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THE CROSS-EXAMINATION OF THE ALIENIST¹

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The expert in mental disorder is brought into court for a very definite purpose, which is either—depending upon which side calls him—to testify to the responsibility or irresponsibility of a certain person. I shall discuss in this article more particularly the alienist in murder trials. In these the burden of proof rests on the defense. The defendant is presumed sane by the law and to overthrow this assumption his attorneys bring experts in mental disorders into court to testify that he is not responsible. This testimony having been offered, the prosecution combats it either by offering experts of their own to testify to the contrary or by merely refusing to offer any testimony in rebuttal and claiming that the alleged insanity has not been proved.

When considering at all the question of irresponsibility as it affects criminal law, one is tempted to dilate upon many aspects of it, to consider indeed the whole question of responsibility, the trial of mental status by lay juries, the hiring of experts, the method of testifying, and many other points of interest. The scope of this paper will not be so extensive, however, for several reasons. For one thing, it is the writer's opinion that a fair constructive criticism of the present system could only be made by the collaboration of a jurist versed in medical matters with an alienist experienced in the law. Such comment as the writer might be able to offer would only be destructive in nature, would no doubt be unjust in that it would not be informed by comprehensive knowledge and would not have constructive suggestions to offer.

It is, therefore, in no spirit of reform or uplift that the writer ventures to present a few impressions, arduously sweated from him in the hot-box known as the witness-stand, exposed to the fierce light of public scrutiny, bathed in the sun of the judge's legal knowledge and subjected to the fire of the opposing lawyer.

It is thought these might serve to show how easily the psychiatrist, testifying in a murder trial, may be put in a false position, how difficult it is for him to present his conception of the case to the jury, how skilfully his statements may be emasculated by cross-examination; it may perhaps serve to explain why he goes on the stand, feeling that he

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is testifying in behalf of an irresponsible unfortunate whose mental condition should be taken into account in dealing with him, and leaves the stand wondering whether he has not helped to tighten the noose about his neck.

The first point the writer wishes to touch upon is the danger of bias. The picture which the general public usually forms of insanity as a defense in a murder trial is a series of bewhiskered experts solemnly testifying that the accused is insane, followed by a series of equally hirsute and learned men testifying that he is sane. The natural reaction of the layman is to discount the whole business and no doubt this is what practically happens in the case of many juries. They say among themselves, "Well, three doctors have testified on one side and three on the other. We don't know which to believe. Let's throw this whole insanity business out. The man doesn't look very crazy to us, anyhow." The result is, of course—a man being presumed sane by the law—that the accused loses all the benefit of a doubt as to his mental condition.

Under our present system, it is practically impossible for the most honest alienist to avoid leaning one way or the other. He stands after all in the delicate relation of employed to employer. The lawyer seeks him out especially, thus gratifying his *amour propre*, flatters him by telling of his side's dependence upon him for the strength of the case and finally he pays a good fee for his services. The alienist thus comes into court with a friendly feeling towards the lawyers for the defense together with a sympathy for the accused and it is small wonder that when attacked by the prosecuting attorney he is inclined to make doubtful statements emphatic and strong ones even stronger. Even those overly conscientious men who fear lest they might be unconsciously prejudiced sometimes show bias in that they may lean too far the other way, which is just as bad. Worse in fact.

However, let us assume that our protagonist has gotten on the witness-stand and, led on by the sympathetic and admiring attitude of the counsel for the defense, has stated his opinion that the accused was of unsound mind at the time the crime was committed. He is then delivered over into the hands of the prosecution.

The scene which follows next is one familiar in all criminal courts. There is the endless wrangling over small points, the endeavor to trap the witness into a contradiction or an admission, the quarrels over definitions, the citations of authority, etc., etc.

The effort of the cross-examination—as the writer has observed it from the less desirable side of the witness-box—seems to be divided

into two main parts, to discredit the witness and to vitiate his testimony.

The attempt to discredit the expert witness personally is often done only indirectly, but he may be the object of direct attacks under which it is rather difficult to retain one's equanimity. For example, a doctor who had had some experience in mental disorder was a prisoner himself and was called to testify in behalf of the defendant. The prosecutor brought the fact that the doctor himself was a prisoner before the jury by such questions as "Did you occupy the same cell at the jail with the accused?" or "Did you observe the accused when you rode up from the jail in the wagon with him this morning?"

Of course, in the instance cited, the attorney for the defense immediately objected to each question on the ground that it brought indirectly before the jury facts that could not be presented to it directly. This objection was sustained, but the jury became aware that the witness was in bad odor with the community himself, which was, after all, what the prosecution wanted.

The alienist's motives may be brought into question by asking him whether he has been paid for testifying or not and whether he is to get a larger sum if the defendant is acquitted than if he is convicted. (The medical expert, I may remark, parenthetically, should never agree to a contingent fee.)

Or the medical expert may be attacked on the professional side by intimating that his qualifications, which were brought out so grandiloquently by the other side, are not so very much after all. Thus, should he be on the staff of a hospital for mental disorder, the cross-examiner may enlarge upon the fact that he is only second, or third, or fourth on the staff. This he is especially likely to do if, as sometimes happens, one of his own experts should be a member of the same staff and hold a technically higher rating.

The cross-examiner may attempt the direct way of discrediting the alienist's professional attainments by questioning him along the line of his specialty, but this is rather dangerous business, unless the lawyer is especially conversant with psychiatry or the alienist is especially incompetent. The witness saw one physician attempt to qualify as an expert in mental and nervous diseases and when asked to tell what a neuron was and give the number of cranial nerves was unable to do either.

A method more usual is to produce various text-books in court and ask the witness if he is familiar with them. He should beware how he admits that any one of them is an authority lest a statement be immediately quoted from it opposed to one he himself has made. The writer heard one exasperated expert declare that hereafter if he has

read a text-book cited he will say it, is good, but not an authority, but if he has not read it, he will say it is not much good anyway. Or a prosecuting attorney may try to get the witness to answer metaphysical questions, as one asked each opposing expert: "What is the first principle of human knowledge?" and if the doctor said he didn't know, would say, "What, doctor, you claim to be a scientific man and admit you can't tell the first principle of human knowledge."

Other ways of discrediting the witness are by endeavoring to show that he has not devoted sufficient time to the examination of the accused to form an opinion, that he has neglected to make a physical examination, that he saw him too long after the crime itself, and so on.

These do not exhaust the possibilities, but we shall pass on to the attack on the testimony itself. This is made in various ways which we shall endeavor to touch upon at least.

First, let me allude to written memoranda. My own method is to make very few notes at the time I examine a prisoner, noting down briefly only the outstanding symptoms and relying on my memory for my testimony. Many psychiatrists, however, are more meticulous and make detailed notes to which they are prone to refer in court. This always leads to the prosecutor objecting to the consultation of the notes, except to "refresh the memory." If the memory requires too much refreshment, the witness is subject to sarcastic comment. I have seen a lawyer give his own witness opportunity to refer frequently to his notes in the following manner: He would allow him to testify as much as he could from memory and then, when he saw him hesitate, would ask some such question as, "What did his brother-in-law say?" The doctor would not be able to recall without looking at his notes and was advised to "refresh his memory." After looking carefully through several pages of notes, he would say, "Nothing," and continue his testimony with his memory much refreshed apparently.

It seems to the writer that the chief reason for the poor showing which the alienist makes on the witness-stand and for the tremendous advantage which the cross-examiner has over him is in the fact that medicine is not an exact science itself, especially that branch dealing with mental disorder, but the testimony of the witness is attacked as if the points he made were as susceptible of exact proof as a mathematical demonstration.

It is well known, e. g., that even in the chronic insane many acts are not irrational as such. Thus a patient with marked grandiose and persecutory delusions may yet go to his meals, dress and undress him-

self, play games, etc. Suppose the doctor to be cross-examined about such a patient, we might suppose the district attorney to ask:

"You say So-and-So is insane; now, isn't it a fact that he dresses himself neatly every morning? He doesn't put his trousers on his arms and his coat on his legs, does he, doctor? When it is meal time he goes to the dining-room, he doesn't go to the sitting-room, does he?" etc.

Again, the prosecutor may ask you what "pathology" you have found, especially if you have defined insanity as a disease of the brain. He will ask you if there can be any disease without a pathological process, if you have found any pathological process; if you have not he will ask you how you can say insanity exists if you have found no disease of the brain.

The most common attack in cross-examination is by attacking individually each symptom quoted by the doctor in giving his reason for thinking the accused of unsound mind. This is quite effective and exasperating, its effectiveness lying in the fact that mental disorder is, speaking broadly, not demonstrable in any examination of the patient at one time, nor in any single act committed by him, but in a broad view of his conduct over a certain period of time or in the circumstances and setting, say, of his criminal act.

In other words, the conclusion to which an alienist comes, especially when his opinion is based on a hypothetical question, is after all the result of a process of inductive reasoning which automatically lays itself open to the attack that all the facts were not known.

The doctrine of probability, too, which lends strength to the opinion, is not available when the symptoms are taken up singly. Thus the prosecuting attorney may take a single act, quoted by the alienist, out of its setting and force the physician to admit that of itself it is not necessarily an insane act or a symptom of insanity. Then he may say: "In other words, doctor, you have admitted that this is not a symptom of insanity; in other words, that it means nothing. Now, one thousand times nothing is still nothing, isn't it?" Which is perfectly true, mathematically speaking, but in medicine the whole is sometimes greater than the sum of all its parts. What is not brought before the jury is that a man may perform one bizarre action and still be sane; if he does two, we think of mental disorder, three or four still more so and with every additional symptom the probability increases in geometrical proportion, so that we feel justified in giving an opinion of unsoundness of mind based on a series of abnormal actions, while we cannot swear that each act taken by itself is evidence of insanity, or,

as it is frequently put, "Would it be possible for a person of sound mind to do it "

Speaking of abnormality reminds me of the trap of definition into which I earnestly adjure psychiatrists not to fall. Thus at one trial several hundred people wasted one golden hour, set with sixty diamond seconds—as the copy books used to say—trying to get an expert to define a normal person, which he held, very properly, was impossible.

Of course, the crux of the legal situation is, after all, whether or not the defendant knows right from wrong and when the physician has replied in the negative he is liable to be bombarded with questions tending to show that the defendant attempted escape or concealment after his crime. Thus the mere automatic flight after a murder and the instinctive avoidance of people are held to be evidences of the existence of a realization of guilt.

Having once gotten the physician to say the accused was irresponsible on the day of his crime, the prosecutor naturally quotes various things he did in a perfectly rational manner on that day, including perhaps the preliminaries of the crime itself. Thus, if the accused picked up an iron bar, he will ask, "Doctor, when the accused picked up an iron bar, did he know it was iron?" "When he struck his victim, did he know he had killed him?" "Was picking up an iron bar and not a lead pencil evidence of sanity or insanity?" etc. If the doctor states he does not know what was in the accused's mind he is met with "Why, doctor, how can you come into court here and pretend to tell this jury what was the state of the mind of the defendant when you admit you don't know it?"

Another method of attack, used especially where the diagnosis has been based partly at least on the accused's own story, is to ask:

"Doctor, did you believe So-and-So when he told you that?"

If you say you did believe him, he will say, "Now, doctor, the accused knew he was in danger of his life. Do you think that would make any difference in his story?" or "Doctor, you say you knew he was insane and yet you believed everything he told you. Do you always believe everything an insane person tells you?"

If the physician says he did not believe everything, but only parts of his story, the prosecutor says, "Oh, you pick out the parts you want to believe and reject the rest, do you?"

In this connection, the witness is of course asked how he knows the accused is not malingering, or how far the replies were suggested by his questions. If the accused contradicts himself in the course of two examinations the doctor is asked which he believes and why. If

he recalls something at the second examination he could not at the first he is asked if his memory is better then or if he has only made up a new lie.

Time will not permit of the discussion of hypothetical questions, but they are of course attacked by dropping each part of them in turn and saying, "Now, suppose we leave that out, would that affect your opinion?" The unwary witness may thus see four or five of his symptoms dropped and then become uneasy at their dwindling, say when it is suggested that the next symptom be elided, that he would then change his opinion. This gives the cross-examiner his opportunity. He says, "In other words, you wouldn't call him insane without this symptom (or act), but you would with it?" This focuses an undue attention on this particular symptom and it is attacked intensively, with the result that if the witness is obliged to admit that it is not in itself indicative of insanity it seems to the jury as if he had abandoned the one thing he emphasized.

The counter-hypothetical question is of course constructed by leaving out parts of the hypothetical question which the prosecutor believes he can disprove, by putting in acts showing no abnormality and by giving motives for acts which seem purposeless in the hypothetical question. The chief defense against this is to say that the question does not give enough material to form an opinion on, just as the physician should say, when questioned about the meaning of a certain act quoted by the prosecutor to show rationality, that it does not of itself indicate either sanity or insanity. The physician will be forced to admit probably that he cannot diagnose insanity from the counter-hypothetical question. This, as will be seen, puts the matter in a false light. The jury is only allowed to see certain acts and statements or selected parts of a life history and are told that the *eminent alienist* can find nothing in them to indicate insanity. In other words, the insane person in a day may do ninety things which are not unusual or eccentric, but the sane person does not commit ten absurd actions in a day.

As suggested above, there are many aspects of the matter which are here omitted. Other subjects open too wide a field of speculation, e. g., the question as to whether or not there should be a doctrine of partial responsibility. However, I have only given some high lights which may be of reminiscent interest to those who have been through the mill and serve as danger signals to those who seek experiences of this sort under the impression that alienists receive big fees for a little pleasant work.