

John H. Wigmore on the Abolition of Partisan Experts

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The American justice system traditionally has relied on expert witnesses hired by adverse parties, resulting in the appearance of dueling hired guns. There have been attempts to reform the system through court-appointed impartial experts, but trial attorneys have resisted them. Celebrated cases have brought the problem to the forefront—for example, the 1924 murder trial of Richard Loeb and Nathan Leopold, Jr, in Chicago. These young men were on trial for kidnapping and killing a teenage boy. That there was no motive but thrill-seeking incensed citizens, who called for their death. Several psychiatrists testified at the penalty phase. The judge sentenced the defendants to life in prison, ostensibly because of their age. Commenting on the case, John H. Wigmore, Dean of Northwestern Law School and authority on evidence, critiqued the system of partisan experts. This article contains a reprint of his editorial and a discussion of it in the context of evolving expert testimony standards. My conclusion is that a robust but honest airing of opinions is most helpful in criminal cases and that court-appointed experts may be more appropriate in civil and domestic relations matters.

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Expert witnesses, whether seen as a necessary evil or an indispensable asset, are permanent fixtures among the law's *dramatis personae*. Legal systems of antiquity did not require adversarial experts; the idea was scarcely conceptualized before the 18th century.¹ Until the mid-1700s, experts were considered *amici curiae*.² In England, there was a transition in the makeup of juries and the identity of medical experts in criminal trials of the 1800s.³ Jurors, who often knew the defendant from the community, were selected more randomly, and expert witnesses, who often had prior knowledge of the defendant, were more detached. We can see nascent consciousness of a need for objectivity in matters requiring cool reflection.

Psychiatric experts should not overidentify with legal arguments on one side or another; but should only educate the trier of fact. Even as we now strive for objectivity,⁴ we can recall that the 19th century

boom in the use of partisan experts in America tainted trial procedure.⁵ As an early 20th century commentator⁶ put it, "A lawyer who would absolutely refuse to pass a counterfeit bill will unhesitatingly palm off counterfeit expert testimony on a jury" (Ref. 6, p 255). Barring unreliable testimony requires vigilant gatekeeping and has become standard procedure in American courts.

When psychiatric testimony appears in high-profile cases, the popular perception of a battle of the experts is reified by the news headlines. Seemingly polar views expressed by eminent professionals may suggest that there is no truth in psychiatric expertise, only a pecuniary interest among the players. Experts appear for one side or the other. As Diamond⁷ put it, the idea of the impartial expert is a fallacy. This does not necessarily imply that expert witnesses are unethical or that they should shun legal matters. There have been proposals to neutralize the polarization of expert witnesses, so that they become true friends of the court, not battling avatars; but change has been slow. This article recalls one such effort by a prominent law school dean, occurring shortly after the controversial verdict in a 1924 Chicago murder trial that included several psychiatric witnesses.

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The Loeb-Leopold Trial

The world's attention focused on Chicago in 1924, when police quickly solved a heinous child-murder case and obtained confessions, and prosecutors put the two young defendants on trial for their lives. The perpetrators, Richard Loeb, 18, and Nathan Leopold, Jr, 19, kidnapped and killed 14-year-old Bobby Franks. By all accounts, they did it for the sensation, as if they were Nietzschean supermen, above the law.⁸ Were they evil incarnate or victims of incomplete and deviant psychological development? Expert psychiatric evaluations would tell, or so it was promised.

Vilified by the news media and public sentiment, the defendants were represented by famed death-penalty opponent Clarence Darrow, who arranged medical and psychiatric testing.⁹ Sparing no expense to the defendants' parents, Darrow obtained metabolic and radiological assessments in addition to extensive interviewing by psychiatrists. Armed with pathological findings, Darrow wisely conceded guilt, forcing a penalty-phase bench trial. He also prevailed against the prosecutor's argument that, since a full trial was unnecessary, expert witnesses could be eliminated.^{8,10}

Judge Caverly heard extensive expert testimony, including that of Drs. White, Healy, Glueck, and Hamill for the defense.^{8,10,11} According to the editors of a law journal, the Loeb-Leopold trial was the first instance of mitigation testimony by psychiatrists.¹² The journal editors, who included Dean Wigmore of Northwestern Law School, were displeased with Darrow's tactic:

[C]riminologists everywhere are interested in the psychiatrists' reports, for this is probably the first instance of the offer of elaborate psychiatric analyses as the basis for remitting the law's penalty for a calculated, cold-blooded murder, committed by persons not claimed to be insane or defective in any degree recognized by the law as making them not legally responsible [Ref. 12, p 347].

Expert Testimony

The defense presented evidence that the defendants were deeply flawed developmentally and out of touch with reality, whereas the prosecution's experts, Drs. Patrick, Singer, Church, and Krohn, described no overt psychopathology.¹³ The following are the conclusions from the defense joint report:

[Re Nathan Leopold] We could draw no other conclusions from Leopold's abnormal phantasy life, his delusional development of notions about himself, his defective or deteriorated judgment which has not permitted him to see the pathological absurdity of mixing up phantasy and real life;

his repression and misplacement of emotional life; his abnormal urge toward activity and search for the experience of new mental and physical sensations; his disintegrated personality to the extent that he has shown an essential and abnormal lack of foresight and care even for his much beloved ego—we can draw no other conclusions from the above than that Leopold is and was on the twenty-first day of May, 1924, a thoroughly unbalanced individual in his mental life. He represents a picture of a special abnormal type, the paranoid psychopathic personality. His ability as a conversationalist and as a student had led to his being unrecognized for what he really is, and his delusional conceptions about himself have therefore not been taken seriously. His very manic (over-excitible and over-energetic) tendencies have been misinterpreted as evidences of cleverness. The fact that he has been able to carry himself along in the world without being recognized as being abnormal is in itself typical of individuals who belong to this special group of mental disorders [Ref. 11, pp 371–2].

[Re Richard Loeb] It is evident from the foregoing that in this case we are dealing with an adolescent who in his development has manifested a markedly pathological divergence or split between his intellectual and emotional life, so that while he may be considered mature intellectually, he is decidedly infantile in his capacity for reacting to the ordinary situations of life with normal, appropriate emotions. His whole behavior in connection with the Franks case before and after its occurrence and up to the present moment, indicates a degree of callousness which is wholly incomprehensible except on the basis of a disordered mentality. The opinion is inescapable that in Loeb we have an individual with a pathological mental life, who is driven in his actions by the compulsive force of his abnormally twisted life of phantasy or imagination, and at this time expresses himself in his thinking and feeling and acting as a split personality, a type of condition not uncommonly met with among the insane. We therefore conclude that Richard Loeb is now mentally abnormal and was so abnormal on May 21st, 1924, and, in so far as any-one can predict at this time, will continue, perhaps with increasing gravity, as time goes on [Ref. 11, p 379].

Baatz⁸ underscored the stark difference in tone of the state's experts' conclusions: "There was no evidence of any mental disease" [Dr. Patrick]; "There was no mental disease of any character" [Dr. Church]; "There is nothing . . . that would indicate mental disease" [Dr. Singer]; "They are not suffering from any mental disease" [Dr. Krohn] (Ref. 8, p 339).

The press coverage was avid and hyperbolic, emphasizing a battle of the experts over whether the defendants were sick or evil. The *Chicago Herald and Examiner* reported "Fifty Alienists to Fight for Slayers."¹⁴ Figure 1 is a *Chicago Tribune* cartoon from August 14, 1924, depicting the battle of experts (alienists) in the Loeb-Leopold trial before an exasperated judge. In this characterization, the cartoonist portrayed the experts as out of control, hurling learned treatises at one another. In reality, the court permitted mitigation testimony to guide the sentencing.



Figure 1. “Battle of the Alienists” by John T. McCutcheon. *Chicago Tribune* August 14, 1924. Reprinted with permission from the McCormick Library of Special Collections at Northwestern University, Evanston, Illinois.

Ultimately, according to Judge Caverly, the expert testimony did not sway the court. The judge sentenced the defendants to life in prison plus 99 years, basing the decision on their youth, rather than on mitigation testimony.¹⁵ He was more impressed than were the prosecution’s experts by the defendants’ psychopathology, but reasoned that such findings were generic to criminals. Thus, the findings would be more applicable to criminology than to the jurisprudence of an individual case.¹⁵ Though Judge Caverly employed a reasoned and broad-minded approach to mitigation testimony, from a public perspective, it appeared that the Loeb-Leopold trial did little to burnish psychiatry’s image.

The Legendary Dean Wigmore

Following Loeb and Leopold’s sentencing, there was a flurry of criticism of the trial strategies, the court’s reasoning, and the confusion created over the experts’ divergent views. How could the young science of psy-

chiatry present such disparate evidence? What were the implications for expert testimony generally? Especially vocal was John Henry Wigmore, dean of Northwestern University’s School of Law (Fig. 2). Wigmore insisted that the testimony lacked credibility, suggesting that Darrow had bought it and that it confused the judge, who failed to take the correct path of sentencing the defendants to death.

Best known for his massive *Treatise on Evidence*,¹⁶ Wigmore’s contributions to legal theory and practice, as well as his commentary on trials, had a profound influence on American law.¹⁷ Having joined the faculty of Northwestern Law School in 1893, he was its dean from 1901 until 1929, remaining on the faculty until his death in 1943.¹⁸ Although he supported the use of scientifically supported evidence presented by reputable experts, he was a fierce opponent of what we now call junk science.

Wigmore’s Views on Mental Health Testimony

Wigmore spoke out to protect the integrity of evidence, taking a conservative stance on admissibility of expert testimony. A widely discussed example of



Figure 2. Dean John Henry Wigmore. Source: Northwestern University Archives.

his acerbic pen was his 1909 critique of psychological research in word association.¹⁹ This experimental tool had been touted by C. G. Jung and was immediately disparaged by Freud during a 1906 lecture to Viennese law students.²⁰ Harvard psychologist and progenitor of forensic psychology Hugo Münsterberg had proposed the applied technique for assessing the reliability of eyewitness and other lay testimony, citing Jung and others.²¹ His book highlighted problems in human perception and memory and how they contaminated court proceedings. Wigmore ridiculed Münsterberg's views in a satirical mock trial for libel, with members of the legal profession as plaintiffs and Münsterberg as the defendant.¹⁹ Though the psychologist may have identified correctly that the law lags science, Wigmore attacked, defending the legal establishment and eviscerating the nascent psychology application. The critique has been regarded as effectively setting back forensic and applied psychology for years.²² It is not that Wigmore was antiscience; only that Münsterberg's research was not ready to aid the law. This tension is echoed in today's debate over the use of neuroimaging in trials; that is, whether such evidence is subject to overclaims, more prejudicial than probative.^{23,24}

There was scientific evidence in the Loeb-Leopold penalty-phase trial, ranging from skull radiographs to endocrinological effects on sex to psychoanalytic concepts.⁹ It is doubtful that any of it was material to the sentence. Nevertheless, in the wake of the Loeb-Leopold verdict, Wigmore criticized Judge Caverly for failing to impose the death penalty on eminently worthy recipients.²⁵ He then turned on the use of psychiatric expert testimony: "I maintain that the reports of the psychiatrists called for the defense, if given the influence which the defense asked, *would tend to undermine the whole penal law*" (Ref. 25, p 403; italics original). In an editorial appearing in Northwestern's law journal, Wigmore proceeded to propose a way to rein in the misuse of professionals in the court room. The following is the text in its entirety (punctuation and italics original).

TO ABOLISH PARTISANSHIP OF EXPERT WITNESSES, AS ILLUSTRATED IN THE LOEB-LEOPOLD CASE

In the course of a colloquy between counsel, over the testimony of a psychiatrist called for the defense, this passage occurred: Mr. D. "Let me ask you, doctor, what was Dick's attitude toward that compact?" Mr. C. "By 'Dick,' do you mean the defendant, Richard Loeb?"

Mr. D. "If necessary, I am willing to stipulate that 'Dickie' or 'Dick' means Richard Loeb, and that 'Babe' means Nathan Leopold, Jr."

This passage was evoked by the frequent instances of the expert witnesses' use of the endearing, youthful, innocent epithets 'Dickie' and 'Babe,' both in direct and cross-examination: thus:

Q. "Is Loeb the leader in this crime?"

A. "I should say that Babe has the more constructive component, etc. Dickie on the other hand is rather essentially destructive, etc."

1. This voluntary adoption of the endearing, attenuating epithets 'Dickie' and 'Babe' to designate the defendants reflects seriously on the medical profession. The whole evil of expert partisanship is exemplified in this action of these eminent gentlemen.

Most of the criticism directed against distorted and manufactured expert testimony has hitherto been based on the supposed bias due to the fees—the money taint. But in this case the fee was exactly the same on both sides. And in this case, also, the personality of the gentlemen refutes the possibility of such an influence. Two of the six experts testifying for the defense are known to me personally, and all the world knows that in the case of all six no question could possibly arise of the taint of money. Their standing, their whole career, has placed them beyond any such suggestion. And yet the sad spectacle is presented of these eminent scientists committing themselves to the cause of one side rather than the other, by adopting epithets calculated subtly to emphasize the childlike ingenuousness and infantile naivety [sic] of the cruel, unscrupulous wretches in the dock. It was the cue of the defense to impress this character on the judge, and the experts' well-chosen language lent itself shrewdly to that partisan end.

2. What then is the ultimate cause of expert witnesses' partisanship, if it is found even where character and reputation exclude the cause commonly attributed?

It is this; *the vicious method of the Law*, which permits and requires each of the opposing parties to *summon the witnesses on the party's own account*.

This vicious method naturally makes the witness himself a partisan. He is spoken of habitually as "my" witness or "our" witness. In the Loeb-Leopold case, where the experts devoted long hours to the study of the defense's case, consulted only with the defense's counsel, made preliminary reports to those counsel, cut down those original reports in their testimony, and answered only the questions that were asked by counsel, it was natural and inevitable that their testimony should take on a partisan color. Partly this would be unconscious. Partly it would be conscious, in that they came to sympathize with the only side of the case known to them, and in that they committed themselves to conclusions which it was hard to modify when grilled by hostile counsel.

This method of the law is inherently bad. Its badness has long been known or suspected. The Loeb-Leopold case merely gave a clear demonstration of it to the eyes of all the world.

What is the remedy? Very simple. *Let the expert witness be summoned by the Court himself*. Let all subsequent proceed-

ings be based on this theory,—payment by the state,—consultations with counsel on either side if desired,—direct interrogation by the Court, and cross-examination by both counsel if desired,—exchange of views beforehand with other experts, if any.

This is the only method that will remove the scandal and mistrust that now attaches so often to expert testimony, whether in the medical or other sciences.

3. The medical profession has long complained of the present method. Yet the two methods commonly proposed as substitutes are quite impracticable.

One of these is to compose the jury of experts. This is out of the question; first, because the constitutional principle of jury trial will not permit it; secondly, because no case turns solely on a scientific issue, and two juries, one of laymen and the other of experts, would be unmanageable.

The other proposal has been to compile a standing list of official experts, and to limit such testimony to this list. This proposal is impracticable; first, because local partisan politics would make such a list untrustworthy; secondly, because the variety of scientific questions is too great to have a list for each; thirdly, because no one judicial area contains all the best experts on all subjects; and fourthly, because it is and ought to remain a constitutional right of a party to secure any testimony which he deems useful, regardless of an official list.

4. No,—there is only one remedy, but it is sufficient, viz, to issue the summons from the Court on behalf of the Court, and to *place the witness on the stand as the Court's witness*. This leaves each party free to secure any witness he deems useful, by notifying the Court of the person's name and address; the Court issues and serves the summons and notifies both parties that the witness will be called; and the witness informs both parties whether and when he will consult with either or both of them before trial. This ensures impartiality, both subjective and objective.

In the Loeb-Leopold case, one of the experts called for the state refused originally to come as a partisan; he told the state's attorney that he did not want to be a partisan witness, that he wished to be free to form and to state any conclusions that he might reach. The state's attorney told him that he would be put on the stand whatever conclusion he might reach. On that condition he consented to study the defendants' personality; and the state's attorney never saw him again until the morning of the hearing.

It is a pity that the eminent gentlemen who consented to be engaged for the defendants by the defendants' counsel did not refuse to come unless and until they were summoned by the Court and *for* the Court, with freedom to lay before the state's attorney before trial every scrap of their conclusions. That would have been a fine service to the cause of Science and Justice, and they would have been applauded as pathfinders by both professions [Ref. 26, pp 341–3].

Was Wigmore Constructive?

If Clarence Darrow stood against capital punishment, John Henry Wigmore was the anti-Darrow. His premise was that no sentence but death was appropriate for Loeb and Leopold. In his editorial,

however, he suggested that a flawed legal system permitted Darrow and his group of mercenaries to overrun the court. He then proceeded to offer some remedies. Though abrasive, Wigmore's critique targets the heart of perennial concerns about partisanship and expert testimony.

Wigmore criticized the defense's rhetorical tactic of using the defendants' nicknames (Dickie and Babe), calling it an example of "[t]he whole evil of expert partisanship." He reasoned that by using the youths' juvenile names, the defense would distract the court from the heinousness of their crime. Wigmore's comments on "the money taint" imply that undercutting a profit motive by paying all experts equally would reduce partiality. Citing that the witnesses in the Loeb-Leopold case were beyond reproach in this domain, he faulted them for swapping science for rhetoric and using language characterizing the defendants as more human than the monsters they were. Witnesses should be paid for their time, Wigmore conceded. As Mnookin²⁷ pointed out, the problem is not that experts are paid, it is that the respective parties are paying them. And what are jurors to make of a hefty fee, she asks: that the witness is just in it for the money or that the high level of expertise is expensive?

In his editorial, Wigmore ruled out some unwieldy solutions, directing most of his attack on the law's "vicious method" (likely meaning immoral). Perhaps because he had no faith that the system would change, he ultimately turned to the expert witnesses to take the moral high ground. However, he gave no credence to the idea that experts can think and act freely, as if once caught in the law's procedures they would behave as partisans.

After noting that the method of having each side call witnesses is morally flawed, Wigmore concluded that the expert witnesses had little choice but to follow suit. Theorizing that the partisan behavior was partly unconscious, he suggested that, under examination, the experts were essentially railroaded into a firm opinion. The remedy, he said, would be to have the court call witnesses, without precluding the parties' doing the same. All examinations and findings would be transparent and discoverable.

Wigmore's cynically stated views were, at their core, constructive. What he did not address is whether his scheme would be used in all civil and criminal matters or selectively. While he was critical of the experts' attempt to humanize the defendants,

he lacked the perspective to appreciate the important difference between guilt- and penalty-phase testimony: that in the latter, the defendant facing death would have the right to present any mitigating evidence. The United States Supreme Court addressed that point in 1978,²⁸ and the right of the defendant to have the judge or jury weigh a variety of issues not enumerated in state statutes is standard procedure.

The Debate Continues

A Northwestern University law journal revisited the Loeb-Leopold trial and the views of Dean Wigmore and others in 1925.²⁹ A psychiatrist, Dr. H. I. Gosline, considered the defense experts' use of nicknames to be innocently motivated. Supported by personal knowledge of the experts, he argued that it had no rhetorical meaning. The larger question, he said, was intrinsic to competing schools of psychiatry (new versus old). Wigmore responded to some of Dr. Gosline's comments on criminology, without further discussion of the Loeb-Leopold testimony.³⁰

In the 1925 book *Battling the Criminal*,³¹ Child enumerated reasons that criminals were going free. He endorsed Wigmore's views on expert witnesses, those "floppy-minded persons who, under the guise of scientific knowledge or of mere sentimentality, idealize the criminal" (Ref. 31, p 233). Because jurors cannot judge the credibility of experts, he argued, "almost every few days some murderer or conspicuous wrongdoer walks out of a court room with a flower in his buttonhole because some jurymen have been goose-stuffed with something called 'modern science'" (Ref. 31, p 234).

Instead of accepting the impartiality of the partisan expert's role, witnesses could insist on aloofness, thus evolving the system (if the parties agreed) to a higher level. Though the standards published by AAPL have us striving for objectivity,^{4,32} there has not been a guild-based movement to change the legal system in the manner Wigmore suggested. Instead, people view experts as blithely saying whatever they are paid to say, immune to perjury, malpractice, or unethical behavior, and flying under the radar of a typical juror's ability to detect fraud.³³ Identifying psychiatry's complicity in creating unreliable evidence, Diamond³⁴ framed the problem this way: "The psychiatric expert is apt not to be a very wise man, but rather a possessor of technical knowledge of some depth, but little breadth. He seldom comprehends or is sympathetic to the legal process. . . . The

result is a pseudoscientific veneer for the psychiatrist and his testimony, behind which the lack of wisdom and lack of legal comprehension are concealed" (Ref. 34, p 1342). To Diamond, this sad phenomenon was due to a meld of overly complex theory and permissiveness of the justice system. Even when evaluation standards are followed, there will continue to be variability among expert opinions.³⁵ This is not necessarily a bad thing, as diversity or plurality in views may still be the best way to ensure a thorough airing of evidence.

Sticking to His Guns

Wigmore's editorial was not his last word on the use of expert witnesses. In 1937, while Dean Emeritus at Northwestern, he surveyed international legal systems in search of the cultural bases for seemingly irrational processes.³⁶ After reviewing procedures on several continents, he imagined an exchange between an American lawyer and a foreigner. The friend was incredulous that expert witnesses were barred from addressing the ultimate issue or even from answering leading questions in America, asking, "Why call qualified persons, if not to help the jury on the very point at issue?" The *reductio ad absurdum* continues:

"No," answers the American friend, "our law forbids that; the jury might believe them, and thus might go wrong."

"But if these experts were wrong, then experts could be called on the other side to say so?"

"Yes, of course; but then the jury would be confused."

"They might; but may they not also be confused when any other witnesses on opposite sides contradict each other?"

"Yes, but that can't be helped."

"Then why call the experts at all?"

"No, we couldn't very well do that, but we can call them and then stop them from being of any service; which is what our rule amounts to" [Ref. 36, p 264].

Facetiousness aside, Wigmore seems to be saying that partisan experts at best confuse jurors and at worst negate one another, rendering them useless. Yes, "the jury might believe them," but that alone fails to indict the system. Neither litigators nor scientists desire rules that hamstring witnesses, but Wigmore had not yet appreciated a middle road: vetting testimony at the pretrial level. As it was, the general-acceptance standard for admitting expert testimony had been articulated in federal jurisdiction in 1923.³⁷ *Frye v. United States* was the landmark, setting a standard for excluding junk science, though it lacked importance until the 1970s.²⁷ The evidence in question

was a systolic blood pressure deception test, a physiological analogue of Münsterberg's word-association model: lying causes measurable perturbations. The court barred the expert testimony in *Frye*, and many jurisdictions adopted the general-acceptance test, even after the Rule 702-based decision in *Daubert v. Merrell Dow Pharmaceuticals*³⁸ 70 years later. Such tests may indeed exclude unworthy science, but do not address directly the points raised by Wigmore.

Alternate Models of Scientific Expertise

Problems of partisanship in expert testimony are neither uniquely American nor universal. Taylor³⁹ reviewing the use of experts from ancient civilizations through modern France, noted the current law's origins in the Napoleonic Code. Outside the United States, trial procedures permit expert witnesses and tend to be regarded with less suspicion. A review of European criminal trial procedure in 1935 disclosed two major differences: the appointment of an impartial investigating magistrate (the *juge d'instruction* in France, the *Untersuchungsrichter* in Germany, and the *giudice istruttore* in Italy) to conduct all inquiries and collate experts' opinions and the use of institutes of legal medicine as a central authority.⁴⁰ The institutes credentialed and listed acceptable experts on a regular basis. In contrast to an adversarial criminal trial, the Continental model is aimed at fact-finding without domination by attorneys or partisan experts.³⁹ Though experts can be cross-examined on their findings, the presiding judge conducts the initial questioning. In the Italian model, experts' reports are read in court, avoiding the battle scene. Then, if clarification is needed, only the official expert, not the one for the defense, may be called into court.⁴⁰

Changing the System: No Shortage of Ideas

Weihofen,⁴¹ writing in 1935, lamented the lack of progress in the jurisprudence of insanity since 1843 (M'Naughten's case). Worse, the spectacle of battling experts scarred the system. He touted Maine's procedures as examples of impartial, hospital-based assessments as alternatives: "They have practically rendered extinct the disgraceful 'battles of the experts' which still characterize insanity cases elsewhere, and have substituted an impartial, scientific diagnosis of the defendant's mental condition for the theatrical spectacle of a court trial" (Ref. 41, p 421). The American Law Institute's 1930 version of its Model Code of Criminal Procedure, Weihofen ob-

served, permitted but did not mandate the appointment of disinterested experts to determine insanity by local standards. Thus, by 1935, most states had not solved the problem of partial experts, but not for lack of a model.

Another attempt to abolish partisan experts sought to make written reports, not testimony, the focus of opinions. Tracing the history of psychiatric reports, Weiss and colleagues⁴² noted awareness of the problems created by adversarial experts as early as the mid-19th century. In the late 1930s, the National Conference of Commissioners on Uniform State Laws proposed a model law, the Uniform Expert Testimony Act.^{43,44} The drafters took a dim view of the state of the art in adversarial proceedings. In addition to suggesting uniform compensation of experts, they proposed the following: the court could appoint experts in civil or criminal trials, without eliminating partisan witnesses; the parties would have an opportunity to cross-examine the experts and to hold them accountable for the bases of their opinions; and the court could have experts read their findings into the record or convene one or more to issue a joint report, all subject to legal objections.

Individual jurisdictions have been reluctant to adopt this scheme and abandon the system that everyone knew had gotten out of hand. The American Law Institute proposed that, under Rule 408, experts would read their reports into evidence.⁴⁵ Lamenting that little had been accomplished in the preceding decades, Overholser⁴⁵ in 1953 viewed reliance on expert testimony as an artifact of a system based on oral argumentation. About 20 years later, with no widespread change in procedures, Ordover⁴⁶ suggested yet another way to avoid unseemly polarization. Drawing from the Uniform Rules of Evidence (Model Code Rule 401(2)), he proposed: when technical matters required expert testimony, the court could order that a report be presented in written form along with an affidavit, if it was in the interest of justice; the judge would be more active, directing the presentation; the witness would present the report, without interruption, on direct examination; and the jurors could assess the witness's demeanor during cross-examination. Pollack⁴⁷ suggested a concise but complete format for reports in which the issues would be noted, findings stated, and reasoning delineated.

The Federal Rules of Evidence have been criticized for failing to solve the problems created by expert testimony.⁴⁸ Rule 706, however, explicitly grants the

court the authority to appoint experts without precluding attorneys' appointing their own.⁴⁹ In the notes to the 2011 version, it appears that the rule is more of a deterrent against hired guns than a likely option for judges:

The practice of shopping for experts, the venality of some experts, and the reluctance of many reputable experts to involve themselves in litigation, have been matters of deep concern. Though the contention is made that court appointed experts acquire an aura of infallibility to which they are not entitled, the trend is increasingly to provide for their use. While experience indicates that actual appointment is a relatively infrequent occurrence, the assumption may be made that the availability of the procedure in itself decreases the need for resorting to it. The ever-present possibility that the judge may appoint an expert in a given case must inevitably exert a sobering effect on the expert witness of a party and upon the person utilizing his services [Ref. 49, footnote omitted].

Still, the court-appointment option is rarely used, perhaps because judges resist taking responsibility for influencing jurors or for giving the impression that the court's expert has the last word on the subject.⁵⁰ According to Lee,⁵⁰ Rule 706 lacks potency for this reason, but "an amended Rule 706 can recognize that judicial indifference joins judicial partiality as a violation of the judicial role" [Ref. 50, p 503].

Discussion

The prevalent perception of expert witnesses, from popular, jurisprudential, and law-reform perspectives, is that they are a necessary evil. Yet, unrealized recommendations for reform abounded in 20th century scholarship. In Hand's view,⁵¹ the expert's role should be reduced to a nubbin of specialized knowledge: "We have seen that the expert is necessary and logical only to supply to the jury certain propositions of general applicability, or laws of nature, which are not the heritage of the ordinary man whom the jury, like the Greek chorus, heroically shadow forth" (Ref. 51, p 55). By contrast, the pompous, overpaid, and overzealous hired gun runs the risk of being ignored by jurors.⁵² Experience should tell us, as Goldstein suggested, that experts "all require to have their strong wine diluted by a very large admixture of common sense" (Ref. 53, p 41).

Though psychiatry is not uniquely culpable, lack of scientific precision magnifies its shortcomings in the courtroom. In *The New Wigmore*,⁵⁴ the authors list several themes that contribute to negative perceptions of experts in court: undue partisanship, fraudulent credentials for hire, reliance on demeanor ver-

sus knowledge, and the inability of jurors to distinguish good from bad testimony. The same authors⁵⁵ acknowledge potential problems in using neutral experts, including judges' resistance to the use of Rule 706, cynicism about experts' neutrality, the perception of appointed experts as infallible, the process of finding experts, trials lawyers' insistence on adversarialism, and increased cost. Mnookin²⁷ also cautions that neutral experts may foreclose the possibility of ethical disagreement among experts. After all, a single expert may not represent a consensus opinion.

Wigmore's critique focused on the psychiatric testimony in the Loeb-Leopold trial, but aimed at reforming the adversarial system in the law. True, these expert witnesses were not forced to participate and could have found reasons to decline. Indeed, when the *Chicago Tribune* offered Sigmund Freud \$25,000 to weigh in on the inner workings of Loeb and Leopold, he declined.^{9,56} His reason was straightforward and ethical: that he had not examined the defendants. But Wigmore knew that it could not be left to the medical profession to self-police. Instead, he made a simple proposal: that experts be accountable to the court, not to one side or the other. This had also been proposed in personal injury cases during the Wigmore era.⁵⁷

Wigmore's solution was practical: to undermine the adversarial system's use of expert witnesses by making them agents of the court. It was, however, impracticable due to systemic resistance ("vicious process") from within the law. While his appeal was in direct response to the 1924 trial, it was not an entirely novel idea. At the beginning of the 20th century, citizens and jurists protested the use of expert witnesses, though it appears that they directed their vitriol more at the witnesses than at the system and its principals.⁵⁴ Kaye and colleagues⁵⁸ in *The New Wigmore* acknowledge the massive resistance to the wholesale abandonment of partisan experts. Hopeful, they list areas for modest reform: using Rule 706 and the "reliability" aspect of *Daubert*³⁸ hearings, and a code of ethics for witnesses, among others.

Should All Testimony Be Reined In?

Should psychiatric experts be court appointed and, if so, is there a foundation within the law to effect the change? The foundation appears to be present, but there are differences among criminal, civil,

and domestic matters: their respective resolutions are pegged to morality (freedom), liability (money), and problem solving (wisdom). Recalling the Loeb-Leopold case, it is apparent that, during a penalty-phase criminal trial, there is more permeability between the defense arguments and expert testimony; admissibility thresholds may be lower. Consensual values and case law in contemporary America support the robust use of testimony facilitating jurors' moral responses to the question of deathworthiness, whether voiced by experts or the families of victims. This would reasonably include the use of psychiatric and associated testimony to humanize the defendant and is in essence what attorney Darrow did with "Dickie" and "Babe," though the now-commonplace tactic was perceived by Wigmore and others as immoral.

Beyond penalty-phase testimony is the vast area of use of scientific experts in civil matters. By no means a special area of concern for psychiatry, a popular example of plaintiffs' attorneys cashing in on psychiatric diagnoses is that of posttraumatic stress disorder.⁵⁹ Here, the "money taint" may be too strong for partisan experts to generate sufficient objectivity. Yet, it seems unlikely that the parties would volunteer to have a neutral expert determine the outcome. Domestic relations matters (child custody) may be another fertile area for court-appointed witnesses, since battling experts in this domain may produce more heat than light, undoubtedly an artifact of the warring parties.

The Frontier: Epistemic Competence of Juries and Performative Freedom of Experts

Expert witnesses, by rule, testify when the subject matter is beyond common knowledge. Therefore, as Mnookin²⁷ observed, jurors have the daunting task of evaluating testimony in a knowledge vacuum, relying instead on proxies, such as appearance and demeanor. That is, jurors cannot evaluate what they lack the capacity to know. It seems that an ethical expert, mindful of the problem, would balance message and medium, to compensate for jurors' (and perhaps judges'²⁷) lack of epistemic competence. The idea that cases would be decided by an epistemically competent trier of fact *à la* the Continental schema, however, lacks momentum in American society; Wigmore called a jury of experts "unmanageable."²⁶

How much of ourselves may we import into expert testimony and what does our ethics require us to check at the courtroom door? It would seem artificial

to require an expert witness to testify mindlessly, without values. Griffith⁶⁰ made this pithy but deeply felt comment: "I am persuaded that our work takes on a different tone when truth-telling, respect for persons, and objectivity are leavened with humanity and generosity" (Ref. 60, p 381). I agree that genuineness is the elusive ingredient that could have mollified Wigmore. But how can we maintain it in the face of conscious gain or unconscious partisanship? Surely, being human leaves us susceptible to the corruption everyone fears. And when the witness is a dedicated forensic professional, there are additional concerns about marketing and pandering to potential clients.²⁷

This returns us to Wigmore's solution: that the court summon expert witnesses, have the state pay them, and permit both sides consultations.²⁶ This schema might best be suited to civil and domestic relations cases, as a variant of mediation. There is a practical concern in criminal matters: that the consideration of a defendant's freedom requires jurors' moral reflection which, in addition to the attorneys' arguments, can be stimulated by a robust airing of opposing views. Griffith and Baranoski,⁶¹ plainly stating that testimony is performance, suggested that an expert witness's efficacy is optimized when there is freedom of expression tempered by ethical restraint. Perhaps Wigmore, channeling popular sentiment in the Loeb-Leopold case, overreacted to a need for reform in criminal trials. When performance shades into partisan argumentation, attorneys and judges know how to contain it. Then the discovery of truth, located within the tension of views, can enjoy as much light as it needs.

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