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Bernard L. Diamond
University of California, Berkeley

David W. Louisell
University of California, Berkeley

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THE PSYCHIATRIST AS AN EXPERT WITNESS: SOME RUMINATIONS AND SPECULATIONS†

Bernard L. Diamond* and David W. Louisell**

CONSIDER the difference between the expert testimony of an orthopedic surgeon in a personal injury suit and the testimony of a psychiatrist in a murder trial in which some elements of the *mens rea* are at issue. In both instances an expert opinion is received in evidence, providing the trier of fact with technical, specialized information which must, or should, be available in order to permit a rational decision-making process. Well-established rules govern the nature of expert evidence and its mode of presentation.¹ In legal theory, the orthopedic surgeon and the psychiatrist are both experts—physicians—who perform comparable functions in the court proceedings. Presumably, they are governed by the same rules of evidence, they are subject to the same restrictions, and their testimony bears an essential, though perhaps fragmentary, relationship to the chief issues at trial.

In actual practice, however, there can be a vast difference between the functions which these two experts play in the legal process.

In a typical, relatively uncomplicated accident suit involving an injury to the body, the questions to be decided are capable of reasonably precise definition and resolution: What was the negligent act or omission by the defendant? What was the causal relationship between that act or omission of the defendant and the injury and disability of the plaintiff? Was the plaintiff free of contributory negligence? What is the nature of the injury? What is the extent and permanency of the consequent disability? Obviously, even in simple litigation there are also less well-defined questions that are incapable of easy resolution. How much pain and suffering has the plaintiff undergone in the past and how much may he anticipate in the future? What is the monetary value of an hour, a day, or a month

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* M.D., Professor of Criminology and of Law, University of California, Berkeley; Assistant Chief of Psychiatry, Mt. Zion Hospital, San Francisco.—Ed.

** Professor of Law, University of California, Berkeley.—Ed.

1. McCORMICK, EVIDENCE §§ 13-18 (1954); 3 WIGMORE, EVIDENCE §§ 555-71, 687-88, 1923, 1925 (3d ed. 1940); Louisell, *The Psychologist in Today's Legal World*, 39 MINN. L. REV. 235 (1955).

of pain? But these are subordinate to, and distinguishable from, the central questions which are at the heart of the litigation.

In such a situation the expert witness should have little or no difficulty defining his own functional role in the trial. He is to supply particular, specialized information to the court—information derived both from his direct observation of the plaintiff and from his fund of general professional knowledge about the structure and mechanics of the human body and the nature of the injuries which the body suffers from external forces. If the witness is a man of high integrity, experience, and professional competency, he will find it easy to communicate to the court which of his answers are based upon firm, objective facts and which veer off into more speculative hypotheses. He need not become defensive about his technical knowledge and his expertise, and he should be able to avoid becoming involved in those issues at trial which clearly have no relationship to his area of competency.

Particularly, the form in which such an expert's evidence is presented in the courtroom should not normally concern him seriously. He can testify almost as capably if his evidence is given in reply to a series of questions as if it is given as a continuous narrative. Cross-examination should hold no terrors for him. It should be of no grave consequence to him whether the questions are proposed as real or as hypothetical, provided they be put intelligibly. In short, this expert witness should be capable of easily adapting himself and his testimony to whatever rules, restrictions, and modes of presentation the law, in its own wisdom, deems best. Most especially, he should experience no need to involve himself emotionally or intellectually in the outcome of the trial.

It is possible to look upon the rules of evidence simply as logical, necessary devices to ensure that all of this takes place: that the expert witness be truly an expert and that he be exposed if he is not; that his evidence be objective and relevant and that it be presented in such a fashion that its weight and significance may be judged. The ordinary rules of evidence can, in most instances, ensure that the expert is not drawn into issues that do not concern him or that could be better determined by other kinds of witnesses giving other kinds of evidence.

Thus, in a well-run personal injury trial, the orthopedic surgeon of competence and integrity can be close to the ideal of the uninvolved, objective, impartial expert. If this ideal is not too frequently achieved, it is not necessarily because the rules of trial procedure are at fault. It is more likely the result of human failings and the ex-

iciencies of the expert's professional practice. Often, surgeons habitually will be either a defendant's or a plaintiff's witness. Some degree of bias is inevitable and its nature depends upon the orientation of the surgeon's medico-legal practice. Permanent emotional bias may also exist within the expert's own personality. He may be strongly identified with authority and conservative ideas of individual responsibility and determined, at least unconsciously, that the plaintiff receive a minimum of compensation. Or he may over-identify with the patient's position as the underdog and engage in a crusade from the witness stand on the patient's behalf. But these defects should be demonstrable by the questioning of a skillful attorney. No basic change in procedure or departure from the time-honored adversary system is necessary to cope with these problems. The fact that orthopedic surgeons for reasons of temperament and training frequently dislike the adversary system, as physicians often do, is not of great materiality to the law, except as it limits available competent expertise.

There is no occasion here to attempt to pass judgment on the various proposals for substantive change in handling personal injury litigation. Certainly the introduction of pre-trial discovery procedures has facilitated and improved the use of expert testimony, and it can be expected that in time the extraordinary increase of such cases will bring further reforms. But we see no reason to contemplate fundamental change in the basic functions and roles of such expert witnesses, except that the movement to so-called "impartial" expertise to supplement partisan testimony may receive additional impetus.

I. THE MODERN PSYCHIATRIC EXPERT

The present-day psychiatric expert witness, particularly if he is of psychodynamic or psychoanalytic orientation, poses a vastly different and more complex problem for traditional trial procedure and legal theory. And it is open to question whether the conventional rules of evidence and procedure are capable of adequately coping with the psychiatrist's intrusion into the legal process. Some would, perhaps, wish to deal with the psychiatrist's trouble-making propensities by thrusting him completely out of the courtroom, relegating him to pre- and post-conviction phases of the judicial process.² Others would temper and restrict his role to that of the traditional expert. Still others propose new rules to meet specifically this new

2. 6 HOUTS, *TRAUMA* 4:1 (1964); ROCHE, *THE CRIMINAL MIND passim* (1958).

kind of expertise.³ But neither the statutory nor the appellate law seems fully to appreciate the extent and depth of the changes which have come about in the use of psychiatric testimony on the trial court level. There have been only limited attempts to define the legitimate boundaries of such evidence and to develop broad general principles to direct the increasing use of psychiatric evidence into sound channels of legal progress.

It is true that in some cases the role of the psychiatric expert witness is nearly as well-defined as that of an orthopedic surgeon or any other medical expert.⁴ When the psychiatrist testifies as to the existence of an overt psychosis, such as schizophrenia, and supports a plea of insanity in a murder trial, or when he describes the incapacity of a conversion hysterical paralysis following an industrial injury in a compensation case, he may very well be as impartial and as objectively scientific as any surgeon describing a fractured leg. Furthermore, his role in the trial may be sharply restricted to specific, technical questions, and he need not involve himself in the ultimate issues of the litigation. In these instances the traditional rules and procedures work well.

But in recent years there has been a sharp increase in quite a different type of psychiatric evidence which, we believe, performs a different function in the trial. This change has come about, we think, because, on the one hand, of a much more sophisticated attitude by the law toward psychiatric and psychological problems, and, on the other hand, because of a radical change in the nature of psychiatry. In the late nineteenth century, psychiatry was very much a sub-speciality of neurology. Already by then neurology had become an extraordinarily precise branch of medicine. By meticulous examination of the patient's reflexes and sensory and motor functions, it was possible to localize and describe with exactness the lesion of the nervous system.

"Then, knowing the location of the lesion, one could often deduce the etiological agent, and sometimes prescribe a remedial treatment. The neurologists were able, through these methods, to demonstrate the existence of hundreds of discrete

3. Dieden & Gasparich, *Psychiatric Evidence and Full Disclosure in the Criminal Trial*, 52 CALIF. L. REV. 543 (1964).

4. Perhaps the converse is more often true. Because of lack of visibly demonstrable pathology, the surgeon may have to present expert testimony of an intuitive, judgmental quality approaching that given by the psychiatrist. In such an instance, the real value of the surgeon's testimony lies not in the so-called objective facts, but rather in the skill, experience, knowledge, and judgment of the expert. *Quaere*: might not the generalization be made that the more difficult the trial situation, the more controversial the issues to be resolved, and the more uncertain the balance of evidence, the more likely the expert testimony, be it surgical, medical, pathological, criminalistic or ballistic, will approach the subjective, intuitive and holistic quality of the psychiatrist's expertise to be described *infra*?

neurological diseases with particular, well-defined, and uniformly located lesions, disclosed by reasonably constant subjective and objective symptoms and pathological manifestations of body function. It was anticipated that the same would be accomplished in the area of mental disease."⁵

This anticipation was never realized. The development of Freudian psychoanalytic and psychodynamic theories, with their emphasis on psychotherapy and dynamic formulation rather than static diagnosis, created a completely different climate for the development of psychiatric knowledge.

"Modern psychotherapeutic psychiatry as practiced today by well-trained physicians conceptualizes mental illness as a complex interplay of forces: instinctual as well as acquired and environmental social forces interacting with the defenses and adaptive functions of the ego Obviously such a dynamic conceptualization of mental illness sacrifices much of the precision and discreteness so eagerly sought by the early neurologists. But what has been gained has been a marvelously useful, psychologically broad concept of all human behavior, not just of gross mental abnormality. Medical psychology has expanded far beyond its old borders and has contributed significant insights into almost every field of human activity—the arts as well as the sciences."⁶

Because the new breed of psychoanalytic psychiatrists were so few in number and so intensely preoccupied with therapy, there was a long time lag before twentieth century psychiatry was brought into the courtroom. By and large, forensic psychiatry was left by default to the neuropsychiatrist whose orientation was physical rather than psychological, and custodial rather than therapeutic. Following World War II, there was a rapid increase in the number of psychiatrists. Many outstanding European psychoanalytic pioneers had emigrated to the United States just before the war, and they now exerted a profound influence upon the clinical and theoretical training of the younger American psychiatrists.

Today, American psychiatry is a complex amalgamation of Freudian, Neo-Freudian, socio-cultural, and biological concepts and theories. The emphasis on psychotherapy continues unabated by the significant new developments in pharmacotherapy. Psychological, sociological, physical, and pharmacological methods of treatment are not regarded as competitive alternatives, but as supplements to each other in the treatment of the total human being.

Much of this change in the psychiatric climate has still not fully

5. Diamond, *From M'Naghten to Currens, and Beyond*, 50 CALIF. L. REV. 189, 195 (1962).

6. *Ibid.*

penetrated into the courtroom. The forensic psychiatrist is still apt to be someone who talks like a nineteenth century neurologist. But the changeover is now proceeding much more rapidly and the outstanding legal psychiatrists of today are closely identified with the psychoanalytic movement.

So today, the psychiatrist in the courtroom may be called upon to answer questions of a very different nature than would have been thought of a hundred, fifty, or even twenty years ago. And the psychiatrist responds to these questions very differently than he would have in pre-psychoanalytic years.

Undoubtedly the development of psychoanalytic theories and their widespread popularization have contributed to the sophistication of the law. But other factors have contributed too: the growing preoccupation of the law with the individualization of justice, and the greater emphasis on the rights, uniqueness, and worth of human life. In a century when powerful social and political forces throughout the world have tended to devalue these elements of humanity, our law often has stood as an ever-strengthening bulwark in support of such values. This is particularly evident in the diminishing harshness of the criminal law and the greatly increased emphasis on rehabilitation, rather than mere punishment, as the goal of the administration of criminal justice.

Whatever the reasons for the changes might be, modern psychodynamic psychiatry fits in very well with these humanitarian values and goals. Lady Barbara Wootton said:

"Without question, therefore, in the contemporary attitude towards anti-social behaviour, psychiatry and humanitarianism have marched hand in hand. Just because it is so much in keeping with the mental atmosphere of a scientifically-minded age, the medical treatment of social deviants has been a most powerful, perhaps even the most powerful, reinforcement of humanitarian impulses; for to-day the prestige of human proposals is immensely enhanced if these are expressed in the idiom of medical science. Indeed we might go so far as to say that, even if the intellectual foundations of current psychiatry were to be proved to be wholly unsound, and even if psychiatric 'science' was exposed as nothing more than fantasy, we might yet have cause to be grateful for the result of so beneficent a delusion."⁷

II. THE PSYCHOLOGICAL SCIENCES

The psychological sciences differ from the biological sciences in that the subject matter of the former is not visible.⁸ The investiga-

7. WOOTTON, *SOCIAL SCIENCE AND SOCIAL PATHOLOGY* 206 (1959).

8. In this the psychological sciences resemble modern physics, much of whose

tor is able to have a first-hand acquaintance only with his own conscious mind—never with his own unconscious, and never directly with the conscious or unconscious minds of others. The investigator must therefore rely upon inferences made from derivatives: speech, non-verbal communication, actions, behavior. For example, a psychoanalyst never actually knows what his patient dreams. He knows only what the patient tells him about his dream, and there is reason to believe that the telling of a dream is much different from the dreaming process itself.

Furthermore, psychological experimentation is strictly limited. One can rarely devise an experiment that would have the precision taken for granted by the chemist and the physicist. Scientific experimentation consists largely in rigorously controlling irrelevant factors and isolating the variable under investigation. Techniques for doing this are not easy to devise with human psychology. Important ethical and humane considerations block the performance of crucial experiments. So the psychologist and psychiatrist rely heavily upon natural experimental opportunities: that is, careful observation of interactions which spontaneously occur in certain partially controlled situations. So-called clinical research consists of the observations of patients in situations in which diagnosis and treatment are the primary goals; much of the observation is concerned with the interaction between the clinician and the patient. Thus, the clinician, himself—his ability to observe, to interact, to feel, and to sense intuitively—becomes the chief instrument of research.

With few exceptions, such as the electroencephalogram, nothing is observed, described, or measured except derivatives of the mental processes. In order to make deductions and inferences about the mind—both its normal and pathological functions—the observer must have a theoretical framework in which to order, explain, and interpret his observations of the mental derivatives. Further, his inferences, as well as his observations, are strongly colored by the qualities of his observing instrument: that is, his own personality, experience, and theoretical training.

Psychiatry and psychology thus are not exact sciences. Observations about an individual that can be quantified, such as an I.Q., are of doubtful validity and often of no relevancy to the kind of information required to answer questions posed by the law. Some judges are fond of pontificating that psychiatry is not an exact

subject matter (*e.g.*, atoms and sub-atomic particles) is not visible. The physicist, too, must make inferences from his observations of derivatives of the phenomena which he wishes to study.

science; therefore they feel free to reject all psychiatric evidence. It is often within their power to do so. But they must not harbor the illusion that psychiatry and psychology will ever be "exact" in the sense that these judges would like: that is, precise, quantitative, experimentally verified, and with substantially unanimous agreement of all behavioral scientists as to observation and theory.

The law must recognize that the usefulness of psychiatric evidence is not determined by the exactness or infallibility of the witness' science. Rather, it is measured by the probability that what he has to say offers more information and better comprehension of the human behavior which the law wishes to understand. The psychiatrist offers a hypothesis explaining a specific set of human thoughts, feelings, and actions. He then attaches values to the phenomena he describes: certain feelings are "normal," certain thoughts or actions are "pathological," certain behavior is "compulsive," other behavior is "free," etc. The legal usefulness of such hypotheses and values will depend less upon their scientific precision than upon their wisdom.

III. THE USEFUL PSYCHIATRIST

Following this line of reasoning, then, the useful forensic psychiatrist must possess two characteristics: he must be a wise man, and he must fully comprehend and be sympathetic to the goals of justice—not only to the ends, but to the means of the law as well. But this is precisely where the difficulty with forensic psychiatry lies. The psychiatric expert is apt not to be a very wise man, but rather a possessor of technical knowledge of some depth, but little breadth. He seldom comprehends or is sympathetic to the legal process. The situation is worsened when the law treats the psychiatrist as if he were similar to a surgeon, a laboratory scientist, a ballistics expert, or any other technical expert who is experienced in providing trial courts with specialized information. The result is a pseudo-scientific veneer for the psychiatrist and his testimony, behind which the lack of wisdom and lack of legal comprehension are concealed.

A good psychiatrist may very well possess a great deal of wisdom about human nature, particularly concerning the deviant varieties with which the law is concerned. A wise man differs from ordinary mortals by virtue of his knowledge, his capacity to observe perceptively, his self-discipline, and his ability to integrate information derived from many different sources into a meaningful whole. Most of all, he is capable of surmounting, or at least discounting, his own prejudices and preconceptions and of overriding the obvious and often glib conclusions based upon common sense

alone.⁹ Common sense conclusions, particularly about human nature, are not necessarily the embodiment of the wisdom of the ages. "Common sense" may be the superficial rationalizations by which we avoid the real and deeper meanings of the human mind. Wise men recognize this and are prepared to accept explanations of human behavior and natural phenomena that seem esoteric and enigmatic to the less wise. Hence the mystery which has always been associated with the oracle.

In truth, the psychiatrist is rapidly becoming a sort of oracle to be piously consulted by the courts of law, all accomplished with appropriate rituals of pseudo-scientific jargon in reply to non-scientific questions such as: "Is the defendant capable of distinguishing right from wrong?" or "Did the defendant possess the capacity to entertain malice aforethought at the instant of the criminal act?" or "Is the pain in the leg of the plaintiff the result of a genuine emotional trauma sustained in an accident or is it imaginary, reflecting his motivation to get something for nothing?"

Recently one of the authors received a letter from a judge who is chairman of a crime commission in his state. The letter requested information as to how a law might be formulated that would guarantee that no sexual offender would be discharged from an institution if he might commit a second offense after his release. The only logical answer to such an inquiry is the suggestion that the institution be placed in charge of a skilled and certified fortune-teller. Psychiatrists generally do not possess such abilities to predict the future.

IV. THE NEED FOR PROCEDURAL CHANGES

If the psychiatrist is to be useful to the law, not as an oracle, fortune-teller, or pseudo-exact scientist, but rather as a man possessed of a certain modicum of wisdom about human beings and their behavior, it might be desirable for the law to modify some of its procedures in order to facilitate this. Some of the traditional ways of doing business in a courtroom might not be the most appropriate or useful for communicating what the psychiatrist has to say to the trier of fact. Nor are the traditional ways necessarily the best to reveal whether in truth the psychiatrist is a wise man who comprehends the goals of the law.

We wish to limit the remainder of our discussion in this paper to a few of the possible modifications of procedure which might improve psychiatric testimony and which would be more compatible

9. Louisell & Diamond, *Law and Psychiatry—Detente, Entente or Concomitance?*, 50 CORNELL L.Q. 217 (1965).

with the psychiatrist's true role in the decision-making process of the trial. No claim is made that these are radical innovations.

A. *The Fallacy of Impartiality*

One of the authors has had considerable experience as a psychiatric expert for the defense in criminal trials. Taking advantage of judicial leniency he has experimented with different modes of participation in the criminal process. Out of this experience has come the conviction that the psychiatrist achieves a more significant, and at the same time, more honest and ethical relationship to the trial process if many of the customary pretenses of the expert witness are discarded.

The law too much assumes that psychiatric experts, especially court-appointed ones but to a degree also those called by parties, are impartial; that they furnish *neutral expertise* rather than *professional viewpoint*. The reality of this is open to question.¹⁰ In former years, the psychiatrist who relied solely upon the obvious and objectively visible evidence of mental disease and who spent only a brief time with the defendant could, perhaps, retain a kind of impartiality. But now, when most of the better trained psychiatrists are keenly interested in the deeper and more obscure workings of the pathological mind and may develop a close and intimate emotional relationship with the defendant-patient through many hours of probing clinical examination, it becomes difficult to continue the pretext of detachment and impartiality.

Of even greater importance is the present trend toward a closer and more prolonged working relationship between the psychiatrist and the attorney. It is not unusual for an attorney (either prosecution or defense) to consult a psychiatrist very early in a criminal case. The attorney may depend heavily upon the advice and experience of the psychiatrist in planning the basic strategy of the entire legal proceeding, from the preliminary investigations to the concluding argument to the jury. Not infrequently the mental state of the defendant is the sole issue in dispute during the trial, and the problems of the mental state—the *mens rea*—may be most complicated and difficult of demonstration and resolution. Hence, the attorney may wisely utilize the collaboration of the psychiatrist at every step of the way.

Should the law then permit the illusion that the psychiatrist remains impartial and outside the adversary system? We think not.

10. Diamond, *The Fallacy of the Impartial Expert*, 3 ARCHIVES OF CRIMINAL PSYCHO-DYNAMICS 221 (1959), reprinted (in part) in LOUISELL & HAZARD, PLEADING AND PROCEDURE 1291 (1962).

The remedy must lie in the full disclosure to the jury of the psychiatrist's role and function in the particular case. And it should not be necessary to drag this information from the reluctant witness through sharp and vigorous cross-examination. Rather, the psychiatrist should be prepared to describe his complete relationship to the defense (or to the prosecution) in his primary testimony as a legitimate part of the clinical information upon which his opinion is based. In this way, not only the opinion of the expert but also his role and participation become matters for the jury to weigh.

B. *The Form of the Testimony*

Traditionally, the expert witness presents his testimony, as does the ordinary witness, in the form of direct answers to specific questions proposed by the attorney. This interrogatory form of communication probably developed out of the necessity of presenting evidence in tiny fragments, each fragment an entity in itself which could then be evaluated, determined if competent, relevant, and material, and then affirmed or contradicted by further interrogation. This may be the best method for the presentation of so-called objective facts, although this has been incisively questioned by able observers. In any event, it is gravely doubtful that it is the best means of communicating the psychological essence of the human mind.

Only a few decades ago psychiatrists were trained to imitate the systematic precision of the physician and surgeon. The mental examination, as set forth in the medical records of that time, followed very closely the form used by other physicians. It was divided into a great many different elements, each with a suitable rubric such as chief complaint, present illness, family history, past history, developmental history, educational and employment record, orientation to time, place, and person, recent and recall memory, contact with reality, insight, affect, and many more specific items, ending with a diagnosis, prognosis, and prescription for treatment. The psychodynamic psychiatrist of today no longer describes his patients this way, and he avoids thinking in such a fragmented manner. The human mind, normal or pathological, is best and most meaningfully described as a continuous story that begins with the individual's birth, or even before, with his family, social, and cultural heritage, and ends with the present moment which, in a criminal trial, means the defendant sitting in the presence of the jury, under its scrutiny, and awaiting its decision.

It is no small task for the psychiatrist to describe and interpret

all of this from the witness stand. Particularly, it is difficult, but nevertheless essential, that he convincingly communicate to the jury the relevancy of the total life history of the defendant to that critical moment of the alleged criminal act upon which the jury must pass judgment.

To do this successfully and meaningfully, the psychiatrist must use the narrative form. He has a story to tell, a story of another man's whole life, thoughts, feelings, hopes, fears, fantasies, loves, hates, delusions, and dreams. Unavoidably, the clinical history, like all good stories, will contain exaggerations for the sake of emphasis, discrepancies and inconsistencies, loose ends, and unresolved contradictions. But these can be dealt with in cross-examination. For it is in clarifying, criticizing, verifying, and validating that the technique of question and answer works best.

So we propose that the psychiatrist be permitted and encouraged to tell his story as a narrative, all in one piece, taking as long as reasonably necessary, to relate to the jury who he, the witness, is, how he came to be involved with the defendant, what functions he has played in the development of the case, his interaction with the defendant, how he elicited the information he received, how he reconstructed the events of the defendant's life, and what he has inferred about the secret and invisible processes of the defendant's mind.

Then, upon the completion of this story, it becomes appropriate for the criticism and clarification to begin. For this, the traditional techniques of cross-examination seem well suited. It is in cross-examination that our method of utilizing expertise seems to excel in relation to typical European methods.¹¹

C. *Full Disclosure and the Hypothetical Question*

It is recognized that a few situations exist in law (as, for example, an issue of testamentary capacity) where no approach other than the hypothetical question is normally possible. But if one accepts the principle that the validity of the psychiatrist's observations and inferences is dependent upon the totality of his approach, upon his taking everything, including his own personal and subjective interaction with his patient, into account, then the hypothetical question generally becomes a dubious technique.

No hypothetical question can ever be formulated which would contain sufficient facts to justify a really valid psychiatric inference. This is because the modern, psychodynamically oriented psychiatrist simply does not assemble diagnostic facts *A*, *B*, and *C* about his

11. See SCHLESINGER, *CASES ON COMPARATIVE LAW* 224, 250 (1959).

patient and thus arrive at conclusion *D*. The psychiatrist may be very much interested in observed phenomena, such as mannerisms, delusional and hallucinated behavior, and the like, but he can not derive a valid conclusion from such phenomena until he puts them together with his own subjective relationship to the examinee within the context of the latter's total background. There are few, if any, pathognomonic signs of mental disease.

The problem of the hypothetical question usually arises in a criminal trial under two circumstances. First, it arises when the psychiatrist has not actually examined the defendant. Such hypothetical testimony is of doubtful worth and often of dubious ethical quality. Secondly, it arises when it is used as a device to restrict the information admitted to the jury. A defendant may not wish to testify on his own behalf, being unwilling to admit the facts of the deed. The strategy of the trial may demand that all sorts of information about the crime and the criminal be withheld from the jury's knowledge, including evidence of previous offenses. The hypothetical question can be used for this purpose, restricting the psychiatrist to only certain facts and aspects of the case. This is the defendant's constitutional right. But it is not necessarily the psychiatrist's ethical duty to cooperate with such strategy. He should not and, if he is conscientious, he will not, wholly shrug off the responsibility for the consequences of his testimony.

There are two basic and radically different strategies available to the defense in a criminal trial involving a psychiatric defense. The defense can, in effect, say, "We admit nothing—prove your case." Or the defense can say, "We admit all the objective facts, we want you to hear the total account of this man's life, mind, and deed, and after you have heard everything you, the jury, will be better able to reach a just decision."

It seems to us that the psychiatrist may well have conscientious scruples as to the legitimacy of a role in the typical "admit nothing" defense. Of what possible use can such a role typically have other than to obscure the issues and befuddle the jury with professional jargon and abstract theories? Good psychiatric testimony generally is compatible only with full disclosure. It is, in fact, a type of full disclosure which goes far beyond that customary in the courtroom. The jury is asked to listen to and consider evidence of a type rarely disclosed in normal human relations. The defendant relinquishes all right of privacy, both as to his past and as to the inner depths of his mind, even as to matters of which he, himself, may be unaware.

We doubt that compromise can be possible here. To be willing

to disclose in depth only those aspects about the self of the defendant that are strategically useful can quickly place the psychiatrist in the position of a dupe, in the position of one whose knowledge and skills are being used for purposes foreign to the values of his own discipline. Here, the remedy lies with the ethical and professional responsibility of the psychiatrist rather than with a change of the legal rules. The psychiatrist may insist that he will not participate in legal work unless he is permitted to disclose all. And he may wish to keep a careful watch over the uses to which his testimony is put.

It is true that the law can exercise its prerogative of saying to the psychiatrist, "This is none of your business. We want the answers to certain technical questions, and what we do with your answers is no concern of yours." But the price of such legal arrogance is the limitation of courtroom psychiatric expertise to the incompetent, the indifferent, and the pseudo-scientific purveyor of jargon. The leaders and the thinkers of the psychiatric profession simply will not participate on such terms.¹²

However, it would be a sad mistake for the psychiatrist to assume that he is qualified by training or experience to dictate to the lawyer the precise tactics of the criminal trial. And to threaten boycott for non-compliance would certainly not improve the rapport between the two professions, nor would it benefit either the defendant or society. Obviously, there must be a middle ground of necessary compromise that will not offend the ethical sensibilities of the most competent psychiatrist and at the same time will recognize the realities of the legal process. Most psychiatrists are primarily therapists, and they derive their sense of what is proper and responsible from the requirements of the therapeutic situation. But the legal trial is not an extension of the therapeutic process, and the psychiatrist is called upon to alter his perspective when he changes his role to that of expert witness. He needs the help of the lawyer in making this shift, and he must be willing to allow the lawyer to bear the final responsibility for the tactical decisions involved.

D. *The Problem of Self-Incrimination*

Candor compels acknowledgment that the psychiatrist's desideratum of "full disclosure" in the courtroom potentially confronts the principle against compulsory self-incrimination. We do not here attempt a reappraisal of the contemporary significance of that prin-

12. As, for an example, Freud's reluctance. See Diamond, *Criminal Responsibility of the Mentally Ill*, 14 STAN. L. REV. 59, 63 (1961). See also LOUISELL & WILLIAMS, TRIAL OF MEDICAL MALPRACTICE CASES ¶ 1.03 (1960).

ciple's two discrete elements—that pertaining to the right of *any person* to refuse to answer incriminating questions and that which has to do with a *defendant's* right wholly to avoid questioning; nor do we examine whether the value of the latter element is now independently achieved at least in substantial part by due process and related developments.¹³ The right of a defendant generally to stand mute, whether phrased in terms of the privilege against self-incrimination, due process, presumption of innocence, or the prosecution's obligation to prove guilt beyond a reasonable doubt, is a cornerstone of our accusatorial system.¹⁴ Any chipping of any essential part of that cornerstone is tolerable, if at all, only after deliberate and basic reappraisal of current problems in the light of historical dangers.

Therefore, the Bar and the public should be cautioned that psychiatry is susceptible of surreptitious use as an illegitimate chipping tool. Psychiatry, with its special investigatory devices of persuasion, insinuation into a suspect's confidence, "lie detection," hypnosis, "truth serums," projective tests, and other procedures, can flagrantly violate basic constitutional and other personal rights. Sometimes such violations have been tolerated or at least ignored by courts,¹⁵ but generally they have been disapproved.¹⁶ Current developments of the right to counsel and guarantees against coerced confessions¹⁷ may excite a corresponding impressment of the jail doctor or police psychiatrist into the role of sleuth. Such a physician by falsely playing the part of helper, healer, or sympathizer can sometimes obtain information from a suspect that is foreclosed from other investigators. Few would deny that deceit is all the more reprehensible when garbed in the benign robes of physician-healer, and we hold no brief for such medical trickery.

But can, and should, society permanently afford a defense based primarily on psychiatric evidence when the defendant simultaneously relies on the privilege against self-incrimination? Can a jury reasonably be expected to place faith in psychiatric testimony if the defendant is not also willing to demonstrate from his own mouth and behavior the psychopathology upon which the psychiatrist bases his opinion? In a word, can the psychiatrist's ideal of "full disclosure" coexist with a mute defendant?

13. See Louisell, *Criminal Discovery and Self-Incrimination—Roger Traynor Confronts the Dilemma*, 53 CALIF. L. REV. 89 (1965). See also Louisell, *Criminal Discovery—Dilemma Real or Apparent?*, 49 CALIF. L. REV. 56, 87 (1961).

14. *Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964); *Malloy v. Hogan*, 378 U.S. 1 (1964).

15. See *People v. Nash*, 52 Cal. 2d 36, 41, 338 P.2d 416 (1959).

16. *Townsend v. Sain*, 372 U.S. 293, 307 (1963); *Leyra v. Denno*, 347 U.S. 556 (1954).

17. *E.g.*, *Escobedo v. Illinois*, 378 U.S. 478 (1964).

In our present state of imperfect knowledge, we feel that these are questions that formal law should currently pretermitt—that is, they are questions that should be left to *society* and *juries*. We certainly would not now urge abrogation of the privilege against self-incrimination, or related due process or procedural guarantees, as a condition of a defendant's right to use psychiatric evidence. Protection against tyrannous or otherwise excessively harsh prosecution is too important a part of freedom to be unqualifiedly subordinated to the assumed probative values of any species of evidence, including psychiatric.¹⁸ We see the problem essentially as one of *education* rather than *legal compulsion*. After all, if the strategy of full disclosure is as good as we think it often can be and if it alone will permit the trier of fact to be truly convinced of the validity and relevancy of the psychological evidence, it should not require the force of formal law to gain acceptance. It will come into common usage in proportion to the degree that the defense learns to appreciate its usefulness, that juries can be convinced of its validity, and that the psychiatrist, in shifting his role from therapist to expert witness, understands that he must not also shift out from under his basic ethical and professional responsibilities.

E. *The Problem of Hearsay*

The psychiatrist, even more than other physicians, relies upon statements of the patient, facts and opinion gathered from relatives, friends, and others, as well as observations and opinions of other professionals in order to formulate his own opinion of his patient's mental condition. For strictly therapeutic purposes, especially in psychoanalytic therapy, he may wish to exclude all information which does not come directly from his patient; but this is done for reasons of rapport and transference and to avoid certain therapeutic complications. It is always recognized by the therapist that such a restriction sharply diminishes the accuracy and objectivity of his diagnostic formulations. However, in nearly every instance in which a psychiatrist desires within a reasonable time limit to reach conclusions about a patient that are as valid and reliable as possible, he will fully utilize every available scrap of information which he can get, no matter what the source. Further, because the opinion of the psychiatrist is derived from his own highly subjective, total impression of the patient, it is impossible for him to divide his opinion into fragments. He cannot claim that a particular portion of his opinion was derived from direct observations of the patient while

18. See LOUISELL & WILLIAMS, *THE PARENCHYMA OF LAW* 287-314 (1960).

another portion comes from third parties. He cannot even confidently say that in the absence of such and such information he might have reached a different conclusion.

If the psychiatrist is well trained and experienced, he will resist with all his powers such attempts to particularize and fragment. Modern psychodynamic psychiatry is firmly based upon the premise that the human mind (and body) is indivisible—that human thought, feeling, and behavior are not a mosaic of individual faculties. All of the psychiatrist's professional education has been directed toward the development of a fluid, amorphous, sentient comprehension of the inner life of his patient. Every tiny portion of information communicated to him becomes an integral part of this comprehension, and he cannot strike from the record of his clinical judgment material which came to him from sources to which the law takes objection. The result, as expressed in his opinion as an expert witness, may not be very precise and may offend those who nurture the "exact science" myth; but the opinion may still be arguably valid, reliable, and pertinent to the legal issues.

It is in this area of third-party information that there exists the greatest discrepancy between what is demanded by good clinical practice and what supposedly is required by good law. The law wishes the expert to base his opinion only upon first-hand observation. The strictest rule is that "opinion of a medical expert as to the physical or mental condition of some person involved in the proceeding, or as to the cause or effect of some disease or injury with which such person is afflicted, based upon information from third persons out of court, is inadmissible."¹⁹

Objections to the strict hearsay rule have been expressed by many.²⁰ Some jurisdictions have allowed some exceptions: for example, California allows an expert to base his opinion in part upon third-party information when the trier of fact has before him corroborative evidence from which he could draw the same conclusion

19. 20 AM. JUR. *Evidence* § 866.5 (Cum. Supp. 1964).

20. "To deny the competency of a physician who does not know his facts from personal observation alone is to reject medical testimony almost in its entirety. To allow any physician to testify who claims to know solely by personal experience is to appropriate the witness-stand to imposters. Medical science is a mass of transmitted and collated data from numerous quarters; the generalizations which are the result of one man's personal observation exclusively are the least acceptable of all. The law must recognize the methods of medical science. It cannot stultify itself by establishing, for judicial inquiries, a rule never considered necessary by the medical profession itself. It is enough for a physician, testifying to a medical fact, that he is by training and occupation a physician; whether his source of information for that particular fact is in part or entirety the hearsay of his fellow-practitioners and investigators, is immaterial." 3 WIGMORE, *op. cit. supra* note 1, § 687. See also MORGAN, MAGUIRE & WEINSTEIN, *CASES ON EVIDENCE* 232 (1957); Rheingold, *The Basis of Medical Testimony*, 15 VAND. L. REV. 473, 475 (1962).

that the expert assumes from the third party's statements.²¹ A number of other jurisdictions have permitted various degrees of exception, but always with some qualifying restrictions. For example, in *Yellow Cab Company v. Henderson*,²² a physician-witness was allowed to testify as to third-party statements, but only because both the physician and the third party (the mother, acting as the nurse and attendant of the three-year-old plaintiff) were in close attendance upon the patient. In *Jenkins v. United States*²³ the appellate court overruled the trial court's exclusion of a psychiatrist's testimony, stating: "But we agree with the leading commentators that the better reasoned authorities admit opinion testimony based, in part, upon reports of others which are not in evidence but which the expert customarily relies upon in the practice of his profession."²⁴

Nevertheless, there are a good many decisions to the contrary, and the annotation of *Yellow Cab Company v. Henderson*²⁵ can state without fear of contradiction in most jurisdictions, "The opinion of a medical expert as to the sanity of a defendant in a criminal proceeding based partly upon the statements of third persons out of court is generally considered inadmissible." Yet, what actually occurs in the trial courts is often quite different.

There seems to be two ways in which this exclusionary rule is evaded in many trial courts. One way is for the trial court simply to ignore the rule. Repeatedly, one of us has given testimony based upon clinical facts obtained from a wide variety of third parties under all sorts of different circumstances. Seldom were objections raised. Today, particularly in a criminal trial, the psychiatrist often has a great deal of freedom in the presentation of his clinical evidence—considerably more than the appellate decisions generally indicate. It is not infrequent that the judge in a criminal trial exhibits great flexibility in applying the rules of evidence to witnesses for the defense. And because the prosecution usually cannot appeal from a judgment based on a verdict of acquittal, a leniency which, if it were for the benefit of the prosecution, would likely result in appeal and reversal goes by without professional notice when it improves the case of the defense. Consequently, there is a tendency to hold the prosecution's expert to a more rigid and traditional presentation of his evidence than the witness for the defense. The

21. *People v. Powell*, 34 Cal. 2d 196, 204, 208 P.2d 974, 979 (1949).

22. 183 Md. 546, 39 A.2d 546 (1944).

23. 307 F.2d 637 (App. D.C. 1962).

24. *Id.* at 641.

25. Annot., 175 A.L.R. 275, 287 (1944).

remedy is, perhaps, for the appellate courts frankly to recognize the changes which are already occurring, critically to appraise their desirability, and to clarify the general legal principles which should govern such testimony.

The other way of skirting the evidentiary rules is for the expert witness simply to claim that he has based his opinion solely upon his own direct observations. True, he talked to the relatives and examined the reports of the nurses, psychologists, and other physicians, but somehow these other sources of information were all peripheral to his clinical judgment and he was uninfluenced by them. We suspect that this is very often the device used by the expert. But we believe it to be very undesirable because, first, it is not being truthful; second, it deprives the court and the jury of the educational value of knowing exactly how the expert does arrive at his opinion; and, third, it produces the utterly false impression that a medical conclusion based upon direct observation alone is in some mysterious way superior to a conclusion based upon full information derived from a variety of sources. Would the judge who endorses this kind of bad medicine in the courtroom tolerate it for one moment in the hospital were it to concern his own health?

It is time, we believe, for the law in all jurisdictions and in all circumstances to bring itself into contact with reality on this issue. The law must decide whether it is only playing games with the psychiatric expert—games with arbitrary and capricious rules—or whether it genuinely wishes to have the benefit of the psychiatrist's skill and knowledge. The law must determine whether it truly wishes to know how the psychiatrist formed his opinion and the kinds of clinical information upon which that opinion was based. In short, the law must choose between having good medicine or bad medicine in its courtrooms.

The psychiatrist is perfectly aware of the fact that the clinical history obtained from the patient is distorted and self-serving. He knows that the information provided by family and friends may have relatively little validity and that the psychological test report, or the nurses' notes, or the consultation reports of other physicians are not the whole story of the case. The psychiatrist is especially trained to assimilate information from a wide variety of sources, to evaluate each fact, to discount some, to emphasize others, and to ignore still others. He then makes his own personal observations of his patient, puts everything together, and arrives at a conclusion. This is the clinical method—the procedure by which all doctors diagnose and heal the sick. Only the quacks pretend they have X-ray

eyes that can penetrate with one glance into the essence of the pathology of the body and mind.

We suggest that in all instances the psychiatric expert be allowed to relate to the court exactly how he reached his opinion and what were the sources of his information. He should be required to describe in fairly precise terms his own process of evaluating his source material: what information did he accept, and what did he reject; what sources did he place great weight upon, and what sources did he minimize; and why did he evaluate the clinical material in these ways. But always, the psychiatrist (as with all physicians) must be trusted to determine in his own way what are the relevant clinical facts upon which a professional opinion can be based. For this, the psychiatrist is accountable to the standards of his professional colleagues and their accumulated body of professional skill and knowledge. He is also subject to cross-examination which may gain in incisiveness and pertinency proportionally to the freedom accorded him to tell the whole story.