the accused had the propensities to commit the crime charged.⁸³

79 McKERNAN, *supra* note 1.

80 Tyler v. Tyler, 401 Ill. 435, 82 N.E.2d 346 (1948); ZILBOURG, THE PSYCHOLOGY OF THE CRIMINAL ACT AND PUNISHMENT 123 (1954).

81 *Id.* at 125-26.

82 U.S. v. Hiss, 88 F. Supp. 559 (S.D.N.Y. 1950).

83 McCORMICK, EVIDENCE § 45 (1954).

In addition, it has been suggested that criminals should be classified on the basis of their psychological propensities and the inner structure of their personalities. Neither the law nor the warden is fit to pass on the corrigibility or incorrigibility of a given criminal.⁸⁴

Every effort should be made to give the accused the justice due him. Psychiatric evidence must be allowed in the courts in order for the court to know the whole man. Admittedly, the field of psychiatry is still in the formative stages, but it has made great strides during the past decade. Today, the psychiatrist needs a fuller hearing by the law. He is not permitted to reveal all that he could reveal about those who commit crimes. Our court procedure must be radically reformed to permit a more direct presentation of the major psychological issues involved in criminal behavior.⁸⁵

Dr. Zilbourg suggests that the psychiatric profession formulate its own moral code which would govern every psychiatrist in good standing and at the same time establish definite medical standards which must be met by potential psychiatrists. In this way, the legal profession and the public would know which psychiatrists the psychiatrists themselves considered qualified as specialists in the field of forensic psychiatry. Under this code, a qualified psychiatric expert would not appear for any one side in a criminal case, but only as a friend of the court. Furthermore, he would be considered as acting against the ethical principles of his profession if he accepted the concept of legal insanity; for clinical psychiatry does not know of such a condition and after almost two hundred years of clinical investigation seriously doubts its existence. By accepting those ethical principles the expert would not find it difficult, nor immoral, nor illegal, to refuse to answer any hypothetical question propounded to him.⁸⁶

Conclusion

The gap between the legal and psychiatric appraisal of crime has been narrowing, as has the gap between the legal and psychiatric evaluation of mental disease itself. While it is true that many issues remain to be solved, the expert knowledge of the psychiatrist is gradually replacing the early legal views of mental disorder.⁸⁷ Furthermore, as Professor Curran has pointed out:

Methods of proof are the heart of the law in action, in litigation. Stare decisis has its necessary place in substantive law, but there should be no vested interests of litigants in the law of evidence. The courts must seek reality and truth by the best available methods and certainly cannot ignore scientific findings, analyses, opinions and methods— and these do not remain static.⁸⁸

84 ZILBOURG, *supra* note 80 at 129.

85 *Id.* at 121-22.

86 *Id.* at 124-125.

87 HOCH AND ZUBIN, *PSYCHIATRY AND THE LAW* (1955).

88 Curran, *supra* note 27 at 1019.