

Response to Stone's "Comment on Goldstein's Posttrial Competency Examination of Jurors"

Robert Lloyd Goldstein, MD, JD

The fact that psychiatry can be abused does not make psychiatry an abuse. Scientists can be suborned, but science remains essential to human welfare. I join the call for ethical vigilance in medicine and science, not the Luddite appeal for wrecking the machinery in the vain hope of returning to a sinless Eden.¹

Stone does well to sound the alarm bells in order to caution us about a far more important and far reaching issue than any specifically dealt with in my own paper, i.e., the issue of potential misuse and abuse of psychiatry in the legal arena. Here, Stone is in good company. Freud was one of the first to raise doubts about the use of psychiatry in the courtroom. He wrote that "[p]sychology is a knife that cuts both ways" and argued against the half-baked application of psychoanalytic theories to legal proceedings, just as earlier he had warned against *wild analysis* as a reckless and blind misuse of his theories and techniques.^{2,3} More recently, Szasz,⁴ Menninger,⁵ and Robitscher,⁶ among others, have railed against the misapplication of psychiatry to legal matters. I share Stone's concern that psychiatry should not be misused or exploited in the courtroom; however, I am not yet prepared to agree that the machinery should be wrecked or that "the cog looks the worse for wear."

I do not share Stone's *siege mentality* about psychiatry and the law. His usage of language, e.g., "battlefield," "great war between law and psychiatry," "assault," "losses," "stronghold," "foray," etc., etc., bespeaks something categorical about the way he perceives the interface between psychiatry and the law. My own view conceptualizes a more hopeful and constructive model of that same interface, a "psycho-legal partnership"⁷ rather than a "great war."

A new generation of forensic psychiatrists may not be doomed to repeat the mistakes of the past. Better training and more refined expertise (achieved in no small measure through the educational and accreditation efforts of the American Academy of Psychiatry and the Law and the American Board of Forensic Psychiatry) should provide a more valuable and valued role for

Dr. Goldstein is a member of the faculty of the Department of Psychiatry of the College of Physicians and Surgeons of Columbia University, a graduate of the Columbia University School of Law, and a member of the New York State Bar. Address reprint requests to Dr. Robert Goldstein, 390 West End Avenue, New York, NY 10024.

forensic psychiatrists in the future. I am confident that Stone and others, concerned about maintaining the highest professional and ethical standards in psychiatry, will remain vigilant in order to ensure that psychiatrists stay within the recognized limitations of their expertise, whenever they venture beyond the safe confines of the consulting room and the couch.

My own article calls attention to the contribution psychiatrists can make in the circumscribed situation when psychiatric impairment of a juror has vitiated the fairness and integrity of a verdict in a criminal trial. I am not advocating anything like a routine and mandatory psychiatric screening of all jurors in advance or on flimsy grounds. Such an approach would be a grotesque misuse of psychiatry, an usurpation by our profession that would paralyze the system and offer very little in return. However, when a sufficient preliminary showing of juror incompetence has been made to require further inquiry by the court, as in my case illustrations, I believe psychiatrists can make a legitimate and useful contribution. It is not beyond our professional ken to infer that if a juror holds a delusional belief that he can discern guilt, without regard to the evidence presented at trial, because he is clairvoyant or if he experiences command hallucinations directing his verdict, then he necessarily is incompetent to carry out the traditional function of a juror under our system.

In view of his circumspect position, it is surprising that Stone concludes that "[n]either case suggests that a great injustice has been done" under these circumstances because both defendants were probably guilty anyway (a determination that is certainly beyond the expertise of a psychiatrist*). Psychiatrists do not make new laws or decide which would be the better law in a particular situation. They are bound to operate within the framework of the law as it exists within a given jurisdiction. It would be up to the legislatures or the courts, not up to psychiatrists, to make the decision, on the basis of a cost-benefits analysis, that on social policy grounds, this type of inquiry should never be made because of its potential for upsetting the jury system. They might decide that the cost to the jury system of such inquiries is too high a price to pay for whatever greater increment of fairness

* Stone dismisses any attempt to invoke the requirement of unanimous juror competency as merely "one more tactic for the kind of procedural delays that now overburden the courts." While it may be tempting to view an attempt to invoke such a requirement as a "tactic" to bedevil the courts, on the part of a defendant who we believe is undeserving and guilty, we should not lose sight of the fact that such a requirement is a constitutionally mandated safeguard and protection that helps to ensure that justice will be done.

If due process requires unanimous juror competency, are only eleven competent jurors of twelve good enough? If, in Stone's opinion, merely one incompetent juror is insufficient to constitute an injustice, what would he require? What if two of the jurors were incompetent? Six? All twelve? It seems to me that the competency of each and every individual juror is of great importance, because the vote of each and every individual juror is critical. Consider, for example, the possibility of a hung jury, in terms of its impact on the outcome of a criminal trial.

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to an individual defendant that might result therefrom. In cases where (1) a disturbed juror spoke and acted rationally during the trial; (2) was not "detected" by the judge or his fellow jurors; (3) the others were unanimous for guilt; and (4) there was no evidence that the suspect juror influenced the verdict reached by the others, perhaps there should be something akin to a *harmless error* doctrine for such cases, to avoid the need for a full retrial, when there is no indication that a different outcome might result.⁸ Again, that is a decision for the legislatures and the courts and not for psychiatrists.

Under existing law, a defendant in a criminal trial is entitled to enjoy the full benefit of a *unanimously competent* jury. It would be unfair, if not unconstitutional, for his fate to be decided by eleven "normal" jurors, basing their verdict on the evidence and the applicable law, and a twelfth juror who is operating under the control of a psychotic *influencing machine*.

References

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