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Wouldn't You Like To Be an Expert, Too?

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It was once an open secret among lawyers that finding an expert to testify in your client's behalf was one of the easiest aspects of litigating. Lawyers not in possession of private lists of experts easily located persons willing and able to sell their expertise in the back pages of the state bar journal, in advertisements in legal newspapers, and in direct mail appeals from companies whose business is selling expertise. One consequence was that the phrase "a battle of the experts" came to be applied to a number of different types of lawsuits, and people began referring to both lawyers and experts as "hired guns". Another consequence was a professional cynicism about the virtue (classical, not instrumental) of experts.

My sense is that today's public is aware of this open secret among lawyers. Unlike many of my colleagues, who are cynical on this point, however, I remain convinced that the public, for the most part, accepts the authority of experts. When Dennis Barrie, the curator at the Contemporary Arts Center in Cincinnati, was charged several years ago with obscenity for displaying the photographs of Robert Mapplethorpe, the jury's ignorance of modern art was perceived as a severe blow to Barrie's chances. The jury nevertheless acquitted him because, according to some members of the jury, they deferred to the opinions of defense experts who testified that Mapplethorpe's work was not legally obscene.[1] When Eileen Franklin-Lipsker suddenly recalled the death twenty years before of her girlfriend Susan Nason at the hands of Eileen's father, George Franklin Sr., expert testimony regarding the authenticity of recovered memory syndrome was crucial to Franklin's murder conviction.[2] In addition, jurors (and judges) in a number of states heard the testimony of anthropologist Louise Robbins, who claimed that footprints were unique and that she was uniquely qualified to identify their maker. This testimony aided the conviction of at least 11 criminal defendants. It is now viewed as "nonsense," and a cause of several wrongful convictions.[3]

The principal reason lawyers find it is easy to hire an expert to render an opinion favoring the client's position (other than the crass economic reason that demand may create supply) is that the Federal Rules of Evidence, enacted in 1975 and adapted by at least 34 states, make it easy to qualify a witness as an expert. Federal Rule of Evidence 702 simply requires the witness to have "specialized knowledge" which will "assist" the trier of fact.[4] Rule 702 states that this specialized knowledge can be gained through "knowledge, skill, expe-

rience, training, or education," and anyone possessing any one of those criteria may, unlike any other witness, give the trier of fact an opinion about what happened. For lawyers, then, finding and qualifying an expert is not an onerous chore. The more difficult chore is persuading the trier of fact that the expert's testimony should be believed.

The principal reason lawyers are able to persuade the trier of fact (either the jury, or, in a case in which a jury is neither demanded nor permitted, the judge) of the "reality" of the expert's testimony is that we live in a bureaucratic and therapeutic state. The bureaucratic state exalts expertise over common wisdom, which becomes myth or folklore. A complex society demands higher-order solutions, and those solutions are found in the domain of a "Brains Trust" or other group of experts. The therapeutic state rationalizes the horrific and inconceivable, and presents the hope of turning the maladjusted into the well-adjusted.

Both the bureaucratic state and the therapeutic state enmesh popular culture. From Fred Friendly's rather highbrow efforts on PBS to bring experts in disparate fields together to solve, for example, the "problem" of free speech in a diverse society, to CNN's "Crossfire" or "The Larry King Show" to talk radio to the daily fare on Oprah, Phil, Geraldo, Sally and their imitators, popular culture radiates the language of therapy and expertise.

Just as the American legal system allows almost anyone to sue for almost anything, it permits almost anyone claiming expertise to testify as an expert. I was not surprised that lawyers from a very large Chicago law firm[5] would attempt to obtain favorable testimony from an expert in a case in which "a great deal was at stake."[6] I was not surprised that the judge initially ruled against admitting Dr. Marsden's testimony on the cultural use of the phrase "drive-in restaurant," for the issue probably was what the *parties* understood was meant by "drive-in restaurant," rather than the popular culture definition of that phrase. (It is not true, as Dr. Marsden suggests, that fixing the cultural meaning of particular terms and concepts fixes the legal meaning of those terms and concepts. However, the particularized information may be helpful to determining the likely meaning of the parties, and that's all the rules of evidence require.) I was not surprised when the judge later reversed himself, for judges often do that when trying cases without juries. (They tend to think out loud rather than to themselves.) Finally, I was not surprised that the judge disclaimed any reliance on Dr. Marsden's testimony, because this silences any claim on appeal that the judge erroneously relied on inadmissible testimony, and thus insulates the judge's decision from appellate review. I was only surprised that the judge initially ruled that Dr. Marsden was not an expert; as I noted above, in all but the most hopeless cases, the parties are quite capable of finding witnesses who meet the slender evidentiary definition of an expert.

(And Dr. Marsden possessed much more expertise than many others qualified as experts.) But judges, no matter how they comport themselves on the bench, are human beings capable of making (and, in this case, rectifying) their mistakes.

It is difficult to draw any particular lessons from the "popular culture meets the law" story told by Dr. Marsden. For those who are not lawyers, it may be interesting to note the (relative) ease by which one is denominated an expert. The readers of this commentary, most of whom, like me, make a living by selling their knowledge, can gain comfort in the fact that they too may be able to redistribute some wealth from a large, multinational corporation to a (more deserving?) member of the knowledge class. As for "first times," it might be expected that the event was anticlimactic.

A more interesting (to me) interplay of popular culture and law is the impact of popular culture on the operation of the law.[7] We are a society saturated by law. Novels about law by John Grisham, Scott Turow and others[8] have sold millions of copies. Television inundates viewers with stories of law. Police procedurals invoking the *Miranda* warnings ("You have the right to remain silent . . . ."), docudramas telescoping true crime stories like the trial of the Menendez brothers, and obviously fictionalized series like "Law & Order" or "L.A. Law" offering courtroom dramas give the public a particular view of the role of law in our society. The particular view is often contradictory, suggesting on the one hand that law impedes the search for justice (like legal "technicalities" freeing the guilty criminal defendant) and that lawyers use dirty tricks (or the adversary system, which may mean the same thing) to thwart just results but also suggesting on the other that our devotion to the rule of law separates us from other countries and that individual lawyers, driven by a thirst for justice, wield the sword of law to champion just causes. Because the United States, unlike any other country in the world, relies on the collective judgments of non-expert jurors (consisting of a cross-section of much, although not all, of the public) to decide who wins and who loses, the view of law channelled to most homes most nights affects not just our perceptions of law, lawyers and justice, but the course of law, the conduct of lawyers and the impact of justice. In this respect, the popular portrayal of laws and legal actors affects what counts in the "discipline" of law. (On more than once occasion, lawyers have apologized to the members of the jury for not providing them an "L.A. Law"-type of case or courtroom demeanor.) This interplay offers a wonderful opportunity for legal academics and popular culture academics to use the skills of their respective disciplines for fruitful interdisciplinary research.

If popular culture studies is to be defended on the basis of its instrumental value (and as an academic I'm not enamored of that kind of defense), I suggest that this value is not demonstrated by the events leading to Dr. Mars-

den's research and testimony. The "usefulness" of popular culture studies in law lies less in the ammunition it gives highly paid lawyers for one large corporation against lawyers for another large corporation than in the study of the contradictory ways in which law is portrayed in popular culture. We may gain some insights about visions of law and democracy in our society from the relation of portrayals of heroic lawyers like Atticus Finch in *To Kill A Mockingbird*, or of jurors in the play (and teleplay) *Twelve Angry Men*, to the work of the Warren Court, or from the corruption (or corruptibility) of lawyers in the recent novels of John Grisham. This is above-ground archeology at its best. Michael Kammen's fascinating cultural history of the Constitution, *A Machine That Would Go of Itself*, describing "the place of the Constitution in the public consciousness and symbolic life of the American people,"[9] offers an approach popular culture studies would do well to emulate. In this way, popular culture studies is not only not "non-orthodox," but the most orthodox of academic studies.

Notes

1. See Isabel Wilkerson, "Obscenity Jurors Were Pulled Two Ways," *N. Y. Times*, Oct. 10, 1990, A12.

2. See Amy Dockser Marcus, "Mists of Memory Cloud Some Legal Proceedings," *Wall St. J.*, December 3, 1990, B1; Barbara Kantrowitz, "Forgetting to Remember," Newsweek, February 11, 1991, 58. Franklin-Lipsker's psychotherapist, Lenore Terr, who testified for the prosecution in this case, has recently written a book discussing this case and repressed memory syndrome. Lenore Terr, *Unchained Memories* (1994).

3. See Mark Hansen, "Believe It or Not," *ABA J.*, June 1993, 64.

4. The literal interpretation of F.R. Evid. 702 was accepted by the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786 (1993).

5. For those interested in irony, the firm which hired Dr. Marsden is also the firm that counts among its partners Scott Turow, whose novels on the work of lawyers have been best-sellers and have been made into popular movies, all of which, of course, provides a popular picture of lawyers.

6. In "Expert Testimony on the Definition of a Drive-In Restaurant," Marsden does not state how much money was at stake. I assume it was a truly substantial amount. To be frank, experts are few and far between when the stakes are small.

7. An interesting study on the popular view of lawyers is Anthony Chase, "Lawyers and Popular Culture: A Review of Mass Media Portrayals of American Attorneys," 1986 *A.B.F. Res. J.* 281. See also "Symposium: Popular Legal Culture," 98 *Yale L. J.* 1545-1709 (1989).

8. On the proliferation of "legal thrillers," see Adrienne Drell, "Murder, They Write," *ABA J.*, June 1994, 46.

9. Michael Kammen, *A Machine That Would Go of Itself* (1986), xi.