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### Historical Truth, Narrative Truth, and Expert Testimony

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# HISTORICAL TRUTH, NARRATIVE TRUTH, AND EXPERT TESTIMONY

Marianne Wesson\*

A number of remarkable issues are illuminated when a psychologist or psychiatrist is invited to testify in a legal proceeding. Some of these issues have commanded a great deal of scholarly and judicial attention. There is, for example, the way in which such expert testimony emphasizes the competing and to some degree incompatible premises of law and psychology.<sup>1</sup> There is the struggle to insure that important social judgments are not made by the witness rather than by the jury, to whom they rightly belong.<sup>2</sup> There is an ongoing debate about the propriety of a court's reliance on an expert's predictions about the dangerousness of an individual.<sup>3</sup> Each of these subjects deserves the attention it has received. This article, however, is concerned with a frequent concomitant of psychological expert testimony that has largely escaped comment—the difficulty of exploiting the witness's expertise without giving undue weight to his conclusions about what I will call “historical truth.”

By “historical truth” I mean the question of what really happened in the world. Although experts are not usually asked directly to state what they believe to have happened in some historical time and place, their views on such questions of historical truth often form an inevitable part of expert testimony. For example, consider an expert hired to examine and testify about the sanity of a defendant in a murder trial. The expert's commission does not normally encompass making a binding judgment about (for example) whether the victim of a crime invited the defendant into her room or whether the defendant broke in forcibly. Yet in the process of arriving at a conclusion about whether that defendant had substantial capacity to control his conduct on the night in question, the expert very likely must, for his or

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1. See, e.g., Bromberg, *Psychiatrists in Court: The Psychiatrist's View*, 125 AM. J. PSYCHIATRY 1343 (1969); Roberts, *Some Observations on the Problems of the Forensic Psychiatrist*, 1965 WIS. L. REV. 240.

2. See, e.g., Bazelon, *New Gods for Old: "Efficient" Courts in a Democratic Society*, 46 N.Y.U. L. REV. 653 (1971); Pugh, *The Insanity Defense In Operation: A Practicing Psychiatrist Views Durham and Brawner*, 1973 WASH. U.L.Q. 87.

3. See, e.g., Cocozza & Steadman, *The Failure of Psychiatric Predictions of Dangerousness: Clear and Convincing Evidence*, 29 RUTGERS L. REV. 1084 (1976); Dix, *Administration of the Texas Death Penalty Statutes: Constitutional Infirmities Related to the Prediction of Dangerousness*, 55 TEX. L. REV. 1343 (1977); Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CALIF. L. REV. 693 (1974).

her own purposes, make some judgment. Moreover, the expert's judgment about such a question of historical truth will probably, in the course of his or her testimony, become known to the jury. The rules of evidence are designed to permit just such communication of the expert's premises.<sup>4</sup> Having heard the expert's view about "what really happened" on the night of the murder, the jury is likely to be led to undervalue its own role in determining, on the basis of the evidence before it, the historical truth. It is likely to be so misled because of its natural inclination to give more credit to the version of historical truth espoused by the expert than to competing versions.<sup>5</sup>

This concern should be distinguished from the concern, mentioned above, that the expert's judgment about questions such as the defendant's sanity or competency will unduly influence the jury.<sup>6</sup> Questions of sanity or

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4. See Fed. R. Evid. 803(4) (statements made for purposes of medical diagnosis or treatment not hearsay) and 703 (experts may disclose the bases of their opinions to the jury even though the facts or data on which they rely are not admissible in evidence).

5. In *Washington v. United States*, 390 F.2d 444, 451 (D.C. Cir. 1967), the court noted, "It has often been argued that in the guise of an expert, the psychiatrist became the thirteenth juror, and unfortunately the most important one." See also *United States v. Addison*, 162 U.S. App. D.C. 199, 202, 498 F.2d 741, 744, (1974) (scientific evidence "may . . . assume a posture of mystic infallibility in the eyes of a jury of laymen"); *White v. Estelle*, 554 F. Supp. 851, 858 (S.D. Tex. 1982) ("when this lay opinion is proffered by a witness bearing the title of 'Doctor,' its impact on the jury is much greater than if it were not masquerading as something it is not"), *aff'd*, 720 F.2d 415 (5th Cir. 1983); Giannelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, A Half-Century Later*, 80 COLUM. L. REV. 1197, 1237 (1980) ("The major danger of scientific evidence is its potential to mislead the jury; an aura of scientific infallibility may shroud the evidence and thus lead the jury to accept it without critical scrutiny." (footnotes omitted)).

6. See *supra* note 2 and accompanying text. There may be, however, useful parallels between this topic and the question of whether experts have any special faculty that enables them accurately to predict dangerous behavior, see *supra* note 3. Years of studies suggesting that psychiatric and psychological experts cannot make such predictions with greater accuracy than lay persons have been insufficient to deter some experts from testifying confidently on the subject, even when their testimony literally affected life and death. See, e.g., *Dix, Expert Prediction Testimony in Capital Sentencing: Evidentiary and Constitutional Considerations*, 19 AM. CRIM. L. REV. 1 (1981). The United States Supreme Court recently refused to rule that the use of such discredited testimony as a basis for imposing the death penalty violated a defendant's due process rights. *Barefoot v. Estelle*, 103 S. Ct. 3383, 3416-17 (1983), *reh'g denied*, 104 S. Ct. 209 (1983). One court, however, has accepted claims that the use of expert testimony of such dubious reliability violates a capital defendant's constitutional rights. See *People v. Murtishaw*, 29 Cal. 3d 733, 631 P.2d 446, 175 Cal. Rptr. 738 (1981), *cert. denied*, 445 U.S. 922 (1982).

The practice may decline regardless of judicial approval or disapproval as a result of the official disapproval of the American Psychiatric Association (APA), which filed a brief *amicus curiae* in *Barefoot* suggesting that there is no basis for lending expert predictions of dangerousness any greater credence than lay predictions. *Amicus Curiae Brief of American Psychiatric Association, Barefoot v. Estelle*, 103 S. Ct. 3383. It appears that the APA was led to take a position on the inappropriate uses of psychiatric predictions of dangerousness by particularly controversial testimonial episodes, such as the testimony in *Barefoot*. Moreover, lawyers have begun to acquire the sophistication necessary to focus a trial court's or a jury's attention on the speculative character of an expert witness's prediction of dangerousness. See 2 J. ZISKIN, *COPING WITH PSYCHIATRIC AND PSYCHOLOGICAL TESTIMONY* 72-112 (3d ed. 1981) (suggested cross-examination techniques). Thus professional restraint and thoughtful advocacy may, at least in some cases, accomplish what constitutional doctrine could not: limiting the

competency do contain social judgments. Accordingly we are jealous of the jury's ultimate decisionmaking power concerning them. Nevertheless they also fall squarely within the boundaries of the special expertise that we believe the witness to possess. Consequently we welcome the expert's assistance in answering them, although we may use techniques to remind the jury that it has the ultimate role in assessing conflicting testimony.<sup>7</sup>

Probably a similar belief prompts us to tolerate (or even fail to notice) the expert's frequent domination in the matter of determining historical truth. That is, we believe that such expert witnesses possess special expertise in the determination of historical truth, and that belief accounts for our ready acceptance of their influence on the jury's conclusions about it. But recent work by experts trained in the psychoanalytic tradition suggests that if we entertain this belief about witnesses with such training we are ascribing to them powers of ratiocination that they do not have. Since many psychologists and psychiatrists who do serve as expert witnesses have been trained wholly or partly in that tradition, this recent work suggests that we should reevaluate the conventions and rules of evidence that rest on our erroneous belief in their privileged access to matters of historical truth.

This article examines studies tending to cast doubt on the existence of any special faculty that enables psychoanalytically trained experts to discern the historical truth. It then illustrates, by examining the events at one trial, the distortions in the trial process that can arise when experts do purport to resolve issues of historical truth. Finally, it suggests some solutions to the problems described.

## I. THE ARGUMENT AGAINST PSYCHOANALYTIC EXPERTISE ON MATTERS OF HISTORICAL TRUTH

The premise that psychoanalysts can uncover the truth about phenomena in the world is as old as psychoanalysis. Freud compared the psychoanalyst to an archaeologist, who sifts through mounds of refuse and finally uncovers authentic artifacts of the buried civilization.<sup>8</sup> And the metaphor

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occasions when a factfinder might be led to cede its role in making an important determination to an "expert" who has, in fact, no more expertise about the subject of his testimony than does the jury. This article seeks to expose expert testimony that looks back into the past to the same critical scrutiny that has been brought to bear on expert testimony that purports to see into the future.

7. See, e.g., the instructions for the jury and the expert witness approved in *Washington v. United States*, 390 F.2d 444, 456–58 (D.C. Cir. 1967).

8. Apparently the archaeologist metaphor appears pervasively in Freud's writing. See D. SPENCE, *NARRATIVE TRUTH AND HISTORICAL TRUTH: MEANING AND INTERPRETATION IN PSYCHOANALYSIS* 160 (1982) [hereinafter cited as D. SPENCE]. See, e.g., Freud, *Constructions in Analysis*, in 23 S. FREUD, *THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD* 259 (J. Strachey

persists; even contemporary psychoanalytic literature, Donald Spence observes, presents the findings of analysts concerning their subjects as a “record of the facts,” rather than as an “interpretation of some of the data.”<sup>9</sup> However, certain modern psychoanalysts have recently questioned the premise that psychoanalysts can or should discover “historical truth.” Donald Spence is a key exponent of this view. His interest is precisely in debunking this pervasive but largely unarticulated premise.

Spence is principally concerned with the implications of his thesis for psychoanalytic research.<sup>10</sup> The premise that psychoanalytic data are discoverable historical truths has led to the development of a body of psychoanalytic theory believed to be, like any other empirical theory, verifiable or refutable by reference to this historical “data.”<sup>11</sup> But lawyers should consider Spence’s arguments in detail, because they speak directly to the law’s treatment of the psychoanalytically-oriented expert witness as a person who does have some privileged access to the historical truth.

Spence sets out to demonstrate that for a variety of reasons his profession’s claim to competence at discovering historical truth is suspect.<sup>12</sup> He begins by examining the assumption that the psychoanalytic process—participated in by a subject who is directed to report all thoughts, memories, and associations without criticism or selection, and an analyst who is

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ed. 1964) (“But just as the archaeologist builds up the walls of the building from the foundations that have remained standing, determines the number and position of the columns from the depressions in the floor and reconstructs the mural decorations and paintings from the remains found in the débris, so does the analyst proceed when he draws his inferences from the fragments of memories, from the associations and from the behaviour of the subject of the analysis.”).

On other occasions, however, Freud expressed the belief that the techniques of psychoanalysis were not suited to excavating the past. Concerning the now-controversial matter of whether Freud’s psychoanalytic patients who described sexual abuse in childhood were remembering real events or fabricating them, see J.M. MASSON, *THE ASSAULT ON TRUTH: FREUD’S SUPPRESSION OF THE SEDUCTION THEORY* (1984). Apparently, Freud eventually arrived at the view that he would never know the historical truth concerning any particular patient’s experience. In *The Introductory Lectures*, he wrote: “[E]ven to-day we have not succeeded in tracing any variation in the results according as phantasy or reality plays the greater part in these experiences.” Freud, *The Paths of Symptom-Formation*, in S. FREUD, *A GENERAL INTRODUCTION TO PSYCHOANALYSIS* 324–25 (J. Riviere ed. 1943).

9. D. SPENCE, *supra* note 8, at 26.

10. See D. SPENCE, *supra* note 8, at chapter VIII *passim*.

11. Cf. T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 23–24 (1970) (scientific theorizing is dependent upon a body of data against which theories can be tested).

12. Spence does not originate this argument (he gives credit to philosophers Serge Viderman and Paul Ricoeur, among others, for their earlier articulations of it, see Ricoeur, *The Question of Proof in Freud’s Psychoanalytic Writings*, 25 J. AM. PSYCHOANALYTIC A. 835 (1977); Viderman, *The Analytic Space: Meaning and Problems*, 48 PSYCHOANALYTIC Q. 257 (1979)), but his essay seems destined to reach and persuade a larger audience than did his predecessors’. His persuasive power comes in part from an invocation of modern philosophical thought (especially linguistics and aesthetics), experimental psychology, literary criticism, and work in the foundations of physics and the “hard” sciences. But his argument draws much of its force from the circumstance that he is himself an analyst, and hence uniquely qualified to take a critical look at the premises of a calling that is a mystery to most outsiders.

enjoined to absorb this report with “evenly-hovering attention”—will lead in time to the discovery by both subject and analyst of the “real truth” about the subject’s past life. Spence opens his assault on this assumption by observing that *no* coherent narrative, whether or not in some sense true, will result if both subject and analyst obey their instructions.<sup>13</sup> If the subject really reports his associations, memories, and dreams in the chaotic way they first come into his consciousness, the analyst must supply some critical organizing principle or the report will never advance beyond being an indigestible jumble. If, on the other hand, the analyst is able to comprehend the subject’s account with no more effort than the maintenance of “evenly-hovering attention,” it must be because the subject is supplying some coherence, disobeying the injunction to relate the contents of his consciousness without criticism or selection.

Spence supports his thesis that the rules of psychoanalysis, if taken seriously, preclude coherent narrative by pointing to the non-homeomorphic relationship between visual experience and verbal description, employing striking examples from the history of art. In light of the essential indescribability of all but the most simple visual perceptions, the only psychoanalytic subject who really obeys his instructions may be the one who is silent (and who, ironically, is often diagnosed as “resistant” to the psychoanalytic process).<sup>14</sup>

Spence argues, moreover, that even the communication of nonvisual subjective experience is impossible if editing of the speaker’s thoughts is forbidden. Spence points out that the effective communication of non-visual subjective experience requires a skilled narrator using sophisticated techniques to signal point of view, genre, and other critical variables—a task singularly beyond even the most talented novelist if she is required to forswear any editing of her thoughts.<sup>15</sup> For all these reasons, there is bound to be a great deal of slippage between the “real truth” of what the subject is experiencing or remembering during the analytic hour, and what is communicated to the analyst.

Spence demonstrates that the psychoanalyst takes a further step away from the historical truth when she supplies her own “unwitting interpretation” of the subject’s productions, or (perhaps more seriously) influences the subject to experience memories that do not accurately correspond to his history.<sup>16</sup> The reality of the latter phenomenon is argued for by the work of

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13. D. SPENCE, *supra* note 8, at 52–54.

14. *Id.* at 55–79.

15. *Id.* at 39–54.

16. *Id.* at 81–135.

Elizabeth Loftus, author of the invaluable work *Eyewitness Testimony*<sup>17</sup> and numerous studies of the fallability and mutability of memory.

Loftus demonstrated that persons exposed to visual stimuli in a film or slides reported memories of the events depicted that varied dramatically depending upon the wording of the questions that were put to them about the event. Thus many subjects who saw a film of a car travelling down a road, and who were asked (in the midst of a series of similar inquiries) "How fast was the sports car going when it passed the barn while travelling along the country road?," reported a week later that they remembered a barn in the film, although in fact there had been none.<sup>18</sup>

Spence does not argue that the analyst would set out, as Loftus did, deliberately to induce a false memory. He suggests, however, that in the process of talking with the subject about his memory, dream, or feeling, the analyst may unintentionally supply a phrase or description, which the subject seizes onto and incorporates into his private experience.<sup>19</sup> (Even Freud, propounder of the archaeologist metaphor, wrote of the "screen memory," a distorted or fabricated memory, but Freud believed that the subject's private psychodynamic process supplied the screen.)<sup>20</sup> Further, Spence suggests, the nature of the transference (the feelings that the subject has about his analyst) influences the subject to produce certain material even though it may have little correspondence to the historical truth. A patient who is eager to be regarded as a rewarding and exceptional psychoanalytic subject, for example, might embellish a vague or elusive memory of childhood, expecting to please the analyst with a detailed and vivid description.<sup>21</sup>

Spence argues, furthermore, that the psychiatrist's own psychodynamic process may affect her ability to discover the historical truth about her subject. Despite taking care to remain aware of her countertransference and other personal issues, the analyst is bound on occasion to hear a production in a certain way because to hear it in that way satisfies her own needs. Nor is the analyst immune from defenses such as projection and intellectualization that may prevent her from acknowledging that this is what she has done.<sup>22</sup>

Spence mentions an example of a therapist in training who brought to his supervisor a tape of a session with a patient. The therapist explained to his supervisor that the tape was not a complete record of the session, because the patient had asked in the middle of the session that the tape recorder be

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17. E. LOFTUS, *EYEWITNESS TESTIMONY* (1979).

18. *Id.* at 60.

19. D. SPENCE, *supra* note 8, at 99-113.

20. Freud, *Screen Memories*, in 3 S. FREUD, *THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD* 303 (J. Strachey ed. 1962).

21. D. SPENCE, *supra* note 8, at 95.

22. *See id.* at 99-135.



turned off so he could make a particularly painful disclosure. When the tape was played, it became apparent that it was the therapist who had suggested that the recorder be disengaged at the critical juncture. The therapist had no memory of having made the suggestion, even after listening to the tape.<sup>23</sup> Thus, according to Spence, the analyst's confusion of the subject's process with his own provides ample opportunity for distortion, which is compounded by the unlikelihood that the confusion will ever be corrected. The analyst's process notes form the basis for any supervision that she may be receiving as well as for any account of the analysis that appears in peer-reviewed literature. Such notes would most likely present the analyst's own "hearing" of the production. Transcripts can make possible the detection of errors such as that in the example, but transcripts have limitations as well; most importantly, they cannot convey affect or inflection and they do not accurately record periods of silence.<sup>24</sup>

The analyst's most significant contribution to the formulation of the "truth" sought is to fit the huge volume of material produced in the course of an analysis into an explanatory or illuminatory "pattern." Yet Spence maintains that even the execution of this essential function may lead the analyst to leave the historical "truth" further behind.<sup>25</sup> In an important passage, Spence (relying on a paper by Jacobsen and Steele) shows his readers that even Freud succumbed on occasion to the lure of promoting hypothesis to evidence in the service of a compelling explanation. In the case of the "Wolf-Man," Freud described his patient's memory of watching a maid kneeling on the floor with a pail and a short broom, teasing or scolding the patient, who was then a child. Freud hypothesized from this description that the boy had urinated on the floor. He then speculated concerning whether the cause of this indiscretion was sexual excitement. In the course of the case history, Freud constructed a compelling narrative built around this simple memory, involving the boy's identification with his father in the scene, the maid's joking threat to castrate the boy for his conduct, and the boy's recollection, prompted by the maid's posture, of a primal scene. Yet, as Spence demonstrated, there is not a shred of evidence that the boy had urinated on the floor in the scene, and without that link all of the subsequent explanation evaporates.<sup>26</sup> Furthermore, it appears that Freud, like the young therapist who didn't remember suggesting turning off the tape recorder, was completely unaware of his contribution to the web of

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23. *Id.* at 99 (quoting Wallerstein & Sampson, *Issues in Research in the Psychoanalytic Process*, 52 INT'L J. OF PSYCHO-ANALYSIS 11 (1971)).

24. D. SPENCE, *supra* note 8, at 215–37.

25. *Id.* at 127–74.

26. *Id.* at 117–22; Jacobsen & Steele, *From Present to Past: Freudian Archaeology*, 6 INT'L REV. OF PSYCHOANALYSIS 349 (1979).

“truth” that he had woven; he wrote later in the “Wolf-Man” case history that the scene as he had described it was “a spontaneous product of the patient’s memory, and no construction or stimulation by the physician played any part in evoking it.”<sup>27</sup>

By the time the various transformations that Spence describes have occurred, the distance between historical truth and psychoanalytic “truth” is quite a gulf. From what “really happened” to what the subject or patient remembers is one transformation; from what he remembers to what he articulates is another; from what he says to what the analyst hears is another; and from what the analyst hears to what she concludes is still another. If Spence’s arguments for the existence of this gulf are accepted, what are the implications for the profession of psychoanalysis? Curiously, on this question Spence seems to be ambivalent. At times he argues that these difficulties can be overcome by the use of a technique that he denominates “naturalizing” or “unpacking” the recorded transcript of the analytic session. The technique requires that the analyst, very soon after the session, annotate the transcript with her observations about what significance she attaches to various productions of the subject and why; how the session fits into the pattern of previous sessions; why the analyst responded (or failed to respond) as she did at each juncture; and generally what “background assumptions” must be brought to any understanding of the session by one who was not present. Such “naturalized” transcripts must, according to Spence, become the data on which any research in psychoanalysis proceeds.<sup>28</sup>

In other parts of the book, however, Spence suggests that his profession disavow any competence to reconstruct the historical truth (in essence disclaiming any resemblance to Freud’s metaphorical archaeologist). He suggests, moreover, that the profession accept that the result of the successful psychoanalytic process is the construction (not *reconstruction*) of a sort of truth Spence terms “narrative truth.”<sup>29</sup> The criterion for the “truth” of an interpretation or explanation in this sense is its power to illuminate the subject’s life in a way that is useful to him, not its perfect correspondence to the past.

Spence further elucidates the concept of narrative truth by comparing a statement that enjoys “narrative truth” to what the philosopher M.G. Singer calls “pragmatic statements.” Singer’s pragmatic statements are made to induce belief in them, in order that they may thus become true. Accordingly, in Singer’s example, a politician may say that he will win next week’s election, not because he knows or even believes that it is true, but

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27. D. SPENCE, *supra* note 8, at 119.

28. *Id.* at 239–62.

29. *Id.* at 263–78.

because he hopes by making the statement to influence voters in his favor, and hence ultimately to make the suggestion *become* true.<sup>30</sup>

Spence suggests a further comparison between “narratively true” statements and the statements of an artist who seeks in artistic creations to impress on the reader certain aesthetic “truths” not necessarily dependent upon the literal truth of the statements.<sup>31</sup> Hence *Moby Dick* contains, in this sense, as much (or more) truth as a student’s essay about what the student did during summer vacation, even though the second may contain “historical truth” and the first contain none.<sup>32</sup>

In a review of Spence’s book published in *The New Yorker*,<sup>33</sup> Janet Malcolm<sup>34</sup> takes Spence to task for assuming that psychoanalytic practitioners believe that they are hearing or discovering historical truth. The analyst looks for truth, says Malcolm, not in the content of the patient’s statements, but in the relationship between the patient and the analyst, where the patient will eventually re-enact all of the important conflicts and dramas of the patient’s past. Hence, says Malcolm, Spence misunderstands the analytic process when he complains that the transference relationship can interfere with the patient’s accurate descriptions of memories or associations; it is in the nature of the transference, rather than in the described

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30. *Id.* at 271–75.

31. *Id.* at 268–70.

32. These comparisons are provocative, but not entirely satisfactory. Spence has some difficulty articulating in any operational way a criterion for the “narrative truth” of a statement—difficulty that is unsurprising considering the hazards of articulating an operational measure for artistic truth, sometimes called “beauty.” One of his efforts at definition is contained in his assertion that associations and interpretations “become true as they become familiar and lend meaning to otherwise disconnected pieces of the patient’s life,” *id.* at 280, a process he elsewhere describes as “finding a narrative home” for the subject’s productions, *id.* at 138. Similarly, but not redundantly, Spence argues that an interpretation that facilitates the process of therapy by inducing in the subject new associations or other helpful new clinical material enjoys some status as a “narrative truth.” *Id.* at 279–83. Unfortunately for this part of Spence’s argument, these various definitions of “narrative truth” are not necessarily consistent with one another—that is, some statements would apparently be true according to some of the definitions and not according to others. Consider, for example, Freud’s assertion that the patient he called “Wolf-Man” had just urinated on the floor in the scene that he describes with the maid. *See supra* note 26 and accompanying text. Suppose (as seems entirely possible) the assertion is historically false, but that the patient accepts Freud’s reconstruction as true and even (per E. LOFTUS, *supra* note 17) begins to remember that things happened in that way. But suppose further that this created memory, rather than facilitating the process of therapy, causes the patient to become blocked in his associations, or more seriously, to become so displeased by the situation that he terminates the analysis. Freud’s assertion would, then, be true in the sense that it was integrated and accepted into the patient’s belief system, but untrue in the sense of facilitating the therapeutic process. Spence might object that it is impossible for the patient to have accepted and believed the reconstruction if it was of a sort to induce blocking or resignation, but there is nothing in his work that tells us why this should be so. Moreover, even if Freud’s reconstruction was true in neither of the senses considered above, it certainly (in the view of most readers) would enjoy the sort of aesthetic or artistic persuasive power that Spence suggests as another criterion for “narrative truth.”

33. Malcolm, *Six Roses ou Cirrhose?* (Book Review), 58 *NEW YORKER* 96 (Jan. 24, 1983).

34. Malcolm is the author of *PSYCHOANALYSIS: THE IMPOSSIBLE PROFESSION* (1982).

memories, that the analyst looks for clues to the patient's past. As Freud observed, "[T]he patient does not say that he remembers that he used to be defiant and critical toward his parents' authority; instead, he behaves in that way to the doctor."<sup>35</sup>

Similarly, Malcolm argues that the psychoanalyst is interested in neither the historical truth of an account, nor in the narrative truth of it, which she defines as "what might have happened." Instead, the analyst searches for the psychoanalytic truth, which she defines as "the truth of what the present betrays about the past."<sup>36</sup> According to Malcolm,

The analyst is only minimally interested in the story the patient is trying to tell him. What he is really after is the story behind the story—the story that the patient is not telling him—and this he can infer only from the patient's behavior toward him (transference) and from his manner of disobeying the fundamental rule of free association (resistance).<sup>37</sup>

Malcolm's view of the rule of historical truth in psychoanalysis is consistent with that of analysts who have given their attention to the nature of the psychoanalytic narrative. Roy Schafer, for example, writes in his essay "Narration in the Psychoanalytic Dialogue"<sup>38</sup> of the gulf between the traditional notion of psychoanalysis as a truth-seeking enterprise and his conception of it as a creative narrative enterprise:

Traditionally, the official psychoanalytic conception of reality has been straightforwardly positivistic. Reality is "out there" or "in there" in the inner world, existing as a knowable, certifiable essence. At least for the analytic observer, the subject and object are clearly distinct. Reality is encountered and recognized innocently: in part it simply forces itself on one; in part it is discovered or uncovered by search and reason free of theory . . . .

But this positivistic telling is . . . incoherent with respect to the epistemological assumptions inherent in psychoanalytic inquiry, that is, those assumptions that limit us always to dealing only with *versions* of reality. . . . In this account, reality is always mediated by narration. Far from being innocently encountered or discovered, it is created in a regulated fashion.<sup>39</sup>

Since Schafer and others so freely concede the non-scientific status of psychoanalytic truth, Malcolm may be correct in suspecting Spence of laboring to disprove a myth that analysts no longer believe. But her

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35. S. FREUD, THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 150 (J. Strachey ed. 1958) cited in MALCOLM, *supra* note 34, at 100.

36. *Id.* at 103.

37. *Id.*

38. Schafer, *Narration in the Psychoanalytic Dialogue*, in ON NARRATIVE 25 (W.J.T. Mitchell ed. 1980).

39. *Id.* at 45.

observations do not diminish, indeed they enhance, the drastic implications of Spence's argument for forensic psychiatry and psychology. The function of the courtroom proceeding is often precisely to ascertain the historical truth, and quite frequently the "mental health professional" is asked to aid the factfinder—judge or jury—in that task. Great difficulties face the well-intentioned expert witness who either cannot discover historical truth (according to Spence) or is not much interested in it (according to Schafer and Malcolm). Less scrupulous experts may seek to parley their expert status into an invitation to argue their personal view of historical truth to a jury, although their expertise may not justify affording their views any deference.<sup>40</sup> Thus there is a mismatch between what we expect from or permit such witnesses and what they are competent to provide. Seeking a solution to this mismatch may be a far more important task than others in the field of law and psychiatry that are more frequently urged, such as reformulating the insanity defense.

## II. THE MISCHIEF IN RELYING ON PSYCHOANALYTIC EXPERTISE IN MATTERS OF HISTORICAL TRUTH

The rules of evidence,<sup>41</sup> the deference that a jury usually accords expert testimony,<sup>42</sup> and the difficulty of cross-examining an expert witness concerning the factual foundations that underlie the expert's conclusions<sup>43</sup> all conspire to conceal the extent to which a trial jury's prerogative to weigh the credibility of witnesses and find facts is often undermined when an expert psychologist or psychiatrist testifies. We are accustomed to tolerating this result, perhaps in part because we have believed in the premise that Spence has attacked—the premise that the psychoanalyst-as-archaeologist can tell

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40. It may be objected that Spence's critique of his profession's expertise in matters of historical truth is largely irrelevant to the law's use of mental health professionals as experts because very few of them are psychoanalysts. But a mental health professional need not have psychoanalytic certification to have been exposed to the psychoanalytic or dynamic theory of human behavior. Indeed, the clinical psychologists and psychiatrists who do forensic work often have been trained largely but not exclusively in the psychoanalytic tradition (inside of which there is plenty of room for disagreement). Moreover, those forensic professionals with psychoanalytic training or expertise often cite this training as the source of their particular acumen in helping the legal process arrive at accurate results. *See, e.g.,* Salzman, *Psychiatric Interviews as Evidence: The Role of the Psychiatrist in Court—Some Suggestions and Case Histories*, 30 GEO. WASH. L. REV. 853, 874 (1962) ("The casual, brief interviews by psychiatrists whose skill lies only in descriptive and classificatory psychiatry can no longer serve the interests of the community or of justice to the accused. Depth interviews by dynamically trained psychiatrists will obviate much of the criticism that now falls upon the expert witness. They will not only be convincing, but will be so compelling that the petty contentiousness which now characterizes the psychiatric witness will be minimized.").

41. *See supra* note 4.

42. *See supra* note 5.

43. *See infra* notes 54–59 and accompanying text.

us what is the historical truth about a matter. But if Spence is right, then our view of forensic psychology should be radically changed. If it is true that mental health professionals have no special competence at uncovering the "historical truth," then a number of the rules of evidence and procedure governing expert testimony may be dysfunctional.

An expert whose understanding of the historical truth is inaccurate may undermine the truth-seeking function of a trial in several ways. First, the expert's opinion will, at least in part, be based upon his understanding about "what happened"; if he is mistaken in what he understands, his conclusions may be erroneous, or he may have a misplaced degree of confidence in them. Second, the rules of evidence permit the expert to convey to the jury the bases of his conclusions.<sup>44</sup> If, in doing so, he describes the historical truth incorrectly, he may mislead the factfinder by conveying that the version of the historical truth at which he has arrived is indisputable,<sup>45</sup> or by suggesting that he is equipped with some special faculty that gives his version of truth more credibility than alternate versions that might be supported by other evidence.<sup>46</sup> Finally, the rules of evidence now often permit statements made to a medical expert for purposes of diagnosis or treatment to come into evidence despite any hearsay objection.<sup>47</sup> The hearsay exception represents a considerable liberalizing of older rules that

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44. FED. R. EVID. 703, 705.

45. See R. ARENS, *INSANITY DEFENSE* 69 (1974) (psychiatric witnesses present their conclusions with an "air of certitude"); Connolly & McKellar, *Forensic Psychology*, 16 BULL. BRIT. PSYCHOLOGICAL SOC'Y (No. 51, reprint) 3 (1963) ("When questions of testimony are involved, our legal informants have the strong impression that the court—that is to say the jury, judge, etc.—tend to be more impressed by the witness who can give his evidence with 'absolute certainty.' The witness who qualifies his statements and makes minor reservations for the sake of greater accuracy makes relatively less impact. This may not seem unreasonable but we know from many laboratory experiments that certainty is no absolute guarantee that the witness is correct or any more accurate."). Expert witnesses may be tempted to exaggerate their confidence because they believe that juries will discount their testimony if they equivocate, and they may be right. See R. SIMON, *THE JURY AND THE DEFENSE OF INSANITY* 163–70 (1967) (jurors were in general annoyed by a psychiatric expert's failure to be more categorical, and "wanted to hear the expert say what he would do if the decision was in his hands").

Lawyers also contribute to the pressure on experts to testify with more confidence than they feel, by pursuing and rewarding expert witnesses who are willing to quell their reservations when they get on the stand. One Dr. Grigson, who testified in *Barefoot v. State*, 596 S.W.2d 875 (Tex. Crim. App. 1980), *cert. denied*, 453 U.S. 913 (1981), that there was a "one hundred percent and absolute chance" that the defendant would commit future acts of violence if not put to death, has apparently been rewarded for his confident manner with employment by the prosecution in at least thirty death penalty cases. J. ROBITSCHER, *THE POWERS OF PSYCHIATRY* 199 (1980). He has been asked to examine more than eight thousand accused felons. *Id.* He has been denounced by the American Psychiatric Association for his exaggeration of the degree of certainty that such predictions carry. See *supra* note 6. Lawyers also pressure prospective witnesses directly to abandon their objectivity and serve as advocates for the litigant who has retained them. See, e.g., the account of the pressures placed on a prospective witness given in W. GAYLIN, *THE KILLING OF BONNIE GARLAND* 193–99 (1982).

46. See *infra* notes 66–74 and accompanying text.

47. See, e.g., FED. R. EVID. 803(4).

were designed to prevent the introduction of the self-serving statements of a party to litigation through the mouth of the party's chosen physician.<sup>48</sup> Although it enjoys considerable scholarly approval, the more liberal hearsay exception may serve to hinder the truth-seeking function of the trial by giving a special status to one particular account of the "historical truth"—the account given to a mental health professional by the person whose mental state, sanity, or emotional condition is the subject of the litigation.

The well-intentioned expert may try heroically to avoid exceeding his expertise when confronted with issues of historical truth, only to find that he cannot avoid resolving questions of historical truth in the course of forming his opinion. Consider the following example: A clinical psychologist is asked to examine a defendant charged with felony-murder, for purposes of determining whether the defendant was sane at the time of the offense. The police offense report, a copy of which is furnished to the psychologist, indicates that the defendant made the acquaintance of his young female victim in a laundromat, that he followed her home after she left the laundromat to avoid his attentions, that he picked the lock on her apartment door with a plastic credit card, and that she died of strangulation in a struggle as he attempted to rape her. In many hours of interviews with the defendant, the psychologist has heard (in the midst of much other material) that the defendant's mother was an extremely disturbed woman who would frequently behave seductively toward the defendant when he was a child, and then spank him or beat him when he responded affectionately. The defendant also gives an account of the crime that differs in some significant respects from the account contained in the police reports. He recounts that he was acquainted with his victim before the night of the crime, having danced with her several times at a local tavern; that she did not leave the laundromat to escape from him, but rather invited him to come home with her, going ahead so she could put her laundry away while his was in the dryer; that he did not pick the lock, but that she opened the door for him; that she went to the bedroom, undressed, and began to make love with him; and that after several minutes she suddenly became hostile and violent, and began to struggle and hit him. The defendant claims that he cannot remember exactly what happened after that: he vaguely recalls walking home from her apartment, and the later arrival of the police to arrest him.

The psychologist faced with such material must decide how to deal with the issue of the historical truth concerning what happened the night of the killing. He has several alternatives, or he may employ a combination of them. He may form an opinion about the historical truth based solely on the account given by the defendant, deciding from the defendant's demeanor,

48. See C. McCORMICK, *McCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE*, § 293 (E. Cleary ed. 1972).

consistency, and plausibility what portions of his account to believe or disbelieve.<sup>49</sup> Or the psychologist may employ tests, both objective and projective, to explore the defendant's character and to aid in the decision of whether to credit his account of the crime.<sup>50</sup> The psychologist may attempt to resolve the discrepancies between the various accounts, perhaps by conducting an investigation of his own that might include interviewing the witnesses whose reports appeared in the police version of the crime; he might, by using such techniques, eventually satisfy himself concerning what really happened.<sup>51</sup> Finally, the psychologist may conclude that all or some aspects of the "historical truth" are irrelevant to his opinion concerning sanity, and hence that he need not resolve the discrepancies.<sup>52</sup>

None of these methods is completely satisfactory. Consider the efforts of the prospective expert witness who conscientiously seeks out multiple sources of information in an attempt to determine the "historical truth" of an occurrence. For example, in the alleged rape-murder situation above, the examining expert might conclude after many hours of investigation and consideration that the defendant's account of his mother's behavior is substantially accurate, and that the defendant is telling the truth about the details of his encounter with the victim. Suppose the expert concludes on the basis of this determination that at the time of the crime the defendant satisfied the prevailing criteria for the insanity defense, and at trial he so testifies. Although careful and responsible, this expert's behavior is susceptible to the objection that he has effectively stolen from the jury its responsibility for determining which of the witnesses to believe and what inferences to draw from the evidence. Such a theft would, perhaps, be tolerable if the expert's view of the past were entitled to a special deference, but Spence's work suggests that it is not.<sup>53</sup>

Cross-examination may, of course, pursue questions about the factual premises on which the expert's opinion rests. For a variety of reasons,

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49. See, e.g., Gerard, *Psychiatric Evaluation*, in A. BROOKS, LAW, PSYCHIATRY, AND THE MENTAL HEALTH SYSTEM 21, 23 (1974).

50. See, e.g., Testimony of Dr. Martin Orme, in THE TRIAL OF PATTY HEARST 294-300 (1976) [hereinafter HEARST TRANSCRIPT]. The HEARST TRANSCRIPT contains a complete, unedited transcript of the Hearst trial.

51. See, e.g., J.M. MACDONALD, PSYCHIATRY AND THE CRIMINAL 116-19 (3d ed. 1976) (recommending that the expert consult outside sources, including the statements of other witnesses, and in some cases interview other witnesses); HEARST TRANSCRIPT, *supra* note 50, at 421 (testimony of Dr. Joel Fort).

52. See, e.g., *infra* notes 61-65 and accompanying text.

53. Even the few safeguards against erroneous historical interpretations that might exist in the setting of psychoanalytic therapy or analysis are absent when an expert evaluates a subject for litigation purposes. The forensic psychologist or psychiatrist cannot, as Janet Malcolm suggests a therapist can, see text accompanying *supra* note 35, glean clues to the historical truth from the nature of the transference that ensues; the brief relationship between subject and forensic witness cannot provide the setting in which a transference will develop.



however, it is often not effective in exposing the issue of historical truth to the critical examination of the jury.<sup>54</sup> Experts, having committed themselves to an opinion on the question of, for example, sanity, often respond to questions about the plausibility of one of their factual premises with the rejoinder that the truth of that particular premise is after all unimportant because their opinion is based on so many various premises that the loss of one is not critical.<sup>55</sup> In the face of such a response, the question-and-answer format of cross-examination is not effective to convey that the expert's data base consists of a collection of such individual items, and that there may be many other items in it that the cross-examiner cannot discredit, but whose value depends entirely on their unproved historical truth.

A further obstacle to full exploration of historical truth may arise when the cross-examiner does not have any specific evidence to disprove one of the expert's premises, for example, that the defendant was telling the truth about his mother's behavior.<sup>56</sup> If cross-examination seeks to discredit the validity of an unproven premise, the expert may parry with the suggestion that because of special clinical training or expertise, the expert can sort out truth from lies and arrive at a confident conclusion about "what really happened."<sup>57</sup> Spence's work suggests that this proposition is false. Not infrequently, these explicit or implicit claims of near-omniscience are made by an expert who will agree, if asked directly, that persons in the expert's profession are not equipped to do "detective work."<sup>58</sup> Nevertheless, the jury may be led to rely on the expert's version of the past because it imagines that the expert is somehow more skilled than the jurors at discovering the truth.<sup>59</sup> An expert may use the results of psychological tests (especially projective tests such as the Rorschach ink-blot in which there is no opportunity for "lying") to bolster her confidence about, and the jury's belief in, the version of historical truth on which she relies. Some experts, for example, will claim that it is reasonable to believe a history given by an individual who shows no tendency to malingering or present a false picture on a test like the Minnesota Multiphasic Personality Inventory.<sup>60</sup> All of these varieties of expert testimony tend both to create and to obscure an important

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54. A similar observation is made in Note, *Hearsay Bases of Psychiatric Opinion Testimony: A Critique of Federal Rule of Evidence 703*, 51 S. CAL. L. REV. 129, 145-46 (1977).

55. See, e.g., *infra* notes 62-64 and accompanying text.

56. See D. SPENCE, *supra* note 8, at 168 ("many interpretations become true because there is simply no disconfirming evidence to be used against them").

57. See, e.g., HEARST TRANSCRIPT, *supra* note 50, at 294-300 (testimony of Dr. Martin Orne).

58. See, e.g., *id.* at 288 (testimony of Dr. West).

59. See *supra* note 5.

60. See, e.g., HEARST TRANSCRIPT, *supra* note 50, at 275 (testimony of Dr. West: "we know she is not trying to deceive us because the L scale, or the Y scale is right on normal"); *id.* at 313 (testimony of Dr. Orne that psychological test results bolstered his conviction that Hearst was giving an accurate history of her ordeal).

problem—that the expert is doing the jury’s job when he resolves questions of historical truth in his own mind and then testifies to an opinion based on his version of the past.

Some examples of the confusion that may be produced in such a situation are found in one of the most interesting criminal trials of recent years—the 1976 trial of Patricia Hearst for bank robbery. The defense did not claim insanity, but it did seek to introduce evidence, including expert testimony, relevant to the defense of duress. Many of the expert witnesses employed one or more of the testimonial techniques described above.

#### A. *The “It Doesn’t Matter Anyway” Premise*

Dr. Louis Joloy West, Chair of the Department of Psychiatry at UCLA Medical School and Psychiatrist-in-Chief of UCLA Hospitals, testified for the defense. In one bit of testimony, West recounted a particular incident that contributed to his conclusion that Hearst acted under duress. The incident concerned a statement that Hearst had made, after her arrest and while she was being held in custody, to her childhood friend Trish Tobin. Hearst told Tobin that when she was free she wanted to tell the story of her involvement with the Symbionese Liberation Army “from a revolutionary feminist perspective.”<sup>61</sup> On cross-examination, West was asked to reconcile that statement with his testimony that Hearst acted under duress when committing crimes with SLA members. He replied that at the time she made the statement to Tobin, Hearst had been in a small room and that Emily Harris (one of the more unpleasant SLA members) had been in the room with her, implying that Hearst spoke as she did while in fear of Harris. West conceded that his source for the information that Emily Harris was present at the “radical feminist” conversation was Patty Hearst herself. The prosecution was later able to establish from jail records that Emily Harris was not present when Hearst met with Tobin.<sup>62</sup>

When the prosecution inquired of Dr. West what alteration his opinion would undergo if it could be shown that Harris was not in fact present at the conversation, West met the challenge with aplomb. He testified: “I’d find that fascinating; and, it would suggest to me that—and quite consistent with some of the other findings—that to her, Emily Harris was a constant presence as long as she was there.”<sup>63</sup> Hence Dr. West, his factual premises discredited, retreated to the position that his conclusion was based on so many pieces of data that a blow to the truth value of any one piece of data

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61. *Id.* at 273.

62. *Id.* at 291.

63. *Id.* at 273.

could not affect his confidence in his opinion. Indeed, West demonstrated that he could cleverly reweave a new or contradictory fact into the fabric of his opinion so that it contributed to, rather than detracted from, the opinion's authority.

Nor was this technique for avoiding issues having to do with historical truth confined, in the Hearst trial, to the defense witnesses. Dr. Harry L. Kozol, a prosecution witness, based his estimate of Hearst's character (and hence a portion of his conclusion that she acted as she did out of feelings of rebellion against her family and authority) in part on a report that Hearst had once lied that her mother was suffering from cancer in order to avoid taking a high school examination.<sup>64</sup> When asked whether his opinion would change, should it be proved that there had been no such incident, Kozol replied, "No, it doesn't. I am glad—I am glad to hear it. I am perfectly willing to believe it, but it doesn't change my opinion on the total picture, that is only one tiny item."<sup>65</sup>

*B. The "I couldn't be wrong" Premise*

Another testimonial pattern that appears in the Hearst trial is the claim by an expert witness that he could not be mistaken in his view of the historical truth because he could not have been deceived by his subject. Dr. Robert Jay Lifton, distinguished author of many psychiatric works, rested nearly his entire testimony for the defense on Hearst's account of her life with the SLA. When confronted with a piece of evidence that seemed not to fit with her account, he suggested at first that it was not to be believed, and second that in any event it was quite consistent with his opinion:

Q: . . . Doctor, did you hear the testimony in the courtroom that she told somebody to keep his expletive deleted head down?

A: I either heard that testimony or read it.

Q: And again is that consistent, in your theory, with your theory of terror and fear?

A: Well, my impression was that she denied having said that and that that was quite uncertain as to whether she did say it.

Q: Well, let's assume that she did say it . . .

A: If she did say it, which I am not ready to assume, but if she did say it, it could be perfectly consistent with carrying out the role as well as she could of looking like a revolutionary bank robber.<sup>66</sup>

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64. *Id.* at 523.

65. *Id.* at 534.

66. *Id.* at 332.

Lifton asserted at the close of his cross-examination that it was impossible that he had been deceived by Hearst.<sup>67</sup>

A prosecution expert witness, Dr. Joel Fort, began his testimony by taking to task psychiatric experts in general for their tendency to accept uncritically whatever they are told by a subject whom they are examining.<sup>68</sup> And indeed the testimony of Drs. West and Lifton suggests that this criticism is merited. But Dr. Fort then proceeded to testify as though he, too, had some special faculty that enabled him to divine the historical truth—he simply reconstructed it from different sources than did the defense experts. Commenting on the significance of an incident in which Hearst used machine-gun fire to cover the escape of two SLA members from a store where they had been caught shoplifting, Fort prefaced his answer, “[A]s I piece together the investigative reports and the testimony regarding that incident,” and concluded that Hearst’s account of the incident was “unbelievable.”<sup>69</sup> This inadvertent confession makes clear that Fort committed the same sin as West and Lifton: assuming some privileged access to the historical truth. He merely regarded his methods for discovering that truth as better than those of the opposing witnesses.

Yet scattered through the expert testimony may also be found disclaimers by experts of any special ability to detect lies or otherwise to ascertain the historical truth. Dr. West testified at one point, “I am not a detective. I am a psychiatrist.”<sup>70</sup> Dr. Martin Orne, a defense witness, agreed that he had testified in another trial that psychiatrists are not very good at “recognizing the truth.”<sup>71</sup> He elaborated that he could not testify with any degree of confidence as to whether “a specific event really happened.”<sup>72</sup> Dr. Orne did believe, though, that he could discern by the use of psychological tests whether an individual was truly afflicted with a pathological condition or was malingering. His distinction between historical truth and psychological truth seems quite useful. Unfortunately, it was left behind when Orne was asked on what factual premises he based his opinion that Hearst had been under duress. He testified, “there were certain facts which were known and which I had from—particularly from the detailed history and compilation which Dr. West and Dr. Singer had made.”<sup>73</sup> In other words, Dr. Orne had to depend in the end on Patty Hearst’s account.

Later in his testimony, Dr. Orne stated, “taking it all very carefully together, the weight of the data is unequivocally,[sic] in my view, that she

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67. *Id.* at 334.

68. *Id.* at 421.

69. *Id.* at 438.

70. *Id.* at 288.

71. *Id.* at 301–02.

72. *Id.* at 302.

73. *Id.* at 308.

was not simulating when I saw her. *She was truthful with me.*”<sup>74</sup> Hence his earlier careful distinction between his ability to detect *malingering* and his inability to detect *falsehood* seemed to have vanished even from Dr. Orne’s own mind. By the end of his redirect testimony, Dr. Orne was asserting that he was confident that he had been working from an accurate history of Patricia Hearst’s ordeal.<sup>75</sup>

In the middle of so much testimony that depends for its authority on the premise that the opinion-holder can sort out truth from falsehood, it is odd to find that the trial judge repeatedly admonished the jury that they were the sole judges of the truth of any person’s testimony and that they were to disregard any expert witness’s opinion concerning whether someone had told the truth.<sup>76</sup> (This admonition was prompted once by Dr. Orne’s characterization of Hearst as truthful and later by the testimony of Dr. Fort that a particular statement made by Hearst was “unbelievable.”) The instruction reflects the law’s assignment of the role of credibility-judge to the jury. But this assignment, emphasized at some times, is undermined at others when experts are permitted to judge the credibility of various “witnesses” (whether or not those persons actually testify at trial) in the process of arriving at their opinion.

### C. *The “I’ve known it all along” Premise*

The slippery nature of historical truth ought to generate great concern about the extent to which, as Spence suggests, the predisposition of the expert becomes an important determinant of which version of the past he believes, and what conclusions he draws from it.<sup>77</sup> A large body of experimental data supports the hypothesis that examiner inclination is a major determinant of diagnosis; moreover, some studies go further and indicate that the behavior of the examiner is a critical determinant of what data the

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74. *Id.* at 312 (emphasis added).

75. *Id.* at 313. The distinction is an important, but difficult, one. It has eluded some courts on occasion. In Colorado, for example, courts have properly recognized that the rules of evidence permit a witness, regardless of expertise, to express an opinion concerning the credibility of another witness. *See, e.g.,* *People v. Ashley*, 687 P.2d 473, 475 (Colo. Ct. App. 1984). But one court has gone further to suggest that an expert may be allowed to testify that the victim of a crime was “not fabricating” his account of the crime, so long as the defense has made the witness’s credibility an issue. *See People v. Ortega*, 672 P.2d 215, 218 (Colo. Ct. App. 1983). The latter sort of testimony goes beyond a simple assessment of whether the victim is in general a credible person, and enters the realm of treating the expert as though the expert has some special knowledge, unavailable to others, about the historical truth.

There is some research evidence that mental health professionals are not particularly accurate even in the assessment of malingering or credibility. *See* I J. ZISKIN, *COPING WITH PSYCHIATRIC AND PSYCHOLOGICAL TESTIMONY* 429–41 (3d ed. 1981).

76. HEARST TRANSCRIPT, *supra* note 50, at 294, 438.

77. *See* text accompanying *supra* notes 22–27.

examinee produces.<sup>78</sup> These studies lend credence to Spence's argument that examiner or psychoanalyst expectations may shape the "story" that is produced and believed more powerfully than any set of historical circumstances.

In the Hearst trial there was significant evidence that one of the principal witnesses had, in fact, formed some opinion of Hearst's culpability (and hence necessarily of "what happened") before ever examining Hearst. Prior to Hearst's arrest, Dr. West wrote a letter to her parents in which he stated in part:

Enclosed are a couple of reprints on the subject of so-called ["brainwashing"]. From them, you can see that considerable work from medical and psychiatric stand-viewpoint has been reported concerning the extent to which single-minded captors can profoundly influence individuals who come under their control. There's much that could be elaborated on the subject; but, at this time, I would make the following points: . . . there are historical precedents for special legal consideration if such a victim [sic] . . . . In spite of the charges that have been filed against [Patricia], I believe powerful medical and legal arguments can be mobilized for her defense.<sup>79</sup>

Questioned concerning whether these preliminary conclusions might have influenced his later examination of Hearst or his conclusions, West bristled:

I approached the examination of this patient not only with my usual objectivity, but with excessive precautions against the fact that since I'm an expert on brainwashing and have been called by the Judge for this purpose, not to let myself be biased and to see things that I was looking for. . . . I feel that this account, this case study of this patient, is as honorable and unbiased and scientific as any psychiatric case study that's ever been done.<sup>80</sup>

Yet West's claims to "scientific" objectivity are thrown even further into doubt by some of his own testimony. For example, West testified that among the disorienting experiences suffered by Hearst in captivity was sleep deprivation. When asked whether Hearst had complained of sleep deprivation during her examination by him, West replied, "She complained of practically nothing . . . I had to pry it out of her, all of it."<sup>81</sup> West also admitted that at the very outset of his examination he had informed Hearst what her defense was to be, as follows:

[T]o emphasize the involuntary and violent way in which you were dragged out of a relatively normal life with a forcible and terrifying sort of indoctrination that you got, and the tremendous pressure of threats in the beginning to

78. See Wesson, *The Privilege Against Self-Incrimination in Civil Commitment Proceedings*, 1980 Wis. L. REV. 697, 711 n.69, 712 n.72 (citing studies).

79. HEARST TRANSCRIPT, *supra* note 50, at 288-89.

80. *Id.* at 289.

81. *Id.* at 268.

make you subservient and compliant with the leadership of this group so that they would be able to keep control of you. I think myself that is the best explanation for what happened. I haven't heard anything to make me think otherwise. Doesn't that sound logical to you?<sup>82</sup>

West also said that Hearst had a very poor memory for the events of her captivity.<sup>83</sup> A situation more suited to the generation of a version of the historical truth that conforms to the examiner's expectations can hardly be imagined: a subject with little memory, an examiner who has already committed himself to a theory of the events, and an interviewing technique that consists of "prying" things out of the subject or suggesting them to her. Seen in this light, West's indignant claim that his opinion about Hearst is as "honorable and unbiased and scientific" as any case study ever done is reminiscent of Freud's assertion that his "Wolf-Man" study is entirely the product of his subject's memories, in which "no construction or stimulation by the physician played any part."<sup>84</sup>

### III. TOWARD RESTORING THE JURY'S ROLE IN ASCERTAINING HISTORICAL TRUTH

Is there any solution to the problem of historical truth as a basis for expert testimony? One technique for eliminating some of the difficulties associated with an expert's overreliance on his favored version of the past is the old-fashioned hypothetical question.<sup>85</sup> There was a time when the law of evidence, perhaps in recognition of the central role of the jury in ascertaining historical truth, required that questions assuming matters not personally known to the expert witness be put to her in the form of hypothetical questions.<sup>86</sup> The form of the question, although often criticized as confusing and tedious,<sup>87</sup> at least made clear to the jury and to the expert that it was not the expert's task to arrive at any version of the truth; her function was to articulate an opinion based on a set of premises, the truth of which premises was left for the jury to determine.

It is tempting to argue for the reinstatement of the requirement that experts testify in the form of responses to hypothetical questions as a solution to

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82. *Id.* at 287.

83. *Id.* at 253.

84. See text accompanying *supra* notes 25–27.

85. For a general discussion, see Note, *The Expert Witness and the Hypothetical Question*, 13 W. RESERVE L. REV. 755 (1962).

86. See, e.g., C. McCORMICK, *supra* note 48, at 31.

87. See, e.g., 2 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 686 (J. Chadbourne rev. 1979); Guttmacher, *Viewpoint of the Psychiatrist*, 13 MD. L. REV. 283, 305, 310–11 (1953) (in *The Doctor in Court—Expert Medical Testimony: A Symposium*).

expert preemption of the question of historical truth. The difficulty, however, with hypothetical questions is that most experts rely on hundreds or thousands of factors—tangible and intangible, narrative and non-narrative—in arriving at their opinions. A hypothetical question could not do justice to the expert's premises unless it were impossibly long and complex. Moreover, often the expert relies on a Gestalt-like pattern of behavior, history, and presentation such that the whole of her clinical impression is more than the sum of its parts.<sup>88</sup> No dry recitation of hypothetical facts can give an expert the same confidence in her conclusions about them as can a series of personal encounters with an actual subject. (Principally for this reason, the American Psychiatric Association has declared that it is unethical for a psychiatrist to offer a professional opinion unless she has conducted an examination of the subject.)<sup>89</sup> Such considerations in part led to the relaxation of evidentiary rules requiring experts to testify in response to hypothetical questions, and to the adoption of more flexible rules permitting an expert to state her opinion and then to disclose the bases of the opinion if asked.<sup>90</sup>

Some reaffirmation of the jury's primary role in judging the historical truth might be accomplished through the use of a jury instruction, appropriately stressed by counsel in closing arguments. Some courts have responded to the work of Loftus and other critics of the accuracy of eyewitness testimony by fashioning a special instruction cautioning the jury about the frequent unreliability of such testimony.<sup>91</sup> A similar instruction concerning the jury's paramount role in determining "what happened," incorporating the proposition that there is no reason to give special weight to any expert's belief about that subject, might raise the jury's consciousness on those points and suggest fruitful lines of argument to counsel.<sup>92</sup>

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88. Diamond & Louisell, *The Psychiatrist as an Expert Witness: Some Ruminations and Speculations*, 63 MICH. L. REV. 1335, 1346-47 (1965) ("No hypothetical question can ever be formulated which would contain sufficient facts to justify a really valid psychiatric inference. This is because the modern, psychodynamically-oriented psychiatrist simply does not assemble diagnostic facts A, B, and C about his patient and thus arrive at conclusion D. . . . [H]e cannot derive a valid conclusion from such phenomena until he puts them together with his own subjective relationship to the examinee within the context of the latter's total background."); Amicus Curiae Brief of APA, *supra* note 6, at 18. ("In our view, the use of hypothetical questions is no substitute for an in-depth psychiatric examination and evaluation . . .").

89. AMERICAN PSYCHIATRIC ASSOCIATION, THE PRINCIPLES OF MEDICAL ETHICS, WITH ANNOTATIONS ESPECIALLY APPLICABLE TO PSYCHIATRY § 7(3), at 9 (1981).

90. See, e.g., FED. R. EVID. 705; UNIF. R. EVID. 58; UNIF. ACT ON EXPERT TESTIMONY § 9.

91. For a collection of state cases regarding jury instructions on eyewitness identification testimony, see Annot., 23 A.L.R. 4th 1089 (1983).

92. Current law would seem to sanction such an instruction. Courts often state that a jury may reject an expert opinion if it finds that the opinion was based on an incorrect view of the facts. See, e.g., *United States v. Ingman*, 426 F.2d 973, 977 (9th Cir. 1970); *Mason v. United States*, 402 F.2d 732, 737 (8th Cir.



Trial lawyers should think harder about the issue of historical truth, and devise techniques of advocacy that better expose the disputable nature of the expert's premises than do most cross-examinations essayed today. Such techniques might include inquiring whether an expert witness is familiar with the work of Spence, and what effect Spence's observations have on his confidence in his conclusions. An attorney who questions an expert's historical premises might also consider calling his own expert witness who espouses Spence's or similar views. In expounding these views the witness would focus the jury's attention on the doubtful wisdom of the original expert's reliance on his judgments about historical truth.

Finally, expert witnesses ought to study the arguments of such authors as Spence and Schafer, and consider whether they are not persuaded that they should be more modest in their claims to have the ability to pierce the veil that separates us from the past. It would be refreshing and encouraging to hear an expert testify along the following lines:

It is my conclusion that the defendant lacked substantial capacity to control his conduct, as a result of mental disease or defect. I must qualify this conclusion, however, by stating that it depends in large degree upon the truth of certain statements made to me by the defendant. I have no way of being certain that these statements are true; making such determinations is not a job for which I am trained or qualified.<sup>93</sup>

## CONCLUSION

Spence suggests that the psychoanalyst<sup>94</sup> is equipped neither by training nor by method for the detection of historical truth. Moreover, Spence is concerned about the implications of this circumstance for the scientific status of research in psychoanalysis. I have suggested that whatever their research consequences, Spence's arguments, if accepted, are subversive of

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1968), *cert. denied*, 394 U.S. 950 (1969).

93. In the area of predictions of dangerousness, *see supra* notes 3, 6, one authority suggests that the responsible expert may wish to qualify his testimony as follows: "Your Honor, my clinical impression is that the defendant may be physically assaultive in the near future . . . ; however, I should warn the court that predictions in this area are highly inaccurate and there is a risk of hospitalizing a non-dangerous person." Poythress, *Coping on the Witness Stand: Learned Responses to Learned Treatises*, *PROF. PSYCHOLOGY* 139, 146 (1980).

In W. GAYLIN, *supra* note 45, at 202, the author, a psychiatrist, eloquently describes the dangers posed by expert witnesses who testify with more confidence than they truly experience: "To be physician and advocate, to see ambiguity everywhere and feel committed to certitude will inevitably undermine the integrity of his standing and statements, and confound the purposes of justice." But Gaylin also recognizes, and lawyers should as well, the pressure that the legal system places on experts to de-emphasize ambiguities and uncertainties. *Id.* at 193-99; *see supra* note 45.

94. *See supra* note 40.

the respect that the law affords psychoanalytically-oriented expert witnesses who base their opinions in part on their belief in a particular version of events that happened in the past. The greater the significance of the historical truth to the opinions of experts, the more their testimony is likely to rest on unverified or unverifiable premises. Moreover, their premises are often precisely the "facts" about which it is the jury's obligation to be agnostic until persuaded of those facts by admissible evidence. Liberalization of the rules of evidence surrounding expert testimony has exacerbated rather than improved this testimonial situation, and few trial lawyers have the skills to persuade the jury to set aside an expert's opinion because of a quarrel about the factual premises on which it rests.

Recently, scholars and some courts have expressed doubts about the wisdom and propriety of reliance on mental health professionals as expert witnesses concerning the prediction of the future.<sup>95</sup> The same critical attention might profitably be turned to our frequent, unacknowledged reliance on the same professionals as experts concerning the facts about the past.

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95. *See supra* note 6.