EVIDENCE OF CHARACTER: FROM THE "CRUCIBLE OF THE COMMUNITY" TO THE "COUCH OF THE PSYCHIATRIST"

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Jones was convicted upon two counts of an information charging the commission of lewd and lascivious acts upon the person of his nine year old niece. At the time of the alleged offenses, Carol, the niece, was living with Jones and his wife. She testified to the conduct of Jones upon the two occasions specified in the information, "and it clearly was a violation of the statute." In addition, she testified that Jones indulged in similar acts "lots of days," and that on one occasion, Jones "showed her four books containing pornographic pictures and writing" prior to his lewd and lascivious conduct. "Briefly stated," said the court, "what Jones did, as related by Carol, amounted to sexual relations without penetration."

Jones denied having committed any of the acts or having shown Carol any pornographic books, although he admitted "having had eight or nine pictures of nude women in his bedroom." Jones and his wife testified that their sexual relationship was mutually satisfactory but his mother-in-law "told of complaints by him that his wife did not satisfy him sexually." There was evidence that Jones had a good reputation for morality in his community. Mrs. Jones testified that Carol's reputation for truth and veracity was bad.

On appeal, while conceding the sufficiency of the evidence to support the conviction, Jones claimed error because of the rejection of the following offer of proof:

At this time, rather than bringing the psychiatrist into court and having an adverse ruling on what he would testify about, I would like at this time to make an offer of proof that we will produce Dr. James Solomon, a duly licensed physician and surgeon under the laws of California, specializing in psychiatry who is a graduate of the University of Illinois College of Medicine, who interned at the Cedars of Lebanon Hospital, Boston Psychopathic Hospital, residency in neurology in Massachusetts General Hos-

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pital, assistant in neurology, Harvard University Medical School, resident staff psychiatrist, Compton Sanitarium, and for the last six years has devoted full time practice to the field of psychiatry and neurology, who is a member of the Los Angeles County Medical Association, California Medical Association, American Medical Association, Los Angeles Society of Neurology and Psychiatry, American Psychiatric Association and is a staff physician at the following: Los Angeles County General Hospital, Cedars of Lebanon Hospital, Methodist Hospital, Temple Hospital, Midway Hospital, Mt. Sinai Duarte National Center, Braewood Hospital, Los Angeles Neurological Institute, Westerly Sanitarium, Alhambra Sanitorium, Clear View Sanitarium, Santa Monica Rest Home, Resthaven Sanitarium, Los Angeles Psychiatric Service, who is an independent medical examiner for the State Department of Mental Hygiene and L. A. Psychopathic Court and of the State Industrial Accident Commission.

If produced as a witness, Dr. Solomon will testify that at my request he examined Mr. Rayburn Jones on two occasions, one without the use of drugs and on the second occasion with the aid of a drug known as sodium pentothal; that as a result of those examinations he reached the conclusion that Mr. Jones is not a sexual deviate. . . .¹

The Supreme Court of California (one judge not participating) unanimously sustained this contention.² Evidence of good character is relevant "[i]n the determination of the probabilities of guilt"; "the purpose of the evidence as to the character of the accused is to show his disposition, and to base thereon a probable presumption that he would not be likely to commit, and, therefore, did not commit, the crime with which he is charged"; while "character is proved by evidence of the accused's general reputation in the community for the traits which are in issue," the California statute providing for the control of "sexual psychopaths" states "a legislative determination that such a person is more likely to violate [the criminal statute in question] than one who has no such propensity; to some extent there is a cause and effect relationship"; from "evidence which tends to prove that a person is not a sexual psychopath, an inference reasonably may be drawn that he did not commit the offense denounced" by the statute; "the competency of expert opinion in this field of evidence is established by the statutory procedure for the determination of sexual psychopathy. Accordingly, the evidence here excluded was relevant to the general issue before the jury and should have been admitted." And, because "the only direct evidence is the charges made by Carol and the denials of Jones . . .

1. The offer of proof, as quoted, is from the Reporter's Transcript.

2. *People v. Jones*, 266 P.2d 38 (Cal. 1954).

the exclusion of the psychiatrist's testimony was prejudicially erroneous."³

The holding is plainly a very significant one⁴ and presents a number of interesting and fairly difficult questions.⁵

1. PROOF OF CHARACTER BY OPINION EVIDENCE

Passing for the moment the difficult question of whether the court was justified in accepting "expert" testimony touching defendant's disposition or propensities, we note first a radical departure from orthodox doctrine which limits proof of character to reputation evidence. "The rule is as follows: If evidence of good character is given in behalf of the prisoner, evidence of bad character may be given in reply; but in either case the evidence must be confined to the prisoner's general reputation, and the individual opinion of the witness as to his disposition, founded on his own experience and observation, is inadmissible."⁶ As Mr. Justice Jackson put it in *Michelson v. United States*:⁷ "The wit-

3. *Id.* at 42-3.

4. In the People's "Supplemental Memorandum" in support of the petition for rehearing, it is said (page 3): "We do not believe that this court has come to the conclusion that evidence of character has passed from the crucible of the community to the couch of the psychiatrist." But the petition was denied and the court's conclusion appears to be as characterized in the Memorandum. Accordingly, we have adopted it as the title of our Article.

5. As will be seen, the scope of this Article is limited. We have not undertaken an investigation of current scientific thought and findings in respect to the dependability of psychiatric testimony in the area in question. We leave that to others better qualified. Our endeavor has been to identify the effects of the decision on the orthodox cluster of legal rules regulating the proof of character in criminal cases and to survey briefly the implications of the decision—effects and implications which the court in the *Jones* case may or may not have taken into account. The decision is, of course, of particular importance in California. But it has significance also in all states which have enacted legislation similar to the California Sexual Psychopathic Act. CAL. WELF. & INST. CODE § 5500 *et seq.* (Deering 1952).

Special sex psychopath legislation in other states is discussed in Bowman, *Review of Sex Legislation and Control of Sex Offenders in the United States of America*, 20 FINAL REPORT ON CALIFORNIA SEXUAL DEVIATION RESEARCH 15 (March 1954), and digested in Bowman and Engle, *Synopses of Special Sex Psychopath Laws—United States*, *id.* at 41. See ALA. CODE ANN. tit. 15, § 434 *et seq.* (Supp. 1953); COLO. STAT. ANN. c. 48, § 550(1) *et seq.* (Cum. Supp. 1953); D.C. CODE ANN. § 22-3501 *et seq.* (1951); ILL. REV. STAT. c. 38, § 820 *et seq.* (1953); IND. STAT. ANN. § 9-3401 *et seq.* (Burns Supp. 1953); KAN. GEN. STAT. § 62-1534 *et seq.* (Corrick Supp. 1950); MASS. ANN. LAWS c. 123A, § 1 *et seq.* (1949); MICH. COMP. LAWS § 780.501 *et seq.* (Mason 1948), as amended, MICH. COMP. LAWS § 780.501 *et seq.* (Mason Supp. 1952); MINN. STAT. ANN. § 526.09 *et seq.* (1947); MO. ANN. STAT. § 202.700 *et seq.* (Vernon 1952); NEB. REV. STAT. § 29-2901 *et seq.* (Supp. 1953); N.H. LAWS 1949, c. 314, as amended, N.H. LAWS 1953, c. 114; N.J. STAT. ANN. tit. 2A, § 164-3 *et seq.* (1953); N.Y. CODE CRIM. PROC. § 659 *et seq.*; N.Y. PENAL LAW § 2188 *et seq.*; OHIO GEN. CODE ANN. § 13451.19 *et seq.* (Page Cum. Supp. 1952); ORE. REV. STAT. § 137.112 *et seq.* (1953); PA. STAT. ANN. § 1166 *et seq.* (Purdon Supp. 1953); VA. CODE ANN. § 53-278.2 *et seq.* (Supp. 1952); VT. ACTS 1951, No. 170, § 438 *et seq.*; WASH. REV. CODE, c. 71.06 (1952); WIS. STAT. §§ 340.485, 351.66 (1951); WYO. COMP. STAT. ANN. § 10-3001 *et seq.* (Supp. 1953).

6. *People v. Gordon*, 103 Cal. 568, 573-4, 37 Pac. 534, 535 (1894). See also, 7 WIGMORE, EVIDENCE §§ 1980, 1981, 1983 (3d ed. 1940).

7. 335 U.S. 469 (1948).

ness may not testify about defendant's . . . possession of a particular disposition or of benign mental or moral traits. . . ." ⁸

In justification of the departure from existing doctrine the California court has only this to say:

"These statutory provisions [the Sexual Psychopathic Law] concerning those who commit sex offenses clearly state a legislative determination that such a person is more likely to violate section 288 than one who has no such propensity; to some extent there is a cause and effect relationship. Evidence that a person has no such disposition is analogous to that in regard to character, for it bears upon the probability of the innocence of the accused. From evidence which tends to prove that a person is not a sexual psychopath, an inference reasonably may be drawn that he did not commit the act denounced by section 288. . . . The competency of expert opinion in this field of evidence is established by the statutory procedure for the determination of sexual psychopathy." ⁹

But it is very difficult to see how the provisions of this act, which by its terms, is not operative until after conviction of the criminal offense, can be said to manifest a legislative intention to abrogate a rule of evidence of long standing which is applicable in the trial of the criminal action. The salient features of the Sexual Psychopathic Act are sum-

8. *Id.* at 477. More at length, Justice Jackson discussed the rule as follows:

"When the defendant elects to initiate a character inquiry, another anomalous rule comes into play. Not only is he permitted to call witnesses to testify from hearsay, but indeed such a witness is not allowed to base his testimony on anything but hearsay. What commonly is called 'character evidence' is only such when 'character' is employed as a synonym for 'reputation.' The witness may not testify about defendant's specific acts or courses of conduct or his possession of a particular disposition or of benign mental and moral traits; nor can he testify that his own acquaintance, observation, and knowledge of defendant leads to his own independent opinion that defendant possesses a good general or specific character, inconsistent with commission of acts charged. The witness is however, allowed to summarize what he has heard in the community, although much of it may have been said by persons less qualified to judge than himself. The evidence which the law permits is not as to the personality of defendant but only as to the shadow his daily life has cast in his neighborhood. This has been well described in a different connection as 'the slow growth of months and years, the resultant picture of forgotten incidents, passing events, habitual and daily conduct, presumably honest because disinterested, and safer to be trusted because prone to suspect. . . . It is for that reason that such general repute is permitted to be proven. It sums up a multitude of trivial details. It compacts into the brief phrase of a verdict the teaching of many incidents and the conduct of years. It is the average intelligence drawings its conclusion.' Finch, J., in *Badger v. Badger*, 88 N.Y. 546, 552.

"While courts have recognized logical grounds for criticism of this type of opinion-based-on-hearsay testimony, it is said to be justified by 'overwhelming considerations of practical convenience' in avoiding innumerable collateral issues which, if it were attempted to prove character by direct testimony, would complicate and confuse the trial, distract the minds of jurymen and befog the chief issues in the litigation. *People v. Van Gaasbeck*, 189 N.Y. 408, 419, 82 N.E. 718, 721."

9. *People v. Jones*, 266 P.2d 38, 42 (Cal. 1954).

marized in the margin.¹⁰ It is sufficient for the text merely to note that the Act is applicable only after conviction of a criminal offense; that after conviction the court may, and in some cases must, certify to the Superior Court the question whether the accused is a "sexual psychopath"; and that, in aid of this determination, the latter court is directed to appoint at least two and not more than three psychiatrists, whose function it is "to make a personal examination of the alleged sexual psychopath, directed toward ascertaining whether the person is"

10. A sexual psychopath is defined as one "who is affected, in a form predisposing to the commission of sexual offenses, and in a degree constituting him a menace to the health or safety of others, with any of the following conditions: (a) Mental disease or disorder. (b) Psychopathic personality. (c) Marked departures from normal mentality." CAL. WELF. & INST. CODE § 5500 (Deering 1952). "When a person is convicted of any criminal offense, whether or not a sex offense, the trial judge, . . . if it appears to the satisfaction of the court that there is probable cause for believing such person is a sexual psychopath . . . , may adjourn the proceeding or suspend the sentence . . . and certify the person for hearing and examination by the superior court . . . to determine whether the person is a sexual psychopath. . . ." *Id.* § 5501(a). This procedure is mandatory in the case of one convicted of a sex offense involving a child under 14 years of age, if the offense is a felony or if the defendant has been previously convicted of any sex offense. *Id.* § 5501(b). The defendant is to be informed of the nature of the proceeding and of his rights to make a reply and to produce witnesses. The hearing and examination shall be held in open court. *Id.* § 5503. The court is required to refer the matter to the probation officer, "to investigate and report to the court within a specified time, upon the circumstances surrounding the crime and the prior record and history of the person." The report shall include the criminal record, if any, of the person to be obtained from the State Bureau of Criminal Identification and Investigation. The probation officer's report goes not only to the court but as well to each psychiatrist appointed by the court. *Id.* § 5503.5. Not less than two nor more than three qualified psychiatrists are to be appointed. Their function is "to make a personal examination of the alleged sexual psychopath, directed toward ascertaining whether the person is a sexual psychopath." *Id.* § 5504. Each psychiatrist is required to file with the court a separate written report, together with his conclusions and recommendations. And "at the hearing each psychiatrist shall hear the testimony of all witnesses, and shall testify as to the result of his examination, and to any other pertinent facts within his knowledge." *Id.* § 5505. Any psychiatrist so appointed by the court may be called by either party or by the court and "when so called shall be subject to all legal objections as to competency and bias and as to qualification as an expert." *Id.* § 5506. Either party may call other experts and the judge shall cause to be examined as a witness any other person whom he believes to have knowledge "of the mental condition" of the subject or of his financial condition or that of any person liable for his support. *Id.* § 5509. If, upon the hearing, the person is found to be a sexual psychopath, the court shall return him to the court in which the case originated "for such disposition as that court may deem necessary and proper." *Id.* § 5511.7. If the person is found to be a sexual psychopath, he shall be committed to a county or state hospital for a period of not to exceed 90 days for "observation and diagnosis." Within 90 days, the superintendent of the hospital shall cause the person to be examined and shall forward to the court his opinion as to whether the person is a sexual psychopath, whether he is a menace to the health and safety of others and whether he will benefit by care and treatment in a state hospital. If the superintendent reports that the person is not a sexual psychopath or that he is such but would not benefit by care and treatment in a state hospital, he is to be returned to the court in which the criminal charge was tried to await action thereon. If the superintendent reports that the person is a sexual psychopath and would benefit by treatment, a further hearing shall be arranged, at which the court may commit the person to a state hospital for an indeterminate period. *Id.* § 5512.3. Provision is then made for periodic reports on the person's progress, further hearings based on such reports and further appropriate action by the court. *Id.* § 5514.

such, and each of whom is required to file with the court "a written report, together with his conclusions and recommendations."

It is to be observed that the statute is clear to the effect that at any stage of the rather complex procedure, if it appears that the subject is not a sexual psychopath, he is to be returned to the criminal court for normal action based on the conviction. In other words the post-conviction opinion of the psychiatrists and findings of the court supervising the special statutory procedure that the subject is not a sexual psychopath result in allowing the criminal law to take its normal course. How these provisions evince a legislative design to vary the traditional rules of evidence in the criminal trial so as to allow psychiatric opinion that the accused is possessed of benign propensities is very difficult to see. It seems fair to assume that had the legislature intended such a radical change in traditional doctrine it would have made that intention adequately evident.

While the traditional California rule limiting proof of character of the accused to reputation evidence rests entirely on judicial decision, it is appropriate to observe that the analogous limitation on proof of character to impeach a witness has a statutory basis. Sections 2051 and 2052 of the Code of Civil Procedure (applicable to criminal as well as to civil trials¹¹) specify in detail the permissible methods of impeachment. In the first of these sections it is provided that "[a] witness may be impeached by the party against whom he was called, . . . by evidence that his general reputation for truth, honesty, or integrity is bad, but not by evidence of particular wrongful acts, except that it may be shown by the examination of the witness, or the record of the judgment, that he had been convicted of a felony. . . ." ¹² These provisions as drawn and interpreted,¹³ leave no room for the admission of opinion evidence of character. In view of the parallel development of the rules excluding opinion of traits of character of a witness and those of an accused,¹⁴ and the similarity, if not identity, of applicable policy considerations, it is suggested that the California court in the *Jones* case did not give adequate consideration to the legislative policy imbedded in the impeachment provisions nor to the basic anomaly of a judicial departure from what Wigmore calls one branch¹⁵ of the ortho-

11. CAL. PEN. CODE § 1102 (Deering 1949).

12. CAL. CODE OF CIV. PROC. § 2051 (Deering 1953). Section 2052 provides for impeachment by prior inconsistent statements.

13. The methods prescribed in the code for the impeachment of a witness are exclusive. See *People v. Harlan*, 133 Cal. 16, 20, 65 Pac. 9, 10 (1901); *People v. Holman*, 72 Cal. App. 2d 75, 97, 164 P.2d 297, 309 (1945).

14. See 7 WIGMORE, EVIDENCE §§ 1983, 1985 (3d ed. 1940).

15. *Id.* § 1983.

dox American rule when it is quite clear that the impeachment statutes forbid a similar relaxation of the other branch.

In the second *Hiss* trial,¹⁶ Judge Goddard admitted psychiatric testimony to the effect that the chief prosecution witness "was a psychopath with a tendency toward making false accusations," a holding which has provoked considerable debate.¹⁷ But such a holding would appear to be precluded in California under the statutory provisions referred to.

So much for technical difficulties. What about the merits and implications of the *Jones* decision? Wigmore, of course, is critical of the latter-day rule which restricts proof of character to reputation evidence. "The Anglo-American rules of evidence have occasionally taken some curious twistings in the course of their development," he says, "but they have never done anything so curious in the way of shutting out evidential light as when they decided to exclude the person who knows as much as humanly can be known about the character of another, and have still admitted the secondhand, irresponsible product of multiplied guesses and gossip which we term reputation."¹⁸ But he makes it very clear that by the testimony of the "person who knows as much as humanly can be known about the character of another" he means "the warm affectionate testimony" of those few whose long intimacy and trust has made them ready to demonstrate their faith to the jury. . . . Put yourself in the place of a jurymen, he suggests, and speculate whether you would be helped more "by the witnesses whose personal intimacy gives to their belief a first and highest value, or by those who merely repeat a form of words in which the term 'reputation' occurs. Look at it from the standpoint of the prosecution . . . and then decide whether the witness [excluded in *Regina v. Rowton*],¹⁹ was not, if believed, worth more than forty opposing witnesses testifying to that intangible, untestable creation called 'reputation'." One can agree with Wigmore that "a perusal of the records of State trials will show how natural, straightforward, and useful was this method of asking after belief *founded on personal experience for intimacy*,"²⁰ and

16. *United States v. Hiss*, 88 F. Supp. 559 (S.D.N.Y. 1950); see 1950 ANNUAL SURVEY OF AMERICAN LAW 804 (1951).

17. See 1950 ANNUAL SURVEY OF AMERICAN LAW 804 (1951); Comment, 30 NEB. L. REV. 513 (1951).

18. 7 WIGMORE, EVIDENCE § 1986, at 167 (3d ed. 1940).

19. 10 COX CR. CAS. 25 (1865). This was a prosecution for indecent assault upon a boy; the witness for the prosecution was asked, "What is the defendant's general character for decency and morality of conduct?", and answered: "I know nothing of the neighborhood's opinion, because I was only a boy at school when I knew him; but my own opinion and the opinion of my brothers who were also pupils of his is that his character is that of a man capable of the grossest indecency and the most flagrant immorality." *Id.* at 28.

20. 7 WIGMORE, EVIDENCE § 1986, at 166-7 (3d ed. 1940) (*italics added*).

yet be skeptical of extending the relaxation so as to permit the opinion of a psychiatrist based on nothing more than an interview or two, or as was the case in the *Hiss* trial, on observation of courtroom demeanor and assumptions in a hypothetical question, without any clinical examination whatever.

It is to be noted that both the Model Code of Evidence²¹ and the Uniform Rules of Evidence²² would allow not only reputation evidence but as well opinion evidence as to the character of the accused in a criminal action. While the comment of the draftsman in neither case throws any light upon the considerations which prompted this proposed change in existing law, it seems a justifiable conclusion that it is traceable to Wigmore's quite persuasive strictures on the existing rule and might well be interpreted accordingly. It is true that the Model Code provision specifically states that "a witness may state his opinion under Rules 401-409,"²³ this reference being to the rules regulating the reception of opinion testimony, both lay and expert. But this falls short, we believe, of a persuasive indication of an intention to open the door to psychiatric testimony in the *Jones* situation. Rather, the language employed appears calculated to make it clear that the opinion rule as such should not operate to exclude the belief of a character witness whose conclusions as to the accused's character are based on personal acquaintance. As Wigmore observes,²⁴ the opinion rule should yield here, since the witness, by the nature of the case, will manifestly be unable to reproduce, in words, the minutiae of the accused's conduct ("every incident and act indicative of character") upon which his opinion depends.

2. IS THIS A PROPER SUBJECT OF EXPERT TESTIMONY?

So far as his qualifications as an expert psychiatrist are concerned, there can seem to have been no question in the *Jones* case as to the witness' competency. But there remains the more basic question: Is *psychiatry* competent to measure propensity on the basis of two consultations or interviews? The offer of proof does not touch the problem. An independent examination of the record discloses no showing of scientific recognition of the ability of psychiatry to perform this feat. Nor was the trial court's attention directed to any scientific literature on the subject. Likewise, the opinion of the Supreme Court contains no indication that that tribunal made any investigation of the

21. MODEL CODE OF EVIDENCE, Rule 306 (1942).

22. UNIFORM RULES OF EVIDENCE, Rules 46, 47 (1953).

23. MODEL CODE OF EVIDENCE, Rule 305(2) (1942).

24. 7 WIGMORE, EVIDENCE § 1986, at 166 (3d ed. 1940).

matter. It is obviously beyond the competence of the writers of this Article to appraise the ability of the psychiatrist to fathom the mind and heart of an accused on the basis of two consultations, and we doubt that judges are in any better position to do so. Thus, it would appear that there should have been required some preliminary showing of scientific acceptance of the dependability of the doctor's conclusions in the circumstances of this case.²⁵ All that we have here is an offer to show that a qualified psychiatrist is of the opinion that Jones "is not a sexual deviate." If, without more, this is to be received it seems to mean that the opinion of any "expert" is to be received on any subject related to his profession, whether or not his colleagues, taking account of the learning and findings of the discipline, deem the opinion so far error-proof as to entitle it to be accepted as the rational basis for important action. It is, of course, this absence of adequate scientific recognition and consequent doubt of dependability which explain the uniform current of judicial decision rejecting results of lie detector tests,²⁶ "truth-serum" tests²⁷ and the early decisions excluding results of drunkometer tests.²⁸

The only answer to the foregoing provided by the opinion in the *Jones* case is this single sentence: "The competency of expert opinion in this field of evidence is established by the statutory procedure for the determination of sexual psychopathy."²⁹ But, as pointed out, all this act "establishes" is the propriety of taking psychiatric opinion in a unique post-conviction procedure, which the court has characterized

25. "Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while the courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs." *Frye v. United States*, 293 Fed. 1013, 1014 (D.C. Cir. 1923).

26. See 1950 ANNUAL SURVEY OF AMERICAN LAW 814 (1951); 1952 ANNUAL SURVEY OF AMERICAN LAW 727 (1952).

27. 1952 ANNUAL SURVEY OF AMERICAN LAW 727 (1952). In rejecting evidence of defendant's denials of guilt while under the influence of "truth-telling serum," the Missouri Supreme Court said in 1926: "Testimony of this character—barring the sufficient fact that it cannot be otherwise classified than as a self-serving declaration—is, in the present state of human knowledge, unworthy of serious consideration. We are not told from what well this serum is drawn or in what alembic its alleged truth-compelling powers are distilled. Its origin is as nebulous as its effect is uncertain. A belief in its potency, if it has any existence, is confined to the modern Cagliostro, who still, as Balsamo did of old, cozen the credulous for a quid pro quo, by inducing them to believe in the magic powers of philters, potions and cures by faith. The trial court therefore, whether it assigned a reason for its action or not, ruled correctly in excluding this clap-trap from the consideration of the jury." *State v. Hudson*, 289 S.W. 920, 921 (Mo. 1926).

28. See 1950 ANNUAL SURVEY OF AMERICAN LAW 816 (1951); 1951 ANNUAL SURVEY OF AMERICAN LAW 853 (1952); 1952 ANNUAL SURVEY OF AMERICAN LAW 727 (1952).

29. *People v. Jones*, 266 P.2d 38, 42 (Cal. 1954).

as being "civil in nature rather than penal."³⁰ It is taking a giant step to conclude from this that the legislature has "established" the dependability of psychiatric opinion of propensity on the issue, in the criminal case, of guilt of the specific offense. It is to be noted also that the Sexual Psychopath Act requires that there be furnished to each psychiatrist the probation officer's report which is to include "the circumstances surrounding the crime and the prior record and history" of the defendant, as well as his criminal record.³¹ Also, he is required to listen to "the testimony of all witnesses" at the psychopathic hearing.³² So that, in any case, the provisions of the act miss by a considerable margin a legislative determination that psychiatric opinion based on examination alone is acceptable. Finally, it is to be observed that the offer in the *Jones* case was the testimony of the psychiatrist that Jones was not a "sexual deviate." The statute upon which the court relies has to do with "sexual psychopaths," defined in the act with some precision.³³ Whether a "sexual deviate," as the proposed witness would have used the expression and as the jury would have understood it, is included in the statutory definition of "sexual psychopath" is not determinable from the opinion or the record in the case.

The full implications of the court's decision are apparent from its explicit disapproval of *People v. Sellers*,³⁴ a 1951 decision of the District Court of Appeal. Charged with sexual perversion, an act with another male, defendant offered and there was received evidence that "his reputation in the community for morality, chastity, and nonhomosexuality was good."³⁵ He also offered, but the trial court rejected, the opinion of a physician specializing in neurology and psychiatry that defendant was not a homosexual. The conviction was affirmed by the District Court of Appeal. In disapproving this holding, the Supreme Court in the *Jones* opinion says: "The reasoning of that case overlooks the accepted fact that homosexual acts of the nature there considered constitute abnormal conduct indulged in by persons with a propensity for it; normal individuals ordinarily do not resort to such acts, hence a showing of sexual normality in that respect has relevancy to the nonperformance of homosexual acts."³⁶ This is very persuasive of the relevancy of character evidence; but it offers nothing on the question

30. See *People v. McCracken*, 39 Cal. 2d 336, 346, 246 P.2d 913, 918 (1952); cf. *In re Mundy*, 97 N.H. 239, 240, 85 A.2d 371, 372 (1952).

31. CAL. WELF. & INST. CODE § 5503.5 (Deering 1952).

32. *Id.* § 5505.

33. *Id.* § 5501.

34. 103 Cal. App. 2d 830, 230 P.2d 398 (1951).

35. *Id.* at 831, 230 P.2d at 399.

36. *People v. Jones*, 266 P.2d 38, 43 (Cal. 1954).

of whether proof of character should be limited to reputation evidence and, more important, it does not reach the matter of the necessity of some showing of scientific recognition of the dependability of psychiatric opinion as to whether one is or is not a "homosexual."

While the decision in the *Jones* case appears bottomed entirely on what the court conceives to be a legislative recognition of the admissibility of this type of psychiatric testimony, and thus it is perhaps not justifiable to project the applicability of the rule of the case to prosecutions for other than sexual offenses, still, on principle, it seems difficult to see why, on the same general reasoning, psychiatric testimony as to lack of propensity ought not be equally admissible in any type of prosecution. What, for example, does the *Jones* decision presage for a future situation like that in *People v. Villegas*?³⁷ Villegas, with another, was charged with robbery. The defense was that Villegas committed the acts upon which the charge was based under coercion of his co-defendant. He called a "psychologist" and offered to prove by her that she had known Villegas for 14 years, and that by reason of her study of psychology "she was in a position to testify that [defendant's] will power was weak, that his physical condition was bad, and that he therefore was without sufficient force to 'resist the impulse of this other boy to take him out on these robberies'." ³⁸ In affirming the action of the trial court rejecting this offer, the District Court of Appeal said that the offered testimony was incompetent and immaterial. "[S]he was entitled only to testify, as she was permitted under the court's ruling to do, concerning the general reputation of the [defendant] in the community in which he lived for the traits involved in the offenses charged." ³⁹

And if expert opinion is to be received that defendant is not a "sexual deviate" or a "homosexual," on what principle may there be excluded psychiatric opinion that he is not a "thief," a "robber" or a "murderer"?

3. THE PROSECUTION'S EVIDENCE IN REBUTTAL

While, of course, the prosecution is not permitted to open up the character question, it is elementary law that, if defendant offers evidence of good character as making guilt less likely, the prosecution in rebuttal may offer evidence of bad character.⁴⁰ The holding in the *Jones* case thus seems to mean that wherever in a sexual case the de-

37. 29 Cal. App. 2d 658, 85 P.2d 480 (1938).

38. *Id.* at 663, 85 P.2d at 482.

39. *Ibid.*

40. 1 WIGMORE, EVIDENCE § 58 (3d ed. 1940); MODEL CODE OF EVIDENCE, Rule 306 (1942); UNIFORM RULES OF EVIDENCE, Rule 47 (1953).

fendant opens up the question of his character by reputation evidence, psychiatric opinion evidence or otherwise, the prosecution may, in rebuttal, introduce the testimony of qualified psychiatrists that in their opinion defendant is a "sexual psychopath," a "sexual deviate," a "homosexual," a "sexual pervert," etc.⁴¹ In other words, the rule should work both ways. There arises here what seems to be a fairly difficult semantic problem as to the precise meaning of characterizations such as those just suggested. When, for the defendant, the psychiatrist testifies that he is "not a sexual deviate," what does he mean or how will the jury understand him? That he has no desire to "deviate"? Or merely that he has never "deviated"? And, if to meet this, the prosecution, in rebuttal offers psychiatric opinion that defendant is a "sexual deviate," how will the jury take this? That he has actually "deviated"? Or merely that he has a black heart but with no implication that he has ever yielded? The question is important because orthodox doctrine, apparently deemed unobjectionable by authoritative commentators, forbids proof of character, not in issue, by specific instances of good or bad conduct.⁴² Accordingly, unless this rule is also to be thrown overboard, care must be exercised in applying the *Jones* rule to see to it that the experts, on both sides, are testifying merely to traits, not to conduct, and that their interrogation proceeds in such a manner and the jury be so instructed as to insure, as far as possible, against leaving the impression that the accused has or has not actually "deviated."

4. ADMISSIBILITY OF RESULTS OF "TRUTH SERUM" TESTS

It will be recalled that one of the two examinations of Jones by the psychiatrist was accomplished with the aid of a drug known as sodium pentothol. It was one of the contentions of the prosecution on appeal that the testimony of the psychiatrist was inadmissible "because it was inextricably interwoven with the use of the drug." The court said this contention was without merit. "Although the attorney general properly points out that it is questionable whether the results of examinations made while a person is subject to the 'truth drugs' are admissible in evidence . . . that conclusion is correct only if the statements are offered for the purpose of proving the truth of the matter asserted.

41. The Model Code of Evidence (Rule 306) and the Uniform Rules of Evidence (Rule 47) would permit, as does the New York statute (N.Y. CODE CRIM. PROC. § 393-c), the prosecution, in rebuttal, to show bad character not only by reputation and opinion evidence but as well by evidence of defendant's conviction of a crime.

42. 3 WIGMORE, EVIDENCE § 979 (3d ed. 1940). See also MODEL CODE OF EVIDENCE, Rule 306 (1942); UNIFORM RULES OF EVIDENCE, Rule 47 (1953).

. . . Here, the proffered evidence was not the answers of Jones to certain questions, but the interrogator's expert analysis of those answers for the purpose of determining whether Jones was a sexual deviate. . . . Jones' responses were the means to an end, the end being proof of the fact that Jones was not a sexual deviate." ⁴³

Whatever the theory, this appears to be the first decision of any appellate court ⁴⁴ sanctioning the admissibility of the results of "truth serum" tests and is thus of considerable significance for this reason also. It is to be emphasized that neither in the offer of proof under consideration nor otherwise was any showing made of scientific recognition of the dependability of the results of this type of experiment. Nor does the opinion disclose any independent investigation by the court of the pertinent scientific findings. The New Mexico Supreme Court, in a recent decision, ⁴⁵ after what appears to have been a careful study of the pertinent medical literature, held that evidence of the results of a sodium pentothol test was properly excluded, saying: "Until the use of the drug as a means of procuring the truth from people under its influence is accorded general scientific recognition, we are unwilling to enlarge the already immense field where medical experts, apparently equally qualified, express such diametrically opposite views on the same facts and conditions, to the despair of the court reporter and the bewilderment of the fact finder." ⁴⁶

The problem of scientific dependability would seem to be present whether or not the statements of the suspect are directly offered for assertive use by the tribunal. Even where not, and the testimony is in form merely the opinion of the expert, it is evident he is basing his opinion upon an assumption of the truth of what the suspect said while under the influence of the drugs. Indeed, the test would appear to have no efficacy whatever unless the statements of the suspect are ac-

43. *People v. Jones*, 266 P.2d 38, 43 (Cal. 1954). *But cf.* *People v. McNichol*, 100 Cal. App. 2d 554, 224 P.2d 21 (1950). There the defendant, charged with forging checks, testified that he had consumed a pint of whiskey and four cans of beer the morning of the alleged offense and had no recollection of what he had done. One Singer, a clinical psychologist, was permitted to testify, in response to hypothetical questions, that one who had consumed this amount of liquor "would not be conscious of an intent to do an act to obtain money—that his intent would not be a conscious intent." But the trial court refused to admit evidence of statements made by defendant while under the influence of sodium pentothol administered by Singer. On appeal defendant contended, *inter alia*, that his statements while under the influence of the drug should have been admitted "to show the facts upon which Mr. Singer based his opinions." But the court held otherwise. "How any statements made by defendant during the imposed hypnotic state would have served to show facts upon which he based his replies to the hypothetical questions, or any facts at all, is not made apparent." *Id.* at 558, 224 P.2d at 24.

44. See 1952 ANNUAL SURVEY OF AMERICAN LAW 728 (1952).

45. *State v. Lindemuth*, 56 N.M. 257, 243 P.2d 325 (1952).

46. *Id.* at 273-4, 243 P.2d at 336.

cepted, at least by the "interpreter," more or less at face value. In other words, the supposed utility of these drugs depends, as Wigmore puts it, "upon the expedient of *suppressing temporarily the normal waking consciousness* and producing a narration which *recites the interior record* of the original perception and recollection." While the use of this expedient would not reveal errors of original perception or of original recollection, it would, continues Wigmore, "eliminate errors due to conscious distortion or involuntary perturbation during the later stage, viz. narration."⁴⁷ The matter of scientific recognition cannot be brushed aside merely because the jury is not to get verbatim and directly what the suspect said while under the influence of the drug.

One more word on this phase of the case. While it is true that in some of the previous decisions which have excluded results of truth-serum tests it appeared that the narration of the suspect was being offered assertively,⁴⁸ it is not clear that such was the case in all of them. Thus, in the New Mexico case⁴⁹ the defendant offered to show that the psychiatrist "questioned him on many points, and as a result of this examination it became very clear that the defendant not only did not kill Lucille Ramirez, but that the confessions he made were false, and that he told a true and accurate story of his connection with the case which was identical in all respects to the story he told on the witness stand." Both the trial and appellate courts held the evidence objectionable, not because it amounted to an attempt by the accused to prove self-serving hearsay, but "on the ground that such tests were not reliable or generally approved and accepted by the members of the medical profession specializing in psychiatry."⁵⁰

In sum, then, the *Jones* case appears to stand for the proposition that the results of a truth-serum test in the form of the opinion of the interrogator, are admissible; and this without any showing of scientific recognition of dependability.

5. A BRIEF WORD IN CONCLUSION

In what is unquestionably one of the most careful and comprehensive judicial discussions of the rules touching proof of character in criminal cases,⁵¹ Mr. Justice Jackson has said that while "much of this law is archaic, paradoxical and full of compromises and compensations by which an irrational advantage to one side is offset by a poorly rea-

47. 3 WIGMORE, EVIDENCE § 998, at 642 (3d ed. 1940).

48. *State v. Hudson*, 289 S.W. 920 (Mo. 1926) (see note 26 *supra*); *People v. McNichol*, 100 Cal. App. 2d 554, 224 P.2d 21 (1950) (see note 42 *supra*); *Orange v. Commonwealth*, 191 Va. 423, 61 S.E.2d 267 (1950) (*semble*).

49. *State v. Lindemuth*, 56 N.M. 257, 243 P.2d 325 (1952) (see text at note 44 *supra*).

50. *Id.* at 271, 243 P.2d at 334.

51. *Michelson v. United States*, 335 U.S. 469, 486 (1948) (see notes 6, 7 *supra*).

soned counter-privilege to the other . . . somehow it has proved a workable even if clumsy system when moderated by discretionary controls in the hands of a wise and strong trial court. To pull one misshapen stone out of the grotesque structure is more likely simply to upset its rational balance between adverse interests than to establish a rational edifice." These observations appear as applicable to the problem in the *Jones* case as to the question which was under consideration in *Michelson*. Enough has been said to make it reasonably clear, we believe, that before any one of the cluster of the traditional rules regulating proof of character in criminal cases is scuttled, however archaic or clumsy that rule may appear in a present-day context, careful attention should be given to the full implications of such a determination and its effect upon kindred doctrine. In a number of particulars, the holding in the *Jones* case may easily turn out to be of a seismic character.

Certainly not the least significant result of this decision is the obvious expansion of the area of conflicting expert testimony. Even in the case of strictly medical testimony, where the issue concerns physical rather than mental or psychological condition or disability—"objective" rather than "subjective" symptoms—experience has demonstrated the commonness of disagreement among the "experts." When the inquiry is centered on an intangible, impalpable, wholly subjective thing like state of mind, personality or "propensity," the likelihood of disagreement is greatly enhanced. Thus there is point to the conclusion of the New Mexico court to the effect that it was "unwilling to enlarge the already immense field where medical experts, apparently equally qualified, express such diametrically opposite views on the same facts and conditions," to the "bewilderment of the fact finder."⁵² Indeed, the California Supreme Court itself, in the recent case of *People v. Cullen*,⁵³ voiced the same apprehension when, in dealing with an offer of proof based on a sodium pentothol test, it observed that such evidence would be "conjectural since the truth thereof would depend entirely on the psychiatrist's opinion which conceivably might conflict with the opinion of another psychiatrist."⁵⁴

52. *State v. Lindemuth*, 56 N.M. 257, 274, 243 P.2d 325, 336 (1952).

53. 37 Cal. 2d 614, 234 P.2d 1 (1951).

54. *Id.* at 626-7, 234 P.2d at 8. In his argument in support of the petition for rehearing in the *Jones* case, the attorney general said: "The performances now put on in the trial of cases involving the issue of sanity do little credit to the legal and medical professions. . . . Now it is proposed to introduce similar procedures into every case involving sex and the credibility of witnesses. The endless hypothetical question and the garrulous answer will be the order of the day." Supplemental Memorandum in Support of Application for Rehearing, p. 3. In its decision affirming the conviction in the *Jones* case, the District Court of Appeal said: "To transfer the determination of the guilt or innocence of those charged with such offenses to the psychiatrists would be a definite menace to law enforcement and the protection of society." *People v. Jones*, 255 P.2d 479, 481 (Cal. 1953).