Evaluating Psychological Expertise on Questions of Social Fact

The Case of Price Waterhouse v. Hopkins

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The empirical evidence summarized in the APA amicus brief in Price Waterhouse v. Hopkins was initially presented at trial, subject to quality control measures contained in the Federal Rules of Evidence and an opportunity for cross-examination. This evidence was incorporated into the adjudicative facts determined by the trial judge. These unique circumstances rendered the APA brief more akin to a guild brief than to a typical APA science translation or Brandeis brief. As such, the brief was effective. However, the debate about the brief highlights shortcomings in the existing system for evaluating social science facts presented for the first time by a friend of the court. Recommendations are made to take into account the consensus of experts in the field and adverse findings when presenting empirical evidence for the first time in an appeal brief.

The debate about the American Psychological Association amicus brief submitted to the United States Supreme Court in Price Waterhouse v. Hopkins (1989) prompted a reexamination of the role of amicus briefs as vehicles to present psychological expertise to the court on critical questions of social fact. It is not the purpose of this commentary to question the substantive empirical findings in the APA brief. However, this case raises several questions about the best way to communicate research findings to the court and brings into focus certain shortcomings of the present amicus system for evaluating social facts. Seen in this light, much of the recent controversy is attributable to predictable consequences of the existing system, rather than problems inherent in the APA brief.

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Legal Functions of the Psychological Research Findings

The psychological expertise at issue in *Price Waterhouse v. Hopkins* cuts across functionally distinct categories of social scientific findings traditionally distinguished by the courts, namely *adjudicative facts* and *legislative facts* (Davis, 1942). These distinctions have practical consequences because (a) the way in which the information is used by the courts depends to some degree on the functional category it fulfills, and (b) the methods available to courts to evaluate the substance of the empirical findings vary according to the legal role which they occupy.

Adjudicative facts are typically those facts determined at the trial level by the fact-finder based on the oral testimony of witnesses, subject to the rules of evidence and an opportunity for cross-examination. The ultimate adjudicative fact, in a gender-based disparate treatment case, such as *Price Waterhouse*, is whether the employer discriminated against the plaintiff when a specific adverse employment decision was made—in this instance, denial of promotion to partnership. Put another way, adjudicative facts are the facts of the case that pertain to the particular parties in the litigation, derived from testimony concerning the specific events in controversy. Adjudicative facts may be determined from expert testimony presented at trial. The purpose of the expert testimony in *Price Waterhouse* was to assist the court in determining whether Ms. Hopkins was treated differently from male candidates for promotion in part because of her gender.

Legislative facts, by comparison, are general social facts, including products of psychological expertise, that provide background on existing social science authority used to guide the court in creating or modifying the content of existing law. The goal in presenting legislative facts is to assist the court in making policy determinations that have a bearing on individuals other than the parties engaged in the immediate case in controversy. Legislative facts are most frequently presented to a reviewing court in a written brief on appeal after the trial is over and the adjudicative facts have been determined by the fact-finder, although they may be presented at trial by testifying expert witnesses (Monahan & Walker, 1991).

When presented in a written brief on appeal, legislative facts of which the court may take cognizance are not subject to the rules of evidence designed to ensure the qualifications of experts, nor to those designed to ensure the quality of the expert evidence, such as the *Frye* (1923) test. A common criticism of empirical findings presented in this way is the absence of any mechanism for quality control. For example, there is no opportunity for opponents to scrutinize the material, to subject it to cross-examination, or to prepare a response highlighting a countervailing interpretation or viewpoint.

Psychological Expertise Presented at Trial

On behalf of the plaintiff, Ann Hopkins, testimony summarizing existing psychological research on sex stereotyping was presented orally at trial by a social psychologist, Dr. Susan Fiske. The goal of her review of the literature was to provide a framework or background to better equip the trial judge to make find-