

# Perceptions of Psychiatric Testimony: A Historical Perspective on the Hysterical Invective

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**This paper discusses the perceptions of psychiatric testimony by the public, lawyers, and psychiatrists. Five major criticisms are put into historical perspective: psychiatrists excuse sin; psychiatrists always disagree; psychiatrists give confusing, subjective, uninformed, jargon-ridden testimony; psychiatrists dictate the law; psychiatrists give conclusory opinions. Proposed solutions to these criticisms are analyzed.**

The testimony of psychiatrists has been more severely criticized than that of any other profession.<sup>1</sup> This paper will discuss perceptions of psychiatric testimony by the public, legalists, and the medical profession. The major criticisms of psychiatric testimony will then be put into a historical perspective, and possible solutions to these criticisms will be discussed.

One to two weeks after John Hinckley's insanity verdict, a survey showed that 40 percent of the public, if they had been jurors in the Hinckley trial, would have had no confidence in the psychiatric testimony; another 20 percent would have had only slight confidence.<sup>2</sup>

Table 1 shows how likely potential jurors would be to agree with the testimony of different experts. Medical doctors are ranked well above psychiatrists.<sup>3</sup> Potential jurors' opinions were found to be highly correlated with their perceptions of the witnesses' honesty and competence. Table 2 summarizes the amount and quality of the subjects' previous out-of-court contact with the different types of witnesses. Contact with medical doctors was far more frequent and positive than that with psychiatrists. The quality of out-of-court contact with members of a profession was highly correlated with willingness to accept the opinion of an expert witness in court.<sup>3</sup>

One reason for psychiatrists' lack of credibility in court is the fact that psychiatry is held in less regard than other medical specialties.<sup>4</sup> According to a 1972 survey, 48% of the American public had a great deal of confidence in medicine, but only 31% had that degree of confi-

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**Table 1**  
**Ratings of Witnesses\***

Witness Category	Likely to Agree with
Medical doctor	8.13
Firearms expert	7.62
Psychiatrist	6.44
Eyewitness	6.41
Psychologist	6.28
Police officer	6.19
Polygraph expert	5.55

\* Table modified from data of Saks and Wissler.<sup>3</sup>

**Table 2**  
**Relationship of Amount and Quality of Contact with Experts out of Court with Ratings of In-Court Agreement with Experts\***

Witness Category	Personal Contact	Positive: Negative Contact
Medical doctor	99%	10.1:1
Firearms expert	16%	15.0:1
Psychiatrist	35%	2.5:1
Eyewitness	18%	3.5:1
Psychologist	35%	1.9:1
Police officer	91%	2.8:1
Polygraph expert	15%	2.0:1

\* Table modified from data of Saks and Wissler.<sup>3</sup>

dence in psychiatry.<sup>5</sup> A Canadian survey showed that physicians were rated high in honesty and ethical standards 60% of the time; psychiatrists were rated high only 28% of the time, only two percentage points above lawyers.<sup>6</sup> The low credibility of psychiatry in general may be partially due to the public's skepticism about psychiatric testimony.

The hostility and skepticism of the press toward psychiatric testimony has changed very little in the past century.<sup>7</sup> Columnist George Will recently said, "Psychiatry as practiced by some of today's itinerant experts-for-hire is this century's alchemy. No, that is unfair to alchemists, who are confused but honest

chemists. Some of today's rent-a-psychiatry is charlatanism laced with cynicism. Much psychiatry is ideology masquerading as medicine."<sup>8</sup>

Judges have often been critical of psychiatric testimony.<sup>9,10</sup> Some of the kinder comments refer to psychiatry as a new or inexact science.<sup>11,12</sup> A survey of Southern California Industrial Accident Commissioners and Referees showed that they viewed psychiatrists' reports as less valuable, less understandable, more mysterious, less honest, more subjective, more complicated, and more unscientific than those of other specialists.<sup>13</sup>

Psychiatrists themselves have been among the severest critics of psychiatric testimony.<sup>14,15</sup> Stone asserts that forensic psychiatrists are without any clear guidelines as to what is proper and ethical.<sup>16</sup> Perr wrote, "As a student of the interaction between medicine and law, I have become increasingly disenchanted with physicians who sell not their bodies but their minds, sometimes with great fervor and righteousness, in the brothels of the law . . . (This) occurs in an environment in which legal journals advertise 'expert testimony' for sale."<sup>17</sup>

### History of Psychiatric Testimony

The first recorded example of psychiatric testimony in a criminal insanity trial occurred in the 1760 Ferrers trial.<sup>18</sup> Dr. John Monro, of Bethlem Hospital, did not testify about the specific defendant, but served as a consultant to the court about lunacy itself.<sup>19</sup> In 1758, Dr. Monro was criticized for allowing spectators to visit Bethlem "like a zoo" but

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not allowing medical students.<sup>19</sup> Dr. Edward Monro, the fourth generation of Monros to serve as superintendents of Bethlem Hospital, was the leading defense psychiatrist in the 1843 McNaughtan Trial. Two of the four Monros were forced to resign due to scandal, one because of excessive use of restraints. One patient was unable to turn over for nine years because of a 28-pound head iron.<sup>20</sup>

When the 13 founders of the American Psychiatric Association (APA) gathered at their first scientific meeting in 1844, the medical jurisprudence of insanity was one of the important topics.<sup>21</sup> Quen<sup>22</sup> estimates that forensic matters occupied up to 20% of asylum psychiatrists' time. In a case that included testimony from three of the 13 APA founders, the judge told the jury, "The opinions of professional men on a question of this description are competent evidence, and in many cases are entitled to great consideration and respect."<sup>23</sup> At that time, the law and the newly born specialty of psychiatry treated each other with considerable respect. The heat of reciprocal fault finding did not come until later.<sup>21</sup>

In 1927, the American Bar Association (ABA), the APA, and the American Medical Association (AMA) agreed that a psychiatrist should be available to every court and that a psychiatric report should be made before sentencing any felon. This degree of cooperation with psychiatry has not been duplicated since.<sup>24</sup>

In 1985, the United States Supreme Court in *Ake v. Oklahoma* commented

upon the "pivotal role that psychiatry has come to play in criminal proceedings. (W)hen the state has made the defendant's mental condition relevant, the assistance of a psychiatrist may well be crucial."<sup>25</sup>

## Criticisms of Psychiatric Testimony

The historical criticisms of psychiatric testimony will be divided into five major categories:

- I. Psychiatrists excuse sin.
- II. Psychiatrists always disagree.
- III. Psychiatrists give confusing, subjective, uninformed, jargon-ridden testimony.
- IV. Psychiatrists dictate the law.
- V. Psychiatrists give conclusory opinions.

**I. *Psychiatrists Excuse Sin*** The harshest criticism of psychiatrists occurs when they are perceived as a threat to public security and a "fancy means for getting criminals off."<sup>26</sup> The extraordinary publicity given to insanity trials is the basis upon which a substantial segment of the public forms opinions about psychiatry. Moran observed, "No other defense has been so often denounced or so routinely criticized as the insanity defense. The public believes that it allows the guilty to escape the stern hand of justice; and that it does not sufficiently protect society from the wrath of criminal madmen."<sup>27</sup> The following poem was widely published after McNaughtan's acquittal:

Ye people of England! exult and be glad  
For ye're now at the will of the merciless mad.  
They're a privileg'd class, whom no statute  
controls  
And their murderous charter exists in their  
souls.  
Do they wish to spill blood—they have only to  
play

A few pranks—get asylum'd a month and a day  
 Then heigh! to escape from the mad doctor's keys,  
 And to pistol or stab whomsoever they please.<sup>28</sup>

The vicious attacks on psychiatry that are made after a major insanity acquittal are actually criticisms of the philosophical role of psychiatrists in criminal trials. The risk that moral judgments may be cloaked in scientific clothing has been a longstanding concern. Halleck noted, "The psychiatrist is the only expert witness who is asked to form opinions as to man's responsibility and man's punishability."<sup>29</sup>

The issue of psychiatrists excusing sin was a concern even before the McNaughtan trial. Haslam, apothecary to Bethlem Hospital from 1795 to 1816, advised psychiatrists "not to palm on the court the trash of medical hypothesis as the apology for crime. . . ."<sup>30</sup> An editorial after the McNaughtan acquittal stated, "We believe . . . that an overindulged . . . passion, exercises . . . an irresistible control over him who yields to it; and when . . . the passion is evil it suggests the wildest delusions, as well as the most disgusting and atrocious acts; but this is not madness, it is depravity; and it is to cut off this that the sword of the law is appointed."<sup>31</sup>

After the McNaughtan trial, an outraged citizen published a 99-verse poem, entitled "Monomania", under the pseudonym, Dry Nurse. The following verse addresses the doctor's role in accomplishing the "insanity hoax":

Doctors were not subpoena'd, to shield a knave  
 From common justice, righteous retribution—

By flimsy, barefaced artifice, to save  
 A brutal murderer from execution—  
 To prove him mad, by theories, too wild,  
 Too weak, too silly, to deceive a child.<sup>32</sup>

In England in 1864, the public was outraged when a psychiatrist testified that a convicted killer was insane and therefore could not be executed. The *Manchester Guardian* stated, "The professional 'mad doctors' . . . would acquit us all of guilt and convict us all of insanity; we protest against their extravagances."<sup>33</sup>

After the Hinckley verdict in 1982, columnist Carl Rowan stated, "It is about time we faced the truth that the 'insanity' defense is mostly last gasp legal maneuvering, often hoaxes, in cases where a person obviously has done something terrible."<sup>34</sup> Concern about defendants' successfully faking mental illness to avoid responsibility dates back to at least the tenth century.<sup>35-38</sup> By the 1880s, many Americans considered physicians a generally impious, mercenary, and cynical lot who might participate in the "insanity dodge."<sup>39</sup> After Guiteau's insanity defense failed in his trial for assassinating President Garfield, one verse of an American folk song went:

I tried to play off insane,  
 but found it would not do,  
 the people all against me,  
 it proved to make no show.<sup>39</sup>

A bitter response to the criticism that psychiatrists were unable to discern mental illness from feigned symptoms was made in 1873 by Maudsley: "Many a gibing sneer and ill-timed jest at medical testimony in courts of justice would be spared if those who uttered them so

glibly were to spend a few months in an asylum."<sup>40</sup>

The history of moral insanity provides a useful object lesson in the nineteenth century perception that psychiatrists excuse sin. The term "moral insanity" implied an inability to conform to the dictates of society—as a consequence of disease, not depravity, and despite the absence of traditionally accepted signs of mental disturbance.<sup>39</sup> The French were the first to describe a class of mental disorders affecting the individual's emotional and volitional capacities, rather than the reason or intellect. These included manie sans delire, monomania, and a group of impulsive insanities, such as kleptomania, pyromania, erotomania, and homicidal mania.<sup>41</sup>

In 1810, Dr. Benjamin Rush, in the United States, described "moral derangement" as "the state of mind in which the passions act involuntarily through the instrumentality of the will, without any disease in the understanding."<sup>42</sup> In 1835, the British physician Prichard described "moral insanity" as "madness consisting of a morbid perversion of the natural feelings, affections, inclinations, temper, habits, moral dispositions, intellect or knowing and reasoning faculties, and particularly without any insane delusion or hallucination."<sup>43</sup> When moral lunatics raised an insanity defense, it was sometimes the crime itself that served as the principal evidence of disease. The public believed that the definition of lunacy was expanding and, as a result, that evil was being excused.<sup>19</sup>

Isaac Ray, the father of American fo-

rensic psychiatry, espoused the theory of moral insanity in the 1838 edition of his book, *Medical Jurisprudence of Insanity*.<sup>44</sup> Throughout his life, Ray held the view that moral insanity was a valid excuse from legal responsibility.<sup>21</sup>

John Gray, editor of the *American Journal of Insanity*, was the strongest opponent of the doctrine of moral insanity. Gray wrote, "The acceptance of such a doctrine of convulsive ideas . . . would be opening a door through which every criminal could pass unwhipt of justice."<sup>45</sup> Gray was a deeply religious man with a strong streak of Calvinism.<sup>46</sup> He argued that "sin, not the metaphysical sentimentalism of moral insanity, caused crime; lust was the proper appellation for nymphomania, depravity for kleptomania; dissipation and weakness for dysomania."<sup>39</sup>

In the 1881 trial of Charles Guiteau for the assassination of President Garfield, the unprecedented number of 36 medical experts were heard, 23 for the government and 13 for the defense. Dr. Spitzka, the leading defense psychiatrist, testified that he knew Guiteau was "a moral monstrosity" even before asking him any questions; all he had to do was see him.<sup>47</sup> The *Independent*, one of America's most influential weeklies, argued that Spitzka's interpretation of mental illness "would put into the category of insanity, men who by long continued habits of wickedness . . . have acquired . . . depraved moral character."<sup>39</sup> Gray was called as the final government witness to debunk moral insanity. The Guiteau conviction dealt a death blow to moral insanity as an ac-

cepted diagnosis in the United States.<sup>42,48</sup> One of the last papers on the topic in the *American Journal of Insanity* admonished psychiatrists against ever using the term "moral insanity" in a court of justice.<sup>49</sup> However, syndromes such as pyromania and affective disorders without delusions continued to be recognized as valid.<sup>42</sup>

In 1924, the country was shocked when the wealthy Leopold and Loeb were charged with the brutal kidnap-murder of a 12-year-old boy. Defense attorney Clarence Darrow chose to plead the defendants guilty and focus his energy on avoiding the death penalty. The defense hired the leading psychiatrists of the day.<sup>50</sup> Freud declined \$25,000, or any sum he named, to come to the United States to personally psychoanalyze Leopold and Loeb.<sup>51</sup> Freud argued against the half-baked application of psychoanalytic theory to legal proceedings.<sup>52,53</sup>

Although the judge stated that he was not swayed by the psychiatric testimony, he did spare the lives of Leopold and Loeb because they were 18 and 19 years old, respectively.<sup>50</sup> Nonetheless, the issue of psychiatrists excusing sin surfaced in a letter to the editor in the *New York Times*: "It takes a lot of money to hire a noted lawyer and alienists to swear that a scoundrel is a moral pervert and must not therefore be hanged."<sup>54</sup> A *New York Times* editorial stated, "... the court's contemptuous dismissal of the experts . . . may come to exercise a salutary influence on our criminal court procedure by putting scientific theory in its proper place."<sup>55</sup>

Today, the public views the following diagnoses as unjustly "getting criminals off": dissociative reaction, the "Twinkie" defense, post-Vietnam stress disorder, temporal lobe epilepsy, premenstrual syndrome, and pathological gambling. The closer a defendant is to normality, the more public opinion is outraged by insanity acquittals. People are unwilling to excuse conduct that appears to have a rational criminal motive. Evidence of the ability to plan and premeditate a crime flies in the face of the public's perception of mental disease.

The scathing recriminations toward psychiatric testimony involving insanity acquittals can be contrasted with the absence of comment when psychiatrists testify about other issues.<sup>56</sup> Recommendations for civil commitment are generally rubber-stamped by courts. The press does, however, respond to psychiatric recommendations for release of persons acquitted by reason of insanity. Columnist Richard Cohen stated, "While the mistakes of doctors sometimes kill their patients, the mistakes of psychiatrists can sometimes kill others."<sup>57</sup>

**II. Psychiatrists Always Disagree**  
Halleck observed that, in the courtroom, "It often appears that psychiatrists are a group of inconsistent, disagreeable, and even ludicrous amateur philosophers."<sup>59</sup> Columnist Andy Rooney, after pointing out that the five psychiatrists paid by the prosecution all testified that Hinckley was sane and the five psychiatrists for the defense all testified Hinckley was insane, put it this way: "The average person . . . can reach one of two conclu-

sions about psychiatrists: either psychiatrists can be bought, or psychiatry is such an inexact science that it is worthless. I don't want any psychiatrists mad at me, so I'll leave it to them to say which of these two categories they fall into."<sup>58</sup>

There are other explanations for why psychiatrists disagree.<sup>59</sup> In actuality, the appearance of disagreement is greatly heightened by press coverage of sensational, contested insanity trials.<sup>60</sup> A consensus among prosecution and defense psychiatrists causes 80% of successful insanity defenses in Oregon to be resolved out of court. Even in contested cases in which there is psychiatric disagreement over criminal responsibility, there is diagnostic agreement in two thirds of the cases.<sup>61</sup>

Many kinds of forensic scientists work almost exclusively in police laboratories. This makes it difficult for the defense to find rebuttal experts. Because the insanity defense is an affirmative defense, prosecutors will usually produce their own psychiatric experts to counter testimony of defense psychiatrists. This helps to account for the public image that psychiatrists contradict each other in court with singular regularity, whereas other forensic scientists do not.<sup>3</sup>

I will discuss six reasons that psychiatrists may disagree in court: (1) the adversary system, (2) selection procedures, (3) different schools of psychiatry, (4) different data, (5) bias, and (6) occasional venality.

*The Adversary System* The adversary system tends to polarize expressions of psychiatric opinion "and to highlight

the differences even when a large degree of agreement is present."<sup>62</sup> Rules of procedure and evidence that preclude prosecution and defense psychiatrists from access to full information may cause each psychiatrist to see an incomplete picture. The legal profession is not discredited when prosecution and defense attorneys present opposing views. Ballistics and orthopaedic experts who present opposing views are not discredited. I believe that psychiatrists are discredited by disagreement because they are perceived to be excusing sin.

Isaac Ray noted, "Lawyers are especially fond of declaring . . . that experts equally numerous and skillful may always be obtained on both sides of the case. As if a trial ever occurred in which the evidence was perfectly harmonious."<sup>63</sup> Lord Thurlow once said, "The decrees of Scottish judges were least to be respected when they were unanimous, as in that case they probably, without thought, had followed the first of their number who had expressed an opinion; whereas, when they were divided, they might be expected to have paid some attention to the subject."<sup>63</sup>

*Selection Procedures* Procedures used by attorneys to select expert witnesses contribute to disagreement on the witness stand. Attorneys are aware of which psychiatrists have philosophically broader and narrower views of who qualifies for an insanity defense.<sup>64,65</sup> Although 99 out of 100 experts will conclude that a defendant is sane, the defense attorney has a right to present the opinion of the one expert who disagrees.<sup>3,66</sup> Ray suggested that a defendant

"could not be said to have had a fair trial if such opinion had been shut out."<sup>63</sup> Humorist Art Buchwald satirized the situation this way:

I asked a defense attorney . . . suppose you hire a psychiatrist to examine your client and he decides the person was sane at the time he committed the crime.

I'd fire him . . . I've had cases where five shrinks have examined my client before I could get one to say he was crazy.

And that was the one you called to the stand? If I called the other four, I could have been sued for malpractice.

How do you feel about medical experts?

We have lists of shrinks who believe anyone who commits a major crime is crazy, just as the government has lists of doctors who are willing to testify that anyone involved in one was sane.

We don't use their lists and they don't use ours.<sup>67</sup>

*Different Schools of Psychiatry* Psychiatric inferences about clinical data vary with different schools of psychiatry.<sup>13,47,59,68,69</sup> There are at least 416 theories of psychiatric treatment in this country.<sup>70,71</sup> Ray observed, "Considering that every man's experience differs from every other man's; . . . it is no more than what might be expected that men would often differ in the conclusions to which they are led by the same state of facts."<sup>63</sup>

*Different Data* Psychiatrists may reach different conclusions because the opposing attorneys provide different data to them.

*Bias* Bias has been a concern regarding expert witnesses since they first began to testify.<sup>47,72,73</sup> In 1843, Lord Campbell stated, "Hardly any weight is to be given to the evidence of what are called scientific witnesses; they come

with a bias in their minds to support the cause in which they are embarked."<sup>74</sup>

In a survey of both criminal justice and mental health personnel, Rappeport found that objectivity was judged to be the most important item in evaluating the testimony of an expert witness.<sup>75</sup> Ray warned against a major source of expert bias: "Counsel look at one side of the question only, and naturally endeavor to make the expert participate in their views, while their intercourse is marked by a kind of cordiality and fellow feeling somewhat adverse to that independence which the expert should never relinquish."<sup>76</sup>

Once an opinion has been formed by an expert, complete impartiality is impossible. Judge Bazelon stated, "Like any other man, a physician acquires an emotional identification with an opinion that comes down on one side of the conflict; he has an inescapable, prideful conviction in the accuracy of his own findings."<sup>77</sup> Diamond points out that "support for one side can vary all the way from a deliberate, conscious participation in the planning of legal strategy, to a more aloof, detached facsimile of impartiality that masks his secret hope for victory of his own opinion."<sup>64</sup>

*Venality* The allegation of venality is an old explanation for disagreement among psychiatrists. In 1943, an eminent professor of the Harvard Law School stated that the "medical expert has become a stench in the nostrils of upright judges. Alienists are notoriously available for prosecution and defense in sensational criminal trials."<sup>78</sup>

Physicians have been among the most



vitriolic in criticizing the "hired gun" expert witness.<sup>14, 33, 39, 79, 80</sup> Grissom<sup>81</sup> denounced Dr. William Hammond at the 1878 Annual Meeting of the American Psychiatric Association by saying, "Behind the black robe of the semi-judicial expert, may be heard a sound, more fearful than the groans of suffering humanity, . . . a sound that chills the marrow as with the breathing of a fabled vampire, it is the clink of money under the girdle . . . (T)he false expert is no man at all, but a moral monster . . ." (p. 35).

Ironically, this melodramatic invective was based upon Hammond's testimony in a murder trial that marked the first time in American medical jurisprudence that an expert had taken the position of *amicus curiae*, and had given testimony for both the prisoner and the people.<sup>82</sup> Ray, among others,<sup>29, 78</sup> took exception to allegations of venality: "Because a man's opinions are worth money, it does not follow that they are corruptly bought."<sup>63</sup>

**III. Psychiatrists Give Confusing, Subjective, Uninformed, Jagon-ridden Testimony** Chief Justice Burger stated, in *Addington v. Texas*, "Given the lack of certainty and the fallibility of psychiatric diagnosis, there is a serious question as to whether a State could ever prove beyond a reasonable doubt that an individual is both mentally ill and . . . dangerous."<sup>83</sup> Greenberg stated, "(T)here is no more reason to accept a psychiatrist's predictions than those of an astrologer."<sup>84</sup>

Allegations that psychiatric testimony confuses the jury have been com-

mon.<sup>34, 85, 86</sup> At the time of the Guiteau trial in 1881, a *New York Times* editorial said, "It is evident that the whole tenor of the expert testimony, pro and con, will turn up some rather abstruse psychological questions admirably calculated to confuse the jury."<sup>87</sup> Judge Jerome Frank stated, "I think it's a mistake for my colleagues to needlessly embark without pilot, rudder, compass or radar on an amateur's voyage on the fog enshrouded sea of psychiatry."<sup>88</sup> In response to the allegation that psychiatric testimony was confusing because of its discrepancies, Ray suggested that the same charge could be made toward "the addresses of counsel, the very purpose of which, half the time, is to distract and puzzle the jury."<sup>63</sup>

Psychiatric testimony is accused of being subjective and vague.<sup>1, 62, 89, 90</sup> Columnist George Will wrote that the psychiatric profession produced "a cacophony of loopiness in court and cannot even define its perishable terms."<sup>8</sup> Pollack<sup>91</sup> stated, "In no medical field, other than psychiatry, do practitioners respond so individualistically and so idiosyncratically; and no others glory so in being deviant" (p. 334). In a recent case, a six-year-old plaintiff claimed brain damage following an accident. A nonpracticing psychologist predicted, without ever seeing the child, that he would hit a teacher at some time during high school and be expelled. The judge told the jury to disregard his testimony.<sup>92</sup>

Psychiatrists in court have been accused of being ignorant. In 1875, one judge referred to psychiatrists as "so-called experts, who always have some

favorite theory to support—men often as presumptuous as they are ignorant of the principles of medical science.”<sup>93</sup> Congressman John Ashbrook stated, “Psychiatrists have about as much understanding of the human mind as the butcher, the baker, and the candlestick maker.”<sup>94</sup>

Psychiatric testimony is accused of being unscientific. Only the most intellectually arrogant would attempt to deprecate early theories on the basis of modern developments of psychiatry. Prevailing theories of one era may appear to subsequent generations as dogma and pseudoscience.<sup>24</sup> Nonetheless, it is instructive to review some of the prevailing “scientific” theories of psychiatry presented in the courtroom over the last few centuries. In Norwich, England in 1664, the noted physician Sir Thomas Browne testified that two women were witches, and they subsequently received the death penalty.<sup>78</sup> Evidence included the fact that “they had caused herrings to jump out of a boat” and afflicted others “with lice of extraordinarily bigness.”<sup>47</sup>

Phrenology was an important “science” in the United States from 1820 to 1840. Phrenologists believed that the outer skull reflected the brain, which was divided into about 30 different psychological characteristics.<sup>95</sup> Although never accepted by the medical profession in general, Amariah Brigham, founder of the *American Journal of Insanity*, was a stout believer in phrenology.<sup>96</sup> In 1839, the *American Phrenological Journal* described a defendant who was charged with murdering a peddler on a public

highway.<sup>97</sup> Fowler, a celebrated phrenologist, testified that the defendant was insane as a result of “monomania.” The organs of “destructiveness, secretiveness, and acquisitiveness were immense, the head measuring about 7¼ [inches] in diameter from ear to ear.”<sup>97</sup>

In the nineteenth century, the diagnosis of moral insanity was presented as “scientific fact.”<sup>41</sup> When some jurists referred to moral insanity as a groundless theory, Ray replied, “Such . . . arrogant contempt for the results of other men’s inquiries . . . suggests . . . a comparison . . . with the saintly persecutors of Galileo, who resolved . . . that nature always had operated and always should operate in accordance with their views of . . . truth.”<sup>98</sup> The political decision to eliminate homosexuality from the APA nomenclature is another example of changed “scientific theory.” We can only speculate about how primitive DSM-III will appear a century from now.

Physicians have been accused of excessive jargon since the seventeenth century.<sup>77,98-103</sup> A 1683 medical journal suggested, “You must describe the functional capacity of the wounded in clear terms without arabic, barbaric, or scholastic terms.”<sup>104</sup> After the McNaughtan trial, one of the verses by Dry Nurse attacked psychiatric jargon:

This legal murder,—I would simply ask,  
And let the doctors answer, if they dare;  
Let them cast off the poor and paltry mask—  
The jargon of the shop!—to make men stare:  
Tell me, ye judges of our mortal sins,  
Where madness ends, and sanity begins?<sup>32</sup>

In 1881, Lord Chief Justice Cockburn<sup>105</sup> stated, “In the (early) days

an insane man was one whose insanity was patent to everyone. In these days, we are vexed . . . with the most . . . absurd theories about 'moral insanity,' 'mania transitoria,' 'uncontrollable impulses,' the various klepto-, dypso-, pyro-, and other manias . . ." (p. 61). There was considerable pressure for psychiatrists to use jargon because the "more esoteric the name of the disorder, the more incapacitating it sounds."<sup>19</sup> A century later, columnist George Will stated, "Psychiatrists are often hired to put an acre of embroidery around a pinhead of 'fact' so they bandy about diagnostic categories that are as evanescent as snowflakes . . ."<sup>8</sup>

**IV. Psychiatrists Dictate the Law** Lawyers have never been receptive to psychiatric attempts to modify the law.<sup>21, 29, 106</sup> Attorneys had to manage the legal consequences of mental disease before psychiatry was ever born. Precedents were established without the benefit of any scientific help.<sup>21</sup> When Johan Weyer challenged the existing laws regarding mental illness, the Saxon Code of 1572 commented, "Weyer is not a lawyer, but a physician—consequently, his views on the relationship between mental disease and transgression of the written law are of no moment."<sup>21</sup> Judge Doe, author of the New Hampshire rule, apologized to Isaac Ray for failing to acknowledge his contribution in the formulation of his opinion in *Boardman v. Woodman*.<sup>107</sup> He wrote, "I thought any reference to your views . . . would, in the minds of indiscriminating lawyers, detract from the force of the argument . . ."<sup>108</sup>

In the McNaughtan trial, all seven psychiatrists who testified agreed on the conclusion of insanity. Because the psychiatrists could not be accused of bias, venality, or contradicting each other, the newspapers chose to criticize them for dictating the law.<sup>109, 110</sup> An editorial in the *Standard* stated, "The fault, if fault there has been, was in permitting the 'mad doctors' to dictate the law, and in allowing too much weight to their crude, and we must say, absurd opinions in their own department of knowledge (if they really know anything)."<sup>66</sup> One of Dry Nurse's verses also addressed this issue:

I fear that common sense is out of date,  
Or else the laws are not quite understood  
By those who make them, since we've seen of  
late,  
Lawyers and judges, the supreme concoctors  
In legal knowledge, knuckle to the doctors.<sup>32</sup>

**V. Psychiatrists Give Conclusory Opinions** In 1817, Haslam wrote, "The physician should not come into court merely to give his opinion—he should be prepared to explain it, and able to afford the reasons which influenced his decisions . . ."<sup>30</sup> Judge David Bazelon, one of psychiatry's most quoted critics, wrote, "Psychiatry, I suppose, is the ultimate wizardry. My experience has shown that in no case is it more difficult to elicit productive and reliable expert testimony . . ."<sup>77</sup> Judge Bazelon said that psychiatrists have been pressed to end this "age of mystique. Psychiatry, unfortunately, has responded poorly, appearing to be a profession that wishes to judge, but not be judged, examine but not be examined."<sup>111</sup> Pollack reviewed

100 consecutive psychiatric reports and found that all but two were conclusory; unfortunately, the reasoning in those two was found to be faulty.<sup>13</sup>

Psychiatrists have long been urged to state the limitations and uncertainties in their opinions.<sup>76</sup> Bazelon suggests that, for psychiatrists, "candor would require admitting how very few clothes the Emperor really has."<sup>112</sup> He pointed out that "the Emperor's troubles began not because he was scantily clad, but because he claimed he was fully clothed."<sup>113</sup>

There are many pressures for psychiatrists to speak with greater certitude than is justified.<sup>47,76</sup> Even Bazelon admits that the legal process does not tolerate ambiguity very well. "No trial judge wants to hire an expert who articulates the doubt and ambivalence inherent in almost any (psychiatric) diagnosis."<sup>114</sup> Shah identified some of the pressures on us not to acknowledge the uncertainties in our opinions: the MD after our names accords us societal deference; having our curriculum vitae recited tends to inflate the illusion that we are knowledgeable. It is hard after that not to make it appear as if we are experts.<sup>115</sup>

It is not easy for the trier of fact to assign proper weight to opposing opinions, when each is stated with certainty.<sup>78</sup> One attorney opined. "A glib and unscrupulous expert witness with no qualification in his professed field other than a willingness to sell any opinion to anyone who wants it will frequently outsell the conscientious, well-trained, and careful expert who gives no opinion that he cannot back up. The

concept that the jury can detect a fraud is absurd."<sup>116</sup>

## Solutions

What is a fair assessment of psychiatric testimony today? In my opinion, the criticisms of psychiatric testimony are both deserved and undeserved. The criticism that we "get criminals off" is primarily undeserved. Psychiatrists rarely dupe juries or judges into insanity acquittals. Halleck noted, "The psychiatrist is used to lend scientific authenticity to a social ritual; he is much more of a pawn than a knight."<sup>29</sup> The criticism that psychiatrists always disagree is greatly exaggerated and is often due to the adversary system itself. There is some merit to the criticisms that our opinions are sometimes subjective and idiosyncratic and that we too often fail to specify our limitations. I am also certain that there are a few bad apples who bring shame on the profession by testifying without moral constraints. The criticism that psychiatrists dictate the law is unfounded. I have no doubt that the law can look out for itself. Columnist Richard Cohen summed the situation up fairly: "There are things about which psychiatrists do not agree and things they do not know. But there are things they do know, and to summarily reject this knowledge because it is not as all-embracing or comforting as primitive concepts of criminology like bad and good, is nothing worse than a return to know-nothingism."<sup>57</sup>

A number of solutions have been proposed to respond to the criticisms of psychiatric testimony. I will address the

criticisms of giving conclusory opinions and confusing, subjective, uninformed, jargon-ridden testimony together. First, the courtroom should never be used as a platform to espouse idiosyncratic views.<sup>22</sup> The second proposed solution is peer review in professional organizations or journals<sup>22, 117</sup>—such as Ray offered in his day.<sup>118</sup> Academic psychiatrists have been encouraged to report all medical-legal activities to their department chairmen for review.<sup>86</sup> Perr suggested that “shame, ridicule, and fear of exposure might affect behavior when supererogatory and legal sanctions cannot.”<sup>17</sup> Psychiatrists are, however, quite reluctant to participate in any public criticism of colleagues.<sup>47</sup>

How can we respond to the criticisms that psychiatrists regularly disagree in court? A commonly suggested solution is to forbid psychiatrists from addressing the ultimate issue in insanity trials.<sup>29</sup> In 1817, Haslam advised psychiatrists: “Having gauged (the defendant’s) insanity, he has performed his duty. If it should be presumed that any medical practitioner is able to penetrate into the recesses of a lunatic’s mind at the moment he committed an outrage; . . . and to depose that he knew the Right and Wrong he was about to commit, it must be confessed that such knowledge is beyond the limits of our attainment.”<sup>30</sup> The APA took the position that psychiatrists should not address the ultimate issue regarding criminal responsibility.<sup>119</sup> This was incorporated into the Federal Insanity Defense Reform Act of 1984.<sup>120</sup> I do not believe that elimination of ultimate issue testimony will reduce

jury confusion or “battles of the experts” any more than the 1954 Durham decision did; Zilboorg<sup>121</sup> had predicted the Durham rule would eliminate the “old unpleasantness of the adversary proceeding” (p. 200).

Proposals to use court-appointed experts have been made for the last two centuries,<sup>19, 81, 122-125</sup> especially after the Guiteau trial.<sup>39</sup> It has long been noted that this system works in Europe and sharply reduces bad publicity for the psychiatric profession.<sup>63</sup> Europe, however, has an inquisitorial, rather than an adversarial, system. There are several problems with court-appointed experts.<sup>126</sup> Ray observed that “men with standing and character” would be likely to “decline because of pressures of private duties. But men with small qualifications would seek such appointments.”<sup>63</sup> Davidson was doubtful about the court-appointed expert because “this doctor invisibly wears the robe of a judge, and the halo of a saint . . . ; no human being can be impartial.”<sup>127</sup> Diamond points out that “such illusions may be good for the public relations of psychiatry, but they are not good for the administration of justice.”<sup>64</sup>

Zilboorg recommended that the medical witnesses on both sides consult before the trial.<sup>21</sup> Defense experts in the Leopold and Loeb case did seek to consult with the experts for the state, but the state’s attorney would not allow it.<sup>21</sup> The Supreme Court in *Ake v. Oklahoma* has virtually eliminated such contact in criminal cases by defining the defense psychiatrist’s role as a consultant to the defense attorney.<sup>25</sup>

Public education about the adversary system would be very helpful in reducing the perception that psychiatrists always disagree. Brent suggests that being an expert witness should only be a minimal part of one's professional activity; the expert should be primarily a scholar, clinician, teacher, or investigator in the field of his expertise.<sup>80</sup> Experts would disagree less if we were explicit about our assumptions and careful to acknowledge our limitations.<sup>4</sup> We must be humble about the role we play in decision making.

With respect to the perception that psychiatrists excuse sin, I do not think that there is a solution. The insanity defense preceded psychiatry by hundreds of years. The public's need for retribution in heinous crimes is unabated by the presence of mental illness in the perpetrator. Sensational criminal trials, divided psychiatric opinion, and public criticism of psychiatric testimony are certain to continue.

### Conclusion

Alan Stone told the American Academy of Psychiatry and the Law that to choose a career in forensic psychiatry is to choose to increase the risks in a life of moral adventure.<sup>16</sup> I say to you that to choose a career in forensic psychiatry is to choose more brickbats than bravos, more missiles than medals, and more gratuitous insults than grateful inscriptions. No physician undergoes more intense scrutiny than the psychiatrist who testifies in court.

It takes courage of conscience to tell the attorney who retained you that your opinion will not help him. It takes cour-

age to endure seeing your opinions deliberately distorted by a cross-examiner one day and incorrectly reported in the press the next. It takes courage to testify in a malpractice suit against an errant colleague, only to have his attorney imply that you have sold your professional integrity for a few hundred dollars. On such occasions, you may wonder if it is all worth it. A life spent serving justice is a life well spent. The psychiatrist who works at the interface of psychiatry and the law participates in the most exciting issues of the day.<sup>29</sup> Neither crucifixion by criticism nor the crucible of cross-examination can discredit the psychiatrist who does thorough evaluations, guided by the light of science and a pure heart. I thank you for the privilege of serving as your President, and I salute you as courageous members of an honorable profession.

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