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PSYCHIATRIC AND PSYCHOLOGIC OPINIONS IN COURT

Wladimir Eliasberg

The author is a practicing psychiatrist in New York City. He was educated (M.D. and Ph.D) in Germany and served in the German Army Medical Corps during World War I. In 1926 he founded the German Congress for Psychotherapy and became Editor of the *Allgemeine arztl. Zeitsch. f. Psychotherapie*. In 1938 he came to the United States, continued his medical studies, received recognition from the State of New York as a Qualified Psychiatrist and Qualified Examiner. He has more than 250 publications to his credit in English, French, German and Italian in the fields of psychiatry, psychology and their applications in forensics, industry, education and other fields.

He has taught Forensic Psychiatry for the Munich Bar Association and Applied and Social Psychology in Rutgers University.

His "New Theory of the Perpetrator and the Duties of the Psychiatric Expert" was published in this JOURNAL for Nov.-Dec., 1939, "Criminal Prophylaxis," Sept.-Oct., 1944, and "Opposing Expert Testimony" in Nov.-Dec., 1945.—EDITOR.

Psychology has become a system of knowledge based on scientific data and an indispensable base of psychiatry. I want to mention a few of the landmarks in the contributions of psychology to court procedure. In 1903 the first volume of William Stern's *Contributions to the Psychology of Testimony* were published.¹ In 1907 Clara and William Stern's *Recalling, Deposing, Lying* opened a series of valuable books by psychologists. Foremost among them were the contributions by Karl Marbe. At Harvard Hugo Muensterberg² taught his students the pitfalls of testimony. A survey of his own and other publications came out in 1923. Psychopathology based on experimental psychology was furthered by R. Sommer³ and A. Gregor.⁴ A highly valuable contribution was that by Robert H. Gault.⁵ He surveyed not only the older investigations of testimony but in a very clear and concise chapter on Attitudes he made this modern concept of psychology available to criminology. The present author,

¹ L. William Stern, *Beitrage zur Psychologie der Aussage*, Johann Ambrosius Barth, Leipzig, 1903.

Clara and William Stern, *Erinnerung, Aussage, Luege*, Johann Ambrosius Barth, Leipzig, 1907.

Karl Marbe, *Grundzuege der Forensischen Psychologie*, C. H. Beck, Muenchen, 1913.

Ibid, *Fortschritte der Psychologie und Ihrer Anwendungen*, B. G. Teubner, Leipzig, Berlin, 1912.

Ibid, *Die Betriebsunfaelle auf der Deutschen Reichsbahn im Jahre 1925*, *Die Reichsbahn, Amtliches Nachrichtenblatt*, 1926, p. 246.

² Hugo Muensterberg, *On the Witness stand, Essays on Psychology and Crime*, New York, McClure Co., 1909.

³ R. Sommer, *Lehrbuch der psychopathologischen Untersuchungsmethoden*, Berlin und Wien 1899, p. 1 ff. *Ibid* *Diagnostik der Geisteskrankheiten*, 2. Aufl. Berlin und Wien 1901, p. 14.

⁴ A. Gregor, *Leitfaden der experimentellen Psychopathologie*, Berlin, 1910.

⁵ Robert H. Gault, *Criminology*, D. C. Heath and Co., Boston, New York, 1932.

also trained in psychology, has built up the concept of motivations.⁶ While attitudes are defined as mental and neural states of readiness, organized through experience, exerting a directive or dynamic influence upon the original response to all objects and situations⁷ in the motivation, the emphasis is on the relationship to consciousness or potential consciousness and in this way the psychological concept of motivation contains the bases for the lawyers' handling of negligence.

Great progress has been achieved in the differential psychology of testimony. The testimony of children, of boys and girls of prepubertal age, of adolescents of primitive state of mind, of morons, of dwellers in rural areas, the influence of special training, skill, social psychological ties, food, alcohol, drugs were experimentally investigated. At the same time psychology was furthered through the findings of the neurologists especially in cases of aphasia and agnosia. Here it was shown that apparently simple mental processes, as the perceptions, consist of components and that each of them may be put out of commission separately.

Psychology, assimilating all these teachings to its own findings, has finally become a full fledged science.⁸ Small wonder then, that it demanded to be heard and to contribute its insight to the solution of burning problems, not as a handmaiden that carries the train but, to use the famous comparison of Kant, walks ahead of her mistress and bears the torch for her.

A psychological expert for the first time was called in to the trial after the great derailment near Muellheim, Baden in the summer of 1911. Karl Marbe, Professor of psychology in Wuerzburg, offered to clear what had happened by means of reaction experiments. Soon afterward he appeared in trials to

⁶ W. Eliasberg, *Rechtspflege und Psychologie (Administration of Justice and Psychology)*, Carl Heymanns, Berlin, 1932.

⁷ Gordon W. Allport, *Attitudes, Handbook of Social Psychology*, 1935, edited by Carl Murchison, Worcester, Mass., 1935.

⁸ Jerome Michael, Mortimer Adler, *Criminal Law and Social Science*, pp. 55-65 to the contrary! These authors in the abstract and somewhat haughty style, which is characteristic of their work, wind up by saying: There is no scientific psychology, nor criminology. Unfortunately it seems that their criticism has come to stay among non-psychiatrist, non-criminologist, non-sociologists like Jerome Hall, "Criminal Responsibility," *Columbia Law Review*, 1945, p. 681. All these critics and authors of "crisis-books" overlook the fact that in the practice there is much less dissension among competent men than would appear from the discussion of principles. I have shown that the psychology of the irresistible impulse has many aspects and consequently many criteria exist. In a strictly experiential, if not experimental way, many so-called critical points could be cleared up for all practical purposes and it is to be hoped that men of great experience will also furnish us in due time with a satisfactory theory. Agnosticism has never achieved anything and it is no basis for a criticism of our present psychology; or would any of the agnostics like to revert to the stage before the introduction into the courtroom of modern experimental psychology of the testimony of the adult and the child!

evaluate the testimony of children and in 1913 he published his experience⁹ in the book *Grundzuege der Forensischen Psychologie*. However, most courts and psychiatrists did not take cognizance of the existence of psychology and its teachings. Thus, the very typical book by George W. Jacoby¹⁰ does not list psychology in its index other than as part of the physiology of the brain and psychological experts are not mentioned. In my book which came out in 1932 (quoted above) I described the contributions of social psychology. My main topics were social psychology of the experts, the sociological relations between the expert and lay witnesses and the role of all those cooperating in the trial.¹¹

After this very short historical survey we may now approach the following questions:

1. What is the difference between the psychologists' and the psychiatrists' opinion?
2. Can there be a unification, harmony and integration between the psychologists and the psychiatrists as experts and can their opinions be made to work together?

Differences between Psychologic and Psychiatric Opinion

The differences consist in:

1. The specific training of the expert and his field of experience.
2. The subject matter which is discussed in the opinion.
3. The logical structure of the opinion itself.

There is no use denying that the psychology of childhood and youth, sex psychology, experimental and social psychology of testimony and the witness on the whole have played a very small role if any in the medical training of psychiatrists but have been taken up largely by psychologists (Ph.D.s). Many methods on the other hand that are taught in the laboratory have no immediate bearing upon life and the court. One may say, then, that the training of both psychologists and psychiatrists can and must be reorganized if they want to appear in court. The full competency of psychologists like the late William Stern, Hugo Muensterberg or Karl Marbe should not be denied and in this respect it is important that these psychologists themselves have

⁹ K. Marbe, *Psychologische Gutachten zum Prozess wegen des Muellheimer Eisenbahnungluecks*, *Fortschr. d. Psychol.* Bd. 1, 1913, S. 339 ff. *ibid.*, *Der Psychologie als Gerichtsgutachter im Straf- und Zivilprozess*, Stuttgart, 1926.

¹⁰ George W. Jacoby, *The Unsound Mind and the Law*, Funk & Wagnalls, New York, London, 1918.

¹¹ W. Eliasberg, "Opposing Expert Testimony," *J. of Criminal Law and Criminology*, Vol. 36, No. 4, Nov.-Dec. 1945.

excluded questions of psychopathology, e.g. selfincrimination from their opinions; thus Marbe¹² states explicitly that he would not render opinions on self-incrimination.

While it is easy to differentiate, on the conceptual level, the subject matter of opinions stating that pathology belongs to the M.D. and the measurement of reactions of normal persons to the Ph.D. in psychology, it should be noted that normality and abnormality have a certain breadth of variation. It has often been stated that the phase of puberty in the normal development is closer to pathology than to normality. Such differentiation can be very difficult in practice. There are cases of positive or negative malingering. It is known that patients with complete blindness and particularly with aphasia or with paranoia may quite aptly dissimulate.¹³ The whole question of normality or pathology is complicated because in each individual case it must first be stated that there is no known pathology. Normality or pathology are not diagnoses that offer themselves to the layman in either field, let alone to the layman in both fields. Even in the average case it is quite a task to find out whether the probable cause of a crime is to be sought in the natural course of events as in the development of a character, or in a momentary blurring of the consciousness, or in a permanent motivation, or finally in a pathological process which might be very slight in the beginning. Here again the problem is whether the beginning of the process must be adjudged as of the same importance as the fully developed disease. Who is to say this but the highly experienced M.D.-psychiatrist.¹⁴ Wherever the expert's opinion branches out into treatment there again the psychologists will have to give precedence to the psychiatrists, although it should be recognized that on the technical level the treatment of aphasia is largely based on psychology. Here we can see that the issue of precedence is by far not so important as that of wholehearted cooperation.¹⁵

On the logical level the diagnosis of the physician is directed toward a generality, namely the establishment of the type of

¹² Karl Marbe, *Psychologische Gutachten anlaesslich des Wiederaufnahmegesuchs im Eterprozess Juerges*, (Elberfeld) *Archiv fuer die gesamte Psychologie*, Vol. 82, No. 1-2, 1931.

¹³ Anton, *Ueber die Selbstwahrnehmung der Herderkrankungen bei Rindenblindheit und Taubheit*. *Arch. f. Psychiatrie u. Nervenkrankh.* Vol. 32, p. 86, 1899. Redlich and Bonvicini: *Ueber das Fehlen der Wahrnehmung der eigenen Blindheit bei Hirnkrankheiten*, 1908. (anosognosia)

¹⁴ W. Eliasberg, *The New Theory of the Perpetrator and the Duties of the Psychiatric Expert*, *J. of Crim. Law and Criminology*, Vol. XXX, No. 4, Nov.-Dec. 1939.

¹⁵ W. Eliasberg, "Training and Healing after Apoplexy," *Clinical Medicine*, Vol. 51, No. 8, August 1944, pp. 203-204.

pathological process that has befallen the party. For the practical purposes of the court it is often not necessary to show how the personality has changed under the influence of a psychotic process.

If one can prove to the satisfaction of the jury that the perpetrator at the time of the commitment of the crime had been suffering from paresis or schizophrenia, then there should be no problem for the jury. It is not necessary to describe the parietic or schizophrenic personality and to show how the deed has sprung up within the pathological personality. It is sufficient that there is some pathological inadequacy of motivations or lack of such motivations: pathological is just what is inadequate in the premorbid personality. There can be no partial responsibility where there is true psychosis. The psychological opinion on the other hand is directed either toward an individual in his singularity or to the general type of reactions, sensations, perceptions to which the individual's reactions belong. In the first case the psychologist makes an individual character or personality diagnosis, in the second the diagnosis of a general type of reactions. But for both purposes what the psychologist does differs also logically from what the psychiatrist is expected to do.

Integration

Integration does not consist of the exchange of personal amenities nor can there be a unity of subject matter or a unity of the viewpoints. Were there only mutual malice of psychiatrists and psychologists, then we certainly would already have that objective harmony and there would be no room for the multiplicity of sciences and viewpoints. That doesn't mean there is no such malice; there is very much and up to this day we see relapses to that blustering style of the professors at small universities of the 19th century who used to empty the vials of sarcasm on the unfortunate human being that did not share to the dot their more or less scurrilous ideas. There is still much sociology of the in-and outgroup, but on the whole these are trivialities which are not worth discussing.

Integration cannot be a giving up of different viewpoints. We cannot in such manner discover heretofore hidden unity of the subject matter. Integration and unity are not ready made, they cannot be had for the asking and cannot simply be excavated. Unity is an infinite task the solution of which may be approached asymptotically; nor is a method of getting that unity found in simply stringing up the different viewpoints like beads. History of the sciences shows, however, that differences that seemed

unsurmountable in bygone centuries appear small and insignificant in our present time. Why? Because the viewpoints themselves may form alloys as for instance physical chemistry, or in our field, psychological psychiatry. On the other hand viewpoints and problems may drift apart as theology or philosophy and the sciences of experience have done. In other words unity is a task, not an idea. Each time has the right to demand certain unities and to give up others. And there is finally the question: who should demand unity and who should be forbidden to give up his independence? Thus in a trial it is in the mind of the court and the jury that the unity of the viewpoints should be worked out. It is often absolutely unnecessary that one psychiatrist should politely confirm the idea of the other, or the psychologist's opinion simply be repeated by the psychiatrist. The unity in the mind of the court will be more valuable the more different the viewpoints are that are offered. To sum up, we have to consider the problem of the differences between the opinions in the courtroom, independently from the problem of unity. While we may talk about differences in training *ad personam*, and such differences will become greater or smaller, the question of unity is one that concerns the mind of the finder of fact. His labors will be the more fruitful, the more honest and truthful the objective viewpoints that are offered to him. Otherwise, what matters most is that honest and bona fide experts should be available to the courts. It is one of the foremost tasks of the organizations, i.e. the American Psychiatric Association and the American Psychological Association, to work out the viewpoints. There should be lists of men whom these associations consider competent experts.

The question of the fees should be worked out and last but not least the public relation offices should make it clear to the court and to the public at large that opposing experts' testimonies are much better than a presumptuous attitude on the part of the finders of fact who are not in a position to judge difficult facts.¹⁶

¹⁶ W. Eliasberg, "Opposing Expert Testimony," *J. of Criminal Law and Criminology*, Vol. 36, No. 4, Nov.-Dec. 1945.