WITNESSING FOR SOCIOLOGY

Sociologists in Court

Pamela J. Jenkins, Steve Kroll-Smith

Greenwood
PUBLISHING GROUP

WITNESSING FOR SOCIOLOGY

This page intentionally left blank

WITNESSING FOR SOCIOLOGY

Sociologists in Court

Edited by
PAMELA J. JENKINS
and
STEVE KROLL-SMITH

Foreword by Marvin E. Wolfgang
Afterword by Kai Erikson

PRAEGER
Westport, Connecticut
London

Library of Congress Cataloging-in-Publication Data

Witnessing for sociology : sociologists in court / edited by Pamela J. Jenkins, Steve Kroll-Smith ; foreword by Marvin E. Wolfgang ; afterword by Kai Erikson.
p. cm.
Includes bibliographical references and index.
ISBN 0–275–94852–8 (alk. paper)
1. Evidence, Expert—United States. 2. Forensic sociology—United States. I. Jenkins, Pamela J. II. Kroll-Smith, Steve.
KF8968.68.W58 1996
347.73'67—dc20 95-45421
[347.30767]

British Library Cataloguing in Publication Data is available.

Library of Congress Catalog Card Number: 95-45421
ISBN: 0-275-94852–8

First published in 1996

Praeger Publishers, 88 Post Road West, Westport, CT 06881
An imprint of Greenwood Publishing Group, Inc.

Printed in the United States of America

The paper used in this book complies with the Permanent Paper Standard issued by the National Information Standards Organization (Z39.48–1984).

P

Steve Kroll-Smith dedicates this book to his aunt,

Blanche Vandewalle,

for believing

This page intentionally left blank

Contents

Foreword

Marvin E. Wolfgang

Expert witnesses have been recorded since ancient times. Consider the trials of Jesus, Socrates, and, later, Galileo. The U.S. Supreme Court heard expert witnesses in the famous *Plessy v. Ferguson* case of separate but equal clauses of conditions of life from education to drinking fountains, buses, and businesses.

How can we trust expert witnesses? We cannot, not easily. We must use the principle of the best available evidence, which means that we must rely on the traditional canons of scientific inquiry.

There is no substitute for the dogged pursuit of testing hypotheses over and over again. The maverick scientist who contradicts the commitments of dozens of carefully researched findings is an unlikely voice of truth. There may be virtue in the challenge of the scientific community, but neither science nor law can count on it until history passes and possesses the accumulation of replications.

We are at a new threshold of significance in the use of expert witnesses. Congress has debated the issue of statistical evidence regarding discrimination in the use of the death penalty. Statistical evidence has been accepted in housing and employment discrimination cases but not in death penalty sentences.

I first testified in Little Rock, Arkansas, in the *Maxwell* case in 1966 and showed the court that there was a systemic, 20-year period of disproportionate (discriminatory) sentencing of blacks to the death penalty when the defendant was black and the victim, white. Baldus and others since have confirmed in brilliant detail what I reported much earlier.

The Supreme Court has listened to but not learned from our researches. The expert witness often is viewed as a biased liberal, despite our efforts to show our commitment to scientific inquiry and methodological objectivity.

Social science is, however, marching ahead on many issues that are arising in litigation and appellate review. Sexual harassment, domestic

violence, and racial discrimination are some of these issues.

The expert witness will become more and more important in the traditional court drama. I recommend to my colleagues who may be requested to testify: keep your curriculum vitae up to date; do not speak in absolutes; use probability statements; be calm and never aggressive; sound confident in all your statements; admit you do not know if you really do not know.

A courtroom experience, with a court reporter taking note of every word said, is quite different from a seminar session at the university. One must be careful in language and law to say precisely what is meant. Do not hesitate; do not have gaps of silence. Speak affirmatively and with a sense of authority.

As an expert, you must be a person who knows more than the prosecutor and the defense lawyer about your topic. If you follow these dicta, you may not always win, but you will never lose your dignity.

Witnessing for Sociology is a richly documented account of personal and professional experiences by those who have been called to serve as expert witnesses. This volume has a breadth of topics and a variety of reactions to testifying in court that go beyond any other collections I have seen. I congratulate the editors and all the contributors.

Acknowledgments

There are several people who deserve recognition for their efforts on behalf of this book. Edmund LaTour and Sheila Meyers helped to clarify legal questions and read and commented on several chapters. Lori Kelly, Barbara Davidson, and Dallas McGlinn assisted in keeping us organized and also read and commented on several chapters. Steve Meinhold worked quickly and efficiently during the final days, using his wizardry with computers and a good editor's eye to bring the project to a successful conclusion. Finally, a special thanks goes to Molly Biehl, who, mature beyond her years, read and commented on final drafts, served as our style editor, and gave us the confidence to bring this project to closure.

This page intentionally left blank

1

Old Stories, New Audiences: Sociological Knowledge in Courts

Steve Kroll-Smith and Pamela J. Jenkins

If at one time sociology was like a spacious room off the center hall of the academy, today it looks more like a sagging porch flimsily attached to the main house, struggling to remain standing. Sociology is fighting for its legitimacy. Departments are being scaled back or downsized. Graduate programs are being cut. Most disturbing of all, entire departments are being eliminated. Sociology appears to be losing favor with college and university administrators strapped by shrinking budgets and increasing operating costs.

What are the root causes of sociology's current crisis? Perhaps, it is the eclipse of what Gouldner (1970) called "academic sociology" by new left theories, ethnomethodology, and other nonfunctionalist models of social order. These non-Parsonian theories are, after all, less inclined to address the practical problems of adjusting to a late capitalist welfare state and, therefore, are more easily dispensed with. On the other hand, perhaps it is an unintended consequence of an uncritical positivism that, to paraphrase Collins (1975), encourages keen minds to pursue explanatory exercises that fall well below the levels of genuine intellectual concern, or it might be because of the increasing Balkanization of the discipline itself, expressed in the observation that a sociologist is always "a sociologist of (pick one of dozens of substantive specialties)." No longer guided by core theories and questions, it is difficult for others to visualize just what it is that sociologists do. Finally, a less interesting, but plausible cause of sociology's crisis is the post–Reagan-Thatcher impetus that dissuades students from considering careers that require more than a four-year technical or business degree while promoting a balanced budget at the expense of human welfare projects that, by definition, would invite a sociological point of view.

Sociology's crisis will continue to be debated as it shortens the careers and pinches the pocketbooks of scholars from 4-year state schools to the mandarins of Wisconsin, Chicago, and the Ivy League.

Ironically, as the question "Why sociology?" haunts the corridors of academe, sociology itself is becoming an increasingly authoritative voice in tort, criminal, and civil proceedings. As sociology faces a challenge to its claim to a rightful place in colleges and universities, it seems to us an appropriate moment to consider the work of those sociologists who represent their discipline in courts of law. We do not know how many sociologists in the United States work as expert witnesses or expert consultants in legal cases; the number, however, appears to be increasing. Many sociology departments can now identify one or two faculty members, perhaps more, who represent sociology in legal proceedings as far ranging as nuisance suits, toxic torts, capital sentencing hearings, spousal abuse, or civil rights violations. The term "represent" purposely is used here to denote two interrelated processes. The sociologist who serves as an expert witness speaks *for* the discipline of sociology while also speaking *to* the courts about the relevance of sociology for the legal issues in question.

Courts of law are dramatic public stages where moral and material fortunes depend on the capacity of the actors to tell persuasive stories. For many of the participants in these dramas, including defendants, plaintiffs, judges, juries, and attorneys, sociology is an abstract, perhaps arcane, academic discipline with no particular relevance to the important issues before the court. Medicine, psychology, and engineering, on the other hand, are first among those specialties generally recognized as legitimate areas of expertise. Therefore, when a sociologist appears in court or at some juncture in a legal proceeding, she is afforded an opportunity to speak for the culturally redeeming value of sociology to a generally skeptical public in a high-stakes arena. The soci-ologist is, in short, a witness for the explanatory value of sociology but is obviously doing more than representing the discipline.

A sociologist who gives a deposition, testifies in a legal proceeding, assists in preparing a legal brief, or simply consults on a case fashions, to some degree, the opinions of the courts. Sociological knowledge, albeit some small part of it, becomes a perspective for introducing and interpreting certain facts of a case. If it is true that an increasing number of life circumstances and troubles are now adjudicated, it also is true that an increasing number of sociologists are rendering sociological interpretations that have some bearing on the courts' decisions.

As a growing chorus of sociologists speak in court about the relevance of sociological knowledge, sociology is reaching into a critical arena of social and political life. At stake in court proceedings are such critical human resources as money, housing, social standing, and, at times, life itself. Sociological knowledge that contributes in some measure to the redistribution of money or the civil rights to shelter, that enhances or diminishes social standing or complicates the question of capital punishment has political implications beyond the classroom and the occasional journal article or book. Teaching and publishing will

continue to be the mainstays of the discipline, but as the chapters in this book illustrate, sociology is reaching beyond the academy to address a real and increasingly visible politic of contemporary life: the courtroom.

In his recent presidential address to the Mid-South Sociological Association, Standford Lyman observed that the future of sociology depends in part on the capacity of sociologists to "tell better and more plausible stories" (1994:224). We would append to Lyman's sage prediction an additional idea: sociologists not only must tell better and more plausible stories, they also must tell these stories to audiences whose lives are changed, albeit in some small measure, by the narration. Although publishing and teaching are the measures by which we judge ourselves, they no longer may be a sufficient justification for our discipline or any other that purports to interpret the human condition. Thus, the chapters in this book do more than describe the rich and varied experiences of sociologists who serve as expert witnesses; they also are modest reasons for optimism as we anticipate the future of sociology.

UNITY IN DIVERSITY: A SHORT HISTORY OF THE BOOK

In the summer of 1993, we wrote a short article for the American Sociological Association newsletter announcing our intention to create a directory of sociologists who serve as expert witnesses. Included in this announcement was an additional appeal to readers who might be interested in contributing a chapter to an edited book on sociologists as expert witnesses. We received over three dozen enthusiastic responses to the book proposal. Shelving the directory for the moment, we decided to devote our limited time to editing a book.

We had three criteria for selecting chapter contributors. First, we wanted only sociologists. Next, we wanted contributors who had full-time academic appointments; we specifically did not want professional expert witnesses. Finally, we wanted the chapters to represent a broad distribution of legal areas in order to illustrate the wide-ranging role of sociology in the courts. We specifically did not use publication records to select authors. Indeed, we took this opportunity to create some space for the voices of sociologists who work as expert witnesses but do not regularly publish. Thus, there are a range of publishing records represented in these chapters. Contributors were asked to write original chapters that described their personal experiences as expert witnesses and to focus attention on specific ways in which sociological knowledge helped shape or fashion the legal questions at issue. Sociologists rarely are asked to write reflexively, to consider themselves as subjects. This proved difficult at first for a few contributors. With suggestions from the editors and considerable work by the contributors, however, readers can discern a reflexive voice in each chapter.

We encountered an unanticipated problem in pursuit of the reflexive stance, however. Reading through the first drafts, we were struck by the diversity of personal experiences. Narrating personal accounts, we quickly learned, resulted in a wide array of story styles. Some contributors chose to focus on one or two cases, while others discussed many cases. Some authors recounted emotions, describing both the tribulations and satisfactions of expert witnessing; others provided a more detached account of events, preferring to keep emotional matters to themselves; still others mixed the two styles. Our response to these mixes of reflexive voices was admittedly simple, if not preordained: we surrendered to it. Perhaps a reviewer or two will critique the project for its diversity of personal stories. Reflected in this diverse array of first-person accounts, however, is a common theme: the personal recollections of a small group of sociologists on a topic of some importance to their professional careers and, by implication, to the career of the discipline.

A second source of unity is the attention each author pays to the specific uses of sociological knowledge in courts. We asked contributors to consider how sociology constructed a part of the legal drama. Each chapter, therefore, addresses a particular way in which the imagination of sociology becomes confounded with the imagination of the courts. Readers will be struck by the seriousness attributed to sociological knowledge in a wide array of legal proceedings. Several authors suggest how sociological knowledge challenges the knowledge claims of psychology and medicine, complicating questions of causality and guilt. Other contributors illustrate ways in which sociology is helping to define the limits of moral accountability in courts of law. Still others show how sociologists teach the courts the meaning of statistics or surveys, at times lecturing hostile judges or naive attorneys on the rudiments of research. Finally, a number of authors direct attention to the uses of sociology in humanizing a defendant by situating criminal behavior in a life-history narrative that does not forgive but helps to explain such deleterious conduct.

Thus, running through each of these chapters is a reflexive voice narrating accounts of how sociology informs the deliberations of the courts. We take this opportunity to thank the chapter authors for their hard and persistent work to address these two themes.

A brief consideration of laws pertaining to the use of experts and expert evidence sets the stage for a more-extended introduction to the chapters.

FRYE, DAUBERT, AND THE EXPERT WITNESS

Expert witnesses aid juries or judges in finding facts that bear on civil, criminal, and tort matters. An expert is not sought because he has observed events or knows the defendant. It is his skillful ability to

identify and interpret circumstances, events, and other occurrences that are beyond the ken of nonexperts that makes him an expert.

As with any courtroom procedure, rules guide the use of experts. Trial judges are the first and sometimes final arbiter in deciding whether or not expert testimony is applicable to a particular case. Their decisions are based on general principles that, on the surface, appear straightforward.

First, for the issue(s) to be understood in the courtroom, testimony is required from someone with specialized knowledge. The general test is whether the subject matter is beyond the understanding of the ordinary person. This test constitutes a threshold standard applied to determine when expert testimony can be admissible (Crocker 1985).

Next, whatever it is that the expert claims to know must pass a test for reliability. The test asks, simply, whether or not knowledge or practice in a particular field is sufficiently developed to evaluate the credibility of the expert's testimony. The reliability standard is met if an expert is able to convince the court that his testimony is derived from generally accepted procedures and concepts in the particular discipline.

The reliability standard was established over 50 years ago in the landmark Supreme Court case, *Frye v. United States* (1923). In 1923, a young black man named James Frye was accused in federal court of murdering a white man. His lawyer offered evidence of a polygraph test accompanied by expert testimony. The testimony and the polygraph results were rejected. The court ruled that the novel, newfangled contraption called a "lie detector" was not generally accepted as an appropriate measure of determining the truth. Hereafter referred to as the rule of general acceptance, expert evidence presented to the court must be based on theories or techniques that have near-unanimous acceptance in an appropriate field (Jasanoff 1989).

Although the *Frye* standard has been popular in many state and federal courts, other jurisdictions have used Rule 702 of the Federal Rules of Evidence (1989), adopted by the U.S. Congress in 1975. It is not acceptance by the scientific community that constitutes the *Frye* test, but whether the testimony will help jurors understand evidence or determine a fact at issue. Judges may exclude the testimony if they determine that it might prejudice, confuse, or mislead the jury. *Frye* and Rule 702, in combination with numerous state rules, created a permissive climate that allowed a wide spectrum of disciplines, professions, and specialties to serve as experts.

It was expected that the debate on expert testimony in courts would subside somewhat with the recent Supreme Court ruling in *Daubert v. Merrell Dow Pharmaceutical* (1993). In this case, parents of two children with limb-reduction birth defects sued the manufacturer of the drug Bendectin, alleging that it caused the defects. In the civil trial, Merrell Dow Pharmaceutical submitted an affidavit from an expert who analyzed 30 published studies that involved 130,000 patients who were

treated with Bendectin; he concluded that the drug was not a human teratogen. The plaintiffs did not challenge the use of the defendant's research but offered eight of their own experts, who testified that Bendectin does cause birth defects, based on test-tube and live-animal studies, pharmacological studies, and a reanalysis of previously published epidemiological studies (Orr 1994). However, the major studies cited by the plaintiff's experts were not published in refereed journals and, thus, were subject to challenge by the defense using the general acceptance rule (*Frye*).

The district court granted summary judgment for Merrell Dow, and the Ninth Circuit affirmed, based on *Frye*. At some surprise to the legal community, however, the U.S. Supreme Court granted certiorari to determine the appropriate standard for admission of expert testimony. In other words, the Supreme Court agreed to address the issue of expert testimony for the first time in 70 years.

Amicus briefs, or friend-of-the-court statements, were filed with the Supreme Court from states, individual scientists, and a remarkable diversity of scientific and legal organizations. Many of the national science organizations argued that this was an opportunity for the court to rule on "junk science." The American Association of Science, the National Academy of Sciences, and the American Medical Association supported the position of the defendant, Merrell Dow. Other scientists, who supported the plaintiff, were concerned that scientific testimony must pass a test of consensus or that acceptable scientific results must be published in particular forms to be accepted. Amicus briefs for the plaintiff were provided by a group of scientists including Stephen Jay Gould; the American Society of Law, Medicine and Ethics; and the American Trial Lawyers Association.

The Supreme Court ruled that the *Frye* test was replaced by the Federal Rules of Evidence. Moreover, although the rejection of *Frye* lessened the general acceptability rule, the court stressed that trial judges shall play a crucial role in the admissibility of testimony. The court wrote that judges should be "active gatekeepers" who have a duty to ensure that "any and all scientific testimony or evidence admitted is not only relevant, but reliable" (113 S. Ct., 2795). The court did provide general observations to help federal judges decide whether specific evidence is admissible, including whether the theory or technique has been (and can it be) tested, whether the proposed evidence has been subjected to peer review and publication, what is the potential rate of error for the scientific technique at issue, and whether the methodology enjoys general acceptance in the discipline or has been able to attract minimal support in the community (113 S. Ct., 2796-2797). The *Daubert* ruling was expected to create a more flexible approach toward the admissibility of expert testimony. Surprisingly, however, in a review of the federal cases since *Daubert*, half have excluded expert testimony. Moreover, *Daubert* is being used in state courts to limit expert

testimony rather than to expand it. In this conservative climate, *Daubert* may represent the changing face of expert testimony and other changes in tort litigation. In the future, sociologists as expert witnesses may face even more stringent tests of credentials.

In summary, when a sociologist decides to become an expert witness, she faces a rugged and often-uncertain challenge to both her status as an expert and to the relevancy of the expertise. In spite of the difficulties, however, sociologists are influencing the courts by applying the perspectives of sociology to a broad spectrum of legal issues from tort to liability to criminal law. Moreover, each chapter in this volume suggests that allowing the discipline into the courts is not a benign exercise. Sociology's influence on legal proceedings might be likened to the occasional college freshman who allows himself to be affected by an introductory course in sociology. In other words, it expands and complicates the range of issues the freshman customarily attends to, assuring that the world is more bizarre, quixotic, and interesting than common sense would have it.

The next several pages introduce the chapters by identifying four ways in which the stories sociologists tell in court are likely to haunt, if not directly challenge, several of the court's entrenched assumptions regarding defendants, victims, criminal behavior, human losses, and so on.

TELLING OUR OLD STORIES TO NEW AUDIENCES

Narrative is reenchanting the academy. Sociologists and, somewhat surprisingly, biologists and, perhaps less surprisingly, physicists (Riessman 1993; Gould 1977; Feyerband 1975) are increasingly referring to their work as story telling, couching their learned conclusions in chronicles intended to illuminate the reader. Joining what some might call the "narrative turn" in the human sciences, we are encouraged to consider the sociologist who serves as an expert witness a storyteller. Like Levi Strauss' bricoluer, the sociologist as expert weaves together a method, a concept, and an interpretation to tell sociological stories about defendants and plaintiffs, environments, religious practices, and pornography, about safe and dangerous locations, and so on to the often skeptical audiences of the courts.

With some exceptions, of course, most sociological stories are told to sociologists. Over time, story telling among confederates assumes the character of ritual, where each participant in the telling knows the story and waits with assurance for the next development. It is not new knowledge that is passed among confederates during a story ceremony but a generally affirming feeling that they are all in this together.

Talking about a research project in a two o'clock session at a regional meeting attended by five or six sociologists sprinkled about a room with 50 chairs, however, is considerably different than explaining and

defending sociological knowledge in depositions and trials. Both are story-telling events, to be sure, but one story is told to confederates, insiders who often can anticipate at least the plot sequence, if not the denouement, while the second story is told to an array of audiences, many of whom know very little about sociology.

Moreover, the stakes in the outcomes of the two expressive events are not commensurate. Telling a sociological story to sociologists is, to be sure, risky for the storyteller but is routinely experienced by the audience as at least a benign, if not a tedious, event. Sociologists who tell their stories in legal proceedings, on the other hand, face audiences that are both sympathetic and hostile and not unaffected by the tale. The emotional responses to sociological stories told in court is explained in some measure by the simple idea that degree of attention and affect are likely to increase proportionately to the perception that the stories being told will bear in some measure on the redistribution of important life resources. Such a perception, we dare say, is noticeably absent in a two o'clock paper session at a regional meeting.

The fact that sociological stories are told in courts at all invites comment. Indeed, it could be argued that sociological knowledge is not particularly suitable for the design of the court. Sociological stories routinely complicate the romantically elegant notions that there is a right and a wrong, a good and bad, or an innocent and a guilty party. In this romantic world, the courts reward heroes and punish villains, wrongs are redressed, and the moral order, thrown askew by wayward deeds, is regularly made straight. It is true that this idyllic view does not represent the typical experiences of, say, an overworked, underpaid, and burned out public defender. Nevertheless, at the very least, it expresses the hopes of those whose destinies in some fashion are dependent upon legal proceedings. The truth be known, the frustrations of public defenders probably stem in no small measure from the disjuncture between their vision of the law and their intimate observations of its day-to-day practice.

Belief in an "American legal romanticism," a term borrowed from Robin West (1985:161), is more easily sustained when evidence in courts is limited to the paradigmatic assumptions of medicine, psychology, or engineering, for example, that focus attention on physical systems or individuals and not on abstract, nebulous things like social stratification, attitude distributions, social role, life history, alienation, and so on. There is a certain fit between the tendencies of the courts to think in the polarized logic of innocent or guilty, liable or nonliable, coerced or volunteered, drunk or sober, and so on and the hard, obdurate evidence of bridges, engines, sobriety tests, deoxyribonucleic acid strands, or personality indexes.

Each chapter in this book suggests that sociology complicates the romantic notion that truth is just a fact away from being established. Truth, these chapters remind us, is usually quite messy, confounded by

histories, surveys, critical assessments of literatures, scaler methodology, and sustained arguments with the reductionist assumptions of medicine and psychology. Sociology enlarges appreciably the traditional range of concerns a court must consider to reach a just decision. Its maddening premise that every way of seeing is also a way of not seeing challenges the court to expand its deliberations to include the more abstract but no less real concerns of a sociological imagination.

We identified four story lines in these chapters that represent how sociology is challenging courts to consider an appreciably more complicated vision of human behavior and, in turn, a more complicated vision of punishment, liability, moral accountability, and so on. These stories include the numbers game, humanizing the defendant, a benign satire of entrenched knowledge, and expanding the court's traditional boundaries of moral accountability. Although these narratives are not assumed to be inclusive of the ways sociology challenges the courts, we encourage their inclusion in future discussions of sociology's influence on judges and juries charged with a fair and impartial assessment of the "facts."

THE NUMBERS GAME

Sociological knowledge chides the specificity of the law through its most frustrating sleight of hand: statistics. From "split-half reliability" and "Latin-square design" to "halo effects" and "recursive modeling," statistics rests on a foundation of peculiar, if not bizarre, terms. Stringing strange term after stranger term, however, does not result in definitive answers. Statistical answers are always contingent. Resting on the uncertain foundation of probability, statistical stories explain by elimination. They seem more interested in what does not explain observed differences than in what does. Not surprisingly, sociologists who wield the statistical stick often face a skeptical and hostile courtroom.

A sociologist works for defense attorneys to design and supervise community surveys to determine local citizen awareness and opinions of defendants accused of committing notorious murders (Jacoby, Chapter 2 in this volume). Popular knowledge of a well-publicized murder often creates a prejudicial climate that makes it difficult to impanel a fair and impartial jury. Use of inferential statistics to demonstrate bias among potential jurors often is challenged by judges and opposing counsel, who question the logic of the representative sample. After all, it is argued, a part is not a whole. It is not reasonable to interview all potential jurors, however. Therefore, a sociologist tries to convince a skeptical judge and an argumentative state's attorney that justice in this case begins with accepting an apparent statistical sleight of hand.

Another sociologist, working for several plaintiffs who are alleging job discrimination, designs a statistical study that eliminates differences in reliability, punctuality, and skills as causes of unequal treatment by an employer (Feinberg, Chapter 3 in this volume). Devising a modified sign test for the regression coefficients for race in each month the discrimination allegedly occurred, he concludes that race remains a critical factor in accounting for the unfair treatment. In this fashion, sociological knowledge probes behind the apparent "facts" of a case to construct a morality play symbolized in ordinary least squares equations.

HUMANIZE A DEFENDANT

Blueprints, test scores, determinations of a body's unique chemistry, and accounts of a person's character measured by standardized questionnaires share at least one common feature: the unit of concern or focus of attention is so defined as to eliminate, or, at best, obscure, the social and cultural backgrounds, settings, and forces that shape events and circumstances. The Manichean morality of criminal, tort, and civil law encourages a focus on the smallest, most exclusive act or event. It is far easier to find light and dark (good and bad) by considering only simple, basic human acts, not the increasingly inclusive, more complicated set of circumstances and "facts" within which a single behavior or occurrence is inevitably situated. The momentum of sociological knowledge, however, is from a discrete act to a more inclusive, more abstract interpretation. In the hands of a skilled sociologist, a defendant, even a convicted murderer, can be fashioned into a human being with virtues and vices and a biography not unlike our own.

To obtain the death penalty after a capital murder conviction, for example, the prosecution will argue vehemently against introducing testimony that locates the defendant in a social milieu that in some small measure explains his or her conduct. The goal of the prosecution is to keep the court focused on the discrete act of murder, but a murderer, as any social scientist will acknowledge, is also someone's son, perhaps a brother, father, husband, employee, rural or urban dweller, and so on — in short, a typical person, often similar to members of the jury. A sociologist who represents defendants convicted of first-degree murder pleads for life rather than death by carefully reconstructing life histories that locate these single horrendous acts in complicated webs of social and cultural influences (Forsyth, Chapter 4 in this volume).

Sociologists do not necessarily look at situations or evidence of which the courts are unaware, but they do look at them in a different way. Recalling the image of the Russian nesting doll, sociology begins with an assumption that a solitary act is more adequately accounted for by nesting it in increasingly broad and more complicated social and

cultural patterns. If a criminal lawyer's task is either to match the facts of a case with a law or to argue that a particular law does not apply to certain facts, the sociologist might be just as interested to know what laws the accused is following when he or she behaves in an allegedly criminal manner. Ignorance of a law, of course, is not a legal excuse for breaking it, but one sociologist argues persuasively that knowing a defendant struggles with reconciling one culture's laws with those of another does challenge the court to recognize the all too human experience of living betwixt and between codes of conduct (Steinhoff, Chapter 5 in this volume). Finally, a sociologist expands the identity of a battered woman who kills to include her past history of abusive relationships, and her struggles to carve out a sense of self-efficacy in a violent world and to achieve some closure on a way of life that traps her in a chronic state of danger (Jenkins, Chapter 6 in this volume).

BENIGN SATIRE OF ENTRENCHED KNOWLEDGE

Sociology does more than dare courts to think about equity and fairness in the logic of distributions and probabilities; it also challenges many of the assumptions of psychology and medicine that have become, over time, entrenched truths in courts of law. In its inclination to assume that "things are not what they seem" (Berger 1963:23), sociology challenges the often utilized wisdom of the courts, engaging in what we might call a benign satire of entrenched knowledge. The word "benign" is used here to signal the motive of the sociologist serving as an expert witness. The intention is not to lampoon the court, chiding it for failing to consider a more complex rendering of the "facts" of a case; this trope is likely to be reserved for colleagues and graduate students. The purpose, rather, is to represent sociology to the court as a mode of thought suitable for making sense of a type of behavior, act, or event. In so doing, however, the sociologist trespasses, albeit often unintentionally, on many of the commonsense assumptions of courts and society.

Consider a sociologist who tenaciously rebukes the claims of psychologists (and at least one sociologist) that new religions use brainwashing to attract young adults to their organizations (Richardson, Chapter 7 in this volume). Based on his own research and assessment of the literature, he concludes that young people voluntarily join new faiths, participate for a while, and routinely drop out. This sociologist participated in writing several amicus briefs to, among other judicial venues, the United States Supreme Court, making a case for the nonscientific basis of brainwashing claims.

Exclusive reliance on medical models of chemical dependency is contested in court by a sociologist who argues persuasively for complicating the issues of volition and individual responsibility by nesting drug or alcohol abuse in social and cultural fields (Kinsey, Chapter 8 in this

volume). Loss of control, for example, from drug or alcohol use is shown to be closely related to cultural expectations regarding the effects of substances on the body. Drinking norms, often coded in specialized argots, are shown to not only represent behavior but also, in part, determine it. In this fashion, sociology joins physiology to culture to tell a story about substance abuse that ensnares courts in tangled webs of causality that highlight the limitations of the biomedical model.

Finally, a sociologist challenges the courts to develop more sophisticated criteria for gang membership by demonstrating the limitations of a police science model based on naive and unreliable indicators. This same sociologist also disputes the psychological bias of a key concept used to defend women who act violently toward their partners (Bowker, Chapter 9 in this volume). "Battered woman syndrome" (BWS) is a gendered variant of learned helplessness, an acquired incapacity to act effectively when faced with important life troubles. A key problem with BWS, however, is that many women who are abused and arrested for killing or wounding their partners do not necessarily appear helpless. Moreover, to be officially labeled as suffering from BWS is to risk being judged an unfit mother and to lose the right to parent. Embedding BWS in a sociological field focuses attention on severity and levels of abuse (physical, psychological, economic, social, and sexual) and indicators of the interaction patterns between the abused, her abuser, and other immediate social relationships. From a sociological perspective, a battered woman may be quite active, developing strategies to avoid violence while seeking assistance and advice from others. Her violence may be an extreme form of coping that expresses a momentary lapse from other, more benign, strategies of self-protection.

EXPANDING THE COURT'S TRADITIONAL BOUNDARIES OF MORAL ACCOUNTABILITY

If sociological knowledge in courts often ignites debates with medicine and psychology, thawing out a few of the hardened assumptions of body-mind narratives, it also, in the hands of some experts, expands the court's relatively narrow boundaries of moral accountability.

Working on premise liability cases, for example, two sociologists developed and regularly use a "crime foreseeability model" that accounts for a complicated array of variables in determining degree of responsibility in cases where a person is attacked or injured on a specific site (Voigt and Thornton, Chapter 10 in this volume). Their system level analysis combines industry standards of security, profiles of offender and victim, and demographic features of the surrounding area, among several other variables, to complicate considerably the court's assessment of the relative degree of negligence.

If a prosecutor seeks an obscenity conviction based on belief that the public's standards of decency are jeopardized by a film or magazine, a sociologist might determine through a survey of adult attitudes regarding pornography that the local public finds the suspect materials morally acceptable and the state's charge groundless (Holley, Chapter 11 in this volume). An environmental sociologist, on the other hand, argues persuasively that victims of toxic contamination are threatened by more than the presence of toxins in their local biospheres (Picou, Chapter 12 in this volume). Expanding the legal limits of compensable loss into the more nebulous areas of diminution of neighborhood life, separation from significant cultural traditions, and diminished self-esteem, sociology is making it more costly to pollute human habitats.

Housing is another arena where sociology is contributing to an expansion of the court's traditionally narrow range of moral accountability (Silver, Fischbach, and Kaye, Chapter 13 in this volume). With no constitutional right to housing, Americans in increasing numbers are finding themselves homeless. Building shelters to house the homeless typically is resisted by communities, who fear a surge of crime and loss of property values. Residents of one neighborhood in a conservative New England city protested the city's plan to build a modest shelter in their area. Citing a version of the domino theory, that is, one shelter would be followed by others until the neighborhood was a collage of homeless, prostitutes, and unkept public housing, a citizen's group sought to dissuade the city from building the proposed housing. Working closely with two attorneys, a sociologist gathered sufficient statistical data to document discriminatory intent and offered an opinion on the importance of these data based on her familiarity with social science literature on race relations. She, thus, argued that the conflict was not over differences in the changing use of urban land but over an expression of racial discrimination. As a consequence of her testimony, the court permitted the case to be heard as a violation of the federal Fair Housing Act, which makes it illegal to act in a manner that effectively results in housing discrimination based on race, sex, ethnicity, and so on.

SOME CONCLUDING REMARKS

Sociological knowledge complicates the goal of the courts by making it more difficult to reach a decision or verdict. Telling stories that humanize defendants, challenging the physical and individual reductionism peculiar to medicine and psychology, expanding the limits of moral accountability, or, finally, using statistics to reveal patterns of inequity that likely would remain invisible in the absence of probabilities is to invite the court to reconsider its typical modes of reasoning. When a sociologist asks the court to revisit its typical strategies for interpreting human behavior or the contextual circumstances of events,

sociological knowledge is momentarily transformed into an ethical appeal to refashion the limits of liability, accountability, motive, and so on.

John Rawls might argue that sociological knowledge pushes justice in the direction of greater fairness, if to be fair necessarily entails treating all sides alike (1971). If justice ultimately is based on impartial judgments of the "facts" of a case, then what "facts" get introduced is itself a moral deliberation on the limits of fairness. Limiting the "facts" of a case to an act, to its physical and, perhaps, psychological representations, is likely to make it easier to reach a verdict. Introducing sociological knowledge in a court of law, however, is likely to increase the range of plausible explanations and perspectives, expanding the opportunity for more fairness while making it more difficult to reach a decision. It is the capacity of sociological knowledge to frustrate the court's traditionally less complicated modes of moral reasoning that prompted a judge to remark during a television interview regarding the O. J. Simpson murder trial, "We can't be social scientists and get our work done."

If sociological knowledge stretches the limits of fairness by encouraging the courts to mull over elaborately interconnected and abstract "facts," it is worth considering how courts should address the problem of priority in determining what is fair. After all, not all "facts" are equal. To know that a defendant was battered as a child and as an adult abused drugs after several failed attempts to find work is plausibly of less importance than the fact that he murdered his wife, but "knowing" the defendant in this more complicated fashion may save his life, an accomplishment some people would view as less than just. Thus, what weight should courts give to sociological observations and conclusions? Society will ask and answer this question in the years to come. We only can observe that, at this juncture in time, sociological knowledge is an increasing part of the court's deliberations.

REFERENCES

Berger, P. L. 1963. *Invitation to Sociology*. New York: Doubleday.

Collins, R. 1975. *Conflict Sociology*. New York: Academic Press.

Crocker, P. L. 1985. The Meaning of Equality for Battered Women Who Kill Men in Self-Defense. *Harvard Women's Law Review*, *8*, 121–153.

Federal Rules of Evidence for United States Courts and Magistrates. (1989) St. Paul, MN: West.

Feyerband, P. 1975. *Against Method*. London: NLB Press.

Gould, S. J. 1977. Eternal Metaphors of Paleontology. In A. Hallam (Ed.), *Patterns of Evolution as Illustrated by the Fossil Record* (pp. 1–26). Amsterdam: Elsevier.

Gouldner, A. W. 1970. *The Coming Crisis in Western Sociology*. New York: Basic Books.

Jasanoff, S. 1989. Science on the Witness Stand. *Issues in Science and Technology*, *6*(1), 80–87.

Lyman, S. M. 1994. The Bequests of 20th Century Sociology to the 21st Century. *Sociological Spectrum, 15*, 209–225.

Orr, J. A. 1994. Electromagnetic Field Litigation: The Use and Abuse of Scientific Evidence. National Rural Electric Cooperative Association, G&T Legal Seminar, November 10–11.

Riessman, C. K. 1993. *Narrative Analysis*. Newbury Park, CA: Sage.

Rawls, J. 1971. *A Theory of Justice*. Cambridge: Harvard University Press.

West, R. 1985. Jurisprudence As Narrative: An Aesthetic Analysis of Modern Legal Theory. *New York University Law Review, 60*(2), 145–211.

CASES CITED

Daubert v. Merrell Dow Pharmaceutical, 113 S. Ct. 2786 (1993).

Frye v. United States, 293 F.1013,1014 (D.C. Circuit 1923).

This page intentionally left blank