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1993

### Experts, Stories, and Information

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#### Recommended Citation

Lempert, Richard O. "Experts, Stories, and Information." *Northwestern University Law Review* 87 (1993): 1169-1181.

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## EXPERTS, STORIES, AND INFORMATION

*Richard Lempert\**

### I. EDUCATION AND DEFERENCE: AN UNHELPFUL DICHOTOMY

In the infancy of the jury trial, there were no witnesses. The jury was self-informing. Members of the jury were drawn from the community. It was expected that they would know, either firsthand or on the basis of what they had heard, the true facts of any disputed incident, and they were gathered together to say what those facts were. Ronald Allen and Joseph Miller, in their insightful paper, see the ideal of the self-informing jury as very much alive today.<sup>1</sup> Allen and Miller tell us that jurors ideally should experience firsthand the factual information needed to arrive at rational verdicts. In their ideal world, jurors compelled to rely on others' accounts would enter the heads of witnesses to distinguish what was actually observed from what was added, lost, or distorted in the recounting process. According to this model, witnesses should educate jurors on relevant facts within their knowledge, and jurors should assimilate the facts presented by the various witnesses to determine both what happened and the implications of those events given the applicable law.

This model works tolerably well, according to Allen and Miller, when ordinary people—that is, people like the jurors—are testifying to facts that ordinary people can easily understand. But it potentially breaks down when jurors lack the knowledge and experience that a witness has brought to his observations. In these circumstances, jurors often will not know what to make of the witness's observations, creating a danger that the jury will simply defer to the witness and accept whatever conclusion the witness has reached. This danger is exacerbated, the more conclusory the witness's testimony, which is to say the less its factual and theoretical underpinnings are revealed. "Danger" is a loaded word, but it is appropriate here because the common law's norm, according to Allen and Miller, is that jurors should be educated by witnesses; they should not defer to them. Education and deference, Allen and Miller tell us, "are the choices that are available" to jurors presented with new

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<sup>1</sup> Ronald J. Allen & Joseph S. Miller, *The Common Law Theory of Experts: Deference or Education?*, 87 NW. U. L. REV. 1131 (1993).

knowledge.<sup>2</sup> These choices constitute a dichotomy that is central to Allen and Miller's argument, a dichotomy they use creatively to illuminate various academic debates concerning expert testimony.

My views are different. Treating education and deference as a dichotomy highlights the importance of attending to the implications of different policies for informing juries, but it fails as an analytic paradigm. The common law's ideal trial (accepting Allen and Miller's characterization) does not and cannot exist. Juries often defer to the opinions and conclusions of witnesses, both expert and lay, even when witness testimony educates them in basic facts. Conversely, juries may learn little about the factual underpinnings of witnesses' conclusions yet still not defer to them.

Consider a simple larceny trial. The state's first witness testifies that she saw *A*, standing at a 7-11 check out counter, put his hat on just as the clerk opened the cash drawer. Then she heard a loud crash, saw the clerk leave her position to investigate, and saw *A* reach into the cash drawer, take what he could gather, and run. The state's second witness says that he saw *B* intentionally grab a can from the middle of a stack causing all the cans above it to fall. The state's third witness, a police expert, describes the crime of till tapping. He testifies that the behavior reported by the two witnesses constitutes a classic *modus operandi*. *A* escaped, and the jury must decide whether *B* is guilty of larceny.

The jury is both educated by and asked to defer to each of the witnesses. The two lay witnesses tell the jury what occurred as each saw it. In this sense, the jury has been educated in the facts of the case. Yet the jury cannot know, apart from the witnesses' assertions, what they saw. The state is asking the jurors to defer to the witnesses' portraits of what occurred. It is true that the portrait may be challenged—one witness may be shown to be nearly blind and the other to be *B*'s lifelong enemy—but the fact that the jury can choose not to defer and has been given reasons not to defer does not change the fact that the prosecutor is nevertheless seeking deference.

This situation does not disturb us because we believe that jurors are familiar with the implications of the facts that cut for and against deference to the witnesses' stories. Indeed, what I describe as a deference process, Allen and Miller would, no doubt, call education. The essence of the process is providing the jurors with facts that allow them to apply their own reason and experience to the questions they confront—in this case, whether the state's witnesses are telling the truth. But the credibility-related facts the jurors evaluate come from other witnesses to whom the jurors are in turn asked to defer.

The chain appears potentially infinite, but it is stopped short by convention. The convention is that each juror's reason and experience al-

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<sup>2</sup> *Id.* at 1146-47.

lows her to determine on the basis of demeanor, consistency, and other characteristics of a witness's testimony whether that witness is telling the truth. Consequently, at some point, almost always a very early point, one need not present the jury with facts extrinsic to a witness's testimony to ensure that a juror is not simply deferring to what she has been told but is actively deciding whether what she has been told is worthy of deference.

Yet a convention that assumes that a juror's acceptance of a witness's story is based on reason and experience rather than pure deference poses problems. First, the convention may not be behaviorally accurate. A juror may simply and uncritically defer to a witness. Second, the convention assumes that reason and experience provide a rational basis for credibility judgments when, in fact, they may not. Aspects of demeanor, such as the confidence of an eyewitness,<sup>3</sup> may be a poor guide to credibility as may other heuristics that humans apply in assessing evidence.<sup>4</sup>

Thus, even with ordinary witnesses the education/deference distinction breaks down. Jurors are always asked to defer to witnesses. What varies is the amount of information on which jurors base deference decisions and the degree to which deference resolves the jury's verdict-related tasks. Expert testimony is of special concern because deferring to an expert's conclusions often substitutes the expert's judgment for a large part of what the law expects the jury to discern, as when a jury assessing an insanity defense accepts a psychiatrist's conclusion that the defendant did not know right from wrong. But lay witnesses pose the same danger, as when a victim's story is the only evidence of a crime.

Now consider the expert in our example, the police officer who testifies to the *modus operandi* of till tappers. His testimony both educates and seeks deference. Jurors are educated in the sense that they have learned a new way of interpreting the described behavior. Yet, the very goal of educating the jurors on the *modus operandi* of till tappers is to encourage deference to the expert's conclusion linking *B* with *A*. It is true, as with the lay witnesses, that the parties may dispute whether deference to the conclusion is deserved. But, as with the lay witnesses, the fact that deference is not automatic does not mean that it does not occur.

The important distinction between the lay and expert witness in this example is that the jurors who defer to the lay witnesses still must rely on their common sense and experience to determine the legal implications of what they have learned. Indeed, the lay witnesses would not be allowed to share with the jurors their belief that *B* had colluded with *A*. But deference to the officer's conclusions virtually determines the jurors' verdict.

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<sup>3</sup> See ELIZABETH F. LOFTUS & JAMES M. DOYLE, EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL § 1.02, § 1.04 (1987).

<sup>4</sup> RICHARD NISBETT & LEE ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT (1980).

One reason expert testimony poses serious problems for both the legal system and academic theorists is that the law assimilates different kinds of testimony under the same general rules. Consider a scientist who compares DNA found in semen taken from a rape victim with the DNA of a suspect. She testifies that the DNA taken from the two sources match and that there is a one in 50,000 chance that a match would occur with a randomly chosen man. Compare this testimony with the testimony of the till tapping expert and the lay witnesses in the previous example, taking the perspective of Allen and Miller's ideally situated juror who can enter the head of each testifying witness and make her own assessment of the perceptions that animate the witness's testimony.

We can imagine how this juror with privileged access to witness perceptions would react as each witness testified. When a lay witness spoke the juror might respond, "Yes, that's how I would interpret what happened," or perhaps, "No, *B* wasn't trying to remove the can; it was an accident." When the DNA expert testified, the juror would be more likely to say, "So that's what this all means," for a typical juror with privileged access to the expert's perception of, for example, the configuration of DNA on an autorad or the distribution of allele lengths in a reference data base would not know what to make of the observations she and the expert shared.

The privileged juror would find the perceptions the police expert recalled while testifying more like those recalled by the lay witness than like those recalled by the DNA expert. The data the officer would remember while testifying—other examples of how till tappers operate—would be more understandable than the data the DNA expert draws on both because of its greater familiarity and because of its fit with interpretive methodologies the juror is accustomed to using. Thus the juror might endorse the officer's conclusion, thinking, "The pattern of cooperation is so like other cases of known till tapping that a conspiracy is clear," or the juror might interpret the officer's data differently, concluding, "There is no other case in which till tappers cooperated in precisely this way; it is too much of a leap from other forms of distracting clerks to say that *B*'s behavior fits a classic *modus operandi*."

The testimony of the lay witnesses and the police expert resemble each other more than they resemble the DNA expert's testimony<sup>5</sup> because they are based on underlying data—perceptions the witness called

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<sup>5</sup> Different similarities emerge from other perspectives. The DNA expert's testimony is arguably like the lay witnesses' testimony in that each reports facts for the jury to consider; in contrast, the police officer tells the jury how to work with facts that other witnesses have presented. (Note, however, that to the extent the DNA expert bases her testimony on the hearsay of others, she too is interpreting for the jury the implications of what others have said.) From a third perspective, the testimony of the two experts is similar because each is based on judgments that ordinary people could not make, even though exposed to the same case facts as the experts. It is this similarity that the law recognizes in Rule 702 which specifies the bases of expertise.

to mind in determining what occurred—that an ordinary juror could interpret for herself if she could only access the data as the witness can.<sup>6</sup> From this it would appear that if the law were concerned with educating jurors so that they could more fully judge events for themselves, it would require the lay witnesses and the police expert to present the fundamental perceptions that underlie their testimony while it would allow the DNA expert to simply state the fact and probability of a match. We often see just the opposite.

DNA experts typically testify to such things as how DNA is extracted from semen, how it is run on a gel, the appearance of an autorad, and the way in which a reference data base was constructed. Lay witnesses like those in the example, however, are not required to break down their global perceptions into constituent sense data. Similarly, the police officer on direct examination would not be required to rehearse for the jury the details of other till tapping incidents with which he was familiar.

Does the law have things backward? I think not. Instead, the law adapts to how people ordinarily think. Lay witnesses ordinarily report behavior based on global assessments or *gestalts*. Those who link behavior to a *modus operandi* make a similar global assessment in matching a particular instance of behavior to a body of varied and overlapping information of which they are aware. DNA experts, on the other hand, have an expertise that has been institutionalized, for the acceptability of their testimony turns less on their own expertise than it does on the fact that an accepted protocol for determining DNA matches has been followed. In telling jurors of that protocol and what each step accomplishes, the expert is justifying her conclusion in much the same way the police officer justifies his conclusion by describing his years of experience.

The DNA expert's testimony will leave jurors feeling as if they have been educated in the technology of DNA identification even if the jurors' new found knowledge provides no basis for second-guessing the expert's judgment. This inability to make well-grounded second guesses is typical of situations involving technical scientific evidence.<sup>7</sup>

The jurors who heard the police officer will also feel educated about

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<sup>6</sup> One can argue that a more intelligent commentary would be possible if a juror in a DNA expert's head could review everything the DNA expert had learned about DNA analysis, and that from one perspective the officer's store of knowledge about till tapping crimes could be analogized to the DNA expert's store of knowledge about DNA analysis. However, the officer's knowledge base is easily understood by laypersons in a way that the DNA expert's is not. Even if this is actually a difference in degree, practically, it is so large as to amount to a difference in kind. But I think it is in fact a difference in kind. Consider by way of analogy a complicated mathematics problem which is given to two students along with detailed information about how to solve it. Even though they have identical information about how to solve the problem and similar training in mathematics, one may find the answer while the other remains mystified.

<sup>7</sup> In one special case, however, detailed expert testimony will provide such a basis: when the jury learns that the expert's conclusions assume certain facts, and the jury is in a good position to determine if the assumed facts exist.

an unfamiliar *modus operandi*, even though his testimony is largely conclusory and consequently demands deference. The lack of detailed knowledge about the information underlying the officer's opinion is not troubling for, as with the lay witnesses, the possibility that the officer's conclusions misinterpret more basic data may be raised on cross-examination. The officer might be asked, for example, if he knew of other cases in which the confederate of a till tapper created a disturbance by pulling down a display of cans, just as the lay witness could be asked whether *B* looked down the aisle toward the cash register before he reached for the can.

The problems that expert testimony pose for courts are most acute when opposing experts give conflicting testimony. At the outset the naive observer is shocked, for expertise is thought to allow individuals to perceive with special reliability what the nonexpert cannot. When witnesses claiming the same expertise disagree, the frailness of each expert's claim to special testimonial status is evident, as is the jury's resulting problem: if two experts cannot agree, how can a jury choose between them? There is no easy answer to this question. In some situations, jurors may be helpless in the face of scientific disagreement. In others, a comparison of credentials, ordinary credibility cues, testimonial coherence, the jurors' knowledge, or other facts in the case may provide the jurors with a rational basis on which to resolve a conflict.

Given the impossibility of educating most jurors to the level of most experts, the practical question is less likely to be whether jurors should be educated or expected to defer than it is to be how much information should jurors be given before deference is sought. A party's answer to this question—and it is the parties who in practice answer it—will turn not on an abstract desire to educate the jury but on a judgment about the amount and kind of information that is most likely to lead the jury to side with the expert. The issue then is information, not education or deference. Postulating a dichotomy misleads. The choices Allen and Miller point to are choices between giving jurors more or less information. More information may suggest educated decisionmaking while less information may suggest deference, but there is no quantum of information that determines education or deference, and giving jurors more information may not diminish or may even enhance the probability of uncritical deference to a witness's conclusion.<sup>8</sup>

It is not surprising that although Allen and Miller properly force their readers to confront directly the implications of various policy arguments for information given to the jury and for visions of the jury's capacity to use information, their discussion packs little normative punch. The education/deference dichotomy has little bite because it does not

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<sup>8</sup> Thus Bell and Loftus report that the more minor details witnesses include in their testimony, the more persuasive witnesses tend to be. Brad E. Bell & Elizabeth F. Loftus, *Trivial Persuasion in the Courtroom: The Power of (a few) Minor Details*, 56 J. PERS. & SOC. PSYCHOL. 669 (1989).

capture what is at stake in informing the jury. But can we do better? If the distinction between education and deference is of little help in deciding how much supporting information expert witnesses should provide before offering conclusions, is there some other perspective that can aid in confronting this normative question? I believe there is.

## II. STORIES AND EXPERTS

This perspective is the "story model" perspective developed by the psychologists Nancy Pennington and Reid Hastie.<sup>9</sup> Pennington and Hastie argue that the typical trial is a contest between the adequacy of competing stories to explain the evidence presented, and that the party that offers the jury facts that can be most easily assimilated into a preferred story will prevail. Although Pennington and Hastie do not consider the implications of their theory for expert testimony, I think it can illuminate complexities in this area.

Thinking of the trial as a story told through witnesses highlights different functions that expert testimony can play. First, expert testimony can tell virtually the entire story, or, at least, the only part of the story that is in dispute. In a rape case, for example, the only contested portion of the story may be the defendant's involvement, which today will often be decided by DNA evidence. It is important that the jury receive considerable information about the DNA test, not to second-guess an expert's judgment, but so that the jury (and the defendant) can understand why the story of the trial has been and may properly be reduced to a DNA test. Absent such information, the jury may be unwilling to convict, or it may appear that the expert's considered judgment and not the jury's is convicting the defendant.<sup>10</sup>

A second use of expert testimony is to fill in gaps in stories. Unlike the first situation in which the expert testimony determines the story, when expert testimony fills story gaps, the story may carry the expert testimony along with it. Consider for example a suit brought against the Beatrice Company for illnesses attributed by plaintiffs to Beatrice's contamination of a town's wells.<sup>11</sup> The Beatrice Company was likely to have contaminated ground water through its toxic waste disposal practices;

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<sup>9</sup> See Nancy Pennington & Reid Hastie, *Explaining the Evidence: Tests of the Story Model for Juror Decision Making*, 62 J. PERS. & SOC. PSYCHOL. 189 (1992); Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519 (1991); Nancy Pennington & Reid Hastie, *Explanation-Based Decision Making: Effects of Memory Structure on Judgment*, 14 J. EXPERIMENTAL PSYCHOL. LEARNING, MEMORY & COGNITION 521 (1988); see also Richard Lempert, *Telling Tales in Court: Trial Procedure and the Story Model*, 13 CARDOZO L. REV. 559 (1991).

<sup>10</sup> Also, as I pointed out in note 7, *supra*, there may be occasions where the jury will be in a good position to find facts that resolve a conflict between experts. This would be impossible if one DNA expert simply claimed there was a match between the evidence DNA and the defendant's DNA while the other expert did no more than deny that claim.

<sup>11</sup> The Beatrice case along with a companion case involving W.R. Grace & Co. is discussed



the town's wells were contaminated by the kinds of chemicals that Beatrice had allegedly dumped, and the plaintiffs had diseases that might arguably be attributed to toxic contamination of the kind for which Beatrice was responsible. But these facts are not enough for a plaintiff victory; a winning story requires more of a connection. The plaintiffs must be correct in their assertion that Beatrice's effluents polluted their town's wells. The plaintiffs' problem was that Beatrice's alleged contamination of ground water occurred at some distance from the wells and on the other side of a river. To fill in the causation gap, the plaintiffs offered hydrogeological experts who testified that contaminants from the Beatrice property could migrate to the town's wells. The defendants offered equally qualified experts who said that migration was impossible given the position of the river.

The conflicting testimony was sufficiently technical and the issue so obviously subject to legitimate dispute that neither a jury nor a judge could have understood the science well enough to resolve the disagreement. Indeed, the conflicting testimony appeared to reflect unresolved disputes within the science of hydrology. Nevertheless, the plaintiffs' expert evidence was arguably sufficient to prevail. This is not because taken alone it is more plausible than the defendant's expert evidence, but because it becomes more plausible when considered along with substantial evidence that the defendant dumped toxic chemicals, the proven contamination of the town's wells, and the defendant's inability to offer a convincing alternative account of how the wells might have become contaminated.<sup>12</sup> In this sense, a story based largely on other case facts lends credence to an expert's claims.

When expert testimony is used to fill gaps in a larger story that one side must tell to prevail, extensive information about the bases of expert testimony may have little value, particularly in a case like the Beatrice suit in which the jury and judge have difficulty in comprehending what they are told. What is important is that a story that appears plausible based on other evidence is not rendered unlikely by the scientific untenability of a particular link. If reputable scientists drawing on a plausible theory are willing to testify that the posited link is tenable, this may be all that the legal system can or should require. If a link is scientifically untenable, a story that depends on it cannot be maintained.

A third use of expert testimony is to provide the jury with a story plot. This is the function served by the testimony of the police officer in

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without a full case name or citation in Mitchell Pacelle, *Contaminated Verdict*, AM. LAW., Dec. 1986, at 75, 75-80.

<sup>12</sup> The defense's attribution of the pollution to the river was apparently not credited by the jury. The jury nevertheless found for Beatrice because the judge in instructing the jury ruled that the company could not be held responsible for dumping wastes unless this occurred after a certain date, and the plaintiff's strongest evidence that Beatrice dumped toxic wastes pertained to times before that date.

the till tapping example. The jury has an array of facts before it, but without expert testimony the jurors will be unaware of one story line that makes sense of the evidence. The expert testimony in this case, unlike that in the DNA example, may be believed without being decisive, for the jury may believe the expert has identified a credible explanatory story yet find another story explaining *B*'s clumsiness even more credible. But the expert's testimony will be necessary for a conviction if without it an alternative exonerative story, like an accident story, will have no competition.

Where expert testimony provides a jury with a story plot, the expert's testimony is likely to synthesize either wide reading in some relevant literature or experience that is difficult to share in detail with a jury. What matters is that the expert is in a position to know a range of alternative stories and that the jurors are able to trust the expert when he characterizes the case facts as consistent with the plot he provides. The first requisite is ordinarily better established through an expert's qualifications than through an attempt to share the data that undergird the expert's opinion. The second requisite calls attention to the possibility that the fit between the case facts and the plot the expert offers to explain them will appear closer than an *ex ante* extrapolation from the expert's store of knowledge would have suggested. The solution, however, is not to require the expert on direct examination to share his *ex ante* knowledge store with the jury. He knows too much for this to be practical. Instead, it is for the judge to ensure that the expert's testimony is not an *ad hoc* formulation designed to incriminate the defendant and for opposing counsel to cross-examine the expert about the degree to which his *ex ante* knowledge supports his suggestion that the case facts can be explained by the story plot he offers.

Just as the jury tries to make sense of the evidence in a case by arriving at a story that best explains it, the jury tries to comprehend each witness's testimony by arriving at a story that best explains the testimony.<sup>13</sup> Where a witness's testimony is plausible and consistent with other evidence in a case, this story is usually a simple one, such as the witness was on the scene, she has no reason to lie, and she is telling us what she saw. Where a witness's testimony is inconsistent with other evidence, the jury's stories are likely to focus on the general trustworthiness, biases, or disabilities of the witness and the other evidence. But sometimes jurors will be unaware of stories that might plausibly explain witness testimony.

A fourth use of expert testimony is thus to provide juries with novel plots that explain not the evidence in the case but the testimony of particular witnesses. An example is the testimony of the eyewitness expert

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<sup>13</sup> This is a proposition that I advance. Pennington and Hastie's work focuses on case structures. They do not discuss witness credibility.

who tells the jury that identifications can sometimes be explained by the normal deficiencies of human information processing and instructs the jury about the scientific status of cues it might use in deciding whether a witness's version of events can be trusted.<sup>14</sup>

If juries evaluate both cases and witnesses by story fitting, then every expert witness will want to embed her conclusion in a story that plausibly explains it. This will often require the expert to inform the jury in some detail about the facts and theory that support her conclusion since a good story to explain an expert's conclusion is one that is consistent, given the facts of the case, with generally accepted theory. Jurors hearing testimony that explains the theory and highlights the facts justifying an expert's conclusion will have been educated in the sense that they should have a fuller understanding of the matter before them. Nevertheless, accepting the expert's opinion will be more an act of deference than an educated judgment. It could hardly be otherwise. The jurors cannot achieve an expert's understanding, and however much information the expert provides, her testimony is designed to motivate the jury to accept her judgment. There is nothing wrong with this. Indeed, a good reason to allow jurors to be informed about the facts and theory underlying an expert's judgment is to give jurors the sense that they are accepting an expert's judgment for reasons other than brute authority. If an expert's judgments are not worthy of deference, the expert's testimony should not be allowed in the first instance.

### III. THE REACH OF RULE 703

Perhaps the best test of the story model perspective is its utility in resolving disputes over how expert testimony should be treated. Consider by way of example an application of this perspective to the controversy between Ron Carlson<sup>15</sup> and Paul Rice<sup>16</sup> that Allen and Miller so interestingly discuss. The question that divides Carlson and Rice is

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<sup>14</sup> In doing so, the expert encourages the jury to explain a witness's identification through, for example, an "extreme stress distorted her perceptions" story rather than a "defendant did it" story. The eyewitness expert's testimony appears educational since she does not say that certain witnesses can or cannot be believed but rather informs jurors of those circumstances that make eyewitness testimony more or less valid. The parties offering eyewitness experts are, however, seldom content to equip jurors to make their own educated judgments. Instead, the expert witness will emphasize those aspects of the identification that are prone to error, and the jury will be encouraged to accept the expert witness's implicit judgment that a mistake occurred in the given instance. Moreover, while it is common for eyewitness experts to cite studies supporting their cautions, the citations are less an educational than a rhetorical tactic, for the jury can only defer to the expert's reliance on and characterization of the research cited. Thus even in testimony that appears overtly educational, large amounts of deference are sought.

<sup>15</sup> Ronald L. Carlson, *Experts as Hearsay Conduits: Confrontation Abuses in Opinion Testimony*, 76 MINN. L. REV. 859 (1992) [hereinafter Carlson, *Hearsay*]; Ronald L. Carlson, *Policing the Bases of Modern Expert Testimony*, 39 VAND. L. REV. 577 (1986) [hereinafter Carlson, *Expert Testimony*]; Ronald L. Carlson, *Collision Course in Expert Testimony: Limitations on Affirmative Introduction of Underlying Data*, 36 U. FLA. L. REV. 234 (1984).

whether Federal Rule of Evidence 703 should be interpreted to allow otherwise inadmissible evidence to be presented to the jury when it helps form the basis for an expert's conclusions. The story model suggests that the answer should turn on how the inadmissible evidence fits into various stories the jury might construct.

Often otherwise inadmissible evidence that supports an expert's conclusions fits only a story relating to the expert's credibility. In these circumstances, the evidence should be admissible to bolster the trustworthiness of the expert's conclusions by showing the jury that she has considered the range of relevant evidence and that this evidence is consistent with her conclusions. On occasion, however, inadmissible evidence not only supports an expert's testimony, but also supports a potentially influential story that can be constructed without the expert's help. In the worst case, the story that requires no expertise to construct may be more likely to influence the jury than the story the expert tells. In such cases, otherwise inadmissible evidence introduced through an expert is likely to be misused, possibly leading to the suspicion that the expert's testimony was offered to foster the misuse. Inadmissible evidence should not be allowed in such cases.

Consider, for example, an accident reconstruction expert who, in concluding that the defendant was speeding, relies in part on a bystander's notes describing the defendant's car's skid marks. The notes are inadmissible hearsay, but if it is scientifically defensible for an accident reconstruction expert to consider such notes, the expert ought to be able to disclose the notes to the jury and explain how the bystander's observations figured in her conclusions. The jury is likely to consider this information only as part of the expert's testimony, for without the expert's interpretation, the jury could not easily construct a "defendant was speeding" story from the skid mark information. Moreover, if the defendant's expert appeared to be scientifically more competent than the plaintiff's expert, the plaintiff's case would not receive an independent boost from the skid mark information; it would persuade only to the extent that it made for a more credible expert story.<sup>17</sup>

Suppose however that instead of referring to skid marks, the bystander's notes asserted that while the plaintiff was traveling within the speed limit, the defendant was going fifty miles per hour in a twenty-five mile per hour zone. Even if accident reconstruction experts ordinarily consider such bystander observations in reconstructing accidents, Rule 703 should be interpreted to allow the plaintiff's expert to say no more on direct examination than that she considered bystander reports of speed in

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<sup>16</sup> Paul R. Rice, *Inadmissible Evidence as a Basis for Expert Opinion Testimony: A Response to Professor Carlson*, 40 VAND. L. REV. 583 (1987).

<sup>17</sup> The jury would be properly suspicious of the defendant's expert's story if it could not account for the skid marks and the plaintiff's expert's story could. Evidence of the skid marks would not hurt and might help the defendant if a plausible defense story explained their presence.

reaching her conclusion. Otherwise the jurors might find for the plaintiff not because they find the plaintiff's scientific story more credible than the defendant's opposing version, but because they are willing to construct a "defendant was speeding story" to explain the bystander's observation. Even though the jurors' story construction is not irrational, the hearsay rule forbids such reasoning.

Honoring the hearsay rule in these circumstances deprives the plaintiff of a legitimate benefit, since the need to interpret Rule 703 presupposes the scientific validity of considering the bystander's statement. For this reason, the expert should be able to indicate that she considered a bystander's observations about the speed the cars were going. The jurors will, of course, be able to figure out that the bystander is likely to have reported that the defendant was speeding, and to this extent, the inadmissible evidence may aid the plaintiff apart from its contributions to the expert's opinion. But merely alluding to the bystander's notes differs from recounting their contents in that only the recounting provides the jurors with enough information to construct a speeding story although they otherwise discredit the expert testimony. Whether under the guise of interpreting Rule 703 or applying Rule 403, this compromise strikes an appropriate balance.<sup>18</sup>

The story model perspective thus suggests that if truth within the spirit of the evidence rules is our goal, neither Carlson nor Rice have carried the day on the issue of how Rule 703 should be interpreted. My argument based on the story model is that courts applying Rule 703 should appreciate the contingencies of expert testimony and jury reasoning and interpret the rule accordingly. Inadmissible evidence that experts properly rely on in forming opinions should be kept from the jury only when and to the degree to which the evidence might encourage the jury to construct a story that could determine the verdict even if the testimony of the expert offering the evidence is otherwise unpersuasive.<sup>19</sup>

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<sup>18</sup> Professor Carlson would allow the expert to tell the jury that bystanders' reports were considered, but it is not clear that he would allow the jury to know that the reports concerned the speed at which the cars were traveling. See Carlson, *Hearsay*, *supra* note 15; Carlson, *Expert Testimony*, *supra* note 15. Moreover, this is as far as he would go even if the jury could not construct a defendant liability story from the information on which the expert relied. He would not admit hearsay to show the length of skidmarks.

<sup>19</sup> For a case example that illustrates this perspective, see *Gong v. Hirsch*, 913 F.2d 1269 (7th Cir. 1990), in which the issue was whether the plaintiff's decedent had suffered a peptic ulcer due to a drug prescribed by the defendant. The plaintiff's medical expert was unable to introduce a letter from the deceased's family doctor stating that the plaintiff's decedent had a peptic ulcer traceable to the prescribed drug because the court found that the doctor's letter did not technically qualify as a business record and was not the type of evidence reasonably relied on by experts or, if it was, was still insufficiently trustworthy to pass the Rule 403 balancing test. The court's trustworthiness judgment is questionable for, with a proper foundation, one can easily imagine the letter qualifying as a business record. Also, since the naming of the drug that caused the disease had nothing to do with the purpose for which the letter was written, there is no reason apart from its hearsay character to suspect the trustworthiness of this information. Moreover, experts consider the opinions of other

## IV. CONCLUSION

I began this Essay by reflecting on Allen and Miller's interesting comments on expert testimony. I argued that their education/deference dichotomy was misfocused, but that they were right in calling attention to the ways in which many disputes regarding expert testimony are disputes about conceptions of the jury and about the amount of information juries should be given. I then turned to a new way of thinking about trials—the story model. This perspective, I argued, suggests normative judgments about the minimum amount of information that experts should provide juries. In most cases, however, we need not worry about the minimum being provided since informing juries why an expert judgment has been formed is a rhetorical tactic that fosters deference even while increasing juror understanding. I also suggested that the story model provides a perspective from which to rethink evidentiary policy, and I illustrated this with a discussion of what the model portends for the dispute between Professors Carlson and Rice about how best to interpret Rule 703's permission to base expert testimony on otherwise inadmissible evidence. Ultimately, like Allen and Miller, I conclude that attending to the informational implications of rules regarding expert testimony is central to their evaluation.

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experts all the time. But from the story model perspective, the decision to exclude the information makes sense, for even if the plaintiff's expert's judgment did not persuade the jury of the existence and cause of the ulcer, the family doctor's otherwise inadmissible hearsay might. Note that the story model would suggest a different result than does the court's analysis had the letter merely listed symptoms suggestive of a drug-induced ulcer. In these circumstances a story model analysis would admit the letter, for a jury could not determine its implications without an expert's aid; under the court's analysis the letter would remain excluded. Yet I do not think a court that, like the *Gong* court, was willing to read Rule 703 as removing the general bar of hearsay would have excluded the hypothesized letter. In short, I think the *Gong* court was motivated by story model considerations without thinking in those terms.