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RESURRECTION OF THE ULTIMATE ISSUE RULE: FEDERAL RULE OF EVIDENCE 704(b) AND THE INSANITY DEFENSE

Prompted by public reaction to the jury's not guilty by reason of insanity verdict of would-be presidential assassin John Hinckley, Jr.,¹ Congress amended Federal Rule of Evidence 704² in 1984. Rule 704 had abolished the common law "ultimate issue rule" for the federal courts.³ The 1984 amendment provides an exception to the common law rule in rule 704(b)⁴ by prohibiting an expert witness from stating "an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto."⁵

Although not restricted to determinations of insanity,⁶ rule 704(b) primarily affects federal insanity defense trials, where courts and lawyers rely heavily on experts.⁷ At such trials, evidence typically focuses on the mental state associated with the defendant's

¹ See newspaper articles and radio and television transcripts collected in *Reform of the Federal Insanity Defense: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 98th Cong., 1st Sess. 150-93 (1983) [hereinafter *Reform Hearings*].

² The original rule 704 is now rule 704(a): "[T]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." FED. R. EVID. 704(a).

³ See *id.* advisory committee's note.

⁴ Rule 704(b) provides in full:

No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

Id. 704(b).

⁵ *Id.*

⁶ See S. REP. NO. 225, 98th Cong., 1st Sess. 231 (1983) [hereinafter S. REP.] ("[T]he rationale for precluding ultimate opinion psychiatric testimony extends beyond the insanity defense to any ultimate mental state of the defendant that is relevant to the legal conclusion sought to be proven."), reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3413; *infra* notes 101-05 and accompanying text (discussing relevance of rule 704(b) to proof of mens rea).

⁷ See Note, *Due Process and Psychiatric Assistance: Ake v. Oklahoma*, 21 TULSA L.J. 121, 139-40 (1985) (expert testimony necessary because lay witness cannot observe and draw inferences about defendant's cognitive capacity).

This Note assumes that rule 704(b) primarily affects testimony by mental health experts, particularly psychiatrists. Experts on other subjects, however, occasionally testify as to a criminal defendant's mental state. See, e.g., *United States v. Brown*, 776 F.2d 397 (2d Cir. 1985) (undercover police officer's testimony as to behavior patterns in street narcotics deals related to defendant's mental state), *cert. denied*, 106 S. Ct. 1793 (1986).

conduct rather than on whether he committed the criminal act.⁸ Psychiatric experts, trained to fit particular behavior into a larger pattern of mental illness, can help to explain an accused's cognitive capacity at the time of the criminal act.⁹

Rule 704(b) will muddle insanity defense trials in federal courts. By resurrecting traditional prohibitions on expert testimony concerning ultimate issues, rule 704(b) departs from rule 704's original approach to expert testimony. Furthermore, rule 704(b) is not necessary to achieve Congress's goals for amending rule 704 and creates more administrative problems than it solves. Consequently, trial judges should construe rule 704(b) narrowly so as to minimize its impact on insanity defense trials.

I

BACKGROUND OF RULE 704(b)

A. The "Ultimate Issue Rule" and Rule 704

Throughout the first half of this century, American courts followed the "ultimate issue rule," an evidentiary doctrine that prohibited witnesses from testifying about their opinions or conclusions concerning dispositive facts at issue.¹⁰ The rule stemmed from concern that jurors might adopt an influential witness's opinion without

⁸ See Slovenko, *The Insanity Defense in the Wake of the Hinckley Trial*, 14 RUTGERS L.J. 373, 376-77 (1983).

⁹ Note, *supra* note 7, at 139-40. At insanity defense trials, courts permit psychiatric experts to stray beyond the immediate circumstances of the offense to paint a more complete portrait of the accused's character and the conduct associated with his character. Slovenko, *supra* note 8, at 377. Commentators have suggested that understanding a defendant's background may make juries sympathetic and likely to forgive:

A great fault of psychiatric expert witnesses is that under the guise of telling us truths about human responsibility, they give us explanations of behavior and histories of character development. By doing this, they allow us, when it suits our purposes, to forgive the guilty and even to let them go free. . . . We acquit by reason of insanity someone whose past and future are pretty much like our own, but whose present is unexpectedly clouded by a violent act that psychiatrists are willing to explain away.

W. WINSLADE & J. ROSS, *THE INSANITY PLEA* 202-03 (1983).

¹⁰ See *United States v. Spaulding*, 293 U.S. 498, 506 (1935) ("The experts ought not to have been asked or allowed to state their conclusions on the whole case."); C. McCORMICK, *EVIDENCE* § 12, at 30 (E. Cleary 3d ed. 1984).

The origins of the ultimate issue rule remain obscure. See Stoebuck, *Opinions on Ultimate Facts: Status, Trends, and a Note of Caution*, 41 DEN. L. CENTER J. 226, 226 (1964) ("The mist the gods drew about them on the battlefield before Troy was no more dense than the one enshrouding the origins of the [ultimate issue] rule."). Stoebuck traced the appearance of the rule in American courts to *Davis v. Fuller*, 12 Vt. 178 (1840). The *Davis* court held that a witness could not testify as to the cause of backwater in a river in part because such testimony represented a matter of opinion on the point at issue. *Id.* at 189. Stoebuck suggests that the ultimate issue rule was well established by 1874. Stoebuck, *supra*, at 227.

independently analyzing contested facts.¹¹ Courts applied the ultimate issue rule in insanity defense cases to prohibit expert opinions on "whether the accused was capable of judging between right and wrong"¹² and on whether "the accused acted under an insane delusion or was impelled by an irrepressible impulse"¹³ to commit the alleged crime.¹⁴ Judges often applied the ultimate issue rule mechanically, without considering the necessity or propriety of providing juries with expert assistance on particular types of issues.¹⁵ The rule also presented judges with vexing decisions such as whether testimony consisted of opinion or fact or whether an opinion concerned a mediate or an ultimate fact.¹⁶

Beginning in the 1930s and 1940s, these difficulties led courts to reject the ultimate issue rule.¹⁷ *Grismore v. Consolidated Products Co.*,¹⁸ decided in 1942, exemplified the trend away from the ultimate issue rule. The plaintiff, a turkey raiser, sought damages for the death of and injury to turkeys allegedly caused by the defendant's product, which the plaintiff had fed to his stock in accordance with

¹¹ C. McCORMICK, *supra* note 10, at 30. The danger of expert domination of juries is discussed *infra* at notes 83-91 and accompanying text.

¹² *State v. Palmer*, 161 Mo. 152, 174, 61 S.W. 651, 657 (1901).

¹³ *State v. Brown*, 181 Mo. 192, 215, 79 S.W. 1111, 1116 (1904).

¹⁴ The determination of what constitutes an ultimate issue in an insanity defense case relates to the legal standard for insanity. See *infra* notes 116-29 and accompanying text. At the turn of the century, the prevailing common law standard for insanity in the United States was the "right and wrong test." H. WEIHOFFEN, *INSANITY AS A DEFENSE IN CRIMINAL LAW* 15 (1933). According to that standard, a person was not criminally responsible for an offense if at the time of his action he was so mentally unsound as to lack capacity to know right from wrong with respect to the particular act charged. *Id.* at 33-34. Some states also included an "irresistible impulse test" which excused a defendant for conduct he knew was wrong if he was incapable of controlling the impulse to commit it. *Id.* at 16. For the current federal insanity defense standard, see *infra* note 119.

¹⁵ Korn, *Law, Fact, and Science in the Courts*, 66 COLUM. L. REV. 1080, 1086 (1966). The propriety of providing juries with expert help on insanity defense issues is discussed *infra* at notes 92-98 and accompanying text.

¹⁶ See C. McCORMICK, *supra* note 10, at 31.

¹⁷ Professor McCormick credited *Grismore v. Consolidated Prods. Co.*, 232 Iowa 328, 5 N.W.2d 646 (1942), with beginning the trend away from the ultimate issue rule. C. McCORMICK, *supra* note 10, at 30-31 & 30 n.7. Other early cases allowed opinion testimony, illustrating the trend to abandon the ultimate issue rule. See, e.g., *People v. Wilson*, 25 Cal. 2d 341, 153 P.2d 720 (1944); *Dowling v. L.H. Shattuck, Inc.*, 91 N.H. 234, 17 A.2d 529 (1941); *Schweiger v. Solbeck*, 191 Or. 454, 230 P.2d 195 (1951).

¹⁸ 232 Iowa 328, 5 N.W.2d 646 (1942). *Grismore* provided an extensive review of early cases rejecting the ultimate issue rule. *Id.* at 348-60, 5 N.W.2d at 657-63; see also *Cropper v. Titanium Pigment Co.*, 47 F.2d 1038, 1043 (8th Cir. 1931) ("[A] witness may be permitted to state a fact known to him because of his expert knowledge, even though his statement may involve a certain element of inference or may involve the ultimate fact to be determined by the jury.").

Some courts also rejected the ultimate issue rule in insanity defense cases. See, e.g., *Commonwealth v. Chapin*, 333 Mass. 610, 625, 132 N.E.2d 404, 414 (1956) (expert witness qualified to express opinion on insanity may do so if testimony would assist jury).

the defendant's directions.¹⁹ The trial court admitted the testimony of the plaintiff's expert as to the cause of the turkeys' harm.²⁰ On appeal, the defendant argued that the trial judge erred in admitting the testimony because it went to the ultimate issue to be decided by the jury.²¹ The court overruled earlier decisions applying the ultimate issue rule and held that the trial judge properly admitted the expert opinion.²² The court based its decision partly on its impressions that the ultimate issue rule caused "judicial confusion and quibbling"²³ and that the rule was the single subject most "provocative of . . . useless appeals";²⁴ it concluded that implementation of the ultimate issue rule had "become almost a fetish"²⁵ with no sound basis.

By 1964, a majority of American jurisdictions had rejected the ultimate issue rule.²⁶ In 1975, passage of rule 704 "specifically abolished"²⁷ the ultimate issue rule in the federal courts. The advisory committee for the Federal Rules of Evidence concluded that "[t]he rule was unduly restrictive, difficult of application, and generally served only to deprive the trier of fact of useful information. The basis usually assigned for the rule, to prevent the witness from 'usurping the province of the jury,' is aptly characterized as 'empty rhetoric.'"²⁸ Rule 704 embodied the advisory committee's belief that the federal courts should admit opinion testimony whenever it is "helpful to the trier of fact."²⁹ It is important to note, however, that under rule 704, experts could voice an opinion only as to the ultimate *factual* issues and not the ultimate *legal* issues.³⁰

B. Why Congress Passed Rule 704(b)

On March 30, 1981, John Hinckley, Jr., attempted to assassinate President Reagan in order to make what Hinckley called "an unprecedented demonstration of love"³¹ for movie actress Jodie Fos-

19 232 Iowa at 330-31, 5 N.W.2d at 648-49.

20 *Id.* at 341, 5 N.W.2d at 654.

21 *Id.* at 342, 5 N.W.2d at 654-55.

22 *Id.* at 361-62, 5 N.W.2d at 663-64.

23 *Id.* at 343, 5 N.W.2d at 655.

24 *Id.*

25 *Id.* at 345, 5 N.W.2d at 656.

26 Stoebuck, *supra* note 10, at 227-34.

27 FED. R. EVID. 704 advisory committee's note.

28 *Id.* (quoting 7 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1920, at 18 (J. Chadbourne ed. 1978)).

29 *Id.*

30 See *Owen v. Kerr-McGee Corp.*, 698 F.2d 236, 240 (5th Cir. 1983) ("Rule 704 . . . does not open the door to all opinions. . . . [Q]uestions which would merely allow the witness to tell the jury what result to reach are not permitted. Nor is the rule intended to allow a witness to give *legal* conclusions.").

31 N.Y. Times, July 9, 1982, at A10, col. 3. In a letter to a *New York Times* reporter,

ter.³² After a highly publicized trial, a federal jury announced its finding of "not guilty by reason of insanity" on June 21, 1982.³³ Public dissatisfaction with the verdict evolved into criticism of the procedure that produced it.³⁴ Because media coverage of Hinckley's trial had highlighted disagreements among the testifying psychiatrists, critics partly blamed the court-sanctioned "battle of experts" for the trial's result.³⁵

Congress responded to this criticism by passing the Insanity Defense Reform Act of 1984.³⁶ Among other reforms,³⁷ the Act amended rule 704 by adding rule 704(b). By means of this amendment, Congress sought "to eliminate the confusing spectacle of competing expert witnesses testifying to directly contradictory conclusions as to the ultimate legal issue to be found by the trier of fact."³⁸

In support of the amendment, the Senate Judiciary Committee drew upon the reasoning of the American Psychiatric Association (APA),³⁹ which traced jury confusion to "leaps in logic" forced upon experts testifying about ultimate facts:

"When . . . 'ultimate issue' questions are formulated by the law and put to the expert witness who must then say 'yea' or 'nay,' then the expert witness is required to make a leap in logic. He no longer addresses himself to medical concepts but instead must infer or intuit what is in fact unspeakable, namely, the *probable relationship* between medical concepts and legal or moral

Hinckley called his act "the greatest love offering in the history of the world." *Id.* at col. 2.

³² For an examination of Hinckley's character, the events leading to his attempt on the President's life, and his trial, see W. WINSLADE & J. ROSS, *supra* note 9, at 181-97.

³³ N.Y. Times, June 22, 1982, at A1, col. 6.

³⁴ See *supra* note 1 and accompanying text; see also H.R. REP. NO. 577, 98th Cong., 1st Sess. 2 (1983) [hereinafter H.R. REP.] (calling Hinckley verdict "a miscarriage of justice").

³⁵ See, e.g., White, *In the State of Psychiatry*, Boston Globe, Jan. 29, 1983, at 20, col. 1 ("After the Hinckley trial . . . it seemed clear to many people that . . . a lawyer . . . could find a psychiatrist who would say just about anything."); *Reform Hearings, supra* note 1, at 150-93 (collecting news reports of reactions to psychiatric testimony in Hinckley trial).

³⁶ The Insanity Defense Reform Act of 1984 is chapter IV of title II of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, tit. 2, §§ 401-406, 98 Stat. 1837, 2057-68 (codified at FED. R. EVID. 704(b) and in scattered sections of 18 U.S.C. (Supp. III 1985)).

³⁷ See, e.g., Insanity Defense Reform Act of 1984 § 402(a), 98 Stat. at 2057 (codified at 18 U.S.C. § 20(b) (Supp. III 1985)) (shifting to defendants burden of proving insanity by "clear and convincing" evidence; discussed *infra* at note 100 and accompanying text); *id.* (codified at 18 U.S.C. § 20(a) (Supp. III 1985)) (new definition of insanity; for text, see *infra* note 119).

³⁸ S. REP., *supra* note 6, at 230, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS at 3412.

³⁹ See AMERICAN PSYCHIATRIC ASSOCIATION, STATEMENT ON THE INSANITY DEFENSE (1983) [hereinafter APA STATEMENT], reprinted in 140 AM. J. PSYCHIATRY 681 (1983).

constructs. . . . These impermissible leaps in logic made by expert witnesses confuse the jury."⁴⁰

The Senate Committee believed that rule 704(b) would narrow the scope of mental health expert testimony to explaining diagnoses and characteristics of diseases, thereby eliminating conflicting expert conclusions about ultimate factual issues.⁴¹ Despite its disenchantment with experts' influence, the Committee conceded that experts serve an important function at insanity defense trials and " 'must be permitted to testify fully about the defendant's psychiatric diagnosis, mental state and motivation . . . at the time of the alleged act.' "⁴² The Committee, however, emphasized that responsibility for the ultimate determination of legal insanity rests solely

⁴⁰ S. REP., *supra* note 6, at 231 (quoting APA STATEMENT, *supra* note 39, at 14, reprinted in 140 AM. J. PSYCHIATRY at 686), reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS at 3413.

The APA apparently misunderstood the requirements of the pre-rule 704(b) Federal Rules of Evidence. See *infra* notes 55-69 and accompanying text (disputing whether "yea" or "nay" ultimate legal questions would occur under properly enforced pre-rule 704(b) Rules).

The APA based its position at least partly upon concern for the integrity of psychiatry. See APA STATEMENT, *supra* note 39, at 8, 14, reprinted in 140 AM. J. PSYCHIATRY at 683-84, 686. This concern was not unfounded. Indeed, skepticism over the value of the science and the integrity of its practitioners motivated some legislators to limit psychiatric testimony. The Senate Report calls expert testimony "inherently imprecise" and questions whether there is medical consensus on the meaning of psychiatric terminology. S. REP., *supra* note 6, at 222, 228, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS at 3404, 3410; see also *Reform Hearings*, *supra* note 1, at 557 (statement of Rep. Sensenbrenner) ("[T]he insanity defense [is] a true legal art form with high-priced psychiatrists used to parade confusing conjecture about the mental condition of a defendant."); *The Insanity Defense: Hearings Before the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 469 (1982) [hereinafter *Insanity Defense Hearings*] (prepared statement of Sen. Grassley) (psychiatry is at best "inexact science").

The APA Statement notes that "[m]any psychiatrists . . . believe that psychiatric testimony (particularly that of a conclusory nature) about volition is more likely to [confuse] jurors than is psychiatric testimony relevant to a defendant's appreciation or understanding." APA STATEMENT, *supra* note 39, at 11, reprinted in 140 AM. J. PSYCHIATRY at 685. This concern about "volition" testimony, however, is moot in federal courts because Congress dropped the "irresistible impulse" prong of the legal standard for insanity. Insanity Defense Reform Act of 1984 § 402(a), 98 Stat. at 2057 (codified at 18 U.S.C. § 20(a) (Supp. III 1985)); see *infra* note 119 (new definition of federal insanity defense).

⁴¹ See S. REP., *supra* note 6, at 230, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS at 3412. But see *National Mental Health Association, Myths & Realities: Hearing Transcript of the National Commission on the Insanity Defense* 23, 30 (1983) [hereinafter *National Mental Health Association Hearing*] (testimony of Rudolph Giuliani, Associate Attorney General of the United States) (opposing change in evidentiary rule despite "massive amounts of conflicting testimony by psychiatric experts").

⁴² S. REP., *supra* note 6, at 231 (quoting APA STATEMENT, *supra* note 39, at 14, reprinted in 140 AM. J. PSYCHIATRY at 686), reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS at 3413; see also *Limiting the Insanity Defense: Hearings Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 272 (1983) [hereinafter *Limiting Hearings*] (prepared statement of Dr. Seymour L. Halleck, Professor of Psychiatry, University of North Carolina) (psychiatrists should educate insanity defense factfinders

with the legal factfinder.⁴³

The House Judiciary Committee's approach to the "battle of experts" problem emphasized the nature and limits of psychiatric expertise. The Committee noted that mental health experts have no special ability to draw legal conclusions about insanity;⁴⁴ consequently, it sought to eliminate expert testimony on the ultimate question of responsibility in favor of the jury's application of societal or community values. The Committee acknowledged, however, that "proper interpretation" of rule 702,⁴⁵ which requires proven expertise on the offered testimony's subject, would produce the same result.⁴⁶ Properly applied, rule 702 prevents a psychiatrist from offering an opinion on the defendant's "guilt" or "responsibility" because such moral determinations are beyond the scope of psychiatry.

C. Infrequency of the Problem: Statistics on Insanity Defense Trials and Expert Disagreement

The nation's obsession with the Hinckley trial focused an inordinate amount of attention on expert testimony and the use of the insanity defense in jury trials. In fact, insanity defense trials are few, and the "spectacle of competing expert witnesses"⁴⁷ rarely occurs. These cases attain disproportionate notoriety because insanity plea cases generally go to trial only when the victim, defendant, or nature

about defendant's mental health at time of offense and how his mental disorder may have influenced his behavior).

⁴³ S. REP., *supra* note 6, at 231 (quoting APA STATEMENT, *supra* note 39, at 14, reprinted in 140 AM. J. PSYCHIATRY at 686), reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS at 3413; see also *Insanity Defense Hearings*, *supra* note 40, at 84 (statement of Sen. Cochran) (jury must determine whether defendant's mental illness constitutes legal insanity).

⁴⁴ H.R. REP., *supra* note 34, at 16 ("While the medical and psychological knowledge of expert witnesses may well provide data that will assist the jury in determining the existence of the defense, no person can be said to have expertise regarding the legal and moral decision involved. Thus, with regard to the ultimate issue, the psychiatrist, psychologist or other similar expert is no more qualified than a lay person." (citation omitted)).

⁴⁵ Rule 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

FED. R. EVID. 702; see *infra* text accompanying notes 60-64 (discussing rule 702's effect on psychiatric testimony).

⁴⁶ H.R. REP., *supra* note 34, at 16 n.29. The Committee nevertheless concluded that rule 704(b) is necessary to ensure elimination of psychiatric testimony on moral issues. *Id.*

⁴⁷ See S. REP., *supra* note 6, at 230, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS at 3412.

of the crime is extraordinary.⁴⁸ Consequently, the lay public, and perhaps even some Congressmen, may assume incorrectly that guilty defendants routinely “get off” on insanity pleas, undermining public respect for both courts and psychiatry.⁴⁹

Few criminal defendants raise the insanity defense and most such attempts fail.⁵⁰ The insanity defense is raised in only one to two percent of the criminal cases that go to trial.⁵¹ Of those cases, only about ten percent end in a verdict of “not guilty by reason of insanity.”⁵² Thus, the fear that highly paid psychiatrists often sway juries to acquit guilty defendants is largely unsubstantiated. Nor are “battling experts” the rule even where an insanity plea goes to trial: prosecution and defense psychiatric experts often agree on the nature of the defendant’s mental state at the time of the offense.⁵³

II

RULE 704(b)’S MISTAKEN RESURRECTION OF THE ULTIMATE ISSUE RULE

Rule 704(b)’s resurrection of the ultimate issue rule for expert opinions on a criminal defendant’s mental state is unnecessary and only serves to muddle the law of evidence. If properly implemented, other Rules would bar the confusing expert testimony that troubled Congress. Rule 704(b) underestimates juries’ ability to comprehend complex issues and deprives them of helpful testimony. Finally, rule 704(b) will create new problems for judges, juries, and the parties at insanity defense trials.⁵⁴

⁴⁸ Slovenko, *supra* note 8, at 379 (“The trials become media showcases because the individuals are well-known or the crimes so bizarre or atrocious as to make for ‘good copy.’”).

⁴⁹ See W. WINSLADE & J. ROSS, *supra* note 9, at 199.

⁵⁰ Illustrative statistics are collected at H.R. REP., *supra* note 34, at 5 nn.7-8. In fiscal 1982, only 52 of 32,500 adult defendants represented by the New Jersey Public Defender’s Office entered insanity pleas. Of those 52 insanity pleas, only 15 succeeded. In Virginia, fewer than 1% of felony cases involve the insanity defense, and no more than 15 defendants are acquitted each year. In New York, the defense is raised in less than 2% of felony arrests; 25% of the insanity pleas succeed. *Id.*

⁵¹ Slovenko, *supra* note 8, at 379. Ninety-five percent of criminal cases are plea-bargained. *Id.*

⁵² *Id.*

⁵³ APA STATEMENT, *supra* note 39, at 14, *reprinted in* 140 AM. J. PSYCHIATRY at 686. The APA claims that, within the profession, the diagnostic concurrence rate is approximately 80%. *Id.* at 7, *reprinted in* 140 AM. J. PSYCHIATRY at 683. Others estimate that the rate is as high as 90%. See, e.g., *Reform Hearings*, *supra* note 1, at 109 (statement of Dr. Melvin Sabshin, chief executive officer of APA).

⁵⁴ There may also be a constitutional objection to rule 704(b). The fifth amendment prohibits governmental actions depriving any person of “life, liberty, or property, without due process of law.” U.S. CONST. amend. V. In a criminal proceeding, due process requires an adversarial hearing in which the participants present favorable evidence to an impartial decision maker. W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE

A. Other Rules Adequately Limit Confusing Evidence

In order to minimize jury confusion at insanity trials, the prosecution and defense both seek to elicit succinct expert testimony. Carried to an extreme, however, this effort may contribute to jury confusion by failing to elicit the factual detail upon which responsible determinations of insanity should be based.⁵⁵ When faced with conclusory testimony, inability to grasp the factual issues may force the jury to decide solely on the basis of witness credibility:⁵⁶ denied an opportunity to evaluate the experts' reasoning, the jury simply picks one to believe.

If properly applied, rules 403⁵⁷ and 702⁵⁸ provide adequate safeguards against the confusion spawned by attorneys' poor questioning and experts' conclusory opinion testimony without the addition of rule 704(b).⁵⁹ Rule 702 requires that a qualified expert's opinion "assist" the trier of fact.⁶⁰ For an expert's conclusion to be helpful, it must be well explained. In 1972, the District of Columbia Circuit stated in *United States v. Brawner*⁶¹ that "[i]t is the responsibility of all concerned—expert, counsel and judge—to see to it that the

§ 1.6, at 37-42 (1984). Two essential elements of such an adversarial process are the opportunity to present evidence to the decision maker and the chance to confront and cross-examine unfavorable witnesses or evidence. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 555 (2d ed. 1983); see also *Washington v. Texas*, 388 U.S. 14 (1967) (holding that defendants have constitutional right to call and examine witnesses).

In federal courts, criminal defendants have a statutory right to plead insanity. 18 U.S.C. § 20(a) (Supp. III 1985). Although rule 704(b) does not deny a defendant who pleads insanity the right to present an expert witness, it does impair his ability to utilize fully mental health experts in his defense. See *infra* note 100 and accompanying text. Thus, rule 704(b) may abridge the federal insanity defendant's right to procedural due process by depriving him of meaningful examination and cross-examination of witnesses.

⁵⁵ A. GOLDSTEIN, THE INSANITY DEFENSE 103 (1967).

⁵⁶ *Id.* at 103-04.

⁵⁷ Rule 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403.

⁵⁸ *Id.* 702. For the text of rule 702, see *supra* note 45.

⁵⁹ *Cf.* *Tabatchnick v. G.D. Searle & Co.*, 67 F.R.D. 49, 55 (D.N.J. 1975) (although rule 704 (now rule 704(a)) allows expert opinion to embrace ultimate issue to be decided, rule does not allow an expert to state bare conclusion without also describing supporting data and rationale for conclusion).

Before the Senate Committee on the Judiciary, Richard Bonnie, Director of the Institute of Law, Psychiatry and Public Policy at the University of Virginia, testified:

[Under the existing rules of evidence] trial judges should preclude expert witnesses from answering questions such as, "Do you believe that the defendant was legally insane at the time of the offense?" or "Do you believe that the defendant lacked criminal responsibility at the time of the offense?" . . . [N]o [new] statute is necessary to secure that result.

Insanity Defense Hearings, *supra* note 40, at 261.

⁶⁰ FED. R. EVID. 702.

⁶¹ 471 F.2d 969 (D.C. Cir. 1972).

jury in an insanity case is informed of the expert's underlying reasons and approach, and is not confronted with ultimate opinions on a take-it-or-leave-it basis."⁶² An expert's judgment is only as helpful to a trier of fact as the reasoning underlying that judgment.⁶³ Furthermore, approached as alert and intelligent bodies, rather than as passive recipients of simplistic and reductive testimony, juries can sort out even the most complex questions.⁶⁴

Judges and counsel should ensure that expert testimony assists the trier of fact. Rule 403 authorizes the court to preclude testimony that poses a risk of prejudice, confusion, or waste of time.⁶⁵ In addition, judges can use precise jury instructions to minimize confusion and prejudice caused by admitted evidence.⁶⁶ A judge should carefully explain to jurors that they may reject expert opinion if they conclude that the facts assumed in questions posed to the expert are unproven, or that the opinion is unsound, unreasonable, or incompetent.⁶⁷

Rules 403 and 702 can also guide counsel in eliciting clear, well-reasoned testimony from mental health experts. On direct examination, counsel can formulate questions that bring to light an expert's analysis of, as well as his conclusions about, the defendant's

⁶² *Id.* at 1006; *cf. Reform Hearings, supra* note 1, at 435-36 (prepared statement of Stephen Golding, Ph.D., Department of Psychology, University of Illinois) (professional responsibility alone requires mental health expert to present complete reasoning).

⁶³ *See Feguer v. United States*, 302 F.2d 214, 236 (8th Cir. 1962) ("[E]xpert opinion on competency rises no higher than the reasons on which it is based . . .").

⁶⁴ *See In re United States Fin. Sec. Litig.*, 609 F.2d 411, 429-30 (9th Cir. 1979) (The argument that juries are incapable of understanding complicated matters "demeans the intelligence of the citizens of this Nation. . . . Jurors, if properly instructed and treated with deserved respect, bring collective intelligence, wisdom, and dedication to their tasks . . ."), *cert. denied*, 446 U.S. 929 (1980). *But see Jorde, The Seventh Amendment Right to Jury Trial of Antitrust Issues*, 69 CALIF. L. REV. 1, 5-6 (1981) (judges should decide complex economic market structure issues in antitrust suits, leaving only conduct and damages issues to jury); Loo, *A Rationale for an Exception to the Seventh Amendment Right to a Jury Trial*, 30 CLEV. ST. L. REV. 647 (1981) (discussing possibility of "complexity exception" to jury trial in complex, lengthy civil litigation).

⁶⁵ For the text of rule 403, see *supra* note 57.

⁶⁶ *See United States v. Scavo*, 593 F.2d 837, 844 (8th Cir. 1979) ("possibility of undue prejudice was removed by the trial court's careful instructions regarding the juror's role in deciding the facts and weighing the credibility of witnesses, including expert witnesses"); FED. R. EVID. 403 advisory committee's note ("In reaching a decision whether to exclude on grounds of unfair prejudice, consideration should be given to the probable effectiveness . . . of a limiting instruction."); Bonnie & Slobogin, *The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation*, 66 VA. L. REV. 427, 466 (1980) (instruction cautioning jury to critically assess expert opinion is available).

⁶⁷ *See Reform Hearings, supra* note 1, at 651 (prepared statement of Daniel Crystal, Chairperson, New Jersey Coalition to Defend the Bill of Rights) (survey by New Jersey Coalition to Defend the Bill of Rights suggests that circuit courts of appeals believe that trial judges can control danger of expert opinion).

mental state.⁶⁸ Cross-examination might focus on the imprecision of an expert's definitions, other conclusions reachable on similar facts, and the shortcomings of the expert's evaluative techniques.⁶⁹

B. Rule 704(b) Serves No Legitimate Evidentiary Concerns

The enactment of rule 704(b) only confuses the law of evidence. Rule 704(b), by singling out opinions on mental state for special treatment, contradicts the Rules' generally liberal approach toward expert testimony on ultimate issues. In passing the rule, Congress underestimated jurors' power to assimilate complex psychiatric testimony and prohibited the kind of evaluative psychiatric testimony that is most helpful to the trier of fact.

1. *Testimony Concerning a Criminal Defendant's Mental State Should Not Be Singled Out for Special Treatment*

The Federal Rules of Evidence generally permit admission of opinion testimony when helpful to the trier of fact.⁷⁰ The Rules give trial judges great latitude to decide whether testimony is helpful enough for admission. When a party offers expert testimony, the judge determines whether that testimony has any tendency to prove a fact⁷¹ and whether the expert is well qualified.⁷² The judge generally admits evidence passing these tests absent some overriding reason to exclude.⁷³ Against this liberal background, rule 704(b) intrudes upon the trial judge's discretion. Rather than allowing judges to evaluate evidence on a case-by-case basis, Congress concluded that the potential for confusion from conflicting psychiatric testimony provided an overriding reason to exclude ultimate issue mental state testimony.⁷⁴

Rule 704(b) makes an unwarranted distinction between the testimony of mental health experts and the testimony of all other experts.⁷⁵ Courtroom disagreement among experts does not justify

⁶⁸ See Bonnie & Slobogin, *supra* note 66, at 466.

⁶⁹ *Id.*

⁷⁰ FED. R. EVID. 704 advisory committee's note.

⁷¹ Under rule 402, only relevant evidence is admissible. The court decides the preliminary question of whether or not the evidence is relevant. *Id.* 104(a). " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Id.* 401.

⁷² See *id.* 702; cf. C. McCORMICK, *supra* note 10, § 13, at 34 (trial judge's decision respecting experts' qualifications reviewable only for abuse of discretion).

⁷³ See FED. R. EVID. 403; *supra* note 57.

⁷⁴ See S. REP., *supra* note 6, at 230, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS at 3412; *supra* text accompanying notes 35-38.

⁷⁵ See *Reform Hearings*, *supra* note 1, at 85 (statement of Birch Bayh on behalf of National Commission on the Insanity Defense of the National Mental Health Associa-

limiting psychiatric testimony. Such disagreement is not peculiar to mental health experts:⁷⁶ experts testify as to subjective facts in many areas, including medical malpractice,⁷⁷ products liability,⁷⁸ child abuse,⁷⁹ highway safety,⁸⁰ and antitrust.⁸¹ Furthermore, nothing indicates that juries are more subject to suggestion in insanity defense trials than in other trials with conflicting expert testimony.⁸²

2. *Fear of Domination and Confusion of Juries Should Not Impair the Scope of Mental Health Expert Testimony*

Expert testimony on ultimate issues does not "usurp[] the function of the jury"⁸³ because juries may reject any expert's opinion, however respected and well qualified.⁸⁴ Even if only the defense of-

tion) ("[P]sychiatrists and other mental health experts should not be limited beyond the limitations placed on any other experts in judicial proceedings.").

⁷⁶ Slovenko, *supra* note 8, at 380-81. Admittedly, psychiatry cannot formulate rules as certain as the physicist's laws of motion, but the clinician's observations, intuitions, and theories can nevertheless aid a layman charged with judging human behavior. Bonnie & Slobogin, *supra* note 66, at 463; *see also supra* notes 8-9 and accompanying text (discussion of psychiatry's special helpfulness at insanity defense trial).

⁷⁷ *See, e.g.*, Steinberg v. Indemnity Ins. Co. of N. Am., 364 F.2d 266 (5th Cir. 1966) (doctor's testimony on issue of defendant plastic surgeon's negligence).

⁷⁸ *See, e.g.*, Nielson v. Armstrong Rubber Co., 570 F.2d 272 (8th Cir. 1978) (expert witness permitted to testify as to cause of tire defect).

⁷⁹ *See, e.g.*, United States v. Bowers, 660 F.2d 527 (5th Cir. Unit B Sept. 1981) (pediatrician allowed to testify that child suffered from battered child syndrome).

⁸⁰ *See, e.g.*, Young v. Illinois Cent. Gulf R.R., 618 F.2d 332 (5th Cir. 1980) (error to exclude civil engineer's assessment of dangerousness of railway crossing).

⁸¹ *See, e.g.*, *In re Japanese Elec. Prods. Antitrust Litig.*, 723 F.2d 238 (3d Cir. 1983) (error to exclude expert testimony concerning existence of Japanese television cartel), *rev'd on other grounds sub nom.* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 106 S. Ct. 1348 (1986).

⁸² Slovenko, *supra* note 8, at 380-81. In any event, conflicts in testimony are consistent with the premise of an adversarial decision-making process: more often than not, truth is revealed in the clash of opposite sides. *See* D. PECK, *THE COMPLEMENT OF COURT AND COUNSEL* 9 (1954) (adversary system is "probably best calculated to getting out all the facts and elucidating the law"); *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A.J. 1159, 1161 (1958) ("[T]he experienced judge or arbitrator desires and actively seeks to obtain an adversary presentation of the issues. Only when he has had the benefit of intelligent and vigorous advocacy on both sides can he feel fully confident of his decision."). *But see* Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975) (challenging idea that adversarial system is best method for determining truth).

⁸³ 7 J. WIGMORE, *supra* note 28, at 18 (calling notion that experts may usurp jury functions "mere bit of empty rhetoric"); *see* C. McCORMICK, *supra* note 10, at 30-31.

⁸⁴ 7 J. WIGMORE, *supra* note 28, at 18; *see also* Edelson v. Soricelli, 610 F.2d 131, 140 (3d Cir. 1979) (Rules "demonstrate confidence by Congress in the jury's ability to evaluate even the most compelling expert presentations"); *Reform Hearings, supra* note 1, at 436 (prepared statement of Stephen Golding, Ph.D., Department of Psychology, University of Illinois) ("Psychological and psychiatric conclusions do not have any magic potency, and those that are seen as unreasoned or unsupported by the trier of fact, whether that be judge or jury, can easily be dismissed if they are not convinced that evidentiary weight should be placed on it.").

fers psychiatric testimony, both cross-examination and the jury's own skepticism will test that evidence.⁸⁵ Nor does concern about confusion justify keeping complex expert testimony from the jury, especially in an insanity defense case. In *United States v. Torniero*,⁸⁶ decided while the Insanity Defense Reform Bill was pending, the trial court had excluded expert testimony at an insanity defense trial because of its potential for confusion.⁸⁷ The Second Circuit disagreed with the district court's reasoning, noting that the unique complexity of the insanity defense militates against excluding conflicting expert testimony solely in the interests of reducing confusion.⁸⁸ Rather, the court placed its trust in the jury's ability to digest such testimony:

In making this legal and moral judgment, the jury should not be shielded from differences of opinion in a profession that can never be entirely devoid of subjective disagreements. Psychiatric testimony should not be excluded solely as a result of an unfounded belief that "a jury will not be able to separate the wheat from the chaff."⁸⁹

In any event, after hearing an expert's detailed preliminary testimony and analysis, hearing his or her conclusions about the relationship between the accused's character and the underlying offense is not likely to confuse jurors further. In a system where the "law looks to the experts for input, and to the jury for outcome,"⁹⁰ legislators should have faith in the jury's ability to understand and selectively to assimilate psychiatric testimony.⁹¹

⁸⁵ Bonnie & Slobogin, *supra* note 66, at 466.

⁸⁶ 735 F.2d 725 (2d Cir. 1984), *cert. denied*, 469 U.S. 1110 (1985).

⁸⁷ 735 F.2d at 733-34. The defendant claimed that his addiction to gambling rendered him insane at the time of his alleged interstate transportation of stolen goods. The Second Circuit affirmed the exclusion of psychiatric experts on grounds of irrelevance, finding that addiction to gambling is not relevant to a nongambling offense. *Id.* at 733.

⁸⁸ *Id.* at 734.

⁸⁹ *Id.* (quoting *Barefoot v. Estelle*, 463 U.S. 880, 899 n.7 (1983)). The *Torniero* court noted further, "The framers of the Bill of Rights expected that juries would be capable of resolving disputed issues of fact in the federal courts. Even in civil litigation, where non-perspicuous issues and abstruse evidence proliferate, we have never acknowledged a 'complexity exception' to the right to a jury trial." *Id.* (citation omitted). *But see* Loo, *supra* note 64 (proposing "complexity exception" to seventh amendment right to jury trial).

⁹⁰ *United States v. Brawner*, 471 F.2d 969, 1007 (D.C. Cir. 1972).

⁹¹ *See Insanity Defense Hearings*, *supra* note 40, at 100 (statement of William Cahalan, prosecuting attorney) ("[W]e have got to have faith in the jurors, that they can discern and give [it] weight to the psychiatric testimony, [and] that they won't give [it] any more weight than it should have.").

3. *Ultimate Issue Testimony Is Necessary for Meaningful Psychiatric Evidence*

Expert conclusions about the ultimate issue are particularly valuable at insanity defense trials, where factfinders face enormous amounts of detailed evidence. A defendant pleading insanity is not limited to presenting evidence of his mental state on the date of the alleged crime: the defendant may attempt to paint a complete picture of his history and character insofar as they may have affected his intent or appreciation of his conduct at the time of the offense.⁹² If such evidence is to assist jurors, courts should allow experts to help the jurors characterize it.

Psychiatric experts can “assist” triers of fact in accordance with rule 702 by analyzing and drawing conclusions about an accused’s mental state where lay persons could not readily do so.⁹³ Psychiatric experts are qualified to supply opinions on an insanity defendant’s mental state, and their opinions on the ultimate factual questions can help jurors evaluate the evidence before them.⁹⁴ Moreover, this additional testimony may be essential to ensure that the factfinder gets the “thrust” of complicated explanations.⁹⁵ Thus, rule 704(b)’s prohibition of ultimate issue testimony deprives jurors at insanity defense trials of arguably “the most necessary tes-

⁹² See *Browner*, 471 F.2d at 994 (broad range of testimony “concerning the condition of a defendant’s mind and its consequences” should be presented to the jury in insanity defense cases); *supra* notes 8-9 and accompanying text.

⁹³ See C. McCORMICK, *supra* note 10, § 13, at 33 (expert witness offers “the power to draw inferences from the facts which a jury would not be competent to draw”). Rule 702 does not, however, limit expert opinion to areas “beyond the ken of laymen”—experts may testify so long as their specialized knowledge aids the jury in understanding the fact in issue. See *supra* note 45; see also *Reform Hearings*, *supra* note 1, at 310 (statement of Raymond Smietanka, associate counsel to the House Committee on the Judiciary) (“If psychiatrists are prohibited from drawing a diagnostic conclusion as well as a legal conclusion, what utility is their testimony going to be as opposed to the testimony of . . . a lay person?”).

⁹⁴ A. GOLDSTEIN, *supra* note 55, at 101; see Bonnie & Slobogin, *supra* note 66, at 480 (“The training and clinical practice of most mental health professionals extend well beyond the diagnosis and treatment of severe mental disorder. Personality assessment, ego psychology, and psychodynamic interpretation are important features of their training and practice.”).

⁹⁵ See *Reform Hearings*, *supra* note 1, at 442-43 (statement of Professor Jules Gerard, Washington University School of Law) (Psychiatric experts should be permitted to testify as to ultimate legal issues because otherwise the jury receives “a lot of psychiatric evidence about the person’s craziness and nothing else, . . . no guidelines . . . on how to connect it to the crime.”); see also *National Mental Health Association Hearing*, *supra* note 41, at 30 (statement of Rudolph Giuliani, Associate Attorney General of the United States) (“[I]t would probably make no sense at all to a jury if you didn’t have the psychiatrist in the long run drawing a conclusion. It would be all gobbledy-gook without the psychiatrist drawing a conclusion as to what he’s saying.”); cf. *Reform Hearings*, *supra* note 1, at 309 (statement of Raymond Smietanka) (cross-examination is more effective if there is definite opinion to attack).

timony"⁹⁶—that which teaches the jury how to evaluate the evidence before it. Rules of evidence should not deny aid to jurors simply because the aid consists of expert testimony on the very point in issue.⁹⁷ Rather, the rules should encourage litigants to exploit professional expertise if such utilization can possibly assist the triers of fact.⁹⁸

C. Rule 704(b) Will Create Problems in Court

Application of rule 704(b) in an insanity defense trial raises problems for the parties, the jury, and the judge. Rule 704(b) will adversely affect both the prosecution and the defense, and force judges to engage in difficult and time-consuming line drawing.

1. For the Parties

Rule 704(b) lessens the effectiveness of both prosecution and defense expert testimony.⁹⁹ With respect to the accused's ability to present an insanity defense, the rule magnifies the effect of another provision of the Insanity Defense Reform Act of 1984 which shifts the burden to the defendant to prove insanity by clear and convincing evidence.¹⁰⁰ In a less obvious way, rule 704(b) may prove troublesome for the prosecution if the accused chooses to challenge the presence of *mens rea* instead of raising the insanity defense¹⁰¹ be-

⁹⁶ 7 J. WIGMORE, *supra* note 28, § 1921, at 22; see Bonnie & Slobogin, *supra* note 66, at 456 ("[T]he common proscriptions of expert testimony on 'ultimate issues' erects [sic] an artificial barrier to relevant expert opinion, often depriving the factfinder of the most useful information the clinician can offer.").

⁹⁷ 7 J. WIGMORE, *supra* note 28, § 1921, at 22; see also *United States v. Hearst*, 563 F.2d 1331, 1351 (9th Cir. 1977) ("Once it is conceded that experts in psychology and psychiatry can be of help to a jury faced with a defense [of duress], we see no basis . . . for limiting their opinions to subsidiary issues and prohibiting them from opining whether appellant [acted] voluntarily or under duress."), *cert. denied*, 435 U.S. 1000 (1978).

⁹⁸ See 7 J. WIGMORE, *supra* note 28, § 1921, at 22; cf. *Grismore v. Consolidated Prods. Co.*, 232 Iowa 328, 346, 5 N.W.2d 646, 656 (1942) ("The purpose of court trials is to ascertain the truth and rightness of the matters in issue, and the purpose of expert opinion testimony is to instruct and aid the jury in ascertaining that truth, whether it be the ultimate fact or some minor evidential fact."); *Limiting Hearings*, *supra* note 42, at 260-61 (statement of Sen. Heflin) (expert witnesses are at insanity defense trials precisely to answer questions that invade the jury's province or are on ultimate issue).

⁹⁹ *United States v. Prickett*, 790 F.2d 35, 37 (6th Cir. 1986) ("Rule 704(b) may work to disadvantage the introduction of expert testimony as to mental condition at the time of [the defendant's] alleged offenses . . ."); see *supra* notes 92-98 and accompanying text.

¹⁰⁰ See 18 U.S.C. § 20(b) (Supp. III 1985).

¹⁰¹ See S. SALTZBURG & K. REDDEN, *FEDERAL RULES OF EVIDENCE MANUAL* 691 (4th ed. 1986); see also *Browner*, 471 F.2d at 1000-01 (expressly permitting defendants to introduce expert testimony tending to prove lack of *mens rea* when insanity defense not asserted); cf. *infra* note 108 (suggesting how rule 704(b) could favor accused in insanity defense case).

cause the prosecution retains the burden of proving mens rea "beyond a reasonable doubt." For example, if a murder defendant admits that he committed the offense and realized its wrongfulness at the time, he may introduce expert testimony negating premeditation in an attempt to reduce the degree of criminal homicide.¹⁰² Similarly, a defendant may as part of an entrapment defense deny predisposition to violate the law.¹⁰³ In *United States v. Prickett*,¹⁰⁴ the district court discussed application of rule 704(b) to an entrapment situation. The court noted in dicta that it would have permitted expert testimony on "inducement by law enforcement officials . . . as well as evidence of Defendant's personal background [and] prior conduct," but would have excluded under rule 704(b) expert testimony concerning whether "Defendant lacked the predisposition to commit a violation of the law."¹⁰⁵ In both the murder and entrapment examples, the prosecution may be unable to present evidence persuasive enough to dispel doubts raised by the defense experts; consequently the jury may be unable to find the requisite mens rea beyond a reasonable doubt.

2. For Juries

Ironically, an evidentiary rule intended to make mental health testimony less confusing to factfinders¹⁰⁶ may actually deprive jurors of information necessary to make that testimony helpful. To the extent that it prevents psychiatric experts from indicating whether the defendant's clinical condition falls within the legal definition of insanity, rule 704(b) hampers the expert's ability to teach jurors how to evaluate detailed descriptions of abnormal behavior.¹⁰⁷ Expansive application of rule 704(b) could lead to jury members' leaving the courtroom impressed by tales of the defendant's bizarre behavior, but with no sense of whether the defendant's disease or defect had legal significance to the crime charged.¹⁰⁸

¹⁰² *Browner*, 471 F.2d at 1002.

¹⁰³ *Davis v. United States*, 160 U.S. 469 (1895); *W. LAFAVE & J. ISRAEL*, *supra* note 54, § 5.2, at 416.

¹⁰⁴ 604 F. Supp. 407 (S.D. Ohio 1985), *aff'd*, 790 F.2d 35 (6th Cir. 1986).

¹⁰⁵ 604 F. Supp. at 411 n.2.

¹⁰⁶ See *supra* text accompanying note 38.

¹⁰⁷ See *Limiting Hearings*, *supra* note 42, at 209 (statement of Allan Beigle, chairman of APA Governmental Relations Committee); *S. SALTZBURG & K. REDDEN*, *supra* note 101, at 690 ("To the extent that experts testify that certain things are probable, likely, not probable, etc., something that [rule 704(b)] might permit, [the experts] may be inhibited from explaining to the jury why in any particular case that which is possible or probable ought to be rejected."); *supra* notes 95-96 and accompanying text.

¹⁰⁸ See *Reform Hearings*, *supra* note 1, at 442-43 (testimony of Professor Jules Gerard, Washington University School of Law) (Preventing psychiatric experts from testifying with respect to whether the defendant did or did not lack substantial capacity to appreciate his criminality leaves the jury with "a lot of psychiatric evidence about the person's

Expert testimony will further perplex juries when lawyers attempt to avoid rule 704(b)'s impact by using circumspect language, such as "might" or "could" rather than "did."¹⁰⁹ The Rules abolished the old ultimate issue rule in part to avoid the negative effect of these "odd verbal circumlocutions."¹¹⁰ Rule 704(b) undermines this laudable goal¹¹¹ by making mental health expert testimony less, instead of more, helpful to the trier of fact.

3. *For Judges*

The ultimate issue rule inevitably produced many close questions of application.¹¹² Similarly, rule 704(b) will present judges with difficult line-drawing problems at insanity defense trials.¹¹³ When a party offers psychiatric testimony, the judge must first determine whether the evidence constitutes a fact (and is therefore not governed by rule 704(b)) or an opinion which rule 704(b) might preclude.¹¹⁴ For example, when a psychiatrist testifies that a defendant has a mental illness that typically obscures a person's ability to tell right from wrong, the trial judge must determine whether the testimony constitutes an opinion as to whether the defendant has

craziness and nothing else, . . . no guidelines . . . on how to connect it to the crime. The result is that the prosecutors very much fear—and I think it is a reasonable fear—that the jury will then go to the jury room and say that all they heard is that the guy was crazy, so he must be insane.”).

¹⁰⁹ Cf. FED. R. EVID. 704 advisory committee's note (In order to avoid the ultimate issue rule "in cases of medical causation, witnesses were sometimes required to couch their opinions in cautious phrases of 'might or could,' rather than 'did,' though the result was to deprive many opinions of the positiveness to which they were entitled . . ."); *Grismore v. Consolidated Prods. Co.*, 232 Iowa 328, 349, 5 N.W.2d 646, 658 (1942) ("If the [expert] witness is confident of his conclusion, let him say so. If it is but a probability in his judgment, let him say so. If it is but a possibility in his mind, let him say so. But do not compel him to say it is only a possibility, when he believes it is an actuality. If the latter is the way he feels about it, the jury wish to know it and should know it.").

¹¹⁰ FED. R. EVID. 704 advisory committee's note.

¹¹¹ See *Reform Hearings*, *supra* note 1, at 436 (prepared testimony of Stephen Golding, Ph.D., Department of Psychology, University of Illinois) (barring psychiatric expert testimony on ultimate mental state issues "is simply encouraging a complex decisional process to speed backwards into the Middle Ages").

¹¹² See C. McCORMICK, *supra* note 10, at 31.

¹¹³ See S. SALTZBURG & K. REDDEN, *supra* note 101, at 690. For an example of a rule 704(b) line-drawing problem, see *United States v. Brown*, 776 F.2d 397 (2d Cir. 1985) (undercover police officer's expert testimony that defendant's patterns of conduct matched typical pattern of conduct of "steerer"—one who ascertains whether a potential heroin buyer is actually a user—comes close to being opinion on ultimate issue, but is not prohibited by rule 704(b)), *cert. denied*, 106 S. Ct. 1793 (1986).

Naturally, each party at an insanity defense trial will seek maximum latitude for his or her experts while attempting to limit the scope of the opposing experts' testimony. The consequent need for frequent evidentiary rulings on rule 704(b) objections will interrupt and delay proceedings. In addition, rule 704(b) objections will provide losing parties with more opportunities for appeals.

¹¹⁴ S. SALTZBURG & K. REDDEN, *supra* note 101, at 690.

the requisite mental state or "factual information concerning the defendant that the trier of fact can use to assess the insanity defense."¹¹⁵

The trial judge must also determine what constitutes an "ultimate issue" in each case.¹¹⁶ In any given case, judges could construe a wide range of opinions and inferences to address the ultimate issue.¹¹⁷ Courts need not rely on rule 704(b) to prevent experts from stating opinions on many ultimate issues, however, because rule 702 prohibits a psychiatric expert from opining on subjects beyond his field of expertise.¹¹⁸

Courts could limit rule 704(b)'s prohibition to only those expert opinions that focus on whether the defendant meets the federal statutory standard for insanity. Courts could further limit the prohibition to the standard's precise language, so that a psychiatrist could not testify that the defendant, "as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts."¹¹⁹ In *United States v. Prickett*,¹²⁰ the district court limited rule 704(b) to language closely related to the statutory standard for insanity. The court explained that "an expert . . . is not to offer the jury a conclusion as to whether [the mental disease or defect] rendered the defendant 'unable to appreciate the nature and quality or the wrongfulness of his acts.'"¹²¹ The *Prickett* court would prohibit as too close to the insanity standard any "expert's inference or opinion that, at the time of the alleged crimes, Defendant was (1) sane; (2) insane; [or] (3) lacked substantial capacity to know the wrongfulness of his conduct."¹²²

115 *Id.*

116 *See id.*

117 *See infra* notes 125-29 and accompanying text.

118 *See supra* note 45; *see also* A. GOLDSTEIN, *supra* note 55, at 97 (counsel may not ask expert witness whether defendant was "responsible," but witness may testify as to whether defendant was "sane" or knew right from wrong because these issues are viewed as within expert's realm of special competence).

119 Section 402(a) of the Insanity Defense Reform Act of 1984 defines the insanity defense for federal courts: "It is an affirmative defense to a prosecution under any Federal Statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts." 18 U.S.C. § 20(a) (Supp. III 1985).

120 604 F. Supp. 407 (S.D. Ohio 1985), *aff'd*, 790 F.2d 35 (6th Cir. 1986).

121 604 F. Supp. at 409 (quoting 18 U.S.C. § 20(a) (Supp. III 1985)).

122 *Id.* at 411 (omitting fourth prong of court's test—"lacked substantial capacity to conform his conduct to the requirements of the law which he is charged with violating"—because Insanity Defense Reform Act renders question of volition moot; *see supra* note 40). The court relied on its impression that Congress considered the "ultimate issues" to include "[w]hether or not the defendant was in [the expert's] opinion 'insane,' 'sane,' lacked the capacity to distinguish 'right from wrong,' or lacked the capacity to 'conform his behavior to the requirement of law.'" *Id.* at 410 (quoting S. REP., *supra* note 6, at 225, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 3407)).

Even under the straightforward *Prickett* guidelines, courts will encounter line-drawing problems in deciding whether expert testimony presents a rule 704(b) "inference" as to the ultimate issue. The *Prickett* court recognized that experts must continue to teach juries about defendants' mental diseases and defects and about the characteristics and implications of such conditions.¹²³ Judges at insanity defense trials, however, must determine whether a psychiatric expert's statement merely describes a defendant's disorder or constitutes an impermissible inference as to the ultimate issue. That psychiatrists' clinical testimony is often dispositive as to the ultimate issue magnifies the problem.¹²⁴

The Senate Subcommittee on Criminal Law explored a hypothetical that illustrates the difficulty of distinguishing between expert descriptions and opinions or inferences about ultimate issues.¹²⁵ According to this hypothetical, a mother on trial for her son's murder claims that she thought she was killing Satan. She asserts the insanity defense, claiming that she was unable to appreciate the "nature and quality or wrongfulness" of her actions.¹²⁶ A psychiatrist who concluded that the mother truly mistook her victim's identity could state his perception of her mental state in at least three ways: he could say that (1) the mother believed she was killing Satan, (2) she did not understand that she was killing her child, or (3) she did not understand the nature and quality or wrongfulness of her act. Each of these formulations expresses the same belief, yet courts applying rule 704(b) would in all likelihood treat them differently. Even the *Prickett* court's standard would prohibit the third statement as too close to the statutory standard for insanity.¹²⁷ A different court might draw the line after the first formulation, prohibiting the second and third as opinions or inferences as to the ultimate fact in issue.¹²⁸ Or a court could stretch rule

¹²³ *Id.* at 409.

¹²⁴ See Note, *The Expert in Court*, 99 LAW Q. REV. 197, 209 (1983).

¹²⁵ See *Limiting Hearings*, *supra* note 42, at 270-71.

¹²⁶ See *supra* note 119. During the discussion of the hypothetical, Dr. Seymour Halleck, professor of psychiatry at the University of North Carolina, stated that the psychiatrist's function is to explore the mother's mental state and to report, if his finding confirmed it, that she truly mistook her victim's identity. *Limiting Hearings*, *supra* note 42, at 271. Senator Specter then asked, "But if you find that she thought she was killing the devil, would you not necessarily find that she did not know what she was doing or [that she did not] intend[] to kill her child? She was intending to kill the devil." *Id.* One possible result under rule 704(b) is that a court would allow the opinion that the mother intended to kill Satan, but exclude the opinion that she did not intend to kill her son. This seems a classic "distinction without a difference." *Insanity Defense: Irrational in Any Form*, N.Y. Times, Feb. 5, 1983, at A22, col. 4 (letter of Dr. Abraham Halpern, clinical professor of psychiatry, New York Medical College).

¹²⁷ See *supra* notes 119-22 and accompanying text.

¹²⁸ See *Limiting Hearings*, *supra* note 42, at 231 (testimony of Dr. Seymour Halleck,

704(b) to exclude even the first statement because it is tantamount to saying that the mother lacked the required intent for murder.¹²⁹

D. A Proposed Solution

The range of reasonable interpretations of rule 704(b) suggests that its application in any given case involves substantial judicial discretion. Judges may interpret rule 704(b) to prohibit only opinions incorporating the statutory language of the insanity standard; they may apply the rule to issues that they deem so closely related to the statutory standard that those issues are regarded as "ultimate"; or they may construe rule 704(b) to prohibit any clinical testimony that as a practical matter constitutes an indirect opinion or inference on the ultimate issue. The more broadly judges construe rule 704(b), the more they will deprive juries of relevant and helpful testimony. Therefore, federal trial courts should interpret rule 704(b) narrowly by limiting its application to statements incorporating the statutory language. Even the *Prickett* court's attempt to distinguish testimony "closely related" to the statutory standard may stretch too far and deprive jurors of useful testimony. Rather, judges and counsel at federal insanity defense trials should rely on rules 403 and 702 to minimize jury confusion and to ensure that expert testimony assists the trier of fact.

CONCLUSION

Courts, commentators, and Congress rejected the "ultimate issue rule" as an ill-conceived and unnecessary evidentiary doctrine. Congress's resurrection of the ultimate issue rule in Federal Rule of Evidence 704(b) suffers from the same inadequacies.

By singling out for special limitation testimony concerning a criminal defendant's mental state, rule 704(b) contradicts the generally liberal approach of the Federal Rules of Evidence toward expert testimony. Furthermore, rule 704(b) is not necessary to limit confusion from expert testimony if rules 403 and 702 are properly enforced. Rule 704(b) actually makes expert witnesses less useful to factfinders because it encourages indirect and incomplete testimony.

Rule 704(b) will raise problems for all involved at insanity defense trials. The rule hampers both the prosecution and defense in

Professor of Psychiatry, University of North Carolina) (advocating prohibiting second and third formulations on basis of same hypothetical).

¹²⁹ See Bonnie & Slobogin, *supra* note 66, at 475 (Where witness can "state confidently that the defendant lacked capacity to have the required mens rea, this is tantamount to saying that, in the witness's opinion, the defendant did not *in fact* entertain the necessary state of mind.").

their attempts to persuade the factfinder, deprives factfinders of useful expert testimony, and forces judges to devote time and energy to difficult line-drawing problems.

Rule 704(b) is an unnecessary addition to the Federal Rules of Evidence. It is an imprudent amendment that is likely to increase perplexity and uncertainty at insanity defense trials. Therefore, trial judges should use their discretion to apply rule 704(b) narrowly, excluding only statements which reflect the language of the statutory insanity defense standard. By limiting the impact of rule 704(b), trial judges will allow mental health experts to assist factfinders as effectively as possible.

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