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In the spring of 1999, Professor Thomas Lyon of the University of Southern California Law School published a lengthy law review article in which he argued that the introduction into evidence of research on the suggestibility of child witnesses was not of assistance to triers of fact.[1] Lyon's article has found its way into judicial training packets and has been posted to electronic bulletin boards sponsored by organizations with interest in custody evaluations, psychology and law, and related topics. Because judges are soon likely to encounter arguments based upon Lyon's article, I wish to alert judges to what I believe to be significant fallacies in his critique of children's suggestibility research.

Lyon is critical of what he refers to as the "new wave in children's suggestibility research." As the term is used by Lyon, the new wave refers to a body of research conducted by Stephen Ceci, Maggie Bruck, and others.[2] It is my contention that the new-wave research has added much to our earlier understanding of memory processes. The professional recognition that the new-wave researchers have received suggests that the contribution made by their work to our understanding of children's suggestibility has been widely appreciated.

Although Stephen Ceci, the developmental psychology professor who has spearheaded research in this area, and law professor Richard Friedman have already responded to Lyon's critique,[3] my perspective on this matter is somewhat different and, I believe, much like a judge's might be. I am not a researcher—rather, I am a "consumer" of research data. For 15 years, I have been a court-appointed evaluator of comparative custodial suitability; in that capacity, I have encountered a significant number of abuse allegations. Knowledge of the cognitive dynamics demonstrated in the new-wave research has been helpful to me on many occasions. It is for this reason that I believe it to be information of potential use to triers of fact.

Lyon's primary criticisms are: (1) that the new-wave researchers have overstated the frequency with which suggestive questioning occurs and, in their proposals for methodological changes, have failed to address the risk that abusers will be acquitted; (2) that new-wave research conditions have failed to replicate real-world phenomena closely enough, thereby making it unreasonable to presume that we have gained meaningful knowledge of the real-world phenomena through the research on their artificial analogues; (3) that Maggie Bruck in particular has erred in statements made during testimony and that her decision to offer didactic as opposed to case-specific testimony is flawed; and, finally, (4) that jurors are already aware that children are suggestible and that testimony concerning the new-wave research causes jurors to overestimate the probability that testimony from a particular child witness has been distorted by suggestive questioning.

HOW SERIOUS IS THE PROBLEM?

Though Lyon asserts in his opening that the new-wave researchers assume that highly suggestive interviewing techniques are the norm, he later acknowledges that Ceci and Bruck have alerted their readers to the possibility that materials reviewed by them may not be representative. The various researchers mentioned by Lyon are surely aware that where their involvement has been sought it was because someone believed that the interviews being brought to their attention were conducted improperly. There is no basis for suggesting either that the researchers are unaware that they have been examining an unrepresentative sample of interview transcripts or that they have endeavored to conceal this fact from their readers.

Footnotes

1. Thomas D. Lyon, *The New Wave in Children's Suggestibility Research: A Critique,* 84 CORNELL L. REV. 1004 (1999).
2. The new-wave research is represented in the following works: Maggie Bruck, Stephen J. Ceci, & Helene Hembrooke, *Reliability and Credibility of Young Children's Reports: From Research to Policy and Practice,* 53 AMER. PSYCHOL. 136 (1998); Stephen J. Ceci & Maggie Bruck, *The Suggestibility of the Child Witness: A Historical Review and Synthesis,* 113 PSYCHOL. BULL. 403 (1993); Stephen J. Ceci & Maggie Bruck, *Child Witnesses: Translating Research into Policy,* SOC. POL'Y REP., Fall 1993 at 1; STEPHEN J. CECI & MAGGIE BRUCK, JEOPARDY IN THE COURTROOM: A SCIENTIFIC ANALYSIS OF CHILDREN'S TESTIMONY (1995); STEPHEN J. CECI & HELENE HEMBROOKE, EXPERT WITNESSES IN CHILD ABUSE CASES: WHAT CAN AND SHOULD BE SAID IN COURT (1998); Stephen J. Ceci, David F. Ross, & Michael P. Toglia, *Suggestibility in Children's Memory: Psycholegal Implications*, 116 J. EXPERIMENTAL PSYCHOL.: GEN. 38 (1987); STEPHEN J. CECI, MICHAEL P. TOGLIA, & DAVID F. ROSS, CHILDREN'S EYEWITNESS MEMORY (1987); JOHN DORIS, THE SUGGESTIBILITY OF CHILDREN'S RECOLLECTIONS (1991); and, Elizabeth F. Loftus & Graham M. Davies, *Distortions in the Memory of Children,* 40 J. SOC. ISSUES 51 (1984).

As we contemplate the relative risks associated with different interview techniques, we must be mindful of the fact that some of the emotional distress experienced by children involved in sexual-abuse investigations is attributable to the methods we employ in the course of our interactions with them. It is, I believe, recognized that some children are unable to ascertain the difference between events that have actually occurred and events about which they have been involved in detailed discussions. It is, therefore, likely that in our well-intentioned (but sometimes incompetent) attempts to protect children, we have left some nonabused children with memories of abuse that, in fact, never occurred.

Unfortunately, there is no foundation for the sanguine view held by some that the practitioners whose tactics have been discredited in highly publicized cases represent a small minority of the mental health professionals who have become involved in evaluating children believed to have been the victims of sexual abuse. In a study of appellate court decisions handed down in sex-abuse cases between 1980 and 1990, it was found that 46% of the interviewing experts had been treating the child who was the focus of the case.[4] Within the mental-health professions there is general agreement that the performance of each activity (conducting therapy and conducting a forensic assessment for the purpose of formulating an objective professional opinion with respect to abuse) compromises one's effectiveness in the performance of the other activity.[5] The presence among the testifying experts of so many treating practitioners suggests that many of the mental-health professionals who have been performing investigations of alleged sexual abuse are not among those who are familiar with generally accepted standards of practice.

IS THE NEW-WAVE RESEARCH APPLICABLE TO REAL-WORLD CASES?

An assessment of the applicability of research to a particular case must be based upon the amount of overlap between the characteristics of the situations created by researchers and the characteristics of the real-world situation that is the focus of the case. To borrow from the Supreme Court's ruling in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[6] vigorous cross-examination and the introduction into evidence of opposing views are the traditional means by which to address such issues.

It is Lyon's position that if children are suggestible, they are also counter-suggestible and that false allegations arising from leading questions can be ferreted out through effective cross-examination. He cites data from a study in which an attempt was made to convince three and four year olds that they had witnessed the theft of money from a purse. According to Lyon, under cross-examination only one of the five children maintained that he had witnessed the theft. This finding does not persuade me that suggestive interviewing is a tactic the consequences of which are minimal.

Few would argue that some very serious errors have been made in some high-profile cases. In discussions of the new-wave research and its applicability, attention frequently shifts to the case of *State v. Michaels*,[7] a case in which the investigative techniques employed by Eileen Treacy, the state's expert, were criticized in an amicus brief submitted by Ceci, Bruck, and 43 other researchers.[8] The New Jersey Supreme Court declared that no amount of cross-examination could have undone the harm caused by Treacy's interviews.

Unfortunately, there is no foundation for the sanguine view . . . that the practitioners whose tactics have been discredited in highly publicized cases represent [only] a small minority . . . .

Lyon implies that cases like the *Michaels* case are to unpublicized evaluations as airplane crashes are to routine air travel. He seems to suggest that, for that reason, our energy is misdirected when we scrutinize such cases. While I acknowledge my lack of expertise in the area of flight safety, it is my impression that in its examination of disasters, the NTSB frequently uncovers problems the solutions to which make day-to-day air travel relatively uneventful, as we wish it to be.

IS MAGGIE BRUCK DOING IT RIGHT?

Lyon has faulted Bruck for offering didactic testimony without familiarizing herself with case-specific details and has criticized her testimony in two particular cases. The offering of expert testimony intended to educate triers of fact concerning phenomena with which they may be insufficiently knowledgeable is generally considered to be among the most useful of the types of testimony offered by mental-health professionals. Such testimony provides a context within which evidence can be evaluated. The applicability of the anticipated framework testimony can be considered in pretrial proceedings, can be alluded to in a judge's instructions to a jury, and can be contemplated by the jurors. Though Lyon suggests that Bruck's desire to simply function as an educator is inappropriate, many seasoned experts would endorse her position. Immersing oneself in case-specific details can compromise one's objectivity.

Though experts are reasonably expected to be effective communicators, an analysis of an expert's testimony provides more information about the expert's performance under pressure than it does about the expert's findings, theories, and conclusions.

3. Stephen J. Ceci & Richard D. Friedman, *The Suggestibility of Children: Scientific Research and Legal Implications,* 86 CORNELL L. REV. 33 (2000).
4. Mary Ann Mason, *A Judicial Dilemma: Expert Witness Testimony in Child Sex Abuse Cases,* J. PSYCHIAT. & LAW, Fall/Winter 1991 at 185.
5. Stuart A. Greenberg & Daniel W. Shuman, *Irreconcilable Conflict between Therapeutic and Forensic Roles,* 28 PROF. PSYCHOL.: RES. & PRACTICE 1 (1997).
6. 509 U.S. 579 (1993).
7. 625 A.2d 489 (N.J. Super. Ct. App. Div. 1993), *aff'd*, 642 A.2d. 1372 (N.J. 1994).
8. Maggie Bruck & Stephen J. Ceci, *Amicus Brief for the Case of* State of New Jersey v. Michaels *Presented by Committee of Concerned Social Scientists*, 1 PSYCHOL. PUB. POL'Y & L. 272 (1995).

When we prepare our thoughts for publication, we choose our words with care: we have ample time in which to review and contemplate what we have written; we are able to obtain input from respected colleagues; and, when our words appear in print, we are not required to disclose how many drafts we discarded. When offering testimony, the situation, as we are all well aware, is quite different. An accurate picture of a researcher's position with respect to her own work or the work of others is better obtained by examining the researcher's writings than by reviewing transcripts of her testimony in the course of an emotionally charged trial.

TESTIMONY CONCERNING NEW-WAVE RESEARCH: PREJUDICIAL OR PROBATIVE?

Ascertaining what evidence has been critical in juror decision making is not as simple as it might appear. Even if we presume that jurors endeavor to be forthright when responding to inquiries concerning the manner in which they arrived at their decisions, the best they can do is share with us those aspects of their decision making of which they are aware. Even among trained professionals, decision making can be influenced by factors of which we are not consciously aware.[9]

Even undisputed facts can, under certain circumstances, be more prejudicial than probative. Lyon correctly calls attention to the fact that when asked to estimate the frequency with which an event occurs, individuals conduct a mental search for instances of that event. Our estimate of the frequency is strongly influenced by the number of and/or the impact of examples that come to mind. To illustrate, ever since the May 1979 disappearance of Etan Patz on his first unaccompanied two-block walk from home to school, child abduction has received widespread publicity. It is likely that people asked to quantify various risks to the health and well-being of children would overestimate the incidence of abduction—particularly by strangers.

In an apparent endeavor to minimize the importance of suggestive interviewing techniques, Lyon cites studies from which the data indicate that approximately 10% of interviewers' questions are suggestive. The deleterious effect of one strong suggestion from an authoritative source is not likely to be diminished simply because it is followed by numerous non-suggestive questions. Thus, we should endeavor to ascertain the percentage of interviews that are undistorted by *any* suggestive questions. That figure would have more meaning.

It has been well established that a proffer of evidence must be accompanied by confirmation of its authenticity. It must be shown that it is what it is presented as being. If the prosecution wishes to introduce testimony concerning what is purported to be a memory of an actual event, the defense should be afforded the opportunity to question the authenticity of the memory.

SHOULD NEW-WAVE RESEARCH GUIDE POLICY MAKING?

Lyon argues that we should not permit our concern with regard to tactics such as those of Eileen Treacy to influence policy decisions that might set standards for all child interviews. As we consider whether or not we should permit our discomfort concerning one evaluator's actions in one case to influence policy decisions, we should bear in mind that the *Michaels* case was neither Eileen Treacy's first case nor was it her last. Treacy functioned as the state's expert in many uncomplicated cases that were adjudicated without fanfare and without offsetting expert testimony concerning the new-wave research. It would be naive to presume that the methods employed by her in the *Michaels* case were unique to that case.

Lyon suggests that investigators must move beyond open-ended questions when asking young children about possible abuse because of the powerful disincentives to disclosure. Accused felons, when being interrogated by police, are strongly motivated not to confess. Should we, therefore, accept the use by police officers of coercive tactics when they are confident that the individual being questioned is guilty?

Lyon opines that the interview strategy changes suggested by the new-wave researchers would hamper the detection of true cases of abuse. Those who share Lyon's concern might consider the arguments that were mounted against *Miranda* warnings. There was widespread concern that advising individuals of their rights prior to questioning them would alter the interrogation process in such a way as to make it more difficult to gather evidence, secure indictments, and prosecute wrongdoers. We have lived with the terms of the *Miranda* decision since 1966 and I believe it safe to say that our country is comfortable with the concept.

While accepting the validity of one of Lyon's concerns (that testimony concerning the new-wave research may cause juror's to overestimate its importance in evaluating the testimony of a particular child witness), it remains my strongly held view that the probative value of such testimony far outweighs any prejudicial effect that it might cause.

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9. Randy Borum, Randy K. Otto, & Stephen Golding, *Improving Clinical Judgment and Decision Making in Forensic Evaluation,* 21 J. PSYCHIAT. & LAW 35 (1993).