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PSYCHIATRIC EVIDENCE IN CRIMINAL TRIALS: TO JUNK OR NOT TO JUNK?

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INTRODUCTION

If nothing else, the interaction between the criminal courtroom and the mental health profession has produced some memorable nomenclature. “The abuse excuse,”¹ “battered woman syndrome,”² “child sexual abuse accommodation syndrome,”³ “false memory syndrome,”⁴ “television intoxication,”⁵ “urban

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1. See, e.g., ALAN DERSHOWITZ, *THE ABUSE EXCUSE AND OTHER COP OUTS, SOB STORIES, AND EVASIONS OF RESPONSIBILITY* (1994).

2. See, e.g., LENORE E. WALKER, *THE BATTERED WOMAN* (1979).

3. See, e.g., David McCord, *Expert Psychological Testimony About Child Complainants in Sexual Abuse Prosecutions: A Foray Into the Admissibility of Novel Psychological Evidence*, 77 J. CRIM. L. & CRIMINOLOGY 1 (1986).

4. See, e.g., Jacqueline Hough, Note, *Recovered Memories of Childhood Sexual Abuse: Applying the Daubert Standard in State Courts*, 69 S. CAL. L. REV. 855, 864 (1996) (noting that proponents of false memory syndrome “suggest that internal and external forces may be responsible for creating false memories”).

5. See, e.g., Patricia J. Falk, *Novel Theories of Criminal Defense Based Upon The*

survival syndrome,"⁶ "XYY chromosome abnormality"⁷—these are just a few of the colorful appellations used to describe claims that mental health professionals have bolstered with their testimony over the years.⁸ From reading the popular press, one could easily come to the conclusion that such testimony is spurious "psychobabble" that will eventually swallow up our justice system.⁹ Even a more tempered observer is likely to wonder whether this type of opinion evidence is worthy of consideration in courts of law. That is the primary question this Article seeks to address.¹⁰

Toxicity of the Social Environment: Urban Psychosis, Television Intoxication, and Black Rage, 74 N.C. L. REV. 731 (1996).

6. See, e.g., *id.*; Robert P. Mosteller, *Syndromes and Politics in Criminal Trials and Evidence Law*, 46 DUKE L.J. 461 (1996).

7. See, e.g., Deborah W. Denno, *Human Biology and Criminal Responsibility: Free Will or Free Ride?*, 137 U. PA. L. REV. 615 (1988); Maureen P. Coffey, Note, *The Genetic Defense: Excuse or Explanation?*, 35 WM. & MARY L. REV. 353 (1993).

8. For a much longer list, see DERSHOWITZ, *supra* note 1, at 18-19 (including "adopted child syndrome," "American dream syndrome," "black rage syndrome," "computer addiction," "fetal alcohol syndrome," "premenstrual stress syndrome," "self-victimization syndrome," and "UFO survivor syndrome"). It should be noted, however, that not all of these have been used in criminal trials.

9. See Lori Montgomery, *Teen Killer Blames Fear of Other Blacks: His Survival Defense Troubles Neighbors as Well as Legal Experts*, DETROIT FREE PRESS, Oct. 22, 1994, at 1A; Niko Price, *The "Abuse Excuse": Threat to Justice?; More and More Lawyers Using Trauma as Defense to Crimes*, LEGAL INTELLIGENCER, May 31, 1994, at 3 (referring to "two decades of pop psychology and afternoon talk shows that have convinced society . . . that there is an explanation—and possibly a justification—for almost any act"); *Nightline: Is Abuse an Excuse?* (ABC television broadcast, Feb. 4, 1994); cf. Margot Slade, *I am a Victim of (Fill in Blank) and Couldn't Help Myself: Legal Defenses Put Blame on Syndromes*, STAR TRIB. (MINNEAPOLIS-ST. PAUL), May 21, 1994, at 4A, available in 1994 WL 8438344 (discussing notable uses of various syndromes).

10. Others have addressed the issue of whether these various defenses will significantly undermine the retributive and deterrent objectives of the law. In a word, their answer is no. See Peter Arenella, *Demystifying the Abuse Excuse: Is There One?* 19 HARV. J.L. & PUB. POL'Y 703, 703-05, 709 (1996) (noting that successful "abuse excuses" are very rare and that typically only those claiming insanity are eligible to be excused under abuse excuse theories); Richard J. Bonnie, *Excusing and Punishing in Criminal Adjudication: A Reality Check*, 5 CORNELL J.L. & PUB. POL'Y 1, 3-4, 15 (1995) (describing the lack of success of novel psychiatric defenses in a number of cases and arguing that public attitudes toward those with mental problems have hardened); Stephanie B. Goldberg, *Fault Lines: Has a Talk-Show Mentality Softened Jurors to Accept any Excuse?*, A.B.A. J., June 1994, at 40, 42 (indicating that such defenses are usually unsuccessful).

This Article begins, in Part I, with a brief review of the past four decades¹¹ of psychiatric and psychological testimony in criminal trials (henceforth referred to simply as “psychiatric testimony”). Although this review cannot be called comprehensive,¹² it does make clear that, contrary to what the popular literature would have us believe, psychiatric innovation is neither at an all time high nor the prevalent form of opinion testimony by mental health professionals. At the same time, such “nontraditional” expert opinion from clinicians, on those rare occasions when it does occur, has changed over the past few decades in both content and objective.

Part II canvasses historical developments in the law governing the admissibility of psychiatric testimony. With the Supreme Court’s recent decision in *Daubert v. Merrell Dow Pharmaceuticals*,¹³ this law has undergone a metamorphosis, at least on the surface. What is also clear, however, is that evidentiary changes have not, to date, affected the admissibility of most psychiatric testimony. Traditional psychiatric testimony continues to be admitted regardless of its reliability. Further, while novel psychiatric testimony is usually subjected to *Daubert*-type or other screening tests, the continuing ambiguity of these tests means that nontraditional evidence is still admitted, excluded, or limited in its scope for reasons that are not always immediately apparent. A better method of parsing out truly “junk” testimony is needed.

Part III offers ways of improving the evidentiary analysis. A good framework for such analysis already exists—under the Federal Rules of Evidence, the admissibility of any expert testimony hinges on its materiality, probative value, helpfulness, and understandability.¹⁴ Most courts, however, perhaps not attuned to

11. This review only goes back 40 years because, prior to the 1950s, appellate cases dealing with the admissibility of psychological testimony were few and far between.

12. This Article’s claims about the content and focus of psychiatric testimony stem primarily from analysis of appellate cases, law review articles, and, to a lesser extent, from talking to mental health professionals “in the trenches.” Although it accurately reports what these sources provide, this Article does not necessarily reflect the entire story unfolding in trial courts around the country because many cases are not appealed and because there are many different “trenches.”

13. 509 U.S. 579 (1993).

14. See generally Michael C. McCarthy, Note, “Helpful” or “Reasonably Reliable”?

the subtly different versions of behavioral “science,” could benefit from an elaboration of this framework as it applies to psychiatric testimony.

The most important contention in Part III concerns the assessment of probative value. The thesis here is that a distinction should be made between psychiatric evidence presented to prove past mental state and psychiatric evidence proffered to prove acts. Given the difficulty, in theory and in practice, of proving past mental state,¹⁵ the reliability assessment that is part of gauging probative value should be less demanding for psychiatric evidence on this issue. At the same time, psychiatric testimony that focuses on whether an act occurred—an objective and scientifically verifiable fact—should have to meet a more stringent test. In short, assessment of probative value should take into account the extent to which accuracy is possible.

Part III also makes suggestions aimed at improving analysis of the other three components of the admissibility framework: materiality, helpfulness, and countervailing factors. First, courts should pay much closer attention to the substantive scope of the law governing mental state defenses, a move that should curtail some of the more outlandish claims. At the same time, the law should define the helpfulness inquiry in broad terms, focusing on the extent to which psychiatric evidence offers counterintuitive explanations. Finally, courts must consider whether the evidence will be subject to adversarial testing, given the importance of ensuring the evidence is understood for its actual worth.

Part IV concludes the Article with a discussion of an interesting implication of the foregoing arguments: the ultimate impact of the proposed framework is to allow criminal defendants more leeway than the government in presenting psychiatric evidence. Part IV briefly presents two normative justifications for this outcome, the first derived from the constitutional right to present a defense and the second based on utilitarian concerns about what

Analyzing the Expert Witness's Methodology Under Federal Rules of Evidence 702 and 703, 77 CORNELL L. REV. 350, 354-58 (1992) (discussing two of the Federal Rules of Evidence governing expert testimony).

15. See *infra* text accompanying notes 162-87.

would happen if that right were seriously abridged. Taken together, the arguments made in this Article suggest that suspect psychiatric science has a role to play in the criminal courtroom, but normally only when it supports claims concerning the past mental state of a defendant.

I. AN OVERVIEW OF PSYCHIATRIC TESTIMONY

Any attempt to assess the admissibility of psychiatric evidence must begin with some understanding of its nature and scope. It also should be informed by some knowledge of the wide range of legal issues such evidence might purport to address. The following discussion examines these two topics from an historical perspective.

A. *Types of Psychiatric Testimony*

Psychiatric testimony comes in all shapes and sizes. Particularly conspicuous these days is so-called "syndrome testimony." For instance, the battered woman syndrome (BWS) describes the state of "learned helplessness" allegedly visited on women who suffer through cyclical battering from their spouse or significant other.¹⁶ It has been used to support a defense of insanity, provocation, or self-defense.¹⁷ The child sexual abuse accommodation syndrome (CSAAS)¹⁸ and the rape trauma syndrome

16. The initial, although not the most coherent, description of the syndrome is found in WALKER, *supra* note 2. See also Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1197 (1993) (noting traditional view of "learned helplessness" as an element of BWS).

17. See, e.g., *People v. Humphrey*, 921 P.2d 1 (Cal. 1996) (examining BWS in self-defense context); *State v. McClain*, 591 A.2d 652 (N.J. Super. Ct. App. Div. 1991) (examining adequate provocation); *State v. Thomas*, 673 N.E.2d 1339 (Ohio 1997) (examining BWS in self-defense context); *State v. Whitney-Biggs*, 936 P.2d 1047 (Or. Ct. App. 1997) (examining extreme emotional disturbance relevant to manslaughter). See generally Susan Murphy, *Assisting the Jury in Understanding Victimization: Expert Psychological Testimony on Battered Woman Syndrome and Rape Trauma Syndrome*, 25 COLUM. J.L. & SOC. PROBS. 277 (1992) (examining use of BWS testimony to support claims of insanity or self-defense).

18. See generally Roland C. Summit, *The Child Sexual Abuse Accommodation Syndrome*, 7 CHILD ABUSE & NEGLECT 177 (1983) (providing the first explicit treatment of CSAAS).

(RTS)¹⁹ purport to identify psychological symptoms experienced by people who have been subjected to sexual abuse, and are relied upon by prosecutors to bolster testimony by victims whose injuries are otherwise hard to discern.²⁰ The “Vietnam veteran syndrome,” like the three syndromes just discussed, is an application of the post-traumatic stress disorder diagnosis, this time to those who experienced the trauma of war.²¹ It is usually introduced in insanity cases to support the argument that the defendant experienced a “flashback” to his war days at the time of the crime.²²

Other types of syndrome testimony are less common, but no less familiar to those who peruse the media. “Urban survival syndrome,” which posits that black ghetto youth are also in a “war zone”—an urban one that makes them particularly fearful of other black youths—recently received considerable publicity even though it has been advanced in only one case to date.²³ Also rare, but particularly controversial, are prosecutions for decades-old child abuse²⁴ bolstered by psychiatric evidence that people can repress memories and then “discover” them years

19. See generally Ann Wolbert Burgess & Lynda Lytle Holmstrom, *Rape Trauma Syndrome*, 131 AM. J. PSYCHIATRY 981 (1974) (providing the first scholarly article on RTS).

20. See Lisa R. Askowitz & Michael H. Graham, *The Reliability of Expert Psychological Testimony in Child Sexual Abuse Prosecutions*, 15 CARDOZO L. REV. 2027, 2040-44 (1994) (discussing cases in which testimony based on CSAAS has been admitted); Karla Fischer, *Defining the Boundaries of Admissible Expert Psychological Testimony on Rape Trauma Syndrome*, 1989 U. ILL. L. REV. 691, 710-26 (outlining admissibility of RTS evidence in various contexts).

21. See generally Chaim Shatan, *Soldiers in and After Vietnam*, 31 J. SOC. SCI. 25 (1975) (describing the existence of a delayed reaction to the stress of combat during the Vietnam War); Chaim Shatan, *The Grief of Soldiers—The Vietnam Combat Veterans' Self-Help Movement*, 43 AM. J. ORTHOPSYCHIATRY 640 (1973) (same).

22. See, e.g., *United States v. Crosby*, 713 F.2d 1066 (5th Cir. 1983); *State v. Felde*, 422 So. 2d 370 (La. 1982); *State v. Coogan*, 453 N.W.2d 186 (Wis. Ct. App. 1990).

23. See Wally Owens, Casenote, *State v. Osby*, *The Urban Survival Defense*, 22 AM. J. CRIM. L. 809 (1995); see also Montgomery, *supra* note 9, at 1A (reporting use of urban survival syndrome defense in the *Osby* case).

24. See, e.g., *State v. Hungerford*, No. 94-S-045 et al., 1995 WL 378571 (N.H. Super. Ct. May 23, 1995), *aff'd*, 697 A.2d 916 (N.H. 1997); *Commonwealth v. Crawford*, 682 A.2d 323 (Pa. Super. Ct. 1996), *appeal granted*, 693 A.2d 965 (Pa. 1997).

later;²⁵ these claims may be rebutted by what has been called the "false memory syndrome."²⁶

With such a wide array of new and sometimes bizarre-sounding psychiatric claims finding their way into criminal trials, it is no wonder that many commentators charge that modern-day psychiatric testimony often appears to be made-to-order junk science unfit for a court proceeding.²⁷ Part III of this Article addresses the legal ramifications of these challenges. For now, a few observations about the nature of psychiatric testimony will help to put them in perspective.

First, and most importantly, the bulk of criminal trials in which mental health professionals testify do not involve any of these dramatic claims. Rather, the typical expert psychiatric opinion is rather humdrum, usually concerning whether the defendant was evidencing symptoms of schizophrenia, manic-depressive psychosis, antisocial personality, schizoid personality, or some other traditional diagnosis.²⁸ The battles of the experts, if

25. The term "repression," when used to mean the act of "keeping something out of consciousness," was popularized by Sigmund Freud. See Matthew Hugh Erdelyi & Benjamin Goldberg, *Let's Not Sweep Repression Under the Rug: Toward a Cognitive Psychology of Repression*, in FUNCTIONAL DISORDERS OF MEMORY 355, 360 (John F. Kihlstrom & Frederick J. Evans eds., 1979), cited in Gary M. Ernsdorff & Elizabeth F. Loftus, *Let Sleeping Memories Lie? Words of Caution about Tolling the Statute of Limitations in Cases of Memory Repression*, 84 J. CRIM. L. & CRIMINOLOGY 129, 134 n.16 (1993). Almost every state has enacted statutes that toll or extend the statute of limitations in cases where "memory" of childhood sexual abuse becomes "unrepressed" years after it occurred. See Ernsdorff & Loftus, *supra*, at 150-53.

26. False memory syndrome "refers to a condition in which the victim's personality or identity and interpersonal relationships revolve around a traumatic memory which is objectively false, but in which the person strongly believes." Douglas R. Richmond, *Bad Science: Repressed and Recovered Memories of Childhood Sexual Abuse*, 44 U. KAN. L. REV. 517, 521 (1996).

27. See, e.g., LEE COLEMAN, *THE REIGN OF ERROR: PSYCHIATRY, AUTHORITY, AND LAW* ix (1984) (arguing that psychiatrists "have no valid scientific tools or expertise to justify their legal power"); MARGARET A. HAGEN, *WHORES OF THE COURT: THE FRAUD OF PSYCHIATRIC TESTIMONY AND THE RAPE OF AMERICAN JUSTICE* (1997) (arguing that psychiatric testimony should be banned from the courtroom because it is based on subjective opinions, intuition, and "junk science"); see also DERSHOWITZ, *supra* note 1, at 38 (labeling "much" of the new psychiatric knowledge "psychobabble" and warning that "we must not be seduced by the jargon of experts, particularly 'experts' who are really advocates for a particular political position or worldview").

28. See RALPH REISNER & CHRISTOPHER SLOBOGIN, *MENTAL HEALTH LAW: CIVIL AND CRIMINAL ASPECTS* (3d ed. forthcoming 1998) (reporting transcript of insanity trial of John Hinckley illustrating experts' disagreements over whether Hinckley was

they occur at all, are over whether the defendant fits into diagnostic categories that have been well-established for decades.²⁹ Rare is the forensic professional who has ever offered syndrome or other "novel" opinion testimony.³⁰

A related observation is that, contrary to the innuendo of the anti-junk science literature and the press, psychiatric innovation in criminal cases is not at an all-time high. Twenty years ago, the psycho-legal landscape was no less dotted with gaudy claims. In the 1970s, defendants based exculpatory defenses on "television intoxication,"³¹ cultural upbringing,³² "brainwashing,"³³ "rotten social background,"³⁴ and the possession of an extra Y chromosome.³⁵ Going back even further, a number of criminal

suffering from some type of psychosis or merely a personality disorder); *see also* *Clabourne v. Lewis*, 64 F.3d 1373, 1381 (9th Cir. 1995) (involving testimony supporting a claim of schizophrenia); *People v. Medina*, 906 P.2d 2 (Cal. 1995) (involving testimony concerning psychotic disorder, most likely schizophrenia), *cert. denied*, 117 S. Ct. 151 (1996); *Van Poyck v. State*, 694 So. 2d 686 (Fla. 1997) (involving testimony relating to schizo-affective disorder), *cert. denied*, 118 S. Ct. 559 (1997).

29. Supporting this point with case law is difficult because so few psychiatric cases are appealed. *See supra* note 12. It can, however, be supported indirectly. For example, virtually everyone who is hospitalized after being found not guilty by reason of insanity is categorized according to a standard diagnosis listed in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders. *See* GARY MELTON ET AL., *PSYCHOLOGICAL EVALUATIONS FOR THE COURTS* 216-17 (1987).

30. For instance, only a handful of the veteran forensic mental health experts that I have trained in Florida, Virginia, and elsewhere over the past 18 years have given such testimony.

31. *See Zamora v. State*, 361 So. 2d 776, 779 (Fla. Dist. Ct. App. 1978) (discussing admissibility of psychological testimony on "involuntary subliminal television intoxication" in the context of an insanity defense).

32. *See People v. Poddar*, 103 Cal. Rptr. 84, 88-89 (Cal. Ct. App. 1972) (discussing admissibility of anthropological testimony on relationships in India in the context of a diminished capacity defense), *rev'd*, 518 P.2d 342 (Cal. 1974).

33. *See United States v. Hearst*, 412 F. Supp. 889, 891 (N.D. Cal. 1976) (discussing expert testimony about whether treatment of the defendant by her captors "deprived her of the requisite general intent to commit the offense charged"), *aff'd*, 563 F.2d 1331 (9th Cir. 1977).

34. *See United States v. Alexander* 471 F.2d 923, 957-65 (D.C. Cir. 1972) (discussing "rotten social background" as a defense).

35. *See, e.g., People v. Tanner*, 91 Cal. Rptr. 656 (Cal. Ct. App. 1970); *Millard v. State*, 261 A.2d 227 (Md. Ct. Spec. App. 1970); *People v. Yukl*, 372 N.Y.S.2d 313 (N.Y. Sup. Ct. 1975); *State v. Roberts*, 544 P.2d 754 (Wash. Ct. App. 1976). *See generally* Lawrence B. Kessler, Note, *The XYY Chromosomal Abnormality: Use and Misuse in the Legal Process*, 9 HARV. J. ON LEGIS. 469 (1972) (describing research into "the XYY anomaly" and its correlation to socially deviant behavior).

defendants in the 1960s relied on claims of multiple personality disorder,³⁶ “psychic disintegration,”³⁷ and other manifestations of the unconscious.³⁸

At the same time, the nature of nontraditional testimony does seem to have changed at the margins over the past few decades in at least three ways. First, such testimony is more likely to be explicitly *nomothetic*, as opposed to *idiopathic*, in nature. Instead of individualized descriptions based on an intimate interview with the subject of the testimony, which was the usual fare twenty-five years ago, the newer brand of nontraditional evidence tends to rely on off-the-rack data or impressions about a group of people, presented by an expert who may never have seen the defendant or witness to whom it is applied.³⁹ John Monahan and Larry Walker have called this type of testimony “social framework evidence,”⁴⁰ because it provides only background information that must then be tied into the case at hand by other submissions. For instance, framework testimony in a child abuse case might describe the typical psychological characteristics of a victim of child abuse. Other evidence is then needed to link those characteristics with the child in question. All psychiatric testimony fits this pattern to some extent; for in-

36. See CAROLYN ANSPACHER, *THE TRIAL OF DR. DEKAPLANY* 115 (1965) (describing the defendant as having two personalities, one courageous and gentle, the other cowardly, brutal, and sadistic).

37. See *People v. Gorshen*, 336 P.2d 492, 496 (Cal. 1959) (involving psychiatric testimony that stated that “for this man to go insane, means to be permanently . . . under the influence of the devil. . . . [A]n individual in this state of crisis will do anything to avoid the threatened insanity.”).

38. See *United States v. Pollard*, 282 F.2d 450, 460-64 (6th Cir.) (discussing psychiatric testimony to the effect that the defendant committed the crime as a result of an unconscious need for punishment), *mandate clarified*, 285 F.2d 81 (6th Cir. 1960); *United States v. Batchelor*, 19 C.M.R. 452, 489-94 (A.C.M.R. 1954) (addressing claim based on “induced political psychosis”), *aff’d*, 22 C.M.R. 144 (C.M.A. 1956).

39. In 1987, for instance, Professors Walker and Monahan noted that “[w]ithin the past several years . . . courts have increasingly begun to use [general research of the type described in the text]. . . . Notable examples can be found in cases concerning eyewitness identification, assessments of dangerousness, battered women, and sexual victimization.” Laurens Walker & John Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 559, 563 (1987).

40. *Id.* at 560 (defining “social framework” as the use of “general conclusions from social science research in determining factual issues in a specific case”).

stance, even traditional testimony that the defendant was hearing voices at the time of the offense is usually bolstered by references to the typical symptoms of schizophrenia.⁴¹ The new syndrome testimony, however, is more explicit about focusing on "group character,"⁴² as opposed to the character of the subject.

A closely related difference between the recent and more distant past is that today's nontraditional testimony is more likely to be presented in a self-consciously scientific style. This is not to say that today's testimony is necessarily based on better science, just that it is more commonly framed in scientific terms. For instance, experts who testify about BWS or RTS often talk about studies purporting to show specific symptoms to be sequelae of battering and rape.⁴³ In contrast, testimony of yesterday about unconscious conflicts, brainwashing, and rotten social background, as well as unusual defenses of the early 1980s, such as pathological gambling⁴⁴ and premenstrual syndrome,⁴⁵ rarely referred to concerted scientific research; instead, the usual basis of the opinion was experience and theory.⁴⁶

41. See, e.g., *United States v. Evanoff*, 10 F.3d 559, 563 (8th Cir. 1993) (noting expert testimony that behavior of a defendant who "hears voices" is consistent with schizophrenic mental disorder).

42. See Andrew E. Taslitz, *Myself Alone: Individualizing Justice through Psychological Character Evidence*, 52 MD. L. REV. 1, 25-29 (1993) (containing one of the first uses of the label "group character").

43. See *Ibn-Tamas v. United States*, 407 A.2d 626, 631-39 (D.C. 1979) (describing testimony by Dr. Lenore Walker about her research concerning battered women); *People v. Taylor*, 552 N.E.2d 131, 133-35 (N.Y. 1990) (discussing studies concerning RTS); see also *Shahzade v. Gregory*, 923 F. Supp. 286, 287-290 (D. Mass. 1996) (discussing Dr. Bessel van der Kolk's testimony describing "several studies which focused on the concept of repressed memories").

44. See *United States v. Lewellyn*, 723 F.2d 615, 619 (8th Cir. 1983) (noting "recent" recognition of pathological gambling as a disease); *United States v. Shorter*, 618 F. Supp. 255 (D.D.C. 1985), *aff'd*, 809 F.2d 59 (D.C. Cir. 1987) (discussing "the impact of pathological gambling disorder on the volitional faculties").

45. See generally Robert Mark Carney & Brian D. Williams, *Recent Decision, Premenstrual Syndrome, A Criminal Defense*, 59 NOTRE DAME L. REV. 253 (1983) (examining *People v. Santos*, No. 1K046229 (N.Y. Crim. Ct. Nov. 3, 1982), and the validity of PMS as a criminal defense).

46. See *United States v. Hadley*, 918 F.2d 848 (9th Cir. 1990) (allowing expert to testify based on professional experience, without using special techniques or models); *Lewellyn*, 723 F.2d at 619 (discussing expert's basis as "experience with pathological gamblers"); *Santos*, No. 1K046229 (discussing expert who had worked with women who were violent prior to menstruation).

A third difference between psychiatric testimony today and that of a quarter century ago or even that of fifteen years ago is that more of it departs from the medical model of mental disability. Psychodynamic testimony and claims about extra Y chromosomes, premenstrual conditions, or pathological gambling attribute mental problems primarily to biological or intrapsychic causes.⁴⁷ In contrast, claims based on urban psychosis, war-induced trauma, or cultural differences (the latter of which have become much more frequent in the 1980s and 1990s) place primary blame for mental disturbances on the environment.⁴⁸ The "abuse excuse," a label encompassing a wide array of claims to the effect that previous abuse caused particular criminal behavior,⁴⁹ also focuses on exogenous etiological factors.⁵⁰

Not too much should be made of these tendencies regarding psychiatric evidence at criminal trials. Certainly some nontraditional psychiatric testimony from the 1970s was nomothetic and explicitly research-based (e.g., concerning the effects of watching television),⁵¹ and some of the specific claims made in that decade focused on environmental causes (e.g., television intoxication, rotten social background, and brainwashing testimony).⁵²

47. See *Lewellyn*, 723 F.2d at 617-20 (discussing inability of pathological gambler to resist impulses to gamble); *Santos*, No. 1K046229 (involving argument by defendant that she "blacked out" as a result of PMS); *People v. Yukl*, 372 N.Y.S.2d 313, 319-20 (N.Y. Sup. Ct. 1975) (examining evidence of XYY syndrome as biological cause of deviant behavior).

48. See, e.g., *Dang Vang v. Vang Xiong X. Toyed*, 944 F.2d 476, 480-82 (9th Cir. 1991) (discussing expert testimony regarding defendant's cultural background); *State v. Coogan*, 453 N.W.2d 186, 187 (Wis. Ct. App. 1990) (involving claim by defendant that, at the time of the killings, he "believed he was in a combat situation in Vietnam"); *Owens*, *supra* note 23, at 810 (noting claim by defendant that, because of his upbringing in a violent, urban environment, he believed his only option was to kill his two victims).

49. See generally *DERSHOWITZ*, *supra* note 1, at 3 (defining the "abuse excuse" as "the legal tactic by which criminal defendants claim history of abuse as an excuse for violent retaliation").

50. See *id.* at 19 (noting that each of the various "abuse excuse" claims shares in common "a goal of deflecting responsibility from the person who committed the criminal act onto someone else who may have abused him or her or otherwise caused him or her to do it").

51. See *Zamora v. State*, 361 So. 2d 776 (Fla. Dist. Ct. App. 1978) (involving research based testimony on the effects of television violence on children).

52. See *Zamora*, 361 So. 2d at 779-81 (examining psychological testimony on "television intoxication"); *United States v. Alexander*, 471 F.2d 923 (D.C. Cir. 1973)

Nonetheless, these three mini-trends are worth noting; as developed below, they may bear some relationship to judicial analysis of psychiatric evidence.

B. The Legal Focus of Psychiatric Testimony

Psychiatric testimony has changed not only in content but also in purpose. In the "old" days, such testimony was offered almost entirely in support of an insanity defense, with occasional attempts to prove lack of mens rea (the latter sometimes referred to as "diminished capacity").⁵³ Today, psychiatric testimony is used to ground self-defense,⁵⁴ provocation,⁵⁵ duress,⁵⁶ and entrapment⁵⁷ claims, as well as insanity and absence-of-mens rea arguments.⁵⁸

(involving rotten social background); *United States v. Hearst*, 412 F. Supp. 863 (N.D. Cal. 1975) (involving "brainwashing" defense).

53. Professor Lewin's 1975 article, focusing on psychiatric evidence presented in criminal trials for purposes other than insanity, discussed only diminished capacity cases. See Travis H.D. Lewin, *Psychiatric Evidence in Criminal Cases for Purposes Other than the Defense of Insanity*, 26 SYRACUSE L. REV. 1051 (1975).

54. See, e.g., *Shepard v. State*, 847 P.2d 75 (Alaska Ct. App. 1993) (holding that post-traumatic stress disorder testimony should have been admitted to prove self-defense); *People v. Sandoval*, 841 P.2d 862 (Cal. 1992) (allowing forensic psychiatrist to testify regarding a self-defense claim that ingestion of PCP made the victim angry, aggressive, and violent), *aff'd*, 511 U.S. 1 (1994); *State v. Purcell*, 669 N.E.2d 60 (Ohio Ct. App. 1995) (holding psychiatric testimony admissible to prove self-defense); *Commonwealth v. Kacsmar*, 617 A.2d 725 (Pa. Super. Ct. 1992) (holding battered person syndrome admissible to establish self-defense).

55. See, e.g., *State v. Maelega*, 907 P.2d 758 (Haw. 1995) (using battered spouse expert evidence to support extreme mental or emotional disturbance defense in an effort to reduce murder charge to manslaughter).

56. See, e.g., *United States v. Brown*, 891 F. Supp. 1501 (D. Kan. 1995) (using battered spouse syndrome to prove duress and compulsion); *State v. Duncan*, 830 P.2d 554 (N.M. Ct. App. 1990) (holding the exclusion of psychiatric testimony on duress to be reversible error), *aff'd*, 805 P.2d 621 (N.M. 1991); *State v. Riker*, 869 P.2d 43, 47 (Wash. 1994) (examining use of BWS testimony to support a duress defense).

57. See, e.g., *United States v. Bastanipour*, 41 F.3d 1178 (7th Cir. 1994) (excluding expert testimony on coercion in drug possession case); *United States v. Newman*, 849 F.2d 156 (5th Cir. 1988) (holding admissible testimony regarding mental disease or subnormal intelligence to show defendant was peculiarly susceptible to inducement by government).

58. See, e.g., *Wilkes v. United States*, 631 A.2d 880 (D.C. 1993) (involving use of psychiatric testimony in support of insanity defense); *State v. Provost*, 490 N.W.2d 93, 98 & n.2, 99 & n.3 (Minn. 1992) (examining use of psychiatric testimony on the

In each of these newer areas, the testimony takes advantage of, or tries to get the courts to adopt, relatively recent substantive reforms in the law that subjectify inquiries into the defendant's mental state at the time of the offense. For instance, in some jurisdictions for some types of crimes, self-defense no longer depends upon whether the force used by the defendant was reasonably necessary, but on whether the defendant honestly *believed* the force was necessary.⁵⁹ Similarly, in some jurisdictions, a manslaughter instruction must be given not only when a reasonable person would have been provoked, but also when, to use the Model Penal Code's much-copied formulation,⁶⁰ the provoked reaction was reasonable in light of the actor's situation under the circumstances as he or she believed them to be.⁶¹ Subjectifying blameworthiness in this way opens the door wide to psychological speculations.

Nor has psychiatric testimony in criminal cases been limited solely to assessments of mental state. Courts also have allowed such testimony in support of a claim that the defendant does not meet the *act* requirement of an offense. Usually, the testimony is framed in terms of the defendant's character; someone with the defendant's personality, the expert opinion suggests, could not have (or could have) committed the offense in question.⁶² The first reported appellate opinion sanctioning such testimony was

issue of mens rea in several states).

59. The Model Penal Code endorses such an approach, at least when the belief that defensive force is necessary is neither reckless nor negligent. See MODEL PENAL CODE § 3.09(2) (1985). In such cases, "self-defense" is probably better seen as an excuse than as a justification. See, e.g., N.D. CENT. CODE § 12.1-05-08 (1997) ("A person's conduct is excused if he believes that the facts are such that his conduct is necessary and appropriate for any of the purposes which would establish a justification or excuse under this chapter, even though his belief is mistaken.").

60. See MODEL PENAL CODE § 210.3(1)(b) (1985).

61. See *People v. Shelton*, 385 N.Y.S.2d 708 (N.Y. Sup. Ct. 1976), *aff'd*, 434 N.Y.S.2d 649 (N.Y. App. Div. 1980); *State v. Ott*, 686 P.2d 1001 (Or. 1984).

62. See *United States v. MacDonald*, 688 F.2d 224, 227-28 (4th Cir. 1981) (supporting trial court's exclusion of expert testimony that defendant's personality was inconsistent with outrageous and senseless murders of his family); *State v. Treadaway*, 568 P.2d 1061, 1066 (Ariz. 1977) (allowing testimony that defendant was incapable of "inflicting grievous harm to anyone"); *Kanaras v. State*, 460 A.2d 61, 72-73 (Md. Ct. Spec. App. 1983) (allowing testimony that defendant is passive and thus unable to commit violent crime).

handed down during the 1950s,⁶³ but the phenomenon appears to have been much more prevalent in the last twenty years.⁶⁴

Still another way in which innovative lawyers have used psychiatric testimony in recent years is as a method of addressing the credibility of a witness. In a sense, this issue arises any time a mental health professional testifies in support of or against a psychiatric defense. An opinion that the defendant is insane suggests that the defendant's claim of insanity is true, and a contrary opinion suggests the opposite. The type of credibility testimony of concern here, however, is that testimony which is explicitly framed in terms of whether a witness other than the defendant is telling the truth about some event. Perhaps the most famous example was the psychiatric testimony presented in the Alger Hiss trial, which asserted that Whittaker Chambers, Hiss's prime accuser, was a psychopathic liar.⁶⁵ That trial, like the first character evidence cases, took place during the 1950s, but it seems to have been well ahead of its time. Most appellate cases dealing with expert testimony about the truthfulness of a witness have come in the past two decades, many of them in cases involving child abuse and rape.⁶⁶

A related novel use of behavioral scientists is helping the trier of fact determine whether a witness is accurate, as opposed to truthful.⁶⁷ The most obvious example of this practice is expert testimony about the foibles of witnessing and remembering an event. The eyewitness expert points to phenomena that can affect one's registration of an event (e.g., weapons focus), memory of an event (e.g., time), or recall of an event (e.g., suggestions by the police).⁶⁸ The jury then may consider this nomothetic infor-

63. See *People v. Jones*, 266 P.2d 38 (Cal. 1954).

64. See cases cited *supra* note 62.

65. See *United States v. Hiss*, 88 F. Supp. 559 (S.D.N.Y. 1950); see also JUDSON FAUKNOR, 1950 ANNUAL SURVEY OF AMERICAN LAW EVIDENCE 804-08 (1950), reprinted in JON R. WALTZ & ROGER C. PARK, CASES AND MATERIALS ON EVIDENCE 484-86 (8th ed. 1995) (describing the use of psychiatric testimony in *Hiss*).

66. See, e.g., *State v. Foret*, 628 So. 2d 1116 (La. 1993) (involving child witness's credibility); *State v. Kim*, 645 P.2d 1330 (Haw. 1982) (involving rape victim's credibility); *State v. Wilson*, 456 N.E.2d 1287 (Ohio 1982) (involving rape victim's credibility); see also *Munoz v. State*, 763 S.W.2d 30, 32 (Tex. Ct. App. 1988) (involving credibility testimony in a murder trial).

67. A "truthful" witness is one who merely *believes* his or her story is accurate.

68. See generally ELIZABETH F. LOFTUS & JAMES M. DOYLE, EYEWITNESS TESTIMONY

mation in deciding whether a particular eyewitness identification is correct. A variant is testimony about the theoretical basis for repressed memory, designed to support the validity of a sudden remembrance of an event that occurred years ago.⁶⁹ Here, however, the expert not only tends to provide information about the theory of repressed memory but also vouches for the accuracy of the particular memory in question.⁷⁰

II. THE LAW'S APPROACH TO PSYCHIATRIC TESTIMONY

The admissibility of psychiatric evidence of the type described in Part I hinges on the law governing expert testimony. That law has gone through several transformations. In the end, however, the particular evidentiary formulation applied appears to have little effect on the admission of psychiatric evidence. Regardless of the test, traditional testimony is admitted readily, while nontraditional testimony is subjected to a multi-factor analysis that often bears little or no relationship to the language of the relevant test.

A. *Changes in Evidentiary Law*

Before 1975, the usual threshold requirement for opinion testimony was that it be based on specialized information "beyond the ken of [the] jury."⁷¹ In theory, then, opinions about some-

36-39, 51-52, 90-94 (1979) (examining the effects of weapons focus, memory of events over time, and police suggestion).

69. See *Cole v. Shults-Lewis Child and Family Services, Inc.*, 681 N.E.2d 1157, 1159-60 (Ind. Ct. App. 1997) (holding that a party asserting repressed memory must also provide expert testimony to support "the scientific validity of the phenomenon"); *Barrett v. Hyldburg*, 487 S.E.2d 803, 806 (N.C. Ct. App. 1997) (holding "testimony regarding recovered memories . . . may not be received at trial absent accompanying expert testimony on the phenomenon of memory repression").

70. See *Shahzade v. Gregory*, 923 F. Supp. 286, 290 (D. Mass. 1996) (noting that, despite the inability to test repressed memories empirically, the theory of repressed memory has been generally accepted and applies in this case); *Isely v. Capuchin Province*, 877 F. Supp. 1055, 1067 (E.D. Mich. 1995) (allowing expert to testify in a civil case "as to whether Mr. Isely's behavior is consistent with someone who is suffering repressed memory").

71. *State v. Vaccaro*, 298 A.2d 788, 792 (R.I. 1973) (holding that opinion of spectrographs expert must be "beyond the ken of [the] jury" to be permitted); see also *Dawson v. State*, 439 P.2d 472, 473 (Nev. 1968) (holding, in a diminished capacity case, that "[a]n expert witness may state conclusions on matters within his

thing the typical layperson could grasp were not admissible.⁷² Testimony that did meet this threshold might also be subject to two further limitations. It could not rely on information, such as hearsay, which was not independently admissible,⁷³ and it could not address the ultimate legal issue in the case.⁷⁴

Coexisting with these rules, at the federal level and in many states, was the *Frye* test. This test came from a 1923 case, *Frye v. United States*,⁷⁵ which held that the results of polygraph testing were not admissible because the basis of the test was not "sufficiently established to have gained general acceptance in the particular field in which it belongs."⁷⁶ In many jurisdictions, this "general acceptance" test became the primary means of evaluating the admissibility of scientific evidence, especially novel scientific evidence in criminal cases.⁷⁷ Indeed, many courts evaluating such evidence relied entirely on *Frye*, without any explicit inquiry into whether evidence was "beyond the ken of the jury."⁷⁸

expert knowledge provided the conclusion is one laymen would not be capable of drawing for themselves"); 3 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE § 702[02], at 702-10 (1996) (noting that prior to the enactment of the Federal Rules, the test for expert testimony typically was whether the testimony was "within the common knowledge of the average layman").

72. See WEINSTEIN & BERGER, *supra* note 71, at 702-10 (noting "no need for expert testimony unless the issue to which the testimony would be directed is 'not within the common knowledge of the average layman'").

73. Prior to the enactment of the Federal Rules of Evidence, the "majority view" was "that a question is improper if it calls for the witness' opinion on the basis of reports that are not in evidence or are inadmissible in evidence under the hearsay rule." 1 MCCORMICK ON EVIDENCE § 15 at 62 (John William Strong ed., 4th ed. 1992).

74. See *id.* § 12 at 47-48 ("[U]ntil about 35 years ago, a very substantial number of courts . . . had announced the general doctrine that witnesses would not be permitted to give their opinions or conclusions upon an ultimate fact in issue.").

75. 293 F. 1013 (D.C. Cir. 1923).

76. *Id.* at 1014.

77. As certain commentators have noted:

In civil cases, *Frye* would not be cited as a guiding principle until 1984, and was mentioned in less than half a dozen civil cases. In criminal cases, by contrast, *Frye* became the polestar to guide the admission of test results from dozens of widely varied techniques that poured out of the growing number of crime laboratories in the 1970s.

ANDRE A. MOENSSSENS ET AL., SCIENTIFIC EVIDENCE IN CIVIL AND CRIMINAL CASES 8 (4th ed. 1995).

78. See *Coppolino v. State*, 223 So. 2d 68, 70 (Fla. Dist. Ct. App.), *appeal dis-*

In 1975, the Federal Rules of Evidence went into effect. On their face, the new federal rules governing expert testimony—widely copied by the states—relaxed previous restrictions. Under Rule 702, opinions based on “scientific, technical or other specialized knowledge” need only “assist the trier of fact to understand the evidence or to determine a fact in issue.”⁷⁹ While the difference between evidence that “assists” and evidence that is “beyond the ken” may be subtle, the former language suggests a greater willingness to classify an opinion as expert, and courts have so held.⁸⁰ In more obvious contrast with previous practice in many jurisdictions, Rule 703 permits opinion to be based on otherwise inadmissible information if it is “of a type reasonably relied upon by experts in the particular field.”⁸¹ Finally, again in contrast to the law in at least some jurisdictions at the time it went into effect, Rule 704 permitted qualified opinion testimony to “embrace[] an ultimate issue to be decided by the trier of fact.”⁸²

Although Rule 703’s “reasonable reliance” language resonated with *Frye*, the commentary to that rule and the other federal rules governing expert testimony made no reference to that case.⁸³ Nonetheless, many courts continued to apply *Frye* to scientific evidence, with or without reference to the federal rules or

missed, 234 So. 2d 120 (Fla. 1969); *Commonwealth v. Fatalo*, 191 N.E.2d 479, 480-81 (Mass. 1963); see also John William Strong, *Questions Affecting the Admissibility of Scientific Evidence*, 1970 U. ILL. L.F. 1, 14 (“The *Frye* standard . . . tends to obscure . . . proper considerations by asserting an undefinable general acceptance as the principle if not sole determinative factor.”).

79. FED. R. EVID. 702.

80. See *United States v. Downing*, 753 F.2d 1224, 1226-32 (3d Cir. 1985) (recognizing, in context of eyewitness testimony, that Rule 702 calls for a more liberalized admissibility standard than the “beyond the ken” inquiry); *State v. Bednarz*, 507 N.W.2d 168, 171-72 (Wis. Ct. App. 1993) (holding expert testimony on BWS admissible even though the dynamics of domestic abuse are not unknown to the layperson); see also 1 MCCORMICK ON EVIDENCE, *supra* note 73, § 13 at 54 (“Rule 702 should permit expert opinion even if the matter is within the competence of the jurors if specialized knowledge will be helpful . . .”).

81. FED. R. EVID. 703.

82. FED. R. EVID. 704. *But see infra* text accompanying notes 101-02.

83. See 2 STEPHEN SALTZBURG & KENNETH REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 15 (5th ed. 1990) (“It is not clear whether Rules 702 and 703 are intended to codify something like the *Frye* test or whether they establish a less demanding standard for scientific evidence . . .”).

the analogous state rules.⁸⁴ Other courts developed their own separate screening tests for scientific testimony. For instance, one test looked at whether there was “substantial,” as opposed to general, acceptance of the subject matter,⁸⁵ and another focused on whether the opinion was “the product of an explicable and reliable” system of analysis.⁸⁶

Still other courts, with the support of most commentators,⁸⁷ rejected separate screening tests for expert testimony.⁸⁸ Instead, these jurisdictions adhered to the Federal Rules’ “helpfulness” analysis, supplemented by the balancing test applicable to any proffered evidence; under this regime, any helpful specialized knowledge from a qualified expert is admissible unless its potential for confusing the jury, prejudicing one of the parties, or wasting time substantially outweighs its probative value.⁸⁹ This approach might be called the 401/403 balancing test, in reference to the federal rules that deal with the definition of relevance⁹⁰ and the delineation of countervailing factors.⁹¹

84. See MOENSSENS ET AL., *supra* note 77, at 12 (discussing the post-1975 division of jurisdictions into at least three groups, one that rejected *Frye* in favor of the federal rules, one that held that *Frye* survived the rules and is complementary to Rule 702, and the third that adopted neither approach). See, e.g., *United States v. Two Bulls*, 918 F.2d 56, 60 (8th Cir. 1990) (“[W]e feel Rule 702 and *Frye* both require the same general approach to the admissibility of new scientific evidence.”); *United States v. Christophe*, 833 F.2d 1296, 1299 (9th Cir. 1987) (explaining that Rule 702 is not met unless the expert testimony “conforms to a generally accepted explanatory theory”).

85. *United States v. Gillis*, 773 F.2d 549, 558 (4th Cir. 1985).

86. *State v. Kim*, 645 P.2d 1330, 1336 (Haw. 1982).

87. The authors of *McCormick on Evidence* find the “relevancy” approach “the most appealing.” 1 MCCORMICK ON EVIDENCE, *supra* note 73, § 203, at 874. They cite a long list of commentators who agree, including 1 DAVID W. LOISELL & CHRISTOPHER B. MUELLER, FEDERAL EVIDENCE § 105 (1977); Margaret A. Berger, *A Relevancy Approach to Novel Scientific Evidence*, 115 F.R.D. 89, 89-91 (1987); and Edward J. Imwinkelried, *The Standard for Admitting Scientific Evidence: A Critique from the Perspective of Juror Psychology*, 28 VILL. L. REV. 554 (1983).

88. See 1 MCCORMICK ON EVIDENCE, *supra* note 73, § 203, at 872 (“[S]everal jurisdictions expressly have rejected *Frye*, leaving the task of regulating the admission of scientific evidence to the normal doctrines of relevancy and helpfulness of expert testimony.”).

89. See *id.*

90. See FED. R. EVID. 401.

91. See FED. R. EVID. 403.

In short, even at the federal level, the scope and effect of Rule 702 and its companion rules were unclear for many years. Then came the Supreme Court's 1993 decision in *Daubert v. Merrell Dow Pharmaceuticals*.⁹² In that case, the Court rejected what it called the "austere" *Frye* standard as the sole test of admissibility in favor of the multi-factor "liberal" regime of the federal rules.⁹³ Under this approach, the Court explained, courts are to judge the admissibility of scientific evidence by its "helpfulness," which in turn depends on "whether the reasoning or methodology underlying the testimony is scientifically valid and . . . whether that reasoning or methodology properly can be applied to facts in issue."⁹⁴ Validity, said the Court, can be determined by the "falsifiability" or "testability" of the theory and methodology underlying it; the error rate associated with the theory or procedure; the extent to which it has been subject to peer review and publication; and the extent to which it has been generally accepted by the relevant field.⁹⁵ Although the latter factor obviously echoes *Frye*, the difference under *Daubert* is that general acceptance is now neither necessary nor sufficient for admissibility. Some states have followed the federal lead and adopted *Daubert*;⁹⁶ others have adhered to *Frye* or its equivalent.⁹⁷

B. *The Impact of Evidentiary Law on Psychiatric Testimony*

How has all of this evidentiary ferment affected psychiatric testimony? Not at all, if one focuses exclusively on traditional psychiatric evidence. Mental health professionals who testify in insanity cases relying on a typical Axis I or Axis II diagnosis⁹⁸

92. 509 U.S. 579 (1993).

93. See *id.* at 588-89.

94. *Id.* at 592-93.

95. See *id.* at 593-94.

96. See *Jones v. State*, 862 S.W.2d 242, 245 (Ark. 1993) (noting the adoption of a *Daubert*-like standard in Arkansas prior to the *Daubert* decision); *State v. Porter*, 698 A.2d 739, 746-52 (Conn. 1997); *State v. Cephas*, 637 A.2d 20 (Del. 1994); *State v. Foret*, 628 So. 2d 1116 (La. 1993); *State v. Hungerford*, 697 A.2d 916 (N.H. 1997).

97. See *State v. Bible*, 858 P.2d 1152, 1181-83 (Ariz. 1993); *People v. Leahy*, 882 P.2d 321 (Cal. 1994); *Hadden v. State*, 690 So. 2d 573, 575 (Fla. 1997); *Tungate v. Commonwealth*, 901 S.W.2d 41, 43 (Ky. 1995); *State v. Copeland*, 922 P.2d 1304, 1313-15 (Wash. 1996).

98. The American Psychiatric Association's Diagnostic and Statistical Manual, cur-

have been able to say virtually anything they want in court, post-*Frye*, post-Rule 702, and post-*Daubert*.⁹⁹ Most forensic mental health professionals have never had their testimony challenged.¹⁰⁰ The only significant limitation on such opinion has been a prohibition on ultimate testimony concerning mental state, introduced in the federal system in the wake of the Hinckley trial in 1984,¹⁰¹ and even that limitation has had very little practical effect.¹⁰²

rently in its fourth edition, conceptualizes assessment of human functioning along five axes. Axis I (clinical disorders, such as the psychoses) and Axis II (personality disorders and mental retardation) comprise all the "mental disorders" catalogued in the DSM. The other axes deal with "general medical conditions" (Axis III), "psychosocial and environmental problems" (Axis IV), and "global assessment of functioning" (Axis V). See AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 25 (4th ed. 1994) [hereinafter DSM-IV].

99. For instance, one review of post-*Daubert* case law, which one would assume to be the most likely group of cases to view traditional testimony with skepticism, apparently found that of the 30 or so opinions that applied *Daubert* to social science evidence, an overwhelming number involved "syndrome" testimony. See James T. Richardson et al., *The Problems of Applying Daubert to Psychological Syndrome Evidence*, 79 JUDICATURE 10, 15-16 (1995).

100. I base this statement on conversations with participants in training programs that I have taught, see *supra* note 30, as well as the results of an informal survey sent out in December, 1996 on Psy-Law, a listserv with over 900 members, most of whom are practicing forensic mental health professionals. See listserv<psylaw-L@UTEPUM.EP.UTEXAS.EDU>. All respondents (N=9) agreed with the statement in the text. One veteran (Charles Ewing) stated that "in 99 percent of what we do we don't have to worry about *Frye*, *Daubert* or 702," and another (Joe Dixon) stated "I have been involved with hundreds of criminal cases over the past ten years and testified in federal and state court dozens and dozens of times, and yes, you are correct, I have rarely had my testimony challenged on the grounds you mention." The rest of the sample stated that they had never been challenged on lack-of-expertise grounds.

101. See FED. R. EVID. 704(b). The rule states:

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.

102. See *United States v. Salamanca*, 990 F.2d 629, 636 (D.C. Cir. 1993) (permitting expert testimony that "someone who had drunk as much as [the defendant] would have a diminished capacity to think and plan"); *United States v. Kristiansen*, 901 F.2d 1463, 1466 (8th Cir. 1990) (permitting defense counsel to ask whether the mental disease of the type the defendant allegedly had "would affect a person's ability to appreciate their actions"); *United States v. Davis*, 835 F.2d 274, 276 (11th Cir. 1988) (approving the trial court's inquiry of appellant's expert regarding the capabili-

In "nontraditional" contexts, however, the courts have been more willing to scrutinize the admissibility of psychiatric testimony. Thus, opinions about pathological gambling, the effect of an extra Y chromosome, BWS, RTS, CSAAS, and eyewitness accuracy have all been subjected to one of the screening tests mentioned above.¹⁰³ Application of such a test often means the testimony is excluded, although, as detailed below, not always or for all purposes.

The first question one might ask in light of these facts is why traditional testimony has been exempted from any type of screening analysis. Although there are several possible answers to this question, the two upon which courts seem to rely are neatly summarized by the California Supreme Court in describing when it applies its version of the *Frye* test:

First, *Kelly-Frye* only applies to that limited class of expert testimony which is based, in whole or in part, on a technique, process, or theory which is new to science and, even more so, the law. . . . The second theme in cases applying *Kelly-Frye* is that the unproven technique or procedure appears in both name and description to provide some definitive truth which the expert need only accurately recognize and relay to the jury.¹⁰⁴

Applied in our context, this reasoning suggests that traditional psychiatric testimony is not subject to judicial scrutiny because

ty of an individual diagnosed with multiple personalities to understand what he or she was doing).

103. See *United States v. Lewellyn*, 723 F.2d 615, 619 (8th Cir. 1983) (pathological gambling); *United States v. Fosher*, 590 F.2d 381, 382-83 (1st Cir. 1979) (eyewitness identification testimony); *Ibn-Tamas v. United States*, 455 A.2d 893, 894 (D.C. 1983) (BWS); *State v. Kim*, 645 P.2d 1330, 1335 (Haw. 1982) (child sexual abuse situation); *State v. Black*, 745 P.2d 12, 14 (Wash. 1987) (RTS); *State v. Roberts*, 544 P.2d 754, 758 (Wash. Ct. App. 1976) (XYY syndrome).

104. *People v. Stoll*, 783 P.2d 698, 710 (Cal. 1989); see also *State v. Varela*, 873 P.2d 657, 663-64 (Ariz. Ct. App. 1993) (holding that psychiatric testimony that "is not 'new, novel or experimental scientific evidence' . . . does not require the additional screening provided by *Frye*"). In contrast to courts applying *Frye*, courts applying *Daubert* usually reject the novelty threshold. See, e.g., *United States v. Bighead*, 128 F.3d 1329, 1335 (9th Cir. 1997) (holding *Daubert* not limited to scientific evidence that is novel). To date, however, none have applied *Daubert* to what this Article defines as "traditional" testimony. For instance, the testimony to which *Daubert* was applied in *Bighead* involved CSAAS. See *id.* at 1330.

(1) it is traditional; and, more persuasively, (2) juries are not likely to consider it objective or infallible, but rather will naturally treat it with skepticism.

Assuming a particular type of psychiatric evidence is thought to be "novel" enough to require screening, a second question arises: How do courts apply the relevant screening test? This question is more difficult to answer because, as Professor McCord has demonstrated, application of the general acceptance test and similar screening tests in the psychiatric context seem to be placeholders for other concerns.¹⁰⁵ Interestingly enough, to the extent they are explicitly mentioned or discernable from the cases, these concerns appear to parallel the trends in nontraditional psychiatric testimony that were previously described in Part I of this Article.¹⁰⁶ As a general matter, the more nomothetic, scientific-looking, nonmedically oriented and doctrinally suspicious testimony is, the more likely courts will exclude it.

A few examples illustrate this point. First, consider testimony about the accuracy of eyewitness identification. As social science testimony goes, this type of opinion evidence is highly reliable,¹⁰⁷ yet courts often exclude it.¹⁰⁸ Many courts point to the fact that such testimony is usually not based on the facts of

105. See David McCord, *Syndromes, Profiles and Other Mental Exotica: A New Approach to the Admissibility of Nontraditional Psychological Evidence in Criminal Cases*, 66 OR. L. REV. 19, 87-88 (1987) (noting that the "problem with these standards" is that they imply they are outcome determinative when in fact "there is no one factor that is dispositive with respect to the admissibility of non-traditional psychological evidence"). McCord makes the same finding with respect to judicial application of Rule 702's assistance test:

[C]ourts rarely examine in detail the circumstances of the particular case to determine if the particular testimony would assist the jury. Courts are instead content to simply pigeonhole the testimony as to type (e.g., rape trauma syndrome, battered wife syndrome, etc.) and then opine in general whether such testimony would be helpful to the jury.

Id. at 92.

106. See *supra* notes 39-70 and accompanying text.

107. See Steven D. Penrod et al., *Expert Psychological Testimony on Eyewitness Reliability Before and After Daubert: The State of the Law and the Science*, 13 BEHAV. SCI. & L. 229, 256 (1995) (arguing that such testimony meets the reliability requirements of *Daubert*).

108. See Roger B. Handberg, *Expert Testimony on Eyewitness Identification: A New Pair of Glasses for the Jury*, 32 AM. CRIM. L. REV. 1013, 1032 (1995) (concluding that most courts resist admitting such testimony).

the case or contact with the eyewitness involved, but rather on pre-published research findings¹⁰⁹—in other words, it is social framework evidence par excellence. Other courts worry about the jury being able to analyze expert testimony concerning eyewitnesses.¹¹⁰ In other words, due to the nomothetic and scientific appearance of such evidence, judges believe it is both less relevant (as a result of its general nature) and more likely to confuse or overawe the jury.¹¹¹

Expert opinions describing the effects of poverty, television, and inner city living on criminal defendants have not fared well either.¹¹² To some extent, exclusion of this type of evidence may be due to the factors just discussed. But the opinions in these cases suggest a second explanation for judicial hostility: These types of claims depart from the medical model to such a great extent that they conjure up fears of legal anarchy. After

109. See, e.g., *Lewis v. State*, 572 So. 2d 908, 911 (Fla. 1990) (upholding trial court discretion to exclude expert testimony on eyewitness identification); *State v. Gardiner*, 636 A.2d 710, 713-14 (R.I. 1994) (excluding expert testimony based on general research findings).

110. See *United States v. Kime*, 99 F.3d 870, 884 (8th Cir. 1996) (excluding expert testimony that "intrude[d] into the jury's domain"), cert. denied, 117 S. Ct. 1015 (1997). See generally Handberg, *supra* note 108, at 1032-41 (cataloguing the bases for rejection of expert testimony on eyewitness accuracy).

111. That is not to say that all courts react this way to eyewitness testimony or other types of social framework evidence. See Handberg, *supra* note 108, at 1041; see also *Terrio v. McDonough*, 450 N.E.2d 190, 198 (Mass. App. Ct. 1983) (holding expert testimony on RTS involving the manner in which victims react to rape admissible because it was "cast in tentative generalities, without regard to the incident or persons involved" in the case, and did not state that the plaintiff had, in fact, been raped). Ultimately, trying to find consistent patterns in the case law is a futile enterprise. The effort here is merely to explain the most prominent reasons behind the exclusion of psychiatric testimony.

112. In the first case raising the rotten social background defense, the trial judge specifically instructed the jury to pay no attention to that line of argument, an instruction upheld by the appellate court. *United States v. Alexander*, 471 F.2d 923, 959, 968 (D.C. Cir. 1973) (quoting and sanctioning instruction to jury which said: "We are not concerned with a question of whether or not a man had a rotten social background."). In the one reported television intoxication case, the court ruled the research testimony supporting the defense inadmissible. See *Zamora v. State*, 361 So. 2d 776, 780 (Fla. Dist. Ct. App. 1978). In the one reported case in which a defendant explicitly raised the urban survival syndrome defense, the expert evidence was permitted at the first trial but excluded at the second. See Lori Montgomery, *Teen Guilty of Murder: Urban Theory Not Allowed*, DETROIT FREE PRESS, Nov. 12, 1994, at 6A.

all, the judges in these types of cases seem to be saying, almost everyone who commits a crime is subject to some type of traumatizing condition; we cannot excuse them all.

Consider these comments from Judge McGowan, who wrote a portion of the majority opinion in *United States v. Alexander*,¹¹³ the leading "rotten social background" case:

The tragic and senseless events giving rise to these appeals are a recurring byproduct of a society which, unable as yet to eliminate explosive racial tensions, appears equally paralyzed to deny easy access to guns. Cultural infantilism of this kind inevitably exacts a high price, which in this instance was paid by the two young officers who were killed. The ultimate responsibility for their deaths reaches far beyond these [two African-Americans].

*As courts, however, we administer a system of justice which is limited in its reach. We deal only with those formally accused under laws which define criminal accountability narrowly.*¹¹⁴

Judge McGowan added that the court was upholding the trial court's instructions because they "remind the jury that the issue before them for decision is *not one of the shortcomings of society generally*, but rather that of appellant Murdock's criminal responsibility for the illegal acts of which he had earlier been found guilty."¹¹⁵

Of even greater interest, in light of his well-known willingness to broaden the scope of the insanity defense,¹¹⁶ are the similar comments of Judge Bazelon. In his dissenting opinion in *Alexander*, Judge Bazelon began by giving several reasons why the law

113. 471 F.2d 923 (D.C. Cir. 1973).

114. *Id.* at 965 (dictum) (emphasis added).

115. *Id.* at 968 (emphasis added).

116. See *United States v. Brawner*, 471 F.2d 969, 1032 (D.C. Cir. 1972) (Bazelon, J., concurring) (arguing against the "mental disease or defect" predicate to the insanity defense, as well as the requirement that specific behavioral impairments be shown, and advocating adoption of a test that would require a person to be found insane "if at the time of his unlawful conduct his mental or emotional processes or behavior controls were impaired to such an extent that he cannot justly be held responsible for his act").

should recognize a combination bad upbringing/black rage defense.¹¹⁷ He also conceded, however, that

[i]t does not necessarily follow . . . that we should push the responsibility defense to its logical limits and abandon all the trappings of the medical or disease model. However illogical and disingenuous, that model arguably serves important purposes. Primarily, by offering a rationale for detention of persons who are found not guilty by reason of "insanity," it offers us shelter from a downpour of troublesome questions.¹¹⁸

The judges in *Alexander* are not alone in such sentiments. In the *Zamora* case involving the television intoxication defense, the appellate court made analogous observations:

In the concluding pages of defense counsel's lengthy brief the following language appears: "In the case at bar, television was on trial . . ." Such was simply not the case . . . [T]elevision was not on trial; Ronny Zamora was on trial. . . . Stated simply, this was a murder trial, and it is to the trial judge's credit that he confined the testimony and evidence to the relevant issues.¹¹⁹

In other words, these judges conclude, the criminal law's inquiry into accountability should focus on endogenous, not exogenous, causes.

Finally, in some cases, exclusion of novel psychiatric testimony seems to be based not on its nomothetic or nonmedical nature but on the fact that it pushes the doctrinal envelope. Here, however, judges are not always as explicit about their reasoning; their skepticism about substance may be masked by evidentiary rulings. Both these points are illustrated by *United States v. Lewellyn*,¹²⁰ which rejected pathological gambling as a basis for an insanity defense on *Frye* grounds.¹²¹ The trial court testimony about pathological gambling was both individualized and medical-model based.¹²² Moreover, the pathological gambling

117. See *Alexander*, 471 F.2d at 957-61 (Bazelon, J., dissenting).

118. *Id.* at 961 (Bazelon, J., dissenting).

119. *Zamora v. State*, 361 So. 2d 776, 784 (Fla. Dist. Ct. App. 1978).

120. 723 F.2d 615 (8th Cir. 1983).

121. See *id.* at 619-20.

122. See *id.* at 618-20 (describing the testimony of Drs. Taber and Custer).

diagnosis had been ensconced in the Diagnostic and Statistical Manual for four years, and was thus presumptively "accepted."¹²³ Still, the court excluded the testimony.¹²⁴ As Professor Bonnie has argued, the real motivation for this type of ruling is probably the concern that permitting acquittal in such cases would open the floodgates to traditionally disfavored volitional impairment claims.¹²⁵

Substantive misgivings have also affected evidentiary analysis of clinical testimony concerning mens rea. Although diminished capacity evidence is clearly material and often not much different from insanity testimony in content, it is limited in many irrational ways.¹²⁶ Similarly, courts have rejected psychiatric testimony in self-defense cases on what appear to be substantive grounds, even though they claim to be relying on evidentiary rules.¹²⁷ The same reaction often occurs when judges are confronted by psychiatrically-based claims about whether a criminal act occurred and whether a witness is truthful or accurate. Even if such claims have probative value, judges resist them in large part because they are more likely than traditional testimony to encroach on well-accepted lay functions, or "usurp the jury," as courts often put it.¹²⁸

123. See *id.* at 619 (noting that the diagnosis was in the third edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-III), published in 1980, and that both experts testified that this meant it was a "generally accepted" diagnosis). The court justified its contrary holding on the general acceptance issue by noting that pathological gambling was not recognized in the second edition of the DSM, published in 1968, and that only 20 to 25 doctors were experienced with the diagnosis. See *id.* at 619-20.

124. See *id.* at 620.

125. See Richard Bonnie, *Compulsive Gambling and the Insanity Defense*, 9 NEWSL. AM. ACAD. PSYCHIATRY & L. 6, 7 (1984).

126. See generally REISNER & SLOBOGIN, *supra* note 28 (detailing the "mental disease or defect," "capacity," and "crime" limitations on diminished capacity testimony).

127. See *Jahnke v. State*, 682 P.2d 991, 997 (Wyo. 1984) (holding that testimony about battered children was inadmissible under *Frye*, but also stating that "the notion that a victim of abuse is entitled to kill the abuser . . . is antithetical to the mores of modern civilized society").

128. See *United States v. Azure*, 801 F.2d 336, 341 (8th Cir. 1986) (rejecting an expert's testimony about whether a victim was telling the truth about being abused on the grounds that accepting such testimony may cause juries to "surrender their own common sense in weighing testimony"); *State v. Hulbert*, 481 N.W.2d 329, 332 (Iowa 1992) ("Our cases also hold . . . that expert psychological evidence may not be

Perhaps the most interesting thing about the courts' approach to psychiatric evidence is how minimal a role reliability plays in determining admissibility. Recall first that the two reasons given by the California Supreme Court for exempting traditional testimony from special judicial scrutiny—precedent and the accessibility of the evidence¹²⁹—have nothing to do with reliability. Even more surprisingly, reliability does not seem to play much of a role in determining the admissibility of *nontraditional* psychiatric testimony, even when it is subjected to one of the screening tests. Outside the psychiatric context, *Frye's* general acceptance test has often been used as a proxy for a reliability assessment,¹³⁰ and *Daubert*, of course, specifically requires an evaluation of scientific validity.¹³¹ According to one mammoth study,¹³² however, the courts ignore these maxims when psychiatric testimony is at issue. Based on a comprehensive analysis of the cases, the authors of the study concluded that “[c]ourts are not generally engaging in scientific reviews of the proffered syndrome[; m]ost typically, the focus is on general acceptance and the qualifications of the expert, and even then the judicial review tends to be cursory.”¹³³

used to merely bolster a witnesses's credibility . . . because veracity is not a 'fact in issue' subject to expert opinion [and] . . . is uniquely within a lay jury's common understanding.”); *Commonwealth v. Seese*, 517 A.2d 920, 922 (Pa. 1986) (rejecting credibility testimony about a child witness because it “would be an invitation for the trier of fact to abdicate its responsibility to ascertain the facts relying upon the questionable premise that the expert is in a better position to make such a judgment”).

129. See *People v. Stoll*, 783 P.2d 698, 710 (Cal. 1989).

130. See Bert Black, *A Unified Theory of Scientific Evidence*, 56 *FORDHAM L. REV.* 595, 628 (1988) (“The cases since *Frye* reveal extreme incoherence and inconsistency in the application of the general acceptance test. In most . . . the *Frye* test merely masks legal decisions about reliability.”).

131. See *Daubert v. Merrill Dow Pharms., Inc.*, 509 U.S. 579, 592-95 (1993).

132. See James T. Richardson et al., *A Case Law Survey of Social and Behavioral Science Evidence After Daubert* (unpublished manuscript, presented at 1998 American Psychology-Law Association Annual Meeting, on file with author).

133. *Id.*; see also Paul C. Giannelli, *Forensic Science: Daubert in the States*, 34 *CRIM. L. BULL.* 154, 155-60 (1998) (surveying post-*Daubert* approaches to expert testimony and contrasting the *Daubert* “reliability” approach with the *Frye* approach and the relevancy approach); Paul C. Giannelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, a Half-Century Later*, 80 *COLUM. L. REV.* 1197, 1223-25 (1980) (noting that the *Frye* test both excludes reliable evidence and admits unreliable evidence).

As a concrete illustration of the judicial tendency to ignore reliability and focus instead on the types of factors discussed above, consider the way the courts have handled claims based on some version of Post-Traumatic Stress Disorder (PTSD)—i.e., claims of Vietnam veterans, child sex abuse victims, rape victims, and battered women. If reliability were the test, one might conjecture that, because the same basic diagnosis is at issue,¹³⁴ the analysis of admissibility would be the same with respect to each. It is not, however. Because Vietnam veterans almost always use PTSD in support of an insanity defense,¹³⁵ they have had no problem introducing such testimony.¹³⁶ In contrast, alleged rape victims have had some trouble doing so and alleged child sex abuse victims have met much more judicial resistance,¹³⁷ largely because courts perceive this evidence as an effort to prove a criminal act occurred, or at least to bolster the victim's credibility.¹³⁸

BWS has the most interesting story in this regard. Women who introduced the syndrome in self-defense cases were rebuffed at first,¹³⁹ but today not only do many jurisdictions judicially permit testimony about BWS,¹⁴⁰ a number actually guarantee

134. See MOENSSENS ET AL., *supra* note 77, at 1147-48 (categorizing these and other types of testimony under the Post-Traumatic Stress Disorder rubric).

135. See C. Peter Erlinder, *Paying the Price for Vietnam: Post Traumatic Stress Disorder and Criminal Behavior*, 25 B.C. L. REV. 305, 328 (1984) (noting that all known examples of PTSD testimony in Vietnam veteran cases through 1983 involve "the affirmative defense of insanity").

136. See McCord, *supra* note 105, at 66 ("The admissibility of this type of testimony has met with no problems on the appellate level.").

137. According to one source, "the courts have not been as generous" toward admissibility of evidence of CSAAS as they have been toward admissibility of RTS evidence. MOENSSENS ET AL., *supra* note 77, at 1154.

138. See *United States v. Whitted*, 994 F.2d 444, 447 (8th Cir. 1993) (holding that expert testimony on CSAAS impermissibly invaded the province of the jury); *State v. Saldana*, 324 N.W.2d 227, 230 (Minn. 1982) (holding that to allow RTS to prove "whether [a rape] has occurred . . . would . . . invade the jury's province of factfinding"); *State v. Hutchens*, 429 S.E.2d 755, 758-59 (N.C. Ct. App. 1993) (holding inadmissible CSAAS testimony to the effect that the emotional state of the victim was consistent with the type of behavior exhibited by child sex abuse victims); *Commonwealth v. Gallagher*, 547 A.2d 355, 357 (Pa. 1988) (noting that expert testimony regarding RTS "was introduced for the sole purpose of shoring up the credibility of the victim on the crucial issue of identification"); see also *supra* note 128 (listing cases rejecting expert testimony on witness veracity).

139. See *infra* note 142 and accompanying text.

140. See, e.g., *State v. Hickson*, 630 So. 2d 172 (Fla. 1993); *State v. Anaya*, 438

its legitimacy through legislation.¹⁴¹ The syndrome met initial resistance because it sometimes undermined the necessity requirement of traditional self-defense law—acquitting a woman for killing her batterer even when he was not attacking her at the time struck courts as antithetical to the “imminent threat” threshold of justification doctrine.¹⁴² More recently, however, as Professor Mosteller has pointed out,¹⁴³ the ground swell of support for battered women has led courts and legislatures, implicitly or explicitly,¹⁴⁴ to subjectify self-defense law in this type of case. In other words, substantive law has been changed in response to political pressures, and thus the syndrome no longer pushes the doctrinal envelope.

III. TOWARD A MORE NUANCED APPROACH TO PSYCHIATRIC TESTIMONY

The courts’ often chaotic approach to the admissibility of psychiatric evidence in criminal trials could benefit from a coherent analytical framework. One such framework—embodied in Rules 401, 403 and 702 of the Federal Rules of Evidence—already exists. Under Rules 401 and 403, any evidence, expert or otherwise, must be evaluated in terms of how its relevance to the facts at issue weighs against countervailing factors.¹⁴⁵ When

A.2d 892 (Me. 1981); *State v. Kelly*, 478 A.2d 364 (N.J. 1984); *State v. Hill*, 339 S.E.2d 121 (S.C. 1986); *State v. Allery*, 682 P.2d 312 (Wash. 1984).

141. According to Professor Mosteller, at least eleven states have a specific statutory authorization mandating admissibility of BWS evidence. See Robert P. Mosteller, *Syndromes and Politics in Criminal Trials and Evidence Law*, 46 DUKE L.J. 461, 484 n.77 (1996).

142. See MOENSSENS ET AL., *supra* note 77, at 1135 (noting that in early battered spouse cases, “[w]omen were foreclosed altogether from using a self defense claim because the killing was not committed during an abusive attack”).

143. See Mosteller, *supra* note 141, at 486-91 (discussing trend toward admission of BWS evidence).

144. See *id.* at 488-89 (“Despite the fact that change is coming through an evidentiary rule rather than a modification of self-defense law, my point remains: courts and legislatures are altering the substantive law by admitting a new class of evidence that will produce predictably different outcomes.”).

145. See FED. R. EVID. 401, 403.

the evidence is offered as expert evidence, it must further "assist" the factfinder, as Rule 702 requires.¹⁴⁶

As Part II made clear, although courts routinely refer to these rules or their equivalent, they often fail to take one or more of them seriously, or they add additional considerations that cloud the analysis.¹⁴⁷ This part of the Article fleshes out a more structured, four-step approach to evaluating the admissibility of psychiatric evidence using the federal rules. The first part of this approach involves gauging the relevance of the evidence, an inquiry which itself has traditionally been broken down into two steps: an assessment of materiality and an assessment of probative value. The next step involves assessing the helpfulness of the evidence. The final step focuses on whether there are significant countervailing reasons for excluding the testimony.

A. *Relevance—Materiality*

Assessing the materiality of evidence requires an understanding of the governing substantive law. The previous section discussed the tendency of courts to exclude evidence that stretches traditional doctrinal boundaries. Unfortunately, this tendency is not always explicit; as already noted, one often gets the sense that exclusion of evidence on lack of helpfulness or acceptance grounds is a smokescreen hiding a more pressing concern about substantive impact.¹⁴⁸ At the other extreme, as James Wilson has documented, some courts at both the trial and appellate level seem willing to admit almost any kind of testimony proffered by a mental health professional, without regard to its logical connection to the law of the jurisdiction.¹⁴⁹ Neither approach is appropriate. Courts need to address the materiality issue head

146. See FED. R. EVID. 702.

147. See *supra* text accompanying notes 98-144.

148. See *supra* notes 120-28 and accompanying text.

149. See JAMES Q. WILSON, MORAL JUDGMENT: DOES THE ABUSE EXCUSE THREATEN OUR LEGAL SYSTEM? 89 (1997). Wilson argues that courts have ignored the distinction between judging a defendant, which involves considering "mental state only to the extent necessary to establish the existence of one or another of a small list of excusing or justifying defenses," and explaining the defendant's actions, which "searches for a full account of the factors—the motives, circumstances, and beliefs—that caused them." *Id.* at 90.

on. If they did so, they might not have to worry about reliability and helpfulness issues.

Take, for instance, testimony that people with an extra Y chromosome are statistically more likely to commit crime. This testimony is clearly not material to any defense based on cognitive impairment (i.e., lack of mens rea, self-defense, or the cognitive prong of the insanity defense). People with more "maleness" still intend to commit the crimes they commit and know that it is wrong do so.¹⁵⁰ Even in a jurisdiction with a volitional prong to the insanity defense, XYY testimony ought to be excluded on materiality grounds. That people with two Y chromosomes are more likely to commit crime than people with only one does not mean the former are *compelled* to do so; at most it means they have a stronger or more frequent urge to commit crime than others. As Professor Michael Moore has argued persuasively, because all behavior is caused by something (biology, environment, character, or situation), proof of causation alone cannot be proof of compulsion, nor can it support an excuse.¹⁵¹ The fact that people with tempers, people who grew up in poverty-stricken conditions, or people with low intelligence are more likely to commit crime does not excuse them from it. As Moore contends, unless the causative agent renders one unable to control one's actions rationally, compulsion is not present.¹⁵²

The same analysis can be directed at any psychiatric evidence that consists merely of a correlation between criminal activity and a certain trait (e.g., antisocial personality disorder, a particular brain structure, excess testosterone, premenstrual anxiety).

150. *Cf.* *People v. Tanner*, 91 Cal. Rptr. 656, 659 (Ct. App. 1970) (holding XYY testimony inadmissible because, inter alia, the experts could not state that an extra Y chromosome prevented defendant from knowing the nature and quality of his act or that it was wrong); see also *Millard v. State*, 261 A.2d 227, 231 (Md. Ct. Spec. App. 1970) (noting that the presence of the XYY "genetic abnormality" would not, of itself, indicate a lack of "substantial capacity" to appreciate the criminality of particular conduct); *People v. Yukl*, 372 N.Y.S.2d 313, 318 (N.Y. Sup. Ct. 1975) (noting inadequacy of existing research in determining a causal connection between "XYY genetic phenomenon" and "a predisposition toward violent criminal conduct").

151. See Michael S. Moore, *Causation and the Excuses*, 73 CAL. L. REV. 1091, 1130 (1985).

152. See *id.* at 1129-30 ("The difference between compulsion and causation comes to this: compulsion involves interference with practical reasoning. . . . Most causes of human behavior do not operate as compulsions.").

Nonetheless, not only courts, but many commentators seem to believe that any evidence describing a link between criminal behavior and an "abnormality" is material.¹⁵³ That approach disregards (and therefore undermines) the substantive criminal law.

Courts have often been more attuned to materiality analysis in the self-defense context. For instance, as noted earlier, a number of courts have held that psychiatric evidence about learned helplessness in battered women is material only in cases where the woman was *imminently* threatened by death or serious bodily harm at the hands of her victim.¹⁵⁴ It was also noted that many jurisdictions have abandoned this relatively "objective" approach and permitted acquittal on self-defense grounds even when the perceived threats are more long term.¹⁵⁵ Few courts, however, have fine tuned the materiality analysis any further. One intermediate option, at least in homicide cases, would be to hold the woman liable unless the objective facts indicate an imminent threat, but permit a reduction from murder to manslaughter or negligent homicide if she made a mistake as to imminence that was reckless or negligent, respectively.¹⁵⁶

153. See, e.g., Richard Delgado, "Rotten Social Background": Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation? 3 L. & INEQUALITY 9, 12-23 (1985) (examining the debate over the validity of rotten social background as a defense); Falk, *supra* note 5, at 809 ("[I]f the criminal law restricts itself to the consideration of only short-term causal explanations for criminal behavior, it will miss the rich contribution these theories of defense can make by elucidating more diffuse and long-term pathogenic factors in criminal behavior."); David Skeen, *The Genetically Defective Offender*, 9 WM. MITCHELL L. REV. 217 (1983) (arguing inter alia that testimony about chromosomal abnormality ought to be admissible); Cf. MICHAEL L. PERLIN, *THE JURISPRUDENCE OF THE INSANITY DEFENSE* 120-28 (1994) (suggesting that the law's adherence to intentionality and free will paradigms may be outmoded given science's "remarkable contrary evidence").

154. See *supra* note 142 and accompanying text. The traditional approach to self-defense is summarized by Professors LaFave and Scott as follows:

One who is not the aggressor in an encounter is justified in using a reasonable amount of force against his adversary when he reasonably believes that he is in *immediate* danger of unlawful bodily harm from his adversary and that the use of such force is necessary to avoid this danger.

WAYNE R. LAFAVE & AUSTIN W. SCOTT, *CRIMINAL LAW* § 5.7, at 454 (2d ed. 1986) (emphasis added).

155. See *supra* notes 139-44 and accompanying text.

156. This approach seems similar to that taken under section 3.09(2) of the Model

Under this regime, a battered woman who killed in response to an objectively nonimminent danger (e.g., a sleeping husband) would be convicted of some form of homicide, rather than acquitted outright.¹⁵⁷

This is not the place to debate the appropriate contours of these difficult political and moral issues. The important point for present purposes is that courts and legislatures need to think hard about the scope of the insanity defense, self-defense, and other defensive doctrines. They should not dodge these issues through suspect rulings about psychiatric evidence.¹⁵⁸

B. Relevance—Probative Value

Daubert is right: The federal rules do, and should, require an assessment of reliability. Evidence that is unreliable has no probative value.

The more difficult issue is how one measures reliability. *Daubert* provides a starting point by recognizing the various ways reliability can be gauged, including assessment of its basis using the scientific method, proof of its error rate, peer review, and, if all else fails, an assessment of whether its basis is gener-

Penal Code, which only provides a defense for a non-negligent belief—defined as a belief that is reasonable for a person in the defendant's "situation"—that force is necessary. See *supra* note 59. The latter provision, however, could be construed to allow a *complete* defense for a battered woman if "situation" is defined subjectively. In terms of the "stereotypical" battered woman's situation, a mistaken belief that serious harm was imminent and that the woman could only prevent it through killing might be considered nonreckless and even nonnegligent. See Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 92-93 (1991) (comparing the battered woman to a hostage and stating "[w]e believe the danger to a hostage is imminent *both* because the force used to hold them there is apparent *and* because our cultural knowledge includes the memory of the many hostages who have been harmed in the past").

157. A court might reach the same sort of result through application of the provocation doctrine. See *State v. Whitney-Biggs*, 936 P.2d 1047 (Or. Ct. App.) (upholding manslaughter conviction of defendant who shot her husband despite lack of imminent threat), *review denied*, 943 P.2d 633 (Or. 1997).

158. Of course, materiality is not a fixed quantum. Evidence can be more or less material. For instance, in a case involving an armed perpetrator, proof that eyewitnesses forget what they see relatively quickly is not as material as proof that people confronted with weapons tend to focus on the weapon. The level of materiality is a factor that must be considered in conjunction with the other components of admissibility analysis.

ally accepted.¹⁵⁹ The Court appeared to place general acceptance at the bottom of the measurement hierarchy, and rightly so. The fact that professionals in the field routinely rely on particular theories or methodologies is useful information in determining admissibility, but it is no substitute for a straightforward assessment of accuracy, if such an assessment is possible.

Thus, contrary to *Daubert's* suggestion, the test developed in that case under Rule 702 is not always more "liberal" than the *Frye* test. Indeed, in the psychiatric context, it is the latter test that is likely to produce more generous results. Testimony based on traditional psychiatric nosology is, almost by definition, generally accepted.¹⁶⁰ Much of it, however, is not very reliable. For example, testimony about personality disorders such as schizoid personality disorder and antisocial personality disorder has played a prominent (and unchallenged) role in many trials, yet both laboratory and field trials show that the "error rate" for these diagnoses is well above fifty percent.¹⁶¹ Only psychiatric evidence that is based on research and that is new to the field is likely to fail the general acceptance test and still have a chance of success under *Daubert*.

159. See *Daubert v. Merrill Dow Pharms., Inc.*, 509 U.S. 579, 593-94 (1993).

160. After all, if a particular diagnosis is in DSM-IV, it has survived considerable debate within the profession. See, e.g., *United States v. Cantu*, 12 F.3d 1506, 1509 & n.1 (9th Cir. 1993) (taking judicial notice that a condition listed in the DSM is a recognized psychiatric condition). For an interesting description of the DSM development process, see David Goleman, *Who's Mentally Ill?*, PSYCHOL. TODAY, Jan. 1978, at 34.

161. Although laboratory tests of DSM diagnoses such as schizophrenia and mood disorders indicate a high reliability rate, field tests have arrived at different results even for these major diagnoses. See Paul Lieberman & Frances M. Baker, *The Reliability of Psychiatric Diagnosis in the Emergency Room*, 36 HOSP. & COMM. PSYCHIAT. 291, 292 (1985) (showing 41% agreement on schizophrenia, 50% agreement on mood disorders, and 37% agreement on organic brain syndromes). For subcategories of the major diagnostic classifications (e.g., subtypes of schizophrenia, schizoid personality disorder), the agreement in field trials is often much lower, between 10 and 40%. See *id.*; see also Graham Mellsop et al., *The Reliability of Axis II of DSM-III*, 139 AM. J. PSYCHIATRY 1360, 1361 (1982) (finding that reliability of personality disorder diagnoses in everyday clinical settings ranged from 49% for antisocial personality to 1% for schizoid personality).

So how does one decide when, if ever, psychiatric evidence must be subject to hard scientific scrutiny and when, if ever, it need only pass the general acceptance test or a similarly lax standard? The proposal advanced here is that meeting the latter test is sufficient for evidence that is material to past mental states, but that *Daubert's* test must be met when psychiatric evidence is used to prove any other type of issue (which will usually involve whether a particular act occurred).

The rationale for this approach is, in the first instance,¹⁶² based on necessity: while the phenomenology of physical acts can be subjected to the scientific method—that is, use of controlled populations, adequate samples, and meaningful criterion variables—past mental state cannot be. This is so for two reasons. First, past mental states are not objective facts the existence of which can be proven in the same way the occurrence of an act can be proven. Second, even if they are, obtaining useful empirical information about legally relevant past mental states is virtually impossible, or at least much more difficult than studying the psychological correlates of actions.

The first assertion is based on the ideas of Professor Andrew Taslitz.¹⁶³ Drawing on feminist literature and other sources,¹⁶⁴ Taslitz argues that we can never discover “objective truth” about past mental states in the same way we can know whether an event occurred.¹⁶⁵ We can “know” such mental states only through acts of interpretation that inevitably differ depending on a host of factors, including the identity of the “observer” and the time at which the mental state is ob-

162. A deeper rationale for this approach is noted in the conclusion to this Article and explored in detail in Christopher Slobogin, *The Admissibility of Behavioral Science in Criminal Litigation: From Primitivism to Daubert to Voice*, PSYCHOL. PUB. POL. & L. (forthcoming 1999).

163. See Andrew E. Taslitz, *A Feminist Approach to Social Scientific Evidence: Foundations*, 5 MICH. J. GENDER & L. 1 (1998).

164. See, e.g., Susan J. Brison, *Outliving Oneself: Trauma, Memory, and Personal Identity*, in FEMINISTS RETHINK THE SELF, 12 (Diana Tietjens Meyers ed., 1977); JAEGWON KIM, *PHILOSOPHY OF MIND* (1996); ROBIN WEST, *CARING FOR JUSTICE* (1997).

165. See Taslitz, *supra* note 163, at 78 (arguing that “mental states” are “interpretive acts, not single, objective truths waiting ‘out there’ to be discovered”).

served.¹⁶⁶ Even the person whose mental state is in question, if asked to report what it was at a particular point in time (the type of report on which psychiatric evidence usually relies), engages in interpretation.¹⁶⁷ As Taslitz notes:

Memory itself is an assertion, a self-report, which we play an active role in constructing. Our memories never involve solely historical truths, for we seek to create an account of the past consistent with a preconceived cognitive or moral scheme. Memory is thus at least partly a created narrative.¹⁶⁸

The difficulty of ascertaining past mental state is exacerbated by the possibility that an actor may not “know” his mental state even at the time it is occurring. As Taslitz puts it, “[w]e may be ambivalent, desiring and spurning simultaneously, leaving us confused; we may deceive ourselves out of fear, guilt, or self-protection.”¹⁶⁹ This may be particularly true in criminal situations of the type normally the subject of psychiatric testimony, where motivations, thoughts, and urges are likely to be jumbled together rather than straightforward and logical.

When the factfinder is a third party rather than the subject, the truth about mental states becomes even more contingent. Triers of fact attempting to discern the individual’s mental state add their own interpretive gloss to the evidence presented. As Taslitz states, “[w]hen jurors name a mental state as ‘premeditation,’ ‘heat of passion,’ or a ‘belief in the imminent need to use deadly force in self defense,’ they are crafting an interpretation that partly embodies their own assumptions, attitudes, and beliefs.”¹⁷⁰

In short, while ascertaining objective truth might be possible with respect to acts, “narrative thinking” dominates attempts to reconstruct mental state.¹⁷¹ Any description of mental state is

166. See *id.* at 12-27 (discussing mental state as an interpretive activity).

167. See *id.* at 19-20 (noting that “[m]emory is [] at least partly a created narrative”).

168. *Id.*

169. *Id.* at 24. Unconscious motivations are a particular problem. See MICHAEL MOORE, LAW & PSYCHIATRY 374 (1984) (speaking of unconscious compulsion as an “excuse in its own right”).

170. Taslitz, *supra* note 163, at 26.

171. See *id.* at 34 (“It is narrative thinking that dominates our conceptions of the

closer to a story than a depiction of an observable event. Science cannot tell us the truth about past mental states because science is meant to identify objective reality, not interpretations of reality. At most, science can help us decide whether acts and other types of more objectively discernable facts have occurred.

Even if, in theory, the existence of a particular mental state can be scientifically proven, as a practical matter science will often not be up to that task. This point can be illustrated through explication of another recent work, authored by Professors Thomas D. Lyon and Jonathan J. Koehler.¹⁷² Lyon and Koehler argue that the probative value of a given type of expert evidence can often be gauged by what they call the "relevance ratio."¹⁷³ The "relevance ratio" is simply the ratio between the proportion of cases in which a symptom is observed in the population of interest and the proportion of cases in which the same symptom is observed in the rest of the population.¹⁷⁴ For instance, assume that sixty percent of abused children suffer from symptoms X, Y, and Z, and that thirty percent of children who are not abused suffer from symptoms X, Y, and Z. The relevance ratio in this case is 2:1 (sixty percent/thirty percent), meaning that proof that a child has these three symptoms has significant probative value on the issue of whether the child was abused.

Lyon and Koehler argue that the relevance ratio is "the most efficient way to think about evidentiary relevance."¹⁷⁵ Assuming that methodological problems do not render the information relied upon invalid,¹⁷⁶ this assessment seems to be on target; the ratio is an eminently sensible way of evaluating the proba-

self: 'Our plannings, our rememberings, even our loving and hating, are guided by narrative plots.'" (quoting Theodore R. Sarbin, *The Narrative as a Root Metaphor for Psychology*, in NARRATIVE PSYCHOLOGY: THE STORIED NATURE OF HUMAN CONDUCT 3, 11 (Theodore R. Sarbin ed., 1986)).

172. See Thomas D. Lyon & Jonathan J. Koehler, *The Relevance Ratio: Evaluating the Probative Value of Expert Testimony in Child Sexual Abuse Cases*, 82 CORNELL L. REV. 43 (1996).

173. *Id.* at 46-50.

174. See *id.* at 46-47.

175. *Id.* at 47.

176. Lyon & Koehler describe a number of methodological difficulties associated with calculating the relevance ratio in a section entitled "Are All Studies Created Equal?" See *id.* at 67-70.

tive value of evidence. If the subject population is no more likely to have the symptoms than the general population (i.e., the relevance ratio is one or less), the evidence has no probative value concerning the relationship of the symptoms to the subject population. If the ratio is greater than one, the evidence has some tendency to prove a fact at issue, the definition of relevance.¹⁷⁷ Relevance ratio analysis might prove very useful in conducting the reliability assessment demanded by *Daubert* and Federal Rule 401.

Consider, however, the difficulty of gathering information necessary to calculate the relevance ratio where psychiatric evidence about past mental state is involved. For instance, when self-defense is asserted in a battered woman case, one would need to determine the proportion of battered women who kill their spouses believing they have no alternatives and the proportion of nonbattered women who kill their spouses believing they have no alternatives.¹⁷⁸ Without any other information, the most plausible conclusion is that, of the two groups, the battered women are more likely to feel that they have no options. That kind of thinking, though, is not science; the scientific method would require large enough samples of both groups being compared and the development of reliable methods of obtaining the relevant information about them.¹⁷⁹

177. Federal Rule of Evidence 401 states: "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." FED. R. EVID. 401.

178. In the literature discussing the admissibility of expert psychiatric testimony, one sometimes sees the following type of comment: BWS (or some other syndrome or psychiatric claim) is not relevant because most battered women do not kill. See Stephen J. Morse, *The Twilight of Welfare Criminology: A Reply to Judge Bazelon*, 49 S. CAL. L. REV. 1247, 1259 (1976) ("[W]e must agree . . . that persons of low socioeconomic status probably find it easier than others to turn to violent street crime for money, excitement, or release. Yet it is also true that the majority of poor people are not violent criminals."). This type of argument has a superficial appeal: if most battered women do not kill their batterers, most of these women must think they have other options besides killing. Even if most battered women do think they have other options, however, women who are battered may be *more* likely to feel that they have no options than women who are not battered. That is the relevant legal issue under a subjective self-defense test, and thus the correct comparison is the one indicated in the text.

179. See, e.g., BARRY F. ANDERSON, *THE PSYCHOLOGY EXPERIMENT: AN INTRODUC-*

In conducting such research, one significant problem would be ensuring that no other variables taint the comparison; that is, the two groups should be similar in all significant ways except with respect to whether they were battered. This problem, however, confronts any attempt to use the relevance ratio.¹⁸⁰ A second problem, and one that is much more likely to afflict the study of past mental state phenomena, is measuring the dependent variable. Even assuming past mental state is an objective "fact" rather than an interpretive story, how does one accurately tell whether a female killer believed she had no alternative way of avoiding serious physical harm at the time she killed? The researcher can, of course, ask the woman whether she felt that the killing was necessary. Even ignoring the possible inaccuracy of self-serving statements made about an event that may have occurred months ago, gauging the all-important variable—the *intensity* of the woman's belief in the necessity of her action—and then *comparing* it to the beliefs of other women is all but impossible. As Stephen Morse has noted in a related context, "[t]here is no scientific measure of the strength of urges."¹⁸¹ Similarly, there is no scientific measure of the strength of beliefs that occurred at a specific point of time in the past.

Another example of the difficulty of calculating the relevance ratio in a past mental state case comes from *People v. Gorshen*.¹⁸² In *Gorshen*, a psychiatrist testified that the defendant killed his employer, with whom he had had an argument, to avoid permanent insanity.¹⁸³ A *Daubert*/relevance ratio calculation in this case would require the impossible task of determining the proportion of people on the verge of psychic disintegration who kill someone they dislike to the proportion of those who choose to (or allow themselves to) disintegrate instead of

TION TO THE SCIENTIFIC METHOD (1971) (examining the requirements and proper use of scientific method in psychology).

180. See Lyon & Koehler, *supra* note 172, at 67 (describing "selection bias" which "occurs when the abused and nonabused children who are selected for study differ in ways that may affect the variables measured in the studies").

181. Stephen J. Morse, *Crazy Behavior, Morals and Science: An Analysis of Mental Health Law*, 51 S. CAL. L. REV. 527, 584 (1978).

182. 336 P.2d 492 (Cal. 1959).

183. See *id.* at 495-96.

kill the disliked person. Even if one could meaningfully define "psychic disintegration," trying to find people who refrained from aggressive action while on the verge of such disintegration would be a fruitless endeavor.¹⁸⁴ If such people *were* found, one would still need to measure the strength of the psychic pressure they experienced, which, as Morse notes, is not possible.¹⁸⁵

To put the point another way, even if research relevant to past mental state can be characterized as "science," it is science that is so likely to be tainted by methodological flaws that, in effect, it is no different from interpretation and story-telling. In contrast, research conducted to assist in proof of acts would not need to determine the strength or existence of slippery phenomena like beliefs, emotions, or urges in the past. In the child abuse example given earlier, the task would be to locate abused and nonabused children and then catalogue their symptoms.¹⁸⁶ This task is not easy, but it is certainly easier than ascertaining whether spouse-killers felt they had alternatives or whether a person on the verge of decompensation felt the need to kill.

Given the theoretical and practical difficulties in scientifically proving past mental state, a *Daubert* analysis involving a rele-

184. Sir Karl Popper, the progenitor of the "falsifiability" concept given so much play in *Daubert*, believed that one of the "best examples" of unfalsifiable theories was Freudian thought, that the "psychodynamic" testimony in *Gorshen* reflects. See Ralph Underwager & Hollida Wakefield, *A Paradigm Shift for Expert Witnesses*, 5 ISSUES IN CHILD SEX ABUSE ACCUSATIONS 156, 158-59 (1993).

185. See *supra* note 181 and accompanying text. The point here is that relevance ratio analysis cannot profitably be carried out in this situation, not that the psychiatric testimony in *Gorshen* should have been admissible. For one thing, there is a good argument that the testimony was immaterial, as it was proffered to show lack of mens rea, to which volitional impairment is irrelevant. See *Gorshen*, 336 P.2d at 496. Second, it is not clear that the psychiatrist's theory of "psychic disintegration" is one that would be plausible to other professionals (even those committed to psychodynamic explanations), a test which, as argued below, must be met by any psychiatric evidence. See *infra* notes 187-90 and accompanying text.

186. Note that in such cases the *dependent* variables—symptoms thought to be associated with abuse, such as anxiety or hyperactivity—might require an assessment of mental state. This assessment differs from the BWS analysis in two ways. First, what is being proven in court is still the act, an objective fact that can, at least in theory, be proven scientifically. Moreover, the mental state information is more likely to be ascertainable in practice as well, because the dependent variables involve assessment of *present* mental condition that, albeit an interpretation, does not involve the added interpretation required to *remember* a *specific* mental state.

vance ratio calculation or some other scientifically-based technique should not be required in assessing the probative value of psychiatric evidence on that issue. Rather, some version of the general acceptance test should suffice. This test, as I would formulate it, would still require psychiatric evidence on past mental state to be based on a theory or concept that is plausible to a significant number of professionals in the field.¹⁸⁷ Furthermore, the logic underlying the relevance ratio could still play a role by framing the plausibility inquiry. For instance, testimony on BWS probably should be admissible because a sizeable number of professionals now believe, although they can not “scientifically” prove, that women who are battered and kill their spouses feel they have fewer options than those spouse-killers who are not battered.¹⁸⁸ On the other hand, the theory that urban black youths who kill other black youths fear their victims more than other killers of black youth is less plausible (and, probably for that reason, not well-accepted among professionals).¹⁸⁹ As Federal Rule 702 indicates, even if it cannot be called “scientific” knowledge, psychiatric evidence about past mental state must at least be “specialized” knowledge.¹⁹⁰

187. The test is formulated this way to avoid any connotation that the basis of the testimony must be accepted as “science” or by *most* members of the relevant field; the latter definitions might well be indistinguishable from *Daubert's*. Thus, for instance, syndrome testimony that a sizeable number of professionals believe is based on a plausible hypothesis would meet the suggested test, regardless of its scientific validity, as would any opinion based on a diagnosis found in DSM.

188. See *State v. Koss*, 551 N.E.2d 970, 974 (Ohio 1990) (noting that BWS “has gained substantial scientific acceptance to warrant admissibility”); *People v. Torres*, 488 N.Y.S.2d 358, 363 (N.Y. Sup. Ct. 1985) (same).

189. See *DERSHOWITZ*, *supra* note 1, at 73 (noting that “urban survival syndrome” is not a medically recognized syndrome).

190. See *FED. R. EVID. 702*. Note that if, consistent with the arguments made in this Article, past mental state evidence is seen as “specialized” knowledge rather than “scientific” knowledge, the approach advocated here does not violate *Daubert's* dictates, because a footnote in the majority opinion specifically avoided applying the “falsifiability” requirement to “technical and specialized” knowledge. See *Daubert v. Merrill Dow Pharms., Inc.*, 509 U.S. 579, 590 n.8 (1993); see also *Berry v. City of Detroit*, 25 F.3d 1342, 1349 n.6 (6th Cir. 1994) (noting the Court’s holding in *Daubert* with respect to the applicability of Federal Rule 702 to technical and specialized knowledge); cf. *United States v. Rouse*, 100 F.3d 560, 568 (8th Cir. 1996) (citing *Richardson et al.*, *supra* note 99, at 10-11, for the proposition that “the nature of certain social and behavioral science theories may be inherently inconsistent

C. Helpfulness

Even if material and probative, evidence is not and should not be admissible as expert opinion unless it assists the factfinder.¹⁹¹ In theory, the easiest way to find out whether expert evidence helps the jury is to compare the accuracy of jury decisionmaking with the expert testimony to its accuracy without it. Studies comparing lay and expert decisionmaking on questions like the accuracy of eyewitnesses or determinations of abuse could be quite useful in this regard. Unfortunately, very little research of this type has been conducted.¹⁹² Furthermore, here too there may be a distinction between evidence about acts, as in the eyewitness and abuse examples just given, and evidence about past mental states. Assessing the helpfulness of expert testimony about the latter issue could be virtually impossible in some cases, this time not because of the elusiveness of past mental states, but because of the elusiveness of the doctrines to which they are relevant. For instance, if a jury and an expert disagree on who is insane, how do we decide who is "right?"¹⁹³

with *Daubert* criteria such as 'falsifiability' and 'error rates'"), *cert. denied*, 118 S. Ct. 261 (1997).

191. See FED. R. EVID. 702.

192. See, e.g., Patricia Frazier & Eugene Borgida, *Juror Common Understanding and the Admissibility of Rape Trauma Syndrome Evidence in Court*, 12 LAW & HUM. BEHAV. 101, 115 (1988) (reporting on lay understanding of myths surrounding rape cases and stating that "most of the comparable studies in the eyewitness area do not . . . compare expert and nonexpert accuracy rates"). Research comparing lay and expert predictions of dangerousness is also lacking. See Thomas R. Litwack, *Assessments of Dangerousness: Legal, Research, and Clinical Developments*, 21 ADMIN. & POL'Y MENTAL HEALTH 361, 373 (1994) (noting that whether "mental health professionals have any special ability, not shared by laypersons, to assess dangerousness . . . remains to be determined by future research").

193. Attempts to operationalize the extremely amorphous insanity construct have met with limited success. Cf. Norman J. Finkel & Christopher Slobogin, *Insanity, Justification, and Culpability: Toward a Unifying Schema*, 19 LAW & HUM. BEHAV. 447, 449, 463 (1995) (questioning the relevance of juror intuition about insanity to the normative project of defining insanity). Expert/non-expert accuracy might be more testable on some other issues of past mental state. See Frazier & Borgida, *supra* note 192, at 111-15 (indicating significant accuracy differences between experts and laypersons with respect to various aspects of rape, the latter of which might be useful in drawing conclusions about whether intercourse was consensual).

Accordingly, assessments of helpfulness today must usually be based on a more seat-of-the-pants assessment. Testimony that merely repeats what everyone "knows" is a waste of time and perhaps even detrimental to the extent it becomes cast in stone by the expert's words. On the other hand, testimony about acts or mental states that is meant to rebut presumptions, overcome statements or innuendo from the opposing side, or in some other way provide counterintuitive or corrective information should be considered helpful. A few examples of each of these situations should suffice to make the point.

The criminal law presumes sanity¹⁹⁴ and permits an inference that one intends the natural and probable consequences of one's acts.¹⁹⁵ These legal rules are based in part on normative and procedural considerations,¹⁹⁶ but rely primarily on empirical assumptions that are probably right—most criminal defendants are sane and most do intend the natural and probable consequences of their acts. More importantly, these assumptions are undoubtedly shared by most people, including the majority of jurors and judges. Thus, any past mental state evidence offered to the contrary ought to be considered helpful. Specifically, probative testimony tending to support an insanity, provocation, or lack of mens rea defense ought to be admissible because it rebuts legal and lay preconceptions about mental state.

In other situations, it is a party, rather than the law itself, that relies on commonly held assumptions. For instance, when self-defense is the issue in a battered woman case, the prosecution might make much of the defendant's failure to leave a

194. See LAFAVE & SCOTT, *supra* note 154, §4.5(e) at 353 ("On the issue of lack of responsibility because of insanity, the initial burden of going forward is everywhere placed upon the defendant."); see also *Davis v. United States*, 160 U.S. 469, 470 (1895) (recognizing a presumption of sanity).

195. At one time a person was "presumed" to intend the natural and probable consequences of his acts, but since *Sandstrom v. Montana*, 442 U.S. 510 (1979), courts are permitted to instruct juries only that they may draw an inference about intent from behavior. See *id.* at 522-23. See generally LAFAVE & SCOTT, *supra* note 154, § 3.5, at 225-26 (discussing *Sandstrom* and personal intent).

196. For instance, the presumption of sanity has been described as a device for saving "the state the fruitless trouble of proving sanity in the great number of cases where the question will not be raised" and as "a description of the initial assignment of the burden of producing evidence to the defendant." 2 MCCORMICK ON EVIDENCE, *supra* note 73, § 343, at 455 n.7.

battering husband despite several apparent opportunities to do so.¹⁹⁷ In a child abuse or rape case, the defense might emphasize the victim's failure to report the alleged offense immediately after it "supposedly" occurred.¹⁹⁸ In these situations as well, probative psychiatric evidence about BWS, CSAAS, and RTS, respectively, would be helpful because it would disabuse jurors of the notions that most battered spouses leave their batterers and that abused and raped victims usually report the assault right after it happens. Even courts that are generally resistant to syndrome testimony often permit it as rebuttal evidence in such cases.¹⁹⁹

Finally, there are situations in which no explicit statements about behavior or mental state are made by either the law or the parties, yet psychiatric evidence can be helpful because it provides counterintuitive information. Determining when such a situation exists can be difficult. Ideally, empirical information indicating people's preconceptions about various issues would be available,²⁰⁰ but even that can be misleading because stereotypes change all the time and may differ between jurisdictions or even juries. When in doubt, if the other evidentiary prerequisites are met, the court should err on the side of admissibility.

197. See, e.g., *People v. Day*, 2 Cal. Rptr. 2d 916, 923 (Cal. Ct. App. 1992) (noting prosecution argument that defendant "could have easily left" the abusive relationship), *overruled by* *People v. Humphrey*, 921 P.2d 1 (Cal. 1996).

198. See, e.g., *People v. Karst*, 560 N.Y.S.2d 577 (N.Y. App. Div. 1990) (involving victim's failure to promptly report the alleged rape).

199. See Askowitz & Graham, *supra* note 20, at 2040 ("The overwhelming majority of jurisdictions will allow testimony based on CSAAS when it is used to explain the significance of the child complainant's seemingly self-impeaching behavior, such as delayed reporting or recantation."); Fischer, *supra* note 20, at 713-17 (detailing cases which allow RTS evidence "when it is used to rebut misconceptions about victim behavior"); Mosteller, *supra* note 141, at 479 ("When BWS is used for the purpose of restoring the credibility of the defendant by countering prosecutorial impeachment . . . the evidence, almost regardless of form, is readily accepted.").

200. See, e.g., Kenneth A. Deffenbacher & Elizabeth F. Loftus, *Do Jurors Share a Common Understanding Concerning Eyewitness Behavior?* 6 LAW & HUM. BEHAV. 15 (1982) (examining lay beliefs about potential eyewitness inaccuracy); Frazier & Borgida, *supra* note 192, at 111-15 (reporting study comparing expert and non-expert beliefs about rape); Gail S. Goodman et al., *Jurors' Reactions to Child Witnesses*, 40 J. SOC. ISSUES 139, 142 (1984) (examining beliefs about the accuracy of child witnesses).

Consider psychiatric evidence that the defendant has a “passive” character, proffered to show that the defendant did not commit the act charged. Because it does not involve proof of mental state, it would first have to pass the *Daubert*/relevance ratio hurdle (rather than the less onerous general acceptance/professional plausibility test).²⁰¹ If it does, it should be considered helpful as well, since most jurors are likely to assume that those who are charged committed the act. Although this assumption may seem to run afoul of the presumption of innocence,²⁰² that presumption, unlike the presumption of sanity or the inference regarding intent, is not supported empirically (most people charged are *guilty*) and is probably not believed by most laypeople. By the same token, unless offered in rebuttal of such evidence, proof that a person is *not* passive should not be admissible because it would merely reinforce the widespread assumption that a person charged with a crime committed that crime. Such an outcome, of course, is consistent with the traditional character evidence rule barring proof of propensity by the prosecution unless the defense “opens the door.”²⁰³

201. A relevance ratio analysis would require one to compare the proportion of “passive” individuals who commit violent crime to the proportion of violent crime in the general population. Assuming one could define “passive” in a meaningful and nontautological way (avoiding what Professors Lyon and Koehler, *supra* note 172, at 68-70, have labeled “detection bias”), the proportion of violent criminals is likely to be extremely low within both groups and it is not obvious that the passive group would have the smaller proportion. Cf. James M.A. Weiss et al., 2 A.M.A. ARCHIVES: GEN. PSYCHIATRY 669 (1960). The authors state:

In general, the sudden murderers [i.e., persons who kill without any previous involvement in serious aggressive acts] demonstrated certain qualities of the schizoid personality (emotional coldness and isolatedness, difficulty in forming close relationships with other persons, and difficulty in directly expressing hostility), and certain qualities of the passive-aggressive personality (inefficiency, feelings of helplessness, and persistent reaction to frustration with resentment).

Id. at 675.

202. As Professor LaFave points out, the presumption of innocence is not really a presumption, in that it does not require proof of an underlying fact that then allows the assumption of innocence. See LAFAVE & SCOTT, *supra* note 154, § 1.8(f), at 58. Rather, it is designed to overcome, *inter alia*, the assumption that the “fact of accusation is . . . evidence of . . . guilt.” *Id.*

203. See FED. R. EVID. 404(a)(2) (providing that “[e]vidence of a person’s character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except . . . (1) evidence of a pertinent trait

Psychiatric evidence about credibility of a witness can be analyzed in the same way. Because most people probably assume that witnesses who are put under oath and testify under threat of perjury will tell the truth, testimony suggesting otherwise would be helpful, whereas testimony supporting truthfulness would not be, unless offered in rebuttal.²⁰⁴ The more significant hurdle for this type of testimony is whether it is probative. Testimony about credibility usually concerns whether an act, such as abuse, occurred, and thus, under the framework advanced in this Article, would have to meet the *Daubert*/relevance ratio test.²⁰⁵

A more difficult case involves psychiatric testimony about so-called "repressed memories," designed to bolster or attack testimony from an alleged abuse victim about incidents often decades old.²⁰⁶ Although jurors probably assume witnesses tell the truth, they might also assume that an account of something so long ago, the memory of which was just recently "discovered," is not likely to be accurate. Accordingly, evidence about the repressed memory phenomenon probably should be considered helpful regardless of which side seeks to offer it,²⁰⁷ however, its ultimate admissibility would depend upon whether it meets the

of character offered by an accused, or by the prosecution to rebut same").

204. Cf. FED. R. EVID. 608(a). The rule states that:

The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

Id.

205. Under that test, the groups compared would be those with the witness's salient characteristics who lie in trial-like situations and those without those characteristics who lie in trial-like situations.

206. See, e.g., *Cole v. Shults-Lewis Child and Family Services, Inc.*, 681 N.E.2d 1157, 1159-60 (Ind. Ct. App. 1997) (noting need for expert testimony to support validity of repressed memory testimony); *J.G. v. Murray*, 915 S.W.2d 548 (Tex. App. 1995) (involving testimony by defense expert attacking the reliability of repressed memories).

207. See, e.g., *Shahzade v. Gregory*, 923 F. Supp. 286, 289 (D. Mass. 1996) (characterizing repressed memory evidence as helpful); *Isely v. Capuchin Province*, 877 F. Supp. 1055, 1063-64 (E.D. Mich. 1995) (allowing expert testimony on repressed memory).

Daubert/relevance ratio test because it too is being used to prove whether an act occurred.²⁰⁸

Helpfulness analysis is also important in determining the form that psychiatric evidence may take. Such evidence can be conceptualized as several-layered,²⁰⁹ along the following lines:

1. Behavioral observations (e.g., the individual hears voices when no one is talking);
2. Inferences or symptoms (e.g., the individual has hallucinations);
3. Diagnosis (e.g., the individual has schizophrenia);
4. Application of the clinical information to the legal issue (e.g., the individual was cognitively impaired at the time of the offense);
5. Application of the clinical information to the ultimate legal issue (e.g., the person was insane).²¹⁰

Stephen Morse has argued that lay people will find only the first level of information helpful because they do not need clinical labels or expert speculations about degrees of impairment to reach the moral judgments demanded by the law.²¹¹ Professor Bonnie and I have countered that, with the exception of ultimate issue testimony, informed speculation by mental health professionals *can* be of assistance on some occasions.²¹² That debate will not be rehashed here.²¹³ Professor Morse is certainly right, however, that courts allow a considerable amount of psychiatric opinion testimony that is superfluous and unhelpful, regardless of its probative value.

208. Research in this area may be difficult to assemble. See Ernsdorff & Loftus, *supra* note 25, at 133 ("The traumatic nature of events that lead[] to repression . . . virtually precludes experimental probing of the theory; researchers have yet to design experiments that will enable them to study the repression and subsequent retrieval of a memory.")

209. See MELTON ET AL., *supra* note 29, at 13-17 (discussing the "several levels of opinion that might be rendered" by mental health professionals).

210. See *id.*

211. See Morse, *supra* note 181, at 554-60.

212. See Richard J. Bonnie & Christopher Slobogin, *The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation*, 66 VA. L. REV. 427, 452-466 (1980).

213. In addition to the articles cited *supra* notes 181 and 212, see MELTON ET AL., *supra* note 29, at 13-17.

We did agree with Morse that, given its moral content, ultimate issue testimony is not helpful and should be proscribed.²¹⁴ That position needs to be amended to recognize, once again, the distinction between psychiatric evidence on mental states and psychiatric evidence used to prove an act.²¹⁵ "Ultimate" testimony as to whether someone is likely to have committed a particular act may well be helpful to the jury, in the sense that the expert will know more about the correlation between certain symptoms and acts. Furthermore, such testimony is not a moral judgment, but a statement of probabilities about an objective fact. On the other hand, expert testimony that someone is insane or acted reasonably in response to perceived provocation is not only a value judgment, but, as stated before, something that cannot be objectively verified.²¹⁶ Thus, an expert's view on this matter is no better than that of a lay person who has been instructed on and follows the law.²¹⁷

D. Countervailing Factors

If expert evidence is material, probative, and helpful it should usually be admissible.²¹⁸ As Federal Rule 403 recognizes, however, even evidence that meets these prerequisites might be so time-consuming relative to its importance, so confusing, or so likely to unfairly prejudice a party that it should be excluded.²¹⁹ Generally, psychiatric evidence should not be excluded for any of these reasons. It is likely to be important enough in a given case to avoid exclusion on waste-of-time grounds, although

214. See Bonnie & Slobogin, *supra* note 212, at 456-57.

215. Note that the relevant federal rule only prohibits ultimate issue testimony as to "mental state or condition." FED. R. EVID. 704(b); see *supra* note 101 and accompanying text.

216. See *supra* text accompanying notes 162-87.

217. Although such testimony is thus not "helpful," it might be allowed for other practical reasons, principal among them that it is so hard to avoid, at least in paraphrase. As I have noted elsewhere, ultimate issue testimony in a truly adversarial proceeding is probably harmless, even if it is not technically "expert." See Christopher Slobogin, *The "Ultimate Issue" Issue*, 7 BEHAV. SCI. & L. 259, 263-66 (1989).

218. See, e.g., 1 MCCORMICK, *supra* note 73, at §§ 184-85, at 772-85 (discussing admissibility of relevant (i.e., material and probative) evidence); *id.* at § 13, at 53-58 (noting admissibility of "helpful" expert opinion).

219. See FED. R. EVID. 403.

redundant or peripheral testimony might be censored.²²⁰ Further, at least when compared to other types of expert evidence, psychiatric testimony is unlikely to befuddle the average jury.²²¹ Testimony about human behavior, even when put in psychiatric terminology or expressed in terms of syndromes and relevance ratios, is far more understandable than discussions of physics, DNA analysis, and economic principles.²²² Finally, for much the same reason, psychiatric testimony is relatively unlikely to carry undue weight, as most laypeople probably understand that psychiatric evidence is more fallible than testimony based on the "hard" sciences.²²³

A few recurring scenarios might, however, pose a Rule 403 risk. First, testimony that merely bolsters strong preconceptions might well unduly prejudice the party fighting the preconception. For instance, evidence that a person charged with rape fits a "rapist profile" reinforces the assumption of guilt and should be excluded.²²⁴ Of course, such evidence might also be excluded as inadmissible character evidence, as unhelpful, and perhaps also because it lacks probative value. Some wily prosecutors, however, may be able to evade the character evidence prohibition by characterizing the testimony as proof of intent or mo-

220. See, e.g., *Engberg v. Meyer*, 820 P.2d 70, 137-38 (Wyo. 1991) (Urbigkit, C.J., concurring in part and dissenting in part) (noting discretion to reject redundant expert testimony).

221. See Charles Bleil, *Evidence of Syndromes: No Need for a "Better Mousetrap,"* 32 S. TEX. L. REV. 37, 66 (1990) (arguing that psychiatric testimony is probably "the least over-awing" of the various type of expert testimony "because jurors have some innate knowledge of human behavior").

222. Cf. *id.* (noting that while jurors have "some innate knowledge of human behavior," they are unlikely to have similar knowledge of physics, genetics, or aeronautics).

223. Certainly the popular press has not hidden its concerns about psychiatric evidence. See *supra* note 9 and accompanying text. The public itself has also demonstrated a healthy skepticism about the objectivity and expertise of the mental health professions. See Daniel Slater & Valerie P. Hans, *Public Opinion of Forensic Psychiatry Following the Hinckley Verdict*, 141 AM. J. PSYCHIATRY 675 (1984); see also Neil J. Vidmar & Regina A. Schuller, *Juries and Expert Evidence: Social Framework Testimony*, LAW & CONTEMP. PROBS., Autumn 1989, at 133, 173 (reporting research indicating that jurors do not treat expert testimony on BWS, RTS, and eyewitness reliability with an unwarranted aura of accuracy).

224. See *Flanagan v. State*, 625 So. 2d 827, 828-29 (Fla. 1993) (holding testimony based on "sex offender profile" inadmissible).

tive,²²⁵ and might also be able to make a colorable argument that any probative scientific evidence adds to the jury's knowledge.²²⁶ Even if they can, they should not be able to get past the Rule 403 hurdle.

A second situation in which the Rule 403 analysis should play a role, likely to be more frequent, occurs when the psychiatric evidence is only minimally relevant, either in the sense of being of low materiality or of low probative value. For instance, general testimony about the inaccuracy of eyewitness identification might be of relatively low materiality because of its lack of "fit" with the case at hand.²²⁷ Yet jurors, impressed by the probative value of that evidence (which, given the strong research on the subject, is very high), might nonetheless rely on the testimony as proof that *no* eyewitness can be trusted, a result some courts have admitted they fear.²²⁸ This type of problem is likely to occur frequently with social framework-type evidence, where an almost inverse relationship between probative value (i.e., validity) and case-specific materiality may exist. In such situations, courts may not only need to evaluate the impact of the psychiatric evidence by itself but also in conjunction with other evidence. For instance, a judge might decide to exclude generalized testimony about eyewitnesses if it is the only defense evidence, but permit it if the defense also has a colorable alibi claim.

Psychiatric evidence that is clearly material but has only minimal probative value might require similarly delicate balancing. Imagine evidence of past mental state that is based on a barely

225. See FED. R. EVID. 404(b) ("Evidence of other crimes, wrongs, or acts . . . may . . . be admissible [to prove] motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . .").

226. See *People v. Beckley*, 456 N.W.2d 391, 401 n.32 (Mich. 1990) (noting expert testimony should only be excluded "when it would add *nothing at all* to the jury's common fund of information" (emphasis added)).

227. See *United States v. Downing*, 753 F.2d 1224, 1242 (3d Cir. 1985) (requiring a showing that eyewitness identification testimony be sufficiently tied to the facts of the case).

228. See, e.g., *People v. Enis*, 564 N.E.2d 1155, 1165 (Ill. 1990) (upholding trial court's exclusion of testimony on eyewitness identification because "[i]t would be inappropriate for a jury to conclude, based on expert testimony, that all eyewitness testimony is unreliable").

plausible theory, accepted by a sizeable group of professionals, but also rejected by at least as many; or suppose that syndrome evidence tending to show an act occurred exhibits a positive, but very weak, relevance ratio. These types of evidence might justifiably be excluded, despite passing the official threshold test for probative value, because of their potentially untoward impact on the jury.²²⁹ Unlike judges who have heard many cases involving expert evidence, juries do not have a comparison sample. While jurors are not incapable of understanding that theories are arcane or that a given relevance ratio is weak, they may have trouble putting that information in context or gauging its relative accuracy.

Of course, a functioning adversarial system may furnish a significant corrective to these potential problems with the jury by exposing the various flaws in psychiatric evidence just described. Through cross-examination and rebuttal experts, lawyers can expose the relative implausibility of a theory or its lack of acceptance among other professionals, and explain a syndrome's weak probative value.²³⁰ Accordingly, a third situation which merits close consideration under Rule 403 occurs when the psychiatric evidence is not subjected to adequate adversarial testing. Unchallenged, the usually minimal risk that psychiatric theories, relevance ratios, and ultimate issue testimony will overwhelm the jury's capacity to think for itself may increase significantly. As one study concluded, "nonadversarial expert testimony causes less systematic processing of . . . expert testimony."²³¹

Another reason for ensuring that psychiatric evidence is subjected to adversarial testing is to prod the research community

229. Indeed, a barely positive relevance ratio might lead to "presumptive" exclusion. After detailing methodological problems that could promote bias in studies comparing abused and nonabused children, Lyon and Koehler state that "[b]ecause these biases are difficult to eliminate . . . courts should treat as presumptively irrelevant symptoms that are only slightly more common among abused children than among nonabused children." Lyon & Koehler, *supra* note 172, at 70.

230. See, e.g., *J.G. v. Murray*, 915 S.W.2d 548, 549-51 (Tex. App. 1995) (involving testimony by defense expert attacking the validity of plaintiff's repressed memories).

231. Nancy J. Brekke et al., *Of Juries and Court-Appointed Experts: The Impact of Nonadversarial Versus Adversarial Expert Testimony*, 15 LAW & HUM. BEHAV. 451, 471 (1991).

to perform better. Professor Faigman, among others, has argued that one advantage of applying strict admissibility rules to psychiatric evidence is that it would provide an incentive to improve the product.²³² He contends that relaxed admissibility rules, of the type advocated here for past mental state, are detrimental to scientific progress because they put the courts' imprimatur on the status quo.²³³ But gaining admission of evidence is only winning the initial battle: the evidence must sway the factfinder to win the war. To the lawyer-consumers of psychiatric evidence, unfavorable verdicts, brought about by vigorous cross-examination and rebuttal evidence, should provide at least as much incentive to push for better research as would exclusion.²³⁴

The difficulty arises in determining whether such adversarial testing will occur. Judges normally cannot foresee the adequacy of a lawyer's preparation or his or her skill during trial. Even if they could, a rule that evidence should be excluded because the opposing side is too incompetent to combat it is paradoxical to say the least.

Some steps are possible, however. Judges can conduct hearings in limine to get a sense of whether evidence will be effectively explored;²³⁵ if it appears the evidence will not be, they can appoint their own expert to flesh out the issues.²³⁶ Indeed, the court might routinely appoint "expert experts" who can point out the weaknesses (and strengths) of evaluation procedures and research methodologies.²³⁷ The jury can be authorized to ask

232. See David L. Faigman, *The Evidentiary Status of Social Science Under Daubert: Is It "Scientific," "Technical," or "Other" Knowledge*, 1 PSYCHOL. PUB. POL'Y & L. 960, 971-77 (1995).

233. See *id.*

234. Note, for instance, that many of the novel defenses that have received press attention, although presented in court using psychiatric evidence, did not prevail and are seldom raised. See *supra* note 9. This is probably in large part because the adversarial process exposes them for the junk theorizing that they are.

235. See *Redevelopment Agency v. Tobriner*, 264 Cal. Rptr. 481, 488 n.5 (Cal. Ct. App. 1989) (noting that "[c]ourts routinely conduct hearings in limine to determine the scope of admissible evidence").

236. See E. Donald Elliot, *Toward Incentive-Based Procedure: Three Approaches for Regulating Scientific Evidence*, 69 B.U. L. REV. 487, 501 (1989) (noting "inherent power of a trial judge to appoint an expert").

237. See *id.* at 507-08 (recommending that the court appoint its own expert if it finds expert testimony proffered by one of the parties would be subject to "substan-

questions as a way of making up for attorney oversights.²³⁸ Briefs on the scientific issues can be provided to the jury as well.²³⁹ Ethical rules, governing both mental health professionals²⁴⁰ and attorneys,²⁴¹ can be enforced more vigorously against incompetent, lazy, or pretentious individuals. In short, the judicial system can develop effective ways of ensuring the factfinder is not presented a one-sided or confused picture of the evidence.

One might argue that if good adversarial presentation of the evidence could be guaranteed through these or other methods, then courts should welcome even psychiatric opinions that have little or no demonstrable probative value; after all, the reasoning

tial doubt in peer review by the scientific community"); *cf.* *Barrett v. Roberts*, 551 F.2d 662, 671 (5th Cir. 1977) (suggesting that trial court on remand appoint an expert using Federal Rule of Evidence 706, which today authorizes court appointment of experts who may be deposed by either party and called by either party or the court). Many courts seem to believe that the best use of such court-appointed experts is to assist the judge in the gate-keeping function of determining whether the evidence meets the *Daubert* or *Frye* test, rather than using them as independent witnesses. *See* JOE S. CECIL & THOMAS E. WILLGING, *COURT APPOINTED EXPERTS DEFINING THE ROLE OF EXPERTS APPOINTED UNDER FEDERAL RULE OF EVIDENCE 706* (Federal Judicial Center, 1993) (noting that a survey of all active federal district court judges, with 80% responding, indicated that using Rule 706 experts as witnesses in criminal cases was extremely rare).

238. *See* Hope Viner Samborn, *Changing the Jury Tool Box: ABA Task Force Invites Criticism of Trial Proposals—And Gets It*, A.B.A. J., Dec. 1997, at 22 (reporting on the Civil Trial Practice standards drafted by the American Bar Association's Litigation Section Task Force on Civil Trial Practice, which include a provision for permitting jurors to submit written questions for witnesses). Under this provision, "[a]fter receiving a question, the judge should disclose it to the attorneys and give them an opportunity to object outside the presence of the jury. A cautionary instruction should explain, among other things, that some queries may be rejected or rewritten." *Id.*

239. *Cf. id.* (noting proposal that judges distribute "jury notebooks" containing selected admitted exhibits and other materials not subject to dispute).

240. *See, e.g.*, *ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT* § 1.04 (Boundaries of Competence); § 1.05 (Maintaining Expertise); § 7.02 (Forensic Assessments). Section 7.02(c) states that: "psychologists clarify the impact of their limited information on the reliability and validity of their reports and testimony, and they appropriately limit the nature and extent of their conclusions or recommendations." *Id.* § 7.02(c).

241. *See, e.g.*, *MODEL RULES OF PROFESSIONAL CONDUCT*, Rule 1.1 (1996) ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."). Of course, defendants are also constitutionally entitled to effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 686 (1984).

might go, the weaknesses of such opinions can be uncovered by the process. Adversariness that clarifies rather than obfuscates cannot be guaranteed on a routine basis, however, and even if it could be, knowingly giving the factfinder information that lacks an indicia of reliability is antithetical to the ideal of a system that purports to do justice. Thus, while a well-functioning adversarial process may allow courts to be more flexible in their admission of evidence than they would otherwise be, it should not nullify the threshold requirements of professional plausibility for past mental state evidence and scientific validity for other types of psychiatric evidence.

CONCLUSION: NORMATIVE CONCERNS

Courts are suspicious of psychiatric evidence that is nomothetic in nature, departs from the traditional medical model, and seeks to support doctrinally novel theories, and this suspicion often exists without regard to or in spite of the evidence's reliability. At the same time, courts unquestioningly accept traditional psychiatric evidence which may be just as unreliable, if not more so. Furthermore, despite *Daubert's* purported finetuning of the analysis, the judiciary has yet to devise a coherent framework for evaluating the admissibility of psychiatric evidence it does suspect.

This Article provides such a framework. All psychiatric evidence—traditional and nontraditional—should be subject to admissibility thresholds, using the four-step analysis provided by the Federal Rules of Evidence. First, the evidence must be material, a requirement which may often necessitate a hard look at the substantive law. Second, the evidence must be probative, a maxim that should require that its basis be generally accepted by, or at least plausible to, a significant number of professionals if the evidence seeks to prove past mental state, and proven through more rigorous scientific testing, using relevance ratio analysis or similar methods, if it does not. Third, it must be helpful, which means it should combat legal presumptions, common preconceptions, or claims by the opposing party. Finally, it must be fairly and understandably presented as the tentative information it is, which can usually be assured by adversarial testing.

As the alert reader has surely surmised by this point, the end result of this approach is that defendants' psychiatric evidence typically will be subjected to less judicial scrutiny than evidence proffered by the prosecution.²⁴² The rationale discussed above for this stance is a combination of necessity, given the difficulty of proving past mental state, and helpfulness, given the natural assumptions about past mental state that most lay people make. Some might object that psychiatric evidence is never "necessary" if it is of low probative value, and that it can never be "helpful," even when counterintuitive, if it leads to questionable findings.²⁴³ The better approach, on this view, is simply to rely on lay rather than expert testimony and fact rather than opinion when the issue is past mental state.

A deeper reason for nonetheless adhering to the framework outlined here stems from democratic principles and the appearance of fairness.²⁴⁴ Our individualistic, pluralistic society espouses a preference for allowing everyone to voice his or her point of view. On issues about which there can be competing versions of the truth, as with past mental state, litigants in criminal trials should be able to tell their story. If telling that story effectively requires an expert, the law should not stand in the way. When the litigant is a criminal defendant, this stance may even be constitutionally required. Under the Supreme Court's decision in *Rock v. Arkansas*,²⁴⁵ we could not prevent

242. This is not always the case, however. For instance, prosecution evidence of RTS, which focuses on the past mental state of consent, would be evaluated under a general acceptance standard. Defense evidence that repressed memories are manufactured, which focuses on whether an act occurred, would be evaluated under a *Daubert*/relevance ratio analysis.

243. This, in short, is the primary objection of Professors Morse and Faigman. See generally David L. Faigman, *To Have and Have Not: Assessing the Value of Social Science to the Law as Science and Policy*, 38 EMORY L.J. 1005 (1989) (arguing that the value of social science is outweighed by its potential to prejudice jurors); Morse, *supra* note 181, at 600-19 (arguing, *inter alia*, that mental health professionals "should not be allowed to testify about theoretical matters that are in dispute or to state conclusions that are not based on firm scientific evidence").

244. This argument derives from a discussion with Mark Fondacaro, Ph.D., University of Florida Department of Psychology. My thanks to him. The argument is developed further, in Slobogin, *supra* note 162.

245. 483 U.S. 44 (1987) (establishing criminal defendants' right to testify based on the Sixth Amendment right to compulsory process, the Due Process Clause and the

the defendant from taking the stand and describing his or her version of the facts, so long as it stays within the bounds of the substantive law. We should likewise be reluctant to prevent an expert retained by the defendant from doing so.²⁴⁶

There is a utilitarian side to this argument as well. The viability of our criminal justice system depends in part on the perception that it is willing to ascertain the truth.²⁴⁷ If that system prevents litigants from telling plausible stories based on theories accepted by the relevant professionals, it may well undermine the trust both of litigants and of society at large.²⁴⁸ That result, to the extent it stems from the desire to *enhance* reliability, would be ironic at best.

Fifth Amendment right to (decide whether) to remain silent).

246. The precise issue in *Rock* was the constitutionality of a per se rule barring defendants from offering hypnotically-induced testimony. The Court required that such testimony be permitted unless the state can show "that hypnotically enhanced testimony is always so untrustworthy and so immune to the traditional means of evaluating credibility that it should disable a defendant from presenting her version of the events for which she is on trial." *Id.* at 61. Under this standard, not only the defendant's own testimony, but most psychiatric testimony presented by the defense, would be admissible. The Court's recent decision in *United States v. Scheffer*, 118 S.Ct. 1261 (1998), permitting an absolute prohibition on polygraph evidence presented by the defendant, does not undercut this point. The Court distinguished *Rock* by noting that a ban on polygraph evidence does not prevent the defendant from telling his story about the crime, but merely bars the defendant "from introducing expert testimony to bolster his own credibility." *Id.* at 1268-69.

247. See generally E. ALLAN LIND & TOM T. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988). Lind and Tyler note, for instance, that "[t]here is a growing body of research showing that the experience of procedural justice not only enhances evaluations of persons, institutions, and specific outcomes, but also leads to greater overall satisfaction with the legal experience and more positive affect with respect to an encounter with the justice system." *Id.* at 70.

248. Indeed, this concern might explain better than anything else why expert testimony about battered women has been so widely accepted despite its scientifically suspect nature.