ADMISSION OF PSYCHIATRIC EVIDENCE: FIRST, A GENERAL STANDARD

ROBERT E. B. ALLEN*

INTRODUCTION

In the past, the piecemeal growth of the use of psychiatric testimony has prevented the development of an overall conception of the psychiatrist's proper role in the courtroom. Restriction of such testimony based on the policies of the exclusionary rules of evidence has diverted judicial discussion from the difficult problem of determining what contribution could be made by psychiatric evidence on each issue on which such testimony is offered. Until the courts determine a basic rationale for the psychiatrist's place in the decision-making process, an issue by issue consideration of the value of such testimony will continue to be avoided.

The solution to be proposed here is to establish rules for the admission of psychiatric testimony which will be consistent with the treatment of other medical testimony. Once the courts have eliminated the evidentiary exceptions, deviations, and inconsistencies which treat the psychiatrist as a medical leper in the legal world, then an issue by issue consideration of the value of such testimony itself may begin. Then the question of admission may turn specifically to the *legal* usefulness of the psychiatrist's contribution to a given question of fact or law.

This article does not advocate that psychiatric testimony should be automatically admitted for all purposes or on all issues. Rather, the decision should rest on the value of specific testimony, and not on the often inappropriate policy of some evidentiary barricade.

This article is not intended as a defense of the substance and quality of psychiatric testimony. The discussion here will be limited to the legal applications of the psychiatric raw material presently available, rather than the problems of developing the potential content of such testimony. Qualification to testify as a psychiatric expert will be limited for the present discussion to those medical graduates specializing in mental disorders. Membership in the American Psychiatric Association, or certification by either the Board of Psychiatry and Neurology or the American Psychoanalytic Association are desirable indicia of the individual's quali-

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* Associate, Kramer, Roche, Burch, Streich & Cracchiolo, Phoenix, Arizona. B.S. 1962, Columbia University; LL.B. 1965, Harvard University. Member, State Bar of Arizona.

fications, but are not invariable requisites of expertness in the field. This paper will undertake only the basic task of developing the grounds for courtroom acceptance of psychiatric testimony and will ignore divergent legal implications of the various psychiatric theories which have grown primarily from an early psychoanalytic core. For present purposes the qualified *psychologists* will be considered as presenting different fields of expertness which the court can draw upon when appropriate, but which should not be indiscriminately intermingled with the medical standards for psychiatry.

MISAPPLICATION OF THE EXCLUSIONARY RULES OF EVIDENCE

The present standards for admission of psychiatric evidence are inconsistent, unrealistic, and constitute a leading example of the paternal treatment of the jury which may be developed through exclusionary rules of evidence. The legal theories upon which courts have excluded psychiatric evidence have not always been clearly articulated, but the most frequently cited reasons are the rules against opinion, hearsay, and unreliability, or an undefined combination of the three.

Traditionally the rule against opinion evidence was invoked to exclude expert testimony regarding the ultimate issue in the case as being an invasion of the jury's province.[1] This mistrust of the role of the expert witness is found in an early article by Learned Hand in which he expressed concern that admitting an expert's opinion about the "major premise" — the ultimate facts of the case — constitutes a usurpation of the jury's function and leaves only the expert's credibility for determination by the traditional fact finders.[2] Despite such reservations, vigorous prodding by legal scholars has led modern courts to admit opinion evidence,[3] even on the ultimate factual issue, whenever qualified experts will be able to aid the jury's understanding of the case.[4] Thus, the opinion evidence rule may properly be invoked to exclude a layman's unsub-

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[1] *E.g.*, State v. Steffen, 210 Iowa 196, 202, 230 N.W. 536, 538 (1930) (Excluding testimony by a fingerprint expert to fact that accused's fingerprints appeared at the scene of the burglary on grounds that this was invasion of jury's province to determine the ultimate facts). See generally Annot., 78 A.L.R. 755 (1931). This early ruling excluding fingerprint evidence is analogous to recent decisions on psychiatric testimony, showing the tendency to apply exclusionary rules without full consideration of the import or effect of the testimony in question.

[2] Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 HARV. L. REV. 40, 51-52 (1901).

[3] 7 WIGMORE, EVIDENCE §§ 1920, 1921 (3d ed. 1940) [hereinafter cited as WIGMORE] advocating total abolition of restrictions upon experts testifying on ultimate facts.

[4] Johnson v. A. Schilling & Co., 170 Cal. App. 2d 318, 324, 339 P.2d 139, 143 (Dist. Ct. App. 1959); Shutka v. Pennsylvania R.R., 74 N.J. Super. 381, 401, 181 A.2d 400, 410 (App. Div. 1962). This modern trend has been embodied in UNIFORM RULE OF EVIDENCE 56(4).

stantiated conclusions which are no more than superfluous testimony,[5] but may not appropriately be applied to exclude an expert's testimony which is based on special knowledge or skill not available to a lay jury.[6]

Psychiatry, as a relatively recent field of medical specialization, has not been consistently incorporated into the general development of the opinion rule. The psychiatric expert, despite years of training and experience in acquiring his special knowledge, may find his professional opinion rejected or ridiculed by the court as the "weakest and most unsatisfactory" kind of evidence,[7] "valueless,"[8] and "the lowest type of testimony," to be admitted only "because nothing better is available."[9] This judicial reluctance to rely upon expert testimony in the psychiatric field was colorfully expressed by Justice Harlan in *Connecticut Mut. Life Ins. v. Lathrop*:

> Whether an individual is insane, is not always best solved by abstruse metaphysical speculations, expressed in the technical language of medical science. The common-sense, and we may add, the natural instincts of mankind, reject the supposition that only experts can approximate certainty upon such a subject . . . *the natural and ordinary operation of the human intellect, and the appearance and conduct of insane persons, as contrasted with the appearance and conduct of persons of sound mind, are more or less understood and recognized by every one of ordinary intelligence who comes in contact with his species.*[10] (Emphasis added.)

Even when psychiatric evidence is admitted, the same aversion to accept an expert opinion has led some courts to impose their own "common sense" opinions on the jury, and substitute a judicial understanding of "the appearance and conduct of insane persons" for the medical opinion of the psychiatric experts who testified.[11]

The reasoning of Harlan's opinion has been accepted in the general rule that everyone's opinion as to an individual's mental condition is

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[5] Rosenthal, *The Development of the Use of Expert Testimony*, 2 LAW & CONTEMP. PROB. 403, 413 (1935).

[6] 7 WIGMORE § 1923; Pederson, *The Opinion-Evidence Rule in Oregon as it Relates to Cases Involving Medical Matters and Insanity.*, 33 ORE. L. REV. 243-245 (1954).

[7] *In re* Collin's Estate, 174 Cal. 663, 670, 164 Pac. 1110, 1113 (1917).

[8] Davis v. Phillips, 85 Mich. 198, 203, 49 N.W. 513, 514 (1891).

[9] Commonwealth v. Jordan, 407 Pa. 575, 583, 181 A.2d 310, 314 (1962).

[10] 111 U.S. 612, 619 (1884).

[11] *In re* Arnold's Estate, 16 Cal. 2d 573, 588-590, 107 P.2d 25, 32-33 (1940). (Where testator's will appears "normal" on its face and was written in a steady hand this was sufficient to refute medical testimony that testator's mental disability rendered him incapable of testimonial capacity.) *In re* Mason's Estate, 185 Okla. 278, 280-281, 91 P.2d 657, 661-663 (1939).

admissible.[12] After all, the cobbler, the carpenter, and the constable, as well as the psychiatrist, are "men of intelligence . . . in contact with their species."[13] The flaw in this analysis is that if the ability to evaluate mental conditions is within the general experience of all the members of the community, any party having personal contact with the individual in question should be limited to relating descriptions of behavior. No one would need to contribute an opinion or conclusion from that behavior which the jury would be equally competent to reach for itself.

A more realistic explanation for admitting all opinion concerning a party's mental condition is not that the "conduct of insane persons . . . is understood and recognized by everyone," but rather that everyone has only a vague and undefined concept of normal and abnormal behavior. The description of "abnormal" or "insane" behavior is so elusive that a summary opinion is accepted in its stead.[14] Harlan's opinion, quoted above, justified the admission of lay opinion, in large part, on the difficulty inherent in describing the discrete behaviors which would enable the jury to determine mental condition.[15] Under this rationale, the layman should be restricted to those descriptions which may imply a conclusion, but which do not constitute an elaborated judgment as to the cause of the behavior.[16] The latter opinion would still be the sole province of the expert, and should require that the expert's conclusion be distinguished from the layman's description.

Frequently courts fail to distinguish these grounds for admission of lay testimony as to mental conditions from the reasons for admitting

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[12] DeBruin v. DeBruin, 195 F.2d 763 (D.C. Cir. 1952). Recent cases have limited lay opinion to persons intimately acquainted with the party and have excluded eyewitness testimony based on one particular period of behavior. McKenzie v. United States, 266 F.2d 524, 526-527 (10th Cir. 1959). See also McClure v. O'Neil, [1945] 4 D.L.R. 373 (B.C. Ct. App.); 2 WIGMORE §§ 568, 1938.

[13] The psychiatrist's condemnation of the admission of nonexpert opinion evidence on mental conditions is well illustrated in this colorful denunciation:

> The statement of the village cobbler, blacksmith, carpenter or constable to the effect that he did not believe a certain person had tuberculosis or syphilis would have no weight as evidence against the positive statement to the contrary by a competent physician. Such is not the case in deciding the much more difficult problem about the very complex, and often obscure disease — insanity. In such cases any person may, and often does, express his opinion, and the very bulk of such testimony carries great weight with the jury.

HOAG & WILLIAMS, CRIME, ABNORMAL MINDS AND THE LAW 102 (1923), quoted in Pederson, *supra* note 6 at 263-4.

[14] Turner v. American Security & Trust Co., 213 U.S. 257, 260 (1909); 7 WIGMORE, §§ 1934, 1935.

[15] 111 U.S. at 620-622.

[16] In response to interrogation about how the person in question behaved, the lay witness might properly answer: "He appeared to be normal;" or "He behaved as though he were crazy." The lay witness should not be allowed to answer a question seeking an opinion about whether the person's behavior led the witness to believe or conclude that the person was insane.

expert testimony on the same issue. The standard procedure is to lump all such testimony together and instruct the jury to give "equal weight" to both expert and lay opinions.[17] The "equal weight" treatment lends itself to abuses which may be worse than the so-called "battle of experts" which is so often decried as the result of limiting opinion to psychiatric testimony. In *Commonwealth v. Carluccetti*,[18] the defendant had spent most of the fourteen years prior to trial in a state mental hospital, and ample medical records and psychiatric experts were available to both sides. Nevertheless, the prosecution used the equal weight approach to rebut the opinions of defense psychiatrists by introducing sixteen laymen as eye witnesses to testify that the defendant "appeared normal" at the time he was alleged to have committed a double murder.[19] The psychiatrists had testified that defendant believed his neighbors were telling stories about him, calling him names and saying he was a "Black Hand." These statements were, in part, the basis for a diagnosis that paranoid delusion had prompted the shooting of his neighbors. The lay witnesses' testimony that defendant appeared "normal" when he walked up and shot his neighbors was not necessarily contradicting or even inconsistent with the expert's diagnosis. Very little sophistication is required to see that the lay and expert witnesses are testifying to different aspects of the defendant's total behavior patterns. Both kinds of testimony should be admissible, but should not be confused by treating their statements as interchangeable.[20]

Either party may abuse this confusion between lay and expert opinions. The tactical use of lay testimony could be adopted by persons seeking to prove their mental disability by introducing lay witnesses who would truthfully testify to the party's "strange" behavior, while a psychiatrist would consider the party to be malingering. In every case, the failure to distinguish the purposes for admitting lay and expert testimony serves only to becloud the value of each.

The theory behind admission of lay testimony is that the witness' personal contact with the party in question gives the witness access to facts about the party's behavior which common experience has shown may indicate something about his mental condition. The expert's testimony, on the other hand, is admitted because his special knowledge may be useful to the jury in synthesizing what has been offered in other testimony about the party's behavior.[21]

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[17] Tyler v. Tyler, 401 Ill. 435, 441, 82 N.E.2d 346, 349-350 (1948).

[18] 369 Pa. 190, 85 A.2d 391 (1952).

[19] *Id.* at 208-209, 85 A.2d at 399 (Justice Stearn dissenting).

[20] Distinctions between psychiatrists and lay witnesses were acknowledged by the court, 369 Pa. at 200-201, 85 A.2d at 395, but were vitiated by an instruction that "the layman is just as competent as the expert" on the question of insanity. 369 Pa. at 201, 85 A.2d at 396.

[21] McCormick, Evidence § 13, at 28 (1954) [hereinafter cited as McCormick].

The jury may receive two kinds of testimony from the psychiatric expert: one of observation, the other of analysis. Thus, psychiatric testimony is potentially a valuable courtroom tool in two ways. First, the psychiatrist may provide additional first-hand knowledge of the subject matter by testifying to behavior and reactions which he observed during examination of the individual in question. In this way the psychiatrist's testimony as to observed facts is similar to that of neighbors and friends testifying to certain traits, or that of eyewitnesses testifying to particular behavior. Each of these witnesses is adding information for selection and compilation by the court's fact-finding authority. The second purpose of psychiatric testimony is to provide an analytical tool to be used by the jury in weighing and assimilating the composite of observed physical facts given by all the witnesses. In this sense the psychiatrist is the true expert witness, supplying the jury with special knowledge and experience which, if accepted, may be used to better understand the significance of the observed facts presented to them.

Perhaps the psychiatrist's *observations* may be given equal weight and treated as comparable testimony with the observations of the other witnesses; however, the psychiatrist is a trained observer with special knowledge of the behavior which may be most relevant to the issue at hand, and therefore may be testifying even as to his observations from the basis of his expert training and experience. Regardless of the relative merit of lay and expert observations, the expert's analytical or opinion testimony should not be lumped with the testimony concerning factual data. The conclusions based on educated opinion should be considered separately, and if accepted, should be incorporated in the ultimate decision. The expert's and the layman's *opinions* should be given "equal weight" only in the sense that neither is binding on the jury, and the difference in purpose and content between the layman's observations and the expert's medical opinion should not be neglected in instructing the jury to determine the value of each independently.

These distinctions between lay and expert testimony require that more care be devoted to the selection of experts qualified to testify in the analytical and not just the observational sense. The present standards of expertness for psychiatric testimony vary from the naive acceptance of some reading in the field,[22] to the more practical requirement of

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McCormick describes the expert's role as contributing "the power to draw inferences from the facts which a jury would not be competent to draw."

[22] Davis v. State, 35 Ind. 497 (1871), still accepted in recent cases. *In re* Millar's Estate, 185 Kan. 510, 345 P.2d 1033 (1959); Grant v. Commonwealth, 302 Ky. 836, 196 S.W.2d 601 (1946).

classroom study.[23] Neither of these standards for qualification seems adequate. The better standard would be to adopt Dean Wigmore's suggestion that the expert witness should possess such qualifications as the community would rely upon when seeking medical advice about mental disorders.[24] A consistent application of this standard would eliminate the confusion and conflict which results from varying degrees of expert familiarity with the issue. In most of the United States, the expert under this standard would be limited to the medically qualified psychiatrist, but the general medical practitioner who serves as a community's substitute for the specialist might also be allowed to testify.[25]

Aside from the opinion rule, psychiatric testimony has also been excluded as hearsay when the expert's opinion or diagnosis was based in large part upon the patient's, or his family's, recitation of his personal history and behavior.[26] The application of the hearsay rule to medical examinations where the patient related his past or present symptoms to the doctor has aroused Dean Wigmore's stern disapproval.[27] Wigmore recalled the story about Bismarck's physician who once upbraided the cantankerous Chancellor, saying, "If you wish to be cured without questions asked, you had better send for a veterinary surgeon."[28] Wigmore concluded that application of the hearsay rule in medical diagnoses would stultify the law and leave the courts in the hands of the veterinary surgeons. In the psychiatric area, such patient's statements are especially necessary to diagnosis since the symptoms of mental conditions are behavior, past and present, and its impact on the patient. Behavior must be observed or related, and only the rare behavioral phenomenon can be recorded and preserved by means other than the description of the actor or the observer. Objective devices such as the electroencephalogram, galvanic skin response, or even the movie camera will seldom record sufficient data for the psychiatrist's diagnosis. More to the point, seldom are other medical diagnoses which are presented in court supported by such independent verification. Seldom is such verification required for the doctor's observation, and the patient's symptoms are usually adequate to support a diagnosis in the courtroom.

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[23] Holt v. State, 84 Okla. Crim. 203, 181 P.2d 573 (1947); see *In re* Lindou's Will, 241 App. Div. 819, 270 N.Y. Supp. 771 (1934) (Admission of testimony of physician not qualified as an alienist was reversible error.)

[24] 2 WIGMORE § 569.

[25] The difference in viewpoint and training of the various persuasions engaged in this field is shown in Hoch & Darley, *A Case at Law*, 17 AMERICAN PSYCHOLOGIST 623 (1962), in the Amici Curiae briefs filed by the American Psychological and American Psychiatric Associations in Jenkins v. United States, 307 F.2d 637 (D.C. Cir. 1962).

[26] People v. Hill, 195 N.Y. 16, 87 N.E. 813, 816 (1909); People v. Raizen, 211 App. Div. 446, 208 N.Y. Supp. 185, 197-198 (1925).

[27] 3 WIGMORE § 688.

[28] *Id.* at 4, note 1.

The objective of the hearsay rule is to exclude out-of-court statements which are presented to assert the truth of the statement.[29] The psychiatrist's diagnosis, based in part on information obtained from the patient during psychiatric examination, is not an assertion of the truth of the patient's statements. The diagnosis is a conclusion which may include what the statements reveal about the patient's mental processes, but it is not verification of the factual content of the statements. If the patient tells the psychiatrist that he is being followed by mysterious persons bent on his destruction, and that statement is *not true,* the psychiatrist will have information supporting a diagnosis of paranoid tendencies. Before determining that the patient is paranoid, the competent expert must be satisfied that the patient is not being followed and is not lying about his belief in his persecutors. If the psychiatrist is mistaken in determining that the followers do not exist, their existence may be proven in court and the weight given the diagnosis will be reduced, if not entirely rejected. If the diagnosis relies heavily on the patient's statements, and the jury believes the patient is lying, the diagnosis again will be rejected. Cross-examination and rebuttal witnesses are available to show the inaccuracies upon which the diagnosis relies if the psychiatrist fails to verify his conclustions. Exclusion of a diagnosis because the patient's statements might not be true transforms the expert's opinion from an evaluation of the significance of the statement itself into an acceptance of the content of that statement. The truth of such statements should be relevant to the weight to be given the testimony and not to the admissibility of the expert's opinion.[30]

Recently, most decisions have recognized that unverified statements by the patient may be important in establishing psychiatric diagnoses.[31] But some courts, doubting the psychiatrist's ability to detect malingering or feigned symptoms, still imply a hearsay exclusion by challenging the basis of expert testimony as predicated upon possibly self-serving statements.[32] Such decisions deny the expert's ability to verify his conclusions, based in part on a patient's statement, and deny the jury the decision on the patient's credibility regarding these statements. Disagreement among psychiatric experts is often cited to show that the present state of psychiatric knowledge is not sufficiently developed to justify legal acceptance of such evidence. "The profession and prestige of psychiatry has been

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[29] MCCORMICK § 225.

[30] The hearsay problem in statements to the psychiatrist by family and acquaintances which corroborate the patient's statement is discussed, infra note 56.

[31] Kaufman v. Kaufman, 164 F.2d 519 (D.C. Cir. 1947); Santiemmo v. Days Transfer, 9 Ill. App. 2d 487, 496, 133 N.E.2d 539, 543-544 (1956).

[32] Commonwealth v. Jordan, 407 Pa. 575, 580-583, 181 A.2d 310, 313-314 (1962); Commonwealth v. Patskin, 375 Pa. 368, 375-376, 100 A.2d 472, 475 (1953).

gravely damaged" in the minds of some courts both by the contradictory testimony and by opinions which the court believes to be insufficiently substantiated.[33] Professor Green has noted that much of the judicial suspicion concerning psychiatry results from the "spectacle" of groups of experts of equal eminence lined up on both sides of the case.[34]

Despite such condemnation of psychiatric testimony, disagreement among expert witnesses is no novelty in the courtroom.[35] Indeed, the use of experts as parties' witnesses, rather than friends of the court, implies that both sides may attempt to elicit favorable expert testimony whenever disparate opinions can be found. As a branch of medicine, psychiatry makes no claim to being an exact science with invariant diagnoses; neither does it claim an intra-professional unity unknown to other fields of medicine. As in other fields, disagreement results from divergent interpretations of the same facts, and as in other fields, the resolution of facts and conclusions should be left for jury determination.

The refusal of the courts to give effect to psychiatric testimony ignores the wide range of legal consequences which are assigned to these same opinions when offered in other contexts. Psychiatric diagnosis may determine fitness to stand trial,[36] commitment after trial,[37] or civil commitment.[38] The Federal Rules of Criminal Procedure and the statutes of many states authorize the court to appoint psychiatric specialists.[39] Outside the courts, many important relationships are governed by the result of psychiatric examination. A numerically striking example is the more than half million soldiers discharged during World War II on the basis of diagnostic reports of sub-psychotic disorders.[40] Law and society have recognized psychiatric categories and given legal responsibility to the practitioner's diagnosis in many areas of daily life.

Certainly the fact that psychiatry has not reached the apex of its development is not an adequate justification for excluding or restricting psychiatric testimony. The psychiatrist's opinion, based on the astronomical number of facts constituting behavior, could reasonably result in differing selection of the crucial facts. That difference in diagnosis

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[33] Commonwealth v. Patskin, 375 Pa. 368, 371, 100 A.2d 472, 473 (1953).

[34] Green, *Proof of Mental Incompetency and the Unexpressed Major Premise*, 53 YALE L.J. 271, 285 (1944).

[35] 2 WIGMORE § 563.

[36] *E.g.*, 63 Stat. 686 (1949), 18 U.S.C. 4244 (1964) for report of psychiatrist on competence to stand trial. Mass. Ann. Laws ch. 123, § 100A (1965).

[37] *E.g.*, CAL. WELFARE & INST'NS. CODE § 5500-14 and the similar sexual psychopath laws adopted in about half of the states.

[38] Kutner, *The Illusion of Due Process in Commitment Proceedings*, 57 Nw. U.L. REV. 383, 385 (1962).

[39] Weihofen, *Eliminating the Battle of Experts in Criminal Insanity Cases*, 48 MICH. L. REV. 961, 963 n.4 (1950) (listing twenty state and federal statutes).

[40] Comment, 59 YALE L.J. 1324, 1337 (1950) citing MENNINGER, PSYCHIATRY IN A TROUBLED WORLD 343 (1948).

would not indicate incompetence, or even vitiate the value of the testimony. The very process of selecting certain facts as important to the diagnosis would give a lay jury useful and relevant information. Psychiatric testimony should be admitted when its concepts, though still being developed and refined, will be more useful than no knowledge at all.[41] The admitted complexity of the development of psychiatry as a scientific field casts all the more doubt on the old wives' tales and legal fictions which substituted for knowledge when even less was known of the working of the human mind. To prefer these common-sense substitutes until all scientific doubt is resolved ignores the nature of science and the complexity of man.

Disagreement among psychiatric experts is only surprising to those still so naive as to agree with Justice Harlan's 1884 statement that understanding mental conditions and interpreting human behavior is within the competence of every man of "ordinary intelligence." Such disagreement has been accentuated in the courtroom by the special potentialities for abuse of the hypothetical question when used to obtain psychiatric opinion. Dr. Overholser, the late director of St. Elizabeth's Hospital in Washington and an outspoken critic of the present use of psychiatric testimony, has stated that the alleged "disagreements are more apparent than real, thanks to the hypothetical question and the refusal to permit the expert witness to explain his views and the reasons therefor. . . ."[42] Legal authorities have also noted that much of this apparent disagreement, cited as the proof of unreliability, may result from different hypothetical questions being propounded to each side.[43] A common technique is to cull out all the facts favorable to the propounder[44] and present a question which the expert may believe has no relation to the person he is asked to testify about.[45]

An example of how the hypothetical question may be misused is found in *State v. Garrison* where the trial court allowed the prosecution to ask its experts a long series of questions, each based on a single strange act of the defendant as established by defense witnesses.[46] After each question, the expert testified that the single factor mentioned did not itself indicate insanity. The misleading implications of such seriatim hypotheticals required a reversal of the conviction in *Garrison*. A less blatant distortion is the practice of using a hypothetical question which

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[41] 7 WIGMORE § 1923.

[42] Overholser, *The Place of Psychiatry in the Criminal Law*, 16 B.U.L. REV. 322, 338 (1936).

[43] Green, *supra* note 34, at 285 note 75.

[44] Pederson, *supra* note 6, at 275-276.

[45] *Id.* at 259-262; Overholser, *supra* note 42.

[46] 590 Ore. 440, 117 Pac. 657 (1911).

represents the propounder's theory of the case, though not a balanced representation of the facts.[47] In either of these cases the expert testimony will only be as fair and accurate as the question the expert must answer. Certainly these abuses were part of the frustrating treatment of the psychiatric expert which led Dr. Zilbourg to protest:

> [The hypothetical question is] 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 and decide what to do with both in fact.[48]

The use of psychiatric terminology which may have a technical meaning different from the everyday usage of the word, and the use of diagnostic categories which are too broad and ill-defined have also been the cause of misunderstanding and alleged unreliability in psychiatric testimony.[49]

The inconsistencies in psychiatric testimony do deserve judicial attention to eliminate as much confusion and misunderstanding as possible. Exclusion or judicial denigration of the testimony is not the solution. A carefully applied standard of qualification of experts limiting psychiatric testimony to those with medically recognized qualifications as psychiatrists, and the careful policing of courtroom practices regarding such testimony would meet most of the objections of both lawyers and psychiatrists.[50]

The difference between the medical opinion offered by the psychiatrist and the clinical test data offered by the *psychologist* is also a source of confusion to both courts and juries. Properly qualified psychologists may have their opinions admitted as expert testimony on mental disorders.[51] However, the psychologist and the psychiatrist employ different techniques and their conclusions are frequently not intended to cover equivalent diagnostic or treatment categories. The psychologist's testimony as to I.Q. or the test data on a patient's ability to muster thought processes can be weighed with the psychiatrist's statement about the patient's psychic condition. The jury should be informed of the differences in examination and testing used by these experts and should not treat the inconsistent diagnoses as proof of the unreliability of both.

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[47] *In re* Richard's Estate, 5 Utah 2d 106, 112, 297 P.2d 542, 546 (1956) (psychiatrist was required to answer a hypothetical question framed upon facts which fairly represented the theory of the party propounding the question).

[48] ZILBOURG, THE PSYCHOLOGY OF THE CRIMINAL ACT AND PUNISHMENT 123 (1954).

[49] Broderick, *The Role of the Psychiatrist and Psychiatric Testimony in Civil and Criminal Trials*, 35 NOTRE DAME LAW. 508, 518 (1960).

[50] Jenkins v. United States, 307 F.2d 637 (D.C. Cir. 1962).

[51] *Id.* at 643. *Contra*, State v. Padilla, 66 N.M. 289, 347 P.2d 312 (1959) (psychologist's testimony excluded as not meeting requirements of expertness). See also Hidden v. Mutual Life Ins. Co., 217 F.2d 818, 821 (4th Cir. 1954).

The jury, operating under appropriate instructions, is the proper means of resolving any apparent inconsistencies between psychological and psychiatric opinions.[52]

THE CONFUSION OF AN UNARTICULATED STANDARD

The policy of restricting modern psychiatric testimony on the basis of concepts established when that science had not progressed beyond Bentham's psychological hedonism can lead to tortuous and contrived results. The Supreme Court of Pennsylvania used all of the previously discussed methods of excluding psychiatric evidence in reaching the unfortunate results found in the two cases discussed below. These cases are chosen to illustrate the untoward results which follow when a court applies an unarticulated standard of rejecting psychiatric testimony whenever the psychiatrist's diagnosis differs from the diagnosis which the court would have reached from the facts in the record.[53]

In *Commonwealth v. Patskin*,[54] the defendant was indicted for the murder of his wife and was examined by two psychiatrists, including the superintendent of a state mental hospital. Both psychiatrists testified, in terms of the standard for insanity in Pennsylvania, that the defendant suffered from delusions which prevented him from knowing right from

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[52] Jenkins v. United States, 307 F.2d 637 (D.C. Cir. 1962), is generally an admirable decision, allowing full scope of admission to psychological, as well as psychiatric opinion on questions of mental disorder. However, the several opinions contain unfortunate implications which should be pointed out.

1) The majority opinion begins with the premise that even lay opinion on the question of insanity is admissible upon a showing of familiarity with the subject, a fortiori the trained psychologist's opinion should be accepted. The psychologist's special qualifications are subsequently emphasized, thereby undercutting the suggestion that lay testimony is to be treated as equivalent to expert opinion. However, this opinion never does recognize that the differences in training, methods of examination, and criteria of mental disorder, justify distinguishing between psychiatric and psychological testimony when both are admitted. Both persuasions are entitled to have their testimony admitted as separate methods of reaching a common clinical goal.

2) The concurring opinion of Judge Burger fails to recognize the value of the psychologist as the representative of a distinct clinical speciality in the study of mental disorder. His standard would admit psychologists' opinions only when they approximate the same list of diagnostic factors which would be used for the psychiatrist. This standard fails to distinguish between the grounds for admitting psychological opinion, and the reasons why such opinion should not be indiscriminately treated as equivalent to more psychiatric expert opinion.

3) The dissenting opinion confers special significance on the *medical* training of the psychiatrist. The medical standard is justified as the test for accepting *expert medical opinion*, but should not foreclose the recognition of nonmedical experts. Again, the psychologist should be recognized as representing a serious scientific study of mental disorders, and his opinion should be admitted on that basis, though not without distinguishing the source from the psychiatric diagnoses.

[53] Green, *supra* note 34, has suggested that the difficult issues of mental competency have led courts to apply unarticulated standards as an evasion of the unsatisfactory resolutions provided by the expressed standards.

[54] 372 Pa. 402, 93 A.2d 704 (1953).

wrong. The state supreme court, in reviewing his conviction by the jury, placed great stress on the fact that the psychiatrists' diagnoses were based to a large extent upon the statements made by the defendant during the psychiatrists' examinations. The supreme court upheld the trial court's exclusion from the psychiatrists' consideration of the corroborating statements by the defendant's family about his delusional behavior.[55] Finally, when thus restricted to defendant's statements and behavior as the grounds for diagnosis, the superintendent of the state hospital testified that he thought he could detect simulated and feigned symptoms of insanity, but that, in his opinion, the defendant was legally insane.[56] The court analyzed the defendant's actions at length, including a confession in which the defendant referred to himself as a "beastly murderer," and concluded that the defendant had undoubtedly concocted his symptoms and therefore the expert's contrary opinion was of no value. "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."[57]

The court, in this case, utilized the rules against hearsay and self-serving declarations to eliminate all effect of the expert testimony. The psychiatric testimony was found unreliable because it did not meet the *court's* standard of corroboration, regardless of its medical acceptance. This appears to be an exclusion of such expert opinions in general, since there is no indication that the court thought that these psychiatrists lacked the necessary qualifications to testify on the standards accepted by their profession. The *Patskin* court appears to have found the expert testimony invalid as a matter of law, since an option in the jury to accept the expert opinion would leave the value of expert testimony a matter of factual determination. Furthermore, since the jury, in convicting the defendant, had already rejected the expert testimony in this case, a judicial reiteration of the rejection was unnecessary unless the court wished to emphasize that no reasonable jury could have reached a contrary decision without requiring a new trial.

The *Patskin* opinion purported to recognize the jury's function of weighing psychiatric evidence, but some doubt was cast on the scope

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[55] *Id.* at 416, 93 A.2d at 711.

[56] *Id.* at 417, 93 A.2d at 712. 3 WIGMORE § 688 recognizes the propriety of excluding secondary sources from the data used in making a medical diagnosis. Such a principle should not be extended to psychiatric diagnoses. Since lay witnesses' statements about patients' behavior are regularly admitted for jury consideration, there seems to be little justification for requiring the psychiatrist to exclude such statements as "hearsay," thereby limiting his consideration to less than the jury will know about the patient's behavior.

[57] 372 Pa. at 423, 93 A.2d at 714.

of the jury's function by a subsequent opinion involving the commitment of the same defendant.[58] After the defendant's conviction, a sanity commission appointed under state law conducted a new examination, with new tests, and found him to be legally insane. The commission recommended his commitment to a state hospital. Reviewing a denial of the commitment, the Pennsylvania Supreme Court, referring to the original trial testimony, discussed the insufficiency of psychiatric evidence and concluded the insufficiency constituted a justification for court rejection of psychiatric testimony in general. Justice Bell repeated his concern that if such evidence as supported the psychiatrists' diagnoses were sufficient to prove insanity, "few 'murderers' would ever be convicted."[59] The implication of this decision is that the psychiatrist's opinion must be based on a preponderance of the evidence as determined by the court, not by medical standards. However, if the expert's opinion is acceptable only if it complies with the court's conception of whether the diagnosis is supported by the weight of the evidence, such a test removes the purposes of having an expert give his opinion allegedly based on special knowledge. The test then begs the ultimate question.

If a jury, acting under proper instructions, be seen as the final determinant of the validity of psychiatric testimony, then inadequate grounds for the diagnosis would only reduce *credibility* of the testimony. The expert's opinion would not need to be rejected *ipso facto* as insufficient to support the ultimate jury finding. When the court rejects the psychiatrist's diagnosis as based on "erroneous facts," it usurps the jury's function of determining what the facts are. As applied in the *Patskin* cases, the "facts" would have to be used retrospectively in determining whether the expert's testimony could be given any weight in determining those very facts.

The conclusion seems inescapable that the *Patskin* opinions reject, as a matter of law, any psychiatric diagnosis which the court believes to be inconsistent with the commonly accepted layman's interpretation of the conduct in question, and the mental state which that conduct implies. This suggestion that the court will impose its own "psychiatric" standard was confirmed in *Commonwealth v. Jordan*.[60] There, a psychiatrist "with a rather impressive background of credentials," in the court's own estimation, "performed a complete neurological and psychological examination of the defendant."[61] The psychiatrist testified that at the

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[58] 375 Pa. 368, 100 A.2d 472 (1953).

[59] 372 Pa. at 424, 93 A.2d at 715. Since the jury had already convicted *this* "murderer" with such testimony before it, the justice's concern appears to be unnecessary.

[60] 407 Pa. 575, 181 A.2d 310 (1962).

[61] *Id.* at 580, 181 A.2d at 313.

time defendant shot his admitted victims he was suffering from an intense fear psychosis which "made it possible for him to . . . not be aware of what he was doing."[62] After comparison with the defendant's confession and the witnesses' accounts, the psychiatrist's opinion was rejected by the court as being based upon "erroneous and insufficient information."[63] The court then conducted a *de novo* review of the evidence and concluded:

> [If the psychiatrist had made a] thorough inquiry into basic facts . . . he would have determined that all through the fatal day, it was the defendant, who was the threatening and attacking aggressor, the one looking for trouble — not the abused and frightened individual the doctor concluded him to be.[64]

In the *court's* opinion, the common experience that aggression is not the reaction of a frightened man overrode the psychiatrist's opinion that fear led the defendant to aggression. The court reached this conclusion with the assurance that the expert's opinion must have been based on the unsubstantiated examination of the patient. To confirm its own conclusion, the court charges that the psychiatrist failed to test the accused's "mental quotient or any thematic aperception [sic] tests for the purpose of seeking corroboration of his findings."[65] Apparently even the selection of the numerous tests to aid diagnosis is to be subject to the court's standards. The unexpressed standard for admission seems to be the court's agreement with the psychiatrist's techniques and conclusions.

The unarticulated standard which the Pennsylvania court seems to have adopted for the admission of psychiatric evidence misconceives the expert's role in contributing to the jury's understanding. The court has interposed itself between the expert's diagnosis and the jury's verdict, apparently in the belief that the latter must follow from the former. The result of this misconception and the misapplication of the doctrines which limit such expert testimony is that the court engages in hip-pocket psychiatry to reach its own conclusions about the parties' mental condition, based on the everyday interpretation of the same behavior. Here indeed is confusion resulting from what Justice Frankfurter criticized as "laymen's ventures into psychiatry."[66]

The objection in most cases is that the courts have failed to distinguish between psychiatric and lay testimony and have encouraged the jury to lump all such testimony into single consideration. The Penn-

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[62] *Id.* at 581, 181 A.2d at 313.

[63] *Id.* at 582, 181 A.2d at 314.

[64] *Ibid.*

[65] *Ibid.*

[66] Fisher v. United States, 328 U.S. 463 (1946) (Frankfurter dissenting at 477, 478).

sylvania approach goes further and appears to have foreclosed jury acceptance of the psychiatric diagnosis whenever the expert's testimony differs from a non-psychiatric interpretation represented by the court's *sub silento* diagnosis. The Pennsylvania approach is an extreme in the judicial rejection of psychiatric evidence, but is different only in degree from the large number of courts which disparage or limit the effect of psychiatric testimony to a greater degree than other expert testimony. In all such cases, the lack of standards for legal recognition of psychiatry as an intricate medical speciality does not have significant support in the medical profession, or in American society as a whole. The judicial refusal to recognize the community acceptance of psychiatry as an orthodox branch of medicine represents a backwater in the modern application of technical knowledge in the quest for a just legal process.

ISSUES ON WHICH PSYCHIATRIC TESTIMONY HAS BEEN FREELY ADMITTED

Although judicial reluctance to admit or give credence to psychiatric testimony has been the dominant response to such evidence, there have been isolated issues where psychiatric testimony has been freely admitted for jury consideration. A dramatic illustration of the inconsistency of legal recognition of psychiatric testimony is found in the decisive weight given the medical expert's opinion in civil commitment proceedings.[67] The psychiatrist's opinion may even be accepted by way of an examination certificate, so cross-examination about the diagnosis may not be available.[68] In fifteen states a jury trial may be requested before commitment. In these proceedings psychiatric evidence is freely admitted though the ultimate decision is left for the jury.[69] Psychiatric opinion is accepted in involuntary commitment proceedings despite the exclusion of the same evidence from other court proceedings by the application of the evidentiary grounds discussed above.

The concern that is presently being expressed for the protection of legal rights in commitment proceedings[70] merely serves to underscore the main point of this article: Recognition of the admissibility of psychiatric testimony should be only the *first step* in the use of such testimony on any legal issue. The second step should be the separate consideration

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[67] Kutner, *supra* note 38; Ross, *Commitment of the Mentally Ill: Problems of Law and Policy*, 57 MICH. L. REV. 945, 961 (1959).

[68] Kittrie, *Compulsory Mental Treatment and Requirements of "Due Process,"* 21 OHIO ST. L.J. 28, 39 (1960).

[69] Ross, *supra* note 67, at 1014 (summary of Table 2); see Comment, 56 YALE L.J. 1179, 1209 (1947) showing twenty-three states permitting jury trial of commitment at that date. The tendency is away from jury determination, with concentration of the decision in the expert's hands.

[70] Kittrie, *supra* note 68; Kutner, *supra* note 38.

of what legal effect will follow from that testimony. In most areas of the law, failure to distinguish between *admissibility* and *effect* has led to an unwarranted exclusion of psychiatric opinion. In civil commitment cases, the acceptance of admission as the equivalent of adopting the expert's conclusion has led to an unintended submersion of any separate legal standard for commitment. In either case, the problems of admissibility of expert opinion should be distinguished from its legal effect in order to develop a rational utilization of the psychiatrist's knowledge within an acceptable legal framework.

Even though psychiatric testimony has been seen as an invasion of the jury's prerogative to determine an ultimate issue such as insanity, many courts have been willing to accept testimony of mental condition on the secondary issue of witness credibility.[71] Legal scholars have uniformly advocated the admission of psychiatric testimony as to witness credibility in cases involving sex crimes.[72] Allegations of sex crimes are generally recognized to be a potential outlet for mental aberrations, with fanciful abuses stirred by deep-seated motives. Unlike the untruths of the "normal" person, which in general may be identified with commonly recognized motives, the distortions which lead to nonfactual testimony of disturbed witnesses may be the product of hidden aberrations which the psychiatric expert will recognize.[73] The paranoid and the rare pathological liar are examples of the irresponsible witness which the untrained layman would not detect if unfamiliar with those behavioral symptoms. The entire range of psychotic, neurotic, and defective conditions, frequently not severe enough to constitute "insanity" in the layman's terms, may require the psychiatrist's trained observation to evaluate the effect of the witness's mental condition on his testimony.[74] Assertions of the witness may be impeached by the psychiatrist by showing how the witness's mental condition would adversely affect the ability to observe the events in the testimony, to recollect them at the time of testifying, or narrate them truthfully to the jury.[75]

The admission of psychiatric testimony in these circumstances is limited to the credibility of the witnesses and like the other evidence

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[71] Ingalls v. Ingalls, 257 Ala. 521, 535, 59 So. 2d 898, 911 (1952) (witness as to fiduciary responsibility of trustee of fund for minor children); Saucier v. State, 235 S.W.2d 903 (Tex. Crim. 1950) (witnesses to murder of attendant in state mental hospital); Ellarson v. Ellarson, 198 App. Div. 103, 190 N.Y. Supp. 6 (1921) (complaining witness in suit for conversion of cattle).

[72] McCormick § 45; 3 Wigmore §§ 924(a), 934(a), 968.

[73] Comment, *Psychiatric Evaluation of the Mentally Abnormal Witness*, 59 Yale L.J. 1324 (1950).

[74] *Id.* at 1326-31.

[75] Juviler, *Psychiatric Opinions as to Credibility of Witnesses: A Suggested Approach*, 48 Calif. L. Rev. 648 (summarized in an interesting prospectus for use by a psychiatrist in preparing to testify at 682).

presented, is not conclusive on the jury.[76] The scope of psychiatric impeachment is shown in the following distinct uses of the expert's testimony.[77] *People v. Cowles*[78] admitted testimony to impeach the alleged victim of a rape as being a pathological liar, sexually disturbed, and likely to fabricate such an experience. *Miller v. State*[79] admitted psychiatric testimony to rehabilitate the prosecuting witness, an alleged nymphomaniac, as being normal and sufficiently competent for her testimony to be believed. In *Rice v. State*,[80] the appellate court went beyond the admission of psychiatric testimony for jury consideration, and set aside the conviction for molesting a young girl on the basis of a doctor's testimony. The conviction there was based on the girl's uncorroborated statement, and the doctor's testimony that her mental condition induced "unreal and phantom pictures in her mind" confirmed the appellate court's belief that her story was highly improbable. This psychiatric impeachment was held to be sufficient to destroy the prosecution's *prima facie* case. The use of psychiatric impeachment evidence for purposes beyond the jury's determination of credibility is rare, and is not justified by the concepts under which the testimony was admitted. However, the court in the *Rice* case may have simply intended to reiterate the common rule that in rape cases an uncorroborated statement is insufficient as a matter of law, with a further acknowledgement that one reason for this policy is the well known possibility of sexual delusions.

United States v. Hiss[81] extended the acceptance of psychiatric testimony concerning credibility beyond sex cases. There the court held that psychiatric evidence was admissible to impeach the credibility of any witness where mental aberrations may affect truthfulness or reliability. The court held that the jury was entitled to consider such evidence rather than be restricted to the judge's ruling on whether the witness was sufficiently lucid to testify.[82] The defendant was convicted in spite of the psychiatric testimony on the unreliability of the principal prosecution witness. The jury apparently considered, and rejected, the psychiatric evidence offered there, and this decision again indicates that the admission of psychiatric evidence is *not* tantamount to yielding the jury's

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[76] Broderick, *supra* note 49, at 511.

[77] *Id.* at 510-11 for a discussion of these cases.

[78] 246 Mich. 429, 224 N.W. 387 (1929).

[79] 49 Okla. Crim. 133, 295 Pac. 403 (1930).

[80] 195 Wisc. 181, 217 N.W. 697 (1928).

[81] 88 F. Supp. 559 (S.D. N.Y. 1950). Although prior examples of such use of psychiatric testimony exist, see Ellarson v. Ellarson, 198 App. Div. 103, 190 N.Y. Supp 6 (1921), the Hiss case received wide publicity and focused attention on this kind of testimony.

[82] 2 WIGMORE § 501. The insane and defective were formerly incompetent to testify, their competency being determined by the trial judge.

function to the expert.

The primary objection to admission of psychiatric opinion upon witness's credibility is that the use of courtroom diagnosis will be encouraged.[83] Psychiatric opinion made from limited observation in the courtroom, and not based on careful examination and testing, would not satisfy medical standards for clinical diagnosis.[84] Nevertheless, the demeanor of the witness, his answers, and his history may give sufficient data for the psychiatrist to assess the probability of personality disorders which would not be recognized by the layman.[85] A two-step rationale has led to the acceptance of psychiatric testimony on the issue of witness credibility despite the dangers of limited examination: first, experience that mental disturbance may make a witness's statements unreliable; and second, acknowledgement that even under the disadvantage of limited observation the psychiatric expert may notice behavior patterns indicating mental disturbance which ordinarily would not be detected by the untrained laymen on the jury. The latter point argues for the admission of such testimony even where courtroom observation is used, though the limited value of such a diagnosis should be emphasized to the jury.

The issue of credibility is particularly within the area of exclusive jury determination. On the issue, psychiatric testimony has not been rejected as the "invasion of the jury's province" even though it has been rejected for this reason on many other issues. Also, the temptation to use courtroom diagnosis makes psychiatric testimony on this issue less likely to be reliable than where full examination would be the usual practice. Here, neither the sanctity of the jury's province nor the increased possibility of unreliability has been an insurmountable obstacle to admission.

Two lessons can be drawn from the admission of psychiatric testimony on the issue of credibility. First, psychiatric testimony can provide the jury with information about the motivation for some kinds of behavior which the layman of ordinary intelligence would not have gained from his general experience with his species. Second, the justifications given for limiting psychiatric testimony are not consistently applied even on issues where they would be most applicable.

Psychiatric evidence concerning character and personality traits has also been admitted as substantive evidence on the issue of whether that

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[83] Note, 30 NEB. L. REV. 513, 519-20 (1951).

[84] Taft, *Opinion Evidence of Medical Witnesses*, 14 VA. L. REV. 81, 92 (1927); Schroeder, *Psychiatry and the Oriental Law, Symposium on Medico-Legal Problems* (series two) 148-49 (1949); also see the results of a survey of psychiatrists on the desirability of courtroom diagnosis, indicating that psychiatrists found such examinations totally inadequate. Mack, *Forensic Psychiatry and the Witness—A Survey*, 7 CLEV.-MAR. L. REV. 302, 305 (1958).

[85] Comment, 59 YALE L.J. 1324, 1336 (1950).

person has the propensity to commit a specific act.[86] The orthodox rule of character evidence excludes all proof of a party's character save for general pronouncements about his reputation in the community.[87] Criticism of the anomalous orthodox rule was crystalized by Justice Jackson in *Michelson v. United States*[88] with his famous statement that the exclusion of all testimony of conduct, disposition, or traits reduced the potentially valuable testimony of those who know a person best to a mere reflection of the shadow the subject's daily life has cast in his neighborhood.

"A radical departure from the orthodox doctrine which limits proof of character to reputation evidence"[89] was made in *People v. Jones*.[90] The Supreme Court of California reversed Jones' conviction for sexually molesting his nine-year-old niece because of the exclusion of psychiatric testimony that the defendant was not a "sexual deviate." The psychiatrist's testimony was offered to show that the defendant had a "normal state of mind," and, therefore, was not "prone to commit such an act."[91] In admitting this testimony, the California court relied heavily upon the California Sexual Psychopath Act[92] as a legislative recognition of the validity of such psychiatric diagnoses.[93]

Professors Falknor and Steffen have attacked the *Jones* decision on the ground that the legislative recognition of post-conviction psychiatric evidence for sentencing purposes, as found in the Sexual Psychopath Act, has no proper bearing on the rules of evidence which exclude such evidence from the trial.[94] This criticism misses both what the California court did and the significance of the *Jones* approach. The court saw the Sexual Psychopath Act as a legislative recognition that psychiatric diagnoses were sufficiently developed and accurate to vest the psychiatrist's opinion with legal significance in the sentencing procedure.[95] The statute reflected the community recognition of psychiatric standards as being relevant to legal problems in this area. This gave impetus to the court to re-examine its own evidentiary standards in light of the changing social and scientific acceptance of psychiatric opinion. The court, not the legislature, made this change. The statute was not specifically on

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[86] People v. Jones, 42 Cal. 2d 219, 266 P.2d 38 (1954).

[87] WIGMORE § 52.

[88] 335 U.S. 469, 477 (1948).

[89] Falknor & Steffen, *Evidence of Character: From the "Crucible of the Community" to the "Couch of the Psychiatrist,"* 102 U. Pa. L.Rev. 980, 982 (1955).

[90] 42 Cal. 2d 219, 266 P.2d 38 (1954).

[91] *Id.* at 222, 266 P.2d at 41.

[92] *Id.* at 224-25, 266 P.2d at 42-43.

[93] CAL. WELFARE & INST'NS CODE §§ 5500-5514.

[94] Falknor & Steffen, *supra* note 89, at 985.

[95] 42 Cal. 2d at 225, 266 P.2d at 42.

point, but was used by the court as precedent for the recognition of psychiatric testimony.[96] The court in *Jones* acknowledged the probative value of the psychiatrist's testimony concerning the presence of personality traits which usually accompany the commission of sexual crimes against children. The decision implies only that such testimony is relevant to the case, and does not require the jury to accept the psychiatrist's opinion. In fact, upon the re-trial of the *Jones* case with the psychiatrist's testimony admitted, the defendant was again convicted.[97]

A further objection to the *Jones* decision rhetorically asks: If evidence is admissible to show the defendant is not a "sexual deviate," then won't psychiatrists also be allowed to testify that a defendant isn't a "thief" or a "murderer" on the basis of his personality traits?[98] This question is answered by Professor Curran's response that whenever the psychiatrists identify a constellation of personality traits which correlates with those crimes, and those classifications receive the degree of public and legislative recognition given to the psychiatric determination of sexual deviancy, then the expert's opinion *should* be admitted.[99]

The psychiatric testimony offered in *Jones* is open to many criticisms. The testimony that one is not a deviate is a negative conclusion which carries little weight in any context, and such testimony does not preclude the possibility that one is not a sexual deviate in the psychiatric sense, but still committed the specific act for which he was indicted.[100] *State v. Sinnott* rejected the *Jones* reasoning relying on the latter point, saying that the commission of an alleged specific act and the psychiatric opinion of the tendencies to commit such acts in general were separated by too great a gap to give the expert opinion any more than a tenuous value.[101] The New Jersey court in *Sinnott* did not recognize that all testimony about reputation or character is subject to the same objection; that it does not establish any definite correlation between a particular act and the

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[96] Landis, *A Note on "Statutory Interpretation,"* 43 HARV. L. REV. 886 (1930). This note condemns the restrictive interpretation of statutes advocated by Professors Falknor & Steffen in favor of using the legislature's purposes and aims as a broad judicial guidepost for reaching the legislatively determined goals.

[97] Curran, *Expert Psychiatric Evidence of Personality Traits*, 103 U. PA. L. REV. 999, 1003 (1955) (reporting correspondence with the defense attorney; the re-trial apparently was not appealed).

[98] Falknor & Steffen, *supra* note 89, at 990.

[99] Curran, *supra* note 97, at 1013. Professor Curran could have cited Lord Nottingham's response to just such an argument in determining how far to extend the period of perpetuities: "Where will you stop if you don't stop here? I will tell you where you will stop: I will stop whenever any visible inconvenience doth appear." Duke of Norfolk's Case [1682] 3 Ch. Cas. 1, 26, 22 Eng. Rep. 931, with emphasis from a dignified bow to W. Barton Leach.

[100] Curran, *supra* note 97, at 1007.

[101] 24 N.J. 408, 429, 130 A.2d 298, 310 (1957).

individual in question. Only if the psychiatrist's identification of traits is less reliable than the layman's account of a mythical "general reputation in the community" will the expert's testimony be less valuable than the layman's in determining the probabilities of whether the specific act was committed. References to the difficulty of diagnosis and the possibility of conflict between experts suggest that the *Sinnott* opinion was actually questioning the reliability and validity of the psychiatrist's opinion rather than its relevance and probative value. The lower court in *Sinnott* had been quite candid in rejecting the psychiatric evidence because the field is "still in a state of refinement" and "historically it has not been disadvantageous for the courts to lag a little."[102]

The *Sinnott* case thus puts the theory of the *Jones* opinion directly in issue. The California court in *Jones* accepted the proposition that psychiatry had developed to a point where its diagnostic categories were given legal effect in quasi-judicial and nonjudicial settings, and, therefore, the court was no longer justified in closing its eyes to the community recognition of psychiatric developments. The New Jersey court responded by implying a future recognition of the value of psychiatric testimony only when the science becomes fully "refined." New Jersey's "lag a little" standard suggests no means of developing a test for admissibility short of mathematically exact diagnostic criteria and complete unanimity of opinion. Surely such a standard will never be reached outside of the exact sciences, and certainly not in that branch of medicine which deals directly with human behavior.

The task then is to articulate an appropriate and consistent limitation on the "lag" which the New Jersey court advocates. This phenomenon of the "cultural lag" between scientific advances and acceptance of the innovation by the legal institution is not new.[103] Every field of scientific growth presents different problems for the legal institution, but the general tests for legal acceptance should be carried into the new fields whenever possible. The standards for judicial acceptance of psychiatric evidence should begin with the general standards applied to other scientific and medical developments. Only if these prior tests are found inadequate must a new legal standard be defined.

In dealing with psychiatric evidence, most courts have failed to articulate a standard for admission, or have failed to apply their general standard to this area where common knowledge is a tempting, if unsatisfactory, substitute for the expert's trained opinion. In this field, the

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[102] State v. Sinnott, 43 N.J. Super. 1, 10, 127 A.2d 424, 429 (App. Div. 1956).

[103] Britt, *Blood-Grouping Tests and the Law: The Problem of "Cultural Lag,"* 21 MINN. L. REV. 671, 695 (1937).

legal structure has failed to take the step identified by Justice Frankfurter as differentiating the "law which reflects the most advanced scientific tools and the law remaining a leaden-footed laggard."[104]

Developing a Test for the Admission of Psychiatric Evidence

The courtroom, as presently constituted, has not been the medium best suited to seeking an absolute or even a relative truth. Our scientific society could have applied its desire for experimentation toward developing a more controlled measure, a more rational and consistent means of ascertaining facts.[105] However, the laborious development of law and legal principles went not to the laboratory, but to the adversary system and the inexperienced jury of laymen. The growth of the legal institution in its present form reflects a basic choice of policy about the way that man wants to be governed. The error factor which distinguishes the jury process from that of the scientist may even be the essence that distinguishes justice from scientific truth. In any case, the legal system has accepted the fallible human factor as part of the moral judgment in decision-making which no scientifically demonstrable truth can supply. The moral factor is supplied by the judgment of the judge and jury and does not require special knowledge from any expert witness.

The legal standard must still adapt to changing technical knowledge, as well as preserve the integrity of the policy that allocates decision-making power. Any search for reality and truth "can not ignore scientific findings, analysis, opinions, and methods — and these do not remain static."[106] Placing the ultimate decision in the hands of the layman rather than the expert is not *anti-scientific*, not a repudiation of technical knowledge, but is a preference for one kind of error factor over the other. It is a mistake for a court to see the nonscientific system of judicial decision as requiring the exclusion of whatever scientific knowledge is available. Similarly, it is a mistake to admit such knowledge only on the same level that the laboratory scientist would accept as confirmation or rejection of his hypothesis; only metaphorically is the courtroom a laboratory of human behavior. The standard for admission of all scientific evidence, including that of the psychiatrist, must be the test of meaningfulness to the jury, and not whether the experts are in such accord that the principle becomes an undisputed axiom.

No sound basis exists for excluding or specially restricting psychiatric evidence as being opinion, hearsay, or too unreliable when the same

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[104] Fisher v. Unitd Stats, 328 U.S. 463 (1946) (Frankfurter dissenting at 478).

[105] Marshall, *Evidence, Psychology, and the Trial: Some Challenges to Law*, 63 Colum. L. Rev. 197, 199 (1963).

[106] Curran, *supra* note 97, at 1019.

difficulties plague numerous other fields where expert testimony is consistently admitted. As repeatedly emphasized in this article, the evidentiary standard for recognition of psychiatric evidence should be based on the same legal criteria which have been developed for the admission of other types of medical and scientific opinion.

The test to be suggested here supports only the admission of expert psychiatric opinion of a medically recognized nature. The moral and legal judgments of the psychiatrist should be no more admissible than those of any other expert. Since the psychiatrist's opinions will edge very close to moral decisions on such questions as the insanity defense, the technical standards for recognizing psychiatric opinion as generally admissible must be kept clearly separate from the question of whether any given opinion to be offered by the psychiatrist may not exceed the boundaries of his opinion as a scientifically oriented expert. Examples of the limitation on psychiatric testimony which would exist even after recognition of general admissibility will be given below.

The guideline for a legal standard of admission of psychiatric testimony should be the test set forth in *Frye v. United States.*[107] In the *Frye* case, the defendant appealed his conviction for murder on the ground that the trial court erroneously excluded expert testimony based on the result of a "systolic pressure deception test." The federal court of appeals, while affirming the exclusion of this early lie-detector evidence, stated the following test for admission of expert testimony:

> Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made *must be sufficiently established to have gained general acceptance in the particular field in which it belongs.* (Emphasis added.)[108]

The application of the *Frye* test requires only that the basic principles be sufficiently well recognized by experts in the field to have been generally accepted and does not require certainty or unanimous agreement on all questions which might be raised in that field.[109] Incorporation of the scientific principles into the practical and research operations in that field seems an appropriate indication of general acceptance. *Medley v.*

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[107] 293 Fed. 1013 (D.C. Cir. 1923), 34 A.L.R. 145, 24 COLUM. L. REV. 429 (1924), 37 HARV. L. REV. 1138 (1924), 33 YALE L.J. 771 (1924).

[108] 293 Fed. at 1014.

[109] Comment, 51 MICH. L. REV. 72, 77 (1952).

United States[110] held an expert's testimony on spectroscopy to be admissible under *Frye* because "it is easily demonstrable that it is now in general use in scientific research and industrial analysis."[111] The test in *Medley* was not whether there could be no disagreement on the results of this particular spectrograph analysis, but whether the field was sufficiently established to behoove the court to recognize this as an area of expertness, beyond the competence of the layman, which might contribute to the solution of the case. Under the *Frye* test, the burden of showing general scientific recognition would be on the propounder of the evidence.[112]

Recent cases upholding the limited admissibility of the lie-detector have acknowledged that the usefulness of technical information is not restricted to its ultimate scientific development. In *State v. Valdez*, the Supreme Court of Arizona stated: "Although much remains to be done to perfect the lie-detector as a means of determining credibility we think it has been developed to a state in which its results are probative enough to warrant admission upon stipulation."[113] The *Valdez* case is a reminder that even in the controversial area of lie-detectors, infallibility is not the standard for admissibility of scientific evidence.[114]

If the *Frye* test for admissibility is applied to the field of expert psychiatric testimony, the question for the court will be whether psychiatry has achieved sufficient recognition to justify its admission as being generally accepted in the medical field. The teaching of pyschiatry at every major medical school and the widespread use of psychiatrists in treating the behavioral maladjustments which often accompany physical injury or disease attests to the medical acceptance of psychiatry as an acknowledged specialty in that field.[115] Under the *Frye* standard, the general medical acceptance of psychiatry per se would not be seriously refuted today.

With the general admissibility of psychiatric testimony established under *Frye*, then, if the witness has met medical standards of qualification which satisfy the judge, his broad diagnosis is admissible without courtroom quibbling and laymen's second guessing. Only when a particular test or device is used in reaching that diagnosis may the issue of admissibility of that aspect of the testimony arise again under the *Frye* test. Such a case would be the use of narcoanalysis — "truth drugs" —

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[110] 115 F.2d 857 (D.C. Cir. 1946).
[111] *Id.* at 860.
[112] People v. Becker, 300 Mich. 562, 566, 2 N.W.2d 503, 505 (1942), 139 A.L.R. 1174.
[113] 91 Ariz. 274, 283, 371 P.2d 894, 900 (1962).
[114] Note, 65 W. VA. L. REV. 76, 79 (1962).
[115] GUTTMACHER & WEIHOFEN, PSYCHIATRY AND THE LAW 10 (1954).

for psychiatric examination. There the propounder would have to establish the general acceptance of that particular device in the field of psychiatry before admission of such data. Each development must have achieved general acceptance within the psychiatric specialty before the court can admit it as a basis for diagnosis. Acceptance by the body of experts in the field qualifies the practice as reliable, but does not determine the ultimate effect given to such testimony. If such psychiatric evidence be admitted under the *Frye* approach, the jury is free to accept or reject all or part of the diagnostic conclusion as with other medical testimony.

An alternative formulation of the *Frye* test is to base the admissibility of scientific data upon general acceptance of the reliability of the data by the community as a whole.[116] While acceptance by the community may not be an appropriate test for technical data in most fields, it is a plausible standard for determining the general admissibility of psychiatric evidence. The *Jones* case[117] applied a modification of this standard by requiring the admission of psychiatric testimony where the legislature had directed that legal effect be given to the same information in a similar context. There the legislature's decision represented an explicit community judgment, though in most cases the widespread use of psychiatric facilities would be sufficient recognition of community acceptance.[118] Thus, community recognition of psychiatry as one of the generally available and widely used medical facilities may indicate when the courts are falling too far behind the consensus of society in the recognition of technical change. This should always represent an outer limit to the court's "cultural lag." But within that outside line, the more appropriate test is general acceptance by experts in the field as the standard to which expert witnesses should be held. If the community and the court be wholly familiar with the problems and developments in the field, the expert is not required at all. For this reason, the expert's testimony should be tested against the requirements and standards recognized within his profession.

Legal protection is not abdicated to the experts under the suggested general standard for admission of psychiatric testimony since such evidence still faces all the tests of relevance, competence, materiality, privilege, and the like,[119] *i.e.*, the weight of judicial scrutiny has been

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[116] See Comment, 51 MICH. L. REV. 72, 75 (1952).

[117] Note 90 *supra.*

[118] Hospital and clinic patients and outpatients receiving psychiatric care in 1964 exceeded 1,095,000, not including psychiatrists' private patients. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 78, chart 96 (85th ed. 1965).

[119] Note, 5 U. FLA. L. REV. 5, 6 (1952).

shifted to the threshold of admissibility and away from unwise dispute with the expert's conclusions after admission. As in other areas of expert testimony, the careful qualification of experts should be relied upon to remove the incompetent, and the disagreement among the competent left for factual determination.

Admission of psychiatric testimony under the same standards and restrictions as other medical testimony does not constitute a court endorsement of the substance of the testimony. Indeed, as seen in the Pennsylvania cases discussed above,[120] much of the trouble in this field has come from the reluctance of some courts to admit any testimony which the judge would not accept as a correct and indisputable fact. At the present state of psychiatric knowledge, a court should not give binding authority even to uncontradicted psychiatric testimony. As a general proposition, such testimony would not be sufficient to support a directed verdict.[121] Though psychiatric testimony alone would not support a directed verdict, it should be available for consideration with the objective facts when it is relevant to the jury's decision. Relevance as the measure of probative value is not limited to evidence which is dispositive of the issue.[122] The jury in most cases could accept the psychiatrist's testimony and still not find it to control the legal issue.

The *Frye* test advocates admission of the increased technical knowledge of the psychiatrist. This does not mean that the court must then admit whatever the qualified expert wishes to say. The testimony should be restricted to his specialized knowledge, and in those cases where the legal issue would not be clarified by that kind of knowledge, then the psychiatrist's opinion should be excluded. In cases where a soldier is accused of giving aid to the enemy, an expert's opinion of whether an individual *can* resist interrogation and torture should be limited to any relevant physiological tolerances, and leave the opinion of what limits a man *must* withstand to those qualified to give a military or a moral judgment. This is a possible legal conclusion which would exclude the psychiatrist's opinion on the second step — its substantive value — even after the general admissibility of such expert testimony has been recognized under a *Frye* standard.

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[120] Commonwealth v. Jordan, 407 Pa. 575, 181 A.2d 310 (1962); Commonwealth v. Patskin, 372 Pa. 402, 93 A.2d 704 (1953); Commonwealth v. Carlucetti, 369 Pa. 190, 85 A.2d 391 (1952).

[121] Holloway v. United States, 148 F.2d 665 (D.C. Cir. 1945); United States v. Pollard, 171 F. Supp. 474 (E.D. Mich. 1959). *Contra*, McKenzie v. United States, 226 F.2d 524 (10th Cir. 1959) (held that testimony of legal insanity by seven psychiatrists, rebutted only by lay testimony that defendant appeared normal, should have resulted in granting defense motion for acquittal). See also 5 WAYNE L. REV. 344 (1959).

[122] MCCORMICK § 152, at 317.

A more common problem is the scope of psychiatric testimony in an insanity defense to criminal charges. Separation of the general admissibility of psychiatric evidence from the question of what should be the expert's contribution to the determination of insanity will clarify what kind of testimony should be admitted as expert opinion on that issue.

The legal concept of "insanity" is predicated on man's ability to understand and control his behavior by the application of his reasoning power. Under the classic *M'Naughten* test, "know" is the operative word to prove insanity:[123] Does the individual have some cognitive malfunction which prevents "knowledge" of his act or its consequences. Such a conception of insanity is in fundamental conflict with the psychiatric concept of mental disorders as a failure to develop a unitary emotional and intellectual appreciation for behavior which would make the "reasoning process" a meaningful governor of conduct.

The law recognizes such a distinction between the "knowledge" and the "appreciation" of conduct in children by requiring that both factors be present before finding a child's conduct was culpable,[124] but does not recognize the same distinction in application of its tests for adult insanity. As long as this dichotomy of legal and psychiatric concepts of mental disorders is retained, the legal structure should seek a standard which will utilize that psychiatric knowledge which is not inconsistent with existing legal standards.

Any attempt to provide a rational standard employing the present diverse medical and legal concepts of insanity would be outside the scope of this article and would likely be merely an academic exercise. But assuming there would be some efficacy in such a standard, the immediate effect of such a hypothetical standard would be to restrict the psychiatric testimony admitted on this issue by excluding any testimony which postulates as a theoretical basis for diagnosis any attribution of the origin of the disorder to unconsciously operating relationships within the individual's historical make-up. The secondary effect would be to remove the pretense that the present legal standard, based on the philosophical distinction between mind and body, is compatible with modern psychiatric theory. Modern theory conceives of the entire organism as having its conduct determined by the combination of past and present interactions within itself and with its environment and not by particular "knowledge" within the control of the "mind." This secondary effect might well be a greater impetus to restructure the legal standard of

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[123] M'Naughten's Case, 10 Clark & F. 200, 8 Eng. Rep. 718 (1843). See generally GLUECK, LAW AND PSYCHIATRY, COLD WAR OR ENTENTE CORDIALE (1962); PERKINS, CRIMINAL LAW (1957).

[124] PERKINS, *op. cit. supra* note 127, at 731.

insanity to include whatever other psychiatric testimony the court finds is being unnecessarily excluded from legal consideration by the present legal conception of the mental processes.

This consideration of the medical and legal concepts of "insanity" is not an integral part of the general standard for admission of psychiatric testimony advocated in this article; rather, it is simply an example of how the scope of psychiatric testimony would necessarily be better defined by focusing the discussion on the substance of each issue regardless of the result, rather than on whether psychiatry is a field in which expert opinion should be admitted at all.

The recognition of psychiatric testimony, where appropriate, as a competent medical specialty is not likely to have an undue influence on the jury. The jury's ability to rationally weigh and to reject psychiatric evidence when the jury does not accept its conclusion is amply supported by the cases discussed in this paper. In *Hiss*, in *Jones*, in *Patskin*, and in *Jordan*,[125] the admission of psychiatric testimony did not prevent a jury decision which disregarded the opinions and testimony of the expert witness. The fear of the expert usurping the jury's function seems to be a "red herring." The experiments conducted in the Chicago jury study confirm that those experimental juries were not willing to relegate to the experts the decision concerning the legal effect to be given an alleged mental condition.[126] The Chicago study indicates (1) that the expert testimony did not overawe the jury and prevent full deliberation of the psychiatric testimony, (2) that most of the jurors believe the question of "insanity" should be left in their hands, and (3) that the psychiatric testimony was fitted into the entire fact pattern of the case in the jury's deliberations.[127]

Public familiarity with psychiatric concepts has removed the mystical aura which might have led lawyers and judges of a few decades ago to doubt the jury's ability to handle intelligently the psychiatrist's jargon and his apparently vague diagnostic categories. Today, large numbers of patients are under psychiatric treatment, and psychiatric articles and columns appear *ad nauseam* in magazines and newspapers. Constant exposure should make a jury familiar with such materials and better able to assimilate psychiatric testimony than medical testimony relating to whiplash, hernia, or the myriad of technical questions juries must repeatedly face.

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[125] United States v. Hiss, 88 F. Supp. 559 (S.D. N.Y. 1950); People v. Jones, 42 Cal. 2d 219, 266 P.2d 38 (1954); Commonwealth v. Patskin, 372 Pa. 402, 93 A.2d 704 (1953); Commonwealth v. Jordan, 407 Pa. 575, 181 A.2d 310 (1962).

[126] James, *Jurors' Evaluation of Expert Psychiatric Testimony*, 21 OHIO ST. L.J. 75 (1960).

[127] *Id.* at 82.

Another "old chestnut" about psychiatric evidence is worth noting in passing. Many lawyers and judges appear to believe that psychiatric testimony in insanity cases will be no more profound than stating that antisocial behavior is the product of mental disorder, and anyone behaving in such a manner must be "insane." If this were all that could be gained, psychiatric testimony would offer little aid in reaching the legal decision. However, records of compulsory psychiatric examination under the Massachusetts Briggs Law show that only nineteen per cent of those accused of committing the serious crimes which require examination were diagnosed to have a mental disorder.[128] Of that nineteen per cent, only one and two-tenths per cent were in the category of definitely psychotic. A similar rate of one per cent insane or mentally defective is estimated to apply among English prison populations.[129] A definite selective and diagnostic factor is thus available in psychiatric evidence when adequately presented to the jury.

CONCLUSION

Resolution of the much publicized confrontation between law and psychiatry is usually sought in a long-run re-education of legal and psychiatric practitioners.[130] Less patient critics have advocated a complete revision of the legal structure attuned to the modern understanding of man's behavior,[131] or at the least a revision of legal procedures to adapt to modern psychiatric concepts.[132] The present study has taken the microcosmic focus of the effects of the rules of evidence on psychiatric testimony. Within this limited field, and readily available for judicial revision, is a method of eliminating much of the inconsistent and unrealistic courtroom treatment of psychiatric opinion. The consistent application of the general standards of admissibility used in other areas of medicine and science require that the question of what scope and effect are given psychiatric testimony be determined in the light of the specific legal issue, and not on the basis of some arbitrary exclusionary doctrine. If psychiatric testimony is admitted after consideration of its substantive impact on that legal issue, the jury will still be free to reject that explanation and rely on the conventional wisdom which many courts now require.

Whether or not psychiatric opinion is admitted on any given issue,

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[128] Swartz, *Psychiatry and the Courts*, 32 MICH. ST. B.J. 52, 55-56 (1953).

[129] Curran, *Forensic Psychiatry and Psychiatric Evidence in Court*, 1 MED. SCI. & LAW 292, 294 (1960).

[130] Broderick, *The Role of the Psychiatrist and Psychiatric Testimony in Civil and Criminal Trials*, 35 NOTRE DAME LAW. 508, 522 (1960).

[131] Marshall, *supra* note 105, at 200.

[132] Overholser, *The Place of Psychiatry in the Criminal Law*, 16 B.U.L. REV. 322 (1936).

the courts should recognize their responsibility to test the legal doctrines against whatever scientific data is available, and wherever possible "the 'make-believe' should give way to the empirical."[133] The adoption of the *Frye* test to determine the threshold question of expertness is such an attempt to recognize the empirical.

While a long run re-evaluation of the rule of psychiatry in the courtroom is still necessary, a major advance can be made by this application of the existing legal tools. A consistent standard for the recognition of psychiatric testimony is but the first step toward the goal described by Cardozo:

> [T]he student of the life of the mind in health and disease should combine with students of the law in a scientific and deliberate effort to frame a definition and a system of administration that will combine efficiency with truth.[134]

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[133] Marshall, *supra* note 105, at 200.

[134] CARDOZO, LAW AND LITERATURE 108 (1931).