

Psychiatric Testimony in a Criminal Setting*

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INTRODUCTION

Dr. Seymour Pollack has aptly noted:

Most American psychiatrists take a dim view of forensic psychiatry . . . [and] most practicing psychoanalysts shun consulting for the court.¹

Similarly, most practicing attorneys take a dim view of using forensic psychiatry and of dealing with forensic psychiatrists (not to mention psychoanalysts). This issue, which has largely been undealt with by the psychiatric profession, simmers beneath the surface at an unconscious level, but must be meaningfully confronted by practicing forensic psychiatrists if they are to continue any sort of an *entente cordiale* with lawyers, especially courtroom lawyers. Most likely, its lack of resolution stems from a host of psychodynamic factors, all of which deserve considerably more attention than they have been paid by either profession.

At the outset, just as many psychiatrists do not attempt to understand the workings of the legal system, so do many lawyers seriously lack understanding of psychiatric concepts, psychodynamics and the entire value-system of psychiatry. Abraham Goldstein has observed² that the roots of the insanity defense³ are not tampered with because of a lack of lawyers' understanding of that defense, and that the entire allegedly exculpatory thrust of the insanity defense thus stems from the failure of members of the legal system to identify themselves with the "insane" and from the concomitant inability of the public to use punishment of the "insane" as a basis upon which to defer them from committing criminal acts.⁴ Similarly, the day-to-day lack of understanding of psychodynamics on the part of many attorneys diminishes their drive to comprehend and to involve themselves with the psychiatric system.

Tied in with this lack of understanding, of course, is a fear of confronting those impulses in oneself that would be magnified by a confrontation of such drives in others: It comes as no shock to suggest that lawyers, judges and legislators are as "motivatable" by unconscious forces as all other persons—a literal denial of the psychiatric system permits the denial of these impulses.⁵

In addition, these "extra-legal" impulses, drives, etc., cannot be dealt with in the "objective," "logical" manner upon which the law prides itself. Although Justice Cardozo noted more than fifty years ago that what he referred to as "subconscious forces . . . so far beneath the surface" were significant in the formulation of judicial opinions,⁶ it is clear that courts (and lawyers) are often uncomfortable with data which cannot be objectified, quantified and definitively categorized. The simplicity of the truism suggested by Diamond and Louisell—that "the psychological sciences differ from the biological sciences in that the subject matter of the former is not visible"⁷—should not mask its significance to this process.

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Finally, tied in with these explanations is a fear of sharing power with or losing control to any competing system. As Jonas Robitscher has aptly pointed out:

Law has jurisdiction over its own territory; psychiatry rules firmly in its own area. Between them lies the debatable land, claimed by both with neither in command . . . it is an area of bogs and ruts and hidden dangers.⁸

Elsewhere, he quotes, to the same end, F. A. Whitlock's characterization of the relationship between law and medicine as the result of a "shotgun wedding," and not merely a "marriage de convenance."⁹ Thus, as has been pointed out, because "some judges are fond of pontificating that psychiatry is not an exact science . . . they [therefore] feel free to reject all psychiatric evidence."¹⁰ Clearly, there is great uncertainty in psychiatric diagnosis,¹¹ and there is even some evidence that courts are more accurately predictive than are hospitals in determining when patients should be released;¹² however, this uncertainty should not serve as an estoppel on the comprehension, synthesis, adaptation and understanding of psychodynamics, psychoanalytic theory and psychiatry.

Within this framework, it is necessary to consider the role of the psychiatrist at pre-trial, trial and post-trial proceedings. At each level, to some extent, it will be apparent that the problem referred to above is of more significance than the talismanic qualities of any specific legal formulation used to define "insanity," "responsibility," or "incompetency."

A. At Pre-trial

In pre-trial matters, the scope of the usefulness of psychiatric testimony extends far beyond its usual perceived limitation—the finding of whether or not a specific defendant is competent to stand trial. One recent study, for instance, shows that less than 10% of examined defendants are ever found incompetent to stand trial;¹³ these statistics, however, cannot be read to imply that the pre-trial psychiatric role should be minimized either with reference to *these* cases or with regard to all other areas in which psychiatric evidence might be crucial.

Thus, the finding of incompetency is, in reality, usually not given a great deal of thought by either participating counsel or the court. It is usually seen as an easy way of shunting cases out of the penal system;¹⁴ although this aim may be a commendable one in many instances, it often masks the real issues involved.

First, it is inevitable that in many cases, the court (or the prosecutor) will feel that the defendant is simply lying or malingering. The legal system has not moved particularly far from the attitude expressed by a State Supreme Court Chief Justice nearly fifty years ago:

The judge who denied the motion presided over the jury trial, saw the defendant, heard him testify in his own behalf, and of course watched his apparent mental capacity as revealed both under direct and cross-examination and by his other conduct in the courtroom during the trial. The judge may well have been able to form a judgment as to legal responsibility of the defendant for crime, based upon common sense inferences and intelligent observation, more reliable as a practical guide to accomplishment of justice than the refined distinctions and technical niceties of alienists and experts in psychopathic inferiority.¹⁵

This position was predicted, nearly 100 years prior to its articulation, by Isaac Ray, who, in his famed 1838 treatise,¹⁶ found the fear of malingering to be the major reason ("probably more than all other causes together") that the American legal system was so bound to such rigid legal constructions of mental illness as it influences criminality.¹⁷ Similarly, Henry Weihofen has noted that the negative attitude of lawyers and judges towards any revisions of the law of criminal responsibility is "colored by the fear that it is too easy for malingerers to simulate insanity and thus escape their just punishment."¹⁸ Counsel and psychiatrists must confront this problem.

In addition, although incompetency to stand trial is usually raised in the cases of mentally ill persons who will eventually plead insanity, a very real issue here is the applicability of the doctrine to the mentally retarded¹⁹ or to those with organic brain syndrome who may be competent for certain purposes and even competent to stand trial until such time as confronted with the stressful situation of the courtroom.²⁰ This problem is especially significant with retarded defendants who will likely *not* regain their competence to stand trial "in the foreseeable future,"²¹ and who are very often *not* so dangerous to themselves or others as to require involuntary hospitalization.²² That these defendants will then most likely remain both free of criminal liability and non-institutionalized is a fact with which both the court and the State may have great difficulty dealing.

In addition, this area requires close cooperation between counsel and the psychiatrist, since it is frighteningly easy here for a defendant to "get lost" in the system (especially if he has been committed to an institution for a period of observation). Unlike divorce clients or real estate clients, criminal incompetency clients require constant "case surveillance."²³ Although the Group for the Advancement of Psychiatry, for instance, has made specific and provocative recommendations for changes in the process of determining competency to stand trial (including a suggestion that psychiatrists should screen all defendants whose competency is questioned *before* they are transferred to institutions for the criminally insane),²⁴ little public interest has been fomented.

One final problem which must be considered in any incompetency situation is the question of competency to stand trial while the defendant is under the influence of drugs. Although it has been suggested that the court would exhibit "greater concern for the defendant's mental competency to stand trial" where he had been given a potentially mind-influencing drug by a representative of the criminal justice system,²⁵ this is probably an unwarrantedly optimistic evaluation of an unresolved issue.²⁶

Beyond the issue of competency, though, there are other areas of pre-trial practice which should be discussed in light of the potential impact of psychiatric evidence. Of course, early entry of a psychiatrist into the criminal process is critical, and perhaps even dispositive of the ultimate outcome of a case. Thus, where defense counsel is aware of a psychiatric problem at an early stage, he can contact a competent psychiatrist to examine and evaluate his client, even perhaps prior to indictment. Dr. Carl Malmquist has noted:

It can be stated that if the psychiatrists and attorney can mutually discuss the problems and questions prior to an examination, they have taken a first step towards understanding the kinds of data and answers that may be possible from a psychiatric specialist.²⁷

Indeed, if the defendant is examined prior to the gearing up of the entire criminal procedural mechanism, that structure can often be avoided. If, *e.g.*, it can be demonstrated to the court and state that the defendant is engaged in an outpatient treatment program, there may be a reluctance to disturb the modality of treatment, and charges may be disposed of administratively, an advantage to all: to the defendant, who can receive beneficial treatment with the least concomitant stigma; to the court, which can help cut down on its backlog by not having to docket another case; and to the state, which can accede to the defendant's plea for continued treatment without having to take publicly a position agreeing to the dismissal of already-existing charges on what are viewed by many as "legal technicalities."

In addition, though, there are at least four other areas in which psychiatric evidence at the pre-trial stage may be crucial in the disposition of a case.

Extradition: In many states, a hearing before the Attorney General or Governor is discretionarily contemplated before extradition can be executed if the defendant has equitable grounds to present.²⁸ Very often the grounds at such a hearing involve the

believability of a defendant's perceptions of imminent harm if he is returned to a state where prisoners are forced to serve on chain gangs or where they are in danger of being homosexually assaulted; in such cases, a respected psychiatrist's diagnosis as to the potential harm in returning such a defendant may be of major significance.

Addiction: In many states, courts can discretionarily send defendants to rehabilitatory drug and/or alcohol programs in lieu of a trial as a result of which they might be sentenced to a reformatory or prison facility.²⁹ Often a psychiatric evaluation at this juncture can be of great value in convincing the court that such a rehabilitatory program would be preferable to such incarceration.

Minor Sexual Offenders: In certain jurisdictions, any defendant convicted of *any* sex offense must be sent to a diagnostic unit, and, then, if his conduct is found to be characterized by "repetitive, compulsive behavior,"³⁰ committed to a prison-like "sex treatment unit."³¹ Where the offense is a relatively minimal one (*e.g.*, streaking, exposure), if a prediagnostic unit examination shows the action is not a manifestation of a serious problem, the case can often be either dismissed or downgraded to a minor offense to avoid the often Draconian mechanisms of the compulsory sex offender acts.

"Quirky" case: In those instances in which a defendant is charged with a minor offense (such as petty larceny) which nevertheless raises a question as to the possible existence of a psychiatric problem (*e.g.*, where the defendant steals only pantyhose),³² a psychiatric examination may serve to indicate the real problem (if, in fact, one is present) and to direct the defendant towards a suitable therapeutic treatment program.³³

Again, in these cases—as in those involving a determination of competency to stand trial—it is critical that the psychiatrist be able to express him/herself in clear, descriptive English, comprehensible to all parties. The court will rarely search for the use of a specific diagnostic label; rather, it is interested in learning the answer to the question of *why* the expert witness labeled a specific defendant's behavior as "psychotic." This response cannot be found in the refuge of the DSM-II; it must be formulated by explaining to the court *which* behavior is deemed significant (and *why*), *what* the significance of that behavior is, and *how* the existence of that behavior bears on the legal question before the court. If these questions are not answered, the role of the expert witness will continue to be a puzzled and puzzling one.

B. At Trial

Of course, the bulk of the writing, analysis, case law and legal/psychiatric jurisprudential debate regarding the interplay of criminal law and psychiatry centers on the existence and use of the insanity defense. The intensity of this debate³⁴ and its emphasis on the differences and similarities inherent in the major "tests" for criminal responsibility,³⁵ however, can mask the underlying issues which often are far more critical to the disposition of a case than the individual formula used. Those issues—specifically including the reasons behind the basic hostility towards and mistrust of the whole concept of an insanity defense by all parties as well as the public—must be confronted meaningfully by both professions.

Thus, although the *M'Naghten* test has received well-deserved criticism for its emphasis solely on the cognitive function³⁶ and its "heavily intellectualistic and . . . psychological[ly] . . . narrow"³⁷ point of view, it has been suggested by many, including Abraham Goldstein, that a "good" expert witness can work as well with it as with the ALI test.³⁸ Whether that is so or not, it underlines the point that the standard employed need not necessarily be the dispositive issue at any insanity defense trial.³⁹

Rather, at this point, the academic debate has shifted to the propriety of the insanity defense in criminal trials under any circumstances—this is the area which is now beginning to receive the most attention and commentary.⁴⁰ Interestingly, the forces of abolition are led by what can loosely be referred to as the academic "left,"⁴¹ for a variety of reasons. These include a fear of the "therapeutic state,"⁴² the brutality of "punish-

ment" often meted out in mental hospitals⁴³ as well as the theory that the insanity defense is a tool by which the state can obtain authority to sanction those without *mens rea* (on the theory that, unlike self-defense [which is an exception to guilt], insanity is an exception to innocence), reflecting a society which presents an inherent social conflict between the need to exculpate the sick and blame and/or punish the guilty.⁴⁴

Yet, ironically, on an empirical political/legislative basis, it is usually the "law and order right" that looks for abolition—so as not to "needlessly encourage the proffer of such defenses and [thus] . . . result in a diminished capacity of the criminal justice system to deter violent crime."⁴⁵ Of course, much of the impetus for the abolition debate on a Federal level came from former President Nixon's unsupported charge two and a half years ago that the insanity defense had been subject to "unconscionable abuse by defendants."⁴⁶ This drive, though, may evolve into nothing more than semantics, since the legislative abolitionists often will compromise and suggest a new category of "guilty but insane"⁴⁷ which merely allows the prosecutor to chalk up more "victories" and provides for psychiatric testimony *in mitigation of punishment* at a later stage.⁴⁸

Notwithstanding the vigorousness of the debate discussed above, however,⁴⁹ it is suggested that the most important topic for consideration is an examination of why the judicial system reacts to the insanity defense as it does, since it reflects the way all mental health problems are viewed by the criminal law system: although little has been written in this area, it is probably the topic most deserving of greater exploration, and should be of the most practical importance to the psychiatrist who will testify in court.

At the outset, under the best of circumstances, it is clear that the insanity defense will be difficult to put forward, as it is treated with hostility and mistrust by both judges and juries, for several significant reasons, including the following:

(1) The criminal must be punished as an outlet for the internalized and moralized (but repressed) aggression of society (a) to show guilty party he can't "get away with it," (b) to establish an equilibrium between the id and superego, thus maintaining a balance between indulgence and punishment and sublimating "dangerous impulses," and (c) to focus on the criminal as an example of the temptations which befall the remainder of society.⁵⁰ Thus, the jury, as the conscience of a community which generally distrusts—for different reasons—doctors, lawyers and criminal defendants, must punish the defendant in spite of the "law of insanity."

(2) The overassertion of the prosecuting, punitive attitude towards law-breakers reveals the intensity of one's inner struggle and the instability of one's own emotional equilibrium.⁵¹ According to Nietzsche, "No one is more ferocious in demanding that the murderer pay for his crime than the man who felt strong impulses in the same direction."⁵² Or, as David Abrahamsen has stated, "[Law-abiding citizens] unconsciously identify with the criminal because of their own latent anti-social tendencies and somehow vicariously demand and accept the punishment to relieve their own guilt feeling."⁵³

(3) The well-known "combat feelings" of many litigants,⁵⁴ with whom their counsel often identify, may drive the attorney to "victory" as a means of satisfying his own aggressive urges as much as a by-product of his professional training and the limitations of the adversary system.⁵⁵ The exceptional role of the insanity defense in the courtroom—raising as it does so many unconscious fears and hostilities—might reasonably result in an even higher level of aggression.

(4) Abraham Goldstein has pointed out that the legal system simply doesn't understand the insanity defense, so it won't tamper with its roots,⁵⁶ as such an acknowledgment of the defense's deficiencies—in response to non-legal criticisms—might appear to be an admission that others may know more about an area which involves its own expertise. Although the results are clearly dated, it is still of some significance that a 1951 poll showed that lawyers had a higher distrust of psychiatrists than did any other group of professionals polled.⁵⁷ Thus, *e.g.*, trial judges will say "He doesn't look sick to me," or, even more revealingly, "He is as healthy as you or me." Harold Lasswell has pointed out

that judges, jurors and attorneys have been adverse to enlarge the scope of the insanity defense "especially if defendants failed to conform to popular images of 'craziness'."⁵⁸

(5) According to Katz and J. Goldstein, as long as our unconscious feelings of apprehension, awe and anger towards the sick are hidden by a conscious desire to protect them, the problem of the insanity defense will remain unresolved. The system, they argue, must acknowledge its wishes to neglect, destroy, stigmatize and punish through a system of restraints before the problem can be really confronted.⁵⁹

(6) Finally, though, underlying the hostility is an unconscious refusal on the parts of judges, prosecutors, defense counsel and legislators to come to grips with psychological realities about their own selves—through the use of ego defenses such as denial or avoidance⁶⁰—to forestall the inevitably-feared discovery of potential personality disorders and deficiencies in their own makeup which would otherside remain hidden behind the extra "layers" of superego endemic to the structural composition of many lawyers who opt for the "parenting" role they choose.⁶¹

Any psychiatrist dealing with the legal system must confront these issues head on.

Of course, in addition to questions involving the insanity defense, psychiatric testimony is often of critical value at criminal trials in such areas as admissibility of confessions, accuracy of identification at lineups, and presence of coercion in "consent" situations.⁶² In each of these areas, the same problems discussed regarding the use of the insanity defense will face the practitioner: again, the dispositive issue will usually not be the exact interpretation of the nuances of *Miranda v. Arizona*,⁶³ *United States v. Wade*,⁶⁴ or *Mapp v. Ohio*;⁶⁵ rather, it will be the way in which psychiatric evidence is perceived by the judicial system, and the reactions of the psychiatric profession to those perceptions.

C. At Post-Trial

Finally, psychiatric testimony can be of significance in at least two major areas in a post-trial setting. As discussed above, some states are opting either for a new verdict ("guilty but insane") or for a bifurcated procedure, whereby, after a jury determines a person not guilty by reason of insanity, the court separately holds a hearing on need for institutionalization. At either such hearing, psychiatric testimony can be crucial as to ultimate disposition of case.⁶⁶

In addition, in non-insanity cases, a psychiatric opinion as to the need for incarceration, as to the suitability of alternative placements (of more importance since the doctrine of the "least restrictive alternative" has reached constitutional dimensions),⁶⁷ or as to the preferability of non-incarceration may be invaluable as well.

D. CONCLUSION

In conclusion, then, it is clear that the folkways of "insanity" practice are more important in the long run than specific legal formulations. Until attitudes are reshaped, unconscious motivations examined, and unarticulated fears stated, the legal system's approach to the insanity defense will likely remain where it has been for 150 years—out of consciousness. The psychiatric profession and the legal profession must begin to work meaningfully together in order for the "shotgun wedding"⁶⁸ to succeed.

References

1. Pollack S: Psychiatric consultation for the court, in *Effective Utilization of Psychiatric Evidence*, 69, 73 (PLI ed 1970)
2. Goldstein A: *The Insanity Defense*, 89-92 (1967)
3. For a more complete discussion of the insanity defense, see below at pp 146-148.
4. Goldstein, note 2, above, at 15; see also Schoenfeld: Law and unconscious mental mechanisms, 28 *Bull Menninger Clinic* 23, 28-30 (1964)
5. See generally, Schoenfeld: Psychoanalysis and the Law 14-16 (1973); cf Schroeder: The Psychologic study of judicial opinions, 6 *Calif L Rev* 89 (1918). For a discussion of at least

a dozen situations in which an attorney's "irrational transference feelings" might be generated toward a group or individual with which he is involved (including his own clients as well as his adversary's clients), see Malmquist: Psychological aspects in the lawyer-client relationship, in George ed, *The Effective Use of Psychiatric Evidence in Civil and Criminal Litigation* 95, 105-106 (P.I. ed 1974)

6. Cardozo: *The Nature of the Judicial Process*, 11-12 (1921)
 7. Diamond and Louisell: The psychiatrist as an expert witness: some ruminations and speculations, 63 Mich L Rev 1335, 1340 (1965)
 8. Robitscher: Pursuit of Agreement: Psychiatry and the Law, 15 (1966)
 9. *ibid* at 12, citing Whitlock: Criminal Responsibility and Mental Illness (1963)
 10. Diamond and Louisell, note 7, above, 62 Mich L Rev at 1341-1342. For the most striking example of this, note how Chief Justice Burger, in his concurring opinion in *O'Connor v Donaldson*, 422 US 563, 43 USLW 4929, 4934, n 2 (1975), makes reference to the "baffling field of psychiatry," and his attempt to hoist plaintiff's counsel in that case by his own petard by citing one of counsel's own articles, Ennis and Litwack: Psychiatry and the presumption of expertise: flipping coins in the courtroom, 62 Calif L Rev 693 (1974), in support of the proposition that "many forms of mental illness are not understood . . . [and that there is] . . . uncertainty of diagnosis and . . . tentativeness of professional judgment [in this field]." 43 USLW at 4936. See also, *State v Reed*, 34 NJ 554, 566, 140 A 2d 419 (1961) (blithe acceptance of existence of geometricity of drug abuse progression, i.e., 1 pusher infects 4 whom infect 16), compared to *State v Carter*, 64 NJ 382, 397, 316 A 2d 449 (1974) (total rejection of theory suggested in Szasz: Psychiatry, ethics and the criminal law, 58 Col L Rev 183, 196-198 (1958) as "wholly ignor[ing] considerations as to the protection of society" and *State v Lucas*, 30 NJ 37, 72, 152 A 2d 50 (1959) (labeling modern psychiatric thinking as "nebulous" because of its lack of "firm foundation in scientific fact"); cf *State v Krol*, 68 NJ 236, —A 2d— (1975)
 11. See, eg, Ennis and Litwack, note 10, above; Dershowitz A: Dangerousness as a criterion for confinement, 2 Bull Am Acad Psych & L 172 (1974); Rubin: Prediction of dangerousness in mentally ill criminals, 27 Arch Gen Psych 397 (1972); American Psychiatric Association, *Clinical Aspects of the Violent Individual* 23-30 (1974)
 12. Rappeport, Lassen and Gruenwald: Evaluation and follow-up of hospital patients who had sanity hearings, in Rappeport, ed, *The Clinical Evaluation of the Mentally Ill*, 81, 89 (1967)
 13. Holles: Few defendants fail mental tests. *New York Times*, November 9, 1975, Section 1, at 37 (study referred to by Dr. W. Walter Menninger, Director, Clinical Services, Kansas State Hospital, Topeka, Kansas)
 14. See, eg, National Institute of Mental Health, *Competency to Stand Trial and Mental Illness* 6 (1974)
 15. *Commonwealth v Devereaux*, 257 Mass 391, 153 NE 881 (Sup Jud Ct 1926)
 16. Ray I: *A Treatise on the Medical Jurisprudence of Insanity* (1962 ed)
 17. *ibid*, §247 at 243
 18. Weihofen: Mental Disorder as a Criminal Defense 45-46 (1954). Cf Szasz. Law, Liberty and Psychiatry 19-20 (1963) (discussion of historical labeling process of "malingerers")
 19. See, eg, *State of New Jersey v Benjamin Washington*, Indictment #1315-71 (Mercer County Court 1974) (charges dismissed where mentally retarded defendant deemed incompetent to stand trial for the foreseeable future)
 20. See, eg, *State of New Jersey v Leroy Miller*, Indictment #1869-71, (Mercer County Court 1974) (decision on motion to have defendant declared incompetent deferred until trial time to determine whether stressful situation of trial would, in fact, cause defendant to become incompetent)
- For a discussion of the issues raised by such a factual setting, see Myers, Lindenthal and Pepper: Life events and psychiatric impairment. 152 J Nervous and Mental Disease 149, 151-155 (1971) (significance of legal related events in relationship between life crises and psychological impairment); Crawfis: Commitment of the mentally ill, in Schroeder, ed, *The Mind* §9.10, at 214-215 (1962) (discussion of the "traumatic character" of legal proceedings); Aponte and Miller: Stress related social events and psychological impairment, 28 J Clin Psychol 455-457 (1972); Steinberg and Durell: A stressful social situation as a precipitant of schizophrenic symptoms: an epidemiological study. 114 Brit J Psychiat 1097, 1104 (1968); Hocking: Extreme environmental stress and its significance for psychopathology. 24 American J Psychother 4, 23 (1970)
21. *Jackson v Indiana*, 406 US 715, 738 (1972)
 22. See, eg, *O'Connor v Donaldson*, 422 US 563, 43 USLW 4929, 4933 (1975); *State v Caralluzzo*, 49 NJ 152, 156-157, 228A 2d 693 (1967)
 23. This is probably one reason why criminal incompetency is one of the least favorite areas of legal practice

24. Group for the Advancement of Psychiatry: *Misuse of Psychiatry in the Criminal Courts: Competency to Stand Trial* 906 (1974)
25. Haddox, Gross & Pollack: *Mental competency to stand trial while under the influence of drugs*. 7 *Loyola L A L Rev* 425, 447 (1974)
26. Compare to the cases cited in Haddox, Gross and Pollack, note 25, above, *State v Spivey*, 65 NJ 21, 43, 319A 2d 461 (1974); see for a general survey, Kunz, *Psychotropic Medication and Competency to Stand Trial* (1974)
27. Malmquist: *The complete psychiatric evaluation for legal purposes*, in George, note 5, above, at 109, 111
28. See, eg, NJSa 2A:160-12
29. See, eg, NJSa 24:21-27a (2); cf Fingarette: *Addiction and criminal responsibility*. 84 *Yale LJ* 413 (1975)
30. See, eg, NJSa 2A:164-5; see generally, Vuocolo: *The Repetitive Sex Offender* (1969)
31. See, eg, *Davy v Sullivan*, 354 F Supp 1320 (MD Ala 1973); *Humphrey v Cady*, 405 US 504 (1972)
32. For a classic analysis, see, eg, Krafft-Ebing: *Psychopathia Sexualis*, 543-548 (Paperback Library ed, Rehman trans 1965)
33. Defendants institutionalized in psychiatric facilities subsequent to criminal commitments are nevertheless entitled to the same constitutional right to treatment as persons committed civilly. See, eg, *Wyatt v Stickney*, 325 F Supp 781 (MD Ala 1971), 334 F Supp 1341 (MD Ala 1971), 344 F Supp 373 (MD Ala 1972), 344 F Supp 387 (MD Ala 1972), *aff'd sub nom Wyatt v Aderholt*, 503 F 2d 1305 (5 Cir 1974); *Welsch v Likins*, 373 F Supp 487 (D Minn 1974); *Davis v Watkins*, 384 F Supp 1196 (ND Ohio 1974); *In re D.D.*, 118 NJ Super 1, 285A 2d 283 (App Div 1971); cf *Donaldson v O'Connor*, 493 F 2d 507 (5 Cir 1974) vacated and remanded on other grounds 422 US 563, 43 USLW 4929 (1975)
34. See, eg, Wales: *The rise, The fall, and the resurrection of the medical model*. 63 *Geo LJ* 87 (1974); Stone: *Mental Health and Law: A System in Transition*, 218-232 (1975)
35. Cf *M'Naghten's Case*, 8 Eng Rep 78 (HL 1843), to *Durham v United States*, 214 F 2d 969 (DC Cir 1954), to *United States v Brawner*, 471 F 2d 969 (DC Cir 1972) and American Law Institute: *Model Penal Code*, Sec 4.01 (1962)
36. See, for a summary of major criticisms of the M'Naghten test, Fingarette: *The Meaning of Criminal Insanity*, 144-149 (1972)
37. Morris: *Criminal insanity*. 43 *Wash L Rev* 583, 605 (1968)
38. Goldstein, note 2, above, at 213
39. See, for one of the most vigorously pro-M'Naghten-ite judicial points of view, Weintraub: *Criminal responsibility: psychiatry alone cannot determine it*, 49 *ABAJ* 1075 (1963)
40. See, eg, Katz and Goldstein J: *Abolish the insanity defense—why not?* 72 *Yale LJ* 853 (1963); Monahan: *Abolish the insanity defense?—not yet*. 26 *Rutgers L Rev* 719 (1973); Morris: *Psychiatry and the dangerous criminal*. 41 *S Cal L Rev* 514 (1968); Brady: *Abolish the insanity defense—No!* 8 *Houston L Rev* 629 (1971); Perr: *Is the insanity defense unconscionable*, 20 *J Forensic Sci* 169 (1975); Szasz, note 18, above.
41. See, eg, Katz and Goldstein, note 40, above; Szasz, note 18, above
42. Szasz, note 18, above, at 212; cf Kittrie: *The Right to be Different*, 398-399 (Pelican ed 1973)
43. See, eg, the factual setting of *Wyatt v Stickney*, 325 F Supp 781 (MD Ala 1971), 334 F Supp 1341 (MD Ala 1971), 344 F Supp 373 (MD Ala 1972), 344 F Supp 387 (MD Ala 1972), *aff'd sub nom Wyatt v Aderholt*, 503 F 2d 1305 (5 Cir 1974)
44. Katz and J. Goldstein, note 40, above, at 865
45. NJ Criminal Code Revision Commission: *Responsibility* (August 1974 draft), at 11; see also, Cohen: *The New Jersey insanity defense, present and proposed*, 1 *Crim JQ* 214, 217 (1973) ("Free will means that man consciously directs his actions; accordingly, criminal responsibility must be judged at the level of the conscious"), and McDonald: *Speech to convention of the central neuropsychiatric association*, *Medical Tribune*, October 16, 1964, at 31, cited in Robitscher, note 8, above, at 63 ("when people can get off punishment by pleading insanity, they will plead this more often")
46. Mackenzie: *New code would alter rules on insanity*. *Washington Post*, October 12, 1975, at p C6
47. For a discussion of the psychiatric role at such a post-trial hearing, see p 148 below
48. Compare, eg, A 3282, Section 2C:4-1 (New Jersey Assembly Bill, April 7, 1974) (abolishing the defense) supported in pertinent part by the State Attorney General, to Draft Bill Concerning Criminal Responsibility (adopting the ALI test), accompanying New Jersey Mental Health Planning Committee: *Draft Material: Legal Aspects of Mental Health Care and Treatment* 37-45 (September, 1975)
49. On the other hand, it should be noted that, in a one-year California study, of 34,643 felony dispositions, only 464 pled not guilty by reason of insanity (1.3%). Of these, 195 went

to trial (.53%), of whom 109 were found not guilty, 86 guilty, and 66 not guilty by reason of insanity (.17%). Matthews: *Mental Disability and the Criminal Law*, 26-28 (1970)

Another nationwide study revealed that only 4% of all hospitalized persons whose commitments involved the criminal process were institutionalized following insanity acquittals. Scheidemandel and Kanno: *The Mentally Ill Offender: A Survey of Treatment Programs*, 20 (1966). Cf. for a discussion of the treatment of insanity acquittees in hospitals, Note: Commitment of persons acquitted by reason of insanity: the example of the District of Columbia, 74 Col L Rev 733 (1974)

In spite of these statistics, it is suggested that the question of criminal responsibility is still one of the great moral issues "at the intersection of psychiatry and law," Fingarette, note 36, above, at 17, and that its relative disuse highlights the avoidance and denial exhibited by the legal system in dealing with the defense which, in turn, underscores the significance of the defense's role in the criminal process, if only on an unconscious level

50. Flugel: *Man, Morals and Society*, 169-170 (Compass ed 1961)

51. Weihofen: *The Urge to Punish* (1956)

52. *ibid*

53. Abrahamsen: *The Psychology of Crime*, 3 (1964)

54. See, eg, Frank, *Courts on Trial*, 374 (1950)

55. See, eg, Schoenfeld, note 5, above, at 99-100

56. Goldstein, note 2, above, at 9-20, 89-91. See text accompanying notes 2-4, above

57. Weihofen, note 18, above, at 4, citing Overholser: *The Psychiatrist and the Law*, 132 (1953)

58. Lasswell: "Foreword," in Arens: *The Insanity Defense*, xi (1974). Arens graphically reproduces transcripts of two hearings conducted by the same judge on the same day in which he merely asks defendants the date, the names of the President and Vice-President and Washington's standing in the American League: the motion of the defendant who answered all four questions correctly was denied; the defendant who knew only the President's name was ordered held for psychiatric evaluation. *Ibid* at 77-79

59. Katz and J. Goldstein, note 40, above, at 868-870

60. For a classic description and explanation of ego defenses, see, eg, Drellich: *Classical psychoanalytic school: the theory of neuroses*, in I Arieta, ed, *American Handbook of Psychiatry*, 737, 750-752 (2d ed 1974)

61. See, eg, Schoenfeld, note 5, above, at 40-42; cf Kennedy: *How the law school fails: a polemic*, 1 Yale L & Soc Action 71 (1970)

For a discussion of why certain psychiatrists are drawn to the courtroom as an example of their "urge to testify," see generally, Halleck: *A critique of current psychiatric roles in the legal process*, [1966] Wis L Rev 379; see also, Roberts: *Some observation on the problem of the forensic psychiatrist* [1965] Wis L Rev 240

62. See, eg, Buckhout, Figueroa, and Huff: *Psychology and Eyewitness Identification* (1974); Buckhout: *Eyewitness Identification: Effects of Suggestion and Bias on Identification* (1975); Slomovitz: *Signal Detection Analysis of Eyewitness Recall* (1975); Reik, *The Compulsion to Confess: On the Psychoanalysis of Crime and Punishment* (1959)

63. 384 US 436 (1966)

64. 388 US 217 (1967)

65. 367 US 643 (1961)

66. See, eg, *State v Krol*, 68 NJ 236, — A 2d — (1975)

67. See, eg, *Shelton v Tucker*, 364 US 479, 488 (1960); *Lessard v Schmidt*, 349 F Supp 1078, 1096 (ED Wis 1972), vacated on other procedural grounds 414 US 473 (1974), on remand 379 F Supp 1376, 1379 (ED Wis 1974), vacated and remanded — US —, 43 USLW 3600 (1975); NJ Ct R. 4:74-7 (revised September 8, 1975)

68. See note 9, above