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MARYLAND RULE 5-704(b): WHERE TO DRAW THE LINE FOR ULTIMATE ISSUE TESTIMONY

by Lisa Cuozzo

Introduction

In response to both the highly publicized trial of John Hinckley, Jr. in 1984 and the recommendations of the American Psychiatric Association (APA), Congress passed the Insanity Defense Reform Act of 1984.[1] The Act changed many of the legal factors associated with the insanity defense, including the definition of legal insanity and the scope of expert testimony permitted in insanity trials.[2] Congress amended Federal Rule of Evidence 704 by adding a second section which prohibits expert testimony on ultimate issues of mental state or mental condition.[3]

Maryland Rule of Evidence 5-704(b) maintains that prohibition of expert testimony for most ultimate issues but carves out one special exception. Maryland allows testimony only on the ultimate issue of criminal responsibility (Maryland's equivalent of the insanity defense).[4] This paper discusses why Maryland Rule 5-704(b) should drop that exception and be modified to agree with Federal Rule 704(b). Section I explains the history of the Insanity Defense Reform Act of 1984. In Section II, the discussion turns to the rationale behind Maryland Rule 5-704(b). Section III compares both rules and explains why the Federal Rule results in a fairer trial. Finally, Section IV summarizes why the Maryland Rule intrudes on that fairness and proposes a modification of Maryland Rule 5-704(b).

I. History of the Act

In order to fully understand the Insanity Defense Reform Act, it is essential to examaine the history behind it, especially the trial of John W. Hinckley, Jr., and the political climate at that time. One must also understand the pressure that several interest groups -- especially the APA -- exerted on Congress, in an effort to convince the legislature to agree with their position.

A. Insanity Defense Before Hinckley

Before the Insanity Defense Reform Act of 1984, federal courts employed the American Law Institute (ALI) test for insanity. The ALI method is a two-prong test, which provides that "A person is not responsible for criminal conduct if, at the time of such conduct, as a result of mental disease or defect, he lacks substantial capacity either to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of law."[5] The first prong, referred to as the "cognitive prong," questions a person's capacity to know right from wrong. The second prong, conforming conduct to the law, is the "volitional prong."

In 1982, the Reagan administration called for the abolition of the insanity defense. The administration essentially sought to restrict the admissibility of evidence of mental illness when offered to prove the defendant did not have the requisite intent for the crime charged.[6] In other words, such evidence would only be permitted if the defendant was completely unaware that he had a weapon in his hand, or was so delusional he did not know he was harming a

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[1] David Cohen, *Punishing the Insane: Restriction of Expert Psychiatric Testimony by Federal Rule of Evidence 704(b)*, Title IV, Pub. L. No. 98-473, 98 Stat. 2067 (1984), *cited in* 40 U. FLA. L. REV. 541 (1988) [hereinafter Reform Act].

[2] *See id.*

[3] FED. R. EVID. 704(b) reads: "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."

[4] MD. R. EVID. 5-704(b) reads: "An expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may not state an opinion or inference as to whether the defendant had a mental state or condition constituting an element of the crime charged. That issue if for the trier of fact alone. *This exception does not apply to an ultimate issue of criminal responsibility.*" (emphasis added).

[5] MODEL PENAL CODE §4.01(1) (1962).

[6] Jonathan B. Sallet, *After Hinckley: The Insanity Defense Reexamined*, 94 YALE L.J. 1545, 1546 (1985).

person.[7] This movement, however, was unsuccessful and the ALI insanity defense remained intact until 1984.

B. Trial of Hinckley

In 1976, John Hinckley, Jr. was a "drifter" temporarily living in Hollywood.[8] He repeatedly watched the film *Taxi Driver*, starring the actress Jodie Foster, and started obsessing about Foster and President Reagan.[9] In March of 1981, Hinckley, in an effort to impress Foster, attempted to assassinate President Reagan.[10]

Hinckley's trial gained extensive media attention, not just because he targeted the President of the United States, but also because Hinckley claimed insanity as his defense. The government focused on premeditation, emphasizing that Hinckley purchased a gun and bullets, wrote a note to Foster immediately preceding the shooting, and basically stalked the President until he had a decent shot to take.[11] The defense, however, focused on Hinckley's "process schizophrenia," especially his delusions.[12] As a result, the trial came down to a battle of the experts. Hinckley was found not guilty by reason of insanity, and the public was outraged.

C. Public Pressure

Following the Hinckley trial, many groups initiated a movement to change the insanity defense. The APA, the American Medical Association, and the American Bar Association are only three of the groups that wrote to Congress seeking to change or abolish the defense. At the same time, the public was disgusted with the trial, the outcome, and the whole idea of the insanity defense. According to a survey conducted in the weeks following the Hinckley verdict, "40% of the public, if jurors, would have had no confidence in the psychiatric testimony; 20% would have had only slight confidence."[13]

D. Congress Passes the Insanity Defense Reform Act

Pressured to make some change, Congress passed the Insanity Defense Reform Act in 1984.[14] The Act added an extra section to Federal Rule of Evidence 704, thereby preventing expert testimony on ultimate issues of mental state or mental condition.[15]

The Act was passed for three basic reasons: first, to "eliminate competing expert witnesses testifying to directly contradictory conclusions;"[16] second, because expert testimony was often unreliable and confused juries;[17] and third, because experts were testifying to matters beyond their expertise.[18] Congressional notes relied heavily on the APA's statement, which will be discussed in detail below.

Although the most obvious effect the Insanity Defense Reform Act had on expert testimony was the modification to Rule 704, expert testimony has also been changed by the elimination of the volitional prong. As a result of the Act, Congress dropped the first prong of the ALI test. That change substantially limits the insanity defense to only those who are unable to understand right from wrong. This new definition of insanity in federal courts was recommended by the APA, probably because it "conforms with the way psychiatrists think and analyze mental processes."[19] Psychiatrists can "be more comfortable in bringing [their] expertise to bear in a courtroom setting."[20] The jury may have a better understanding of this definition as well, as "it avoids the artificiality of trying to separate intellectual from emotional understanding."[21]

In Maryland, however, the test for criminal responsibility remains the two-prong ALI test.[22] Maryland, therefore, allows expert testimony on the defendant's ability to conform his conduct to the law despite the unreliability of such testimony.

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[7] *See id.*

[8] See *id.* at 1547.

[9] *See id.* at 1548.

[10] *See id.*

[11] See *id.*

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

[13] Phillip J. Resnick, M.D., *Perceptions of Psychiatric Testimony: A Historical Perspective of the Hysterical Invective*, 14 BULL. AMER. ACAD. PSYCHIATRY & L. 203 (1986) [hereinafter Resnick].

[14] Reform Act, *supra* note 1.

[15] *See id.*

[16] S. REP. NO. 225, 98th Cong., 1st Sess. 231 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182 [hereinafter S.Rep.].

[17] *Id.*

[18] *Id.*

[19] FAUST E. ROSSI, EXPERT WITNESSES 524, 525 (1991) [hereinafter Rossi].

[20] *Id.*

[21] *Id.*

[22] MD. CODE ANN., HEALTH-GEN. §12-108 (1996).

E. The APA Statement

The APA statement carried a great deal of weight in Congress for changing the Insanity Defense. Congress echoed most of the APA's rationale in the legislative notes that accompany the Act, often quoting the APA statement verbatim.

1. Usurping the Power from the Jury

First, the APA and Congress both agreed that allowing expert testimony on the issue of criminal responsibility usurps the power of the jury. Although this rationale has been repeatedly referred to as "empty rhetoric,"[23] "many commentators agree that clinicians . . . should stop short of answering the ultimate legal question."[24] The APA statement pointed out that "determining whether a criminal defendant was legally insane is a matter for legal fact-finders, not for experts."[25] The Senate Report echoed the APA, stating, "Section 406 of Title IV of the Bill amends Rule 704; [The] purpose of this amendment is to eliminate the confusing spectacle of competing expert witnesses testifying to directly contradictory conclusions as to the **ultimate legal issue to be found by the trier of fact.**"[26] The House of Representatives agreed, seeking to disallow expert testimony on ultimate issues and leave it to the jury to apply "societal or community values."[27]

2. Verdict Depends on Credibility of Experts

Second, the essential issue in the trial, namely, whether the defendant is indeed responsible, disappears when conflicting expert testimony on responsibility is permitted. The controversial issue for the jury to decide then becomes one of the credibility of the expert witnesses rather than the responsibility of the defendant.[28] That was clearly the case in the Hinckley trial, where the prosecution refused to stipulate that Hinckley was delusional.

Some issues of credibility cannot be avoided when experts offer conflicting testimony; however, the federal rule limits conflicting testimony by limiting the scope of expert opinion. Since ultimate issue testimony is not permitted in federal court, the experts are limited to explaining the defendant's diagnosis, symptoms, and history. Often, those are areas on which the prosecution and the defense agree, disputing only the severity of the symptoms. Thus, there is a likelihood in federal court that the experts will, in large part, agree with each other. Jurors can then deliberate on the responsibility issue, feeling more confident that both sides' experts were telling the truth about diagnosis, history, and symptoms.

In Maryland court, where ultimate issue testimony is permitted, the experts will often voice their disagreement over the issue of responsibility. The expert is not required to limit his testimony, so he can freely testify that the defendant is or is not responsible, without further explanation. Jurors are then left hearing conflicting testimony, and the question in the jury room becomes "Which expert did you believe?", rather than "Is he responsible?"

Philip Resnick offers six possible explanations for the psychiatrists' disagreement in the courtroom. First, such disagreement is bound to result from the nature of the adversarial system. Second, attorneys implement witness selection procedures that result in conflicting testimony. Third, there are many different schools of psychiatry and, for example, a cognitive therapist will give a different answer than a psychodynamic therapist would. Fourth, experts may use different data. Fifth, experts may be biased. Sixth, and lastly, he notes the occasional "venality" of some experts.[29]

If the experts are permitted to take the stand and answer the ultimate question, juries are often forced to decide the case on credibility of those experts; the jury is not given the chance to simply "evaluate the experts' reasoning."[30] Jurors are likely to receive inaccurate testimony in many courts that allow experts to answer the ultimate question without a full explanation. "Such testimony obscures the special expertise of the mental-health professional and the distinctions between clinical and moral dimensions."[31]

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[23] 7 WIGMORE ON EVIDENCE §1920-21 (1940).

[24] Stephen K. Hoge and Thomas Grisso, *Accuracy and Expert Testimony*, 20 BULL AMER. ACAD. PSYCHIATRY & L. 71 (1992) [hereinafter Hoge and Grisso].

[25] APA Statement on Insanity Defense, 140 AM. J. PSYCHIATRY 681, 686 (1983) [hereinafter APA Statement].

[26] S. Rep., *supra* note 15 [emphasis added].

[27] H. R. REPORT NO. 557, 98th Cong. 1st Session (1983)., *cited in* Anne Lawson Braswell, *Resurrection of the Ultimate Issue Rule: Federal Rule of Evidence 704(b) and The Insanity Defense*, 72 Cornell L. Rev. 620, 626 (1987).

[28] Anne Lawson Braswell, *Resurrection of the Ultimate Issue Rule: Federal Rule of Evidence 704(b) and The Insanity Defense*, 72 CORNELL L. REV. 620, 628 (1987) [hereinafter Braswell].

[29] Resnick, *supra* note 13, at 209.

[30] Braswell, *supra* note 28, at 628.

[31] Hoge and Grisso, *supra* note 24, at 71.

3. Confuses the Jury

Expert testimony also tends to confuse the jury, especially because psychiatric terminology and legal terminology are not synonymous.[32] Sanity, for example, is a legal issue, not a medical one.[33] Clinical diagnoses, such as psychosis, have no legal equivalent legal definition and have no correlation to legal insanity or non-responsibility.[34] According to the APA, when a mental health expert is asked a question about the ultimate legal issue, he "is required to make a leap in logic; he no longer addresses himself to medical concepts but instead must infer or intuit what is in fact unspeakable, namely, the probable relationship between medical concepts and legal or moral concepts. These leaps confuse the jury."[35] That statement from the APA was incorporated into the legislative history of the Insanity Defense Reform Act[36] and heavily relied on by Congress.

Expert psychiatric testimony is also confusing because it is unreliable. Jurors often hear expert opinion, or test results, and do not know how much weight to give that testimony because it may be unreliable. In response to the mental health field's inability to reliably assess a defendant's behavior at the exact moment of the crime, many instruments are now being used to assist the practitioner with his prediction. Tests like the Mental State at the Time of the Offense Screening Evaluation (MSO), the Research Diagnostic Criteria (RDC), and the Rogers Criminal Responsibility Assessment Scales (R-CRAS) "were designed to translate the legal insanity concepts into quantifiable variables that would meet the standard of reasonable scientific certainty."[37] The R-CRAS measures the patient's "reliability, organicity, psychopathology, cognitive control, and behavioral control."[38]

As Stephen Morse, an expert in forensic psychology, points out, any test given to the defendant is administered after the crime - sometimes well after the crime - so the results "tell the factfinder nothing definite about defendant's behavior at the time of the crime."[39] Morse therefore questions how much the evidence really assists the jury and how reliable it really is in the decision-making process. At least with these scientific evaluations, however, the jury can hear testimony about reliability of the test used, rather than just hearing personal opinions from the expert's experience.

4. The Verdict Involves Moral and Social Judgments

Also, as the APA explained, the issue of criminal responsibility has moral and social judgments as well as the legal and psychological decisions.[40] Psychiatrists have no expertise in this field or with moral judgments. The APA statistics show a high degree of reliability (about 80%) "so long as psychiatric testimony is restricted to medical and scientific, and not legal or moral issues."[41] When the jury considers criminal responsibility, however, the issue is entirely legal and moral, therefore reducing the reliability of the expert testimony.[42]

Instead of making a moral decision for the jury, the doctor's job in court is to "present medical information and opinion about the defendant's mental state and motivation and explain in detail reasons for his medical conclusion."[43] If the expert is permitted to make judgments about the defendant's sanity, there is fear the jury "may be led, incorrectly, to infer that the ultimate questions to be resolved are scientific rather than moral and experts are permitted to express opinions on questions which are beyond clinical expertise."[44]

Morse points out that "speculations, assumptions, and assertions are not substitutes for hard evidence; unreliable and invalid scientific evidence cannot assist the factfinder and it may be

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[32] APA statement, *supra* note 25, at 681.

[33] *See id.*

[34] Hoge and Grisso, *supra* note 24, at 73.

[35] APA Statement, *supra* note 25, at 686.

[36] Reform Act, *supra* note 1.

[37] Michael L. Perlin, *Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence*, 40 CASE W. RES. L. REV. 599, 656 (1989-90) [hereinafter Perlin].

[38] *Id.*, at 656 n.251.

[39] Stephen Morse, *Failed Explanations and Criminal Responsibility: Experts and Unconsciousness*, 68 VA. L. REV. 971, 1051 (1982) [hereinafter Morse].

[40] APA Statement, *supra* note 25, at 683.

[41] *Id.*

[42] Well-known expert Michael Perlin explains the insanity defense as a "natural for philosophical debates," because it involves "notions of free will, determinism, responsibility, rationality, community standards, and ethical perspectives." Perlin, *supra* note 37, at 666.

[43] APA Statement, *supra* note 25, at 686.

[44] Richard J. Bonnie and Christopher Slobogin, *The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation*, 66 VA. L. REV. 427, 456 (1980) [hereinafter Bonnie and Slobogin].

misleading and prejudicial."[45] Maryland ignores the unreliability and moral implications, and permits the "expert" to render an opinion totally outside his expertise.

Congress agreed with all of the foregoing reasons offered by the APA: usurping the jury power, experts battling for credibility, the potential of confusing the jury, and the moral aspect tied up with the verdict. In a time when the public was amazed at Hinckley's acquittal, Congress chose to limit the defense exactly as the psychiatrists - the experts themselves - recommended.

II. Maryland Rule 5-704(b)

Although Congress enacted the Insanity Reform Act, Maryland has not adopted the federal modification verbatim. Instead, Maryland codifies the first part of the federal rule, rejecting opinions about certain mental states like intent or predisposition, but then adds an exception permitting opinion about the ultimate issue of responsibility.[46] [47] In other words, a mental health expert would not be permitted, under Maryland Rule 5-704(b), to give his opinion whether the defendant was able to form the requisite intent for murder in the first degree, or whether he was predisposed to entrapment.[48] However, if the defendant offers a not-criminally responsible plea, then, and only then, may an expert give an opinion on the ultimate issue. As the Rule Committee Comments to Maryland Rule 5-704(b) explain, the expert witness "can be asked if defendant was suffering from mental disorder, the result of which caused him to lack substantial capacity to conform to law."[49]

Why did Maryland carve out the narrow exception allowing opinion testimony only on the issue of criminal responsibility? Most Maryland courts maintain that there is little difference in opinion pointing to the ultimate question and opinion that actually answers the ultimate question. "The distinction between an opinion as to a predicate fact that inevitably yields the ultimate fact and an opinion as to the ultimate fact itself [is] a distinction without a difference."[50] It seems Maryland courts simply were accustomed to allowing answers on all ultimate issues, as was permitted before the Hinckley trial and the Insanity Defense Reform Act. It is important to note, however, that Maryland did adopt Federal Part B, and then added the provision that "[t]his exception does not apply to an ultimate issue of criminal responsibility."[51]

A. Expert Opinion on Intent

The question that remains is, why did Maryland keep the rest of Federal 704(b), forbidding opinion on *mens rea*, or intent issues. The Maryland Court of Appeals suggests it may be because "a psychiatrist cannot precisely reconstruct the emotions of a person at a specific time."[52] Whether the defendant had the intent or predisposition, for example, is mere conjecture, and beyond the expertise of mental health experts.

The Maryland Court of Special Appeals also explained that "intention is a fact which the accused can testify to but it cannot be [any] other person testify[ing] directly concerning the intention of another."[53] One trial court had allowed the expert to answer that, due to the defendant's substance abuse and intoxication, the defendant had "no reason or understanding at the time of the crime."[54] The trial court, however, would not allow testimony that, because he was under the influence, a defendant could not form the necessary *mens rea* for the specific intent crime of first degree murder.[55] The Maryland Court of Appeals found no error, holding that the trial judge was correct in refusing testimony about intent or *mens rea*.[56]

B. Expert Opinion on Volition

The APA points out that psychiatric opinion about a defendant's ability to control his behavior, previously part of the federal test for insanity, is often

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[45] Morse, *supra* note 39, at 1048.

[46] MD. R. EVID. 5-704, §2.704.4 (b)(ii), 199.

[47] It is important to know what exactly is an ultimate issue. The Maryland Court of Special Appeals explains the ultimate issue as the element of the crime that either acquits or convicts the defendant. "The credibility of a witness is not an ultimate issue...[defendant] could not be imprisoned on the basis of such allegation and proof." Yount v. State, 99 Md. App. 207, 215, 636 A.3d. 50, 54 (1993). In contrast, "the corpus delecti of the crime" or the "criminal agency of the defendant" are both ultimate issues. *See id.*

[48] Examples taken from S. REP., *supra* note 16.

[49] Md. R. Evid. 5-704, *supra* note 46.

[50] Cirincione v. Maryland, 75 Md. App. 166, 182, 540 A.2d 1151, 1159 (1988).

[51] MD. R. EVID. 5-704(b), *supra* note 4, at 196.

[52] Simmons v. State, 313 Md. 33, 48, 542 A.2d 1258, 1265 (1986) (discouraging expert testimony on the issue of honest belief of self defense).

[53] Cirincione v. State, 75 Md. App. 166, 180, 540 A.2d 1151, 1158 (1988). *See also* Hartless v. State, 327 Md. 558, 611 A.2d 581 (1992).

[54] *Cirincione*, 75 Md. App.at 181, 540 A.2d at 1185.

[55] *See id.* at 180, 540 A.2d at 1158.

[56] *See id.* at 182, 540 A.2d 1159.

unreliable and entirely without scientific basis.[57] However, when restricted to the effect of mental illness, such as whether one could reason or understand, the opinion is within the realm of the psychiatrist's expertise. It is difficult for the psychiatric expert to make a hindsight assessment as to whether or not the defendant a) may have had an intent to commit the crime or b) whether the defendant could control himself at the time he committed the crime.

Mental health experts have a great deal of trouble predicting whether a defendant is insane as prescribed by the Maryland ALI test. It may be within their expertise to opine on the definition, symptoms, or effect of the illness, but psychiatrists cross the line when they claim to know the defendant's thought processes influencing control at the time of the offense. As the APA statement pointed out, "the line between an irresistible impulse and an impulse not resisted is probably no sharper than that between twilight and dusk."[58] The APA rejects the volition test because "psychiatric testimony about volition is more likely to produce confusion for jurors" than expert testimony about defendant's understanding right from wrong.[59]

Maryland, in keeping the volitional prong, adds to jury confusion by making the the insanity defense difficult to understand and promotes unreliable testimony. Experts in Maryland are testifying to whether the defendant can control his behavior even though these experts themselves, in the APA statement, expressed their inability to assess a defendant's volition.

III. Comparison between Maryland Rule and Federal Rule

In everyday practice, the difference between federal and Maryland courts centers around the specific words permitted, the questions admitted, and the extent of the role of experts in the courtroom. The federal rule, however, allows the same information to reach the jury in a manner such that the experts do not usurp the jury's role, confuse them, or make moral judgments for them.

A. Questions Permitted

1. Federal Court

In federal court, for example, the expert would not be permitted to answer the question "Did X's illness impair X's ability to appreciate the wrongfulness of his crime?" or "Could X still understand the wrongfulness of the crime?" Any answer given would answer the ultimate issue. On the other hand, the same expert could explain in great detail the defendant's mental illness and the effect that illness has on his ability to understand. Thus, the expert could respond to the question "Was X suffering from bipolar disorder?" and then go on to explain the symptoms of this particular condition. As long as the discussion is kept to psychiatric or medical terms and focuses on the effect of the illness in general, as opposed to the effect on the defendant, the question will most likely be permissible. Likewise, an expert could answer to "What are the effects or symptoms of schizophrenia?" or "Does schizophrenia affect one's ability to differentiate between fantasy and reality?" Since the attorney can ask these background questions and keep them vague, the expert witness can avoid giving the ultimate answer as to the defendant's responsibility.

The Federal Rule simply "changes the style of question and answer that can be used to establish both the offense and the defense thereto."[60] As before, everything underlying the opinion is still permitted, and all testimony pointing to the ultimate issue is permitted.[61]

As the legislative history of 704(b) reflects, the witness "must be permitted to testify fully about defendant's psychiatric diagnosis, mental state, and motivation at the time of the alleged act."[62] The line is drawn so that witnesses cannot tell the jury how to find; the jury must do the work themselves. Although it prohibits certain questions, "it is clear that Rule 704(b), as interpreted, has not significantly handicapped the receipt of psychological testimony in criminal cases."[63]

2. Maryland Court

Maryland courts would provide wide latitude and permit the expert to say anything, although still

[57] APA Statement, *supra* note 25, at 685.

[58] *Id.*

[59] *Id.*

[60] U.S. v. Mest, 789 F.2d 1069, 1071 (4th Cir. 1986).

[61] *Id.*

[62] S. REP. NO. 225, *quoted in* Braswell, *supra* note 28, at 625.

[63] Rossi, *supra* note 19, at 113.

maintaining that the expert provide the basis for his opinion rather than just stating the conclusion. Maryland would therefore do the same as the federal courts, but would then go a step further by permitting the expert to answer a question such as, "In your opinion, was X criminally responsible for his actions on March 24, 1997?" This would be allowed even though the expert is in no better position than the jury to know how X was thinking at that particular time on March 24.

Dr. Jonas Rappeport, a well-known forensic psychiatry expert in Maryland, favors the Maryland rule. He is vehemently opposed to the federal rule, and enjoys giving his opinion on the ultimate issue whenever possible.[64] Dr. Rappeport feels the federal rule "castrates your testimony because you can't tie everything together."[65] In his experience, most federal judges let him go on, ignoring the federal rule. He advocates testifying against the federal rule because "every time you say anything in federal court, the prosecutor gets up and says you're in sacred ground."[66] Dr. Rappeport also states that he has seen many defense attorneys trying to circumvent the rule by asking hypotheticals.

As one of the authors of the APA statement, Dr. Rappeport categorizes it as a political move more than anything else. He states, however, that the APA position is still the same today as it was in 1984.

3. Hypothetical Questions

Many savvy lawyers try to circumvent Federal Rule 704(b) whenever possible, hoping the trial judge will not realize the lawyer is overstepping his bounds. There has been some disagreement in federal courts regarding where to draw the line, especially with hypothetical questions containing facts that mirror the case on trial.

The Eighth Circuit has found:

> [T]he fact that part of the wording of a question may track the legal test by asking if the disease prevents one suffering from the disease from understanding the nature and quality of an act does not violate the rule [because] the jury is left to ultimately decide whether the disease was so strongly present that the defendant himself suffered the effect of being unable to appreciate the quality of his act.[67]

That position seems to be disfavored, however, because most other circuits have found that similar hypothetical questions come too close to the line. In *United States v. Smart*[68], a D.C. Circuit case, the government's drug expert was asked a hypothetical question involving facts identical to those in the case.[69] [70] In answer to the hypothetical, the witness said "[H]e met the elements."[71] The court of appeals noted that it was a "close question" because most cases in federal circuits find a violation when the word "intent" is used, however in this case the word "element" was used.[72] The court ultimately held that for the trial court to have allowed the hypothetical was error.[73]

The *Smart* case was distinguished from *United States v. Boyd*, also from the D.C. Circuit, in which the government also posed a hypothetical, except that the expert witness used the word "intent" in his answer.[74] In *Boyd*, the court of appeals held that the expert testimony violated Federal Rule 704(b) because the witness was giving an opinion about the necessary mental state for the crime charged.[75]

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[64] Telephone interview with Jonas Rappeport, M.D., expert in forensic psychiatry and member of the APA (March 21, 1997).

[65] *Id.*

[66] *Id.*

[67] U.S. v. Kristiansen, 901 F.2d 1463, 1466 (8th Cir. 1990).

[68] U.S. v. Smart, 98 F.3d 1379 (D.C. Cir 1996).

[69] The prosecutor asked the witness: "A person is observed walking directly to a spot located next to a building...picks up a large white, rock-like substance wrapped in plastic. Within minutes that person is stopped and has a large, white, rock-like substance on him. It's 25.5 grams that turns out to be cocaine base. He also has a pager, $580 in bills, 56 empty Ziploc bags, and a 9 millimeter handgun. With what activity are these actions consistent?"
The defense objected, on the grounds it was not a hypothetical question. The objection was overruled and the expert answered that according to the hypothetical, the person was involved in a drug operation. *Smart*, 98 F.3d at 1385.

[70] As the *Smart* case illustrates, many circuit courts have extended the federal rule so it also excludes ultimate issue testimony by law enforcement officers who are offered as experts in drug cases, perhaps limiting expert testimony even more than Congress intended.
It is interesting to note that legislative history, contained in the Senate Report, suggests Congress only intended to limit expert testimony by mental health experts, but no federal circuit court has drawn such a limit. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE, §704.2 (4th ed. 1996).

[71] *Id.*

[72] *Smart*, 98 F.3d at 1386.

[73] The court held the error was harmless, however, due to the totality of properly admitted evidence against Smart and the absence of exculpatory evidence. *Id.* at 1390.

[74] U.S. v. Boyd, 55 F.3d 667, 670 (D.C. Cir, 1995). The witness answered that the facts of the hypothetical showed "possession with intent to distribute." *Id.*

[75] *See Smart,* 98F3d at 1387.

Apparently, use of the word "intent" automatically violates 704(b), stepping over the line of ultimate issue territory.[76] In order to resolve their close question, the *Smart* court looked to the rationale underlying the rule, especially the rationale of preventing juries from attaching "undue weight" to expert testimony.[77] Ultimately, the court held that the testimony came too close to the 704(b) line because of the "context of the interchange and the use of other words connoting intent."[78]

The D.C. Circuit adopted the Seventh Circuit rule, which instructs the court to consider two key elements of the testimony: (1) the language used by either the attorney or the expert; and (2) whether the context clearly shows the expert opinion is "based on knowledge of general criminal practices" and not a special or personal knowledge of the defendant's practices.[79]

Likewise, the Eleventh Circuit dealt with hypothetical questions in the *Manley* case, holding that "courts cannot permit the use of the hypothetical question as a vehicle to circumvent the clear mandate of Rule 704(b)."[80] In that case, the key word "intent" was not even used. Rather, the defense asked its expert whether, hypothetically, a person suffering from bipolar disorder would "be able to appreciate the nature and quality or the wrongfulness of their actions."[81] Thus, the defense attorney phrased his hypothetical in the exact terms of the insanity rule itself. The objection was sustained and the expert was not permitted to answer.

The *Manley* court contrasted another Eleventh Circuit case, *United States v. Davis*.[82] In the *Davis* case the question was whether a person with multiple personality disorder was able to understand what he was doing. The court allowed the expert to answer because the question "sought an explanation of the disease and its typical effect on a person's mental state."[83]

These cases establish that the key element is the particular words used; one cannot phrase the question in the exact terminology as the insanity test itself, yet background questions that elicit a better understanding of the mental illness will be admitted. According to the Eleventh Circuit, Congress intended to allow expert testimony on the issue of whether the defendant's behavior corresponded to a certain diagnosis.[84] After that, the jury decides whether, because of the mental disorder, the defendant was insane at the time of the crime.[85]

Perhaps the Second Circuit summarized it best when Judge McLaughlin explained that the testimony in question was impermissible because it "stat[ed] the bottom-line inference, leaving it to the jury merely to murmur, 'Amen.'"[86] The Federal Rule prohibits the expert from stating the inference, so that the expert "must leave the inference, however obvious, for the jury to draw."[87]

In the Maryland courts, of course, one need not pose a hypothetical because the witness is permitted to answer specific questions regarding the defendant's responsibility. There is no need for line drawing because the court has unlimited discretion to allow expert opinions on the question of responsibility.

B. Criticism of Maryland Rule 704(b)

Therefore, while the jury's bottom-line question remains the same no matter which court hears the case, the way the jury answers that question will vary, depending where they are. Thus, when in federal court, the jury will have to absorb all of the testimony illustrating the effect of mental illness and apply that information to the facts at hand. Conversely, in Maryland court, the jury has already heard the mental health expert state that "X was unable to appreciate the wrongfulness of his conduct," so the only remaining question is whether the expert is believable and convincing. Also, if there are two conflicting experts in Maryland court, i.e., one for each side, the jury is likely to be confused and the issue comes down to which expert is more credible and

[76] *Id.*

[77] *See id.*

[78] *Id.* at 1389.

[79] *Id.* paraphrasing United States v. Lipscomb, 14 F.3d 1236 (7th Cir. 1994).

[80] U.S. v. Manley, 893 F.2d 1221, 1223 (11th Cir. 1990).

[81] *Id.* at 1222.

[82] U.S. v. Davis, 835 F.2d 274 (11th Cir. 1988) (*cited in Manley*, 893 F.2d at 1224).

[83] *Davis* at 835 F.2d at 274, (*cited in Manley*, 893 F.2d at 1224).

[84] The attorney could ask, for example, "Is this behavior indicative of anti-social personality?" *Id.*

[85] *Id.*

[86] U.S. v. DiDomenico, 985 F.2d 1159, 1165 (2nd Cir. 1993).

[87] *Id.* (referring to U.S. v. Alvarez, 837 F.2d 1024 (11th Cir. 1988)).

convincing. That is particularly the question Congress wanted to eliminate by enacting Part B.

1. Expert Testimony is to Assist the Jury

Expert testimony, no matter what the subject, is offered to "assist the trier of fact."[88] Maryland's rule, however, goes beyond that. It not only helps the jury, but does the jury's job for them. A question arises as to which of the following answers would **assist** the jury: (1) "X could not appreciate the wrongfulness of the crime and therefore is not responsible;" (2) "X's delusions at the time could have misled him so that he thought he was stabbing a bear in self defense, and not a person." While the former may help the jury go home earlier because they are given the answer to the ultimate issue, the latter example actually **helps** them in deliberations and helps them reach the ultimate issue on their own.

Further, the first answer involves issues of morality and responsibility, whereas the second illustrates the effect of the illness, without incorporating legal concepts. Although the first answer may or may not be reliable or valid, "testimony regarding the nature and relative severity of defendant's psychological dysfunction and informed estimates of what he **may** have known, perceived, or intended at a particular time, lie within the expertise of mental health professionals."[89] It is more helpful for the jury to receive testimony in the form of the second answer because the jurors receive reliable, psychiatric testimony that is not couched in legal jargon.

As Morse explained, "experts offering legal conclusions are operating as extra, unnecessary jurors."[90] If the expert is on the stand to assist the jury with the evidence that is beyond their knowledge, the expert should limit his testimony to that type of material only. Once he states whether or not the defendant was responsible, he becomes the thirteenth juror.

2. The issue of criminal responsibility is no more difficult than other jury issues.

The question remains: Why bother making a special exception just for criminal responsibility? Criminal responsibility is no more difficult than any other issue for the jury. Expert testimony is utilized because the expert is presumed to be more competent to answer the questions than the jury. However, the concept of criminal responsibility is not beyond the understanding of the jury, so long as they are given the legal test. The jurors are equally as competent as the expert witness to take all of the evidence, incorporate that evidence into the facts, and create a complete picture ultimately leading to their verdict.

Federal Rule 704(b) encourages the expert to explain any and all information to assist the jury in reaching a decision. Likewise, Rule 705 permits the court to require the expert to give his underlying facts or data. With all of those facts offered for the jury to digest, asking for expert opinion on the defendant's criminal responsibility seems like overkill. Maryland should give its juries more credit, assuming they are able to take all the information provided and competently apply the information to the criminal responsibility test.

3. Maryland fosters confusion

The rationale underlying Federal Rule 704(b) pertains to Maryland Rule 5-704(b) as well. One of the most compelling reasons provided by Congress was to "eliminate the confusing spectacle of competing expert witnesses testifying to contradictory conclusions."[91] Maryland instead fosters such confusion by encouraging experts to take the stand and opine as to the defendant's ability to appreciate the wrongfulness of his alleged crime at the time it was committed.

4. The "expert" has no expertise

The second reason supported by Congress is perhaps the most significant: mental health "experts" are not experts in law[92] or moral issues. Expert testimony is presented simply because the expert possesses some "scientific, technical, or other specialized knowledge."[93] However, as the APA and Congress agree, the mental health expert does not have any special knowledge when it comes to legal terms. He or she is an expert in mental health issues, concepts, and theory. Thus, any testimony given should be restricted to only those issues, concepts, and theories. Responsibility for crime is not a scientific concept.

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[88] FED. R. EVID. 702.

[89] Bonnie and Slobogin, *supra* note 44, at 456 (emphasis added).

[90] Morse, *supra* note 39, at 1057.

[91] S. REP., *supra* note 16, at 231.

[92] *Id.*

[93] FED. R. EVID. 702.

Dr. Jay Katz is an expert in this field and has examined the issue from both perspectives. According to Katz, a psychiatrist and professor of law, permitting expert testimony on the ultimate issue contributes significantly to the so called "battle of the experts."[94] Katz insists he will not answer ultimate questions in court because those are questions a psychiatrist cannot answer.[95] "I can tell a story that I hope will aid judge and jury in making the moral/legal judgment that only they can make."[96] He is in favor of the federal rule prohibiting testimony on the responsibility question because it would force the psychiatric expert "to [attend] to the person and, after all, it is the person they have been trained to evaluate and not the law's jurisprudence."[97] Moreover, Katz believes the experts should express "the uncertainties that affect their judgments and conclusions" and believes we should be critical of the questions lawyers are permitted to ask.[98]

5. Jury participation leads to a fairer trial

It also seems the defendant gets a fairer trial if the jury makes the decision instead of just adopting the expert's opinion based solely on the assumption that the expert is more knowledgable. Although Professor Wigmore characterized the idea of usurping the jury's function as "empty rhetoric,"[99] there is something to be said for asking the jury to sift through the evidence themselves, deliberate, and reach an independent decision. The jury system is in place to ensure fairness; twelve impartial people are supposed to be the fact finders. If the jury is going to accept the expert's opinion without careful consideration, the trial may as well be a bench trial. It is not the psychiatrist's job to set the standard and decide who is responsible and who is not. That is strictly the jury's responsibility. Do we, as a society concerned with justice, really want someone's fate to be based not on the facts in the case, but on which side can hire a more credible expert? Maryland Rule 5-704(b) stands in the way of fairness because the question of the ultimate issue, and therefore the defendant's fate, is in the hands of the experts. The verdict comes down to "may the most credible expert win", not "may justice be done."

IV. Proposal

Maryland's exception allowing opinion testimony on the issue of responsibility is misplaced. The issue of responsibility is the most difficult and unreliable area of mental health expertise. There is no reason to treat testimony on criminal responsibility any differently from testimony on intent, predisposition, malice, or other mental states. Mental health professionals have no higher ability to predict responsibility for the crime than they have to predict intent. If Maryland is going to continue to codify Federal Rule 704(b), the Maryland Rule should drop the last sentence and adopt the federal rule verbatim.

V. Conclusion

Congress enacted Federal Rule 704(b) in response to the overwhelming outrage of the insanity defense and Hinckley's trial. Although the impetus behind the Insanity Defense Reform Act was the APA statement and public outcry, the Act itself changed the insanity defense for the better.

The fears addressed by the APA statement -- usurping the power of the jury; confusing the jury; experts making moral judgments; and a verdict dependant on credibility of witnesses -- still survive today. These fears are legitimate and stand in the way of a defendant getting a fair trial.

Maryland Rule 5-704(b) attempts to alleviate those fears when it comes to intent or mental state, but does nothing for the defendant who pleads not criminally responsible. For that defendant, his trial is still a "battle of the experts," with the experts determining the outcome rather than the facts determining his fate.

Maryland should give the APA statement a thorough reading and do some further research. Federal Rule 704(b) exists as it does for good reason - to preserve the integrity of the trial and try to promote fairness and jury involvement.

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[94] Jay Katz, M.D., *"The Fallacy of the Impartial Expert" Revisited*, 20 BULL. AMER. ACAD. PSYCHIATRY AND L. 141, 146 (1992).

[95] *See id.* at 148.

[96] *Id.*

[97] *Id.* at 147.

[98] *Id.* at 149-50.

[99] WIGMORE, *supra* note 23.