On the Admissibility of Psychological Testimony in Criminal Justice Proceedings

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For a number of years I have been working to decrease the frequency with which psychologists have been appearing before juries in criminal justice proceedings. My opposition to such appearances is based upon a number of arguments about the nature of empirical research and theory in psychology, several of which have been presented elsewhere (Pachella, 1986). In these brief remarks I will try to rearticulate and amplify the most general of these arguments.

First, I would like to make it clear that the position presented here favors neither defense nor prosecution considerations in general. When I originally began to argue for the exclusion of "expert" psychological testimony in criminal justice proceedings, the cases that were of the most widespread interest, especially to cognitive psychologists, concerned the adequacy of eyewitness testimony (see Loftus, 1979). In these cases, the "expert" would likely be called by the defense for the purpose of calling into question the testimony of a prosecution eyewitness. However, other kinds of non-traditional, psychological "experts" have been appearing recently with increased frequency.[1] In most of these cases, "expert" psychological testimony is more likely to appear for the prosecution. In child abuse cases, for example, psychologists have been called by the prosecution to testify as to whether a child exhibits "child abuse syndrome," or to vouch for a child's credibility regarding sexual abuse, or to enhance a child's credibility by explaining the general capabilities of child witnesses (McCord, 1986). Even though the victims in these child abuse cases are sympathetic figures, consistency warrants that the opposition noted above take the same form as in the eyewitness situation: I believe the testimony does not properly qualify as expert testimony; that it is an invasion of the province of the jury; and that its possible prejudicial effects outweigh its potential probative value. In fact, I can envision a single case in which both defense and prosecution might garner my opposition at the same time by calling such "experts" with regard to different aspects of the case, and not simply to counter each others' witness. Consider a rape case in which the defense presents a psychologist to attack the

credibility of the victim's eyewitness testimony, on the one hand, and the prosecution presents a psychologist to explain the victim's "aberrant" behavior in not immediately reporting the crime under the guise of "rape trauma syndrome," on the other hand. I would be opposed, for the same reasons, to the appearance of either "expert"—to say nothing of the possible "experts" that might appear for each side to counter the other side's experts.

The core of my opposition to the appearance of psychological "experts" in criminal justice proceedings[2] stems from my beliefs about the nature of the knowledge that is accrued by a psychologist during his or her training and research career. I believe that this knowledge is very different from the kind of knowledge that is accrued by other disciplines that offer experts to the legal system. Specifically, while essentially all of the knowledge of some disciplines such as chemistry or pathology falls outside of the realm of common experience, I do not believe that expert psychological knowledge acquired through research or formal education is of a kind that is not accessible to lay people through common experience. To say this slightly differently, I do not believe that most psychological research "discovers" phenomena that are unknown to lay people in general. Most people who have had any educational background in the field, have had the experience, particularly in their early psychology courses, of finding that many of the principles in the textbooks seemed to be a matter of "common sense." I believe that the basis for this experience is that they have, in fact, induced most of this information on the basis of common experience.

If this is true, wouldn't it seem then that I am arguing that much of the work of professional psychologists is simply a waste of time? No, I don't believe so. Psychological research and scholarship is necessary and important on two counts that make a psychologist's knowledge different from, *but not necessarily more extensive than,* a lay person's knowledge: It is *articulate* knowledge and it develops explanatory accounts of phenomena that are available through common experience. I am arguing that a lay person can obtain from common experience much the same knowledge of psychological phenomena that a psychologist has, he or she simply cannot articulate it. Likewise, most psychological research has as its goal not the discovery of new phenomena, but rather the discovery of mechanisms that explain or account for these phenomena. These are useful and important activities. But what must not be lost sight of in context of the legal system is the realization that jurors are neither being asked to produce articulations of psychological principles nor to develop explanatory accounts. They are simply being asked to apply their psychological knowledge to the case before them, and to arrive at a verdict. There is no reason to believe that articulate knowledge, as opposed to knowledge that is present but not articulate, is more useful in this application. In other words, it is not clear that juries consisting of psychologists, for all of their ability to articulate their knowledge, would be

more likely to arrive at truth in deciding verdicts than juries made up of lay persons. In this way, I believe that psychologically (if not strictly legally) the presentation of a psychologist as an "expert" is an invasion of the province of the jury. The jury needs neither the psychologist's articulations nor his or her explanatory accounts.

With regard to the legal arguments about the admissibility of such testimony, the field of psychological knowledge really presents an interesting kind of "Catch-22" situation: There is an overwhelming correlation between the intuitive compellingness of psychological findings and the consensual agreement among the practitioners of the field. The law requires that to qualify as grounds for expert testimony, there must be consensual agreement by the practitioners of the field about the general principle in question. However, in psychology most of the statements of general principle that are widely enough accepted to be considered as grounds for expert testimony do not lie outside the ken of the typical juror. On the other hand, those principles that truly seem counter to general intuition simply do not achieve the necessary consensus among practitioners to qualify as expert knowledge. In either case, the testimony does not qualify for presentation to a jury.

If such expert testimony should be regularly admitted into criminal justice proceedings, the consequences for both psychology and the law will be significant. I can see no alternative development other than a parading to the witness chair of an increasing string of "expert" witnesses. The law should make no mistake about the biases of psychology in this matter. The field of psychology is committed to the scientific model of causal determinism. As time goes by, one can expect a proliferation of "syndromes" to account for an ever-increasing array of behaviors, each calling forth its expert to explain its ramifications to a jury. Consequently, there will be an ever-decreasing realm of facts to be disposed of by the jury. Of course, since few of these "syndromes" will achieve consensual agreement, each side would be able to find its own experts to dispute the findings of the other side. It seems clear to me that no good will come of this "battle of the experts," with the exception of a general improvement in the future employment picture for psychologists.

NOTES

1. See McCord (1985, 1986, 1987) for a discussion of the admissibility of this nontraditional psychological testimony.

2. It should be noted that my opposition is largely limited to testimony in criminal cases as opposed to civil cases. In most civil cases, a more subjective criterion of "professional opinion" is relevant, as compared to the criterion of "reasonable scientific certainty" that obtains in criminal proceedings.

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