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A PROPOSAL TO ADOPT THE CONTINENTAL CODE OF  
CRIMINAL PROCEDURE FOR INSANITY DEFENSES

INTRODUCTION

The insanity defense as it presently exists is one of the most controversial issues in the field of criminal law and numerous proposals have recently emerged in an attempt to inject a new structuralization into the law of criminal responsibility.<sup>1</sup> The basic structure of the insanity defense is a mixture of legal and medical elements. While the law oriented element implements judicial process in the courts, the medical element of an insanity defense seeks to aid the court in its determination of the mental state of the accused. In the past, legalists, as well as those in the field of psychiatry, have tried in vain to formulate new tests of criminal responsibility which would accommodate the legal profession while recognizing the importance of psychiatry in such cases.<sup>2</sup> As yet an accommodation between the legal and medical professions through formulation of an "ideal" test of criminal insanity appears impossible; for on the one hand is the *M'Naghten*<sup>3</sup> test and its modern variations which exclusively accommodate the legalist, while at the polar extreme is the *Durham*<sup>4</sup> rule which allows the psychiatrist to pass judgment on the accused.<sup>5</sup>

In theory, the purpose of "accommodation" is two-fold: (1) to insure that the province of the court is not usurped in its power of making final disposition of the ultimate issue,<sup>6</sup> while (2) allowing the psy-

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1. E.g., *Washington v. United States*, 390 F.2d 444 (D.C. Cir. 1967); Krash, *The Durham Rule and Judicial Administration of the Insanity Defense in the District of Columbia*, 70 YALE L.J. 905 (1961); Weihofen, *The M'Naghten Rule in its Present Day Setting*, FED. PROBATION 8 (Sept. 1953).

2. E.g., *Daniel M'Naghten's Case*, 8 Eng. Rep. 718 (1843) (*M'Naghten rule*); *Smith v. United States*, 59 App. D.C. 144, 36 F.2d 548, 549 (D.C. Cir. 1929) (*irresistible impulse test*); *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954) (*Durham rule test*); *People v. Henderson*, 60 Cal. 2d 482, 386 P.2d 677, 35 Cal Rptr. 77 (1963) (*diminished responsibility test*); *Fegeur v. United States*, 302 F.2d 214 (8th Cir. 1962) (*combination of M'Naghten and irresistible impulse test*); MODEL PENAL CODE § 4.01.

3. *Daniel M'Naghten's Case*, 8 Eng. Rep. 718 (1843).

4. *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954).

5. E.g., *State v. Lucas*, 30 N.J. 37, 152 A.2d 50 (1959); See generally de Grazia, *The Distinction of Being Mad*, 220 CHI. L. REV. 339 (1955).

6. It has been stated that:

The function of the psychiatrist is not to try to tell jurors what verdict

chiatrist to testify as to the conclusions he has reached and the complete fact analysis upon which his opinion is based.<sup>7</sup> Attempts made to accommodate both the legal and medical elements in a case involving the insanity defense have proved unsatisfactory. Unless a change is soon made, the results of the past and the prospectus for the future is uninformative psychiatric testimony providing the fact finder merely rudimentary information upon which to evaluate the criminal responsibility of the accused.<sup>8</sup> This discussion proposes to examine the complexity of accommodation, the significance of psychiatric testimony, and the need for full disclosure.

### HISTORICAL PERSPECTIVE

The evolution of the right to introduce the insanity defense is uncertain. There are three prevailing theories based on early primitive law which are conflicting in regards to the requirement of criminal responsibility. The "strict liability" theory of primitive law whereby only the *actus reus* element of the crime was considered in the guilt of the accused is the first approach.<sup>9</sup> A second viewpoint is the "blood relationship" theory which advocates strict liability for the crime based upon feudal honor and kinmanship.<sup>10</sup> Thirdly, and conversely, is the school of thought which adheres to the ideology that even in early primitive law the mental aspect of the crime was, as it is today, an essential element of the offense.<sup>11</sup> Thus, as this theory sees it, moral culpability became an important aspect of legal liability.<sup>12</sup>

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they should render but rather to portray, as fully and completely as possible, the mental and emotional make-up of the defendant, how his emotional and intellectual processes work and how they affected his capacity to control his conduct, both generally and in the specific situation surrounding the crime charged.

Campbell v. United States, 307 F. 2d 597, 614 (D.C. Cir. 1962).

7. *People v. Martin*, 87 Cal. App.2d 581, 584, 197 P.2d 379, 380 (1948). The court in this case held: "[e]xpert evidence is really an argument of an expert to the court, and is valuable only in regard to the proof of the facts and the validity of the reasons advanced for the conclusions." *Id.*

8. For an excellent example of the courts dismay over the present state of psychiatric testimony see *Rollerson v. United States*, 343 F.2d 269 (D.C. Cir. 1964); *Commonwealth v. Woodhouse*, 401 Pa. 242, 164 A.2d 98 (1960).

9. Wigmore, *Responsibility for Tortious Acts: Its History*, 7 HARV. L. REV. 315, 317 (1894).

10. Sayre, *Mens Rea*, 45 HARV. L. REV. 974 (1932).

11. Mueller, *Tort, Crime and the Primitive*, 46 J. CRIM. L. C. & P. S. 303 (1955).

12. *E.g.*, *Holloway v. United States* 148 F.2d 665 (D.C. Cir. 1945); Ames, *Law and Morals*, 22 HARV. L. REV. 97 (1908).

Although the development of the insanity defense has been clouded by time, it is a certainty today that in trying any offense requiring specific intent the mental element must be present in order to convict. Following this thread of reasoning, most courts logically hold that as soon as some evidence of mental disorder is introduced by the accused, the prosecution as part of its case must prove beyond a reasonable doubt (like any other fact) either (1) that the accused was sane when he committed the act, or (2) that even if a mental illness existed such was not the cause of the crime, that cause being the accused's own free will.<sup>13</sup>

### CRIME, MENTAL DISEASE, AND CAUSATION

Deciding whether a person has a mental illness is one problem,<sup>14</sup> but determining if it produced the criminal act is yet another complexity. In cases dealing with the insanity defense, the fact that a mental disease exists in the accused does not necessarily mean that criminal responsibility is non-existent. The Royal Commission on Capital Punishment in dealing with this problem concluded:

There is no *a priori* reason why every person suffering from any form of mental abnormality or disease, or from any particular kind of mental disease, should be treated by the law as not answerable for any criminal offense which he may commit, and be exempted from conviction and punishment.<sup>15</sup>

It is therefore vitally important to an understanding of the significance of full disclosure by the psychiatrist that one has cognizance of the problem of law permeating the insanity cases. As succinctly stated in *Carter v. United States*:<sup>16</sup>

The problem of law in these cases is whether a person who has committed a specific criminal act—murder, assault, arson, or what not—was suffering from a mental disease, that is, from a medically

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13. *E.g.*, *United States v. Currens*, 290 F.2d 751, 761, (3d Cir. 1961); *Tatum v. United States*, 190 F.2d 612, 615 (D.C. Cir. 1951).

14. In *McDonald v. United States*, 312 F.2d 847, 851 (D.C. Cir. 1962), the court held, "[T]he 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."

15. ROYAL COMMISSION ON CAPITAL PUNISHMENT REPORT NO. 99.

16. 252 F.2d 608 (D.C. Cir. 1957).

recognized illness of the mind; whether there was a relationship between that specific disease and the specific alleged criminal act; and whether that relationship was such as to justify a reasonable inference that the accused would not have committed the act if he had not had the disease.<sup>17</sup>

In disseminating the complexities<sup>18</sup> created by the introduction of the insanity defense, the significance and importance which must be attributed to adequate psychiatric testimony becomes evident.<sup>19</sup> Not only must a jury decide whether the accused's acts constituted the offense, but also whether he is responsible for such acts.<sup>20</sup> The primary source of information for the jury in formulating its conclusions regarding the defendant's criminal responsibility is the testimony of the psychiatrist; furthermore, the effectiveness of such testimony hinges on the psychiatrist's ability to give full disclosure of his findings. It naturally follows that if the medical expert is not allowed to relate to the fact finder the complete background information upon which his ultimate opinion is founded, what should be exclusively a matter of reason in the jury's fact finding about insanity often becomes a matter of chance.

#### THE PRESENT LACK OF FULL DISCLOSURE BY PSYCHIATRISTS IN CRIMINAL PROCEEDINGS

Once the significance of the medical expert is recognized in criminal trials involving the insanity plea, the next crucial consideration is the weight presently afforded psychiatric testimony. Unfortunately, it is apparent that the probative value presently placed upon psychiatric evidence is at an exceedingly low ebb. A typical evaluation of such testimony, as well as an adequate explanation of what constitutes "full disclosure", is found in *Rollerson v. U.S.*,<sup>21</sup> where the court laments:

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17. *Id.* at 617.

18. Aside from the difficulties inherent in possibly differing legal and medical definitions of the terms "insanity" or "mental disease or defect," it is apparent that even the doctors have difficulty in classifying patients whose mental disorder is on the fringe area which separates the sane from the mentally deranged. See Waelder, *Psychiatry and the Problem of Criminal Responsibility*, 101 U. PA. L. REV. 378, 384 (1952).

19. *Campbell v. United States*, 307 F.2d 597, 614 (D.C. Cir. 1962).

20. In *Carter v. United States*, 252 F.2d 608, 616 (D.C. Cir. 1957) the court stated:

If a man is "*amens (id est) sine mente*" in respect to an act to such an extent that in doing the act he is not a free agent, or not making a choice, or unknowing of the difference between right and wrong, or not choosing freely, or not acting freely, he is outside the postulate of the law of punishment.

21. 343 F.2d 269 (D.C. Cir. 1964).

No one hearing this testimony or reading these records could understand why either Rollerson or Kimble acted as he did. We know nothing of their childhood, their emotional structure, the major events of their lives, their day to day behavior, their personalities, their own explanations of their behavior. As it stands the testimony does little to help the jury answer the question whether either defendant has any abnormal conditions of the mind which substantially affected his mental or emotional processes or substantially impaired his behavior controls.<sup>22</sup>

It is therefore apparent that full disclosure by the psychiatrist is advocated by the courts, but due to the existing American system of criminal procedure there has been little, if any, accommodation toward informative psychiatric testimony.

*Past and Present Attitude of the Courts Toward Full Disclosure.*

Traditional rules of evidence, *e.g.*, the "hearsay" rule, are seemingly in conflict with the ideology of full disclosure of psychiatric findings. But as a matter of law, courts today are quite liberal in construing such rules and seek to allow the psychiatrist to admit broad amounts of evidence relevant to the insanity issue. As a matter of practice, however, such construction is rarely implemented due to lack of testimony upon which to make a ruling.

A psychiatrist, if making a proper examination of the patient's case, will take into consideration all relevant data concerning the accused's history and present mental state. The sources of such information are primary as well as secondary. In the case of primary information, such as training, experience, and knowledge gained from personal observation, the courts, under this liberal construction, will admit all such testimony assuming the psychiatrist shows the validity of the tests utilized.<sup>23</sup> In respect to secondary sources, this type of information, received before trial, may be subject to possible hearsay objection in a rare instance. However, as in the case of primary information, evidence rules are presently very broad in admitting secondary information (*i.e.*, acts of the accused, information from other experts, and medical records).

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22. *Id.* at 272-273.

23. *People v. Modesto*, 59 Cal.2d 722, 732, 382 P.2d 33, 39, 31 Cal. Rptr. 225, 227 (1963).

*Acts of the Accused*

A major source of secondary information is the physical and mental condition of the accused. Physical and mental condition includes the presence of any states of delirium, hallucinations, nervous fits, or any other condition observed by the psychiatrist and can be properly admitted in evidence over any hearsay objection in order to show the relevant mental state of the accused at the time of the crime.<sup>24</sup>

Secondly, the declarations of the accused as to his own physical and mental state are admissible to show (1) the basis upon which the expert supports his opinion concerning the accused's mental state and (2) facts to be considered by the jury in resolving the ultimate issue of insanity. It should be noted that if the court in its discretion considers that such statements by the accused were given with design, such evidence will be excluded; however, absent this fact, such evidence is admissible under an exception to the hearsay rule.<sup>25</sup> The reason and policy for allowing the expert to testify to the accused's spontaneous utterances is succinctly stated by Professor Wigmore:

There is a diminished risk of untrustworthiness, in that the stress of excitement stills the reflective faculties and makes likely a sincere utterance. There is a necessity, in the sense that on the subjects covered there is no other testimony likely to be as sincere and free from calculation.<sup>26</sup>

Thirdly, the accused's assertions pertaining to his own background and prior facts leading up to the present circumstances, as a basis for ascertaining symptoms of a mental illness by the psychiatrist, traditionally have been held inadmissible as part of the expert's testimony.<sup>27</sup> Thus, under the normal circumstances, where the psychiatrist has had his first contact with the accused subsequent to the crime but prior to the trial, the defendant's declarations as to his history of past symptoms of mental disturbances is traditionally inadmissible by the expert in giving his medical findings. However, if the psychiatrist has had the defen-

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24. McCORMICK, EVIDENCE § 227 (1954); 6 WIGMORE, *Evidence* § 1770 (3d ed. 1940).

25. McCORMICK, EVIDENCE §§ 265-268 (1954); WIGMORE, EVIDENCE § 1718 (3d ed. 1942); *People v. Butler*, 57 Cal. Rptr. 798 (Cal. App. 1967); *People v. Darrow*, 212 Cal. 167, 298 P. 1 (1931); *State v. Orsini*, 232 A.2d 907 (Conn. 1967).

26. WIGMORE, EVIDENCE § 1752 (3d ed. 1942).

27. *Shifflett v. State*, 38 Ala. App. 662, 93 So.2d 523 (1956), *cert. denied* 265 Ala. 652, 93 So.2d 526 (1957); *People v. Bray*, 42 Cal. App. 465, 183 P. 712 (1919); *Bennet v. State*, 382 S.W.2d 930 (Tex. Crim. App. 1964).

dant as a patient in the past, his medical history is admissible.<sup>28</sup> Moreover, the trend in the law today regarding the accused's assertions of his case history as a basis upon which to support the psychiatrist's opinion is that such evidence is admissible and necessary for the proper synthesis of a medical conclusion.<sup>29</sup>

Beyond the spectrum of information the psychiatrist can obtain from his own knowledge and experience and the declarations of the accused (upon which the expert may partly base his opinions but such declarations are not to be considered as proof of facts in issue),<sup>30</sup> he may also delve into other sources. It has been held that general background information from lay observers,<sup>31</sup> opinions of other experts,<sup>32</sup> and medical records<sup>33</sup> may be utilized by the psychiatrist in arriving at his conclusions. Such information is allowed under exceptions to the "hearsay" rule.

Thus the existing situation is that most jurisdictions in the United States when confronted by the insanity issue have tried to formulate rules of evidence whereby the psychiatrist may be fully accommodated in his testimony on the accused's mental condition. These rules of evidence allow the psychiatrist great latitude in the sources he may use, both primary and secondary, in reaching his ultimate opinion. But for a few exceptions, the "hearsay" rule is almost completely relaxed in order that the opinion given will be highly informative, fully discussed, and of benefit to the jury in deciding the ultimate issue.

There are three major causes for the failure of the present system: (1) rules of evidence in many states allowing the psychiatrist to testify as to the ultimate issue;<sup>34</sup> (2) the use of hypothetical questions by the

28. McCORMICK, EVIDENCE § 267 (1954).

29. *United States v. Roberts*, 62 F.2d 594 (10th Cir. 1932); *Fields v. State*, 221 Ga. 307, 144 S.E.2d 339 (1965); *Perangelo's Case*, 277 Mass. 59, 177 N.E. 892 (1931); *Roberts v. Kubik*, 129 Neb. 795, 263 N.W. 143 (1953); *Orth, Kleifeker & Wallace v. Scott*, 173 Okla. 448, 49 P.2d 112 (1935); *Maryville v. McConkey*, 19 Tenn. App. 520, 90 S.W.2d 951 (1953).

30. *Rohnee v. Cross*, 121 Cal. App. 667, 9 P.2d 509 (1932); *Mutual L. Ins. Co. v. Davis*, 48 Ga. App. 742, 173 S.E. 471 (1934); *Kennedy v. Woods*, 131 Neb. 217, 267 N.W. 390 (1936); *Eagle Picher Lead Co. v. Black*, 164 Okla. 67, 22 P.2d 907 (1933).

31. *E.g.*, *Jenkins v. United States*, 307 F.2d 637 (D.C. Cir. 1962).

32. *Smith v. United States*, 353 F.2d 838 (D.C. Cir. 1965) (In this case it was held that a psychiatrist could affirmatively rely on the opinion of another expert in his field as to the mental condition of the accused); *Fitts v. United States*, 328 F.2d 844 (10th Cir. 1964).

33. *Commonwealth v. Harrison*, 342 Mass. 279, 173 N.E.2d 87 (1961); WIGMORE, EVIDENCE § 1693 (3d ed. 1942).

34. *E.g.*, *State v. Paglino*, 319 S.W.2d 613 (Mo. 1958).



defense counsel for the purpose of concealing relevant psychiatric findings;<sup>35</sup> and (3) failure on the part of some psychiatrists to make adequate examination of the accused.<sup>36</sup>

*The Consequences of Evidence Rules Allowing Expert Testimony on the Ultimate Issue*

In a number of jurisdictions, both state<sup>37</sup> and federal,<sup>38</sup> as well as in the view of leading commentators,<sup>39</sup> it is solely the province of the jury and not of the expert to draw inferences or conclusions concerning the ultimate issues. However, a reputable number of jurisdictions adhere to the rationale that the expert's conclusions concerning the ultimate issue is yet another element of evidence which the jury must weigh in making its decision.<sup>40</sup> It is in these latter jurisdictions, where the ultimate issue is admitted in the expert's testimony, that in *fact* the ultimate issue *is* the only testimony given. Thus, assuming a jurisdiction which follows this type of evidence rule and also the *M'Naghten* test of criminal responsibility,<sup>41</sup> the normal question asked the psychiatrist would be, "Did the accused know the difference between right and wrong when he committed the act?" or "Is the defendant a psychotic?" Indeed, under this authority the attorney gears his questions solely to the test of criminal responsibility with a twofold purpose in mind: (1) to try to compel the psychiatrist to answer categorically "yes"

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35. *E.g.*, Estate of Dolbeer, 149 Cal. 227, 243, 86 P. 695, 702 (1906).

36. There have been some instances in the past where a psychiatrist was allowed to testify as to his conclusions based solely on the testimony given in court. Cross examination for the purpose of discrediting the witness is the solution to this problem, however.

37. *E.g.*, Sanders v. State, 243 Ala. 691, 11 So.2d 740 (1943); George v. State, 148 Ark. 638, 231 S.W. 9 (1921); State v. Campbell, 82 Conn. 671, 74 A. 927 (1910); State v. Young, 97 N.J. Law 501, 117 A. 713 (1922); Lancaster v. State, 168 Ga. 470, 148 S.E. 139 (1929); Murrell v. State, 137 Tex. Crim. 92, 127 S.W.2d 896 (1939); Dickerson v. Town of Christianburg, 201 Va. 342, 111 S.E.2d 292 (1959).

38. *E.g.*, Shreve v. United States, 103 F.2d 796 (9th Cir. 1939), *cert. denied*, 308 U.S. 570 (1939).

39. *E.g.*, McCORMICK, EVIDENCE 25 (1954).

40. *E.g.*, Tongay v. State, 79 So.2d 673 (Fla. 1955); State v. Paglino, 319 S.W.2d 613 (Mo. 1958); Long v. State, 274 P.2d 553 (Okla. Crim. 1954); Commonwealth v. Nasuti, 180 Pa. Super. 279, 119 A.2d 642 (1956); State v. Ring, 54 Wash.2d 250, 339 P.2d 461 (1959).

41. The *M'Naghten* rule has been followed in most American jurisdictions as an exclusive test of criminal responsibility: Weihofen, *The M'Naghten Rule in Its Present Day Setting*, FED. PROBATION 8 (Sept. 1953); WEIHOFFEN, INSANITY AS A DEFENSE IN CRIMINAL LAW 15, 64-68, 109-147 (1933); Leland v. State, 343 U.S. 790 (1952).

or "no" as to the insanity of the accused; and (2) to try to persuade the jury that the defendant actually is insane by not letting any other "unfavorable" evidence appear.<sup>42</sup>

This problem becomes more complex since in many instances a categorical answer in medical terms cannot be given. In such cases experts have found great difficulty in drawing a line between the merely antisocial personality and the diseased mind, the psychotic and the psychopathic.<sup>43</sup> Furthermore, in this type of jurisdiction the complexities mount because traditionally psychiatrists have exhibited some hesitancy to testify in a legal proceeding.<sup>44</sup> In relation to the insanity defense, this hesitancy is explainable by the fact that the psychiatrist is not only strapped by legal jargon, *i.e.*, his findings are limited to the narrow issue of the defendant's capacity to determine legal right and wrong, but also he is asked to give his opinion as to the accused's moral culpability instead of solely testifying on his medical findings. As a result, the psychiatrist's testimony is given little weight and is often negated by a judge's instructions to the jury characterizing it as "opinion evidence" and therefore "low grade."<sup>45</sup>

#### *Use of Hypothetical Questions by Defense Counsel*

In all jurisdictions, regardless of the rules of evidence relating to testimony on the ultimate issue, there is a uniform method of delineating "unfavorable" psychiatric evidence. This universally recognized method, the hypothetical question, is utilized by defense counsel as a means, in theory, to elicit information from the psychiatrist.<sup>46</sup> However, as is often the case, practice shades theory and the use of hypothetical questions has been abusive. This abuse has been criticized by numerous courts,<sup>47</sup> commentators,<sup>48</sup> and psychiatrists.<sup>49</sup> The abuse

42. De Grazia, *The Distinction of Being Mad*, 22 U. CHI. L. REV. 339, 347 n. 36 (1955).

43. Waelder, *Psychiatry and the Problem of Criminal Responsibility*, 101 U. PA. L. REV. 378, 384 (1952).

44. Under the present system of criminal procedure more than twenty per cent of psychiatrists, some of whom are the most able men in the profession, refuse all employment as a partisan witness. Guttmacher, *The Psychiatrist as an Expert Witness*, 22 U. CHI. L. REV. 325, 329 (1955).

45. *Commonwealth v. Woodhouse*, 401 Pa. 242, 164 A.2d 98 (1960). It is worth noting that Justice Musmanno in his dissent considered such instructions erroneous due to the high quality of psychiatrists today and their equally valuable opinions. 401 Pa. 242, *Id.* at 108.

46. *E.g.*, *George v. State*, 240 Ala. 632, 200 So. 602 (1941); *People v. Black*, 367 Ill. 209, 10 N.E.2d 801 (1937); *Wessells v. Commonwealth*, 164 Va. 664, 180 S.E. 419 (1935).

47. *Estate of Dolbeer*, 149 Cal. 227, 243, 86 P. 695, 702 (1906).

48. 2 WIGMORE, EVIDENCE § 686 (3d ed. 1940) comments on the abusiveness of the

stems from misconceptions by both defense counsel and the prosecuting attorney. The misconception harbored by defense counsels was recognized by Dieden when he stated:

Defense attorneys often fail to appreciate the nature of psychiatric evidence and the requirement of full disclosure. They sometimes feel justified in concealing "incriminating" background information while at the same time endeavoring to introduce a "favorable" psychiatric opinion. This effort usually takes the form of a slanted hypothetical question with its resultant opinion concerning the condition of a non-existent hypothetical man.<sup>50</sup>

In *Estate of Dolbeer*,<sup>51</sup> the court by scrutinizing the abuse made of the hypothetical questions concluded that such interrogations were always phrased by defense counsel with particularity in order that only views favorable to the defense would be admitted. Moreover, most of these hypothetical questions had a shallow basis and disregarded overwhelming amounts of countervailing evidence. Because of this, the court ultimately concluded that hypothetical questions were, "astutely drawn, and drawn for a purpose and that purpose never is the presentation of all the evidence. It is never to present the fair and accurate view, but the purpose always is to frame a question such that the answer will announce a predetermined result."<sup>52</sup>

The relationship of the prosecuting attorney and uninformative psychiatric testimony is also very close:

In the minds of many prosecuting attorneys there exists an exaggerated suspicion that psychiatric testimony is offered by the defense primarily as a vehicle for the introduction of otherwise incompetent material, especially as a method for circumventing the hearsay and best evidence rules. This often results in numerous

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hypothetical question as:

The hypothetical question is theoretically a necessity. But practically its abuse by clumsy or clever counsel obstructs the truth and brings the law of Evidence into disrepute with expert witnesses. A modern learned, judge has said; "The hypothetical question is the most horrific and grotesque wen upon the fairface of Justice".

49. Guttmacher, *The Psychiatrist as an Expert Witness*, 22 U. CHI. L. REV. 325, 329 (1955).

50. Dieden, Gasparich, *Psychiatric Evidence and Full Disclosure in the Criminal Trial*, 52 CAL. L. REV. 543, 545 (1964).

51. *Estate of Dolbeer*, 149 Cal. 227, 243, 86 P. 695, 702 (1906).

52. *Id.*

technical evidentiary objections, sometimes erroneously sustained, leading to a disruption of the orderly presentation of the evidence, to confusion, and to a curtailment of essential disclosure.<sup>53</sup>

By ascertaining the past and present consequences created by the abusive use of the hypothetical question, it is apparent that such misuse has contributed to the failure of the present procedure and of its primary objective of eliciting full disclosure of psychiatric findings. By use of this abusive tactic at the trial level, doubtful material is over-emphasized by the defense, and the question is often long and involved,<sup>54</sup> with the net result being a hypothetical man who has little resemblance to the accused whose mental condition is in issue.

#### *Failure of Some Psychiatrists to Make an Adequate Examination of the Accused*

In a few isolated cases, the failure of the psychiatrist to perform his duty has resulted in uninformative testimony. It should be noted, however, that if the psychiatrist has not made a proper study of the accused and does not arrive at his opinions logically, then little weight will be attributed to such testimony.<sup>55</sup>

Under the normal case, however, qualified psychiatrists are prepared to relate their medical findings to the jury. Explanations have been made to show that the courts are most willing to entertain full disclosure by the psychiatrist; furthermore, explanation has also shown that under the present procedure psychiatric testimony has had limited probative value. There have been several proposals to accommodate the medical profession, one of which merits discussion.

#### BOK'S PROPOSAL TO ESTABLISH AN EXPERT BOARD

In *Commonwealth v. Woodhouse*,<sup>56</sup> Curtis Bok, an associate justice on the Pennsylvania Supreme Court, sought in his dissenting opinion

53. Dieden, Gasparich, *Psychiatric Evidence and Full Disclosure In the Criminal Trial*, 52 CAL. L. REV. 543, 545-46 (1964).

54. *Guardianship of Jacobsen*, 30 Cal.2d 312, 182 P.2d 537 (1947). (Forty page hypothetical question); *Treadwell v. Nickel*, 194 Cal. 243, 228 P. 25 (1924) (hypothetical question eighty-three pages long with a fourteen page objection thereto).

55. The court held in *United States v. Amburgey*, 189 F. Supp. 687, 695-96 (D.D.C. 1960) that, ". . . if the trier believes they [the experts' opinions] are logically arrived at, they are accepted; if not, they are rejected. It's precisely because the conclusions of the expert's must be weighed in this fashion that it is necessary to probe their basis."

56. 401 Pa. 242, 164 A.2d 98 (1960).

partially to accommodate the psychiatric profession.<sup>57</sup> This proposal as expounded by Justice Bok advocated an abolishment of the state's test of criminal responsibility. The crux of the proposal, however, is the separation of the "judicial and the penological processes."<sup>58</sup> By this separation, the sole responsibility of the court would be to decide whether or not the accused committed the criminal act. The case would then move to an administrative board of experts, including psychiatrists, which would decide whether to hospitalize or punish the accused based on adequate information. This expert board would also maintain the responsibility of deciding when, if ever, the defendant would be ready for release.<sup>59</sup>

Although this theory has a few valuable points (such as allowing the expert's opinion to be given considerable weight), it answers the problem of accommodating both the court and the psychiatric profession by actually avoiding it. Unlike governmental safe-guards, a separation of powers in this case would result in a denial of jury trial on one of the most important issues of the case, *i.e.*, the criminal responsibility of the accused. This theory adheres to the ideology that the jury is not competent in most instances to decide legal irresponsibility. While separation of court and expert would effectuate a complete change in the present system, accommodation requires only a working *within* the existing procedure. Such a deviation from traditional rules of criminal law and procedure as Bok's theory advocates is much more radical than necessary. It is the province of the court to decide the fate of the defendant while the expert merely aids in this decision.

#### A POSSIBLE SOLUTION FOUND IN THE CONTINENTAL CODES OF CRIMINAL PROCEDURE

Because of the fragmentation of the German court system by Hitler over three decades ago, the restructuralization of the German Code of Criminal Procedure was not completed until early in 1950.<sup>60</sup> In this German code is found a possible solution to the accommodation of both the courts and the psychiatrist in a criminal proceeding. Article 69 of the German Code of Criminal Procedure states:

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57. *Id.* at 109 (dissenting opinion).

58. *Id.* at 110.

59. *Id.*

60. 10 THE AMERICAN SERIES OF FOREIGN PENAL CODES, 1-23 (1965).

I. The witness shall be caused to give a narrative account of what he knows about the subject matter of his examination. The subject matter of the investigation and the person of the accused, if such an accused exists, shall be pointed out to the witness before his examination.<sup>61</sup>

The procedural code of France, is very similar to the German Code in that it also allows an uninterrupted narrative account to be given by the expert on his findings.<sup>62</sup>

In implementing this type of procedure in the American system, full disclosure by the psychiatrist will result. Furthermore, in allowing the expert to testify fully and freely in terms of his own medical discipline, the jury will be given much more than merely rudimentary information upon which to base their ultimate decision. A somewhat similar departure from the general rules concerning the introduction of expert evidence has been adopted in New York.<sup>63</sup>

Rule 4515 of New York's C.P.L.R. is the new rule dealing with expert opinion:

Unless a court orders otherwise, questions calling for the opinion of an expert witness need not be hypothetical in form, and the witness may state his opinion and reasons without first specifying the data upon which it is based. Upon cross-examination, he may be required to specify the data and other criteria supporting the opinion.<sup>64</sup>

The purpose of this new rule, as found in the practice commentary, is to "permit the expert to state what he knows in a natural way, leaving to the adversary the opportunity on cross examination to discredit him."<sup>65</sup> This rule also seeks to eliminate the evils of the hypothetical question, *i.e.*, its slanted nature as well as undue length and complexity.<sup>66</sup> However, while this new rule seeks to suppress such distortions, it still allows the utilization of the hypothetical question by both counsels. The problem found in the New York rule is a failure to confront squarely the issue of accommodation. Unlike the New York evidence rule, the present proposal tends to go even further because it seeks the

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61. *Id.* at 48.

62. 7 THE AMERICAN SERIES OF FOREIGN PENAL CODES, 116 (1964).

63. N.Y. R. CIV. PRAC. 4515.

64. *Id.*

65. N.Y.R. CIV. PRAC. 4515 (commentary thereto).

66. *Id.*

abolition of hypothetical questions during direct testimony. By confronting the problem in this manner, by eliminating tactics and strategy on direct examination, there will evolve a place in the trial where the psychiatrist will be given the chance to relate all of his findings to the the jury. This procedure, if implemented correctly at the trial court level, will allow full disclosure and will not leave to chance a decision which should be based on well-founded reasoning.

It should be recognized that while the accommodation of both the legalist and the psychiatrist will be attained by the utilization of this new procedure, there are possible dangers in this method which may be encountered.

### *Testimony on the Ultimate Issue*

As aforementioned, there are numerous jurisdictions which apply the exclusionary rule relating to testimony on the ultimate issue. Under the present proposal there is a good possibility that in the psychiatrist's narrative account some testimony will be concentrated on the accused's ability or disability to frame the necessary intent required to commit the crime. However, it is in insanity cases where the expert's opinion is most needed for the benefit of a jury uneducated in such complex matters. Thus the adoption of the present proposal by these jurisdictions will also require the ratification of the view that the expert's conclusions concerning the ultimate issue is yet another element which the jury must weigh in making its decision.<sup>67</sup>

### *Responsibility of the Court*

As previously discussed, courts have recently sought greater disclosure by the psychiatrist; however, while this procedure will allow more informative expert testimony, the courts necessarily will have to assume greater responsibilities.

In some cases there will be a lack of medical testimony on the ultimate issue of criminal responsibility. As previously recognized, many psychiatrists hesitate to draw conclusions as to the defendant's capacity to determine legal right and wrong. In such a situation it will be the responsibility of the trial judge, in his charge, to relate to the jury the

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67. E.g., *Tongay v. State*, 79 So.2d 673 (Fla. 1955); *State v. Paglino*, 319 S.W.2d 613 (Mo. 1958); *Long v. State*, 274 P.2d 553 (Okla. Crim. 1954); *Commonwealth v. Nasuti*, 180 Pa. Super. 279, 119 A.2d 642 (1956); *State v. Ring*, 54 Wash. 2d 250, 339 P.2d 461 (1958).

medical findings on both sides in conjunction with the legal test of insanity in that jurisdiction. The charge to the jury in substance must inform the fact finder that some medical illnesses of the mind, such as anti-social behavior, are not considered as legal diseases;<sup>68</sup> furthermore, assuming the experts differ in medical opinion such that only the defense contends that a legal disease exists, then the jury must be told to decide the credibility of each expert and his medical findings and determine whether in actuality a legal disease of the mind is existent. The responsibilities delegated to the court by adoption of this rule must be properly assumed, for this is the pivotal point of success or failure of this proposed rule.

### *Irrelevant Material*

Since the psychiatrist on direct testimony will be unrestricted, irrelevant material may be presented to the jury. Because criminal procedure is wedded to the concept of an adversary system, one concession should be rendered for the benefit of opposing counsel. This concession, although the proposed procedure seeks a full and uninterrupted medical testimony, is to allow objection by opposing counsel in the instance where the psychiatrist's testimony is no longer medical in nature but rather is highly prejudicial to the opposition's case. Furthermore, since many psychiatrists are partisan witnesses, the medical evidence thus presented may be biased. Cross examination, however, is the device which will curb any such abuse. Since it is a general rule that liberal cross examination is permitted not only to probe the basis of the psychiatrist's findings<sup>69</sup> but also to confront the witness with countervailing medical authority,<sup>70</sup> the solution to this problem is evident.

### CONCLUSION

As previously shown, it is obvious that psychiatric testimony is an important element in a criminal proceeding involving the insanity defense. With the ultimate design of heightening the effectiveness of judicial determinations in criminal cases, the present proposal should be

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68. While psychosis is considered a legal disease, an anti-social personality, which is recognized as a mental illness, has been rejected by the courts as a legal illness.

69. *People v. Feldman*, 299 N. Y. 153, 85 N. E. 2d 913 (1949); *Greenwood v. State*, 51 Okla. Crim. 74, 299 P. 248 (1931).

70. *E.g.*, *Seay v. State*, 207 Ala. 453, 93 So. 403 (1922); *State v. Hunter*, 183 Wash. 143, 48 P.2d 262 (1935).



adopted since it allows psychiatrists, in terms of their own medical discipline, to relate their findings to the jury in an uninterrupted narrative account. This procedure, if adopted, would have a few adverse consequences while far more advantages would result. The possible disadvantages to this rule have been discussed as well as the methods for curbing any abuse. However, the foremost advantage of this rule in regard to psychiatrists would be to encourage more participation by them in criminal proceedings. Secondly, by allowing full psychiatric testimony on the mental state of the accused, the quality and quantity of medical evidence, upon which the ultimate decision will be based, would be enlarged considerably. This fact, combined with the inclusion of more able psychiatrists who are encouraged to testify as to their medical findings under this new procedure, will provide the basis for a better determination of criminal responsibility.

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