Volume 20
Number 2 *Winter 1986*

*pp.*145-185

Winter 1986

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Valparaiso University Law Review

Volume 20 Winter 1986 Number 2

TRIAL BY JURY: REFLECTIONS ON WITNESS CREDIBILITY, EXPERT TESTIMONY, AND RECANTATION

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Six years after a jury convicted him of rape, Gary E. Dotson sought a new trial. The basis for his motion was "new testimony" by the alleged victim that she had perjured herself at Dotson's trial and that, in fact, there had been no rape. In a decision that drew national attention, Judge Richard L. Samuels, of Cook County Circuit Court in Chicago, Illinois, who had been the judge at the trial six years earlier, denied Dotson's motion for a new trial, finding that the "recanting witness" was not telling the truth. Governor Thompson commuted the sentence to time served, after deciding that the victim's need to have Dotson punished had obviously been satisfied.[1]

The Dotson case focused national attention on the problems raised when the chief witness against a criminal defendant later recants his or her testimony. This article addresses some of those concerns, along with the broader issues raised by a system of justice that depends largely on jury evaluation of live witness testimony to find truth. Part I discusses trials and witness credibility, with an emphasis on the use of expert testimony to assist jurors in determining credibility. Part II focuses on recantation, and the determination by courts of the credibility of recanting witnesses.

I. TRIALS AND WITNESS CREDIBILITY

In a trial by jury, the jury is said to be the sole judge of the credibility of witnesses, although the judge makes the determination of the witnesses' basic competence to testify. The system is generally thought to have three methods of assuring that witnesses tell the truth: witnesses are required to testify under oath, or some equivalent

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1. N.Y. Times, May 9, 1985, at A25, col. 1.

solemn affirmation;[2] opposing counsel has an opportunity to cross-examine the witnesses;[3] and the jury is able to observe the witnesses' demeanor on the stand as an aid in determining their credibility.[4]

Often, the credibility of a particular witness is bolstered by corroborative evidence, and in some cases, notably criminal cases involving sexual offenses, such corroborative evidence may be required by law.[5] Occasionally, there will be testimony from a lay witness about the "general reputation for truth and veracity" of a particular witness. Traditionally, however, courts have been reluctant to admit scientific or expert testimony that directly addresses the issue of the credibility of a particular witness or that of a defendant who chooses to testify in his own behalf. There is a noticeable trend expanding the use of expert psychological testimony in the courtroom. This article argues that the trend is a sensible one that will lead to enhanced ability of our fact-finding process to indeed find truth.

A. Traditional Assurances of Credibility: The Oath, Cross-Examination, and Jury Observation of Witness Demeanor

The requirement that a witness testify under oath is often cited as a general safeguard that helps ensure credibility. The oath is said to be important in two respects: as a "ceremonial and religious symbol it may impress upon the witness a feeling of special obligation to speak the truth, and it may impress upon the witness the danger of criminal punishment for perjury, to which the judicial oath or an equivalent solemn affirmation would be a prerequisite condition."[6]

Thus, a witness who will not affirm or swear to tell the truth cannot testify, and a witness who can be shown to lack an understanding of the nature of an oath would be disqualified to testify by the court, despite the fact that most psychologists agree that moral knowledge does not necessarily correspond to moral behavior.[7] While

2. FED. R. EVID. 603 states: "Before testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with a duty to do so . . . .

3. On the importance of cross-examination, *see* C. MCCORMICK, MCCORMICK ON EVIDENCE § 4 (3d ed. 1984); 97 C.J.S. *Witness* §§ 368-376 (1957).

4. On jury observation of witness demeanor as an aid in recognizing dishonest testimony, *see generally* Sahm, *Demeanor Evidence: Elusive and Intangible Imponderables*, 47 A.B.A.J. 380 (1961).

5. *See infra* notes 122-126 and accompanying text.

6. C. MCCORMICK, *supra* note 3, at § 245; People v. Partis, 41 N.Y.2d 36, 390 N.Y.S.2d 848, 359 N.E.2d 858 (1976).

7. Damon, *Moral Development*, in NEW DIRECTIONS FOR CHILD DEVELOPMENT (1978).

the oath requirement may have some slight effect on adults, it has been criticized by many, and the requirement as it applies to children has been viewed with even greater skepticism by some authorities.[8] Nevertheless, a number of states specifically retain the requirement that a child understand the nature of an oath in order to testify.[9]

Arguably, the most important tool for assuring truthful testimony is cross-examination. McCormick summed up the all but unanimous opinion of authorities when he wrote: "For two centuries, common law judges and lawyers have regarded the opportunity of cross-examination as an essential safeguard of the accuracy and completeness of testimony, and they have insisted that the opportunity is a right and not a mere privilege."[10] The right to cross-examination is considered so fundamental to a criminal trial that it is constitutionally protected by the sixth amendment.[11]

Finally, the jury is trusted to make the best possible evaluation of a witness, because the jury has the opportunity to observe the "demeanor" of each witness: the nonverbal, intangible evidence that can be derived from observing the eyes, hands, face, and body movements of a person as he gives his sworn testimony in open court. It is standard wisdom that the jury is capable of making such discrimination, despite some evidence that the average person is not particularly skilled at evaluating the truthfulness of others. One expert on nonverbal behavior argues that his own research, and that of most others, found that, in judging whether someone is lying or truthful, few people would do better than they would if their choices were completely random.[12] That is not to say that some jurors might not be very good at detecting liars, or that most people cannot be trained to recognize nonverbal clues to lying and truthtelling, but only that the average person, including the average juror, is not necessarily very skilled at detecting lies based on the demeanor of a witness.

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8. Melton, *Children's Competency to Testify*, 5 LAW & HUM. BEHAV. 73 (1981).

9. *See, e.g.*, ALA. CODE § 12-21-165(a) (Michie 1977): "Persons who have not the use of reason . . . and *children who do not understand the nature of an oath* are incompetent witnesses" (emphasis added). *See also* GA. CODE ANN. § 38-1607 (1984 Cum. Supp.): "[C]hildren who do not understand the nature of an oath are incompetent to testify as witnesses."

10. *See* C. MCCORMICK, *supra* note 3, at § 19.

11. A full discussion of cross-examination and the confrontation clause of the sixth amendment is outside the scope of this article. For a recent discussion by a well-known expert on the law of evidence, *see* Younger, *Confrontation*, 24 WASHBURN L.J. 1 (1984).

12. P. EKMAN, TELLING LIES 162 (1985).

B. Other Assurances of Credibility: Expert Testimony

One way in which courts have sought to protect the jury's role in determining the credibility of witnesses is by prohibiting experts from testifying before a jury on the credibility of other witnesses. The fear is that the jury will not be able to fulfill its function because expert accrediting or impeaching testimony will serve as an invitation to the jury to abdicate its own responsibility, relying on the questionable premise that the expert is in a better position to make such a judgment.[13] This reluctance has been criticized by some authorities who point to work done by psychologists with simulated juries to demonstrate that juries are as capable of weighing expert testimony as they are of weighing any other kind of evidence.[14] Recently, the courts have begun to admit expert testimony that directly or indirectly speaks to the credibility of other witnesses.

Issues as to the admissibility of such testimony have arisen in a variety of cases. Courtroom advocates have been most successful in loosening the traditional bar to such expert testimony in cases involving the credibility of children and women who are victims of sexual or domestic violence.[15] Efforts to introduce expert testimony about the credibility of other witnesses, such as eye witnesses to crimes, have met with far more limited success, and the use of "scientific machines," such as the polygraph or lie-detector, to test a witness' credibility remains controversial.[16]

1. Expert Testimony about Ordinary Witness Credibility

Given the importance of the jury's evaluation of witness demeanor, it is almost surprising that there are no reported cases in which a party has proffered expert psychological testimony to educate the jury, generally, about how to read a person's demeanor to determine whether or not he is lying. Such evidence would not be totally frivolous, as there are indeed experts who have studied non-verbal behavior for clues to whether or not a person is telling the truth and who believe that ordinarily one's ability to detect a liar can be improved by such knowledge.[17] Empirical studies, for example, have

13. State v. Kim, 645 P.2d 1330, 1334 (Hawaii 1982).

14. Imwinkelried, *The Standard for Admitting Scientific Evidence: A Critique from the Perspective of Juror Psychology*, 28 VILL. L. REV. 554, 566 (1983) (argues that there is little or no objective support for the assertion that jurors attach too much weight to scientific evidence and that the available data points to the contrary).

15. *See infra* notes 75-131 and accompanying text.

16. *See infra* notes 18-24 and accompanying text.

17. *See generally* P. EKMAN, *supra* note 12.

shown that there are certain involuntary muscle movements that indicate when a person has been emotionally aroused, the knowledge of which can aid another—for example, a juror—in detecting some lies.[18]

In one sense, experts in non-verbal behavior have already found a way into some courtrooms, indirectly. For more than half a century, advocates have sought to introduce polygraph evidence to impeach or accredit the testimony of witnesses.[19] The polygraph itself works by recording changes in the subject's autonomic nervous system activity, such as heart rate, blood pressure, skin conductivity, and skin temperature. However, the polygraph examiner is usually a person who has some training in reading other verbal and non-verbal behavior to aid in interpreting the signs of emotional arousal or non-arousal that the machine records.[20] At trial, since the machine cannot testify, it is the expert examiner whose testimony is offered.

The use of polygraph evidence at trial has been, and remains, enormously controversial, both in the literature[21] and in the courts.[22]

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18. *Id.* at 197.

19. The leading case for many years was Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), in which the court ruled that the precursor of the modern polygraph was inadmissible and set forth a standard for admitting scientific evidence.

For a discussion of the *Frye* test and its impact see Gianneli, *The Admissibility of Novel Scientific Evidence: Frye v. United States a Half-Century Later*, 80 COLUM. L. REV. 1 (1980).

20. For a description of how the polygraph works, see P. EKMAN, *supra* note 12, at 197.

21. Eckman suggests that more than 4,000 books and articles on the scientific reliability of the polygraph have been published, although fewer than 400 actually report research, and of those, no more than 30 to 40 meet minimum scientific safeguards. P. ECKMAN, *supra* note 12, at 191.

For a list of citations to articles on the use of the polygraph, see State v. Dean, 103 Wis. 2d 228, 234, 307 N.W.2d 628, 631, n.2 (1981).

In 1984, the Congressional Office of Technology Assessment (OTA) issued a report on the scientific evidence about the accuracy of the polygraph. The report, although cautious in its conclusions, found that there is some evidence that polygraph examinations do better than chance in detecting lies when used in investigating specific criminal incidents. The accuracy varies depending on the particular lie, the liar, the questioning technique adopted by the examiner, the examiner's skill in designing questions to be asked, and how the polygraph charts are scored. It remains to be seen how much impact the OTA report will have on the courts. OFFICE OF TECHNICAL ASSISTANCE, UNITED STATES CONGRESS, SCIENTIFIC VALIDITY OF POLYGRAPH TESTING: A RESEARCH REVIEW AND EVALUATION (1983).

22. The courts have charted several approaches to the admissibility of polygraph evidence at trial. A small minority of states allow polygraph results to be introduced into evidence even over the objections of one of the parties. *See, e.g.*, State v. Dorsey, 88 N.M. 184, 539 P.2d 204 (1975); State v. Olmstead, 261 N.W.2d 880 (N.D. 1978).

The debate over its use rests only partially on the scientific reliability of the instrument, although that is clearly a major problem for many courts.[23] What makes the polygraph unacceptable to most courts, however, is the fact that it is seen as an intrusion into the heart of the jury system for finding truth. The irony of polygraph evidence is that a court may be convinced that it is sufficiently reliable to be admissible, yet exclude it for that very reason because too little would be left to the jury's traditional role as truth-seeker if the test results were admitted.[24] More than any human expert, the polygraph is seen as having a special "aura of infallibility, akin to the ancient oracle of Delphi" that the jurors are thought to find hard to ignore.[25] Thus, to the extent that the polygraph results are accepted as unimpeachable or conclusive by the jurors, despite cautionary instructions to the contrary by the judge, the jury's traditional responsibility to collectively ascertain the guilt or innocence of the defendant is preempted by the

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Several states allow polygraph results only on the written stipulation of the parties, subject to the discretion of the trial judge, cross-examination, and requisite jury instructions. *See, e.g.,* Valdez v. State, 91 Ariz. 274, 371 P.2d 894 (1962); People v. Levelson, 54 Mich. App. 477, 221 N.W.2d 235 (1974); State v. Jackson, 287 N.C. 470, 205 S.E.2d 123 (1975); Washington v. Woo, 84 Wash. 2d 472, 527 P.2d 271 (1974). *But see* State v. Dean, 103 Wis. 2d 228, 307 N.W.2d 628 (1981).

Most states and the federal courts still prohibit the use of polygraph results, reasoning that the scientific reliability of the machine is still open to question and that a stipulation of the parties adds nothing to the reliability of the test. *See, e.g.,* People v. Anderson, 637 P.2d 354 (Colo. 1981); People v. Baynes, 88 Ill. 2d 225, 430 N.E.2d 1070 (1981); Akonom v. State, 40 Md. App. 676, 394 A.2d 1213 (1979); State v. Biddle, 599 S.W.2d 182 (Mo. 1980); State v. Brown, 297 Or. 404, 687 P.2d 751 (1984).

23. *See, e.g.,* United States v. Alexander, 526 F.2d 161 (8th Cir. 1975) for a long decision discussing the scientific acceptability standard for *Frye* as it applies to polygraph evidence. The court concluded that there was insufficient scientific acceptability of the polygraph to warrant its admission into evidence, distinguishing the polygraph from other kinds of scientific evidence dealing with physical phenomena, e.g., finger prints, handwriting, voice prints, ballistics, and neutron-activation analysis. The court also noted that polygraphy remains an art with unusual responsibility placed on the examiner in preparing the test, discussing it with the examinee, and introducing the examinee to the method. *Id.* at 167.

An additional problem with the polygraph is that pathological liars can beat the machine.

24. *Id.* at 168. "The jury institution was created and maintained due to the public reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges . . . [if polygraph evidence were admitted], a single person, the polygraph examiner, will give testimony which will often be the determinative factor as to the guilt of innocence of a defendant in a jury-tried case. This would deprive the defendant of the common sense and collective judgment of his peers, derived after weighing facts and considering the credibility of witnesses, which has been the hallmark of the jury tradition." *Id.*

25. *Id.* at 168.

expert scientific evidence. An additional concern is that there is a potential conflict with constitutional guarantees, since a defendant presumably could not be required to submit to a polygraph without violation of his fifth amendment rights.

Despite its tremendous potential as a tool for aiding juries in determining the credibility of witnesses, the polygraph remains little used in most courtrooms. The same is true of expert psychological testimony about the meaning of a person's non-verbal behavior.

Expert testimony concerning a *particular* witness' demeanor may be admitted where there are unusual circumstances. In two recent cases, Arizona courts have overturned trial judge decisions to exclude such testimony.[26] In both cases, the defendant sought to introduce expert testimony that a witness suffered from a mental deficiency that should be taken into account by the jury in evaluating that witness' testimony. The witness in the first case was the nine-year-old victim of child molestation, sexual abuse, and aggravated assault. At the request of the defendant, the court ordered two psychiatrists to examine the child to aid in determining her competency to testify at trial. The experts reached opposite results. After an *in camera* hearing, the court found the girl competent to testify. Defense counsel sought to introduce the expert who had questioned the child's competency so that the jury could hear that the victim suffered an organically-based learning disability which severely limited her verbal intellect, such that she would not be a reliable witness because she could not understand any but the simplest questions, and had a defective memory.[27] The trial court ruled that competence was for the court and excluded the testimony. On appeal, the Arizona court held that the jury should be informed of all matters which may in the slightest affect a witness' credibility, and reversed.[28]

In the second case, the witness whose credibility was at issue was the defendant in a criminal case, who suffered from mental retardation and organic brain syndrome.[29] The defendant took the stand in his own behalf, and then sought to introduce expert testimony about his I.Q. to explain his demeanor on the stand. Again, the trial court excluded the testimony, and again the appellate court reversed. The high court explained:

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26. State v. Gonzales, 140 Ariz. 349, 687 P.2d 1368 (1984); State v. Roberts, 139 Ariz. 117, 677 P.2d 280 (1983).

27. *Roberts*, 139 Ariz. at 120, 677 P.2d at 284.

28. *Id.* at 121, 677 P.2d at 284.

29. *Gonzales*, 140 Ariz. at 349, 681 P.2d at 1368 (1984).

> A witness who is mildly retarded may appear to the jury to be dishonest even when telling the truth because of underdeveloped social skills. Where apprehensive responses to questions by counsel and failure to look directly at the jurors during the trial result from low intelligence rather than from consciousness of guilt or fabrication of the truth a witness' intelligence is relevant to assessing his credibility.[30]

The Arizona cases both present the kind of unusual circumstances that compel the admission of such testimony: the kinds of impairments suffered by the witnesses were physical in nature, rather than psychological, and the witnesses themselves were central to the case—the defendant in one, and the victim in the other. Moreover, Arizona courts are particularly liberal in admitting psychological testimony.[31]

Generally, courts have been reluctant to admit expert psychological testimony to establish the incompetency of a witness because of his mental state, or to impeach the witness' credibility.[32] Among the most frequently cited cases are two federal cases, *United States v. Hiss*[33] and *United States v. Hearst*,[34] both of which were highly-publicized but failed to open the door to similar expert testimony in other less celebrated cases. In the *Hiss* case, the defense sought to discredit the main government witness, Whittaker Chambers, by the use of expert testimony that Chambers was "mentally deranged" and thus incapable of testifying truthfully.[35] The court could find no federal case law on the issue, and relied on a handful of state cases to allow the testimony because of what it called "unusual circumstances."[36]

When defendants in later cases tried to introduce the same kind of evidence, they were less successful in convincing the courts that sufficiently unusual circumstances existed to warrant admitting expert testimony to impeach a witness. In one such case, the defendant proffered a psychiatrist who was prepared to testify that a prosecution witness was a "sociopath who would lie when it was to his advantage to do so."[37] The trial court refused to admit the testimony,

30. *Id.* at 353, 681 P.2d at 1372-73.

31. Arizona was the first state to report an appellate decision in which the exclusion of "eyewitness expert" testimony was reversed. *See* State v. Chapple, 135 Ariz. 281, 660 P.2d 1208 (1983).

32. *But see* C. MCCORMICK, *supra* note 3, at § 45 (criticizing courts that have limited the use of such testimony).

33. United States v. Hiss, 88 F. Supp. 359 (S.D.N.Y. 1950).

34. United States v. Hearst, 563 F.2d 1331 (9th Cir. 1977).

35. *Hiss*, 88 F. Supp. 359.

36. *Id.* at 360.

37. United States v. Barnard, 490 F.2d 907 (9th Cir. 1973).

and the Ninth Circuit agreed, despite the fact that it was remarkably similar to the kind of evidence that had been heard in the *Hiss* case. The court gave two reasons for excluding the testimony. First, it feared that it might cause the jurors to surrender their own common sense in weighing the testimony, the same fear that echoes throughout the cases that reject the use of polygraph evidence to impeach or accredit a witness. Second, the court seemed to anticipate what would in fact happen in the *Hearst* case: that the admission of such testimony would lead to a battle of the experts, or a trial within a trial on the "collateral matter" of whether or not the witness was telling the truth.[38] Those same concerns have been reiterated in later cases excluding similar expert testimony.[39]

There is little doubt that the underlying concern has much to do with judicial distrust of the science or art of psychology, along with an ambivalent attitude toward the jury. On the one hand, courts articulate a strong belief in the value of the jury system and a desire to protect the traditional role of the jury as fact finder. At the same time, there is often a lack of faith in the jury's ability to discern truth that is reflected in the decision to withhold information from the jury because of the fear that lay jurors will be unable to pierce through its "aura of scientific reliability" to perform their highly valued function.

Where a witness is not competent to testify, or may be hurt by testifying, expert psychological testimony may be offered to establish that the witness is "psychologically unavailable" for trial to provide a basis for admitting otherwise inadmissible hearsay (e.g., prior trial or deposition testimony) in lieu of live testimony.[40] Since that

38. *Id.* at 912.

39. United States v. Jackson, 576 F.2d 46 (5th Cir. 1978); Beesher v. State, 522 S.W.2d 761 (Mo. 1975), *cert. denied*, 423 U.S. 946 (1973). *See also* United States v. Wertis, 505 F.2d 683 (5th Cir. 1974), *cert. denied*, 422 U.S. 1045 (1973), in which the court explained why it would not allow psychiatric opinion as to the witness' tendency to be reliable in distinguishing truth from nontruth and realities from fantasies: "[Such testimony] is beyond the competence of any witness. Peeled of its thin veneer of jargon, it amounts to no more than an inquiry whether the witness is to be believed by the jury or not."

40. *See, e.g.*, State v. Burne, 112 Wis. 2d 131, 332 N.W.2d 757 (1983) (the testimony of a sexual assault and kidnapping victim given at a preliminary hearing was admitted over the objection of the defendant, because the victim had since become a catatonic schizophrenic who could not testify); Warren v. United States, 436 A.2d 831 (D.C. 1981) (allowing statements from an earlier trial to be used in lieu of testimony on retrial of defendant for rape, assault, armed kidnapping, and robbery, where psychiatric experts agreed that the victim would likely suffer severe psychosis, even possibly suicide, if she was forced to testify). *See also* People v. Gomez, 26 Cal. App.

determination is one to be made by the court, not a jury, there does not seem to be any reluctance to hear the testimony. To the contrary, expert testimony would seem to be required to prove the mental status of the witness.

The credibility of a witness does not rest solely on the intended truthfulness of the witness. Equally important is the ability of the witness to accurately perceive the questioned event, and to remember what was perceived. Jurors can disbelieve an eyewitness who thinks he is being candid because they believe the witness could not have perceived the event clearly, or that the witness' memory has been weakened or distorted by time and intervening events.

The United States Supreme Court has long recognized that there are problems with eyewitness identifications: that an eyewitnesses' recollection of an encounter with a stranger under emergency or emotionally stressful conditions can be distorted easily by the circumstances, or by later actions of the police.[41] For example, Justice Brennan noted in *United States v. Wade*,[42] almost two decades ago, that, "[T]he vagaries of eyewitness identification are well known; the annals of criminal law are rife with instances of mistaken identification."[43] In providing for the right to counsel at line-ups, the court in *Wade* recognized the inherent untrustworthiness of an identification of a stranger made by a witness who may have observed the stranger for only a few moments. The danger of misidentification is exaggerated by intentional or unintentional suggestions by the police or prosecutor, particularly when the witness is susceptible to such suggestions because he knows he had only a limited opportunity to observe.

Psychologists have focused a great deal of attention on the problems associated with eyewitness testimony. Research findings about the limitations of human perception and memory are reported in books and highly respected journals.[44] Experts and commentators have concluded from reported data that the average juror is not very good

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3d 225, 228, 103 Cal. Rptr. 80, 82 (1972) (two psychiatrists testified that the witness was very vulnerable to stress, and her present and future mental health might be injured by testifying); People v. Lombardi, 39 A.D.2d 700, 701, 332 N.Y.S.2d 749 (1972), *aff'd*, 33 N.Y.2d 658, 348 N.Y.S.2d 980 (1973), *cert. denied*, 416 U.S. 906 (1974) (rape victim found to be "unavailable" on the basis of psychiatric testimony that her mental health would be seriously jeopardized, and she might make further suicide attempts if forced to testify at trial).

41. Manson v. Brathwaite, 432 U.S. 98 (1977).

42. United States v. Wade, 388 U.S. 218, 228-29 (1967). *See also* Manson v. Brathwaite, 432 U.S. 98 (1977); Neil v. Biggers, 409 U.S. 188 (1972).

43. *Wade*, 388 U.S. at 228.

44. EVALUATING WITNESS EVIDENCE: RECENT PSYCHOLOGICAL RESEARCH AND

at judging the reliability of eyewitness testimony, because he or she may draw "intuitive conclusions" about human perceptions and memory that are not necessarily supported by empirical studies.[45]

Given the historical recognition by the courts of the weaknesses inherent in eyewitness testimony, the increasing volumes of psychological data, and the sense that jurors are not necessarily familiar with the findings of psychologists, it is not surprising that advocates have introduced into the courtrooms experts in eyewitness testimony. Generally, the goal is to educate jurors as to general psychological findings and studies on human perception and/or memory.

Appellate courts have been reluctant to sanction such evidence. Until very recently, they were practically unanimous in upholding trial court decisions excluding such expert testimony for a variety of reasons.[46] The leading case rejecting such testimony is *United States v. Amaral*.[47] The defendant in that case had been charged with bank robbery, and his attorney sought to introduce evidence by a Ph.D. psychologist on the effect of stress on perception and the general unreliability of eyewitness testimony. The Ninth Circuit Court of Appeals applied the *Frye* test[48] for admission of scientific evidence, which requires that novel scientific evidence meet a threshold foundational requirement. The requirement is that the underlying scientific principle or technique be generally accepted in the field to which it belongs. Applying this test, the court found the psychologist's expertise in

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NEW PERSPECTIVES (C. Lloyd-Bostock & I. Clifford eds. 1983); EYEWITNESS TESTIMONY: PSYCHOLOGICAL PERSPECTIVES (C. Wells & E. Loftus eds. 1983); E. LOFTUS, EYEWITNESS TESTIMONY (1979); SOBEL, EYEWITNESS IDENTIFICATION: LEGAL AND PRACTICAL PROBLEMS (2d ed. 1974); YARMEY, THE PSYCHOLOGY OF WITNESS TESTIMONY (1979).

45. Note, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 29 STAN. L. REV. 969 (1977).

46. State v. Chapple, 135 Ariz. 281, 660 P.2d 1208 (1983) (this is the first reported decision where an appellate court found the trial court's refusal to allow such testimony was an abuse of discretion). Since *Chapple*, several influential courts have found that such testimony should not necessarily be excluded. United States v. Downing, 753 F.2d 1224 (3d Cir. 1985); United States v. Smith, 736 F.2d 1103 (6th Cir. 1984) (per curiam); People v. McDonald, 37 Cal. 3d 351, 690 P.2d 709, 208 Cal. Rptr. 236 (1984) (en banc).

However, appellate decisions are misleading since such testimony is almost always offered by the defendant, who would not appeal a decision when the testimony is accepted and the defendant acquitted. One psychologist has testified that she had been allowed to testify at more than thirty-four cases in various states, and knew of another expert who had been permitted to testify in more than twenty trials. State v. Warren, 230 Kan. 385, 395, 635 P.2d 1236, 1243 (1981) (Dr. Loftus' testimony).

47. United States v. Amaral, 488 F.2d 1148 (9th Cir. 1973).

48. Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

eyewitness testimony to be lacking. Moreover, the court reiterated a preference for the traditional guarantor of witness credibility: cross-examination. Expert testimony was unnecessary, the Ninth Circuit decided, because the research findings on the effects of stress on perception could be effectively communicated to the jury by a probing cross-examination of the witness.[49]

Although the psychologists have made enormous contributions to the state of the art in the eleven years since *Amaral* was decided,[50] the vast majority of reported decisions continue to allow trial courts to exclude expert testimony on the subject.[51] At times, appellate courts simply defer to the trial courts, reasoning that the admissibility of expert testimony is within the discretion of the trial court and ought not be overturned absent an abuse of such discretion.[52] More often they rely on one or more of the concerns first articulated in the *Amaral* case: that the scientific basis for such testimony is not sufficiently reliable, despite advances in the field;[53] that the subject matter is within the common knowledge of the jury, making it inappropriate for expert testimony, even where the court recognizes that

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49. *Amaral*, 488 F.2d at 1152.

50. In 1984, two leading researchers estimated that more than 85% of the entire published literature on eyewitness testimony has surfaced since 1978. *See* C. WELLS & E. LOFTUS, EYEWITNESS IDENTIFICATION 3 (1985).

51. Dyas v. United States, 376 A.2d 827, 831-32 (D.C.), *cert. denied*, 434 U.S. 973 (1977); United States v. Fosher, 590 F.2d 381, 382-84 (1st Cir. 1979); United States v. Thevis, 665 F.2d 616, 641 (5th Cir.), *cert. denied*, 103 S. Ct. 57 (1982); United States v. Watson, 587 F.2d 365, 368-69 (7th Cir. 1978), *cert. denied sub nom.*, Davis v. United States, 439 U.S. 1132 (1979); United States v. Brown, 501 F.2d 146, 150-51 (9th Cir. 1974), *rev'd sub nom. on other grounds*, United States v. Nobles, 422 U.S. 225 (1975); United States v. Brown, 540 F.2d 1048, 1053-54 (10th Cir. 1976), *cert. denied*, 429 U.S. 1100 (1977); People v. Lawson, 37 Colo. App. 442, 551 P.2d 206 (1976); Jones v. State, 232 Ga. 762, 208 S.E.2d 850 (1974); State v. Hoisington, 104 Idaho 165, 657 P.2d 17 (1983); People v. Dixon, 87 Ill. App. 2d 814, 410 N.E.2d 342 (1977); State v. Moore, 230 Kan. 495, 497, 639 P.2d 458, 460 (1982); State v. Warren, 230 Kan. 385, 393, 635 P.2d 1236, 1240-44 (1981); State v. Stucke, 419 So. 2d 939, 944-45 (La. 1982) (refusal to allow identification was not an abuse of discretion where the court was concerned about the competency of the tests, the number of variables, and the way the tests were conducted); State v. Fernald, 397 A.2d 194, 197 (Me. 1979); Commonwealth v. Francis, 390 Mass. 89, 453 N.E.2d 1204 (1983); State v. Helterbridle, 301 N.W.2d 545, 547 (Minn. 1980); People v. Brown, 124 Misc. 2d 938, 479 N.Y.S.2d 110 (1984); State v. Porraro, 404 A.2d 465 (R.I. 1979); Welch v. State, 677 S.W.2d 562 (Tex. Ct. App. 1984); State v. Onorato, 142 Vt. 99, 453 A.2d 393 (1982).

52. State v. Galloway, 275 N.W.2d 736 (Iowa 1979); State v. Helterbridle, 302 N.W.2d 545 (Minn. 1980); Hampton v. State, 92 Wis. 2d 450, 285 N.W.2d 868 (1979).

53. United States v. Watson, 587 F.2d 365, 369 (7th Cir. 1978), *cert. denied sub nom.*, Davis v. United States, 439 U.S. 1132 (1979); State v. Stucke, 419 So. 2d 939, 944-45 (La. 1982); Commonwealth v. Francis, 390 Mass. 89, 453 N.E.2d 1204 (1983).

a proffered expert has a high degree of expertise;[54] the fear that always surfaces when experts are proffered, that the trial will take too long, will become bogged down in collateral matters, or will degenerate into an expensive battle of experts.[55] The last concern is not a frivolous one, since eyewitness expertise is almost always offered by defense counsel in criminal cases and criminal defendants are frequently poor. Opening the door to such testimony may well result in opening the public purse.[56] Of course, if an innocent defendant is deprived of a fair trial because the jury did not hear relevant, reliable evidence that would have changed its verdict, the cost to society is far greater than the monetary cost of providing free expert testimony, however expensive it may be.

Some courts that purport to recognize the inherent weaknesses of eyewitness identification continue to find that cross-examination is a more appropriate tool for testing the perception and memory of an eyewitness than are generalizations made by a psychologist, or they believe that cautionary instructions to the jury will provide sufficient safeguards.[57] It is hard to believe that such testimony would not have a greater impact on the jury, especially since research findings contradict some widely held beliefs about what factors make a person perceive, remember, and report an event accurately. Judges, as well as jurors, may share those erroneous beliefs, and may instruct jurors on the basis of such beliefs if there is no expert evidence to contradict them.[58]

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54. *See, e.g.*, State v. Hoisington, 104 Idaho 165, 657 P.2d 17 (1983); State v. Warren, 230 Kan. 385, 393, 635 P.2d 1236, 1241 (1982); Commonwealth v. Francis, 390 Mass. 89, 453 N.E.2d 1204 (1983); State v. Helterbridle, 301 N.W.2d 545, 547 (Minn. 1980); State v. Porraro, 404 A.2d 465, 471 (R.I. 1979); State v. Onorato, 142 Vt. 99, 437 A.2d 393 (1982).

55. *See, e.g.*, Commonwealth v. Francis, 390 Mass. 89, 453 N.E.2d 1204 (1983).

56. A number of indigent defendants have tried to have the state pay for experts in the area of reliable eyewitnesses. In the reported cases thus far, those efforts have failed. *See* State v. Moore, 230 Kan. 495, 639 P.2d 458 (1982); People v. Brown, 124 Misc. 2d 938, 479 N.Y.S.2d 110 (1984); State v. Sellers, 52 N.C. App. 380, 278 S.E.2d 907, 915 (1981).

57. State v. Warren, 230 Kan. 385, 395, 635 P.2d 1236, 1243 (1983). *See also* State v. Helterbridle, 301 N.W.2d 545, 547 (Minn. 1980) (in which the court suggested that additional safeguards include the prosecutor's discretion not to prosecute a case, and the trial court's ability to suppress improper identification testimony).

58. If precautionary instructions are to safeguard the defendant, they must accurately reflect the state of the art. In State v. Warren, 230 Kan. 385, 395, 635 P.2d 1236, 1240 (1981), the Kansas court excluded expert testimony on eyewitnesses because it felt that cross-examination and precautionary instructions would adequately safeguard the defendant. The court suggested that a juror should evaluate credibility based on five factors. *Id.* at 390, 635 P.2d at 1240 (the factors were mentioned by Powell, J., in Neil v. Biggers, 409 U.S. 188 (1972)).

There is some indication that the law is beginning to recognize the value of psychological expertise in this area. Recently, a few appellate decisions have opened the door to expert testimony about eyewitnesses. While few in numbers, the decisions are likely to be important because they come from highly respected and influential courts.[59]

In *People v. McDonald*,[60] the California Supreme Court met the issue head on for the first time. Defense counsel in a murder case sought to introduce expert testimony on the psychological factors affecting accuracy of eyewitness testimony. The expert, a licensed psychologist and professor with twenty years experience, intended to testify about empirical research that he believed undermined a number of widespread lay beliefs about the psychology of eyewitness identification, for example, that the accuracy of a witness' recollection increases with his certainty, that accuracy is also improved by stress, that cross-racial factors are not significant, and that the reliability of an identification is unaffected by the presence of a weapon or violence at the scene.[61] The People objected on the grounds that to admit the testimony would "usurp the jury's function" and the trial court agreed to exclude the evidence, noting that such testimony might have a tendency to cause confusion in the jurors' minds, and that it was not "scientific enough at this point in time."[62]

In a long decision, the appellate court reversed, reiterating that the decision to admit or exclude expert testimony on psychological factors affecting eyewitness identification remains primarily a matter within the trial court's discretion. The court noted, however, that "when an eyewitness identification of the defendant is a key element

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The factors include: (1) the witness' opportunity to view; (2) his degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and confrontation. Presumably, the proper precautionary instructions would direct the jury's attention to those factors. However, such instructions would not necessarily reflect current state of the art, as there is some experimental data indicating there is no relationship between the confidence that a witness has in his or her identification and the actual accuracy of that identification. *See* State v. Chapple, 135 Ariz. 281, 291, 660 P.2d 1208, 1221 (1983) (proffered testimony of Dr. Loftus); *Accord* People v. McDonald, 37 Cal. 3d 351, 364, 690 P.2d 709, 718, 208 Cal. Rptr. 236, 245 (1984) (proffered testimony of Dr. Shomer).

59. United States v. Downing, 753 F.2d 1224 (3d Cir. 1985); United States v. Smith, 736 F.2d 1103 (6th Cir. 1984); People v. McDonald, 37 Cal. 3d 351, 690 P.2d 709, 208 Cal. Rptr. 236 (1984).

60. *McDonald*, 37 Cal. 3d 351, 690 P.2d 709, 208 Cal. Rptr. 236.

61. *Id.* at 326, 690 P.2d at 716, 208 Cal. Rptr. at 243.

62. *Id.* at 363, 690 P.2d at 716-17, 208 Cal. Rptr. at 244.

of the prosecution's case but is not substantially corroborated by evidence giving it independent reliability and the defendant offers qualified expert testimony on specific psychological factors shown by the record that could have affected the accuracy of the identification but are not likely to be fully known or understood by the jury it will *ordinarily be error to exclude the testimony.*"[63]

In reaching its decision, the court noted the volume of empirical studies that had been published on the subject and refuted the justifications usually given to exclude such evidence. First, the court agreed that a party may not impeach a witness by calling another witness to testify to the former witness' capacity. The court suggested, however, that the expert was *not* being called to testify about any particular witness' capacity to perceive, but rather to inform the jury about general psychological factors that may impair the accuracy of a typical eyewitness.[64]

Second, the court made a distinction between the testimony of an expert's opinion and an expert's testimony as to *facts*, and made the dubious characterization of the proposed testimony as testimony "primarily as to matters of fact: the contents of eyewitness identification studies reported in the professional literature—their methodology, their data, and their findings—are facts, verifiable by anyone who can read and understand the studies in question."[65] Anyone who has read reports of empirical studies knows that they are replete with assumptions, presumptions, and inferences, and that the heart of such studies—i.e. the authors' explanations of their findings—are frequently only loosely derived from tested hypotheses.[66] Thus, to characterize such evidence as "facts" rather than opinion is to play loosely with language.

More to the point, the court rejected several arguments against admissibility of such evidence. The court recognized that expert testimony need not be about a subject that is totally "beyond common experience" so long as it is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.[67] The court also disposed of the argument that admitting expert testimony on

63. *Id.* at 377, 690 P.2d at 727, 208 Cal. Rptr. at 254.

64. *Id.* at 366, 690 P.2d at 719, 208 Cal. Rptr. at 246.

65. *Id.* at 366-67, 690 P.2d at 719, 208 Cal. Rptr. at 246.

66. That is not to suggest that such findings are not in fact useful, but merely that the "scientific method" followed by experimental psychologists is subject to the same limitations as that method as when pursued by all scientists. *See* S. GOULD, THE MISMEASURE OF MAN (1981).

67. *McDonald*, 37 Cal. 3d at 367, 690 P.2d at 720, 208 Cal. Rptr. at 247.

eyewitness testimony would "invade the province of the jury." The court agreed with Dean Wigmore that such language is merely "empty rhetoric," since the jurors retain the power and duty to determine the amount of credibility to be given to the witness, taking into account the factual background provided by the expert.[68]

More recently, the Third Circuit became the second federal appeals court to hold that a trial judge erred in excluding expert psychological testimony on the reliability of eyewitness identification, and the first to remand for that reason.[69] The decision may have wide impact, not only on the developing rules regarding eyewitness experts, but, more importantly, on psychological testimony in general. The Third Circuit specifically rejected the *Frye* test and set forth a new balancing test for determining the admissibility of expert testimony. The court began its analysis by interpreting Rule 702 of the Federal Rules of Evidence[70] as mandating a "liberal standard of admissibility" and by suggesting that the rejection of eyewitness expert testimony by other courts was not consistent with the liberal standard of Rule 702. Instead, the court noted, there will be some cases in which the testimony will in fact satisfy the appropriately liberal standard of Rule 702 that testimony be helpful to the jury. District courts are to make a preliminary inquiry to determine the admissibility of "novel scientific evidence," defined by the Third Circuit as "evidence whose scientific fundaments are not suitable candidates for judicial notice,"[71] to determine whether that standard is met in a particular case.

Part one of the three-prong test focuses on the *reliability* of the evidence. This threshold reliability determination is to take the place of the "nose-counting" of the old *Frye* test. It is to be a flexible inquiry, in which the court considers not only the scientific acceptance of the new technique, but such factors as the relationship of the new technique to more established modes of scientific analysis and the existence of specialized literature dealing with it (two factors which help a court determine whether or not the scientific basis of the new tech-

68. *Id.* at 370, 690 P.2d at 722, 208 Cal. Rptr. at 249.

69. United States v. Downing, 753 F.2d 1224 (3rd Cir. 1985). Earlier, the Sixth Circuit had held that expert testimony and the reliability of eyewitness testimony had been improperly excluded, but found that the exclusion was harmless error and did not require reversal on remand. United States v. Smith, 736 F.2d 1103 (6th Cir. 1984).

70. FED. R. EVID. 702 provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise."

71. United States v. Downing, 753 F.2d at 1224, 1230 (3d Cir. 1985).

nique has been exposed to sufficient critical scientific scrutiny), the qualifications and professional stature of the proffered expert witness, the non-judicial uses to which the technique has been put, the frequency with which it leads to erroneous results, and any expert testimony from previous cases in support or opposition to the evidence. These factors are to be examined to make a determination of the "soundness and reliability of the process or technique used in generating the evidence."[72]

The second part of the test involves possible prejudice. The trial court is directed to consider the possibility that admitting the evidence would "overwhelm, confuse or mislead" the jury.[73] Thus, for reasons that the Third Circuit called "policy considerations involved in determining the likelihood that a particular type of evidence will mislead the jury," the trial court is vested with discretion to balance reliability and prejudice.

Finally, the court must consider the relevancy or "fit" of the proffered evidence, "the proffered connection between the scientific research or test result to be presented, and particular, disputed factual issues in the case."[74] In the case of eyewitness experts, the defendant who seeks to admit such testimony must make a detailed showing to the court that establishes the presence of factors (e.g., stress, or racial differences between the witness and defendant) which have been found by researchers to impair the accuracy of eyewitness identification.[75] General testimony about the unreliability of eyewitness identification would thus be inadmissible under the new standard. Having departed from the *Frye* test, and opened the door to more liberal use of psychological testimony, the Third Circuit may well have led the way for other jurisdictions to do the same.

2. Expert Testimony and the Credibility of Children

Traditionally, certain kinds of witnesses, notably children and women who claim to be victims of rape and domestic abuse, have posed special credibility problems for the courts. Increased awareness of and sensitivity to the needs and problems of women and children in general, and those who are victims in particular, has led to the whittling away of some traditional barriers to expert testimony. Recent

72. *Id.*
73. *Id.* at 1231.
74. *Id.* at 1242.
75. *Id.*

psychological and sociological studies leave open the possibility of further inroads into the rules against expert testimony about the credibility of victim-witnesses.

Historically, children have been viewed as less reliable witnesses than adults, and the law has treated child witnesses with great skepticism. While adults have been presumed to be competent witnesses, until recently the general rule was that children below a certain age were presumptively incompetent to testify at trial and their competency had to be established in every case.[76] Some states required corroboration of children's testimony in certain cases, notably those involving charges of sexual assault.[77] Finally, courts have permitted attorney comments on the untrustworthiness of children's testimony[78] and, at times, judges were required to give special precautionary instructions to the jury about the credibility of children.[79]

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76. In a frequently cited case, the Supreme Court held that a trial judge should make a case by case determination of the child's competency to testify, based on the "capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as his duty to tell the former." Wheeler v. United States, 159 U.S. 523, 524-25 (1895).

The requirement that the competency of a child witness be established in each case continues to be the rule in the overwhelming majority of the states, despite the recommendations of most authorities. *See, e.g.,* Collins & Bond, *Youth as a Bar to Testimonial Competence*, 8 ARK. L. REV. 100 (1953); Melton, *Children's Competency to Testify*, 5 LAW & HUM. BEHAV. 73 (1981); Siegal & Hurley, *The Role of the Child's Preference in Custody Proceedings*, 11 FAM. L.Q. 1 (1977); Thomas, *The Problem of the Child Witness*, 10 WYO. L.J. 214 (1956).

Only a few states have followed the lead of the Federal Rules of Evidence, which effectively eliminate all grounds for competency, including age. *See* FED. R. EVID. 601, providing that, "[E]very person is competent to be a witness except as otherwise provided in these rules."

77. Lloyd, *The Corroboration of Sexual Victimization of Children*, in CHILD SEXUAL ABUSE AND THE LAW 103-124 (J. Bulkley ed. 1983). *See also* Gertner, *The Unsworn Evidence of Children and Mutual Corroboration*, 16 OSGOODE HALL L.J. 495 (1978).

78. United States v. Bear Ribs, 722 F.2d 420 (8th Cir. 1983); Fitzgerald v. United States, 443 A.2d 1295 (D.C. App. 1982) (requiring corroborative evidence). *See also* 3A J. WIGMORE, EVIDENCE § 924(a) (1970).

79. *See, e.g.,* 81 AM. JUR. 2D *Witnesses* § 667 (1976): "In determining the credibility of a witness, and the weight accorded his testimony, regard may be had to his age and mental or physical condition, such as whether the witness is a child, is intoxicated, is a narcotics addict, or is insane or of unsound and feeble mind." H. BREENE & T. GUIDABONI, CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA 55 (3d ed. 1975): "Children are more suggestible than adults. Moreover, children may not have a full understanding of the serious consequences of the testimony they give. You should consider the capacity of a child witness to distinguish truth from falsehood and to appreciate the seriousness of this testimony."

Distrust of the child witness continues to be a factor in the legal system, despite increased attention to the child witness in both the legal[80] and psychological[81] literature, and heightened public awareness of the frequency with which children are the victims of abuse and sexual assault. It can be seen in the reluctance of prosecutors to pursue cases in which the sole or main witness is a child,[82] and in the way that jurors respond to children who do testify as witnesses. A recent study, for example, of juror reactions to child witnesses offers some evidence that juries do not lend the same credibility to children that they do to adult witnesses.[83]

Historically, there seemed to be reason for the law's concern that faulty memories and pressure on young "suggestible" minds from parents or other adults would make children unreliable witnesses.[84]

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80. *See* Lloyd, *supra* note 77. *See also* Hass, *The Use of Videotape in Child Abuse Cases*, 8 NOVA L.J. 373 (1984); Parker, *The Child Witness Versus the Press: A Proposed Legislative Response to Globe v. Superior Court*, 47 ALB. L. REV. 408 (1983); Parker, *The Rights of Child Witnesses: Is the Court a Protector or a Perpetrator?*, 17 NEW ENG. L. REV. 643 (1982); Skoler, *New Hearsay Exceptions for Child's Statement of Sexual Abuse*, 18 J. MAR. 1 (1984); Note, *Protecting Child Rape Victims from the Public and Press after Globe Newspaper and Cox Broadcasting*, 51 GEO. WASH. L. REV. 269 (1983).

81. *See, e.g.*, a recent issue of the *Journal of Social Issues*, which devoted the entire issue to articles on criminal victimization. 40 J. SOC. ISS. (1984).

82. In a recent case, one New Jersey prosecutor testified that a review of 75-80 child abuse cases showed that 90% of the cases were dismissed as a result of problems attendant to the testimony of child witnesses. State v. Sheppard, 197 N.J. Super. 411, 484 A.2d 1330 (1984).

83. Goodman, Golding & Haith, *Juror's Reactions to Child Witnesses*, 40 J. SOC. ISS. 139 (1984). In a case study using mock jurors, the authors found that testimony from an adult witness would more often be considered sufficient to find a defendant guilty than would the same testimony if it came from a child. In effect, the jury would give less credence to the testimony of children and would only convict if the child's testimony was corroborated by other evidence. The authors found, however, a "sleeper effect," i.e. that jurors would dissociate the evidence heard from the source of the evidence. Thus, even those jurors who believed that a child would not or could not provide accurate testimony would be influenced by the child's testimony, and would ultimately credit such testimony if it was corroborated by evidence from other sources. However, no such "sleeper effect" would be seen where the child was the sole witness for one side. In those cases, it was more difficult to dissociate the testimony from its source. This failure to credit children's testimony can be a problem, particularly in certain child abuse cases where the child victim may be the only witness.

See also Yarmey & Jones, *Is the Psychology of Eyewitness Identification a Matter of Common Sense?*, in CHILD SEXUAL ABUSE AND THE LAW 13-40 (J. Bulkley ed. 1983), for a study in which several groups of people were asked to judge the reliability of a hypothetical eight-year-old child's testimony. Fewer than 50% felt that the child would respond accurately to questions by police or in court.

84. For a discussion of early psychological studies, *see* Goodman, *Children's*

Psychologists no longer believe that such reason exists, however, as current literature indicates that children are better witnesses than the law and most lay persons believe. Generally, the credibility of any witness rests on several factors: (a) the witness' ability to perceive and understand the event that is experienced or witnessed; (b) the ability to remember the event, since trial may not take place until months or even years later; (c) the ability to communicate in a manner that is understandable to the trier of fact; and (d) the ability to testify truthfully. On all counts, there seems little reason for the law to disparage the testimony provided by children, particularly if jurors are given some background about what is currently known about children's abilities and limitations.[85]

Psychologists have changed their ideas about the ability of children to perceive events in the first instance. For example, it is now known that children do not necessarily notice *less* than adults, but rather that they attend to different stimuli, and thus notice *different* things.[86] While they may not fully comprehend everything that they perceive, children can provide useful evidence by reporting on what they do understand. For example, children can usually distinguish between socially acceptable ("good") behavior and socially unacceptable ("bad") behavior, even when they do not know whether the behavior was intended or merely accidental.[87]

Testimony in Historical Perspective, 40 J. SOC. ISS. 9 (1984). Dr. Goodman points out that older studies of children are not considered reliable because they suffered from methodological flaws and from what she terms the "intrusion of negative biases against children." *Id.* at 10.

Courts have been known to point to the "suggestibility of children" as a reason why jurors should be cautious of their testimony. State v. Hunt, 2 Ariz. App. 6, 406 P.2d 208 (1965); Fitzgerald v. United States, 412 A.2d 1 (D.C. App. 1980); Gelhar v. State, 4 Wis. 2d 230, 163 N.W.2d 609 (1969).

85. For a review of the developmental and experimental psychology literature on children's memory, cognitive development, and moral development, *see* Melton, *Children's Competency to Testify*, 5 LAW & HUM. BEHAV. 73 (1981). The author, who has written extensively on child witnesses, concludes from the available data that the liberal use of children's testimony is well-founded, since memory is no more a problem for children than adult eyewitnesses, when recollection is stimulated by direct questions; that children are no more prone to lying than adults, and that while young children may have difficulty conceptualizing complex events, they are able to communicate what they do see and experience sufficiently to be of value to adult jurors.

86. Johnson & Foley, *Differentiating Fact from Fantasy: The Reliability of Children's Memory*, 40 J. SOC. ISS. 33 (1984).

87. Ackerman, *Young Children's Understanding of a Speaker's Intentional Use of a False Utterance*, 31 DEV. PSYCH. 487 (1981).

There has long been concern that children do not make good witnesses because their memories are poor, and/or because they are too "suggestible." Neither of those concerns seems well-founded. Recent studies show that children's memories are quite good,[88] and that children may not be any more "suggestible" than adults, at least under some circumstances.[89] Of course, it would be helpful to jurors to understand some of the ways in which children's memories do differ from those of adults, so that their evaluation of children's testimony is not made on the basis of inappropriate adult standards.

Even young children can communicate what they know—if not verbally, then with the use of props, such as the anatomically correct dolls that are used in increasing numbers of cases involving child sexual abuse. Again, the child's testimony will be better evaluated by an educated jury. For example, a jury that understands that children are more literal than adults will better understand that a child's direct answers to questions may appear to be inconsistent, but they may not be.[90]

Unless and until the data that is available to psychological experts about the actual perception, memory, cognitive, and communication skills of children is widely disseminated to the lay public, juries

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88. *See, e.g.*, Johnson & Foley, *supra* note 86, in which the authors review the literature on children's memory and their own experimental research. They conclude that children tend to recall less than adults, but that there is *not* good evidence to support other commonly held notions about the deficiencies of children's memory. Children do not necessarily forget more rapidly than adults, nor confuse real and imaginary events, as is commonly feared.

Children do recall differently than adults. Experiments have shown that a child may not be able to accurately recall an event unless the questioner uses specific cues or question probes to remind the child of the context in which the questioned event occurred. Adults, on the other hand, can more easily recreate the context on their own when asked a more general question. Ackerman, *Children's Retrieval Deficit*, in BASIC PROCESS IN MEMORY DEVELOPMENT: PROGRESS IN COGNITIVE DEVELOPMENT RESEARCH (C.J. Brainerd & M. Pressley eds. 1985).

89. Loftus & Davis, *Distortions in the Memory of Children*, 40 J. SOC. ISS. 51 (1984). Loftus and others who have done considerable research on adult witnesses have raised serious concerns about the suggestibility of adult witnesses. Recently, one commentator has picked up on those concerns and has recommended some radical reforms of the civil litigation process to control the dangers of suggestion (i.e. manipulation of witnesses). He suggests that *ex parte* attorney interviews of neutral witnesses be limited, and that records be kept of such interviews to allow inquiry into charges of witness suggestion, which would be made unethical. Landsman, *Reforming Adversary Procedure: A Proposal Concerning the Psychology of Memory and the Testimony of Disinterested Witnesses*, 45 U. PITT. L. REV. 547 (1984).

90. Ackerman, *Form and Function in Children's Understanding of Ironic Utterances*, 35 J. EXPTL. CHILD PSYCH. 487 (1983).

are likely to continue to lend less credibility to child witnesses than the children ought to be given. Thus, it would seem appropriate to allow, and even to encourage, expert testimony from child psychologists on the abilities of children as a general aid to the jury in assessing the testimony of child witnesses.

Recently, reformers have advocated changes in the way that child witnesses are treated in the courtroom. Proposals have included the suggestion that special child-courtrooms be built, that children's testimony should be presented through videotape testimony, instead of live in a courtroom open to the public, and that courtrooms should be closed to the public during the child's testimony.[91] These calls for reform have rested primarily on concerns for the well-being of the child witness, particularly those who are victims, and a desire to minimize the negative impact on the child of a traumatic court experience.

Legislatures in several states have responded by passing legislation designed to facilitate the testimony given by child witnesses, especially victim-witnesses.[92] Again, the purpose is generally to protect the minor victim from the trauma of testifying in court.[93] While the concern for the welfare of children is long overdue, there would

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91. In a well-received scholarly article, Jacqueline Parker recommended a series of reforms including the appointment of child hearing officers, an attorney employed by the state to act as counsel and advocate for every child victim-witness; the use of specially-designed small, informal "child hearing courtrooms"; pre-trial interrogation by or in the presence of the child hearing officer; video-taped deposition of the child's testimony, to be used at trial; and speedy trials, where there are child-victims. Parker, *The Rights of Child Witnesses: Is the Court a Protector or Perpetrator?*, 17 NEW ENG. L. REV. 643, 664 (1982). Her proposal updated and refined those made earlier by Libai, *The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System*, 15 WAYNE L. REV. 977 (1969), which had been largely ignored by courts and legislatures.

See also Melton, *Sexually Abused Children and the Legal System: Some Policy Recommendations*, AM.. J. FAM. THERAPY (in press 1985); and Melton, *Procedural Reforms to Protect Child Victim/Witnesses in Sex Offense Proceedings*, in CHILD SEXUAL ABUSE AND THE LAW (J. Bulkley ed. 1983).

92. Legislation permitting video taped testimony by minor victims has been passed in a number of states. *See* ALASKA STAT. § 12.45.047 (Michie Supp. 1984); ARK. STAT. ANN. § 43-2036 (Cum. Supp. 1983); ARIZ. REV. STAT. ANN. § 12-23-12 (West 1982); MONT. CODE ANN. § 46-14-401 (1983); TEX. CRIM. PROC. CODE ANN. § 38.071 (Vernon 1983).

New Hampshire provides for *in camera* testimony by witnesses under sixteen years. N.H. REV. STAT. ANN. § 632-a:8 (1983); and several states have enacted special child hearsay exceptions for cases involving sexual abuse of children. *See* COLO. REV. STAT. § 13-15-129 (1983); KAN. STAT. ANN. § 600-640 (1983); WASH. REV. CODE ANN. § 9A.44.120 (West Supp. 1983).

93. *See, e.g.*, ARK. STAT. ANN. § 43-2036 (Cum. Supp. 1983).

seem to be another, equally compelling reason to advocate reform of the ways in which children give evidence, one that rests on the traditional, articulated goal of the adversary system—to ascertain truth. It has been suggested that children's testimony out of court may be more reliable than in-court testimony, because the child is relieved of pressures that might otherwise lead him to distort or mislead the truth.[94] To the extent that videotape testimony, for example, can not only protect a child's emotional well-being but actually enhance the fact finding process by providing evidence that is both more credible and in fact more reliable, the practice should be encouraged.

Several commentators have questioned whether videotape testimony will withstand constitutional challenges, primarily on the grounds that the sixth amendment right of confrontation means the right to confront one's accuser, face-to-face, in an open courtroom.[95] However, that analysis is based largely on one federal court case, *United States v. Benfield*,[96] in which the court overturned a conviction based on the videotaped deposition of an adult kidnap victim who was too traumatized to testify in court at the time of the trial. Since *Benfield*, several courts have permitted videotape testimony by adult witnesses in lieu of trial testimony.[97]

In a recent case, a New Jersey court permitted the use of videotape testimony by a ten-year-old victim of sexual assault, over a sixth amendment challenge, even though there is no specific statutory authority for such testimony in New Jersey.[98] At a hearing on a pretrial motion to admit the testimony, the state proffered the testimony of a forensic psychiatrist who had interviewed the girl and believed that the use of videotape equipment would improve the accuracy of her testimony by relieving her mixed feelings of guilt, fear, and anxiety that might produce inaccurate testimony in court. In addition, two prosecuting attorneys who handled large numbers of child abuse cases testified to the special problems inherent in eliciting testimony from the victims of child abuse.[99] The court distinguished *Benfield* on the grounds that the case involved a child victim in a sexual abuse case. Moreover, the court found that a jury would be

94. State v. Sheppard, 197 N.J. Super. 411, 484 A.2d 1330 (1984); Love v. State, 64 Wis. 2d 432, 219 N.W.2d 294 (1974).

95. *See* Skoler, *supra* note 80; Melton, *Child Witnesses and the First Amendment: A Psycholegal Dilemma*, 40 J. Soc. Iss. 109 (1984).

96. 593 F.2d 815 (8th Cir. 1979).

97. *See* cases discussed *supra* note 40.

98. State v. Sheppard, 197 N.J. Super. 411, 484 A.2d 1330 (1984).

99. *Id.* at 417, 484 A.2d at 1332.

able to see the child on live-monitor video. The court was apparently influenced by the argument that the video method would enhance the fact finding process:

> Truth is the ultimate quest. This is the proper interest of the prosecution, the defense, the jury, the judge and all of our society in all judicial proceedings. Philosophically, it may be argued that truth is not an absolute. If so, that conclusion does not diminish the premise. Truth, though unattainable in all of its labyrinthic extremities must always be the judicial goal.[100]

It is clear that the expert testimony had an impact on the New Jersey court. The lack of such testimony may well account for the fact that a similar attempt by a prosecutor to allow child victims in a "lewd conduct with minor" case to testify by closed circuit television was rebuffed by a California court.[101] In the California case, the sole testimony about the distress that the children might suffer from testifying in court was provided by the father of a ten-year-old witness, and the mother of a nine-year-old witness. There was no expert testimony to support the possible negative effects on the child and none to make the argument that the testimony elicited by closed-circuit video might be more accurate than that elicited in an open courtroom.

The court found that there were serious constitutional issues involving the right to a public trial, confrontation of witnesses, and due process raised by the "drastic deviation from settled procedures" and refused to permit the closed-circuit testimony, absent explicit statutory authority.[102] Given that there was little evidence to support the argument that there were counterveiling public policy reasons to allow the testimony, the decision is not surprising. It would seem that expert testimony in trials involving child witnesses may be useful not only to educate juries about the limitations and abilities of children in general, but also to permit courts to feel more free to be innovative in dealing with child witnesses in ways that can enhance the fact-finding process.

In a handful of states, expert psychological testimony about the credibility of children has already been found admissible in one kind

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100. *Id.* at 433-34, 484 A.2d at 1343.

101. Hochheiser v. Superior Court, 161 Cal. App. 3d 777, 208 Cal. Rptr. 273 (1984).

102. Sahd & Rada, *Incest Hoax: False Accusations, False Denials*, 6 BULL. AM. ACAD. PSYCHIATRY & LAW 269 (1978).

of case: cases involving child-witnesses who are victims of sexual abuse by a family member.[103] In those cases, experts have been permitted to testify about the typical response of a child who has been sexually abused by a family member. Such testimony is critical in prosecutions for child sexual abuse, since there is very good evidence that children frequently recant their own (true) reports of such abuse.[104] A respectable body of social science literature on the problems of incest and intrafamilial child sexual abuse explains the typical behavior patterns that can be expected in such cases, and that many incest victims are reluctant to report their experience for fear of being blamed or punished, or of causing the break-up of the family, or of not being believed.[105] Contrary to the assertions of Wigmore and Freud,[106] children seldom lie or fantasize about sexual abuse. Instead, many experts believe that many children who suffer assault actually under-report the amount and type of abuse, or fail to report it because the consequences of telling seem worse than the consequences of being victimized again.[107]

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103. *See, e.g.*, State v. Middleton, 294 Or. 427, 657 P.2d 1215 (1983), involving the rape of a fourteen year old girl by her father. The court allowed a child social worker to testify that a young victim often feels guilty about testifying against someone she loves, and wonders if she is doing the right thing in so testifying.

104. *See* Sahd & Rada, *supra* note 102.

105. *Middleton*, 294 Or. at 429-30, 657 P.2d at 1219-20. *See also* State v. Meyers, 359 N.W.2d 604 (Minn. 1984).

106. Dean John Henry Wigmore's treatise on Evidence is one of the most influential authorities on the law of evidence. In § 924(a) of his treatise, Wigmore argued that women and young girls could not be trusted to testify credibly.

In a scathing but scholarly article, Dr. Leigh Bienen has traced the "authorities" cited by Wigmore in § 924(a), and argues convincingly that Wigmore was so wholeheartedly committed to his repressive and misogynist position that all females who allege sexual assault should be assumed to be lying, that he deliberately misrepresented the supposedly objective, scientific authority upon which he relied. Bienen, *A Question of Credibility: John Henry Wigmore's Use of Scientific Authority in Section 924(a) of the Treatise on Evidence*, 19 CAL. W.L. REV. 235, 236 (1983).

Freud, of course, is the major figure in the development of psychoanalytic theory. It is now known that Freud suppressed his own discoveries about incest, and instead publicized a theory about children's sexual fantasies, that was widely believed for many years. For a book on why Freud may have done so, see J. MASSON, THE ASSAULT ON TRUTH: FREUD'S SUPPRESSION OF THE SEDUCTION THEORY (1984).

The persistence of such myths can be seen in some court decisions. *See, e.g.*, State v. Looney, 294 N.C. 1, 18, 240 S.E.2d 612, 622 (1978) ("Obviously, there are types of sexual offenses, notably incest, in which by the very nature of the charge, there is grave danger of completely false accusations by young girls of innocent appearance, but unsound minds, susceptible to sexual fantasies and possessive of malicious, vengeful spirits.").

107. Berliner & Barberi, *The Testimony of the Child Victim of Sexual Assault*, 40 J. SOC. ISS. 125, 127 (1984).

There is, then, good reason to permit expert testimony to dispel popular myths, and to corroborate the testimony of the child victim. The courts have allowed a variety of experts to present the evidence, including a board-certified pediatrician and child psychiatrist,[108] a child protective social worker,[109] a juvenile counselor for the county,[110] and a clinical psychologist.[111]

In the most frequently cited case, *State v. Middleton*,[112] an Oregon court permitted testimony about intrafamilial sexual abuse from two experts, a juvenile counselor who testified for the state, and a child protective social worker who was called by the defendant.[113] The case involved a rape charge brought against a defendant by his fourteen year old daughter. Six weeks after she reported the rape to a friend's mother, a children's service worker, a doctor, and the police, the girl wrote a statement saying that she had lied about the rape "to get out on [her] own."[114] Two months later, at trial, the girl testified that her father had indeed raped her, and the father's attorney introduced the written notes on cross-examination to discredit her. Over the objections of defense counsel, both experts testified that the daughter's behavior was typical of incest victims.[115]

On appeal, the high court affirmed the conviction, finding that the expert testimony was useful in helping the jury to evaluate the credibility of the girl:

> It would be useful to the jury to know that not just this victim but many child victims are ambivalent about the forcefulness with which they want to pursue the complaint, and it is not uncommon for them to deny the act ever happened. Explaining this superficially bizarre behavior and identifying its emotional antecedents could help the jury better assess the witness' credibility.[116]

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108. State v. Kim, 645 P.2d 1330 (Hawaii 1982).
109. State v. Middleton, 294 Or. 427, 429, 637 P.2d 1215, 1217 (1983).
110. *Id.*
111. State v. Meyers, 359 N.W.2d 604 (Minn. 1984). *See also* State v. Carlson, 360 N.W.2d 442 (Minn. 1985) (overturning a pretrial order refusing to admit a "qualified expert" from testifying); Smith v. Nevada, 688 P.2d 326 (Nev. 1984) (allowing an expert to testify about the dynamics of intrafamilial child sexual abuse to explain a six-year-old's delay in telling her mother, and the mother's delay in reporting to the police).
112. 294 Or. 427, 657 P.2d 1215 (1983).
113. *Id.* at 429, 657 P.2d at 1216.
114. *Id.* at 429, 657 P.2d at 1215.
115. *Id.* at 434, 657 P.2d at 1219.
116. *Id.* at 436, 657 P.2d at 1220.

Middleton thus appeared to stand for the proposition that expert testimony about sexual abuse of children, particularly testimony that it is common for victims to be so ambivalent about reporting such abuse that they recant their stories, was admissible in Oregon to enable the jury to better evaluate the testimony of child victims. However, since *Middleton*, the Oregon courts have been reluctant to open the door to expert testimony too widely. Later cases have permitted only "general" testimony about the kind of mental and emotional factors that might influence the behavior of members of an identifiable group, for example, victims of familial child abuse, since such evidence is said to be only an "indirect comment on the child witness' veracity."[117] However, expert testimony that includes the expert's opinion that a *particular* witness is truthful has been excluded as "going too far."[118] The distinction does not seem to be a meaningful one, and runs contrary to the modern trend to allow experts to give their opinions, even on ultimate issues of fact.

However, some courts are reluctant to allow *any* expert testimony regarding "child sexual abuse syndrome," largely based on the traditional fear that the "aura of scientific reliability" that surrounds any expert is too powerful and might allow a jury to abdicate its fact-finding role to the expert.[119] Given a history of mistrusting child witnesses, the widely acknowledged difficulties in prosecuting child abuse cases, and the slowness with which reforms have been adopted that might ease the trauma of children of testifying in court, the admission of expert testimony on child abuse syndrome to aid the jury in evaluating the credibility of a child who appears to have recanted her story seems warranted.

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117. State v. Pettit, 66 Or. App. 575, 675 P.2d 183 (1984) (expert allowed to testify about whether victims of familial sexual abuse can recall dates and relate details, and whether such victims generally tell consistent stories and report such incidents promptly).

118. State v. Munro, 68 Or. App. 63, 680 P.2d 708 (1984). *See also* People v. Reid, 123 Misc. 2d 1084, 475 N.Y.S.2d 741 (1984), involving an eleven year old who was raped by her neighbor-babysitter. The judge permitted testimony about false recantation to avoid public embarrassment as a symptom of rape trauma syndrome, but would not allow the expert to give her opinion as to whether or not the victim was telling the truth.

119. State v. Haseltine, 120 Wis. 2d 92, 352 N.W.2d 673 (1984) (error to admit psychiatric opinion that sixteen-year-old incest victim was telling the truth, in the absence of any indication that the victim had any physical or mental disorder that might affect her credibility).

3. Expert Testimony and the Credibility of Women Who Are Victims of Rape or Domestic Violence

Children are not the only witnesses who have received special treatment from the law: there is a long history of distrust of the woman who claims to be a victim of rape or domestic abuse, and takes the witness stand to testify against a man. In the case of rape, the law's bias against women was articulated in the oft-quoted comment of Lord Hale that "rape is an accusation easily to be made, and hard to be proved, and harder to be defended by the party accused, though ever so innocent."[120] This comment was repeated to juries in precautionary instructions given in rape cases for many years.[121]

The law took steps to assure that rape remained "hard to be proved." To protect the accused from being punished solely on the basis of a woman's word, a number of states developed corroboration requirements for rape and other sexual crimes. Such corroboration had not been required at common law, and has never been required for most other crimes.[122] Designed to protect innocent defendants from false accusations of rape, the rules generally contributed to the notoriously low conviction rates in rape cases.[123] As part of the movement to reform rape laws, corroboration rules were dropped in some states, and watered down in others.[124] In a curious ambivalence toward

120. M. HALE, PLEAS OF THE CROWN 635 (1847). Susan Brownmiller characterized the problems as the "syndrome of Potipher's wife," or a fear of false charges of rape, in her book AGAINST OUR WILL: MEN, WOMEN AND RAPE 370 (1978).

121. Even today, some states permit such instructions in at least some circumstances. *See* State v. Mackie, 38 Mont. 86, 622 P.2d 673 (1981) (*Hale* instruction allowed where there was no evidence of malice or no corroborative evidence).

122. For a history and discussion of the corroboration rules, *see* 7 WIGMORE, EVIDENCE § 2061 (1970); Comment, *The Admissibility of Extrajudicial Rape Complaints*, 64 BOSTON U.L. REV. 199 (1984); Comment, *Corroborating Charges of Rape*, 67 COLUM. L. REV. 1137 (1967); Comment, *The Rape Corroboration Requirements: Repeal not Reform*, 81 YALE L.J. 1365 (1972). According to Wigmore, the testimony of the prosecutrix or injured person in the trial of all offenses against the chastity of a woman was sufficient to support a conviction at common law. 7 WIGMORE, EVIDENCE § 2061 (1970). For a detailed analysis of modern sexual assault statutes, *see* H. FIELD & L. BIENEN, JURORS AND RAPE: A STUDY IN PSYCHOLOGY AND LAW 207 (1980).

Surviving corroboration statutes differ from state to state. Some require corroboration of a rape victim's testimony in all cases, while others require corroboration only if special circumstances suggest that the victim's testimony is not altogether trustworthy. *See* Comment, *The Admissibility of Extrajudicial Rape Complaints*, 64 BOSTON U.L. REV. 199 (1984).

123. Note, *Checking the Allure of Increased Conviction Rates: The Admissibility of Expert Testimony on Rape Trauma Syndrome in Criminal Proceedings*, 70 VA. L. REV. 1657 (1984).

124. There is an extensive body of literature on rape, rape reform, and the

women, some courts found that the elements of corroboration included, *inter alia*, the "promptness of complaints to friends and police."[125] The effect of such a rule was to create an exception to the general rule of evidence that a prior consistent statement by a witness is self-serving, inadmissible hearsay, unless offered for certain limited purposes such as to rebut a charge of recent fabrication. In rape cases, however, a prior consistent statement of the victim—that is, a prompt complaint of rape—became admissible, even though it was precisely the kind of statement that is ordinarily excluded, however much it might actually serve to bolster the credibility of the witness.[126]

Other special rules for rape cases also reflected the general distrust of the woman who cries rape. Prior to the passage of rape-shield laws, the credibility of the rape victim could be challenged by evidence of her prior sexual experience. Such evidence was admissible in some states for the purpose of demonstrating that she was of unchaste character and hence unlikely to be telling the truth, and in others to discredit her claim of lack of consent on the grounds that a woman who consents once is unlikely to withhold consent on other occasions. During the 1970s, feminists led a groundswell of protest against rape laws that led to reforms in every state, including the repeal of corroboration requirements and the passage of rape-shield laws to protect victim-witnesses from devastating cross-examination that was only marginally relevant to the real issue of credibility.[127]

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law concerning rape. For rape-related studies, see Field & Barnett, *Forcible Rape: An Updated Bibliography*, 68 J. CRIM. L. & CRIMINOLOGY 146 (1977). *See also* S. BROWNMILLER, *supra* note 120.

125. Allison v. United States, 409 F.2d 443 (D.C. Cir. 1969). *But see* People v. Murray, 183 A.D. 468, 469, 170 N.Y.S. 873, 874 (1918) finding that prompt disclosures by a victim were not considered corroborative evidence in New York because such evidence "depends wholly on the veracity of the complainant" and that it is not "other evidence" in support of her version of the event.

126. Raum, *Rape Trauma Syndrome as Circumstantial Evidence of Rape*, 11 J. PSYCH. & LAW 203 (1983), arguing for the admissibility of rape trauma syndrome especially where some corroboration of the victim's testimony is still required.

A recent student work reviews the most frequently cited social science literature and argues that there is insufficient research on rape victims to provide reliable social science evidence to support the admissibility of such expert testimony. The Note finds that there is little consensus concerning what, if any, symptoms are particular to rape victims. *See* Note, *supra* note 123.

However, given that evidence of rape trauma syndrome is usually introduced in cases where the defendant has raised the defense of "consent," it would not seem to be important whether rape victims share certain symptomology with other crime victims, since consensual sexual intercourse among adults is rarely a crime anymore.

127. Beinen, *Rape II: National Developments in Rape Reform Legislation*, 6

The most recent battle in the war over rape laws involves the admissibility of expert testimony about "rape trauma syndrome," a phrase coined by a nurse-social worker team[128] to describe behavior generally exhibited by victims of rape and other traumatic experiences. The courts are split over the admissibility of such testimony, and the cases are hard to reconcile. At first glance, one wonders if the earliest landmark cases were not decided on the basis of the credentials—or lack of them—of the proffered experts. However, later cases belie that analysis, as courts justified excluding experts whose credentials were too good, and thus thought to pose a greater threat to the jury system than less qualified experts.[129]

As in the case of most experts, there is a conflict between the desire to educate the jury, and the fear that the expert will usurp the jury's function and become the final arbiter of whether the woman who alleges she was raped was indeed raped, or is merely making a false accusation against an innocent man. No court has yet found that the absence of symptoms of rape trauma syndrome means anything. As a result, the evidence has only been admitted to support the victim's credibility as a witness, and thus strengthen the prosecutor's case, something some courts are more willing to do than are others.

While expert testimony of child abuse syndrome and of rape trauma syndrome has been successfully used by prosecutors in at least some cases where the sole or primary witness is a child or female victim whose testimony might otherwise be given less weight than it deserves, expert testimony of another syndrome, "battered spouse

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WOMEN'S RIGHTS L. REP. 170 (1980); Note, *Rape Reform Legislation: Is it the Solution?*, 24 CLEV. ST. L. REV. 463 (1975).

128. Holmstrom & Burgess, *Assessing Trauma in the Rape Victim*, 73 AM. J. NURSING 1288 (1973); Holmstrom & Burgess, *Rape Trauma Syndrome*, 131 AM. J. PSYCHIATRY 981 (1974).

129. Expert testimony on rape trauma syndrome was admitted in the following cases: Division of Corrections v. Wynn, 438 So. 2d 446 (Fla. App. 1983) (civil suit for damages where plaintiff was raped by released inmate); State v. McQuillen, 236 Kan. 161, 689 P.2d 822 (1984); State v. Marks, 231 Kan. 645, 647 P.2d 1292 (1982); People v. LaPonte, 103 Mich. App. 844, 303 N.W.2d 222 (1981); State v. Liddell, 685 P.2d 918 (Mont. 1984); State v. Jackson, 97 N.M. 467, 641 P.2d 498 (1982).

Similar testimony was excluded in the following cases: People v. Stanley, 36 Cal. 3d 233, 681 P.2d 302 (1984); People v. Bledsoe, 36 Cal. 3d 236, 681 P.2d 901 (1982) (inadmissible to prove witness had been raped, but harmless error); State v. Bressman, 236 Kan. 296, 689 P.2d 901 (1984); State v. McGee, 324 N.W.2d 232 (Minn. 1982); State v. Saldone, 324 N.W.2d 227 (Minn. 1982); State v. Taylor, 663 S.W.2d 235 (Mo. 1984); State v. Walker, 639 S.W.2d 834 (Mo. App. 1982).

syndrome," has been offered in another way. Defense counsel in criminal cases brought against a battered woman who struck back at her batterer have attempted to introduce the snydrome for several purposes: (a) as a defense in and of itself, and (b) as evidence to bolster the credibility of a woman who tries to prove a classic defense of self-defense, particularly where the defensive killing happened some time after the last battering. Typically, the woman testifies that she reasonably perceived herself to be in such imminent danger from her husband that she killed him in self-defense. Should the jury have any doubts that she truly feared her husband, particularly in cases where the killing takes place hours, or even days after the woman was beaten or abused, such doubts are allayed by an expert who testifies that battered women really do fear their husbands, even if they have difficulty in acting to change the situation.[130] The use of such testimony is controversial, even among feminists, who are concerned about evidentiary rules that may reinforce negative stereotypes about women.

To the extent that various "syndromes" can be identified, the details of which may remain outside the realm of common knowledge,

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130. In the first case admitting rape trauma syndrome evidence that received wide attention, the expert was a board-certified psychiatrist and neurologist. He was also one of the few people certified in forensic psychiatry. Without much explanation, the court allowed the testimony, claiming that it would not invade the province of the jury. State v. Marks, 231 Kan. 643, 647 P.2d 1292 (1982).

In contrast, the "expert" in the next major case was a woman whose academic credentials consisted of a B.A. in psychology and social work. In excluding her testimony, the court made much of the fact that she had no medical training, despite the fact that she was employed as a counselor for sexual assault victims and the director of a victim assistance program. State v. Saldone, 324 N.W.2d 227, 230 (Minn. 1982). Had the court wanted to find her to be a qualified expert, no doubt it could have done so on the basis of her experience with rape victims.

When the issue reached the Missouri court, the expert had impressive credentials: a psychiatrist who testified to having treated more than 300 victims of rape and sexual assault, and the author of a book on the topic. Apparently, he was too credible, because the court feared that his training in evaluating verbal and nonverbal responses would lend a "special reliability" to his conclusions that the victim suffered from rape trauma syndrome. The conviction was overturned. State v. Taylor, 663 S.W.2d 233, 240 (Mo. 1984).

Some courts have taken a partial step toward allowing the testimony of experts, apparently because of lingering doubts about the admissibility of an expert's opinion on the credibility of a witness. In a recent New York case, an expert was allowed to testify on rape trauma syndrome generally. She was not allowed to testify on whether or not she believed the eleven-year-old victim, who had reported a rape by her neighbor-babysitter and later recanted. People v. Reid, 123 Misc. 2d 1084, 475 N.Y.S.2d 741 (1984). *Accord* State v. Munro, 68 Or. App. 63, 680 P.2d 708 (1984).

some education of the jury would seem to be in order. Moreover, such testimony can help to balance out the traditional prejudice against the witness who is a victim of rape or spousal abuse, and ought to be admissible so long as it meets the standards developed by the Third Circuit in *Downing*.[131]

Thus, expert evidence of child abuse syndrome, for example, should be admissible if the prosecutor convinces the court (1) that the reliability of such evidence outweighs the risk that it will "overwhelm, confuse, or mislead" the jury, and so prejudice the defendant; and (2) that there is sufficient connection between the proffered evidence and particular, disputed factual issues in the case to warrant its admission. Where there is a dispute as to the credibility of a victim who has reported abuse, and then recanted her report, evidence that such recantation is typical of victims should be sufficiently relevant to satisfy the second requirement of the *Downing* test.

II. THE CREDIBILITY OF THE RECANTING WITNESS

A host of issues surrounding a witness' credibility are raised when a witness recants his trial testimony: How should the credibility of the witness be judged? Should there be a hearing? What evidence should be admissible at the hearing? Should expert testimony be permitted at the recantation hearing to aid the judge in determining whether or not a new trial should be granted? This section addresses those issues.

A. The Recantation

When a witness recants after a criminal defendant has been convicted, the defendant typically makes a motion for a new trial based on "newly discovered evidence" or "in the interests of justice." Evidence is usually submitted by affidavit, and the defendant prepares to appeal from the trial judge's denial of his motion. Given the difficulty of getting a new trial in any case, and the particular suspicion

131. United States v. Downing, 753 F.2d 1224 (3d Cir. 1985). *See, e.g.*, IBN-Tomas v. United States, 407 A.2d 626 (D.C. 1979). *See also* Note, *The Admissibility of Expert Testimony on Battered Wife Syndrome: An Evidentiary Analysis*, 77 NW. U.L. REV. 348 (1982), which describes the syndrome. According to the author, it can be characterized by the following: (a) a stage of minor abuse, followed by acute battering and explosions of uncontrolled violence, leading to a "loving respite" stage during which the batterer seeks forgiveness and promises reform; (b) psychological paralysis on the part of the abused woman, resulting from the violence; (c) social factors restraining the woman from seeking help; and (d) general psychological characteristics involving attitude and behavior. *Id.* at 360-61.

with which courts have traditionally viewed recantation testimony,[132] it is not surprising that new trials are rarely granted on the basis of a prosecution witness' change of heart. Since new trials are generally in the discretion of the trial judge, it is rarer still that an appellate court will overturn the trial court's denial of such a motion.[133]

Courts cite several reasons for the general rule that recantation by a witness does not necessarily entitle a defendant to a new trial, including the widely shared belief that recantation testimony is inherently lacking in credibility,[134] the reluctance of judges to tamper with decisions reached by a jury,[135] and the need for finality of judgments.[136] No doubt another factor, albeit an unarticulated one, is the difficulty human beings, including judges, have in admitting that they have been duped by a liar.

Recanting testimony is thought to be inherently unreliable, in part because it comes from the lips of a liar, and there is a persistent belief that he who lies once will lie again.[137] Thus, why grant any credence at all to the affidavit or testimony of a self-admitted perjurer? It is thought to be unreliable too, because of the fear that the defendant may have harassed, bribed, threatened, or intimidated the witness into changing his or her story.[138]

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132. *See, e.g.*, United States v. Johnson, 487 F.2d 1278, 1279 (4th Cir. 1973); State v. Theus, 207 Kan. 571, 485 P.2d 1327 (1971); Hensley v. Commonwealth, 488 S.W.2d 338 (Ky. 1972); State v. Linkletter, 345 So. 2d 452, 458 (La. 1977); People v. Shilitano, 218 N.Y. 161, 112 N.E. 733 (1916); People v. Donald, 107 A.D.2d 818, 484 N.Y.S.2d 651 (1985).

133. Annot., 158 A.L.R. 1062 (1945).

134. People v. Marquis, 344 Ill. 261, 176 N.E. 314 (1931); People v. Shilitano, 218 N.Y. 161, 112 N.E. 733 (1916); Commonwealth v. Coleman, 438 Pa. 37, 264 A.2d 649 (1970); Commonwealth v. Dohner, 295 Pa. Super. 342, 441 A.2d 1263 (1982); State v. Nicholson, 296 S.E.2d 342, 344 (W. Va. 1982).

135. People v. Marquis, 344 Ill. 261, 265, 176 N.E. 314, 315 (1931). Such a confession of perjury does not justify the conclusion that the confessor lied. Instead, "the *conclusion of the jury* would rather warrant the presumption that his testimony was truthful, and his affidavit false." (emphasis added).

136. Commonwealth v. Mathews, 356 Pa. 100, 51 A.2d 609 (1947) (no finality if verdicts and judgments could be this easily nullified); Wohlfert v. State, 196 Wis. 111, 112, 219 N.W. 272, 273 (1928).

137. Loucheim v. Strause, 49 Wis. 623, 6 N.W. 360 (1880) ("*false in uno, falsus in omnibus*"). This same notion is seen throughout the law of evidence. The one kind of character evidence that is generally admissible at trial is evidence of a witness' reputation for truth or veracity. That is, evidence that tells the jury whether or not the witness is a liar. C. MCCORMICK, *supra* note 3, at § 44.

138. State v. Hill, 312 Minn. 514, 253 N.W.2d 378 (1977); People v. Shilitano, 218 N.Y. 161, 112 N.E. 733 (1916).

Clearly the fear of false recantation is reinforced by the fact that many witnesses in criminal cases are co-defendants or other "criminals" who have turned state's evidence in exchange for leniency. Once a plea bargain with the witness has been carried out, the witness is thought to have little reason to remain truthful.[139] One questions whether the promise of a lenient sentence, while clearly an incentive to testify in a manner that is helpful to the prosecutor, is necessarily an incentive to testify "truthfully." Similarly, one wonders why defendants are thought to be more likely to harass, bribe, or threaten a witness to change his story after trial than they are before conviction? Nevertheless, both concerns are expressed in the case law.

Certainly, at least in the case of children who are incest and rape victims, there is good reason for the courts to give little credence to recanting testimony, since the current psychological literature supports the notion that such children are more likely to falsely recant a report of actual abuse than to fantasize or lie about such abuse in the first place.[140] Most courts seem to understand that children's recantations are unreliable, although a few still rely on outdated psychology to justify granting new trials when a child victim recents.[141] One recom-

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139. United States v. Gaither, 440 F.2d 262 (D.C. Cir. 1971); Smith v. State, 435 N.E.2d 346 (Ind. 1983); Commonwealth v. Osborne, 223 Pa. Super. 523, 302 A.2d 395 (1973); Horneck v. State, 64 Wis. 2d 1, 218 N.W.2d 370 (1974).

140. *See supra* notes 102-119 and accompanying text.

141. New trials were denied in the following reported cases, despite the fact that a child victim-witness recanted his or her story. Doss v. State, 203 Ark. 407, 157 S.W.2d 499 (1942); Sutton v. Smith, 197 Ark. 686, 122 S.W.2d 617 (1941); People v. McGaughen, 197 Cal. App. 2d 6, 17 Cal. Rptr. 121 (1961); Ferguson v. Stone, 415 So. 2d 98 (Fla. App. 1982); Wedmore v. State, 237 Ind. 212, 143 N.E.2d 649 (1957); State v. Zellinger, 147 Kan. 707, 78 P.2d 845 (1938); People v. Andrews, 360 Mich. 372, 104 N.W.2d 199 (1960); Powell v. Commonwealth, 179 Va. 703, 20 S.E.2d 536 (1942).

Still, of the few reported decisions that grant new trials on the basis of recanting testimony, many seem to involve various sexual crimes, including statutory rape and family abuse. No doubt, that is in part due to reliance on misinformation about intrafamilial abuse.

In one such case, People v. Smallwood, 306 Mich. 49, 10 N.W.2d 303 (1943), the defendant was convicted of raping his fifteen-year-old daughter, based solely on the girl's testimony. When she later recanted, the father won a new trial. The appeals court affirmed in a case that quotes extensively from Wigmore. Wigmore's views on the lack of credibility of girls and women have been convincingly debunked by modern authorities. See Bienen, *supra* note 106.

More recently, in a case in which another fifteen-year-old recanted after her father was convicted of incestual sexual abuse, the Pennsylvania court sounded an old note: "False accusations in sex crimes are generally conceded to be far more frequent than untrue charges of other crimes." Commonwealth v. Mosteller, 446 Pa. 83, 88, 284 A.2d 786, 787 (1971). For that reason, the court granted a rare new trial based on recanting testimony.

mendation would be to allow expert testimony on the typical reactions of child victims of such abuse to be heard at hearings for new trials in instances where the recanting witness is a child victim to aid the court in determining the reliability of such recantation testimony.

There is no equivalent body of scientific or social science literature to support the general, instinctive feeling of the legal system that the ordinary witness who recants his trial testimony is generally lying. That feeling, however, receives support from a number of factors, including: the procedures that govern a defendant's attempt to get a new trial based on recanting testimony; the standards that are used to determine when a defendant is entitled to a new trial; and presumptions concerning the validity of the original testimony.

Procedurally, motions for a new trial are generally addressed to the same trial judge who tried the case, who is believed to have the most information on which to base a decision, having actually seen the witness, and having observed his or her demeanor at the trial.[142] Such motions are frequently brought months, occasionally even years, after the original trial,[143] so that there is little reason to be confident that most judges are actually capable of remembering a particular witness' performance at trial. It is just as likely that the information that is brought to the post-conviction hearing by the original judge includes some emotional investment in believing that the first trial was fair and just. In many cases, the trial judge makes a decision on the recanting testimony solely on the basis of affidavits, without actual testimony from anyone, including the recanting witness.[144]

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142. *See, e.g.*, Daellenbach v. State, 562 P.2d 679 (Wyo. 1977).

143. In one of the most widely celebrated recantation cases, Rubin "Hurricane" Carter and a co-defendant were convicted of murder by a jury in May, 1967. Seven and one-half years later, in 1974, Carter moved for a new trial based on "newly discovered evidence," consisting of the affidavits of two state witnesses recanting significant portions of their trial testimony identifying the defendants. State v. Carter, 136 N.J. Super. 271, 345 A.2d 808 (1974) (new trial denied), *vacated and remanded*, 136 N.J. Super. 596, 347 A.2d 383 (1975), *reversed on other grounds*, 69 N.J. 420, 354 A.2d 627 (1976). On retrial, the defendants were again found to be guilty, and the verdict was affirmed. 91 N.J. 86, 449 A.2d 1280 (1982). The most recent development in the Carter case came on November 7, 1985, when a federal judge again overturned the conviction, citing constitutional violations by the prosecutors. N.Y. Times, Nov. 8, 1985, at A1, col. 1.

144. One problem faced by defendants seeking a new trial based on alleged recantations is that few witnesses are as willing to subject themselves to prosecution for perjury as was the woman who recanted her accusation that Gary Dotson raped her. Many witnesses, once advised of their fifth amendment rights, choose not to testify

There are several possible approaches that could be taken to determine when recanting testimony should result in a new trial. One would be for the court to accept the recantation at face value, assume that a jury would believe it, and grant a new trial unless the remaining evidence is sufficient to convict the defendant. No court has adopted that approach. It has been rejected largely on the grounds that to automatically grant a new trial would shift the power to grant new trials from the court to the witness who testified against the defendant.[145] Of course, the court's desire to maintain control of the right to decide when a new trial is warranted is no doubt reinforced by the instinctive feeling that the recanting testimony is generally worthless.

Alternatively, the court could approach recanting testimony with more skepticism, and play a more active role in judging the credibility of the recanting testimony. At trial, the court's role is to determine the threshold competency of a particular witness, leaving to the jury the job of determining how much credibility should be attributed to the witness. In every state, however, it is the court, not the jury, that determines whether or not a recanting witness is sufficiently credible to warrant granting the defendant a new trial.[146] Presumably, the court does so by comparing the affidavit or testimony of the witness to his earlier trial testimony. Only if the court is reasonably satisfied that the recanting testimony is true, and the earlier trial testimony is false, is there any question about whether or not to grant a new trial. In an oft-cited concurrence, Justice Cardozo explained:

> [I]t was the duty of the trial judge to try the facts, and determine as best as he could where the likelihood of truth lay.... I do not mean that to justify a new trial he must have been convinced that the first story of the witnesses was false and that their new story was true. He might act upon a *reasonable probability*. But if, on the contrary, he

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at a recantation hearing in a manner that would subject themselves to such perjury charges. *See, e.g.*, Dunbar v. State, 555 P.2d 548 (Alaska 1976).

One solution to this problem is for the prosecutor to offer immunity to the witness who seeks to recant. In one case, the witness had a change of heart midway through the trial, and the prosecutor refused to grant immunity to allow the witness to testify differently without subjecting herself to perjury charges. The New York appellate court reversed the trial judge because of the prosecutor's abuse of discretion. People v. Priester, 98 A.D.2d 820, 470 N.Y.S.2d 478 (1983).

145. People v. Tallmage, 114 Cal. 427, 46 P. 282 (1896); Swett v. State, 268 A.2d 814 (Me. 1970); People v. Shilitano, 218 N.Y. 161, 112 N.E. 733 (1916).

146. Kearney v. United States, 682 P.2d 214, 220 (D.C. Cir. 1982); State v. Harris, 428 S.W.2d 497, 501 (Mo. 1968); Commonwealth v. Nelson, 484 Pa. 11, 398 A.2d 636 (1979).

> was convinced that the second tale was false, that a criminal league had been formed to set at nought the verdict of the jury and the judgment of the court, his duty was clearly marked.... He was not at liberty to shift upon the shoulders of another jury his own responsibility.... He was charged with a responsibility to seek the truth himself.[147]

Once a court has been reasonably satisfied that recanting testimony is true, certain other criteria must be met before a new trial will be granted. First, if the basis for the motion is "newly discovered evidence," then the evidence must indeed be newly discovered. That is, the evidence must have been discovered by the defendant some time after the trial, or the defendant must have been taken by surprise and unable to meet the false testimony at trial.[148] The requirement is necessary because of the strong public policy favoring an end to litigation. If the defendant could have shown that trial testimony was perjurous in nature at the time of the trial, then he was obligated to do so. If he failed to do so, he will not be given a second opportunity in order to retry his case properly.

Nor will the defendant be entitled to a new trial if the recanting testimony was not really critical to the outcome of the case. If the evidence can be characterized as merely cumulative or impeaching, a new trial will be denied.[149] How critical is critical? The courts cannot agree. In some, a new trial will be granted if the court finds that the jury *might have reached* a different conclusion if it had heard the true testimony.[150] In other words, those courts do not truly weigh and sift the new evidence in deciding the motion for a new trial. Rather, the job of sifting and weighing the recantation evidence is left to the jury to do at the new trial. The trend, however, is for the court to assume more power to deny a new trial unless it finds that the recanting testimony *would probably* produce acquittal in the event of retrial.[151] In effect, the judge determines not only the credibility of the recanting testimony, but its significance in the overall trial as well, and grants a new trial only in those few cases where an acquittal is most likely to result.

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147. People v. Shilitano, 218 N.Y. 161, 112 N.E. 733 (1916).

148. Larrison v. United States, 24 F.2d 82, 87 (7th Cir. 1928). *See also* cases collected in 24 C.J.S. *Impeachment* § 1460 (Supp. 1985).

149. People v. McGraughen, 197 Cal. App. 3d 6, 17 Cal. Rptr. 121 (1961); People v. Valencia, 30 Cal. App. 126, 86 P.2d 122 (1938); Heard v. United States, 245 A.2d 125 (D.C. 1968); State v. Mosley, 133 Me. 168, 175 A. 307 (1934); Powers v. State, 168 Miss. 541, 151 So. 730 (1933).

150. Larrison v. United States, 24 F.2d 82, 87-88 (7th Cir. 1928).

151. Derrington v. United States, 488 A.2d 1314 (D.C. 1985); Godfrey v. United

It is neither surprising nor inappropriate for a court to find that the affidavit of a witness who refuses to appear at a hearing is not sufficient to overcome the presumption that the testimony given by that witness at trial was true.[152] However, in some cases, the problem is not that a witness is reluctant to testify at a post-conviction hearing, but that the court will not permit the defendant a full hearing with witness testimony.[153] To deny the defendant a new trial in those circumstances without hearing from the recanting witness smacks of unfairness.

The decision to deny a new trial despite recanting testimony is not particularly troublesome when there is other sufficient evidence to support the conviction. In those cases, one can reasonably be assured that the defendant was indeed guilty, and he or she deserves to be punished. On the other hand, when a defendant has been convicted largely—or solely—on the testimony of a prosecution witness who later recants, the denial of a new trial raises the possibility of an innocent person being punished for a crime he or she did not commit, largely because there must be an end to litigation. Nevertheless, most courts insist that even when the sole witness recants, the matter rests squarely in the discretion of the trial judge, and the recantation does not in and of itself entitle the defendant to a new trial. Certainly, that rule would seem fairer if there were evidence—such as expert testimony to explain why a recantation from a child victim is unlikely to be reliable—to support the implicit finding that the recantation testimony is not reliable. However, few courts have looked for such testimony, and only a very few have thought the risk of an innocent person being punished so great that they will find a trial judge to have abused his discretion if he denied a new trial where

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States, 454 A.2d 293 (D.C. 1982); Heard v. United States, 245 A.2d 125 (D.C. 1968); People v. Jones, 26 Ill. App. 3d 78, 325 N.E.2d 56 (1975); Smith v. Indiana, 455 N.E.2d 346, 351 (Ind. 1983); State v. Pittman, 210 Neb. 117, 313 N.W.2d 252 (1981); State v. Hortman, 207 Neb. 395, 299 N.W.2d 187 (1980).

152. People v. Marquis, 344 Ill. 261, 265, 176 N.E. 314, 315 (1931); State v. Linkletter, 345 So. 2d 452, 458 (La. 1977) ("a judgment rendered regularly ought not to be set aside on the unsupported affidavit of an admitted perjurer that he will swear to the truth on another trial.").

153. Derrington v. United States, 488 A.2d 1314 (D.C. 1985); Tafero v. State, 440 So. 2d 350 (Fla. 1983); Snyder v. State, 460 N.E.2d 57 (Ind. App. 1984); Best v. State, 418 N.E.2d 316 (Ind. App. 1981); State v. Wilson, 16 Wash. App. 434, 557 P.2d 18 (1976). *But see* Dunbar v. State, 555 P.2d 548 (Alaska 1976), in which a sixteen-year-old victim-witness and her younger brother recanted their testimony. The Supreme Court of Alaska ordered an evidentiary hearing so that their recantation testimony could be tested by cross-examination.

the conviction rests solely on the testimony of a witness who seeks to recant.[159]

Due process considerations prevent the state from knowingly using perjured testimony to obtain a conviction.[155] Where it can be proven that the state did so, the defendant has been denied a fair trial and will be entitled to a new one. However, few cases can be shown to involve the knowing use of perjured testimony, and most courts do not find a violation of due process when the defendant cannot prove that the state knew that the testimony was false.

B. Expert and Scientific Evidence at Recantation Hearings

In most cases, the problem is not what to do about perjured testimony, but how to determine which testimony was perjured. For the most part, judges make that determination without much aid save their own experience and judgment. There are few reported cases in which defendants have sought to bolster their motions for new trial with expert testimony. Yet the door to such testimony may have been opened by a few courts that have allowed polygraph results to be heard by the judge who must determine whether or not a new trial is warranted.

In the leading case, *People v. Barber*,[156] the high court in Michigan set forth guidelines for the use of polygraph results at new trial hearings, while reiterating that Michigan law does not permit polygraph results at the trial itself. The defendant in *Barber* had been convicted of extortion, largely on the testimony of the victim and her husband. Later, he moved for a new trial on the grounds that "newly discovered evidence" showed that the husband had given perjured testimony at the trial. Since proof that a defendant had been convicted by the use of perjured testimony is grounds for a new trial in Michigan, the credibility of this newly discovered evidence was critical to the defendant's hopes for a new trial. The new evidence consisted of the

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154. Derrington v. United States, 488 A.2d 1314 (D.C. 1985); Tafero v. State, 440 So. 2d 350 (Fla. 1983).

155. People v. Cornille, 95 Ill. 2d 497, 448 N.E.2d 857 (1983) (antithetical to our system of justice not to grant a new trial for a defendant when it is convincingly established that he was convicted on the basis of false testimony). *Accord* Fugitt v. State, 251 Ga. 451, 307 S.E.2d 471 (1983) (new trial granted where witnesses' testimony was pure fabrication). *But see* Drake v. State, 248 Ga. 891, 287 S.E.2d 180 (1982) (post trial declaration by state's witness that his former testimony was false was not ground for a new trial).

156. People v. Barbara, 400 Mich. 352, 255 N.W.2d 171 (1977).

testimony of two witnesses who had not testified at the original trial, and proof that one of the two had "passed" a polygraph examination.

The high court upheld the admissibility of the polygraph evidence, giving several reasons for doing so. First, the court reasoned that a new trial hearing is not a trial, but is rather a kind of "preliminary proceeding" in which the defendant's guilt or innocence is not at issue, and the judge is not bound by the usual rules of evidence, but can receive affidavits and other data which would be inadmissible at trial. Thus, the fact that polygraph evidence is not admissible at trial in Michigan was no bar to its use at post-trial hearings and its use at such hearings would not be a drastic innovation.[157] Second, the court set forth strict rules that would protect defendants: the results could only be used on behalf of the defendant; the tests must have been taken voluntarily; the court must pass on the qualifications of the expert, and on the quality of the equipment and procedure used; all knowledge of the test would be kept from the trier of fact, either judge or jury, on retrial; and the test would be admissible only to bolster the credibility of a *new* witness.[158]

The Michigan decision was an extremely tentative one. Polygraph evidence obviously is thought to have some validity, but not enough validity to allow a jury—or even a trial judge—to hear it; appeals from its discretionary admission at post trial hearings are restricted by limiting its use to use on behalf of the defendant. Finally, the requirement that the test be admissible only to bolster the credibility of a new witness is so restrictive as to render the polygraph useless in the one common situation where the credibility of a witness is most problematic: that is, when the witness recants. Why prohibit evidence to evaluate the credibility of a witness who claims to have lied under oath, when the alternative is to allow judgment to rest on the experience and instincts of a single person, the trial judge?

Tentative as the Michigan decision is, it is more radical than most. Few states have chosen to follow the lead of Michigan, with most continuing to exclude polygraph evidence from new trial hearings, as well as from trials themselves.[159] Still, the door has been opened a crack, and there is room for it to be opened further.

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157. *Id.* at 411, 255 N.W.2d at 197.

158. *Id.* at 412-14, 255 N.W.2d at 198.

159. There are only a few reported decisions in which other states have allowed the use of polygraph evidence at a new trial hearing. *See* State v. Catanese, 368 So. 2d 975 (La. 1979); State v. Yodsnukis, 281 N.W.2d 255 (N.D. 1979). *See also* Commonwealth v. DiLegio, 387 Mass. 394, 439 N.E.2d 807 (1982) (a case involving the use of polygraph

C. Other Innovations at Hearings for New Trial

Some of the reforms proposed in the way that child witnesses are treated at trial might also be useful in assisting courts in determining what to do when a child victim recants. If a child victim is permitted to testify by videotape deposition, instead of by live testimony, it is possible to preserve a far better record of the child's statement than that provided by an ordinary transcript of the trial. The judge determining whether or not to grant a new trial would thus have the benefit of viewing the earlier videotape, as well as current testimony, before deciding what to do.

CONCLUSIONS

The adversary system as a method of ascertaining truth depends largely on the ability of judges and juries to evaluate the credibility of witnesses called to give testimony in court. Traditionally, courts have been reluctant to look to experts for assistance in such evaluations. As psychologists and other experts add to our body of knowledge about the way in which human beings think, remember, react, and communicate, the possibilities increase for enhancing the truth-seeking abilities of judges and jurors by drawing on the knowledge of such experts to help evaluate live witness testimony.

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evidence at trial, in which the court dropped a footnote suggesting that it might permit the use of such evidence at a new trial hearing). Most courts continue to disallow the use of polygraph evidence at hearings for a new trial. *See, e.g.,* People v. Hilliard, 109 Ill. App. 3d 797, 441 N.E.2d 135 (1982) (polygraph inadmissible at post-conviction hearing to determine the validity of recantation by prosecution witness). *Accord* People v. Cihlar, 125 Ill. App. 3d 204, 465 N.E.2d 625 (1984).