SCHOOL OF LAW
CASE WESTERN RESERVE UNIVERSITY

Case Western Reserve Law Review

Volume 40 | Issue 1

1989

On Common Sense and the Evaluation of Witness Credibility

Steven I. Friedland

ON COMMON SENSE AND THE EVALUATION OF WITNESS CREDIBILITY

*Steven I. Friedland**

The common law's dependence on the common sense of jurors for determining witness credibility has been the subject of widespread criticism in the psychological literature. The author examines this criticism and the effect that admitting expert testimony or providing special jury instructions about witness credibility would have on the American judicial system. He concludes that the traditional approach which excludes expert testimony and special instructions should persist except in certain narrowly defined circumstances. The author proposes a new rule of evidence that defines those circumstances.

"If there is ever devised a psychological test for the valuation of witnesses, the law will run to meet it."[1]

IN THE AMERICAN criminal justice system, the jury[2] evalu-

---

* Associate Professor of Law, Nova University Center for the Study of Law; B.A., State University of New York at Binghamton (1978); J.D., Harvard Law School (1981).

I wish to extend special thanks to Gayle Coleman and Brent Moody for their assistance in the preparation of this Article and to Tony Chase, Michael Flynn, Kerri Barsh, Joel Mintz, Michael Shames, Brian Cutler, Lilly Levi and Randolph Braccialarghe for their useful comments on earlier drafts.

1. 3A J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 875 n.1 (rev. ed. 1970).

2. Criminal trials are jury trials, except when (1) the defendant knowingly and voluntarily waives his sixth-amendment right to a jury, *e.g.*, Singleton v. State, 288 Ala. 519, 262 So. 2d 768 (1971) (With the consent of the State and the court, the defendant, charged with a noncapital felony, may waive a jury trial, enter a plea of not guilty, and be tried by a circuit judge without a jury.); State v. Long, 408 So. 2d 1221 (La. 1982) (When a defendant was personally informed by the court of his right to a jury trial and the judge accepted the defendant's waiver, the waiver was made knowingly and voluntarily and, therefore, was operative), or (2) the maximum sentence for the charge is six months or less, *e.g.*, Landry v. Hoepfner, 840 F.2d 1201 (5th Cir. 1988) (The United States Constitution does not require a right of trial by jury for "petty offenses."); Brookens v. Committee on Unauth. Practice of Law, 538 A.2d 1120 (D.C. 1988) (The right to a jury trial in contempt proceedings is limited to those cases resulting in imprisonment for more than six months.).

ates witness credibility.[3] Whether the witness is an eyewitness to an alleged robbery,[4] an expert on accounting procedures,[5] or a complainant in a sexual abuse case,[6] jurors must determine if they believe the witness. Jurors are expected to make credibility decisions based on their common sense, which is also termed intuition[7] or experience.[8] This concept of common sense is considered essential to the jury's task. When jurors exercise their common sense in evaluating a witness' testimony, a full and fair credibility determination is presumed to follow.[9] Special assistance from a judge or expert, therefore, would be superfluous[10] and invade the exclusive province of the jury.[11]

In recent years, the accuracy of common sense credibility assessments by jurors has been the subject of considerable scrutiny. First, the Supreme Court of the United States acknowledged that

---

3. *E.g.*, State v. Myers, 382 N.W.2d 91 (Iowa 1986); Commonwealth v. O'Sears, 466 Pa. 224, 352 A.2d 30 (1976).

It is the judge's task, however, to rule on witness competency. *E.g.*, FED. R. EVID. 104(a). In federal courts, "[e]very person is competent to be a witness except as otherwise provided in [the Federal Rules of Evidence]." FED. R. EVID. 601. In many state courts, the judge may exclude witnesses, such as children or the mentally impaired, as incompetent under certain circumstances. *See, e.g.*, State v. Struss, 404 N.W.2d 811, 814 (Minn. Ct. App. 1987) (defining the circumstances in which a court may find a child under ten years of age incompetent to testify as when a child "lacks capacity to remember or to relate truthfully facts respecting which [he is] examined").

4. *E.g.*, Walker v. Engle, 703 F.2d 959 (6th Cir. 1983); People v. Davis, 144 A.D.2d 379, 533 N.Y.S.2d 965 (1988); State v. Brown, 549 A.2d 1373 (R.I. 1988).

5. *E.g.*, United States v. Black, 644 F.2d 445 (5th Cir. 1981); Patterson v. Commonwealth, 3 Va. App. 1, 348 S.E.2d 285 (1986).

6. *E.g.*, State v. Myers, 382 N.W.2d 91 (Iowa 1986).

7. *E.g.*, Kaplan, *Decision Theory and the Factfinding Process*, 20 STAN. L. REV. 1065, 1091 (1968) (concluding that the use of statistical decision theory to determine witness credibility would be unbearably complicated if it was not left to a "factfinding body that could reach intuitive judgments based at least in part on its own experience").

8. *E.g.*, Barnes v. United States, 412 U.S. 837 (1973) (The jury could use its common sense and experience in deciding that the defendant knew he had possession of stolen property.).

9. *See* Commonwealth v. Francis, 390 Mass. 89, 453 N.E.2d 1204 (1983) (Jurors' common sense enables them to fully and fairly assess eyewitness testimony without the aid of expert testimony on memory functions.).

10. Cross-examination by counsel, argument from counsel and observations of the witness' demeanor are considered sufficient to enable jurors to make an accurate assessment of a witness' credibility. *Id.*

11. *E.g.*, State v. Kim, 64 Haw. 598, 602, 645 P.2d 1330, 1334 (1982); State v. Kekaualua, 50 Haw. 130, 132, 433 P.2d 131, 133 (1967); State v. Brodniak, 221 Mont. 212, 222, 718 P.2d 322, 329 (1986); Lessard v. State, 719 P.2d 227, 233 (Wyo. 1986); State v. Correra, 430 A.2d 1251, 1255 (R.I. 1981); United States v. Samara, 643 F.2d 701, 705 (10th Cir. 1981) (quoting United States v. Ward, 169 F.2d 460, 462 (3d Cir. 1948)).

eyewitness identification testimony may mislead the jury. Consequently, the Court shaped legal rules for line-ups and other identification procedures to minimize prejudice.[12] Second, key witnesses who recanted their testimony publicly after the conclusion of the trials in which they testified have received considerable publicity.[13] Finally, mounting empirical data from psychological studies suggest that lay persons such as jurors inadequately evaluate the testimony of others.[14] These psychological studies, in effect, suggest that common sense is a myth.

The growing awareness of the alleged inaccuracy of juror credibility assessments based exclusively on common sense has led lawyers to make proffers of expert psychological testimony[15] and ask for special jury instructions[16] concerning witness credibility. These proffers have occurred predominantly in criminal cases involving such issues as the battered woman's syndrome[17] and the

---

12. *E.g.*, Manson v. Braithwaite, 432 U.S. 98 (1977) (Identification testimony is admissible only if it is reliable as determined by various, enumerated factors.); United States v. Wade, 388 U.S. 218, 228-29 (1967) (A criminal defendant is entitled to counsel at a post-indictment line-up because, *inter alia*, "the vagaries of eyewitness identification are well known; the annals of criminal law are rife with instances of mistaken identification.").

13. *E.g.*, Frank v. State, 142 Ga. 617, 83 S.E. 233 (1914) (involving the recantation of testimony almost 50 years after the trial); State v. Dotson, 163 Ill. App. 3d 419, 516 N.E.2d 718 (1987) (involving the celebrated 1985 recantation of purported rape victim Kathleen Coswell Webb, six years after trial).

14. Greer, *Anything But the Truth? The Reliability of Testimony in Criminal Trials*, 11 BRIT. J. CRIMINOLOGY 131, 133-35 (1971) (discussing several studies by legal scholars which demonstrate the inaccuracy of juries in evaluating eyewitness testimony).

15. The subject matter of the testimony usually concerns testimonial capacities: memory, perception, and narration. *See generally* Brigham, *The Accuracy of Eyewitness Evidence: How Do Attorneys See It?*, 55 FLA. B.J. 714, 720-21 (1981) (suggesting use of expert witnesses on the accuracy of eyewitness testimony would help jurors focus on factors found critically important in making a correct identification).

This testimony focuses most often on the selectivity of perception, cross-racial effects on identification, the lack of correlation between a witness' level of confidence and the reliability of her identification, and the effect of repeated viewings. *E.g.*, People v. Brooks, 128 Misc. 2d 608, 610, 490 N.Y.S.2d 692, 694-95 (West. Cty. Ct. 1985) ("[A]dmission of the proffered testimony, when limited to an explication of the factors which studies have shown are relevant to making a reliable identification, is proper expert testimony and will enhance the ability of the jury to reach its decision in this case.").

Some psychologists have been retained in a considerable number of cases. *E.g.* United States v. Smith, 736 F.2d 1103, 1106 (6th Cir. 1984) ("Dr. Fulero and another expert in the field, Dr. Loftus, have appeared as experts in over 60 criminal cases.").

16. *E.g.*, United States v. Telfaire, 469 F.2d 552, 558-59 (D.C. Cir. 1972) (containing sample jury instructions).

17. *E.g.*, State v. Kelly, 97 N.J. 178, 478 A.2d 364 (1984) (Trial court held to have improperly excluded expert testimony offered to prove the state of mind of the defendant claiming the battered woman's syndrome as a defense to her murder charge.).

unreliability of eyewitnesses,[18] although experts who would testify simply about "memory" have also been offered as witnesses.[19] Most courts have rejected the proffered testimony and instructions.[20] Such rejection is not surprising, since the use of psychological data runs counter to the traditional view that the jurors' common sense is the only mechanism necessary for assessing credibility. In a small but growing minority of jurisdictions, however, courts have permitted expert psychological witnesses or used special jury instructions to educate jurors about the evaluation of credibility, and control their discretion in credibility matters.[21]

The reasons courts use to support the admission or exclusion of psychological data vary considerably.[22] Instead of establishing a stable and acceptable relationship between intuitive and empirically assisted credibility evaluations, the judicial response has

---

18. *E.g.*, United States v. Downing, 753 F.2d 1224 (3d Cir. 1985) (Court held that expert testimony concerning the unreliability of eyewitnesses should be allowed when meeting standard of Fed. R. Evid. § 702. Eyewitnesses are subject to: diminishing memory of the facts; inaccuracy of perception and the distortion of one's subsequent recall due to stress; incorporating inaccurate information gathered after the event; "unconscious transfer" of visualization of defendant resulting in an incorrect identification in a line-up; unreliability of cross-racial identification; and inaccurate identification due to lighting, distance, and duration.); State v. Chapple, 135 Ariz. 281, 660 P.2d 1208 (1983) (The court held that expert testimony regarding unreliability of eyewitness should have been admitted where eyewitnesses identified defendant in a photo lineup over one year after the event occurred, recognizing the following factors in assessing the accuracy of identification: diminishing memory of the facts; the effect of stress upon perception; "unconscious transfer"; the assimilation of post-event information; and, the question of confidence and its relationship to accuracy.); *see generally* Loftus & Schneider, *Behold With Strange Surprise: Judicial Reactions To Expert Testimony Concerning Eyewitness Reliability*, 56 UMKC L. REV. 1 (1987) (examining the contradictions and conflicts involved in the admissibility of expert testimony for the unreliability of eyewitness testimony, and supporting the use of expert testimony in this area given the recent scientific advances and courts' new understanding of the psychological principles of such testimony).

19. *E.g.*, United States v. Affleck, 776 F.2d 1451, 1458 (10th Cir. 1985) (The trial court in a securities fraud case properly excluded expert testimony about the defendant's memory on the ground that an untrained layman could intelligently evaluate the evidence without expert assistance.). For a discussion of the *Affleck* case, see *infra* text accompanying notes 148-51.

20. *E.g.*, United States v. Christophe, 833 F.2d 1296 (9th Cir. 1987) (jurors are aware of the problems of eyewitness identification); *Affleck*, 776 F.2d 1451 (testimony of "memory" expert not admitted because jurors understand that witnesses forget); United States v. Fischer, 587 F.2d 365 (7th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979) (work in the field of ethnic eyewitness identification still inadequate, thus it does not qualify as specialized knowledge).

21. For further discussion of the use of expert testimony about credibility, see Ingulli, *Trial By Jury: Reflections On Witness Credibility, Expert Testimony, and Recantation*, 20 VAL. U.L. REV. 145 (1986).

22. *Infra* section III, pp. 188-209.

added to the long-standing controversy about the role of social science in the trial system.

This Article explores the tension between common sense-based and empirical evaluations of credibility. While the subject of the paper is the relationship between common sense and the empirical psychological approach generally, this Article uses the most common manifestation of this empiricism, expert psychological testimony, as representative of the empirical approach.

One of the most common arguments advanced in favor of excluding psychological experts and their data is that such evidence lacks utility. The expert allegedly reiterates what the jury already knows intuitively, and the existence of traditional safeguards, such as cross-examination, renders assistance to the jurors unnecessary. In addition, the evidence arguably creates unfair prejudice due to the unreliability of the data, its manner of communication, or the inability of the jury to evaluate it properly.

The Article's central thesis is that these doctrinal evidentiary arguments, although strong, are inadequate in resolving whether such evidence should be admitted. An alternative analytical approach, therefore, is necessary. Under this approach it becomes apparent that expert psychological assistance, while possibly promoting more accurate results, undermines the jury function of community representation. As a general rule, therefore, it must be excluded. The Article further concludes, however, that when a credibility assessment is central to the outcome of the case and corroborative evidence is largely or entirely lacking, psychological data should be admitted to further the policy of protecting the criminal defendant's presumption of innocence.

Section I discusses the basic concepts underlying the jury function generally, with emphasis on the criminal jury system,[23] credibility, and common sense. Section II describes the psychologists' critique of the traditional approach to credibility assessment. Section III examines how federal and state courts have treated the admissibility of empirical assistance to credibility evaluations and suggests that the rationales used for both the inclusion and exclusion of such expert testimony are unpersuasive and indeterminate. Section IV then explains that because of the inadequacy of the

23. Although the analysis in this paper is applicable to both civil and criminal cases, the focus will be on criminal matters because they raise significant constitutional and policy considerations that best reveal the difficulty of creating a coherent framework for evaluating witness credibility.

evidentiary doctrinal analysis, a different critique, based on policy considerations, is necessary to evaluate the propriety of assisting the jury on credibility questions. This alternative critique reverses the roles that common sense and empirically assisted credibility evaluations play today in the courts. Finally, in Section V, the Article offers a codification of its conclusions, embodied in a rule of evidence specifically designed to deal with common sense and psychological testimony on credibility assessments.

I. COMMON SENSE AND THE JURY FUNCTION

The jury system is the backbone of the American criminal process. In *Duncan v. Louisiana*,[24] Justice White noted that:

> A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. . . . The deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement qualifies for protection under the Due Process Clause of the Fourteenth Amendment . . . .[25]

The Court concluded that trial by jury in serious criminal cases[26] is a fundamental part of the American system of justice.[27]

---

24. 391 U.S. 145 (1968).

25. *Id.* at 155-56. Justice White, however, further noted: "Of course jury trial has 'its weaknesses and the potential of misuse.' " *Id.* at 156 (quoting Singer v. United States, 380 U.S. 24, 35 (1965)). He also remarked that: "We are aware of the long debate, especially in this century, among those who write about the administration of justice, as to the wisdom of permitting untrained laymen to determine the facts in civil and criminal proceedings." *Id.* at 156-57. Justice White then noted that the debate about the jury system is stronger in the context of civil juries as compared to criminal juries. *Id.* at 157.

26. *Id.* at 157-58. Later cases have held that the right to a jury trial exists for all felony cases as well as misdemeanor cases in which the defendant could receive a prison sentence of more than six months. *E.g.*, Baldwin v. New York, 399 U.S. 66, 69 (1969) (defining a nonpetty, jury-triable offense as a case "where imprisonment for more than six months is authorized").

27. *But see Duncan*, 391 U.S. at 172 (Harlan, J., dissenting) (arguing that the trial by jury is not so fundamental that it should be incorporated pursuant to the 14th amendment of the Constitution.). Justice Harlan reasoned that flexibility is warranted because of variations in local conditions, as in the size of the caseload and the ease of summoning jurors, and because other trial conditions concerning fairness also play a great role in the way a trial system should be structured. *Id.* at 193. Justice Harlan concluded, therefore, that the incorporation doctrine would be more of a straitjacket to the states if applied to jury trials than anything else. *Id.* at 175-76. Safeguards are available, he suggested, in the form of the political process and resort to the courts, to protect the fairness of trials. *Id.* at 193. He concluded that by requiring jury trials, the "Court has chosen to impose upon every State one means of trying criminal cases; it is a good means, but is not the only fair means, and it is not demonstrably better than the alternatives States might devise." *Id.*

This Section discusses the goals of the jury system, with emphasis on criminal cases. It also explores the meaning of credibility and common sense.

A. Objectives of the Jury System

1. Truth-finding

The American criminal justice system is often viewed primarily as a quest for truth.[28] The adversarial design of the system, in which opposing parties "fight" each other on questions of law and fact, is believed to promote the discovery of truth.[29] The jury's role is to weigh the evidence and arguments presented by the combatants and thereby reach the truth.

The rules of evidence, in large part, are designed to further the truth-seeking end of the criminal justice system. The admissibility of only relevant evidence maximizes the opportunity for jurors to determine accurately what happened.[30] The cross-examination of witnesses further ensures that jurors develop an accurate picture.[31] The admissibility of expert testimony that explains other evidence or provides additional information is also designed to assist the jury in achieving an accurate determination of the facts.[32]

The jury verdict is generally considered to be "a statement about what happened."[33] In essence, the verdict is treated as "a

---

28. As one commentator has stated:

> The men who compose our trial courts, judges and juries, in each law-suit conduct an intelligent inquiry into all the practically available evidence, in order to ascertain, as near as may be, the truth about the facts of that suit . . . . Such a method can yield no more than a guess, nevertheless an educated guess.

J. FRANK, COURTS ON TRIAL, MYTH AND REALITY IN AMERICAN JUSTICE 80 (1949); Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1360 (1985) ("A trial is ostensibly structured as a truth-seeking process concerned with justice for the parties.").

29. J. FRANK, *supra* note 28, at 80 ("Many lawyers maintain that the 'fight' theory and the 'truth' theory coincide. They think that the best way for a court to discover the facts in a suit is to have each side strive as hard as it can, in a keenly partisan spirit . . . .").

30. *See* FED. R. EVID. 402 (All relevant evidence is admissible unless excluded by another law.).

31. *See* Delaware v. Arsdall, 475 U.S. 673 (1986) (The defendant's right to cross-examine witnesses is protected by the Confrontation Clause of the sixth amendment, although failure to permit cross-examination may be harmless error.). FED. R. EVID. 611(b) (assuming a right of cross-examination, but limiting it to "the subject matter of the direct examination and matters affecting the credibility of the witness").

32. *See* FED. R. EVID. 702.

33. Nesson, *supra* note 28, at 1358 (the object of a verdict is to state a conclusion about a past event rather than a conclusion about the evidence.).

surrogate for discoverable truth."[34] While it may be impossible for a jury to reconstruct prior events with complete accuracy, the law acknowledges its confidence in the jury's evaluations by using non-quantifiable standards of proof such as "beyond a reasonable doubt."[35]

2. Dispute Resolution

The jury system also attempts to resolve disputes and provide finality, whether or not the actual truth has been discovered. Thus, when the parties agree to the disposition of any matter, no truth is sought with respect to that issue and the system is spared an exhaustive and time-consuming search for relevant evidence. In many disputes, moreover, the facts are simply not available. In such cases, burdens of persuasion and production declare the winner regardless of the lack of evidence. Statutes of limitations and rules excluding evidence that causes undue delay or constitutes a waste of time also serve the dispute resolution goal.[36]

3. Representation-Reinforcement

To a large degree, the jury is a symbol of democratic ideals. A representative jury symbolizes "[t]he common meaning of democracy, [which] is 'government or rule by the people, either directly or through elected representatives.' . . . [This] concept of democracy . . . refers to a method of governing that specifies who rules, or, in other words, who decides what values will control the

---

34. *Id.* at 1363-64 n.21.

35. The 'beyond a reasonable doubt standard' is not quantifiable. A sample jury instruction is illustrative:

> A reasonable doubt is not a possible doubt, a speculative, imaginary or forced doubt. Such a doubt must not influence you to return a verdict of not guilty if you have an abiding conviction of guilt. On the other hand, if, after carefully considering, comparing and weighing all the evidence, there is not an abiding conviction of guilt, or, if, having a conviction, it is one which is not stable but one which wavers and vacillates, then the case is not proved beyond every reasonable doubt and you must find the defendant not guilty because the doubt is reasonable. It is to the evidence introduced upon this trial, and to it alone, that you are to look for that proof. A reasonable doubt as to the guilt of the defendant may arise from the evidence, conflict in the evidence or the lack of evidence . . . .

FLORIDA SUPREME COURT, COMMITTEE ON STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES, FLORIDA STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES § 2.03 (1981).

36. *See, e.g.*, FED. R. EVID. 403 (excluding relevant evidence when probative value is substantially outweighed by considerations of undue delay and wasted time).

resolution of disputes."[37] The jury's representativeness is assured by the constitutional requirement that the jury contain a cross-section of the community in which the trial is held.[38] Thus, the trial result obtains validity not only because it defines the truth and resolves a dispute, but also because it is reinforced by the presumptive approval of the community. The jury system thereby generates confidence and trust in the criminal justice system as a whole.

Acting with the putative approval of the community, the jury that returns a guilty verdict determines that the defendant merits moral condemnation for his actions. Thus, the jury acts both as moralist and as fact-finder. "Moralists . . . purport to help courts make difficult moral choices by offering unadorned edicts on the goodness or badness of persons, acts, or rules of law."[39]

The jury as moralist is reflected in the jury's power to "nullify" the evidence before it. As one commentator noted:

> Under this doctrine the jury is expected to inject community values into its verdict even in derogation of the law created by legislature and described by the judge in instructions. This view of nullification prevailed at the time the United States Constitution was adopted. The Founding Fathers knew that, absent jury nullification, judicial tyranny not only was a possibility, but was a reality in the colonial experience. Although scholars continue to debate the historical and policy justifications for jury nullification, there can be no doubt that American juries exercise that power. Many established trial procedures insulate from judicial review all but a few of the most egregious examples of jury lawmaking." [40]

---

37. Gold, *Covert Advocacy: Reflections on the Use of Psychological Persuasion Techniques in the Courtroom*, 65 N.C.L. REV. 481, 498-99 (1987) (citation omitted).

38. The sixth amendment requires that juries be impartial. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." U.S. CONST. amend. VI. Courts have interpreted the sixth amendment's right of impartiality to require a cross-section of the population on juries. Taylor v. Louisiana, 419 U.S. 522, 530 (1975) (The Court concluded that juries are to include women and accepted "the fair-cross-section requirement as fundamental to the jury trial guaranteed by the Sixth Amendment and [we] are convinced that the requirement has solid foundation."); Akins v. Texas, 325 U.S. 398 (1945) (juries to include people regardless of their race); *see also* Gold, *supra* note 37, at 499 ("In theory, the jury is composed of individuals reflecting a representative cross-section of the people living in the community in which the case arises.").

39. Delgado & McAllen, *The Moralist as Expert Witness*, 62 B.U.L. REV. 869, 872 (1982).

40. Gold, *supra* note 37, at 498-500.

Actual public confidence in and acceptance of the jury's verdict are vital to the judicial system.[41] The truth-serving, dispute resolution and representation-reinforcement functions of the jury all contribute to public approval. If a criminal conviction is to serve a cathartic function for the community, the guilty verdict must generally receive actual community support.[42] Similarly, in civil cases, there can be no finality or enforcement of decisions without the public's approval.

Most of the jury's work is shielded from public view in order to promote community approval.[43] The secrecy of jury deliberations, for example, minimizes public scrutiny of the jury function. It insulates verdicts from criticism by protecting the jury's analysis and rationale. The jury verdict, moreover, is a general one, without any stated explanation for the decision. This generality further protects the jury's decision from reproach or second-guessing.

B. Credibility

Credibility is the value a jury will place on a witness' testimony. A credibility assessment depends on the perceived accuracy and truthfulness of the testimony. Jurors must evaluate the credibility of all witnesses, including eyewitnesses, expert witnesses (i.e. medical doctors), children, and even nontestifying witnesses whose hearsay statements are properly introduced for the jury's consideration.

For the purposes of this Article, "credibility" includes jury evaluations of a witness' demeanor, perception, memory, narration and sincerity. "Testimony on credibility" embraces comments that are directed specifically at another witness' accuracy or veracity as well as comments that implicitly corroborate or undermine the other witness' accuracy or veracity. Testimony about the rape trauma and battered person syndromes are based on psychological assessments of others and fall within the definition of credibility testimony.[44] Testimony about the premenstrual stress syndrome,

---

41. Nesson, *supra* note 28, at 1363, 1367 (acceptance of jury verdict as a statement about a past event required to believe that consequent punishment is justified).

42. Such catharsis is considered necessary on a psychoanalytic level to prevent the community from falling prey to vigilantism. *See* O. RANK, MODERN EDUCATION 12 (1932).

43. *See* Nesson, *supra* note 28, at 1365-69.

44. On the admissibility of psychological expert testimony in rape trauma syndrome cases, see Massaro, *Experts, Psychology, Credibility and Rape: The Rape Trauma Syn-*

however, a primarily physiological and not psychological state, does not fall within the definition.[45]

Most expert psychological testimony about credibility touches the credibility of particular witnesses only indirectly.[46] Indirect psychological testimony on credibility takes several forms. Experts may refer to specific characteristics or behavioral responses common to a group of individuals such as battered children or eyewitnesses. These behavioral patterns may have been discovered through observing or working with the group studied, or through clinical studies.

Testimony may also cover a particular scientific syndrome that describes and explains certain behavioral responses, such as the rape trauma syndrome or battered woman's syndrome.[47] Such testimony often includes a general exposition of psychological or other principles that combine to form the syndrome. Occasionally, an expert may testify directly on a witness' actions, as when an expert is called to explain the actions of a defendant who claims the battered woman's defense.[48] The common thread to all expert testimony, direct or indirect, however, is that it is introduced to enable jurors to better understand and evaluate the motives or behavior of a witness.[49] Of course, even testimony that is indirect and general is not necessarily objective. General testimony is still

---

drome and Implications for Expert Psychological Testimony, 69 MINN L. REV. 395 (1985); 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) [hereinafter VIRGINIA Note]. On the admissibility of psychological expert testimony to aid the jury in determining the credibility of a self-defense plea in battered child syndrome cases, see Hicks, *Admissibility of Expert Testimony on the Psychology of the Battered Child*, 11 LAW & PSYCHOLOGY REV. 103 (1987).

45. For a discussion of why expert testimony should be admitted to substantiate a defense of premenstrual stress syndrome in criminal cases, see Note, *Premenstrual Stress Syndrome as a Defense in Criminal Cases*, 1983 DUKE L.J. 176 (1983).

46. *See, e.g.*, United States v. Hiss, 88 F. Supp. 559 (S.D.N.Y.), *aff'd*, 185 F.2d 822 (2d Cir. 1950), *cert. denied*, 340 U.S. 948 (1951) (psychiatric testimony to impeach the credibility of the government's key witness in a perjury trial held admissible). For a detailed discussion of the case, see A. WEINSTEIN, PERJURY AND THE HISS-CHAMBERS CASE (1978).

47. *See supra* notes 17 and 44.

48. *See supra* note 17.

49. Expert testimony on credibility is not always used, however. In one case, for example, the prosecutor for the state elicited the testimony of several witnesses that defendant Richardson lacked remorse in the hours after he had killed his seven children by poisoning them. This testimony seemed especially damaging. The defense called no medical experts who might have testified that lack of remorse was a normal reaction. Flowers & Gallagher, *Poisoned Justice*, Miami Herald, Dec. 11, 1988 (Tropic), at 21, col. 2.

used to bolster or diminish the jurors' opinions about the credibility of one or more witnesses.

C. Common Sense

Attempts to define common sense with precision have proven futile.[50] The continued survival of the notion of common sense may be due to the fact that a precise definition is neither needed nor available. If common sense is used to assess credibility because jurors are responsible for determining guilt and innocence on behalf of the community, the concept of common sense is synonymous with "the average community viewpoint." Common sense embraces, therefore, the broad disparity of experiences and approaches to credibility that may exist in a representative cross-section of the community. Such a concept defies simple definition.

There are two possible justifications for the judicial system's reliance on the jurors' common sense to determine credibility. First, on a practical level, jurors, as mature citizens, can be expected to have made many credibility assessments in the contexts of their jobs, social relationships, formal education and other aspects of everyday life. Second, on a normative level, reliance on common sense enhances the representation-reinforcement goal of the jury system. Because the jurors represent a cross-section of the community,[51] their common sense is representative of the morals, values and experience of the community. Thus, the use of common sense ensures democratic verdicts and enhances the perceived and actual fairness of the judicial system.

1. Applying Common Sense

To assess the credibility of a witness, jurors apply their common sense in different ways. One method is the use of analogy. A juror may compare the statements of the witness to the juror's own experiences or education. The witness may testify, for example, that it took a certain amount of time to walk a city block. The juror may compare that statement with her own experience of walking city blocks. A juror may also compare the characteristics

---

50. For example, common sense has been defined as "[t]he endowment of natural intelligence possessed by rational beings; ordinary, normal or average understanding; the plain wisdom which is everyone's inheritance." 3 THE OXFORD ENGLISH DICTIONARY 573 (2d ed. 1989). This definition does not shed much light on the subject.

51. *Supra* note 38 and accompanying text.

of the particular witness to what he believes is typical of a person in the witness' situation. Thus, a witness who testifies about a personal tragedy may be judged against the reaction expected of an individual who has suffered that or similar harm.

Similarly, a juror's education, in the form of information received from others, may provide a basis for comparison. The juror may measure what the witness says against information the juror has received from books, television, friends, teachers or others.

Jurors may also focus on a witness' demeanor in making comparisons. Demeanor may consist of nonverbal cues such as body language, manner of dress, accent, manner of speech, or other intangibles.[52] The juror may form subjective impressions about the witness' veracity from observation of his demeanor while testifying.[53]

The use of common sense to assess credibility may require, however, no analogy whatsoever.[54] Jurors are not required to use their common sense in any particular form or manner. Thus, the application of common sense to credibility may be an instinct, a hunch or an unarticulable gut reaction.

2. The Scope of Common Sense

The scope of the jurors' common sense is determined by the court. Courts have drawn the parameters broadly, although they have imposed various limitations. If a court decides that a credibility issue lies outside the realm of common experience, assistance in the form of expert testimony or special jury instructions may be permissible.[55]

---

52. *See* Ingulli, *supra* note 21, at 147.

53. *Id.*; *see also* Delaware V. Fernsterer, 474 U.S. 15, 20 (1985) (Even when a witness cannot recall the basis of his opinion, the factfinder can assess the witness' demeanor.).

54. *Cf.* C. NORRIS, DERRIDA 49 (1987) (Where a mimic performance had no prior model, "then there is simply no appealing to a concept . . . that would always point back to a truth or reality beyond the mere play of textual inscription.").

55. "The decision of whether or not to admit expert testimony respecting credibility will, of course, rest in the discretion of the trial court and will not be overturned on appeal unless it is manifestly erroneous or a clear abuse of discretion." State v. Kim, 64 Haw. 598, 607, 645 P.2d 1330, 1338 (1982). Moreover,

> [e]xpert testimony respecting witness credibility is not, of course, appropriate to all situations. In most cases, the common experience of the jury should suffice as a basis for assessments of credibility. In such cases, even though an expert's assessment of credibility may arguably provide the jury with potentially useful information, the possibility that the jury might be unduly influenced by an expert's opinion would mitigate against admission. When, however, the nature of a witness's mental or physical condition is such that the common experience of the

II. THE PSYCHOLOGICAL CRITIQUE OF EVALUATING CREDIBILITY

The results of psychological studies on, and systematic observations about, witnesses suggest that common sense-based beliefs about witnesses are deficient.[56] The studies have brought to light counter-intuitive factors that can affect credibility assessment and do not form a part of the lay understanding of credibility.[57] These factors are discussed below.

A. Psychological Assessments of Credibility Evaluations

The reliability of a "fact" witness eyewitness identification generally "depends on [the witness'] capacity to perceive, remember, and articulate what occurs before him."[58] It is widely accepted that the processes of perception, memory, and narration may have defects that affect the reliability of the witness.[59] The

---

> jury may represent a less than adequate foundation for assessing the credibility of a witness, the testimony of an expert is far more likely to be of value, and thus more likely to be admissible when its probative value is measured against its prejudicial effects. Other courts and commentators have recognized such testimony in situations to include those involving the allegedly mentally ill witness and the mentally retarded witness and . . . child complainants whose claims are substantially uncorroborated.

Id. at 607, 645 P.2d at 1337-38 (citing People v. Russel, 69 Cal. 2d 187, 443 P.2d 794, 70 Cal. Rptr. 210, *cert. denied*, 393 U.S. 864 (1968) (discussing use of psychiatric testimony where a child's sex offense claims were substantially uncorroborated); People v. Parks, 41 N.Y.2d 36, 359 N.E.2d 358, 390 N.Y.S.2d 848 (1976) (concerning expert testimony in the form of a psychiatric exam for child witnesses); Saxe, *Psychiatry, Psychoanalysis and the Credibility of Witnesses*, 45 NOTRE DAME LAW. 238 (1970) (concerning the use of expert testimony where witnesses have psychoses, neuroses, antisocial behavior, mental retardation or suffer from alcoholism or drug dependence).).

56. Greer, *supra* note 14, at 133-35 (discussing several studies by legal scholars which demonstrate the inaccuracy of juries in evaluating eyewitness testimony). In addition to psychologists, others, including lawyers, have performed studies or experiments. In 1905, for example, Wigmore conducted a series of "Testimonial and Verdict Experiments" at Northwestern University Law School in Chicago. *See id.* at 134-35.

57. *E.g.*, Cutler, Penrod & Stuve, *Juror Decision Making in Eyewitness Identification Cases*, 12 LAW & HUM. BEHAV. 41, 53-54 (1988) (concluding that jurors lack the knowledge and skills to assess the reliability of eyewitness identification); *see infra* text accompanying notes 83-85. *Cf.* Greer, *supra* note 14, at 131-32 (criticizing the hearsay exception for dying declarations as based on a "judicial hunch").

58. Comment, *Unreliable Eyewitness Evidence: The Expert Psychologist and the Defense in Criminal Cases*, 45 LA. L. REV. 721, 723 (1985) [hereinafter LOUISIANA Comment].

59. *See, e.g.*, FED. R. EVID. 801 advisory committee's note (Nonverbal conduct which was not intended as an assertion by the actor is not hearsay, even though "evidence of this character is untested with respect to the perception, memory and narration . . . of the actor.").

nature and extent of these defects have become the focal point of much psychological research.[60]

In a typical study on the question of eyewitness identification, performed in 1988, subjects acted as jurors in a mock case involving a defendant accused of robbing a liquor store.[61] The primary evidence against the defendant was the victim's eyewitness identification. The jurors were tested for various factors affecting their assessment of the victim's credibility.[62] The authors concluded that "jurors do not possess the knowledge and skills necessary to adequately assess the reliability of eyewitness identifications."[63]

This and other studies suggest two major deficiencies in the use of jurors' common sense to decide questions of credibility. First, jurors sometimes lack the necessary experience with which to judge the veracity of a witness' assertions.[64] This deficiency exists primarily with respect to such witnesses as the mentally ill and mentally retarded,[65] rape victims[66] and child sexual abuse victims,[67] but may also exist with respect to any witness.[68]

Second, even when jurors have a considerable pool of experience relating to a witness' mental or physical condition, that experience may contain misconceptions or errors that lead to distortions in assessment.[69] Irrational factors such as discrimination, prejudice or myth may unduly influence a witness' determination

---

60. *E.g.*, LOUISIANA Comment, *supra* note 58, at 723.

61. Cutler, Penrod, & Stuve, *supra* note 57, at 43.

62. These factors were: disguise; weapon visibility; violence; retention interval; mugshot search; lineup instructions; lineup size; similarity of lineup members; voice samples; and witness confidence. *Id.* at 44-45.

63. *Id.* at 54.

64. Sanders, *Expert Witnesses in Eyewitness Facial Identification Cases*, 17 TEX. TECH L. REV. 1409, 1439 (1986).

65. *See* Saxe, *supra* note 55, at 247. On the admissibility of expert testimony to determine a mentally retarded person's capacity to testify, see People v. Parks, 41 N.Y.2d 36, 48-49, 359 N.E.2d 358, 368, 390 N.Y.S.2d 848, 858 (1976);

66. On rape and the rape trauma syndrome, see State v. Huey, 145 Ariz. 59, 63, 699 P.2d 1290, 1294 (1985); People v. Bledsoe, 36 Cal. 3d 236, 246-251, 681 P.2d 291, 298-301, 203 Cal. Rptr. 450, 457-60 (1984); State v. Brodniak, 718 P.2d 322 (Mont. 1986).

67. On the jury's difficulties in assessing the credibility of child abuse victims, see United States v. St. Pierre, 812 F.2d 417, 420 (8th Cir. 1987); State v. Linsey, 149 Ariz. 472, 475, 720 P.2d 73, 76 (1986); State v. Myers, 359 N.W.2d 604, 610 (Minn. 1984); State v. Middleton, 294 Or. 427, 436, 657 P.2d 1215, 1219-20 (1983).

68. *See* Cutler, Penrod & Stuve, *supra* note 57, at 54.

69. Common errors are misjudging the base rates of identification, Sanders, *supra* note 64, at 1440, and over-estimating the accuracy of eyewitnesses. *Id.* at 1441. It has been shown that jurors place great reliance on what are known as indicator variables. *Id.* at 1443. For example, jurors interpret witness certainty to indicate an accurate identification. *Id.* at 1444.

of truthfulness or accuracy and, in turn, the jurors' assessment of that witness.[70] This second type of deficiency applies to all witnesses, but is perhaps best typified by eyewitness testimony. This type has been given the most attention by psychologists and is treated first below.

1. Juror Misconceptions: The Prevalent Deficiency

According to psychological studies, juror misconceptions may occur at each step of the witness evaluation process.[71] This process is comprised of stages defined by the various testimonial capacities of a witness, including the cognitive processes of perception,[72] memory,[73] narration and sincerity.[74] At the perception stage, the witness processes various stimuli using her senses of sight, hearing, smell and touch. At the memory stage, the witness stores perceived information and recalls it. Having retrieved the information, the witness relates the contents of the memory at the narration stage.

In assessing credibility, the juror considers whether any defects or deficiencies occurred in the witness' perception, memory or narration. Finally, the juror considers whether the witness' demeanor suggests that the witness is sincere. Misconceptions that occur at three of these stages — perception, memory and sincerity — are discussed next.

i. Juror Errors in Evaluating Witness Perception

Psychological studies indicate that juror stereotypes and assumptions about perception differ considerably from the actual process of perception. This leads to erroneous credibility assessments because jurors are unable to integrate and understand witness responses accurately.[75]

---

70. *Cf.* A. DERSHOWITZ, THE BEST DEFENSE xxi (1982) (stating that judges believe "[a]lmost all criminal defendants are, in fact, guilty").

71. *See infra* text accompanying notes 75-123.

72. *See infra* text accompanying notes 75-89.

73. *See infra* text accompanying notes 90-111.

74. *See infra* text accompanying notes 112-123.

75. Factors that affect perception can be grouped into two categories: those inherent in the event; and those inherent in the observer or witness. E. LOFTUS, EYEWITNESS TESTIMONY 22 (1979). Factors inherent in the event include the duration of the perception, the frequency of the perception, the type of facts perceived and the presence of violence in the event. *Id.* at 23-32. The length of time during which an observer perceives an event directly correlates with the accuracy of that perception. *Id.* at 23; Laughery, *Recognition of*

Perception is the total amalgam of sensory signals received and then processed by an individual at any one time. The psychological data suggest that many factors affect perception. One significant factor is the volume of information to be processed. Perception "is highly selective because the number of signals or amount of information impinging upon the senses is so great that the mind can process only a small fraction of the incoming data."[76] The result is an incomplete acquisition of data.[77]

Another factor influencing perception is that some witnesses fill in the gaps in their perception.[78] Because people are motivated by the desire to live up to others' expectations and desires,[79] witnesses often compensate for their incomplete acquisition of data by filling in details based on inferences and personal experiences.[80] The inferences fill in gaps with logical but possibly incorrect information.[81] Repeated questioning of a witness in the interrogation process, for example, may produce inconsistent answers because the witness thinks that his first answer was not satisfactory. This tendency, however, may well not be common knowledge, and jurors probably fail to take it into account.

Another factor, also counter-intuitive, is that the type of fact perceived affects the reliability of perception.[82] People tend to have great difficulty estimating duration, time, speed and distance.[83] Moreover, not all errors in perception are consistent. Most errors involving height and weight, for example, have no predictability.[84] Estimates of duration, however, tend to be too great

---

Human Faces: Effects of Target Exposure Time, Target Position, Pose Position, and Type of Photograph, 55 J. APPLIED PSYCHOLOGY 477, 480 (1971). The frequency of perception also corresponds with its accuracy. LOUISIANA Comment, *supra* note 58, at 727. The more opportunities the witness had to perceive an event, the more likely that the witness has perceived it accurately. *Id.*

76. LOUISIANA Comment, *supra* note 58, at 723.

77. A person who witnesses a crime, for example, has "one-shot perception," which is like seeing a single frame of a film. *Id.* at 724. Thus, the selecting and storing of information occurs without an opportunity to stabilize memory. *Id.*

78. *Id.* at 721.

79. *Id.* at 723.

80. *Id.* at 724.

81. *Id.* at 724.

82. E. LOFTUS, *supra* note 75, at 27-31.

83. *Id.*

84. An exception is that such errors do have some predictability if the post-event suggestions are known. *See* Christiansen, Ochalek & Sweeney, *Influencing Eyewitness Descriptions*, 7 LAW & HUM. BEHAV. 59, 64 (1983).

rather than too small.[85]

Other factors associated with the observer may significantly affect the accuracy of perception.[86] These factors include stress[87] and personal expectations.[88] While common sense probably makes jurors somewhat aware of such factors, studies have shown that these factors may be more important in evaluating credibility than common sense dictates.[89]

ii. Juror Errors in Evaluating Witness Memory

Scientific examination has shown that many aspects of memory deviate from common-sense or lay experience. Psychological studies indicate that, contrary to popular belief, "human memory does not operate like a camera, gathering every detail for later recall exactly as it was perceived. Rather, it is an active, reconstructive process in which images are constantly altered through the integration of new experiences and interpretations."[90] Like perception, memory is an unconscious process.[91] Jurors may not know that the unconscious processes of memory — encoding, retention and retrieval — can alter the information originally

---

85. E. LOFTUS, *supra* note 75, at 31. Another factor found by researchers to be relevant to the accuracy of perception is the presence of violence. *Id.* When an event does not contain violence, witnesses to the event apparently provide a more accurate description. This increased accuracy is attributed to a decreased level of arousal or excitement. Comment, *supra* note 58, at 728. Furthermore, the accuracy of recalling violent events declines as the number of perpetrators increases. *Id.*

86. "The factors which affect the reliability of eyewitness performance operate on both perception and memory, and are classified according to their source." Comment, *supra* note 58, at 725. Factors relating to the observer that pertain to the accuracy of the identification have been called "witness" factors; factors relating to the subject matter of the observation have been labeled "event" factors. E. LOFTUS, *supra* note 75, at 32.

87. E. LOFTUS, *supra* note 75, at 33-36.

88. *Id.* at 36-48. Hunters, for example, who observe and hear movement in a bush expect that the movement belongs to an animal. *Id.* at 36-37. People hearing noises in the dark frequently attribute such noises to evil circumstances.

Psychologists suggest that there are different sources creating the expectations. *Id.* A witness may expect certain perceptions based on acculturation or stereotypes, past specific experiences, personal prejudices or temporary or momentary stimuli. *Id.*

89. The role of stress, for example, has been studied by psychologists at least since 1908, when researchers Yerkes and Dodson noticed that an increase in emotional arousal had a negative impact on cognitive performance. E. LOFTUS, *supra* note 75, at 33. The Yerkes-Dodson law was originally formulated in studies with mice. Numerous other subsequent studies with humans indicate that the researchers' original results are applicable to human behavior as well. *Id.*

90. LOUISIANA Comment, *supra* note 58, at 724.

91. *Id.*

perceived.[92]

Other juror misconceptions exist. Jurors may misjudge the witness' memory by not compensating for the witness' expectations and stereotypes.[93] Furthermore, the witness may fill in gaps in memory.[94] Perhaps the most popular myth associated with memory is the belief that memory loss declines in equal increments through time.[95] Psychologists, in classic research dating to 1885,[96] suggest that memory loss does not occur gradually but instead occurs more rapidly immediately following the event.[97] This phenomenon, labeled the "forgetting curve," has been tested and confirmed in numerous studies.[98]

The way witnesses use post-event information is also likely to be foreign to jurors' intuition.[99] Witnesses often modify their own recollection of events through post-event discussions.[100] The information obtained through the discussions may be added to the original memory and alter it. This resulting memory may be slightly distorted or even totally incorrect. A post-event discussion may, for example, change the witness' recollection of the level of noise or violence of an event.[101]

Jurors may be unaware that the memory of a witness is greatly affected by the circumstances surrounding the retrieval of

---

92. *Id.*

93. *Id.* at 726.

94. Witnesses, due to social pressures or other reasons, tend to fill in the gaps of their memory through speculation about or modification of what they remember. E. LOFTUS, *supra* note 75, at 82-84; Buckhout, *Eyewitness Testimony*, 231 SCI. AM. 23, 27, 28 (Dec. 1974); *see infra* notes 99-101 and accompanying text.

In one experiment, for example, a "semi-dramatic" photograph was shown to subjects of varying backgrounds. In the photograph, a black male and a white male were standing and conversing. Despite the fact that only the white male was holding a razor, more than half of the subjects reported that the black man had been holding the razor, and several described the black man as "brandishing it wildly." LOUISIANA Comment, *supra* note 58, at 727; E. LOFTUS, *supra* note 75, at 38. The study concluded that people's expectations and stereotypes cause them to see and remember what they want to see or remember, even if the manipulations are not done consciously or in bad faith. E. LOFTUS, *supra* note 75, at 39; LOUISIANA Comment, *supra* note 58, at 726.

95. *See* E. LOFTUS, *supra* note 75, at 53 (suggesting that this belief is a myth).

96. H. EBBINGHAUS, MEMORY: A CONTRIBUTION TO EXPERIMENTAL PSYCHOLOGY (1964); E. Loftus, *supra* note 75, at 53.

97. E. LOFTUS, *supra* note 75, at 53.

98. *Id.*

99. *See* Christianson, Ochalek & Sweeney, *supra* note 84, at 64 (concluding that post-event information affects memory).

100. E. LOFTUS, *supra* note 75, at 54-78.

101. *Id.* at 70.

the information.[102] Factors such as whether the retrieval is stimulated by questions, who asks the questions, and the way the questions are asked[103] all may influence the nature of the information retrieved.[104] Modern scientific techniques, such as the polygraph test and hypnotism, are affected by the subjectivity of the questions asked and the power of suggestion. "Free narrative questions tend to produce more accurate but less complete responses, while direct, or controlled narrative questions tend to give lower accuracy but greater completeness."[105] Leading questions or questions with biased terms "enhance the opportunity for suggestion to fill gaps or replace poorly remembered details."[106]

Jurors may fail to consider that the subject matter of the testimony — such as testimony about an event involving criminal conduct — can affect memory.[107] Studies have shown that the accuracy of memory improves as the seriousness of the crime increases.[108] For example, "a witness may have better recall of the theft of an auto than of the theft of a pencil."[109] This is because "the less serious the event, the less attention and energy the witness is likely to devote to it."[110]

Jurors are also likely to apply the intuitive belief that inconsistencies in a witness' testimony indicate that it is inaccurate. Recent studies have shown, however, that there is no correlation between consistency and accuracy.[111]

In addition to errors in witness perception and memory, credibility assessments are affected by some errors in the perception

---

102. *Id.* at 89.

103. A. YARMEY, THE PSYCHOLOGY OF EYEWITNESS TESTIMONY 192-96 (1979) (discussing a 1909 study by Whipple, in which the same question was asked of subjects but in different forms reflecting various degrees of suggestiveness. The study demonstrated that the responses to the questions decreased in accuracy as suggestiveness increased.).

104. E. LOFTUS, *supra* note 75, at 108-09.

105. LOUISIANA Comment, *supra* note 58, at 728.

106. *Id.*

107. *Id.* at 727.

108. *Id.* at 728.

109. *Id.*

110. *Id.* The age of the witness can also affect his memory. Studies with mock jurors have suggested that elderly witnesses are substantially more likely to misidentify a subject than younger witnesses. Yarmey, *Age As a Factor in Eyewitness Memory*, in EYEWITNESS TESTIMONY 142, 152-53 (1984) (discussing Yarmey & Kent, *Eyewitness Identification by Elderly and Young Adults*, 4 LAW & HUM. BEHAV. 339 (1980) and Yarmey & Rashid, Eyewitness Identification by Elderly and Young Adults (1981) (unpublished manuscript)).

111. Geiselman & Padilla, *Cognitive Interviewing with Child Witnesses*, 16 J. POLICE SCI. & ADMIN. (in press Dec. 1988).

and memory of the jurors. Jurors are expected to listen passively to, perhaps, days of testimony and numerous witnesses. This task is made more difficult in jurisdictions where jurors are not permitted to take notes. Under these circumstances, the same defects that may affect the witnesses' testimony may distort the jurors' recollection of that testimony.

iii. Juror Errors in Evaluating Witness Sincerity

Psychological studies suggest that the sincerity of a witness is observable through nonverbal cues. Perhaps the most widely known and most controversial form of nonverbal evaluation of a declarant's sincerity is the polygraph or lie detector test. The modern version of the polygraph, which traces its ancestry back more than 2,000 years, measures autonomic physiological reactions, including heart rate, blood pressure, respiration, and perspiration, of a subject who has been asked a series of questions.[112] Differences in measurements are supposed to demonstrate whether the witness is truthful. Indeed, "[c]ontemporary lie-detection literature suggests that within certain specified limits physiological measures of deception do have scientific support."[113]

Other, more visible, nonverbal clues to sincerity exist in the form of a witness' demeanor.[114] A 1971 study indicates, for example, that deceit is generally associated with rigid posture and relaxed facial expressions.[115] Other experiments suggest that lying witnesses move their hands less, speak with higher pitched voices, and, even though they may control their facial expression, may reveal their deceit through foot and leg movements.[116] Given the complexity and subtlety of these nonverbal cues, an untrained observer, such as a juror, has "probably . . . no better than chance"[117] to assess accurately sincerity from nonverbal action.

Psychologists suggest that common misconceptions may further distort lay assessments of sincerity. The belief that a witness' confidence in her identification correlates with the reliability of the identification is perhaps the most glaring of these misconcep-

---

112. A. YARMEY, *supra* note 103, at 171.
113. *Id.*
114. *See id.* at 168.
115. *Id.* at 169 (referring to a 1971 study by Mehrabian).
116. *Id.* (referring to studies performed by Ekman (1969) and Schreider and Kintz (1977)).
117. *Id.*

tions.[118] This mistaken correlation often has a strong impact in eyewitness identification cases and is implicit in many jury instructions on eyewitness identification.[119]

Psychologists,[120] as well as philosophers,[121] have also examined the morality of lying and deception. Lying, particularly in the form of social "white lies," is perceived in our country as common, according to one study.[122] Such moral distinctions affect each juror's evaluations of sincerity, and can lead to distortions if the morality of the evaluating juror differs from that of the evaluated witness.[123]

2. Absence of Juror Experience

In many instances, juror error in using common sense is caused not so much by misconceptions about witness perception, memory and sincerity or defects in their own perception and memory, but by a lack of the background experience necessary to resolve the type of credibility question presented.[124] Many jurors, for example, may lack experience with which to assess the credibility of witnesses who suffer from mental retardation or mental illness. Others may have no experience of criminal acts or violent conduct. Familiarity gained through the media is not an adequate substitute for actual experience, because media images are second-hand images.

---

118. Convis, *Testifying About Testimony: Psychological Evidence on Perceptual and Memory Factors Affecting the Credibility of Testimony*, 21 DUQ. L. REV. 579, 584, 588 n. 43 (1983) (Because jurors are instructed to weigh the evidence as they see fit, their misguided assumption that confidence reflects accuracy is never corrected.); Deffenbacher, *Eyewitness Accuracy and Confidence*, 4 LAW & HUM. BEHAV. 243 (1980) (Both judge and jury rely on witness confidence to demonstrate accuracy.).

119. *See* Cutler, Penrod & Martens, *The Reliability of Eyewitness Identification: The Role of System and Estimator Variables*, 11 LAW & HUM. BEHAV. 233, 234 (1987). On the recent experimental literature that questions whether a meaningful or useful correlation exists between the accuracy of the prior description and of the subsequent identification, see Wells, *Verbal Descriptions of Faces From Memory: Are They Diagnostic of Identification Accuracy*, 70 J. APPLIED PSYCHOLOGY 619 (1985).

120. A. YARMEY, *supra* note 103, at 214 (discussing Kintz's 1977 study).

121. *See* S. BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE (1978) (for an insightful analysis of lying and deception in different contexts).

122. *See* YARMEY, *supra* note 103, at 214 (discussing Kintz).

123. *See supra* section I.C.1., pp. 176-77 (discussing how jurors may make credibility evaluations by making analogies to their own experience).

124. *See* YARMEY, *supra* note 103 at 215 (Kolhberg asserts that there are three basic levels of moral orientation: premoral, conventional role conformity, and self-accepted moral principles. All of these inform behavior, particularly the behavior of credibility evaluation.).

Even if some jurors have the requisite experience, the jury as a whole may arguably lack a commonality of values and standards. The idea that community members share common values may have been valid in an era when communities were small and self-contained. In the modern era, however, with transient populations and fewer geographical limits to define communities, the notion of a group of people defined by their community is rapidly becoming illusory. Today, cities melt into suburbs which melt into rural areas. Moreover, the increase in occupational specialization has narrowed the diversity of experience of many people and further diminished their commonality of understanding.

B. The Implications of the Psychological Critique to the Application of Jury Common Sense

The results of the psychological studies call into question the judicial system's reliance on common sense to assess the credibility of witnesses. Simply put, the studies systematically and effectively expose the notion of common sense as a myth. They reveal that lay persons rely on misconceptions and erroneous assumptions in assessing the credibility of others. These myths and misinterpretations are embodied in the concept of common sense and arguably not only permit, but also facilitate, erroneous assessments of credibility. If jurors must be selected from a cross-section of the community, the empirical data suggest that jurors could reach more accurate credibility evaluations if they were informed about the myths and misconceptions associated with common sense.

The conclusions drawn by this psychological critique rock the foundations of the jury system. Since jurors are, in effect, observing the re-creation of an act or dispute, defects in the ability of the jury to evaluate witnesses could easily undermine accurate or even acceptable juror decision-making. The significance of such conclusions lies in the potential for a psychologically designed reordering of the jury system. As one commentator remarked:

> Psychologists established a prima facie case at least for recognition by lawyers that they can contribute to the study of evidentiary and procedural problems. By proper development and use of the experimental methods of psychology we may well be able to construct a law of evidence more closely related to known facts of human behaviour.[125]

125. Greer, *supra* note 14, at 152.

The case for using psychologists at trial to expose the imperfections in jurors' common-sense analysis is strengthened by the observation that participating lawyers apparently cannot correct the flaws in the jury's analysis. This is because lawyers themselves lack expertise in the area and suffer from the same defects in intuition that jurors do. Thus, they cannot effectively expose the myths and prejudices on cross-examination. Furthermore, even if attorneys became aware of such imperfections and attempted to expose them, jurors would be skeptical of any argument that is counter-intuitive; re-educating is better done by an expert. Additionally, special jury instructions would probably not help, since studies have shown that many jury instructions are ineffective.[126]

The courts have been assessing and evaluating the admissibility of psychological evidence regarding credibility assessment. The way in which the courts evaluate psychological data has the potential for redefining the role of the jury during trial, as well as the role of psychology in the courtroom.

III. THE COURTS' RESPONSE TO THE PSYCHOLOGICAL CRITIQUE

The courts' approaches to the admissibility of psychological evidence on credibility illustrate the conflict between the empirical and the common-sense approaches to credibility. This section will explore the largely unsuccessful efforts of courts to alleviate the tension by devising various rules and principles.

The common-sense approach to credibility still maintains a strong grip on most courts. In the large majority of cases, courts have defended the exercise of jury common sense and excluded expert testimony or special jury instructions when offered at trial and these exclusions have generally been sustained on appeal.[127] In a few jurisdictions, however, the insights provided by the empirical data and the occurrence of inaccurate lay assessments of credibility resulting in erroneous verdicts have led courts to permit such testimony[128] or special jury instructions[129] designed to accomplish the same purpose.

The common-sense evaluations that have come under attack are primarily those involving child sexual and physical abuse and

126. *See infra* note 229 and accompanying text.
127. *See* Loftus & Schneider, *supra* note 18, at 4.
128. *See infra* text accompanying notes 172-223 and 230-38.
129. *See infra* text accompanying notes 224-229.

eyewitness identification. Yet the considerations relied on by courts in evaluating the sufficiency of common sense credibility assessments are independent of the nature of these cases. Themes such as redundancy,[130] centrality,[131] generality,[132] and prejudice[133] transcend the boundaries of subject matter and apply to all witnesses who rely on their perception and memory to testify or whose sincerity must be evaluated by the jury.

A. The Applicable Rules of Evidence

Federal Rule of Evidence 702 states: "[i]f 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."[134] Many states have an identical or substantially similar rule on the admissibility of expert witness testimony.[135]

The rule is broadly framed to favor the admissibility of testimony that may assist the jury. The Advisory Committee stated: "[w]hether the situation is a proper one for the use of expert testimony is to be determined on the basis of assisting the trier."[136] In Wigmore's words, the appropriate question asked under this rule is "on *this subject* can a jury from *this person* receive appreciable help?"[137] When opinions are excluded, it is because they are unhelpful and therefore superfluous and a waste of time.[138] Another commentator has explained the rule thus:

> There is no more certain test for determining when experts may be used than the *common sense* inquiry whether the untrained layman would be qualified to determine intelligently and to the

130. *See infra* text accompanying notes 144-155.
131. *See infra* text accompanying notes 230-238.
132. *See infra* text accompanying notes 187-216.
133. *See infra* text accompanying notes 156-171.
134. FED. R. EVID. 702.
135. Twenty-seven states adopted Federal Rule 702 verbatim. These states are Alaska, Arizona, Arkansas, Colorado, Delaware, Hawaii, Idaho, Iowa, Maine, Minnesota, Mississippi, Montana, Nebraska, New Hampshire, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin and Wyoming. Four other states — Florida, Michigan, Nevada and North Carolina — have adopted the federal rule with minor changes. 2 G. JOSEPH & S. SALTZBURG, EVIDENCE IN AMERICA: THE FEDERAL RULES IN THE STATES § 51.2 (1988).
136. FED. R. EVID. 702 advisory committee's note.
137. 7 J. WIGMORE, *supra* note 1, § 1923.
138. *Id.* at § 1918.

> best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute.[139]

Even if the evidence meets the broad standard of Rule 702, however, Federal Rule of Evidence 403 and comparable state rules require additional prerequisites to admissibility: "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[140] Expert testimony may create a "battle of the experts," or in balance not be worth the time devoted to it.[141] If expert testimony is irrelevant or unfairly prejudicial or if it runs foul of any other of the 403 criteria, a judge will not admit it in evidence.[142]

The balancing of the need to assist the jury against the danger of unfair prejudice and other considerations has proven to be central to most courts' decisions about the admissibility of expert testimony.[143] Appellate courts that have articulated rationales for admitting or excluding psychological evidence invariably have em-

---

139. Ladd, *Expert Testimony*, 5 VAND. L. REV. 414, 418 (1952) (emphasis added).

140. FED. R. EVID. 403. *E.g.*, United States v. Serna, 799 F.2d 842, 850 (2d Cir. 1986); United States v. Downing, 753 F.2d 1224, 1243 (3d Cir. 1985); United States v. Fosher, 590 F.2d 381, 383 (1st Cir. 1979); United States v. Scavo, 593 F.2d 837, 844 (8th Cir. 1979); United States v. Green, 548 F.2d 1261, 1268 (6th Cir. 1977); United States v. Amaral, 488 F.2d 1148, 1152 (9th Cir. 1973); United States v. Collins, 395 F. Supp. 629, 636 (M.D. Pa. 1975); State v. Kim, 64 Haw. 598, 605, 645 P.2d 1330, 1336 (1982).

Under the federal "substantially outweighed" standard, the balance between prejudice and probative value is generally to be struck in favor of admissibility. D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 382 (1979); 3 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 702[02], at 702-30 (1988); *see also* Loftus & Schneider, *supra* note 18, at 16 (applying the 403 test to the subject of eyewitness testimony).

141. *See* Convis, *supra* note 118, at 582.

142. *E.g.*, State v. Moran, 151 Ariz. 378, 382, 728 P.2d 248, 252 (1986) ("We see no reason to risk influencing the jury's credibility determination by allowing expert opinion testimony on a witness's [sic] believability.").

The trial judge has broad discretion to determine the admissibility of testimony. *E.g.*, Salem v. United States Lines Co., 370 U.S. 31, 35 (1962); United States v. Langford, 802 F.2d 1176, 1179 (9th Cir. 1986), *cert. denied*, 483 U.S. 1008 (1987); United States v. Azure, 801 F.2d 336, 339-40 (8th Cir. 1986); State v. Tafoya, 94 N.M. 762, 764, 617 P.2d 151, 153 (1980); 3 J. WEINSTEIN & M. BERGER, *supra* note 140, ¶ 702[02], at 702-22.

The standard of appellate review of a trial judge's decision on the admissibility of expert psychological testimony is "abuse of discretion or manifest error." United States v. Binder, 769 F.2d 595, 601 (9th Cir. 1985). If expert testimony is erroneously admitted, it only constitutes reversible error if "the admission more probably than not materially affected the verdict." *Id.* at 601-02.

143. This analysis applies to jury instructions as well.

phasized either the testimony's helpfulness or one or more of the countervailing concerns listed in Rule 403.

B. The Courts' Approach to Excluding Expert Psychological Testimony - Exposition and Analysis

Courts considering the admissibility of special assistance to the jury on credibility questions generally base their decision on either the relevance or prejudicial impact of such assistance. Regardless of whether a court has admitted or excluded such assistance, this section demonstrates that the court's analysis in this area is indeterminate.

1. Relevancy

Some courts exclude psychological testimony on the ground that it is irrelevant and fails to assist the jury in evaluating the credibility of witnesses. These courts see such testimony as "needless presentation of cumulative evidence."[144] In particular, these courts generally focus on either the redundancy of the data vis-à-vis the jury's common sense or the existence of traditional methods of assistance, such as cross-examination and the opportunity to observe witness demeanor.

i. The Redundancy of the Evidence: Duplicating the Jury's Common Sense

Many courts exclude testimony or special instructions about witness credibility because it merely duplicates the jury function of judging the facts of the case. These courts conclude that the testimony is cumulative because, in most cases, the common experience of the jury should suffice as a basis for assessments of credibility.[145] Both expert testimony and jury instructions are believed to "muddy the waters"[146] by providing information that the jurors already possess.[147]

In *United States v. Affleck*,[148] the defendant was charged

144. FED. R. EVID. 403.

145. In excluding expert testimony on the unreliability of eyewitnesses, the court in United States v. Serna, 799 F.2d 842, 850 (2d Cir. 1986), *cert. denied*, 481 U.S. 1013 (1987), noted that the expert "acknowledged that many of his conclusions coincided with common sense."

146. *Id.*

147. *See supra* note 11 and accompanying text.

148. 776 F.2d 1451 (10th Cir. 1985).

with and convicted of securities, interstate commerce, and bankruptcy fraud. During trial, the defendant offered a "memory expert" to explain "how well or how poorly people are able to remember events over the course of time and why they remember things the way that they do."[149] The trial court excluded the testimony and the Tenth Circuit Court of Appeals upheld the exclusion. The appellate court reasoned that the average person understands that people forget things.[150] The court also noted that cross-examination can elicit defects in memory.[151]

Interestingly, this redundancy analysis generally deals with the psychological studies by ignoring them. The mere assertion of the sufficiency of common sense does not, however, refute the studies or their conclusions. It merely preserves, without specific justification, the traditional roles of expert and jury. While guidance on matters of common sense may be repugnant to the traditional roles of jury and experts, tradition alone does not negate the value of the psychological data.

ii. The Presence of Alternative Safeguards

In a number of jurisdictions, courts have excluded special assistance for credibility assessments because of a different type of redundancy: the existence of alternative safeguards. These safeguards, including cross-examination and the jury's ability to observe witness demeanor, purportedly render expert testimony and special jury instructions superfluous.[152] In *Commonwealth v. Francis*,[153] for example, the defendant was tried on charges of armed robbery and assault and battery with a dangerous weapon. At trial, the evidence included the testimony of two eyewitnesses. The defendant was not permitted to offer the testimony of an expert on eyewitness reliability. The defendant was convicted and he appealed. On appeal, the Supreme Judicial Court of Massachusetts stated that like most appellate courts, it did not view expert testimony as a "standard safeguard" against potential misidentifications.[154] Instead, it concluded that safeguards such as cross-ex-

149. *Id.* at 1458.

150. *Id.*

151. *Id.*

152. *E.g.*, United States v. Brewer, 783 F.2d 841 (9th Cir.), *cert. denied*, 479 U.S. 831 (1986); Johnson v. State, 438 So. 2d 774 (Fla. 1983), *cert. denied*, 465 U.S. 1051 (1984); Commonwealth v. Francis, 390 Mass. 89, 453 N.E.2d 1204 (1983).

153. 390 Mass. 89, 453 N.E.2d 1204 (Mass. 1983).

154. *Id.* at 100, 453 N.E.2d at 1210.

amination, closing argument, and regular jury instructions would provide more than adequate protection as a general rule.[155] Courts that subscribe to this "equivalent safeguards" analysis conclude that cross-examination, when combined with other traditional safeguards, completely satisfies the jury's need for information upon which to base credibility assessments.

The "sufficiency of safeguards" analysis, while superficially appealing, is misguided. In rejecting the testimony on these grounds, courts do not view the purported assistance as advancing the evaluation process but rather as an additional source of information that the jurors have already. The courts fail to recognize, however, that the expert's empirical data examines the evaluation process itself. The purpose of the data is to assist jurors in organizing the raw credibility information they derive from the traditional safeguards such as cross-examination, attorney arguments, and witness demeanor.

Attorneys and judges cannot effectively provide this organizational assistance because they are not familiar enough with the psychological data to communicate it to the jury properly. The task is better left to an expert who deals regularly with the data and is better able to explain it to the jury, particularly with respect to its counter-intuitive components.

2. Prejudice

While empirically assisted determinations of credibility have often been rejected on the ground that special assistance from experts or jury instructions provides no appreciable help, the most prevalent ground of exclusion has been the prejudicial impact of the psychological testimony.[156] If a court deems that expert testi-

---

155. As the court indicated:

> [A]s the trial of this case demonstrates, . . . [t]he jury has the opportunity to assess the witnesses' credibility on the basis of what is presented at trial and not solely on general principles. The case has not been made that the introduction of the testimony of Dr. Loftus would have assisted the jury in their difficult task.

Id. at 101, 453 N.E.2d at 1210; *see also* United States v. Brewer, 783 F.2d 841, 843 (9th Cir.) ("We have observed that cross-examination should be effective to expose any inconsistencies or deficiencies in eyewitness identification.") (citing United States v. Amaral, 488 F.2d 1148, 1153 (9th Cir. 1973)), *cert. denied*, 463 U.S. 831 (1986); State v. Wooden, 658 S.W.2d 553, 557 (Tenn. Crim. App. 1983).

156. Several different types of prejudice exist. In United States v. Amaral, 488 F.2d 1148 (9th Cir. 1973), the court presented four criteria for the admissibility of expert witnesses: (1) the witness must be a qualified expert; (2) the testimony must be based on a generally accepted scientific explanatory theory; (3) the subject matter must be proper; and

mony on eyewitness identification, for example, is based on an unreliable area of study, or that the jury is likely to give it disproportionate weight, the court will refuse to admit it on the ground that its prejudicial effect substantially outweighs its probative value.[157] Some courts have also been concerned that such testimony could prove costly, prolong a trial, and still mislead the jury by presenting "extraneous information having an aura of scientific credibility."[158]

i. The Unreliability of the Psychological Evidence

The reliability of scientific evidence provides the threshold prejudice inquiry in determining its admissibility. Some judges reject testimony about witness credibility because the techniques used to derive the psychological conclusions about credibility may be insufficiently reliable. They reason that admission of unreliable conclusions would be unfairly prejudicial because it might mislead the jury, which is unlikely to fully appreciate its defects.

Courts that exclude psychological data on unreliability grounds usually apply the test advanced in the seminal case of *Frye v. United States*.[159] *Frye* concerned the admissibility of systolic blood pressure deception (polygraph) test results, but its rule has been extended to all forms of novel scientific evidence.[160] In

---

(4) the probative value must outweigh the testimony's prejudicial effect. *Id.* at 1153. While criterion (3) essentially requires that the testimony assist the jury, criteria (2) and (4) provide different prejudice tests.

The court in United States v. Fosher, 590 F.2d 381, 382-83 (1st Cir. 1979), focused only on the latter three criteria. It required that the testimony be relevant to a fact in issue, able to assist the jury's common understanding, and the result of a reliable scientific analysis. *Id.* Under the test advanced in the seminal case of Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923), evidence based on a new scientific method of proof is only admissible if such evidence is shown to be generally accepted as reliable in the scientific community in which it was developed. *See infra* text accompanying notes 159-162. While criterion (1) concerning a witness's qualifications has not been a significant factor in deciding admissibility, criteria (2) and (4) have been considered by courts fairly frequently.

157. *See* FED. R. EVID. 403.

158. Commonwealth v. Francis, 390 Mass. 89, 101 n.8, 453 N.E.2d 1204, 1210 n.8 (1983); *see also* State v. Lewisohn, 379 A.2d 1192, 1203-04 (Me. 1977) (Expert testimony on the reliability of infact witnesses would only divert the jury from the true issues of the case.); State v. Stucke, 419 So. 2d 939, 945 (La. 1982) (The prejudicial effect of expert testimony on witness credibility outweighs its probative value and usurps the jury function.).

159. 293 F. 1013 (D.C. Cir. 1923).

160. *E.g.*, United States v. Watson, 587 F.2d 365, 369 (7th Cir. 1978) (expert testimony on cross-racial identification insufficiently developed as a science), *cert. denied*, 439 U.S. 1132 (1979).

Frye, the District of Columbia Circuit Court of Appeals held that testimony based on novel scientific discoveries may be introduced if the "scientific principle or discovery . . . from which the deduction is made [is] sufficiently established to have gained acceptance in the particular field in which it belongs."[161] In subsequent applications of this rigorous standard, courts have rejected expert testimony in many novel areas, including witness credibility, for failing to possess the requisite scientific reliability.[162]

The problems with the *Frye* test are numerous.[163] Its inflexibility, for example, forecloses the introduction of potentially valuable information simply because it is new and not yet widely accepted in the scientific community.[164] Thus, while the *Frye* standard may assure reliability, it also sometimes prevents important and worthwhile evidence from reaching the jury by failing to take into account special circumstances.

ii. Jury Over-Reliance on the Psychological Data

Courts have also excluded expert testimony about credibility as unfairly prejudicial on the ground that the jury will accord it exaggerated importance. The expert would usurp the role of the jury by substituting the conclusions of the expert for the independent conclusions drawn by the lay jurors.[165] Arguably, this trans-

---

161. *Frye*, 293 F. at 1014; *see* United States v. Smith, 736 F.2d 1103, 1107 (6th Cir. 1984) (Expert testimony must "conform to a generally accepted explanatory theory" to be admissible and that on eyewitness identification it does.).

162. *E.g.*, United States v. Jackson, 16 Crim. L. 2507 (D.C. Super. Ct. 1975) (Eyewitness identification is not yet a generally recognized field of psychological study.); *see also* United States v. Wilson, 361 F. Supp. 510, 514 (D. Md. 1973) (noting that the "uniqueness of the human psyche" weakens the scientific status of the behavioral sciences as compared to the physical sciences).

Other courts have been less harsh and concluded that the reliability of scientific analysis concerning eyewitness identification, a novel area of study, has progressed to the point that its "day may have arrived." *Smith*, 736 F.2d at 1107 (concerning expert testimony on eyewitness perceptions in stressful situations). One court has even posited that "[t]he scientific validity of the studies confirming the many weaknesses of eyewitness identification cannot be seriously questioned at this point." United States v. Moore, 786 F.2d 1308, 1312 (5th Cir. 1986) (citation omitted).

163. *See* Imwinkelreid, *The Standard for Admitting Scientific Evidence: A Critique from the Perspective of Juror Psychology*, 28 VILL. L. REV. 554, 557-60 (1982); Imwinkelreid, *A New Era in the Evolution of Scientific Evidence: A Primer on Evaluating The Weight of Scientific Evidence*, 23 WM. & MARY L. REV. 261 (1981).

164. *See* M. GRAHAM, FLORIDA HANDBOOK ON EVIDENCE, 546-54 (1987) (The *Frye* test "by its conservative nature depriv[es] the trier of fact of relevant, usually newly discovered, scientific evidence.").

165. United States v. Azure, 801 F.2d 336, 340 (8th Cir. 1986) ("putting an impres-

fer of decision-making is institutionally improper. Furthermore, it is more likely to occur as the expert's testimony approaches the ultimate issues that the jury must decide.[166] The jury may overestimate the value of the testimony for several reasons. The jury may simply defer to the expert's judgment because of her qualifications and stature. The jury may adopt the expert's conclusions because she already has performed the work of thinking through the problem.

Unfair prejudice may also arise when jurors assume that experts will adopt a bipartisan, objective stance in educating them about their area of expertise. Experts, however, may cross the line between educator and advocate[167] and jurors may not realize or believe that the expert is advocating, rather than simply educating.[168] If a jury cannot distinguish between the two roles an expert

---

sively qualified expert's stamp of truthfulness on a witness's story goes too far"); United States v. Addison, 498 F.2d 741, 744 (D.C. Cir. 1974) (expert scientific evidence "may in some circumstances assume a posture of mystic infallibility in the eyes of a jury of laymen."); United States v. Barnard, 490 F.2d 907, 912 (9th Cir. 1973) (receiving expert testimony on credibility "may cause juries to surrender their own common sense in weighting testimony); Washington v. Unites States, 390 F.2d 444, 451 (D.C. Cir. 1967) ("It has often been argued that in guise of an expert, the psychiatrist becomes the thirteenth juror and unfortunately the most important one."); Commonwealth v. O'Searo, 466 Pa. 224, 228-29, 352 A.2d 30, 32 (1976) ("To permit psychological testimony . . . would be an invitation for the trier of fact to abdicate its responsibility to ascertain the facts relying upon the questionable promise that the expert is in a better position to make such a judgment.").

166. *See* Loftus & Schneider, *supra* note 18.

167. Ironically, experts may tend to reinforce juror decisions when weak and strong identification circumstances exist. When weak circumstances exist, the expert reinforces the lack of identification, and vice versa. This result, of course, is not always beneficial or fair for a criminal defendant.

168. State v. Myers, 382 N.W.2d 91, 94 (Iowa 1986) ("[E]xpert opinions on the truthfulness of a witness should generally be excluded because weighing the truthfulness of a witness is a matter reserved exclusively to the fact finder."); Commonwealth v. O'Searo, 466 Pa. at 229, 352 A.2d at 32 (To permit the testimony to be admitted "for this purpose would be an invitation for the trier of fact to abdicate its responsibility . . . .").

Like expert testimony on the reliability of specific eyewitness identifications, expert testimony about the veracity of the particular child complainant in a sexual abuse case is generally inadmissible. Kruse v. State, 483 So. 2d 1383, 1387-88 (Fla. Dist. Ct. App. 1986) (Expert testimony that goes directly to the truthfulness of child sexual abuse victim is inadmissible.); Note, *The Admissibility of Expert Testimony In Intrafamily Child Sexual Abuse Cases*, 34 UCLA L. REV. 175, 204 (1986) (even where expert testimony regarding sexually abused child syndrome in general is admitted, expert opinion on truthfulness of child's testimony is inadmissible). *But see* State v. Kim, 64 Haw. 598, 602-10, 645 P.2d 1330, 1334-39 (1982) (child psychiatrist's opinion about believability of complainant in rape case admissible).

Even testimony that only indirectly impeaches the credibility of the complaining witness in sexual abuse cases, particularly those involving adult victims, is often not permitted.

can play, ethical constraints on the expert and cross-examination provide the only safeguards against misleading the jury.

iii. Confusing the Jury

Finally, courts have excluded expert testimony about credibility on the ground that it confuses rather than clarifies the issues at trial.[169] This is most likely to occur when opposing parties each present their own experts. Such a "battle of the experts" requires jurors to decide which of the expert witnesses is more credible.[170] Paradoxically, the jurors must then decide which expert to believe, while the experts are testifying about how to determine the believability of other witnesses.

iv. Evaluating the Prejudice Analysis

Despite the reliance on various forms of prejudice as a basis for excluding expert testimony about credibility, several weaknesses are apparent in using these rationales for excluding psychological testimony. First, in light of the policy favoring the admissibility of expert testimony helpful to the jury, the mere possibility of abuse should not foreclose its use, but instead suggests that a case-by-case assessment is preferable.[171] In addition, the potential

---

See, e.g., People v. Bledsoe, 36 Cal. 3d 236, 251, 681 P.2d 291, 301, 203 Cal. Rptr. 450, 460 (1984) (Rape trauma syndrome evidence is unreliable and consequently inadmissible.); State v. Marks, 231 Kan. 645, 654, 647 P.2d 1292, 1299 (1982) (expert testimony on "rape trauma syndrome" admissible to show that a forcible assault occurred); State v. Saldana, 324 N.W.2d 227, 230-31 (Minn. 1982) (Expert testimony on the rape trauma syndrome is inadmissible because it is not more reliable than the common sense of the jury.); State v. Taylor, 663 S.W.2d 235, 241 (Mo. 1984) (Expert testimony on rape trauma syndrome erroneously admitted because the testimony constituted an implied opinion on the credibility of the complainant which could mislead the jury.); *see also* United States v. Binder, 769 F.2d 595, 602 (9th Cir. 1985) (concluding that the effect of expert testimony on the believability of children in a sexual child molestation case is to "improperly buttress" the credibility of the complaining witness).

169. *E.g.*, United States v. Ramirez, 871 F.2d 582, 585 (6th Cir. 1989) (allowing each side to present experts regarding a witness' credibility would raise even more issues for the jury).

170. *See, e.g.*, Garner v. Santoro, 865 F.2d 629, 645 (5th Cir. 1989) ("Thus, we have a 'battle of the experts,' and the jury 'must be allowed to make credibility determinations and weigh the conflicting evidence in order to decide the likely truth of a matter not itself initially resolvable by common knowledge or lay reasoning.' ") (quoting Osburn v. Anchor Labs., 825 F.2d 809 (5th Cir. 1987), *cert. denied*, 108 S. Ct. 1476 (1988)).

171. Courts sometimes decide difficult questions, such as the admissibility of empirical data on credibility assessments, by focusing on procedural limitations. The Federal Rules of Evidence, however, favor admissibility over exclusion of helpful expert testimony. FED. R. EVID. 702 advisory committee's note. Moreover, it is well-established that the trial

for substitution of judgment, obfuscation and over-reliance on the testimony can be guarded against through special cautionary instructions by the court. Finally, the potential for prejudice arises with all kinds of expert testimony and yet courts regularly admit such evidence. The potential for prejudice should be no more of an obstacle to the admission of expert testimony on credibility than it is to the admission of other forms of expert testimony.

C. Courts' Rationales for Admitting Expert Psychological Testimony

A growing minority of federal and state courts have concluded that expert psychological testimony does satisfy the helpfulness and prejudice standards of admissibility.[172] While some appellate courts have held that the exclusion of expert psychological testimony under certain circumstances is reversible error, most appellate courts commit the question firmly to the trial court's discretion.

1. The Testimony is Helpful

Courts that have admitted expert testimony on credibility have found that the testimony meets the assistance requirement because "[i]t is not required that a question be unanswerable by the trier of fact before [such testimony] can be admitted, but only that it will be of assistance."[173] This approach reflects a principle of "partial assistance" and is consistent with the notion that the jury must still evaluate, organize and weigh the raw credibility information on even the most common of questions. Under this approach, the purpose of credibility testimony is to facilitate these jury tasks.

---

judge has broad discretion in admitting or excluding expert testimony. *E.g.*, United States V. Serna, 799 F.2d 842, 850 (2d Cir. 1986), *cert. denied*, 481 U.S. 1013 (1987). When the issue of admissibility is debatable, the trial judge's decision will prevail. *E.g.*, *id.*; United States v. Samara, 643 F.2d 701, 705 (10th Cir. 1981), *cert. denied*, 454 U.S. 829 (1981); State v. Lint, 657 S.W.2d 722, 725 (Mo. Ct. App. 1983). The standard of review of trial court decisions to admit or exclude evidence is whether the decision was "clearly erroneous." *Serna*, 799 F.2d at 850. In light of the principles favoring admissibility and allowing the trial court discretion, one might expect that many courts would be receptive to the occasional admission of expert testimony on credibility.

172. FED. R. EVID. 702. *See, e.g.*, United States v. Downing, 753 F.2d 1224, 1231 (3d Cir. 1985); Commonwealth v. Francis, 390 Mass. 89, 453 N.E.2d. 1204, 1209 (1983).

173. Convis, *supra* note 118, at 583.

The analysis of the court in *United States v. Moore*[174] is illustrative. In *Moore*, three defendants were accused of extortion and conspiracy to commit extortion. There were two eyewitnesses, but little corroborating circumstantial evidence. The defense offered a psychologist, Dr. Elizabeth Loftus, to testify on the credibility of the eyewitness testimony.[175] The trial court excluded the expert testimony, holding that the evaluation of eyewitnesses was not an area requiring expert testimony. The Fifth Circuit Court of Appeals affirmed the decision, noting that the decision to admit or exclude such testimony lies within the discretion of the trial court.

The Court of Appeals explained, however, that the psychologist's testimony was potentially admissible, because it did not merely restate common knowledge.[176] The Court found that the conclusions of psychological studies on eyewitness identification "are largely *counter-intuitive*, and serve to 'explode common myths about an individual's capacity for perception . . . .' "[177]

This analysis echoes that of *United States v. Smith*.[178] In *Smith*, the defendant was convicted of armed robbery. Three eyewitnesses identified the defendant as the perpetrator and the defendant's palm print was found at the scene of the crime. The trial court rejected an offer of expert testimony on the potential unreliability of eyewitnesses.[179] On appeal, the Sixth Circuit Court of Appeals held that the exclusion was error, because the testimony "might have refuted common assumptions about the reliability of eyewitness identification."[180] The Court affirmed the defendant's conviction, however, finding the error harmless.[181]

---

174. 786 F.2d 1308 (5th Cir. 1986).

175. Dr. Loftus's testimony would have consisted of factors such as: 1. the "forgetting curve," which indicates that memory decreases at a geometric rather than an arithmetic rate; 2. the "assimilation factor," which shows that witnesses sometimes include inaccurate post-event information in their testimony; 3. the "feedback factor," which describes how witnesses who discuss the case with other witnesses may reinforce mistaken identification; and 4. other psychological theories relating to eyewitness identification. *Id.* at 1311. See *supra* notes 75-116 and accompanying text.

176. The court went further and stated that in certain situations, such as when eyewitness testimony "may make the entire difference between a finding of guilt or innocence," it may be an abuse of that discretion to exclude expert testimony. *Moore*, 786 F.2d at 1313.

177. *Id.* at 1312 (quoting United States v. Smith, 736 F.2d 1103, 1105 (6th Cir.), *cert. denied*, 469 U.S. 868 (1984)).

178. 736 F.2d 1103 (6th Cir. 1984).

179. *Id.* at 1105.

180. *Id.* at 1106.

181. *Id.* at 1108.

Nevertheless, even if it is assumed that the common-sense approach to evaluating witness credibility contains inaccuracies, the analyses of *Moore* and *Smith* do not resolve the underlying tension between the law's embrace and the psychologists' rejection of the concept of common sense. The psychological studies are not in accord over whether informing jurors about the inaccuracies of the common sense approach would actually assist the jurors' evaluation of particular witnesses at trial.[182] It is questionable whether jurors could be educated that quickly, or at all, on matters that are mostly counter-intuitive. Education would require, first, an unlearning and, second, a disciplined effort to understand the sometimes complex conclusions drawn by the experts. Thus, the narrow question of whether such expert testimony assists the jury remains unanswered. It is still not obvious that there is a direct causal relationship between communicating to jurors the conclusions drawn from the empirical studies and improved juror accuracy in assessing credibility.[183]

2. The Testimony is Not Unfairly Prejudicial

Some courts have concluded that expert psychological testimony assists the jury and is not unfairly prejudicial. These courts have used several methods to reduce the prejudicial impact of psychological testimony before admitting it. These methods include limiting the subject areas of the testimony,[184] modifying the test of reliability,[185] and using jury instructions instead of experts.[186]

i. The Form of the Testimony: Specific Versus General

a. Specific Testimony

In determining whether psychological testimony is unfairly

182. *Compare* McCloskey & Egeth, *Eyewitness Identification: What Can a Psychologist Tell a Jury?*, 1985 AM. PSYCHOLOGIST 550, 556 (concluding that jurors who have the benefit of expert psychological testimony do not improve the accuracy of their evaluations of eyewitness identification testimony) *with* Cutler, Dexter & Penrod, *The Eyewitness, the Expert Psychologist and the Jury*, 13 LAW & HUM. BEHAV. 311, 329 (1989) [hereinafter Cutler, Dexter & Penrod, *The Eyewitness*] (demonstrating that expert testimony does improve jurors' judgment).

183. Ironically, unless a judge relies on a psychological study to exclude empirical data about credibility assessments, the judge uses her own intuition about the sufficiency of the jury's common sense.

184. *See infra* text and accompanying notes 187-217.

185. *See infra* text accompanying notes 218-223.

186. *See infra* text accompanying notes 224-229.

prejudicial, many courts have based their conclusion largely on the form of the testimony. Expert testimony that refers specifically to other witnesses in the case is rarely permitted.[187] In Oregon, for example, "a witness, expert or otherwise, may not give an opinion on whether he believes a witness is telling the truth. [Oregon] reject[s] testimony from a witness about the credibility of another witness, although [it] recognize[s] some jurisdictions accept it."[188] On the other hand, in *People v. Cowles*,[189] the Michigan Supreme Court admitted testimony by medical experts about the rape victim's credibility. The Court held that it was proper for the experts to testify that the victim was a "pathological falsifier."[190] In so doing, the Court expressly accepted that the testimony was relevant "not in extenuation of rape, but for its bearing upon the question of the weight to be accorded the testimony of the [victim]."[191]

b. General Testimony

The most commonly admitted form of expert testimony on credibility concerns the common or general characteristics of a group of people.[192] Courts have found this form of testimony to have the least prejudicial impact.[193] The testimony usually instructs jurors on how to assess properly the credibility of a certain type of witness or explains that certain behavior is relatively normal.[194] Such testimony still affects indirectly the credibility of individual witnesses, but as one judge stated, "[s]ome bolstering of

---

187. *But see* Jeffers v. State, 145 Ga. 74, 78, 88 S.E. 571, 573 (1916); Convis, *supra* note 118 (survey of the early usage of expert testimony based on psychological factors).

188. State v. Middleton, 294 Or. 427, 438, 657 P.2d 1215, 1221 (1983) (footnote omitted).

189. 246 Mich. 429, 224 N.W. 387 (1929).

190. *Id.* at 431, 224 N.W. at 388.

191. *Id.*

192. In *Middleton*, 294 Or. 427, 657 P.2d 1215, the defendant had allegedly raped his fourteen year-old daughter. At trial, a juvenile counselor/social worker was permitted to testify that the fourteen-year-old's behavior was characteristic of sexual abuse victims. The counselor stated, among other things, that the child had acted "very much in keeping with children who have complained of sex [sic] molestation at home." *Id.* at 432 n.5, 657 P.2d at 1218 n.5. On appeal, the Oregon Supreme Court upheld the admission of the expert's testimony, concluding that it provided "information the jury did not have" and that would allow a more accurate determination of credibility. *Id.* at 435-36, 657 P.2d at 1219-20.

193. *E.g.*, Kruse v. State, 483 So. 2d 1383, 1386 (Fla. Dist. Ct. App. 1986) (permitting expert testimony on behavior patterns of child assault victims).

194. *Id.*

a party's credibility cannot be helped."[195]

The admission of general credibility testimony occurs most often in cases involving sexual abuse and child witnesses.[196] In *State v. Myers*,[197] the Minnesota Supreme Court upheld the admission of expert psychological testimony about the typical symptoms of sexually abused children.[198] In *Myers*, a clinical psychologist with vast professional experience in cases involving sexually abused children testified about some general characteristics of those children.[199] In upholding the admission of this testimony, the Minnesota Supreme Court reasoned that the "emotional and psychological characteristics observed in sexually abused children [are] a proper subject of expert testimony,"[200] because they provide "a relevant insight into the puzzling aspects of the child's conduct and demeanor which the jury could not otherwise bring to its evaluation of her credibility . . . ."[201] The child's young age appeared to be important to the admissibility of the expert's information.[202]

General expert testimony about other widely disparate aspects of sex crimes cases has been permitted. One court allowed testimony on the frequency of delays in reporting incidents of child sexual abuse.[203] Other courts have permitted testimony about different mental and psychological symptoms of sexually

---

195. *Id.* at 1388.

196. *See, e.g.*, People v. Roscoe, 168 Cal. App. 3d 1093, 215 Cal. Rptr. 45 (Dist. Ct. App. 1985) (permitting expert testimony about the class of molestation victims being reluctant to talk to investigators); *see also* People v. Bledsoe, 36 Cal. 3d 236, 247, 681 P.2d 291, 298, 203 Cal. Rptr. 450, 457-58, (1984) (citing cases that have admitted such testimony).

197. 359 N.W.2d 604 (Minn. 1984).

198. *Id. But see* State v. Maule, 35 Wash. App. 287, 293-94, 667 P.2d 96, 99-100 (1983) (expressing disapproval of the use of expert testimony "as substantive evidence to help persuade the jury that [defendant] was guilty").

199. The victim was a seven-year-old girl. *Myers*, 359 N.W.2d at 606. The psychologist, Dr. Clare Bell, had sixty sexual abuse cases at the time of trial. *Id.* at 608. The general characteristics she referred to included fear of men, nightmares about attacks, and conduct in which "the child looks and acts older than she is." *Id.* at 608-09.

200. *Id.* at 609.

201. *Id.* at 610.

202. *Id.* at 610 (distinguishing jury's need for background data on child victims of sexual abuse from that for adult rape victims); *see also* State v. Carlson, 360 N.W.2d 442 (Minn. Ct. App. 1985) (in which the court permitted expert testimony in a child abuse case involving children ages eight and ten). For a different conclusion regarding the admissibility of expert testimony when the victim is age seventeen, see State v. Danielski, 350 N.W.2d 395 (Minn. Ct. App. 1984).

203. State v. Petrich, 101 Wash. 2d 566, 576, 683 P.2d 173, 180 (1984).

abused children.[204] In *State v. Kim*,[205] the Supreme Court of Hawaii affirmed the admission of expert testimony in a case in which the defendant was accused of having sexual intercourse with his thirteen-year-old step-daughter. Dr. Eberhard Mann, a pediatrician and child psychiatrist, testified about the likelihood of the victim's having fantasized the sexual acts, among other things.[206] The court found that the expert offered the jurors information about "specific" and "comprehensible" characteristics not otherwise available to them.[207]

Often, the expert testifying about common behavioral responses to physical or sexual abuse frames the testimony in terms of clinical "syndromes." These syndromes include the battered woman's syndrome,[208] the rape trauma syndrome,[209] the battered child syndrome,[210] and the sexually abused child syndrome.[211] This type of testimony also relates circumstantially to the credibility of witnesses. The expert testifies about an empirically based psychological state and behavior, caused by crimes such as sexual abuse or rape.[212] The exposition of these syndromes corroborates the victim's claims by expressly or implicitly stating that the victim's behavior is consistent with the behavior of other such victims.

It is axiomatic that while general testimony is less prejudicial than specific testimony about other witnesses, general testimony also is less probative. The preference for general testimony, however, appears to reflect a distinction in the Federal Rules of Evi-

---

204. *E.g.*, State v. Myers, 382 N.W.2d 91, 97 (Iowa 1986) ("[I]t seems that experts will be allowed to express opinions on matters that explain relevant mental and psychological symptoms present in sexually abused children.").

205. 64 Haw. 598, 645 P.2d 1330 (1982).

206. *Id.* at 601, 645 P.2d at 1334.

207. *Id.* at 608, 645 P.2d at 1338.

208. Recent cases admitting testimony about the battered woman's syndrome include: Hawthorne v. State, 408 So. 2d 801, 806 (Fla. Dist. Ct. App. 1982); Smith v. State, 247 Ga. 612, 617-619 , 277 S.E.2d 678, 682-83 (1981). Not all jurisdictions are permitting such testimony, however. *E.g.*, State v. Thomas, 66 Ohio St. 2d 518, 521-22, 423 N.E.2d 137, 139-40 (1981); Buhrle v. State, 627 P.2d 1374, 1378 (Wyo. 1981).

209. *E.g.*, State v. McQuillen, 236 Kan. 161, 171, 689 P.2d 822, 828-29 (1984); State v. Marks, 231 Kan. 645, 653-55, 647 P.2d 1292, 1299 (1982).

210. Comment, *Expert Testimony On Rape Trauma Syndrome: Admissibility and Effective Use in Criminal Rape Prosecution*, 33 AM. U.L. REV. 417, 442 (1984) (Testimony on battered child syndrome admissible as a description of victim's injuries. It is not unduly prejudicial because it does not identify batterer.).

211. Hicks, *supra* note 44.

212. *See* Note, *The Unreliability of Expert Testimony on the Typical Characteristics of Sexual Abuse Victims*, 74 GEO. L.J. 429, 437 (1985).

dence, which, arguably, favors evidence with low probative value and a small prejudicial effect over evidence that is both highly prejudicial and highly probative.[213]

Some courts, however, find the lower probative value of general testimony to be an obstacle to its admissibility. For these courts, the admission of testimony about the behavioral patterns of sexual abuse victims is error because it permits an indirect opinion on the credibility of a witness that would be improper if offered directly. In *State v. Myers*,[214] for example, the defendant was convicted in Iowa of indecent contact with an eight-year-old child. The trial court permitted an expert to testify generally about the veracity of children who allege sexual abuse. The Iowa Supreme Court held that the admission of such testimony was an abuse of discretion and reversed the conviction.[215] The Court painted a bright line that prohibited indirect testimony about credibility whenever direct testimony would also be inadmissible.[216]

ii. The Scope of Juror Common Sense

A different approach to admitting credibility evidence involves restricting the accepted parameters of jury common sense. When common sense is defined narrowly, the prejudice anticipated from the admission of empirical data on credibility is more easily reconciled with the tradition of relying on the jury's common sense in those areas where jurors arguably lack common sense or experience. In such areas, expert testimony can be admitted to supplement deficiencies in experience, rather than to counter-biases or myths resulting from prior experiences. Courts that permit assistance to jurors may thus attempt to resolve the delicate question of whether the expert testimony would replace or merely supplement the jury's decision-making process by describing the scope of common sense narrowly. Instead of viewing expert testimony as challenging the very essence of the jury function, courts may analogize psychological testimony about credibility to well-established exceptions beyond the boundaries of

213. *See, e.g.*, FED. R. EVID. 405 (permitting proof of character by reputation and opinion evidence but not the more probative and prejudicial evidence of specific acts).

214. 382 N.W.2d 91 (Iowa 1986). This case should not be confused with the different case by the same name, discussed *supra* text accompanying notes 197-202.

215. *Id.* at 98.

216. *Id.* at 97-98.

common sense. An example of such an exception is testimony about a witness' mental condition.[217]

While this approach appears to avoid a direct confrontation between the traditional conception of the jury role and the empirical data of the psychologists, courts must still determine where common sense leaves off and diversity of experience begins. This new question still forces courts to define common sense, and to consider the psychological studies to determine the contours of common sense. Consequently, the new analysis is no different than the original question posed regarding the efficacy of common sense-based decision making. The result of a court's beginning down the "slippery slope" of narrowing the scope of common sense could be the complete replacement of jury common sense with psychological evaluations of credibility.

iii. The Flexible Reliability Test

Some courts have limited the prejudicial impact of expert credibility testimony by abandoning the "general acceptance" test of *Frye v. United States*[218] and adopting a more flexible relevancy test as did the Third Circuit Court of Appeals in *United States v. Downing*.[219] In *Downing*, the court rejected the *Frye* test,[220] replacing the "general acceptance" standard with a more flexible, multiple-factor test to govern the admission of novel scientific evidence.[221] The court stated:

> In our view, Rule 702 requires that a district court ruling upon the admission of (novel) scientific evidence, i.e., scientific evidence whose scientific fundaments are not suitable candidates for judicial notice, conduct a preliminary inquiry focusing on (1) the soundness and reliability of the process or technique used in generating the evidence, (2) the possibility that admitting the evidence would overwhelm, confuse, or mislead the jury, and (3) the proffered connection between the scientific research or test result to be presented, and particular disputed factual issues in the case.[222]

Under the new test, the Court in *Downing* concluded that expert

---

217. *See* sources cited *supra* note 55.

218. 293 F. 1013, 1014 (D.C. Cir. 1923). *See supra* text accompanying notes 159-162.

219. 753 F.2d 1224 (3d Cir. 1985).

220. *Id.* at 1232, 1233 n.11.

221. *Id.* at 1237.

222. *Id.*

testimony about the unreliability of eyewitnesses was reliable and, therefore, generally admissible.[223]

iv. Special Jury Instructions

Still other courts have minimized the prejudicial effect of the psychological data by determining not to admit it as evidence, but rather to include it in special jury instructions.[224] A model jury instruction on the potential for eyewitness misidentification was offered by the District of Columbia Court of Appeals in *United States v. Telfaire*,[225] and adopted by the Fourth Circuit Court of Appeals.[226] The instruction cautions the jury to consider eyewitness testimony "with great care."[227] Other jurisdictions use different instructions[228] to achieve the same objective. These special instructions have been criticized, however, as ineffective.[229]

3. The Testimony is Central

Some courts have admitted expert testimony on policy grounds that are not in the plain language of the applicable rules of evidence. The most prevalent policy rationale upon which expert testimony has been admitted is centrality — how important the evidence is to the outcome of the case. In these trials, witness credibility is exceedingly important because it is not supplemented by corroborating evidence.

Several recent decisions illustrate the centrality analysis. In these cases, the courts have held that the exclusion of "helpful" expert testimony on credibility constituted reversible error. In *People v. McDonald*,[230] the defendant was convicted of murder in

---

223. *Id.* at 1243-44.

224. *See, e.g.*, United States v. Zeiler, 470 F.2d 717, 720 (3d Cir. 1972) ("The danger that the jury may give undue weight to eyewitnesses' testimony can be further guarded against by appropriate jury instructions.").

225. 469 F.2d 552, 558-59 (D.C. Cir. 1972).

226. United States v. Holley, 502 F.2d 273, 277-78 (4th Cir. 1974).

227. Carey v. Maryland, 617 F.Supp. 1143, 1147 (D. Md. 1985), *aff'd*, 795 F.2d 1007 (4th Cir. 1986).

228. Commonwealth v. Francis, 390 Mass. 89, 100, 453 N.E.2d 1204, 1210 (1983).

229. The instructions are based on the court's own misconceptions and omit reference to weighing the various factors involved. *E.g.*, Greene, *Judges Instructions on Eyewitness Testimony: Evaluation and Revision*, 18 J. OF APPLIED SOC. PSYCHOLOGY 252, 273 (1987) (Judges are often "unaware of the fallibility of eyewitness evidence" and, thus, are not "motivated to give instructions which stress caution in evaluating eyewitness evidence.").

230. 37 Cal. 3d 351, 690 P.2d 709, 208 Cal. Rptr. 236 (1984).

a California state court and sentenced to death. The only evidence tying the defendant to the crime was the testimony of four eyewitnesses. Their identifications all contained potential grounds for reasonable doubt as to whether the defendant committed the crime.[231] At trial, the defendant offered the testimony of an expert on the unreliability of eyewitness identification, but the trial court rejected the testimony. On appeal to the Supreme Court of California, the defendant's conviction was reversed. The California Supreme Court held that although the admissibility of such expert testimony falls primarily within the trial court's sound discretion:

> [w]hen an eyewitness identification of the defendant is a key element 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 to or understood by the jury, it will ordinarily be error to exclude that testimony.[232]

In *State v. Chapple*,[233] the defendant was convicted in an Arizona state court of three counts of first-degree murder. The only evidence connecting him to the crime was the uncorroborated testimony of two eyewitnesses.[234] Defense witnesses testified that the defendant was in another state at the time of the crimes. The defendant also offered expert testimony about the factors that bear on the unreliability of eyewitness identification. The trial court refused to permit the expert to testify. On appeal, the Arizona Supreme Court reversed the lower court's decision to exclude the expert testimony, holding that while the admissibility of this type of testimony was within the trial court's discretion, the testimony here would have been "of significant assistance" to the jury on "a number of substantive issues of ultimate fact."[235] To exclude the testimony in this case was consequently an abuse of discretion.

The centrality analysis has been applied to the credibility of more than just eyewitnesses to murder. In *Skamarocius v. State*,[236] the defendant was convicted in an Alaska state court of sexual assault. The only evidence linking the defendant to the

231. *Id.* at 353, 690 P.2d at 711, 208 Cal. Rptr. at 238.
232. *Id.* at 377, 690 P.2d at 727, 208 Cal. Rptr. at 254.
233. 135 Ariz. 281, 660 P.2d 1208 (1983).
234. *Id.* at 285, 660 P.2d at 1212-13.
235. *Id.* at 297, 660 P.2d at 1224.
236. 731 P.2d 63 (Alaska Ct. App. 1987).

crime was the uncorroborated identification of the victim and a towel, which the alleged perpetrator had used during the assault. Once again, the trial court rejected the defendant's offer of expert psychological testimony about the unreliability of eyewitness testimony. On appeal, the Alaska Court of Appeals held the trial judge had abused his discretion in excluding the testimony. The testimony was central to the defendant's case and might have dispelled any misconceptions the jurors might have had about the meaning of an eyewitness' confidence. The court stated, however, that exclusion is proper when the eyewitness testimony is corroborated by substantial physical evidence or a co-defendant's testimony.[237]

The centrality approach of the courts in *McDonald*, *Chapple*, and *Skamarocius* is inconsistent with a traditional evidentiary analysis that does not factor into the calculation of admissibility considerations such as the importance of the offered evidence or the lack of corroboration.[238] The centrality analysis may be characterized as a compromise between the common-sense and empirical approaches to evaluating witness credibility. It is the most successful compromise between the two extremes because it only indirectly confronts the dual evidentiary concerns of assistance and prejudice, switching the relevant question from "Can the jury be assisted by this information?" to "How important is the credibility determination to the outcome of the case?" When expert testimony is admitted under this approach, the court is stating in essence that whatever prejudice may be associated with the testimony is outweighed by the importance of a credibility assessment to a just resolution of the case.

---

237. *Id.* at 67. In State v. Taylor, 50 Wash. App. 481, 749 P.2d 181 (1988), the defendant had been convicted of burglary and assault. The sole evidence against the defendant was the eyewitness testimony of the victim. The trial court excluded the proffered expert testimony about eyewitness misidentification. The Washington Court of Appeals reversed recognizing that "the exclusion of such testimony is an abuse of discretion" in certain situations, including this one in which the defendant's identification is the central issue at the trial, the defendant has an alibi defense, and there is little or no other evidence against the defendant. *Id.* at 488-89, 749 P.2d at 184; *see also* State v. Moon, 45 Wash. App. 692, 726 P.2d 1263 (1986) (Exclusion of expert testimony which could help the jury determine the reliability of eyewitness identification is an abuse of discretion when identification is a principal issue.).

238. *See, e.g.*, FED. R. EVID. 403 (considering only probative value and prejudicial effect of the particular piece of evidence, not as viewed with respect to the entire case).

D. The Inconclusiveness of the Courts' Response to Psychologically Assisted Credibility Assessments

In determining whether to admit the testimony of psychological experts or special jury instructions on witness credibility, courts have developed several tendencies. They have considered such factors as the generality of the testimony, its reliability and its helpfulness. Despite the recurrence of these themes, the conventional, evidentiary rules-based analysis has yielded no persuasive conclusion about the admissibility of expert testimony or special jury instructions concerning witness credibility. Even though many courts recognize, for example, that the psychological data reliably suggest that jurors assess credibility inaccurately, they remain in doubt as to whether educating the jury about credibility would improve the accuracy of these evaluations and thereby satisfy the helpfulness requirement.[239]

The use of alternative approaches such as centrality holds out some promise for reconciling the competing policies, but does not seem to be justified by a traditional analysis under the rules of evidence. The following section argues that the centrality approach is the only one that makes sense.

IV. The Structural Implications of Abandoning Common Sense and Adopting a Psychological Model of the Jury

"I think there is such a thing as Quality, but that as soon as you try to define it, something goes haywire."[240]

A rules-based analysis of the admissibility of psychological information on credibility reveals the inability of courts to approach such evidence in a logical, persuasive or even unified manner. This is due to reasons associated with the underlying tension between a jury system modeled on social science data and a more traditional conception of the criminal trial process based on the jurors' common sense.

This section suggests that an alternative to the inconclusive doctrinal/evidentiary analysis described in the preceding section is

---

239. *See* Cutler, Dexter, & Penrod, *Expert Testimony and Jury Decision-Making: An Empirical Analysis*, 7 Behavioral Sci. & L. 215, 223 (1989); Cutler, Dexter & Penrod, *The Eyewitness*, *supra* note 182, at 329.

240. R. Persig, Zen and the Art of Motorcycle Maintenance 184 (Bantam New Age ed. 32nd printing 1985).

necessary to resolve this issue. The proffered alternative analysis directly confronts the offending underlying conflict evaluating the competing approaches to assessing credibility in light of the three primary objectives of the criminal justice system: truth-finding,[241] dispute resolution,[242] and representation-reinforcement.[243] The analysis suggests that the value of common sense is both overshadowed and undervalued by the psychological studies. The section concludes that systemic concerns such as public confidence in the verdict and the representation function of the jury justify the continued reliance on common sense. The section argues further, however, that psychological testimony or data should be admissible when strong policy concerns are overriding, such as when credibility assessment is central to the outcome of the case and the presumption of innocence is threatened.

The alternative analysis offered in this section replaces the current model of juror functioning, which relies on juror credibility assessments using common sense, with a model that presupposes the necessity for expert psychological testimony about credibility.[244] Such a system is based on the importance of juror education through expert witnesses. The experts are presumed necessary to provide jurors with a scientific framework for making credibility assessments. This section evaluates, in terms of its effect on the objectives of the jury system, the hypothetical model's use of expert testimony to assist the jury on credibility questions and its corresponding abandonment of the principle of the sufficiency of common sense.

A. Replacing Current Assumptions with New Ones

It is well-established within current law that, as a general rule, the common sense of the jury — along with the traditional assistance provided by cross-examination, legal argument and the opportunity to observe the witness' demeanor — provides sufficient guidance for credibility evaluations. The current model of the jury system is based upon this principle. If, however, we reject

241. *See supra* text accompanying notes 28-35.

242. *See supra* section I.A.2, p. 172.

243. *See supra* text accompanying notes 37-43.

244. This analysis is loosely based on a methodology proposed by Professor Unger. Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561 (1983). Professor Unger offered a method of analysis called deviationist doctrine. While the actual methodology used in this paper is vastly different from Professor Unger's practice and intent there are still some similarities to the deviationist doctrine technique.

this principle on the ground that it is empirically incorrect, we can hypothesize a different model of the jury system. This model would be based on the assumption that jurors are unable to assess accurately credibility questions that either fall outside of their common experience (*e.g.*, with respect to sexual child abuse) or fall within their common experience but are distorted by prejudices resulting from prior experiences (*e.g.*, with respect to eyewitnesses).

This section replaces the current prevailing assumptions about jurors' common sense with counter-assumptions and examines the consequences. Thus, the model of the competent juror armed with common sense is replaced by that of the limited-experience juror influenced by prejudices, myths and stereotypes. The practical consequences of such a change would be immediate and are illustrated by the following examples.

1. Areas of Conflict

The following examples illustrate the most prominent areas of conflict between the two models of the jury system. An eyewitness, after making a positive, at-the-scene identification of the suspect in an armed robbery, is unsure two years later at trial whether the defendant is the same armed robber.[245] According to traditional theory, the jury is capable of evaluating the lapse in the witness' memory without assistance. According to the counter-view, an expert should be permitted to testify about the significance of such a lapse, particularly since studies have shown that memory loss does not occur gradually but geometrically. Similarly, whether the eyewitness expresses either great or little confidence in her identification, jurors should be informed that there appears to be no relationship between the level of confidence and the accuracy of an identification.[246]

A six-and-a-half-year-old child claims to have been molested by an adult. There are no other witnesses to the molestation or additional corroborative evidence. The dominant view today would

---

245. *Cf.* Wynn v. United States, 538 A.2d 1139 (D.C. 1988) (sixth amendment right to a speedy trial may be affected and prejudice to the defendant incurred when trial takes place 24 months after alleged assault by prison inmate and defense witnesses are unable accurately to recall the events).

246. *See* Bothwell, Deffenbacher, & Brigham, *Correlation of Eyewitness Accuracy and Confidence: Optimality Hypothesis Revisited*, 72 J. APPLIED PSYCHOLOGY 691, 694 (1987) (concluding that eyewitness confidence is not correlative to eyewitness accuracy).

not permit expert testimony on the issue of the child's veracity. Under the counter-view, a juror, although she was young once, would be deemed not to have the tools necessary to deal with such a sensitive and foreign question of credibility. An expert who uses doll simulations, who is either familiar with the common responses of abused children, has performed various psychological studies on child abuse, or is familiar with this child, would, therefore, be called to supplement and shed light on the testimony of the child victim. The expert would assist the jurors to calibrate their assessments of the complaining witness' testimony relative to their assessments of the alleged perpetrator's testimony.

Through these examples, it is apparent that the hypothetical model is reluctant to rely on the naked ability of jurors to assess the credibility of witnesses. This reluctance attaches not only to sensitive cases, but to all cases, no matter how ordinary. Experts would "help" the jury even in ordinary cases, because jurors are considered ill-equipped to assess credibility evidence.

The hypothetical model views cross-examination primarily as a means of gathering information, rather than organizing or weighing it. Thus, cross-examination and the arguments of counsel are not thought to limit and guide jury discretion adequately, nor to minimize prejudices and erroneous evaluation mechanisms sufficiently. These techniques are not relied on to provide the jury with an effective measuring device. Instead, the hypothetical model uses expert psychological testimony to counteract the prejudices that are inherent in the current concept of the jury system.[247]

2. The Sources of the Current and Counter-Assumptions

The presently dominant view, which presumes that jurors are competent to decide credibility questions using mere common sense,[248] is justified primarily by the goal of representation-rein-

---

247. These prejudices are currently recognized by the courts. *E.g.*, United States v. Telfaire, 469 F.2d 552 (D.C. Cir. 1972) (in which a special identification instruction was created for use in cases when eyewitnesses testify).

248. Recently two commentators have noted that:

> This [view] and its pessimistic conclusion seem to rest on several implicit assumptions about psychology and the proper functioning of the trial system. They reflect the belief that our trial process produced better results before psychologists started meddling with it; now that lawyers are using sophisticated techniques based on psycholegal research, they are upsetting the natural balance and subverting the proper function of the trial. Moreover, critics claim, trial attor-

forcement.[249] By embracing the unassisted role of common sense, it assures that jurors and, by implication, all members of the community are responsible for the verdict. The verdict, then, is representative of the community's viewpoint. This heightened trust in the jury theoretically generates more confidence in the result.

The hypothetical model, on the other hand, draws its power primarily from the truth-finding function. Scientific information about credibility assessments is adduced to enhance the accuracy of credibility assessments and consequently of trial outcomes. While assistance from professionals might weaken the premise that the jury's decision is representative of and speaks for the community, community approval should remain high because of the increased accuracy of the result. Jurors will arguably perform better if trained and educated. Instead of permitting the jury unchecked discretion to assess credibility, which effectively invites jurors to allow their prejudices and ignorance to influence determinations of credibility, the hypothetical model would structure jury discretion to ensure accuracy. Thus, the hypothetical model rejects the belief that "jurors in their 'natural' state, not subjected to psychological persuasion techniques, will return more accurate, impartial verdicts, based on a rational consideration of the evidence."[250]

B. The Impact of Exchanging Current Assumptions for Counter-Assumptions

In some respects, the new system would be radically different from its predecessor. In other respects, the similarities would be striking. The following three sections will examine these differences and similarities.

1. A Different System

The replacement of the presently dominant assumptions with

---

neys have become capable of inducing jurors to make bad decisions based on biases and other improper factors, and no existing mechanism can prevent such abuse. This argument can be broken down into several psychological assumptions about how jurors reach decisions and the nature of psycholegal research, and several legal assumptions about the theory and structure of trials.

Tanford & Tanford, *Better Trials Through Science: A Defense of Psychologist-Lawyer Collaboration*, 66 N.C.L. REV. 741, 743 (1988).

249. *See supra* text accompanying notes 37-43.

250. Tanford & Tanford, *supra* note 248, at 743.

the counter-assumptions would lead to changes in the institutional roles of judge, juror, expert and attorney. The judge would share with the expert some of her power to disclose general principles and rules.[251] The expert would gain a greater ability to influence the outcome of the case. Jurors, while retaining the power to decide the facts, would be influenced by more experts than before. The attorneys would probably have to adjust their theory of the case and the structure of their arguments to accommodate the expert testimony, particularly if they formerly would have based their arguments on stereotypes or myths embraced by common sense. The change in roles would result in a reallocation of courtroom power.

This shift in power would also cause a shift in responsibilities. While jurors would have the same responsibility over the outcome of the case, the expert's increased role might make him appear at least partly responsible for erroneous verdicts. The judge, meanwhile, would have greater responsibility in determining exactly what type of psychological evidence is admissible and under what circumstances. The jurors would be responsible for reeducating themselves about common-sense beliefs that they might hold strongly.

This reordering would also produce other, equally significant effects. The expert's provision of general information might, for example, encroach on the judicial function. The facts dispensed by the expert resemble legislative facts more than adjudicative facts.[252] Thus, the expert might be perceived as a quasi-judge who educates the jury not on the law but on how the jury can carry out its role as fact-finder.[253]

Reliance on psychological studies of human behavior could eventually lead to sweeping changes in the entire jury system and the rules that govern it.[254] Psychological studies, as interpreted by

---

251. This is because expert testimony provides information that the jurors may treat like judicially noticed facts. *See generally* VIRGINIA Note, *supra* note 44 (arguing against permitting expert testimony on rape trauma syndrome).

252. "Adjudicative facts are simply the facts of the particular case. Legislative facts . . . are those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body." FED. R. EVID. 201(a) advisory committee's note.

253. One commentator called this new type of evidence "social frameworks," meaning "the use of general conclusions from social science research in determining factual issues in a specific case." Walker & Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 559, 559 (1987).

254. For an interesting parallel, see Craig v. Boren, 429 U.S. 190 (1976) where the

expert psychologists, could determine what judges say to the jurors about understanding the evidence, how they say it, and when they say it.[255] Experts could be used to inform jurors about how to perform their deliberations properly and about the psychology of being a juror. Jurors could even be instructed on the effects of the way testimony is presented.[256]

Such professionalization of the system through the widespread use of psychologists would have a significant impact. Overall, the impact would be difficult to accept. An amateur jury, although it may make mistakes, remains a preferable symbol because the acceptance of the counter-assumptions would serve to reduce public confidence in the criminal justice system. The public might see elitism as the motivating force behind the replacement of common sense with expert guidance.[257]

The adverse effects of psychological intervention have been well-documented in the context of the insanity defense. In *Durham v. United States*,[258] the D.C. Circuit held that the appropriate test for determining insanity was whether the criminal conduct was a "product" of a mental disease or defect.[259] This test made the definition of a legal concept fully dependent on the medical community. The "product" test eventually proved to be no test at all, but merely the sum of the views of the medical profession. It engendered mistrust of the psychiatric community and was eventually abandoned.[260] A similar disintegration could readily occur with expert credibility testimony.

Another significant effect of this reordering would be to re-

---

Court rejected reliance on purely social science data for Equal Protection analysis. *See infra* note 279.

255. For an interesting study of the influence a judge can have on a jury by the use of certain tones of voice or nonverbal behavior, see Note, *The Appearance of Justice: Judges' Verbal and Nonverbal Behavior in Criminal Jury Trials*, 38 Stan. L. Rev. 89 (1985), *summarized in Guilty Looks*, Sci. Am., June 1986, at 72.

256. The implications of extending the hypothetical model are best observed in the area of jury instruction and deliberation. This model would require that jurors expressly be made aware of how the presumption of innocence applies to the evidence, and how to sift through the evidence in applying the law. Merely reading the instructions would not be sufficient; jurors would require much more preparation. Judges would then themselves need expert assistance in how to instruct jurors effectively.

257. *See also supra* notes 37-43 (discussing the representation-reinforcement function of the jury).

258. 214 F.2d 862 (D.C. Cir. 1954).

259. *Id.* at 874-75 (citing State v. Pike, 49 N.H. 399 (1870); State v. Jones, 50 N.H. 369, 398 (1871)).

260. United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972).

strict the jury in several ways. Increased expert testimony would limit the jury's discretion to assess credibility and, by implication, its power to "nullify" the testimony of any witness. Jurors would have to learn to approach many ordinary questions from a counter-intuitive perspective. Moreover, as the quantity of information the jury must assimilate increased, the more difficult the jury's task would become.

2. A Similar System

While the replacement of the presently dominant assumptions with the counter-assumptions would modify the operation of the judicial system, the system would remain the same in many ways. The dichotomy of a binary order, involving assumptions and counter-assumptions, would still exist. The essential purpose of the jury would remain unchanged. The jury would continue to be responsible for finding the facts based on what the court admits into evidence. The jury would still weigh the evidence and evaluate the credibility of witnesses. More significantly, the attempt to eliminate reliance on common sense would not eliminate the variable of human experience from the jury evaluation process. Instead, the psychological approach essentially would replace common sense analysis with another value-laden approach. The values involved would be those of the experts and those of the jurors in assessing the experts. Because of the qualitative nature of credibility assessments, which require subtle and individualized evaluations, the psychological data would be subject to a new set of biases, myths, and errors that would vary with each juror. Thus, under any system, the jury process appears to require an irreducible use of common sense. Plain logic and rationality cannot simply be replaced with a completely scientific analysis of credibility. Thus, just as the polygraph has failed to completely replace the jury's evaluation of witness credibility, a psychological model of the criminal justice system would not eliminate the need for the jury's judgment or common sense.

i. But Not a Better Similar System

The best measure of the legal model is whether the testimony has a positive effect on the objectives of the system. If use of expert testimony is perceived as excessive, it could very well undermine public confidence in the results that juries reach. This would be due, in part, to society's view of the discipline of psychology:

> 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.[261]

Thus, while psychological data point out correctly the deficiencies in lay assessments of credibility, mistrust of psychology diminishes the value of the data.

Public confidence in the jurors themselves, and not just in the results they reach, would also decrease under the new system. To the extent that the public believes the psychological testimony to be true, the public is likely to question whether jurors selected from a cross-section of the community can render a fair verdict based on their own experience.[262] The inference is that if jurors cannot resolve basic questions of credibility, what questions can they resolve? If experts are more knowledgeable about such common questions, should not the jurors defer to the experts? Because it assumes that the jury is incapable of performing a function so central to its role, the psychological model would eventually erode the public's confidence and trust in the jury's ability to do what is right.

ii. The Expert as Unintended Moralist

The values the jury chooses to adopt and govern their deliberations are an important aspect of the concept of democracy as applied to the jury system.[263] Moreover, the expert's testimony, although substantive, is not without its own set of values that may influence the jury. Thus, even the expert as educator must be

---

261. Ingulli, *supra* note 21, at 153.

262. It is interesting that jurors have difficulty with many types of technical evidence. *Cf.* Thompson & Schumann, *Interpretation of Statistical Evidence in Criminal Trials: The Prosecutor's Fallacy & the Defense Attorney's Fallacy*, 11 LAW & HUM. BEHAV. 167 (1987) (concerning jurors' underutilization of base and incidence rates for forensic tests in which an object found at the scene of the crime is matched to the suspect).

263. *See* Gold, *supra* note 37, at 498 (fragmenting the courtroom decisionmaking power bars the state from using "the judicial system of as tool of governmental oppression"); *supra*, text accompanying notes 37-43.

aware that any interpretation he makes carries value assumptions and that his discussion of witness evaluation is in effect about "goodness" and "badness." Thus, the jury's choice of values under the psychological model is impeded by the experts.

a. Truth-finding

Psychological evidence about credibility is considerably less certain of its assertions than physical scientific evidence, such as DNA-typing, blood-testing for alcohol or hair analysis. Yet, its imprimatur on the jury may carry a much higher certitude.

The difference in the nature of the evidence is readily seen by example. In one controversial case,[264] for example, defendant Gary Dotson was convicted of rape primarily on the testimony of the victim, Kathleen Crowell Webb. Webb recanted her trial testimony approximately seven years after the trial.[265] Despite the recantation, however, Dotson was not released from prison. In 1988, technological advances in DNA comparison showed that the semen found on Ms. Webb could have been that of only 5% of the male population and not that of Mr. Dotson.[266] The psychological testimony does not pretend to provide such exactitude.[267] Instead, psychological evidence, necessarily introduces the subjective variable of human evaluation. Unlike evidence of DNA comparisons, and like quantifications of pain and suffering, psychological evidence does not preclude juror speculations. Thus, the claim that expert-psychological testimony improves juror accuracy does not appear to be warranted.

b. Realism and Credibility

Expert credibility testimony based on social science data can be viewed as a legal realist analysis of credibility assessment. The psychological data on credibility, while not establishing "with certainty the existence of any fact that is of consequence to an issue

---

264. People v. Dotson, 99 Ill. App. 3d 117, 424 N.E.2d 1319 (1981).

265. People v. Dotson, 163 Ill. App. 3d 419, 516 N.E.2d 718 (1987).

266. Gorner & Barnum, *Nicarico Case to Put Genetic Tests on Trial*, Chi. Tribune, May 28, 1989, at 1. For another example of the use of such testing, see Andrews v. State, 533 So. 2d 841 (Fla. Dist. Ct. App. 1988).

267. "Clearly, the social sciences do not claim empiricism, or the scientific exactitude that physics and medicine aspire to." Note, *Expert Testimony in Child Sexual Abuse Prosecutions: A Spectrum of Uses*, 68 B.U.L. Rev 155, 181 (1988) (citing State v. Logue, 372 N.W.2d 151, 157 (S.D. 1985)).

at trial," is arguably, as the proponents of legal realism might conclude, "capable of providing information regarding the probability that something did or did not occur."[268] General probabilities, however, do not assist the fact finder to determine the truth about a specific case.

Psychological testimony, like legal realism, fails to provide a viable alternative to present methods of credibility assessment. The social science data does not itself tell jurors how to determine the weight to give to each credibility factor, how and when to substitute those factors for their own prejudices and experiences, or how to apply the factors to each witness. Instead, expert testimony can only supplant the jury's role, be ignored or confuse the jury.

The realist exposure of biases and prejudices may reveal that common sense is not value-neutral, but not necessarily that its use is invalid. The normative component of a jury verdict is essential to the governance of acceptable minimum standards of behavior. The normative component requires values that include past experiences and biases. The realist rejection of bias and prejudice consequently abandons an important component of jury action and, perhaps even more significantly, fails to provide its own neutral framework. Instead, it replaces the old biases with new ones.

The hypothetical model is also deficient in failing to recognize that the elimination of bias and prejudice may be impossible. As one commentator noted:

> To psychologists, however, the unbiased juror does not exist. Jurors, like all other human decision makers, cannot evaluate evidence as if it were sui generis but must always relate it to past experiences and preconceived beliefs about the world: the knowledge structures they have accumulated over a lifetime. Based on this premise some psychologists have concluded that the purpose of jury selection cannot be the selection of an impartial jury. Rather, it must be the selection of the most favorably biased jury.[269]

To compensate for the fact that jurors must guess as to credibility and that biases are unavoidable, common sense is a necessary and valuable repository of morality, community intuition and judgment.

---

268. Walker & Monahan, *supra* note 253, at 595; *cf.* People v. Collins, 68 Cal. 2d 319, 438 P.2d 33, 66 Cal. Rptr. 497 (1968) (rejecting the use of statistical probabilities to infer guilt).

269. Gold, *supra* note 37, at 492 (citations omitted).

That social science data are an inadequate basis for justifiable legal rules is exemplified by the experience of the Supreme Court of the United States in determining the number of jurors required in criminal cases. Historically, the American jury was composed of twelve individuals from the community.[270] This number of jurors was widely accepted, but not officially recognized as constitutionally based. In the 1970s, the Court considered several cases involving the number of jurors required. In *Williams v. Florida*,[271] the Court held that a six-person jury in a criminal case satisfied the sixth amendment requirement of trial by jury.[272] The Court noted that "the reliability of the jury as a fact-finder hardly seems likely to be a function of its size."[273] Many social scientists accepted the Court's implicit invitation to analyze the relationship between jury size and jury function.[274]

Eight years later, in the face of shrinking juries in several states, the Court prohibited juries of fewer than six members. In *Ballew v. Georgia*,[275] the Court held that a five-person jury in a criminal case violated the constitutional requirement of trial by jury. The Court relied on empirical research in reaching this conclusion:

> While we adhere to, and reaffirm our holding in *Williams v. Florida*, these studies, most of which have been made since *Williams* was decided in 1970, lead us to conclude that the purpose and functioning of the jury in a criminal trial is seriously impaired, and to a constitutional degree, by a reduction in size to below six members.[276]

The Court went on to say, "the assembled data raise substantial doubt about the reliability and appropriate representation of

---

270. For the possible origin of this requirement, see Williams v. Florida, 399 U.S. 78, 87-90 (1970).

271. 399 U.S. 78.

272. *Id.* at 80. (The Florida law provided for a six person jury in all but capital cases.).

273. *Id.* at 100-01.

274. *E.g.*, NEW JERSEY CRIMINAL LAW REVISION COMMISSION, SIX-MEMBER JURIES (1971); Davis, Kerr, Atkin, Holt & Meck, *The Decision Processes of 6- and 12- person Mock Juries Assigned Unanimous and Two-Thirds Majority Rules*, 32 J. PERSONALITY & SOC. PSYCHOLOGY 1 (1975); Diamond, *A Jury Experiment Reanalyzed*, 7 U. MICH. J.L. REF. 520 (1974); Lempert, *Uncovering "Nondiscernible" Differences: Empirical Research and the Jury-Size Cases*, 73 MICH. L. REV. 643 (1975); Nagel & Neef, *Deductive Modeling to Determine an Optimum Jury Size and Fraction Required to Convict*, 1975 WASH. U.L.Q. 933.

275. 435 U.S. 223 (1978).

276. *Id.* at 239.

panels smaller than six."[277] Even so, the focal point of the Court's decision was not its interpretation of the social-science data. The Court conceded that "we readily admit that we do not pretend to discern a clear line between six members and five."[278] The Court rightly hesitated to rely on studies that cannot and should not replace its own legal conclusions. A legal rule derived from current social science data would be vulnerable to attack from future studies that contradict the findings upon which the present case relies.[279]

V. A NEW RULE OF EVIDENCE ON EXPERT CREDIBILITY TESTIMONY

Despite the many reasons for excluding psychological data on credibility questions, there is at least one strong policy reason supporting its admissibility in certain situations. That reason is the presumption that a criminal defendant is innocent until proven guilty[280] beyond a reasonable doubt.[281] In 1970, the Supreme

---

277. *Id.*

278. *Id.*

279. A parallel lies in the Equal Protection Clause analysis of gender discrimination. In Craig v. Boren, 429 U.S. 190 (1976), the Supreme Court considered the constitutionality of an Oklahoma statute that required different minimum ages for men and women in the purchase of 3.2 percent beer. Statistics were offered in support of the gender disparity: "The appellees introduced a variety of statistical surveys. First, an analysis of arrest statistics for 1973 demonstrated that 18-20 year-old male arrests for 'driving under the influence' and 'drunkenness' substantially exceeded female arrests for that same age period." *Id.* at 200. "Similarly, youths aged 17-21 were found to be overrepresented among those killed or injured in traffic accidents, with males again numerically exceeding females in this regard." *Id.* at 201. The Court concluded, however, that the statistical support for a gender-based classification was unpersuasive. *Id.* The Court stated that the statistical "shortcomings . . . seriously impugn their value to equal protection analysis." *Id.* at 202. The Court then focused directly on the relationship between statistics and the Equal Protection Clause:

> It is unrealistic to expect either members of the judiciary or state officials to be well versed in the rigors of experimental or statistical technique. But this merely illustrates that proving broad sociological propositions by statistics is a dubious business, and one that inevitably is in tension with the normative philosophy that underlies the Equal Protection Clause.

Id. at 204.

280. This presumption is realized in the beyond-a-reasonable-doubt standard of proof. In In re Winship, 397 U.S. 358 (1970), the Supreme Court considered whether due process requires proof beyond a reasonable doubt in a juvenile proceeding. The Court, in concluding that it does, stated that the standard "is a prime instrument for reducing the risk of convictions resting on factual error." *Id.* at 363. This standard "impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue." *Id.* at 364 (quoting Dorsen and Rezneck, *In Re Gault and the Future of Juvenile Law*, 1 FAM. L.Q., No. 4, 1, 26 (1967)). The Court added that "[t]he standard provides concrete

Court held expressly that in a criminal prosecution a state must prove beyond a reasonable doubt all the elements of its case.[282] The presumption of innocence and the high burden of proof are fundamental safeguards that protect the defendant from the stigma of conviction, the loss of property, and the loss of life. Consequently, jury instructions, legal argument, and the requirement of competent proof are tailored to prevent a rush to judgment. Underlying this policy is the value that "it is better that ten guilty persons escape, than that one innocent suffer."[283] In light of this policy, the following rule of evidence is proposed to provide a comprehensive framework within which to treat psychological data on credibility assessments.

A. Problem — Victim Versus Defendant

The theoretical presumption of innocence is subject to nullification by the finder of fact. This presumption is especially vulnerable when the primary evidence in a case juxtaposes the victim's claims and the defendant's rebuttal without significant corroborating evidence. The contradictions leave the jury with what often appears to be an "either-or" situation regarding the truth. The natural inclination in such a situation is to balance the competing testimony, and to ignore the artificial burden of proof.

B. Solution — the Centrality Approach

To protect more fully the presumption of innocence when the presumption may be compromised, the defendant should be permitted to introduce expert testimony on credibility. The threshold for admission should be drawn where the evidence could make a reasonable difference to the outcome of the case. Thus, the centrality approach favored in *State v. Chapple*[284] and *People v. McDonald*[285] is preferable, although not because the expert testimony itself is justifiable under the traditional rules of evidence. Rather, the testimony becomes justifiable because of its value in safe-

---

substance for the presumption of innocence . . . ." *Id.* at 363.

281. *Id.* at 362.

282. *Id.* at 364.

283. 4 W. BLACKSTONE, COMMENTARIES *358.

284. 135 Ariz. 281, 297, 660 P.2d 1208, 1224 (1983); *see supra* text accompanying notes 233-235.

285. 37 Cal. 3d 351, 355, 690 P.2d 709, 711, 208 Cal. Rptr. 236, 238 (1984); *see supra* text accompanying notes 230-232.

guarding the presumption of innocence or the corollary right to mount a defense.

The following, proposed rule attempts to reflect the proper value of common sense and the inadequacy of the courts to provide coherent guidance with respect to psychological evidence, while at the same time acknowledging the importance of the presumption of innocence.[286] The rule parallels in many ways the treatment of character evidence under Federal Rule of Evidence 404(a). As the Advisory Committee noted about that rule,

> '[c]haracter evidence is of slight probative value and may be very prejudicial. It tends to distract the trier of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of fact to reward the good man and to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened.'[287]

Similar concerns have shaped the drafting of the rule that follows.

1. The Proposed Rule

"(a) PSYCHOLOGICAL EVIDENCE GENERALLY. Evidence of a scientific, psychological or comparative nature bearing on evaluations of witness credibility is not admissible to assist the trier of fact with credibility assessments, except:

(l) when offered by the accused, or

(2) when offered on behalf of a complainant to rebut a claim of fabrication.

(b) If the court determines that proffered psychological evidence falls within exception (a)(l) or (a)(2), it shall balance the prejudicial impact of the testimony against its probative value. The Court must also take into account the form in which it is offered and the centrality of a credibility assessment to the outcome of the trial to determine whether to admit the evidence.

(c) If psychological evidence satisfies the requirements of parts (a) and (b) of this provision, it shall be admitted. The court shall have discretion to permit testimony by a qualified expert or a jury instruction designed to accomplish the same end."

---

286. In addition, in the interests of fairness, the victim will be able to use psychological testimony to refute a claim of fabrication.

287. FED. R. EVID. 404(a) advisory committee's note (quoting CALIFORNIA LAW REVISION COMMISSION, REPORT, RECORD & STUDIES, TENTATIVE RECOMMENDATION AND A STUDY RELATING TO THE UNIFORM RULES OF EVIDENCE 615 (1964).

2. The Proposed Legislative History

A legislative history for this rule might be added as follows:

"(1) This rule is intended to apply to all types of empirical and comparative testimony or jury instructions about the credibility of a witness, including generalized testimony about common witness characteristics or psychological syndromes such as the rape trauma syndrome and the undercover stress syndrome. The common themes underlying all of the testimony and instructions affected by this rule are that they touch on the credibility of one or more witnesses at trial, in particular with respect to the witnesses' psychological or mental processes.

(2) The purpose of credibility testimony or jury instructions is to corroborate or undermine the testimony of another witness. The breadth of the exclusions is intended to protect the decision-making process of the jury from psychological data that invade the province of the jury.

Part (a) of the rule states the general rule of exclusion and provides for two exceptions. The first exception, (1), concerning the accused in a criminal case, is similar to the special dispensation that Federal Rule of Evidence 404(a) provides for the accused with respect to character evidence. This dispensation is permitted to effectuate fully the presumption of innocence and to provide the defendant sufficient leeway to present a full and fair defense.

The second exception, (2), permits the state to offer psychological evidence in rebuttal to claims of fabrication. This is a fairness rule that prevents a defendant from using the exception as both a sword and a shield. It is intended to minimize abuses by defendants.

Even if psychological evidence falls within one of the two exceptions under Part (a), Part (b) requires additional scrutiny prior to the admission of the evidence at trial. In particular, Part (b) looks to the prejudicial impact of the form of the testimony and balances the prejudice against the importance of the testimony to the outcome of the case. In evaluating the impact of the form of the testimony, the court should consider whether the testimony refers specifically to individual witnesses at trial or the testimony describes in general terms a larger subject-group and/or subject-group characteristics.

In evaluating the centrality of the evidence, the court should first determine how important the credibility assessment is to the outcome of the case. If the court finds that the credibility issue is

important, if not dispositive, it must then consider whether other forms of corroborating evidence exist which minimize the importance of the psychological evidence. Only if there is little corroborating evidence should the court then move to Part (c) of the rule.

Once the court determines that some form of psychological evidence is warranted, the court must then determine which form it will allow. The court has a wide range of choices, from specific testimony about witnesses at trial to general testimony about witness characteristics to other types of comparisons studied by experts. The court shall, if feasible and warranted, hear the expert outside of the hearing of the jury and ask each attorney for an instruction that will fairly embody the substance of the testimony. If this is not feasible or warranted, the court shall allow experts to testify directly to the jury."

CONCLUSION

The use of common sense by jurors to evaluate witness credibility is sometimes an inaccurate method of assessing the credibility of witnesses. In recent years, there has been increasing pressure to permit the results of psychological studies of credibility assessment to be revealed to the jury by experts. The use in criminal trials of psychologically assisted credibility assessments is of questionable admissibility when evaluated under the criteria of usefulness to the jury and unfair prejudice. More significantly, however, the testimony does not appear to serve the objectives of the jury system, and particularly the representation-reinforcement role of the jury. The use of psychological data decreases the likelihood of public confidence in the verdict without any showing of increased accuracy. It should be treated, therefore, with skepticism.

Psychological testimony and the related psychological studies take on greater importance, however, when they are offered to protect the defendant's presumption of innocence. The value of the testimony is most apparent in cases that present little corroborative evidence of a witness' testimony. In these cases, the credibility assessment is often dispositive of the outcome of the case and makes the difference between life and death or liberty and restraint. Under such circumstances, it is appropriate to permit some form of psychological data to be presented to the jury, either on the defendant's behalf or to rebut the defendant's claim of government fabrication.