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Behavior and the Law Reconsidered: Psychological Syndromes and Profiles

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ABSTRACT: Recently, a new concept of behavior and the law has emerged which looks beyond the defendant's satisfaction of the elements which define the charge. This formulation, which considers not simply the objective facts but motive, intent, and circumstance, has marked a legal shift from diminished capacity to diminished responsibility. Still in evolution, this trend has challenged the relationship between law and the behavioral sciences, and prompted serious reconsideration of the role of each. This paper examines the landmarks of the movement, considers its implications, and looks to the future.

KEYWORDS: forensic science, syndromes, psychological profiles, insanity, diminished responsibility, drug abuse, post-traumatic stress disorder, multiple personality disorder, battered woman syndrome, abuse excuse

With federal passage of the Insanity Defense Reform Act of 1984 (1), in the wake of the John W. Hinckley, Jr. Trial, abuse of the insanity defense in America became far more difficult. The Act restored the insanity formulation to its historic roots, which were tied to the defendant's capacity to distinguish right from wrong. The 1984 Act also made insanity an affirmative defense in the federal courts, thus placing the burden of proof on the defendant.

Most states had already returned to a fundamental insanity formulation, but few shifted the entire burden of proof to the defendant. American law is unique in that it does not rely simply on whether a defendant did or did not do a particular deed; but looks beyond the obvious facts to motive, intent, and circumstance. State law typically does not consider a defendant's mental state simply in terms of an element of a crime, but also considers mental state more broadly as a matter of fact. Some states grant a presumption of sanity and requisite mental circumstances, but if a defendant asserts a defense based on mental criteria, the burden of proof may shift to the prosecution to disprove the facts of the defense's assertion beyond reasonable doubt.

These changes and their jurisdictional variations have created subtle procedural distinctions, and it is therefore not surprising that not only jurors but judges and lawyers as well can become lost in the judicial details. Just such a misadventure occurred in 1988 Mulica case (2). No one disputed that John Mulica had made off with and squandered more than $200,000.00 of someone else's money. The problem confronting his defense was finding a way to keep John out of jail. The "compulsive gambler defense" had been tried before in other jurisdictions and by the late eighties had been thoroughly discredited (3). Post traumatic stress disorder (PTSD) had only recently been defined and, amidst continuing debate, incorporated into the then-current Diagnostic and Statistical Manual (4).

The defense asserted PTSD, and the jury had little trouble sorting out the facts of the case, but everyone became confused when the jurors were about to start their deliberation and the judge began to explain the law. The jury could have accepted that John was a compulsive gambler, but that particular mental state would have gained the defendant nothing in the way of leniency. The judge then asked the jury to base its ruling on PTSD, but when the jury convicted and appeared to reject that argument, the defense contended that it should be able to assert a different theory.

The appellate courts agreed, holding that the prosecution is not relieved of its burden of disproving a defendant's mental incapacity simply because a defendant pursues a focused trial strategy centered on a diagnosis which the jury rejects. The decision was not intended to issue a fishing license for the murky waters of diminished responsibility, but to warn prosecutors to shut all of the doors to these "novel" defenses the first time around. But simply the potential of a "mini" mental status defense; a defense that could get a defendant out from under a criminal charge without meeting all of the formal requirements and probable confinement reinstated as a part of the actual insanity defense; was too great a temptation for defense attorneys to ignore.

There is little doubt that stress can change lives. As Bessel van der Kolk, perhaps the leading figure in international traumatic stress, said in summarizing a career of research, "overwhelming social experience can become indelibly etched in people's memories and set up a cascade of disturbances that can permanently alter their capacity to regulate their biological systems (5)." Stress, however, is a fact of life. The same events can have very different impacts on different people, and people can and do recover from extraordinary experiences and never turn to these experiences as justifications for failing to observe reasonable standards of human conduct.

For centuries, men killed and were set free by juries who applied the "UnWritten Law" that men are justified in taking out their anger against an unfaithful spouse or her lover. The fact that even more women acted on the same anger and benefited from unwritten social mores did little to change the fact that other women without a convenient excuse for murder endured desperately unhappy marriages. In the late Seventies, psychologist Lenore Walker was called in as an expert witness at several trials of women who had killed their husbands. To help explain the common threads of these

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cases, Walker originated a theory based upon "learned helplessness." A husband may beat his wife for overcooking an egg, or for undercooking it; for turning on the TV or for turning it off; for talking or for keeping still. Eventually she finds that there is no connection between what she does and what happens to her. Why go on trying?

Learned helplessness is, of course, not unique to women; but it did seem to fit the stories reported by many women who had murdered their mates. Walker's book, The Battered Woman (6), struck a resonant cord in the feminist movement, and became well known to lawyers representing women charged with domestic murder.

For seven years, Ernest Kelly drank and beat his wife Gladys. She would move out, he would promise to change, and she would return to him. Their rows were ongoing, but almost always took place out of public view. But on May 24, 1980, as the typically drunk Ernie and his bride of seven years walked down the street, Gladys stabbed him to death. According to prosecution testimony, Gladys started a scuffle. Quickly separated and restrained by passersby, Gladys shouted that she would kill her husband. Breaking away, she chased after him, pulled a pair of scissors from her pocketbook, and took his life.

The defense tried unsuccessfully to introduce expert testimony on battered woman's syndrome, but the Supreme Court of New Jersey, in an opinion which draws extensively from Walker's work, overturned the conviction, holding that the research on battered woman's syndrome was "sufficiently reliable" to meet the standards for "scientific testimony (7)."

Battered woman's syndrome, and psychological syndromes in general, would remain a subject of controversy in the criminal law for the remainder of the decade (8,9). In medicine, the term syndrome is used to describe a group of signs and symptoms that collectively characterize or indicate a particular disease or abnormal condition; the sum of signs associated with any pathological process. For example, cardio-auditory syndrome (10) consists of the combination of sensorineural deafness and prolongation of the part of the standard electrocardiogram known as the QT interval. While there is no obvious connection between these two seemingly unrelated symptoms, research has determined that their co-occurrence is associated with other systemic characteristics which suggest a common etiology. While the exact pathogenesis is as yet unknown, there is reason to believe that the cluster is a distinct biodynamic entity and not simply a coincidental co-occurrence. Knowledge of the syndrome, moreover, is important because it alerts a clinician detecting a hearing problem to rule out the possibility of an associated heart condition which, if left undetected and untreated, may be fatal. The concept of syndromes takes on additional significance in medical-legal conditions such as "shaken baby syndrome (11)."

In psychiatry, however, there is a far weaker link between behavioral manifestations and underlying biodynamic processes (12). Mental health professionals therefore seldom use the term syndrome, preferring instead "disorder" which is unequivocally descriptive yet implies no specific etiology. In medicine, the disorder first described by Tourette is well-enough understood to be classified as a syndrome, yet the Diagnostic and Statistical Manual of Mental Disorders, consistent with its nomenclature, still applies the more conservative term of "Tourette's Disorder (13)."

Human behavior in the context of the law, however, is not only subject to all of the vagaries inherent in mental health, but is compounded by the obvious vested interests of parties to litigation in which not only vast sums of money but freedom and life itself are often at stake. To what extent is it appropriate to lend the imprimatur of "science" to opinions about human behavior and motivation in the context of a criminal trial? Was the judge at Gladys Kelly's trial correct in believing that such testimony was little more than an attempt to "explain and justify" as opposed to sharing scientific findings beyond the experience of the jury?

There can be no clear, bright line between the point at which behavioral science ends and advocacy begins. Inherent in American justice is an acceptance that justice requires consideration of both actions and intent. In a secular culture, our source of guidance in that gray zone which forms the buffer between worthy and unworthy intent has fallen, by default, to the behavioral professionals. But responsibility for acting appropriately on that guidance, like the responsibility for distinguishing good from evil, is one which can not be delegated.

While it is the jury which must define justice, it is the courts which must define the rules of evidence. This was the duty confronted by the Supreme Court of Ohio in State v Koss (14), and either course open to that court brought with it a potential for hindering the administration of justice. At the heart of Koss, however, was not a simple act of murder but the seemingly inexplicable behavior of the woman accused of the crime. Where Gladys Kelly simply stabbed her husband, Brenda Koss spent the next day following a routine which seemed inconsistent with her alleged conduct. In the years following Kelly, the battered woman's movement had grown increasingly sophisticated (15). In the process, social psychologist Angela Browne made an observation which the Koss court found directly on point. "A history of physical abuse alone does not justify the killing of the abuser," she wrote. "Having been physically assaulted by the abuser in the past is pertinent to such cases only as it contributes to the defendant's state of mind at the time the killing occurred (16)."

The significance of the "syndrome," this suggested, was *not* to offer a legal excuse for murder. If in fact expert testimony could help the jury make sense of Brenda Koss' unusual behavior in the hours after the crime, then there should be no reason why the jury need be denied its benefit. Obviously the defense attorney could argue the theory to the jury, but lawyers are not behavioral scientists and are not generally subject to cross-examination. Let the jury hear the theory, the Supreme Court of Ohio concluded in its landmark Koss decision which proved a turning point for judicial acceptance of syndrome testimony nationally—the jury will be free to make of it what they may.

Once opened, however, the door to mental health "exotica" proved difficult to monitor. Within a year, the courts were flooded with expert witnesses of dubious distinction advocating plausible theories as implausible defenses. A new definition of syndrome had been created specifically for trial law:

> **SYNDROME (LEGAL VARIETY)** = (1) socially unacceptable behavior + (2) a sympathetic antecedent; combined with (3) a behavioral dynamic explanation.

In 1985, Lisa Becker Grimshaw arranged for two male friends to waylay her husband in a wooded area where he was bludgeoned to death with baseball bats. She use the battered woman defense and was convicted of the lesser charge of manslaughter. By the early nineties, however, when the case reached appeal, even the highest courts in the nation were growing impatient with "expert" witnesses, and the Supreme Judicial Court of Massachusetts concluded that the prosecutor's use of the term "hired gun" to describe Lenore Walker, while "to be disapproved of," was not a reversible

error since in this case since the characterization did not create a "substantial risk of miscarriage of justice (17)."

Perpetrators as Victims

Syndromes had, however, become the behavioral science tool of the defense. The conduct which most frequently placed defendants in need of legal refuge, not surprisingly, centered on primal forces of sex, drugs, greed, and ambition. In the late eighties, with the arrival of wide-spread cocaine abuse and particularly crack cocaine, also known as free base or rock cocaine, the justice system and society itself was confronted by a tidal wave of crime and health problems. Cocaine abuse by pregnant women today ranges from 1% to over 10% in urban areas, with resulting birth defects which will impact the health and functioning of their children throughout their lives.

Many drug abusers have pre-existing psychiatric conditions. Others develop symptoms as the consequences of abuse begin to take their toll. By the early nineties, courts were faced with the potential of countless defendants claiming lack of responsibility for the consequences of events which the defendants themselves had set in motion. Commonwealth v. Herd (18) was a turning point in the resolution of that issue. Reginald Herd had been using cocaine when he beat his girlfriend's three-year-old son to death with 277 blows of an electric cord. He plead lack of criminal responsibility, but a noteworthy appellate decision provided the first clear guidelines on the role of drugs in diminished capacity. While Herd does not preclude a defense of legal insanity by drug abusers, it does preclude a diminished responsibility defense for symptoms produced by drug abuse, even by a person who begins or continues drug use knowing that it will or may arouse symptoms of a pre-existing mental disease or defect.

By the late 1980s, posttraumatic stress disorder (PTSD), first officially created in large part in response to patient demands for an officially recognized diagnosis which would fit their symptoms, but also in response to shifting attitudes toward Vietnam veterans, had become in the words of many mental health and legal professionals the "black hole" of litigation (19). The diagnosis remains controversial (20–23), and many legal experts would prefer to see it eliminated or at least replaced with something more objective. Everyone does agree, however, that no other diagnosis in American psychiatry has had as profound an influence on civil and criminal law.

Charles Delaney and his estranged wife were in the midst of an ongoing disagreement over child custody when he strangled her with a garrote. The grave which he had dug two days earlier hardly suggested that the crime was spontaneous and unpremeditated. Yet like many other veterans, when charged with his crime Delaney blamed his conduct on the trauma of military service and arrived at trial prepared to impress the jury with war stories.

Just as physicians make it a practice to be among the first to read each month's issue of the Reader's Digest medical column so as to be prepared for the expected symptoms of the month, psychiatrists had learned to follow the current films. Movies like *The Deer Hunter* and *The Burning Bed*—in themselves valuable contributions to a nation's awareness of the unseen scars of trauma and abuse—make excellent guidebooks for anyone searching for excuses to avoid criminal conviction (24). Military veterans themselves have been among the most active and successful at routing out false claims of military stress "syndrome," which they rightly consider an affront to every serviceman who has returned to civilian life and managed to avoid taking out their frustrations on innocent bystanders.

Delaney claimed, among other defenses, that he had recovered bodies from the October, 1983, bombing of the Beirut Marine Barracks. His commanding officer, however, had no knowledge of such an experience, and recalled that the tank mechanic had spent most of his Lebanon tour in a hotel and had never been exposed to combat or even hostile fire. A psychiatrist who examined him prior to trial noted that Delaney brought his attention to a twich, similar to that seen in movies about traumatized veterans, which Delaney affected on initial interview but vanished when the defendant was alone. Suspecting that he was being led to a self-serving diagnosis, the psychiatrist asked Delaney if he had the nightmare which occurred every night in PTSD victims. Delaney said that he did, but was unable to describe their content and observers were unable to note any indications of actual sleep disturbance.

Delaney was appealed all the way to the highest court in the state, and although each review devoted careful attention to assuring that all of his due process rights had been fully protected, Charles Delaney's murder conviction was upheld (25).

By the time Norma Roman asserted her multiple personality disorder (MPD) defense in the early 1990, arguing that while one of her personalities may have been caught dealing drugs but her "core" personality was law abiding, the diagnosis itself had begun to wear thin. The courts found that at least one of the "personalities" had criminal intent, and upheld her conviction (26).

There was little awareness of "multiple personalities," among the mental health professions or the public, until the 1950s when Chris Sizemore presented with the symptoms which became the basis for the celebrated book and 1957 Academy Award tour de force movie *The Three Faces of Eve* which starred Joanne Woodward as a woman with separate identities and personalities. Patients, exposed to Eve and its imitators, began to present with similar manifestations, and soon America had an epidemic of "split personalities." It was not until the eighties that clinicians responsible for treating patients at public institutions began to compare notes and discovered that few of them had ever seen a case of multiple personality disorder.

Chris Sizemore, in the meantime, had gone on to become a celebrity and dynamic lecturer. Multiple personality disorder enjoyed a brief vogue as a criminal defense, but the lawyers soon figured out that whichever of their client's personality had done the criminal act, they would all hang by the same neck; therefore that particular defense lost favor (27).

In a sense, the concept of multiple personalities actually had some validity, and anticipated by decades the discovery of the dispersed operation of the human mind (28). It is the notion that each of the dispersed components have their own names, wardrobes and identities that fuels continuing debate. Now known as Dissociative Identity Disorder, DSM-IV 300.14 focuses upon a failure to integrate various aspects of identity, memory, and consciousness. Accepted by the mental health community as a disorder consistent with both presenting patient symptoms and our increased understanding of neuroanatomy, its discussion in DSM-IV reflects both the controversy which the diagnosis continues to generate among scientists, and its limitations as a basis for legal dispensations. Even Chris Sizemore has become active in correcting the false impression that "multiple personalities" can exculpate a criminal defendant.

Only rarely has a court accorded any significance to a criminal defense plea based on multiple personalities, which makes the 1993

decision in United States v. Denny-Shaffer (29) worthy of note. A New Mexico delivery nurse, 37-year-old Bridget Denny-Shaffer had a history of depression, abusive relationships, and two failed marriages when her pregnancy by a boyfriend ended in miscarriage. Wearing the uniform and false credentials of a medical student, she later walked into the nursery of another hospital, examined several of the babies, selected one of the infants, and walked away with the child undetected. Arriving at the home of her boyfriend in visible (yet false) pregnancy, she spent the night and the next day when the boyfriend returned home from work Bridget greeted him from a blood soaked bed, held out the missing infant, and said "This is your little one."

Thrown out by the boyfriend, Denny-Shaffer and the infant began a cross-country odyssey that ended in an F.B.I. stop and a federal conviction for interstate transport of a child unlawfully kidnapped. Her counsel had chosen to assert a multiple personality defense which crumbled in the realization that the diagnosis could not protect her under the post-Hinckley federal insanity guidelines. A sad and sympathetic figure by any definition, her case was taken up by the U.S. Court of Appeals which reversed the conviction and sent the case back for retrial. The decision, however, had little to do with psychiatry and a great deal to do with American justice.

Even in early England, with its formalistic legal codes which offered prosecutors little discretionary authority, justice often prevailed despite the law. At a time when the "gentlemen" of the jury were truly gentlemen in the sense of rank and privilege, the early English courts would often look the other way and allow a jury to hand down decisions contrary to law (30). Known as "jury nullification" in the legal vernacular, America's reconceptualization of justice administration made the practice largely unnecessary. In fact, our obsession with fairness has led us from justice by judicial discretion being denounced as too prejudicial to this group or that, followed by its replacement with mandatory sentencing guidelines, which are then denounced as too inflexible to serve the interests of justice—a cyclical gyration with often paradoxical consequences (31).

The idea of jury nullification occasionally reemerges, however, particularly when the public becomes exasperated with the existing system, and both Maryland and Indiana have sanctioned the practice under selected circumstances while other states have held hearings on its adoption (32,33). In truth, our juries are under appreciated and have more power than they may realize, but turning them loose without restraint is a formula for both reform and abuse. In the case of Denny-Shaffer, however, the Court of Appeals concluded that a jury could not do any worse by Bridget than what she had already endured, and asked the trial court to reconsider the "jury's right to determine credibility, to weigh evidence, and to draw justifiable inferences." In short, with all due respect to the insanity guidelines, perhaps this was one best left to the common sense of a jury.

No one has yet tried to assert a questionable syndrome defense under Denny-Shaffer, but the case has come to represent a small milestone for juror discretion. Perhaps this reflects, in part, a measure of faith in the axiom that anyone who is able to consider a mitigating defense before committing a crime is unlikely to see that defense accepted by an actual jury. Less visible to the public, however, was an equally insidious potential for behavioral forensic abuse by the prosecution.

Profiles, Syndromes, and Stereotypes

Generally we think of legal "syndromes" as a tool of the defense. Profiles, the psychological models developed by the F.B.I., are traditionally thought of as tools of the prosecution. In reality, both have been used to support anything and everything which may be of help to either side.

In State v. Allewalt (34), in which prosecutors sought to convict a 17 year-old of the rape of his girl friend's mother despite testimony by both the defendant and the girlfriend that the mother had initiated the encounter, it was the prosecution which reached out for expert behavioral syndrome testimony; not simply in an effort to bolster the credibility of and sympathy for the mother, but to use that credibility and sympathy to convict the defendant. And, as with so many legal "syndromes," the scientific credibility of the testimony drew upon post traumatic stress disorder. Although there have been endless court battles over the admissibility of testimony on everything from "battered spouse syndrome" and "Vietnam survivor syndrome" to "rape trauma syndrome (35)" and "child sexual abuse accommodation syndrome (36)," all draw their scientific credibility not from any legal "syndrome" but from the *Diagnostic and Statistical Manual of Mental Disorder*'s inclusion of post traumatic stress disorder as a recognized diagnostic entity.

The PTSD diagnosis, however, was never intended to support litigation. PTSD was included in the DSM upon the insistence of clinicians who had been confronted by people with symptoms of often unknown etiology. Often these individuals had difficulty being taken seriously because family, friends and officials doubted whether they had experienced anything at all which would justify the alleged symptoms. People know, from their real-life experiences, that secondary gain is a powerful motivation. The world is filled with unhappy, vindictive, or envious folks who want recognition, support, and an explanation for their emotions. Much of the work of behavioral therapy is an investment of human effort in search of a meaning for the events of daily life.

Everyday, people have disputes in which it is impossible to sort out the true facts and establish who is right and who is wrong. That is why we have courts. Courts settle disputes by considering all of the evidence and taking a side—this is how we define justice.

Clinicians have traditionally been trained to focus upon human response and behavioral dynamics rather than objective truth or legal responsibility. Clinicians confront people with problems, and it is their job to address those problems. If a person seeks help for an emotional issue, many clinicians chose to work first on the emotional issue rather than how the issue arose. Since everybody faces disputes, and most of these disputes are resolved in one way or the other, everyone by that definition is wrong at least some of the time. At best, most people learn to compromise and accommodate, but most still have some positions on which they are reluctant to go against what they consider to be right. Others are unhappy because of an entire host of problems which most observers would consider to be of their own making. Others always try to do the right thing yet have exceptionally bad luck. Still others are unhappy because they got what they thought they wanted but are having difficulty living with the price.

Many psychotherapists maintain that quibbling over blame will not help—that prolonging dispute, by itself, simply makes matters worse. So they learned to be non-judgmental: to accept what the patient said and move on from there. Some therapists even took a further step and tried to teach the world to take people at their word. Others, quite correctly, pointed out that regardless of fault, stress can cause people to do strange things. Blame is often just a further complication. In a great many cases, however, people can and do have mixed feelings, and these conflicting emotions contribute to distress as much if not more than being a completely blameless victim of uncontrollable forces.

Post traumatic stress disorder, as a DSM diagnosis, was ultimately accepted simply as a name for powerful emotions, and a diagnostic label through which these emotions can be explored in the context of an environmental explanation. It has four criteria. Three of these relate to the emotion: persistent reexperience; the avoiding of people, places and feelings; and increased arousal. The fourth, placed first on the list, is a past confrontation with a threat which generated intense fear, helplessness, or horror. The diagnosis assumes that the environmental trigger is the cause of the emotions because the person in treatment *reports* reexperiencing and avoiding things that are related to that experience.

It is significant to consider that the association of experiences and powerful emotions predates the inclusion of this diagnosis in the psychiatric lexicon. In fact, recognition of the association predates Freud and the birth of modern psychodynamic insights. Prior to Freud, professionals who dealt with emotional issues were quick to assume very simplistic relationships between objective events and subsequent emotions—what behaviorists termed stimulus and response. Even Freud's early work is filled with just such assumptions. But as Freud and those who followed progressed in their research they came to the realization that few causal links are all that simple. The basic defense mechanisms are, in fact, a catalog of explanations as to just why simple assumptions are generally wrong.

Yet the very inclusion of such assumptions is inherent in the acceptance of post traumatic stress disorder as a diagnostic entity. To make the diagnosis of PTSD is to say that there was a traumatic event and that the event caused the response. It was for this reason that PTSD encountered so much resistance in the professional community, and why it took so long for it to be inserted into the DSM. In the end, it was put in because the clinicians mustered greater political power than the researchers and scholars. The clinicians wanted to be able to respond to patient assertions, and many of those assertions were driven by activists who wanted to be able to argue that identifiable life problems were the obvious source of common emotional problems.

The original logic behind the legal acceptance of behavioral "syndromes" was grounded in solid psychodynamic theory. People who have been through traumas do inexplicable things. They may be slow to report a victimization, fail to take obvious defensive measures, and even maintain a seemingly pleasant relationship with their victimizer. People who must nevertheless unravel the truth of criminal assertions, including juries, need to understand this. The original purpose of expert testimony was to provide that knowledge.

By testifying that a person has PTSD, however, an expert by definition testifies to the truth of the alleged charge. That expert, moreover, lends the full weight and authority not only of their personal presence and qualifications, but of all the mental health professions as well. This conclusion is unavoidably implicit in any such testimony, and is further complicated in Allewalt by the psychiatrist's explicit statement as well.

In a case like Allewalt, there is no way of ever really knowing whose story is correct. Both accounts may be completely accurate from the point of view of the person recounting the events. Or for all we know it is the psychiatrist who got it right. At best, this defendant can not be commended for his judgment or restraint.

But there is another way to look at the facts. Clearly the deed was done, and clearly the woman involved was very unhappy afterwards. Many of her symptoms, however, were consistent with behavior she had been exhibiting for at least three months before. Her testimony also includes references to the fact that following her encounter with young Allewalt she wondered if neighbors, friends, and acquaintances thought she was "cheap," or if she was "dressing cheap," or if they were looking at her out of the windows when she came out of her home. She was no longer comfortable around young men, and was withdrawing into herself.

She was a woman, married for 16 years, and dealing with the reality of living alone. She had been thrown into daily close contact with a healthy young man who was living with her daughter. It doesn't take a psychiatrist to come up with dozens of alternative scenarios; each more or less favorable to one side or the other. This is the point in fact, and why it is so helpful to be able to call upon a credible "expert" to cast one's own preferred spin to a jury.

Allewalt is still law in Maryland, and was cited as precedent in one case which made it all the way to the United States Supreme Court (37). But one lone voice on the seven man court which decided Allewalt had an interesting suggestion. "I agree," the Judge said, "that testimony explaining post traumatic stress disorder (PTSD) is admissible . . . [but] I do not agree that opinion testimony should be received on the question of whether the complainant actually suffered PTSD (38)." The remainder of the court dismissed the observation as irrelevant to the question placed before it, but the following year the state of Washington took a broader view:

"The courts which have admitted rape trauma syndrome testimony believe it sufficient that the myriad of symptoms encompassed therein are 'generally accepted to be a common reaction to sexual assault.' We find, however, that this is not the relevant question. The issue is not whether rape victims may display certain symptoms; the issue is whether the presence of various symptoms, denominated together as 'rape trauma syndrome,' is a scientifically reliable method admissible in evidence and probative of the issue of whether an alleged victim was raped. The literature on the subject demonstrates that it is not (39)."

The Dynamics of Expert Behavioral Testimony

American law is still a myriad patchwork quilt of conflicting judicial opinions on the topic of behavioral science expert testimony, but the Washington court's insight marked a turning point toward what is now emerging as a workable accommodation between the very different needs of clinical practice and practical jurisprudence.

Whenever the assertion of a psychological condition or trait plays a role in a legal dispute, there are always two fundamental questions. The first hinges upon the relationship between the alleged condition or trait and the asserted events. Here expert testimony may assist a trier of fact in evaluating the credibility of and alternative explanations for the alleged psychological phenomena. The second question, the weight which should be accorded the alleged psychological phenomena in reaching a conclusion as to the issues of fact before the court, is ultimately a juristic determination which can only be resolved by the trier of fact.

When the resolution of a disputed issue involves information or analysis beyond the knowledge or capabilities of the trier of fact, parties to a trial are allowed to introduce testimony by expert witnesses. It is the trier of fact, the jury or the judge in a non-jury trial, who will ultimately decide which version of the facts they will chose to believe. The test for the appropriateness of expert testimony is the extent to which it will help the trier of fact.

In medical malpractice cases, for example, the facts in dispute are generally of sufficient complexity and beyond the daily experience of the court that the law may require that expert testimony be introduced to explain the issues and to help frame the questions

which the jury must answer. In this unique role, the expert is allowed to speak from general experience and knowledge, and to apply that expertise to facts in dispute even though the expert may have little or no direct knowledge of those specific facts. Between direct testimony and in cross-examination by opposing counsel, it is assumed that the jury will have the opportunity to weigh the expert's opinion and the extent to which that opinion should be relied upon in deciding the case.

In legal cases which involve human behavior, however, it is more difficult to define the appropriate role of the expert. While most non-physician jurors can easily see how an expert can help them understand a medical issue, most human behavior is not considered beyond the expertise of the general public. People deal with behavior, their own and that of the people around them, every day. Knowledge of the appropriate standards for human behavior—the distinction between right and wrong—is something which everyone is taught and then tests against the realities of life from the day they are born.

If a dispute involves issues which are truly beyond the experience of a jury, for example the conduct of a person held hostage for a prolonged period, the jury is much more likely to defer to professional expertise. Furthermore, if expert testimony is reasonably consistent with the natural instincts of the jury they are more likely to accord weight to the testimony and perhaps modify their judgment accordingly. A case in point is the trail of newspaper heiress Patricia Hearst for her part in the April 15, 1974 armed robbery of the Hibernia Bank in San Francisco. Hearst had been taken captive by the radical Symbionese Liberation Army, but later joined her captors as a gun-wielding member of their gang. At trial, experts testified that such behavior was not uncommon among hostages who come to depend upon and identify with their oppressors.

Captive or "Stockholm" syndrome testimony was novel at the time (40,41), and led to a major battle between experts as to its applicability. In the end, however, the jury convicted Hearst; not necessarily because they failed to believe the experts who testified that allying with captors was a fairly common phenomenon, or even because they believed that being a hostage was sufficiently within their own experience so that behavioral expertise was unnecessary; but because it was their judgment that regardless of how common the behavior may be it should not excuse or justify armed robbery.

The role of expert testimony is to help the jury understand the facts of a case. Based upon that understanding, the jury then decides the case based upon their judgment of right and wrong. To understand that abused women may chose to freely remain with their abuser rather than take steps to change their situation is not the same as concluding that this common behavior justifies the subsequent murder of the abuser. To cite the statistic that young black men frequently kill other human beings does make it any more likely that a jury will then conclude that this justifies a dispensation for future black murders—even if you dress up the argument as "Black Rage Syndrome."

The core of the scientific evidence concerning battered women, and black offenders, and virtually every other identified special population which comes before the courts is that people can and do assess their options; and that often people see their options as far more limited than they may well be in actuality. This is the "learned helplessness" which Lenore Walker saw in the battered women who went on to kill their abusers, and a similar inability to see more reasonable solutions to common problems has influenced both the characterization of defendant populations and the rationale for sharing this insight with the triers of fact who must determine their fate.

Radical activists, on the other hand, responding to their own agendas, have extended this logic to conclude that all injustice could be eliminated if only the courts would always take their side in any dispute. When there are no witnesses, and you come down to the word of one person against another; always assume that the woman is right. Or the racial minority is right. Or that whoever the special interest group represents must be and always will be right.

One problem with this advocacy logic is that it does not stop at simply accepting scientific observations noted in some members of a given population, but elevates these observations to the stature of an inevitable truism. This has the paradoxical consequence of turning members of minority groups into apologists for the very negative stereotypes which most members of that minority group abhor. Women's legal syndromes, therefore, have come to paint women as indecisive clinging predators who mean no when they say yes, who can not be trusted to make up their own mind, and who are unable to take responsibility for their own actions and decisions (42). Minority syndromes have similarly painted blacks as violent and impulsive (43,44), Hispanics as playing by their own rules (45), white men as unable to tolerate the normal vicissitudes of daily life (46), and most foreigners as unable to live in our land of opportunity without welfare and our toleration in them of behaviors which we would consider unacceptable in our own offspring (47).

The American judicial system does not condone and will actively oppose any attempt to then use its arena as a forum in which to propagate stereotypes about the relative worth of one group as opposed to another. The justice system does, however, share with all of the responsible institutions in our society a stake in providing citizens with a maximum opportunity to fully understand their options and obligations, and in helping people to make informed choices with which they are both willing and able to abide. This is a desire, however, which the justice system must always balance against its unique duty to also preserve, for each responsible American, the ability to make free choices and to live with the fruits of those decisions, both good and bad.

The courts have grown increasingly wary of the use of any legal "syndrome," ascribed to a complainant in a criminal trial, to support an inference that the accused is in fact guilty of the crime (48–51). On the other hand, courts continue to recognize that expert testimony as to how victims of the *type* of crime alleged by the prosecution typically conduct themselves can assist the trier of fact when such testimony does *not* carry with it any opinion as to whether the complainant is telling the truth about either the crime itself or an alleged offender (52). In addition, expert testimony is generally held to be admissible when it is used to refute suggestions that a prosecution witness may be unreliable due to behaviors which can be better appreciated by the trier of fact when placed in context by expert testimony (53,54).

Behavioral Testimony and the Two Edged Sword

Use of complainant syndromes, however, is a two edged sword. Not only are prosecution experts open to attack under cross-examination, and their testimony potentially turned to the benefit of the defense, but the defense can introduce their own experts who may characterize the complainant to the advantage of the defendant. Georgia, for example, experienced a spat of cases in which accused child molesters sought to introduce expert testimony on the "Lying child syndrome" in hope of discrediting complainants (55–57).

The "syndrome" detailed the propensity of a child to relate and to repeat untruthful statements about a person who is an authority figure in their life in order to manipulate that child's environment to advantage. The courts, which characterized the phenomenon as not "unique as a mysterious area of human response," said thanks but no thanks—we know about that one and if the jury doesn't, it can figure it out for itself.

Syndromes are not the only tools which have been enlisted in support of a defense. While profiles are generally considered tools of the prosecution, there are circumstances in which they can become attractive to either side of a case. Entrapment, the affirmative defense that alleged crimes were in reality induced by government persuasion or trickery, is a good example. An entrapment defense, as with defenses to most serious criminal charges, turns on the defendant's mental state: was the defendant an active participant or simply a passive bystander to conduct actually carried out by a government operative? While early cases tended to hold that a defendant asserting the affirmative defense of entrapment could not establish their state of mind through expert testimony, the courts now generally consider such testimony an appropriate aid to the triers of fact (58–60).

Most other attempts to enlist expert testimony regarding a defendant's personality profile to help disprove a criminal charge have been less successful. Introduction of psychiatric testimony regarding the "dependent personality disorder" of a defendant was excluded, for example, as support of her assertion that she was unaware that computer equipment which she sold was in fact stolen. Here the court felt that imprimatur of such an official-sounding label was neither necessary nor helpful to the jury in making its assessment of the defendant's mental state (61).

Similarly, the psychological profile of a murder and robbery defendant was excluded as possible support that his crime could not have been deliberate and premeditated, holding that the profile appeared to be simply a narration of the defendant's social history with little or no rational bearing on issues of premeditation and intent (62). Such personality testimony has also been excluded as a defense to armed robbery and assault (63), and manslaughter (64), where the defendant sought to establish that they were simply not the "type" to use a weapon.

In many instances, the testimony is simply a way in which to introduce character evidence. Testimony in support of good character is generally permissible (65), but the courts are leery of according it scientific stature (66). Nevertheless, in two controversial decisions, lay character witness testimony has been upheld in a child molestation case (67), and a psychologist's opinion was upheld as appropriate testimony concerning a defendant charged with lewd and lascivious acts upon a child, noting that the testimony was based, at least in part, upon standardized testing (68).

Most frequently, however, courts have excluded expert testimony aimed simply at ruling out a defendant as the guilty party. This has been the case in proposed testimony as to "peaceableness" (69), psychiatrist testimony as to lack of characteristics "likely to result in abuse of infant victim" (70), psychiatrist testimony that defendant had made previous false confessions and may therefore be mentally ill and his confession untrustworthy (71), expert testimony as to defendant's remorse or lack of remorse (72), and that the defendant had undergone a religious conversion and therefore could be rehabilitated (73). Expert testimony is also typically not allowed as to mitigation of an offense (74). Often such expert testimony is offered in place of the defendant taking the stand in her own behalf, and thus becoming subject to cross-examination. The jury system quite correctly assumes that a defendant is his own most revealing character witness, and that if character is to be made an issue it is best presented by the defendant himself (75).

Expert behavioral testimony on behalf of a defendant can also end up working against that defendant. For example, in State v. Hunt (76), defense claimed that a borderline personality prevented him from being able to form the necessary intent to be guilty of a shooting charge. The court ruled that this assertion opened the door for broad inquiry into his mental condition, and allowed the prosecution to counter the claim with expert testimony that the defendant was actually suffering from nothing more than "antisocial personality disorder." In order to explain how this conclusion was reached, the expert was further permitted to recount for the jury defendant's difficulties in interpersonal relationships, including his prior "bad acts."

The Power of Profiles and a New Judicial Perspective

If profile evidence has had little impact upon the ability of the accused to fashion a defense, it has provided a potentially devastating weapon in the hands of the prosecution. The case of Sgt. Russell Banks illustrates just how powerful and insidious prosecution profile testimony can become, even when the "expert" does not testify as to a personal conclusion about the guilt or innocence of the defendant. In this instance, a pinpoint profile which could only describe the defendant—a stepfather living with his wife and her young daughter—combined with the known limitations of a child witnesses, and an aggressive child "therapist" able to lead that witness and allowed to testify as to her own conclusions, created a direct path to the defendant which a jury would be hard pressed to ignore.

In its Banks holding (77), the Court of Military Appeals noted that its reversal of Sgt. Banks conviction for child rape and sodomy was consistent with the case law in both federal and state courts that has severely criticized attempts to introduce "profile" evidence to establish either guilt or innocence. As the Supreme Court of Kansas noted in the 1989 case of State v. Clements, "Evidence which only describes the characteristics of a typical offender has no relevance in determining whether the defendant committed a crime in question, and the only inference which can be drawn from such evidence, namely that the defendant who matches the profile must be guilty, is an impermissible one (78)." This conclusion has been reached in cases as diverse as child molestation (79), child abuse (80), murder (81), rape (82), and shoplifting (83).

This is not to say that expert profile testimony may never be used by the prosecution. If the defendant places his own personality and character at issue, the prosecution can call experts to help rebut defense assertions (84,85). In a Washington state case, a defendant who stuttered pointed to the fact that the person he allegedly assaulted was unable to identify his assailant as a stutterer. The prosecution was permitted to introduce to the jury expert scientific testimony as to the statistical percentage of probability that a stutterer would not exhibit that particular speech anomaly in certain situations (86).

Expert profile testimony as to a lack of profile can also be admissible when a defendant deviates significantly from the expectation which a lay jury may hold about people who commit particular types of crimes (87). Finally, background testimony which does not specifically address guilt or innocence of a defendant but instead enables the jury to understand evidence that does go to guilt or innocence has been held to *not* be impermissible profile evidence.

By far the greatest controversy over the use of offender profiles has arisen not simply in connection with their use at trial, but their deployment as an investigative tool. Nowhere has the controversy been more heated than in the area of drug dealing. In 1987, Judge Charles Becton published a law review article that drew attention to a seemingly chameleon-like way in which drug courier profiles adapted to any particular set of observations (88). Within months, the Court of Appeals for the Ninth Circuit incorporate Judge Becton's arguments into United States v. Sokolow (89); a case which it had debated for over two years. By the late 1980s, however, criminal profiles had become a staple of law enforcement. Even the U.S. Supreme Court could not stand by and watch them wiped out in a single sweep of a judicial pen.

The high Court went back to basics, and they found their foundation in Terry v. Ohio (90). Officer McFadden, and his detention of two men casing Zucker's clothing store on an Ohio day in 1963, had given rise to the "stop and frisk" exception to the Fourth Amendment and the reasonable suspicion test which provided justification, short of probable cause, under which police officers could initiate limited investigatory action. The Supreme Court knew that it could not allow any decision which it could make in Sokolow to turn profiles into unrestricted hunting licenses for over enthusiastic enforcement officials, nor was it willing to set up an entirely new bureaucracy to review the constitutionality of each and every profile. The Court also recognized that profiles changed over time, and that their effectiveness would evaporate if they became frozen and subject to public scrutiny.

The solution was not to demand that every profile meet the criteria for reasonable suspicion, but to insist that every law enforcement intervention, regardless of whether or not it was set in motion by a profile, must be justifiable through the same articulation of facts—the "totality of the circumstances"—required for a Terry stop. In this single decision, the Court recognized the validity of the probabilistic assumptions underlying the application of behavioral science techniques in justice administration, yet made it impossible to elevate criminal profiles into a license for Fourth Amendment abuse.

Criminal profiles continue to serve as a tool in law enforcement, but more importantly profiles are a means of leveraging investigative expertise, training investigative and enforcement officials, and applying systematic methodologies to the fast-changing and highly mobile environment which characterizes contemporary criminal operations. Once the intervention has been initiated, however, the profile is of no further probative relevance. Arrest and even the issuance of a search warrant requires probable cause, and prosecution of any resulting charges must be based upon substantive evidence of guilt. The original profile is inadmissible in support of guilt, and is presumed to be inherently prejudicial (91–95).

The temptation to push these limits was brought home to the British public in a highly publicized 1995 case. Three years earlier, 23-year-old Rachel Nickell took her two-year-old son and dog for a walk. She selected Wimbledon Common as her south London destination because of its reputation for safety, but less than an hour later she was found, soaked in the blood of some 49 stab wounds, her child clinging to her lifeless body crying "Get up mummy." Police responded with the biggest murder investigation in London history—and one of the nation's early attempts at using the new science of psychological profiling.

England's first encounter with the behavioral sciences in criminal investigation came in the 1985 "Railway Rapist" case. Although profiling had become well established in the U.S. through the work of the F.B.I. Behavioral Science Unit, both serial killers and the methods for catching them were only just then taking hold in Britain. David Canter, professor of investigative psychology at Liverpool University, had a background in the psychology of building design, human behavior during fires, and the psycholinguistics of hoax fire calls; but the rigor of his science well prepared him to become that nation's leading criminal profiler. His methodical work led to the conviction of John Duffy, and inspired the Robbie Coltrane character in the hit television detective series Cracker (96).

By the time of the Nickell murder, however, the publicity surrounding criminal profiling had attracted a host of psychologists who had been bitten by the detective bug. It was one of these who claimed the case, produced a profile, and eventually took over much of the day-to-day police operations directed toward conviction of the suspect, Colin Stagg, targeted by the profile. Through an attractive blond undercover policewoman, the psychologist initiated an eight months liaison with the 31 year-old Stagg in which she shared violent sexual fantasies, confessed to the ritual sexual murder of a baby and a young woman, and egged him on to match her stories; even telling him that she wished he were Nickell's murderer because "That's the kind of man I want."

Stagg never claimed credit for the killing, but from 700 pages of letters and transcribed telephone conversations and public meetings, the psychologist concluded that Stagg's fantasies, modeled upon information fed to him by those familiar with the details of the crime, revealed unique knowledge of the crime scene which could be known only by the murderer. Dragged before a judge in open court at the Old Bailey, defense quickly pointed out that Stagg hadn't even made good guesses—he didn't know the location of the crime and had wrongly asserted that the victim had been raped.

Up until that point, Great Britain had never felt the need for an entrapment statute, but the judge recognized a "honey trap" when he saw one. Clearing the accused and acknowledging the understandable pressure on the police, the judge was nevertheless forced to conclude that the operation betrayed "not merely an excess of zeal, but a blatant attempt to incriminate a suspect by positive and deceptive conduct of the grossest kind." Stagg left the chaotic courtroom vowing to sue everyone involved, the police were the butt of press ridicule, and David Canter observed with typical English understatement that pulling in some "media recognized expert" can undermine "more effective, longer term development of a professional discipline (97)."

Its not just the newcomers who can make mistakes. The 1996 Summer Olympics began in the wake of the first case of suspected air terrorism on American soil, and as the investigation of the TWA flight 800 crash off New York moved ahead with commendable precision, a bomb blast rocked the Olympic festivities in Atlanta. Unwilling to stand by in the face of two national assaults, an inexperienced F.B.I. agent allowed the press to get word that a psychological profile had identified the private security guard who first spotted the bomb as the likely perpetrator. In moments, Richard Jewell went from hero to the object of media scrutiny and scorn.

After a week of publicized investigation, in which the entire world got to see Jewell live on CNN sitting forlorn on his own front steps as the F.B.I. picked through his apartment, the investigation yielded nothing more than a few pathetic souvenirs of a man's only moment of glory. Pressed for an explanation, an F.B.I. spokesperson on the scene curtly informed the press that "We don't make apologies." F.B.I. director Louis Freeh, called before a congressional investigating committee, tried to put a better face on the public relations disaster but confided privately that "We wish we never heard of Richard Jewell" (98,99).

This is not to say that mention of a profile, or court testimony which overlaps in any way with a profile, is necessarily prohibited. Testimony can mention a profile in the context of background as to how and why a defendant was stopped and searched provided that such testimony is confined to the preliminary stop and not the actual investigation, and the fact that the individual satisfied the profile is not used to impugn the defendant (100). Moreover, the expertise reflected in profiles *can* be the subject of expert testimony to refute assertions by the defendant (101–104), to supply factual information helpful to the trier of fact in placing the case in context (105), or to establish motive, intent, absence of mistake or accident, or identity of a common scheme or plan (106).

Conclusion

After a decade of debate and publicity, the legal status of the most advanced behavioral science contributions to the criminal justice process remain wedded to fundamental concepts which would be easily recognized by the 12th Century jurist Henry de Bracton were he with us today. In order for profile or syndrome evidence to be admissible, the physical, emotional, or mental condition at issue must be one that is generally recognized as meeting the scientific requirements for legal evidence (107).

Expert testimony concerning a trait of an accused may only be used as evidence that the accused possesses such a trait. It must, with or without the benefit of expert opinion on the ultimate issue before the court (a circumstance which varies by jurisdiction), be left to the jury to determine whether and how such a trait may impact upon the facts of the case (108). While the terms "syndrome" and "profile" may appear to give behavioral evidence an aura of scientific respectability, these labels themselves do nothing to enhance the stature of the substantive underlying observations. In fact, if anything, good science and credible observation are more readily accepted without them (109).

The debate on the role of mental illness in clinical practice as opposed to the courts, which extends back to at least the Twelfth century, did not begin to gain focus until society recognized insanity as a legal concept distinct from the medical diagnoses of mental health experts. The current diminished responsibility debate has similarly suffered from a persistent confusion between clinical and legal concepts, despite the Cautionary Statement at the beginning of DSM-III and its successors that the *Manual*'s classifications "may not be wholly relevant to legal judgments." Perhaps we have reached a point where a parallel legal terminology is needed for the mental health concepts which are supporting diminished responsibility defenses with increasing frequency.

Behavioral science will continue to play an expanding role in American justice, but regardless of the terminology used to package its contributions or the point in the process at which it will be introduced, all parties to the disputes which this form of evidence will inevitably engender must be continually alert if we are to assure that this tool contributes to the integrity of the judicial system and not to its abuse.

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