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## OPPOSING EXPERT TESTIMONY

W. Eliassberg

In its sociological aspects this article offers a systematic criticism of many somewhat monomaniac suggestions of lopsided reformers. But besides, it includes systematically developed positive proposals. As to the latter it is important to bear in mind that they refer, not to a millennium, but to these United States in the year 1945.

The author is a well known psychiatrist and expert witness in New York City, who frequently contributes to this *Journal*.—EDITOR.

"Law is through and through a social phenomenon . . . Social facts are not facts taken to mean something done, finished, or over with . . . Their conflicts are proof of a vital genuineness."—John Dewey in *My Philosophy of Law*.<sup>1</sup>

### Definitions

There are, broadly speaking, two groups of definitions of the expert in court. The first relates to his knowledge; the second limits him as one appointed to serve in court for a fee and as one to whom certain procedural rules apply.

A definition of the first type is the following: The expert is one who transmits knowledge, or applies it, or gets at the facts, or unearths them, or demonstrates them, or does any of these things or all of them with skill and thoroughness.<sup>2</sup> A definition in the second type: 'one who legally, on the order of proper judicial authority and under oath, applies his knowledge to unearth and demonstrate facts, and/or to interpret them for the particular purposes of a trial. The latter type of definition prevails in the continental literature. It is in keeping with the fact that the expert, whether or not he is introduced by the parties, may function only after the court appoints him and only after a special expert's oath<sup>3</sup> has been administered to him. The American Law Institute steers the middle course between these two definitions, thus: "*Expert witness defined*: A witness is an expert witness and is qualified to give expert testimony if the judge finds that to perceive, know, or understand the matter concerning which the witness is to testify requires special knowledge, skill, experience, or training, and that the witness has the requisite special knowledge, skill,

<sup>1</sup> Boston, Boston Law Book Co., 1941.

<sup>2</sup> Rogers, *Expert Testimony*, 2nd ed., 1891, calls an expert anyone who is skilled in any art, trade or profession, and possessed of peculiar knowledge concerning the same. We object that this is not the definition of the expert in court, but in any relation in life. Cf. W. Eliassberg, *Psychology and the Administration of the Law*, Berlin, Heymann, 1932, p. 86 ff.

<sup>3</sup> In the continental litigation and trial, as often as not, the experts are chosen by the court. They may not be rejected by the parties, who, however, may question them through the presiding judge. Cf. G. Aschaffenberg, *Synopsis of the Position of the Experts in Court in Western Europe and in the United States*. (Mimeographed lecture at the 99th annual meeting of the American Psychiatric Association, Detroit, 1943.)

experience, or training.”<sup>4</sup> This definition would be complete if the following words were added: “and if the judge, upon such finding, appoints the witness in the way described by the law, to be an expert.”

Let us see some examples of the different functions of the knowledge of an expert witness in court. The judge may want to know what is the present knowledge about schizophrenia in general; or he may ask whether the defendant at the time of the commission of an alleged crime was conscious of acting contrary to the law or whether he was laboring under any and what delusions.<sup>5</sup> When the judge asks such questions his definition of expert witness is evidently of the second type. It is so, likewise, whenever he is seeking general rules and when he wants to know whether individual data are covered by a rule.

Getting at the facts is one of the most important achievements of the expert. Poisons may be imperceptible to the naked eye and the other senses. The expert will prove or exclude their presence. He will have to make the second step also, viz., make the facts demonstrable to the common sense of the lay judge of fact. It is the task of the expert to demonstrate the facts. It is his task also to persuade the jury of the existence of the facts, i.e., to convince them. But it is not his task to impose upon them, to trick them into a certain theory, to marshal all his facts artfully in such a manner as counsel may do.

This difference, slim as it may seem at first blush, has important consequences. If the expert claims to be possessed of facts which he cannot find ways to demonstrate to the common sense of the jury, but which he can only foist or force upon them, he must not be admitted in court. This holds for any expert or occultist who tells the court or implies that he possesses and can demonstrate certain facts only because he has peculiar qualities or powers that laymen do not have: powers or qualities that have been “given” to him. It is not admissible that there is any knowledge that is accessible only to the super-normal or to privileged votaries. If there were such knowledge the trier of fact would either have to believe it blindly or reject it. In other words, the decision of fact would be taken away from the trier of fact and given to the expert.<sup>6</sup>

If the question is raised as to whether a certain deed has been committed by the defendant in a state of temporary confusion, the expert might say that the habitual character of the perpetrator is sufficient to connect him with the act. This would be circumstantial evidence, inasmuch as a certain characterological

<sup>4</sup> Rule 402 of the “Model Code of Evidence,” American Law Institute, 1942.

<sup>5</sup> Question 5 put to the judges in M’Naghten’s case in 1843.

<sup>6</sup> Cf. W. Eliasberg, *Op. cit.*, p. 88; L. L. Rosenthal: *Development of the Use of Expert Testimony. Law and Contemporary Problems*, vol. II, no. 4, 1935, p. 4 ff. s p g-10: The expert and the lay witnesses.

type is brought into close connection with the case at hand. As is well known, the so-called hypothetical question has been developed to offset this danger. Under no circumstances should the expert's demonstration of general facts of knowledge amount to a statement of guilt or include it or, indeed, anticipate any finding of the jury or the court.<sup>7</sup>

Differences among experts may arise at any point in the trial. They may differ in their knowledge, in the way they apply knowledge to the facts, and in their skill and tact in demonstration. Beyond such individual differences, basic arguments may arise among experts, between the expert and the court, or between the expert and opposing counsel, as to what is fact and what is opinion. Rather, in our present procedure, one expert may find himself in no position to answer "yes" or "no" whereas another may. The former may feel that what is hypothetically presented to him as fact is of no factual nature at all. Nor will admission in evidence, or, indeed, the determination of fact by the jury help him in his embarrassment. He still might not feel that he is dealing with a fact. Such a predicament may arise when the plea of insanity has been entered by the defense in mitigation or as reason for postponing trial.<sup>8</sup> "Worse yet, an expert who has not examined or even seen the defendant at all is competent to testify in answer to a hypothetical question . . . Moreover, the witness may not himself believe in the truth of the facts assumed."<sup>9</sup>

In unearthing, and demonstrating what is pertinent to the case at hand, changes of the facts themselves may occur. The embarrassment of the expert witness in such a case is identical with that of scholars who differ in their description and evaluation of historical facts. Both expert witnesses and historians deal with facts that branch out into the social world, in other words with social facts, which as John Dewey said, are activities; meaning that they are of an intrinsically changing nature and by no means wholly static and definitely established.

Very often the sources from which experts derive their knowledge may account for differences. One who deals professionally with numbers is more articulate about statistics,<sup>10</sup> while another, who is used to analysis and to adaptation of theories to individual cases will dwell on the particulars. The former, keeping aloof, as it were, from the individual case, will take no keen interest in the verification of an item at hand.

<sup>7</sup> See part 11.

<sup>8</sup> Cf. H. Weihofen: "An Alternative to the Battle of the Experts." *Law and Contemporary Problems*, Vol. II, No. 4, 1935.

<sup>9</sup> H. Weihofen: *Insanity as a Defense in Criminal Law*. New York, Commonwealth Fund, 1933.

<sup>10</sup> Has the all-embracing business ideology of the twenties, with its glorification of efficiency, mass production, and outputs, made inroads into the "business" of the experts? We submit this as a suitable topic for the studies of an analyst or historian of modern culture.

Consequently, while the former will talk of probabilities, the latter focusses on reasonable truth.

Often, but by no means always, differences between individualist and collectivist experts coincide with the experience of the practitioner or specialist in private practice and that of the head of a large hospital or institute.

There are differences not based on the sources of knowledge or on individual training. Who is the retainer of the expert? In discussing the question, we are dealing only with the situation as it is observed at present. In the second part of this paper we will show that this has been a bone of contention and that many reformers have picked upon this question alone.

As it is now, there are "testifiers" for the plaintiff<sup>11</sup> on the one hand, and experts for the defense on the other. A situation has developed in which the more experienced and respectable doctors take sides with the companies, and the younger, less experienced, ambitious, and often greedy expert, testifies for the complainant. It stands to reason that this situation is not favorable for fact-finding.

The differences mentioned so far have their roots in what precedes the trial; in the expert's techniques, beliefs, mores, customs, folkways, affiliations, etc. But the "jeer, sneer and leer,"<sup>12</sup> a to and fro of attacks and counter-attacks; of fanning and rooting and intrigue among all those before the bar—these are the roots of an atmosphere which is hostile to the ideals which are often found engraved upon the pediments of our court buildings: "The Place of Justice is a Sacred Place."

The relationship between the lay witness and the expert who meet one another for the first time in the courtroom, develops also in that atmosphere. How should the expert approach the testimony of the lay witness? How should he handle the facts which he learns from the testimony? He, of course, need not assume, before the trier of fact has explicitly stated it, that these are legal facts, and that he is not involved in the problem of *prima facie* evidence. The main problems which the expert has to deal with are the following: 1. To evaluate the testimony or to judge the witness in borderline cases, i.e., the child witness, the psychopathic witness, the psychotic, the deaf-mute, the feeble-minded, the senile, the menstruating woman, and other such witnesses. 2. To measure the testimony against established theories. These are the more important cases. Many contemporary theories that confront the court are based on statistics. The expert should examine the contingency of the theory by assuming as long as possible

<sup>11</sup> J. W. Courtney. "Address to the Graduating Class." *Boston Medical and Surgical Journal*, January 3rd, 1916.

<sup>12</sup> P. E. Elliott and R. Spillman. "Medical Testimony in Personal Injury Cases." *Law and Contemporary Problems*, Vol. II, No. 4, 1935.

that the testimony contains something which the witness knows from his own experience, and that such facts cannot be superseded by theoretical and general knowledge. In certain cases, however, theory has priority over what our senses do not reveal to us. For example, we believe the earth is a ball although the eye does not show it so. But upon closer examination it is not perception that the theory contradicts. Theory is based upon perception. What the theory discredits is the primitive disk-theory of the earth which was based on those same perceptions. This then, is what the expert should do. While accepting the witness' perceptions as long as possible, he should see what theory they fit into best.

In a recent case, three witnesses, all of them employees of the same company, told the court that they had seen the claimant walk upstairs and had not seen him come down. So he must have fallen from the roof. The company was not liable to damage for falling from the roof. The claimant maintained he had been bruised when a crate fell from the roof, a height of twenty feet. The expert, by applying a simple physical formula, computed the force which must have been brought to bear upon the skull as that of an eighty-three horsepower automobile travelling at a speed of twenty miles an hour against a stone wall. It is clear that from such an impact the claimant must have sustained severe fractures not only of the skull but also of the limbs, etc. Being grazed by the crate while in a standing position was the much more probable assumption because the forces in that case were much smaller. This is a case where the expert was forced to put aside the witness' testimony. It is at the same time a case in which the witnesses, all employees of the same company, gave only circumstantial evidence.

### *Reforming the Practice of Expert Witnesses*

"What is to be done about it? In no field have there been so many super-serviceable and ill-considered proposals for reform."<sup>13</sup> Though their authors may be subjectively honest, many of the suggestions from both medical men and other experts on the one hand, and lawyers on the other, are thinly-veiled nostrums that can not be intended to serve the truth. Experts who have chafed under the "debunking" attacks of opposing counsel would like to take away from the parties the right to retain experts of their own choice. Procedurally, they would exempt experts from the usual cross-examination. They would allow the parties to address them only through the court.<sup>14</sup> Some have gone to such lengths as to suggest juries of experts for the decision of certain complex facts. They take the question of insanity away from the lay jury and settle it by competent experts and require the lay jury to accept their judgment as final. According to these suggestions, there would be a pre-trial jury, an expert bench, a suggestion which is in opposition to the letter of the constitution.

<sup>13</sup> L. P. Stryker. *Courts and Doctors*. New York, Macmillan, 1939.

<sup>14</sup> P. E. Elliott and R. Spillman, *op. cit.*

This is somewhat reminiscent of the suggestions that have been developed in the last century for the reform of the industrial society and the healing of the festering wounds of the class struggle. Each reformer thought that his suggestion was a panacea.<sup>15</sup>

Each particular reform presupposes for its success a degree of authority, interest, enthusiasm and devotion to the public welfare, which are, however, less determined by character and other purely psychological factors than by the social situation. The basic concepts for understanding human behavior in civilized life are social role, motivation and attitude, much more than character, individual psychological differences, heredity, biopsychological determinants, etc.

The concept of the rôle is taken from the play. An actor must have an understanding of his rôle; he must embody it, and act it out. It is given him more or less ready-made as contained in the play book. It is up to him to transfer himself and to grow into it. In fact his success will depend on how well he can do that. He may specialize in certain types of rôles, which means that other rôles will no longer be acceptable to him. Perfect acting is built on the assumption that several rôles will cooperate. There is no real play and no rôle where one star outshines all the other actors. If there is no play, the chances are that the audience will take it amiss. It will show in the box office returns, and after a week it will be a flop. Thus it can be demonstrated to all those who should have cooperated and did not that it is their own interest they have harmed. In certain crises, enthusiasm and religious devotion will keep the cast together, but on the whole these are rare exceptions and much more frequently egotistic interests will have to be appealed to.

The perfect play is an interplay. To understand this the actor will be helped only very little by general ethics. Altruism does not make for good acting. On the whole, the actor who plays noble characters will not become a noble character in private life, nor should you identify your gentle neighbor with the villain he is used to playing on the stage. He himself takes it for granted that all villainous tendencies are removed from his personality together with the make-up. The actor is a peaceful citizen, who after a more or less thorough preparatory training, wants to make a living by acting.

Experts also are people, who after a certain training and after having been invested with degrees, diplomas, or any other proof of their professional experience, want to be called upon to play the rôle of men in the know. They are good or bad actors according to their talent, training, character, understanding of the rôle and the situation, their ability to cooperate, etc.

<sup>15</sup> Cf. W. Eliasberg, "The Challenge of the Social Neuroses." *J. Nerv. and Men. Dis.*, 1941, 94, 676-87.

Reforming the actor and the expert, if need be, cannot be done as, under certain antiquated theories, we have tried to proceed with the criminal. Jailing a criminal and leaving it to him to make the best of it, is a crude but definite change in the situation. Delving into his character and his neurosis is another way. These two things have been done so far with not much interplay. The reforms aimed at the experts have pregnantly resembled those of the criminalists.

Men are all wicked; experts are men. Ergo, only much moralizing will help — is one type of a crude social-psychological syllogism.

Call them in the right way, don't ask them silly hypothetical questions; strengthen their authority, and they will not only behave, but serve the purposes of justice to the best of their knowledge — this is another apriorism. What the reforms should be *at present*, can be developed only after a thorough sociological and social-psychological, and legal analysis of the present situation.

#### *Panoramic View*

The expert, then, called in by a party has to promote the purposes of justice by offering his knowledge, that is based on facts, and should lead to other facts. He intends to make a living for himself in this and related ways. Litigation and trial in our system are based on several principles which it is not always easy to bring into harmony. There is the principle of material scientific truth which, however, is limited very definitely by the principle of the disposition of the parties and the law of evidence. The expert may not claim the absolute validity of scientific truth and under our procedural laws nobody holds a position above the parties. While the authoritative expert will be able to pass cross examination, such examination cannot establish beyond reasonable doubt, the facts on which the expert's opinion itself is based. To get at the real background of the expert's answers, the analysis as outlined above is necessary. It is often surprising to see how such an analysis, performed by a trained mind, changes the apparent contradictions into a panoramic view. One might suggest a reform of the law that requires the judge to charge the jury. Such charges should contain an analysis of the expert's opinions. The jurors should be told that the finding of facts, if based on experts' opinions, must proceed by combining different aspects of the testimony. Such an analysis must be strictly on the analytical level and should avoid the mere grading of opinions. However, the fact that there are differences between the experts can not and should not be denied. Who is to judge such differences? In the continental procedure, an attempt has been made to solve this problem by giving an official position to certain experts, i.e., by appointing them irrevoc-



cably, as federal judges are appointed in this country, and by excluding the appointment by the parties of the expert in the case at hand. The experiences with the so-called *Gerichtsaerzte* were not encouraging. As office-holders for life they felt no stimulus to keep abreast of scientific development. There was no competition between the *Gerichtsaerzte* and the free lance experts of the parties, but the chances were that the latter, called in on account of their well-earned reputation, were by far more serviceable in the pursuit of the truth. In certain cases, in which particular equipment is necessary which is not easily accessible to private persons, e.g., in coroners' inquests and post mortem autopsy, the examiner may have to be a court's physician.<sup>16</sup> Upon the former point every one who has witnessed the continental development will agree.<sup>17</sup> Does this mean that the Anglo-Saxon system is unimpeachable? Of course not. But it may prove that a sociologically wrong reform does not hold out hope of real improvement.

The competitive system, which is the life-blood of democracy, must be preserved in our field. Democratic competition must be regulated, however. Democratically regulated competition is in keeping with democratically regulated free initiative<sup>18</sup>; with increasingly limited freedom of choice; limits of property rights; in short, with the multiplied encroachments on what had been the sphere of liberty in the older régime.

The so-called liberal professions have been regulated by autonomous professional organizations since antiquity.<sup>19</sup> The interference from the larger political organizations, the police or the state, has continually increased with both the principles

<sup>16</sup> Max Hirschberg, in his paper "Wrongful Convictions", *Rocky Mountain Law Review*, 1940, 13, 20-47, has listed cases where the "court's physician" had grossly erred in overlooking findings and had thus contributed to verdicts of murder in the first degree, where on appeal only manslaughter through negligence was found.

<sup>17</sup> In addition to the above-mentioned objections, one might think of a danger that a new, irremovable, and fatefully backward bureaucracy was created, and thus in a new field anti-democratic forces were strengthened. It is well known that in the interval period the judicial bureaucracy opposed the German Republic. Cf. H. Kelsen, *Vom Wesen und Wert der Demokratie*, Tübingen, 1929, 2nd ed.

<sup>18</sup> C. E. Merriam. *The New Democracy and the New Despotism*, N. Y., McGraw-Hill, 1939.

<sup>19</sup> Cf. T. Loewenfeld. *Inaestimabilität und Honorierung der artes liberales nach Römischen Recht. Festgabe der München Juristenfacultät zum Doctorjubiläum des Herrn Geheimen rats und Professors, Dr. J. J. W. v. Planck*, München, 1887; a classical investigation based on profound knowledge which has greatly influenced the development of the theory of the liberal professions. Cf. also, S. Feuchtwanger, *Die Freien Berufe, in besondern: die Anwaltschaft*. München, Duncker u. Humblot, 1922; Esther L. Brown, *Lawyers and the Promotion of Justice*, New York, Russell Sage Foundation, 1938; W. Eliasberg, *Textbook of Propaganda*, Brno, Rohrer, 1936, ch. 15; the same author, *Physician and Propaganda*, Vienna, Saturn Verlag, 1936; H. Laski, *The Limitations of the Expert*, London, Fabian Tracts, No. 235, 1931.

It is the last two points, outlined above, in which the member of the profession who is an incumbent for life is obviously less interested.

of democracy and of the omnipotent state.<sup>20</sup> In the democracies, however, other factors than the clamping down of state rule on the professional organizations have proven valuable. In every organization there is a tendency to over-do the in-group ties and to overlook the interests of the consumers of the services. In a democracy, however, this tendency is likely to be corrected in the long run, while in a totalitarian form of professional organization the redressing forces, both for lack of information and a fulcrum cannot be brought to bear upon the developing deformity. In a democracy, the consumers of said services may organize and public opinion may become articulate. Commissions are being set up, hearings take place, investigations are being carried through, handouts appear in the press, the thing gets on the air, legislation is called for or passed — all of which the organizations are loathe to see happen to them. This process may take time, but it invariably works so long as the relationships between profession and people, are kept alive.

It is such a basis which is needed in the reform of the expert's opinions. The hand of the autonomous professional organizations should be strengthened, but at the same time the "people at large" should hear much more about the professional life, and whenever called for, about committee hearings. The political parties should not stop their occasional enquiries into professional organizations and their supervision of the experts. In a country in which the law is essentially the proclaimed and articulate will of the people, the procedural rules should be drawn in the light of the democratic atmosphere.

#### *The Fees*

The viewpoint of sociology becomes understandable against the background of the particular civilization.<sup>21</sup> Let us apply it to the problem of the fees.<sup>22</sup> The rule developed in antiquity

<sup>20</sup> The National Socialist and the Fascist states have been aware, from the beginning, of the importance of professional organizations for their purposes. Certain members were declared unworthy of belonging, on account of race, liberal ideas, fight against National Socialism, etc.; they were ejected. The right to elect the president and other officers, or to set up any independent professional policies, were taken away. Every professional organization got its *fuehrer* who according to the leadership principle, nominated the officers. To the membership was left only the right to pay the dues and to take cognizance of the decrees of the *fuehrer*. A large part of the post-graduate training was taken away for indoctrination in the new official teachings on race, etc. This, together with the new policies of the iron fist, made the scientific search for truth largely unnecessary and impossible, taking away the firm ground from under the feet of the experts.

<sup>21</sup> Much more background delving is needed to understand a Sophoclean play than a modern one, which proves that our own background is present in our minds, not that we need no background.

<sup>22</sup> Cf. the publications quoted in footnote 4 to p. 15, appearing on p. 16. Cf. also H. L. Bomar, Jr., *The Compensation of Expert Witnesses. Law and Contemporary Problems*, Vol. II, No. 4, 1935, p. 510. Cf. Also, J. Jastrow, *Freie Berufe und Gewerbesteuer (The Liberal Professions and Trade Taxes)* Munich, Duncker und Humblot, 1930.

and taken up by the Church, that services and achievements of a spiritual order should not be paid for but that what is necessary for a decent life must be tendered by society to its servants, is not entirely eliminated in our own time. That much is clear! It has not proven feasible to keep the professional groups aloof from the mechanisms and motives of industrial, democratic, competitive civilization. Against this background, the rôles or rules of the game have been written. The free lance professional may sell his services to the highest bidder — if he can get high bids. Experience shows that less than one per thousand members of the professions are interested in keeping up the absolute freedom of bargaining with the individual client. There is on the other hand, the fee schedule, which is the spine of every type of socialization of professional services. No professional man and no client has ever been fully satisfied with the principle of the fee schedule which consists in computing conventional measures such as pieces of time or space, or 'cuts' of performance.<sup>23</sup> The professional man may feel that in that one moment when the diagnosis or basic idea dawns on him, he does more for the client than the employee who spends eight hours and gets paid for eight hours. The professional man knows that such achievements in seconds are possible only because of his years of patient work, training, and abnegation. The client knows all this, too. In other words, there is a factor of accountability introduced into the professions which is strange in itself to the typical and best the professions have to offer. The patient and the client feel that theirs is an individual case, no matter how much it may resemble the neighbor's predicament. And with their feeling there dovetails the conviction in all service-rendering and counselling professions that there won't be repeats no matter how often you spin it. How then, could this be paid for according to fee schedules?

There is, thirdly a middle way, which is the legal terminology is expressed in such words as decent fee, reasonable fee, etc. The viewpoints of decency and reasonableness refer not only to the amounts paid, but also the ways of reaching the consumers. Certain actions are illicit by law, among them advertising in the business way and fee splitting. This is not ridiculous, prejudicial, absurd, and antiquated pettifoggery. These forms are preserved in the interest of the clients, who, it is felt, see the professional man not only on account of his skill but also because they want to confide in him. Such terms as de-

<sup>23</sup> In a fee schedule edited in 1933 for the advertising men in Germany general functions, like drawing up of general plans, etc., were rated higher than special items. In other words, the position of the family doctor in advertising was strengthened. The older professions should not be loath to learn from developments in the younger ones.

scribed leave it to the discretionary powers what in a certain civilization at a certain time is reasonable and decent, depending on how these services are estimated, how much they are in demand, etc.<sup>24</sup> This holds true for the expert, too. The law does not directly prevent him from selling a specific skill for the highest price to the party, although he is expected not to sell out to the highest bidder. Society, in the interest of justice may demand that the extraordinarily skillful expert be available at a reasonable fee, because it is generally supposed that the expert primarily aids the process of justice by giving his opinion,<sup>25</sup> and witnesses, expert or lay, are duty-bound to such help. It is along the same line that one argues that in a criminal trial the defendant may be in no position to pay the fees to which an extraordinarily skilled expert is entitled, but obviously it is in the interest of justice that the financial position of the defendant should make no difference. Where the gist of the reform runs toward making the expert the companion of court and justice, any private compensation is, of course, ruled out. But this solution, much as it seems to appeal at present to the reformers, leads in its consequences to infringements upon the party principle in trial and such suggestions should be thoroughly "cross examined."

### *Suggestions*

Looking back to the century-old discussion of the expert problem, to sad experiences and to hopeful, although often somewhat convulsive, proposals one may sum up: Suggestions for the improvement of the situation should follow the advice that all legislators must take: that the reforms must grow from the soil of present experiences and must be devised to meet the present need or that of the immediate future. In other words, there can be no absolute or metaphysical norm and law.

At present, the rules, procedural or otherwise, most urgently needed, are the following:

#### REFERRING TO THE EXPERT:

The right of the parties to present experts must be preserved. The court should prepare lists from which the parties may or may not choose their experts. The fact that the expert was or was not so chosen should be mentioned either at the beginning of the trial or when the jury is charged.

The scientific and professional organizations should offer comprehensive courses on scientific and legal aspects of rendering expert opinions.

The expert's oath should be administered solemnly. He should be appointed by the court for the case at hand. Counsel should be held in contempt if he willfully attacks the honor or selfinterest of the expert.

<sup>24</sup> The present author learned in Moscow, in 1931, that while the monthly salary of a doctor in a state dispensary was 150 rubles, employees earning about the same amount were willing to spend as much as fifty rubles for one visit with an old-time doctor to get a "real diagnosis and treatment."

<sup>25</sup> H. L. Bomar, Jr. *l.c.* p. 515.

The expert should be allowed to depose, i.e., to read or to narrate his opinion, which should be prepared in writing if possible. On cross-examination or re-direct, the expert may be asked hypothetical questions which he may answer either in essay or yes-no, true-false form.

The expert should be present when the witnesses are examined.

Counsel should be allowed to ask for the expert's opinion on the witness' testimony. A discussion of the expert's opinion in connection with the testimony of lay witnesses should be possible. On the whole we are now ready to liberalize the common law rules of evidence because we are ready to forget the older fears of the incompetence of the layman juror and to hold a new belief in the common man.<sup>26</sup>

The regulation of the expert's fees should be based on the idea that the best experts should be available even to the poorest defendant. In other words, there should be state and/or federal funds for this purpose.

#### REFERRING TO THE COURT AND THE JURORS:

The court and the jurors should rid themselves of the idea that there is only one indivisible truth and that at best one, and at worst, none of the experts, tells the truth. The task of the court and the jurors is to examine the expert's opinion logically, psychologically, and sociologically, and to combine the different aspects, to find a reasonable truth.

The call for reforms will not stop, but what we need today is a call for cross examination of the reformists' suggestions. That sociology, together with the legal and other professional viewpoints is called upon to help in such examination, has been shown in this paper.

<sup>26</sup> C. J. Friederich. *The New Belief in the Common Man*. Boston, Little, Brown, 1942.