CREDIBILITY: A FAIR SUBJECT FOR EXPERT TESTIMONY?

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I. Introduction

How can two leading commentators take diametrically opposed positions concerning the use of expert testimony to address witness credibility? After the adoption of the Federal Rules of Evidence, Judge Weinstein stated categorically that the Federal Rules permit experts to testify concerning a witness’s truthful character, but Professor Michael Graham stated with equal confidence that they do not. Courts have also adopted conflicting positions on whether expert testimony on witness credibility is admissible. The Fifth Circuit has asserted that “[t]he readily apparent principle is that the jury should, within reason, be informed of all

A possible benefit stemming from the allowance of opinion testimony . . . is that the psychiatric expert will no longer have to adhere to the artificial rule of couching his or her opinions in terms of mental capacity; he or she may speak freely in terms of traits of character, to the extent that the concept is meaningful, without fear of running into the restrictions of the opinion rule.

1. 3 Jack B. Weinstein & Margaret A. Berger, Weinstein’s Evidence § 608[04] (Joseph M. McLaughlin ed., 1st ed., rev. vol. 1996) [hereinafter Weinstein 1996]. Although Judge Weinstein’s treatise no longer contains such a firm assertion, it still acknowledges that experts may express an opinion concerning the witness’s veracity:

A possible benefit stemming from the allowance of opinion testimony . . . is that the psychiatric expert will no longer have to adhere to the artificial rule of couching his or her opinions in terms of mental capacity; he or she may speak freely in terms of traits of character, to the extent that the concept is meaningful, without fear of running into the restrictions of the opinion rule.

2. 2 Michael H. Graham, Handbook of Federal Evidence § 608.1, at 130 n.3 (5th ed. 2001).

3. Weinstein 1996, supra note 1, ¶ 608[04].

4. 2 Graham, supra note 2, § 608.1, at 130 n.3.
matters affecting a witness’s credibility to aid in their determination of the truth.”

Other courts regard expert testimony relating to credibility as an invasion of the jury’s province, taking the view that “[c]redibility . . . is for the jury—the jury is the lie detector in the courtroom.”

The explanation for the conflicting lines of authority lies in the residual strength of the common-law maxim that witnesses—particularly expert witnesses—must not invade the jury’s province by vouching for or bolstering a witness’s credibility. It also lies in the extension of that maxim to preclude expert testimony that explains weaknesses in credibility. Judge Weinstein looks at the Federal Rules of Evidence, which allow opinion testimony and expert testimony, and concludes that the Rules permit experts to testify concerning credibility. Professor Graham examines judicial decisions and concludes that the testimony is not admissible. Graham’s assertion reflects the judiciary’s persistent adherence to the common-law maxim, even though the maxim was not codified in the Federal Rules of Evidence.

The common-law prohibition against expert testimony on credibility should not continue to restrict the admissibility of evidence bearing on credibility. Instead, courts should set aside the maxim’s broadly stated prohibition and should eliminate the overprotection of the jury’s “special province.” The courts should forthrightly engage the evidentiary issues raised by specific types of expert testimony that bolsters or impeaches. The Federal Rules of Evidence do not support the continued prohibition on expert testimony addressing credibility. Moreover, the courts cannot expect juries to function as accurate lie detectors; modern research has documented human weakness at divining credibility. The legal system should respond to this insight by providing juries with as much assistance as possible as they evaluate which witnesses to believe and which facts to credit. Expert witnesses are sometimes able to supply this assistance.

5. United States v. Partin, 493 F.2d 750, 762 (5th Cir. 1974) (citing Walley v. State, 126 So. 2d 534 (Miss. 1961)).
8. See 4 WEINSTEIN 2006, supra note 1, § 608.13[3][a].
9. See 2 GRAHAM, supra note 2, § 704.1, at 631–37 n.22.
10. See Simmons, supra note 7, at 1018–23 (discussing the evolution of the concept of the jury’s special province as it applies to expert testimony bearing on credibility and questioning the validity of the concept). One commentator suggests that this notion of the “special province” is simply shorthand for the pre-Rules reasons for excluding expert testimony. See Margaret A. Berger, United States v. Scop: The Common-Law Approach to an Expert’s Opinion About a Witness’s Credibility Still Does Not Work, 55 Brook. L. Rev. 559, 592, 617 (1989).
An expert witness may provide insight concerning a specific witness based on expert evaluation of that witness or may educate the jury on matters that the jury can bring to bear when assessing credibility. A particular expert’s testimony may address witness credibility in one of several ways. Courts should base admissibility decisions on the way in which the testimony addresses witness credibility.

First, an expert may be in a position to testify concerning a witness’s general tendency to be truthful or untruthful—the witness’s character for truthfulness. The notorious case, United States v. Hiss, involved this type of testimony. The trial court admitted the defense expert’s testimony that the government’s key witness had a pathological condition that caused him to lie persistently. Although courts have rarely followed the precedent established in Hiss, the modern Federal Rules of Evidence expressly provide that opinion concerning a witness’s character for truthfulness is admissible, and the Rules do not carve out a special rule for expert opinion. Expert testimony, like lay witness testimony, that addresses character for truthfulness should be admissible under the Rules.

Second, and far more commonly, expert testimony may address the witness’s perception and memory or the witness’s bias. Testimony that bolsters or attacks credibility in these ways is not governed by a specific evidence rule. Instead, it is governed by the general rules providing that relevant evidence is admissible, although the court may exclude relevant evidence if its negative characteristics substantially outweigh its probative value. Evidence that helps the jury understand the witness’s perception, memory, or bias has high probative value, and evidence falling into this category should generally be admitted.

13. See Fed. R. Evid. 608(a). Rule 608(a) provides:

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

Id.

Third, an expert witness may help the jury understand the way in which a witness’s conduct reflects on the witness’s credibility. When a witness’s conduct may suggest a lack of credibility to the jury, expert insight into that conduct may bolster the witness’s credibility. Like evidence of perception, memory, or bias, testimony in this category is not governed by a specific rule of evidence and can play an important role in assisting the jury.

Courts do not always recognize the different roles expert testimony can play, and, as a result, they apply evidentiary rules inappropriately or simply invoke the outdated common-law maxim to bar expert testimony without providing a thorough analysis. Courts should consider in a more nuanced manner the role proffered expert testimony plays and how evidence rules affect this testimony’s admissibility. Doing so should lead courts to embrace the promise of the modern rules of evidence and to permit experts to assist juries in assessing credibility.16 This Article explores the ways in which experts can help the jury and suggests the analytical approaches courts should apply to varying types of expert testimony.

In Part II, this Article briefly summarizes the relevant Federal Rules of Evidence to provide the context for the discussion. Part III of this Article describes the common-law maxim and then demonstrates the flaws in the maxim’s foundation. In Parts IV and V, this Article considers the different ways that expert testimony can help the jury assess credibility and argues that courts should admit this testimony far more readily. Parts VI and VII consider some of the barriers that have prevented courts from abandoning the common-law maxim and have limited the admissibility of expert testimony bearing on credibility. Finally, in Part VIII, this Article examines and cautions against overreaching by the parties who present expert testimony on credibility and suggests that a more restrained approach will increase the willingness of courts to allow such testimony.

II. THE CONTEXT: A PRIMER ON THE RULES OF EVIDENCE

The admissibility of expert testimony addressing credibility must be considered in the context of the modern rules of evidence as embodied in the Federal Rules of Evidence.17 The Rules marked a change in the law,


17. Since the Federal Rules went into effect in 1975, a majority of states have adopted rules
and the Rules establish a clear bias in favor of admissibility. In addition, the Rules specifically abandon some common-law restrictions on admissible evidence. Three sets of rules, each expanding the range of admissible evidence, bear on this discussion: the general rules governing the admissibility of relevant evidence; the rules governing character evidence; and the rules governing expert testimony. Each of these sets of rules favors the admissibility of expert testimony addressing credibility.

First, the rules governing character evidence open the door to some evidence that would have been excluded at common law. Although the Rules limit the admissibility of character evidence, they admit opinion evidence concerning truthful character. Under Rule 404(a), character evidence is generally inadmissible to establish that a person acted in conformity with that character. However, Rule 404(a)(3) creates an exception, admitting some character evidence that is relevant to credibility.


18. See Stephen A. Saltzburg, Michael M. Martin & Daniel J. Capra, Federal Rules of Evidence Manual 241 (7th ed. 1998) (“[T]he policy of the Rule is that if the balance between probative value and countervailing factors is close, the Judge should admit the evidence. In other words, there is a presumption in favor of admitting relevant evidence. . . . The rationale is that exclusion amounts to a total deprivation of the offeror’s probative evidence, while admission may be accompanied by redaction, limiting instruction, or other safeguard by which both the objector and the offeror can ordinarily be accommodated.”) (footnotes omitted); Glen Weissenberger & James J. Duane, Weissenberger’s Federal Evidence § 403.2 (4th ed. 2001) (“[I]t is clear that, at least symbolically, Rule 403 favors a presumption of admissibility by mandating that the negative attribute of the evidence must substantially outweigh its probative value before exclusion is justified.”); Berger, supra note 10, at 587 (“The central objective of the Federal Rules of Evidence is to ensure that all available useful information reaches the trier of fact.”) (footnote omitted). See generally Imwinkelried, Federal Rules of Evidence 402, supra note 17 (arguing that Rule 402 generally abolishes all common-law rules that barred admission of evidence, which shows the Rules have a strong bias in favor of admissibility).

19. See, e.g., Fed. R. Evid. 704 (abrogating the common-law prohibition on testimony regarding the ultimate issue in a case).


23. Fed. R. Evid. 404(a)(3) provides that “[e]vidence of the character of a witness, [is admissible] as provided in Rules 607, 608, and 609.” See McKenzie v. McCormick, 27 F.3d 1415, 1421 (9th Cir. 1994) (“Under Fed. R. Evid. 404(a)(3) and 608(a), evidence of [a witness’s]
is central to the discussion that follows.\textsuperscript{24} Rule 608(a) allows the introduction of evidence of a witness’s untruthful character to raise the inference that, acting in conformity with her untruthful character, the witness did not tell the truth at trial.\textsuperscript{25} In response, a party seeking to bolster the witness’s credibility may introduce evidence of truthful character to raise the inference that the witness testified truthfully.\textsuperscript{26} Rule 608 codifies the common-law rule that allowed evidence of a witness’s truthful or untruthful character, and the Rule expands the range of admissible testimony.\textsuperscript{27} Where the common law permitted character to be proved only through evidence of reputation, the modern Rule admits opinion evidence as well.\textsuperscript{28} With this expansion, the Rule opens the door to expert opinion concerning a witness’s character for truthfulness.\textsuperscript{29}

Second, the Rules favor admissibility of relevant evidence, which logically includes expert testimony concerning credibility. The Federal Rules of Evidence contain no general rule addressing evidence that attacks or bolsters credibility.\textsuperscript{30} Instead, most impeachment questions are governed by the general rules of admissibility, Rules 402 and 403.\textsuperscript{31} These Rules...
establish a preference for admitting relevant evidence. Rule 402 provides, in part, that “[a]ll relevant evidence is admissible, except as otherwise provided.”32 Rule 403 gives the court discretion to exclude otherwise admissible relevant evidence only if the risk of negative impact on the jury or on the administration of the trial substantially outweighs its probative value.33 Thus, a court should exclude otherwise admissible expert testimony relevant to impeach or bolster credibility only if its negative characteristics substantially outweigh its tendency to impeach or bolster.

Third, aspects of the rules governing expert testimony also favor admission of expert testimony bearing on credibility.34 In particular, Rule 704 provides that “testimony 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.”35 In the comments accompanying


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

34. A full consideration of the impact of the rules governing the admissibility of expert testimony addressing credibility is beyond the scope of this Article. Under prevailing federal law, the trial court must evaluate the reliability of the expert’s opinion. FED. R. EVID. 702. Rule 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Id. Some expert testimony addressed to credibility will not be able to clear this hurdle. See generally Berger, supra note 10, at 606 (referencing the “helpfulness” standard of Rule 702); Friedland, supra note 16, at 189–90 (discussing the admissibility of evidence under Rule 702).

35. FED. R. EVID. 704. The full text of the Rule provides:

(a) Except as provided in subdivision (b), testimony 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.
Rule 704, the Advisory Committee on the Federal Rules of Evidence emphasized the importance of using expert testimony to help the jury and rejected, as “‘empty rhetoric,’” the notion that an expert would usurp the province of the jury. In addition, by allowing expert testimony whenever it assists the jury, the Rules liberalized admissibility and abandoned the common-law rule that admitted expert testimony only when it was necessary to the jury’s deliberations. Further, the Rules permit an expert

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

Id.

36. FED. R. EVID. 704 advisory committee’s notes (quoting JOHN HENRY WIGMORE, WIGMORE ON EVIDENCE § 1920 (3d ed. 1940)); see also FED. R. EVID. 702 advisory committee’s notes; United States v. Downing, 753 F.2d 1224, 1228–33 (3d Cir. 1985) (rejecting an argument that expert testimony would usurp the jury’s function); Berger, supra note 10, at 593–604 (discussing this requirement as applied to testimony touching on credibility). The fundamental question that a court must answer is “‘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.’” FED. R. EVID. 702 advisory committee’s note (quoting Mason Ladd, Expert Testimony, 5 VAND. L. REV. 414, 418 (1952)). See generally Simmons, supra note 7, at 1023–25 (discussing the origins of the ultimate issue rule and the impact of Rule 704).

37. See United States v. Brawner, 173 F.3d 966, 969 (6th Cir. 1999) (holding that “‘necessity’ is not a condition precedent for admissibility of [expert] opinion testimony under Federal Rule of Evidence 702; rather, the test is whether the opinion ‘will assist the trier of fact’”); Breidor v. Sears, Roebuck & Co., 722 F.2d 1134, 1139 (3d Cir. 1983) (“Helpfulness is the touchstone of Rule 702 . . . .”); State v. Gherasim, 985 P.2d 1267, 1272 (Or. 1999) (holding that evidence need only be helpful to be admitted); State v. Middleton, 657 P.2d 1215, 1219 (Or. 1982) (detailing an “assist the jury” standard); see also PAUL F. ROTHSTEIN, FEDERAL RULES OF EVIDENCE 401–03 (3d ed. 2007) (summarizing the common-law understanding of expert testimony as follows: “The common law viewed expert testimony with a somewhat jaundiced eye. Although ‘progressive’ courts began to liberalize the standards, in its purest form the common law was quite restrictive on a number of levels. (a) It confined experts to those with extensive formal learning. (b) They were allowed to testify only in areas totally beyond lay ken. (c) They had to base their testimony only on admissible, admitted evidence, (d) presented to them in an open court ‘hypothetical question’ that had to (e) stick scrupulously to proven facts, (f) and had to include substantially all the pertinent facts. (g) Neither experts nor lay witnesses could testify to an ultimate issue in the case, and (h) expert conclusions had to be based ‘on a reasonable degree of professional probability or certainty, not just possibility.’” (footnote omitted)); 29 CHARLES A. WRIGHT & VICTOR J. GOLD, FEDERAL PRACTICE & PROCEDURE § 6264 (2007) (“Expert testimony was admissible under prerules common law only where the subject of that testimony was beyond the experience or knowledge of ordinarily lay people and would provide ‘appreciable help’ to the trier of fact.”(footnotes omitted)); Berger, supra note 10, at 593–95 (discussing the difference between
to base her opinion on a wider range of information than the common law allowed.\textsuperscript{38}

In combination, these three aspects of the modern rules of evidence should smooth the path to the introduction of expert testimony bearing on credibility.\textsuperscript{39} Still, courts resist by continuing to rely on the common-law maxim that precludes such evidence, overlooking the nonprejudicial probative value of testimony addressed to credibility and creating barriers the pre-Rules “invading the province of the jury” test and post-Rules helpfulness test); Deon J. Nossel, Note, \textit{The Admissibility of Ultimate Issue Expert Testimony by Law Enforcement Officers in Criminal Trials}, 93 COLUM. L. REV. 231, 234–35 (1993) (discussing Rule 702’s “assist the trier of fact” requirement). A trial court’s assessment that expert testimony is unhelpful may be reversed as an abuse of discretion. \textit{See, e.g.}, State v. White, 943 P.2d 544, 547 (N.M. Ct. App. 1997) (holding that it was an abuse of discretion for the trial court to exclude as unhelpful expert testimony concerning the common manifestations of post-traumatic stress disorder (PTSD) because the Supreme Court had ruled that evidence of PTSD was valid, probative, and not unduly prejudicial).

\textsuperscript{38} \textit{See Fed. R. Evid.} 703; \textit{see also} \textit{Fed. R. Evid.} 705 (allowing an expert to testify without first disclosing the basis of her opinion); Daniel D. Binka, “\textit{Practical Inconvenience” or Conceptual Confusion: The Common-Law Genesis of Federal Rule of Evidence 703,} 20 AM. J. TRIAL ADVOC. 467, 514 (1997) (reasoning that Rule 703 was important not only because it continued common-law traditions, “but also because the Federal Rules of Evidence greatly expanded the boundaries of admissibility.”). Rule 703 provides in part:

\begin{quote}
The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If 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 in order for the opinion or inference to be admitted. \textit{Fed. R. Evid.} 703.
\end{quote}

Questions may arise concerning an expert’s access to information related to the opposing party’s witness. To realize the promise of Rule 608 and to maximize the utility of the other types of expert testimony that can help juries more accurately assess credibility, experts will require access to information related to the witnesses about whom they are asked to testify. As a result, courts may be asked to provide the opposing party’s expert witness access to information to assess character with an eye to attacking the witness’s credibility. In some cases, the expert will need to examine the witness whose credibility is questioned. \textit{See, e.g.}, Abbott v. State, 138 P.3d 462, 464, 467–68 (Nev. 2006) (discussing the test governing whether to grant the defendant’s request for a psychological examination of the prosecution witness); People v. Acklin, 424 N.Y.S.2d 633, 636 (N.Y. Sup. Ct. 1980) (discussing the prosecution’s disclosure of the defense concerning complaining witness); Commonwealth v. Crawford, 718 A.2d 768, 769–70 (Pa. 1998) (alluding to the defendant’s request and court’s order to have the prosecution’s witness submit to a psychological evaluation). Alternatively, the expert might have had access to information through prior dealings or affiliations with the opposing party. For a discussion of when such prior dealings will lead to disqualification of the witness, see Kendall Coffey, \textit{Inherent Judicial Authority and the Expert Disqualification Doctrine,} 56 FLA. L. REV. 195 (2004). Consideration of these questions is beyond the scope of this Article.

\textsuperscript{39} Simmons, \textit{supra} note 7, at 1018–23.
to the admissibility of such expert testimony. This resistance is unfortunate, and courts should instead accept the invitation of the Federal Rules of Evidence to open the door to expert testimony on questions of credibility.

III. DEBUNKING THE MAXIM RESTRICTING EXPERT TESTIMONY ADDRESSING CREDIBILITY

The prohibition on expert testimony addressing credibility finds its roots in the common-law maxim that an expert witness must not invade the jury’s province of determining witness credibility. This maxim rests on the premise that the jury is adequately equipped to assess a witness’s credibility and that expert testimony addressing credibility is unnecessary and unduly invades the jury’s province. Resting on this premise, the maxim is invoked in modern cases to limit the use of expert testimony to help the jury assess credibility.

There are two flaws in this legal framework. First, as discussed in Part III.B, the premise that the jury can effectively assess credibility is false. Second, as discussed in Part III.C, the maxim is applied far more broadly than its roots warrant. As this Article suggests in the later Parts, courts should move away from this common-law maxim and should instead apply the modern rules of evidence to allow expert testimony that will assist the jury accurately to assess witness credibility.

A. The Maxim

Many courts tenaciously cling to the maxim that witnesses must not invade the jury’s province by vouching for or bolstering a witness’s credibility. In Commonwealth v. Seese, the Pennsylvania Supreme Court held that expert testimony is not admissible to assist the jury in determining witness credibility. The Court based this decision on the common-law maxim that expert testimony should not be admitted to assist the jury in determining witness credibility. The Court reasoned that the maxim is based on the premise that the jury is adequately equipped to assess a witness’s credibility and that expert testimony addressing credibility is unnecessary and unduly invades the jury’s province. As a result, the Court held that expert testimony addressing witness credibility is not admissible.

40. See, e.g., United States v. Alicea, 205 F.3d 480, 483 (1st Cir. 2000) (“Except in the most unusual circumstances . . . . credibility determinations are for the jury . . . .”); United States v. Cruz, 981 F.2d 659, 663 (2d Cir. 1992) (“We affirm here the principle that the credibility of a fact-witness may not be bolstered by arguing that the witness’s version of events is consistent with an expert’s description of patterns of criminal conduct . . . .”); United States v. Komisaruk, 885 F.2d 490, 494 (9th Cir. 1989) (stating that “[w]e have held that expert testimony cannot be offered to buttress credibility” to explain why the defendant could not introduce expert testimony that would support her claim that based on international law she reasonably believed the computer she destroyed was not property); United States v. Barnard, 490 F.2d 907, 912 (9th Cir. 1973) (“Credibility . . . is for the jury—the jury is the lie detector in the courtroom.”); Price v. State, 469 S.E.2d 333, 335 (Ga. Ct. App. 1996) (quoting a series of cases for the proposition that “[i]n no circumstance may a witness’ credibility be bolstered by the opinion of another, even an expert, as to whether the witness is telling the truth”); People v. Williams, 773 N.E.2d 1238, 1242 (Ill. App. Ct. 2002) (stating that “expert testimony should not be used to give an opinion as to the credibility of a witness at trial” (citing People v. Simpkins, 297 N.E.2d 302, 312 (Ill. App. Ct. 1979))); State v. Neswood, 51 P.2d 1159, 1164 (N.M. Ct. App. 2002) (acknowledging the basis for the...
defendant’s argument that an expert improperly invaded the province of the jury to determine credibility); Commonwealth v. Loner, 609 A.2d 1376, 1377 (Pa. Super. Ct. 1992) (citing a series of cases for the proposition that “[t]he law is clear that the determination of the veracity of a witness is reserved exclusively for the jury”); Pritchett v. Commonwealth, 557 S.E.2d 205, 208 (Va. 2002) (“An expert witness may not express an opinion as to the veracity of a witness because such testimony improperly invades the province of the jury to determine the reliability of a witness.”). See generally WALTER R. LANCASTER, EXPERT WITNESSES IN CIVIL TRIALS § 9:21 (2d ed. 2006) (discussing cases objecting to expert opinions as impermissibly invading the province of the jury); Friedland, supra note 16, at 167–68 (noting that most proffered expert testimony is rejected as counter to the jury’s special province to evaluate credibility); Simmons, supra note 7, at 1017–23 (discussing the origins and application of the prohibition on invading province of jury). The district court for the District of Columbia invoked this maxim in rejecting I. Lewis “Scooter” Libby’s proffered expert testimony on memory. United States v. Libby, 461 F. Supp. 2d 3, 7, 13 (D.D.C. 2006) (citing Nimely v. City of New York, 414 F.3d 381, 398 (2d Cir. 2005)).

Courts invoke the maxim aggressively when expert testimony touches on witness credibility. Courts fear that the jury will abdicate its
responsibility to assess the witness’s credibility and will defer to the expert’s opinion.

However, in considering the parameters of permissible expert testimony, courts invoke the maxim too broadly and sometimes fail to

error in this regard would justify a reversal regardless of who provoked the error”).

44. See United States v. Mathis, 264 F.3d 321, 335 (3d Cir. 2001) (excluding testimony on

grounds that the “aura of reliability that’s attached to an expert witness . . . is significant”); Cruz,

981 F.2d at 663 (explaining that expert testimony “strongly suggests” that the expert is to be

believed); Patterson v. State, 628 S.E.2d 618, 621 (Ga. Ct. App. 2006) (expressing concern that

expert testimony concerning a witness’s credibility would be “particularly compelling” to the jury);

State v. Bailey, 87 P.3d 1032, 1039 (Mont. 2004) (“Expert testimony offered to bolster the

credibility of a party and his or her claims is improper because it invades the province of the jury

by ‘placing a stamp of scientific legitimacy on a victim’s allegations, or by dismissing the validity

of the allegations.’” (quoting Benjamin v. Torgerson, 985 P.2d 734, 740 (Mont. 1999))); Townsend

v. State, 734 P.2d 705, 709 (Ne. 1987) (“[I]t is essential to recognize that expert testimony, by its

very nature, often tends to confirm or refute the truthfulness of another witness.” (citing State v.

Myers, 359 N.W.2d 604, 609 (Minn. 1984))); Seese, 517 A.2d at 922 (“[T]o permit expert
testimony for the purpose of determining the credibility of a witness ‘would be an invitation for the

trier of fact to abdicate its responsibility to ascertain the facts relying upon the questionable premise

that the expert is in a better position to make such a judgment.’” (quoting Commonwealth v.

O’Searo, 352 A.2d 30, 32 (Pa. 1976))); see also Berger, supra note 10, at 604 (discussing the

“fear[] that jurors will ascribe more probative value to evidence than it actually possess[es], or will

accept [expert testimony] as dispositive because they have no way of assessing its accuracy”);

Simmons, supra note 7, at 1015 (arguing that courts should abandon the maxim “in its entirety”).

Courts exaggerate the likelihood that jurors will defer to expert opinion. See Simmons, supra

note 7, at 1053–54 (discussing studies demonstrating that jurors are not overly deferential to expert

opinion in the form of polygraph evidence). Doing so, they sometimes treat improper vouching as

serious error. In Homan v. United States, 279 F.2d 767 (8th Cir. 1960), the Eighth Circuit noted that
courts view the harm inflicted by improper bolstering evidence introduced to support a prosecution

witness as more serious than “the mere needless burdening of the proceedings or the distracting

injection of collateral issues. They recognize that such testimony is capable at times of so bolstering

a witness’ testimony as artificially to increase its probative strength with the jury” making it

reversible error. Id. at 772. In Homan, the court noted that the federal courts are less inclined to

reverse on this basis and concluded that the error was harmless. Id. at 773. But see Maurer v. Dep’t

of Corr., 32 F.3d 1286, 1289–91 (8th Cir. 1994) (concluding that improper vouching testimony

rendered a state court criminal trial fundamentally unfair and ordering the trial court to grant

petitioner’s writ of habeas corpus). In Maurer, the prosecution asked each of its four witnesses
whether the complainant “seemed sincere” when she told them of the alleged rape. Id. at 1288–89.
The state courts held that this testimony should not have been admitted but did not grant relief on

that ground. Id. at 1290. The Eighth Circuit concluded that the challenged testimony “invaded the

jury’s credibility determination to such an extent that it denied [the defendant] due process of law.”

Id. at 1289, 1291 (quoting from the court’s statement of the federal issue, which it resolved in the

defendant’s favor). But see McCafferty v. Leapley, 944 F.2d 445, 454 (8th Cir. 1991) (finding no
due process violation where witnesses at most “inferentially placed [their] ‘stamp of believability’”
on witness); Adesiji v. Minnesota, 854 F.2d 299, 300–01 (8th Cir. 1988) (finding that an expert’s
testimony that children rarely make up false accusations of sexual abuse did not prevent jury from

weighing evidence fairly and did not deny due process where expert had not interviewed the

witness in the case and “made no reference to that particular child’s truthfulness”).
45. See Friedland, supra note 16, at 167, 178–87 (summarizing the psychological literature); see also Berger, supra note 10, at 588–89 (citing cases allowing specialized expert testimony about areas in which juries probably lacked knowledge or understanding); Jeremy A. Blumenthal, A Wipe of the Hands, a Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility, 72 NEB. L. REV. 1157, 1188–92 (1993) (providing an introduction to the differences between a legal system’s reliance on a jury’s ability to lie-detect and research finding the contrary); Glenn Littlepage & Tony Pineault, Verbal, Facial, and Paralinguistic Cues to the Detection of Truth and Lying, 4 PERSONALITY & SOC. PSYCHOL. BULL. 461, 463 (1978) (conducting a study concerning lie detection that found that “facial information is not effectively used as an important cue to the perception of truth”); Michael W. Mullane, The Truthsayer and the Court: Expert Testimony on Credibility, 43 MICH. L. REV. 53, 64 (1991) (“Existing research strongly suggests society in general, and the legal profession in particular, may seriously overestimate the lay jury’s ability to determine truth ... ”); Olin Guy Wellborn III, Demeanor, 76 CORNELL L. REV. 1075, 1075 (1991) (“According to the empirical evidence, ordinary people cannot make effective use of demeanor in deciding whether to believe a witness.”). The limitation on the ability accurately to assess credibility is exacerbated when jurors are asked to make cross-cultural determinations of truthfulness because cultural norms often cause jurors to read indicators improperly. See Joseph W. Rand, The Demeanor Gap: Race, Lie Detection, and the Jury, 33 CONN. L. REV. 1, 4 (2000) (“[J]urors of one race, even those well-intended and free of racial animus, will be unable to dependably judge the demeanor of a witness of a different race because they are unable to accurately decipher the cues that the witness uses to communicate sincerity.”).

46. See Rand, supra note 45, at 3 (“[M]ost observers in controlled studies detect deception about as well as a flipped coin, because they focus on ‘cues’ to deception derived from folklore and common sense—such as the speaker’s inability to maintain a steady gaze—that are often more a sign of discomfort than deception. Meanwhile, the savvy liar, familiar with that same folklore, successfully suppresses those cues to fool the detector.”).

47. See Friedland, supra note 16, at 188 (noting that many courts have not abandoned “[t]he common-sense approach to credibility” that has been challenged by social science research).
of credibility is the jury’s special province, courts should welcome expert
testimony that helps the jury determine whether a particular witness is
being truthful and whether a particular account of the facts is accurate.
Courts should take advantage of the latitude of the modern rules of
evidence to facilitate, rather than bar, consideration of evidence that may
shed light on a witness’s credibility.

C. Applied Too Broadly

Like many maxims, this one is given undue scope. Courts cite the
maxim when excluding expert testimony that addresses a range of issues
related to witness credibility.48 The maxim sometimes acts as a barrier to
evidence that should be admitted and sometimes acts as a surrogate for
other specific evidence problems.

The maxim has a questionable pedigree, yet it is invoked and applied
as a broad principle to restrict admissible expert testimony.49 To illustrate
the way in which the common-law maxim is perpetuated and given undue
scope, it is helpful to examine the impact of the Ninth Circuit’s opinion in

48. See, e.g., United States v. Lumpkin, 192 F.3d 280, 289 (2d Cir. 1999) (holding that expert
testimony concerning eyewitness identification threatened the jury’s function); Cruz, 981 F.2d at
663–64 (reasoning that introduction of expert police testimony regarding drug dealing patterns was
reversible error); United States v. Cecil, 836 F.2d 1431, 1436–37, 1442 (4th Cir. 1988) (excluding
a psychiatrist’s report alleging that the government’s witness suffered from a narcissistic
personality disorder precluding the witness from testifying truthfully); United States v. Barnard,
490 F.2d 907, 912–13 (9th Cir. 1973) (excluding expert psychiatric testimony concerning the
defendant’s discharge from military and the defendant’s ability to testify truthfully); State v.
Tucker, 798 P.2d 1349, 1353 (Ariz. Ct. App. 1990) (holding that the trial court erred in admitting
expert testimony concerning the characteristics of child molesters where the expert was asked to
relate the specific facts of the case to the general characteristics of child molesters and their
victims); State v. Doan, 498 N.W.2d 804, 812 (Neb. Ct. App. 1993) (“We hold that in a prosecution
for sexual assault of a child, an expert witness may not give testimony which directly or indirectly
expresses an opinion that the child is believable, that the child is credible, or that the witness’
account has been validated.”); State v. Fairweather, 863 P.2d 1077, 1081 (N.M. 1993) (“[T]he
expert may not testify that the victim’s PTSD symptoms were in fact caused by sexual abuse.”
(quoting State v. Alberico, 861 P.2d 192, 212 (N.M. 1993))); see also Greenwell v. Boatwright, 184
F.3d 492, 496 (6th Cir. 1999) (“[T]he testimony regarding the credibility of [the] eyewitness
testimony was improper . . . .”).

49. See, e.g., United States v. Beasley, 72 F.3d 1518, 1528 (11th Cir. 1996) (holding that
“[e]xpert medical testimony concerning the truthfulness or credibility of a witness is generally
inadmissible because it invades the jury’s province to make credibility determinations”); United
States v. Ward, 169 F.2d 460, 462 (3d Cir. 1948) (“[A]n expert may not go so far as to usurp
the exclusive function of the jury to weigh the evidence and determine credibility.”); United States v.
Rosenberg, 108 F. Supp. 798, 806 (S.D.N.Y. 1952) (“[I]t is hornbook law that the credibility of a
witness and the weight to be given his testimony rests exclusively with the jury.”); see also Berger,
supra note 10, at 582 (noting that the Second Circuit invoked the maxim but cited limited authority
in support).
United States v. Rivera. Both the precedent on which the court relied in Rivera and Rivera’s subsequent impact outside the Ninth Circuit demonstrate the problem with the maxim.

In his treatise on federal evidence, Professor Graham cites Rivera to support the assertion that “Rule 704(a) of course permits neither a lay nor expert witness . . . to testify as to whether another witness is telling the truth.” In Rivera, the Ninth Circuit actually held that the trial court did not commit plain error by admitting the testimony of a prosecution expert because the defendant had failed to object on grounds of bolstering and had also opened the door to the testimony on cross-examination. Nevertheless, in discussing the testimony, the court asserted that expert testimony “may not appropriately be used to buttress credibility” and that an expert “is not permitted to testify specifically to a witness’ credibility or to testify in such a manner as to improperly buttress a witness’ credibility.” In Rivera, the court supported its assertions by citing United States v. Brodie and United States v. Candoli. However, neither opinion supports the broad assertions of Rivera.

In Brodie, the Ninth Circuit upheld the exclusion of the defendants’ expert in accounting, who would have testified that the defendants’ tax liability for the years in which they failed to file tax returns was much less than the government’s estimate. Because the only relevant inference was that the defendants believed that they owed no taxes, the court concluded that the testimony was precluded under Rule 704(b) as an opinion that the defendants did not have the requisite mental state. The court went on to discuss “a further reason” for excluding the opinion—it represented improper bolstering. The court cited United States v. Binder for the proposition that “[e]xpert testimony may not appropriately be used to

50. 43 F.3d 1291 (9th Cir. 1995).
51. 2 Graham, supra note 2, § 704.1, at 619, 631.
52. Rivera, 43 F.3d at 1295.
53. Id. (quoting United States v. Brodie, 858 F.2d 492, 496 (9th Cir. 1988)).
54. Id. (quoting United States v. Candoli, 870 F.2d 496, 506 (9th Cir. 1989)).
55. 858 F.2d 492 (9th Cir. 1988).
56. 870 F.2d 496 (9th Cir. 1989).
57. See Brodie, 858 F.2d at 496.
58. Fed. R. Evid. 704(b) (“No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.”).
59. Brodie, 858 F.2d at 496.
60. Id.
61. 769 F.2d 595 (9th Cir. 1985), overruled on other grounds by United States v. Morales, 108 F.3d 1031 (9th Cir. 1997).
buttress credibility”\textsuperscript{62} and both \textit{Binder} and \textit{United States v. Brown}\textsuperscript{63} for the proposition that “[e]xpert testimony is properly excluded when it merely assesses the credibility of a taxpayer.”\textsuperscript{64}

In \textit{Brown}, a Tenth Circuit case tried before the adoption of the Federal Rules of Evidence, the court affirmed the exclusion of the defendant’s expert on eyewitness identification.\textsuperscript{65} The court simply concluded that the subject was one of common knowledge, so the proffered testimony would have invaded the jury’s province.\textsuperscript{66} The court did not consider whether the Federal Rules of Evidence had altered the evaluation of the question and cited only pre-Rules authority.\textsuperscript{67}

In \textit{Binder}, the court considered expert testimony that the child victims could “distinguish reality from fantasy and truth from falsehood” and held that the testimony “improperly buttress[ed]” the witnesses’ credibility, citing \textit{United States v. Barnard} (another case decided before the Federal Rules of Evidence went into effect) and \textit{United States v. Awkard}.\textsuperscript{68} In \textit{Awkard}, the court held that the expert testimony constituted improper bolstering before an attack on credibility—a timing problem—\textsuperscript{69}—and also cited \textit{Barnard} for the broader proposition that credibility is for the jury, “the lie detector in the courtroom.”\textsuperscript{70} In \textit{Awkard}, the court went on to assert that “[u]nder the Federal Rules, opinion testimony on credibility is limited to character; all other opinions on credibility are for the jurors themselves to form.”\textsuperscript{71} The court cited no rule or other authority to support this

\begin{itemize}
\item \textsuperscript{62} \textit{Brodie}, 858 F.2d at 496 (citing \textit{Binder}, 769 F.2d at 602).
\item \textsuperscript{63} 540 F.2d 1048, 1054 (10th Cir. 1976).
\item \textsuperscript{64} \textit{Brodie}, 858 F.2d at 496 (citing \textit{Binder}, 769 F.2d at 602; \textit{Brown}, 540 F.2d at 1054).
\item \textsuperscript{65} \textit{Brown}, 540 F.2d at 1054.
\item \textsuperscript{66} \textit{Id}.
\item \textsuperscript{67} \textit{Id}. The Federal Rules of Evidence went into effect July 1, 1975. \textit{See Imwinkelried, The Silence Speaks Volumes, supra note 17, at 1014}. In \textit{Brown}, the offense date was July 1975 and the appeal was submitted July 1976, when little interpretation of the rules had occurred. \textit{See Brown}, 540 F.2d at 1048, 1050.
\item \textsuperscript{68} \textit{See Binder}, 769 F.2d at 602 (citing \textit{United States v. Barnard}, 490 F.2d 907, 912–13 (9th Cir. 1973); \textit{United States v. Awkard}, 597 F.2d 667, 671 (9th Cir. 1979); \textit{overruled on other grounds by United States v. Morales}, 108 F.3d 1031 (9th Cir. 1997)). The majority in \textit{Binder} noted that the experts did not merely explain the psychological literature or discuss a class of victims but instead testified that the children in the case “could be believed.” \textit{Id}. Judge Wallace wrote separately and took issue with the characterization of the testimony, noting that “the experts testified only that the children were capable of telling the truth—they did not opine as to whether or not the children actually had done so.” \textit{Id}. at 605 (Wallace, J., concurring in part and dissenting in part).
\item \textsuperscript{69} \textit{Awkard}, 597 F.2d at 670.
\item \textsuperscript{70} \textit{Id}. at 671 (citing \textit{Barnard}, 490 F.2d at 912).
\item \textsuperscript{71} \textit{Id}. In \textit{Awkard}, the court also held that the expert had crossed the line into improper bolstering by testifying that the witness’s “memory had been accurately refreshed by hypnosis.” \textit{Id}. at 670.
\end{itemize}
In *Candoli*, the other case cited by the Ninth Circuit in *Rivera*, the trial
court permitted an expert to testify that another witness—the prosecution’s
arson expert—had an excellent reputation as an expert. The Ninth Circuit
correctly concluded that Rule 608(a) governed and held that the testimony
was improperly admitted. The court also held that under Rule 608(a) the
testimony could extend only to reputation for truthfulness and that the
bolstering evidence could not be admitted unless the expert’s character for
truthfulness had first been attacked. The court, citing *Binder*, went on to
assert broadly that “[a]n expert witness is not permitted to testify
specifically to a witness’ credibility or to testify in such a manner as to
improperly buttress a witness’ credibility.”

Thus, the assertion in *Rivera* traces its legal pedigree both to pre-Rules
cases that set out common-law principles and to an unexamined and
unsupported assertion about the effect of the Federal Rules. By citing pre-
Rules authority and overstating the significance of that authority, courts
have improperly given undue impact to the maxim that expert testimony
may not address credibility. Going forward, each court should carefully
evaluate the role played in each case by the particular expert testimony
offered. Each court should apply the Federal Rules of Evidence,
recognizing that those rules do not incorporate the common-law maxim
and therefore should not be restricted by that maxim.

IV. USING EXPERTS TO ASSESS CHARACTER FOR
TRUTHFULNESS—RULE 608(a)

Unlike the common law, the Federal Rules of Evidence admit opinion
evidence concerning the truthful or untruthful character of a witness. An
expert may be able to gauge a person’s general tendency to truthfulness or
untruthfulness. By opening the door to opinion testimony, the Rules
present an opportunity for an expert witness to opine on a witness’s
truthfulness. Despite this change in the law, courts, which are influenced
by the common-law maxim, generally remain reluctant to admit expert
opinion on truthful or untruthful character.

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72. See id. at 671.
73. United States v. Candoli, 870 F.2d 469, 505 (9th Cir. 1989).
74. Id. at 506.
75. Id. (citing Fed. R. Evid. 608(a); *Awkard*, 597 F.2d at 671).
76. Id. (citing United States v. Binder, 769 F.2d 595, 602 (9th Cir. 1985), overruled on other
grounds by United States v. Morales, 108 F.3d 1031 (9th Cir. 1997)).
77. See Fed. R. Evid. 608.
Moreover, even if a court is willing to admit expert opinion on a witness’s character for truthfulness, the testimony is subject to two limitations. First, the testimony may address only truthful or untruthful character and not the witness’s conduct.78 Second, expert opinion that the witness has a truthful character is inadmissible unless the witness’s credibility has been attacked.79 These limitations restrict the utility of expert testimony admitted under Rule 608(a). As discussed in Part V, the jury will receive the full benefit of expert testimony on credibility only if courts recognize that much of this testimony does not speak to character but speaks to credibility in other ways.

A. The Promise

The character evidence rules contemplate both robust attacks on credibility and a response to those attacks that may be time consuming.80 That framework is codified in Rule 608,81 which represents an exception to the general prohibition against using character evidence to prove action in conformity with a witness’s character.82 Under the Rule, character witnesses may testify that a witness is untruthful or, conversely, truthful, and they may express this as reputation testimony or opinion.83 The jury

78. FED. R. EVID. 608(a)(1).
79. FED. R. EVID. 608(a)(2).
80. See 2 GRAHAM, supra note 2, § 608.2, at 133 n.2 (explaining that although admission of character evidence rests within the discretion of trial court, the general practice is to admit numerous character witnesses); see, e.g., United States v. Jackson, 696 F.2d 578, 594 (8th Cir. 1982) (allowing the defendant to present seven character witnesses at the first trial and six at the second); State v. Kalex, 789 A.2d 1286, 1290–92 (Me. 2002) (holding that the trial court committed reversible error by excluding the testimony of five defense witnesses who were prepared to testify that the complaining witness had a bad reputation for truthfulness).
81. FED. R. EVID. 608.
82. FED. R. EVID. 404(a)(3).
83. See generally Berger, supra note 10, at 583–85 (discussing the development and purpose of Rule 608). When lay witnesses testify concerning a party’s character, courts permit these witnesses to testify whether they would believe that party under oath. See, e.g., United States v. McMurray, 20 F.3d 831, 834 (8th Cir. 1994) (holding that a prosecutor was properly permitted to ask a witness, who expressed an opinion of the defendant’s truthfulness, whether she would believe the defendant under oath); United States v. Dotson, 799 F.2d 189, 193 (5th Cir. 1986) (concluding that a witness with sufficient basis to testify to opinion concerning character may be asked whether the person in question was to be believed under oath); United States v. Lollar, 606 F.2d 587, 588–89 (5th Cir. 1979) (discussing the role of Rule 608 and holding that a question about trusting a witness under oath was proper); United States v. Bambulas, 471 F.2d 501, 503–05 (7th Cir. 1972) (discussing the divergence of authority on this type of question but concluding that a trial court might have committed error by precluding defense counsel from asking the defendant’s character witnesses whether they would believe the defendant under oath); Held v. United States, 260 F. 932, 933 (5th Cir. 1919) (concluding that the trial court erred by precluding defense counsel from asking
may infer from this character testimony whether the witness is likely to behave consistently with that character and testify accordingly. The Rules not only allow character witnesses to address truthfulness but also appear, with admissible opinion testimony, to open the door to expert assessment of a witness’s general capacity for truthfulness.

The reason for admitting character evidence and exploring a witness’s character for truthfulness is that credibility is a central concern in many trials. As Judge Weinstein points out, “[C]redibility is often the crucial issue in a case [and] character evidence, despite its flaws, ‘may still serve a purpose in calling to the jury’s attention what might be an otherwise unknown deficiency of the witness and thus give the jury a more adequate basis for judging his testimony.’” Given the importance and difficulty of credibility determinations, the Rules admit evidence of truthful or untruthful character to assist the jury in making these determinations.

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84. See 4 Weinstein 2006, supra note 1, § 608.02[1] (noting that “evidence of a witness’s bad character . . . is relevant to prove that the witness is probably lying”); see also United States v. Davis, 639 F.2d 239, 244–45 (5th Cir. 1981) (holding that the trial court erred in excluding two witnesses’ testimony proffered to discredit the government witness’s character); Cooper v. State, 628 So. 2d 1371, 1374 (Miss. 1993) (holding that the trial court erred by precluding a witness from testifying to his opinion that the prosecution’s witness had untruthful character).

When the Rules were adopted, they opened the door to opinion evidence as a way to prove character. Rule 608(a) specifically allows the use of opinion evidence concerning truthful or untruthful character, and the majority of states that have enacted rules of evidence have adopted the same broad rule. Judge Weinstein succinctly stated the promise of this expanded rule of admissibility, asserting that “[e]xpert witnesses . . . may now be called to express their opinion of the witness’ veracity.”

Given the special insight an expert may have into whether a witness tends to be truthful or untruthful, this testimony may be extremely helpful to the jury. Certain conditions are associated with untruthful character.

86. See Fed. R. Evid. 608(a); see also Berger, supra note 10, at 583–85 (discussing the development and purpose of the Rule).

87. See, e.g., Ala. R. Evid. 608(a); Alaska R. Evid. 608(a); Ariz. R. Evid. 608(a); Ark. R. Evid. 608(a); Colo. R. Evid. 608(a); Conn. Code Evid. § 6-6(a); Del. R. Evid. 608(a); Haw. R. Evid. 608(a); Idaho R. Evid. 608(a); Ind. R. Evid. 608(a); Iowa R. Evid. 5.608(a); Ky. R. Evid. 608(a); Md. R. Evid. 5-608; Mich. R. Evid. 608(a); Minn. R. Evid. 608(a); Miss. R. Evid. 608(a); Mont. R. Evid. 608(a); Nev. Rev. Stat. § 50.085 (2005); N.H. R. Evid. 608(a); N.J. R. Evid. 608; N.M. R. Evid. § 11-608(a); N.D. R. Evid. 608(a); Ohio R. Evid. 608(a); Okla. Stat. tit. 12, § 2608 (2007); Or. Rev. Stat. § 40.350 (2005); R.I. R. Evid. 608(a); S.C. R. Evid. 608(a); S.D. Codified Laws § 19-14-9 (2007); Tenn. R. Evid. 608(a); Tex. R. Evid. 608(a); Utah R. Evid. 608(a); Vt. R. Evid. 608(a); W. Va. R. Evid. 608(a); Wyo. R. Evid. 608(a). Some states expressly preclude the use of expert testimony to help the jury understand character as a predictor of conduct. See, e.g., Fla. Stat. § 90.609 (2007) (prohibiting the use of opinion testimony); La. Code Evid. Ann. art. 608(a) (2006) (same); Me. R. Evid. 608(a) (same); Neb. Rev. Stat. § 27-405 (2006) (limiting the admissibility of expert opinion under Neb. Rev. Stat. § 27-608(1) (2006), to nonscientific grounds); N.C. R. Evid. 405(a) (proscribing expert testimony to show circumstantial evidence of behavior under N.C. R. Evid. 608(a)); Pa. R. Evid. 608(a) (prohibiting the use of opinion testimony); Wash. R. Evid. 608(a) (same). North Carolina, for example, addresses the question in Rule 405(a) of the Rules of Evidence by limiting proof of character via the following sentence, which is not included in Federal Rule 405(a): “Expert testimony on character or a trait of character is not admissible as circumstantial evidence of behavior.” N.C. R. Evid. 405(a).

Both impeachment and bolstering under Rule 608 operate to inform the jury that the witness is truthful or untruthful and thereby invite jurors to draw the inference that the witness, acting in conformity with character, is telling the truth or lying. As a result, the limitation in N.C. R. Evid. 405(a) precludes the use of expert testimony under N.C. R. Evid. 608(a). See State v. Aguallo, 350 S.E.2d 76, 81 (N.C. 1986) (excluding expert testimony as inadmissible under N.C. R. Evid. 608(a)); State v. Heath, 341 S.E.2d 565, 567 (N.C. 1986) (holding that admitting expert opinion regarding credibility was error and violated N.C. R. Evid. 608 and N.C. R. Evid. 405).

88. 3 Weinstein 1996, supra note 1, ¶ 608[04]. For Judge Weinstein’s current articulation of the same premise, see supra note 1.

89. See Mullane, supra note 45, at 97.

90. Disorders affecting veracity include conduct disorder, factitious disorder, and antisocial behavior disorder. See generally Am. Psychiatric Ass’n, Diagnostic and Statistical Manual of Mental Disorders (4th ed. 2000) [hereinafter Manual of Mental Disorders] (discussing, inter alia, the effects experienced by those suffering from various mental disorders).

[Those suffering from conduct disorder display] a repetitive and persistent pattern
An expert may be able to provide an informed opinion that a witness suffers from a mental condition that impairs the witness’s ability to provide truthful testimony.\textsuperscript{91} Like any other witness’s opinion given under Rule 608(a), an expert’s opinion that the witness is not a truthful person is offered to persuade the jury not to believe the witness. In the case of the expert, the persuasion lies in the specialized insight expressed in the opinion. Thus, expert testimony falling within Rule 608(a) that addresses untruthful character may have greater probative value than lay testimony about a witness’s general character for untruthfulness.

The First Circuit recognized this beneficial aspect of Rule 608(a) in \textit{United States v. Shay}.\textsuperscript{92} In Shay, the trial court refused to admit the defendant’s expert testimony that the defendant suffered from pseudologia of behavior in which the basic rights of others or major age-appropriate societal norms or rules are violated . . . .

. . . . Acts of deceitfulness or theft may include . . . frequently lying or breaking promises to obtain goods or favors or to avoid debts or obligations . . . .

. . . . [Those suffering from conduct disorder] may be callous and lack appropriate feelings of guilt or remorse. It can be difficult to evaluate whether displayed remorse is genuine because some of these individuals learn that expressing guilt may reduce or prevent punishment.

\textit{Id.} at 93–96. Likewise,

The essential feature of [f]actitious [d]isorder is the intentional production of physical or psychological signs or symptoms . . . . The presentation may include fabrication of subjective complaints (e.g., complaints of acute abdominal pain in the absence of any such pain), falsification of objective signs (e.g., manipulating a thermometer to create the illusion of fever), . . . exaggeration or exacerbation of preexisting general medical conditions . . . .

\textit{Id.} at 513. Finally, “Individuals with [a]ntisocial [p]ersonality [d]isorder fail to conform to social norms with respect to lawful behavior . . . . They are frequently deceitful and manipulative in order to gain personal profit or pleasure (e.g., to obtain money, sex, or power) . . . . They may repeatedly lie, use an alias, con others, or malinger.” \textit{Id.} at 702.

\textsuperscript{91} Of course the expert testimony must comport with Rule 702 of the Federal Rules of Evidence; the expert must be qualified and must apply reliable expertise with an adequate basis. See Fed. R. Evid. 702; 2 Graham, supra note 2, § 702.1, at 426 (explaining that an expert witness may be qualified on the “basis of either knowledge, skill, experience, training, or education or a combination thereof”). Graham goes on to explain that the trial court must also determine whether the evidence would “be helpful[] to understand the evidence or to determine a fact in issue.” \textit{Id.}; 4 Weinstein 2006, supra note 1, § 702.02[3]–[4] (discussing the prerequisites to admissibility of expert opinion testimony).

\textsuperscript{92} 57 F.3d 126 (1st Cir. 1995).
fantastica, a mental disorder characterized by self-aggrandizing lies.\textsuperscript{93} The testimony would have supported the defense’s contention that the defendant’s statements suggesting that he was responsible for a fatal bombing were untrue.\textsuperscript{94} Both the trial court and the government took the view that the evidence “concerned a credibility question that was [in] the jury’s exclusive province.”\textsuperscript{95} The First Circuit disagreed and stated that Rule 608(a) “contemplates that truthful or untruthful character may be proved by expert testimony.”\textsuperscript{96} While remarking that “an expert’s opinion that another witness is lying or telling the truth is ordinarily inadmissible pursuant to Rule 702,” the circuit court held that the trial court’s exclusion of the evidence constituted error.\textsuperscript{97}

Similarly in \textit{United States v. Gonzalez-Maldonado},\textsuperscript{98} the First Circuit found error where the trial court did not allow the defendant’s expert to testify concerning the defendant’s poor character for truthfulness.\textsuperscript{99} Like \textit{Shay}, \textit{Gonzalez-Maldonado} entailed a defense attack on the defendant’s credibility to reduce the weight of the defendant’s recorded statements, which were introduced by the prosecution.\textsuperscript{100} The defense expert would have testified that the defendant “had a medical condition that led him to exaggerate.”\textsuperscript{101} The evidence should have been admitted under Rule 608(a) to establish the defendant’s poor character for truthfulness and the consequent likelihood that he was lying in the recorded statements.

Despite the promise of Rule 608(a), courts have been slow to admit expert opinion that falls squarely within the Rule.\textsuperscript{102} Disregarding the explicit language of the Rule, which permits opinion testimony to establish untruthful or truthful character, courts remain committed to the proposition that expert testimony is “generally inadmissible because it invades the

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\item \textsuperscript{93} Id. at 129–30.
\item \textsuperscript{94} Id. at 129. In this case, the testimony was offered under Rule 806 to impeach the credibility of the defendant’s own statements, which were offered by the prosecution. Id. at 131–32.
\item \textsuperscript{95} Id. at 130–31.
\item \textsuperscript{96} Id. at 131.
\item \textsuperscript{97} Id. The circuit court pointed out that the advisory committee notes to Rule 405 expressly contemplate the use of expert opinion testimony to establish character traits when evidence of those traits is admissible. Id.
\item \textsuperscript{98} 115 F.3d 9 (1st Cir. 1997).
\item \textsuperscript{99} Id. at 15.
\item \textsuperscript{100} See id. at 14.
\item \textsuperscript{101} Id. at 15. The symptoms of the defendant’s condition included “‘verbosity;’ ‘grandezza’ (‘[h]e has to feel important and the center of attention as part of his . . . fragmented ego needs’); and exaggeration.” Id. (citation omitted).
\item \textsuperscript{102} See 2 \textsc{Graham}, supra note 2, § 608.1, at 130 n.3 (asserting that “[e]xpert opinion as to the character of a witness for truthfulness is not admissible”); id. § 704.1, at 631–32 n.22 (citing cases refusing to admit expert opinion on truthful character).
\end{itemize}
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jury’s province to make credibility determinations.” 103 In a number of cases, courts have excluded evidence that appears to qualify as opinion evidence that describes truthful or untruthful character warranting admission under Rule 608(a). For example, in United States v. Beasley, 104 the defendants offered expert testimony that a key prosecution witness “was a psychopath who had no conception of the truth.” 105 The Eleventh Circuit held it was properly excluded, stating that “[e]xpert medical testimony concerning the truthfulness or credibility of a witness is generally inadmissible because it invades the jury’s province to make credibility determinations. 106

Similarly, in Bastow v. General Motors Corp., 107 a products liability decision, the Eighth Circuit held that the trial court had properly excluded the testimony of the defendant’s psychologist. 108 The defendant argued that the proffered testimony, which showed that the plaintiff “had an antisocial behavior disorder and hence a character for untruthfulness,” was

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103. United States v. Beasley, 72 F.3d 1518, 1528 (11th Cir. 1996); see also United States v. Adams, 271 F.3d 1236, 1245–46 (10th Cir. 2001) (holding that experts may not usurp the function of the jury by discussing witness credibility); United States v. Hall, 165 F.3d 1095, 1107 (7th Cir. 1999) (“Furthermore, we believe that the credibility of eyewitness testimony is generally not an appropriate subject matter for expert testimony because it influences a critical function of the jury—determining the credibility of witnesses.” (citing United States v. Kime, 99 F.3d 870, 884 (8th Cir. 1996))); United States v. Falcon, 245 F. Supp. 2d 1239, 1245 (S.D. Fla. 2003) (“[A]bsent extreme or unusual circumstances, expert scientific testimony concerning the truthfulness or credibility of a witness is inadmissible because it invades the jury’s province in determining credibility.” (citing Beasley, 72 F.3d at 1528))); United States v. Jacques Dessange, Inc., 2000 WL 294849, at *2 (S.D.N.Y. Mar. 21, 2000) (“[A] expert may not intrude on the jury’s role in assessing credibility. It is appropriate, therefore, to exclude expert testimony offered to bolster the credibility of fact witnesses.” (citing United States v. Lumpkin, 192 F.3d 280, 289 (2d Cir. 1999); United States v. Cruz, 981 F.2d 659, 663 (2d Cir. 1992); United States v. Scop, 846 F.2d 135, 142 (2d Cir.), rev’d in part on reh’g, 856 F.2d 5 (2d Cir. 1988))); Commonwealth v. Seese, 517 A.2d 920, 922 (Pa. 1986) (“It is an encroachment upon the province of the jury to permit admission of expert testimony on the issue of a witness’ credibility.” (citing Commonwealth v. O’Searo, 352 A.2d 30, 32 (Pa. 1976))).

104. 72 F.3d 1518 (11th Cir. 1996).
105. Id. at 1528.
106. Id. The court cited the Fifth Circuit opinion in United States v. Wertis, 505 F.2d 683 (5th Cir. 1974), a pre-Rules decision. In Wertis, the defendant offered expert testimony from a psychiatrist on “whether a principal prosecution witness [had] a tendency to be reliable as a witness in distinguishing the truth from non-truth.” Id. at 685. The Fifth Circuit held that the evidence was properly excluded, stating “[s]uch a question as that proffered is beyond the competence of any witness. Peeled of its thin veneer of jargon, it amounts to no more than an inquiry whether the witness is to be believed by the jury or not.” Id.

107. 844 F.2d 506 (8th Cir. 1988).
108. Id. at 511.
admissible under Rule 608(a)(1).\textsuperscript{109} The Eighth Circuit agreed with the trial court that the evidence might cause the jurors “’to surrender their own common sense’” and could lead to a minitrial on the plaintiff’s credibility—“’a collateral but important matter.’”\textsuperscript{110} The court did not address the clear invitation of Rule 608 to provide insight into witness’s character for truthfulness.

Courts steeped in the maxim that witnesses—particularly expert witnesses—must not invade the jury’s province by vouching for or bolstering a witness’s credibility are understandably resistant to admit such testimony: This expert testimony speaks directly to the witness’s credibility and nothing else. However, the expert testimony in these cases could have assisted the jury in assessing credibility and was properly admissible under Rule 608(a).

B. The Limitations

The rules that admit character evidence to establish truthful or untruthful character exist against the backdrop of other evidence rules that disfavor admitting character evidence as a means for predicting behavior. Courts are also reluctant to allow expert assessment of credibility. The law strongly prefers to judge the case, not the person, and views the inference that someone acted in accord with character as relatively weak. In addition, questions of character can be unduly distracting and may inject unfair prejudice into a trial. As a result, the rules of evidence encourage juries to determine the facts of the events and not to dwell on the character of those involved. For those reasons, character evidence is strictly limited as to admissibility and, when admissible, as to form. Although Rule 608(a) allows a party to use character evidence to attack, and in response to bolster, a witness’s credibility, testimony admitted under Rule 608(a) is subject to two limitations. First, when admissible under Rule 608(a), expert testimony is circumscribed: it may not stray into discussion of the witness’s conduct, remaining instead within the parameters of character evidence,\textsuperscript{111} and it may address only truthfulness.\textsuperscript{112} Second, the Rules

\textsuperscript{109} Id. at 510.

\textsuperscript{110} Id. at 511 (quoting United States v. Barnard, 490 F.2d 907, 912 (9th Cir. 1973)). The trial court and circuit court relied entirely on the maxim that credibility is for the jury, failing to assess whether the witness lacked expertise, had an inadequate basis for the proffered opinion, or had misapplied expert principles. See id. at 510–11.

\textsuperscript{111} See 2 Graham, supra note 2, § 608.2, at 133 (“[S]pecific instances of conduct in support of the witness’ character for truthfulness remain inadmissible.”); see also United States v. Visinaiz, 428 F.3d 1300, 1314 (10th Cir. 2005) (reasoning that DUI history was inadmissible because it was barred by Rule 405 as a specific instance of conduct); United States v. Perez-Perez, 72 F.3d 224, 227 (1st Cir. 1995) (“Reputation evidence of this kind is sometimes admissible, FED. R. EVID.
prohibit bolstering with evidence of truthful character before the witness’s credibility has been attacked.\footnote{113}

1. Subject Matter: Character for Truthfulness Only

As noted, Rule 608(a) severely limits the admission of character
evidence. Under the Rule, the evidence may relate only to truthful character.114 It does not extend to the witness’s truthfulness on specific matters.115 Character witnesses may testify only about whether, in their opinion or based on their knowledge of another’s reputation, the other witness has a truthful or untruthful character and whether they would believe the witness under oath.116 Thus, an expert testifying under Rule 608(a) is limited to discussing conditions that bear on general truthfulness or untruthfulness.117 While expert witnesses may identify some conditions that bear directly on a general propensity for truthfulness or untruthfulness, far more psychological conditions, which affect a witness’s perception and memory or behavior, may reflect on credibility.118 Rule 608(a) does not accommodate expert testimony reaching those subjects. Expert testimony concerning perception, memory, or conduct bears on credibility but not specifically on truthful character.

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114. See United States v. Azure, 801 F.2d 336, 339–40 (8th Cir. 1986) (concluding that an expert’s testimony did not fall within Rule 608(a) because it was not limited to an opinion on the witness’s character for truthfulness but “addressed the specific believability and truthfulness of [the witness’s] story”); United States v. Awkard, 597 F.2d 667, 671 (9th Cir. 1979) (“Under the Federal Rules, opinion testimony on credibility is limited to character; all other opinions on credibility are for the jurors themselves to form.”); see also Fed. R. Evid. 608(a), advisory committee’s note (“In accordance with the bulk of judicial authority, the inquiry is strictly limited to character for veracity, rather than allowing evidence as to character generally.”).

115. See generally Maddox v. Cash Loans of Huntsville II, 21 F. Supp. 2d 1336, 1338–40 (N.D. Ala. 1998) (explaining the distinction and discussing relevant authority). But see United States v. Piccinonna, 885 F.2d 1529, 1536 (11th Cir. 1989) (expressing the view that a polygraph test supporting the claim that a witness is telling the truth as to specific matters would be admissible under Rule 609(a) if the witness’s credibility were first attacked); United States v. Padilla, 908 F. Supp. 923, 928 (S.D. Fla. 1995) (“[O]nce a witness’ character for truthfulness or credibility has been attacked, a polygraph expert may introduce testimony as to that witness’ character for truthfulness based on the results of a polygraph examination.”).


117. See United States v. Candoli, 870 F.2d 496, 506 (9th Cir. 1989) (holding that because Rule 608(a) restricts testimony to reputation for truthfulness, the district court erred by permitting a witness to testify to another witness’s excellent reputation as an expert); United States v. Greer, 643 F.2d 280, 283 (5th Cir. 1981) (“Since counsel’s question inquired of [the witness’s] reputation in the community, rather than being limited to his reputation for truthfulness and veracity, it was improper under Rule 608(a).”); Awkard, 597 F.2d at 670–71 (reasoning that expert testimony concerning whether a witness’s memory was restored with hypnosis was not limited to the witness’s character for truthfulness). Of course, an expert who knows a witness well enough to form an opinion of the witness’s truthful character or who is familiar with the witness’s reputation may testify in the same way as a lay witness under Rule 608(a).

118. See infra note 134 and accompanying text.
2. Timing: No Bolstering Before Attack

Under Rule 608, a party may not bolster a witness’s credibility with evidence of good character for truthfulness until the witness’s character for truthfulness has been attacked. Therefore, to present bolstering character testimony, the party must persuade the court either that the witness’s credibility has been attacked or that the offered testimony does not fall within Rule 608 because it is not offered merely to establish truthful character.

This general rule—that evidence of good character for truthfulness may not be introduced until the witness’s character for truthfulness has been attacked—has its roots in the principle that “every witness is in law assumed to be of normal moral character for veracity”; thus, bolstering is not worthwhile until there has been an attack. There is also a concern that initiating an exploration of truthful character by introducing bolstering evidence will precipitate a time-consuming exchange that may distract the jury from the central issues of the case. In addition to wasting time and distracting the jury, courts also worry that bolstering may “artificially . . . increase” the probative value of the witness’s testimony.

119. See United States v. Drury, 396 F.3d 1303, 1314–16 (11th Cir. 2005) (explaining that the trial court did not abuse its discretion by disallowing bolstering testimony when witness credibility had not been attacked); United States v. Bonner, 302 F.3d 776, 780–81 (7th Cir. 2002) (explaining that rehabilitative evidence is permissible only after an attack on credibility has been made); United States v. Scott, 267 F.3d 729, 734–35 (7th Cir. 2001) (differentiating between bolstering evidence and evidence offered to rehabilitate attacked credibility); Candoli, 870 F.2d at 506 (holding that the district court erred by permitting one expert to testify to another witness’s excellent reputation as an expert because it represented bolstering before the witness’s character had been attacked).

120. Homan v. United States, 279 F.2d 767, 772 (8th Cir. 1960) (citing 4 JOHN HENRY WIGMORE, WIGMORE ON EVIDENCE § 1104 (3d ed. 1940)); see also Johnson v. State, 108 N.W. 55 (Wis. 1906). In Johnson, the court explained:

That rule is the logical result of the other one that the law presumes every person to be reputed truthful till evidence shall have been produced to the contrary and therefore, for one to take the initiative in establishing that which so needs no support, other than the legal presumption, is useless.

Johnson, 108 N.W. at 58.


122. Homan, 279 F.2d at 772. The Homan court, however, concluded the improper bolstering was harmless. Id. at 773. Interestingly, the Fifth Circuit later cited Homan as standing for the proposition that “[w]hen bolstering testimony suggests to the jury that it may shift to a witness the responsibility for determining the truth of the evidence, its admission may constitute reversible error.” United States v. Price, 722 F.2d 88, 90 (5th Cir. 1983).
After a witness’s general character for truthfulness has been directly or indirectly attacked, evidence of good character for truthfulness is admissible. The mere suggestion that the witness has not told, or is not able to tell, the truth in specific instances does not constitute a sufficient attack to open the door to bolstering. The clearest example of an attack is calling an anti-character witness under Rule 608 to testify that the other witness has a bad character for truthfulness. In addition, however, courts have held that certain avenues of cross-examination constitute attacks on character that open the door to bolstering. Consequently, the opposing party often holds the key to the admissibility of bolstering evidence that falls within Rule 608(a) and must open the door before the other party may offer the bolstering evidence.

Rule 608(a) thus offers an avenue for introducing some expert testimony to assist the jury to assess witness credibility. But this avenue is extremely narrow. The expert may speak only to the witness’s general

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123. See Fed. R. Evid. 608(a) advisory committee’s note. Opinion or reputation evidence of a witness’s untruthfulness, as well as evidence of misconduct, constitute attacks on credibility sufficient to admit rehabilitative testimony. See id.; see also Renda v. King, 347 F.3d 550, 555 (3d Cir. 2003) (reasoning that an opening statement that suggests a witness is a corrupt police officer constitutes an attack under Rule 608(a)(2)); United States v. Murray, 103 F.3d 310, 321 (3d Cir. 1997) (holding that exposure, during cross-examination, of witness’s longstanding and heavy drug use, acquaintance with drug dealers, convictions for drug possession, unlawful carrying of an unlicensed firearm, and prior inconsistent statements to the grand jury allowed for bolstering evidence directed at veracity under 608(a)(2)); United States v. Dring, 930 F.2d 687, 690 (9th Cir. 1991) (“The purpose of Rule 608(a)(2) is to encourage direct attacks on a witness’s veracity in the instant case and to discourage peripheral attacks on a witness’s general character for truthfulness.”); Bennett, supra note 83, at 589–90 (discussing what constitutes an attack).

124. See Fed. R. Evid. 608(b) advisory committee’s note. Evidence of bias does not allow for the admission of character evidence under Rule 608(a) because it focuses on a witness’s veracity in a particular case, rather than a predisposition for untruthfulness. See Renda, 347 F.3d at 554 (“[E]vidence of bias . . . does not open the door for evidence of good character for truthfulness . . . because evidence of bias only relates to a motive to lie in the particular case, not a general predisposition to lie.” (citations omitted)); see also Dring, 930 F.2d at 691 (reasoning that bias evidence constitutes a direct attack on specific instances of untruthfulness). Likewise, prior inconsistent statements or testimony also do not open the door for rehabilitative evidence. See Renda, 347 F.3d at 554 (noting that “prior inconsistent statements do not open the door for evidence of good character for truthfulness because there can be a number of reasons for the error”); United States v. Danehy, 680 F.2d 1311, 1314 (11th Cir. 1982) (“The mere fact that a witness is contradicted by other evidence in a case does not constitute an attack upon his reputation for truth and veracity.”) (quoting Kauz v. United States, 188 F.2d 9, 10 (5th Cir. 1951))); United States v. Med. Therapy Scis., Inc., 583 F.2d 36, 41 (2d Cir. 1978) (noting that “[s]ome types of bias . . . do not necessarily involve any issue relating to the moral character of the witness”).

125. See, e.g., United States v. Herzberg, 558 F.2d 1219, 1224–25 (5th Cir. 1977) (holding that testimony of bad reputation in the community is appropriate impeaching testimony).

126. See, e.g., Murray, 103 F.3d at 321 (holding that vigorous and extensive cross-examination exposing a witness’s illegal activities constitutes an attack on character for veracity).
character for truthfulness or untruthfulness and may not offer evidence of truthfulness unless the opposing party attacks the witness’s character for truthfulness. However, not all expert testimony that bolsters or impeaches credibility falls within Rule 608 because it focuses on character for truthfulness.\textsuperscript{127} Moreover, while the Rule allows opinion concerning character to be used in a way that is otherwise not permitted, the use of opinion for other purposes is not excluded.\textsuperscript{128}

As the discussion that follows reflects, most admissible expert testimony bearing on credibility should be evaluated under other rules and admitted to give the jury insight into something other than the witness’s truthful character. A court that mistakenly applies Rule 608(a) to noncharacter expert testimony, however, will analyze the evidence incorrectly by not accounting for the testimony’s actual role in the case and may inappropriately restrict expert testimony addressing credibility.\textsuperscript{129}

\textsuperscript{127} Even when admitting such evidence, courts may be confused. In \textit{State v. Adams}, 5 P.3d 642 (Utah 2000), the Supreme Court of Utah held that the trial court properly permitted the prosecution expert to testify that the prosecution’s witness was too mentally limited to be susceptible to coaching. \textit{Id.} at 646. Rather than offering a direct opinion of the witness’s character for truthfulness, the expert “merely stated that [the witness’s] mental capacity probably prevented her from either inventing or learning and consistently repeating a fabricated story.” \textit{Id.} at 645–46. The court set forth the colloquy from the trial, reporting that the expert testified that given the witness’s inability to master simple educational tasks, such as spelling her own name or accurately recalling her own birth date, he did not see how she could be coached to give a consistent, false account of the facts. \textit{Id.} at 645. Therefore, the court held that “[b]ecause [the expert’s] testimony did not directly address [the witness’s] veracity . . . it did not impermissibly invade the province of the jury or violate rule 608(a).” \textit{Id.} at 646 (citing \textit{State v. Workman}, 852 P.2d 981, 984 (Utah 1993)). In \textit{State v. Greninger}, 569 N.W.2d 189 (Minn. 1997), the Minnesota Supreme Court addressed expert testimony about battered woman’s syndrome. \textit{Id.} at 193. The court in \textit{Greninger} held:

[Expert testimony regarding battered woman syndrome is admissible] if it is introduced after the victim’s credibility has been attacked by the defense, see MINN. R. EVID. 608(a), if it helps the jury understand the victim’s inconsistent statements or delay in seeking prosecution of the batterer, see MINN. R. EVID. 702, and if the expert merely describes the syndrome and its characteristics and does not offer an opinion as to whether the victim suffers from it, thereby reducing the risk of unfair prejudice to the defendant, see MINN. R. EVID. 403.

\textit{Id.} at 193–94, 197 (formatting added).

\textsuperscript{128} \textit{See generally} Berger, supra note 10, at 584–86 (concluding that “[o]pinion testimony on credibility offered on a theory other than to prove character should likewise be admissible provided it satisfies the relevancy test of Rule 401”).

\textsuperscript{129} For example, courts have demonstrated confusion about the role of Rule 608 in evaluating polygraph evidence. Polygraph evidence speaks to a witness’s truthfulness or reactions to information in a specific case, not to general character for truthfulness or untruthfulness. Some courts have erroneously concluded that the admissibility of polygraph evidence is governed by Rule
The distinction is particularly critical in jurisdictions that explicitly preclude experts from testifying to opinions concerning truthful character. It is therefore crucial that courts properly determine the role of expert testimony in assessing credibility and evaluate the testimony’s admissibility under the appropriate rules.

V. PROPER IMPEACHMENT AND BOLSTERING NOT WITHIN RULE 608

Truthfulness is only one of the jury’s concerns in assessing the credibility of a witness’s testimony. Even a truthful witness may not be worthy of belief in a particular case, and a generally untruthful witness may provide reliable information in a particular case. The jury should not credit the testimony of a witness who tells the truth but suffers from impaired perception or memory. The jury should scrutinize the testimony of a witness who may be influenced by bias or self-interest. In addition, the jury should consider whether the witness’s conduct is consistent with the witness’s in-court testimony and whether there is factual corroboration of the witness’s testimony. Rule 608 does not govern testimony that addresses credibility in these other ways.

Expert witnesses can often offer insights into these other measures of credibility without addressing truthful character. Noncharacter expert testimony bearing on credibility falls into three categories of admissible evidence: (1) evidence concerning perception, memory, or bias; (2) evidence explaining behavior; and (3) testimony simply agreeing with a witness’s testimony. Admissibility of evidence falling within these categories is governed only by the general rules of admissibility: Rules 402 and 403. In each of these areas, the expert testimony has more probative force than the mere character inference that the witness is a liar.

608. See United States v. Piccinonna, 885 F.2d 1529, 1536 (11th Cir. 1989) (expressing the view that a polygraph test supporting a claim that a witness is telling the truth as to specific matters would be admissible under Rule 608(a) if the witness’s credibility were first attacked); accord United States v. Padilla, 908 F. Supp. 923, 927–28 (S.D. Fla. 1995) (holding that “once a witness’ character for truthfulness or credibility has been attacked, a polygraph expert may introduce testimony as to that witness’ character for truthfulness based on the results of a polygraph examination”); see also State v. Myers, 359 N.W.2d 604, 610 (Minn. 1984) (applying Rule 608(a) to justify admitting noncharacter testimony that explained behavior and addressed credibility in the specific case of sexual abuse of children).

130. For a list of some of these states, see supra note 87.

131. See, e.g., United States v. Affleck, 776 F.2d 1451, 1458 (10th Cir. 1985) (upholding exclusion of an expert’s testimony concerning memory because the average person is able to understand that people forget and therefore a memory expert does not satisfy Rule 702); State v. Marine, 520 S.E.2d 65, 66–67 (N.C. Ct. App. 1999) (considering alternative grounds for admitting expert testimony).

and therefore is more likely to be lying in court. Evidence addressing perception, memory, bias, conduct, or the substantive issues in the case speaks pointedly to the credibility of the testimony in the case and has extremely strong probative value. Consequently, expert testimony falling into these categories should be more readily admitted at trial. Nevertheless, the effect of the common-law maxim is apparent in these areas and, as a result, judicial resistance to this testimony endures.\textsuperscript{133}

The remainder of this Part addresses these three categories of expert testimony. Part V.A examines the role of expert testimony to help the jury understand the witness’s bias or the witness’s ability to perceive or remember accurately. Part V.B discusses the use of expert testimony to help the jury understand behavior that may otherwise skew the jury’s assessment of credibility. Part V.C briefly considers courts’ exclusion of expert testimony merely because it is consistent with the testimony of a witness.

\textbf{A. Expert Testimony Concerning Perception, Memory, or Bias}

Experts often offer insight into credibility on grounds other than character. Expert testimony may bolster or impeach a witness’s credibility by addressing the witness’s perception or memory as it would affect the accuracy of the witness’s testimony.\textsuperscript{134} Alternatively, expert testimony

\textsuperscript{133} For examples of cases discussing the hesitancy of courts to admit certain expert testimony, see supra note 40. See also Mullane, supra note 45, at 68.

\textsuperscript{134} Friedland, supra note 16, at 167 n.15 (noting that most expert testimony addresses memory, perception, and narration); see also United States v. Vallejo, 237 F.3d 1008, 1019–20 (9th Cir. 2001) (noting that the expert could have helped the jury understand why a witness with a history of learning difficulties “appeared to struggle while testifying at trial”); Schutz v. State, 957 S.W.2d 52, 59–71 (Tex. Crim. App. 1997) (discussing the difference between a comment on truthfulness and a comment on perception). A number of disorders affect perception or memory. They include conduct disorder, delirium, amnestic disorders, schizophrenia, delusional disorders, and depression. See Manual of Mental Disorders, supra note 90, at 95, 136, 172–73, 299, 323, 788. Those suffering from conduct disorder may suffer from misperception: “Especially in ambiguous situations, aggressive individuals with this disorder frequently misperceive the intentions of others as more hostile and threatening than is the case . . . .” \textit{Id.} at 95. A witness who suffered from delirium at the time of the events would experience “a disturbance of consciousness that is accompanied by a change in cognition[,] . . . a reduced clarity of awareness of the environment,” and an impairment of “[t]he ability to focus, sustain, or shift attention.” \textit{Id.} at 136. A witness suffering from an amnestic disorder may be “impaired in their ability to learn new information” or “unable to recall previously learned information or past events.” \textit{Id.} at 172. Schizophrenia is characterized by “a range of cognitive and emotional dysfunctions that include perception.” \textit{Id.} at 299. Delusional disorder involves “the presence of one or more nonbizarre delusions that persist for at least [one] month.” \textit{Id.} at 323. Depression may impair the “ability to think, concentrate, or make decisions” and may lead to distraction or memory difficulties. \textit{Id.} at 350.
may explain how the witness may be influenced by a cognitive predisposition for or against a particular party due to a witness’s bias or self-interest.\textsuperscript{135} Experts equipped to provide insight into a witness’s capacity for perception, ability to remember, or bias offer valuable assistance to the jurors who must determine the credibility of the witness’s testimony. The courts should generally admit such expert testimony.

Both evidence that addresses a witness’s capacity to perceive or recall the events about which she testifies and evidence that reveals bias on the part of a witness can make an important contribution to a case. Such evidence is not character evidence and should not be subject to the restrictive rules governing character evidence. In \textit{United States v. Abel},\textsuperscript{136} the Supreme Court emphasized the limited scope of Rule 608 and rejected an argument that the Rule governed and limited the admissibility of evidence that tended to impeach by showing the witness’s bias.\textsuperscript{137} Emphasizing that Rule 608 applies only to character evidence, the Court held that evidence of bias is governed by Rules 402 and 403.\textsuperscript{138} The evidence was presumptively admissible because it was relevant, but it could be excluded under Rule 403 if the unfair prejudice that the evidence injected into the case substantially outweighed its probative value in tending to show bias.\textsuperscript{139} Further, the Court emphasized the strong probative value of bias evidence.\textsuperscript{140}

Like bias evidence, evidence relating to a witness’s capacity to perceive or remember should be evaluated under the relevancy rules rather than under the character evidence rules.\textsuperscript{141} Furthermore, courts should recognize that evidence related to a witness’s strength or weakness of perception or memory has stronger probative value in assessing the credibility of the witness’s testimony than evidence of a general character for truthfulness or untruthfulness. Even a truthful witness should not be credited if the witness’s perception or memory of the events was impaired.

\textsuperscript{135} \textit{See infra} notes 136–40 and accompanying text.
\textsuperscript{136} 469 U.S. 45 (1984).
\textsuperscript{137} \textit{Id.} at 51, 56.
\textsuperscript{138} \textit{Id.} at 51; \textit{see also} \textit{Fed. R. Evid.} 402; \textit{Fed. R. Evid.} 403.
\textsuperscript{139} \textit{See Abel}, 469 U.S. at 49, 53.
\textsuperscript{140} \textit{See id.} at 51 (“A successful showing of bias on the part of a witness would have a tendency to make the facts to which he testified less probable in the eyes of the jury than it would be without such testimony.”); \textit{see also} \textit{Davis v. Alaska}, 415 U.S. 308, 316–17 (1974) (emphasizing the probative value of bias evidence); Berger, \textit{supra} note 10, at 584–86 (discussing Rule 608 and \textit{Abel}); Imwinkelried, \textit{Federal Rule of Evidence} 402, \textit{supra} note 17, at 148–50 (discussing the admissibility of bias evidence under the Federal Rules).
\textsuperscript{141} \textit{See generally} \textit{Fed. R. Evid.} 402; \textit{Fed. R. Evid.} 403.
The distinction between evidence of perception or memory and evidence of character is critical. In *Washington v. Schriver*, the Second Circuit recognized this distinction. The Second Circuit concluded that the trial court had failed to draw the critical distinction between evidence bearing on credibility and evidence bearing on reliability of the witness’s testimony. The circuit court pointed out that, although restrictive rules apply to testimony addressing credibility, that is, “the jury’s assessment of whether a witness is telling the truth,” testimony addressing reliability, “whether the witness’s perception or memory is accurate,” is generally admissible.

A number of other courts have likewise acknowledged the importance of this type of evidence and have not found that its tendency to bolster or impeach is a barrier to admissibility. In *United States v. Partin*, the defendant sought to present an expert who would explain that another witness’s mental condition at the time of the alleged offenses “would have a tendency to affect his ability to see and hear,” and the court recognized

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142. 255 F.3d 45 (2d Cir. 2001).
143. Id. at 58.
144. Id. at 50. The court described the proposed testimony as follows:

Dr. Steven Thurber, a psychologist who specializes in the field of child memory[,] . . . proposed to testify that children under seven have trouble separating appearances from reality; that leading questions about sexual abuse and other subjects can cause young children to adopt information contained in the questions as remembered fact; that the use of anatomically correct dolls is unduly suggestive; and that the interrogation techniques used in this case by detectives, a social worker, assistant district attorneys, and doctors were leading and suggestive.

Id.

145. See id. at 58. The circuit court nevertheless held that the exclusion of the evidence in the defendant’s state trial did not rise to the level of a constitutional violation. See id. at 59.
146. Id. at 58 (quoting *Washington v. Schriver*, 90 F. Supp. 2d 384, 389 (S.D.N.Y. 2000), aff’d, 255 F.3d 45 (2d Cir. 2001)); see also *State v. Heath*, 341 S.E.2d 565, 568 (N.C. 1986) (noting that expert opinion regarding whether the victim had a mental condition that would “cause her to fantasize about sexual assaults in general” would be admissible to address the victim’s reliability, whereas expert opinion regarding whether the victim would make up a story about a specific sexual assault was impermissible because it addressed the victim’s credibility).
148. 493 F.2d 750 (5th Cir. 1974).
the role this type of evidence can play. In State v. Gherasim, the Oregon Supreme Court overturned the trial court’s exclusion of the defendant’s expert testimony. The psychiatrist called by the defendant would have testified that the victim’s recall of the night of the assault was impaired by dissociative amnesia. The expert explained that his testimony did not relate to truthfulness but to the victim’s “mental ability” to recall the events accurately. The trial court concluded that the expert’s testimony impermissibly commented on the victim’s credibility and that the jury could assess the victim’s credibility without expert assistance.

The Oregon Supreme Court concluded that the expert’s opinion concerning the witness’s “capacity to remember what had occurred on the night that she was assaulted” would have been helpful to the jury and should have been admitted.

Similarly, in cases where the jury has learned that a witness suffers from mental illness, courts should allow expert testimony regarding a witness’s ability to distinguish reality from fantasy. Such testimony bolsters the witness’s credibility if it helps allay the jury’s possible concern that the mental illness interferes with the witness’s ability to perceive and remember. Its more important role, however, is to provide essential information to the jury.

149. See id. at 764. In Partin, the trial court excluded the testimony because the expert “could not state to any degree of medical certainty that [the witness] could not perceive or understand what was happening around him” at the time of the events. Id. However, the Fifth Circuit concluded that the trial court should have permitted the jury to hear this testimony. Id. The circuit court also held that the defendant should have been permitted to use certain medical and psychiatric records on cross-examination to undermine the credibility of prosecution witnesses. See id. The court noted that “[t]he readily apparent principle is that the jury should, within reason, be informed of all matters affecting a witness’s credibility to aid in their determination of the truth.” Id. at 762 (citing Walley v. State, 126 So. 2d 534 (Miss. 1961)). The records in question revealed that the witness was suffering from auditory hallucinations just a few months before the events as to which he testified. Id. at 764. For another case addressing testimony about a witness’s mental condition, see Sinclair v. Turner, 447 F.2d 1158 (10th Cir. 1971). In Sinclair, the Tenth Circuit recognized that “insanity or mental abnormality either at the time of observing the facts which he reports in his testimony, or at the time of testifying, may be provable, on cross-examination or by extrinsic evidence, as bearing on credibility.” Id. at 1162.

150. 985 P.2d 1267 (Or. 1999).
151. Id. at 1268.
152. Id. at 1269.
153. Id. at 1270.
154. Id. at 1271. The trial court was persuaded in part by the expert’s response to questions on cross-examination that pushed him to state his conclusion that the victim’s account was probably not accurate. See id. at 1270–71 (outlining the cross-examination and the trial court’s conclusion).
155. See id. at 1272.
156. See, e.g., Eberhardt v. State, 359 S.E.2d 908, 910 (Ga. 1987) (concluding that expert testimony should have been allowed because it was relevant and was not offered “merely for the
Not all courts have recognized the value of this type of expert testimony.\(^{157}\) The influence of the common-law maxim is apparent. Some courts overlook the significance of testimony addressing perception and memory, and these courts conclude that this type of expert testimony invades the province of the jury.\(^{158}\) For example, in *Westcott v.*
litigation where money is sought. She criticized Dr. Tyndall for using a structured
interview in diagnosing PTSD because it could allow Nichols to act under the
influence of secondary gain and recall bias, “and this is—I mean this is what
happened.” She also defined “malingering” as feigning or making up symptoms
for the purpose of secondary gain.

The plaintiff argued that this testimony impermissibly addressed the plaintiff’s “veracity
and credibility,” and the Eighth Circuit agreed with the plaintiff’s argument. Id. at 882–83. The
court stated that “[s]uch evidence is not helpful if it draws inferences or reaches conclusions within
the jury’s competence or within an exclusive function of the jury.” Id. at 883 (citing United States
v. Call, 129 F.3d 1402, 1406 (10th Cir. 1997); Pelster v. Ray, 987 F.2d 514, 526 (8th Cir. 1993)). The
court in Nichols expressed concern that the evidence might confuse or mislead the jury by
“causing [the jury] to substitute the expert’s credibility assessment for its own common sense
determination.” Id. (citing United States v. Kime, 99 F.3d 870, 884–85 (8th Cir. 1996)). The court
drew a line between testimony that “explain[ed] psychiatric terms and the situations in which they
may arise” and testimony that expressed the expert’s own opinion that the plaintiff’s statements to
her expert “were influenced by recall bias, secondary gain, and malingering.” Id. (citing United
States v. Rouse, 111 F.3d 561, 570–71 (8th Cir. 1997); Arcoren v. United States, 929 F.2d 1235,
1239 (8th Cir. 1991)). The testimony “impermissibly instructed the jury on how to weigh [the]
evidence.” Id. at 884. The court overlooked the insight that the expert provided into the plaintiff’s
perception and memory of the critical events.

159. 68 F.3d 1073 (8th Cir. 1995).
160. Id. at 1076–77.
161. Id. at 1077.
162. See id. at 1075.
163. Id.
164. Id. at 1077. The court stated:

The testimony before us . . . is the same type [as in United States v. Azure, 801
F.2d 336 (8th Cir. 1986) and United States v. Whitted, 11 F.3d 782 (8th Cir.
1993)], as it provides a psychological label or diagnosis as a way of excusing or
justifying [the defendant’s] statements made immediately after the shooting. The
accuracy of these statements is a pure question of credibility.
Actually, the expert testimony represented precisely the type of information that can enhance the jury’s assessment of credibility by arming it with increased knowledge about perception and memory.\textsuperscript{165} The following three sections examine the ways courts have handled three types of expert testimony: eyewitness testimony, post-hypnosis testimony, and child witness testimony. For each of these types, courts have let go of the maxim that experts are not permitted to address credibility and have opened the door to expert testimony that will help the jury understand the specific issues of perception, memory, or bias raised by a witness.

1. Eyewitness Testimony

Erroneous eyewitness identification has contributed to the conviction of innocent defendants.\textsuperscript{166} Experts on eyewitness identification can help jurors understand the psychological dynamics of identification and, most critically, can help them overcome erroneous assumptions that infect eyewitness identification.\textsuperscript{167} Specifically, an expert can help jurors understand the vagaries of perception and memory that undermine the accuracy of eyewitness identification. Given the probative value of psychological insights into eyewitness identification,\textsuperscript{168} a qualified expert

\textit{Id.} The court then remarked that \textit{Azure} and \textit{Whitted} “plainly stand for the proposition that expert testimony going to the issue of credibility is not admissible.” \textit{Id.} Characterizing the issue as “close,” the Eighth Circuit held that the trial court had committed reversible error by admitting the evidence. \textit{Id.}

165. The Ninth Circuit has also improperly condemned this type of expert testimony. See United States v. Binder, 769 F.2d 595, 602–03 (9th Cir. 1985) (rejecting expert testimony that would have provided insight into the witness’s accuracy of perception and memory), overruled on other grounds by United States v. Morales, 108 F.3d 1031 (9th Cir. 1997).


167. See Simmons, supra note 7, at 1030–32 (discussing the science of eyewitness identification).

should be permitted to testify concerning the psychology of eyewitness identification.

The long battle over the admissibility of expert testimony relating to eyewitness identification is instructive. The cases reveal that courts are resistant to expertise touching on witness credibility. The cases also illustrate the ways that courts justify excluding expert testimony even though the testimony speaks directly to the ways that perception and memory can generate false but convincing identification testimony. However, an examination of the relevant cases reveals an increasing acceptance of this type of testimony.

Many courts have been unreceptive to expert testimony addressing eyewitness credibility. The reluctance to admit expert testimony on identification appears attributable to many courts’ adherence to the prohibition on expert testimony addressing credibility and, at least in part, to the fact that the judges asked to rule on the question share the misconceptions that the expert testimony was intended to counteract.

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Franny Forsman, *Attacking Reliability of Eyewitness Testimony After Daubert*, THE CHAMPION, June 21, 1997, at 60 (asserting that there is a need to allow experts to explain the unreliability of eyewitness testimony).

169. See Berger, *supra* note 10, at 601–04 (pointing out a shift in decisions concerning expert testimony on eyewitness identification); Mullane, *supra* note 45, at 98–104 (detailing a shift in decisions from excluding expert testimony to admitting it under Rule 702); Stein, *supra* note 168, at 295–96 (explaining the fit between expert testimony and eyewitness identification).

170. See United States v. Crotteau, 218 F.3d 826, 833 (7th Cir. 2000) (holding that thorough cross-examination precludes the need for experts on the fallibility of eyewitness identification); United States v. Hall, 165 F.3d 1095, 1104 (7th Cir. 1999) (affirming the exclusion of expert testimony on eyewitness identification and discussing the Seventh Circuit’s reluctance to admit such evidence because it does not assist the jury); United States v. Lumpkin, 192 F.3d 280, 289 (2d Cir. 1999) (declaring that the testimony of an expert on eyewitness identification is inadmissible because it invades the jury’s province of credibility determination); United States v. Smith, 122 F.3d 1355, 1358–59 (11th Cir. 1997) (concluding that expert testimony on eyewitness identification does not assist the jury and that the jury can subject identification to “common-sense evaluation”); United States v. Rincon, 28 F.3d 921, 926 (9th Cir. 1994) (deciding that expert testimony could be confusing and misleading, thus negating its helpfulness); United States v. Downing, 753 F.2d 1224, 1232 (3d Cir. 1985) (“Judicial resistance to the introduction of this kind of expert testimony is understandable given its innovativeness and the fear of trial delay spawned by the spectre of the creation of a cottage industry of forensic psychologists.”); see also Stein, *supra* note 168, at 297 (noting that some courts are suspicious of expert testimony on eyewitness identification).

171. See Stein, *supra* note 168, at 298 (noting reasons that courts give for finding that expert testimony does not assist the trier of fact).

172. See, e.g., United States v. Fosher, 590 F.2d 381, 382–84 (1st Cir. 1979) (affirming the exclusion of expert testimony on eyewitness identification); People v. Enis, 564 N.E.2d 1155, 1165 (Ill. App. Ct. 1990) (rejecting the testimony of a leading expert on eyewitness reliability); see also Simmons, *supra* note 7, at 1032–37 (discussing the case law governing expert testimony on eyewitness identification).
In *Neil v. Biggers*, the Supreme Court set out the factors courts must consider in determining whether identification testimony is sufficiently reliable:

> The factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness’ degree of attention, the accuracy of the witness’ prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

Since *Biggers* was decided in 1972, the approach it defines has been repeatedly reaffirmed. As a result, courts often view expert opinion as unnecessary to help the jury assess credibility. Indeed, the courts remain committed to the *Biggers* factors despite strong psychological evidence that undermines the applicability of those factors.

Psychological research has demonstrated that *Biggers* rests on erroneous beliefs about eyewitness identification. The *Biggers* list of

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174. *Id.* at 199–200.
175. See, e.g., Sumner v. Mata, 455 U.S. 591, 597 n.10 (1982) (noting the Court’s acceptance of the factors set forth in *Biggers*); Manson v. Brathwaite, 432 U.S. 98, 114 (1977) (“The factors to be considered [regarding the admissibility of identification testimony] are set out in *Biggers.*”); *see also* United States v. Brownlee, 454 F.3d 131, 139 (3d Cir. 2006) (discussing the totality-of-circumstances approach announced in *Biggers*); Howard v. Bouchard, 405 F.3d 459, 472 (6th Cir. 2005) (“In judging reliability, we consider the totality of the circumstances, including the factors described in . . . *Biggers.*”); United States v. Henderson, 320 F.3d 92, 100 (1st Cir. 2003) (reasoning that the starting point for admissibility of identification testimony is set forth in *Biggers*).
176. See, e.g., United States v. Langan, 263 F.3d 613, 619–22 (6th Cir. 2001) (upholding the exclusion of the defendant’s expert eyewitness testimony where the trial court stated that the testimony would have improperly invaded jury’s province); United States v. Brien, 59 F.3d 274, 276–78 (1st Cir. 1995) (affirming the trial court’s decision to exclude the defendant’s expert where the trial court had “noted the risks of confronting the jury with battles of experts on areas within the common-sense competence of jurors”); Commonwealth v. Spence, 627 A.2d 1176, 1182 (Pa. 1993) (holding that testimony concerning the effect of stress on identification was properly excluded because it would have intruded on the jury’s role). In *Langan*, the court stated that “the hazards of eyewitness identification are within the ordinary knowledge of most lay jurors.” 263 F.3d at 624. In *United States v. Downing*, the Third Circuit noted that a number of courts had excluded expert testimony on eyewitness identification because the jury could adequately assess the identification by applying common sense, but the *Downing* court ultimately concluded that the evidence should be admitted under Rule 702 in the proper circumstances. 753 F.2d 1224, 1229–31 (3d Cir. 1985).
factors has been criticized for including factors that have little relationship to an accurate identification. For example, the fact that the witness provides a precise description of the perpetrator is not a good predictor of the correctness of the identification. An eyewitness’s sense of confidence can unintentionally be artificially enhanced by the lineup procedures employed by law enforcement. Thus, in this arena expert testimony can play a useful role in educating not only the jury but also the court about the credibility of eyewitness identification testimony.

Nevertheless, the development of this psychological literature has not persuaded all courts that expert testimony has value to the jury in cases of eyewitness identification. In United States v. Lumpkin, the Second Circuit upheld the exclusion of the defendant’s expert on eyewitness identification. The defendant sought to have the expert explain to the jury that an eyewitness’s confidence in her identification does not correlate to, or effectively predict, the accuracy of that identification. The defendant argued that the evidence was necessary “to rebut the natural assumption that the confidence shown by [a witness] indicated

noting “eyewitness identification evidence is among the least reliable forms of evidence and yet is persuasive to juries,” and criticizing the Biggers factors); Gary L. Wells & Amy L. Bradfield, “Good, You Identified the Suspect”: Feedback to Eyewitnesses Distorts Their Reports of the Experience, in 83 J. APPLIED PSYCHOL. 360, 360–76 (1998) (finding that “confidence tends to be only modestly related to eyewitness identification accuracy” and such confidence is malleable, subject to “[c]onfidence inflation” after “feedback manipulation”); Gary L. Wells, Verbal Descriptions of Faces from Memory: Are They Diagnostic of Identification Accuracy?, 70 J. APPLIED PSYCHOL. 619, 619–26 (1985) (calling into question the Biggers factors). Wells suggests that the Court in Biggers was wrong to rely on the accuracy of verbal descriptions when assessing the accuracy of the identification. See id. at 619. Although Wells acknowledges that his findings support the Court’s approach, he did state that “it appears that the relationship between descriptions of faces and the identification of faces is not due to a process wherein good describers are good identifiers.” Id. at 624–25; see also Melissa Pigott & John C. Brigham, Relationship Between Accuracy of Prior Description and Facial Recognition, 70 J. APPLIED PSYCHOL. 547, 548 (1985) (“Research findings from other paradigms also suggest that people’s ability to recall something seen previously will not be strongly related to their ability to identify the same object on a recognition test”). Pigott and Brigham went on to find that “[t]here was no relationship between subjects’ accuracy in describing the target person and the accuracy with which they recognized him in a photograph lineup.” Id. at 552.

178. See Wells, Eyewitness Identification, supra note 177, at 608 (noting that the Biggers factors have been criticized because the “accuracy of description is a rather poor predictor of accuracy of identification”).

179. See id. (noting that lineup procedures can cause an eyewitness to “overestimate how good of a view they had of the perpetrator as well as lead them to develop false confidence”).

180. 192 F.3d 280 (2d Cir. 1999).

181. Id. at 289.

182. Id. at 288.
reliability.” The court held that the evidence would have intruded on the jury’s “task of assessing witness credibility” and “intrud[ed] too much on the traditional province of the jury to assess witness credibility.” The court expressed concern that the proffered testimony would have usurped the jury’s role and stated that it might have even “placed the officers’ credibility here in jeopardy.”

In United States v. Langan, the Sixth Circuit affirmed the trial court’s decision to preclude the defense expert from testifying. The court assumed that expert testimony would ultimately have clouded the issues:

Although we recognize that expert testimony on eyewitness identification might inform the jury on all of the intricacies of perception, retention, and recall, we nevertheless agree with the district court that the hazards of eyewitness identification are within the ordinary knowledge of most lay jurors. It is likely that an uninformative battle of experts would have occurred if the government had offered its own expert testimony in order to refute [the defense expert], and the jury could have been unduly misled and confused.

These decisions illustrate courts’ overprotective attitude toward the jury and improper assessment of this type of evidence. Expert testimony on eyewitness identification is largely counterintuitive and therefore necessary to address the jury’s natural tendency to credit witnesses who testify with confidence about their identification of the defendant. These courts excluded legitimate expert testimony necessary to counteract the jury’s natural tendency to view confidence on the stand as a signal of reliability.

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183. Id. at 289.
184. See id.
185. Id. The court also expressed concern that the expert’s testimony may have usurped the role of the trial judge in instructing the jury on applicable law, which provides that witness confidence is a factor to be considered in assessing the credibility of eyewitness identification. Id.
186. 263 F.3d 613 (6th Cir. 2001).
187. Id. at 625.
188. Id. at 624.
189. See also United States v. Brien, 59 F.3d, 274, 276 (1st Cir. 1995) (noting that “the expert testimony in this case involved a credibility determination within the ken of the ordinary judge and juror—unlike, say, DNA identification” and stating concerns regarding reliability of expert testimony of this kind).
190. See Stein, supra note 168, at 300 (stating that eyewitness identification is counterintuitive and “weakly or not at all correlated with the accuracy of such identification”).
Other courts, however, have moved toward admitting this type of expert testimony. In United States v. Downing, the Third Circuit emphatically repudiated the trial court’s conclusion that the expert witness would “usurp the ‘function of the jury’” as a basis for exclusion. More recently, in United States v. Brownlee, the trial court limited the expert’s testimony concerning eyewitness identification and the Third Circuit reversed, emphasizing the importance of admitting expert testimony to educate jurors who come to the case unaware of the unreliability of eyewitness identification.

191. The trend appears to be in favor of admitting testimony by eyewitness identification experts. See United States v. Smithers, 212 F.3d 306, 311 (6th Cir. 2000) (recognizing a trend to admit expert testimony on the question of eyewitness identification); Brien, 59 F.3d at 277 (recognizing that judicial opinion on the value of expert testimony concerning eyewitness identifications was becoming more receptive); United States v. Moore, 786 F.2d 1308, 1312–13 (5th Cir. 1986) (upholding the exclusion of an eyewitness expert in the case but acknowledging the admissibility of this type of testimony in some circumstances). See generally Simmons, supra note 7, at 1032–37 (discussing the developing acceptance of expert testimony on eyewitness identification and the continuing limitations on the testimony).

192. 753 F.2d 1224 (3d Cir. 1985).

193. Id. at 1228. The court noted that Rule 704 abolishes the ultimate issue rule and “rejects as ‘empty rhetoric’ the notion that some testimony is inadmissible because it usurps the ‘province of the jury.’” Id. at 1229. The court therefore surmised that the district court may have ruled on the erroneous basis that “[an] expert[’s] testimony concerning the reliability of eyewitness identifications is never admissible in federal court because such testimony concerns a matter of common experience that the jury is itself presumed to possess.” Id.

194. 454 F.3d 131 (3d Cir. 2006).

195. Id. at 140–44; see also United States v. Mathis, 264 F.3d 321, 341 (3d Cir. 2001) (concluding that the trial court should have admitted most of the offered testimony concerning aspects of eyewitness identification but agreeing with the exclusion of the expert testimony explaining that viewing an object for a longer period would produce a more accurate memory because this information was “rather pedestrian”); United States v. Stevens, 935 F.2d 1380, 1398–1401 (3d Cir. 1991) (affirming the trial court’s exclusion of the defense expert’s testimony concerning the suggestiveness of identification from a wanted board and the way in which the initial identification may have infected victims’ later identifications as pedestrian points that did not require expert insight but holding that the court erred by excluding expert testimony concerning lack of correlation between confidence of identification testimony and its accuracy because a witness’s confidence in erroneous identifications is “counterintuitive” and expert testimony was therefore quite helpful); United States v. Moore, 786 F.2d 1308, 1312 (5th Cir. 1986) (holding that the exclusion of expert testimony on eyewitness identification was not reversible error even though testimony “is not simply a recitation of facts available through common knowledge” but is “largely counter-intuitive”).
2. Post-hypnosis Testimony

The decisions dealing with hypnotically refreshed memory stand in stark contrast to those dealing with eyewitness identification.196 In the middle of the twentieth century, hypnosis came into use as a means of refreshing a witness’s memory.197 Research soon demonstrated the risks of this practice, establishing the impact of hypnosis on the witness’s testimony and the difficulty of untangling the genuine memory from that established through hypnosis.198 Two approaches emerged. One was to bar the testimony altogether.199 The other was to allow the witness to testify
and to admit expert testimony concerning the effect of hypnosis. Rather than adhering to the maxim that questions of credibility are for the jury, the courts understood the importance of educating the jury about the impact of hypnosis on the witness’s ability to remember and narrate accurately.

3. Child Witness Testimony

Courts have also wrestled with and generally been more receptive to the use of expert testimony to help jurors understand issues of perception and memory in young witnesses. Cases involving allegations of sexual abuse of children raise special concerns about perception and memory. In these cases, the jury can benefit from the insights of expert testimony.

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200. See, e.g., Clay v. Vose, 771 F.2d 1, 4–5 (1st Cir. 1985) (upholding a conviction based on hypnotically refreshed testimony and noting that the jury had received the benefit of expert testimony as to the possible effects of hypnosis to help it assess the credibility of the witness and the accuracy of the testimony); People v. Hughes, 453 N.E.2d 484, 497 (N.Y. 1983) (noting that post-hypnotic testimony may be challenged with expert testimony concerning the potential effect of the hypnosis on the witness’s recollections); State v. Armstrong, 329 N.W.2d 386, 395 (Wis. 1983) (suggesting the use of expert testimony to help the jury assess the credibility of hypnotized witness).

201. See also Rock v. Arkansas, 483 U.S. 44, 61 (1987) (noting that expert testimony may be used to educate the jury concerning the risks of post-hypnosis testimony). But see United States v. Awkard, 597 F.2d 667, 671 (9th Cir. 1979) (limiting expert hypnosis testimony to the “general nature and usual effects of hypnosis” and leaving to the jury the issue of credibility). In *Awkard*, the court held that the defense attempted to discredit the witness on the grounds that the witness had been hypnotized, the permissible testimony would have been limited to “the general nature and usual effects of hypnosis, and the details of [the expert’s] hypnosis of [the witness].” *Id.* The expert should not under any circumstances be permitted to testify that the witness’s memory had been “accurately refreshed.” *Id.* at 670.

202. See Friedland, supra note 16, at 202 (asserting that “admission of general credibility testimony occurs most often in cases involving sexual abuse and child witnesses” and citing authority).
Courts do not always see the important role of such testimony.\textsuperscript{203} For example, in \textit{United States v. Binder},\textsuperscript{204} the trial court admitted expert testimony informing the jury that the children who testified “were able to distinguish reality from fantasy and truth from falsehood.”\textsuperscript{205} This testimony provided insight into the perception of the witnesses, a five year old and a seven year old, and helped the jury determine the children’s credibility.\textsuperscript{206} However, the Ninth Circuit misconceived the role of the expert testimony and held that the expert’s testimony should not have been admitted, citing the maxim that credibility is for the jury to determine and concluding that the expert testimony invaded the province of the jury.\textsuperscript{207} The court expressed the view that expert testimony offered to show that the complaining witnesses were “able to distinguish reality from fantasy and truth from falsehood” “improperly buttress[ed]” the witnesses’ credibility.\textsuperscript{208} The court also stated that the jurors “did not need additional assistance” in assessing the credibility of the witnesses and characterized the expert testimony as asserting “that these particular children in this particular case could be believed.”\textsuperscript{209} In the court’s view, “[t]he jury in effect was impermissibly being asked to accept an expert’s determination that these particular witnesses were truthful.”\textsuperscript{210} Justice Wallace, who concurred in part and dissented in part, more accurately understood the role of the expert testimony. He pointed out that “the experts testified only that the children were capable of telling the truth—they did not opine as to whether or not the children actually had done so.”\textsuperscript{211} Given the importance of determining whether a young witness is capable of accurate perception, memory, and narration, expert testimony addressing the maturity of the young witnesses’ perception would have been helpful to the jury.


\textsuperscript{204} 769 F.2d 595 (9th Cir. 1985), overruled on other grounds by United States v. Morales, 108 F.3d 1031 (9th Cir. 1997).

\textsuperscript{205} See id. at 602; see also Washington v. Schriver, 255 F.3d 45, 61 (2d Cir. 2001) (holding that the trial court’s exclusion of expert testimony on children’s suggestibility was not constitutional error).

\textsuperscript{206} Binding, 769 F.2d at 598.

\textsuperscript{207} See id. at 602.

\textsuperscript{208} See id.

\textsuperscript{209} See id.

\textsuperscript{210} See id.

\textsuperscript{211} See id. at 605 (Wallace, J., concurring in part and dissenting in part).
Other courts accept the legitimate role that expert testimony can play in helping the jury evaluate the credibility of a child’s testimony. For example, in *Doe v. Johnson*, the Seventh Circuit rejected the argument that expert testimony improperly invaded the province of the jury. The court allowed the expert to explain the circumstances that could have caused the child to allege sexual abuse out of self-interest.

Even courts that accept the value of this type of expert testimony recognize that the testimony should be confined to a discussion of perception and memory and should not extend to a direct assessment of truthfulness. In *United States v. Rouse*, the Eighth Circuit stated the general rule and posed the problem:

> A qualified expert may explain to the jury the dangers of implanted memory and suggestive practices when interviewing or questioning child witnesses, but may not opine as to a child witness’s credibility. That leaves a troublesome line for the trial judge to draw—as the expert applies his or her general opinions and experiences to the case at hand, at what point does this more specific opinion testimony become an undisguised, impermissible comment on a child victim’s veracity?


\[\text{213. 52 F.3d 1448 (7th Cir. 1995).}
\[\text{214. Id. at 1463.}
\[\text{215. See id. (reporting that the expert testified that parents rewarded the child for making allegations and punished her for recanting); accord Schutz v. State, 957 S.W.2d 52 (Tex. Crim. App. 1997) (discussing the admissibility of expert testimony concerning manipulation of child witnesses).}

\[\text{216. 111 F.3d 561 (8th Cir. 1997).}
\[\text{217. Id. at 571. As reported in the panel decision that was vacated, the precluded testimony provided:}

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Similarly in *Doe v. Johnson*, the court held that the expert testified properly when the expert “discussed the possibility that [the child]’s allegations were influenced by [her adopted mother]’s contemporaneous research into child abuse.”218 The expert stopped short of offering a specific opinion as to the credibility of the witnesses.219 Thus the testimony appropriately helped the jury focus on a factor that could have influenced the witness’s perception.

The evolution of the law in these three areas offers hope that courts will, over time, recognize the value of expert testimony on other questions of perception and memory. Courts should take a lesson from the initial resistance to and eventual acceptance of the expertise offered to help the jury with questions of credibility when faced with eyewitness identification testimony, post-hypnosis testimony, and a child’s testimony. Courts should be more receptive to expert testimony that addresses issues of perception, memory, and bias, because these types of testimony may improve the jury’s assessment of credibility.

### B. Expert Testimony Explaining Behavior

Expert witnesses are also called on to explain the behavior of witnesses to help juries understand the significance of a pattern of behavior.220

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Q And based on your review of [the trial testimony] and your review of the records, all the files in this matter, is it your belief that there’s been a practice of suggestibility employed in these techniques?

A Yes, sir.

United States v. Rouse, 100 F.3d 560, 566 (8th Cir. 1996), vacated, 111 F.3d 561 (8th Cir. 1997); see also id. at 568–69 (discussing the expert’s testimony in more detail). Ultimately, the Eighth Circuit concluded that if the exclusion of the testimony was error, it was harmless. See *Rouse*, 111 F.3d at 572; *accord Provost*, 875 F.2d 172 (8th Cir. 1989). In *Provost*, the court held that the court-appointed expert witness had not strayed into improper vouching. *Provost*, 875 F.2d at 175–76. The expert, a psychologist, explained the victim’s linking of two events, stating that sexually abused children might link two events in time even though they occurred on separate occasions because one of the events might act as a triggering mechanism. *Id.* at 176. Explaining why the victim may have linked the two events, the expert stated, “an elementary basic thing is that whether or not they were contingent in time they both occurred.” *Id.* The court characterized the testimony as “at most, an implied statement of her belief that [the witness] was telling the truth.” *Id.* The court did not approve the form of the testimony and actually concluded that it came close to, but did not cross, the line established in *United States v. Azure*, 801 F.2d 336 (8th Cir. 1986). See *Rouse*, 111 F.3d at 176.

218. *Doe v. Johnson*, 52 F.3d 1448, 1463 (7th Cir. 1995).

219. See *id.*

220. See *People v. Simpkins*, 697 N.E.2d 302, 312 (Ill. App. Ct. 1998) (distinguishing between expert testimony that explains behavior and expert testimony that improperly comments on witness credibility). See generally *Friedland*, supra note 16, at 175, 201 (commenting that experts may
Because the expert’s guidance will encourage juries either to credit or to discredit the witness, this testimony also plays an impeaching or bolstering role and therefore sometimes falls prey to the common-law maxim.\textsuperscript{221} Like expert testimony concerning perception or memory, this category of expert testimony is not governed by Rule 608 because it does not address character for truthfulness.\textsuperscript{222} Instead, its admissibility should be assessed under Rules 402 and 403 and the rules governing expert testimony.\textsuperscript{224} Moreover, this type of testimony is generally of greater probative value than standard character impeachment evidence. If the testimony satisfies the expert testimony rules, then it should generally be admitted because it is relevant and not otherwise excluded.

The law has consistently recognized that evidence of behavior has probative value because this evidence provides insight into the mental state of the actor.\textsuperscript{224} Juries are routinely urged to view credibility through the prism of a witness’s or party’s behavior. A witness’s prior inconsistent statements are admissible to cast light on the witness’s truthfulness at trial.\textsuperscript{227} Evidence that the victim of a sexual assault made a prompt complaint is frequently admissible to corroborate the witness’s testimony.\textsuperscript{228} Evidence that a criminal defendant fled or changed appearance to avoid apprehension is admissible to show consciousness of guilt.\textsuperscript{229} Law enforcement officers are often permitted to testify as experts

\begin{itemize}
  \item [221] See Berger, \textit{supra} note 10, at 613–14 (asserting that the evidence acts as testimony about credibility).
  \item [222] See \textit{Fed. R. Evid.} 608.
  \item [223] \textit{Fed. R. Evid.} 402.
  \item [224] \textit{Fed. R. Evid.} 403.
  \item [226] See \textit{Fed. R. Evid.} 404(b). See generally \textit{Broun et al., supra} note 23, § 190 (discussing evidence of bad acts as proof of mental state).
  \item [227] See \textit{Broun et al., supra} note 23, §§ 34–38 (discussing the evidentiary use of prior inconsistent statements).
  \item [228] See generally Kathryn M. Stanchi, \textit{The Paradox of the Fresh Complaint Rule}, 37 B.C. L. Rev. 441, 442, 441–77 (1996) (discussing the fresh complaint rule, which “permits the prosecution to introduce, in its case in chief, out-of-court statements made by the complainant shortly after the assault, alleging that the sexual assault occurred”).
  \item [229] \textit{Broun et al., supra} note 23, §§ 263–265 (discussing evidence of consciousness of guilt).
\end{itemize}

One commentator suggests that polygraph evidence acts as evidence of guilty conscience rather
to explain the significance of certain behavior or language used by the defendants.\textsuperscript{230} Expert testimony giving the jurors insight into the probative significance of particular behavior is simply another example of evidence falling in this general category. Whether the witness’s behavior suggests that the witness’s factual account of events is accurate or inaccurate, the expert may help the jury understand the behavior and its significance in the case.

Two situations, discussed in the following sections, illustrate the value of such expert testimony. First, experts can help jurors understand why a defendant may have given a false confession. Second, experts can help explain to jurors the sometimes counterintuitive conduct of abuse victims.

1. Confession Cases

Expert testimony can assist the jury to evaluate a defendant’s challenge to the credibility of her own confession. Jurors may have difficulty comprehending that a suspect would confess to a crime she did not commit, yet these false confessions do occur.\textsuperscript{231} Expert testimony can explain the circumstances and personal characteristics that may generate a false confession.

Although the common-law protection of the jury’s special province may make courts reluctant to admit such testimony, courts have recognized its value.\textsuperscript{232} For example, in \textit{Pritchett v. Commonwealth},\textsuperscript{233} the

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\textsuperscript{230} Nossel, \textit{supra} note 37, at 250–56 (reviewing case law on law enforcement officers testifying as experts).

\textsuperscript{231} See Dwyer et al., \textit{supra} note 166, at 101–37 (providing examples of situations when false confessions occurred and reasons for their occurrence); Richard A. Leo, \textit{False Confessions: Causes, Consequences, and Solutions}, \textit{in Wrongly Convicted: Perspectives on Failed Justice} 36, 36–53 (Saundra D. Westervelt & John A. Humphrey eds., 2001) (discussing “how false confessions are produced and how they influence the police investigation, the prosecution’s presentation of the case, and the jurors’ and judges’ decisions”).

\textsuperscript{232} See United States v. Hall, 93 F.3d 1337, 1345 (7th Cir. 1996) (holding that a defense expert should have been allowed to testify and “would have let the jury know that a phenomenon known as false confessions exists, how to recognize it, and how to decide whether it fit the facts of the case being tried”); State v. Romero, 81 P.3d 714, 719, 723 (Or. Ct. App. 2003) (holding that the trial court should have permitted the defendant’s expert to testify regarding her suggestibility and the risk that she confessed involuntarily and inaccurately and that proposed testimony would not have commented improperly on defendant’s credibility); Commonwealth v. Jones, 327 A.2d 10, 12–13 (Pa. 1974) (holding that the trial court should have permitted the defendant’s expert to testify concerning the defendant’s mental capacity, I.Q., and lack of verbal ability to help the jury determine whether the confession introduced by the prosecution was valid); see also United States v. Gonzalez-Maldonado, 115 F.3d 9, 15–17 (1st Cir. 1997) (holding that the trial court erred by refusing to allow the defendant’s expert to testify to the defendant’s mental condition, which was characterized by exaggeration and verbosity, to help the jury understand the defendant’s statements than of credibility or truth telling. See Simmons, \textit{supra} note 7, at 1038–39.

\textsuperscript{233} See also United States v. Hall, 93 F.3d 1337, 1345 (7th Cir. 1996) (holding that a defense expert should have been allowed to testify and “would have let the jury know that a phenomenon known as false confessions exists, how to recognize it, and how to decide whether it fit the facts of the case being tried”); State v. Romero, 81 P.3d 714, 719, 723 (Or. Ct. App. 2003) (holding that the trial court should have permitted the defendant’s expert to testify regarding her suggestibility and the risk that she confessed involuntarily and inaccurately and that proposed testimony would not have commented improperly on defendant’s credibility); Commonwealth v. Jones, 327 A.2d 10, 12–13 (Pa. 1974) (holding that the trial court should have permitted the defendant’s expert to testify concerning the defendant’s mental capacity, I.Q., and lack of verbal ability to help the jury determine whether the confession introduced by the prosecution was valid); see also United States v. Gonzalez-Maldonado, 115 F.3d 9, 15–17 (1st Cir. 1997) (holding that the trial court erred by refusing to allow the defendant’s expert to testify to the defendant’s mental condition, which was characterized by exaggeration and verbosity, to help the jury understand the defendant’s statements
defendant offered expert testimony to explain that the mildly retarded defendant was compliant, prone to suggestibility, and probably said whatever the police wanted him to say.\textsuperscript{234} The trial court excluded the testimony because the testimony would “invade the province of the jury as to the ultimate issue of [the defendant’s] intent” at the time of the crime.\textsuperscript{235} However, the Supreme Court of Virginia disagreed and concluded that the offered evidence played a key role in helping the jury understand the defendant’s behavior.\textsuperscript{236} Similarly, in \textit{United States v. Vallejo},\textsuperscript{237} the Ninth Circuit held that the trial court erred when it refused to permit the defense expert to explain the defendant’s communication problems.\textsuperscript{238} This was error because the expert’s testimony would “help the jury understand how [the defendant] struggled to comprehend and communicate during the interrogation.”\textsuperscript{239} Expert testimony in these cases can play an important role in educating the jury about conduct that would otherwise be inexplicable.

2. Abuse Cases

Expert testimony has also been presented to explain the behavior of victims of sexual or spousal abuse. In some cases, the behavior threatens to undermine the witness’s credibility, and the expert testimony in these cases helps the jury understand behavior that otherwise may appear inconsistent or irrational. In other cases, an expert might attack the witness’s credibility by establishing that the witness did not behave in the expected manner.

Although such testimony has frequently been challenged as impermissible bolstering that invades the province of the jury, courts have allowed experts to explain to the jury why victims behaved in ways that are counterintuitive to the ordinary juror, such as failing to report incidents of abuse or staying with an abusive spouse.\textsuperscript{240} In these cases, the expert

\begin{itemize}
  \item[]{\textsuperscript{233} 557 S.E.2d 205 (Va. 2002).}
  \item[]{\textsuperscript{234} \textit{See id.} at 207; \textit{accord} People v. Slago, 374 N.E.2d 1270, 1274 (Ill. App. Ct. 1978) (holding that the trial court properly excluded the defendant’s expert testimony that explained why the defendant might have falsely confessed and discussing limits on admissibility of such testimony).}
  \item[]{\textsuperscript{235} \textit{See Pritchett}, 557 S.E.2d at 207.}
  \item[]{\textsuperscript{236} \textit{Id.} at 208.}
  \item[]{\textsuperscript{237} 237 F.3d 1008 (9th Cir. 2001).}
  \item[]{\textsuperscript{238} \textit{Id.} at 1019–20.}
  \item[]{\textsuperscript{239} \textit{Id.}
  \item[]{\textsuperscript{240} \textit{See}, e.g., \textit{United States v. Antone}, 981 F.2d 1059, 1062 (9th Cir. 1992) (allowing an expert to explain the general characteristics of abused children); \textit{State v. Myles}, 887 So. 2d 118,}
does not so much bolster the witness’s credibility as dispel a false impression possibly created by the relevant behavior.\textsuperscript{241} The testimony shores up the credibility of the witness by supporting the witness’s factual account; the expert testimony focuses neither on the witness’s truthfulness nor on memory or perception per se.\textsuperscript{242}

Conversely, the expert may provide insight into conduct and thereby cast doubt on the witness’s credibility. For example, an expert may testify that the alleged victim has not manifested the types of behavior typical of abuse victims.\textsuperscript{243} An expert may also be called on to explain the possibility

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\textsuperscript{241} See, e.g., United States v. Bighead, 128 F.3d 1329, 1331 (9th Cir. 1997) (concluding that expert testimony describing the behavior of sexual abuse victims was properly admitted and was not improper buttressing); \textit{Ex parte} Hill, 553 So. 2d 1138, 1139 (Ala. 1989) (holding that the expert was properly permitted to testify concerning the behavior of teenage victims of sexual abuse to explain delay in reporting and recantation); State v. Myers, 359 N.W.2d 604, 610 (Minn. 1984) (holding that the expert could properly describe characteristics or traits that she typically observed in sexually abused children because “the sexual abuse of children places lay jurors at a disadvantage”); State v. Neswood, 51 P.3d 1159, 1162, 1164 (N.M. Ct. App. 2002) (concluding that a list of reasons why a victim of child abuse would recant is permissible expert testimony); see also United States v. Cox, 23 M.J. 808, 815 (N-M.C.M.R. 1986) (recognizing the role of rape trauma syndrome testimony in explaining the victim’s reaction).

\textsuperscript{242} See, e.g., State v. Folse, 623 So. 2d 59, 68 (La. Ct. App. 1993) (noting that the defense corrected improper expert testimony by clarifying on cross-examination that the expert could say only that the witness’s account was “consistent with the dynamics of sexual abuse”); \textit{Middleton}, 657 P.2d at 1219 (noting that “if the jurors believed the experts’ testimony, they would be more likely to believe the victim’s account” but also that “[n]either of the experts directly expressed an opinion on the truth of the victim’s testimony”).

\textsuperscript{243} See, e.g., State v. White, 943 P.2d 544, 546 (N.M. Ct. App. 1997) (holding that the trial
that a child testifying to abuse who makes otherwise inexplicable accusations and testimony may be responding to adult manipulation. In these cases, the expert provides insight into patterns of behavior that will help the jury evaluate the credibility of the witness’s account. Because the jury may believe that actions speak louder than words, it is critical that the jury understand the message sent by the witness’s actions.

Despite the assistance provided by expert testimony explaining witness behavior, courts sometimes dismiss expert testimony bearing on behavior as improper expert comment on credibility by characterizing expert testimony that merely explains behavior as improper bolstering. In Commonwealth v. Gallagher, for example, the Pennsylvania Supreme Court held that the prosecution expert, who explained the effect of rape trauma syndrome on the victims of rape, impermissibly intruded on the province of the jury to determine credibility. The court described the testimony as follows:

The crux of the testimony appears to be that the victim’s failure to identify the appellant two weeks after the rape is unremarkable, as she was in the acute phase of [rape trauma syndrome] in which a victim has difficulty performing even normal functions, and the in-court identification five years later is particularly credible, as it results from a flashback, with the mind operating like a computer. It is clear that the only purpose of the expert testimony was to enhance the credibility of the victim.


245. See State v. Remme, 23 P.3d 374, 382–83 (Or. Ct. App. 2001) (holding that expert testimony related to the behavior of an abuse victim was properly admitted); see also State v. Keller, 844 P.2d 195, 198, 201–02 (Or. 1993) (concluding that the expert could fairly testify to the types of behavior that might indicate leading and coaching of young children but holding that the witness crossed the line into improper assessment of specific credibility). In Remme, the court attempted to reconcile Oregon decisions related to expert testimony concerning abuse victims and suggested that the line falls between testimony that assists the jury in its assessment of credibility and testimony that supplants that assessment. Remme, 23 P.3d at 383.


247. Id. at 356–57.

248. Id. at 358; accord Commonwealth v. Dunkle, 602 A.2d 830, 837–38 (Pa. 1992) (holding that the prosecution expert should not have been permitted to testify to reasons that a sexually abused child might not come forward and might omit details of the incident because “it would infringe upon the jury’s right to determine credibility”); Commonwealth v. Seese, 517 A.2d 920, 921 (Pa. 1986) (holding that allowing an expert to testify that child abuse victims do not have sufficient knowledge to fabricate the details of sexual encounters invaded the province of the jury even though the expert did not specifically address the credibility of the witness in the case);
This holding bears the mark of the common-law maxim, which led the court to exclude helpful expert testimony out of excessive concern for the jury’s role in assessing credibility.

Like expert testimony concerning perception, memory, and bias, expert testimony that helps the jury understand behavior can improve the jury’s assessment of credibility. The mere fact that the expert’s testimony will support the witness’s account of the facts should not lead to its exclusion. Instead, recognizing the utility of the expert in helping the jury understand the witness’s otherwise inexplicable behavior, courts should allow the testimony.

C. Expert Testimony Expressing an Opinion Consistent or Inconsistent with a Witness’s Testimony

In some cases, the expert bolsters the witness merely by expressing an opinion that dovetails with the witness’s testimony or, conversely, impeaches a witness by expressing a contrary view of the facts. Such expert testimony should not be precluded or even scrutinized as an improper comment on credibility. Instead, it bolsters or impeaches only to the extent that any evidence tends to strengthen or diminish the force of other consistent evidence.

Sometimes such evidence is nevertheless targeted as improper bolstering. For example, in State v. Mackey,249 the defendant, who contended that the agent who had investigated him for drug offenses had conducted himself improperly, offered an expert in law enforcement techniques to describe the protocol for investigating drug trafficking.250 The evidence could have helped the jury assess the account of the prosecution’s chief witness, a retired police officer, who purchased drugs from the defendant without following many normal police procedures.251 The court excluded the evidence because it viewed the proffered testimony

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250. Id. at 557, 559.
251. Id. at 555–56.
as improperly commenting on the credibility of the prosecution witness.\textsuperscript{252} In fact, the expert’s testimony would not have addressed the witness’s credibility per se. Instead, it would simply have given the jury a standard against which to judge the way the witness claimed to have investigated the defendant.\textsuperscript{253}

In \textit{State v. O’Hanlan},\textsuperscript{254} the North Carolina Court of Appeals recognized the distinction between testimony about credibility and testimony about one party’s version of the facts.\textsuperscript{255} In \textit{O’Hanlan}, the defendant objected to the testimony of the emergency room physician who had examined the victim of the alleged rape on the ground that the expert impermissibly bolstered the alleged victim’s credibility.\textsuperscript{256} The expert testified—based on his observation of her physical and emotional condition and on her statements—that the victim’s “emotional state was consistent with having been assaulted,” that “it seemed pretty clear that there had been some type of assault,” and that “her emotional state was consistent with a very severe and significant assault.”\textsuperscript{257} None of this testimony was specifically directed at assisting the jury to assess the victim’s credibility. Instead, the expert’s diagnosis acted as independent evidence of the offense.\textsuperscript{258} As the court pointed out, any bolstering was “incidental” to the expert’s testimony.\textsuperscript{259}

That the common-law maxim is even invoked in these situations demonstrates the breadth of its reach. Expert testimony will often have an incidental impact on credibility assessments, either by bolstering or

\textsuperscript{252} See id. at 558–59. It is not clear, but the court may have excluded the evidence because its probative value was questionable. See id. at 559.

\textsuperscript{253} See id.

\textsuperscript{254} 570 S.E.2d 751 (N.C. Ct. App. 2002).

\textsuperscript{255} Id. at 756–58; accord Harris v. State, 631 S.E.2d 772, 774–75 (Ga. Ct. App. 2006) (allowing an expert to testify that tests conducted yielded results consistent with sexual molestation); Williams v. State, 597 S.E.2d 621, 625 (Ga. Ct. App. 2004) (same).

\textsuperscript{256} O’Hanlan, 570 S.E.2d at 757.

\textsuperscript{257} Id. at 756.

\textsuperscript{258} See id. at 755–57; accord United States v. Kearns, 61 F.3d 1422, 1427 (9th Cir. 1995) (rejecting an argument that a DEA agent, who testified concerning certain aspects of drug trafficking, improperly vouched for the prosecution’s informant witness because he did not “[p]lac[e] the prestige of the government behind the testimony of [the witness],” and he did not mention her or claim any knowledge of the specific case (quoting United States v. Necoechea, 986 F.2d 1273, 1276 (9th Cir. 1993))); United States v. St. Pierre, 812 F.2d 417, 419–20 (8th Cir. 1987) (holding that the trial court properly permitted the expert to testify concerning the behavior of abused children and the behavior he observed in the alleged victim-witness).

\textsuperscript{259} O’Hanlan, 570 S.E.2d at 758; accord McDavid v. State, 594 So. 2d 12, 16 (Miss. 1992) (rejecting the defendant’s argument that certain evidence should have been excluded as bolstering and noting that “[s]uch evidence, if otherwise admissible, would not be inadmissible simply because it corroborated her testimony” (citing Henry v. State, 209 So. 2d 614, 617 (Miss. 1968))).
undermining the jury’s belief of other testimony. That incidental impact should have no bearing on the admissibility of the expert testimony.

VI. Timing Questions: May Expert Testimony Supporting Credibility Precede an Attack on Credibility?

Regardless of the role played by expert testimony that bolsters credibility, courts often raise a question concerning whether the bolstering testimony may be admitted before the witness’s credibility has been attacked. At common law, courts espoused a rule prohibiting bolstering except in response to an attack on the witness and often stated the rule broadly. The rationale rested in part on a desire not to waste time on bolstering if the witness’s credibility was not going to be attacked. The courts should not import that overbroad prohibition on bolstering evidence into modern jurisprudence. Instead, the timing requirement should be enforced only when the expert testimony is offered only to establish the witness’s truthful character and not when it bolsters the witness’s credibility in some other way.

The Federal Rules of Evidence contain no general rule against bolstering prior to attack. Only two rules specifically address bolstering. Rule 608(a) precludes bolstering with evidence of truthful character before the witness’s character for truthfulness has been attacked. Rule 801(d)(1)(B) allows prior consistent statements to be admitted to prove the
truth of the assertions they contain only to rebut specific types of attack, such as a claim of improper motive or recent fabrication.\footnote{265} The absence of any other language dealing with bolstering before attack suggests that there is no general timing requirement. Interestingly, an examination of the decisions that prohibited bolstering before attack also reveals that the prohibition developed as a limitation only on these two types of bolstering.\footnote{266}

Despite the absence of clear authority governing the timing of noncharacter bolstering evidence, some courts have imposed such a requirement.\footnote{267} In \textit{Awkard}, for example, the court stated that the Rules preclude bolstering until a witness’s credibility has been attacked, pointing to Rules 801(d)(1) and 608(a).\footnote{268} The court concluded that “[s]imilar considerations must govern the exercise of the trial judge’s discretion” concerning whether to permit the government to present an expert to testify concerning hypnosis and the ability of a hypnotized witness to recall the events.\footnote{269} Therefore, it was error to permit bolstering testimony when defense counsel made it clear that the defense would not cross-examine the expert to raise questions about the reliability of hypnotically refreshed testimony.\footnote{270}

The courts should not apply a blanket rule requiring an attack on credibility to precede bolstering testimony except when the testimony falls

\footnotesize{\begin{itemize}
\item FED. R. EVID. 801(d)(1)(B). The admissibility of prior consistent statements as substantive evidence is limited by Rule 801(d)(1)(B) to situations in which the prior statement rebuts specific types of attack on the witness’s credibility. See Tome v. United States, 513 U.S. 150, 155–57 (1995) (discussing the law governing prior consistent statements).
\item See, e.g., Holmes, 26 F. Cas. at 356 (addressing prior inconsistent statements); Jackson, 5 Cow. at 314 (concluding that bolstering is allowed only after an attack on general character or a claim of inconsistency); Conway, 26 S.W. at 402 (addressing a prior consistent statement).
\item See, e.g., State v. Black, 537 A.2d 1154, 1156 (Me. 1988) (recognizing the timing rule). In Black, the trial court permitted a prosecution expert “to explain to the jury the reason for timing and sequencing inconsistencies in [the alleged sexual assault victim]’s testimony.” Id. The Maine Supreme Court concluded that such testimony could be introduced only to rebut an attack on the witness, noting its concern that expert testimony that bolsters a witness’s credibility by explaining the witness’s conduct “can have a profound impact on the outcome of the trial.” Id. The court held that the defense’s cross-examination opened the door to the expert’s explanation of the witness’s apparent inconsistency and that the trial court therefore had discretion to admit the expert’s testimony before the attack. Id. But see Pennsylvania v. Crawford, 718 A.2d 768, 206–07 (Pa. 1998) (reasoning that the trial court properly excluded testimony of the defendant’s expert on repressed memory because the prosecution had not offered expert testimony in support of repressed memory, apparently assuming that bolstering not only could but must precede the particular attack on credibility).
\item United States v. Awkard, 597 F.2d 667, 670 (9th Cir. 1979).
\item Id.
\item See id.
\end{itemize}}
within Rule 608 and is thus clearly subject to a timing requirement. Even if a witness’s ability to perceive or remember has not been specifically attacked, expert testimony addressing specific aspects of perception or memory may be helpful to the jury. For example, when a complaining witness suffers from mental or physical impairments that make it difficult to testify, the prosecution should be permitted to anticipate the jury’s concerns and to present expert testimony explaining the witness’s competence even if the witness’s credibility has not been attacked.271 Similarly, even absent a pointed attack, an expert may help the jury view a witness’s behavior in ways that bolster the credibility of the witness’s testimony. Even if the defense does not argue that the complainant in a domestic violence case was slow to report the defendant’s conduct, an expert on the behavior of battered women may help the jury place testimony in context to overcome jurors’ preconceived notions of logical behavior.272

Even if there is no per se rule precluding this expert testimony prior to an attack on the witness’s credibility, it may be relevant as the court applies the Rules. Whether the witness’s credibility has been attacked may be a decisive factor as a court applies Rule 403 to evidence bolstering credibility. Under Rule 403, the court must determine whether the negative characteristics of the offered evidence substantially outweigh its probative value.273 Expert testimony explaining conduct or addressing perception or memory has greater probative value in a case if the witness’s credibility has been attacked on that basis.274 That is, if the defendant has suggested

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273. See FED. R. EVID. 403.

274. See Patricia A. Korey, Evidence—Rehabilitative Expert Testimony in Child Sexual Abuse Cases: The Supreme Court of Pennsylvania Shuts the Door on Effective
during cross-examination or in some other way implied that a sexual assault did not occur because the complaining witness failed to report it promptly, then expert testimony informing the jury that such behavior is common among victims has greater probative value than if the defendant had not raised that issue.

VII. THE RULES ON EXPERT TESTIMONY AS BARRIERS TO TESTIMONY CONCERNING CREDIBILITY

Of course, to be admissible, expert testimony must satisfy the requirements of the rules governing all expert testimony. The witness must be qualified as an expert. The expert’s testimony must meet the

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Prosecutions—Commonwealth v. Dunkle, 602 A.2d 830 (Pa. 1992), 66 Temp. L. Rev. 589, 604–05 (1993) (explaining the importance of allowing an expert to counteract a defendant’s assertions of delay in reporting child abuse); John E. B. Myers et al., Expert Testimony in Child Abuse Litigation, 68 Neb. L. Rev. 1, 83 (1989) (“Properly qualified experts can assist jurors in sifting through the mountain of complex and sometimes conflicting and counterintuitive information presented in many child sexual abuse cases.”); Michael J. Grills, Comment, Expert Testimony on Rape Trauma Syndrome in Colorado: Broadening Admissibility to Address the Question of Consent in Sexual Assault Prosecutions, 61 U. Colo. L. Rev. 833, 834–35 (1990) (evaluating the usefulness of expert testimony on rape trauma syndrome in helping the jury understand and combat the prejudicial effect of defendant statements and stating that “evidence of rape trauma syndrome has adequate probative power to clearly outweigh any possible unfair prejudice to the sexual assault defendant”); Cynthia Lynn Barnes, Annotation, Admissibility of Expert Testimony Concerning Domestic-Violence Syndromes to Assist Jury in Evaluating Victim’s Testimony or Behavior, 57 A.L.R.5th 315, 332 (1998) (“Under Federal Rule of Evidence 403[a], or a corresponding local rule . . . expert testimony on domestic-violence syndromes introduced to explain the conduct or behavior of the victim [is] not unduly prejudicial.”). Therefore, courts may admit otherwise inadmissible expert testimony after an attack on credibility. See State v. Moran, 728 P.2d 248, 254 (Ariz. 1986) (“Defendant claimed that the victim’s accusations were prompted by anger over discipline imposed by her parents. Testimony providing the jury with an alternative explanation for the victim’s anger was admissible to assist the jury in determining what had motivated the initial charges against defendant.”); State v. Bowman, 352 S.E.2d 437, 440 (N.C. Ct. App. 1987) (“[Doctor’s] testimony concerning delay in a child’s reporting sexual abuse cases was used to corroborate victim’s credibility after defendant’s cross-examination attacked her credibility and therefore was properly admitted.”); see also Schutz v. State, 957 S.W.2d 52, 71–73 (Tex. Crim. App. 1997) (discussing opening the door to expert testimony concerning credibility).

275. A thorough discussion of the expert testimony rules as they relate to discussions of credibility is beyond the scope of this Article. For a thorough consideration of that topic, see Berger, supra note 10.

276. See Fed. R. Evid. 702. Rule 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and
methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Id. Many courts have examined the requirements of Rule 702. See, e.g., Kopf v. Skyrn, 993 F.2d 374, 377 (4th Cir. 1993) (“The witness’ qualifications to render an expert opinion are also liberally judged by Rule 702. Inasmuch as the rule uses the disjunctive, a person may qualify to render expert testimony in any one of the five ways listed: knowledge, skill, experience, training, or education.” (citing Friendship Heights Assoc. v. Koubek, 785 F.2d 1154, 1159 (4th Cir. 1986))); Lavespere v. Niagara Mach. & Tool Works, Inc., 910 F.2d 167, 176–77 (5th Cir. 1990) (“A witness therefore can qualify as an expert even though he lacks practical experience, provided that he has received suitable training or education or has otherwise gained the requisite knowledge or skill. Thus, although the absence of hands-on experience is certainly relevant to the determination whether to accept a witness as an expert, it is not determinative.” (footnote omitted)); see also 29 WRIGHT & GOLD, supra note 37, § 6265, at 246–48 (“While Rule 702 does not define the meaning of the terms used to describe the bases for expert qualification, the courts have given them common sense interpretations. ‘Education’ sufficient to qualify an expert may be formal, resulting in a degree or certification. ‘Education’ also may be based on informal self-study or independent research. ‘Training’ usually means on the job instruction or work-related classes. ‘Skill’ is a specialized aptitude developed as a result of significant involvement with a specific subject. ‘Experience’ may qualify a witness as an expert so long as it is obtained in a practical context. This means that experience developed as a professional expert witness is not sufficient.” (footnotes omitted)).

277. See FED. R. EVID. 702; see also Kumho Tire Co. v. Carmichael, 526 U.S. 137, 152 (1999) (noting that the reliability standard is designed “to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field”); Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 593–94 (1993) (identifying factors that help evaluate reliability, including whether the technique (1) can be and has been tested, (2) was subjected to peer review, (3) has a high known or potential rate of error, (4) has controlling standards, and (5) is generally accepted); United States v. Ferri, 778 F.2d 985, 988–89 (3d Cir. 1985) (examining the reliability of an expert’s novel techniques); United States v. McFillin, 713 F.2d 57, 61 (4th Cir. 1981) (allowing an expert to testify after determining that the expert’s technique rested upon well-established scientific principles); United States v. Havvard, 117 F. Supp. 2d 848, 850–51 (S.D. Ind. 2000) (evaluating the reliability of latent fingerprinting techniques).

278. See FED. R. EVID. 702; see also Bitler v. A.O. Smith Corp., 400 F.3d 1227, 1234 (10th Cir. 2004) (“‘Relevant evidence ‘means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.’ . . . A trial court must look at the logical relationship between the evidence proffered and the material issue that evidence is supposed to support to determine if it advances the purpose of aiding the trier of fact. Even if an expert's proffered evidence is scientifically valid and follows appropriately reliable methodologies, it might not have sufficient bearing on the issue at hand to warrant a determination that it has relevant ‘fit.’ Testimony concerning the laws of quantum mechanics may be scientifically relevant, but may have no practical relevance to testimony concerning the function and possible failure of a water heater safety valve control. Evidence appropriate for one purpose, therefore, may not be relevant for a different purpose, and it is the trial court's task to make this fitness determination.” (quoting FED.
opinion must be acceptable under Rule 703. 279

In some cases, a party offers expert testimony relating to credibility that clearly fails to satisfy the rules governing expert testimony. 280 In those

279. See Fed. R. Evid. 702; see also United States v. Stevenson, 6 F.3d 1262, 1266–67 (7th Cir. 1993) (holding that an expert opinion meets the Rule 702 requirements when the trier of fact “might not otherwise be capable of interpreting [evidence] easily and correctly”); United States v. Boney, 977 F.2d 624, 628 (D.C. Cir. 1992) (“Under that requirement that expert testimony ‘assist’ the jury (usually referred to as the ‘helpfulness’ requirement), testimony should ordinarily not extend to matters within the knowledge of laymen.”); Downing, 753 F.2d at 1229 (finding, under Rule 702, that “an expert can be employed if his testimony will be helpful to the trier of fact in understanding evidence that is simply difficult, [though] not beyond ordinary understanding”); 2 Graham, supra note 2, § 702.4, at 448–52 (explaining the “assist the trier of fact” requirement and noting “even as to matters within the general common knowledge and experience of jurors, where helpful to comprehension or explanation, expert testimony is permitted”); 29 Wright & Gold, supra note 37, § 6264, at 207 n.10 (“Expert testimony should not be excluded unless the jury is as competent as the expert.”).

280. See Fed. R. Evid. 703. Rule 703 provides:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If 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 in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert’s opinion substantially outweighs their prejudicial effect.

Id.; see also Daubert, 509 U.S. at 592 (“Unlike an ordinary witness, see Rule 701, an expert is permitted wide latitude to offer opinions, including those that are not based on firsthand knowledge or observation.”); Mendes-Silva v. United States, 980 F.2d 1482, 1485 (D.C. Cir. 1993) (“Rule 703 serves the two-fold purpose of broadening the acceptable bases for expert testimony, by allowing testimony based on hearsay or otherwise inadmissible evidence, and avoiding the time-consuming process of introducing the mass of evidence that forms the basis of an expert opinion.” (citing Ambrosini v. Labarraque, 966 F.2d 1464, 1466 (D.C. Cir. 1992))); 29 Wright & Gold, supra note 37, § 6273, at 309–10 (“Rule 703 permits an expert to base opinion testimony on three possible sources—personal knowledge, evidence admitted at trial, or evidence not admitted but ‘of a type reasonably relied upon by experts in the particular field.’”).

281. See, e.g., United States v. Charley, 189 F.3d 1251, 1260–61 (10th Cir. 1999) (criticizing the trial court for failing to make a reliability determination before permitting an expert to give an unqualified opinion that alleged victims had been sexually abused); United States v. Cecil, 836 F.2d 1431, 1438, 1440 (4th Cir. 1988) (rejecting the testimony of a defense “expert” whose qualifications were never established and who provided no information relating to the basis for his conclusions); People v. Randall, 845 N.E.2d 120, 127 (Ill. App. Ct. 2006) (holding that the trial
cases, the evidence is properly excluded.\textsuperscript{282} However, in other cases, as discussed in this Part, courts apply unduly restrictive rules to expert testimony relating to credibility.\textsuperscript{283} First, courts dismiss such testimony as unhelpful, hastily asserting that the jury needs no help on credibility
questions. Second, courts impose overly restrictive basis requirements, rejecting expert testimony that relies on a particular view of disputed facts.

A. The Requirement that the Testimony Assist the Jury

Some courts resist the admissibility of expert testimony relating to credibility by invoking the maxim that the jury can determine the reliability of the statements without the help of expert testimony. Accordingly, these courts conclude that the expert’s testimony will not assist the jury as required by Rule 702. The Advisory Committee emphasized the importance of using expert testimony to help the jury and rejected, as “empty rhetoric,” the notion that an expert would usurp the province of the jury. The Rules liberalized admissibility and abandoned the common-law rule that admitted expert testimony only when it was necessary to the jury’s deliberations. Instead, the Rules invite courts to admit expert testimony whenever it would help shed light on the questions before the jury.

In United States v. Hall, the Seventh Circuit pointed out that the trial court had applied an inordinately demanding standard to the proffered defense expert’s testimony. The court noted that the trial court may admit expert testimony even if it “cover[s] matters that are within the

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284. See, e.g., Nichols, 154 F.3d at 883 (rejecting expert testimony as unhelpful to the trier of fact); Hudson, 884 F.2d at 1024 (excluding expert testimony as unhelpful).

285. See generally Fed. R. Evid. 702; Friedland, supra note 16, at 191–92 (noting that many courts exclude expert testimony because it merely duplicates the function of the jury and therefore is not helpful).

286. Fed. R. Evid. 704, advisory committee’s note (quoting 7 Wigmore, supra note 36, §§ 1920, 1921, at 17); see also United States v. Gonzalez-Maldonado, 115 F.3d 9, 16–19 (1st Cir. 1997) (holding that the trial court improperly excluded the defendant’s expert’s testimony describing the defendant’s mental condition because the testimony was necessary to help the jury assess the defendant’s statements in recorded conversations introduced by the prosecution and was particularly important because the defendant was incompetent to testify, leaving the jury with no opportunity to judge his demeanor); United States v. Shay, 57 F.3d 126, 133–34 (1st Cir. 1995); Fed. R. Evid. 702 advisory committee’s note (noting that the fundamental question that a court must answer is “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.”) (quoting Ladd, supra note 36, at 418)); Berger, supra note 10, at 593–604 (discussing this requirement as applied to testimony touching on credibility). In Shay, the court quoted the Advisory Committee and then explained why expert testimony relating to the defendant’s mental condition may have been admissible and remedied for determination of the question. Shay, 57 F.3d at 134.

287. See Simmons, supra note 7, at 1049–50 (discussing the change in law on this question).

288. See supra note 37.

289. 93 F.3d 1337 (7th Cir. 1996).

290. Id. at 1342–44.
average juror’s comprehension.”

Nevertheless, some courts view credibility issues as uniquely within the jury’s province and therefore off limits to expert testimony, opining that common knowledge is all that is required to assess credibility. In Washington v. Schriver, for example, the trial court excluded the defendant’s expert testimony concerning the suggestibility of child witnesses, reasoning that it is “well within the knowledge of the average juror” and it is “soft scientific testimony at best.” The court in Schriver also concluded that the testimony represented improper comment on the witness’s credibility. Thus the court erected barriers to the evidence under the rules on expert testimony.

Even after the adoption of the Rules, courts continued to cite restrictive pre-Rules authority to exclude expert testimony related to credibility. A frequently cited authority is United States v. Barnard, which the Ninth Circuit decided in 1973. In Barnard, the defense offered expert testimony that a witness for the prosecution was a sociopath, and the trial court excluded the testimony. The proffered testimony was based on a review of the prosecution’s witness’s Army psychiatric evaluation, his grand jury testimony, and the expert’s courtroom observation of the witness. Based on this review, the expert concluded that the witness “was a sociopath who would lie when it was to his advantage to do so.” Concluding that the defense’s expert testimony was properly excluded, the

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291. Id. at 1342 (citing 3 Weinsein 1996, supra note 1, ¶ 702(02)).
292. See, e.g., Nichols v. Am. Nat’l Ins. Co., 154 F.3d 875, 883 (8th Cir. 1998) (rejecting expert testimony as not helpful because credibility questions are within the jury’s competence and exclusive function); United States v. Hudson, 884 F.2d 1016 (7th Cir. 1989) (excluding an expert on eyewitness testimony as unhelpful because the testimony was well within jury’s understanding). See generally Simmons, supra note 7, at 1050–52 (discussing cases); Friedland, supra note 16, at 169.
293. 255 F.3d 45 (2d Cir. 2001).
294. Id. at 50.
295. Id.
296. Accord United States v. Shay, 57 F.3d 126, 132–33 (reserving judgment on the question whether expert opinion on truthfulness may be excluded as unhelpful even though it satisfies the other requirements of Rule 702).
297. 490 F.2d 907 (9th Cir. 1973).
299. Barnard, 490 F.2d at 912.
300. Id.
Ninth Circuit characterized the jury as “the lie detector in the courtroom” and held that the testimony would not have been helpful to the jury. The court further opined that this type of testimony should be admitted “only in unusual cases, such as United States v. Hiss.” Invoking Barnard as authority, courts continue to treat the jury as a lie detector that requires no help from expert witnesses.

Instead of enforcing such a demanding standard, courts should recognize that jurors are not well equipped to assess credibility. Rather than exclude expert testimony addressing witness credibility, courts should welcome the assistance this testimony offers to the jury.

B. The Basis of Expert Opinion

Another way in which courts restrict expert testimony concerning credibility is to enforce overly stringent basis requirements. In their efforts to protect the province of the jury, courts sometimes exclude expert testimony related to credibility on the ground that the testimony rests on the truthfulness of the witness’s account. That represents an unduly stringent basis requirement.

The law has long allowed expert opinion to be based on one party’s view of the disputed facts in the case. Before the modernization of the rules governing expert testimony, there were two ways to provide the facts that formed the basis of the expert’s opinion: (1) the expert could sit through the entire trial and base the opinion on the evidence presented, or (2) the attorney would ask a hypothetical question, building into the question the version of the facts espoused by that party. In either situation, the opinion would rest on one version of the facts rather than on conflicting versions. The modern rules permit experts to base their testimony and opinions not only on evidence admitted in the trial but also on materials that are not admitted into evidence. Experts may base their

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301. Id. at 912–13.
302. Id. at 913 (citing United States v. Hiss, 88 F. Supp. 559 (S.D.N.Y. 1950)).
303. See, e.g., United States v. Saint Pierre, 812 F.2d 417, 420 (8th Cir. 1987) (recognizing that expert testimony could be helpful “because jurors are at a disadvantage when dealing with sexual abuse of children”).
304. See Thomas A. Mauet & Warren D. Wolfson, Trial Evidence § 9.5, at 308 (3d ed. 2005) (noting three possible sources that can provide the basis for expert opinion: (1) observing the witness; (2) attending the trial or hearing and listening to relevant testimony; and (3) asking the expert a hypothetical question based on relevant facts in the case); Kenneth M. Mogill, Examination of Witnesses § 6:30 (2d ed. 2007) (discussing expert witness examination strategies, including having the expert sit in on the trial); see also Berger, supra note 10, at 569 (stating that the expert may base an opinion on trial testimony or on a hypothetical containing the relevant facts of the case).
testimony even on unadmitted information, provided it is of a type reasonably relied upon by experts in the same field.\textsuperscript{305} Regardless of which approach the party takes, the expert may base her conclusions on information contained in the testimony of fact witnesses.\textsuperscript{306} A disagreement about the facts or questions about the credibility or accuracy of a witness’s testimony should not foreclose a party from presenting an expert opinion that assumes the truthfulness and accuracy of a witness’s account.\textsuperscript{307}

\begin{footnotesize}
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\item \textsuperscript{305} See 2 Graham, supra note 2, § 703.1, at 586–87 (noting that under Rule 703 experts may base opinions on inadmissible evidence only if the evidence is of a type reasonably relied upon by experts in the field); Mauet, supra note 304, § 9.5, at 309 (“[Rule] 703 authorizes expert opinions based on inadmissible facts or data reasonably relied on by experts in the particular field when they form opinions or inferences on the subject.”); 29 Wright & Gold, supra note 37, § 6274 (“Rule 703 permits expert opinion to be based on three possible sources: firsthand knowledge, admitted evidence, and facts or data not admitted into evidence if ‘of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject.’”); Nossel, supra note 37, at 234–35 (“Rule 703 provides that in addition to these sources, an expert may rely on facts made known to him before trial, and, [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.” (alteration in original)). See generally Richard Neumeg, Annotation, \textit{What Information Is of Type ‘Reasonably Relied Upon by Experts’ Within Rule 703, Federal Rule of Evidence, Permitting Expert Opinion Based on Information Not Admissible in Evidence}, 49 A.L.R. Fed. 363 (1980) (analyzing the federal cases that “deal with what types of information may be ‘reasonably relied upon by experts’ within the meaning of Rule 703”).

\item \textsuperscript{306} See Fennell v. Goolsby, 630 F. Supp. 451, 455–57 (E.D. Pa. 1985) (concluding that the trial court erred when it excluded defendant’s expert’s testimony on battered woman syndrome because the expert lacked personal knowledge of key facts and based her conclusions on reports prepared by others, and noting that the law is clear that an expert does not need personal knowledge of the facts but may rely on “the assumed truth of the testimony of other witnesses”); State v. White, 943 P.2d 544, 546 (N.M. Ct. App. 1997) (discounting the trial court’s concern that the expert had not examined the victim but based his opinion on facts testified to by other witnesses). See generally Mauet, supra note 304, § 9.5, at 308 (noting the challenge in establishing a basis for expert testimony when testimony is in conflict and noting that “[t]he dilemma ordinarily is left for resolution during cross-examination”); Mullane, supra note 45, at 79–81 (stating that expert testimony may be based on the methods reasonably relied on in the field including statements made by others).

\item \textsuperscript{307} See United States v. Johnson, 319 U.S. 503, 519–20 (1943) (rejecting an argument that the expert should not be permitted to base testimony on disputed evidence); Greenwell v. Boatwright, 184 F.3d 492, 497 (6th Cir. 1999) (holding that the expert was not required to consider eyewitness testimony with which he disagreed); United States v. Hall, 93 F.3d 1337, 1345–46 (7th Cir. 1996) (noting that “it is a rare case where everything is agreed except the subject matter for which the expert is presented”). Legitimate expert testimony will sometimes necessarily include assessment of or reliance on a witness’s sincerity. See generally Berger, supra note 10, at 569–72 (“If the hypothetical on which the expert is being asked to comment is based on the testimony of a witness whose credibility is in dispute, then, ‘the expert may assume the truth of the witness’ trial testimony.’” (quoting United States v. Scoe, 846 F.2d 135, 143 (2d Cir.), rev’d in part on reh’g, 856 F.2d 5 (2d Cir. 1988))). In State v. Marine, for example, the court held that the expert’s
testimony concerning the honesty of the victim’s statements to her was permissible to explain the basis of her expert opinion that the victim suffered from post-traumatic stress syndrome disorder. 520 S.E.2d 65, 68 (N.C. Ct. App. 1999). Similarly, in State v. Wise, the court concluded that the expert’s testimony that the victim’s emotions during counseling sessions were “genuine” was merely the observation of an expert on a relevant topic—the victim’s emotions—not an impermissible comment on credibility. 390 S.E.2d 142, 146 (N.C. 1990); accord Skidmore v. Precision Printing & Packaging, Inc., 188 F.3d 606, 617–18 (5th Cir. 1999) (holding that the expert could properly testify that the plaintiff’s “symptoms and recollections appeared genuine and that he felt he had not been ‘duped’” to explain his opinion that she suffered from post-traumatic stress syndrome).

308. See, e.g., United States v. Charley, 189 F.3d 1251, 1261 (10th Cir. 1999) (“Most courts that have considered the issue have concluded that expert testimony, based on the statements of the alleged victim, that sexual abuse in fact occurred is inadmissible.”); United States v. Whitted, 11 F.3d 782, 785–86 (8th Cir. 1993) (noting that a doctor’s opinion about an alleged victim’s truthfulness may not be disguised as a medical opinion because it would invade the jury’s function to decide credibility); United States v. Samara, 643 F.2d 701, 705 (10th Cir. 1981) (holding that the defense expert was properly precluded from testifying to conclusions based on credibility assessments); Johnson v. State, 732 S.W.2d 817, 820–21 (Ark. 1987) (noting that the trial court erred in allowing expert testimony that was based only on the history provided by the victim because the jury is competent to connect the history provided by the victim to the characteristics detailed by the expert); State v. Batangan, 799 P.2d 48, 52 (Haw. 1990) (finding that it is of no assistance to the jury for an expert to comment on the truthfulness or believability of a victim’s report); State v. Bressman, 689 P.2d 901, 907–08 (Kan. 1984) (holding that the trial court erred by permitting an expert to testify when the expert’s opinion was essentially based on the story related to her by the victim); State v. Black, 537 A.2d 1154, 1157 n.1 (Me. 1988) (noting that “an expert may testify in order to explain inconsistent conduct or testimony of the victim, [but] the expert may not offer an opinion as to the truth of the victim’s story”); Commonwealth v. Colin C., 643 N.E.2d 19, 22–23 (Mass. 1994) (stating that “[a]n expert may not . . . offer his opinion on issues that the jury is equally competent to assess”); People v. Beckley, 456 N.W.2d 391, 407–08 (Mich. 1990) (noting that it is improper to allow an expert to draw a legal conclusion about whether abuse occurred because such a determination is for the jury); State v. Lucero, 863 P.2d 1071, 1075 (N.M. 1993) (noting that expert testimony cannot be offered to establish that the alleged victim is telling the truth); State v. Gokey, 574 A.2d 766, 768, 771–72 (Vt. 1990) (concluding that “the expert’s testimony, beyond a limited description of the profile and the opinion that the child’s behaviors were consistent with that profile, was inadmissible under [Vermont Rule of Evidence] 702”); State v. Haseltine, 352 N.W.2d 673, 676 (Wis. Ct. App. 1984) (excluding expert opinion that essentially stated that the victim was telling the truth).

309. 846 F.2d 135 (2d Cir.), rev’d in part on reh’g, 856 F.2d 5 (2d Cir. 1988).

310. Id. at 142.
offer opinions on relevant events based on their personal assessment of the credibility of another witness’s testimony” and concluded that an opinion based on such an assessment of credibility would be inadmissible.311 The court went on to clarify its holding in light of Rule 703, which permits the expert to rely on facts or data made known to the expert at the trial.312 The court explained that the expert is free to rely on the “testimony of a witness whose credibility is not in dispute” or, “[w]here the credibility of the witness is an issue, the expert may assume the truth of his or her trial testimony and thereafter offer an opinion based on the substance of the testimony.”313 Thus, Scop  seems to require experts—or counsel who conducts the examination—to use careful phrasing when explaining the basis of an expert opinion, stating that the truth of certain testimony is assumed but not that the testimony is true or the witness credible.314

Because courts resist admitting this evidence, the party presenting the expert may be wise to sidestep admissibility problems by carefully preparing and examining an expert. The party presenting an expert should make sure that the expert has an adequate basis for any opinion that the party wants the expert to express. Expert testimony must rest on some basis other than mere acceptance of a witness’s account. If the basis is that limited, no expertise comes into play. For example, in United States v. Whitted,315 the court concluded that the doctor testifying for the prosecution overstepped the permissible limits because the prosecutor had not established the basis for the doctor’s diagnosis of repeated sexual abuse.316 This lack of basis left open the possibility that the diagnosis rested entirely on the victim’s statements, which constituted an inadmissible assessment of her credibility.317 Given this insufficient basis,
the doctor’s testimony that sexual abuse had occurred amounted to “a thinly veiled way of stating that [the witness] was telling the truth.”

The party should construct its examination of the expert to avoid the problem of improper basis. In United States v. Collins, for example, the court rejected the defendant’s argument that the prosecution had improperly bolstered its witnesses by simply asking its expert to assume facts consistent with the prosecution’s evidence and “to explain the tax implications.” The witness did not comment on the truthfulness of the witnesses whose testimony had established the assumed facts. The Sixth Circuit commented that “the credibility of the testimony underlying those hypotheticals was not withdrawn from proper independent determination by the jury.”

Expert testimony that bears on credibility should not be subjected to a higher standard than other expert testimony. Courts should not permit the common-law maxim to live on in the guise of a rule that deems testimony on credibility unhelpful. Nor should courts exclude expert testimony

summarize the medical evidence and express an opinion that the evidence is consistent or inconsistent with the victim's allegations of sexual abuse.

Id. at 785 (citations omitted). However, the alternate grounds for the physician’s opinion, based on physical findings, were insufficient. Id. at 786. The court based its decision in part on the conclusion that expert testimony that sexual abuse had in fact occurred dealt with an issue about which expert testimony was not useful and therefore not admissible under Rule 702. Id. at 785. The court noted that “jurors are equally capable of considering the evidence and passing on the ultimate issue of sexual abuse.”

318. Id. at 787. But see United States v. Wright, 119 F.3d 630 (8th Cir. 1997). In Wright, the court rejected the defendant’s argument that the doctor who testified for the prosecution improperly based his diagnosis on the alleged victim’s account of events and there was no medical evidence of sexual abuse. Id. at 635. Rather, the testimony was sufficiently circumspect to pass muster. Id.

319. 78 F.3d 1021 (6th Cir. 1996).

320. Id. at 1037.

321. Id.

322. Id. (citing United States v. Barnette, 800 F.2d 1558, 1569 (11th Cir. 1986)); accord United States v. Price, 722 F.2d 88 (5th Cir. 1983). In Price, the court reversed a conviction where the prosecution’s expert, an IRS Agent, testified that “he had based his computations on the statements of two of the government witnesses and that he believed them.” Price, 722 F.2d at 89. The court did not set out the specific testimony, but it seems clear that the agent could properly have testified to computations based on facts contained in the statements of the witnesses and proven at trial. The jury could then decide whether to credit those statements. If the jurors rejected the statements as unreliable, inaccurate, or untruthful, they would correspondingly reject the agent’s computations. Thus, it appears that the error lay entirely in the agent’s gratuitous assertion of belief. See id. at 90–91 (noting that the expert’s testimony was improperly admitted because it bolstered the witness’s credibility).
relating to a witness’s credibility because it relies on a particular version of the facts of the case. Instead, courts should be receptive to such expert testimony, but, as discussed in the following Part, the parties should exercise care to avoid overreaching when presenting an expert.

VIII. OVERREACHING: IMPROPER EXPERT COMMENT ON SPECIFIC CREDIBILITY IN THE CASE

The utility of expert testimony on credibility may be limited by the litigant’s failure to respect the limits imposed on such testimony. Many of the cases that reject expert testimony bearing on credibility reflect overreaching by the offering party. Otherwise helpful expert testimony will be excluded if the expert’s testimony overreaches. If litigants respected these limitations, courts might be more receptive to expert testimony that assists the jury to assess credibility. Correspondingly, if courts define and enforce rules of admissibility that are not influenced by the outdated common-law maxim, the parties will be better able to present appropriate expert testimony without overreaching.

The cardinal rule is that even when the expert is properly qualified and has an appropriate basis for expressing an opinion, the expert may not opine directly on the truthfulness of a witness’s testimony. In its comments, the Advisory Committee notes: “[The rules governing expert testimony] afford ample assurances against the admission of opinions which would merely tell the jury what result to reach . . . . They also stand ready to exclude opinions phrased in terms of inadequately explored legal criteria.” In accord with these comments, courts uniformly condemn testimony from experts claiming to know the truthfulness of any witness. No witness’s expertise extends to whether another witness is

323. See, e.g., Nimely v. City of New York, 414 F.3d 381, 394–95, 398 (2d Cir. 2005) (holding that the trial court erred by admitting expert testimony regarding the “misperception hypothesis” where the expert repeatedly asserted that he believed the defendant police officers’ account and condemning the testimony as an “attempt[] to substitute the expert’s judgment for the jury’s” (quoting United States v. Duncan, 42 F.3d 97, 101 (2d Cir. 1994))).

324. See, e.g., United States v. Scop, 846 F.2d 135, 143 (2d Cir.) (“Where such facts or data are based on the trial testimony of a witness whose credibility is not in dispute, the expert need not make a judgment about credibility. Where the credibility of the witness is an issue, the expert may assume the truth of his or her trial testimony and thereafter offer an opinion based on the substance of the testimony. There is thus no need for an expert to make, much less state to the jury, an assessment of credibility when offering an opinion based on trial testimony.”), rev’d in part on reh’g, 856 F.2d 5 (2d Cir. 1988).

325. Fed. R. Evid. 704 advisory committee’s notes.

326. See, e.g., United States v. Charley, 189 F.3d 1251, 1267 (10th Cir. 1999) (“[E]xpert testimony which does nothing but vouch for the credibility of another witness encroaches upon the jury’s vital and exclusive function to make credibility determinations . . . .”); United States v.
telling the truth. Nevertheless parties overreach by asking their experts to testify about the believability or truthfulness of a witness. Such

Azure, 801 F.2d 336, 340–41 (8th Cir. 1986) (stating that an expert who “put[s] his stamp of believability on [the witness’s] entire story . . . essentially told the jury that [the witness] was truthful” and could cause the jury to “‘surrender['] their own common sense in weighing testimony’” (quoting United States v. Barnard, 490 F.2d 907, 912 (9th Cir. 1973))); In re B.J., 735 N.E.2d 1058, 1065 (Ill. App. Ct. 2000) (noting that the expert could have explained the problems with the technique used to question a child but could not assert that the child was not credible); State v. White, 943 P.2d 544, 546 (N.M. Ct. App. 1997) (noting that an opinion concerning a victim’s veracity or truthfulness of a witness’s account would not be admissible); State v. Milbradt, 756 P.2d 620, 624 (Or. 1988) (“‘[A] witness, expert or otherwise, may not give an opinion on whether he believes a witness is telling the truth.’” (quoting State v. Middleton, 657 P.2d 1215, 1221 (Or. 1983)). But see Berger, supra note 10, at 610–12 (arguing that the court’s emphasis in Azure, on form rather than content, was problematic).

327. See United States v. Vest, 116 F.3d 1179, 1185 (7th Cir. 1997) (commenting that “the expert was in no better position than a lay person to say whether the [witnesses had] testified truthfully”); United States v. Shay, 57 F.3d 126, 131 (1st Cir. 1995) (remarking that “an expert’s opinion that another witness is lying or telling the truth is ordinarily inadmissible pursuant to Rule 702 because the opinion exceeds the scope of the expert’s specialized knowledge and therefore merely informs the jury that it should reach a particular conclusion”); United States v. Benson, 941 F.2d 598, 604 (7th Cir. 1991) (noting that the expert was no more qualified than the jury to answer questions); State v. Heath, 341 S.E.2d 565, 569 (N.C. 1986) (noting that the expert “went beyond the scope of her expertise” by commenting on “the victim’s credibility or record for truth and veracity”); see also Smith v. State, 925 So. 2d 825, 838–39 (Miss. 2006) (“[C]omments about a witness’s veracity, i.e. truthfulness, will generally be inadmissible, because of its ‘dubious competency.’” (quoting Williams v. State, 539 So. 2d 1049, 1051 (Miss. 1989)). But see Berger, supra note 10, at 620 (arguing that an expert with an adequate basis should be permitted to “make an explicit statement assessing the truthfulness of the [witness]”); Simmons, supra note 7, at 1029 (asserting that “[w]e now have experts who are skilled (or at least claim to be skilled) in determining credibility issues”).

328. See, e.g., United States v. Dukagjini, 326 F.3d 45, 54–56 (2d Cir. 2002) (holding that a DEA agent testifying as an expert for the prosecution strayed from the limits imposed by the district court when the agent interpreted conversations based on his knowledge of and beliefs concerning the facts of the case rather than on his expertise); Vest, 116 F.3d at 1185 (holding that the prosecution’s expert should not have been permitted to compare the defendant-doctor’s files with the patient-witnesses’ statements nor to testify whether each patient actually had the symptoms the defendant recorded because the testimony involved no application of expertise but merely vouched for the witnesses’ credibility); Benson, 941 F.2d at 603–04 (condemning the testimony of an expert who recaptured prosecution evidence and reached conclusions based on evidence outside his area of expertise); Waters v. Kassulke, 916 F.2d 329, 335 (6th Cir. 1990) (holding that the trial court erred by admitting the physician’s testimony regarding the credibility of child rape victims because such testimony invaded the province of the jury); Williams v. State, 597 S.E.2d 621, 626 (Ga. Ct. App. 2004) (finding that the expert witness should not have testified that victim did not seem “coached” and seemed “truthful and honest”); State v. O’Connor, 564 S.E.2d 296, 297 (N.C. Ct. App. 2002) (finding that it was plain error to give the jury the expert’s report that expressed an opinion that the victim of an alleged sexual abuse was credible). In Waters, the expert stepped too far and moved from explaining behavior to vouching for credibility. See 916 F.2d at 335. At the defendant’s rape trial, the prosecution expert, a pediatrician, testified:
testimony goes far beyond appropriate expert testimony on credibility. It does not represent either admissible testimony concerning truthful character or testimony admissible to help the jury assess the witness’s perception and memory or understand the witness’s behavior.

There is a difference between testifying “I would not believe the witness because she has an untruthful character” and testifying “I would not believe the witness because I believe other witnesses instead or view the facts of this case differently.” The first form of testimony is allowed

Based on his physical and oral examinations of the girls, he believed they had been the victims of sexual abuse. He also testified that the girls’ behavior was consistent with that of sexually abused children, and that their detailed sexual knowledge was greater than one would expect of girls their ages.

Id. at 332. This testimony was properly confined to the expert’s observations and explanation of behavior. See id. at 335. However, he then went further and testified, “I assume [R.W.] was telling the truth as far as who she said did it.” Id. at 332.

329. See Azure, 801 F.2d at 341 (concluding that the expert’s testimony did not fall within Rule 608(a) because it was not limited to an opinion on the witness’s character for truthfulness but “addressed the specific believability and truthfulness of [the witness’s story]”).

330. See supra Parts V.A & V.B. In addition, expert testimony regarding the believability of the witness rarely comports with the rules governing expert testimony. See, e.g., Vest, 116 F.3d at 1185 (noting that under Rule 703 experts may rely on inadmissible evidence if it is of a type reasonably relied upon by experts in the field but finding that the credibility of the witness is not something “within an expert’s area of special competence”); Benson, 941 F.2d at 604 (“Credibility is not a proper subject for expert testimony . . . .”). The evidence likely will not satisfy the requirements of Rule 702 because the expert is likely to be testifying outside the realm of anything the expert can claim as expertise. Vest, 116 F.3d at 1185 (noting that the credibility of the witness is not something “within an expert’s area of special competence”). In addition, this type of testimony is not likely to assist the jury and may generate problems that warrant exclusion under Rule 403. See generally FED. R. EVID. 403; Berger, supra note 10, at 588 (stating that “[t]he helpfulness test in Rule 702 embodies the Rule 403 notion that evidence may be admitted only after it is assessed contextually to see whether it will assist the trier in the particular case”).

331. Conversely, there is a difference between testifying that a witness has a truthful character and is therefore generally worthy of belief and testifying that the witness is telling the truth in a specific case. Courts do not always recognize that difference. See, e.g., Hobgood v. State, 926 So. 2d 847, 854 (Miss. 2006) (finding no error where expert testified that she found the witness “credible” and emphasizing that the witness “never stated that the victim was telling the truth”). In Jackson v. State, the defendant challenged the following portion of the expert’s examination, in which the expert unambiguously vouched for the credibility of the witness’s account of the alleged sexual abuse:

During the State’s re-direct examination of Dr. Wright, she testified that “ninety percent of the time, you’re assuming that a child is telling the truth as to sexual abuse.” She qualified her testimony by explaining that she would “be looking for evidence that it’s not the truth.” The following re-direct examination ensued:

Q. Dr. Wright, was that assumption of truth made with [Jane Doe]?
A. It was.
under the character evidence rules, and experts, like other character witnesses, should be permitted to express such opinions provided the proper foundation is laid.332 The second form, by contrast, constitutes overreaching that is not permitted by any rule.333 While an expert can, in some cases, fairly assess a witness’s general propensity for truthfulness or untruthfulness, no expert should be permitted to claim knowledge of the witness’s specific truthfulness in the trial.

In United States v. Azure,334 a decision frequently cited for the broad maxim that experts may not vouch for credibility, the Eighth Circuit recognized the line between proper and improper use of expertise, precluding expert testimony that bolstered the credibility of a witness by vouching for the truthfulness of her in-court testimony.335 In Azure, the trial court improperly permitted the prosecution’s expert to testify that “he could ‘see no reason why [the child witness] would not be telling the truth in this matter,’” which went beyond the expert’s qualifications and “invaded the exclusive province of the jury to determine the credibility of witnesses.”336 The Eighth Circuit acknowledged that an expert could help the jury assess credibility without usurping the jury’s credibility-

Q. And was it ever disproved?
A. It was never disproved.

743 So. 2d 1008, 1016 (Miss. Ct. App. 1999). The court rejected the challenge, concluding that “[s]uch testimony does not constitute ‘a direct opinion offered by a witness in a child sexual abuse case as to the child’s veracity.’” Id. (quoting Griffith v. State, 584 So. 2d 383, 386–87 (Miss. 1991)). In State v. Kim, the Supreme Court of Hawaii stated:

We see no relevant difference between such opinions and that expressed by Dr. Mann. While his opinion was not couched in terms of character, its function and effect were indistinguishable from traditional character evidence: calling to the jury’s attention “what might be an otherwise unknown [characteristic] of the witness and thus give the jury a more adequate basis for judging his testimony.” Essentially, the difference between an opinion as to character for truthfulness and an opinion as to the believability of a witness’ statements is the difference between “I think X is believable” and “X’s statement is believable.” We feel the admissibility of either statement should turn not on niceties of phraseology but on the probative value of the testimony.


332. See discussion supra Part IV.
333. See infra notes 334–38 and accompanying text.
334. 801 F.2d 336 (8th Cir. 1986).
335. Id. at 340–41.
336. Id. at 339.
assessment function. The court recognized potential expert testimony that would address the witness’s perception and memory or conduct and simply would corroborate the witness’s account or the witness’s truthful character. But the expert could not put his “stamp of believability” on the witness’s “entire story.”

The risk of crossing the line into improper comment on credibility is greatest when the expert has inside knowledge of the case or has worked closely with the witness in question. For example, the jury may assume that a law enforcement officer that worked on the case has inside knowledge and thus may give undue weight to the officer’s testimony. Similarly, when an expert who has counseled a witness is called as an expert witness, there is a risk both that the expert will express belief in the witness’s account and that the jury will give undue weight to that assessment because of the expert’s familiarity with the witness and the case. When it is obvious to the jury that the expert possesses no special

337. See id. at 340.

338. See id. The court stated:

[The expert] might have aided the jurors without usurping their exclusive function by generally testifying about a child’s ability to separate truth from fantasy, by summarizing the medical evidence and expressing his opinion as to whether it was consistent with [the witness’s] story that she was sexually abused, or perhaps by discussing various patterns of consistency in the stories of child sexual abuse victims and comparing those patterns with patterns in [the witness’s] story.

339. Id. at 340–41; accord Patterson v. State, 628 S.E.2d 618, 619 (Ga. Ct. App. 2006) (reversing a conviction where the prosecution’s expert testified that she did not believe that the victim had made up the allegations of sexual abuse); State v. Heath, 341 S.E.2d 565, 567 (N.C. 1986) (emphasizing that the prosecutor’s questions impermissibly elicited the expert’s assessment of whether the victim’s account of the alleged sexual assault was credible); State v. Milbradt, 756 P.2d 620, 624 (Or. 1988) (emphasizing that “no psychotherapist may render an opinion on whether a witness is credible in any trial conducted in this state”); State v. Leahy, 78 P.3d 132, 135 (Or. Ct. App. 2003) (finding that the trial court erred by allowing the prosecutor to ask the officer whether, based on his past experience, he had an opinion as to whether the victim had been abused); see also Berger, supra note 10, at 610–12 (discussing Azure and pointing out how elusive a line the court draws).

340. See, e.g., United States v. Scop, 846 F.2d 135, 143 (2d Cir.) (expressing concern that the jurors would infer that, who had investigated the prosecution’s case for over four years, had special knowledge to which they should defer and that the expert himself would not differentiate between the facts proved at trial and those known to him as a result of his investigation), rev’d in part on reh’g, 856 F.2d 5 (2d Cir. 1988); see also Nossel, supra note 37, at 245–46 (noting that “[o]ne danger presented by ultimate issue expert testimony by law enforcement officers is that the jury may infer that the officer has special knowledge about the defendant”).

341. See, e.g., United States v. Roy, 843 F.2d 305, 308 (8th Cir. 1988) (holding that an FBI
insight, the comment on credibility may be improper but is less likely to create a reversible error.\textsuperscript{342}

In some cases, an overreaching party tries to present an expert as a “trained observer”—essentially, an expert in detecting prevarication or sincerity.\textsuperscript{343} In \textit{United States v. Roy},\textsuperscript{344} the prosecution presented an FBI agent as an expert in investigating crimes and in determining the truthfulness of witness accounts.\textsuperscript{345} The prosecution had the agent assess the accuracy of the statements made by the defendant’s accomplices.\textsuperscript{346} In doing so, the prosecution emphasized the consistency among those statements and explained the expert’s rationale for concluding that the story was not concocted.\textsuperscript{347}

agent who investigated the case crossed the line into improper vouching); State v. Townsend, 635 So. 2d 949, 958 (Fla. 1994) (finding that the treating psychologist’s testimony that the child victim was truthful constituted reversible error). \textit{See generally} Berger, \textit{supra} note 10, at 572–75 (discussing the dangers when an investigator acts as an expert witness).

342. \textit{See, e.g.}, Greenwell v. Boatwright, 184 F.3d 492, 496–97 (6th Cir. 1999) (holding that the expert’s improper comment was harmless error); United States v. Candoli, 870 F.2d 496, 505–06 (9th Cir. 1989) (finding that the expert testimony about another expert’s reputation was improper but did not require reversal of conviction). In \textit{Smith v. State}, 925 So. 2d 825 (Miss. 2006), the court explained:

\begin{quote}
The jury had the benefit of examining the videotapes with [the victims’] interviews to compare to their in-court testimony, thereby placing the jury in a position to draw upon their own life experiences as to the veracity of the young girls. They could draw their own conclusions from the verbal statements and non-verbal reactions of the girls in the taped interviews and on the witness stand. As always, the jury has the prerogative to accept or reject, in whole or part, the testimony of any witness, expert or lay.
\end{quote}

\textit{Id.} at 839.

343. \textit{See, e.g.}, United States v. Rosario-Diaz, 202 F.3d 54, 62, 65 (1st Cir. 2000) (noting that it was improper for an FBI agent who had worked with the prosecution’s star witness before trial to testify that he had not needed a polygraph to determine whether the witness was lying, explaining, “[w]e were pinning him down without a polygraph. We could tell when he was lying.”); \textit{Milbradt}, 756 P.2d at 622 (reporting that the prosecutor asked the psychologist if part of his training was to be a trained observer); \textit{see also} \textit{Leahy}, 78 P.3d at 135–36 (finding error where the prosecutor elicited an officer’s opinion whether the victim had been abused based on his experience in similar cases, an interview of the victim, and contact with the defendant); Simmons, \textit{supra} note 7, at 1058 (suggesting that judges and juries will be skeptical of such expert testimony).

344. 843 F.2d 305 (8th Cir. 1988).

345. \textit{Id.} at 307–08.

346. \textit{Id.}

347. \textit{Id.} The court concluded that the error was harmless, relying in part on the absence of evidence of special training that would have given the agent “some great advantage over the jurors in divining truth.” \textit{Id.} at 309. One must question this premise, given the presumptive credibility of a law enforcement witness combined with the explicit testimony detailing the agent’s years of
investigative experience. It seems quite likely that the jurors would have felt that the agent possessed a superior ability to choose between differing accounts of criminal events. For example, in *People v. Bobo*, the expert testified on cross-examination that “ninety-eight percent of the time when a child makes an allegation of sexual abuse they are telling the truth.” The testimony necessarily rests on the assessment of the truthfulness of an unspecified number of witnesses in unrelated cases, and this poses several problems. First, there is no reliable technique for determining whether witnesses in other cases have been truthful. To do so would require a method to verify claims of abuse independently and accurately, but such a method does not exist. Second, the generalization is far too broad to guide the jury’s assessment of the specific high school student on whose credibility *Bobo* turned. The witness did not purport to distinguish among alleged abuse victims based on their age, their relationship to the alleged abuser, or the nature of the alleged abuse. There was no assurance that the statistic cited by the witness, even if accepted, had any bearing on the testimony in the actual case. Finally, it is antithetical to the jury system to invite the jury to believe a witness because of the probability that a witness of this type is truthful. The use of probability to assess credibility suffers from the same problems that probability evidence does in other aspects of jury fact finding.

Overreaching may also manifest itself in a generalization concerning the truthfulness of certain categories of witnesses. For example, in *People v. Bobo*, the expert testified on cross-examination that “ninety-eight percent of the time when a child makes an allegation of sexual abuse they are telling the truth.” The testimony necessarily rests on the assessment of the truthfulness of an unspecified number of witnesses in unrelated cases, and this poses several problems. First, there is no reliable technique for determining whether witnesses in other cases have been truthful. To do so would require a method to verify claims of abuse independently and accurately, but such a method does not exist. Second, the generalization is far too broad to guide the jury’s assessment of the specific high school student on whose credibility *Bobo* turned. The witness did not purport to distinguish among alleged abuse victims based on their age, their relationship to the alleged abuser, or the nature of the alleged abuse. There was no assurance that the statistic cited by the witness, even if accepted, had any bearing on the testimony in the actual case. Finally, it is antithetical to the jury system to invite the jury to believe a witness because of the probability that a witness of this type is truthful. The use of probability to assess credibility suffers from the same problems that probability evidence does in other aspects of jury fact finding.

348. *See*, e.g., Nimely v. City of New York, 414 F.3d 381, 400 (2d Cir. 2005) (holding that the trial court erred by permitting a witness to testify concerning the tendencies of police officers to tell the truth in excessive force investigations); Jones v. State, 606 So. 2d 1051, 1057–58 (Miss. 1992) (holding that the trial court erred by allowing an expert to testify that children who have been sexually abused do not lie); Commonwealth v. Cepull, 568 A.2d 247, 249–50 (Pa. Super. Ct. 1990) (finding that the expert’s testimony that studies show that “only 3 percent of all women who reported being sexually assaulted had in fact lied or made up a story” could have had a substantial prejudicial effect); see also David McCord, *Expert Psychological Testimony About Child Complainants in Sexual Abuse Prosecutions: A Foray into the Admissibility of Novel Psychological Evidence*, 77 J. CRIM. L. & CRIMINOLOGY 1, 53–57 (1986) (criticizing similar testimony). *But see Ex parte Hill*, 553 So. 2d 1138, 1139 (Ala. 1989) (allowing social workers to testify “that teenagers and children in general do not fabricate episodes of sexual abuse and that delay in reporting is normal”); State v. Myers, 359 N.W.2d 604, 609–10 (Minn. 1984) (allowing an expert to testify that children do not generally make up allegations of sexual abuse).


350. *Id.* at 626.

351. *See id.* at 625–26 (noting the reports of allegations made against the defendant by nine different high school girls and expert testimony that 98% of all sexual abuse victims are telling the truth).

352. *See id.* at 626 (detailing the statistical testimony of the expert).

353. *See* McCord, *supra* note 348, at 55 (noting that “such testimony invites the jury to convict the defendant on the basis of a statistical probability rather than on the basis of the evidence in the case”); *see also Bobo*, 662 N.E.2d at 626 (quoting McCord, *supra* note 348, at 55).
Of course, the parties can avoid improper testimony by preparing their experts appropriately and by avoiding questions that elicit improper endorsements of credibility. However, the line between what is proper testimony and what is an improper assessment of credibility is elusive, and an expert can easily drift from proper to improper testimony. In State v. Keller, the Oregon Supreme Court held that the trial court committed reversible error by allowing the prosecution expert to testify during direct examination that there was no evidence that the victim in a child abuse case was led, coached, or fantasizing. While she could fairly testify to what types of behavior might indicate one of these problems or to the risks of leading and coaching young children, the witness crossed the line into improper assessment of specific credibility when she testified that the victim “was ‘obviously telling you about what happened to her body’ and was remembering what happened.”

The courts and the litigants share responsibility for controlling overreaching and for allowing expert testimony about credibility. Courts must define and enforce clear rules that permit and delineate expert testimony that fairly assists the jury to assess witness credibility. Courts should not resort to a broad prohibition on all such testimony. The parties presenting expert testimony to help the jury evaluate credibility should be clear about the testimony’s role in the case and should respect the prohibition on direct comment on the truthfulness of the witness’s account.

354. In State v. Folse, 623 So. 2d 59 (La. Ct. App. 1993), the defense attorney focused on the limits of expertise in his cross-examination of the prosecution’s expert, asking “you can’t tell us whether she was telling the truth or not, can you?” and eliciting the answer, “the accurate way to present it, is to say that the information that the child gave is consistent with the dynamics of sexual abuse.” Id. at 68.
355. 844 P.2d 195 (Or. 1993).
356. Id. at 198, 202.
357. Id.; accord United States v. Rosales, 19 F.3d 763 (1st Cir. 1994). In Rosales, the court considered the testimony of an expert in a child abuse case who testified that children who have been sexually abused “generally ‘tend to be reluctant, they tend to be embarrassed, uncomfortable, ashamed of what happened. They’re very uncomfortable giving details. I see a lot of that. And I saw that in these children.’” Rosales, 19 F.3d at 765. The defendant argued that the prosecution’s presentation of this testimony required reversal of his conviction. Id. The court treated the question as falling under Rule 403, which permits exclusion of otherwise admissible evidence if it injects undue prejudice. See id. at 766; see also FED. R. EVID. 403. The court viewed the expert’s testimony as sending “an implicit message to the jury that the children had testified truthfully” and stated that “this might therefore have interfered with the jury’s function as the sole assessor of witness credibility.” Rosales, 19 F.3d at 766.
IX. CONCLUSION

Courts should evaluate expert testimony that addresses credibility with more precision. At the same time, courts should free the discussion of such evidence from the limitation of the common-law notions that the jury has such a special role in assessing credibility and that expert testimony on the topic is foreclosed. By taking these two steps, courts will open the door to more expert testimony on credibility and thereby better equip jurors to assess credibility.

When a party offers expert testimony that bears on credibility, the court should first ask whether the testimony addresses truthful or untruthful character and is therefore governed by Rule 608(a). If so, the evidence should be admitted subject to the limitations of that Rule. If the expert’s opinion is not limited to mere truthful or untruthful character, then the court should determine how it informs the jury’s determination of credibility. If the expert will help the jury understand the witness’s perception, memory, or bias, or if the expert will explain the witness’s behavior to the jury, then the court should admit the evidence and not impose the limitations that apply to character evidence. Moreover, while such testimony must satisfy the usual rules governing expert testimony, it should not be subjected to more demanding rules. Taking this approach, courts should admit a wider range of expert testimony to help the jury evaluate credibility.

A more precise approach will better prepare the courts for future questions concerning credibility evidence. The future holds the promise, or threat, that science will achieve ways to more accurately divine a witness’s truthfulness on a specific subject or to gauge the strength of a witness’s perception or memory. This prospect may be one of the reasons that courts have continued to rely on the maxim and to restrict expert testimony bearing on credibility. For example, the debate over the use of polygraph technology, which has occupied the courts for decades, reflects in part the concern that scientific assessment will supplant the jury’s role of assessing credibility. Rather than imposing blanket

359. Such evidence will not be admitted until it has achieved a satisfactory level of scientific reliability. Polygraph technology has achieved, or is close to achieving, that level. See Simmons, supra note 7, at 1037–39 (discussing polygraph science). Other scientific methods that may prove useful, such as MRI technology, are still being developed. See Jeffrey Kluger & Coco Masters, How to Spot a Liar, Time, Aug. 28, 2006, at 46–48 (surveying recent developments in lie-detection and polygraph science).
restrictions on expert testimony bearing on credibility, courts should analyze the evidence precisely and admit it when it will assist the jury.

Eventually, we may face this crucial question: If reliable and viable scientific technology could determine whether a witness was consciously lying, would we want the fact finder to have that information? More often, however, expert testimony merely plays a modest role by helping the jurors better evaluate the credibility of specific testimony by providing insight into a witness’s character, perception, memory, bias, or conduct, and expert testimony should be allowed to play that role.

(discussing the admissibility of polygraph evidence); Charles W. Daniels, *Using Polygraph Evidence After Scheffer*, The Champion, May 2003, at 12–18 (discussing the admissibility of polygraph evidence and considering the function of the jury as a basis for exclusion). Courts continue to be reluctant to admit polygraph evidence even though its reliability has been established and is accepted outside the courtroom. *See* Simmons, *supra* note 7, at 1043 (noting that “[d]espite . . . developments, many federal circuits and most states maintain an absolute ban on admissibility and even in the jurisdictions where admissibility is discretionary, trial court judges rarely admit the evidence in practice”). Perhaps polygraph evidence would be more acceptable to the courts if they viewed it not as a naked assessment of a witness’s credibility but viewed it instead as offering the jury insight into the witness’s consciousness of guilt or knowledge of certain relevant facts. *See id.* at 1038–39 (suggesting that a polygraph provides state-of-mind evidence rather than an assessment of credibility).