

Comment on Goldstein's Posttrial Competency Examination of Jurors

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As one surveys the many battlefields of the great war between law and psychiatry and as one counts the losses on our side, it is astonishing to come upon a psychiatrist who is calling for a fresh assault on the law's ultimate stronghold, the sanctum sanctorum — the jury. Not only do the timing and the target boggle the mind, but this new psychiatric foray is premised not on any therapeutic or psychiatric objective, but on the premise that expert psychiatric opinion is necessary to further the law's own objectives of fairness and due process. Goldstein is apparently prepared to forgive and forget, or at least to overlook, a decade of legal opinion and scholarship hostile to expert psychiatric testimony; hostility grounded on the claim that expert psychiatric testimony offends due process and fairness.¹

Putting aside these strategic considerations, Goldstein's proposal should be examined on its merits. He would have courts order posttrial psychiatric evaluation of a juror when "strong evidence" exists "that it is likely that a particular juror suffered from incompetence to understand the issues or to deliberate at the time of service." The need for what more explicitly might be called an *after the verdict* evaluation can only arise under the following circumstances:

1. The mentally ill juror was not excused from jury duty because of his disorder.²
2. The mentally ill juror survived the *voir dire* (screening before trial) including questioning and peremptory challenges to prosecution and defense.³
3. The jury itself, during its deliberations, did not recognize the difficulty which could have led to the juror's dismissal and his replacement by an alternate.⁴
4. The judge failed to recognize the juror's incompetence at any time during the trial.⁵
5. No third party came forward during the trial to raise the question of the juror's competency.⁵

We must assume that the supposedly "incompetent" juror has overcome all of these hurdles in order to participate in the verdict. Therefore, under

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what further set of circumstances would Goldstein's *after the verdict* psychiatric evaluation be necessary?

If, on the one hand, the defendant has been found innocent, it is unlikely that those who favor due process safeguards would want the prosecution to be able to overturn an innocent verdict on the theory that one juror was not competent. The issue of double jeopardy would be of central concern to civil libertarians.

On the other hand, if a juror's "psychotic misperceptions" actually led him to an aberrant decision against consensus, there would be a hung jury. Since in those circumstances the entire jury is dismissed; again, no posttrial evaluation would be necessary.

Thus, the only actual need for Goldstein's due process safeguard would be when a defendant is found *guilty* and the alleged incompetent juror has managed to conceal his incompetence and has reached a consensus of guilty with his fellow jurors. This, in fact, is what happened in the two cases that Goldstein reports. Neither case, when the opinions are reviewed, suggests that a great injustice has been done. Both defendants appear to be guilty on the record, and one would be more apt to question the competence of a juror who perceived them as innocent.

All this suggests to me that Goldstein's procedure would rarely, if ever, be necessary to correct an injustice and when invoked would do little more than provide guilty defendants one more tactic for the kind of procedural delays that now overburden the courts.

If one is ready to forge ahead, despite all of these objections, one must confront the most difficult concept in law and psychiatry — competency. Competency is neither a binary, yes/no status like pregnancy, nor is it a purely psychiatric concept.

Goldstein mentions in a footnote that "a more precise and operationally sound standard for juror competence is needed in order to guide psychiatrists and help them to reach a determination that is accurate, reliable, and useful to the court." This is easier said than done. Consider the legal difficulties attendant on the effort to articulate such a standard for competency to refuse treatment. Even if lawyers could articulate such a standard, I am less sanguine than Goldstein about our ability to provide "accurate, reliable, and useful" testimony. The standard of criminal responsibility has been elaborated for over two centuries, with no sign of improvement in our abilities to be useful to the courts.

Imagine the scientific clarity adversarial psychiatrists would bring to the subject of competency to be a juror. Is this the kind of solid evidence that justifies challenging the sanctum sanctorum of law, the jury? Would this be a valuable contribution to the law's due process? I think not.

Posttrial Competency Examination

As psychiatrists, we learn to focus on pathology and its disabling effects. Sometimes we underestimate our patients' adaptive capacities. When a juror we might diagnose as mentally ill has successfully surmounted the legal hurdles of jury selection and the interpersonal stresses of jury deliberation, we would do well to respect the "uninformed ignorance" of the law which honors that juror's decision and question our own pathologic bias. Goldstein may be correct that psychiatry is an "*inextricable cog in the machinery of the law*," but the cog looks the worse for wear. It would be a mistake to overburden it.

References

1. *Tarasoff v. Regents of University of California*, 551 P.2d 334 at 354, 131 Cal. Rptr. 14 at 34 (Mosk J, concurring and dissenting) (1976)
2. Cal. Penal Code §1072 (West Supp., 1981)
3. 47 Am. Jur. 2D Jury §233 (1973); see e.g., Cal. Penal Code §1069 (West Supp., 1981)
4. See e.g., Cal. Penal Code §1089 (West Supp., 1981)
5. *People v. Von Badenthal*, 48 P.2d 82; 8 C.A.2d 404 (1935)