CHAPTER 1

# Law and the Mental Health Professions

## *An Uneasy Alliance*



### 1.01. The Context for Law and Behavioral Science

In the late 19th century, a well-known lawyer and judge once grouped witnesses into three classes: "simple liars, damned liars, and experts."[1] As this declaration and several similar ones from that era make clear,[2] expert witnesses of all types have long been the objects of scorn in some quarters. But mental health professionals have been particularly popular targets of critics. Although the criticism has diminished somewhat in recent years, society in general, the legal profession, and mental health professionals themselves have long voiced a dim view of what mental health professionals say in court.[3]

The public's antipathy toward clinical opinion appears to stem from the belief that much "expert" testimony is based on "junk science" from professionals who, for a fee, will find evidence of almost anything.[4] Although seldom successful,[5] highly publicized psychological defenses—often associated with flamboyant names like "abuse excuse" or "urban survival syndrome"[6]—have led many in the public to question the objectivity and expertise of the mental health professions.[7] For decades, popular commentators have worried that liberal psychologists and other experts use the legal process to undermine the political judgments of popularly elected legislators.[8] Thus, for instance, dismay about mental health testimony led both houses of the New Mexico legislature to pass legislation in 1995 (ultimately vetoed by the governor) that would have required mental health professionals who testified in criminal cases to "wear a cone-shaped hat that is not less than two feet tall."[9]

Legal professionals have echoed these concerns. The late Judge David Bazelon, who at one time advocated for liberal use of behavioral science in legal decisionmaking, ultimately described himself as a "disappointed lover" chagrined by clinicians' overreaching into moral and political domains.[10] A deputy associate attorney general with the federal government stated that "quite frankly, you'd be better off calling Central Casting to get 'expert psychiatric testimony' in a criminal trial."[11] Legal scholars have called most forms of clinical opinion testimony "story-telling" and "suppositional," because it is untested by any scientific method.[12] Published appellate cases document numerous in-court statements impugning the morals and objectivity of mental health experts.[13] Partly because of the controversy associated with courtroom behavioral expertise, law schools now offer entire courses on use of expert social science evidence.[14]

Concerns expressed by the public and the legal world about psychological expertise have been more than matched by criticisms leveled by the mental health profession itself.[15] A crucial turning point in this conflict was the publication, in the late 1980s and early 1990s, of articles by Jay Ziskin and David Faust in *Science* and other prestigious journals arguing that clinical opinions were neither reliable nor valid enough to be used as evidence in court.[16] Although others had previously made similar arguments,[17] the prestige of the forum in which Ziskin and Faust's views appeared led to a remarkable professional brouhaha. Their articles not only stimulated special symposia at professional meetings, but also provoked replies from both the chief executive officer and the president of the American Psychological Association.[18]

The criticisms of Ziskin, Faust, and others have led innumerable investigators to pursue research over the past two decades that has vastly enhanced the scientific bases of mental health opinions. This book is devoted in large part to describing those advances, which have justifiably muted the harshest critics.[19] But even in our original 1987 edition, which came out when the criticisms of forensic clinicians were the most vehement, we took the position that the various controversies about the use of mental health professionals' opinions in the legal process had been blown out of proportion and reflected a misunderstanding of the purpose of expert evidence and the standard for its admission. As we describe in more detail later in this chapter, in scientific terms the law expects *incremental*—not absolute—validity. The question is whether mental health professionals' opinions will *assist* legal decisionmakers, not whether the opinions meet a particular standard of scientific rigor. At the same time, we believe that professional credentials by themselves are not enough to guarantee that opinions will be sufficiently helpful to warrant their admission into evidence.

The "moderate" view that we express in this chapter and throughout the book may take some of the sting out of arguments advanced both by advocates of outright exclusion and by those who defend professional prerogatives. Nonetheless, it is important to understand the underlying conflicts because they involve fundamental differences of epistemology and worldview; they will not disappear with a good-natured exchange of views. Thus the purposes of this chapter are to analyze the sources of the current ambivalence about the interaction between law and mental health, and to address generally the limits of expertise possessed by mental health professionals. In discussing these questions, we also make some initial inquiry into the problems of who is an expert, and for what purpose—questions that recur throughout this volume.

## 1.02. Some Preliminary Problems in Law and Mental Health

### CASE STUDY 1.1

Below are excerpts of expert testimony from two different proceedings involving Mike Drake, who is charged with embezzlement. The issue addressed in the first proceeding, a criminal trial on the embezzlement charges, is whether Mr. Drake was "insane" at the time of the offense. In this jurisdiction, insanity is defined as a "mental disease or defect that causes a substantial inability to appreciate the wrongfulness of the act or to conform behavior to the requirements of the law."

Q: Now, Doctor, your testimony is that the defendant is suffering from a gambling disorder?

A: Yes.

Q: And this is a mental disease?

A: Yes, it is in the fifth edition of the American Psychiatric Association's *Diagnostic and Statistical Manual,* and I suppose there are 20 or 30 psychologists like myself who specialize in this area and are convinced it's a serious problem.

Q: What led you to give him this diagnosis?

A: This individual admits he is preoccupied with gambling, and can't stop himself from doing it. He feels anxious unless he is gambling or planning a gambling trip. Though he's never been in trouble with the law before, he's now at the point where he's embezzling from his company.

Q: Does this make him incapable of distinguishing right from wrong?

A: Well, here's a man who normally knows the law well, who knows about right and wrong, but a man who is in a desperate strait. He is under a tremendous amount of stress, does not consider right and wrong. Based on my experience with these people, I don't think that becomes part of his thinking process. His process is to survive. He's losing his job, his family, his children, his reputation, everything is going down. So he functions this way, in an irrational way, which leaves his judgment impaired.

Q: And what about his ability to conform his acts to the requirements of the law?

A: He has virtually none. While he probably intends to return the money, he can't help himself from embezzling because of the urge to gamble. Again, based on my experience, people like this are prone to commit crimes to get money. There's also a study of 70 people with this disorder, which shows that one out of five have committed crimes like forgery, theft, or embezzlement. Whereas, as a conservative estimate, only 1 of 200 people in the general population commit such crimes, meaning pathological gamblers are 40 times more likely to commit these crimes than the average person. This man needs treatment, not punishment.

Q: So would you say he's insane?

A: I would, yes.

Mr. Drake is acquitted by reason of insanity and is committed to an institution for observation. A month later, the court holds a commitment hearing to determine whether he should remain in the hospital. Continued hospitalization is permitted only if Mr. Drake is shown to be "dangerous to self or others," defined as "a likelihood that, as a result of mental disorder, the individual will cause substantial harm to himself or another." The lone expert witness at the 15-minute hearing, a member of the hospital staff, testifies as follows:

Q: What is Mr. Drake's condition at this time?

A: He's unresponsive to treatment.

Q: Does that make him dangerous to others or self?

A: He is still dangerous [here the doctor describes the same study described at trial]. There is no guarantee he won't steal again to feed his habit. Also, studies show that 15–20% of persons who seek treatment for gambling disorder have attempted suicide.

**Questions:** Applying the test of *Frye v. United States* [see § 1.04(c) for a discussion of this case], at least one court has held that clinical testimony attempting to link gambling disorder to insanity is inadmissible.[20] On the facts of this case, do you agree? Assuming that such testimony is admissible as a general matter, should any of the witnesses' statements be legally or ethically prohibited? Assuming that the witnesses accurately described the studies they cited, should the results be admissible? What else would you like to know about the studies? Does it matter whether testimony about clinical findings or research is presented in a criminal trial by the defendant as opposed to the state at a commitment proceeding? How would your answers to these questions change if a jurisdiction followed *Daubert v. Merrell Dow Pharmaceuticals* [see § 1.04(c) for a description of this case]?

As the introduction to this chapter suggests, some clashes between law and the mental health professions reflect fundamental conceptual differences, which the next section discusses. Here we tackle some of the more practical reasons for tension between lawyers and mental health professionals.

### *(a) Bridging Gaps in Training*

Discussions of what is "wrong" in the relationship between the legal and the mental health professions have tended to focus on relatively superficial problems of communication—typically suggesting that the core problem is that lawyers and mental health professionals do not "speak the same language." Hence (this view suggests), lawyers may be awed when a mental health professional appears to be able to sweep away the complexities of the human mind with profundities about "diffuse ego boundaries," and mental health professionals may complain that the sorts of questions lawyers ask force them to compartmentalize their observations in foreign and untenable ways. If the tension between law and mental health is the result of semantic difficulties, it should be erasable by facilitating communication between the two professional groups—perhaps through some combination of cross-disciplinary training and transformation of legal tests into language and concepts commonly used by mental health professionals.

Such a view strikes us as naive, at least for the near future.[21] We do not mean to minimize the need for training, of course. Indeed, this book is oriented toward facilitation of an understanding of the kinds of questions that the law poses for mental health professionals. We, like others, are troubled by "expert" mental health professionals who testify on a particular legal issue without any understanding of the nature of the issue they are purporting to address. We are also troubled when legal authorities claim ignorance of "medical" problems in the law and effectively avoid hard decisions by demanding conclusory opinions from mental health professionals. Both examples indicate inappropriate avoidance of "confusion by the facts." Whether legally

or behaviorally trained, professionals whose practice takes them into interdisciplinary matters have an ethical obligation to learn enough to be able to function competently in such a context.

Such training will not eliminate interdisciplinary problems, however. Simply inculcating a common understanding of key terms will not eradicate the philosophical problems inherent in interdisciplinary endeavors. A well-known example of this fact was the failure of an experiment by the District of Columbia Circuit Court of Appeals in the 1950s with a new formulation of the insanity defense. In *Durham v. United States*,[22] that court, quoting well-known forensic psychiatrists, concluded that the 19th-century *M'Naghten* test[23] was based on an "entirely obsolete and misleading conception" of insanity because it focused on a defendant's ability to know right from wrong. The sole emphasis on knowing, wrote Judge Bazelon for the court, "does not take sufficient account of psychic realities and scientific knowledge." Rather than constrain mental health professionals to "one symptom," Bazelon reasoned, the law should ask psychiatrists to inform the court of the character of the defendant's mental disorder, so that jurors could determine whether the defendant's alleged act was the "product of mental disease or defect." Essentially, under this test the question was simply whether the legally relevant behavior was caused by the defendant's mental illness, a concept assumed to be well within the repertoire of mental health professionals [see § 8.02(b) for further discussion of the *M'Naghten* and *Durham* tests].

The *Durham* test ultimately failed, however,[24] because as we discuss in § 1.03(a), mental health professionals have no conceptual basis for determining which behaviors are produced by "free choice" and which behaviors are the products of mental illness. Simply medicalizing the terms of the insanity test does not eliminate the much more fundamental philosophical differences between how the law and the behavioral sciences explain human action. In Case Study 1.1, for example, the question of whether Mr. Drake's embezzlement was the "product" of a gambling disorder is not a *medical* question at all; knowing that Mr. Drake's behavior fits the gambling disorder diagnoses neither tells us whether or how the disorder "produced" embezzlement nor answers the ultimate legal question of whether he should be held responsible for it. In short, the differences between the questions the law asks jurors to decide and the questions behavioral sciences answer will not be eliminated—although they may be clarified—by acquiring a working knowledge of key concepts in the law (for mental health professionals) or the behavioral sciences (for lawyers).

### *(b) Bridging Attitudinal Differences*

If hoping that training programs will eliminate problems in the interaction between law and mental health seems naïve, viewing these conflicts as merely reflecting attitudinal differences is simplistic. Those who emphasize the significance of these differences tend to see all lawyers (for example) as overly vigorous advocates for the civil liberties for people with mental illness irrespective of their need for treatment. Conversely, all mental health professionals are deemed to be paternalistic problem-fixers, undeterred by concerns for individual liberty, who advocate hospitalization and treatment whether the context is civil commitment, criminal trial, or sentencing. Such perceptions lead to the conclusion that reaching some middle ground of attitudes toward people with mental disabilities would eliminate conflicts between the law and the mental health professions; what is needed, this position remonstrates, is simply some consciousness raising.

Undoubtedly, there are substantial differences in the socialization of the professions. However, we believe that differences between libertarian and paternalist attitudes are overemphasized as a source of disciplinary conflict. First, as proponents of "therapeutic jurisprudence" note, rules based on a preference for autonomy and rules meant to promote a person's mental health may lead to the same ends.[25] Second, attitudes differ as much within the professions as between them.[26] For example, the American Psychiatric Association has commonly advocated for less deference to patients' wishes and less cumbersome legal procedures in decisionmaking about treatment than have the American Psychological Association and the American Orthopsychiatric Association.[27] And many lawyers tend to be paternalists themselves when they actually encounter and work with people who have serious mental illnesses. This remains as true today as it did decades ago, when Poythress found he could not get lawyers to take a more adversarial stance

when representing respondents in civil commitment actions.[28] Although the lawyers Poythress observed could recognize the inadequacies of testimony by mental health professionals (e.g., problems of reliability and validity of diagnosis), they would not cross-examine testifying doctors vigorously, because they thought their clients needed to be hospitalized. In short, particular attitudes are not the province of any one profession. Rather, they are again the product of fundamental philosophical positions that may not be reconcilable.

### *(c) The State of the Art*

A more significant source of trouble between law and the mental health professions, although still one that is practical rather than philosophical, is the paucity of scientific knowledge concerning human behavior in many contexts. Even if it were easy to translate knowledge about the behavioral sciences into legal concepts, mental health professionals often have little legally relevant knowledge to apply. Moreover, when they do have such knowledge, the conclusions that can be drawn from it may not be sufficiently reliable to warrant their use in legal decisionmaking.

The state-of-the-art problems may be divided into three types. First, legal determinations usually concern individuals, and what mental health professionals can say about individuals may not be precise or objective enough to warrant admitting their opinions—or, if such opinions are admitted, to warrant placing much weight on them. For example, mental health professionals who study violent behavior can make insightful, scientifically grounded comments about social, psychological, and biological processes that precipitate aggression in general. Yet when they discuss why a *particular* individual acted aggressively at a particular time, they often invoke the same types of "folk psychology" explanations[29] that laypeople do.[30] In part, this is because even when mental health professionals can adduce statistically demonstrated factors that help explain individual behavior, the explanatory power of those factors is often only partial[31] and may have limited generalizability to specific situations outside the experimental setting.[32] The ambiguity often found in legal constructs can exacerbate this difficulty. While the accuracy of clinical opinions on some issues such as risk or competency can sometimes be evaluated through studies of their reliability[33] and validity[34] (many of which are described in this book), in other contexts, such as determinations of insanity, the legal norms are so variable that a meaningful measurement of accuracy is virtually impossible.[35]

Irrespective of general uncertainties in the behavioral sciences, a second problem stems from lack of knowledge that directly addresses questions asked by the law. For example, mental health professionals know a good deal about how parents' divorces affect their children. But as Chapter 16 explains, little of that research is directly applicable to questions pertaining to custody disputes, either in individual cases or as a matter of policy. Similarly, although many studies describe the types of cognitive impairments associated with schizophrenia and other diagnoses, no instrument measures awareness of wrongfulness during antisocial acts committed by mentally ill individuals, the key issue in insanity cases.[36] Thus, although the state of knowledge about general effects of divorce and the cognitive impact of schizophrenia may be rather advanced, the literature may tell mental health professionals and courts very little about how to resolve legally relevant questions. To return to Case Study 1.1, the considerable research on the effects of stress might seem relevant to explaining Mr. Drake's behavior, but virtually none of that research addresses how stress affects people's decisions about gambling or committing crimes.

A third state-of-the-art problem arises when questions asked by the law are inherently unanswerable. Sometimes the differences between possible dispositions are so subtle that it is extremely unlikely that behavioral science would ever advance to a point where their effects would be distinguishable. To give an extreme example, one of us was once asked to evaluate a child in a divorce dispute to assess the relative impact of spending one week a year versus two weeks a year with his mother. We know of no scientific findings that even begin to address that question.

## 1.03. Paradigm Conflicts

While it may be difficult to reconcile variations in attitude, flaws in training, or tensions created by state-of-the-art problems, the most likely cause of

rifts between the law and the behavioral sciences are differences in paradigm. This section addresses the following questions: How might interactions between lawyers and mental health professionals be affected by differing ways of conceptualizing problems? Do the differences in the philosophies of law and science imply inherent conflict?

### *(a) Individual Choice versus Biology and Social Influences*

Perhaps the most obvious philosophical difference between the law and the behavioral sciences is that the former is predicated on the assumption that people act for reasons, can control themselves, and make choices for which they may deserve praise or punishment. By contrast, the behavioral sciences generally seek to find causes or influences on people's behavior that people themselves are unaware of, do not choose, or do not control. Indeed, the point of much behavioral science often is to show that the factors that really determine or predict persons' behavior are something other than those persons' conscious, expressed reasons.

As an illustration of the difference between the law's traditional explanatory motifs and those sought by mental health professionals and behavioral scientists, consider the hypothetical case of John Doe, an individual who has schizophrenia and who smokes a pack of cigarettes a day. Video footage shows Mr. Doe entering a convenience store, where he waited near the checkout counter until the clerk looked away; then he quickly grabbed a pack of cigarettes from behind the counter, stuffed it under his coat, and hastened out the door. Security personnel gave chase and caught Mr. Doe as he was opening the pack of cigarettes in the store's parking lot. Police arrested Mr. Doe and charged him with misdemeanor theft.

The law assumes that most of us are responsible for our conduct because, as Stephen Morse puts it, we "are the sort of creatures that can act for and respond to reasons."[37] In Mr. Doe's case, the law might acknowledge that Mr. Doe had a serious mental illness (schizophrenia). Yet his actions—waiting until the clerk's attention was directed elsewhere before taking the cigarettes, hiding the cigarettes under his coat, and hurrying out the door—showed that he knew he was doing something illegal. No one forced Mr. Doe to steal the cigarettes by threatening him. Mr. Doe just wanted some smokes but had no money, so he stole the cigarettes rather than pay for them. He chose to break the law but got caught. Now, the law states, he deserves punishment for his wrongdoing. As Morse states, "[t]he law properly treats persons generally as intentional creatures and not as mechanical forces of nature" unless "an excusing condition, an affirmative defense, such as legal insanity (essentially a rationality defect) or duress (a compelling 'hard choice' situation, such as a 'do-it-or-else' threat at gunpoint) was present when the agent committed the offense."[38]

This straightforward account of Mr. Doe's criminal responsibility is insufficiently nuanced for many mental health professionals. While they understand the meanings of guilt and innocence and the role of punishment in a criminal justice system, to physicians, psychologists, and other professionals who use or create the findings of behavioral scientists, the previous paragraph's discussion of Mr. Doe's conduct lacks real explanatory value. Most people don't steal cigarettes, behavioral scientists would note. The important questions are these: *Why* did Mr. Doe steal them, and why did he do it *when* he did it?

In answering these questions, a behavioral scientist, especially one with a neurobiological background, might point out, first, that sufferers of schizophrenia have a brain disease; specifically, they have abnormalities in brain structure that lead (among many things) to reduced control over the release of dopamine and glutamate, two of the chemicals that brain cells use to communicate with each other.[39] Second, for persons with schizophrenia who have no prior drug exposure, these abnormalities result in neural and motivational changes similar to those seen in persons who have long-term substance use problems.[40] Third, most individuals with chronic schizophrenia smoke, and perhaps for good reasons: Nicotine interacts with many of the disturbed neuronal pathways affected by schizophrenia and mitigates many of the brain-based impairments that characterize schizophrenia.[41] Smokers with schizophrenia, in other words, are medicating themselves to get their brains to work better.

Fourth, recent discoveries show that repeated exposure to addictive substances (including nicotine) causes a host of epigenetic changes that perturb levels of key intracellular protein, modify neuronal signaling, and alter information processing in those brain circuits that control responses to stresses, rewards, and punishments.[42] Thus we can posit a clear set of biological links from the inborn

brain pathology of schizophrenia to nicotine addiction to Mr. Doe's failure to obey the law. Mr. Doe's nicotine craving and intense pursuit of cigarettes reflects disease- and addiction-altered dopamine functioning in those parts of his brain circuitry that are required for self-restraint. His previous, chronic nicotine exposure has left him with abnormally enhanced motivation to procure cigarettes; he, like other drug-addicted individuals, can be *expected* to engage in illegal behavior to get drugs, even in the face of known adverse consequences.[43]

We also know (a behavioral scientist might continue) that the use of addictive substances is clearly affected by factors such as low socioeconomic status and poor parental support, which are sources of stress that increase vulnerability to drug use. Finally, the widespread availability of addictive substances and the criminal penalties associated with their procurement is determined by social factors far larger than Mr. Doe's decisionmaking. The legislators who enact laws and set punishments (the behavioral scientist might suggest) are not always well informed about or cognizant of the biological and social forces that *really* explain use of substances like nicotine, alcohol, and psychoactive drugs and the behavior associated with such use, including crime.

This neurobehavioral explanation for Mr. Doe's conduct focuses on questions quite different from those that customarily concern the criminal justice system. Notice, moreover, how the neurologically based explanation of Mr. Doe's actions contrasts with what the law seeks to establish. When neuroscientists (and scientifically knowledgeable mental health professionals) adduce biological *explanations* for mental problems, they are not simply trying to say why mental disorders, including addictions, are often modifiable by psychotropic medications. They are also recharacterizing *what* is happening when someone is mentally ill and behaves in ways linked to the illness. More specifically, when neuroscientists talk about addictions, schizophrenia, and many other severe psychiatric disorders, they often focus largely on problems with brain processes and information processing, not on the beliefs and desires that occupy legal decisionmakers. In doing so, they take human action outside the explanatory psychological framework that the law uses to assign responsibility and blame.

One response to this approach to assessing responsibility, common among legal thinkers, is to point out that most of the time we can find no direct link between an organic condition and someone's behavior. We know, for example, that many severe mental disorders have a genetic basis. Yet the relationship between genes and disorder is generally one in which genetic factors account for only a portion of the variance. Genetic factors merely *predispose* an individual to psychopathology; the psychopathology is activated only after the individual has experienced something in addition—for example, events found in a pathogenic, stressful environment.[44] Moreover, although our knowledge of gene–environment interactions has grown enormously in the last 40 years,[45] we still cannot identify the inherited anatomical or biochemical abnormalities associated with most instances of individual criminal acts.

This counterargument has some merit today.[46] But as organic and other scientific explanations for behavior have become more detailed and encompassing, this response has become weaker.[47] A more important counterargument against replacing individual choice with explanations that invoke biosocial causes is that *all* behavior occurs in social contexts and is governed by people's nervous systems. A biosocial explanation for behavior provides no philosophical basis for distinguishing the lawfulness of behavior attributable to a defective central nervous system and behavior emanating from someone with a "normal" nervous system. Both types of behavior are shaped by genetic makeup in interaction with life experiences. To salvage this situation, some thinkers have argued that humans are "caused causers" who can be held accountable for actions that are the result of their reasons and beliefs (at least rational ones).[48] From the perspective of neurobehavioral scientists, however, the assumption that reasons and beliefs cause behavior, and the assumption that reasons and beliefs are in any meaningful sense independent of prior, uncontrollable causes, are both dubious.[49] Most of the many clinicians who are more likely to focus on an individual's social and interpersonal interactions rather than organic explanations agree with this position.[50]

In short, if clinicians are theoretically consistent, the paradigm within which psychiatrists and many other mental health professionals now work would appear to be in inherent conflict with legal worldviews. Notwithstanding attempts at reconciliation by some commentators,[51] the legal and mental health disciplines use very different philosophical perspectives and approaches when they explain

behavior. These differences are of substantial significance as matters of policy in attempting to apply the behavioral sciences or clinical opinions to legal problems.

However, the individual expert need not be paralyzed by this dilemma. Indeed, there is at least a partial solution: Mental health professionals should be neither permitted nor cajoled to give opinions on the ultimate legal issue (i.e., the conclusion that the factfinder—the judge or the jury—must ultimately draw). Although practical problems result from this position [see § 18.07], we feel that clinicians should ideally resist requests or the temptation to offer conclusions about legal notions such as "voluntariness" or "responsibility," because these are legal concepts. They are not matters of clinical or scientific expertise, even when mental health professionals can testify about factors that might influence the factfinder's conclusions about voluntariness and responsibility. Rather, mental health experts should present factual findings and their scientific context, so that the factfinder can fit them into the legal framework and make whatever moral–legal judgments follow.

To return to the problem of assessing the "voluntariness" of Mr. Drake's embezzlement [see Case Study 1.1], a mental health expert might assist the factfinder by describing the types of choices Mr. Drake confronted, given his particular characteristics and his specific situation. The mental health expert might also explain that DSM-5 has classified gambling disorder among the "substance-related and addictive disorders" because the "compulsive" behavior involved in problem gambling is very similar to addictive use of drugs; moreover, gambling and drug addiction involve the same brain dysfunction and genetic liabilities.[52] However, whether his behavior was "involuntary"—whether the choice was so hard as to represent an "overbearing" context—should be left to the factfinder. This "ultimate-issue issue" is discussed at greater length below [§ 1.04] and in Chapter 18.

### *(b) The Process of Factfinding*

Still another potential source of tension between the law and the mental health professions stems from how each discipline seeks the truth. Mental health professionals often express discomfort with the adversary process employed in Anglo-American law. Part of this discomfort probably stems from the different socialization that students of the law and the behavioral sciences receive. Behavioral scientists and mental health professionals often disagree amongst themselves, but they generally perceive their role as collaborative and accept advancing knowledge and helping people as common goals. In their direct interactions with each other, mental health professionals are best served by approaches that acknowledge others' points of view, that seek positive interpersonal relations, and that reduce or at least deemphasize conflict. By contrast, the law often approaches disputes by *sharpening* conflict, with the aim of ensuring that issues in the disputes are carefully posed and that they are resolved fairly in accordance with societal values. In view of these differing functions, it's no surprise that mental health and legal professionals differ in the comfort they experience when dealing with conflict generally and adversariness in particular.

Indeed, to mental health professionals, legal rules governing the admission and consideration of evidence seem at odds with the collegial approach of clinical practice and the collaborative outlook that characterizes scientific inquiry. The resulting culture clash creates ambiguity and conflict about the standards to be applied, leading naturally to the following question: Does forensic work inevitably result in some compromise of mental health professionals' principles, or at least in their mode of operation?[53]

Mental health professionals who want to contribute to legal proceedings need to accept and get comfortable with how lawyers and courts handle disputes. This requires understanding that the purposes and uses of forensic evaluations differ qualitatively from the purposes and uses of evaluations developed for treatment purposes. Although mental health professionals may feel that the adversary system distorts their conclusions by stimulating the presentation of only the evidence that is favorable to one side, they should understand that the legal process is designed not just to uncover *truth,* but also to render *justice.* Due process demands that each side have the opportunity to put forward whatever evidence best makes its case. This is not to say that the law should or does ignore reality. But in legal proceedings, finding the truth is subordinate to the pursuit of justice.[54] Hence, as long as they maintain intellectual integrity, avoid changing their

opinion simply to suit the party that retains them, and acknowledge the limits of their observations and expertise, mental health professionals should be undisturbed if they are "used" by one side in the dispute.[55]

A similar source of tension comes when experts find that their observations are "pigeonholed" into categories that strip the clinical data of their richness. For example, for reasons explored earlier, courts are often focused on the desires and beliefs that seem to motivate conduct, not the kinds of detailed personal knowledge and social and cultural contexts that clinicians use to understand people.[56] Similarly, clinicians may feel constrained by certain legal rulings, such as the inability to talk about prior criminal offenses or what the law regards as inadmissible "hearsay" that seems crucial to a well-based opinion.

Concern about these practices again arises from a misunderstanding of purpose. The law is fundamentally conservative. What Justice Oliver Wendell Holmes stated in the late 19th century is still true: "historic continuity with the past is not a duty, it is only a necessity."[57] Following precedent and rules of law is how judges and lawyers convey their respect for the social institutions that courts protect, particularly the even-handed and predictable administration of justice. For instance, the implementation of criminal laws governing homicide often takes a single-minded focus on planning, because, for reasons developed over scores of years, the law has pinpointed premeditation as the primary criterion for establishing murder. Similarly, the evidentiary rule barring evidence of past crimes rests on the belief, reinforced through centuries of trial practice, that otherwise the factfinder may convict a person for what he or she did in the past rather than focus on whether facts support conviction on the current charge. Thus, although at times examination of the evidence within a narrow historical framework may seem to pull attention away from the best interests of the parties, such narrowness of concern ensures that specific points of dispute will be resolved justly.

Occasionally, however, jurists become so focused on normative analysis and historic legal values that they carry precedent beyond its logical bounds. Sometimes, in their zeal to protect legal values, judges seem to derive an "is" from an "ought"—that is, to assume that people in fact operate in the way that they think people do or should. Such blinders to the real world promote unfair decisionmaking. For example, the United States Supreme Court has justified placing limits on minors' autonomy and privacy through empirically unsupportable assumptions about adolescents' competence and family life (e.g., that youth under age 18 years are not competent to make treatment decisions).[58] Basing the deprivation of liberty on invalid assumptions is unjust and intellectually dishonest. If judges are in fact basing their decisions on particular values, they should state those values clearly. Thus, to return to the example, if the Supreme Court wishes to support a particular view of family autonomy—that parents should control the lives of their children until the age of 18 years—it should say that this is a matter of policy preference. On the other hand, if empirical findings underlie a particular legal analysis, whether of case facts or of legislative facts, the parties should be able to expect that a persuasive display of evidence on point will turn the case.[59]

### (c) The Nature of a Fact

Even if we could remove the clashes over explanatory relationships and disagreements about how to discover such relationships, fundamental and probably more problematic epistemological differences between law and the behavioral sciences would remain. Specifically, the two disciplines do not conceptualize a "fact" in the same way. This definitional issue is linked closely to the process issue just discussed, in that whether the law and the behavioral sciences recognize particular information as a relevant "fact" depends on whether the respective truthfinding process has been followed. For clarity of analysis, we separate the process of finding facts from the question of whether a fact exists, and we turn now to the latter issue.

#### (1) From Probability to Certainty

Perhaps the most basic problem rests in differing conceptions about the role of probability assessments. Although the sciences are inherently probabilistic in their understanding of truth, the law demands at least the appearance of certainty, perhaps because of the magnitude and irrevocability of decisions that must be reached in law. As Haney has noted, "there is a peculiar transformation that probabilistic statements undergo in the law. The legal

concept of 'burden of proof,' for example, is explicitly probabilistic in nature. But once the burden has been met, the decision becomes absolute—a defendant is either completely guilty or not."[60]

To give an example of this difference in conceptualization of facts, suppose that a construction company is charged with negligence after a bridge that it built collapses. Specifically, the company is alleged to have used steel rods that were too small for the construction needs. A civil engineer is asked, as an expert, to measure the rods and to determine the width that the rods should have been in order to provide a safe structure. The engineer might take several measurements of the rods and conclude that the probability is greater than .95 that the true width of the rods was between 1.35 meters and 1.37 meters, when measured at 24°C. The engineer then might consider the probability of contraction to a given length at the lowest temperature observed in the bridge's locality, and consider the further probability of an even lower temperatures occurring in the future. Yet from a legal perspective, the "fact" that the judge or jury must determine is either that the rods were too small, or that they were not. Although the legal standard of proof applied to this judgment—preponderance of the evidence—acknowledges the possibility of error, the judge or jury makes a conclusion of fact in an all-or-none fashion.

This difference in conceptualizing facts may seem rather trivial at first glance, but its import is actually quite substantial. Because of the law's preference for certainty, experts may feel tempted to reach beyond legitimate interpretations of their data both to appear "expert" and to provide usable opinions. Similarly, legal decisionmakers may disregard testimony properly given in terms of probabilities as "speculative," and may attend instead to experts who express categorical opinions about what did or will happen. The result is a less properly informed court. The risk of distorting the factfinding process is particularly great in the behavioral sciences, given that single variables rarely account for more than 25% of the variance in a particular phenomenon, and that the reliability and validity of observations by mental health professionals are far from perfect.

Part of the problem is simply intellectual dishonesty, however well intended it may be. In the desire to be helpful, experts may permit themselves to be seduced into giving opinions that are more certain than the state of knowledge warrants. Yet doing so is contrary to the ethical guidelines of forensic psychologists and psychiatrists, which rightly direct practitioners to describe the uncertainty in their conclusions.[61] These admonitions should be followed even though such honesty may result in the courts' reducing the weight accorded the testimony.[62]

The problem is not simply one of professional ethics, however, or even of overzealousness by attorneys in their attempt to elicit strongly favorable opinions from experts. The style of clinical decisionmaking itself (as opposed to that of scientific research) often may not be conducive to a nuanced truthfinding process. Although researchers customarily report their findings in terms of probability statements, practitioners often must make yes-or-no judgments. To develop and implement treatment plans, for example, clinicians must decide what they think the problem is and how best to treat it, despite the scientific limitations of their diagnostic and therapeutic powers. If this style of thinking and decisionmaking is carried into the reporting of forensic evaluations, the legal factfinder may be misled as to the certainty of the conclusions.

Unfortunately, this style of presentation—especially when it is "idiographic" in nature (i.e., case-centered rather than based on group data)—is often statutorily required[63] and is preferred by the courts as well as lawyers. For instance, testimony like the statements in Case Study 1.1 that Mr. Drake was irrational and anxious will virtually always be accepted by the courts. But testimony in the form of probabilities, such as the statements in that case about the percentage of gamblers who commit forgery and other crimes, may be given less credence because they are expressed in relative terms. This reluctance toward accepting probabilistic information is especially serious if the topic is one on which academic psychologists are more likely to be expert, such as the reliability of eyewitness testimony.[64] In any case, the general point is that even if it heightens the discomfort of both clinicians and courts, clinicians involved in the legal process should aim to think like scientists and give an accurate picture of probabilistic findings.

This general admonition is appropriate even in jurisdictions that attempt to transform probabilistic judgments into certain facts by applying the standard of "reasonable medical (or psychological or scientific) certainty" when deciding the admissibility

of expert testimony. Both courts and professionals are likely to have idiosyncratic subjective judgments of "reasonable certainty";[65] moreover, even "uncertain" opinions may still be relevant and of assistance to the trier of fact, provided that the conclusions have some probative value and are not prejudicial. Most important, the standard of reasonable certainty may itself result in prejudicial opinions, because the "certainty" standard masks the fact that the underlying judgments are merely probabilistic. Experts should leave to the judge the question of whether the opinions are so uncertain as to be unhelpful.

### *(2) From Group to Individual*

As already noted, the scientific database for the behavioral sciences on which all researchers and many clinicians rely develops principles of behavior by comparing *groups* that differ on a particular dimension. Given that in psychology a particular variable will almost never perfectly account for the variance in another variable, experts must decide how well group-based psychological findings apply to specific individuals—a scenario that has been called the "G2i" (general-to-individual) issue.[66] Although this usually does not cause problems for the experts themselves, it is a major conceptual obstacle for legal factfinders and may result in rejection of the experts' opinions.

Some examples based on actual cases illustrate the significance of the philosophical dilemmas that are presented when nomothetic principles[67] are applied to the resolution of individual cases.

**Case 1.**[68] The defendant's 14-year-old daughter accused him of raping her. Two months later (and on two subsequent occasions), she wrote statements recanting her accusation; she said that she had lied so she could get "out on her own." However, at trial, she returned to her original story. Experts testified that such inconsistency is common among victims of incest.

**Case 2.**[69] The defendant was charged with third-degree murder of his three-month-old son. An expert on child abuse testified that the pattern of injuries was consistent with "battered-child syndrome." He testified further that abusing parents tend to have been abused as children themselves, and that they are prone to a number of negative personality characteristics (e.g., short temper and social isolation). The state then called two witnesses from the defendant's past (his caseworker as a youth; an employee of a therapeutic school he had attended). The caseworker testified that the defendant had been abused; both testified that the defendant had many of the personality traits identified by the first expert. Other witnesses provided additional testimony suggesting that the defendant possessed characteristics that the expert had said were common to battering parents.

**Case 3.**[70] The defendant was stopped by Drug Enforcement Administration (DEA) agents after she disembarked from an airplane at the Detroit Metropolitan Airport. The DEA agent's suspicions were aroused because the defendant's behavior fit a "drug courier profile": (1) The plane on which she arrived had originated in a "source city" (Los Angeles, thought to be the origin of much of the heroin brought to Detroit); (2) she was the last person to leave the plane; (3) she appeared to be nervous and watchful; (4) she did not claim any luggage; and (5) she changed airlines for her flight from Detroit. On questioning, the defendant appeared nervous, and the agents discovered that she had purchased her ticket under an assumed name. A search revealed heroin hidden in her undergarments. The defendant contested the search on the ground that the agents had no reasonable basis for suspecting that she was involved in criminal activity and for stopping her for an investigation. Testimony at trial indicated that during the first 18 months of the surveillance based on behavioral profiles, agents had searched 141 persons in 96 encounters and had found illicit substances in 77 instances.

**Case 4.**[71] After serving his sentence for rape, an offender is committed at a civil hearing under the state's sexual predator statute because he is judged likely to engage in future acts of sexual violence, based in part on a risk assessment instrument that assigns him a 58% risk to commit a violent act within seven years of release to the community. He argues that his risk classification is inappropriate, because the psychological test predictions are based in part on his parents' misbehavior (e.g., parental alcoholism) and in part on his failure to meet diagnostic criteria for schizophrenia. Moreover, he asserts that he has "reformed" since participating in a prison-based treatment program for sex offenders, and that he should be considered to be among the 42% of "very-high-risk" offenders who will not be recidivists.

These four cases starkly pose the question of whether attention to probability data in the legal system is legitimate.[72] They represent four different problems (respectively, whether a crime occurred, the identity of a past legal actor, the identity of a present legal actor, and the identity of a future legal actor).[73] Is the issue of whether to consider this type of probability evidence merely a function of its reliability and explanatory power, or is there something inherently unfair about making determinations of past, present, or future guilt based on data about groups of similar people?

A thorough consideration of these issues was presented in an early but still influential article by Tribe,[74] who concluded that for the most part,[75] the law should bar evidence expressed in mathematical probabilities. Tribe raised a number of objections to "precision" in the consideration of evidence:

1. Probability estimates are themselves inherently probabilistic; that is, the precision of the probability estimate itself must be considered. Take, for example, a case in which eyewitnesses saw a blue-eyed, blond-haired male rob a bank in a small New Mexico town. To assess the probability that a defendant who meets the physical description and was found in the town is indeed the robber, jurors must take into account the accuracy of the initial eyewitness's account and the imprecision in statistical estimates of how often people with these characteristics are found in small New Mexico towns. Consequently, the presentation of a single statistic or even a string of statistics may be deceptive. Moreover, jurors' consideration of the data may be complicated by statistical interdependence. For example, blue eyes and blond hair are correlated, so one cannot do a simple computation to learn the probability of their joint occurrence.

2. The presumption of innocence may be effectively negated by permitting consideration of the probability that a person with X characteristic is guilty.[76] For instance, direct consideration at trial of such probabilities will necessarily force the fact-finder to include in the calculus the probability of guilt that is associated merely with having been brought to trial. Presumably this initial probability is greater than zero, despite legal assumptions to the contrary.

3. "Soft" variables will be dwarfed by more easily quantifiable ones.[77] To return to our example of the bank robber, attention to the defendant's physical characteristics might divert attention from the probability that he has been framed.

4. The "quantification of sacrifice" (i.e., the recognition of the risk of a wrongful conviction) is intrinsically immoral.[78] It seems unjust to tell a defendant that the jury is willing to tolerate X risk of error in convicting him.

5. Reliance on statistical evidence dehumanizes the trial process by diminishing jurors' ritualized intuitive expression of community values.[79] Rather than clarify the jury's role in expressing the will of the community, statistical evidence will obscure this role and make the legal process seem alien to the public.

Although Tribe articulated important issues, we are more persuaded by Saks and Kidd's critique of his article.[80] First, Tribe's analysis relied in part on unverified psychological assumptions (e.g., jurors will be overly influenced by quantified evidence, and jurors in the present system feel subjectively certain in their judgments when they reach a verdict based on a standard of "beyond a reasonable doubt"). Second, research on the intuitive information processing preferred by Tribe suggests that jurors will make errors of analysis in their consideration of implicit probabilities unless the actual probabilities are brought to their attention. Third, as Tribe himself acknowledged, all evidence is ultimately probabilistic, regardless of whether it is quantified. Simply pretending that it is not probabilistic and ignoring the clearest, most specific evidence do not lead to morally superior decisionmaking.

At the same time, accuracy of evidence is not the only concern. Other legal considerations may counsel limiting or excluding even relatively reliable probability evidence in some types of cases. Two such concerns are particularly important. The first is that certain types of information used in probabilistic testimony, although scientifically relevant, may not be legally cognizable. For instance, reliance on race as a statistical predictor may be impermissible for constitutional reasons, even if it is correlated to a legally relevant variable; the Supreme Court has stated that basing a criminal sentence on race, even "in part," "is a disturbing departure from a basic premise of our criminal justice system: Our law punishes people for what they do, not who they are."[81] Indeed, some have argued that, at least

in the criminal sentencing context, *every* factor over which one has no control (e.g., parental alcoholism, and perhaps an offender's schizophrenia) should be banned as a basis for an actuarial determination.[82]

A second concern is the effect probabilistic information may have on the factfinder. Tribe exaggerated the layperson's inability to understand such information. But there is a danger that if and when it is understood, statistical information will assume too much prominence in the factfinder's decision-making process, at least when it is used by the state to bolster the preconceived and often incorrect notions of the factfinder. This danger of "prejudice," to use the legal term,[83] is probably greatest in the criminal context in cases such as the four described above, where the stakes are high in terms of threats both to individual freedom and to public welfare.

Probably the least prejudicial use of probabilistic information is in connection with police investigation. Using behavioral science techniques to construct a "profile" of offender characteristics that might be associated with a particular kind of crime, law enforcement agents have tried to narrow the range of suspects in a given case (as in Case 3). Although this approach is not without problems,[84] at least it is relegated to the investigative phase of trial, where probability assessments are inherent and thus more easily countenanced.[85]

Use of such evidence in criminal adjudication (Cases 1 and 2), where the legal objective is to determine definitively whether *this* defendant committed a crime, is much more problematic. For instance, when applied to a criminal defendant on trial (as in Case 2), such evidence is character evidence, which is not ordinarily admissible unless the defendant puts character at issue by claiming that he or she is not the type of person who would commit the crime.[86] Even though well-designed research may show a substantial correlation between particular traits and involvement in particular kinds of offenses, the law deems such information too prejudicial to permit except in response to defense assertions. As the Supreme Court stated, defendants must be convicted based on what they did, not who they are.

The character evidence rule is not applicable when profile evidence is used to suggest that a crime occurred (Case 1). Thus initial prosecution use of such evidence has often been permitted, most often as expert testimony to suggest that the purported victim shows behavioral characteristics exhibited by victims of a particular kind of offense [see §§ 8.03(c), 15.04(c)(4)]. Here too, however, syndrome evidence can create problems. Even if it is strong scientifically, it may be inherently misleading because of the difficulty most people have in processing base rates.[87] For example, Table 1.1 presents a hypothetical case in which an extraordinarily valid profile of a sexually abused child—far more valid than anything currently available—still would result in only a 32% probability that a randomly selected child showing the profile would have recently been abused. Yet a judge or jury, once hearing that the victim met the profile, would probably not believe the probability to be so low. Nor would telling them how low it is be likely to diminish the profile's impact, as the mere fact that a prosecution has been brought already has created the strong impression that a crime must have been committed. Thus a "defendant-first" rule

**TABLE 1.1. Probability That a Child Fitting a Hypothetical Profile of a Sexually Abused Child Actually Has Been Recently Abused**

1. There are about 74 million children and youth in the United States.
2. Assume that 5% have been sexually abused recently.[a]
3. Therefore, 3.7 million children and youth have been recently sexually abused; 70.3 million have not.
4. Assume that 90% of the children found to fit the profile of a sexually abused child on the Melton Magnificent Measure (MMM) have recently been sexually abused, while 10% of those who fit the profile have not been abused.
5. Sally Doe fits the MMM profile.

What is the probability that Sally has been recently sexually abused?

3.7 million × 0.90 = 3.3 million true positives (TPs)
70.3 million × 0.10 = 7.0 million false positives (FPs)
3.3 million TPs + 7.0 million FPs = 10.3 million positives (Ps)
3.3 million TPs divided by 10.3 million Ps = 0.32

Therefore, the hypothetical probability (under a scenario of far more pronounced base-rate differences than is true in reality) is only about 1 in 3!

[a]This hypothetical percentage probably substantially exceeds the actual base rate of recent sexual abuse. Community surveys (most of them retrospective) to determine prevalence *at any point* during childhood have yielded median prevalence rates of 15% for females and 6.5% for males. Stefanie Doyle Peters et al., *Prevalence,* in A SOURCEBOOK ON CHILD SEXUAL ABUSE 15, 20–21 (David Finkelhor ed., 1986).

barring such probabilistic data unless the defendant opens the door, analogous to the character evidence rule, might be appropriate here as well unless the profile evidence is very strong.

In forward-looking decisions (e.g., commitment predicated on future risk, as in Case 4, or the commitment decision in Case Study 1.1), the inquiry is, as with investigation and unlike at trial, inherently probabilistic; actuarial data are thus directly relevant [see § 9.09(c)]. Here too, however, the possibility exists that such data will overly impress the factfinder, at least when used by the state to confirm the likely assumption of the factfinder that a person who has just committed a crime will offend again.[88] Although research suggests that actuarial risk assessment is less likely than nonactuarial, clinical testimony about risk to overinfluence the factfinder,[89] courts considering the use of actuarial information should ensure at the least that the data come from a relevant population and that the factfinder understands its nomothetic nature. More is said about all these issues at relevant points of this book.

## 1.04. Should Mental Health Professionals Be Considered Experts?

As the preceding discussion illustrates, and as we reiterate below, some controls on mental health testimony are necessary in circumstances in which it is inherently misleading or prejudicial. Nonetheless, we retain our general preference for liberal use of behavioral science expertise. To explain this view, we come now to what may be the core problem in contemporary forensic mental health: Should mental health professionals be recognized as experts by the law, and if so, for what purposes? Before discussing the courts' answer to this question, we give our own. In doing so, we refer liberally to the Federal Rules of Evidence, the relevant parts of which are listed in Table 1.2. Because most states have adopted all or part of these rules, they will form the baseline for our analysis.

### *(a) The Definition of Specialized Knowledge*

The first point to note is that whereas laypersons may generally testify only about what they have directly observed (see Rule 701), experts may testify

**TABLE 1.2. Federal Rules of Evidence, Article 7: Opinions and Expert Testimony**

**Rule 701.**
**OPINION TESTIMONY BY LAY WITNESSES**

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

**Rule 702.**
**TESTIMONY BY EXPERTS**

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

**Rule 703.**
**BASES OF OPINION TESTIMONY BY EXPERTS**

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

**Rule 704.**
**OPINION ON ULTIMATE ISSUE**

(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 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.

as to opinions if the "specialized knowledge" of the witness will "assist" the trier of fact in determining a relevant issue (Rule 702). Rule 702's insistence that the expert assist the factfinder is derived in part from the democratic principle that everyone is equal before the bar of justice, and that professional education in itself does not confer special status in the legal system. It follows that occupational status should not infringe the societally designated authority of the judge or jury to decide the case at hand.[90] Experts should be able to go further than lay witnesses only if doing so would provide *specialized* information that will help the trier of fact to understand the evidence presented.

In analyzing the import of Rule 702's requirement that opinion evidence be based on specialized knowledge that can assist the factfinder, it helps to consider the several levels of opinion that an expert might render. For example, in considering whether a defendant meets the *M'Naghten* test of insanity [see § 8.02(b)], the following levels of inference might occur, all of which represent increments in opinion formation:

1. Application of meaning (perception) to a behavioral image (e.g., "He was muttering").
2. Imputation of a general mental state (e.g., "He appeared to be talking to someone who was not present").
3. Formulation of a general mental state that is consistent with theoretical construct or the research literature, or synthesizes observations (e.g., "His behavior during the interview was indicative of having auditory hallucinations").
4. Diagnosis (e.g., "His behavior during the interview and his reported history are consistent with having schizophrenia").
5. Relationship of formulation or diagnosis to legally relevant behavior (e.g., "At the time of the alleged offense, his psychosis impaired his ability to carefully consider the consequences of his behavior").
6. Elements of the ultimate legal issue (e.g., "Although his mental illness limited his ability to *reflect* upon or care about the illegality of his behavior, he *knew* that he was stealing a pack of cigarettes and *knew* that stealing the cigarettes was illegal").
7. Ultimate legal issue (e.g., "He was sane at the time of the offense").

In considering the question of which, if any, levels of inference mental health professionals should be permitted to state in their testimony, most scholarly commentators agree:[91] Despite the fact that such opinions are commonly requested and even expected by courts, *mental health professionals ideally should refrain from giving opinions as to ultimate legal issues.* As we have already seen, the constructs about which an opinion might be sought (e.g., voluntariness) are often inconsistent with the model of behavior on which an expert's observations are based. Even when the constructs appear familiar, however, experts should avoid giving ultimate-issue opinions; questions as to criminal responsibility, suitability for commitment, parental fitness, and so forth are not based on "specialized" knowledge, but are legal and moral judgments outside the expertise of mental health professionals *qua* mental health professionals. For example, the types of behavior that constitute "mental disorders" as a matter of law may be substantially different from the range of conditions that mental health professionals categorize as "mental disorders." Similarly, a court's decision about dangerousness involves a legal judgment about whether the probability of particular kinds of behavior is high enough to warrant state intervention. While mental health professionals can certainly offer probative evidence about parenting skills or risk, the ultimate determination of whether a person is "fit" to parent or dangerous is the court's. When experts give ultimate-issue opinions, they usurp the role of the factfinder and may mislead the factfinder by suggesting that the opinions are based on their specialized professional knowledge rather than their personal judgment.

Although Rule 704(a) allows experts to give opinions on ultimate issues, Rule 702 prohibits admission of *any* opinion not based on specialized knowledge—a prohibition that presumably can include ultimate-issue opinions. Indeed, Rule 704(b) (an amendment to the original Rule 704 that was inspired by John Hinckley's acquittal on insanity grounds) makes this point concretely with respect to mental state testimony in criminal cases. The position we take is that ideally, the same evidentiary prohibition should apply to *all* types of cases.

Thus, even if a court *permits* ultimate-issue opinions to be admitted as a matter of law, we recommend that mental health professionals not volunteer such opinions because of the explicit or implicit

misrepresentation of the limits of expertise involved if a clinician, *acting as an expert on mental health matters,* gives an opinion on a legal issue.[92] Even in cases where courts or statutes request or expect ultimate-issue statements, the thoughtful mental health professional should always ask him- or herself, "To what extent is my response the product of my expertise as a clinician? Does my opinion actually stem from my moral sensibility or my common sense as a citizen?" If the latter, the expert should try to avoid offering the opinion (perhaps by testifying, "That's the issue the court must decide"); if such an opinion is demanded, it should be described as a legal, moral, or common-sense judgment, not a psychological or medical one ("Given my findings, it would make sense for the court to conclude . . . ").

Under this reasoning, clinicians would not volunteer opinions at level 7 in the hierarchy set out earlier. Testifying that a person is "sane," "dangerous," "competent," "parentally fit," or "disabled" (for workers' compensation or Social Security purposes) tramples on both legal and ethical domains. Testimony at level 6 is concerning as well, because the clinician will be using legally defined language. Admittedly, a rigid prohibition on testimony at this level may sometimes be an artificial constraint. Talk about whether criminal defendants "knew" their act was "wrong" (both aspects of the *M'Naghten* test), even if banned, can easily be replaced with testimony about whether defendants were "aware" or "remained able to recognize" that they were breaking the law (consider, in this regard, the testimony in Case Study 1.1). Similarly, it is often difficult to discuss competence to proceed without directly discussing a defendant's ability to assist counsel—one of the elements of the competence standard [see Chapter 6]. However, the question of *how much* "knowledge" or "awareness" a defendant must have to be sane, or the *extent to which* defendants must be able to "assist" their attorney to be competent, is a decision for the court to make. Consequently, clinicians should at the least avoid parroting the language of the legal test without explanation, unless statutes or the questions posed during testimony demand that they do otherwise.[93]

The question is harder with respect to opinions based on intermediate levels of inference (2 through 5 in the list above, as well as statements at level 6 that avoid legal language). The most articulate proponent of exclusion is Morse, who has argued that only two types of testimony by mental health professionals (when testifying in that capacity) should be permitted.[94] First, Morse would permit presentation of "hard actuarial data," when relevant and available. Second, because mental health professionals usually have much more experience with "crazy" persons than do laypersons, and thus are likely to be better observers of the kinds of behavior that may be legally relevant, he would allow them to present their observations of behavior. For example, Morse believes that mental health professionals are likely to be more skilled than laypersons in asking the right questions to elicit information about hallucinations, suicidal plans, and so forth, and should thus be able to describe the answers to those questions.

On the other hand, Morse would not allow opinions as to the meaning of the behavior; he would bar mental health professionals from stating conclusions on ultimate issues, and from giving testimony about their formulations and diagnoses as well. Therefore, the role of mental health professionals would be that of specially trained fact witnesses. Morse has summarized his objections to most expert testimony by mental health professionals on the following grounds:

> [F]irst, professionals have considerably less to contribute than is commonly supposed; second, for legal purposes, lay persons are quite competent to make judgments concerning mental disorder; third, all mental health law cases involve *primarily* moral and social issues and decisions, not scientific ones; fourth, overreliance on experts promotes the mistaken and responsibility-abdicating view that these hard moral questions (i.e., whether and in what way to treat mentally ill persons differently) are scientific ones; and fifth, professionals should recognize this difference and refrain from drawing social and moral conclusions about which they are not expert.[95]

We have already indicated our agreement with Morse as to his third, fourth, and fifth points. We also agree for the most part with his second point: Whether a person appears sufficiently disabled to warrant special legal treatment is an intuitive social and moral judgment. Diagnosis, for example, is often irrelevant to mental health law questions.[96]

However, we part company with Morse with respect to his first point. We recognize the well-known[97] limitations of mental health assessment and prediction. The literature with respect to

specific forensic questions is reviewed in more detail throughout this volume. Yet, although we share Morse's preference for testimony based on valid, quantified research, we would still permit mental health professionals to offer other opinions short of the ultimate issue.

In our view, Morse underestimates the degree to which mental health professionals can assist the factfinder in making legal judgments, provided that professionals both know and acknowledge the limits of their expertise. As Bonnie and Slobogin pointed out,[98] the law's approach to the admissibility of expert opinions is *incremental:* The main consideration, as formulated in Rule 702 of the Federal Rules of Evidence, is whether the opinion will *assist* the factfinder—not whether it is dispositive. Stated somewhat more precisely, the question is whether the probative value of the evidence outweighs its tendency to be inefficient, misleading, or prejudicial.[99] Of course, Rule 702 now contains a clause (added in 2000) that limits experts to testimony based on "sufficient facts or data" and on "reliable principles and methods" properly applied to the facts of the case. To the extent that this language—the genesis of which is discussed more fully below—leads courts to inquire more deeply into the extent to which the basis of expert testimony is verified, we think it is all to the good. But consistent with the foregoing comments, we do not think that "reliability" ought to be defined in a way that would lead to admission of only those opinions that are based on "hard data"; nonstatistical methodology or principles can produce informed clinical beliefs that should be admissible as well.[100]

Clinical beliefs and testimony about them often rely on a body of specialized, professional knowledge (i.e., knowledge commonly unshared by the lay public) that can assist legal factfinders in making informed judgments—judgments that would otherwise be based on even more speculative assessments. Melton, Weithorn, and Slobogin administered a test of knowledge about clinical syndromes commonly observed in criminal and juvenile forensic practice and the research relevant to those syndromes to samples of mental health professionals and trial judges.[101] Mental health professionals' performance was generally superior to that of judges; when the latter were compared to mental health professionals specialized in forensic practice, the differences were especially marked.

Even when the research basis of opinions is weak, there may be instances in which the underlying knowledge is sufficiently great to warrant the admission of the opinions. For example, in contrast to Morse, we favor admission of psychological formulations and diagnoses (levels 3 and 4 in the typology of inference set out earlier) in many legal contexts. Such opinions are not based on precise "science," but that does not make them either mere folklore nor homespun wisdom. The argument here is analogous to Morse's approval of mental health professionals as trained observers of "crazy" behavior. Mental health professionals are trained and experienced in observing, explaining, and categorizing abnormal behavior. Even if these formulations are mere "stories,"[102] they can provide plausible explanations that would otherwise be unavailable to the trier of fact, and that can give a defendant's behavior context and narrative coherence.[103] If such explanations are delivered with appropriate caution, they may well assist the factfinder in reaching a judgment, even though they have not been or cannot be verified.[104]

### *(b) Limitations on the Use of Specialized Knowledge*

Mental health professionals may provide factfinders with more assistance in some contexts than in others. Their knowledge and conclusions seem particularly germane when their testimony rebuts allegations made by the state designed to deprive the individual of liberty (as in civil commitment proceedings, criminal trials, and sentencing hearings). In such situations, it may often be unjust to deprive a defendant of the chance to bring appropriately framed evidence before the factfinder. As a matter of fairness, if the criminal law allows defenses based on subjective mental states (as most jurisdictions do), then defendants should be allowed to present expert opinions that bear on their mental state, even though mental health professionals cannot "scientifically" verify what someone was thinking several months earlier. Indeed, given the right to testify, defendants may have a constitutional right to present their exculpatory mental states through an expert, even when the expert's testimony consists of interpretations about the defendant's behavior rather than "scientific" findings.[105] More generally, knowledge derived from the medical and behavioral sciences can be especially valuable when

the information presented challenges jurors' misconceptions (e.g., the belief that people intend their actions, or the belief that "everyone knows their *Miranda* rights"[106])—a point we develop in other parts of this volume [see, e.g., § 8.03(b)].

At the same time, mental health testimony—whether interpretive or more scientific in nature—raises serious moral questions if it goes unchallenged, particularly if the testimony invokes the upper levels of inference discussed earlier. In insanity trials, capital sentencing proceedings, or parental fitness hearings, experts usually have to defend their views in the face of cross-examination, and factfinders usually hear testimony from rebuttal experts. But some proceedings—civil commitment and competence-to-proceed hearings, to name but two—often resemble star chambers, where a lone expert's word is dispositive. In such situations, clinicians should try, at the least, to explain their inferences whenever they answer questions that require responses above level 1 testimony.[107]

In summary, although the testimony that mental health professionals offer courts should ideally exclude opinions of a purely moral or legal nature, courts should allow professional opinions that can assist the trier of fact, especially when they are likely to challenge factfinders' presumptions about human behavior and motivation. At the same time, lawyers and judges should be sensitive to the prejudicial impact that mental health testimony may have, particularly when it goes unchallenged. And ethical mental health experts should always strive to explain their testimony and the limitations on the validity or certainty of their opinions.[108]

### (c) Expertise under *Frye* and *Daubert* [109]

The foregoing considerations set the stage for an examination and critique of the law's current approach to admitting testimony from mental health professionals. Most courts follow virtually none of our suggestions, much less those proposed by Morse. Similarly, to the extent that judges pay attention to Rule 702, they usually make only cursory assessments of how reliable mental health testimony will be.

Until 1993, the dominant test for evaluating clinical testimony in federal court and many state courts was the *Frye* rule, which originated in the 1923 case of *Frye v. United States*.[110] That decision, involving an attempt to introduce the results of an early polygraph test, held that to be admissible, scientific evidence should be "sufficiently established to have gained general acceptance in the particular field to which it belongs."[111]

Traditional clinical testimony about competence, sanity, and dangerousness has generally been immune from *Frye* challenges. Some courts have simply claimed that the behavioral sciences should not be governed by rules relating to the "physical sciences,"[112] while others have assumed that most mental health professionals would agree that clinical opinions are based on "generally accepted" theories.[113] In contrast, courts frequently banned more novel clinical testimony under *Frye*—sometimes because the diagnosis at issue had not yet appeared in the *Diagnostic and Statistical Manual of Mental Disorders* (DSM),[114] or if it had, because the relevant field was too small, or the evidence for the relevant theory too meager.[115]

Critics of the *Frye* rule regard it as unduly conservative. By requiring general acceptance, the rule excludes evidence that may be new yet scientifically valid. At the same time, the *Frye* test seems to permit admission of evidence based on faulty ideas that nonetheless have general acceptance despite their limited scientific basis (e.g., clinical predictions of dangerousness). Nonetheless, many courts retained the *Frye* rule because of the time and expertise required to make case-by-case determinations of scientific merit. Under *Frye,* a court needs merely to learn whether a particular technique is "generally accepted," rather than carefully balance its relevance against is prejudicial impact.[116]

In 1993, however, the evidentiary landscape seemed to change with the United States Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals*.[117] This unanimous holding rested on a straightforward legal analysis: when Congress adopted the Federal Rules of Evidence in the 1970s, it did not intend to incorporate the "austere" *Frye* standard into the new Rules promoting "liberal" admission of evidence.[118] The Court's opinion added extensive dicta,[119] joined by seven of the nine Justices, about the types of factors courts might consider in weighing whether to admit proffered scientific evidence. By implication, that discussion, written by Justice Blackmun, provides guidance to experts and attorneys preparing the presentation of opinions.

Probably the most important point made in *Daubert* is that bright-line indicia of reliability (e.g., whether general acceptance has been obtained, or even whether peer review has occurred) are inconsistent with the balancing test implicit in the requirement for specialized knowledge that will assist the trier of fact. Thus, the Court stated, *Frye*'s "threshold" standard of scientific reliability or expert credibility was misguided. The Rules of Evidence, Justice Blackmun wrote, are "designed not for cosmic understanding but for the particularized resolution of legal disputes."[120]

As to how the admissibility of scientific evidence should now be gauged, *Daubert* made clear that the opinion must be based on "an inference or assertion . . . derived by the scientific method"; that is, the court should decide "whether the reasoning or methodology underlying the testimony is scientifically valid and . . . whether that reasoning or methodology properly can be applied to the facts in issue."[121] While noting that its list was not exhaustive or dispositive, the Court offered four criteria to use in determining admissibility: whether the theory or technique that forms the basis for the opinion can be and has been tested; "the known or potential rate of error" associated with the technique being used; and two *Frye*-like factors, "whether the theory or technique has been subjected to peer review and publication," and whether it has been met with "general acceptance" by experts in the relevant scientific community.[122] Blackmun emphasized that Rule 702 prescribed a "flexible" inquiry, with the "overarching" focus to be on "the scientific validity—and thus the evidentiary relevance and reliability—of the principles that underlie a proposed submission." He further clarified that "the focus, of course, must be solely on principles and methodology, not on the conclusions that they generate."[123] Thus new but valid ideas not yet generally accepted in the scientific community were not barred from consideration by judges and jurors.

Although these latter comments sound more "liberal" toward admission of expert testimony than *Frye,* the thrust of *Daubert* is actually conservative. Not only does the decision retain peer review and general acceptance as factors to consider in the admissibility inquiry; its other two factors focus entirely on whether the basis of testimony has undergone any "testing." Such an emphasis on scientific validity could have a particularly significant impact on the admissibility of testimony based on "soft" social sciences. Shortly after the *Daubert* ruling, one commentator asserted that "read literally," the decision "would dictate the end of the receipt of psychiatric and psychological testimony in federal courts."[124]

For a time after *Daubert,* courts could avoid facing this possibility by categorizing the basis of such testimony as "specialized" rather than "scientific" knowledge;[125] because *Daubert* dealt only with "scientific testimony" (specifically, a claim relating the morning-sickness drug Bendectin to birth defects), it did not apply to clinical testimony from mental health professionals. But in 1999, the United States Supreme Court decided *Kumho Tire Co. v. Carmichael,*[126] which made clear that *Daubert* applies to all three types of knowledge mentioned in Rule 702 (i.e., scientific, technical, and specialized). As the Court put it, "[t]here is no clear line" between the three categories, and thus, for all three, "the trial judge must determine whether the testimony has a 'reliable basis in the knowledge and experience of [the relevant] discipline.'"[127] One year later, in an effort to emphasize this point, Congress amended Rule 702 to say, as noted above, that scientific, technical or specialized knowledge is admissible only if "(1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." That language requires the trial court judge to assess the factual, methodological, and theoretical basis of any expert testimony, as well as the "fit" of that testimony with the case at hand, all through the prism of legal "reliability."[128]

The impact of *Daubert* on clinical testimony has been muted in two ways. First, about 20 states still adhere to the *Frye* rule or some variant of it[129] (though even in these jurisdictions, *Daubert*'s emphasis on scientific testing has sometimes been influential[130]). Second, empirical studies in the decade after *Daubert* showed that most courts were hesitant about applying the decision's rules rigidly when assessing the admissibility of testimony from mental health professionals.[131]

In any event, assiduous application of *Daubert* would not spell the end of behavioral science testimony. For instance, the type of probabilistic data discussed earlier and information about many clinical diagnoses have often resulted from traditional,

scientific hypothesis testing. Furthermore, interpreting *Daubert* rigidly as a bright-line rule barring all clinical testimony not backed up by data would be unwise. Such a stance would eliminate ways of thinking about human behavior that may aid the trier of fact and that go beyond "common sense." Consider, for instance, two statements taken from the sample reports set out in Chapter 19 of this book:

> One characteristic stress response is for individuals to "relive" through their own thoughts and fantasies the original stressful episodes in an apparent effort to bring about more successful (i.e., psychologically acceptable) solutions. (p. 628)

> [I]t is probable that the death of his father contributes to his . . . loss of self-esteem. (p. 657)

Under a strict *Daubert* approach, experts could make neither of these statements unless they could point to research articles supporting their underlying propositions—for example, that people "relive" their original stress episodes, that this reliving can be an attempt to heal, or that loss of a father can contribute to loss of self-esteem. The second and third propositions cannot easily be subjected to scientific testing; the first might be, although current scientific explanations of the "reexperiencing" characteristic of posttraumatic stress disorder tend to emphasize biological processes (e.g., how elevated levels of stress response hormones and neurotransmitters affect memory encoding and retrieval).[132] As others have suggested,[133] exclusion of such statements would not comport with the notion that testimony is expert if it "assists the factfinder," language that is still found in Rule 702. In short, a requirement that all clinical testimony be "verifiable" is too demanding. A rigid rule of exclusion for theories about human behavior that have not been subjected to "scientific testing"—including those that, for ethical or practical reasons, cannot be so tested[134]—is overbroad.

It is also too narrow. That something is "verifiable" does not mean that testimony based on it will help the jury. While juror skepticism and cross-examination can often ferret out unreliable clinical testimony,[135] jurors may not be skeptical *enough* about research-based testimony, and cross-examination does not always expose unreliable testimony. (Recall also the tensions created by legal use of probabilistic evidence, described in § 1.03(c).) Just as testimony can be good or bad, research and cross-examination can be deficient.

Rather than relying solely on verifiability as the gauge of admissibility, the better answer, we believe, is to take the nuanced approach to admissibility we developed in § 1.04(b) while trying to improve the performance of both mental health professionals and lawyers—the task to which this book is devoted. We agree with *Kumho Tire*'s emphasis—an emphasis that seems to be ignored in much of the writing about that decision and *Daubert*—that the test for expert testimony should be a "flexible" one.[136] As the Court stated in *Kumho Tire,* "we can neither rule out, nor rule in, for all cases and for all time the applicability of the factors mentioned in *Daubert,* nor can we now do so for subsets of cases categorized by category of expert or by kind of evidence."[137] Rather, the overall test, the Court stressed, is whether the expert has "sufficient specialized knowledge to assist jurors 'in deciding the particular issues in the case.' "[138]

## 1.05. Which Professionals Should Be Considered Experts?

Assuming that mental health professionals' opinions should be admissible in at least some instances, *which* mental health professionals should courts regard as experts? Traditionally, courts had addressed this question by examining educational credentials, particularly with respect to discipline. Until relatively recently, courts regarded physicians as experts in mental health matters, even if they had no psychiatric training. Beginning with the *Jenkins* decision in 1962,[139] courts have also admitted testimony by clinical psychologists, although some jurisdictions require psychologists to meet special experiential or training requirements before they can be acknowledged as experts, and many do not permit psychologists to file civil commitment affidavits. Psychiatric social workers are often considered experts in juvenile and domestic relations matters and sometimes at sentencing in criminal cases, but are generally not permitted to testify about a defendant's competence to proceed or mental state at the time of the offense.[140]

These general guidelines have evolved more from the internecine conflicts among the mental health guilds and the law's preference for a medical model

of mental illness than from any systematic attempt to identify which mental health discipline can best assist the trier of fact on particular forensic issues. Ideally, the law should use a functional approach to evaluate qualifications, as Rule 702 (which uses a criterion of probable assistance to the trier of fact) suggests. Moreover, the law should consider not just educational attainment, but experience in the relevant area and—a point we emphasize throughout this volume—the evaluation procedures used. Under this approach, the criteria for establishing qualifications would be both broader and narrower than those courts commonly use.

The prevailing standard as to qualifications should be broader, in that the historic preference for medically trained experts has little justification in the 21st century. The level of knowledge about forensic practice is not predictable by discipline, and for many types of forensic evaluations, nonmedical clinicians may have more relevant knowledge, training, and experience than psychiatrists do.[141] Social workers can perform competence evaluations if they receive proper training and use appropriate evaluation procedures;[142] indeed, in this area, trained nurses and graduate students reach conclusions similar to those of mental health professionals.[143]

On the other hand, the standard as to qualifications should also be narrower, in that general training as a mental health professional does not produce expertise sufficient to conduct most of the specialized forensic evaluations that courts need. On certain specific topics, most medically trained clinicians know more than most nonmedical professionals; for example, psychiatrists generally know more than other mental health professionals about the uses and effects of psychotropic medication. However, some psychologists who have done research or received specialized training in psychopharmacology know far more about such matters than the average psychiatrist. Conversely, although psychologists usually have more training in research methods than psychiatrists, psychiatrists who do research will know more about research design than the average psychologist.[144]

In short, the law should regard members of the various mental health professions as potentially qualified as experts, and should focus on the specific spheres of specialized knowledge that an expert may offer. For example, courts should not let clinicians render opinions about dangerousness if they lack detailed knowledge about available research on assessing the risk of violence. Mental health professionals should not perform evaluations of competence to proceed without knowledge of the standard and specific assessment techniques. Even more generally, clinicians without sensitivity to the special ethical and legal problems raised by forensic evaluation itself [see Chapter 4] should avoid participating in forensic work. Finally, no clinician who lacks knowledge of the substantive law that defines the scope of his or her testimony should be considered qualified. The knowledge level and evaluation procedures appropriate for a given type of testimony should become apparent as one examines the relevant portions of this book.

## 1.06. Conclusion

In subtitling this chapter "An Uneasy Alliance," we have called attention both to the conflicts in perspective—some of them inherent—between lawyers and clinicians and to the points of alliance. Readers will recognize this ambivalent theme throughout this volume. On the one hand are paradigmatic disciplinary differences in how each discipline conceptualizes and discerns facts; in addition, mental health professionals often know far less about forensically relevant matters than lawyers think they do. On the other hand, ever-expanding knowledge in the behavioral sciences would, if available to legal decisionmakers, result in more informed judgments on many issues. Our primary admonition to mental health professionals and to lawyers who would consult them is to keep both aspects of this theme in mind. Mental health professionals do the law no service when they exaggerate the state of knowledge (either their own or of the field as a whole) or ignore problems in translating the psychological and medical concepts into legal findings. At the same time, lawyers who either ignore the behavioral sciences or swallow whole the conclusions of mental health professionals fail to exercise proper diligence in the pursuit of justice. We hope that readers from both perspectives will find this volume useful in developing an interdisciplinary alliance wherever doing so would improve the quality of legal decisionmaking. Less globally, we hope that this volume will demystify the arcane aspects both of the courts and of the mental health system.

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