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Punishing the Insane: Restriction of Expert Psychiatric Testimony by Federal Rule of Evidence 704(b)

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NOTE

PUNISHING THE INSANE: RESTRICTION OF EXPERT PSYCHIATRIC TESTIMONY BY FEDERAL RULE OF EVIDENCE 704(b)*

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I. INTRODUCTION

In the summer of 1976, a young John Hinckley, Jr. watched Travis Bickle plot to assassinate a presidential candidate in the cult film *Taxi Driver*.¹ Hinckley fell in love with actress Jodie Foster, who portrayed

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***Author's Note:* The author thanks Professor Toni M. Massaro for providing the topic and much guidance.

1. Sallet, *After Hinckley: The Insanity Defense Reexamined*, 94 YALE L.J. 1545, 1547 (1985).

a twelve year old prostitute in the film.² Hinckley's obsession with both Foster and the President culminated on March 30, 1981, when Hinckley shot and wounded President Reagan in a desperate attempt to impress Foster.³

Several defense psychiatrists testified at trial. Since Hinckley suffered from "process schizophrenia," they concluded he was insane when he shot the President.⁴ Despite contradictory testimony by government psychiatrists,⁵ the jury found Hinckley not guilty by reason of insanity.⁶ In the wake of the ensuing public outcry against the insanity defense,⁷ Congress enacted the Insanity Defense Reform Act of 1984.⁸ The Act severely limited the availability and effectiveness of the insanity defense.⁹

This note calls for the repeal of the portion of the Act that established Federal Rule of Evidence 704(b).¹⁰ Rule 704(b) prohibits expert witnesses from stating "ultimate" conclusions on the mental health of criminal defendants.¹¹ As a limitation on the testimony of mental health experts, Rule 704(b) prejudices criminal defendants and creates confusion in federal courts. Rule 704(b) resurrects the defunct ultimate issue rule, long recognized as unsound by courts and legal scholars.¹² Thus, Rule 704(b) restricts testimony crucial to an insanity defense, and should be repealed.

2. *Id.* at 1547-48.

3. *Id.* at 1548.

4. *Id.* at 1545.

5. *Id.*

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

7. Sallet, *supra* note 1, at 1553 n.28 (according to an ABC news poll, 83% of the nation considered Hinckley's acquittal unjust).

8. Title IV, Pub. L. No. 98-473, 98 Stat. 2067 (1984) (codified at 18 U.S.C. § 20) [hereinafter Act].

9. The Act accomplished three major reforms. It established a new test for insanity, limited expert testimony through Rule 704(b), and shifted the burden of proving insanity to the defense. The Act reads:

Insanity defense

(a) Affirmative Defense. — It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.

(b) Burden of Proof. — The defendant has the burden of proving the defense of insanity by clear and convincing evidence.

Id.

10. Act, *supra* note 8.

11. FED. R. EVID. 704(b). See *infra* note 35.

12. See *infra* notes 18-27 and accompanying text.

This note will first outline the history of the ultimate issue rule. This outline includes the rationale that inspired the rule, and the criticism that led to its abolition. This note will then discuss Rule 704(b)'s resurrection of the ultimate issue rule. Next, this note will interpret the original intent of Rule 704(b) through its text and legislative history. Then, this note will describe the conflicting applications of Rule 704(b) in federal courts. Finally, this note will identify four legitimate dangers inherent in ultimate issue psychiatric testimony, and propose an approach that addresses the dangers more effectively than Rule 704(b).

II. THE ULTIMATE ISSUE RULE

In 1840, the Vermont Supreme Court in *Davis v. Fuller* excluded testimony regarding the cause of backwater in a river.¹³ The court reasoned that causation was an issue for the jury alone to decide. As such, witnesses may not replace the jury by giving opinions "on the point on trial."¹⁴ Vermont thus became the first state to implement the ultimate issue rule.¹⁵ Soon thereafter, numerous American courts¹⁶ barred witnesses from expressing opinions on ultimate issues, reasoning that such opinions "invade the province of the jury."¹⁷

By the turn of the century, courts began to question the validity of the ultimate issue rule.¹⁸ In the 1930's and 1940's, criticism of the rule intensified, and numerous courts allowed opinion testimony on the issue before the jury.¹⁹ In 1942, the Iowa Supreme Court embarked

13. See Stoebe, *Opinions on Ultimate Facts: Status, Trends, and a Note of Caution*, 41 DEN. L. CENTER J. 226 (1964) (citing 12 Vt. 178 (1840)).

14. *Id.*

15. *Id.*

16. *Id.* at 226-27 & nn.6-9 ("after 1874, the rule is frequently encountered").

17. *Id.* at 226. Such testimony was said to either "usurp the function of the jury," or "invade the province of the jury." See, e.g., *United States v. Spaulding*, 293 U.S. 498 (1935) (excluding an expert opinion as to whether the insured was permanently disabled before the lapse of the insurance policy).

18. See, e.g., *Eastern Transp. Line v. Hope*, 95 U.S. 477, 478 (1877) ("[i]t is not an objection . . . that [the witness] was asked a question involving the point to be decided by the jury"); *Western Coal & Mining Co. v. Berberich*, 94 F. 329 (8th Cir. 1899) (court allowed expert to testify that a coal mine was in safe condition).

19. See, e.g., *Holloway v. United States*, 148 F.2d 665 (D.C. Cir. 1945) (psychiatrists could testify that defendant was able to tell right from wrong at the time of the offense); *Mutual Benefit Health & Accident Ass'n v. Francis*, 148 F.2d 590 (8th Cir. 1945) (experts, as opposed to lay witnesses, may express opinions on ultimate issues); *Svenson v. Mutual Life Ins. Co.*, 87 F.2d 441 (8th Cir. 1937) (doctors performing autopsy could testify that deceased's wounds were not self-inflicted); *New York Life Ins. Co. v. Doerksen*, 64 F.2d 240 (10th Cir. 1933) (medical expert may give opinion as to cause of death).

on a detailed analysis of the rule.²⁰ In *Grismore v. Consolidated Products Co.*,²¹ the court concluded that the jury's prerogative to accept or reject testimony preserves the jury's role as final arbiter, even in the face of ultimate issue testimony.²² *Grismore* began a widespread trend towards abandoning the rule.²³ By 1964, many legal scholars had declared the rule theoretically unsound,²⁴ and most jurisdictions had abandoned or severely modified the rule.²⁵ In 1975, Congress seemed to lay the ultimate issue rule to rest by enacting Federal Rule of Evidence 704.²⁶ Rule 704 codified the nearly unanimous proposition that otherwise admissible opinion testimony may embrace ultimate issues.²⁷

Although Rule 704 imposed no restriction on expert testimony, other evidentiary rules limited its admissibility.²⁸ Federal Rules of Evidence 701²⁹ and 702³⁰ mandate that opinion testimony assist the trier of fact. Further, Rule 403 requires exclusion of evidence if its prejudicial effect substantially outweighs its probative value.³¹ Thus,

20. *Grismore v. Consolidated Products Co.*, 232 Iowa 328, 5 N.W.2d 646 (1942).

21. *Id.*

22. *Id.* at 344-47, 5 N.W.2d at 656.

23. *Stoebuck*, *supra* note 13, at 238 (refers to *Grismore* as a "pathfinder case"). *See, e.g.*, *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954) (psychiatrist could testify that defendant was of unsound mind at the time of the crime); *Hooper v. General Motors Corp.*, 123 Utah 515, 260 P.2d 549 (1953) (expert could testify as to cause of truck accident).

24. C. McCORMICK, EVIDENCE § 12 (2d ed. 1972); J. WIGMORE, 7 EVIDENCE §§ 1920-21 (3d ed. 1940) (Wigmore labeled the rule "empty rhetoric"). *See also* *Stoebuck*, *supra* note 13, at 226.

25. *Stoebuck*, *supra* note 13, at 236.

26. As originally enacted, Fed. R. Evid. 704 read: "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." *Id.*

27. Many states have adopted provisions similar to Rule 704. *See, e.g.*, CALIF. EVID. CODE § 805 (1965); ILL. ANN. STAT. ch. 38, para. 20, § 5-2-5 (1985); MD. ANN. CODE art. 9, § 120 (1978); OKLA. STAT. tit. 12, § 2704 (1986).

28. The Advisory Committee Note warns that Rule 704 does not admit all opinions. This warning refers to the limitations imposed on Rule 704 by Rules 403, 701 & 702. FED. R. EVID. 704 Advisory Committee Note.

29. FED. R. EVID. 701 provides that non-expert opinion testimony is admissible only if "helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." *Id.*

30. FED. R. EVID. 702 reads: "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." *Id.*

31. FED. R. EVID. 403 reads: "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.*

even after Rule 704 abolished the ultimate issue rule, courts continued excluding ultimate issue testimony when witnesses offered prejudicial or unhelpful legal conclusions.³² In *Hinckley* and other similar cases, however, criminal courts granted expert witnesses unbridled discretion to state conclusions as to the defendant's sanity.³³

III. THE HISTORY AND APPLICATION OF FEDERAL RULE OF EVIDENCE 704(b)

A. *The Enactment of Rule 704(b)*

In 1984, Congress enacted the Insanity Defense Reform Act.³⁴ The Act added section (b) to Rule 704,³⁵ limited the existing definition of

32. See, e.g., *Torres v. County of Oakland*, 758 F.2d 147 (6th Cir. 1985) (witness could not testify that plaintiff had been "discriminated" against); *Owen v. Kerr McGee Corp.*, 698 F.2d 236 (5th Cir. 1983) (expert could not testify as to the legal "cause" of a car accident); *United States v. Masson*, 582 F.2d 961 (5th Cir. 1978) (FBI agent could testify that defendant was a bookmaker, but not that defendant was "guilty"). See generally *United States v. Scavo*, 593 F.2d 837 (8th Cir. 1979) (legal conclusions are still inadmissible after Rule 704); *United States v. Milton*, 555 F.2d 1198, 1203 (5th Cir. 1977) (court reasoned that, "Rule 704 abolishes the per se rule against testimony regarding ultimate issues of fact . . . however, courts must remain vigilant against admissions of legal conclusions").

33. See, e.g., *United States v. Figueroa*, 666 F.2d 1375 (11th Cir. 1982) (experts could testify as to whether defendant was able to appreciate the wrongfulness of his conduct); *United States v. Sullivan*, 595 F.2d 7 (9th Cir. 1979) (expert could testify that defendant was insane); *United States v. Hall*, 583 F.2d 1288, 1293 (5th Cir. 1978) (expert could testify that defendant "lacked substantial mental capacity to conform his behavior to the requirements of the law"). See generally *United States v. Burks*, 547 F.2d 968, 969-70 (6th Cir. 1978) ("[p]sychiatrists and psychologists . . . may testify broadly as to their contacts with a defendant who relies on an insanity defense, and state their conclusions as to his condition, in medical as well as legal terms"). These cases reflect the current law of Florida. FLA. STAT. § 90.703 (1987) abolished the ultimate issue rule, but Florida has not adopted Rule 704(b). The only limitations on expert testimony in Florida are FLA. STAT. §§ 90.702 & 90.403 (1987) which mirror Federal Rules 702 and 403, respectively. See *Lenahan v. Lenahan*, 511 So. 2d 365 (Fla. 1st D.C.A. 1987).

Florida's insanity defense is very similar to the current federal test:

If at the time of an alleged crime a defendant was by reason of mental infirmity, disease or defect unable to understand the nature and quality of his act or its consequences or, if he did understand it, was incapable of distinguishing that which is right from that which is wrong, he was legally insane.

Wheeler v. State, 344 So. 2d 244 (Fla. 1977). It has long been established in Florida that an expert may express an opinion as to the sanity or insanity of a criminal defendant. See, e.g., *Hellman v. State*, 492 So. 2d 1368 (Fla. 4th D.C.A. 1986); *Blocker v. State*, 87 Fla. 128, 110 So. 547 (1926).

34. See Act, *supra* note 8.

35. FED. R. EVID. 704 now reads:

(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.

insanity,³⁶ and shifted the burden of proving insanity to the criminal defendant.³⁷ Rule 704(b) prohibits an expert witness from stating an opinion as to whether the defendant possessed the mental state constituting an element of the crime charged or of a defense to the crime.³⁸ The rule reserves such "ultimate issues" for the trier of fact.³⁹

The legislative history behind Rule 704(b) expressed an intent to limit expert mental health testimony because such testimony was often unreliable and confused juries.⁴⁰ The legislative history cited to the American Psychiatric Association (APA) Statement on the Insanity Defense.⁴¹ In this statement, the APA expressed the psychiatric profession's concern that mental health experts often testified as to matters beyond their expertise.⁴² Acknowledging this concern, the rule limits psychiatric expert testimony to medical diagnoses. For the purposes of Rule 704(b), medical diagnoses include determining whether the defendant suffers from a severe mental disease, and, if so, exploring the characteristics of the disease.⁴³

(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. American courts first adopted the English test of insanity established in the *M'Naughten* case, which excused criminal defendants who were unaware of their acts or that such acts were wrong. In 1897, the United States Supreme Court in *Davis v. United States*, 165 U.S. 373 (1897), added a volitional prong to the test, whereby one who acted under an "irresistible impulse" resulting from mental disease was not held responsible for criminal actions. In 1954, the District of Columbia Circuit attempted to simplify the test, excusing in *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954), unlawful acts which were the product of mental disease or defect. In 1972, *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972), overruled *Durham* and adopted a two pronged test formulated by the American Law Institute (ALI) MODEL PENAL CODE, which excused defendants who lack "substantial capacity to appreciate the criminality" of their conduct or to conform to the law. *See generally* *United States v. Freeman*, 357 F.2d 606 (2d Cir. 1966). The current test eliminates the volitional prong of the ALI test. *See* S. REP. NO. 225, 98th Cong., 1st Sess. 231 (1983), reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3405-06.

37. *See supra* note 9. Previously, if a defendant raised the issue of insanity, the government then had the burden of proving the defendant's sanity beyond a reasonable doubt. S. REP. NO. 225, *supra* note 36, at 3406.

38. FED. R. EVID. 704(b).

39. *Id.*

40. *See* S. REP. NO. 225, *supra* note 36, at 3404-05.

41. *Id.* at 3412 n.33.

42. *Id.* at 3413.

43. *Id.* at 3412.

While the legislative history of the rule focused on the inadequacy of expert psychiatric testimony, the plain language of amended Rule 704 indicates that reliable testimony may be excluded merely because it reaches the ultimate issue. The original Rule 704 provided that "otherwise admissible" opinion testimony will not be excluded merely because it embraces an ultimate issue.⁴⁴ In amending the rule, Congress designated this original rule as Rule 704(a), and qualified it with the preface, "except as provided in subdivision (b)."⁴⁵ By identifying Rule 704(b) as an exception to Rule 704(a), the language of the entire rule implies that 704(b) excludes otherwise admissible opinion testimony because it embraces an ultimate issue. The legislative history indicated that the rule excludes confusing testimony outside of the expert's area of expertise.⁴⁶ However, for testimony excluded by Rule 704(b) to be "otherwise admissible," it must be relevant,⁴⁷ probative,⁴⁸ and helpful to the jury.⁴⁹

The last sentence of Rule 704(b) states that the issue of the defendant's mental state is an "ultimate issue . . . for the trier of fact alone."⁵⁰ This sentence suggests that Rule 704(b) is a limited application of the ultimate issue rule abolished by the original Rule 704.⁵¹ Thus, the plain meaning of Rule 704(b) departs from the well-established rule that an expert may state an opinion on any issue, if the opinion assists the trier of fact.⁵²

B. *The Application of Rule 704(b)*

Since Congress enacted Rule 704(b), federal courts have struggled to coherently apply the rule. Some courts have adopted the apparent legislative intent, while others have followed the language of the rule.⁵³ Several courts have applied the rule in a manner that is consistent with neither the language nor the intent of the rule.⁵⁴

44. See *supra* note 26.

45. See *supra* note 35.

46. See *supra* notes 40-42 and accompanying text.

47. FED. R. EVID. 402 provides that "[e]vidence which is not relevant is not admissible." *Id.*

48. FED. R. EVID. 403; see *supra* note 31.

49. FED. R. EVID. 702; see *supra* note 30.

50. See *supra* note 35.

51. See *supra* notes 13-27 and accompanying text.

52. See, e.g., *Frase v. Henry*, 444 F.2d 1228, 1231 (10th Cir. 1971) (an expert may give an opinion on an ultimate issue if the opinion aids the jury in understanding the evidence). See generally *DiBella v. County of Suffolk*, 574 F. Supp. 151 (E.D.N.Y. 1983) (after Rule 704, Rule 702 may still exclude mixed questions of law and fact).

53. See *infra* notes 58-84 and accompanying text.

54. See *infra* notes 85-91 and accompanying text.

Two distinct approaches have thus evolved. Courts focusing on legislative intent have excluded testimony phrased in terms of applicable legal standards because such legal terms are beyond the expertise of psychiatric experts.⁵⁵ Yet, due to the Rule's reference to ultimate issues, courts focusing on the language of the Rule have excluded testimony reaching ultimate issues regardless of legal terminology.⁵⁶ As a result of the inconsistent applications of Rule 704(b), it is difficult to predict whether a given court will admit or exclude expert psychiatric testimony regarding the mental state of a criminal defendant.⁵⁷

1. Some Courts Exclude Testimony Phrased in Legal or Statutory Language

Most federal courts have interpreted Rule 704(b) as prohibiting expert testimony that employs conclusory legal terminology or that

55. See *infra* notes 58-84 and accompanying text.

56. See *infra* notes 85-91 and accompanying text.

57. Courts have consistently held that Rule 704(b) is constitutional. In 1986, Rule 704(b) withstood a constitutional challenge when the Eleventh Circuit held that the Rule does not violate the fifth amendment. See *United States v. Freeman*, 804 F.2d 1574 (11th Cir. 1986). In *Freeman*, the defendant was convicted of robbery despite his claim of insanity. *Id.* at 1575. On appeal, defendant contended that the trial court's exclusion of expert testimony under 704(b) violated his fifth amendment right to prepare a defense. *Id.* at 1576. The court held that the Rule does not prohibit the defendant from introducing evidence helpful to the jury, but "merely reserves for the jury the authority to determine the insanity of the accused under the statutory standards." *Id.*

In support of the constitutionality of the Rule, the *Freeman* court noted that the Rule applies equally to testimony offered by the prosecution. However, the fact that the exclusion applies to the government as well as to the defendant does not justify the rule. The government no longer has the burden of producing any evidence of a defendant's sanity, and enjoys greater resources than criminal defendants. Equal elimination of the tools of both parties magnifies the government's inherent advantage.

Other circuits using similar language later held that the rule does not violate the sixth amendment right to a fair trial. See *United States v. Williams*, No. 86-5750, 822 F.2d 60 (6th Cir. 1987) (unpublished disposition available on WESTLAW, CTA 6 database). The rule also does not violate the fourteenth amendment guarantee of due process. See *United States v. Alexander*, 805 F.2d 1458 (11th Cir. 1986).

On other constitutional challenges, several federal courts have held that retroactive application of the rule is constitutionally permissible. Convicted of first degree murder, the defendant in *United States v. Mest*, 789 F.2d 1069 (4th Cir. 1986) contended that retroactive application of the rule violated the ex post facto clause of the Constitution. *Id.* at 1070 (defendant committed the crime on August 31, 1984; Rule 704(b) was enacted on October 12, 1984). The Fourth Circuit interpreted the Rule as merely changing "the style of question and answer" allowable in eliciting expert psychiatric testimony. *Id.* at 1071. According to the court, the Rule did not limit the "actual facts" to which the expert may testify. *Id.* at 1071-72; see also *United States v. Edwards*, 819 F.2d 262, 265 (11th Cir. 1987). The Sixth and Eleventh Circuits subsequently adopted the *Mest* holding. See *United States v. Alexander*, 805 F.2d 1458, 1462 (11th Cir. 1986); *United States v. Prickett*, 790 F.2d 35 (6th Cir. 1986).

closely follows an applicable statute. Courts have excluded experts' responses to questions regarding the defendant's ability to discern the wrongfulness of his behavior or his ability to conform his behavior to legal requirements.⁵⁸ The courts invoked Rule 704(b) because the questions mirrored the language of the then applicable test of insanity.⁵⁹

Other courts have prohibited the defendant's experts from stating an opinion as to whether the defendant was "legally insane" at the time of the offense.⁶⁰ Similarly, in one case where the defendant's intent to evade taxes constituted an element of the offense charged, the Seventh Circuit reversed the lower court's admission of expert testimony that the defendant "intentionally" understated his income.⁶¹

2. Some Courts Exclude Testimony on Certain Issues, Regardless of Terminology

Although some courts apply Rule 704(b) as merely a stylistic regulation of the terms employed by mental health experts,⁶² other courts indicate that the rule focuses on issues rather than terminology. In *United States v. Esch*,⁶³ the defendant was convicted of sexual exploitation of children.⁶⁴ Defense counsel attempted to introduce a clinical psychologist's testimony that the defendant had a "dependent personality," and that the defendant's attitudes towards sexuality stemmed from certain childhood experiences.⁶⁵ In affirming the trial court's exclusion of the testimony,⁶⁶ the Tenth Circuit reasoned that the testimony was offered to show the defendant's inability to form the requisite intent.⁶⁷ This intent was an element of the offense.⁶⁸ Thus, the court excluded the expert's diagnosis because it was relevant to the

58. *See Mest*, 789 F.2d at 1071; *United States v. Prickett*, 604 F. Supp. 407, 409 (S.D. Ohio 1985), *aff'd*, 790 F.2d 35 (6th Cir. 1986).

59. Both offenses occurred prior to the enactment of the Insanity Defense Reform Act. While Rule 704(b) is procedural and may be retroactively applied, the insanity test is substantive and retroactive application would violate the Constitution's ex post facto clause. *See supra* note 57 and accompanying text.

60. *United States v. Alexander*, 805 F.2d 1458, 1460 (11th Cir. 1986).

61. *United States v. Windfelder*, 790 F.2d 576 (7th Cir. 1986).

62. *See supra* note 57 and accompanying text.

63. 832 F.2d 531 (10th Cir. 1987).

64. *Id.* at 533.

65. *Id.* at 534.

66. *Id.* at 533.

67. *Id.* at 535.

68. *Id.*

ultimate issue before the jury, even though the opinion omitted legal or statutory language.⁶⁹

The decision in *United States v. Cox*⁷⁰ reveals a similar departure from the stylistic approach in favor of an issue based analysis. The *Cox* court allowed an expert to testify that the defendant, who failed to raise the insanity defense, was aware of the wrongfulness of his criminal act.⁷¹ Although the testimony reflected the language of the insanity statute, the court admitted the testimony because the ultimate issue was the defendant's intent, not insanity.⁷² If the defendant's insanity had been the ultimate issue, then the court would have excluded the testimony.

The *Cox* holding directly conflicts with the Seventh Circuit's decision in *United States v. Hillsberg*.⁷³ In *Hillsberg*, the defendant sought to introduce expert testimony that the defendant was unable to conform his conduct to the requirements of the law.⁷⁴ The testimony was intended to prove that the defendant was unable to form the requisite intent for second degree murder, rather than to show that he was insane.⁷⁵ The court rejected the proffered testimony, reasoning that the defendant's intent was an ultimate question reserved exclusively for the jury.⁷⁶

In both *Cox* and *Hillsberg*, the defendant attempted to introduce expert testimony phrases in terms of insanity tests, but relevant only to the issue of the defendant's intent. While the *Hillsberg* court excluded the testimony because it embraced the ultimate issue of the defendant's intent, the *Cox* court admitted the testimony for the same reason.

The prospective exclusion of expert testimony regarding the defendant's mental state in *United States v. Buchbinder*⁷⁷ also indicates an issue based interpretation of Rule 704(b). In *Buchbinder*, the defendant contended he was prejudiced by his attorney's failure to introduce expert psychiatric testimony regarding the defendant's lack of requi-

69. The exclusion of diagnostic testimony specifically contradicts the express legislative intent to allow experts to present and explain their diagnoses. See S. REP. NO. 225, *supra* note 36, at 3412-13.

70. 826 F.2d 1518 (6th Cir. 1987).

71. *Id.* at 1524.

72. *Id.*

73. 812 F.2d 328 (7th Cir. 1987).

74. *Id.* at 331.

75. *Id.*

76. *Id.* at 332.

77. 796 F.2d 910 (7th Cir. 1986).

site mental state.⁷⁸ The court held that the defendant was not prejudiced, as the testimony would have been excluded by Rule 704(b) had it been offered.⁷⁹ Because the testimony had not yet been articulated, prospective exclusion of all testimony on the issue of the defendant's mental state without knowledge of the language of the testimony cannot be characterized as "stylistic."

The issue based analysis often leads to illogical results. In *United States v. Aders*,⁸⁰ the Fourth Circuit allowed the defendant's expert to testify about the defendant's mental disease and to describe the characteristics of the disease.⁸¹ The court permitted the expert to state whether an inability to appreciate the wrongfulness of one's conduct was a characteristic of the defendant's disease.⁸² However, the court did not allow the expert to opine whether the defendant was unable to appreciate the wrongfulness of his act.⁸³ The court thus defined the defendant's specific ability to appreciate the wrongfulness of his actions as the ultimate issue, and refused to permit testimony on that issue. Yet, identically phrased testimony that mandated the same conclusion was admissible. The court permitted this testimony because it did not specifically refer to the defendant and, in form, it avoided the ultimate issue.⁸⁴

*United States v. Dotson*⁸⁵ suggests an interpretation of Rule 704(b) that is neither stylistic nor issue based. In *Dotson*, the defendant was convicted of tax evasion.⁸⁶ On appeal, the defendant assigned as error the trial court's admission of a government tax expert's testimony that the defendant "willfully and intentionally" failed to report income.⁸⁷ Although the expert's testimony both related to the defendant's mental state constituting an element of the crime and was phrased in the terms of the applicable statute, the Fifth Circuit affirmed the lower court's admission of the testimony.⁸⁸ The court reasoned that

78. *Id.* at 917.

79. *Id.*

80. 816 F.2d 673 (4th Cir. 1987) (unpublished disposition available in WESTLAW, CTA 4 database).

81. *Id.* Although the phrase "severe mental disease" mirrors the language of the insanity statute, the legislative history specifically allows experts to testify on that issue. See S. REP. NO. 225, *supra* note 36, at 3412.

82. 816 F.2d 673.

83. *Id.*

84. *Id.* The court admitted that its approach stressed form over function, but explained that such emphasis "is the essence of Rule 704(b)." *Id.*

85. 817 F.2d 1127 (5th Cir. 1987).

86. *Id.*

87. *Id.* at 1132.

88. *Id.*

the expert's testimony merely summarized facts and that the expert drew a conclusion based on these facts.⁸⁹ Under this approach, all expert testimony would be admissible, even if phrased in legal terms and directly related to an ultimate issue, if the expert first established the underlying facts supporting the conclusion.

In light of the inconsistent applications of Rule 704(b), it is unclear how *Hinckley* would have proceeded had the rule been in effect. Courts endorsing the stylistic approach would allow Hinckley's doctors to testify fully about the characteristics and the severity of Hinckley's mental disease. Yet, these courts would preclude the experts' conclusions that Hinckley was insane, or unable to appreciate the wrongfulness of his acts, or to conform them to the law.⁹⁰ Courts employing the issue based analysis would prohibit the experts from offering any testimony, regardless of phraseology, which bears on the ultimate issue of Hinckley's sanity.⁹¹ The latter courts might, under *Cox*, allow testimony as to sanity if offered to prove that Hinckley could not have formed the requisite intent.⁹² Courts following *Dotson* would permit experts to state all conclusions after providing a proper factual basis.⁹³ Thus, the conflict between legislative intent and the language of the rule, the incongruity between the language of Rule 704(b) and Rule 704(a)'s abolition of the ultimate issue rule, and the resultant divergent applications of Rule 704(b), render futile any attempt to predict the admissibility of expert psychiatric testimony.

IV. THE FOUR DANGERS THAT RULE 704(b) ADDRESSES

The legislative history of Rule 704(b) and court opinions enforcing the rule reveal four perceived dangers posed by expert mental health testimony. Some courts contend that mental health experts go beyond their expertise when asserting legal conclusions. Other courts fear that ultimate issue testimony invades the province of the jury. Congress and courts also express concern that psychiatric testimony confuses the jury. Finally, courts have held that expert opinions regarding sanity necessitate an impermissible moral judgment.

89. *Id.*

90. See *supra* note 57 and accompanying text.

91. See *supra* notes 62-79 and accompanying text.

92. See *United States v. Cox*, 826 F.2d 1518 (6th Cir. 1987) (admitting expert opinion as to sanity as an ultimate issue focused on intent to rob, not sanity/insanity). *But cf.* *United States v. Hillsberg*, 812 F.2d 328 (7th Cir. 1987) (excluding testimony reflecting the language of an inapplicable insanity test).

93. See *supra* notes 85-89 and accompanying text.

A. *Mental Health Experts State Impermissible Legal Conclusions*

Federal courts excluding expert psychiatric testimony often state that while experts may present all relevant facts, they may not state their conclusions.⁹⁴ Both the APA Statement⁹⁵ and the House Judiciary Committee Report⁹⁶ expressed concern that mental health experts draw legal conclusions despite their lack of legal expertise. One perceived danger in allowing such testimony is that the expert might adopt, and the jury might accept, an erroneous legal standard.⁹⁷

The danger of expert witnesses inaccurately stating the law is not exclusive to the mental health area. When an expert witness expresses an opinion regarding the "cause"⁹⁸ of an accident, or the "guilt"⁹⁹ of a party, the jury may adopt the expert's implicit definition of those legal terms. However, the Rules of Evidence adequately deal with this danger. The Advisory Committee Note to the original Rule 704 specifically stated that Rules 701, 702 and 403 "stand ready to exclude opinions phrased in terms of inadequately explored legal criteria."¹⁰⁰

A mental health expert may either state or imply an erroneous legal standard. The latter occurs when the expert incorrectly testifies that the defendant was sane or insane because the expert relied upon an incorrect standard when rendering his opinion. For example, a psychiatrist who believes that the defendant understood the wrongfulness of his actions, but was unable to conform his behavior to the

94. See *Blocker v. United States*, 238 F.2d 853, 863 (D.C. Cir. 1961) (courts must exclude "conclusions of law, for which the psychiatrist has no competence"); see also *United States v. Cox*, 826 F.2d 1518, 1524 (6th Cir. 1987) ("the district court promptly sustained objections to [the expert's] rendering of such a legal conclusion"); *United States v. Edwards*, 819 F.2d 262, 265 (11th Cir. 1987) ("Rule 704(b) forbids only 'conclusions as to the ultimate legal issue'"); *United States v. Aders*, 816 F.2d 673 (4th Cir. 1987) (the expert "could not state the legal conclusion that Aders himself was unable to appreciate the wrongfulness of his acts").

95. See S. REP. NO. 225, *supra* note 36, at 3412 n.33.

96. H.R. REP. NO. 577, 98th Cong., 1st Sess. 2 (1983); see also Note, *Resurrection of the Ultimate Issue Rule: Federal Rule of Evidence 704(b) and the Insanity Defense*, 72 CORNELL L. REV. 620, 626 (1986-87) ("[t]he committee noted that mental health experts have no special ability to draw legal conclusions about insanity").

97. See *Torres v. County of Oakland*, 758 F.2d 147, 150 (6th Cir. 1985) ("[t]he problem with testimony containing a legal conclusion is in conveying the witness' unexpressed, and perhaps erroneous, legal standards to the jury").

98. See *Owen v. Kerr McGee Corp.*, 698 F.2d 236 (5th Cir. 1983).

99. See *United States v. Masson*, 582 F.2d 961 (5th Cir. 1978).

100. Advisory Committee Note to Rule 704(a), 56 F.R.D. 183, 284 (U.S. 1972); see *Torres*, 758 F.2d 147 (expert could not testify that defendant "discriminated" against plaintiff); *Davis v. Combustion Eng'g, Inc.*, 742 F.2d 916 (6th Cir. 1984) (expert could not testify that discrimination was "unlawful").

requirements of the law, might state that the defendant was insane. The expert would be unaware that the assumed facts do not meet the current insanity test.¹⁰¹ Requiring the expert to explain the basis of the conclusion eliminates this danger. In fact, Rule 704(a) specifically prohibits naked conclusions, as they are "inadequately explored."¹⁰² Thus, Rule 704(b) is unnecessary to exclude a witness' unsupported conclusion that the defendant was sane or insane at the time of the crime.¹⁰³

If the expert states the basis of his conclusion but improperly recites the insanity defense, the error will not go unnoticed. Opposing counsel will either promptly object or expose the expert's lack of understanding of the law on cross examination. Even in the unlikely event that the error escapes the attention of opposing counsel, the judge will correct the error by instructing the jury of the applicable legal standard.¹⁰⁴

The second perceived danger in allowing experts to testify in terms of legal conclusions is that the conclusions often include legal jargon unintelligible to the lay juror.¹⁰⁵ Federal Rule 702, which allows expert testimony only if it will assist the trier of fact,¹⁰⁶ adequately addresses this concern; incomprehensible testimony does not assist the jury. Furthermore, despite the APA's stance that mental health experts should be permitted to testify in "clinical and commonsense terms,"¹⁰⁷ courts have excluded understandable language merely because it reflects statutory wording.¹⁰⁸ This protection is, however, ill founded. For example, testimony that a defendant is "incapable of appreciating the wrongfulness of his conduct"¹⁰⁹ will not confuse the jury.¹¹⁰

Courts excluding psychiatric conclusions incorrectly assume that this testimony will mislead the jury. If an expert's opinion rests on

101. See *supra* note 9.

102. *Advisory Committee Note*, 56 F.R.D. at 284.

103. See, e.g., *United States v. Brawner*, 417 F.2d 969, 1006 (D.C. Cir. 1972) (experts must reveal their "underlying reasons and approach," rather than present opinions to the jury "on a take-it-or-leave-it basis").

104. *Id.* at 1008 (suggested jury instruction for insanity cases).

105. See, e.g., *Blocker v. United States*, 288 F.2d 853, 863 (D.C. Cir. 1961) (jurors are often confused by "unintelligible technical jargon").

106. See *supra* note 30.

107. See S. REP. NO. 225, *supra* note 36, at 3412 n.33.

108. See *supra* notes 58-61, 73-76 and accompanying text.

109. See, e.g., *United States v. Mest*, 789 F.2d 1069 (4th Cir. 1986); *United States v. Prickett*, 604 F. Supp. 407 (S.D. Ohio 1985), *aff'd*, 790 F.2d 35 (6th Cir. 1986).

110. See *Sallet*, *supra* note 1, at 1553 (the ALI's two pronged insanity test "does not appear to be unusually abstruse").

an improper basis or is phrased in terms unclear to the jury,¹¹¹ the testimony is not "otherwise admissible;" Rule 702 excludes the testimony from evidence. If, as these courts suggest, the purpose of Rule 704(b) is to exclude legal conclusions, rather than ultimate issues, Rule 704(b) is thus unnecessary, and improperly suggests that unsupported or unintelligible conclusions by non-psychiatric experts are admissible.¹¹²

B. *Expert Testimony on the Issue of a Defendant's Mental Condition Invades the Province of the Jury*

The most frequent objection to testimony excluded by Rule 704(b) is that the impermissible opinion would "invade the province of the jury."¹¹³ Courts excluding testimony on this basis revive the defunct ultimate issue rule, long ago abandoned and dismissed as "empty rhetoric."¹¹⁴ The APA's admonition that the determination of legal insanity is for the jury rather than the expert,¹¹⁵ the federal courts' oft-repeated assertion that ultimate issues must be "reserved" for the jury,¹¹⁶ and the plain language of Rule 704(b)¹¹⁷ are all reminiscent of the sweeping exclusions of ultimate issue testimony in the nineteenth century.¹¹⁸ Nevertheless, Rule 704(a) still stands for the general abolition of the ultimate issue rule. Since Rule 704(b) is an exception to Rule 704(a), this limited application of the ultimate issue rule suggests that testimony regarding the criminal defendant's mental condition poses a greater risk of invading the jury's province than does all other ultimate issue testimony.

The original ultimate issue rule rests on the premise that if a witness states an opinion as to how the case should be decided, the jury might ignore the facts of the case and blindly accept the expert witness' conclusion as true. In response to the contention that tes-

111. Some non-psychiatric cases suggest that testimony must be rephrased if the jury would ascribe a different meaning to the terms than is intended by the expert. *United States v. Kelly*, 679 F.2d 135, 136 (8th Cir. 1982); *United States v. Hearst*, 563 F.2d 1331, 1351 (9th Cir. 1977).

112. See C. EHRHARDT, *FLORIDA EVIDENCE* 128 (2d ed. 1988 Pocket Part) ("Hopefully, the amendment will not be interpreted as a Congressional intent to permit testimony regarding legal conclusions in all cases other than those specified in [Rule 704(b)].").

113. See, e.g., *United States v. Alexander*, 805 F.2d 1458, 1463 (11th Cir. 1986); *United States v. Prickett*, 604 F. Supp. 407, 409 (S.D. Ohio 1985), *aff'd*, 790 F.2d 35 (6th Cir. 1986).

114. See *supra* notes 13-27 and accompanying text.

115. See S. REP. NO. 225, *supra* note 36, at 3412 n.33.

116. See, e.g., *United States v. Williams*, 822 F.2d 60 (6th Cir. 1987); *United States v. Freeman*, 804 F.2d 1574, 1576 (11th Cir. 1986).

117. See *supra* note 35.

118. See *supra* notes 13-27 and accompanying text.

timony by lay witnesses poses the very same risk,¹¹⁹ courts have argued that scientific testimony is often beyond the ken of lay jurors. As such, jurors choose to accept the experts' conclusions rather than wade through "unintelligible technical jargon."¹²⁰ However, scientific testimony includes many areas of expertise not covered by Rule 704(b). Furthermore, the testimony that the Rule excludes is neither unintelligible nor technical. Finally, psychiatric testimony is generally less likely to overawe the jury than other types of expert testimony.

The jury is prone to discredit expert psychiatric testimony for several reasons. First, society shares the distrust of psychiatry expressed in the legislative history of Rule 704(b).¹²¹ Defense psychiatrists are at a particular disadvantage, due to the popular belief that they conspire to keep sane criminals out of prison.¹²² This disadvantage is magnified by the defense's burden of proving insanity by clear and convincing evidence,¹²³ especially when the jury naturally presumes most men are sane.¹²⁴ Furthermore, the jury may be prejudiced against the defense psychiatrist by natural desires to gain retribution,¹²⁵ or by personal beliefs that insanity does not excuse criminal acts.

While courts have cited the "mystic infallibility"¹²⁶ juries accord scientific evidence, the legislative history of Rule 704(b) states that the purpose of the rule is to eliminate "the confusing spectacle of competing expert witnesses testifying to directly contradictory conclusions"¹²⁷ These concerns are incompatible. A jury clearly cannot

119. Ladd, *Expert Testimony*, 5 VAND. L. REV. 414, 423 (1952) ("a jury is no more required to accept a questionable opinion of an expert than it is required to accept a false statement of fact").

120. Blocker v. United States, 288 F.2d 853, 863 (D.C. Cir. 1961).

121. Sallet, *supra* note 1, at 1553 (congressional debates reflected "widespread societal distrust of psychiatry;" former Attorney General Smith referred to mental health experts as "supposed experts"). See also Bonnie & Slobogin, *The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation*, 66 VA. L. REV. 427, 466 (1980) (jurors are naturally skeptical of psychiatric testimony).

122. Sallet, *supra* note 1, at 1553.

123. See *supra* note 9.

124. Since our laws generally prohibit acts that the majority considers wrongful, one who violates the law, but does not appreciate that the action is wrongful is, except as to a few unpopular laws, in the minority. Thus, by definition, most people are sane.

125. When a jury acquits a defendant upon determining that the defendant did not commit the crime, the acquittal may restore the jury's faith in the criminal justice system. When, however, the jury determines that the defendant committed a criminal act, but will not be held responsible for it, the jury is likely to feel that a wrong has not been redressed.

126. United States v. Addison, 498 F.2d 741, 744 (D.C. Cir. 1974). See generally Barefoot v. Estelle, 463 U.S. 880 (1983).

127. S. REP. NO. 225, *supra* note 36, at 3412.

accept both the conclusion that the defendant is sane and the conclusion that the defendant is insane. Furthermore, the experts need not conflict for the jury to dispense with the supposed mystic infallibility of scientific evidence. In rare cases where the defense presents uncontradicted expert testimony as to the defendant's insanity, juries have often exercised their right to disregard the expert's conclusion.¹²⁸

Even if juries were prone to blindly accept psychiatric testimony, Rule 704(b) would not remedy the situation. The legislative history provides that the expert must be permitted to state a diagnosis and explain the characteristics of the disease, even though the existence of the disease is also an ultimate issue for the jury.¹²⁹ Because the diagnosis necessitates medical terminology, the "unintelligible technical jargon" that mesmerizes the jury is admissible. Furthermore, expert testimony that the defendant has a severe mental disease and that people who suffer from the disease cannot appreciate the wrongfulness of their acts, convinces the jury just as if the expert could state the inevitable conclusion.¹³⁰ In fact, expert testimony may be more convincing if the expert cannot state the conclusion. If courts allow opinion testimony that logically requires the jury to reach a certain conclusion and then do not allow the expert to state the conclusion, then the jury might erroneously assume that it reached the conclusion itself. Jurors are likely to be more overawed by their own conclusions than by conclusions of even the most impressive witnesses.

The ultimate issue rule is unworkable. No clear line exists between testimony that embraces an ultimate issue and testimony that merely assists the jury in issue resolution. More significantly, the rule was abandoned as theoretically unsound. Witnesses are incapable of usurping the jury's function as finder of fact.¹³¹ The jury can, and will,

128. See, e.g., *United States v. Hall*, 583 F.2d 1288 (5th Cir. 1978); *United States v. Dresser*, 542 F.2d 737 (8th Cir. 1976); *Dusky v. United States*, 295 F.2d 743 (8th Cir.), *cert. denied*, 368 U.S. 998 (1961); *McClain v. State*, 327 So. 2d 106 (Fla. 1st D.C.A. 1976).

129. S. REP. NO. 225, *supra* note 36, at 3412.

130. See, e.g., *United States v. Aders*, No. 86-5127, 816 F.2d 673 (4th Cir. 1987) (unpublished disposition available in WESTLAW, CTA 4 database) (the court would have allowed an expert to testify that defendant had a certain mental disease, and that people suffering from the disease were unable to appreciate the wrongfulness of their actions, but not that defendant was similarly unable); *United States v. Hillsberg*, 812 F.2d 323, 332 (7th Cir. 1987) (the court indicated that an expert could give testimony that logically required a particular finding by the jury, but could not state the logically required inference); *United States v. Masson*, 582 F.2d 961 (5th Cir. 1978) (an expert could testify that defendant was a bookmaker, but not that defendant was "guilty" of bookmaking).

131. *Grismore v. Consolidated Prods. Co.*, 232 Iowa 328, 344-47, 5 N.W.2d 646, 656 (1942) ("a witness could not usurp [the] function or invade the province of the jury, by his opinion, if he wished"); see also *Ladd*, *supra* note 119, at 424 ("jurors realized that they are the final triers to determine the issues and are reluctant to part with that right").

disregard testimony that it deems unreliable or untrue, regardless of its presentation.¹³² Opposing counsel, through cross-examination,¹³³ and the presiding judge, through jury instruction,¹³⁴ can ensure that unreliable or inaccurate testimony does not reach the jury. Beyond those measures, our judicial system has no choice but to trust the jury's ability to recognize the truth.¹³⁵

C. *Conflicting Expert Mental Health Testimony Confuses the Jury*

Congress¹³⁶ and the courts¹³⁷ have expressed concern that expert mental health testimony confuses the jury. However, Rule 403 allows the judge to exclude relevant testimony if its probative value is substantially outweighed by its prejudicial effect.¹³⁸ If Rule 704(b) is designed to prevent confusing psychiatric testimony, Congress must have determined, per se, that the confusion wrought by the testimony substantially outweighs the value of the testimony. Alternatively, Congress has imposed a harsher standard for admitting the testimony.

The phraseology excluded by 704(b) is not inherently confusing; conclusions as to a defendant's sanity are only confusing when they are contradictory. Yet, the nature of the adversary system invites conflicting evidence as an integral part of the fact-finding process.¹³⁹

132. See, e.g., *United States v. Barry*, 501 F.2d 578, 584 (6th Cir. 1974) ("the testimony of an expert witness may be disregarded if it conflicts with the sound judgment of the [trier of fact]"); *Feguer v. United States*, 302 F.2d 214, 242 (8th Cir. 1962) ("[O]f course it is the jury, and not the . . . expert . . . which must decide the ultimate issue of insanity here. And the jury was free to reject the testimony of . . . these experts."). But cf. *Douglass v. United States*, 239 F.2d 52 (D.C. Cir. 1956) (the jury may not arbitrarily disregard expert testimony).

133. See *Davis v. Combustion Eng'g, Inc.*, 742 F.2d 916, 920 (6th Cir. 1984) (expert's lack of familiarity with the applicable statute was exposed on cross-examination); see also *Bonnie & Slobogin*, *supra* note 121, at 466 ("the imprecision of an expert's concepts, and the possible shortcomings of his evaluative techniques, may be explored through direct examination and cross examination").

134. See *United States v. Brawner*, 471 F.2d 969, 1012 (D.C. Cir. 1972) (jury instructions can prevent encroachment upon the jury's function); see also *United States v. Fogg*, 652 F.2d 551, 557 (5th Cir. 1981) (expert opinion was placed in proper perspective by jury instructions).

135. See *Oppen v. United States*, 348 U.S. 84, 95 (1984) ("our theory of trial relies upon the ability of the jury to follow instructions"); *United States v. Ridling*, 350 F. Supp. 90, 98 (E.D. Mich. 1972) (juries are skilled in discerning the truth).

136. S. Rep., *supra* note 36, at 3405 (Department of Justice Statement).

137. See, e.g., *United States v. Alexander*, 805 F.2d 1458, 1463 (11th Cir. 1986) (citing the confusing battle of experts).

138. See *supra* note 31.

139. Slovenko, *The Insanity Defense in the Wake of the Hinckley Trial*, 14 *RUTGERS L.J.* 373, 380-81 (1983) (conflicts of testimony often lead to discovery of truth).

Accordingly, testimony should be excluded only if inherently confusing, independent of other evidence.

Furthermore, Rule 704(b) admits the most confusing testimony, the expert's medical diagnosis,¹⁴⁰ and excludes the least confusing testimony, the expert's opinion as to sanity. Furthermore, stopping the expert short of a conclusion precludes the expert from explaining the link between the diagnosis and the determination of insanity.¹⁴¹ By denying the expert the opportunity to summarize the testimony, the Rule diminishes the clarity of the admitted testimony.

Rule 704(b) thus excludes testimony that does not confuse the jury, and that has significant probative value in summarizing the expert's testimony. A per se exclusion of such testimony invades the judge's province to determine the admissibility of evidence.¹⁴²

D. *Conclusions as to Sanity Involve an Impermissible Moral Judgment*

The most perplexing justification for excluding expert testimony on the ultimate issue of mental condition is that expert testimony implies an impermissible moral judgment.¹⁴³ Determining which mental states excuse criminal conduct necessitates a moral decision. Yet, such moral judgments are made by the legislature, not the judge, jury, or witness. Eliminating the volitional prong of the insanity defense test¹⁴⁴ was a moral decision; Congress decided that one who is unable to resist committing criminal acts, but who knows that such acts are wrong, is nonetheless responsible for those acts. Given the test of insanity established by Congress, the jury must simply apply the facts

140. See generally Sallet, *supra* note 1 (medical testimony from the *Hinckley* trial).

141. Ciccone & Clements, *The Insanity Defense: Asking and Answering the Ultimate Question*, Vol. 15, No. 4 BULL. AM. ACAD. PSYCHIATRY L. 335 (1987):

To bar the psychiatrist from providing an opinion about the relationship of the psychiatric illness to the person's capacity to make a choice and appreciate its consequences is to artificially separate the process of inquiry To deny the jury the expert's opinion is to deny the jury the opportunity to directly hear the full scientific inquiry and assess its validity.

Id. See also Note, *supra* note 96, at 633 (conclusions "may be essential to ensure that the factfinder gets the 'thrust' of complicated explanations").

142. FED. R. EVID. 104(a) provides that questions of admissibility of expert testimony shall be determined by the court.

143. See S. REP. NO. 225, at 3412, n.33, *supra* note 36; Bonnie & Slobogin, *supra* note 121, at 456 (whether defendant should be held responsible is a social and moral question); see, e.g., *United States v. Freeman*, 357 F.2d 606, 623 (2d Cir. 1966) (expert testimony involving a moral or legal pronouncement is inadmissible).

144. See *supra* notes 9 & 36.

as it finds them. If the jury finds that the defendant appreciated the wrongfulness of his conduct, it may not find him not guilty by reason of insanity, regardless of any moral convictions. The expert witness merely aids the jury in this ultimate factual determination by presenting data and opinions as to the defendant's mental state at the time of the offense.

The moral judgment objection seems to imply that absent Rule 704(b), courts would permit experts to testify that a defendant "should not be held responsible" for his actions. An opinion of this sort does not assist the jury, and is thus inadmissible under Rule 702.¹⁴⁵ An expert's opinion that a defendant was "unable to appreciate the wrongfulness of his acts," or even that a defendant was "insane" (if the expert reveals the basis for the opinion) assists the jury, and does not involve a moral judgment.¹⁴⁶

V. PROPOSAL

Although the dangers Rule 704(b) contemplates are overstated, the Rule addresses several legitimate concerns. However, the Rule as written and applied does not adequately remedy these problems, and inaccurately suggests that such dangers are exclusive to psychiatric testimony. Proper implementation of Rule 702 would eliminate legitimate dangers that opinion testimony poses, and would eliminate the usefulness of Rule 704(b).

First, in order to further the intent of Rule 704(a), unsupported conclusions should be excluded. An expert's opinion is helpful and reliable only if supported by adequate factual conclusions. Under Rule 702, courts should therefore require each expert to explain the underlying premise of the expert's opinion.

Second, courts should exclude testimony couched in terms that the ordinary juror will not understand. However, terms should not be deemed incomprehensible merely because they track statutory terminology. Instead, courts should require experts to explain any term that is beyond the jury's understanding. If the expert fails to adequately explain the testimony, the court should exclude it under Rule 702 as unhelpful to the jury.

Third, courts should not allow witnesses to determine legal standards. Accordingly, courts should exclude testimony that states or implies to the jury the applicable legal standard. Such testimony is clearly unhelpful to the jury, and thus, inadmissible under Rule 702.

145. See *supra* note 30.

146. See Ciccone & Clements, *supra* note 141, at 336 ("to characterize conclusions as moral and legal is to misunderstand the scientific process, which is synthetic").

Finally, courts must not restrict testimony merely because it bears on an ultimate issue. All relevant expert testimony should be admitted if it will assist the trier of fact. Jurors must be trusted to separate convincing from unconvincing expert testimony. Given these modifications, Rule 704(b) as it exists should be repealed.

VI. CONCLUSION

If Rule 704(b) is merely a congressional determination that opinion testimony formulated as a legal conclusion is not helpful to the trier of fact, then the rule is an egregious example of poorly worded and improperly codified legislation. The implementation of Rule 702 suggested herein¹⁴⁷ would better effectuate congressional intent and eliminate linkage to the long abandoned ultimate issue rule. Use of Rule 702 would encompass all expert testimony and would not imply, as does Rule 704(b), that a non-psychiatric expert may define legal standards, assert naked conclusions, or testify in terms a jury might misunderstand.¹⁴⁸

If, however, Rule 704(b) reflects Congress' belief that testimony that might assist the trier of fact should nevertheless be excluded because it bears on the ultimate issue of the defendant's mental state,¹⁴⁹ the rule is far more offensive. Such a rule expresses an unfounded distrust of psychiatry¹⁵⁰ and unfairly prejudices the criminal defendant. Superior governmental resources place criminal defendants at a disadvantage from the outset;¹⁵¹ when the defendant must bear the burden of proving insanity, the court must permit the defendant to produce all relevant evidence.¹⁵² Yet, Rule 704(b) mandates the exclusion of relevant, probative testimony for fear that it may be too persuasive. Exclusion on these grounds contradicts the underlying premise of our criminal justice system: it is better to acquit several guilty persons than to punish one innocent person.

147. See *supra* section V.

148. See *supra* note 112 and accompanying text.

149. The plain language of the rule suggests this intent. See *supra* notes 45-52 and accompanying text.

150. Psychiatry has evolved from its originally unreliable state, and merits trust today. *United States v. Freeman*, 357 F.2d 606, 625 (2d Cir. 1966). The Supreme Court recently recognized the necessity for psychiatric assistance when it held that an indigent criminal defendant has a constitutional right to psychiatric assistance if sanity is at issue. *Ake v. Oklahoma*, 467 U.S. 68 (1985).

151. The government's greater resources and credibility are offset by the general presumption of innocence.

152. See *Freeman*, 357 F.2d at 624 ("[i]n a criminal trial, when life and liberty hang in the balance, . . . arbitrary limitations on expert and jury are all the less defensible").

When the jury found John Hinckley, Jr. not guilty of a crime millions watched him voluntarily commit, many citizens became outraged that this guilty man would escape punishment.¹⁵³ But in the eyes of the law, Hinckley, or anyone who commits a wrongful act, but due to mental disease is unaware of the wrongfulness of the act, is innocent.¹⁵⁴ Imprisoning such a person punishes the innocent and denies treatment to the sick.¹⁵⁵ Those who believe that all persons are responsible for voluntarily acting in a manner that society regards as wrongful, regardless of the actor's inability to comprehend societal norms, may argue that the current test of insanity is inappropriate. They may even contend that the insanity defense should be abolished.¹⁵⁶ They may not, however, justifiably assert that a criminal defendant should be deprived of the opportunity to produce evidence relevant to the current test. Until the law changes, all evidence that assists the jury in applying the current test must be admitted.

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153. Sallet, *supra* note 1, at 1553 (many Americans believe "that a sane man was kept from jail with the assistance of doctors skilled in an inexact discipline").

154. See *supra* note 9.

155. *Williams v. United States*, 250 F.2d 19, 25 (D.C. Cir. 1957) ("[i]t is both wrong and foolish to punish where there is no blame and where punishment cannot correct").

156. According to an ABC news survey taken soon after the *Hinckley* case, only 21% of those polled supported the existence of an insanity defense. Ciccone & Clements, *supra* note 143, at 329. The APA, however, has asserted that the defense is "essential to the moral integrity of the law." *Id.*