

# Psychiatric Evidence on the Ultimate Issue

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Federal Rule of Evidence 704(b) prevents psychiatrists and other expert witnesses in federal criminal trials from testifying as to whether a defendant did or did not have a mental state or condition comprising either an element of the crime or an element of the defense. This paper describes the origins of the Rule and its judicial development. The Rule is an exception to a 20th century trend that has seen witnesses increasingly permitted to address the ultimate issue. It has been applied inconsistently, has been criticized in appellate decisions, and has spawned an idiosyncratic legal definition of “helpful.” Attempts to circumvent it have included inviting jurors to make inferences, inventing hypothetical cases that mimic the one before the court, and eliciting expert testimony on what is “possible” or “probable.” Courts have held that rendering transparent the reasons behind an expert’s conclusions can minimize the damage done by ultimate issue testimony.

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The Federal Rules of Evidence were introduced in 1975. In their original form they made provision for the admission of an expert’s conclusion on the question before the court. They did so despite longstanding concern that such “evidence on the ultimate issue” intrudes into the jury’s domain and leads to confusion when experts disagree. After the rules were introduced, high-profile cases in which expert evidence was heard focussed these concerns. Rule 704(b) was added in 1984 after the acquittal of John Hinckley. It provides that:

No expert witness testifying with respect to the mental state or condition of the 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 [Ref. 1, p 14].

The rule is not limited to psychiatric evidence.<sup>2,3</sup> It has been applied to police officers testifying that a defendant’s behavior indicated he intended to distribute drugs.<sup>4</sup> One U.S. District Court described Rule 704(b) as the only legislatively established limit on the intrusion of expert evidence into the province of the jury.<sup>5</sup>

The Federal Rules do not state what counts as an “ultimate issue.” Case law from before and after the Rules were introduced suggests, however, that when a witness uses the same words that will be presented to the jury, a line has been crossed. Thus, when a plaintiff’s “total permanent disability” was at issue, the U.S. Supreme Court held that it had been an error to allow doctors to use this term to describe his condition.<sup>6</sup> When the charge described a “willful” attempt to “evade” paying taxes, psychiatric testimony that addressed whether a defendant’s actions were indeed willful or amounted to evasion was excluded.<sup>7</sup> For psychiatrists in insanity trials, at least, the answer seems clear. Prior to the Insanity Defense Reform Act of 1984, the ultimate issue when a defendant pled insanity in federal court was whether he lacked “the substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law” (Ref. 8, p 265). Since the Act’s passage, it has been whether he “appreciated the nature and quality or the wrongfulness of his acts” (Ref. 9, p 134).

Case law and the Rules’ legislative history suggest also that in less clear cases an issue’s “ultimate” status hinges on who has the authority to decide it. The U.S. Court of Appeals of the 8th Circuit excluded a psychologist’s evidence on the credibility of prosecu-

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tion witnesses because it amounted to an “ultimate opinion.” By this the 8th Circuit meant an opinion that could only be properly reached by a jury.<sup>10</sup> The House Report introducing Rule 704(b) referred to the ultimate issue in a civil commitment proceeding as being whether the person was so dangerous as to necessitate commitment.<sup>11</sup> The authors of the report concluded that experts did not have the skills or authority to resolve such a question. Deciding whether someone should be committed, they observed, required weighing the security of society against the liberty of the individual. This no expert was qualified, or could be properly authorized, to do.

Other Federal Rules also regulate admissibility. Rule 403 excludes unfair, prejudicial, or misleading evidence. Rule 701 limits permissible opinions and inferences to those that are “helpful” and “rationally based.” Rule 702 excludes experts from the usual requirement that witnesses have firsthand knowledge. The rule replaced a common law rule that the admissibility of expert testimony depended on the state of acceptance of the relevant body of knowledge<sup>12</sup> and was amended in 2000 after the Supreme Court’s decisions in *Daubert*<sup>13</sup> and *Kumho*.<sup>14</sup> The rule includes a qualification similar to that contained in Rule 701—that the expert’s opinion must “assist the trier of fact.” This qualification has seen the exclusion of evidence that would complicate a jury’s task<sup>15</sup> or that amounts to no more than common sense.<sup>16,17</sup> It has not prevented evidence on the ultimate issue from being heard.<sup>18</sup> Subsection (a) of Rule 704, in contrast to the subsection that follows it, provides that “testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact” (Ref. 1, p 14).

Rule 704(b) thus differs from other Federal Rules of Evidence in singling out mental state evidence for exclusion and in naming particular circumstances in which that exclusion will apply. This article describes the origins and development of Rule 704(b) and then reviews the case law governing the rule’s application.

## Federal Rule 704

### *Jurisprudential Origins*

The “principle of testimonial knowledge,” which holds that a witness should speak as a “knower” and not as a “guesser,” seems to have first appeared in

English common law in the 1700s.<sup>19</sup> One consequence was that the opinions, as opposed to the recollections, of witnesses came to be regarded as generally inadmissible. At the same time, the presentation to the jury of evidence from witnesses was coming to replace two means by which the courts had previously made use of professional and other expertise. The first of these required empanelling a special jury. The Mayor in 14th-century London had summoned juries of merchants to settle trading disputes, and special juries seem to have continued to be used in this way in England at least until the 17th century. The second occurred when the court summoned experts to offer advice to it directly on questions of fact where it lacked knowledge.<sup>20</sup>

Expert opinion was thus required, for the first time, to be presented to a lay jury and to be available for cross examination. The change did not occur without criticism. Justice Learned Hand argued that it had led to the expert’s taking the place of the jury, provided they believed the expert. Two practical consequences, Justice Hand argued, were that the expert inevitably became a champion of one side and that, when experts disagreed, juries were confused because they had no means of deciding which expert to believe. A jury that was able to decide this would not have required expert evidence in the first place.<sup>20</sup> Justice Hand’s preference was for a tribunal of experts that would hear expert evidence (and hear it cross-examined) before providing a single opinion to the court. This the jury could then accept or reject.

Experts were not the only people in the 19th century giving evidence as to the sanity, or otherwise, of the accused. The principle of testimonial knowledge does not seem to have prevented the opinions of lay witnesses from being admitted provided the witness had observed the defendant’s behavior.<sup>21</sup> Josiah Pike’s appearance and conduct prior to his killing of Thomas Brown had led lay witnesses to conclude that he was insane. These opinions had been excluded at trial. On appeal, Justice Doe remarked:

Opinions, like other testimony, are competent on the class of cases in which they are the best evidence, as when a mere description without opinion would generally convey a very imperfect idea of the force, meaning, and inherent evidence of the things described. Like other testimony, opinions are incompetent in the class of cases in which they are not the best evidence, as when they are founded on hearsay, or on evidence from which the jury can form an opinion as well as the witness [Ref. 22, p 423].

Opinions were constantly given, Justice Doe concluded. A case could not be tried without them.

Nineteenth century judgments defending the use of expert evidence pointed also to the additional facts of which experts might have knowledge:

Facts having been proved, men skilled in such matters may be admitted to prove the existence of other more general facts or laws of nature. . .so as to enable the jury to form an inference for themselves. Thus the existence of certain appearances in the dead body having been proved, the chemist testifies that such appearances invariably or generally indicate the operation of some powerful chemical agent [Ref. 23, p 674–5].

Expert testimony was to be admitted when the jury was “incompetent to infer, without the aid of greater skill than their own, as to the probable existence of the facts to be ascertained” (Ref. 23, p 674–5). Nineteenth- and 20th-century appellate cases indicate also, however, that where the jury had not been left “to form an inference for themselves,” expert evidence on the ultimate issue was to be excluded. The justification for this exclusion was that such evidence represented an “invasion of the province” (Ref. 24, p 71) of the jury and “usurped” the jury’s function.<sup>25</sup>

This view may have been more widely held by appellate judges than by trial courts. Nineteenth-century cases indicate also that, at least when the issue was one of legal competence to make a will, opinions on the ultimate issue were regularly elicited without objection.<sup>26</sup> The court in *Sessa* was later to argue that the principle of excluding expert evidence going to the ultimate issue gave juries insufficient credit:

Nor is it sensible to preclude an expert’s testimony on a question of fact on the ground that it goes to “the very issue before the jury.” A jury does not lose its ability to critically evaluate an expert’s opinion simply because that opinion touches on an “ultimate” question [Ref. 5, p 1067].

The Judicial Conference drafting the Federal Rules of Evidence<sup>27</sup> was able to point to several cases where testimony going to the ultimate issue had been admitted<sup>28,29</sup> and to the conclusions of legal texts that excluding such evidence was unduly restrictive.<sup>19,30</sup>

In a statement that echoed Justice Doe’s 19th-century advocacy of “best evidence” as the proper criterion for admissibility, the Judicial Conference concluded that opinions, lay and expert, should be admitted when they would be helpful to the trier-of-fact. Acknowledging that this may already be normal practice in many courts, the conference explained that the original Rule 704 was drafted to “render this

approach fully effective and to allay any doubt on the subject” (Ref. 27, p 91). The same point appears in an advisory committee annotation to the final version of Rule 704. The final version stated, “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” (Ref. 31, p 53). The Federal Rules were enacted in January of 1975 and became effective in July of that year.

### **Rule 704(b): A Psychiatric Exception**

Psychiatric evidence on the ultimate issue had generated particular concern, however, perhaps due to its contribution to the acquittal, by means of the insanity defense, of people who had admitted committing acts that were otherwise illegal. In 1967 the D.C. Circuit had held that, when the defendant plead insanity:

[T]here is no justification for permitting psychiatrists to testify on the ultimate issue. Psychiatrists should explain how defendant’s disease or defect relates to his alleged offense, that is, how the development, adaptation and functioning of defendant’s behavioral processes may have influenced his conduct [Ref. 32, p 456].

Subsection 704(b) reinstated the prohibition on witnesses addressing the ultimate issue when their testimony concerned the defendant’s mental condition. It became effective in October of 1984 as part of the Comprehensive Crime Control Act. The Act was passed in the wake of the shooting of President Reagan, although attacks on the insanity defense had predated the outrage that followed John Hinckley’s acquittal.<sup>33</sup> Two related concerns seem to have contributed to the change in the Rules.

The first echoed the fear expressed in 19th- and 20th-century judgments, that the roles of jury and expert should not overlap. The House Report noted:

While the medical and psychological knowledge of expert witnesses may well provide data that will assist the jury in determining the existence of the defense, no person can be said to have expertise regarding the legal and moral decision involved. Thus, with regard to the ultimate issue, the psychiatrist, psychologist or other similar expert is no more qualified than a lay person [Ref. 11, p 16].

The amended rule has been held necessary to ensure that jurors do not “take on faith” the views of experts<sup>34</sup> and instead decide for themselves whether a defendant is legally sane.<sup>35,36</sup>

This separation of roles has been maintained in part by the judicial development of the principle of

helpfulness alluded to by Justice Doe and made explicit in the deliberations of the Judicial Conference. When the appellate courts have described testimony on the ultimate issue as unhelpful<sup>37</sup> they have usually not meant unhelpful in the eyes of the jury. In an insanity case, for instance, one court noted:

The evidence that would most 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 [Ref. 35, p 1249].

The Court nevertheless found the evidence of the defense expert to be inadmissible. Instead, "helpful" seems to mean helping a jury to reach its verdict properly. A verdict properly reached is not one that has been reached after experts have given their views on a question that lies within the jury's realm. This applies even to testimony on matters outside most jurors' knowledge or experience, such as the reliability of children's allegations of sexual abuse.<sup>10</sup>

The second concern echoed Justice Learned Hand's that juries would be confused as to how to proceed when experts disagreed. The Senate Report on Rule 704(b) explained that one purpose of the change to the Rules was to prevent the "spectacle" of expert witnesses testifying to directly contradictory conclusions.<sup>38</sup> The courts have since held, similarly, that the Federal Rule had been designed to prevent the "confusion and illogic" of translating medical concepts relied on by psychiatrists and other mental health experts into legal conclusions (Ref. 39, p 1241). Although Congress and the courts have reached the same conclusion as Justice Hand, their arguments seem to lack the force generated by his pragmatism. Without referring to "spectacle" or "illogic," the justice had stressed that a nonexpert jury faced with two opinions would have no adequate means of choosing between them.

### **The Boundaries of the Psychiatric Exception**

The Senate Report introducing Rule 704(b) proposed that experts should still be permitted to testify as to the presence or absence of other legal concepts such as mental disease or mental defect. This recommendation appears to have been based on the assumption that these terms were in widespread medical use:

Under this proposal, expert psychiatric testimony would be limited to presenting and explaining their diagnoses, such as whether the defendant has a severe mental disease or defect and

what the characteristics of such a disease or defect, if any, may have been [Ref. 38, p 3412].

At the time the report was written, a U.S. District Court had already noted that the presence of a DSM category did not indicate, for legal purposes, the presence of mental disease.<sup>40</sup> The Senate nevertheless added that "mental disease or defect" carried a clinical meaning to which experts could meaningfully testify.

The House Report took a different position. In discussing the merits of one, subsequently rejected, alternative to the phrase "mental disorder or defect," the Committee outlined the advantage of using non-medical terms:

This is consistent with the Committee conclusion that the insanity defense must rest upon legal, not medical, concepts. The Committee language is not technical. . . . Employing a medical definition of "mental disease or defect" would grant the medical profession the ability to control who qualifies to raise the insanity defense [Ref. 11, p 13].

The final version of the Federal Rules of Evidence<sup>31</sup> was silent on whether the presence or absence of mental disorder or defect was, or was not, an ultimate issue for the jury.

In 1999, however, the 5th Circuit Court of Appeals held that psychiatric testimony as to the presence or absence of mental disease or defect should be admitted. The court did not make reference to the divergence between the Senate and House Reports. In rejecting the defense argument that there were two ultimate issues ("severe mental disease" and "inability to appreciate") it relied, instead, on the wording of the Rule itself. It held that, for the purposes of the insanity defense:

The mental state or condition which constitutes an element of the defense is the inability to appreciate wrongdoing. The "severe mental disease" requirement is subordinate to this overall element and should not be considered a subject prohibited by Rule 704 (b) [Ref. 41, p 400].

Other courts have also permitted psychiatrists to address whether or not a defendant pleading insanity has a mental disease or defect without offering a similarly explicit justification.<sup>42</sup>

Because Rule 704(b) describes two circumstances under which evidence is disallowed, when that evidence goes to an "element of the crime charged" or a "defense thereto" (Ref. 1, p 14), the courts have sometimes held that the same evidence meets the criteria for exclusion in one of these circumstances but not in the other.<sup>43</sup> Thus a psychiatrist's opinion

as to whether an armed robbery defendant was capable of conforming his conduct to the law (and hence “legally sane”) was admissible when the defendant did not plead insanity and sought to show instead that he lacked the necessary intent. An expert’s conclusion that the defendant knew what he was doing was wrong—inadmissible if he plead insanity—was also admissible on the question of intent.<sup>44</sup>

### Legal Interpretation of Rule 704(b)

Case law suggests that courts have usually sought to interpret Rule 704(b) in such a way that evidence will be admitted, a policy that is consistent with their approach to other evidence going to insanity.<sup>36</sup> Thus when the defendant’s intention was at issue, only an expert’s explicit use of the word “intended” implicated Rule 704(b)<sup>45</sup> and when the defendant pled insanity even a psychiatrist’s use of the word “insane” was to be understood only as a diagnosis of the patient’s condition.<sup>46</sup> When evidence has been improperly admitted the appellate courts have held the error cured by an instruction to the jury.<sup>41</sup> In applying Rule 704(b), the courts have also rendered judgments on several techniques by which attorneys have sought to introduce conclusory evidence supportive of their clients’ cases.

### Inferences

When an expert avoids expressing an opinion on the ultimate issue, it may nevertheless be possible for a jury to infer from the expert’s testimony what that opinion is. It is difficult to identify from appellate judgments a point at which the inference becomes so obvious that testimony will consistently be excluded. Rule 704(b) has been held to preclude evidence from which a conclusion on the ultimate issue “necessarily follows” (Ref. 3, p 1037). Testimony that a defendant “was well aware,” for instance, was so close to the criminal requirement for “knowledge or willfulness” that it should have been excluded.<sup>47</sup> Other courts have warned against similar attempts to subvert the rule by using “semantic camouflage” (Ref. 15, p 1165).

Other courts have chosen to emphasize that the prohibition in Rule 704(b) applies only to the “final inference” (Ref. 34, p 332; Ref. 48), however, and have stated<sup>45</sup> or implied<sup>49,50</sup> that an expert can even go so far as to suggest what this inference might be. Expert testimony will also be admitted when it calls into question the safety of other inferences that a jury

might draw. In *U.S. v. Childress*, the District of Columbia Circuit concluded that psychiatric evidence should have been admitted because, while it would otherwise have been safe to assume from the defendant’s behavior that he understood enough to be guilty, Childress’s mental retardation meant that it might not be safe to do so in his case.<sup>51</sup>

### Hypotheticals: Tracking the Facts of the Case

As the courts’ approach to inference suggests, questions from counsel that ask an expert’s opinion of a hypothetical person in the defendant’s position become inadmissible when the expert’s answers lead to a “necessary inference” (Ref. 9, p 134) as to whether the defendant had the required intent.<sup>2</sup> A psychologist’s opinion that someone with a clinical history identical to that of the defendant would be able to appreciate the nature and quality or the wrongfulness of his or her conduct was thus excluded on the basis that it was a “vehicle to circumvent the clear mandate of Rule 704(b)” (Ref. 52, p 1223). Psychological evidence concerning a hypothetical person with the same mental condition as the defendant who had consumed the amount of beer the defendant had consumed on the night in question was nevertheless admissible, provided it was limited to whether the defendant would have had the capacity to form the necessary intent.<sup>53</sup>

### Factual Impossibility

Questions to expert witnesses that are couched in the form “Is it possible that, given his psychiatric condition, the defendant could have formed the necessary intent?” pose a particular problem for the courts. An answer in the negative addresses the ultimate issue. An answer in the affirmative, however, merely leaves open the question of whether the necessary intent was present. In deciding whether such a question is admissible, some courts have looked to the answer that the expert gave. Thus in *Esch*,<sup>54</sup> when a psychologist gave evidence to the effect that the defendant’s dependent personality would have prevented her from forming the intent necessary for conviction, the 10th Circuit Court of Appeals declared the testimony inadmissible.

Other courts have declared the question inadmissible without reference to the expert’s answer. In *Hillsberg*, a question to a psychiatrist of whether the defendant had the capacity to form the necessary intent was excluded because a reply in the negative

would be, “dispositive of the issue of intent” (Ref. 34, p 332). The concurrence in *West*, which referred to the “pernicious effects” of Rule 704(b), suggested that the psychiatrist could have been asked “Does a finding that a person suffers from schizoaffective disorder, in and of itself, indicate that a person is unable to appreciate the wrongfulness of his acts?” (Ref. 35, p 1251). This question, the concurrence argued, avoided what the defendant actually knew or intended. It seems that it would still have been excluded by the court in *Hillsberg*, however, because a reply in the affirmative would have addressed the ultimate issue.

### Probability Statements

The defendant in *Bennet* was charged with bank and mail fraud in relation to the operation of a Ponzi scheme in which funds obtained from investors as charitable donations were used for other purposes. The appeals court excluded psychiatric and other expert testimony to the effect that the defendant’s mental state “precluded” his forming the intent to defraud, along with similar evidence to the effect that his mental state made it “unlikely” or “highly unlikely” that he could do so.<sup>55</sup>

When a defendant sought to show that he was the victim of police entrapment, psychiatric evidence was permitted to address the question of whether the defendant’s mental condition rendered him more susceptible than the usual person to persuasion, but not whether he was in fact induced by the police to act as he did.<sup>56</sup> Psychiatric testimony has also been allowed on the question of whether someone’s mental disease or defect would “affect” a person’s ability to appreciate his actions because it left to the jury the question of whether this was sufficient to render him unable to appreciate them.<sup>42</sup>

It seems to follow that statements referring to no more than a reasonable probability, such as a particular characteristic’s being “consistent with” a particular finding on the ultimate issue, are frequently allowed also. Thus the evidence provided by a narcotics detective that the quantity and nature of cocaine found in the defendant’s possession was “consistent with distribution” was admissible (Ref. 4, p 216), as was the evidence of a psychiatrist that the behavior of the defendant who had schizophrenia was “consistent with” his knowing what he did was wrong.<sup>57</sup>

### Sources of Information

Although Rule 704(b) applies to any expert evidence that goes to the mental state of the defendant, some courts have distinguished between the origins of evidence in ruling on its admissibility. In *Lipscomb*, the 7th Circuit Court of Appeals held that the evidence of police officers that cocaine found in the defendant’s possession was for distribution could be admitted provided that the jury was instructed, or it was made clear in the course of the examination of the officers, that the evidence was, “based on the expert’s knowledge of common criminal practices, and not on some special knowledge of the defendant’s mental processes” (Ref. 58, p 1241).

### Conclusion

Outside the courtroom, psychiatrists are often encouraged to address the ultimate issues, and, in certain circumstances, they are authorized to do so by statute. Thus, Title 18 of the United States Code reads, at section 4247, “a psychiatric. . .report ordered [by the court]. . .shall include. . .the examiner’s opinions as to. . .whether the [defendant] was insane at the time of the offense charged” (Ref. 59). Many states have civil commitment statutes that provide for a decision by professionals pending court review—this despite the House Report’s injunction to the contrary (Ref. 11, p 16). The decision on the ultimate issue in these cases has effectively been “delegated” to professionals, at least in the short term.

The appellate courts have themselves pointed to inconsistencies in the application of Rule 704(b).<sup>48,60</sup> Some have gone so far as to question the wisdom of the rule, arguing that its spirit runs contrary to the principle whereby helpfulness is the first criterion determining the admissibility of expert evidence. When a defendant pleads insanity in the federal system, the 7th Circuit stated the evidence that most helps a jury is the expert’s opinion on whether the defendant knew what he was doing and whether he knew it was wrong (Ref. 35, p 1249).

The development of the rule, however, reflects a longstanding and widespread concern that psychiatric testimony is more likely than other evidence to intrude into the jury’s realm.<sup>61</sup> This concern, in turn, seems to reflect two related and recurring arguments: that there are some choices that are not merely the jury’s to make but that are the jury’s to make using only the resources that a lay person brings to the

courtroom<sup>62</sup> and that a dispute between experts generates a legal spectacle that is unhelpful and unbecoming. The second of these arguments seems to obscure an earlier and more forceful point that, even with the benefit of listening to cross examination, juries often do not have the resources to choose properly between divergent expert opinions.

The cases reviewed here do not suggest that appellate decisions regarding the admissibility of psychiatric evidence in federal trials are becoming more consistent. To the extent that the boundaries of what will be admitted remain unclear it remains for experts, attorneys, and individual courts to decide how closely and in what way expert evidence will be allowed to approach the ultimate issue. Psychiatrists' decisions will be guided, in part, by their own moral and ethics-based positions on what is, and is not, within their field of expertise.

The most frequent advice to psychiatrists has been that a decision on the ultimate issue usually requires the application of moral values and should therefore be left to the jury.<sup>63-67</sup> Some legal authors have distinguished that part of Rule 704(b) that applies to "an element of the crime charged" from the part that applies to criminal defenses, arguing that testimony should be permitted to address the former but not the latter.<sup>68</sup> The American Psychiatric Association has not issued guidelines, but has suggested that the prudent course is for psychiatrists to give evidence using medical, rather than legal, language.<sup>69</sup> Missing from the debate is any defense, on theoretical and practical grounds, of psychiatrists and other expert witnesses giving evidence on the ultimate issue.

What form might such an argument take? First, it might seek to defend psychiatric evidence going to the ultimate issue only when additional steps have been taken to test the credibility of expert witnesses. One such step may be the appointment of a judge's expert to assist the court. Second, it might point to the fact that mental state defenses are so rarely used that many courts and attorneys have little experience of them. A supporter of Rule 704(b) might then respond that this latter consideration, which limits the capacity of the courts to control expert evidence and of cross examination to test that evidence, strengthens the case for statutory regulation. Appellate cases demonstrate that ultimate issue evidence, direct and indirect, is often heard. This may suggest that some courts have found it more useful than theorists have admitted.

Those called as expert witnesses may note also that much of the harm that courts identify as stemming from evidence going to the ultimate issue could be avoided if evidence were given with greater transparency. In noting that lay witnesses had offered their opinions as to the "soundness" of a slave, an ultimate issue for the court, the South Carolina judge in *Seibles* held that:

... [I]f they had stopped there such testimony ought to have been rejected; but [the witnesses] go on to fortify their opinions with facts showing some foundation for them, and hence they were admissible and were to be compared with the facts by the jury [Ref. 70, p 57].

Twentieth century judgments on the admissibility of medical and other expert evidence have similarly emphasized the need for the jury to see how the expert arrived at his or her opinion.<sup>62,71</sup> Psychiatric and psychological commentators have adopted the same position.<sup>69,72</sup>

Some 19th century judgments took a different view, that admissibility was a prior matter not reducible to whether the evidence would be transparent.<sup>21</sup> But the court in *Seibles* had an 18th century precedent. When Lord Ferrers pled insanity, he represented himself at his trial in the House of Lords. He asked a Dr. Monroe whether the doctor considered him insane. The Crown's objection to the question was sustained because it, "ask[ed] the doctor's opinion on the result of the evidence." Ferrers was told that his question would be admissible, however, if the facts on which the doctor's opinion was based were to be explained (Ref. 73, p 943). This seems to have done Ferrers little good. Although he successfully elicited the doctor's view that he was insane, the House of Lords preferred their own opinion and convicted him of murder.

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