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CREDIBILITY: A FAIR SUBJECT  
FOR EXPERT TESTIMONY?

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# CREDIBILITY: A FAIR SUBJECT FOR EXPERT TESTIMONY?

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“[E]xpert witnesses . . . may now be called to express their opinion of the witness’ veracity.”<sup>1</sup>

The Honorable Jack B. Weinstein

“Expert opinion as to the character of a witness for truthfulness is *not* admissible.”<sup>2</sup> Professor Michael Graham

### I. INTRODUCTION

How can it be that two leading commentators take diametrically opposed positions concerning the use of expert testimony to address witness credibility? While after the adoption of the Federal Rules of Evidence, Judge Weinstein stated categorically that the Federal Rules permit experts to testify concerning a witness’s truthful character, Professor Michael Graham states with equal confidence that they do not. Courts also adopt conflicting positions on the admissibility of expert testimony on witness credibility. The Fifth Circuit has asserted that “[t]he readily apparent principle is that the jury should, within reason, be informed of all matters affecting a witness’s credibility to aid in their determination of the truth.”<sup>3</sup> Other courts regard expert testimony relating to credibility as an invasion of the jury’s province, taking the view that “[c]redibility . . . is for the jury – the jury is the lie detector in the courtroom.”<sup>4</sup>

The explanation for the conflicting lines of authority lies in the residual strength of the common law maxim that witnesses – particularly expert witnesses – must not invade the jury’s province by vouching for, or bolstering, a witness’s credibility. It also lies in the extension of that maxim to preclude expert testimony that explains weaknesses in credibility. Judge Weinstein looks at the Federal Rules of Evidence, which opened the door to more opinion testimony and more expert testimony, and concludes that the rules permit experts to testify concerning credibility.<sup>5</sup> Professor Graham examines decisions and concludes that the testimony is not admissible.<sup>6</sup> His assertion reflects the courts’ persistent adherence to the maxim, even though that limitation was not codified in the rules of evidence.

The common law prohibition on expert testimony on credibility should not be given this residual effect and continue to restrict the admissibility of evidence bearing on credibility. Instead, the courts should set aside the maxim’s broadly stated prohibition and eliminate the overprotection of the jury’s “special province.”<sup>7</sup> The courts should engage forthrightly the

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<sup>1</sup> 3 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S EVIDENCE § 608[4] (Joseph M. McLaughlin ed., 1st ed. 1996). Although Judge Weinstein’s treatise no longer contains such a firm assertion, it still acknowledges that experts may express an opinion concerning the witness’s veracity:

A possible benefit stemming from the allowance of opinion testimony is that the psychiatric expert will no longer have to adhere to the artificial rule of couching his or her opinion in terms of mental capacity; he or she may speak freely in terms of traits of character, to the extent that the concept is meaningful, without fear of running into the restrictions of the opinion rule.

*Id.* at § 608[28].

<sup>2</sup> 2 MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 608.1, 130 n.3 (5th ed. 2001) [hereinafter GRAHAM, FEDERAL EVIDENCE].

<sup>3</sup> *United States v. Partin*, 493 F.2d 750, 762 (5th Cir. 1974).

<sup>4</sup> *Unites States v. Barnard*, 490 F.2d 907, 913 (9th Cir.1973).

<sup>5</sup> 4 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S EVIDENCE § 608.13 [3][a] (Joseph M. McLaughlin ed., 2d ed. 2006).

<sup>6</sup> *See* 2 GRAHAM, FEDERAL EVIDENCE, *supra* note 2, at § 704.1, 631-37 n.22.

<sup>7</sup> *See* Ric Simmons, *Conquering the Province of the Jury: Expert Testimony and the Professionalization of Fact-Finding*, 74 U. CIN. L. REV. 1013, 1018-23 (2006) (discussing evolution of concept of jury’s special province and its

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evidentiary issues raised by specific types of bolstering or impeaching expert testimony. The rules of evidence do not support discontinued implementation of the prohibition on expert testimony addressing credibility. Moreover, the courts cannot expect juries to function as accurate lie detectors; modern research has documented human weakness at divining credibility. There is no reason to think that jurors can effectively determine whether a witness is lying or telling the truth. The legal system should respond to this insight by providing the jurors with as much assistance as possible, as they evaluate which witnesses to believe and which facts to credit. Expert witnesses are sometimes able to supply this assistance.

An expert witness may provide insight concerning a specific witness based on expert evaluation of that witness, or may educate the jury on matters that the jury can bring to bear on its credibility assessment. A particular expert's testimony may address witness credibility in one of several ways. How the courts should assess admissibility depends on the way in which the testimony addresses witness credibility.

First, the expert may be in a position to testify concerning the witness's general tendency to be truthful or untruthful – the witness's character for truthfulness. The notorious case, *United States v. Hiss*,<sup>8</sup> involved exactly such testimony. The trial court admitted the testimony of the defense expert that the government's key witness, Whittaker Chambers, had a pathological condition that caused him to engage in persistent lying.<sup>9</sup> Although the precedent established in *Hiss* has rarely been followed, the modern rules of evidence expressly provide that opinion concerning a witness's character for truthfulness is admissible and carves out no special rule for expert opinion.<sup>10</sup> Expert testimony addressing character for truthfulness should be admissible under the rules like that of lay character witnesses.

Second, and far more commonly, expert testimony may address the witness's perception and memory or the witness's bias. Testimony that bolsters or attacks credibility in these ways is not governed by a specific evidence rule; instead, it is governed by the general rules providing that relevant evidence is admissible but allowing the court to exclude relevant evidence if its negative characteristics substantially outweigh its probative value. Evidence that helps the jury to understand the witness's perception, memory, or bias has strong probative value. Evidence falling in this category should generally be admitted.

Third, an expert witness may help the jury understand the way in which a witness's conduct reflects on the witness's credibility. When a witness's conduct may suggest a lack of credibility to the jury, expert insight into that conduct may bolster the witness's credibility. Like evidence of perception, memory, or bias, testimony in this category is not governed by a specific rule of evidence and can play an important role in assisting the jury.

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application to expert testimony bearing on credibility and questioning validity of concept). One commentator suggests that this notion of the "special province" is simply shorthand for the pre-rule reasons for excluding expert testimony. See Margaret A. Berger, *United States v. Scop: The Common-Law Approach to an Expert's Opinion About a Witness's Credibility Still Does Not Work*, 55 BROOK. L. REV. 559, 592, 617 (1989).

<sup>8</sup> 88 F. Supp. 559 (D.C.N.Y. 1950).

<sup>9</sup> *Id.* at 559-60; see also Richard H. Underwood, *Truth Verifiers From the Hot Iron to the Lie Detector*, 84 KY. L.J. 597, 626 (1995-1996) (discussing, albeit briefly, admission of expert's testimony regarding Chamber's veracity). The expert's testimony is available at

<http://www.law.umkc.edu/faculty/projects/ftrials/hiss/hisstrialtranscripts.html#Dr.%20Carl%20A.>

<sup>10</sup> See FED. R. EVID. 608(a). Federal Rules of Evidence, Rule 608(a) provides:

Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

*Id.*

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Courts do not always recognize the different roles expert testimony can play, and, as a result, they apply evidentiary rules inappropriately or simply invoke the outdated maxim to bar expert testimony without full analysis. The courts should engage in a more nuanced consideration of the role played by proffered expert testimony and how the role of the evidence affects its admissibility. Doing so should lead the courts to embrace the promise of the modern rules of evidence and permit experts to assist juries as they assess credibility.<sup>11</sup> This article explores the ways in which experts can help the jury, suggesting the analytical approaches the courts should apply depending on the nature of the expert testimony.

In Section II, I provide a brief overview of the relevant rules of evidence to provide the context for the discussion. In Section III, I describe the common law maxim and then demonstrate the flaws in its foundation as a rule in modern evidence law. In Sections IV and V, I consider the different ways in which expert testimony can be used to help the jury assess credibility, arguing that the courts should admit such testimony far more readily. In Sections VI and VII, I consider some of the barriers that have been used to continue the effect of the common law maxim and limit the admissibility of expert testimony bearing on credibility. Finally, in Section VIII, I examine and caution against overreaching by the parties presenting expert testimony on credibility, suggesting that a more restrained approach will increase the willingness to allow such testimony.

### **II. THE CONTEXT: A PRIMER ON THE RULES OF EVIDENCE**

The admissibility of expert testimony addressing credibility must be considered in the context of the modern rules of evidence as embodied in the Federal Rules of Evidence.<sup>12</sup> The federal rules marked a change in the law. The rules establish a clear bias in favor of admissibility.<sup>13</sup> In addition, the rules specifically abandon some common law restrictions on admissible evidence.<sup>14</sup> Three sets of rules, each expanding the range of admissible evidence, bear on this discussion: the general rules governing the admissibility of relevant evidence, the rules governing character evidence, and the rules governing expert testimony. Each of these sets of rules favors the admissibility of expert testimony addressing credibility.

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<sup>11</sup> I disagree with the conclusion of Professor Friedland that a rules-based approach is not workable. See Steven I. Friedland, *On Common Sense and the Evaluation of Witness Credibility*, 40 CASE W. RES. L. REV. 165, 209-10 (1989). His proposal for a system of limited admissibility would curtail expert testimony related to credibility too much and continue to deprive the jury of useful information. See *id.* at 221-25.

<sup>12</sup> Since the federal rules went into effect in 1975, the majority of states have adopted rules of evidence modeled on the federal rules.

<sup>13</sup> See 1 STEPHEN A. SALTZBURG, MICHAEL M. MARTIN & DANIEL J. CAPRA, FEDERAL RULES OF EVIDENCE MANUAL 241 (7th ed. 1998) (“The policy of the Rule is that if the balance between probative value and countervailing factors is close, the Judge should admit the evidence. In other words, there is a presumption in favor of admitting relevant evidence. . . . The rationale is that exclusion amounts to a total deprivation of the offeror’s probative evidence, while admission may be accompanied by redaction, limiting instruction, or other safeguard by which both the objector and offeror can ordinarily be accommodated.” (footnotes omitted) ); GLEN WEISSENBERGER & JAMES J. DUANE, WEISSENBERGER’S FEDERAL EVIDENCE § 403.2, 87 (4th ed. 2001) (“It is clear that, at least symbolically, Rule 403 favors a presumption of admissibility by mandating that the negative attribute of the evidence must substantially outweigh its probative value before exclusion is justified.”); Berger, *supra* note 7, at 587 (“The central objective of the Federal Rules of Evidence is to ensure that all available useful information reaches the trier of fact.”); Edward J. Imwinkelried, *Federal Rule of Evidence 402: The Second Revolution*, 6 REV. LITIG. 129 (1987) (discussing structure of federal rules and bias in favor of admissibility).

<sup>14</sup> See, e.g., FED. R. EVID. 704 (abrogating prohibition on testimony as to ultimate issue).

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First, the rules governing character evidence open the door to some evidence that would have been excluded at common law. While the rules of evidence limit the admissibility of character evidence, they admit opinion evidence concerning truthful character. Under Rule 404(a), character evidence is generally inadmissible to establish that the person acted in conformity with character. However, Rule 404(a)(3) creates an exception, admitting some character evidence relevant to credibility.<sup>15</sup> One aspect of that exception is codified in Rule 608(a) and is central to the discussion that follows.<sup>16</sup> Rule 608(a) allows the introduction of evidence of a witness's untruthful character to raise the inference that, acting in conformity with her untruthful character, the witness did not tell the truth at trial. In response, the party seeking to bolster the witness's credibility can introduce evidence of truthful character to raise the inference that the witness testified truthfully. This rule codifies the common law rule that allowed evidence of a witness's truthful or untruthful character, but it expands the range of admissible testimony. Where the common law permitted character to be proved only through evidence of reputation, the modern rule admits opinion evidence as well.<sup>17</sup> With this expansion, the rule thus opens the door to expert opinion concerning a witness's character for truthfulness.<sup>18</sup>

Second, the rules favor admissibility of relevant evidence, a proposition that logically extends to expert testimony concerning credibility. The Federal Rules of Evidence contain no general rule addressing evidence that attacks or bolsters credibility.<sup>19</sup> Instead, most impeachment questions are governed by the general rules of admissibility, Rules 402 and 403.<sup>20</sup> These rules establish a preference for admitting relevant evidence. Rule 402 provides, in part, that “[a]ll relevant evidence is admissible, except as otherwise provided.”<sup>21</sup> Rule 403 gives the

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<sup>15</sup> FED. R. EVID. 404(a)(3) provides that evidence of the character of a witness is admissible as provided in Rules 607, 608, and 609. *See* *McKenzie v. McCormick*, 27 F.3d 1415, 1421 (9th Cir. 1994) (“Under FED. R. EVID. 404(a)(3) and 608(a), evidence of [witness’s] character for truthfulness was admissible after [attack].”); *United States v. Butt*, 955 F.2d 77, 84 n.8 (1st Cir. 1992) (explaining that Rule 608 acts as exception to general exclusion of character evidence); *United States v. Candoli*, 870 F.2d 496, 505-06 (9th Cir. 1989) (reasoning that Rule 404(a)(3) creates exception to Rule 404, allowing character evidence pursuant to Rule 608(a)); KENNETH S. BROUN ET AL., *MCCORMICK ON EVIDENCE* 281 (John W. Strong ed., 5th ed. 1999) (“Thus, Federal Rule and Revised Uniform Evidence Rule 404(a), which basically codify common law doctrine, provide that subject to enumerated exceptions, ‘[e]vidence of a person’s character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion . . . .’”); 1 GRAHAM, *FEDERAL EVIDENCE* 353 (“Rule 404(a)(3) refers to the exception for evidence of the character of a witness as effecting [sic] the witness’ credibility provided in Rules 607, 608, and 609”).

<sup>16</sup> *See* FED. R. EVID. 608(a) (allowing admission of character evidence concerning truthfulness). For the text of Rule 608(a), *see supra* note 10; Fred Warren Bennett, *Is the Witness Believable?*, 9 ST. THOMAS L. REV. 569 (1997). The other aspects of the Rule 404(a)(3) exception are codified in Rule 608(b) (allowing cross examination on specific conduct reflecting untruthful character) and Rule 609 (allowing impeachment with prior convictions as proof of untruthful character).

<sup>17</sup> *See also* FED. R. EVID. 405(a) (allowing opinion as well as reputation evidence to prove character).

<sup>18</sup> The specific limitations of Rule 608 are discussed in Section IV.B *infra*.

<sup>19</sup> *See generally* Edward J. Imwinkelried, *The Silence Speaks Volumes: A Brief Reflection on the Question of Whether it is Necessary or Even Desirable to Fill the Seeming Gaps in Article VI of the Federal Rules of Evidence, Governing the Admissibility of Evidence Logically Relevant to the Witness Credibility*, 1998 U. ILL. L. REV. 1013, 1026 (1998). Some state rules address impeachment generally. *See, e.g.*, PA. R. EVID. Rule 607(b) (“The credibility of a witness may be impeached by any evidence relevant to that issue, except as otherwise provided by statute or these Rules.”).

<sup>20</sup> *See* Imwinkelried, *The Silence Speaks Volumes*, *supra* note 19, at 1026.

<sup>21</sup> FED. R. EVID. 402; *see also* *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 587 (1993) (“The Rule’s basic standard of relevance thus is a liberal one.”); *United States v. Abel*, 469 U.S. 45, 48-49 (1984); David S. Caudill & Lewis H. LaRue, *Why Judges Applying the Daubert Trilogy Need to Know About the Social, Institutional, and Rhetorical -- and Not Just the Methodical -- Aspects of Science*, 45 B.C.L. REV. 1, 41 (2003) (“Rule 402 sets

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court discretion to exclude otherwise admissible relevant evidence due to its likely negative impact on the jury or on the administration of the trial, but only if the risk of negative impact *substantially* outweighs its probative value.<sup>22</sup> Thus, unless expert testimony relevant to impeach or bolster credibility is excluded by a specific rule, the court should admit it unless its negatives substantially outweigh its tendency to impeach or bolster.

Third, aspects of the rules governing expert testimony also favor admission of expert testimony bearing on credibility.<sup>23</sup> In particular, Rule 704 of the Federal Rules of Evidence provides, that “testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.”<sup>24</sup> In the comments accompanying Rule 704, the Advisory Committee emphasized the importance of using expert testimony to help the jury and rejected the notion that an expert would usurp the province of the jury as “empty rhetoric.”<sup>25</sup> In addition, the rules liberalized admissibility, abandoning the common law rule that admitted expert testimony only when it was necessary to the jury’s deliberations and allowing expert testimony whenever it would assist the jury.<sup>26</sup>

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forth a liberal admissibility standard for ‘[a]ll relevant evidence,’ defined in Rule 401 as ‘evidence having any tendency’ to make ‘more probable or less probable’ the existence ‘of any fact . . . of consequence’); Imwinkelried, *The Silence Speaks Volumes*, *supra* note 19, at 1026.

<sup>22</sup> See FED. R. EVID. 403. Rule 403 provides, in full:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

*Id.*

<sup>23</sup> A full consideration of the impact of the rules governing expert testimony on the admissibility of expert testimony addressing credibility is beyond the scope of this article. Under prevailing federal law, the trial court must evaluate the reliability of the expert’s opinion. Rule 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to 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 (1) the testimony is based upon 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.

FED. R. EVID. 702. Some expert testimony addressed to credibility will not be able to clear this hurdle. See *generally* Berger, *supra* note 7, at 606 (referencing “helpfulness” standard of Rule 702); Friedland, *supra* note 11, at 189-90 (discussing admissibility of evidence under guidelines of Rule 702).

<sup>24</sup> FED. R. EVID. 704. The full text of the rule is as follows:

(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

(b) No 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.

*Id.*

<sup>25</sup> FED. R. EVID. 704, advisory committee’s notes (quoting 7 WIGMORE §§ 1920-21); see also FED. R. EVID. 702, advisory committee’s notes. The fundamental question that a court must answer . . . is “whether the untrained layman would be qualified to determine intelligently and to the best degree, the particular issue without enlightenment from those having a specialized understanding of the subject matter involved.” *Id.* United States v. Downing, 753 F.2d 1224, 1228-29 (3d Cir. 1985) (rejecting argument that expert testimony would usurp jury’s function); Berger, *supra* note 7, at 593-604 (discussing this requirement as applied to testimony touching on credibility). See *generally* Simmons, *supra* note 7, at 1023-25 (discussing origins of ultimate issue rule and impact of Rule 704).

<sup>26</sup> See United States v. Brawner, 173 F.3d 966, 969 (6th Cir. 1999) (holding necessity is not condition precedent for admissibility of expert opinion testimony; rather, test is whether the opinion will assist trier of fact); Breidor v. Sears, Roebuck and Co., 722 F.2d 1134, 1139 (3d Cir. 1983) (“Helpfulness is the touchstone of Rule 702.”); State v. Gherasim, 985 P.2d 1267, 1272 (Or. 1999) (holding evidence need only be helpful to be admitted and that the trial



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Further, the rules permit experts to base their opinion on a wider range of information than the common law allowed.<sup>27</sup>

In combination, these three aspects of the modern rules of evidence should smooth the path to the introduction of expert testimony bearing on credibility. Still, courts resist. They continue to rely on the common law maxim precluding such evidence, they overlook the fair probative value of testimony addressed to credibility, and they create barriers to the admissibility of such expert testimony. The courts instead should take the invitation of the rules of evidence and open the door to expert testimony on questions of credibility.

### **III. DEBUNKING THE MAXIM RESTRICTING EXPERT TESTIMONY ADDRESSING CREDIBILITY**

The prohibition on expert testimony addressing credibility finds its roots in the common law maxim that the expert must not invade the jury's province of determining witness credibility.

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court had applied too demanding a standard); *State v. Middleton*, 657 P.2d 1215, 1219 (Or. 1982) (detailing "assist the jury" standard); PAUL F. ROTHSTEIN, FEDERAL RULES OF EVIDENCE, *Rule 702* (3d ed. 2006) (discussing common law understanding of expert testimony.).

The common law viewed expert testimony with a somewhat jaundiced eye. Although 'progressive' courts began to liberalize the standards, in its purest form the common law was quite restrictive on a number of levels. (a) It confined experts to those with extensive formal learning. (b) They were allowed to testify only in areas totally beyond lay ken. (c) They had to base their testimony only on admissible, admitted evidence, (d) presented to them in an open court 'hypothetical question' that had to (e) stick scrupulously to proven facts, (f) and had to include substantially *all* the pertinent facts. (g) Neither experts nor lay witnesses could testify to an ultimate issue in the case, and (h) expert conclusions had to be based "on a reasonable degree of professional probability or certainty, not just possibility.

*Id.*; 29 CHARLES A. WRIGHT & VICTOR J. GOLD, FEDERAL PRACTICE & PROCEDURE § 6265 (2006) ("Expert testimony was admissible under pre-rules common law only where the subject of that testimony was beyond the experience or knowledge of ordinarily lay people and would provide 'appreciable help' to the trier of fact."); Berger, *supra* note 7, at 593-95; Deon J. Nossel, Comment, *The Admissibility of Ultimate Issue Expert Testimony by Law Enforcement Officers in Criminal Trials*, 93 COLUM. L. REV. 231, 234 (1993). A trial court's assessment that expert testimony is unhelpful may be reversed as an abuse of discretion. *See, e.g., State v. White*, 943 P.2d 544, 547 (N.M. Ct. App. 1997).

<sup>27</sup> *See* FED. R. EVID. 703. Rule 703 provides, in part:

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.

*Id.*; Daniel D. Blinka, "Practical inconvenience" or Conceptual Confusion: The Common-Law Genesis of Federal Rule of Evidence 703, 20 AM. J. TRIAL ADVOC. 467 (1997) (reasoning that adoption of Rule 703 was important not only because it continued common-law traditions, "but also because the Federal Rules of Evidence greatly expanded the boundaries of admissibility . . ."); *see also* FED. R. EVID. 705 (allowing expert to testify without first disclosing basis of opinion).

Questions may arise concerning the expert's access to information related to the opposing party's witness. To realize the promise of Rule 608 and to maximize the utility of the other types of expert testimony that can help jurors more accurately assess credibility, experts will require access to information related to the witnesses about whom they are asked testify. As a result, the courts may be asked to provide the opposing party's expert access to information to assess character with an eye to attacking the witness' credibility. In some cases, the expert will need to examine the witness whose credibility is questioned. *See, e.g., Abbott v. State*, 138 P.3d 462 (Nev. 2006) (discussing test governing whether to grant defendant's request for psychological examination of prosecution witness); *People v. Acklin*, 424 N.Y.S.2d 633, 636 (N.Y. Sup. Ct. 1980) (discussing prosecution disclosure to defense concerning complaining witness); *Crawford*, 718 A.2d 768, 769 (Pa. 1998) (alluding to defendant's request and court's order to have prosecution witness submit to psychological evaluation). Consideration of this question is beyond the scope of the article.

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That maxim rests on the premise that the jury is adequately equipped to assess a witness's credibility and that expert testimony addressing credibility is both unnecessary and unduly invasion of the jury's province. This maxim, resting on this premise, is invoked in modern cases to limit the use of expert testimony to help the jury assess credibility.

There are two flaws in this legal framework. First, as discussed in Section B, the premise that the jury can effectively assess credibility is false. Second, as discussed in Section C, the maxim is applied far more broadly than its roots warrant. As I suggest in the later sections of the article, the courts should move away from this common law maxim and instead apply the modern rules of evidence to allow expert testimony that will assist the jury accurately to assess witness credibility.

### *A. The Maxim*

Many courts cling tenaciously to the maxim that witnesses must not invade the jury's province by vouching for or bolstering a witness's credibility.<sup>28</sup> In *Commonwealth v. Seese*, the Pennsylvania Supreme Court explained:

The question of whether a particular witness is testifying in a truthful manner is one that must be answered in reliance upon inferences drawn from the ordinary experiences of life and common knowledge as to the natural tendencies of human nature, as well as upon observations of the demeanor and character of the witness. The phenomenon of lying, and situations in which prevarications might be expected to occur, have traditionally been regarded as within the ordinary faculty of jurors to assess. For this reason, the question of a witness's credibility has routinely been regarded as a decision reserved exclusively for the jury.<sup>29</sup>

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<sup>28</sup> See, e.g., *United States v. Alicea*, 205 F.3d 480, 483 (1st Cir. 2000) (“Except in the most unusual circumstances . . . credibility determinations are for the jury . . . .”); *United States v. Cruz*, 981 F.2d 659, 663 (2d Cir. 1992); *United States v. Komisaruk*, 885 F.2d 490, 494 (9th Cir. 1989) (stating “[w]e have held that expert testimony cannot be offered to buttress credibility” to explain why defendant could not introduce expert testimony that would support her claim that based on international law she reasonably believed the computer she destroyed was not property); *United States v. Barnard*, 490 F.2d 907, 912 (9th Cir. 1973) (“Credibility . . . is for the jury – the jury is the lie detector in the courtroom.”); *Price v. State*, 469 S.E.2d 333, 335 (Ga. Ct. App. 1996) (quoting series of cases for proposition that “[i]n no circumstance may a witness’ credibility be bolstered by the opinion of another, even an expert, as to whether the witness is telling the truth”); *Pritchett v. Commonwealth*, 557 S.E.2d 205, 208 (Va. 2002) (“An expert may not express an opinion as to the veracity of a witness because such testimony improperly invades the province of the jury to determine the reliability of a witness.”); *People v. Williams*, 773 N.E.2d 1238, 1242 (Ill. App. 2002) (stating that “expert testimony should not be used to give an opinion as to the credibility of a witness at trial”); *State v. Neswood*, 51 P.2d 1159, 1164 (N.M. Ct. App. 2002) (acknowledging basis for defendant’s argument that expert improperly invaded province of jury to determine credibility); *Price v. State*, 469 S.E.2d 333, 335 (Ga. Ct. App. 1996) (quoting series of cases for proposition that “[i]n no circumstance may a witness’ credibility be bolstered by the opinion of another, even an expert, as to whether the witness is telling the truth”); 2002) (acknowledging basis for defendant’s argument that expert improperly invaded province of jury to determine credibility); *Commonwealth v. Loner*, 609 A.2d 1376, 1377 (Pa. Super. Ct. 1992); *Pritchett v. Commonwealth*, 557 S.E.2d 205, 208 (Va. 2002) (“An expert may not express an opinion as to the veracity of a witness because such testimony improperly invades the province of the jury to determine the reliability of a witness.”); see also *Simmons*, *supra* note 7 (discussing origins and application of the prohibition on invading province of jury); *Walter R. Lancaster & Mark A. Dombroff, Expert Witnesses in Civil Trials* (2d ed. 2005), available at Westlaw, EXPWIT-CIV § 9:21; *Friedland, supra* note 11, at 168 (noting that most proffered expert testimony is rejected as counter to the jury’s special province to evaluate credibility). The district court for the District of Columbia invoked this maxim in rejecting I. Lewis “Scooter” Libby’s proffered expert testimony on memory. See *United States v. Libby*, 461 F. Supp. 2d 3, 7 (D.D.C. 2006) (citing *Nimely v. City of New York*, 414 F.3d 381 (2d Cir. 2005)).

<sup>29</sup> 517 A.2d 920, 922 (Pa. 1986) (citation omitted).

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The courts invoke the maxim aggressively when expert testimony touches on witness credibility.<sup>30</sup> The courts fear that the jury will abdicate its responsibility to assess credibility and defer to the expert's opinion.<sup>31</sup>

However, in considering the parameters of permissible expert testimony, the courts invoke the maxim too broadly and sometimes fail to distinguish between expert testimony that is helpful to the jury and expert testimony that simply endorses the testimony of the witness. Thus, the maxim casts too wide a net, and is often invoked to exclude evidence that should be admitted. Most significantly, it keeps the courts from focusing on the appropriate questions about the expert testimony – whether they satisfy the requirements of the rules governing expert testimony.

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<sup>30</sup> See *United States v. Beasley*, 72 F.3d 1518, 1528 (11th Cir. 1996) (stating that “[e]xpert medical testimony concerning the truthfulness or credibility of a witness is generally inadmissible because it invades the jury’s province to make credibility determinations”); *United States v. Benson*, 941 F.2d 598, 604 (7th Cir. 1991) (“Credibility is not a proper subject of expert testimony; the jury does not need an expert to tell it whom to believe, and the expert’s ‘stamp of approval’ on a particular witness’ testimony may unduly influence the jury.”); *United States v. Scop*, 846 F.2d 135, 142 (2d Cir. 1988) (expert witnesses may not opine as to the credibility of another witness’s testimony - this is a determination left solely to the jury); *United States v. Ward*, 169 F.2d 460, 462 (3d Cir. 1948) (“[I]t is nevertheless axiomatic that the ‘expert’ may not go so far as to usurp the exclusive function of the jury to weigh the evidence and determine credibility.”); see also *Berger*, *supra* note 7, at 565 n. 23 (noting that appellate court permitted defense to appeal based on error on cross and stating that “[t]he majority apparently believes that not only must there be a per se rule excluding all expert testimony opinion about the credibility of another witness, but also that any error in this regard would justify a reversal regardless of who provoked the error”).

<sup>31</sup> See *United States v. Mathis*, 264 F.3d 321, 335 (3d Cir. 2001) (excluding testimony on grounds that “aura of reliability that’s attached to an expert witness . . . is significant”); *United States v. Cruz*, 981 F.2d 659, 663 (2d Cir. 1992) (explaining that expert testimony “strongly suggests” expert is to be believed); *Patterson v. State*, 628 S.E.2d 618, 621 (Ga. Ct. App. 2006) (expressing concern that expert testimony concerning witness’ credibility would be “particularly compelling” to the jury); *State v. Bailey*, 87 P.3d 1032, 1039 (Mont. 2004) (“Expert testimony offered to bolster the credibility of a party and his or her claims is improper because it invades the province of the jury by placing a stamp of scientific legitimacy on a victim’s allegations, or by dismissing the validity of the allegations.”); *Seese*, 517 A.2d at 922; *Townsend v. State*, 734 P.2d 705, 709 (Nev. 1987) (“[I]t is essential to recognize that expert testimony, by its very nature, often tends to confirm or refute the truthfulness of another witness . . . .”); see also *Berger*, *supra* note 7; *Simmons*, *supra* note 7 (arguing that courts should abandon the maxim).

Courts exaggerate the likelihood that jurors will defer to expert opinion. See *Simmons*, *supra* note 7, at 1053-54 (discussing studies demonstrating that jurors are not overly deferential to expert opinion). Doing so, they sometimes treat improper vouching as serious error. In *Homan v. United States*, 279 F.2d 767 (8th Cir. 1960), the court noted that the courts do view the harm inflicted by improper bolstering evidence introduced to support a prosecution witness as more serious than “the mere needless burdening of the proceedings or the distracting injection of collateral issues. They recognize that such testimony is capable at times of so bolstering a witness’ testimony as artificially to increase its probative strength with the jury” making it reversible error. 279 F.2d at 772. In *Homan*, the court noted that the federal courts are less inclined to reverse on this basis and concluded that the error was harmless. *But see Maurer v. Dep’t. of Corr.*, 32 F.3d 1286, 1289-91 (8th Cir. 1994) (concluding that improper vouching testimony rendered state court criminal trial fundamentally unfair and ordering trial court to grant petitioner’s writ of habeas corpus). In *Maurer*, the prosecution asked each of its four witnesses whether the complainant “seemed sincere” when she told them of the alleged rape. 32 F.3d at 1288-89. The state courts held that this testimony should not have been admitted but did not grant relief on that ground. See *id.* at 1289. The Eighth Circuit concluded that the challenged testimony “invaded the jury’s credibility determination to such an extent that it denied [the defendant due process of law].” *Id.* at 1289 (quoting from the court’s statement of the federal issue which it resolved in the defendant’s favor). *But see McCafferty v. Leapley*, 944 F.2d 445, 454 (8th Cir. 1991) (finding no due process violation where witnesses at most “inferentially placed their ‘stamp of believability’” on witness); *Adesiji v. Minnesota*, 854 F.2d 299, 300-01 (8th Cir. 1988) (expert’s testimony that children rarely make up false accusations of sexual abuse did not prevent jury from weighing evidence fairly and deny due process where expert had not interviewed the witness in case).

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### *B. Based on a False Premise*

Jurors cannot be expected to serve as accurate lie detectors. There is now ample psychological literature demonstrating that humans in general and jurors specifically have limited ability to detect lying.<sup>32</sup> In part, this limited lie-detection capability is due to our cultural reliance on analyzing physical cues when determining truthfulness – cues which social science research has shown are often not indicative of lying.<sup>33</sup>

Therefore, rather than reflexively restricting evidence that addresses questions of credibility, the courts should focus on how to help the jury assess credibility.<sup>34</sup> Rather than invoking the maxim that credibility is the jury's special province, the courts should welcome expert testimony that helps the jury determine whether a particular witness is being truthful and whether a particular account of the facts is accurate. The courts should take advantage of the latitude of the modern rules of evidence to facilitate, rather than bar, consideration of evidence that may shed light on a witness's credibility.

### *C. Applied Too Broadly*

Like many maxims, this one is given undue scope. Courts cite the maxim when excluding expert testimony addressing a range of issues related to witness credibility.<sup>35</sup> The

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<sup>32</sup> See Berger, *supra* note 7, at 600-01 (citing cases allowing specialized expert testimony in areas jurors probably lacked knowledge or understanding); Friedland, *supra* note 11, at 167 and 178-87 (summarizing literature); Jeremy A. Blumenthal, *A Wipe of the Hands, a Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility*, 72 NEB. L. REV. 1157, 1189-1192 (1993) (providing introduction to differences between legal system's reliance on jury's ability to lie-detect and research finding the contrary); Glenn Littlepage & Tony Pineault, *Verbal, Facial and Paralinguistic Cues to the Detection of Truth and Lying*, 4 PERSONALITY AND SOC. PSYCHOL. BULL. 461 (1978) (conducting study concerning lie detection and found that "facial information is not effectively used as an important cue to the perception of truth"); Michael W. Mullane, *The Truthsayer and the Court: Expert Testimony on Credibility*, 43 ME. L. REV. 53, 64-64 (1991); Olin Guy Wellborn III, *The Demeanor Gap: Race, Lie Detection, and the Jury*, 76 CORNELL L. REV. 1075 (1990-91). The limitation on the ability to assess credibility accurately is exacerbated when jurors are asked to make cross-cultural determinations of truthfulness; cultural norms often cause jurors to read indicators improperly. See Joseph W. Rand, *The Demeanor Gap: Race, Lie Detection, and the Jury*, 33 CONN. L. REV. 1, 4 (2000) ("[J]urors of one race, even those well-intended and free of racial animus, will be unable to dependably judge the demeanor of a witness of a different race because they are unable to accurately decipher the cues that the witness uses to communicate sincerity.").

<sup>33</sup> See Rand, *supra* note 32, at 3 ("[M]ost observers in controlled studies detect deception about as well as a flipped coin, because they focus on 'cues' to deception derived from folklore and common sense—such as the speaker's inability to maintain a steady gaze—that are often more a sign of discomfort than deception. Meanwhile, the savvy liar, familiar with that same folklore, successfully suppresses those cues to fool the detector.")

<sup>34</sup> See Friedland, *supra* note 11, at 188 (noting that many courts have not abandoned "the common-sense approach to credibility" that has been challenged by social science research).

<sup>35</sup> See, e.g., *United States v. Lumpkin*, 192 F.3d 280 (2d Cir. 1999) (holding expert testimony concerning eyewitness identification threatened jury's function); *United States v. Cruz*, 981 F.2d 659, 664 (2d Cir. 1992) (reasoning that introduction of expert police testimony regarding drug dealing patterns was reversible error); *United States v. Cecil*, 836 F.2d 1431, 1436 (4th Cir. 1988) (excluding psychiatrist report alleging that government's witness suffered from narcissistic personality disorder precluding witness from testifying truthfully); *United States v. Barnard*, 490 F.2d 907 (9th Cir. 1973) (excluding expert psychiatric testimony concerning defendant's discharge from military and ability to testify truthfully); *State v. Tucker*, 798 P.2d 1349, 1353 (Ariz. Ct. App. 1990) (holding trial court erred in admitting expert testimony concerning characteristics of child molesters); *State v. Doan*, 498 N.W.2d 804, 812 (Neb. Ct. App. 1993) ("We hold that in a prosecution for sexual assault of a child, an expert witness may not give testimony which directly or indirectly expresses an opinion that the child is believable, that the child is credible, or that the witness' account has been validated."); *State v. Fairweather*, 863 P.2d 1077, 1081 (N.M. 1993) ("[T]he expert may not testify that the victim's PTSD [Post Traumatic Stress Disorder] symptoms were in fact caused by

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maxim acts sometimes as a barrier to evidence that should be admitted and sometimes as a surrogate for other specific evidence problems.

The maxim has a questionable pedigree, yet it is invoked and applied as a broad principle restricting admissible expert testimony.<sup>36</sup> To illustrate the way in which the common law maxim is perpetuated and given undue scope, it is helpful to examine the impact of the Ninth Circuit's opinion in *United States v. Rivera*.<sup>37</sup> Both the precedent on which the court relied in *Rivera* and its impact outside the Ninth Circuit demonstrate the problem with the maxim. In his treatise on federal evidence, Professor Graham cites *Rivera* to support the assertion that "Rule 704(a) of course permits neither a lay nor expert witness . . . to testify as to whether another witness is telling the truth."<sup>38</sup> In *Rivera*, the court actually held that the trial court did not commit plain error by admitting the testimony of a prosecution expert where the defendant had failed to object on grounds of bolstering and had also opened the door to the testimony on cross-examination.<sup>39</sup> Nevertheless, in discussing the testimony, the court asserted that expert testimony "may not appropriately be used to buttress credibility"<sup>40</sup> and that an expert "is not permitted to testify specifically to a witness' credibility or to testify in such a manner as to improperly buttress a witness' credibility."<sup>41</sup>

In *Rivera*, the court supported its assertions by citing *United States v. Brodie*<sup>42</sup> and *United States v. Candoli*.<sup>43</sup> Neither opinion supports the broad assertions of *Rivera*. In *Brodie*, the Ninth Circuit upheld the exclusion of the defendant's expert in accounting, who would have testified that the defendants' tax liability for the years in which they failed to file tax returns was little or nothing.<sup>44</sup> Because the only relevant inference was that the taxpayers believed they owed no taxes, the court concluded that the testimony was precluded under Rule 704(b)<sup>45</sup> as an opinion that the defendants did not have the requisite mental state. The court went on to discuss "a further reason" for excluding the opinion – namely that it represented improper bolstering.<sup>46</sup> The court cited *United States v. Binder*<sup>47</sup> for the proposition that expert testimony "may not appropriately be used to buttress credibility,"<sup>48</sup> and both *Binder* and *United States v. Brown*<sup>49</sup> for

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sexual abuse."). See also *Greenwell v. Boatwright*, 184 F.3d 492, 495 (6th Cir. 1999) (Merritt, J., dissenting) ("[T]he testimony regarding the credibility of the eyewitness testimony was improper.");

<sup>36</sup> See, e.g., *United States v. Beasley*, 72 F.3d 1518, 1528 (11th Cir. 1996) (holding expert scientific testimony concerning truthfulness or credibility of witness is inadmissible because it invades jury's province in determining credibility); *United States v. Rosenberg*, 108 F.Supp. 798, 806 (S.D.N.Y. 1952) ("[I]t is hornbook law that the credibility of a witness and the weight to be given his testimony rests exclusively with the jury."); *United States v. Ward*, 169 F.2d 460, 462 (3d Cir. 1948) ("[A]n expert may not go so far as to usurp the exclusive function of the jury to weigh the evidence and determine credibility."). See also *Berger*, *supra* note 7, at 582 (noting that Second Circuit invoked principle based on very limited authority).

<sup>37</sup> 43 F.3d 1291 (9th Cir. 1995).

<sup>38</sup> 2 GRAHAM, FEDERAL EVIDENCE § 704.1, 631.

<sup>39</sup> *Rivera*, 43 F.3d at 1295.

<sup>40</sup> *Rivera*, 43 F.3d at 1295 (citing *United States v. Brodie*, 858 F.2d 492, 496 (9th Cir. 1988)).

<sup>41</sup> *Rivera* 43 F.3d at 1295 (citing *United States v. Candoli*, 870 F.2d 496, 506 (9th Cir. 1989)).

<sup>42</sup> 858 F.2d 492 (9th Cir. 1988).

<sup>43</sup> 870 F.2d 496 (9th Cir. 1989).

<sup>44</sup> See *Candoli*, 858 F.2d 492 (9th Cir. 1988).

<sup>45</sup> FED. R. EVID. 704(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").

<sup>46</sup> *Brodie*, 858 F.2d at 496.

<sup>47</sup> 769 F.2d 595 (9th Cir. 1985)

<sup>48</sup> *Brodie*, 858 F.2d at 496 (citing *Binder*, 769 F.2d at 601).

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the proposition that expert testimony “is properly excluded when it merely assesses the credibility of a taxpayer.”<sup>50</sup> In *Brown*, a Tenth Circuit case tried before the adoption of the Federal Rules of Evidence, the court affirmed the exclusion of the defendant’s expert on eyewitness identification.<sup>51</sup> The court simply concluded that the subject was one of common knowledge, so the proffered testimony would have invaded the province of the jury. The court did not consider whether the Federal Rules of Evidence had altered the evaluation of the question and cited only pre-rule authority.<sup>52</sup> In *Binder*, the court considered expert testimony that the child victims could “distinguish reality from fantasy and truth from falsehood” and held that the testimony “improperly buttressed” the witnesses’ credibility, citing *Barnard*, another case decided before the Federal Rules of Evidence went into effect, and *United States v. Awkard*.<sup>53</sup> In *Awkard*, the court held that the expert testimony constituted improper bolstering before an attack on credibility – a timing problem – and also cited *Barnard* for the broader proposition that credibility is for the jury, “the lie detector in the courtroom.”<sup>54</sup> In *Awkard*, the court went on to assert that “[u]nder the Federal Rules, opinion testimony on credibility is limited to character; all other opinions on credibility are for the jurors themselves to form.”<sup>55</sup> The court cited no rule or other authority to support this claim.<sup>56</sup>

In *Candoli*, the other case cited by the Ninth Circuit in *Rivera*, the trial court permitted an expert to testify that another witness – the prosecution’s arson expert – had an excellent reputation as an expert. The Ninth Circuit held the testimony was improperly admitted.<sup>57</sup> The court correctly concluded that Rule 608(a) governed and held that the testimony could extend only to reputation for truthfulness and that the bolstering evidence could not be admitted unless the expert’s character for truthfulness had first been attacked.<sup>58</sup> The court, citing *Binder*, went on to include the broad assertion that “[a]n expert witness is not permitted to testify specifically to a witness’ credibility or to testify in such a manner as to improperly buttress a witness’ credibility.”<sup>59</sup>

Thus, the assertion in *Rivera* traces its legal pedigree to pre-rule cases setting out common law principles and an un-examined and unsupported assertion about the effect of the federal rules. By citing pre-rule authority and overstating the significance of the authority cited, the courts have given the maxim that expert testimony cannot address credibility undue impact. Instead, each court should evaluate with care the role played in the case by the particular expert

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<sup>49</sup> 540 F.2d 1048, 1054 (10th Cir.1976).

<sup>50</sup> *Brodie*, 858 F.2d at 496 (citing *Binder*, 769 F.2d at 602, and *United States v. Brown*, 540 F.2d 1048, 1054 (10th Cir. 1976)).

<sup>51</sup> *Brown*, 540 F.2d at 1054.

<sup>52</sup> *Brown*, 540 F.2d at 1054. The FRE went into effect July 1, 1975. In *Brown*, the offense date was July 1975 and the appeal was submitted July 1976 when little interpretation of the rules had occurred.

<sup>53</sup> See *Binder*, 769 F.2d at 602 (citing *United States v. Barnard*, 490 F.2d 907, 912-13 (9th Cir.1973), and *United States v. Awkard*, 597 F.2d 667, 671 (9th Cir. 1979)). The majority noted that the experts did not merely explain the psychological literature nor discuss a class of victims but instead testified that the children in the case “could be believed.” Judge Wallace wrote separately and took issue with the characterization of the testimony, noting that the experts “testified only that the children were *capable* of telling the truth-they did not opine as to whether or not the children *actually had done so*.” *Id.* at 605 (emphasis in original).

<sup>54</sup> *Awkard*, 597 F.2d at 671.

<sup>55</sup> *Awkard*, 597 F.2d at 671. In *Awkard*, the court also held that the expert had crossed the line into improper bolstering by testifying that the witness’ “memory had been accurately refreshed by hypnosis.” *Id.* at 670.

<sup>56</sup> *Awkard*, 597 F.2d at 671.

<sup>57</sup> *United States v. Candoli*, 870 F.2d 496 (9th Cir.1989).

<sup>58</sup> *Candoli*, 870 F.2d at 506.

<sup>59</sup> *Candoli*, 870 F.2d at 506 (citing *Binder*, 769 F.2d at 602).

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testimony offered. The court should apply the rules of evidence, recognizing that those rules did not incorporate the common law maxim and should not be restricted by that maxim.

### **IV. USING EXPERTS TO ASSESS CHARACTER FOR TRUTHFULNESS – RULE 608(A)**

Unlike the common law, the modern evidence codes admit opinion evidence concerning the truthful or untruthful character of a witness. An expert may be able to gauge a person's general tendency to truthfulness or untruthfulness. By opening the door to opinion testimony, the rules create the opportunity to present an expert witness to opine on a witness's propensity to be (un)truthful. Despite this change in the law, the courts, influenced by the common law maxim, generally remain reluctant to admit expert opinion on (un)truthful character.

Moreover, even if a court is willing to admit expert opinion on (un)truthful character, the testimony is subject to two limitations. First, the testimony can address only (un)truthful character and not the witness's conduct. Second, expert opinion that the witness has a truthful character is not admissible until the witness's credibility has been attacked. These limitations restrict the utility of expert testimony admitted under Rule 608(a). As discussed in Section V below, the jury will receive full benefit of expert testimony on credibility only if the courts recognize that much of the testimony does not speak to character but addresses credibility in other ways.

#### *A. The Promise*

The character evidence rules contemplate robust attacks on credibility as well as a possibly time-consuming response to those attacks.<sup>60</sup> That framework is codified in Rule 608, which represents an exception to the general prohibition on using character evidence to prove action in conformity. Under the rule, character witnesses may testify that the witness is untruthful or, conversely, truthful and can express this fact in the form of reputation testimony or opinion.<sup>61</sup> The jury can infer from this character testimony that the witness, possessing the

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<sup>60</sup> See 2 GRAHAM, FEDERAL EVIDENCE, *supra* note 2, § 608.2, 133 n.2 (explaining that although admission of character evidence rests within the discretion of trial court, general practice is to admit numerous character witnesses); *see, e.g.*, *United States v. Jackson*, 696 F.2d 578 (8th Cir. 1982) (allowing defendant to present seven character witnesses at first trial and six at the second); *State v. Kalex*, 789 A.2d 1286 (Me. 2002) (holding that trial court committed reversible error by excluding testimony of five defense witnesses prepared to testify that complaining witness had bad reputation for truthfulness).

<sup>61</sup> See generally *Berger*, *supra* note 7, at 583-85 (discussing development and purpose of rule). When lay witnesses testify concerning a party's character, courts permit them to testify concerning whether they would believe that party under oath. *See, e.g.*, *United States v. McMurray*, 20 F.3d 831, 834 (8th Cir. 1994) (holding that prosecutor was properly permitted to ask witness who expressed opinion of defendant's truthfulness whether she would believe defendant under oath); *United States v. Dotson*, 799 F.2d 189, 193 (5th Cir. 1986) (concluding that witness with sufficient basis to testify to opinion concerning character may be asked whether the person in question was to be believed under oath); *United States v. Lollar*, 606 F.2d 587 (5th Cir. 1979) (discussing role of Rule 608 and holding question proper); *United States v. Bambulas*, 471 F.2d 501, 503-04 (7th Cir. 1972) (detailing discussing divergence of authority on question but concluding that trial court may have committed error by precluding defense counsel from asking defendant's character witnesses whether they would believe him under oath); *Held v. United States*, 260 F. 932 (5th Cir. 1919); *Ballard v. State*, 767 So. 2d 1123, 1140 (Ala. Crim. App. 1999); *State v. Muse*, 319 So. 2d 920, 922 (La. 1975) ("The proper question to be put to a witness for the purpose of impeaching the general character of another witness . . . is whether he would believe him upon his oath."); *Pitts v. State*, 74 So. 2d 232 (Ala. 1954) (holding that trial court properly allowed character witness to be asked on cross-examination whether he would believe the defendant under oath "where he personally was interested in the outcome of the case"). In *Ballard*, the defendant called character witnesses who testified that she had a good character for honesty and truthfulness. 767

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character trait described by the character witness – untruthfulness or truthfulness – is likely to behave consistently with that character trait and testify accordingly.<sup>62</sup> Not only do the federal rules continue this use of character witnesses addressing truthfulness, but, by including opinion testimony, the rules appear to open the door to expert assessment of a witness’s general capacity for truthfulness.

The reason for admitting character evidence and permitting this exploration of a witness’s character for truthfulness is that credibility is a central concern in many trials. As Judge Weinstein points out, “credibility is often the crucial issue in a case, and character evidence, despite its flaws ‘may still serve a purpose in calling to the jury’s attention to what might be an otherwise unknown deficiency of the witness and thus give the jury a more adequate basis for judging his testimony.’”<sup>63</sup> Given the importance and difficulty of credibility determinations, the rules admit evidence of truthful or untruthful character to assist the jury in making these determinations.

When the Federal Rules of Evidence were adopted, they opened the door to opinion evidence as a way to prove character. Rule 608(a) specifically allows the use of opinion evidence concerning (un)truthful character,<sup>64</sup> and the majority of states that have enacted rules of evidence have adopted the same broad rule.<sup>65</sup> Judge Weinstein succinctly stated the promise of

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So. 2d at 1140. On direct, they also testified that they would believe the defendant’s testimony under oath. *See id.* The Alabama court held that the prosecution was properly allowed to ask on cross-examination whether the witness “would believe the defendant’s testimony in this courtroom under oath even if to do so you would have to disbelieve the testimony of four or five other witnesses who testified also under oath, including a police officer.” *See id.*; *see also* United States v. Walker, 313 F.2d 236, 239-41 (6th Cir. 1963) (discussing division of authority but concluding that majority position is to allow the question); 2 GRAHAM, FEDERAL EVIDENCE, *supra* note 2, § 608.3, 139 (5th Ed. 2001) (citing Ladd, *Techniques and Theory of Character Testimony*, 24 IOWA L. REV. 498, 534 (1939)) (allowing question); Bennett, *supra* note 16, at 569 (1997) (“At common law, in criminal prosecutions, the accused was allowed to call witnesses to show that his character was such that it was unlikely that the defendant would be guilty of the charged crime.”).

<sup>62</sup> *See* 4 WEINSTEIN’S EVIDENCE, *supra* note 5, § 608.02[1]; *see also* United States v. Davis, 639 F.2d 239, 244-45 (5th Cir. 1981) (holding that trial court erred in excluding two witnesses proffered to discredit government witness’s character); Cooper v. State, 628 So. 2d 1371, 1374 (Miss. 1993) (holding trial court committed error by precluding witness from testifying to his opinion that prosecution witness had untruthful character).

<sup>63</sup> 4 WEINSTEIN’S EVIDENCE, *supra* note 5, § 608.02[1] (quoting Mason Ladd, *Techniques and Theory of Character Testimony*, 24 IOWA L. REV. 498, 534 (1939)).

<sup>64</sup> *See* Bennett, *supra* note 16, at 569.

<sup>65</sup> *See., e.g.*, IOWA CODE ANN. § 5.608(a) (West 2006); Md. CODE ANN., Evid. § 5-608 (West 2006); 4 NEV. REV. STAT. ANN. § 50.085 (West 2005); 12 OKLA. STAT. ANN. § 2608 (West 2005); S.D. CODIFIED LAWS § 19-14-9 (2006); ALA. R. EVID. 608(a); ALASKA R. EVID. 608(a); ARIZ. R. EVID. 608(a); ARK. R. EVID. 608(a); COLO. R. EVID. 608(a); CONN. CODE EVID. § 6-6(a); DEL. R. EVID. 608(a); HAW. R. EVID. 608(a); IDAHO R. EVID. 608(a); IND. R. EVID. 608(a); KY. R. EVID. 608(a); MICH. R. EVID. 608(a); MINN. R. EVID. 608(a); MISS. R. EVID. 608(a); MONT. R. EVID. 608(a); N.H.R. EVID. 608(a); N.J.R. EVID. 608(a); N.M.R.A. 11-608(a); N.D.R. EVID. 608(a); OHIO R. EVID. 608(a); OR. R. EVID. 608(1); R.I.R. Evid. 608(a); S.C.R. EVID. 608(a); TENN. R. EVID. 608(a); TEX. R. EVID. 608(a); UTAH R. EVID. 608(a); VT. R. EVID. 608(a); W. VA. R. EVID. 608(a); WYO. R. EVID. 608(a). Some states expressly preclude use of expert testimony to help the jury understand character as a predictor of conduct. *See* FLA. STAT. ANN. § 90.609 (prohibiting use of opinion testimony); LA. CODE EVID. ANN. art. 608(a) (2006) (prohibiting use of opinion testimony); NEB. REV. STAT. § 27-405 (2005) (limiting admissibility of expert opinion under NEB. REV. STAT. § 27-608(a) (2005) to non-scientific grounds); ME. R. EVID. 608(a) (prohibiting use of opinion testimony); N.C.R. EVID. 405(a) (proscribing expert testimony under Rule 608(a)); PA. R. EVID. 608(a) (prohibiting use of opinion testimony); WASH. R. EVID. 608(a) (prohibiting use of opinion testimony). North Carolina, for example, addresses the question in Rule 405(a) of the Rules of Evidence. The North Carolina rule limits proof of character by adding the following sentence to the language of the Federal Rule 405(a): Expert testimony on character or a trait of character is not admissible as circumstantial evidence of behavior. Both impeachment and bolstering under Rule 608 operate by informing the jurors that the witness is untruthful or truthful



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this expanded rule of admissibility, asserting that “expert witnesses . . . may now be called to express their opinion of the witness’ veracity.”<sup>66</sup>

Given the special insight an expert may have into whether a witness has a tendency to be untruthful or truthful, this testimony offers to be extremely helpful to the jury.<sup>67</sup> Certain conditions are associated with an untruthful nature or character.<sup>68</sup> An expert may be able to provide an informed opinion that a witness suffers from a mental condition that impairs the ability to provide truthful testimony.<sup>69</sup> Like any other witness testifying pursuant to the invitation of Rule 608(a), an expert expressing an opinion that the witness is not a truthful person is doing so to persuade the jury not to believe the witness. In the case of the expert, the persuasion lies in the specialized insight expressed in the opinion. Thus, expert testimony addressing untruthful character falling within Rule 608(a) may have greater probative value than a lay assessment of the witness’s general character for untruthfulness.

The First Circuit recognized this aspect of Rule 608(a) in *United States v. Shay*<sup>70</sup>. In *Shay*, the trial court refused to admit the defendant’s expert testimony that he suffered from pseudologia fantastica, a mental disorder characterized by self-aggrandizing lies.<sup>71</sup> The testimony would have supported the defense contention that the defendant’s statements suggesting he was responsible for a fatal bombing were untrue.<sup>72</sup> Both the trial court and the government took the view that the evidence “concerned a credibility question that was the jury’s

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and thereby inviting them to draw the inference that the witness, acting in conformity with character, is lying or telling the truth. As a result, this limitation in Rule 405(a) precludes the use of expert testimony under Rule 608(a). See *State v. Heath*, 341 S.E.2d 565, 567 (N.C. 1986) (holding that admission of expert opinion regarding credibility was error); *State v. Aguillo*, 350 S.E.2d 76 (N.C. 1986) (excluding expert testimony).

<sup>66</sup> 3 WEINSTEIN’S EVIDENCE, *supra* note 1, ¶ 608[4].

<sup>67</sup> See *State v. Tafoya*, 617 P.2d 151, 153 (N.M. 1980) (acknowledging the admissibility of expert testimony under Rule 608(a); *see*). See also *Mullane*, *supra* note 32, at 97.

<sup>68</sup> Disorders affecting veracity include conduct disorder, factitious disorder, and antisocial behavior disorder. See DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (American Psychiatric Association, 4th ed., 2000). Those suffering from Conduct Disorder display:

a repetitive and persistent pattern of behavior in which the basic rights of other or major age-appropriate societal norms or rules are violated. . . . Acts of deceitfulness or theft may include . . . frequently lying or breaking promises to obtain goods or favors or to avoid debts or obligations. . . . They [those suffering from Conduct Disorder] may be callous and lack appropriate feelings of guilt or remorse. It can be difficult to evaluate whether displayed remorse is genuine because some of these individuals learn that expressing guilt may reduce or prevent punishment.

*Id.* at 93-94. Likewise,

[t]he essential feature of Factitious Disorder is the intentional production of physical or psychological signs or symptoms. The presentation may include fabrication of subjective complaints (e.g. complaints of acute abdominal pain in the absence of such pain), falsification of objective signs (e.g. manipulating a thermometer to create the illusion of fever) . . . exaggeration or exacerbation of preexisting general medical conditions . . . .

*Id.* at 513. Finally, “[i]ndividuals with Antisocial Personality Disorder fail to conform to social norms with respect to lawful behavior. . . . They are frequently deceitful and manipulative in order to gain personal profit or pleasure (e.g. to obtain money, sex, or power). They may repeatedly lie, use an alias, con others, or malingering.” See *id.*

<sup>69</sup> Of course the expert testimony must comport with Rule 702 of the Federal Rules of Evidence; the expert must be qualified and must apply reliable expertise with an adequate basis. See 3 GRAHAM, FEDERAL EVIDENCE, *supra* note 2 § 702:1 (explaining expert witness can be qualified on “basis of knowledge, skill, experience, training, or education or a combination thereof”). Graham goes on to explain that the trial court must also determine whether the evidence would “be helpful, to understand the evidence or to determine a fact at issue.” *Id.*; 4 WEINSTEIN’S EVIDENCE, *supra* note 5, § 702.02 [3]-[4] (discussing prerequisites to admissibility of expert opinion testimony).

<sup>70</sup> 57 F.3d 126 (1st Cir. 1995).

<sup>71</sup> See *id.* at 129-30.

<sup>72</sup> In this case, the testimony was offered under Rule 806 to impeach the credibility of the defendant’s own statements offered by the prosecution. See *Shay*, 57 F.3d at 131-32; FED. R. EVID. 806.

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exclusive province to resolve.”<sup>73</sup> The First Circuit disagreed, acknowledged that Rule 608(a) “contemplates that truthful or untruthful character may be proved by expert testimony.” While remarking that “an expert’s opinion that another witness is lying or telling the truth is ordinarily inadmissible pursuant to Rule 702,” the court held that the trial court’s exclusion of the evidence constituted error.<sup>74</sup>

Similarly in *United States v. Gonzalez-Maldonado*,<sup>75</sup> the First Circuit found error where the trial court did not allow the defendant’s expert to testify concerning the defendant’s poor character for truthfulness. Like *Shay*, *Gonzalez-Maldonado* entailed a defense attack on the defendant’s credibility in order to reduce the weight of the defendant’s recorded statements introduced by the prosecution. The defense expert would have testified that the defendant “had a medical condition that led him to exaggerate.”<sup>76</sup> The evidence should have been admitted under Rule 608(a) to establish the defendant’s poor character for truthfulness and the consequent likelihood that he was lying in the conversations.

Despite the promise of Rule 608(a), courts have been slow to admit expert opinion that falls squarely within the rule.<sup>77</sup> Disregarding the explicit language of the rule, which permits opinion testimony to establish untruthful or truthful character, the courts remain committed to the proposition that expert testimony is “generally inadmissible because it invades the jury’s province to make credibility determinations.”<sup>78</sup> In a number of cases, courts have excluded evidence that appears to qualify as opinion evidence describing truthful or untruthful character warranting admission under Rule 608(a). In *United States v. Wertis*, for example, the defendant offered expert testimony which the court described as having “a psychiatrist opine whether a principal prosecution witness ‘ . . . would . . . have a tendency to be reliable as a witness in distinguishing the truth from non-truth, realities from fantasies . . . .’”<sup>79</sup> The Fifth Circuit held that the evidence was properly excluded, stating “[s]uch a question as that proffered is beyond the competence of any witness. Peeled of its thin veneer of jargon, it amounts to no more than an inquiry whether the witness is to be believed by the jury or not.”<sup>80</sup>

Similarly, in *Bastow v. General Motors Corp.*, a products liability decision, the Eighth Circuit held that the trial court had properly excluded the testimony of the defendant’s

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<sup>73</sup> *Shay*, 57 F.3d at 126, 130-31.

<sup>74</sup> *Shay*, 57 F.3d at 131. The court pointed out that the advisory committee notes to Rule 405 expressly contemplate the use of expert opinion testimony to establish character traits when evidence of those traits is admissible.

<sup>75</sup> 115 F.3d 9 (1st Cir. 1997).

<sup>76</sup> 115 F.3d at 15. The symptoms of the defendant’s condition included “‘verbosity;’ ‘grandeza’ (‘[h]e has to feel important and the center of attention as part of his . . . fragmented ego needs’), and exaggeration.” *Id.* at 15.

<sup>77</sup> See 2 GRAHAM, FEDERAL EVIDENCE, *supra* note 2, § 608.1 at 130 n. 3, § 704. 1 at 31-32 n. 22 (asserting “[e]xpert opinion as to the character of a witness for truthfulness is *not* admissible” and citing cases refusing to admit expert opinion on truthful character) (emphasis in original).

<sup>78</sup> *United States v. Beasley*, 72 F.3d 1518, 1528 (11th Cir. 1996); see also *United States v. Lumpkin*, 192 F.3d 280, 289 (2d Cir. 1999) (“[A]n expert may not intrude on the jury’s role in assessing credibility. It is appropriate, therefore, to exclude expert testimony offered to bolster the credibility of fact witnesses.”); *United States v. Hall*, 165 F.3d 1095, 1107 (7th Cir. 1999) (“Furthermore, we believe that the credibility of eyewitness testimony is generally not an appropriate subject matter for expert testimony because it influences a critical function of the jury -- determining the credibility of witnesses.”); *United States v. Adams*, 271 F.3d 1236, 1245 (10th Cir. 2001) (holding that experts may not usurp the function of the jury by discussing witness credibility); *United States v. Falcon*, 245 F. Supp. 2d, 1239, 1245 (S.D. Fla. 2003) (“[A]bsent extreme or unusual circumstances, expert scientific testimony concerning the truthfulness or credibility of a witness is inadmissible because it invades the jury’s province in determining credibility.”); *Commonwealth v. Seese*, 517 A.2d 920 at 922 (“It is an encroachment upon the province of the jury to permit admission of expert testimony on the issue of a witness’ credibility.”).

<sup>79</sup> 505 F.2d 683 (5th Cir. 1975).

<sup>80</sup> *Wertis*, 505 F.2d at 685.

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psychologist.<sup>81</sup> The defendant argued that the proffered testimony that the plaintiff “had an antisocial behavior disorder and hence a character for untruthfulness” was admissible under Rule 608(a) (1).<sup>82</sup> The Eighth Circuit agreed with the trial court that the evidence might cause the jurors “to surrender their own common sense” and could lead to a mini-trial on the plaintiff’s credibility – “a collateral but important matter.”<sup>83</sup> The court did not address the clear invitation of Rule 608 to provide insight into witnesses’ character for truthfulness.

Courts steeped in the maxim that witnesses – particularly expert witnesses – must not invade the jury’s province by vouching for or bolstering a witness’s credibility are understandably resistant to admitting such testimony. This expert testimony speaks directly to the witness’s credibility and nothing else. The expert testimony in these cases could have assisted the jury to assess credibility and was properly admissible under Rule 608(a).

### *B. The Limitations*

The rules admitting character evidence to establish truthful or untruthful character exist against the backdrop of evidence rules that disfavor the admissibility of character evidence as a means for predicting behavior as well as of courts reluctant to allow expert assessment of credibility. The law strongly prefers to judge the case, not the person and views the inference that someone acted in accord with character as relatively weak. In addition, exploring questions of character at trial can be unduly distracting and may inject unfair prejudice. As a result, the rules of evidence encourage the jury to determine the facts of the events and not dwell on the character of those involved. For those reasons, character evidence is strictly limited as to admissibility and, when admissible, as to form. Although Rule 608(a) allows a party to use character evidence to attack, and in response to bolster, a witness’s credibility, testimony admitted under Rule 608(a) is subject to two limitations. First, when admissible under Rule 608(a), expert testimony is circumscribed: it cannot stray into discussion of the witness’s conduct, but must remain within the parameters of character evidence,<sup>84</sup> and can address only one character trait – truthfulness.<sup>85</sup> Second, the rules prohibit bolstering with evidence of truthful character before the witness’s credibility has been attacked.<sup>86</sup>

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<sup>81</sup> 844 F.2d 506 (8th Cir. 1988).

<sup>82</sup> See *Bastow*, 844 F.2d at 510.

<sup>83</sup> *Bastow*, 844 F.2d at 511 (citing *Barnard*, 490 F.2d 907, 912 (10th Cir. 1973)). The trial court and appellate court relied entirely on the maxim that credibility is for the jury, rather than on any assessment that the witness lacked expertise, had an inadequate basis for the proffered opinion or had misapplied expert principles.

<sup>84</sup> See 2 GRAHAM, FEDERAL EVIDENCE, *supra* note 2, § 608.2, 133 (“[S]pecific instances of conduct in support of the witness’ character for truthfulness remain inadmissible.”); see also *United States v. Visinaiz*, 428 F.3d 1300, 1314 (10th Cir. 2005) (reasoning that DUI history was inadmissible, in that it was barred by Rule 405 as specific instance of conduct); *United States v. Perez-Perez*, 72 F.3d 224, 227 (1st Cir. 1994) (“Reputation evidence of this kind is sometimes admissible, FED. R. EVID. 608(a), although its weight is usually quite limited—precisely because specific examples of untruthfulness cannot be elicited in support.”); *United States v. Dring*, 930 F.2d 687, 691 (9th Cir. 1991) (“[T]he Rule [608(a)] prohibits rehabilitation by character evidence of truthfulness after direct attacks on a witness’s veracity in the instant case. However, the Rule permits rehabilitation after indirect attacks on a witness’s general character for truthfulness.”); *Kitchens v. State*, 898 P.2d 443, 450 (Alaska Ct. App. 1995) (“Under [Rule 608], [the attorney] could properly ask [the witness] for his opinion of [another witness’s] general credibility, but [the attorney] was not entitled to elicit [the witness’s] opinion as to the credibility of any specific statement by [another witness].”); *Galuser Storage, L.L.C v. Smedley*, 27 P.3d 565, 571 (Utah Ct. App. 2001) (“Opinion testimony concerning credibility must be limited to testimony addressing a witness’s general reputation for truthfulness, leaving the resolution of credibility for the fact-finder.”).

<sup>85</sup> See FED. R. EVID. 608(a)(1) (“[E]vidence may refer only to character for truthfulness or untruthfulness.”); see also *Renda v. King*, 337 F.3d 550, 553-54 (3d Cir. 2003) (“[E]vidence of a witness’s good character for truthfulness is

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### 1. Character for truthfulness only

As referenced, Rule 608(a) severely circumscribes the evidence it admits. Under the rule, the testimony may relate only to truthful character.<sup>87</sup> It does not extend to the witness's truthfulness on specific matters.<sup>88</sup> Character witnesses can testify only whether, in their opinion or based on their knowledge of reputation, the other witness has a truthful or untruthful character and whether they would believe the witness under oath. Thus, an expert testifying under Rule 608(a) is limited to discussing conditions that bear on general truthfulness or untruthfulness.<sup>89</sup> While expert witnesses may identify some conditions that bear directly on a general propensity for (un)truthfulness, far more psychological conditions affect a witness's perception and memory or behavior that may reflect on credibility. Rule 608(a) does not accommodate expert testimony

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admissible under some circumstances to show that the witness is acting in conformity with that character for truthfulness when testifying in the particular case.”); *United States v. McHorse*, 179 F.3d 889, 901 (10th Cir. 1999) (reasoning that past sexual encounters were unrelated to truthfulness); *United States v. Nazarenu*, 983 F.2d 1480, 1486 (8th Cir. 1993) (explaining that history of exceeding speed limit was unrelated to truthfulness); *United States v. Jackson*, 588 F.2d 1046, 1055 (5th Cir. 1979) (allowing defendant to admit evidence of truthful character provided prosecution chooses to attack same); *United States v. Med. Therapy Sciences*, 583 F.2d 36, 39 (2d Cir. 1978) (reasoning that character evidence only admissible when directed at witness's character for truthfulness); 2 GRAHAM, FEDERAL EVIDENCE, *supra* note 2, § 608.1, 131-32 (“Rule 608 relates solely to the introduction of opinion or reputation testimony and specific instances of conduct offered as probative of the witness' character for truthfulness and untruthfulness. Admissibility of specific acts of misconduct or opinion or reputation testimony offered for any other purpose lies outside the scope of Rule 608.”). Additionally, in those states that preclude the introduction of expert testimony under Rule 608, expert testimony is only admissible if it addresses a non-character issue.

<sup>86</sup> See FED. R. EVID. 608(a)(2) (“[E]vidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.”); see also *United States v. Drury*, 396 F.3d 1303, 1314-15 (11th Cir. 2005) (determining prosecutor's questioning failed to attack defendant's character for truthfulness); *United States v. Murray*, 103 F.3d 310, 321 (3d Cir. 1997) (concluding that cross-examination exposing witness's “various illegal and sordid activities” constituted attack on truthfulness); *United States v. Hilton*, 772 F.2d 783, 786 (11th Cir. 1985) (“[E]vidence of a witness' [sic] truthful character is admissible only after character for truthfulness has been attacked.”).

<sup>87</sup> See *United States v. Awkard*, 597 F.2d 667, 671 (9th Cir. 1979) (“Under the Federal Rules, opinion testimony on credibility is limited to character; all other opinions on credibility are for the jurors themselves to form.”); *Azure*, 801 F.2d at 339-40 (concluding that expert's testimony did not fall within Rule 608(a) because it was not limited to an opinion on the witness' character for truthfulness but “addressed the specific believability and truthfulness of [the witness' story]”). See also FED. R. EVID. 608, advisory committee's notes (“In accordance with the bulk of judicial authority, the inquiry is strictly limited to character for veracity, rather than allowing evidence as to character generally.”).

<sup>88</sup> See generally *Maddox v. Cash Loans of Huntsville II*, 21 F.Supp.2d 1336, 1338-40 (N.D. Ala. 1998) (explaining distinction and discussing authority). But see *United States v. Piccinonna*, 885 F.2d 1529, 1536 (11th Cir. 1989) (expressing view that polygraph test supporting claim that witness is telling the truth as to specific matters would be admissible under Rule 609(a) if witness' credibility were first attacked); *United States v. Padilla*, 908 F.Supp. 923, 927-28 (S.D. Fla. 1995) (accord).

<sup>89</sup> See *Candoli*, 870 F.2d at 506 (9th Cir. 1989) (holding that court committed error by permitting witness to testify to excellent reputation as an expert because Rule 608(a) restricts testimony to reputation for truthfulness); *United States v. Greer*, 643 F.2d 280, 283 (5th Cir. 1981) (“Since counsel's question inquired of [the witness's] reputation in the community, rather than being limited to his reputation for truthfulness and veracity, it was improper under Rule 608.”); *United States v. Awkard*, 597 F.2d 667, 670-71 (9th Cir. 1979) (reasoning that expert testimony concerning whether witness's memory was restored with hypnosis was not limited to witness's character for truthfulness). Of course, an expert who knows a witness well enough to form an opinion of the witness' truthful character or who is familiar with the witness' reputation can testify in the same way as a lay witness under Rule 608(a).

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reaching those subjects. Expert testimony concerning perception, memory or conduct bears on credibility, but not specifically on truthful character.

### 2. Timing: No bolstering before attack

Under Rule 608, a party cannot bolster a witness's credibility with evidence of good character for truthfulness until the witness's character for truthfulness has been attacked.<sup>90</sup> Therefore, to present bolstering character testimony, the party must persuade the court either that the witness's credibility has been attacked, or that the offered testimony is not offered merely to establish truthful character and therefore does not fall within Rule 608.

This general rule that evidence of good character for truthfulness cannot be introduced until the witness's character for truthfulness has been attacked has its roots in the principle that "every witness in the law is assumed to be of normal moral character for veracity" so bolstering is not worthwhile until there has been an attack.<sup>91</sup> There is also a concern that initiating an exploration of truthful character by introducing bolstering evidence will precipitate a time-consuming exchange that may distract the jurors from the central issues of the case.<sup>92</sup> In addition to avoiding waste of time and distraction of the jury, courts also worry that bolstering may "artificially increase" the probative strength of the witness's testimony.<sup>93</sup>

After a witness's general character for truthfulness has been directly or indirectly attacked, evidence of good character for truthfulness is admissible.<sup>94</sup> The mere suggestion that

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<sup>90</sup> See *United States v. Drury*, 396 F.3d 1303, 1315-16 (11th Cir. 2005) (explaining trial court did not abuse discretion by in disallowing bolstering testimony when witness credibility had not been attacked); *United States v. Bonner*, 302 F.3d 776,781 (7th Cir. 2002) (explaining rehabilitative evidence is permissible only after attack on credibility has been made); *United States v. Scott*, 267 F.3d 729, 734-35 (7th Cir. 2001) (differentiating between bolstering evidence and evidence offered to rehabilitate attacked credibility); *Candoli*, 870 F.2d at 506 (holding court committed error by permitting one expert to testify that an expert who testified in the prosecution's case-in-chief had an excellent reputation as an expert, in part, because it represented bolstering before the witness's character had been attacked).

<sup>91</sup> *Homan v. United States*, 279 F.2d 767, 772 (8th Cir. 1960) (citing IV John Henry Wigmore, WIGMORE ON EVIDENCE, § 1104 (3d ed. 1940)).

<sup>92</sup> Imwinkelried, *Federal Rule of Evidence 402*, *supra* note 13, at 144; Imwinkelried, *The Silence Speaks Volumes*, *supra* note 19, at 1025.

<sup>93</sup> *Homan*, 279 F.2d 767, 772 (8th Cir. 1960). In the case before it, the *Homan* court concluded that the improper bolstering was harmless. Interestingly, the Fifth Circuit later cited *Homan* as standing for the proposition that "[w]hen bolstering testimony suggests to the jury that it may shift to a witness the responsibility for determining the truth of the evidence, its admission may constitute reversible error." *United States v. Price*, 722 F.2d 88, 90 (5th Cir. 1983); see also *Johnson v. State*, 108 N.W. 55 (Wis. 1906). In *Johnson*, the court explained:

That rule is the logical result of the other one that the law presumes every person to be reputed truthful till evidence shall have been produced to the contrary and therefore, for one to take the initiative in establishing that which so needs no support, other than the legal presumption, is useless.

*Id.* at 58.

<sup>94</sup> See FED. R. EVID. 608 advisory committee's note. Opinion or reputation evidence of a witness's untruthfulness, as well as evidence of misconduct, constitute attacks on credibility sufficient to admit rehabilitative testimony. See *id.*; see also *Renda v. King*, 347 F.3d 550, 556 (3d Cir. 2003) (reasoning that opening statement, by suggesting witness was corrupt police officer, constituted attack under Rule 608(a)(2)); *United States v. Murray*, 103 F.3d 310, 321 (3d Cir. 1997) (holding that exposure, during cross-examination of witness's long-standing and heavy drug use, acquaintance with drug dealers, convictions for drug possession, unlawful carrying of an unlicensed firearm and inconsistent statements to grand jury allowed for bolstering evidence directed at veracity); *United States v. Dring*, 930 F.2d 687, 690 (9th Cir. 1991) ("The purpose of Rule 608(a)(2) is to encourage direct attacks on a witness's

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the witness has not told or is not able to tell the truth in specific instances does not constitute a sufficient attack to open the door to bolstering.<sup>95</sup> The clearest example of an attack is calling an anti-character witness under Rule 608 to testify that the other witness has a bad character for truthfulness.<sup>96</sup> In addition, however, courts have held that certain avenues of cross-examination constitute attacks on character that open the door to bolstering.<sup>97</sup> Consequently, the opposing party often holds the key to the admissibility of bolstering evidence that falls within Rule 608(a) and must open the door before it can be offered.

Rule 608(a) thus offers an avenue for introducing some expert testimony to assist the jury to assess witness credibility. But it is severely circumscribed. The expert can only speak to the witness's general character for (un)truthfulness and evidence of truthfulness may not be introduced unless the opposing party attacks the witness's character for truthfulness. However, not all expert testimony that bolsters or impeaches credibility focuses on character for truthfulness and therefore falls within Rule 608.<sup>98</sup> Moreover, while the rule allows opinion concerning character to be used in a way that is otherwise not permitted, it does not exclude the use of opinion for other purposes.<sup>99</sup>

As the discussion that follows reflects, most admissible expert testimony bearing on credibility should be evaluated under other rules and admitted to give the jury insight into something other than the witness's truthful character. A court that mistakenly applies Rule 608(a) to non-character expert testimony, however, will analyze the evidence incorrectly, not accounting for its actual role in the case, and may inappropriately restrict expert testimony addressing credibility.<sup>100</sup> The distinction is particularly critical in jurisdictions that explicitly

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veracity in the instant case and to discourage peripheral attacks on a witness's general character for truthfulness."); Bennett, *supra* note 16, at 590 (discussing what constitutes attack).

<sup>95</sup> See FED. R. EVID. 608 advisory committee's notes. Evidence of bias does not allow for the admission of character evidence under Rule 608(a), as it focuses on a witness's veracity in a particular case, rather than a predisposition for untruthfulness. See *Renda*, 347 F.3d at 554; see also *Dring*, 930 F.2d at 691 (reasoning that bias evidence constitutes a direct attack on specific instances of untruthfulness). Likewise, inconsistent statements or testimony also open the door for rehabilitative evidence. See *Renda*, 347 F.3d at 554; *United States v. Danehy*, 680 F.2d 1311, 1314 ("The mere fact that a witness is contradicted by other evidence in a case does not constitute an attack upon his reputation for truth and veracity"); *United States v. Med. Therapy Sciences, Inc.*, 583 F.2d 36, 41 (2d Cir. 1978).

<sup>96</sup> See, e.g., *United States v. Herzberg*, 558 F.2d 1219, 1224 (5th Cir. 1977) (holding testimony of bad reputation in community is appropriate impeaching testimony).

<sup>97</sup> See, e.g., *United States v. Murray*, 103 F.3d 310, 320-21 (3d Cir. 1997) (holding vigorous and extensive cross-examination exposing witness's illegal activities constitutes attack on character for veracity); *United States v. Scholle*, 553 F.2d 1109, 1123 (8th Cir. 1977) (allowing bolstering evidence after cross-examination that included accusations of misconduct and bad character).

<sup>98</sup> Even when admitting such evidence, courts may be confused. In *State v. Adams*, 5 P.3d 642 (Utah 2000), the Supreme Court of Utah held that the trial court properly permitted the prosecution expert to testify that the prosecution's witness was too mentally limited to be susceptible to coaching. Rather than recognizing the role of the evidence in explaining the witness's memory and perception, the court treated the testimony as addressing truthful character and therefore admissible under Rule 608(a). See *Id.* at 645-46. The court set forth the colloquy from the trial, reporting that the expert testified that, given the witness's inability to master simple educational tasks, such as spelling her own name or accurately recalling her own birth date, he did not see how she could be coached to give a consistent, false account of the facts. See *id.* at 645. The limitations that apply under Rule 608(a) did not come into play because the expert testimony responded to an attack on the witness on cross-examination, which raised the suggestion of fabrication and coaching. See also *State v. Grecinger*, 569 N.W.2d 189, 193-94 (Minn. 1997) (holding expert testimony regarding battered woman syndrome was admissible under Rule 608(a) rather than recognizing its role in explaining conduct, not character).

<sup>99</sup> See generally Berger, *supra* note 7, at 584-86.

<sup>100</sup> For example, courts have demonstrated confusion about the role of Rule 608 in evaluating polygraph evidence. Polygraph evidence speaks to a witness's truthfulness or reactions to information in a specific case, not to general

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preclude experts from testifying to opinions concerning truthful character.<sup>101</sup> It is therefore crucial that courts (1) properly determine the role expert testimony plays in the assessment of credibility, and (2) evaluate its admissibility under the appropriate rules.<sup>102</sup>

### **V. PROPER IMPEACHMENT AND BOLSTERING NOT WITHIN RULE 608**

Truthfulness is only one of the jury's concerns as it assesses the credibility of a witness's testimony. Even a truthful witness may not be worthy of belief in a particular case; and a witness who has a generally untruthful character may provide reliable information in a particular case. The jury should not credit the testimony of a witness who tells the truth but suffers from impaired perception or memory. The jury should scrutinize the testimony of a witness who may be influenced by bias or self-interest in the case. In addition, the jury should also consider whether the witness's conduct is consistent with their in-court testimony and whether there is factual corroboration of the witness's testimony. Rule 608 does not govern testimony that addresses credibility in these other ways.

Expert witnesses often offer insights that speak to these factors that bear on credibility without addressing truthful character. Non-character expert testimony bearing on credibility falls into three categories of admissible evidence: evidence concerning perception, memory, or bias; evidence explaining behavior; and testimony that simply agrees with a witness's testimony. Admissibility of this evidence is governed only by the general rules of admissibility – Rules 402 and 403. In each of these areas, the expert testimony has more probative force than the mere character inference that the witness is a liar and therefore is more likely to be lying in court. Evidence addressing perception, memory, bias, conduct, or the substantive issues in the case speaks pointedly to the credibility of the testimony in the case and has extremely strong probative value. Consequently, expert testimony falling into these categories should be more readily admitted at trial. Nevertheless, the effect of the common law maxim is apparent in these areas and, as a result, judicial resistance to this testimony endures.<sup>103</sup>

The following three sections address these three categories of expert testimony. In Section IV.A I examine the role of expert testimony to help the jury understand the witness's ability to perceive or remember accurately or the witness's bias. In Section IV.B I discuss the use of expert testimony to help the jury understand behavior that may otherwise skew the jury's assessment of credibility. In Section IV.C I consider briefly the courts' exclusion of expert testimony merely because it is consistent with the testimony of a witness.

#### *A. Expert Testimony Concerning Perception, Memory, or Bias*

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character for (un)truthfulness. Some courts have erroneously concluded that the admissibility of polygraph evidence is governed by Rule 608. *See, e.g.,* United States v. Piccinonna, 885 F.2d 1529, 1536 (11th Cir. 1989) (expressing view that polygraph test supporting claim that witness is telling the truth as to specific matters would be admissible under Rule 608(a) if witness's credibility were first attacked); United States v. Padilla, 908 F. Supp. 923, 927-28 (S.D.Fla.1995) (accord); *see also* State v. Myers, 359 N.W.2d 604, 610 (Minn.1984) (applies Rule 608(a) to justify admitting non-character testimony explaining behavior and addressing credibility in specific case).

<sup>101</sup> *See* note 65 *supra*.

<sup>102</sup> *See, e.g.* United States v. Affleck, 776 F.2d 1451, 1458 (10th Cir. 1985) (upholding exclusion of expert who would have testified concerning memory); State v. Marine, 520 S.E.2d 65, 66-67 (N.C. 1999) (considering alternative grounds for admitting expert testimony).

<sup>103</sup> For examples of cases discussing the hesitancy of courts to admit certain expert testimony, *see* note 28. *See also* Mullane, *supra* note 32, 68.

## *Credibility: A Fair Subject for Expert Testimony?*

Experts often offer insight into credibility on grounds other than character. Expert testimony may bolster or impeach a witness's credibility by addressing the witness's perception or memory as it would affect the accuracy of the witness's testimony.<sup>104</sup> Alternatively, expert testimony may explain how the witness may be influenced by a cognitive predisposition for or against a particular party due to bias or self-interest. Experts equipped to provide insight into a witness's capacity for perception, ability to remember, or bias offer valuable assistance to the jurors who must determine the credibility of the witness's testimony. The courts should generally admit such expert testimony.

Evidence that addresses a witness's capacity to perceive or recall the events about which he or she testifies or evidence that reveals bias on the part of a witness makes an important contribution to the case. Such evidence is not character evidence and should not be subject to the restrictive rules governing character evidence. In *United States v. Abel*,<sup>105</sup> the Supreme Court emphasized the limited scope of Rule 608 and rejected the argument that the rule governed and limited the admissibility of evidence that tended to impeach by showing the witness's bias. Emphasizing that Rule 608 applies only to character evidence, the Court held that evidence of bias is governed by Rules 402 and 403. The evidence was presumptively admissible because it was relevant but could be excluded under Rule 403 if the unfair prejudice it injected into the case substantially outweighed its probative value as tending to show bias.<sup>106</sup> Further, the Court emphasized the strong probative value of bias evidence.<sup>107</sup> Like bias evidence, evidence relating to a witness's capacity to perceive or remember should be evaluated under the relevancy rules rather than the character evidence rules. Furthermore, the courts should recognize the evidence related to a witness's strength or weakness of perception or memory has stronger probative value in assessing the credibility of the witness's testimony than evidence of a general character for truthfulness or untruthfulness. Even a truthful witness should not be credited if the witness's perception or memory of the events was impaired.

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<sup>104</sup> Friedland, *supra* note 11, at 167 n. 15 (noting that most expert testimony addresses memory, perception and narration). See also *United States v. Vallejo*, 237 F.3d 1008, 1020 (9th Cir. 2001) (noting that expert could have helped jury understand why witness with history of learning difficulties "appeared to struggle" while testifying at trial); *Schutz v. State*, 957 S.W.2d 52 (Tex.Crim.App. 1997) (discussing difference between comment on truthfulness and comment on perception). A number of disorders affect perception or memory. They include conduct disorder, delirium, amnesic disorders, schizophrenia, delusional disorders, and depression. See DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (American Psychiatric Association, 4th Ed., 2000). Those suffering from Conduct disorder may suffer from misperception: "Especially in ambiguous situations, aggressive individuals with this disorder misperceive the intention of others are more hostile and aggressive than is the case . . ." *Id.* at 95. A witness who suffered from delirium at the time of the events would experience "a disturbance of consciousness that is accompanied by a change in cognition . . ." "a reduced clarity of awareness of the environment," and impairment of "[t]he ability to focus, sustain, or shift attention." *Id.* at 137. A witness suffering from an amnesic disorder may be "impaired in their ability to learn new information" or "unable to recall previously learned information about past events." *Id.* at 172. Schizophrenia is characterized by "a range of cognitive and emotional dysfunctions that include perception." *Id.* at 299. Delusional Disorder involves "the presence of one or more nonbizarre delusions that persist for at least 1 month." *Id.* at 323. Depression may impair the "ability to think, concentrate, or make decisions" and may lead to distraction or memory difficulties. *Id.* at 351.

<sup>105</sup> 469 U.S. 45, 49 (1984).

<sup>106</sup> See *Abel*, 469 U.S. at 49 (1984).

<sup>107</sup> See *Abel*, 469 U.S. at 51 ("A successful showing of bias on the part of a witness would have a tendency to make the facts to which he testified less probable in the eyes of the jury than it would be without such testimony."). See also *Davis v. Alaska*, 415 U.S. 308, 316-17 (1974) (emphasizing probative value of bias evidence); Imwinkelried, *Federal Rule of Evidence*, *supra* note 13, at 148-50 (discussing admissibility of bias evidence under the federal rules); Berger, *supra* note 7, at 584-86 (discussing Rule 608 and *Abel*).



## *Credibility: A Fair Subject for Expert Testimony?*

The distinction between evidence addressing perception or memory and character evidence is critical. In *Washington v. Schriver*,<sup>108</sup> the Second Circuit recognized this distinction. In *Schriver*, the state trial court had excluded the testimony of the defendant's expert, a psychologist who would have educated the jury concerning the perception and memory of children under seven.<sup>109</sup> The Second Circuit concluded that the trial court had failed to draw the critical distinction between evidence bearing on credibility and that bearing on reliability of the witness's testimony.<sup>110</sup> The court pointed out that, while restrictive rules apply to testimony addressing credibility, that is "the jury's assessment of whether a witness is telling the truth,"<sup>111</sup> testimony addressing reliability, that is "whether the witness's perception or memory is accurate," is generally admissible.<sup>112</sup>

A number of other courts have likewise acknowledged the importance of this type of evidence and have not found its tendency to bolster or impeach to be a barrier to admissibility.<sup>113</sup> In *United States v. Partin*,<sup>114</sup> the defendant sought to present an expert who would explain that the witness's mental condition "would have a tendency to affect his ability to see and hear" at the time of the alleged offenses, and the court recognized the role this type of evidence can play.<sup>115</sup> In *State v. Gherasim*,<sup>116</sup> the appellate court overturned the trial court's exclusion of the defendant's expert testimony.<sup>117</sup> The psychiatrist called by the defendant would have testified that the victim's recall of being raped was impaired by a dissociative amnesic disorder.<sup>118</sup> The expert explained that his testimony did not relate to truthfulness, but to the victim's "mental

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<sup>108</sup> 255 F.3d 45 (2d Cir. 2001).

<sup>109</sup> See 255 F.3d 45 (2d Cir. 2001). The court described the proposed testimony as follows:

Dr. Steven Thurber, a psychologist who specializes in the field of child memory . . . proposed to testify that children under seven have trouble separating appearances from reality; that leading questions about sexual abuse and other subjects can cause young children to adopt information contained in the questions as remembered fact; that the use of anatomically correct dolls is unduly suggestive; and that the interrogation techniques used in this case by detectives, a social worker, assistant district attorneys, and doctors were leading and suggestive.

*Id.* at 50.

<sup>110</sup> See 255 F.3d at 60. The court nevertheless held that the exclusion of the evidence in the defendant's state trial did not rise to the level of a constitutional violation. See *id.*

<sup>111</sup> *Schriver*, 255 F.3d at 59.

<sup>112</sup> *Schriver*, 255 F.3d at 59; see also *State v. Heath*, 341 S.E.2d 565, 568 (N.C. 1986) (noting that expert opinion regarding whether the victim had a mental condition that would "cause her to fantasize about sexual assaults" would be admissible).

<sup>113</sup> See, e.g., *State v. Padilla*, 704 P.2d 524 (Or. 1985) (upholding conviction where expert testified that child could accurately perceive and relate sexual contact).

<sup>114</sup> 493 F.2d 750 (5th Cir. 1974).

<sup>115</sup> See *Partin*, 493 F.2d at 764. In *Partin*, the trial court excluded the testimony because the expert "could not state to any degree of medical certainty that [the witness] could not perceive or understand what was happening around him" at the time of the events, and the Fifth Circuit concluded that the trial court should have permitted the jury to hear this testimony. *Id.* The court also held that the defendant should have been permitted to use certain medical and psychiatric records on cross-examination to undermine the credibility of prosecution witnesses. The court noted "[t]he readily apparent principle is that the jury should, within reason, be informed of all matters affecting a witness's credibility to aid in their determination of the truth." *Id.* at 762. The records in question revealed that the witness was suffering from auditory hallucinations just a few months before the events as to which he testified. See also *Sinclair v. Turner*, 447 F.2d 1158, 1162 (10th Cir. 1971) (recognizing that "insanity or mental abnormality either at the time of observing the facts which he reports in his testimony, or at the time of testifying, may be provable, on cross-examination or by extrinsic evidence, as bearing on credibility).

<sup>116</sup> 985 P.2d 1257 (Or. 1999).

<sup>117</sup> See *Gherasim*, 985 P.2d 1257, at 1268 (Or. 1999).

<sup>118</sup> See *Gherasim*, 985 P.2d at 1269.

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ability” to recall the events accurately.<sup>119</sup> The trial court concluded that the expert’s testimony impermissibly commented on the victim’s credibility and that the jury could assess her credibility without expert assistance.<sup>120</sup> The Oregon appellate courts concluded that the expert’s opinion concerning the witness’s “capacity to remember what had occurred on the night that she was assaulted” would have been helpful to the jury and should have been admitted.<sup>121</sup>

Similarly, in cases where the jury has learned that a witness suffers from mental illness, the court should allow expert testimony regarding whether the witness can distinguish reality from fantasy. Such testimony bolsters the witness’s credibility if it helps allay the jury’s possible concern that the mental illness interferes with the witness’s ability to perceive and remember. Its more important role, however, is to provide essential information to the jury.<sup>122</sup>

Not all courts have recognized the value of this expert testimony.<sup>123</sup> The influence of the common law maxim is apparent. Some courts overlook the significance of testimony addressing perception and memory and view the expert’s testimony as invading the province of the jury.<sup>124</sup>

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<sup>119</sup> See *Gherasim*, 985 P.2d at 1270.

<sup>120</sup> See *Gherasim*, 985 P.2d at 1271. The trial court was persuaded in part by the expert’s response to questions on cross-examination that pushed him to state his conclusion that the victim’s account was probably not accurate. See *id.*

<sup>121</sup> See *Gherasim*, 985 P.2d at 1272.

<sup>122</sup> *Eberhardt v. State*, 359 S.E.2d 908, 910 (Ga. 1987) (concluding that the testimony was relevant and not asked “merely for the purpose of bolstering the credibility of the victim.”); *People v. Acklin*, 424 N.Y.S.2d 633, 636 (N.Y. Sup. Ct. 1980) (discussing admissibility of expert testimony to explain witness’s infirmities); *State v. Adams*, 5 P.3d 642, 645-46 (Utah 2000) (holding expert testimony addressing witness’s mental capacity admissible); *State v. Froehlich*, 635 P.2d 127 (Wash. 1981) (concluding that expert was properly permitted to testify concerning witness’s memory).

<sup>123</sup> See, e.g., *Commonwealth v. Crawford*, 718 A.2d 768 (Pa. 1998) (holding that the trial court had not abused its discretion by excluding expert testimony on suppressed recollection). In *Crawford*, the trial court excluded entirely the testimony of an expert who advanced a number of reasons to distrust the recollection of the prosecution witness testifying on the basis for memories that had been suppressed for almost twenty years. See *id.* at 771. The Pennsylvania Supreme Court emphasized its consistent statements that determinations of credibility are exclusively for the jury, as well as the fact that the prosecution did not characterize the testimony as based on recovered memory. See *id.* at 772-73. See also *Nimely v. City of New York*, 414 F.3d 381, 392-95 (2d Cir. 2005) (ascribing no legitimate role to expert testimony offering an explanation – “the misperception hypothesis” – for the apparent inconsistency between the defendants’ account of the shooting and the physical evidence).

<sup>124</sup> See, e.g., *Nichols v. American National Insurance Company*, 154 F.3d 875 (8th Cir. 1998). In *Nichols*, the plaintiff in a sexual harassment suit complained that the defendant’s expert psychiatrist had been permitted to give the following testimony:

Dr. Pribor testified that Nichols had poor psychiatric credibility. She defined this as poor ability to assess the cause of her own psychological state or to report her psychological symptoms accurately. In reaching this assessment she relied on her conclusions that Nichols had multiple psychiatric stressors in her life but that she focused only on her experience at American National, that Nichols said she had no psychological problems before working for American National, that Nichols did not want to be in Dr. Pribor’s office and refused to answer some of her questions, that Nichols had had difficulties at several jobs in the past, and that her claims of harassment changed over time. Dr. Pribor testified that Nichols had difficulty interpreting social settings and a tendency to blur fantasy with reality. She also stated that in an independent evaluation “you need to interpret and weigh what they tell you” or else “you can get a very skewed and inaccurate view of what actually happened.”

Dr. Pribor also gave her opinion that Dr. Tyndall had been influenced by the way Nichols related what had happened to her. She said that Nichols had recall bias and that her statements were affected by secondary gain and malingering. She testified that “recall bias” refers to an individual’s belief that she has not experienced certain symptoms even though her medical records indicate otherwise, such as Nichols’ statement that she had not experienced symptoms of depression and anxiety before she worked at American National. She defined “secondary gain” as the possibility that claimed psychological symptoms are motivated by financial gain and mentioned the potential for secondary gain in litigation where money is sought. She criticized Dr. Tyndall for using a structured interview in diagnosing PTSD because it could allow Nichols to act under the influence of secondary gain and recall

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For example, in *Westcott v. Crinklaw*,<sup>125</sup> a civil rights action against a police officer, the trial court permitted the defendant's expert to testify that the defendant was "exhibiting symptoms of posttraumatic stress syndrome," a disorder that could cause incomplete memory and impair one's ability to provide an accurate account of events, but the Eighth Circuit reversed.<sup>126</sup> The plaintiff had introduced the statements the defendant made immediately after the shooting. The defendant claimed that the statements were not accurate and offered expert testimony to provide insight into the possible effect of posttraumatic stress on the defendant at the time he made the statements, which may have caused him to make inaccurate assertions. The Eighth Circuit condemned the testimony because it "directly addressed the credibility of [the defendant]."<sup>127</sup> Actually, the expert testimony represented precisely the type of information that can enhance the jurors' assessment of credibility by arming them with increased knowledge related to perception and memory.<sup>128</sup>

The following three sections examine the way in which courts have handled expert testimony in three specific contexts: eyewitness testimony, post-hypnosis testimony, and the testimony of child witnesses. In each of these contexts, courts have let go of the maxim that experts are not permitted to address credibility and opened the door to expert testimony that will assist the jury to understand the specific issues of perception, memory, or bias raised by the witness.

### 1. Eyewitness testimony

Erroneous eyewitness identification has contributed to the conviction of innocent defendants.<sup>129</sup> Experts on eyewitness identification can help jurors understand the psychological dynamics of identification and, most critical, overcome erroneous assumptions that infect

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bias, "and this is-I mean this is what happened." She also defined "malingering" as feigning or making up symptoms for the purpose of secondary gain.

154 F.3d at 882. The plaintiff argued that this testimony impermissibly addressed the plaintiff's "veracity and credibility," and the Eighth Circuit agreed. The court stated, "[s]uch evidence is not helpful if it draws inferences or reaches conclusions within the jury's competence or within an exclusive function of the jury." 154 F.3d at 883. The court expressed concern that the evidence might confuse or mislead the jury, "causing it to substitute the expert's credibility assessment for its own common sense determination." The court drew the line between testimony that "explain[ed] psychiatric terms and the situations in which they may arise" and testimony that expressed the expert's own opinion that the plaintiff's statements to her expert "were influenced by recall bias, secondary gain, and malingering." 154 F.3d at 884. The testimony "impermissibly instructed the jury on how to weigh the evidence." 154 F.3d at 884. The court overlooked the insight the expert provided into the plaintiff's perception and memory of the critical events.

<sup>125</sup> 68 F.3d 1073, 1076 (8th Cir. 1995).

<sup>126</sup> See *Westcott*, 68 F.3d at 1073, 1076 (8th Cir. 1995).

<sup>127</sup> The court stated:

The testimony before us . . . is the same type [as in *Azure* and *Whitted*], as it provides a psychological label or diagnosis as a way of excusing or justifying [the defendant's] statements made immediately after the shooting. The accuracy of these statements is a pure question of credibility.

68 F.3d at 1077.

The court then remarked that *Azure* and *Whitted* "plainly stand for the proposition that expert testimony going to the issue of credibility is not admissible." 68 F.3d at 1077. Characterizing the issue as "close," the Eighth Circuit held that the trial court had committed reversible error by admitting the evidence. 68 F.3d at 1077.

<sup>128</sup> See also *United States v. Binder*, 769 F.2d 595, 601 (9th Cir. 1985) (rejecting expert testimony that would have provided insight into witness' accuracy of perception and memory).

<sup>129</sup> See BARRY SCHECK ET AL, ACTUAL INNOCENCE 101-137 (2001); see also *Abdur-Raheem v. Kelly*, 98 F.Supp.2d 295, 305-07 (E.D.N.Y. 2000) (discussing dangers of eyewitness identification testimony).

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assessment of eyewitness identification.<sup>130</sup> Specifically, the expert can help jurors understand the way in which vagaries of perception and memory undermine the accuracy of eyewitness identification. Given the probative value of psychological insights into eyewitness identification,<sup>131</sup> a qualified expert should be permitted to testify concerning the psychology of eyewitness identification.

The long battle over the admissibility of expert testimony relating to eyewitness identification is instructive.<sup>132</sup> The cases reveal the courts' resistance to expertise touching on witness credibility.<sup>133</sup> They also illustrate the ways in which the courts justify exclusion of expert testimony even though it speaks directly to the ways in which perception and memory can generate false but convincing identification testimony. Furthermore, an examination of the relevant cases reveals an increasing acceptance of this testimony.

Many courts have been unreceptive to expert testimony addressing eyewitness credibility.<sup>134</sup> The reluctance to admit expert testimony on identification appears attributable to the courts' adherence to the prohibition on expert testimony addressing credibility and, at least in part, to the fact that the judges asked to rule on the question share the misconceptions that the expert testimony was intended to counteract.

In *Neil v. Biggers*,<sup>135</sup> the Supreme Court set out the factors to be considered in determining whether identification testimony is sufficiently reliable:

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<sup>130</sup> See Simmons, *supra* note 7, at 1030-32 (discussing science of eyewitness identification).

<sup>131</sup> See Michael R. Leippe, *The Case for Expert Testimony About Eyewitness Testimony*, 1 PSYCHOL. PUB. POL'Y & L. 909 (1995) ("The mounting evidence of eyewitness error is one of the major bases of the argument that expert courtroom testimony by research psychologists about eyewitness testimony is sometimes required as a means of providing jurors education and perspective about eyewitness testimony."); Edward Stein, *The Admissibility of Expert Testimony About Cognitive Science Research on Eyewitness Identification*, 2 LAW, PROBABILITY & RISK 295 (2003) (espousing importance of experts to explain fallibility of eyewitness testimony); Rene L. Valladares & Franny Forsman, *Attacking Reliability of Eyewitness Testimony After Daubert*, 21-JUN CHAMPION 60 (1997) (asserting need to allow experts to explain unreliability of eyewitness testimony); Wayne T. Westling, *The Case for Expert Witness Assistance to the Jury in Eyewitness Identification Cases*, 71 OR. L. REV. 93, 103 (1992) ("An expert witness should be allowed to present scientific data about the reliability or unreliability of eyewitness testimony to the jury.")

<sup>132</sup> See Stein, *supra* note 131, at 295 (explaining fit between expert testimony and eyewitness identification); Berger, *supra* note 7, at 601-04 (pointing out shift in decisions concerning expert testimony on eyewitness identification); Mullane, *supra* note 32, at 98-104.

<sup>133</sup> See *United States v. Crotteau*, 218 F.3d 826, 833 (7th Cir. 2000) (holding thorough cross-examination precludes need for experts on fallibility of eyewitness identification); *United States v. Hall*, 165 F.3d 1095, 1104 (7th Cir. 1999) (affirming exclusion of expert testimony on eyewitness identification, discussing Seventh Circuit's reluctance to admit such evidence and noting that it does not assist the jury); *United States v. Lumpkin*, 192 F.3d 280 (2d Cir. 1999) (declaring testimony of expert on eyewitness identification inadmissible as invading jury's province of credibility determination); *United States v. Smith*, 122 F.3d 1355, 1358-59 (11th Cir. 1997) (concluding that expert testimony on eyewitness identification does not assist the jury and that jury can subject identification to "common-sense evaluation"); *United States v. Rincon*, 28 F.3d 921 (9th Cir. 1994) (deciding expert testimony could be confusing and misleading, negating helpfulness); *United States v. Downing*, 753 F.2d 1224, 1232 (3d Cir. 1985) ("Judicial resistance to the introduction of this kind of expert testimony is understandable given its innovativeness and the fear of trial delay spawned by the specter of the creation of a cottage industry of forensic psychologists."). See also Stein, *supra* note 131, at 295.

<sup>134</sup> See, e.g., *United States v. Fosher*, 590 F.2d 381, 382-84 (1st Cir. 1979) (affirming exclusion of expert testimony on eyewitness identification); *People v. Enis*, 564 N.E.2d 1155, 1165 (Ill. App. 1990) (rejecting testimony of leading expert on eyewitness reliability); see also Simmons, *supra* note 7, at 1032-37 (discussing case law governing expert testimony on eyewitness identification).

<sup>135</sup> 409 U.S. 188 (1972).

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[T]he factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.<sup>136</sup>

Since *Biggers* was decided in 1972, the approach it defines has been repeatedly reaffirmed.<sup>137</sup> As a result, courts often view expert opinion as unnecessary to help the jury assess credibility.<sup>138</sup> Indeed, the courts remain committed to the *Biggers*' factors despite the strong psychological evidence to the contrary.

Psychological research has demonstrated that *Biggers* rests on erroneous beliefs about eyewitness identification.<sup>139</sup> The list of factors includes factors that have little relationship to the accuracy of the identification. For example, the fact that the witness provides an accurate description of the perpetrator is not a good predictor of correctness of the identification.<sup>140</sup> The eyewitness's sense of confidence can be unintentionally artificially enhanced by the lineup procedures employed by law enforcement.<sup>141</sup> Thus, in this arena expert testimony can play a

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<sup>136</sup> See 409 U.S. at 188, 199-200 (1972).

<sup>137</sup> See e.g., *Sumner v. Mata*, 455 U.S. 591, 597, n.10 (1982) (noting Court's acceptance of various factors in *Biggers*); *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977) ("The factors to be considered [regarding the admissibility of identification testimony] are those set out in *Biggers*."); see also *United States v. Brownlee*, 454 F.3d 131, 139 (3d Cir. 2006) (discussing totality of circumstances approach announced in *Biggers*); *Howard v. Bouchard*, 405 F.3d 459, 472 (6th Cir. 2005) ("In judging reliability, we consider the totality of the circumstances, including the factors described in . . . *Biggers*."); *United States v. Henderson*, 320 F.3d 92, 100 (1st Cir. 2003) (reasoning that starting point for admissibility of identification testimony is list of factors set forth in *Biggers*).

<sup>138</sup> See, e.g., *United States v. Langan*, 263 F.3d 613, 619-22 (6th Cir. 2001) (upholding exclusion of defendant's expert eyewitness testimony where trial court stated testimony would have improperly invaded jury's province); *United States v. Brien*, 59 F.3d 274, 277-78 (1st Cir. 1995) (affirming trial court's decision to exclude defendant's expert where trial court had "noted the risks of confronting the jury with battles of experts on areas within the common-sense competence of jurors"); *Commonwealth v. Spence*, 627 A.2d 1176, 1182 (Pa. 1993) (holding that testimony concerning the effect of stress on identification was properly excluded because it would have intruded on the jury's role). In *Langan*, the court stated, that "the hazards of eyewitness identification are within the ordinary knowledge of most lay jurors." 263 F.3d at 613, 624. In *Downing*, the Third Circuit noted that a number of courts had excluded expert testimony on eyewitness identification because the jury could adequately assess the question by applying common sense, but concluded that the evidence should be admitted under Rule 702 in the proper circumstances. 753 F.2d at 1229-31.

<sup>139</sup> See generally Gary L. Wells, et al, *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 LAW & HUM. BEHAVIOR 1 (1998) (discussing research and making recommendations); Gary L. Wells & Amy L. Bradfield, "Good, You Identified the Suspect": *Feedback to eyewitnesses distorts their reports of the experience*, 83 J. APPLIED PSYCHOL. 360-376 (1998) (finding, that "confidence tends to be only modestly related to eyewitness" identification accuracy" and such confidence is malleable, subject to "[c]onfidence inflation" after "feedback manipulation"); Gary L. Wells, *Verbal Descriptions of Faces From Memory: Are They Diagnostic of Identification Accuracy?*, 70(4) J. APPLIED PSYCHOL. 619-626 (1985) (calling into question *Biggers* factors). Specifically, Wells suggests that the Court is wrong to rely on the accuracy of verbal descriptions when assessing the accuracy of the identification. See *id.* Although Wells acknowledges that his findings support the Court's approach, he did state that "it appears that the relationship between descriptions of faces and the identification of faces is not due to a process wherein good describers are good identifiers." *Id.*; see also Melissa Piggot & John C. Brigham, *Relationship Between Accuracy of Prior Description and Facial Recognition*, 70(3) J. APPLIED PSYCHOL. 547-555 (1985) (noting that "[r]esearch findings from other paradigms also suggest that people's ability to recall something seen previously will not be strongly related to their ability to identify the same object on a recognition test"). Piggot and Brigham went on to find that "[t]here was no relationship between subjects' accuracy in describing the target person and the accuracy with which they recognized him in a photograph lineup." *Id.*

<sup>140</sup> Wells et al, *Eyewitness Identification*, *supra* note 139, at 2.

<sup>141</sup> Wells et al, *Eyewitness Identification*, *supra* note 139, at 2.

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useful role educating not only the jury but also the court concerning the credibility of eyewitness identification testimony.

Nevertheless, the development of this psychological literature has not persuaded all courts that expert testimony has value to the jury in cases of eyewitness identification. In *United States v. Lumpkin*,<sup>142</sup> the Second Circuit upheld the exclusion of the defendant's expert on eyewitness identification. The defendant sought to have the expert explain to the jury that an eyewitness's confidence in her identification does not correlate to, or effectively predict accuracy of that identification.<sup>143</sup> The defendant argued that the evidence was necessary "to rebut the natural assumption that the confidence shown by [the witnesses] indicated reliability."<sup>144</sup> The court held that the evidence would have intruded on the jury's "task of assessing witness credibility" and "intrud[ed] too much on the traditional province of the jury to assess credibility." The court expressed concern that the proffered testimony would have usurped the jury's role and stated that it might even have "placed the officers' credibility here in jeopardy."<sup>145</sup>

In *United States v. Langan*,<sup>146</sup> the Sixth Circuit affirmed the trial court's decision to preclude the defense expert from testifying. The court assumed that expert testimony would ultimately have clouded the issues:

Although we recognize that expert testimony on eyewitness identification might inform the jury on all of the intricacies of perception, retention, and recall, we nevertheless agree with the district court that the hazards of eyewitness identification are within the ordinary knowledge of most lay jurors. \* \* \* [I]t is likely that an uninformative battle of experts would have occurred if the government had offered its own expert testimony in order to refute [the defense expert], and the jury could have been unduly misled and confused.<sup>147</sup>

These decisions illustrate the overprotective attitude toward the jury and mis-assessment of the evidence.<sup>148</sup> Expert testimony on eyewitness identification is largely counterintuitive and therefore necessary to address the jury's natural tendency to credit witnesses who testify with confidence to their identification of the defendant.<sup>149</sup> These courts excluded legitimate expert testimony necessary to counteract the jurors' natural tendency to view confidence on the stand as a signal of reliability.

Other courts, however, have moved toward admission of this expert testimony.<sup>150</sup> In *United States v. Downing*,<sup>151</sup> the Third Circuit emphatically repudiated the trial court's

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<sup>142</sup> 192 F.3d 280 (2d Cir. 1999).

<sup>143</sup> See 192 F.3d at 288.

<sup>144</sup> 192 F.3d at 289.

<sup>145</sup> 192 F.3d at 290. The court also expressed concern that the expert's testimony would have usurped the role of the trial judge because it was at odds with the jury instruction that witness confidence is a factor to be considered in assessing the credibility of eyewitness identification. 192 F.3d id. at 289.

<sup>146</sup> 263 F.3d 613 (6th Cir. 2001).

<sup>147</sup> *Langan*, 263 F.3d 613, 2d at 624 (6th Cir. 2001).

<sup>148</sup> See also *United States v. Brien*, 59 F.3d 274, 276 (1st Cir. 1995) (excluding expert testimony explaining that the eyewitness's confidence in the identification can be artificially enhanced by the way in which the police conduct the identification).

<sup>149</sup> See Stein, *supra* note 131, at 295.

<sup>150</sup> The trend appears to be in favor of admitting testimony by eyewitness identification experts. See *United States v. Smithers*, 212 F.3d 306 (6th Cir. 2000) (recognizing trend to admit expert testimony on the question of eyewitness identification); *United States v. Brien*, 59 F.3d 274, 277 (1st Cir. 1995) (recognizing that judicial opinion on the value of expert testimony concerning eyewitness identifications was becoming more receptive); *United States v. Moore*, 786 F.2d 1308, 1313 (5th Cir. 1986) (upholding exclusion of eyewitness expert in case but acknowledging its admissibility in some circumstances). See generally Simmons, *supra* note 7, at 1032-37 (discussing developing acceptance of expert testimony on eyewitness identification as well as continuing limitations on the testimony).

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conclusion that the expert witness would “usurp the ‘function of the jury’” as a basis for exclusion.<sup>152</sup> More recently, in *United States v. Brownlee*,<sup>153</sup> the trial court limited the expert’s testimony concerning eyewitness identification and the Third Circuit reversed, emphasizing the importance of admitting expert testimony to educate jurors who come to the case unaware of the unreliability of eyewitness identification.<sup>154</sup>

### 2. Post-hypnosis testimony

The decisions dealing with hypnotically refreshed memory stand in stark contrast to those dealing with eyewitness identification.<sup>155</sup> In the middle of the twentieth century, hypnosis came into use as a means of refreshing witnesses’ memories.<sup>156</sup> Research soon demonstrated the risks

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<sup>151</sup> 753 F.2d 1224 (3d Cir. 1985).

<sup>152</sup> See *Downing*, 753 F.2d at 1224, 1228 (3d Cir. 1985). The court noted that Rule 704 abolishes the ultimate issue rule and “rejects as ‘empty rhetoric’ the notion that some testimony is inadmissible because it usurps the ‘province of the jury.’” *Id.* at 1229. The court therefore surmised that the district court may have ruled on the erroneous basis that “an expert’s testimony concerning the reliability of eyewitness identifications is never admissible in federal court because such testimony concerns a matter of common experience that the jury is itself presumed to possess.” *Id.*

<sup>153</sup> 454 F.3d 131 (3d Cir. 2006).

<sup>154</sup> See 454 F.3d at 131, 140-43 (3d Cir. 2006). See also *United States v. Mathis*, 264 F.3d 321, 341 (3d Cir. 2001) (concluding that trial court should have admitted most of the offered testimony concerning aspects of eyewitness identification but agreeing with exclusion of expert testimony explaining that viewing an object for a longer period of time would produce a more accurate memory, since information was “rather pedestrian”); *United States v. Stevens*, 935 F.2d 1380, 1398-1401 (3d Cir. 1991) (affirming district court’s exclusion of defense expert’s testimony concerning suggestiveness of identification from wanted board and way in which initial identification may have infected victims’ later identifications as pedestrian points that did not require expert insight but holding court erred by excluding expert testimony concerning lack of correlation between confidence of identification testimony and its accuracy because information was “counterintuitive” and expert testimony was therefore quite helpful); *United States v. Moore*, 786 F.2d 1308, 1312 (5th Cir. 1986) (holding exclusion of expert testimony on eyewitness identification was not reversible error even though testimony “is not simply a recitation of facts available through common knowledge” but is “largely counter-intuitive”) (emphasis in original).

<sup>155</sup> “Hypnosis has been defined as an alteration in consciousness and concentration, in which the subject manifests a heightened degree of suggestibility, while awareness is maintained.” See Richard G. Montevideo, *Hypnosis – Should the Courts Snap Out of It? – A Closer Look at the Critical Issues*, 44 OHIO ST. L.J., 1053, 1055 (1983) (“Hypnosis has been defined as an alteration in consciousness and concentration, in which the subject manifests a heightened degree of suggestibility, while awareness is maintained.”) (quoting Spector & Foster, *Admissibility of Hypnotic Statements: Is the Law of Evidence Susceptible?* 38 OHIO ST. L.J. 567, 570 (1977)). See also R.T.C., Note, *The Admissibility of Testimony Influenced by Hypnosis*, 67 VA. L. REV. 1203, 1206-14 (1981) (discussing history, scientific background and effect of hypnosis).

<sup>156</sup> “It was the acceptance of hypnosis, as a therapeutic tool, in the 1950s and 60s that reawakened the hypnosis controversy and produced a flurry of judicial activity during the last twenty-five years.” David S. McDonald, Comment, *The Admissibility of Hypnotically Refreshed Testimony*, 14 OHIO N.U.L. REV. 361, 366 (1987). (“It was the acceptance of hypnosis, as a therapeutic tool, in the 1950s and 60s that reawakened the hypnosis controversy and produced a flurry of judicial activity during the last twenty-five years.”); see also Lisa K. Rozzano, *The Use of Hypnosis in Criminal Trials: The Black Letter of the Black Art*, 21 LOY. L.A. L. REV. 635, 645 (1988) (“As hypnosis came to be recognized as a valuable tool in criminal investigations, the phenomenon found its way into courtrooms. An increasing number of cases ruled on the admissibility of hypnotically enhanced testimony when it formed the basis of the case against a criminal defendant.”). Some courts simply admitted the evidence. See, e.g., *Wyller v. Fairchild Hiller Corp.*, 503 F.2d 506 (9th Cir. 1974) (holding hypnotically refreshed testimony admissible); *Harding v. State*, 246 A.2d 302 (Md. 1968) (holding victim properly allowed to testify after hypnosis restored otherwise irretrievable memories of assault and rape as hypnosis may affect credibility as determined by jury, but not admissibility); *State v. Jorgensen*, 492 P.2d 312 (Or. 1971) (holding objections over hypnosis go to weight, not

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of this practice, establishing the impact of hypnosis on the witness's testimony and the difficulty of untangling the genuine memory from that established through hypnosis.<sup>157</sup> Two approaches emerged. One was to bar the testimony altogether.<sup>158</sup> The other was to allow the witness to testify but also admit expert testimony concerning the effect of hypnosis.<sup>159</sup> Rather than adhering to the maxim that questions of credibility are for the jury, the courts understood the importance of educating the jury on the impact of hypnosis on the witness's ability to remember and narrate accurately.<sup>160</sup>

### 3. Testimony of child witnesses

Courts have also wrestled with the use of expert testimony to help jurors understand issues of perception and memory in young witnesses and have generally been more receptive to this use of expert testimony.<sup>161</sup> Cases involving allegations of sexual abuse of children raise special concerns with perception and memory. In these cases, the jury can benefit from the insights of expert testimony.

Courts do not always see the important role of such testimony.<sup>162</sup> For example, in *United States v. Binder*,<sup>163</sup> the trial court admitted expert testimony informing the jury that the children

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admissibility, of testimony). Others admitted the testimony only with procedural safeguards. *See, e.g.*, *State v. Hurd*, 432 A.2d 86, 91 (N.J. 1981) (holding hypnotically refreshed testimony must meet acceptability standard of scientific evidence in order to be admitted); *State v. Beachum*, 643 P.2d 246, 252 (N.M. Ct. App. 1811981) (“post-hypnotic recollections, revived by the hypnosis procedure, are only admissible in a trial where a proper foundation has also first established the expertise of the hypnotist and that the techniques employed were correctly performed, free from bias or improper suggestibility.”).

<sup>157</sup> *See generally* Rozzano, *The Use of Hypnosis in Criminal Trials*, 21 Loy. L.A. L. Rev. SUPRA NOTE at 639-44 (1988) (explaining dangers of hypnosis including suggestibility, confabulation and overconfidence).

<sup>158</sup> The per se inadmissible approach to hypnotically refreshed memory as the basis for testimony began in 1980. *See* McDonald, *Admissibility of Hypnotically Refreshed Testimony*, 14 OHIO N.U.L. REV. 361 SUPRA NOTE at 370 (citing *State v. Mack*, 292 N.W.2d 764 (Minn. 1980), where court applied *Frye* test to hypnosis and finding that it did meet necessary requirements); *see also* McQueen v. Garrison, 619 F.Supp. 116, 131 (E.D.N.C. 1985) (holding expert's testimony about unreliability of hypnosis made admission of witness's testimony improper); *Watson v. State*, 604 S.E.2d 804 (Ga. 2004) (holding that witness may only testify as to statements made before hypnosis refreshed memories); *People v. Sutton*, 812 N.E.2d 543 (Ill. App. Ct. 2004) (finding witness's refreshed memories are not admissible); *State v. Collins*, 464 A.2d 1028 (Md. Ct. App. 1983) (overruling *Harding*, adopting *Mack* per se inadmissible approach to hypnosis); *Commonwealth v. Nazarovitch*, 436 A.2d 170 (Pa. 1981).

<sup>159</sup> *See, e.g.*, *Clay v. Vose*, 771 F.2d 1 (1st Cir. 1985) (upholding conviction based on hypnotically refreshed testimony noting that the jury had received the benefit of expert testimony as to the possible effects hypnosis to help it assess the credibility of the witness and accuracy of the testimony); *People v. Hughes*, 466 N.Y.S.2d 255 (1983) (noting that post hypnotic testimony may be challenged with expert testimony concerning the potential effect of the hypnosis on the witness's recollections); *State v. Armstrong*, 329 N.W.2d 386 (Wis. 1983) (suggesting use of expert testimony to help the jury assess credibility of hypnotized witness).

<sup>160</sup> *See also* *Rock v. Arkansas*, 483 U.S. 44, 61 (1987) (noting that expert testimony can be used to educate jury concerning risks of post-hypnosis testimony); *but see* *United States v. Awkard*, 597 F.2d 667 (9th Cir. 1979) (permitting use of testimony on effects of hypnosis). In *Awkard*, the court held that, had the defense attempted to discredit the witness on the grounds that the witness had been hypnotized, the permissible testimony would have been limited to “the general nature and usual effects of hypnosis, and the details of [the expert's] hypnosis of [the witness].” 597 F.2d at 671. The expert should not under any circumstances be permitted to testify that the witness' memory had been “accurately refreshed.” *Id.* at 671.

<sup>161</sup> *See* Friedland, *supra* note 11, at 202-03 (asserting, that “admission of general credibility testimony occurs most often in cases involving sexual abuse and child witnesses” and citing authority).

<sup>162</sup> *See* *Schutz v. State*, 957 S.W.2d 52 (Tex.Crim.App. 1997) (summarizing authority concerning admissibility of expert testimony concerning manipulation and fantasy in child witnesses).

<sup>163</sup> 769 F.2d 595 (9th Cir. 1985).



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who testified “were able to distinguish reality from fantasy and truth from falsehood.”<sup>164</sup> This testimony provided insight into the perception of the witnesses, a five year old and a seven year old, and, doing so, offered assistance to the jury in determining credibility in the case. However, the Ninth Circuit misconceived the role of the expert testimony and held that it should not have been admitted, citing the maxim that credibility is for the jury to determine and concluding that the expert testimony invaded the province of the jury.<sup>165</sup> The court expressed the view that expert testimony offered to show that the complaining witnesses were “able to distinguish reality from fantasy and truth from falsehood” “improperly buttressed” the witnesses’ credibility.<sup>166</sup> The court stated, further, that the jurors “did not need additional assistance” in assessing the credibility of the witnesses and characterized the expert testimony as asserting “that these particular children in this particular case could be believed.”<sup>167</sup> In the court’s view, “[t]he jury in effect was impermissibly being asked to accept an expert’s determination that these particular witnesses were truthful.”<sup>168</sup> Justice Wallace, concurring in part and dissenting in part, more accurately understood the role of the expert testimony. He pointed out that the experts “testified only that the children were *capable* of telling the truth – they did not opine as to whether or not the children *actually had done so*.”<sup>169</sup> Given the importance of determining whether a young witness is capable of accurate perception, memory and narration, expert testimony addressing the maturity of the young witnesses’ perception would have been helpful to the jury.

Other courts accept the legitimate role expert testimony can play helping the jury evaluate the credibility of the children’s testimony.<sup>170</sup> For example, in *Doe By and Through G.S. v. Johnson*,<sup>171</sup> the Seventh Circuit rejected the argument that expert testimony improperly invaded the province of the jury. The expert explained the circumstances that could have caused the child to allege sexual abuse out of self-interest.<sup>172</sup>

Even courts that accept the value of the expert testimony recognize that the testimony should be confined to a discussion of perception and memory but should not extend to a direct

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<sup>164</sup> See *Binder*, 769 F.2d 595 at 602 (9th Cir. 1985); see also *Washington v. Schriver*, 255 F.3d 45, 57-58 (2d Cir. 2001) (holding that trial court’s exclusion of expert testimony on children’s suggestibility was not constitutional error).

<sup>165</sup> See *Binder*, 769 F.2d at 595, 601.

<sup>166</sup> See *Binder*, 769 F.2d at 602.

<sup>167</sup> See *Binder*, 769 F.2d at 602.

<sup>168</sup> See *Binder*, 769 F.2d at 602.

<sup>169</sup> See *Binder*, 769 F.2d at 605.

<sup>170</sup> See, e.g., *Washington v. Schriver*, 255 F.3d 45, 57-58 (2d Cir. 2001) (recognizing value of expert testimony explaining memory and perception in child witnesses); *United States v. Provost*, 875 F.2d 172 (8th Cir. 1989) (allowing testimony concerning how two different events may become linked in child’s memory). See generally Erica Beecher-Monas, *Blinded by Science: How Judges Avoid the Science in Scientific Evidence*, 71 Temp. L. Rev. 55, 94 -95 (1998) (discussing *Rouse* and remarking that “an increasing number of jurisdictions are turning to the admissibility criteria of *Daubert* for resolution of admissibility questions regarding the social sciences and psychological evidence.”); Bennett L. Gershman, *Child Witnesses and Procedural Fairness*, 24 Am. J. Trial Advoc. 585, 587-591 (2001) (explaining approaches of different courts to child credibility/suggestibility evidence); Thomas Lyon, *The New Wave In Children’s Suggestibility Research: A Critique*, 84 Cornell L. Rev. 1004 (1999) (providing overview of suggestibility/credibility evidence in child witness cases); see also John E.B. Myers, *A Decade of International Legal Reform Regarding Child Abuse Investigation and Litigation: Steps Toward a Child Witness Code*, 28 Pac. L.J. 169, 182 (1996) (discussing history of child witness credibility and attacks thereon).

<sup>171</sup> 52 F.3d 1448 (7th Cir. 1995)

<sup>172</sup> See *Johnson*, 52 F.3d at 1463 (reporting that expert testified that parents rewarded child for making allegations and punished her for recanting).

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assessment of truthfulness in the case. In *United States v. Rouse*,<sup>173</sup> the Eighth Circuit stated the general rule and posed the problem:

A qualified expert may explain to the jury the dangers of implanted memory and suggestive practices when interviewing or questioning child witnesses, but may not opine as to a child witness's credibility. That leaves a troublesome line for the trial judge to draw – as the expert applies his or her general opinions and experiences to the case at hand, at what point does this more specific opinion testimony become an undisguised, impermissible comment on a child victim's veracity?<sup>174</sup>

In *Johnson v. Doe*,<sup>175</sup> for example, the court held that the expert testified properly where the expert “discussed the possibility that [the child]’s allegations were influenced by [her adopted mother]’s contemporaneous research into child abuse.”<sup>176</sup> The expert stopped short of offering a specific opinion as to the credibility of the witnesses.<sup>177</sup> The testimony appropriately helped the jury focus on a factor that could have influenced the witness's perception.

The evolution of the law in these three areas offers hope that courts will, over time, recognize the value of expert testimony on other questions of perception and memory. Courts should take a lesson from the initial resistance to and eventual acceptance of the expertise offered to help the jury with questions of credibility when faced with eyewitness identification testimony, post-hypnosis testimony, and the testimony of children. Courts should be more receptive to expert testimony that addresses issues of perception, memory, and bias, realizing that the testimony may improve the jury's assessment of credibility.

### *B. Expert Testimony Explaining Behavior*

Expert witnesses are also called on to explain the behavior of witnesses in order to help the jurors understand the significance of a pattern of behavior.<sup>178</sup> Because the expert's guidance

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<sup>173</sup> 111 F.3d 561 (8th Cir. 1997).

<sup>174</sup> *Rouse*, 111 F.3d at 571. As reported in the panel decision that was vacated, the precluded testimony was as follows:

Q And based on your review of [the trial testimony] and your review of the records, all the files in this matter, is it your belief that there's been a practice of suggestibility employed in these techniques?

A Yes, sir.

*Id.* at 566; *see also id.* at 568-69 (discussing expert's testimony in more detail). The court concluded that if the exclusion of the testimony was error, it was harmless. *Id.* at 572; *see also* *United States v. Provost*, 875 F.2d 172 (8th Cir. 1989). In *Provost*, the court held that the court-appointed expert witness had not strayed into improper vouching. The expert, a psychologist, explained the victim's linking of two events, stating that sexually abused children might link two events in time even though they occurred on separate occasions because one might act as a triggering mechanism. 875 F.2d at 176. Explaining why the victim may have linked the two events, the expert stated “an elementary basic thing is that whether or not they were contingent in time *they both occurred . . .*” *Id.* (emphasis in original). The court characterized the testimony as “at most, an implied statement of her belief that [the witness] was telling the truth.” *Id.* The court did not approve the form of the testimony and actually concluded that it came close to, but did not cross, line established in *Azure*. *See id.*

<sup>175</sup> 234 F.3d 1273 (7th Cir. 1995). *See also* *Schutz v. State*, 957 S.W.2d 52 (Tex.Crim.App. 1997) (discussing admissibility of expert testimony concerning manipulation of child witnesses).

<sup>176</sup> *Johnson*, 234 F.3d at 1463.

<sup>177</sup> *See Johnson*, 234 F.3d at 1463.

<sup>178</sup> *See* *People v. Simpkins*, 697 N.E.2d 302, 312 (Ill. App. 1998) (distinguishing between expert testimony that explains behavior and expert testimony that improperly comments on witness credibility). *See generally* Friedland, *supra* note 11, at 175, 201 (commenting experts may explain behavior or common characteristics of class of witnesses such as victims of sexual abuse or child witnesses). This article does not address the particular problems

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will encourage the jurors either to credit or to discredit the witness, this testimony also plays an impeaching or bolstering role, and therefore sometimes falls prey to the maxim.<sup>179</sup> Like expert testimony concerning perception or memory, this category of expert testimony is not governed by Rule 608, since it does not address character for truthfulness. Instead, its admissibility should be assessed under Rules 402 and 403 and the rules governing expert testimony. Moreover, it generally offers stronger probative value than standard character impeachment evidence. If it satisfies the rules on expert testimony, it should generally be admitted because it is relevant and not otherwise excluded.

The law has consistently recognized that evidence of behavior has probative value providing insight into the mental state of the actor.<sup>180</sup> Jurors are routinely urged to view the credibility of a witness or party through the prism of their behavior. The witness's prior inconsistent statements are admissible to cast light on the witness's truthfulness at trial.<sup>181</sup> Evidence that the victim of a sexual assault made a prompt complaint is frequently admissible to corroborate the witness's testimony.<sup>182</sup> If a criminal defendant fled or changed appearance to avoid apprehension, that evidence is admissible to show consciousness of guilt.<sup>183</sup> Law enforcement officers are often permitted to testify as experts to explain the significance of certain behavior or language used by the defendants.<sup>184</sup> Expert testimony giving the jurors insight into the probative significance of particular behavior is simply another example of evidence falling in this general category. Whether the witness's behavior suggests that the witness's factual account of events is accurate or inaccurate, the expert may help the jury understand the behavior and its significance in the case.

Two situations, discussed in the following sections, illustrate the value of such expert testimony. First, experts can help jurors understand why a defendant may have given a false confession. Second, experts can help explain the sometimes counterintuitive conduct of abuse victims to jurors.

### 1. Confession cases

Expert testimony may assist the jury to evaluate a defendant's challenge to the credibility of his or her own confession. Jurors may have difficulty comprehending that a suspect would confess to a crime she did not commit, yet false confessions do occur.<sup>185</sup> Expert testimony can explain the circumstances and personal characteristics that may generate a false confession.

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that arise if the prosecution seeks to use an expert to describe a pattern of behavior of a particular type of criminal. Such evidence can generate the risk that the jury will convict the defendant for fitting a profile rather than actually committing the charged offense. *See, e.g.,* *Turtle v. State*, 600 So. 2d 1214, 1221 (Fla. 1992) (reversing conviction where prosecution expert described general patterns of behavior typical of pedophiles and prosecution urged jury to view defendant's behavior in that light).

<sup>179</sup> *See* Berger, *supra* note 7, at 613-14 (asserting that the evidence acts as testimony about credibility).

<sup>180</sup> *See* FED. R. EVID. 404(b). *See generally* BROUN ET AL., *supra* note 15, at § 190 (discussing evidence of bad acts as proof of mental state).

<sup>181</sup> *See* BROUN ET AL., *supra* note 15, at §§ 34-38 (discussing evidentiary use of prior inconsistent statements).

<sup>182</sup> *See* Kathryn M. Stanchi, *The Paradox of the Fresh Complaint Rule*, 37 B.C. L. REV. 441 (1996) (discussing rule).

<sup>183</sup> BROUN ET AL., *supra* note 15, at §§ 263-65 (discussing evidence of consciousness of guilt). One commentator suggests that polygraph evidence acts as evidence of guilty conscience rather than of credibility or truth telling. *See* Simmons, *supra* note 7, at 1038-39.

<sup>184</sup> Nossel, *supra* note 26, at 250-56 (reviewing case law on law enforcement officers testifying as experts).

<sup>185</sup> *See* BARRY SCHECK ET AL, ACTUAL INNOCENCE 101-137 (2001); Richard A. Leo, *False Confessions: Causes, Consequences and Solutions* in SAUNDRA WESTERVELT ET AL, WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE (2001).

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Although the common law protection of the jury's special province may prompt reluctance to admit such testimony, courts have recognized its value.<sup>186</sup> In *Pritchett v. Commonwealth*,<sup>187</sup> for example, the defendant offered expert testimony to explain that the mildly retarded defendant was compliant and prone to suggestibility and probably said whatever the police wanted him to say.<sup>188</sup> The trial court excluded the testimony, concluding that it would "invade the province of the jury as to the ultimate issue" of the defendant's intent at the time of the crime.<sup>189</sup> However, the Supreme Court of Virginia disagreed and concluded that the evidence offered to play a key role in helping the jury to understand the defendant's behavior. Similarly, in *United States v. Vallejo*,<sup>190</sup> the Ninth Circuit held that the trial court committed error when it refused to permit the defense expert to explain the defendant's communication problems in an effort to "help the jury understand how he struggled to comprehend and communicate during the interrogation."<sup>191</sup> Expert testimony in these cases can play an important role in educating the jurors concerning conduct that would otherwise be inexplicable.

### 2. Abuse cases

Expert testimony has also been presented to explain behavior of victims of sexual or spousal abuse. In some cases, the conduct threatens to undermine the witness's credibility, and the expert testimony in these cases is presented to help the jury understand the behavior which otherwise may appear to the jurors to be inconsistent or irrational. In other cases, an expert may be used to attack the witness's credibility by establishing that the witness did not behave in the expected manner.

Although such testimony has frequently been challenged as impermissible bolstering invading the province of the jury, experts have been allowed to explain to the jury why the victims behaved in ways that are counterintuitive to the ordinary juror, such as failing to report incidents of abuse or staying with an abusive spouse.<sup>192</sup> In these cases, the expert does not so

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<sup>186</sup> See *United States v. Hall*, 93 F.3d 1337, 1345 (7th Cir. 1996) (holding that defense expert should have been allowed to testify and "would have let the jury know that a phenomenon known as false confessions exists, how to recognize it, and how to decide whether it fit the facts of the case being tried"); *State v. Romero*, 81 P.3d 714 (Or. 2003) (holding that trial court should have permitted defendant's expert to testify regarding her suggestibility and the risk that she confessed involuntarily and inaccurately and that proposed testimony would not have commented improperly on defendant's credibility); *Commonwealth v. Jones*, 327 A.2d 10, 13 (Pa. 1974) (holding that trial court should have permitted defendant's expert to testify concerning defendant's mental capacity, I.Q. and lack of verbal ability to help the jury determine whether the confession introduced by the prosecution was valid); see. See also *United States v. Gonzalez-Maldonado*, 115 F.3d 9, 15-17 (1st Cir. 1997) (holding that trial court committed error by refusing to allow defendant's expert to testify to defendant's mental condition, which was characterized by exaggeration and verbosity, to help the jury understand defendant's statements in tape recorded conversations).

<sup>187</sup> 557 S.E.2d 205 (Va. 2002).

<sup>188</sup> See *Pritchett*, 557 S.E.2d at 207. See also *People v. Slago*, 374 N.E.2d 1270 (Ill. App. 1978) (holding trial court properly excluded defendant's expert testimony explaining why he might have confessed falsely and discussing limits on admissibility of such testimony).

<sup>189</sup> See *Pritchett*, 557 S.E.2d at 207.

<sup>190</sup> 237 F.3d 1008, (9th Cir. 2001).

<sup>191</sup> *Vallejo*, 237 F.3d at 119-20.

<sup>192</sup> See, e.g., *United States v. Antone*, 981 F.2d 1059 (9th Cir. 1992) (allowing expert to explain general characteristics of abused children); *Commonwealth v. Federico*, 683 N.E.2d 1035, 1038 (Mass. 1997) (deciding qualified experts may testify as to general behavior patterns of sexually abused children; this testimony aids jury's fact-finding and provides information generally beyond scope of common knowledge); *Harris v. State*, 84 P.3d 731, 748 (Okla. Crim. App. 2004) (holding in spousal abuse case, it is not improper bolstering of witness credibility for an expert to testify as to the general characteristics of battered spouses.); *Commonwealth v. Kacsmar*, 617 A.2d 725,

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much bolster the witness's credibility as dispel the false impression possibly created by the relevant behavior.<sup>193</sup> The testimony shores up the credibility of the witness by supporting the witness's factual account; the expert testimony does not focus either on the witness's truthfulness or on memory or perception per se.<sup>194</sup>

Conversely, the expert may provide insight into conduct and thereby cast doubt on the witness's credibility. For example, an expert may testify that the alleged victim has not manifested the types of behavior typical of abuse victims.<sup>195</sup> An expert may also be called on to explain the possibility that a child testifying to abuse may be responding to adult manipulation, helping the jury to understand otherwise inexplicable accusations and testimony.<sup>196</sup> In these cases, the expert provides insight into patterns of behavior that will help the jury evaluate the credibility of the witness's account.<sup>197</sup> Because the jury may believe that actions speak louder than words, it is critical that the jury understand the message sent by the witness's actions.

Despite the assistance provided by expert testimony explaining witness behavior, courts sometimes dismiss expert testimony bearing on behavior as improper expert comment on credibility, characterizing expert testimony that merely explains behavior as improper bolstering. In *Commonwealth v. Gallagher*, for example, the Pennsylvania Supreme Court held that the testimony of a prosecution expert who explained the effect of rape trauma syndrome on the

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731-32 (Pa. 1992) (rejecting prosecution's argument that expert testimony was merely vouching for the defendant's credibility and holding that the trial court committed reversible error by excluding the expert testimony that would have explained the impact of the abusive home environment on the defendant and supported claim of self-defense by explaining "battered person syndrome" to the jury); *Middleton*, 657 P.2d at 1220 (holding that expert did not cross the line by testifying not only to the typical behavior of young victims of sexual abuse but also to the fact that the victim's behavior fit the typical pattern); *State v. Myles*, 887 So. 2d 118, 125 (La. Ct. App. 2004) (declaring this type of testimony helpful as long as it "explain[s] in general the behavioral characteristics of child abuse victims in disclosing alleged incidents without giving an opinion directly concerning the particular victim's credibility."); *State v. Proffitt*, 596 N.E.2d 527, 528 (Ohio Ct. App. 1991) (allowing objective medical evidence showing injuries consistent with abuse to be admitted as testimony did not assert victim must be believed). See also Imwinkelried, *Federal Rule of Evidence*, *supra* note 13, at 147 (discussing use of experts to bolster victims of child abuse).

<sup>193</sup> See, e.g., *United States v. Bighead* 128 F.3d 1329, 1331 (9th Cir. 1997) (concluding that expert testimony describing behavior of sexual abuse victims was properly admitted); *Ex parte Hill*, 553 So. 2d 1138, 1139 (Ala. 1989) (holding that expert was properly permitted to testify concerning behavior of teenage victims of sexual abuse to explain delay in reporting and recantation); *State v. Myers*, 359 N.W.2d 604, 610 (Minn. 1984) (holding expert could properly describe characteristics or traits she typically observed in sexually abused children because "the sexual abuse of children places lay jurors at a disadvantage."); *State v. Neswood*, 51 P.2d 1159, 1162 (N.M. Ct. App. 2002) (describing as permissible expert testimony listing reasons why victim of child abuse would recant); see also *United States v. Cox*, 23 M.J. 808, 815 (1986) (recognizing the role of rape trauma syndrome testimony in explaining the victim's reaction to the fact finders).

<sup>194</sup> See, e.g., *State v. Folse*, 623 So. 2d 59, 68 (La. 1993) (noting that defense corrected improper expert testimony by clarifying on cross-examination that the expert could only say that the witness' account was "consistent with the dynamics of sexual abuse"); *State v. Middleton*, 657 P.2d 1215, 1219 435 (Or. 1983) (noting that "if the jurors believed the experts' testimony, they would be more likely to believe the victims' accounts" but also that "[n]either of the experts directly expressed an opinion on the truth of the victim's testimony").

<sup>195</sup> See, e.g., *State v. White*, 943 P.2d 544, 546 (N.M. Ct. App. 1997) (holding trial court committed error by excluding testimony concerning lack of symptoms).

<sup>196</sup> See generally *Schutz v. State*, 957 S.W.2d 52 (Tex.Crim.App. 1997) (discussing admissibility of manipulation testimony).

<sup>197</sup> See *State v. Remme*, 23 P.3d 374, 382-83 (Or. 2001) (holding that expert testimony related to the behavior of abuse victim was properly admitted); see also *State v. Keller*, 844 P.2d 195, 198 (Or. 1993) (concluding that expert could fairly testify to what types of behavior might indicate leading and coaching young children, but holding that the witness crossed the line into improper assessment of specific credibility). In *Remme*, the Court attempted to reconcile Oregon decisions related to expert testimony concerning abuse victims and suggested that the line falls between testimony that assists the jury in its assessment of credibility and that which supplants that assessment.

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victims of rape impermissibly intruded on the province of the jury to determine credibility.<sup>198</sup>

The court described the testimony:

The crux of the testimony appears to be that the victim's failure to identify the appellant two weeks after the rape is unremarkable, as she was in the acute phase of RTS in which a victim has difficulty performing even normal functions, and the in-court identification five years later is particularly credible, as it results from a flashback with the mind operating like a computer. It is clear that the only purpose of the expert testimony was to *enhance the credibility* of the victim.

<sup>199</sup>

This holding bears the mark of the common law maxim leading the court to exclude helpful expert testimony out of excessive concern for the jury's role in assessing credibility.

Like expert testimony concerning perception, memory, and bias, expert testimony helping the jury understand behavior can improve the jury's assessment of credibility. The mere fact that the expert's testimony will support the witness's account of the facts should not lead to its exclusion. Instead, recognizing the utility of the expert in helping the jury understand the witness's otherwise inexplicable behavior, the courts should allow the testimony.

### *C. Expert Testimony Expressing an Opinion Consistent or Inconsistent with a Witness's Testimony*

In some cases, the expert bolsters the witness merely by expressing an opinion that dovetails with the witness's testimony or, conversely, impeaches a witness by expressing a contrary view of the facts. Such expert testimony should not be precluded or even scrutinized as improper comment on credibility. Instead, it bolsters or impeaches only to the extent that any evidence tends to strengthen or diminish the force of other consistent evidence.

Such evidence is nevertheless sometimes targeted as improper bolstering. For example, in *State v. Mackey*, the defendant, who contended that the agent who had investigated him for drug offenses had conducted himself improperly, offered an expert in law enforcement techniques to describe the protocol for investigating drug trafficking.<sup>200</sup> The evidence could have helped the jury to assess the account of the prosecution's chief witness, a retired police officer, that he purchased drugs from the defendant without following many normal police procedures. The court excluded the evidence because it viewed the proffered testimony as

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<sup>198</sup> 547 A.2d 355, 356-357 (Pa. 1988).

<sup>199</sup> 547 A.2d at 358 (emphasis in original). *See also Seese*, 517 A.2d at 921 (holding that allowing an expert to testify concerning the behavior of child abuse victims, stating in particular that they do not have sufficient knowledge to fabricate the details of sexual encounters invaded the province of the jury even though the expert did not specifically address the credibility of the witness in the case); *Commonwealth v. Dunkle*, 602 A.2d 830, 837-38 (Pa. 1992) (holding that prosecution expert should not have been permitted to testify to reasons sexually abused child might not come forward and might omit details of the incident because "it would infringe on the jury's right to determine credibility"); *Commonwealth v. Garcia*, 588 A.2d 951, 956 (Pa. Super. 1991) (holding trial court should not have admitted expert testimony concerning behavior of child abuse victims because it infringed on jury's function). In *Dunkle*, Justice McDermott, writing separately, criticized the majority for "ascribing to the average juror incredible sophistication regarding the effect of sexual abuse on the workings of a young mind" and "trivial[izing] an entire field of child psychology by implying that everybody already knows these facts." 602 A.2d at 839-40. *But see Commonwealth v. Cepull*, 568 A.2d 247, 248-49 (Pa. Super. 1990) (concluding that expert could properly give "generalized description of rape trauma syndrome" although expert should not have been permitted to testify concerning studies concluding that "victims of rape lie in only three percent of the cases").

<sup>200</sup> 535 S.E.2d 555 (N.C. 2000).

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improperly commenting on the credibility of the prosecution witness.<sup>201</sup> In fact, the expert's testimony would not have addressed the witness's credibility per se. Instead, it would simply have given the jury a standard against which to judge the way in which the witness claimed to have conducted his investigation of the defendant.

In *State v. O'Hanlan*, the North Carolina Supreme Court recognized the distinction between comment on credibility and testimony that merely supports one party's version of the facts.<sup>202</sup> The defendant objected to the testimony of the emergency room physician who had examined the victim of the alleged rape on the ground the expert impermissibly bolstered her credibility.<sup>203</sup> The expert testified, based on his observation of her physical and emotional condition and on her statements, that the victim's "emotional state was consistent with having been assaulted," that "it seemed pretty clear that there had been some type of assault," and that "her emotional state was consistent with a very severe and significant assault."<sup>204</sup> None of this testimony was specifically directed at assisting the jury to assess the victim's credibility. Instead, the expert's diagnosis acted as independent evidence of the offense.<sup>205</sup> As the court pointed out, any bolstering was "incidental" to the expert's testimony.<sup>206</sup>

That the maxim is even invoked in these situations demonstrates the breadth of its reach. Expert testimony will often have an incidental impact on credibility assessments, either bolstering or undermining the jury's belief of other testimony. That incidental impact should have no bearing on the admissibility of the expert testimony.

### **VI. TIMING QUESTIONS: MAY EXPERT TESTIMONY SUPPORTING CREDIBILITY PRECEDE AN ATTACK ON CREDIBILITY?**

Regardless of the role played by expert testimony that bolsters credibility, courts often raise a question concerning whether the bolstering testimony may be admitted before the witness's credibility has been attacked.<sup>207</sup> At common law, the courts espoused a rule prohibiting bolstering except in response to an attack on the witness and often stated the rule

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<sup>201</sup> See 535 S.E.2d at 558-59. There may have been other reasons for excluding the evidence; its probative value in the case was questionable.

<sup>202</sup> 570 S.E.2d 751, 756 (N.C. 2002). See also *Waters v. Kassulke*, 916 F.2d 329, 331-32 (6th Cir. 1990) (noting that expert could properly testify that "based on his physical and oral examinations of the girls, in his opinion, were victims of sexual abuse"); *Harris v. State*, 631 S.E.2d 772 (Ga. App. 2006) (allowing expert to testify that tests conducted yielded results consistent with sexual molestation); *Williams v. State*, 597 S.E.2d 621, 625 (Ga. App. 2004) (same).

<sup>203</sup> 570 S.E.2d at 757.

<sup>204</sup> *O'Hanlan*, 570 S.E.2d at 756.

<sup>205</sup> See *O'Hanlan*, 570 S.E.2d at 756; see also *United States v. Kearns*, 61 F.3d 1422, 1427 (9th Cir. 1995) (rejecting argument that DEA agent who testified concerning certain aspects of drug trafficking improperly vouched for the prosecution's informant witness because he did not "place the prestige of the government behind the witness;" he did not mention her or claim any knowledge of the specific case); *United States v. St. Pierre*, 812 F.2d 417, 419-20 (8th Cir. 1987) (holding that trial court properly permitted expert to testify concerning behavior of abused children as well as behavior he observed in alleged victim-witness).

<sup>206</sup> *O'Hanlan*, 570 S.E.2d at 758. See also *State v. McDavid*, 594 So. 2d 12, 16 (Miss. 1992) (rejecting defendant's argument that certain evidence should have been excluded as bolstering and noting that "such evidence, if otherwise admissible, would not be inadmissible simply because it corroborated her testimony").

<sup>207</sup> See, e.g., *Manning v. State*, 929 So. 2d 885, 895 (Miss. 2006) ("It is of course the rule in virtually all jurisdictions that a witness's unimpeached or unquestioned credibility may not be bolstered by any means, including references to polygraphic evidence."); *Berger*, *supra* note 7, at 612-13 (stating as a general rule that an attack must precede bolstering).

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broadly.<sup>208</sup> The rationale rested in part on a desire not to waste time on bolstering if the witness's credibility was not going to be attacked.<sup>209</sup> The courts should not import that overbroad prohibition on bolstering evidence into modern jurisprudence. Instead, the timing requirement should be enforced only when the expert testimony is offered only to establish the witness's truthful character and not when it bolsters the witness's credibility in some other way.

The Federal Rules of Evidence contain no general rule against bolstering prior to attack.<sup>210</sup> Only two rules specifically address bolstering. Rule 608(a) precludes bolstering with evidence of truthful character before the witness's character for truthfulness has been attacked. Rule 801(d)(1)(B) allows prior consistent statements to be admitted to prove the truth of the assertions they contain only to rebut specific types of attack, such as a claim of improper motive or recent fabrication.<sup>211</sup> The absence of any other language addressing the question of bolstering before attack suggests that there is no general timing requirement. Interestingly, an examination of the decisions that state a prohibition on bolstering before attack also reveals that the prohibition developed as a limitation on only these two types of bolstering.<sup>212</sup>

Despite the absence of clear authority governing the timing of non-character bolstering evidence, some courts have imposed such a requirement.<sup>213</sup> In *United States v. Awkard*, for example, the court stated that the Rules of Evidence preclude bolstering until a witness's credibility has been attacked, pointing to Rules 801(d)(1)(B) and 608(a). The court concluded that "[s]imilar considerations must govern the exercise of the trial judge's discretion" concerning whether to permit the government to present an expert to testify concerning hypnosis and the ability of a hypnotized witness to recall the events.<sup>214</sup> It was therefore error to permit bolstering

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<sup>208</sup> *Conway v. State*, 26 S.W. 401, 402 (Tex. Crim. App. 1894) ("No principle in the law of evidence is better settled than the one enunciated in the rule that testimony in chief of any kind, tending merely to support the credit of the witness, is not to be heard except in reply to some matter previously given in evidence by the opposite party to impeach it."); *United States v. Holmes*, 26 F. Cas. 349 (C.C. Me. 1858) (addressing prior consistent statements); *Jackson, ex. dem. the People, v. Etz*, 5 Cow. 314 (NY 1826) (bolstering allowed only after attack on general character or claim of inconsistency). See also Imwinkelried, *The Silence Speaks Volumes*, *supra* note 19, at 1018.

<sup>209</sup> Imwinkelried, *The Silence Speaks Volumes*, *supra* note 19, at 1019.

<sup>210</sup> Imwinkelried, *The Silence Speaks Volumes*, *supra* note 19, at 1020. Some jurisdictions have rules that appear to apply more broadly. See, e.g., Louisiana Evidence Code Art. 607 (4th ed.) (providing that "the credibility of a witness may not be supported unless it has been attacked").

<sup>211</sup> The admissibility of prior consistent statements as substantive evidence is limited by Rule 801(d)(1)(B) to situations in which the prior statement rebuts specific types of attack on the witness's credibility. See *Tome v. United States*, 513 U.S. 150, 155-56 (1995) (discussing law governing prior consistent statements).

<sup>212</sup> See, e.g., *Conway v. State*, 26 S.W. 401, 402 (Tex. Crim. App. 1894) (addressing prior consistent statement); *United States v. Holmes*, 26 F. Cas. 349 (C.C. Me. 1858) (addressing prior consistent statements); *Jackson, ex. dem. the People, v. Etz*, 5 Cow. 314 (NY 1826) (bolstering allowed only after attack on general character or claim of inconsistency).

<sup>213</sup> See, e.g., *State v. Black*, 537 A.2d 1154, 1156 (Me. 1988) (recognizing timing rule). In *Black*, the trial court permitted a prosecution expert to "to explain to the jury the reason for timing and sequencing inconsistencies in [the alleged sexual assault victim]'s testimony." 537 A.2d at 1156. The Maine Supreme Court concluded that such testimony could be introduced only to rebut an attack on the witness, noting its concern that expert testimony that bolsters a witness's credibility by explaining the witness's conduct "can have a profound effect on the outcome of the trial." 537 A.2d at 1156. The court held that the defense cross-examination opened the door to the expert's explanation of the witness's apparent inconsistency and that the trial court therefore had discretion to admit the expert's testimony before the attack. *But see Crawford*, 718 A.2d at 206 (reasoning that trial court properly excluded testimony of defendant's expert on repressed memory because the prosecution had not offered expert testimony in support of repressed memory; apparently assuming that bolstering not only could but must precede the particular attack on credibility).

<sup>214</sup> 597 F.2d at 670.



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testimony where defense counsel made it clear that the defense would not cross-examine the expert to raise questions about the reliability of hypnotically refreshed testimony.<sup>215</sup>

The courts should not apply a blanket rule requiring an attack on credibility to precede bolstering testimony except when the testimony falls within Rule 608 and is thus clearly subject to a timing requirement. Even if a witness's ability to perceive or remember has not been specifically attacked, expert testimony addressing specific aspects of perception or memory may be helpful to the jury. For example, where a complaining witness suffers from mental or physical impairments that make it difficult to testify, the prosecution should be permitted to anticipate the jury's concerns and present expert testimony explaining the witness's competence even if the witness's credibility has not been attacked.<sup>216</sup> Similarly, even in the absence of a pointed attack, an expert may help the jury view a witness's behavior in ways that bolster the credibility of the witness's testimony. Even if the defense does not argue to the jury that the complainant in a domestic violence case was slow to report the defendant's conduct, an expert on the behavior of battered women may help the jury place the testimony in context and overcome jurors' preconceived notions of logical behavior.<sup>217</sup>

Even if there is no per se rule precluding this expert testimony prior to an attack on the witness's credibility, it may be relevant as the court applies the rules of evidence. Whether the witness's credibility has been attacked may be a decisive factor as the court applies Rule 403 to evidence bolstering credibility. Under Rule 403, the court must determine whether the negative characteristics of the offered evidence substantially outweigh its probative value. Expert testimony explaining conduct or addressing perception or memory has greater probative value in the case if the witness's credibility has been attacked on that basis.<sup>218</sup> That is, if the defendant

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<sup>215</sup> See *Awkard*, 597 F.2d at 670.

<sup>216</sup> See, e.g., *People v. Acklin*, 424 N.Y.S.2d 633 (N.Y. Sup. Ct. 1980) (discussing admissibility of school psychologist's testimony to explain complaining witness' infirmities to the jury).

<sup>217</sup> See Carol Jacobsen et. al, *Battered Women, Homicide Convictions, and Sentencing: The Case For Clemency*, 18 HASTINGS WOMEN'S L.J. 31, 39 (2007) (discussing history of expert testimony on battered spouse syndrome in Michigan); Melanie Randall, *Domestic Violence and the Construction of "Ideal Victims": Assaulted Women's "Image Problems" In Law*, 23 ST. LOUIS U. PUB. L. REV. 107, 120-24 (broadly discussing effects of battered spouse syndrome); H. Morley Swingle et al., *Unhappy Families: Prosecuting and Defending Domestic Violence Cases*, 58 J. MO. B. 220, 226 (.2002) (highlighting development of battered spouse testimony in Missouri Domestic abuse cases); Paula Finley Mangum, Note, *Reconceptualizing Battered Woman Syndrome Evidence: Prosecution Use of Expert Testimony on Battering*, 19 B.C. THIRD WORLD L.J. 593, 603-05 (1999) (describing evolution of expert testimony regarding battered women); see also Jay B. Rosman, *The Battered Woman Syndrome in Florida: Junk Science or Admissible Evidence?*, 5 ST. THOMAS L. REV. 807, 842 -843 (2003) (criticizing recent Florida case excluding battered spouse testimony in sexual assault case).

<sup>218</sup> See *State v. Bowman*, 352 S.E.2d 437, 440 (N.C. Ct. App. 1987) ("[Doctor's] testimony concerning delay in a child's reporting sexual abuse cases was used to corroborate victim's credibility after defendant's cross-examination attacked her credibility and therefore was properly admitted."); *State v. Moran*, 728 P.2d 248, 254 (Ariz. 1984) ("Defendant claimed that the victim's accusations were prompted by anger over discipline imposed by her parents. Testimony providing the jury with an alternative explanation for the victim's anger was admissible to assist the jury in determining what had motivated the initial charges against defendant."); *Schutz v. State*, 957 S.W.2d 52, 71-73 (Tex.Crim.App. 1997) (discussing opening the door to expert testimony concerning credibility); Michael J. Grills, Comment, *Expert Testimony on Rape Trauma Syndrome in Colorado: Broadening Admissibility to Address the Question of Consent in Sexual Assault Prosecutions*, 61 U. COLO. L. REV. 833, 834 (1990) (evaluating usefulness of expert testimony on rape trauma syndrome in helping jury understand to combat prejudicial effect of defendant statements); Patricia A. Korey, *Evidence – Rehabilitative Expert Testimony in Child Sexual Abuse Cases: The Supreme Court of Pennsylvania Shuts the Door on Effective Prosecutions – Commonwealth v. Dunkle*, 66 TEMP. L. REV. 589 604-605 (1992) (explaining importance of allowing expert to counteract defendant assertions of delay in reporting child abuse); John E. B. Myers, Jan Bays, Judith Becker, Lucy Berliner, David L. Corwin & Karen J. Saywitz, *Expert Testimony in Child Abuse Litigation*, 68 NEB. L. REV. 1, 83 (1989) ("Properly qualified experts can

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has suggested in cross-examination or in some other way implied that a sexual assault did not occur because the complaining witness failed to report it promptly, then expert testimony informing the jury that such behavior is common among victims and explaining why is particularly helpful; the testimony has greater probative value than if the defendant had not raised that issue.

### **VII. THE RULES ON EXPERT TESTIMONY AS BARRIERS TO TESTIMONY CONCERNING CREDIBILITY**

Of course, to be admissible, expert testimony must satisfy the requirements of the rules governing all expert testimony.<sup>219</sup> The witness must be qualified as an expert.<sup>220</sup> The expert's testimony must meet the reliability criteria of Rule 702.<sup>221</sup> The testimony must be relevant and must fit the facts of the case.<sup>222</sup> It must assist the jury.<sup>223</sup> Finally, the basis of the expert's opinion must be acceptable under Rule 703.<sup>224</sup>

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assist jurors in sifting through the mountain of complex and sometimes conflicting and counterintuitive information presented in many child sexual abuse cases. "); Cynthia Lynn Barnes, *Admissibility of expert testimony concerning domestic-violence syndromes to assist jury in evaluating victim's testimony or behavior*, 57 A.L.R.5th 315 (1998); see also Berger, *supra* note 7, at 615.

<sup>219</sup> A thorough discussion of the expert testimony rules as they relate to discussions of credibility is beyond the scope of this article. For a thorough consideration of that topic, see Berger, *supra* note 7.

<sup>220</sup> See FED. R. EVID. 702.

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to 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 (1) the testimony is based upon 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.

*Id.*; see also *Kopf v. Skyrms*, 993 F.2d 374, 378 (4th Cir. 1993) ("The witness' qualifications to render an expert opinion are also liberally judged by Rule 702. Inasmuch as the rule uses the disjunctive, a person may qualify to render expert testimony in any one of the five ways listed: knowledge, skill, experience, training, or education."); *Lavespere v. Niagara Machine & Tool Works, Inc.*, 910 F.2d 167, 176-177 (5th Cir. 1990) ("A witness therefore can qualify as an expert even though he lacks practical experience, provided that he has received suitable training or education or has otherwise gained the requisite knowledge or skill. Thus, although the absence of hands-on experience is certainly relevant to the determination whether to accept a witness as an expert, it is not determinative."); 29 WRIGHT & GOLD, *supra* note 26, at § 6265 ("While Rule 702 does not define the meaning of the terms used to describe the bases for expert qualification, the courts have given them common sense interpretations. 'Education' sufficient to qualify an expert may be formal, resulting in a degree or certification. 'Education' also may be based on informal self-study or independent research. 'Training' usually means on the job instruction or work-related classes. 'Skill' is a specialized aptitude developed as a result of significant involvement with a specific subject. 'Experience' may qualify a witness as an expert so long as it is obtained in a practical context. This means that experience developed as a professional expert witness is not sufficient.").

<sup>221</sup> See FED. R. EVID. 702; see also *Kumho Tire v. Carmichael*, 526 U.S. 137, 152 (1999) ("[the reliability standard is designed] to make certain an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field."); *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) (identifying factors helping in evaluation of reliability including, whether the technique can be and was tested, whether it was subjected to peer review, whether there is a high known or potential rate of error, whether there are controlling standards and whether there is general acceptance of the technique); *United States v. Ferri*, 778 F.2d 985 (3d Cir. 1985) (examining reliability of expert's novel techniques); *United States v. McFillin*, 713 F.2d 57 (4th Cir. 1981) (allowing expert to testify after determining technique used rested upon well-established scientific principles); *United States v. Havvard*, 117 F.Supp.2d 848, 850 (S.D. Ind. 2000) (evaluating reliability of latent fingerprinting techniques).

<sup>222</sup> See FED. R. EVID. 702; see also *Bitler v. A.O. Smith Corp.*, 400 F.3d 1227, 1234 (10th Cir. 2004) ("Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. . . . The trial court

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In some cases, a party offers expert testimony relating to credibility that clearly fails to satisfy the rules governing expert testimony.<sup>225</sup> In those cases, the evidence is properly excluded. In other cases, however, the courts apply unduly restrictive rules to expert testimony related to credibility.<sup>226</sup> First, courts dismiss such testimony as unhelpful, hastily asserting that

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must look at the logical relationship between the evidence proffered and the material issue that evidence is supposed to support to determine if it advances the purpose of aiding the trier of fact. Even if an expert's proffered evidence is scientifically valid and follows appropriately reliable methodologies, it might not have sufficient bearing on the issue at hand to warrant a determination that it has relevant 'fit.' Id. Testimony concerning the laws of quantum mechanics may be scientifically relevant, but may have no practical relevance to testimony concerning the function and possible failure of a water heater safety valve control. Evidence appropriate for one purpose, therefore, may not be relevant for a different purpose, and it is the trial court's task to make this fitness determination."); *United States v. Downing*, 753 F.2d 1224, 1242 (3d Cir.1985) ("An additional consideration under Rule 702--and another aspect of relevancy--is whether expert testimony proffered in the case is sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute")

<sup>223</sup> See FED. R. EVID. 702; see also *United States v. Stevenson*, 6 F.3d 1262, 1266-1267 (7th Cir. 1993) (holding expert opinion meets Rule 702 requirements where trier of fact "might not otherwise be capable of interpreting [evidence] easily and correctly"); *United States v. Boney*, 977 F.2d 624, 629 (D.C. Cir. 1992) ("Under that requirement that expert testimony "assist" the jury (usually referred to as the "helpfulness" requirement), testimony should ordinarily not extend to matters within the knowledge of laymen."); *United States v. Downing*, 753 F.2d 1224, 1229 (3d Cir. 1985) (finding under Rule 702, "an expert can be employed if his testimony will be helpful to the trier of fact in understanding evidence that is simply difficult, [even if] not beyond ordinary understanding."); 3 GRAHAM, FEDERAL EVIDENCE, *supra* note 2, § 702:4 (explaining "assist trier of fact" requirement); 29 WRIGHT & GOLD, *supra* note 26, at § 6264 n. 10 ("expert testimony should not be excluded unless the jury is as competent as the expert.")

<sup>224</sup> See FED. R. EVID. 703.

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.

See also *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 591 (1993) ("Unlike an ordinary witness, see Rule 701, an expert is permitted wide latitude to offer opinions, including those that are not based on first-hand knowledge or observation."); *Mendes-Silva v. U.S.*, 980 F.2d 1482, 1485 (D.C. Cir. 1993) ("Rule 703 serves the two-fold purpose of broadening the acceptable bases for expert testimony, by allowing testimony based on hearsay or otherwise inadmissible evidence, and avoiding the time-consuming process of introducing the mass of evidence that forms the basis of an expert opinion."); 29 WRIGHT & GOLD, *supra* note 26, at § 6273 ("Rule 703 permits an expert to base opinion testimony on three possible sources--personal knowledge, evidence admitted at trial, or evidence not admitted but "of a type reasonably relied upon by experts in the particular field.").

<sup>225</sup> See, e.g., *United States v. Charley*, 189 F.3d 1251, 1261 (10th Cir. 1999) (criticizing trial court for failing to make a reliability determination before permitting an expert to give unqualified opinion that alleged victims had been sexually abused); *United States v. Cecil*, 836 F.2d 1431 (4th Cir. 1988) (rejecting testimony of defense "expert" whose qualifications were never established and who provided no information relating to the basis for his conclusions); *People v. Randall*, 845 N.E.2d 120, 127 (Ill. App. 2006) (holding trial court properly excluded testimony of defense expert which was speculative and had a questionable basis and also remarking that the testimony would have "invaded that province of the jury to determine the credibility of the witnesses"). See also 2 GRAHAM, FEDERAL EVIDENCE, *supra* note 2, § 608.1, 130 n. 3 (5th Ed. 2001) (citing *Cecil* and explaining proposition that expert testimony addressing credibility is not admissible).

<sup>226</sup> See generally *Simmons*, *supra* note 7, at 1047-53 (discussing courts' implementation of the requirement that the evidence assist the jury); *Berger*, *supra* note 7. See, e.g., *United States v. Langan*, 263 F.3d 613, 619 (6th Cir. 2001) (reporting that trial court based exclusion of defense expert on eyewitness identification in part on the fact that the expert had never "studied any victim or eyewitness of a bank robbery"); *Washington v. Schriver*, 255 F.3d at 50 (2d Cir. 2001) (reporting that trial court excluded as within knowledge of jury); *United States v. Charley*, 189 F.3d 1251, 1265-67 (10th Cir. 1999) (concluding that expert testimony based on victim's statements impermissibly vouched for victim's credibility); *Nichols v. American National Insurance Co.*, 154 F.3d 875, 883 (8th Cir. 1998) (rejecting

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the jury needs no help on credibility questions. Second, courts impose overly restrictive basis requirements, rejecting expert testimony that relies on taking a particular view of disputed facts.

### *A. The Requirement that the Testimony Assist the Jury*

Resisting the admissibility of expert testimony related to credibility, courts invoke the maxim that the jury can determine the reliability of the statements without the help of expert testimony and accordingly conclude that the expert's testimony will not assist the jury as required by Rule 702.<sup>227</sup> The Advisory Committee emphasized the importance of using expert testimony to help the jury and rejected the notion that an expert would usurp the province of the jury as "empty rhetoric."<sup>228</sup> The rules liberalized admissibility, abandoning the common law rule that admitted expert testimony only when it was necessary to the jury's deliberations.<sup>229</sup> Instead, the rules invite courts to admit expert testimony whenever it would help shed light on the questions before the jury.<sup>230</sup>

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expert testimony as not helpful); *United States v. Hudson*, 884 F.2d 1016 (7th Cir.1989) (excluding expert testimony as unhelpful); *State v. Batangan*, 799 P.2d 48, 52 (Haw. 1990) (dismissing expert testimony as impermissible bolstering in child sexual abuse case); *People v. Beckley*, 456 N.W.2d 391, 407-08 (opining that underlying purpose of psychological expert testimony was to enhance credibility of victim) (Mich.1990); *State v. Black*, 537 A.2d 1154, 1157 & n. 1 (Me.1988) (rejecting expert testimony that witness' behavior was consistent with victim of child abuse); *State v. Bressman*, 689 P.2d 901, 907-08 (Kan.1984) (holding expert testimony regarding behavior of alleged rape victim impermissibly passed on credibility of allegations); *Commonwealth v. Colin C.*, 643 N.E.2d 19, 22-23 (Mass.1994) (explaining that expert testimony that alleged victims were sexually abused "was tantamount to an expert opinion that the children's claims of sexual abuse were likely true"); *State v. Gokey*, 574 A.2d 766, 768, 771-72 (explaining danger inherent in expert testimony about behavioral characteristics of sexual abuse victims) (Vt.1990); *Goodson v. State*, 566 So. 2d 1142, 1146-47 (Miss. 1990) (doubting scientific validity of expert testimony concerning "child sexual abuse profile"); *State v. Haseltine*, 352 N.W.2d 673, 676 (Wis. App. 1984) (remarking that "aura of scientific reliability" surrounding psychological credibility assessment took ultimate issue of guilt away from jury); *Johnson v. State*, 732 S.W.2d 817, 821 (Ark.1987) (noting that "lay jurors were jurors were fully competent to determine whether the history given by the victim was consistent with sexual abuse."); *State v. Kallin*, 877 P.2d 138, 140-41 (Utah 1994) (affirming lower court's refusal to allow expert testimony the defendant did not match psychological profile of a pedophile); *State v. Lucero*, 863 P.2d 1071, 1075 (N.M.1993) (explaining that "[d]etermining the complainant's credibility or truthfulness is not a function for an expert in a trial setting, but rather is an issue reserved for the jury.").

<sup>227</sup> See generally *Friedland*, *supra* note 11, at 191-92.

<sup>228</sup> FED. R. EVID. 704, advisory committee's notes (quoting Wigmore); see also FED. R. EVID. 702, advisory committee's notes:

The fundamental question that a court must answer . . . is "whether the untrained layman would be qualified to determine intelligently and to the best degree, the particular issue without enlightenment from those having a specialized understanding of the subject matter involved."

See also *Berger*, *supra* note 7, at 593-604 (discussing this requirement as applied to testimony touching on credibility). See also *Shay* 57 F.3d at 173; *United States v. Gonzalez-Maldonado*, 115 F.3d 9 (1st Cir. 1997) (holding that trial court improperly excluded defendant's expert testimony describing his mental condition which manifested itself in verbosity and exaggeration; the testimony was necessary to help the jury assess the defendant's statements in recorded conversations introduced by the prosecution and was particularly important because the defendant was incompetent to testify, so the jury had no opportunity to judge his demeanor). In *Shay* the court quoted the Advisory Committee and then went on to explain why expert testimony relating to the defendant's mental condition may have been admissible and remanded for determination of the question. 57 F.3d at 134.

<sup>229</sup> See *Simmons*, *supra* note 7, at 1049-50 (discussing change in law on this question).

<sup>230</sup> See *Middleton*, 657 P.2d at 1219 (detailing "assist the jury" standard); *United States v. Brawner*, 173 F.3d 966, 969 (6th Cir. 1999) (holding necessity is not a condition precedent for the admissibility of expert opinion testimony; rather, the test is whether the opinion will assist the trier of fact); *Gherasim*, 985 P.2d at 1272 (holding evidence need only be helpful to be admitted and that the trial court had applied too demanding a standard); *Breidor v. Sears, Roebuck and Co.*, 722 F.2d 1134, 1139 (3d Cir. 1983) ("Helpfulness is the touchstone of Rule 702."); PAUL F.

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In *United States v. Hall*,<sup>231</sup> the Seventh Circuit pointed out that the trial court had applied an inordinately demanding standard to the proffered defense expert's testimony. The court pointed out that the trial court may admit expert testimony even if it "covers matters that are within the average juror's comprehension."

Nevertheless, some courts view credibility issues as uniquely within the jury's province and therefore off limits to expert testimony, opining that common knowledge is all that is required to assess credibility.<sup>232</sup> In *Washington v. Schriver*, for example, the trial court excluded the defendant's expert testimony concerning the suggestibility of child witnesses, reasoning that it is "well within the knowledge of the average juror" and it is "soft scientific testimony at best," as well as that it represented improper comment on the witness's credibility.<sup>233</sup> Thus the court erected barriers to the evidence under the rules on expert testimony.<sup>234</sup>

Even after the adoption of the Federal Rules of Evidence, courts continue to cite restrictive pre-rule authority to support rulings excluding expert testimony related to credibility. Courts frequently cite *United States v. Barnard*, a 1973 Ninth Circuit decision.<sup>235</sup> In *Barnard*, the defense offered expert testimony that a prosecution witness trial court excluded testimony of defense experts. Proffered testimony was based on review of the prosecution witness' "was a sociopath who would lie when it was to his advantage to do so."<sup>236</sup> Concluding that the defense expert testimony was properly excluded, the Ninth Circuit characterized the jury as "the lie detector of the courtroom" and held that the testimony would not have been helpful to the jury. The court further opined that this type of testimony should be admitted only in "unusual cases, such as *United States v. Hiss*." Invoking this authority, courts continue to treat the jury as a lie detector requiring no help from expert witnesses.

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ROTHSTEIN, FEDERAL RULES OF EVIDENCE, *Rule 702* (3d ed. 2006) ("The common law viewed expert testimony with a somewhat jaundiced eye. Although 'progressive' courts began to liberalize the standards, in its purest form the common law was quite restrictive on a number of levels. (a) It confined experts to those with extensive formal learning. (b) They were allowed to testify only in areas totally beyond lay ken. (c) They had to base their testimony only on admissible, admitted evidence, (d) presented to them in an open court 'hypothetical question' that had to (e) stick scrupulously to proven facts, (f) and had to include substantially *all* the pertinent facts. (g) Neither experts nor lay witnesses could testify to an ultimate issue in the case, and (h) expert conclusions had to be based "on a reasonable degree of professional probability or certainty, not just possibility."); 29 WRIGHT & GOLD, *supra* note 26, at § 6265 ("Expert testimony was admissible under prerule common law only where the subject of that testimony was beyond the experience or knowledge of ordinarily lay people and would provide 'appreciable help' to the trier of fact."); Simmons, *supra* note 7, at 1049-50 (discussing requirement); Berger, *supra* note 7, at 593-95; Nossel, *supra* note 26, at 234. A trial court's assessment that expert testimony is unhelpful may be reversed as an abuse of discretion. *See, e.g., State v. White*, 943 P.2d 544, 547 (N.M. Ct. App. 1997).

<sup>231</sup> 93 F.3d 1337, 1342-44 (7th Cir. 1996).

<sup>232</sup> *Nichols v. American National Insurance Co.*, 883 (8th Cir. 1998) (rejecting expert testimony as not helpful because credibility questions are within the jury's competence and exclusive function); *United States v. Hudson*, 884 F.2d 1016 (7th Cir. 1989) (excluding expert on eyewitness testimony as unhelpful since testimony was well within jury's understanding). *See generally* Simmons, *supra* note 7, at 1050-52 (discussing cases); Friedland, *supra* note 11, at 169.

<sup>233</sup> 255 F.3d at 50 (2d Cir. 2001).

<sup>234</sup> *See also United States v. Shay*, 57 F.3d 126, 132-33 (reserving judgment on the question of whether expert opinion on truthfulness can be excluded as unhelpful even though it satisfies the other requirements of Rule 702).

<sup>235</sup> *United States v. Barnard*, 490 F.2d 907, 913 (9th Cir. 1973). Westlaw reports numerous cases citing *Barnard*. *See, e.g., United States v. Provenzano*, 688 F.2d 194, 204 (3d Cir. 1982) (citing *Barnard* to support conclusion that psychiatric testimony concerning credibility would not be admissible); *Bastow v. General Motors Corp.*, 844 F.2d 506, 511 (8th Cir. 1988) (citing *Barnard* in support of decision to excluded testimony); *State v. Israel*, 963 P.2d 897 (Wash. App. 1998) (citing *Barnard* to support exclusion of expert testimony bearing on truthfulness).

<sup>236</sup> F.2d 907 at 912. The expert based the opinion on a review of the witness' Army psychiatric evaluation, his grand jury testimony and courtroom observation of the witness. F.2d 907 at 912.

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Instead of enforcing such a demanding standard, the courts should recognize that jurors are not well equipped to assess credibility. Rather than excluding expert testimony addressing witness credibility, the courts should welcome the assistance it offers to the jury.<sup>237</sup>

### *B. The Basis of Expert Opinion*

Another way in which courts restrict expert testimony concerning credibility is to enforce overly stringent basis requirements. In their effort to protect the province of the jury, courts sometimes exclude expert testimony related to credibility on the ground that it rests on the truthfulness of the witness's account. That represents an unduly stringent basis requirement.

The law has long allowed expert opinion to be based on one party's view of the disputed facts in the case. Before the modernization of the rules governing expert testimony, there were two ways to provide the facts that formed the basis of the expert's opinion: the expert could sit through the entire trial and base the opinion on the evidence presented or the attorney would ask a hypothetical question, building into the question the version of the facts espoused by that party.<sup>238</sup> In either situation, the opinion would rest on one version of the facts rather than conflicting versions. The modern rules permit experts to base their testimony and opinions not only on evidence admitted in the trial but also on materials that are not admitted into evidence and even on unadmitted information, provided it is of a type reasonably relied upon by experts in the same field.<sup>239</sup> Regardless of which approach the party takes, the expert thus may base her conclusions on information contained in the testimony of fact witnesses.<sup>240</sup> A disagreement about the facts or question about the credibility or accuracy of a witness' testimony should not foreclose the party from presenting an expert opinion that assumes the truthfulness and accuracy of the witness' account.<sup>241</sup>

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<sup>237</sup> See, e.g., *United States v. St. Pierre*, 812 F.2d 417, 420 (8th Cir. 1987) (recognizing that expert testimony could be helpful "because jurors are at a disadvantage when dealing with sexual abuse of children").

<sup>238</sup> See KENNETH M. MOGILL, *EXAMINATION OF WITNESSES* § 6:30 (2d ed. 2006) (discussing expert witness examination strategies, including having expert sit-in on trial); THOMAS A. MAUET & WARREN D. WOLFSON, *TRIAL EVIDENCE* § 9.5 (3d ed. 2005) (same); see also Berger, *supra* note 7, at 569.

<sup>239</sup> See MAUET § 9.5 (discussing basis of expert testimony); Nossel, *supra* note 26, at 234-353; GRAHAM, *FEDERAL EVIDENCE*, *supra* note 2, § 703:1 (examining bases for expert opinion testimony); 29 WRIGHT & GOLD, *supra* note 26, at § 6274 ("Rule 703 permits expert opinion to be based on three possible sources: firsthand knowledge, admitted evidence, and facts or data not admitted into evidence if 'of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject'"); Richard Neumeg, Annotation, *What Type of Information is "Reasonably Relied Upon by Experts" within Rule 703, Federal Rule of Evidence, Permitting Expert Opinion Based on Information not Admissible in Evidence*, 49 A.L.R. FED. 363 (1980).

<sup>240</sup> See *Fennell v. Goolsby*, 630 F.Supp. 451, 456-57 (E.D. Pa. 1985) (concluding that trial court erred when excluded defendant's expert testimony on the battered woman syndrome because the expert lacked of personal knowledge of key facts and based her conclusions on reports prepared by others and noting that the law is clear that an expert does not need personal knowledge of the facts but may rely equally on "the assumed truth of the testimony of other witnesses"); *State v. White*, 943 P.2d 544, 546 (N.M. Ct. App. 1997) (discounting trial court's concern that expert had not examined victim but was basing opinion on facts testified to by other witnesses). See generally MAUET § 9.5 (noting challenge of establishing basis for expert testimony when testimony is in conflict and noting that "[t]he dilemma ordinarily is left for resolution during cross-examination"); Berger, *supra* note 7, at 565-67; Mullane, *supra* note 32, at 79-81.

<sup>241</sup> See *United States v. Johnson*, 319 U.S. 503, 519 (1943) (rejecting argument that expert should not be permitted to base testimony on disputed evidence); *United States v. Hall*, 93 F.3d 1337 (7th Cir. 1996) (noting that "it is a rare case where everything is agreed except the subject matter for which the expert is presented"); *Greenwell v. Boatwright*, 184 F.3d 492, 497 (6th Cir. 1999) (holding that expert was not required to take into account eyewitness testimony with which he disagreed). Legitimate expert testimony will sometimes necessarily include assessment of or reliance on a witness' sincerity. See generally Berger, *supra* note 7, at 569-72. In *Marine*, for example, the court

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Nevertheless, a number of courts preclude experts from testifying if they base their credibility-related opinions on the truth of contested testimony, concluding that such testimony invades the province of the jury to determine credibility.<sup>242</sup> For example, in *United States v. Scop*, the Second Circuit expressed concern that the expert's "opinions were based on his positive assessment of the trustworthiness and accuracy of the testimony of the government's witnesses."<sup>243</sup> Noting that credibility is a question solely for the jury, the court stated "expert witnesses may not offer opinions on relevant events based on their personal assessment of the credibility of another witness's testimony" and concluded that an opinion based on such an assessment of credibility would be inadmissible.<sup>244</sup> The court went on to clarify its holding in light of Rule 703, which permits the expert to rely on facts or data made known to the expert at the trial.<sup>245</sup> The court explained that the expert is free to rely on the "testimony of a witness whose credibility is not in dispute" or "[w]here the credibility of the witness is an issue, the expert may assume the truth of his or her trial testimony and thereafter offer an opinion based on the substance of the testimony."<sup>246</sup> Thus, *Scop* seems to require experts (or counsel who is conducting the examination) to use careful phrasing when explaining the basis of an expert opinion, stating that the truth of certain testimony is assumed, but not that the testimony is true or the witness credible.<sup>247</sup>

Because courts are resistant to admitting this evidence, the party presenting the expert may be wise to sidestep admissibility problems by carefully preparing and examining an expert. The party presenting an expert should make sure that the expert has an adequate basis for any opinion the party wants the expert to express. Expert testimony must rest on some basis other than mere acceptance of the witness' account. If the basis is that limited, no expertise comes into play. For example, in *United States v. Whitted*, the court also concluded that doctor testifying for the prosecution overstepped the permissible limits where the prosecutor had not established the

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held the expert's testimony concerning the honesty of the victim's statements to her was permissible to explain the basis of her expert opinion that the victim suffered from post traumatic stress syndrome disorder. 520 S.E.2d at 68. Similarly, in *State v. Wise*, the court concluded that the expert's testimony that the victim's emotions during counseling sessions were "genuine" was merely the observation of an expert on a relevant topic – the victim's emotions - not an impermissible comment on credibility. 390 S.E.2d 142, 146 (NC 1990). See also *Skidmore v. Precision Printing and Pkg., Inc.*, 188 F.3d 606, 618 (5th Cir. 1999) (holding expert could properly testify that plaintiff's "symptoms and recollections appeared genuine and that he felt he had not been 'duped'" to explain his opinion that she suffered from post traumatic stress syndrome).

<sup>242</sup> See, e.g., *United States v. Charley*, 189 F.3d 1251, 1261 (10th Cir. 1999); *Whitted*, 11 F.3d at 785-86; *United States v. Samara*, 643 F.2d 701, 705 (10th Cir. 1981) (holding defense expert was properly precluded to testifying to conclusions based on credibility assessments); *State v. Batangan*, 799 P.2d 48, 52 (Haw.1990); *People v. Beckley*, 456 N.W.2d 391, 407-08 (Mich. 1990); *State v. Black*, 537 A.2d 1154, 1157 & n. 1 (Me.1988); *State v. Bressman*, 689 P.2d 901, 907-08 (Kan.1984); *Commonwealth v. Colin C.*, 643 N.E.2d 19, 22-23 (Mass. 1994); *State v. Gokey*, 574 A.2d 766, 768, 771-72 (Vt. 1990); *Goodson v. State*, 566 So. 2d 1142, 1146-47 (Miss. 1990); *State v. Haseltine*, 352 N.W.2d 673, 676 (Wis. App.1984); *Johnson v. State*, 732 S.W.2d 817, 821 (Ark.1987); *State v. Kallin*, 877 P.2d 138, 140-41 (Utah 1994); *State v. Lucero*, 863 P.2d 1071, 1075 (N.M.1993). In *Charley*, the Tenth Circuit noted that "[m]ost courts that have considered the issue have concluded that expert testimony, based on the statements of the alleged victim, that sexual abuse in fact occurred is inadmissible." 189 F.3d at 1261 (*citing* *United States v. Birdsall*, 47 M.J. 404, 409-10 (C.A.A.F.1998)).

<sup>243</sup> 846 F.2d 135, 142 (2d Cir. 1988).

<sup>244</sup> 846 F.2d at 142.

<sup>245</sup> See *Scop*, 846 F.2d at 142.

<sup>246</sup> *Scop*, 846 F.2d at 143. See also *Nimely v. City of New York*, 414 F.3d 381, 398 (2d Cir. 2005) (stating disapproval of "the practice of expert witnesses basing their conclusions on the in-court testimony of fact witnesses out of concern that such expert testimony may improperly bolster the account given by the fact witnesses").

<sup>247</sup> See also *United States v. Hall*, 93 F.3d 1337, 1345-46 (7th Cir. 1996) (stating that "[i]t is enough if the expert makes clear what his opinion is, based on the different possible factual scenarios that might have taken place").

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basis for the doctor's diagnosis of repeated sexual abuse, leaving open the possibility that it rested entirely on the victim's statements, therefore constituting inadmissible assessment of her credibility.<sup>248</sup> Given the insufficient basis, the doctor's testimony that sexual abuse had occurred amounted to "a thinly veiled way of stating that [the witness] was telling the truth."<sup>249</sup>

The party should construct its examination of the expert to avoid the problem of improper basis. In *United States v. Collins*, for example, the court rejected the defendant's argument that the prosecution had improperly bolstered its witnesses where the prosecutor had simply asked its expert to assume facts consistent with the prosecution evidence and "to explain the tax implications."<sup>250</sup> The witness did not comment on the truthfulness of the witnesses whose testimony had established the assumed facts.<sup>251</sup> The Sixth Circuit commented that "the credibility of the testimony underlying those hypotheticals was not withdrawn from proper independent determination by the jury."<sup>252</sup>

Expert testimony that bears on credibility should not be subjected to a higher standard than other expert testimony. Courts should not permit the common law maxim to live on in the guise of a rule that deems testimony on credibility unhelpful. Nor should the courts exclude expert testimony relating to a witness's credibility because it relies on a particular version of the facts of the case. Instead, the courts should be receptive to such expert testimony, but, as discussed in the following section, the parties should exercise care to avoid overreaching in their presentation of the expert.

### **VIII. OVERREACHING: IMPROPER EXPERT COMMENT ON SPECIFIC CREDIBILITY IN THE CASE**

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<sup>248</sup> See 11 F.3d 782 (8th Cir. 1993). The court held that much of the doctor's testimony was proper: In the context of child sexual abuse cases, a qualified expert can inform the jury of characteristics in sexually abused children and describe the characteristics the alleged victim exhibits. A doctor who examines the victim may repeat the victim's statements identifying the abuser as a family member if the victim was properly motivated to ensure the statements' trustworthiness. A doctor can also summarize the medical evidence and express an opinion that the evidence is consistent or inconsistent with the victim's allegations of sexual abuse. *Id.* at 785 (citations omitted).

The alternate grounds for the opinion were also insufficient. *Whitted*, 11 F.3d at 786-87. The court also based its outcome in part on the conclusion that expert testimony that sexual abuse had in fact occurred addressed an issue on which expert testimony was not useful and therefore not admissible under Rule 702. The court noted that "jurors are equally capable of considering the evidence and passing on the ultimate issue of sexual abuse." *Whitted*, 11 F.3d at 785.

<sup>249</sup> *Whitted*, 11 F.3d at 787. *But see* *United States v. Wright*, 119 F.3d 630 (8th Cir. 1997). In *Wright*, the court rejected the defendant's argument that doctor who testified for the prosecution improperly based his diagnosis on the alleged victim's account of events, where there was no medical evidence of sexual abuse. However, the testimony was sufficiently circumspect to pass muster. The doctor testified only "that in his opinion the lack of medical evidence was not inconsistent with molestation." 119 F.3d at 635.

<sup>250</sup> 78 F.3d 1021, 1037 (6th Cir. 1996).

<sup>251</sup> See *Collins*, 78 F.3d at 1037.

<sup>252</sup> *Collins*, 78 F.3d at 1037. See also *United States v. Price*, 722 F.2d 88, 89 (5th Cir. 1983). In *Price*, the court held that the conviction must be reversed where the prosecution's expert, an IRS Agent, testified that "he had based his computations on the statements of two of the government witnesses and that he believed them." The court did not set out the specific testimony, but it seems clear that the agent could properly have testified to computations based on facts contained in the statements of the witnesses and proven at trial. The jury could then decide whether to credit those statements. If the jurors rejected the statements as unreliable, inaccurate or untruthful, they would correspondingly reject the agent's computations. Thus, it appears that the error lay entirely in the agent's gratuitous assertion of belief.



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The utility of expert testimony on credibility may be limited by the litigant's failure to respect the limits imposed on such testimony. Many of the cases that reject expert testimony bearing on credibility reflect overreaching by the party offering the testimony. Otherwise helpful expert testimony will be excluded if the expert's testimony overreaches.<sup>253</sup> If litigants respected these limitations, courts might be more receptive to expert testimony assisting the jury to assess credibility.<sup>254</sup> Correspondingly, if the courts define and enforce rules of admissibility that are not influenced by the outdated common law maxim, the parties will be better able to present appropriate expert testimony without overreaching.

The cardinal rule is that even when the expert is properly qualified and has an appropriate basis for expressing an opinion, the expert may not opine directly on the truthfulness of the witness' testimony. In its comments, the Advisory Committee on the Federal Rules of Evidence notes:

[The rules governing expert testimony] stand ready to exclude opinions which would merely tell the jury what result to reach . . . . They also stand ready to exclude opinions phrased in terms of inadequately explored legal criteria.<sup>255</sup>

In accord with these comments, courts are uniform in their condemnation of expert testimony claiming to know the truthfulness of any witness.<sup>256</sup> No witness' expertise extends to whether the witness is telling the truth in the case.<sup>257</sup> Nevertheless parties overreach by asking their experts to testify concerning whether a witness is believable in the particular case or whether the witness' account of the facts is truthful.<sup>258</sup> Such testimony goes far beyond appropriate expert

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<sup>253</sup> See, e.g., *Nimely v. City of New York*, 414 F.3d 381, 394-98 (2d Cir. 2005) (holding trial court committed error by admitting expert testimony regarding "misperception hypothesis" where expert repeatedly asserted that he believed the defendant police officers' account and condemning the testimony as an attempt to "substitute the expert's judgment for the jury's").

<sup>254</sup> See, e.g., *United States v. Scop*, 846 F.2d 135, 143 (2d Cir. 1988) (rejecting expert testimony using "inadequately explored legal criteria").

<sup>255</sup> FED. R. EVID. 704, advisory committee's notes.

<sup>256</sup> See, e.g., *Charley*, 189 F.3d at 1267 ("expert testimony which does nothing but vouch for the credibility of another witness encroaches upon the jury's vital and exclusive function to make credibility determinations"); *Azure*, 801 F.2d 336; *In re B.J.*, 735 F.2d 1058, 1065 (Ill. App. 2000) (noting that expert could have explained problems with technique used to question child, but could not assert that the child was not credible); *State v. White*, 943 P.2d 544, 546 (N.M. 1997) (noting that opinion concerning victim's veracity or truthfulness of witness' account would not be admissible); *Milbradt*, 305 Or. at 629-30 (Or. 1988) ("a witness, expert or otherwise, may not give an opinion on whether he believes a witness is telling the truth"). *But see Berger*, *supra* note 7, at 610-12 (arguing that court emphasized form over content).

<sup>257</sup> See *Vest*, 116 F.3d 1179 (commenting that "the expert was in no better position than a lay person" to determine whether the witnesses had testified truthfully); *Benson*, 941 F.2d at 604-05 (noting that expert was no more qualified than jury to answer questions); *Heath*, 341 S.E.2d at 343; *Shay*, 57 F.3d at 131 (1st Cir. 1995) (remarking that "an expert's opinion that another witness is lying or telling the truth is ordinarily inadmissible pursuant to Rule 702 because the opinion exceeds the scope of the expert's specialized knowledge and therefore merely informs the jury that it should reach a particular conclusion"). See also *Smith v. State*, 925 So. 2d 825, 839 (Miss. 2006) (noting that "comments about a witness' veracity, i.e. truthfulness, will generally be inadmissible, because of its 'dubious competency'"). *But see Simmons*, *supra* note 7, at 1029 (asserting that "[w]e now have experts who are skilled (or at least claim to be skilled) in determining credibility"); *Berger*, *supra* note 7, at 620 (arguing that expert with adequate basis should be permitting to "make an explicit statement assessing the truthfulness of the [witness]").

<sup>258</sup> See, e.g., *United States v. Dukagjini*, 326 F.3d 45, 54-56 (2d Cir. 2003) (holding that DEA agent testifying as prosecution expert strayed from the scope of his expertise when he interpreted conversations based on his knowledge of and beliefs concerning the facts of the case rather than his expertise); *Vest*, 116 F.3d at 1185 (holding that prosecution expert should not have been permitted to compare the defendant-doctor's files with the patient-witnesses' statements and determine whether each patient actually had the symptoms the defendant recorded because the testimony involved no application of expertise but merely vouched for the witnesses' credibility);

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testimony on credibility. It does not represent either admissible testimony concerning truthful character<sup>259</sup> or testimony admissible to help the jury assess the witness' perception and memory or understand the witness' behavior.<sup>260</sup>

There is a difference between testifying "I would not believe the witness because she has an untruthful character" and testifying "I would not believe the witness because I believe other witnesses instead or view the facts of this case differently."<sup>261</sup> The first form of testimony is allowed under the character evidence rules, and experts, like other character witnesses, should be permitted to express such opinions provided the proper foundation is laid.<sup>262</sup> The second form, by contrast, constitutes overreaching, not permitted by any rule. While an expert can, in some

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United States v. Benson, 941 F.2d 598, 604 (7<sup>th</sup> Cir. 1992) (condemning testimony of expert who recapitulated prosecution evidence and explained why he believed certain facts to be true); *Waters v. Kassulke*, 916 F.2d 329 (6<sup>th</sup> Cir. 1990); *Williams v. State*, 597 S.E.2d 621, 626 (Ga. Ct. App. 2004) (holding that expert witness should not have testified that victim did not seem "coached" and seemed "truthful and honest"); *State v. O'Connor*, 564 S.E.2d 296 (N.C. Ct. App. 2002) (plain error to give jury expert's report that expressed opinion that victim of alleged sexual abuse was credible). In *Waters*, the expert went one step too far and moved from an explanation of behavior into vouching for credibility. At the defendant's rape trial, the prosecution expert, a pediatrician, testified: [B]ased on his physical and oral examinations of the girls, he believed they had been the victims of sexual abuse. He also testified that the girls' behavior was consistent with that of sexually abused children, and that their detailed sexual knowledge was greater than one would expect of girls their ages.

This testimony was properly confined to the expert's observations and explanation of behavior. However, he then went further and testified, "I assume [R.W.] was telling the truth as far as who she said did it." 916 F.2d at 331-32.<sup>259</sup> See *Azure*, 801 F.2d at 339-40 (concluding that expert's testimony did not fall within Rule 608(a) because it was not limited to an opinion on the witness' character for truthfulness but "addressed the specific believability and truthfulness of [the witness' story]").

<sup>260</sup> See Sections V.A and B *supra*. In addition, it rarely comports with the rules governing expert testimony. *United States v. Vest*, 116 F.3d 1179 (7<sup>th</sup> Cir. 1997); *Benson*, 941 F.2d 598. The evidence is likely to fail to satisfy the requirements of Rule 702, because the expert is likely to be testifying outside the realm of anything the expert can claim as expertise. In addition, this type of testimony is not likely to assist the jury and may generate problems that warrant exclusion under Rule 403. See generally *Berger*, *supra* note 7.

<sup>261</sup> Conversely, there is a difference between testifying that a witness has a truthful character and is therefore generally worthy of belief and testifying that the witness is telling the truth in a specific case. Courts do not always recognize that line. See, e.g., *Hobgood v. State*, 926 So. 2d 847, 854 (Miss. 2006) (finding no error where expert testified that she found the witness "credible;" emphasizing that she "never stated that the victim was telling the truth"); *Jackson v. State*, 743 So. 2d 1008, 1016 (Miss.App. 1999); *State v. Kim*, 645 P.2d 1330, 1339 n. 14 (Haw. 1982). In *Jackson*, the defendant challenged the following portion of the expert's examination, in which the expert unambiguously vouched for the credibility of the witness' account of the alleged sexual abuse:

During the State's re-direct examination of Dr. Wright, she testified that "ninety percent of the time, you're assuming that a child is telling the truth as to sexual abuse." She qualified her testimony by explaining that she would "be looking for evidence that it's not the truth." The following re-direct examination ensued:

Q. Dr. Wright, was that assumption of truth made with [Jane Doe]?

A. It was.

Q. And was it ever disprove[d]?

A. It was never disprove[d].

The court rejected the challenge, concluding that "[s]uch testimony does not constitute 'a direct opinion offered by a witness in a child sexual abuse case as to the child's veracity.'" *Jackson*, 743 So. 2d at 1016.

In *Kim*, the Supreme Court of Hawaii stated:

We see no relevant difference between such opinions and that expressed by Dr. Mann. While his opinion was not couched in terms of character, its function and effect were indistinguishable from traditional character evidence: calling to the jury's attention "what might be an otherwise unknown (characteristic) of the witness and thus give the jury a more adequate basis for judging his testimony." Essentially, the difference between an opinion as to character for truthfulness and an opinion as to the believability of a witness' statements is the difference between "I think X is believable" and "X's statement is believable." We feel the admissibility of either statement should turn not on niceties of phraseology but on the probative value of the testimony. 645 P.2d at 1339 n. 14 (citations omitted).

<sup>262</sup> See Section IV *supra*.

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cases, fairly assess a witness' general propensity for (un)truthfulness, no expert should be permitted to claim knowledge of the witness' specific (un)truthfulness in the trial.

In *United States v. Azure*, a decision frequently cited for the broad maxim that experts cannot vouch for credibility, the Eighth Circuit recognized the line between proper and improper use of expertise, precluding expert testimony that bolstered the credibility of a witness by vouching for the truthfulness of her in court testimony.<sup>263</sup> In *Azure*, the trial court improperly permitted the prosecution's expert to testify that "he could 'see no reason why [the child witness] would not be telling the truth in this matter,'" going beyond the expert's qualifications and "invad[ing] the exclusive province of the jury to determine the credibility of the witnesses."<sup>264</sup> The Eighth Circuit acknowledged that an expert could help the jury assess credibility without usurping its credibility-assessment function, recognizing potential expert testimony that would address the witness' perception and memory or conduct, simply provide corroboration by its consistency with the witness's account, or address truthful character.<sup>265</sup> But the expert could not put his "stamp of believability" on the witness' "entire story."<sup>266</sup>

The risk of crossing the line into improper comment on credibility is greatest when the expert has inside knowledge of the case or has worked closely with the witness in question. For example, the jury may assume that a law enforcement officer worked on the case has inside knowledge and give undue weight to the testimony.<sup>267</sup> Similarly, when an expert who has counseled a witness is called as an expert witness, there is a risk both that the expert will express belief in the witness' account and that the jury will give undue weight to that assessment because of the expert's familiarity with the witness and the case.<sup>268</sup> When it is obvious to the jury that the expert possesses no special insight, the comment on credibility may be improper but it is less likely to require reversal.<sup>269</sup>

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<sup>263</sup> 801 F.2d 336 (8th Cir. 1986).

<sup>264</sup> 801 F.2d at 339.

<sup>265</sup> See *Azure*, 801 F.2d at 340

[B]y generally testifying about a child's ability to separate truth from fantasy, by summarizing the medical evidence and expressing his opinion as to whether it was consistent the [the witness'] story that she was sexually abused, or perhaps by discussing various patterns of consistency in the stories of child sexual abuse victims and comparing those patterns with patterns in [the witness'] story.

*Id.*

<sup>266</sup> *Azure*, 801 F.2d 336. See also *State v. Heath*, 341 S.E.2d 565, 567 (N.C. 1986) (emphasizing that prosecutor's questions impermissibly elicited the expert's assessment of whether the victim's account of the alleged sexual assault was credible); *State v. Milbradt*, 756 P.2d 620, 624 (Or. 1988) (reporting that prosecutor repeatedly asked the expert whether he had seen indications of deception when he interviewed the victims); *Leahy*, 78 P.3d 132 (Or. Ct. App. 2003) (reporting that prosecutor asked officer whether, based on his past experience, he had an opinion as to whether the victim had been abused); *Patterson*, 628 S.E.2d 618 (Ga. Ct. App. 2006) (reversing conviction where prosecution expert testified that she did not believe the victim had made up the allegations of sexual abuse). See also *Berger*, *supra* note 7, at 610-11 (discussing *Azure* and pointing out how elusive a line the court draws).

<sup>267</sup> See, e.g., *Scop*, 846 F.2d at 143 (expressing concern that the jurors would infer that the expert, who had investigated the prosecution's case over four years, had special knowledge to which they should defer and that the expert himself would not differentiate between the facts proved at trial and those known to him as a result of his investigation). See also *Nossel*, *supra* note 26, at 245-46

<sup>268</sup> See, e.g., *State v. Townsend*, 635 So. 2d 949, 958 (Fla. 1994) (finding that treating psychologist's testimony the child victim was truthful constituted reversible error); *Roy*, 843 F.2d 305 (holding that FBI agent who investigated the case crossed the line into improper vouching). See generally *Berger*, *supra* note 7, at 572-75 (discussing danger when investigative agent acts as expert witness).

<sup>269</sup> See, e.g., *Greenwell*, 184 F.3d at 497 (holding expert's improper comment was harmless error); *Candoli*, 870 F.2d 496. In *Smith v. State*, 925 So. 2d 825, 839 (Miss. 2006) the court explained:

The jury had the benefit of examining the videotapes with [the victims'] interviews to compare to their in-court testimony, thereby placing the jury in a position to draw upon their own life experiences as to the veracity of the

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In some cases, an overreaching party tries to present an expert as a “trained observer” – essentially, an expert in detecting prevarication or sincerity.<sup>270</sup> In *United States v. Roy*, the prosecution presented an FBI agent as an expert in investigating crimes and in determining the truthfulness of witness accounts.<sup>271</sup> The prosecution elicited the agent’s assessment of the accuracy of the statements made by the defendant’s accomplices. In doing so, the prosecution emphasized the consistency among those statements explaining the expert’s rationale for telling that the story was not concocted.<sup>272</sup>

Overreaching may also manifest itself in a generalization concerning the truthfulness of certain categories of witnesses.<sup>273</sup> For example, in *People v. Bobo*,<sup>274</sup> the expert testified on cross-examination that “ninety-eight percent of the time when a child makes an allegation of sexual abuse they are telling the truth.” The testimony necessarily rests on the assessment of the truthfulness of an unspecified number of witnesses in unrelated cases. It poses several problems. First, there is no reliable technique for determining whether witnesses in other cases have been truthful. To do so would require a method to verify claims of abuse independently and accurately, a method which does not exist. Second, the generalization is far too broad to guide the jury’s assessment of the specific high school student on whose credibility *Bobo* turned. The witness did not purport to distinguish among alleged abuse victims based on their age, their relationship to the alleged abuser, or the nature of the alleged abuse. There was no assurance that the statistic cited by the witness, even if accepted, had any bearing on the testimony in the actual case. Finally, it is antithetical to the jury system to invite the jury to believe a witness because of the probability that a witness of this type is truthful. The use of probability to assess

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young girls. They could draw their own conclusions from the verbal statements and non-verbal reactions of the girls in the taped interviews and on the witness stand. As always, the jury has the prerogative to accept or reject, in whole or part, the testimony of any witness, expert or lay.

<sup>270</sup> See, e.g., *United States v. Rosario-Diaz* 202 F.3d 54, 62 & 65 (1st Cir. 2000) (reporting that FBI agent who had worked with the prosecution’s star witness before trial testified that he had not needed a polygraph to determine whether the witness was lying, explaining, “[w]e were pinning him down without a polygraph. We could tell when he was lying.”); *Milbradt*, 756 P.2d at 626 (reporting that prosecutor asked psychologist if part of his training was to be a trained observer). See also *State v. Leahy*, 78 P.3d 132 (Or. Ct. App. 2003) (finding error where prosecutor elicited officer’s opinion as to whether victim had been abused based on his experience in similar cases, interview of the victim and contact with the defendant). See also *Simmons*, *supra* note 7, at 1058 (suggesting that judges will not readily admit such expert testimony).

<sup>271</sup> See 843 F.2d 305 (8th Cir. 1988).

<sup>272</sup> See *Roy*, 843 F.2d at 307. The court concluded that the error was harmless, relying in part on the absence of evidence of special training that would have given the agent “some great advantage over the jurors in divining the truth.” 843 F.2d at 309. One must question this premise, given the presumptive credibility of a law enforcement witness combined with the explicit testimony detailing the agent’s years of investigative experience. It seems quite likely that the jurors would have felt that the agent possessed a superior ability to choose between differing accounts of criminal events.

<sup>273</sup> See, e.g., *Nimely v. City of New York*, 414 F.3d 381, 396-97 (2d Cir. 2005) (holding trial court committed error by permitting witness to testify concerning the tendencies of police officers to tell the truth); *Jones v. State*, 606 So. 2d 1051, 1057-58 (Miss. 1992) (holding it was error to allow expert to testify that children who have been sexually abused do not lie); *Commonwealth v. Cepull*, 568 A.2d 247, 249-50 (Pa. Super. 1990) (condemning expert’s testimony that studies show that “only 3 percent of all women who reported being sexually assaulted had in fact lied or made up a story about that”). But see *State v. Myers*, 359 N.W.2d 604, 610 (Minn.1984) (allowing expert to testify that children do not generally make up allegations of sexual abuse); *Ex parte Hill*, 553 So. 2d 1138, 1139 (Ala. 1989) (same). See also, David McCord, *Expert Psychological Testimony About Child Complainants in Sexual Abuse Prosecutions: A Foray into the Admissibility of Novel Psychological Evidence*, 77 J. CRIM. L. & CRIMINOLOGY 1, 53-56 (1986) (criticizing similar testimony).

<sup>274</sup> 662 N.E.2d 623, 626 (Ill.App. 1996).

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credibility suffers from the same problems that probability evidence does in other aspects of jury fact finding.

Of course, the parties can avoid improper testimony by preparing their expert's appropriately and avoiding questions that elicit improper endorsements of credibility.<sup>275</sup> However, the line between what is proper testimony and what is improper assessment of credibility is elusive and an expert can easily drift from proper to improper testimony. In *State v. Keller* the Oregon Supreme Court held that the trial court committed reversible error by allowing the prosecution expert to testify during direct examination to her "diagnosis" of the victim in the child abuse case that "[t]here was no evidence of leading or coaching or fantasizing."<sup>276</sup> While she could fairly testify to what types of behavior might indicate one of these problems or to the risks of leading and coaching young children, the witness crossed the line into improper assessment of specific credibility, even testifying that the victim "was obviously telling you about what happened to her body" and was remembering what happened.<sup>277</sup>

The courts and the litigants share responsibility for controlling overreaching while allowing expert testimony concerning credibility. The courts must define and enforce clear rules permitting and delineating expert testimony that fairly assists the jury to assess witness credibility rather than resorting to a broad prohibition on all such testimony. The parties presenting expert testimony to help the jury evaluate credibility should be clear concerning its role in the case and should respect the prohibition on direct comment on the truthfulness of the witness's account.

### **IX. CONCLUSION**

The courts should evaluate expert testimony addressing credibility with more precision. At the same time, the court should free the discussion of such evidence from the limitation of the common law notion that the jury has such a special role in assessing credibility that expert testimony on the topic is foreclosed. By taking these two steps, the courts will open the door to more expert testimony on credibility and thereby better equip jurors for their task of assessing credibility.

When a party offers expert testimony that bears on credibility, the court should ask first whether the testimony addresses (un)truthful character and is therefore governed by Rule 608(a). If so, the evidence should be admitted subject to the limitations of that rule. If the expert's opinion is not limited to mere (un)truthful character, the court should determine how it informs the jury's determination of credibility. If the expert will help the jury understand the witness's

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<sup>275</sup> In *State v. Folse*, 623 So. 2d 59 (La. 1993), the defense attorney focused on the limits of expertise in his cross-examination of the prosecution's expert, asking "you can't tell us whether she was telling the truth or not, can you" and eliciting the answer, "the accurate way to present it is to say that the information that the child gave is consistent with the dynamics of sexual abuse." 623 So. 2d at 68.

<sup>276</sup> 844 P.2d 195 (Or. 1993)

<sup>277</sup> *Keller*, 844 P.2d at 198. See also *United States v. Rosales*, 19 F.3d 763 (1st Cir. 1994). In *Rosales*, the court considered the testimony of an expert in a child abuse case who testified that children who have been sexually abused "generally 'tend to be reluctant, they tend to be embarrassed, uncomfortable, ashamed of what happened. They're very uncomfortable giving details. I see a lot of that. And I saw that in these children.'" 19 F.3d at 765. The defendant argued that the prosecution's presentation of this testimony required reversal of his conviction. The court treated the question as falling under Rule 403, which permits exclusion of otherwise admissible evidence if it injects undue prejudice. The court viewed the expert's testimony as sending "an implicit message to the jury that the children had testified truthfully," and stated that "this might therefore have interfered with the jury's function as the sole assessor of witness credibility." 19 F.3d at 766.

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perception, memory, or bias or if the expert will explain the witness's behavior to the jury, the court should allow the evidence and not impose the limitations that apply to character evidence. Moreover, while such testimony must satisfy the usual rules governing expert testimony, it should not be subjected to more demanding rules. Taking this approach, courts should admit a wider range of expert testimony to help the jury evaluate credibility.

A more precise approach will better prepare the courts for future questions concerning evidence speaking to credibility. The future holds the promise, or threat, that science will achieve ways accurately to divine a witness' truthfulness on a specific subject or to gauge the strength of a witness' perception or memory.<sup>278</sup> This prospect may be one of reasons that courts have continued to rely on the maxim and restrict expert testimony bearing on credibility. For example, the debate over the use of polygraph technology which has occupied the courts for decades reflects in part the concern that scientific assessment will supplant the jury's role of assessing credibility.<sup>279</sup> Rather than imposing blanket restrictions on expert testimony bearing on credibility, courts should analyze the evidence precisely and admit it where it will assist the jury.

Eventually, we may face this crucial question: If reliable and viable scientific technology could determine whether a witness was consciously lying, would we want the fact finder to have that information? More often, however, expert testimony merely plays a modest role helping the jurors better evaluate the credibility of specific testimony by providing insight into witness character, perception, memory, bias, or conduct. It should be allowed to play that role.

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<sup>278</sup> Such evidence will not be admitted until it has achieved a satisfactory level of scientific reliability. Polygraph technology has achieved, or is close to achieving, that level. See Simmons, *supra* note 7, at 1037-39 (discussing polygraph science). Other scientific methods that may prove useful, such as MRI technology, are still being developed. See Jeffrey Kluger & Coco Masters, *How to Spot a Liar*, TIME, Aug. 20, 2006, at 46 (surveying recent developments in lie-detection and polygraph science).

<sup>279</sup> See *United States v. Scheffer*, 523 U.S. 303, 313 (1998) (plurality opinion) (asserting that exclusion of polygraph evidence protects role of trial fact finder, citing *Barnard*). See generally Simmons, *Conquering the Province of the Jury* at 1039-46 (discussing admissibility of polygraph evidence); Charles W. Daniels, *Using Polygraph Evidence After Scheffer*, 27-MAY CHAMPION 12 (2003) (discussing admissibility of polygraph evidence and considering function of jury as basis for exclusion). Courts continue to be reluctant to admit polygraph evidence even though its reliability has been established and is accepted outside the courtroom. See Simmons, *supra* note 7, at 1043. Perhaps polygraph evidence would be more acceptable to the courts if they viewed it not as a naked assessment of a witness' credibility but view it instead as offering the jury insight into the witness' consciousness of guilt or knowledge of certain relevant facts. See Simmons, *supra* note 7, at 1038-39 (suggesting that polygraph provides state of mind evidence rather than an assessment of credibility).