Misleading Witness Memory

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I. Introduction

You are not capable of telling the whole truth. What we remember is not always what we saw or heard. The normal chaos of our physical environment obstructs our initial memory. There is also the limit of our own sensing ability magnified by impairments, which for most people guarantee an imperfect memory. Our memory environment, suggestions and our own physiological quirks—reshape the truth.

II. The Criminal Justice System

Prompted by significant psychological research the criminal judicial system proactively addressed unreliable identification testimony to lessen it being the crux of wrongful convictions. The criminal system views testimony through the lens of system variables that the courts should fix due to government actor(s) influencing testimony by express or implied suggestion or estimator variables that are beyond the judicial system, such as influence by private actors, perception deficits like distance, physical obstructions, lighting, and individual impairments.

The criminal system fixes system variables through protocols used by law enforcement, specific judicial procedures to prevent unreliable identification testimony from being admitted as evidence, and jury instructions to properly educate a jury when potentially unreliable testimony is admitted.

There are no equivalents in the civil judicial system, perhaps because there are few government actors in a civil case where suspect identification testimony is material. This should not matter, because a witness suffering from a government actor’s suggestion who identifies the wrong suspect is the same type witness who describes the wrong events, describes the wrong person, recalls the wrong conversation, or testifies with false certainty about their own actions. These realities should prompt civil courts to more closely examine fact witness testimony, evaluate processes to limit unreliable testimony, and educate juries through expert witness or proper jury instructions.

III. The Unique Quality of Witness Testimony

A witness’s testimony, whether in a criminal or civil case, is offered to a jury with a solemn promise of telling the whole truth. Federal Rule of Evidence 603 requires that “[b]efore testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness’s conscience.”

These oaths or affirmations are impressive for a jury to hear and may impress a duty on the witness’s conscience, the desire to tell the truth, but what does the jury really learn about a witness’s consciousness, the accuracy of the truth being told.

The Federal Rules of Evidence allow for some exploration of consciousness through Rules 602 (Need For Personal Knowledge), Rule 612 (Writing to Refresh Memory), and Rule 613 (Prior Statements) and covers conscious through Rule 608 (Character for Truthfulness or Untruthfulness) and Rule 609 (Impeachment by Criminal Conviction). These rules seem like the tools to catch a witness in “the big lie” revealing that person’s lack of integrity, scruples, or a sense of right and wrong.

Most trials don’t have that drama, however. The better word to describe what most juries see today is inconsistencies. Some inconsistent testimony may come from a lack of conscious—a witness told a small lie
or just didn't tell the whole truth. There is much more inconsistent witness testimony that comes from imperfect information. It might be imperfect because of physical limitations of the witness such as limited vision or hearing or limitations due to environmental distractions, e.g. distance, noise, and obstructions. A limitation also might exist due to a witness's illness, or substance use or abuse. All of these factors can be found through discovery, but a jury will never learn about the imperfections of a testifying witness's memory, unless these limitations are exposed and made part of the civil case through an informed attorney setting the proper stage in discovery or through expert testimony at trial.

IV. The Process of Memory


These memory stores interact, but are unique in their processing abilities. Our senses have their own storage system. Each limited in duration: they hold information for a very brief period of time. For example, the visual system's sensory store, called iconic memory, holds information for about 150 – 300 milliseconds. If attention is directed towards the items in iconic memory, that information can be sent onto the second stage, short-term memory (“STM”).

STM is limited in capacity. Depending on the situation, STM may hold one or two items or as many as seven to nine. Cowan, N. (1988), *Evolving conceptions of memory storage, selective attention, and their mutual constraints within the information processing system*, Psychonomic Bulletin, 104, 163-191 and Miller, 1956, *The magic number seven, plus or minus two: Some limits on our capacity for processing Information*, Psychological Review, 63, 81 – 97. Because of this limited capacity, items in STM can easily be displaced by newly acquired information. For an item to remain in STM, an individual must commit additional focus towards the rehearsal of that information. Because it is impossible to focus on a single item indefinitely, information can be displaced from STM. This natural erosion of memory is enhanced by emotional factors like acute anxiety, which prevents sufficient focus to rehearsal of the information.

With sufficient rehearsal, items can transfer from STM to the final storage system, long-term memory (“LTM”). This consolidation process is still imperfect. A person is continually distracted by other life events and this distraction degrades the quality of information as it passes from sensory memory to STM and eventually to LTM.

Consider the witness at a crime scene distracted by weapons or by analogy fire personnel focused on a rescue. That focus detracts from perceiving other information. For crime scenes, studies have shown that identification of a suspect was worse if participants viewed a scene in which the suspect held a gun, relative to a scene where he held a checkbook. Loftus, E.F., Loftus, G. R., & Messo, J. (1987), *Some facts about weapon focus*, Law and Human Behavior, 11, 55 – 62.

Other psychological factors, like previous knowledge and individual biases, can influence what an individual perceives, how they perceive the situation, and, as a result, the consolidation process from STM to LTM. For example, the own-race bias describes the tendency for facial identification to be more difficult if the suspect is a different race than the identifier Meissner, C. A. & Brighman, J. C. (2001), *Thirty years of investigating the own-race bias in memory for faces: A meta-analytic review*, Psychology, Public Policy, and Law, 7, 3 – 35. This disruption is likely the result of unconscious biases that occur while the identifier is encoding the face.
Even if a memory is stored accurately in LTM, retrieval of the memory may be flawed. Just as information can be modified as it is stored, memories are also susceptible to suggestion, misinformation, biases, and previous knowledge as they are retrieved. For this reason, memories are often described as “reconstructions” of a previous experience: The memory is not retrieved as a single event, but is pieced together from a variety of sources – some accurate and some not.

An example of modifying retrieval is best seen in the word choice by a questioner. In a seminal study, Loftus and Palmer (1974), showed participants a video of a two-car accident. Later on, participants were asked “how fast were the cars going when they ______?” Loftus, E. F. & Palmer, J. C. (1974), Reconstruction of automobile deconstruction – example of the interaction between language and memory, Journal of Verbal Learning and Verbal Behavior, 13, 858 – 589. This verb used to fill in this blank varied across participants. Some heard “bumped” others “contacted” and still others “smashed.” Loftus and Palmer found that the more violent the verb, the higher the estimates of speed. Loftus and Palmer argued that the participants incorporated the verb into their reconstruction of the memory. They used this information when estimating speed – slow cars “bump” but fast cars “smash.”

Children and older adults are more susceptible to this misinformation effect. Children are more prone to suggestion, while being “old” equates to memory decline as a result of normal or degenerative aging.

Finally, physiological factors can influence memory. Highly stressful situations and chronic stress can both have negative effects on the formations of memories. Drugs, like benzodiazepines and alcohol, may also disrupt the creation of new memories. Alcohol has interesting effects on metamemory, i.e. the awareness of one’s own memory and memory processes. One study gave participants a beverage to drink, and then had them watch slides of a man shoplifting. Assefi, S. L. & Garry, M. (2003), Absolute memory distortions, Alcohol placebos influence the misinformation effect, Psychological Science, 14, 77-80. Some of the participants were misled and told that they were drinking alcohol. These participants were more susceptible to suggestions produced by later questioning (i.e. Loftus & Palmer, 1974). Ironically, alcohol also leads to overconfidence in one's own memories. Nelson, T. O., McSpadden, M., Fromme, K., & Marlatt, G. A. (1986), The effects of alcohol on metamemory and on retrieval from long-term memory, Journal of Experimental Psychology: General, 115, 247 – 254. Thus, alcohol may make memories less accurate, but the individual will be more confident in their memory.

This finding is consistent with the body of evidence on confidence: In general, confidence is not a reliable predictor of memory accuracy. One exception to that rule may be flash-bulb memories, which are very vivid memories for emotional events, like the attack of September 11, 2001, or the assassination of John F. Kennedy Jr. Evidence suggests that these memories are relatively robust to decay – years later they are still remember with surprising detail. Hirst, W., Phelps, E. A., Buckner, R. L., Hudson, A. E., Cuc, A. et al. (2009), Long-term memory for the terrorist attack of September 11: Flashbulb memories, Event memories, and the factors that influence their retention, Journal of Experimental Psychology: General, 138, 161 – 176. However, flashbulb memories are not immune to psychological limitations like attention constraints, suggestibility, bias, and misinformation. These flashbulb events tend to be discussed often, leading to the consistent retrieval. Repeated retrieval is a key process to solidifying memory for the details associated with these experiences. Even so, the emotional components of these memories do fade with time, and become susceptible to error.

V. Suggested Testimony

A change of perspective is needed to challenge a witness's testimony not as a liar, but because their testimony is not truthful as imperfectly recorded or unintentionally revised as it is initially stored in short
term and then moves to long term memory. A criminal lawyer routinely begins by questioning imperfections created during the short term phase that become fixed into long term memory.

In 1999, the Department of Justice released a research report titled, “Eyewitness Evidence, A Guide for Law Enforcement”3 (the “DOJ Report”). The DOJ Report was the culmination of many years work to devise an instructional guide for law enforcement when gathering eye witness evidence and more specifically the use of eye witness testimony to identify suspects. The purpose of this report was to insure reliability by removing any suggestive traits in the process of an eye witness identifying a suspect. The instigators causing this change were notable psychologists studying the effects of suggestion on an eye witness and how subtle cues from law enforcement would cause the witness’s testimony to veer away from actual knowledge (the truth) and towards unreliability.4

VI. Criminal Jury Instructions

The law concerning flawed witness testimony has continued to evolve with criminal courts adopting common jury instructions given to educate a jury. These jury instructions suggest that the credibility of a witness's testimony might be tied to that person's intelligence, physical limitations (sight and hearing), or environmental obstructions.5 There is room to improve these instructions and then transport them to the civil context.

For example, an inherent flaw at inception of a memory is the lack of sufficient comparable information within the person's own memory stores. The American Bar Association in 2008 explored the limited example of how individuals from different races in some instances lack the capacity to provide reliable identification testimony. The flaw exists because although the witness may record an image, the witness's memory has no ability to compare that image to other images to a degree where it carries enough meaningful detail to distinguish one person from another. And so, the ABA's Report to the House of Delegates from the Criminal Justice Section recommended that judges recognize that cross-racial identifications may increase the risk of an erroneous conviction. The ABA Report encouraged adoption of a new jury instruction:6

In this case, the identifying witness is of a different race than the defendant. You may consider, if you think it is appropriate to do so, whether the fact that the defendant is of a different race than the witness has affected the accuracy of the witness’ original perception or the accuracy of a later identification. You should consider that in ordinary human experience, some people may have greater difficulty in accurately identifying members of a different race than they do in identifying members of their own race.

You may also consider whether there are other factors present in this case which overcomer any such difficulty of identification. [For example, you may conclude that the witness had sufficient contacts with members of the defendant’s race that [he] would not have greater difficulty in making a reliable identification.]

These are strides forward for criminal cases, but that process has not crossed over to a civil court. Federal Rule of Evidence 601 is direct in stating that “[e]very person is competent to be a witness unless these rules provide otherwise.” Rules 602 and 603 add the requirements of personal knowledge and taking an oath or affirmation. For Rule 602, the evidence required to prove a person’s personal knowledge may consist of the witness’s own testimony, which seems to support the conclusory statement “because I said so” as being sufficient. Rule 401 and 402 concerning a test for and admissibility of relevant evidence have equally broad application, evidence is relevant if “it has a tendency to make a fact more or less probable than it would be without the evidence....”
VII. Memories Get Worse and Confidence Gets Higher

This creates a dilemma where the witness is certain even though their memory could just be an image of someone else's suggestion. This scenario is exemplified when a witness has been drinking alcohol, for example. That witness is not testifying about their knowledge and instead offering hearsay testimony excluded by Federal Rule of Evidence 802.7

In addition, as noted above, based on age alone, children and older adults are more likely to have poor memory. Recall the moments when your child's memory actually helped you find that lost toy. The same observation can be made for those being older or having older parents. Even with the ages in-between, for some, suggesting that they have poor memory is akin to a personal attack on their character.

So, an informed approach is required to avoid conflict when exploring the truthfulness of a witness's testimony. Some witnesses may admit to blurred memory. Other witnesses may be defensive, perceiving the questions as an attempt to make them look foolish or worse, a liar.

The ingenuity of the DOJ Report is the creation of a standard where judgment is absent. A witness is relieved of being a fool or a liar where the attorney can demonstrate that the guidelines were not followed. The witness wasn't wrong or right, it is just that the psychological environment created unreliable testimony. And while practicality of having similar formal guidelines in a civil case does not exist, an informal guide can be utilized by counsel.

The DOJ Report offers some assistance. Law enforcement is cautioned that when answering a 911 call, investigating a crime scene, and obtaining information from a witness that they are to only ask open ended questions. They are discouraged from asking suggestive or leading questions. Additional caution is given for the investigating officer to separate witnesses and instruct them to avoid discussing details with one another.

These techniques are well known and straightforward in the criminal context to develop as evidence—the witness and officer encounters are generally recorded in a report. The civil context is a bit trickier. A report might have been contemporaneously created which shows how initial testimony was gathered. In many instances this does not exist, so the task is to establish a factual timeline inquiring who a witness spoke to, what questions were asked of them, and whether they spoke to anyone, if so, who and what was discussed. Based on this information, a continuation of the same questions would be directed to the identified person(s) in the chain.

A civil case often includes diagrams and computer-generated scenarios to fix a description of the physical environment. This description in some instances is the result of a witness testimony and so a description of the memory environment is needed. For example, in addition to describing the physical obstructions to a witness initially recording the information, explain the process of how that information was stored and then recalled, perhaps years later. Identify if the witness has comparable experiences to insure the information has meaningful detail and moments where a memory may have been modified by suggestion from another witness, the media, or influenced by other events in that witness's life. It is these details which frame a jury's understanding about the limitations of any witness testimony.

VIII. The Courts Perspective

The judicial perspective to cure unreliable testimony has been limited to suspect identifications in criminal cases and even within that context defined very narrowly to arise only when law enforcement conduct exists. A civil case offers only cross examination to reveal unreliable testimony. A need exists to have cor-
responding jury instructions in a civil case or the recognition by civil courts that expert testimony in some instances will assist the trier of fact to more fairly weigh the evidence.

The United States Supreme Court in *Manson v. Brathwaite* 432 U.S. 98 (1977) provides some insight on how these concepts can transfer to civil cases. The Court in this case was asked to consider “whether the Due Process Clause of the Fourteenth Amendment compels the exclusion, in a state criminal trial, apart from any consideration of reliability, of pretrial identification evidence obtained by a police procedure that was both suggestive and unnecessary.” The Court ultimately concluded that the presence of suggestive and unnecessary conduct by law enforcement was not decisive and instead was balanced against the reliability of the identification. The Court said, “[w]e therefore conclude that reliability is the linchpin in determining the admissibility of identification testimony… the opportunity of the witness to view the criminal at the time of the crime, the witness’ degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation.”

*Brathwaite* is instructive in the above quote, it is just that its application is too constrained. A suspect identification is a critical part of any criminal case and should be afforded this level of scrutiny. There is no reason why a civil court should not also conclude that reliability is the linchpin in determining the admissibility of any fact witness testimony and the criteria to examine this is: (1) the opportunity of the witness to view; (2) degree of attention; (3) accuracy of description; (4) level of certainty; and, (5) time between the event and testimony.

The more recent case *State v. Henderson*, 27 A.3d 872 (N.J. 2011), is the New Jersey Supreme Court’s definitive statement that a reform within the criminal justice system, at least in New Jersey, is underway to implement a more effective approach to identify and exclude unreliable eye witness testimony. The Harvard Law Review provides a well-researched and insightful analysis of the *Henderson* case by commenting that the court did not go far enough to recognize the reliability of testimony, whether influenced by law enforcement or not, remains the core responsibility of the court. See, *New Jersey Supreme Court Uses Psychological Research to Update Admissibility Standards for Out-of-Court Identifications. — State v. Henderson, 27 A.3d 872 (N.J. 2011)*, Harv. L. Rev., Vol. 125:1514 (2012).

The most recent discussion by the Supreme Court *Perry v. New Hampshire*, 132 S.Ct. 716 (2012) did not embrace the enthusiasm of *Henderson*. The issue in *Perry* was whether the protections given a criminal defendant when an improper identification occurs because of law enforcement conduct should be extended to improper identifications absent police conduct. Declining this offer, the Court said, “Our decisions, however, turn on the presence of state action and aim to deter police from rigging identification procedures, for example, at a lineup, show up, or photograph array. When no improper law enforcement activity is involved, we hold, it suffices to test reliability through the rights and opportunities generally designed for that purpose, notably, the presence of counsel at post indictment lineups, vigorous cross-examination, protective rules of evidence, and jury instructions on both the fallibility of eyewitness identification and the requirement that guilt be proved beyond a reasonable doubt.”

The lesson from *Perry* is that a court should only become proactively involved in evaluating reliability with government action. At best, the court in *Perry* limits a civil litigant to vigorous cross examination and protective rules of evidence. There may be, however, additional processes to consider.

**IX. Testing Reliability in a Civil Case**

Aside from cross examination and relying on the rules of evidence, Federal Rule of Procedure 35 hints as being a tool to evaluate unreliable testimony in a civil case. This Rule allows for the physical and men-
tal examination of a party upon proper motion. It does not extend this right to a non-party witness and in 1964, the United States Supreme Court confirmed this limitation in *Schlagenhauf v. Holder*, 379 U.S. 104, 13 L.Ed.2d 152 (1964). In addition to finding this, the Court also commented on the scope of Rule 35. In this auto accident case, a party testified in deposition that he had seen the red lights of the vehicle in front of him, but failed to take action. A request for a Rule 35 examination by a doctor of internal medicine, ophthalmology, neurology, and psychiatry followed to explore why this occurred. The Court ultimately disagreed with such a broad request and remanded the case for the lower court to consider a more limited request. It is a stretch, but assume for a moment that enough evidence is gathered to show that a party’s testimony was tainted by suggestion, anxiety, and other factors, perhaps a psychological examination might better define the veracity of that testimony.

And, for parties or non-parties, a civil case has a mechanism through a motion in *limine* to challenge testimony. It is not a novel concept to test reliability. An expert witness is required to meet the standards of Federal Rule of Evidence 702 and establish the reliability of their testimony through a *Daubert* hearing. If an expert witness must be viewed through this process, a good debate exists that a fact witness’s testimony is more important and so should at least be subject to this same process.

**X. A Jury Instruction**

Even if a process is not functional in a civil case, a proper jury instruction would alleviate the sliding scale of arguments by counsel that a witness’s testimony is between being a liar and an idiot. The science supporting the actual memory environment recognizes each that witness is unique and the science of psychological limitations is neither framed by intelligence nor intent. A jury instruction should explain this in a neutral manner. For example:

In this case, a witness is offering testimony about events that occurred in the past. You should consider the time between the event and testimony given in this case, the opportunity of the witness to view the events being described (distance, obstructions, and lighting), the degree of attention by the witness at the time of the events or whether he/she had any physical impairments, the level of the witness’s certainty, and the accuracy of the description compared to other evidence.

You may consider, if you think it is appropriate to do so, if the witness’s personal experiences since the event has affected the accuracy of his/her testimony, whether due to interactions with others about the events or public media. You should consider that in ordinary human experience, some people may have greater difficulty in accurately describing persons, places, items, or events that they have not previously encountered.

**XI. Closing Thought**

A civil court should examine more closely the reliability of fact witness testimony where the indicia of unreliability exists. At a minimum, litigants should be afforded leeway to present evidence demonstrating unreliable fact witness testimony through motions in *limine* supported by expert witness analysis and if still admitted, balanced by a proper jury instruction.
Endnotes

1 The New Jersey Supreme Court in State v. Chen, 27 A.3d 930 (N.J. 2011) found that actions by a private actor were sufficient to become a system variable.

2 According to the Benchbook for U.S. District Court Judges, Fifth Edition, Federal Judicial Center September 2007, a suggested oath would be, “Do you solemnly swear [or affirm] that all the testimony you are about to give in the case now before the court will be the truth, the whole truth, and nothing but the truth, so help you God?” Federal Rule of Evidence 43(b) allows an affirmation in lieu of an oath which is suggested as, “Do you affirm that all the testimony you are about to give in this case now before the court will be the truth, the whole truth, and nothing but the truth. This I do affirm under the pain and penalties of perjury.” www.fjc.gov/public/pdf.nsf/lookup/Benchbk5.pdf/$file/Benchbk5.pdf. Last visited on October 31, 2012. A more dramatic affirmation is required in the United Kingdom, “I do solemnly, sincerely and truly declare and affirm that the evidence I shall give shall be the truth the whole truth and nothing but the truth.” www.nidirect.gov.uk/giving-evidence-in-court. Last visited on October 31, 2012.


4 Appendix A, titled "Further Reading" in the DOJ Report lists the articles and authors.

5 The 7th Circuit has an instruction titled "Testimony of Witnesses (Deciding What to Believe):"

You are to decide whether the testimony of each of the witnesses is truthful and accurate, in part, in whole, or not at all, as well as with what weight, if any, you give to the testimony of each witness. In evaluating the testimony of any witness, you may consider, among other things: [the witness’s age;] the witness’s intelligence; the ability and opportunity the witness had to see, hear, or know the things that the witness testified about; the witness’s memory; any interest, bias, or prejudice the witness may have; the manner of the witness while testifying; and the reasonableness of the witness’s testimony in light of all the evidence in the case.

Of interest is the committee comment, which states “The portion of the instruction relating to age should be given only when a very elderly or a very young witness has testified.” http://www.ca7.uscourts.gov/pjury.pdf. Last viewed on November 14, 2012.

The 6th Circuit seems to address even better the issues of witness testimony:

(1) You have heard the testimony of ________, who has identified the defendant as the person who ________. You should carefully consider whether this identification was accurate and reliable. (2) In deciding this, you should especially consider if the witness had a good opportunity to see the person at that time. For example, consider the visibility, the distance, whether the witness had known or seen the person before, and how long the witness had to see the person. (3) You should also consider the circumstances of the earlier identification that occurred outside of court. For example, consider how that earlier identification was conducted, and how much time passed after the alleged crime before the identification was made. (4) You may take into account any occasion in which the witness failed to make an identification of defendant, or made an identification that was inconsistent with his identification at trial. (5) Consider all these things carefully in determining whether the identification was accurate and reliable. (6) Remember that the government has the burden of proving beyond a reasonable doubt that the defendant was the person who committed the crime charged. http://www.ca6.uscourts.gov/internet/crim_jury_insts.htm. Last viewed on November 14, 2012.


7 The definition of “statement” under Rule 801 is “a person’s oral assertion, written statement, or nonverbal conduct, if the person intended it as an assertion.” The subtle cues mentioned to be made by law enforcement in the DOJ Report suggest that they are assertions, oral and nonverbal, which meet the definition of hearsay.