Maryland Law Review

Volume 13 | Issue 4 Article 5

Viewpoint of the Psychiatrist

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VIEWPOINT OF THE PSYCHIATRIST

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Some of the most important of the legal writers stress the fact that a trial is not a scientific investigation. It is not a search for objective truth. Sir James Stephen wrote of the law: "It has nothing whatever to do with truth. It is an exclusively practical system invented and maintained for an actually existing society".[1] The function of a court is social and political, not scientific. Its chief contribution is to the security of the individual and to that of the community. It resolves individual and community tensions.

The pursuit of truth may take decades. Justice delayed is often justice denied. These are basic truths that physicians must recognize.

The author thinks it is worth while to pause for a moment and consider in a very sketchy way the history of trial procedure, even though this is done in gross and inadequate strokes.

The earliest method was trial by battle, of which the duel is a survival. Then, there was trial by ordeal, which had in itself an important medical element. An individual had to undergo various ordeals, such as walking across molten plowshares, or carrying a white hot iron ring a certain distance, and then his hands or his feet were bound, and in a specified number of days these wounds were inspected. If the wounds were healing satisfactorily, he was considered to be not guilty. If the wounds were infected and healing badly, he was considered guilty. God was not on his side. And consequently he was punished, and often executed.

The same thing, of course, occurred in the way witches were tried. Water was blessed, and the witches were thrown into it. If their garments were voluminous enough to keep them afloat, they were considered guilty, because

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[1] STEPHEN, A GENERAL REVIEW OF THE CRIMINAL LAW OF ENGLAND (1863) 90.

the water had rejected them. If they sank, they were allowed to go down a couple of times, and then pulled out breathless but innocent. All of these trial methods had a common basis: God was the judge and He would not let the innocent be condemned.

These early methods of trial were followed by trial by compurgation. That was a method of trial where a group of your neighbors would come in and swear that you were incapable of doing the act of which you were charged. If it were found that, despite the oaths of those people you had committed the act, they suffered the same penalty that you did. So it was really not so very easy to get people to come in and swear to your innocence.

Finally, of course, the jury method gradually evolved. Originally the jury was composed of people who were familiar with the facts of the case. People lived and moved in small constricted areas. The townspeople were called together, and they were to decide the case, largely on the basis of their own personal knowledge of the individual and the facts of the case.

As opposed to this, today an individual is disqualified if he has any personal knowledge of the situation of which he is the judge.

These were not scientific methods. Surely anyone observing the present trial process with an objective eye would certainly not consider it a scientific process, either.

The author feels that this is an important thing for doctors to realize when they become disturbed and show great disquietude about the law and its vagaries. They have got to realize that the primary function of the law is to resolve individual and community tension, and that arriving at scientific truth is an ideal goal, often unattainable. And lawyers must realize, and I think many of them do, how alien the spirit of the ordinary trial is to the average doctor. He is accustomed to being listened to deferentially by his colleagues and by his patients, whenever his opinion is sought. He is by nature independent and, under our American system he has no boss — he pursues his vocation

and his investigations by his own methods. In the courtroom everything is radically changed. He is not permitted to express his findings nor his opinions in his own way. He is told when to speak and when to keep quiet. He is badgered by lawyers, who often try to provoke him to anger. Not only is the accuracy of his views questioned, but his motives and integrity are assailed, so that there is little wonder that most doctors are at least loath to come into a courtroom.

As the Chairman of the Legal Aspects Committee of the American Pyschiatric Association, I recently sent out a questionnaire, to find out what the attitude of psychiatrists was to this whole problem. I found that about twenty per cent of the psychiatrists were unwilling to go into court in a criminal case, and another fifteen percent were only willing to serve as an expert in a criminal case when they were employed by the court. Eighty percent of the psychiatrists found that the commonly accepted legal tests of responsibility were unsatisfactory. Less than half of them felt that they could accurately present their findings and opinions under the present methods of court procedure. The greatest number based this on the partisan role that they had to play in the trial process. The next largest number felt that the restrictions inherent in the inquisitorial method, as contrasted to the expository method, were the greatest handicap; that they were required to reply to the questions which were given them by answering yes or no, rather than being permitted to freely express their knowledge and opinions, even though they had sworn to tell "the whole truth".

I do not believe that anyone who has worked in the courts can feel that we are going to bring the greatest possible degree of medical help to the courts — and that is what they want — by partisan testimony.

The first case in which I was ever privately employed was before the State Industrial Accident Commission. It was shortly after I came back to Baltimore to practice. A man was unloading a beer truck and had inexpertly al-

lowed a full barrel to roll down on his head, with rather disastrous results. I had examined him, for one side or the other. I cannot remember now which side it was. I was sitting there, biding my time, as we often do in the court process, when I saw another physician. I went over to him and asked him why he was there. He mentioned the same case that I was in. We then talked it over. I said to him after a few minutes, "You know, we are in such agreement here, that we ought to toss up a quarter and see which one has to testify." He said, "I am afraid you are young and a little naive; by the time your lawyer gets you to stretch the truth as far as it can be stretched, and my lawyer gets through stretching the truth as far as he can, nobody will feel that we were in agreement about anything."

I thought then, those were bitter words. Perhaps, my colleague was in a choleric mood that day. But, actually, I have since learned that they were wise words, realistic words. I think if one is going to be realistic, one must admit that the partisan method of trial resembles in many respects a sporting contest; it has aspects to it that are dramatic, and it challenges intellectual agility. It has produced some great thinkers and many of the leaders of our country have been trained by this process. But we ought not to delude ourselves into thinking that this is the best way that medical truth can be brought to the courts.

I understand that there is a common law right in the courts to appoint experts to advise them. There are two States, Michigan and Illinois, where the appellate courts have decided that that is not permitted. Wigmore, one of the greatest American authorities on Evidence, thinks that is bad law, and that the courts should have this inherent right.

Today, there are several methods of providing a neutral psychiatric examination of defendants. In Massachusetts we have the well known Briggs law,[2] named after Dr. Vernon Briggs, which was passed in 1921. This law provides for routine psychiatric examination of most major

[2] 4 Ann. Laws of Mass. (1949), Ch. 123, §100A.

offenders and most recidivists prior to trial. The accused is examined by a representative of the Department of Mental Disease. The examination is focused entirely on the presence or absence of a psychosis. The report is filed with the court, and a copy goes to both the prosecution and the defense prior to trial.

In Colorado, as soon as the "not guilty because of insanity" plea is made, the individual is sent to the State Hospital and remains there for thirty days observation. The State Hospital then renders a report to the court.

There are six metropolitan centers, of which Baltimore, I am happy to say, is one, that have behavior, or psychiatric, clinics attached to the adult courts. In Baltimore, in a large number of the more important criminal cases, and those in which psychopathology is most likely to exist, the accused is examined by the neutral staff psychiatrists, and a report made to the court. This report is also available to the defense and the prosecution.

The Model Code of Evidence of the American Law Institute, and the Federal Rules of Criminal Procedure,[3] although they have not gone quite so far, emphasize this one point, that of bringing into the trial process the nonpartisan expert.

The Model Code of Evidence of the American Law Institute[4] works it out in this way: The parties agree on the experts who serve. If they cannot reach an agreement, then the matter is taken before the Court, and the Court picks the experts. These experts all have the right to examine the defendant personally. The experts meet together and frame a joint report if possible. If not, there is a majorty report and a minority report. The report is then filed with the court, and it is available to both parties.

Now, of course, this does not deprive either side of the right to introduce its own experts, if they wish to controvert the evidence of this neutral group. But, of course, it is seldom done. It is seldom done in Baltimore in criminal cases, either, not because Dr. Boslow and I are such wise

[3] Rule 28.
[4] (1942) Rules 403 to 410.

psychiatrists, but because the judges and the juries realize that we have "no axe to grind", as one juror put it to me early in my career.

Juries are confused by medical testimony anyway, and they would rather go along with our neutral contention than with the contention of the partisan expert. They distrust him and they distrust the method. It seems that wherever you have these groups of non-partisan experts, it is going to be hardly worthwhile to oppose them, although the legal right to do so should be preserved, for, of course, they may be wrong, and should be proven so. Furthermore, the unbiased testimony of the Court's expert is likely to keep the parties' experts pretty much in line and prevent gross distortions and exaggerations.

In Continental Courts, there are no partisan experts. I recently read a report of a psychiatrist at Yale who was making a study of Continental Court procedures; the men who do psychiatric testifying in the Continental Courts are held in the highest regard. They are leaders of their profession, frequently the professors who are heads of University clinics, and they are not subjected to the type of treatment that so often is meted out to the expert in our trial process.

Perhaps we physicians ought to be tough and not mind such things. As a matter of fact, I have gotten tough, and I don't mind it very much, but for those not used to it, it may sometimes prove to be a pretty humiliating procedure.

The next reform we would like to see is doing away with the hypothetical question. Wigmore says that the hypothetical question is one of the few truly scientific features of the rules of evidence. But in practice the logic breaks down, and he admits that the hypothetical question "misused by the clumsy and abused by the clever, has in practice led to intolerable obstruction of the truth." Judge Learned Hand termed it "the most horrific and grotesque wen on the fair face of justice." The late Dr. William A. White, the leader in legal psychiatry, called it a "medical monstrosity".

Many people have written about the hypothetical question, and some of it makes for very interesting reading.

I remember one case in which an expert was to assume the truth of all the evidence, one witness having stated that the defendant normally weighed one hundred pounds, another had said one hundred and twenty pounds, and still another gave the individual's normal weight as one hundred and seventy-five. Now, when one must assume all these things to be true in order to arrive at a conclusion, it is indeed difficult.

Both the Uniform Expert Testimony Act[5] and the Model Code of Evidence of the American Law Institute[6] advocate an expression by the expert of an opinion and then the expert is permitted to tell fully what this opinion is based on. He is not to be hampered by the presiding judge, nor bothered by the opposing counsel, in either the expression of the opinion nor in the explanation of its foundation.

There are many judges — and I must say that most of the judges of the Supreme Bench of Baltimore are among them — who will permit an expert a great deal of freedom in so expressing himself.

I was unfortunate enough to be in a trial in rural Virginia not so very long ago where no such freedom was permitted. This practice varies greatly from one community to another. The hypothetical question becomes totally unnecessary if the expert after giving his opinion states all the minutiæ of the evidence on which this opinion is based.

There is also a third point that the author wishes to emphasize. I think there should be a modernization of the legal definitions of certain mental conditions. All of this dates back a century or more, a period when the faculty psychology and the cult of phrenology were dominant. Intellect and reason were supposed to be discrete. They were in air-tight compartments, separate from emotion and will, which of course we know now to be nonsense.

Certainly, most of these old legal rules, and these old legal definitions are not sacrosanct. I think there are many

[5] 9 U. L. A. 427-439.
[6] *Supra*, n. 4.

doctors, and many lawyers, and even many judges, who feel that they are, unfortunately.

The law is subject to change, and the law is, theoretically, at least, supposed to keep pace with scientific progress. Only recently Judge Biggs, in a dissenting opinion in *United States v. Baldi*,[7] blasted the *M'Naghten*[8] rule with respect to criminal responsibility much more effectively than any psychiatrist I ever heard do so.

Thus, it does not mean that these things are mummified and are to stay for all time. They should be subject to change.

The *M'Naghten* rule, of course, came down to us from a famous trial in 1843. The burden of it is that if the defendant knows right from wrong and realizes the nature and consequences of his act, he is a responsible agent.

Understandably, there has been a great deal of debate on whether the capacity to distinguish between "right" or "wrong" meant moral "wrong" or legal "wrong." Justice, then Judge, Cardozo in the *Schmidt*[9] case held that it meant a moral "wrong." There are certain psychiatrists who have refused to answer these questions: e.g., Dr. Philip Roche and Dr. Gregory Zilboorg, who says that these are problems in ethics, and should be answered by the clergy and not by a psychiatrist.

The existence of delusion also enters into *M'Naghten's* rule. If a man acts on the basis of insane delusion, he is exculpated only if he would have been justified in his actions had the delusive belief been real. Now, for instance, if a man has delusion that he is being followed, and turns around and stabs somebody, because he had the delusion that this man was after him and had a knife at his back, then he could not be considered a responsible agent.

Dr. Isaac Ray, a very prominent legal psychiatrist in his time, made a very illuminating comment on this seventy-five years ago, where he said, "A lunatic will not be held

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[7] 192 F. 2d 540, *dis. op.* 549, 566 *et seq.* (3rd Cir., 1951).

[8] Daniel M'Naghten's Case, 10 Clark. & Fin. 200, 8 Eng. Rep. 718 (1843).

[9] People v. Schmidt, 216 N. Y. 324, 110 N. E. 945 (1915).

responsible for his act provided only that he acts with reason and propriety."

Another famous case, was the *Burton* case, in 1863, in England, mentioned by Maudsley. Burton was an eighteen year old schizophrenic who killed a lad because he wanted to be hanged, and he felt if he killed this perfectly innocent boy, that was one sure way to be hanged. Justice Wightman pointed out with fine legal reasoning that this clearly proved that he was responsible, since he clearly recognized that he would be punished, and otherwise he would not have committed the act. When the death sentence was passed, he thanked the court very deferentially. The account goes on to say, "He was in due course executed; the terrible example having been thought necessary in order to deter others out of doing murder, out of a morbid design to indulge in the gratification of being hanged."[10]

I think it is important for physicians to realize that the law is not attempting to diagnose psychoses when they use this kind of reasoning. They are attempting to pick out and to isolate certain offenders who are non-deterrable and whose execution will have little or no value in deterring other individuals from committing similar crimes.

The law has not said, these are our own special definitions of psychosis. Law is not interested in labels. It is interested in picking out the people who cannot be deterred by threat of punishment or whose execution will not deter others. It holds that it is a very poor example to kill some insane man because this could have very little effect on the actions of sane people. The crucial issue is whether the *M'Naghten* rule really picks those people out. I feel that psychiatrists in general think it does not do so.

I think that the widest acceptance would probably be found for the theory that those individuals, should be found irresponsible, who are (1) suffering from well recognized mental disorder, (2) which had manifested itself by significantly distorting the individual's social judgment, and/or

[10] MAUDSLEY, RESPONSIBILITY IN MENTAL DISEASES (1898), 169-171.

(3) had seriously interfered with the exercise of customary social control,[11] (4) and that the alleged criminal act resulted from the mental disorder.

I feel that such an attempt at definition would satisfy the psychiatrists rather than one framed in terms of right and wrong, concepts which are extremely difficult to evaluate medically.

There are also legal procedural devices that mystify the unsophisticated, and even the sophisticated, medical expert. If an attorney should be brash or ignorant enough to ask the expert witness whether he considers the accused a responsible agent, opposing counsel jump to their feet and shout objections, the judge looks menacingly stern and pounds on the dais. Obviously, some sacred canon has been violated. The lawyer then reaches for a musty volume and substitutes for his former question, a complex formula about the knowledge of right and wrong. The judge smiles beneficently, all is now aright, because the expert would obviously have usurped the prerogatives of the court and jury, had he expressed an opinion as to the defendant's responsibility. But this substitute formula is precisely the legal definition of responsibility, laid down by the appellate court. This is all very confusing to the poor medical witness. Law seems to have its own system of logic, two no

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[11] In the question and answer period which followed the symposium, this statement was further amplified as follows:

"I cannot presume to phrase the test in legal language. I think that every person to be irresponsible criminally should be suffering from a well recognized mental disease, and that it should be shown that this disease affected his judgment and his social behavior, and furthermore, or in the alternative, that it should have affected his control, his self control.

Now, the New Hampshire test, which, has been in existence since the 1860's, is in large measure the test as stated above. New Hampshire is the only state using this test. There are thirty states that have the 'ability to distinguish between right and wrong' and 'realizing the nature and consequences of the act' as the sole tests, and there are seventeen states which use the 'irresistable impulse' test, in addition.

I presume the phrase 'irresistable impulse' is open to a great many objections. I think it is a simpler thing to define responsibility on the order of the New Hampshire rule mentioned above, and say that where an individual meets that test, it is safe to conclude that he is not deterrable, and that his punishment is not going to have a particularly salutory influence on the community in general."

longer equals two, but something else. Translating from Arabic to Roman numerals has alchemized the whole thing and given it a gleam of respectability.

I should also like to advocate the use of non-partisan experts, not only in criminal trials, but in civil trials. To implement this, I think a panel of experts should be nominated by the Medical Society, physicians who would have the ability, the authority and the integrity to represent and assist the court. Each of the specialties would be represented by a group of available, competent experts.

I think one of the things that might be changed in the Maryland law is the fact that people who are found not guilty because of insanity at the time of the crime cannot be held, if recovered at the time of the trial. In other words, if a man commits a murder while insane, is subsequently caught and brought to trial, and in the meantime has apparently recovered, he must be held not guilty and released immediately into the community.

Maryland is one of the few states where such a situation exists. I think there are only eight. In most states the court has the responsibility of deciding whether a defendant found not guilty by reason of insanity should be hospitalized. In Indiana and California statutes provide that these individuals must remain in the hospital for a specified period, before release can be considered at all. In one state it is one year, and in the other state two years. This, I believe has been upheld by the appellate courts of those states. The Maryland provision, I feel, makes a travesty of the legal plea of insanity, when an individual can be relieved of the responsibility of crime because of mental disease, and only a few months after its commission can be considered well enough to go home, without even any legal or medical supervision.

It is the first duty of the law to give protection to all of us citizens. It seems to me that any one who has been sufficiently disturbed or disordered to have committed a crime and not be held responsible for it should be in a hospital, under a prolonged period of observation, so that the

community can be certain that there will not be a recurrence of this condition.

Then, of course, Maryland is one of the states that has no privileged communications on the part of physicians. This is a subject about which some of my colleagues get very much upset. I personally cannot get quite so upset about it. In the majority of states the physician has a privileged status. Certain legal privileges have recently come into disrepute, and some of the legal writers have been in favor of abolishing privileged communications altogether.

This privilege has been brought into disrepute largely through personal injury cases. A man in States that have the privileged status may go to a doctor for first aid, the doctor finds comparatively little injury, and puts a band-aid over the wound, which heals well. But the victim of the accident sees more doctors and more lawyers, and talks to more friends, and a case is made out. Of course, they don't want the first doctor in court, because it is obvious that his testimony would not be particularly helpful to the plaintiff. Nor can he be required to come, because his patient pleads privilege. This is obviously an abuse and highly objectionable, and the Maryland rule seems correct, at least in this particular situation.

I certainly know very little about the law, but I think it would be possible to have a privileged status for physicians except in personal injury cases. I imagine such a law could be passed, and in fact such a statute exists in California.[12]

[12] Deering's Cal. Code of Civil Proc. (1949), §1881(4).