The Psychiatrist's Role in Determining Accountability for Crimes: The Public Anxiety and an Increasing Expertise

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THE PSYCHIATRIST'S ROLE IN DETERMINING ACCOUNTABILITY FOR CRIMES: THE PUBLIC ANXIETY AND AN INCREASING EXPERTISE

"The comrades of the wounded men, seeing the plight those two were in, now began showering stones on Don Quixote, who shielded himself as best he could with his buckler, although he did not dare stir from the trough for fear of leaving his armor unprotected. The landlord, meanwhile, kept calling to them to stop, for he had told them that this was a madman who would be sure to go free even though he killed them all." Cervantes, The Ingenious Gentleman Don Quixote De La Mancha, Ch. III (1605).

I. INTRODUCTION

In conjunction with the criminal law, the psychiatrist witness has been asked to evaluate people at four different stages. He has been asked to give his opinion whether the defendant understands the charges and is able to aid his defense, whether the defendant should be held responsible for his activity, to recommend a disposition and finally to recommend a stay for execution of sentence. This comment will discuss the second of these functions, the role of the psychiatrist in determining whether someone should be held accountable for the consequences of his acts who has accomplished activity classified by society as criminal. This comment will discuss the legal tests for insanity only peripherally, by illustrating the legal semantical difficulty produced by the attempts of the District of Columbia Court of Appeals to deal with this problem. The legal tests have been so overtreated and overemphasized that one noted authority has remarked: "Rivers of ink, mountains of printer's lead, foresets of paper have been expended on this issue, which is surely marginal to the chaotic problem of effective, rational, and humane prevention and treatment of crime."  

II. COMMUNICATION

There are three levels of what may be broadly called communication. On the first level are experts talking to fellow experts, a psychiatrist to a psychiatrist. The second level of communication is the expert "[T]alking to people who are not members of an expert circle, but are equipped with general background of common interest and previous information." An example of this level is the psychiatrist speaking to a group

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1 Sardoff, Mental Illness and the Criminal Process: The Role of the Psychiatrist, 54 A.B.A.J. 566 (1968); see also Wis. Stats. §§ 957.11 and 957.13 (1967) and In re Hogan, 232 Wis. 521, 287 N.W. 725 (1939); see Hotz, The Burden of Proof of Insanity as a Defense in Arkansas, 20 Ark. L. Rev. 121 (1966).
3 Wolfenden, in The Languages of Science 24-6 (1963).
4 Id. at 24.
of general medical practitioners. The third level of communication, the concern of this comment, is that level at which the expert talks to the ordinary man. This is the psychiatrist talking to the juror and to the judge. "[I]n real life the vast majority of communications are at the third and lowest level..."5

In order for there to be a communication there must first exist four requirements:

1. a coding device;
2. a transmitter;
3. a receiver;
4. a decoding device.6

This comment is concerned with coding and decoding. Wigmore once used similar terminology in explaining testimonial evidence.7 He held that there were three mental elements present in a witness' statement.

First, the witness must have received sense-impressions, i.e. must have observed the affray, or otherwise received some impressions on the question . . . ; to this element may be given the term Perception.

Secondly, the witness must have a recollection of these impressions, the result of his Perception; this may be termed Recollection, or Memory.

Thirdly, he must communicate this recollection to the tribunal; that is, there must be Communication, or Narration, or Relation (for there is no single term entirely appropriate).8

The third element, Transmission, specifically of psychiatric witness opinions to the jury (the third level), will be examined in this comment. The inadequacy of language as a medium is well known.9 Wigmore explained the coding-decoding difficulty by remarking that the inadequacy of language has two aspects:

[1] The witness, by his mental equipment and condition may not be able to choose the words that exactly express his thought, and [2] the hearer, not being acquainted with the witness' personality [i.e., his experience], may not receive the words in the same sense.10

What code does the psychiatrist use? Is the jury able to decode the psychiatric communication? The object of this communication of psychiatrist to the jury, this coding-decoding, is the "perception and cate-

5 Id. at 25.
6 Gray, The Language of Animals in The Languages of Science 96-7 (1963); see also Stanton, Psychological Factors Influential in Jury Trials, 1963 Federation Ins. Counsel J. 91.
8 Id. at 308.
9 Id. § 262 at 569.
10 Id.
gorization" of human beings, e.g., the alleged accused criminals. Should or should not these men be held responsible for their crimes?

III. Psychiatric Thinking

Science is a “method of observation, experiment and hypothesis.” Unlike the law it recognizes no authority. Newton was wrong, Einstein explained. Einstein too may have been wrong. Science claims to prove nothing. It can only disprove. Nevertheless science is clearly distinguishable from other human methods of study in that the scientist is constantly testing and recording the results of his tests. Furthermore, although all men classify all things (Don Hutson was a “great” end whereas Carroll Dale is a “good” end), “the scientist is a classifying animal par excellence.”

The scientist’s classification differs from the non-scientist’s in that the controls he imposes upon his perception result in observations with greater degrees of precision, validity, reliability, objectivity, and predictability. . . . Through classification, a scientist attempts to organize the data associated with a phenomenon in order to abstract from it regular or recurrent patterns.

The psychiatrist, like his fellow scientific cohorts, is a classifying animal. These classifications or labels, e.g., psychotic, are familiar and used “by virtually every discipline from anthropology and the arts through zoology.” They comprise “a modern lingua artis universalis.” The psychiatrist views man’s personality and body as an indivisible whole and foresees “a growing integration of the biological, psycho-dynamic, and sociological approaches and the emergence of a comprehensive psychiatry . . .” Psychiatry is still a fluid, changing and, one might even say, perhaps paradoxically, uncertain science.

Unlike many other scientists, the psychiatrist has difficulty quantifying his observations. He studies the mind, but he perceives only what derives from the mind—speech and action. Therefore, only in very, very few cases will there be tangible evidence of a biological difficulty (e.g., a brain injury) to show to the jury. There will be no presentation of “the thing itself” to accompany the testimonial evidence, no “autoptic preference,” as Wigmore put it. The psychiatrist cannot show to the

11 McKenna, A Rationale For Typologies of Criminal Behavior, 40 Temp. L.Q. 316-17 (1967).
12 Id.
14 McKenna, supra note 11, at 317.
15 Id.
17 Id.
20 1 Wigmore, Evidence § 24, at 397 (3d ed. 1940).
jury what he himself cannot perceive. In the ordinary case he relies on "clinical judgment."21 This clinical judgment is based on psychiatric examination.22 The history of the patient, his schooling, work, social activities, familial and other relationships, and family illnesses are all reviewed. The psychiatrist carefully analyzes the appearance of the patient, his awareness, his spatial and time orientation, his memory, his mood and his thought content. This is a vast oversimplification, because each of these words (e.g., "mood") is a story in itself. He also will have made a physical examination and perhaps also a neurological examination in addition to the well-known psychological tests.23 The psychiatrist, despite his "struggling with relatively crude techniques for the scientific measurement of emotional differences," can brag that he is the inheritor "of sixty modern years of careful, clinical observation of mentally ill persons."24

But his clinical judgment, unlike the judgment of most scientists, is based on behavioral evidence and "is an opinion about socioethical normality of conduct."25 In a broad sense, other branches of medicine cannot define findings quantitatively,26 but "Psychiatry has less capacities for quantitation today than the other branches of medicine."27 Today, the lowest possible common denominator of the results of its experimental methodology is a qualitative explanation.28 There is a difference in kind, not degree, between the testimony of an orthopedic surgeon in a personal injury suit and of a psychiatrist in a criminal trial.29 The difference is that the orthopedic surgeon merely supplies certain relatively specific information ("derived both from his direct observation of the plaintiff and from his fund of general professional knowledge about the human body") whereas:

21 Alexander & Szasz, Mental Illness As An Excuse for Civil Wrongs, 43 Notre Dame Law. 24, 27 (1967).
22 This very brief explanation of a psychiatric examination was drawn from an address by Dr. Thomas Currier, Assistant Head of Mental Health for Milwaukee County, Criminal Law I Class, Marquette University, October 6, 1967.
24 Heller, supra note 16 at 284. See also Alexander & Selesnick, supra note 18 at 496:

There is even a movement to cast aside some sixty years of knowledge and ideas amassed through the Freudian approach. It must be for psychiatry to retain its sense of proportion, to recognize that although the Freudian approach has its limitations, it would be absurd not to make use of the great work that has grown out of Freud's legacy.
25 Alexander & Szasz, supra note 21, at 27.
26 Dr. Lawrence C. Kolb (Director, New York State Psychiatric Institute), Insanity As a Defense, a Panel Discussion, 37 F.R.D. 365, 405 (1964).
27 Id.
28 Cf. Kaufman, Insanity As a Defense, a Panel Discussion, 37 F.R.D. 365, 394 (1964), where the Judge said: "The difficulty that I see with this entire area is that we're trying to draw a sharp line and a sharp line for psychiatrists as well but all they have in hand is a paint brush."
29 Diamond & Louisell, supra note 19, at 1335.
30 Id. at 1336.
With few exceptions, such as the electro-encephalogram, nothing is observed, described, or measured except derivatives of the mental processes. In order to make deductions and inferences about the mind—both its normal and pathological functions—the observer must have a theoretical framework in which to order, explain, and interpret his observations of the mental derivatives. Further, his inferences, as well as his observations, are strongly colored by the qualities of his observing instrument; that is, his own personality, experience, and theoretical training.31

The psychiatrist takes what he learns through his clinical observations and communicates it in a code of labels. He places this system before us, not in the hope that it is exact or that it will ever quantify, but rather that it "offers more information and better comprehension of the human behavior"32 than any other system presently can. Psychiatry does not claim to be mathematical.

IV. LEGAL CONCEPTS AND LABELS

One problem of the psychiatrist appears to be that although he is an expert, he is forced to communicate in a code, with which he is not familiar, to a group of non-experts (the third level of communication) who understand neither his code nor the code imposed upon him. The law seems to be waiting around for psychiatry to become more exact and usable. The Fourth Circuit, which recently adopted the American Law Institute Rule on insanity33 (which the adopting courts clearly be-

31 Id. at 1341.
32 Id. at 1342.
33 There is a trend toward the rule of the American Law Institute (the A.L.I. Rule):

A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of the law. Model Penal Code § 4.01, Comment at 66 (Proposed Official Draft, 1962).


As a practical matter there is no difference in effect between those jurisdictions which still retain the M'Naghten Rule supplemented by the Irresistible Impulse Rule and those which are using the newer A.L.I. Rule. Here is a modern restatement of the M'Naghten Rule:
lieve is more psychiatric), indicated that this rule was a mere stopgap which it had to use until "penology, psychiatry, and psychology become more advanced." It need hardly be said that many people simply do not trust psychiatrists with anything so obviously serious as the determination of criminal responsibility. Although this mistrust exists, there seems to be an admission by the judiciary (it is they who have, for the most part, formulated the tests) that the best rule is something modern, something scientific, approaching psychiatry, but without giving the psychiatrist too much power.

This conflict between the psychiatrist's desired aid and fear of his power is manifested as a battle of labels. Which code should we use? The development of the Durham Rule is illustrative. The Durham

An accused must have had at the time of the commission of the criminal act:

(1) Such a defect of reason as not to know the nature and quality of the criminal act, or

(2) If he did know, that he did not know he was doing what was wrong. State v. Schantz, 98 Ariz. 200, 403 P.2d 521, 525 (1965).

At least half of the states also have some leaning in the direction of the Irresistible Impulse Rule. State v. Schantz, 98 Ariz. 200, 403 P.2d 521, 527 (1965) ("uncontrollable impulse"); 26 Am. Jur. 2d Criminal Law §35, at 120-22 (1965). As with the M’Naghten Rule the exact statement of the Irresistible Impulse Rule varies slightly from jurisdiction to jurisdiction. This test is merely a gloss, or addition, to the M’Naghten Rule. No jurisdiction relies solely on it. It can be argued that the first part of the A.L.I. Rule ("lacks substantial capacity to appreciate the wrongfulness of his conduct") is equivalent to the second part of the M’Naghten Rule ("If he did know, that he did not know he was doing what was wrong") and that the last part of the A.L.I. Rule ("or to conform his conduct to the requirements of the law") is simply a variant of the Irresistible Impulse Rule. See, e.g., State v. Schantz, 98 Ariz. 200, 403 P.2d 521, 526 (1965).

The main semantic source of rebuttal for the A.L.I. courts is the word "substantial." It is said that the M’Naghten Rule as supplemented by the Irresistible Impulse Rule does not recognize degrees of incapacity. State v. Schoffenner, 31 Wis. 2d 412, 437, 143 N.W.2d 458, 470 (1966). The Seventh Circuit Court has said that the Irresistible Impulse Rule "requires complete destruction of power of self-control where A.L.I. requires only that the defendant have less than 'substantial capacity' to conform his conduct." United States v. Shapiro, 383 F.2d 689, 690 (7th Cir. 1967). The M’Naghten courts have, it would seem, effectively answered this theoretical argument by saying that such a subtle discrimination would not be likely to control the average juror's decision. See, e.g., Pierce v. Turner, 276 F. Supp. 289, 295 (Utah 1967).

24 United States v. Chandler, 393 F.2d 920, 928 (4th Cir. 1968).

The ideal solution, perhaps, would be to exclude the question of criminal responsibility from the trial, leaving to penologists the answers to the question of criminal responsibility, with leave to record the court's commitment as criminal or civil depending upon the answer to that question, and to the questions of the kind and duration of the custodial care and treatment he receives. Such an arrangement would afford an opportunity for the answers to come after the development of much fuller, more reliable record upon more thorough psychiatric and psychological testing. Id.

See also the words of Mr. Justice Marshall about "the undeveloped state of the psychiatric art," in connection with "free will" to resist alcohol. Powell v. Texas, 392 U.S. 514, 526 (1968).


36 The Durham Rule is adhered to in only three jurisdictions, the District of Columbia, New Hampshire and Maine. Durham v. United States, 214 F.2d 882, 874-75 (D.C. Cir. 1954); State v. Pike, 49 N.H. 399 (1870); State v. Jones,
Rule, a reshaped version of an earlier New Hampshire test, read: "[A]n accused is not criminally responsible if his unlawful act was the product of mental disease or defect." The reasons for the adoption of the rule are not important any longer. What is important is that the court, even as it chose the new definition, was forced to define words within that definition. The Durham Rule, because it has had a much shorter history than its predecessors, is an outstanding example of the law's attempt to duplicate the work of another discipline, namely, psychiatry, through the law's quite unscientific case method. The court in Durham distinguished the words "disease" and "defect":

We use disease in the sense of a condition which is considered capable of either improving or deteriorating. We use "defect" in the sense of a condition which is [1] not considered capable of either improving or deteriorating, or [2] the result of injury, or [3] the residual effect of a physical or mental disease. It was inevitable that these words would prove to be troublesome. The court in effect picked them out of the air, preferring an almost forgotten New Hampshire legal precedent to fifty years of modern psychiatric labeling. In Blocker v. United States a doctor testified at a first degree murder trial that a sociopathic personality disturbance was not a mental disease or defect. Less than one month after the verdict, a doctor from the same hospital staff testified to the opposite. The court granted a new trial.

Even though the Durham rule has only a few words, another label in it has also been attacked. What does the word "product" mean? A dissenting judge in Blocker attacked this term and in doing so pointed out the root problem behind the more superficial problem of labels. He said that the term was inadequate because it was used in a quasi-medical sense and thereby allowed the experts to go too far in expressing conclusions as to the causal link between the disease and the criminal act charged. The court was being quasi-medical.

The court came to realize that because the definition looked quasi-medical, the psychiatrist had begun to treat it as medical invitation and that since psychiatry has no classification of persons termed "mentally ill," that the psychiatrist was simply, "perhaps unwittingly," injecting his "own notions about blame to determine whether the term mental illness should" include, for example, "all mental abnormalities." The court was forced, in McDonald v. United States, to add to the code

50 N.H. 389 (1871); ME. REV. STAT. ANN. tit. 15, § 102 (1964). Its importance nationally lies primarily in the lessons which can be learned from the difficulties encountered in the development of the rule.


38 Id. at 875.

39 274 F.2d 572 (D.C. Cir. 1959).


41 Washington v. United States, 390 F.2d 444, 446 (D.C. Cir. 1967).

42 312 F.2d 847 (D.C. Cir. 1962).
that it was developing and imposing on the psychiatrist. The court stated:

[N]either the court nor the jury is bound by ad hoc definitions or conclusions as to what experts state is a disease or defect. What psychiatrists may consider a "mental disease or defect" for clinical purposes, where their concern is treatment, may or may not be the same as mental disease or defect for the jury's purpose in determining criminal responsibility. Consequently, for that purpose the jury should be told that a mental disease or defect includes any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls. Thus the jury would consider testimony concerning the development, adaptation and functioning of these processes and controls.

We emphasize that since the question of whether the defendant has a disease or defect is ultimately for the triers of fact, obviously its resolution cannot be controlled by expert opinion. The jury must determine whether the nature and degree of the disability are sufficient to establish a mental disease or defect as we have now defined those terms. What we have said, however, should in no way be construed to limit the latitude of expert testimony. The court was reasserting, inter alia, the primacy of its still-developing code over the well-developed and readily usable code of the psychiatrist. In this sense it can be said that the court not only dabbled in semantics, but also reduced the power of the psychiatrist by rejecting his system of labels.

There are actually two separate types of label problems in the Durham series: (1) The psychiatrist sometimes has used his own code (e.g., schizophrenia, neurosis) without sufficient explanation; (2) The psychiatrist has used the actual terms of the definition (e.g., "product" and "mental disease or defect"). In other words, not only does the psychiatrist have a tendency to use his own code, but to misuse the legal code. This was recognized in the latest important case of this series, Washington v. United States: The court required that as to the first problem, "[T]he trial judge should ensure that their meaning [i.e., the

43 Id. at 851. This, of course, is not merely a question of semantics, but is also tied up with the whole problem of insufficient pleading in criminal trials; see Note, 51 Marq. L. Rev. 104, 112 (1967).

44 390 F.2d 444, 446 (D.C. Cir. 1967); Another important case in this series is Carter v. United States, 252 F.2d 608, 617 (D.C. Cir. 1957), where the court said, prior to the McDonald case:

Unexplained medical labels—schizophrenia, paranoia, psychosis, neurosis, psychopathy—are not enough. Description and explanation of the origin, development and manifestations of the alleged disease are the chief functions of the expert witness. The chief value of an expert's testimony in this field, as in all other fields, rests upon the material from which his opinion is fashioned and the reasoning by which he progresses from his material to his conclusion; in the explanation of the disease and its dynamics, that is, how it occurred, developed, and affected the mental and emotional processes of the defendant; it does not lie in his mere expression of conclusion.
labels of the psychiatric code] is explained to the jury and, as much as possible, that they are explained in a way which relates their meaning to the defendant.\textsuperscript{45} As to the second issue, the court continued, at least temporarily, not to prohibit testimony on "mental disease or defect," but had a different view on the label, "product":\textsuperscript{46}

The term "product" has no clinical significance for psychiatrists. Thus, there is no justification for permitting psychiatrists to testify on the ultimate issue. Psychiatrists should explain how defendant's disease or defect relates to his alleged offense; that is, how the development, adaptation and functioning of defendant's behavioral processes may have influenced his conduct. But psychiatrists should not speak directly in terms of "product," or even "result" or "cause."\textsuperscript{47}

To further clarify the scope of psychiatric testimony to the expert and the jury, the court wrote an 850-word letter of instructions which it ordered sent to the psychiatrist at the time he is required to examine a defendant and, also, ordered it read to the jury in open court as soon as the first psychiatric witness qualified as an expert. This labeling difficulty is common to all of the tests, because all tests are "proposed substitutes" for the science of psychiatry.\textsuperscript{48}

The reason for these proposals, while actually a mistrust of psychiatry, is often explained by saying that the aims or goals of the criminal law and psychiatry are so dissimilar that a legal code must be developed.\textsuperscript{49} The standard goals of the criminal law, (1) retribution, (2) deterrence of antisocial acts by the criminal, (3) deterrence of such acts by others, and (4) general security, have been adequately discussed elsewhere.\textsuperscript{50} These goals are often spoken of in terms of social control.

\textsuperscript{45} 390 F.2d 444, 454 (D.C. Cir. 1967).
\textsuperscript{46} Id. at 456.
\textsuperscript{47} Id. For the use of limiting instructions to prevent other dangers of possible jury confusion and prejudice, see Jackson v. Denno, 378 U.S. 369 (1964) (confession case involving possible confusion in simultaneous determination of questions of voluntariness and truthfulness). Spencer v. Texas, 385 U.S. 554 (1967) (possible prejudicial effect on guilt determination by evidence relevant to a since modified habitual offender statute); Whitty v. State, 34 Wis. 2d 278, 149 N.W.2d 557 (1967) (possible prejudicial effect on guilt determination of evidence of prior occurrences introduced to impeach credibility); see Note, 51 MARQ. L. REV, 104 (1967); See also Wells v. State, 40 Wis. 2d 724, 162 N.W.2d 634 (1968) (district attorney commenting on prior crimes at voir dire; waives).
\textsuperscript{48} See the remarks of Chief Justice Weintraub of the New Jersey Supreme Court, Insanity As a Defense, a Panel Discussion, 37 F.R.D. 365, 370 (1964). The Durham series is easier to criticize because it is short and confined to one jurisdiction.
\textsuperscript{50} Since the vast majority of the people, moreover, have no confidence that psychiatrists can either (1) determine with accuracy when a person should be excused from punishment, or (2) adequately apply therapy to prevent a recurrence of asocial behavior, there has grown up in the law a series of "tests" for insanity which have little to do with the realities of even present psychiatric knowledge.
\textsuperscript{50} Note, supra note 35, at 358.
based on general policy decisions. It is becoming clear, however, that there is a common "interface" between psychiatry and the law. Some have gone so far as to say that the role of these two disciplines is generically the same: "Both psychiatry and law are concerned with defining which roles are socially legitimate and which are not, and with enforcing conformity to prescribed roles." Others with more exactitude point out that psychiatry is a broader discipline, but that there is significant contact:

This interface [between law, psychiatry and society] relates to the fact that within a given society, law attempts to control specific kinds of behavior by a system of sanctions [e.g., custody, punishment, and detention], while psychiatry seeks to develop a general understanding of human behavior and improved methods of treating mental illness.

The difference in emphasis between the criminal law and psychiatry has been imposed by society. Also, differences in terminology, or code as this comment posits, do not necessarily imply fundamental differences in social control and in goals, or even in effect on the accused individual, but simply that different lines of study have developed on the same topic.

V. THE JURY: ITS FEARS AND ABILITIES.

THE POSSIBILITY OF AN EDUCATIVE PANEL

We have thus far examined the code of the psychiatrist and the code of the law (by an exemplar, the Durham-McDonald rule). It will now be necessary to deal somewhat with the recodification ability of the jury. The psychiatrist testifies using the legal code, but slipping into his own code whenever he is allowed. How does the jury react to these communications? Is a solution, or rather a betterment, possible within the present legal context?

No one asserts that the jury system for the determination of criminal responsibility is perfect. Advocates of the use of the jury to determine the issue simply believe that the "judgment of the community" is the best tool to use because "total human behavior is not an exact science and cannot presently be completely understood and explained."


Szasz, supra note 35, at 275.

Heller, supra note 16, at 284.

Alexander & Szasz, supra note 21, at 33. When the psychiatrist speaks of "mistakes ... in interpreting reality and reacting to it" it doesn't necessarily imply, from what may appear to the layman to be euphemistic phraseology for murder and rape, that the psychiatrist will be "softer" on what the layman calls "murderers" and "rapists."

Spurlock v. State, 212 Tenn. 132, 368 S.W.2d 299, 302 (1963). An interesting parallel can be drawn between psychiatric testimony given on the issue of criminal responsibility and testimony as to whether a confession is testi-
It is not possible to meet the inexact science argument except to say that exactness should not be the sole criterion. Psychiatry, it would seem, has much more to tell us about human behavior than the jury does. While it may be impossible empirically to rebut the exactness argument, it may be possible to show that there are weaknesses in what advocates of jury use in this area call common sense. Professor Jerome Hall, one of these advocates, has admitted that psychiatrists obviously know more about mental disease than juries, but that he prefers the “common sense psychology of intelligent laymen,” even while conceding that modern psychiatry has added to this common sense.

An experiment was conducted recently by a sociologist from the University of Illinois in which 1,176 jurors from jury pools in three large cities listened to recorded trials. The variants in the trials were the legal tests and the type of testimony. It was discovered that 12 percent more jurors voted for acquittal under the Durham Rule than under M'Naghten. More important, changes in the quality and extent of expert testimony had no effect on the results. The facts are that the jury (1) does not understand the code of the psychiatrist, (2) does not understand the legal framework, and (3) applies its own reasoning to the case to the extent of regarding its own fears as more important than the elaborate judicial system. In other words, the layman, the juror, puts his own “value” on the asocial behavior.

Dr. Sidney Shindell has analyzed jury behavior in terms of whether the juror is able to identify with the victim or whether the juror fears the victim because of possible injury to things and concepts which the

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57 Diamond & Louisell, supra note 19, at 1342.
60 Id. at 216.
61 Id. at 217.
63 Shindell, supra note 49.
juror values. His view is that the present general structure, as inaccurate as it may be, must be retained and improved because it meets the anxieties of the public. It reassures the public. The public, as represented by the jury, must deal with the public problem.

It is possible to maintain the participation of the public through the use of the jury and still bring the psychiatric, scientific accuracy of the twentieth century into the courtroom. Both concepts could be served if a panel of psychiatrists would, before voir dire, in effect explain modern psychiatry to prospective jurors. This panel would present what could be called "instructions" to the laymen. The laymen would be educated about the integrated personality, the id, the psychotic, methods of clinical psychiatry, and other related matters, before they knew what type of cases they would hear. The panel would serve an instructive, educative function in this limited area. Since it would not be called by either side, there could be no challenges of immateriality and prejudice. One objection to such a panel might be expense. This objection comes up every time a new courtroom or judgeship is proposed and can only be answered by saying that justice is priceless and that there are few if any social instruments which should be as well subsidized as the judicial system. Another objection would be the possibility of debate about what actually to tell the prospective jurors. Perhaps the American Medical Association, or some similar organization, could establish a pattern of instructions and standards for this panel. The composition of the panel and the selection of disciplines to be represented might also be the subject of debate and might be even more difficult to solve.

One of the great virtues of such a panel would be that the entire meaning of psychiatry (in capsule form) could be told in an organised fashion at one time, separate from the normal guilt determination so sacred to the law. Increased narration by psychiatric witnesses during trial should also be advocated, but it cannot be an effective substitute for the panel because the testifying psychiatrist cannot put the accused's conduct and personality in context without presenting a choppy and incomplete view of psychiatry as a whole. It is of little value to tell a layman that the defendant is psychotic if the layman does not know the

64 Id. Dr. Shindell in a discussion with the writer classified these anxieties as of three types: (1) Dissolution of society (e.g., treason). (2) Bodily harm (e.g., kidnapping). (3) Honor (e.g., rape and, interestingly, also fear of loss of property, a source of self-image). In addition to fear there are other important determinatives of the decision of the jury. See Staton, Psychological Factors Influential in Jury Trials, 1963 FEDERATION INS. COUNSEL J. 91, 108, where the author discusses randomly selected topics to illustrate unconscious psychological mechanisms influential in determining how people act. The following are there discussed (1) concepts, (2) emotions, (3) identification, (4) rationalization, and (5) emotional generalization; see also Prosser, Book Review, 43 CALIF. L. REV. 536, 558 (1955).

65 GLEUCK, LAW AND PSYCHIATRY 152 (1962); see also Wis. Stats. § 957.27 (1967). See FLESC, THE ART OF PLAIN TALK 164 (1951) (Can a science be truly explained to a layman?).
meaning of neurotic. Some medical experts have the relatively easy task of explaining to us how one bone in our body functions, but the psychiatrist's task, that of explaining human behavior, is much more comprehensive and difficult. It would surely simplify his task if he had only to tell us of the behavior of one man, knowing that human behavior in general has already been expounded on by an impartial panel. It must be acknowledged that, just as with the present system of legal tests, such a panel would provide a substitute standard for the community standard based on common experience and logic. This substitute standard would be based on logic but also on experience derived from learned specialized study. As with all expertise, it would also be based somewhat on hearsay. Dr. X would in part base his testimony (or in this case, a member of the educative panel would base his instruction) on the books he had read written by Dr. Z. Such a panel, however, would expand the role of the psychiatrist and the jury and would still meet the problem of public anxiety by allowing the public as the jury decide the issue.

VI. OTHER POSSIBLE IMPROVEMENTS

There are other possible solutions to the general problem of how to accurately determine who should be held criminally accountable. These solutions are all proposed by men who have faith in psychiatry as a science. Under the present system, to somewhat oversimplify, the jury determines two issues: (1) The fact. Did the defendant commit the act? What were the consequences of the act? (2) Why? Should the defendant be held criminally responsible? What was his intent?

Some states have instituted a system of bifurcated trials. The two issues (fact and why) are dealt with separately by the same jury.66

66 State ex rel La Follette v. Raskin, 34 Wis. 2d 607, 625, 150 N.W.2d 318, 327 (1967); California has a new statute implementing the bifurcation procedure. CAL. PENAL CODE § 190.1 (West Supp. 1968):

Sentences of death or imprisonment for life; determination; minors under 18

The guilt or innocence of every person charged with an offense for which the penalty is in the alternative death or imprisonment for life shall first be determined, without a finding as to penalty. If such person has been found guilty of an offense punishable by his life imprisonment or death, and has been found sane on any plea of not guilty by reason of insanity, there shall thereupon be further proceedings on the issue of penalty, and the trier of fact shall fix the penalty. Evidence may be presented at the further proceedings on the issue of penalty, of the circumstances surrounding the crime, of the defendant's background and history, and of any facts in aggravation or mitigation of the penalty. The determination of the penalty of life imprisonment or death shall be in the discretion of the court or jury trying the issue of fact on the evidence presented, and the penalty fixed shall be expressly stated in the decision or verdict. The death penalty shall not be imposed, however, upon any person who was under the age of 18 years at the time of the commission of the crime. The burden of proof as to the age of said person shall be upon the defendant.

If the defendant was convicted by the court sitting without a jury, the trier of fact shall be the court. If the defendant was convicted by a plea of guilty, the trier of fact shall be a jury unless a jury is waived. If the defendant was convicted by a jury, the trier of fact shall be the
logical extension of bifurcation is to allow the jury to determine the fact issue, a determination at which no one is clearly expert, and to relegate the why question to someone with greater understanding of psychiatry. The judge could determine this issue better than the jury, having had contact with modern psychiatry and having clarified his thinking processes by a long general education. The question then becomes whether the judge should use the legal tests for insanity or whether he should use the code of the psychiatrist.

Instead of having the judge determine the issue of responsibility, a panel of experts, as proposed by Sheldon Gleuck, could be established. He suggested that, for example, the panel be composed "[O]f a psychiatrist, a psychologist, a sociologist or cultural anthropologist, an educator, and a judge with long experience in criminal trials and with a special interest in the protection of the legal rights of those charged with crime." Such a panel would be such a radical departure that it is not at all startling also to propose and predict that if it were so composed, it would not use the legal code, but rather the code of modern psychiatry. It would have the advantages of impartiality and the vice of bureaucracy. It would be bureaucratic in the sense that it would eliminate the ultimate community judgment which the jury system retains in some degree.

Because psychiatrists today, at least for the defense, work much closer with the litigant than was once the case, they are becoming less impartial than they once were and much less impartial than a panel, chosen by neither side, could be. In addition to working more closely with the litigant, the psychiatrist today works closer and longer with the same jury unless, for good cause shown, the court discharges that jury in which case a new jury shall be drawn to determine the issue of penalty.

In any case in which the defendant has been found guilty by a jury, and the same or another jury, trying the issue of penalty, is unable to reach a unanimous verdict on the issue of penalty, the court shall dismiss the jury and either impose the punishment for life in lieu of ordering a new trial on the issue of penalty, or order a new jury impaneled to try the issue of penalty, but the issue of guilt shall not be retried by such jury.

See comments of Professor Wechsler, Insanity As a Defense, a Panel Discussion, 37 F.R.D. 365, 411 (1964). He believes the judge should determine the issue of criminal responsibility. He points out that the American Law Institute considered that there were insurmountable difficulties, constitutionally, in such a solution. As an alternative he advocates the addition of a court appointed psychiatrist as an impartial appearing expert witness. Cf. Judge Biggs' comments at 412.

Compare the comments of Judge Hays, Insanity As a Defense, a Panel Discussion, 37 F.R.D. 365, 367 (1964) with comments of Judge Biggs at 395.

GLEUCK, supra note 65 at 152:

The primary duty of such a sentencing and treatment-guiding body would be to determine the therapeutic plan appropriate to the individual as a member of a class whose past responses to various forms of sentence have been systematically investigated.

Id.
attorney.\textsuperscript{71} The establishment of such a panel would tend to bring the psychiatrist in immediate contact with his world of objectivity and science and relieve him of the burden of being a good witness. As to the objection that such a panel would be beyond the control of the public and would be dictatorial and all-powerful, it can only be said that we already tolerate such dictatorship in our parole board procedures and that perhaps the knowledge that experts are handling the problem will be enough to meet the public anxiety once the panel has been allowed to prove itself by a reasonable interval of operation.\textsuperscript{72}

VII. Conclusion

It is clear that the law needs the psychiatric language or code which is common to so many other disciplines. But such a code is merely symbolic of the greater need for the re-examination of the subjective aspects of the juridical act. The code and, more importantly, the experience of psychiatry should be utilized because it is already well developed and accepted by many related disciplines. Such experience must either be (1) taught to the jury (perhaps by a state-established panel of educators at the pre-voir dire stage) or (2) the judgment of criminal responsibility must be vested in experts rather than the jury. If the issue is taken from the jury, it may either be assigned solely to a panel of experts or it may be argued to the judge who is presumably much more familiar with the psychiatric experience.

The judge could be allowed to treat insanity as a plea in bar, a plea which goes to bar the prosecution's case, that is, to defeat it absolutely and entirely. An analogous procedure was advocated by the Government and Mr. Justice Roberts in \textit{Sorrells v. United States} where it was argued that "[T]he issue of entrapment is not triable under the plea of not guilty, but should be raised by plea in bar or be adjudicated in some manner by the court rather than by the jury. . . ."\textsuperscript{73} This position was again raised, and again rejected twenty-five years later in \textit{Sherman v. United States}.\textsuperscript{74} Mr. Justice Frankfurter, concurring in the result in the \textit{Sherman} case, agreed with Mr. Justice Roberts.\textsuperscript{75} Such a pre-trial motion and the use of modern commitment procedures (such as the present Wisconsin statutory scheme), would have the admirable result of eliminating inconsistent pleading.\textsuperscript{76} The person involved would no longer have to say, "I am not guilty and not guilty by reason of insanity," just as Mr. Justice Roberts advocated that one should not have to argue, "not guilty and not guilty by reason of entrapment."

\textsuperscript{71} Diamond & Louisell, supra note 19, at 1344.
\textsuperscript{73} 287 U.S. 435, 453 (1932).
\textsuperscript{74} 356 U.S. 369, 377 (1957).
\textsuperscript{75} id. at 384-85.
\textsuperscript{76} See Wis. Stats. Ch. 51 (1967); see also Dix, \textit{Hospitalization of the Mentally Ill in Wisconsin; A Need for a Reexamination}, 51 Marq. L. Rev. 1, 4-10 (1967).
This comment has shown that there are various possible alternatives to the present method of determining criminal responsibility for crimes. Of all the alternatives, the possibility of the use of an educative panel to inform the prospective jurors is perhaps the best accommodation of the American trust in the jury system and modern psychiatry. Although the A.L.I. Rule and the Durham Rule are splendid creations within the context of our present legal system, it would seem that no legal test will allow the greater individualization of justice for which the law should strive, because mental disease is much too complex to "make it simple and understandable to everyone just by inventing simple words or phrases to describe it." The path of change to a better legal test and consideration of mental illness is strewn with constitutional, emotional, political, historical, and administrative difficulties; but an attempt to provide something better, perhaps in the nature of an educative panel, is overdue.

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77 112 CONG. REC. 2975 (1966) (remarks of Senator Dodd).
78 See Cardozo, What Medicine Can do for Law, in Law and Literature and Other Essays and Addresses (1931), for an eloquent prediction made in 1928 that "... at a day not far remote the teachings of biochemists and behaviorists, of psychiatrists and penologists, will transform our whole system of punishment for crime." When? See Roberts v. State, 41 Wis. 2d 537, 164 N.W.2d 525 (1969), where it was held that a qualified psychologist may testify to his opinion of the mental state of a person he has examined.