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Professor Daniel J. Capra

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A Recipe for Confusion: Congress and the Federal Rules of Evidence

PROFESSOR DANIEL J. CAPRA

Dana Hassin's Comment on Federal Rule of Evidence 704(b) provides a very incisive and useful analysis of how that troubling Rule can best be applied when law enforcement officers testify as experts on drug activity. More importantly, it provides a compelling case study of some of the negative consequences that arise when Congress bypasses the rulemaking process and directly amends the Federal Rules of Evidence.

PROBLEM ARISING FROM DIRECT CONGRESSIONAL ENACTMENT OF AN AMENDMENT TO THE EVIDENCE RULES

As Ms. Hassin points out, Rule 704(b) was enacted in direct response to the perceived injustices in the Hinckley case. This is a hallmark of congressional change to the Federal Rules: when Congress gets involved, the Rules get changed for political reasons. Congress might perceive an outrage in a single decision, or perhaps a few decisions, and lay blame at the foot of the Federal Rules. In such a heated political environment, members of Congress have little interest in waiting for the rulemaking process to unfold. The rulemaking process takes a minimum of three years from proposal to enactment and usually goes beyond the next election cycle. What is more, if the rulemaking process is used, a congressman will not be able to say that he sponsored or voted for the legislation that rectified the outrage. It is hardly political fodder to say, "I monitored the rulemaking process and did not vote so that the suggested rule could become law."

The problem with a hyped-up political reaction to existing Federal Rules of Evidence is that it is usually completely disproportionate to the defect, if any, in the Rule to be amended. An outrageous decision in a single case, or even in a few cases, does not necessarily mean that the Rule should be amended. An alternate possibility is that the trial court simply misread or misapplied the rule, and the appellate court found no abuse of the trial court's broad discretion. This does not mean that the error will happen again, much less that it will happen frequently. Another possibility is that the outrageous case presented unusual facts or circumstances unlikely to arise again. A third possibility is that the Rule was properly applied, that the Rule imposed societal costs in the particular application, but that the costs of the Rule are outweighed by its long-

term benefits, or that the Rule is less costly than other alternatives. A fourth possibility is that the Rule is in fact problematic, but the courts are in the process of working it out, will work it out over time, and that the cost of imposing a new rule will outweigh the benefits of amendment. (This is because every rule change carries the cost of upsetting settled expectations).

All of these alternatives are better considered by experts in the deliberations attendant to the rulemaking process, especially since they are not considered at all in a heated political atmosphere. It can be expected that when Congress gets involved in drafting evidence rules for a transitory political purpose, expediency wins out over good drafting. Rule 704(b) is an obvious example of a problematically-drafted amendment. As Ms. Hassin points out, the amendment was intended to prevent mental health professionals from testifying to a criminal defendant's intent. But there is no such mental health limitation in the terms of Rule 704. Because the amendment did not come through the rulemaking process, there is no advisory committee note that sets forth with some clarity the scope of the Rule. There was no public comment period in which academics and other parties could inform the drafters of the Rule's problematic effects. Consequently, federal courts have spent seventeen years trying to figure out how a Rule not designed to cover law enforcement expert testimony can in fact be applied to cover law enforcement expert testimony.¹

It should be noted that the Rule 704(b) fiasco is not the only exam-

1. See, e.g., *United States v. Lipscomb*, 14 F.3d 1236, 1241 (7th Cir. 1994) ("[I]t is evident that Rule 704(b) was designed to avoid the confusion and illogic of translating the 'medical concepts' relied upon by 'psychiatrists and other mental health experts' into legal conclusions."). The Court in *Lipscomb* concluded that the most sensible way to read Rule 704(b), in light of its terms and purposes, is to apply it only to testimony based on a psychiatric or medical analysis of the defendant's mental processes; see also *United States v. Gastiaburo*, 16 F.3d 582 (4th Cir. 1994) (stating that Rule 704(b) does not apply to testimony of a law enforcement agent). The *Lipscomb* Court was ultimately unprepared, however, to conclude that Rule 704(b) was completely inapplicable to law enforcement agent-expert testimony. It came to the following conclusion:

Notwithstanding these alternatives, we simply cannot ignore the fact that this court and others have routinely assumed that Rule 704(b) imposes an additional limitation, however slight, on the expert testimony of law enforcement officials. To reconcile that fact with our impression . . . that the rule is of more limited scope, we conclude that when a law enforcement official states an opinion about the criminal nature of a defendant's activities, such testimony should not be excluded under Rule 704(b) as long as it is made clear, either by the court expressly or in the nature of the examination, that the opinion is based on the expert's knowledge of common criminal practices, and not on some special knowledge of the defendant's mental processes. Relevant in this regard, though not determinative, is the degree to which the expert refers specifically to the "intent" of the defendant, for this may indeed suggest, improperly, that the opinion is based on some special knowledge of the defendant's mental processes.

ple of Congressional politics leading to faulty rulemaking. More recently, Congress bypassed the rulemaking process to add Federal Rules of Evidence 413-415. These Rules provide for more liberal admissibility in sexual assault cases where the defendant has committed a prior act or acts of sexual assault. Under Federal Rule of Evidence 404, evidence of the defendant's character is not admissible to prove that he had a propensity to commit the crime charged.² Congress in Rules 413-415 adopted an exception to this historic limitation, so that evidence of the defendant's prior sexual misconduct is now "admissible" to prove his propensity to commit the sexual misconduct charged.³ The Rules were passed as part of a Congressional effort to get "tough on crime" and came quickly on the heels of a few poster child cases in which evidence of a defendant's prior sexual assaults was excluded from trial. (One of the poster child cases, involving William Kennedy Smith, was not even a federal case).⁴ Responding to criticism from the Judicial Conference, Congress provided for the possibility of reconsideration should the Judicial Conference make a timely objection to the new Rules. The Judicial Conference Advisory Committee on Evidence Rules, and subsequently the Standing Committee on Rules of Practice and Procedure and the Judicial Conference itself, concluded that the Rules embodied bad policy, and recommended their reconsideration; Congress refused to do so.⁵

As an alternative, the Advisory Committee on Evidence Rules drafted proposed amendments to the rules on character evidence, Rules 404 and 405, that would both correct ambiguities and possible constitutional infirmities identified in new Evidence Rules 413, 414, and 415, and yet still effectuate Congressional intent. The Advisory Committee proposal would have: (1) expressly applied the other rules of evidence, such as Federal Rule of Evidence 403 and the hearsay rule, to evidence offered under the new rules; (2) expressly allowed rebuttal; (3) expressly enumerated the factors that a Court must take into account in balancing under Rule 403; (4) rendered the notice provisions consistent with the existing notice provision of Rule 404(b); (5) eliminated the notice provisions in civil cases, so that notice would be required as provided in the Federal Rules of Civil Procedure; and (6) permitted reputation and opin-

Lipscomb, 14 F.3d at 1242-43. The *Lipscomb* Court reached an appropriate compromise, by showing respect for the plain language of the rule but avoiding its most illogical consequences.

2. FED. R. EVID. 404.

3. FED. R. EVID. 413; FED. R. EVID. 414; FED. R. EVID. 415.

4. See, *State v. Smith*, Fifteenth Judicial Circuit of Florida, #91-005482 CF A; see also Cathy Booth, *The Case That Was Not Heard*, TIME, Dec. 23, 1991, at 38.

5. See the discussion of this legislative history in STEPHEN A. SALTZBURG, MICHAEL M. MARTIN & DANIEL J. CAPRA, FEDERAL RULES OF EVIDENCE MANUAL 677-83 (7th ed. 1998).

ion evidence only after such evidence has been offered by the defendant.⁶ Congress did not adopt any of these proposed changes, and it is unknown whether they were given meaningful consideration. As a result, Rules 413-415, as originally enacted by Congress, became effective in 1995.

The Rule 413-415 package is, predictably, full of drafting holes. Most notably, it is unclear from the Rules whether the trial court has the discretion under Federal Rule of Evidence 403 to exclude a prior act of sexual misconduct where its probative value is substantially outweighed by its prejudicial effect. There are a few snippets from the debate in Congress indicating that the sponsors of the legislation intended for Rule 403 to apply; but there is nothing as carefully formulated as an Advisory Committee Note to assist the courts in interpreting the Rule.⁷ Luckily, the courts have uniformly held that the trial judge retains discretion under Rule 403 when applying these new rules.⁸ But that is no thanks to Congress.

THE PROBLEM WITH RULE 704(b)

Ms. Hassin correctly notes that Rule 704(b) has been counter-productive not only because it applies beyond its mental health expert origin, but more generally because the Rule "requires the jury, as the finder of fact, to reach a conclusion as to the defendant's mental state without the benefit of the most useful testimony the expert could offer."⁹ Rule 704 imposes a limitation on the factfinding process that is contrary to the search for truth. The Rule is by definition at cross-purposes with the goal of expert testimony, which is to help the factfinder.

Rule 702 permits expert testimony only when it helps the factfinder; if the testimony is not helpful, it is not admissible. Rule 704(a) applies that helpfulness standard to "ultimate issue" testimony. It recognizes that if expert testimony will in fact assist the factfinder, it

6. See The Judicial Conference of the United States, *Report of the Judicial Conference of the United States on the Admission of Character Evidence in Certain Sexual Misconduct Cases* (1995), reprinted in 159 F.R.D. 51 (1995).

7. See, e.g., 113 Cong. Rec. H5438 (1993) (statement of Representative Kyl, indicating that under these Rules the trial judge still has discretion to exclude evidence under Rule 403).

8. See, e.g., *United States v. Guardia*, 135 F.3d 1326 (10th Cir. 1998) (finding no error in the trial court's exclusion of prior acts of sexual misconduct offered under Rule 413; evidence admissible under Rule 413 can still be excluded under Rule 403, and the trial judge properly considered that the prior acts of sexual misconduct offered against the defendant might unduly confuse the jury); *United States v. Larson*, 112 F.3d 600, 604-05 (2d Cir. 1997) (construing the parallel Rule 414: "We view Rule 403 analysis in connection with evidence offered under Rule 414 to be consistent with Congress's intent.")

9. Dana R. Hassin, Comment, How Much is Too Much? Rule 704(b) Opinions on Personal Use vs. Intent to Distribute 55 U. MIAMI L.REV. 667, 671 (2001).

should not be excluded merely because it encompasses an ultimate issue. The reasoning behind Rule 704(a) is that if an expert provides a solid foundation and explanation, then the factfinder is simply left hanging if the expert cannot cap off the testimony with a conclusion about the ultimate issue to which the expert is testifying. Sometimes, a conclusion on the ultimate issue ties the expert's testimony together into a coherent whole, and as such it will be more helpful to state the conclusion along with the rest of the opinion. The Rule also recognizes that a distinction between "ultimate" and other issues is elusive, and that common-law decisions attempting to draw such a distinction were often arbitrary and unpredictable.

Rule 704(a) permits ultimate issue testimony only if it will be helpful in accordance with Rule 702. The testimony will not be helpful if the witness simply gives a conclusion on an ultimate issue, without disclosing her reasoning process or any predicate facts. But it might be helpful if the witness, in the course of explaining difficult matters, lends context to detailed testimony by then drawing a conclusion on an ultimate issue.¹⁰

Because Rule 704(a) permits only helpful ultimate issue testimony, and Rule 704(b) prohibits some testimony admissible under Rule 704(a), it follows that Rule 704(b) must by definition exclude some helpful expert testimony. Otherwise it has no reason for being. Unhelpful ultimate issue testimony is already excluded under Rule 702. For example, in *United States v. Scop*, the defendants were charged with violation of a statute prohibiting fraudulent and manipulative securities practices.¹¹ The expert, a chief investigator for the SEC, declared throughout his testimony that the defendants had engaged in a "fraudulent" and "manipulative" scheme.¹² The Court found that the expert "consciously used the same formulation throughout his testimony," and concluded that this was impermissible.¹³ It noted that the expert "made no attempt to couch the opinion testimony in even conclusory factual statements but drew directly upon the language of the statute and accompanying regulations."¹⁴ Thus, the testimony was conclusory and unhelpful and therefore should have been excluded under Rule 702. The Court did not

10. *See, e.g.*, *Fiataruolo v. United States*, 8 F.3d 930 (2d Cir. 1993) (in an action for refund of tax penalties assessed against "responsible persons" for a contractor's unpaid withholding taxes, there was no error in permitting an expert to opine that the plaintiff was not a responsible person under the statute, as the opinion was not a bald assertion of law; the conclusion grew out of and capped off a detailed explanation of the factual situation).

11. 846 F.2d 135 (2d Cir. 1988).

12. *Id.* at 138.

13. *Id.*

14. *Id.*

need, and did not rely on, Rule 704(b) to exclude the evidence. Thus, the only situation in which Rule 704(b) can have any effect is when it is invoked to exclude helpful expert testimony. But why on earth should we exclude helpful expert testimony?

The inherent illogic and harmfulness of Rule 704(b) was lost on Congress in the heat of the Hinckley result. Ms. Hassin does a fine job of analyzing the negative impact of Rule 704(b) on the testimony of law enforcement experts. Her blueprint for permissible testimony under Rule 704(b) is most helpful.¹⁵ But if one were to listen to the proposed testimony from a juror's perspective, one might say to the expert: "What does it all mean? Get to the point! Stop being so vague! You give me some building blocks, but why not tell me what you make of all of it? I might not come out the same way as you, but I would like to know what you think of all this."¹⁶

For example, the suggested expert on narcotics distribution would testify to typical amounts distributed at the wholesale level; the price of that amount; that it is typically sold for cash or on consignment; that the denomination of the bills depends on the nature of the transaction; and that a certain number of dosage units can come from a certain amount of cocaine base. A typical juror might well have difficulty putting all of this disparate information together with the facts of a case, and might well have even more difficulty in determining the collective weight of the elicited factors. Even if each of the facts proven in the case were to match the very general testimony given by the expert, the juror would be at a loss to consider the cumulative impact of such a match. The fact that one fact proven in the case is consistent with drug activity is one thing, but the fact that five separate facts are each consistent with drug activity is far more powerful. If the expert were allowed to make a conclusion on the ultimate issue, the jury would more easily be able to understand the cumulative impact of the prosecution's case.

All this is not to say that law enforcement experts should be permitted to opine on the defendant's intent without limitation. Again, the testimony must be helpful to be admissible. If the expert simply takes the stand and says, "based on my thirty-five years of drug interdiction, I can tell you that the defendant intended to distribute drugs" this testi-

15. She also helpfully points out that the Rule 704(b) roadblock can be more successfully negotiated if the witness is testifying solely as an expert and not as a combination expert/fact witness. If the witness is solely an expert, it is easier to establish that the opinion "is based on the expert's knowledge of common criminal practices, and not on some special knowledge of the defendant's mental processes." *United States v. Willis*, 61 F.3d 526, 533 (7th Cir. 1995) (citing *United States v. Lipscomb*, 14 F.3d 1236, 1242 (7th Cir. 1994)).

16. These concerns from a typical juror would not be caused by any shortcoming in Ms. Hassin's analysis. Rather, they are caused by the fatally flawed Rule 704(b).

mony should be excluded. It is not helpful; it simply tells the jury to take the expert's word for it. But if the expert provides particularized testimony and a solid foundation concerning the typical practices of drug dealers and explains how the defendant's activity fits those particulars, she should be able to provide a capstone to her testimony by expressing a conclusion on the ultimate issue. Otherwise the jury is left hanging.

OTHER COSTS IMPOSED BY RULE 704(b)

Ms. Hassin focuses on the roadblocks Rule 704(b) imposes on the government when proffering law enforcement expert testimony. It should be noted, however, that Rule 704(b) imposes other unnecessary costs as well. Rule 704(b) has had a negative impact on the testimony of mental health experts. For example, in *United States v. West*,¹⁷ the defendant was charged with bank robbery and his defense was insanity. The trial judge appointed a psychiatrist to examine West. The psychiatrist concluded that West was suffering from schizoaffective disorder, a severe mental disease. But he also concluded that West understood the wrongfulness of his actions when he robbed the bank.¹⁸ Defense counsel saw an advantage under Rule 704(b): he could get the expert to testify that the defendant was suffering from schizoaffective disorder (because that was not an opinion on the ultimate mental state), and yet he could prevent the expert from testifying that the defendant knew that what he was doing was wrong (because that was an opinion on the ultimate mental state). Thus, defense counsel had the thrill of using the state-appointed expert to distort the factfinding process. The government moved to exclude the psychiatrist's testimony, and the trial court agreed, reasoning that it would be "outrageous" to allow a defendant to call an expert to testify to a mental disorder when that very expert has concluded that there was no causal relationship between the illness and the crime charged.¹⁹

The Court of Appeals reversed in *West*. It reasoned that the psychiatrist's ultimate conclusion that West knew right from wrong was inadmissible under Rule 704(b). But Rule 704(b) did not operate to exclude the psychiatrist's conclusion that the defendant was suffering from a mental disease.²⁰ The *West* Court, like the trial judge, was clearly concerned that the expert's testimony, bereft of its ultimate conclusion, would be misrepresentative. The Court, however, believed that it was "obligated to follow the rules Congress has made, and not rewrite or

17. 962 F.2d 1243 (7th Cir. 1992).

18. *Id.* at 1245.

19. *Id.*

20. *Id.* at 1248.

avoid them, however unwise they may be."²¹ While Rule 704(b) might have been intended to promote proper jury determination, the Court in *West* indicates that the Rule can actually lead to distortions of the factfinding process.²²

Nor is the negative impact of Rule 704(b) limited to the prosecution's presentation. Defendants have also suffered from Rule 704(b). For example, in *United States v. Bennett*, the defendant was charged with fraud, check-kiting, money-laundering, and filing false statements and tax returns.²³ In a pretrial ruling, the court precluded the defendant's psychiatric expert from testifying that the defendant's mental disorders made it "unlikely that he could form the intent to defraud" and "affected his ability to knowingly and wilfully submit false statements to the I.R.S."²⁴ So the jury was left with general testimony about the defendant's mental disorders without a sufficient explanation of how these disorders might have affected his culpability for the charged crimes. Rule 704(b) has also been invoked to preclude defendants from introducing exculpatory polygraph evidence, on the ground that the expert's testimony that the defendant was truthful constitutes testimony as to the defendant's mental state.²⁵ Rule 704(b) has further been applied to preclude testimony as to the defendant's physiological responses to a polygraph, the courts finding "no principled distinction" between such testimony and a conclusion that the defendant was telling the truth.²⁶ So the costs of Rule 704(b) are spread widely across criminal trials.

THE PROBLEM OF LINE-DRAWING

One final and serious cost of Rule 704(b) must be noted: the cost of line-drawing. As Ms. Hassin points out, there is a continual battle over how close to the line expert testimony can go without crossing the deadly barrier of intent. Some courts allow mirroring hypotheticals; some do not.²⁷ Some find it crucial that the jury is instructed that the expert has no personal knowledge of the defendant's mental state; some do not.²⁸ The thin and variable line between permissible and impermis-

21. *Id.* at 1249.

22. *See also* *United States v. Brown*, 32 F.3d 236, 239 (7th Cir. 1994) (criticizing Rule 704(b) as denying juries "the specialized knowledge of experts in just the type of complex case in which it is most useful.").

23. 161 F.3d 171 (3d Cir. 1998).

24. *Id.* at 183.

25. *United States v. Morales*, 108 F.3d 1031 (9th Cir. 1997).

26. *United States v. Campos*, 217 F.3d 707, 712 (9th Cir. 2000).

27. *See* the cases collected in SALTZBURG, *supra* note 5, 1425-34.

28. *Id.*

sible testimony under Rule 704(b) can be illustrated by a couple of cases.

In *United States v. Brown*, the defendant was charged with bank robbery and interposed an insanity defense.²⁹ The prosecution's psychiatrist testified that Brown suffered from a major depressive disorder, and may have suffered some depressive episodes with psychotic features. Following the description of this diagnosis, the prosecutor asked the expert whether a person suffering from the disorder described was, by that reason alone, "unable to understand the wrongfulness of his acts?" and the expert answered "no."³⁰ Brown objected that this was ultimate issue testimony as to his legal sanity, barred by Rule 704(b). But the trial judge denied the objection and the Seventh Circuit affirmed.³¹

The Court of Appeals in *Brown* concluded that despite the prohibitory language of Rule 704(b), "testimony may be adduced exploring the particular characteristics of the mental disease and whether those characteristics render one afflicted with the disease able to appreciate the wrongfulness or the nature and quality of his behavior."³² Relying on the finest of distinctions, the Court noted that the prosecution's expert "never testified to Brown's peculiar mental state" but rather "merely described Brown's mental disorder and that such an affliction does not preclude one from appreciating the nature or quality of his acts."³³ The *Brown* Court declared that since the expert testimony was not "specific to Brown's mental state" but rather concerned "the characteristics of his mental disorder," it was permitted by Rule 704(b).³⁴ It is clear that the Court in *Brown* was struggling with the Rule, and indeed it was critical of the Rule. The Court declared that the Rule had the misguided purpose of requiring jurors to decide the issue of sanity "without being told what conclusion an expert would draw."³⁵ Such a result is counterproductive because it "denies juries the specialized knowledge of experts in just the type of complex case in which it is most useful."³⁶

Another example of fine line-drawing arose in *United States v. Thigpen*,³⁷ where the Court found no error in allowing the prosecutor to "ask a series of questions to elicit an opinion as to whether [schizophrenia] by necessity implies that a person would be unable to appreciate the

29. 32 F.3d 236 (7th Cir. 1994).

30. *Id.* at 237.

31. *Id.*

32. *Id.* at 239.

33. *Id.*

34. *Id.*

35. *Id.* (citing *United States v. West*, 962 F.2d 1243, 1247 (7th Cir. 1992)).

36. *Id.*

37. 4 F.3d 1573 (11th Cir. 1993) (en banc).

nature and quality of his acts.”³⁸ The Court stated that these questions were permissible because “no question by the prosecutor asked the witness to opine whether Thigpen was able to appreciate his actions.”³⁹ The Court concluded that while a “thinly veiled hypothetical may not be used to circumvent Rule 704(b),” the Rule does not bar “an explanation of the disease and its typical effect on a person’s mental state.”⁴⁰

The line drawn by the Court in *Thigpen* is between a hypothetical that includes virtually all of the characteristics of the defendant (i.e., a thinly veiled hypothetical), and a more general hypothetical about the nature of the disease suffered by the defendant and its “typical” effect on human conduct. But this is hardly a bright line; and it is often meaningless to distinguish between “general” hypotheticals and “thinly veiled” hypotheticals. For example, in *United States v. Kristiansen*,⁴¹ the defendant was charged with escape from a halfway house. He claimed that he lacked wilful intent to escape, due to insanity. Kristiansen’s expert psychiatrist testified that Kristiansen had been under the influence of cocaine and suffered from psychosis. On cross-examination, the prosecutor asked: “Would this severe mental disease . . . affect the individual’s ability to appreciate the nature and quality of the wrongfulness of his acts?”⁴² The trial court sustained an objection, and the Court of Appeals affirmed, reasoning that this was a hypothetical question designed to elicit testimony on the ultimate issue of intent. In apparent contrast, the Court held that the defendant should have been permitted to ask: “Could the severe mental disease . . . affect the ability of an individual to appreciate the nature of the quality or the wrongfulness of his acts?”⁴³ The Court of Appeals reasoned as follows:

[T]he defense should have been permitted to ask this question because it relates to the symptoms and qualities of the disease itself and does not call for an answer that describes Kristiansen’s culpability at the time of the crime. Rule 704(b) was not meant to prohibit testimony that describes the qualities of a mental disease.⁴⁴

There is obviously little difference between the two questions put to the expert in *Kristiansen*, yet the Court specifically held that one was permissible under Rule 704(b) and one was not. Apparently, counsel is not permitted to ask, “Would a person suffering from the defendant’s condition be able to appreciate the nature and quality of his actions?”

38. *Id.* at 1580.

39. *Id.*

40. *Id.*

41. 901 F.2d 1463 (8th Cir. 1990).

42. *Id.* at 1465.

43. *Id.*

44. *Id.* at 1466.

But, counsel is apparently permitted to ask, “Would the defendant’s condition affect the ability of a person suffering from that condition to appreciate the nature and quality of his actions?”

While the above examples concern mental health expert testimony, Ms. Hassin shows quite powerfully that the same line-drawing difficulties apply to the testimony of law enforcement experts. For example, *United States v. Lipscomb*⁴⁵ involved typical expert testimony from drug enforcement agents, to the effect that the seized drugs were for “street level distribution.”⁴⁶ The Court began by noting that courts applying Rule 704(b) would typically find this testimony permissible, because the expert did not say that the particular defendant had an intent to distribute drugs. The Court found, however, that this distinction was relatively useless when applied to the testimony of law enforcement agent-experts:

In the first place, though officers did not in fact say “intent” or “intended,” they may as well have, for the effect would have been exactly the same. If the drugs found on Lipscomb “were for street sale distribution,” as each of the officers testified, then Lipscomb possessed them for that purpose; he intended to distribute them.⁴⁷

The *Lipscomb* Court quite rightly saw the insubstantial nature of the distinction between “the drugs were for street sale distribution” and “Lipscomb, who was found with the drugs, was engaged in street sale distribution.”⁴⁸ But the Court nonetheless found this distinction warranted and indeed required by Rule 704(b).

One can only conclude that any Rule that relies on such an evanescent distinction does not deserve a long life in the Federal Rule of Evidence.

WHAT SHOULD BE DONE WITH THIS RULE?

The reader might ask: “If the Rule is so terrible, why not get rid of it?” Isn’t the author of this response the Reporter to the Advisory Committee on Evidence Rules? Instead of complaining, why not get the Advisory Committee to do something about it? My response to such a question is twofold:

- 1) I am only the Reporter; I can’t get the Advisory Committee to do anything. Issues for the Committee are generated by suggestions from judges, lawyers, and academics, and from the Advisory Committee members themselves. The Reporter’s role is to assist the Committee with background research, to provide

45. 14 F.3d 1236 (7th Cir. 1994).

46. *Id.* at 1238.

47. *Id.* at 1240.

48. *Id.*

drafting alternatives, and to prepare the Advisory Committee Note. Reporters who conceive themselves as members of the Committee they serve usually do not serve very long.

- 2) More importantly, the provenance of Rule 704(b) makes it difficult to abrogate or amend through the rulemaking process. It is clear that Congress has ultimate authority over federal court rulemaking. The rulemaking process established by the Enabling Act⁴⁹ provides for court-generated rulemaking, but Congress did not cede its oversight, nor its ultimate authority to amend the Rules directly. It would be quite awkward for the Advisory Committee, and then the Judicial Conference, to recommend the abrogation of a Rule that was enacted directly by Congress.

The rulemaking process is designed to be less political than the legislative process, but politics, broadly speaking, is still a part of court rulemaking. Amending or abrogating rules of evidence only makes sense where the benefits of an amendment clearly outweigh the costs. On the cost side must be included any long-term harm to the rulemaking process that might arise from a conflict between the courts and Congress. If the courts are surviving with the rule as they appear to be, however unhappily, the benefits of a rule change are unlikely to outweigh the costs. This is not to speak of the costs of upsetting settled expectations that come with any rule change.

A less onerous alternative might be to amend Rule 704(b) to limit its bad effect to the testimony of mental health professionals. Such an amendment might look something like this:

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 mental health expert witness testifying ~~with respect to the mental state or condition of a defendant~~ in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

The reason this proposal is more “politically” palatable is because it can be pitched as an amendment that restores Rule 704(b) to its originally intended scope, i.e., as a limit on psychiatric testimony such as that in the Hinckley case. As such, it is not a slap to the face of Congress. It

49. 28 U.S.C. §§ 2071-2077.

can even be pitched as correcting the *courts'* misinterpretation of what Congress must have, in its infinite wisdom, intended.

Of course, the amendment is not a cure-all because the courts will still be beset with line-drawing and with the stifling of the truthfinding function when mental health experts are called to testify. But at least these problems will no longer spill over to law enforcement experts. This more limited amendment would mean that the vast majority of expert witnesses in a criminal trial would no longer be subject to the insubstantial distinctions of Rule 704(b).

Now, if only somebody could suggest this change to the Advisory Committee.