

CHAPTER 8

Expert Psychological Testimony

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Do you really think that the social scientists have discovered something new? Go home and ask your grandmother from Poland or your uncle from Armenia, who didn't get past third grade. Ask them and you'll have the answer. Grandmother will tell you, uncle will tell you, "Sure, perception is different, memories falter, speech fails, bias and prejudice must be allowed for, and liars exist." (Younger, 1979, p. 52)

In the courtroom, we offer expert testimony not because our views are recently come from Sinai but because in law and in fact, our knowledge . . . exceeds that of laymen by a considerable margin, and will probably aid the trier in search for truth. If our knowledge is not yet perfect, neither is it trivial or useless for these purposes. (Rosenhan, 1983)

Courtroom verdicts have historically been based on case-specific evidence in the form of testimony from witnesses who have firsthand knowledge of relevant facts. Equally influential, however, can be the testimony of an expert witness—someone who by training or education is qualified to give an opinion in the courtroom. Recently courts have stretched their use of evidence to include expert psychological testimony about general aspects of human behavior and performance. The purpose of such testimony is to help judges and jurors more effectively evaluate the psychological factors that may be involved in a particular case. For example, if an eyewitness alleges to have seen the color of a defendant's jacket on a moonless night, it may be useful for an expert witness to describe the general lighting conditions necessary for

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various colors to be observed. With this additional psychological information, jurors are presumably better able to evaluate the credibility of that witness's testimony.

The presence of psychologists in the courtroom has generated considerable controversy among members of the legal profession, as well as among psychologists. While some people urge that this testimony be admitted in court (Loftus & Monahan, 1980; Arnolds, Carroll, & Seng, 1981; Walker, Thyfault, & Browne, 1982; Thar, 1982; Rosenhan, 1983), others argue that it is inappropriate and should be excluded (McCloskey & Egeth, 1983; Younger, 1979). Critics of the use of psychological testimony question its validity, its impact on the jury, its moral implications, and whether psychologists can offer any useful knowledge that jurors do not already have. In this chapter we discuss various types of expert psychological testimony, describe the criteria that have been used to determine their admissibility, and outline a number of arguments that have been used to support and to criticize their use in court.

The applicability of psychology to the law has been appreciated since the turn of the century (e.g., Munsterberg, 1908), but psychological findings did not enjoy a breakthrough in terms of making their way into court until the famous 1954 desegregation case of *Brown v. Board of Education*. In a footnote to that decision, the works of seven contemporary social scientists were cited as suggesting the harmful effects of segregation on black children.

Since then, psychologists have provided expert testimony on a number of different legal issues including, but not limited to, the following:

- the mental state of a defendant, and whether he or she is competent to stand trial or was sane at the time the crime was committed;
- the degree of neurological impairment incurred by a victim in an accident disability case;
- the degree of mental retardation and acceptability of certain psychological treatment or therapies for individuals in various civil matters;
- employment discrimination class actions;
- the effects of bilingualism in children;
- sentencing recommendations;
- community standards on obscenity;
- the effects of prejudicial pretrial information;
- trademark infringement and fraudulent advertising suits;
- the reliability of eyewitness testimony;
- the degree of psychological trauma suffered by a victim of violent crimes; and

- the typical behavioral pattern of abused women and children (Perlin, 1977).

Some of these topics—particularly the ones involving determination of a person's mental state—fall squarely within the expertise of clinical psychologists or psychiatrists. Typically, a clinician or psychiatrist interviews or examines someone and then details in court the opinion that he or she has formed on the basis of that interview. This kind of expert testimony can be distinguished from the testimony of research psychologists who more typically describe the results of certain empirical studies that bear on the issues involved in a particular case. These experts may or may not actually interview parties in the case. The opinions of these psychologists are based on the results of their own and others' research—work that is presumably relevant to the particular case being litigated. Therefore, while clinicians often have opinions about a specific individual and may be asked to state those opinions in court, research psychologists are more likely to describe how people in general, given these circumstances, would behave. The researcher is usually not asked for—and is rarely able to provide—an opinion about psychological factors that had a definite impact on the case. Rather, he or she provides information to jurors so that they can decide for themselves what role these psychological factors might have played.

In this chapter, we focus on the expert testimony of research psychologists rather than clinicians because certain debates, such as the probative value of the testimony, arise whenever a research psychologist is called to the stand and because a substantial body of literature examining clinical testimony is already available (Brodsky, 1977; Brodsky & Robey, 1973; Ziskin, 1975). Specifically, we will discuss the role of the expert witness in eyewitness identification cases, battered woman homicide cases, and rape cases. All of these experts provide testimony based upon experimental data. First we describe what an expert can offer in each of these three areas, and second we discuss the issue of admissibility and the legal community's general reaction to this type of testimony. The issues involved in determining admissibility of expert testimony are surprisingly similar in these three realms; they are so similar, in fact, that a comparison of the controversies and outcomes involved may shed light on ways to resolve future controversies about expert testimony.

PSYCHOLOGICAL TESTIMONY ON EYEWITNESS IDENTIFICATION

In May 1984 a young man named Joe Morton was tried in Reno on several counts of armed robbery. Morton's identity was made known to the police through a secret witness program instituted in Nevada. Morton maintained that he had been framed, that only by coincidence did he bear any resemblance to the robber, and that he was innocent. At trial, the defense moved to introduce the testimony of an expert witness—a psychologist trained in cognitive and social psychology—to discuss factors that could have influenced the eyewitnesses' identifications. Although the expert was not allowed to testify before the jury in this case, Morton was acquitted and subsequently freed. In other cases, experts on the topic of eyewitness identification have been allowed to testify, and the Arizona Supreme Court recently ruled that a lower court erroneously excluded an expert's testimony (*State v. Chapple*, 1983).

Research bearing on eyewitness performance comes both from specific studies utilizing an eyewitness paradigm and from psychological research on more general memory and perceptual processes. These studies have allowed psychologists to reach a number of general conclusions about eyewitness performance, and certain findings are commonly discussed by psychologists who testify in an eyewitness case. Although these findings are generally agreed upon by many researchers in the psychological community (see Yarmey & Jones, 1983), the validity and generalizability of some of these conclusions is not universally accepted (McCloskey & Egeth, 1983). We address this issue in more detail below.

A number of recent studies have documented the misconceptions many people have about eyewitness accuracy (Loftus, 1979; Brigham, 1981; Deffenbacher & Loftus, 1982; Wells, 1984). These studies, as well as research in the field of memory and perception, have led to the involvement of experimental psychologists as expert witnesses in cases that turn on eyewitness testimony. A psychologist is more likely to testify for the defense in criminal cases, but for either side in civil cases, in order to dispel certain myths that may exist in jurors' minds and to educate the judge or jury about the factors that influence eyewitness reliability.

Several factors or issues are commonly mentioned in expert testimony about eyewitness performance. They include the following:

- (1) *The schematic nature of memory.* There is a wealth of literature indicating that people often do not remember specific details but rather

encode a general schema or abstraction about a particular event (Bartlett, 1932; Bransford & Franks, 1971; Cofer, 1973; Flagg, Potts, & Reynolds, 1975). Moreover, these schema are formed according to people's expectations about what they think should have occurred (Allport & Postman, 1958).

- (2) *Forgetting over time.* The classic forgetting curve shows that forgetting over time increases dramatically at first and then gradually levels off (e.g., Ebbinghaus, 1964; Underwood, 1945). While the exact shape of the curve may depend on the type of information being recalled, forgetting curves are invariably monotonic in nature (Loftus, 1982).
- (3) *Cross-racial identification.* A number of experiments have suggested that people are generally more accurate at identifying people who are of the same race as themselves than people of a different race (Malpass & Kravitz, 1969; Lindsay & Wells, 1983).
- (4) *The impact of anxiety.* Deffenbacher (1983) reviewed 21 studies and concluded that people are most likely to remember an event when they are moderately anxious. Very high and very low anxiety levels reduce the likelihood that a person will accurately recall an event.
- (5) *The impact of misleading information.* It is commonly observed that memories for events can be changed as a result of misleading questions (Loftus & Palmer, 1974; Loftus, Miller, & Burns, 1978). For example, subjects will recall and even describe in detail a nonexistent yield sign after hearing the question "How fast was the red Datsun going while it was stopped at the yield sign?" (Schooler, Gerhard, & Loftus, 1984).
- (6) *The relationship between confidence and accuracy.* Although some studies have revealed a small relationship between confidence and accuracy, many others have observed little or no relationship between how accurate someone is and how confident they are in their memory (Deffenbacher, 1980).
- (7) *Biased identification techniques.* A number of different types of line up and identification techniques have been shown to bias witnesses and increase the likelihood that an innocent person will be mistakenly identified (Loftus, 1979; Malpass & Devine, 1983).
- (8) *Weapon focus.* A number of studies in perception indicate that people fixate longer on novel objects than on familiar objects. Additionally, when people see a weapon, they spend a disproportionate amount of time looking at it and consequently are less able to recall other aspects of the event (Loftus, Loftus, & Messo, 1984).
- (9) *Individual differences in eyewitness ability.* Various studies have indicated that, contrary to popular belief, average eyewitnesses are no worse than the police at recognizing criminal suspects (Clifford, 1966). Individual differences due to the age of a witness are often observed (Yarmey & Kent, 1980; Loftus & Davies, 1984).
- (10) *Overestimation of eyewitness ability.* A number of jury simulations have suggested that jurors tend to overestimate the reliability of eyewitnesses (Wells, Lindsay, & Ferguson, 1979; Wells, Lindsay, & Tounisnant, 1980). Some studies have also shown that overestimation

can occur even when the eyewitness has been discredited—that is, even after hearing that “the victim had 20/400 eyesight,” subject jurors still believe the witness (Cavoukian, 1980; Loftus, 1974; Saunders, Vidmar, & Hewitt, 1983).

These examples represent a sampling of the issues that a psychologist could discuss when testifying about eyewitness performance. (For a more thorough description, including an example of an actual trial transcript, see Loftus, 1979.) Generally, an expert witness will not mention all of the above factors, but only those that are relevant to the case at hand. For example, if the case involves a frightened clerk who was robbed at gun point by a janitor, the expert is likely to discuss weapon focus and the effects of anxiety on memory. He or she is not likely to discuss the memory abilities of a police officer, however. Additionally, the expert does not assert an opinion about whether a particular witness is accurate. Instead, the expert provides generalizations about eyewitness performance, leaving it to the jury to decide whether these factors have affected the witness's recollection.

PSYCHOLOGICAL TESTIMONY ON THE BATTERED WOMAN SYNDROME

Beverly Ibn-Tamas shot and killed her husband shortly after an altercation during which he threatened her with a pistol. Mrs. Ibn-Tamas testified at trial that her husband had beaten her many times over the course of their 3½-year marriage and that she was afraid for her life when she shot him. At trial, the defense offered the testimony of a psychologist who had conducted research on the topic of battered women to inform the jury about the characteristic mentality and behavior of these women. Although the trial judge refused to admit the expert testimony and Ibn-Tamas was convicted, the conviction was overturned on appeal, in part because the higher court determined that the expert testimony should have been admitted (*Ibn-Tamas v. United States*, 1979). The admissibility of this type of evidence is controversial; some courts freely admit it, others patently exclude it (Cross, 1982).

The term *battered woman syndrome* is used to describe a pattern of severe physical and psychological abuse inflicted upon a woman by her mate. Psychologists have conducted long-term studies of battered women and have developed theories to account for their predictable pattern of behavior (Walker, 1979).

A research psychologist is occasionally called upon to testify as an expert witness in battered women homicide trials. One common

defense in these cases is the claim of self-defense—that the battered woman had to defend herself against abuse by her husband or partner. A requirement of this self-defense claim is that the woman must have experienced a reasonable fear of imminent danger. What happens, then, when battered women kill their husbands when the men are asleep, unarmed, or inattentive, as is often the case? Can they no longer use the self-defense argument? Because the traditional self-defense claim may be an inadequate defense for the battered woman defendant, many of the defendants have attempted to introduce expert testimony relating to the reasonableness of their belief of imminent harm. A psychologist would testify about the cyclical nature of most battering relationships using information gained from several relevant empirical studies. The expert might attempt to show how perceptions become distorted as a result of continuous physical abuse and how a woman could indeed fear for her safety even when confrontation is not imminent. The hope is to educate jurors and judges so that some prevalent myths about battered women are dispelled and so the battered woman defendant's claim of self-defense can be fairly evaluated.

Several studies of battered women have been conducted in recent years (Gelles, 1980; Goodstein & Page, 1981; Langley & Levy, 1977; Walker, 1979), and certain conclusions about the battering relationship and the woman involved have resulted. Some issues that an expert witness might discuss are presented below.

The cyclical theory of battering. Walker (1979) was the first to describe the three-phase cycle typical of many battering relationships. The first phase is characterized by minor abuse and tension buildup. The woman often attempts to calm her attacker to keep the beatings from worsening, but these attempts are usually unsuccessful and the incidents increase in number and severity. The second phase of the cycle—the acute battering stage—is characterized by severe and often brutal beatings. If one of the parties in a battering relationship is killed because of the beatings, it will invariably happen during this period. The third phase of the cycle is characterized by calm and loving behavior on the part of the batterer as well as his pleas for forgiveness and promises never to beat the woman again. The woman's hopes that her mate's behavior will change are reaffirmed, and women who have decided to leave often change their minds at this point.

Learned helplessness. Although battered women may, in theory, have some control over their situations, in reality they seem to become

passive and helpless. They have learned through experience that the battering cycle is a process beyond their control and that nothing they do will change their situation. The battered woman lives in what some psychologists have termed a state of learned helplessness (Seligman, 1975).

Minimized consequences of violence. One result of this state of learned helplessness is a change in the woman's perception of the consequences of violence. The constant fear with which these women live often numbs them to the consequences of their actions. In fact, some women do not realize they have killed their husbands until so informed by the police.

The concept of the battering cycle and the resultant psychological effect of learned helplessness can explain how a battered woman perceives her situation. A psychologist testifying about the battered woman syndrome typically explains these theories to the judge or jury, trying to educate the decision makers so they can better evaluate the claim of self-defense.

PSYCHOLOGICAL TESTIMONY ON THE RAPE TRAUMA SYNDROME

The issue of rape trauma syndrome arose in the case of *State v. Saldana* (1982). A Minnesota woman alleged that she was raped by Saldana, but delayed a day in reporting the rape. At trial, the prosecution offered testimony from a psychologist who had counseled the rape victim for a 10-day period, beginning 10 days after her alleged rape. The expert testimony was offered in rebuttal of the defendant's claim that intercourse had been consensual.

The expert described the victim's reactions and testified that in her opinion, a criminal offense had occurred and the victim was telling the truth. Reasoning that an expert has no special ability to discern the truth, the Minnesota Supreme Court held that admission of this testimony was erroneous and overturned the defendant's conviction. Since then, several courts have allowed expert witnesses to testify about rape trauma syndrome; other courts have excluded this testimony (Ross, 1983).

A sizable literature suggests that rape produces a characteristic pattern of psychological, behavioral, and somatic reactions on the part of a victim and that these reactions are similar to the reactions of victims of other violent crimes (Burgess & Holmstrom, 1974; Hilberman, 1976; Symonds, 1976; Burgess, 1984). One difference is that the reactions are

often more pronounced in rape victims than in others because the act of rape involves a personal violation described by one psychologist as "the ultimate violation of the self" (Hilberman, 1976, p. 436). This pattern of behavioral, psychological, and physical reactions has been termed *rape trauma syndrome*.

While psychologists, psychiatrists, and some lawyers and judges have come to view rape as an act of violence, others perceive it as a sexual act. Consequently, the legal response to a woman's allegation that she was raped has historically been to require corroborating evidence. The reasoning goes that if a woman was not secretly desirous of a sexual relationship, she would fight to the death in resisting such an attack. It is believed that if her accusation were true, corroborating evidence would be readily available.

What happens when a victim alleges that she has been raped but there is no evidence of her resistance, and when, as is often the case, there has been some association before the rape between the victim and the defendant? Presented with such a case, jurors are rarely impressed by emotional trauma. Instead they often apply an assumption-of-risk philosophy in judging the prerape conduct of the victim, and tend to acquit the defendant (Kalven & Zeisel, 1966):

The jury, as we come to see it, does not limit itself to [the issue of consent]; it goes on to weigh the women's conduct in the prior history of the affair. It closely, and often harshly, scrutinizes the female complainant and is moved to be lenient with the defendant whenever there are suggestions of contributory behavior on her part. (p. 249)

In recent years, expert psychological testimony has been used by prosecutors to educate jurors in rape cases, to dispel certain myths they may have about the sexual nature of a rape, and to describe the psychic terror that may have caused a victim to submit in order to survive. Psychologists who testify in court typically discuss the psychological impact of rape on its victims; in particular, their behavior before and during the assault, and their postrape psychological responses.

Behavior during the assault. Research has shown that the rape victim's response during an assault is similar to that of victims of other violent crimes (Burgess & Holmstrom, 1974; Symonds, 1976). Their primary objective is survival; the sexual nature of the assault is secondary. Consequently, rape victims react to the peril in predictable ways. The characteristic form of resistance is verbal, not physical, and

most rape victims submit to their aggressors in the hopes that they will survive the attack.

Postrape psychological response. Research has also identified predictable patterns of postrape psychological adjustment in rape victims (Sutherland & Scherl, 1970; Burgess & Holmstrom, 1974). In the period immediately after the assault, a number of physical symptoms may be present (including physical trauma, sleep disturbances, muscle tension, and intestinal problems). Psychologically, the pervasive feelings are those of fear and anxiety. In the long-term reorganization phase, the rape victim attempts to regain control of her life but her behavior may still be pervaded by fear. The development of specific phobic reactions is common.

Expert testimony in rape trials could be used either to corroborate the testimony of the victim or to provide indirect education to the jury. A psychologist who testifies that rape victims typically respond to the violent rather than the sexual aspect of an assault could corroborate the victim's contention that a rape occurred although there was no sign of resistance. Similarly, a competent expert who has interviewed the victim can testify to a diagnosis of rape trauma syndrome when certain symptoms are present. In both of these roles, the expert provides the judge or jury with information that can be used to more fairly assess the prosecution's claim of forcible rape.

ADMISSIBILITY OF EXPERT TESTIMONY

Certain issues are central to determining the admissibility of any expert testimony, although different emphases may be put on these questions depending upon the particular kind of testimony offered. Traditionally, four basic requirements govern the admissibility of expert testimony (*United States v. Amaral*, 1973):

- (1) The subject matter must be beyond the common understanding of the average juror or must assist the juror in understanding the evidence;
- (2) the expert must be sufficiently qualified so that his or her opinion or inference will aid the jury;
- (3) the evidence about which the expert testifies must be scientifically reliable and generally accepted in the scientific community; and
- (4) the probative value of the evidence must outweigh its prejudicial effect.¹

Even when these requirements are met, it is still within the trial judge's discretion to allow an expert witness to testify; he or she casts the ultimate vote in the admissibility election.

In the next section, we discuss the debate over the admissibility of these three kinds of expert testimony. More emphasis is placed on testimony about eyewitness behavior than about other kinds of expert advice because a great deal more research and writing has been done in this area and because an important controversy over the validity of this testimony has been generated within the psychological community. We examine the claims of McCloskey and Egeth (1983) that expert psychological testimony on eyewitness behavior should not be offered in court, as well as the counterclaims by other psychologists (Loftus, 1983; Wells, 1983, 1984) that this testimony is helpful. Because the usefulness of other kinds of expert testimony has not been a subject of controversy in the psychological literature, much of our analysis will describe the *legal community's* reaction to the eyewitness expert. However, since the issues in this area are applicable in other realms, we will weave together these different types of testimony and attempt to address the validity of each.

Does expert testimony assist the juror in understanding the evidence? Is the subject matter beyond the ken of the average juror?

Before these questions can be addressed, a more fundamental question must be answered: What do jurors commonly know? It is not immediately apparent whether certain issues are within the ken of the jury, although several recent studies have examined jurors' common understanding of eyewitness behavior (Deffenbacher & Loftus, 1982; Brigham & Bothwell, 1983; Yarmey & Kent, 1980). Deffenbacher and Loftus administered a questionnaire to students and to residents of Washington, D.C., half of whom had previously served on a jury in a criminal trial. Overall, typical performance was above chance level but was not high in absolute terms. Only half of the items were responded to relatively accurately. Deffenbacher and Loftus suggest that "jurors' intuitions might stand further edification regarding the vagaries of eyewitness behavior" (p. 24) and argue that expert testimony might improve the situation.

Brigham and Bothwell (1983) make the same point. In their study, prospective jurors were given descriptions of two previously conducted research studies on eyewitness behavior and were asked to predict the number of correct identifications made by subject-witnesses in those original experiments. Prospective jurors greatly overestimated the accuracy of experimental witnesses. Brigham and Bothwell concluded that the chance of finding 12 jurors who were sufficiently informed about the reliability of eyewitness testimony was remarkably slim.

Taken together, these studies suggest that jurors may hold certain misconceptions about eyewitness behavior. Moreover, they lend

weight to the argument that expert testimony, if admitted, could serve to clarify these misconceptions and to make jurors more aware of the factors that influence the eyewitness and of how these factors operate.

In their recent, influential article, McCloskey and Egeth (1983) take issue with this point of view. One argument they advance is that psychologists' knowledge of eyewitness performance is not beyond the common understanding and experience of the average juror. In particular, they question the assertion that uninformed jurors tend to overestimate the accuracy of eyewitness testimony (Loftus, 1974; Wells et al., 1979; Wells et al., 1980) and make several points about this alleged overestimation.

They argue that although a few studies suggest that jurors may overestimate the accuracy of witnesses, other studies indicate that jurors can be quite skeptical of eyewitness testimony (McKenna, Mellot, & Webb, 1981; Hosch, Beck, & McIntyre, 1980) and some research has shown that jurors will become more skeptical as a result of discrediting information (McCloskey, Egeth, Webb, Washburn, & McKenna, 1983; Weinberg & Baron, 1982). Second, they point out that cases of wrongful conviction do not necessarily demonstrate overestimation on the part of jurors. According to McCloskey and Egeth, mistakes will always occur, and if jurors were any more skeptical they might make more mistakes by allowing a disproportionate number of guilty people to go free. They also argue that studies showing that subject-jurors believe witnesses more often than they should (given the average accuracy of witnesses) have measured the wrong variable. The critical issue should not be belief rates but rather whether or not conviction rates are overly affected by eyewitness testimony—an issue that is often unaddressed. Finally, they suggest that even if jurors do occasionally forget to be skeptical of eyewitnesses, defense attorneys have plenty of opportunity to point out witnesses' deficiencies during cross-examination and in closing arguments.

McCloskey and Egeth's arguments are well articulated, but a number of psychologists have responded with compelling rebuttals. First, although some research has failed to demonstrate that jurors overestimate the accuracy of eyewitness testimony, this does not invalidate those studies in which this tendency has been observed. Instead of discounting these latter studies, researchers should ask, "How do they differ from the others?" and "What are the situations that are most and least likely to promote juror skepticism?" (Loftus, 1983). As a case in point, a recent study conducted by Saunders, Vidmar, and Hewitt (1983) suggests that whether jurors adequately consider

discrediting information may depend on the strength of that information. Apparently, mild discrediting, such as mentioning the witness's poor eyesight, is insufficient to discredit the witness. Thus, jurors' failures to consider adequately the limitations of eyewitnesses appears to be a problem that should not be dismissed.

A second rebuttal suggests that while it is of interest to consider the effects of eyewitness testimony on conviction rates, the fact remains that a number of studies have revealed a dramatic disparity between the belief rates of subject-jurors and the accuracy rates of the witnesses whose testimony they observed. This disparity suggests that overbelief is a problem in at least certain circumstances (Wells, 1983).

Finally, it may be naively optimistic to suggest that lawyers can adequately point out the shortcomings of eyewitness testimony. A lawyer's remarks are invariably perceived as being motivated by the partisan interests of his or her client. Moreover, attorneys do not have the scientific credentials to give their opinion the credibility that follows from expertise. Finally, lawyers may engender negative reactions in the jury if they are overly rigorous in challenging the testimony of witnesses, particularly if the witness is also a victim (Loftus, 1983).

Ultimately, arguments about juror overestimations of eyewitness testimony boil down to a disagreement over how much evidence is necessary to make a psychological generalization. McCloskey and Egeth feel that the evidence is insufficient:

The available evidence fails to show that jurors are overly willing to believe eyewitness testimony. This does not mean that jurors exhibit an appropriate amount of skepticism toward eyewitness testimony. Our point is simply that contrary to the claims of many psychologists and lawyers . . . juror overbelief in eyewitnesses has not been demonstrated. (1983, p. 555)

Clearly, some evidence for juror overbelief does exist, even if it is not sufficient to convince McCloskey and Egeth. As Loftus observes,

Herein lies the major point of disagreement. How long should we continue doing research and how much data must we amass before we feel comfortable with application of that research. On this issue, reasonable people will and surely do disagree. (1983, p. 576)

In sum, eyewitness experts have argued about the extent to which psychological is beyond the common knowledge of jurors and whether jurors are overbelieving of eyewitnesses. Analogous questions can be asked about jurors who might hear other types of expert testimony.

Is expert testimony on the battered woman and rape trauma syndrome beyond the ken of the average layperson? Can expert testimony assist jurors in understanding evidence in these trials? Unfortunately, there are no studies of jurors' common understanding about battered women and rape victims, so it is difficult to say whether their assumptions conform to what psychologists know about these clinical phenomena. It is conceivable that jurors may reason the way the prosecutor in the case of *Ibn-Tamas v. United States* (1979) did. He suggested that the "logical reaction" of a battered woman would be to either call the police or leave her batterer. If jurors had this misconception, they could perhaps be aided by the testimony of an expert indicating that for various psychological reasons or fear of reprisal, battered women generally cannot leave.

The requirement that expert testimony be beyond common knowledge has been at the core of much debate over whether to allow experts to testify on these issues. Courts that have admitted testimony from an expert on the battered woman syndrome have done so in part because it will help jurors understand and evaluate the evidence. For example, the Supreme Court of Georgia in *Smith v. State* (1981) reasoned that

the expert's testimony explaining why a person suffering from battered women's syndrome would not leave her mate, would not inform police or friends, and would fear increased aggression against herself, would be such conclusions that jurors could not ordinarily draw for themselves.

On the other hand, some courts have excluded testimony because of the assumption that juries are capable of understanding and deciding for themselves whether a defendant has proved self-defense and that expert testimony will not help them in that regard.

There is a similar dearth of information about jurors' commonsense understanding of rape trauma, although one recent study shows that jurors have many misconceptions about a rape victim's perceptions and behavior (Borgida & Brekke, 1984). As in battered woman cases, the issue of helpfulness to the jury has been controversial in cases that involved rape trauma syndrome. Some courts have reasoned that this evidence is within jurors' common knowledge (e.g., *State v. Saldana*, 1982) and others have decided that while jurors may have opinions about the common reactions of rape victims, these opinions may be wrong and an expert should therefore be allowed to testify about this matter. This debate would be clarified by further study of what it is that jurors already know about battered women or rape victims. If it is

determined that jurors' commonsense understanding is at odds with research findings, then psychologists should not hesitate to offer testimony and trial judges should seriously consider admitting that testimony in hope of aiding the fact finder.

IS THE EXPERT WITNESS ADEQUATELY QUALIFIED?

There has not been a great deal of controversy over the qualifications of a potential expert witness. Most critics of expert psychological testimony question what the expert might say and not his or her ability to have an informed opinion. One general concern about the selection of expert psychological witnesses has been raised, however. Haward (1981) and Loftus (1983) discuss the potential problems resulting from lawyers' and judges' lack of awareness of the differences in training between one branch of psychology and another. As a result of their naivete, lawyers may ask their "pet" psychologist to testify on areas with which they are generally unfamiliar. In such situations, the psychologist may indeed be unqualified. In other instances, a person with education or experience in one field may be improperly asked to offer an opinion in an area outside of his or her expertise. For example, in *People v. White* (1980), a physician in internal medicine who had had "occasion to treat battered women" (p. 1072) was not allowed to testify on battered woman syndrome. Even though this doctor had treated battered women, he did not have special psychological expertise in the area and therefore could not be qualified as an expert witness. In general, however, because an expert must undergo cross-examination, it is not advantageous for an attorney to try to qualify an ill-prepared person and thus the expert's qualifications are rarely at issue.

DOES EXPERT PSYCHOLOGICAL TESTIMONY CONFORM TO A GENERALLY ACCEPTED SCIENTIFIC THEORY?

The concern here is that expert testimony without a recognized scientific basis may mislead or deceive juries. Without general scientific acceptance, that testimony would merely reflect a personal opinion. For this testimony to be admitted, it must be generally accepted as valid by other researchers in the field. Are these established theoretical bases for different types of psychological testimony, and do these theories merit the inclusion of the expert's advice at trial? Not surprisingly, the answers to these questions depend on whom one asks.

We first review psychologists' assessments of the validity of research on eyewitness behavior. As before, discussions about the validity of research on which other types of expert testimony are based will lag behind as there has been little attention to this question.

McCloskey and Egeth (1983) argue that almost anything an expert might tell a juror about eyewitness performance is either obvious or unwarranted. Specifically, they question many of the commonly cited "facts" regarding eyewitness testimony, they are skeptical of the alleged minimal relationship between confidence and accuracy because studies outside of the eyewitness area indicate a strong relationship between these two variables, and they question conclusions about weapon focus because of the small amount of research on this topic. Also, they question the alleged impact of anxiety on memory because there seems to be no systematic way to compare the anxiety levels induced in different studies and even cite a few studies that they view as evidence against the widely accepted notion that memories fade with time. One could infer from these remarks that there is considerable lack of scientific consensus in the eyewitness area.

There have been two major responses to McCloskey and Egeth's attacks on the validity of eyewitness research. It has been pointed out that many conclusions about eyewitness unreliability are based not only on specific studies but also on an entire history of cognitive, perceptual, and memorial research. This long history of research on, say, memory has prompted one researcher to state, "When an occasional study comes along that fails to show a decline in memory, even with a relatively long retention interval, I am interested, but it would take much more for me to completely revise my view" (Loftus, 1983, p. 569). Similarly, although there may be only a few studies that explicitly demonstrate the problem of weapon focus, there is a substantial body of literature indicating that people generally tend to focus on unusual or highly informative objects (e.g., Antes, 1974; Loftus & Mackworth, 1978).

The consensus among experts in the field is a second response to challenges to the validity of eyewitness testimony. A recent study by Yarmey and Jones (1983) asked 16 psychologists with one or more publications in the area of eyewitness performance various questions regarding eyewitness identification. Their results suggested that generally experts agree on most of the issues that are commonly discussed in court.

This issue of the validity essentially reduces to a question of how sure one needs to be about the state of the scientific literature before he or

she is willing to testify about a particular finding. Even when a psychologist is certain that his or her findings are valid, there is still a personal decision that must be made about whether to testify to these findings. As one psychologist who responded to the Yarmey and Jones's (1983) questionnaire commented, "I would not 'swear to' any of the answers, not even the ones supported by my own data" (p. 38).

In the areas of battered woman and rape trauma syndromes, there has been little consensus about the validity of the available research and about whether that research can form the basis for an expert's opinion. Some courts have argued that the existence of these syndromes is well documented in the scientific literature and therefore that an expert be allowed to testify about them at trial (e.g., *State v. Marks*, 1982). Other courts have decided that because syndrome evidence has not been reliably established or documented by psychologists, the expert should not be permitted to testify (e.g., *State v. Saldana*, 1982). Interestingly, discussions of whether syndrome evidence is a sufficiently developed concept center on trying to decide at what point scientific principles become generally accepted as valid by other researchers in a particular field. Obviously this is a judgment call; it mirrors the controversy that exists in the eyewitness area. Until sufficient data are amassed to convince even the most demanding judge that the research is reliable, some psychologists will be allowed to testify because their opinions seemed based on generally accepted scientific consensus and others will be excluded because that scientific acceptance seems lacking.

DOES THE PROBATIVE VALUE OF EXPERT TESTIMONY OUTWEIGH ITS PREJUDICIAL EFFECTS?

Testimony has probative value if it is important to the determination of guilt or innocence. It has prejudicial effects if it misleads or biases the jury. It is important to keep in mind that this test must balance these competing influences. Simply demonstrating that a particular piece of evidence may have probative value or prejudicial effects is insufficient in and of itself to warrant the acceptance or exclusion of that evidence. Evidence with some probative value may still be excluded if there is sufficient potential for prejudice. These two factors pertain to the admissibility of expert psychological testimony and to the impact that such testimony may have on a jury.

In what ways could expert testimony be probative? When eyewitness testimony plays a major role in a case, there is the danger that an

innocent person could be convicted. Considering that some studies have shown that jurors regard eyewitness testimony with little skepticism, expert testimony could increase the likelihood that jurors will carefully scrutinize the eyewitness account and, as a result, could decrease the likelihood of a wrongful conviction. Alternatively, it could help jurors discriminate between accurate and inaccurate eyewitness accounts. In terms of its prejudicial impact, there is the possibility that research evidence could bias or mislead the jury. It could cause jurors to become overly skeptical.

McCloskey and Egeth (1983) conclude that the potential harm of presenting expert testimony on eyewitness performance outweighs the possible benefits. We break their discussion into two parts: evidence for the probative value of this type of expert testimony, and evidence for its prejudicial effects.

McCloskey and Egeth acknowledge that various studies indicate that jurors' ability to discriminate accurate from inaccurate witnesses is not very good (Lindsay, Wells, & Rumpel, 1981; Wells et al., 1979). They argue, however, that no research yet demonstrates that providing jurors with testimony about eyewitness performance improves their ability to discriminate accurate from inaccurate witnesses. To buttress this point, they refer to Wells et al.'s (1980) failure to find differences between the overall discriminatory ability of subject-jurors who had received expert testimony and those who had not.

There are a number of responses to this critique. First, McCloskey and Egeth base their conclusions on a single study in which the expert testimony provided to some jurors consisted of only general information about eyewitness performance. Had subject-jurors received more explicit information (for example, that there is a minimal relationship between confidence and accuracy), their performance might have been better (Loftus, 1983). In fact, in a recent study reported by Wells (1983), subject-jurors were provided with just such information and showed significant improvement in their discriminatory ability. Thus, there now exists at least some evidence that expert testimony can facilitate juror discrimination.

A second point relates to the empirical observation that expert testimony decreases the likelihood that a subject-juror will believe a witness (Hosch, Beck, & McIntyre, 1980; Loftus, 1980; Wells et al., 1980). Even if expert testimony does not improve overall discrimination, it still may help by changing the nature of the mistakes that jurors make. Considering that eyewitnesses in criminal cases generally assist the prosecution's case, information that decreases the likelihood that

jurors will believe inaccurate witnesses will also decrease the likelihood that innocent people will be convicted—that is, it will minimize a mistake that is generally considered far worse than letting a guilty person go free. Thus, even if expert testimony does not change the total number of mistakes that jurors may make, it can still reduce the worst type of mistake—the conviction of an innocent person.

Although McCloskey and Egeth find little evidence for the probative value of expert testimony about eyewitness performance, they see two ways in which it might have detrimental effects on juries. First, if jurors are already appropriately skeptical without expert testimony, then expert testimony may make them overly skeptical. Second, providing testimony about certain variables may cause jurors to overemphasize their importance and once again decrease their overall effectiveness.

Psychologists responding to these criticisms point to several inconsistencies in McCloskey and Egeth's logic. Wells (1984) points out, for example, that they argue that eyewitness testimony does not have much impact on the outcome of trials (McCloskey and Egeth cite studies by Chen, 1981, and Myers, 1979, in this regard). If this is true, then discrediting such testimony should also have little effect.

There are other inconsistencies in McCloskey and Egeth's reasoning. Throughout their article they suggest that the average juror has a sophisticated understanding of eyewitness performance, is appropriately skeptical of eyewitnesses, and generally has a low opinion of psychologists. If all of this is true, then why should jurors abandon their skepticism and disregard their understanding of eyewitness performance just because they hear expert testimony from a person whose profession they question? McCloskey and Egeth may be trying to have their cake and eat it too.

Similar problems arise when trying to weigh the probative versus prejudicial effects of other kinds of expert psychological testimony. In the area of the battered woman syndrome, possible prejudice could arise from labeling the murder victim a "batterer" or from the overly sympathetic effect that this testimony could engender in the defendant's favor. These possibilities must be weighed against the value of the expert's testimony in helping jurors evaluate the defendant's claim of self-defense. Because no one has studied the impact of this testimony on jurors, it is difficult to define a general balance between the two extremes.

With regard to rape trauma, the problem of prejudice arises if expert testimony is seen as attacking the character of the defendant. This possibility must be weighed against the benefit to jurors of information

that may help them evaluate the issue of consent. Conceivably, recent kinds of testimony—specifically testimony that addresses *victim* behavior rather than *defendant* behavior—could tip the balance toward probativeness and away from prejudice, although this assumption has not been tested empirically.

How will these issues be resolved? Should experts be allowed to testify as long as their testimony has not conclusively proven to be prejudicial? Even if expert testimony is not prejudicial, is it appropriate to introduce if it has only questionable probative value? These questions seem to be decided on a case-by-case basis now. There are, however, certain safeguards that trial judges can take to ensure that prejudice does not outweigh probative value. For example, a cautionary instruction to jurors that expert testimony constitutes only one source of the available evidence might minimize its prejudicial effects.

WHAT IS THE PROPER ROLE OF AN EXPERT WITNESS?

Although the admissibility criteria subsume many of the issues surrounding the use of expert testimony, there are some other subtle points that need to be considered. McCloskey and Egeth argue, for example, that having psychologists testify in court will inevitably produce nasty battles of the experts, with each side reducing the credibility of the other. According to McCloskey and Egeth, this display of conflict would hurt the reputation of the psychological profession by “creating (or sustaining) the impression of psychology as a subjective, unscientific discipline and of the psychologist as a ‘gun for hire’” (1983, p. 559). One response to this criticism is that other scientific disciplines have been able to engage in courtroom disputes without causing undue harm to their respective professions. In addition, Wells (1984) suggests that by refusing to give expert testimony, psychologists may actually reduce the public’s view of their profession by reinforcing the impression that psychologists are unable or unwilling to do research that has an applied value.

Whether expert psychological testimony affects the public’s opinion of psychology is an empirical question that could be addressed by a well-designed survey study. Ultimately, however, the answer to this question will depend upon the manner in which the expert testimony is presented. A number of psychologists, judges, and lawyers, in an effort to avoid the potential “gun for hire” attitude, have suggested that psychologists routinely serve as “impartial” educators of the court

(Kogan, 1977; Pacht, Kuehn, Bassett, & Nash, 1973). According to this position, expert witnesses scrupulously avoid taking sides and instead try to present all the evidence on both sides of the issues. Proponents of this approach believe that by presenting both sides of the debate, battles of the experts will be reduced and jurors will receive a fairer assessment of the psychological knowledge of the issue.

Others have criticized this idea (Diamond, 1973; Perlin, 1977; Schofield, 1956), arguing that the legal system is designed for information to be presented in an adversarial manner. They assert that it would require a superhuman to avoid taking some position. They argue that expert witnesses should present their opinion (i.e., take a side) and perhaps even prepare a position for or against a certain proposition. It is assumed that alternative interpretations of the data will surface during cross-examination.

As a third opinion, Wells et al. (1980) suggest that psychologists should develop a standard form of expert advice that could be routinely delivered to triers of fact. The advantage of this approach is that it would avoid both the conflict and cost associated with hiring expert psychologists.

Having reviewed the debate over the proper role of expert psychological testimony, we wonder whether there exists an impartial and objective assessment of the issue. Both adherents and critics of psychological testimony have rather compelling scientific arguments to bolster their cases, and clamorings on both sides of the issue have been persistent and articulate (recall the comments of Younger and Rosenhan).

Ultimately it seems that personal values may decide how these issues will be handled. Psychologists must decide for themselves how much evidence is necessary before they can make generalizations about human behavior and whether even more evidence is required before such generalizations should be offered in court. Their decisions might be affected by answers to questions such as, How much worse is it to convict an innocent person than it is to let a guilty person go free? or, Should I feel a moral obligation to apply my research, or for that matter, not to apply my research? These questions are ones that science alone can never resolve.

Whenever diverse disciplines interact, each inevitably learns from the other. The relationship between psychology and law is no exception. Psychologists who testify in court—whether they describe eyewitness unreliability, battered women, or rape trauma syndrome—often experience conflict because of the dramatic differences they perceive

between the adversarial nature of the courtroom and the education nature of academia (Camper & Loftus, 1984). Perhaps psychologists may learn from interacting with the law that psychologists are more adversarial than they often care to admit. In considering whether their research is applicable to the law, psychologists have been found to realize that their options are not absolute. Rather, they include personal values that often go without being identified explicitly. Understanding and articulating these underlying values is perhaps the single most important thing that psychologists can do to help resolve the controversy surrounding their expert testimony. Some psychologists will undoubtedly conclude that it is inappropriate for them to testify in court. Others will decide that they have valuable information that should be shared with the legal system. If psychologists follow their consciences and openly admit these predispositions, jurors will recognize that experts, like themselves, have personal opinions. It is the jurors' task to decide whether to buy that expert advice and just how much it's worth.

NOTE

1. The legal principles used to determine admissibility vary with each jurisdiction and with the particular testimony offered; i.e., some states rely on the *Dyas* test in deciding the admissibility of battered women expert testimony (*Dyas v. United States* 1977). This test requires that (1) the subject matter of the testimony is beyond the ken of the average layperson; (2) the expert have sufficient knowledge or experience in the field to make it appear that his or her opinion will aid the trier-of-fact; and (3) the state of the art of the field be such that an opinion can be formed by an expert. Other jurisdictions refer to Rule 702 of the Federal Rules of Evidence. This standard is somewhat more lenient than the *Dyas* test. It requires only that (1) the expert be qualified through skill, knowledge or experience; and (2) the expert be able to help the trier of fact understand the evidence or determine a fact in issue. Even if the testimony falls within the understanding of the average juror, an expert is still allowed to testify if that testimony adds to jurors' understanding of the evidence. In the eyewitness area, courts have generally looked to the requirements set out in *United States v. Amaral* (1973), while in the rape trauma syndrome cases, Rule 702 is the norm. The requirements outlined in this paper closely approximate those described by Rule 702.

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