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**PSYCHIATRIC EXPERT TESTIMONY IN CRIMINAL CASES
SINCE McNAGHTEN—A REVIEW**

Winfred Overholser

Dr. Winfred Overholser (A.B. Harvard 1912, M.D. Boston University 1916, Sc. D. [hon.] Boston University 1940) is a former Commissioner of Mental Diseases for the Commonwealth of Massachusetts. In 1937 he was appointed Superintendent of Saint Elizabeth's Hospital, the large Federal mental institution in Washington, D. C., succeeding the late Dr. William A. White. He was formerly Professor of Psychiatry at Boston University, and now serves in that capacity at George Washington University, Washington, D. C. He is a Past President of the American Psychiatric Association, was Vice President of the International Congress of Psychiatry at Paris in 1950 and was recently honored by the French Government by being made a Chevalier of the Legion of Honor. Doctor Overholser has long been interested in the legal aspects of psychiatry, and has contributed numerous articles on the subject to the periodical literature, both medical and legal.

The Conference on Criminal law and Criminology at Northwestern University in 1909 and the American Institute of Criminal Law and Criminology in the years immediately following (See this *Journal*, 42, No. 1, May-June, 1951, pages 2 ff.) placed great emphasis upon expert psychiatric testimony. This circumstance, alone, made it especially appropriate to invite Dr. Overholser to prepare the present article for the "Northwestern University Centennial Volume."—EDITOR.

For various reasons, psychiatric expert testimony in criminal cases has long been the subject of criticism. A large segment of the public probably believes that the only time that psychiatric evidence is used in the courts at all is in such cases, whereas instead such evidence is preponderantly introduced in tort, commitment, will, and other civil actions. However, the cases in which psychiatric testimony is employed are often those which have attracted a great deal of public attention and resentment. It is not only the public, however, which is interested. Serious students of law and procedure, both legal and medical, have given much thought through the years to the improvement of this type of opinion evidence.

It is especially appropriate that the *Journal of Criminal Law, Criminology and Police Science* should consider this topic, among others, in this "Northwestern University Centennial Volume," since the University Law School and its brain child, the Institute of Criminal Law and Criminology, have long been interested in a reform of expert testimony. At a crucial time the Institute, indeed, did much to focus attention on possible improvements.

It is not my intention to deal with the whole problem of the psychiatric aspects of criminal law and procedure. That would take volumes and, indeed, treatises of great comprehensiveness and incisiveness have

been contributed in recent times, notably by Sheldon Glueck and Henry Weihofen. There are many points at which psychiatry is tangential to the criminal law, and such problems as criminal responsibility, motivation, premeditation, deliberation, intent, and so on are intimately tied up with psychiatric considerations. It is my intention, however, to devote myself solely to the problems relating to the introduction of expert testimony of a psychiatric nature in criminal cases.

Testimony of this sort has long been known and certainly has been in use at least since the time of the trial of Earl Ferrers in 1760, and by the time of the never-to-be-forgotten *McNaghten Case* was far from uncommon and not in particularly good odor, either. In the *Tracy Peerage Case*,¹ for example, (1843) Lord Campbell said "Hardly any weight is to be given to the evidence of what are called scientific witnesses. They come with a bias on their minds to support the cause in which they are embarked." The United States Supreme Court in 1858 opined that "experience has shown that opposing opinions of persons professing to be experts may be obtained in any amount,"² while only a little later (1870) we find a California court saying "these witnesses are generally but adroit advocates of the theory upon which the party calling them relies³ rather than impartial experts, upon whose superior judgment and learning the jury can safely rely." That there were those who doubted whether psychiatry was properly a field of medicine is indicated by the statement of the Lord Chancellor of England in 1862 to the effect that "the introduction of medical opinions and medical theories into this subject, [the criminal law] has proceeded upon the vicious principle of considering insanity as a disease."⁴ That the Lord Chancellors of England are sometimes slow to change their views is suggested by the fact that as late as 1924 the occupant of that office stated in a debate on a similar subject "any more vague science at the present time, any science in which vague terms can so readily be made to do duty for clear conceptions, I do not know. It, [psychology] is a most dangerous science to apply to practical affairs."⁵

Dissatisfaction was not expressed solely by the courts and legal officers. Medical men were likewise among the objectors to some of the practices. Isaac Ray, for example, in his classic, *Medical Jurisprudence of Insanity*, the first book on the subject published in this country (Boston, 1838), lamented the inexperience of some of the experts who

1. 10 Cl. & F 154.

2. *Winans v. R.R. Co.*, 21 How. 88.

3. *Grisby v. Water Works Co.*, 40 Cal. 396.

4. 165 HANSARD'S DEBATES, 3rd series 1297.

5. 57 Parliamentary Debates (Lords), 443.

were produced and recommended the setting up of a panel of experts. An article in the very first volume of the *American Journal of Insanity* (1844) commented that "the jurisprudence of insanity remains about where it was left by Blackstone and Lord Coke"⁶ and a slightly later writer in the same periodical spoke likewise of the lack of qualifications of experts who are selected by counsel "from motives of expediency." He commented also that some are ready to compromise their independence and that most physicians anyway are not familiar with the subject of insanity.⁷ He, like Ray, suggested a board of disinterested and experienced experts.

In England Dr. J. M. Pagan in his *Medical Jurisprudence of Insanity* (London, 1840) said, "the discrepancies of medical witnesses are unfortunately too frequent for the credit of the profession" and he directed attention particularly to the importance of bias as a factor in the testimony of some witnesses. Again Forbes Winslow devoted one of his three Lettsomian Lectures (London, 1854) to the topic of medico-legal evidence in cases of insanity. He stressed the importance of the competence of the witness and of appearing to avoid partisanship, but commented also on "the doubts, the pleading, the innuendos, and the legal finesse of the advocate, the unbending dicta of the judge and the inexperience of the jury." He pointed out, in other words, that not all of the difficulties lay at the door of the expert, but that the latter was certainly to some extent at the mercy of the lawyer and the judge, and occasionally put in a false light by that reason.⁸

As we trace the literature through the rest of the 19th Century we find a continuing interest and, indeed, suggestions which seem strangely novel today. Sir James Fitzjames Stephen, for example, in his *History of the Criminal Law of England* (London, 1883) discusses expert testimony and emphasizes the importance of fairness and competence. He advocated especially joint examination by the experts of both parties,⁹ a proposal which we find echoed much later, for example, in the Federal Rules of Criminal Procedure. At a meeting of the Royal Medico-Psychological Association in 1880 a paper was read by Dr. D. Hack Tuke and discussed by some of the other outstanding psychiatrists of the day, notably Henry Maudsley. Tuke expressed the aims of expert testimony as being, (1) to adopt the most scientific means of ascertaining

6. COVENTRY, C.B. MED. JURISPRUDENCE OF INSANITY, AM. J. INSANITY 1:134.

7. STOKES, W. H. *On a Court of Medical Experts in Cases of Insanity*. AM. J. INSANITY 10:112.

8. *Op. cit.* p. 85. See also HAND, LEARNED. *Historical and Practical Considerations Regarding Expert Testimony*. 15 HARV. L. R. 40 (1901).

9. Vol. 1, p. 576.

the mental condition of the accused, (2) to protect him from punishment if he is irresponsible, (3) to protect society from false pleas of insanity, and (4) to avoid discharging the mentally ill until it is safe for them to be at large. Dr. Maudsley in his discussion uttered the somewhat cynical comment that he was "afraid that our legal dignitaries had not the least desire to be helped out of their dilemma," adding that from his earliest recollections "they had been hammering away at this subject."¹⁰

In the early part of this present century, then, the objections made to the use of psychiatric expert testimony in criminal cases resolved themselves largely into the following: That the standards of expertness were lacking, that the evidence presented was of a partisan nature, that additional expense and prolongation of trials resulted from the injection of this testimony, that the juries were confused by it, that some lawyers exhibited a lack of scruple in the use of such evidence, and that judges permitted "speculative vagaries of ill-informed minds."¹¹ Although the first two criticisms were of long standing, an objection to the possible abuses of the hypothetical question was just developing. It has been repeated since then with growing emphasis.

Before considering what attempts have been made to improve a situation which has caused a good deal of professional and public concern it should be pointed out that if correction is possible it should be easier to accomplish on the criminal side. In civil cases the State acts largely as an arbiter only, and for this reason it is difficult to control the temptations caused by the personal or pecuniary interests of the parties. On the criminal side, however, the State has a dual interest, being at once the prosecutor and the protector of the rights of the accused. It is largely for this reason, perhaps, that the attempts at legislative reform have been aimed especially at criminal prosecutions with only a collateral interest in civil cases.¹²

It is hardly a mere coincidence that, before the Report of Committee B of the Institute of Criminal Law and Criminology in 1915,¹³ very little had been attempted in the line of legislative remedies. To be sure, in the middle of the nineteenth century, Maine and, slightly later, Massachusetts, had provided for the commitment to mental hospitals for observation of a defendant in whose defense insanity was pleaded—this

10. TUKE, D. HACK. *Mental Experts and Criminal Responsibility*. J. MENT. SCI. 28:35 (1882). For discussion, see vol. 26:126 (1880).

11. FRIEDMAN, L. M. *Expert Testimony, Its Abuses and Reformation*, 19 YALE L. J. 247 (1910).

12. TAFT, HENRY W. *Opinion Evidence of Medical Witnesses*. 14 VA. L. R.81 (1927).

13. 5 J. CRIM. LAW 643 (1915). 6 J. CRIM. LAW 672, 38 YALE L. J. 368 (1929).

presumably as a means of obtaining qualified and unbiased information. Again in 1897, the Massachusetts Medical Legal Society and the Massachusetts Medical Society proposed legislation which would have provided a panel of experts from which the court might appoint, but this bill was never enacted.¹⁴ In 1905, Michigan passed a law limiting the fees of expert witnesses and providing that no more than three should appear on either side, except in the discretion of the court. Homicide cases were, at first, excepted, but later this exception was stricken.¹⁵

One of the important early bits of legislation was an enactment in the State of Washington, in 1909, providing that insanity should be no defense to a charge of crime, and further providing that, if, in the judgment of the court, the defendant was irresponsible at the time of the act or insane at the time of the trial, the court, in its discretion, might order the defendant confined in a State hospital until recovered. This law, however, was held to be unconstitutional.¹⁶

For practical purposes, then, relatively little concerning the control of expert psychiatric testimony in criminal cases had been done up to the time of the Report of Committee B of the Institute of Criminal Law and Criminology, in 1915.¹⁷ Professor Edwin R. Keedy, whose interest continues unabated at the time of this writing, and his associate, Professor William E. Mikell, were members of this committee, as were Judge Orrin N. Carter of the Supreme Court of Illinois and Judge Albert C. Barnes of the Superior Court of that State. The three psychiatric members, leaders in their fields, as were the legal members in theirs, were Doctors Adolf Meyer, Morton Prince, and William A. White, all, unfortunately, since deceased. Since this report in many ways constituted the turning point, brief mention of its contents may be in order. First of all, it was proposed: that the court be given the specific right to summon witnesses, not precluding either party from using other expert witnesses; that no testimony concerning the mental condition of the accused shall be received from his witnesses until the witnesses summoned by the prosecution have been given an opportunity to examine the accused; that commitment to a mental hospital for observation be permitted; that written reports from the witnesses be permitted, subject, of course, to cross-examination; that consultation of witnesses be encouraged. This proposal received substantial approval from a number

14. FOSTER, W. L., *Expert Testimony—Prevalent Complaints and Proposed Remedies*. 11 HARVARD L. R. 169 (1897).

15. Mich., Pub. Acts of 1905, No. 175.

16. *St. v. Strasburg*, (1910) 60 Wash. 106, 110 Pac. 1020.

17. See note 13 above. For discussion of proposals see WHITE, WILLIAM A. *Expert Testimony in Criminal Procedure*. 11 J. CRIM. LAW 499 (1921).

of sources, namely, the Conference of Medical Legislation of the American Medical Association, a Special Committee of the Commissioners on Uniform State Laws, and the Committee on Jurisprudence and Law Reform of the American Bar Association (which latter had minor reservations about the provision for observation commitment). The work of Committee B is only one of the contributions of which the Institute may be proud.

In 1921, Wisconsin passed a statute providing for the appointment of experts by the court, and this law was subsequently declared constitutional,¹⁸ on the ground that such appointment is an appropriate judicial function. It is perhaps an open question whether courts have such a right in the absence of statutory authority. There seems some indication, from pronouncements of the United States Supreme Court,¹⁹ that they have an inherent right, but the courts of Illinois and Michigan have declared to the contrary.²⁰ Weihofen, in a recent article,²¹ reports that at least 20 States now have statutes expressly authorizing the trial courts to appoint experts to examine the defendant and make a report. The same provision is found in Rule 28 of the Federal Rules of Criminal Procedure.

California, in 1925, provided for the court appointment of experts, and, in 1929, provided additionally that, if the defendant pleads not guilty by reason of insanity, the court must appoint two alienists, one of whom is to be a member of the staff of a State hospital.²² This at least gives some assurance of proper qualifications of the expert.

In 1927, Colorado²³ enacted legislation providing for the compulsory commitment to a mental hospital for observation in those cases in which mental disorder is pleaded as a defense. This again gives assurance of an opportunity for study by competent persons who are impartial. Apparently the procedure has worked well as far as it goes, though at least one very conspicuous miscarriage of justice occurred in 1938, when a young man of low intelligence, a former inmate of a school for the feeble-minded, was convicted, in spite of an unequivocal report of the doctors that he was incapable of distinguishing between right and wrong. Apparently the brutality of the crime outweighed the scientific evidence, and the defendant was not only convicted but permitted by the

18. *Jessner v. St.* (1930) 202 Wis. 184, 231 N.W. 634.

19. *In re Peterson*, (1920) 253 U.S. 300.

20. *Peo. v. Scott* (1927) 326 Ill. 327, 157 N.E. 247. *Peo. v. Dickerson* (1910) 164 Mich. 148, 129 N.W. 199.

21. WEIHOFEN, H. *Eliminating the Battle of Experts in Criminal Insanity Cases*. 46 MICH. L. R. 961 (1950).

22. Code of Civil Procedure, §1871 (Acts of 1925, p. 305). Penal Code §1027 (Acts of 1929, p. 702). For comment see 17 Cal. L.R. 537 (1929).

23. Colo. Laws 1927, C. 90 §2.

Governor to be executed.²⁴ In another, more recent case, something similar happened, except that the Supreme Court of the State reversed the conviction of an old-time schizophrenic of 25 years standing, with the statement, "The verdict is incomprehensible, save upon the supposition that the brutal character of the killing so aroused the passion and prejudice of jurors as to cause them to overlook or disregard the Court's instruction."²⁵ Weihofen reports that at least 13 States now have statutes which permit such observation commitment. In a recent article, Weihofen²¹ discusses at some length the experience of several of the States in which such a law has been in operation, with particular reference to the Colorado provision.

In 1928, Mississippi attempted to follow the lead of Washington State by excluding insanity as a defense in murder trials. This legislation was promptly declared unconstitutional,²⁶ with the comment that if there is an abuse of the insanity defense that is not a sufficient reason for such legislation. The decision points out, too, that there is more abuse of alibi and self-defense as defenses than there is of insanity. In the same year, the State of Louisiana, following a different line, vested absolute power in a commission to determine whether the accused was presently insane or insane at the time of the offense, withdrawing from the courts the power to determine the present sanity of the accused and also withdrawing the right of the accused to urge insanity as a defense before the courts. The Supreme Court of the State, in declaring this act unconstitutional,²⁷ held that the accused has a right to have his defense of insanity tried by a jury, and further, that the question of present insanity is an incident of a criminal case and its determination a judicial one.

Somewhat more recent is the experience of New York. Until 1936, the courts in New York City, if in doubt as to the present sanity of a defendant, were at liberty to appoint a "lunacy commission" of not more than three "disinterested persons." The utilization of these committees became a notorious scandal, since many of the judges appointed political henchmen with no psychiatric or even medical experience as members of these commissions, at very substantial fees. Accordingly, in 1939, the so-called Desmond Act was passed, which provided for the examination at the request of the court by members of the staff of the Division of Psychiatry of the Department of Hospitals in New York City.²⁸

24. *Arridy v. Peo.* (1938) 103 Colo. 29, 82 P (2nd) 757.

25. *Graham v. Peo.* (1934) 95 Colo. 544, 38 P (2nd) 87.

26. *Sinclair v. St.* (1931) 161 Miss. 142, 132 So. 581.

27. *St. v. Lange* (1929) 168 La. 958, 123 So. 639.

28. For comment on old system see communication by OVERHOLSER, W., *AM. J. PSYCHIAT.* 95:733 (1937-8).

Desmond Act enacted as Acts 1939, c. 861, and PARKER, S. *The Determination of Insanity in Criminal Cases.* 26 CORNELL L. Q. 375 (1941).

Parenthetically, mention should be made of the existence of a few outstanding psychiatric court clinics, which are utilized, in general, for the determination of the mental state of persons who have already been convicted by the court, as an aid to the court in determining the proper disposition of the case.²⁹ The earliest clinic of this sort was established by the Recorder's Court of Detroit, in 1919. The Supreme Bench of Baltimore has had a medical officer since 1925, the Chicago Municipal Court since 1930, and the Court of General Sessions in New York City since 1931. These clinics are operated under the auspices of the court, but are advisory to the court and therefore hardly come within the scope of the present discussion.

Most of the typical provisions which have been mentioned (the list of jurisdictions is not complete) have to do with the limitation of the numbers of witnesses, with the provision for unbiased status by reason of court appointment, and for the qualification of examiners. All of them, however, are lacking in one important regard, namely, that the original selection of the case to be referred for psychiatric examination is left to a nonmedical agency, be that agency the attorney for the defense, the court attachés, the prison officials, or the judge himself. There is, thus, no assurance that *all* of the defendants who should be examined and who may indeed be suffering from serious mental disorder will be examined. There is, too, no positive assurance in most jurisdictions that the expert selected by the court will be the most competent person available; as we have seen in the case of New York City, there have been instances in which quite the reverse has been the case. For this reason, particular mention should be made of a law which has now been in operation in Massachusetts for 30 years and which combines the advantages of the other existing methods with the additional one of automatic operation.

This statute,³⁰ enacted in 1921, is generally referred to as the Briggs Law, as it was written and enacted through the activities of Dr. L. Vernon Briggs, a prominent Boston psychiatrist much interested in forensic psychiatry. The law provides that, whenever a person is indicted by a grand jury for a capital offense or whenever a person who is known to have been indicted for any other offense more than once or to have been previously convicted of a felony is indicted by a grand jury or bound over for trial, the clerk of the court shall give notice to the

29. See chapter by Zilboorg, G. in *ONE HUNDRED YEARS OF AMERICAN PSYCHIATRY* (ed. HALL AND ZILBOORG), N. Y. 1944; Col. Univ. Press, pp. 507-584, at 581.

30. Mass. Gen. Laws, ter. ed. (as amended), c. 123, see 100 A. For full discussion see OVERHOLSER, W.: *The Briggs Law of Mass.—A Review and an Appraisal*. 35 J. CRIM. LAW 859 (1935). (The figures herewith given are taken from that article.)

Department of Mental Health, and the Department shall cause such person to be examined "with a view to determine his mental condition and the existence of any mental disease or defect which would affect his criminal responsibility." It further provides that the report of the Department shall be filed with the clerk of the court in which the trial is to be held and that the report shall be accessible to the court, the probation officer, the district attorney, and the attorney for the accused. A small fee is allowed the examining physicians. The report itself is not admissible in evidence, but the physicians who have made the examination may be called to testify by either the prosecution or the defense. The unusual features of the law are three: (1) The examination is conducted by neutral, impartial experts; (2) these experts are selected by a professional department of the administrative branch of government, namely, the Department of Mental Health of the Commonwealth; (3) the examination is applicable to *all* defendants falling within certain clearly defined legal categories and is not dependent upon the supposed "recognition" of mental disease by the judge, defense attorney, or some other nonpsychiatric participant in the proceedings.

The desirability of impartial experts has long been stressed by critics of court practices. The fact that the experts are selected by psychiatrists and not by any parties to the trial of the case, even the judge, may be taken as reasonable assurance of the competence of the experts. Judges, indeed, have in times past hesitated to appoint court experts, on the ground that they themselves were not competent to judge of the ability of the persons whom they might appoint. Furthermore, it has been found that, in certain instances, judges could not be entirely depended upon to select the most competent experts. The automatic reference feature does not, of course, operate upon all persons accused of crime, but, as a practical matter, some limitation had to be provided. Presumably those persons accused of a capital offense or those who have been previously convicted of a felony and are now again charged with a felony may be assumed to belong in the more serious category of offenders. Ideally, perhaps, all offenders should be examined before trial, but this is not feasible. While it is true that certain defendants suffering from mental disorder may not be recognized as ill, it is equally true that, in certain instances in which the facts as to an offense are clear, the attorney may file a plea of insanity as an act of desperation. Whatever the situation, however, within the categories specified by the law, there is reasonable assurance that the court and all parties interested will be informed before the trial begins whether they are dealing with a person who is mentally abnormal or not. The attorneys, as a rule, have

been most cooperative, for, after all, a lawyer can hardly afford to put himself in the position of not wishing to know whether his client is mentally ill! Needless to say, too, he would be in an unenviable position if he introduced evidence claiming to support a defense of insanity after he had refused to permit his client to cooperate with the impartial examination of the Commonwealth. In the words of Mr. (now Senator) Estes Kefauver,³¹ "The principle of this legislation is to reduce to a minimum the trial of persons who, because of mental abnormality, can more wisely be disposed of without a formal trial. This law eliminates the common fault in modern legislation of leaving mental examination to chance or caprice." The Supreme Judicial Court of Massachusetts stated in an early case: "The examination under the statute may fairly be assumed to have been made by competent persons, free from any disposition or bias and under every inducement to be impartial and to seek and ascertain the truth."³²

The operation of the law has not been studied in detail since 1935, when the present author published an extended study in this Journal. A recent article based upon a sampling of the reports on file, however, indicates that the statistics which were reported earlier are still substantially correct.³³ During the period 1921 to 1934, 4,392 prisoners were examined. Of these, 66 were reported as insane, and, in the cases of 143, additional commitment for observation to a mental hospital was recommended. Three hundred and eighty-eight had been reported as mentally defective and 96 as having some other mental abnormality, such, for example, as epilepsy or psychopathic personality. Including all clear, borderline, and doubtful cases of abnormality, 693, or 15.8 percent, were reported. Indeed, the tendency appeared to be somewhat downward during the latter years of the period studied. This compares, for example, with 40 percent of the prisoners committed for observation who were reported to be mentally abnormal in Maine, 26.8 percent in Vermont, and 26 percent in Colorado. In South Carolina 32 percent were so reported, in addition to another 41 percent who were reported as feeble-minded!³⁴ This indicates what is clearly the fact, namely, that in the States in which the initiation of the plea has to be a condition precedent to commitment, only the most obvious cases are sent to the hospital for study.

31. KEFAUVER, E. *Insanity as a Defense in Criminal Proceedings*. 8 TENN. L. R. 26 (1929).

32. *Comm. v. Devereaux* (1926) 257 Mass. 391, 153 N. E. 881.

33. HAGOPIAN P. B. *Examination of the Accused in Massachusetts*. AM. J. PSYCHIAT. 107:337 (1950).

34. Weihofen, *loc. cit.*, p. 969.

It will be noted that the law provides that the examiners shall determine "the mental condition of the prisoner and the existence of any mental disease or defect which would affect his criminal responsibility." Some of the judges have been inclined to disregard any comments as to the mental condition of the prisoner, and some have even requested that only the absence or presence of mental disease or defect be reported. In view of the wording of the statute, it would appear that to limit the report to a statement as to the responsibility (a legal and not a psychiatric concept) of the defendant is to fail in one's duty as a psychiatrist and, indeed, to trench on the functions of the court and the jury.

In general, the juries and courts have followed the recommendations of the examiners. In those cases in which a prisoner is reported to be mentally ill, he is committed to a hospital, or, if his condition is sufficiently doubtful to warrant a recommendation of observation, the trial usually does not proceed until there has been such observation. The district attorney has almost never used other experts, and the defense rarely, although, of course, neither party is precluded from introducing additional testimony.

The law has been attacked on a number of points, but has been sustained on every one by the Supreme Judicial Court of Massachusetts. It has been held, for example, that the examination does not violate the Constitutional guarantee against self-incrimination³⁵ and that, when this examination has been conducted, the defendant is not entitled as a matter of right to have further experts appointed in his behalf at public expense, this being held as to be entirely within the discretion of the trial justice.³⁶ It has also been held that the making of the examination is not a condition precedent to trial, that is, that the trial is valid even though, for some reason or other, the examination may not have been held, or though the case may not have been reported to the Department of Mental Health.³⁷ The only case which has been decided in the Federal courts has upheld the State court in its decision that the defendant, having been examined under the Briggs Law, is not entitled as a matter of right to further examination at public expense.³⁸ The Briggs Law of Massachusetts perhaps comes the nearest to being the answer to some of the troublesome problems in the field of expert testimony in criminal cases. It would not be practical in every State. Indeed, only

35. *Comm. v. Millen et al.* (1935) 289 Mass. 441, 194 N. E. 463.

36. *Comm. v. Belenski* (1931). 276 Mass. 35; *Comm. v. McGarty* (1948), 323 Mass. 435, 82 N.E. (2nd) 603.

37. *Comm. v. Vallarelli et al.* (1930) 273 Mass. 240.

38. *McGarty v. O'Brien* (1950) 190 F. (2nd) 987.

two States, Kentucky and Michigan,³⁹ have considered it practical enough to follow its lead, and in those two instances it appears from a recent study by Henry Weihofen that the law is not actively used. It would seem highly desirable and probably practical in any State to provide that, at least in capital cases, a routine mental examination should be held in advance of the trial, in order to protect the rights of the mentally ill defendant who may otherwise be undiscovered.

During the '20's and the '30's, the agitation for some sort of improvement seems to have been intensified. In 1926, for example, the American Medical Association passed a resolution endorsing the principles of court appointment of experts, the presentation of written opinions rather than answers to hypothetical questions, and the control of fees by the court.⁴⁰ In 1929, the same organization passed another resolution approving the principle of securing, in the case of all capital charges and in the case of as many other criminal charges as the psychiatric facilities of the State will permit, an impartial and routine mental examination of the defendant in advance of the trial. It approved, further, the principle of removing, as far as possible, the question of sanity from the trial itself, reserving the employment of psychiatric data for a post-trial inquiry.⁴¹ In 1927, likewise, the Criminal Law Section of the American Bar Association and the American Psychiatric Association began a very fruitful cooperative study of the problems relating to psychiatry in its relation to the criminal law.⁴² This cooperation continued until about 1940, and it is a pleasure to report that it recently has been re-established.

The interest of these various groups was undoubtedly a factor in the consideration of this problem by the National Conference of Commissioners on Uniform State Laws. Under the Chairmanship of Dean Albert J. Harbo, of the University of Illinois Law School, a committee of that Conference proposed, in 1937, the Uniform Expert Testimony Act. This Act was approved by the American Bar Association and proposed to all of the States. A portion of it has been enacted into law in Vermont and sustained by the Supreme Court of that State,⁴³ and it has been copied almost verbatim into the Rules of the Supreme Court of South Dakota. The fundamental principles have likewise been embodied in the Federal Rules of Criminal Procedure. It is a melancholy fact that after the lapse of 14 years this progressive legislative pro-

39. Ch. 1, 2nd Sp. Session, §17 (Ky. 1938). Pub. Act 259 of 1939 (Mich.) Law upheld in *Peo. v. Dubina*, (1943), 8 N.W. (2nd) 99.

40. J. AM. MED. ASSOC. 86: 1296 (1926).

41. J. AM. MED. ASSOC. 93:290 (1929).

42. For a review of this collaboration see OVERHOLSER, W. *Ten Years of Cooperative Effort*. 29 J. CRIM. LAW 23 (1938).

43. Ch. 47, Acts of 1939, Vt. *Tunney v. Crosby*, (1941) 112 Vt. 95, 22 Atl. (2nd) 145.

posal is in force in only two States and in the Federal courts! One is reminded of Henry Maudsley's taunt referred to earlier, to the effect that "our legal dignitaries have not the least desire to be helped out of their dilemma!" The fundamental principles of the Uniform Expert Testimony Act are: authority to the court to appoint expert witnesses, notice to the parties when experts are appointed by the court, notice to the court when the parties appoint experts, agreement on expert witnesses by the parties, inspection and examination of subject matter by the experts, a report by the experts and a filing thereof, conference and joint report by the expert witnesses, calling of the expert witnesses by the court or parties (all of them subject to cross examination), and permission to the experts to state their inferences without first specifying hypothetically the data on which the inferences are based; finally the fixing of the compensation of expert witnesses by the court.

It must be admitted that the court appointment of experts does not necessarily mean that they are professionally unimpeachable. Indeed, in the field of psychiatry one sometimes wonders what constitutes expertness. The Illinois Supreme Court, for example, recently uttered the surprising dictum: "while physicians are better qualified to testify to a diseased condition than are laymen, their testimony upon the subject of the mental capacity of an individual whom they have been privileged to observe is not entitled to any greater weight than that of laymen."⁴⁴ Nor are the courts in entire agreement as to whether the weight of a court appointed expert's testimony is any greater than that of an expert advanced by the parties. Several States, notably Kansas⁴⁵ and Virginia, have answered this question in the affirmative, namely that the fact that there is lack of bias is entitled to consideration by the jury. On the other hand Delaware has taken the position that an expert appointed by the court becomes the witness of the party calling him.⁴⁶

By all means there should be insistence on qualifications. The courts in general assume that any physician is competent to testify on any topic in the field of medicine.⁴⁷ This is certainly unrealistic, especially with regard to psychiatry, in view of the wholly inadequate training in psychiatry which until very recently was given to medical students, and the general lack of interest of the medical profession in the subject of mental disorder. The American Psychiatric Association,⁴⁸ concerned

44. *Tyler v. Tyler*, (1948) 401 Ill. 435, 82 N.E. (2nd) 346.

45. *Meek v. Wheeler, Kelly & Hagny Inv. Co.* (1926) 251 P. 184 (Kansas). *Tugman v. Riverside & Dan River Cotton Mills* (1926) 144 Va. 473.

46. *Bowring v. Del. Rayon Co.* (1937) 192 Atl. 598.

47. *Kelly v. Carroll* (Washington, 1950) 219 P (2nd) 79. "Doctors with unlimited licenses are competent to give expert medical testimony in the entire medical field."

48. See MAX, J. V. Presidential Address, *The Establishment of Psychiatric Standards by the Association*. AM. J. PSYCHIAT. 90:1 (1933).

with the problem of the inadequately qualified psychiatric "expert," was largely motivated by this concern in the establishment of the American Board of Psychiatry and Neurology in 1934. The requirements for certification by this Board are high, and there is every assurance that a diplomate of the Board may be looked upon as professionally competent in his field. It is to be hoped, indeed, that eventually courts may come to look upon certification by the Board as a prerequisite to admission to the giving of expert testimony in the field of psychiatry, or at least to question the qualifications of the non-diplomate.

In fairly recent years there has been considerable criticism of the abuse of the hypothetical question in interrogating witnesses. Students of the subject recognize the fact that two attorneys on opposing sides, by drafting differing hypothetical questions based on portions of the same testimony, can make an honest expert give two different answers. The jury, of course, may well be misled by this tactic and think that the expert does not know about what he is talking. The California Supreme Court, in criticizing the hypothetical question,⁴⁹ once referred to this technic in the following words: "All perspective was eliminated, all proportion destroyed, and the picture was as false to the original as is a fantastic and distorted shadow passed by a flickering and uncertain light a false portrayal of the reflected object." There are, of course, practical legal obstacles to the complete abolition of the hypothetical question, especially in cases in which the subject of the testimony is not available for examination, as in will cases, for example. Certainly it is far better that the examiners should examine the individual and examine him together with all of the facts available to all parties. When this is done, the likelihood of substantial difference of opinion is vastly minimized.

So far, we have discussed the examination of defendants. The mental state of complaining witnesses in criminal cases and of plaintiffs in civil cases should not be entirely ignored. Massachusetts,⁵⁰ for example, provided in 1918 that, in both civil and criminal cases, the court is empowered to request the State Department of Mental Health to make a mental examination "of any person coming before the court." This act has been sustained by the Supreme Judicial Court of the Commonwealth as applicable to civil and criminal cases and based upon a power which is inherent in the court, although it has been employed relatively little. The question of the mentality of the complaining witness or of

49. *In re Dolbeer's Estate*, (1906) 86 Pac. 695.

50. G. L. (ter. ed.) c. 123, sec. 99. Sustained in *Sullivan v. the Judges*, (1930) 271 Mass. 435.

other witnesses in criminal cases is not infrequently of considerable interest, and a few cases of this sort have been decided by the courts. It would seem that, in any case where there is a reasonable showing that the witness may be suffering from a mental illness likely to affect his credibility, the court should have the power and should order a clinical examination of the witness, and, if he refuses examination, should stay the proceedings or bar him as a witness. As a writer in the *Yale Law Journal* remarks, "The jury's opinion of the credibility of a witness is only an intuitive guess."⁵¹

As for the examination of prisoners after conviction as an aid to disposition, this is usually recognized as a judicial or administrative matter, which is out of the hands of the jury. It is usually not a question, therefore, of controversy, and for this reason, is not further explored here.

As we have seen, although there have been some fumbling attempts at improvement of legislation and at least one outstandingly successful one, notably the Briggs Law, the question next comes as to what can be done without legislation. After all, it is difficult to legislate morals and ethics, and no matter what qualifications are demanded or what legal provisions may be set up, parties will be tempted to utilize persons who are of inadequate qualifications or who are perhaps even on the verge of charlatanism and venality. In 1940, the Minnesota State Medical Association, together with the State Bar Association, established what has come to be known as the Minnesota Experiment.⁵² By setting up a form of self-policing, a committee on expert testimony is appointed by the State Medical Association, and any judge, attorney, or physician may make complaint in writing to this Committee if, in his opinion, any medical expert has knowingly and wilfully testified improperly. The Committee thereupon obtains the complete transcript of the testimony in the case, hears evidence from specialists in the field involved, and then takes whatever steps appear to be indicated. It has no disciplinary power in itself but, in some instances, it has reported cases to the State Board of Medical Examiners for possible action. This experiment certainly points the way to a practical cleaning up of the situation, so far as such cleaning up is called for. In fairness, it should be said that the instances of gross venality and incompetence in experts are sensational when they happen, but probably rare.

Mr. Lloyd Paul Stryker, in an address in 1928, discussed this matter at considerable length, pointing out the importance of the self-policing

51. See *Psychological Evaluation of the Mentally Abnormal Witness*, 59 YALE L. J. 1324 (1950).

52. HAMMES, E. M. *The Control of Medical Testimony*. MINN. MED. 28:111 (1945).

of the professions. He considered it important to clarify the right of the trial judge to decide the qualifications of the expert; this, indeed, seems to be one of the weakest points in the present system. He pointed out, however, that the ultimate remedy lies "in a better development of conscience on the part of the experts who testify against their opinion or advance questionable theories."⁵³ He pointed out, too, that the legal profession, as well as the judges, are not entirely immune from criticism, and that a higher standard of ethics in the selection of experts by contesting parties should be developed. One recognizes, of course, the temptations to which an advocate is subjected, as compared to the position of the expert, who, after all, does not have, or at least should not have, a direct interest in the outcome of the case but should be interested solely in presenting his honest opinion, so far as the rules of evidence and the tactics of lawyers will permit.

What of the possibilities for the future? The possibility of reforms of methods cannot be better indicated than in the summary offered by Henry Weihofen in his valuable recent article, previously referred to. He opposes the contingent fee; compensation should be paid to the expert without regard to whether he is to be called, and without regard to his diagnosis. Compensation paid or to be paid should be required to be disclosed if requested on cross-examination. No surprise expert witnesses should be permitted. Consultation between the experts retained by the opposing parties should be encouraged. The experts should, so far as is constitutionally permissible, be allowed to examine and observe the defendant to whatever extent may be necessary for proper diagnosis. Finally, the hypothetical question should be abolished. Many of these suggestions are not new, but they are all sound, and most of them do not require any legislation. From the point of view of the psychiatrist it would be highly desirable to consider it an unethical practice to enter a case unless it can be agreed that the examination will be a joint one with the experts representing the other party (or parties, in the case of the court-appointed expert). In another connection I once summed up the ideal in these words: "In legal proceedings he should be jealous of the prerogatives of the profession and appear always as an adviser rather than as an advocate, telling the truth as he sees it to the best of his ability, unmoved by the prospect of gain or fame. He should, in the legal field particularly, avoid so far as possible any controversies with his colleagues and seek opportunity for joint examination and report in contested cases."⁵⁴

53. STRYKER, LLOYD PAUL. *The Need of Legislation Bearing Upon the Question of Expert Testimony*. N. Y. ST. J. MED. 28:243 (1928).

54. OVERHOLSER, W. *Presidential Address* (Am. Psychiatric Assoc.) (AM. J. PSYCHIAT.

Perhaps ultimately we should look for what was proposed nearly a century ago by Francis Wharton,⁵⁵ namely, a disposition tribunal. He recommended then that the trial should "confine its inquiry to the mere factum of the commission of the offense; reserving the question of treatment to be determined by a special commission of experts." This is, of course, what was proposed in the legislation of the State of Washington which was overturned by the Strasburg Case, and it is quite likely that even today it would be held that a constitutional amendment would be necessary. If the question of the mental state of the offender could be made an administrative matter or something to be determined after the jury has determined that the offense was committed, the "battles of experts" would virtually cease. As it is, however, we should look to the development of practices on the part of the legal and medical professions which will, so far as possible, avoid not only bias and venality but the suspicion of them, and will provide for the presentation only of competent advisers to the court—the original function of the expert.

105: 1 (1948). See also, for advice to the expert, GROVE, W. E. *The Otolaryngologist Looks at the Law*. WISC. MED. J. 35:624 (1936).

55. WHARTON, F. A MONOGRAPH ON MENTAL UNSOUNDNESS. p. 227 Phila. 1855: Kay & Brother.