

# Psychological Autopsy: A New Tool for Criminal Defense Attorneys?

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Since Freud first introduced psychoanalytic theory, experts in the scientific study of human behavior have been used by courts.<sup>1</sup> Most often, each side in a trial will call its own expert witness to interpret the facts in a light most favorable to itself.<sup>2</sup> This practice often results in what has been called a "battle of the experts."<sup>3</sup>

One innovative technique, the psychological autopsy, allows an expert in human behavior to draw a psychological picture of a dead person whom the expert has never met.<sup>4</sup> The technique was originally developed to aid in determining the mode of death in cases where cause of death was uncertain.<sup>5</sup> The profile is developed through interviews with survivors and examination of the decedent's notes and letters, medical records, and related materials.<sup>6</sup>

The psychological autopsy has recently found application in the criminal defense setting.<sup>7</sup> Arizona has become the first state to allow a criminal defendant to attempt to show self-defense through the testimony of a court-appointed expert using psychological autopsy.<sup>8</sup> Many other jurisdictions, however, have utilized the psychological autopsy to determine whether a gift is in contemplation of death under section 2035 of the 1954 Internal Revenue Code.<sup>9</sup>

This Note will first discuss psychiatric or psychological expert testimony and explain its use at trial. The development of the psychological autopsy as a diagnostic tool will then be explored. The Federal and Arizona Rules of Evidence and their relevant common law predecessors will

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1. Comment, *The Psychologist as Expert Witnesses: Science in the Courtroom?*, 38 MD. L. REV. 539, 539 (1979).

2. Needell, *Psychiatric Expert Witnesses: Proposals for Change*, 6 AM. J.L. & MED. 425, 427 (1980).

3. *Id.*

4. Alsop, *Psychiatric Autopsy: The Dead are Psychoanalyzed at Murder Trials; Technique Aids Suspects Pleading Self Defense*, *The Wall Street Journal*, July 23, 1980, at 44, col. 1.

5. Widmann, *The Use of a Suicidologist in Accidental Death Litigation*, 47 INS. COUNSEL J. 219, 220 (1980).

6. Alsop, *supra* note 4, at 44, col. 1.

7. See text & notes 195-207 *infra*.

8. *Id.*

9. See text & notes 164-82 *infra*.

be outlined and their impact on psychological and psychiatric expert testimony analyzed. This Note will then trace the evolution of the psychological or psychiatric autopsy from an innovative new tool to a reliable and accurate technique and will demonstrate how the psychological autopsy meets present admissibility requirements. Finally, this Note proposes that the psychological autopsy is a useful and reliable technique for the criminal defense attorney which should receive broader application in the future.

### PSYCHOLOGICAL AND PSYCHIATRIC EXPERT TESTIMONY

A psychological or psychiatric "expert"<sup>10</sup> is a person so qualified by study or experience that he can form an opinion concerning an individual's character or behavior based on science, art or trade.<sup>11</sup> The expert's opinion is used in court to aid the factfinder.<sup>12</sup> In formulating an opinion, the psychiatrist or psychologist relies heavily on the patient's history.<sup>13</sup> The personal biography is essential to assess psychiatric disorders because only against the individual life history do the disorders take on meaning.<sup>14</sup> Even a defective description given by the patient or another person may be

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10. Because psychologists and psychiatrists frequently serve the same function in courtroom battles, confusion and professional rivalry often result. Needell, *supra* note 2, at 425; Girsh, *Using Psychologists in the Courtroom*, 35 NAT'L LEGAL AID & DEFENDER A. 87, 87 (1978). For a discussion of the reliability of psychologists versus psychiatrists, see Ennis & Latwick, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CAL. L. REV. 693, 696 n.6, 735 n.149 (1974); Dix & Pothyness, *Propriety of Medical Dominance of Forensic Mental Health Practice: The Empirical Evidence*, 23 ARIZ. L. REV. 961, 962 (1981). For the purposes of this Note, no distinction is made between psychologists and psychiatrists. Either one apparently would be qualified to do a psychological autopsy since there is no indication from the literature which profession is the more qualified.

Although the two professions are treated identically for the purpose of this Note, certain distinctions can be drawn between them. The psychologist is trained in human behavior generally, with an expertise in a particular area. Girsh, *supra* note 10, at 87. A clinical psychologist is also skilled in diagnostic evaluation and therapy. It is the clinical psychologist whose expertise most often overlaps with the psychiatrist. *Id.* Generally, licensing is required for a clinical psychologist unless he is purely an academician. *Id.* For clinical counseling and consulting psychology there is an added requirement of certification by the American Board of Professional Psychology. *Id.* This certification is based on peer review of competency and experience. *Id.* The training of the psychologist is focused on scientific examinations of both individual and group behavior with an emphasis on research, normal and abnormal patterns of development and an assessment of personality and psychotherapy methods. *Id.* at 88. By comparison, the psychiatrist has gone to medical school and completed a one year internship and a psychiatric residency. *Id.* Thus, the difference between the two professions can be summarized as follows: A psychologist has knowledge of a wide range of human behavior with an orientation toward normal behavior; a psychiatrist is oriented toward pathology—psychopathology is his baseline.

A psychologist relies on research data and diagnostic tools; a psychiatrist relies on clinical observation more heavily.

A psychologist treats patients with psychological therapy and behavior modification; a psychiatrist treats with drugs and physiological treatments. *Id.*

11. The basis of medical expertise, which includes psychiatry and psychology, is: 1) education and training; 2) experience; 3) books and periodicals; 4) scientific principles and facts, general medical knowledge, statistical information and methodologies of tests. I J. ZISKIN, *COPING WITH PSYCHIATRIC AND PSYCHOLOGICAL TESTIMONY* 1-2 (3d ed. 1981); see text & notes 84-120 *infra* for a discussion of expert witnesses under the Federal and Arizona Rules of Evidence.

12. Board of Regents v. Cannon, 86 Ariz. 176, 178-79, 342 P.2d 207, 209 (1959).

13. S. NOVEY, *THE SECOND LOOK* 3 (1968).

14. *Id.* at 5.

revealing to the professional.<sup>15</sup> Where the informant is not the patient, however, it is the informant's world which is seen first hand.<sup>16</sup> Yet, even this information can add to the expert's analysis of the subject.<sup>17</sup>

The psychologist or psychiatrist generally begins his study by acquiring predominantly factual data about a person's behavior. Most of this factual information is gleaned from personal observations of the individual during a clinical interview.<sup>18</sup> The clinician then synthesizes the empirical data he has obtained into a diagnosis which accounts for the subject's behavior during the interview or at the time of an event.<sup>19</sup> It is this diagnosis which the professional will discuss in his in-court testimony.<sup>20</sup>

Psychological and psychiatric expert testimony has been received in both civil and criminal settings.<sup>21</sup> In a criminal setting, such testimony is frequently used to determine if a defendant is criminally insane, competent to stand trial, or whether he should be tried as a child or as an adult.<sup>22</sup> It may also be introduced at the presentence hearing to aid the judge in determining the proper sentence for the individual offender.<sup>23</sup> In the civil context, the use of psychological or psychiatric expert witnesses has found even broader application. The professional may be asked to testify at competency hearings,<sup>24</sup> child custody hearings, or hearings regarding testamentary capacity.<sup>25</sup> In addition, such testimony is frequently used as character evidence<sup>26</sup> of a witness's credibility.<sup>27</sup> The field of psychiatric and psychological expert testimony has continually expanding application.<sup>28</sup>

15. *Id.* at 7.

16. *Id.* at 6.

17. *Id.* Important attitudes of a nonpatient spouse toward his or her mate are often shown as clearly by distortions as by direct statements. *Id.* at 7.

18. Comment, *supra* note 1, at 540. The professional analyzes both subjective observations of the subject's behavior and the objective results of his or her psychological tests. *Id.* at 540-41. For most professionals, this face-to-face interview is the most important tool. Bendheim, *The Psychiatric Autopsy: Its Legal Application*, 7 BULL. AM. ACAD. PSYCH. & L. 400, 409 (1979).

19. Comment, *supra* note 1, at 541. At this point the professional must make judgments based on his skill about whether the individual has a mental disorder. This diagnosis is empirically based and derives its meaning from scientifically validated principles about human behavior. *Id.*

20. *Id.*

21. Needell, *supra* note 2, at 425-26.

22. *Id.* at 426 n.2.

23. *Id.*

24. Girsh, *supra* note 10, at 88; Needell, *supra* note 2, at 425 n.1.

25. Needell, *supra* note 2, at 425 n.1.

26. R. SLOVENKO, PSYCHIATRY AND LAW 43-50 (1973). Traditionally, this evidence had heavy moral connotations of good and bad. This is no longer so true. Thus, both psychiatric exams and psychological test results are freely admitted. *Id.* See FED. R. EVID. (and ARIZ. R. EVID.) 608 and Comments. The psychiatric or psychological witness, unlike the lay character witness, bases his opinion on his training and interpretations of the person's behavior. R. SLOVENKO, *supra*, at 43.

27. Manning & Mewett, *Psychiatric Evidence*, 18 CRIM. L.Q. 325, 338-39 (1976). The expert must answer two questions: 1) "What mental conditions are likely to affect a person's capacity to observe, recollect and communicate?" 2) "What precisely is the underlying effect of these conditions on the observation, recollection and communication?" *Id.* at 340.

28. The textual list of psychological and psychiatric uses of experts in court is by no means exhaustive. Psychological opinion has also been helpful in pornography and obscenity cases, in jury selection and behavior, in evaluating eyewitness testimony, and in conducting community surveys. See generally Bersoff & Prasse, *Applied Psychology and Judicial Decision Making: Corpo-*

Along with the increased use of psychological and psychiatric expert witnesses,<sup>29</sup> there has been increased criticism of the forensic use of psychiatrists and psychologists both from within and without the profession.<sup>30</sup> Psychiatrists themselves point out that giving testimony is the least helpful or productive of the psychiatrist's tasks.<sup>31</sup> These professionals argue that participation should either be entirely precluded or at least limited to pre-trial or postverdict proceedings.<sup>32</sup> Dr. Karl Menninger has suggested that psychiatrists should be entirely excluded from court, not merely because they dislike being disputed by colleagues, badgered and discredited, "but also because questions relating to guilt, competence, and responsibility are moral or legal questions, not medical or psychiatric ones."<sup>33</sup> Although arguments based on possible injury to the psychologist's or psychiatrist's professional pride do not seem persuasive in determining whether to exclude potentially helpful testimony,<sup>34</sup> more troubling arguments assailing the very nature of the profession have been made.<sup>35</sup>

First, experts are often chosen by an attorney because that expert is the best witness for their case.<sup>36</sup> Thus, the expert, rather than acting as an impartial scientist, becomes an advocate whether or not he or she is aware of it.<sup>37</sup> The jury evaluating the expert testimony is left to rely entirely on the advocates' direct and cross examination of the witness and may thus be misled.<sup>38</sup> Indeed, Dean McCormick succinctly summarized these argu-

*ral Punishment as a Case in Point*, 9 PROF. PSYCH. 400 (1978); Girsh, note 10 *supra*; Morse, *Law and Mental Health Professionals: The Limits of Expertise*, 9 PROF. PSYCH. 389 (1978); Suggs & Sales, *The Art and Science of Conducting the Voir Dire*, 9 PROF. PSYCH. 367 (1978).

29. Needell, *supra* note 2, at 426 n.1, 427. The in-court use of psychiatrists has tracked the growth in psychiatry as a field of specialization. *Id.* From 1963 to 1973 there was a 50% increase in the number of psychiatrists. Brown, *The Life of Psychiatry*, 133 AM. J. PSYCH. 489, 490 (1976).

30. R. SLOVENKO, *supra* note 26, at 28. Most criticism of courtroom use of psychologists and psychiatrists has focused on criminal use. See generally Bonnie & Slobogin, *The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation*, 66 VA. L. REV. 427 (1980).

31. R. SLOVENKO, *supra* note 26, at 28.

32. *Id.* At such proceedings the expert is not exposed to the same rigorous cross-examination and possibility of impeachment that he is subject to during a trial. See *id.* at 29.

33. *Id.* Menninger argues that court hearings put psychologists and psychiatrists at a disadvantage because their testimony is very different from their normal clinical approach to the subject. See note 121 *infra*. When they testify, these experts are required to reach definitive results for the court and translate them into legal terms. This is very unlike therapeutic diagnosis, which is frequently much less definitive. Menninger urges that subjects should be examined outside of the courtroom and that testimony should be limited to reports on the results of these exams. R. SLOVENKO, *supra* note 26, at 29.

Slovenko, Menninger, and other professionals are concerned with how the public will assess in-court disagreements between professionals. They believe that such public disagreement undermines public respect for the profession. Apparently the disagreements are felt to be a result of problems with labelling, since psychiatric labels cannot exactly describe any individual because of normal differences between people. Further, psychiatrists dislike testifying about diagnoses which are based in part on psychological tests administered by a psychologist because such reliance raises questions of interpretation, administration, validity, reliability and applicability. *Id.* at 28-34.

34. Slovenko, *Reflections on the Criticisms of Psychiatric Expert Testimony*, 25 WAYNE L. REV. 37, (1978) 61, citing K. MENNINGER, *THE CRIMES OF PUNISHMENT* 139 (1968).

35. See text & notes 127-39 *infra* for a more detailed discussion of these arguments.

36. Needell, *supra* note 2, at 430.

37. Diamond, *The Psychiatrist as an Advocate*, 1 J. PSYCH. & L. 5, 7 (1973).

38. Needell, *supra* note 2, at 430. In a "battle of the experts" the jury may be persuaded more by the expert's courtroom demeanor than by his reasoning. *Id.*; S. NOVEX, *THE SECOND LOOK*

ments when he stated that the adversary process is unsuited for a "dispassionate presentation of data."<sup>39</sup>

In addition, opponents of psychological and psychiatric expert testimony have asserted that psychological techniques are still experimental.<sup>40</sup> Therefore, it is argued, they are not sufficiently reliable to be probative in court.<sup>41</sup> Although certain of the arguments against using such testimony are persuasive, they are not dispositive. There is sufficient evidence of the usefulness of these experts to militate against a ban on their courtroom assistance. Arguments that the psychological or psychiatric expert's testimony is too subjective, however, have substantially less merit when applied to the psychological autopsy, which relies on data from many sources other than the subject.<sup>42</sup>

### THE PSYCHOLOGICAL AUTOPSY

The psychological autopsy was developed in the early 1950s by Dr. Edwin Schneidman and his colleagues at the Los Angeles Suicide Prevention Center.<sup>43</sup> In equivocal death cases, information acquired from survivors of the deceased was combined with coroner's findings on the cause of death.<sup>44</sup> This compilation, denoted a "psychological autopsy,"<sup>45</sup> was used to determine whether the death was due to accident or suicide.<sup>46</sup>

The psychological autopsy is predicated on the theory that most suicide victims communicate their intentions to others in some way.<sup>47</sup> The individual analyzing the death, a "suicidologist,"<sup>48</sup> determines what clues were given by the decedent while he was alive.<sup>49</sup> The psychological au-

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115-16 (1968). See also Browning, *The Psychiatric Expert*, 15 TRIAL 36, 36 (Feb. 1979). Browning points out that there are three kinds of psychiatrists: clinical, academic and forensic. The forensic are best in court because they are familiar with the nature of a trial and how expert testimony fits in; they can communicate in a manner that the court and the jury can comprehend; they are more interested in enlightening the jurors than in advocating their own theories; and they are more impartial and better on cross examination. *Id.* at 36.

39. D. McCORMICK, EVIDENCE § 17, at 38 (2d ed. 1972).

40. J. ZISKIN, *supra* note 11, at 3; see text & notes 127-38 *infra* for a more detailed discussion on this point.

41. See note 40 *supra*.

42. See text & note 52-58 *infra*.

43. Widmann, *supra* note 5, at 219-20.

44. N. FABEROW & E. SCHNEIDMAN, THE CRY FOR HELP 12 (1961). The coroner's statement of cause of death is a first step in assessing whether or not it was suicide. For example, if the person died of injuries in an airplane crash, there would be substantially less chance of a suicide than if he died of a self-inflicted gun wound.

45. *Id.*

46. *Id.*; Curphey, *The Psychological Autopsy: The Role of the Forensic Pathologist in the Multi-Disciplinary Approach to Death*, 1968 BULL. SUICIDOLGY 39, 40; Neill, *The Psychological Autopsy: A Technique for Investigating a Hospital Suicide*, 25 HOSP. & COMM. PSYCH. 1, 33-36 (1974). See generally E. Schneidman, *Orientations Toward Cessation: A Reexamination of Current Modes of Death*, 13 J. FOR. SCI. 33 (1968); E. Schneidman, *Orientations Toward Death: A Vital Aspect of the Study of Lives*, 2 INT'L J. PSYCH. 167 (1966); E. Schneidman, *Suicide, Sleep and Death*, 28 J. CONSULTING PSYCH. 95 (1964).

47. N. FABEROW & E. SCHNEIDMAN, *supra* note 44, at 118.

48. The "suicidologist" is an individual or an interdisciplinary team that conducts an investigation to determine whether it is most likely that the decedent committed suicide.

49. Neill, *supra* note 46, at 34. When used to analyze a possible suicide by a hospital patient, the psychological autopsy consists of interviewing not only family and friends, but also hospital staff involved in the patient's care. *Id.* Then, all the staff members involved in patient care meet

topsy also focuses on personality traits associated with suicides.<sup>50</sup> The object is to reconstruct the lifestyle of the decedent from the clues gathered.<sup>51</sup>

A suicide investigator examines not only written reports about the individual<sup>52</sup> but also writings by the individual.<sup>53</sup> He or she then interviews relatives, friends and others who knew the decedent.<sup>54</sup> The interviews are useful in the suicidologist's effort to reconstruct the victim's background.<sup>55</sup> Finally, the investigator obtains a detailed account of the events immediately preceding death.<sup>56</sup> The compilation of data is a ready source of information about a dead person which the investigator, who is usually a psychologist, can use to draw that person's profile.<sup>57</sup> Additional information such as statistical analysis of deaths in the community or medical in-

to discuss the implications of the information that has been gathered. If the team determines that the patient died due to suicide, preventative measures for future patients are discussed. *Id.*

50. N. FABEROW & E. SCHNEIDMAN, *supra* note 44, at 118.

51. *Id.*

52. Curphey, *supra* note 46, at 40. The suicidologist examines reports from police officers and nonmedical investigators as well as toxicological autopsy results. *Id.*

53. Schneidman, *Classification of Suicide Phenomena*, 1968 BULL. SUICIDOLGY 1, 3. In a suicide, one of the most important communications is the suicide note. Taken alone, however, suicide notes are generally uninformative because they are all similar. As one commentator has noted:

What is most disappointing is that most suicide notes, written at perhaps the most dramatic moment of a person's life, are surprisingly commonplace, banal, even sometimes poignantly pedestrian and dull. It is obviously difficult to write an original suicide note; it is almost impossible to write a note which is really informative or explanatory.

Schneidman, *Suicide Notes Reconsidered*, 36 PSYCH. 379, 380 (1973). See generally Neuringer, *Rigid Thinking in Suicidal Individuals*, 28 J. CONSULTING PSYCH. 54 (1964); Osgood & Walker, *Motivation and Language Behavior: A Content Analysis of Suicide Notes*, 59 J. ABNORMAL SOC. PSYCH. 58 (1959).

54. Schneidman, *Some Current Developments in Suicide Prevention*, 1967 BULL. SUICIDOLGY 31, 34. "To assess intent, careful and selective in-depth interviewing of the decedent's survivors, relatives, and acquaintances with a special focus on the matrix of communication before death for items consistent with suicide or accident is necessary." *Id.*

55. Litman, *Investigations of Equivocal Suicides*, 184 J.A.M.A. 924, 925 (1963).

56. *Id.* Problems which are often encountered in the investigation include: variety in the adequacy of police reports, paucity of information where the survivors were very emotional, investigators responding to emotional reactions of survivors, and hostility in survivors to suicide investigation. *Id.* at 926.

57. Curphey, *supra* note 46, at 41. Examples of the application of psychological autopsy to establish whether a death was suicide include:

1) Causes of death certified as acute drug intoxication. The suicidologist team found barbiturate addiction and a previous suicide attempt. The decedent's first husband had burned to death in front of her, her mother died in an operating room explosion, her father had become a chronic alcoholic who beat both her and her mother and she had an acute psychotic breakdown requiring hospitalization. The cause of death was changed to probable suicide by acute drug intoxication.

2) Cause of death certified as acute drug intoxication where woman was found face down in a bath tub full of water. The team established that her personal doctor suspected that she was an alcoholic. Her husband reported that she drank heavily. The team found, however, that she never had spoken of depression or suicide. On the night of her death, both faucets were on, her watch had been taken off, and her bathing suit was laid out as if for a later swim. She routinely took hot baths to "sober up" and had fallen on her face four times in the previous year while she was drunk. The mode of death was entered as probable accident. *Id.* at 42-44.

In classifying deaths, one team of suicidologist ranged the deaths along a continuum according to how self-destructive the individual appeared. Cases where the victim was highly self-destructive were assessed as clearly suicide. At the other extreme were deaths of persons who routinely placed their lives in danger without a desire to die (as, for example, military paratroopers or race car drivers). The latter group were often only slightly more likely to have died due to suicide than for some other cause. *Id.*

formation concerning the decedent may also be helpful to a suicidologist.<sup>58</sup>

The psychological autopsy has proven useful in a variety of settings.<sup>59</sup> The technique has aided coroner's investigations, studies concerning the mental state of dying geriatric patients,<sup>60</sup> and investigations of aircraft "accidents."<sup>61</sup> It is noteworthy that many investigators have observed that it is easier to piece together the past than to predict the future.<sup>62</sup> The potential suicide is difficult to recognize because symptoms are not as easy to interpret before the act when the mental health professional cannot see the whole picture.<sup>63</sup>

The psychological autopsy has been used in civil lawsuits<sup>64</sup> and, in Arizona, criminal trials.<sup>65</sup> Its use in criminal litigation, however, has not been tested beyond the trial court level.<sup>66</sup> In the case of *State v. Jones*,<sup>67</sup> the psychological autopsy was used to obtain a jury verdict of manslaughter.

58. Widmann, *supra* note 5, at 219. Dr. Otto Bendheim has created the term "psychiatric autopsy" to denote a psychological autopsy, which includes medical factors such as toxicology, pharmacology, anatomical pathology and clinical events in the decedent's life. Bendheim, *supra* note 18, at 409.

59. Curphey, *supra* note 46, at 41.

60. Kastenbaum, *The Mental Life of Dying Geriatric Patients*, 7 GERONTOLOGIST 97, 97 (1967). In one study, a multi-disciplinary team did a psychological autopsy on each recently deceased patient who had been voluntarily admitted. *Id.* After this team, consisting of a psychologist, nurses, social workers, chaplains, occupational therapist and other caseworkers, pooled their information, a psychiatric consultant commented on the results and prepared a final summary. The psychological autopsy was valuable because it generated practical suggestions for present and future patients. *Id.*; see note 49 *supra*.

61. Jones, *Suicide by Aircraft: A Case Report*, 48 AV. SPACE ENVT'L MED. 454, 454 (1977). Aware of psychological autopsies from their use in single-occupant automobile accidents, authorities developed the life history of a pilot (the sole occupant) of a small executive aircraft which had crashed. *Id.* at 455. The investigators found that the decedent pilot had been hospitalized for psychiatric observation, had undergone personal changes and had been involved in a single car, single-occupant auto crash. *Id.* In addition, on the day of the plane crash, he had written a suicide note which was found in his parked car along with a half-empty beer bottle. *Id.*

62. Jones, *supra* note 61, at 455; Weisman, *The Psychological Autopsy and the Potential Suicide*, 1967 BULL. SUICIDOLOGY 15, 19.

63. Weisman, *supra* note 62, at 19. Although the professional does not have his "most valuable" tool, the face-to-face encounter with the subject, the irrefutable documentary history and oral testimony of survivors are more than adequate compensation. Bendheim, *supra* note 18, at 409.

64. *Alsop, supra* note 4, at 44, col. 1. See text & notes 164-89 *infra*, for a discussion of the civil use of psychological autopsies.

65. *Alsop, supra* note 4, at 44, col. 1. A good example use of the technique in an Arizona criminal trial is *State v. Wendy Irene Anne Jones*, 1 CA-CR 2589 (Ariz. Ct. App. Apr. 18, 1978) (*mem.*). The trial court's admission of a psychiatric autopsy was not challenged on appeal.

Since *Jones*, Arizona trial courts have admitted the psychiatric autopsy into evidence in at least two cases:

1) In *State v. Ida Mae Jones*, CR. No. 98666, (Ariz. Super. Ct. 1978) (*mem.*), the psychiatric autopsy of a murder victim was admitted on behalf of the defendant who claimed self-defense in the killing. The psychiatric autopsy showed that the defendant, a repeatedly battered wife, was not unreasonable in her assumption that the victim may have killed her.

2) In *State v. Carrethers*, CR. No. 100359 (Ariz. Super. Ct. June 7, 1978) (*mem.*), a psychiatric autopsy of the defendant's dead father was admitted. The defendant claimed defense of his mother in the killing of his father. The psychiatric autopsy indicated that the father drank heavily, routinely battered his wife and his step daughter, and provoked numerous acts of violence at work. Again, the psychiatric autopsy revealed that the son had been reasonable in his reaction to his father's violence. Note that in these Arizona criminal cases, the term "psychiatric" rather than "psychological" autopsy was used. See note 55 *supra* for an explanation regarding the distinction.

66. *Alsop, supra* note 4, at 44, col. 1. See also Bendheim, *supra* note 18, at 404-05.

67. 1 CA-CR 2589 (Ariz. Ct. App. Apr. 18, 1978) (*mem.*); see text & notes 199-203 *infra* for a more detailed discussion of the *Jones* case.

ter.<sup>68</sup> According to both Dr. Bendheim, the court appointed psychiatrist, and the presiding judge, the psychological autopsy allowed the jury to see the defendant as a normal person under enormous stress rather than as a temporarily insane individual.<sup>69</sup> According to the presiding judge in *Jones*, the psychiatric autopsy allows the jury to understand the defendant's situation.<sup>70</sup>

Because the psychiatric autopsy employs either a psychiatrist or a psychologist, the technique is really a subset of those specialties. Thus, court rules which determine the admissibility of psychological and psychiatric expert testimony necessarily apply to the psychological autopsy. The next section will examine these applicable rules of evidence.

### THE APPLICABLE RULES OF EVIDENCE

To understand how the psychological autopsy is used in trial, a basic understanding of the applicable rules of evidence is helpful. The Federal Rules of Evidence, which codify much common law, are either proposed or adopted in twenty-three states.<sup>71</sup> They are adopted almost unchanged in the Arizona Rules of Evidence, effective September 1, 1977. Rules 703, 704 and 705 were exactly duplicated from the Federal Rules of the same number. These rules are especially important in determining the admissibility of the psychological autopsy because they deal with expert witnesses.

Prior to the promulgation of the Federal Rules, a federal test of admissibility, the "customary reliance test," was developed in *Jenkins v. United States*.<sup>72</sup> There, the appellant Jenkins was committed for a mental examination to determine his competency to stand trial and his condition at the time of the crime.<sup>73</sup> Two psychologists diagnosed "basic unchanging deficiency in brain function."<sup>74</sup> Jenkins was thus determined to be incompetent to stand trial.<sup>75</sup> After subsequent testing by different psychologists who arrived at a different result, the first two psychologists revised their diagnoses.<sup>76</sup> Their revised diagnoses were based primarily on the results of tests done by the second group of psychologists.<sup>77</sup> The court determined that the revised diagnoses, although based on opinions of third persons, were admissible.<sup>78</sup> The court concluded that despite previous case law barring expert testimony based upon facts not in evidence, the better

68. Slip op. at 1.

69. Also, *supra* note 4, at 44, col 2. "Self-defense only lets you look at the last few minutes before the murder. The psychiatric autopsy allows the jury to see the entire life of the victim." Hall, *Sometimes the Murder Victim is Guilty, says Court Psychiatrist Otto Bendheim*, PEOPLE WEEKLY Aug. 17, 1981, at 101.

70. State v. Wendy Irene Anne Jones, 1 CA-CR 2589 (Ariz. Ct. App. Apr. 18, 1978) (*mem.*).

71. Note, *supra* note 66, at 621. These states are Alaska, Arizona, Arkansas, Colorado, Florida, Hawaii, Illinois, Maine, Michigan, Minnesota, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, South Dakota, Texas, Vermont, Washington, Wisconsin and Wyoming. *Id.* at 621 n.35, citing P. ROTHSTEIN, FEDERAL RULES OF EVIDENCE xii (2d ed. 1979).

72. 307 F.2d 637 (D.C. Cir. 1962) (en banc).

73. *Id.* at 639.

74. *Id.*

75. *Id.* at 640.

76. *Id.*

77. *Id.* at 641-42.

78. *Id.*

reasoned authorities admit such testimony where the reports of others are customarily relied upon by experts in the same profession.<sup>79</sup> In theory, the reliability of such testimony is assured because the expert has the ability to screen out unreliable information in formulating his opinions.<sup>80</sup>

In another pre-Federal Rules case, *Frye v. United States*,<sup>81</sup> the District of Columbia Circuit stated in succinct terms when a scientific principle or discovery becomes a recognizable discipline. The principle or discovery must cross the line between experimental and demonstrable.<sup>82</sup> The test is whether the deduction made is based on a principle "sufficiently established to have gained general acceptance in the particular field in which it belongs."<sup>83</sup> Thus, taken together, *Frye* and *Jenkins* created a workable standard for the courts to use in assessing whether information used by a given expert was of a kind customarily relied upon, and further, whether such reliance was reasonable in light of the state of the art.

In essence, Rule 703 codified this common law standard of admissibility. Rule 703 allows expert testimony predicated on facts and data otherwise inadmissible if they are of a kind reasonably relied upon by experts in the field.<sup>84</sup> Thus, hearsay, if of a kind generally relied upon by other experts in the field, is an allowable basis for psychiatric testimony.<sup>85</sup>

Courts construing Rule 703 as it applies to the hearsay basis of psychological testimony, however, have continued to rely solely on the *Jenkins* test of customary reliance.<sup>86</sup> Generally, either the psychiatrist's accustomed use of hearsay in his practice or a court-drawn analogy to the hearsay basis of medical opinion is sufficient to establish the reliability of the hearsay.<sup>87</sup> At its extreme, the *Jenkins* test may result in a court's allowing the expert witness to assess the reliability of the basis of his own

79. *Id.* at 641.

80. Note, *Hearsay Basis of Psychiatric Opinion Testimony: A Critique of Federal Rules of Evidence 703*, 51 S. CAL. L. REV. 129, 141 (1977), citing *Jenkins v. United States*, 307 F.2d 637, 641 (D.C. Cir. 1962) (en banc). The ability of the expert to screen out unreliable information may be impaired in those cases where the expert has some bias or other reason for using particular information not generally relied on by similar experts. *Id.* at 152.

81. 293 F. 1013 (D.C. Cir. 1923).

82. *Id.* at 1014.

83. *Id.*

84. FED. R. EVID. 703 and ARIZ. R. EVID. 703:

*Basis of Opinion Testimony by Experts.*

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

FED. R. EVID. 702 (ARIZ. R. EVID. 702) allows expert testimony in the form of an opinion.

85. ARIZ. R. EVID. 703, Introductory Note: Problems of Opinion Testimony; Note, *supra* note 80, at 129-30.

86. Note, *supra* note 80, at 142. See, e.g., *United States v. Sims*, 514 F.2d 147, 149 (9th Cir.), cert. denied, 423 U.S. 845 (1975); *United States v. Harper*, 450 F.2d 1032, 1037 (5th Cir. 1971); *People v. Ward*, 61 Ill. 2d 559, 568, 338 N.E.2d 171, 177 (1975).

87. Note, *supra* note 80, at 141-42; see *United States v. Harper*, 450 F.2d 1032, 1037 (5th Cir. 1971) (applying the *Jenkins* test of reliability); *People v. Ward*, 61 Ill. 2d 559, 567, 338 N.E.2d 171, 176 (1975) (finding Federal Rule 703 and *Jenkins* persuasive).

Exceptions to the old rule barring opinion testimony based on hearsay were made for physicians, *Wise v. Monteros*, 93 Ariz. 124, 379 P.2d 116 (1963), and assessors in condemnation cases, *City of Tucson v. LaForge*, 8 Ariz. 413, 446 P.2d 692 (1968). These exceptions were based upon both the necessity and objective reliability of hearsay-based testimony in these situations. Cohen,

opinion.<sup>88</sup>

Prior to the adoption of Arizona's new Rules of Evidence, the Arizona Supreme Court in *State v. Clark*<sup>89</sup> adopted the rationale of Federal Rule 703. In *Clark*, the defendant led police to the body of his wife after calling them to report her probable death.<sup>90</sup> He claimed that he and his wife had accepted a ride with four cowboys, who attacked them both.<sup>91</sup> He stated that he had escaped.<sup>92</sup> At the trial for his wife's murder, Clark entered an insanity plea which the state rebutted by using a psychological expert witness.<sup>93</sup> The expert's opinion was based in part upon Clark's medical records, which were hearsay.<sup>94</sup> On appeal to the Arizona Supreme Court, Clark argued that opinion testimony based on facts not in evidence had not been allowed prior to that time<sup>95</sup> and that therefore, the expert opinion given at his trial was inadmissible.<sup>96</sup> The court recognized that the purpose of the prior rule was to prevent an expert from testifying on assumptions not known to the jury and not in evidence.<sup>97</sup> It pointed out, however, that such a rule ignores custom and practice in the expert's field.<sup>98</sup> For that reason, the court held that Federal Rule 703 provides the better solution since it both considers custom and practice and provides adequate safeguards.<sup>99</sup> The data relied upon by the expert is limited by custom and practice in the expert's field and the expert's opinion is subject to cross-examination to check its validity.<sup>100</sup>

The *Clark* decision seemed to make it clear that the more generous standards of the Federal Rules were to be the order for Arizona courts. Following that decision, however, the Arizona Court of Appeals in *Inter-*

*Expert Witness Opinion Testimony Under the New Arizona Rules of Evidence*, 13 ARIZ. B. J. 4, 9 (June 1977).

88. *United States v. Sims*, 514 F.2d 147, 149 (9th Cir.), cert. denied, 423 U.S. 845 (1975); Note, *supra* note 80, at 141-42. Whether influenced by the *Jenkins* "customary reliance" test or the common-law physician's exception, it appears that courts have applied the Rule 703 standard less rigorously to psychological expert testimony than to testimony in other areas. Note, *supra* note 80, at 149-50; see authorities cited in note 86 *supra*.

89. 112 Ariz. 493, 543 P.2d 1122 (1975).

90. *Id.* at 494, 543 P.2d at 1123.

91. *Id.*

92. *Id.*

93. *Id.* at 496, 543 P.2d at 1125. The expert relied on an interview with Clark, a tape of police interviewing Clark, information furnished from the prosecutor's files, and reports and charts of Clark's medical history (which was not in evidence at trial). *Id.*

94. See *id.*

95. *Id.*; see, e.g., *American Honda Motor Co., Inc. v. Smith*, 110 Ariz. 593, 595, 521 P.2d 1139, 1141 (1974) (expert witness reconstructing a motorcycle accident can base his opinion on third-party observations only if those observations are in evidence); *State v. Gevrez*, 61 Ariz. 296, 303, 148 P.2d 829, 832 (1944) (psychiatrist's opinion of defendant's mental condition at the time he murdered his wife is inadmissible because based partly upon attorney records and conversations with acquaintances of the defendant); *Middleton v. Green*, 35 Ariz. 205, 211, 276 P. 322, 324 (1929) (doctor's expert opinion about plaintiff's injuries is hearsay and inadmissible if even partly based on evidence outside the courtroom).

96. 112 Ariz. at 496, 543 P.2d at 1125.

97. *Id.*

98. *Id.*

99. *Id.*; see text & notes 84-85 *supra*.

100. *Id.* at 496, 543 P.2d at 1125. The court reasoned that since medical charts are within the category of information a psychiatrist relies upon, there is no error in admitting testimony based on medical records not in evidence. *Id.*

*national Harvester Co. v. Chiarello*<sup>101</sup> made the state of the law uncertain. In that case, over the defendant's objection, an expert witness was given a hypothetical question that asked him to assume that the work done on the truck that hit plaintiff was ordinary and acceptable.<sup>102</sup> There were no facts in evidence showing the presence or absence of ordinary and acceptable work.<sup>103</sup> The court of appeals stated that where an opinion is based on a hypothetical, the facts of the hypothetical must be in evidence.<sup>104</sup>

The adoption of Arizona Rule 703 reasserted Arizona's conformity with Federal Rule 703 and maintained consistency with the prior law enunciated in *Clark*.<sup>105</sup> Whether the facts and data forming the basis of the expert's testimony are those relied upon by experts in the field is a question of law for the court.<sup>106</sup> One of the principal purposes of Rule 703—"to expedite the reception of expert testimony"—is thus fulfilled.<sup>107</sup>

In addition to Rule 703, both Federal and Arizona Rules 704 and 705 have a direct impact on psychiatric or psychological expert testimony. Prior to the promulgation of Rule 704,<sup>108</sup> an expert witness generally could not testify about his opinion when such an opinion could or would decide an ultimate issue.<sup>109</sup> Consequently, witnesses had difficulty testifying in terms that rigorously distinguished facts from opinions.<sup>110</sup> Courts were similarly unable to distinguish the two without undue restrictions.<sup>111</sup> Thus, Federal Rule 704 is designed to allow an expert witness to give testimony about an ultimate issue so long as it is helpful to the jury and not wasteful of the court's time.<sup>112</sup> Rule 704 eliminates the difficult job of distinguishing between an empirical fact and an issue of ultimate fact.<sup>113</sup>

Rule 705 requires an expert to disclose the particular fact basis for his opinion only upon request.<sup>114</sup> Prior to the promulgation of Rule 705, an expert witness without personal knowledge of the facts constituting the basis of his opinion could give his testimony only in response to a hypothetical question.<sup>115</sup> The hypothetical question would ask the expert to assume

101. 27 Ariz. App. 411, 555 P.2d 670 (1976).

102. *Id.* at 413, 555 P.2d at 672.

103. *Id.*

104. *Id.* at 413-14, 555 P.2d at 672-73. The assumptions were immaterial to the expert's opinion. It was therefore immaterial that the facts in the hypothetical were not in evidence. *Id.*

105. Kaufman, *The Arizona Rules of Evidence—A Comparison with the Federal Rules*, 1977 ARIZ. ST. L.J. 365, 375.

106. *Id.*

107. See State Bar Committee Note, reprinted in Cohen, *Expert Witness Testimony Under the New Arizona Rules of Evidence*, 13 ARIZ. B. J. 4, 9 (June 1977).

108. FED. R. EVID. 704 and ARIZ. R. EVID. 704 provide: "Opinion on Ultimate Issue. Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of facts."

109. Sough, *Testamentary Capacity—Evidence Aspects*, 36 TEX. L. REV. 1, 14 (1957).

110. See FED. R. EVID. 704 (ARIZ. R. EVID. 704), Advisory Committee's Note.

111. Comment, *supra* note 1, at 550.

112. *Id.*; J. WIGMORE, EVIDENCE § 1918 (Chadburn rev. 1978).

113. Bonnie & Slobogin, *supra* note 30, at 430.

114. FED. R. EVID. 705 and ARIZ. R. EVID. 705 provide:

Disclosure of Facts or Data Underlying Expert Opinion. The Expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may, in any event, be required to disclose the underlying facts or data on cross-examination.

115. 3 J. WEINSTEIN'S EVIDENCE 705-5 (1976).

certain facts and then give his opinion based on those facts.<sup>116</sup> Such an approach to the elicitation of expert opinion testimony was not a practical one.<sup>117</sup> Criticisms of the hypothetical question led to the adoption of Rule 705,<sup>118</sup> which allows the expert to give testimony consisting of opinions or inferences without prior disclosure of the underlying facts and data, unless the court instructs otherwise.<sup>119</sup> The hypothetical question is now actually discouraged.<sup>120</sup>

Rules 703, 704 and 705 are an effort to make expert testimony, when helpful to the trier of fact, more available than previously. These rules, taken together with the earlier case law exemplified by *Frye*, *Jenkins* and *Clark*, indicate a move by the courts to encourage the forensic use of experts. There are many fields of knowledge which are simply too foreign to common experience for a jury to deal with absent expert assistance. Psychological and psychiatric analysis generally, and psychological autopsies specifically, are just such fields.

#### APPLICATION OF RULES OF EVIDENCE TO PSYCHOLOGICAL AUTOPSIES

Application of the Rule 703 standard to psychological autopsies conducted by psychiatrists or psychologists raises interesting questions concerning admissibility. Psychiatrists and clinical psychologists generally rely on face-to-face interviews with the subject in conducting an evaluation.<sup>121</sup> Thus, the use of information derived solely from documents and third parties, which is what the psychological autopsy technique relies upon, would appear to violate the Rule 703 standard.<sup>122</sup> This is so because the psychological profession as a whole does not customarily rely upon third party information alone.<sup>123</sup> The result is different, however, if the standard used is acceptance by experts performing psychological autopsies as a subspecialty, rather than those in the field of psychology or psychiatry generally.<sup>124</sup> Furthermore, the type of information relied upon by a psychologist preparing expert testimony for litigation is frequently quite different from the information a psychologist uses in his clinical practice.<sup>125</sup>

116. D. McCORMICK, *supra* note 39, § 14, at 32.

117. Cohen, *supra* note 87, at 12. Criticisms of the hypothetical question include the partisan bias inherent in the question, the awkwardness of the questions, the potential for misleading of the jury, and the confusing length of the question. *Id.* at 12; J. WIGMORE, *supra* note 112, § 686, at 962.

118. For an application of the hypothetical question before adoption of Rule 705 see *American Honda Motor Co., Inc. v. Smith*, 110 Ariz. 593, 595, 521 P.2d 1139, 1141 (1974); *International Harvester Co. v. Chiarello*, 27 Ariz. App. 411, 413-14, 555 P.2d 670, 673 (1976); *Ball Corp. v. George*, 27 Ariz. App. 540, 542-43, 556 P.2d 1143, 1145-46 (1976). For the text of FED. R. EVID. 705 (ARIZ. R. EVID. 705) see note 114 *supra*.

119. FED. R. EVID. 705 (ARIZ. R. EVID. 705); ARIZ. R. EVID., Article VII, Introductory Note: Problems of Opinion Testimony.

120. *See id.*

121. *See* Bendheim, *supra* note 17, at 409; text & notes 13-20 *supra*.

122. *See generally* text & notes 43-58, 84-107 *supra*.

123. *See* text & notes 43-58 *supra*.

124. Note, *supra* note 66, at 628.

125. Note, *supra* note 80, at 148. For example, a clinical psychiatrist does not care "whether his now deceased patient knew the extent of his possessions and the natural objects of his bounty in drawing up his will." *Id.* The psychiatrist will, however, give an opinion on this and similar issues in court. *Id.*

The Rule 703 "customary reliance" test thus leaves the standard for assessing the reliability of the expert's testimony unclear. Under this test, no distinction is made between opinions useful to the psychiatrist in treatment and those used only in preparation for testimony.<sup>126</sup> Arguably, however, the reliability of the testimony could be adequate for in-court purposes if the information was the kind generally relied upon by forensic psychologists. Thus, the frame of reference used when assessing the reliability of psychological autopsy data under Rule 703 may well be the determining factor.

Another issue involving admissibility of psychological autopsies concerns whether a psychologist's or psychiatrist's statements are in the nature of data. One school of thought contends that psychiatry and psychology have not yet crossed the line from experimental to demonstrable.<sup>127</sup> The rationale is that an expert's opinion must meet the standard of "reasonable medical certainty" before it can be reasonably relied upon.<sup>128</sup> The medical certainty standard requires less than absolute certainty, but more than "sheer speculation."<sup>129</sup> Thus, it is argued that because there are no psychiatric principles adequately validated, and since validity and reliability of psychiatric assessment are low because the very act of psychiatric examination contaminates the data produced, psychiatric opinion generally does not meet the reasonable medical certainty test.<sup>130</sup>

The problem with this argument is that the "literature appraising the scientific accuracy of [psychological or] psychiatric judgments is limited."<sup>131</sup> The arguments about the scientific basis of such testimony are dependent upon a diversity of studies, with no one being conclusive.<sup>132</sup> Such studies do raise questions about whether courts are correct in their assumption that psychological and psychiatric techniques are sufficiently accurate to be probative in court.<sup>133</sup> Certainly, the very creation of the subspecialty of forensic psychology or psychiatry<sup>134</sup> indicates that methods of examination and purposes of diagnosis may vary in different settings.<sup>135</sup> Although it would seem to be self-evident that the purpose for which the data is to be used will affect the diagnosis, examination methods in one situation are used in others.<sup>136</sup> In large part, however, this problem has

126. *Id.*

127. J. ZISKIN, *supra* note 11, at 3; see text & notes 78-80 *supra*.

128. J. ZISKIN, *supra* note 11, at 3.

129. *Id.* at 4-5.

130. *Id.*

131. Comment, *supra* note 1, at 542.

132. *Id.* See generally, Ennis & Latwick, note 10 *supra*; Helzer, Clayton, Pambakian, Reich, Woodruff & Riveley, *Reliability of Psychiatric Diagnosis: II The Test/Retest Reliability of Diagnostic Classification*, 34 ARCHIVES GENERAL PSYCH. 136 (1977); Spritzer, *More on Pseudoscience in Science and the Case for Psychiatric Diagnosis*, 33 ARCHIVES GENERAL PSYCH. 459 (1976).

133. Comment, *supra* note 1, at 542.

134. Forensic is defined as: "Belonging to courts of justice." Forensic psychiatry is defined as: "That branch of medicine dealing with disorders of the mind in relation to legal principles and cases." BLACK'S LAW DICTIONARY 583 (5th ed. 1979).

135. T.S. SZASZ, LAW, LIBERTY & PSYCHIATRY 91-93 (1963). A partial list of psychiatric situations includes: mental hospitals, private practice, psychiatric clinics, psychoanalytic training systems, military service, courtrooms and prisons. *Id.* at 27.

136. *Id.* at 27. In a courtroom the diagnosis (or classification) is intended to justify particular

been alleviated by the advent of the *Diagnostic and Statistical Manual of Mental Disorders* (DSM III),<sup>137</sup> which provides detailed diagnostic criteria and 235 independent categories of mental disorders. This work effectively standardizes psychiatric and psychological nomenclature and thus assures an increased degree of consistency within the profession.<sup>138</sup>

The problem of different purposes requiring different methods is substantially less important in the area of psychological autopsies. Unlike psychology and psychiatry generally, the psychological autopsy is never used for diagnosis or treatment.<sup>139</sup> It is primarily used merely to assess a decedent's state of mind or behavior at a certain time. Thus, the technique by its very nature is relatively standardized.

An opposing school of thought argues in favor of increased use of psychologists in the courtroom.<sup>140</sup> Although aware of the possible problems with such testimony, these authorities contend that it is probative and helpful.<sup>141</sup> Furthermore, they argue, science requires precision, not certainty, and psychology is sufficiently precise to meet the reasonable medical certainty test.<sup>142</sup> Although the clinician cannot render an exact prediction, general knowledge about variables in human behavior is sufficient to utilize such an expert to assure fairness and enlightened justice.<sup>143</sup> This is particularly true in psychological autopsies where the investigator is merely *interpreting* a prior set of facts rather than *predicting* future behavior based upon the limited facts available before assessment.<sup>144</sup>

Although it is generally agreed that an expert witness should not give an opinion on a moral issue,<sup>145</sup> opinion testimony about the nature and severity of a psychological disorder and expert assessment of a person's perceptions or intentions at a given time are within the mental health professional's expertise.<sup>146</sup> The proponents of psychological and psychiatric expert testimony argue that such testimony should be admitted as long as the court assures itself that the professional is properly qualified to testify.<sup>147</sup> Opinions about psychological processes are primarily judgments by the expert based upon theories generally shared by mental health pro-

recommendations about the subject, *i.e.*, that he should not be permitted to stand trial. *Id.* at 30. For the purposes of other classifications see *id.*, at 28-30, Table II.

137. AM. PSYCHIATRIC ASSN., *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* (3d ed. 1980).

138. Uelmen, *The Psychiatrist, The Sociopath and the Courts: New Lines for an Old Battle*, 14 *LOY. L.A. L. REV.* 1, 2 (1980).

139. See text & notes 43-70 *supra*.

140. J. MARSHALL, *LAW AND PSYCHOLOGY IN CONFLICT* 157 (2d ed. 1980); S. NOVEY, *supra* note 13, at 115.

141. J. MARSHALL, *supra* note 140, at 158; S. NOVEY, *supra* note 13, at 115-16.

142. See J. MARSHALL, *supra* note 140, at 160; S. NOVEY, *supra* note 13, at 116; text & note 129 *supra*.

143. Bonnie & Slobogin, *supra* note 30, at 430.

144. See text & note 63 *supra*.

145. Bonnie & Slobogin, *supra* note 30, at 456. Moral issues involve assessments which require value judgments. *Id.* Examples include testimony in terms of concepts such as "insanity" or "substantial incapacity," "voluntariness," "mental disease or defect," and "extreme mental or emotional disturbance." *Id.*

146. *Id.*

147. *Id.* at 457; see *FED. R. EVID. 702 (ARIZ. R. EVID. 702)*; text & note 11 *supra*.

professionals.<sup>148</sup> The purpose of such opinion testimony is to aid the jury and therefore it should be admitted.<sup>149</sup>

In the area of mens rea,<sup>150</sup> expert opinion offered by a mental health expert can be especially helpful.<sup>151</sup> Such opinion offers a plausible alternative to the layman's normal assumption that there is a common sense explanation for departure from the norm.<sup>152</sup> Thus, for example, an expert can show through the psychological autopsy that a defendant acted as a normal person under the circumstances and that the circumstances, not the defendant, were bizarre.<sup>153</sup>

The trend in most jurisdictions is to permit psychiatrists and psychologists to give their opinions on many issues.<sup>154</sup> Arizona and Federal Rule 704 allow an expert to offer an opinion on an ultimate issue.<sup>155</sup> Even where the issue is the victim's state of mind, as in a self-defense claim, Rule 704 would allow the expert to testify on the matter by presenting a psychological autopsy.<sup>156</sup> The propriety of the expert's opinions are easily ascertained.<sup>157</sup> Thus, under Rule 704, the psychological autopsy is admissible. Not only is such testimony helpful to the jury, but the expert's qualifications are easily verified.

Yet, the use of psychological and psychiatric expert opinion is by no means a completely settled area. Arguments arise for and against the use of such experts based upon the reliability and validity of their methods.<sup>158</sup> Where the testimony is diagnostic and based entirely upon tests and face-to-face interviews, this attack on reliability is especially meritorious. When the testimony is not diagnostic, however, such an attack has considerably less weight. Interpretive psychology or psychiatry, which merely describes why a person acted as he did, is not intended to be a basis for treatment of that person. Such interpretive analysis is more nearly art than pure "science" in the sense of chemistry or physics.<sup>159</sup> When the mental health professional is operating in this nondiagnostic realm, the reliability and validity of his techniques cannot be quantitatively measured.<sup>160</sup> They

148. Bonnie & Slobogin, *supra* note 30, at 461.

149. *Id.* at 464. Of course, probative value must outweigh the likelihood of delay and confusion. *Id.* at 466; see FED. R. EVID. 403. The probability of delay or jury misunderstanding and confusion resulting from psychological expert testimony is arguably offset by direct examination, cross-examination, and final arguments. Bonnie & Slobogin, *supra* note 30, at 466. In addition, "the court can confine the expert to his sphere, use cautionary instructions," and rely on a juror's natural suspicion. *Id.* Thus, total exclusion of such expert opinion is unnecessary and would probably help the prosecution at the expense of the defendant. *Id.* See also text & note 112 *supra*.

150. Mens rea is defined as: "A guilty mind; a guilty or wrongful purpose; a criminal intent. Guilty knowledge and wilfulness." BLACK'S LAW DICTIONARY 889 (5th ed. 1979).

151. Bonnie & Slobogin, *supra* note 30, at 485.

152. *Id.*

153. See text & notes 198-204 *infra*.

154. Bonnie & Slobogin, *supra* note 30, at 452-53.

155. See text & notes 112-13 *supra*.

156. See *id.* Of course, the testimony must be helpful to the jury and not a waste of time. See *id.*; ARIZ. R. EVID. 704; FED. R. EVID. 704 & Advisory Committee's Note.

157. See text & notes 72-88, 115-20 *supra*.

158. See text & notes 127-44 *supra*.

159. See text & notes 147-49 *supra*.

160. The expert's interpretive analysis is not applied to the subject and the results monitored and measured. To apply such an interpretive test to the subject would be to make it diagnostic.

are rather a function of his training and experience. As such, their usefulness to the trier of fact should be gauged on the probability that his experience qualifies him to assess behavior in a more accurate way than a layman could.<sup>161</sup> This argument is particularly applicable to the psychological autopsy. There the expert obviously does not intend to treat the subject who is deceased. Rather, on the basis of his training and experience, the expert can assess all of the facts and explain why the decedent behaved as he or she did.<sup>162</sup>

## IN-COURT USE OF THE PSYCHOLOGICAL AUTOPSY

### *Civil Application*

Although psychological autopsy as a term of art is of recent origin,<sup>163</sup> its use in civil litigation is much older.<sup>164</sup> A common use of this technique in a civil setting was found in litigation involving section 2035 of the 1954 Internal Revenue Code, which dealt with gifts in contemplation of death.<sup>165</sup> Since the decedent's intentions were at issue, the court often had to rely upon records and testimony of people who knew the decedent.<sup>166</sup>

The judicial test for a "gift in contemplation of death" was enunciated in 1931 by the Supreme Court in *United States v. Wells*.<sup>167</sup> There, the Court stated that a gift in contemplation of death depends on the donor's motives determined from all the facts and circumstances of the case.<sup>168</sup> The determination involved an assessment not only of the decedent's age and health, but also of his physical and mental condition.<sup>169</sup> A gift could not be within the ambit of section 2035 unless death was the impelling cause.<sup>170</sup> Thus, the Court held that it was necessary to examine the facts of each case to detect the "dominant motives" of the donor.<sup>171</sup>

In applying *Wells*, lower courts have considered a variety of factors. In *Neal v. Commissioner*,<sup>172</sup> the Eighth Circuit considered the decedent's pattern of giving his children gifts and his apparent robust health before

161. Bonnie & Slobogin, *supra* note 30, at 485.

162. See text & notes 47-58 *supra*.

163. See text & notes 43 *supra*.

164. See Widmann, *supra* note 5, at 220.

165. I.R.C. § 2035(b) (1954) provides in relevant part:

If the decedent within a period of 3 years ending with the date of his death . . . transferred an interest in property, relinquished a power, or exercised or released a general power of appointment, such transfer, relinquishment, exercise, or release shall, unless shown to the contrary, be deemed to have been made in contemplation of death; . . . but no such transfer, relinquishment, exercise, or release made before such 3-year period shall be treated as having been made in contemplation of death.

166. See generally Shaffer, *The Psychological Autopsy in Judicial Opinions Under Section 2035*, 3 LOY. L.A. L. REV. 1 (1970).

167. 283 U.S. 102, 119 (1931).

168. *Id.*

169. *Id.* at 117-18.

170. *Id.* at 117. The factfinder was asked to distinguish between a common awareness of death, which all people have, and a more compelling awareness of impending death. *Des Portes v. United States*, 171 F. Supp. 598, 601 (E.D.S.C. 1959).

171. *Id.* at 119.

172. 53 F.2d 806 (8th Cir. 1931).

the attack that preceded his death.<sup>173</sup> A doctor examined the decedent following the attack and discovered he was gravely ill, but did not tell him.<sup>174</sup> In considering all the facts, however, the court stated that it could not assume the decedent was unaware of his illness.<sup>175</sup> Therefore, the court held that the gift made by the decedent was in contemplation of death.<sup>176</sup>

Other courts have conducted a similar analysis, considering factors such as conditions of body and mind,<sup>177</sup> age,<sup>178</sup> contracts made by the decedent,<sup>179</sup> whether the transfer was to a revocable or irrevocable trust,<sup>180</sup> extent of travel by the decedent,<sup>181</sup> and whether the decedent had obtained legal advice.<sup>182</sup> Sorting and weighing numerous pieces of information, the trier of fact in section 2035 litigation ultimately determined whether a decedent's transfer was motivated primarily by his contemplation of death.<sup>183</sup> The analysis of whether a gift was in contemplation of death thus involved the factfinder in just the type of psychological reconstruction done in psychological autopsies.<sup>184</sup>

Similarly, the posthumous re-creation of an individual's personality is done when the issue of suicide is litigated.<sup>185</sup> Expert witnesses have been allowed to testify about whether a decedent was, on a certain date, likely to commit suicide.<sup>186</sup> This question is crucial when an insurance company is refusing life insurance benefits because it believes the insured committed suicide.<sup>187</sup> Courts are generally willing to admit such testimony, when it is found that there is a proper foundation and that the testimony will be helpful to the jury in deciding the issue of suicide.<sup>188</sup> As long as the expert is qualified and the testimony is within his or her field of expertise, it may be admitted.<sup>189</sup>

173. *Id.* at 807-809.

174. *Id.* at 808.

175. *Id.* at 809. The decedent gave his secretary some stock, something he had never done before. *Id.*

176. *Id.* The *Neal* court also found that a letter from the decedent to the donee was indicative of his intent. It stated that he hoped she would enjoy the gift and would see fit to divide it among her children when she was ready to provide for them. *Id.*

177. *Updike v. Commissioner*, 88 F.2d 807, 810 (8th Cir.), *cert. denied*, 301 U.S. 708 (1937).

178. *Id.*

179. *United States v. Tonkin*, 150 F.2d 531, 534 (3d Cir. 1945).

180. *Northern Trust Co. v. Commissioner*, 116 F.2d 96, 98 (7th Cir. 1940).

181. *Old Colony Trust Co. v. United States*, 15 F. Supp. 417, 419 (D. Mass. 1936).

182. *Des Portes v. United States*, 171 F. Supp. 598, 601 (E.D.S.C. 1959). See generally *Peck v. United States*, 16 A.F.T.R.2d 6125 (M.D. Ga. 1965) (jury instructions); *Robinson v. United States*, 8 A.F.T.R.2d 6082 (N.D.N.Y. 1961) (judge's charge); *Estate of Oliver Johnson*, 10 T.C. 680 (1948); *Riecker, A Pragmatic View of Transfers In Contemplation of Death*, 53 MINN. L. REV. 265 (1968).

183. *Tout v. Safe Deposit & Trust Co.*, 74 F.2d 851, 854 (4th Cir. 1935); see text & notes 170-171 *supra* requiring that death was the impelling cause of the gift.

184. See text & notes 43-70 *supra*.

185. See text & notes 46-51 *supra*.

186. *Starkey Paint Co. v. Springfield Life Ins. Co.*, 24 N.C. App. 507, 510, 211 S.E.2d 498, 501 (1975).

187. *Id.* at 510, 211 S.E.2d at 500-01.

188. *Biro v. Prudential Ins. Co.*, 110 N.J. Super. 391, 401, 265 A.2d 830, 834, *rev'd*, 57 N.J. 204, 271 A.2d 1 (1970); see FED. R. EVID. 702; ARIZ. R. EVID. 702; Advisory Committee's Note to FED. R. EVID. 704.

189. See authority cited in note 188 *supra*.

The *Frye* test,<sup>190</sup> when applied to a psychological autopsy, indicates that the technique has become a recognized discipline.<sup>191</sup> The technique developed as a courtroom tool out of necessity when, under section 2035, contemplation of death had to be proved or disproved.<sup>192</sup> Its continuous use by juries in interpreting that section clearly indicates that the technique was a demonstrably effective tool.<sup>193</sup> The subsequent development of the psychological autopsy as a technique for ascertaining whether a death was accidental or suicide lends further credence to claims of its usefulness.<sup>194</sup> Its applicability in civil actions may well be duplicated in criminal suits.

### *Use in a Criminal Setting*

Although the psychological autopsy has been used in different civil contexts<sup>195</sup> its use in criminal cases remains virtually unexplored. The technique has been used, however, in a few homicide cases in Arizona.<sup>196</sup> These cases have all been situations where the defendant has claimed defense of self or others.<sup>197</sup>

Psychological autopsy is especially well-suited to the self-defense claim—particularly where the defendant is claiming that she is a “battered wife.”<sup>198</sup> In *State v. Wendy Irene Anne Jones*,<sup>199</sup> the trial judge admitted psychiatric autopsy testimony which indicated that the victim had routinely beaten his wife.<sup>200</sup> The judge allowed presentation of the psychological autopsy testimony to the jury because he felt the jury needed a full understanding of the circumstances.<sup>201</sup>

Although there are evidentiary problems associated with the admissibility of the psychological autopsy,<sup>202</sup> these problems can be dealt with in the same manner as psychological or psychiatric testimony generally. The psychological autopsy in criminal trials is not merely another technique which a defense attorney can add to his arsenal. Rather, its value lies in the fact that the technique is more objective than psychiatric examination

190. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923); see text & notes 81-83 *supra*.

191. See text & note 124 *supra*.

192. See text & notes 165-84 *supra*.

193. *Id.*

194. See text & notes 43-70 *supra*.

195. The psychological autopsy has been used, for example, to determine whether a death was an accident or a suicide for coroner's reports, see text & notes 45-63 *supra*, and for the settlement of life insurance disputes, see Alsop, *supra* note 4, at 44, col. 2. It has also been used in settling workers' compensation claims and testimony capacity determinations. *Id.*

196. *State v. Wendy Irene Anne Jones*, 1 CA-CR 2589 (Ariz. Ct. App. Apr. 18, 1978) (*mem.*); *State v. Ida Mae Jones*, CR. No. 98666, (Ariz. Super. Ct. 1978); *State v. Carrethers*, CR. No. 100395 (Ariz. Super. Ct. June 7, 1978); see note 65 *supra*. Note that these cases use the term “psychiatric” rather than “psychological” autopsy. See note 58 *supra* for an explanation of the distinction.

197. See text & note 65 *supra*.

198. *Ibn-Tamas v. United States*, 407 F.2d 626, 633 (D.C. Cir. 1979). In *Ibn-Tamas*, the court ruled that the trial court erroneously excluded expert testimony indicating that there was a recognized psychological condition, with particular symptoms known as “battered wife.” *Id.* at 634-35.

199. 1 CA-CR 2589 (Ariz. Ct. App. Apr. 18, 1978) (*mem.*).

200. Slip op. at 2. The admissibility of the psychiatric autopsy was not an issue before the court of appeals.

201. Alsop, *supra* note 4, at 44, col. 1.

202. For a complete discussion of the admissibility of psychiatric autopsies under both common law and Federal Rules of Evidence, see Note, *supra* note 66; text & notes 121-162 *supra*.

generally<sup>203</sup> and allows the jury to see mitigating circumstances in the defendant's favor. Furthermore, the technique allows a defense attorney to avoid the overworked claim of temporary insanity and instead show that the defendant's act was reasonable because of circumstances within the victim's control.<sup>204</sup>

When, as in *Wendy Jones*, the court appoints an expert to do a psychological autopsy, the battle of the experts can be avoided.<sup>205</sup> Since the data pool is the same, and consists largely of records,<sup>206</sup> even experts chosen by the parties will have less leeway for differences of opinion. Use of the psychological autopsy may thus neutralize several of the criticisms voiced against psychological expert testimony in general.<sup>207</sup>

### CONCLUSION

The fields of psychology and psychiatry, though different in many respects, share a similar position of acceptance in the legal system. Experts from both fields are called upon to aid the finder of fact in determining what an individual thought, perceived, or intended. Such experts have also been used outside the legal system to determine whether an individual's death was due to suicide or accident. This out-of-court application of psychology and psychiatry has become generally known as "psychological autopsy."

The psychological autopsy has, in effect, been used in civil cases for some time. It has more recently been used in criminal cases in Arizona. Use of a psychological autopsy in the criminal setting can effectively demonstrate that the victim, not the accused, was the aggressor by demonstrating that such aggression was a common pattern. Thus, although still a new technique in the criminal setting, the psychological autopsy is potentially invaluable to a criminal defense attorney. The psychological autopsy can be used to show a jury that a defendant's actions were a normal response to extreme or unusual circumstances.

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203. The psychological autopsy relies entirely upon data acquired from records and interviews with persons other than the subject. See text & notes 52-58 *supra*. In addition, since it is an after-the-fact assessment, it is much easier to see the whole picture and avoid the difficult problem of predictions. See text & notes 62-63 *supra*. Although the investigator loses the benefit of a face to face interview, he acquires a much more objective data base because of the wide variety in sources of input. Bendheim, *supra* note 18, at 409.

204. Bendheim, *supra* note 18, at 407; Alsop, *supra* note 4, at 44, col. 1.

205. The battle of the experts occurs when each side hires its own expert witnesses. Where the expert is court appointed, as has been the case in Arizona, he is usually more objective and impartial. See Bendheim, *supra* note 18, at 409; Note, *supra* note 66, at 633; Alsop, *supra* note 4, at 44, col. 2; text & notes 36-39 *supra*.

206. See text & notes 52-58 *supra*.

207. See text & notes 36-41 *supra*.

