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PSYCHIATRY, PSYCHOANALYSIS, AND THE CREDIBILITY OF WITNESSES*

David B. Saxe**

[T]he students of the life of the mind in health and disease, should combine with students of the law in a scientific and deliberate effort to frame a definition, and a system of administration, that will combine efficiency with truth.

Cardozo, Law and Literature

I. Introduction

The manifest purpose of any legal proceeding is the rendition of a fair and just decision. This purpose is either helped or hindered by the means and methods available to courts for ascertaining the truth or falsity of contentions presented. By far the most effective means of ascertaining truth is through the testimony given by witnesses in open court, and the jury must base its findings on such testimony. Ordinarily the jury, in evaluating the credibility of a witness, will be concerned with his memory, observational powers, and narrative ability. When, however, the witness suffers from some behavioral pathology or mental disorder, another dimension is added to the problem of fact finding.

A behavioral disorder may significantly undermine a witness's credibility.¹ The difficulty is further compounded for the jury, because behavioral pathology is often difficult for the untrained observer to detect. Distortion of truth by witnesses suffering from behavioral disorders is the result of deeply-rooted emotional conflicts, while the distortion of mentally normal witnesses is generally the result of clear and understandable motivation or simply the normal failings of memory or observation.² The need for a trained observer or expert to report on these behavioral pathologies is evident. Such an expert, by reason of his training in the behavioral pathologies, is the psychiatrist. His testimony, directed to the jury, would provide a distinct aid in the evaluation of witnesses' credibility.

Expert opinion is especially vital today, since early common-law requirements for testing the competency of mentally deranged witnesses have been severely restricted.³ At common law, "insane" persons and "idiots" were incompetent to testify.⁴ This absolute ban against mentally deranged persons has been modified; now, in order to disqualify a witness on the basis of mental derangement, the derangement must be such as would substantially impair the

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¹ See Schneiderman v. Interstate Transit Lines, Inc., 394 Ill. 569, 577, 69 N.E.2d 293, 297 (1946); State v. Schweider, 5 Wis. 2d 627, ---, 94 N.W.2d 154, 157 (1959); 2 J. Wigmore, EVIDENCE §§ 492, 501, at 583-84, 594 (3d ed. 1942) [hereinafter cited as Wigmore].
² Authorities and cases are collected in 2 Wigmore § 492, at 583-84 & n.4.

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3 See Schneiderman v. Interstate Transit Lines, Inc., 394 Ill. 569, 577, 69 N.E.2d 293, 297 (1946); State v. Schweider, 5 Wis. 2d 627, ---, 94 N.W.2d 154, 157 (1959); 2 J. Wigmore, Evidence §§ 492, 501, at 583-84, 594 (3d ed. 1942) [hereinafter cited as Wigmore].
witness's "trustworthiness upon the specific subject of testimony." So long as the derangement does not prevent the witness from having the ability to observe, recollect, and communicate the subject of the testimony, he may testify.

In nearly all instances today, a witness is presumed competent to testify unless facts appear to negate that presumption. The question of competency is decided by the court out of the jury's presence, although in one leading case, the court said that the jury may be present, in the trial judge's discretion, since questions of credibility might be raised. With this relaxation of the old competency requirements, a witness who may be suffering from a marked behavioral pathology is considered competent to testify. Upon the jury, then, falls the task of determining the degree to which this pathology will affect the witness's ability to tell the truth.

The idea of introducing psychiatric testimony to aid the jury in ascertaining the truth is not new. In 1906, Sigmund Freud, in a lecture to a law class at the University of Vienna entitled "Psycho-Analysis and the Ascertaining of Truth in Courts of Law," stated:

There is a growing recognition of the untrustworthiness of statements made by witnesses, at present the basis of so many judgments [sic] in Courts of Law; and this has quickened in all of you, who are to become judges and advocates, an interest in a new method of investigation, the purpose of which is to lead the accused person to establish his own guilt or innocence objectively. This method is of a psychological and experimental character, and is based upon psychological research; it is closely connected with certain views which have only recently been propounded in medical psychology.

Freud, however, was less than optimistic about linking psychoanalysis and the law; and when, in 1924, he was offered a large sum of money by Colonel McCormick of the Chicago Tribune to come to the United States to "psychoanalyze" Leopold and Loeb, he declined the offer stating: "I would say that I cannot be supposed to be prepared to provide an expert opinion about persons and a deed when I have only newspaper reports to go on and have no opportunity to make a personal examination."

In 1908, Harvard professor of psychology Hugo Münsterberg suggested that the method of applied psychology could be used to test the reliability of witnesses prior to introduction of their testimony in court.
[W]hile the court makes the fullest use of all the modern scientific methods when, for instance, a drop of dried blood is to be examined in a murder case, the same court is completely satisfied with the most unscientific and haphazard methods of common prejudice and ignorance when a mental product, especially the memory report of a witness, is to be examined. No jurymen would be expected to follow his general impressions in the question as to whether the blood on the murderer's shirt is human or animal. But he is expected to make up his mind as to whether the memory ideas of a witness are objective reproductions of earlier experience or are mixed up with associations and suggestions. The court proceeds as if the physiological chemistry of blood examination had made wonderful progress, while experimental psychology, with its efforts to analyse the mental faculties, still stood where it stood two thousand years ago.\textsuperscript{14}

Professor Münsterberg further warned:

The courts will have to learn . . . that the individual differences of men can be tested . . . by the methods of experimental psychology. . . . Modern law welcomes, for instance, for identification of criminals all the discoveries of anatomists and physiologists as to the individual differences. . . . But no one asks for the striking differences as to those mental details which the psychological experiments on memory and attention, on feeling and imagination, on perception and discrimination, on judgment and suggestion, on emotion and volition, have brought out in the last decade.\textsuperscript{15}

The following year Professor Wigmore, in a devastatingly satirical article, attacked Münsterberg's assumptions on the grounds that there were no precise scientific methods for evaluating the testimonial reliability of witnesses.\textsuperscript{16} Perhaps due to Professor Wigmore's preeminence in the legal profession, his discrediting of Münsterberg's theories caused a hiatus in scientific and legal interest in the general problem area of testimonial credibility.\textsuperscript{17}

The purpose of this article is to describe the methods and means by which psychiatric testimony may aid a jury in formulating views on witnesses' credibility and to survey the current legal status of such psychiatric testimony.

II. Behavioral Pathology Affecting Credibility

Since mental disturbance in the human organism varies in kind and degree, this section surveys the major areas of behavioral pathology in order to relate mental abnormalities to the problems of credibility.

A. Psychoses

In this category are included schizophrenia, affective manic psychosis, paranoid states, and senile psychosis.

\textsuperscript{14} H. Münsterberg, On the Witness Stand 44-45 (1913).
\textsuperscript{15} Id. at 63.
\textsuperscript{16} Wigmore, Professor Münsterberg and the Psychology of Testimony, 3 ILL. L. Rev. 399 (1909).
\textsuperscript{17} See Burtt, Legal Psychology 8-10 (1931). Münsterberg also had a war of words, in a series of articles with another attorney, Charles Moore. This is recounted in Rouke, Psychological Research on Problems of Testimony, 13 J. Social Issues, No. 2, 1957, at 50, 50-51.
1. Schizophrenia

Schizophrenia is a disorder in the organization of communication; this results in a profound alteration of the subject's self-experience and his experience of the world.\(^{18}\) Implied is a fundamental breakdown in the psychobiological equipment by which information is coded and decoded. A state of fluidity arises so that the self becomes intensely magnified and the world as reconstructed through hallucinations, delusions, and illusions revolves around the individual. There results a "concomitant loss of focus and coherence and a profound shift in the meaning and value of social relationships and goal-directed behavior."\(^{20}\) For the schizophrenic, "each and every event and personal interaction acquires a special magical and often uncanny significance. These interpretations are unshared and lead rapidly to enormous isolation or autism and to a profoundly unrealistic assessment of reality ...."\(^{20}\)

The schizophrenic has an altered experience of the internal and external world—a loss of his moorings to reality.\(^{21}\) He exists in a state of fluidity with a loss of conventional perspectives so that the self becomes intensely magnified and the world, as reconstructed through hallucinations, delusions, and illusions, revolves around him.\(^{22}\)

While the schizophrenic's testimony is properly open to attack, schizophrenia may be difficult to detect.

2. Manic-depressive Psychosis

The manic-depressive is characterized by a disturbance of behavior and thought corresponding to various mood changes; he alternates between extremes of excitement and depression. In the excited state the manic is hyperkinetic, talkative, and overexuberant.\(^{23}\) To him, "nothing and nobody else counts.\(^{24}\) Lack of guilt and shame run concurrently with his "supreme self-esteem."\(^{25}\) Although his thinking is often delusional, the delusions are restrained to the point that the manic's behavior is not clearly removed from reality.\(^{26}\)

Laymen often fail to perceive this psychosis, because there is no definite change in the subject's identity.\(^{27}\) "His overconfidence makes him more positive on the witness stand than the facts warrant. His radiant euphoria often makes
him a sort of juristic pet, who is challenged only at the peril of the cross-examiner. Lawyers must be tactful in cross-examining such a witness.

A frontal attack on the competency of an intelligent, well-preserved manic is almost certainly doomed to fail. In the short run, he can best the attorney at the question-and-answer game. Skillful advocates find it tactically better to let the witness talk on. The manic is more likely to expose his own psychosis, given time enough, than he is to allow himself to be trapped into such exposure by a hostile attorney.

3. Paranoid States

Paranoid states are psychoses characterized by the existence of grandiose or persecutory delusions. Generally, intelligence is well preserved, emotional responses are appropriate to the ideas generated and hallucinations are uncommon. The true paranoid suffers from more than a rigid suspicion and mistrust of others, his feelings of persecution have become permanent. When the paranoid sees a group of people talking, and if one of the group makes a casual glance in his direction, he will be convinced that they are discussing him. Exceptionally marked delusional thinking distinguishes paranoid states from schizophrenias and manias in which thought and mood disorders, respectively, are the predominant abnormalities.

The paranoid's delusional network of rigid hostility and mistrust is often projected in endless feuds and litigations. This type of individual has been commonly labeled "litigious paranoid." Paranoid testimony, presented in the context of a judicial proceeding, may withstand "skillful empirical testing and . . . logical inquiry."

The witness suffering from a paranoid state often makes good sense. Even when the delusion system is apparent, judges and jurors are likely to accept testimony that does not seem to impinge on the delusional network. The psychiatrist knows that a delusional system is not watertight, that it reflects a serious disorganization of thinking, and that spurious reasoning is likely to contaminate all of the patient's thought processes. The non-psychiatrist does not know this. If the witness, for example, has an obviously psychotic delusion about politics, his testimony about a taxicab accident is often accepted in good faith. The psychiatrist realizes, however, that a delusion of psychotic intensity is likely to color all of the patient's thinking.

Eventually, a clinician will discover a well-developed system of paranoid delusions. The trial lawyer, however, is not a clinician, and a clever paranoid can influence a jury not cognizant of his behavioral pathology.

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28 H. DAVIDSON, FORENSIC PSYCHIATRY 259 (1965).
29 Id.
30 O. ENGLISH & S. FINCH, supra note 22, at 409.
31 Id.
32 O. ENGLISH & S. FINCH, supra note 22, at 410.
33 DSM 37.
34 F. REDLICH & D. FREEDMAN, supra note 18, at 483.
35 Id.
36 H. DAVIDSON, supra note 28, at 259-60.
37 F. REDLICH & D. FREEDMAN, supra note 18, at 483.
4. Senile Psychosis

Senile psychosis involves a marked deterioration of all personality functions. The predominant characteristics of senile psychosis are memory impairment, especially as to recent events; poor judgment; and feelings of distrust. The afflicted witness may have an excellent recollection of past events, but he may be unable to recall very recent events. The assistance of a clinician would readily enable the lawyer to expose this condition.

B. Neuroses

1. Anxiety Neurosis

Anxiety created by inner tensions does not of itself render a witness unreliable. Neurotics suffering from deeply-rooted anxieties, however, may make false accusations in an attempt to satisfy some disturbing intrapsychic tension. Although the anxiety-ridden witness may perspire profusely and incur breathing problems, the jury easily empathizes with him and attributes his nervousness to the natural aversion of a layman for the witness stand.

In order to properly understand the danger presented by the anxiety-ridden witness, a very brief explanation of the psychoanalytic theory of anxiety development is necessary. Explanation must commence with an appreciation of the roles played by the id, the ego, and the superego. The ego is the tester of reality, the seat of consciousness. The id, on the other hand, is unconscious, containing all basic instinctual drives. The third element, superego, roughly corresponds to what is commonly called conscience. It contains the censorship data of the individual, regulating his conception of right and wrong.

The ego tests reality by receiving stimuli and impressions from the environment. Anxiety results when the ego is intruded upon by internal or external stimuli unacceptable to the individual. The ego produces anxiety—a "danger signal"—thus avoiding the intrusion of the dangerous impulse. Psychoanalytically, this effect is referred to as the defensive operation of the ego. Anxiety defenses include changes in attention, fantasy formation, and replacement of the threatening internal impulse with another less dangerous construct.

The psychic by-products of anxiety are the crucial factors in assessing the afflicted person's credibility as a witness. Anxious individuals must cope with their anxieties. In this coping process, painful situations may be forgotten, distorted, or fantasized. In addition to the defensive operation of the ego, discussed above, there are other ego-oriented processes that function primarily as defenses to internal impulses. These processes are referred to as "defensive mechanisms."

38 O. English & S. Finch, supra note 22, at 495-96.
39 Id.
41 O. English & S. Finch, supra note 22, at 36.
42 Id.
43 Id. at 37-39.
45 Id.
In striving to ward off anxiety and panic, the defensive mechanisms often have the effect of reducing, distorting, or obliterating the informational content of an anxiety-ridden witness’s testimony. The anxious witness’s quest for intrapsychic stability commands these unconscious defensive mechanisms, while the court demands truth. The neurotic attempts to follow the court’s directive, but his unconscious motivation often renders such attempts futile.

The behavioral pathology of anxiety neurosis offers a unique challenge to medico-legal scholars concerned with the credibility of a witness. In therapy, the repressed conflicts that produce anxiety are worked out through psychoanalytical techniques linking the genesis of the conflict with its present exploitation of the individual. This linkage provides the curative feature of the discipline. On the other hand, one noted expert claims that a witness’s biography is irrelevant to his testimony if that testimony is to be evaluated in terms of its truth or falsity. It is his position that biography is essential to evaluating an individual’s message only when the function of the message “is expressive and directive as well as informative.” This view notwithstanding, the author would contend that a witness’s past can aid a jury in evaluating his credibility. Further, although theoretically the jury is concerned only with the informative function of testimony, pragmatically it is equally concerned with the expressive and directive function. Realistically, it is not only what is said, but how it is said and by whom it is said, that will influence the jury.

2. Hysterical Neurosis

Hysterical neurotics engage in dramatic, exhibitionist behavior; lability of mood; a certain childish egocentricity; and most of all, a high degree of suggestibility and gullibility. It is their high degree of suggestibility that leads them to transform reality into imaginative and romantic schemes, often rendering themselves “compelled actors.” Hysterical neurosis in a woman may produce false accusations of sex crimes committed against her. These accusations may be the result of the hysterical behavior of the neurotic woman, or they may be the acting out of sexual fantasies by the psychotic woman. A young girl has intensely erotic desires, and where these urges exist and are intensified by the proximity of a man, she may imagine engaging in sexual intercourse with him.

47 Id.
48 Id.
49 F. Redlich & D. Freedman, supra note 18, at 372.
50 Id.
51 E.g., State v. Prior, 74 Wash. 121, 132 P. 874 (1913) (holding that it was reversible error to exclude “medical testimony” to the effect that the state’s witness in a rape prosecution was “suffering from hysteria, which caused her to have ‘delusions, hallucinations . . . and illusions’ ” at the time the crime was allegedly committed).
53 See 3 Wigmore § 924(a), at 459. See also Rice v. State, 195 Wis. 181, 217 N.W. 697 (1928). Reversing a rape conviction, the Wisconsin Supreme Court related the facts as culled from the complaining girl’s testimony and then observed:

The more sensible view of this matter comes from [the physician who examined the witness’s mental condition] — that the child was not normal, but imagined things entirely beyond facts and conditions. She was approaching the age of puberty,
Psychiatric testimony regarding the credibility of sex-crime prosecutrices is distinctly necessary. First, the accusations of a sex crime arouse community sympathy, especially if the prosecutrix is a young, virginal-looking girl. Second, the accusations are difficult to defend due to the common-law rule that the testimony of the prosecutrix in a rape case is alone sufficient for corroboration. Third, penalties may be severe. Many courts, although disapproving of psychiatric testimony in other areas, allow such evaluation in prosecutions for sex crimes. This evidence must be admitted, if at all, under the impeachment rule. As the court stated in People v. Cowles:

"The testimony should have been received, not in extenuation of rape, but for its bearing upon the question of the weight to be accorded the testimony of the girl and the question of whether the mind of the girl was so warped by sexual contemplation and desires as to lead her to accept the imagined as real, or to fabricate a claimed sexual experience."

Other courts will not admit psychiatric testimony in this area. In Wedmore v. State, where the defendant was charged with carnal knowledge of a girl under sixteen years of age, the court said:

"We do not believe this court has the power or authority to require the State to support the testimony of a prosecuting witness in a sex case by requiring her to submit to a psychiatric examination, the report of which is to be presented in evidence, in order to sustain a conviction."

Dean Wigmore has suggested that "No judge should ever let a sex-offense charge go to the jury unless the female complainant's life history and mental makeup have been examined and testified to by a qualified physician." Other commentators favor such examinations only when there is no corroborating evidence. It is this writer's contention that the liberal attitude of those courts admitting psychiatric evidence is desirable. A requirement of a pretrial psychiatric examination of the sex-complainant is not unduly onerous in view of the potential injustice if such a procedure is not pursued.

when her mind might have been disturbed by her mental condition. The charitable view is that she was not responsible for her improbable stories; rather that they were the figments of her abnormal condition. Id. at — 217 N.W. at 698-99.

54 3 WIGMORE § 924(a), at 459.
55 7 WIGMORE § 2061, at 342. This rule has been eroded in some states by decisions requiring corroboration by additional evidence. E.g., People v. Romano, 279 N.Y. 392, 18 N.E.2d 634 (1939). The same effect has been achieved legislatively. E.g., N.Y. PENAL CODE § 2013 (McKinney 1967). In some states, very little corroboration is demanded. For example, in People v. DeFrates, 395 Ill. 439, 70 N.E.2d 591 (1946), the complainant's prompt disclosure of the act was deemed sufficient.


60 Id. at 223, 143 N.E.2d at 654.
61 3 WIGMORE § 924(a), at 460.
C. Antisocial Personality

The old psychiatric nomenclature referred to antisocial behavior as "sociopathic" or "psychopathic." These terms have recently fallen into disrepute and have been replaced by the term antisocial personality. This term is reserved for basically unsocialized persons whose behavior pattern brings them repeatedly into conflict with society. They do not suffer from the inner turmoil that afflicts the neurotic individual. On the contrary, they make others suffer and are not concerned with or bothered by fear, guilt, or shame. Being callous and hedonistic, they are able to rationalize their behavior to themselves. These are the charming scoundrels who lie with impunity, intelligence, and wit. In short, the antisocial personality may be an imposing witness for an attorney to confront; he simply cannot grasp the meaning or essence of a falsehood. His disregard for the truth in this sense is remarkable; "[w]hile committing the most serious of perjuries, it is easy for him to look anyone calmly in the eye." 

The jury has a particularly difficult task in understanding the attorney's attack on the credibility of the antisocial witness. A juror understands that a witness may lie to avoid the consequences of the accusations brought against him. But this type of individual may lie where there is nothing to gain from his false testimony (except, perhaps, the satisfaction of some childish desire for notoriety.) The jury then sees no reason to disbelieve the witness. After all, his testimony is not self-serving and may even be detrimental to him. The manner of evaluating a witness is based on the jury's conception of normal motivation in human behavior; but the antisocial witness confuses the jury by "his use of the witness stand as a vehicle of aggression and hostility . . . and his willingness to wreak mischief even at the cost of degrading himself." As one expert has noted:

The psychiatrist would know that the psychopath bears false witness because he enjoys being in the limelight (even if he degrades himself); or to vent an unconscious hostility. But this is too subtle a motivation for the average juror. . . . The malevolence which drives a psychopath into a testimonial network of lies is utterly beyond the ken of the psychiatrically unlearned jurist or juror.

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63 DSM 43.
64 Id.
65 F. Redlich & D. Freedman, supra note 18, at 350.
66 Id. at 392-95.
68 In this respect the behavior of the antisocial personality parallels that of the hysterical neurotic. Perhaps the most poignant example to be found in American history of the vicious effects that the tainted testimony of these types of persons can have on the fate of the accused resulted from what has come to be known as the Salem Witch Trials. In 1692 twenty people were convicted of being witches and hanged. Their accusers were a group of young girls that "in modern terms . . . in one degree or another, had hysteria." M. Starkey, The Devil in Massachusetts 45 (Anchor ed. 1969).

In analyzing the actions of the afflicted witnesses, Marion Starkey observed that: The girls . . . were having a wonderful time. Their present notoriety was infinitely rewarding to childish natures beset by infantile cravings for attention. Hitherto snubbed and disregarded, they were now cosseted and made much of. They could hardly have attracted more notice if among them they had married the king and all his court. Id. at 47.
69 H. Davidson, supra note 28, at 270.
70 Davidson, Testimonial Capacity, 39 B.U.L. Rev. 172, 179 (1959). The entire area of the psychopathology of accusation would make for fruitful inquiry as Dr. Davidson points out.
The difficulty in diagnosing antisocial personality is great, and clinical observations of such a person would probably not suffice. Unlike the psychotic, the antisocial personality retains a firm grasp on reality. A complete life history of the subject would be required. This would render the testifying psychiatrist vulnerable to the charge that his opinion as to the credibility of the witness is not based on a clinical examination of the witness. One commentator believes that by correlating the witness's behavioral pathology into a diagnostic life-pattern, a psychiatrist may be capable of distinguishing the normal liar from the pathological liar, thus aiding the attorney in the formidable task of attacking the credibility of this charming scoundrel. Two objections to this suggestion are immediately evident. The correlation of such an individual's behavior into a diagnostic life-pattern might often be hopelessly difficult and time consuming due to the problem of assembling and collating biographical data. The second objection is even more cogent. Assuming that a diagnostic life history of antisocial behavior could be "worked up," the psychiatrist would be testifying on the basis of biography rather than clinical observation. Although this method may, in many instances, reveal as much satisfactory and acceptable evidence of behavioral pathology as a clinical examination, the jury would be aware of the basis for the opinion and conceivably would react unfavorably to this method of evaluation. In addition, this approach leaves the expert and his testimony vulnerable to the type of skillful cross-examination found in the famous case of United States v. Hiss.

D. Mental Retardation

Mental defectives are classified as idiots, imbeciles, or morons. A subnormal is an unreliable witness because of limitations on his powers of observation and because of his propensity to be easily led into "traps" by an attorney. The cross-examiner might expose the subnormal condition by showing that the witness has had a very limited education and by obtaining reports on the witness's intelligence quotient. One commentator, at least, hints that it may be dangerous to rely on an intelligence quotient for impeachment purposes, since it is not possible to accurately fix a cut-off point for mental retardation.
E. Alcoholism

Chronic alcoholics suffering from a type of chronic brain syndrome known as Korsakov's psychosis,78 are characterized by memory impairment, disorientation, and confabulation.79 The alcoholic is a dangerous witness, even when not intoxicated. He "is not only unreliable, but may be peculiarly pernicious for out of fantasy may come all sorts of false but persistent accusations."80 Psychiatrists know that a chronic alcoholic is an unreliable observer, that he is often "at the mercy of mixed and unpredictable emotions, given to periods of mawkish sentimentality and emotional instability."81 Probing deeply into the drinking habits of a witness might elicit some vital information, but unless the judge has a sufficiently sophisticated view of the problem, the attorney is likely to be thwarted rather abruptly in his inquiry.82

F. Drug Dependence

Drug addiction or dependence does not disqualify a witness.83 A diagnosis of drug dependence "requires evidence of habitual use or a clear sense of need for the drug."84 Unless the drug user is "acutely under the influence of the drug," he can be a reliable witness,85 although some psychiatrists believe that drug dependence renders the addict untrustworthy and unreliable.86 More recent writers have taken a contrary position. Dr. Davidson has noted that "[If he could maintain a steady and unvarying supply of his drug, the addict would, for all practical purposes, be normal."87 With the present conflict of medical opinion on the subject of drug dependence, psychiatric testimony that addicts are habitually untrustworthy witnesses could be given little weight.

Disagreement also exists as to the extent drug dependence may affect a witness's capacity to observe, recollect, and narrate.88 Should further research convincingly demonstrate the adverse effects of drug dependence on a witness's memory, reliability, and perception, then, as one writer has observed, "the implementation of psychiatric testimony at a trial would not be difficult. A definitive diagnosis of addiction can usually be accomplished simply and within the temporal confines of the litigation. The primary basis of the diagnosis is withdrawal symptoms . . . ."89 If medical research provides some definite guidelines on the

79 Confabulation is a term used to describe the compensatory filling of memory gaps. Davidson, supra note 40, at 177.
80 Id. at 178.
81 Id. at 177.
82 Id.
84 DSM 45.
85 Davidson, supra note 40, at 178.
87 Id.
88 Juviler, supra note 83, at 678.
89 Id. This observation is not entirely accurate since withdrawal symptoms may be entirely absent with marihuana or cocaine. DSM 45.
effect of drug dependence on credibility, it would be proper to allow expert testimony to be introduced so that the effect of drug dependence on credibility might be understood more clearly and be of assistance to the legal process.

III. Psychiatric Method of Evaluating Witness

The discussion thus far has focused on some of the more significant behavioral pathologies and the possible effect of such disturbances on the ability of a witness to testify truthfully. Now the significant problem of evaluating the methods of psychiatry in assessing credibility must be considered; specifically, the grounds upon which a psychiatrist may base his testimony and the extent to which the basis for his assessment may be adequate for impeachment purposes must be examined.

A. Clinical Examination

It has been suggested that clinical examination of witnesses is the most reliable basis for psychiatric opinion introduced into the courtroom. The clinical examination by a psychiatrist involves a study of the subject as a "psychobiological whole"; physical and mental examination, aided by psychoanalytical technique and psychological testing devices, is necessary to evaluate an individual's total personality. The disclosure of mental abnormalities can be accomplished through the use of a proper psychiatric interview, noninquisitorial in nature, that will provide some insight into the behavior of the witness. Requiring a witness to submit to lengthy examination, while clinically desirable, is not the ideal manner of uncovering intrapsychic processes. We do not live in an ideal world, and less than perfect means of providing answers must be utilized. A more abbreviated psychiatric examination, reinforced by other biographical data, would enable a psychiatrist to present a meaningful, although not complete, diagnosis of the prospective witness. This procedure would allow a court or jury to make a more realistic evaluation of the testimonial credibility of a witness.

One writer, critically examining the method of clinical diagnosis as a device for the assessment of credibility, has asked:

[Is he [the psychiatrist] able to detect it [a lie] when the witness has talked over the matter with him in psychotherapy? Theodor Reik in his book The Unknown Murderer says that psychoanalysis has no contribution to make to evidence of guilt, as it is concerned with mental (inner) reality rather than material (outer) reality. A therapist does not check on material reality. He is ordinarily concerned with the patient's view of the world rather than what the world actually is. He does not cross-question the patient. Some therapists say that outside information about the patient interferes with their clinical work, and they prefer to close their eyes to it. They know the situation only through the eyes of the patient. Something more, then, is needed to test veracity.]

91 Slovenko, supra note 46, at 16-17.
This objection to the role of analytic (clinical) technique in the process of truth assessment is, though articulate, not the most significant or prevalent argument utilized by opponents of psychiatric expert testimony in matters of credibility. Moreover, the inner reality of a person may indeed have significance in judging a person's credibility. The conflicts, anxieties, and other behavioral pathologies discussed have roots in deep-seated, emotionally charged situational experiences. The patient's view of the world is meaningful if we realize that the "exploitation of the genetic dimension" may uncover, in the process, the developmental conflicts that cause distortions and unconscious motivations.

A second problem involves the authority of a court to order psychiatric examination of a witness. The majority of courts that have ruled on this question have held that a trial court has discretion to order such an examination under the doctrine of "implied" or "inherent" judicial power, but failure to do so is not an abuse of this discretion. Generally, the cases do not indicate the standards to govern this discretion, but in State v. Butler, the court held that there must be a "substantial showing of need and justification." In this regard, Wigmore has suggested that all female sex complainants be subjected to "careful psychiatric scrutiny." Generally, however, the courts, apparently proceeding on the theory that such an unpleasant experience would deter innocent victims from bringing a complaint, have held that a refusal to order such an examination is not an abuse of judicial discretion, and hence not grounds for reversal.

In harmony with this view is the policy advanced in rule 35 of the Federal Rules of Civil Procedure. Rule 35 authorizes trial courts to order a physical or mental examination of a party when his physical or mental condition is "in controversy." Although some witnesses would not qualify as "a party," still, where the rule does apply there is no limitation to the effect that the condition be "immediately" or "directly" in controversy, nor is there any limitation in rule 35 regarding the type of civil action in which it may be invoked. It would appear, then, that for the narrow class of witnesses to whom the rule applies, psychiatric examination to help resolve the question of credibility would be permissible. Though rule 35 does not strictly apply to nonparty witnesses, its policy and the policy of similar state procedural rules modeled after it would seem to augur well for the use of psychiatric clinical data. Behavioral disorders are not often perceived by lay judges or jurors, unsophisticated in psychiatric methodology. It is submitted, then, that trial courts ought freely allow pretrial clinical examination of witnesses for the purpose of aiding in the assessment of their credibility. In other sexual-abuse prosecutions, where the need for psychiatric examination is vital, some courts have displayed a medieval attitude toward

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92 Id. at 20.
95 Id. at 605, 143 A.2d at 556.
96 3 Wigmore § 924(a), at 460.
psychiatry by refusing to order the prosecuting female to submit to a psychiatric examination.

It is submitted that a liberal standard ought be developed to govern this discretionary power. The standard need not be so rigorous as that articulated in Butler, but rather ought encompass simply a good-faith demand based on a need for adequate preparation of the defense. The standard could be more tightly drawn in civil litigation, for the immediate consequences of a witness’s behavioral pathology may not be so severe as in a criminal prosecution, yet clinical psychiatric diagnosis ought be available on proper demand where it is clearly necessary.

If clinical examination of witnesses is to be of value to the legal process, the courts must control its implementation. If each party is allowed to introduce psychiatric evidence to rebut the other side’s contentions, the judicial process will be confused by what has been euphemistically labeled the “battle of the experts.” The court could, however, appoint one psychiatrist, an impartial observer, whose testimony would be admitted subject to cross-examination by either party’s attorney. The parties would have no further right of offering expert testimony. Or, perhaps, the court could appoint rotating groups of psychiatrists who would offer testimony based upon clinical examinations, their testimony being subject to refutation or rehabilitation by testimony of psychiatrists selected by the parties to the litigation. But court-appointed psychiatrists, like other appointed experts, present numerous problems. It is apparent that the psychiatrist, although attempting to report clinical data truthfully, has an orientation depending upon his psychiatric training.

Dr. Guttmacher and others foresee the possibility that the psychiatric examination might profitably be conducted under the auspices and supervision of a state mental institution or adult psychiatric clinic. Yet, as one authority cogently argues, the bias still exists. The neutral or court-appointed psychiatrist concept has recently fallen into disrepute, as such psychiatric experts often display “a fairly medium level of clinical competence.” From another point of view, one commentator disapproving of the impartial psychiatric witness maintains: “There is great danger that the authority of the court psychiatrist may become so overwhelming that other psychiatrists in the community are reluctant to testify, particularly if they have a contrary opinion.” Elements of time, expense, and fairness are relevant here. Impartial psychiatric experts appointed on a rotating basis by the court to conduct psychiatric examinations of witnesses seem to this writer advisable, tempered by the right of either party to offer its own experts at trial.

A third problem with the use of psychiatric experts revolves around the relationship between the witness and the psychiatrist. In order for the psy-
chiatrist to provide the jury with insight, there must be a level of cooperation between witness and psychiatrist. Analysis depends upon trust, candor, and cooperation between the witness and psychiatrist. When the witness submits to a psychiatric examination by order of the court, he is not likely to be completely cooperative or candid with the psychiatrist. The witness may be fearful of disclosing information that will implicate him in a crime. This realistic possibility of self-incrimination has been minimized by the unsound assertion of one writer that the self-incrimination danger could be avoided by warning the psychiatrist not to ask questions concerning the criminal behavior of the witness and forbidding him to disclose in his report to the court any incriminating evidence that may have been revealed. This suggestion places unjustifiable discretion in the hands of the psychiatrist, who is not and does not claim to be an expert in matters of self-incrimination. Another possible solution would be to have counsel present at the examination in order to call to the psychiatrist's attention the possibility of improper questioning. The psychiatrist might object to this procedure, claiming that it would transform the clinical session into little more than a courtroom proceeding, thus diminishing its value. The dilemma is real and significant. One court has recently held that a court-appointed psychiatrist could testify to admissions made by a defendant during a psychiatric examination, impliedly holding that voluntary answers to the questions of the psychiatrist waived any privilege or right against self-incrimination.

It may be argued that examination of a witness is less likely to involve self-incriminating statements than examination of a party. Still, examination of a witness with antisocial personality features may easily elicit admissions to past crimes. No satisfactory solution to this problem has yet been offered. The fifth amendment privilege against self-incrimination appears broad enough to encompass a situation where a witness is required to submit to a psychiatric examination, implying that voluntary answers to the questions of the psychiatrist waived any privilege or right against self-incrimination.

The proposal for immunity is made because the prohibitions on the examiner advocated in 8 WIGMORE § 2382, at 817-21, impose too great a responsibility on the examiner to edit the witness's responses when relating the bases for the diagnosis, and because the advent of narco-analytical techniques in legal interrogation presents imposing problems for the safeguarding of individual rights. See generally, J. MACDONALD, PSYCHIATRY AND THE CRIMINAL 72-88 (1958); Selving, Testing the Unconscious in Criminal Law Cases, 69 HARV. L. REV. (1956); Note, Everything But the Truth—Narco-Analysis and Its Effect Upon Confessions, 31 TEMPLE L.Q. 359 (1958).

Aside from the problems created by the privilege against self-incrimination, there exist in the majority of states statutes making confidential patient-physician communications privileged. For a recent compilation of the pertinent state legislation, see, Note, The Psychologist in Criminal Proceedings, 40 N.D. L. REV. 173, 182 (1964). The immediate problem, of course, is whether the physician-patient, psychiatrist-patient, or psychologist-patient relationship exists between a court-appointed expert and the witness undergoing examinations. The privilege might be invoked for testimony of a psychiatrist on the question of the credibility of one of his patients; but it would most likely not be invoked where the psychiatrist was not acting as the witness's physician for therapeutic purposes but
Once admitted into evidence, the probative value of psychiatric testimony must be determined. The test of the probative worth of scientific evidence, generally stated, is whether the theories and techniques upon which the scientific findings are based have been accorded "general acceptance" among scientists in the particular field.\textsuperscript{109} This test has resulted in the inadmissibility of evaluations by lie-detector tests,\textsuperscript{319} and expert testimony on the results of narcoanalytic examinations.\textsuperscript{311} The probative value of psychiatric testimony would thus depend upon the extent to which its methods have achieved general acceptance. In this respect the reliability of clinical examinations presents a problem. Information concerning the effectiveness in practice of clinical diagnostic systems is not totally clear. One clinical study was made in which three psychiatrists participated.\textsuperscript{112} One psychiatrist found the test patients to have serious personality or mental deficiencies, while the other two psychiatrists found the patients to be in the normal range. The author of the study commented:

\begin{quote}
[It] is likely that the lack of congruity between the diagnostic label and the complexities of the biodynamics of mental structure is itself at the heart of diagnostic failure. No general formula seems to do full justice to the individual case. More probably it will violate the complexities of the facts.\textsuperscript{113}
\end{quote}

In another study, psychiatric residents anticipated fifty-five percent of the official subtype diagnoses correctly.\textsuperscript{114} The study appeared to show "that the reliability of psychiatric diagnosis diminishes as the frequency of the incidence decreases."\textsuperscript{115}

Several explanations for the disparities in psychiatric diagnosis have been offered. The most satisfactory explanation is that in private practice the psychiatrist is not so much concerned with diagnosis as with treatment. It is only when the legal process intervenes that the psychiatrist must resort to rigid classification, based on a single period of observation. Thus a second psychiatrist observing the same subject at another time may see and describe different be-

\textsuperscript{109} Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923).
\textsuperscript{110} Id.
\textsuperscript{113} Id. at 276. See Mehlman, The Reliability of Psychiatric Diagnosis, 47 J. Abnormal & Social Psychology 577 (1952).
\textsuperscript{115} Id.
havioral pathologies or fail to observe a condition that the first clinician observed and diagnosed differently.

Perhaps disparity is inherent in any attempt to quantify human behavior — to formulate a calculus of cause and effect for the human organism's behavioral responses and actions — which the science of human behavior may never achieve. When the notion that psychology and psychiatry must meet the same exacting quantitative and statistical standards that prevail in the community of the physical sciences is dispelled, it may become apparent that psychiatric diagnostic agreement could be achieved if each psychiatrist were allowed to present a more comprehensive description of the subject, based on study over a period of time.

B. Diagnosis Made in Court

If the psychiatrist has not made a clinical examination of the witness, he may be able to render a competent psychiatric opinion as to the witness's credibility based solely upon observation in the courtroom. A witness's demeanor on the stand is always relevant in evaluating his credibility. Eccentricities of posture, mood, and attitude could be commented on by a qualified psychiatrist. However, "courtroom techniques for probing personality are perforce limited." Were the court to allow a psychiatrist to direct the cross-examination, the doctor would still be deprived of the direct rapport with the witness that is essential to a professional diagnosis. Further, such procedure is likely to cause undue delay and confusion in the conduct of the trial.

Courtroom techniques for assessing credibility are limited to a great extent by the hostility, fear, or reticence engendered in a witness by the foreboding atmosphere of a courtroom and by restrictive evidentiary rules on challenging a witness's veracity by means of extrinsic evidence. The manner of presenting such in-court diagnosis also gives rise to problems. Generally, the psychiatrist, as an expert, can be asked to give his opinion through the vehicle of a hypothetical question based upon evidence introduced in court. But the hypothetical question device has many serious, built-in objections. Hypothetical questions may be, and often are, biased in favor of one party and misleading to the jury. Fortunately, judicial trend has swung away from the requirement that the opinion of an expert be hypothetical in form and toward favoring expert testimony without first requiring the expert to specify the data upon which his conclusion is based.

116 3 Wigmore § 946, at 498.
118 Id. Related problems are discussed in Davidson, supra note 1, at 481-82.
119 See 2 Wigmore § 878, at 372-73.
Dr. Henry Davidson, the distinguished forensic psychiatrist, is guardedly optimistic about the possibilities of psychiatric diagnosis in court:

While a defendant is testifying, a skilled psychiatrist could sit in the courtroom and later give an opinion about the defendant's mental state. Within limits this is medically sound, but legally disputable and tactically unwise. It is medically sound, because — for the most part — psychiatric examination consists essentially in observation. The psychiatrist looks for his patient's mood, pressure of talk, stream of thought, brightness, orientation, content of thinking, memory, psychomotor activity, and presence or absence of insight. If a defendant is on the witness stand long enough, the experienced psychiatric observer can fill in most of these headings. It is, however, second-rate testimony. It would be better if the examiner had more time, a more cooperative patient, and access to historical details about the defendant. But it is still possible to offer a reasonably solid opinion about the defendant's sanity and, within broad limits, his psychiatric diagnosis.122

The psychiatrist who testifies on the basis of the witness's demeanor and testimony, however, runs the risk of having his diagnosis dissected and decimated during cross-examination. A skillful cross-examiner may move a jury from viewing a constellation of facts indicating behavioral disorders to an isolated examination of separate components that by themselves may seem insignificant. A brief look at the Hiss trial demonstrates the dangers involved. In 1950, Alger Hiss was prosecuted by the United States for perjury. The government's chief witness was Whittaker Chambers. The defense sought to impeach Chambers's testimony with psychiatric evidence depicting Chambers as a psychopathic personality with a tendency to make false accusations. The court ruled the psychiatric testimony admissible, declaring:

It is apparent that the outcome of this trial is dependent to a great extent upon the testimony of one man — Whittaker Chambers. Mr. Chambers' credibility is one of the major issues upon which the jury must pass. The opinion of the jury — formed upon their evaluation of all the evidence laid before them — is the decisive authority on this question . . . .

The existence of . . . mental derangement is admissible for the purpose or discrediting a witness. Evidence of . . . [mental derangement] is not merely for the judge on the preliminary question of competency, but goes to the jury to affect credibility.124

The psychiatric diagnosis was in part based on the courtroom demeanor of Chambers, and in part upon his testimony at trial. The psychiatrist, Dr. Carl Binger, testified that the psychopathic disorder afflicting Chambers had "nothing to do with the conventional judgment of sanity."125 The symptoms upon which

123 United States v. Hiss, 88 F. Supp. 559 (S.D.N.Y.), aff'd, 185 F.2d 822 (2d Cir. 1950), cert. denied, 340 U.S. 948 (1951)
124 Id. at 559.
125 A. COOKE, A GENERATION ON TRIAL 305 (1950). Dr. Henry A. Murray, a Harvard clinical psychologist, was also called as a witness. He agreed with Dr. Binger's conclusions. For a capsule summary of Dr. Murray's testimony, see N.Y. Times, Jan. 13, 1950, at 9, col. 4.
The psychiatrist based his diagnosis of psychopathic personality included "chronic, persistent and repetitive lying; acts of deception and misrepresentation; alcoholism and drug addiction; abnormal sexuality; vagabondage, panhandling, inability to form stable attachments, and a tendency to make false accusations."\(^{126}\)

The prosecutor, on cross-examination of Dr. Binger, shredded his testimony by zealous concentration on the separate components of the psychiatric diagnosis. The doctor had, on direct examination, attached importance to Chambers's "untidiness." On cross-examination, the psychiatrist admitted that this trait was manifest in such persons as Will Rogers, Owen Young, and Bing Crosby.\(^{127}\) Dr. Binger had further testified that Chambers habitually gazed at the ceiling, avoiding direct contact with his examiner during the interrogation. The prosecutor told Dr. Binger:

> We have made a count of the number of times you looked at the ceiling. During the first ten minutes you looked at the ceiling nineteen times. In the next fifteen minutes you looked up twenty times. For the next fifteen minutes ten times and for the last fifteen minutes ten times more. We counted a total of fifty-nine times that you looked at the ceiling in fifty [sic] minutes. Now I was wondering whether that was any symptom of a psychopathic personality?\(^{128}\)

"Not alone," replied Dr. Binger frostily as he shifted nervously in the witness chair. The doctor had also testified that stealing was a psychopathic symptom. The prosecutor asked Dr. Binger, "Did you ever take a hotel towel or a Pullman towel?" Dr. Binger answered, "I can't swear whether I did or not, I don't think so." The prosecutor then asked, "if any member of this jury had stolen a towel, would that be evidence of [a] psychopathic personality?" Dr. Binger replied, "[t]hat would have no bearing on it."\(^{129}\)

This clever questioning, emphasizing individual elements of testimony, apparently distracted the jury from the consideration of the entire constellation of antisocial personality factors allegedly evident in Chambers's life pattern. Dr. Binger, reflecting on his courtroom experience some years later, admitted that the cross-examination was designed to prevent consideration of the totality of antisocial characteristics.\(^{130}\) The *Hiss* case has had a salutary effect in generating interest in psychiatric testimony as a vehicle for more effective and legitimate impeachment procedure.\(^{131}\) In spite of the drawbacks inherent in psychiatric diagnosis grounded on in-court examination, the information adduced may provide insight in evaluating the behavioral pathology of a witness and hence ought be admitted.

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\(^{127}\) Id. at 311.

\(^{128}\) Id.; N.Y. Times, Jan. 11, 1950, at 12, col. 4.

\(^{129}\) Id., Jan. 12, 1950, at 9, col. 1.

\(^{130}\) Id., Jan. 12, 1950, at 9, col. 1.

Psychedelic testimony regarding the credibility of a witness, whether based on clinical examination or courtroom observation, ought be admitted in an effort to maximize the jury’s ability to render a fair and just verdict. This testimony, in order to be in assistance to the jury, must be presented in a clear, intelligible fashion and must be designed to instruct, not to confuse, the triers of fact. The procedure that will produce the most reliable assistance to the jury is the clinical diagnosis by a panel of neutral experts. Courts must recognize the development of the principles of psychiatry and psychoanalysis to the extent that the discretionary powers vested in courts to admit or bar such testimony ought be exercised, guided by a judicial standard of liberal admissibility. In this way, the judicial process can live up to a higher standard, prescribed not by judicial fiat but by universal moral belief: “Thou shalt not bear false witness against thy neighbor.”

133 Exodus 20:16.