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The Truthsayer and The Court: Expert Testimony on Credibility

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THE TRUTHSAYER AND THE COURT: EXPERT TESTIMONY ON CREDIBILITY

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INTRODUCTION

Listen now to the story of the Elephant. . . . In Hind it was that the keepers of the Elephant desired to show the Elephant to curious ones. Yet it was in a dark room. The seekers came and felt of it, since they could not see. One, laying his hand on its trunk, said, "This creature is like a water-pipe." Another, feeling its ear, said, "Verily it is a fan." A third came upon its leg, and he said, "Nay, beyond doubt it is a pillar." Had any one brought a candle to the room, all would have seen the same.

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"And where," Omar asked, "will you find a candle to enlighten the world?"[1]

Mr. Woodburn was accused of sexually abusing his eldest son. At trial he called Dr. Sobchuk as a witness. Dr. Sobchuk, a licensed psychologist, had been treating the boy at the state's request. The doctor was to testify that the boy suffered from a number of emotional problems which resulted in an inability to distinguish fantasy from reality, an overwhelming need to please adults and avoid punishment, and the inability or refusal to accept personal responsibility with a concomitant absence of remorse for misconduct, including lying. The trial justice refused to permit the doctor to testify on these matters. The jury returned a verdict of guilty. Mr. Woodburn appealed, claiming error in the trial court's exclusion of Dr. Sobchuk's testimony.[2] The Maine Supreme Judicial Court, sitting as the Law Court, affirmed. Justice Hornby dissented:

> It is disturbing to me that in evaluating the credibility of an eight-year-old boy,[3] the critical and uncorroborated witness in this case, the jury is not entitled to hear the opinion of an independent clinical psychologist who, wholly apart from this criminal prosecution, had been assessing the boy's truthfulness by checking his stories over a nine-month period. I agree with the Court that the Maine Rules of Evidence seem to compel that result, but in doing so they are fundamentally unfair.[4]

Justice Hornby's words are the essence of tragedy. The rule of law is to prevent injustice, not to compel it. The trial was fundamentally unfair. If the jury had heard Dr. Sobchuk's testimony, the verdict may still have been guilty. How the jury weighed the credibility of the boy's accusations will never be known, but they did so without information that would have helped them.

Do the Maine Rules of Evidence require exclusion of Dr. Sobchuk's testimony? Psychiatrists and psychologists testify almost daily as expert witnesses, and courts accept the validity of their respective sciences. Their opinions are routinely admitted as aids to

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1. H. LAMB, OMAR KHAYYAM 138-39 (1971).

2. State v. Woodburn, 559 A.2d 343, 344 (Me. 1989). The defendant also asserted two other grounds on appeal. He claimed the trial justice erred in finding the boy competent to testify as a witness. Defense counsel did not call Dr. Sobchuk as a witness on the issue of the boy's competence. He also claimed error in the trial justice's refusal to ask certain questions on voir dire of the jury panel. The trial justice submitted the questions in written form, declining to ask the questions orally. *Id.* The Supreme Judicial Court found no error on either ground.

3. The child was six years old at the time of the alleged abuse. *Id.*

4. *Id.* at 347 (Hornby, J., dissenting). The majority ultimately found Dr. Sobchuk's testimony to be impermissible character evidence under the Maine Rules of Evidence. *Id.* at 346. It was this argument Justice Hornby felt compelled the result. The majority also questioned the foundation of the scientific validity of Dr. Sobchuk's diagnosis and, apparently, the doctor's qualifications as an expert. *Id.*

the pursuit of truth—unless the testimony relates to the credibility of another witness. Expert witnesses testifying about the credibility of other witnesses are perceived as *truthsayers*. The very concept of a truthsayer in the court invokes a brooding unease in the legal psyche. However welcome their testimony on other subjects, when called to testify on credibility, the behavioral scientists find their professional judgments subjected to a polite, largely unspoken, but implacable antipathy.

The purpose of this Article is to analyze the admissibility of expert testimony on credibility. *State v. Woodburn* serves as a lens to focus on the broader issues. The primary issue is an examination of expert testimony on credibility in light of the Federal Rules of Evidence and their progeny. The Rules of Evidence mandate admission or exclusion of expert testimony based on certain criteria. How are these criteria applied to expert testimony on credibility? How *should* they be applied? The surprising survivability of other criteria discarded by the Rules is also considered.

A. The Truthsayer

The state's case against Mr. Woodburn rested entirely upon the testimony of an eight-year-old boy, the eldest of the Woodburns' two sons. Life for the Woodburn family was "unstable and difficult. Between 1979 and 1985 the Woodburns . . . lived in some fifteen different places, including in an automobile. [Mrs.] Woodburn treated [her oldest son] violently on many occassions [sic], often striking him for no apparent reason."[5] In 1985, Mrs. Woodburn and a Mr. Brown entered into a relationship. Mr. Woodburn and Mrs. Brown also entered into a relationship and went to California for several months. The two boys stayed in Maine with Mrs. Woodburn and Mr. Brown. Mr. Brown abused the older boy. "At this time, [the older boy] was exposed to pornographic magazines and videotapes. He ran at least one pornographic videotape through the VCR by himself."[6]

In June, 1985, Mr. Woodburn and Mrs. Brown returned to Maine. They and the two boys moved in with Mr. Woodburn's mother, stepfather, and stepbrother. The home had two bedrooms and a combined kitchen/living area. Mrs. Brown left a month later.[7] One of the two bedrooms was shared by Mr. Woodburn, his two sons, and his stepbrother. The room had three beds.

> [A]ttempts to get [the older boy] to sleep with [his younger

5. Brief for Appellant at 8, State v. Woodburn, 559 A.2d 343 (Me. 1989) (No. LIN-88-35). The Woodburns also had a daughter, who was removed from the Woodburns' custody by the state at the age of eight months. *Id.* The reasons for this action do not appear on the record.

6. *Id.* (citations to transcript omitted).

7. *Id.* at 9.

> brother] failed because the boys would "raise chaos" and kick each other until they were separated. [Mr. Woodburn and his eldest son eventually began sleeping in the same bed. The older boy] would often wet the bed. . . . When the bed was wet, the defendant would awaken the child and change his pajamas and the bedsheets, often accompanied by a spanking and much angry shouting. [The boy] was embarrassed by his inability to control his bladder, and angry at being frequently berated about something over which he had no control.
>
> During this period, [the boy] had a number of behavior problems at home and school, frequently getting into fights with other children.[8]

The Maine Department of Human Services had been providing services to Mr. Woodburn's mother for some time.[9] The social worker asked Dr. Sobchuk, a licensed psychologist, to evaluate Mr. Woodburn's competence as a parent.[10] In August, 1985, the social worker also referred the boy to Dr. Sobchuk for treatment at the grandmother's request.[11] Dr. Sobchuk met with the boy twenty-four times over the next six months. The sessions usually lasted one hour.[12] The Department eventually removed the boy from the Woodburn home for reasons unrelated to any allegation of sexual abuse by the father, and placed him in a foster home in a remote location. The boy was very lonely. The foster mother, who could not tolerate the boy's bedwetting, forced him to wear diapers and sleep in the bathtub.[13] While at the foster home, the boy accused his father of sexual abuse during the time they slept in the same bed at his grandmother's house.[14] Dr. Sobchuk had treated the boy throughout much of the period in which the abuse allegedly occurred.

At trial, Mr. Woodburn called Dr. Sobchuk as an expert witness. Dr. Sobchuk testified about his qualifications, and his evaluation of Mr. Woodburn. The direct examination then turned to the doctor's treatment and diagnosis of the boy. The state objected. An extensive voir dire followed. Dr. Sobchuk testified the boy suffered from a

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8. *Id.* at 9-10 (citations to transcript omitted).

9. It appears these services were in place when the defendant and his sons moved in with the mother. It is unclear from the record as to why the mother's household was receiving services from the Department of Human Services (DHS). The services may have been related to defendant's half brother, who had Down's Syndrome. *Id.* at 9.

10. Transcript at 308-10, State v. Woodburn, 559 A.2d 343 (Me. 1989) (No. CR 87-291 & CR 87-292). Dr. Sobchuk also evaluated Mr. Woodburn to determine functional disability for Social Security purposes during 1985. *Id.*

11. Brief for Appellant, *supra* note 5, at 10.

12. *Id.*

13. *Id.* at 12.

14. It is unclear whether the accusation was spontaneous, or the result of questioning by the social worker. *Id.* at 12-13, n.9.

"medically recognized syndrome."[15] As a result of his emotional disability, the boy differed from other children his age in that:

A. His ability to separate fact from fiction was "highly suspect. He was often times mixing facts and fantasy."[16]

B. He had a need to gain attention and to please which was "elevated to pathology."[17] "He aimed to please the examiner [by saying] whatever . . . he felt the examiner wanted to hear"[18] and "[was] just going to do almost anything to please you."[19]

C. He told lies, "show[ing] very little remorse or . . . very little signs or understanding of the consequences . . . ."[20] The boy, "with few exceptions, was not telling the truth."[21]

D. His exposure to pornographic material may have "sensitize[d] him prematurely" to sexual matters, causing him to "use his imagination and transcend a lot of the reality if, in fact, it served his purpose, if he wanted to please you."[22]

Dr. Sobchuk also stated that the basis of his diagnosis included the boy's allegations of sexual activities with a girl his own age. This allegation prompted an investigation which revealed that the girl simply did not exist. Dr. Sobchuk concluded: "[Y]ou would have to wonder whether or not it's a pathological lie, whether or not there is fantasy. . . . There maybe [sic] both for [the boy], particularly at this age. But he definitely, he is definitely telling a lie."[23]

Aware that the boy slept in the same bed with his father, Dr. Sobchuk was concerned about the possibility of abuse.[24] On three occasions, Dr. Sobchuk spent most of his session with the boy trying to determine if he was being abused.[25] In view of the boy's mental and emotional problems, Dr. Sobchuk structured his inquiries carefully. He "tried not to lead [the boy] and conduct[ed] a casual, if not superficial inquiry, as to what was transpiring at home between dad and [the boy]."[26] The results were the same on all three occasions. The boy gave no indication that any inappropriate contact

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15. Transcript, *supra* note 10, at 329.

16. *Id.* at 327.

17. *Id.* at 346.

18. *Id.* at 327. Dr. Sobchuk further explained: "I think if you take a look at [the boy's] environment, there is nowhere to please. There is absolutely nowhere to please. . . . [If] all of a sudden . . . he will find someone who is willing to accept him and adopt him and listen to him. It's amazing to him." *Id.* at 334.

19. *Id.*

20. *Id.* at 327. Noting that pathological lying is "a rather harsh concept to draw," Dr. Sobchuk concluded that, "for the most part," the concept applied. *Id.*

21. *Id.*

22. *Id.* at 335.

23. *Id.* at 336.

24. According to Dr. Sobchuk, the DHS social worker was "very eager" to get evidence the boy was being abused by his father. *Id.* at 349.

25. *Id.* at 331.

26. *Id.*

was occurring between him and his father.[27] Dr. Sobchuk was confident the boy would have disclosed any abuse that was occurring.[28] In view of his other findings, Dr. Sobchuk "would still have [had a] strong suspicion about whether or not [the child] had, in fact, been sexually abused,"[29] even if the boy had claimed his father abused him.

B. The Court

The trial justice sustained the state's objection to Dr. Sobchuk's testimony about the boy's credibility.[30] The justice first recited without comment the substance of Rule 404(b)[31] and Rule 702.[32] The justice then turned to Rule 704:[33]

> Rule 704 deals with the opinion on the ultimate issue and it is discretionary with the trial judge as to whether or not opinion on the ultimate issue will be allowed. . . . [I]n the instant case, and I have no questions whatsoever about the qualifications of Doctor Sobchuk, I am impressed by his credentials but the nature of the testimony that is being offered through Doctor Sobchuk is, as far as I am concerned, just as consistent with sexual abuse as not with sexual abuse and the Court, as stated in the commentary to Rule 704 and 704.1[34] that, of course, the trial judge has his usual discretion to exclude under Rule 403[35] opinions, the probative value of which is substantially outweighed by the danger of unfair prejudice or confusion or which would tend to be a waste of time.

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27. *Id.* at 339-40.
28. *Id.* at 340-41.
29. *Id.* at 349.
30. *Id.* at 345.
31. M.R. Evid. 404(b) reads:

> (b) **Other Crimes, Wrongs, or Acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith.

This language is identical to its federal counterpart. The Maine version omits the remaining sentence of the federal rule, which reads: "It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." FED. R. EVID. 404(b). The advisers' note to the Maine rule uses substantially identical language in explaining the limits of testimony excluded by the rule. R. FIELD & P. MURRAY, MAINE EVIDENCE 105 (2d ed. 1987). This suggests that the Maine drafters omitted the last sentence of the federal rule as superfluous, rather than from any decision to create a substantive difference.

32. M.R. Evid. 702 (expert opinion testimony) is identical to FED. R. EVID. 702.

33. The substantive provisions of M.R. Evid. 704 are identical to FED. R. EVID. 704(a). Maine has not amended the rule to include provisions similar to FED. R. EVID. 704(b) (banning expert testimony on a criminal defendant's mental state when it is an element of the crime).

34. The trial justice is apparently referring to R. FIELD & P. MURRAY, MAINE EVIDENCE 262-68 (2d ed. 1987).

35. M.R. Evid. 403, Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time, is identical with FED. R. EVID. 403.

It is the conclusion of this Court that this borders so closely upon the testimony on the ultimate issue as to the credibility of [the boy] that the testimony of Doctor Sobchuk is excluded.[36]

Before considering the problems raised by *Woodburn* and similar cases under the Rules of Evidence, it is appropriate to briefly consider the problem of credibility in a broader perspective.

I. THE LAW OF EVIDENCE

The adversarial trial and lay jury, linked by the law of evidence, have proven remarkably effective in minimizing injustice caused by errors in determining factual truth.[37] Among the English-speaking peoples of the world, it is their common boast that the common law jury finds truth and serves justice better than any other system. Yet even the most zealous advocate of the common law jury will concede that the accuracy rate in this regard is less than one hundred percent.

A. The Pursuit of Truth

In the lexicon of metaphysics, truth and justice are synonyms on the deepest level of meaning. Our concept of jurisprudence recognizes that justice can only be attained through ascertainment of the truth. "There is no gainsaying that arriving at the truth is a fundamental goal of our legal system."[38] The law of evidence is intended as a catalyst to facilitate this process.[39]

Eliciting the witness's account of any past event involves perception, memory, and communication. Absent evidence to the contrary, the witness is assumed to possess a basic competency in each of these activities. Each activity, however, is subject to all the limitations and frailties of the human condition.

Perception is subject to the limitations of newtonian physics upon individual perspective. It is also subject to physiological limitations

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36. Transcript, *supra* note 10, at 351-52 (emphasis added).

37. The effectiveness of the common law jury in justly, or at least rigorously, applying the law is perhaps less certain. This is hardly surprising. The jury was, at least in part, intended to provide a final bulwark against the imposition of the sovereign's will upon individual citizens. In this respect the jury is intended as a device for the misapplication of law. Williams v. Florida, 399 U.S. 78, 100 (1970). *See also* Address by Chief Judge Singleton to the International Society of Barristers, *reprinted in* Singleton, *Jury Trial: History and Preservation*, 32 TRIAL LAW. GUIDE 273 (1989).

38. United States v. Havens, 446 U.S. 620, 626 (1980). The skeptic may disagree. The trial is often perceived as a competition between parties striving to portray fantasy as truth. This view results from a confusion of the parties' goals with those of society. The societal goal is to administer justice based upon discovery of the truth. The jury trial is the device selected to obtain this goal. The adversarial trial makes no impossible demand of impartiality on the parties. It presumes their opinions as to the truth will differ.

39. *See* FED. R. EVID. 102.

and variations in individuals' sensory experience. Beyond these physical limitations, perception is also distorted by an observer's biases, expectations, desires, and fears. These influences produce subliminal distortions in the perceptions of the most rigorously honest. They also tempt to falsehood.

Memory is a bridge from the present to the past. Memory, like a bridge, is a human construct. It is the individual's subjective attempt to create the mental impression of a perception not being experienced. Memory is the zealous servant of its master. The bridge is built, maintained, and modified according to the needs of the individual. Few people are blessed with total recall; everyone must pave over gaps in his or her memory. This process is so common it becomes automatic, subsiding below the level of conscious awareness.[40] Trial witnesses are subject to additional influences. Many, if not most, witnesses believe they have a stake in the outcome. Even the "impartial" witness tends to identify with or against the cause of one party. This tendency is encouraged by trained advocates skilled in the subtle arts of persuasion and manipulation. Consciously and unconsciously, the memory and testimony of witnesses vary from the original perception.

Communication is also subject to similar limitations. The witness's ability to describe perceptions is limited. The question or answer may contain undetected ambiguities. The hearer's ability to understand is limited by the same factors which limit all human perception and understanding. In addition, the trial setting imposes its own limitations and opportunities for miscommunication. The public forum, adversarial procedures, and evidentiary rules are unfamiliar to the average witness and juror. Furthermore, a witness may consciously distort or falsify.

None of this is recent revelation. The law has recognized these problems in the fact-finding process as far back as the twelfth century. In response, a number of devices have been tried to enhance the pursuit of justice through truth. Trials by ordeal or combat were early attempts to solve the problem. Calling upon the Godhead to resolve disputes was an understandable reaction to the realization

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40. The same phenomenon occurs in perception. A series of still photographs viewed *seriatim* are seen as a moving picture. Similar is the lack of awareness of blinking as an interruption of sight. This phenomenon received judicial recognition in United States v. Russell, 532 F.2d 1063 (6th Cir. 1976):

> Witnesses focus on gross or salient characteristics of any sensory experience, and fill in the details . . . according to some previously internalized pattern they associate with the perceived gross characteristics. In addition, the construction of memory is greatly influenced by post-experience suggestion. Suggestions compatible with the witness' internalized stereotype are likely to become part of the witness' memory . . . because they fit the preconceived stereotype.

Id. at 1066 (citations omitted).

that human justice is often defenseless against good faith error and the plausible lie told by the practiced liar.

In trial by combat or ordeal, the sheriff gathered the freeholders of the district, bringing them to "some ancient moot-hill, which ever since the times of heathenry [had] been the scene of justice."[41] The freeholders were called to serve as "doomsmen." They were to be witnesses of the judgment, not the evidence. "If of two litigants the one contradicts the other flatly, if the plain 'You did' of the one is met by the straight-forward 'You-lie' of the other, here is a problem that man cannot solve. . . . He has recourse to the supernatural."[42] Trials by ordeal or combat, however, were based upon belief in a proactive divinity willing to stand as surety for human justice. Over the centuries the belief developed that the Godhead had washed its hands of any obligation to intervene in the human pursuit of temporal justice.[43] Viewed from this perspective, trial by jury is the fallback method selected by our ancestors to deal with the problem of witness credibility.

The retreat was not a rout; a grudging rear guard has fought every step of the way.[44] Initially the common law did not entirely abandon recourse to a higher authority. Trial by battle, with its interesting mix of an appeal to divine justice and simple pragmatism, persisted for centuries.[45] A party, or a witness serving as the party's champion, would swear to the truth of the party's cause and then would offer to defend his or her oath in mortal combat. The wisdom of this approach goes beyond a hope that God would arrange for right to prevail over might. The modern witness in the equivalent situation may fear the ordeal of cross-examination and might worry about the risk of conviction for perjury. On the other hand, ancient witnesses had to be willing to risk death if their testimony was challenged.

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41. F. MAITLAND, 2 THE COLLECTED PAPERS OF FREDERICK WILLIAM MAITLAND 445-46 (H.A.L. Fisher ed. 1911).

42. *Id.*

43. The Church prohibited participation by the clergy in trials by ordeal in a decree of the Fourth Lateran Council issued in 1215. J. THAYER, PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 36-38 (1896).

44. *Id.* at 38-39. "The 'Mirror', written, as Maitland conjectures, between 1285 and 1290, regrets that [trial by ordeal] has gone by. 'It is an abuse,' says the writer, 'that proofs and purgations are not made by the miracle of God where no other proof can be had.' In 1679 a defendant astonished the court by asking to be tried by ordeal." *Id.* at 38.

45. Trial by battle, as opposed to trial by ordeal, proved a more durable fixture of the common law. Professor Thayer notes instances occurring in 1531, 1638, and, "in an Irish case in 1815 . . . to the amazement of mankind, the defendant escaped by means of this rusty weapon." *Id.* at 45 (footnote omitted). In another case, "the famous appeal of murder . . . in which the learning of the subject was fully discussed by the King's Bench, [the] battle was adjudged to be still 'the constitutional mode of trial' in this sort of case." *Id.* (footnote omitted). Trial by combat was finally abolished in 1819. *Id.*

Contemplation of such a risk might tend to encourage more honesty. Permitting the parties to be represented by champions skilled in personal combat arguably had an opposite effect.

The determination of truth at trial is necessarily based primarily upon the living memory of witnesses. The common law jury is assigned the task of determining truth from evidence which is inevitably less than the "truth, the whole truth, and nothing but the truth." The jury must construct a mosaic of the truth from a jumble of pieces. At best, most of the pieces are only approximations of the truth, and some may be deliberate falsehoods.[46] The problem remains. Errors occur.[47]

B. Freud, the Professor, and the Dean

Starting from folk wisdom and philosophical speculation, the behavioral sciences have grown into an accepted body of scientific inquiry and knowledge in less than a century. In the late nineteenth century, Sigmund Freud pioneered a new field of knowledge devoted to understanding the human mind. The relevance of this knowledge to the trial process quickly became apparent. So did the legal profession's reluctance to accept the behavioral scientist as an aid to determining credibility issues. As early as 1909, Harvard psychology professor Hugo Münsterberg already felt the courts were proving unreasonably recalcitrant.

> The lawyer and the judge and the juryman are sure that they do not need the experimental psychologist. They do not wish to see that in this field pre-eminently applied experimental psychology has made strong strides, led by Binet, Stern, Lipmann, Jung, Wertheimer, Gross, Sommer, Aschaffenburg, and other scholars. They go on thinking that their legal instinct and their common sense

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46. For an interesting study of how jurors resolve conflicts in the evidence or its interpretation, see Kassin, Reddy & Tulloch, *Juror Interpretations of Ambiguous Evidence: The Need for Cognition, Presentation Order, and Persuasion*, 14 LAW & HUM. BEHAV. 43 (1990).

47. The recent move to equip police cars with video cameras is clearly an attempt to avoid such problems. Taping field sobriety tests circumvents the need to rely upon the disparate memories of the defendant and the arresting officer. The technology solution may have only limited application, however. Intoxication is unique in that it involves persistent and largely unavoidable physiological effects which are usually apparent to the lay person.

Cross-examination and witness confrontation before the jury are two traditional devices intended to assist the jury in assessing credibility. The recent explosion of child abuse cases has raised concerns that these devices may carry too high a human cost for the victims. *See* Maryland v. Craig, 110 S. Ct. 3157 (1990); Coy v. Iowa, 487 U.S. 1012 (1988). *Compare* Commonwealth v. Bergstrom, 402 Mass. 534, 524 N.E.2d 366 (1988) *and* Commonwealth v. Amirault, 404 Mass. 221, 535 N.E.2d 193 (1989). Limitations on these traditional methods of determining truth suggest the need for an increase in other forms of assistance to jurors in resolving credibility issues.

supplies them with all that is needed and somewhat more . . . .[48]

Dean Wigmore rushed to defend the legal profession. He counter-attacked with satire. With mock outrage, he scripted a hypothetical trial in which Dr. Münsterberg was accused of and found liable for defaming the entire legal profession. Dr. Münsterberg's feeble attempts to defend were unavailing. He was liable.[49]

C. *The Emperor's New Clothes*

Eventually, legal commentators recognized the emerging field of behavioral science as a long sought, if not exactly God-sent, aid to the problems of determining credibility. In spite of his initial reservations, by 1937 Dean Wigmore had changed his mind. He was ready to accept the behavioral scientist as an expert witness not only on the mental condition of a witness, but also on the witness's "testimonial trustworthiness."[50] The courts proved more difficult to

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48. H. MÜNSTERBERG, ON THE WITNESS STAND 10-11 (1917). It should come as no surprise to learn that Professor Münsterberg was not a lawyer. Professor Münsterberg also proved unpopular with the public:

> I ventured last year to write a letter to a well-known nerve specialist in Chicago who had privately asked my opinion as a psychologist in the case of a man condemned to death for murder. The man had confessed the crime. Yet I felt sure that he was innocent. My letter somehow reached the papers and I became the target for editorial sharpshooters everywhere. . . . "Harvard's Contempt of Court" is the big heading here, "Science Gone Crazy" the heading there, and so it went on in the papers, while every mail brought an epistolary chorus. . . .
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> . . . And if the sensational press did not manifest a judicial temper, that seemed this time very excusable. . . . [A]s long as a demand for further psychological inquiry appeared . . . as "another way of possibly cheating justice" and as a method tending "towards emasculating court procedure and discouraging and disgusting every faithful officer of the law," the newspapers were almost in duty bound to rush on in the tracks of popular prejudice.
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> I took it thus gladly as a noble outburst of Chicago feeling against my "long-distance impudence" that a leading paper resumed the situation in this way: "Illinois has quite enough of people with an itching mania for attending to other people's business without importing impertinence from Massachusetts. This crime itself, no matter who may be the criminal, was one of the frightful fruits of a sickly paltering with the stern administration of law. We do not want any directions from Harvard University irresponsibles for paltering still further." This seems to me to hit the nail on the head exactly, and *my only disagreement is with the clause "no matter who may be the criminal." I think it does matter who may be the criminal*
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> . . . .

Id. at 139-42 (emphasis added).

49. Wigmore, *Professor Münsterberg and the Psychology of Evidence*, 3 ILL. L. REV. 399 (1909).

50. Wigmore, *Jury-Trial Rules of Evidence in the Next Century*, in 1 LAW, A CENTURY OF PROGRESS 1835-1935, 360 (A. Reppy ed. 1937). *See also* Convis, *Testifying About Testimony: Psychological Evidence on Perceptual and Memory Factors Affecting the Credibility of Testimony*, 21 DUQ. L. REV. 579 (1983).

convince. The ancient and venerable jury system may recognize the difficulty of getting safely across the intersection of Truth and Falsehood. It is, however, unwilling to accept the assistance of the eager young scout of science, anxious to do a good deed.

The behaviorists insist on reminding us how rudimentary is the general knowledge of perception, memory, and communication.[51] Jurors' understanding of the forces that affect perception, memory, and communication is limited to the individual juror's self-knowledge and knowledge of others derived from the random experiences of everyday life. Collectively, the normal jury is by definition ignorant of the abnormal.[52] Even worse, the interloping experts demonstrate that such common wisdom as exists on the subject is also often demonstrably wrong.[53]

The accuracy of the witness's perception, recall, and communication is only half the equation of our professional faith in the trial process. The jury's ability to assess accuracy is equally essential. Existing research strongly suggests society in general, and the legal profession in particular, may seriously overestimate the lay jury's ability to determine truth, especially with respect to some common types of testimony. The question of eyewitness identification has been the subject of considerable research and will serve as a single example. There is no evidence more damning than a confident eyewitness who looks the defendant in the eye, points, and positively identifies him or her as the person who committed the crime. Attorneys and judges recognize that in-court identification is the essence

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51. For comprehensive surveys of the scientific findings concerning these and other factors affecting the accuracy of testimony, see Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934 (1984); Convis, *supra* note 50; Weihofen, *Testimonial Competence and Credibility*, 34 GEO. WASH. L. REV. 53 (1965). These articles offer the following examples: there are demonstrable and significant differences in the ability to identify individuals of a different race by sight. Similarly, the ability to recognize and identify voices differs markedly between women and men (i.e., men are more than twice as accurate as women in recognizing individual female voices (95.5% correct versus 46.7%)).

52. On the broad scale this proposition is a statistical certainty. In the individual case, preemptive challenges effectively ensure the absence of any juror possessing special experience, skill, knowledge, or training relevant to any issue the jury must decide, including credibility.

53. For example, it is commonly accepted that the memory of the elderly is less acute than that of the young. In fact, this is true only in a very limited sense. Tests have been conducted pitting age against youth in eleven types of memory exercises. The elderly *outperformed* youth in two types of memory. There was no significant difference by age in five of the tests. Youth held an advantage in only four of the eleven exercises. Similarly, the perception of danger by the witness is commonly thought to enhance the ability to remember. The violent, traumatic event is believed to etch itself on the memory of the witness. However, high levels of stress, including fear, in fact have the opposite effect. The witness's perception of danger has been proven to significantly distort or impair perception and recall. *See* Convis, *supra* note 50; Johnson, *supra* note 51; Weihofen, *supra* note 51.

of proof beyond a reasonable doubt. Cross-examination may point out the brevity of the initial contact, the stress of the event, suggestive influences, and other factors which might influence the ability to perceive and recall. If, through it all, the witness remains unshaken, the fact finder will have little difficulty in concluding that the accused is guilty. The confidence of lawyers in the effect of such testimony on jurors is well placed. One study found that almost eighty percent of all jurors concluded a witness had correctly identified the culprit. Unfortunately, the percentage did not significantly vary when the witness identified the *wrong* person.[54] This occurs because jurors rely primarily upon the confidence displayed by the witness in assessing the accuracy of the identification. Witness confidence, however, bears no relation to witness accuracy.[55] Such findings do not fit well within a system of justice dedicated to the proposition that it is better to acquit the guilty than risk convicting an innocent person. The suggestion that our faith in the jury's ability to divine truth is misplaced can also be deeply disturbing to our professional self-esteem.

However discomforting the conclusions, the law has sought better solutions.[56] Some address the inherent limitations in a jury's ability

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54. Wells, Lindsay & Tousignant, *Effects of Expert Psychological Advice on Human Performance in Judging the Validity of Eyewitness Testimony*, 4 LAW & HUM. BEHAV. 275, 277-78 (1980) (citing Wells, Lindsay & Ferguson, *Accuracy, Confidence, and Juror Perceptions in Eyewitness Testimony*, 64 J. APPLIED PSYCHOLOGY 440 (1979)).

The experiments of the behavioral scientists have, however, shown that the percentage of witnesses who, in good faith, *wrongly* identify an innocent person range from only 15% up to 85%. The studies also show that jurors are singularly inept in distinguishing between an accurate and inaccurate identification by witnesses acting in good faith, finding that from 58% to 73% of jurors will believe a witness who incorrectly identifies an innocent person.

These conclusions are startling. If there is only one eyewitness available, that witness is likely to "identify" an innocent person two out of three times. If the witness appears confident on the stand, the innocent defendant's fate will hinge upon the deliberation of a jury where eight of the twelve jurors believe the witness made no mistake in identifying the defendant. For additional research by the behavioral scientists on eyewitness identification, see the 33 recent studies collected in Hoffheimer, *Requiring Jury Instructions on Eyewitness Identification Evidence at Federal Criminal Trials*, 80 J. CRIM. L. & CRIMINOLOGY 585, 587-88, n.6 (1989). *See also* Kassin, Reddy, & Tulloch, *Juror Interpretations of Ambiguous Evidence: The Need for Cognition, Presentation Order, and Persuasion*, 14 LAW & HUM. BEHAV. 43 (1990) (videotaped confessions as evidence).

55. Deffenbacher, *Eyewitness Accuracy and Confidence: Can we infer anything about relationship?*, 4 LAW & HUM. BEHAV. 243 (1980).

56. The growing judicial unease concerning the disparity between lay assumptions that eyewitness testimony is accurate and the contradictory scientific evidence has led to a growing number of cases affirming or mandating admission of expert testimony on this aspect of credibility.

> [E]mpirical studies of the psychological factors affecting eyewitness identification have proliferated, and reports of their results have appeared at an

to accomplish the task by seeking a replacement device. The twentieth century has witnessed a clash between science and religion. Under the circumstances it is ironic, if inevitable, that most efforts to replace the jury offer the modern substitute for divine omniscience: science. "Truth" serums, lie detectors, hypnotism, and a host of other methods have been advanced as better means of distinguishing the honest from the dishonest. So far, science has been unable to offer a demonstrably reliable replacement for the jury as truth finder.

Most of these methods seek ways to improve the jury's ability to evaluate the credibility of witnesses. The achievements of science are also offered as aids to the jury in its pursuit of truth. Here science has achieved some verifiable progress. This is particularly true in the collection, preservation, and rigorous scrutiny of tangible evidence. The reception of such aids by the legal profession has been less hostile. The sheer logic, predictability, and verifiable nature of newtonian physics have made the admission of evidence from the "hard" sciences a legal commonplace.[57] Such evidence is, however, largely accepted only as a cross-check on human perception and memory. The human psyche and its role in the process remained in the realm of those mysteries which only the jury could divine. The behavioral sciences were unwanted interlopers, which might destroy our faith in the magic.

II. THE FEDERAL RULES

When Professor Münsterberg concluded the legal profession was unlikely to ever accept expert evidence on credibility, he rested his hopes for change on an appeal to the public.[58] Dean Wigmore suggested change was likely to come from a more direct route: legisla-

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> ever-accelerating pace in the professional literature of the behavioral and social sciences. . . . The consistency of the results of these studies is impressive, and the courts can no longer remain oblivious to their implications for the administration of justice.

People v. MacDonald, 37 Cal.3d 351, 364-65, 208 Cal.Rptr. 236, 245, 690 P.2d 709, 718 (1984).

57. This reliance is occasionally misplaced. Courts and the bar for years accepted the paraffin test as conclusive proof that an individual had fired a gun. This is no longer the case. Similarly, forensic laboratories widely adopted a new technique for typing blood (protein gel electrophoresis). The results were routinely admitted for over five years. Then, beginning in the mid-1980s, serious doubts were raised about the accuracy of the technique. Thompson & Ford, *DNA Typing: Acceptance and Weight of the New Genetic Identification Tests*, 75 VA. L. REV. 45, 47-48 (1989) (analyzing three methods of typing human DNA from the viewpoint of admissibility and evaluation of the weight to be given the test results). *See also* Note, *The Dark Side of DNA Profiling: Unreliable Scientific Evidence Meets the Criminal Defendant*, 42 STAN. L. REV. 465 (1990) (discussion of cases questioning the validity of DNA profiling as a method of identification).

58. H. MÜNSTERBERG, ON THE WITNESS STAND, 10-12 (1908).

tion.[59] Dean Wigmore's suggestion proved prophetic: in 1975, Congress enacted the Federal Rules of Evidence. Seven decades into the century Professor Wigmore thought would see the acceptance of expert testimony on credibility, the Federal Rules of Evidence seemed to finally clear the way.

> Rule 702. **Testimony By Experts.** If scientific . . . knowledge will assist the trier of fact to . . . determine a fact in issue, a witness qualified as an expert . . . may testify thereto in the form of an opinion or otherwise.[60]
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> Rule 703. **Basis of Opinion Testimony By Experts.** The facts or data in the particular case upon which an expert bases an opinion or inference . . . [i]f of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.[61]
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> Rule 704. **Opinion On Ultimate Issue.**
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> (a) . . . [T]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.[62]

The Federal Rules of Evidence contemplated admission of expert testimony if the testimony met three tests: (1) Is the underlying science or theory valid?; (2) Is the witness an expert?; and (3) Is the opinion helpful to the jury? The federal advisory committee's notes to Rule 704 suggest a fourth criteria, imported from Rule 403: Does the probative value of the opinion justify the time necessary to put it into evidence?[63] None of these tests would operate as a *per se* exclusion of expert testimony on credibility. Rule 704 eliminated the last obstacle. Expert testimony was admissible, even if it went to the ultimate issue. Nothing in the rules suggested that expert testimony on credibility issues would be treated differently than expert testi-

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59. J. WIGMORE, A STUDENTS' TEXTBOOK OF THE LAW OF EVIDENCE § 127 (1935).

60. M.R. Evid. 702 and FED. R. EVID. 702 are identical.

61. M.R. Evid. 703 and FED. R. EVID. 703 are identical.

62. FED. R. EVID. 704(a). The original text of FED. R. EVID. 704 is now contained in FED. R. EVID. 704(a). In October, 1984, Congress passed the so-called Hinckley amendment adding paragraph (b) to FED. R. EVID. 704. The amendment specifically excluded expert opinions as to whether or not the defendant in a criminal case had the "mental state or condition constituting any element of the crime . . . or of a defense . . . ." Many states, including Maine, have not adopted a similar exception. M.R. Evid. 704 is identical to FED. R. EVID. 704(a).

63. "The abolition of the ultimate issue rule does not lower the bars so as to admit all opinions. . . . Rule 403 provides for exclusion of evidence which wastes time." FED. R. EVID. 704 advisory committee's note. The advisory committee did not include exclusion of evidence the probative value of which was "substantially outweighed by the danger of unfair prejudice." It is probable this omission was intentional. Messrs. Field and Murray, however, suggest an opposite assumption, although the Maine adviser used similar language in commenting upon Maine's adoption of Rule 704. *See* R. FIELD & P. MURRAY, MAINE EVIDENCE 281-82 (2d ed. 1987). Twenty-four other states adopted the original federal version of Rule 704 without change. 3 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 704[04] (1988 & Supp. 1989).

mony on any other subject.

Judicial reluctance or no, it seemed Congress had finally opened the door to admit the insights of the behavioral sciences on perception, memory, and communication into the courtroom. Changes which Dean Wigmore and others had been unable to achieve through years of persuasion, Congress had done in a single stroke. State legislatures and courts followed the federal lead. Over two-thirds of the states adopted rules of evidence paralleling the Federal Rules of Evidence.[64]

Appellate courts, however, have continued to affirm, and even mandate, exclusion of expert testimony on credibility, generating an impressive list of arguments supporting their decisions. These include: (1) The scientific method used is suspect; (2) The proffered witness is not an expert; (3) The "common sense" understanding of the jury is sufficient; (4) The "waste of time" spent on a "collateral issue" is unnecessary; and (5) The point addressed by the expert was adequately established by other evidence. These five grounds correspond to criteria established by the Rules of Evidence. They apply to all expert testimony. Courts have, however, applied these criteria differently when the subject of the testimony is credibility. Furthermore, although neither the rules nor the commentary suggest expert testimony on credibility is subject to any additional criteria for admission, courts have continued to exclude such evidence on other grounds. These additional grounds include: (6) The testimony invades the province of the jury; (7) The jurors will be so impressed by the expert, they will abdicate their duty as finders of fact; (8) The testimony is unfairly surprising; and (9) The court should avoid a battle of the experts.[65] In *State v. Woodburn*,[66] the Maine Law Court added a new ground: (10) It is inadmissible character evidence.

There are, of course, a number of decisions which have found opinion testimony on credibility issues admissible. Finding a "golden thread" weaving the decisions for and against admission

64. *See* Wroth, *The Federal Rules of Evidence in the States: A Ten-Year Perspective*, 30 VILL. L. REV. 1315, 1349-54 (1985), for a survey and discussion of the Rules of Evidence as creatures of statute or the court's rulemaking powers. In either case the courts are bound to follow the spirit and letter of the rules as enacted or promulgated.

65. For general surveys of decisions excluding expert testimony on credibility both before and after adoption of the Federal Rules of Evidence, see Convis, *supra* note 50; Ingulli, *Trial by Jury: Reflections on Witness Credibility, Expert Testimony, and Recantation*, 20 VAL. U. L. REV. 145 (1986); and Feeney, *Expert Psychological Testimony on Credibility Issues*, 115 MIL. L. REV. 121 (1987). Expert testimony has been excluded on other grounds which do not address the issue directly, *e.g.*, any error in excluding the evidence was harmless, or the proponent failed to make a sufficient offer of proof. *See also* United States v. Earley, 505 F. Supp. 117 (S.D. Iowa 1981) (credibility is not a fact in issue).

66. 559 A.2d 343 (Me. 1989).

into a coherent whole has proved difficult. There are several reasons for this, not the least of which is the paradoxical combination of the legal profession's need to believe in the jury's magic, and its tendency to depreciate the jurors' individual and collective abilities.

A. Admission of Expert Testimony on Credibility Under the Rules of Evidence

1. Is the Underlying Science Valid?[67]

The trial of Galileo offers a unique perspective on the institutional distrust of the sciences:

> So, on 12 April 1633, Galileo was brought into [the] room, sat at [the] table, and answered the questions from the Inquisitor. The questions were addressed to him courteously in the intellectual atmosphere which reigned in the Inquisition—in Latin, in the third person. How was he brought to Rome? Is this his book? How did he come to write it? What is in his book? . . .
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> . . . .
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> The court did not meet again; the trial ended here, to our surprise. That is to say, Galileo was twice more brought into [the] room and allowed to testify on his own behalf; but no questions were asked of him. The verdict was reached at a meeting of the Congregation of the Holy Office . . . which laid down absolutely what was to be done. The dissident scientist was to be humiliated; authority was to be shown large not only in action but in intention. Galileo was to retract; and he was to be shown the instruments of torture as if they were to be used.
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> . . . .
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> Galileo was not tortured. He was only threatened with torture, twice. His imagination could do the rest. That was the object of the trial, to show men of imagination that they were not immune from the process. . . .[68]

Judicial attempts to determine the validity of scientific knowledge have always been fraught with peril. Yet it is an unavoidable task if our system of justice is to avail itself of knowledge and skills beyond the scope of common knowledge. Depriving the jury of access to valid knowledge is not the only risk. Charlatans and quacks earn healthy livings purveying plausible pseudo-science. Clearly non-science should be excluded. But how is a judge to determine the validity of a field of scientific knowledge? It is improbable that the judge has any expertise in the expert's field.

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67. Logically, the validity of the underlying science should be considered before addressing the qualification of the individual claiming expertise within the science. Courts, however, normally consider the issues in reverse order. This occurs because the court is usually willing to accept, at least provisionally, the proposition that there is a valid body of knowledge which might be the proper subject of expert testimony.

68. J. BRONOWSKI, THE ASCENT OF MAN 213-16 (1973).

In the 1923 case of *Frye v. United States*,[69] Associate Justice Van Orsdel offered an answer to the dilemma, in a *tour de force* of judicial economy. In one paragraph of a two-page opinion he accurately stated the problem and proposed a solution. Justice Van Orsdel implicitly acknowledged the court's inability to judge the validity of a scientific theory. He suggested the courts look to those who were competent.

> Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.[70]

Justice Van Orsdel's solution came to be known as the *Frye* test. It promised considerable time savings by focusing on a single inquiry: whether the expert's testimony is based on generally accepted scientific principles. Trial lawyers and judges alike are enamored of such a litmus test approach which provides a memorable and less subjective test of admissibility. Not surprisingly, the *Frye* test was widely adopted.

The *Frye* test was flawed in at least one respect.[71] The exponential growth of knowledge in the basic sciences rendered the *Frye* test inadequate because it prevented the use of newly discovered technology.[72] The law would always lag behind the frontiers of science. The Maine Law Court recognized these problems in *State v. Williams*.[73] In *Williams* the defendant was charged with terrorizing. The prosecution offered a speech spectrograph, or voice print, analysis identifying the defendant as the maker of a telephoned bomb threat. Although speech spectrography was not "generally accepted," the trial justice admitted the evidence. The Law Court affirmed, holding that although evidence of "general acceptance" under the *Frye* test was sufficient to support admissibility, lack of "general acceptance" did not preclude admission. The court refused to adopt the *Frye* test as the *sole* basis for admission of expert testimony.

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69. 54 App. D.C. 46, 293 F. 1013 (1923).

70. *Id.* at 47, 293 F. at 1014.

71. The ease of application proved increasingly illusory in the decades that followed. *See, e.g.*, United States v. Brown, 557 F.2d 541 (6th Cir. 1977).

72. Application of the *Frye* test has resulted in exclusion "of such expert evidence as results of . . . systolic blood pressure tests, spectrographic analysis and a new test for detecting a lethal dose of succinylcholine chloride." R. FIELD & P. MURRAY, MAINE EVIDENCE 270 (2d ed. 1987) (footnotes omitted).

73. 388 A.2d 500 (Me. 1978).

> We believe it would be at odds with the fundamental philosophy of our Rules of Evidence, as revealed more particularly in Rules 402 and 702, generally favoring the *admissibility* of expert testimony whenever it is relevant and can be of assistance to the trier of fact. As stated in McCormick on Evidence:
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> > "General scientific acceptance" is a proper condition for taking *judicial notice* of scientific *facts*, but not a criterion for the *admissibility* of scientific *evidence*. Any relevant conclusions . . . by a qualified expert witness should be received unless there are other reasons for exclusion. . . .
>
> In accordance with the provisions, and basic spirit, of our Rules of Evidence . . . we conclude that there is no justifiable distinction in principle arising because . . . expert testimony may happen to involve newly ascertained or newly applied scientific principles.[74]

The *Williams* decision has been widely praised. A growing number of jurisdictions have adopted its reasoning as a proper modification of the venerable *Frye* test under the approach to admissibility of expert testimony mandated by the Rules of Evidence.[75]

Determination of scientific validity often becomes entangled in the paternalistic thread woven through the law of evidence. If the court's ability to determine the validity of the underlying theory is limited, how much more limited is that of the lay juror? Judges should resist the temptation to take the decision from the jury. The

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74. State v. Williams, 388 A.2d 500, 503-504 (Me. 1978) (citing MCCORMICK ON EVIDENCE § 203 at 491 (2d ed. 1972)). M.R. Evid. 402, Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible, and M.R. Evid. 702, Testimony by Experts, are identical to their federal counterparts. M.R. Evid. 703, Basis of Opinion Testimony by Experts, is identical to FED. R. EVID. 703. M.R. Evid. 704, Opinion on Ultimate Issue, is identical to FED. R. EVID. 704 as originally enacted. Maine has not adopted the so-called Hinckley amendment to Rule 704 (excluding opinion testimony as to whether defendant had the mental state or condition included as an element of the crime charged). The Maine version of Rule 705, Disclosure of Facts or Data Underlying Expert Opinion, varies from its federal counterpart only by providing that, upon objection, an expert may be required to state the basis of the opinion before disclosing the opinion, and in providing that, once the opponent has established a prima facie case that the opinion is not supported by adequate basis, the proponent must prove the adequacy of the basis.

75. *See, e.g.*, United States v. Downing, 753 F.2d 1224, 1237 (3rd Cir. 1985) (the "spirit" of the Federal Rules suggests abandonment of the *Frye* test); Fensterer v. State, 493 A.2d 959, 962 n.3 (Del. 1985) (rejecting the *Frye* test as an independent controlling standard). The *Frye* test, however, is still accepted as a prerequisite to admissibility by some courts. *See* United States v. Kozminski, 821 F.2d 1186 (6th Cir. 1987), *aff'd on other grounds*, 487 U.S. 931 (1988). For an alternative approach to solving the problems raised by the *Frye* test, see Giannelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, a Half-Century Later*, 80 COLUM. L. REV. 1197, 1245-50 (1980), suggesting that in criminal cases the prosecution be required to prove the validity of the underlying science beyond a reasonable doubt, while criminal defendants and civil litigants be held to a preponderance standard. In all cases the proponent would be free to offer any evidence probative of the issue. *See also* United States v. Gwaltney, 790 F.2d 1378 (9th Cir. 1986), *cert. denied* 479 U.S. 1104 (1987).

risk that the evidence will be more likely to overwhelm twelve jurors than one judge is minimal. Furthermore, jurors share with judges a tendency to reject or ignore evidence they do not understand.

The temptation to preempt the jury is particularly strong when the expert will testify about credibility. Ironically, *State v. Williams*[76] provides an example. The majority in *Williams* cast an anxious eye upon the effect of its holding on future admissibility of expert testimony about credibility. Nearly a quarter century earlier the court had held polygraph tests inadmissible in *State v. Casale*,[77] noting that lie detectors had not been generally accepted. This was not the basis of its decision, however. It excluded the lie detector evidence on the grounds the underlying scientific principle had not "reached the *demonstrable* stage."[78] That is, the results were not consistently reproducible and predictable. Therefore, the lie detector failed to meet the primary criteria of scientific proof.[79]

The courts in *Frye*,[80] *Casale*, and *Williams* all understood the issue was scientific certainty. They also understood scientific certainty ultimately depended upon scientific methods of proof, which required demonstration.[81] The court in *Williams*, however, was compelled to reaffirm its decision in *Casale*, and to offer an additional rationale supporting the continued exclusion of lie detector evidence:[82]

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76. 388 A.2d at 503-504.

77. 150 Me. 310, 320, 110 A.2d 588, 593 (1954).

78. *Id.* at 319, 110 A.2d at 592 (quoting Boeche v. State, 151 Neb. 368, 37 N.W.2d 597 (1949)) (emphasis added).

79. For a description of the scientific method as applied to the social sciences, see Whitford, *Lowered Horizons: Implementation Research In a Post-CLS World*, 1986 WIS. L. REV. 755 (1986).

80. Justice Van Orsdel proposed the *Frye* test as a method of determining when a scientific proposition crossed from experimental hypothesis to demonstrable principle.

81. A theory is deemed acceptable if it provides an explanation for known facts or phenomenon. The theory is considered proven when results predicted from its application are consistently reproducible. Justice Van Orsdel's approach suggests a judicial poll of the scientific community. His reasoning depended upon the inference that scientists would not extend acceptance to propositions until proven by scientific methods. Justice Van Orsdel concluded this was the only method of proving scientific validity.

It was at this point the Maine Law Court took a different path. In both *Casale* and *Williams* the Law Court held "general acceptance" constituted prima facie evidence of scientific validity, but was not willing to accept the *Frye* test as the sole means to determine admissibility. The approach in *Casale* and *Williams* is correct. Even in the Information Age there is an inherent time lag between demonstration amounting to scientific proof and general acceptance. It is also possible, of course, that generally accepted principles or techniques may be demonstrably wrong. Finally, exclusive reliance upon the *Frye* test precludes even the opportunity to establish validity of the newly discovered truth. It also precludes challenging the scientific commonplace. *See* State v. York, 564 A.2d 389, 392-93 (Me. 1989) (Hornby, J., dissenting).

82. State v. Williams, 388 A.2d at 502.

> The reference to a special standard of admissibility in *Casale*, however, was occasioned by the peculiarly special nature of lie detector tests as evidence. Lie detector evidence directly and pervasively impinges upon that function which is so uniquely the prerogative of the jury as fact-finder: to decide the credibility of witnesses. The admissibility of lie detector evidence therefore poses the serious danger that a mechanical device, rather than the judgment of the jury, will decide the credibility. For this reason, it remains questionable whether this Court by its language in *Casale* was purporting to establish a specially restrictive standard regarding the admissibility of *any* type of expert testimony which may rest on new, or new applications of, scientific principles.[83]

Williams represents a step forward in determining admissibility of expert testimony. But in preserving a "special standard" for expert testimony on credibility, the court simultaneously took a step backward.[84] The decision in *Woodburn* is at least partially a reflection of that regression. Dr. Sobchuk was a licensed clinical psychologist. His expertise was not questioned and was expressly accepted by the trial justice.[85] There is no indication the court had any reason to question the personal honesty or professional integrity of Dr. Sobchuk.

Dr. Sobchuk testified he diagnosed the boy as suffering from a "medically recognized syndrome," basing his diagnosis on many sessions with the boy and information provided by the Department of Human Services and his teachers. This type of information is normally relied on by psychiatrists, psychologists, and physicians in treating their patients. The state offered no evidence, nor ever suggested the boy did not suffer from a medically recognized syndrome. The trial court gave no indication it doubted the truth of Dr. Sobchuk's testimony on these issues.[86] Dr. Sobchuk's opinions were "relevant conclusions which [were] supported by a qualified expert witness [and which] should [have been] received."[87]

The Law Court found this foundation insufficient. The doctor was

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83. *Id.* at 502-503 (footnotes and citations omitted).

84. *See* State v. York, 564 A.2d at 393 (Hornby, J., dissenting). The convictions in *York* were vacated based upon lack of scientific validity supporting the unobjected-to admission of testimony by a clinical social worker that the alleged victim exhibited behaviors consistent with sexual abuse. Justice Hornby, joined by Chief Justice McKusick, dissented. "[W]ittingly or not, appellate courts are in the process of carving out a separate and tougher evidentiary rule for expert testimony in areas where they are skeptical of the science—clinical social work, perhaps the psychology profession or even the social sciences generally." *Id.*

85. *See supra* notes 9-36 and accompanying text.

86. *See* Transcript, *supra* note 10, at 321-23 and 351-58. The author has been informed that the state was prepared to call a psychiatrist in rebuttal, if Dr. Sobchuk's testimony had been admitted. The record on appeal, however, is as stated.

87. State v. Williams, 388 A.2d at 503 (quoting McCORMICK ON EVIDENCE § 203 at 491 (2d ed. 1972)).

faulted for not specifying the relevant section of the Diagnostic and Statistical Manual of Mental Disorders III (DSM III). The defense was faulted for not offering a copy of the DSM III into evidence. According to the Law Court, the trial justice was justified in concluding he was unable to determine if the doctor's testimony was based upon a valid theory.[88] The trial court, however, made no such determination. Furthermore, all three points are make-weight arguments.

Assume the issue was whether the boy suffered from a soft tissue injury. Assume also that a licensed doctor treated the boy, and was prepared to testify that the boy suffered from a medically recognized injury. In such a case, any objection based upon a lack of foundation as to the scientific validity of the diagnosis would have been given short shrift by the trial court. It is inconceivable that an appellate court would raise the issue *sua sponte*. A treating physician's testimony that the patient suffers from a "medically recognized" condition is a sufficient basis for admission. Such testimony satisfies the requirements of the *Frye* test, and meeting the *Frye* test is prima facie evidence of the requisite validity. In *Woodburn*, the state neither objected nor even suggested that Dr. Sobchuk based his diagnosis on an invalid theory.[89]

There is no requirement that a party offer a learned treatise into evidence to support the unchallenged validity of a licensed physician's diagnosis. There is no rule of law or evidence requiring a presumption that the expert witness is lying or mistaken. The proponent is not required to prove the truth of his witness's sworn testimony by extrinsic evidence.[90] In *Woodburn*, the trial judge did

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88. The Law Court majority stated:

> Such behavior, [Dr. Sobchuk] opined, demonstrated an "inability to distinguish truth from falsehood" which was a "medically recognized syndrome somewhat akin to" what is listed in the Diagnostic and Statistical Manual of Mental Disorders III (DSM III) as "conduct disorder, unsocialized aggressive." The DSM III was not introduced into evidence nor was there any other reference to it by Sobchuk. . . .
>
> . . . .
>
> Throughout the extensive voir dire Sobchuk never identified the "medically recognized syndrome" to which he alluded, other than by the vague reference that it was "akin to conduct disorder, unsocialized aggressive." He at no time stated whether the "syndrome" was listed in any DSM . . . or what, if any, were the criteria for its diagnosis. Sobchuk's testimony demonstrates no scientifically accepted basis for determining that the child was unable to distinguish truth from falsehood. . . . Thus, the trial court could properly determine that the testimony did not meet the requirements of M.R. Evid. 702 and, therefore, was inadmissible . . . .

State v. Woodburn, 559 A.2d at 345-46.

89. M.R. Evid. 705 provides that the proponent must prove the basis of the expert opinion, *only* after the adverse party has made a prima facie showing that the basis is inadequate to support the opinion.

90. If anything, the general practice is directly opposite. Rule 403 is invoked to

not exclude Dr. Sobchuk's testimony out of any concern over the validity of his diagnosis. The trial judge excluded the evidence because he felt the doctor's testimony "border[ed] so closely upon . . . the ultimate issue as to the credibility of [the boy]."[91]

Another level of inquiry by the court is also necessary to determine the validity of the underlying theory: Does the theory support the forensic conclusion? The internal pressures of the advocacy process can tempt counsel and the expert to stretch a valid theory or technique to cover a forensic purpose beyond its intended use. The issue is not inherently difficult for the court to resolve.[92]

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limit, if not preclude, such evidence.

91. Transcript, *supra* note 10, at 352. The trial justice felt that M.R. Evid. 704, Opinion on Ultimate Issue, gave the court discretion to admit or exclude testimony on an ultimate issue. *Id.* M.R. Evid. 704 is identical to FED. R. EVID. 704. The Law Court's opinion suggests the trial justice relied "primarily on M.R. Evid. 404(b) and 702 and the discretionary power of the court pursuant to Rule 403" in excluding Dr. Sobchuk's testimony. State v. Woodburn, 559 A.2d at 345.

The trial justice indeed mentioned all three rules in his remarks prior to ruling. For the most part he confined himself to summarizing the content of each rule. The only reference to any finding which might relate to Rule 702 was his statement that Dr. Sobchuk's testimony "is, as far as I am concerned, just as consistent with sexual abuse as not with sexual abuse." Transcript, *supra* note 10, at 351-52. This suggests the trial judge concluded Dr. Sobchuk's testimony might be excludable under the helpfulness requirement of Rule 702. The Law Court did not comment on this implausible conclusion. It chose instead to rely on the separate requirement of Rule 702 that the opinion be based on a valid theory. There is no suggestion the trial court had any such concern. The trial court's reference to Rule 404(b) related to the doctor's testimony concerning the numerous lies or fantasies the boy had told him. This testimony was offered on voir dire as a part of the basis of Dr. Sobchuk's opinion. Ultimately the trial justice ruled as quoted in the text.

92. The forensic and scientific use need not always be the same. It is only necessary for the forensic use to be a logical extension of the scientific purpose. An excellent example of this type of analysis can be found in State v. Black, 537 A.2d 1154 (Me. 1988). The prosecution introduced evidence of "indicators" or "clinical features" relied upon by mental health professionals in providing therapy to victims of sexual abuse. The expert witness testified the alleged victim displayed these indicators. In the expert's opinion, the alleged victim had been abused by a male adult in a "trust or authority relationship." *Id.* at 1157. The Law Court reversed and remanded, stating:

> Neither [the expert's] qualifications nor her methods as a mental health professional are in question. The record, however, does not support the admissibility of her testimony identifying John as a victim of past sexual abuse. The validity of the summary of symptoms encountered in the population of her patients is seriously impaired by a selection bias. No comparison testing was done with children who were not victims of sexual abuse to determine whether they also demonstrated like indicators. Her testimony demonstrates no scientific basis for determining that a causal relationship exists between sexual abuse and the "clinical features of sexual abuse," nor is there demonstrated even a positive correlation between the two.

Id. Compare People v. Bledsoe, 36 Cal.3d 236, 249 n.11, 203 Cal.Rptr. 450, 459 n.11, 681 P.2d 291, 300 n.11 (1984) (suggesting in dicta that evidence of the battered child syndrome would be admissible because it was "developed in large part to identify

Reasonable judges may differ about which method is most appropriate to determine scientific validity. Whatever method is selected, it should apply to all expert testimony. There is no justification for the creation of a "special standard" of reliability for expert testimony about credibility.[93] The Rules of Evidence are sufficient to exclude expert testimony based upon invalid theories. There is no justification for preventing jurors from considering relevant expert testimony based upon valid theories, whatever the subject. In cases where the validity is subject to dispute, doubts should be resolved in favor of admission. What weight, if any, given such evidence is for the jury to decide.

2. *Is the Witness an Expert?*

Determination of whether or not a witness is qualified as an expert is a question for the court.[94] The modern trend has been towards liberality in judicial findings of competency of witnesses.[95] Degrees of competency, or expertise, are generally deferred to the finder of fact as affecting the weight of the testimony.[96] The policy

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those children whose injuries were intentionally inflicted") *and* People v. Castro, 144 Misc. 2d 956, 545 N.Y.S.2d 985 (Sup. Ct. 1989) (holding evidence of DNA profiling inadmissible based upon a finding that the laboratory techniques used were an invalid application of a valid theory). For a classic case of mystical science and expertise, see People v. Walker, 69 Cal. App. 475, 231 P. 572 (Dist. Ct. App. 1924) (Wife acted as interpreter for her severely "crippled" husband, whose answers were inaudible to everyone but the wife. His answers were also apparently made without moving the lips or making any other physical indication he had spoken at all.).

93. *See, e.g.*, Hughes v. Mathews, 576 F.2d 1250, 1258 (7th Cir. 1978), and State v. Marks, 231 Kan. 645, 654, 647 P.2d 1292, 1299 (1982) (both holding that the *Frye* test applied to psychiatric diagnoses as well as to physical scientific evidence).

94. FED. R. EVID. 104(a).

95. In commenting upon the provision of Rule 703 (permitting experts to base their testimony upon otherwise inadmissible evidence), the federal advisory committee stated: "In this respect the rule is designed to broaden the basis for expert opinions beyond that current in many jurisdictions and to bring the judicial practice into line with the practice of the experts themselves when not in court." FED. R. EVID. 703 advisory committee's note. *See also* 3 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 381 (1979 & Supp. 1989) *and* 2 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §§ 501 (policy of abolishing disqualifications through mental derangement) and 509 (policy of abolishing disqualification by infancy) (rev. ed. 1979), for Dean Wigmore's arguments supporting a general policy of restricting judicial exclusion of witnesses on competency grounds.

96. Determination of an expert's qualifications and the competency of a lay witness are directly analogous. The discussion of the latter in Dean Wigmore's treatise is helpful:

> (c) The preliminary determination of capacity is *for the judge*, not the jury . . . ; the jury has nothing to do with preliminary questions of admissibility. But, after the court has passed on the witness' capacity, it is still open to the jury to conclude that the witness is not credible and to reject the testimony entirely; and the court's decision does not necessarily affect the estimate which the jury must make.

toward more liberal findings of competence springs from an underlying change in attitude towards juries.

The law of evidence began to emerge in the late seventeenth century. The jury had evolved from a body of witnesses to a fact-finding body having no pre-existing knowledge of the case. This change occurred in the context of an English society highly structured along class lines. Judges and barristers were members of the upper class.[97] In time, service on juries expanded downward through the social structure. Individuals considered less than peers by court and counsel were called to serve as jurors. The upper class doubted the ability of such people to decide cases justly based upon the dispassionate dictates of rational analysis and the law.[98] This led to a paternalistic desire to protect jurors from evidentiary influences exceeding their limited abilities and rationality. The law of evidence was at least partially the result of these social preconceptions. The paternalistic theme in the developing law of evidence survived trans-

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2 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 497(c) (footnote in original: "Saucier v. State, 156 Tex.Crim. 301, 235 S.W.2d 903 (1950) (having ruled the witness competent, the court erroneously excluded evidence of insanity to impeach him)") (rev. ed. 1979).

97. Will and Ariel Durant give the following description of English society at the beginning of the 19th century:

> Many unnatural inequalities remained. The concentration of wealth was unusually high. Equality before the law was nullified by the cost of litigation. Accused lords could be tried only by the House of Lords (a jury of their peers); this "privilege of peerage" survived till 1841. Careless men of no pedigree might be forcibly impressed into the Navy. Commoners rarely reached high office in the Navy or the Army, in the civil service, the universities, or the law. A ruling class of nobles and gentry seldom allowed to the undistinguished mass any share in determining the personnel or policies of the government.
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> . . . .
>
> So till 1832, the nobility was supreme, and smiled at its challengers.

11 W. & A. DURANT, THE STORY OF CIVILIZATION: THE AGE OF NAPOLEON 352-53 (1975).

98. So pervasive was the class structure, it influenced even the most virulent disciples of the English Enlightenment. Prior to devoting his energy exclusively to poetry, Samuel Taylor Coleridge (1772-1794) was a political lecturer and magazine editor.

> [Coleridge] spoke as a bridge-burning radical against the war [with revolutionary France], slavery, shackling of the press, and especially against sales taxes as falling cruelly upon the common man. But he did not recommend universal adult suffrage, male or female. "We should be bold in the avowal of political truth among those only whose minds are susceptible of reasoning; and never to the multitude, who, ignorant and needy, must necessarily act from the impulse of inflamed passions."

Id. at 426 (quoting R. WHITE, POLITICAL TRACTS OF WORDSWORTH, COLERIDGE, SHELLEY *xxxii* (1953) (footnotes omitted)). The degree of trust extended jurors by the legal profession was typified by its regulation of the deliberation process. Deliberation was the one time the jurors escaped the direct scrutiny and control of their betters. "In trials the jurors . . . retired to an adjoining room, where, 'in order to avoid intemperance and causeless delay,' they were kept without meat, drink, fire, or candle . . . 'till they were unanimously agreed.' " *Id.* at 356 (quoting BLACKSTONE IN HALEVY 101).

plantation to North America. Notwithstanding our egalitarian self-image, the elite of the modern American meritocracy also tends to anoint itself with the chrism of innate superiority.

The law of evidence is still permeated by the paternalism of its origins. Though it may be less obvious than it once was, professional condescension towards the lay juror still exists. It finds expression in many of the rules and their application. Even our professional peers from other fields are not exempt: psychiatrists and psychologists are particularly subject to skepticism. If the expert is accepted as a professional peer, the paternalistic focus shifts back to the jurors and a concern that they may be overwhelmed by the obvious superiority of the expert.

The *Woodburn* case[99] provides an example of the tension which still exists. There is an indication that the majority questioned Dr. Sobchuk's qualifications. The dissent responded:

> I do not agree with the Court's faulting of Dr. Sobchuk's testimony . . . for what is basically an inadequate foundation—*i.e.* that the defense did not qualify Dr. Sobchuk to give the opinion sought. Here, the State made no objection on this ground at trial and the trial court made a clear finding that Dr. Sobchuk *was* qualified. Rule 702, though mentioned in passing, was not the basis for the trial court's ruling excluding this testimony, the transcript demonstrates that neither trial counsel nor the trial court considered it to be an issue, and the defendant therefore never had reason to beef up his proffer.[100]

Better judgment prevailed among those responsible for the Federal Rules of Evidence. Whatever the limitations of individual jurors, the jury is no longer assumed to be collectively as ignorant, uneducable, gullible, irrational, or subject to the tides of passion as was once taken for granted. Testimony establishing that a witness has the requisite professional degree or license constitutes prima facie evidence that the witness is qualified to testify as an expert.[101] Thereafter, it is the opponent's obligation to produce evidence rebutting the inference of competency. Absent clear evidence of incompetency, the issue becomes one of credibility for the jury. The doctor may speak but only the jury can decide whether it will listen.

The question remains: Which expert is competent to determine the credibility of another person? The answer lies in Rule 703. This

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99. State v. Woodburn, 559 A.2d 343 (Me. 1989).

100. *Id.* at 347. The majority opinion only notes that the state failed to object to Dr. Sobchuk's "qualifications as an expert." *Id.* at 345 n.1. Given the absence of a direct challenge to Dr. Sobchuk's qualifications in the opinion, it appears the majority ultimately agreed with Justice Hornby on this point. *See also* State v. York, 564 A.2d 389 (Me. 1989) (holding it was error to admit expert testimony because the underlying scientific theory was invalid as a matter of law, even though the opponent did not challenge the validity at trial) (Hornby, J., joined by McKusick, C.J., dissenting).

101. 3 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 381 (1979 & Supp. 1989).

rule permits experts to base their testimony on facts inadmissible in evidence "[i]f of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject. . . ."[102] The advisory committee's notes make it clear the rule was specifically intended to include resolution of the competency issue.

> [T]he rule is designed to broaden the basis for expert opinions beyond that current in many jurisdictions and to bring judicial practice into line with the practice of the experts themselves when not in court. Thus a physician in his own practice bases his diagnosis on information from numerous sources . . . including statements by patients and relatives . . . . The physician makes life-and-death decisions in reliance upon them. *His validation, expertly performed and subject to cross-examination, ought to suffice for judicial purposes.*[103]

Rule 703 adopts the respective discipline's decision about what should be relied on in forming opinions within the field. Rule 703 also adopts the discipline's methods of assessing the *validity* of that basis. The law is not the only profession faced with the need to assess otherwise unverifiable statements by lay persons. Where routinely used within another field, the expert's judgment about the veracity of such statements will also be accepted by the law as worthy of submission to the jury for evaluation. There are two foundational prerequisites. First, the assessment of credibility must be reasonably necessary to the field of expertise. Second, the expert's profession must assume that competent practitioners are able to assess accuracy to an appropriate degree. If these criteria are met, the expert is deemed competent to assess credibility.[104]

Psychiatrists and psychologists are competent to diagnose mental illness or impairment. Diagnosis is based to some extent upon the assessment of the history given by the patient. This requires the doctor to assess the patient's credibility. The experimental arm of the behavioral sciences also requires credibility assessments, devoting much of its study to discovering the extent and causes of error and distortion in human perception, recall, and communication. The sciences rely on the doctor's ability to assess credibility. The Federal Rules of Evidence find that reliance sufficient.[105]

This is not as revolutionary as it may first appear. Consider something as prosaic as the soft tissue whiplash case. The treating physi-

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102. FED. R. EVID. 703.

103. FED. R. EVID. 703 advisory committee's note (citations omitted) (emphasis added).

104. This approach borrows from the same wisdom underlying the court's decision in Frye v. United States, 54 App.D.C. 46, 293 F. 1013 (1923), discussed *supra* notes 69-91 and accompanying text.

105. *See also* the discussion *infra* text accompanying notes 146-48, about the similarities and distinctions between the pursuit of truth by the court and by the clinical psychologist or psychiatrist.

cian is called to testify about the fact, nature, and extent of the alleged injury. Most doctors will admit medicine has no objective test capable of verifying the injury. Certainly no test has been found to objectively measure pain.[106] Diagnosis depends entirely upon the doctor's subjective interpretation of the patient's subjective complaints. Such testimony is admitted routinely. The essence of such cases is plaintiff's testimony concerning neck pain after the accident. The primary purpose of calling the doctor is to provide expert testimony supporting that testimony.[107] In fact, the opinion is nothing more than that the doctor believes the patient's complaints of pain and stiffness. The sole issue is the patient/plaintiff's truthfulness.

On cross-examination, defense counsel routinely establishes the distinction between objective and subjective findings. Defense counsel establishes the subjective basis of the diagnosis. The doctor is asked: "Have you ever been fooled by a patient?" The answer is almost always: "Yes."[108]

On redirect examination, plaintiff's counsel asks if it is unusual for a diagnosis to be based upon subjective complaints. The answer is always: "No." Typically, the next question is: "Do you attempt to determine the accuracy of subjective complaints by patients?" Answer: "Yes." This question is usually followed by a discussion of guarding,[109] range of motion, and observation of the patient's movements. Finally, plaintiff's counsel asks one or all of the following questions: "Having considered all the points raised by the defense lawyer, do you see any reason to change your diagnosis?" "Did you ever notice anything about the plaintiff which gave you cause to doubt the plaintiff suffered an injury and was continuing to experience pain?" "Did you ever have any reason to doubt the accuracy of plaintiff's complaints?"

The foregoing minuet is so routine it rarely draws an objection

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106. Thermography is currently being offered for this purpose. The technique consists of taking photographs of the patient with film sensitive to differences in skin temperature. The theory is that the human body has a left-right symmetry. It is presumed the skin temperature of corresponding parts of the body should be the same, absent injury or disease. "Advocates say thermography takes 'pictures of pain'. . . . Critics claim thermograms aren't reliable because they often show signs of injury where none exists or fail to detect an injury. . . . Courts have ruled both ways." Wall St. J., June 5, 1990, at B1, col. 1.

107. Generally the only other purposes for calling the treating physician are to lay a foundation for the medical bills and to suggest a prognosis. The former requires a foundation including the necessity of the treatment, which depends upon the existence, nature, and extent of the injury. The prognosis assumes the injury exists in the first place. Both depend upon the veracity of the plaintiff's complaints.

108. Defense counsel have even been known to shift the focus from falsehood to possible error by briefly inquiring into the subject of psychosomatic complaints.

109. Alteration of normal movement or behavior adopted by an individual to avoid discomfort.

from either side.[110] If either counsel were to call the doctor for the avowed purpose of giving an opinion about the truth or falsity of plaintiff's testimony, the result is likely to be dramatically different. Yet there is no legal basis for a different outcome. The Rules of Evidence contain no provision providing a different rule for experts called to testify on credibility issues. It is possible that the expert is relying upon undetected error or falsehood. Cross-examination should establish and explore that possibility. The expert's testimony is submitted to the jurors for consideration. The jurors will give it whatever weight they decide is warranted.

Specialization within the field can also raise problems in determining an expert's competency. Generally, the expert need not be found a specialist within the subject area in order to qualify.[111] A note of caution is warranted, however. The law has only recently embraced specialization. Medicine and psychology have a longer experience in the development and recognition of specialties. The subject matter of the testimony may nonetheless be beyond the expertise of a licensed practitioner. For example, a court may reject testimony about the dynamics of eyewitness identification by a clinical psychiatrist. Similarly, an experimental psychologist specializing in the study of memory might not be competent to diagnose schizophrenia.

It is appropriate for the court to consider the limits of the proffered expert's specialty, and to determine if the testimony concerns matters beyond that specialty. Such inquiries must be done carefully. Expert testimony often draws upon a mixture of the scientific commonplace and highly specialized aspects of the field. In most cases, however, questions about the witness's expertise go to the weight to be given the testimony. The court's function is to make only a threshold determination. The decision is analogous to the judge's role in deciding motions for directed verdicts. The question is not whether the witness is the best qualified expert available, nor is it whether the judge agrees with the witness's conclusions. There is only one issue: Has the proponent made a prima facie showing that the proffered testimony is based on some "scientific, technical

110. The admission of such testimony is not confined to soft tissue injuries. The diagnoses of psychiatrists and psychologists generally fall within this category. Nor is the phenomenon limited to the field of medicine. Accident reconstructionists often base their opinions in part upon statements of witnesses as to start positions, angles of approach, and so on. Economists projecting lost income also depend upon subjective information. Other examples abound. *See, e.g.*, Ladd, *Expert Testimony*, 5 VAND. L. REV. 414, 417-18 (1952).

111. *See, e.g.*, United States v. Viglia, 549 F.2d 335 (5th Cir. 1977), *reh'g denied*, 553 F.2d 101 (5th Cir.), *cert. den.*, 434 U.S. 834 (1977) (expert with degrees in medicine and pharmacy allowed to testify concerning obesity); Holmgren v. Massey-Ferguson, Inc., 516 F.2d 856 (8th Cir. 1975) (expert in engineering mechanics allowed to testify concerning design of farm machinery).

or other specialized knowledge"?[112] Only in the clearest of cases should the expert be excluded for lack of credentials or experience in a recognized specialty.

3. *Will the Expert Testimony Help the Jury?*

"Whether the situation is a proper one for use of expert testimony is to be determined on the basis of assisting the trier. . . . When opinions are excluded, it is because they are unhelpful and therefore superfluous and a waste of time."[113] This inquiry was intended by the drafters of the Rules to be the central focus of questions concerning admissibility of expert testimony. Will the testimony help the jury?[114] Courts have found a bewildering complexity hidden within this simple question, particularly when the subject is expert testimony about the credibility of another witness. There is, however, some merit in first examining the easy case.

The least disputed type of expert testimony is that based upon examination of tangible evidence. Expert testimony may enhance the jury's ability to perceive or understand the significance of tangible evidence.[115] This evidence is admissible even if it directly contradicts the testimony of another witness. Examples are commonplace. The authenticity of a document or signature is a frequent issue of disputed fact. Jurors are permitted to form their own judgments as to the genuineness of handwriting.[116] Notwithstanding this, both lay and expert witnesses are permitted to give their opinions on the subject.[117] The rationale is straightforward. The lay opinion is admissible because the witness's greater familiarity with the handwriting may help the jury. The expert may be able to detect subtle congruencies or discrepancies which are imperceptible to the lay juror.

This commonplace has another dimension bearing on our inquiry. Lay witnesses are permitted to express their opinion as to the authenticity of handwriting. The handwriting expert's testimony may directly contradict the testimony of lay witnesses in several ways: It may contradict the opinion testimony of a lay witness that she recognizes the handwriting as that of another; it may contradict the testimony of witnesses who state they saw a particular individual write or sign the document in question; and it may even contradict the testimony of another witness that he did not sign the document.

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112. FED. R. EVID. 702.

113. FED. R. EVID. 702 advisory committee's note (citing 7 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1918 (rev. ed. 1979)).

114. Breidor v. Sears, Roebuck and Co., 722 F.2d 1134, 1139 (3d Cir. 1983) ("helpfulness" is the touchstone of FED. R. EVID. 702).

115. X-rays, microscopic examination, chemical analysis, and many other techniques enhance human perceptual acuity, permitting the jury to see what is otherwise beyond the reach of their senses.

116. FED. R. EVID. 901(b)(3).

117. FED. R. EVID. 901(b)(2).

In the last two circumstances, the expert's testimony is a direct assault upon the credibility of other witnesses. Yet it is admissible because it may help the jurors assess the credibility of the other witness.

Another example may be found in *United States v. Alexander*.[118] The defendant in that case was accused of having robbed a bank. Bank surveillance photos were admitted into evidence. The government called three bank employees who identified Dr. Alexander as the man in the photographs. The government also called four acquaintances of the defendant, who testified that they believed the person in the surveillance photographs was the defendant.

The defendant denied having robbed the bank, claiming a case of mistaken identity. The defendant produced five witnesses who testified that the person in the photographs was not the defendant. The defendant also called two expert witnesses: One an orthodontist who specialized in cephalometrics (the scientific measurement of the dimensions of the human head); the other a former F.B.I. agent expert in photographic comparisons.[119] Both would have testified that the defendant could not be the person in the surveillance photographs. The trial judge excluded the testimony of both defense experts because "the jury was able to make the necessary photographic comparisons without the aid of expert witnesses."[120]

The Fifth Circuit reversed, finding it "unlikely that any of the jurors were sufficiently informed about cephalometry to undertake this type of comparison without expert assistance."[121] The court also held it was error to exclude the former F.B.I. agent's testimony concerning distortion in pictures taken by the surveillance camera. Such testimony would "have aided the jury in visually comparing the photos."[122]

The Fifth Circuit was aware that the expert testimony was an indirect assault on the credibility of no less than seven witnesses called by the government, and would also have bolstered the credibility of the defendant and his five lay witnesses. The court, however, noted the absurdity of excluding the expert testimony, even though it tended to rebut lay opinions of those acquaintances who viewed the surveillance photographs. It apparently did not occur to the court that *all* eyewitness identifications are lay opinion testimony.

As in so many cases on this issue, the opinion in *Alexander* evidences an unarticulated unease about admitting expert testimony on credibility. The court took considerable pains to point out that such

118. 816 F.2d 164 (5th Cir. 1987), *cert. denied*, 110 S. Ct. 1110 (1990).
119. *Id.* at 167.
120. *Id.*
121. *Id.*
122. *Id.* at 168.

testimony would not be admissible in every case.[123] The factors identified by the court as separating *Alexander* from the ordinary case are instructive. The Fifth Circuit noted the government's case emphasized irrelevant personal traits of the defendant.[124] The F.B.I. investigation failed to uncover any physical evidence connecting the defendant with the crime.[125] The court found *Alexander* distinguishable from other cases where expert testimony on credibility might be offered because of the relative weakness of the government's case. The implication is that the defendant would not be permitted to call witnesses attacking the credibility of the prosecution witnesses if the government had a stronger case. This approach is wrong. The relative strength of the opponent's case has no logical relevancy to the admissibility of the proponent's evidence.[126]

The outcome in *Alexander* was correct. The witnesses were expert within fields of specialized knowledge who based their opinions upon valid scientific theories. Their testimony might help the jurors decide at least two issues: the jury had to assess the credibility of the witnesses expressing their opinions about the identity of the bank robber, and the jurors also had to make their own direct comparison of the photographs with the defendant's appearance. The phrase "might help" is important. The focus of the Rules of Evidence is to provide the jury with any information which *may* assist them in finding the truth. This includes both information which may assist them in weighing the evidence and the benefit of special skill or expertise applied directly to evaluating the credibility of other evidence. The decision, however, remains with the jury. The Rules anticipate exclusion of expert testimony where such testimony is superfluous or within the common knowledge of the jury. The concern is one of judicial economy, not the integrity of the system. Jurors may ignore or reject the expert's testimony. They may even accept and consider it, but still reach an opposite conclusion.[127]

Once the subject of the proffered testimony departs from examination or analysis of hard evidence, the courts are even more reluc-

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123. *Id.*

124. The Fifth Circuit stated that the prosecution's case "mainly consisted of an in-depth recitation of [the defendant's] sloppy bookkeeping . . . and his habit of visiting night clubs featuring exotic dancers." *Id.* at 169 n.5. By contrast, the court in the first sentence of the opinion noted that the defendant was a physician and referred to him as "Dr. Alexander" throughout.

125. *Id.*

126. Such an approach suggests that the trial court should first determine the correct outcome of the trial. Expert testimony on credibility is to be admitted only when it will help the jury reach the correct decision. Such an approach is a judicial preemption of the parties' right to have fact issues decided by a jury.

127. This is what apparently happened on remand. The jury in Dr. Alexander's second trial found him guilty. *See* United States v. Alexander, 869 F.2d 808 (5th Cir. 1989).

tant to admit expert testimony on credibility. At this point, the judicial focus tends to shift. The inquiry is no longer a straightforward analysis of whether or not the testimony may assist the jury. Courts instead tend to fixate on the fact to be determined. Many courts approach the issue as if expert testimony on credibility is subject to special rules of admissibility. There is no basis for this supposition in the Rules of Evidence, nor is there any basis in logic.

Whatever the reason for this phenomenon, there is little doubt it exists. The pre-occupation with expert testimony on credibility as a substantively distinct type of evidence has resulted in the proliferation of collateral issues.

Much of the confusion in this area of the law arises because the witnesses and courts are often speaking at cross purposes, both approaching the testimony from the often disparate analytical approach of their respective disciplines. The behavioral sciences have come to understand that the ability to perceive, recall, and communicate accurately varies widely between individuals, depending upon such influences as the effect of any mental or emotional disfunction, the effect of extraordinary experiences or circumstances, and the individual's developmental age, intelligence, training, and, perhaps, the individual's personality. The expert witnesses formulate their opinions within a conceptual matrix based on the insights and objectives of their own disciplines.[128]

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128. The problems with psychiatric expert testimony are not entirely due to the courts' struggle with evidentiary problems. Dr. Binger testified for the defense in the trial of Alger Hiss. He was subjected to an effective cross-examination:

> Binger on direct examination had pointed out Chambers' untidiness, and on cross-examination he was made to acknowledge that the trait was found in such persons as Albert Einstein, . . . Will Rogers, . . . Bing Crosby, and Thomas Edison. Binger testified that Chambers habitually gazed at the ceiling while testifying and seemed to have no direct relation with his examiner. The prosecutor in a turnabout told Binger: "We have made a count of the number of times you looked at the ceiling. During the first ten minutes you looked at the ceiling nineteen times; in the next fifteen minutes you looked up twenty times, for the next fifteen minutes ten times, and for the last fifteen minutes ten times more. We counted a total of fifty-nine times that you looked at the ceiling in fifty minutes. Now I was wondering whether that was any symptom of a psychopathic personality?" Shifting uneasily in the witness chair, Binger replied, "Not alone." Binger had testified that stealing was a psychopathic symptom and the prosecutor asked him: "Did you ever take a hotel towel or Pullman towel?" Binger replied, "I can't swear whether I did or not, I don't think so." The prosecutor thereupon asked: "And if any member of this jury had stolen a towel, would that be evidence of a psychopathic personality?"

R. SLOVENKO, PSYCHIATRY AND LAW 45-46 (1973). Dr. Binger's experience left a lasting impression. Fifteen years after the experience he remarked:

> Many of my psychiatric friends agreed with me in this [diagnosis], but were less willing to expose themselves to ridicule and contumely than I was. Perhaps they were wiser. . . . I know that [the prosecutor's questioning] is all part of the game, but it seemed to me shocking and preposterous. I had

Courts, on the other hand, use several distinct conceptual matrixes to analyze the proffered testimony. Traditional legal analysis divides credibility issues into two main categories: falsehood and error. Several other abstract classifications are commonly raised which are found both within and outside this traditional division. Some are suggested by traditional legal methodology. Others are drawn from the courts' understanding of human nature. For example, it has long been accepted that error may occur within perception, memory, or communication. Similarly, courts have distinguished between generic testimony on credibility, testimony about the credibility of a particular individual, and testimony relating to specific statements by a witness. Courts have recognized the problem resulting from these disparate approaches, and have attempted to fit the approach of the expert's discipline within the legal matrix. This approach leads to wonderfully intellectual excursions into abstract complexity. There is a tendency, however, to lose sight of the purpose of the *legal* inquiry, neglecting to ask the simple question: Does this approach help the jury answer the question?[129]

Is there a legally significant difference in the probative value of testimony about the possibility of human error as opposed to deliberate falsehood? The answer is no. It makes no difference whether the testimony will assist the jury in deciding if a witness has made a mistake or is lying since both are problems juries must resolve. The jury in *Alexander* was faced with both problems. The experts' testimony might have helped the jury decide whether the eyewitnesses, acquaintances, and friends were mistaken. Their testimony also could have helped the jury decide if the defendant was telling the truth when he denied robbing the bank. If the testimony can help with either, it should be admitted.

Does it matter if the testimony relates to perception, as opposed to memory? Once again, the answer is no. These distinctions only

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> only one wish and that was to tell the truth and not lose my temper. I think I did both. [The prosecutor], on the other hand, was determined to try and have me lose my temper and distort the truth.

Id. at 46 (quoting a letter from Dr. Binger to Dr. Slovenko). Experiences like that of Dr. Binger have had their effect on psychiatrists and psychologists.

> One might hope that psychiatrists would open up their reservoirs of knowledge in the courtroom. Unfortunately, in my experience, they try to limit their testimony to conclusory statements couched in psychiatric terminology. Thereafter, they take shelter in a defensive resistance to questions about the facts that are and ought to be in their possession. They thus refuse to submit their opinions to the scrutiny that the adversary process demands.

E. BENEDEK, CHILD PSYCHIATRY AND THE LAW, at 46 (1980). Given the long course of aversion therapy administered by trial lawyers and the courts, such defensive behavior is, perhaps, understandable.

129. Whatever its motivation, the *Alexander* court ultimately focused on this issue. United States v. Alexander, 816 F.2d at 168.

help determine if the evidence is relevant to credibility. If the evidence is relevant to any aspect of credibility, it is presumed admissible.[130] It does not matter if the testimony relates to factors affecting the abilities of all or most persons as opposed to those of a particular witness. Testimony relating only to a particular statement of a single witness may still be of help to the jury.

Admissibility depends only upon a determination that the evidence can assist the jury in deciding the case.[131] As long as the evidence relates to a legitimate issue for determination, admissibility is not dependent upon which task it helps the jury accomplish. The federal advisory committee envisioned a more direct approach.

> There is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute.[132]

This suggests only two criteria for admission: (1) whether the testimony offers information beyond the common knowledge of the jury, and (2) whether the expert brings the benefit of skills of observation or analysis beyond those of the lay juror. The distinction between these two criteria was addressed in *State v. Kim*.[133] The trial court in that case admitted testimony by a psychiatrist called by the prosecution. The doctor testified about characteristics observed in children who were victims of rape by family members. The doctor also compared these characteristics to his personal observations of the victim.[134] The Hawaii Supreme Court affirmed, holding:

> [A]lthough the comparisons performed and conclusions reached by the witness could arguably have been done by the jury, the expertise of the witness as a clinician and his ability to actually compare the conduct and character of the complainant with that of other victims suggests that his opinion regarding the concurrence of these characteristics would be of some assistance to the jury in making their own evaluations.[135]

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130. FED. R. EVID. 402.

131. At this point in the inquiry the court has already made two decisions. First, the witness qualifies as an expert. Second, there is sufficient evidence of the validity of the underlying science to warrant its submission to the jury.

132. FED. R. EVID. 702 advisory committee's note (quoting Ladd, *Expert Testimony*, 5 VAND. L. REV. 414, 418 (1952)).

133. 645 P.2d 1330 (Haw. 1982). The Hawaii Rules of Evidence became effective shortly after the trial. The Hawaii Supreme Court, however, expressly based its analysis on the principles set forth in HAW. R. EVID. 102 and 702-705. *Id.* at 1335-36.

134. *Id.* at 1333-34.

135. *Id.* at 1338. Recently, the Hawaii Supreme Court again addressed this issue, using this distinction to reach the opposite conclusion as to admissibility. In State v. Batangan, 799 P.2d 48 (Haw. 1990), the court found the admission of expert testi-

It is often difficult to determine when proffered expert testimony will add necessary information or analysis to the jury's deliberation. The proffered expert testimony, however, is not the problem. In determining the preliminary questions of expertise and scientific validity, the court generally is made aware of what the expert has to offer. The problem lies in determining what the jury knows.[136] The proponent's obligation is to offer evidence satisfying the court that the proffered testimony *may* help the jury. Conclusive proof that the expert testimony is beyond or counter to common knowledge is not required. The jury's task of determining credibility is inherently difficult. Courts should resolve doubts in favor of admission.

Yesterday's resolution of today's commonplace is helpful. Today, the testimony of accident reconstructionists is routinely admitted. This was not always the case. Twenty years before the adoption of

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mony bolstering the credibility of the alleged victim in a child abuse case reversible error. The court noted that the witness must first be found to be an expert, and the proffered testimony must add something "not commonly known or understood." *Id.* at 54. The court then found the expert's testimony was "minuscule," and noted that the expert "several times asked the jury to recall their own childhood days and suggested that Complainant's actions were actions of normal children under similar circumstances." *Id.* Such testimony failed to meet the requirements of Rule 702. *See also* State v. Chapple, 135 Ariz. 281, 660 P.2d 1208 (1983).

136. The court must answer this question within the context of a particular trial. Logically, the focus should be on what this particular jury is likely to know and understand. "Common knowledge," on the other hand, is an expression of a presumed average. It may or may not accurately predict the actual knowledge of a specific group of individuals. The inherent accuracy of such a predictor decreases as the number of individuals whose knowledge is being predicted decreases. Furthermore, the decision implicitly rests upon the individual judge's preconception of what is and is not a matter of "common knowledge" among the community. Trial judges rarely relate such decisions to what is known of the individuals actually sitting in the jury box. The voir dire process and preemptive challenges effectively insure that individuals who have particularly relevant experience, knowledge, or skill will not be sworn as jurors. It is hard to conceive of counsel for either side allowing a psychiatrist to remain on a jury in a case where either or both plan on calling a psychiatrist as an expert.

Judicial inquiries into what is within the common knowledge are not confined to this issue. "Common knowledge," for instance, is also a basis for judicial notice where it refers to matters known "generally in the course of the ordinary experience of life" or matters "accepted . . . as true and . . . capable of ready and unquestionable demonstration." Roden v. Connecticut Co., 113 Conn. 408, 415, 155 A. 721, 723 (1931). In English v. Miller, 43 S.W.2d 642, 644 (Tex. Civ. App. 1931), the court suggested that "common knowledge" as a basis for judicial notice should be limited to the operation of natural forces and universally accepted principles of science and mechanics. For instance, in professional malpractice cases the plaintiff must call an expert in the defendant's profession who is willing to testify that the care or service fell below the standard. There is a "common knowledge" exception to this rule, however. If the alleged error is so plain that no special training or experience is necessary to recognize it, the case may be submitted to the jury without the production of expert testimony. *See, e.g.*, Crowely v. O'Neil, 4 Kan. App. 2d 491, 494, 609 P.2d 198, 202 (1980); Totten v. Adongay, 337 S.E.2d 2, 6 (W.Va. 1985).

the Rules, federal district court Judge Vogel considered the propriety of admitting a state trooper's opinion about which side of the centerline the point of impact occurred.

> [T]his is not [an issue] where the conclusion . . . is so obvious that any reasonable person, trained or not, could easily draw the inference. . . .
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> . . . .
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> Modern legal thinking indicates quite clearly that the rule excluding opinion evidence is to be applied sparingly, if at all, so that the jury may have all evidence that may aid them in their determination of the facts. Thus, Wigmore states that, rightfully understood, the true test of the rule is whether opinion testimony upon this subject matter from this particular witness *may* appreciably assist the jury.[137]

Admitting the evidence of things the jury knows will cost some time. Excluding information unknown to the jury may result in a verdict based upon ignorance or mistaken assumptions. This approach is consistent with the mandate of Rule 102.[138]

One can almost hear the trial bench groaning under the weight of yet another preliminary fact issue. While additional delay will occur, it need not be prolonged. Nor should it occur in every case.[139] Establishing the extent of common knowledge on the subject of the proposed expert testimony is a *preliminary* matter, determined by the court.[140] The Rules of Evidence do not apply.[141] This will reduce the time needed to lay the necessary foundation. Furthermore, the natural accretion of appellate decisions will result in a growing list of subjects acknowledged as beyond the common wisdom.[142]

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137. Een v. Consolidated Freightways, Inc., 120 F. Supp. 289, 293-94 (D.N.D. 1954) (citing 7 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1929 (3d ed.) (emphasis added)). *See also, e.g.*, Ibn-Tamas v. United States, 407 A.2d 626, 639 (D.C. 1979); State v. Chapple, 135 Ariz. 281, 660 P.2d 1208 (1983).

138. "These rules shall be construed to . . . the end that the truth may be ascertained and proceedings justly determined." FED. R. EVID. 102; M.R. Evid. 102.

139. As discussed later, not all evidence on credibility need be admitted, even if contrary to common knowledge. *See infra* text accompanying notes 63-68. The credibility of any witness is only as important as his testimony. The probative value of the witness's testimony may be slight. In such cases Rule 403 may justify exclusion of the proffered expert testimony as an unnecessary expenditure of time.

140. FED. R. EVID. 104(a).

141. FED. R. EVID. 1101(b)(1).

142. The opinion in *Kim* is one example, as is State v. Chapple, 135 Ariz. 281, 660 P.2d 1208 (1983), discussed *infra* text accompanying notes 188-97.

Maine has developed an inventory of decisions on the subject. State v. Jacques, 558 A.2d 706 (Me. 1989) (admissibility of past sexual experiences of children to counter jury's intuitive assumption that children would be unable to describe events charged unless they had experienced them at the hands of the defendant); State v. Black, 537 A.2d 1154 (Me. 1988) (counterintuitive effects of abuse on children); State v. Willoughby, 507 A.2d 1060 (Me. 1986) (puffing syndrome in prisoners); State v. Conlogue, 474 A.2d 167 (Me. 1984) (enhanced probability of child abuse by adults who

Judicial economy is a legitimate concern. Dockets are crowded. Every additional hour of trial postpones the next trial. Considerations of judicial economy, however, are a secondary priority.[143] It is justice that we are about. Justice is blindfolded to insure impartiality. The blindfold also represents the singlemindedness of her pursuit. It would be sad to catch her peeking, even if only to cast an impatient eye upon the courtroom clock.

There is a problem beyond the difficulty inherent in courts determining the extent of common knowledge. The common knowledge may itself be wrong. This phenomenon is often referred to by the rubric "counterintuitive."[144] Determining whether or not evidence is counterintuitive is fairly simple—once the court has determined what the common knowledge on the subject is. It merely requires that the court compare the proffered testimony with the common knowledge. Counterintuitive information is helpful *per se*. Failure to admit such evidence is calculated to produce a verdict based upon a false premise.[145]

a. Is the expert's assessment of credibility duplicative of the fact-finder's efforts?

As previously discussed, credibility assessment is an essential aspect of the behavioral sciences. It is not confined to forensic applications. The behavioral scientists' reliance upon their ability to assess credibility is sufficient to establish their *legal competency* to testify on the issue.[146] The law also presumes the jury is competent. On

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were abused as children); State v. Anaya, 438 A.2d 892 (Me. 1981) (counterintuitive effects of the battered spouse syndrome).

Appellate decisions holding that particular aspects of a subject are commonly known will also occur. Caution is warranted, however, in applying such decisions to subsequent cases. The ultimate basis of opinions reaching this result is a finding that the proponent failed to carry her burden. This does not prevent another litigant from doing a better job, or utilizing newly available studies.

143. Delay can itself cause injustice. Modern procedural rules, however, provide mechanisms for effective legal triage. *See, e.g.*, M.R. Evid. 102, 104; FED. R. EVID. 102, 104.

144. *See, e.g.*, United States v. Blade, 811 F.2d 461, 465 (8th Cir. 1987); United States v. Moore, 786 F.2d 1308, 1312 (5th Cir. 1986); United States v. Downing, 753 F.2d 1224, 1229 (3d Cir. 1985); United States v. Amaral, 488 F.2d 1148, 1152-53 (9th Cir. 1973); State v. Ciskie, 110 Wash. 2d 263, 273-74, 751 P.2d 1165, 1171 (1988).

145. *See, e.g.*, State v. Conlogue, 474 A.2d 167 (Me. 1984). In *Conlogue*, the defendant father was accused of physically abusing his children. The children's mother had initially confessed to the abuse. She retracted her confession when faced with losing custody of her children. The trial court excluded evidence that the mother was an abused child and expert testimony to the effect that parents who were abused as children are more likely to abuse their own children. The Law Court held it was error to exclude the evidence; such a phenomenon, being counterintuitive, tended to prove the truthfulness of the mother's confession.

146. *See* the discussion, *supra* notes 94-145 and accompanying text ("Is the Witness an Expert?").

first blush it appears the expert witness has nothing to offer. As mentioned above, the behavioral sciences have yet to find a new method of reliably detecting falsehood or error. Behavioral scientists rely on the same methods as the law to detect specific instances of falsehood and error. They can compare the patient's statement to facts within their personal knowledge. They can compare it to other sources of information and make a judgment on its relative credibility. They may also conclude the patient's statement is untrue based upon internal inconsistencies. Finally, they may consider the impossibility or improbability of the statement. These same methods are available to the jury. Furthermore, the finder of fact has advantages denied the behavioral scientists. The oath, the power of subpoena, cross-examination by a skilled adversary, and all the other devices of the trial are denied the doctor examining the patient.

It is equally true, however, that the behavioral scientists have advantages denied the finder of fact. Their primary advantage is the ability to engender trust in the patient. The psychologist and psychiatrist are in a much better position to encourage honesty and frank self-examination. The sole purpose of treatment is to help the individual.[147] This is not true of the legal process. The client does have an advocate committed to her best interest. The trial process, however, presupposes that a party's interests are hostile to those of another. Each party is subjected to the efforts of an adversary whose goal is a result detrimental to him.

There are other factors enhancing the behavioral scientist's ability to develop interpersonal trust. The relationship between the behavioral scientist and the individual is inherently private. The impact of privacy extends beyond the clinical setting. Individuals participating in broad-based experiments are assured of anonymity. The behavioral scientist is also generally afforded the time necessary to develop a trusting and nonthreatening relationship. In contrast, the courtroom is a public forum. The legal system forces a decision within the relatively brief span of a trial. The fact-finder's exposure to the witness is brief. Trial procedures are designed to preclude an interpersonal relationship between the witness and finder of fact.

The clinical psychiatrist and psychologist are trained to be nonjudgmental. The patient's frankness is unencumbered by fear of condemnation. In contrast, the courtroom is a place of judgment. Similarly, the experimental psychologists take care to minimize if not eliminate their influence upon the participants and outcome. Trial lawyers take care to achieve the opposite effect. The behavioral scientists are also trained to be skilled listeners. Jurors have no such training.

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147. Forensic examinations are not conducted for the purpose of treatment. Therefore, the doctor conducting a forensic examination is deprived of many of these advantages.

The assessment of credibility by behavioral scientists is based upon knowledge and skills absent in jurors. Their testimony adds otherwise missing dimensions to the information available to the finder of fact. Their opinions are not duplicative of the jury's deliberation.

b. The mentally ill, normative, and impaired witness

Expert testimony on credibility is helpful to the jury if it explains factors affecting a witness's perception, memory, or ability to communicate. It is the effect of these factors which makes the evidence helpful. It does not matter if the effect results from *mental illness*, is inherent in all *normative* individuals, or results from an *impairment* found in an otherwise normative individual.[148]

Nevertheless, these distinctions are helpful to our inquiry on two grounds. First, they relate directly to the jury's understanding of both the underlying phenomenon of mental illness, normativeness, and impairment, and the sciences devoted to their study. There are real differences between the extent and accuracy of common knowledge about each of these three areas. Second, many courts have at least implicitly recognized these distinctions when addressing the helpfulness issue. Therefore, these distinctions are helpful in examining the validity of various criteria used by courts in considering the usefulness of the expert testimony.

(i) The Mentally Ill Witness

The mentally ill witness has proven the easiest of the three categories for the courts. Courts and jurors are more conscious of their own ignorance about mental illness, and tend to readily acknowledge the need for expert help.

Recognition of severe mental illness by common law courts is an ancient thing. Lord Coke commented upon the exclusion of witnesses deemed *non compos mentis*. Coke distinguished between the idiot (congenitally impaired), the lunatic (periodic fits of impairment), those impaired by grief or other circumstance, and those who temporarily impair themselves as through drunkenness.[149] Sanity

148. For the purposes of this discussion, "mental illness" is used to describe persons diagnosed as suffering from a clinically recognized disorder. The author has coined the term "normative individual" to describe persons *not* suffering from mental illness and to distinguish such individuals from those who do. "Impairment" is used to describe any experience or circumstance likely to affect the testimonial accuracy of an otherwise normative individual.

The fields of psychiatry and psychology have a well founded aversion to the adjective "normal" as applied to individuals. The lay person and legal profession, however, find the term sufficient for most purposes.

149. 2 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 492 (rev. ed. 1979) (quoting E. COKE, NOTES UPON LITTLETON, 246b (1628)).

was always subject to proof or attack by lay opinion in English courts.[150] In the United States, however, development of the opinion rule created a problem. The opinion rule was applied to exclude lay opinions on the subject. At the time, however, there was no recognized field of expertise on mental or emotional illness. By the mid-nineteenth century the absurdity of the result was apparent.[151]

By excluding or limiting lay opinions, the opinion rule also fostered early recognition of the admissibility of expert testimony on the issue of impairment. The modern science of psychology was founded by Wilhelm Wundt, who established the first experimental psychology laboratory at the University of Leipzig in 1879.[152] In the 1890's, Dr. Freud began his medical career. In the United States, admission of expert testimony about mental illness as relevant to credibility of a witness predates both Wundt and Freud.

Perhaps the earliest American example can be found in *Lessees of Armstrong v. Timmons*,[153] decided in 1841. The defendant called a justice of the peace as the sole surviving witness to the execution of a deed. The plaintiff objected to the justice's competency. The plaintiff called the witness's brother and nephew, both of whom happened to be doctors. The trial court admitted the doctors' testimony, but found the justice of the peace incompetent to testify. On appeal, the defendant claimed the doctors should not have been permitted to express their opinions. The court found that "[t]he opinions of medical men are entitled to peculiar weight on this subject, especially if they have had good means of observation as is the case [here]."[154]

In 1854, the New York Court of Common Pleas specifically held that opinion testimony on mental illness was admissible on the issue of a witness's credibility, as opposed to competency. In *Rivara v. Ghio*,[155] the defendant called a witness to prove that the plaintiff's witness, who testified without objection, "had been of imbecile mind and memory." This offer was overruled on the ground that the ob-

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150. 7 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1933 (rev. ed. 1979).

151. The decision in Clary's Administrators v. Clary, 24 N.C. 62, 2 Ired. 78 (1841), and Justice Doe's dissent in Boardman v. Woodman, 47 N.H. 120 (1866), led most courts back to acceptance of lay opinions on the existence and apparent effects of mental illness. 7 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1933 (rev. ed. 1979).

152. T. LEAHEY, A HISTORY OF PSYCHOLOGY 181 (1987).

153. 3 Del. (3 Harr.) 342 (1841). This case did not involve expert testimony on the issue of witness credibility. The trial court heard testimony from the doctor first and then ruled the witness incompetent.

154. *Id.* at 346.

155. 3 Smith 264 (N.Y. C.P. 1854). This is the earliest case on point found by the author. The facts of this case have a curiously modern ring. Plaintiff left some luggage with the defendant in New York. By some unexplained mechanism the luggage ended up in Cleveland. When returned, it had been "rifled," and some of the contents were missing.

jection should have been taken earlier "upon the calling of [the] witness" herself.[156] The judgment was reversed: "Such evidence would tend to prove that less reliance should be placed upon her statements than those of a witness who was *compos mentis*."[157] The plaintiff's argument that the defendant had waived any objection to the witness's competency by not objecting when she was called to the stand was rejected. "[Such testimony] may be given in evidence as going to the degree of credit to which the testimony of the witness is entitled . . . ."[158] As early as 1862, it was recognized that some doctors had greater experience than others in dealing with patients "suffering from mental maladies."[159]

Throughout the balance of the nineteenth century, a growing number of courts reached the same conclusion. One of the earliest federal decisions implicitly approving admission of expert testimony on credibility is *District of Columbia v. Armes*.[160] The plaintiff sued for injuries sustained when he slipped off the edge of an elevated sidewalk, falling two feet, and sustaining a "concussion which injured his spine and produced partial paralysis, resulting in the impairment of his mind and ultimately [after trial] in his death."[161]

The plaintiff testified at the trial. Although his testimony was neither incoherent nor unintelligible, "it appeared from his testimony that his mind was feeble."[162] After the plaintiff testified, two doctors were called.[163] One doctor had treated the plaintiff for his injuries at a general hospital. While there, the plaintiff had attempted suicide. The doctor testified that the plaintiff was, at that time, "deranged and insane." The other doctor had treated the plaintiff while he was a patient at the Government Hospital for the Insane. He testified that the plaintiff suffered from "acute melancholy," that his "memory was impaired," and that there was some "confusion of ideas in his mind."[164] After the doctors testified, the defendant moved to strike the plaintiff's testimony on the ground that he was incompetent. The trial court denied the motion. The District of Columbia Supreme Court affirmed, holding the evidence

156. *Id.* at 268.

157. *Id.*

158. *Id.* The court cites no authority in support of either proposition.

159. Fairchild v. Bascomb, 35 Vt. 398, 409 (1862). This case discusses the expert qualifications of a doctor associated with institutions devoted to the care of the insane. It also contains an excellent survey of the early American cases discussing the admission of expert testimony on the question of testamentary capacity based upon facts provided by lay witnesses. *Id.* at 412-16.

160. 107 U.S. 519 (1882). The plaintiff was a doctor. At the time of the accident he was a civilian working for the United States Army.

161. *Id.* at 520.

162. *Id.*

163. *Id.* It is not clear whether the doctors were initially called by the plaintiff on damage issues, or by defendant solely to impeach plaintiff.

164. *Id.* at 520.

was properly submitted to the jury on the issue of plaintiff's credibility.[165]

This century has seen a general trend away from judicial disqualification of witnesses on the grounds of incompetency.[166] This trend has created a concomitant growth in both the need and willingness to admit evidence of mental illness on the issue of credibility of afflicted, but competent, witnesses.[167] During the same period, both psychiatry and psychology achieved recognition as valid disciplines within medicine. As a result, the necessity of relying upon lay opinions to determine issues of mental illness declined. Today, it is generally accepted that the behavioral sciences have outstripped the lay person's understanding of mental illness. It is also accepted that the behavioral sciences have developed skills in diagnosis and evaluation beyond that of judges and jurors.[168] Expert testimony is helpful in

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165. For other early cases accepting expert testimony on impairment to attack credibility, see Alleman v. Stepp, 52 Iowa 626, 3 N.W. 636 (1879) (error to exclude testimony of physician concerning impairment of plaintiff's memory after injury and the subsequent amputation of leg); Derwin v. Parsons, 52 Mich. 425, 18 N.W. 200 (1884) (expert permitted to testify that plaintiff in an "indecent assault and battery" case was diagnosed as suffering from a specified disease and that a substantial percentage of women having the disease tended to suffer hallucinations concerning the conduct of men); Lord v. Beard, 79 N.C. 5 (1878) (physician permitted to give opinion that paralysis tended to impair minds of the elderly); Anderson v. State, 65 Tex. Crim. 365, 144 S.W. 281 (1912) (error to exclude expert testimony concerning effect of government witness's use of cocaine upon her mental and moral sensibilities); State v. Pryor, 74 Wash. 121, 132 P. 874 (1913) (reversing the trial court's refusal to admit medical testimony that prosecutrix was suffering from hysteria (resulting in delusions and hallucinations) in an abortion prosecution); State v. Robinson, 12 Wash. 491, 41 P. 884 (1895) (physician should be permitted to testify concerning the effects of morphine generally but not as to effects on the witness); and State v. Perry, 41 W. Va. 641, 24 S.E. 634 (1896) (approving testimony by doctor as to hallucinations of plaintiff caused by treatment with chloroform and ether).

It is interesting to note that all of the above cases, save two, involved claims of medical malpractice or testimony by women, usually as victims in sexual assaults. *Perry* involved both. In People v. Cowles, 246 Mich. 429, 224 N.W. 387, 388 (1929), two doctors were permitted to testify that the victim in a statutory rape case was "a pathological falsifier, nymphomaniac, and sexual pervert." *But see* State v. Pelser, 182 Iowa 1, 163 N.W. 600 (1917) (affirming exclusion of medical testimony on the effect of premature sexual development in a prosecution for incest on grounds that the effects on women are disputed by experts in the field); and State v. Driver, 88 W. Va. 479, 107 S.E. 189, 15 A.L.R. 917 (1921) (affirming exclusion of expert testimony in attempted rape case that victim was a "moron," and therefore prone to lie about sexual matters).

166. 2 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §§ 501 (policy of abolishing disqualification through mental derangement) & 509 (policy of abolishing disqualification by infancy) (rev. ed. 1979).

167. *See, e.g.*, United States v. Hiss, 88 F. Supp. 559, 559-60 (S.D.N.Y. 1950), *cert. denied*, 340 U.S. 948 (1951).

168. Recognition of the comparative inadequacy of the lay witness is reflected by the typical statutory requirements mandating the testimony of a psychologist or psychiatrist in commitment proceedings, or to determine sanity in criminal cases. Model

both respects. It can help the jury detect the existence of mental illness in a witness. It can also help in assessing the impact of the condition upon the witness's testimony.

The sociopathic personality presents many special problems. One symptom of this mental illness is the inability to recognize any obligation to tell the truth.[169] The shift from the effects of mental illness on the risk of error to the effects on risk of falsehood has proven a problem for some courts.[170] Such evidence should not be excluded under Rule 702 on the basis that it is not helpful. There is no logical distinction between expert testimony on mental illness as it affects accuracy of perception, and as it affects truthfulness. Furthermore, by dint of long and dedicated practice, many sociopaths have become extremely accomplished liars. For all its strengths, the adversary system is defenseless against the plausible lie told by the skillful liar.

Lying is not confined to sociopaths. Certainly all of us are

Penal Code § 4.05 (1980). *But see* State v. Boone, 444 A.2d 438, 444 (Me. 1982). In *Boone*, the Law Court held the trial justice, as finder of fact, competent to determine sanity of a criminal defendant based on observations during the trial. The trial justice's determination was affirmed, notwithstanding uncontradicted expert testimony to the contrary. The opinion notes the absence of any evidence of prior mental or psychological problems. The Law Court also remarked on the absence of any "indication" of mental impairment in the defendant's conduct during trial.

169. The Diagnostic and Statistical Manual of Mental Disorders (3d ed. 1987) (DSM III) has abandoned the term "Sociopathic Personality" in favor of "Antisocial Personality Disorder." Common usage has not followed suit. The DSM III description of the Antisocial Personality Disorder states in part:

> The essential feature of this disorder is a pattern of irresponsible and antisocial behavior beginning in childhood or early adolescence and continuing into adulthood. For this diagnosis to be given, the person must be at least 18 years of age and have a history of Conduct Disorder before the age of 15.
>
> Lying, stealing, . . . [and etc.] are typical childhood signs. In adulthood the antisocial pattern continues . . . .
>
> . . . .
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> Finally, [people with Antisocial Personality Disorder] generally have no remorse about the effects of their behavior on others; they may even feel justified in having hurt or mistreated others.

DSM III § 301.70.

Dr. Sobchuk's proffered testimony in State v. Woodburn, 559 A.2d 343 (Me. 1989), provides an example of all three. *See* Transcript, *supra* note 10, at 324-29 (basis of diagnosis), 330 (impairment affecting ability to distinguish fantasy from reality), and 327 (pathological aspects of the boy's lying). The boy in *Woodburn*, however, did not suffer from an Antisocial Personality Disorder (*i.e.*, he was not a sociopath). By definition, the diagnosis of this mental illness is restricted to adults. DSM III § 301.70 (1987).

170. Commonwealth v. Repyneck, 181 Pa. Super. 630, 124 A.2d 693 (1956) (The trial court permitted psychiatric testimony about the impact of this disorder on the ability to perceive, recall, or communicate. The trial judge excluded all testimony about the effect of a sociopathic personality disorder on the ability to understand and comply with the obligation to tell the truth. The exclusion was affirmed.).

tempted to lie. Most of us cannot avoid the subtle indications of discomfort in voice and body language when lying. It is hoped that the jury will detect and recognize these subtle clues as signals of falsehood. The premise does not apply to sociopaths. Lacking conscience, sociopaths have no guilt and, therefore, no discomfort when lying. Unless the jurors are aware of these attributes of the sociopathic personality, they will have no reason not to rely on such clues, and, finding none, conclude the witness is telling the truth. This is not a revolutionary concept. The justification for permitting reputation evidence of the witness's character for truthfulness rests in large part on this truth. In the artificial and relatively brief exposure to any witness, there is always the risk that the jury will be unable to detect falsehood.

Mental illness has a more compelling effect upon behavior than does a person's character.[171] It would be passingly strange to admit reputation evidence, based on who knows what, of a witness's character, but exclude the diagnosis and expert knowledge of a licensed doctor as to the existence and known effects of a mental illness. The Federal Rules of Evidence also permit lay opinions on a witness's character for truthfulness.[172] It would be even stranger to admit lay opinions on truthfulness while excluding those of the expert.[173]

Testimony about the effect of mental illness upon truthfulness is no less helpful than that about effects upon the accuracy of perception, recall, or communication. The only foundational requirement to establish the relevancy of expert testimony on the subject is evidence upon which the jury might find: (1) the witness suffered from a mental illness; and, (2) that the mental illness might affect the witness's abilities to perceive, recall, or communicate accurately *or* honestly.

Certainly, there is a risk that jurors may choose to believe or disbelieve the subject witness based only upon the diagnosis and explanation. That risk can be minimized by proper instruction of the jury. The risk that the jury will believe a plausibly spun falsehood is inherently greater. The jurors are told that they should not abdicate all responsibility for the judgment of credibility. As a group, they can be relied upon to at least try to do what is right. This is simply

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171. Cross-examination is also likely to be a more effective tool in discovering truth when applied to the opinion of an expert. An individual's reputation is presumed to be the result of multiple individual opinions which are bandied about the community. Each source is presumed to have some basis for judging the subject witness. Each source must also have some motive to tell others of this opinion. The sources of reputation are not available for cross-examination. The expert witness is.

172. FED. R. EVID. 405, 608. A number of states, including Maine, do not permit opinion evidence of character.

173. *See* United States v. Alexander, 816 F.2d 164 (5th Cir. 1987), *cert. denied*, 110 S. Ct. 1110 (1990) (exclusion of expert analysis of surveillance photographs while admitting lay opinions about the identity of the person depicted).

not true in the case of the sociopathic witness.

(ii) The Normative Witness[174]

Alexander Pope reminded us that error is an inherent accident of the human condition.[175] All humans understand that others may lie. Both facts are within the common knowledge. Equally important for our inquiry, all adults have practical experience in evaluating credibility.

Most individuals understand that the probability of error differs from one human activity to another. Jurors can also be relied upon to understand that many circumstances can increase or decrease the chance for error in any given activity. Almost by definition, normative individuals recounting their memory of something within the broad range of commonplace experience do not present a problem. Scientific evidence concerning perception, memory, and communication of a normative individual which corresponds to the folk wisdom of common knowledge adds nothing. The evidence should be "excluded . . . because [it is] unhelpful and therefore superfluous and a waste of time."[176]

As previously discussed, however, common knowledge is occasionally wrong.[177] The disparity between the assumptions of common knowledge and the findings of behavioral research into eyewitness identification has grown enormously in recent years. The issue has become one of the most litigated subjects involving the credibility of normative witnesses, and is a good vehicle for exploring problems in this area.

United States v. Amaral[178] has stood as the leading case for the exclusion of such evidence for over fifteen years. The jury convicted Manuel Amaral of bank robbery. At trial the defense called a psychologist who would testify about the effects of stress upon the ability of eyewitnesses to identify persons seen during a stressful event. The trial judge ruled the psychologist's testimony inadmissible, stat-

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174. "Normative" is used to designate an individual who is not mentally ill or impaired. *See supra* note 148.

175. A. POPE, AN ESSAY ON CRITICISM ("To err is human . . .").

176. FED. R. EVID. 702 advisory committee's note (citing 7 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1918 (rev. ed. 1979)).

177. *Compare* Cutler & Penrod, *Forensically Relevant Moderators of the Relation Between Eyewitness Identification Accuracy and Confidence*, 74 J. APPLIED PSYCHOLOGY 650 (1989) (suggesting there is no correlation between the confidence with which the witness makes the identification and the accuracy of the identification) *with* Whitlay & Greenberg, *The Role of Eyewitness Confidence in Juror Perception*, 16 J. APPLIED SOC. PSYCHOLOGY 387 (1986) (witness confidence is a prime factor in juror evaluation of credibility, except where expertise is considered a relevant factor). For research suggesting that jurors hold certain negative and unjustified stereotypes of children as witnesses, see Ross, Dunning, Toglia, & Ceci, *The Child in the Eyes of the Jury*, 14 LAW & HUM. BEHAV. 5 (1990).

178. 488 F.2d 1148 (9th Cir. 1973).

ing "it would not be appropriate to take from the jury their own determination as to what weight or effect to give to the evidence of the eye-witness and identifying witnesses and to have that determination put before them on the basis of the expert witness testimony as proffered."[179]

The Ninth Circuit affirmed. Speaking for the court, Judge Turrentine established four criteria for the admission of expert opinion testimony: "1. qualified expert; 2. proper subject;[180] 3. conformity to a generally accepted explanatory theory; and 4. probative value compared to prejudicial effect."[181] The decision in *Amaral* predates enactment of the Federal Rules of Evidence by some two years, a fact infrequently noted by courts citing *Amaral*. Judge Turrentine apparently concluded that exclusion of the expert testimony resulted in no impediment to the pursuit of truth. Counsel could effectively raise the same issues through cross-examination.

> "Our legal system places primary reliance for the ascertainment of truth on the 'test of cross-examination.'" In [*United States v.*] *De Sisto*,[182] a truck driver . . . testified as to the identity of the hijacker and gave conflicting testimony regarding . . . tattoo marks on the accused's arms. Judge Friendly wrote that the jury was "superbly equipped" to evaluate the impact of the stress during the hijacking on the perception of the identification witness. It is the responsibility of counsel during cross-examination to inquire into the witness' opportunity for observation, his capacity for observation, his attention and interest and his distraction or division of attention.[183]

Judge Turrentine's reliance on cross-examination and argument of counsel was misplaced. These devices are ineffective when applied to counterintuitive matters. Convincing jurors that their common sense is wrong is a daunting task. Even the most skillful of trial lawyers are likely to fail. Such arguments are especially likely to prove futile when fabricated from whole cloth with no support in the evidence.[184]

Judge Turrentine also engaged in an analysis of the underlying science. He referred to Dr. Buckout, "whose expertise in the area of perception was acknowledged by the Government (although he was

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179. *Id.* at 1153 (quoting the trial transcript).

180. "Proper subject" refers to expert testimony which "serves to inform the court (and jury) about affairs not within the full understanding of the average man." *Id.* at 1152-53 (quoting Farris v. Interstate Circuit, 116 F.2d 409, 412 (5th Cir. 1941)).

181. *Id.* at 1153.

182. 329 F.2d 929 (2d Cir. 1964).

183. *Id.* (citations omitted).

184. There is evidence that reliance on these "engines of the truth" is misplaced even in cases involving factors traditionally considered effective attacks upon credibility. Lindsay, Lim, Marando & Cully, *Mock-Juror Evaluation of Eyewitness Testimony: A Test of Metamemory Hypothesis*, 16 J. APPLIED SOC. PSYCHOLOGY 447 (1986).

not to testify at the trial)."[185] Dr. Buckout's research revealed "eyewitnesses do reply 'I can't recall, it happened so fast.' " The court thought this significant. The court also noted that defense counsel had failed to bring out any inconsistencies in the eyewitnesses' testimony on cross-examination. Based on Dr. Buckout's revelations and the cross-examination, the court concluded that the witnesses' ability to perceive and remember was unaffected. Finally, Judge Turrentine noted that the eyewitnesses were subjected to different levels of stress.

Considered in detail, Judge Turrentine's reasoning is less than persuasive. The court's finding that the witnesses' perceptions were not affected is irrelevant. This is a question for the jury to decide, not the court. Under the Rules of Evidence the issue is whether or not the jury might have found the testimony helpful. Moreover, some witnesses may indeed say they cannot recall because "it happened too fast." Such a fact does not support a conclusion that a witness will never positively identify the wrong person in complete good faith. Nor does distortion of perception or memory necessarily result in inconsistencies demonstrable during cross-examination. Neither premise compels the court's conclusion.

Stress can have a dramatic effect on the accuracy of eyewitness identifications. That effect can be counterintuitive. There is strong evidence to suggest that the intuitive criteria used by jurors to assess accuracy of the identification is wrong.[186] This leads to an uncomfortable conclusion. Common knowledge of factors affecting the accuracy of an eyewitness identification is often incomplete or wrong. Absent appropriate expert testimony, the possibility that eyewitnesses may be mistaken cannot be effectively demonstrated by the tools of cross-examination and argument. Left to their own devices, the jury's verdict must be based upon speculation, ignorance, or assumptions which are demonstrably false.[187]

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185. United States v. Amaral, 488 F.2d at 1153.

186. *See* the discussion of State v. Chapple, 135 Ariz. 281, 293-94, 660 P.2d 1208, 1220-21 (1983), *infra* at text accompanying note 188. Judge Turrentine's observation that the witnesses experienced different levels of stress is also a *non sequitur*. The only issue is whether or not information might have helped the jury assess the credibility of at least one witness.

187. Hoffheimer, *Requiring Jury Instructions on Eyewitness Identification Evidence at Federal Criminal Trials*, 80 J. CRIM. L. & CRIMINOLOGY 585, 593 (1989). Professor Michael Hoffheimer is among those concerned about the growing gulf between common knowledge and the behavioral scientists' understanding of eyewitness identification. He proposes use of jury instructions to advise the jurors of factors known to affect the accuracy of eyewitness identification. Professor Hoffheimer argues that instructions are a more cost-effective solution than expert testimony. His article also surveys the history, use, and treatment on appeal of generic eyewitness instructions by the various circuits. His approach is reminiscent of the original practice of direct consultation of experts by the court. Professor Hoffheimer's suggestion is worthy of exploration, but there are problems with this approach. Generalized pat-

In 1984, in *State v. Chapple*,[188] the Arizona Supreme Court broke with the line of authority based upon *Amaral*. The defendant was charged with two drug offenses and three counts of first degree murder. The killings occurred in Arizona during a purchase of marijuana by two buyers from Kansas City. The buyers had more in mind than purchasing a large quantity of marijuana. They also wished to punish the sellers for financial misdeeds during an earlier transaction. Two Arizonans helped the out-of-town buyers arrange for the purchase and were present at the sale. Both helped the buyers destroy evidence of the killings. One of the surviving Arizonans, Mr. Scott, wished to discuss the matter with the authorities. Predictably, two things happened: Mr. Scott obtained a grant of immunity and identified, from photographs, Mr. Chapple as one of the two buyers. The prosecution was eventually able to induce Mr. Scott's co-broker to also become a witness for the state.

The defendant, Mr. Chapple, claimed he had been wrongfully identified. At his extradition hearing seven witnesses testified he was in Illinois on the day of the killings. At trial, the defendant called a clinical psychologist specializing in perception and memory as a witness. The psychologist's testimony was offered to rebut the eyewitness identifications by Mr. Scott and his partner. The trial judge excluded the testimony. The trial court shared Judge Turrentine's faith in the art of cross-examination, if not argument: "I don't find anything . . . that this expert is going to testify to . . . that couldn't really be covered in cross-examination of the witnesses who made the identification, and probably will be excessively argued in closing arguments to the jury."[189]

The Arizona Supreme Court reversed. Writing for the majority, Justice Feldman acknowledged that most jurisdictions that had considered the question held similar testimony inadmissible.[190] The court then considered the four criteria propounded by Judge Turrentine in *United States v. Amaral* as determinative of admissibility.[191] The psychologist's qualifications were more than adequate.[192]

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tern instructions risk omission or over-inclusion in many cases. The approach also does not address the myriad other types of expertise available on credibility issues not involving eyewitness identification. Finally, this approach would require a mechanism for effectively updating the instructions.

188. 135 Ariz. 281, 660 P.2d 1208 (1983).

189. *Id.* at 293, 660 P.2d at 1220.

190. Justice Feldman also distinguished those cases decided on grounds inapplicable under the facts of this case. *Id.* at 292, 660 P.2d at 1219.

191. 488 F.2d 1148 (9th Cir. 1973). *I.e.*, (1) the witness is an expert; (2) the testimony is a proper subject for expert testimony; (3) the underlying theory is valid; and, (4) the probative value of the testimony is not substantially outweighed by an unfairly prejudicial effect. The Arizona Supreme Court applied the test propounded in Frye v. United States, 54 App.D.C. 46, 293 F. 1013 (1923), requiring that the validity of the underlying theory be "generally accepted" by experts in the field. The *Frye* test was also used in *Amaral*. See discussion of the *Frye* test, *supra* text accompany-

The scientific validity of her work was also unquestioned. The court rejected the state's argument that the probative value of her testimony was substantially outweighed by any unfairly prejudicial effect. The Arizona Supreme Court also found the proffered testimony to be a "proper subject" of expert testimony under Rule 702.[193]

> [Rule] 702 allows expert testimony if it "will assist the trier of fact to understand the evidence or to determine a fact in issue." Put conversely, the test "is whether the subject of inquiry is one of such common knowledge that people of ordinary education could reach a conclusion as intelligently as the [expert] witness . . . ." Furthermore, the test is not whether the jury could reach some conclusion in the absence of the expert evidence, but whether the jury is qualified without such testimony "to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject. . . ."[194]

The trial judge had determined Dr. Loftus' testimony was not beyond common knowledge. The Arizona Supreme Court acknowledged this was a proper grounds for excluding her testimony but reached a different conclusion. "We note at the outset that the law has long recognized the inherent danger in eyewitness testimony. *Of course, it is difficult to tell whether the ordinary juror shares the law's inherent caution of eyewitness identification.*"[195] The court reviewed the proffered testimony in detail,[196] and concluded:

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ing notes 69-75.

192. "Dr. Loftus specializes in an area of experimental and clinical psychology dealing with perception, memory retention and recall. Her qualifications are unquestioned, and it may fairly be said that she 'wrote the book' on the subject." State v. Chapple, 135 Ariz. at 291, 660 P.2d at 1218.

193. ARIZ. R. EVID. 702 is identical to its federal counterpart, as is M.R. Evid. 702.

194. State v. Chapple, 135 Ariz. at 292-93, 660 P.2d at 1219-20 (1983) (citing FED. R. EVID. 702 advisory committee's note *quoting* Ladd, *Expert Testimony*, 5 VAND. L. REV. 414, 418 (1952)) (other citations omitted).

The Tennessee Rules of Evidence became effective on January 1, 1990. They provide an interesting counterpoint. Prior Tennessee case law held that only expert testimony "necessary" to the trier of fact was admissible. As a result, Tennessee's version of Rule 702 varied from the federal pattern. TENN. R. EVID. 702 provides expert testimony is admissible when it will "*substantially* assist the trier of fact to understand the evidence or to determine a fact in issue . . . ." (emphasis added). One need not be familiar with the Tennessee courts and bar to predict the imminent birth and vigorous growth of a new line of appellate decisions dedicated to finding a working definition of "substantial."

195. State v. Chapple, 135 Ariz. at 293, 660 P.2d at 1220 (emphasis added) (footnote in original: "The [varieties] of eyewitness identification are well known: the annals of criminal law are rife with instances of mistaken identification. . . . 'What is the worth of identification testimony even when uncontradicted? The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials.' ") (quoting United States v. Wade, 388 U.S. 218, 228 (1967)).

196. *I.e.*, the "forgetting curve," which describes a rapid initial deterioration in

> We cannot *assume* that the average juror would be aware of the variables concerning identification and memory about which Dr. Loftus was qualified to testify.
>
> Depriving [the] jurors of the benefit of scientific research on eyewitness testimony force[d] them to search for the truth without full knowledge and opportunity to evaluate the strength of the evidence. In short, this deprivation prevent[ed] [the] jurors from having "the best possible degree" of "understanding the subject" toward which the law of evidence strives.[197]

The decision in *Chapple* led to a broader recognition of the need to admit evidence of the counterintuitive factors at play in eyewitness identifications. In the following year, California followed the lead of the Arizona courts;[198] and one year later, the Third Circuit Court of Appeals in its landmark opinion *United States v. Downing*[199] became the first federal court to acknowledge the admissibility of such expert testimony. In the six years since *Downing*, several jurisdictions have either held that such testimony is admissible based on the showing made in the trial court, or that the proponent was entitled to the opportunity to make such a showing.[200]

The reasoning and analysis in *Chapple* is equally applicable to any expert testimony on credibility. The key element is not the subject of eyewitness identification. The testimony is helpful, and therefore admissible, because it provides the jury with information which may be counterintuitive.

The foundation required for testimony about credibility of a nor-

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memory, followed by a more gradual long term erosion (implying that early identifications are significantly more accurate than those occurring even a relatively short time later); research shows most lay persons assume stress enhances memory, when in fact it causes inaccurate perception and a concomitant distortion of memory; the phenomenon of unconscious transfer resulting in confusion with persons seen in similar or associated contexts (especially as prompted by photo lineups which include individuals the witness had seen at a time other than the crime); the unconscious effects of post-event information and feedback upon the reconstructive processes of memory and upon the witnesses' confidence in the identification (two of the witnesses were related and had discussed their identification of a defendant); the lack of correlation between witness confidence and accuracy of the identification. *Id.* at 293-94, 660 P.2d at 1220-21.

197. *Id.* at 294, 660 P.2d at 1221 (quoting Note, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 29 STAN. L. REV. 969, 1017-18 (1977)) (emphasis added). The court found the defense had offered evidence that at least two aspects of Dr. Loftus' testimony were counterintuitive. *I.e.*, the effect of stress on perception, and the lack of correlation between witness confidence and accuracy. Consideration was also given to the other aspects of her testimony. The court concluded it could not *assume* the testimony was within the jury's common knowledge. This is the correct approach.

198. People v. McDonald, 37 Cal. 3d 351, 208 Cal. Rptr. 236, 690 P.2d 709 (1984).

199. 753 F.2d 1224 (3d Cir. 1985).

200. For a list of cases following *Downing*, see State v. Gunter, 554 A.2d 1356, 1362-63 (N.J. Super. 1989).

mative witness differs significantly from that required in the case of the mentally ill individual. It is not necessary to establish a diagnosis of a recognized mental illness. It is only necessary to offer evidence that normative individuals are subject to some effect on their ability to perceive, recall, or communicate, and that the effect is counterintuitive. Evidence that the subject witness actually demonstrated such an effect may enhance the probative value of the expert's testimony, but is not necessary as a foundational matter.

(iii) The Impaired Witness[201]

Impaired witnesses seem to fit into neither of the preceding categories. They are not mentally ill, but the effects of the impairment distinguish them from other normative witnesses. Furthermore, those effects are often limited to specific subjects or activities.[202] The analysis under the Rules of Evidence parallels that used to determine the admissibility of testimony about effects on all normative individuals. Testimony about the effects of impairment will be helpful if: (1) there is a known impact upon the witness's ability to perceive, recall, or communicate about some matter; and (2) the effect is beyond the range of common knowledge or is counterintuitive.

It may occasionally be difficult to distinguish between *impairment* and *mental illness*. The distinction is without significance for the courts' purposes, however. As previously discussed, it is the effect of these conditions, not the label, that determines if the testimony is helpful. This proposition is often given only grudging acceptance by the courts.[203] Maine's experience is typical.

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201. "Impairment" is used to describe an otherwise normative witness whose testimonial accuracy is likely to be affected by an extraordinary experience or circumstance.

202. Common phobias are perhaps the most commonly experienced extraordinary influences. For example, the author's ability to accurately judge the size and aggressive intent of any spider is highly suspect.

The psychologist's proposed testimony in State v. Chapple, 135 Ariz. 281, 660 P.2d 1208, contains examples of counterintuitive effects of extraordinary circumstance on a normative observer. *See supra* note 197. *See also* State v. Conlogue, 474 A.2d 167 (Me. 1984); State v. Anaya, 438 A.2d 892 (Me. 1981); Convis, *Testifying About Testimony: Psychological Evidence on Perceptual and Memory Factors Affecting the Credibility of Testimony*, 21 DUQ. L. REV. 579, 593-95 (1983-84).

203. *See, e.g.*, State v. Castro, 756 P.2d 1033 (Haw. 1988). The trial court admitted psychiatric testimony supporting the credibility of the complaining witness in an attempted murder and aggravated assault case. The trial court relied on the earlier decision in State v. Kim, 645 P.2d 1330 (Haw. 1982). The Hawaii Supreme Court vacated and remanded, suggesting its earlier decision should be confined primarily to child abuse cases. State v. Castro, 756 P.2d at 1044. In *Kim* the Hawaii Supreme Court noted that some courts had limited expert testimony to cases involving "the allegedly mentally ill witness and the mentally retarded witness . . . ." State v. Kim, 645 P.2d at 1337. The court also found admission justified when it related to "child complainants whose claims are substantially uncorroborated." *Id.* at 1337-38.

In 1977, the Law Court decided *State v. Lewisohn.*[204] The jury found the defendant guilty of murdering his wife. The defendant claimed he accidentally shot his wife while he was cleaning a gun at the kitchen table. The state called the two minor daughters of the defendant and decedent as witnesses. The daughters were asleep in their rooms when they were awakened by the sounds of their parents arguing and a loud "bang." Mrs. Lewisohn had been shot in the shoulder and was pronounced dead on arrival at the hospital.[205] The court summarized the younger daughter's trial testimony:

> [She] reached the kitchen first and observed her father kneeling beside her wounded mother on the floor. She heard her mother cry: "Jimmy, call the hospital, I'm bleeding." She stated that her father then got up and said: "If it will make you happy, I'll shoot myself; at least we will die together." She added that her father then shot himself.
>
> The other daughter, aged 14, then appeared . . . and, observing her mother and father lying on the kitchen floor, telephoned for medical assistance.[206]

The defendant called a psychologist who had watched the girls testify.

> The proffered opinion of this expert witness would have been to the effect that children of that age will screen out facts in conflict with their wishful thinking with resulting adjustment of their initial perception as well as their later remembrance of the events. The presiding Justice excluded such evidence on the ground it would be a very serious invasion of the province of the jury. We agree.
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> The question at issue is, whether the credibility of a witness whose competency . . . is not disputed may be impeached by expert evidence that persons subjected to occurrences of a frightening nature, and especially children . . . are incapable of accurately perceiving, recalling and relating the events as they happened . . . .
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> . . . .
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> *Absent a "medical" condition affecting the ability of the witness to tell the truth, evidence may not be received to discredit the testimony of a witness in the nature of an expert's opinion that the events were such as to have so affected the mental capacity of such witness that his ability to make an accurate observation of the facts and to retain a true recollection thereof has been impaired and that his assertions respecting the details of the occurrence will necessarily or most probably be a distortion.* Any other rule might lead to as many collateral issues as there are witnesses, and would only serve to divert the minds of the jurors from the

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204. 379 A.2d 1192 (Me. 1977). The Maine Rules of Evidence became effective in February 1976. M.R. Evid. 702-705 are substantially similar to the Federal Rules as originally adopted.

205. *Id.* at 1196.

206. *Id.*

> true issues in the case. Such testimony would in effect take over the jury's task of determining the weight and credibility of the witness' testimony.
>
> *We agree that a witness' capacity to perceive, recollect and communicate may be impeached in certain circumstances, as where the witness is afflicted with a disability affecting the mental or physical processes, such as mental disease, blindness, deafness, or the like.*[207]

The decision in *Lewisohn* was announced in November of 1977. Four months earlier two Brink's guards were picking up cash receipts from a department store when a man attempted to rob them. An exchange of gun fire ensued. The would-be robber was wounded and fled the scene. Later the same day, a Mr. Fernald appeared at a local hospital, suffering from multiple gunshot wounds. The next morning one of the Brink's guards was brought to the hospital where he identified Mr. Fernald as the would-be robber. At trial the defense attempted to call a psychologist to testify about the effects of severe stress upon perception. The trial court sustained the state's objection. The Law Court affirmed.[208]

> We need not now consider, or intimate opinion on, whether *Lewisohn* extends so far as to bar *in all circumstances* expert testimony as to the effects of stress, or other factors, on the accuracy of human perceptional processes to assist a fact-finder in determining the reliability of eyewitness testimony . . . . It is sufficient for present purposes that we decide that there was no error . . . [in excluding] the proffered testimony . . . . The eyewitness identifications resulted from a direct and close, face-to-face confrontation of the two eyewitnesses and the gunman. The light was good, and the gunman's entire face was not obscured in any respect. The making of direct face-to-face judgments of identification, and an awareness of the factors bearing on the reliability of such judgments, are so much a part of the day-to-day experiences of ordinary lay people that we must conclude . . . the jury was capable of making an intelligent assessment of the reliability of the identification . . . without need of the benefit of expert testimony as to how stress may affect human perceptional processes.[209]

In *Fernald* the court suggested such evidence might be admissible, even absent diagnosis of a "medical condition." The opinion in *Fernald* also did not depend on a perceived need to defend the "province of the jury." At most *Fernald* displayed hairline cracks in reflexive exclusion of such evidence.

The court did not have long to wait for a third opportunity to consider the problem. In *State v. Anaya*,[210] the defendant stabbed

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207. *Id.* at 1203-1204 (emphasis added).
208. State v. Fernald, 397 A.2d 194 (Me. 1979).
209. *Id.* at 197.
210. 438 A.2d 892 (Me. 1981).

her lover in the back. He bled to death in her arms. She did not contest these facts. Ms. Anaya claimed her lover had abused her and that she acted in self-defense, or under extreme provocation. Although Ms. Anaya did not testify, both trial counsel recognized the believability of her defense as the central issue in the case.[211]

The defense called a psychologist as an expert witness at trial to testify that abused women often do not leave their abuser. He would have explained that a "certain substrata of abused women perceive suicide and/or homicide to be the only solutions to their problems."[212] The trial justice stated that "although [the psychologist] was qualified to testify about the 'battered wife syndrome', the evidence would be excluded as irrelevant, prejudicial, and confusing to the jury."[213] The defendant also called a specialist in internal medicine who had treated Ms. Anaya on several occasions for injuries inflicted by the deceased. The doctor would have testified that the defendant suffered from the battered spouse syndrome. The trial justice also excluded this testimony.[214] The jury found Ms. Anaya guilty of manslaughter. On appeal, the Law Court held the evidence that had been admitted and offered was adequate foundation to admit evidence that the defendant suffered from the "battered wife syndrome." There was no question as to the psychologist's competency to testify on the existence and effects of that condition. The court held that the testimony "must be admitted since it '*may have . . . a substantial bearing on her perceptions* and behavior at the time of the killing, . . . [and is] central to her . . . defense.' "[215]

The Law Court focused on the correct issue. The helpfulness of the testimony hinges upon the effect of the prior experience. The label attached to those effects is irrelevant. How the behavioral sciences choose to classify the effect of an abusive relationship upon the victim is not the issue. *Anaya* stands for the proposition that expert testimony about the fact and effect of experiences known to affect perception is admissible. Admission does not depend upon classification as a mental illness.[216]

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211. "The State's closing argument focused on the 'bizarre' behavior of the victim and the defendant, implying that defendant could not have been fearful of Williams since she never attempted to leave him . . . ." *Id.* at 894.

212. *Id.*

213. *Id.* at 893.

214. *Id.* at 894.

215. *Id.* (quoting Ibn-Tamas v. United States, 407 A.2d 626, 639 (D.C. 1979) (emphasis added)).

216. It is not clear whether the court consciously thought of the problem as involving expert testimony on credibility. The opinion is, however, framed around this unarticulated assumption. The court recognized the proffered evidence as relevant to the believability of Ms. Anaya's defense. The court understood that the proffered testimony went directly to the issue of the truth and reasonableness of her percep-

Recognizing the distinction between medical classification of the cause and legal relevance of the effect avoids several problems. These range from unresolved debates about classification within the scientific community, to ensuring that the court and jury focus on the relevant issue.[217]

Finally, in *State v. Black*[218] the Law Court seemed to resolve any doubt about the effect of *Anaya*. In *Black* the trial court permitted testimony by a psychiatric nurse called by the prosecution. The nurse explained the "reason for timing and sequencing inconsistencies in [the child victim's] testimony."[219] The nurse also described certain indicators of abuse in a child which had been observed in the victim. The Law Court affirmed. "Such testimony may be helpful to the jury because it is not within a lay person's common knowledge that a person who suffers *some type of traumatic experience* may have difficulty relating that experience in a chronological, coherent and organized manner."[220]

In *Black*, however, the court apparently experienced some lingering discomfort, finding it necessary to limit the admissibility of such testimony to rebuttal evidence.

> We recognize, however, that expert testimony offered to explain inconsistent testimony or conduct of the victim can have the effect of bolstering that person's credibility. Such evidence can have a profound impact on the outcome of the trial, particularly, as in the present case, when the prosecution offers the evidence to establish its case in chief. Consequently, the prosecution may introduce expert testimony to assist the trier of fact in understanding an inconsistency in the victim's conduct or testimony only to rebut an ex-

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tions at the critical moment.

Whatever the court's initial thoughts, in State v. Conlogue, 474 A.2d 167, 173 (Me. 1984), it expressly recognized *Anaya* as requiring the admission of expert psychological testimony on the credibility of a witness.

217. For a more detailed discussion of cases considering the admission of evidence of the Battered Spouse Syndrome, see Comment, *The Admissibility of Expert Testimony on the Battered Woman Syndrome in Support of a Claim of Self-Defense*, 15 CONN. L. REV. 121 (1982-83). Battered Spouse Syndrome is not the only condition raising the question of admissibility of expert testimony. The recognition of Post Traumatic Stress Disorder [PTSD] also raises the issue. PTSD is in some respects the parent of the Battered Spouse Syndrome. An even more recent offspring of PTSD, the Battered Child Syndrome, is finding its way into the courts with growing frequency. *See, e.g.*, State v. Schimpf, 782 S.W.2d 186 (Tenn. Cr. App. 1989). Prosecutors are also offering expert testimony on the Rape Trauma Syndrome as corroboration of the victim's allegation. *See, e.g.*, People v. Bledsoe, 36 Cal.3d 236, 203 Cal. Rptr. 450, 681 P.2d 291 (1984) (inadmissible); State v. Marks, 231 Kan. 645, 647 P.2d 1292 (1982) (admissible); State v. Saldana, 324 N.W.2d 227 (Minn. 1982) (inadmissible); State v. Liddell, 685 P.2d 918 (Mont. 1984) (admissible).

218. 537 A.2d 1154 (Me. 1988).

219. *Id.* at 1156.

220. *Id.* at 1156-57. The trial court held other portions of the nurse's testimony inadmissible on the ground there was no showing of the requisite scientific validity.

> press or implied defense assertion that such inconsistency makes it improbable that either a crime was committed or that this defendant committed the crime.[221]

This passage suggests a law of evidence as Alice might have found it through the looking glass. It implies there is a danger in admitting the proffered expert testimony because it is highly probative. Evidence which is relevant is admitted precisely because, if believed, it will have an impact upon the outcome of the trial. The adversary system and the law of evidence are both intended to insure presentation of all highly probative information. The only apparent distinction drawn by the court between the relevancy of this evidence and that of evidence generally is the curious statement that such evidence "can have the effect of bolstering . . . credibility." The evidence is relevant only to credibility. It may help the jury assess the credibility of the key witness. This is its sole contribution to the pursuit of truth. Yet it seems the court wishes it could be assured the evidence would not accomplish the only purpose for which it was admitted. Curiouser and curiouser.

Why impose a special limitation on this type of evidence? Why make admissibility of such evidence dependent on the conduct of trial counsel?[222] Why not determine admissibility by looking to the issues presented by the evidence? If the child's testimony is arguably confused or inconsistent, the expert testimony is likely to help the jury. If it is not, the expert's testimony is superfluous. Who raised the issue is not important. The only questions of concern are whether the proffered testimony conveys information beyond what the jurors can be reasonably expected to know, and whether the testimony gives the jury the benefits of judgments by those having skills beyond those of the average citizen. Therefore, the only foundation necessary to establish the admissibility for such testimony is: (1) evidence that the subject witness had an experience;[223] (2) expert testimony that such an experience might affect the witness's ability to perceive, recall, or communicate matters within the scope of the witness's testimony; and, (3) a determination that the jurors may

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221. *Id.* at 1156.

222. Such a rule invites tactical game playing by both counsel. The type of evidence at issue presumes that a witness is incapable of giving internally consistent testimony as to timing and sequence. Thus, the inconsistencies are likely to appear during direct examination. Certainly the prosecution should be able to induce inconsistencies. The rule imposed in *Black*, however, prevents the state from presenting expert testimony explaining the inconsistencies until and unless the defense suggests the state's evidence is incredible.

223. The extraordinary circumstance need not have occurred during the testimonial event. An experience which pre-dates the subject of the testimony may affect any or all of the mental processes involved in testifying. Extraordinary experiences occurring after the testimonial event may affect memory or communication.

not be aware of such effects.[224]

4. *Should the Expert Testimony be Excluded Pursuant to Rule 403?*

Some consideration of the application of Rule 403 to expert testimony on credibility is appropriate.[225] All relevant evidence is presumptively admissible.[226] A Rule 403 objection only arises after the evidence has been found relevant and admissible under Rule 702. The limitations on expert testimony imposed by Rule 702 cover much of the ground included in Rule 403.[227] A ruling that expert testimony on credibility is admissible under Rule 702 presupposes that the court has determined there is evidence sufficient to support findings that: (1) the witness is an expert; (2) the testimony is based upon a correct application of valid scientific principles; and, (3) the evidence may help the jury assess the credibility of the subject witness.

The most common ground for invoking Rule 403 is exclusion of unfairly prejudicial evidence. It is difficult to imagine otherwise admissible expert testimony on credibility which is *unfairly* prejudicial.[228] The basis of the expert opinion is a different matter. Rule 403 may be invoked to exclude the basis of the opinion. *State v. Woodburn*[229] provides an example. On voir dire Dr. Sobchuk testified about sexual fantasies and lies the boy told him. The trial justice was concerned about Dr. Sobchuk's testimony concerning these incidents. "We deal first with the problem under Rule 404(b),[230] that evidence of other—and I omit crimes—but other wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith."[231] The trial justice con-

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224. *See, e.g.*, State v. Conlogue, 474 A.2d 167 (Me. 1984) (error to exclude testimony concerning studies of higher incidence of abuse by parents who were victims of abuse as children).

225. FED. R. EVID. 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." M.R. Evid. 403 is identical as is the version enacted by most states adopting a version of the Federal Rules of Evidence.

226. FED. R. EVID. 402.

227. The pertinent text of Rule 702 appears *supra* at text accompanying note 60.

228. See the discussion of State v. Chapple, 135 Ariz. 281, 660 P.2d 1208 (1983), *supra* text accompanying note 188.

229. 559 A.2d 343 (Me. 1989).

230. *See* M.R. Evid. 404(b), *supra* note 31. The first sentence is identical to the first sentence of the federal counterpart. The federal version contains a second sentence noting such evidence is not inadmissible when offered for other purposes. Maine omitted the second sentence as unnecessary. M.R. Evid. 404 adviser's note; R. FIELD & P. MURRAY, MAINE EVIDENCE 104-105 (2d ed. 1987).

231. Transcript, *supra* note 10, at 351.

cluded the evidence was not excludable under either Rule 404(b) or Rule 702.[232] The justice then said, "the trial judge has his usual discretion to exclude under Rule 403 opinions, the probative value of which is substantially outweighed by the danger of unfair prejudice or confusion or which would tend to be a waste of time."[233]

The court sustained the state's objection under Rule 403. A Rule 403 analysis weighing the probative value of the testimony as the *basis* for the opinion was appropriate. The court could limit or entirely exclude the testimony if it found the risk of unfair prejudice substantially outweighed its probative value.[234] Such a finding does not, however, justify excluding the opinion itself. The basis of an expert's opinion is admissible because it is relevant to the credibility of that opinion. Rule 705 permits experts to testify without prior disclosure of the basis for their opinions or inferences.[235] The court may exclude the basis of the expert's conclusion from evidence under Rule 403. Such a ruling does not affect the scientific validity of the opinion.[236] If the opinion is admissible under Rule 702, and not excludable under Rule 403 in its own right, it is admissible. The reverse is not always true. If the opinion is excluded under Rule 403, its basis is no longer admissible under Rule 703. The basis of an excluded opinion is admissible only if it is independently relevant and admissible in its own right.[237]

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232. *Id.* The trial justice's conclusion that the evidence was admissible under Rule 404(b) was correct. The defendant did not offer Dr. Sobchuk's testimony as evidence of the boy's character. It was offered as part of the basis underlying the doctor's diagnosis and explanation of the effects on the boy. The majority of the Law Court reached the opposite and incorrect opinion.

233. Transcript, *supra* note 10, at 352.

234. The trial justice apparently felt Rule 404(b) suggested the "unfairness" of the prejudicial impact. After the court ruled, defense counsel asked what testimony the court was excluding. The trial justice responded: "As long as it does not pertain to specific acts so that we get right back into the Rule 404 problem again." *Id.*

235. The substance of the Maine and federal rules are identical on this point. Both permit inquiry into the underlying facts and data on cross-examination. Under both rules, the court may require disclosure of the basis before the opinion. The Maine rule contains a second subsection specifying the procedure for objection and voir dire by the opponent before the expert states her opinions to the jury.

236. It will, of course, ultimately affect the jury's assessment of the weight to be given the expert's testimony. Justice Hornby reached the same result by a different route in his dissent in *Woodburn*: "The specific incidents on which the opinion was based would be admissible only on cross-examination." State v. Woodburn, 559 A.2d 343, 349 n.7 (Me. 1989) (citing M.R. Evid. 608(b), Evidence Of Character And Conduct Of Witness; Specific Instances of Conduct.). M.R. Evid. 608(b) is identical to its federal counterpart. Justice Hornby's analysis is consistent with a determination that Dr. Sobchuk's testimony is character evidence. However, Dr. Sobchuk's testimony was not character evidence.

237. The trial court in *Woodburn* reached this result as to some items of the basis underlying Dr. Sobchuk's diagnosis. The trial justice said he would permit Dr. Sobchuk to testify concerning any statements the boy made which were inconsistent with his testimony at trial. Transcript, *supra* note 10, at 357. Defense counsel wished

Rule 403 also permits exclusion of evidence when necessary to avoid an extraordinary danger of misleading the jury or creating confusion over the issues. Ordinarily the risk that jurors will misunderstand the purpose of an expert's testimony offered on credibility is minimal. In *State v. Anaya*[238] the defense offered expert testimony on the effects of the battered spouse syndrome. The trial justice excluded the evidence, in part because he felt it was more likely to confuse the jury than help it.[239] The Law Court found the exclusion was an abuse of the trial court's discretion. The credibility of the subject witness was the central issue in the case. The Law Court properly suggested that the probative value of testimony on this issue cannot be *substantially outweighed* by the risk that it will lead to confusion.[240] There are several reasons compelling this conclusion.

Pragmatically, the "helpfulness" analysis under Rule 702 effectively predetermines the issue. It is unlikely the trial judge will conclude that the testimony will help the jury resolve a material issue, and then decide the jurors will not be able to understand the evidence or its purpose. Furthermore, exclusion on this ground risks underestimation of the jurors' collective ability to understand the evidence. Finally, even if the jury proves incapable of understanding the evidence, it is unlikely that their difficulty will affect the verdict. Jurors are likely to ignore testimony they do not understand, especially if it is counterintuitive.[241]

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to elicit testimony concerning "other problems" the boy discussed with Dr. Sobchuk, offering this testimony as evidence of the boy's trust in and candor with Dr. Sobchuk. Counsel argued this evidence tended to make it more probable the boy would have mentioned any abuse by his father. The trial justice stated, "I am going to accept that line of questioning as a form of attacking the credibility . . . of the witness. Now if you wish to argue further and snatch defeat from the mouth of victory, just keep talking." Transcript, *supra* note 10, at 358.

238. 438 A.2d at 892. The facts and holdings in *Anaya* are discussed *supra* notes 210-17 and accompanying text.

239. *Id.* at 893. Whether the trial court was concerned with the jury's ability to understand the testimony or with possible misapplication is not clear.

240. *Id.* at 894.

241. Courts occasionally leap past Rule 702 to exclude evidence under Rule 403. *See, e.g.*, State v. Russell, 571 A.2d 229 (Me. 1990). The defense offered generalized testimony about the effects of interview techniques commonly used by social workers and police when interviewing suspected victims of child abuse. The trial court excluded the testimony. The Law Court affirmed, finding no evidence of the techniques actually used to interview the child. *Id.* at 230. Absent such evidence the proffered testimony could not help the jury assess the child's credibility. The expert's testimony should be excluded because it failed to meet the requirements of Rule 702. The trial justice, however, excluded the evidence based on Rule 403 because the testimony "would entirely change the focus of the trial from what happened in this case to the way in which the investigation was carried out." *Id.* The Law Court agreed: "His testimony, if admitted, would have created a trial within the trial." *Id.* at 231. Both statements imply the testimony would confuse, distract, and mislead the jury. These observations are only true in the sense that credibility of contested evidence on a key issue always creates a "trial within a trial." The credibility of the victim was the issue

Rule 403 considerations of judicial economy[242] are also duplicative of the helpfulness analysis required by Rule 702. The advisory committee's note to Rule 702 suggests that *helpful* expert testimony is never a waste of time. "When [expert] opinions are excluded, it is because they are unhelpful and therefore superfluous and a waste of time."[243] Generally, helpful expert testimony on credibility should not be excluded under the judicial economy mandate of Rule 403. Rule 403 does, however, suggest an additional basis for finding such testimony a "waste of time": Where the probative value of the subject witness's testimony is so slight that it will not justify the time required to present the expert testimony.

B. The Persistence of Myth, Judicial Anxiety Closets, and Related Matters

In the preceding section, the requirements for admission of expert testimony on credibility, and the grounds for excluding such evidence under Rule 403, were considered. Courts have continued to exclude such evidence on other grounds. The most frequent grounds for exclusion are: (1) the expert's testimony invades the province of the jury; (2) a fear that jurors will abdicate their duties as finders of fact; (3) the need to avoid unfair surprise; and (4) avoiding a battle of the experts. None of these grounds is a valid basis for excluding expert evidence under the Rules of Evidence. These mythical four horsemen of exclusion will be discussed in this section. Finally, the Law Court's conclusion in *State v. Woodburn*[244] that Dr. Sobchuk's testimony was impermissible character evidence will be considered.

1. Invading the Province of the Jury

This ground for exclusion is simply a legal fantasy. The "province of the jury" is a mythical land. Like Camelot, Brigadoon, and Garrison Keillor's Lake Woebegone, the Province of the Jury cannot be found on any map. Its undefined borders are free to expand and contract to meet the needs of its appointed defenders. "The mist the gods drew about them on the battlefield before Troy was no more dense than the one enshrouding the origins of the rule."[245]

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in the case. Certainly the court approved exploration and argument of the same issue by more traditional means. *Id.* at 231 n.1.

242. "Relevant evidence may be excluded by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403.

243. FED. R. EVID. 702 advisory committee's note (quoting 7 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1918 (rev. ed. 1979)).

244. 559 A.2d 343 (Me. 1989).

245. Stoebuck, *Opinions on Ultimate Facts: Status Trends and A Note of Caution*, 41 DEN. L. CTR. J. 226 (1964). Professor Stoebuck's research found the earliest application of the rule to be in Davis v. Fuller, 12 Vt. 178 (1840). *Davis* was followed by decisions in 1856, 1863, and 1874 from Louisiana, New York, and Iowa respectively. Marcy v. Sun Mut. Ins. Co., 11 La. Ann. 748, 749 (1856); Perese & Brooks

Whatever its origin, the "province of the jury" rule was adopted in every jurisdiction save New Hampshire.[246] Notwithstanding its almost universal adoption it appears no one ever bothered to define the phrase.[247] Defined or not, for almost a century the term has been offered as justification for excluding evidence. The simple fact, however, is that only the judge can invade the province of the jury by taking the case out of the jury's hands. The admission of evidence cannot impinge on the jury's decision-making power.

> This [argument] is untenable because the witness is not attempting to invade the province of the court or jury but merely to put before them a piece of evidence. Moreover, he could not invade their province if he desired. The court will declare the law and the jury cannot be compelled to accept the witness' testimony on any proposition.[248]

As the twentieth century progressed, the myth was under attack. Dean Wigmore characterized the rule as "empty rhetoric."[249] Although Dean Wigmore's considerable influence was not enough to cause abandonment of the rule, his criticism did encourage adoption of a new label. References to "the ultimate issue" began to replace "province of the jury" in commentaries and opinions.[250] There was progress on more substantive grounds as a number of courts abandoned the rule.[251]

Paper Works v. Willett, 24 N.Y. Super. Ct. (1 Rob.) 131 (1863); Muldowney v. Illinois Cent. Ry., 39 Iowa 615, 622 (1874). These early cases simply enunciated the rule without citation or discussion, implying the rule was already accepted as a legal commonplace. Stoebuck, *supra*, at 227.

246. *Id.* at 228.

247. The editors of WORDS AND PHRASES list no cases defining "the province of the jury." Similarly the editors of BLACK'S LAW DICTIONARY (5th ed. 1979) included no entry for "province of the jury" or "invading the province of the jury." There is one entry under "invades the province of the jury." 22A WORDS AND PHRASES (Supp. 1990-91). In 1961 Justice McNeill, writing for the Texas Court of Civil Appeals, was faced with trying to determine the meaning of an objection:

> An objection to evidence should be so clear and specific that the Judge may immediately understand the point raised. An objection using an expression which may mean one or more of several specific complaints is usually too general . . . . So we think was the effect of the objection that the witness's testimony would "invade the province of the jury."

Hooten v. Dunbar, 347 S.W.2d 775, 778 (Tex. Civ. App. 1961) (citing Moore v. Knemeyer, 271 S.W. 653 (Tex. Civ. App. 1928)). Judge McNeill noted the phrase was often used to indicate the evidence going directly to the "point the jury is to decide." *Id.* Apparently, this is as close as an American court has ever come to defining the term.

248. C. MCCORMICK & R. RAY, TEXAS LAW OF EVIDENCE § 627, at 787 (1937). *See also* J. WIGMORE, A STUDENTS' TEXTBOOK OF THE LAW OF EVIDENCE § 127(b)(1) (1935).

249. 7 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1920 (rev. ed. 1979).

250. Dean Wigmore is credited with suggesting the phrase "usurping the function of the jury," which also began to replace "invading the province of the jury." 3 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 394, at 689 (1979).

251. By 1964, Professor Stoebuck's research indicated that the ban on opinion

Adoption of Rule 704 was intended to toll the death knell of the rule.[252] As is often the case, however, it is easier to enact rules than change articles of judicial faith.[253]

Woodburn provides an example of the concept's persistence. The trial justice excluded Dr. Sobchuk's testimony because it "borders so closely upon the testimony on the ultimate issue as to the credibility of [the boy]. . . ." The trial justice acknowledged the mandate of Rule 704, but felt "it is discretionary with the trial judge as to whether or not opinion on the ultimate issue will be allowed."[254] There is nothing in the text of the rule or the adviser's notes to suggest the rule vests the trial court with such discretion.[255] The Law Court's opinion in *Woodburn* does not directly hold this finding in error. The majority simply noted: "If otherwise admissible, M.R. Evid. 704 provides for the admissibility of testimony in the form of an opinion on an ultimate issue to be decided by the jury. . . ."[256] The court went on, however, to find "Sobchuk's testimony demon-

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testimony relating to the ultimate fact had been abandoned entirely by four, and probably five, states as well as by the Fourth Circuit. Stoebuck, *supra* note 245, at 227-28. The First Circuit had also said, in *dicta*, it would abandon the rule. The United States Supreme Court, two other circuits, and ten states had acknowledged an exception permitting expert testimony on an ultimate fact. This is an "exception [which] nearly eats up the rule." *Id.* at 230-31. Another two circuits and twelve states had adopted the same exception, but limited its application to cases where the jury was "not qualified" to form the opinion. Finally, eight other states (including Maine) and the Seventh Circuit had relaxed the prohibition on such testimony in one fashion or another. *Id.* at 227-36. *See* United States v. Wainwright, 413 F.2d 796 (10th Cir. 1969) as an example of a court which avoided use of the phrase, but applied the rule.

252. FED. R. EVID. 704 advisory committee's note (citing 7 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1920 (rev. ed. 1979)).

> The basic approach to opinions, lay and expert, in these rules is to admit them when helpful to the trier of fact. In order to render this approach fully effective and to allay any doubt on the subject, the so-called "ultimate issue" rule is specifically abolished by the instant rule.
>
> The older cases often contained strictures against allowing witnesses to express opinions upon ultimate issues . . . . The basis usually assigned for the rule [is] to prevent the witness from "usurping the province of the jury". . . .

Id.

253. The 1990 supplement to Annotation, *Necessity and Admissibility of Expert Testimony as to Credibility of Witness*, 20 A.L.R.3d 684 (1968), lists 35 cases from 18 states and the Second, Eighth, and Ninth Circuits as "supporting exclusion of expert testimony on credibility as an invasion of the jury's province." *Id.* § 13 (Supp. 1990). The listed cases were decided between 1982 and 1989 and include State v. Kim, 64 Hawaii 598, 645 P.2d 1330 (1982). In the author's judgment, this case cannot be construed as supporting a ban on "invasions of the jury's province." *See also* State v. Schimpf, 782 S.W.2d 186 (Tenn. Cr. App. 1989). For a typical case adhering to the anti-invasion rule notwithstanding adoption of evidentiary rules paralleling the Federal Rules of Evidence, see State v. Saldana, 324 N.W.2d 227 (Minn. 1982).

254. Transcript, *supra* note 10, at 351.

255. The Maine and federal versions of Rule 704 are identical in this regard.

256. State v. Woodburn, 559 A.2d 343, 345 (Me. 1989).

strates no scientifically accepted basis for determining that the child was unable to distinguish truth from falsehood. . . . Thus, the trial court could properly determine that the testimony did not meet the requirements of M.R. Evid. 702, *and, therefore, was inadmissible under* M.R. Evid. 704."[257] The court suggests that Rule 704 is a basis for exclusion of evidence. It is not.

Rule 704 is clear. "[T]he worry about invading the province of the jury has been solved for us by the provisions of Rule 704 . . . which permits opinion testimony even though it 'embraces an ultimate issue.' "[258] Rule 704 is a rule of inclusion, not exclusion. The court may not exclude opinion evidence because it is probative of credibility. There is no special category for evidence which invades the province of the jury, usurps the function of the jury, or embraces an ultimate issue. It is to be treated the same as any other evidence.[259] "[A]n expert's opinion does not invade the province of the jury. It is merely offered as any other evidence, with the expert subject to cross-examination and the jury left to determine its weight."[260]

2. *Impressionability of the Jury*

This ground for excluding expert opinions on credibility is simply concern about "invading the province of the jury" viewed through the other end of the telescope. The focus is simply shifted from a perceived mandate to defend the jury, to anxiety over the consequences of failing to protect the jury. Like most fears, it is best to approach this anxiety indirectly. For instance, appraisers testify every day, giving opinions on the value of real estate, art, jewelry, and other items of personal property. Actuaries predict life expectancies. Economists predict a lifetime's earnings. There is little judicial concern that jurors will abdicate their responsibilities to the appraisers, actuaries, and economists.[261] Why assume the result would be any different as to opinions on factors affecting credibility?

Research by the behavioral scientists suggests the fear that juries

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257. *Id.* at 346 (emphasis added).

258. State v. Chapple, 135 Ariz. 281, 292, 660 P.2d 1208, 1219 (1983).

259. The amendment adding paragraph (b) to FED. R. EVID. 704 does create a limited exception excluding such evidence. The very existence of the amendment argues that the rules contemplate that expert testimony on credibility be treated no differently than expert testimony on any other issue.

260. State v. Marks, 231 Kan. 645, 654, 647 P.2d 1292, 1299 (1982). *Compare* State v. Saldana, 324 N.W.2d 227 (Minn. 1982).

261. Nor is any tendency towards wholesale abdication of decision-making by jurors apparent in such cases. Jurors tend to listen attentively to the experts. Ultimately they retire to make their own decision. In the author's experience the majority of juries return verdicts reflecting some value between those set by the competing expert witnesses. Tax Court judges have the same reaction. Pies & Fischer, *Special Report: Why Not Court Appointed Experts?*, 40 TAX NOTES 303 (July 18, 1988).

will abdicate their responsibility is illusory.[262] Experience also suggests the fear of jury abdication to the expert is more illusory than real. First, jurors are sentient beings having a normal allotment of human ego. While they may serve reluctantly, few fail to take their duty seriously. Fewer still are willing to abdicate their decision-making authority to mere witnesses, expert or not. Second, our adversary process virtually insures the jury will be made aware of any doubt concerning the validity of the expert's testimony. If other experts might reach a different conclusion, the opponent may provide the jury the benefit of an opposing view. Third, verdicts are the result of a group decision. One juror might be tempted to blindly follow the suggestions of the forensic expert. It is unlikely, however, that all, or even a majority, of the other jurors will do so. The residual risk, if any, of wholesale abdication is of the type normally handled through proper instruction of the jury by the trial court.[263]

A Massachusetts jury provides an example. The jurors refused to accept uncontroverted scientific proof of a defendant's innocence even when presented by an agent of the Federal Bureau of Investigation. The victim was raped by a stranger and identified the defendant as the man who assaulted her. Two blood tests and DNA typing performed by the F.B.I. proved the defendant could not have been the rapist. The jury returned a verdict of guilty.

> The verdict . . . stunned even the prosecutor . . . who acknowledged that he had "fully anticipated a not guilty" ruling based on the DNA profile.
>
> The DNA results prompted prosecutors to offer Hammond a deal. . . . [The defendant's attorney] said Hammond refused the deal because he figured he had nothing to fear at trial.
>
> "He was innocent," [defendant's lawyer] said. "He thought the truth would set him free."[264]

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262. *See* Cutler, Dexter, & Penrod, *Expert Testimony and Jury Decision Making: An Empirical Analysis*, 7 BEHAV. SCI. & L. 215 (1989) (Jurors not exposed to expert testimony on the subject were insensitive to factors affecting the accuracy of eyewitness identification. The addition of appropriate expert testimony improved juror sensitivity to the issue. Significantly, however, the expert testimony created no increase in juror skepticism about the accuracy of eyewitness testimony.). *See* Wells, Lindsay, & Tousignant, *Effects of Expert Psychological Advice on Human Performance in Judging the Validity of Eye Witness Testimony*, 4 LAW & HUM. BEHAV. 275 (1980). *See also* Lindsay, Lim, Marando & Cully, *supra* note 184.

263. *See* United States v. Hiss, 88 F. Supp. 559 (S.D.N.Y. 1950).

264. Holher, *Jury Finds Guilt in Rape Case Despite DNA Test*, Boston Sun. Globe, April 8, 1990, at 65, col. 3. The final outcome of other cases discussed in this article also supports the conclusion that juries will often disregard the expert. The defendants were convicted on retrial after remand requiring the admission of expert testimony on credibility in United States v. Alexander, 816 F.2d 164 (5th Cir. 1987), *appeal after remand* 869 F.2d 808 (5th Cir. 1989), *reh'g denied* 874 F.2d 812 (5th Cir. 1989), *cert. denied* 110 S. Ct. 1110 (1990), discussed *supra* notes 118-27 and accompanying text; State v. Chapple, 135 Ariz. 281, 660 P.2d 1208 (1983), discussed *supra* notes 188-97 and accompanying text; State v. Anaya, 438 A.2d 892 (Me. 1981), *appeal*

Since the adoption of the Rules of Evidence, usurpation arguments are often raised under Rule 403. The argument, however, remains without merit:

> The State argues that there would have been little probative value to the witness' testimony [concerning the effect of extreme stress on the ability to later identify persons involved] and a great danger of unfair prejudice. The latter problem is claimed to arise from the fact that [Dr.] Loftus' qualifications were so impressive that the jury might have given improper weight to her testimony. We do not believe that this raises the issue of *unfair* prejudice.[265]

3. *Avoiding Unfair Surprise*

The third mythical horseman of exclusion rides upon the trial lawyer's fear of ambush. Modern discovery rules have, however, effectively eliminated ambush by experts from the competent lawyer's litany of real worries. The Federal Civil and Criminal Rules of Procedure both provide effective discovery tools designed to insure that no party need come to court unprepared to meet the testimony of his opponent's expert.[266]

4. *Avoiding a "Battle of the Experts"*

This is perhaps the most mysterious of the grounds for exclusion. Our system of jurisprudence is dedicated to the proposition that truth is best discovered through an adversarial presentation of evidence. Opinion testimony by expert witnesses is an accepted part of the common law trial. Indeed, in most professional negligence cases, expert testimony is essential to the claim.[267]

Furthermore, it is passingly strange to find a sudden desire to avoid an adversarial presentation of testimony whether lay or expert about credibility or any other subject. Nevertheless, this argument was advanced as the rationale supporting the 1984 amendment to Rule 704 excluding expert testimony on whether or not a criminal defendant had the requisite mental state. "The purpose of this amendment is to eliminate the confusing spectacle of competing expert witnesses testifying to directly contradictory conclusions as to the ultimate legal issue to be found by the trier of fact."[268]

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after remand 456 A.2d 1255 (Me. 1983), discussed *supra* notes 210-17 and accompanying text.

265. State v. Chapple, 135 Ariz. at 292, 660 P.2d at 1219.

266. FED. R. CIV. P. 26; FED. R. CRIM. P. 16.

267. *E.g.*, Fitzgerald v. Manning, 679 F.2d 341 (4th Cir. 1982); Waatti v. Marquette General Hospital, Inc., 329 N.W.2d 526 (Mich. App. 1983); Marshall v. Tomaselli, 372 A.2d 1280 (R.I. 1977); Parker v. Vanderbilt Univ., 767 S.W.2d 412 (Tenn. App. 1988).

268. Insanity Defense Reform Act of 1984, S. REP. No. 225, 98th Cong., 1st Sess. 230-31 (1983), *reprinted in* 3 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE 704-1

Why the sudden aversion to the adversary system? Whatever the reason, the logic of the argument does not bear close examination. Every jury is confronted with the spectacle of contradictory evidence or interpretations of evidence. Such a spectacle may be confusing, but it is also the sole reason jurors are summoned to court. Nor does the amendment eliminate contradictory testimony by experts. If the experts hold contradictory opinions, one would assume they have reached different diagnoses or, at least, hold contradictory opinions on "the characteristics of [the] disease or defect."[269]

Whatever the wisdom of Fed. R. Evid. 704(b), it adds to our inquiry. The amendment was necessary to exclude expert testimony on this "ultimate legal issue."[270] It was necessary because, seemly or not, the Rules of Evidence offer no other basis for avoiding the battle of experts on this or any other relevant issue which is a proper subject for expert testimony.

5. *Is the Testimony Impermissible Character Evidence?*

This Article began with the trial of Mr. Woodburn. It is appropriate to conclude by returning to consider the decision of his appeal. The Law Court affirmed his conviction. The court ultimately did not base its decision on any of the grounds discussed so far, holding instead that Dr. Sobchuk's testimony was impermissible character evidence.[271]

Justice Hornby believed the result was "fundamentally unfair,"[272] but was forced to conclude: "Dr. Sobchuk's testimony is inadmissible under the Maine Rules of Evidence [because] the Rules simply

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(1990), amending FED. R. EVID. 704. "Legal issue" as used here should not be confused with an "issue of law." No amendment was necessary to preclude psychologists and psychiatrists from rendering opinions on issues of law. Psychiatrists and psychologists are not competent to render legal opinions. Nor is the jury asked to decide the defendant's mental state as a legal issue. The court provides the jury with the legal definition of the requisite mental state in terms the jurors can understand and apply to the facts. The issue is put to the jury not as a question of law, but as a question of fact. Rule 704, as originally enacted, did not permit psychologists or psychiatrists to tell the jury what the law held to be the requisite mental state. The original rule did permit the expert to explain her findings in terms of the legal criteria provided to the jury. This does not require legal expertise. It is precisely what we ask the lay jury to do. *See, e.g.*, State v. Chapple, 135 Ariz. 281, 660 P.2d 1208 (1983); State v. Willoughby, 507 A.2d 1060, 1064 (Me. 1986); State v. Flick, 425 A.2d 167, 170-71 (Me. 1981). In any event, it is this aspect of the doctor's testimony which the language of FED. R. EVID. 704(b) excludes.

269. "Under this proposal, expert psychiatric testimony would be limited to presenting and explaining [the] diagnoses, such as whether the defendant had a severe mental disease or defect and what the characteristics of such a disease or defect, if any, may have been." S. REP. No. 225, *supra* note 268.

270. *Id.*

271. State v. Woodburn, 559 A.2d 343 (Me. 1989).

272. *Id.* at 349 (Hornby, J., dissenting).

do not permit opinion testimony on credibility."[273]

The Maine rules permit proof of a person's character *only* by evidence of reputation. They do not follow the federal example of also permitting opinion testimony as evidence of character.[274] Maine's decision to exclude opinion testimony as evidence of *character*, however, does not justify the conclusion that its Rules of Evidence "do not permit opinion testimony on *credibility*."[275]

The common law in the United States permitted proof of character for truthfulness by evidence of reputation from an early date.[276] Before adoption of the Federal Rules of Evidence many jurisdictions expanded the common law rule to permit opinion testimony as evidence of a witness's character.[277] The Federal Rules of Evidence incorporated this expansion of the common law rule. The drafters of the Maine rule, however, chose not to follow the federal example of permitting opinion testimony on character.

> There is some justification for [the federal approach of allowing opinion testimony], since the jury is likely to think that a witness who says that the defendant's reputation is good is in fact vouching for him. There is, however, the risk that wholesale allowance of opinion testimony would tend to turn a trial into a swearing contest between conflicting character witnesses.[278]

This reasoning parallels that offered to justify the exclusion of expert testimony on credibility in order to avoid a "battle of experts." Justice Hornby suggested it was time to reassess Maine's decision to exclude opinion testimony on character. The federal experience and

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273. *Id.* at 347.

274. M.R. Evid. 608(a) provides in part: "The credibility of a witness may be attacked or supported by evidence of reputation . . . ." The corresponding portion of FED. R. EVID. 608 states: "The credibility of a witness may be attacked or supported by evidence in the form of *opinion* or reputation . . . ." (emphasis added). The Maine and federal versions of Rule 405, Methods of Proving Character, reflect the same difference.

This is not a parochial issue. Maine is not alone in confining proof of character to reputation evidence. The issue is also of interest to those jurisdictions permitting opinion evidence of character. If the Law Court's analysis is correct, lay opinion testimony about credibility is potentially admissible in those jurisdictions following the federal lead. The psychologist's and psychiatrist's medical expertise is no longer material, nor is the validity of the theory underlying their opinion because Rule 702 is no longer applicable. Lay opinion testimony is controlled by Rule 701, which requires that the opinion be "rationally based on the perception of the witness" and be helpful to the jury.

275. State v. Woodburn, 559 A.2d at 347 (Hornby, J., dissenting) (emphasis added).

276. 7 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1985 (rev. ed. 1979).

277. *Id.* The courts in England tunnelled from the opposite side of the mountain, permitting proof of character by opinion evidence from an early date. Permitting reputation evidence was a later innovation. *Id.* at §§ 1980-82.

278. M.R. Evid. 405 advisers' note, *reprinted in* R. FIELD & P. MURRAY, MAINE EVIDENCE 114 (2d ed. 1987).

that of states adopting the same course suggested the concerns of Maine's drafters were largely groundless.[279]

The Inhabitants of Phillips v. The Inhabitants of Kingfield,[280] decided in 1841, was cited as the source of Maine's decision to exclude opinion evidence as proof of character.[281] The facts underlying the case have a thoroughly modern ring:

> It appeared that [Mr.] Wood was much absent from his wife and family, and that in the year 1820 . . . he being absent, laboring from home, a small amount of supplies was furnished by the overseers of the poor of the town of Kingfield, where she then was found in destitute circumstances.[282]

The town sought to recover the cost of the supplies provided to Mrs. Wood. The sole factual issue was the location of Mr. Wood's residence at the relevant time. The plaintiff called Mr. Wood as a witness. A defense witness believed Mr. Wood was untrustworthy. On appeal the Law Court held the defense witness's testimony to be inadmissible. What tends to be overlooked, however, is that the court rejected only *lay* opinions.

> The rule, as stated by Swift, is more satisfactory and less liable to abuse in practice. He says the only proper questions to be asked are, whether he knows the general character of the witness in point of truth among his neighbors, and what that character is, whether good or bad. And states, that his testimony must be founded on the common repute as to truth, and not as to honesty.
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> One acquires a character for truth or the reverse . . . . And it is this trait of character as a fact, that should be placed before a jury for their consideration in weighing the testimony. *The opinions of a witness are not legal testimony except in special cases; such, for example, as experts in some profession or art* . . . . In other cases, the witness is not to substitute his opinion for that of the jury; nor are they to rely upon any such opinion instead of exercising their own judgment, taking into consideration the whole testimony.[283]

Phillips v. Kingfield held that lay witnesses are incompetent to give their opinion of a person's character. The case is an early example of what Dean Wigmore described as the "historical blunder" of the lay opinion rule.[284] Lay opinions were inadmissible. Lay persons were only competent to testify as to the *fact* of a person's reputa-

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279. State v. Woodburn, 559 A.2d at 347 (Hornby, J., dissenting).

280. 19 Me. 375 (1841).

281. The Maine advisers' note to M.R. Evid. 608(a) does not cite *Phillips*. The Note does, however, parallel the reasoning of *Phillips*.

282. Phillips v. Kingfield, 19 Me. at 376.

283. *Id.* at 378-79 (emphasis added) (citing SWIFT'S Ev. 143).

284. J. WIGMORE, A STUDENTS' TEXTBOOK OF THE LAW OF EVIDENCE § 127 (1935). *See also* 7 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1986 (rev. ed. 1979), citing *Phillips* as an example of an "opinion rule" case relied upon to justify exclusion of lay opinions on a witness's character for truthfulness.

tion. Opinion testimony was limited to the expert witness.[285]

State v. Woodburn was not the first time the Maine court had cause to consider the admissibility of expert testimony on "character traits." The issue arose in *State v. Arnold*.[286]

In *Arnold*, the Law Court affirmed the exclusion of psychological testimony about the defendant's *character* for truthfulness and peacefulness. The defendant admitted that the proffered testimony was character evidence. He argued that Maine Rule of Evidence 405(a) merely permitted reputation evidence, but did not preclude other methods of proof.[287] The Law Court rejected this interpretation, holding that evidence of reputation was the sole means of proving character. No other type of evidence would be admitted as proof of a person's character.[288] Maine's refusal to include opinion testimony in its version of Rule 405(a) reflected

> a generalized determination by the Supreme Judicial Court that, at least at present, a purported expert psychological evaluation of any human being's character or character traits is not sufficiently reliable to be relevant. So read, Rule 405(a) precludes the possibility that a particular trial judge, purporting to act in accordance with our analysis in *State v. Williams*, might find such expert testimony "sufficiently reliable to be held relevant."[289]

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285. Reputation evidence is, of course, nothing more than an anthology of lay opinions gratuitously published by one's neighbors. The court's preference for reputation evidence is based on an interesting premise.

> The observations of Justices Gibson and Duncan, in the case of Kimmel v. Kimmel, 3 S. & R. 336, are just and appropriate. Mr. Justice Gibson says: "there is danger from the proneness so often observable in witnesses, to substitute their own opinion for that of *the public, whose judgement cannot be so readily warped by prejudice or feeling as that of the individual* . . . ."

Phillips v. Kingfield, 19 Me. at 379-80 (emphasis added). Whether individuals are more prone to "prejudice or feeling" than the public is open to debate. *See also* Professor Münsterberg's account of his experience with the public and press of Chicago, *supra* note 48.

286. 421 A.2d 932 (Me. 1980).

287. *Id.* at 937.

288. *Id.*

289. *Id.* at 938 n.5 (quoting State v. Williams, 388 A.2d 500 (Me. 1978)). The footnote suggests a final judgment on the behavioral sciences. It is unclear upon what evidence the court concluded the behavioral sciences not only lacked "sufficient reliability," but was certain that they were unlikely to achieve it in the foreseeable future. Furthermore, the codification of this conclusion will make it difficult to bring the issue before the Law Court for reconsideration. If trial courts are precluded from considering the issue, the parties will be precluded from offering any evidence demonstrating that the psychological findings have advanced to the point that they are now "sufficiently reliable." There is a certain irony in the court's citation to its earlier decision in *Williams*. In *Williams* the Maine court rejected the *Frye* test of general acceptance within the pertinent field as the sole basis for determining validity of a scientific theory. *Williams* has been widely praised as reflecting a needed openness to new scientific information which may enhance the courts' pursuit of truth. The *Frye*

In *Woodburn*, Justice Hornby interpreted *Arnold* as banning all opinion evidence offered on *credibility*.[290] This conclusion is not supported by the holding in *Arnold*, nor is it required by the Rules of Evidence.

Woodburn stands in sharp contrast to the decision of Judge Goddard thirty years earlier in the second perjury trial of Alger Hiss.[291] The government accused Mr. Hiss of lying to a grand jury inquiring into charges he passed classified documents to Whittaker Chambers. The government's case hinged primarily upon the testimony of Mr. Chambers. During the second trial the defense wished to call a psychiatrist who was prepared to testify that Mr. Chambers was a sociopath. The government objected, presenting Judge Goddard with a novel issue in the midst of a highly publicized case.

> Since the use of psychiatric testimony to impeach the credibility of a witness is a comparatively modern innovation, there appears [sic] to be no federal cases dealing with this precise question. However, the importance of insanity on the question of credibility of witnesses is often stressed. There are some State cases in which such testimony has been held to be admissible . . . .
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> Expert testimony of this character was excluded in *State v. Driver. The Court's reasoning seemed to be based upon the theory that the witness was to be regarded as a character witness who could only testify as to reputation and not as to his personal opinion. The Court indicated that it would not allow him to be qualified as an expert. This was in 1921—before the value of psychiatry had been recognized.*
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> . . . .
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> . . . [E]vidence concerning the credibility of the witness is undoubtedly relevant and material and under the circumstances in this case, and in view of the foundation which has been laid, I think should be received.[292]

There is no gainsaying the fact the Maine court has established a conclusive presumption that science has no "sufficiently reliable" means of establishing an individual's character.[293] This does not, however, mandate the result in *Woodburn*.[294] The question remains, what is "character."[295]

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and *Williams* cases are discussed *supra* notes 69-83 and accompanying text.

290. State v. Woodburn, 559 A.2d at 347 (Hornby, J., dissenting).

291. United States v. Hiss, 88 F. Supp. 559 (S.D.N.Y. 1950).

292. *Id.* at 559-60 (citing State v. Driver, 88 W. Va. 479, 107 S.E. 189 (1921)).

293. State v. Arnold, 421 A.2d 932 (Me. 1980).

294. State v. Woodburn, 559 A.2d 343 (Me. 1989).

295. This issue also arises in jurisdictions permitting opinion testimony on a witness's character for truthfulness. In State v. Kim, 645 P.2d 1330, 1339 n.14 (Haw. 1982), the court found no distinction between character evidence and an expert's opinion that a witness's statements were true. *Kim* holds such testimony is character evidence under Rule 608(a) only to the extent the expert expresses an opinion on whether a specific statement by a witness is true. Opinions about possible or actual

"Character" has many definitions in the English language. When used to describe an individual, it is defined as "[t]he combined moral or ethical structure of a person or group, . . . [m]oral or ethical strength; integrity; fortitude . . . ."[296] Courts have rendered similar definitions of "character." " 'Character' is a generalized description of one's disposition in respect to a general trait such as honesty, temperance, or carefulness . . . ."[297] "Character" has also been described as "the complex of accustomed mental and moral characteristics and habitual ethical traits marking a person."[298] Dean Wigmore commented: "Thus, in discrediting an assertion, we may appeal . . . not only to defects in specified qualities whose minimum existence is required for admitting the assertion, but also to the qualities of *moral character* . . . ."[299]

"Character," as used in Rule 608, describes the moral or ethical principles a person appears to follow in the conduct of his or her life. There is a distinction between a person's adherence to ethical or moral values, and the scientific study of factors affecting human perception, memory, and communication. The distinction is equally clear when juxtaposed to the diagnosis and effects of mental or emotional disease.[300]

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errors in perception, memory, or communication are not considered evidence of character. *Id.* at 1338.

Six years after its decision in *Kim* the Hawaii Supreme Court decided State v. Castro, 756 P.2d 1033 (Haw. 1988). In *Castro* the court analyzed the relationship between evidence of prior bad acts and evidence of a defendant's character. It ruled on the admissibility of expert testimony on credibility without mentioning any relationship to character evidence under Rule 608.

296. The American Heritage Dictionary (2d coll. ed. 1982).

297. Frase v. Henry, 444 F.2d 1228, 1232 (10th Cir. 1971).

Character has also become a legal word of art in many jurisdictions. A large number of courts have long considered "character" and "reputation" synonymous as used within the law of evidence. *See, e.g.*, Knode v. Williamson, 84 U.S. (17 Wall.) 586, 588 (1873); Stewart v. United States, 104 F.2d 234, 235 (1939); Garrison v. State, 217 Ala. 322, 116 So. 705 (1928); Reed v. Real Detective Pub. Co., 63 Ariz. 294, 306, 162 P.2d 133, 139 (1945); Clark v. State, 52 Ga. App. 254, 255, 183 S.E. 92, 92 (1935); Waine v. State, 37 Md. App. 222, 244, 377 A.2d 509, 522 (1977); People v. DeLano, 318 Mich. 557, 577, 28 N.W.2d 909, 917 (1947); People v. Hinksman, 192 N.Y. 421, 430, 85 N.E. 676, 680 (1908); State v. Sing, 114 Ore. 267, 291, 229 P. 921, 928 (1924), *reh'g denied* 229 P. 921 (1925); Rogers v. State, 126 Tex. Cr. R. 39, 41, 70 S.W.2d 188, 189 (1934); Zirkle v. Commonwealth, 189 Va. 862, 871, 55 S.E.2d 24, 29 (1949).

This usage resulted from the common law rule, still honored in Maine, limiting proof of character to evidence of reputation. The issue raised in *Woodburn* clearly related to something other than the boy's reputation among his schoolmates. Dr. Sobchuk's testimony was not "character" evidence within this narrow sense of specialized legal usage.

298. People v. Coleman, 19 Mich. App. 250, 256, 172 N.W.2d 512, 515 (1969) (citing Webster's Dictionary).

299. 2 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 876 (rev. ed. 1979) (emphasis added).

300. *Compare* 3 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 342 (1979), sug-

"Character for truthfulness" as used in the law of evidence refers only to the presence or absence of moral restraints on deliberate falsehood. It seeks to establish personal values which may tend to override other motives to lie. "Character evidence" does not relate to the possibility of error. The evidence offered by behavioral scientists may relate to either falsehood or error. As to the latter, such issues do not involve truthfulness. There are also significant distinctions between the evidentiary concept of character for truthfulness and expert testimony about mental or emotional dysfunctions precluding the formation or functioning of a personal moral code. Psychiatric testimony describes the presence or absence of an impulse towards, or restraint on, falsehood.[301] In this sense, the expert testimony is directly analogous to evidence of bias, prejudice, self-interest, and other considerations which may tempt an individual to lie. Character for truthfulness, on the other hand, describes the presence or absence of ethical or moral values countering such impulses. Both types of evidence are relevant to the jury's assessment of credibility. They describe competing influences which will affect the individual's decision to tell the truth or to lie. The expert's testimony can also deal with the presence or absence of factors affecting a witness only on a particular subject. A person's public reputation may not reflect the effects of such factors.

In *Woodburn*, the boy was Dr. Sobchuk's patient. The doctor had made a diagnosis. In his professional opinion the boy suffered from a number of mental and emotional conditions. He was able to explain the demonstrable effects these conditions had upon the child's ability to distinguish fact from reality. He could describe the boy's heightened need to gain approval and avoid rejection. He would have explained the effect of this need on the boy's ability to resist suggestion. It is fair to assume Dr. Sobchuk would be appalled at any suggestion that he was passing a personal judgment on the boy's morals.

Dr. Sobchuk was not a character witness in any common or legal sense of the word. The Law Court provided persuasive authority for this proposition. In *State v. Willoughby*[302] the defendant was tried

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gesting a distinction between "volitional" behavior and that compelled by mental impairment. Louisell and Mueller acknowledge the distinction is difficult for courts to apply. They also admit it may not correspond to "any line drawn by psychiatrists or psychologists." The volitional approach is inappropriate for other reasons.

301. It is interesting to note that the DSM III contains no definition of "character." To the extent the behavioral sciences use the word "character," its meaning is different from the law's usage. The *Psychiatric Dictionary* indicates that "character" is currently used in psychiatry as a synonym for "personality." This reference also lists a number of commonly used terms including the word "character," (*e.g.* "character, anal;" "character, ascetic;" "character, daemonic;" "character, epileptic;" "character, exploitative.") R. CAMPBELL, PSYCHIATRIC DICTIONARY 102-103 (5th ed. 1981).

302. 507 A.2d 1060 (Me. 1986).

on charges of murder, kidnapping, robbery, and aggravated assault. He made several incriminating statements while held in jail awaiting trial. The prosecution offered these statements as admissions at trial. The defense intended to offer the testimony of a clinical psychologist to explain the defendant's apparently damaging statements. The psychologist would have testified that the defendant demonstrated a tendency to "puff up" or exaggerate his participation in the crime. The "puffing" was prompted by an emotional need to enhance his own and other inmates' estimation of him.

> Relying on *State v. Arnold*, the trial justice excluded Dr. Rines' expert opinion as "psychological testimony offered to impeach the truthfulness" of the defendant. However, a comparison of the nature of the proffered testimony in *Arnold* with that in the case before us reveals that this reliance was misplaced. In *Arnold*, the psychologist sought to testify solely about the defendant's character for truthfulness. We held . . . the evidence . . . was inadmissable under Rule 405(a) of the Maine Rules of Evidence, which provides the exclusive method of proving a trait of character [is evidence of reputation].
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> Here, *the proffered testimony was not merely "a generalized description of [the defendant's] disposition in respect to a general trait, such as honesty," but was medical testimony concerning a "puffing syndrome," which, like the expert testimony of the battered child syndrome in Conlogue, "cannot fairly be called 'character evidence' within the meaning of the rule."* . . . [It was a] description of the puffing syndrome related to [the defendant's] personality disorder . . . . Accordingly, Dr. Rines' testimony should have been admitted.[303]

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303. State v. Willoughby, 507 A.2d 1060, 1063-64 (Me. 1986) (emphasis added) (citations omitted) (footnote in original:

> We note . . . that the nature and form of the psychologist's testimony here met the requirements for admissibility set forth in State v. Flick, 425 A.2d 167 (Me. 1981). We stated in *Flick* that a medical expert is not competent to testify to *legal conclusions*, and that conclusory opinions, or those so framed in terms of legal considerations that they will not assist or will confuse a trier of fact, may be excluded. *Id.* at 170-71. Dr. Rines' testimony [in *Willoughby*] . . . was based on observation and testing of the defendant; it was given in layman's terms, so as not to be confusing; and the basis for the opinion was fully explained.).

The court concluded the error was harmless. In the court's judgment the defendant's testimony that the damning statements were lies intended to enhance his stature within the jail population, and the testimony about the "pecking order" within the jail were sufficient to raise the issue. Dr. Rines' testimony was deemed "cumulative to that of the defendant and inmates. Furthermore, that the defendant may have exaggerated particularly the . . . details of his involvement . . . does not change the fact he admitted commission of the crime." *Id.* at 1064.

The court acknowledged that the defendant's credibility was affected by a medically diagnosed personality disorder. The court also concluded that testimony by the person suffering from the disorder is an adequate substitution for testimony by a qualified expert. Mr. Willoughby faced life imprisonment without parole. The only

The majority opinion in *Woodburn* did not discuss its prior decision in *Willoughby*. The dissent did. Justice Hornby could offer no explanation of the contradiction between the decisions other than to remark, "[w]e have had previous difficulty with the wholesale exclusion of opinion testimony."[304]

CONCLUSION

The courts' struggle with expert testimony on credibility has spanned the twentieth century. Eighty years have passed since Professor Münsterberg suggested that the behavioral sciences could enhance the jury's search for truth. Fifty years ago Dean Wigmore came to the same conclusion. Almost twenty years have passed since Congress enacted the Federal Rules of Evidence. Through it all, the battle between the behavioral sciences and the courts has raged on undiminished.

Expert opinion testimony is admissible if the witness demonstrates expertise in a valid body of knowledge, and the testimony might, if accepted by the jury, help them decide a fact in issue. Mr. Woodburn called a licensed psychologist selected by the state to treat his son. The psychologist's professional abilities and integrity were not challenged by the prosecution or court. The doctor would have explained that Mr. Woodburn's son was the victim of long-term emotional trauma at the hands of every adult in his life. As a result, the boy did not see the world in the same way as other children. Fantasy, including sexual fantasies beyond his years, were indistinguishable from reality. The boy was also driven by an exceptional need to please and avoid displeasing adults. If the jury accepted even a small part of the testimony, it would have been helpful in assessing the boy's credibility. They might of course have rejected or ignored it. That would have been their prerogative. It was their right to decide, and the right of Mr. Woodburn to have them decide. But the rights of both were pre-empted.

Justice Hornby spoke for all courts. The refusal to accept expert testimony on credibility on the same basis as all other expert testimony has caused no end of difficulties. It is a tear in the fabric of the law which courts must constantly patch. If we cannot accept this proposition, it is time to say so, and amend the rules to declare ex-

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factual corroboration for his self-diagnosis came from "fellow inmates." The doctor's testimony might have helped the jury assess the credibility of the defense. Given these facts, deciding that the error was harmless is an astounding result. Nor is it logical to distinguish between exaggeration of details and admitting commission of the crime. The defendant pleaded not guilty. His testimony at trial did not consist of an admission that he committed the crimes. Although not directly stated in the opinion, it is clear the defense claimed the admission and details were both false, and both a result of defendant's personality disorder.

304. State v. Woodburn, 559 A.2d 343, 348 n.3 (Me. 1989) (Hornby, J., dissenting).

pert testimony on credibility different from all other forms of evidence.

There is an alternative. We can set aside our ingrained bias against the behavioral sciences. We can give the lay jury a chance to prove or disprove our fears. We can treat experts on credibility the same as those called to testify on other issues. What is more, the Rules of Evidence require that we do so.