

# Commentary: Is the Plot Thickening for Partisan Forensic Expert Witnesses?

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Knowledge of the past has a powerful way of clarifying the challenges of the present. Dr. Weiss enables the reader to exploit this phenomenon as it applies to the important perennial struggle of the expert witness for objectivity.

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Over the past several years, Kenneth Weiss has contributed a series of engaging and useful essays centered on classic forensic cases dealing with critical topics. Either solo, as here<sup>1</sup> and recently,<sup>2</sup> or with co-authors,<sup>3</sup> he has explored with a keen sense of drama the little-known narratives that enhance our understanding of the individual players in each case. Taking care to introduce each character and role in context, he has given his audience the opportunity to reflect productively on the close connection between the stage and the witness stand. In the current article, the hero was John Henry Wigmore, a dynamic Chicago law professor and dean, outraged over a local court's welcoming partisan personages to testify from dubious expert scripts.

Allusions to the realm of theater are deliberate and fundamental to Weiss's thinking, as he states in his opening sentence. He is in excellent company. Ralph Slovenko<sup>4</sup> held that there is a sporting theory undergirding our adversarial justice system, in that it follows the closely related rules of game theory and the nature of theater. The relationship dates back to at least the age of the morality plays and therefore applies especially to criminal trials, but also to civil cases.

Slovenko extended his argument by claiming that "the art of acting is as necessary in a trial as in a play"

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(Ref. 4, pp xvii-xxviii). The prime example he offered was Clarence Darrow, the defense attorney in the case at the heart of Weiss's present essay. He asserted that advocates of Darrow's caliber typically trained and exercised hard in order to gain and maintain their eloquence. Griffith and Baranoski<sup>5</sup> are clear and steadfast in their insistence that the ability to perform well is essential to one's functioning as an expert witness. For serious experts, this involves sustained hard work, dedication to rigorous practice, and humble sensitivity to global and ethics concerns. Weiss's conclusion is correct that Wigmore would be pleased if all experts performed as thoughtful thespians.

## Wigmore's Partisan Efforts

Wigmore evidently selected the Loeb-Leopold case for particular attention because it was the first to involve psychiatric expert witnesses attempting to persuade a court to mitigate punishment. Also the details surrounding the murder made it a celebrated case, even though the judge claimed that it was the teenaged defendants' youth and not the experts' testimony that led him to give sentences of life rather than death.

Wigmore used the Loeb-Leopold narrative as a platform on which to base his vociferous complaints and propose his idea of a solution. Somewhat surprisingly, he could not justify eliminating partisan experts totally; rather he seemed to feel that for fairness' sake he must allow their optional inclusion through a wide-open pretrial set of negotiations, on which he

relied to somehow preserve impartiality for the whole process. Wigmore used as an exemplar one of the prosecution's experts who refused to testify as a partisan witness, only to have the prosecutor reply that he should proceed with his work and would be called to the stand (by the state), regardless of what opinion he might have formed.

Wigmore also tossed in a few pejorative remarks about fees paid to experts, whom he further seemed to regard as mentally incarcerated upon being hired by either side. Of note, Weiss scores Wigmore's contributions as constructive. At the same time, room enough remains at least for speculation on whether Wigmore might himself be viewed as something of a biased partisan thespian for his own position.

### Bias and Error

Wigmore seemed to regard bias as reasonably detectable and readily remediable if only it is acknowledged. More significant, he regarded it as normally preventable through the control or elimination of partisanship. However today's forensic scientists, including behavioral science experts, generally recognize that some degree of bias is inevitable and has to be controlled by using various means of decoupling it from one's professional work and its products.

To transcend bias, it is worthwhile to recognize that it occurs in a variety of ways. A structural kind of bias is built into relationships and functions. For example, our medical school dean unforgettably pointed out to the graduating class that the MD degrees he was about to confer were only statements of opinion. They were inevitably (structurally) biased opinions, but nonetheless, still expert. This kind of bias may make an appearance when an expert's credentials are challenged during a hotly contested *voir dire*. Another important structural source of bias arises as a built-in result of the expert-client relationship, as we recognize in Wigmore's complaint.

Additional varieties of bias relate to culture and valence. Cultural bias may arise as a negative attitude, a distorting unconscious ignorance, or even a casual and exaggerated familiarity. Bias may also express itself in either a distant and aloof cognitive manner or in one that is emotionally overinvolved and usually intense. Also, it is quite possible to overcorrect for bias.

The major concern regarding bias is that it ushers in the specter of error. Christensen and colleagues<sup>6</sup> have provided a superb recent typology of forensic

science error, summarized here: operator or practitioner error is a mistake made by an individual. Technological error occurs when an instrument fails, giving an incorrect reading. Statistical error arises from a difference between actual and expected results that is greater than the predicted variability. Finally, an error of method or technique can arise from a misfit between the precision expected and the resolving power of the procedure in question.

### Public Reactions to Erring Experts

Although the problems of error can generally (and usefully) be distinguished from those of bias, the two can also readily synergize. This reality is currently driving two national governmental executive initiatives: one in Canada<sup>7</sup> and one in the United States.<sup>8</sup> In Ontario, Canada, an appeals court case led to the opening of an inquiry into the status of pediatric forensic pathology; it was found seriously wanting. In addition to reforms in the training of pediatric forensic pathologists, the inquiry articulated universal best practices in expert testimony as well as basic principles for forensic practice.

The following year, 2009, saw the release of a report from the National Academy of Sciences' National Research Council. It documented a need for extensive reforms across the forensic sciences.<sup>9</sup> Surprisingly, it contained very little mention of forensic behavioral science. As of this writing, the formation of scientific working groups is well under way. Future developments remain to be seen. The plot may be expected to thicken.

### The Continental Model

Weiss points out that one means of avoiding the need for partisan witnesses is to be found in the so-called continental model. Originating predominantly in ancient Rome, it came, through the Napoleonic code, to such European countries as France, Germany, and Italy. In brief, this model gives more prominence to the judge and far less to the parties' experts.

There is yet another legal system with the same origins, the tribunals of the Roman Catholic Church. Operating under the Code of Canon Law, this system has a global reach. By far the bulk of its work is concerned with evaluating the validity of church marriages that have come to civil divorce. In these courts, all participants are seen as jointly seek-

ing the truth, with the presiding judge in the lead.<sup>10</sup> Psychiatric and psychological experts are generally desired and in some cases required.

## Conclusion

Experts have been called to the courtroom stage since at least the 14th century, and their role has been a moving target ever since.<sup>11</sup> It appears likely that its velocity may be increasing and quite possibly accelerating. We can expect to know more as the National Research Council's agenda develops. As it proceeds, we should not be surprised to notice a comeback of the scripts of John Henry Wigmore. He was a charter cast member of the Council,<sup>12</sup> which was founded in 1916 under Woodrow Wilson's auspices and has not been noted for overlooking or forgetting a good plot.

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