FEDERAL RULE OF EVIDENCE 704(B): A REMEDY IN NEED OF A CURE

INTRODUCTION

> Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.[1]

These words, written over a century ago by Justice Oliver Wendell Holmes, aptly capture the effect that the 1982 trial of John Hinckley Jr. had on the law.[2] In that trial, Hinckley was found "not guilty by reason of insanity" for the attempted assassination of President Reagan.[3] The Hinckley case was both great, difficult, and, as Holmes predicted, it resulted in particularly bad law.[4] In reaction to the outcome of this trial,[5] Congress amended Federal Rule of Evidence 704 by adding to it Rule 704(b).[6] This amendment partially reinstated a prohibition on expert testimony in trials known as the "ultimate issue" rule.[7] The "ultimate issue" rule had been previously rejected by federal courts[8] because it was "unduly restrictive, difficult of application, and . . . deprive[d] the trier of fact of useful information."[9] Thus, what was formerly clear became muddled as the "ultimate issue" rule returned to federal courts in a new form, despite all of its noted problems.

It is therefore unsurprising that Rule 704(b) revives many of the same problems that were the impetus for the abolition of the original

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1 N. Sec. Co. v. United States, 193 U.S. 197, 400–01 (1904) (Holmes, J., dissenting).

2 *See infra* Part I.B.

3 Hinckley v. United States, 140 F.3d 277, 279 (D.C. Cir. 1998).

4 *See infra* Part I.B.

5 Anne Lawson Braswell, Note, *Resurrection of the Ultimate Issue Rule: Federal Rule of Evidence 704(b) and the Insanity Defense*, 72 CORNELL L. REV. 620, 624 (1987).

6 S. REP. NO. 98-225, at 230 (1983). The text of the new amendment states: "In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone." FED. R. EVID. 704(b).

7 Braswell, *supra* note 5, at 620. The "ultimate issue" rule was a common law development that prohibited any witness, whether expert or lay, from giving an opinion regarding issues, such as guilt and innocence, which were the exclusive province of the jury to decide.

8 *Id.* at 623.

9 FED. R. EVID. 704 advisory committee's note to 1972 proposed rule. In codifying the abolition of the rule, the committee noted that many modern decisions had already abandoned the rule completely. *Id.*

"ultimate issue" rule: Rule 704(b) is unduly restrictive,[10] creates confusion in federal courts as to the Rule's application,[11] and strips juries of some of the most useful testimony an expert can offer.[12] Part I of this Note discusses the history behind the abolition of the "ultimate issue" rule and the events that catalyzed its reanimation in the form of Rule 704(b). Part II examines the impact of Rule 704(b) on federal courts and concludes that, in addition to failing to remedy the problems Congress proffered it would solve, the Rule actually creates more problems for the evidentiary system. Part III analyzes several proposed solutions to the problems created by Rule 704(b) and recommends that the Rule be repealed.

I. THE ORIGINS OF RULE 704

Federal Rule of Evidence 704 is titled "Opinion on an Ultimate Issue," and is currently composed of two subsections:

> (a) In General—Not Automatically Objectionable. An opinion is not objectionable just because it embraces an ultimate issue.
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> (b) Exception. In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone.[13]

Thus, while 704(a) articulates that it is not inherently impermissible for a witness to state an opinion that reaches the ultimate issue of a case, 704(b) counters that such opinions are indeed prohibited in certain situations.

A. Rule 704(a)—The Life and Death of the Ultimate Issue Rule

To understand the regressive nature of Rule 704(b), it is first important to understand the history behind the rule it altered, Rule 704(a). Rule 704(a) embodies the modern consensus of courts that any witness's opinion, whether lay or expert, should be admitted at trial when helpful to the trier of fact.[14] Historically, however, expert opinion was not always universally allowed.[15]

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[10] *Id.*

[11] *See* DAVID H. KAYE ET AL., THE NEW WIGMORE: A TREATISE ON EVIDENCE EXPERT EVIDENCE § 2.2.3.b (2d ed. 2011) (discussing the three main approaches adopted by courts when determining the admissibility of nonpsychological expert testimony).

[12] *See* Daniel J. Capra, *A Recipe for Confusion: Congress and the Federal Rules of Evidence*, 55 U. MIAMI L. REV. 691, 697–98 (2001) (arguing that Rule 704(b) allows juries to have general information about a defendant's mental disorder without sufficiently explaining how the mental disorder impacts the defendant's actions regarding the alleged crime).

[13] FED. R. EVID. 704.

[14] FED. R. EVID. 704 advisory committee's note to 1972 proposed rule.

[15] *See* Ric Simmons, *Conquering the Province of the Jury: Expert Testimony and the Professionalization of Fact-Finding*, 74 U. CINCINNATI L. REV. 1013, 1016–17 (2006) (observing that expert opinion was prohibited in early common law).

Some expert opinion testimony was permitted in courts as early as the end of the eighteenth century.[16] Expert opinion was treated differently from lay witness opinion in that the expert did not need to have first-hand knowledge of the events at issue to provide an opinion in court.[17] Testimony from an expert who did not have first-hand knowledge was permitted only if the expert witness was skilled in the particular subject on which he testified[18] and the "jury would really be aided by the expert's opinion."[19] As expert witnesses became more common at trial, some judges grew concerned about experts testifying on the ultimate issue to be decided in the case.[20] It was thought that such testimony would invade the province of the jury, who would simply accept the expert's conclusion and not consider the other evidence at trial.[21] This logic led to the development of the "ultimate issue" rule, which excluded expert opinion on factual issues that were the responsibility of the jury to decide.[22]

In the twentieth century, the frequency of expert testimony in trials increased as litigated issues grew in complexity and required judges and juries to rely on specialists to understand those issues.[23] Judges often faced difficult line-drawing decisions as to whether expert testimony was an opinion that concerned an ultimate question.[24] Beginning in the 1930's and as the century progressed, some courts rejected the "ultimate issue" rule out of necessity—they needed the information experts provided.[25] Courts and critics alike decried the rule, asserting that it had virtually no sound basis and was one of the greatest contributors of "useless appeals."[26] By the mid-1960's, most jurisdictions had rejected the "ultimate issue" rule[27] as "unduly restrictive, difficult of application, and generally

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16 *Id.*

17 Fireman's Ins. v. J. H. Mohlman Co., 91 F. 85, 87 (2d Cir. 1898) ("Expert witnesses are permitted to give their opinion upon a given state of facts hypothetically presented, whether personally cognizant or not of some or all of the facts of the particular case.").

18 At common law, an expert was "a person possessed of science or skill respecting the subject-matter; one who has made the subject upon which he gives his opinion a matter of particular study, practice or observation." Maury R. Olicker, *The Admissibility of Expert Witness Testimony: Time to Take the Final Leap?*, 42 U. MIAMI L. REV. 831, 833 (1988).

19 Simmons, *supra* note 15, at 1016–17.

20 *Id.* at 1018. It is not clear exactly when these concerns first arose, but it is likely that it was in the mid-nineteenth century. Olicker, *supra* note 18, at 850.

21 Paul R. Rice & Neals-Erik William Delker, *A Short History of Too Little Consequence*, 191 F.R.D. 678, 711 (2000).

22 *Id.*

23 Simmons, *supra* note 15, at 1024.

24 Braswell, *supra* note 5, at 622; Simmons, *supra* note 15, at 1024.

25 Braswell, *supra* note 5, at 622–23; Simmons, *supra* note 15, at 1024 (stating that "frequently the ultimate issue itself . . . could not be resolved without the aid of experts").

26 Braswell, *supra* note 5, at 623–24.

27 *Id.*

serv[ing] only to deprive the trier of fact of useful information."[28] The rule was finally abolished in federal courts in 1975 with the codification of the Federal Rules of Evidence.[29]

Federal Rule of Evidence 704 specifically overturned the "ultimate issue" rule[30] by providing that "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."[31] The Advisory Committee to the Rules noted that expert opinion should be admitted whenever helpful to the trier of fact.[32] The Committee also indicated, however, that the abolition of the "ultimate issue" rule did not mean that all expert opinion was admissible—such testimony would still need to conform to the other Federal Rules of Evidence.[33] Concerns that the new Rule would allow experts to testify without restriction were therefore ameliorated by adopting other Rules of Evidence.[34]

This issue was thus resolved in federal courts for nearly a decade before Congress amended Rule 704 in 1984.[35] Why then did Congress resurrect a rule that, for much of the twentieth century, was recognized as "unduly restrictive, difficult of application, and . . . [which] deprive[d] the trier of fact of useful information"?[36] The answer lies in one great case thrust into the public eye in 1982[37] that caused even "well settled principles of law [to] bend."[38]

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[28] FED. R. EVID. 704 advisory committee's note to 1972 proposed rule; *see also* 7 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1921 (2d ed. 1923) (discrediting the "ultimate issue" rule for the under-inclusiveness and over-breadth that results when the rule is applied).

[29] Braswell, *supra* note 5, at 623.

[30] FED. R. EVID. 704 advisory committee's note to 1972 proposed rule.

[31] Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926, 1937 (1975) (enacting the Federal Rules of Evidence). Prior to the Rule's amendment in 1984, there were no subdivisions and what is currently Rule 704(a) represented the entire Rule. *See* S. REP. NO. 98-225, at 230 (1983) (discussing the proposed amendment that became Rule 704(b)). However, Rule 704(a) was subsequently modified to now read: "An opinion is not objectionable just because it embraces an ultimate issue." FED. R. EVID. 704(a).

[32] FED. R. EVID. 704 advisory committee's note to 1972 proposed rule.

[33] *Id.*

[34] For instance, Federal Rule of Evidence 702(a) qualifies the admissibility of expert testimony by allowing an expert to testify only if "the expert's scientific, technical, or other specialized knowledge will *help* the trier of fact to understand the evidence or to determine a fact in issue." FED. R. EVID. 702(a) (emphasis added). Therefore, opinions that "merely tell the jury what result to reach" are excluded under Rule 702 as not being helpful to the jury's understanding of the evidence. FED. R. EVID. 704 advisory committee's note to 1972 proposed rule. Similarly, an expert opinion that makes unfounded legal conclusions is excluded. *Id.*

[35] Rice & Delker, *supra* note 21, at 711–12.

[36] FED. R. EVID. 704 advisory committee's note to 1972 proposed rule.

[37] Braswell, *supra* note 5, at 623–24.

[38] N. Sec. Co. v. United States, 193 U.S. 197, 401 (1904) (Holmes, J., dissenting).

B. Rule 704(b)—The Ultimate Issue Rule Reanimated

On a gray and rainy spring afternoon in Washington, D.C., John Hinckley, Jr. waited outside the Washington Hilton where President Reagan was scheduled to appear.[39] He hoped that by killing the President he would impress actress Jody Foster.[40] When President Reagan emerged from the hotel, Hinckley opened fire and wounded four people including the President.[41] In the highly publicized trial that followed, Hinckley was found not guilty by reason of insanity.[42] The nation was outraged by the verdict.[43] Meanwhile, media coverage surrounding the outcome of the trial concentrated on the contradicting opinions of the psychiatric experts who evaluated Hinckley and testified at trial.[44] Critics blamed the result of the trial on, among other things, the faulty procedural system that had allowed such contradictory expert opinion to evidently confuse the jury into rendering such a verdict.[45] In this politically charged climate, Congress decided that the best solution was to reform the trial system that had allowed such an "injustice."[46]

Following the Hinckley trial, Congress passed the Insanity Defense Reform Act.[47] This comprehensive Act was intended to "modernize the Federal criminal code"[48] with regard to the insanity defense and, ostensibly, to ensure that the results of the Hinckley trial were not repeated. A component of this reform, Rule 704(b),[49] amended Federal Rule of Evidence 704.[50] In drafting the amendment, Congress used broad

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[39] Jonathan B. Sallet, *After Hinckley: The Insanity Defense Reexamined*, 94 YALE L.J. 1545, 1548 (1985); Howell Raines, *Reagan Wounded in Chest by Gunman; Outlook 'Good' After 2-Hour Surgery; Aide and 2 Guards Shot; Suspect Held*, N.Y. TIMES (Mar. 30, 1981), http://www.nytimes.com/learning/general/onthisday/big/0330.html#article.

[40] Sallet, *supra* note 39, at 1548.

[41] Raines, *supra* note 39; *see also* Dana R. Hassin, Comment, *How Much is Too Much? Rule 704(b) Opinions on Personal Use vs. Intent to Distribute*, 55 U. MIAMI L. REV. 667, 670 (2001) (noting that President Reagan, Press Secretary James Brady, and two others were shot as part of the attempted assassination of President Reagan).

[42] David Cohen, Note, *Punishing the Insane: Restriction of Expert Psychiatric Testimony by Federal Rule of Evidence 704(b)*, 40 U. FLA. L. REV. 541, 542 (1988).

[43] *See id.*

[44] Braswell, *supra* note 5, at 623–24.

[45] *Id.* at 624.

[46] Capra, *supra* note 12, at 691.

[47] Insanity Defense Reform Act of 1984, 18 U.S.C. § 20 (1984), *amended by* 18 U.S.C. §§ 17, 4241 (1988); *see also* S. REP. NO. 98-225, at 230–31 (1983) (explaining the purpose behind the Rule 704 amendment to was limit the scope of mental health expert testimony); Braswell, *supra* note 5, at 623–24 (stating Congress passed the Act in response to criticism after the trial).

[48] S. REP. NO. 98-225, at 222.

[49] FED. R. EVID. 704(b).

[50] S. REP. NO. 98-225, at 230.

language that reached far beyond the issue at hand[51] and, in part, reanimated the dead "ultimate issue" rule.[52]

II. THE LEGACY OF RULE 704(B)

As detailed below, Rule 704(b) is beset with many flaws.[53] However, if the Rule actually fixed the problem Congress intended to remedy, perhaps an argument could be made that the Rule is warranted regardless of the additional problems it creates. As discussed in Part II.B, the Rule cannot even be justified on that basis because it fails to solve even the alleged issue it was designed to correct: jury confusion.[54]

A. Rule 704(b) Creates the Same Problems as the Ultimate Issue Rule

It might be expected that a reanimation of the "ultimate issue" rule in criminal cases would cause the same problems in those cases that plagued courts under the original "ultimate issue" rule. The Advisory Committee for the Federal Rules of Evidence noted a few of the major problems with the "ultimate issue" rule.[55] The Committee observed that the rule was "unduly restrictive, difficult of application, and . . . deprive[d] the trier of fact of useful information."[56] Predictably, these same problems have haunted the courts since Rule 704(b) brought the "ultimate issue" rule back from the dead.

1. Unduly Restrictive

Just as the "ultimate issue" rule was unduly restrictive, Rule 704(b) unjustifiably restricts witness testimony because of its overly broad reach.[57] Statistics demonstrate that the insanity defense is rarely used and even more rarely used successfully.[58] Yet, because of the Hinckley

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[51] *See infra* Part II.A.1.

[52] *See* Braswell, *supra* note 5, at 621 (noting that Rule 704(b) will reinstate some of the traditional prohibitions on the use of expert testimony).

[53] *See infra* Part II.A.

[54] *See infra* Part II.B.

[55] FED. R. EVID. 704 advisory committee's note to 1972 proposed rule.

[56] *Id.*

[57] *See* Hassin, *supra* note 41, at 672 (asserting that 704(b) encompasses all expert testimony).

[58] *See* Lisa A. Callahan et al., *The Volume and Characteristics of Insanity Defense Pleas: An Eight-State Study*, 19 BULL. AM. ACAD. PSYCHIATRY & L. 331, 335, tbl.1 (1991) (citing a survey of forty-nine counties across eight states that showed an insanity defense plea rate of as low as 0.93% and an acquittal rate of only 26.27% of that number); Stephen G. Valdes, *Frequency and Success: An Empirical Study of Criminal Law Defenses, Federal Constitutional Evidentiary Claims, and Plea Negotiations*, 153 U. PA. L. REV. 1709, 1723 (2005) (citing a study that reported the occurrence and later success rates for insanity defense pleas at 0.87% and 23.55%, respectively). These articles survey insanity pleas and success rates across state jurisdictions. However, while there are no statistics available on insanity pleas and success rates in federal courts, it is widely agreed that the defense is not

trial, Congress ignored the actual rarity of insanity pleas and amended Rule 704 using needlessly broad language that reached well beyond the issue at hand.[59] The language certainly functioned to limit psychiatric expert testimony in cases involving an insanity plea, but also carelessly and inadvertently restricted non-psychiatric expert testimony that in no way involved a defense of insanity.[60]

Courts recognize that the "purpose of [R]ule 704(b) is to prevent a jury adjudicating an insanity claim from becoming thoroughly confused by medical experts' testimony about the ultimate legal issues."[61] Indeed, historical evidence indicates that Congress intended the Rule to apply only to psychiatric testimony on the ultimate issue in the case.[62] Despite this, some courts hold that the Rule is not limited to mental health experts, but applicable to *all* expert witnesses who offer an opinion on whether a defendant had the requisite mental state.[63] This is because the rules of statutory construction given by Supreme Court precedent require this application.[64] If the meaning of a statute is plain and unambiguous, the statute must be applied according to its terms.[65] Additionally, if the

common. William French Smith, *Limiting the Insanity Defense: A Rational Approach to Irrational Crimes*, 47 MO. L. REV. 605, 606 & n.1 (1982).

[59] *See* S. REP. NO. 98-225, at 230 (1983) (stating that the amendment was intended to limit expert psychiatric testimony on the ultimate issue in insanity defense cases).

[60] *See, e.g.*, United States v. Morales, 108 F.3d 1031, 1036 (9th Cir. 1997) (holding that "[t]he language of Rule 704(b) is perfectly plain. It does not limit its reach to psychiatrists and other mental health experts. Its reach extends to all expert witnesses.").

[61] United States v. Kristiansen, 901 F.2d 1463, 1466 (8th Cir. 1990).

[62] Both the Senate and House reports on this issue indicated that the amendment was intended only to reach psychiatric testimony. The Senate Report clearly stated that Rule 704 was amended to create limitations on "the scope of expert testimony by psychiatrists and other mental health experts," and went on to say that, "[u]nder this proposal, *expert psychiatric testimony* would be limited to presenting and explaining their diagnoses, such as whether the defendant had a severe mental disease or defect and what the characteristics of such a disease or defect, if any, may have been." S. REP. NO. 98-225, at 230 (emphasis added). Similarly, the House Report read, "with regard to the ultimate issue, the *psychiatrist, psychologist* or other *similar expert* is no more qualified than a lay person." H.R. REP. NO. 98-577, at 16 (1983) (emphasis added). The Senate report specified that the rationale for excluding *psychiatric* expert testimony on ultimate issues was not limited only to the insanity defense but also included other mental states. S. REP. NO. 98-225, at 230. However, nowhere in either report does Congress indicate there was concern with non-psychiatric expert testimony. Inexplicably, the plain language of the Rule failed to reflect Congress's narrow concern on the effect of expert *psychiatric* testimony.

[63] *Morales*, 108 F.3d at 1036.

[64] The Supreme Court holds that the Federal Rules of Evidence should be interpreted in the same manner as any other statute, Daubert v. Merrell Dow Pharm., 509 U.S. 579, 587 (1993), and thus the first interpretive step is to consider the plain meaning of the statute, Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 163 (1988). If the meaning is unambiguous, no further steps need to be taken to apply another meaning to the statute. Carcieri v. Salazar, 555 U.S. 379, 387 (2009).

[65] *Carcieri*, 555 U.S. at 387.

meaning is unambiguous, the Court will not "restrict the unqualified language of a statute to the particular evil that Congress was trying to remedy—even assuming that it is possible to identify that evil from something other than the text of the statute itself."[66]

The language of Rule 704(b) is unambiguous: "an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense."[67] The language of the Rule is not limited to psychiatric or psychological expert testimony, although this is most likely what Congress intended,[68] but rather, broadly extends to all expert testimony. Therefore, as the language of Rule 704(b) is unambiguous, no further steps are taken to re-interpret it,[69] regardless of Congress's intent.

The result is that most federal courts, bound by the Supreme Court's requirements for interpretation, dutifully apply this broadly-written rule to encompass *all* expert opinion on a defendant's requisite mental state. This interpretation of Rule 704(b), while faithful to the plain meaning of the Rule's text and required by Supreme Court precedent, is unduly restrictive, as it limits expert testimony not only beyond what Congress originally intended,[70] but also beyond what is necessary to attain the result Congress set out to achieve.[71]

2. Difficulty in Application

Since the adoption of Rule 704(b), courts have also struggled to delineate the Rule's scope and determine its application.[72] As the Rule's broad language encompasses cases in which either a psychological expert or a non-psychological expert testify, courts have had to decide what type of testimony to allow from each type of expert. For cases involving expert

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66 Brogan v. United States, 522 U.S. 398, 403 (1998).

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

68 *See supra* note 62.

69 Ratzlaf v. United States, 510 U.S. 135, 147–48 (1994) (noting that the Court does "not resort to legislative history to cloud a statutory text that is clear.").

70 United States v. Morales, 108 F.3d 1031, 1036 (9th Cir. 1997) (stating that the legislative history behind Rule 704(b) indicates that "Congress intended to limit the reach of Rule 704(b) to psychiatrists and other mental health experts.").

71 *See infra* Part III.

72 *See, e.g.*, 3 STEPHEN A. SALTZBURG ET AL., FEDERAL RULES OF EVIDENCE MANUAL, § 704.02[5]–[6] (10th ed. 2015) (illustrating the difficulty courts have in drawing lines between permissible expert testimony and conclusions on the defendant's mental state by examining *United States v. West*, 962 F.2d 1243 (7th Cir. 1992)); Charles W. Ehrhardt, *The Conflict Concerning Expert Witnesses and Legal Conclusions*, 92 W. VA. L. REV. 645, 653, 655 (1990) (asserting that results of expert testimony admission have been inconsistent).

psychological testimony, courts typically adopt either a simple "stops-short" approach[73] or a discretionary approach.[74]

The "stops-short" approach looks almost exclusively at the words used by the expert.[75] Expert testimony is admissible under this approach as long as the testimony stops short of stating that the defendant did or did not have the mental state or intent required by the law.[76] Conversely, the discretionary approach is much more fluid and it is not always clear when expert testimony will be admissible under such an analysis. This second approach is often utilized when concerns arise over a hypothetical scenario posed to a psychological expert. The expert's response is typically admissible if it describes the intent and mental states of persons in general, but inadmissible if the testimony goes to the intent of the specific defendant.[77] Where the hypothetical involves a fact pattern that mirrors the facts of the case, it is less certain whether testimony will be admitted. However, expert testimony is typically allowed as long as it leaves a further inference regarding the mental state of the defendant for the jury to decide.[78] Although these two approaches have been distilled here as

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[73] KAYE ET AL., *supra* note 11, § 2.2.3(b).

[74] The discretionary approach is not a categorically definable one, but has been given such a designation by the Author to encompass courts that handle expert testimony in a way that does not fall squarely into the other categories of approaches. While some general rules do seem to exist under this approach, the decision to admit evidence appears to be largely at the discretion of the judge.

[75] KAYE ET AL., *supra* note 11, § 2.2.3(b).

[76] *Id.*

[77] *Id.* at § 2.2.3(a). Under the discretionary approach, there does not appear to be any bright-line test for when testimony is inadmissible. *Compare* United States v. Brown, 32 F.3d 236, 239 (7th Cir. 1994) (noting that under Rule 704(b), "testimony may be adduced exploring the particular characteristics of the mental disease and whether those characteristics render one afflicted with the disease able to appreciate the wrongfulness or the nature and quality of his behavior"), *with* United States v. Manley, 893 F.2d 1221, 1222 (11th Cir. 1990) (noting that, after a hypothetical example closely reflecting the defendant's case was given, it was impermissible under Rule 704(b) for counsel to ask the psychiatric expert, "would that person as described be able to appreciate the nature and quality or the wrongfulness of their actions?").

[78] United States v. Goodman, 633 F.3d 963, 970 (10th Cir. 2011). In this case, the court held that where the "prosecution posed hypothetical facts that mirrored the charged robberies and asked the experts whether the hypothetical robber's actions were consistent with the behavior of someone with PTSD," it did not violate Rule 704(b). *Id.* The court specified that "hypothetical questions mirroring the fact patterns of the trial case [are] permissible when the answering testimony still allows the fact finder to make an additional inference as to whether the defendant had the mental state or condition constituting an element of the crime charged." *Id.*; *see also* United States v. Dixon, 185 F.3d 393, 401 (5th Cir. 1999) (noting that under Rule 707(b) a majority of circuits that exclude expert testimony that leads to necessary inferences about the requisite mental state).

fairly straightforward rules, in practice, it is far from clear exactly when testimony becomes inadmissible.[79]

Insanity pleas are rare.[80] Therefore, most disputes involving expert testimony under Rule 704(b) center around testimony from experts in non-psychological fields such as law enforcement and even accounting.[81] For cases where the testifying expert is a non-psychological expert, courts have generally adopted one of three widely-varying approaches for interpreting and applying the Rule.[82] These have been termed the "stops-short" approach,[83] the "necessarily-follows" test, and the "probes-the-mind" test.[84] The vague nuances of these approaches and the fine line-drawing performed by courts indicate just how difficult Rule 704(b) is to apply in practice.[85] In fact, even within the same jurisdiction, the lines between the various approaches frequently blur.[86]

As discussed previously, jurisdictions that follow the "stops-short" approach for non-psychological expert testimony look almost exclusively at the words used by the expert and admit testimony as long as it stops short of stating that a defendant did or did not have the mental state or intent required by law.[87] This approach is used by the Second,[88] Tenth,[89]

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[79] *See* Capra, *supra* note 12, at 699–700 (summarizing cases that illustrate just how fine of a line it often is between admissible and inadmissible expert testimony).

[80] *See* sources cited *supra* note 58.

[81] *See* KAYE ET AL., *supra* note 11, § 2.2.3(b) (compiling cases involving expert testimony under Rule 704(b) where the vast majority are non-psychological experts).

[82] *Id.*

[83] The "stops-short" test appears to be the only approach that is used by courts for both psychological expert testimony and non-psychological expert testimony. This can be seen by a comparison of two criminal cases from the Tenth Circuit. *See* United States v. Goodman, 633 F.3d 963, 970 (10th Cir. 2011) (analyzing psychological expert testimony in insanity plea under the "stops-short" test); United States v. Richard, 969 F.2d 849, 855 (10th Cir. 1992) (analyzing non-psychological expert testimony under the "stops-short" test).

[84] KAYE ET AL., *supra* note 11, § 2.2.3(b).

[85] Capra, *supra* note 12, at 698–99.

[86] KAYE ET AL., *supra* note 11, § 2.2.3(b).

[87] *Id.*

[88] United States v. DiDomenico, 985 F.2d 1159, 1165 (2d Cir. 1993) ("The plain language of the rule, however, means that the expert cannot expressly 'state the inference,' but must leave the inference, however obvious, for the jury to draw.").

[89] United States v. Richard, 969 F.2d 849, 854 (10th Cir. 1992).

and Eleventh Circuits[90] as well as arguably the Fifth[91] and D.C. Circuits.[92] Illustrative of this approach is the Tenth Circuit opinion of *United States v. Richard*.[93]

In *Richard*, an undercover law enforcement agent posed as a drug supplier and set up a drug deal with the defendants to purchase 300 pounds of marijuana.[94] The defendant brought four men with him to the drug deal and all five men were subsequently arrested.[95] At trial, the undercover agent testified as an expert witness that, "[n]o drug dealer of a drug deal this size is going to have four persons that don't know anything about it."[96] The defendants argued that this testimony violated Rule 704(b) because the expert stated an inference about the mental state of the defendants that was an ultimate issue in the case.[97] The court disagreed and held that the agent's testimony was admissible as it only implied an opinion that the defendants were aware of the nature of the transaction and did not specifically state that conclusion for the jury.[98] The court ruled that "Rule 704(b) only prevents experts from expressly stating the final conclusion or inference as to a defendant's actual mental state. The rule does not prevent the expert from testifying to facts or

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[90] United States v. Alvarez, 837 F.2d 1024, 1031 (11th Cir. 1988) (holding that where a DEA agent stated that it would be unlikely for crew members aboard a vessel carrying drugs to be unaware of the cargo, his testimony did not violate Rule 704(b) because he did not "expressly state a conclusion that the defendant did or did not have the requisite intent.").

[91] United States v. Dotson, 817 F.2d 1127, 1132 (5th Cir. 1987) (holding that a tax expert's testimony that consecutive increases in defendant's net worth "is indicative, and based on my experience shows to me, that he willfully and intentionally increased his income knowing full well that he had not reported the taxes due thereon," did not violate Rule 704(b) because the expert merely stated these actions were "indicative" and not that he certainly knew that was the defendant's intent), *vacated in part on reh'g*, 821 F.2d 1034 (5th Cir. 1987). *But see* United States v. Dixon, 185 F.3d 393, 400 (5th Cir. 1999) (holding that "[a]n expert is therefore free to testify as to whether the defendant was suffering from a severe mental illness at the time of the criminal conduct; [but] . . . prohibited . . . from testifying that this severe mental illness does or does not prevent the defendant from appreciating the wrongfulness of his actions."). The conflict in these holdings illustrates the struggle courts have in consistently applying Rule 704(b). As shown here, even within the same circuit, courts will sometimes interpret the Rule differently for expert psychological testimony than they do for other expert testimony.

[92] United States v. Williams, 980 F.2d 1463, 1466 (D.C. Cir. 1992) (holding that expert opinion on whether possession of plastic bags containing cocaine indicated that the drugs were intended to be distributed rather than personally consumed was permissible under the Rule because it did not directly refer to defendant's intent, but instead referred generally to anyone possessing that number of small bags of cocaine).

[93] *Richard*, 969 F.2d at 854–55.

[94] *Id.* at 851.

[95] *Id.* at 852.

[96] *Id.* at 854.

[97] *Id.*

[98] *Id.* at 855.

opinions from which the jury could conclude or infer the defendant had the requisite mental state."[99]

The "necessarily follows" test, like the "stops-short" approach, excludes expert testimony that states the final conclusion as to a defendant's mental state.[100] The "necessarily-follows" test is more restrictive, however, as it also excludes any expert opinion that leads to a necessary inference by the jury.[101] The "necessarily-follows" test excludes testimony if the inference left to the jury is too obvious.[102] The Ninth Circuit seems to be the lone circuit that has interpreted Rule 704(b) in this way.[103]

The Ninth Circuit provided a clear example of this approach in *United States v. Morales*, where the defendant was convicted of willfully making false entries in a union ledger.[104] A critical issue in the case was whether the false entries were a result of the defendant's ignorance of proper bookkeeping or whether she had intentionally falsified the records.[105] The defendant proffered expert testimony from a certified public accountant on whether the defendant understood bookkeeping principles, but the trial court would not allow it.[106] The court of appeals reversed,[107] stating that Rule 704(b) "allows testimony supporting an inference or conclusion that the defendant did or did not have the requisite *mens rea*, so long as the expert does not draw the ultimate inference or conclusion for the jury and the ultimate inference or conclusion does not *necessarily follow* from the testimony."[108]

The third interpretation of Rule 704(b) that courts have adopted is the "probes-the-mind" test.[109] Under this approach, the court asks if the expert testimony on the issue comes from expertise in psychology, psychiatry, or similar fields.[110] If it does not, then Rule 704(b) does not

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[99] *Id.* at 854–55.

[100] KAYE ET AL., *supra* note 11, § 2.2.3(b).

[101] *Id.*

[102] *Id.*

[103] *See* United States v. Morales, 108 F.3d 1031, 1038 (9th Cir. 1997) (explaining and adopting the "necessarily follows" test); United States v. Dela Cruz, 358 F.3d 623, 626 (9th Cir. 2004) (continuing to apply the test from *Morales*); KAYE ET AL., *supra* note 11, § 2.2.3(b) (noting *Morales* is the case frequently cited for the approach); *supra* notes 88–92 and accompanying text (discussing the different approach adopted by the Second, Tenth, Eleventh, Fifth, and D.C. Circuits); *infra* note 113 and accompanying text (discussing an alternative approach adopted by the Seventh and Eight Circuits).

[104] *Morales*, 108 F.3d at 1033.

[105] *Id.* at 1034.

[106] *Id.*

[107] *Id.* at 1033.

[108] *Id.* at 1038 (emphasis added).

[109] KAYE ET AL, *supra* note 11, at §2.2.3(b).

[110] *Id.*

apply.[111] If the testimony does involve one of these fields, then Rule 704(b) precludes the expert only from testifying that she has special knowledge of the defendant's mental processes.[112] The Seventh and Eighth Circuits currently adhere to this approach.[113]

A good example of this approach is the Eighth Circuit case, *United States v. Wells*.[114] In *Wells*, the defendant was convicted of manufacturing methamphetamine.[115] A special agent with the Drug Enforcement Agency testified that "the patterns he identified in the pseudoephedrine [purchase] logs were consistent with someone who was purchasing pseudoephedrine pills for use in the manufacture of methamphetamine"[116] and that "[t]his pseudoephedrine [was] being purchased to be used in the manufacturing of methamphetamine."[117] The court held that the testimony was admissible because the expert did not claim expert knowledge of the defendant's mental state, but merely described the defendant's pseudoephedrine purchases as "consistent with someone who was purchasing the pills to manufacture methamphetamine."[118]

As indicated by these divergent approaches among the circuits and even among courts within the same circuit, Rule 704(b) requires courts to draw very fine lines. While this is not conclusive of its difficult application, the conflicting opinions are certainly good evidence of the great difficulty courts have in applying this Rule. Thus, as the "ultimate issue" rule did before it,[119] 704(b) creates significant difficulty for courts attempting to apply the Rule.

3. Deprives Jury of Useful Information

The final "ultimate issue" problem that Rule 704(b) mirrors is the suppression of information that is helpful to the jury. Under the "ultimate issue" rule, the jury was often denied information that was useful and even critical to their task as fact-finder.[120] The exclusion of this

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111 *Id.*

112 *Id.*

113 See *United States v. Lipscomb*, 14 F.3d 1236, 1241–42 (7th Cir. 1994), and *United States v. Wells*, 706 F.3d 908, 913–14 (8th Cir. 2013), for examples of this approach.

114 *See Wells*, 706 F.3d at 914 (holding that where an expert witness testified showing that the pseudoephedrine logs showed patterns consistent with the purchase of the drug for the manufacturing of methamphetamine, such testimony was admissible under Federal Rule of Evidence 704(b) because the testimony was based on the expert's "knowledge of the purchasing patterns of someone using pseudoephedrine to manufacture methamphetamine, rather than on any special knowledge of [the Defendant's] thought processes.").

115 *Id.* at 911.

116 *Id.* at 912.

117 *Id.* at 913–14.

118 *Id.* at 914.

119 *See supra* Part I.A.

120 FED. R. EVID. 704 advisory committee's note to 1972 proposed rule.

information was based on the concern that juries would simply accept an expert's opinion as true without considering the other facts.[121] However, this assumption underestimates the jury's ability to separate expert opinion from the ultimate issue and was correctly recognized as hollow logic.[122] Rule 704(b), by relying on this same faulty logic, essentially reinstates the "ultimate issue" rule for criminal cases and creates the same problem of keeping helpful information from juries.[123]

Juries are frequently required to make a distinction between an expert's subjective opinion and the ultimate issue to be decided in the case.[124] Yet, in most cases, expert opinion is not withheld from the jury simply because it touches an ultimate issue in the case.[125] Indeed, Rule 704(a) explicitly permits expert opinion on ultimate issues.[126] For instance, juries are permitted to hear expert forensic testimony to determine the cause of death[127] and even hear expert psychological testimony on the *victim's* mental state in child abuse trials.[128] According to the rationale of Rule 704(b), it is only in the case of expert testimony on a *defendant's* mental state that the jury is thought incompetent to distinguish between the expert's opinion and the ultimate issue. Far from being innocuous, this miscalculation "denies juries the specialized

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[121] Rice & Delker, *supra* note 21, at 711; Cohen, *supra* note 42, at 555.

[122] Rice & Delker, *supra* note 21, at 711; *see also* Cohen, *supra* note 42, at 555–58 (discussing the natural tendencies and capabilities of the jury that demonstrate the logical flaws of the "ultimate issue" rule in the context of Rule 704(b)).

[123] Rice & Delker, *supra* note 21, at 712 ("The only testimony that [Rule 704(b)] eliminates from the trial is the most useful testimony the expert could offer–the expert's opinion about the defendant's state of mind at the time the crime was committed").

[124] For example, consider a hypothetical child abuse trial where the victim has alleged physical, emotional, and mental abuse. At trial, a psychological expert testifies regarding the child's mental and emotional abuse. The jury must still determine whether to accept the expert's opinion and whether it was the defendant who caused the abuse. In this situation, the jury is trusted to hear such opinion from the expert witness on the *victim's* mental state and to separate that opinion from their verdict. This is true despite such opinion touching on an ultimate issue: whether the child suffered emotional or mental trauma. *See* Braswell, *supra* note 5, at 630–31 (providing examples of recorded cases where expert testimony on ultimate issues was permitted).

[125] *See, e.g.*, United States v. Lockett, 919 F.2d 585, 590 (9th Cir. 1990) ("A witness is not permitted to give a direct opinion about the defendant's guilt or innocence. . . . [H]owever, an expert may otherwise testify regarding even an ultimate issue to be resolved by the trier of fact.").

[126] FED. R. EVID. 704(a).

[127] Moses v. Payne, 543 F.3d 1090, 1106 (9th Cir. 2008) (holding that the expert opinion of a medical examiner that the victim died as a result of a homicide is permissible).

[128] Abshier v. Workman, No. CIV-02-1138-D, 2010 WL 3259817, 2010 U.S. Dist. LEXIS 85061, at *80 (W.D. Okla. Aug. 18, 2010) (holding that "expert testimony [is permitted] to assist the jury in understanding child abuse evidence").

knowledge of experts in just the type of complex case in which it is most useful."[129]

When a jury is permitted to hear from a psychological expert that the defendant has a mental illness, but is not permitted to hear from that expert whether those afflicted by the illness can understand the wrongness of their actions, it creates a hole in the jury's understanding. This missing information is some of the most useful a jury could obtain for deciding how to apply the expert's testimony in the case at hand. In place of this valuable information, the jury is merely left with a picture of the defendant's problems, but no tools to determine whether those problems have any legal significance.[130] If the testimony is helpful to the jury, why should it be excluded by Rule 704(b) simply because it goes to the ultimate issue to be decided by the jury?[131] The jury is always free to accept or reject the expert's opinion. Instead, Rule 704(b) does not trust the jury to do this and creates the bizarre situation where an expert can give a diagnosis, but not explain to the jury what the diagnosis means.

Consider the Seventh Circuit case of *United States v. West*.[132] In *West*, the defendant was caught on videotape robbing a bank and was later apprehended by police while still wearing a mask, carrying a gun, and holding the stolen money.[133] Left with few other options as a defense, the defendant pled insanity.[134] A psychiatric expert examined the defendant and prepared his written report for trial that the defendant suffered from "a severe mental disease or defect, specifically a schizoaffective disorder, and that [the defendant] was suffering from that disorder on the day he robbed the bank."[135] However, the expert also concluded that despite the defendant's mental condition, the defendant still understood that his actions were wrong.[136] The first part of the expert's testimony identifying the defendant's disease was unquestionably admissible under Rule 704(b) because it did not address the mental state of the defendant constituting an element of the defense.[137] On the other hand, the expert's conclusion that made sense of the diagnosis for the jury—that the defendant still understood the wrongness of his actions despite his mental condition—was not admissible under the Rule.[138] This is because the ability to

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[129] United States v. Brown, 32 F.3d 236, 239 (7th Cir. 1994).

[130] Braswell, *supra* note 5, at 635.

[131] *See* Simmons, *supra* note 15, at 1024 (arguing that expert testimony should be allowed where it is also probative).

[132] 962 F.2d 1243 (7th Cir. 1992).

[133] *Id.* at 1244.

[134] *Id.*

[135] *Id.* at 1245.

[136] *Id.*

[137] *Id.* at 1250.

[138] *Id.* at 1247.

understand the wrongness of one's actions is an essential element of the insanity defense,[139] and therefore, expert testimony on this issue violated Rule 704(b).

Instead of allowing part of the testimony, however, the district court excluded all of the expert's testimony stating, "it is outrageous to say that a psychiatrist . . . should testify in support of an insanity defense when the physician says that under the definition of the statute . . . there is no insanity . . . ."[140] The court of appeals disagreed and held that the expert should have been allowed to testify as to the defendant's mental diseases, but should not have been allowed to testify on the conclusion that these diseases did not prohibit the defendant from understanding the wrongness of his actions.[141] Remarkably, the judge who authored the opinion openly questioned the logic of Rule 704(b), yet held that the court was nonetheless bound to follow the Rule's plain language.[142] The concurring judges went even further, as one ridiculed the outrageous results created by the Rule[143] and the other described possible ways to circumvent the Rule at the retrial.[144]

Clearly, Rule 704(b) is problematic. It is unduly restrictive, difficult for courts to apply, and strips juries of some of the most useful information they could be given. So, how did a rule with such problems get passed and why is the Rule still part of our judicial system? Given the politically charged atmosphere surrounding the passage of the Insanity Defense Reform Act, it is unlikely Congress considered the potential problems Rule 704(b) would create.[145] But perhaps Congress believed that any potential difficulties Rule 704(b) might create were worth enduring because of the problems the Rule would solve. Giving Congress the benefit of the doubt, the logical question is: do the problems proffered by Congress actually exist and, if so, does the Rule solve them?

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[139] The United States Code specifies that in order to raise insanity as a defense to prosecution under a federal statute, the defendant must show that "at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts." 18 U.S.C. § 17 (2012).

[140] *West*, 962 F.2d at 1245 (omissions in original).

[141] *Id.* at 1250.

[142] *Id.* at 1249 (stating that the rationale of such a procedural system may be doubted because "[t]he evidence that would probably be most helpful to a jury on the question of sanity is an expert's opinion on whether the defendant knew what he or she was doing and whether or not it was wrong").

[143] *Id.* at 1250 (Cudahy, J., concurring) (agreeing with the trial court that "'it is outrageous to say that a psychiatrist . . . should testify in support of an insanity defense when the physician says that under the definition of the statute . . . there is no insanity. . . . There is no causative relationship, and the doctor says so right out.' The procedure *is* outrageous and seems to me to defy common sense.").

[144] *Id.* at 1251 (Manion, J., concurring).

[145] *See supra* Part I.B.

B. Problems Purportedly Remedied by Rule 704(b)

Congress's stated goal in amending Rule 704 was to prevent jury confusion by eliminating "the confusing spectacle of competing expert witnesses testifying to directly contradictory conclusions as to the ultimate legal issue to be found by the trier of fact."[146] Congress proffered that this confusion primarily arose in two places: the disagreement between psychiatric experts[147] and the leaps in logic those experts made, under pressure by the legal system, from medical concepts to legal or moral judgments.[148] With a stunning lack of logic[149] and the precision of a toddler with a chainsaw, Congress decided that the best solution was simply to prohibit any conclusions by any expert that approached such judgments. Yet even if Congress's concerns were legitimate, Rule 704(b) fails to address those concerns, making its considerable costs even more untenable.[150]

1. Testimony is Confusing to the Jury Due to Disagreement of Experts

Congress proffered that Rule 704(b) solved the problem of jury confusion caused by contradicting psychiatric expert testimony at trial.[151] Conflicting expert testimony in trial is far from unusual.[152] Yet Congress did not ban all expert testimony. Instead, testimony by psychiatric and mental health experts was singled out by Congress as a type uniquely constituted for confusion.[153] It would logically follow that there was evidence that this type of testimony was inherently more confusing to juries.[154] This would be logical, but it would be incorrect.[155] Apparently Congress believed that psychiatric expert testimony was not as exact as other types of expert testimony, so a jury had a greater likelihood of erring when considering this type of conflicting testimony.[156] Despite virtually no evidence that juries are more easily swayed when a psychiatric expert

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146 S. REP. NO. 98-225, at 230 (1983).

147 *Id.* at 223.

148 *Id.* at 231.

149 *See infra* Part II.B.1 & 2.

150 *See supra* Part II.A.

151 S. REP. NO. 98-225, at 230.

152 Braswell, *supra* note 5, at 630–31.

153 S. REP. NO. 98-225, at 230.

154 Of course, this is assuming Congress acted rationally, instead of politically, in passing the amendment. The author of this Note suggests that the amendment was likely a heated and politically motivated response to the Hinckley trial, *supra* Part I.A & B, and other critics contend the same, Simmons, *supra* note 15, at 1025–26; Capra, *supra* note 12, at 691.

155 *See* Braswell, *supra* note 5, at 631 (noting that there is nothing to suggest juries give more weight to mental health experts as compared to other types of experts).

156 S. REP. NO. 98-225, at 222 (stating that expert testimony in insanity cases involves "inherently imprecise expert testimony").

testifies to the ultimate issue involving a defendant's mental state,[157] Congress decided that the answer was to eliminate this type of testimony altogether. Congress's solution not only causes additional problems,[158] but it does not even solve the alleged problem of jury confusion because it is founded on two faulty assumptions.[159]

First, Congress assumed illogical consequences of providing a jury with less information.[160] Expert testimony that confuses a jury because it addresses the ultimate issue in a case does not become suddenly lucid if the expert is prohibited from explaining her conclusion.[161] How is a jury to understand and apply the expert's specialized knowledge if the expert is not permitted to tell the jury what that specialized knowledge means?

A hypothetical scenario in a trial involving an arson charge illustrates the absurdity of this logic. Consider a trial where the defense calls a psychiatrist as an expert witness.[162] The psychiatrist testifies that, in her opinion, the defendant has "paranoid schizophrenia" and concludes that, based on that diagnosis, the defendant was unable to appreciate the wrongfulness of his actions at the time of the crime.[163] The prosecution then calls a different psychiatric expert who testifies that the defendant merely had an "abnormal personality."[164] He concludes that the defendant could appreciate the wrongfulness of his actions at the time of the crime.

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[157] Braswell, *supra* note 5, at 630–31.

[158] Rice & Delker, *supra* note 21, at 713 ("In reality, the limitation imposed by subsection (b) *adds to*, rather than diminishes, jury confusion.").

[159] *See id.* at 713 (noting the reasons and stating "Congress's reasons [for Rule 704(b)] did not support the provision it enacted").

[160] *See* Capra, *supra* note 12, at 696 ("The inherent illogic and harmfulness of Rule 704(b) was lost on Congress in the heat of the Hinckley result.").

[161] P.H.V., Annotation, *Testimony of Expert Witness as to Ultimate Fact*, 78 A.L.R. 755 (2014). The author posits that "some ultimate facts in their inherent nature are such that the evidentiary facts to prove the same are unintelligible to any mind except that of the expert, and unexplainable to a person of ordinary experience and skill." *Id.* Therefore, it is not just useless, but absurd for an expert to testify to evidentiary facts and yet stop short of stating his opinion that ties those facts to a coherent conclusion regarding their meaning. *Id.* "An adherence to the rule excluding the opinion of an expert witness as to the ultimate fact . . . leaves to the jury the impossible task of determining that fact from premises of which they are ignorant, perhaps, even after the statements and explanations of the witness." *Id.*

[162] The Author has selected the following diagnoses to illustrate this point because in its report on the confusion of expert testimony, the Senate cited "paranoid schizophrenia" and "abnormal personality" as examples of terms that are undefined by psychiatric medicine and often yield conflicting diagnosis by psychiatric experts. S. REP. NO. 98-225, at 223 (1983).

[163] While all courts prohibit expert testimony that the defendant's mental state does or does not meet the legal definition of sanity, some courts also prohibit a description of the effect of this disease on a similarly situated hypothetical person. *See supra* note 77.

[164] *See* S. REP. NO. 98-225, at 223 ("[E]xperts often do not agree on the extent to which behavior patterns or mental disorders that have been labeled 'schizophrenia,' 'inadequate personality,' and 'abnormal personality' actually cause or impel a person to act in a certain way.").

While each underlying diagnosis would likely be admissible under Rule 704(b), neither of the conclusions could be admitted.[165] Even if one accepts the premise that a jury is confused by conflicting expert testimony, how is such confusion lessened when a jury is permitted to hear conflicting diagnoses, but not the explanations of the effect of those diagnoses? Surely it is not. The underlying conflicting opinions are still admitted and each expert will still testify that the defendant had either "paranoid schizophrenia" or an "abnormal personality." It is only the explanation of what those diagnoses actually mean in the real world that Rule 704(b) renders inadmissible.[166] Prohibiting an expert from explaining the meaning of her diagnosis in the particular case at hand does not in any way provide clarity for a jury that is left with plenty of jargon but little explanation. Indeed, this prohibition serves only to rob the jury of helpful information.[167]

Second, Congress assumed that the other Rules of Evidence did not already prohibit much of the testimony that so concerned Congress.[168] This is simply not true. If expert testimony is truly confusing or if it misleads the jury, the Federal Rules of Evidence will not allow it.[169] For instance, Federal Rule of Evidence 702 specifically lays out the qualifications for an expert witness and requires, among other things, that the testimony help the jury understand the evidence.[170] If the expert's testimony is confusing, it will not help the jury understand and should be prohibited. Similarly, Federal Rule of Evidence 403 allows the court to exclude evidence "if its probative value is substantially outweighed by a danger of . . . confusing the issues, misleading the jury, [or] wasting time."[171] Because these two rules already preclude testimony that is confusing or unhelpful to the jury, Rule 704(b) must logically exclude only

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165 Cohen, *supra* note 42, at 553.

166 Rice & Delker, *supra* note 21, at 714 ("After experts present competing diagnoses, the jury must decipher the meaning of each, perhaps choose one, and decide whether that diagnosis equates with the applicable legal standard.").

167 *See supra* Part II.A.3.

168 Braswell, *supra* note 5, at 628–30.

169 *Id.*

170 Federal Rule of Evidence 702, Testimony by Expert Witnesses, states:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
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> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.

FED. R. EVID. 702.

171 FED. R. EVID. 403.

testimony that *is* helpful to the jury.[172] Therefore, far from eliminating confusion for jurors, Rule 704(b) excludes only helpful testimony and leaves juries more confused.[173]

2. Confusion Due to Leaps in Logic

Congress also appeared worried about two potential scenarios where a psychiatric expert witness might confuse the jury by making an unacceptable "leap in logic."[174] The first scenario that Congress apparently envisioned is a trial in which two psychiatrists testifying as experts both agree on the diagnosis of a defendant's mental disease and the characteristics of that disease, but come to unsupported contradictory conclusions as to how the disease affected the defendant.[175] Without support or reason, one expert testifies that the defendant is sane and the other expert testifies that the defendant is insane and thus throws the jury into total confusion. However, if either expert witness does not adequately explain how or why she has reached her conclusion on the effect of the mental disease on the defendant, Rule 702 prohibits the unsupported conclusion because such a statement does not help the jury understand the evidence or facts at issue.[176] Therefore, any potential confusion caused in such a scenario should not be concerning and does not necessitate a prohibition of expert opinion in the manner of Rule 704(b).

The second scenario with which Congress seemed concerned is one in which a psychiatric expert misunderstands the law and testifies to a legal

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[172] Capra, *supra* note 12, at 695; *see also* United States v. West, 962 F.2d 1243, 1246 (7th Cir. 1992) (stating that despite expert psychiatric opinion being "clearly relevant to the merits of [defendant's] defense. . . . [and] highly probative on the issue of insanity, . . . it was also an opinion on the ultimate issue . . . and under Rule 704(b) it was, therefore, inadmissible testimony").

[173] Rice & Delker, *supra* note 21, at 714.

[174] S. REP. NO. 98-225, at 231 (1983).

[175] *Id.* Congress quoted a statement by the American Psychiatric Association and appeared to agree that "in many criminal insanity trials both prosecution and defense psychiatrists do agree about the nature and even extent of mental disorder exhibited by the defendant at the time of the act." *Id.* (quoting Loren Roth et al., *American Psychiatric Association Statement on the Insanity Defense*, 140 AM. J. PSYCHIATRY 681, 686 (1983)). Therefore, the problem with which Congress must have been concerned is the jury confusion that could result when those same expert witnesses disagree as to the application of the diagnosis to the defendant's alleged actions and make a leap in logic by failing to support their conclusions.

[176] Rule 702 prohibits such testimony as being unhelpful to the jury which, in such a case, has merely obtained a conclusion from the expert without any foundation with which to consider its import. *See* FED. R. EVID. 702 (requiring that a witness who wishes to testify as to his opinion, must among other things, base his testimony on "sufficient facts or data" and his knowledge must "help the trier of fact to understand the evidence or to determine a fact in issue").

conclusion she is not equipped to make.[177] In light of the other measures adopted by Congress's reform of the insanity defense, it is likely that the particular scenario Congress envisioned was one in which an expert misunderstands the legal definition of insanity.[178] However, if a careful foundation for the expert's testimony is required[179] and a helpful explanation of the diagnosis is allowed, any incorrect application of the law by a witness will surely be recognized by opposing counsel and the court.[180]

Thus, Congress proffered a straw-man argument that juries are confused by expert psychiatric testimony and offered Rule 704(b) to solve the problem.[181] If the Rules of Evidence are correctly applied, even contradictory expert testimony will not confuse a jury. Additionally, when the Rules of Evidence are applied, an expert will not be allowed to make "impermissible leaps in logic" and so confuse a jury. As the other Rules of Evidence prohibit the testimony that so concerned Congress, Rule 704(b) is, at best, surplusage.

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[177] S. REP. NO. 98-225, at 231. The report states that "it is clear that psychiatrists are experts in medicine, not the law." *Id.* (quoting Roth et al., *supra* note 175, at 686). The report goes on to say that when questions involving a key element of the crime are asked of the expert, "the expert witness is required to make a leap in logic [because h]e no longer addresses himself to medical concepts but instead must infer . . . the probable relationship between medical concepts and legal or moral constructs." *Id.*

[178] The same Senate report that recommended amending Rule 704 also recommended changing the legal definition of insanity. S. REP. NO. 98-225, at 225–26. The new definition excluded from the insanity defense the argument that the defendant knew her actions were wrong, but was unable to control her actions due to her mental disease. *Id.* Therefore, it is likely that the type of "leap in logic" Congress wanted to avoid was one in which an expert psychiatric witness, unaware of the change in the legal definition of the word, diagnosed the defendant as insane because the defendant was unable to control her actions.

[179] Such foundation for the expert's testimony is indeed required by Federal Rule of Evidence 702. This rule qualifies the admissibility of expert testimony by allowing an expert to testify only if "the testimony is based on sufficient facts or data . . . [and] the expert has reliably applied the principles and methods to the facts of the case." FED. R. EVID. 702(b), (d).

[180] Cohen, *supra* note 42, at 554; *see also* Rice & Delker, *supra* note 21, at 713 n.154 (reasoning that the presiding judge will instruct the jury as to the relevant legal standard).

[181] The Senate Committee report is instructive when it states that if a psychiatric expert "present[s] medical information and opinion about the defendant's mental state and motivation and . . . explain[s] in detail the reason for his medical-psychiatric conclusions," he is "do[ing] psychiatry," not making impermissible leaps in logic. S. REP. NO. 98-225, at 231 (quoting Roth et al., *supra* note 175, at 686). Indeed, the report specifies that, "[p]sychiatrists, of course, must be permitted to testify fully about the defendant's diagnosis, mental state and motivation (in clinical and commonsense terms) at the time of the alleged act so as to permit the jury or judge to reach the ultimate conclusion." *Id.* Therefore, that the Rule prohibits *all* conclusions on the defendant's mental state and not just *unfounded* conclusions indicates that Congress's concern may not really have been with leaps in logic, but with the particular conclusions at which the experts arrived. *Id.* Of course for obvious reasons, it would hardly have been acceptable for Congress to pass a Rule that prohibited only expert testimony that led to a "not guilty by reason of insanity" verdict.

III. PROPOSED SOLUTIONS

The problems caused by Rule 704(b) have not gone unnoticed and many solutions have been offered.[182] Four of the most promising ones are analyzed below. The solutions are addressed in order of the least to greatest impact to Rule 704(b).

A. Apply the "Probes-the-Mind" Test

One proposed solution to the problem of Rule 704(b) is for courts to use the "probes-the-mind" test.[183] As previously discussed, this approach would eliminate much of the confusion that results from the broad wording of the Rule because it excludes from the Rule's grasp all expert testimony that does not come from expertise in the psychological sciences.[184] Therefore, non-psychological health experts could testify freely, provided their testimony conforms to the requirements of the other Rules of Evidence. Under this approach, the confusion that courts currently endure in cases involving non-psychological expert testimony would be eliminated.[185] This approach also has the benefit of more closely reflecting Congress's likely intent in passing the Rule.[186] Still, this approach has several major weaknesses. First, it ignores the rules of statutory construction delineated by the Supreme Court.[187] Second, it still leaves untouched the extensive problems the Rule causes in cases where psychological experts testify to the defendant's mental state. Overall, this is not a satisfactory solution.

B. Limit the Application of the Rule to Mental Health Experts

A second solution proffered to the problem of Rule 704(b) is an amendment to the Rule that limits its pernicious effects to the testimony of mental health experts testifying on the mental state of a defendant in

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[182] *See* KAYE ET AL., *supra* note 11, at §2.2.3(b) (designating the three major approaches that courts have adopted as the "stops-short" analysis, the "necessarily-follows" test, and the "probes-the-mind" inquiry); Capra, *supra* note 12, at 702–03 (reasoning that "[a] less onerous alternative might be to amend Rule 704(b) to limit its bad effect to the testimony of mental health professionals"); Braswell, *supra* note 5, at 639 ("Therefore, federal trial courts should interpret rule 704(b) narrowly by limiting its application to statements incorporating the statutory language."); Cohen, *supra* note 42, at 560–61 (calling for practical modifications that would fundamentally change Rule 704(b)).

[183] KAYE ET AL., *supra* note 11, at §2.2.3(b).

[184] *Id.*; *see also supra* notes 109–18 and accompanying text.

[185] *See* s*upra* notes 109–11 and accompanying text.

[186] *See* explanation provided *supra* note 62.

[187] *See* Carcieri v. Salazar, 555 U.S. 379, 387 (2009) (stating that if the statutory text is plain and unambiguous, "settled principles of statutory construction" dictate that no further steps are needed to interpret statute).

a criminal case.[188] One example for such an amendment to Rule 704 is as follows:

> (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.
>
> (b) No *mental health* 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.[189]

While this solution is similar to the previous and subsequent ones, it has several advantages. One advantage is that, unlike the "probes-the-mind" or "narrow construction" approaches, such an amendment would not require courts to ignore the rules of statutory construction.[190] Since such an amendment would limit the effect of the Rule to testimony by mental health experts, courts would no longer be forced to bypass the plain meaning of the Rule to limit its application. Another advantage is that such an amendment would tailor the impact of the Rule to the type of testimony that Congress originally intended to address, which would prohibit the rule from affecting other categories of expert testimony such as law enforcement.[191] Moreover, an amendment like this would even give Congress the opportunity to save face and claim that the change in the language restores the Rule to its original intended purpose.[192] This would likely be a more politically acceptable option compared to others herein considered. The obvious weakness of such an amendment is that it still fails to remedy the problem that the Rule creates in criminal cases where mental health experts testify.[193] Therefore, this approach is not ideal because it would still limit crucial expert testimony that is helpful to the jury.

C. Narrowly Construe the Rule

A third solution is for courts to construe the Rule even more narrowly than the "probes-the-mind" test so that the Rule "prohibit[s] only opinions

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188 Capra, *supra* note 12, at 702.

189 *Id.*

190 *See Carcieri*, 555 U.S. at 387 (noting that statutory interpretation requires interpreting text based on the plain language if the text is unambiguous).

191 *See* Capra, *supra* note 12, at 702 (stating that an amendment limiting the Rule to expert witness testimony would likely restore Rule 704(b) to "its originally intended scope").

192 *Id.* at 702–03. Capra wryly suggests that this amendment could "even be pitched as correcting the *courts*' misinterpretation of what Congress must have, in its infinite wisdom, intended." *Id.* (emphasis in original).

193 *See supra* Part II.A.3.

incorporating the statutory language of the insanity standard."[194] Under this approach, psychological expert testimony would be permitted so long as it does not use language that tracks the statutory definition of insanity.[195] This option has several advantages. First, it would limit the application of (and damage caused by) the Rule to those cases where the insanity defense is raised.[196] It is likely that this limited application most closely reflects the original intent of Congress, despite the sweepingly broad language actually used in the Rule.[197] Second, it has the advantage of providing the jury with more adequate explanations of how the diagnosed mental disease or defect may have impacted the defendant by allowing the expert to more fully explain his diagnosis.[198] Therefore, while a psychiatric expert could not specifically state that the defendant *was* unable to appreciate the wrongfulness of his acts as required by law,[199] the expert could explain how such a mental disease usually impacts the cognitive ability of someone suffering from it.

This solution certainly mitigates some of the problems created by Rule 704(b), but this approach has several difficulties. First, like the "probes-the-mind" test, interpreting Rule 704(b) in this way contradicts the plain meaning of the statute's language and disregards the rules of statutory interpretation dictated by the Supreme Court.[200] Even though this approach is a logical application of the Rule based on legislative history, it is not an acceptable way of dealing with the problem. Second, while this interpretation narrows the application of the Rule to a smaller number of cases, it still leaves those cases involving insanity pleas

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194 Braswell, *supra* note 5, at 639.

195 "Insanity" is defined in the United States Code under the insanity defense statute: "It is an affirmative defense . . . that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts." 18 U.S.C. § 17(a) (2012).

196 By limiting the application of the Rule to only the statutory definition of insanity, the Rule would no longer prohibit ultimate mental state testimony in other areas of the law such as premeditation in homicide cases or predisposition in entrapment. *See Insanity—Scope of Expert Testimony*, JUSTICE.GOV, http://www.justice.gov/usam/criminal-resource-manual-639-insanity-scope-expert-testimony (last visited Oct. 11, 2015) ("The restriction in Rule 704 on ultimate opinion psychiatric testimony extends to any ultimate mental state of the defendant relevant to ultimate legal conclusions to be proved, such as premeditation in a homicide case, or lack of predisposition in entrapment.").

197 *See* United States v. Morales, 108 F.3d 1031, 1036 (9th Cir. 1997) ("[T]he language of Rule 704(b) is perfectly plain. It does not limit its reach to psychiatrists and other mental health experts. Its reach extends to all expert witnesses.").

198 *See* Braswell, *supra* note 5, at 639 (reasoning that "[t]he more broadly judges construe rule 704(b), the more they will deprive juries of relevant and helpful testimony").

199 18 U.S.C § 17(a) (2012).

200 *See* Carcieri v. Salazar, 555 U.S. 379, 387 (2009) (noting the well-settled principle of statutory construction to take no additional steps when the language of the statute is clear and unambiguous).

untouched. The costs of this Rule simply do not justify its difficulties for *any* number of trials, no matter how few.

D. Repeal the Rule

A final proposal to remedy the problems caused by Rule 704(b) is simply to repeal it.[201] The rationale for this recommendation is sound. Rule 702 and Rule 403 effectively prohibit the type of expert testimony that so concerned Congress.[202] If the concerns of Congress are addressed by these Rules, why should Rule 704(b) remain? No evidence indicates that juries are more prone to persuasion by experts who testify on the defendant's mental state than by other experts.[203] Therefore, juries can be trusted to separate conflicting expert opinion on the mental state of the defendant just as they are trusted to do for all other types of expert testimony.[204] The reasons that Congress provided for legislating Rule 704(b) are founded on faulty assumptions.[205] Repealing the Rule might appear to be a "slap to the face of Congress,"[206] but it is also an opportunity for Congress to fix the problems caused by this poorly constructed Rule.[207] Repealing Rule 704(b) and allowing the other rules of evidence to do their job is the best way to cure the problems created by this Rule.

CONCLUSION

Rule 704(b) is a misguided response to a dubious problem. Prior to the Hinckley trial, it was manifest that the "ultimate issue" rule served no legitimate purpose and caused substantial problems.[208] Yet, to paraphrase Justice Holmes, the "immediate overwhelming interest" in the verdict of the Hinckley trial made "what previously was clear seem doubtful."[209] Congress was so concerned that the trial's outcome might be repeated that its judgment was distorted and it forgot or ignored that

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[201] Cohen, *supra* note 42, at 560–61.

[202] Braswell, *supra* note 5, at 628–29.

[203] *Id.* at 631.

[204] *Id.*

[205] *See supra* Part II.B.

[206] *See* Capra, *supra* note 12, at 702 (reasoning that because Congress is the ultimate authority over the Federal Rules of Evidence, proposing an amendment is more "politically palatable" and "[a]s such, it is not a slap to the face to Congress").

[207] If the Rule is to change, Congress must change it. While the Supreme Court has the power to prescribe rules of evidence, those rules must be consistent with Acts of Congress. 28 U.S.C. §§ 2071–72 (2012). Therefore, because Congress has legislated on the issue of expert testimony in criminal trials in Rule 704(b), the Supreme Court may not change the Rules of Evidence to contradict this Rule. *Id.* § 2071(a)*; see also* Capra, *supra* note 12, at 702 (noting Congress's ultimate authority over the rulemaking in federal courts).

[208] *See* FED. R. EVID. 704 advisory committee's note to the 1972 proposed rule (noting that the ultimate issue rule "was unduly restrictive, difficult in application, and generally served only to deprive the trier of fact of useful information").

[209] N. Sec. Co. v. United States, 193 U.S. 197, 400–01 (1904) (Holmes, J., dissenting).

which was formerly obvious.[210] Consequently, an overly-broad and poorly-written Rule became law and the "ultimate issue" rule crawled out of its grave to once again haunt the federal courts with its problems.[211] Rule 704(b) is based on faulty assumptions and is a remedy desperately in need of a cure. The Rule does virtually nothing to solve the alleged problems it was designed to address and needlessly creates additional ones. Rule 704(b) unnecessarily restricts expert opinion, creates confusion in courts as to its application, and strips the jury of some of the most useful testimony an expert can offer. The solution to these problems is not novel or complicated. Indeed, it is surprisingly straightforward. Rule 704(b) should be repealed. Perhaps then the "ultimate issue" rule will finally remain in the grave where it belongs.

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[210] *See* Simmons, *supra* note 15, at 1024 (stating that Rule 704 was amended as a "result of political pressures after the would-be presidential assassin John Hinckley was acquitted by reason of insanity").

[211] 1 JACK B. WEINSTEIN ET AL., WEINSTEIN'S FEDERAL EVIDENCE § 704App.01 (Joseph M. McLaughlin ed., 2d. ed. App. 2015) ("Rule 704(b) plainly revives the ultimate issue rule in criminal cases.").

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