

PSYCHIATRIC EVALUATION OF THE MENTALLY ABNORMAL WITNESS

THE outcome of trials depends in large part on human testimony. A jury's¹ job is to find the facts, and often the sole evidence of the facts is what witnesses say on the stand. The job is hard enough when the jury must rely on a mentally normal² witness whose testimony may be marred by flaws in his observation, recollection, narration or veracity.³ It becomes even more difficult when a witness is the victim of a mental abnormality⁴ which makes him incapable of describing what actually occurred.⁵ For such witnesses may appear remarkably lucid and credible to the average jury.⁶ Unlike the untruths of normal people, which usually spring from readily understandable motives, the distortions of abnormal people stem largely from deep-seated personality disturbances.⁷ And these disturbances can often be discerned only by the trained psychiatrist.⁸ To help the jury evaluate the credibility of abnormal witnesses, a new technique⁹ has made

1. The terms "jury" and "jurors" are used here to designate fact finders in civil and criminal trials; whatever is said about juries is equally applicable to trial judges who must act as fact finders where there is no jury.

2. The term "normal" is used here to designate the mentally healthy as distinct from the mentally ill or abnormal. "Mental illness" or "mental abnormality" are used here synonymously to designate the class of psychobiological disturbances not caused by any specific bodily organ. See ZILBOORG, *MIND, MEDICINE, AND MAN* 51-65 (1943).

3. See 3 WIGMORE, *EVIDENCE* § 876 (3d ed. 1940) (hereinafter cited as WIGMORE). See also note 9 *infra*.

4. See note 2 *supra*.

5. It should be understood that not every mental abnormality impairs a witness' faculties in this manner. For those that do, see pages 1326-31 *infra*. This comment deals only with the latter type of abnormality.

6. The great majority of psychological illnesses show little or no outward change in demeanor or social attitude. HENDERSON & GILLESPIE, *A TEXTBOOK OF PSYCHIATRY*, 101 (6th ed. 1947). See also OVERHOLSER & RICHMOND, *HANDBOOK OF PSYCHIATRY* 9-10 (1947); Aschaffenburg, *Psychiatry and Criminal Law*, 32 J. CRIM. L. & CRIMINOLOGY 3 (1941). For specific examples, see pages 1326-31 *infra*.

7. Altshuler, *The Psychopathology of Lying*, 6 J. OF NEUROLOGY AND PSYCHOPATHOLOGY 20 (1925); Karpman, *Lying*, 40 J. CRIM. L. & CRIMINOLOGY 135 (1949). By far the most comprehensive analysis of truth perversion, with excellent case histories, is HEALY & HEALY, *PATHOLOGICAL LYING, ACCUSATION AND SWINDLING* (1915). See further GLUECK, *STUDIES IN FORENSIC PSYCHIATRY* 156-83 (1916); West, *A Psychological Theory of Law*, in *INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES* 767, 780-2 (Sayre ed. 1947). See also pages 1326-31 *infra*.

8. Although some disturbances are apparent to laymen, persons suffering from obvious abnormalities are seldom called as witnesses in a lawsuit. The abnormalities of those persons who *are* called generally cannot be discovered by laymen. For a case history in point, see HEALY & HEALY, *op. cit. supra* note 7, at 178-82.

9. The rules of evidence offer a wide variety of impeachment techniques for attacking a witness' credibility. See, generally, 3 WIGMORE §§ 874-1046. Counsel may seek by these techniques to show defects in a witness' powers of observation, recollection, or narration—the three essential elements of a testimonial assertion. Counsel may further attempt

its bow—psychiatric¹⁰ testimony.

Modern relaxation of competency requirements¹¹ for witnesses has increased the need for psychiatry in the courtroom. Formerly the deranged and defective were deemed incompetent.¹² Today a sense of duty to speak the truth and a bare minimum of ability to observe, remember and recount qualify a witness to give testimony.¹³ As a consequence, more and more people with personality disorders and defects¹⁴ now testify in criminal and civil trials.¹⁵

to impeach a witness by demonstrating bad general character, bias, interest, or corruption. See Ladd, *Credibility Tests—Current Trends*, 89 U. OF PA. L. REV. 166 (1940). The availability of impeachment techniques varies, however, depending on whether the data is sought from the witness himself on cross-examination or by calling other witnesses. See pages 1333–6 *infra*.

10. A good introductory article on psychiatry is Menninger, *Psychiatry Today*, 181 ATLANTIC MONTHLY 65 (Jan., 1948). For an excellent discussion of lay misconception about psychiatry and the mind generally, see ZILBOORG, *op. cit. supra* note 2, at 3–71.

11. To be competent, a witness must have the capacity to (a) observe [District of Columbia v. Arnes, 107 U. S. 519 (1883); Thomas v. State, 73 Fla. 115, 74 So. 1 (1917)]; (b) remember [Worthington & Co. v. Mencer, 96 Ala. 310, 11 So. 72 (1892); Hartford v. Palmer, 16 Johns. 143 (N.Y. 1819)]; and (c) communicate [Walker v. State, 97 Ala. 85, 12 So. 83 (1892)]. On competency requirements generally, see Schneiderman v. Interstate Transit Lines, Inc., 394 Ill. 569, 69 N.E.2d 293 (1946); Note, 148 A.L.R. 1140 (1944). But “. . . [testimonial] capacity of person offered as a witness is *presumed*; i.e. to exclude a witness on the ground of mental . . . incapacity the existence of the incapacity must be made to appear.” 2 WIGMORE § 497.

Opposing counsel should object to a witness' qualifications as soon as a disqualifying fact is apparent, either before the witness is sworn or while the witness is on the stand. 2 *id.* § 486. Otherwise, counsel may be deemed to have waived any objection. 2 *id.* § 586. Moreover, one court has held that failure to object to a witness' competency will bar subsequent attempts to impeach the witness by showing mental defects. State v. Teager, 222 Iowa 391, 269 N.W. 348 (1936).

Whenever an objection is made, the judge must conduct a *voir dire* examination out of the jury's hearing. State v. Comeaux, 142 La. 651, 77 So. 489 (1918); White v. State, 52 Miss. 216 (1876). In conducting this examination, the judge is not bound by the ordinary rules of evidence. For example, he need not permit cross-examination of a witness called to disprove another witness' qualifications. 2 WIGMORE § 487. And the judge has full discretion to use any available aids, such as mental and psychological tests. See Hutchins & Slesinger, *Some Observations on the Law of Evidence—The Competency of Witnesses*, 37 YALE L.J. 1017, 1019 (1928). For an interesting account of a *voir dire* examination, see Commonwealth v. Tatisos, 238 Mass. 322, 130 N. E. 495 (1921). The Tatisos examination is compared with standard psychological intelligence tests in Hutchins & Slesinger, *supra*.

12. 2 WIGMORE § 492.

13. 2 *id.* § 501. See, e.g., Truttmann v. Truttmann, 328 Ill. 338, 159 N.E. 775 (1927); Hancock v. Hallmann, 229 Wis. 127, 281 N.W. 703 (1938).

14. Zilboorg estimates that at least one in every twenty persons of our population has been or is going to be under some sort of psychiatric treatment. ZILBOORG, *op. cit. supra* note 2, at 133.

15. See, e.g., Weeks v. State, 126 Md. 223, 94 Atl. 774 (1915) (derangement not resulting in extreme impairment of witness' faculties does not render a witness incompetent);

DISORDERS AND DEFECTS AFFECTING CREDIBILITY

Mental Disorders

An individual's capacity to relate objective facts may be impaired by disorders in his thinking, feeling, and behavior. These disorders are sometimes precipitated by physical factors, like concussion of the brain or excessive use of alcohol or drugs.¹⁶ But more often they are due to subtle non-physical causes: when basic needs and desires cannot be satisfied harmoniously, intrapsychic conflicts result.¹⁷

Psychoses. The major mental disorders are the psychoses.¹⁸ Psychotics are those persons who have lost touch with reality; they are roughly the group which lawyers call the "insane."¹⁹ As witnesses, their veracity may

State v. Crouch, 130 Iowa 478, 107 N.W. 173 (1906) ("feeble-mindedness" does not disqualify). See also Wigmore's statement that the broad principle "now practically everywhere accepted" is that a "derangement or defect, in order to disqualify, must be such as substantially negatives trustworthiness upon the *specific subject of the testimony*. . . ." 2 WIGMORE § 492.

A trial court's determination of competency is subject to reversal only if it is a clear abuse of discretion. Ruocco v. Logiocco, 104 Conn. 585, 134 Atl. 73 (1926); People v. Washor, 196 N.Y. 104, 89 N.E. 441 (1909). See Note, 148 A.L.R. 1140 (1944).

16. Physical factors also include a wide range of serious diseases like epilepsy and syphilis. The disorders associated with physical factors are generally the psychoses. See pages 1326-8 *infra*; NOYES, MODERN CLINICAL PSYCHIATRY 166-330 (2d ed. 1939); OVERHOLSER & RICHMOND, *op. cit. supra* note 6, at 60-122.

17. Such conflicts generally give rise to neurotic reactions. See pages 1328-30 *infra*. But they may also be associated with psychoses like schizophrenia. See HENDERSON & GILLESPIE, *op. cit. supra* note 6, at 288-330.

The balancing of selfish desires and social inhibitions is a part of one's daily adaptations to the stresses of life. However, such adaptation may be faulty, thereby leading to mental or physical disturbances in the organism. For an analysis of the development of basic motives and drives, see HENDERSON & GILLESPIE, *op. cit. supra* note 6, at 123-38. See generally, ALEXANDER, FUNDAMENTALS OF PSYCHOANALYSIS (1948); MENNINGER, THE HUMAN MIND (3d ed. 1947).

18. For the American and British classifications of the different types of disorders, see HENDERSON & GILLESPIE, *op. cit. supra* note 6, at 15-27. For a thorough discussion of the dynamics, symptoms, and treatment of psychoses, see *id.*, *passim*; NOYES, *op. cit. supra* note 16, *passim*.

19. "Insanity" as a legal term denotes people who cannot differentiate between right and wrong, according to the standards of their society. Consequently, such people are held not to be responsible for criminal behavior. This test was formulated in M'Naghten's case, 10 Clark & F. 200 (1843). See Overholser, *The Place of Psychiatry in the Criminal Law*, 16 B.U.L. REV. 322, 323-26 (1936); Tulin, *The Problem of Mental Disorder in Crime: A Survey*, 32 COL. L. REV. 933, 935-43 (1932). The "insane" may include not only psychotics but also extreme mental defectives, such as idiots and imbeciles. See pages 1330-31 *infra*.

But the term "insanity" has been practically rejected from the medical vocabulary. "[K]nowledge of right and wrong are no longer conceived as concrete entities that either are or are not. . . . The language of the law, while it might have been all right a hundred or two years ago is no longer usable by the present-day psychiatrist. . . ." WHITE, INSANITY AND THE CRIMINAL LAW 104 (1923). The psychiatrist has instead a different set of standards, based on the degree of disturbance in a psychobiological organism attempt-

be impaired in varying degrees by their lack of capacity to observe, correlate, or recollect actual events. Some alcoholic psychoses may result in memory impairment followed by fabrication to fill in the gaps.²⁰ It is possible for a psychotic to be aware of a portion of reality while entertaining certain delusions about the rest of it.²¹ While some psychotic disorders may be discernible by lay juries, others may not. For example, every mental hospital has patients whose intelligence and charm deceive visitors.²² But these people really suffer from hallucinations and delusions²³ constructed by processes operating unconsciously to serve some maladjusted need of the personality.²⁴

Of all the psychotics, the most misleading to the layman is the paranoiac, who entertains delusions of persecution or grandeur²⁵ but whose personality may not appear as disturbed as that of other psychotics. No matter how unfounded or absurd his delusions, the paranoiac may retain an appearance of normality and react in normal fashion to matters outside his delusional

ing to adjust to its environment. OVERHOLSER & RICHMOND, *op. cit. supra* note 6, at 9-11.

20. Memory gaps can be created by the damaging influence of active psychoses, alcoholic or otherwise. The compensatory filling of such gaps is termed "confabulation." Confabulation occurs in personalities unable to face inferiority and prone to erect defenses. The toxic condition then acts as a precipitating factor, bringing to the surface desires that could be repressed while the person was normal. Thus the content of confabulations, having no basis in reality, is determined by unconscious desires. See ALEXANDER, *op. cit. supra* note 17, at 259-60; Karpman, *supra* note 7, at 148-9. For studies of alcoholism in our society, see HALPERN, *STUDIES OF COMPULSIVE DRINKERS* (1946); STRECHKERS & CHAMBERS, *ALCOHOL ONE MAN'S MEAT* (1938).

21. A washwoman at a mental institution, for example, might claim that she is Cleopatra. If asked why she, as Cleopatra, washes floors, she might answer that the "hospital attendant would be angry" if she didn't. See the similar example in OVERHOLSER & RICHMOND, *op. cit. supra* note 6, at 9.

22. *Ibid.*

23. Delusions, illusions, and hallucinations have no counterpart in reality. They differ only in the form of manifestation—delusions are false beliefs or ideas, illusions are perceptual misinterpretations, and hallucinations are auditory misinterpretations. For a discussion of their occurrence in the mental disorders, see NOYES, *op. cit. supra* note 16, at 96-111.

24. See the statement by West: "The human mind is endowed with varied and adequate machinery for maintaining self respect. . . . [It is] maintained by continuous distortions of the facts of life and its personal relationships. The psychological processes involved include those of faulty perception, fantasy identification, selective remembering, projection, and rationalization." West, *supra* note 7, at 781.

25. Such delusions are rationalizations of hostile impulses which have broken through the barriers of repression. For example, a person may blame his wife for infidelity because he himself suffers from impotence or from some shameful sexual experience, and cannot admit either of these failings to himself. Or, having unfulfilled ambitions and being unable to admit failure to himself, one may first blame his environment (delusions of persecution) and later may come to believe that his ambitions have been attained (delusions of grandeur). For a thorough discussion of the diagnosis and treatment of paranoiacs, see HENDERSON & GILLESPIE, *op. cit. supra* note 6, at 331-40. See also ALEXANDER, *op. cit. supra* note 17, at 252-5; MENNINGER, *op. cit. supra* note 17, at 85-9, 245-7.

system. A good illustration is the "litigious paranoiac,"²⁶ whose delusions create grievances that he feels can only be settled by judicial fiat. His career is generally touched off by a lawsuit whose outcome left him dissatisfied. Thereupon he begins a legal crusade as a civil plaintiff, ostensibly to preserve his "rights," but actually to strengthen his sensitive insecurity and protect the weak points of his personality. Throughout his career, he generally remains free of hallucinations, conversationally adept, and probably intellectually superior to average people.²⁷ Generally pleading his own case in court, he can quote voluminously from case books and statutes, and his judgment on matters outside the field of his delusions remains largely intact.²⁸ The lay juror, uninformed of the paranoiac's career, will seldom sense the presence of a disorder. And the paranoiac, adept at his business, may often win his trumped-up case.

Neuroses. The lesser mental disorders are the neuroses or psychoneuroses.²⁹ Unlike the psychotic, who has usually broken with reality, the neurotic's "inner defenses" generally remain sufficiently strong to maintain undisturbed his grasp of reality and the external world.³⁰ Nevertheless, memory lapses and delusions may accompany neurosis, especially in the case of "hysteria."³¹ Thus, a woman afflicted with "hysteria" neurosis may actually believe she was raped by an innocent doctor, falsifying reality to satisfy unconscious motives and unsatisfied wishes.³² Similarly, an "hysteric" suffering from forgetfulness may be moved by strong community

26. For a thorough discussion of this type of paranoia, with excellent case histories, see GLUECK, *op. cit. supra* note 7, at 132-55. See also LICHTENSTEIN & SMALL, A HANDBOOK OF PSYCHIATRY 221-5 (1943); OVERHOLSER & RICHMOND, *op. cit. supra* note 6, at 158-9.

27. GLUECK, *op. cit. supra* note 7, at 133.

28. *Id.* at 136.

29. Neurosis is the most common form of mental illness. It develops whenever a person cannot satisfy his emotional needs harmoniously without internal conflict. This conflict may result from unsatisfactory past relationships with other people, or may arise in relation to present hopes, ambitions, jealousies, and the like. In any case, the neurotic keeps the conflict within himself, and develops such symptoms as phobias, obsessions, backaches, and stomach distress. For a thorough discussion of the causes, symptoms, and treatment of neurosis, see HENDERSON & GILLESPIE, *op. cit. supra* note 6, at 139-219; NOYES, *op. cit. supra* note 16, at 331-94. A particularly good analysis of the dynamics of neurotic behavior can be found in ALEXANDER, *op. cit. supra* note 17, at 193-205, 208-13. For examples of the various neurotic types, see MENNINGER, *op. cit. supra* note 17, at 134-50.

30. The difference between psychosis and neurosis is one of degree. Put another way, the neurotic fights himself while the psychotic has given up the struggle. See HENDERSON & GILLESPIE, *op. cit. supra* note 6, at 144; OVERHOLSER & RICHMOND, *op. cit. supra* note 6, at 164.

31. On "hysteria" neurosis see generally HENDERSON & GILLESPIE, *op. cit. supra* note 6, at 171-93; ALEXANDER, *op. cit. supra* note 17, at 246-51.

32. See, e.g., the letters from Drs. William A. White, Karl A. Menninger, W. F. Lorenz, and Otto Mönkemöller, reprinted in 3 WIGMORE § 924a, discussing case histories of false accusation by hysterical girls.

pressures to fill in his memory gaps and condemn an innocent person. Yet a neurotic often develops no outward change of personality and may, when testifying, display great equanimity.³³ Hence a juror may regard the neurotic witness as, at most, a bit "strange" or "eccentric,"³⁴ without discrediting his testimony. The true nature of the disorder may never be apparent to the jury and an unfounded charge may be turned into a disastrous verdict.

Psychopathic Personality. A third type of disorder, akin to neurosis, is the psychopathic personality.³⁵ All people, whether disordered or not, may at times manifest asocial or amoral behavior. But the psychopath is distinguished as a "neurotic character"³⁶ by a consistent life pattern of "perverse" behavior.³⁷ Being a neurotic sufferer, he has subtle conflicts which disturb his being. But unlike other neurotics, whose conflicts find expression within the person itself, the psychopath gratifies his needs by his conduct toward other people.³⁸ Unable to face reality in a socially acceptable

33. This is particularly true of the hysteric. Though the layman applies the word "hysteric" to one who is highly emotional, easily upset or confused, and unable to behave rationally in crises, the psychiatrist uses the word to describe a different set of symptoms. As one psychiatrist explains, "The real hysteric, the one who has definite symptoms of obscure psychological origin, may feel considerable discomfort on occasion, but he usually displays an extraordinary equanimity. This is so striking a characteristic of such patients that the leading French authority on the subject, Janet, was prompted to speak of *la belle indifférence des hystériques*." ZILBOORG, *op. cit. supra* note 2, at 130.

34. See the excellent examples cited in MENNINGER, *op. cit. supra* note 17, at 135-43.

35. See generally KAHN, *PSYCHOPATHIC PERSONALITIES* (1931); NOYES, *op. cit. supra* note 16, at 504-20; COON, *Psychiatry for the Lawyer*, 31 CORNELL L. Q. 466 (1946); Lipton, *The Psychopath*, 40 J. CRIM. L. & CRIMINOLOGY 584 (1950).

Because the term covers many different types of maladjusted people, rather than more precise categories with exact syndromes, it has sometimes been called a general wastebasket for every type of misbehavior. MENNINGER, *PSYCHIATRY IN A TROUBLED WORLD* 263 (1948). Nevertheless, a psychopathic personality is no more difficult to diagnose than other psychiatric conditions. ALEXANDER, *op. cit. supra* note 17, at 236.

Some psychiatrists have suggested substitutes for this category. See Menninger, *Recognizing and Renaming "Psychopathic Personalities,"* 5 MENNINGER CLINIC BULLETIN 150 (1941); Karpman, *On the Need of Separating Psychopathy into Two Distinct Clinical Types: the Symptomatic and the Idiopathic*, 3 J. CRIM. PSYCHOPATHOLOGY 112 (1941).

36. "Neurotic character" is Alexander's term for psychopathic personality. See ALEXANDER, *op. cit. supra* note 17, at 235.

37. As Menninger puts it, "'Perverse' describes these folk. . . . They are headed across-stream; they play at the game, but break all the rules. They are oftentimes possessed of good bodies, good looks, good manners; they lack neither intelligence nor perceptual powers. Their defectiveness is in their emotional and volitional functioning. They cannot keep out of trouble. They may achieve some good in the world, but the world pays dearly for it, and the net total of the individual's life is in the red." MENNINGER, *op. cit. supra* note 17, at 150. For examples of psychopaths, see *id.* at 151-5. The English have classified such people as "moral imbeciles." See HENDERSON & GILLESPIE, *op. cit. supra* note 6, at 381-2; OVERHOLSER & RICHMOND, *op. cit. supra* note 6, at 11. They usually become tramps, vagrants, criminals, habitual (pathological) liars, or swindlers.

38. While neurotics fight themselves, the psychopaths fight society. They "are not

manner, his behavior is repeatedly anti-social. Generally a person of unstable emotions and attachments, he tends to be insensitive, bizarre, and paranoid. Frequently, and of special import to juries, he engages in pathological lying.

While the normal person lies³⁹ for self-protection or bias or for any number of conscious motives, the pathological liar may be driven by unconscious motives to repetitious lying entirely disproportionate to any discernible end in view.⁴⁰ In effect, he loses his capacity to relate the truth as he himself sees it. The dope addict, for example, may lie pathologically about topics unrelated to his drug habit.⁴¹ Such lying may stem from a feeling of shame (accentuated by the covert methods generally necessary to obtain the drugs), from fear of the habit's consequences, and toxic weakening of his social inhibitions.

In spite of his disordered personality, the psychopath who lies pathologically may appear quite normal, mild-mannered, and intelligent. His lies are usually told with more conviction than those of normal people. Even if his lying is exposed, he is capable of quick adjustment,⁴² thereby thoroughly misleading the layman. The psychiatrist, however, can separate the pathological liar from the normal liar by correlating the psychopath's maladaptive behavior into a diagnostic life pattern.

Mental Defects

Unlike the disordered person, whose intelligence is rarely subnormal, the mental defective has never attained average mental capacity.⁴³ The failure may be due to an innate fault in developmental potentiality or to an

satisfied with the substitutive gratifications which neurotic symptoms offer. They 'act out' their neurotic impulses, in contrast to psychoneurotics, whose most important activity is in their fantasy." ALEXANDER, *op. cit. supra* note 17, at 235.

39. Lying is a common psychic phenomenon. "The processes of self-deception in the interest of self-esteem are very wide in our lives. We can readily distort our observations to maintain our self respect. This fact . . . is not the prerogative of a criminal class or of normal mankind under great stress. It is of the very stuff of the mind of man." West, *supra* note 7, at 780-1.

40. See GLUECK, *op. cit. supra* note 7; HEALY & HEALY, *op. cit. supra* note 7; HENDERSON & GILLESPIE, *op. cit. supra* note 6, at 387-90.

41. See HENDERSON & GILLESPIE, *op. cit. supra* note 6, at 433; MENNINGER, *op. cit. supra* note 17, at 148.

42. See HEALY & HEALY, *op. cit. supra* note 7, at 19, 100, *passim*; GLUECK, *op. cit. supra* note 7; Karpman, *supra* note 7, at 153.

43. On mental defects generally, see HENDERSON & GILLESPIE, *op. cit. supra* note 6, at 551-74; NOYES, *op. cit. supra* note 16, at 521-44. See also ABEL, *THE SUBNORMAL ADOLESCENT GIRL* (1942); BENDA, *MONGOLISM & CRETINISM* (1946).

It is possible for a mental defective to be disordered as well. "A psychosis in a mental defective, however, is likely to be a rather colorless affair, since the patient does not have a large stock of ideas with which to build up false notions about reality." OVERHOLSER & RICHMOND, *op. cit. supra* note 6, at 11.

arrest in developmental progress. As a result, the defective cannot understand and make proper use of the complex features of his environment.

Mental defectives, commonly known as the "feeble-minded,"⁴⁴ are classified as idiots, imbeciles, and morons. The idiot has a mental age ranging up to three years, the imbecile from four to seven, and the moron from eight to twelve.⁴⁵ While idiots and imbeciles seldom appear as witnesses, morons often do.⁴⁶ They may appear good-looking and alert. Nonetheless, they are usually highly suggestible⁴⁷ and prone to give erroneous testimony, deceptive and misleading to the lay observer.⁴⁸

DISCOVERING DISTURBANCES

*Clinical*⁴⁹ *Diagnosis*

To the psychiatrist, there is no line of demarcation between mind and body. The *psyche* and *soma* are but different aspects of the human organism, the processes of which are integrated to form one psychobiological whole.⁵⁰ To discover a "mental" disturbance, therefore, the psychiatrist studies the entire human organism—the evolution of the personality, as well as the somatic factors. This usually requires a physical examination⁵¹ and a com-

44. The "feeble-minded" include cretins, mongoloids, hydrocephalics, and microcephalics. The category also includes persons suffering from defects associated with prenatal disease or with diseases occurring in infancy or early childhood. See sources cited note 43 *supra*.

45. This is the classification adopted by the American Association on Mental Deficiency. See NOYES, *op. cit. supra* note 16, at 528.

High-grade idiots may understand the simplest words, but can rarely articulate them. High-grade imbeciles learn to read one-syllable words and can follow elementary instructions. Morons can usually read and write and perform simple, routine work, but generally find it impossible to make a successful social adjustment. See HENDERSON & GILLESPIE, *op. cit. supra* note 6, at 551-74; NOYES, *op. cit. supra* note 16, at 521-44.

46. See, e.g., *Territory v. Titcomb*, 34 Hawaii 499 (1938); *People v. Hudson*, 34 Ill. 187, 173 N.E. 278 (1930).

47. As one goes down the intellectual scale, remarkable increases in suggestibility appear. See BURTT, *LEGAL PSYCHOLOGY* 111 (1931).

48. See OVERHOLSER & RICHMOND, *op. cit. supra* note 6, at 51-2. See also Goddard's acute observation: "It is a notorious fact that men . . . refuse to admit a girl is feeble-minded if she is pretty." GODDARD, *HUMAN EFFICIENCY AND LEVELS OF INTELLIGENCE* 14 (1920).

49. The term "clinical" refers here to examinations conducted either in a psychiatric clinic or in a psychiatrist's private office.

50. "Man is a unitary organism or being whose physical, mental, emotional, and social reactions constitute but different aspects of one individual whole which functions as a unit. The mind therefore is but one of the . . . functions of these organisms and not an entity having an existence parallel with the body. . . . If a person says 'I am sad' the questions 'Where am I sad?' or 'With what am I sad?' do not occur to him. His sadness, anger or good spirits are total reactions—integrated psychobiological responses of the organism." NOYES, *op. cit. supra* note 16, at 18-19. This is frequently referred to as the "organismic theory." See OVERHOLSER & RICHMOND, *op. cit. supra* note 6, at 5.

51. For example, the accusations of a sex prosecutrix may result in large part from vaginal irritations. See HEALY & HEALY, *op. cit. supra* note 7, at 182.

plete case history, together with a mental examination to probe the personality in all its aspects. The patient's moods, activity, stream of thought, perception, memory, and insight must all be studied.⁵² In conducting this analysis, the psychiatrist may employ a host of psychoanalytical and psychological⁵³ tests to probe the patient's psychic determinants and general intelligence.⁵⁴

After thorough clinical examination,⁵⁵ the psychiatrist integrates the data secured from the biological, psychological, social, and other fields of inquiry. The personality disorder or defect is then diagnosed by analyzing and reconstructing the dynamic factors in its production.⁵⁶

Courtroom Diagnosis

When a psychiatrist has not made a clinical examination of a witness, the question arises whether he can render a competent opinion solely on the basis of data presented in court.⁵⁷ Courtroom information which may shed

52. For detailed accounts of the methods of psychiatric examination, see HENDERSON & GILLESPIE, *op. cit. supra* note 6, at 83-100, 545-50, 563-74; NOYES, *op. cit. supra* note 16, at 139-61.

53. While psychology studies behavior in general, psychoanalysis is a method of exploring the mental life, based on the teachings of Freud, Jung, and Adler. An excellent discussion of psychoanalytic therapy is ALEXANDER, *op. cit. supra* note 17, at 272-300. For a good history of psychoanalysis, see BRILL, *FREUD'S CONTRIBUTION TO PSYCHIATRY* (1944).

Most psychiatrists, as doctors specializing in mental disorders, draw heavily on the knowledge and techniques of both psychology and psychoanalysis. See OVERHOLSER AND RICHMOND, *op. cit. supra* note 6, at 2-8.

54. The *Binet-Simon I.Q.* test, standardized by Terman, is particularly useful for gauging mental defects. See Terman & Merrill, *MEASURING INTELLIGENCE* (1937). In the *Rorschach Test*, which seeks to explore perceptual organization, a patient is shown a series of inkblots and asked what they represent. See RORSCHACK, *PSYCHODIAGNOSTICS* (1942). In the *Thematic Apperception Test*, he is shown photographs of situations and asked to make up a story. See MURRAY, *EXPLORATION IN PERSONALITY* (1938). For a résumé of these and other psychological and psychoanalytical testing devices, see MENNINGER, *op. cit. supra* note 17, at 175-80.

55. Examination may take anywhere from a few days to a month. See Weihofen, *Eliminating the Battle of Experts in Criminal Insanity Cases*, 48 MICH. L. REV. 961, 965 (1950). But in any case, "... a thirty-day period is generally sufficient for diagnosis." Communication to the Yale Law Journal from Dr. Lawrence Freedman, Psychiatrist, Yale Medical School, dated June 19, 1950, in Yale Law Library.

56. "Of course, the patient's cooperation is very important. Without it, the psychiatrist may not be able to make a diagnosis. But even where the patient is unwilling, a formulation can sometimes be made." *Ibid.*

57. A person qualifying as an expert can be asked a hypothetical question provided it is based on evidence adduced in court. The jury can then disregard the expert's opinion if it does not believe the evidence upon which the opinion is grounded. As such, the hypothetical is a logical device to give expert aid to the jury. See 2 WIGMORE, §§ 672-81.

The hypothetical, however, is subject to serious objections. An attorney can, if he wishes, include in the hypothetical only facts favorable to his side, thereby strait-jacketing and antagonizing experts. Moreover, long and biased hypotheticals may be forgotten

light on a witness' personality is of three types: the witness' demeanor; his answers to questions on the stand; and extrinsic evidence of his past activities.

Demeanor. During a witness' entire performance in court, a psychiatrist can observe his dress, gait, posture, gestures, voice, and any peculiarities in physical appearance.⁵⁸ He can likewise study aspects of the witness' personality, such as his attitude or mood and the intensity of his emotions, which are often suggested by muscular tensions, postures, and other physical expressions.⁵⁹ While some of these characteristics may be distorted by the witness' uneasiness on the stand or by his hostility to the cross-examiner, a psychiatrist, with his experience in assessing demeanor,⁶⁰ can make allowance for variables of this sort.

The Witness' testimony. While the direct examination may, in rare cases, elicit meaningful psychiatric data from the witness, cross-examination will ordinarily be the primary source. It usually allows full probe of a witness' general mental state, intellect, perception, memory, and cogitative faculties.⁶¹ Cross-examination may also be used to obtain as much of a case history as the witness himself will relate.⁶² Furthermore, it may sometimes expose litigious paranoid tendencies where counsel are permitted to question a plaintiff about prior suits he has brought.⁶³ Similarly, prior acts of

by the jury while the expert opinion remains impressed on their mind. 2 *id.* § 682. Wigmore has advocated that the hypothetical be abolished. Instead, where the expert has read or listened to any of the testimony given in court, Wigmore would allow him to state his conclusion as soon as he begins to testify. The bases for his opinion could then be brought out on direct or cross-examination. 2 *id.* § 686. For an invaluable collection of materials on expert testimony, see 2 LAW & CONTEMP. PROB. 401 (1935). See also McCormick, *Some Observations Upon the Opinion Rule and Expert Testimony*, 23 TEX. L. REV. 109 (1945).

58. The demeanor of a witness on the stand may always be considered in evaluating his credibility, and demeanor is always assumed to be in evidence. 3 WIGMORE § 946. *But cf.* Kovacs v. Szentes, 130 Conn. 229, 33 A.2d 124 (1943) (in alienation of affections case, findings of trial court based in part upon observation of plaintiff's wife and defendant in courtroom, held error). On the importance of demeanor evidence generally, see 5 WIGMORE § 1395.

59. On the importance of these factors for diagnostic purposes, see HENDERSON & GILLESPIE, *op. cit. supra* note 6, at 93-5; NOYES, *op. cit. supra* note 16, at 149-54.

60. See note 52 *supra*.

61. See, e.g., *People ex rel. Taylor v. Smalley*, 121 Misc. 331, 201 N.Y.S. 39 (1923); *Roberts v. State*, 117 Tex. Crim. Rep. 418, 35 S.W.2d 175 (1931). A collection of cases by jurisdiction can be found in 3 WIGMORE § 987. For a careful analysis of the various rules governing the scope of the cross-examination, see Note, 24 IOWA L. REV. 564 (1939).

62. A good example is the cross-examination of Whittaker Chambers in the first and second perjury trials of Alger Hiss. See N.Y. Times, June 3, 1949, p. 1, col. 8; June 4, 1950, p. 1, col. 4; June 7, 1949, p. 1, col. 1; June 8, 1949, p. 1, col. 1; Nov. 23, 1949, p. 1, col. 2; Nov. 24, 1949, p. 1, col. 2; Nov. 29, p. 1, col. 2. See also note 92 *infra*.

63. See, e.g., *Mintz v. Premier Cab Ass'n*, 127 F.2d 744 (D.C. Cir. 1942) (plaintiff in personal injury action questioned regarding previous claims for injuries); *Johnson v. Richards*, 50 Idaho 150, 294 Pac. 507 (1930) (wife, in suit for alienation of husband's affections questioned about accusations of women other than defendant). To prevent un-

misconduct, sexual or otherwise, may be revealed.⁶⁴ Finally, the psychiatrist may direct the cross-examination, thereby approximating a personal interview with the witness.⁶⁵

Extrinsic evidence. While cross-examination is generally controlled solely by the policy of relevancy, extrinsic testimony is further governed by the auxiliary policies of preventing confusion of issues, unfair surprise, and undue prejudice.⁶⁶ As a result, information of vital import to the psychiatrist may be excluded.

Efforts to attack a witness' veracity by extrinsic evidence must follow a few well-defined channels. If a witness has been convicted of a felony, the conviction can be introduced in evidence to cast doubt on his veracity,⁶⁷ since it is irrebuttable proof of an act which supposedly indicates a character

fair prejudice to the plaintiff, however, courts have sometimes limited such questioning. See 3 WIGMORE § 963.

64. In a few states only prior acts of misconduct which affect veracity may be exposed on cross-examination. *E.g.*, *Shailer v. Bullock*, 78 Conn. 65, 61 Atl. 65 (1905). But generally the extent of questioning about prior misconduct is left entirely to the trial court's discretion. *E.g.*, *Territory v. Chavez*, 8 N.M. 528, 45 Pac. 1107 (1896). A famous example of a court's failure to exercise such discretion is *Commonwealth v. Sacco*, 255 Mass. 369, 151 N.E. 839 (1926), noted in 36 YALE L.J. 384 (1927). See, generally, 3 WIGMORE §§ 982-8; Ladd, *supra* note 9, at 184.

While Wigmore feels that in most instances cross-examination should be limited to misconduct affecting veracity, he favors wide open cross-examination of sex prosecutrices about prior immorality and illicit conduct. In such cases, he feels, chastity may bear directly on truth-telling capacity, so that full inquiry into the social and mental history should be permitted. 3 WIGMORE § 982. For a recent case in accord with Wigmore's views, see *Redmon v. State*, 150 Neb. 62, 33 N.W.2d 349 (1948), noted in 28 NEB. L. REV. 132 (1948). Wigmore further proposes that no judge should allow a sex offense to go to the jury unless the prosecutrix' mental makeup and social history have been examined and testified to by a psychiatrist. 3 WIGMORE § 924a.

65. In the first Hiss trial, for example, Hiss' attorney conferred with Dr. Carl Binger during the cross-examination of Whittaker Chambers. N.Y. Times, June 7, 1949, p. 1, col. 1. But Dr. Binger was not allowed to testify at this trial. See note 92 *infra*.

66. See 3 WIGMORE § 878. These auxiliary policies, however, are seldom articulated by courts. Instead, they use the word "relevancy," when they really mean "legal relevancy." See James, *Relevancy, Probability and the Law*, 29 CALIF. L. REV. 689 (1941).

67. At common law a conviction for a felony, or for a misdemeanor involving dishonesty (*crimen falsi*), rendered the convicted person incompetent as a witness. 2 WIGMORE § 520; Ladd, *supra* note 9, at 174.

This disqualification generally has been removed by statutes, which provide instead that conviction of crime shall be admissible to impeach. The statutes, however, vary widely in their wording and interpretation as to what crimes are admissible for this purpose. Some courts hold that the crime must be one that would disqualify at common law. *Melaragero v. United States*, 88 F.2d 264 (3d Cir. 1937); *Card v. Foot*, 57 Conn. 427, 18 Atl. 713 (1889). Others say it must be a crime involving moral turpitude. *Grammer v. State*, 239 Ala. 633, 196 So. 268 (1940). Yet others allow conviction for any crime, including misdemeanors not reflecting on credibility. *Quigley v. Turner*, 150 Mass. 108, 22 N.E. 586 (1889). For a compilation of the statutes and decisions in the various states, see 3 WIGMORE § 987.

flaw.⁶⁸ But past acts of misconduct for which the witness was never convicted may not be proved extrinsically, for fear that rebuttal and litigation of these acts may confuse the jury.⁶⁹ Prior suits and claims of a plaintiff-witness which may denote litigious paranoia are excluded for the same reason.⁷⁰ Similarly, a witness' ordinary case-history, less directly relevant to veracity than prior acts of misconduct or prior suits and claims, is rarely admissible. A witness' veracity may always be attacked, however, by evidence of a bad reputation for truthfulness in the community.⁷¹ The bearing of such evidence on a witness' credibility is felt to be sufficiently strong to outweigh any confusion which might ensue from collateral litigation of that reputation.

Aside from attacks on a witness' veracity, counsel may seek by extrinsic evidence to show shortcomings in the witness' powers of observation and recollection. But when such evidence is offered by anyone other than a psychiatrist, courts generally admit it only if the defect is linked to insanity.⁷²

Those courts which admit extrinsic evidence of drug addiction treat it as a category unto itself.⁷³ Some of these admit such evidence only when it is

68. As Justice Holmes put it, ". . . [W]hen it is proved that a witness has been convicted of a crime, the only ground for disbelieving him which such proof affords is the general readiness to do evil which the conviction may be supposed to show. It is from that general disposition alone that the jury is asked to infer a readiness to lie in the particular case, and thence that he has lied in fact. The evidence has no tendency to prove that he was mistaken, but only that he has perjured himself and it reaches that conclusion solely through the general proposition that he is of bad character and unworthy of credit." *Gertz v. Fitchberg R.R.*, 137 Mass. 77, 78 (1884).

Psychiatrically speaking, however, a single criminal act is not in itself sufficient proof of a personality-type. See Ladd, *supra* note 9, at 178.

69. 3 WIGMORE § 979. The other auxiliary policies of preventing unfair surprise and undue prejudice may also operate here, on the theory that it is unfair to require that a witness be prepared to rebut alleged acts that may range over his entire life. *Ibid.*

70. 3 *id.* § 963.

71. 3 *id.* § 923. Some courts admit evidence of bad general character. A majority, however, feel that general qualities of character are too broad and vary too much with the person judging them, while everyone can discuss qualities related to veracity. See 3 *id.* §§ 922-4; cases cited in 90 A.L.R. 870 (1934).

The rule that character must be proved by reputation alone, which developed from a misunderstanding of the earlier English cases, is supported on two grounds today: that it excludes lay opinions (which give no aid to the jury), and that otherwise character proof might be based on some limited personal experience or prejudice. See 7 WIGMORE §§ 1918, 1985-6; Ladd, *supra* note 69, at 509-18. But the early common law rule, which allowed character proof that was based on personal knowledge or belief, seems highly preferable to the present American practice. See 7 WIGMORE § 1986.

72. 3 WIGMORE §§ 931-2. See also note 19 *supra*.

Any reputable practicing physician, although not a specialist in mental illnesses, can testify to insanity. *Weihofen*, *supra* note 55, at 962. Even lay testimony regarding insanity is sometimes admitted. *State v. Madena*, 165 La. 474, 115 So. 661 (1928); *State v. Witherspoon*, 210 N.C. 647, 188 S.E. 111 (1936). See 2 WIGMORE § 568; 3 *id.* §§ 933-8.

73. Some courts exclude evidence of drug addiction altogether. *E.g.*, *State v. King*, 88 Minn. 175, 92 N.W. 965 (1903); *Katleman v. State*, 104 Neb. 62, 175 N.W. 671 (1919).

supported by competent testimony that the memory is probably, or in fact, impaired.⁷⁴ Other courts always admit evidence of the drug habit on the theory that habitual use of drugs indicates moral degeneracy incompatible with veracity,⁷⁵ or that it results in pathological lying.⁷⁶ But while habitual use of alcohol may be as probative psychiatrically as drug addiction,⁷⁷ courts traditionally exclude all extrinsic evidence of chronic alcoholism.⁷⁸

Summary. Concededly, a psychiatrist operates at optimum capacity in a clinical examination. But despite restrictive rules of evidence and the courtroom atmosphere, enough data may be presented in court to provide the basis for a psychiatric diagnosis⁷⁹ which will be helpful to the jury. For example, by correlating all the factors of a witness' personality, a psychiatrist may sometimes be able to detect a pathological liar in the courtroom as easily as in the clinic.⁸⁰ These factors may include the witness' ability to adjust quickly to exposure of his lies, a case history denoting bizarre, insensitive, or paranoid tendencies, and any convictions or indications of a bad reputation for veracity extrinsically revealed. Thus, whenever a qualified psychiatrist believes that he can make a competent courtroom diagnosis, the court should allow him to do so. Despite any shortcomings in

74. *Kelly v. Maryland Casualty Co.*, 45 F.2d 782 (W.D. Va. 1929); cases cited in 15 A.L.R. 912 (1921). See 3 WIGMORE § 934.

75. *Beland v. State*, 86 Tex. Crim. Rep. 285, 217 S.W. 147 (1920); *State v. Concanon*, 25 Wash. 327, 65 Pac. 534 (1901); *State v. Prentice*, 192 Iowa 207, 183 N.W. 411 (1921) *semble*.

76. *State v. Fong Loon*, 29 Idaho 248, 158 Pac. 233 (1916); *cf. Effinger v. Effinger*, 48 Nev. 205, 209, 239 Pac. 801 (1925) (doctor testified that witness a dope addict and that dope addicts are not to be believed). For further cases and discussion generally, see Rossman, *Testimony of the Drug Addicts*, 3 ORE. L. REV. 81 (1924); Comment, 16 So. CALIF. L. REV. 333 (1943).

77. Chronic alcoholism and drug addiction are both commonly symptomatic of neuroses. It is useless to generalize about which anaesthetic has the greater effect on the moral faculties. In every case there are numerous variables, such as the amount of anaesthetic consumed, kind of drug, and the personal equation of the patient. See ALEXANDER, *op. cit. supra* note 17, at 240-41; HENDERSON & GILLESPIE, *op. cit. supra* note 6, at 427-30, 433-40; NOYES, *op. cit. supra* note 16, at 232-5, 239-46; OVERHOLSER & RICHMOND, *op. cit. supra* note 6, at 90, 96-8.

78. *E.g.*, *Woods v. Dailey*, 211 Ill. 495, 71 N.E. 1068 (1904); *State v. Castle*, 133 N.C. 769, 46 S.E. 1 (1903). The distinction which courts make between alcohol and drugs may be due to the general acceptability of drinking in our community, as opposed to the strong moral opprobrium attached to the taking of drugs.

Intoxication, however, at the time of the event testified to, or at time of trial, may affect a witness' capacity to observe or recollect. Thus, a general habit of intemperance during a given month may be admitted to show probable intoxication on a certain day of that month. *E.g.*, *Kuenster v. Woodhouse*, 101 Wis. 216, 77 N.W. 165 (1898). By this technique alcoholism may sometimes be shown despite the general rule excluding the habit itself.

79. For a contrary view, see Bendiner, *The Ordeal of Alger Hiss*, *Nation*, Feb. 11, 1950, p. 123.

80. HEALY & HEALY, *op. cit. supra* note 7, at 256.

a diagnosis of this sort, the psychiatrist is better qualified than a lay jury to assess personality disorders.

PRESENT USE OF PSYCHIATRISTS

Courts have not always welcomed psychiatric diagnoses in discovering disorders and defects likely to impair a witness' credibility.⁸¹ While evidence of extreme mental derangement verging on insanity is clearly admissible,⁸² judges have sometimes barred expert diagnosis of the lesser mental illnesses.⁸³

This attitude stems from the erroneous assumption that while the line between sanity and insanity is a clear one, the diagnosis of any lesser disorder or defect is based on speculation and inference. Once in the realm of speculation, psychiatrists are in no better position than lay jurors to determine the truth-telling capacity of a disordered witness. And, the argument proceeds, there may be too much disagreement among the psychiatrists, leading to a battle of experts.

But the notion that psychiatry lacks definite guideposts for classifying the minor disorders and defects overlooks the realities of modern medicine.⁸⁴ Personality disorders below the level of psychosis and mental defects above the level of imbecility have been recognized for decades,⁸⁵ and their effects

81. "We have collected an enormous material about the fallibility of testimony; but criminal justice often acts as if there were no perjury, no error in identification, no hysteria of female witnesses, no fantastic stories of children trembling on the witness-stand." Hirschberg, *Pathology of Criminal Justice*, 31 J. OF CRIM. L. & CRIMINOLOGY 536, 538 (1941).

82. See 3 WIGMORE § 932.

83. The first Hiss trial, N.Y. Times, July 1, 1949, p. 1, col. 2 (courtroom diagnosis of psychopathic personality excluded); Commonwealth v. Meyers, 5 Pa. D. & C. 410 (1924) (clinical diagnosis of impaired mental condition and subnormal intelligence, made two years before trial, excluded); State v. Driver, 88 W. Va. 479, 107 S.E. 189 (1921) (courtroom diagnosis of untrustworthy moral pervert).

The rationale of the exclusion in both the *Meyers* and *Driver* cases, *supra*, was that opinion evidence assailing a witness' veracity must be based on knowledge of the witness' reputation for veracity in his community. This rationale fails, however, if a psychiatrist's testimony is regarded as *expert*, because only ordinary character witnesses are confined to general reputation for veracity. See notes 57 and 71 *supra*. As Judge Goddard in the second Hiss trial significantly noted, in distinguishing the *Driver* case, "The court indicated that it would not allow him [the psychiatrist] to be qualified as an expert. This was in 1921—before the value of psychiatry had been recognized." United States v. Hiss, 88 F. Supp. 559, 560 (S.D.N.Y. 1950). See also note 92 *infra*.

The ground on which psychiatric testimony was excluded in the first Hiss case is unknown, since there was no written opinion.

84. Consider, for example, the practice of the United States government in World War II, in discharging soldiers for lesser psychiatric disturbances. A total of 388,600 neuropsychiatric cases were given medical discharges, and an additional 163,000 persons, including those with mental deficiency, psychopathic personality, drug addiction, alcoholism and homosexuality, were given administrative discharges. MENNINGER, *PSYCHIATRY IN A TROUBLED WORLD* 343 (1948).

85. This recognition has led some states to repudiate the orthodox notions of crim-

on credibility are scientifically ascertainable. And while psychiatrists may sometimes disagree among themselves,⁸⁶ this possibility exists whenever experts testify,⁸⁷ and no valid reason appears for drawing the line at psychiatry.

Many courts have indeed come to realize that psychiatry can render valuable assistance in assessing the lesser mental disturbances. Judicial appreciation of psychiatry has been most pronounced in sex offense cases. Recognizing that false sex charges may stem from the psychic complexes of a female who appears normal to the layman, courts have permitted psychiatrists to expose mental defects,⁸⁸ hysteria,⁸⁹ and pathological lying⁹⁰ in sex prosecutrices. The liberal attitude in this area⁹¹ is probably due to the gravity of the charge; to the general lack of corroborating evidence; and perhaps to a popular feeling that sex is peculiarly within the ken of psychiatrists.

inal responsibility, see note 19 *supra*, and to provide instead for commitment to a mental institution when the defendant is a mental defective or psychopathic personality. See, e.g., MASS. ANN. LAWS c. 123, §§ 113-15 (Supp. 1948); VT. STAT. §§ 6699-6703 (1947). See also Weihofen & Overholser, *Commitment of the Mentally Ill*, 24 TEX. L. REV. 307 (1946).

86. But see *People v. Hudson*, 341 Ill. 187, 173 N.E. 278 (1930) (principal witness in arson case examined by three physicians, all of whom gave same diagnosis, despite fact that one was appointed by the prosecution, another by the defense, and the third by the court).

And see Overholser's statement: "[M]any of the disagreements are more apparent than real, thanks to the hypothetical question, [and] the refusal to permit the expert witness to explain his views and the reasons therefore..." Overholser, *The Place of Psychiatry in the Criminal Law*, 16 B.U.L. REV. 322, 328 (1936). See also Weihofen, *supra* note 55, at 962.

87. See 2 WIGMORE § 563. Moreover, where there is considerable disagreement, the jury can always disregard the psychiatric testimony entirely. See 2 *id.* § 673.

88. *Jeffers v. State*, 145 Ga. 74, 88 S.E. 571 (1916). *Accord*, *State v. Teager*, 222 Iowa 391, 269 N.W. 348 (1936) (evidence of prosecutrix' subnormal mentality would have been allowed for impeachment purposes if defense had not failed to object to prosecutrix' competency).

89. *Mell v. State*, 133 Ark. 197, 202 S.W. 33 (1918); *State v. Pryor*, 74 Wash. 121, 132 Pac. 874 (1913); *Rice v. State*, 195 Wis. 181, 217 N.W. 697 (1928).

90. *People v. Cowles*, 246 Mich. 429, 224 N.W. 387 (1929); *State v. Wesler*, 1 N.J. 58, 59 A.2d 834 (1948), noted in Comment, 39 J. CRIM. L. & CRIMINOLOGY 750 (1949); *Miller v. State*, 49 Okla. Cr. 133, 295 Pac. 403 (1930).

91. See, however, one writer's statement that in sex cases a "majority of courts refuse to admit the opinions of psychiatrists and social workers as to the moral and mental character of a witness. . . ." Comment, 39 J. CRIM. L. & CRIMINOLOGY 750, 752-3 (1949). This view is not borne out by the reported sex cases in which psychiatrists have been offered. See notes 83, 88-90 *supra*. Courts do exclude opinions as to a witness' mental and moral character, however, when offered by persons other than psychiatrists. *E.g.*, *Ah Tong v. Earl Fruit Co.*, 112 Cal. 679, 45 Pac. 7 (1896); *Abbott v. State*, 113 Neb. 517, 204 N.W. 74 (1925). *Contra*, *State v. Witherspoon*, 210 N.C. 647, 188 S.E. 111 (1936) (constable's statement that prosecutrix "not a normal girl mentally," held admissible). And in *State v. Teager*, 222 Iowa 391, 269 N.W. 248 (1936), a schoolteacher's offer to testify that a rape prosecutrix was "subnormal mentally" was excluded only because the prosecutrix' competency had not been challenged.

But there is no reason to restrict this attitude to sex cases. Whenever a psychiatrist can expose personality disturbances that may affect a witness' credibility, the policy of admitting any relevant material demands that he be heard. Thus, in the recent prejury trial of Alger Hiss,⁹² a forthright federal court accepted a diagnosis based entirely on courtroom observation. The psychiatrist called by the defense was permitted to testify that in his opinion Whittaker Chambers, one of the prosecution's star witnesses, was a psychopathic personality with "a tendency towards making false accusations."⁹³

The Desirability of Clinical Examination

Although courtroom diagnosis is better than nothing, the full potentialities of psychiatric guidance will not be realized until all diagnosis is based upon a full clinical examination. Courtroom techniques for probing personality are perforce limited. Although the psychiatrist, by directing cross-examination, may approximate a personal interview, he is deprived of direct rapport with the witness, often essential to diagnosis. A case history obtained on cross-examination may be incomplete. Questioning can be limited by the judge at his discretion. And an uneasy or hostile witness, antagonized or awed by the ominous atmosphere of the courtroom, may be reticent or evasive. Vital information withheld by the witness on cross-examination may never be brought out due to restrictive rules of evidence. Past acts of misconduct, chronic alcoholism, or traits of litigious paranoia, for example, may never be divulged.

To provide juries with maximum psychiatric assistance, courts should

92. There were two trials. In the first trial, Dr. Carl Binger, the psychiatrist, was not allowed to testify. N.Y. Times, July 1, 1949, p. 1, col. 2. His testimony was admitted, however, in the second trial. *United States v. Hiss*, 88 F. Supp. 559 (S.D.N.Y. 1950).

The *Hiss* ruling does not stand alone as an example of judicial appreciation of psychiatry in cases other than sex cases. *Coffin v. Reichard*, 148 F.2d 278 (6th Cir. 1945) (hospital records showing that appellant in habeas corpus proceeding was a psychopathic personality, admitted); *People v. Hudson*, 341 Ill. 187, 173 N.E. 278 (1930) (testimony of three experts that 42-year-old principal witness in an arson case was a moron); *Pool v. Day*, 143 Kan. 226, 53 P.2d 912 (1936) (expert testimony that plaintiff-witness suffered from "retrograde amnesia"); *Bouldin v. State*, 87 Tex. Crim. Rep. 419, 222 S.W. 555 (1920) (exclusion of evidence that prosecuting witness in robbery case was feeble-minded, held erroneous). See *U.S. v. Pugliese*, 153 F.2d 497, 499 (2d Cir. 1945) (extrinsic evidence that a witness has been in mental institution is admissible to impeach).

93. N.Y. Times, Jan. 6, 1950, p. 1, col. 2. In describing psychopathic personality, Dr. Binger said it was "not the conventional note of insanity," but rather a personality deviation characterized by amoral and asocial conduct. *Ibid.* For the various factors upon which Dr. Binger based his diagnosis, see N.Y. Times, Jan. 7, p. 8, Col. 5. The defense also called as a witness Dr. Henry A. Murray, a clinical psychologist from Harvard, who supported Dr. Binger's conclusions. N.Y. Times, Jan. 13, 1950, p. 9, col. 4.

order clinical⁹⁴ examination of any witness⁹⁵ by a court-appointed psychiatrist⁹⁶ upon a reasonable showing that the witness may be suffering from a mental illness likely to affect his credibility. If the witness refuses to submit to the examination,⁹⁷ the court could stay the proceedings or dismiss

94. Public clinics are generally available for the conduct of such examinations. In some of our larger cities, for example, psychiatric clinics are utilized by municipal, see Olson, *The Psychopathic Laboratory of the Municipal Court of Chicago*, 92 CENT. L.J. 102 (1921); Weihofen, *Hospital Examination of Defendants Before Trial*, 2 LAW & CONTEMP. PROB. 419, 427 (1935), and juvenile courts. See HEALY, *THE INDIVIDUAL DELINQUENT* (1929). For a collection of statutes, see 8 WIGMORE § 2220. State hospitals are also available. In at least 13 states, judges can commit criminal defendants to state hospitals for observation when the defendant's sanity is in issue. See Weihofen, *supra* note 55, at 965-74. See also notes 49 *supra* and 96 *infra*.

95. While this procedure would be used most often to impeach a plaintiff or a witness for the prosecution, see pages 1338-9 *supra*, a defendant who takes the stand and witnesses who testify in his behalf should not be exempt. Like the plaintiff and his witnesses, they may be impeached. 3 WIGMORE § 890. And when their credibility is in issue they should be examined upon a showing of probable mental illness.

96. Judges can appoint psychiatrists under their inherent constitutional power to summon witnesses. See 9 WIGMORE § 2484. And in several states, they are empowered by statute to appoint experts wherever they feel the need. See 2 *id.* § 563; 8 *id.* § 2220 for a collection of these statutes. Exercising their powers, trial judges have appointed psychiatrists to examine witnesses whose competency was questioned by opposing counsel. *E.g.*, *People v. Hudson*, 341 Ill. 187, 173 N.E. 278 (1930); *Commonwealth v. Koch*, 305 Pa. 146, 157 Atl. 479 (1931). And in *Goodwin v. State*, 114 Wis. 318, 321, 90 N.W. 170, 171 (1902), the court stated that examination may be imposed as a condition precedent to testifying where the court is seriously doubtful of a witness' mental competency.

In the *Hudson* case, *supra*, the *voir dire*, see note 11 *supra*, served as a procedural device for obtaining clinical diagnosis which was later available to impeach the witness. In *State v. Palmer*, 206 Minn. 185, 288 N.W. 160 (1939), moreover, psychiatric examination was allowed after the witness left the stand; the diagnosis based on this examination was then used to impeach the witness. This is the closest a court has come to court-ordered examination for the purpose of impeachment. In *Goodwin v. State*, *supra*, however, the court refused to order an examination for the purpose of impeaching an alleged "hysteric" after she left the stand.

Of course, there may be cases where a diagnosis is already available because the witness has had psychiatric treatment either privately or in a mental hospital or clinic. And while the witness may prevent admission of such diagnosis by invoking the doctor-patient privilege, 8 WIGMORE § 2382; see also Chafee, *Is Justice Served or Obstructed by Closing the Doctor's Mouth?*, 52 YALE L.J. 607 (1943), the privilege is not universal: it exists by statute in about two-thirds of the states. See 8 WIGMORE § 2380. Under certain circumstances, moreover, it may be waived. See 8 *id.* § 2388. Where the privilege is not in force, or where it has been waived, the trial court should use its discretion in deciding whether a court-appointed psychiatrist would provide a more impartial diagnosis.

97. A "refusal to submit" includes a refusal to cooperate with the psychiatrist, see note 56 *supra*, when such refusal makes a diagnosis impossible. There is no reason to assume, however, that witness will generally refuse to submit. Witnesses have consented to psychiatric examinations and have been diagnosed when their competency to testify was challenged by opposing counsel. See, *e.g.*, *Territory v. Titcomb*, 34 Hawaii 499 (1938); *People v. Hudson*, 341 Ill. 187, 173 N.E. 278 (1930).

the case (if he is the plaintiff or prosecuting witness), or it could bar him from testifying.

The only serious objection to compulsory clinical examination is that a witness should not be forced to reveal the intimate details of his life.⁹⁸ But here the individual's right to privacy is outweighed by the need for getting at the truth, especially where the fate of an innocent defendant hangs in the balance.⁹⁹ And if the witness is normal, his privacy will remain intact, since nobody but the psychiatrist will have heard the witness' life history. Moreover, a witness' privacy is always jeopardized as soon as he takes the stand, and impartial psychiatric examination is certainly more scientific and affords greater protection to the individual than the existing impeachment devices available to opposing counsel.¹⁰⁰

CONCLUSION

Without the benefit of psychiatric assistance a jury may of course make the proper evaluation of an abnormal witness' credibility. But its decision is at best an intuitive guess; good luck alone can make it correct. Aided by expert analysis, the jury can at least make an informed guess, with greater chances for success. Psychiatric diagnosis should be admitted whenever it is offered, whether based on clinical examination or courtroom observation alone.

98. Along these lines, the objection might also be raised that clinical examination would violate the witness' privilege against self-incrimination. See 8 WIGMORE §§ 2250-51. But such incrimination can only arise if the witness answers incriminating questions truthfully. To begin with, he need not answer such questions at all. And if he does answer truthfully, the psychiatrist can omit the incriminating incidents when he relates in court the bases for his diagnosis.

An additional objection might be that the doctor-patient privilege, see note 96 *supra*, precludes the psychiatrist from reporting his diagnosis to the jury. But there is no reason to extend this much criticized privilege to compulsory examinations, since it applies only to voluntary consultation for curative treatment. 8 WIGMORE § 2382.

99. Indeed, psychiatric impeachment has been used most often against civil plaintiffs and prosecuting witnesses. See pages 1338-9 *supra*.

100. Court-ordered examinations have additional advantages. Although the parties' own psychiatrists could participate in these examinations and present their findings to the jury, impartial diagnoses by court-appointed experts would invariably be given more weight when psychiatrists disagree. See Weihofen, *supra* note 55, at 967. And psychiatrists would be more willing to testify on the basis of clinical examinations to avoid the hypothetical question made necessary by courtroom diagnosis. See note 57 *supra*.