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Eye-Witness Identification: Legal and Practical Problems, by Nathan Sobel; Reliability of Evidence, by Arne Trankell

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BOOK REVIEW

EYE-WITNESS IDENTIFICATION: LEGAL AND PRACTICAL PROBLEMS.
By Nathan R. Sobel. New York: Clark Boardman Company,
Ltd., 1972. Pp. xii, 204. \$12.00.

RELIABILITY OF EVIDENCE. By Arne Trankell. Vallingby, Swed.: Beckmans, 1972. Pp. 165. \$4.50.

In 1909 Dean Wigmore concluded his review of Hugo Muensterberg's *ON THE WITNESS STAND*¹ by stating his belief that psychology had nothing to offer the legal profession. Dean Wigmore stated his further belief that when psychology had something to offer, the law would receive it openly and happily.² In 1935 Cairns reported no change in the communications vacuum between psychologists and lawyers.³ In 1973, by and large, psychologists and lawyers continue to operate in blissful ignorance of each other's efforts. Psychologists rarely appear in the courtroom as witnesses.⁴ The law of evidence has seldom taken account of the results of psychological research when designing rules for the admission, exclusion, and evaluation of testimonial assertions.⁵ Psychologists, on the other hand, have rarely asked the kinds of questions about perception, memory, communicative activities or human motivation to which the legal system requires answers.

This neglect by each profession of the other is readily explainable. By and large the research psychologist has defined and investigated problems of behavioral normality or abnormality as a matter of statistical probability resulting from study of a reasonably large number of incidents. The measure of normality is a frequency distribution around a median or mean. Through use of such techniques, psychologists are able to describe behavioral ranges which occur. This is of little assistance to a judge or a lawyer, who is not concerned with truth in a probabilistic or statistical

1. H. MUENSTERBERG, *ON THE WITNESS STAND: ESSAYS ON PSYCHOLOGY AND CRIME* (1908).

2. J. Wigmore, *Professor Muensterberg and the Psychology of Testimony: Being a Report of the Case of Cokestone v. Muensterberg*, 3 ILL. L. REV. 399, 412-15 (1909).

3. H. CAIRNS, *LAW AND THE SOCIAL SCIENCE* 169 (1935).

4. The most famous exception is *United States v. Hiss*, 88 F. Supp. 559 (S.D.N.Y. 1950). Typically, courts reject offers of psychological or psychiatric opinions upon a witness's credibility, preferring to leave the matter to the discretion of the factfinder.

5. This fact is well documented in J. MARSHALL, *LAW AND PSYCHOLOGY IN CONFLICT* (1966); particularly in Chapter I, "Psychology and Evidence." *Id.* at 5-40.

sense, but instead with "the probability of a single case"⁶ of human behavior. In making such a decision it is of no particular use to know that 65 per cent of all witnesses will (or will not) accurately report and describe a particular fact. The issue is whether or not the particular witness has done so, and for this task statistical probabilities over large numbers just don't help. Thus, since 1909, the lawyers and psychologists have gone their separate ways, asking different kinds of questions about human behavior, and being unconcerned with either the questions or answers developed by the other profession.

These two books, from their legal and psychological perspectives, may signal some change in this long standing separation of the respective professions of the authors. Nathan R. Sobel is a trial judge and author. His new book, *EYEWITNESS IDENTIFICATION: LEGAL AND PRACTICAL PROBLEMS* is a discussion of the constitutional rules for eyewitness identification first articulated in the *Wade-Gilbert-Stovall* trilogy,⁷ as modified in *Kirby v. Illinois*,⁸ and the special rules for pretrial photographic identification first developed in *Simmons v. United States*.⁹ His book is an effort to bring together the body of law which has grown up since *Wade, Gilbert and Stovall* and which, in Sobel's words, was "the first attempt by the Court to establish effective constitutional safeguards and rules governing eyewitness evidence of identification in federal and state criminal trials."¹⁰ As Judge Sobel points out, prior to these decisions, eyewitness identifications were a neglected area of the criminal law, yet an area peculiarly riddled with risks to the factfinding processes. These risks of misidentification are caused by factors which are of interest to and the subject of psychological research. The Supreme Court itself recognized and discussed these risks and some relevant psychological data in its *Wade* opinion.¹¹ In a direct way, the constitutional rules, hence Judge Sobel's discussion of them, represent a judicial application of psychology's teachings to the probability of the specific instance. This the Court tried to accomplish largely by regulating in some detail the nature of pretrial, police-arranged lineups, showups and photographic identifications by eyewitnesses. These practices had become suspect as causes of possible witness misidentifications.

6. Lerner, *Introduction to EVIDENCE AND INFERENCE* (D. Lerner ed. 1958). Lerner's introduction contains a brief but excellent discussion of the importance to various disciplines of this distinction.

7. *United States v. Wade*, 388 U.S. 218 (1967); *Gilbert v. California*, 388 U.S. 263 (1967); *Stovall v. Denno*, 388 U.S. 293 (1967).

8. 406 U.S. 682 (1972).

9. 390 U.S. 377 (1968).

10. N. SOBEL, *EYE-WITNESS IDENTIFICATION: LEGAL AND PRACTICAL PROBLEMS* 1, 2 (1972) [hereinafter cited as SOBEL].

11. *United States v. Wade*, 388 U.S. 218, 228-31 (1967).

Arne Trankell is a Swedish psychologist with an interest in, and some expertise as, a forensic psychologist. In his recently translated book, *RELIABILITY OF EVIDENCE*, Professor Trankell has attempted to provide a technology for the assessment and interpretation of the factual assertions of particular witnesses at particular times and places under particularized circumstances. To the knowledge of this writer, his book represents one of the first efforts by a psychologist to move from knowledge by numbers to the problems presented by specific cases. For this reason alone it is worthy of note. Professor Trankell's book, however, has more than this to recommend it. He has illustrated his discussion with examples taken from his personal experience as an expert witness for Swedish courts. Hence an American attorney can learn from such experiences many ways in which a psychologist could assist in making determinations of the relative reliability or unreliability of the assertions of particular witnesses. Professor Trankell, as is customary in Europe, appeared as a witness for the court. Nonetheless his experiences suggest ways in which American trial attorneys could make use of psychologists while preparing for a criminal trial.

This reviewer was struck, when comparing and contrasting the subject matter of these books, with both the disparity between an adversarial and an inquestorial mode of trial and the resulting differences in approach to the resolution of problems of testimonial reliability. The *Wade-Gilbert-Stovall-Simmons* rules are rules of exclusion of evidence. As such they operate upon litigants in several ways. They are, however, only an indirect response to the problem they purport to solve. The rules do not specify the conditions which must occur in order to decide that a particular corporeal or photographic identification was reliable. Instead they only specify conditions under which the police or the prosecution may conduct such identifications: in the presence of defense counsel in the case of a post-indictment lineup or showup; or under circumstances which are not "unnecessarily"¹² or "impermissibly"¹³ suggestive if counsel is not present or the identification is photographic. If counsel is not present at a corporeal identification, or if the pretrial identification is photographic, the witness' trial identification is excluded unless the prosecutor can establish that the procedures used to obtain the pretrial identification were not "so unnecessarily suggestive and conducive to irreparable mistaken identification"¹⁴ or did not have such a tendency "to give rise to a very substantial likelihood of irreparable misidentification"¹⁵ that allowing the witness to

12. *Stovall v. Denno*, 388 U.S. 293, 301-02 (1967).

13. *Simmons v. United States*, 390 U.S. 377, 384 (1968).

14. *Stovall v. Denno*, 388 U.S. 293, 302 (1967).

15. *Simmons v. United States*, 390 U.S. 377, 384 (1968).

make an in-court identification would be a denial of due process of law.¹⁶ In making a showing that the in-court identification had a source independent of the impermissible practices, the prosecution must do so by clear and convincing evidence.

These are fairly complicated rules. Judge Sobel explains in his preface that, unlike the exclusionary rules announced in *Mapp v. Ohio*¹⁷ and in *Miranda v. Arizona*,¹⁸ the *Wade-Gilbert-Stovall* rules were not preceded by the development of a significant body of law in the lower federal courts or the states, despite general agreement that mistaken identifications had produced more miscarriages of justice than had resulted from any other cause. Judge Sobel, who commented upon the exclusionary rules in *Mapp* and *Miranda* a few months after each decision, delayed writing the book being reviewed until a sufficient body of lower court law had built up so that various aspects of the rule in operation could be explored. Thus Judge Sobel's book explores such problems as waiver of counsel, accidental or unarranged showups, the standards which have developed for determining whether a lineup was "fair", the role of defense counsel at a lineup, and the factors which have been developed for determining whether or not an in-court identification results from a source independent of the tainted identification practice. By and large he does an excellent job of describing the body of law which has accreted,¹⁹ and even permits himself some criticism of certain decisions and sub-rules which have been developed. Unlike an earlier book by a different author,²⁰ Judge Sobel's does not discuss psychological factors which affect identifications, nor, by and large, does he purport to evaluate the efficacy of the rules which have resulted from the Supreme Court decisions. This is not a criticism of Judge Sobel's book, but is instead intended to question the efficacy of the Supreme Court's rules in *Wade, Gilbert, Stovall* and *Simmons*.

It is true that the *Wade-Gilbert-Stovall-Simmons* rules provide a means whereby certain police practices which might lead to false identi-

16. *Foster v. California*, 394 U.S. 440 (1969).

17. 367 U.S. 643 (1961).

18. 384 U.S. 436 (1966).

19. Judge Sobel erred in asserting that most jurisdictions permit unlimited bolstering of an in-court identification by proof of previous out-of-court identifications consistent therewith, through the witness or by third party bolstering. No doubt Judge Sobel, as a New York trial judge, did not sufficiently understand the peculiarities of New York law when compared with most jurisdictions. Some of the history of the New York rules may be found in Desmond, *The Trowbridge Case: A Near Miscarriage of Justice*, 41 A.B.A.J. 209 (1955).

20. P. WALL, *EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES* 90-132 (1965). Judge Sobel does discuss the factors elucidated by the Supreme Court in *Wade* as determining whether an in-court identification has a source independent of an illegal pretrial confrontation. SOBEL, *supra* note 10, at 125-37.

fications can be regulated. To this extent they are useful in reducing the risks of misidentifications which might otherwise be created. However, the incidence of misidentifications caused by such unregulated practices is unknown; the efficacy of the exclusionary rule either as a corrective to the earlier practices or for witness errors generally is unknown, and the more likely causes of misidentifications remain quite untouched by the rules of exclusion devised by the Supreme Court. This is not to suggest that exclusionary rules ought not be devised or imposed as a means of reducing errors arising from impermissibly suggestive pretrial showup, lineup or photographic identification practices. As Judge Sobel makes clear, there are valid reasons for suspecting such practices as causes for eyewitness misidentification. The point is that misidentification resulting from such practices may be a small percentage of the totality of eyewitness misidentifications from all causes. These exclusionary rules, in other words, may be effective in only a limited number of cases.²¹ They do not, nor can they, act to correct other causes of witness misidentification.

This is intended neither as criticism of the Supreme Court nor of Judge Sobel's book. It is to point out that an exclusionary rule of evidence is a device of limited efficacy, requiring something in the way of objectively manifested conduct in order to function. A rule of exclusion is effective insofar as it is possible to determine that the conditions giving rise to its operation have or have not been met. As an example, it is clear that the Supreme Court utilized the sixth amendment right to counsel in devising its lineup rules as a way to develop proof of unfairness as well as a means for upgrading police lineup practices through adversarial screening and observation of the techniques used. In similar fashion the *Miranda* warnings requirements was a method for providing some objective conduct upon which a rule of exclusion could be founded. Eyewitness identification, however, is basically a subjective process. Most of the errors of perception, recollection, and communication, and the problems of human motivation which lead to misidentification are difficult to expose inasmuch as they are manifested only in the act of identification itself. They are internalized to the identifier, who may himself be unaware of the factors which might give rise to an honest misidentification of a purported participant in some criminal activity.²² The Anglo-American system of trials has relied upon adversarial cross-examination to expose or demonstrate erroneous identifications. Again, though, one suspects that this device is only partially effective for this purpose. The trial attorney faced

21. Judge Sobel estimates that the *Wade-Gilbert-Stovall* rules affect only about five per cent of all criminal trials, typically robberies. SOBEL, *supra* note 10, at 4-5.

22. See generally D. LOUISELL, J. KAPLAN & J. WALTZ, *CASES AND MATERIALS ON EVIDENCE* 1200-74 (2d ed. 1972); J. MARSHALL, *LAW AND PSYCHOLOGY IN CONFLICT* (1966).

with the problem of exposing a witness's misidentification must pull out information which is locked into the witness's subconscious. This is, at best, a difficult task, requiring considerable insight into human beings generally, and the witness in particular. One suspects that many attorneys are not equipped to accomplish this successfully. No matter how skillful, insightful, or educated the attorney may be, he is concerned with "the probability of the single instance"²³ of human behavior. It is to this problem that Professor Trankell has addressed himself, although from the perspective of a forensic psychologist rather than that of an advocate.

Much of Professor Trankell's book discusses cases in which he was called upon to act as a court appointed expert for the purpose of testifying as to the reliability or unreliability of witness's testimony. In and of itself this is most unusual to Americans, since it is only on rare occasions that psychologists or psychiatrists have appeared in our courts for such a purpose.²⁴ His methods are, however, of far greater interest, and provide a contrast to the adversarial methodology, specifically the operation of exclusionary rules and cross-examination of witnesses. Given a particular witness's story, Professor Trankell attempts to test its validity. In some instances which he reports, the testing took the form of requiring the witness to duplicate observations under conditions similar to those in which the witness originally observed. In other cases, the testing involved an analysis of the story for logical and psychological consistency or inconsistency. In each case this analysis was followed by the formulation of alternative plausible hypotheses or explanations which were used to devise methods for testing the truth or falsity of the original story.²⁵

The comparison and contrast with Anglo-American methodology is striking. Given the fact that a particular criminal trial may turn upon the accuracy or reliability of a witness's testimony, the American judge and attorneys must proceed to an immediate determination of this question. There is no time to halt the trial, as is true in Europe, in order to call in a Professor Trankell. There is no time for analysis, nor for the devising of hypotheses. There is not time to devise tests which seek verification through replication. This is not the place to argue the merits and demerits of the adversarial and inquisitorial modes of trial, and the foregoing observations are not intended to be critical of adversarial justice. They do emphasize a major difference between the two systems: the role of the attorney. The functional equivalent in the United States of the Swedish Professor Trankell is the trial attorney himself. He must, either alone or with the assistance of professionals such as Professor Trankell, perform

23. See note 6 *supra* & text accompanying.

24. See note 4 *supra*.

25. See generally J. WIGMORE, *THE SCIENCE OF JUDICIAL PROOF* 18-32 (1937).

the necessary analysis of a witness's story, develop his hypotheses and then test them in meaningful ways. Furthermore, this must be accomplished before trial rather than be delayed until the issue is posed through the taking of testimony. Thus the American trial attorney needs to know far more about the causes and indicia of testimonial unreliability than does his European counterpart.

As was previously stated, Professor Trankell's book is an effort by a psychologist to move from knowledge by numbers to the problem of deciding specific cases, i.e., the reliability of the testimony of individuals. This reviewer is not qualified to evaluate or criticize his psychology. However, the method he uses to bridge the gap has little to do with psychology as such. It is a basic, common sense, and familiar analytical method. He assumes that human beings are fallible organisms, and therefore that human perception, recollection, and efforts to communicate about retained perceptions are at times accurate and at times inaccurate. Therefore, a given witness's testimony will contain elements both of objective reality and of "created" facts. The evaluative problem is to separate the one from the other. Professor Trankell accomplishes this by applying basic logical and psychological principles, understood by any trial lawyer, to determine the probability that a witness is accurately describing reality. What he does is to locate circumstantial indicia of reliability. This is not an unusual methodology, and its interest lies not in its novelty, but rather in that Professor Trankell, a psychologist, adopts essentially a legal methodology to determine the reliability of testimony. It therefore appears that Dean Wigmore's assertion that psychology has little to offer the law is still valid. *Reliability of Evidence* does not break new psychological ground, and does little to integrate psychological principles into close working relationship with the law.

This is not to suggest that Professor Trankell's book is devoid of value. As previously mentioned, it is extremely useful in suggesting ways in which trial attorneys could make use of psychologists while preparing for trial. More importantly, Trankell's book provides a simple method for analyzing problems of testimonial reliability. He has developed what he terms "Statement Reality Analysis" to facilitate an exploration of a witness's story.²⁶ This is not put forward as a formal theory. In its essence Statement Reality Analysis is a mixture of logical and psychological criteria which can be used as an inventory when analyzing the reliability of a given story. The criteria he suggests are quite obvious,²⁷

26. A. TRANKELL, *RELIABILITY OF EVIDENCE* 124-48 (1972).

27. For example, Trankell formulates what he terms a homogeneity criterion: If independent details in an account define one and the same event there is an increased probability that the account describes an actual occurrence.

Id. at 129.

but do provide ways of evaluating a story by examining it for internal and external consistency. From a scientific viewpoint, one doubts the effectiveness of Statement Reality Analysis for two reasons. First, Trankell's inventory is by no means complete. Second, some of his criteria are difficult to understand, and one suspects are even more difficult to apply or even to decide whether or not they do apply. But to the extent that his criteria can be used, it seems likely that they would function to assist in deciding the increased or decreased probability that an individual witness is reporting reliably.

Ultimately, then, Professor Trankell's book is useful because it confirms and adopts a methodology long used by trial lawyers to determine the reliability or unreliability of evidence. Judge Sobel's book is also useful because, unlike Professor Trankell's, it describes recent efforts to reduce or eliminate investigative biases as a source of testimonial unreliability, through the device of adopting rules of exclusion. Together these two books represent some progress of a sort toward an eventual state of closer cooperation between lawyers and psychologists with respect to problems of mutual interest.

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