The Forensic Psychiatrist: Consultant versus Activist in Legal Doctrine

Bernard L. Diamond, MD

In the Middle Ages and the Renaissance, it was easy to know the public perception of every rank and occupation of society. The Dance of Death was a popular art form that showed in a series of cartoons each person, from king to peasant, from merchant to beggar, from judge to robber in the final rendezvous with Death, with his or her frailties, dishonesty, and hypocrisies mercilessly exposed. The most famous series is that of Holbein published in 1538.[1]

Holbein portrays the physician as impotent and helpless to cure the effects of age. "He holds out his hand to receive, for inspection, a urinal which Death presents to him, and which contains the water of a decrepit old man whom he introduces, and seems to say to the physician, 'Canst thou cure this man who is already in my power?'"[2]

The lawyer is portrayed thus: "The rich client is putting a fee into the hands of the dishonest lawyer. Death also contributes, but reminds him that his [hour] glass is run out. To this admonition he seems to pay little regard. Behind the lawyer is the poor suitor, wringing his hands, and lamenting that poverty disables him from coping with his wealthy adversary."[3]

Of course, there is no Dance of Death for the forensic psychiatrist, but I am sure that if public opinion was expressed in that art form today, he would be portrayed with the images of both Holbein's physician and lawyer: powerless to cure, ineffectual, dishonest, and greedy for money.

This is not a recent problem. In 1895, Mr. Justice Harlan, writing for the majority of the United States Supreme Court, said:

> It seems to us that undue stress is placed in some of the cases upon the fact that in prosecutions for murder the defense of insanity is frequently resorted to and is sustained by the evidence of ingenious experts whose theories are difficult to be met and overcome. Thus, it is said, crimes of the most atrocious character often go unpunished, and the public safety is thereby endangered.[4]

Originally presented at the Annual Meeting of the American Academy of Psychiatry and the Law in San Francisco, October 1989. Edited by Jacques M. Quen, M.D. and Robert Weinstock M.D. Address reprint requests to: Jacques M. Quen, M.D., 180 E. 79th St., New York, NY 10021.

What is new in recent years is the trend toward countering expert testimony not by the expert's examination of the person involved, but by attacking the basic scientific status of psychiatry itself. In a recent California criminal murder trial, the prosecution's expert did not examine the defendant. As reported in the appellate decision:

> The prosecution, on rebuttal, presented the testimony of Dr. Jay Ziskin, a clinical psychologist and also the holder of a law degree. Ziskin criticized the present techniques employed by other psychiatrists and psychologists for diagnosing mental illness. He noted that these professionals changed diagnostic definitions frequently, as evidenced by the Diagnostic and Statistical Manual of Mental Disorders, third edition. He noted that in a study concerning the prediction of dangerousness and violence, the participating psychiatrists were found to be nearly always wrong. He questioned whether any clinical psychologist or psychiatrist could assess an individual's present or past mental state. He testified also concerning the factors which might adversely affect an evaluator's accuracy in the forensic arena where a defendant is in custody and is facing a criminal trial.[5]

In another California trial, Dr. Thomas Szasz testified that the defendant could not have been mentally ill at the time of the crime because mental illness is a myth. He had not examined the defendant, a woman who had committed a bizarre murder. She was overtly psychotic and delusional and had previously been hospitalized for long periods of time for schizophrenia. Szasz testified that she was not mentally ill, but was morally depraved and deserved punishment. The defendant was convicted and sentenced to life imprisonment without possibility of parole. After the trial a juror was interviewed by the press and said that the jury believed Dr. Szasz, rather than the defense psychiatrists, because he had not talked with the defendant and thus had not been unduly influenced by her.[6]

To my recollection, the most prestigious scientific journal in the United States, *Science*, has published only two articles on forensic psychiatry—both extremely critical. The first, in 1973, was the notorious article by David Rosenhan, "On Being Sane in Insane Places."[7] Rosenhan had a number of subjects simulate mental illness in order to gain admission to mental hospitals. The simulations were not detected by any of the hospital staffs, and all the subjects were grossly misdiagnosed. Despite serious methodological problems with Rosenhan's research[8] (which practically invalidate his findings), his findings are still widely quoted and accepted as invalidating psychiatric evaluation and diagnostic methods.

The second article published in *Science* by David and Ziskin, two longstanding foes of psychiatric expertise, is an essay, rather than a report of research, and is the featured lead article in the July 1, 1988, issue.[9] The editor of Science focused attention on the article in a preliminary article in "This Week in Science" (p. 7) writing:

> Each year, psychologists and psychiatrists participate in a million or more legal proceedings; many studies show that their professional judgments are no more accurate than are those of nonprofessionals. Furthermore, the opinions of both "experts" and others are less accurate than information from actuarial data that address the same difficult predictions (such as, is the accused likely to be a threat to society?) or retrospections... Faust and Ziskin conclude

> that time and money are wasted on such "experts (although they could advise courts as to which cases might be addressed by certain actuarial data). These clinicians may actually interfere with the dispensing of justice, because a confident witness (whether accurate or not) can mislead a judge or jury.[10]

To some degree, the public image of all psychiatrists is linked to the "snake-pit" era of public hospitals. Lasting over a hundred years from the mid-nineteenth century to the mid-twentieth century, well-meaning physicians with the best of intentions were trapped in a system which provided utterly inhumane, even cruel, totally inappropriate treatment for mental patients. Even by the standards and clinical knowledge then current, the "snake-pit" treatment was harmful, wrong, and unethical.[11] Although the driving forces for such inhumane treatment were economic factors and the public fear and lack of understanding of the needs of the mentally ill, such depraved conditions could never have occurred if the medical profession had refused to participate under such conditions and restraints.

I believe that many of the problems with the public image of the psychiatrist is the consequence of this degraded, technician role that the psychiatrist has usually fulfilled in the service of society and the law. No other specialty of medicine has allowed itself to be degraded and perverted in its social role to the degree which has been true for psychiatry. No surgeon, except in the direst emergency, would be willing to perform a serious operation without anesthesia in unsterile conditions with rusty instruments. Yet the equivalent of this is how psychiatry was, and sometimes still is, practiced in the public hospital and clinic. It is not surprising that the public does not think well of us.

Part of the problem with our image is the universal belief that mental illness is easily faked and that doctors are consistently fooled by such deception. This belief is very ancient, going back to Biblical times. The first book of Samuel, Chapter 21 describes how David

> . . .was sore afraid of Achish, the king of Gath. And he changed his behavior before them, and feigned himself mad in their hands, and scrabbled on the doors of the gate, and let his spittle fall down upon his beard.

The earliest statute in English law dealing with competency to stand trial was passed in the 33rd year of the reign of Henry VIII (1542). Entitled "An act for due process to be had in high treasons, in cases of lunacy or madness." it complains that:

> In as muche as sometyme some personnes beinge accused of hyghe treasons, have after they have benne examined before kinges majesties counsayle, confessed theyr offences of hyghe treason, and yet never the lesse after the doynge of theyr treasons, and examinations and confessions therof, as afore saide, haue fallen to madnes or lunacye, wherby the condygne punishemente of theyr treasons, were they never soo notable and detestable, hath been deferred spared and delayed, and whether their madness or lunacy by them outwardly shewed, were of trouth or falsely contrived and counterfayted, it is a thinge almost impossible certainely to judge or try. Be it therefore enacted by authoritie of this present parliament, to avoide al sinister counterfeit and false practices and ymaginations that may be used for excuse of punishement of high treasons, in suche cases where they be done or committed by any person or persons of good perfect and hole memory at the time of suche their offences. . . .

The statute then goes on to prescribe trial *in absentia* for such cases, without regard for their mental condition.[12] Upon the death of Henry VIII, this statute was repealed. I suspect the American public, today, would welcome such trials *in absentia.* Despite the absence of evidence to support the belief in the prevalence of malingering of insanity, this obsessive fear of malingering dominates the legal system of today.

Judge David Bazelon in 1967 appended to a District of Columbia appellate decision his idea of the proper function of the psychiatric expert. In this model "Court's Instruction to Expert Witness in Cases Involving the 'Insanity Defense.'" he wrote:

> Dr. _____, this instruction is being given to you in advance of your testimony as an expert witness, in order to avoid confusion or misunderstanding. The instruction is not only for your guidance, but also for the guidance of counsel and the jury. . .
> . . .[I]t must be emphasized that you are to give your expert diagnosis of the defendant's mental condition. This word of caution is especially important if you give an opinion as to whether or not the defendant suffered from a "mental disease or defect" because the clinical diagnostic meaning of this term may be different than its legal meaning. You should not be concerned with its legal meaning. Neither should you consider whether you think this defendant should be found guilty or responsible for the alleged crime. . . .[13]

Although Judge Bazelon's instructions contain much good advice for the psychiatric expert with which I would agree, at the risk of being unfair to Judge Bazelon, I wish to focus only on the two points I have quoted: one, that the law may redefine psychiatric terms and concepts any way it pleases; and two, the psychiatrist is to have no concern or interest in the way the law uses his testimony in determining the outcome of the case. This brings us to the heart of my topic: What is, or should be, the role of the psychiatrist in the service of the law?

There has been much talk in recent years of the contractual relationship of psychiatrist to patient. In the spirit of the therapeutic community[14] and to avoid the intimidating authority of the traditional physician, many psychiatrists attempt to relate to their psychotherapeutic patients on a simple contractual basis. The psychiatrist contracts to do certain things for the benefit of the patient, and in turn the patient agrees to do certain things. The relationship is defined as egalitarian, nonauthoritarian, noncontrolling, each being responsible for only those contractual obligations. No further obligations are implied.

The idea is attractive, and perhaps helpful in some cases. Unfortunately, the psychiatrist-patient relationship can never be based on a simple contract. The legal responsibility of the psychiatrist, like that of all physicians, is based upon what the law terms a "fiduciary contract." Ballentine's Law Dictionary defines a fiduciary contract as:

> A contract which embraces trust and confidence reposed by one party in the other, refers to the integrity and fidelity of the party trusted rather than his credit or ability, and contemplates good faith rather than legal obligation.[15]

In a recent informed consent suit, the California Supreme Court in discussing the "fiducial qualities"[16] of the physician-patient relationship stated:

> . . .[T]he patient, being unlearned in medical sciences, has an abject dependence upon and trust in his physician for the information upon which he relies during the decisional process, thus raising an obligation in the physician that transcends arm's-length transactions.[17]

A used-car salesman can contract to sell a customer a car which is totally unsuitable for his needs, and need take no responsibility for the subsequent dissatisfaction of the buyer. The dealer need only refrain from fraudulent or deceitful practices. The professional, such as a psychiatrist, is obligated to resist the demands of his patients for inappropriate or harmful treatment. Although the patient has the right to decide whether he will accept a given treatment or procedure, the doctor has the obligation to refuse to administer a treatment he believes in his professional judgment to be improper, inappropriate, or unwise for his patient. This is the essence of fiducial responsibility. The professional does only that which, in his professional judgment, he believes is best for his patient. He cannot force his recommended treatment on the patient, for the patient retains all rights of informed consent. But he must not administer improper treatment just because the patient demands it.

I am here recommending that the relationship between psychiatry and the law be defined as fiducial. The psychiatrist is no mere technician to be used by the law, as the law sees fit, nor is the science, art, and definitions of psychiatry and psychology to be redefined and manipulated by the law as it wishes. The psychiatric expert does not enter into a simple contract with the law to deliver useful information regardless of the consequences. To follow Judge Bazelon's instructions, as quoted above, is to deprive the psychiatrist of his professional status and degrade him to the contractual level of the used-car salesman.

I believe that in all cases, the forensic psychiatrist must insist upon full disclosure of the uses to which his testimony is to be put and the ultimate consequences arising from it. If such use and consequences would be contrary to the professional and/or ethical judgment of the expert, he should refuse to participate.

For the application of this fiducial responsibility, the psychiatric expert must make an ethical judgment about the uses to which his testimony will be applied. Obviously, he cannot force his ethical judgments upon the law, anymore than a physician has the right to force his treatment program on a competent patient. But the psychiatrist does have the right not to participate in any legal process which offends his ethical and professional values.

At first, such fiducial responsibility can only be formulated and enforced by individuals acting for and by themselves in particular cases. But as consensus on ethical and moral issues is achieved, it should be possible for organizations, such as AAPL and the American Board of Forensic Psychiatry to promulgate formal ethical standards which would be enforceable on their members and set a standard, even though unenforceable, for their nonmembers. Great care must be taken that any such standards are truly fiducial—that is, for the benefit of

the law, justice, and society, and not primarily for the self-interest and public relations of the psychiatrist. In my opinion certain of the recommendations and policies of the American Psychiatric Association on issues of criminal responsibility since the notorious Hinckley trial have little to do with legal reform but were motivated primarily to improve the public image of the psychiatrist and allow him to ride the bandwagon of populist, reactionary demands of law-and-order politicians.

For the psychiatrist to be accepted by the law in a professional fiducial role, and thus to have influence on the development of the law, requires that there be a consistently higher quality of expert testimony than now exists. Much of the criticism and contempt for forensic psychiatry is fully justified.

The "hired gun" must be eliminated. This does not mean that the psychiatrist can cling to an idealized image of the expert who is impartial, detached, scientifically objective and who functions outside the adversarial system. This is an illusion. Few are deceived by such a posture, but many experts still claim such an objective role, giving evidence without prejudice, bias, or advocacy, uninvolved in the adversarial system, beholden to neither side, retaining their purity and detachment despite their immersion in the dirty work of courtroom reality. For 30 years I have persistently tried to deflate such a notion and expose the hidden biases and phony status behind the idea of the impartial expert.[18] Until recently, I have never had much success, but now that the United States Supreme Court, in *Ake v. Oklahoma*,[19] has endorsed such advocacy and adversarial roles for the psychiatric expert, perhaps my colleagues will also see the light.

The psychiatrist can be an advocate and fully engaged in the adversarial process and still be honest and not a "hired gun." This requires that there not be deception by either omission or inclusion of information. If the psychiatrist cannot tell the whole story, he should stay off the witness stand. He must not leave it up to the attorneys of either side to manipulate or otherwise control the content of his testimony. He must clearly distinguish between his own idiosyncratic views and that of the scientific community. He must not claim as scientifically valid published research and theories that have not been replicated by others and that are not accepted by the relevant community of researchers. He must not assert unproven and untested hypotheses, published or not, to be clinical truths and clinical facts. Except in those situations where it is impossible, as when the subject of the litigation is dead, the expert should not testify as to the mental state or psychological characteristics of persons whom he has not personally examined. Such examinations must conform to generally accepted clinical standards, both as to content and length. The confidence level of the expert's opinion should always be expressed. Exaggerated assertions of confidence must be avoided.

The psychiatrist does not make legal decisions and he must not usurp the functions of the judge, attorneys, or jury.

But he does have a stake in the use to which his expertise is put and in the outcome of the case. If that use and the probable outcome is not in harmony with his personal and professional values he should not participate in the case. Under no circumstances should he participate and falsify his testimony by omission or inclusion in order to advance his own political, social, religious, professional, or other personal values.

To deserve the trust and confidence inherent in a fiduciary professional role requires that the psychiatric expert be willing to perform *pro bono* work. Significant reforms of the law rarely arise out of sensational cases of wealthy defendants. To achieve reforms and develop new adaptations of the law requires participation in cases in which unresolved conflicts over legal theory and social justice are at issue. More often than not, these are financially unrewarding cases involving heavy expenditures of time and energy and unfavorable publicity for both attorney and psychiatrist.

Good psychiatric testimony may have an important educational function for the courts. It has been my good fortune to have publications of mine cited in many appellate decisions, but the one citation which has pleased me the most and which I consider did me the greatest honor was a short statement in a footnote to a 1962 California District Court of Appeal case in which neither I nor any publications or theories of mine were involved. The appellate decision lashed out against the psychiatric testimony of both the defense and the prosecution, stating that neither expert provided any relevant information for the jury to consider, but simply presented conclusions as if they were instructing the jury to bring in the verdict they favored. The appended footnote stated, "Compare the testimony in this case with that of Dr. Diamond in *People v. Gorshen...*" [an unrelated case in which I had testified in another court].[20]

Performing a fiduciary function for the law does not mean that the forensic psychiatrist always does what is good for psychiatry and medicine. Rather, it means doing what is deemed best for the law, justice, and society and avoiding that which is deemed harmful. Should not lawyers be the judge of what is best for the law? Should not legislators, and ultimately the people, be the judge of what is best for society? Certainly lawyers, legislators, and voters, like the physician's patients, have the power of informed consent. It is up to them to decide which policies advocated by psychiatry and mental health experts are to be accepted. But they are not always the best judge of what is appropriate, possible, or desirable. They make ceaseless demands for applications of psychiatry and psychology to the law which are frequently inappropriate, impossible, and highly undesirable. It has been the psychiatrist's willing compliance with these irrational demands which is at the root of the past and current problems of the relationship of psychiatry and law.

It is easy to deplore such compliance when it is expressed by the pseudoscientific "hired gun" on the witness stand. It is more difficult to regret it when the compliance is presented in erudite and

scholarly form as in the publications of the late Seymour Pollack.

I have discussed and criticized Pollack's view of the role of psychiatry in the service of the law in a previous article,[21] so I will not repeat the arguments here other than to say that Pollack presented a coherent and logical view of the role of psychiatry in law in which not only must the psychiatric expert witness comply with the rules of law, but the concepts, theories, and even the established facts of psychiatry must also be subjected to redefinition and manipulation in accordance with legal demand. Thus, the criteria for defining what is and what is not a mental illness as well as the threshold of psychopathology which determines the legitimacy of a diagnosis are to be made by legal, rather than medical, standards.[22] However, I believe Pollack, though well intended, was dead wrong. It is the prerogative of the law to decide whether to accept certain conditions as exculpatory, or even relevant, to issues of responsibility. But law does not have the knowledge or the right to decide what is or is not mental illness,[23] nor does it have the right to juggle the level of psychopathology which justifies the application of a given diagnostic label. Only clinical theory, knowledge, and experience can contribute to these functions.

How does one know what is good for the law? Clearly, the value judgments required are much more complex than the ordinary fiducial responsibilities toward our patients. Further, I readily admit that the forensic psychiatrist often lacks the necessary expertise to make such judgments. But, at least in the limited area in which the law and psychiatry impact, it is possible for the psychiatrist (and I believe mandatory for the psychiatrist) to acquire the necessary knowledge. And this he must do, if he is to exercise this responsibility.

Just as one cannot determine what is best for one's patients solely upon medical facts, disregarding their social, cultural, economic, and personal backgrounds, so one cannot exercise a fiduciary responsibility to the law without a reasonable comprehension of the nature of law, its functions in society, its value systems, and most of all its basic principles as they have developed throughout history.[24]

Anglo-American law and the administration of justice is a peculiar amalgam of historical tradition, moral concepts derived from Judeo-Christian religion, varied economic and social forces, political exploitation of populist fears and demands, and upon irrational policies based on trivial events of history. Critical to its development was the idiosyncratic relationship of King Henry VIII to his many wives. Because the Pope, in Rome, refused to authorize his divorces and remarriages, Henry VIII determined to establish a legal system in England which would be distinct from the Justinian Code system used throughout Europe, thereby freeing both him and the English church from papal subservience. The result was the English common law. Because it is always difficult for people to accept new systems of law, Henry VIII's legal scholars cleverly claimed that the common law (i.e., judge-made law)

had always been the law of England, at least from the thirteenth century, and that England was simply returning to its true legal heritage. Whether this claim was valid is still a matter of academic debate. Nevertheless, through subsequent historical and political events, England developed a most peculiar tripartite system of law.

In countries dominated by the Justinian Code (and later, the Napoleonic Code) law tended to be monolithic. Whoever was in political control, be it monarch, pope, parliament, or dictator, made the law. It was written down in a book, called a *Code*, and the responsibility of judges was to enforce the law as written. Code law countries tend to be politically unstable, because with a change in political control, large portions of the entire body of law can quickly be altered.

The tripartite system of England, however, resulted in three lawmaking agencies: the King, Parliament, and the Judges. Evolution of the law now became a complex, dynamic process in which the constantly changing interactions of three different political power groups resulted in compromise policies.

Because of America's English heritage, this system became ours and evolved into the system of checks and balances between our Executive, Legislative, and Judicial branches of government. So we have administrative law made by Presidents, Governors, and executive agencies; legislative law by Congress and state and local legislative bodies; and judge-made law by judicial review. In the twentieth century, in some states, such as California, a fourth lawmaking agency has been established: the vote of the people by initiative and referendum. To add to the confusion, in the United States all law must conform to the Constitution, an admirable policy document of great wisdom, but hopelessly vague and unclear about some matters of great importance.

It is not surprising that it is sometimes exceedingly difficult to know what the law is, let alone what it should be. The dominance of the law (and hence, the political body) by any one power group is made very difficult, if not impossible, resulting in great political stability compared with European code law countries. But the price for this stability is high: inefficiency, often ineffectiveness, confusion concerning basic principles, and an abundance of lawyers. Some also would include in the excessive price an abundance of forensic psychiatrists and psychologists.

But the cost in efficiency and confusion is not too high considering the benefits to the individual of political, social, economic, religious, and psychological freedom. In short, American law is an inefficient, often ineffective, incredibly cumbersome and outrageous system which is very difficult to improve. Laws are constantly made and unmade by power groups who seldom comprehend the actual, as against the intended, consequences of the revisions. Thus, demands by the law are often made for psychiatric expertise which are contrary to the basic principles of justice and which cater to popular fears and expedient solutions.

For example, one of the most fundamental principles of criminal justice is that an act alone does not constitute a crime. To be held criminally responsible, the offender must possess a guilty mind–the *mens rea*—which establishes his blameworthiness. This is the logic behind the insanity defense. If the criminal act is a result of mental disease for which the offender is not to blame, then he cannot be held responsible for the crime—for he is not blameworthy.

The opposite of *mens rea* law is strict liability, where persons are held criminally responsible for their deeds alone, regardless of their mental state or their blameworthiness. In the name of expediency, many attempts have been made to introduce strict liability laws into our justice system. Some attempts have been successful and there are a very few strict liability crimes in penal codes.[25] The United States Supreme Court has frequently overturned convictions and declared statutes unconstitutional because of the lack of a required *mens rea*,[26] but strangely enough, the Supreme Court has refused to establish this as a necessary element for all crimes.[27] As a result, the pressure for increasing the number of strict liability crimes continues, thus eliminating the psychological element of blameworthiness. Such a system of strict liability in my opinion is fit only for totalitarian societies, yet some psychiatrists seem quite willing to cooperate with such regressive trends.

A second fundamental principle is that persons are punishable only for deeds they have done, and not for acts they might do in the future. Public fears create strong pressures to do the expedient and devise a system of preventive punishment. Because this cannot be done under the criminal law, systems of preventive punishment are sometimes disguised as mental health treatment and psychiatrists are co-opted into punitive roles which are prohibited for the criminal justice system. Such practices may sometimes prevent harm to potential victims, but they are hardly compatible with a democratic society.

Many other examples, in both criminal and civil law, could be given, but these two demonstrate what I mean. Obviously, the psychiatrist must make a value judgment as to what is good for the law, just as he must make a value judgment as to what is good for his patients. However, he must also fully understand the principles of law which he supports or opposes. Physicians, including psychiatrists, tend to be impatient with the inefficiency of the law, and so they advocate changes in procedure which they do not realize would drastically violate constitutional rights as well as basic common law principles.[28]

I wish to make it very clear that I am advocating only a very limited exercise of fiducial responsibility. A fiducial relationship implies that the professional possesses superior knowledge and experience and so is qualified to exercise that responsibility. Psychiatrists have no business making value judgments about aspects of the law they neither comprehend nor appreciate in the social and historical context of the law. Psychiatrists, being physicians, possess a medi-

cal expertise, not a legal expertise, but they can surely acquire sufficient knowledge of the law to take responsibility for the application of their medical skills and knowledge to the law, and resist all applications which are in opposition to fundamental principles of justice and to the spirit of humanity inherent in all of medicine. To do otherwise is to degrade your status from professional to technician, from qualified expert to "hired gun." In the dynamic struggle of the law in which there is oscillation between historical principle and political expediency, the forensic psychiatrist must choose which side he is on.

I do not know how typical my experience has been, but in recent years it has seemed to me that there has been a marked increase in a type of procedure in which the psychiatrist can be of great fiducial value for the law. This is the *ad limine* (at the threshold) hearing in which issues of the validity and appropriateness of evidence can be considered and ruled upon before the start of a trial. Because no jury is present, procedural rules can be less rigid and full discussion, including presentation of scientific and clinical literature, can be achieved. Such hearings are often conducted in accordance with the so-called *Frye* test for scientific evidence. In the 1923 decision in *Frye v. United States the District of Columbia Court of Appeals* denied admission of evidence derived from an early version of the lie detector. The court said:

> Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.[29]

Examples of such *ad limine* hearings in which I participated were a number on the unreliability of evidence given by subjects who had been hypnotized, several on the unreliability of predictions of dangerousness, and one on the misuse of psychoanalytic theory as evidence in a civil suit involving corporate business practices.[30] In all but one or two of the hearings the judge was keenly interested in the scientific and clinical issues and directly questioned me and the other expert witnesses at great length.

The *Frye* test is not used in all states and apparently is not required by the United States Supreme Court, judging by the Texas "Dr. Death" cases.[31] Nevertheless, such evidentiary hearings can be very useful in providing a means for discussion of the scientific reliability, validity, abuse, misuse, and inappropriate applications of scientific evidence.

Amicus appellate briefs are a powerful means of communicating scientific information to the courts and influencing the development of the law, especially when submitted by professional organizations. Such briefs can clarify the scientific status of both old and new types of expert evidence, and can caution against the misapplication and inappropriate use of such evidence. If the views presented are adopted by the appellate

courts, and obviously they are not always accepted they become an important influence on the further development of the law.

Scholarly publications in scientific, professional, and legal journals are often relied upon by appellate courts. Even when not offered in evidence and not presented in briefs, the courts may go directly to the literature to provide a foundation for their decisions. In the landmark decision, *Brown v. Board of Education*,[32] the Supreme Court directly referred to sociological publications which established that separate education for black children could not also be equal. In 1982, the California Supreme Court ruled that witnesses whose memory had been enhanced by hypnosis must be excluded from criminal trials because of the high probability of confabulation and contamination.[33] The court relied almost entirely on its own review of the scientific literature on hypnosis. I particularly urge that psychiatrists publish articles in law reviews and law journals for that greatly increases the likelihood that your ideas will be considered by legal authorities.

Sometimes there is a substantial delay before the appellate courts pick up on one's recommendations, so one must have patience. In a 1962 law review article,[34] I criticized the restrictive clause of the ALI Model Penal Code rule of criminal responsibility, which prohibits a condition manifested only by criminal or antisocial behavior from being considered a mental disease or defect for purposes of the insanity defense. I asserted that this clause was discriminatory against poor defendants in that wealthy defendants could hire experts who by spending a great deal of time on examinations in depth could always legitimately find evidence of psychopathology that would be more than criminal or antisocial behavior. But poor defendants, subject to cursory, superficial psychiatric examinations would be dismissed as not mentally ill. No one paid any attention to this until eight years later when the Ninth Circuit Court of Appeals adopted the ALI rule of insanity it specifically rejected the restrictive clause because of its discriminatory nature and cited my article as authority for that.[35] So you have to be really patient, indeed!

I am convinced that it is possible to practice good psychiatry in relation to the law, and to be a significant influence on the development of law in line with the humanitarian and ethical values of traditional medicine. The legal system can be influenced by expert testimony, by scholarly writings on research and policy, by teaching in the classroom, and most importantly by example.

Psychiatry has had less control over its own practice than any other medical specialty. Of psychiatric subspecialties, forensic psychiatry has permitted itself to be misused, abused, and perverted to a disgraceful degree, and its low public image is well deserved. I am suggesting how that image might be improved within the humanitarian tradition of medical responsibility. It just may turn out to be good for the law, as well.

In closing, one must ask does all this make economic sense for the forensic

psychiatrist? Probably not. It probably means that forensic work should not be the sole source of income for a psychiatrist. To refuse to be manipulated by the attorneys who are paying your bill, and to reject cases because their potential does not meet one's ethical standards is not conducive to a successful forensic practice. It is only too easy to slip into the "hired gun" role when your family's economic welfare is at stake. The honest and responsible forensic psychiatrist requires some type of subsidy, so that he is always able to pick and choose his cases independently of his financial needs. In the current American world of law and psychiatry I do not believe it is possible to be incorruptible and also earn a decent living from forensic psychiatry. So I caution against the full-time private practice of forensic psychiatry. A combination of a more general psychiatric practice with part-time forensic work seems to work out if one can manage the difficult problems of scheduling. Employment in a clinic, mental health facility, or government agency may be satisfactory if one is not restricted by bureaucratic policies. Academia, preferably with tenure, provides the ideal subsidy. But if feeding your children is contingent upon the goodwill of trial lawyers, you are in deep trouble.

References

1. Reprinted as Holbein's Dance of Death and Bible woodcuts. New York, The Sylvan Press, 1947
2. *Id.* Plate XXVI, p. 26
3. *Id.* Plate XIX, p. 19
4. Davis v. United States, 160 U.S. 469, at 492, 16 S.Ct. 353 (1895)
5. People v. Rosenkrantz, 198 Cal. App.3d 1187, at 1199, 244 Cal. Rptr. 403 (1988); Jay Ziskin is the coauthor of *Coping with Psychiatric and Psychological Testimony* (ed 4), Marina del Rey, CA, Law and Psychology Press, 1988); the book is a well-documented, scathing denunciation of psychiatric and psychological expert testimony, and is widely used by prosecutors
6. Alameda Co. Trial
7. Rosenhan D: On being sane in insane places. Science 179:250–8, 1973
8. See for critiques of the Rosenhan article: Spitzer RL: On pseudoscience in science, logic in remission, and psychiatric diagnosis: a critique of Rosenhan's "On being sane in insane places." J Abnorm Psychol 84:442–52, 1975; Wallerstein RS: Discussion of Rosenhan's "On being sane in insane places." Bull Menninger Clin 37:526–30, 1973; Wolitsky D: Insane versus feigned insanity: a reply to Dr. D. L. Rosenhan. J Psychiatry Law 1:463–73, 1973
9. Faust D, Ziskin J: The expert witness in psychology and psychiatry. Science 241:31–5, 1988; see also letter of protest from the president of the American Psychological Association and response of authors, Science 241:1143, 1988
10. Editorial. Science 241:7, 1988
11. It is important to note that exposure and denunciation of the "snake-pit" institution did not result from any leadership of the medical profession; rather, it was a consequence of the persistence of dedicated lay persons, such as the teacher Dorothea Dix in the nineteenth century and the journalist Albert Deutsch in the twentieth century
12. 33 Henry VIII, Ch. xx
13. Washington v. United States, 390 F.2d 444, at 457 (D.C. Cir. 1967)
14. As proposed by Maxwell Jones in The Therapeutic Community, New Haven, CT, Yale University Press, 1953
15. Ballentine's Law Dictionary (ed 3). Edited by Anderson WS. Rochester, NY, Lawyers Co-Operative Publishing Co., 1969, p 470
16. Cobbs v. Grant, 8 Cal.3d 229, at 246; 104 Cal. Rptr. 505 (1972)
17. *Id.* at 242
18. Diamond BL, The fallacy of the impartial expert. Arch Criminal Psychodynamics 3:221–36, 1959; The psychiatrist as advocate. J Psychiatry Law 1:5–12, 1973
19. Ake v. Oklahoma, 470 U.S. 68; 105 S.Ct. 1087 (1985)
20. People v. Williams, 200 Cal. App.2d 838, at fn. 3, 19 Cal. Rptr. 743 (1962)

21. Diamond BL: Reasonable medical certainty, diagnostic thresholds, and definitions of mental illness in the legal context. Bull Am Acad Psychiatry Law 13:121–8, 1985
22. The relevant citations to Pollack's publications are given in my article, supra note 21
23. Recall the debate over the so-called "Caveat" clause of the Model Penal Code definition of insanity that in effect excluded personality disorders from consideration as mental illness. See Freedman LZ, Guttmacher M, Overholser W: Mental disease or defect excluding responsibility: a psychiatric view of the American Law Institute: Model Penal Code Proposal. Am J Psychiatry 118:32–4, 1961; see also footnotes 31 and 32 infra
24. Attending law school is not necessarily the best way of obtaining such an understanding; all too many lawyers fail to acquire such knowledge
25. For example, possession of an unlicensed automatic weapon; such possession is a crime, even if the owner did not know that the weapon was automatic
26. For example, Lambert v. California, 355 U.S. 225; 78 S.Ct. 240 (1957)
27. United States v. Balint, 258 U.S. 250: 42 S.Ct. 301 (1922); Morissette v. United States, 342 U.S. 246; 72 S.Ct. 240 (1952). For limitations on non *mens rea* crimes see United States v. United States Gypsum Co., 438 U.S. 422; 98 S.Ct. 2864 (1978)
28. For example, physicians often recommend that lay jurors decide only that a defendant has committed the criminal act, but that issues of mental state, insanity, and responsibility, etc. be decided by a panel of experts; they fail to realize that these issues are intrinsic to the verdict of guilt and must be left to the lay juror; to change this is to destroy the constitutional right to a jury trial
29. Frye v. United States, 293 F. 1013, at 1014 (D.C. Circ. 1923); for an excellent recent discussion of the *Frye* test see Black B: Evolving legal standards for the admissibility of scientific evidence. Science 239:1508–12, 1988
30. This case involved a Harvard Professor of Business Administration who, strangely enough, had had psychoanalytic training and was making outrageous Freudian deductions from little or no evidence; I testified, in opposition, that such applications of psychoanalysis were not well established in the psychoanalytic community and the judge barred this Harvard professor from testifying
31. In Barefoot v. Estelle, 463 U.S. 880, 103 S.Ct. 3383 (1983), the Court accepted expert testimony on prediction of dangerousness to justify the death penalty despite overwhelming scientific evidence of the unreliability of such predictions
32. Brown v. Board of Education, 347 U.S. 483 (1954)
33. People v. Shirley, 31 Cal.3d 18, 181 Cal. Rptr. 243 (1982)
34. Diamond BL: From *M'Naughten* to *Currens*, and beyond. Cal L Rev 50:189–205, 1962
35. Wade v. United States, 426 F.2d 64, at 72 (1970)