

**Psychological Science in the Courtroom, Consensus and Controversy**, edited by Jennifer L. Skeem, Kevin S. Douglas, and Scott O. Lilienfeld. Published by The Guilford Press, 2009.

## Reviewed by Jeffrey D. Boyd, J.D.

This is a collection of state-of-the art articles about the law and the psychological sciences. When I saw the title I expected to learn how to use psychology to cause jurors to do back-flips, instead, I found a scholarly work designed “to help forensic psychologists, lawyers, judges, and other professionals with the complex task of evaluating conflicting and often confusing research evidence to arrive at clear conclusions about the state of the science and how it applies to legal issues.” A lofty goal, but indifferently achieved, due to the exhausting scientific vernacular: the article authors have twenty-eight Ph.D.s among them (but only four J.D.s). This is not light reading, and it is not written in the language of trial lawyers or juries.

I highly recommend this book if you have a need for top-shelf information on any one of the subjects covered in specific chapters (listed below). In addition, three chapters have topics of general interest: standards of legal admissibility, *Daubert* and scientific theory, and the common ground between psychology and the law. However, I can’t recommend it as a general read – it’s just too technical.

The examination of *Daubert* and the subsequent “gatekeeper” cases leads to a discouraging conclusion. The authors state *Daubert* was decided because “the law must join the scientific age.” A noble ideal perhaps, but the science shows that judges are more likely to exclude valid expert evidence (a false-negative error) than to admit invalid evidence (a false-positive error). This cannot be good for justice. How many cases have been needlessly complicated or even dismissed because evidence which otherwise could have been weighed by citizen-jurors was held to be inadmissible by judges who had no particular scientific education or expertise of their own? Further, how many millions, if not billions, of dollars have those holdings caused litigants to incur for legal fees and for expert witness expenses? Given that sum, it is particularly disheartening to learn:

“None of the research we have reviewed has provided any evidence that judges are admitting valid science and excluding junk science. The same can be said for attorneys: just because they are filing more motions to exclude expert testimony or are more selective when choosing experts does not mean that they are doing so effectively.”

Put more plainly, there is no scientific proof that the case designed to increase the reliability of scientific proof is working! Has anyone brought this finding to the attention of the courts?

The specialized chapters are as follows:

#### The Scientific Status of "Repressed" and "Recovered" Memories of Sexual Abuse

Do we actually "repress" memories, particularly horrific memories of sexual abuse? How can we know if testimony involving such memories is reliable? A controversial subject among trial lawyers, it is the position of the authors that "the notion of 'repression' as distinct from ordinary mechanisms of forgetting has not been established."

#### Forensic Hypnosis: The State of the Science

Should witnesses' hypnotically elicited memories be admissible at trial? The authors weigh in against it, noting that they are "unaware of any non-controversial or unquestionably scientific supported forensic use" of hypnosis. The research provides support for the position that hypnosis does not have scientific evidence as a reliable recall enhancement method, and hypnotically elicited testimony should not have a place in the courtroom.

#### Expert Testimony Regarding Eyewitness Identification

As long as there has been eyewitness testimony, there have been questions about its accuracy. In fact, the more research that is done, the more questions are raised. There is a trend to call psychologists to give expert testimony about the accuracy/inaccuracy of eyewitness identification. Most jurors instinctively understand there are some problems with eyewitnesses; should experts on these difficulties be thrown into the mix? The chapter concludes with a caution to potential experts: "regardless of which side retains the expert's services, there is pressure to go further than the science itself justifies." Isn't that what attorneys really need to know about this topic?

#### Techniques and Controversies in the Interrogation of Suspects: The Artful Practice versus the Scientific Study

All experienced trial lawyers think they know a liar when they see one, but much to the contrary, "research has not supported the theory that behaviors or response styles reliably distinguish truth from deception" in witness interviews. The authors note that "science has also not supported the notion that investigators are adept at detecting deception in interviews, regardless of whether the suspect is guilty or innocent." Also, they find that in interrogations - guilt-presumptive processes focusing on extracting a confession from a suspect who is believed to be guilty - interpretation of the suspect's words and actions will be resolved in favor of guilt. We see what we expect to see, but our interpretations are not scientifically reliable.

#### Reliability of Child Witnesses Reports

Not surprisingly, the authors validate something known by any experienced trial lawyer: children can be led in nearly any direction by asking the right questions in the right manner.

The validity of children's testimony depends on whether they are questioned by unbiased interviewers, and in the civil justice system, that is unlikely to occur.

#### The Psychopathy Checklist in the Courtroom: Consensus and Controversies

This chapter concerns the psychopathic personality disorder, and focuses on four controversies with direct implications for using a psychological instrument known as the psychopathy checklist: whether this instrument is reliable, predictive, prejudicial, and relevant to criminal conduct.

#### Projective Techniques in the Courtroom

Projective techniques are those such as the Rorschach inkblot tests or tests where the subject creates drawings that illustrate their thinking or emotions. The controversy is whether interpretations of these images are of legal usefulness in the courtroom. The conclusion is that the Rorschach "currently lacks any well-supported uses in the courtroom."

#### Psychophysiological Detection of Deception and Guilty Knowledge

This chapter looks at the reliability of the polygraph, and reviews its evolution and use in legal matters. In summary, "there are as yet no scientifically supported uses of polygraph tests."

#### Criminal Profiling: Facts, Fictions, and Courtroom Admissibility

Criminal "profiling" as a forensic behavioral technique is examined. At its most basic level, profiling represents "a process whereby behaviors and/or actions exhibited in a crime are assessed and interpreted to form predictions concerning the characteristics of the probable perpetrator(s) of the crime." While this makes for great movies, the techniques' "operationalization into scientifically grounded principles that are reliable and accurate remains elusive."

#### The Science and Pseudoscience of Assessing Psychological Injuries

This is a chapter of use to many practicing civil trial attorneys. The authors address the familiar issues of claimed psychological injury: whether a person's post-event condition is worse than their pre-event condition, whether the alleged wrongdoing caused the worsened condition, and the degree to which the alleged wrongdoing will continue to cause dysfunction and impairment in the future.

Their conclusions, however, will cause discomfort to plaintiffs' lawyers, as they opine that the following are scientifically unsupported:

- Any definitive conclusions that current functioning was caused by the legally-contested adverse event;
- Any definitive statements about past psychological functioning derived from current psychological testing, as no instruments or assessment protocols exist that can do so. Diagnoses of malingering, absent conclusive evidence of intentionality;
- Offering prognosis about future psychological functioning or disability on the basis of mental health variables alone.

These statements may simply be an expression of the difference between legal “reasonable certainty” and what scientists believe is “proof.” However, even if that is the case, there is reason for personal injury lawyers to be concerned about these conclusions.

#### Controversies in Child Custody Evaluations

Family law practitioners will appreciate this chapter on child custody evaluations, although the conclusions are somewhat startling: the authors label as myth the idea that “there is a reasonably well-established standard for conducting child custody evaluations.” Further myths: custody evaluators can settle factual disputes, and parent alienation syndrome is a well-researched and accepted phenomena. Food for thought.

#### Controversies in Evaluating Competence to Stand Trial

Because the legally recognized premise for incompetence lies in the domain of mental impairment, courts routinely rely on the evaluations and testimony of mental health professionals to make informed decisions about competence. Suffice it to say that this is an area of great controversy, with practitioners advocating uses of competence assessment measures that are scientifically unsupported, or controversial. Again, contrary to popular belief, there is only a short list of scientifically supported uses of competence measures.

#### Violence Risk Assessment: Core Controversies

Courts would love a means by which they could accurately assess the risk of violence of the persons appearing before them. There are, thankfully, scientifically supported uses of testing including conclusions that persons scoring higher on validated assessments are at greater risk for violence than those scoring lower on the test instruments. However, the authors also point out that many uses are scientifically controversial, scientifically unsupported, or even untested.

#### Appropriate Treatment Works, but How?: Rehabilitating General, Psychopathic, and High-Risk Offenders

Does treatment reduce the risk of recidivism for general offenders? For psychopathic and other high-risk offenders? Where are the gaps in our knowledge about this? The good news is that offenders can be rehabilitated. The bad news is that few offenders get the type of care necessary to get the best results of the new scientific breakthroughs. Penny wise but pound foolish?

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