University of Pennsylvania Law Review

FOUNDED 1852

Formerly
American Law Register

VOL. 105

DECEMBER, 1956

No. 2

PERSUADING THE JURY WITH FACTS NOT IN EVIDENCE: THE FICTION- SCIENCE SPECTRUM*

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In seeking to persuade, an advocate may ask the jury "to violate all logical rules, and do violence to all the laws of legitimate inference."¹ Indeed, "it is never a good ground of exception that an argument is unsound,"² at least where counsel's efforts to convince the trier of the fact are concerned.³ With this much as conceded premise,⁴ it is not

*This article draws extensively upon scientific materials collected and prepared in connection with a project on Law and Behavioral Science being conducted at the University of Pennsylvania Law School, financed by a grant from the National Institute of Mental Health.

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1. *Combs v. State*, 75 Ind. 215, 219 (1881).

2. *Abuses in Arguments of Counsel*, 7 LAW NOTES 126 (1903), relying on *In re McCabe*, 70 Vt. 155, 40 Atl. 52 (1898).

3. Compare *Combs v. State*, 75 Ind. 215, 219 (1881) ("... but we cannot undertake to correct their [counsel's] logic"), with *State v. Moore*, 32 Ore. 65, 81, 48 Pac. 468, 473 (1897) ("... if he make a wrong deduction, the court will, upon request therefor, correct it by giving a proper instruction. . .").

4. "Now in this domain of logic, it is conceded, the counsel is free from restraint during argument. His desired inference may be forced, unnatural and untenable; but as to this the jury are to judge; that is precisely their function." 6 WIGMORE, EVIDENCE § 1807, at 272 (3d ed. 1940). But see Wigmore's conclusion that counsel's argument is "subject, no doubt, to judicial correction in case of palpable bad faith. . . ." *Ibid.* See also Notes, *Nature and Consequences of Forensic Misconduct in the Prosecution of a Criminal Case*, 54 COLUM. L. REV. 946, 954-55 (1954); *The Permissible Scope of Summation*, 36 COLUM. L. REV. 931, 934 (1936).

surprising that the rules governing the permissible limits of argumentation are relatively few and that the administration of what rules there are has been characterized as "relaxed and careless."⁵ Even where there is sound basis for objecting to an argument, tactical considerations may dictate acquiescence on the part of the opposing attorney,⁶ and the bench is frequently hesitant to intrude its views on propriety during the course of an advocate's peroration.⁷ What results is a truly wide latitude for flights of forensic oratory.

It would, of course, be wrong to assume that counsel can commit no wrong in his argument or that a trial court is immune from reversible error in refusing to impose restrictions. Some limits do exist. This article attempts to explore those which relate to the advocate who asserts or assumes facts not in evidence, either during a review of the testimony or in the process of urging a particular evaluation of it.

Proof and persuasion are two basic components of the process we know as the trial of an issue of fact. The former is accomplished by adducing evidence; the latter by arguing the effect which should be accorded that which has already been introduced. Both are important.⁸ For a trial court to deny the right of argument, or even to imply that a jury "should receive no impressions" from counsel's attempts at persuasion has been held reversible error.⁹ Yet, with some notable exceptions to be considered subsequently, the judicial attitude of leniency which characterizes the permissible range of the advocate's perorations stands in sharp contrast to the attitudes which have marked the development of our complex pattern of exclusionary rules.¹⁰ In

5. Michael & Adler, *The Trial of an Issue of Fact: II*, 34 COLUM. L. REV. 1462, 1485 n.21 (1934).

6. See *Berry v. State*, 10 Ga. 511, 522 (1851) ("... what practitioner has not regretted his untoward interference, when the counsel thus interrupted, resumes, 'yes, gentlemen, I have touched a tender spot, the galled jade will wince; you see where the shoe pinches'"). See also *People v. Kirkes*, 243 P.2d 816, 834 (Cal. Dist. Ct. App. 1952). In addition to the possibility that counsel may only succeed in emphasizing the argument to the jury by objecting to it, Wigmore emphasizes the possibility that other counsel will pick up tricks of argument from appellate opinions which must decide their propriety. 6 WIGMORE, EVIDENCE § 1806 n.1, 266 (3d ed. 1940). See also *Britton v. Michigan Cent. R.R.*, 118 Mich. 491, 76 N.W. 1043 (1898) (interruption of argument of counsel forbidden by trial court); 1 THOMPSON, TRIALS § 957 (2d ed. 1912). But see *Pierson v. State*, 18 Tex. App. 524, 564 (1885).

7. See *Sullivan v. State*, 66 Ala. 48 (1880); *State v. Moore*, 32 Ore. 65, 81, 48 Pac. 468, 473 (1897). But cf. discussion of the duty of the presiding judge to check improper argument on his own motion in 1 THOMPSON, TRIALS § 958 (2d ed. 1912).

8. "The resolution of an issue of fact requires inferences as well as testimonial and real proof. In order to bring the inferences to the attention of the jury, counsel must present them in argument." Note, 54 COLUM. L. REV. 946, 954 (1954). See also Michael & Adler, *supra* note 5, at 1480.

9. *Metropolitan Life Ins. Co. v. Alterovitz*, 214 Ind. 186, 205, 14 N.E.2d 570, 578 (1938).

10. For an interesting exploration of the relationship between the rigidity of evidence doctrines and misconduct of counsel in argument, see *Abuses in Arguments of Counsel*, 7 LAW NOTES 126 (1903): "It is also well known that the common law

the latter area excessively rigorous standards of admissibility have long given rise to dissatisfaction.¹¹ Even now, the call of the commentators for some measure of relaxation cannot be said to be meeting with overwhelming success.¹²

It is precisely this stringency in testing admissibility, with its resultant mass of "evidence" law,¹³ which may prove an important factor in re-examining the role of persuasion. The "lush exuberance of doctrines which bloom in the digests"¹⁴ and in the multi-volumed treatises have lent force to current efforts at reform by simplification. Certainly as regards those exclusionary rules intended to protect the trier of the fact from evidence likely to be unworthy because of error-potential, the contemporary cry, emerging as a recurrent theme, is for admissibility "for whatever weight" the evidence may have.¹⁵ We are content to protect our juries less from the effects of that which has little force¹⁶ and to rely more on their ability to discriminate and evaluate.

If we are to put a new and heavy emphasis on the ability of the trier of the fact to weigh the evidence, it is appropriate to inquire concerning the tools at his disposal. More often assumed than articulated is the premise that jurors must rely on common sense, or the knowledge and experience which they share with the community generally.¹⁷ But "common sense is frequently wrong. . . . Our every day experience of the world comes in crude, unrepresentative chunks, with causal relations hopelessly obscured, and with prejudice, superstition, and self-interest inextricably intertwined in perception."¹⁸

for various reasons, historical or practical, excludes many items of evidence that in every-day life would be extremely persuasive and are in fact admitted in courts of other highly civilized nations; and it is difficult for counsel to submit to a rule which bars out testimony that our own courts freely concede to be of great weight everywhere except in the judicial tribunals of England and America."

11. See, e.g., Clark, *Foreword, A Symposium on the Uniform Rules of Evidence*, 10 *RUTGERS L. REV.* 479 (1956); Levin, *Pennsylvania and the Uniform Rules of Evidence: Presumptions and Dead Man Statutes*, 103 *U. PA. L. REV.* 1 (1954); Morgan, *Introduction to Symposium, Minnesota and the Uniform Rules of Evidence*, 40 *MINN. L. REV.* 297 (1956).

12. See *id.* at 297.

13. Cleary, *Evidence as a Problem in Communicating*, 5 *VAND. L. REV.* 277 (1952).

14. McCormick, *Tomorrow's Law of Evidence*, 24 *A.B.A.J.* 507, 508 (1938).

15. See Cleary, *supra* note 13, at 279; MORGAN, *THE LAW OF EVIDENCE—SOME PROPOSALS FOR ITS REFORM* 24-25 (1927) (quoting from the second report of the English Common Law Practice Commissioners, 1853).

16. Of course, some of the force in the attempts to simplify evidence rules probably results from glaring inconsistencies: "The exclusionary rules, as a whole, are a conglomeration of inconsistencies which prevent jurors from hearing highly relevant, credible evidence while permitting them to hear and consider evidence of slight weight and doubtful credibility." Morgan, *Introduction to Symposium, Minnesota and the Uniform Rules of Evidence*, 40 *MINN. L. REV.* 297 (1956).

17. See MCCORMICK, *EVIDENCE* 691 (1954).

18. Bitterman, *The Evaluation of Psychological Propositions*, in LEVIN, *EVIDENCE AND THE BEHAVIORAL SCIENCES* A-16 (mimeo. 1956).

This is no argument for *not* using common sense. We operate judicial institutions with the best we have and under the inescapable necessity of making concessions to the shortness of life. The point is, however, that today the proper evaluation of evidence can often be aided by techniques more refined and more compelling than utilization of "jury knowledge" without more. Significant experimentation on the problems of identification of faces, of voices, of handwriting has taken place in recent years¹⁹ and a great deal more is projected.²⁰ May these be used by the advocate in argumentation and, if so, under what conditions? Counsel may suggest to a jury that eyewitnesses who make positive identification can still be mistaken. May he also tell them that the median test score in a recent experiment showed close to forty per cent error in recognizing faces—over half the subjects wrong in more than one third of their identifications?²¹ He can discuss the fact that memory fades with time. Can he state that science has shown that people forget close to three quarters of what they learned two days previous, if the basis for the statement is an experiment with non-sense syllables and the litigation concerns the details of an auto accident?²² We shall attempt to explore these and similar questions. New and constantly increasing scientific data ranging from the problems of suggestibility and perception through those of memory, combined with an increased emphasis on the evaluation of evidence admitted under new and more liberal rules of admissibility, warrant increased concern with the permissible limits of persuasion.²³ The legal rules governing forensic oratory have been virtually neglected²⁴ as bench,

19. See, e.g., Belbin & Cane, *Some Factors Affecting Response in Recognition Tests*, 8 Q.J. EXPER. PSYCH. 45 (1956); Howells, *A Study of Ability To Recognize Faces*, 33 J. AB. & SOC. PSYCH. 124 (1938); McGehee, *The Reliability of the Identification of the Human Voice*, 17 J. GEN. PSYCH. 249 (1937); Inbau, *Lay Witness Identification of Handwriting (An Experiment)*, 34 ILL. L. REV. 433 (1939); Tresselt, *A Study of the Factors in the Identification of Handwriting*, 24 J. Soc. PSYCH. 101 (1946).

20. See LEVIN, EVIDENCE AND THE BEHAVIORAL SCIENCES B-401, E-28 (mimeo. 1956). These materials were prepared with the participation of the following consultants from the Behavioral Sciences: Andrew S. Watson, M.D. (Co-Director of the broader project of which evidence is one phase), M. E. Bitterman, Ph.D., Richard G. Lonsdorf, M.D., Julius Wishner, Ph.D., Marvin E. Wolfgang, Ph.D.

21. See Howells, *supra* note 19.

22. Cf. Hutchins & Slesinger, *Some Observations on the Law of Evidence—Memory*, 41 HARV. L. REV. 860, 866 (1928).

23. *But cf.* Cleary, *supra* note 13, at 280: "Effective control of the decision-making process seems likely to be accomplished only in terms of rules of exclusion, and the integrity of the process demands that the rules be defensible."

24. See *id.* at 294: "Any account of the stimuli to which trier is exposed would be patently incomplete in the absence of at least passing reference to the final arguments of counsel. . . . They lie outside the conventional scope of the subject of evidence, and hence beyond the confines of this discussion." This bias has been reflected in the little attention paid to the subject by McCormick. See MCCORMICK, EVIDENCE 691 (1954). Wigmore, however, has a fairly complete discussion, replete with illustration, of one phase of the problem. 6 WIGMORE, EVIDENCE §§ 1806-07 (3d ed. 1940). Occasional analyses have been available, but these have largely concerned themselves only with

bar and legal commentators put heavy emphasis on problems of admissibility. Today, however, increased interest in argumentation on the part of some courts has already been demonstrated.²⁵ This is an interest which is likely to spread.

ADMITTEDLY IMPROPER ARGUMENT: THE PRIMARY CATEGORIES

Any inquiry concerned with limitations on the right of the advocate to argue must deal²⁶ with a category of case in which the freedom of the advocate has been substantially, if not evenly, limited by all courts. That category has been mildly labeled "unfair comment."²⁷ Reading from an article entitled "Only a Boy Peddler," an account of the death of "a little fellow" who sold "collar buttons and pocket combs from a modest tray, to help support his mother and eight brothers and sisters . . .,"²⁸ which account has absolutely no relationship to the case being litigated except to inflame the juries against corporations generally, has been held not to be permitted.²⁹ As the North Carolina court has so aptly put it, after reviewing some of the cases: "These illustrations of unfair comment, beginning with the familiar 'poor widow and rich corporation' argument, running through the 'Pennsylvania Yankee' appeal, including the famous upas tree declaration³⁰ and ending with

the problem of prejudicial comment, or such topics as the failure of the accused to testify, counsel's opinion of the guilt of the accused, local or sectional bias. See, e.g., Bruce, *The Right To Comment Upon the Failure of the Defendant To Testify*, 31 MICH. L. REV. 226 (1933); Notes, 63 CENT. L.J. 398 (1906); 33 HARV. L. REV. 956 (1920); 42 J. CRIM. L., C. & P.S. 73 (1951). Additionally, commentators on trial practice and tactics have paid some casual attention to the topic. See, e.g., CUTLER, *SUCCESSFUL TRIAL TACTICS* 189-91 (1949); KEETON, *TRIAL TACTICS AND METHODS* 261-65 (1954). The most complete, albeit dated, treatment of the law of argument may be found in 1 THOMPSON, *TRIALS* §§ 940-1010 (2d ed. 1912).

25. See *State v. Bogen*, 13 N.J. 137, 144, 98 A.2d 295, 298 (1953): "The opening and closing statements of all counsel in every jury case are integral and important parts of the trial proceeding. It is not presently required that they be recorded stenographically. The court is of the opinion that wholesome results may be realized from such a requirement, and we are therefore including in the forthcoming *Revision of the Rules Governing the Courts* appropriate rules requiring that in all causes, civil or criminal, tried before a jury . . . the opening and closing statements of all counsel to the jury shall be taken stenographically in open court."

26. The appeal to prejudice which this rule proscribes, while an independent basis of objection, is often considered by the court in conjunction with other problems and articulated to buttress a decision made upon other grounds. See, e.g., *People v. Kirkes*, 243 P.2d 816 (Cal. Dist. Ct. App. 1952).

27. *Conn. v. Seaboard Airline Ry.*, 201 N.C. 157, 160, 159 S.E. 331, 333 (1931). The opinion gives eight classes of restrictions which counsel may not violate in argument.

28. *Williams v. Brooklyn Elevated R.R.*, 126 N.Y. 96, 102, 26 N.E. 1048, 1049 (1891).

29. *Williams v. Brooklyn Elevated R.R.*, *supra* note 28.

30. *Coble v. Coble*, 79 N.C. 589, 591 (1878) (" . . . he [the defendant] was like the upas tree, shedding pestilence and corruption all around him. . . "). See also *McDonald v. People*, 126 Ill. 150, 155, 18 N.E. 817, 819 (1888) (Reversible error for counsel to say of defendant's brother: "They say there is a fabled tree that grows in some torrid clime; that the birds of the air which fly near its branches, influenced by the aroma of it, fall beneath it and die. That is the influence of M. C. McDonald in this and all matters connected with the administration of justice.").

the religious and social theories referred to in the *Beal* case, all stand as a lasting monument to vituperative ingenuity."³¹

We need not pause here to attempt to define the limits of the prejudicial appeal.³² Suffice it to note that there is considerable latitude even in the area of allegedly inflammatory remarks. A more accurate reflection of the law in action may be found in the comment of Weaver, J. who, finding utility in declamations which relieve the tedium of the jury,³³ observed:

"The sorrowing, 'gray-haired parents,' upon the one hand, and the broken-hearted 'victim of man's duplicity,' upon the other, have adorned the climax and peroration of legal oratory from a time 'whence the memory of man runneth not to the contrary,' and for us at this late day to brand their use as misconduct would expose us to just censure for interference with ancient landmarks."³⁴

A second category of admitted impropriety is the attempt of counsel to establish, not by proof but by his own assertions during the course of argument, material facts concerning which the record is silent. Stating to the jury that a hat bearing defendant's initials was discovered near the scene of the homicide charged, no evidence of this having been introduced, is obviously improper,³⁵ and the litigated cases include such extreme examples as quoting assertions of guilt made by non-witnesses.³⁶ It requires no great devotion to the spirit of the exclu-

31. *Conn. v. Seaboard Airline Ry.*, 201 N.C. 157, 160, 159 S.E. 331, 333 (1931).

32. See *Annotts.*, 78 A.L.R. 1438 (1932); 1918D L.R.A. (n.s.) 4; *Notes*, 54 COLUM. L. REV. 946 (1954); 36 COLUM. L. REV. 931 (1936); 42 J. CRIM. L., C. & P.S. 73 (1951).

33. For another expression of this policy, see *Ballard v. United States*, 152 F.2d 941, 943 (9th Cir. 1945), *rev'd on other grounds*, 329 U.S. 187 (1946): "It is our opinion that if the conduct of the prosecution in argument in this case constitutes error, then, the prosecution in every case is limited to a listless, vigorless summation of fact in Chesterfieldian politeness. Gone are the days of the great advocates whose logic glowed and flowed with the heat of forensics!"

34. *State v. Burns*, 119 Iowa 663, 671, 94 N.W. 238, 241 (1903).

35. The example is taken from *Wigmore* who maintains it would be improper even to ask the jury to *suppose* such a hat were found, where the hypothetical statement was intended only as an illustration of a general proposition relative to circumstantial evidence. 6 WIGMORE, EVIDENCE §1807, at 266-67 & n.2 (3d ed. 1940); see text at notes 57-59 *infra*. See also *State v. Peirce*, 178 Iowa 417, 159 N.W. 1050 (1916) (error for prosecutor, in trial of police chief for malfeasance in office, to comment to jury upon the number of crimes which had been committed in the past year); *State v. Leming*, 217 La. 257, 46 So. 2d 262 (1950) (defense counsel not permitted to state that prosecution's chemistry expert had been thrown out of more courts than any person in the state).

36. *Grosse v. State*, 11 Tex. App. 364, 377 (1882) (reversible error for prosecutor to state that "he heard, while out on the street. . . a citizen remark that it was a great shame that the defendant should have taken the money of the old man Wucherer. . ."). See also *People v. King*, 276 Ill. 138, 114 N.E. 601 (1916); *Brow v. State*, 103 Ind. 133, 2 N.E. 296 (1885); *People v. Dane*, 59 Mich. 550, 26 N.W. 781 (1886); *Note, Limitations Upon the Prosecution's Summation to the Jury*, 42 J. CRIM. L., C. & P.S. 73, 76-78 (1951).

sionary rules for a court to prohibit this type of argument. It becomes even easier where counsel resorts to his own assertions in summation precisely because evidence of the proposition has been excluded during the course of the trial³⁷ or has not been offered because of the likelihood that it would be excluded.³⁸ In all of these cases persuasion is used not in an attempt to interpret evidence, but in an attempt to substitute for it. Elaboration of these rules as part of the problem of hearsay³⁹ becomes intelligible: counsel is attempting, in the oft-repeated words of the cases, to testify without subjecting himself to cross-examination.⁴⁰

BUILDING A THEORY

A prohibition against testimony in summation does not yet preclude "theorizing" upon whatever evidence has been introduced. It has been said that counsel "has the right in argument to build up a theory of his case as it is made by the evidence, and often in doing so he may give expression to thoughts which have been drawn from the realms of his imagination."⁴¹ The difficult problem is that of determining the extent to which the case "made by the evidence" limits resort to the rather richer resources of counsel's imagination. The advocate who builds a theory strictly within the evidence is doing no more than drawing inferences. Furthermore, in order not to inhibit counsel in stating the evidence in the light most favorable to his own client,⁴² the rule has developed that inferences may be invited even where the reasoning "be faulty, . . . deductions from the premises illogical. . . ." ⁴³

There is also value in allowing counsel to discuss gaps in the evidence which concern significant, but legally dispensable, questions

37. *E.g.*, *Chellis Realty Co. v. Boston & M.R.R.*, 79 N.H. 231, 106 Atl. 742 (1919); *Marshall v. State*, 78 Tex. Crim. 451, 455-56, 182 S.W. 1106, 1108 (1915); 1 THOMPSON, TRIALS § 970 (2d ed. 1912); *cf.* *Allen v. State*, 66 Miss. 385, 6 So. 242 (1889) (error for prosecutor to argue as indicative of guilt evidence of threats by defendant admitted only to impeach defense witness).

38. *Cf.* *Proving the Business Background of a Contact*, in FULLER, BASIC CONTRACT LAW 415, 416-17 (1947).

39. See 6 WIGMORE, EVIDENCE § 1806 (3d ed. 1940), criticized in Note, 36 COLUM. L. REV. 931, 943 (1936): "Rationales which regard the law of summation as merely one phase of the rule as to hearsay evidence or as a branch of professional ethics would appear to ignore the proper function of persuasion."

40. "When counsel are permitted to state [unevidenced] facts in argument and to comment upon them, the *usage* of the Courts in regulating trials is departed from, the laws of evidence are violated, and the full benefit of trial by Jury is therefore denied. . . . To an extent not definable, yet to a dangerous extent, they [statements of counsel] are evidence, not given under oath—without cross-examination, and irrespective of all those precautionary rules by which competency is tested." *Mitchum v. State*, 11 Ga. 615, 630 (1852). See also *Tucker v. Hennicker*, 41 N.H. 317, 325 (1860).

41. Hart, J. in *People v. Rossi*, 37 Cal. App. 778, 782, 174 Pac. 916, 918 (1918).

42. 1 THOMPSON, TRIALS § 957, at 812 (2d ed. 1912).

43. *People v. Carter*, 116 Cal. App. 2d 533, 538, 253 P.2d 1016, 1020 (1953), quoting *People v. Willard*, 150 Cal. 543, 552, 89 Pac. 124, 128 (1907). See text at notes 1-4 *supra*.

such as motive, and even to suggest alternatives which would explain his view of the case. The risk is obvious. There is concern lest the suggestions of counsel be accepted as proven fact.⁴⁴ Although the cases have been far from uniform in evaluating this risk,⁴⁵ factors influencing the decisions are not difficult to isolate. Relatively little harm is likely to result to a defendant by the prosecutor's listing of several alternative hypotheses to explain defendant's acts, where the acts alone are necessary elements of the crime charged.⁴⁶ The very statement of alternatives guards against the possibility that the "jury could reasonably have believed that the assertions . . . were based upon information or knowledge of facts that the speaker possessed which had not been developed in the evidence."⁴⁷

Fear that hypotheses will be misunderstood as the equivalent of evidence is reflected in judicial concern for the form in which the argument is couched. Since counsel may not testify upon his own authority without becoming a witness,⁴⁸ statements made "as of fact" are objectionable.⁴⁹ This, however, is no litmus-like test to be applied mechanically. On the one hand, courts will pierce form for substance so that statements which, from the total context, really emerge as "testimony" of counsel will not be immunized from attack by the mere prefix of some such formula as: "You are entitled to infer from the evidence in the case. . . ." ⁵⁰ On the other hand, reasonable comment is

44. *People v. Kirkes*, 243 P.2d 816, 831 (Cal. Dist. Ct. App. 1952); see note 48 *infra*. But see *People v. Amaya*, 134 Cal. 531, 539, 66 Pac. 794, 797 (1901) ("his theory that the motive of the crime was robbery, as put forward in his argument to the jury, may have had no support in the evidence, but an unfounded argument is not misconduct").

45. Perhaps some decisions have imposed undue restraint. See, e.g., *Grissom v. Dahart Ice Cream Co.*, 34 Ala. App. 282, 40 So. 2d 333 (1949) (prosecutor not permitted to suggest that if plaintiff had been working for one of the co-defendants they would have brought in records of her employment, because no evidence that they kept such records). But cf. *People v. Carter*, 116 Cal. App. 2d 533, 253 P.2d 1016 (1953) (attorney permitted to inform jury that he had not used expert handwriting analysts in forgery prosecution because two-handed forgers were difficult to detect by inspection).

46. *People v. Kinder*, 265 P.2d 24, 29 (Cal. Dist. Ct. App. 1954) ("The reasons advanced were merely conjectures on the part of the prosecutor. The ultimate question presented was left to the jury.").

47. The quoted language is from *People v. Kirkes*, 243 P.2d 816, 832 (Cal. Dist. Ct. App. 1952), a case in which the argument was held clearly improper because the risk described was present.

48. *Kennedy v. State*, 240 Ala. 689, 690, 196 So. 884, 885 (1940) (prosecutor's detailed theory of argument which led to homicide contradicted sworn testimony of defense witnesses); *State v. Seminary*, 165 La. 67, 80, 115 So. 370, 375 (1928) (defense attorney not permitted to explain why he had chosen defense of insanity); see note 151 *infra*.

49. *Nix v. State*, 32 Ala. App. 136, 137-38, 22 So. 2d 449, 450 (1945); *Harris v. State*, 28 Ala. App. 528, 532, 189 So. 787, 791 (1939).

50. See *People v. Kirkes*, 243 P.2d 816, 832 (Cal. Dist. Ct. App. 1952). See also *Hartley v. Pennsylvania Fire Ins. Co.*, 91 Minn. 382, 384, 98 N.W. 198, 200 (1904) (charge that opposing party had instigated criminal prosecution, prefaced by "we suspect," held improper although not reversible error).

safeguarded by a tendency to construe, "in the absence of anything to the contrary, the solicitor's remarks . . . as a deduction from the evidence."⁵¹ Greater freedom seems to be accorded counsel's attempts to attack the credibility of witnesses, regardless of the form of the statement.⁵²

There are obvious limits which even the most unmistakable theorizing must not transgress. The court will prevent counsel from speculating about defenses which have already been ruled out of the case.⁵³ Nor should counsel be permitted to theorize when his manner and language, despite the use of tenable hypotheses, are calculated to, or naturally do, result in unfair prejudice, particularly to a defendant in a criminal prosecution.⁵⁴

Permission to theorize thus emerges as a rule consistent with the general prohibition against arguing facts not in evidence. It is this prohibition which is central to our inquiry. To say this much does not dispose of the problem of traveling outside the record; it serves only to introduce it. Even hypotheses aside, counsel is not limited in argument⁵⁵ to the use of statements which he knows to be true. On the contrary, fiction, anecdotes, jokes and Bible stories are commonly regarded as acceptable.⁵⁶ Nor is it easy to articulate a rule at once defining the permitted use of that which does not even purport to be true and the prohibited use of what may well be true. Wigmore freely confesses difficulty in the attempt, essays a generalization,⁵⁷ adds an

51. *Floyd v. State*, 143 Ga. 286, 289, 84 S.E. 971, 972 (1915); see also *Biggers v. State*, 19 Ga. App. 604, 605, 91 S.E. 919 (1917); *People v. Edgar*, 34 Cal. App. 459, 468, 167 Pac. 891, 894 (1917).

52. *Waters v. State*, 150 Ga. 623, 625, 104 S.E. 626, 627 (1920) (permissible for prosecutor to suggest that jury ignore testimony of joint indictor that he had done the killing because in his own trial the defendant would similarly swear for his benefit); *Laska v. United States*, 82 F.2d 672, 679-80 (10th Cir. 1936) (proper to argue that co-defendants had testified falsely in hope that leniency would be given their pleas of guilty, but improper to speculate as to the court's reason for deferring sentence). But see *People v. Margeson*, 99 Mich. 146, 147-48, 57 N.W. 1099 (1894) (prosecutor may not state that expert had testified to defendant's insanity in order to get business for his sanatorium); *Hartley v. Pennsylvania Fire Ins. Co.*, 91 Minn. 382, 387, 98 N.W. 198, 200 (1904) (arguing a suspicion that opposing party had instigated criminal prosecution held improper although not reversible error).

53. *Sims v. Commonwealth*, 134 Va. 736, 764-65, 115 S.E. 382, 391-92 (1922).

54. See *Williams v. United States*, 168 U.S. 382, 398 (1897); *People v. Kirkes*, 243 P.2d 816, 831-33 (Cal. Dist. Ct. App. 1952).

55. It is often said that counsel is allowed the "largest and most liberal freedom of speech" in argument. *E.g.*, *Tucker v. Henniker*, 41 N.H. 317, 323 (1860). The opinion goes on to add that counsel's "illustrations may be as various as the resources of his genius," *ibid.*, although the holding in the case was that improper argument required reversal. See text and citations at note 104 *infra*.

56. *Sheffield v. Lewis*, 287 S.W.2d 531, 539 (Tex. Civ. App. 1956): "It is well-settled law in Texas that the facts of a case may in argument be related to history, fiction, personal experience, anecdotes, Bible Stories or jokes." The remainder of this article will examine the extent to which a statement this broad in scope requires modification.

57. 6 WIGMORE, EVIDENCE § 1807, at 267 (3d ed. 1940): "It seems difficult to frame a definition which will accurately draw the line of distinction for such cases. One sug-

obfuscating footnote with "another way" to reach the same result⁵⁸ and concludes with quotations from courts which "have tried in various phrasings to express the necessary distinction, though not with the clearest success."⁵⁹ What is needed is an analysis of the factors which make for proper use of fiction, for permitted and proscribed reference by counsel to his personal experiences and for the prohibition against arguing that which purports to be true in situations where fiction might well have been allowed.

ILLUSTRATIONS

Fiction

An abstract proposition concerning probability values in the weighing of evidence is not likely to do much by way of persuading twelve jurors. Illustrate the proposition with a concrete, easily understood example and the effect is likely to be telling. Counsel may desire to inform the jury that circumstantial evidence can be of such quality as to preclude the need for eyewitness testimony in establishing certainty of guilt. He would probably do better by retelling how Robinson Crusoe, having discovered a footprint in the sand, knew without doubt that there was another man on his island. It is not important that Robinson Crusoe is a fictional character. There is brought home to the jury, in concrete terms, "the general truth that circumstantial evidence may produce absolute persuasion in the mind."⁶⁰ Fiction may thus be used to make a permissible abstract assertion intelligible to the trier of the fact. It serves to illustrate a generalization whose truth is, as a matter of common knowledge, already "known" to judge and jury. Illustration may also serve an added function. It may increase the jury's estimate of the probability of a particular fact being true. Thus, to assert that experts may make mistakes or may lie is unlikely to have the impact of an anecdote whose humorous effect comes from an immediate demonstration of an expert's fallibility.⁶¹ The chuckle

gestion, however, may be useful; namely, that a test may often be made by asking *if it is immaterial for the case in hand whether the specific fact asserted be true or not*; if its truth is thus immaterial, then its force will lie merely in symbolizing or illustrating a general truth, and its employment will be proper."

58. "[P]lace the word 'suppose' before the assertion of the fact stated, and notice whether it equally serves the purpose." Wigmore then gives an example taken from Robinson Crusoe and adds: "Here it is seen that the force of the fact as merely an illustration is in no way diminished by making the assertion hypothetical." 6 *id.* § 1807 n.2. However, Wigmore appears to prohibit many arguments even with the word "suppose" actually prefixed by counsel. See notes 62 *infra* and 35 *supra*.

59. 6 *id.* at 267.

60. 6 *id.* at 266.

61. Witness the following story quoted to the jury by M. Labori, counsel for M. Emile Zola: "Once an expert was discussing before the presiding judge Bérard des Glasjeux the similarity in writing between an anonymous document and other docu-

or laugh serves to fix the story in the jury's mind; the credible tale invites the jurors repeatedly to inquire of themselves whether identical factors may not be operating in the very case being argued.

The Case-Oriented Illustration

Suppose counsel eschew the usual sources of fiction and prefer to fabricate his own hypothetical illustration, using the general setting of the case in which he argues, but adding elements not supported by the evidence. What if he demonstrate the force of circumstantial evidence by asking the jury to consider the weight they would give to the discovery of a hat with the initials of defendant near the scene of the alleged homicide, although no evidence has been introduced on this point? From the viewpoint of formal logic this illustration may be identical with one provided by Defoe, but real dangers inhere in it. There is the risk that counsel will convey the impression that he is in fact asserting that such a hat was found. Balancing what little there is to be gained against the prejudice potential, there is reason for exclusion. In an early case counsel asked the jury to suppose that defendant's accomplice had made statements corroborating defendant's guilt.⁶² Lumpkin, J., after adequate expression of "unfeigned pride and pleasure" in proper "effusions of forensic eloquence," sharply condemns the use of this type of hypothetical, terming it a surreptitious array of facts unproven. It is "highly reprehensible," he asserts, for "counsel to undertake by a side wind to get that in as proof which is merely conjecture. . . ." ⁶³ Wigmore is entirely in accord.⁶⁴ Legitimate illustration has the potential of a dual role. As indicated above, it may serve to concretize an abstract proposition. It also invites the jury to apply the proposition in evaluating the evidence in the case being litigated. Illustration by a fictitious variation of the evidence is likely to do more; ⁶⁵ it may engender a confusion which results in the jurors accepting fiction for fact.

ments introduced for comparison. 'The writing of the anonymous documents,' said he, 'in no way resembles that of the other documents, but in one corner of the paper there is a marginal note in pencil. This is clearly in the hand of the accused. There is no doubt about it.' 'Then,' said the judge, 'I am the forger. I am the author of the marginal note.' THE TRIAL OF EMILE ZOLA 314 (Tucker ed. 1898). See text at notes 104-07 *infra*.

62. *Berry v. State*, 10 Ga. 511, 521 (1851). A truncated version of the argument given by the court in its opinion indicates that counsel presented the statement prefixed by "suppose"; there is no indication of the purpose of the supposition or that an illustration was clearly involved. Wigmore cites and quotes the case as an example of judicial disapproval of the attempt by counsel to make an assertion upon his own credit. 6 WIGMORE, EVIDENCE § 1806, at 259 (3d ed. 1940).

63. *Berry v. State*, 10 Ga. 511, 522 (1851). It should be noted that the conviction was nevertheless affirmed. See discussion in text at notes 91-93 *infra*.

64. 6 WIGMORE, EVIDENCE § 1807(1) (3d ed. 1940).

65. It is this potential confusion which presents the difficulty with Wigmore's "suppose" test for illustration. See note 58 *supra*. Putting a "suppose" in front of

Personal Experience of Counsel

Analogous problems are presented by assertions of counsel made on the basis of his own experience. It is certainly permissible for counsel to urge that a witness employed by one of the litigants may be biased in favor of his employer. This argument assumes a proposition about human conduct which is generally conceded both correct and the subject of common knowledge; it is a generalization which will be said to be within the limits of judicial notice and jury knowledge.⁶⁶ May counsel illustrate the proposition with instances in which such economic interest led, *e.g.*, to perjury? May he give examples in which a defendant employer utilized his position to compel false testimony? In *Perry v. Western N.C. Ry.*⁶⁷ counsel did exactly that. Although professing to give an instance "without mentioning any names,"⁶⁸ he made it entirely clear that the employer involved in his previous experience was the defendant in the case being argued. Here there is no risk of confusing a hypothetical statement with evidence; the argument includes an assertion of fact directly relevant on the issue of credibility. This is the equivalent of testimony as to which there has been no opportunity for cross-examination and no assurance of accuracy. For the failure of the trial judge "to interfere at the request of opposing counsel"⁶⁹ a new trial was ordered.

The *Perry* case presents no challenging problems. Appellate courts have been obliged to deal with a number of instances in which counsel made unsupported assertions of fact relative to credibility,⁷⁰ or to the customs of a profession,⁷¹ or the scene of an accident.⁷² That counsel in *Perry* did so under the guise of illustrating an acceptable general proposition is of no moment; the harm of introducing inadmissible "evidence" is not thereby mitigated. The case falls squarely within

hypothesized factual data taken from the context of the case being tried would probably equally serve the purpose of illustrating the commonly known general proposition. The objection upon which most courts refuse the argument is that the hypothesized facts *do more* than serve the purpose of illustration. See note 62 *supra*.

66. See McCORMICK, EVIDENCE 691 (1954): "The jury has the power, analogous to the power of the judge, to consider as if proven, facts within the common knowledge of the community. Accordingly, . . . counsel may, without evidence, argue the truth of such facts. . . ."

67. 128 N.C. 471, 39 S.E. 27 (1901).

68. *Id.* at 474, 39 S.E. at 28.

69. *Id.* at 476, 39 S.E. at 29.

70. See, *e.g.*, *State v. Leming*, 217 La. 257, 306-07, 46 So. 2d 262, 279 (1950); *Haggard v. State*, 99 Tex. Crim. 354, 356, 269 S.W. 438, 439 (1925).

71. See *Moore v. Holroyd*, 219 Ala. 392, 395, 122 So. 349, 351 (1929); *cf. People v. Carter*, 116 Cal. App. 2d 533, 538, 253 P.2d 1016, 1020 (1953); *Winstead v. Commonwealth*, 195 Ky. 484, 243 S.W. 40 (1922).

72. See *Ward v. Brown*, 122 S.W.2d 684, 686 (Tex. Civ. App. 1938).

the previously-considered category of prohibited testimonial assertions.⁷³

A more interesting question is presented by counsel's recounting personal experiences sufficiently divorced from the case being litigated that they could in no wise be thought to constitute "testimony." May counsel argue, *e.g.*, the weight to be accorded circumstantial evidence by stating "I have seen men sent to the gallows without a single eyewitness . . ."?⁷⁴ This was the tactic of a prosecuting attorney who had also seen men sent "to the penitentiary for life on entirely circumstantial evidence, and oftentimes on the testimony of only one witness. I have seen, and you have, too," he argued, "where a man was hung, and before death they had confessed where they had denied the crime on the witness stand."⁷⁵ Although the argument is couched in terms of the personal experience of counsel, probably little would be lost by use of the form "We are all aware" or "You yourselves have heard." If this be so, then it is not merely the proposition illustrated which is common knowledge; the very facts of the illustration would stand on the same footing. In the parlance of the courts, the jury is being "reminded" of what they already "know": that convictions are had on less than two eyewitnesses, that defendants who assert innocence at a trial may thereafter confess. This is the analysis of the court in *Winstead v. Commonwealth*,⁷⁶ affirming a judgment of conviction. Analytically, then, the significance of the illustration does not turn on the fact that counsel asserts it as his own experience, nor is it of great importance whether counsel has or has not observed such cases; the argument is "based upon an assumed common experience of all mankind."⁷⁷

To say this much is not yet to probe the problem deeply, nor even to report the *Winstead* case adequately. The court in *Winstead* refused squarely to hold the argument of counsel proper. Instead, the opinion points out that "it could not have been prejudicial, even if it can be regarded as improper," albeit adding, "which in our judgment is at least doubtful."⁷⁸ Positing the propriety of illustration from fiction, can any of these observations reported by counsel, which may or may not be true, stand on any worse footing? Two further examples, each of which divided a court of last resort, may prove helpful in the analysis.

73. See text at note 36 *supra*.

74. *Winstead v. Commonwealth*, 195 Ky. 484, 493, 243 S.W. 40, 44 (1922).

75. *Ibid.*

76. 195 Ky. 484, 243, S.W. 40 (1922).

77. *Id.* at 494, 243 S.W. at 44-45.

78. *Id.* at 494, 243 S.W. at 45.

In *State v. Horr*⁷⁹ the prosecuting attorney urged conviction, asserting, "In my experience I have seen juries bring in verdicts of guilty on less favorable testimony to the state than this has been."⁸⁰ Finally, in *Kuehl v. Hamilton*,⁸¹ a motor vehicle accident case in which liability turned on whether plaintiff's conceded negligence was a proximate cause of the accident, counsel told how the very day before his argument he had himself been "tagged" by a policeman for speeding. The point of the story was that rear view mirrors are "not infallible," a rather relevant consideration inasmuch as plaintiff's negligence consisted in not having such a mirror and the accident occurred while he was pulling his truck into the left lane of traffic in order to pass another car. In *Horr* the court reversed; in *Kuehl* the court affirmed. In both cases majority and dissenters agreed that the argument was improper.

Two factors bear analysis; both have figured in judicial opinions. First, the experience of counsel is presented not as fiction, but as an actual occurrence. Conceivably, a jury may be more impressed with the probability-potential of what has in fact already occurred than with a tale conjured up by some author. That juries actually convict in capital cases, even in the absence of eyewitnesses, is likely to be more forceful to a wavering juror than the mental state of a Defoe character. Secondly, counsel occupies a rather unique and central position. The assertion of his own experience or observation is for this reason likely to carry extra weight,⁸² particularly where he appears in the role of a public official charged with protecting the public interest. He may be viewed as setting forth examples of a proper standard, one which has been applied and which he, in his official capacity, believes should be applied.⁸³ In supporting his position with argument from personal experience, one judge contended forcefully,⁸⁴ counsel violates the spirit if not the letter of the canon of legal ethics which provides that "It is improper for a lawyer to assert in argument his personal belief in his

79. 63 Utah 22, 221 Pac. 867 (1923).

80. *Id.* at 46, 221 Pac. at 876.

81. 136 Ore. 240, 297 Pac. 1043 (1931).

82. Cf. the following statement by Shinn, P.J. in *People v. Kirkes*, 243 P.2d 816, 831 (Cal. Dist. Ct. App. 1952): "The closing argument of the deputy district attorney must be considered as coming from one who by virtue of his office and as a representative of the State wields great power and influence. A statement of the prosecutor to the jury that he believes the defendant to be guilty is weighted with the authority of his office. It is a declaration of a conclusion he has reached in his official capacity. . . . It means that the district attorney . . . has passed on to the jury his own conclusion, fortified by his experience and knowledge in such matters and by the public confidence and prestige which he enjoys." Reversal in *Kirkes* was for a roster of errors in argument. It should be noted that the district attorney had himself emphasized his role and responsibility as a public official.

83. *State v. Horr*, 63 Utah 22, 221 Pac. 867 (1923).

84. Kelly, J. in *Kuehl v. Hamilton*, 136 Ore. 240, 255, 297 Pac. 1043, 1048 (1931) (dissenting opinion).

client's innocence or in the justice of his cause."⁸⁵ In short, two risks are said to be inherent in the use of the advocate's personal experience: first, the jury may be unduly influenced by assuming as true an illustration which has not been proved; second, the jury may be unduly impressed with the professional experience or the public status of the lawyer arguing. His experiences may be improperly equated with a proper standard. Whether these risks are substantial remains to be considered. No less important is the need to consider whether the risks appear with sufficient frequency to warrant a fixed rule of prohibition.

Preliminarily one may observe that we know little enough about the processes of jury decision. We cannot speak with assurance of the impact which an assertion of fact is likely to make compared to that of an illustration born of an attorney's giving "play to his wit, or wing to his imagination."⁸⁶ Experimentation may provide some answers.⁸⁷ Until then, we may hazard the guess that other factors, ranging from the personality of the advocate to his skill in selecting the raw materials of argument, will reduce the experience-versus-fiction distinction to insignificance, at least in the usual run of cases. The relevance of the canon governing assertion of personal belief fares no better. It is obvious enough that a prosecutor may, by indirect statements, serve the purpose of expressing his own confidence in the guilt of the accused. That he falls short of direct, unequivocal assertion will not prevent judicial scrutiny of such remarks. Sometimes these indirections do no more than skirt the border of transgression, sometimes they are held to violate the rule.⁸⁸ Arguing in terms of personal experience could be used as a device for suggesting counsel's personal belief in the justice of his cause. Is this, however, a substantial basis for a

85. CANONS OF PROFESSIONAL ETHICS No. 15; see DRINKER, *LEGAL ETHICS* 146-47 (1953).

86. *Mitchum v. State*, 11 Ga. 615, 631 (1852).

87. See KALVEN, *REPORT ON THE JURY PROJECT OF THE UNIVERSITY OF CHICAGO LAW SCHOOL* (text of speech delivered at Ann Arbor, Michigan, Nov. 5, 1955, on file in Biddle Law Library) (describing some experiments being performed); cf. Weld & Roff, *A Study in the Formulation of Opinion Based Upon Legal Evidence*, 51 AM. J. PSYCH. 609 (1938).

88. *Compare* *People v. Head*, 108 Cal. App. 2d 734, 737, 239 P.2d 506, 508 (1952) ("A reasonable interpretation of the prosecutor's argument in reference to his belief that all defendants were guilty of the offense as charged, is that it was clearly predicated upon his statement that he believed the evidence showed that they were guilty."), *with* *People v. Cascio*, 219 La. 819, 826, 54 So. 2d 95, 98 (1951) ("A re-examination of the case has convinced us that the statement . . . that the accused was 'involved in the matter' imports that he was of the opinion that defendant was guilty of the crime charged."). Several courts have set up a dichotomy which permits the prosecutor to express an opinion as to the guilt of the accused based upon the evidence adduced at the trial, while preventing an opinion which is not accompanied by any qualification. *Compare* *State v. Horton*, 151 La. 683, 92 So. 298 (1922), *with* *Balis v. State*, 137 Neb. 835, 291 N.W. 477 (1940). See Notes, 54 COLUM. L. REV. 946, 955-56 (1954); 42 J. CRIM. L., C. & P.S. 73, 76-78 (1951).

general prohibition of illustrations drawn from counsel's experience? The factual context should be controlling; a sweeping prohibition goes too far. It is revealing that the case in which it was urged so strongly that the rule against expression of counsel's personal belief justifies prohibiting use of his personal experiences was precisely one in which, on its facts, this argument seemed inappropriate. Counsel had recounted an incident involving his own rear-view mirror in illustrating a point about causation of a motor vehicle accident. The opinion's reasoning seems far-fetched if one considers the rationale of the ethical canon. The only reason in support of that rule with the slightest relevance to the problem of the particular case is the possibility of "improper advantage to the older and better known lawyer, whose opinion would carry more weight, and also with the jury at least, an undue advantage to an unscrupulous one."⁸⁹ Again one may doubt that the applicability of these factors will be general.

More significantly, pursuit of distinctions as subtle as these with a view to the development of finespun doctrine, to be rigorously enforced and assiduously refined, would be most unhappy. We must avoid at all cost the creation of a "multiplicity of rules"⁹⁰ with an unreality rivaling that of which we would rid the law of admissibility. What appears indicated is maximum flexibility at both the trial and the appellate levels. Certainly the factors appropriate for consideration in administration of a flexible system should be articulated, but the context must not be one of hard and fast rules. A number of doctrines are currently available to insure flexibility on appeal. Concededly improper argument may be found no basis for reversal because the error below, in total context, is not considered prejudicial;⁹¹ or because comment of court or advocate has "cured" it;⁹² or because no oppor-

89. DRINKER, *LEGAL ETHICS* 147 (1953).

90. Cleary, *Evidence as a Problem in Communicating*, 5 VAND. L. REV. 277 (1952).

91. See, e.g., *Winstead v. Commonwealth*, 195 Ky. 484, 243 S.W. 40 (1922); *State v. Gee Jon*, 46 Nev. 418, 211 Pac. 676 (1923); *State v. Bogen*, 13 N.J. 137, 98 A.2d 295 (1953); cf. *People v. Travis*, 129 Cal. App. 2d 29, 276 P.2d 193 (1954). For analysis of the various tests formulated for prejudicial error, see Note, 36 COLUM. L. REV. 931, 938-39 (1936).

92. See, e.g., *Effron-Kushner & Co. v. American Ry. Express Co.*, 195 Iowa 1169, 1171, 193 N.W. 539, 541 (1923); *Kuehl v. Hamilton*, 136 Ore. 240, 297 Pac. 1043 (1931) (*semble*); 1 THOMPSON, *TRIALS* § 960 (2d ed. 1912). There is serious question as to the validity of the psychological assumption which underlies the doctrine that instructions by the court will erase from jurors' minds, and from their verdict, any prejudicial effect of an improper argument. Cf. KALVEN, *REPORT ON THE JURY PROJECT OF THE UNIVERSITY OF CHICAGO LAW SCHOOL* 24 (text of speech delivered at Ann Arbor, Michigan, Nov. 5, 1955, on file in Biddle Law Library), describing experiments in instructions as to insurance coverage of defendants in tort cases: "We are tempted to conclude therefore that instructing the jury about insurance will tend to keep them from talking about it, but will also tend to increase the frequency with which they do something affirmative about it."

tunity for correction was afforded by timely objection.⁹³ Nor are courts hesitant to use these traditional devices, for agreement of the justices on the impropriety of a particular argument is often submerged in sharp dissent over whether or not to reverse.⁹⁴ Provision for discretion in the trial judge, who is usually best qualified to gauge the impact in context of a challenged statement,⁹⁵ is a needed supplement at the *nisi prius* level.⁹⁶

This does not yet discharge a full measure of responsibility. The bar is entitled to an articulation of policy which will assist, before the fact,⁹⁷ in segregating the permissible from the prohibited, the ethical from the unethical. By the same token, a trial judge might well be aided by the restatement of the factors which should control the exercise of discretion, guideposts against which to measure his decisions. In the area of argument on the basis of the personal experience of counsel a practicable rule would allow the trial court to exercise his discretion, recognizing that where the truth of the assertion was not judicially ascertainable particular caution should be exercised that the fact of the incident being asserted as true was not likely to be unduly significant and recognizing further, that as part of this test, the position of the lawyer as one familiar with the law and the courts might tend in a particular case to make it so. The personal credibility of counsel should be minimized as a factor in jury decision.

93. See *Spahn v. People's Ry.*, 3 Boyce 302, 323, 92 Atl. 727, 730 (Del. Super. Ct. 1912) (counsel's reference to the pain caused by his own knee injury improper, but not reversible error because opposing party did not object at the trial); 1 THOMPSON, TRIALS § 957 (2d. ed. 1912).

94. See, e.g., *Kuehl v. Hamilton*, 136 Ore 240, 297 Pac. 1043 (1931); *State v. Horr*, 63 Utah 22, 221 Pac. 867 (1923).

95. That the trial judge is best qualified to evaluate in this type of situation is an assumption which should be tested scientifically. It may well be, e.g., that the very closeness of the trial judge to the case is likely to deny him a sense of perspective which an appellate court can achieve. Of course the law has indulged our basic assumption so often with respect to other problems of appellate review that it may appear a truism rather than an assumption, and in the absence of evidence to the contrary it seems a plausible hypothesis.

96. At present, of course, the trial judge has some discretionary powers which apply equally to argument. He may influence the jury in his remarks by way of "cure," he may grant or withhold a new trial with relatively little fear of reversal. A grant of discretion specifically with respect to arguments would increase the range of the judge's powers and is likely, in addition, to focus more sharply the judge's responsibility in this area. Cf. Wigmore, *Jury-Trial Rules of Evidence in the Next Century*, in 1 LAW: A CENTURY OF PROGRESS 347, 368 (Reppy ed. 1937), where he suggests as part of a summary of non-jury trial principles that the trial judge's ruling not be final insofar as the judge may state an erroneous principle of evidence, but that it be final in the "application of any rule of evidence to a particular offer."

97. If any rule of discretion is thought to lack the predictability which counsel preparing for argument may well desire, it is only possible to suggest that in the present state of authorities unqualified approval of counsel's use of his personal experiences is not likely, although of course reversal is by no means automatic. See, e.g., *Spahn v. People's Ry.*, 3 Boyce 302, 92 Atl. 727 (Del. Super. Ct. 1912) (counsel's reference to the pain caused by his own knee injury improper, but not reversible error because opposing party did not object at the trial); *Winstead v. Commonwealth*, 195 Ky. 484, 243 S.W. 40 (1922); *Kuehl v. Hamilton*, 136 Ore. 240, 297 Pac. 1043 (1931).

Applying these factors to a given case there may well be reason for requiring more rigorous adherence to a higher standard on the part of prosecuting attorneys in criminal cases.⁹⁸ Their unique obligations and their official role offer the potentiality of greater harm from a particular remark. More significantly, there is evidence of a judicial sensitivity to the risk of circumventing the presumption of innocence,⁹⁹ replacing it with one that public officials do not prosecute men whom they believe innocent. The risk of prejudice against a criminal defendant is particularly great where the prosecutor attempts comparisons with the evidence in other cases.¹⁰⁰ *State v. Horr*¹⁰¹ is an example. The district attorney's statement that he knew juries to have convicted on less evidence was held reversible error. Dissent and majority joined in condemning the argument; importing an external standard of sufficiency to convict was improper. This is particularly true since this is the type of case in which the jury may well consider the district attorney to have an unusual competence. Here, then, was an assertion of unproved fact, the verity of which is unknown to the court, being used to persuade. It does not require particularly fertile imaginations to consider the possibility that this "illustration" carried more weight with the jury in fixing the level of reasonable doubt than did the relevant portions of the judge's charge.¹⁰² In the rear-view mirror case, the court also found agreement on the impropriety of arguing from personal experience, the majority holding no reversible error, but the dissenting judge urging strongly that the illustration of counsel, including assertions of fact which could not be verified, were likely to have been of determinative weight.¹⁰³

98. "It is the privilege of defense counsel to go farther afield in argument than the prosecutor may go. Their theories and their statements of opinion as spokesmen for the defendant have little weight as compared with similar statements of the district attorney." *People v. Kirkes*, 243 P.2d 816, 833 (Cal. Dist. Ct. App. 1952). "The . . . [prosecuting attorney] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Viereck v. United States*, 318 U.S. 236, 248 (1943), quoting *Berger v. United States*, 295 U.S. 78, 88 (1935); cf. *People v. Talle*, 111 Cal. App. 2d 650, 678, 245 P.2d 633, 649 (1952). But see *State v. Dallao*, 187 La. 392, 434, 175 So. 4, 18, cert. denied, 302 U.S. 635 (1937); *State v. Genna*, 163 La. 701, 716, 112 So. 655, 661 (1927).

99. Cf. *State v. Coleman*, 49 Tex. Crim. 82, 86, 90 S.W. 499, 501 (1905).

100. For further elaboration of this problem see text at p. 157 *infra*.

101. 63 Utah 22, 221 Pac. 867 (1923).

102. Even in this case there is room for disagreement. There was a vigorous dissent on the question of whether to reverse. *Id.* at 49, 221 Pac. at 878. Wigmore approved the dissent. 6 WIGMORE, EVIDENCE § 1807 n.2 (3d ed. 1940).

103. *Kuehl v. Hamilton*, 136 Ore. 240, 256, 297 Pac. 1043, 1048 (1931). It is interesting that the majority, while not yet approving the use of the unproved tale, found a reasonable analogy to a statement of the experience of men with rear view mirrors. Altogether, it may be doubted that the story of counsel's experience was sufficiently more effective than one couched in terms of "Haven't you ever been driving when . . ." to warrant a finding of impropriety. See text at note 75 *supra*.

The "Celebrated" Case and Reading From Books

Tales of what other juries have done in similar trials,¹⁰⁴ of ultimate confessions by accused who had protested innocence,¹⁰⁵ or of severe sentences meted out on less evidence are often offered on the personal veracity of counsel and have figured in the preceding discussion of argument based on the advocate's own experience. They constitute precisely the kind of case in which the risks there considered are likely to materialize. But counsel may, and often does, attempt to refer to similar litigation with which he does not claim a personal familiarity.¹⁰⁶ These references range from anecdote-like instances which are said to have occurred before a venerated local judge¹⁰⁷ to classic trials of history.

In *State v. Jenkins*¹⁰⁸ the prosecuting attorney detailed the events of a prior prosecution, including a subsequent confession, without offering any explanation as to the source of his information. The context, however, was clearly one in which the incident was being offered as true, and the appellate court held the argument improper. Certainly failure to ascribe any source should not be expected to result in more favored treatment than that accorded the personal experience of counsel, particularly since, in context, counsel appeared to be asserting that the facts had occurred precisely as he was relating them. The personal veracity of the advocate is no less involved because the assertion of truth is by implication rather than by explicit statement.

Discussion of famous trials stands on a somewhat different footing. The basis for assuming truth is the common knowledge of the community.¹⁰⁹ In a Louisiana case¹¹⁰ the prosecuting attorney referred to the Leopold and Loeb trial, urging the jury to reject a defense of

104. See *Berry v. Commonwealth*, 227 Ky. 528, 13 S.W.2d 521 (1929); *State v. Corpening*, 157 N.C. 621, 73 S.E. 214 (1911); *Rodriguez v. State*, 58 Tex. Crim. 275, 125 S.W. 403 (1910); *State v. Horr*, 63 Utah 22, 221 Pac. 867 (1923); cf. *Tucker v. Hennicker*, 41 N.H. 317 (1860) (improper for counsel to refer to damages awarded by referee in a similar case).

105. *Winstead v. Commonwealth*, 195 Ky. 484, 243 S.W. 40 (1922).

106. The analysis of this section is not intended to apply to the many cases which consider the right of counsel to argue the law of the case. See generally 1 THOMPSON, TRIALS §§ 940-51 (2d ed. 1912). The primary focus of this article is a consideration of sources available to counsel in the argument of propositions which are properly open for treatment by him. Other topics such as the propriety of arguing the efficacy of capital punishment to the jury are also outside the scope of the present inquiry. See note 120 *infra*.

107. *Jenkins v. State*, 49 Tex. Crim. 457, 93 S.W. 726 (1906). But see note 61 *supra*.

108. 49 Tex. Crim. 457, 93 S.W. 726 (1906).

109. See *Berry v. Commonwealth*, 227 Ky. 528, 13 S.W.2d 521 (1929); *Tyree v. Commonwealth*, 212 Ky. 596, 279 S.W. 990 (1926); *State v. Davis*, 83 N.H. 435, 144 Atl. 124 (1928); *State v. McAlister*, 133 S.C. 83, 130 S.E. 511 (1925). See also note 66 *supra*.

110. *State v. Genna*, 163 La. 701, 112 So. 655 (1927).

insanity. This the Supreme Court found unobjectionable. Such references, the opinion points out, are no more prejudicial to the defendant than if counsel "had referred to the story of Cain and Abel, or the assassination of Julius Caesar or the French Revolution; just as the attorney for the defendant would have been quite free, if he chose to do so, to refer to Magna Charta, the Bill of Rights, and the Declaration of Independence, without overstepping the bounds of propriety in any manner whatever. Literature and history are open to all men; and the Leopold and Loeb Case is an event in current history. . . ." ¹¹¹ It is only a slight extension to cases of more local and less persevering interest, the facts of which are sufficiently well known to prove helpful in argument.¹¹²

That a case may be referred to because well known in a particular community does not permit of any use which an advocate may care to make of it. Choice of language may run afoul of the general rule with respect to prejudicial statements,¹¹³ and the addition of facts not generally known but vouched for on the personal credibility of counsel would fare no better.¹¹⁴ Likewise use of the case to illustrate a proposition in itself improper would not be sanctioned.¹¹⁵ In short, the famous case, as a generally known fact of ancient or contemporaneous history, satisfies the requirement with respect to a proper source of unproved fact; it avoids the risk of an untruth passing for truth. It must yet satisfy whatever other requirements are germane to the particular argument.

A further source of information about similar prosecutions is published works such as Professor Borchard's *Convicting the Innocent*, a collection of sixty-five case studies assembled to disprove the proposition that "innocent men are never convicted. . . ." ¹¹⁶ Obviously, this is the kind of material, scholarly, competent and highly relevant to the proper evaluation of identification testimony and circumstantial evidence, which defense counsel could use to advantage. Illustration of the infirmities inherent in the use of mere men as witnesses drawn from these instances is likely to be highly effective. Certainly, objecting district attorneys appear to have thought so.¹¹⁷ Use of Borchard's book might have been thought to fall squarely within the rule which

111. *Id.* at 717, 112 So. at 661.

112. See *State v. Pierre*, 189 La. 764, 180 So. 630 (1938).

113. See text at note 27 *supra*.

114. See text at note 35 *supra*.

115. See text at notes 120-21 *infra*.

116. *Preface* to BORCHARD, *CONVICTING THE INNOCENT* (1932).

117. See, e.g., *Bryant v. State*, 191 Ga. 686, 13 S.E.2d 820 (1941) (*semble*); *Osteen v. State*, 83 Ga. App. 346, 63 S.E.2d 416 (1951); *Commonwealth v. Roberts*, 44 Luz. L. Reg. Rep. 175 (Luzerne County, Pa. C.P. 1952).

states that ". . . counsel in their arguments have the right to use illustrations from history or literature or any other stock of common knowledge."¹¹⁸ The holdings do not support so simple an affirmation. What is required is an analysis of the problems raised by the use of relevant books.

In a relatively recent Pennsylvania case defense counsel "was halted when he waved a book in front of the jury, told them its author was Lewis E. Lawes, a former warden at Sing Sing prison, and [stated] that it was shown in this book that the number of murder cases had decreased in States which had abolished capital punishment."¹¹⁹ The first problem presented is whether the subject matter of the argument, the deterrent effect of capital punishment, is within the scope of what the jury may properly consider in fixing its penalty. Some cases have answered that question in the negative.¹²⁰ Obviously, then, the problem of what may be used in support of the argument is never reached; the topic is not appropriate for consideration. The Pennsylvania court did not rest its decision on that ground.¹²¹ It met head-on the question of whether this source of material was an appropriate one. The opinion on this point is interesting. Justice (later Chief Justice) Stern rejects the contention that Warden Lawes' work is literature, within the meaning of that term as used in the earlier cases. "Obviously," he states, "the 'illustrations from history, literature or any other stock of common knowledge' were meant to refer only to universally recognized and accepted works of literature or science, a limitation which would scarcely include treatises such as that of Mr. Lawes."¹²² Yet, this did not require a finding that use of books and treatises not universally accepted was improper. The court instead approves a rule of discretion, allowing a latitude to the trial judge

118. *Commonwealth v. Sykes*, 353 Pa. 392, 396, 45 A.2d 43, 45 (1946), quoting from *Commonwealth v. Brown*, 309 Pa. 515, 522-23, 164 Atl. 726, 728-29 (1933).

119. *Commonwealth v. Sykes*, 353 Pa. 392, 396, 45 A.2d 43, 45 (1946).

120. "Whether capital punishment is right or wrong, and whether it should be abolished, is a question of policy which can be determined by the Legislature alone; and thus to permit counsel to attack that policy, and to show that it is wrong by comparing it to the laws of other states which do not have capital punishment, is beyond the legitimate exercise of the right of counsel to represent their clients." *Jones v. State*, 166 Ga. 251, 254, 142 S.E. 866, 867 (1928); see *Styles v. State*, 129 Ga. 425, 59 S.E. 249 (1907).

121. Earlier in his argument counsel was stopped by the court when he urged that capital punishment had not proved itself a deterrent to crime, that it had been abandoned in a number of states, and that a bill to abolish it was at that very time before the Pennsylvania legislature. The Supreme Court approved the prohibition of this line of argument with the terse statement that "the law of the State must be administered as it presently exists, and it still provides for capital punishment as a penalty in appropriate cases." *Commonwealth v. Sykes*, 353 Pa. 392, 395-96, 45 A.2d 43, 44 (1946). The court did not revert to this point in considering the argument from Lawes' book.

122. *Id.* at 396-97, 45 A.2d at 45.

which, on the record before it, was not abused by a ruling against utilization of the Lawes book.¹²³

The decision appears sound. Published works which must be conceded to fall short of the "universally-accepted" criterion may yet be highly reliable, adequately documented and thus a valuable source of illustrative material which can bring home to the jury risks inherent in a particular type of testimony. True, the risk of inaccuracy has not been eliminated, but contrast the safeguards available in this area with the dangers in the use of counsel's personal experience. The author of a work such as produced by Professor Borchard is motivated by no interest in the present litigation, he stakes a significant professional reputation on the academic integrity of his product, and the very fact of publication invites refutation if there be reason to refute.¹²⁴ Of course, not all books to which counsel would like to refer in summation are of this calibre. Reliability is a matter for determination by the judge, and in making this determination he may legitimately consider the nature of the proposition being illustrated, its relative simplicity or complexity, and the extent of support sought in the work being cited.¹²⁵

123. *Ibid.* In *Commonwealth v. Roberts*, 44 Luz. L. Reg. Rep. 175, 212 (Luzerne County, Pa. C.P. 1952), *Sykes'* grant of discretion was interpreted to allow "control [of the] argument within reasonable limits," as a result of which the court permitted reference to Borchard, but prohibited reading from it or showing it to the jury.

124. Cf. discussion of the use of learned treatises in evidence as an exception to the hearsay rule in text at notes 202-08 *infra*.

125. In *Planebeck v. Chicago Ry.*, 294 Ill. 302, 308, 128 N.E. 513, 515 (1920), counsel was arguing that a person may receive serious injury without realizing the extent to which he had been injured, saying: "It has been said that it is a common thing in war for a person to receive serious injury and not know it. You who have read this wonderful book, 'Over the Top', know the experiences." The court said: "He did not undertake to narrate any of the experiences detailed by that book, nor to make reference to any of the experiences related therein. We think there was nothing in what he said that seriously violates the rules applicable to argument to juries, and that plaintiffs were not prejudiced by such an argument." Contrast an attempt by counsel, in arguing the reliability of memory, to discuss a technical phenomenon such as "rem-iniscence," see LEVIN, EVIDENCE AND THE BEHAVIORAL SCIENCES B-314 to 17 (mimeo. 1956), with reference to detailed results of particular experimentation. See text at notes 214-15 *infra*.

Some very old cases, which seem not to have attracted a great deal of attention, justify Wigmore's comment that "in a few jurisdictions a hazy distinction is made between their [learned treatises] use in 'illustration' and their use as evidence, the former being sanctioned. But the general opinion discounts any such uses." 6 WIGMORE, EVIDENCE § 1700(c), at 20 (3d ed. 1940). See also Annot., 1918D L.R.A. (n.s.) 4, 81-82. Some of the cases hold that such argument is proper. See, e.g., *Harvey v. State*, 40 Ind. 516 (1872) (prosecutor allowed to read from Wharton's *Medical Jurisprudence*; opinion does not state that use was as illustration); *Corey v. Silcox*, 6 Ind. 39 (1854). In *Corey* the lower court had said concerning counsel's reading from Evans' *Millwright Guide*: "Like argument of counsel, or any other thing adduced to illustrate, they may be satisfactory to the jury or they may not." The appellate court added: "Reason is neither more nor less than reason, because it happens to be read from a book; and we think that we would be adopting a very difficult rule to enforce, if we should attempt to compel counsel to use their own arguments for every position they may assume." *Id.* at 40. Generally, however, sanction of the use of treatises for illustration has been by way of dictum, because the argument was irrelevant (Legg

However, this does not dispose of the total range of problems in the permissible use of books. It is one thing to refer orally to the general content of Borchard's volume and quite another to allow voluminous quotation on the part of an advocate who parades the full detail of a large number of Borchard's cases before the jury. Reading from a book of impressive proportions, or from a series of them,¹²⁶ adds to the risk of undue impact. This is a distinction which has impressed the courts both where they have allowed and where they have prohibited the use of books.¹²⁷ Once again we are reduced to some assumptions about potential impact on a jury, but until scientific experimentation establishes the contrary, it would seem reasonable to assume that leaving a jury with an avalanche of detail taken from a series of cases in which conviction was a miscarriage of justice might result in a less objective evaluation of the evidence and application of a "reasonable doubt" rule than would denial of this privilege to counsel. Discretion in the trial judge seems an appropriate device with which to achieve a balance. While counsel should not be denied the opportunity for effective presentation of the risks of improper conviction, neither should he be allowed to present a picture so skewed as to obliterate the distinction between absolute, scientific certitude and the lesser standard of "beyond a reasonable doubt."

History and Current Events

If famous cases in the community and the nation are sufficiently matters of "common knowledge" to be used as illustration, other current events which attract equal attention should be no less so. Counsel in a recent case urged the jury to find defendant's confession unreliable because coerced, buttressing his argument with references to Cardinal Mindszenty and William Oatis and with a description of the brainwashing to which American soldiers were subjected in Korea.¹²⁸ This the appellate court held proper, observing that "Every person of

v. Drake, 1 Ohio St. 286, 289 (1853); Wade v. DeWitt, 20 Tex. 398 (1857)), because the argument is improper when the court does not instruct that the facts may not be used as evidence (Yoe v. People, 49 Ill. 410, 412 (1868)) or because the trial court did not abuse its discretion in refusing the argument (State v. O'Neil, 51 Kan. 651, 675-76, 33 Pac. 287, 291-92 (1893)). Of course, reading treatises as illustration may go without correction where no objection was made at the trial. See Byers v. Nashville, C. & St. L.R.R., 94 Tenn. 345, 29 S.W. 128 (1895). See also text at notes 222-34 *infra*, for discussion of use of scientific data in argument.

126. In *Commonwealth v. Roberts*, 44 Luz. L. Reg. Rep. 175, 212 (Luzerne County, Pa. C.P. 1952), counsel proposed to make use of Borchard, *Convicting the Innocent*, Gardner, *Court of Last Resort* and Phillips, *Famous Cases of Circumstantial Evidence*. "Each of the books had markers protruding from selected places. Counsel picked one up and opening it advanced toward the jury when objection was made."

127. See notes 123, 125 and 126 *supra*.

128. *People v. Travis*, 129 Cal. App. 2d 29, 276 P.2d 193 (1954).

common intelligence possessed of superficial information as to what has been going on in the world has heard and probably shares the common belief that confessions and untruths have been uttered under compulsion by our servicemen and other citizens while they were held as prisoners in foreign lands.”¹²⁹ The general proposition is commonly accepted and proper for consideration at the trial; the illustrative material is sufficiently well known that no serious threat of jury confusion is presented.

Frequent use is made of facts of recent historical importance in predisposing the jury to one decision rather than another by way of emphasizing the social significance of a conviction or an acquittal. Most commonly the prosecuting attorney seeks to combat jury nullification of prosecutions caused by sympathy for the defendant or dislike of the severity of the penalty.¹³⁰ This may be accomplished by discussing the beneficial results of other convictions,¹³¹ outlining the present evils which conviction would help to deter,¹³² or by projecting the probable evils which would follow an acquittal.¹³³ All of these, it should be noted, may be cast in the convenient and familiar form of illustrations of a general proposition. It is but an illustration of the evils of the crime when, in a prosecution for selling whiskey, the prosecutor states that “They are selling whiskey to the soldiers here . . . and this stuff makes them unsatisfactory for service for days. It encourages syphilis, venereal diseases and prostitution, and we want to stamp it out.”¹³⁴ However, argument based on current events and cast in the form of illustration is not necessarily proper. First, it becomes important to discriminate between current happenings which are common knowledge and those which are not. That the Kefauver investigation has held hearings in a particular city may be well known; what was said at those hearings may not be.¹³⁵ That the dollar has decreased in purchasing power is an accepted fact;¹³⁶ that it has descended to the value of thirty-

129. *Id.* at 38, 276 P.2d at 199.

130. See Michael & Wechsler, *A Rationale of the Law of Homicide: II*, 37 COLUM. L. REV. 1261, 1265 (1937).

131. *Berry v. Commonwealth*, 227 Ky. 528, 13 S.W.2d 521 (1929).

132. *People v. Ridgeway*, 89 Cal. App. 615, 265 Pac. 349 (1928); *Heyl v. State*, 109 Ind. 589, 10 N.E. 916 (1887); *Finley v. State*, 145 Tex. Crim. 507, 169 S.W.2d 975 (1943); *Perez v. State*, 141 Tex. Crim. 575, 150 S.W.2d 402 (1941).

133. *Dennis v. State*, 139 Ala. 109, 35 So. 651 (1903); *Adams v. Commonwealth*, 263 S.W.2d 103 (Ky. 1953).

134. *Finley v. State*, 145 Tex. Crim. 507, 509, 169 S.W.2d 975, 976 (1943). The argument was held improper and the case reversed, however, because of the prejudicial effect upon the defendant of this argument during wartime. See text at notes 138-40 *infra*.

135. *Cf. State v. Bogen*, 13 N.J. 137, 98 A.2d 295 (1953).

136. *United Verde Extension Mining Co. v. Littlejohn*, 279 Fed. 223 (9th Cir. 1922).

nine cents in a particular location at the time of the trial may not be.¹³⁷ In general, the more detailed the proposition, the less likely it is to meet the common-knowledge requirement. But clearing this hurdle, counsel's argument must still be tested by other requirements. Precisely because current events are likely to have so great an impact on the jury,¹³⁸ the other, well-recognized limitations on argument are stringently enforced.¹³⁹ Most apparent is the risk of prejudice to an accused when the prosecutor is seeking to convince. To suggest that acquittal of a policeman being tried for assault would result in brutality in criminal administration would be permissible argument. However, for the prosecutor in the same case to refer to Russian police methods has been sufficient basis for a court, sensitive to the background of heated international conflict, to find prejudice sufficient for reversal.¹⁴⁰

Where the use is clearly non-illustrative, familiar risks appear. When a police chief is on trial for malfeasance in office, the prosecutor should not be permitted to "testify" in summation by telling the jury that "You yourselves know that in the past year there has been more crime, more murders, more holdups, more robbery perpetrated in this city than at any time in its history. You cannot take up a paper in the morning without seeing from one to five burglaries and holdups and murders and where they hang out."¹⁴¹ The jurors may know what is

137. *Todd v. Kansas City R.R.*, 237 S.W. 868 (K.C., Mo. Ct. App. 1922). *But cf. Brown-Miller Co. v. Howell*, 79 So. 2d 818 (Miss. 1955) (permissible to argue that the dollar has decreased in value by one-third).

138. In a number of cases the events are of personal concern to the jurors or, at least, related to their daily living. In others the matters have the appeal of the familiar.

139. See *Effron-Kushner & Co. v. American Ry. Express Co.*, 195 Iowa 1168, 193 N.W. 539 (1923); *Finley v. State*, 145 Tex. Crim. 507, 169 S.W.2d 975 (1943); *Perez v. State*, 141 Tex. Crim. 575, 150 S.W.2d 402 (1941).

140. *Adams v. Commonwealth*, 263 S.W.2d 103 (Ky. 1953). Here the prosecutor, in referring to defendant's alleged attack, said: "My God, you hear of those things, and hear of things like that happening in Russia, where they handcuff people and shoot them in the back." This was held improper. If the tie-in to defendant's action had been less direct, by referring to the Russian methods as an evil which acquittal would invite, a somewhat different balance might be involved.

A number of cases present variations on the prejudice theme. Some involve prejudice which would result from irrelevant use of the proposition being argued. In *Morse v. Phillips*, 157 Miss. 452, 128 So. 336 (1930), an action for assault and battery, counsel's attempt to argue that county inhabitants had already rendered a verdict by electing defendant justice of the peace was held improper.

In *Effron-Kushner & Co. v. American Ry. Express Co.*, 195 Iowa 1168, 193 N.W. 539 (1923), plaintiff was seeking recovery for furs not delivered by a common carrier. Admitting that it was possible that the furs had been delivered to the local station, plaintiff's attorney maintained that "... they were never delivered from the station to the plaintiff's place of business. They were probably stolen. You have all read in the papers that three drivers of the defendant have been arrested for stealing express packages." *Id.* at 1171, 193 N.W. at 541. A strong argument can be made that counsel should be allowed to dramatize in this manner the possibility that drivers stole the goods entrusted to the carrier. On the other hand, the risk of the jury inferring guilt from the fact of arrest, and a recent arrest at that, is patent. The court held the argument improper but did not reverse because the judge's charge to the jury had cured the error. See also *Kelley v. State*, 86 Tex. Crim. 281, 216 S.W. 188 (1919).

141. *State v. Peirce*, 178 Iowa 417, 440-41, 159 N.W. 1050, 1059-60 (1916).

in their morning papers, they almost certainly do not know the past history of crime "at any time" in the history of the city, and they are unlikely to know what factors other than the activity of the police chief may be held responsible. In any event, the proposition which counsel offered in argument is of such central importance to the litigation that nothing but testimony subject to cross-examination will suffice. The situation is precisely analogous to use of Biblical material. A classic source of illustration,¹⁴² scriptural reference has been held improper when counsel urged the jury to base life expectancy for damages on the Biblical estimate of three score years and ten.¹⁴³

The use of current events, no less than historical fact, is a valuable source of material for argument. The propriety of such use is beyond question in a vast range of cases. No doubt current events can be used improperly. An analysis of the factors involved in the various situations is necessary; this analysis is not furthered by a blanket condemnation of "every excursion outside the evidence."¹⁴⁴

ARGUING SCIENTIFIC FACTS

If scripture can be cited to devil's purpose, that which passes in the name of science should not be expected to prove less flexible. A veritable plethora of scientific "facts" are urged upon courts and juries, and if some be of doubtful accuracy, others are not; they are patently false. Attorney for the defense in a rape case urged that the testimony of the prosecutrix was untrue "and not to be credited, because, although she had testified that her first intercourse with defendant was against her will, and had been accomplished by force, yet she had conceived. In other words," said the court, "he was assuming as a scientific fact . . . that if the woman conceived then there was no rape. . . ." ¹⁴⁵ Rejecting the contention as an "exploded theory" without "scientific support in medical jurisprudence," the opinion observes that "It is now conceded that the organs of conception, like those of digestion, perform their appropriate functions without the volition of the female." ¹⁴⁶

142. See text at note 56 *supra*.

143. *Alpine Tel. Corp. v. McCall*, 195 S.W.2d 585 (Tex. Civ. App. 1946); *Misouri, K. & T.R.R. v. O'Hare*, 39 S.W.2d 939 (Tex. Civ. App. 1931).

144. The language is from *State v. Vaszorich*, 13 N.J. 99, 119, 98 A.2d 299, 309 (1953). In this case the argument, although improper, was not held to constitute reversible error. It is a common phenomenon, however, for courts to dispense with consideration of the propriety of argument merely by finding that the facts stated by counsel have no evidentiary support. See, e.g., *Kelley v. State*, 86 Tex. Crim. 281, 216 S.W. 188 (1919); cf. *Grissom v. Dahart Ice Cream Co.*, 34 Ala. App. 282, 40 So. 2d 333 (1949); *State v. Gee Jon*, 46 Nev. 418, 211 Pac. 676 (1923).

145. *State v. Lingle*, 128 Mo. 528, 540, 31 S.W. 20, 23 (1895).

146. *Id.* at 541, 31 S.W. at 23.

Instances can be multiplied, from the changing color of ink¹⁴⁷ to the statistical incidence of syphilis.¹⁴⁸ Even where inaccuracy is not patent, the argument is rendered improper where truth of the proposition being urged is essential to the reasoning and such truth cannot be established as a matter of common knowledge or judicial notice. These cases are analogous to a host of others in which counsel base their arguments on propositions of doubtful validity.¹⁴⁹ It is not for the advocate in summation to assert or assume, without support in the evidence, the practice of obstetricians or gynecologists with respect to having nurses present at all examinations¹⁵⁰ or the relative difficulty of expert detection of "two-handed forgery."¹⁵¹ Sometimes a general proposition of doubtful validity will be implied rather than made express. This will not avail if the point of the argument is to establish an invalid generalization. Thus in a relatively recent North Dakota case¹⁵² great stress was laid upon the fact that plaintiff's witnesses were subpoenaed while those of the defendant were not. Counsel characterized those who had testified for his client as "subpoenaed witnesses" and observed, "We can't sandpaper those witnesses."¹⁵³ Finding no basis for the proposition that subpoenaed witnesses are any more credible than others, the court held the argument improper.

A somewhat more complex problem is presented by *Chellis Realty Co. v. Boston & M.R.R.*,¹⁵⁴ which involves familiar risks in a new context. The issue in that case concerned the ability of an engineer to stop his engine before hitting plaintiff's truck. Counsel argued: "Now, gentlemen, there cannot be a man on this jury but what knows of his own knowledge and good common sense that a man can stop a locomotive in going thirty rods, if he tries to."¹⁵⁵ Adding an example of a train with a string of cars coming into a station, he invoked the

147. See *Sommers v. Weilbacher*, 99 S.W.2d 651 (Tex. Civ. App. 1936).

148. See *American Nat'l Ins. Co. v. Briggs*, 70 S.W.2d 491 (Tex. Civ. App. 1934).

149. See, e.g., *Irwin v. State*, 16 Ala. App. 109, 75 So. 701 (1917) (improper for prosecutor to suggest that an Indian's appetite for liquor is even larger than a Negro's); *State v. Pavlovich*, 245 Minn. 78, 71 N.W.2d 173 (1955) (in a prosecution for sale of beer with more than 3.2% alcohol, improper for prosecutor to set up an equivalent table for other alcoholic beverages based on 6% beer, because alcoholic percentage in beer varies between the two); *Jordan v. Commonwealth*, 181 Va. 490, 25 S.E.2d 249 (1943) (improper for counsel to argue in prosecution for rape that men and women are more passionate when under the influence of alcohol).

150. *State v. Kassabian*, 69 Nev. 146, 243 P.2d 264 (1952).

151. *Contra*, *People v. Carter*, 116 Cal. App. 2d 533, 253 P.2d 1016 (1953). Although the court permitted the prosecutor to explain his failure to call a handwriting expert, the decision seems highly questionable. Search of a standard text, *BAKER, DISPUTED AND FORGED DOCUMENTS* (1955), fails to disclose any mention of such a technique.

152. *Hoffer v. Burd*, 78 N.D. 278, 49 N.W.2d 282 (1951).

153. *Id.* at 299, 49 N.W.2d at 294.

154. 79 N.H. 231, 106 Atl. 742 (1919).

155. *Id.* at 233, 106 Atl. at 744.

experience of the jurors to establish that "it don't take 30 rods" to stop a locomotive. It does not require highly sophisticated analysis to recognize the dangers in this type of situation. Speed of the train, condition of the track, the grade of the roadbed are a few of the factors which will govern. The issue is one crucial to plaintiff's case. His theory requires a finding with respect to a particular locomotive under particular circumstances, a finding which cannot be supported by the generalities of a broad proposition.¹⁵⁶ The details of the circumstances are matters appropriate to the examination of an expert, and it would be an unhappy choice to allow the supposed experience of the jury to supplant the need for testimony which might, by proper cross-examination, be placed in perspective, refined and delimited. The court held the argument reversible error, neatly pointing out that counsel himself had recognized the necessity for proof and had relied upon argument only after failing in the attempt to produce admissible testimony. The rationale of the court, however, is of interest. The common knowledge requirement, it asserts, quoting Wigmore, is strictly limited "to a few matters of elemental experience in human nature, commercial affairs, and everyday life."¹⁵⁷ The distance in which a locomotive can be brought to a stop is not one of these.

Similar language is found in the report of an action for damages said to have resulted from a fire caused by defendant railroad's engine. In that case counsel for the defense was prevented from arguing that "It is a matter of common knowledge that electric locomotives are best and safest for preventing fires."¹⁵⁸ Once again the form of argument made no difference. Assertions prefixed with a common-knowledge formula are not thereby immunized from attack. "However well known this may be to some, it is not apparent that the common knowledge of the public has progressed as far as this. . . ." More cogent is the court's remark that "if certainly true it can be certainly proved."¹⁵⁹ Facts which would be so central to the case as these should either be readily known to be true and applicable¹⁶⁰ or they should be established by means of formal proof. If the assertion is in fact indisputably true so that judicial notice is appropriate, it ill-behooves counsel to remain silent through the trial, waiting for the course of his remarks to the jury to achieve such notice by indirection. The administration of this

156. It is conceivable, but highly unlikely, that a proposition such as this will be so clear, even as applied to the facts of a particular case, as to be appropriate for judicial notice. See text at note 216 *infra*.

157. 79 N.H. at 233, 106 Atl. at 744.

158. *Norfolk Southern R.R. v. Fentress*, 127 Va. 87, 94, 102 S.E. 588, 590 (1920).

159. *Ibid*.

160. *Levlon v. Dallas Ry. & Terminal Co.*, 117 S.W.2d 876 (Tex. Civ. App. 1938) (permissible to argue that automobiles cannot be started with the ignition off).

area of judicial notice, which governs facts not necessarily widely known but nonetheless verifiable beyond contest, is properly for the court; and opportunity for adequate consideration, to say nothing of notice to the opposing party, must be afforded.¹⁶¹

In Aid of Judging Credibility

Probably the greatest potential for use of scientific facts in argument lies in the area of evaluating testimony. Identifications of faces, of handwriting, of voices are common. The memory of witnesses, refreshed and supposedly unrefreshed, is frequently a focal point of litigation. Whether the witness is likely to have perceived accurately is a pervasive question in civil litigation, a haunting one in criminal prosecutions. All this says nothing of veracity. There "being no universal solvent for truth, each court compounds its own with a mixture of introspection and worldly experience."¹⁶² Thus, it is for the court to say whether the twitching of a witness' big toe or his repute for sexual intercourse out of marriage¹⁶³ is relevant to credibility. In the final analysis, however, it is for the jury to weigh the evidence and, having measured the preponderance or examined for the presence of reasonable doubts, to render a verdict which presupposes adequate answers to whatever questions of credibility have been raised. The jury, in discharging this function, is not limited to the evidence in the case. We do not require a "blankness of their mental tablets"¹⁶⁴ when they enter the jury box. We would not if we could,¹⁶⁵ and in any event we cannot, erase the conclusions of prior experience with which the jurors approach problems of memory or perception. On the con-

161. For contrasting views on the need for notice prior to taking judicial notice, compare Davis, *Judicial Notice*, 55 COLUM. L. REV. 945, 974-78 (1955), with Morgan, *Judicial Notice*, 57 HARV. L. REV. 269 (1944). This is not to suggest that in the instant case Davis would not consider notice necessary. See Davis, *supra* at 977. But cf. Wilson v. Van Leer, 127 Pa. 371, 17 Atl. 1097 (1889) (lower court reversed for failure to allow counsel to refer in argument to an almanac for the purpose of showing a particular date to have fallen on a Sunday despite a plea of surprise by opposing counsel). Wigmore specifically relates permissible argument of counsel to the proper scope of judicial notice: "Where the matter is one of which no evidence need ever be introduced because of its notoriety as a subject open to judicial notice . . . , there is obviously no impropriety in a reference to it in argument." 6 WIGMORE, EVIDENCE § 1807, at 266 (3d ed. 1940). See also 1 THOMPSON, TRIALS § 963, at 813 (2d ed. 1912): "An exception to the rule [prohibiting argument of facts not in evidence] has also been admitted where counsel have inadvertently omitted to introduce in evidence a document essential to his client's cause, such as an exemplification of the plaintiff's act of incorporation. Here the question is governed by the rule that the order in which the evidence is presented is within the discretion of the trial judge, and that the mere fact that evidence is presented out of its order is not ground of new trial unless prejudice appears."

162. Comment, 32 MICH. L. REV. 251 (1933).

163. *Ibid.*

164. 9 WIGMORE, EVIDENCE § 2570, at 547 (3d ed. 1940).

165. The New York statute, e.g., requires jurors to be "well informed." N.Y. JUDICIARY LAW § 596.

trary, the court may "instruct them to take in account their knowledge and experience, common to the community generally, in weighing the evidence. . . ." ¹⁶⁶ But common sense and common knowledge are limited tools at best, false measures at their worst.¹⁶⁷ Our inquiry is concerned with the extent to which counsel may, by use of scientific data in argument, strengthen jury assumptions which are correct, blunt the force of those which are in error, sharpen those which can prove helpful only if applied with discrimination.

The significance of the role which argument can play is dependent in great measure on what counsel may tell the jury. It is clearly permissible for counsel to argue that witnesses may be mistaken in estimating the duration of a crucial episode; he may also in all likelihood suggest that science has demonstrated that estimates of the time taken by an occurrence vary widely, for whatever additional impact that may have.¹⁶⁸ But where the crucial issue concerns a matter of minutes, may court ¹⁶⁹ or advocate tell the jury that experiment with college students revealed a range in reported elapsed time from one minute to fifteen minutes, where the actual occurrence was clocked at one minute thirty seconds? ¹⁷⁰

It is one thing to speak generally of the risks in attempting to identify voices. It is quite another to be allowed to tell the jury that after a lapse of five months only thirteen per cent of a group of intelligent auditors could correctly identify a voice previously heard.¹⁷¹ May counsel argue as an illustration of the risk in lay identification of handwriting that only one college professor in seven was able correctly to segregate his own genuine signature from a group of three forgeries? ¹⁷² A number of experiments on recognition of faces reveal a likelihood of error which may well give pause to a jury charged with evaluating

166. McCORMICK, EVIDENCE 691 (1954).

167. "Common sense is frequently wrong. . . . Our every day experience of the world comes in crude, unrepresentative chunks, with causal relations hopelessly obscured, and with prejudice, superstition, and self-interest inextricably intertwined in perception." Bitterman, *The Evaluation of Psychological Propositions*, in LEVIN, EVIDENCE AND THE BEHAVIORAL SCIENCES A-16 (mimeo. 1956).

168. See discussion in text at p. 182 *infra*.

169. That both bench and bar may be bound by the same rule as regards permissible use of extrinsic data, see, *e.g.*, Commonwealth v. Brown, 309 Pa. 515, 522, 164 Atl. 726, 728 (1933) and note 217 *infra*.

170. See Vickery & Brooks, *Time Spaced Reporting of a "Crime" Witnessed by College Girls*, 29 J. CRIM. L., C. & P.S. 371, 374 (1938). See also similar data in 2 MOORE, FACTS ON THE WEIGHT AND VALUE OF EVIDENCE § 871 (1908) ("Sex Differences in Estimates of Time").

171. McGehee, *The Reliability of the Identification of the Human Voice*, 17 J. GEN. PSYCH. 249, 268 (1937). See also Note, 33 J. CRIM. L., C. & P.S. 487 (1943).

172. Inbau, *Lay Witness Identification of Handwriting (An Experiment)*, 34 ILL. L. REV. 433, 436 (1939).

eyewitness identification.¹⁷³ What of the intricacies of line-up practices? If no line-up is used what may defense counsel say about problems of suggestibility? If a line-up is used how much may he say of the manner in which the very use of a line-up deters rather than facilitates accuracy in identification?¹⁷⁴

To appreciate the problems in developing and using scientific data suitable for argument to the jury some perspective with respect to the broader picture of interdisciplinary cooperation in this area is needed. The history of the law's brush with psychology has not been a happy one. In 1908 Professor Hugo Munsterberg published a little book, *On the Witness Stand*, which attempted to demonstrate what the law should learn from psychology. Its tone may be gathered from the author's introduction in which, after alleging that educators, physicians, artists and businessmen had all come to recognize in "Applied Psychology" a source of "help and strength," he asserts: "The lawyer alone is obdurate."¹⁷⁵ He accused, in addition to the lawyer, both judge and jurymen of a smug certainty that they had no need of experimental psychology. For the latter discipline there was lavish praise: its "searchlight" had already been thrown into virtually "every corner of mental life."¹⁷⁶

Munsterberg was pioneering and, admittedly, propagandizing. If the time "is ever to come when even the jurist is to show some concession to the spirit of modern psychology," he wrote, "public opinion will have to exert some pressure."¹⁷⁷ And *On the Witness Stand* was frankly a means of creating that pressure. The lawyers were not slow to respond. The more temperate critics were, years later, to refer to Munsterberg's work as "rash and presumptuous";¹⁷⁸ the less temperate spoke of "Yellow Psychology."¹⁷⁹ Probably Hutchins and Slesinger have not come wide of the mark with their assessment: "The psychologist was too confident, and overshot his mark. The lawyer snapped back and put the psychologist in his place."¹⁸⁰

173. See, e.g., Belbin & Crane, *Some Factors Affecting Response in Recognition Tests*, 8 Q.J. EXPER. PSYCH. 45 (1956); Jampolsky, *Etude de Quelques Epreuves de Reconnaissance*, 49 ANNEE PSYCH. 63 (France 1950); Stern, *The Psychology of Testimony*, 34 J. AB. & SOC. PSYCH. 3, 18 (1939).

174. See *Designing Experiments for New Developments in Line-Up Law*, in LEVIN, EVIDENCE AND THE BEHAVIORAL SCIENCES B-367a (mimeo. 1956). For the consultants participating in the preparation of this volume see note 20 *supra*.

175. MÜNSTERBERG, *ON THE WITNESS STAND* 10 (1908).

176. *Id.* at 7.

177. *Id.* at 11.

178. CAIRNS, *LAW AND THE SOCIAL SCIENCES* 169 (1935).

179. MOORE, *Yellow Psychology*, 11 LAW NOTES 125 (1907). This was a reaction to a magazine article by Munsterberg. Moore is the author of the two-volume work, *MOORE, FACTS ON THE WEIGHT AND VALUE OF EVIDENCE* (1908).

180. Hutchins & Slesinger, *Legal Psychology*, 36 PSYCH. REV. 13, 14 (1929). One of the most interesting reactions to Munsterberg came from Wigmore. Wigmore,

A great deal has happened in the half-century since these debates. True, the immediate aftermath included a reaction on the part of the psychologists. The reception accorded Munsterberg "helped to chill any interest they may have felt in the psychological aspects of the legal process."¹⁸¹ Intellectual climate, however, is subject to change, and today there is sufficient interest on the part of some psychologists to warrant discussion of an Institute of Applied Forensic Psychology.¹⁸²

The total range of potential contributions to the law need not here be explored. Our concern, focused as it is on argument, is a relatively narrow one. Whether or not the experimental scientist will produce findings sufficient to warrant changes in doctrine or to offer guideposts in aid of an enlightened exercise of judicial discretion, it seems clear that further experimentation may prove helpful in the area of evaluation of testimony, provided an atmosphere of receptivity for its use is developed. A jury should be entitled to know whether the witness who asserts positively that defendant is the culprit is any more to be believed than one who couches his testimony in terms of "my impression is that it looked like him."¹⁸³ Both judge and jury are entitled to be told whether bank tellers are any better qualified to identify handwriting from memory than other laymen, and whether they are any more proficient than the average juror at comparing specimens when a standard has been admitted into evidence.¹⁸⁴ Because the answers to these and similar questions are necessary for the improvement of our legal system, it will not do to wait passively until science "has something to offer."¹⁸⁵ It is the law which has the need, and the law which must feel the obligation to assume the initiative.¹⁸⁶ While much is already available as a result of efforts unrelated to legal problems, the primary need is for further data, organized and developed with the requirements of the judicial system in sharp focus.

If experiments are to be designed for direct impact in the trial of cases, there must be as clear an understanding as possible of the legal

Professor Muensterberg and the Psychology of Testimony: Being a Report on the Case of Cokestone v. Muensterberg, 3 ILL. L. REV. 399 (1909). As Cairns summed it up: "He [Wigmore] concluded that psychology at that time at any rate, had nothing to offer; when it did, he asserted, the law would welcome it." CAIRNS, *op. cit. supra* note 178, at 169.

181. *Ibid.*

182. LEVIN, EVIDENCE AND THE BEHAVIORAL SCIENCES B-401 (mimeo. 1956).

183. *State v. Lawrence*, 196 N.C. 562, 575-76, 146 S.E. 395, 402 (1929), in affirming conviction for second degree murder the court stated: "This kind of evidence has frequently been held to be admissible in this jurisdiction."

184. See Note, *Authentication of Disputed Writings by Comparison: The Expert Witness*, 104 U. PA. L. REV. 664, 668-69 (1956).

185. Moore, *Yellow Psychology*, 11 LAW NOTES 125 (1907).

186. Compare the imaginative statement in 3 WIGMORE, EVIDENCE § 997 (3d ed. 1940) on data which "conceivably could be obtained" by new methods of the "psychometrist," with his discussion of methods actually available, 3 *id.* §§ 998-99a.

uses to which particular data might be put. Reference in argument, or in comment on the evidence by the judge, is an obvious possibility which merits consideration. Such consideration should begin with an exploration of the legal limits of argument, not in the narrow context of what science has already made available, but in the broader one of a clearly discernible potential. The controlling rules should be framed to facilitate the use of whatever may prove helpful in experimentation already completed and in that which remains to be done.

This is not to argue for open sluice-gates, inviting an inundation of references to psychological experiments. There are risks.¹⁸⁷ Some experiments are invalid because they neglect factors present in the litigation situation.¹⁸⁸ Some carefully designed experiments which evidence thoughtful consultation with respect to both legal and scientific aspects have not utilized a sufficiently broad statistical sample. Inbau's difficulty in obtaining the cooperation of handwriting experts willing to subject their skill to testing is an example in point.¹⁸⁹ That his data on the proficiency of experts are based on only three subjects represents more than a problem in the size of his sample; it raises doubts concerning its representative quality, for we may "hazard the guess that the less qualified an expert thought himself to be, the less confident in his own judgments, the more reluctant he would be to subject himself to testing."¹⁹⁰ Nor are the generalizations drawn from experimental data free of the risk of error, not to mention the dangers of obsolescence as the scientists explore, explode and refine their theories.¹⁹¹

There remains for consideration a further risk inherent in the nature of much of the scientific data which an advocate might want to bring to bear on issues of credibility. Material of this type will usually deal with the performance levels of groups of people. The results are

187. See the critical analysis of the scientific evidence in the school segregation cases by Cahn, *Jurisprudence*, 31 N.Y.U.L. Rev. 182 (1956), who speaks of "receptivity seasoned with critical judgment."

188. See, e.g., Weld & Roff, *A Study in the Formulation of Opinion Based Upon Legal Evidence*, 51 AM. J. PSYCH. 609 (1938). Although the focus of the experiment was to determine what effect, if any, the order of proof has on the ultimate decision of a case, there was no attempt to include summation of counsel or any substitute therefor. Furthermore, it remains to be determined whether "jurors" who have no responsibility either for the freedom of a defendant or for adjudicating financial responsibility react differently from those charged with such responsibility. See Note, *Critique and Design: A Proposal*, in LEVIN, EVIDENCE AND THE BEHAVIORAL SCIENCES E-28 (mimeo. 1956), for further criticism of the particular experiment.

189. Inbau, *supra* note 172, at 440 n.11.

190. LEVIN, EVIDENCE AND THE BEHAVIORAL SCIENCES B-332 (mimeo. 1956).

191. See, e.g., criticism of Hutchins & Slesinger, *Some Observations on the Law of Evidence—Memory*, 41 HARV. L. REV. 860 (1928), for reliance upon psychological assumptions which "either have since been demonstrated of doubtful validity, or [which], in some instances, were incorrect even at the time they wrote." LEVIN, EVIDENCE AND THE BEHAVIORAL SCIENCES B-315 (mimeo. 1956).

expressed in terms of statistical conclusions: the average number of mistakes in identification, for example. Does any use of medians and means involve too great a danger that the jury will fall prey to "the deplorable hypnosis of averages,"¹⁹² refusing to believe that one witness could remember any better than the average, nor another witness any worse? That there is much substance to this fear is doubtful. The witnesses are neither unknowns nor unknowables; they have appeared before the jury and left impressions, and the advocate in summation will not ignore their individual differences. It is most revealing, however, to compare the risk of statistical hypnosis with the alternatives presently in use. The permissible propositions of common experience, as, *e.g.*, that economic interest may be a basis for doubting credibility, do not purport to assert facts about a particular witness. And a roster of propositions collected from legal sources is little short of amazing: it is very improbable that master mariners would be together for two minutes in the pilot house without speaking;¹⁹³ it is equally improbable that a well-educated man would allow a subscribing witness to sign first, and affix his own signature afterward;¹⁹⁴ no class of evidence is more unreliable than narration of conversations.¹⁹⁵ Argument fairly reporting and applying scientific data which can provide a range of typical experiences against which to measure particular testimony is certainly to be preferred to the current practice of asserting what is "commonly known."

If the hucksters in our society are correct in their estimation of what sells their sponsors' products, vast proportions of our population are much impressed by what "science" demonstrates. Men in white coats, spouting ratios and sporting test tubes, have long been considered valuable assets in shaping consumer decisions. Science, laboratories and experiments have taken on an aura of the sacrosanct. To the extent that this is reflected in the thinking of jurors, they are particularly subject to persuasion by reference to scientific data. Where the risks of referring to such data are not substantial, as in the case of possible misuse of averages, there is no reason for concern, but where the dangers are real, as in the case of the irrelevant or distinguishable experiment, there is particular reason for adequate safeguards.

192. See Haar, *Wayne Township: Zoning for Whom?—In Brief Reply*, 67 HARV. L. REV. 986, 990 (1954).

193. 1 MOORE, *FACTS ON THE WEIGHT AND VALUE OF EVIDENCE* § 188 (1908). While the author's sources here and in the succeeding two notes are legal opinions, the particular legal use originally made of the statements is secondary to the fact of their inclusion in a legal treatise devoted to the distillation of legal wisdom about facts. Cf. the comment by the trial judge in *Quercia v. United States*, 289 U.S. 466 (1933), after referring to the defendant's wiping his hands while testifying. "It is a rather curious thing, but that is almost always an indication of lying." The Supreme Court reversed. *Id.* at 468.

194. 1 MOORE, *FACTS ON THE WEIGHT AND VALUE OF EVIDENCE* § 183 (1908).

195. 2 *id.* § 871, at 1007; cf. LEVIN, *EVIDENCE AND THE BEHAVIORAL SCIENCES* B-315 (mimeo. 1956) (discussing refutation of meaningful material).

Adequate Safeguards, Practical Techniques and Doctrinal Barriers

The traditional technique for probing relevance and force of scientific data is cross-examination of an expert witness. It might well be thought that the next advance in utilizing scientific evidence as an aid in the evaluation of testimony can come only through the use of such experts. Perhaps so; one cannot predict history. Practical considerations, however, cast doubt on the advisability of this as a preferred course. The cost to the litigants is high;¹⁹⁶ the time likely to be consumed in the course of trial great. Furthermore, any step conducive to extending the scope of the already bedeviling battle of the experts is to be decried. Beyond this lies the hurdle of the present state of authorities. There is precedent for the admissibility of extrinsic evidence of a scientific nature on questions of credibility. In the celebrated case of Alger Hiss, for example, psychiatric testimony on the issue of veracity was permitted.¹⁹⁷ McCormick notes that some courts allow proof by other witnesses to show "defects of mind within the range of normality, such as slower than average mind or a poorer than usual memory,"¹⁹⁸ although, as might be expected, the authorities are divided.¹⁹⁹ The important thing, however, is that all of these cases deal with testimony going to the qualifications of an individual witness whose credibility is directly in issue. The type of material with which we are dealing does not;²⁰⁰ it relates only to means and averages, to statistical samples and ranges within them.

Would it be unreasonable in the usual run of litigation for a court to refuse to hear testimony about that fictional creature of statistical expression, the average man? The question of admissibility resolves itself to the balancing of familiar ingredients: the extent to which the proffered proof will advance the inquiry versus possible jury confusion, time consumption and companion risks. Not the least important factor is the availability of an alternative method of bringing before the jury,

196. See consideration of this problem in Jones, *Admission of Psychiatric Testimony in Alger Hiss Trial*, 11 ALA. LAW. 212 (1950).

197. *United States v. Hiss*, 88 F. Supp. 559 (S.D.N.Y. 1950), 30 NEB. L. REV. 513 (1951); 59 YALE L.J. 1324.

198. MCCORMICK, EVIDENCE 97 (1954).

199. *Ibid.*

200. Experimentation directed to the perception of a particular witness, e.g., *Brooks v. State*, 146 Tex. Crim. 265 (1943) (ability to recognize Negroes), or to the facts of a particular case involve the familiar question of similarity of condition. Thus the Missouri Supreme Court has solemnly asserted that a tin can filled with tomatoes was dissimilar from a human skull. *State v. Allison*, 330 Mo. 773, 51 S.W.2d 51 (1932). Counsel in that case was attempting to establish a brain-splatter pattern to show impossibility of suicide. Also tried as targets were cotton pasted on cardboard and a "dressed, picked chicken." See section on *Ad Hoc Experimentation*, in LEVIN, EVIDENCE AND THE BEHAVIORAL SCIENCES B-401 (mimeo. 1956). Compare the situation when counsel asks jurors, in the course of argument, whether they can remember the color of their own ties, the color suit counsel was wearing on a previous day, etc.

in adequate manner, the general background of probable strength and weakness of the evidence to which the scientific data relates. Some advantages of allowing argument by counsel to serve that method have already been suggested. It is obviously less time consuming and less costly. But another aspect of testimony may militate against use of the expert witness. Examination invites cross-examination with its potential mass of obfuscating detail and a likely emphasis on the range of possibilities not excluded by research rather than on the probabilities which have been established. Tactical considerations alone²⁰¹ could thus deter the advocate from calling an expert, even though he might welcome the opportunity of presenting scientific data in argument. Furthermore, in terms of helping a jury, the primary need is for a distillation of conclusions, with just enough figures and detail to lend meaning and carry force. If we can provide a method for assuring minimal accuracy and fairness, presentation by the advocate would appear more efficient and more desirable than introduction into evidence. The doctrinal barriers and the techniques for safeguarding fair reporting and relevant use remain to be explored.

The most fruitful approach to the doctrinal question is to consider the admissibility of scientific data in evidence, but without resort to expert witnesses. Under the Uniform Rules of Evidence, promulgated by the National Conference of Commissioners on Uniform State Laws and approved by the American Bar Association, it would be possible to read into evidence the data and conclusions of appropriate experiments. Rule 63(31) lists learned treatises as an exception to the hearsay rule and provides for the admissibility of "a published treatise, periodical or pamphlet on a subject of history, science or art to prove the truth of a matter stated therein if the judge takes judicial notice, or a witness expert in the subject testifies, that the treatise, periodical or pamphlet is a reliable authority on the subject."²⁰² This rule is still subject to the objection of relevance, and more particularly to the discretion of the judge under rule 45 to exclude admissible evidence. The risk of undue consumption of time, the "danger of undue prejudice or of confusing the issues or of misleading the jury" or of unfairly and harmfully surprising a party who "has not had reasonable opportunity to anticipate that such evidence would be offered" are all bases for exclusion.²⁰³ Admissibility under the learned treatise exception, which has been specifically recommended for adoption by the Committee on

201. This is not to suggest that such considerations will always deter counsel. Obviously, the decision must result from a balancing of these factors against possible advantage.

202. See UNIFORM RULES OF EVIDENCE rule 63(31).

203. *Id.* rule 45.

the Revision of the Law of Evidence of the Supreme Court of New Jersey,²⁰⁴ would clearly allow for subsequent argument. But admissibility is hardly to be desired for its own sake. The strategic advantage gained from a mass of statistics is, at the least, subject to doubt, and the legitimate value to a jury may be diminished rather than enhanced by excessive detail.²⁰⁵

The Uniform Rules suggest the possibility of a practical solution, broad in its basic terms, yet controlled by the court in a manner to prevent abuse. Counsel should be allowed to refer in argument to whatever scientific data or conclusions the learned-treatise exception would have permitted him to introduce into evidence.²⁰⁶ He should be allowed to do so without going through the formality of actually reading the material into the record. Furthermore, since such material can be considered as no more than a needed supplement to the limited common knowledge which a juror brings to bear on the hearing of testimony, the rule should obtain even in jurisdictions which may hesitate to adopt the learned-treatise exception as it applies in the normal case of medical books dealing with particular injuries or mental deficiencies, the legal effects of which are being litigated.

This does not open the doors of argument to citation of and quotation from every allegedly scientific writing which has found itself a printer. Two conditions must be imposed, for they are inherent in the requirement that the material must have been of a quality and force to qualify under the learned-treatise exception. First, the data must have been presented "by a reliable authority on the subject."²⁰⁷ Second, its relevance to the case at hand must be such that presentation of the data in argument will advance the inquiry rather than detract or distract, within the broad principles of judicial discretion already referred to.²⁰⁸

204. COMMITTEE ON THE REVISION OF THE LAW OF EVIDENCE OF THE SUPREME COURT OF NEW JERSEY, REPORT 166 (1955). In a report dated November 1956 the New Jersey Legislature's Commission To Study the Improvement of the Law of Evidence concluded that adoption of this rule would be unwise, arguing "that to permit the reading or submission of such material to the jury would import excessive weight without suitable control. Only a few states accept this exception to the hearsay rule." COMMISSION TO STUDY THE IMPROVEMENT OF THE LAW OF EVIDENCE, REPORT 67 (1956). The controls which may be made available with respect to argument are considered in text at notes 207-14 *infra*.

205. It might be urged that reading the text rather than referring to it would minimize the risk of unfair presentation. This may be doubted so long as counsel may read excerpts. More significantly, the technical material is usually too difficult to be of value.

206. See note 125 *supra*, for discussion of older cases which permitted use of learned treatises in argument.

207. UNIFORM RULES OF EVIDENCE rule 63(31).

208. See text at note 203 *supra*.

Administration of these requirements need not be a formidable task. Goldmann, J., in a careful, scholarly canvas of the advantages and the risks inherent in admitting learned treatises into evidence, suggests that ". . . it would generally be the better practice that there be some notice to the adversary. . . ." ²⁰⁹ Such prior notification, including the basic sources and a rather detailed statement of the terms of reference, would allow for prior determination of propriety by the court with adequate opportunity for hearing the views of opposing counsel. Frequently, of course, such hearing will not be necessary. With surprise eliminated, the opportunity for counter-argument may satisfy counsel as being adequate under the circumstances. Even if a hearing is necessary, there may be no need for the presence of an expert. It is for the judge to satisfy himself as to propriety, and the unequivocal view of friends of the court from academic circles may suffice, particularly in the absence of proffered contradiction. ²¹⁰ For example, it should not be hard to find agreement on the fact that experiments on learning and remembering nonsense syllables are too wide of the mark to be cited helpfully on the issue of remembering conversations. ²¹¹ Written statements, analogous to the affidavits used in summary judgment proceedings, will sometimes be appropriate. In many situations, however, particularly in the early phases of developing permissible references from scientific data, it may be necessary to have a psychologist or statistician available for questioning by the judge. The contrast between such a proceeding in chambers for the benefit of the court and that in the courtroom for the benefit of the jury is obvious. Less obvious, but often more significant in terms of cost and travail, is the fact that scheduling an expert's appearance in the course of a trial can be a difficult task compared to setting a fixed time in chambers, before or after the normal trial day. Bedeviling problems of adjustment to detail will remain; it would be vain to attempt consideration of all of them at this juncture.

What is most important is the fact that patterns are soon likely to emerge which, once established, will set the standard for a large

209. *Ruth v. Fenchel*, 37 N.J. Super. 295, 320, 117 A.2d 284, 298 (1955), *aff'd on narrower grounds than reasoning of the intermediate appellate court would require*, 21 N.J. 171, 121 A.2d 373 (1956).

210. In this context it is helpful to compare the limitations imposed on the judge in making preliminary determinations of fact for the purpose of ruling on admissibility of evidence. Wigmore says flatly that "In *preliminary rulings* by a judge on the admissibility of evidence, the ordinary rules of evidence do not apply." 5 WIGMORE, EVIDENCE § 1385, at 79 (3d ed. 1940). McCormick, although agreeing that "sound sense" supports Wigmore's position, finds the American authorities "scattered and inconclusive." MCCORMICK, EVIDENCE 123-24 n.8 (1954). The subject is explored in Maguire & Epstein, *Rules of Evidence in Preliminary Controversies as to Admissibility*, 36 YALE L.J. 1101 (1927).

211. See LEVIN, EVIDENCE AND THE BEHAVIORAL SCIENCES B-315 (mimeo. 1956).

number of cases without either the necessity for or the desirability of frequent review by the court, or a constant parade of expert witnesses. For example, the permissible references to errors in observation or in identification suitable for a criminal case, once ruled upon by a given court after careful consideration by the office of the district attorney and the active members of the bar specializing in criminal work, would be expected to serve with relative stability.²¹² Precisely because of this it may not be unreasonable to hope for the active participation of suitable instrumentalities of the organized bar in developing appropriate standards and formulas. Much also depends on the calibre and quantity of material produced by intensive research in the field of applied forensic psychology. A roster of generalizations acceptable and widely accepted for use in court may be developed. Statistics on the reliability of psychiatric diagnosis²¹³ are a possibility. Verified data on the ability of bank tellers to recognize handwriting could be helpful and relatively easy to apply. Even today there is convincing data of the phenomenon psychologists call "reminiscence," involving more effective recollection of material sometime after the event as compared with less effective recollection immediately after learning.²¹⁴ Depending on the type of material learned, the length of time in which "reminiscence" can be observed varies, but with the memorization of a poem it can operate for some days,²¹⁵ a phenomenon which may have an impact in appropriate cases. Should counsel consider the litigation and the testimony important enough to warrant argument along these lines, satisfying a judge as to propriety should not prove an insurmountable obstacle.

Reliability of the material which counsel would cite can be established by judicial notice. This is particularly appropriate where data have been published in recognized scientific journals and there is no indication of subsequent refutation. True, there has been language in the cases calling for a more limited view of judicial notice where prob-

212. This is not to suggest no need for discrimination between fact situations even in the case of eyewitness identification. Experimentation may show the need for separate evaluation of the testimony of (1) a victim, (2) a bystander-observer of the crime who is conscious of it and (3) a third party who, at the time of his observation, was unaware of the commission of any crime, as in the case of a third party testifying to defendant's presence near the scene of the event either before or after the occurrence.

213. See, e.g., Ash, *The Reliability of Psychiatric Diagnosis*, 44 J. AB. & Soc. PSYCH. 272 (1949); Mehlman *The Reliability of Psychiatric Diagnosis*, 47 J. AB. & Soc. PSYCH. 577 (1952); Schmidt & Fonda, *The Reliability of Psychiatric Diagnosis: A New Look*, 52 J. AB. & Soc. PSYCH. 262 (1956). These studies may be viewed as indicating a potential for inquiry; they all leave much to be desired.

214. See discussion in LEVIN, *EVIDENCE AND THE BEHAVIORAL SCIENCES* B-315 (mimeo. 1956).

215. *Id.* B-314c (figure III).

lems of jury persuasion are concerned,²¹⁶ but this need not serve as objection. The jury is not being asked to take judicial notice; this is an area for determination by the judge. Such notice, it should be emphasized, indicates a willingness to accept that the experiment has been done, that the data are accurately reported and that they tend to show what the author of the work claims by way of conclusion, usually a carefully guarded statement. The problem of fairness in context is more complex. Until more data are developed with a view to forensic use, this aspect may prove difficult. Argument, however, can be balanced by counter argument, and, where available, ultimate comment by the court is a further safeguard.

A recent Pennsylvania prosecution for fornication and bastardy illustrates some of the potential and some of the risks. While the particular case concerned comment by the judge, Pennsylvania opinions have asserted that both bench and bar are bound by a common rule as regards permissible use of extrinsic data.²¹⁷ In any event, the risk being illustrated here is no less²¹⁸ than would be true of argument. In *Commonwealth v. Watts*²¹⁹ for defendant to have been guilty the period of gestation would have had to be some 310 days, against a normal 282 days.²²⁰ The only expert called was not particularly helpful, testifying to a leeway of some two weeks while both dissent and majority found agreement that the "medically accepted time possibilities"²²¹ ranged much farther from the norm. In charging the jury the court said: "Some of the noted British writers on the subject have spoken and we think that *possibly the best* medico-legal data that we have on it is probably this: '. . . pregnancy has been found to vary from

216. See text at notes 156-58 *supra*. McCormick suggests that jury knowledge is limited to the "common knowledge" aspect of judicial notice. "The other grounds, however, for judicial notice, discussed in succeeding sections [including facts capable of certain verification], are not the basis for jury-knowledge but are available only for administration by the judge." MCCORMICK, EVIDENCE 691 (1954). This objection would not apply here where the matter is clearly left for control by the court. See note 161 *supra*.

217. *Commonwealth v. Brown*, 309 Pa. 515, 164 Atl. 726 (1933), which concerned comment by the judge, but phrased the rule in terms of both court and counsel. The rule was thereafter quoted and applied in *Commonwealth v. Sykes*, 353 Pa. 392, 396-97, 45 A.2d 43, 45 (1946). See also *Quercia v. U. S.*, 289 U.S. 466 (1933), where the trial judge commented on defendant's wiping his hands while testifying. The court reversed, Chief Justice Hughes observing that "the trial judge did not analyze the evidence; he added to it, and he based his instruction upon his own addition." *Id.* at 471.

218. Of course the impact of comment by the court may be greater than that of counsel, which would argue more strongly for reversal in the event of impropriety.

219. 179 Pa. Super. 398, 116 A.2d 844, *allocator refused*, 179 Pa. Super. xxvii (1955).

220. *Id.* at 400, 116 A.2d at 844. This is the figure given as normal by the only expert witness to testify. Various other figures are to be found in the case, including what the trial court stated to be the average, 270 days. See text at note 222 *infra*.

221. *Id.* at 400-01, 116 A.2d at 845 (majority opinion); *id.* at 404, 116 A.2d at 847 (dissenting opinion).

two hundred and twenty to three hundred and thirty days, the average being about two hundred and seventy days.' " 222

Defendant's conviction was affirmed by a divided court. What is disquieting is the failure of the majority to give any consideration whatsoever to a central objection of the dissent: that defendant was entitled, in the context of that trial, to some statement of the probabilities of a birth that long after intercourse. "What are the chances of a birth being the result of sexual intercourse 312 or more days before the date of birth?" asks Woodside, J., "Not one chance in a million!" 223 Omission of this fact in the course of comment by the judge should not be condoned. 224 Facilitating use of accurate but misleading data can prove a step backward rather than an advance.

The problem of dissent among eminent authorities, of science divided against itself, is best handled in the context of the rule assuring fair and helpful use of data. Usually the court will find the wisest course to be a ruling against use of the material. Certainly the jury is not competent to choose between the conflicting claims and it is to be doubted that presentation of both views will often add much beyond confusion. 225 Yet, there is no need for a rule of absolute prohibition; much depends on the circumstances of the case. A juror relying on "common knowledge" might conclude that suggestibility in children is a direct function of age: the younger the child the more suggestible he is likely to be. Scientific literature indicates that this is not true, for "suggestibility appears to reach a maximum at around the age of eight in both males and females." 226 Certainly this information can prove

222. *Id.* at 415, 116 A.2d at 852-53 (dissenting opinion).

223. *Id.* at 403, 116 A.2d at 847 (dissenting opinion).

224. It should be pointed out that the majority opinion viewed the issue of the case as a simple one on the permissible limits of judicial notice. "The *Young* case authorized the court to take judicial notice of accepted medical opinions in respect to duration of pregnancy, and the court below used the same time span in its charge as that approved in *Com. v. Young*, supra." *Id.* at 401, 116 A.2d at 845. Rhodes, P.J., concurring, emphasized the same point adding: "However, it should be noted that the court below merely repeated verbatim what we said in *Com. v. Young*. . . . In my opinion, it was not error for the trial judge to quote from an applicable decision of this Court, but, even if it were true, it is not prejudicial error requiring a reversal in this case." *Id.* at 421, 116 A.2d at 846. Thus neatly posed, one may observe, is the contrast between the freedom of sources an appellate court may reserve to itself and those it allows to the court below. The dissent faces this issue squarely. *Id.* at 411, 417, 116 A.2d at 850-51, 853, emphasizing that the dangers of quotation from a medical treatise ". . . in an opinion—lower court or appellate—does not involve the dangers involved in quoting from them to a jury." *Id.* at 417 n.11, 116 A.2d at 853-54 n.11. We need not here exhaust the question of the obligation of a court to present data on probabilities when correctly taking judicial notice of possibilities. Suffice it for our purpose to emphasize that there is a risk in the presentation of "partial" data, so that the impact is a distorted one; the *Watts* case provides an apt instance. Of course, the court should have the aid of counsel in discovering distortions. In the absence of such aid familiar problems of failure to object may be presented.

225. Cf. CAIRNS, LAW AND THE SOCIAL SCIENCES 218 (1935).

226. WEITZENHOFFER, HYPNOTISM 282 (1953).

helpful in litigation which turns on the credibility of a five-year-old.²²⁷ If experimental data were to challenge earlier findings, placing the age of eight in dispute and suggesting ten or twelve to be more accurate, it should be for the judge to determine whether the conflict is significant to the point of rendering the reference in argument of no value or potentially prejudicial. With no other witness in the disputed age range, the controversy is not that central to the case: under either view the jury is aided. A limitless number of variations on the theme of scientists who differ can be presented. Sometimes a rule of fairness is better satisfied by presentation of both views rather than by studied silence concerning each. The court can be relied on to rule with an eye to the factual context; he need not be bound by supposedly immutable doctrine.

CONCLUSION: A SENSE OF PERSPECTIVE

Fiction, hypothesis and science, in common with the other sources open to counsel, must be evaluated in terms of a single criterion: impact on the jury. The various sources share the potential of advancing a legitimate function of argument, that of providing aid in the evaluation of evidence. This function is sometimes served by concretizing for jurors what they already know in the abstract; it may equally be served by correcting the misconceptions born of erroneous "common knowledge" or by filling a vacuum of non-experience, as in the case of reference to scientific materials. The likelihood of helpful impact is the justification for making available to counsel material outside the record. By the same token, inherent in these sources is a common risk, that of improper impact. In the case of fiction as in the case of personal experience of counsel, the risk may consist primarily of the possibility that jurors will impart more into a statement than logic requires or propriety permits. Variations of this risk occur with every change of source as well as every change of context. It is precisely these variations which require a wide discretion in the trial court, allowing scope for a more careful analysis of the risk-essentials. However narrow the resulting categories, however limited the precedent value of individual cases, the common attribute remains; ultimate evaluation must turn upon effect on the jury.

If influence on the jury is to be the central factor in determining propriety of argument, clearly the challenged words themselves must first be examined. But this alone will not suffice. Argument by an

227. This statement is subject to the absence of other objections earlier considered, as, *e.g.*, reliability.

advocate cannot be treated as an isolated phenomenon, insulated from all other aspects of the trial. Relatively little attention has been paid to the significance of the order of argument and the extent to which that order should be considered by the trial court or in appellate review of challenged persuasion. There is reason to believe, however, that the impact of a particular statement by counsel may be a function of its place in the total proceeding. We know, for example, that the relative order of summation by the advocate and charge by the court has been a matter of serious concern to law reformers.²²⁸ An occasional opinion does make reference to the order of argument as a factor in its ruling,²²⁹ although often in an unsatisfying manner. We may seriously doubt that award of a new trial by the judge is a realistic safeguard against surprise in final argument.²³⁰ More appealing is the possibility of a trial court's allowing an opportunity of reply,²³¹ although the extent to which this is done in practice may be questioned. The ultimate influence of a particular attempt at persuasion may depend on whether or not it is followed by a judge's comment on the evidence.²³² We certainly need to learn more of the influence of summation by the court,²³³ but until further studies are completed we may hazard the

228. See VANDERBILT, *THE CHALLENGE OF LAW REFORM* 53 (1955): "In 20 states in charging the jury in civil matters and in 18 states in criminal matters the charge of the judge to the jury precedes the summation of counsel. Somehow the jury is expected to remember the trial court's charge after it has been subjected to the barrage and counter-barrage of oratory from counsel in the case."

229. See *People v. Kirkes*, 243 P.2d 816, 834 (Cal. Dist. Ct. App. 1952); *Wilson v. Van Leer*, 127 Pa. 371, 380, 17 Atl. 1097, 1099 (1889).

230. See *Wilson v. Van Leer*, *supra* note 229. The expense of a new trial may be expected to serve as a substantial deterrent.

231. "This kind of surprise is one of the dangers incident to every contest, and the only relief against it, is the discretion of the judge, where the new matter or new view may lead to substantial injustice, and is such as could not reasonably have been foreseen, to allow an opportunity of reply, or subsequently to grant a new trial." *Wilson v. Van Leer*, 127 Pa. 371, 380, 17 Atl. 1097, 1099 (1889).

232. See MORGAN, *THE LAW OF EVIDENCE—SOME PROPOSALS FOR ITS REFORM* 9-21 (1927), for an analysis of the value and the need for permitting the judge to comment on the evidence. See also Otis, *The Judge to the Jury*, 6 KAN. CITY L. REV. 3, 7 (1937), quoting Pennsylvania's Chief Justice Gibson in *Delaney v. Robinson*, 2 Whart. 503, 507 (Pa. 1837): "It is doubtless unpleasant to the advocate to have the impressions made by an ingenious speech effaced by the mechanical but accurate process of the judge who follows him, but it is to be remembered that what is lost by it to the advocate is gained by justice, which is the superior object of protection."

233. Cf. KALVEN, *REPORT ON THE JURY PROJECT OF THE UNIVERSITY OF CHICAGO LAW SCHOOL* (text of speech delivered at Ann Arbor, Michigan, Nov. 5, 1955, on file in Biddle Law Library), discussing the agreement between jury verdicts and what judges would have decided: "The percentage of agreement remains almost constant whether or not written instructions are given to the jury, whether or not the judge summarizes the evidence, and whether or not the judge comments on credibility or on the weight of the evidence. These have been highly controversial issues in recent years, but the data are strongly suggestive of the conclusion that at least in personal injury cases these procedural controls make the jury neither more nor less like the judge."

guess that many of the risks which have concerned courts in the past may be minimized by providing for comment by the judge. With that added safeguard we may properly look forward to an expanded scope of the sources open to counsel in attempting to persuade.

The trial of cases cannot await discovery of ultimate truth, and rules of law must be formulated on the basis of available information. Yet it is clear that we need empirical data concerning the processes of jury decision if we are to do more than speculate on what influences a jury. The impact of persuasion by the advocate must be evaluated scientifically. Fortunately, new experimental techniques for studying the jury and how it operates are being developed,²³⁴ and these give promise of value in the solution of the problems at hand. What is needed is a four-point practical program for improving the administration of justice in this area, one suitable for implementation by existing agencies. Judicial councils, law school institutes, governmental research programs or the instrumentalities of the organized bar²³⁵ may prove appropriate, alone or in combination, for particular facets of the broader undertaking.

First, the empirical study referred to above should be undertaken. The actual influence of the various types of argument by counsel must be evaluated with a view to reconsideration and possible reformulation of the law governing the permissible limits of persuasion. Such studies may indicate some of our fears too fanciful to warrant crystallization into doctrine; they may reveal others more substantial than had been thought. There must also be concern with the wide range of unreported practices, for we do know that the law in action may be wide of what it appears from a review of appellate, or even trial court decisions.²³⁶

234. *Id. passim*.

235. See discussion in VANDERBILT, *THE CHALLENGE OF LAW REFORM* 146 (1955).

236. The following statements were made in the course of the prosecutor's summation in the famous Sacco-Vanzetti trial:

"If my brother wants to know why the Commonwealth did not produce this witness, that is the answer, because the Commonwealth believes that what Celluci says in that regard and what Ricci, the foreman, says in that regard is true. . . .

". . . And then there is Lola Andrews. I have been in this office, gentlemen, for now more than 11 years. I cannot recall in that too long service for the Commonwealth that ever before I have laid eye or given ear to so convincing a witness as Lola Andrews."

". . . Could you understand the attitude of Aunt Julia, the elderly lady, 69 years of age, with cataracts in her eyes?"

"We did not produce her. . . . This elderly lady . . . testified that the man was scrouched down under the automobile and that she could tell it was not Sacco by the back of his head. Well, I said to you before that the Commonwealth hesitates long before it puts the stamp of approval of asking condemnation of a man on trial for his

Information on what judges are doing in fact is a prerequisite to an adequate understanding of the dimensions of the problem.

Second, a careful inventory should be taken of scientific data currently available for use by court and counsel. Presentation of such data should be accompanied with some assessment of the factual and legal contexts in which use of the material would be appropriate. Obviously, an inter-disciplinary effort is required.

Third, there is need for a program which will familiarize both lawyers and judges with the legitimate role of scientific materials, with the risks inherent in improper use, and the advantages which may inhere in proper use. Under our adversary system, it is the attorney who is expected to bear the primary burden of informing the court when fresh insights or further information becomes important to decision. This is no easy burden in the context of the individual case for the problems concern the fundamental methodology of related disciplines. The broader program of orientation here suggested would be helpful. Furthermore, its influence may be expected to extend far beyond the problems of argument, for scientific evidence is being offered in increasing measure as relevant to a widening range of substantive problems.²³⁷

Fourth, a vigorous program of further experimentation should be prosecuted in areas where the data can prove helpful to the law. Some of the resultant findings can be expected to expand the sources open to counsel in argument.²³⁸ It is important, however, that the process of such expansion should not consist of mere passive waiting for scientists to provide grist for a judicial mill of review operated by sceptical judges. Not that scepticism cannot be helpful; in decent amounts it is not only proper but necessary. This is an area of applied

life upon any witness, and I would not put my stamp of approval upon that kind of witness." 2 THE SACCO-VANZETTI CASE 2189-90, 2219, 2220 (transcript 1928).

Witness also the following excerpts from statements made without objection by defense counsel:

"I say to you as a matter of common knowledge to yourself, it isn't any different whether you see a person a half hour or whether you see them 10 seconds, if into the retina of your eye was photographed through that eye to your brain a face, it doesn't require an hour, it doesn't require 10 minutes. You will retain it if your observation was sufficient. That woman looked down into that man's face. She told you on the stand she never could forget that face, that that face wasn't the face of Sacco."

"Identifications! Great Scott! We all know. I know my own brother pretty near got in trouble. There was a hold up in Boston. A man thought he was Henry McCarthy, thought he was his cousin. You know it. Different faces, different man. Identification of all things is the hardest thing in the world." 2 *id* at 2153, 2172.

237. See, e.g., Cahn, *supra* note 187.

238. Other results relevant, e.g., to police practices may also be expected. See note 174 *supra*.

science and nothing short of persistent probing, of insistent demand for demonstrated relevance and reliability, can assure data meaningful for courtroom use. It is, however, a happier and more efficient process for the questions to be posed and the doubts to be put at an earlier stage than decision in the course of trial. Lawyers and judges should participate in the design of experiments²³⁹ to assure their validity and thus to contribute to an improved judicial system.

239. Experimentation designed to help a particular litigant in an important case is quite consistent with our adversary system. Objectivity and reliability are more likely to follow from the preparation of data in a disinterested fashion.