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Introduction: Psychology and Psychiatry in the Law

J. Clark Kelso
University of the Pacific; McGeorge School of Law

Psychology And Psychiatry In The Law

J. Clark Kelso*

We see in the law, both in the statute books and the case reporters, a reflection of ourselves and our society. As society changes and the forces at work in society find their way into legislative offices and the courts, the law evolves to meet new demands and to exploit new solutions. Change in the law occurs slowly, however, in part because lawyers are, by training, resistant to quick fixes, and, in part, because lawyers recognize, perhaps better than others, that there are usually two or more sides to every problem.

The articles in this colloquium deal with the legal system's responses to developments in the sciences of psychology and psychiatry. A person not well versed in the dynamics of our legal and political system might suppose that developments in science are taken up by the courts and by the legislatures with enthusiastic endorsement. That is not the case. Courts, in particular, have traditionally been careful to insure that scientific claims to truth receive appropriate scrutiny before being accepted in the courtroom.

The debate surrounding the courts' reliance upon the scientific opinions of psychiatrists and psychologists reflects in part a more fundamental problem which courts face: How can the courts, which need expert assistance to decide certain disputes, determine which experts to rely upon and which of many conflicting theories to believe? The very fact that courts need experts suggests that courts

* Professor of Law, University of the Pacific, McGeorge School of Law.

lack the judgment to choose between conflicting expert opinions. If the experts cannot agree, how can courts know who to believe? Part I of this introduction addresses this question as a prelude to the more focused inquiry explored by the articles in this colloquium.

I. EXPERTISE AND THE ADJUDICATORY PROCESS

Courts have as their primary function the resolution of disputes. For better or worse, courts predominately employ an Aristotelian model of dispute resolution.[1] In this model, our rules of law serve as major premises and factual determinations serve as minor premises in a series of syllogisms that lead, ultimately, to a binary choice: plaintiff wins or plaintiff loses; or, defendant is found guilty or defendant is found not guilty. Courts, particularly courts of equity, occasionally engage in half-measures that deviate somewhat from this Aristotelian model, but the deviations are much more the exception than the rule.

Expertise may be necessary to courts both in framing the major premises, the rules, and in determining the minor premises, the facts. Courts rely primarily upon judges—which means, in the overwhelming number of cases, those who are trained in the law—to supply expertise in choosing the correct major premises to use in resolving the dispute. In the vast majority of cases, judges exercise expertise by selecting the correct rule from one of many rule-sources (e.g., statutes, regulations, cases, respected commentators, and so forth).

The process of rule selection—deciding whether a particular rule applies to a particular case—will, in many cases, be straightforward. When a defendant in California has been accused of murder, the court knows that the definition of murder found in California Penal Code section 187 will be used as a necessary step in the series of syllogisms leading to a finding of guilt or innocence.

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1. Other forms of dispute resolution, such as mediation or negotiation, may draw upon different paradigms of reasoning. *See, e.g.*, Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754 (1984).

In some cases, however, the selection of the right rule is not so clear. For example, does a statute which prohibits the serving of liquor to a visibly intoxicated person supply the appropriate standard of care for use in a negligence action brought by a person who was attacked by the visibly intoxicated patron?[2] Resolution of this purely legal question invokes the expertise of the judge in determining the purposes of the liquor law, the purposes of the law of negligence, and whether these various purposes would be undermined or furthered by application of the statutory standard to the negligence determination.

In the typical case, the judge relies only upon his or her own expertise (or the expertise of the other branches of government) in choosing or framing the appropriate rule. It is a relatively rare case in which a judge significantly relies upon non-governmental, external expertise in framing a rule of law. A good example of a rule of law born of external expertise is found in the Supreme Court of Washington decision in *Helling v. Carey*,[3] where the court held that an ophthalmologist fell below the standard of reasonable care as a matter of law by failing to administer a pressure test for glaucoma to a patient who was under fourty years of age (the age at which routine tests for glaucoma were recommended by ophthalmologists).[4] The more typical judicial response to such scientific issues has been to treat them as questions of fact to be resolved by the fact-finder based upon a presentation of evidence (which may include expertise supplied by expert witnesses).[5]

External expertise is of course much more likely to be employed by the courts in determining the existence of the minor premises that are necessary to complete the series of syllogisms. Very nearly all of the minor premises—the facts—must be introduced

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2. *See, e.g.,* Stachniewicz v. Mar-Cam Corp., 488 P.2d 436 (Or. 1971).
3. 519 P.2d 981 (Wash. 1974).
4. *Id.* at 983.
5. For example, many courts would have treated *Helling* as raising a fact question for the jury to be resolved by expert testimony regarding the customs of ophthalmologists in Washington. *See generally* Richard A. Epstein, *The Path to The T.J. Hooper: The Theory and History of Custom in the Law of Tort*, 21 J. LEG. STUD. 1 (1992).

to the court from external sources. Some facts are so generally agreed upon that courts will accept their truth as a matter of judicial convention, and in a sense, courts no longer need consult external sources to establish or rely upon such facts (e.g., that the force of gravity exists and on Earth exerts a force of 32 feet per second upon objects).[6] Events which take place in the courtroom itself (for example, conduct which amounts to contempt of court) may be another example of facts that can be established without resort to external sources.

Except for these few extraordinary cases, however, courts rely upon external sources to assist in establishing the facts. Most commonly, the external sources are people who have some first-hand knowledge about the events which gave rise to the dispute. Early in the history of our jury system, jurors were sometimes chosen precisely because they knew something about the subject matter of the dispute.[7] It has been several hundreds years now, however, that jurors have generally been *excluded* from service if they knew too much about the events giving rise to the dispute or the subject matter of the dispute. Jurors are now supposed to learn about the events entirely from evidence presented in the courtroom.[8]

Because the jury's factual determinations are supposed to be derived almost entirely from the evidence which is presented in the courtroom, one of the most critical issues for the entire process of courtroom dispute resolution is: What type of evidence will the courts permit the jury to hear, see, smell, touch or taste? As a general matter, we should formulate rules of evidence that permit the introduction of information which will, in more cases than not, assist the trier of fact to make the "right" or "most accurate" determination of the facts. By the same token, we should generally

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6. *See, e.g.*, PAUL C. GIANNELLI & EDWARD J. IMWINKELRIED, SCIENTIFIC EVIDENCE, § 1-2, at 3-7 (1986).

7. *See, e.g.*, Mason Ladd, *Expert Testimony*, 5 VAND. L. REV. 414, 414 (1952); Learned Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 HARV. L. REV. 50, 51-52 (1912).

8. MCCORMICK ON EVIDENCE § 244, at 424-425 (4th ed. 1992).

exclude the introduction of "unreliable" or "untrustworthy" evidence.

The words "reliable" and "trustworthy" must be put in quotes to indicate that courtroom reliability may differ quite substantially from what we mean in ordinary language by the words reliable and trustworthy. For example, empirical study has for some time suggested that eyewitness identifications may be quite unreliable in particular circumstances. Yet, eyewitness identification testimony is virtually always admitted, and the majority of courts to consider the issue have even excluded expert testimony which would educate the jury about the various factors that make eyewitness identification testimony unreliable and statistics showing a very low correlation between eyewitness testimony and reality.[9]

As a general matter, courts take the view that first-hand testimony—testimony from someone who has personal knowledge of the subject matter about which they are testifying—is more reliable than second-hand testimony. This view is commonly expressed in law by the general rule forbidding the introduction into evidence of hearsay.[10]

The rule forbidding hearsay is, as every lawyer knows, riddled with exceptions, including a catch-all exception that courts may resort to when no more specific exception applies.[11] As a generality, the exceptions reflect a decision that evidence which falls into one of the listed categories is, more often than not, likely to be sufficiently reliable to be put before the trier of fact. Thus, for example, we believe that business records kept in the ordinary course are, in most cases, reliable.[12] We believe, probably with less justification, that excited utterances are sufficiently reliable to warrant their admissibility.[13]

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9. *See* GIANNELLI & IMWINKELREID, *supra* note 6, § 9-5, at 289-95.

10. FED. R. EVID. 801. McCormick points out that the hearsay rule and the rule requiring first-hand knowledge are conceptually and historically related, yet distinct. MCCORMICK, *supra* note 8, § 247, at 429. Although the rules are somewhat different, for purposes of this discussion, the two rules, both of which express a judicial concern with the reliability of evidence, may be treated as one.

11. *See, e.g.*, FED. R. EVID. 803(24).

12. *Id.* 803(6).

13. *Id.* 803(2).

The reliability exception to hearsay is particularly important when it comes to the introduction into evidence of a large and apparently growing category of second-hand testimony: the testimony of the expert witness. Recognizing that the world is a complex place and that the interpretation of events in the world may require specialized knowledge, courts have permitted properly qualified experts to present to the trier of fact their expert opinions or interpretation of events.[14]

What makes the second-hand opinion of an expert reliable (or, at least, more reliable than the opinion of a non-expert, which is generally excludable)? Why do the courts trust self-styled experts? The practical answer is that dispute resolution simply could not go on without the use of experts. In our system, judges are generally expert only in the law and in dispute resolution, and the expert jury was discarded long ago. When the critical issue in a case is "how fast was the car going when it went through the intersection," and there exists a long skid mark prior to impact, refusing to employ the services of an expert in accident reconstruction would be folly.

The question is not whether to employ experts. Everyone agrees that experts are a necessary feature of sensible dispute resolution. The more important questions are (1) Who will be permitted by courts to assume the mantle of "expert"? and (2) How much objective substantiation, if any, will courts require experts to provide in support of their opinions?

Both of these questions spring from the same concern about experts and expert opinion: How do we really know that the testimony being given by a person who claims to be an expert has sufficiently increased reliability to justify an exception to the court's usual reluctance to permit hearsay and second-hand testimony? This general concern relates, in turn, to a broader philosophical debate about the validation or acceptance of scientific theories. Why do we as a society believe some theories and reject others? What is it about a particular theory that commands attention? How do new and sometimes revolutionary theories displace the accepted wisdom?

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14. *Id.* 701-706.

These questions have been much debated by philosophers of science. For purposes of this introduction, the philosophical views can conveniently be separated into two camps: the objectivists and the politicians. The objectivists include a large number of philosophers of science who have significant disagreements among themselves. For example, Sir Karl Popper, who believed that a theory could properly be described as scientific only if it was possible to prove the theory false, is ordinarily not included in the same category of scientific philosophers as P.A.M. Dirac or Leibniz, who tested scientific theories against ideal qualities such as simplicity, beauty, and elegance.[15] The link between these otherwise disparate philosophies is their reliance upon an objective measure--something other than counting scientific heads--to determine the reliability or validity of a particular scientific theory.

The politicians--and, again, this single category includes several different sub-groups--generally focus more upon the social dynamics of the scientific community in determining the acceptance or validity of a scientific theory.[16] At its extreme, the political view of science holds that a theory will be accepted if, and only if, the "leaders" of the scientific community accept the theory. The most significant step in gaining credibility, then, is to convince acknowledged leaders that the theory (or new field) is indeed credible.

Although there has been precious little acknowledgment of this philosophical debate by the courts, it appears that our judicial approach to acceptance and validation is much closer to the political model than to the objectivist model. Under Federal Rules of Evidence 702, a witness can qualify as an expert "by knowledge, skill, experience, training, or education." Holding the requisite degrees virtually guarantees qualification as an expert under Rule 702.[17] Courts thus rely upon the politics of education as a sign of

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15. *See generally* SIR KARL POPPER, CONJECTURES AND REFUTATIONS (2d ed. 1965); GEORGE GALE, THEORY OF SCIENCE: AN INTRODUCTION TO THE HISTORY, LOGIC, AND PHILOSOPHY OF SCIENCE 199, 209-10 (1979).

16. See GALE, *supra* note 15, at 227-33.

17. DAVID W. LOUISELL & CHRISTOPHER B. MUELLER, 3 FEDERAL EVIDENCE § 381, at 634 (1979).

acceptance and expertise. Courts have watered-down the political theory of science by not even requiring experts to be leaders in their field.[18] In the courtroom, everyone with a degree is a possible "leader."

The only other threshold limitation sometimes placed upon expert testimony comes from *Frye v. United States*,[19] where the court of appeal held that scientific evidence must be of a sort generally accepted by the relevant scientific community.[20] What is "generally accepted," and how general acceptance may be proven, remains somewhat unsettled,[21] but the temptation to count heads (and to count certain heads as more significant than others), appears to be irresistible.

It is easy to understand why courts would favor the political model of scientific validity. The reason that courts need expertise is precisely because courts are incapable of themselves evaluating and interpreting complex events in the world. But in order to employ the objectivist model in judging the validity of a theory, the judge must have sufficient expertise to measure the theory against the objective standard, and the objective standard itself is part and parcel of the scientific endeavor. If the courts knew enough about science to use an objective standard, the courts would have enough expertise to dispense altogether with outside experts. As a consequence, courts have no choice but to rely upon an essentially political model in assessing the reliability of scientific testimony.

The consequence of courts adopting the political model of scientific validity has been the creation of a substantial gap between what mainstream science and many scientists believe counts in the world and what courts believe counts as science in the courtroom. Peter Huber's wonderfully readable book, *Galileo's*

18. *Id.* § 381, at 638.

19. 293 F. 1013 (D.C. Cir. 1923).

20. *Id.* at 1014. There remains an issue whether *Frye* survived the enactment of Federal Rule of Evidence 702. Louisell & Mueller, *supra* note 17, § 382, at 645-46.

21. Linda E. Carter, *Admissibility of Expert Testimony in Child Sexual Abuse Cases in California: Retire Kelly-Frye and Return to a Traditional Analysis*, 22 LOY. L.A. L. REV. 1103, 1108 (1989).

Revenge: Junk Science in the Courtroom, reveals the size of that gap, both historically and in the courtroom of the present.[22]

In an age when disputes are increasingly complex and the resolution of disputes depends more and more upon scientific developments, courts must make a special effort to keep up with the times. By employing primarily political criteria to judge the reliability of scientific theories, courts risk earning the contempt of the scientific community and, ultimately, the public. The pages of this colloquium issue set a good example for the way in which courts *should* approach scientific issues. Courts must learn to accept the conclusions of science on their own terms and must avoid the temptation to restate scientific conclusions in legal terms that conceal the subtleties of the underlying science. Courts must, in a phrase, use science judiciously, not as a panacea for all of society's ills and not as a convenient method for abdicating the responsibility of making delicate policy decisions.

II. PSYCHIATRY AND PSYCHOLOGY AS EXPERT SYSTEMS

The debate over the judicial use of expertise in psychiatry and psychology comes down, in many respects, to the philosophical problem identified above. Why should courts place special trust in the views of psychiatrists and psychologists? Are the claims which psychiatrists and psychologists make entitled to the legimitizing label of "science"? And how can courts use the sometimes tentative conclusions reached in psychiatry and psychology within a system that appears to demand all-or-nothing determinations? The debate continues in the pages of this special issue.

Thomas Szasz's short essay, *Psychiatry and the Denial of Evil*, reminds us that, even assuming the scientific validity or acceptance of current scientific dogma, there remains to be answered a moral and policy question about the legal significance of scientific dogma. For example, even if science may view a human being as a complex biological machine and may view the human brain as a complex part of that complex machine, society

22. *See also* Peter Huber, *Junk Science in the Courtroom*, 26 VAL. U. L. REV. 723 (1992).

may nevertheless continue to treat the *actions* of a human being as the actions of a morally independent agent. Thus, whether we choose as a society to hold a person legally responsible for their actions may be answered only partly by the sciences of psychiatry and psychology.

The Hospitalization of the Mentally Ill Revisited, authored by Professor Ralph Slovenko, traces the history of society's efforts to treat the mentally ill and identifies the most significant events in the development of psychiatry as an independent field of science. It is too easy to forget sometimes that scientific disciplines are in a constant state of development and flux. Slovenko reminds us of that reality in his description of the significant revolutions in the history of psychiatry. The article provides an historical backdrop against which the judiciary's reliance upon psychiatry may profitably be judged.

The remaining articles in the issue may conveniently, albeit somewhat artificially, be separated into two categories: (a) Those articles dealing primarily with substantive law which has been influenced by psychiatry and psychology, and (b) the use of psychiatrists and psychologists as experts in trials.

A. Psychiatry, Psychology and Substantive Law

The use of the insanity plea as a defense in criminal trials remains controversial. Successful and highly publicized insanity pleas, such as the so-called "twinkie defense" in the killing of San Francisco supervisor Harvey Milk and John Hinckley's acquittal of the charge of attempting to assassinate the President, trigger a sense of outrage among some and force us to reconsider both the moral and modern psychiatric underpinnings of a plea that can be traced at least as far back as the Bible and traditional Hebrew law. In *The Insanity Verdict, The Psychopath, and Post-Acquittal Confinement*, Professor Abraham L. Halpern continues his long-standing criticisms of the insanity defense, emphasizing in this piece the pressure which the insanity defense places upon psychiatry and psychology to ignore good medicine and science in order to satisfy a public demand for post-acquittal confinement. He makes a case

for the proposition that acquittees are routinely confined long past the time when such confinement is medically necessary solely to satisfy the public demand for retribution.

The next article, *Warning Third Parties: The Ripple Effects of Tarasoff*, by D. L. Rosenhan, Terri Wolff Teitelbaum, Kathi Weiss Teitelbaum, and Martin Davidson, is a good example of the adverse consequences which may follow when a court fashions a rule of law that *ignores* the limits of science. The Supreme Court of California, in *Tarasoff v. Regents of University of California*,[23] imposed upon mental health professionals a duty to warn or protect third persons whose physical safety had been threatened by the therapist's patient, notwithstanding the nearly unanimous view of the profession regarding the near impossibility of accurately predicting a patient's dangerousness to others. The article reports the results of a recent survey showing that many psychologists have in fact altered their treatment methodology to reduce the risk of liability created by the *Tarasoff* decision.

Robert F. Schopp's article, *Justification Defense and Just Convictions*, contains a thorough reconsideration and critique of justification defenses to criminal offenses, particularly focusing upon the proper treatment of the defense of duress. The article reminds us that our views about criminal responsibility may be subtly influenced by our views regarding free will and the ability of human beings to remain free agents even against serious threats to our own safety or happiness.

Returning to civil law developments, in *What A Difference A Day Makes: Age Presumptions, Child Psychology, And The Standard Of Care Required Of Children*, Lisa Perrochet and Ugo Colella draw upon research into child development and psychology to support a fundamental reconsideration of the standard of care which some courts have used to judge the conduct of children in negligence cases. Perrochet and Colella highlight recent research by cognitive psychologists that even very young children are able to recognize cause and effect relationships, recognize themselves as

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23. 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976).

causal actors, and are able to exercise self-regulation. They then criticize those courts which have adopted bright-line rules that children under a particular age (e.g., seven or five) are incapable of negligence. The article is a good example of how developments in psychiatry and psychology can properly be relied upon by courts in fashioning rules of law.

B. Psychiatrists and Psychologists as Trial Experts

The gap between "true" science and "courtroom" science is made most clear in John E.B. Myers' article entitled *Expert Testimony Describing Psychological Syndromes.* Professor Myers, himself a leading expert on the use of expert testimony in litigation involving children,[24] identifies several of the most common errors made by courts and attorneys in dealing with testimony about syndromes.

Just as psychiatrists and psychologists have been used (and some would say misused) in the determination of sanity in the criminal context, psychiatric and psychological testimony has become a central feature in child dependency proceedings arising out of allegations of child mistreatment or abuse. In *Big Mother: The State's Use of Mental Health Experts in Dependency Cases,* Professor George J. Alexander reviews the use of expert testimony in this context, and concludes that such testimony has largely been misused by the courts which, desperate to make their determinations more than a roll of the dice, often accept psychiatric or psychological testimony that promises much more in the way of reliability than the science can actually deliver.

In the final article in this colloquium, *Scientific Jury Selection and the Equal Protection Rights of Venire Persons,* Jeffrey J. Rachlinski treats us to a discussion of sociological and psychological methods used in the exercise of peremptory challenges and whether those methods could survive equal

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24. *See generally* JOHN E.B. MYERS, EVIDENCE IN CHILD ABUSE AND NEGLECT CASES (1992); John E.B. Myers et al., *Expert Testimony in Child Sexual Abuse Ligitation,* 68 NEB. L. REV. 1 (1989).

protection scrutiny under recent Supreme Court decisions. Among other things, the article reminds us that considerations of public policy and constitutional law may sometimes override what appear to be perfectly valid empirical conclusions and scientific truths.

III. CONCLUSION

The editors have successfully solicited a wide range of articles on psychiatry, psychology and the law, covering criminal, quasi-criminal and civil actions, including substantive and evidentiary issues, and encompassing both sympathetic and hostile points of view. I hope readers will, upon completing the issue, join the continuing debate over what remains a particularly controversial reliance by courts upon scientific expertise.